
TELECOMMUNICATIONS & ELECTRONIC MEDIA

WILL THE FEDERAL COMMUNICATIONS COMMISSION

BROADCAST FLAG ORDER BE RESURRECTED?

By Stephen T. Yelverton*

In order to protect digital television broadcast programming from mass piracy through the Internet, the Federal Communications Commission (FCC) adopted rules in 2003 to impose certain technical requirements on digital television receivers. This rulemaking, formally entitled *Digital Broadcast Content Protection*, is known as the “Broadcast Flag Order.”¹

A “broadcast flag” is a digital code embedded into a digital broadcast signal. It alerts digital television receivers to limit the indiscriminate copying or redistribution of digital broadcast programming. The FCC’s Broadcast Flag Order required all makers of digital television receivers to design their equipment to recognize the broadcast flag embedded in the digital signal and to provide a mechanism to limit the indiscriminate copying or redistribution of the programming.

The FCC’s rationale for the rulemaking was to enhance the transition from analog to digital television. It reasoned that the broadcast flag would benefit consumers by ensuring continued access to high-value programming content on free over-the-air television. The program producers had voiced fears that digital television would provide an easy opportunity for mass piracy. Therefore, they might withhold their programming from digital broadcasting and shift it to cable and satellite, which is technically less susceptible to piracy.

Over strong protests from consumer groups and thousands of objections from members of the public, the FCC adopted the rulemaking. Their concern was that the yet-to-be-implemented broadcast flag technology would violate the privacy of the television user, prevent copying for personal use the lawful “fair use” of copyrighted materials by educational institutions and libraries, and the lawful copying of non-copyrighted material such as news, public affairs, and political discourse.

The FCC set a deadline of July 1, 2005 for the makers of digital television receivers to comply with the new technical requirements to recognize broadcast flags. In an *Order* adopted on August 12, 2004, the FCC approved thirteen different technologies by various equipment makers to implement the broadcast flag protection for programming on digital television.²

Before the broadcast flag was implemented, the U.S. Court of Appeals for the D.C. Circuit struck down the FCC’s rulemaking: *American Library Association v. Federal Communications Commission*.³ In an opinion by Judges Edwards, Sentelle, and Rogers, the court ruled that the FCC had exceeded its statutory authority in regulating television receivers and the equipment makers. According to the court, Title I of the Communications Act of 1934 (codified under Title 47 of the U.S. Code) confers authority on the FCC to

regulate “apparatus that can receive television broadcast content, but only while those apparatus are engaged in the process of receiving a television broadcast.” In the case of the broadcast flag, the FCC’s regulation of the receiver is *after* the completion of the broadcast and thus beyond its jurisdiction.

The court’s ruling turned on its interpretation of Congressional intent in 47 U.S.C. § 153, which defines “radio and wire communications” to include not only the “transmission of... writings, signs, signals, pictures, and sounds” by aid of wire or radio, but also “all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.” The court very narrowly construed 47 U.S.C. § 153 to limit FCC jurisdiction to the regulation of apparatus used for the receipt of radio or wire communications *only* “while those apparatus are engaged in communication.”

However, the plain wording of 47 U.S.C. § 153 would belie such a strict construction. Its broad language also speaks of the “forwarding” of received communications (not just the receipt) and regulating apparatus “incidental” to transmissions. Thus, the broadcast flag digital television receivers would appear to be well within these jurisdictional parameters.

Albeit questionable reasoning, the court’s ruling is a rare victory for strict constructionists who favor limiting the expansion of authority of the federal regulatory state and also for those who believe that federal courts should not take sides in policy disputes, but rather require Congress to decide—as envisioned by the Founding Fathers.

Congress is now deciding whether to resurrect the Broadcast Flag Order in the pending Communications, Consumer’s Choice, and Broadband Deployment Act (S. 2686, which is the Senate version of H.R. 5252). Included in this proposed legislation is a provision authorizing the FCC to reinstate its broadcast flag rules for digital television. The bill also addresses the issue of flags for digital radio. While supported by Senators Ted Stevens (R-AK) and Gordon Smith (R-OR), there are serious concerns as to how to implement broadcast flags without infringing the rights of consumers.

Likewise, pending before the House is the Digital Content Security Act (H.R. 4569). This bill covers both digital and analog television receivers in preventing piracy and enlists the assistance of the Patent and Trademark Office. Also pending before the House is the Audio Broadcast Flag Licensing Act (H.R. 4861), which authorizes the FCC to implement flags for digital radio.

These bills have lukewarm support, but the conundrum for Congress is how to allow copying for personal and “fair” use, and for non-copyrighted material, while at the same time effectively protecting intellectual property rights on the Internet. A technology that can do all of this may not yet be available. Even with technology that does it all, Congress faces the conundrum of how to effectively enforce the broadcast

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flag. The FCC rules had no real enforcement and the Agency has no real enforcement powers over television users. Many technically savvy consumers could likely disable the anti-piracy mechanisms in the broadcast receivers. What would be the penalty? Would there be fines, payments of copyright royalties, jail sentences? Would the federal courts be overwhelmed by a flood of violations? Would Congress risk voter wrath to mandate strict enforcement?

In sum, Hollywood has an uphill battle to get the needed protection for program producers against digital piracy. But even with new legislation, will the Internet eviscerate copyrights?

Endnotes

- 1 18 FCC Rcd 23550 (2003).
- 2 FCC 04-193.
- 3 406 F.3d 689 (D.C. Cir. 2005).

