

**Before the House Energy and Commerce Committee
Subcommittee on Telecommunications and the Internet**

**Hearing on “The Audio and Video Flags: Can Content Protection and
Technological Innovation Coexist?”**

**STATEMENT OF LIBRARY, EDUCATION, AND SCHOLARLY ASSOCIATIONS
CONCERNING THE BROADCAST VIDEO FLAG**

July 18, 2006

When the Library Copyright Alliance (LCA) testified before the Senate Commerce Committee on January 24, 2006, concerning the broadcast video flag, it identified three areas where the flag could adversely affect legitimate non-commercial uses of broadcast television content: distance education; other educational and research uses permitted by the Copyright Act; and discourse involving news, public affairs programs, and public domain materials. Although our organizations appreciate the efforts to address these concerns, the video flag provision contained in S. 2686 as reported by the Senate Commerce Committee will still restrict important lawful uses of broadcast content.

Distance Education

The LCA has met with proponents of the legislation to discuss a distance education exception. LCA and the other signatories to this statement are pleased to report that progress is being made. While the interested parties have not yet agreed upon statutory language, we are optimistic that a consensus can be reached soon. (S. 2686 directs the Federal Communications Commission to hold an expedited proceeding for certifying digital output protection technologies for use in distance learning. The approach under discussion among stakeholders is superior because it avoids an administrative process and directly permits libraries and nonprofit educational institutions to obtain non-compliant demodulator products for distance learning purposes.)

Research

The distance education discussions also have addressed research concerning news programming. Although we are pleased with the direction of the discussions in this specific area, scholarly research has always connected with all areas of content, not just news. For example, research concerning media depiction of the war in Iraq cannot be restricted to the study of news broadcasts. A researcher must also examine late night monologues, talk shows, and dramas that reference the war. Scholarly research on entertainment programming is an important component of research on the evolving culture and customs of our society.

Research integrity requires the ability to distribute content to scholars in multiple

locations for parallel and independent analysis. This occurs because of the need for what is called "double coding" to assure reliable results. Double coding means that two or more scholars, in different locations, make independent judgments about the content of a broadcast, and then their judgments are compared to assure that a reliable conclusion has been reached. Distribution is also necessary because different scholars specialize in analysis of different aspects of a video -- *e.g.*, some may analyze the visual components, others the audio content, and so forth.

Additionally, distribution occurs because good quality scholarship depends on peer review -- the ability of other scholars to analyze the data in a report to see if they reach similar conclusions independently. Thus, the video component of one study needs to be available after the study is completed for analysis by others.

We hope that as it moves forward, the legislation can be amended to permit the distribution of the full array of content for these research purposes. We recognize that such permission will need to be accompanied by protections for commercial markets, and we are fully prepared to work toward balanced legislation that permits important educational and research uses of copyrighted content while protecting the commercial markets for that content.

News and Public Affairs Programming

S. 2686's exception for "news and public affairs programming the primary commercial value of which depends on timeliness," though a step forward, does not go far enough. In the bill reported by the Senate Commerce Committee, the broadcaster has the power to make the preliminary determination of whether the commercial value of a particular program depends on timeliness, and the FCC can review this determination after the fact. Even if the FCC concludes that the broadcaster wrongly flagged a program, the FCC does not appear to have the power to order the broadcaster to rebroadcast the program without the flag or to penalize the broadcaster in some manner. Thus, as a practical matter, the broadcaster has every incentive to apply this exception as narrowly as possible. A better approach would be to prohibit broadcasters from flagging news and public affairs programming, unless they receive a waiver from the FCC based on the unique economics of a particular program, *e.g.*, extraordinarily high production costs that can be recouped only by multiple broadcasts. Public affairs programming should also be defined to include programming related to health care. Furthermore, the broadcasters should be prohibited from flagging all public domain material.

H.R. 1201

Chairman Barton has indicated on numerous occasions, including the June 27th hearing, that broadcast flag legislation should advance only in conjunction with H.R. 1201, which amends the Digital Millennium Copyright Act. We agree with Chairman Barton's linkage of these issues. The DMCA prohibits the development of technologies that permit the circumvention of measures that protect copyrighted works. If Congress

mandates technological protection measures, it needs to permit the circumvention of those measures for lawful purposes. While the exceptions to the flag rule discussed above will help limit its adverse impact on legitimate library, research, and educational activities, the rule will still restrict lawful uses for other purposes. H.R. 1201 will provide a means for these uses to occur. Moreover, apart from the flag rule, the DMCA has interfered with important library, research, and educational activities that do not infringe copyright. For this reason, the undersigned support H.R. 1201 and its consideration at the same time as broadcast flag legislation.

The undersigned organizations remain concerned about the impact that a broadcast flag regime could have on legitimate education and research activities at our institutions. However, if broadcast flag legislation moves forward, we respectfully direct your attention to the specific problems identified above and request that they be satisfactorily resolved before any broadcast flag legislation is adopted.

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