

American Library Ass'n v. Federal Communications Comm'n,
No. 04-1037, (D.C. Cir. May 6, 2005)

Introduction

The U.S. Court of Appeals for the District of Columbia Circuit struck down the “broadcast flag” rule issued by the Federal Communications Commission (“FCC”), holding that the FCC did not have the authority to regulate how devices treat digital broadcast signals once they are received. The broadcast flag rule required devices capable of receiving digital television broadcasts to respect a signal in the broadcast stream prohibiting digital retransmission. The goal of the broadcast flag was to protect digital television content by preventing its unauthorized retransmission over the Internet.

In 2002, the FCC began a rulemaking process regarding these devices in anticipation of the television broadcasters’ eventual transition from analog technology to digital technology. Broadcasters and content owners had threatened that the ultimate transition to superior digital technology would not occur, due to the risk of widespread unauthorized copying and redistribution of television programs over the Internet.

To ameliorate this risk, broadcasters and content owners proposed a technology mandate. They argued that the FCC should require devices capable of receiving digital signals – “signal demodulators” – to be redesigned and manufactured to recognize and honor a broadcast flag code embedded in the digital signal. The broadcast flag would direct the receiving device not to output a digital signal unless it were done in an encrypted form. This encryption would prevent the signal from being made available over the Internet. The rule would have governed high-definition television sets as well as peripheral digital tuners. While the rule did not directly regulate computer manufacturers, manufacturers could have been required to comply by contract in order to obtain access to the decryption algorithm that deciphered the encrypted digital signal.

The FCC’s rulemaking generated thousands of comments. While broadcasters and content providers supported the proposal, high definition television manufacturers, computer hardware manufacturers, software developers, library associations and consumer advocacy groups opposed it. Computer hardware manufacturers argued that the broadcast flag was an ineffective means of preventing unauthorized distribution of content because it failed to plug the

so-called “analog hole”: a device could still output flagged content in analog form, re-digitized, and then transmitted over the Internet. Critics also argued that the possibility of many different encryption algorithms presented a problem for manufacturers of downstream devices, who would be forced to choose which algorithms their devices would support, or develop support for all potential algorithms. Manufacturers anticipated millions, if not billions, of dollars in compliance and licensing costs. Additionally, under the content providers’ initial proposal, they as a practical matter would have had the power to determine whether a technology complied with the rule’s requirements.

The library associations and consumer advocacy organizations questioned the necessity of the rule, since broadcasters were already transmitted their signals in digital format, notwithstanding the absence of the flag. These organizations also argued that the final rule would need to permit retransmission in a way consistent with the fair use principles inherent in U.S. copyright law. Because fair use is highly fact-specific, crafting a technology mandate that would prevent unauthorized distribution while permitting such uses presents a conundrum.

The FCC ultimately adopted the Flag Order in November 2003, requiring products sold or distributed on or after July 1, 2005 to comply with the flag. The Order did not mandate a specific technology. Rather, a manufacturer would certify that its technology met certain “robustness” requirements, and the content providers could then challenge the certification. The FCC ultimately would decide whether the technology in fact met the rule’s requirements. After the rule’s issuance, several manufacturers certified that their technology complied with the rule, and one manufacturer’s technology withstood challenge by the content providers.

Nine library and consumer organizations challenged the final order, petitioning for review in the U.S. Court of Appeals for the District of Columbia Circuit. The Motion Picture Association of America (“MPAA”) intervened in support of the FCC, and questioned the petitioners’ standing to challenge the agency’s action. This prompted the court to take the somewhat uncommon step of requesting additional briefing from the parties regarding the petitioners’ standing after the case had been argued.¹

Holding

The court unanimously reversed the FCC. In short order, the court dismissed the MPAA’s standing argument, finding that at least one of the petitioners’ members would be

¹ See *American Library Ass’n v. Federal Communications Comm’n*, 401 F.3d 489 (D.C. Cir. 2005).

immediately harmed if the Flag Order was enforced, and then moved onto the primary legal issue of the case – whether the rule was within the FCC’s jurisdiction. The court held that the agency had exceeded the jurisdiction granted to it by the Communications Act of 1934. In American administrative law, it is axiomatic that a federal government agency only has the powers delegated to it by the U.S. Congress. The Flag Order could be valid only if the FCC had the authority to issue it.

The court ruled that the FCC’s primary grant of jurisdiction only permits it to regulate electronics devices while receiving a television broadcast. After reception, the FCC has no general jurisdiction. The agency had attempted to justify its actions under the ancillary jurisdiction provisions of the Communications Act, but the court found that these provisions did not extend the agency’s power over devices while they were not engaged in radio or wire transmission, nor had the agency argued otherwise during its existence. Because the broadcast flag mandate created obligations after a broadcast was completed, the FCC’s jurisdiction ended before the Flag Order began. The court rejected the agency’s “strained and implausible” efforts to base its jurisdiction on the definitions of the Communications Act, quoting the U.S. Supreme Court for the proposition that “Congress ‘does not... hide elephants in mouseholes.’” In light of the FCC’s lack of jurisdiction to enter the Flag Order, the court reversed and vacated the agency’s ruling.

Commentary

The FCC’s claim that its jurisdiction extended to the regulation of devices after their reception of digital broadcast signals prompted critics to remark that the agency sought to become the “Federal Computer Commission.” In oral argument before the U.S. Court of Appeals for the District of Columbia Circuit, the three-judge panel questioned the agency’s newly discovered powers. Judge Edwards asked the FCC’s lawyer, “Are washing machines next?”

Judge Edward’s comment highlights that the implications of the case are greater than a simple point of administrative law. If indeed the court had ruled that the FCC possessed the authority it claimed, the agency’s ability to regulate consumer electronics and information technology would have expanded dramatically.

The issue now will probably move to the U.S. Congress. Because the D.C. Circuit did not reach the merits of the rule, the supporters of the flag could try to convince Congress simply

pass a statute authorizing the FCC to adopt a broadcast flag rule. Alternatively, to prevent an inevitable challenge of the substance of a rule adopted by the FCC, Congress could enact much of the Flag Order as a statute. Another question is whether the content providers will push a stand-alone broadcast flag bill, or will attempt to attach flag language to another piece of legislation. In sum, while opponents of the broadcast flag have scored a victory, the long run result depends upon whether Congress credits broadcasters' and content owners' claims that the broadcast flag is necessary for digital broadcast content to be made available.

Jonathan Band, Band PLLC, jband@policybandwidth.com

Matthew Schruers, Associate, Morrison & Foerster LLP, mschruers@mfo.com