

Before the Committee on Commerce, Science and Transportation

United State Senate

Hearing on the Broadcast and Audio Flag

January 24, 2006

Testimony of Jonathan Band on Behalf of the Library Copyright Alliance

The Library Copyright Alliance (LCA) appreciates the opportunity to explain to the Committee our specific concerns with the Federal Communications Commission's (FCC) broadcast flag rule. We urge the Committee to address these concerns before adopting legislation authorizing the FCC to promulgate the rule.

The LCA consists of five major library associations—the American Association of Law Libraries, the American Library Association, the Association of Research Libraries, the Medical Library Association, and the Special Libraries Association. These five associations collectively represent over 139,000 libraries in the United States employing 350,000 librarians and other personnel. The five associations cooperate in the LCA to address copyright issues that have a significant effect on the information services libraries provide to their users. The LCA's mission is to foster global access to information for creative, research, and educational uses.

The national library associations that constitute the LCA were among the petitioners that successfully challenged the FCC's broadcast flag rule. After the Motion

Picture Association of America questioned the petitioners' standing to file suit, librarians at Vanderbilt University, North Carolina State University, University of California-Los Angeles, and American University filed affidavits with the court explaining and illustrating how the broadcast flag, if it went into effect, would hamper their use of broadcast materials for teaching and scholarship. Copies of these affidavits are attached.

The D.C. Circuit held that at least one of these librarians had standing, which in turn conferred standing to the organization of which the librarian was a member. On this basis, the court was able to reach the merits of the challenge. Although the court struck down the flag rule on the grounds that the FCC did not have the authority to issue it, the library concerns with the rule go far deeper than the proper scope of the FCC's jurisdiction. Specifically, the rule would prevent a wide range of lawful uses of broadcast materials, to the detriment of the public. For this reason, the LCA welcomes this opportunity to explain to the Committee how the rule will have this negative impact.

Whether we like it or not, television is part of the fabric of American life. It remains a major source of news, and both reflects and influences cultural trends in our society. Effective public discourse often requires the copying and dissemination of broadcast content. For example, a website seeking to demonstrate the disparate treatment by news programs of black "looters" and white "food liberators" in the wake of Hurricane Katrina would need to include clips of television news broadcasts. Likewise, an organization dedicated to preserving traditional family values in American society

might distribute over the Internet segments from *Desperate Housewives* and *The O.C.* to demonstrate the corrupting influence of television.

The flag would interfere with these lawful uses. Libraries are most directly concerned that the flag would seriously undermine the Technology, Education and Copyright Harmonization (TEACH) Act passed by the 107th Congress to facilitate distance education in the digital era. The TEACH Act sets forth conditions under which government bodies and accredited nonprofit educational institutions can use copyrighted works in distance education courses conducted over the Internet. The Act contains a variety of procedural safeguards to ensure that the interests of the copyright owners are not harmed.

Unfortunately, the broadcast flag threatens to frustrate the operation of the TEACH Act. Under the TEACH ACT, an educator can include a clip of a television broadcast in distance education materials. For example, a course on criminal procedure could include a clip from *Law and Order* where the detectives conduct a search later claimed by the defendant to be unlawful. The broadcast flag, however, would prevent the educator from retransmitting that clip over the Internet. Contrary to the intent of Congress reflected in the TEACH Act, the broadcast flag will prevent the use of an entire category of works – high definition television programs – in distance education.

The FCC made no accommodation for these lawful uses. If Congress ultimately agrees with the FCC that digital television broadcasts are vulnerable to widespread

infringement, and that a broadcast flag is the best way to prevent such infringement, Congress should ensure that any flag regime includes appropriate exceptions for lawful uses. This could be achieved by prohibiting the flagging of certain kinds of content such as public domain material; news and public affairs programs; and programming designed to serve educational and informational needs.

Furthermore, a governmental body or accredited nonprofit educational institution should be permitted to take actions as are reasonably necessary to make a transmission for distance education as authorized under the TEACH Act, including leasing or purchasing a device that does not detect or otherwise respond to the broadcast flag. It should also be legal to manufacture or import such a device solely for lease or sale to such a body or institution. Libraries and educational institutions need this special TEACH Act exception in order to make legitimate uses of content that does not fall within the public domain or public affairs exceptions. Additionally, the Committee should consider extending this exception to other educational and research uses permitted by the Copyright Act.

Carefully drafted exceptions along the lines discussed above will not prejudice the legitimate interests of copyright owners. Even if certain programs are not flagged, they typically will still be covered by copyright; and if a library or educational institution abuses these exceptions, it can be sued for copyright infringement.

The Internet has the potential of dramatically expanding the quantity and quality of distance education programs at the primary, secondary, and higher education levels. In recent years libraries and educational institutions have begun to tap into this potential, and students in rural areas underserved by traditional forms of education have been among the major beneficiaries. Unfortunately, the broadcast flag could impede the development of robust distance education curricula by preventing the use of the content most compelling to today's students: television programs. The flag rule in its current form allows an independent agency to overrule the clearly expressed will of Congress with regard to distance education and other lawful uses. Modest exceptions can address this serious concern.

We look forward to working with the Committee on this important matter. I would be happy to answer any questions the Committee may have.