

**Testimony of
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The Senate Committee on Commerce, Science, and Transportation
On the Broadcast Flag
Tuesday, January 24, 2006**

Mr. Chairman and members of the Committee, on behalf of the Center for Democracy and Technology (CDT), I appreciate the opportunity to testify today. CDT is a non-profit, public policy organization dedicated to promoting civil liberties and democratic values on the Internet.

CDT takes piracy seriously. CDT is committed to the principles that copyrighted material should be protected from large-scale unauthorized copying. Denying compensation to creators and distributors of digital content undermines First Amendment values by stifling expression, threatening the growth of new media and e-commerce, and depriving consumers of a robust marketplace of content offerings. At the same time, resolving these issues should not come at the expense of reasonable consumer expectations regarding the use of copyrighted works and digital technologies. Nor should it come at the expense of the Internet and innovative new communications technologies that hold tremendous promise to promote free expression, economic growth and civic discourse.

The key for policymakers is to find balanced policy approaches that protect copyright holders' legitimate interest in being compensated for their efforts, without stifling innovation and the great benefits new technologies offer.¹

This Committee is being asked to decide whether to give the Federal Communications Commission the authority to impose the broadcast flag regime, an unprecedented government technology mandate – that a federal court rejected last year. Before the committee simply authorizes that action, *ex post facto*, we urge that you take a fresh and full look at the issue and carefully weigh the risks and benefits of such an approach. Protecting intellectual property is a very important goal, but it is uncertain at best whether imposing a flag regime would achieve that goal. The flag, moreover is not the only means to address the problem. On the other hand, the risks posed by the flag to technology innovation and consumer interests are considerable.

On balance, CDT would not recommend that Congress proceed with flag legislation. But if it does, it is critical that it not give the FCC blank-check authority to implement the

¹ CDT's approach to the broadcast flag is informed by a policy framework for digital copyright that the organization released last spring. *Protecting Copyright and Internet Values: A Balanced Path Forward Version 1.0* (Spring 2005)(<http://www.cdt.org/copyright/20050607framing.pdf>).

regime however the agency sees fit. Any grant of authority to the FCC should include carefully crafted limits and safeguards to help minimize the risks. We discuss those safeguards in more detail below.

1. The Broadcast Flag Regime Involves Significant Government Regulation of Technology Design.

The broadcast flag proposal is not a minor or technical proposal; it would entail ongoing government involvement in technology design for a wide range of devices, including computers and video enabled technologies not yet anticipated. It also could set a precedent for further government technology mandates, which CDT generally opposes. Government-dictated design requirements are unlikely keep pace with innovation in the rapidly moving high tech environment, and may serve as roadblocks to new, unanticipated technologies and features.

A broadcast flag regime would impose design requirements on a broad and growing range of devices. The “broadcast flag” itself is just a marker attached to a television program, signaling that the program should be protected against indiscriminate copying. It only has an impact if downstream devices recognize and respond to this marker. For this reason, the Federal Communications Commission’s flag rules effectively required any device that might be used to display, receive, or record digital television content to incorporate an FCC-approved technology for protecting flagged programs.

As technology converges, the range of devices capable of displaying, receiving, or recording flagged video content is growing very broad. People can now watch video programming not just on televisions, but on portable DVD players; on general purpose computers; on iPods; on Internet-enabled mobile phones; through personal video recorders like TiVo; and through computer game consoles.

The FCC’s flag rules would have had an impact on this entire range of technology products, and would give the FCC ongoing approval authority over the introduction of new video-capable technologies. An innovator seeking to develop a new and improved device would need to either license and incorporate a flag compliance technology already approved by the FCC, or, if the device involved features or functions not contemplated by existing technologies, apply to the FCC for approval of new technology. In effect, the FCC would serve as the gatekeeper for the entry of new technologies into the video marketplace.

There is also the important question of the precedent that broadcast flag legislation would set. If the flag regime is enacted, other requests for technology mandates surely will follow. Already, the flag proposal has been joined by proposals for technology requirements to limit radio recording functionality and restrict analog-to-digital conversion. As Congress considers whether to start down the path of imposing design requirements on computer and communications technology, it should think carefully about whether and how it would draw the line.

2. The Broadcast Flag Carries Risks to Innovation and Legal Consumer Uses of DTV.

The broadcast flag proposal carries a number of significant risks to innovation and to legal consumer uses of digital television.

If the FCC has the authority to sign off on new video enabled technologies, it may well be the final arbiter of which technologies make it to market and when. The FCC could delay approval of an upstart technology because of stiff opposition from business opponents, delaying it from getting to market at the same time as its nearest competitors. And if the FCC approval process is uncertain or unpredictable, innovators will have no clear guidepost to help determine what would likely win approval.

These concerns are not merely hypothetical. Last fall, CDT released a paper which took a close look at the FCC's flag proceedings.² While the FCC approved all thirteen proposed flag compliance technologies that it considered, final approval was only part of the story. Several consumer electronics companies chose to withdraw potentially valuable consumer features from their products *before the FCC ever had a chance to rule on them* because the approval standards were uncertain and there was strong opposition from certain parts of the content industry. To ensure success, the applicants played it safe and removed innovative features permitting users to transfer content in limited ways over the Internet. The lesson from the proceeding was clear: the FCC approval process can chill innovation, particularly if the process is too subjective or unpredictable.

Another serious risk concerns the public's ability to use digital television content in ways that constitute "fair use" under copyright law. This consideration is especially serious with respect to news and public affairs programming which is of transient economic value to copyright holders but critical to informed public discourse. The Internet provides unprecedented ability for individual speakers to engage in political and civic discourse on a large scale. News and public affairs programming that is interesting, important, or satirical can spread quickly on blogs and through email chains.³

But applying the broadcast flag to news and public affairs programming could undermine the potential of the Internet to enhance debate in this fashion. Television continues to be a primary source of video footage concerning the top issues of the day. The flag regime could prevent a blogger from including a short excerpt from a broadcast debate between political candidates in her online blog. It could prevent a charity or a church from using broadcast news clips about a recent natural disaster to bolster an Internet-based appeal for relief assistance or a teacher from including such a clip in an on-line civics course.

² *Lessons of the Broadcast Flag Process: Background for the Legislative Debate* (September 2005) <http://www.cdt.org/copyright/20050919flaglessons.pdf>

³ Broadcast Flag Authorization Legislation: Key Considerations for Congress, Version 1.1 (September, 2005 (www.cdt.org/copyright/20050822broadcastflag.pdf))

Finally, a broadcast flag regime carries a risk of consumer confusion and frustration due to interoperability problems. Consumers may be surprised to learn that their new, flag-compliant devices may not work with their older devices, or with devices using different flag compliance technology. For example, DVDs recorded using a new flag-compliant DVD recorder would not play in an older DVD player.

Any evaluation of flag legislation should weigh these risks against the potential benefits. The concerns of content providers about the long-term risk of widespread online copying of DTV programming are not without merit, and content providers clearly believe that a flag regime would offer them some protection against widespread Internet redistribution. But even the content industry concedes that the flag regime is not likely to stop determined pirates nor keep popular programs off the peer-to-peer networks entirely. Its main effect may be to keep ordinary consumers from uploading recorded programs to the Internet for legitimate purposes.

3. If Congress Proceeds With Broadcast Flag Legislation, It Should Include Important Limitations and Safeguards.

If Congress chooses to proceed with flag legislation, it is critical that it not give the FCC blank-check authority to implement the regime however the agency sees fit. Any grant of authority to the FCC should include carefully crafted limits and safeguards to help minimize the risks discussed above.

First, any such legislation should clearly state the basic scope and limited purpose of the FCC's authority. Specifically, it should say that the FCC may adopt regulations *only* to the extent necessary to prevent flagged content from being redistributed indiscriminately on the Internet.

Second, any such legislation should specify standards for the technology approval process, rather than leaving it all up to FCC discretion. The standards should be designed to ensure an objective, predictable, timely and transparent process. In particular:

- There should be a clear standard for technology approval: Does the technology effectively frustrate an ordinary user from engaging in indiscriminate redistribution of flagged content over digital networks?
- Applicants should be permitted to self-certify compliance; the burden of proof should lie on the party seeking to have a technology rejected.
- There should be an express statement that certain reasonable consumer uses, including secure Internet transmission to a limited number of devices or Internet transmission of limited excerpts, will not be precluded.
- There should be a uniform timeframe for approval decisions.

- There should be an oversight mechanism, such as an advisory board, to help identify any problems or mission creep in the technology approval process and consumers should be represented in the oversight process.

Third, any such legislation should include provisions to reduce the risks to “fair use” and civic discourse. One important safeguard would be to specify that certain content is not eligible to be flagged including material that is in the public domain; coverage of debates or political speeches; and news programming the primary commercial value of which depends on timeliness. For these types of programming, the flag’s risk to legitimate, noncommercial consumer uses seems particularly high, while its benefit to the commercial interests of copyright holders seems relatively low. (These types of programs are not likely to depend on long-term ongoing revenue streams through DVD sales, cable reruns, and so forth). It is important to note that unflagged content would still be covered by copyright law; it simply would not receive the extra layer of technical protection offered by the flag.

It is worth noting that in the rare instances when Congress has imposed technological mandates to address copyright concerns, it has balanced these provisions with language to protect specific types of copying that were considered fair use. The 1992 Audio Home Recording Act mandated use of “Serial Copy Management System” technology in digital audio recording devices – but it also said that consumers may record music for noncommercial purposes without risking infringement lawsuits. Section 1201(k) of the Digital Millennium Copyright Act required analog VCRs to respond to Macrovision copy control technology – but also specified that the technology could not be used to restrict consumers’ ability to record ordinary television programming (including cable) for time-shifting purposes. An effort to address key fair use issues would be warranted in broadcast flag legislation as well.

Finally, any broadcast flag legislation should call for fair disclosure to consumers about interoperability limitations stemming from the flag regime.

Crafting these types of limitations in legislation would require careful work, but would be essential to help minimize the risks posed by the flag regime.

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Thank you again for the opportunity to testify today. CDT stands ready to work constructively with the Committee as it continues to consider issues important to the future of the Internet.