

ORAL ARGUMENT HELD FEBRUARY 22, 2005

**United States Court of Appeals
for the District of Columbia Circuit**

- vs. -

Petitioners,

Respondents.

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Petitioners have standing to bring this appeal. The FCC’s Broadcast Flag rule will not just harm all consumers and librarians who legally use electronic equipment and copyrighted material affected by the Flag scheme, it will specifically injure Petitioners’ members in a number of particularized and concrete ways. These harms fall clearly within the long line of federal appellate court decisions recognizing Article III injuries-in-fact to consumers and others affected by agency rules. Consistent with the Court’s request, Petitioners are today providing thirteen affidavits demonstrating specific harms to their members.

For instance, the Flag rule will foreclose numerous legal uses that Petitioners’ librarian members currently make of copyrighted material. The North Carolina State University Library (“NCSU”), a member of Petitioner Association of Research Libraries (“ARL”), currently assists its faculty in making clips of broadcast television shows such as Univision’s *El Show De Christina* available for distance learning students—a protected use under the TEACH Act. Because the Internet is used to make the clips available, however, the Flag will prevent this educationally beneficial activity.

Likewise, member libraries at American University (“AU”) in Washington, D.C. and at the University of California, Los Angeles (“UCLA”) assist their faculty in making video programming available over the Internet and on computers

for educational purposes. The Television News Archive at Vanderbilt University (“Archive”), another ARL member, sends licensed news programming to over 140 subscribers over the Internet, and makes available a video version of its entire collection over on-campus computers. Each of these uses of broadcast content would be precluded under the Flag scheme, either because they require Internet use or because they employ non-Flag-compliant equipment that would have to be replaced under the FCC’s rule.

Petitioners’ consumer members will suffer in just as many particularized—and profound—ways under a Flag regime. Members such as Professor Lawrence Lessig of Stanford Law School and Carrie McLaren of Brooklyn, New York will be prevented by the Flag from using clips to make social, political, and cultural commentary on their Internet web journals, or “blogs.” Member Jack Kelliher of Utah will be foreclosed from marketing the digital television (“DTV”) tuner cards that he currently sells for “open source” computing systems. Members of Petitioner Consumers Federation Association (“CFA”), including Paul Schlaver of Massachusetts, will be prevented from sharing news and documentary clips at CFA’s Internet town hall meetings for educational and free speech purposes. And member Wendy Seltzer of Petitioner Electronic Frontier Foundation (“EFF”) will be prohibited from using broadcast clips to test her personal video recorder

(“PVR”), from “time shifting” viewing of recorded programs, and from trouble-shooting the PVR she built for her parents.

In all these ways and more, the Broadcast Flag rule concretely injures Petitioners’ members. Thus, far beyond, and in addition to, the harm these members would suffer from the increased price of electronics the Flag would impose, there can be no question that Petitioners have standing to challenge the FCC’s order in this Court.

Both this Court’s and the Supreme Court’s precedent are unequivocal that as long as a single member of an association such as Petitioners will suffer an “injury in fact,” and the other requirements for standing are met,¹ the association has the right to challenge an agency action as a representative of the injured member.

To demonstrate an injury in fact, an association must show only that one of its members will suffer “an invasion of a legally protected interest.”² *Lujan v.*

¹ As explained in the Court’s March 15, 2005 Order, there is no dispute that Petitioners have satisfied the other constitutional requirements for showing standing. *Slip op.* at 5, 7.

² In addition to their individual members’ standing, some of the Petitioner associations have standing themselves. For instance, CFA will be precluded from exercising its own free speech rights and making legal uses of copyrighted material. *See, e.g., Nat’l Treasury Employees Union v. United States*, 101 F.3d 1423, 1430 (D.C. Cir. 1996). Likewise, the Flag will frustrate the educational services Petitioner EFF provides

Defenders of Wildlife, 504 U.S. 555, 578 (1992). The injury must be particularized. Litigants do not satisfy Article III by alleging a “generalized grievance” in having “the government act in accordance with the law.” *Seegars v. Gonzales*, 396 F.3d 1248, 1252-53 (D.C. Cir. 2005). This does not mean, however, that widespread injuries fail to meet the requirement of particularized harm. “[W]here a harm is concrete, though widely shared, the Court has found injury in fact.” *FEC v. Akins*, 524 U.S. 11, 24 (1998).

As recently as last month, in fact, this Court explained that “[a]lthough the political arena may prove appropriate to correct illegal injuries inflicted on much of the public, the fact that an injury is shared, so long as it is concrete enough, doesn’t preclude standing.” *Seegars*, 396 F.3d at 1253; *see also Common Cause v. Dep’t of Energy*, 702 F.2d 245, 251 (D.C. Cir. 1983) (“[T]he widespread character of an alleged injury does not demean the standing of those who are in fact injured.”).³ Thus, it is not an issue of *how many* potential litigants an agency injures that matters for standing purposes, but whether the litigants are *actually* injured. If it were otherwise, the results would be nonsensical: the more grave the

to members through its Digital Television Liberation project, including helping its members to build and test non-Flag-compliant PVRs. *See infra* Part III.D.

³ *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972) (“[T]he fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection....”); *Public Citizen v. United States Dep’t of Justice*, 491 U.S. 440, 449-50, (1989); *Village of Bensenville v. FAA*, 376 F.3d 1114, 1119 (D.C. Cir. 2004).

injury, the harder it would be to prove standing. As the Supreme Court has explained:

[W]e have already made it clear that standing is not to be denied simply because many people suffer the same injury.... To deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread Government actions could be questioned by nobody.

United States v. SCRAP, 412 U.S. 669, 687-88 (1973) (emphasis added).

To support standing, the injury to a legally protected interest cannot be “‘conjectural’ or ‘hypothetical.’” *Lujan*, 504 U.S. at 560 (citation omitted). A petitioner may not rely on “‘some day’ intentions—without any description of concrete plans, or indeed even any specification of when the some day will be—[to] support” a showing of standing. *Id.* at 564.

However, any injury that is “‘concrete and particularized,’” and “‘actual or imminent,’” is sufficient. *Id.* (citation omitted); *Albuquerque Indian Rights v. Lujan*, 930 F.2d 49, 54 (D.C. Cir. 1991) (“[S]tanding may be grounded on a mere ‘trifle,’ so long as injury in fact is present.” (citation omitted)). For example, an agency rule that threatens residents’ plans to recreate in a natural area, *Friends of the Earth, Inc. v. Laidlaw Environmental Services*, 528 U.S. 167, 183-84 (2000), or that frustrates plans to bid on a government contract “‘sometime in the relatively near future,’” *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 211 (1995), are both undeniable harms to “‘cognizable interest[s]” that are not speculative for

standing purposes. *Lujan*, 504 U.S. at 562; *see also Village of Bensenville*, 376 F.3d at 1119 (where final agency order was in place, action that would not occur for 13 years was concrete).

Numerous courts have also found standing for consumers to challenge agency actions that limit or remove products they would like to purchase from the market—“even if they could ameliorate the injury by purchasing some alternative product.” *Consumer Fed’n of Am. v. FCC*, 348 F.3d 1009, 1012 (D.C. Cir. 2003); *Competitive Enterprise Inst. v. NTHSA*, 901 F.2d 107, 112-13 (D.C. Cir. 1990); *In re Center for Auto Safety*, 793 F.2d 1346, 1351 (D.C. Cir. 1986); *Consumers Union, Inc. v. FTC*, 691 F.2d 575, 577 n.9 (D.C. Cir. 1982), *aff’d*, 463 U.S. 1216 (1983). Likewise, it is settled law that economic harms such as the cost of replacing equipment satisfies the injury-in-fact requirement.⁴ And, there is injury in fact where a governmental action impinges on a party’s constitutional rights. *E.g., Seegars v. Gonzales*, 396 F.3d 1248, 1256-57 (Sentelle, J., dissenting).

Indeed, this Court has repeatedly found standing for consumer organizations acting on behalf of their members based on injuries-in-fact that were less concrete than those here. *See, e.g., Center for Auto Safety*, 793 F.2d at 1351 (consumers

⁴ *See, e.g., Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 733-34 (D.C. Cir. 2003); *Minnesota Milk Producers Ass’n v. Madigan*, 956 F.2d 816, 818-19 (8th Cir. 1992); *Common Cause v. Dep’t of Energy*, 702 F.2d 245, 250-51 (D.C. Cir. 1983); *Mountain States Legal Foundation v. Costle*, 630 F.2d 754, 764-65 (10th Cir. 1980); *Illinois v. Bristol-Myers Co.*, 470 F.2d 1276, 1278 (D.C. Cir. 1972).

challenged rule that “reduce[d] the variety of fuel-efficient vehicles”); *Consumers Union*, 691 F.2d at 577 n.9 (standing to appeal agency’s lack of action that “handicapped [members’] efforts to make informed used car purchases”); *Silverman v. Foreman*, 631 F.2d 969, 974 n.12 (D.C. Cir. 1980) (though injury “not...overly burdensome,” bacon consumers had standing to challenge rule leaving “nitrite-free bacon...not readily available at a reasonable price”); *see also Competitive Enterprise Inst.*, 901 F.2d at 112-13.

Here, the harms imposed by the Flag on Petitioners’ consumer members are concrete and particularized: The Broadcast Flag regulation will inhibit or foreclose both *current* uses of copyrighted material and electronic equipment, as well as many *planned* legal uses. Moreover, where there are plans, their concreteness is distinguished categorically from the “some day” assertions courts have found lacking in other contexts.

Below, and in the affidavits submitted today, Petitioners amplify on the effects of the Flag, as requested by the Court’s March 15, 2005 order, by: (1) answering the Court’s specific questions, and (2) addressing some of the various harms Petitioners’ members will suffer as a result of the Broadcast Flag.

1. The Television News Archive at Vanderbilt is a member of ARL, one of the Petitioners. Gherman Aff. ¶3.

2. The Broadcast Flag rule will hinder the ability of Petitioners' members to engage in otherwise permissible copying and distribution of television broadcasts to distant locations. In particular, many of the affiants have already engaged in, and have concrete plans to engage in or continue, uses of video that will be foreclosed by the Flag for all broadcast content. These uses include:

- Stanford Law School Professor Lawrence Lessig's use of broadcast television clips to make commentary on his "blog." Lessig Aff. ¶1.
- Petitioner EFF's posting of high definition television ("HDTV") clips on its Internet page, for download by its members to test their hybrid television-computer systems. Seltzer Aff. ¶¶16-17.
- Professor Rebecca Gordon's plans to send broadcast clips to her students and make them available on a university computer network beginning Spring 2006. Gordon Aff. ¶¶6-8.
- Petitioner CFA's plans to begin using broadcast clips during its Internet town hall meetings beginning this summer. Cooper Aff. ¶¶3, 15.
- The Vanderbilt Archive makes available certain cable news programming over the Internet to more than 100 library subscribers. The Flag will foreclose the same use for broadcast content. Gherman Aff. ¶2.

3. Many of Petitioners' members, including AU, NCSU, and UCLA, qualify as "accredited nonprofit educational institution[s]" under 17 U.S.C. § 110 (2000). *See* Vogel song Aff. ¶1; Kasianovitz Aff. ¶1; Hoon Aff. ¶ 1. Moreover, the current and planned activities of both NCSU and AU qualify for protected uses of copyrighted material under the TEACH Act that would be foreclosed by the Flag. Specifically, the NCSU Libraries currently assists its faculty in using broadcast

materials in Internet “distance learning” courses, and the AU library plans to make broadcast materials available on its password-protected computer network for course purposes in the future. Hoon Aff. ¶2; Vogelsong Aff. ¶7.

4. Members of Petitioners’ organizations have identified other concrete injuries they will suffer as well, as described in detail below.

The Broadcast Flag cuts across society to restrict activities of both the common citizen and those working and living on the cutting edge of technology. Briefly described here are at least eight separate ways that Petitioners’ members will suffer concrete, particularized harm as a direct result of the Flag rule—in addition to the economic harms of increased price that consumers of all Flag-implicated technologies will endure.

One of the most imposing effects of the FCC’s Flag regime is its shackling of a powerful educational tool—use of broadcast clips on the Internet for classroom instruction. One of Petitioner ARL’s members, the NCSU Libraries, is already using the Internet for this purpose. NCSU assists its faculty that would like to use broadcast clips during their “distance learning” courses. For instance, NCSU is currently helping a professor in its Foreign Languages and Literatures Department make short clips of the Univision network’s program, *El Show De*

Christina, on the Internet on a password-protected basis for use in a distance education Spanish-language course. Hoon Aff. ¶¶6-8. ALA member Peggy Hoon, a librarian at NCSU, reports that the Libraries “consistently receives overwhelmingly positive feedback about this service,” and that “[b]oth faculty and students report that use of the kind of materials such as *Christina* significantly enhance the educational experience.” *Id.* ¶9. But because it uses redistribution over the Internet, it would be foreclosed by the Flag.

Similarly, Professor Rebecca Gordon, an ALA member who teaches courses in cyberculture and audio technology at AU, plans to use the Internet to make broadcast clips available to students in her courses beginning Spring 2006. Gordon Aff. ¶4. In her next course, for example, Professor Gordon plans to email such clips to her students, and to make them available on a university computer network. *Id.* ¶6. Use of the Internet is key for this purpose, because while she “could use slower methods of distribution, media coverage moves at lightning speed; if I wait to discuss the material a class or two later, the particular issue I wanted to address often gets stale.” *Id.* Again, however, the Broadcast Flag will foreclose Professor Gordon’s use of these news materials in this way. *Id.* ¶ 8.⁵

⁵ The American University library likewise plans to record broadcast segments for playback over the university computer network by students in their dorm rooms, at campus computing sites, or in the library itself—which the Flag will preclude because use of the Internet and other non-Flag-compliant devices is necessary. Vogelsong Aff. ¶¶8-10.

Other members of Petitioners' organizations are using computer networks for similar purposes. The Vanderbilt Archive provides an invaluable resource to researchers, journalists, and the nation as a whole. Vanderbilt has archived over 40,000 hours of television news broadcasts, including extensive coverage on both wars in Iraq, the tragedy of September 11, 2001, and every United States presidential campaign and State of the Union address since 1968. *Gherman Aff.* ¶¶5-6. Vanderbilt stores a copy of this entire collection on its local server, and the materials can be viewed using thirty-three on-campus computers. Importantly, the Archive also makes available cable news programming available over the Internet to over 100 library subscribers. *Id.* ¶7. The Flag would foreclose this type of use for broadcast news programs. Indeed, the Flag would foreclose such uses by any library or archive seeking to provide news-broadcast material copied pursuant to the specific exemption in the Copyright Act for this activity. *See* 17 U.S.C. § 108(f)(3).

Another useful form of communication that will be hampered by the Flag is Internet "town hall" style meetings among members of civic organizations and other groups. For instance, Mark Cooper, a member of Petitioner CFA, has been leading an effort to conduct "town hall" style meetings with CFA's members using audio and video streaming software, over the Internet. *Cooper Aff.* ¶9. These

virtual meetings are invaluable because they allow coordination without the time and expense that in-person meetings require.

Mr. Cooper explains in his affidavit that following an initial “full scale meeting with over 200 people at ten sites around the country, in September of last year,” he has begun teaching CFA members how to use the software that makes these cyber-conferences possible. *Id.* These Internet conferences are wildly popular among CFA’s membership: The membership would like to hold the Internet conferences monthly, and CFA plans to conduct them at least a few times per year. One of the uses CFA’s members are most excited about for these cyber-conferences is the ability to instantaneously send broadcast news clips on topics of interest to for viewing during the conference. *Id.* ¶14. Accordingly, CFA has tasked its software engineers to make this possibility a reality, and CFA members will in fact be able to take advantage of this use beginning this summer—if the Flag does not take effect. *Id.* ¶12.⁶

A third form of fair use and free speech rights that will be foreclosed by the Flag rule is the use of broadcast clips to annotate blogs. Increasingly, blogs are how everyday citizens make their voices heard in the technological age. Blogs

⁶ In addition, the Flag will foreclose the ability of CFA’s members to show clips of captured broadcast news and other clips off the air that they combine into their own documentaries. Cooper Aff. ¶15.

exist on almost every subject, and they are an important and growing independent voice counterbalancing the mainstream media. For many bloggers, the ability to use broadcast clips on their pages to make social commentary is crucial to the effectiveness of their message.

Two of Petitioners' members are such bloggers. Professor Lawrence Lessig explains in his affidavit that he has posted clips on his blog, www.lessig.org/blog, "from news programs where the programs addressed matters relevant to an article I posted...or where I commented...on the television program itself." Lessig Aff. ¶3. Professor Lessig notes that his use of these clips "is important particularly where I am critiquing a television program because...the only way to credibly make a point is to actually show the matter I am describing." *Id.* Professor Lessig plans to continue his use of video clips, and his plans include use of broadcast clips. *Id.* ¶4.

Similarly, Carrie McLaren, a member of Petitioner Public Knowledge, has used video-clips in the past to make social commentary and criticism on a blog associated with the local magazine she founded, *Stay Free!*. McLaren Aff. ¶¶1-2. Ms. McLaren states that because her blog "is focused on media and consumer culture and includes critiques of commercials, public service announcements and television programming," it is important for her to use broadcast clips on her Internet site. *Id.* ¶¶4, 11. For instance, Ms. McLaren recently used a video-clip of a government-scripted news release to juxtapose the government's delivery of its

message with actual television news stories presented by journalists. *Id.* ¶7. Ms. McLaren testifies that she has plans to purchase equipment this year to allow her to add broadcast video-clips to her site on a regular basis—a plan, however, that will be rendered a nullity by the Flag. *Id.* ¶¶11-12.

Petitioners' members also have been using the Internet to engage in a type of scientific speech and experimentation that the Broadcast Flag will preclude. The most notable example is Petitioner EFF's use of broadcast HDTV segments to assist its members in learning how to build their own TiVo-like PVRs. Last year, during the WB Network's HDTV broadcast of the feature film *Lord of the Rings*, EFF captured a five-minute segment of the broadcast and made it available on its website for its own members and the public to test the capabilities of their PVRs. *Seltzer Aff.* ¶16. EFF plans to continue these and similar efforts in the future. *Id.* ¶20. Once the Flag takes effect, however, EFF will be foreclosed from these activities, because the Flag prohibits distribution via the Internet and to non-compliant devices, such as those at the facilities where EFF appears in trade conventions. *Id.* ¶21.

Some of Petitioners' members will suffer a specific and substantial pecuniary harm from the Broadcast Flag. For instance, EFF member Jack S.

Kelliher, of Sandy, Utah, has designed and markets an HDTV tuner card for computers, the pcHDTV HD-3000. Kelliher Aff. ¶¶1, 4. The card is specifically designed for use in computers operating with “open source” software, and has sold more than 3000 units in the past year. *Id.* ¶¶4, 13. Mr. Kelliher testifies that part of the reason he has championed this card is to support projects such as other EFF members’ building of their own PVRs using open source software. *Id.* ¶18. The Flag will stop Mr. Kelliher’s production. *Id.* ¶16. The Flag would require Mr. Kelliher to redesign his card significantly—almost doubling his production costs, and pushing him out of his target market. *Id.* ¶¶16-17; *see also* Templeton Aff. ¶14 (lost advertising revenue due to Flag).

Other of Petitioners’ members also will be financially harmed by the Flag rule, above and beyond the increase in price of all consumer electronic devices that are made to comply with the Flag. Perhaps most significantly injured will be the Vanderbilt News Archive. The Archive has invested over \$100,000 in two recording studios that it uses to capture news broadcasts off the air. Gherman Aff. ¶13. These studios include various non-Flag-compliant equipment, such as video encoding cards, DVD burners, and computer stations. *Id.* ¶14. Paul M. Gherman, the University Librarian who oversees the Archive, testifies that if it wants to continue its operations after the Flag takes effect, the Archive would have to spend

substantial funds to replace this equipment. *Id.* ¶15. Other library members at UCLA and AU also explain that the Broadcast Flag will force them to incur costs to continue using broadcast clips for instruction at their universities. *Vogelsong Aff.* ¶11, *Kasianovitz Aff.* ¶10; *see also* *Godwin Aff.* ¶13 (consumer replacement costs); *Seltzer Aff.* ¶30 (same).

Similarly, the Flag will harm many of Petitioners' consumer members who have spent money creating a type of computer-based PVR called MythTV (which works with Mr. Kelliher's HD-3000 tuning card), because after the Flag goes into effect, they will no longer be able to repair or expand these systems, or fully utilize their existing PVRs. *Templeton Aff.* ¶¶12-13; *see also* *Seltzer Aff.* ¶¶22-23. In fact, one of the primary features of these PVRs is that they allow streaming of recorded broadcast signals over the Internet to other locations for viewing after a program initially airs. *Templeton Aff.* ¶9. EFF member and staff attorney Wendy Seltzer explains that she enjoys using this feature of her MythTV while traveling, but will be foreclosed from doing so by the Broadcast Flag. *Seltzer Aff.* ¶28.

Finally, the Broadcast Flag reaches so far that it will disrupt communications among the families of Petitioners' members. For instance, EFF member Brad Templeton has used his computer-based PVR to acquire, via the Internet, a

broadcast of a Canadian television show that his brother's PVR recorded. The show featured their father. Under the Broadcast Flag regime, these types of uses would not be possible for American broadcasts. Templeton Aff. ¶¶7-9. Likewise, the Broadcast Flag would prevent Ms. Seltzer from using her computer to administer and troubleshoot a PVR she built for her parents, who live in another state. Seltzer Aff. ¶¶28-30.

For the foregoing reasons, Petitioners respectfully request the Court to find that Petitioners have standing to challenge the FCC's rulemaking before this Court.

Respectfully submitted,

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**UNITED STATES COURT OF APPEALS
FOR THE
DISTRICT OF COLUMBIA CIRCUIT**

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| American Library Association, et al., |) | |
| |) | |
| Petitioners, |) | |
| |) | Case No. 04-1037 |
| v. |) | |
| |) | |
| Federal Communications Commission, et al., |) | |
| |) | |
| Respondents. |) | |
| |) | |

AFFIDAVIT OF MARK COOPER

1. I, Mark Cooper, am the Research Director of the Consumer Federation of America (“CFA”). CFA is one of the petitioners in this proceeding. My business address is Consumer Federation of America, 1424 16th Street, NW, Suite 604, Washington, DC 20036. I am over the age of eighteen and otherwise competent to testify.

2. If the Federal Communications Commission’s Broadcast Flag rule is allowed to take effect, CFA’s members, and CFA’s own ability to carry out its mission and activities, will be harmed. One of CFA’s chief functions is to act as an umbrella organization for regional, state, and local member consumers and member consumer groups. To carry out this function, CFA and its member groups use broadcast video content in a variety of ways. We capture segments of broadcast video and distribute it to our members both physically and on line. It can be viewed by our members in real time and in a time shifted manner. Several of our member groups also produce broadcast shows, which their individual members are encouraged to tape and re-use for educational purposes.

3. This affidavit focuses on the most exciting and newly developing possibility for the use of broadcast video content. I have directed national town hall meetings with our local members and groups via the internet. Using the internet and a software program, CFA members across the nation, including myself, have been able to converse with each other using streaming video and audio. Under my direction, we have also combined broadcast news clips with CFA members' own documentary footage. For the past several months of this year, and much of last year, we have been actively working to better incorporate the transfer of video files into these interactive town hall meetings. The Broadcast Flag, however, will entirely foreclose our ability to use broadcast television clips for our town hall meetings, and for uses such as the documentary that produce rich experiences for our members.

The Consumer Federation of America

4. As a service organization, CFA provides support to a variety of national, state, and local organizations that share our goals—consumer advocacy, research, and education. Many of these local, state, regional, and national organizations are consumer advocacy, education, low income, senior citizen, or cooperative organizations that belong to the CFA. In addition to providing services and support to these local member organizations, CFA also provides support and resources for our member groups, many of whom coordinate and meet with the individual members of CFA's local consumer organizations.

5. For instance, CFA's State and Local Resource Center provides training and technical assistance concerning issues of governance and resource development for our local members and member organizations. CFA further reinforces these efforts by awarding organizational development and equipment grants, as well as providing funding for small, one-time emergency needs.

6. Likewise, the CFA convenes an annual caucus for state and local consumer organizations, to coordinate local and regional efforts on important and emerging consumer issues. In addition, CFA makes available on its own website and offers other information for our members to use concerning local and state member organizations, the issues they cover, and the consumer information and publications they make available.

7. CFA also serves as a clearinghouse for information sharing among local and state groups and members. Specifically, by offering a consumer help-line to assist consumers directly, as well as providing centrally collected information on our website about local consumer issues, the CFA works to facilitate communication and coordinate efforts, research, and information exchange among local and state members and groups on major consumer issues, including health, children's safety, financial education, firearms, and environmental issues.

CFA's Internet Town Hall Meetings and the Broadcast Flag

8. One of the most exciting ways that CFA has been able to help its local organizations and their individual members coordinate their communication and efforts is our internet town hall forums. Traditionally, CFA has conducted in-person meetings with local members and organizations on a rotating basis. These meetings are extremely useful, because they enhance synergies between CFA, CFA's members, and among the members themselves, but because of the expense, time, and travel involved in coordinating such meetings, they can be held only intermittently.

9. Since autumn of 2003, however, I have directed a program at CFA that allows many of our local members and groups to simultaneously convene online. Using the Internet and a type of computer program called deliberative dialog software, CFA members from across the nation have been able to converse with each other using streaming video and audio. After a full scale

meeting with over 200 people at ten sites around the country, in September of last year, I conducted an initial training session with many of our individual and organizational local members teaching them how to use this software.

10. Being able to conduct these Internet town hall meetings is advantageous for a number of reasons. Not only does the capability to meet via internet reduce the expenditure of limited resources incurred in travel and meeting space rental, but the interactive communications made possible by the deliberative dialog software means that anyone in the town hall meeting can instantaneously distribute digital information such as text documents, graphics, and computer “slideshows” to other members in the conference, at the click of a button. It also means that our town hall meetings are not limited to the local members who are able to attend a meeting, for example, in Charlotte, North Carolina, because a single internet meeting can include members from locations in Charlotte; Harlem, New York; Detroit, Michigan; Omaha, Nebraska; Hilo, Hawaii; Atlanta, Georgia; and our home office here in Washington, DC.

11. Perhaps the most promising application of these new internet town hall meetings is the ability to share clips from broadcast television with other CFA members over the internet, during the meetings. There are often local newscasts and documentaries made available on broadcast television that concern consumer issues in which our members are interested. In the past, we have shown some of these clips during our in-person annual caucuses and local meetings.

12. With the advent of our ability to use internet meetings, however, CFA has made plans to use similar clips online over the internet during our town hall forums. To do so, we are currently communicating with software engineers who are endeavoring to make this capability available to all of the participants in our town hall meetings. The engineers have informed me that this capability will be operational in the summer of 2005. However, if the broadcast flag rule is

allowed to remain in place, CFA and its members will be prevented from using broadcast television clips in this manner. Because all broadcast television is going to be digital, and because the broadcast flag restricts sending “flagged” content in the clear over the internet to multiple users, our members simply will not be able to share clips with each other during our internet town hall meetings.

13. With diverse types of groups and diverse institutional settings, it is difficult to know exactly what technology and skills will be available at any given site for an interactive meeting. The ease of excerpting from television broadcasts and playback on any device is essential to our ability to communicate to our diverse membership.

14. The internet town hall meetings have been a spectacular success. Our local members wish to hold these meetings on a monthly basis, and CFA is working to ensure that in the coming years we will be able to do so at least several times each year. Our members are also particularly interested in using our town hall meetings to share broadcast video clips. In fact, since the September 2004 training session, numerous CFA members have commented to me that they would like to use broadcast television clips during the meetings.

15. The broadcast flag also harms CFA and its members in another way. During the September 2004 town hall training session, our members coordinated to combine broadcast news television clips with their own documentary footage. Specifically, two segments from the PBS show “Now” addressing the topic of media ownership were used and combined with our members’ own footage. These documentary segments were both viewed in streaming video over the web, with slide shows running simultaneously. They were also recorded onto DVD discs for educational distribution among the CFA membership and other interested individuals. The members informed me that they plan to continue making similar documentaries in the future

using broadcast news clips, and that in doing so, they would share their documentaries with other CFA members for educational purposes during the internet town hall meetings. However, if the Broadcast Flag stays in effect, our members will be foreclosed from making and utilizing similar documentaries in the future, because the flag embedded within the digital broadcast clips that they would use in the documentaries would forbid sending the documentary over the internet to other CFA members.

I declare under penalty of perjury that the foregoing is true and correct.

Mark Cooper

Executed: March ____, 2005

**UNITED STATES COURT OF APPEALS
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| American Library Association, et al., |) | |
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AFFIDAVIT OF PAUL M. GHERMAN

1. My name is Paul M. Gherman. I am the University Librarian at Vanderbilt University in Nashville, Tennessee. It is my responsibility to oversee the Vanderbilt Television News Archive, which operates as a division of the Vanderbilt University Library. My business address is Vanderbilt University, 611 General Library Building, 419 21st Avenue South, Nashville, Tennessee 37215. I am over the age of eighteen and otherwise competent to testify.

2. Among other harms, the Federal Communications Commission’s Broadcast Flag regulation will prevent Vanderbilt University from streaming licensed broadcast news over the internet to subscribers, as we do today for over 100 subscribers to our collection of certain network news programming. It will also preclude us from making our collection available to the Vanderbilt faculty and student body over the thirty-three computers that are currently able to electronically access the archive from the campus library.

THE VANDERBILT TELEVISION NEWS ARCHIVE

3. The Television News Archive at Vanderbilt University (“Archive”) is the world’s most extensive and complete archive of television news. The Archive’s mission is to help preserve

our nation's cultural heritage through the documentation of national television news coverage.

The archive serves both as a permanent repository of national news programming and as an important resource for scholars, researchers, and journalists interested in contemporary history and television news journalism. Vanderbilt University Library is a member of the Association of Research Libraries ("ARL"), and as a unit of the library, the Archive is as well. ARL is a petitioner in this case, and an association to which we have belonged for more than twenty years. I am also a member of the American Library Association, another petitioner in this proceeding.

4. The Archive's collections consist of television news programming recorded from broadcast and cable television signals. The Archive began off-air recording in 1968. The Archive records the nightly news broadcasts from all three major networks (ABC, CBS, and NBC). In 1995, the Archive began recording programming from the cable news network CNN. As of January 2005, the Archive also records programming from Fox news as well.

5. In addition to recording nightly news coverage, the Archive also traces news coverage of major historical events in-depth. For example, the Archive includes complete, 24-hours-a-day, 7-days-a-week records of the news coverage for the Watergate scandal hearings, the 2000 presidential election, and the tragedy of September 11, 2001. The Archive also includes extensive coverage of U.S. presidential campaigns, both wars in Iraq, the war in Afghanistan, and every Democratic and Republican National Convention and State of the Union address since 1968.

6. Today, the Archive's collection holds over 40,000 hours of news broadcasts. The Archive indexes and abstracts each broadcast to the individual story level. The Archive's holdings also include all advertisements played during the captured news broadcasts. The

Archive is the only publicly accessible, aggregate collection of television news in existence in the world today.

7. Over 20,000 registered patrons located worldwide use the Archive for research, studies, and other personal uses. The Archive loans videotape copies of individual news segments, complete news programs, and compilations to its patrons, who return the copies for destruction following use. In addition, the Archive's entire collection is made available via video on thirty-three computer terminals physically located within the Archive and university library on campus. The Archive also has 140 library subscribers that are able to access our extensive collection of one network's programming over the internet. The Archive is interested in developing similar arrangements with the networks.

THE ARCHIVE'S OPERATIONS

8. To collect and preserve television news programming, the Archive uses a multi-step process. News programs are captured off-air using analog television tuner cards embedded within the Archive's computers. Archive staff then use encoding cards, also located within the computers, to convert the captured broadcast signal into MPEG video files. At this point, "watermark" data are added onto the MPEG files so that the date, time, name of the news network, and a running clock appear on the center of the screen when the program is viewed. These watermark data are also used for indexing and abstracting purposes.

9. Once the broadcasts have been encoded and watermarked in MPEG form, the Archive staff begins the storage archival process. First, the staff uses in-house DVD burners to place the broadcasts onto physical discs for storage. These disks constitute our primary method of archival. They are also what we use to make copies we lend to our patrons upon request.

10. Next, Archive staff periodically transfer the processed MPEG files of all captured newscasts onto high-volume removable disk drives. The Archive lends these disk drives to the Library of Congress in Washington, DC, which then transfers the files to its own archival system and returns the disk drives to Vanderbilt.

11. In addition to these two forms of storage, the Archive makes a reduced-resolution copy of the entire collection, which is stored on a computer server in a centralized location at the archive. When a patron accesses the collection in video from one of Vanderbilt's local computer terminals, it is this "down-rezzed" version of the broadcasts that the patron accesses.

HARM FROM THE BROADCAST FLAG

12. If it is allowed to remain in place, the FCC's Broadcast Flag rule will harm the Vanderbilt Television News Archive in a number of ways.

13. To conduct our core function, news archiving, the Archive has invested well over \$50,000 in recording, computer, and other electronic equipment to complete our primary recording studio—funds obtained largely from research and philanthropic grants and gifts. Currently, the Archive is in the process of constructing a redundant recording studio, at approximately the same cost. However, if the Broadcast Flag is allowed to remain in place, the Archive's substantial investment in its equipment will be jeopardized, because none of the digital equipment that the Archive currently owns is Flag-compliant.

14. For instance, none of the Archive's MPEG-encoding cards are designed to recognize or comply with the Broadcast Flag, nor are any of our multiple DVD burners. Likewise, none of the multiple local computer terminals, or the server where we store our streaming newscasts, will recognize the Flag. Under the Flag rule, however, broadcasters have sole discretion in deciding whether to embed the Flag within broadcast programs. Consequently, if the Flag rule is allowed

to remain in effect, the Archive will be forced to replace our current equipment in order to conduct the same activities we do today. Because none of our digital video equipment is Flag-compliant, we would not be able to use this equipment to store or copy digital television broadcasts that are embedded with the Flag.

15. We would thus be forced to buy entirely new equipment—not just new encoding cards and DVD burners, but also a brand new server and computer terminals for our local streaming operation, as well as new removable disk drives for use with the Library of Congress—in order to continue the Archive’s operations as we conduct them today. This is because the Broadcast Flag will not allow a marked digital broadcast to be passed on to any “downstream” device that can read the digital television content but will not recognize and obey the Flag. Consequently, all of the Archive’s equipment would be rendered inoperable for their current uses. Particularly since the Archive acquired much of this equipment as recently as 2003 and 2004, being forced to replace what is essentially brand-new equipment that we acquired at a substantial cost would be an extremely onerous burden for a non-profit educational archive operating on a limited budget.

16. Indeed, Congress has granted the Archive a specific exemption to the Copyright Act that allows us to “reproduc[e] and distribute[e] by lending . . . a limited number of copies and excerpts” of audiovisual news programs. 17 U.S.C. § 108(f)(3). By constraining how we carry out our mission of providing thousands of individuals access to the important cultural, political, and historical resource that we manage, the Broadcast Flag not only places a significant financial burden on the Archive, it conflicts with Congress’ decision to extend this legal right.

I declare under penalty of perjury that the foregoing is true and correct.

Paul M. Gherman

Executed: March ____, 2005

4. As a lawyer, journalist, and commentator on media and legal issues, I frequently discuss and write about television programs and movies, including movies made available over television channels. As part of my work, I have become in recent years an owner of television capture devices that are designed to output TV content to computers. I have owned two eyeTV analog-TV capture devices since 2003. I now own three such devices, including a digital-television capture device I purchased earlier this year.

5. I am also an avid consumer of broadcast-television content, and I also use and re-use captured television content in the course of my work for Public Knowledge. In February of 2003, to take only one example, I demonstrated before an audience at a Cato Institute-sponsored colloquium my ability to capture television on a laptop computer. That event, including my demonstration of captured (analog) television can be found online at <<http://www.cato.org/events/030205pf.html>>.

6. I am not a computer programmer or an engineer; I am at best an educated consumer of consumer-electronics and digital-technology products, including those related to analog and digital television.

7. My present and future uses of captured broadcast television content, though lawful under our copyright law, will be hindered by the broadcast-flag regulation promulgated by the Federal Communications Commission.

8. I started my weblog last year, and since then I frequently have posted commentary and links related to broadcast television and other topics that interest me. I also have been developing the capability to make television video captures available for commentary. That is one of the reasons that, this year, I purchased an eyeTV digital-

television capture device as well as an antenna that enables me to watch and capture digital television, including HDTV, on my computer.

9. The broadcast-flag regulation promulgated by the Federal Communications Commission will directly interfere with my lawful uses of captured digital television, as I outline them above. It will inhibit me from capturing broadcast content, and from lawfully redistributing it over the Internet.

10. First of all, the regulation will hinder my capture of broadcast content, because devices, including DTV sets, built under the new regulation will not interoperate with my existing digital equipment. I may not even be able to make analog copies of HDTV content: my current HDTV receiver, for example, does not have component or composite analog connections.

11. Moreover, even to the extent that I may solve or develop workarounds for the interoperability problems I face with my own equipment, the broadcast flag and attendant regulatory scheme may interfere with others' viewing or use of the digital television that I lawfully capture and retransmit or otherwise share.

12. Second, the broadcast flag will hinder my redistribution of DTV broadcast content (meaning, after the DTV transition, all broadcast content) over the Internet and my use of such content for my blog. The "analog hole" is not a cure for this problem: the copyright owners are trying to "shut down" the hole, and -- while I disagree -- they may argue that it implicates the Digital Millennium Copyright Act's prohibition on circumvention of technological measures.

13. Finally, of course, since nobody's consumer-electronics or computer equipment lasts forever, there will come a day in the future when, if the broadcast-flag regulation

remains in place, I can no longer purchase analog equipment and all Internet redistribution of digital content will be impossible for me even by converting to analog and re-digitizing.

14. In sum, the broadcast-flag regulation both currently and prospectively hinders my lawful use, including recording and limited retransmission, of captured broadcast digital television.

I declare under penalty of perjury that the foregoing is true and correct.

Mike Godwin

Executed: March ____, 2005

**UNITED STATES COURT OF APPEALS
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AFFIDAVIT OF REBECCA GORDON

I, Rebecca Gordon, hereby declare as follows:

1. I have been a member of the American Library Association (“ALA”) since July 2003. My address is 2907 Hickory Street, Alexandria, Virginia 22305. I am over the age of eighteen and otherwise competent to testify.

2. I have previously used brief clips of broadcast television video as part of the course material for college courses that I periodically teach. A critical component of my course on cyberculture, for example, is examining the ways that cyberculture is defined and portrayed by mainstream media. And for my audio technology fundamentals course, I likewise use material from the mainstream media to facilitate examination of issues such as copyright disputes and peer-to-peer networking. I had planned to begin making course materials, including digital copies of broadcast video clips, available to my students via the Internet to bring their attention to fast-breaking media stories in an efficacious manner. The Federal Communications Commission (“FCC”)’s broadcast flag regime will preclude, or significantly impair, my ability to

use the Internet to provide my students with these clips. I will be harmed as a consequence, because valuable opportunities for me to use broadcast video clips to timely illustrate, discuss and critique media portrayals of cyberculture will be lost, diminishing the effectiveness of my teaching material.

3. I am a college professor and periodically teach courses in cyberculture and audio technology fundamentals at American University in Washington, D.C. My cyberculture course typically draws students from the computer science, anthropology, public affairs, and communications disciplines. A critical component of this course is examining the ways that cyberculture is defined and portrayed by mainstream media, particularly the way that various interests attempt to frame the debate over the legitimacy of peer-to-peer content sharing networks, such as Napster. For example, some media outlets are prone to characterize peer-to-peer content sharing as piracy, while others might characterize the activity as “civil disobedience.” The audio technology fundamentals course is a required course for audio technology and multimedia/game design students, and an elective course for computer science and film students. It is particularly popular with students, and in fact was noted as one of the four “coolest” classes on campus in a recent American University science publication.

4. The ability to capture clips from the broadcast television news, public affairs shows, and even talk shows for use in the classroom is essential for both courses. Given that video and multimedia forms of communication are very much at center stage, it would be difficult to teach students about how the media portrays cyberculture without showing students what the media does. Similarly, these broadcast materials enhance discussion of copyright and other issues in the audio technology fundamentals class. I believe that the students relate

particularly well to timely examples of the matters we discuss, and that the use of these contemporary and interactive materials has contributed to the popularity of this course.

5. Although I am not currently teaching the cyberculture and audio technology courses, in past semesters I taped the clips I wanted to use with an analog VCR and then played the tapes on a VCR in the classroom. I have also located clips on the Internet using a computer and displayed them using a video and data projector in my classroom.

6. My cyberculture course will be offered again in the Spring of 2006 at American University or another school. For that course, I plan to use a digital video recorder (“DVR”) such as a Tivo to capture broadcast video clips. I will then transfer the clips to a computer file server that individual students can access via the Internet, and that I can access in the classroom via the Internet. I had planned to make my materials available via the Internet for a number of reasons, including the need to capture and distribute clips quickly to my students. Timeliness is especially key in a course that studies and critiques the media. For example, I may see video broadcast on a morning news show that is directly relevant to a topic being covered in a class later that day, and like to e-mail it to my students so they can quickly study it and be prepared to discuss it in class. Internet distribution is the only way to make this happen. While I could use slower methods of distribution, media coverage moves at lightning speed; if I wait to discuss the material a class or two later, the particular issue I wanted to address often gets stale or is superseded by another media development. One of my goals is to cover the media in as up-to-date a fashion as possible.

7. It is also important that the media materials we examine, including the video clips, be readily available to my students for independent study and research. Availability over

the Internet, or even a university's campus network, is the most efficacious way to ensure that students can study this material.

8. I understand, however, that the broadcast flag regime will preclude the transfer of flagged broadcast television content over the Internet. If the broadcast flag rule is allowed to stand, I will not be able to use the Internet to provide my students with timely broadcast video material relevant to my courses as I had planned. The timeliness and effectiveness of my course material and my teaching will be diminished. I will consequently be harmed.

I declare under penalty of perjury that the foregoing is true and correct.

Rebecca Gordon

Executed: March ____, 2005

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AFFIDAVIT OF PEGGY E. HOON

1. My name is Peggy Hoon, and I serve as the Scholarly Communication Librarian at the North Carolina State University (“NCSU”) Libraries in Raleigh, North Carolina. The NCSU Libraries is a member of the Association of Research Libraries (“ARL”), and has been since 1982. I, personally, am also a member of the American Library Association (“ALA”). Both the ARL and ALA are petitioners in this case. NCSU is an accredited non-profit educational institution within the meaning of that term as it is defined in 17 U.S.C. § 110. My business address is 2126 D.H. Hill Library, East Wing Box 7111, North Carolina State University, Raleigh, North Carolina. I am over the age of eighteen and otherwise competent to testify.

2. The “broadcast flag” rule ordered by the Federal Communications Commission will harm the NCSU Libraries and its librarians, including myself. Specifically, the broadcast flag rule will prevent the Libraries from assisting faculty members in using broadcast clips as part of their distance education learning courses, over the internet. Currently, the Libraries assists NCSU faculty in this way pursuant to the “TEACH Act,” which is codified in 17 U.S.C. §

110.

The NCSU Libraries and Distance Education

3. In conjunction with the Distance Ed & Learning Technology Aps (“DELTA”) program here at the university, the NCSU Libraries assist professors and other faculty in accessing and obtaining audio, visual, and other media for use in their on- and off-campus courses. One of the Libraries’ specific efforts in this regard is to assist NCSU faculty in using broadcast content taken off the air to use in their distance learning courses.

4. The Libraries currently assists any NCSU faculty who would like to use video content in their distance learning courses. The Libraries plans to continue making this service available into the future. This assistance includes support that we provide for distance learning courses taught over the internet, as well as for professors who wish to use broadcast clips in these courses.

5. For instance, the Libraries recently has been assisting a faculty member in the Foreign Languages and Literatures Department at NCSU to use broadcast clips in his distance education courses for Spanish language instruction. This professor records five-minute and shorter clips of the television program, *El Show De Cristina*, which airs on the Univision network.

6. *El Show De Christina* is a Spanish-language talk show that has been described as a mixture of the English-language talk shows *Oprah!* and *Jerry Springer*. The NCSU professor uses clips from *Christina* because they often include rapid exchanges in Spanish among multiple participants appearing on the show, thus facilitating the teaching of the language to his students in a conversational manner that might not otherwise be possible through a distance learning course.

7. After recording the *Christina* segments, the professor brings them to the Learning and Research Center for the Digital Age, located within the NCSU Libraries, to receive assistance in making the clips usable over the internet. Specifically, librarians and other library staff within the Libraries' Digital Media Lab take the clips from the professor and digitally convert them so that they can be "streamed" over the internet and viewed by the students in the professor's Spanish-language course.

8. Consistent with the TEACH Act, the clips are provided through a technology called WebCT, which allows for the password protection of the materials. As a result, although the internet is used for, and is essential to, making these clips available, the only individuals able to access them are registered students of the NCSU course.

Impact of the Broadcast Flag

9. The NCSU Libraries currently makes this service available to all of its faculty that would like to use broadcast or other video materials available for their courses over the internet, in a manner consistent with the TEACH Act. The Libraries consistently receives overwhelmingly positive feedback about this service (and other services) that the Libraries provides through the Digital Media Lab and the Learning and Resource Center for the Digital Age. Both faculty and students report that use of the kind of materials such as *Christina* significantly enhance the educational experience.

10. Accordingly, the Libraries plans to continue providing these services. However, if the broadcast flag rule takes effect, the Libraries will be foreclosed from helping its faculty use broadcast clips like *Christina*, and many other similar programs, in their distance learning courses, because the broadcast flag is designed to stop redistribution over the internet. As a result, the very services that the TEACH Act allows and that we provide NCSU faculty today—

assisting them with making broadcast clips usable for their students over the internet to make their educational experience more realistic—will be foreclosed. The broadcast flag will have this effect regardless of whether we are assisting faculty to convert or record, because broadcasters will have sole discretion as to whether to “flag” a broadcast and because all broadcasts will be digital.

11. The NCSU Libraries will also be harmed by the broadcast flag in another way. While today we are able to use our Digital Media Lab to help faculty with media they would like to use in their courses using the Media Lab’s current equipment, the broadcast flag will force us to replace much of our expensive computer and other electronic equipment that is capable of reading and copying digital television signals. This is because much of the equipment that we currently have does not comply with the flag’s technical requirements for protecting television content, and thus, that equipment would not be able to interoperate with new, flag-compliant digital television tuners and other technologies.

I declare under penalty of perjury that the foregoing is true and correct.

Peggy E. Hoon

Executed: March ____, 2005

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AFFIDAVIT OF KRIS KASIANOVITZ

1. My name is Kris Kasianovitz. I am employed by UCLA as the Young Research Library Collections, Research and Instructional Services Department Librarian for NGOs and State, Local & Canadian Government. UCLA is an accredited non-profit organization as defined in 17 U.S.C. § 110. UCLA is a member of two petitioners to this case: the American Library Association (ALA), and the Association of Research Libraries (ARL). I am also an individual member of the ALA. My business address is UCLA, 11630 Research Library, Box 951575, Los Angeles, CA 90095. I am over the age of eighteen and otherwise competent to testify.

2. If the FCC's broadcast flag rule goes into effect, it will harm the UCLA Research Library by forcing the library to purchase new equipment in order to continue carrying out our educational mission. Specifically, because I often make use of video clips in my instructional classes and I intend to use broadcast clips for this purpose in the near future, the educational value of my instruction would be diminished unless the library replaced its current equipment with equipment that complies with the broadcast flag.

Use of Video Clips in UCLA Classes

3. As part of my job as a librarian for UCLA, I often teach classes at the request of professors to university students on legislation and the legislative process. I teach these classes several times per year.

4. In teaching these classes, I have found it useful to include video clips in my presentations to the students. For example, I have shown excerpts from C-SPAN to demonstrate the legislative process in action, as well as a video entitled “America Rocks” designed to explain the legislative process to students.

5. To obtain video clips to show in my classes, I record the content onto DVDs and then use the university’s computers and projector machines to present the video clips to the students during classes.

6. I have many plans to use broadcast television clips too in my classroom presentations in the near future. As one example, I intend to show recent news coverage of Congress’ intervention in the case of Terri Schiavo, the Florida woman who was the subject of a court order to be taken off a feeding tube. In addition, I also plan to show a series of news programs on law, demographics, and migration to California. I also plan to use similar television broadcast segments to help highlight my teaching points to the students.

7. The use of television media, including broadcast media, in my instructional classes is important to me. It helps me to bring to life the subject of the legislative process for the students and to keep my presentations current by including the latest examples of the legislative process in action. The library has expended significant funds to invest in the equipment that allows me to carry out these purposes.

Harm from the Broadcast Flag

8. If the broadcast flag rule is not struck down, it will harm the UCLA library by forcing it to either 1) expend funds to update the equipment I use in my classroom instruction, or 2) forego the use of valuable video enhancements to instructional presentations.
9. The DVD players and computers that the library owns are not compliant with the broadcast flag. Therefore, once the digital transition is complete, and if the broadcast flag takes effect, none of the approximately two hundred computers that the UCLA library makes available to its faculty for instructional purposes will be capable of allowing me to record and transfer broadcast television content for use in my presentations. Any broadcast flag-compliant digital tuner would not permit recording or playing of digitally broadcast television programming using the DVD-burning or DVD-playback equipment that the library now has, even though the uses that I and other faculty would make of broadcast materials are lawful uses for educational purposes.
10. In order for me to fulfill my intention of using broadcast video clips in my presentations in the near future, the library would need to purchase new DVD players and computers that would recognize and comply with the broadcast flag. Replacing the approximately two hundred computers that the library uses for instructional purposes would be a significant expenditure of resources for our library, which, as part of a state university supported by taxpayer funds, is always making difficult choices on how to allocate its limited resources.
11. If the library is not able to allocate funds to purchase new equipment, I and other librarians will lose the ability to use broadcast video clips in the classes we teach. This

would mean the loss of a valuable way to enhance our teaching by making our presentations lively and current through the use of recent broadcast television segments.

I declare under penalty of perjury that the foregoing is true and correct.

Kris Kasianovitz

Executed: March ____, 2005

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AFFIDAVIT OF JACK S. KELLIHER

1. My name is Jack S. Kelliher, and I am co-founder, Chief Executive Officer, and President of pcHDTV, Inc. (“pcHDTV”), a computer hardware company based in Sandy, Utah. My business address is 7874 South 965 East, Sandy, Utah 84094. I received a Bachelor of Science degree in Computer Science, from the University of Utah. I have also completed extensive post-graduate work in circuit design at the University of Utah, am named on numerous patents, and have worked for over 25 years in the development of and project management for numerous technological products. I have wide-ranging experience in the business of technology, including emerging technology initiatives and wholesale and retail distribution of technological products. I am over the age of eighteen and otherwise competent to testify.

2. The broadcast flag rule will harm me and my business, pcHDTV, in a number of ways:
- It will force us to entirely re-design the television tuner cards we currently make, frustrating our business plan and undermining our market.
 - As a result, the revenues my company makes from these cards, and the income I personally receive from their sale, will be substantially reduced or eliminated.

- My own efforts to support the Electronic Frontier Foundation (“EFF”)’s mission through making a tuner card available that is compatible with open source software and the MythTV system will be thwarted.

3. I am a member of EFF, one of the petitioners in this proceeding. I have been a member of EFF for over two years, and have made numerous contributions to the organization. My company, pcHDTV, in which I, with my spouse, own a nearly ninety percent interest, also has made substantial monetary and in-kind donations to EFF.

pcHDTV and the HD-2000 Card

4. I co-founded pcHDTV in 2002 in order to develop and market high definition (“HD”) video products for use in personal computers and custom computer makers. Today we have achieved this goal. pcHDTV publicly markets a specific type of tuner card that can be installed into a computer to capture and demodulate high definition digital television and other television broadcasts from the airwaves. The target market of pcHDTV is personal computer users operating their computer systems on an open source software (“Open Source” or “OSS”) platform, such as Linux.

5. Open source software provides the end users and other companies the ability to change the computer software to fix problems, add new features, and create new innovations based on the existing software. Open source software gives the right to others to modify and redistribute the software provided the software remains “open.” Because of this flexibility and inherent incentives for innovation, the OSS community is a growing market, and has demonstrated consistently increasing demand for hardware and other components compatible with the Linux system.

6. The first product marketed by pcHDTV was announced to the public in February 2003. The pcHDTV HD-2000 was the first high definition video card intended for the OSS community, and was manufactured by a company in Utah called Precision Assembly Inc. The

premise of the HD-2000 card was that development cost and time could be low requiring only a modest investment in pcHDTV to produce the card. This was achieved by basing the software to control and use the card on software that was already available in the OSS community, thus minimizing the amount of software that need to be written. The hardware was based on a prototype design from Oren Semiconductor Corporation that used only a few components and their OR51211 chip thus keeping the hardware development costs small. By keeping the development and design simple, we were able to achieve a business plan that required under an \$80,000 investment, and less than 10 months to begin producing our first HD-2000 boards for sale.

7. The HD-2000 card offered a significant new product to the Open Source computing community. It was the first digital video tuner card made publicly available that was compatible with the Linux platform. The HD-2000 card could receive both the current NTSC analog television that we all are accustomed to and the new ATSC digital television with its high definition and clarity (as well as ATSC's five channel digital audio for an enriched video and audio experience). The card did not support use on the Microsoft Windows operating system. The business reason for not supporting Microsoft was the additional cost for developing software for that platform.

8. Since its release, the HD-2000 card has sold nearly 1000 units, a testament to the demand for quality video tuning products that are compatible with Open Source operating systems. In fact, following release, the card was so popular that demand for the product quickly outstripped supply, and in early 2004 many customers were forced to wait for their orders while manufacturing of additional shipments was completed. The HD-2000 card was offered for sale

to the public at an initial price of approximately \$190; first shipments of the card were made beginning August 19, 2003.

The pcHDTV HD-3000 Card

9. In November 2004, we began shipping of the HD-2000's successor product, the HD-3000 high definition television tuner card. The HD-3000 card offered significant improvements over its predecessor. For example, the HD-3000 card has improved reception so that far away stations can be viewed. It also has video inputs for cameras and VCRs. The HD-3000 also costs less to manufacture and has allowed the price for this type of card to fall.

10. As with the HD-2000, the HD-3000 card also is based on a Oren Semiconductor design using improved Oren chips. Thus, only significant development costs for this card were for changing the software that supports the new card. The board is inexpensive because it only has three main components: a tuner module from Thomson, an NTSC receiver and bus controller chip from Conexant, and an ATSC receiver chip from Oren Semiconductor.

11. The HD-3000 card also followed the path of its predecessor by targeting the Open Source market. This new card was specifically designed and tested to guarantee operation only on the Linux system. Again, we built the software and support on Open Source Software that was available. Accordingly, we marketed the HD-3000 card only with Linux-compatible software; we included limited drivers for Windows-based systems for use in experimental testing only.

12. One of the important applications that has emerged for the HD-3000 card is its use as the key component in MythTV, a Linux-based personal video recording ("PVR") system. MythTV has become a large OSS project that can be used to view conventional television with the many television tuner cards on the market. MythTV quickly supplied support for the HD-2000 so that it could be used with the new digital television standard. Currently, the HD-3000 is one of the

few ATSC digital television cards that is used with MythTV to provide users the ability to record, time shift, and view High Definition programming.

13. The HD-3000 card is a spectacular success. The first cards were shipped to customers beginning November 8, 2004, at an initial price of roughly \$190 that has now dropped to under \$170. Over 3000 of these cards have now been sold, with many customers ordering two cards so that they can record one show while watching another, or take advantage of other features made possible by processing a DTV signal over a computer.

The Negative Impact of the Broadcast Flag

14. If it is allowed to remain in effect, the Federal Communication Commission's Broadcast Flag rule will harm both me and my company, pcHDTV, in multiple ways.

15. The OSS market consists of many hobbyists and students that enjoy manipulating the video programming and software to add new features and capabilities. The success of the HD-3000 has been a result of this market's embrace of our product. However, because the broadcast flag would prevent users from manipulating or creating new features, applications, and improvements to video systems that use my card, the broadcast flag ruling will critically undermine the utility of the cards to users such as me.

16. In fact, if the broadcast flag rule remains in effect, I will be forced to either stop making the pcHDTV HD-3000 card altogether, or create an entirely new design for the card. Designing a card that would meet the broadcast flag ruling is a more complex and expensive by a series of magnitudes. This is because to meet the flag's requirements, the video data must be encrypted as soon as it leaves the digital receiver chip, or demodulation chip and this requires another chip to do the encryption. For the board to be useful the video card must have a compatible decryption chip added just before decode and output of the video to a monitor. Currently there are no video

boards with this capability. So a HDTV card would also have to have the output video circuitry on the card. Each of these additions would dramatically increase the design cost since video cards are more complex. My cards currently do not include these video components. Moreover, only a few encryption solutions have been approved by the FCC, and these require even more expenses in purchasing and licensing agreements. Designing our own encryption algorithm would entail additional costs in its own right.

17. Estimating the impacts of incorporating all these changes into my HD-3000 cards in order to meet the broadcast flag requirements, I have determined that I would not be able to market a flag-compliant HD-3000 card for anything less than \$350 to \$400 each. Our targeted market would not respond well to a \$350 card, and our sales would sharply decline. Based on my understanding of the market, I thus believe that even if pcHDTV were able to produce a flag-complaint card, we would not be able to produce them profitably. The HD-3000 card would then be taken off the market as a result of the broadcast flag, and all of our revenues and investment—both corporate and personal—would be reduced or eliminated as a result of the FCC’s action. Accordingly, because of the Broadcast Flag Ruling we will be forced to abandon our current product line and create a different product line—losing the revenue stream, good will, synergies, and coevolutions of new projects, products, and features that we have developed with the OSS community over the last two years for the HD-3000 card.

18. Moreover, part of the reason I decided to develop the pcHDTV cards is because I have a firm belief in the mission of EFF to promote democracy through technology. I have been a strong supporter of the MythTV project, and EFF’s efforts to support MythTV as one way of ensuring digital democracy through new technology. I knew that pcHDTV’s cards would be used in MythTV when we began designing and marketing them, and I have donated products and

money to EFF to support their advocacy of MythTV. However, if the broadcast flag takes effect, MythTV will be hampered or abandoned. I thus view the FCC's action in applying the flag not just as a financial harm to me but also as undermining an exercise in free speech and political advocacy that I have firmly enjoyed and supported.

19. Indeed, the FCC's broadcast flag ruling will further harm both EFF's members and society at large by restricting innovation of new low cost products such as those that would be based on the HD-3000 card in the future.

I declare under penalty of perjury that the foregoing is true and correct.

Jack S. Kelliher

Executed: March ____, 2005

**UNITED STATES COURT OF APPEALS
FOR THE
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| American Library Association, et al., |) | |
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| Petitioners, |) | |
| |) | Case No. 04-1037 |
| v. |) | |
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| Federal Communications Commission, et al., |) | |
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| Respondents. |) | |
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AFFIDAVIT OF LAWRENCE LESSIG

I, Lawrence Lessig, hereby declare as follows:

1. I have been a member of Public Knowledge since its founding and currently am a member of its board of directors. I have also been a member of the Electronic Frontier Foundation (“EFF”) since the 1990’s, and am currently a member of EFF’s board of directors. I am over the age of eighteen and otherwise competent to testify. I maintain a web log (“blog”), and I periodically use brief television video clips to illustrate points I make on my blog. The Federal Communications Commission (“FCC”)’s broadcast flag regime will inhibit my ability to make fair use of such clips on my blog, or will foreclose my ability to do so altogether. Accordingly, I will be directly and concretely harmed by the broadcast flag rule.

2. I am the C. Wendell and Edith M. Carlsmith Professor of Law at the Stanford Law School, teaching in the areas of constitutional law, contracts, comparative constitutional law, and the law of cyberspace. I have authored several books, articles and commentaries on the interaction of new technologies and the law, examining how the two can interact to either

promote or harm public goods like free speech, privacy, public commons, diversity, and scientific inquiry. For the last 2.5 years, I have maintained a blog, www.lessig.org/blog/, on which I post commentary and articles on these and other issues.

3. In the past year, I have periodically included very brief television video clips on my blog to illustrate certain points. For example, I have posted clips from news programs where the programs addressed matters relevant to an article I posted on my blog or and where I commented directly on the television program itself. I believe that use of such video clips is important particularly where I am critiquing a television program because often, the only way to credibly make a point is to actually show the matter I am describing.

4. I plan to continue and expand my use of video clips on my blog in the near term, and my plans include using clips of broadcast television.

5. I understand that the FCC's broadcast flag regime will prohibit the distribution of flagged television broadcast material on the Internet. Such a prohibition will likely preclude me from posting such video clips to my blog. Without this ability, valuable opportunities to illustrate the matters I address in my blog, and to critique media portrayals of those matters, will be lost. Such a loss will compromise my blog's ability to fully serve its intended purpose as a forum for examining the interaction of law and new technologies, harming my interest in commenting on such matters.

I declare under penalty of perjury that the foregoing is true and correct.

Lawrence Lessig

Executed: March ___, 2005

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AFFIDAVIT OF CARRIE MCLAREN

1. My name is Carrie McLaren. I am the founder and Editor of *Stay Free!*, a magazine published in Brooklyn, NY, and have recently started a blog in association with the magazine, called Stay Free! Daily. My business address is 390 Butler Street, Brooklyn, NY 11217. I am a member of petitioner Public Knowledge, which I joined because I support its mission of encouraging the democratization of information and I believe that intellectual property law should be better balanced with the First Amendment. I am over the age of eighteen and otherwise competent to testify.

2. By foreclosing the distribution of flagged content over the Internet, the FCC's broadcast flag rule would significantly hinder or preclude entirely my ability to post broadcast video clips on the *Stay Free!* blog. I have already posted video clips on the blog, and I intend to regularly use video clips, including broadcast content, on the blog in the near future. If the broadcast flag rule goes into effect, it will become immediately more difficult and eventually impossible for me to post video clips on the blog from any broadcast station that is transmitted digitally and uses the flag. The loss of this capability

would frustrate my efforts to exercise my free speech rights as a journalist and social commentator by producing a blog that serves as a forum for examining the role of media and consumer culture in American society.

The *Stay Free!* Blog

3. *Stay Free!* is a non-profit print magazine covering American culture, politics and life, with a particular focus on media and consumer culture. I founded *Stay Free!* in 1992 and have been responsible for its publication ever since, serving as Editor and Art Director of the magazine and Executive Director of the non-profit organization. Currently, two issues are published per year, which are distributed nationally, as well as in South Brooklyn eateries and shops. The magazine's web site is www.stayfreemagazine.org.

4. On February 16, 2005, I initiated a blog, *Stay Free! Daily*, that is available through the magazine's web site. The blog is focused on media and consumer culture and includes critiques of commercials, public service announcements and television programming. Many of the blog's readers are media educators. I personally contribute about ten posts per week to the blog and also monitor the blog generally.

5. The *Stay Free!* blog is important to the continued success of the magazine. I have been working on the publication of *Stay Free!* for over ten years as a print magazine, and though our readership has roughly tripled during that period, there has been a drop in newsstand sales in the last year or two. I believe that this drop reflects the fact that young adults are turning more and more to the Internet for their news and information. To continue to connect with our audience, it is essential that we utilize the Internet as a communication outlet.

USE OF TELEVISION CLIPS

6. Since the initiation of the magazine's blog approximately six weeks ago, I have already posted several clips of television material, including broadcast content. *Stay Free!* has not yet purchased equipment that would allow it to directly post broadcast content, but I was able to post clips available through other media sources.

7. As one example, I posted a link on the blog to an animated feature once shown on broadcast television called "Conspiracy Theory Rock." The television show "Saturday Night Live" aired this satirical animation once in 1998, but it was censored from later re-runs because it is highly critical of major television networks. As I observed on the blog, the broadcast of this animation "was one of those rare moments where an honest critique of big media made its way out on the airwaves, if only for a short time."

8. I also made available on the blog a government video news release provided by the web site of *The New York Times*. As the newspaper reports, the government argues that its video news releases are purely informational and unbiased, so I provided a link to the clip so that this claim could be examined directly, and I dissected some of the language and interviews used in the video. See David Barstow and Robin Stein, *The Message Machine: How the Government Makes News; Under Bush, a New Era of Prepackaged News*, N.Y. Times, Mar. 13, 2005. One difference between regular journalism and the government's new releases, which I pointed out on the blog, is that interviews in standard journalism are not scripted, in contrast to the government's news releases. I pointed out that in the government's news release, you can actually see the interview subjects moving their eyes from left to right as they read their lines. That is the kind of thing that cannot be captured in words; people need to see it for themselves, and

that was able to happen because the clip was posted on the blog. In addition, a number of media literacy educators read the blog. The best way to teach students the difference between pre-packaged news and investigative journalism is to show them examples and discuss the differences. No amount of writing can substitute for viewing primary sources.

9. Another video clip I posted was the “Keep TV Free” film clip, a public service announcement that was an effort by Hollywood and the TV networks to defeat subscription television in the late 1960s by urging consumers to “keep TV free.” The clip served as an ironic commentary on legislation such as the proposed broadcast flag.

HARM FROM THE BROADCAST FLAG

10. If it is allowed to remain in place, the FCC’s broadcast flag rule will harm my interests by limiting or precluding entirely my ability to use broadcast video clips on the *Stay Free!* blog.

11. *Stay Free!* intends to purchase equipment that would allow it to directly post broadcast video material on the blog before the end of this year, most likely sometime after the broadcast rule would take effect in July of this year. I understand that if the broadcast flag rule is not struck down, the equipment the magazine purchases later this year will be required to recognize and comply with the broadcast flag.

12. Consistent with my actions to date, I plan to use broadcast video clips on the *Stay Free!* blog in the near future. As an organization dedicated to providing critical commentary on American media and culture, access to video is key for *Stay Free!*. Media is increasingly video and multimedia-driven, and it is difficult to critique media without showing it.

13. The broadcast flag rule would frustrate my goals of using broadcast video clips to facilitate discussion of American media and consumer culture on Stay Free! Daily. If the broadcast flag rule goes into effect, it will preclude me from posting video clips on the blog from any broadcast station that is transmitted digitally and flags its content. Since after the transition to digital television analog broadcasting will cease to exist, this means that analog video material will also be unavailable for posting on the blog. Without this capability, valuable opportunities to illustrate, discuss and critique broadcast television content will be lost, and I will not be able to fully exercise my free speech rights as a journalist and social commentator by producing a blog that serves as a forum for examining the role of media and consumer culture in American society.

14. I understand that it may be possible to circumvent the broadcast flag's restrictions through the use of digital signals that have been converted to analog signals, but this process would be difficult and time-consuming for our magazine, which is a small organization with limited resources. Furthermore, I believe that once the transition to digital television is complete, the analog equipment used to "exploit" the so-called "analog hole" may also become unavailable. Finally, I fear copyright owners may argue that using analog recording and redigitizing to distribute a broadcast over the Internet is prohibited under the no circumvention provision of the Digital Millennium Copyright Act

15. The broadcast flag rule would also harm my ability to produce the *Stay Free!* blog because I rely heavily on readers to send suggestions for content to post on the blog. Therefore, my blogging efforts would be impaired because the broadcast flag rule would prevent many readers from recording broadcast video clips and sending them to *Stay Free!* via the Internet.

I declare under penalty of perjury that the foregoing is true and correct.

Carrie McLaren

Executed: March ____, 2005

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AFFIDAVIT OF PAUL SCHLAVER

1. My name is Paul Schlaver, and I am President of the Massachusetts Consumers Coalition (“MCC”). MCC was established in 1976 by representatives of local, state, and federal consumer agencies, consumer advocacy organizations and others who were concerned with protecting consumers and ensuring fairness in the marketplace. MCC is a local member organization of the Consumer Federation of America (“CFA”), one of the petitioners in this case; and I serve as a member of the CFA’s Board of Directors. My business address is Massachusetts Consumer Coalition, c/o Cambridge Consumers’ Council, 831 Massachusetts Avenue, Cambridge, Massachusetts 02139-3068. I am over the age of eighteen and otherwise competent to testify.

2. If the broadcast flag rule is allowed to remain in place, MCC and MCC’s members, including myself, will be harmed. During autumn 2003, I participated in an internet town hall meeting organized by Mark Cooper at CFA and involving many of CFA’s nationwide members. The town hall meeting provided a wonderful opportunity to promote MCC’s mission, by communicating with other consumer groups throughout the country and coordinating with national CFA leadership, at minimal cost. In the past, one of the highlights of the local caucuses

hosted by CFA was the viewing of local news and documentary segments about the activities of the other members and member groups of CFA. The broadcast flag would prohibit me and the MCC from transmitting such segments to each other during the CFA internet town hall meetings, because distribution would be occurring over the internet in the clear.

3. For instance, in the next CFA town hall meeting, I would like to show a recent news segment from a local news station here in Boston about the use of credit scores on consumers' credit reports by insurance companies in the determination of insurance rates for homeowners insurance coverage. Issues of this sort are of continuing concern to me and other MCC members, and we would like to use the CFA town hall meetings to raise awareness of such issues by showing news clips similar to the use of credit scores clip mentioned. I plan to do this as soon as it is possible, which I understand from Mark Cooper will be this coming summer.

4. Throughout the course of the year, local news stations in Boston and other towns also will broadcast interviews with MCC staff and members. I would like to show these broadcasts, in addition to the other news segments of interest, during the CFA town hall meetings.

Moreover, MCC's members often engage in the type of documentary film-making discussed in Mark Cooper's affidavit. The broadcast flag, however, will stop us from using broadcast clips for any of these purposes during the CFA internet town hall meetings, thus frustrating our ability to promote MCC's mission and the interests of MCC's members, and to educate other CFA members about up-and-coming consumer concerns.

I declare under penalty of perjury that the foregoing is true and correct.

Paul Schlaver

Executed: March ____, 2005

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AFFIDAVIT OF WENDY SELTZER

1. I am an attorney and special projects coordinator at the Electronic Frontier Foundation (“EFF”). I have also been an EFF member for approximately four years. My business address is Electronic Frontier Foundation, 454 Shotwell Street, San Francisco, California 94110. I am over the age of eighteen and otherwise competent to testify.

2. If the Broadcast Flag mandate takes effect, EFF and I personally will be foreclosed from engaging in a number of activities that we currently perform as part of our Digital Television Liberation project—one of the efforts that I am leading to fulfill EFF’s mission of ensuring free communication through new technologies and protecting the public’s right to use existing and emerging technology for legal purposes. Among other current EFF activities that I have done and plan to do again in the future which will be prevented by the Broadcast Flag are:

- We have made available on the Internet a 5-minute clip of the digital broadcast of *The Lord of the Rings*. We have done so for the educational purpose of helping our members to expand and test the capabilities of their digital television computing systems. We plan to do so again in the future, but the broadcast flag will preclude this plan. I personally have downloaded the *Lord of the Rings* clip from our web site for the same purpose, and I plan to do so again in the future

with similar clips, but the broadcast flag regulation would preclude this use altogether.

- Helping our members to build their own digital television recorders using open hardware and free software; and
- Using our own digital television computing systems at trade shows and technological conventions to demonstrate the capabilities of this emerging technology.

3. In addition, the broadcast flag will:

- Harm certain EFF members by foreclosing their ability to build their own digital television systems, including by participating in “build-in” events that EFF holds;
- Foreclose my own ability to upgrade the system by which I stream digital broadcast signals from my home computer over the Internet to other computers for delaying or “time shifting” my viewing of television programs, and limiting my ability to manage my parents’ high definition personal video recorder system, which I currently do over the Internet; and
- Prevent me from posting broadcast clips of my broadcast appearances on my website, something that I have concrete plans to do.

EFF’S Digital Television Liberation Project

4. Since April 2004, I have been leading a special initiative at EFF, the “Digital Television Liberation” project. This public education campaign has two goals: explaining digital television to the lay public, and encouraging people to build their own fully-capable high-definition personal video recorders (“PVR”) to make legal use of digital broadcast television. The Digital Television Liberation project encourages people to make fair and non-infringing uses of digital television, including recording, commentary, time-shifting, and space-shifting.

5. The Digital Television Liberation project is at the core of EFF’s mission as an online civil liberties organization, furthering our dedication to assuring that our members and the public enjoy the same rights in the digital and online environment as they do in the off-line world. Our Digital Television project thus shows people concrete steps they can take to preserve their fair use opportunities for digital television broadcasts, including building high-definition television

(“HD” or “HDTV”) PVRs that preserve their ability to archive clips from broadcast television, re-mix their own reviews and commentaries using such clips, and share those commentaries and reviews using the Internet. If allowed to remain in place, however, the FCC’s broadcast flag rule will foreclose EFF’s ability to take many of these steps.

High Definition PVRs

6. The personal video recorder, perhaps best known in TiVo’s pioneering implementation, is a videocassette recorder updated for the digital age. It enables television viewers to capture television broadcasts for viewing in real-time, on a delayed basis (for example, by pausing “live TV” for a coffee break), or in instant replay mode (for example, to review a touchdown or a comic scene in a program). Typically, a PVR also allows viewers to record broadcasts on a pre-set or user-defined schedule—for instance, to record all episodes of “America’s Test Kitchen,” all Yankees games, or all movies featuring Cary Grant.

7. With an HDTV tuner and appropriate software, it is also possible to turn a personal computer into a PVR for recording and playback of broadcast digital television. The resulting high definition personal video recorder, or HD-PVR, uses the computer’s hard drive for recording, and either home theater components (television and stereo system) or computer peripherals (monitor and speakers) for viewing and listening.

8. These computer-based HD-PVRs offer tremendous flexibility. They can be configured to watch broadcasts live, to record broadcasts on a schedule or by keyword, to output audiovisual content in any format desired, to archive broadcasts to formats such as DVD, to transfer data over to a local-area network, and to re-transmit recorded broadcasts over the Internet.

9. When they are built around open-source software, these HD-PVRs also can be reconfigured by the end-user to provide additional functions that may not already be available.

For example, HD-PVRs using open-source software allow the user to archive of recordings to removable media such as DVDs, or to export the programming to another personal computer or other device via a home network or the Internet.

10. Compared to commercially available HD-PVRs, computer-based HD-PVRs cost less for greater functionality. For example, they can be built with more archive options, a greater variety of outputs, and a greater capacity—a particularly important feature given the large size of HDTV programs, and a computer-based HD-PVR can be configured to provide preview images of recorded programs, to reduce the size and quality of HD video for transmission from a website, or to extract full-quality clips for use in media commentary and criticism.

EFF's High Definition PVRs

11. As part of its Digital Television Liberation project, EFF has conducted a number of technological and capacity tests of HDTV components for the purpose of building our own computer-based HD-PVRs, and to educate our members and the public about these efforts. In addition, these tests have allowed us to assist our members and the public to build HD-PVRs.

12. For example, we have reviewed several HDTV tuners for use with personal computers. HDTV tuners and PVR software are currently available for computers running Windows, Macintosh, and GNU/Linux operating systems. Most are PCI cards that are inserted into the computer's PCI slot and pass the full digital signal, in the clear, over the computer's PCI bus. For the Macintosh, the hardware company Elgato Systems produces an external tuner that connects to the computer and provides the full digital signal via "FireWire" (IEEE1394 high speed data cable).

13. At EFF, we have also built several computer-based HD-PVRs. These PVRs include:

- A GNU/Linux machine running open-source MythTV software, using HDTV tuners from pCHDTV (HD-2000 and HD-3000) and Technisat (Air2PC);

- A Macintosh machine running Elgato's EyeTV, using the EyeTV 500 HDTV tuner; and
- A Windows machine using HDTV tuners from ATI, DVICO, and MyHD.

14. None of the seven HDTV tuners that I have used to build EFF's HD-PVRs, and to conduct EFF's educational tests, is broadcast flag-compliant. I am also not aware of any manufacturer that intends to build a broadcast-flag compliant HDTV tuner for computer use. As a result, if the broadcast flag mandate takes effect, it will become impossible to replace the components in EFF's already constructed HD-PVR systems, forcing EFF to lose its investment in these machines. Moreover, even if a broadcast flag-compliant computer tuner card were made available, replacing the cards currently in EFF's HD-PVRs with flag-compliant cards would severely limit the utility of our HD-PVRs. For example, we would no longer have access to components that could output full digital signals for use with Free Software, hindering our promotion of user-developed media tools. We would be unable to build new machines capable of recording flagged broadcasts to excerpt clips for public analysis.

EFF'S Testing of HD-PVRs Using Digital Broadcasts

15. In order to assist our members and the public in building HD-PVRs that properly operate and fulfill the user's intended purpose, and to provide feedback to our members to assist them in their HD-PVR use and designs, it is critical for EFF to be able to use HDTV broadcast content to test the machines. We have used digital broadcast for these testing and education purposes in a number of ways and on a number of occasions.

16. For instance, in our review of an HD tuner card that many of our members use, the Elgato EyeTV 500, we recorded the WB Network's November 2004 high-definition broadcast of *The Lord of the Rings* on our Macintosh and Linux-based PVRs. Because HDTV playback requires a fast computer, and because a short segment of the broadcast was enough for our educational

purpose, we posted a five-minute clip from this recording on our Internet site. EFF members accessing our website and other members of the public could then download this clip, using a computer program called BitTorrent, and use it to test whether their machines were powerful enough to decode HD video.

17. Thousands of people, including myself, downloaded the clip to test the quality of HD video playback on their setup using real content from an over-the-air broadcast. As well as evaluating their machines' capability, members who did not yet have the capacity to receive HDTV broadcasts were thus able to evaluate this new format. Using the Internet was essential to our ability to conduct the test, because it allowed us to make the clip available to our entire membership, located across the globe. However, this test would have been impossible with flag-compliant demodulators, because such demodulators prohibit Internet redistribution.

18. I personally downloaded the *Lord of the Rings* clip from the EFF for the same purpose, and intend to do so again with similar clips in the future.

19. EFF intends in the future to make additional broadcast clips available for download and testing, for example, to allow members to compare the different HD formats, 1080i and 720p, or to compare an HD recording against the same program recorded from standard analog broadcast. These tests will be important to us in helping our members to understand how large segments of the public airwaves are being allocated and used.

20. In addition to our use of the Internet to distribute broadcast clips to our members for testing purposes, we have also used HDTV clips at numerous Internet and technology conferences. Since beginning EFF's Digital Television Liberation project in 2004, we have made presentations about the project at many conventions and tradeshows. As part of our ongoing outreach campaign for the project, we plan to continue to make similar presentations

about the project at conferences and tradeshow for the next several years. We have already scheduled some of these appearances. These presentations are important to our public education efforts and help EFF as an organization to attract new members and membership contributions.

21. At several of the conventions where we discussed the Digital Television Liberation project, we have used EFF's HD-PVRs to show sample clips we recorded from HDTV broadcasts. To do so, we typically need to connect EFF's machines to the host venues' audiovisual systems for playback. Many, if not all, of these host venue audiovisual systems are not broadcast flag-compliant. Consequently, because the broadcast flag restricts content from being sent to non-compliant devices that can read the digital television signal in digital format, if we were forced to replace broken systems with flag-compliant ones on our end, the flag would make these demonstrations more difficult or impossible at many of the venues where we present.

Additional Features of EFF's Digital Television Project

22. EFF has implemented a number of other initiatives as part of its Digital Television project. For instance, EFF has produced an HD-PVR guidebook, called "Cooking with EFF," to help EFF's members and other members of the public construct their own HD-PVRs using GNU/Linux, MythTV, and the pcHDTV HD-3000 tuner card. GNU/Linux and MythTV are both Free Software, provided at no cost to the user under the terms of the GNU General Public License ("GPL"). Among other things, EFF links to websites with the freely downloadable source code for these programs and provides groups with the software on CD-ROM.

23. EFF's guidebook, however, will become useless once the broadcast flag takes effect, because it is my understanding that the pcHDTV HD-3000 tuner card cannot be made flag-compliant, and our guidebook is based on use of this card. It is my understanding further that no flag-compliant card could be made that would have similar functionality with the MythTV

software or any other open-source software. EFF has invested a significant amount of time, money, and effort into making its “Cooking with EFF” guide accessible and usable by members of our organization and the public, including more than 50 hours of time by EFF staff who wrote, compiled, and edited the guide.

24. In conjunction with the Digital Television Liberation project, we have hosted and promoted HD-PVR “build-in” events. In March 2005, EFF hosted the first “build-in” event, at which more than a dozen EFF members and other technology enthusiasts assembled HD-PVRs from general-purpose computers, using the MythTV software and the pcHDTV tuner card. Subsequently, numerous other members of EFF and the general public have contacted EFF to request help in organizing their own build-in events. EFF has supported these efforts, coordinating with the individuals to provide the materials necessary to hold the events, including software and instructions. We are also planning to host additional build-ins at EFF offices. Currently, we are encouraging people to hold events before July 1, 2005, to assure being able to acquire HDTV tuners before the broadcast flag mandate is scheduled to take effect. Several EFF members who have contacted us have expressed strong interest in attending an EFF build-in this year, but would be unable to afford the necessary equipment before July 1.

25. Finally, EFF often provides public overviews of electronic privacy, online speech, copyright, and electronic voting issues on its website, for use by EFF members and other interested individuals. EFF also creates roundups of media coverage for staff and the general public, including television and other media appearances by EFF staff members. EFF intends to use excerpts from television broadcasts, including HD broadcasts, in these roundups for educational and public advocacy purposes, using Internet distribution. For example, we have recorded broadcast coverage of electronic voting and online music distribution. Once the

broadcast flag mandate takes effect, however, as we are forced to replace broken hardware with compliant devices, EFF will be hindered in its ability to make these materials available through Internet distribution, because the broadcast flag is designed to prevent such distribution, irrespective of the fact that the distribution is made for fair use purposes. Moreover, we often rely on members to record clips when we are unable to schedule the recordings ourselves (for example, because we do not get coverage from the NBC transmitter from our offices or homes, or because our appearances are broadcast on non-local programs). If our members have flag-compliant devices, they will be unable to send these clips to us.

My Own Use of Digital Broadcast Television

26. As mentioned above, I have personally downloaded the *Lord of the Rings* clip from the EFF website to evaluate my personal computer's capabilities.

27. Along with the machines I have built for EFF, I have personally built two additional MythTV HD-PVRs—one for my use and one for my parents. I do not have cable or satellite television, so the only television I receive is over-the-air broadcast analog and HDTV.

28. Using my HD-PVR, I have often archived digital television programs and “streamed” or copied digital television from the PVR at my home over the Internet to a computer elsewhere, for viewing the programming on a delayed or “time-shifted” basis. Through the Internet, I have also been able to remotely administer and monitor the HD-PVR I built and installed for my parents. I plan to continue both of these activities, as I often want to watch recorded programs when I am traveling. Since my parents live across the country, and do not plan to become computer video experts, I plan to continue to troubleshoot and support their system remotely.

29. If the broadcast flag rule remains in place, I expect I will be unable to replace the components with which I have built these fully configurable, remotely administrable HD PVRs.

30. I know from experience that electronic equipment is fragile, having had to replace several components in my personal computers, including a video card, CD-ROM reader/writer, and hard drives. My experience with personal computer components, including components of PVRs, makes it clear to me that these components have a finite life. I am thus concerned that if the broadcast flag takes effect, I will be prevented from replacing the HDTV tuner cards in my HD-PVRs when they break, because the broadcast flag will prohibit manufacture or import of the kind of non-flag-compliant cards I now use. As a result, I will be forced either to redesign my PVRs to accommodate flag-compliant cards, if such exist, in which case the very functionality and flexibility I sought to achieve by building my HD-PVRs will be defeated, or I will be forced to buy entirely new replacement HD-PVRs. Absent the flag mandate, I would not be harmed in this manner, because the type of tuner cards my HD-PVRs use would not be prohibited by the FCC.

31. As well as writing portions of the EFF Cookbook, I have contributed a few “patches”—updates to the MythTV code and documentation relating to HDTV. Because MythTV is an open source project, I have also benefited tremendously from the work of hundreds of volunteer contributors who write similar patches and help update the software code. Many of those volunteers have also obtained HDTV tuners and written patches to improve MythTV’s HDTV performance. As a result, my HD-PVR has become more functional during the time I have used it, in sharp contrast to the gradual obsolescence of most consumer electronics in the face of new technologies. Because the broadcast flag will prevent open source developers from obtaining or replacing HDTV tuner cards that work with the open source software system, this software will no longer continue to flourish in the manner it is today, because the influx of new developers will

be cut off and existing developers who own non-compliant cards will have less incentive to write software that cannot be used or tested by purchasers of new equipment.

32. I have a personal website that I design and administer. My website links to media coverage of my professional activities. I make media appearances on a consistent basis, typically speaking to print journalists on a daily basis and television journalists several times a year. In my next appearance on broadcast television, I plan to record the broadcast or ask someone to record it for me, and include a clip on my website for download. If the broadcasts become flagged, however, and those able to receive them have only flag-compliant devices, I will be precluded from doing this because I will be unable to extract high-definition recordings suitable for Internet retransmission.

I declare under penalty of perjury that the foregoing is true and correct.

Wendy Seltzer

Executed: March ____, 2005

**UNITED STATES COURT OF APPEALS
FOR THE
DISTRICT OF COLUMBIA CIRCUIT**

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| American Library Association, et al., |) | |
| |) | |
| Petitioners, |) | |
| |) | Case No. 04-1037 |
| v. |) | |
| |) | |
| Federal Communications Commission, et al., |) | |
| |) | |
| Respondents. |) | |
| |) | |

AFFIDAVIT OF BRAD TEMPLETON

I, Brad Templeton, hereby declare as follows:

1. I am chairman of the Board of Directors of the Electronic Frontier Foundation (“EFF”). I have been a member of EFF since the mid-1990s and board chairman since 2000. My business address is 1113 Lochinvar Avenue, Sunnyvale, California. I am over the age of eighteen and otherwise competent to testify.

2. I am a skilled computer software developer and have built several digital video recorder (“DVR”) systems based on MythTV software. MythTV systems are capable of transferring broadcast television programs via the Internet, and in particular, make use of open and unencrypted formats which facilitate interoperation with other programs that can do this. I have used this capability of my MythTV system in the past, and plan to do so in the future. The Federal Communications Commission (“FCC”)’s broadcast flag rule, however, would prevent flagged digital content from being transmitted over the Internet. If this rule goes into effect, I and others will be harmed because we will be precluded, or significantly hindered, from using my MythTV system for this purpose.

3. As an example, I recently learned that my father would appear on Canadian television. As I live in California and did not have over-the-air access to the show, I connected over the Internet to a DVR box I had built for my brother, who lives in Toronto, commanded the box to record the show, and transferred it to my computer in California to watch it. I plan to engage in similar activities with my family and friends (most of whom live in the U.S.) in the future. The broadcast flag rule would, however, preclude this for all U.S. digital television (“DTV”) broadcasts and, after the DTV transition, for *all* U.S. broadcasts.

4. MythTV is “open source” software (meaning the computer code of the software is available to anyone and may be freely modified by users) that enables a user to turn a fairly ordinary personal computer (“PC”) into a device that can be used to digitally record live television programs for later viewing or archiving, among other uses. Through use of a tuner card capable of processing high definition digital television signals, MythTV makes it possible for a PC to record and store high definition television (“HDTV”) programs.

5. In my own home, I have two networked computers which rely on a pcHDTV-3000 computer card to tune and receive digital TV broadcasts, particularly HDTV broadcast network programming, using the MythTV software. As currently configured, HDTV is received and recorded by one MythTV-based system located on one floor of my house. When I wish to play the recorded programming back on my HDTV monitor, which is located on a different floor of my home, the recording is streamed to that monitor via my home computer network, which is an Internet-based network.

6. I built my MythTV systems for the purpose of making fair use of HDTV programming, for example, recording HDTV programs for viewing at my convenience, also

known as “time shifting.” Another of my goals in building the MythTV systems is to experiment with television technology, as I desire to explore and innovate in this area. I have also developed software for use with the MythTV program and post this software on a website that generates advertising revenue.

7. Inherent in a system based on open formats and open source, such as MythTV, is the ability to transfer television programs from one system to another via the Internet. I have utilized this capability. For example, as previously noted, I was recently informed that an interview with my father would air on an analog Canadian television show. I connected over the Internet to a MythTV box I had built for my brother in Toronto, and commanded his box to record this show. I then transferred it to my computer in California to watch it.

8. I enjoy working with and enhancing this system. I would like to continue using my MythTV system to engage in fair uses that involve transferring television programs over the Internet, including HDTV programs. My near term plans also include both building MythTV systems for members of my extended family, and increasing the number of tuners in my own home MythTV system so that if there are two HDTV programs on at the same time that I wish to view, I can record both for later viewing.

9. Some of the most innovative and useful capabilities of the MythTV system will be barred by the broadcast flag rules. First, I understand that the broadcast flag rules will prohibit the transmission of flagged broadcast HDTV programs via the Internet. This quite obviously will prevent new MythTV users from using the systems to engage in fair uses that involve transferring HDTV programs over the Internet. By depriving me of the ability to use a capability that my MythTV system currently has, that I have used in the past (for the Canadian

analog program) and that I planned to use in the future (for HDTV programs), the FCC's adoption of the broadcast flag rule directly harms me.

10. I understand that it may be possible to circumvent the broadcast flag's restrictions by converting digital television signals to analog, and then reconverting them to digital. But having to embark upon such a process every time I wished to transfer HDTV content via the Internet would be very cumbersome. Moreover, my research into equipment to convert analog HDTV signals to digital shows it to be prohibitively expensive where it can be purchased at all. I understand further that once the "digital transition" is complete, any alternatives using analog signals will no longer be available because digital signals will be the only option, and that the copyright owners are trying to shut down the so-called "analog hole" in the first place.

11. The broadcast flag regime will also preclude creation of new HDTV capable MythTV systems or expansion of existing ones. I understand that the broadcast flag regime includes robustness and compliance rules that require demodulation devices, such as DTV tuner cards used in PCs, to encrypt or similarly protect DTV content while the content passes through or between devices that display, record or output the content. An HDTV tuner card is an essential component of an HDTV-capable MythTV system and demodulates digital television signals, but tuner cards capable of working with the MythTV system cannot encrypt the video stream so that the video can be "locked up" while passing through or between these devices. Accordingly, such tuner cards will not be compliant with the broadcast flag regime, and cannot be sold or marketed after the broadcast flag's July 1, 2005 effective date.

12. The unavailability of these tuner cards will, in turn, preclude the creation of new HDTV-capable MythTV systems and the expansion of existing ones. As a consequence, I will

not be able to expand my MythTV system to give it additional HDTV recording capability, nor will I be able to build new HDTV capable systems for my family members as I planned. As HDTV becomes popular in the marketplace, the broadcast flag regime will injure me by essentially rendering my MythTV system obsolete, and by preventing me from expanding my current system or building new ones.

13. While some may assume that the tuner cards and the MythTV system could simply be re-designed to be flag compliant, I do not believe such alterations to the system would be feasible for a number of reasons. Because the MythTV software is open source and freely modifiable by all users, any attempt to have the software enforce compliance with broadcast flag rules could be trivially circumvented by the user on any standard PC hardware. In my judgment, this would fail any robustness requirement specified for certification of compliance with the broadcast flag. The only alternative clear to me would be to have the tuner card or other hardware enforce the broadcast flag restrictions by not allowing the open source MythTV software access to the video data in unencrypted form. MythTV at present, however, would not be able to operate at all if only provided with encrypted video data. Even if people were to perform the extensive modifications required to make some use of such data, a number of MythTV's highly valued functions, such as video editing, transcoding to reduce file size and several others depend on access to the actual, unencrypted video and audio data, and would be rendered inoperable. I, and many other users, frequently make use of the transcoding feature, which recompresses a video file so that it occupies less room on the computer's disk. This allows a machine to store more programs on the same hard disk, saving money. It is my judgment that it would be impossible to write transcoding software which could operate on a securely encrypted video file. Therefore, even if a flag compliant tuner card could be designed,

it follows that I and other MythTV users would be harmed because our existing MythTV systems will not work with it, and a number of valuable features could never be modified to work with it.

14. Finally, I also derive economic benefit from work I do with MythTV systems, and those benefits will be adversely affected when the broadcast flag makes MythTV obsolete. As previously noted, I have developed software for use with the MythTV program. This software enables new MythTV features such as the ability to search upcoming HDTV transmissions or get a list of upcoming HDTV movies and specials that one might command the system to record. I have also built a MythTV add-on program that allows people to generate large wish lists for future recording, and import recommendations for shows to record from other users via the world wide web. And I have developed bug fixes (known as “patches”) for the MythTV system. I currently give this software away for free. But my personal web site, which offers my MythTV enhancement software and corresponding documentation for download, features paid advertising and sponsorships. The more visitors to my web site, the more money I earn. In 2004, advertising revenues from this and other web sites I operate surpassed \$10,000. Although my websites cover other topics in addition to the MythTV-related software, a portion of this web site revenue is attributable to my MythTV related software.

15. Should the broadcast flag mandate go into effect, people will be unable to build new MythTV systems to record and watch HDTV broadcasts. It follows that fewer people will visit the web pages associated with this software, including my own, which will injure me by causing a reduction in the advertising revenue I receive from my websites.

I declare under penalty of perjury that the foregoing is true and correct.

Brad Templeton

Executed: March ____, 2005

**UNITED STATES COURT OF APPEALS
FOR THE
DISTRICT OF COLUMBIA CIRCUIT**

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| American Library Association, et al., |) | |
| |) | |
| Petitioners, |) | |
| |) | Case No. 04-1037 |
| v. |) | |
| |) | |
| Federal Communications Commission, et al., |) | |
| |) | |
| Respondents. |) | |
| |) | |

AFFIDAVIT OF DIANA VOGELSONG

1. My name is Diana Vogelsong. I am the Associate University Librarian for Information Services at the American University (“AU”) in Washington, DC. Both I and the American University Library are members of the American Library Association (“ALA”). The ALA is one of the petitioners in this proceeding. AU is an accredited non-profit educational institution as defined in 17 U.S.C. § 110. My business address is American University Library, 4400 Massachusetts Ave, NW, Washington DC, 20016-8046. I am over the age of eighteen and otherwise competent to testify.

2. The broadcast flag rule, if permitted to take effect, will be harmful to the ability of our library to carry out its functions in two ways. First, the flag will force our library to replace DVD burners and players that do not comply with the flag’s restrictions. These machines are used to record and play segments of broadcast television recorded off the air in classroom instruction. Second, the flag will preclude me from providing copies of broadcast clips over the internet to the AU student body, through password protected courseware in conjunction with ongoing coursework.

Broadcast Use at AU

3. I serve as the second-in-command librarian at the AU library. In this position, I coordinate the library's public services and associated collections, as well as supervise and coordinate with other library faculty and staff. The areas I am responsible for administering provide assistance to both undergraduate and graduate students with scholarly research, and aid faculty members in providing materials for their own research and courses. In particular, I supervise the division of the library that includes Media Services, which collects and loans digital, audiovisual, and other media resources to our student and faculty patrons.
4. On a regular basis, we record broadcast programming off the air for use in classroom instruction at American University. Typically, we make these recordings in response to the request of an AU professor or other instructor teaching at the university. For instance in the past we have recorded presidential addresses and press conferences for government and public speaking classes, major news events for communications and history classes, PBS *Frontlines* (documentaries) for government and international affairs classes, and nightly news and sporting events for journalism classes.
5. Recording this broadcast material for use in AU courses is an ongoing process. Because copyright law allows libraries to make only limited copies for specific educational uses, we destroy the copies we make after use. Typically, this is following display in-class or, if the professor requests that we keep the copy of the segment on reserve for viewing by students outside of normal class time, at completion of the semester.
6. We have been making broadcast recordings available to our faculty for 23 years, and plan

to continue this valuable service indefinitely. The AU faculty consistently report that use of these broadcast materials in their courses enhances their ability to teach and enriches the students' experience, both by making classroom discussions more interactive and contemporary, and also by adding emerging information and a contemporary flair to the course material that often cannot be achieved with textbooks and scholarly articles alone.

7. On occasion, we also assist AU faculty by converting videotape clips to a streaming video format for delivery to students, on a password-protected, class-specific basis, using Blackboard course software. Once a student has signed in to the appropriate page on AU's Blackboard site using her password, she can view the clip in "streaming" format on the computer in her dorm room, at a campus computing center, or in the library itself. To date, we have done this only with video materials from our collection; however, we envision licensing content that we tape off-air for the same purpose.

The Broadcast Flag

8. Currently, we record materials for our faculty using analog video cassette recorders ("VCRs"). The faculty then play the recorded broadcast segments in their classrooms using a VCR and television. However, we recently began converting our recording process from analog to digital, so that all broadcast materials we record for faculty members will be recorded, or "burned," onto optical computer discs, or "DVDs." We expect this transition process to be completed by the end of Summer 2005.

9. Once we have completed the transition to digital recording, faculty members asking the library to record broadcast materials for classroom use will need to play their materials using

machines capable of displaying digital audiovisual signals. AU currently owns nearly one hundred DVD players that can be used for this purpose, with no additional expense to the university.

10. However, once the digital transition is complete, and if the broadcast flag takes effect, none of the DVD players that AU makes available to its faculty for classroom instruction will be able to work for the primary purpose we acquired them—teaching our students. Any broadcast flag-compliant digital tuner would not permit recording or playing of digitally broadcast television programming using the DVD-burning or DVD-playback equipment that we now have, even though the uses that we make of the broadcast materials are clearly lawful uses of the material for educational purposes.

11. Due to the broadcast flag rule, we will be forced to replace this instructional equipment that currently performs for the precise purpose we acquired it. The broadcast flag thus represents not just a financial burden on our library, but also an impending threat to our ability to carry out our mission to educate, and assist our faculty in educating, our student body.

12. The broadcast flag also harms us in another way. While to date we have made only video that is owned by the library available for use by faculty to stream to students over the internet, we believe the TEACH Act and the copyright law protect our ability to do the same thing with off-air recordings. Our faculty are making increasing use of broadcast television and the internet in their courses. The broadcast flag, however, would require every computer on campus that has access to this material to be flag-compliant in order for students to be able to view these educational materials. Accordingly, because the broadcast flag would require us either to retrofit (assuming the proper technology were made available to allow such a retrofitting) or replace every computer on campus to comply with the flag's copy-protection/redistribution

requirements, we would be entirely foreclosed from taking advantage of this exciting new educational tool.

I declare under penalty of perjury that the foregoing is true and correct.

Diana Vogelsong

Executed: March ____, 2005

**CERTIFICATE OF COMPLIANCE
WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS,
AND TYPE-STYLE REQUIREMENTS**

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains _____ words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and D.C. Cir. R. 32(a)(2).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirement of Fed. R. App. P. 32(a)(6) because it has been prepared using proportionally spaced typeface using Microsoft Word 2002 in 14 point Times New Roman type.

Respectfully submitted,

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Dated: March 29, 2005

CERTIFICATE OF SERVICE

I hereby certify that on March 29, 2005 I caused a true and correct copy of the foregoing Petitioners' Supplemental Brief to be served via U.S. mail, first-class postage prepaid, upon the following:

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