



Wednesday, February 9, 2022

Senator Richard Durbin
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Senator Charles Grassley
Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

Re: S.3538 - EARN IT Act of 2022

Dear Chair Durbin and Ranking Member Grassley,

Consumer Reports¹, the independent, non-profit member organization, **writes to urge the Committee to oppose S.3538, the EARN IT Act**. CR supports strong efforts to halt the alarming proliferation of Child Sexual Abuse Material (CSAM) online. We also ask that Congress consider a variety of reforms designed to reform Section 230 of the Communications Decency Act and better hold online platforms accountable for the harms that their design encourages and amplifies. Nevertheless, we urge you to oppose S.3538. While attempting to address a serious, grave, and urgent problem, EARN IT may ultimately cause more harm. Senator Wyden's Invest in Child Safety Act offers an alternative approach to addressing the proliferation of CSAM online. We also urge Congress to consider other potential proposed legislative approaches to platform accountability — some of which we discuss [here](#).

Firstly, to the extent that EARN IT facilitates mandating backdoors to encryption protocols, it would undermine privacy, free speech rights, and the underpinnings of the internet economy. Despite the Leahy amendment originally intended to preserve encryption, losing liability protections could incentivize companies to implement technologies — such as client-side scanning — that would broadly compromise the effectiveness of encryption.² As we

¹ Consumer Reports (CR) is a nonprofit membership organization that works side by side with consumers to create a fairer, safer, and healthier world. For more than 80 years, CR has provided evidence-based product testing and ratings, rigorous research, hard-hitting investigative journalism, public education, and steadfast policy action on behalf of consumers' interests. Unconstrained by advertising or other commercial influences, CR has exposed landmark public health and safety issues and strives to be a catalyst for pro-consumer changes in the marketplace. From championing responsible auto safety standards, to winning food and water protections, to enhancing healthcare quality, to fighting back against predatory lenders in the financial markets, Consumer Reports has always been on the front lines, raising the voices of consumers.

² <https://www.eff.org/deeplinks/2019/11/why-adding-client-side-scanning-breaks-end-end-encryption>

have documented in our white paper, *Beyond Secrets*, the modern online economy is highly dependent upon the proper functioning of encryption technology.³ Undermining encryption invites the potential for compromised consumer data across these and other services, putting everyday consumers at new levels of risk for identity theft and other financial fraud schemes simply for conducting basic digital transactions, and could impede consumer confidence in participating in the online marketplace. The same cryptographic technologies are also essential to *authentication*, by which consumers and businesses can prove to each other they are who they assert to be.⁴ Introducing vulnerabilities to authentication would also compromise a wide number of applications upon which consumers rely every day.

Particularly during the ongoing COVID-19 crisis, where reliable online interactions are more needed than ever, ensuring safety and security in those interactions is also, therefore, more imperative than ever. As such, the potential for EARN IT's recommended best practices to influence technological practices to the detriment, not benefit, of consumer safety and security is cause for serious concern.

Furthermore, the design of the commission that EARN IT proposes is weighted heavily against consumer protection, privacy, civil liberties, and civil rights expertise: it requires only that two of the nineteen members have expertise in any one of those four categories. While the bill's first iteration permitted services to "earn" back (c)(1) immunity through certifying best-practice usage, the present version does not—but committee's weighted structure, however, still runs the risk of unduly influencing future policymaking and judicial considerations with one-sided recommendations.

Accordingly, we respectfully ask that the Committee not approve the bill in its current form and instead work to stop CSAM proliferation through the Invest in Child Safety Act, and continually to explore other avenues to substantially improve platform accountability.

Thank you for your consideration of Consumer Reports' perspective on this crucial matter.

Sincerely,

Laurel Lehman
Policy Analyst

cc: Members of the Senate Committee on the Judiciary

³ <https://advocacy.consumerreports.org/wp-content/uploads/2017/12/Beyond-Secrets-12.21.17-FINAL.pdf>

⁴ *Id.*