

June 17, 2005

Address

Re: Oppose "Broadcast Flag" Legislation

Dear :

The undersigned groups write to you today to ask you to oppose any "broadcast flag" legislation offered in response to the recent U.S. Appeals Court decision striking down the Flag Order issued by the Federal Communication Commission ("FCC"). The broadcast flag scheme will hurt consumers. The flag will also hinder educational use of copyrighted content, and will stifle the design, operation, and further development of innovative consumer electronics.

### **The Broadcast Flag**

The broadcast flag scheme is a broad regulatory regime proposed to prevent broadcast digital television (DTV) from being sent freely over the Internet. Such a difficult task requires an all-encompassing technology that would affect any device that can: 1) receive broadcast DTV signals; or 2) pass along broadcast DTV content. It would also require federal oversight and enforcement over this broad range of consumer products. In late 2003, The FCC adopted the broadcast flag scheme at the behest of the motion picture studios, despite the numerous objections of consumer advocates, libraries, and technological innovators that such a policy would have a detrimental effect on innovation and consumer freedoms.

After the FCC issued its Flag Order, some of the undersigned groups challenged the Order in court. We argued that the broadcast flag scheme turned the Commission into the all-purpose gatekeeper for consumer technologies, without the required authorization from Congress. On May 6, 2005, the U.S. Appeals Court for the D.C. Circuit agreed and vacated the FCC's broadcast flag order, holding the FCC indeed exceeded its authority in creating the broadcast flag scheme.

### **The Legislative "Fix"**

Now, the Motion Picture Association of America is asking Congress to reinstate the flag rule. One draft bill gives the Commission unparalleled new power over the development of digital and analog consumer electronics technology. Congress should reject this big-government, anti-consumer approach for the following reasons:

- **The Flag Rule Limits Educational Uses**

The flag scheme prevents legal educational uses of broadcast DTV. In the May 11, 2005 Congressional Research Service (CRS) report titled "Copyright Protection of Digital Television: The 'Broadcast Flag'," the CRS wrote: "...future fair or reasonable uses may be precluded..." For example, the flag scheme will prevent a teacher from transmitting a DTV clip over the Internet to students as part of a distance learning program.

- **The Flag Rule Would Harm Consumers**

The flag scheme would prevent a member of Congress from emailing a DTV clip of his district appearance on local television to his DC office. Further, the flag scheme would render obsolete a large number of expensive consumer devices. Consumers may quickly find to their consternation that what they have digitally recorded on their newly purchased flag-compliant devices will not play on anything they bought before (including on their DVD players and over their home networks). Worse, even if all their devices are flag-compliant, the 13 approved flag-compliant technologies are incompatible with one another. A broadcast recorded on a TiVo will not play on “5C” device, or vice versa. This lack of compatibility will confuse consumers, especially when their new digital devices turn out to be less consumer friendly than the analog devices they replaced. Such a scheme will surely slow the DTV transition.

- **Innovation Ends at FCC's Gates:**

Restoring the broadcast flag scheme would give the FCC unprecedented power to determine the design of consumer electronics and computer technology. Proponents of the flag regulations will claim that the legislative fix they desire will be narrow – but this claim is patently false. The flag scheme puts the FCC in the position not only of dictating DTV receiver design, but also of having to approve every piece of hardware (computers, television sets, and TiVos) and software (like Windows) that connects to a device that captures a digital television signal. This puts a huge burden on the FCC, and the resulting bottleneck will put a stranglehold on innovators and developers. Moreover, because the flag scheme does not reach analog outputs (the so-called “analog hole”), the MPAA and the NAB will soon be back before Congress requesting a further expansion of the FCC’s jurisdiction. Likewise, the Recording Industry Association of America will insist that the FCC have the authority to apply a flag scheme to digital radio broadcasts.

## **Oppose Broadcast Flag Legislation**

Congress should not reinstate this broad, intrusive regulation which would entangle the government in massive industrial policy and place harsh new limits on what consumers and others can lawfully do with free over-the-air television. Now that a federal court has lowered the broadcast flag, we urge Congress to think twice before raising it again. We ask you to oppose legislation that would ratify the FCC's broadcast flag rule.

Sincerely,

American Library Association

American Association of Law Libraries

Association of Research Libraries

Computer & Communications Industry Association

EDUCAUSE

Electronic Frontier Foundation

Elgato Systems LLC

Free Press

Medical Library Association

Open Source and Industry Alliance

Public Knowledge

Special Libraries Association