Cites & Insights

Crawford at Large

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The Broadcast Flag and Why You Should Care

On November 4, 2003, the Federal Communications Commission (FCC) adopted a *Report and Order and Further Notice of Proposed Rulemaking in the Matter of: Digital Broadcast Content Protection*, MB Docket 02-230. In English, the FCC adopted the Broadcast Flag. You can find the lengthy report (72 pages single-spaced, plus four appendices) on the web.

This commentary may be long but it's far from comprehensive—and certainly not final, since the rulemaking is only a first step. My aim here is to provide a reasonable sampling of background, direct documents, and apparent consequences—and to give you some reason to believe that librarians, and those concerned with the future of digital technology in the U.S., should be concerned about the Broadcast Flag and its implications.

You've Heard This Tune Before

The first mention I can find of "broadcast flag" in *Cites & Insights* was in the November 2002 COPYRIGHT CURRENTS (2:14, p. 6). "When you hear that consumer electronics and entertainment companies have agreed on a solution to protect digital TV, look closely." I noted the work of the Broadcast Protection Discussion Group and its proposed "embedded broadcast flag," with the note that "*all* digital devices would be required to recognize the flag." I thought it sounded a lot like CBDTPA (remember that one) and noted the "analog hole." While the Consumer Electronics Association worried that existing DVD players wouldn't be able to play new "protected" DVDs, Hollywood was opposed to grandfathering existing drives. The proposed solution would make all digital TVs sold to date "obsolete and possibly useless." And Rep. Billy Tauzin, from the Louisiana branch of the Hollywood South, released a draft bill that included the broadcast flag and also called for government-mandated removal of analog outputs from digital TVs, so that you couldn't record a show on your existing VCR.

Last year, the flag earned four mentions, including two separate commentaries. In January, there was a copyright-and-media perspective, THE BROADCAST FLAG: CBDTPA REBORN? I noted that Sen. Fritz Hollings (from Hollywood's South Carolina office—and a Democrat, where Tauzin's a Republican) was pushing an FCC-mandated broadcast flag as a way of getting past the difficulty of passing CBDTPA or comparably Hollywood-friendly legislation. Can't get Congress to act? Tell FCC to do it. I looked at some of the comments sent to the FCC and the issues raised by them. If you're a newcomer to this controversy, it's worth going back to read that two-page perspective; the issues raised there haven't really changed much. (3:1, p. 14-16). If you can't be bothered, here's my quick summary:

Inside this Issue

"How to sum this all up? Here's my quick, uninformed, non-lawyer take:

- "The Broadcast Flag proposed rulemaking is an end-run around Congress' apparent unwillingness to enact something as horrendous as CBDTPA.
- "While ineffective at solving any known problem, the Broadcast Flag would provide an opening for Big Media to insist on other "enforcement" measures that would cripple computers and many other electronic devices.
- "The case for the Broadcast Flag appears internally inconsistent and at odds with technological reality. But then, the MPAA is behind this—and Jack Valenti doesn't seem to have progressed from his two-decade-old assertions that VCRs would destroy the movie industry.

"On its own, perhaps irrelevant for libraries and librarians. As a harbinger, well worth watching."

Two mentions in March 2003 don't amount to much, but the topic justified another Copyright Special in the Spring 2003 issue (3:5, p. 1-5): "The BROADCAST FLAG: HOLLINGS LITE?" That essay was triggered partly because Howard Berman (who *legitimately* represents Hollywood in Congress) thought the flag wasn't tough enough: "I'm opposed to the

FCC attempting to…limit the *exclusive rights* of copyright holders in its broadcast flag rule making." And the MPAA admitted that the flag was "a necessary, but by no means complete, solution" given the "analog hole." That lengthy commentary included several other comments to the FCC, the results of some extended attempts by Raffi Krikorian to actually redistribute high-definition digital broadcasts (worth reading all on its own), and Electronic Frontier Foundation's 32-page (single-spaced) commentary on the Broadcast Flag. Even though I feel that EFF has lost some of its credibility with its "isn't breaking the speed laws wonderful?" campaign in favor of P2P music-"sharing," the group has been on the money in most analyses, including this one. Some of the key points from EFF's analysis, if you don't wish to go read my commentary—and my concluding paragraphs at the time:

- "Internet redistribution of DTV content is not a realistic threat today or in the foreseeable future. Does this need further demonstration? (EFF uses the term "outlandish" in describing MPAA's email scenario.)
- "There's no evidence that content is being withheld from DTV in the absence of the Broadcast Flag, or that it will be withheld tomorrow. Additionally, there's no promise of new content if the Broadcast Flag is mandated.
- "If Internet redistribution was feasible, the Broadcast Flag wouldn't work because it's a "break once, break everywhere" system. That is: It would be legal to have broadcasts that *don't* have the flag; once hacked, a flagged broadcast would be treated as legitimately unflagged. There's also the analog hole, of course, and several other holes.
- "Experience with DVDs should show three things: 1. That content protection will be defeated almost immediately; 2. That appropriately-priced, high-quality commercial offerings will sell very well even if "pirated" counterparts are available; 3. That restrictions imposed to support content protection will burden technological development.
- "The Broadcast Flag would derail convergence—an argument that would be more interesting if convergence made sense otherwise.
- "The proposal would undermine legitimate fair use activities.
- "The proposal is anti-competitive and threatens various constitutional rights.
- "The Broadcast Flag is a bad proposal partly because it was developed badly."

> Will the FCC take the proper course and laugh the Broadcast Flag proposal out of existence? Only time will tell. For all I know, that could have happened by the time this appears.
>
> Even if it does, the experience is worth remembering. Elements of Big Media appear determined to assert absolute, total control over every use of "their" products, overriding first sale, fair use, and any other doctrines and without regard to secondary damage to consumers, the consumer electronics industry, the computer industry, or others.
>
> It's becoming increasingly clear that the MPAA and RIAA don't think current copyright law is unbalanced *enough*. Given the history of prerecorded video and DVD, this attitude doesn't appear to make commercial or financial sense.
>
> The Broadcast Flag debate has no immediate effect on libraries, but the indirect effects could be considerable—particularly if this end-run or congressional action eventually crippled general-purpose computing devices, eliminated the possibility of archival copying, and possibly even eliminated free circulation. Would Big Media ever do something that would make it impossible for libraries to purchase and circulate music, movies, or books as they do now?
>
> Do you need to ask?

The FCC certainly didn't laugh the proposal out of existence. In COPYRIGHT CURRENTS for August 2003 (3:10, pp. 12-13) I commented on a pro-flag article in *EMedia*, by Linden de Carmo: "Checked flag." The article repeats every argument made by the MPAA, including the idea that captured high-definition broadcast streams can be "rebroadcast over the Internet with very little effort," a claim that even the FCC couldn't accept.

Finally, the Midwinter "discursive glossary" included this definition for "broadcast flag":

> A Big Media initiative that would undermine convergence, possibly undermine general-purpose personal computing, and swing copyright even further in the direction of total control by the rightsholders. The FCC has approved the broadcast flag, pending final reading. There will most surely be efforts both in Congress and in the courts to overturn the decision. Expect a big essay or two in the near future, possibly even a special issue.

So here's the promised essay—which, with the accompaniment of BROADCAST FLAG OR SUBPOENAS? EITHER WAY, IT'S PORN, an essay I've been holding for three months, does make up a special issue.

Additional Comments to the FCC before the Ruling

In addition to the comments discussed last year, I've looked at two more: A December 26, 2002 seven-

page document from EPIC, the Electronic Privacy Information Center, and a 22-page undated document prepared by students at American University's Washington College of Law on behalf of ALA, AALL, ARL, SLA, and the Medical Libraries Association (there are many different MLAs!), called "Libraries" for the purposes of the comment.

EPIC asserted that the Broadcast Flag isn't needed to encourage digital broadcasting, won't prevent unauthorized content redistribution, may raise barriers to entry for new consumer electronics manufacturers, and poses various privacy risks. EPIC also suggested a quid pro quo: "If content providers are demanding mandated copy protection as a prerequisite to digital broadcasting, they should be required to initiate DTV broadcasts in return for this regulation." While that suggestion points up the imbalance of broadcast flag interests—at no point do any of the proponents promise to do *anything* in return for the mandate—it seems an odd one in the context of a proposal that EPIC regards as faulty. Does the broadcast flag somehow become less potentially invasive because there are benefits?

The libraries comment begins, "Any broadcast flag rule adopted by the Commission could effectively limit the public's access to information, and impair its ability to use content in new and innovative ways." Specific issues raised include fair-use rights, which should apply to video excerpts just as they would to print—but which would probably be undermined by the broadcast flag, just as they tend to be undermined by DVD copy protection.

The comment recounts some of the history of Big Media and new technologies:

> Content owners have indicated that they will withhold content from, or refuse to develop content for, digital television unless they are given additional legal and technological protection against what they consider to be the potential for the unlawful use and distribution of their materials. This argument has been made before, and seems to surface with each new technological advance in consumer information technology.
>
> During the policy discussions surrounding the introduction of consumer video recording technology, content owners asserted that the new technology would be disastrous to the industry's profitability. Specifically, content owners claimed that if the public was allowed to record broadcast programs on their home recording equipment to watch later, there would be a diminished market for motion picture content on broadcast television. The movie industry argued that if it were denied profits from this market, the result would be a reduction in new motion picture production. Arguing that home taping constituted copyright infringement, they sought to bar consumer use of the new technology. However, as the rollout of the VCR continued, it became apparent not only that the doomsday fears of content providers were misplaced but that the opposite was true: the advent of personal video recorders created an entirely new market for content owners. *This result occurred because the Supreme Court saved this industry from itself…* [Emphasis added]

Is the current situation entirely parallel to the introduction of Betamax? Perhaps not (and now, Sony is on both sides of the fight!)—but the *fundamental* finding in *Sony v. Universal Studios*, that VCRs have substantial non-infringing uses, is most certainly equally true for digital recording and redistribution.

The comment goes on to note that Congress did not mandate specific technological controls as part of DMCA, and that such a mandate represents an unfortunate shift in policy. There's considerable expansion of the fundamental point that the broadcast flag threatens the limitations and exceptions in copyright used by libraries and educational institutions, including a number of pointed examples:

> Imagine a family living in a rural area of the Midwest and the benefits they enjoy under traditional copyright exceptions, including fair use. Under current copyright law, the following educational and nonprofit practices are allowed. The mother, who volunteers in an "English as a second language" course offered by a public library, uses video clips from a Spanish television show to illustrate lessons. The twelve-year-old son uses his school library to find media coverage from the 2000 presidential debate for a presentation in his civics class. The sixteen-year-old daughter sends highlights of her recent performance in a high school softball game, covered by the local television station, over the Internet to her grandfather. Under the broadcast flag, all these otherwise lawful and beneficial practices would be at risk.

The comments also address the inclusion of public domain material within flagged video, preservation and archiving issues, distance education and the TEACH act. A separate section asserts that the FCC lacks jurisdiction to promulgate the rule, given that it goes beyond technical issues related to broadcast to "regulate the rights of content users to use copyrighted material."

In the face of these and many other comments opposing the rule, and thousands of consumer objections to the rulemaking, the FCC's action was predictable: Big Media wanted the Broadcast Flag, and Big Media got *part* of what it wanted.

The Rulemaking

The November 4, 2003 document (FCC 03-273) is 72 pages. Roughly half of that is devoted to appendices providing list of leading commenters, extremely detailed rules, and additional detailed

material. Other than a few notes on a portion of the rules, I won't comment on the appendices.

The first curiosity comes in the page heading, as footnoted: Instead of "Digital Broadcast Copy Protection," it's now called "Digital Broadcast Content Protection." Why?

> To reflect that the redistribution control regime adopted herein for digital broadcast television in no way limits or prevents consumers from making copies of digital broadcast television content.

I suppose it depends on your meaning of "in no way limits or prevents." If you define that as "does not allow for completely preventing," then that's true: the FCC declined to allow a "copy never" flag. Otherwise? Well, you might have to read the full document. I'm not sure I understand all of it.

There's a lot of waffling about why the broadcast flag is needed now. For example, in paragraph 4 (emphases added):

> We conclude that the *potential* threat of mass indiscriminate redistribution will deter content owners from making high value digital content available through broadcasting outlets absent some content protection mechanism. *Although the threat of widespread indiscriminate retransmission of high value digital broadcast content is not imminent, it is forthcoming* and preemptive action is needed to forestall any potential harm to the viability of over-the-air television.

That's the FCC's answer to those who say, *properly*, that it's not feasible to retransmit digital TV over the internet now, and isn't likely to be in any short term: it could happen some day, so they must take preemptive action. It's a fairly novel approach to regulation—but then, so is the idea that the FCC should be able to dictate how personal computers are built (beyond requiring that they not interfere with the regulated spectrum as accidental broadcasters). Don't think they can? That's certainly implicit in these rules.

The same theme reappears in paragraph 8: "Although we acknowledge that technological constraints will inhibit the redistribution of HDTV over the Internet for the immediate future, we *anticipate* that the *potential* for piracy will increase as technology advances." And this threat is demonstrated by "the presence today of analog broadcast content" on P2P networks, even though, two paragraphs earlier, the FCC states that digital content is *more* vulnerable than analog because it "can be easily copied." (A footnote justifying the technological advances mentions Comcast's doubling of downstream speed for broadband service—never mentioning, of course, that the *upload* speed, equally critical for P2P redistribution, remains very low.)

Paragraph 9 "reemphasizes" that "our action herein in no way limits or prevents consumers from making copies of digital broadcast television content." Does it limit fair use and TEACH provisions by making it difficult or impossible to redistribute excerpts? The FCC chooses not to address that, saying merely that their decision "does not reach existing copyright law."

In Paragraph 10 we start to see what "in no way limits…making copies" really means. Yes, you can make them, and use or redistribute them "within the home or similar personal environment as consistent with copyright law." Will you be able to swap episodes with a friend (or loan episodes with a friend), as has always been possible with videotape? Unclear.

Paragraph 18 speaks to ALA's primary objections and those of other groups: "A number of parties have questioned whether adoption of a flag system would restrict legitimate activities relating to the use of digital broadcast content." It goes on to mention fair use, preservation and archiving, and distance education, as well as assistive devices. What's the answer? "Our adoption of a flag redistribution control system…*is not intended* to alter or affect any underlying copyright principles, rights or remedies." As I read the full paragraph, it's a non-answer, but I may be too skeptical.

Things get interesting along the way. Paragraph 20 recognizes that DVD protection (CSS) has been hacked and that deCSS is readily available, but notes that DVD remains a viable distribution platform. This is the "speed bump" theory, and apparently MPAA used this as a selling point: That is, the broadcast flag *can* be circumvented by anyone who knows what they're doing, but ordinary consumers can't be bothered, so it's OK.

We're assured that "existing devices will continue to work at their full functionality and will not require replacement." But look at the footnote that follows that clause: "We recognize that currently, content recorded onto a DVD with a flag-compliant device will only be able to be viewed on other flag compliant devices and not on legacy DVD players…" Does that falsify the previous statement? Their answer: "This single, narrow example…is outweighed by the overall benefits gained in terms of consumer access to high value content."

Some commenters advocated encryption at the source: That is, that the FCC should allow or mandate that HDTV broadcasts be encrypted, not transmitted in the clear. That would, among other things, make existing HDTV sets obsolete—and would represent an astonishing precedent for the free broadcast spectrum that is supposedly provided

in the public interest. The FCC, to its credit, declined to adopt encryption at the source. (Most premium cable TV content is encrypted—but cable isn't a broadcast medium.)

Does the FCC have the authority to impose these regulations? Some commenters say no—the FCC lacks jurisdiction to "require manufacturers of consumer electronics and IT products to design this equipment to recognize and respond to the ATSC flag." That seems particularly relevant for manufacturers that are not broadcast licensees.

But, the FCC says, we need to regulate equipment manufacturers in order to control redistribution. Therefore, we're entitled to do that. The way they interpret their authority, they could regulate pretty much anything that ever touches a broadcast signal in any way. This is a remarkably straightforward answer: "We can do whatever we want in order to enforce a rule we choose to establish."

Some commenters advocated that the flag be prohibited on news and public interest programming. No such luck—and our friends the Corporation for Public Broadcasting were among those arguing that there should be no such restrictions. After all, news and public interest represent big bucks. (One comment, from CBS affiliates, actually claims that it would be difficult for CBS to support "high quality news programming like 60 Minutes" if it couldn't prevent redistribution of the programming—which makes one wonder how they've managed since the VCR was introduced!)

Paragraph 41 is also interesting as it cites limits within DMCA:

> *nothing in this section shall require* that the design of, or the design and selection of parts and components for, a consumer electronics, telecommunications, or computing product provide for a response to any particular technological measure, so long as such part or component, or the product in which such part or component is integrated, does not otherwise fall within the provisions…

In other words, DMCA doesn't require new technological measures. Does that call into question the FCC's ability to impose such measures? Not according to the FCC: They limit the significance of the emphasized section to one *subsection* of DMCA, and deem it as not in any way limiting the FCC from imposing such requirements.

So what's covered? Anything that can receive digital broadcast signals and anything that can convert those signals—but also, at least indirectly, anything that can store, transmit, or display such signals. That would appear to include any recording or playback mechanism.

All of this takes effect commencing July 1, 2005—although some manufacturers may implement the flag as early as July 1, 2004.

The Good News

Paragraph 58 explicitly forbids cable and satellite operators from asserting *greater* redistribution control protection for digital broadcast content than that which the broadcaster has selected. If a broadcaster hasn't flagged a broadcast, cable and satellite operators can't add it.

Who certifies flag-enforcing equipment and software? That's not yet clear—but it is clear that the FCC won't simply turn it over to the MPAA, as seems to have been suggested.

More to be done

The rulemaking includes issues not yet settled. Should cable operators be permitted to encrypt DVT broadcasts (they're explicitly forbidden from encrypting analog broadcasts)? How can the flag system work with open source software and software-defined receivers? What standards and procedures should be adopted to approve new technologies related to the flag? Who *should* approve compliant implementations? And what criteria can be established to evaluate new technologies? A few other issues are also raised, including the need to define a "personal digital network environment," the only kind of network in which flagged broadcasts could be redistributed.

The Rules

The most stringent form of protection provided says that full-resolution digital content may not be recorded except using a "method that effectively and uniquely associates such recording with a single Covered Demodulator Product…so that such recording cannot be accessed in usable form by another product except where the content of such recording is passed to another product as permitted under this subpart" or an Authorized Recording Method. The rules seem to lock any high-definition recordings to the device on which they were made, but that might be wrong.

A compliant receiver *may* output any or all of:

- Analog video output,
- Various forms of modulated output that include the broadcast flag
- Digital outputs protected by authorized technology,
- Unprotected DVI-compliant computer output, but only degraded to "the visual equivalent of no more than 350,000 pixels per frame"—that is, 720x480 pixels and 30

frames per second, essentially the equivalent of analog broadcast TV.

- Audio portions either in compressed audio formats or downgraded to CD quality, that is, 48kHz/16-bit samples.

The broadcast flag would still allow for recording (or redistribution) at the quality level of analog broadcast TV, which is also the effective quality of DVD (except that DVD can include higher-quality audio).

A caveat: I may be misunderstanding portions of this dense rulemaking.

Early Comments and Documents

When it comes to the broadcast flag, context is everything. That said, it makes sense to start with MPAA's 2002 FAQ on the broadcast flag—and comments on that FAQ from the Electronic Frontier Foundation's Seth Schoen, as they appeared July 4, 2002 in "Consensus at lawyerpoint," a weblog devoted to issues related to the broadcast flag. Some notes, skipping a few points:

- **What is a broadcast flag?** It's a sequence of digital bits embedded within a TV broadcast that signals the need to protect he program from "unauthorized redistribution." The MPAA FAQ says implementation "will permit digital TV stations to obtain high value content and assure consumers a continued source of attractive, free, over-the-air programming." EFF notes that digital TV stations can *already* obtain high value content; it's only the major movie studios that won't license their movies for digital TV broadcast without the flag. As EFF notes, that's their rights—but asking for forced changes in the way *all* digital TVs work isn't necessarily a good idea. (The MPAA earlier asserted that "all copyright owners" want the broadcast flag; as EFF notes, only the seven MPAA studios have said that in public, and there are a lot of other sources of movies and TV programming.)
- **Are digital TV programs different?** Yes—they offer higher quality picture and sound, "much like the difference between audio cassettes and CDs or between VHS tapes and DVDs." (The choice of audiocassettes is interesting, as it avoids the LP-vs.-CD sound-quality debate!)
- **What is the BPDG** (Broadcast Protection Discussion Group, which proposed the broadcast flag)? MPAA: "A working group comprised of a large number of content providers, television broadcasters, consumer electronics manufacturers, Information Technology companies, interested individuals and consumer activists." EFF: Sure, but the body of the proposal was drafted in closed, secret negotiations between the seven MPAA members, five electronics companies, and one computer trade association. All consumer advocates and several electronics manufacturers dissented.
- **Who created the flag?** MPAA: The Advanced Television Systems Committee (ATSC). EFF: Fox—but ATSC later ratified it as an *optional* part of ATSC standards.
- **The Report stated that the broadcast flag received broad consensus. How can that be possible when there were so many dissents?** MPAA: There's near-unanimous agreement on the flag itself, but there were "a few" dissents regarding some compliance and robustness recommendations—14 out of 70 organizations. "Of these 14 dissenters, six were *self-styled* "consumer" groups that appear to be opposed in principle to any restraints whatsoever on the reproduction and redistribution of content." (Note the triple mocking: not only scare quotes but "self-styled" and painting the groups as extremists.) EFF: Most manufacturers of products affected by the flag weren't part of the discussion, and most of the 70 organizations don't produce such products. Many organizations that "participated" never made any statements of any kind. The MPAA never questioned the bona fides of consumer groups when it claimed that they participated in the discussion—and consumer groups "certainly do not oppose copyright protection and generally recognize that copyright can be important to the production of creative works." *All* consumer advocates who submitted comments objected to the provisions.
- **When the flag is implemented, can I record any program…and watch it later at a more convenient time?** MPAA: Yes; early model digital recorders will be able to record and playback time-shifted digital recordings, which will play on existing DVD players. When flag-compliant receivers are introduced, their recordings will only play on other flag-compliant products. EFF: "This answer confirms that 'Compliant' devices…are less capable than current-

generation devices." Note also that, while the MPAA says analog recorders are unaffected, that omits mention of the MPAA's broad proposals to close the "analog hole." (The MPAA answer is only correct if your receiver is *also* an early model! If you buy a pre-flag digital recorder and later buy a better TV set, it will only be legally able to pass degraded pictures to the recorder.)

- **Can I record digital programs to my PVR (e.g. TiVo)?** MPAA: Yes, if the PVR is a dedicated device and has no digital outputs. But PVR software in PCs "will need to insure that any recordings of flagged TV programs…are securely protected." EFF: That's part of the collateral damage from the flag: "It effectively means that digital TV content can only be viewed with 'approved' software, instead of the literally hundreds of video recording, editing, and playing applications available today." The MPAA also says it locks out open-source software. The FCC's rulemaking talks about ways to certify open-source software, but there are real tensions in doing so.
- **Can I make a backup copy for my library?** MPAA: Yes. EFF: Sort of—but only if you use hardware or software which meets "criteria set by Hollywood studios," even if it doesn't have the features you want. (As adopted, it appears that the FCC is *not* willing to let MPAA set the criteria.)
- **Some people say the motion picture and other content industries are simply trying to limit my freedom to do what I want with media I obtain over the air. Is this true?** MPAA: Absolutely not. The only intent of the broadcast flag is to restrict the unauthorized redistribution of broadcast content in order to insure that high value content will be made available to consumers over free TV. EFF: The MPAA seems uninterested in talking about 'collateral damage.' Want to email a short video clip to a family member? Impossible unless there's approved technology. (Want to swap recordings with a buddy? Unclear whether that will be possible.) The MPAA answer is as close to a flat-out lie as you'll find in the FAQ.
- **Does the broadcast flag stifle innovation in technologies like broadband?** MPAA: On the contrary… EFF: "A government mandate…tends to spur investment in the [mandated] technology, at the expense of other technologies which are forbidden." The threats to innovation posed by controlling technologies that *might* be used to infringe copyrights are real and well known. (If the MPAA had had their way, there would be no VCRs, for example.) One example: GNU Radio, an open-source software defined radio implementation, which is unlikely to be compliant because it's designed to be modified by users. Another example: Right now, you could build your own PVR; that's unlikely to be legal under mandated rules.
- **Even with the flag, the technology will just be broken into and made worthless in a very short time. Given that, what's the point?** MPAA: "Most people are honest and will not attempt to circumvent the flag." EFF: It's a myth that technological content-control systems are only about "keeping honest people honest." These systems routinely stifle legitimate, legal uses—e.g., playing legally-purchased import DVDs. The originally-proposed rules were so broad as to forbid user-serviceable TVs. More to the point, MPAA knows that the flag is *technologically* extraordinarily weak. "It's tantamount to putting the line 'DO NOT REDISTRIBUTE THIS' at the top of an e-mail message (and then demanding that everyone's e-mail software honor that request.'" MPAA wants to strengthen the proposal by restricting analog recording devices.

Is the EFF being paranoid? Not if you read the MPAA's *Content protection status report*. I looked at an April 25, 2002 version, which clearly states three goals. Note the second goal:

> *Goal One:* Implementing a "broadcast flag" to prevent the unauthorized redistribution of in-the-clear digital over-the-air broadcast television including its unauthorized redistribution over the Internet.
>
> *Goal Two:* Plugging the "analog hole" that results from the fact that digital devices are not generally designed to respond to current analog protection mechanisms. Thus, protected analog content, including content that originated in protected digital format but was stripped of its digital protection when it was converted to analog for display on analog TV receivers, is left unprotected when converted to a digital format.
>
> *Goal Three:* Putting an end to the avalanche of movie theft on so-called 'file-sharing' services, such as Morpheus, Gnutella, and other peer-to-peer (p2p) networks.

The remainder of the document provides status reports and some expansion of the elements. It's a

great "the sky is purple and the moon is made of green cheese" document. For example, the Broadcast Flag "does not mean less functionality for video devices, including PCs that receive DTV. Rather it *adds* to these devices the ability to determine the difference between protected and unprotected works." People outside the MPAA might note that "ability" is actually "requirement, enforced all the way through other devices," and would find it difficult to consider this added functionality.

As to the analog hole, the document says the way to address it is via embedded watermarks—and to require "watermark detectors" in "all devices that perform analog to digital conversions." Naturally, given the source of this document, we find that this "does not mean less functionality for devices." It's also phony: The requirement *must* be based on digital-to-analog conversions, and it requires *obtrusive* watermarks, since unobtrusive watermarks will disappear in digital-to-analog conversion. (That's almost the definition of an unobtrusive watermark: One that isn't part of the visible/audible stream.)

Cory Doctorow published "Understanding the Broadcast Flag" at techtv on August 15, 2002. In addition to defining the flag and noting the primary reason Congress *might* want such a flag—because it wants us all to switch to digital TV so that it can reclaim the analog spectrum from TV stations, which it can't do until 85% of us own digital sets—Doctorow gives his own take on why the flag is a bad idea. First, the flag won't stop unauthorized copies because of the analog hole. Second, "Hollywood always does this":

> Hollywood swore that it wouldn't allow its movies to be transmitted on color TV in the fifties, and then in the eighties it said the same thing about prerecorded…cassettes; in fact, Hollywood studios sued all the way to the Supreme Court to keep the VCR off the market, and they still ended up releasing their movies on prerecorded cassettes. Calling their bluff was all that was needed to force their hand.

But, he also notes, Hollywood is *not* promising to release movies to broadcast digital TV as a quid pro quo—and digital TV doesn't necessarily need Hollywood movies. (Marc Cuban, owner of HDNet, an early high-definition TV network, says he's not interested in airing Hollywood movies. HDNet broadcast the 2002 Winter Olympics in high definition.)

Doctorow says the flag would affect technology by banning open source software that would interact with DTV signals and "requiring Hollywood permission" to make devices. As he notes, a similar mandate in the 1970s would have outlawed VCRs that allow time-shifting—not because time-shifting was illegal but because Hollywood wouldn't permit it to be built. (Note that the FCC's rulemaking may soften or eliminate both of these dangers.)

The article is also a sales pitch for joining EFF, unsurprisingly given Doctorow's affiliations.

A Public Knowledge document, "The broadcast flag and DTV transition," doesn't appear to be dated. It claims that the flag as proposed would require the FCC to "regulate personal computers, handheld devices, CD burners, hard drives and a wide range of other information-technology and consumer-electronics devices." It spells out the difficulty in file trading of *any* TV programs over the internet, much less HDTV, noting that HDTV signals are already heavily compressed and can't be made much smaller without significant quality loss. The document asserts that, for the average consumer, the ability to transfer HDTV over the internet is at least ten years away—and the government typically doesn't regulate technology in the absence of present or impending problems. There's a little more. I find one claim curious—the idea that the flag, in and of itself, requires regulation of handheld devices, CD burners, and hard drives.

Just Before and After

Edward Felten offered a "guide to what to look for in the rules" in an October 20, 2003 posting on Freedom to Tinker:

- First, look at the criteria for an anti-copying technology. Must a technology give copyright owners control over all uses, is it allowed to support time-shifting, *must* it support time-shifting?
- Second, look at who decides. "Whoever makes this decision will control entry into the market for digital TV decoders." Will it be the movie and TV industries, will the FCC decide, or will vendors self-certify?
- Third, see whether the process allows for "the possibility that no suitable anti-copying technology exists."
- Finally, look at what's covered. "Must a device be primarily designed for decoding digital TV; or is it enough for it to be merely capable of doing so?" How broadly does the mandate apply to downstream devices—and, again, is the issue capability or primary intent?

Felten considered the final issue the most important, "since it defines how broadly the rule will interfere with technological process." Worst case: An overbroad rule "that ends up micromanaging the design

of general-purpose technologies like personal computers and the Internet. I know the FCC means well, but I wish I could say I was 100% sure that they won't make that mistake."

A Reuters story posted on Wired News, October 21, 2003, carried the striking headline "Digital TV ain't gonna be free," although that headline presumably came from Wired. While there's nothing in the predictions that you haven't already read, this is one case where one could mildly argue with one negative prediction—not the actual quote, but the stated implications:

> But consumer advocates warn that it would make obsolete 50 million DVD players already in Americans' homes.
>
> "If a consumer records a program on a new broadcast flag-equipped machine and then tries to take that program and play it on Grandma's older DVD player, it's just not going to work," said Chris Murray, legislative counsel for Consumers Union.

Absolutely true. On the other hand, most of those 50 million DVD players were purchased to play commercially produced DVDs in any case; unlike VCRs, DVD did not begin as a recording medium. *High-definition* recordable DVDs would never play back on current DVD players in any case. The rules appear to allow exporting marked programs in the highest resolution that current DVD players actually support (480i), so it's not clear that current DVD recorders would not be supported.

Lawrence Lessig weighed in on October 22, saying of the broadcast flag, "This bit of government regulated code is a mistake. By imposing a requirement (effectively) in the middle of the network, the broadcast flag will break all sorts of innovative new applications." He then refers to the open architecture of the internet—but, of course, the whole intent of the flag is to keep broadcast video *off* the internet. He cites the DVD as "great new technology that effectively competes with free," failing to note that DVDs include copy protection technology that prevents legal excerpting. "This is a classic example of regulate first, and ask questions later, and a perfect example of how not to regulate the internet." I'd guess the FCC would respond that the broadcast flag doesn't regulate the internet at all.

Finally, Arik Hesseldahl took a soothing stance in an October 31 Forbes.com piece, "Little to fear from broadcast flags." He uses the oh-so-neutral term "railing" to refer to the comments of consumer advocates regarding the flag, then asserts that those fears portray "an unlikely worst-case scenario."

> Some shows would be open to recording much like they are now, with little or no restriction. Some might be limited in the number of copies you can make. It may be OK to make one copy for personal use—that much was guaranteed by U.S. courts after a series of lawsuits by broadcasters against the makers of VCRs in the 1980s. But making a copy that you then distribute to a few friends may not be. Some shows—the most valuable ones, presumably—would be ineligible for copying altogether. TVs, recorders and other equipment, including PCs, might be mandated to support it.

Look closely at that paragraph. Note first that the next-to-last sentence flatly contradicts the second sentence. Note also that if the second sentence is correct, then DVDs are presumably illegal (since you can't make a copy for personal use without violating protections), as are copy-protected pseudo-CDs and, for that matter, prerecorded videocassettes.

A bit later, Hesseldahl offers this comment:

> One study by GartnerG2…found that 90% of consumers approve of copying TV shows for personal use, and more than 60% thought it OK to share them with a friend. Broadcasters are well aware of this, and unless they've taken leave of their senses, they won't want to alienate their audiences so badly as to be overly restrictive in their copying rules.

That presumably means nobody would want rules that prevent recording an HDTV program and sharing it with a friend—but that sure seems to be what the FCC rulemaking mandates. The article then goes on to suggest that nobody has problems with the copying restrictions in iTunes. "If TV viewers were required to follow similar rules, why shouldn't they be able to live with that?" Let's see: We don't have the government mandating what players can play iTunes songs, once you've burned the AAC songs downloaded by iTunes onto an audio CD, there's no protection, and some people *are* unhappy with the copy restrictions.

After the Rulemaking

EFF issued a quick release on November 4, with the subheading "Digital television 'broadcast flag' stymies innovation, fair use, and competition." Fred von Lohmann said that the FCC's step to shape the future of television "represents a step in the wrong direction, a step that will undermine innovation, fair use, and competition." Seth Schoen went on, "The broadcast flag rule forces manufacturers to remove useful recording features from television products you can buy today. The FCC has decided that the way to get Americans to adopt digital TV is to make it cost more and do less."

As excerpted in RLG's *NewsScan Daily* for November 5, the Washington *Post* reported, "The movie industry is happy with the FCC's decision, but consumer advocates are worrying that the move will

force people to buy new equipment, will result in new regulation of how computers are designed, and will hinder the copying of programming that's not entitled to industry protection (e.g., shows no longer covered by copyright)."

Edward Felten's immediate post (November 5) notes, "The FCC is committing the classic mistake of not having a clear threat model"—that is, a clearly defined explanation of what a security system is trying to prevent and of the capabilities and motives of the people trying to defeat the security system. He notes that there are two threat models to choose from: Either you are trying to keep the average consumer from giving content to friends and neighbors, or you're trying to prevent "Napsterization." For casual copying, technology only needs to be strong enough to resist attacks by typical consumer; for p2p, *every* would-be infringer must be kept from ripping, since one copy uploaded onto the net becomes available to everyone. But, he says, the FCC wants to have it both ways: They mandated weak protection but expect it to prevent Napsterization. "This incoherence is evident throughout the FCC's broadcast flag order." Maybe that's why I had trouble understanding it.

Seth Finkelstein offered a quick comment on November 5 on the Infothought weblog under the heading "Broadcast flag—desecration." The lead sentence (which includes the quotes): "Do not remove this flag under penalty of law." He goes on,

> Can't have fair use *in practice*—as a functional matter, not a legal defense—because no prison can have a gap in the walls. Can't make distinctions between various types of content—e.g., entertainment versus a political speech—since those are intellectual differences, not technological ones. On and on.

He does note that, "contrary to beloved techie myth, everyone involved is not stupid." The FCC is aware that the flag system is vulnerable, really no better than DVD protection—and, as Finkelstein notes, "the effectiveness of [DVD] security is far better in practice than we like to admit." Yes, you can break CSS—but most of us can't or won't be bothered, so DVD producers still make a profit.

Susan Crawford (no relation!), in a November 5 posting, noted her unhappiness with the FCC ruling "because it seems to be boundless, unprincipled, and based on irrational assumptions." (scrawford.blogware.com/blog/):

- Boundless because it covers all content and all devices that include a demodulator.
- Unprincipled because the FCC doesn't (in her opinion) have jurisdiction; she finds their arguments unconvincing and thinks there's a great jurisdiction lawsuit in the waiting.
- Irrational because…read her essay. Content owners prevailed over device manufacturers and thousands of comments opposing the flag. On its own, the flag doesn't seem likely to succeed—but, she suggests, it's reasonable to think of the flag as "a stating device for later moves to close the analog hole."

CDT issued a Policy Post (9:21, November 5) discussing aspects of the FCC rule. While noting that the FCC's rule "is of concern because it creates a government enforced technological mandate for all equipment capable of receiving *and using* DTV broadcasts, including computers," and noting the extended debate "over the appropriateness of technological mandates as a solution to copyright concerns" that is likely to go on (and that should have happened *before* FCC action), the post makes it clear that the rule is better than MPAA's original proposal in several ways.

How? It explicitly allows software-based protection, it attempts to specify objective functional criteria, it clarifies that the flag is "not intended to restrict any other form of copying," and it adopts an "ordinary-user standard" for resistance to hacking. But it's not yet clear what technologies and uses *will* be permitted and what the final process for approving technologies will be—and, crucially, "the ruling sets a troubled precedent for FCC regulation of computing architecture with little clear sense of the limitations on that authority."

Five days later, Ed Felten posted a "Broadcast flag scorecard" pointing back to the four issues he raised just before the rulemaking. Here, briefly, are his scores:

- First (criteria): Unresolved.
- Second (who decides): Deferred—but the FCC "does appear to understand the danger inherent in letting the entertainment industry control the list." (An interim mechanism has the FCC making final decisions.)
- Third (no suitable technology): Not addressed—but the technology only needs to resist attacks by ordinary users, making compliant technologies much more likely.
- Fourth (how broad is the mandate): "The FCC seems to have been trying to limit the negative impact of the Order by limiting its scope, but some broad impacts seem to be inevitable side-effects of mandating any kind of flag."

His conclusion: "The FCC's order will be harmful, but it could have been much, much worse."

Paul Boutin posted "Will the broadcast flag break your TiVo?" at Slate on November 26, 2003. He says that the flag is "not the end of the world some tech reporters predicted. Instead, it's more like the Big Four networks' last stand against their competition." It won't break your TiVo, and you can keep using it to make current-quality recordings of HDTV using an analog converter in the future. He explicitly recognizes that you will *not* be able to swap high-definition episodes of TV shows, and admits that the new restrictions are "kind of annoying." His specific advice: "Buy a high-definition TV tuner-card for your PC before July 2005. After that you may only be able to get a crippled one…"

Finally (this time around), Simson Garfinkel devoted his "Net Effect" column in the March 2004 *Technology Review* to the flag: "Losing control of your TV." Unfortunately, either my literacy has lapsed or Garfinkel gets it wrong. He claims that flagged broadcasts can only be recorded "on analog tape or on a special low-resolution DVD"—but that's not the way I read the rules. For one thing, the "special low-resolution DVD" described is, in fact, today's DVD specification. For another, the flag (as I read it) would allow higher-resolution recordings, but only on devices that can assure recordings won't be redistributed outside of a household. Bad enough, but very different. (As with censorware and claiming that 20% of legitimate sites would be blocked, I think it's vitally important *not* to overstate the facts against something you oppose, as that undermines your case.)

Garfinkel notes that there's software that will decrypt a DVD and "crunch it down" so it will fit on a CD. He doesn't mention that the results are nowhere near DVD quality, since they represent a further 6:1 or 12:1 compression of a medium that's already enormously compressed. Another paragraph goes on about ways that the flag could be expanded, and it goes so far into paranoia that it's more destructive than useful. Big Media would suggest a flag that "might disable your TV's channel changers and 'off' buttons"? Right.

This is all too bad. There's the germ of a good column here, but the reporting is so defective (again, unless I've lost my mind!) that it makes the column pretty much useless.

CDT's Public Interest Primer

The Center for Democracy and Technology issued *Implications of the broadcast flag: A public interest primer (version 2.0)* in December 2003. The report should be available, starting at www.cdt.org. It's 39 single-spaced pages. The report was prepared with the assistance of Public Knowledge and Consumers Union.

I'm surprised by the tone of the report. In the first major finding, it says, "*genuine* fears have been raised about unauthorized redistribution of unprotected digital TV." Without the qualifier "at some point years from now," I question "genuine." (I don't question the assertion that broadcasters and the MPAA said they fear such redistribution. I question either the knowledge or sincerity behind such fears.) The second finding does raise a warning flag:

> The broadcast flag approach creates many legitimate concerns for television viewers, Internet users, and industry groups. The flag approach has the potential to restrict reasonable uses of content by viewers, hinder innovation, and impose costs that outweigh the benefits of the limited copy protection provided by this approach.

The third finding notes that the FCC did make some "important, consumer friendly modifications" to the original proposals—but put off consideration of many important issues until the follow-on proceedings. After these and other findings, a closing paragraph (for the introduction) ends with a sentence worded in a way I find troublesome for a group that claims to be "dedicated to advancing civil liberties and democratic values on the Internet and other new digital media." This follows a list of concerns—innovation, content protection, and "the user-empowerment potential of the Internet." To wit, "The polarization of the current debate threatens these important values and our ability to deal with the piracy problem." Noting that next-to-last word, which accepts Big Media's extremist wording for the problem of casual copyright infringement over the internet, sends me back to look through the introduction and realize one other key term: Throughout, "consumer" appears where one might expect to see "citizen." That's a shame.

Is this quibbling? Maybe. But *true* media piracy, that is, the mass creation and distribution of copyright-protected goods, for commercial gain, without the consent of the copyright holder, is not what the Broadcast Flag is all about. The FCC knows full well that the flag will do almost nothing to prevent or discourage commercial pirates—but then, the MPAA knows that high quality pirated DVDs tend to come from sources within the industry in any case.

The distinction between "consumer" and "citizen" is also an important one. The former term biases discussion toward a purely capitalistic system consisting only of sellers and buyers, "industry" and "consumers." There's no room for the commons, no room for sharing, no room for the *rights* of citizens.

(Yes, I also object to library users or patrons or borrowers being called consumers or customers.)

That's too much commentary for the first four pages of a 39-page document. There are other elements in the document that make me wonder just where CDT actually stands in the ongoing discussion. Among them, certainly, is the consistent use of "piracy" to refer to all acts of copyright infringement. A footnote blandly notes the existence of the analog hole and efforts being made to address it, without any commentary on the extent to which such closure would necessarily restrict flexibility and innovation. Despite a footnote admitting that Viacom/CBS has dropped its assertion that it would stop broadcasting HDTV without the flag, the mail paragraph seems to accept the assertion that the lack of copy protection will keep "high quality programming" from being available, that this will mean "consumers will not buy DTV sets," and that this would delay the DTV transition.

There's a fairly good explanation of why internet redistribution of HDTV isn't a contemporary threat, although it relies only on download speeds (upload speeds are *much* slower, and P2P sharing requires both). But then you get this: "Though most agree that the threat of widespread copying is several years away, *studios are planning ahead*." The next sentence finds this understandable, and nowhere in this document do I see a fairly simple question: Why is it the FCC's business to diminish citizen rights on behalf of a *potential* threat, some years away, to companies that aren't even broadcasters? How does the MPAA get this kind of power?

Section 3, "The broadcast flag policy debate," discusses a range of contentious issue and includes an early paragraph that I suspect is correct:

> The policy debate that may have the most immediate impact on the flag regulations, however, is not about the substance of the rule, but rather the manner in which it was enacted. Several groups have argued that the FCC does not have the authority to mandate the flag scheme, and as of December 2003 were considering legal challenges on these grounds.

The section goes on to discuss four key themes: content protection, future innovation, reasonable uses of content, and public interest values. Each theme receives expanded discussion. In the first, the MPAA speaks first—but there is at least the recognition that some people believe "government regulation should not be used to protect existing market models." On balance, CDT comes down on the side of broadcasters and MPAA.

Regarding innovation, the document does note concerns that the flag rule is just the first in a series of rules—which certainly seems likely, given the MPAA's four-point plan. And although the paragraph seems to undermine this concern by saying the FCC hasn't *stated* any such plans, it does go on to note that parts of the report "do strongly suggest that the Commission will seriously consider further regulations to plug the analog hole, thus validating the fears of critics."

A paragraph about the effects of the flag on general-purpose computers, e.g., making them "untamperable" (thus, closed), is answered by the FCC's wholly nebulous reassurances. Similarly, for reasonable "consumer" uses, all we have is an element in the full review of application for authorized technology that *allows* (but does not require) the FCC to consider "the extent to which the technology accommodates consumers' use and enjoyment of DTV broadcasts." Beyond that, we have only the assertion of Big Media that the flag won't prevent "any of the activities that the typical consumer engages in today with television." Given the track record of the MPAA in particular, that's not nearly good enough.

Section 3.5 does raise issues regarding public interest values. While it's true that fair use may be difficult to encode, the alternative is to "inadvertently" block uses that are part of fair use.

> It is not sufficient to say 'it is too hard' to 'code' fair use, and therefore block all reasonable consumer uses—including fair uses. To do so would allow technical code to amend legal code (i.e. the rules, however ill-defined, of fair use). We believe a credible point has been raised that mandating technologies that effectively prohibit what would otherwise be fair use of DTV content raises copyright policy and First Amendment concerns.

That train may already have left the station, barring successful challenges in court or Congress—but then, video playback technologies have for many years included technical code that prevents excerpting and other fair uses.

Three pages discussing FCC jurisdiction reach no conclusion, although there's a hint early on: "It is fair to say that the FCC's jurisdiction in this area is far from certain."

The next six pages deal with issues for policymakers. CDT's suggestions in the area of innovation are strikingly timid, calling primarily for multiple authorized technologies and specific objective functional criteria. Where consumer use is concerned, CDT calls for limited secure online transmissions and for consumer input to the authorization process, but does not even suggest that episode-sharing (in the form of recordable HD DVDs) should be legitimate. Neither is there a hint that excerpting should be legitimated or that public domain material should

not be protected, although the report does suggest reconsidering the non-exemption of news and public affairs material.

A laundry list of other concerns includes five points: Precedent set by the flag for regulation of computers; precedent set for technology mandates; no consumer choice because of market dominance by one or a small number of protection technologies; few new consumer uses permitted, with possible retrenchment over time; and the fact that the flag doesn't solve content protection and piracy problems. Those are all significant concerns.

Surprisingly, after discussing the uses of enforcement, education, and new economic models, the report goes on to suggest that encrypted broadcasting is worth exploring further. After noting some of the issues with such encryption *over the free, government-supplied airwaves*, we get this astonishing statement: "While CDT believes these are serious unresolved issues, the costs and benefits of this approach should be explored, and not rejected out of hand because of a possibly outmoded vision of broadcast—especially since the vast majority of American households subscribe to cable or satellite TV, where video content is delivered in protected form." So the quid pro quo of requiring freely-receivable transmission over the freely-provided airwaves might be obsolete? Perhaps I misunderstand.

The summary and conclusion says little new. Once more, "consumer" is the word of choice. Once more, we're assured that it's critical to protect "high quality content" years before there's any legitimate threat. The final sentences would be more sensible if the report itself did not seem so heavily weighted toward Big Media's view of the world:

> The polarization of the current debate has prevented adequate discussion. CDT looks forward to facilitating a more balanced conversation, along the lines suggested in this paper, that seeks to promote what we believe are important and widely-shared values.

Since CDT's primer accepts the MPAA-broadcaster world view as the basis for all discussion, including MPAA's terminology, it's hard to understand how those lines would create a more balanced conversation. As I read this with a growing sense of and unease as to exactly who and what CDT sets out to represent, I was reminded of the "balance" struck by DMCA and CTEA. That's a shame.

Why You Should Care

I know this is a lot of text on an issue that seems peripheral to libraries and, indeed, to your own real-world concerns. That may be why the broadcast flag hasn't gotten the press that other issues have: It's a little arcane and a lot confusing. Of course, public inattention to significant government proceedings is nothing new: Neither CTEA nor DMCA received much attention when they were being enacted.

Here are some of the concerns I see:

- Enactment of the broadcast flag represents the FCC's assertion that it can control the design of electronic components that can in any way interact with digital broadcasting. That's a dangerous precedent in and of itself.
- That assertion, combined with requirements for robustness of flag compliance, almost certainly means some limitations on the inclusion of digital video receiving or copying capabilities within open, expandable, user-modifiable personal computers and other user-modifiable devices.
- Mandating the flag and associated protections years before there's any plausible threat of internet redistribution of high-definition digital TV represents another, and a fairly extreme, unbalancing of government action toward Big Media and away from citizen rights.
- The flag rulemaking makes no real provisions for fair use and other exceptions to absolute control by copyright owners, including transmissions of brief excerpts and legitimate education and distance-education exemptions. There are also no exceptions for archiving and other library-related functions.
- The rulemaking establishes the precedent for FCC to expand its authority by claiming a danger exists—even though it's a danger to non-broadcasters. It's nearly certain that Big Media will push to use that precedent to ask FCC to "close the analog hole," a provision that would have far more negative consequences in many areas than the broadcast flag itself.
- I see no sense of balance in the FCC's proceedings, no sense that fair use is a legitimate issue, no sense that broadcasters have responsibilities to go along with their free bandwidth, no sense that the powers of corporations should be balanced by the rights of citizens. That should concern any citizen.

Consider the other essay in this accidental special issue. Some elected representatives had the idea that the government should *not* be mandating restrictive technologies for consumer products—even the DMCA didn't go that far. Will Congress act to slap down the FCC? Will courts tell the FCC that its authority does not extend that far? We shall see.

Postscript: ALA's Appeal

Here's another reason you should care: ALA does. Along with ARL, AALL, SLA, Consumers Union, the Electronic Frontier Foundation, Public Knowledge, the Consumer Federation of America, and the Medical Library Association, ALA filed a petition with the U.S. District Court of Appeals for the District of Columbia to review the Broadcast Flag order.

Here are the issues to be raised in the petition:

> 1) Whether the Commission exceeded its statutory authority under the [Communications] Act by imposing content redistribution control regulations on equipment manufacturers, including without limitation, whether the Commission erred in interpreting the scope of its ancillary jurisdiction under the Act.
>
> 2) Whether the Commission exceeded its jurisdiction by establishing a regulatory scheme that restricts the copying of copyrighted content even though the Commission has not been given any such authority by the copyright laws.
>
> 3) Whether the Commission's decision to prescribe the broadcast flag and other findings in the proceeding were supported by substantial evidence in the record, including without limitation, evidence of the need for the broadcast flag and its costs and benefits.
>
> [4]) Whether the Commission acted arbitrarily and capriciously in violation of the Administrative Procedure Act in concluding that the broadcast flag was an appropriate method of DTV broadcast content protection given the acknowledged weakness of broadcast flag technology and the costs and benefits of the broadcast flag.

As broadcasters might say, stay tuned.

Bibs & Blather

Why a Special Issue?

The only other single-topic issue of *Cites & Insights*, the CIPA Special, seems to have by far the largest readership and, possibly, impact of any issue—far more than I would ever have anticipated. I'm guessing that this special will go in the other direction: That its long-term unique-download total will be lower than the typical 2003/2004 issue.

But here it is. Why is that? There are several reasons, not all good ones. Here's an NAQ (Never-Asked Questions) on the subject:

- **Why should I care about the Broadcast Flag**? I try to answer that at the end of the major essay. On its face, it represents a significant lessening of fair-use and other citizen rights for future high-definition television broadcasts. Any additional cuts into fair use should concern librarians and thoughtful citizens (or even "consumers"). But the bigger issues, I believe, are that the FCC's rulemaking represents a huge claim of additional authority by an appointed commission—among other things, giving the FCC power over how personal computers and recording devices are designed and whether they can be modified by users; that the MPAA already says this is just a first step, with the next planned step far more injurious; and that the whole FCC proceeding appears to be an end-run around Congress.
- **Why haven't I heard more about this elsewhere?** I'm not sure, except perhaps that it's arcane and there have been other things to worry about.
- **Why don't we get a regular April issue, with this an extra?** For reasons that have nothing to do with the Broadcast Flag and everything to do with vacations, speaking engagements, and energy. We took our first vacation for the year in the second and third weeks of March—and it's the kind of vacation that needs a week of evenings to prepare for and several days to recover from. Then, four days later, I'm off on my first springtime speaking trip. This issue should appear just before or shortly after that trip.
- **So?** I travel without technology—and the kind of source-based writing that makes up most of *Cites & Insights* couldn't be done on the road in any case. My wife and I (who both work for RLG) have a standing attitude on work issues when we're on vacation: We've sailed away from them.
- **Will there be an extra midmonth issue to make up for this nonsense?** I doubt it.

I've wanted to do a post-rulemaking wrapup on the Broadcast Flag ever since it was adopted. It's a little late, but the issues raised will continue for at least a year or two.

A Copyright Perspective

Broadcast Flag or Subpoenas? Either Way, it's Porn

If that title makes no sense, welcome to the wonderful world of Senate hearing transcripts—or at least those of a September 17, 2003 hearing of the Senate

Commerce Committee on "Consumer privacy and government technology mandates in the digital media marketplace."

Ed Felten posted in Freedom to Tinker after his appearance at the hearing. "You would probably be disappointed…at the quality of the debates" (and by the reality that Senators aren't all there and don't all stay for the whole hearing). "Much time is wasted on posturing that is irrelevant to the nominal topic of the hearing and seems designed only to show that one side is purer of heart than the other." His example: "Repeated references to porn on P2P networks."

What *was* the subject of the hearing? Ed Felten believes it was the proposed (and since FCC-adopted) Broadcast Flag and similar government technological mandates relating to TV tuners and the like. I wasn't there—but from reading all of the prepared testimony available from the committee website (start at www.senate.gov/~commerce/), I would assume that the current subpoena provisions of DMCA represented an equally important topic, one that brings P2P into play (and with it porn). Maybe it was about the Digital Consumer Internet Privacy Protection Act, but that's not clear either.

I printed the testimonies of all nine witnesses—some transcribed in strange long paragraphs, some delivered as nicely formatted written testimony or speaking notes. I'm organizing these notes alphabetically by witness, since I don't see an organizing principle. That has the interesting and unintended effect of putting Big Media witnesses last, with the possible exception of one "association" witness who may or may not be a covert Big Media person.

I don't have the questions and answers that took place during the hearing, which might have been much more interesting. These are informal notes with interjected comments—and, with one or two exceptions (primarily Ed Felten), it's fair to say I found all the testimony a little peculiar. Of course, I've never testified before a congressional committee and hope to keep that record intact. Maybe peculiarity is inherent in the process.

William Barr, Verizon

Barr complains about how RIAA is using DMCA subpoena provisions—but he also offers the improbable belief that "appropriate technical and legal solutions will be found" to the issue of digital infringement. (It's possible Barr knows better, but he's a lawyer, not a technologist.) He complains that, while DMCA included an agreement for industries to negotiate toward "standard technical measures," the "copyright community" has never accepted Verizon's offer to begin negotiations. (Maybe the "copyright community"—a term I'm beginning to loathe—avoids such negotiations because they know how unlikely effective, fair, and appropriate technical solutions are. How do you negotiate work toward nonexistent futures?)

Barr says anyone can claim to be or represent a copyright owner, fill out a one-page form asserting a "good faith" belief that infringement has taken place, and—with no review or substantive showing—get a subpoena requiring an ISP to disclose the name, address, and phone number of "anyone using the Internet." That, he says, raises huge dangers as well as being inappropriately broad. It "opens the door to your identity to people with inappropriate or even dangerous motives, such as spammers, blackmailers, pornographers, pedophiles, stalkers, harassers, and identity thieves."

Titan Media, a producer of gay porn, used DMCA subpoena processes to demand names and addresses of 59 SBC subscribers who Titan claimed were exchanging its videos over the internet. Like the RIAA, Titan has an "amnesty program": Reveal your identity and buy Titan's videos, or Titan will expose you as a gay-porn fan through the subpoena process. *Could* Titan reveal your identity publicly without exposing itself to legal action? Barr doesn't address that issue.

Barr notes a few instances of just how absurd the "copyright community"'s actions could be—for example, a Warner Bros. letter to UUnet demanding that they terminate an Internet account for sharing a Harry Potter movie online. Why? "Harry Potter" was part of the title of the file—a *one kilobyte* Rich Text File consisting of a child's Harry Potter book report. I swear I'm not making this up. If you can encode a two-hour motion picture into a 1K file with an .rtf extension, let me know: Magic that powerful is beyond anything Potter can do! Similarly, RIAA wanted Penn State to shut down its astronomy department servers during finals week because it contained infringing songs by Usher. Surely there couldn't be an astronomy professor named "Usher" who would have files on the departmental servers?

Lawrence J. Blanford, Philips Consumer Electronics North America

Blanford is president and CEO. His 21-page (double-spaced) written testimony is all about broadcast flags and other technology mandates. Philips *does* want to see technological prevention of copyright infringement—but Blanford regards current efforts as misguided and doesn't believe the government should "pick technology winners and losers."

I was shocked to see the co-developer of CDs use the spelling "Compact Disk," since you'd expect Blanford to know that the licensed logo specifically says "Compact Disc." Philips is a technology leader in several phases of digital entertainment. I didn't realize that Philips developed the Serial Copy Management System that prevents you from making a copy of a copy of a CD, at least on consumer audio CD recorders. Philips is working on watermarking as a protection methodology. I can't imagine how watermarking could survive file compression and digital-analog-digital cycles without substantial damage to sight or sound, but what do I know? (Actually, given omnipresent network corner tattoos and frequent promos on TV shows, "substantial damage to sight" doesn't seem to be an issue for Big Media.)

Blanford says the transition to digital TV won't work unless consumers get the promised "revolutionary enhancements" in picture quality and flexibility *without* losing today's functionality (including recording and time shifting). He notes that the Broadcast Flag and other FCC proposals would require re-engineering and replacing nearly every device in home theater and home entertainment systems, that at least one proposal would prevent lawful and desirable uses of the internet, that proposed mandates would place public policy decisions in the hands of private interests (primarily movie studios), and that proposed mandates would probably encourage anticompetitive abuses.

He also notes (correctly) that the proposed mandates would fail to provide meaningful protection while affecting far too much content: "The proposed system *just doesn't work*." [Emphasis in original.] He goes on to say "we have time," showing how implausible it is for anyone to swap high-definition or even standard-definition digital television shows now or in the near future. His numbers are a little off in one sense (he assumes that *upload* speed on a home broadband connection can be 1.0 to 1.5mbps, which is almost never the case), but still telling: At robust transfer rates, it would take just under 39 hours to transfer a two-hour HDTV program, or eight hours for a standard-definition program. If infringers are satisfied with the compromised pictures provided through heavily compressed files, then digital broadcast flags have *no effect* on piracy: A simple analog conversion clears them. You can't eliminate analog conversions without making all existing TV equipment obsolete.

Alan Davidson, Center for Democracy & Technology

I have no idea who CDT is, other than Davidson's statement that it is a "non-profit, public interest organization that is dedicated to promoting civil liberties and democratic values on the Internet." Which makes Davidson's testimony interesting, since CDT regards the DMCA subpoena process as appropriate (with, perhaps, a little fine-tuning) and presumes that copyright is currently balanced appropriately. The proposed fine tuning? Sanctions for misuse, compensation for ISPs, reporting requirements and limitations on use and retention of information.

Davidson mostly focuses on the *need* for DMCA subpoenas, for RIAA's measured, temperate approach to the subpoenas, the importance of an expedited subpoena process, and the like. This is a case where it's nearly impossible to interpret the testimony without knowing more about CDT. At first glance, I would assume that it's an industry group posing as a "public interest organization," but that may be unfairly paranoid.

James D. Ellis, SBC

This testimony reads largely as an echo of William Barr—not surprisingly, since Ellis is general counsel for another huge broadband ISP. Here's Titan Media again, here's largely the same set of issues—but with one new one: "Courts may not be private enforcers." If the vast majority of DMCA subpoenas by the RIAA are used to gain private settlements, not to take legal action, is this implied constitutional provision violated?

"The Recording Industry and its allies have taken the position that they need only make an allegation of infringement and Internet users have *no rights*." I'm no great fan of RIAA, but that may overstate the association's position just a wee bit. Or not.

Edward W. Felten, Princeton University

What's an academic doing in with these general counsels and presidents? Offering the sharpest and most technically coherent testimony of the day, aimed directly at technology mandates such as the Broadcast Flag. Felten makes clear he's no friend of infringement: "The debate is not about whether this infringement is harmful—we all know it is—but rather about how we should respond to it."

Felten considers the proposed technology mandates as being "of dubious technical merit," as likely to cause serious harm "by curbing innovation in information technology and consumer electronics," and as possibly "retarding the development of le-

gitimate technologies, while failing to make any dent in infringement."

I love this sentence: "Technology moves fastest in an open and chaotic marketplace of ideas, unconstrained by mandates." And, later: "Innovation is inherently unpredictable. If we know how to do something, we are already doing it; so a technology advance is by definition a surprise." That means you need to keep the field clear for surprising developments—which will be prevented by overregulation.

Felten says the transition to HDTV will *inherently* reduce piracy—because the quality difference between highly-compressed pirated files and actual TV will be larger, thus making pirated files less attractive. Thus, technology mandates make even less sense in the future.

Felten recognizes that regulation will *particularly* harm general-purpose technologies such as the PC and the internet. He offers an analogy to the phone system (which is also content-neutral). "Consider, for example, a hypothetical regulation that bans technologies that can be used to negotiate drug deals." That would amount to a ban on telephones (and pagers, and all other one-to-one communications devices). Could you redesign the phone network so that it couldn't be used to talk about illegal drugs? Perhaps, but (a) it would be massively expensive and screw up telephony, and (b) it wouldn't do any good, as dealers would just negotiate purchases of "sugar" and "flour."

> General-purpose technologies will always be capable of both good and bad uses. To eliminate the bad uses is to eliminate the technologies themselves.

There it is, starkly and correctly stated. Would that bother Jack Valenti or the RIAA? Probably not.

There's more here—including this equally stark and accurate statement: "Most independent technical experts believe that no technology will ever prevent the capture and distribution of digital content by determined pirates.... If this view is correct, then—like it or not—technology is not the answer to the digital copyright dilemma, and the result of mandates will be all pain and no gain."

Felten argues persuasively against technical mandates in this area, but goes on to note that any such mandates *must* be narrowly defined. He offers four criteria (defining each in a paragraph): Any such mandate must be aimed at preventing infringement, not controlling legitimate fair use of content. Technologies should be evaluated according to simple, neutral technical criteria. Mandates should allow for the possibility that *no satisfactory technologies exist*, rather than assuming that a suitable technology can be found. Finally, the set of devices subject to the mandate should be as narrowly defined as possible.

Look back at that third criterion. See connections to filtering?

Christopher Murray, Consumers Union

Murray represented Public Knowledge as well as Consumers Union. The latter, publisher of *Consumer Reports*, certainly cares about copyright: "Copyright is crucial to the creation of content." That alliterative sentence overstates the case (as anti-copyright people have pointed out), but he's establishing CU's stance. He goes further: despite all the other reasons for a decline in CD sales, "Our instincts tell us that much of this phenomenon is traceable directly to the free downloading of music files..." *Instinctual proof*: There's a new standard!

He's leading up to a defense of P2P technology as central to the internet itself. Thus, while "As consumer advocates, we necessarily favor policies that ensure artists and publishers' getting paid for their work...what we won't do, and what we believe the Congress shouldn't do either, is attempt to set in stone the business models of the past while moving forward into the digital age."

Murray notes that technological innovation has been "*perhaps* even more than the creative works of the movie studios and recording artists" a driving force in the U.S. economy for the past two decades. Emphasis added, since that's a needless qualifier: By any rational measure, computing and communications technologies far outweigh movies and recordings in the U.S. economy.

Murray doesn't argue against DRM but does argue against centralized, government-mandated DRM. He offers the example of Lotus 1-2-3 and the effects of "competitive DRM" (or, in actuality, Lotus' DRM vs. Borland's trust in consumers). But today's DRM "all too often...blocks something that [a consumer] might wish to do, and that he or she might have no problem doing with the work's analog counterpart." Thus, it may be easier and cheaper to photocopy a page of a print book for use in a paper than to extract the text from the digital version of the book—even if the ebook is public domain.

Murray argues against the broadcast flag, a "solution" that its proponents admit won't really work, that would require replacing most home digital equipment, and so on. Here's a pointed paragraph:

> Congress has been told before by studios that if Congress will just give them this one thing, they'll roll out digital television—just give them hundreds of billions of dollars worth of digital spectrum for free and they'll roll out DTV right away—but broadcasters have never given in return any enforceable

> commitments, and they still look as far away from giving back their analog spectrum as they did at the beginning of this transition.

This is an interesting point, one not frequently made. Nowhere in studios' pleas for the Broadcast Flag do I see a commitment to a quid pro quo. Instead, it's always the threat that they'll take away something or not do something they haven't done anyway. That seems to be standard MPAA practice: All stick, no carrot.

Here's another radical paragraph, one that would stop the whole mandated-technology discussion dead, probably for keeps:

> We have seen no technology that demonstrates it is possible to protect fair use and other reasonable consumer uses, while at the same time protecting content from piracy. Before the Commission begins to demand that such a wide range of consumer electronics have the flag in it, they should insist upon a demonstration of the actual technology and show us how it will work.

Apparently the FCC had already taken an absurd step, at least in part: Approving a "Plug and Play order" that ensures that future cable-ready TVs and set-top boxes will have content protection built in—and, in the process, *exclude* computers with tuners from ever receiving cable digital television. So much for convergence: As far as broadcasters and studios are concerned, you can only have a computer in your digital TV system if it ceases to be a general-purpose computer.

John Rose, EMI Group

> We have to win the battle against digital piracy…We have to win not only because hundreds of thousands of American jobs are at stake, not only because a vital sector of the economy—one of the few that runs a positive trade surplus—is at stake, and not only because our product helps drive expansion of the telecommunications, consumer electronics and personal computer industries. We have to win the battle because the future of a unique American heritage—music—is at stake. EMI Music is the home to the recordings of Frank Sinatra and John Coltrane. Where is the next American music icon? If piracy continues unabated, we may never find him or her.

Whew. How does music drive expansion of telecom and PC industries, *other than* file sharing? When did music in general become "a unique American heritage"? And when did EMI Group become an American corporation?

Rose has trouble with clarity or facts or both. "EMI is unique among the music companies—our only business is music." That may be unique among the Big Five, but there are *many* smaller labels and other "music companies" whose only business is music. "EMI has acted aggressively to make its music available to consumers through legitimate online services to meet consumer demand and thereby combat piracy"—but never, at least to date, in a manner that provides enough flexibility and fair-use rights to meet consumer expectations. "In 1995, music formats and the devices for playing them were simple and the relationship between the two was straightforward." Hmm. I would have *sworn* that I played CDs on my personal computer in 1995, and in 1990 as well. (But Rose also says "A vinyl record played on a record player," suggesting that he believes vinyl was still a substantial part of the industry in 1995.)

How about this one: "Few industries have coped as well with such extensive changes in their business environment." And "Every serious and credible study [of P2P] concludes that a significant portion of the decline in record industry sales…is attributable to [P2P]." As we know, if a study doesn't show what Big Media wants (as has been the case with several studies) it's neither serious nor credible.

How has rampant piracy affected EMI? The company's eliminated one-fourth of its artists. They treat new artists even worse than recording companies have in the past. EMI cut 20% of its work force. EMI's operating profits *increased 33%*. Profits, I would note, that go to EMI's corporate headquarters, which are *not* in the United States.

The beat goes on. "The pirate file is a perfect replica of the genuine file." If "the genuine file" means the original CD track, that is almost never the case in P2P files—and if Rose believes a 128K MP3 file is a "perfect replica" of an audio track, he has no business working for a record company. Oddly, he does mention the *real* source of actual piracy (that is, mass illicit physical reproduction of recordings for financial gain): "Rings of thieves whose goal is to obtain advance copies of music (etc.)" He says these "thieves" want to leak those files to the web—but it's more likely that they'll churn out phony CDs. After all, that's where the money is. Rose refuses to make distinctions. To him, all forms of P2P infringement "have direct connections to global physical piracy by organized crime rings." That's a serious charge, for which Rose offers the usual evidence: None.

As with any good RIAA member, Rose says that ISPs are "attempting to protect the anonymity of customers who are breaking the law." After all, they're *accused* of infringement—which apparently makes them guilty. A bit later, he suggests that ISPs and PC companies are directly profiting from "piracy." As elsewhere, he refers to the music, movie, and related companies as "the copyright industries,"

which may be appropriate given the level of creativity evident in much current music. Maybe these companies *are* just about copyright, not creativity.

A detailed analysis and commentary on Rose's 4-page testimony might be several times as long as the testimony itself. It's appalling but not surprising.

Cary Sherman, RIAA

Sherman is both president and general counsel for the RIAA. Here's one of his big factoids: Combined sales for the ten top-selling albums in the U.S. were 60 million in 2000, 40 million in 2001, and 34 million in 2002. "The root cause for this drastic decline in record sales is the astronomical rate of music piracy." Wouldn't it be interesting to have lists of those thirty albums, to see whether *content* might have something to do with lower sales? Instead, we get the usual farrago of RIAA-sponsored surveys, usage numbers for P2P networks with the bland assumption that all file exchanges are copyrighted files (mostly sound recordings), and—as Ed Felten notes—blather about "pornography, including child pornography," that has no apparent relevance to anything else in the statement.

Sherman also says, "Music downloading is driving the [broadband] business," using one comment from an obscure company as statistical proof. Sherman claims that DMCA was a compromise and that, absent that compromise, "ISPs could face enormous monetary liabilities for the actions of their subscribers." That would be some legal breakthrough: Making common carriers directly liable for content carried on their networks. I bet the USPS, UPS, Fedex, telephone companies, and others would be fascinated by such a liability theory.

Sherman does note how RIAA identifies the IP addresses of individuals "who [we claim] are illegally uploading or downloading our works": It searches for files "like any other user." Hmm. That's a non-infringing use of P2P technology.

Sherman spends a *lot* of time making fun of Verizon's suggestion that stalkers, pedophiles, and domestic abusers could use the DMCA subpoena mechanism to get the addresses and phone numbers of their targets. To some extent, his logic is reasonable—*if* you assume that stalkers, abusive ex-spouses and pedophiles would be wary of violating laws in their efforts, *if* you assume that they believe they might get caught and would thus be dissuaded from making false declarations, *if* you believe they would not "risk anonymity" by appearing in Court. (But the DMCA process doesn't require appearing in person before a judge; a clerk essentially rubber-stamps the forms.) In other words, as long as stalkers, abusive ex-spouses and pedophiles are good, law-abiding, non-sociopathic citizens who just have one or two quirks, Verizon's suggestion is a straw man.

Jack Valenti, MPAA

Herewith the first three paragraphs, *precisely* as they appear in the transcript:

> No nation can lay claim to greatness or longevity unless it constructs a rostrum from which springs a "moral imperative" which guides the daily conduct of its citizens. Within the core of that code of conduct is a simple declaration that to take something that does not belong to you not only is wrong, but it is a clear violation of the moral imperative, which is fastened deep in all religions.
>
> That is fundamental to how this nation fits itself to honorable conduct. Anyone who deals in inform logic to certify that "stealing movies off the Internet is okay, nothing wrong about it since everybody does it, and no one gets hurt," is obviously offering up a defunct mythology to cover their tracks.
>
> Piracy, or "stealing," is the darker side of digital subversion. Digital theft has an inevitable leaning toward a future darkly seen by those who create, distribute and market films. For the almost one million men and women who work in some aspect of the movie industry—99 percent of whom don't make big salaries, who are good citizens and good neighbors, with mortgages to pay and kids to send to college—their livelihood is perilously in doubt if digital stealing goes on, increasing in velocity with a casual disregard for other people's intellectual property.

My heavens. Set aside the *fact* that downloading of intellectual property is copyright infringement, *not* theft (I regard it as equally serious, but a different crime). Set aside the number of serious public spokespeople or witnesses for the "other side" who have said "stealing movies off the Internet is okay, nothing wrong about it since everybody does it, and no one gets hurt" (a number that I believe to be zero). There's so much here to explore. What's the *lighter* side of "digital subversion"? Did Valenti *really* intend to admit that movie studios pay 99% of their employees badly? Is Valenti saying that it's OK for atheists and agnostics to steal?

Later, Valenti speaks of a film being "kidnapped early in that journey" (from theater to premium and basic cable to home video, and so on)—not noting that the usual source of such "kidnapping" is inside theft of pre-release materials, leading to *physical* piracy that the MPAA *should* be focusing on. He says the movie industry suffers from $3.5 billion in hard-goods piracy—and has no figure for P2P "losses." I suspect Valenti either doesn't know or doesn't care that P2P movies are woefully degraded through high

compression, unlike DVDs made from inside-theft materials.

"I agree that the proposed ban on technology mandates cheers those whose mantra is 'all content must be free,' including pornography and material stolen from its owners. But their view collides with the public interest." And, to be sure, *that view does not exist* among any of the witnesses or others who argue against technology mandates. (Notice that porn popped up yet again. How many readers believe that the porn industry is willing to see "all content" be free, including theirs?) That may be Valenti's greatest flaw: He treats all those who disagree with Big Media's extreme stance as being "content must be free" anti-copyright absolutists.

He offers a wildly inaccurate comment about the Broadcast Flag ("By the way, consumers will never know there is a Broadcast Flag, unless they try to redistribute a program to the Internet"), claims cross-industry support that does not exist, and says that if there's no flag, "high-value content" will "migrate" away from the free broadcast channels. Bet you didn't realize that the good stuff was on ABC, not HBO!

Somehow, Valenti is able to cite Internet2 capabilities as meaning that, three or four years from now, we'll *all* be able to swap six-gigabyte files in a minute or two. Here comes porn again—"a most unwholesome fungus which infests [P2P] sites." "Pornography on a scale so squalid it will shake the very core of your being. As easy as it is to illegally download movies, it is equally easy to bring home this foul pornography. Any 10-year-old can do it—and probably does." Herewith Jack Valenti's estimation of his audience: He just stated that *most* 10-year-olds habitually download foul pornography!

And, of course, he doesn't think Congress should prevent "expert agencies from mandating technical remedies yet to be found to allow parents to fence off this foul material from their children"—that is, porn that includes metatags to entice kids, e.g. "Disney" and "Spy Kids." Any guess as to what "technical remedies" could make that impossible? Oh, there's the third example: Harry Potter. Valenti must believe in magic.

He does. Here's the final sentence, after asserting that Congress must "heed our warnings that unless there is put in place various baffle-plates of protection, we will bear witness to the slow undoing of this huge economic and creative force."

> Which is why I urge the Congress not to close the legislative door on any new technological magic that has the capacity to combat digital thievery which—if unchecked—will drown the movie industry in ever-increasing levels of piracy.

What did Valenti say about fair use? Nothing. Did he admit that the Broadcast Flag really doesn't prevent piracy at all? Of course not. This astonishing heap of rhetoric needs its own baffle-plates, as it certainly left this reader baffled.

And Yet…

The MPAA knows *exactly* how to build its business in the face of file sharing. Offer reasonably priced DVDs that have great pictures, surround sound and loads of extras. Keep them coming—mining the best TV shows, going back to resurrect the classics and lesser movies of the past, putting together clusters of movies at fair prices. What *Lord of the Rings* fan would watch sub-VHS-quality Internet downloads when they can buy four-DVD sets of each movie that expand the movies and add a few hours of backrground for $25 or so?

But Valenti and his crew would rather lock down personal computing, cripple the internet, and do anything else necessary to assure that Hollywood can extract every last dime from its product. A shame, really.

So what does all of this testimony amount to? Your guess is as good as mine.

Postscript: The above is what I wrote last fall. Now my guess is that some Congressfolk were discussing a consumer-friendly move, e.g., explicitly telling the FCC that it couldn't mandate the broadcast flag. This hearing may have been part of that apparently-failed process. Or not.)

The Details

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