

BUGGY WHIPS AND BROADCAST FLAGS: THE NEED FOR A NEW POLITICS OF EXPRESSION

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ABSTRACT

In response to growing fears from the entertainment industry over online file-sharing of valuable content, the Federal Communications Commission (“FCC”) enacted sweeping regulations over the production of electronic devices in the name of protecting digital television broadcasts. Although the FCC’s “broadcast flag” regulation was struck down on jurisdictional grounds, Hollywood has not given up the push for strict control. If Hollywood successfully acquires broadcast flag protection there could be far-reaching implications for innovation and development of new digital technologies. While content providers have important reasons to protect copyrighted material, there is too much at stake to merely acquiesce to their demands in the name of piracy prevention.

INTRODUCTION

¶1 On May 6, 2005, the United States Court of Appeals for the D.C. Circuit decided the case of *American Library Ass’n v. FCC*.² The American Library Association (“ALA”) had challenged the FCC’s jurisdiction to adopt the so-called “broadcast flag” regulation.³ In brief, the broadcast flag was designed to limit high quality digital copying of digital broadcast television (“DTV”) signals. The FCC claimed it had the authority to regulate any device “associated with the overall circuit of messages sent and received — such as digital television receiving equipment.”⁴ The FCC further claimed that it had “ancillary jurisdiction” to adopt the broadcast flag regulations in order to carry out its mandate for transitioning to DTV.⁵

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² 406 F.3d 689 (D.C. Cir. 2005).

³ *Id.* at 691; Digital Broadcast Content Protection, 69 Fed. Reg. 2,688 (Jan. 20, 2004) (codified at 47 C.F.R. pt. 73, 76).

⁴ Brief for Respondents at 17, *Am. Library Ass’n v. FCC*, 406 F.3d 689 (D.C. Cir. 2005) (No. 04-1037).

⁵ *In the Matter of: Digital Broadcast Content Protection*, MB Docket No. 02-230, Report and Order and Further Notice of Proposed Rulemaking, 18 F.C.C.R.

¶2 In a unanimous decision, a three-judge panel of the D.C. Circuit held that the FCC lacked the jurisdiction to pass the broadcast flag regulation.⁶ According to the court, the broadcast flag “imposes regulations on devices that receive communications after those communications have occurred; it does not regulate the communications themselves.”⁷ The FCC’s argument was rejected wholesale because the court found:

In this case, all relevant materials concerning the FCC’s jurisdiction — including the words of the Communications Act of 1934, its legislative history, subsequent legislation, relevant case law, and Commission practice — confirm that the FCC has no authority to regulate consumer electronic devices that can be used for receipt of wire or radio communication when those devices are not engaged in the process of a radio or wire transmission.⁸

In other words, “[t]here is no statutory foundation for the broadcast flag rules, and consequently the rules are ancillary to nothing.”⁹

¶3 Shortly after the decision by the D.C. Circuit, the Motion Picture Association of America (“MPAA”) began pushing a draft bill that would give express Congressional approval to the FCC’s jurisdiction over the broadcast flag.¹⁰ Calls for a Congressionally mandated broadcast flag also appeared in committee meetings focused on setting a final date for DTV conversion.¹¹ While the House Commerce Committee Chairman opposes the addition of the broadcast flag to the DTV transition bill¹² and the MPAA was unable to attach the broadcast flag to an unrelated

23550, 23564 (Nov. 4, 2003), *available at* <http://www.commreg.pf.com/Pfdocuments/FCCRcdPDFs/Fcc03-273.pdf> [hereinafter FCC Report and Order].

⁶ *Am. Library Ass’n.*, 406 F.3d at 696.

⁷ *Id.* at 703.

⁸ *Id.* at 708.

⁹ *Id.* at 692.

¹⁰ Ernest Miller, *MPAA Shopping Draft Broadcast Flag Legislation*, May 12, 2005,

http://www.corante.com/importance/archives/2005/05/12/mpaa_shopping_draft_broadcast_flag_legislation.php.

¹¹ TVTechnology.com, *Subsidies Are Sticky Point in DTV Draft Bill*, May 27, 2005, <http://www.tvtechnology.com/dailynews/one.php?id=2981>.

¹² Donna Wentworth, *CommDaily: MPAA May Not Seek Broadcast Flag in DTV Bill*, June 1, 2005,

http://www.corante.com/copyfight/archives/2005/06/01/commdaily_mpaa_may_not_seek_broadcast_flag_in_dtv_bill.php.

appropriations bill,¹³ it is quite clear that Hollywood is not willing to abandon the flag just yet.

¶4 The broadcast flag is one example of the dogged tenacity of Hollywood and the other content providers to set the legal and policy agenda for intellectual property in the digital age. An examination of the regulation as passed by the FCC illustrates the short-sightedness embodied in many of the recent attempts to protect legitimate copyright interests against digital piracy. That the broadcast flag was struck down by the D.C. Circuit on jurisdictional grounds leaves the important questions of copyright law and innovation policy unanswered. The rise and fall of the broadcast flag reveals many of the key issues that must be resolved in order to ensure the careful balance of copyright is not distorted in a blind and arrogant response to changing technology. Before it is too late, the public must realize what is at stake in the debate over copyright in the digital age and make sure their voices are heard.

I. THE STORY OF THE BROADCAST FLAG

¶5 In order to appreciate the broadcast flag as emblematic of a larger problem surrounding intellectual property, it is important to understand what the broadcast flag is, why Hollywood asked for it, and how it became law.

A. *What is the broadcast flag?*

¶6 The broadcast flag can best be understood as the combination of a marker identifying digital broadcast television programs and regulations passed by the FCC covering devices that will come into contact with such programs.¹⁴ The marker itself, the actual flag, is a simple collection of bits embedded into the signal of DTV transmissions under the standard adopted by the Advanced Television Systems Committee (“ATSC”).¹⁵ Included in the flag is the ATSC approved “redistribution control” which is designed to indicate whether the marked program can or cannot be redistributed.¹⁶ On its own, this is a rather unremarkable technology, but combined with the

¹³ Declan McCullagh, *Senate Punts on Broadcast Flag Option*, June 23, 2005, CNET NEWS.COM, http://news.com.com/2100-1028_3-5759807.html.

¹⁴ CENTER FOR DEMOCRACY AND TECHNOLOGY, IMPLICATIONS OF THE BROADCAST FLAG: A PUBLIC INTEREST PRIMER (VERSION 2.0) 6 (2003), available at <http://www.cdt.org/copyright/031216broadcastflag.pdf> [hereinafter CDT Report]. The website for the CDT is <http://www.cdt.org/>.

¹⁵ FCC Report and Order, *supra* note 5, at 23559-60.

¹⁶ ADVANCED TELEVISION SYSTEMS COMMITTEE, ATSC STANDARD: PROGRAM AND SYSTEM INFORMATION PROTOCOL FOR TERRESTRIAL BROADCAST AND CABLE (REVISION B) 79 (2003), available at http://www.atsc.org/standards/a_65b.pdf.

FCC regulation passed in November 2003 it is controversial.¹⁷ The flag itself and the accompanying regulations apply only to DTV signals transmitted over-the-air, i.e. through the use of an antenna connected to a television set.¹⁸

¶7 At the core of the broadcast flag rule is the requirement that all devices which come into contact with flagged DTV signals “recognize and give effect” to the wishes of the content provider regarding the ability to redistribute the program.¹⁹ This regulation was scheduled to go into effect for all equipment manufactured for use in the United States as of July 2005 and included not just digital television sets, but also personal video recorders, personal computers configured to receive a broadcast television signal, DVD recorders and various other types of equipment.²⁰

¶8 Under the regulation, the FCC would be in charge of approving “authorized technologies.”²¹ Currently, all but one of the technologies proposed by manufacturers for handling flagged content greatly restricts any transmission of flagged content over the Internet.²² All authorized technologies must also meet “Robustness Requirements” designed to prevent circumvention of protected devices and subsequent downstream distribution.²³ The current standard of robustness requires that the technologies cannot be avoided “merely by an ordinary user using generally available tools or equipment.”²⁴

B. Why Hollywood says the broadcast flag is necessary

¶9 As the Internet has increased in popularity, large-scale illicit copying and distribution of copyrighted materials has caused great alarm in

¹⁷ Digital Broadcast Content Protection, 69 Fed. Reg. 2,688 (Jan. 20, 2004) (codified at 47 C.F.R. pt. 73, 76).

¹⁸ See FCC Report and Order, *supra* note 5, at 23552. There are already encryption technologies in place for satellite and cable television transmissions, but those encryptions occur at the transmission source.

¹⁹ CDT Report, *supra* note 14, at 11 (stating “[A]ny new device capable of demodulating DTV content must - 1. check for the presence of the flag; 2. encrypt any flagged content using ‘authorized technologies;’ 3. allow digital recordings of flagged content using only authorized technologies; and 4. allow digital transmission of flagged content via secured digital outputs using authorized technology to other ‘compliant’ devices . . . Collectively these requirements are referred to in the FCC rule as Compliance Requirements.”)

²⁰ FCC Report and Order, *supra* note 5, at 23570 (stating “[t]his necessarily includes PC and IT products that are used for off-air DTV reception.”)

²¹ 47 C.F.R. § 73.9008 (2004).

²² CENTER FOR DEMOCRACY AND TECHNOLOGY, ALL EYES ON TiVo (July 26, 2004), available at <http://www.cdt.org/copyright/20040726tivoflag.pdf>.

²³ FCC Report and Order, *supra* note 5, at 23570-72.

²⁴ 47 C.F.R. § 73.9007 (2004).

Hollywood and led to significant litigation.²⁵ Originally used mostly to share music files, peer-to-peer file-sharing networks are now providing an alternate avenue for consumers to obtain high-quality digital copies of music, films and television shows for free.²⁶ The MPAA and its Hollywood allies say the broadcast flag is necessary because of the unique business model of broadcast television and the rise in online TV file-sharing. While television programs and other video files like feature films constitute a minority of the files on peer to peer networks and bandwidth limitations make downloading DTV files extremely time consuming, Hollywood is fearful that we are on the cusp of the “Napsterization” of video.²⁷

¶10 There are two problems specific to the business models of movie studios and television broadcasters that are not present in concerns about music file-sharing: the dependence on repurposing²⁸ and the advertising-based revenue model.²⁹ First, movie and television studios currently have a business model designed around repurposing content, which is the ability to exploit a multitude of distribution windows throughout the life of a film or television program.³⁰ Studios tightly control the licensing and distribution of their content through each progressive window.³¹ Revenue is obtained through theatrical exhibition, use by airlines, rental, sales of DVDs and videotapes, satellite, cable, and over-the-air broadcast television.³² As content travels through the various windows, revenue streams from each individual window can be affected by the problem of leakage. If an unauthorized, high-quality copy of a given film or television program can be obtained from an over-the-air television signal, there could be a negative effect on the revenue streams from DVD sales, or a decrease in the price a studio could set for the cable license of the film or TV show.³³

²⁵ See e.g., *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001); *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 125 S.Ct. 2764 (2005).

²⁶ Laura Rich, *Hollywood Braces for ‘Napsterization,’* THE INDUSTRY STANDARD, Jan. 10, 2001, available at <http://archives.cnn.com/2001/TECH/computing/01/10/hollywood.napsterization.idg/>.

²⁷ *Id.*

²⁸ CDT Report, *supra* note 14, at 6; see also WILLIAM W. FISHER III, PROMISES TO KEEP: TECHNOLOGY, LAW AND THE FUTURE OF ENTERTAINMENT 65-70 (2004).

²⁹ Peter Menell, *Envisioning Copyright Law’s Digital Future*, 46 N.Y.L. SCH. L. REV. 63, 106 (2002-2003).

³⁰ Fisher, *supra* note 28, at 65-70.

³¹ *Id.*

³² *Id.*; see also CDT report, *supra* note 14, at 6.

³³ See, e.g., Joint Comments of the Motion Picture Association of America Inc., et al., to the Federal Communications Commission, in the matter of Digital

¶11 The second concern rises from the advertising-based revenue model of broadcast television. Broadcast television is available free of charge to anyone with a television set and a tuner.³⁴ Even pay television services, such as cable and satellite are required to carry the signals of the traditional over-the-air networks and make them available to their subscribers.³⁵ The copyright holders and content creators make their money on television through the sale of advertising time during broadcasts. Thus, it is the advertisers who pay the film and television producers, not the viewers.³⁶

¶12 Many in Hollywood fear that if viewers can record these programs at home, they will cut out the very ads that fund these programs. Interestingly, when the movie studios challenged the introduction of the home video tape recorder in the seminal *Sony Betamax* case,³⁷ it was due in large part to the fear that recording and watching a television show at one's convenience, while fast-forwarding through the commercials, would destroy the advertising revenue needed to sustain broadcast television.³⁸ Although statistics have subsequently demonstrated that this fear was unfounded, it has re-emerged in the era of Internet file-sharing.³⁹

¶13 The film and television industries are hoping to learn from the experience of the music industry in its fight against Napster and plan to prevent the copying of video before it reaches epidemic proportions. Hollywood has put forth two goals: (1) preventing the availability of one perfect digital copy on the Internet and (2) creating a "speed bump" designed to "prevent easy widespread copying by regular consumers."⁴⁰ It is probably impossible to completely destroy the possibility of creating and distributing one perfect digital copy; sophisticated users will surely exist who can circumvent even the most extensive protections.⁴¹ However,

Broadcast Copy Protection, 8-10 (MB Docket No. 02-230) (Dec. 2002) [hereinafter MPAA Comments].

³⁴ See Answers.com, Free to Air TV, <http://www.answers.com/topic/free-to-air-tv?method=5&linktext=free%20to%20air%20TV> (last visited Sept. 27, 2005).

³⁵ 47 U.S.C. § 534 (2000).

³⁶ Menell, *supra* note 29, at 106.

³⁷ *Universal City Studios, Inc. v. Sony Corp. of Am.*, 480 F. Supp. 429, 452 (D.C. Cal. 1979), *aff'd in part and rev'd in part*, 659 F.2d 963 (9th Cir. 1981), *rev'd*, 464 U.S. 417 (1984).

³⁸ *Sony*, 480 F. Supp. at 452.

³⁹ Matthew W. Bower, Note, *Replaying the Betamax Case for the New Digital VCRs: Introducing TiVo to Fair Use*, 20 CARDOZO ARTS & ENT. L.J. 417, 442 (2002) (citing to Nielsen study on the impact of the VCR on television viewing); Branch Furtado, *Television: Peer-to-Peer's Next Challenger*, 2005 DUKE L. & TECH. REV. 7, ¶ 1-8 (2005), <http://www.law.duke.edu/journals/dltr/articles/2005dltr0007.html>.

⁴⁰ CDT Report, *supra* note 14, at 7.

⁴¹ *Id.*

curtailing the ability of the average consumer to easily copy DTV content is much more feasible, and it is towards this goal that the broadcast flag is directed.⁴²

C. How the broadcast flag became law

¶14 Hollywood's first major attempt to attack the problems of video file-sharing was the Consumer Broadband and Digital Television Promotion Act introduced in Congress by Senator Fritz Hollings in March 2002.⁴³ Hollings' bill would have created an incredibly broad, government mandated, digital rights management ("DRM") scheme designed to protect digital content from illegal copying.⁴⁴ Any electronic device that came into contact with digital content of any variety would have to comply with the government established DRM standards.⁴⁵ Public opposition to the bill forced Hollings and the video industry to abandon the proposal.⁴⁶

¶15 The current transition of broadcast television from analog to digital transmission has provided an ideal opening for Hollywood to renew their piracy concerns.⁴⁷ The current timeline for full DTV transmission set by the FCC calls for all over-the-air television programs to be sent digitally by the end of 2006.⁴⁸ Once the DTV transition is complete the areas of the broadcast spectrum currently being used for analog TV will be auctioned off for other uses, potentially resulting in billions of dollars of revenue and innovative new communications developments.⁴⁹ This transition is the cause of much anxiety for content providers who fear that if a given digital signal can be received for free, copied at little to no marginal cost and no loss of quality, and then transmitted for free via the Internet, content providers will refuse to make their content available through DTV.⁵⁰

¶16 If the major film and television studios withhold their "high-value" content, the "DTV transition may be seriously threatened."⁵¹ Hollywood found a receptive audience to this line of argument in the FCC, which has been charged by Congress with overseeing the DTV transition.⁵² The FCC

⁴² *Id.*

⁴³ S. 2048, 107th Cong. (2002).

⁴⁴ *Id.*

⁴⁵ *Id.* at § 5.

⁴⁶ *Digital-Copyright Bill Inspires Flurry of Criticism*, ELECTRONIC MUSICIAN, April 10, 2002, available at http://emusician.com/ar/emusic_digitalcopyright_bill_inspires/.

⁴⁷ CDT Report, *supra* note 14, at 7.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ MPAA Comments, *supra* note 33, at 6-7.

⁵¹ *Id.* at 8-10.

⁵² FCC Report and Order, *supra* note 5, at 23564-5.

adopted the broadcast flag proposal submitted by the Broadcast Protection Discussion Group (“BPDG”)⁵³ as the best available means for protecting DTV content because it “provides a satisfactory level of redistribution control at a minimal cost to both consumers and manufacturers.”⁵⁴

II. THE CRITICISM AND FAILINGS OF THE BROADCAST FLAG

¶17 The broadcast flag regulation has been widely criticized.⁵⁵ In the words of one critic:

[The broadcast flag] creates a whole new regime of constraining regulation all at once: restrictions on internet use; design mandates for consumer electronic equipment, including the traditionally open-platform PC; and licensing requirements for any device that connects to the regulated device. Unpredictable, amplifying, and possibly conflicting results from these downstream effects are likely to follow.⁵⁶

Specifically, critics have claimed that the flag’s technological flaws contradict the stated goals of the flag regulation and more importantly, that the flag is contrary to traditional notions of copyright law.

⁵³ According to the MPAA, the BPDG is “a working group comprised of a large number of content providers, television broadcasters, consumer electronics manufacturers, Information Technology companies, interested individuals and consumer activists” which was formed to “evaluat[e] the suitability of the broadcast flag for protecting DTV content and to determine whether there was substantial support for the flag.” The BPDG Report formed the basis of the broadcast flag regulation as passed by the FCC. Broadcast Flag Frequently Asked Questions, http://www.mpa.org/Press/Broadcast_Flag_QA.htm (last visited Aug. 28, 2005) [hereinafter MPAA FAQ]. Some critics claim that the main body of the Report was drafted in secret negotiations “between 7 Hollywood movie studios, 5 electronics companies, and 1 computer trade association” and does not reflect the opinions of the “large number” of interested parties the MPAA claims. EFF Consensus at Lawyerpoint: MPAA FAQ on Broadcast Flag, <http://bpdg.blogs.eff.org/archives/000148.html> (last visited Aug. 28, 2005) [hereinafter EFF FAQ].

⁵⁴ FCC Report and Order, *supra* note 5, at 23559.

⁵⁵ Chief among these are the Electronic Frontier Foundation and Public Knowledge. For information on each organization’s opposition to the broadcast flag see <http://www.eff.org/broadcastflag/> and <http://www.publicknowledge.org/issues/bfcase>.

⁵⁶ Susan Crawford, *Shortness of Vision: Regulatory Ambition in the Digital Age* 21 (Cardozo School of Law, Jacob Burns Institute for Adv. Legal Studies, Work Paper No. 102, 2005) available at <http://ssrn.com/abstract=681409>.

A. The technological and regulatory flaws of the broadcast flag

¶18 The three most commonly discussed technological or regulatory flaws of the broadcast flag are the analog hole, the legacy loophole, and the foreign market loophole. The analog hole describes the fact that because the broadcast flag is attached only to digital signals, an individual can make an analog copy of a DTV program and transfer the copy back into a digital format using an analog-to-digital converter.⁵⁷ This high quality, flag-free, digital copy can then be placed on the Internet and widely shared.⁵⁸ The second flaw is the related legacy loophole, which in simple terms means that the broadcast flag will not be acknowledged by equipment manufactured before the start date.⁵⁹ Tech-savvy users could exploit pre-regulation equipment to make high-quality copies available on the Internet.⁶⁰ Flag advocates assume that “consumer desire for better and more functional equipment will render the legacy hole moot,”⁶¹ but this is not a guaranteed result. The final flaw is the foreign market loophole.⁶² The regulation makes it clear that “products manufactured in the United States solely for export” are not regulated.⁶³ The two major problems with this possible loophole are that manufacturers may now create two different versions of the same equipment (one for domestic sale and the other for export) and that foreign DTV viewers will have the freedom to make digital copies while American viewers will not.⁶⁴

B. The legal and philosophical criticisms of the broadcast flag

¶19 In addition to the three major flaws discussed above critics have taken issue with a number of more general effects of the regulations as adopted. These criticisms include concerns about protecting traditional notions of copyright, supporting consumer rights, and ensuring continued technological innovation. Looming over all of these concerns is the

⁵⁷ See, e.g., Lisa M. Ezra, Note, *The Failure of the Broadcast Flag: Copyright Protection to Make Hollywood Happy*, 27 HASTINGS COMM. & ENT. L.J. 383, 391-92 (Winter 2005).

⁵⁸ *Id.*

⁵⁹ FCC Report and Order, *supra* note 5, at 23558.

⁶⁰ See Ezra, *supra* note 57, at 394.

⁶¹ *Id.*

⁶² Ernest Miller, *Broadcast Flag Loophole Watch – Manufacture for Export* (Nov. 5, 2003),

http://www.corante.com/importance/archives/2003/11/05/broadcast_flag_loophole_watch_manufacture_for_export.php; Ezra, *supra* note 57, at 393-94.

⁶³ 47 C.F.R. § 73.9009 (2004).

⁶⁴ Ezra, *supra* note 57, at 393.

possibility of global broadcast flag regulations that would be even more severe than the domestic flag.⁶⁵

1. Protecting traditional notions of copyright

¶20 Under American copyright laws and jurisprudence, statutory protection is granted for fair use of copyrighted materials.⁶⁶ Over the past twenty-five years there has been a growing appreciation of the sphere of works outside the scope of intellectual property protection, commonly referred to as the public domain.⁶⁷ Critics charge that the implementation of the broadcast flag threatens both fair use and the public domain.

¶21 Fair use, defined broadly, allows individuals to make certain uses of a copyrighted work that do not violate the exclusive rights of the copyright holder.⁶⁸ Under section 107 of the Copyright Act, users are not liable for copyright infringement when copyrighted material is used “for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research.”⁶⁹ The Supreme Court has recognized fair use as one of the two fundamental First Amendment safeguards inherent in American copyright law.⁷⁰ The determination of fair use is made on a case-by-case basis⁷¹ and the four statutory fair use factors enumerated in section 107 are applied to the specific facts of the case.⁷²

¶22 The broadcast flag does not allow for any such case-by-case analysis; it is set at the time of transmission, either to allow copying or not allow copying.⁷³ If there is not a secure technological way to prevent a possible fair use from turning into widespread online distribution, the use will be prevented by the approved technologies. “Under the broadcast flag

⁶⁵ See Crawford, *supra* note 56, at 23; Siva Vaidhyanathan, *Remote Control: The Rise of Electronic Cultural Policy*, 597 ANNALS 122, 129-30 (2005).

⁶⁶ 17 U.S.C. § 107 (2000).

⁶⁷ This is a rather simplified definition of what the public domain means, as much of the recent literature has focused on seeking a workable definition of the public domain. See, e.g., Jessica Litman, *The Public Domain*, 39 EMORY L. J. 965 (1990); David Lange, *Reimagining the Public Domain*, 66 LAW & CONTEMP. PROBS. 463 (2003); James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, 66 LAW & CONTEMP. PROBS. 33 (2003).

⁶⁸ 17 U.S.C. § 107 (2000).

⁶⁹ *Id.*

⁷⁰ *Eldred v. Ashcroft*, 537 U.S. 186, 219-20 (2003).

⁷¹ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994).

⁷² 17 U.S.C. § 107 (2000).

⁷³ See *supra* Part I A “What is the broadcast flag?”

regime, a bureaucracy will determine, in advance, what constitutes a fair use.”⁷⁴

¶23 Much like the statutory exception of fair use, a robust public domain is a necessary component to the copyright system because it provides creative inputs for future innovation.⁷⁵ By ensuring that some material, such as facts and works for which copyright has expired, is available to the public, individuals have the freedom to express themselves in ways that do not run afoul of copyright. The threat to the public domain from the broadcast flag exists because “the FCC rule clearly contemplates flagging of news and other public interest content.”⁷⁶ The fear is that a program of important public interest, such as a news broadcast or educational program, might feature information which is both copyright and in the public domain, yet the flag will be set to prevent any copying. The overarching problem is that the broadcast flag, much as it cannot pre-approve all potential fair uses, does not differentiate between material subject to copyright protection and public domain material.⁷⁷ There are a number of reasons DTV content might not be protected by copyright, including failure to meet copyright’s originality requirements or expiration of the copyright terms.⁷⁸

¶24 While some broadcasters have stated they have no intention of preventing the copying of public domain material, the fact remains that if they chose to do so, they could disregard the limits of copyright law and prevent access to the public domain.⁷⁹ What is to stop a broadcaster from placing the broadcast flag on public domain material and preventing its further distribution other than the broadcaster’s own moral compass? Because there is no flexibility within the settings of the flag, there is a further concern, also borrowed from the DMCA discussion, that a broadcaster could include some small amount of copyrighted material in an otherwise public domain broadcast and flag the entire program. This kind of copy control exerted over material that is not subject to copyright presents a serious concern for future creative expression.

⁷⁴ Robert T. Numbers II, Note, *To Promote Profit in Science and the Useful Arts: The Broadcast Flag, FCC Jurisdiction, and Copyright Implications*, 80 NOTRE DAME L. REV. 439, 460-61 (Nov. 2004).

⁷⁵ Jessica Litman, *The Public Domain*, 39 EMORY L. J. 965, 967 (1990) (“[T]he public domain is the law’s primary safeguard of the raw material that makes authorship possible.”).

⁷⁶ CDT Report, *supra* note 14, at 25.

⁷⁷ See *supra* Part IA on “What is the broadcast flag?”; Since the flag is just placed on the signal, it only marks whether something is broadcast in DTV and nothing else.

⁷⁸ Numbers, *supra* note 74, at 457-58.

⁷⁹ See CDT Report, *supra* note 14, at 25.

2. Supporting consumer rights

¶25 The MPAA claims that “[t]he broadcast flag will in no way interfere with your personal enjoyment of television programming.”⁸⁰ But the Center for Democracy and Technology (“CDT”) points out the only continuing protection of reasonable consumer uses in the FCC regulation is that while reviewing a technology for authorization “the Commission may (though is not required to) consider. . . the extent to which the technology ‘accommodates consumers’ use and enjoyment’ of DTV broadcasts.”⁸¹ In the words of the Electronic Frontier Foundation, a major critic of the broadcast flag regulation, “‘The broadcast flag will in no way interf[ere]’ with what you want to do only if you do it with a Hollywood-approved technology – and only if it *can* be done with a Hollywood-approved technology.”⁸² Some advocates worry that there is no guarantee that content sharing over networks, even secure networks, will ever be authorized.⁸³ Finally, consumer advocates fear that more restrictive protection technologies will become dominant in the marketplace and consumers will have “little choice but to forego some reasonable uses in order to access DTV content.”⁸⁴

3. Ensuring continued technological innovation

¶26 Ultimately, the goal of device manufacturers is for full interoperability: televisions will interact freely with digital recorders, digital cameras, personal computers and the Internet.⁸⁵ The imposition of the broadcast flag regulation on all devices that come into contact with over-the-air DTV signals could severely limit the push for global interoperability. It is undeniable that under the flag scheme, “[t]o the extent that any manufacturer of any device wishes to have that device *connect to* devices that touch [] broadcast content, that manufacturer will have to comply with the licensing rules authorized by the flag proceeding – which in turn will limit interoperability to those devices that are themselves compliant.”⁸⁶

¶27 At the center of the innovation concern is the home computer and its status as an open platform device.⁸⁷ If a computer manufacturer wishes to allow contact with broadcast flagged content it must meet the FCC requirements.⁸⁸ One of the more interesting and flexible features of current

⁸⁰ MPAA FAQ, *supra* note 53.

⁸¹ CDT Report, *supra* note 14, at 23.

⁸² EFF FAQ, *supra* note 53.

⁸³ CDT Report, *supra* note 14, at 24.

⁸⁴ *Id.* at 23.

⁸⁵ Crawford, *supra* note 56, at 22.

⁸⁶ *Id.*

⁸⁷ CDT Report, *supra* note 14, at 22.

⁸⁸ *See id.* (“As we understand it . . . the computer [must be] compliant . . .”).

computer architecture is the presence of unregulated digital outputs. If the home computer is governed by the broadcast flag rules, this feature will necessarily be removed.⁸⁹ The CDT puts forth the uncontroversial claim that the “open architecture of the computer . . . has been a driving force in the digital revolution.”⁹⁰ A substantial change to that openness could have long-lasting deleterious effects on further technological revolutions.

¶28 The impact of regulations like the broadcast flag on technological innovation has received increased attention in recent months. Many people are concerned that the Supreme Court’s decision in *MGM v. Grokster, Ltd.*⁹¹ will have a negative effect on innovators who are afraid of secondary liability for copyright infringement.⁹² In extending contributory infringement to include inducement and looking to the advertising of new technologies, some consumer electronics manufacturers are worried about their liability when introducing new technologies. The broadcast flag does not allow for the same type of concern, because electronics manufacturers have no choice but to comply if their equipment comes into contact with DTV material.⁹³ This limitation on innovation is antithetical to the rule developed in *Sony Corp. of Am. v. Universal City Studios, Inc.*⁹⁴ that “the copyright laws are not intended to discourage or to control the emergence of new technologies.”⁹⁵

III. THE BROADCAST FLAG AS CAUTIONARY TALE

¶29 There is a lot to criticize when it comes to the broadcast flag. The previous section provides merely a short overview of some of its more prevalent flaws. At the core of these various frustrations is the notion that the MPAA and Hollywood are seeking to prevent exploration of the broad possibilities the Internet and digital technologies present in order to preserve their existing business practices. There is nothing inherently wrong with entrenched players, such as the major movie studios, seeking to secure their own position through active political lobbying.⁹⁶ In fact, it would be a disservice to their shareholders not to attempt to maximize profit in any way

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ 125 S.Ct. 2764 (2005) (holding that secondary copyright liability may be found when a party actively induces another to directly infringe).

⁹² See Robert A. Kalinsky and Gregory A. Sebald, *Supreme Court’s Inducement Theory in Grokster Creates Uncertainty*, INTELLECTUAL PROPERTY TODAY, Aug. 2005, at 11, available at http://www.iptoday.com/pdf_current/Kalinsky_Sebald_Final.pdf.

⁹³ Crawford, *supra* note 56, at 22.

⁹⁴ 464 U.S. 417 (1984).

⁹⁵ *Grokster*, 125 S.Ct. at 2791.

⁹⁶ See Fisher, *supra* note 27, at 82.

the law allows. However, it is a disservice to the public at large to stunt the growth of technological innovation to protect rights that were never knowingly granted in the first place. These rights go beyond the traditional bounds of copyright to control of free television broadcast and access to and use of legally purchased materials.

¶30 There is a long tradition in America of unencrypted over-the-air television broadcasts. But, as Susan Crawford points out, “there is no regulatory mandate that television broadcasts be unencrypted.”⁹⁷ According to Crawford, the question now is if we are going to require encryption of this once free transmission, where should the encryption take place?⁹⁸ At the broadcaster level or at the mechanical receiver level?⁹⁹ Perhaps we would be better served by first asking whether encryption should be required in the first place? And in the words of Judge Harry Edwards of the United States Court of Appeals for the D.C. Circuit, if we start to encrypt free broadcast television, will washing machines be regulated by the FCC next?¹⁰⁰

¶31 Unfortunately, Congress has been willing to pass sweeping legislation in the service of protecting Hollywood from digital encroachment. The Digital Millennium Copyright Act (“DMCA”) makes it illegal to circumvent digital encryption of copyrighted materials.¹⁰¹ It was passed by Congress five years before the rule-making of the broadcast flag and its constitutionality has been upheld in a number of federal court cases.¹⁰² But many of the same criticisms that are being leveled at the broadcast flag were rehearsed in the fight against the DMCA.¹⁰³

¶32 We are allowing Hollywood to dictate the terms of this fight and answer these important questions before they are properly asked. Hollywood insists that it is merely protecting itself against the vile actions of pirates. But technology should not always be subverted in favor of the rights asserted by Hollywood. Historically, technological changes have triggered re-evaluation of existing rights, the acknowledgement of new rights and the revocation of old rights. The right to flag broadcasts should

⁹⁷ Susan P. Crawford, *The Biology of the Broadcast Flag*, 25 HASTINGS COMM. & ENT. L.J. 603, n.10 (Spring/Summer 2003).

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ Declan McCullagh, *Court questions FCC's broadcast flag rules*, CNET NEWS.COM, Feb. 22, 2005, http://news.com.com/Court+questions+FCCs+broadcast+flag+rules/2100-1030_3-5585533.html.

¹⁰¹ 17 U.S.C. § 1201 (2000).

¹⁰² *E.g.*, *Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2d Cir. 2001).

¹⁰³ *See e.g.*, Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354 (1999).

not be given to Hollywood before the rest of us have a chance to evaluate its claims.

¶33 Over ten years ago, Professor David Lange posited that emerging digital technologies would require an overhaul of our conceptions of authorship.¹⁰⁴ Lange agreed with the work of Tom Palmer, on the relationship between technological innovations and intellectual property law:

Authorship and invention, the very acts rewarded by intellectual property law, may not be timeless concepts plucked from Heaven but may emerge in conjunction with – and be inextricably intertwined with – the technology that makes them possible. The relationship between intellectual property rights and technology poses a very important question: If laws are dependent for their emergence and validation upon technological innovations, might not succeeding innovations require that those very laws pass back *out* of existence?¹⁰⁵

Could it be that the technological changes brought about by the Internet could require some of the laws, business models and rights Hollywood is relying on to “pass back *out* of existence?”

¶34 Imagine that instead of the transition from analog to digital technology we were talking about the transition from buggy whips to internal combustion engines. It is highly doubtful that given the potential of the automobile and other innovations we would allow the horse industries to capture the rule-making processes.¹⁰⁶ But those who oppose the fencing off of technological innovation cannot merely stand outside the fences and tell us it is a bad idea. Decrying the destruction of fair use, the shrinking of the public domain, the enclosure of the commons, the violation of consumer rights, the overstepping of regulatory jurisdiction is meaningless without first convincing the American public that they have a vested interest in the outcome of this debate. In recent cases, including *ALA v. FCC*¹⁰⁷ and *MGM v. Grokster*,¹⁰⁸ a powerful ally emerged in the form of the consumer electronics industry. While digital technologies have caused alarm among copyright owners, they have contrastingly created excitement among innovators, who are increasingly reluctant to allow blind regulation of technology in the service of copyright protection to stifle innovation.

¹⁰⁴ David Lange, *At Play in the Fields of the Word*, 55 LAW & CONTEMP. PROBS. 139 (1992).

¹⁰⁵ Tom G. Palmer, *Intellectual Property: A Non-Posnerian Law and Economics Approach*, 12 HAMLIN L. REV. 261, 271-73 (1989).

¹⁰⁶ Credit is due to my teacher, Professor David Lange, for sharing with me the comparison of the transition from the Internet to the transition to the automobile.

¹⁰⁷ 406 F.3d 689 (D.C. Cir. 2005).

¹⁰⁸ 125 S.Ct. 2764 (2005).

¶35 What needs to be created is a politics of expression that educates citizens about the interaction between their rights as consumers, their rights of access to and use of copyrighted materials, their First Amendment rights of free expression, and the need for digital innovation. There are growing attempts to create just such a politics of expression, and there are signs of success. From Creative Commons¹⁰⁹ to the Internet Archive¹¹⁰ to an increased appreciation of the public domain¹¹¹ to new theories on the First Amendment,¹¹² there are scholars and activists pushing us toward a better understanding of what is at risk in this debate. In fact, after the decision in *ALA v. FCC* and in response to lobbying by the MPAA for Congressional passage of the broadcast flag, Congressman Rick Boucher of California proposed a deal which would allow the passage of the broadcast flag in exchange for the restoration of the fair use rights which had been eliminated in the DMCA.¹¹³ A discussion of the relative merits of the various approaches to combating the growth of copyright control will not be undertaken in this iBrief. It is enough, for the moment, to acknowledge the growing movement against the accepted wisdom of Hollywood. The story of the broadcast flag should be incorporated in any attempt to galvanize the public through a new politics of expression.

CONCLUSION

¶36 The Motion Picture Association of America and its Hollywood allies are scared by the possibilities presented by the Internet and are responding with increasing attempts to secure more stringent intellectual property rights. Even though both copying and distributing are easier and cheaper than ever before in the digital age, there is no compelling evidence that our long established laws of copyright could not continue to promote the progress of the sciences and useful arts without serious alteration. There is also a corresponding lack of evidence that the measures sought by Hollywood are at all effective in addressing problems of piracy or the need for improved incentives to create. Between the broadcast flag regulations

¹⁰⁹ www.creativecommons.org; See also LARRY LESSIG, FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY 282-86 (2004).

¹¹⁰ Intended to provide a searchable online archive of Internet sites, the Internet Archive is available at www.archive.org.

¹¹¹ See e.g., Lange, *supra* note 67; Boyle, *supra* note 67.

¹¹² Jed Rubenfeld, *The Freedom of Imagination: Copyright's Constitutionality*, 112 YALE L.J. 1 (2002).

¹¹³ Rick Boucher, *A Deal Made in Washington?*, CNET NEWS.COM, June 14, 2005, http://news.com.com/2010-1071_3-5744982.html.

and the DMCA,¹¹⁴ Hollywood seems intent on controlling all facets of distribution, access, and use.

¶37 The rights of copyright holders should undoubtedly be protected by the laws of the United States, but the content industries are taking for granted the existence of rights and controls that we have, until now, never had the opportunity to question. The digital era of the Internet can provide an opening to a political conversation about the future of our culture and the technologies it relies on. It is dangerous to allow entrenched players like the MPAA and Recording Industry Association of America to dictate all of the terms of the discussion. Thirty years ago, when faced with another type of technological innovation Jack Valenti, longtime president of the MPAA, said that the Betamax VTR, the first commercially available home videotape recorder, was “to the motion picture industry and the American public . . . what the Boston Strangler is to the woman alone.”¹¹⁵ Valenti was wrong about the Betamax, and the courts were right to not listen to him. He’s also wrong about the Internet, and we would all do well not to listen to him yet again. But we must do more than not listen; we must offer our own story as well.

¹¹⁴ Digital Millennium Copyright Act of 1998, Pub. L. 105-304, 112 Stat. 2860 (codified in scattered sections of 17 U.S.C., including § 1201).

¹¹⁵ Fisher, *supra* note 28, at 73.