



American Council on Education  
Office of the President

November 16, 2006

United States Senate  
Washington, DC 20510

**Re: Broadcast Video Flag**

Dear Senator:

The undersigned represent universities, libraries and other institutions that provide higher education to millions of students nationwide. We are writing to express our concern about the broadcast video flag (or “broadcast flag”) provision of H.R. 5252, the Advanced Telecommunications and Opportunities Reform Act. We believe the broadcast flag provision would adversely affect our members’ ability to deliver broadcast media via the Internet to support education and, in particular, the delivery of distance education. We urge you to oppose the inclusion of such a mandate in any legislation during this closing session of Congress. Inclusion in an appropriations bill would be particularly inappropriate. Should the Senate choose to consider a broadcast flag mandate, we believe it should do so in regular order.

Distance education plays a pivotal role in higher education both now and in the future. Nearly 3.2 million students took at least one online course in 2005 – an increase of 35 percent over 2004 – and those numbers are expected to continue growing steadily. An important tool for distance educators is the use of broadcast programming clips. In fact, under the Technology, Education, and Copyright Harmonization Act of 2002 (TEACH Act), Congress expressly allowed the use of these copyrighted clips for online classes.

By prohibiting the redistribution of *any* portion of digital broadcast television programming, the broadcast flag will deny educators this critical and legal teaching tool. In addition, by requiring that new digital television devices be broadcast flag “compliant,” the flag mandate will eventually require our member institutions and students to invest in new, expensive equipment that will not work with older, “non-compliant” devices. Those students who cannot afford the new “compliant” devices will simply be denied access to course content. This is an untenable position that compromises the educational mission of our institutions.

While we appreciate legislative efforts to exempt distance education and certain news and public affairs programming from the broadcast video flag, the exemption language in the Senate bill is inadequate. H.R. 5252 would still require distance educators to ask the Federal Communications Commission (FCC) to certify (albeit on an expedited basis) what devices they may use. This process imposes huge costs on our institutions. First, we would have to develop (or pay for others to develop) a distance-education specific broadcast flag-compliant technology. Then, our institutions would have to retain communications counsel to file the highly technical application with the Commission before defending that application against the likely challenges of content owners.

The news and public affairs programming exception included in H.R. 5252 also falls short of what distance education programs need to accomplish their mission. The exception is given for news and public affairs programming, “the primary commercial value of which depends on timeliness.” However, the broadcaster is given the power to make the initial determination as to whether the commercial value depends on timeliness, which the FCC can only review after the fact. Even if the FCC concludes that the broadcaster wrongly flagged a program, the Commission does not appear to have the power to order the broadcaster to rebroadcast the program without the flag or to otherwise penalize the broadcaster. Thus, as a practical matter, the broadcaster has every incentive to flag this programming. Anything short of a full exemption for news and public affairs programming will force our institutions to incur the costs of challenging broadcasters’ decisions at the FCC.

Our institutions seek to use digital broadcast video content for a perfectly legal reason: the delivery of educational content – particularly through distance education – that promotes social welfare and U.S. competitiveness. The broadcast flag will severely constrain our ability to do so. Thus, we urge you to oppose inclusion of the broadcast flag in any legislation that may be considered in the closing session of this Congress.

Sincerely,



David Ward  
President

DW/mmm

On Behalf Of:

American Council on Education  
Association of American Universities  
EDUCAUSE  
Library Copyright Alliance  
National Association of State Universities and Land-Grant Colleges