

June 21, 2006

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

The Honorable Daniel K. Inouye  
Ranking Member, Committee on Commerce, Science and Transportation  
United States Senate  
SD-508 Dirksen Senate Office Building  
Washington, D.C. 20510-6125

Re: Broadcast Video Flag

Dear Chairman Stevens and Ranking Member Inouye:

I write concerning the video flag provision of S. 2686, on behalf of the Library Copyright Alliance (LCA), the Association of American Universities, the American Council on Education, the American Political Science Association, EDUCAUSE, the National Education Association, and the National Association of State Universities and Land Grant Colleges.

When the LCA testified before the Commerce Committee on January 24, 2006, concerning the broadcast video flag, it identified three areas where the flag could adversely affect legitimate non-commercial uses of broadcast television content: distance education; other educational and research uses permitted by the Copyright Act; and discourse involving news, public affairs programs, and public domain materials. Although our organizations appreciate the efforts to address these concerns, the video flag provision contained in the latest draft of S. 2686 will still restrict important lawful uses of broadcast content.

The LCA has met with proponents of the legislation to discuss a distance education exception. LCA and the other signatories to this letter are pleased to report that progress is being made. While the interested parties have not yet agreed upon statutory language, we are optimistic that a consensus can be reached soon. (The latest draft of S. 2686 directs the Federal Communications Commission to hold an expedited proceeding for certifying digital output protection technologies for use in distance learning. The approach under discussion among stakeholders is superior because it avoids an administrative process and directly permits libraries and nonprofit educational institutions to obtain non-compliant demodulator products for distance learning purposes.)

The distance education discussions also have addressed research concerning news programming. Although we are pleased with the direction of the discussions in this specific area, scholarly research has always connected with all areas of content. For example, research concerning media depiction of the war in Iraq cannot be restricted to the study of news broadcasts. A researcher must also examine late night monologues, talk shows, and dramas that reference the war. Scholarly research on entertainment programming is an important component of research on the evolving culture and customs of our society.

We hope that the legislation can be amended to permit research, and the dissemination of research results, that includes the full array of content. We recognize that such permission will need to be accompanied by protections for commercial markets, and we are fully prepared to work toward balanced legislation that permits important educational and research uses of copyrighted content while protecting the commercial markets for that content.

Finally, the exception for “news and public affairs programming the primary commercial value of which depends on timeliness,” though a step forward, does not go far enough. In the current draft, the broadcaster has the power to make the preliminary determination of whether the commercial value of a particular program depends on timeliness, and the FCC can review this determination after the fact. Even if the FCC concludes that the broadcaster wrongly flagged a program, the FCC does not appear to have the power to order the broadcaster to rebroadcast the program without the flag or to penalize the broadcaster in some manner. Thus, as a practical matter, the broadcaster has every incentive to apply this exception as

narrowly as possible. A better approach would be to prohibit broadcasters from flagging news and public affairs programming, unless they receive a waiver from the FCC based on the unique economics of a particular program, *e.g.*, extraordinarily high production costs that can be recouped only by multiple broadcasts. Public affairs programming should also be defined to include programming related to health care. Furthermore, the broadcasters should be prohibited from flagging all public domain material.

We strongly urge the Committee to resolve these problems with the video flag legislation.

Sincerely,



Executive Director  
American Library Association Washington Office

On behalf of:

American Association of Law Libraries

American Library Association

Association of Research Libraries

Medical Library Association

Special Libraries Association

Association of American Universities

American Council on Education

American Political Science Association

EDUCAUSE

National Education Association

National Association of State Universities and Land Grant Colleges