

Broadcast Flag Authorization Legislation

Key Considerations for Congress August 2005

Broadcast television in the United States is in the midst of a transition from analog to digital. This has raised concerns about the risk of piracy, because digital content easily can be copied and distributed on a large scale without degradation of quality. To address these concerns, the FCC adopted a set of rules under which a marker – the “broadcast flag” – would identify broadcast content for protection against widespread copying and redistribution. These rules generated some controversy and were recently struck down by a federal court, but it remains possible that Congress will choose to authorize a broadcast flag regime. This paper offers recommendations for Congress as it considers the issue.

▣ Introduction

On May 6, 2005, the U.S. Court of Appeals for the D.C. Circuit ruled that the Federal Communications Commission (FCC) had no legal authority to impose a “broadcast flag” regime that would have affected all devices capable of displaying, recording, or redistributing digital television broadcasts. Supporters of the flag are now calling for quick action by Congress to authorize the FCC to implement such a regime. CDT believes that the issues at stake are too important to give the FCC blank-check authority in this area, and therefore that any grant of authority must be carefully circumscribed. In this paper, CDT offers specific suggestions for the types of limits that Congress should consider.

CDT recognizes that over-the-air digital television broadcasts are susceptible to large-scale piracy, and that this poses a serious threat to the owners of video content – particularly where the owners are counting on additional revenues from subsequent distribution (e.g., sale of DVDs, syndication on cable, pay-per-view). The idea of the broadcast flag is to enable content owners to include a marker (the flag) in broadcast content that identifies it for protection.

However, for a broadcast flag regime to have any effect, devices that can receive television programs must be designed to recognize and protect flagged content. In today’s increasingly networked world, this includes not just televisions, but also other devices such as personal video recorders (e.g., TiVo), DVD recorders, personal computers, and even Internet-enabled mobile phones.

This means the broadcast flag is no minor, technical step. It would have a major impact on a wide range of technology products and on the ways consumers are

able to use the digital networks of the future. As the Court of Appeals suggested, giving the FCC approval authority over devices such as computers and other general-purpose consumer electronics would be unprecedented and would represent a substantial expansion of FCC jurisdiction. In addition, implementing the broadcast flag without appropriate safeguards and limits would carry several serious risks. It could stymie technological innovation and the deployment of exciting new consumer technologies. It could undermine the Internet's potential to empower bloggers and other individual speakers to comment on and respond to news and public affairs events seen on television. And it could frustrate consumers by preventing new devices they purchase from working properly with devices they already own.

The FCC did a number of things right in its initial broadcast flag decisions, including being open to approving new technologies even if they were controversial. But a future FCC could make different choices. Given the major expansion of authority involved and the significant potential risks, legislation that simply authorizes the FCC to implement a broadcast flag regime in whatever way the agency sees fit would be a mistake.

Nor can Congress successfully limit the scope of authorization by simply approving the specific broadcast flag rulings the FCC has issued to date. The FCC's broadcast flag rules were a work-in-progress; the agency was using interim rules while its rulemaking process continued, and many fundamental issues remained to be addressed. For example, the FCC was still considering such basic matters as "whether objective criteria should be used to evaluate new content protection and recording technologies and, if so, what specific criteria should be used." The decisions the FCC did take – establishing some interim rules and evaluating 13 specific technologies under those rules – simply do not answer the bigger question of what the scope of the FCC's authority should be, on an ongoing basis, over new technology products.

Finally, in CDT's view, the experience with the FCC's interim rules makes clear that, while the FCC process worked well in some respects, there is room for improvement. CDT plans to detail in a forthcoming paper the strengths and shortcomings of the FCC's initial round of technology approvals under the interim rules, and the lessons that policymakers should draw.

In short, if Congress decides to grant broadcast flag authority to the FCC, the scope of that authority should be carefully and expressly defined. Congress needs to set the parameters. In CDT's view, any broadcast flag authorization legislation should contain clear requirements in three areas.

- To ensure that valuable new technologies are not stifled, Congress should require the FCC's flag rules to focus narrowly on the goal of

preventing indiscriminate distribution of flagged digital content over digital networks, and to ensure that the process for approving flag-compliant technologies is objective and timely.

- To preserve access to critical news and public affairs content, Congress should establish a category of news coverage that will not be flagged.
- To protect consumers from unfair surprise, flag rules should require notice to consumers concerning the types of pre-flag devices with which the new, flag-compliant devices will not interoperate.

▣ Clear and Narrow Parameters for FCC Authority and the Technology Approval Process

There is a real risk that if the FCC is given unguided authority to approve or disapprove any device capable of handling digital television programming, it could act in ways that stall the launch of disruptive new technologies. Established players – whether content creators or distributors or device makers – sometimes perceive new technologies as threats; the movie industry famously argued that the VCR would grievously damage the industry and sued all the way to the Supreme Court.

A broadcast flag regime without clear limits on FCC authority would create an additional avenue for opponents of a new technology to attempt to slow it down, control it, or block it. Perhaps the FCC would tend to side with makers of new technologies, but perhaps not – the benefits of disruptive technologies are often more clear in retrospect than when first introduced. Over time, an FCC technology approval process without a clearly limited mission could well become a significant roadblock for upstart consumer technologies.

To its credit, the FCC did not reject any technologies during its initial round of now-nullified broadcast flag proceedings. However, even without any outright regulatory denials, the process did chill some technologies – because in advance of the decision, a number of applicants scaled back the capabilities of their technologies as requested by opponents. In particular, three of the four applicants that proposed to allow secure transmission of content over the Internet in a limited fashion (for example, for remote viewing by the user, as opposed to indiscriminate redistribution) agreed to eliminate this capability before the FCC even ruled.

CDT will review the successes and failures of the FCC's initial round of technology approvals in greater detail in a forthcoming paper. But the key lesson is that the nature of the approval process – not just the FCC's ultimate

decision – is crucial. The process must be sufficiently transparent and objective that innovators can proceed with confidence. It must be focused narrowly on the goal of preventing widespread Internet redistribution of flagged content. And it must avoid giving a technology’s opponents an opportunity to veto it or to extract design changes.

Recommendations: Any legislative grant of authority to the FCC should be tailored expressly and narrowly to implementing the flag regime. It also should contain language specifying basic standards for the technology approval process, rather than leaving it all up to FCC discretion. And it should provide some limits on the types of devices that can be required to use approved technologies, to circumscribe the scope of the FCC’s authority over technology. In particular:

Basic Scope of FCC Authority

- Legislation should expressly state that it authorizes the FCC to adopt regulations only to the extent necessary to prevent digital television broadcast content marked with the Redistribution Control Descriptor set forth in ATSC Standard A/65B (the flag marker) from being redistributed indiscriminately on digital networks by consumers.

Approval Process Standards and Procedures

- Legislation should state a clear, narrowly focused standard against which technologies will be evaluated. In particular, approval should hinge on one main functional requirement that expresses the basic purpose of the flag: does the technology effectively frustrate an *ordinary user* from engaging in *indiscriminate redistribution* of flagged content over the Internet or similar networks? (The FCC effectively did focus narrowly on this functional requirement in its initial round of technology approvals, resisting efforts to convince it to broaden its review and be swayed by other factors. But no narrow standard was stated expressly in the rules, and nothing would prevent a future FCC from taking a different tack.)
- Legislation should create a presumption in favor of approving technologies that make a showing of compliance with the functional requirement stated above. Once a threshold showing is made – ideally, through a self-certification process – the burden of proof should be on those seeking to have a technology rejected. (The FCC’s process contained no explicit statement of where the burden of proof lies.)

- Legislation should specify a uniform timeframe for technology approval decisions. If the timing is open-ended or highly variable, there is a strong incentive to pare back new technology features to avoid any possible opposition.
- Legislation should include creation of an oversight advisory board, or comparable oversight mechanism, to provide regular, independent review of the technology approval process and identify any problems.

Limitations on Devices Covered

- Legislation should limit the FCC's authority to require use of approved technologies to hardware devices that are or contain digital TV demodulators (i.e., devices that are capable of deciphering digital television transmissions). Other consumer electronics may be forced to protect flagged content in order to interconnect with demodulator devices, but that should be a matter of licensing terms rather than FCC regulation of technology. Without this limit, the FCC could become the gatekeeper for virtually any technology device in a consumer's home. (This limitation is consistent with the scope of the FCC's interim rules.)
- Legislation should specify that broadcast flag regulations should not at this time seek to regulate pure software code that performs demodulation functions – a component of “software defined radios.” There is no showing that software defined radios pose any near-term threat, and applying regulations could stifle an important new technology that the FCC actively has sought to promote.

▣ Flag Exclusion for Critical News / Public Affairs Content

Applying the broadcast flag to all news and public affairs programming would undermine the potential of the Internet to enhance public debate in this fashion. Television continues to be a primary source of video footage concerning the top issues of the day. The broadcast flag, if applied too broadly, could prevent an individual from recording a broadcast clip of a notable congressional hearing and starting an email chain to show others. It could prevent a blogger from including footage from a broadcast debate between candidates for public office in her online blog, to illustrate a point or to highlight inconsistencies in candidates' positions. It could prevent a charity or a church from using broadcast news clips about a recent natural disaster to bolster an Internet-based appeal for relief assistance.

Note that in all of these scenarios, using print media – a portion of a news or magazine article, for example – would be permitted under copyright law and would not be subject to any technological impediment. But an overbroad application of the broadcast flag could prevent a similar excerpt from a news broadcast from being widely shared on the Internet. If that news content is flagged, flag-compliant technologies would pose a technical bar to circulating it on the Internet, even where such circulation would constitute legal “fair use” under copyright law.

Requiring certain news and public affairs programming to be broadcast without the flag would pose little serious threat to content owners. Unlike movies or popular television entertainment programs, broadcast coverage on the news of the day typically is not produced with the expectation that it will generate large secondary revenue streams in future months or years. It is not made into DVDs that are then sold or rented to consumers; it is not syndicated for re-run showing on cable; it is not later offered on a pay-per-view basis.

In addition, the nature of much news and public affairs content makes its use particularly likely to fall within copyright law’s “fair use” exception. It concerns matters central to the civic debate that underpins democracy. Programs from serious political talk shows to comedies like “The Daily Show with Jon Stewart” rely on the fair use exception when they use video footage involving politicians and current events. Legally, bloggers and other individual website operators may do likewise – but if the footage carries the flag, they may find these legal uses blocked.

Significantly, leaving certain news and public affairs content unflagged would *not* mean that anyone and everyone would be free to copy and use it without limitation. Copyright law still would apply. For example, a person lifting an entire news broadcast on an unauthorized basis for use in a competing online news service clearly would be infringing copyright, and would face exactly the same legal liability he would face today in the absence of a flag regime. CDT does not believe that this kind of piracy of news programming is occurring on any major scale despite the current lack of flag protection, or that it is a practice in which ordinary consumers (the ones likely to be blocked by the flag) are likely to engage.

Recommendations: To address this issue, Congress should include instructions in any broadcast flag authorization legislation to make certain types of content not eligible to be flagged. Flagging should not be permitted for:

- Any material that is not copyrightable;
- Any coverage of public debates or political speeches; and

- News programming the primary commercial value of which depends on timeliness (as opposed to, for example, documentaries).

▣ Notice to Consumers About Interoperability Limitations

The broadcast flag regime will require all new devices that can display, record, or transmit digital television programming to recognize and protect flagged content. Protecting flagged content involves sharing such content only with other flag-compliant devices. As a result, consumers may find that new devices they purchase will not interoperate fully with their older, pre-flag devices.

For example, suppose a consumer purchases a new flag-compliant DVD recorder, and uses it to record flagged television programs onto a DVD for later viewing. When the consumer tries to watch the resulting DVD on his older DVD player in his bedroom, or on his laptop computer during a plane ride, it simply will not work. CDT believes consumers should be made aware of such interoperability limitations, so that they are not unfairly surprised.

Recommendation: Broadcast flag authorization legislation should direct the FCC to include in its flag rules consumer notification requirements sufficient to minimize confusion and surprise regarding interoperability.

▣ Conclusion

A broadcast flag regime would have significant and lasting consequences. It would create an ongoing role for the FCC in approving a wide range of digital technologies and would have a major impact on the way the public can use digital television. CDT believes that the policy issues surrounding the flag should not be left to unguided FCC discretion. If Congress chooses to authorize implementation of a broadcast flag regime, it should do so pursuant to careful limits and safeguards concerning the FCC's authority and process; the public's ability to comment on news and public affairs programming; and interoperability problems that the flag may pose for consumers.

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