

October 6, 2005

The Honorable Joe Barton, Chairman  
The Honorable John D. Dingell, Ranking Member  
U.S. House Committee on Energy and Commerce  
2125 Rayburn House Office Building  
Washington, DC 20515

The Honorable Fred Upton, Chairman  
The Honorable Edward J. Markey, Ranking Member  
Subcommittee on Telecommunications and the Internet  
2125 Rayburn House Office Building  
Washington, DC 20515

Re: Broadcast Flag

Dear Chairman Barton, Ranking Member Dingell, Chairman Upton, and Ranking Member Markey:

Earlier this year, the U.S. Court of Appeals for the D.C. Circuit ruled that the Federal Communications Commission did not have the legal authority to impose the “broadcast flag” regime on devices capable of receiving digital television broadcasts. Some supporters of the flag rule have called for rapid action by the Congress either to authorize the FCC to implement the rule, or to enact it directly.

Many of the undersigned entities have previously communicated their individual views and concerns about the flag regime. While our views may not be uniform in all respects, we agree that the issues raised by the flag regime for technology and copyright policy are too complex and far-reaching to be addressed by Congress in a hurried manner. The broadcast flag regime would reach not just the design and manufacture of televisions, but also that of digital devices networked with televisions, including personal video recorders, personal computers, and Internet enabled mobile phones. In addition to involving the federal government in the process of technological innovation, there is a substantial risk that the flag regime would restrict users from engaging in a wide variety of fair uses critical to public affairs, education, and culture.

Accordingly, while we support the general goal of combating widespread copyright infringement, we respectfully request that the Committee handle this issue in regular order. In particular, we believe that the Committee should conduct hearings on the flag regime. Although the broadcast flag concept has been touched upon in a few hearings, no congressional committee has conducted an in-depth investigation of the significant technology and information policy questions the flag raises. In addition, reports indicate that the record industry is advocating expanding flag legislation to authorize a comparable regime for digital radio – an idea that has received virtually no congressional consideration to date. The Committee should request witnesses from the

entertainment, technology and public interest communities to answer the following questions, among others:

- Are digital television broadcasts more susceptible to Internet based infringement than analog broadcasts?
- If widespread infringement of digital broadcast signals is a real risk, is the flag regime the most effective means of preventing it?
- What impact would the flag regime have on the development of new technologies?
- What impact would the flag regime have on the fair use of television signals?
- To the extent that the flag regime could have negative impacts in some of these areas, is it possible to craft limitations and safeguards to help minimize those impacts?
- If the flag regime is imposed, what other regulation will likely follow, e.g., the “analog hole” or digital radio broadcasts? What new questions are raised by the idea of extending flag-like regulation to digital radio?

We look forward the working closely with the Committee as it considers this important issue.

Sincerely,

American Library Association

American Association of Law Libraries

Association of Research Libraries

Center for Democracy & Technology

Consumers Union

Electronic Frontier Foundation

Medical Library Association

Public Knowledge

Special Libraries Association

Cc: Members of Subcommittee on Telecommunications and the Internet