

September 19, 2005

The Honorable Ted Stevens  
Chairman  
Committee on Commerce, Science and Transportation  
United States Senate  
Dirksen Senate Office Building  
Room SD-508  
Washington, DC 20510-6125

Re: Broadcast Flag

Dear Chairman Stevens:

The Library Copyright Alliance (LCA) urges that the Committee on Commerce hold hearings on the broadcast flag before adopting legislation authorizing the Federal Communications Commission to promulgate it.

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.

The D.C. Circuit held that at least one of these librarians had standing, which in turn conferred standing on 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 general public. For this reason, the LCA urges Congress to conduct an independent review of the flag rule, rather than simply rubber-stamp it.

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 on the news 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 roles of women in American society might distribute a DVD with segments from *Desperate Housewives* and *Sex and the City* to show how far women have fallen.

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 107<sup>th</sup> 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.

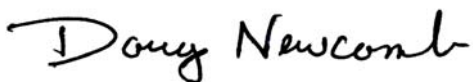
Unfortunately, the broadcast flag threatens to frustrate the operation of the TEACH Act. Under the TEACH Act, an educator can include a clip of a television broadcast in distance education materials. For example, a course on criminal procedure could include a clip from *Law and Order* where the detectives 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 (e.g., public domain, news, public affairs, and educational programs for children), and permitting certain entities, such as libraries and educational institutions, access to receiving devices that do not respect the flag.

But even such accommodations will still diminish the broad scope of lawful uses permitted under existing copyright law. Thus, we urge the Committee to hold hearings to explore whether an infringement problem really exists with respect to digital television, and whether the broadcast flag is the most effective and efficient solution to that problem.

Please let us know if you have any questions. We look forward to working with you and your staff on this important matter.

Sincerely,

A handwritten signature in cursive script that reads "Doug Newcomb".

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**On behalf of the Library Copyright Alliance:** the American Association of Law Libraries, American Library Association, Association of Research Libraries, Medical Library Association, and the Special Libraries Association (contact information for each association is attached).



**American Association of Law Libraries**  
MAXIMIZING THE POWER OF THE LAW LIBRARY COMMUNITY SINCE 1906

The American Association of Law Libraries (AALL) is a nonprofit educational organization with over 5,000 members nationwide. AALL's mission is to promote and enhance the value of law libraries to the legal and public communities, to foster the profession of law librarianship, and to provide leadership in the field of legal information and information policy. <http://www.aall.org/>

Contact: Mary Alice Baish (202-662-9200)



The American Library Association (ALA) is a nonprofit educational organization of over 65,000 librarians, library trustees, and other friends of libraries dedicated to improving library services and promoting the public interest in a free and open information society. <http://www.ala.org/>

Contact: Miriam Nisbet (202-628-8410)



**Association  
of Research  
Libraries**

The Association of Research Libraries (ARL) is a nonprofit organization of 123 research libraries in North America. ARL's members include university libraries, public libraries, government and national libraries. Its mission is to shape and influence forces affecting the future of research libraries in the process of scholarly communication. ARL programs and services promote equitable access to and effective uses of recorded knowledge in support of teaching, research, scholarship and community service.

<http://www.arl.org/>

Contact: Prue Adler (202-296-2296)



The Medical Library Association (MLA), a nonprofit, educational organization, is a leading advocate for health sciences information professionals with more than 4,700 members worldwide. Through its programs and services, MLA provides lifelong educational opportunities, supports a knowledgebase of health information research, and works with a global network of partners to promote the importance of quality information for improved health to the health care community and the public. <http://www.mlanet.org/>

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The Special Libraries Association (SLA) is a nonprofit global organization for innovative information professionals and their strategic partners. SLA serves more than 12,000 members in 83 countries in the information profession, including corporate, academic and government information specialists. SLA promotes and strengthens its members through learning, advocacy and networking initiatives.

<http://www.sla.org/>

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