[US] Broadcast Flag Regulations Overturned

IRIS 2005-6:1/37

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The U.S. entertainment industry now must look elsewhere than the Federal Communications Commission (“FCC”) for help in preventing copying of its content after the ruling of the U.S. Court of Appeals for the District of Columbia Circuit in American Library Association v. Federal Communications Commission, No. 04-1037. On 6 May 2005, a unanimous court rebuffed the FCC for overstepping the scope of its authority by requiring equipment manufacturers to include “broadcast flag” technology to prevent the unauthorized copying and redistribution of digital content (see IRIS 2005-4: 19).

The FCC imposed the broadcast flag regime in controversial regulations issued in late 2003. The scheme, scheduled to be effective as of 1 July 2005, would have required all devices capable of receiving a digital broadcast signal (including all Tivo-like personal video recorders, DVD recorders, cable and satellite set-top boxes with recording capabilities, and personal computers equipped with tuner cards) to include technology that restricted consumers' ability to copy and redistribute content. The entertainment industry hoped that the scheme would help to keep digital content off of filesharing networks. The regulations were contested from the very start. The FCC held an extensive rulemaking procedure in which parties submitted thousands of heated comments for and against the broadcast flag. Numerous comments challenged the FCC's jurisdiction, arguing the FCC had no statutory authority to regulate the use of broadcast content after it is received.

The American Library Association's (“ALA”) court challenge to the broadcast flag was largely based on less technical concerns, as it claimed that the new regulatory regime would interfere with educational activities. The ALA asserted that the broadcast flag would interfere with the ability of libraries and schools to copy and share content, activities that U.S. law excuses from infringement under certain circumstances. The D.C. Circuit ignored the ALA's broader, policy-based arguments in favor of jurisdictional grounds.

The FCC had relied on its “ancillary” jurisdiction under the Communications Act of 1934. The Act allows the FCC to regulate activity “reasonably ancillary” to the FCC's mandated responsibilities. Under the Act, the FCC may regulate the transmission of signals through the air or wires. The FCC argued that its ancillary jurisdiction allowed it to regulate devices capable of receiving a transmission,

even when they were not engaged in the process of transmission. The court disagreed, stating that "Congress never conferred authority on the FCC to regulate consumers' use of television receiver apparatus after the completion of broadcast transmissions."

The rejection of the FCC's broadcast flag regulations likely moves the fight to Congress, where the Motion Picture Association of America has vowed to once again seek legislation mandating copy protection technology. Of course, the entertainment industry's agenda in the legislature and courts also will be shaped by the U.S. Supreme Court's decision in Metro-Goldwyn-Mayer Studios v. Grokster, No. 04-480, expected soon but not yet issued as of the date of this writing.

Decision of the U.S. Court of Appeals for the District of Columbia Circuit in the case American Library Association v. Federal Communications Commission, No. 04-1037, 6 May 2005

http://pacer.cadc.uscourts.gov/docs/common/opinions/200505/04-1037b.pdf