

Waving the Flag in the Digital Jungle

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Outline

1. Technology
2. Broadcasting
3. Copyright
4. Economics

*Post script – The Electronic Frontier
Foundation*





Technology



- Broadcast flag is the ‘redistribution control descriptor’
 - An electronic notice or label
 - Not a ‘technological protection measure’ in the copyright law sense
- An aspect of the American digital broadcast standard
 - Consensus of copyright, broadcasting, consumer electronics and technology industries



Technology



The flag requests a digital receiver outputs a flagged broadcast only:

- i. In analogue form
- ii. In a form suitable for conventional cable or satellite retransmission provided flag is retained
- iii. In digital form to an authorized digital output technology
- iv. In encrypted digital form to a product controlled by the receiver
- v. In encrypted form to a recording device associated with the receiver
- vi. In low-definition digital format when receiver incorporated with computing equipment



Technology



- Features of the flag request
 - The analogue hole: digital to analogue to digital
 - Third output category has been the subject of an FCC rule-making, authorizing several copying technologies and two technologies which permitted on-transmission to 10 other devices
 - No limit on number of copies able to be made
 - No encryption, no technological compulsion and therefore legacy receivers unaffected



Broadcasting - US



- FCC 2003 regulations
 - A ‘systems mandate’ requiring digital receivers supplied in the US after 1 July 2005 to comply with the flag output requests
 - Objective: to make it increasingly difficult for the ordinary person to make high-definition broadcast content indiscriminately available on the Internet
- Court in 2005 finds regulation *ultra vires*
 - Neither legislative reform since nor likely soon



Broadcasting - Oz



- Work under our European DVB standard is formulating the copy protection content management system (CPCM)
 - CPCM is essentially a mere ‘flag’
- Mandate under *Broadcasting Services Act?*
 - Existing powers in the Australian regulator do not extend to mandating flag compliance
 - However new powers in Part 9A (‘technical standards’) or Part 9B (‘industry standards’)



Copyright



- Flags are not technological protection measures in the sense recognised by copyright law
 - Flags are open standards which do not need to be circumvented
 - Flags are not recognised under the draft WIPO Broadcasters' Treaty
 - Flags are not recognised under the Australia-US Free Trade Agreement



Economics - US



- Content owners' choice in a no-flag digital world:
 - Refusal to deal with uncontrollable digital free-to-air broadcasting and effect distribution through other protected channels
 - Free-to-air viewers get second-rate content
- Little possibility in the US of statutory licence compulsion
 - Elsewhere?



Economics - Oz



- Possibility of ‘flag regime export’
 - Highly speculative; dependent upon future US law reform
- If US were to seek to export a future flag regime
 - Technology infrastructure likely to be in place (CPCM flag)
 - Legal infrastructure likely to be in place (Parts 9A or 9B of the *Broadcasting Services Act*)



The EFF position



- The broadcast flag regime would both
 - Leak like a sieve, and
 - Prejudice fair use rights to copy and share
- The EFF solution

‘even if consumer broadband bandwidth were to increase, content owners could obtain additional protection for their DTV broadcast content by requiring that broadcasters transmit in higher resolution formats ...If consumer broadband capacities were to increase in the future, [a broadcaster] could begin broadcasting at higher resolutions, making it more difficult to redistribute the full-resolution content via the Internet’