

The Tillis-Leahy SMART Copyright Act of 2022

Strengthening Measures to Advance Rights Technologies

Myths v. Facts

Setting the record straight on the Tillis-Leahy SMART Copyright Act of 2022

- 1. MYTH: This legislation is not necessary.** The fact that no standard technical measures (“STMs”) have been adopted in the twenty years since section 512(i) of the Copyright Act took effect is not a problem. More powerful proprietary tools exist, and the law addresses technological protection measures under section 1201.

FACT: The SMART Copyright Act is vital for our creative industries, technology companies, user communities, and global technology leadership. Congress clearly envisioned that the safe harbor immunity for online service providers in section 512(i) would act as an incentive for service providers and rights holders to collaborate on evolving technologies and make those measures available to all on reasonable and nondiscriminatory terms. The core premise of this provision is to identify or develop measures through an open, fair, voluntary, multi-industry, standards process that would be accessible by all—including small, independent creators and emerging technology companies. Sections 1201 and 1202 serve a different purpose by creating important legal protections for *all* covered measures that *protect* (1201) or *identify* (1202) copyrighted works, respectively. They do not address the broader availability or accessibility of such measures. The SMART Copyright Act 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.

- 2. MYTH: This is a filtering mandate that will chill free speech and harm users.**

FACT: The SMART Copyright Act creates an open process for all stakeholders, including the public, to identify copyright-related technological measures that should be broadly available to all. Some measures, like the International Press Telecommunications Council (IPTC) photo metadata standard, or a Creative Commons license, can help users know whether and how they can use content while also respecting creators’ rights. Other technological measures, including “filtering” technologies, are used to stop infringing content at scale, or make content available for licensing. The bill ensures that any designation of existing measures requires input from all stakeholders and assessment of public interest considerations. This process is also an opportunity for users to provide technological solutions to these concerns. The Copyright Office’s particular expertise in the area of copyright and its exceptions—like fair use—can assist with ensuring the right balance is struck between curbing infringement that undermines authors’ constitutional rights and promoting online availability of materials.

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3. MYTH: The Copyright Office is not equipped to handle these issues.

FACT: The SMART Copyright Act responds to concerns often raised by the public and stakeholders that the Copyright Office needs more sophisticated technical expertise—not just for this process but also other issues like the 1201 rulemaking. Copyright law must be modernized to be more responsive to current technologies, copyright markets, and business practices in order to hold platforms accountable and promote creativity. The bill provides funding and requires that the Copyright Office hire a Chief Technology Advisor and a Chief Economist to benefit the Office as it works through the many varied issues that arise at the intersection of copyright and the digital technologies. That said, the Copyright Office is not asked to develop technologies, but instead to facilitate a public process to assess whether existing measures may be made available for all. It is also required to consult with federal government experts on issues of privacy, cybersecurity, standards, and antitrust.

4. MYTH: This will interfere with existing proprietary technologies, placing massive burdens on service providers.

FACT: The SMART Copyright Act creates a process for creators, service providers, and other stakeholders to identify and designate technological measures that should be available for all on reasonable terms. It requires hosting service providers to make “commercially reasonable” efforts to accommodate and not interfere with the measures—a standard that deliberately avoids creating burdens on those “covered” service providers. It also allows for types of service providers to be exempted, and even ensures that innocent violators are not subject to damages. While it may create alternatives to existing proprietary systems that keep out small businesses, the bill is deliberately designed to create a process that will ensure the maximum benefit is reaped at minimal expense to service providers. The SMART Copyright Act recalibrates the existing DMCA framework in a measured, thoughtful manner by vesting the Copyright Office and other federal agencies with new authority to identify technological measures that can help prevent costly litigation and lower the overall burden of the current system.

5. MYTH: This bill risks chilling innovation across the entire internet by broadening the existing safe harbor obligations and simultaneously adding a new, competing source of civil liability. Service providers will have to divert resources from current copyright management tools to address these new forms of liability.

FACT: The SMART Copyright Act recognizes that the existing safe harbor provisions are entirely voluntary. Stakeholders still have to come together as a “broad consensus” to identify or develop an STM. As a result, any major service provider controls whether or not they would face liability because they can destroy consensus by choosing not to participate. The new procedure is separate, clearly excludes these voluntary STMs from consideration, and does not affect the safe harbor. Instead, it facilitates widespread adoption of measures—many of which are likely already widely used by service providers—thus enhancing interoperability and innovation.