



## **LIBRARY COPYRIGHT ALLIANCE OPPOSITION TO SMART COPYRIGHT ACT S. 3880**

The Library Copyright Alliance (LCA) strongly opposes enactment of the SMART Copyright Act of 2022, S. 3880, introduced by Chairman Leahy and Ranking Member Tillis. Before addressing the specific problems with the legislation, including the burdens it would place on libraries and free expression, LCA explains that S. 3880 is both unnecessary and premature.

### **I. The Legislation is Unnecessary.**

The precise rationale for this legislation is unclear. The sponsors' press release says S. 3880 is intended to "hold big tech accountable by encouraging them to adopt technical measures to combat stealing and facilitate sharing of critical copyright data." However, the largest platforms already employ technical measures that have significantly reduced infringing activity on their sites. If enacted, this legislation could require smaller service providers with fewer resources, such as libraries, to adopt technical measures appropriate for large commercial platforms.

The "Myths v. Facts" document issued by the sponsors provides a somewhat different rationale. It claims that the legislation "aims to hold platforms accountable by providing a process with legal incentives for platforms to adopt measures that are widely available to all, creating a trusted and workable internet for everyone." This could be read to suggest that the objective is to require the large platforms to abandon their proprietary technical measures in favor of widely available technical measures. It is uncertain how that would benefit rightsholders. Alternatively, this statement could be understood as suggesting that the legislation is intended to pressure the large platforms to license their proprietary technologies to other service providers. This overlooks the vast technical differences between the services provided by large commercial platforms and small noncommercial ones such as libraries, as well as the ability of noncommercial platforms to pay license fees for technical measures.

The press release also suggests that the legislation is intended to effectuate the "grand bargain" of the Digital Millennium Copyright Act (DMCA), which was that service providers "wouldn't have to pay for copyright theft facilitated by their systems if they worked with copyright owners to create effective standardized technical measures (STMs) to identify and protect against distribution of stolen content." The press release indicates that because no STMs have been identified under section 512(i) of the DMCA, service providers haven't lived up to their part of the bargain.

This, however, completely misrepresents the grand bargain of the DMCA. Contrary to the press release, the grand bargain was the merger of two standalone bills in the 105<sup>th</sup> Congress: one bill that created safe harbors for service providers (what is now now 17 U.S.C. § 512); and the other that provided legal protection for technological measures protecting copyrighted works (what is now chapter 12 of title 17). It is precisely this grand bargain—the real grand bargain—that explains why no STMs have been identified under section 512(i).

Section 512(i) was included in the standalone safe harbor bill to address rightsholders' concern that online service providers would strip out or ignore rights management information. At that time, no one anticipated that the separate technological protection measures bill (chapter 12) would be enacted simultaneously. Indeed, both bills were stalled until the Senate Judiciary Committee, under the leadership of Senators Hatch and Leahy, merged the two bills, along with other provisions, into the DMCA.

Chapter 12 is far more powerful than section 512(i). Section 1201(a)(1) prohibits the circumvention of technological protection measures (TPMs) adopted by a rightsholders to control access to a copyrighted work. Further, section 1201(a)(2) and 1201(b) prohibit the trafficking of devices that enable circumvention. These protections apply to TPMs unilaterally implemented by a rightsholder; the TPMs do not need to be adopted through an open, fair, voluntary, multi-industry process. Violation of section 1201 leads to civil and criminal penalties.

Moreover, section 1202(b) prohibits the removal or alternation of copyright management information (CMI). Here too, the format of the CMI could be created unilaterally by the rightsholder and does not need to be developed through a standard-setting process. A violation of section 1202 also could result in civil and criminal penalties.

Many rightsholders employ TPMs and CMI, and have asserted before the Congress and the Copyright Office that chapter 12 has ensured the success of these technical measures in connection to new business models based on streaming from secure servers. At the same time, large commercial platforms have created their own filtering tools that enable rightsholders to prevent or profit from the uploading of unauthorized content. They also have automated the notice and takedown process, which has made the process far more efficient for major rightsholders. Search engines employ algorithms to demote websites that appear to host infringing content.

These voluntary efforts by service providers, combined with the rightsholders' use of TPMs and CMI supported by chapter 12, have rendered section 512(i)(1)(B) largely superfluous. For that reason, S. 3880 is a solution in search of a problem.

## **II. Legislation Concerning Technical Measures is Premature.**

The Copyright Office, in response to a request by Chairman Leahy and Ranking Member Tillis, recently launched public consultations on technical measures to identify or protect copyrighted works online. In response to its Federal Register notice, the Copyright Office received over 6,000 comments which mostly expressed serious concerns with the adverse impact of technical measures on free speech on the Internet. A plenary session in that consultation occurred on February 22, 2022, and industry-specific consultations will take place at a later date. Moreover, the Copyright Office announced a forthcoming notice of inquiry on STMs “which will focus specifically on the interpretation of the DMCA, section 512(i), and the definition and identification of STMs within the scope of the statute.” It is premature for Congress to legislate on this issue before the Copyright Office has completed these inquiries.

## **III. Comments on Specific Provisions.**

### ***A. Amendments to section 512(i).***

The amendment to section 512(i) appears to be based on the premise that it is a problem that no STMs have been adopted under section 512(i) and that the cause of this problem is that the STMs must be adopted through a “multi-industry” consensus process. S. 3880 attempts to fix this purported problem by providing that an STM could also be developed through a consensus of “relevant copyright owners” and “relevant service providers” for a technical measure that is applicable to “a particular industry, type of work, [or] type or size of service provider.” As explained above, STMs have not emerged under section 512(i) because the DMCA as passed by Congress provided rightsholders with much more powerful tools in chapter 12 of Title 17. Thus, there is no problem with section 512(i) that needs to be fixed.

Additionally, the proposed amendment risks disturbing the balance Congress achieved in the DMCA. The current section 512 attempts to balance the interests of rightsholders, services providers and the users. Likewise, section 512, which creates safe harbors for services providers, is itself a counterweight to chapter 12, which provides protections for rightsholders. LCA has previously identified other aspects of the DMCA that must be addressed, including the abuse of the notice and takedown system; the need for additional permanent exceptions to section 1201; and modification of the triennial section 1201 rulemaking process. Section 512(i) should not be amended in a manner that benefits rightsholders without making balancing changes to the DMCA that benefit users and service providers.

Finally, the new language in section 512(i) contains ambiguities that need to be clarified. For example, what is the process, if any, for determining who is a “relevant” rightsholder or service provider in section 512(i)(2)(A)(ii)?

## ***B. Section 514***

The establishment of a rulemaking process to designate technical measures that service providers must accommodate is deeply misguided. The section 514 rulemaking would be burdensome to libraries. The legislation fails to appreciate the enormous complexity of the undertaking. The new section 514 would delegate to the Librarian of Congress extraordinary power to regulate speech on the Internet. Finally, section 514 in effect would replace the section 512 notice-and-takedown system with a notice-and-staydown system.

**1. Section 514 would be burdensome to libraries.** Libraries are service providers within the meaning of section 514(a)(7) because they host institutional repositories for open access materials, and store other materials at the direction of users.<sup>1</sup> Thus, they might need to accommodate and not interfere with the technical measures designated through the section 514 rulemaking. Failure to do so could lead to significant financial liability under section 514's damages provision. While LCA appreciates that subsection 514(e)(2)(J) authorizes the Librarian of Congress to exempt libraries and educational institutions from the subset of service providers covered by the designation, a better approach would be to exclude libraries, archives, and educational institutions altogether. Under the current proposal, libraries would have to expend significant cost and effort to participate actively in the section 514 rulemaking to ensure that the Librarian exempted them from each proposed designated technical measure. (Library digital repositories include all types of copyrighted works). If not exempted, libraries could find themselves required to implement a technical measure that they couldn't afford, that could harm their network, or that could reduce the utility of the network to their users.

**2. S. 3880 fails to appreciate the complexity of the undertaking.** The section 514 rulemaking would apply to technical measures used by copyright owners to identify or protect copyrighted works, or by service providers to identify or manage copyrighted works, which may vary across types and sizes of service providers providing hosting services. This means that an extremely wide array of measures would potentially fall within the scope of the proposed rulemaking. Some of these measures, for example those relating to fingerprinting or filtering, are extremely complicated. The technical specification could be hundreds of pages long, and the software implementing the specification may have hundreds of thousands of lines of code.

The proposed rulemaking is based on the triennial rulemaking for exemptions from section 1201(a), but the rulemakings could not be more different. The Copyright Office, which conducts the section 1201 rulemaking, is asked to evaluate whether the users of a particular class of work are likely to be adversely affected by the section 1201(a) prohibition from making noninfringing

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<sup>1</sup> The precise scope of section 514(a)(7) is ambiguous. While section 514(a)(7)(A) appears to refer to a provider of web hosting services under 17 U.S.C. § 512(c), it is unclear how section 514(a)(7)(B) modifies that definition.

uses of the class of works. In making this evaluation, the Copyright Office's threshold determination is whether the proposed use is in fact likely to be noninfringing. This obviously is a determination related to the traditional competence of the Copyright Office, although one could disagree with their legal conclusions. The Copyright Office must then weigh the adverse impact of the section 1201(a) prohibition on the noninfringing use against the potential harm of an exemption to rightsholders. This balancing is on the edge of the Copyright Office's competence because it calls for speculation on economic impact, but ultimately is similar to the fair use analysis on an industry-wide basis. In short, the section 1201(a) rulemaking is rooted in copyright law (is the use noninfringing?) and requires a focused legal judgment (balancing the impact of a prohibition on users with the impact of an exemption on rightsholders).

Conversely, the section 514 rulemaking would involve primarily technical issues with respect to exceedingly complex technical specifications. The Copyright Office, and the Librarian of Congress, simply do not have the technical competence to evaluate the proposed technical measures, even with input from the National Institute of Standards and Technology and the National Telecommunications and Information Administration. As a threshold matter, the Copyright Office does not have the technical competence to evaluate whether a proposed technical measure would even be effective at identifying, protecting, or managing works. Further, how would the Copyright Office begin to evaluate whether the technical measure poses an undue cybersecurity threat or security vulnerability? Likewise, how would the Copyright Office assess the "burdens imposed on a service provider's system or network" by a particular technical measure? Simply hiring a Chief Technology Advisor in the Copyright Office would not begin to solve the lack of technical competence to conduct this rulemaking.<sup>2</sup>

In contrast to the process proposed in this legislation, under current law, the National Technology Transfer and Advancement Act ("NTTAA") directs federal agencies to adopt standards that are developed by standard setting organizations ("SSO"). In other words, under the NTTAA, the federal agency in essence ratifies the work done by the SSO. OMB Circular A-119 adopts a similar approach. The SSO develops the standard through an open process involving knowledgeable industry participants. This process guarantees that the standard actually works. It also addresses in a fair manner the many tradeoffs inherent in developing a standard. Additionally, it ensures that the standard does not unduly benefit one firm at the expense of all

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<sup>2</sup> Creating the position of a chief technology advisor in the Copyright Office is a good idea regardless of whether the Copyright Office assumes the STM rulemaking function set forth in the proposed amendment. However, such a position should not be mandated by statute. Congress need not micromanage the operations of the Office in this manner. Likewise, the chief economist position need not be codified; the Copyright Office already is in the process of expanding its economics capacity.

others. Furthermore, an open standards process surfaces the myriad intellectual property issues a standard might implicate. Any sophisticated technical measure relating to identifying, protecting, and monitoring copyrighted works likely reads on many patents. The standards process would navigate through this patent thicket, securing fair, reasonable and nondiscriminatory (“FRAND”) licensing commitments from firms controlling the patents; or reconfiguring the standard to avoid patents controlled by firms unwilling to agree to FRAND terms.

Similarly, a sophisticated technical measure probably would require the use of standard application programming interfaces (“APIs”). The precise scope of protection for such APIs remains less than certain because the Supreme Court decided *Google v. Oracle* on the basis of fair use rather than copyrightability. An SSO would resolve any copyright issues relating to the APIs.

Under the NTTAA/OMB Circular A-119 approach, the federal agency does not just rubber stamp the SSO’s work; it closely scrutinizes what the SSO has done. Nonetheless, in this approach, the SSO does the heaviest lifting because it is most competent at doing so. The proposed section 514, however, completely ignores the tried and true NTTAA/OMB Circular A-119 approach, and instead allows rightsholders and service providers to petition the Librarian of Congress directly. This structure is bound to fail. The Copyright Office and the Librarian have no technical competence to perform the tasks demanded by the proposed amendment; indeed, no federal agency does. Standards for technical measures should be developed by SSOs, not the federal government.

**3. Section 514 delegates to the Librarian extraordinary power to regulate speech on the Internet.** Putting aside the technical competency of the Librarian to conduct the section 514 rulemaking, the proposed amendment would empower the Librarian to make sweeping decisions implicating free speech on the Internet. The broad definition of technical measures would include filtering technology. After a rulemaking, the Librarian could select a filtering technology as a designated technical measure, and could further decide that “accommodating” this filtering technology means that many service providers must implement it to comply with section 514. To be sure, the Librarian would need to consider the impact of the designation on criticism, comment, news reporting, teaching, scholarship, research, or other public interest considerations. But the Librarian, acting on the recommendation of the Register of Copyrights, might decide that the economic benefit of the designation to individual rights holders outweighs the burden on free speech. Public interest groups might challenge the constitutionality of the designation, but the outcome of such litigation is far from clear.

Regardless, any filtering technology inevitably would burden free speech on the Internet. The filter invariably would be over-inclusive, and would prevent fair use and other lawful forms of speech. Even if libraries were exempted from section 514’s requirements, section 514 would still

adversely affect the communities libraries serve by imposing filtering obligations on the other platforms these communities use.

**4. Section 514 Eviscerates the Section 512(c) Safe Harbor.** Section 514(j) asserts that “noting in this section shall be construed to alter the scope of the safe harbors set forth in subsections (a) through (e) of section 512, or to impose a condition on eligibility for those safe harbors.” However, by imposing damages liability on a web host for failure to implement a filtering technology designated by the Librarian, S. 3880 in effect replaces the notice-and-takedown regime under section 512(c) with a notice-and-staydown regime.

Due to the foregoing problems, LCA opposes enactment of S. 3880.

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