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BROADCAST AND AUDIO FLAG

HEARING

BEFORE THE

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION UNITED STATES SENATE

ONE HUNDRED NINTH CONGRESS

SECOND SESSION

JANUARY 24, 2006

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SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

ONE HUNDRED NINTH CONGRESS

SECOND SESSION

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BROADCAST AND AUDIO FLAG

TUESDAY, JANUARY 24, 2006

U.S. SENATE,
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION,
Washington, DC.

The Committee met, pursuant to notice, at 10 a.m. in room SD–562, Dirksen Senate Office Building, Hon. Ted Stevens, Chairman of the Committee, presiding.

OPENING STATEMENT OF HON. TED STEVENS, U.S. SENATOR FROM ALASKA

The CHAIRMAN. Good morning. Our Co-Chairman will be along in a few minutes, but he has asked that we start. So, let me thank you all for coming today.

Some time ago, a group of us joined together and asked the FCC to deal with the issues before us now, and this broadcast flag was developed to protect over-air digital television programming from piracy. The FCC adopted that broadcast flag rule, which the consumer electronics industry had begun to implement by developing devices that complied with its requirements. But the court has struck down that regulation and held that Congress had not given the Commission authority to promulgate the rule. And that's what brings us here today, and we are trying to address the question of whether Congress should provide the FCC the authority to put the rule back in place.

Groups like the American Library Association are concerned that if Congress gives the FCC the authority to enforce the broadcast flag, the rights of consumers and educators to copy, watch, and share programs the way VCR recordings are shared will be threatened. Likewise, some consumers want to make sure that they can continue to exercise their fair-use rights to record video programming for personal use.

It's our task in this Committee to consider industry and fair-use concerns and to try to find the proper balance between them. Determining how to protect audio content in the age of digital radio and satellite has only recently gained greater attention. The FCC has not yet acted on that front.

The creative-content side and the distribution side of the music industry should seek mutual ground that supports business models for both. Whether it is an audio flag or an alternative, we seek to balance between them and encourage innovative digital services that spur jobs, economic growth, and consumer options like the iPod against ensuring that the creative genius that brings us all

the great pleasure to earn a return on creative investment is encouraged.

Now, Senator Burns, do you have an opening statement?

STATEMENT OF HON. CONRAD BURNS, U.S. SENATOR FROM MONTANA

Senator BURNS. I do not, Mr. Chairman, but I appreciate you having this hearing today, and your insight on this issue.

With the advent of digital technology, what we thought would uncomplicate our world now is complicating it. Before, as you know, we always talked about a lot of things, but we tend to talk more about bandwidth than anything else when we went to digital, because we could do some things, but we couldn't identify signals. And now we are finding that ones and zeros are hard to identify, whether it's voice, data, or video, and now we're getting in a new era of really branding whose signal it is now, that is moving, rather than the technology.

So, this is a timely hearing. It is something that the industry itself should come to some sort of a conclusion that would be of benefit to everybody, and with the consumers always in mind. But it seems as though that hasn't been done yet. And I would wonder, when government wanders into this area, there are always unintended consequences.

And so, this hearing is timely, and I thank you for having it.

The CHAIRMAN. Thank you very much.

I should state that, coming from a State like Alaska, as I do come from Alaska, one-fifth the size of the United States, we have tried to implement our education system utilizing distance learning to the maximum extent possible. So, that's one of our greatest concerns in this hearing today.

Our first panel is Andy Setos, President of Engineering, Fox Entertainment Group, Los Angeles; Jonathan Band, Counsel at the American Library Association; Thomas Patton, Corporate Vice President for Government Relations at Philips Electronics North America Corporation; and Leslie Harris, Executive Director for the Center of Democracy and Technology, in Washington.

Mr. Setos, we'll call on you first.

STATEMENT OF ANDREW SETOS, PRESIDENT OF ENGINEERING, FOX ENTERTAINMENT GROUP

Mr. SETOS. Good morning, Mr. Chairman and Members of the Committee. My name is Andrew G. Setos, and I am the President of Engineering of the Fox Entertainment Group and the co-inventor of the broadcast flag. Thank you for inviting me to make a contribution to this hearing.

As the great promise of the Internet blossomed several years ago, I became alarmed at the simultaneous phenomenon of abuse to copyrighted works. Digital works, such as music on CDs, that were, by necessity, distributed without the protection of encryption, were vulnerable to looting, on a global scale.

The wisdom of protecting digital content with encryption is all around us—in such Internet appliances as Apple's iPod, Sony's PlayStation Portable, and the new RCA Lyra by Thomson. Traditional multichannel media, such as satellite and cable, and their

new competitors from the telecom sector are also encrypting their digital transmissions. The reason is simple: the threat of piracy undermines every legitimate distribution business model.

However, born in a more naive age, digital broadcast television had not contemplated such protection. This committee had already put the DTV transition in motion, and millions of consumers, such as myself, had started enjoying high-definition broadcasts of our favorite programs and sporting events. This was a dilemma of serious proportions. Here I was aggressively participating in the rollout of DTV within FOX, yet had come to realize that, as formulated, it had a fatal weakness.

What to do? Changing the DTV standard to employ encryption was simply unthinkable, as it would introduce a dangerous delay in the DTV transition and disenfranchise the most fervent believers in high-definition television. However, without some technical form of content protection, we all would be guilty of unwittingly institutionalizing the slow demise of local TV broadcasting. The ultimate reason was clear in my mind. Without such protection, producers of high-value content would become leery of licensing to local digital TV broadcasters, and that would jeopardize the viability of this unique American institution.

To meet this challenge, our goals were clear, if daunting. One, we could do nothing that would obsolete or change, in any way, the features of a single DTV product that had already been sold to consumers. Two, we could not interfere with the consumer's right to make time-shift recordings in their homes. Three, our approach could add virtually nothing to the real cost of the consumer product. Four, the proposal had to be flexible and efficient to stimulate innovative technologies and take advantage of existing commercial architectures. Five, it had to be flexible enough to embrace the Internet. And, finally, six, since government regulation would be needed, something that we always try to avoid, it had to be adequately focused to be practical.

It took a month for my colleague Scott Hamilton and I to conceptualize and diagram our idea, but what ensued was a 5-year odyssey that brings me here before you today. On the way, Intel made an important technical contribution. We built consensus, first, one on one with companies such as Thomson, IBM, Sony, and Panasonic. We petitioned the Advanced Television Systems Committee to standardize the technical details of the flag itself, which they did. The Broadcast Protection Discussion Group was formed, which I had the privilege of co-chairing, along with representatives from Intel and Mitsubishi. This open forum attracted dozens of members from worldwide industry and other interested parties. I met, for over a year, with meetings lasting into the wee hours of the morning, and delivered a consensus document to the FCC for their consideration.

At the FCC, an intensely public process of review transpired, which resulted in the FCC adopting the broadcast flag regulation. Unfortunately, the Federal court struck down the regulation, solely on jurisdictional grounds.

Along the way, there have been many critics. Most of the concerns were due to misunderstandings. My favorite was that the flag would ban home recording of television. Of course, it does not. And

to those who would say that high-definition content is too cumbersome to indiscriminately redistribute over the Internet, two points to ponder. Twelve years ago, it took 8 hours to download a single song from the Internet. Now it takes but moments.

And the CEO of Verizon, Ivan Seidenberg, recently declared his target vision for broadband into the homes of his subscribers is 100 megabits a second, a blinding speed that could download a looted one-hour high-definition episode of FOX's "24" in a convenient four-and-a-half minutes.

The legislation we are seeking ratifies the billions of dollars that local TV broadcasters have spent to do their part to make the DTV transition successful. Local TV broadcasts, offered free to the consumer, deserve and need to have content protection in order to be competitive with the national pay-television offerings, such as HBO, ESPN, video iTunes, and MovieLink.com, in obtaining high-value content.

No other digital media has emerged that has dedicated itself to localism. Even those consumers that subscribe to pay television rely heavily on local TV broadcasts for their news of local events, local political races, and local high-school sports. Local television broadcasts are part of our heritage. They are uniquely American.

It is essential that the television shows we transmit have protection against the indiscriminate redistribution across networks such as the Internet. The broadcast flag is the mechanism that will achieve that goal without any unwanted side effects.

Thank you, once again, for the opportunity to address you on this important matter. I look forward to answering any questions you may have.

[The prepared statement of Mr. Setos follows:]

PREPARED STATEMENT OF ANDREW SETOS, PRESIDENT OF ENGINEERING, FOX ENTERTAINMENT GROUP

Good morning, Chairmen and Members of the Committee. My name is Andrew Setos, and I am the President of Engineering of the Fox Entertainment Group. Thank you for inviting me to participate in this hearing.

As this Committee is well aware, Congress will soon mandate that broadcast television stations abandon the analog spectrum and begin broadcasting exclusively in digital form by 2009. This final step in the DTV transition will bring many benefits to consumers, by eliminating the current confusion that is inevitable in a mixed analog/digital world. However, the benefits of the digital transition will be meaningless to those same consumers unless we can also assure them that high-quality content will continue to be available to them on free over-the-air broadcast. This requires that DTV stations themselves be able to assure content providers of a reasonably equivalent level of protection to that provided by cable and satellite—and even the Internet. At the moment, DTV stations cannot provide this assurance, because DTV is legally obligated to broadcast content in-the-clear with no protection, while cable, satellite and Internet service providers offer content providers a wide variety of conditional access- and DRM-based content protection systems. This imbalance places the long-term viability of free over-the-air digital television in doubt and is certainly not in the public interest.

To correct this imbalance, it is essential that DTV stations be able to offer content providers some level of protection against indiscriminate redistribution across networks such as the Internet. The broadcast flag regulation promulgated by the FCC in 2003, after a years-long process of discussion and debate, is the one mechanism that can achieve that goal, and accordingly, we urge you to reinstate the regulation as soon as possible.

The past decades have seen an explosion in consumers' options to enjoy audio-visual content. Focusing on television alone, where there were once just three broadcast television networks, we now have hundreds—if not thousands—of cable, sat-

ellite, cable-like and Internet-based services. It seems that every day there is news of a new and innovative way for consumers to enjoy television programming, such video-on-demand services (VOD), video iPod and even watching shows on cell phones.

All of these "television services" compete by offering consumers something that they want to see. Unfortunately, the digital revolution has also created the opportunity for theft of that content on an unprecedented scale. Millions of users of so-called "peer-to-peer file-sharing services" upload and download copies of ad-free favorite television shows, like *The Simpsons, House, American Idol*, and *24*, as well as popular sporting events, over the Internet. These programs are, of course, the lifeblood of over-the-air broadcast television stations, which rely on high quality content to attract viewers.

Currently, digital free over-the-air broadcasts are legally required to be transmitted "in the clear," with no protection whatsoever from being redistributed. The process to upload content to the Internet—formerly a process that could be performed only by a relatively sophisticated and motivated pirate—is far easier, and more accessible today than it was even a few years ago. And for those who point out—admittedly, correctly—that DTV signals take a long time to be captured, compressed and redistributed over the Internet today, here is a cautionary tale: Twelve years ago, it took eight hours to download a single song; today, an individual with no computer savvy can do it in less than a minute with a click of the mouse.

Cable, satellite, ISP/telco, and other distributors of television programming have already recognized how important this issue is to ensure the digital future by voting with their dollars. These companies have spent millions on the design, deployment and maintenance of increasingly sophisticated content protection systems based on conditional-access, link protection or software DRM-based technologies. By contrast, DTV stations, at present, are legally barred, and from a practical standpoint are unable to offer content providers anything comparable. It is not hard to predict that without additional measures to safeguard high-value digital content, broadcast stations will soon find it difficult or even impossible to attract high-value programming. Sports leagues and entertainment programming producers will, naturally, choose to offer their programs on a service that can offer protection against indiscriminate redistribution.

Although some so-called "consumer groups" state that the enactment of broadcast flag legislation would be detrimental to the viewing public, which we believe it does not, the real threat to consumers who currently enjoy and benefit from watching their local broadcast channels is the slow demise of free over-the-air broadcast. Without national content, local broadcast stations would struggle to attract viewers and ultimately to stay in business. For millions of Americans, local broadcast stations are the sole source of news and entertainment. But even for consumers who subscribe to a cable or satellite service, local broadcast stations are the only source of televised local news coverage and editorial content. They televise local sporting events, weather reports (including emergency weather reports), and traffic updates. They are the source of information about community issues and local political races. Local television broadcasts are part of our heritage. They are uniquely American, and they are democratic (small "d") at their essence.

Foreseeing these challenges and understanding the value of local television, I, along with my engineering colleague, began to look at how we could protect in-the-clear digital broadcast. As we looked at possible solutions we set up a basic set of criteria:

1. The regime should be invisible to the consumer.
2. The regime should allow consumers to make time shifted-copies of free over-the-air television programs.
3. The regime should be flexible enough to allow for the competitive market place to develop innovative protection technologies as well as allow for content to be transmitted securely in a network environment.
4. The regime should be of *de minimis* cost to the manufacturer and thus to the consumer.
5. The regime should work at the smallest component part of the digital ATSC receiver to ensure that it had no impact on any other component part of a computer or consumer electronic device.
6. The regime should not obsolete the digital television receivers that were already in the market place and in consumers' homes.

After settling on a solution that met all of these goals that we now call the broadcast flag, we presented this regime to a group of CE and IT manufacturers. Thus began the long process which evolved into a large and more diverse group of con-

sumer electronics, computer technology, and video content companies known as the Broadcast Protection Discussion Group.

That conceptual framework developed by the Broadcast Protection Discussion group was the seed for the FCC's broadcast flag regulation. But it took time to get there, and it took a great deal of work—almost three years. Indeed, in preparing for this hearing, I was reminded that four years ago, the President and Chief Operating Officer of News Corporation, Peter Chernin, sat before this very Committee and expressed his hope that cross-industry negotiations would yield a solution acceptable to all of the participants. I am pleased to sit here today and report that they did. Over the years since Mr. Chernin's testimony in 2002, the members of the working group crafted the basic outline of the regulatory regime. Even so, the FCC didn't accept it whole cloth, but following still more discussion and debate—a process in which took into account the views of many consumer groups—ultimately constructed a regulation that most of the parties to the negotiations viewed as an acceptable compromise of interests. Those that continued to disagree with substantive details of the regulation filed motions to reconsider and appeals. These were held in abeyance pending the outcome of an appeal based on a challenge to the FCC's jurisdiction.

Unfortunately, in May of 2005, the D.C. Circuit ruled that the FCC lacked jurisdiction to enact the broadcast flag regulation. The Court did not offer any view on the substance of the flag, for that issue was not before it. Nor did the Court offer any view on the wisdom of the broadcast flag as a matter of policy, for that issue is not within its purview. Rather, the Court held merely that the FCC could enact such a regulation only if Congress authorized it to do so.

The broadcast flag legislation that we support does just that: it reinstates the FCC's broadcast flag regulation, thereby reinstating the carefully crafted multi-industry pact. It also reinstates the pending motions to reconsider and the substantive appeals, leaving all parties exactly where they were before last May's ruling.

Although the regulation has drawn criticism, that criticism is, in my view, misguided or misinformed. Much of it can be dispensed with by focusing on what the flag will *not* do:

- It will not restrict home recording of DTV.
- It will not restrict the movement of recorded DTV shows in the personal digital network, no matter if you are upstairs at home, in your car or boat, or at a permanent or temporary vacation spot. The FCC has already approved some flag-compliant technologies to enable that movement.
- It will not restrict the making of multiple physical copies. It does not restrict the unending physical copying of those copies. And it does not restrict where such physical copies may be played or to whom they are lent or given.
- It will not render obsolete or change the feature set of even one DTV product that has been sold to consumers to date. Not one.
- It will not affect the viewers' experience as they view their televisions or make their home recordings.
- It will not stifle innovation. Nor will it establish the FCC as the "Federal Computer Commission." The FCC's role under the regulation is simple and narrow: to consider proposals for specific protection methods for DTV content containing the broadcast flag and to approve those that provide a reasonable level of protection. Prior to the decision striking down the regulation, the FCC has already proven its ability to ably exercise this simple, well-defined role by approving 13 different protection methods—many of them developed precisely for the purpose of protecting DTV. This is stimulation of innovation—not stifling of it.

Indeed, a broad range of digital devices, including digital recorders and personal digital networking devices, already comply with the flag's rules. Examples include PVRs, D–VHS, DVD recorders, and computers and related technologies. Many other devices that do not even exist yet can be made to comply with the flag's rules. Wired or wireless, software or hardware, any future innovation complying with the flag can receive, record and otherwise process digital television signals.

Ultimately, the broadcast flag regulation will have little or no impact on consumers' legitimate consumption and enjoyment of free over-the-air digital television. It will not interfere with a consumer making unlimited copies in a variety of media; it will facilitate a variety of home networking technologies and a variety of reasonable remote access technologies, as well as new technologies that have not yet even been conceived. In addition to protecting local broadcasting and helping to ensure the viability of the digital transition, the broadcast flag regulation will stimulate American technological prowess in content protection and management technologies.

Thank you once again for the opportunity to address this important matter. I would be pleased to answer any questions.

The CHAIRMAN. Thank you very much, Mr. Setos.

Our next witness is Mr. Band, Counsel, American Library Association.

STATEMENT OF JONATHAN BAND, COUNSEL, AMERICAN LIBRARY ASSOCIATION; ON BEHALF OF THE LIBRARY COPYRIGHT ALLIANCE

Mr. BAND. Mr. Chairman, Members of the Committee, the Library Copyright Alliance, which includes the American Library Association, appreciates this opportunity to explain our concerns with the FCC's broadcast flag rule. We urge the Committee to address these concerns before adopting broadcast flag legislation.

The five national library associations in the LCA were among the petitioners that successfully challenged the broadcast flag rule in the D.C. Circuit. The LCA believes that the rule would prevent a wide range of lawful uses of broadcast materials, to the detriment of the public.

Whether we like it or not, television is part of the fabric of American life. It remains a major source of news, and both reflects and influences cultural trends in our society. Effective public discourse often requires the copying and redissemination of broadcast content. For example, a website seeking to demonstrate the disparate treatment by news programs of black "looters" and white "foragers" in the wake of Hurricane Katrina would need to include clips of television news broadcasts. The flag would interfere with these lawful uses.

Libraries are most directly concerned that the flag would undermine the Technology, Education, and Copyright Harmonization Act passed by Congress in 2002 to enable distance education in the digital era. The TEACH Act permits educational institutions to use copyrighted works in distance-education courses conducted over the Internet.

Unfortunately, the broadcast flag threatens the operation of the TEACH Act. Under the TEACH Act, an educator can include a clip of a television broadcast in distance-ed materials. For example, a course on criminal procedure could include a clip from "Law & Order," where the detectives conduct a search claimed by the defendant to be unlawful. The broadcast flag, however, would prevent the educator from retransmitting that clip over the Internet.

The FCC's rule made no accommodation for distance education. If Congress ultimately decides to authorize the FCC to adopt the flag rule, Congress should ensure that the rule includes appropriate exceptions for lawful uses. This could be achieved by prohibiting the flagging of certain kinds of content, such as public-domain materials, news and public-affairs programs, and educational shows.

Furthermore, libraries and educational institutions should have access to receiving devices that do not respond to the flag. We need this special TEACH Act exception in order to make legitimate uses of content that does not fall within the public-domain or public-affairs exceptions. The Committee should consider extending these exceptions to other uses permitted by the Copyright Act.

Carefully drafted exceptions along these lines will not prejudice the legitimate interests of the copyright owners. Even if certain programs are not flagged, they typically will still be covered by copyright. And then, if a library abuses these exceptions, it can be sued for copyright infringement.

We have reviewed the discussion draft circulated by Senator Smith. The exception for customary uses of broadcast content by consumers is a step in the right direction, but it does not go far enough for libraries. The exception applies to digital radio, but not digital television. It applies to consumers, but not to libraries or educational institutions. It is unclear whether the TEACH Act, passed in 2002, constitutes an historic use.

Finally, the details of protecting fair use should not be delegated to any agency, let alone the FCC, which has no copyright experience.

The Internet has the potential to dramatically expand distance education, providing special benefit to students in rural areas underserved by traditional forms of education. However, the broadcast flag could impede the development of robust distance-ed materials by preventing the use of the content most compelling to today's students: television programs. The flag rule allows an independent agency to overrule the clearly expressed rule of Congress with regard to distance-ed and other lawful uses.

We look forward to working with the Committee to fashion modest exceptions to the rule. Thank you for your attention.

[The prepared statement of Mr. Band follows:]

PREPARED STATEMENT OF JONATHAN BAND, COUNSEL, AMERICAN LIBRARY ASSOCIATION; ON BEHALF OF THE LIBRARY COPYRIGHT ALLIANCE

The Library Copyright Alliance (LCA) appreciates the opportunity to explain to the Committee our specific concerns with the Federal Communications Commission's (FCC) broadcast flag rule. We urge the Committee to address these concerns before adopting legislation authorizing the FCC to promulgate the rule.

The LCA consists of five major library associations—the American Association of Law Libraries, the American Library Association, the Association of Research Libraries, the Medical Library Association, and the Special Libraries Association. These five associations collectively represent over 139,000 libraries in the United States employing 350,000 librarians and other personnel. The five associations cooperate in the LCA to address copyright issues that have a significant effect on the information services libraries provide to their users. The LCA's mission is to foster global access to information for creative, research, and educational uses.

The national library associations that constitute the LCA were among the petitioners that successfully challenged the FCC's broadcast flag rule. After the Motion Picture Association of America questioned the petitioners' standing to file suit, librarians at Vanderbilt University, North Carolina State University, University of California-Los Angeles, and American University filed affidavits with the court explaining and illustrating how the broadcast flag, if it went into effect, would hamper their use of broadcast materials for teaching and scholarship. Copies of these affidavits are attached.

The D.C. Circuit held that at least one of these librarians had standing, which in turn conferred standing to the organization of which the librarian was a member. On this basis, the court was able to reach the merits of the challenge. Although the court struck down the flag rule on the grounds that the FCC did not have the authority to issue it, the library concerns with the rule go far deeper than the proper scope of the FCC's jurisdiction. Specifically, the rule would prevent a wide range of lawful uses of broadcast materials, to the detriment of the public. For this reason, the LCA welcomes this opportunity to explain to the Committee how the rule will have this negative impact.

Whether we like it or not, television is part of the fabric of American life. It remains a major source of news, and both reflects and influences cultural trends in

our society. Effective public discourse often requires the copying and redissemination of broadcast content. For example, a website seeking to demonstrate the disparate treatment by news programs of black "looters" and white "food liberators" in the wake of Hurricane Katrina would need to include clips of television news broadcasts. Likewise, an organization dedicated to preserving traditional family values in American society might distribute over the Internet segments from *Desperate Housewives* and *The O.C.* to demonstrate the corrupting influence of television.

The flag would interfere with these lawful uses. Libraries are most directly concerned that the flag would seriously undermine the Technology, Education and Copyright Harmonization (TEACH) Act passed by the 107th Congress to facilitate distance education in the digital era. The TEACH Act sets forth conditions under which government bodies and accredited nonprofit educational institutions can use copyrighted works in distance education courses conducted over the Internet. The Act contains a variety of procedural safeguards to ensure that the interests of the copyright owners are not harmed.

Unfortunately, the broadcast flag threatens to frustrate the operation of the TEACH Act. Under the TEACH Act, an educator can include a clip of a television broadcast in distance education materials. For example, a course on criminal procedure could include a clip from *Law & Order* where the detectives conduct a search later claimed by the defendant to be unlawful. The broadcast flag, however, would prevent the educator from retransmitting that clip over the Internet. Contrary to the intent of Congress reflected in the TEACH Act, the broadcast flag will prevent the use of an entire category of works—high definition television programs—in distance education.

The FCC made no accommodation for these lawful uses. If Congress ultimately agrees with the FCC that digital television broadcasts are vulnerable to widespread infringement, and that a broadcast flag is the best way to prevent such infringement, Congress should ensure that any flag regime includes appropriate exceptions for lawful uses. This could be achieved by prohibiting the flagging of certain kinds of content such as public domain material; news and public affairs programs; and programming designed to serve educational and informational needs.

Furthermore, a governmental body or accredited nonprofit educational institution should be permitted to take actions as are reasonably necessary to make a transmission for distance education as authorized under the TEACH Act, including leasing or purchasing a device that does not detect or otherwise respond to the broadcast flag. It should also be legal to manufacture or import such a device solely for lease or sale to such a body or institution. Libraries and educational institutions need this special TEACH Act exception in order to make legitimate uses of content that does not fall within the public domain or public affairs exceptions. Additionally, the Committee should consider extending this exception to other educational and research uses permitted by the Copyright Act.

Carefully drafted exceptions along the lines discussed above will not prejudice the legitimate interests of copyright owners. Even if certain programs are not flagged, they typically will still be covered by copyright; and if a library or educational institution abuses these exceptions, it can be sued for copyright infringement.

The Internet has the potential of dramatically expanding the quantity and quality of distance education programs at the primary, secondary, and higher education levels. In recent years libraries and educational institutions have begun to tap into this potential, and students in rural areas underserved by traditional forms of education have been among the major beneficiaries. Unfortunately, the broadcast flag could impede the development of robust distance education curricula by preventing the use of the content most compelling to today's students: television programs. The flag rule in its current form allows an independent agency to overrule the clearly expressed will of Congress with regard to distance education and other lawful uses. Modest exceptions can address this serious concern.

We look forward to working with the Committee on this important matter. I would be happy to answer any questions the Committee may have.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

American Library Association, et al., Petitioners, v. *Federal Communications Commission, et al., Respondents.*
Case No. 04–1037

AFFIDAVIT OF PAUL M. GHERMAN

My name is Paul M. Gherman. I am the University Librarian at Vanderbilt University in Nashville, Tennessee. It is my responsibility to oversee the Vanderbilt Television News Archive, which operates as a division of the Vanderbilt University Library. My business address is Vanderbilt University, 611 General Library Build-

ing, 419 21st Avenue South, Nashville, Tennessee 37215. I am over the age of eighteen and otherwise competent to testify.

Among other harms, the Federal Communications Commission's broadcast flag regulation will prevent Vanderbilt University from streaming licensed broadcast news over the Internet to subscribers, as we do today for over 100 subscribers to our collection of certain network news programming. It will also preclude us from making our collection available to the Vanderbilt faculty and student body over the thirty-three computers that are currently able to electronically access the archive from the campus library.

The Vanderbilt Television News Archive

The Television News Archive at Vanderbilt University ("Archive") is the world's most extensive and complete archive of television news. The Archive's mission is to help preserve our nation's cultural heritage through the documentation of national television news coverage. The archive serves both as a permanent repository of national news programming and as an important resource for scholars, researchers, and journalists interested in contemporary history and television news journalism. Vanderbilt University Library is a member of the Association of Research Libraries ("ARL"), and as a unit of the library, the Archive is as well. ARL is a petitioner in this case, and an association to which we have belonged for more than twenty years. I am also a member of the American Library Association, another petitioner in this proceeding.

The Archive's collections consist of television news programming recorded from broadcast and cable television signals. The Archive began off-air recording in 1968. The Archive records the nightly news broadcasts from all three major networks (ABC, CBS, and NBC). In 1995, the Archive began recording programming from the cable news network CNN. As of January 2005, the Archive also records programming from FOX news as well.

In addition to recording nightly news coverage, the Archive also traces news coverage of major historical events in-depth. For example, the Archive includes complete, 24-hours-a-day, 7-days-a-week records of the news coverage for the Watergate scandal hearings, the 2000 presidential election, and the tragedy of September 11, 2001. The Archive also includes extensive coverage of U.S. presidential campaigns, both wars in Iraq, the war in Afghanistan, and every Democratic and Republican National Convention and State of the Union address since 1968.

Today, the Archive's collection holds over 40,000 hours of news broadcasts. The Archive indexes and abstracts each broadcast to the individual story level. The Archive's holdings also include all advertisements played during the captured news broadcasts. The Archive is the only publicly accessible, aggregate collection of television news in existence in the world today.

Over 20,000 registered patrons located worldwide use the Archive for research, studies, and other personal uses. The Archive loans videotape copies of individual news segments, complete news programs, and compilations to its patrons, who return the copies for destruction following use. In addition, the Archive's entire collection is made available via video on thirty-three computer terminals physically located within the Archive and university library on campus. The Archive also has 140 library subscribers that are able to access our extensive collection of one network's programming over the Internet. The Archive is interested in developing similar arrangements with the networks.

The Archive's Operations

To collect and preserve television news programming, the Archive uses a multistep process. News programs are captured off-air using analog television tuner cards embedded within the Archive's computers. Archive staff then use encoding cards, also located within the computers, to convert the captured broadcast signal into MPEG video files. At this point, "watermark" data are added onto the MPEG files so that the date, time, name of the news network, and a running clock appear on the center of the screen when the program is viewed. These watermark data are also used for indexing and abstracting purposes.

Once the broadcasts have been encoded and watermarked in MPEG form, the Archive staff begins the storage archival process. First, the staff uses in-house DVD burners to place the broadcasts onto physical discs for storage. These disks constitute our primary method of archival. They are also what we use to make copies we lend to our patrons upon request.

Next, Archive staff periodically transfer the processed MPEG files of all captured newscasts onto high-volume removable disk drives. The Archive lends these disk drives to the Library of Congress in Washington, D.C., which then transfers the files to its own archival system and returns the disk drives to Vanderbilt.

In addition to these two forms of storage, the Archive makes a reduced-resolution copy of the entire collection, which is stored on a computer server in a centralized location at the archive. When a patron accesses the collection in video from one of Vanderbilt's local computer terminals, it is this "down-rezzed" version of the broadcasts that the patron accesses.

Harm from the Broadcast Flag

If it is allowed to remain in place, the FCC's broadcast flag rule will harm the Vanderbilt Television News Archive in a number of ways.

To conduct our core function, news archiving, the Archive has invested well over $50,000 in recording, computer, and other electronic equipment to complete our primary recording studio—funds obtained largely from research and philanthropic grants and gifts. Currently, the Archive is in the process of constructing a redundant recording studio, at approximately the same cost. However, if the broadcast flag is allowed to remain in place, the Archive's substantial investment in its equipment will be jeopardized, because none of the digital equipment that the Archive currently owns is flag-compliant.

For instance, none of the Archive's MPEG-encoding cards are designed to recognize or comply with the broadcast flag, nor are any of our multiple DVD burners. Likewise, none of the multiple local computer terminals, or the server where we store our streaming newscasts, will recognize the flag. Under the flag rule, however, broadcasters have sole discretion in deciding whether to embed the flag within broadcast programs. Consequently. if the flag rule is allowed to remain in effect, the Archive will be forced to replace our current equipment in order to conduct the same activities we do today. Because none of our digital video equipment is flag-compliant, we would not be able to use this equipment to store or copy digital television broadcasts that are embedded with the flag.

We would thus be forced to buy entirely new equipment—not just new encoding cards and DVD burners, but also a brand new server and computer terminals for our local streaming operation, as well as new removable disk drives for use with the Library of Congress—in order to continue the Archive's operations as we conduct them today. This is because the broadcast flag will not allow a marked digital broadcast to be passed on to any "downstream" device that can read the digital television content but will not recognize and obey the flag. Consequently, all of the Archive's equipment would be rendered inoperable for their current uses. Particularly since the Archive acquired much of this equipment as recently as 2003 and 2004, being forced to replace what is essentially brand-new equipment that we acquired at a substantial cost would be an extremely onerous burden for a non-profit educational archive operating on a limited budget.

Indeed, Congress has granted the Archive a specific exemption to the Copyright Act that allows us to "reproduc[e] and distribute[e] by lending . . . a limited number of copies and excerpts" of audiovisual news programs. 17 U.S.C. § 108(0(3). By constraining how we carry out our mission of providing thousands of individuals access to the important cultural, political, and historical resource that we manage, the broadcast flag not only places a significant financial burden on the Archive, it conflicts with Congress' decision to extend this legal right.

I declare under penalty of perjury that the foregoing is true and correct.

PAUL M. GHERMAN.
Executed: March 23, 2005.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

American Library Association, et al., Petitioners, v. *Federal Communications Commission, et al., Respondents.*—Case No. 04–1037

AFFIDAVIT OF DIANA VOGELSONG

My name is Diana Vogelsong. I am the Associate University Librarian for Information Services at the American University ("AU") in Washington, D.C. Both I and the American University Library are members of the American Library Association ("ALA"). The ALA is one of the petitioners in this proceeding. AU is an accredited non-profit educational institution as defined in 17 U.S.C. § 110. My business address is American University Library, 4400 Massachusetts Ave, N.W., Washington DC, 20016–8046. I am over the age of eighteen and otherwise competent to testify.

The broadcast flag rule, if permitted to take effect, will be harmful to the ability of our library to carry out its functions in two ways. First, the flag will force our library to replace DVD burners and players that do not comply with the flag's restrictions. These machine are used to record and play segments of broadcast television recorded off the air in classroom instruction. Second, the flag will preclude

me from providing copies of broadcast clips over the Internet to the AU student body, through password protected courseware in conjunction with ongoing coursework.

Broadcast Use at AU

I serve as the second-in-command librarian at the AU library. In this position, I coordinate the library's public services and associated collections, as well as supervise and coordinate with other library faculty and staff. The areas I am responsible for administering provide assistance to both undergraduate and graduate students with scholarly research, and aid faculty members in providing materials for their own research and courses. In particular, I supervise the division of the library that includes Media Services, which collects and loans digital, audiovisual, and other media resources to our student and faculty patrons.

On a regular basis, we record broadcast programming off the air for use in classroom instruction at American University. Typically, we make these recordings in response to the request of an AU professor or other instructor teaching at the university. For instance in the past we have recorded presidential addresses and press conferences for government and public speaking classes, major news events for communications and history classes, PBS *Frontlines* (documentaries) for government and international affairs classes, and nightly news and sporting events for journalism classes.

Recording this broadcast material for use in AU courses is an ongoing process. Because copyright law allows libraries to make only limited copies for specific educational uses, we destroy the copies we make after use. Typically, this is following display in-class or, if the professor requests that we keep the copy of the segment on reserve for viewing by students outside of normal class time, at completion of the semester.

We have been making broadcast recordings available to our Faculty for 23 years, and plan to continue this valuable service indefinitely. The AU faculty consistently report that use of these broadcast materials in their courses enhances their ability to teach and enriches the students' experience, both by making classroom discussions more interactive and contemporary, and also by adding emerging information and a contemporary flair to the course material that often cannot be achieved with textbooks and scholarly articles alone.

On occasion, we also assist AU faculty by converting videotape clips to a streaming video format for delivery to students, on a password-protected, class-specific basis, using Blackboard course software. Once a student has signed in to the appropriate page on AU's Blackboard site using her password, she can view the clip in "streaming" format on the computer in her dorm room, at a campus computing center, or in the library itself. To date, we have done this only with video materials from our collection; however, we envision licensing content that we tape off-air for the same purpose.

The Broadcast Flag

Currently, we record materials for our faculty using analog video cassette recorders ("VCRs"). The faculty then play the recorded broadcast segments in their classrooms using a VCR and television. However, we recently began converting our recording process from analog to digital, so that all broadcast materials we record for faculty members will be recorded, or "burned," onto optical computer discs, or "DVDs." We expect this transition process to be completed by the end of Summer 2005.

Once we have completed the transition to digital recording, faculty members asking the library to record broadcast materials for classroom use will need to play their materials using machines capable of displaying digital audiovisual signals. AU currently owns nearly one hundred DVD players that can be used for this purpose, with no additional expense to the university.

However, once the digital transition is complete, and if the broadcast flag takes effect, none of the DVD players that AU makes available to its faculty for classroom instruction will be able to work for the primary purpose we acquired them—teaching our students. Any broadcast flag-compliant digital tuner would not permit recording or playing of digitally broadcast television programming using the DVD-burning or DVD-playback equipment that we now have, even though the uses that we make of the broadcast materials are clearly lawful uses of the material for educational purposes.

Due to the broadcast flag rule, we will be forced to replace this instructional equipment that currently performs for the precise purpose we acquired it. The broadcast flag thus represents not just a financial burden on our library, but also

an impending threat to our ability to carry out our mission to educate, and assist our faculty in educating, our student body.

The broadcast flag also harms us in another way. While to date we have made only video that is owned by the library available for use by faculty to stream to students over the Internet, we believe the TEACH Act and the copyright law protect our ability to do the same thing with off-air recordings. Our faculty are making increasing use of broadcast television and the Internet in their courses. The broadcast flag, however, would require every computer on campus that has access to this material to be flag-compliant in order for students to be able to view these educational materials. Accordingly, because the broadcast flag would require us either to retrofit (assuming the proper technology were made available to allow such a retrofitting) or replace every computer on campus to comply with the flag's copy-protection/redistribution requirements, we would be entirely foreclosed from taking advantage of this exciting new educational tool.

I declare under penalty of perjury that the foregoing is true and correct.

DIANA VOGELSONG.
Executed: March 24, 2005.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

American Library Association, et al., Petitioners, v. *Federal Communications Commission, et al., Respondents.*—Case No. 04–1037

AFFIDAVIT OF REBECCA GORDON

I, Rebecca Gordon, hereby declare as follows: I have been a member of the American Library Association ("ALA") since July 2003. My address is 2907 Hickory Street, Alexandria, Virginia 22305. I am over the age of eighteen and otherwise competent to testify.

I have previously used brief clips of broadcast television video as part of the course material for college courses that I periodically teach. A critical component of my course on cyberculture, for example, is examining the ways that cyberculture is defined and portrayed by mainstream media. And for my audio technology fundamentals course, I likewise use material from the mainstream media to facilitate examination of issues such as copyright disputes and peer-to-peer networking. I had planned to begin making course materials, including digital copies of broadcast video clips, available to my students via the Internet to bring attention to fast-breaking media stories in an efficacious manner. The Federal Communications Commission ("FCC")'s broadcast flag regime will preclude, or significantly impair, my ability to use the Internet to provide my students with these clips. I will be harmed as a consequence, because valuable opportunities for me to use broadcast video clips to timely illustrate, discuss and critique media portrayals of cyberculture will be lost, diminishing the effectiveness of my teaching material.

I am a college professor and periodically teach courses in cyberculture and audio technology fundamentals at American University in Washington, D.C. My cyberculture course typically draws students from the computer science, anthropology, public affairs, and communications disciplines. A critical component of this course is examining the ways that cyberculture is defined and portrayed by mainstream media, particularly the way that various interests attempt to frame the debate over the legitimacy of peer-to-peer content sharing networks, such as Napster. For example, some media outlets are prone to characterize peer-to-peer content sharing as piracy, while others might characterize the activity as "civil disobedience." The audio technology fundamentals course is a required course for audio technology and multimedia/game design students, and an elective course for computer and film students. It is particularly popular with students, and in fact was noted as one of the four "coolest" classes on campus in a recent American University science publication.

The ability to capture clips from the broadcast television news, public affairs shows, and even talk shows for use in the classroom is essential for both courses. Given that video and multimedia forms of communication are very much at center stage, it would be difficult to teach students about how the media portrays cyberculture without showing students what the media does Similarly, these broadcast materials enhance discussion of copyright and other issues in the audio technology fundamentals class. I believe that the students relate particularly well to timely examples of the matters we discuss, and that the use of these contemporary and interactive materials has contributed to the popularity of this course.

Although I am not currently teaching the cyberculture and audio technology courses, in past semesters I taped the clips I wanted to use with an analog VCR

and then played the tapes on a VCR in the classroom. I have also located clips on the Internet using a computer and displayed them using a video and data projector in my classroom.

My cyberculture course will be offered again in the Spring of 2006 at American University or another school. For that course, I plan to use a digital video recorder ("DVR") such as a Tivo to capture broadcast video clips. I will then transfer the clips to a computer file server that individual students can access via the Internet, and that I can access in the classroom via the Internet. I had planned to make my materials available via the Internet for a number of reasons, including the need to capture and distribute clips quickly to my students. Timeliness is especially key in a course that studies and critiques the media. For example, I may see video broadcast on a morning news show that is directly relevant to a topic being covered in a class later that day, and like to e-mail it to my students so they can quickly study it and be prepared to discuss it in class. Internet distribution is the only way to make this happen. While I could use slower methods of distribution, media coverage moves at lightning speed; if I wait to discuss the material a class or two later, the particular issue I wanted to address often gets stale or is superseded by another media development. One of my goals is to cover the media in as up-to-date a fashion as possible.

It is also important that the media materials we examine, including the video clips, be readily available to my students for independent study and research. Availability over the Internet, or even a university's campus network, is the most efficacious way to ensure that students can study this material.

I understand, however, that the broadcast flag regime will preclude the transfer of flagged broadcast television content over the Internet. If the broadcast flag rule is allowed to stand, I will not be able to use the Internet to provide my students with timely broadcast video material relevant to my courses as I had planned. The timeliness and effectiveness of my course material and my teaching will be diminished. I will consequently be harmed.

I declare under penalty of perjury that the foregoing is true and correct.

REBECCA GORDON.
Executed: March 25, 2005.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

American Library Association, et al., Petitioners, v. *Federal Communications Commission, et al., Respondents.*—Case No. 04–1037

AFFIDAVIT OF PEGGY E. HOON

My name is Peggy Hoon, and I serve as the Scholarly Communication Librarian at the North Carolina State University ("NCSU") Libraries in Raleigh, North Carolina. The NCSU Libraries is a member of the Association of Research Libraries ("ARL"), and has been since 1982. I, personally, am also a member of the American Library Association ("ALA"). Both the ARL and ALA are petitioners in this case. NCSU is an accredited non-profit educational institution within the meaning of that term as it is defined in 17 U.S.C. § 110. My business address is 2126 D.H. Hill Library, East Wing Box 7111, North Carolina State University, Raleigh, North Carolina. I am over the age of eighteen and otherwise competent to testify.

The "broadcast flag" rule ordered by the Federal Communications Commission will harm the NCSU Libraries and its librarians, including myself. Specifically, the broadcast flag rule will prevent the Libraries from assisting faculty members in using broadcast clips as part of their distance education learning courses, over the Internet. Currently, the Libraries assists NCSU faculty in this way pursuant to the "TEACH Act," which is codified in 17 U.S.C. § 110.

The NCSU Libraries and Distance Education

In conjunction with the Distance Ed & Learning Technology Aps ("DELTA") program here at the university, the NCSU Libraries assist professors and other faculty in accessing and obtaining audio, visual, and other media for use in their on- and off-campus courses. One of the Libraries' specific efforts in this regard is to assist NCSU faculty in using broadcast content taken off the air to use in their distance learning courses.

The Libraries currently assists any NCSU faculty who would like to use video content in their distance learning courses. The Libraries plans to continue making this service available into the future. This assistance includes support that we provide for distance learning courses taught over the Internet, as well as for professors who wish to use broadcast clips in these courses.

For instance, the Libraries recently has been assisting a faculty member in the Foreign Languages and Literatures Department at NCSU to use broadcast clips in

his distance education courses for Spanish language instruction. This professor records five-minute and shorter clips of the television program, *El Show De Cristina,* which airs on the Univision network.

El Show De Christina is a Spanish-language talk show that has been described as a mixture of the English-language talk shows *Oprah!* and *Jerry Springer*. The NCSU professor uses clips from *Christina* because they often include rapid exchange in Spanish among multiple participants appearing on the show, thus facilitating the teaching of the language to his students in a conversational manner that might not otherwise be possible through a distance learning course.

After recording the *Christina* segments, the professor brings them to the Learning and Research Center for the Digital Age, located within the NCSU Libraries, to receive assistance in making the clips usable over the Internet. Specifically, librarians and other library staff within the Libraries' Digital Media Lab take the clips from the professor and digitally convert them so that they can be "streamed" over the Internet and viewed by the students in the professor's Spanish-language course.

Consistent with the TEACH Act, the clips are provided through a technology called WebCT, which allows for the password protection of the materials. As a result, although the Internet is used for, and is essential to, making these clips available, the only individuals able to access them are registered students of the NCSU course.

Impact of the Broadcast Flag

The NCSU Libraries currently makes this service available to all of its faculty that would like to use broadcast or other video materials available for their courses over the Internet, in a manner consistent with the TEACH Act. The Libraries consistently receives overwhelmingly positive feedback about this service (and other services) that the Libraries provides through the Digital Media Lab and the Learning and Resource Center for the Digital Age. Both faculty and students report that use of the kind of materials such as *Christina* significantly enhance the educational experience.

Accordingly, the Libraries plans to continue providing these services. However, if the broadcast flag rule takes effect, the Libraries will be foreclosed from helping its faculty broadcast clips like *Christina*, and many other similar programs, in their distance learning courses, because the broadcast flag is designed to stop redistribution over the Internet. As a result, the very services that the TEACH Act allows and that we provide NCSU faculty today—assisting them with making broadcast clips usable for their students over the Internet to make their educational experience more realistic—will be foreclosed. The broadcast flag will have this effect regardless of whether we are assisting faculty to convert or record, because broadcasters will have sole discretion as to whether to "flag" a broadcast and because all broadcasts will be digital.

The NCSU Libraries will also be harmed by the broadcast flag in another way. While today we are able to use our Digital Media Lab to help faculty with media they would like to use in their courses using the Media Lab's current equipment, the broadcast flag will force us to replace much of our expensive computer and other electronic equipment that is capable of reading and copying digital television signals. This is because much of the equipment that we currently have does not comply with the flag's technical requirements for protecting television content, and thus, that equipment would not be able to interoperate with new, flag-compliant digital television tuners and other technologies.

I declare under penalty of perjury that the foregoing is true and correct.

PEGGY E. HOON.
Executed: March 29, 2005.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

American Library Association, et al., Petitioners, v. *Federal Communications Commission, et al., Respondents.*—Case No. 04–1037

AFFIDAVIT OF KRIS KASIANOVITZ

My name is Kris Kasianovitz. I am employed by UCLA as the Young Research Library Collections, Research and Instructional Services Department Librarian for NGOs and State, Local & Canadian Government. UCLA is an accredited non-profit organization as defined in 17 U.S.C. § 110. UCLA is a member of two petitioners to this case: the American Library Association (ALA), and the Association of Research Libraries (ARL). I am also an individual member of the ALA. My business address is UCLA, 11630 Research Library, Box 951575, Los Angeles, CA 90095. I am over the age of eighteen and otherwise competent to testify.

If the FCC's broadcast flag rule goes into effect, it will harm the UCLA Research Library by forcing the library to purchase new equipment in order to continue carrying out our educational mission. Specifically, because I often make use of video clips in my instructional classes and I intend to use broadcast clips for this purpose in the near future, the educational value of my instruction would be diminished unless the library replaced its current equipment with equipment that complies with the broadcast flag.

Use of Video Clips in UCLA Classes

As part of my job as a librarian for UCLA, I often teach classes at the request of professors to university students on legislation and the legislative process. I teach these classes several times per year.

In teaching these classes, I have found it useful to include video clips in my presentations to the students. For example, I have shown excerpts from C-SPAN to demonstrate the legislative process in action, as well as a video entitled "America Rocks" designed to explain the legislative process to students.

To obtain video clips to show in my classes, I record the content onto DVDs and then use the university's computers and projector machines to present the video clips to the students during classes.

I have many plans to use broadcast television clips too in my classroom presentations in the near future. As one example, I intend to show recent news coverage of Congress' intervention in the case of Terri Schiavo, the Florida woman who was the subject of a court order to be taken off a feeding tube. In addition, I also plan to show a series of news programs on law, demographics, and migration to California. I also plan to use similar television broadcast segments to help highlight my teaching points to the students.

The use of television media, including broadcast media, in my instructional classes is important to me. It helps me to bring to life the subject of the legislative process for the students and to keep my presentations current by including the latest examples of the legislative process in action. The library has expended significant funds to invest in the equipment that allows me to carry out these purposes.

Harm from the Broadcast Flag

If the broadcast flag rule is not struck down, it will harm the UCLA library by forcing it to either (1) expend funds to update the equipment I use in my classroom instruction, or (2) forego the use of valuable video enhancements to instructional presentations.

The DVD players and computers that the library owns are not compliant with the broadcast flag. Therefore, once the digital transition is complete, and if the broadcast flag takes effect, none of the approximately two hundred computers that the UCLA library makes available to its faculty for instructional purposes will be capable of allowing me to record and transfer broadcast television content for use in my presentations. Any broadcast flag-compliant digital tuner would not permit recording or playing of digitally broadcast television programming using the DVD-burning or DVD-playback equipment that the library now has, even though the uses that I and other faculty would make of broadcast materials are lawful uses for educational purposes.

In order for me to fulfill my intention of using broadcast video clips in my presentations in the near future, the library would need to purchase new DVD players and computers that would recognize and comply with the broadcast flag. Replacing the approximately two hundred computers that the library uses for instructional purposes would be a significant expenditure of resources for our library, which, as part of a state university supported by taxpayer funds, is always making difficult choices on how to allocate its limited resources.

If the library is not able to allocate funds to purchase new equipment, I and other librarians will lose the ability to use broadcast video clips in the classes we teach. This would mean the loss of a valuable way to enhance our teaching by making our presentations lively and current through the use of recent broadcast television segments.

I declare under penalty of perjury that the foregoing is true and correct.

KRIS KASIANOVITZ.
Executed: March 26, 2005.

The CHAIRMAN. Thank you very much.

Mr. Patton, Corporate Vice President, Philips Electronics.

STATEMENT OF THOMAS B. PATTON, CORPORATE VICE PRESIDENT, GOVERNMENT RELATIONS, PHILIPS ELECTRONICS NORTH AMERICA CORPORATION

Mr. PATTON. Thank you very much, Chairman Stevens, Co-Chairman Inouye and Members of the Committee.

My name is Tom Patton. I'm corporate Vice President for Government Relations with Philips Electronics North America Corporation. Philips thanks you for the opportunity to testify before the Committee today regarding protecting digital broadcast television programming from indiscriminate redistribution over the Internet.

Philips is a leading technology company, expending approximately $3 billion a year on research and development. Philips is also a leading manufacturer of consumer products ranging from healthcare to video and audio entertainment.

There are two principal points I wish to make today. First, Philips supports enactment by the Congress this year of narrowly limited and tailored legislation to ratify the Federal Communications Commission's broadcast flag rules and its technology approval order. Second, Philips believes any such legislation should require that licensing of approved broadcast flag technologies offered to the public must be on reasonable and nondiscriminatory terms. In so doing, Congress should clarify that non-assert obligations imposed upon licensees by licensors of a government-approved and mandated technology is inconsistent with reasonable and nondiscriminatory licensing.

Today, Philips supports statutory ratification of those rules for one simple reason: the Commission basically got it right. The FCC established an open and fair process for selecting technologies, developed a set of objective criteria against which technologies would be judged, and required technology proponents to prove that they meet these criteria. It limited the scope of protection afforded by approved broadcast flag technologies to indiscriminate redistribution over the Internet while expressly preserving consumers' home-recording capabilities. And it required that all approved broadcast flag technologies be licensed on reasonable and nondiscriminatory terms.

The broadcast flag is not a perfect system, but it is a reasonable step on a longer path that balances appropriate content protection against consumer rights and product functionality.

The broadcast flag rules impact two important markets: the emerging market for digital-content protection technologies and the mature and intensely competitive market for consumer electronics products. This Committee understands the critical importance for consumers of competitive markets where innovation is allowed to flourish: consumer choices multiply, prices decline, and product functionality increases. To ensure both marketplaces are competitive and innovative, Congress should require that any approved broadcast flag technology be licensed on reasonable and nondiscriminatory terms.

In the broadcast flag context, a non-assert is a requirement that a licensee of a technology relinquish its rights to its own intellectual property as a condition of obtaining the license.

Chairman Martin recognized the danger posed by non-assert obligations in the broadcast flag context. In his separate statement accompanying the Commission's technology approval order, he lamented that licensees might be forced to, "choose between the lesser of two evils: either don't participate in the relevant product market or compete, but give up your intellectual property rights." Such a result, he posited, "may be anti-competitive, may discourage future investment in intellectual property, and may generally be counter to good public policy." We couldn't agree more. In fact, in this context, non-asserts can be compared with content piracy, inasmuch as they both take intellectual property belonging to others.

Before concluding, permit me to comment briefly on Title I of Senator Smith's draft broadcast flag bill. We support the proposed ratification of the FCC's broadcast flag rules and technology approval order. As I've just indicated, we believe that the bill should address the anti-competitive effects of technology licenses that impose non-assert obligations on licensees. Moreover, expanding the scope of the rules, as the draft bill would do, to reach indiscriminate redistribution over digital networks may be a significant change, and, therefore, requires further consideration. Finally, any legislation will need to provide manufacturers with sufficient time to integrate broadcast flag technologies. We look forward to working with Senator Smith and all the Members of the Committee on this important legislation.

The digital age presents a host of challenges and opportunities. Philips believes it is imperative to create a new global paradigm that fairly values digital-content protection technology, just as we value the content these technologies are designed to protect. Philips looks forward to the day when all stakeholders make clear that electronic infringement of copyrighted video content is wrong, when content owners recognize that innovation in digital-content protection technologies must be coupled with the availability of digital products that enable consumers to enjoy ever-more-flexible uses of content, and when the innovators responsible for those technologies and digital devices are able to enjoy the fruits of their intellectual labor.

Thank you very much for the opportunity to testify today. I'd be pleased to answer any questions you may have.

[The prepared statement of Mr. Patton follows:]

PREPARED STATEMENT OF THOMAS B. PATTON, CORPORATE VICE PRESIDENT, GOVERNMENT RELATIONS, PHILIPS ELECTRONICS NORTH AMERICA CORPORATION

Introduction

Co-Chairmen Stevens and Inouye and Members of the Committee, my name is Tom Patton, and I am Corporate Vice President for Government Relations with Philips Electronics North America Corporation. Philips greatly appreciates the opportunity to testify before the Committee today on the subject of the video Broadcast Flag.

Philips believes that Congress should enact legislation this year to ratify the FCC's November 4, 2003 video broadcast flag rules as well as its August 4, 2004 Order approving thirteen digital broadcast content technologies under the fair and transparent process established under those rules, and that manufacturers should be given a commercially reasonable period of time to implement the new rules. Additionally, to better ensure a fully competitive, pro-innovation marketplace environment under those rules, such legislation also should require that any approved broadcast flag technology that is publicly offered be licensed on reasonable and non-discriminatory terms. Such a requirement entails, at a minimum, offering potential

licensees with an IP interest an opportunity to license their own intellectual property on reasonable and nondiscriminatory terms and precludes the imposition of non-assert obligations on licensees.

In that regard, Philips commends Senator Smith for his leadership on the video broadcast flag issue, which is reflected in Title I of his draft bill, and wishes to express our support for his proposed ratification of the FCC's November 4, 2003 Report and Order and its August 4, 2004 technology approval Order. Philips looks forward to working with Senator Smith and all of the Members of the Committee, as well as all affected stakeholders, to enact video broadcast flag legislation this year. While Senator Smith's draft legislation does not presently address the anticompetitive effects of technology licenses that impose non-assert obligations on licensees, and while we believe expanding the scope of the rules to reach "indiscriminate redistribution over digital networks" requires further consideration, we are optimistic that these and other issues that may arise can be addressed and resolved expeditiously and satisfactorily.

About Philips

Philips is a diversified global technology company employing more than 160,000 people worldwide, including roughly 20,000 throughout the United States. Philips is a company focused on improving, through technological innovation, the lifestyle and physical and emotional well-being of consumers, manufacturing products as varied as home use defibrillators and medical diagnostic equipment such as MRI, CT and ultrasound scanning, electric toothbrushes, electric shavers, lighting products and a full range of video and audio entertainment products ranging from digital television receivers to the Jukebox MP3 player. Philips has been and continues to be a global leader in digital television technologies and products and related consumer electronics products, including DVD players and recorders, personal video recorders, and Direct Broadcast Satellite systems. It is also a leader in video compression, storage and optical products, as well as in semiconductor technology. Philips is well-known as the inventor of mass market entertainment standards, such as the Compact Disc and audio cassette, and Philips has been and continues to be a main contributor to many broadcast, disc, content distribution standards such as DVD and, more recently, Blu-ray.

Philips also has been an active participant in the development of content protection technologies that serve both the needs of the content industry as well as the consumer. Philips invented the Serial Copy Management System, or SCMS, preventing the unauthorized reproduction of multiple generations of copies of digital audio works from a copyright-protected original (while permitting a single generation of copies). Philips continues to provide content protection systems for the industry such as: the Video Content Protection System, or VCPS, system to protect recordable DVDs; DisplayPort, a protected digital technology to replace existing analog systems; and forensic watermarking systems to find and prosecute those who provide content to illicit producers of DVDs.

Philips is one of the largest users of the patent systems in the United States and other industrialized countries. In 2004, we filed U.S. patent applications for about three thousand new inventions. Scientists and engineers at our U.S. laboratories have made pioneering advances that revolutionized and revitalized the electronics industry with innovations that led to high definition television, optical CD and DVD recording, digital cellular telephones, medical imaging and digital rights management.

Philips has been a constructive participant in inter-industry content protection activities, including the Broadcast Protection Discussion Group (BPDG), the Copy Protection Technical Working Group (CPTWG), the Secure Digital Music Initiative (SDMI), and, most recently, the Analog Reconversion Discussion Group (ARDG), co-chaired by one of Philips' most accomplished technologists.

Philips Supports Legislation Ratifying the FCC's Video Broadcast Flag Rules and its Digital Content Protection Technologies Approval Order

As stated above, Philips supports legislation ratifying the FCC's November 4, 2003 video broadcast flag rules as well as its August 4, 2004 technology approval order. Some observers who followed the FCC's video broadcast flag proceeding might be surprised that Philips now supports legislation ratifying the FCC's rules. They should not be.

Throughout the FCC's rulemaking proceeding, Philips expressed several major concerns, which are discussed below. The type of narrowly tailored legislation we support today, together with the open, transparent, thoughtful and balanced rulemaking the FCC conducted, addresses all of them.

So often, the Congress hears criticism of the FCC. In the broadcast flag rulemaking, the FCC got it right. And while virtually everyone recognizes that the broadcast flag is not a perfect system, it is a reasonable step along a longer path that balances appropriate content protection against consumer rights and product functionality, and helps to promote innovation and competition in the consumer electronics and digital content protection technology marketplaces. For these reasons, ratification of the FCC rules is an appropriate action for Congress to take.

FCC Authority

The threshold concern Philips expressed was that the Commission lacked authority to impose a requirement that all digital television receivers, digital VCRs, DVD players/recorders, PVRs, and a host of other digital products recognize and respond to a set of digital bits transmitted by broadcasters, conveniently referred to as the video broadcast flag. Historically, because manufacturers of consumer electronics products are not licensees, the Commission's regulation of such devices has not been permitted absent an explicit grant of statutory power by the Congress. That was the case with the All Channel Receiver Act, the V-chip, and closed captioning. Such a targeted and tightly constrained approach to regulation of consumer electronics products has served the Nation well. The consumer electronics product market is perhaps the most competitive and innovative of all sectors of the American economy. A seemingly endless stream of new products and consistently falling consumer prices are the defining characteristics of this market.

Philips believed that FCC regulation of all digital products containing demodulators—the partial list I just cited—without an express grant of authority by the Congress represented a dangerous and radical departure from wise policy and legal precedent militating against FCC regulation of consumer electronics products except where Congress required it.

The reason we are assembled here today, of course, is that the United States Court of Appeals for the D.C. Circuit agreed with the position Philips and others took. It struck down the video broadcast flag rules solely on the ground that the FCC lacked the statutory authority to promulgate them.

The type of legislation Philips supports today rectifies this problem. It is narrowly tailored to address a specific area of public policy concern following years of study and the open and fair public process conducted by the FCC. It reaffirms the proposition that the Commission's regulatory authority over television receiver manufacturers and other non-licensees is not plenary or inherent, but must derive from a specific grant from Congress.

Competition and Innovation

The second major concern that Philips had when the FCC commenced its video broadcast flag rulemaking was that the issues were being framed too narrowly and the likely result would be a set of rules that would suppress rather than foster competition and innovation in the digital content protection technology marketplace. As discussed in greater detail below, Philips believes very strongly in the importance of creating a global mindset in which content protection is an integral part of the value proposition of the digital age for industry participants and consumers alike. For this concept to take root, however, the rules that apply to any government mandated or sanctioned digital content protection technology must not inhibit competition and innovation in this market.

As a consequence of the vigorous participation of many diverse parties and the public and the extremely careful and insightful approach adopted by the FCC, the rules adopted by the Commission are, subject to one significant clarification discussed below, conducive to a competitive digital content protection technology marketplace. The Commission established an open and fair process for selecting technologies, yielding a set of objective criteria against which technologies would be judged and requiring technology proponents to prove that they fulfilled these criteria. In its August 4, 2004 Order, the Commission approved thirteen digital output and recording protection technologies, including a recording protection technology proposed jointly by Philips and Hewlett-Packard. Of course, even that number of approvals does not necessarily mean that there will be robust competition throughout this market; in certain instances there is only a single technology approved for a particular interface or format, and in other instances the need to interoperate effectively forces manufacturers to use certain technologies. But the process established by the Commission certainly is a promising start. That is why Philips also supports legislation that would expressly ratify the Commission's August 12, 2004 technology approval order.

Scope

Finally, Philips was concerned about the potential scope of any video broadcast flag rules. Regulations that swept too broadly inevitably would undermine consumer acceptance of digital content protection technologies, the very opposite of the result sought by content providers. Once again, the FCC got it right. It defined the scope of its rules as being the prevention of indiscriminate redistribution of digital broadcast television over the Internet. The Commission elaborated:

> This goal will not (1) interfere with or preclude consumers from copying broadcast programming and using or redistributing it within the home or similar personal environment as consistent with copyright law, or (2) foreclose use of the Internet to send digital broadcast content where it can be adequately protected from indiscriminate redistribution. (FCC Report and Order, FCC 03–273, November 4, 2003, ¶ 10).

This clearly defined and limited scope strikes the necessary and appropriate balance to encourage consumer-friendly innovation in the digital content protection technology marketplace. Indeed, it can be viewed as a precursor and a complement to the United States Supreme Court's *Grokster* decision last year that made clear that companies whose business model was predicated upon actively and intentionally inducing copyright violations, *e.g.*, by facilitating indiscriminate redistribution of copyrighted works over the Internet, would be held liable for copyright violation. Just as the Court did nearly 16 months later, the Commission sought to strike a delicate balance that would safeguard copyrighted content without harming innovation in technology and digital consumer products.

Any Broadcast Flag Legislation Enacted by the Congress Should Require That Licensing of the Technology Concerned Must Be on a Reasonable and Non-discriminatory Basis, and Clarify That Requiring Licensees to Give Away Their Intellectual Property Without Compensation as a Condition of That License Is Inconsistent With That Requirement

Another key aspect of the FCC's video broadcast flag order was the reaffirmation of the Commission's policy, announced nearly 45 years ago, that licensing of technologies must be on reasonable and non-discriminatory ("RAND") terms and conditions. Specifically, the Commission, in describing the process and criteria by which it would review and approve digital broadcast content protection technologies, stated:

> Where a content protection technology or recording method is to be publicly offered, we expect that it will be licensed on a reasonable and non-discriminatory basis. We also expect that publicly offered licenses will not be unreasonably withheld from parties. (FCC Report and Order No. 03–273, November 4, 2003, ¶ 55)

To implement that principle, the Commission required each technology proponent to submit a copy of its licensing terms and fees, as well as evidence "demonstrating that the technology will be licensed on a reasonable, non-discriminatory basis." 47 CFR § 73.9008(a)(4).

Non-assert Obligations Are Inconsistent With RAND Licensing

Notwithstanding the clarity of the broad FCC requirement that licensing of these digital broadcast content protection technologies be on reasonable and non-discriminatory terms, a number of the technologies approved by the FCC impose so-called "non-assert" obligations on licensees. When included in a license agreement, a non-assert obligation requires a licensee that may own patents or other intellectual property deemed "essential" to the technology being licensed (but sometimes non-essential technology, as well), to agree that it will not assert those IP rights against the licensors or any other licensee of the technology concerned, as a condition of taking that license. The result is that the licensee that owns IP must pay for the technology and the IP being licensed, but must forgo any compensation or other consideration—either from the licensors or other adopters—for its own IP. For reasons set out fully below, non-assert obligations on licensees are inherently inconsistent with the RAND requirement prescribed by the Commission. In fact, in Philips' view, it is hardly an exaggeration to qualify this as "IP theft."

Now-FCC Chairman Martin succinctly captured the danger posed by non-assert obligations when the Commission adopted its August 4, 2004 technology approval order. In a separate statement issued in connection with that Order, he wrote:

> First, I fear that the "non-assert" clause in the DTCP adopter agreement could hinder competition and suppress innovation. We acknowledge in the Order that DTCP is the only publicly-offered output protection technology we approve that

> permits copying, and is "therefore likely to become the primary" standard for the foreseeable future. As a result, anyone who wants to build products for this market must sign the DTCP license. Yet, the license requires that companies give up any intellectual property rights they have in the DTCP technology before signing. Therefore a party may have to choose between the lesser of two evils: either don't participate in the relevant product market, or compete, but give up your intellectual property rights. I am concerned this result may be anti-competitive, may discourage future investment in intellectual property, and may generally be counter to good public policy. (Statement of Commissioner Kevin J. Martin in FCC Order In the Matter of: Digital Output Protection Technology and Recording Method Certification, FCC 04–193, August 12, 2004).

Chairman Martin was right on target. Non-assert obligations have no place in licenses for technologies to be used pursuant to government mandate such as the video broadcast flag rules. Although the rest of the Commission expressed similar concerns about the "potential for anticompetitive or discriminatory conduct"[1] stemming from the use of non-assert obligations, it was not prepared to resolve the issue definitively. Congress should take this opportunity to clarify the law.

Non-assert Obligations, Particularly In Licenses Subject To A Government Mandate, Are Not Reasonable

The very essence of the constitutionally protected system of patents is the expectation that an individual or company that invests in research and development resulting in patents will be able to realize value from those patents in the form of reasonable royalties. As the Founders recognized, if that expectation is not realized, the incentive to innovate is destroyed. The effect of imposing a non-assert obligation on licensees, because it denies a licensee that owns IP from realizing the value of that IP, is essentially to suspend this core constitutional protection, making it unreasonable on its face.

The irony is especially great here, where the entire purpose of the video broadcast flag rules is to protect the intellectual property of one party—a content creator—and yet the mechanism for doing so requires another party—a consumer electronics manufacturer that is also a technology innovator and contributes to the technology that enables content producers to protect its content—to surrender its own intellectual property rights in that technology and, often, in improvements. Particularly in this context, the notion that a non-assert obligation is "reasonable" defies all common sense.

The "reasonable" alternative to imposing a non-assert obligation on licensees is to subject licensees to the same obligation that the FCC seeks to impose on the technology proponent—an obligation to license its intellectual property on reasonable and non-discriminatory ("RAND") terms. Under a RAND obligation, licensees agree not to use their IP to block the technology licensed, but are not required, in doing so, to sign away their own intellectual property without compensation. The reasonableness of a RAND obligation on licensees has made it commonplace in the technology marketplace. In fact, the entire consumer electronics industry rejected a non-assert obligation in favor of a RAND requirement in the DFAST license that is employed for licensing content protection technologies used with unidirectional digital cable-ready devices.

Non-Assert Obligations Are Discriminatory

Non-assert obligations on licensees discriminate against certain classes of companies, particularly those companies that have invested extensively in research and development of content protection technology, and that themselves also develop or manufacture products that must use the licensed technologies that are commonly used by others in order to permit product interaction.

Indeed, with a non-assert obligation, companies that undertake little or no R&D—often called "imitators"—for whom the non-assert has no implications, are held harmless; whereas the very companies that drive new innovation through aggressive investment in R&D—companies such as Philips—may suffer substantial economic harm because their IP is used without compensation and may be rendered valueless. Put another way, a non-assert obligation requires those implementers with IP to "pay twice"—once for the technology being licensed, and once more for the loss of their IP; while others, potentially its competitors, pay only once. That is clearly discriminatory.

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[1] In the Matter of Digital Output Protection Technology and Recording Method Certifications, *Order*, 19 FCC Rcd 15917(2004).

It's worth noting, as well, that a non-assert obligation is powerless to prevent a third party who does *not* manufacture a product requiring a license, but who owns IP in that technology, from asserting their IP against all licensees.

Non-Assert Obligations Raise Fifth Amendment Concerns

The coupling of a non-assert obligation on licensees with a technology subject to a government mandate raises very serious questions as to whether such action would constitute a taking under the Fifth Amendment for which the government would be liable to provide just and reasonable compensation. Especially in circumstances where a technology holds a monopoly or even duopoly position in the marketplace (as is the case with respect to several approved broadcast flag technologies), a regulatory mandate to take a license for that technology, coupled with a license requirement to surrender the value of one's IP that reads on that technology, would appear to fall within the prohibition of the Fifth Amendment's Takings Clause.

The Negative Public Policy Outcomes Flowing From the Use of Non-Assert Obligations Make Them All The More Objectionable

Not surprisingly, given their unreasonableness and discriminatory nature, non-assert obligations on licensees also have multiple and extremely negative implications for core public policy objectives of this Committee—most notably the need to foster innovation and robust competition in both digital content protection and consumer electronics technologies. These effects harm not only companies that invest aggressively in innovative technologies, but content owners and, most importantly, consumers.

Non-Assert Obligations Stifle Innovation and Competition

One need not be a patent attorney to recognize how a non-assert obligation can dampen investment in new technologies. Because it forces licensees with intellectual property to forfeit the value of their IP as a condition of taking the license, it discourages investments in research and development, which in turn stifles further innovation. Again, the protection afforded patents in the Constitution says it all: those who cannot realize value for their innovations will lose their incentive to innovate.

The anticompetitive effects of non-assert obligations on licensees become immediately apparent in cases where licensors and licensees of a particular technology are direct competitors and where there is no competitive alternative to that technology for the specific area of protection it covers. Such is the case with the broadcast flag, where several approved technologies that employ a non-assert in their license agreements, and for which there is no marketplace alternative, are controlled by direct competitors of Philips (both in the consumer electronics and digital content protection technology spaces). In such cases, non-assert obligations enable one competitor, the licensor—backed by a government mandate—to dampen investment by its competitors, the licensees, that otherwise might result in bringing to market alternative, superior technologies (or improvements) and/or devices.

Moreover, the anticompetitive effects of non-assert obligations on licensees are compounded in instances where the technology's license agreement also permits changes to that technology. In such cases, a non-assert obligation can expand to cover not just the original "essential" IP that a licensee was required to forfeit, but future innovations the licensee might develop, as well.

A simple example illustrates the alarmingly anti-competitive effect at work here. Suppose Philips signs a license, which includes a non-assert obligation, to implement the only government-approved broadcast flag technology that protects content passed over Interface A. Let's call the technology "RED." Philips then creates a competitive content protection system for Interface A, we'll call it "GREEN," which includes a new, patented, feature that makes it more attractive than RED, both for content distributors and for consumers. One would expect this new and improved technology to be a successful competitor. However, the RED license expressly permits changes to that technology—including the addition of the very new feature found in GREEN—and the non-assert obligation precludes Philips from suing for patent infringement. As a result, while GREEN can still be introduced as an alternative, it is left without any distinguishing superior feature, which makes its chances of competing effectively with RED virtually nil.

This is extremely significant for Philips. Philips invests approximately $3 billion per year in research and development, including significant R&D programs in the area of digital content protection and Digital Rights Management ("DRM") technologies and improvements. We simply cannot justify further investment of this kind or extent if we are deprived of the ability to receive reasonable compensation for our resulting innovations. And if we are deprived of the value of our IP, it directly harms our ability to compete.

Imposing non-assert obligations on licensees of broadcast flag technologies should also concern the content industry. Just consider that, ironically, the very innovations that may be stifled by non-assert obligations in broadcast flag technology licenses are new and improved digital content protection technologies or improvements in existing systems! For example, research projects to achieve advances in localization of protected content—a key goal of the content community—are directly implicated by the non-asserts in several of the content protection systems approved by the Commission. These and similar efforts could be put off or abandoned altogether if investments by companies seeking to innovate in these areas risk being stranded by non-asserts that preclude a return on those investments.

Moreover, the prospect of having only one or two entities essentially controlling the methods and terms by which all protected digital broadcast content flows across and among virtually every digital television receiving device is distressing. That is hardly an environment in which further digital content protection innovation will be sparked, or where costs will remain competitive. In short, content owners should be equally—if not even more—concerned about the negative consequences—both from a technological and economic perspective—of non-assert obligations in the digital content protection technologies.

Accordingly, any legislation enacted by Congress reinstating the video broadcast flag rules should expressly require that licensing of publicly-offered digital broadcast content protection technologies approved by the Commission pursuant to the rules must be on reasonable and non-discriminatory terms and conditions. Such a requirement entails, at a minimum, offering potential licensees of that technology who own essential IP, an opportunity to license that intellectual property on reasonable and nondiscriminatory terms. By requiring that a choice be offered, a choice unreasonably and discriminatorily denied by non-assert obligations, Congress will ensure that it is neither directly or indirectly depriving any person or entity of the ability to realize the value of their patented inventions.

Legislation Reinstating the Video Broadcast Flag Rules Could Serve as the Foundation for a New Digital Content Protection Paradigm

As the United States and the rest of the world migrate to digital broadcast transmissions and as broadband networks develop into the dominant means of distributing or accessing video content, there is an imperative to create a new paradigm that values digital content protection as an integral part of the digital video experience. We need a new way of thinking about digital content protection, one that can form the basis of a consensus among copyright holders, technology companies, consumer electronics manufacturers, and, most importantly, global consumers. The creation of this new paradigm will require unprecedented cooperation among parties that have frequently and historically been at loggerheads, reinforced, as needed, by government action.

All stakeholders have a responsibility to underscore the fundamental message of the content community that electronic theft of copyrighted video content is wrong. Indeed, last year, Philips launched a consumer education campaign to highlight that most basic principle. Aggressive law enforcement targeted at the professional thieves who make a business out of copyright infringement is essential. Global acceptance of this proposition is a critical starting point. But it is not an ending point.

The content community should understand that the creation, development, and deployment of evermore innovative and effective digital content protection technologies is indispensable to the creation of a new mindset that values more fully the IP rights in video content. This does not necessarily mean that studios must fund directly the development of such technologies, but they should support a digital content ecosystem that permits technology companies and consumer electronics manufacturers to realize a reasonable return on their own intellectual property research and development investments. Again, this is why RAND licensing is so critical (and why non-assert obligations are so harmful). Without RAND, more effective digital content protection technologies which also enable enhanced personal, noncommercial use of the content by consumers simply will not come to market.

The new value proposition supporting enhanced digital content protection succeeds, however, only if consumers have the opportunity to purchase new digital products that enable them to make more creative and satisfying uses of the digital content they receive than was true in the analog world. The enormous popularity of TiVo and similar home recording devices is an example of the investments that consumers will make if they believe that they are receiving tangible benefits in enjoying video content. Consumers view digital technology as liberating. They will only accept the fences that content producers may view as essential if they can be assured that they will be able to enjoy a richer experience within those boundaries.

Philips views reinstatement of the video broadcast flag rules, with clarification of the requirement of RAND licensing, as a promising first step in creating this new digital content protection paradigm.

I thank you again for the opportunity to testify. I would be pleased to answer any questions that you may wish to ask.

The CHAIRMAN. Thank you very much.

Our next witness is Leslie Harris, the Executive Director of the Center for Democracy and Technology.

Ms. Harris.

STATEMENT OF LESLIE HARRIS, EXECUTIVE DIRECTOR, CENTER FOR DEMOCRACY AND TECHNOLOGY

Ms. HARRIS. Thank you.

Mr. Chairman, Mr. Inouye, Members of the Committee, on behalf of the Center for Democracy and Technology, I appreciate the opportunity to testify today. CDT is a nonprofit public-policy organization dedicated to promoting civil liberties and democratic values on the Internet. CDT strongly opposes piracy, and we support balanced policy approaches that protect copyright owners legitimate interest in being compensated without stifling innovation and the benefits of new technology.

With respect to the broadcast flag, we would urge this Committee to take a fresh look and carefully weigh the risks and the benefits, because the risks to innovation and consumer interests are substantial. On balance, CDT believes that Congress should not proceed with flag legislation, but, if it does, we urge that it not give the FCC a blank check. Legislation must include carefully crafted limits and safeguards to help minimize the risks.

I want to make three points:

First, the broadcast flag regime involves significant government regulation of technology design. It's not a minor or technical proposal, would entail ongoing government involvement in technology design for any device that might be used to display, receive, or record digital television content. And as technology converges, this means not just televisions, but personal video recorders, computers, Internet-enabled mobile phones, iPods, and computer game consoles. In addition, a flag regime would make the FCC the gatekeeper for entry into the marketplace of new technologies not yet anticipated, because those new video-related devices and features would require FCC approval. We think the FCC is ill-equipped for such a role.

Broadcast flag legislation would also set a precedent for additional technology design mandates, some of which are being discussed today. CDT generally opposes such mandates, because of their impact on innovation. But, as Congress considers whether to start down this path, it has to carefully consider whether, and how, it can draw a line.

Second, the broadcast flag carries risks to innovation and legitimate consumer uses. A broadcast flag regime would make the FCC the final arbiter of which technologies make it to market, and when. Technology companies may decide to "play it safe" rather than seek approval for new features, particularly if the approval process lacks clear standards. This is exactly what happened during the FCC process. Several consumer electronics companies chose

to remove innovative features, before the FCC even had a chance to rule on them, in order to avoid delay in the face of opposition.

Another serious risk concerns the public's ability to use digital TV content in ways that constitute fair use. Individuals increasingly use clips of news or public affairs in online learning, in an online political commentary circulated for example, by blogs or e-mails. Application of a broadcast flag to news and public-affairs programming, for example, would undermine the potential of the Internet to enhance civic debate in this fashion.

Finally, there is a risk of consumer confusion and frustration due to interoperability concerns, both with legacy devices and among different flag technologies.

These serious concerns need to be weighed against the potential efficacy of the flag. Even the content industry concedes that regime is not likely to stop determined pirates, nor keep popular programs off of peer-to-peer networks entirely.

Third, however, if Congress does choose to proceed with flag legislation, it must include clear limits and safeguards. First, any grant of authority must be narrow, only to the extent necessary to prevent flagged content from being redistributed indiscriminately on the Internet. Second, it should specify standards for the technology approval process to ensure that it is objective, predictable, timely, and transparent. Applicants should be permitted to self-certify compliance, and the burden of proof should lie on the party seeking to have a technology rejected. There needs to be an express statement in the legislation that certain reasonable consumer uses, including secure Internet transmission to a limited number of devices or Internet transmission of limited excerpts, will not be precluded. And, there needs to be a uniform time framework for approval. And, last, it should include provisions to reduce the risk to fair use. Certain content should not be eligible to be flagged, including material in the public domain, coverage of debates, political speeches, and news programming, the primary commercial value at which depends on timeliness.

Finally, any broadcast flag legislation should call for fair disclosure to consumers about interoperability limitations. We understand that crafting these limitations require careful work, but they're essential to help minimize the risks posed by a flag regime.

Thank you for the opportunity to testify. We stand ready to work constructively with this Committee as it continues to consider issues important to the future of the Internet.

[The prepared statement of Ms. Harris follows:]

PREPARED STATEMENT OF LESLIE HARRIS, EXECUTIVE DIRECTOR, CENTER FOR DEMOCRACY AND TECHNOLOGY

Mr. Chairman and Members of the Committee, on behalf of the Center for Democracy and Technology (CDT), I appreciate the opportunity to testify today. CDT is a nonprofit, public policy organization dedicated to promoting civil liberties and democratic values on the Internet.

CDT takes piracy seriously. CDT is committed to the principles that copyrighted material should be protected from large-scale unauthorized copying. Denying compensation to creators and distributors of digital content undermines First Amendment values by stifling expression, threatening the growth of new media and e-commerce, and depriving consumers of a robust marketplace of content offerings. At the same time, resolving these issues should not come at the expense of reasonable consumer expectations regarding the use of copyrighted works and digital technologies.

Nor should it come at the expense of the Internet and innovative new communications technologies that hold tremendous promise to promote free expression, economic growth and civic discourse.

The key for policymakers is to find balanced policy approaches that protect copyright holders' legitimate interest in being compensated for their efforts, without stifling innovation and the great benefits new technologies offer.[1]

This Committee is being asked to decide whether to give the Federal Communications Commission the authority to impose the broadcast flag regime, an unprecedented government technology mandate—that a Federal court rejected last year. Before the Committee simply authorizes that action, *ex post facto*, we urge that you take a fresh and full look at the issue and carefully weigh the risks and benefits of such an approach. Protecting intellectual property is a very important goal, but it is uncertain at best whether imposing a flag regime would achieve that goal. The flag, moreover is not the only means to address the problem. On the other hand, the risks posed by the flag to technology innovation and consumer interests are considerable.

On balance, CDT would not recommend that Congress proceed with flag legislation. But if it does, it is critical that it not give the FCC blank-check authority to implement the regime however the agency sees fit. Any grant of authority to the FCC should include carefully crafted limits and safeguards to help minimize the risks. We discuss those safeguards in more detail below.

1. The Broadcast Flag Regime Involves Significant Government Regulation of Technology Design.

The broadcast flag proposal is not a minor or technical proposal; it would entail ongoing government involvement in technology design for a wide range of devices, including computers and video enabled technologies not yet anticipated. It also could set a precedent for further government technology mandates, which CDT generally opposes. Government-dictated design requirements are unlikely to keep pace with innovation in the rapidly moving high tech environment, and may serve as roadblocks to new, unanticipated technologies and features.

A broadcast flag regime would impose design requirements on a broad and growing range of devices. The "broadcast flag" itself is just a marker attached to a television program, signaling that the program should be protected against indiscriminate copying. It only has an impact if downstream devices recognize and respond to this marker. For this reason, the Federal Communications Commission's flag rules effectively required any device that might be used to display, receive, or record digital television content to incorporate an FCC-approved technology for protecting flagged programs.

As technology converges, the range of devices capable of displaying, receiving, or recording flagged video content is growing very broad. People can now watch video programming not just on televisions, but on portable DVD players; on general purpose computers; on iPods; on Internet-enabled mobile phones; through personal video recorders like TiVo; and through computer game consoles.

The FCC's flag rules would have had an impact on this entire range of technology products, and would give the FCC ongoing approval authority over the introduction of new video-capable technologies. An innovator seeking to develop a new and improved device would need to either license and incorporate a flag compliance technology already approved by the FCC, or, if the device involved features or functions not contemplated by existing technologies, apply to the FCC for approval of new technology. In effect, the FCC would serve as the gatekeeper for the entry of new technologies into the video marketplace.

There is also the important question of the precedent that broadcast flag legislation would set. If the flag regime is enacted, other requests for technology mandates surely will follow. Already, the flag proposal has been joined by proposals for technology requirements to limit radio recording functionality and restrict analog-to-digital conversion. As Congress considers whether to start down the path of imposing design requirements on computer and communications technology, it should think carefully about whether and how it would draw the line.

2. The Broadcast Flag Carries Risks to Innovation and Legal Consumer Uses of DTV.

The broadcast flag proposal carries a number of significant risks to innovation and to legal consumer uses of digital television.

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[1] CDT's approach to the broadcast flag is informed by a policy framework for digital copyright that the organization released last spring. *Protecting Copyright and Internet Values: A Balanced Path Forward Version 1.0* (Spring 2005) *http://www.cdt.org/copyright/20050607framing.pdf.*

If the FCC has the authority to sign off on new video enabled technologies, it may well be the final arbiter of which technologies make it to market and when. The FCC could delay approval of an upstart technology because of stiff opposition from business opponents, delaying it from getting to market at the same time as its nearest competitors. And if the FCC approval process is uncertain or unpredictable, innovators will have no clear guidepost to help determine what would likely win approval.

These concerns are not merely hypothetical. Last fall, CDT released a paper which took a close look at the FCC's flag proceedings.[2] While the FCC approved all thirteen proposed flag compliance technologies that it considered, final approval was only part of the story. Several consumer electronics companies chose to withdraw potentially valuable consumer features from their products *before the FCC ever had a chance to rule on them* because the approval standards were uncertain and there was strong opposition from certain parts of the content industry. To ensure success, the applicants played it safe and removed innovative features permitting users to transfer content in limited ways over the Internet. The lesson from the proceeding was clear: the FCC approval process can chill innovation, particularly if the process is too subjective or unpredictable.

Another serious risk concerns the public's ability to use digital television content in ways that constitute "fair use" under copyright law. This consideration is especially serious with respect to news and public affairs programming which is of transient economic value to copyright holders but critical to informed public discourse. The Internet provides unprecedented ability for individual speakers to engage in political and civic discourse on a large scale. News and public affairs programming that is interesting, important, or satirical can spread quickly on blogs and through e-mail chains.[3]

But applying the broadcast flag to news and public affairs programming could undermine the potential of the Internet to enhance debate in this fashion. Television continues to be a primary source of video footage concerning the top issues of the day. The flag regime could prevent a blogger from including a short excerpt from a broadcast debate between political candidates in her online blog. It could prevent a charity or a church from using broadcast news clips about a recent natural disaster to bolster an Internet-based appeal for relief assistance or a teacher from including such a clip in an on-line civics course.

Finally, a broadcast flag regime carries a risk of consumer confusion and frustration due to interoperability problems. Consumers may be surprised to learn that their new, flag-compliant devices may not work with their older devices, or with devices using different flag compliance technology. For example, DVDs recorded using a new flag-compliant DVD recorder would not play in an older DVD player.

Any evaluation of flag legislation should weigh these risks against the potential benefits. The concerns of content providers about the long-term risk of widespread online copying of DTV programming are not without merit, and content providers clearly believe that a flag regime would offer them some protection against widespread Internet redistribution. But even the content industry concedes that the flag regime is not likely to stop determined pirates nor keep popular programs off the peer-to-peer networks entirely. Its main effect may be to keep ordinary consumers from uploading recorded programs to the Internet for legitimate purposes.

3. If Congress Proceeds With Broadcast Flag Legislation, It Should Include Important Limitations and Safeguards.

If Congress chooses to proceed with flag legislation, it is critical that it not give the FCC blank-check authority to implement the regime however the agency sees fit. Any grant of authority to the FCC should include carefully crafted limits and safeguards to help minimize the risks discussed above.

First, any such legislation should clearly state the basic scope and limited purpose of the FCC's authority. Specifically, it should say that the FCC may adopt regulations only to the extent necessary to prevent flagged content from being redistributed indiscriminately on the Internet.

Second, any such legislation should specify standards for the technology approval process, rather than leaving it all up to FCC discretion. The standards should be designed to ensure an objective, predictable, timely and transparent process. In particular:

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[2] *Lessons of the Broadcast Flag Process: Background for the Legislative Debate* (September 2005) *http://www.cdt.org/copyright/20050919flaglessons.pdf.*

[3] Broadcast Flag Authorization Legislation: Key Considerations for Congress, Version 1.1 (September 2005) *www.cdt.org/copyright/20050822broadcastflag.pdf.*

- There should be a clear standard for technology approval: Does the technology effectively frustrate an ordinary user from engaging in indiscriminate redistribution of flagged content over digital networks?
- Applicants should be permitted to self-certify compliance; the burden of proof should lie on the party seeking to have a technology rejected.
- There should be an express statement that certain reasonable consumer uses, including secure Internet transmission to a limited number of devices or Internet transmission of limited excerpts, will not be precluded.
- There should be a uniform timeframe for approval decisions.
- There should be an oversight mechanism, such as an advisory board, to help identify any problems or mission creep in the technology approval process and consumers should be represented in the oversight process.

Third, any such legislation should include provisions to reduce the risks to "fair use" and civic discourse. One important safeguard would be to specify that certain content is not eligible to be flagged including material that is in the public domain; coverage of debates or political speeches; and news programming the primary commercial value of which depends on timeliness. For these types of programming, the flag's risk to legitimate, noncommercial consumer uses seems particularly high, while its benefit to the commercial interests of copyright holders seems relatively low. (These types of programs are not likely to depend on long-term ongoing revenue streams through DVD sales, cable reruns, and so forth). It is important to note that unflagged content would still be covered by copyright law; it simply would not receive the extra layer of technical protection offered by the flag.

It is worth noting that in the rare instances when Congress has imposed technological mandates to address copyright concerns, it has balanced these provisions with language to protect specific types of copying that were considered fair use. The 1992 Audio Home Recording Act mandated use of "Serial Copy Management System" technology in digital audio recording devices—but it also said that consumers may record music for noncommercial purposes without risking infringement lawsuits. Section 1201(k) of the Digital Millennium Copyright Act required analog VCRs to respond to Macrovision copy control technology—but also specified that the technology could not be used to restrict consumers' ability to record ordinary television programming (including cable) for time-shifting purposes. An effort to address key fair use issues would be warranted in broadcast flag legislation as well.

Finally, any broadcast flag legislation should call for fair disclosure to consumers about interoperability limitations stemming from the flag regime.

Crafting these types of limitations in legislation would require careful work, but would be essential to help minimize the risks posed by the flag regime.

Thank you again for the opportunity to testify today. CDT stands ready to work constructively with the Committee as it continues to consider issues important to the future of the Internet.

The CHAIRMAN. Well, thank you very much. Those are very constructive comments.

I, again, want to emphasize, though, that the FCC got into this because 11 Members of this Committee wrote and specifically asked them to address the subject. And the rule was in effect for some time before it was determined that—by the court, as I understand it—the FCC didn't have authority from Congress to participate in issuing such a regulation.

So, I do think your comments are constructive, as I said, but let me just ask a couple of questions.

Mr. Setos, Mr. Band, sitting beside you there, talked about the content concept, looking at the content of these transmissions. What's your response to what he was saying about this process?

Mr. SETOS. Well, I think you're referring to his concern that distance learning would be in some way affected by the broadcast flag. And I think that, if I've read the TEACH Act correctly, the TEACH Act requires the content going to students at distant locations via the Internet be protected in some way. And I think that comes right under the regime of the broadcast flag. So, in principle, I

don't see the broadcast flag affecting distance learning in any way, and I would support any mechanism by which that would be made.

The CHAIRMAN. And, Mr. Band, you spoke of libraries being involved in that distance-learning process. My understanding it's basically with educational institutions, like our university, that broadcasts programs all over the state to schools. Now, where do the libraries come in?

Mr. BAND. Well, if the university is engaged in a distance-education program, the university library is a critical part of that process. Same thing at the high-school level, same thing at the primary-school level. Often an instructor will ask—will work with the library—with the school library or the university library—in putting together the distance-education programming.

The CHAIRMAN. Mr. Patton, is there any concern that determining fair license fees for flag technology could complicate this protection?

Mr. PATTON. That—charging fees?

The CHAIRMAN. Yes.

Mr. PATTON. No. In licensing regimes, on reasonable nondiscriminatory terms, there are fees associated with licenses. The primary issue which I have raised is not about the fee required to license a technology, but is about a provision that might prohibit us from asserting our own intellectual property that might read on that technology, for which we would be able to ask no fair price. The non-assert provision would prevent us from asking for that fair remuneration for the contribution that we would make to that technology.

The CHAIRMAN. Ms. Harris, you mentioned the concern about FCC becoming a gatekeeper for technology. How would you address that concern? Obviously, someone's got to be a gatekeeper if we're going to put this rule back into effect. Now, what——

Ms. HARRIS. Well, I think——

The CHAIRMAN.—what process would you find acceptable for the FCC to use?

Ms. HARRIS. I think, in the first instance, it's important for this body to state what "permissible uses" the FCC has to allow. In other words you're talking about distance learning, we're talking about news. You can make a lot of decisions—these are policy decisions, so a decision about whether or not we should permit excerpts to go across the Internet, whether or not we allow content to go to secure devices across the Internet—I think that a lot of those decisions need to be made here. I don't think we want the FCC in the business of becoming an arbiter between incumbents with powerful interests and new entrants who are trying to bring something to market. I think it's—this is the fundamental problem with the flag regime, is that these things could get worked out in a private marketplace. I think once they become a matter in front of the FCC—the FCC does not have enormous expertise in this area. They're having——

The CHAIRMAN. Your fear is about the technology—the development of new technology in this regard, is that right?

Ms. HARRIS. Pardon?

The CHAIRMAN. Your fear is about the development of new technology?

Ms. HARRIS. I'm worried about the development and the deployment of those new technologies. The truth is, the FCC process—I am not going to say they got it 100 percent right, but they did a fairly good job. And, even in that process, you saw companies, who had developed technologies for secure transmission across the Internet to secure devices, withdraw those features, because they saw that they were going to get into a big fight, that it was going to slow down the process. And that's what our concern is. If you went to the consumer electronics show, you know, it was mindboggling about what is coming—what is potentially coming to market that we don't even understand yet. And what we don't want to do is wind up with a regime that locks things in place in a way that makes it difficult for those new technologies.

The CHAIRMAN. Thank you.

Senator Inouye?

STATEMENT OF HON. DANIEL K. INOUYE, U.S. SENATOR FROM HAWAII

Senator INOUYE. Mr. Chairman, first of all, my apologies for being late.

I'm here because I'm interested in the draft that was proposed by Senator Smith, and I'm hoping that the Members of this Committee will study that draft, and members of the industry would do likewise.

Like most Americans, I'm concerned about the legitimate threat of piracy. The movie industry, I think, has been losing billions of dollars. The same can be said of the recording industry. At this time, the broadcast flag is not perfect, but it is about the most balanced solution we have. And since the court here has suggested that the Congress should get into the act to provide some authority, that's why we're gathered here. And we thank you very much for your help.

Mr. Chairman, may I submit my statement, sir?

The CHAIRMAN. Certainly.

[The prepared statement of Senator Inouye follows:]

PREPARED STATEMENT OF HON. DANIEL K. INOUYE, U.S. SENATOR FROM HAWAII

Digital content producers are right to conclude that piracy is a legitimate threat to their long term success. The movie industry, one of the few American industries with a positive trade balance, loses an estimated $3.5 billion annually due to piracy.

This amount, while already large, seems certain to grow as broadband proliferates, particularly if producers of content are unable to stop the indiscriminate distribution of their creative works.

The Federal Communications Commission (FCC) jumped into this breach at the prodding of Congress. In adopting its *Broadcast Flag Order*, the FCC recognized that adopting a standard for the protection of digital, over-the-air, television content was necessary to give broadcasters the same ability to protect video content that currently exists on cable and satellite distribution platforms.

Though far from perfect, the broadcast flag is the closest we have come to date to a balanced solution. With some refinement, it could provide sensible copyright protection without stifling the production of new, innovative consumer electronics.

Despite the recent reversal of the FCC's broadcast flag order by the D.C. Circuit Court of Appeals, the method appears to be gaining favor, and it may very well be appropriate for Congress to explicitly grant the FCC the authority that, the Court contends, it lacks. The testimony provided today will help us make that determination.

Today's hearing also affords us the opportunity to consider strategies designed to protect music and other audio content in a digital age—an industry that knows all

too well the impact of online piracy. As a result, today's second panel will allow us to explore whether similar content protection strategies are warranted for digital audio content.

I thank the witnesses for their participation in today's discussion.

The CHAIRMAN. Do you have any questions, at this time, Senator?

Senator INOUYE. Yes.

Mr. Setos, what would be the impact on the broadcast industry if all patent rights were taken away, if it was wide open?

Mr. SETOS. Well, it's—I liken it to—it would be quite devastating, obviously. We have—in this multi-hundred-channel universe of entertainment and information, the pay-television industry unilaterally can seek out any protections that it requires to feel that it can operate as a business. The music on iTunes, television shows on iTunes that can be downloaded to the iPod are protected by technologies. But if broadcasters—local broadcasters can't assure the rights holders, whether they be sporting leagues or entertainment producers, that their content won't be indiscriminately redistributed, they simply won't be able to gain access to that programming, and local television as we know it today will wither and die for that one sole reason.

Senator INOUYE. I am well aware of the high-tech advancements being made in the industry. And possibly this law that we are considering may do some harm. Do you believe that these copyright holders have their rights, also?

Mr. SETOS. Well, the simple answer is, of course, yes. And I think that, while it's proper for everyone to be concerned about the unwitting harm that something might engender, I think we've worked very hard in building consensus with this—the consumer electronics industry, the information-technology industry, and others to make sure that there is literally zero harm, in any real sense. And certainly with distance learning we think there's no effect. And more—this is primarily just more discussion to ensure that all these uses that people would like to have can be made without harming the local broadcaster.

Senator INOUYE. So, industry is willing to sit down with the content producers.

Mr. SETOS. Yes.

Senator INOUYE. Because you believe that their copyrights are legitimate?

Mr. SETOS. Yes.

Senator INOUYE. And piracy is a legitimate threat.

Mr. SETOS. Yes, it is a very real threat.

Senator INOUYE. Thank you very much.

The CHAIRMAN. Senator Burns?

Senator BURNS. As I understand it, the flag allows the receiver of any content, be it movie, music, or whatever, to record and keep that in his own private collection, but it does not allow it to be rebroadcast a second time. Is that a correct assumption?

Mr. SETOS. Yes, sir.

Senator BURNS. Mr. Band, in the libraries, are we treating electronic content different than print?

Mr. BAND. The flag would treat it differently.

Senator BURNS. Yes.

Mr. BAND. Under the existing copyright laws, you are allowed to engage in distance education, and an educational institution or a government agency is allowed to broadcast copyrighted material for distance-education purposes. So you're able to broadcast copyrighted material in limited degrees. And that would be considered a fair use, it's an exception within the Copyright Act. But the problem is, with the broadcast flag, the technology that you have, the receiving technology, would prohibit that retransmission. So that retransmission that can go on now in the analog world, and that is also, under the TEACH Act, allowed in the current digital world, would be prevented, going forward. And that's exactly our concern, is how do we make sure that the new technologies that would be responding to the flag—how would we still be able to retransmit the way we are able to retransmit right now with current digital technologies?

Senator BURNS. Rather than the government dictate a waiver for specific entities, such as libraries and educational institutions, do you think that the licensor would grant a waiver to those institutions without government requirement?

Mr. BAND. Well, if you're saying that an individual teacher or an individual institution pursue a license, there are two problems. One is cost. Right now the institution is able to do that retransmission, in essence, for free. But, under a license regime, if I were a content provider, I would ask to be paid. But, of course, we're talking about public schools, public libraries. And so, then you fellows would have to come up with the money for them to pay for that.

Senator BURNS. Do they pay for the books——

Mr. BAND. The——

Senator BURNS.—printed material?

Mr. BAND. The libraries now do pay for the books, that's right. But, of course, they would need a new license, on top of that, for the material that's broadcast. Now they are able to get that material for free off the air, and retransmit it for free. But under a flag regime where you then would have to have a license, you would have to presumably pay for that, so, there's a budgetary impact.

The second problem is simply a timing impact. Often, a teacher who's putting together a distance-education program—now the beauty of the Internet and the digital technologies, they are able to respond very quickly to current events. So, if a teacher wanted to retransmit something dealing with a Senate hearing that happened—this hearing, let's say—and they want to retransmit it tomorrow, they would be able to do it. But under a broadcast flag regime, especially if it had to be licensed, that timing, that ability to respond quickly in distance-education programming would just be impossible.

Senator BURNS. Why would we want to license that? Isn't it for public view, anyway?

Mr. BAND. Well, again, if I'm NBC news—and I have a news show, if a school wanted to rebroadcast it, maybe they would want a segment to be rebroadcast for free, or maybe they wouldn't. It would be up to them, under the flag regime. We think that at least with news broadcasts and other public-affairs shows that are so important, that—especially given that Congress is mandating the flag—then you also should be carving out the exceptions. It doesn't

make sense to us that you mandate the regime, but then let the content owners decide whether or not to allow the exceptions. That would be asymmetrical.

Senator BURNS. Ms. Harris——

Ms. HARRIS. Yes, I——

Senator BURNS.—would you like to comment on that? We're trying to sort this——

Ms. HARRIS. Right.

Senator BURNS.—thing out, where—you may comment.

Ms. HARRIS. Right. I think the concern here is that the way the flag regime has been conceptualized, the content owners simply decide—can make a decision to flag everything. And, in flagging everything, they're not just affecting distance learning—and I—having worked on the TEACH Act, completely agree with Mr. Band on his point there—but first of all, things that are in the public domain, public-affairs and news programming, which have an important societal and civic value, and which are increasingly being used on the Internet in snippets and clips to enhance a public debate that's going on, a very important public debate. And as it's currently conceptualized, by giving a grant to the FCC and not saying, "Here are the exceptions. You can't flag news and public affairs, you have to allow technologies that permit excerpting, so that—so that all content that can be used now in a fair-use way, could be used, going forward," that somebody has to say what those exceptions are, if you're going forward. And our view is, those are policy decisions, and they ought to be set by Congress.

The CHAIRMAN. Would you yield right there?

Senator BURNS. Sure.

The CHAIRMAN. I'm informed the FCC took the position that the copyright laws specifically provide the exceptions for fair use in the case of nonprofit libraries, archives, educational institutions, and nothing in their order would interfere with those exceptions. Why wasn't that sufficient?

Mr. BAND. Because, again, the problem is the technology. The flag would require that all receiving devices prohibit the retransmission. So, even though technically you're not changing the copyright law, as a practical matter there is no device that a library could buy that would allow that retransmission. So, that's why a critical part of this is making sure that there would be devices on the market. What we're asking for is very narrow, that there would just be professional devices that would be available only to entities that can take advantage of the TEACH Act so that they would be able to have the devices that would be able to retransmit this content.

The CHAIRMAN. Thank you very much.

Mr. SETOS. If I might say, there are products on the market that do that right now. The Commission did authorize the TiVoToGo technology that would allow the—a large number of locations to receive content, distribute it. And that could be done by a consumer or a library or a teaching institution. So, the Commission was open-minded toward this, and I think that——

Senator BURNS. Well, I guess I'm—I'm not confused, I'm saying—the technology does not allow them to grant a waiver, is that what I'm saying? Is there no technology that says—OK, you are a li-

brary. You are news. Can you make the decision to remove the flag, or is there technology to remove the flag once it's been transmitted?

Mr. BAND. No, that would be——

Ms. HARRIS. No.

Senator BURNS. There's no——

Mr. SETOS. I don't think so.

Senator BURNS.—none.

Mr. BAND. That's right.

Ms. HARRIS. No.

Mr. SETOS. No.

Ms. HARRIS. Absolutely not.

Mr. SETOS. But even the TEACH Act requires that the content sent on the Internet to distant-learning centers or locations be protected using protection means.

Mr. BAND. Right, but that's after you retransmit it. The problem for the library is, it wouldn't be able to retransmit it in the first place. In the TiVo example, it allows some retransmission to a limited number of locations, but, for example, if—in the—I imagine, in the University of Montana, when it's doing a distance-ed class, it might have——

Senator BURNS. This concerns me, by the way——

Mr. BAND. Right.

Senator BURNS.—because——

Mr. BAND. No——

Senator BURNS.—not only the Senator from Alaska has worked on distance learning a long time, I have, too.

Mr. BAND. Right. But you might have 100 students, or 200 students, or maybe 300 students enrolled in that class, and I don't think the technologies that Mr. Setos is describing would allow retransmission to 300 different students. It might allow retransmission to five students. So, if you were to conduct a seminar on the political process, that might fall within it, but if you were to be conducting a course on introductory economics, that wouldn't work.

Mr. SETOS. I do believe, though, that, in the context of the flag regulation, if a library or an institution brought a technology to the Commission and said, "We would like to use this for distance learning," and it protected the content, that it could be authorized under the flag regime, as is. Certainly, we would support that.

Ms. HARRIS. Mr. Burns?

Senator BURNS. Yes?

Ms. HARRIS. While I support that entirely, it doesn't answer the problem of fair-use exercise for everybody else, which may not be transmitting in full, like you would in a library or distance-learning center, but certainly would be excerpting. And, I think that much of the value of what's going on, in terms of democratic debate on the Internet right now, is excerpting of news, public-affairs programming. Sometimes it's parody, sometimes it's serious. But that's already considered a reasonable consumer use, and we don't have technologies licensed, to my understanding, that would permit that excerpting.

The CHAIRMAN. Thank you very much.

Senator Smith? And, Senator Smith, we thank you very much for that draft you circulated. It really has started the dialogue off very well.

STATEMENT OF HON. GORDON H. SMITH, U.S. SENATOR FROM OREGON

Senator SMITH. Thank you, Mr. Chairman. I appreciate you and Senator Inouye for holding this hearing. And the draft that I circulated is a draft. And all of your comments are welcome, and many of your suggestions have certainly illuminated this debate.

I want you to know I am absolutely committed to getting this broadcast flag legislation through, but we want to do it in a way that balances consumer expectations, technology innovation, obviously copyright protection. So, there really is a community of interest. If we end up killing off creative activity in this country because it can't be compensated, a lot of these technologies and sharing really begin to wane in their value, or at least their volume.

For the record, Mr. Chairman, what the draft says, that the Digital Content Protection Act of 2006 would authorize the FCC to adopt the digital television broadcast flag rules that were struck down by the court in 2005. The FCC would be granted narrow authority to implement rules that will discourage indiscriminate file sharing while allowing consumers to utilize new technologies, like TiVo. These rules are the culmination of a hard-fought compromise among broadcast movie and television equipment, manufacturing and information-technology industries. In addition, the bill would create a Federal advisory committee tasked with developing audio-flag technology to protect digital audio broadcasts by FCC licensees. If industry and consumer groups are unable to reach consensus with the Federal advisory committee, the FCC will initiate its own rulemaking. I believe that an industry-focused framework of this sort is absolutely essential to the development of fair and effective digital audio protection measures. But, again, we welcome all of your ideas, and I think many of them can be incorporated.

Ms. Harris, you have testified, I believe, that public information has a transient value.

Ms. HARRIS. Right, I had said news and public-affairs programs have more transient value than entertainment. I'm not going to suggest to you that it can't be, at some point, packaged for some other purpose, but it has an immediate value, yes.

Senator SMITH. Does it have any compensable value?

Ms. HARRIS. Oh, yes, I'm sure that it does. I think that the question is the balance. We're an organization who believes strongly in the rights of content creators. The question is, in the narrow of area of news and public affairs, does copyright law itself protect—I mean, that'sthe basic way to protect copyright holders is the copyright law, which has been somewhat strengthened by the recent Grokster case. So, the question is, on balance, if you keep that unflagged so that the bloggers and the debaters on the Internet are able to use small portions of that, have you deprived the copyright holders of their interests? If somebody abuses that, then we have the protections of the copyright law, which are strong and, as I said, have been probably recently made somewhat stronger.

The CHAIRMAN. Could I interrupt?

Senator SMITH. Yes.

The CHAIRMAN. Are you talking about a one-time broadcast by a blogger, or are you talking a building up of a blogger's library?

Ms. HARRIS. No, I'm not talking about a blogger's library. What I'm talking about is, you know if, today, this hearing was broadcast, as it is, on C–SPAN, and people on different sides of the debate on the Internet see some small portion that they, in their blog, want to comment on, and they want to put Senator Smith's statement about why he's doing this in today's blog, they can do that, right now. They can pull an excerpt. I don't think what we're suggesting here is that they have a right, in perpetuity, to use all of this material. What we're talking about is a fair-use right, and any use that gets used on the Internet, particularly in, sort of, snippets of news and public affairs, has to meet the fair-use test. If it fails to do so, then there are remedies under the copyright law.

So, I think our point is a modest one, it's that there is some programming that probably should not be flagged, and other programming that we should seek to figure out ways, in the technology, and tell the FCC that they need to try to encourage these ways to allow excerpts and the basic tools that people need to exercise fair use, if you're going to proceed here.

The CHAIRMAN. Isn't the test whether the originator—the entity that originated the program put it on the Internet in the first place? This is going on the Internet right now. Anybody can use this.

Ms. HARRIS. I——

The CHAIRMAN. And the same thing with any broadcast of a——

Ms. HARRIS. Right.

The CHAIRMAN.—of a network program. It——

Ms. HARRIS. Well——

The CHAIRMAN.—goes on the Internet. Anybody can use it. Now——

Ms. HARRIS. I'm not sure——

The CHAIRMAN.—what you're talking about is——

Ms. HARRIS. I'm not——

The CHAIRMAN.—developing technology that would store that stuff and make it available to someone else, for a fee.

Ms. HARRIS. Well, that's not what I—that's not my intent, what I'm talking about, Senator. No.

The CHAIRMAN. Thank you, Senator.

Senator SMITH. Mr. Band, I understand your arguments, and I have sympathy for what you're trying to make—preserve. But I understand that you made these arguments to the FCC, and that they rejected your arguments. Is that correct?

Mr. BAND. That's right.

Senator SMITH. Do you feel that they would reject them again if we put the broadcast flag rules into statute? Do you think you would fail again? And can you elaborate why they rejected them?

Mr. BAND. Well, it's an administrative process, so, comments were submitted, there were meetings, and then they simply didn't adopt some of the kinds of exceptions we were seeking.

Senator SMITH. Did they give you a reason why?

Mr. BAND. No. But I would submit that even if the kind of language that you've put in on the digital audio flag, if you still made

it permissive language on the digital broadcast side, it's conceivable that the FCC, thinking about it, would do the right thing. Or maybe it wouldn't. Our point is that they're not elected officials. You are.

Senator SMITH. But your point——

Mr. BAND. You're responsible to——

Senator SMITH.—your point is that, when we pass this into statute, we'd better put in a marker so that they deal with this in a substantive way in——

Mr. BAND. Or I would go a step further. Not just the marker. I would say that you should set forth, these are important public-policy issues, and this is the right body, that's responsive to the people, to adopt those kinds of exceptions in specific fashion. And, again, we're talking about relatively narrow, modest exceptions. The FCC is an independent agency, it's not accountable to the voters, it's not ultimately the right body to make those kinds of policy decisions.

Senator SMITH. What—educate me on this. If we make this exception for you, and everything that goes to the Library of Congress, which is pretty much everything, if it is accepted, isn't this a tremendous loophole in copyright——

Mr. BAND. No, not at all, because there's two parts to what we're seeking. One is that certain kinds of content—this is very much what Ms. Harris is saying—certain kinds of content shouldn't be flagged. And we're willing to work and come up with relatively narrow kinds of content that simply should not be flagged. But, again, if an educational institution abuses that, and still is retransmitting far more than they should, or in the example she's giving, of bloggers who are retransmitting more than they should, that they're infringing on the Copyright Act, and they should be held liable.

Senator SMITH. Well, we'll——

Mr. BAND. And there's——

Senator SMITH.—we'll work with you on those——

Mr. BAND. Right.

Senator SMITH.—definitions. I think they need to be narrow, or else you can drive a truck through this thing and——

Mr. BAND. Right.

Senator SMITH. But——

Mr. BAND. That's right.

Senator SMITH. But I don't—and I know—I don't believe my colleagues, either, have any interest in stopping educational spreading of information. So—Mr. Setos, in your opinion, is there a more viable solution to the problem of an indiscriminate redistribution of digital TV than a broadcast flag? I mean, are there any other ideas out there?

Mr. SETOS. Well, as I said, we—my colleague and I came up with this idea about five and a half years ago, and we've been talking to people since then, talking to a lot of people. And, no, sir, nothing has come forth, neither in our imagination or in anyone else's.

Senator SMITH. And if we don't do something, we're just going to kill off creative copyrighted material, are——

Mr. SETOS. Well, we——

Senator SMITH.—we not?

Mr. SETOS.—we certainly won't see creative material on—high-quality material on local broadcast stations. And that is—that is where this is really focused. It really isn't a copyright play, it's really in the interest of—because copyrights will go to pay television, Home Box Office, et cetera, and we simply won't have local broadcast stations able to compete in the marketplace. We're trying to simply give them a chance to compete in the digital future.

Senator SMITH. Mr. Patton, aren't all, or nearly all, new devices that contain digital tuners already compliant with the broadcast flag rule? Is a delay, as you have testified, in the effective date really necessary if manufacturers are already producing, or able to produce, compliant digital tuners?

Mr. PATTON. No, they are not all built with the flag. The court threw out the regime prior to the date by which the broadcast flag would have been effective. Also, many products that are on the market do not have digital outputs, so, therefore, would not have needed a broadcast flag. So, I think that with the uncertainty, currently, by virtue of the fact that it is not in place, manufacturers would need the time to integrate the broadcast flag circuitry into their sets, if they hadn't already done it. Certainly, it's fair to say that engineers have been preparing, but, again, did not have to integrate in all sets.

Senator SMITH. Mr. Chairman, my time's up. And I thank you, but I just want to emphasize to everyone here that we have to do something, and we want you to help us find the right balance.

The CHAIRMAN. Thank you very much.

Senator Nelson?

STATEMENT OF HON. E. BENJAMIN NELSON, U.S. SENATOR FROM NEBRASKA

Senator BEN NELSON. Thank you, Mr. Chairman. And I want to thank the panel for really enlightening what the issues seem to boil down to. One, it's a matter of technology, but it's also a matter of protecting, but providing certain exemptions.

Ms. Harris, let me ask a question about your concerns about building into this language something that protects, or idolizes, if you will, the flagging of broadcasts. Is there an alternative to this? Is there a way to leave this open so, as technology continues to change, that there's still an opportunity to come in with another way of implementing the same kind of protection?

Ms. HARRIS. You're saying an alternative to the flag, or an alternative to the current 13 that have been——

Senator BEN NELSON. To the flag.

Ms. HARRIS. I mean, the alternative to the flag is vigorous enforcement of the copyright laws, getting your content out in digital form early, which is a lesson, I think, to be learned from the music business. And it's a copyright issue with copyright responses. If the question is also, should we—developing the flag so that new technologies that offer more features and devices for consumers can get approved later on, that we don't lock in a small set of technologies as the only flag technologies, I think that's critical. I mean, right now we have 13 technologies that were approved—don't allow excerpting, don't allow things that, in the future, we may consider reasonable. So, we have to have a process. If you proceed to create

opportunities for people to develop, I would say more granular opportunities to use the content.

Senator BEN NELSON. And that can either—that flexibility for future development could either be retained by Congress or could be delegated, to some extent, to the FTC.

Now, I have to tell you, I have a healthy concern and a fear of alphabet agencies, so I don't like to empower them or authorize them with a free hand to be able to deal with this. But, in this particular situation, apparently we asked them to do it, they did it, the court said they didn't have the authority, so we are now where we——

Ms. HARRIS. Right.

Senator BEN NELSON.—find ourselves. We could probably provide some level of authorization for future development if we didn't want to retain that authority for ourselves. Is that accurate?

Ms. HARRIS. Well, I think that's right, but I think it's important to understand that the FCC is a constantly changing body, and that the kinds of decisions that you're talking about are policy decisions. And so, I don't want to give them too much authority, and I want to give them a lot of guidance, because the Commission changes. They approved 13 technologies. The current chair of the Commission dissented for some of those technologies, and was not chair at that time, so——

Senator BEN NELSON. Well, I agree with you. I said FTC—one alphabet agency, another alphabet agency. We have a lot of them. I agree that we ought not to give them too much to run with.

Now, in terms of protecting both intellectual property and exempting certain uses, can't we identify what kind of retransmission is acceptable, and do that in this bill that becomes law?

Mr. Band?

Mr. BAND. Well, I think that the Senate can do that, and the Congress can do that. Again, we were talking specifically about retransmission, in a very narrow range of circumstances. The TEACH Act already is extremely narrow. And so, we're only asking, at this point, for an exemption for that. Now, it could be other people are going to ask for other exemptions, but that's the exemption that has the most direct impact on libraries and educational institutions. It could very well be that other folks might come and be able to make the case for other similarly narrow exemptions.

Senator BEN NELSON. So, we don't have to do anything in this legislation that would do violence to the kinds of protections or exemptions you'd like to see.

Mr. BAND. Not at all. I think there's a way to address our concerns, but, at the same time, not, in any way, harm the copyright owners.

Mr. PATTON. Senator, if I could add an observation to your line of questioning and refer back to some of the earlier questions, we tend to be struggling over some of the limitations of a technology that's been developed that isn't perfect. And I think we all recognize it isn't perfect. But I would suggest that, in terms of what technology can offer, you ought to fasten your seatbelts. We are entering the digital age, and a flood of new capabilities. And right now we have authentication, we have encryption, we have fingerprinting, we have watermarking, we have digital-rights man-

agement solutions that will continue to evolve. I mean, we don't have to think back too long ago to know that so much of what we're able to do today simply was not possible.

The role of this Committee is critical to maintaining a healthy, robust, innovative, and competitive environment to continue to develop technologies to offer solutions. And we're not just talking about solutions for music and solutions for movies, we've got to move people's health records in a much more secure, safe way so we can reduce cost in the healthcare industry. We have to know where the terrorists are and when they enter our borders. And there are digital-rights management solutions that can give us opportunities through technology to pursue really important public-policy needs. A robust, healthy, competitive market is the message to send to all of the agencies with alphabets that have some responsibility for implementing your good public policy.

And if I could just go back to the one issue which we considered central to our testimony, and that is that as we pursue the marketplace for content protection technologies, we don't allow any anti-competitive or anti-innovation aspects of that to exist. That would argue in favor of good public policy equaling reasonable and non-discriminatory terms upon which technologies ought to be available to give effect to good public-policy objectives and goals. I appreciate the chance to add that.

Senator BEN NELSON. Thank you.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much.

Senator Sununu?

STATEMENT OF HON. JOHN E. SUNUNU, U.S. SENATOR FROM NEW HAMPSHIRE

Senator SUNUNU. Thank you, Mr. Chairman.

I really just have a couple of points that I would like to make.

The CHAIRMAN. Could I interrupt?

Anyone that had opening statements, we'll print them in the record automatically, yes.

Go ahead.

Senator SUNUNU. Thank you, Mr. Chairman.

First, about the focus of this debate. And I think Senator Nelson made some good points, raised some important concerns, and I want to pursue them.

Much of the discussion here has been about exceptions. What exceptions are we going to have to this broadcast flag? What loopholes are there going to be? And I would want to refocus it on the fundamental question of whether such a flag is even needed in the first place.

Now, I think the broad argument for needing a broadcast flag is that we have these new technologies that are different, that represent some unprecedented threat to copyrighted material and to creativity. And I think it's worth questioning that basic premise, because we have seen—and some of us have seen more closely than others—but we have seen many similar periods of innovation and technology that change the way we deal with, receive, and enjoy copyrighted or otherwise protected material.

And not to go too far back, but we had the advent of radio, and the threat that that presented to performers, music writers, composers; television; the advent of videotape, Beta and VHS, and the unprecedented threat that we thought that that would pose to creative work and content; cassette tape; cable television; satellite TV; CDs; DVDs. All of these represent enormous steps and transformation in the presentation, distribution, and dissemination of ideas, content material, much of which is protected, and rightly so, by different forms of copyright.

But, in all cases, we didn't need to step in with a significant statutory, government-regulated mandate on technologies that consumers use to enjoy this material. There are a host of regulations, and many of them are designed to maximize the use and the enjoyment of this. But I don't know of a case where we were discussing such a dramatic step, where the government—the Federal Government would legislatively mandate a specific type of technology to be incorporated in all this material.

I mean, you know, maybe the sky really is falling this time, but I think it is worth suggesting a little bit of skepticism. It's worth offering up a little bit of doubt before we—not just entertain this, but jump ahead to a discussion of what exceptions are required, as if it were a foreordained conclusion.

I think we should, further, be discouraged from moving too fast by the fact that this conversation is so complex. Over the last half hour or so, I was watching about a half hour in my office, was here for 15 or 20 minutes—it's a very complex discussion about exceptions and loopholes and what should be considered, or not, or what exactly is fair use. And when you start entertaining these kinds of complexities and saying, "Well, we're going to incorporate this into legislation," that, alone, should act as a warning that what's being contemplated is very risky, could have a lot of unintended consequences that I think none of us seek, and none of us would enjoy, but we all have to recognize that would be there when we're talking about something that's this complex. It has inherent risks.

That is one basic point I want to make, I want to impress on the panel, and certainly on the members, that we need to really question whether this is needed, and we have a whole history of similar technological innovation that has shown us that the market can react and can respond with its own ways of protecting artists and performers and copyrighted material, that's consistent with the law and consistent with the desire of the artist.

Which brings me to a second broad point, which is the suggestion that underlies much of this debate, that if we don't do this, we'll be killing off creative activity. This will stifle creativity if we don't enact a specific legislative government mandate on these technologies. Well, I don't think I've come up with this on my own, but the very technologies that some seem to be afraid of are driving innovation and driving creativity as we sit here today. In fact, we have an unprecedented wave of creativity and product development and content development, some of which is very, very impressive, some of which is very, very dismaying, but it is an extraordinary wave of creativity, and also an extraordinary wave of development of new business models and new methodologies for distributing this content, good and dismayingly bad. And I think the history of gov-

ernment mandates—in this area, but in just about any area we can conceive of—the history of government mandates is that it always, always restricts innovation. And sometimes we, as regulators, want to do that. We want to restrict—maybe we want to restrict competition in certain areas, maybe we want to restrict corporations from doing certain things that would harm consumers. The whole idea behind government regulation and government legislation is to, in some ways, restrict activity. So, why would we think that, this one special time, we're going to impose a statutory government mandate on technology, but it will actually encourage innovation?

Now, I could be wrong. This could be the one time that the sky is really falling and that the government mandate really won't restrict innovation. But I think, if we have this history to look at, we ought to at least be a little bit more skeptical than we have been so far.

Thank you, Mr. Chairman.

The CHAIRMAN. Well, let me just paraphrase the staff memo that was given to us, in order to, sort of, reestablish why we're here. Non-broadcast media, like cable and satellite television companies, are able to encrypt their signals. The FCC order rejected encryption at the source of digital television broadcasts, because of the cost that would be imposed on consumers by such a solution.

Now, the FCC order required the adoption of this flag developed by industry groups to thwart the redistribution, but, nonetheless, allow consumers to copy programs and watch copies within the limits of their own home viewing networks. Now, we're talking about broadcast flag, not the whole concept of media distribution, and we're talking about what to do about the fact that, without some protection, the threat of piracy would place the broadcast media at a disadvantage, as compared to non-broadcast media, like cable and television. It is a subject that requires an act of Congress, in my opinion.

Now, we'll thank you very much and call the next panel.

Senator SMITH. Mr. Chairman?

The CHAIRMAN. Yes, sir?

Senator SMITH. I think Senator Sununu has given us a good history lesson, and I think his history is right. I think the reason there is a distinction now, the reason the sky may be falling, is simply digital versus analog.

The CHAIRMAN. Thank you very much.

Let's take a 5-minute break so that we can have a change in the panel's names and that sort of thing.

[Recess.]

The CHAIRMAN. If we could turn to the second panel, we're now going to deal with the audio flag.

The need to protect audio content has increasingly gained attention as new digital distribution platforms grow in popularity. We're here now to listen to those who are concerned about the audio side of this problem.

First would be Mitch Bainwol, Chairman and Chief Executive Officer of the Recording Industry Association of America; the next, Gary Shapiro, President and Chief Executive Officer of the Consumer Electronics Association; and then, Dan Halyburton, Senior

Vice President and General Manager of Group Operations of Susquehanna Radio, in Dallas, Texas.

We thank you all for coming. It's a very complex subject, and we're pleased to have your advice.

The first witness will be Mitch Bainwol.

STATEMENT OF MITCH BAINWOL, CHAIRMAN/CEO, RECORDING INDUSTRY ASSOCIATION OF AMERICA

Mr. BAINWOL. Chairman Stevens, Co-Chairman Inouye, Members of the Committee, thank you for this chance to testify.

I'm going to jump right into this. I want to make four key points. One, investment in new music depends on the success of the emerging digital marketplace. Two, convergence is here; the current distinction between radio and downloading is disappearing. Three, there is a market failure in over-the-air terrestrial radio; our case for content protection is even stronger than the case of our video colleagues. Four, we stand ready to work with our partners—the broadcasters, IT, even Gary—to make sure the rollout of HD radio occurs expeditiously.

That said, no amount of cooperation mitigates the need to grant the FCC the authority to implement the right solution. So, let's drill down.

One, investment. In this country, uniquely, we're not paid when music is heard on terrestrial radio. We rely on sales to invest in the next generation of art. As you know, we're in the midst of a crucial transition period. Since the advent of file-sharing—really, stealing—in 1999, sales are down about 30 percent. The sky may not be falling, but sales are down 30 percent. The result? Artist rosters are slashed by a third; songwriters out of business—some, forever; the discovery of new music and the diversity of new music, compromised. But we have pivoted hard to the new world, licensing over 2 million tracks for online sales and rentals to a wide range of models and platforms. We're innovating, and it's working.

As recently as 2003, there were essentially no digital revenues. Today, we're generating significant revenues from download services like iTunes, from subscription services like Rhapsody, and from mobile music offerings, all of which will amount to billions of dollars a year by the end of this decade; that is, unless the emerging digital marketplace is cannibalized by functionality that substitutes for downloads without paying us, creators, comparably.

Two, convergence. Radio has always been a passive listening experience. Sure, people taped off the radio. They did it independently and manually. The quality stunk and degraded over time. If you wanted a good copy, you bought it. The radio service didn't provide a tool to automatically capture perfect-quality songs and subsequently move them effortlessly into your library of music to play on your portable device wherever and whenever you chose, until now. New devices are coming into the market that turn radio into download services. Going way beyond time-shifting and beyond current consumer expectations, these devices effectively provide free ownership.

The problem, of course, is that these radio devices, unlike iTunes, cell phones, and music rental services, don't pay for product. The existence of millions of devices where a consumer can replicate a

purchase, but bypass payment, would undercut our property right, undercut our ability to invest, and threaten the viability of the legitimate download market.

Let me do a bit of show-and-tell. This is the famous iPod. This is a Verizon cell phone. This is a Creative Zen that hooks you up to Rhapsody, a rental service—all examples of the new marketplace that's emerging. This is a picture of the new XM device, from XM Satellite Radio. Note the ad, "It's not a Pod, It's the Mothership."

[Laughter.]

Mr. BAINWOL. All of these are portable MP3 players. They store lots of music and allow personalization for fans so they can really enjoy their favorite tunes. And they're selling like hotcakes, 14 million iPods in the fourth quarter of last year alone. Most consumers rip their CDs into their iPods, or they buy from iTunes, paying 99 cents a song. Some of that comes back to the creators under marketplace licensing agreements. On the Verizon cell phone, they were likewise compensated. Same, too, with Rhapsody. But not on the new digital radio services. They'll allow consumers to download music without paying for it, a good deal if you're seeking to lure consumers to buy new receivers or to subscribe to your service, but not a good deal for us or for the platforms that they compete with unfairly.

Three, market failure. Our circumstance is different from the video context discussed earlier.

First, and most importantly, we don't get paid for product when it's broadcast over the air terrestrially. We're the only industrialized nation in the world where the artist and label do not enjoy a performance right. The motion-picture studios do.

Second, we, therefore, can't withhold content from the broadcasters as equal leverage in the marketplace to achieve effective content protection. Video content owners can.

Third, music is consumed differently. One might time-shift Desperate Housewives to watch it after it airs, or for a second time if you happen to be a big Eva Longoria fan, or a third time if you're obsessed. But a favorite song, whether it's "Stairway to Heaven," "White Christmas," or "Rocky Top," you listen to a thousand times. Uniquely in the United States, we have no market power to force the interested parties that come to the table to make sure our property rights are honored. We've been trying for years, and we can't get people to move. There is a market failure. Without intervention, the developing digital marketplace will be stymied.

Four, moving forward. Satellite radio devices are being launched now. Over-the-air radio devices are expected next year. So, the time is ripe. Talking about talking is no substitute for action. Let me also be clear, we're agnostic about the technical solution deployed to provide the content protection that we deserve. While we agree with many in the IT sector that encryption at the source might be an effective approach, we understand it may not be a viable option, because it would render useless existing car and home radio receivers.

The audio broadcast flag will work. As Senator Inouye says, "It's not perfect, but it will work." It's a good alternative, and it would not affect legacy devices. Therefore, we stand ready to work quickly

with the NAB's new Audio Flag Task Force and other interested parties to implement such a flag.

In the meantime, just as with the video flag, the FCC must be granted the necessary authority to implement an agreement. The current Smith–Boxer discussion draft reflects that approach. It's a great start.

Wouldn't it be great if you could push a button when you hear a song on the radio, and buy it? A buy button. An audio flag will assure that possibility for consumers, and provide a return on investment for creators, for the broadcasters, for the device manufacturers, and all of the interested parties that bring new and exciting entertainment to market.

Again, thank you for focusing on this important issue.

[The prepared statement of Mr. Bainwol follows:]

PREPARED STATEMENT OF MITCH BAINWOL, CHAIRMAN/CEO, RECORDING INDUSTRY ASSOCIATION OF AMERICA

Chairman Stevens, Co-Chairman Inouye, and Members of the Committee, I appreciate this opportunity to appear before you today to address emerging issues in the area of digital audio broadcast and the use of an audio flag for the protection of digital music.

At the outset, let me stress that we are excited about the new opportunities digital radio will provide to expose new artists and offer consumers new choices in the way they get our music, and about the convergence of different platforms and distribution systems. The record industry is wholly supportive of this new platform and joins others in looking forward to its speedy and successful rollout.

Our concern is not over the rollout of HD Radio itself, but rather the advent of new digital radio services and devices that will effectively turn radio into a music library, without paying the fair market price for licensing music that a download store or subscription service must pay. We have no issue with the convergence of radio and downloads, as long as they are licensed for that purpose. But when a radio service that is broadcast terrestrially over-the-air, or over satellite, uses free spectrum and its special treatment under the law to change its very nature, compete unfairly against download and on-demand subscription services that need to obtain an appropriate license, and avoid paying creators of music, we object.

New devices that effectively turn HD Radio into a music library should not come at the expense of those who create and provide the content upon which HD radio depends. New HD Radio services, and current satellite radio services, threaten to transform the intended *passive* listening experience of radio into an interactive one by enabling users to become owners and worldwide distributors of a personalized collection of recordings. What we are talking about here is not casual recording by listeners. It is not taping off the radio like we used to do. We are talking about allowing broadcast programs to be automatically captured and then disaggregated, song-by-song, into a massive library of music, neatly filed in a portable device's digital jukebox and organized by artist, song title, genre and any other classification imaginable in a manner that substitutes for a sale. Listeners will be able to automatically build entire collections of music without the need to ever purchase any of it; indeed, they won't even have to listen to the broadcast in order to build the library. This is not fair use. It is not time-shifting. And it's not radio.

This transformation from a passive to an interactive listening experience without obtaining the proper license to pay the creator is especially troubling because record labels and artists receive *absolutely no payment* from the performance of their works on terrestrial over-the-air radio. This unfair situation means that revenue, if any, comes only from the ultimate sale of that music to listeners. Yet the librarying functionality that could become part of HD Radio—the equivalent of permanent digital downloads—would displace those sales by providing listeners with the same content for free. And it would be enabled ubiquitously in every car radio receiver and in every home. You can imagine why we want to get ahead of this problem.

The resulting loss of sales threatens significant harm to an industry already hit hard by piracy. A recent letter to me from Dr. David K. Rehr, President and CEO of the National Association of Broadcasters (NAB), questioned the threat posed by piracy over HD Radio given the availability of unauthorized music on "Peer-to-peer file sharing . . . iPod uploads and digital music on the Internet." While it is true

that other opportunities for consumers to independently search for pirated music exist, making the free, automatic, selective downloading of music available over radios poses a piracy problem that threatens to surpass that of peer-to-peer ("P2P") file-sharing. Unlike P2P, digital radio downloads will offer pristine copies of songs without the threat of viruses and spyware. The ubiquity and ease of use of radios outstrips that of computers, and the one-way method of communication allows individuals to boldly engage in piracy with little fear of detection. It will affect all age groups, and it will appear to be sanctioned.

The harm from allowing these free digital downloads—as well as the ability to freely redistribute them over the Internet or on removable media—would also take away new market opportunities to provide consumers with convenient music purchases through "buy buttons" on radio receivers that would allow instant sales that produce new revenue streams for broadcasters, device manufacturers, and creators alike. And, of course, the potential loss of sales ultimately affects consumers, as companies are no longer able to invest in the production of new music.

Let us be clear: we are absolutely fine with any and all new radio features that give consumers more flexibility. But when a radio service adds features to effectively become a download service, it should be required to pay the same marketplace price that download services pay. Exemption from such a license is unfair to the legitimate distribution services and retailers, and it is unfair to the copyright owners who deserve fair compensation.

If the appropriate license is not obtained in the marketplace, we must ensure that features contained in free over-the-air radio do not allow it to tread into the realm of those download and interactive services that do pay such a license. This unfair competition threatens the stability of the digital marketplace and the value itself of copyrighted works. In order to accomplish this, we have proposed the implementation, through appropriate marketplace negotiation, of an audio flag that would allow for new consumer functionality for radio, including time-shifting, automatic recording by time, program, or channel, storage, digital read-outs, music purchase options, time-shifting capabilities, and great new sound—but would disallow the type of cherry-picking of songs and librarying that would constitute automatic selective downloading.

Why a flag? While we agree with many in the information technology industries that encryption at the source would be an effective and robust content protection method, we understand that, at this point, just as in the video context, it may not be a viable option. As I stated in my response to Dr. Rehr's letter, we are not insistent upon the use of encryption at the source. We remain agnostic as to the technology implemented to protect broadcast digital content. The broadcast flag will work, just as in the video context, it is a good alternative, and it offers an effective means of ensuring that music acquired through digital broadcasts is used appropriately. The use of a broadcast flag would in no way affect legacy devices and we understand from all relevant sectors that, once a technology is agreed upon, implementation is the easy part. The hard part is agreeing on the usage rules.

But in seeking agreement on usage rules, it is again important to understand what we want and what we don't want. Specifically, we are only asking for protection against radio broadcasts becoming music libraries through slice and dice functionality, and for protection against redistribution of recordings onto the Internet, removable media, or to other devices. We are not seeking to stop or delay the rollout of HD Radio or other platforms. Nothing we are seeking would change consumer expectations about how they use radio. Listeners can still hit a record button when they hear a song they like, and can engage in time-shifting, and in Tivo-like recording by time, program or channel. We merely ask that the line be drawn at automatic searching, copying, and disaggregation features that exceed the experience they, the FCC, and Congress expect from over-the-air terrestrial and satellite radio.

We feel strongly that a proper balance between music usage and protection can be found, and we would like to sit down with other industry players to find the appropriate solution. However, we have been unable to compel those other players to come to the table because of a fundamental lack of bargaining power. Again, *artists and record labels have no leverage to withhold their music since they don't have a performance right at all for over-the-air terrestrial radio, and are limited to a compulsory right for satellite radio*. This lack of a market solution requires that the FCC, the regulatory agency that controls the signal for over-the-air terrestrial radio, be granted the jurisdiction to address these issues and help guide industry participants to operate fairly. Senators Smith and Boxer have released a discussion draft with that goal in mind. We think it's a great start, and stand ready to meet with all the interested parties. (A direct Congressional grant of authority may be required since the United States Court of Appeals for the District of Columbia Circuit

recently vacated the FCC's ruling on digital video broadcasts for lack of jurisdiction. Of course, any grant of authority should not be limited to digital video broadcasts, but should necessarily include digital radio broadcasts, a notion supported by FCC Chairman Martin in a recent letter to Senators Frist and Alexander.)

The concerns we have regarding new HD Radio services are part of a broader desire to see all transmitters of digital content—whether terrestrial over-the-air, satellite, cable, or Internet—play by the same rules. For example, it is now clear that satellite radio, especially with proposed features allowing permanent copying and disaggregation, presents the same issues mentioned here, and should be treated the same. All new distributors of digital music—HD Radio, satellite radio, and Internet radio will be offering the same types of products to the same consumers. They should all follow the same rules so they compete fairly, and compensate creators fairly. By leveling the playing field, all of these platforms will have the chance to grow and compete, and new services will be encouraged to participate, creating more opportunities and choices for everyone.

HD Radio and other digital platforms certainly have much to offer. Enticing new users through increased quality, range, and selection is perfectly appropriate; but encouraging such migration with the lure of free unauthorized downloads is not. Device makers for terrestrial over-the-air radio (and satellite) broadcasts need to prevent the unrestricted redistribution of recordings and the ability to perform search-facilitated or automated copying so that individual recordings cannot be separated from surrounding content. We continue to encourage all interested parties to work with us to seek a mutually beneficial outcome. In the meantime, to guide the appropriate and responsible marketing of new HD Radio receivers, Congress should grant jurisdiction to the FCC to ensure that radio is radio, and that those who wish to effectively offer downloads, do so with a license.

Thank you.

The CHAIRMAN. Thank you very much.

Our next witness is Gary Shapiro, President and Chief Executive Officer of the Consumer Electronics Association.

STATEMENT OF GARY J. SHAPIRO, PRESIDENT/CEO, CONSUMER ELECTRONICS ASSOCIATION

Mr. SHAPIRO. Thank you, Mr. Chairman, Mr. Co–Chairman, Members of the Committee.

On behalf of the Consumer Electronics Association and the Home Recording Rights Coalition, I appreciate the opportunity to discuss these issues with you.

Just a couple of weeks ago at the International CES in Las Vegas, the full genius of our industry was on public display. Over 150,000 trade attendees were dazzled by an array of new products and new services that allow Americans to experience content however, whenever, and wherever they wish. These new technologies have previously created, and will, create lucrative business models for the content and the technology industries, and generate immense benefits for our citizens and also for our economy.

At the same time, this bright future depends upon two things. First is the right of innovators to bring products to market without restrictions, and second is the right of Americans to enjoy products for noncommercial purposes within their homes. Both subjects of today's agenda could diminish these rights and are of great concern for our industry.

First, the television broadcast flag.

Our 2,000 members have a range of views on this issue. I'd say many of them would agree with you, Senator Sununu. However, to the extent this committee opts to go forward with broadcast flag legislation, we urge that you restate, as closely as possible, the narrow language of what the FCC did in its existing order. We are concerned by the content-industry proposals, that go well beyond

the FCC's mass indiscriminate redistribution standard and would constrain, actually, the use of networks within the home. In addition, we urge you to include narrow exceptions for local news and public-affairs programming in our schools and libraries to use broadcast excerpts for distance learning.

Finally, if Congress is going to provide more protection to copyright holders, you should also safeguard the rights of consumers to enjoy the works that they lawfully have acquired. This, for example, would include the right to decrypt for noninfringing purposes. For example, to remove spyware that a CD has unknowingly placed on your computer.

Now, as far as the audio flag, I'm not even sure what we're talking about, because when the RIAA refers to it, there's no such equivalent in audio, the way there is in video. The differences are vast. The video broadcast flag was developed on an open, voluntary basis, by technology and content companies. It took several years. It used a well-known technology. It was aimed simply at mass indiscriminate redistribution over the Internet, not private home recording. The difference goes outside the walls of the home and onto the Internet. That's what we were talking about in the first panel. This panel, what Mr. Bainwol was talking about, is stopping legitimate home recording in your house, not even going over the Internet.

With respect to the audio flag, or so-called flag, there is no industry consensus or agreed-upon technology. No audio-flag proposal has been brought to a standards body or to CEA for discussion. Indeed, the Copyright Protection Technical Working Group, which was established many years ago by the RIAA, the MPAA, Mr. Valenti, myself, and the ITIC, the RIAA dropped out of it 7 years ago, and they haven't been back since.

The flag proposals themselves are not even limited to addressing mass indiscriminate redistribution of music over the Internet. So, instead of merely replicating the broadcast flag, RIAA is trying to limit consumer use of HD radio and satellite radio services and totally limit new products coming to market. They want to stop Americans from recording free over-the-air radio in their private homes for later enjoyment. This is something that Congress has repeatedly discussed and recognized and protected. You can go back to legislative history and report language over and over again that Americans have the right to record off of radio. Indeed, after 7 years of FCC proceedings, all but ignored by the RIAA until recently, the rollout of digital radio, also known as HD radio, is just underway today. Any Congressional nod toward the RIAA limits could hurt the launch of this exciting new technology.

And with respect to the national radio services, XM and Sirius, the content is already encrypted and cannot be redistributed over the Internet. Discussion of a flag in this context makes no sense at all.

As you may know, XM and Sirius have announced new handheld devices to allow their subscribers to record and play back music that they have paid for, like a radio TiVo. And at CES, both these products won awards for innovation and for consumer-friendliness. These products will be fully compliant with the Audio Home Recording Act, and royalties will be paid to the music industry. XM

and Sirius will still pay additional millions in performance royalties. So, the music industry is already getting two streams of royalties from these devices and the music that's being recorded on them.

Because of the Audio Home Recording Act, a law that the RIAA sought and promised would forever satisfy all their digital audio recording problems, all of these products are built so that copies cannot be made of the digital copies. Further, manufacturers have built these products so that digital content cannot be uploaded to the Internet.

But the RIAA wants more. They want to kill new products and keep them out of the hands of consumers. It's simply not justifiable. Ordinary consumers are not pirates, and recording lawfully acquired content for private personal use is not piracy. That's exactly what these RIAA proposals seek to halt. We see no basis for Congressional or FCC interference with ongoing satellite radio service or with the HD radio services that are now being launched nationwide, nor do we see any basis for government to restrict what Americans can do with lawfully acquired content for noncommercial purposes within the privacy of their own homes. This includes activities like indexing, storing, compiling, and making playlists. This is what you do with your TiVo every day, and it's a popular product.

A draft of the combined flag legislation, which we received late last week, purports to establish an audio flag modeled procedurally on the video flag, but, unlike the FCC broadcast flag order, this draft also potentially restricts private in-home consumer recording. It would also freeze the fair-use rights offered by any new product at current historic use. Think about it. Had that been the law at the time, we would have no VCR, no TiVo, and no iPod. All these products were new definitions of fair use, new ways to use content.

Finally, if industries, under this proposal, cannot agree on an audio flag, the bill mandates an anticopying technology that every digital device must use. We would oppose any legislation that proceeds on this basis. As we have feared, having been emboldened by a judicial victory against real pirates, the music industry now sets its sights on ordinary consumers. We respectfully urge you to reject the RIAA's efforts to vilify consumers and repeal basic consumer rights.

Thank you, Mr. Chairman and Members of the Committee, for the opportunity to appear today. We have worked collegially with the content industries, when they have been willing to do so, and we look forward to working with them, and with you and your staff, on future issues.

[The prepared statement of Mr. Shapiro follows:]

PREPARED STATEMENT OF GARY J. SHAPIRO, PRESIDENT/CEO, CONSUMER ELECTRONICS ASSOCIATION

On behalf of the Home Recording Rights Coalition and the Consumer Electronics Association, I appreciate the Committee's invitation to appear today. At CEA, we have more than 2,000 members who contribute more than $125 billion to our economy and serve almost every household in the country. We thus believe it is vital to preserve the innovation, integrity and usefulness of the products that our members deliver to consumers. Any legislation that would impair the usefulness of law-

ful products is a threat to innovation, and to the satisfaction of our customers with us and with our political process.

The Home Recording Rights Coalition was founded more than 25 years ago, in response to a court decision that said copyright proprietors could enjoin the distribution of a new and useful product—the VCR. This court decision was later reversed by the U.S. Supreme Court, and even the motion picture industry has admitted that it is glad that the VCR was allowed to come to market. But elements of the entertainment industry, after repeatedly suggesting that they want cooperative licensing and marketing initiatives rather than new legislation, keep returning to the Congress with unilateral proposals that would subject new and legitimate consumer products to prior restraints.

We have been down this road before, but somehow enough is never enough. From 1989 through 1992, we worked with the Recording Industry Association of America and other rights holders to draft and propose the Audio Home Recording Act of 1992 (the "AHRA"). The AHRA still produces revenue for the recording industry and music publishers, and protects them against serial copying on the latest generations of our industry's lawful and legitimate products. Yet except at royalty collection time, the music industry seems to want to forget that this law exists.

We worked with the motion picture industry and with Members of Congress and their staff in developing Section 1201(k) of the Digital Millennium Copyright Act of 1998 (the "DMCA"). This provision requires that certain analog home recorders must respond to a copy protection technology, but—and this is the key point for us—in return, it has "Encoding Rules" that protect consumers' reasonable and customary time-shift recording practices from interference by content providers.[1]

What is an "Audio Flag"?

I believe we can be excused, Mr. Chairman, for not knowing what the RIAA means when it uses the term "Audio Flag." If it is meant to be something strictly limited and analogous to the video "Broadcast Flag" proposal that was the subject of a Federal Communications Commission regulation (since nullified by the courts), then this is something that to my knowledge has never been shared with us, formally or informally, as a proposed regulation, or in proposed legislation.

The RIAA's first, and most specific iteration of a new constraint on digital radio surfaced at the FCC in 2004, and was *nothing like* the video "Broadcast Flag," which did not and does not purport to limit the utility of consumer recording products inside the home. By contrast, the proposal that the RIAA made to the FCC aimed specifically at frustrating and impairing the long-accepted, reasonable private and noncommercial practices of consumers in the use of *lawfully received content, inside their own homes*. The RIAA admitted in its FCC filings that, *even if not encrypted at the source*, accomplishing this would involve some home encryption requirement that, in order to be effective, would make any new digital radio products severely non-interoperable with existing home stereo systems. The RIAA never explained to the FCC, and has not explained in any public forum, specifically what it is trying to accomplish or how it could accomplish any of its objectives effectively yet in a non-intrusive manner.[2]

More recent suggestions that the popular satellite radio services be locked down also came "out of the blue." There is no indication that new devices now being rolled out, to make these services more portable and convenient[3] for lawful subscribers, would depart from the requirements of the Audio Home Recording Act—*most of which were drafted by the music industry itself*. Nor is there any indication of any problems as a result of the wide consumer acceptance of these services. It seems

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[1] The HRRC and many CEA members also helped launch the Copy Protection Technical Working Group (CPTWG), an open forum in which participants in the content, information technology, and consumer electronics industries have met regularly for almost 10 years. The CPTWG has had work groups on both the "broadcast flag" and the "analog hole," and CEA members served as co-chairs of each group. The RIAA was the fourth founder of this group, but withdrew its support and participation early on to concentrate on the "Secure Digital Music Initiative," which went into permanent hiatus several years ago, and never returned to the CPTWG.

[2] Indeed, the FCC's Digital Audio Broadcast proceeding was begun by the Commission in *1999* and its initial emphasis was almost entirely technical. Nevertheless, neither the RIAA nor any other music industry interest ever made a single filing in that proceeding until *5 years later*—and even then it did not disclose what specific technology would be imposed on consumers, and it still has not done so. But no matter what technology ultimately is chosen, it would be an unwarranted, unnecessary, and probably unworkable intrusion into consumer use, and into the very viability of the new digital radio format on which so many have worked so long and hard for so many years.

[3] Eric A. Taub, "Basics; Satellite Radio Leaves the Car To Go Home And on Walks," *The New York Times*, at C–9, January 12, 2006.

that, as in the case of Digital Audio Broadcasts, the main objective of imposing new constraints on in-home use is to destroy the utility of new consumer products that, like the VCR, will likely have the effect of enhancing consumers' lives and broadening the market for entertainment programming.

The In-Home Consumer Capabilities That RIAA now Wants to Constrain are not new and Have Never Been Shown to be Harmful to the Music Industry.

There is no established basis whatsoever for Congressional or FCC meddling with the ongoing satellite radio services, or with the terrestrial digital audio broadcast services that are just being launched. Whatever consumers will be able to do with these services in the future—including the recording, indexing, storing, and compilation of playlists—it has been equally feasible for decades to do the same things with existing FM radio service, with comparable quality. Yet, every time the Congress has reformed the Copyright Act, the Congress has declined to grant phonorecord producers any right or control over home recording or even over whether albums are broadcast over the radio in the first place.

There is no demonstrated problem, and there is no reason to take control of these services away from broadcasters and satellite radio providers, or to interfere with the customary enjoyment of these services by consumers, and put those controls solely in the hands of the record companies. The Congress has consistently declined to do so.[4] As a result, the United States remains a world leader in developing new broadcast and consumer technologies and services.

The constraints now being sought by the recording industry pertain to the *first* copy a consumer might make inside his or her own home. But, at the behest of the RIAA, the Congress already addressed this issue in the AHRA. The AHRA provides for a royalty payment to the music industry on Digital Audio Recording devices and media. At the specific request of the RIAA and the National Music Publishers Association, the AHRA explicitly does not prevent consumers from making a first generation copy, but limits devices' ability to make digital copies from digital copies. In 1991, Jay Berman, then head of the RIAA and now head of the industry's umbrella organization, IFPI, told the Senate that the AHRA—

> ". . . will eliminate the legal uncertainty about home audio taping that has clouded the marketplace. The bill will bar copyright infringement lawsuits for both analog and digital audio home recording by consumers, and for the sale of audio recording equipment by manufacturers and importers. It thus will allow consumer electronics manufacturers to introduce new audio technology into the market without fear of infringement lawsuits . . ."[5]

Indeed, the AHRA provides explicitly that copyright infringement suits *cannot* be based on products that comply with the AHRA, or based on consumers' use of such devices or their media. And, don't believe RIAA's revisionist claims that the AHRA had a narrow, limited focus. When urging passage of the AHRA, RIAA was singing a different tune. Again, in Mr. Berman's own words: the AHRA "is a generic solution that *applies across the board to all forms of digital audio recording technology*. Congress will not be in the position after enactment of this bill of having to enact subsequent bills to provide protection for new forms of digital audio recording technologies."[6] Moreover, the AHRA was specifically intended to address recordings

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[4] When Congress first granted copyright protection to sound recordings in the 1970s, it affirmed consumers' historical right to record radio transmissions: "In approving the creation of a limited copyright in sound recordings it is the intention of the Committee that this limited copyright not grant any broader rights than are accorded to other copyright proprietors under the existing title 17. *Specifically, it is not the intention of the Committee to restrain the home recording, from broadcasts or from tapes or records, of recorded performances, where the home recording is for private use and with no purpose of reproducing or otherwise capitalizing commercially on it.* This practice is common and unrestrained today, and the record producers and performers would be in no different position from that of the owners of copyright in recorded musical compositions over the past 20 years." House Judiciary Committee Report No. 92–487, 92nd Cong., 1st Sess. at 7 (1971) (emphasis added).

[5] *The Audio Home Recording Act of 1991: Hearing before the Senate Committee on the Judiciary*, S. Hrg. 102–98 at 115, October 29, 1991, written statement of Jason S. Berman at 119. Mr. Berman, in fact, emphasized that the comprehensive compromise nature of the AHRA was a reason for the Congress to pass it: "Moreover, enactment of this legislation will ratify the whole process of negotiation and compromise that Congress encouraged us to undertake." *Id.* at 120.

[6] *Id.* at 111 (emphasis supplied).

made from digital transmissions as well as from prerecorded media.[7] We see no justification to undo the provisions of the AHRA that safeguard the right to manufacture, sell and use devices to record transmissions by digital and satellite radio services.

There Is No Factual or Principled Basis to Constrain Consumers' Use of These Lawful New Products.

In addition to destroying Digital Audio Broadcasts in their infancy, the RIAA proposals seem aimed at destroying the utility of new consumer products that, like the VCR and TiVo, will enhance consumer enjoyment of music and broaden the market for entertainment programming. Sirius has already introduced a new hand-held device and XM has recently announced new hand-held devices that will allow their subscribers to record and playback content they already have paid for, much like a "radio TiVo." At the just concluded International Consumer Electronics Show, both devices won awards for their innovation and consumer friendliness. Configured to meet the terms of the Audio Home Recording Act, the only outputs from the Sirius and XM devices are headphone jacks for listening. They do not permit songs or talk radio to be moved to another device in digital form, and thus block the very kind of P2P file sharing that the RIAA has fought in its program of lawsuits against individuals. And yet the music industry apparently wants to keep these award-winning listening devices out of the hands of consumers.

The drive for legislation to constrain digital audio devices seems aimed at killing innovative new products, *even though* the music that these subscribers would record is music they have lawfully received via satellite and for which they have paid a fee, a portion of which goes to the very same record companies that want to kill these products. In addition, the manufacturers of these devices will make the royalty payments established by Congress in the Audio Home Recording Act to compensate for these recordings and will prevent serial copying as required by Congress under the AHRA. In short, even though the record companies already receive millions of dollars annually in royalty payments for the satellite radio transmissions and millions more for the recordings under the AHRA, the RIAA appears to be looking for double protection and triple compensation.

To be Analogous to the FCC's Prior Action, any "Flag" Proposal Would be Aimed Solely at Mass, Indiscriminate Redistribution Over the Internet by Means of a Known, Industry Standard Flag Technology That Does not Hamper Interoperability Within the Home.

A draft of combined "flag" legislation that was circulated late last week, but has not been introduced, would purport to establish an "audio flag" modeled substantively and, to the extent possible procedurally, on the "video" flag. But this draft appears also to specifically invite impositions against *in-home* consumer recording, as well as explicit constraints on the in-home utility and interoperability of lawful consumer products. In our view this is *not* a "flag" approach aimed, like the original, solely at mass, indiscriminate redistribution of content over the Internet to anonymous entities who have not lawfully acquired it.

The "video" flag (1) referred to a known technical standard, already adopted by the Advanced Television Systems Committee (ATSC), a multi-industry standards-setting organization, (2) was limited in its purpose, in standards and later contexts, to addressing anonymous redistribution outside the home, and (3) underwent a massive and entirely voluntary vetting in the Copy Protection Technical Working Group (CPTWG). The proposal in the "audio flag" portion of the draft bill is none of these things. In fact, the RIAA has never approached any standards-setting organization with any "flag" proposal, nor, for the last 7 or 8 years, has RIAA shown up in the CPTWG *at all*.

To date, no technical specifications have been developed to define an audio flag and there has been no effort by the RIAA to achieve consensus through any voluntary process. As a result, we now see that at least one legislative proposal would bring back the widely criticized procedure at the heart of S. 2048, introduced in the 107th Congress.[8] That bill would have required every digital device of any kind to recognize a "flag" in the information it receives, and restrict copying. It would have given the force of law to a "consensus" proposal from the entertainment and electronics industries. If the entertainment industry withheld its "consensus," the bill

[7] 17 U.S.C. § 1001(1),(3) (digital audio recording devices include those primarily designed to copy from transmissions); S. Rep. No. 102–294, 102d Cong., 2d Sess. 65–66 (June 9, 1992) (rules allow one generation recordings of digital broadcast transmissions).

[8] *See generally, http://www.wired.com/news/politics/0,1283,51275,00.html.*

authorized the FCC to mandate the anti-copying technology that all products must use.

Neither the consumer electronics industry nor the information technology industry has ever been willing to accept the idea of a technical mandate under such circumstances. All of the criticisms leveled at S. 2048 in the 107th Congress, from all quarters, should apply to any such approach, and we would oppose any legislation that proceeds on such a basis.

The Video "Broadcast Flag"

The proposals for a video "broadcast flag" emerged from two forums in which CEA, the HRRC, and various members have been very active—the ATSC, and the Copy Protection Technical Work Group. In ATSC committees, members of the content community for years pushed for a "descriptor" for the purportedly limited purpose of marking content, for possible control over mass Internet transmission. Members of the consumer electronics industry were greatly concerned that such a "flag" might be abused or used for other purposes, resulting in unwarranted control over consumer devices *inside* the home—something that had never been imposed on free, over-the-air commercial broadcasting. In response to these concerns, the content and broadcasting representatives agreed to clarify that the flag was meant to govern not transmission, but *retransmission*, outside the home.

Our members led in forming a broadcast flag work group at the CPTWG, and in drafting a final report. While the concept of a passive "flag" proved simple enough, the digital means of securing content, in response to such a flag, and the potential effect on consumers and their devices, proved controversial and contentious. The pros and cons finally were sorted out in the FCC Report & Order, which specified that the flag was meant solely to address *"mass, indiscriminate redistribution"* of content over the Internet. This is the Order that the Court of Appeals nullified on jurisdictional grounds. We understand that the sole purpose of any video broadcast flag legislation would be, or at least ought to be, to reinstate the FCC's authority to pursue the same course.[9]

While our members have a variety of views on the FCC action, CEA and HRRC have a couple of very clear concerns:

- First, legislative language circulated and attributed to the Motion Picture Association of America and its members would go well beyond the FCC's "mass, indiscriminate redistribution" standard, and could be interpreted as constraining distribution on networks *inside* the home.
- Second, the flag regulations were invalidated before they ever took effect. Accordingly, it should be clearly understood that, if new legislation is enacted, manufacturers must be given a commercially reasonable period of time to manufacture and include the necessary circuitry in their devices.
- Third, we have been disappointed to see the "ATSC Descriptor" show up in a number of standards proceedings, proposed by the content industry for uses that go well beyond those originally described to the ATSC.

If the Congress is going to provide more protection to the media industry, it should, simultaneously, safeguard the rights of consumers to enjoy the copyright works that they lawfully acquire. Our testimony to the other body said that, should the Congress move forward with broadcast flag legislation, the text of H.R. 1201, the Digital Media Consumers Rights Act (Boucher-Doolittle-Barton) should be part of the package, and we commend this view to your Committee as well.

Constraining Lawful Devices Chills Innovation

While we have voiced many specific concerns today about what some of this legislation would do to consumers and to the use and viability of legitimate consumer products, we must not ignore the overarching issue of technological progress and U.S. competitiveness. While other countries are busy developing their technology industries in order to compete more efficiently with the United States, we face proposals from the content community to suppress technological development on arbitrary or insufficient bases. This is a trend that ought not to be encouraged.

Again, thank you, Mr. Chairman, for the opportunity to appear before the Commerce Committee to address these important issues. We appreciate being asked to

[9] Just as there have been superficial and misleading attempts to link the "broadcast flag" with a purported "audio flag," we suspect that confusion may arise as to another commonly discussed issue, the "Analog Hole." As in the case of a purported "audio flag," there is one overriding fundamental difference: The proposals we have seen to address the "analog hole" would restrict home copying, not just Internet retransmission. In a House hearing last year we expressed detailed concerns over drafts of such legislation.

be here, and look forward to working with you and your staff as you examine the important issues that have been raised for discussion today.

The CHAIRMAN. Our next witness is Dan Halyburton, Senior Vice President and General Manager of Group Operations, Susquehanna Radio, in Dallas, Texas.

Thank you, Mr. Halyburton.

STATEMENT OF DAN HALYBURTON, SENIOR VICE PRESIDENT/GENERAL MANAGER, GROUP OPERATIONS, SUSQUEHANNA RADIO CORPORATION; CHAIRMAN, AUDIO FLAG TASK FORCE, NATIONAL ASSOCIATION OF BROADCASTERS (NAB)

Mr. HALYBURTON. Thank you, Chairman Stevens, Co-Chairman Inouye, and Members of the Committee. I'm Dan Halyburton, the VP/GM for Susquehanna Radio's group operations. Our company owns 33 broadcast radio stations.

I'm testifying today on behalf of the National Association of Broadcasters. The NAB is a trade association that advocates on behalf of more than 8,300 free local radio and television stations, and also broadcast networks, before Congress, the FCC, and the courts. I chair the NAB's recently formed Audio Broadcast Flag Task Force.

Local broadcasters support legislative efforts to immediately codify the broadcast flag for video. We believe, however, that copy protections on the audio side merit further discussion.

While I'm not an engineer, I'm a broadcaster who's been engaged in radio technology issues for a number of years. Our industry has commenced a massive rollout of digital broadcast transmissions, and increasingly affordable digital radio receivers are being put on the market and integrated into cars. Currently, 624 AM and FM digital stations are on the air, and that's triple from a year ago.

Individually, broadcasters have committed to upgrading more than 2,000 digital HD radio technology stations, and major radio companies are engaged in a massive marketing campaign to promote digital radio to consumers. HD radio will provide innovative new services to listeners. HD's multicasting will offer listeners new, unique formats and greater programming variety.

Just last week, several major radio companies announced the launch of new HD formats in 28 markets across the U.S. and more are coming. In digital, the listening experience for AM and FM is vastly improved. And HD will also enable enhanced data capabilities. All of these services will amplify radio's traditional strength: service to the local community. In short, the transition to HD radio is hitting on all cylinders.

With that progress as a backdrop, let me comment on the audio broadcast flag.

As a starting point, we should note that peer-to-peer file-sharing and unauthorized distribution of music on the Internet all present larger and more immediate threats to copyright holders than does HD radio. Our over-the-air product, with DJ introductions, commercials, public-service elements, are unique to radio's local presentation. And, accordingly, we're simply not a good source for music piracy. That said, broadcasters, radio as well as television, are content producers, and we oppose piracy in all forms.

The NAB has reached out to the recording industry to foster dialogue on the audio flag, and we were heartened in our most recent correspondence between our organizations. Mr. Bainwol wrote that "encryption at the source is not a viable option." And we agree. No proposal should be allowed to derail the HD radio rollout by making obsolete thousands of receivers already on the market, as well as millions more in the manufacturing pipeline. Other proposals that would restrict listeners' ability to record free over-the-air broadcasts for personal use are problematic.

These proposals differed in very important ways from the DTV broadcast flag. The TV flag does not involve copy restrictions, but only precludes indiscriminate redistribution of programming on the Internet. And the DTV flag would not scrap the existing DTV tuners in the market. Thus, the NAB enthusiastically supports legislation that would empower the FCC to implement the agreed-upon DTV broadcast flag.

On that note, I've submitted, for the record, testimony from NAB board member Preston Padden, of ABC/Disney.

[The information referred to follows:]

PREPARED STATEMENT OF PRESTON R. PADDEN, EXECUTIVE VICE PRESIDENT, WORLDWIDE GOVERNMENT RELATIONS, THE WALT DISNEY COMPANY; MEMBER, NATIONAL ASSOCIATION OF BROADCASTERS (NAB)

My name is Preston Padden. I am Executive Vice President of The Walt Disney Company, which owns ten major market television stations, and I appear here today as a witness for the National Association of Broadcasters. The bottom line on the issue of the television Broadcast Flag is very easy to state. If digital cable and satellite transmissions are protected against unauthorized redistribution over the Internet, but digital broadcast transmissions are not, then the owners of high value content will quite reasonably choose to exhibit their programs on cable and satellite distribution platforms rather than through free over-the-air broadcasting. The ultimate victims would be the American viewers who rely on broadcast television for their entertainment and information. These millions of Americans would lose access to the highest value entertainment and information, and we simply cannot allow that to happen.

The media business is in the midst of a compelling transformation from analog to digital. The new digital technology will create wondrous new opportunities for consumers and for those who produce and distribute entertainment and information content. However, piracy in the digital world is a much greater threat than existed in the analog world. In analog, each successive copy of a movie or television show degrades in quality. And, analog copies had to be physically transmitted to others by sending videotapes through the mail. The digital world is much different. Each digital copy is a pristine perfect replication of the original. Even more troubling is the capacity of the Internet to serve as a vehicle for instantaneous worldwide electronic transmission of these pristine prefect copies.

The threat to television broadcasters is very real. Every day, millions of people use so-called peer-to-peer "file-sharing" networks illegally to download copyrighted works without permission from or payment to the copyright owners. Television shows are among the most popular files being downloaded on these networks, and the threat is only increasing. Take for example just one software application (Cybersky-TV), which is being promoted by its creators as providing "Global free television" and allowing users to "Share television channels in real time, peer-to-peer." See *http://cybersky-TV*. According to the Cybersky-TV website, a copy of which is attached to this testimony, this application allows users to stream live broadcast television with a 5 to 10-second delay (essentially "real-time") to an unlimited number of users anywhere in the world, thereby destroying the territorial exclusivity that is bargained for by broadcasters and that forms the backbone of the free-over-the-air broadcasting industry in this country.

Recognizing the heightened threat of digital piracy, the major motion picture studios and the leading technology and consumers electronics companies negotiated through the 1990s to agree on technology to prevent unauthorized Internet transmission of digital video content. For a very long time the participants in the negotia-

tion believed that the new anti-piracy technology would function only for encrypted cable and satellite digital transmissions. It was believed in good faith by all of the participants in this negotiation that free over-the-air digital broadcast content could not be protected against unauthorized Internet redistribution. The participants believed in good faith that the encryption of the cable and satellite transmission was a necessary prerequisite to preventing unauthorized Internet redistribution.

On March 2, 2001, twelve members of the House and Senate sent a letter to the Chairman of the FCC, urging that digital broadcast signals be included in the new technological regime for preventing Internet redistribution. A copy of that letter is attached to this testimony. I would like to read just two sentences:

> "Millions of American households, particularly those that cannot afford subscription-based services like cable and satellite, continue to rely on free, over-the-air television for their entertainment and news information. If program producers cannot be assured that programming licensed to broadcast television is protected as securely as programming licensed to cable and other subscription-based channels, these producers will inevitably move their programming over to such channels where protections are clearly stronger."

Simply stated, the message from these Congressional leaders was clear—don't leave free broadcasting and its viewers out of the new world of digital content protection.

For quite some time the content, technology and CE companies wrestled with the technology challenge of trying to include broadcasting. Most participants continued to believe in good faith that there simply was no way to bring free broadcast programming within the framework of new content protection technologies. And then, Andrew Setos of FOX came up with the idea of the Broadcast Flag—a simple, single bit electronic indicator that the broadcast content should be protected against unauthorized Internet distribution. Miraculously, leading content, IT and CE companies, who normally can agree on almost nothing, came together and found common ground on the details to implement Mr. Setos's vision. The FCC conducted an open process to consider the Broadcast Flag recommendation.

Ultimately the Commission adopted its Broadcast Flag rules with an ongoing process of technical certification to make sure that innovation could continue to move forward.

The FCC's adoption of the Broadcast Flag was directly and specifically responsive to the March 2001 letter from Congressional leaders. It is critical to emphasize that the Broadcast Flag adopted by the FCC could not be used to prevent home copying by consumers. The only effect of the Broadcast Flag regulation is to control unauthorized Internet redistribution of digital broadcast content and thereby assure that broadcast viewers are not relegated to the status of second class citizens. The Broadcast Flag is also not a case of the government mandating technology. While manufacturers benefit from having a single standard used by broadcasters for signaling protection, the FCC's Broadcast Flag rule adopted a market-based certification process for implementing technologies. That certification process ensures that manufacturers in the IT and CE sectors are free to innovate new and better ways to deliver and manage content, consistent with a baseline set of compliance and robustness standards. The goal was to allow for as many different technologies as the market could support. In the end, every one of the 13 technologies that sought Broadcast Flag compliance certification received it, including one technology whose certification was opposed by the motion picture industry on grounds that it failed adequately to limit unauthorized distribution of digital television content.

Unfortunately, the FCC's Broadcast Flag regulation was challenged and struck down by the D.C. Circuit, not because it was a bad idea or had untoward consequences, but rather because the court found that the FCC lacked the statutory authority to adopt the Flag. It is more than ironic that a regulation adopted directly in response to Congressional input was struck down on the grounds that Congress had not specifically authorized its adoption. There is a critical need for Congress to immediately pass legislation providing the FCC with authority to adopt the Broadcast Flag regulation. The enactment of such legislation is supported by a broad range of broadcasting, content and consumer electronics companies including the following:

ABC Television Affiliates Association
The ABC Television Network
Association for Maximum Service Television Stations, Inc.
CBS Television Network Affiliates Association
CBS Television Network
Fox Broadcasting Company

Fox Television Affiliates Association
Ladies Professional Golf Association (LPGA)
LG Electronics
Major League Baseball
Motion Picture Association of America
National Association for Stock Car Racing Association, Inc. (NASCAR)
National Association of Broadcasters
National Basketball League
National Collegiate Athletic Association
National Football League
National Hockey league
NBC Television Affiliates Association
NBC Universal, Inc.
Philips Electronics North America Corporation
PGA Tour
Thomson Inc.
UPN
Women's National Basketball League

America's television broadcasters have been an important lifeline for news, information and entertainment to millions of Americans. For that tradition to continue, it is imperative that broadcasting be included in the new digital technology framework to prevent unauthorized Internet redistribution of content.

The number of major Sports leagues supporting the Flag is a clear indicator of the importance of the Flag to the future of sports on free broadcast TV. The same is true for all high value content. Consider for a moment a television program like "Lost," which airs on ABC. It is also available for download through iTunes the day after it airs on ABC, and each season is available in its entirety on DVD. ABC would like to continue to air programs like "Lost." The public has an interest in having access to such programs via free over-the-air television. It is our hope and intention to sell and license this film to future generations of viewers and to future generations of exhibition platforms. If "Lost" is licensed for exhibition on cable and satellite networks, it can be protected against unauthorized Internet redistribution, and the future marketing potential of this program via other channels, like iTunes or DVD sets, the film would be preserved. By contrast, in the absence of the Broadcast Flag, episodes of "Lost" are left wholly unprotected when distributed through digital broadcast exhibition, making possible the Internet retransmission of perfect, high-definition copies to millions and millions of consumers worldwide, seriously eroding the market for future sales and licensing.

The same concern arises with respect to access to major motion pictures for free-to-air broadcast. If a studio is faced with the choice of licensing an incredibly valuable motion picture—say, for example, "The Chronicles of Narnia: The Lion, the Witch and the Wardrobe"—for exhibition in high definition digital format via cable or satellite, where it will be protected, or unencrypted high definition digital broadcast television, where it will not be, it is not hard to see how broadcasters will be at a serious disadvantage in the race to acquire sought after content.

As with any legislation, there are some who have criticized the proposal to grant the FCC the authority to reinstate its Broadcast Flag rule. Some, including some who appear before you today, would like to see certain aspects of the FCC's rule modified, whether it be to prohibit the use of the broadcast flag for certain types of content, to exempt certain kinds of users from the rule, or to modify the procedures for certification of compliant recording and output technologies. Let me say just a few words about these concerns you have heard expressed.

First, each and every one of the concerns you have heard was raised at the FCC and considered in the course of the Broadcast Flag proceeding. That proceeding was a long and a difficult one in which all of these concerns were carefully weighed and a complex balancing of interests was performed. No one got everything they wanted, and nearly all participants had reason to be both pleased and disappointed with the result. But, at the end of the day, the result was fair and was one that promised meaningful protection in a way that sought to accommodate the concerns of all involved.

Broadcasters, like everyone else, have a list of things we could ask Congress to change in the FCC rule. But ultimately that would not serve the public interest in promoting the long-term viability of free over-the-air television. Such an exercise would inevitably lead to delay and perhaps inaction. What we are asking is simply that Congress step in to restore the *status quo ante*. All the reconsiderations filed before the FCC will be preserved and can go forward. But the important thing is that we put the Broadcast Flag back on track and let the FCC consider those issues

rather than creating a legacy of devices that fail to protect broadcast content while Congress debates more detailed and controversial legislation.

Second, it needs to be made clear that what we are talking about here is nothing more than ensuring that broadcasters are able to take advantage of the very same protections as are available today to cable and satellite operators. The broadcast flag rule would not allow broadcasters to limit redistribution of their programming in any way that cable and satellite operators are not able to do today with existing technology and under existing FCC rules. To the extent proposals are being made to prohibit the use of the flag in certain circumstances or to provide exemptions in others, it must be recalled that doing so only creates a disparity between broadcast and cable/satellite distribution of the sort the Broadcast Flag is meant to eliminate.

Finally, you will hear from some a concern that they will be impeded by the Broadcast Flag in their ability to make certain uses of broadcast television. We do not believe the Broadcast Flag actually prevents any of the uses we have heard described. To the extent the Broadcast Flag causes any inconvenience in making some of those uses, we must weigh those inconveniences with the value derived from protecting free over-the-air broadcasting by providing a level playing field with cable and satellite. We submit that such an interest is a compelling one.

On behalf of ABC and the National Association of Broadcasters, I urge you to please not leave broadcasting behind. Please don't relegate broadcast viewers to second class status. Please enact legislation to affirm the FCC's authority to adopt the Broadcast Flag regulations.

While Congress should grant the FCC authority to implement the broadcast flag for video, there should be additional reflection and inter-industry dialogue regarding content protections for HD radio.

Senator Smith has circulated the draft legislation aimed at promoting an industry-wide solution for the audio flag, and we think it's a step in the right direction. As evidenced by the progress made on the video flag, we believe that, in this context, legislation that promotes marketplace solutions and inter-industry agreements will produce the most positive result.

We look forward to working with the RIAA, the other interested parties, and this Committee. And thank you for your time today.

[The prepared statement of Mr. Halyburton follows:]

PREPARED STATEMENT OF DAN HALYBURTON, SENIOR VICE PRESIDENT/GENERAL MANAGER, GROUP OPERATIONS, SUSQUEHANNA RADIO CORPORATION; CHAIRMAN, AUDIO FLAG TASK FORCE, NATIONAL ASSOCIATION OF BROADCASTERS (NAB)

Chairman Stevens, Co-Chairman Inouye, and Members of the Committee. My name is Dan Halyburton. I am the Senior Vice President and General Manager for Group Operations for Susquehanna Radio Corp., which owns 33 broadcast radio stations. I am also Chairman of NAB's Audio Flag Task Force. I am testifying today on behalf of the National Association of Broadcasters.

At the outset, NAB wants to make clear that it opposes piracy in all shapes and forms. Broadcasters are, themselves, content owners and support efforts to protect both content owners and their signals from piracy and to prosecute violators. NAB, however, has concerns about current proposals with regard to copy protection for new digital audio broadcasts and receivers, in contrast to NAB's support for the digital television (DTV) broadcast flag. Specifically, NAB is concerned that any attempt to add anti-copying measures at this point should not stall the digital radio transition that promises to provide benefits to the public, broadcasters, music composers and publishers, and the recording industry alike, without solving the unauthorized copying problems raised by the recording industry.

Radio in America is today at the beginning of a massive roll-out of digital broadcast transmissions and all-new digital radio receivers. Currently, 624 digital AM and FM stations are on the air—triple that of a year ago. New digital radio receivers have been launched in the marketplace across a range of product categories. The ability to broadcast multiple program streams has been demonstrated, and broadcasters are fast embracing this option to bring additional content to the listening public within stations' current spectrum. Major radio groups are engaged in a massive marketing campaign to promote digital radio to consumers. The U.S.-developed

digital radio technology, that of iBiquity Digital, is now being tested in many countries around the world. And auto makers and after-market manufacturers are beginning to produce digital radio products for car sound systems. 2005 was an important year for the digital radio roll-out. 2006 promises to be even more important, with auto makers signing up for factory-installed radios and retail outlets prominently featuring many new digital radio products. Broadcasters have individually committed to upgrade more than 2,000 stations to HD Radio technology. It is thus of paramount importance that any copy protection mechanism for digital radio must not impede the digital radio roll-out.

NAB is greatly concerned that developing and implementing a technical system to provide copy protection for digital radio not have a negative impact on the digital radio transition. The DTV broadcast flag mechanism, for example, was developed over many years of intense negotiations by scores of participants from a wide array of industry sectors. The purpose, concept and methodology of the DTV flag were then the subject of voluminous comments and reply comments from affected industry and consumer groups, companies and organizations. The FCC scrutinized these comments, heard in-person presentations from many interested parties and concluded that the purpose of preventing widespread indiscriminate re-distribution of digital video content over the Internet was worthy and that the methodology was sound and workable.

NAB has expressed its willingness to participate in developing and forging a consensus on a digital radio copy protection system so long as it would not interrupt the digital roll-out or create uncertainty that would lead to a slow down of adoption rates by manufacturers, consumers and even broadcasters. NAB does not believe that legislation is necessary at this time. The immediacy, reality, or scope of any threat to the recording industry from a scenario in which consumers make good quality recordings from digital broadcasts on their local radio stations remains to be demonstrated. Those desiring to obtain and listen to pure, uninterrupted performances of sound recordings in lieu of the radio, already have an abundant number of means to do so. Satellite and cable digital subscription services, hundreds of thousands of unencrypted compact discs, peer to peer file sharing, and hours of uninterrupted music that can be stored on recordable CDs and hard drives, are but a few such means. We see no incentive for consumers to seek out random digital audio broadcast (DAB) signals that may contain DJ patter over the recordings in order to create files to make copies of or distribute sound recordings.

In addition, in any discussion of the extent to which copy protection should be accorded to digital audio recordings or transmissions, all parties must take into account Congress' long-standing policy of protecting and preserving the public's right to make home recordings of sound recordings for personal use. The House Report accompanying the Sound Recording Act of 1971 stated:

> In approving the creation of a limited copyright in sound recordings it is the intention of the Committee that this limited copyright not grant any broader rights than are accorded to other copyright proprietors under the existing title 17. Specifically, *it is not the intention of the Committee to restrain the home recording, from broadcasts or from tapes or records, of recorded performances, where the home recording is for private use* and with no purpose of reproducing or otherwise capitalizing commercially on it. This practice is common and unrestrained today, and the record producers and performers would be in no different position from that of the owners of copyright in recorded musical compositions over the past 20 years.[1]

Since that Act, Congress has expanded the sound recording right only sparingly, in careful response to specific and well-documented threats, all the while reiterating the importance of preserving the public's right to make home copies for personal use.

In the Audio Home Recording Act of 1992 ("AHRA"), Congress definitively addressed the issue of home recording of sound recordings and musical works. This Act was intended to be comprehensive, forward-looking legislation designed to end, once and for all, the "longstanding controversy" surrounding the home recording of prerecorded music.[2] Indeed, then-President of the Recording Industry Association of America (RIAA), Jay Berman, described the bill that became the AHRA as "a generic solution that *applies across the board to all forms of digital audio recording technology*."[3]

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[1] H. Rept. 92–487, 92d Congress, 1st Sess. at 7 (Sept. 22, 1971) (emphasis added).

[2] *See* S. Rep. No. 102–294, 102d Cong., 2d Sess. 30, 51 (June 9, 1992).

[3] Hearing Before the Senate Subcommittee on Communications, S. Hrg. 102–908, Serial No. J–102–43, at 111 (Oct. 29, 1991) (statement of Jason Berman, President of RIAA) (emphasis added).

The Senate Report that accompanied the AHRA opens its discussion of the bill with the assertion that "[t]he purpose of S.1623 is to ensure the right of consumers to make analog or digital audio recordings of copyrighted music for their private noncommercial use."[4] To this end, the provision of the AHRA providing the exemption for home copying, section 1008, was considered "one of the cornerstones of the bill" because it "removes the legal cloud over home copying of prerecorded music in the *most proconsumer way possible*: It gives consumers a *complete exemption* for noncommercial home copying *of both digital and analog music*, even though the royalty obligations under the bill apply only to digitally formatted music."[5] The Ninth Circuit confirmed this conclusion in *Recording Industry Association of America* v. *Diamond Multimedia Systems, Inc.*[6]

Current Proposals for Audio Copy Protection Are Problematic

One of the proposed solutions RIAA has advocated in the past for its copy protection concerns is to mandate that all radio broadcasters encrypt their digital content at the source. NAB strongly opposes this approach. Such a mandate would be antithetical to the concept of free, over-the-air broadcasting. No U.S. free, over-the-air broadcast service, analog or digital, has ever been required to encrypt its transmissions.

Any encryption requirement would likely risk stalling the digital radio transition by requiring a change in the technical digital radio broadcasting standard of such magnitude that a year's delay and likely more would be inevitable. Resulting uncertainty in the marketplace and potential loss of confidence and interest in DAB by manufacturers now ready to roll out (DAB) receivers would harm broadcasters and threaten the public's receipt of digital radio. To date, there has been no investigation of what kind of encryption would be utilized, what copy control and re-distribution measures would be added (and acceptable to various stakeholders) and what features receivers can and cannot employ in terms of storage and replay.

Required encryption of DAB transmissions, even at this early stage, would likely result in obsolescence of millions of units of DAB components currently in the production pipeline, including receivers, integrated circuits and installed component parts in automobiles, thereby increasing manufacturers' and auto makers' frustration with deployment of DAB products.

Encryption and copyright protection considerations with regard to digital radio differ in important ways from the DTV broadcast flag. The DTV broadcast flag does not involve copy restrictions (as does RIAA's proposal for digital radio) but rather is designed to prevent only indiscriminate re-distribution of broadcast programming over the Internet. The DTV broadcast flag does not disable the existing base of "legacy" receivers, which will simply not "read" the flag and its instructions on re-distribution. As noted, above encryption of DAB signals would obsolete receivers now in the field as well as receivers and component parts currently in the production pipeline. With the DTV flag, there was an acknowledged problem and a consensus solution developed by a broad cross-section of industry participants.

As an alternative to encryption at the source, the RIAA has, in the past, proposed various recording function rules that would be imposed through mandatory audio protection flags. NAB opposes proposals that would severely restrict a listener's ability to make recordings of free over-the-air radio broadcasts, for example, by limiting "pre-programmed recordings" to a minimum of 30 minutes duration, by prohibiting a listener's ability to subdivide a recorded segment after-the-fact, and by allowing a listener to view the ID information for a particular recording (e.g., song title and artist) only while simultaneously listening to that recording. Digital radio receivers so restricted would present to consumers a stark contrast with the abilities of other devices, such as existing analog radios which incorporate recording features, or software applications that can be added to a computer.

With regard to a proposed digital audio flag, RIAA has offered no clear definition of the problem that the flag is intended to solve, nor any indication of how the regime it proposes may solve that problem, particularly in light of the plethora of unencrypted digital copies of sound recordings available in the marketplace. Moreover, RIAA has provided no cost assessment to broadcasters for adoption of a mandatory audio protection flag.

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[4] S. Rep. No. 102–294, at 51.

[5] 138 Cong. Rec. H9029, H9033 (daily ed., Sept. 22, 1992) (statement of Rep. Hughes) (emphasis added).

[6] 180 F.3d 1072 (9th Cir. 1999).

The Committee Should Reject any Effort to Impose a Sound Recording Performance Right in Digital Broadcasts

NAB urges the Committee to recognize that granting a performance right will have no effect on the redistribution and copying issues raised here. Even in countries where a performance right in sound recording exists today, both for subscription and non-subscription transmissions, the right is almost universally subject to a statutory license. That license does not impose encryption obligations, bar encrypted digital outputs or analog outputs or even prohibit metadata-based recording. Accordingly, even if there were a performance right in sound recordings, the sound recording industry would still be asking Congress for the imposition of additional copy protection. All that a new performance right would do is create a new revenue stream for the producers and performers of sound recordings at the expense of broadcasters for purported reasons having nothing to do with this hearing.

Throughout the history of the debate over sound recording copyrights, Congress has consistently recognized that record companies reap huge promotional benefits from the exposure given their recordings by radio stations and that placing burdensome restrictions on performances could alter that relationship to the detriment of both industries. For that reason, in the 1920s and for five decades following, Congress regularly considered proposals to grant copyright rights in sound recordings but repeatedly rejected such proposals.

When Congress did first afford limited copyright protection to sound recordings in 1971, it prohibited only unauthorized reproduction and distribution of records, but did not create a sound recording performance right. During the comprehensive revision of the Copyright Act in 1976, Congress again considered, and rejected, granting a sound recording performance right. As certain senators on the Judiciary Committee recognized in their (prevailing) minority views:

> For years, record companies have gratuitously provided records to stations in hope of securing exposure by repeated play over the air. The financial success of recording companies and artists who contract with these companies is directly related to the volume of record sales, which, in turn, depends in great measure on the promotion efforts of broadcasters.[7]

Congress continued to refuse to provide any sound recording performance right for another twenty years. During that time, the record industry thrived, due in large measure to the promotional value of radio performances of their records.

It was not until the Digital Performance Rights in Sound Recordings Act of 1995 (the "DPRA") that even a limited performance right in sound recordings was granted. In granting this limited right, Congress stated it: "should do nothing to change or jeopardize the mutually beneficial economic relationship between the recording and traditional broadcasting industries."[8] As explained in the Senate Report accompanying the DPRA, "The underlying rationale for creation of this limited right is grounded in the way the market for prerecorded music has developed, and the potential impact on that market posed by subscriptions and interactive services—but not by broadcasting and related transmissions."[9]

Consistent with Congress' intent, the DPRA expressly exempted from sound recording performance right liability non-subscription, non-interactive transmissions, including "non-subscription broadcast transmission[s]"—transmission[s] made by FCC licensed radio broadcasters.[10] Congress made clear that the purpose of this broadcast exemption was to preserve the historical, mutually beneficial relationship between record companies and radio stations:

> The Committee, in reviewing the record before it and the goals of this legislation, recognizes that the sale of many sound recordings and careers of many performers have benefited considerably from airplay and other promotional activities provided by both noncommercial and advertiser-supported, free over-the-air broadcasting. The Committee also recognizes that the radio industry has grown and prospered with the availability and use of prerecorded music. This legislation should do nothing to change or jeopardize the mutually beneficial

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[7] S. Rep. No. 93–983, at 225–26 (1974)(minority views of Messrs. Eastland, Ervin, Burdick, Hruska, Thurmond, and Gurney).

[8] S. Rep. No. 104–129, at 15 ("1995 Senate Report"); *accord, id.* at 13 (Congress sought to ensure that extensions of copyright protection in favor of the recording industry did not "upset[] the long-standing business relationships among record producers and performers, music composers and publishers and broadcasters that have served all of these industries well for decades.").

[9] *Id.* at 17.

[10] 17 U.S.C. § 114(d)(1)(A). All statutory citations are to the Copyright Act, Title 17 of the United States Code, unless otherwise noted.

economic relationship between the recording and traditional broadcasting industries.[11]

The Senate Report confirmed that "[i]t is the Committee's intent to provide copyright holders of sound recordings with the ability to control the distribution of their product by digital transmissions, without hampering the arrival of new technologies, and without imposing new and unreasonable burdens on radio and television broadcasters, which often promote, and appear to pose no threat to, the distribution of sound recordings."[12]

This discussion is not intended to minimize whatever legitimate concerns the recording industry may have concerning the need for copy protection. Rather, it is intended to assist the Committee in understanding why a performance right for sound recordings is totally irrelevant to those concerns.

Conclusion

NAB believes there is no need for legislation at this time. Rather, the parties should have the opportunity to explore options and attempt to come to consensus. It is of utmost importance not to disrupt the digital radio roll-out currently underway. NAB remains willing to discuss developments and mechanisms to afford some agreed-on protection for content owners that will not threaten the digital radio transition that has been so long in coming to America's radio listening public and America's broadcasters.

Thank you for this opportunity to share our views.

The CHAIRMAN. Well, thank you very much. I'd like to get to that first part of what we're talking about, in terms of the ability of the individual to download from the radio or from CDs. I've got to tell you, you know, I, for years, had my CDs in a little package. I carried it with me on the airplane, listening to CDs that represented songs I've liked for 8 decades. All right? My daughters gave me an iPod, and they downloaded all of those. It took a lot of time to do that.

You're—Mr. Bainwol, you're not talking about that, are you?

Mr. BAINWOL. No. We think that's great. The iPod is a phenomenal device, and if you move your own CDs onto the iPod, that's great. If you buy songs from iTunes individually, put them on the iPod, that's great, too. We're talking about something entirely different. We're talking about being able to replicate a purchase and not make a payment.

The CHAIRMAN. OK. Now, then we come to Mr. Shapiro. You have some problems with that statement, as I understand it. You contradict him, sort of.

Mr. SHAPIRO. Actually—of course.

[Laughter.]

Mr. SHAPIRO. We're talking about three services here, to conceptualize them. There are two national radio services—XM and Sirius—and they are paying royalties to Mr. Bainwol's people, and, plus, the manufacturers of devices, which do what Mr. Bainwol was talking about, are paying royalties to Mr. Bainwol's people. And, plus, those devices are already restricted by acts of Congress as to what they can do. So, there's two royalties and a restriction already that the copyrighter owners get. They're asking for a fourth total restriction now.

There's also a local radio service, which is what the NAB is talking about. It's called HD radio, and it allows the local radio broadcaster to send out a digital signal. It's just started. It's taken—probably a dozen years in the making, 7 years with the FCC. The

[11] 1995 Senate Report, at 15.
[12] *Id.*

RIAA was not present in any of those proceedings til just very recently. We've gone along, we've created a standard, the radios are being sold, and now the RIAA is talking about stopping them from recording to those devices.

At the same time, Congress has considered, over and over again, whether you should have the right to record off of radio. And, every time, Congress has said, "You should be able to record off of radio." And that's what these devices do, they allow you to record off of radio for product that you legitimately got. They don't allow you to send it over the Internet. What Mr. Bainwol is talking about is stopping private home recording, fair use of radio. That's what he's talking about.

The CHAIRMAN. Is that right, Mr. Bainwol?

Mr. BAINWOL. No. And, you know, Gary's charming and compelling, but often very misleading. The——

[Laughter.]

Mr. BAINWOL. It's a dangerous combination. When we were going through our issue with Grokster, Gary instructed us that we should just get over it, that P2P was part of life, that it was fair use. The court disagreed with him, nine-zero. He's got a fairly fringe perspective here when it comes to what he calls "recording rights." And he's applying that fringe perspective in this debate. And I want to clarify a number of things he said.

First of all, fair use is not the right to take something and redistribute it, and it's not the right to replicate a purchase and steal a song. Fair use is the right to enjoy the product that you buy. So, if you buy a CD, you can put it on your iPod. We are the most permissive rights-holders of any of the content players.

The CHAIRMAN. Don't stretch it out too long. I want to know do you disagree with what he said?

Mr. BAINWOL. Well, the——

The CHAIRMAN. Are you——

Mr. BAINWOL.—the key thing——

The CHAIRMAN. Are you——

Mr. BAINWOL.—in terms of recording, we don't want to do anything that's different than current consumer expectations. But if——

The CHAIRMAN. But if I——

Mr. BAINWOL.—went to——

The CHAIRMAN.—if I take something off one of these new radio stations——

Mr. BAINWOL. Right.

The CHAIRMAN.—like Mr. Halyburton's got, and use it, and just use it in my own home, my own iPod, are you trying to restrict that?

Mr. BAINWOL. What we're trying to do is this. If you listen to the radio and manually record, as you can right now, and get it in that fashion, that's fine. If you want to timeshift a block of programming, that, too, is fine. But if you want to go in and program the device to automatically say, "I want that Bruce Springsteen tune, and I'm going to automatically do that without listening to the programming when it's live," that's different than what—than a—the traditional taping off the radio.

If that's your objective, that's exactly what you do when you go to iTunes when you make a purchase. You're saying, "I want Bruce Springsteen's Born to Run. Give it to me now." You put it in your library, you cherrypicked it. That's not right. That emasculates the download model.

Let me give you a consumer quote.

The CHAIRMAN. I've got just limited time, and we've got to get through this——

Senator SUNUNU. Mr. Chairman, can I ask a very specific question here that speaks directly to your point?

The CHAIRMAN. Yes.

Senator SUNUNU. Mr. Bainwol, if I'm listening to XM radio——

Mr. BAINWOL. Right.

Senator SUNUNU.—and they play three songs in succession, and I record all three songs, what you are saying is, I can listen to all three of those songs in the order that they were played by XM, but what you object to is me listening to those songs one at a time over a span of, say, 3 hours. Is that correct?

Mr. BAINWOL. Here's what I'm saying. I'm saying that you can—as you're——

Senator SUNUNU. That's a very clear question.

Mr. BAINWOL. Well——

Senator SUNUNU. If I have recorded—it's a simple——

Mr. BAINWOL. Are you——

Senator SUNUNU.—very simple——

Mr. BAINWOL. Are you——

Senator SUNUNU.—hypothetical.

Mr. BAINWOL.—listening to the radio as this occurs?

Senator SUNUNU. No. I've recorded three songs in succession.

Mr. BAINWOL. Right.

Senator SUNUNU. Can I listen—do you object—do you oppose——

Mr. BAINWOL. The——

Senator SUNUNU.—my right to listen to one of those songs at a particular time the following day?

Mr. BAINWOL. We have a concern about the disaggregation of a block of programming.

Senator SUNUNU. Mr. Chairman, the answer to that question—I think you understood the question—the answer to that question is, yes, I cannot listen——

Mr. BAINWOL. That's——

Senator SUNUNU.—to those songs one at a time.

The CHAIRMAN. And I followed Mr. Bainwol right down to the end, but if I set my television so I can record a particular program——

Mr. BAINWOL. Right.

The CHAIRMAN.—that I'm not going to be able to see—all right?—a ball game——

Mr. BAINWOL. Right.

The CHAIRMAN.—and now I come back and turn it on 2 days later and see it, now that's—there's nothing wrong with that, today.

Mr. BAINWOL. There is nothing wrong with that.

The CHAIRMAN. What's wrong with what Senator Sununu said with regard to recording songs and listening to them later?

Mr. BAINWOL. There are a series of problems. One is, when that TV program is broadcast, the content owner is being paid. When the song is aired on the radio—not in the satellite context—in the HD context, the content owner is not being paid. So, that's the first thing that's wrong.

Second, when you listen to White Christmas or Stairway to Heaven, you listen to it a thousand times. Desperate Housewives, you listen to, or you watch, twice. It is the pattern of consumption.

Third, we have no leverage here.

The CHAIRMAN. OK. I've got to move on. We have a disagreement here, I think.

Mr. Halyburton, do you have any responsibility, as radio operators, to protect radio content—digital radio content?

Mr. HALYBURTON. At this time, no.

The CHAIRMAN. Ah. Are you willing to work for a solution as to content protection?

Mr. HALYBURTON. Yes, as written in our written and our oral testimony, we're ready to sit down with the various players. There are more—obviously, a lot more people than just this table. But, you know, we have concerns about copyright. We are copyright owners. So, we think that there is an opportunity to sit down and have some dialogue, providing that dialogue and the approach is narrow in its attempts to try to accomplish something.

The CHAIRMAN. Now, you've mentioned your digital transition, and I assume you have invested very substantially in that transition, right?

Mr. HALYBURTON. Yes. All of the broadcast companies are spending tens of millions of dollars to make the transition to digital.

The CHAIRMAN. Has that added to your revenue base?

Mr. HALYBURTON. Not at this point. We're just really—as indicated, just really on the beginning of this. There is hopes down the road that this will improve revenues and profitabilities, but I think we're several years away from seeing revenues——

The CHAIRMAN. I sort of take it you're walking a tightrope between these other two witnesses sitting beside you, right?

Mr. HALYBURTON. Yes, it's kind of interesting. Usually, Mitch and I are more debating issues. I'm a little bit over on the side on this one, which is just fine.

The CHAIRMAN. What would you have us do with this bill?

Mr. HALYBURTON. Well, I think, as indicated, Senator Smith's suggestions are good ones, a step in the right direction. I think there is a lot of work to be done. You know, the TV broadcast flag was a long time in the making, but I think that if we can keep our approach contained and narrow so that we can kind of try to accomplish the things for all parties——

The CHAIRMAN. You want us to——

Mr. HALYBURTON.—you know, I think there are some areas to work on.

The CHAIRMAN.—mandate an industry-government solution, right?

Mr. HALYBURTON. We'd like to go back and work on it ourselves and see if we can't figure that out. I think there may be an approach in Senator Smith's bill that gives us a timetable. We can work along——

The CHAIRMAN. That's my——

Mr. HALYBURTON.—those lines.

The CHAIRMAN.—that was going to be my last question. Do you accept the timetable on that?

Mr. HALYBURTON. I think, again, providing we keep this discussion straightforward and limited, and we don't get too broad, and that we're aware of issues, like home recording and—et cetera, then I think we can get some things done.

The CHAIRMAN. Senator Inouye?

Senator INOUYE. I thank you very much, Mr. Halyburton. You mentioned this dialogue that has been developed between you and the recording industry. I'd like to, for the record, place the letter of the president of the NAB and the response of Mr. Bainwol. This is dated January 11th; and response, January 12th. I'd like to commend both of you for the steps taken.

The CHAIRMAN. You want to put those in the record, right?

Senator INOUYE. Yes.

[The information referred to follows:]

NATIONAL ASSOCIATION OF BROADCASTERS
Washington, DC, January 11, 2006

Mr. MITCH BAINWOL,
Chairman and CEO,
Recording Industry Association of America,
Washington, DC.

Dear Mitch:

I am writing to express the broadcast industry's strong interest in collaborating to find a workable solution to content protection issues associated with terrestrial digital radio broadcasting. As you know, the transition to HD Radio is well underway and local radio broadcasters have a great deal invested in a timely and successful rollout of this new technology. The goal for our industry is to find a resolution that balances protection of copyrighted works against the important objective of ensuring the continued and rapid expansion of digital audio broadcasts. Such a balanced approach could, in fact, aid the HD Radio rollout by removing regulatory and legislative uncertainty from the marketplace.

As a matter of initial discussion, NAB questions the degree to which HD Radio threatens copyright or will facilitate unauthorized, digital distribution of sound recordings. Those desiring to obtain and listen to pure, uninterrupted performances of sound recording in lieu of radio already have an abundant number of means to do so. Peer-to-peer file sharing and the hours of uninterrupted music that can be stored on CDs and discs are but a few such means. iPod uploads and digital music on the Internet would seem to present much larger and more immediate threats to copyright holders.

As such, NAB believes the scope of any piracy risk associated with HD Radio is likely more limited than RIAA has previously asserted. However, as content creators ourselves, radio broadcasters oppose piracy in all its forms and therefore hope that we can find an amicable solution to this issue.

We understand from previous conversations that the RIAA has advocated a number of proposals that would set back the HD Radio rollout and be unacceptable to broadcasters. For instance, RIAA has previously suggested broadly empowering the FCC to mandate that all radio broadcasters encrypt their digital content at the source. This approach is antithetical to the concept of free, over-the-air broadcasting. No U.S. free, over-the-air broadcast service, analog or digital, has ever been required to encrypt its transmissions.

An encryption proposal would also likely obsolete HD Radio units already on the market and millions more currently in the manufacturing pipeline. By making obsolete receivers already installed in automobiles, an encryption proposal could increase automakers' frustration and potentially imperil the future integration of HD Radio units into automobiles.

Moreover, mandatory encryption could set back the hundreds of broadcasters who have already licensed and are deploying (or have deployed) HD Radio transmission

equipment. An overly broad encryption system would risk making these stations' broadcast transmission equipment obsolete. Broadcasters simply cannot allow an overly broad encryption system to scuttle the progress made to date and turn back the clock on the digital radio revolution.

Not only would encryption at the source have severe unintended consequences, such an approach would not reflect the careful balancing act that Congress has undertaken in considering copyright issues. In crafting the Digital Performance Right in Sound Recordings Act, Congress essentially established a three-tier system for protecting and/or compensating the copyright owners of sound recordings. This system was based, in large part, on the threat level Congress felt various services presented to copyright holders. Interactive services, perceived to present the greatest threat, were subjected to the most rigorous levels of protection.

Other types of non-interactive subscription services were deemed to pose an intermediate threat level. Protection with respect to these services was provided through a compulsory license accompanied by numerous conditions such as a prohibition against pre-announcing music and limits on the consecutive cuts from one album or by one artist that could be performed.

The third in the three-tier system of protection established in the Act related to analog and digital broadcasting. Congress found they "often promote, and appear to pose no threat, to the distribution of sound recordings." Accordingly, "by contrast" with the other types of services, Congress concluded "not to include free over-the-air broadcasting in this legislation."

Legislation empowering the FCC with overly broad authority to create an "encryption at the source" standard would abandon this longstanding Congressional paradigm.

For these many reasons, we believe that RIAA's encryption proposal is not viable and we strongly oppose such an initiative. However, despite our objections to encryption at the source approaches, we do believe that there are possibilities for technical solutions that would offer effective content protection without slowing digital radio's advancement.

We hope to continue dialogue with you as the radio and recording industries keep working towards mutually acceptable resolution of this issue. We therefore think it would be beneficial for members of NAB's Audio Broadcast Flag Taskforce to meet with counterparts at the RIAA and in the recording industry. Such formal discussions could move the industries forward aggressively, rather than relying on a Congressional mandate. Should you have questions, please do not hesitate to contact me.

Sincerely,

DAVID K. REHR,
President and CEO.

RECORDING INDUSTRY ASSOCIATION OF AMERICA
Washington, DC, January 12, 2006

Dr. DAVID K. REHR,
President and CEO,
National Association of Broadcasters,
Washington, DC.

Dear David:

Thank you for your letter expressing the broadcast industry's strong interest in collaborating with us and other interested parties to find a workable solution to content protection issues associated with over-the-air digital radio broadcasting.

As you know, rampant digital piracy enabled by commercial operators has caused severe damage to thousands of songwriters, artists, labels and so many others in the music community over the past several years. Preventing such piracy over commercial HD Radio services is necessary to preserve the future of music for the health of both of our industries. This is a lesson we learned the hard way once before. We firmly believe a little prudence at this juncture would go a long way.

I appreciate the concerns you raise over encrypting the digital content contained in radio broadcasts at the source. The RIAA has always been agnostic as to the technological method of protecting content contained in digital broadcasts. As stated in our FCC filing, while we agree with many in the information technology industry that encryption at the source provides robust protection, a broadcast flag technology similar to the solution you support in the video context would be adequate to meet our needs. We understand that for the reasons you mention in your letter, encryption at the source is not a technological solution that provides a viable option

at this point and therefore support working with you to implement a broadcast flag solution for digital over-the-air radio.

We look forward to working immediately with members of the NAB's Audio Broadcast Flag Task Force, along with other interested parties, to achieve a timely resolution that can be implemented industry-wide.

Sincerely,

MITCH BAINWOL,
CHAIRMAN AND CEO.

Senator INOUYE. And I look forward to your solutions. So, it would be most helpful to the Committee if you could provide us with a—oh, an account of what you have produced from these meetings—say, once every three weeks—because it would be helpful, as we move along in the drafting of this legislation. And I suppose Senator Smith's bill will be the prime source. We'd like to see your recommendations.

The CHAIRMAN. Can I give you a timetable, Mr. Chair, if I can jump in?

Senator INOUYE. Sure.

The CHAIRMAN. We have a schedule here of 14 hearings. When they're over, we intend to start marking up all of these bills, hopefully get them done by the end of March. So, I think your timetable is absolutely right, no more than 3 weeks.

Senator INOUYE. So, I thank you very much, and I commend both segments of the industry. It may be the answer to the concerns of Senator Sununu. They may come up with a solution.

Thank you very much.

Mr. HALYBURTON. Thank you.

The CHAIRMAN. Senator Smith?

Senator SMITH. Thank you, Mr. Chairman.

Gary, my draft legislation requires the use of flag technology to prevent indiscriminate redistribution of copyrighted audio content. But if a consumer opts to share songs on their home networks, wouldn't such sharing be discriminate, not indiscriminate, and, therefore, permissible?

Mr. SHAPIRO. Thank you, Senator. I would hope so. I'm not sure that distinction is clear to us when we read the bill. And frankly, we're focusing, in large part, on the RIAA proposals along the way.

I think there are two major distinctions to be made here. One is the distinction between video and audio. And I think there's a—clearly, a much better case to be made for video, because it's a multi-year, private process that everyone was welcome to, including the recording industry, and they chose not to participate in it. Here, we're talking about something that's coming from the government, coming from the Congress, at the outset. And that is not the way to proceed, because you're talking—to get to this, you have to create a flag—you have to create a device with a way of detecting a flag. You have to then figure out what is inhibited and what is not. And that's a very, very long thing. And when I hear about the music industry getting together with broadcasters to talk about how our devices should be built, I get a little nervous.

I think the way to do that is to use the established entity, which has already been built, the Copyright Protection Working Technical Group, which Andy Setos has been very much involved in, from FOX, and others, and go there, and say, "Here's an issue. Let's work on a consensus. Let's develop what is OK and what is not OK,

and figure out a technical way of doing it," rather than have Congress step in and say, "Here is the mandate."

If you're agreeing with the basic principle, which I think you are, by your question, that in-home copying is OK and out of home is not, that's a great premise to work off of to go before the CPWTG and have them work it out and thrash and develop something which is workable.

Senator SMITH. Gary, I'm on the horns of two beliefs. One is, "Thou shalt not steal." Another is that markets can best sort these things out. I appreciate what you're saying. And, frankly, though, my reading of the history on the video flag, the video broadcast flag was only developed—resisted by your industry and only developed after the FCC intervened. So, why should Congress have faith that a digital audio content protection system will be developed voluntarily, without specific Federal direction?

Mr. SHAPIRO. I respectfully disagree with that. We were part of the development. As Mr. Setos would say, we worked closely, side by side, on the video broadcast flag. They were in standard-setting committees, which we probably equally populated. It was members of the consumer electronics industry, side by side. And, actually, Mr. Setos mentioned the names. We were there.

Yes, there is some disagreement in our industry whether we aggressively advocate it as a government mandate, but there was no disagreement on the technical aspects and bringing it up to the FCC in that format.

There are also—we have some concerns about the exceptions, as well. But the technical aspect and how that works was something we were side by side with the content community and working on.

Jack Valenti and I set up that group to work it out with Mr. Bainwol's predecessor. The RIAA chose to walk away 7 years ago, and they've never been back.

Senator SMITH. So, you disagree with my understanding of the history.

Mr. SHAPIRO. Yes.

Senator SMITH. And I—so, I appreciate you including that in the record.

Mitch, do you have a comment on that?

Mr. BAINWOL. Well, you know, we have wanted to engage anybody and everybody to solve this problem. And it's been hard to get parties to the table. And that goes to the point of the market failure. We do not have a performance right. We cannot withhold content. The video players could do that. That brought everybody to the table. You know, we—we're stuck in a jam here, where we have real harm. Our future is predicated on the emerging digital marketplace. Here, you have a capacity to obtain—to replicate a purchase without making a purchase, and nobody will pay attention to us, because we have no market power.

And so, the IT community says, "Encryption at the source is the way to go, but, yes, we can protect content." The broadcasters say, "OK, let's protect content, but let's do the flag." Gary really wants to do nothing, when you come down to it. And we're stuck having our property rights abridged. And if we have no property right, our ability to invest in new art will be damaged.

Senator SMITH. Mitch, isn't it also true that songwriters, in fact, are paid when their songs are played on the radio, but artists and record labels are not paid?

Mr. BAINWOL. It is true that songwriters and publishers are paid over the air, and it is also true that, in this country, uniquely, labels and artists are not.

Senator SMITH. And that's copyright law, is it not?

Mr. BAINWOL. That is copyright.

Senator SMITH. And isn't this the reason why an audio flag is needed?

Mr. BAINWOL. It's the reason why we need government to step in, to resolve a market failure.

Senator SMITH. Or at least to incentivize you guys getting together.

Mr. BAINWOL. Frankly, we'd love to do this at the market level and get everybody together around the table. It's hard to get them there when we have no leverage.

Senator SMITH. Well, Mr. Halyburton, if different technology could meet the needs of broadcasters without stranding legacy digital radio equipment, and without delaying the rollout of digital radio, would you be willing to consider such technology?

Mr. HALYBURTON. Yes, we would. And we're ready to work on that.

I'd also like to point out that Mitch continues to talk about this issue of royalty, but—and the U.S. system being unique. And it is unique. But it's a system that works. And for over 80 years—you know, we've got a strong system that works. Radio gives records free over-the-air exposure. It has been very much a synergistic combination that's built a lot of great careers for a lot of artists. So, there is revenue flowing there. It's coming in a different fashion. But I just wanted to point that out.

But we are ready to sit down. We'll talk about broadcast flag. I think we need to be aware of keeping that narrow, so that we don't try to reach too far. I think we need to look to the other members that are part of this area, to get their input on it, so we can find something that can work.

Senator SMITH. I appreciate that. And so, you would agree with me that we should not foreclose consideration of any new technologies but the audio flag. We should allow for the development of these things.

Mr. HALYBURTON. Yes.

Senator SMITH. Thanks, Mr. Chairman.

The CHAIRMAN. Senator Sununu?

Senator SUNUNU. Thank you, Mr. Chairman.

I think that last line of questioning brought us into the area of a discussion of the performance right, which I recognize is something that Mr. Halyburton said ought not to be part of this hearing. But I think it is extremely important.

The word, or phrase, "market failure" was just used, but it was used in reference to Federal copyright law that prohibits royalties for performers and grants them to songwriters. That's not a market failure. That's an unintended consequence of Federal regulation. And we need to understand the difference if we're going to make

good decisions, whatever decision we make. So—and I think this is an important question.

First, let me raise the issue with Mr. Halyburton, specifically with regard to HD radio. Do you believe that HD radio, when it comes, should obey and abide by the same royalty copyright requirements that we have imposed on satellite radio?

Mr. HALYBURTON. No, I don't. I think that we should continue the system that's in place today. It's really an extension of how we operate today.

Senator SUNUNU. That seems to me to be a little bit inconsistent, given the technologies that we're talking about, the fact that the distinction that seems to be so important is digital versus analog, and HD is going to be taking advantage of digital and other technologies to provide a product to consumers that looks similar to—not identical to, but similar to, in many respects, the satellite radio. And I think to say, "Yes, but they shouldn't have the same royalty requirements," is a little bit inconsistent.

Mr. Bainwol, do you think that HD radio should have the same—ideally, have the same royalty requirements as satellite radio?

Mr. BAINWOL. I think you've just done a better job than I did of articulating that there's a problem with parity here. You have a convergence going on—the iPod, the phone, satellite, HD—with devices all able to do essentially the same thing—perform and provide a distribution. And the rule sets are different. That makes no sense.

Senator SUNUNU. And the answer to my question is?

[Laughter.]

Mr. BAINWOL. If this body were to grant us a performance right in HD, we would think that would be a good thing, sure.

Senator SUNUNU. And do you think there should be a performance right for regular over-the-air radio, as well?

Mr. BAINWOL. We think that the fact that there's an anomaly, globally, in that this is the only place in the world, in industrialized nations, where that right is not afforded, is really problematic.

Senator SUNUNU. And—I'm inclined to agree with you. It seems to me this is a more important area to look for consistency. Regardless of the specific technology that's being used to provide a product to consumers, it is a much more important issue to address, and a much more rational argument to make, than arguing that you want regulatory and legislative distinctions based on your viewing or listening patterns, and that suddenly Congress or some regulator has to make distinctions, "Now, that's a Christmas song, so you're really only listening to that five times a year, as opposed to your Thelonius Monk recordings that you listen to all the time; or Desperate Housewives, which is an hour-long program, and everyone watches at least three times, but then it becomes tedious, versus a rerun of Seinfeld that you've all seen 50 times and are going to watch another 50." A little bit dramatic, but I think the point is there. I don't want to be in the position of having to analyze listening or viewing patterns, especially in an age when the type of content is changing dramatically—blogs were talked about here, other people mix and sample different content—and to try to

decide how it fits into the Federal regulatory pattern—or Federal regulatory framework of viewing or listening patterns.

You don't have to respond. I——

Mr. BAINWOL. May I?

Senator SUNUNU. Well, you may, certainly. And I understand, though, you wish to make a distinction between music and video, and argue that there's some difference here. But, please, go ahead, in your own words.

Mr. BAINWOL. I'm always hesitant to spar here, especially with you, but I think there is a clear line here that is evident, and it is not quite the ambiguous scenario that you painted.

Versus video, we're obviously not being paid, so that's a very clear distinction. In the context of recording rights or recording opportunities, personal use, there's a very clear line. If you take those three songs you wanted, and you manually recorded that block, then you could disaggregate them, but if you're going to go and do what is effectively what you're doing on iTunes—if iTunes should pay for the content, then every other platform should pay for the content, too. If iTunes should provide a mechanism for the investor to be rewarded for the investment in content, then so should the other platforms.

Senator SUNUNU. Well, the consumer, in the case of satellite radio, is paying for the service, and, equally important—maybe, in your opinion, more important—you are unrestricted in your ability to negotiate with those satellite providers over a fair and decent royalty for your artists and your performers and your songwriters. And I would argue you would be serving those artists and performers and songwriters much more effectively if you work to ensure a better copyright standard for whatever systems of distribution might be developed in the future——

Mr. BAINWOL. But, remember——

Senator SUNUNU.—and whether it's over-the-air radio, HD radio, satellite radio, or something else.

I do have a very specific question for you, in this context. If someone's music is used in a motion picture—I don't know the answer to this; I guess that's why I'm asking the question—do they not get a royalty, and do they not continue to get a royalty each time that motion picture is sold or performed or played in a venue?

Mr. BAINWOL. I believe so. But when you—if you were to TiVo that, you couldn't isolate that song from the show that you saw it on.

Senator SUNUNU. Frankly, I don't think that is at all relevant. If you TiVo it, though, you're viewing it, you're TiVo'ing it from someone broadcasting it. There's a royalty being paid for the rights of that broadcast. So I think——

Mr. BAINWOL. And——

Senator SUNUNU. And that is, important, being—that is a royalty that's negotiated——

Mr. BAINWOL. Right.

Senator SUNUNU.—based on the power of the system of distribution.

Mr. BAINWOL. Let me——

Senator SUNUNU. And——

Mr. BAINWOL. Let me clarify one thing. You are merging two different things going on. And it's an easy thing to do, because this stuff is really complicated. But you have a performance, for which we are paid, and you have a distribution, for which we're not really being paid. They're different. One is to listen, and the other is to obtain a copy for your personal library——

Senator SUNUNU. I'm sorry, in which case are you—what are you speaking about here?

Mr. BAINWOL. In the beginning part of the prior question.

Senator SUNUNU. Oh, I thought you were back—I thought you were talking about TiVo.

Mr. BAINWOL. I'm not talking about——

Senator SUNUNU. We were on TiVo.

Mr. BAINWOL.—and stuff like that. I'm talking about the satellite radio case, where we are paid for a performance, unlike over the air, but we're not paid for the distribution.

Senator SUNUNU. No, but you are being paid by the provider of the service in a way that is commensurate with the value of the service. And I fully believe——

Mr. BAINWOL. To—for it to be——

Senator SUNUNU.—in the future——

Mr. BAINWOL.—for it to be heard, not for it to be owned.

Senator SUNUNU. Well—this is a little glib, but it's the way the markets work. Renegotiate. OK? Set a new arrangement. You set that license in a free market, willing people, a buyer and a seller. Now, you would argue, "Well, now you're doing different things that we didn't really foresee you doing," and I sympathize with that.

Mr. BAINWOL. There is a compulsory license, so we can negotiate on the performance with an arbitration, but on the distribution, it's a totally different story.

Senator SUNUNU. And the compulsory nature of the license is, once again, pointing the finger back at Federal statute and Federal legislation, which is—my original question to you is this issue of parity and being allowed to——

Mr. BAINWOL. Right.

Senator SUNUNU.—compete effectively in an environment where we have these many different mediums. This isn't 1920 or 1930 or the 1940s, when the original performance restrictions were imposed; this is 2006, I suppose, and I think that this is an area that deserves a lot more investigation and a lot more discussion. And I understand fully reasons that the NAB may not be interested.

Thank you very much, Mr. Chairman.

Mr. SHAPIRO. Can I add to that, Mr. Chairman? May I add a comment on that?

The CHAIRMAN. Yes.

Mr. SHAPIRO. Thank you very much.

Senator Sununu, I think you're absolutely right. I think what we have here is a situation where you have manufacturers paying a royalty to the recording industry, you have the satellite services paying a royalty to the recording industry, and you have perhaps a lack of parity with local broadcasters. Local broadcasters are turning around saying, "Let's negotiate about this—how devices will be built." I don't think that's right, frankly.

And I think my concern is, is there's a tremendous investment that manufacturers have already made in HD radio service. They're about to launch radios. And when they hear from Congress that we might change the design of those radios, they're going to pull back, just as they did in the DTV case, when Sinclair Broadcasting came in and said, "We should stop the DTV standard, because it's not good enough." So, manufacturers started not putting tuners in television sets. They ended up selling a lot of monitors, and consumers liked them. And that's the situation it is today, and television broadcasters are a little frustrated over it.

But the fact is, we could face the same thing now with the full, national rollout by many manufacturers of HD radio. And what you have is, you have a frustrating situation for the RIAA, because they're not getting the royalty they want. And a lot of what people think is going on here is the subterfuge to try to get that performance royalty.

Mr. BAINWOL. Let's be real here. OK?

The CHAIRMAN. This is the last answer.

[Laughter.]

Mr. BAINWOL. Thank you, Mr. Chairman, for indulging me—there is no subterfuge going on here. We're not getting paid over the air, and now we're not going to get paid for the distribution. We're not going to get paid for anything. We work real hard to produce a product, if we're going to be denied our compensation, that investment in new product's going to dry up. That's a problem.

Mr. HALYBURTON. Mr. Chairman, if I could just make one point, just on the radio side. You talk about parity, but there really are some differences. We are held to a higher standard, a public-service standard, that these other industries don't have to do. We don't have subscribers. We have listeners. And we have to serve that community, and then we have to go out and sell advertising to pay the bills and employ the people who work there.

So, you—on one hand, you'd like to say they're all the same. But they're not all the same. And the system has worked well, it continues to work well. In the particular issue, because—and I'm not the guy—I'm not a copyright guy; I'm a radio broadcaster. And what we want to make sure you understand is, we're willing to sit down, talk with the RIAA, with the consumer electronics side, the other parts of this process, to try to find a way to help the record industry protect their copyrights from indiscriminate distribution.

The CHAIRMAN. We thank you for that.

Mr. HALYBURTON. Thank you.

The CHAIRMAN. One of the reasons we're here is that there is not equal treatment of the media, as far as these fees are concerned. But we cannot follow up on your suggestion, Senator, because that fee is not subject to the jurisdiction of this Committee; it's Judiciary. But these media are subject to our——

Senator SUNUNU. Are they busy right now? Is the Judiciary Committee——

[Laughter.]

The CHAIRMAN. A little busy. We might sit down and talk to them about letting us handle some of these things that are related to communications, so we can, you know, balance this out.

But I do want to thank you all. I think we know that the broadcast flag area is going along. We hope that there will be an agreement with Mr. Band and the broadcasters. We hope that this concept that's in Senator Smith's bill will be acceptable.

But let me remind you all that 25 to 30 bills that we worked on very diligently last year are still on the calendar. They were stopped by holds. One Senator can stop a bill. Now, we're working on some things that I think have to be pursued, and have to be accomplished during this year, but that is all the more reason for you all to get together and work something out, on an industry basis, as we thought we had worked out with the FCC on the broadcast flag to start with.

So, I do hope we can find an agreement and we can get a bill that will not be held up, but that's totally problematical, I'm afraid.

I do thank you all for what you've said here today and giving us your suggestions.

Our next hearing will be on Tuesday, and we'll continue our series of hearings on telecommunications.

Again, Senator Smith, we thank you for your draft, and, Senator Sununu, your suggestions. Maybe you should go talk to the Judiciary Committee chairman.

[Laughter.]

The CHAIRMAN. Thank you very much.

[Whereupon, at 12:05 p.m., the hearing was adjourned.]

A P P E N D I X

PREPARED STATEMENT OF HON. BYRON L. DORGAN, U.S. SENATOR FROM NORTH DAKOTA

I want to emphasize that I think in the digital age, preventing piracy and promoting content protection are integral to achieving the full benefits of compelling content that will drive digital technologies.

I especially feel that such protection is critical for making such content as widely distributed as possible, and available on the most common and widespread medium, over the air broadcasting and the Internet.

I do not want to see a day where over the air consumers are disadvantaged to their satellite and cable subscribing brethren, because broadcasters cannot access compelling content because of piracy fears.

Embracing technologies that protect content will drive content production.

But it cannot come at the cost of stifling technology. Nor should it result in a sacrifice by consumers to freely use such content as they expect with their devices, or to engage in discourse that benefits the public interest. A balance must be found.

As you know, I have been strongly concerned that the voices in our society are increasingly controlled by a small number of media conglomerates.

If a broadcast flag would result in content being controlled so that for example, a consumer could not post a news clip in their Internet blog or send it to other concerned citizens, I think the public interest would be harmed.

It would seem to me that there should be a different standard for news or political discourse that is broadcast.

I would think content providers would be less worried about the profits lost by the potential distribution of such content, as opposed to, for example, the latest blockbuster.

On the other hand, the value of making political or news content available for distribution to the public in order to promote free speech is of paramount value.

Last, I think it is important to also take the equipment and technology manufacturers into account—any deadline that is imposed must be realistic so that we don't impose a time frame that cannot be met.

We can and should give the FCC authority to regulate in this area—the digital age requires it. But we should tread carefully when so many important issues are involved.

PREPARED STATEMENT OF HON. BARBARA BOXER, U.S. SENATOR FROM CALIFORNIA

California is home to two of the most exciting and fastest growing industries in America—the entertainment and high-technology industries. The strength of these industries lies in the development and protection of intellectual property.

Unfortunately, that intellectual property—whether it is music, movies, software, or hardware—is far too easy to pirate. Illegal copies of the newest, most innovative products hit the street almost as fast as the original works. The theft of U.S. intellectual property harms the economy, results in untold job losses, and leads to higher prices for honest consumers.

Movies and music are particular vulnerable to piracy. Illegal copies of movies currently in the theater, TV shows, and music are available on the streets of New York and Los Angeles as well as Moscow and Beijing.

Moreover, the Internet, for all its virtues, has made the theft and distribution of pirated material much worse. Peer-to-peer networks such as Morpheus and offshore website operators have made illegal access to copyrighted material cheap and easy.

As broadcasters move to digital television and digital radio (HD Radio), the impact of piracy will dramatically increase. Individuals will be able to record near perfect copies of movies, TV shows, and music using over-the-air receivers and illegally redistribute the programming over the Internet.

To address this problem, Senator Smith and I are working on legislation that would establish protections for broadcast video and audio digital content.

While the advent of digital TV and HD radio will bring new services and better quality to consumers, it should not be at the expense of the intellectual property rights holders. Technological solutions must be implemented that will help prevent piracy of digital broadcasts.

In November 2003, the FCC issued an order adopting a content protection regime for digital TV broadcasts. The FCC required that all consumer electronics devices capable of receiving a broadcast digital TV signal must include protection technologies that would limit the redistribution of digital content that contain a digital "broadcast flag" marker.

The appellate court struck down the "broadcast flag order" on jurisdictional grounds but the substance of the order was sound.

The future of TV and radio broadcasting is digital but adequate content protection is the keystone to making that transition work. Unless people are sure their intellectual property will not be stolen, they will not want to supply their content to broadcasters.

Senator Smith and I are considering legislation that would grant the FCC the authority to implement its broadcast flag order. The FCC also would be allowed to modify the order as necessary to address changes in technology and to ensure "fair use" of protected content.

The broadcast flag order was the culmination of years of advice from both industry and public interest groups. It represents a fair balance between the interest of intellectual property right holders, technology companies, and consumers.

Unfortunately, no similar compromise has been worked out on the digital audio side. For one reason or another, broadcasters, the high-tech industry, content producers, and consumer groups have been unable or unwilling to reach a consensus on how broadcast digital audio content should be protected.

Because no solution is developing in the marketplace, I believe that legislation is necessary to prevent the piracy of digital audio broadcasts.

The framework for such a protection regime, however, should be the result of industry and consumer input and not an arbitrary government mandate.

Under the Smith-Boxer proposal, the FCC would convene an advisory council consisting of industry and consumer groups. For a period of up to 18 months, the advisory council would work to develop a proposed broadcast digital audio content protection framework.

If a consensus is reached, the FCC would implement the proposal. If no consensus is reached, then the FCC would initiate a rulemaking proceeding to examine the issue further.

California is home to technology companies and consumer electronics manufactures as well as content producers. In addition, the interests of consumers are of paramount importance to me.

While intellectual property piracy must be stopped, it is important that the concerns of all these groups be heard and addressed.

By establishing a diverse advisory board, the ideas of interested parties can be vetted and the costs and benefits of different approaches analyzed. Through a collaborative effort, I hope a solution can be reached that works for everyone.

As Senator Smith and I continue to develop our legislative proposal, I welcome advice from those testifying before the Committee as well as the public at large.

PREPARED STATEMENT OF THE BROADCAST MUSIC, INC. (BMI)

Broadcast Music. Inc. ("BMI") hereby submits this written statement for inclusion in the record for the hearing on "Broadcast and Audio Flag" held on January 24, 2006.

Executive Summary

BMI is a music performing right licensing organization ("PRO") whose business centers on the timely and accurate monitoring of public performances of musical works by digital and analog broadcasting entities, including, but not limited to, radio, broadcast television, cable, satellite and the Internet. BMI has invested significant resources in innovative new digital fingerprinting technologies that will enable BMI to harness the speed and power of computers to automate the monitoring of music airplay in ways that were unimaginable only a decade ago. BMI supports the interests of the Recording Industry Association of America ("RIAA") and the Motion Picture Association of America ("MPAA") in protecting copyrighted works from digital theft. BMI joined in support of the broadcast flag in the Federal Communica-

tions ("FCC") rulemaking proceeding. However, BMI is concerned that such content protection legislation adopted by Congress (or rules adopted by the FCC) might unintentionally interfere with BMI's ability to perform its core business. Accordingly, BMI proposes that Congress legislatively protect PRO's monitoring activities from any laws or regulations that would otherwise inhibit this necessary function.

Congress should mandate as part of any flag legislation that PROs have reasonable access to any content that is protected by content owners through broadcast flag and related technology used to control indiscriminate redistribution of their content by consumers. Songwriters' and music publishers' interests should not be overlooked in an effort to limit the technical ability of ordinary viewers to copy and/or retransmit broadcast broadcasting content. BMI believes that legislative protection of its monitoring activities is warranted because such activities are designed to enforce and license music copyrights, which are the same policy goals underpinning the legislation now before Congress. BMI is grateful to Senator Gordon Smith for including a provision on this point in the draft bill as to the audio flag.

Statement of BMI

Mr. Chairman, BMI commends you for holding a hearing on technological measures for content protection in the digital age. BMI is a key player in the digital copyright licensing world. BMI's fundamental and lawful role is to license the "public performing" right in musical works on behalf of its affiliated songwriters, composers and music publishers. The majority of these songwriters are neither performers nor major recording artists and therefore do not receive income from making sound recordings of their own music, or from concert tours, television appearances, commercial endorsements, sales of souvenirs or any of the other activities enjoyed by recording artists. Needless to say, BMI's publishers also do not receive artist-related income from touring and merchandising. As a result, the majority of BMI's affiliated songwriters and publishers are the consummate "small businessmen and women" who depend on their BMI royalties for a major portion of their income.

Formed in 1939, BMI protects the intellectual property of its approximately 300,000 affiliated songwriters, composers and music publishers by ensuring that they are compensated for public performances of their musical works in the United States and abroad, giving the public access to a rich and diversified repertoire of outstanding American music. BMI licenses the public performing right in over 6.5 million musical works to a wide variety of businesses. including radio and television stations, broadcast and cable television networks, Internet websites, live concert venues, and recorded background music services. BMI also has reciprocal license agreements with more than 70 foreign performing right societies worldwide that permit BMI to license in the U.S. the public performing right in thousands of works by foreign songwriters and composers. Through these reciprocal agreements, BMI also collects royalties from those societies for performances of BMI musical works occurring overseas.

BMI operates as a non-profit making business and does not retain earnings. Instead BMI returns all license fees collected, less operating expenses, as royalties to its affiliated songwriters, composers, and music publishers whose works are publicly performed. BMI is an acknowledged leader in developing cutting-edge royalty accounting and collection systems that operate internationally. BMI's technology prowess is entirely compatible with the digital age.

BMI recently announced a new effort of collecting broadcast performance data that will be centered around the patented technology of monitoring musical performances through the technique of "fingerprinting." This technology, known as BlueArrow,℠ creates a unique fingerprint for each sound recording using a sophisticated algorithm. The technology requires that each fingerprint be compared to a vast library of previously identified works for identification purposes on a real-time basis. The new identification systems for audio and video content will depend in part on the ability to make secure retransmission of broadcast programs which are not previously identified. However, this secure distribution function would be disabled by broadcast flag rules without provisions protecting this functionality. If BMI's monitoring systems are disabled, BMI will not be able to monitor digital broadcasts of musical works, or distribute royalties to songwriters, on the most cost-efficient basis in the digital age.

In 2004 the RIAA asked the FCC to adopt digital audio broadcast content protection rules and proposed two specific content protection regimes for digital audio broadcasts that would comply with a set of "usage rules" proposed by the RIAA. The RIAA said it was concerned that digital radio broadcasting will become a source of rampant piracy unless there are controls on the ability to record and redistribute digital broadcasts. In its testimony last week, the RIAA appeared to embrace legislation through which Congress will give the FCC specific authority to adopt audio

flag rules similar to the broadcast flag rules adopted by the FCC for television broadcasting. The RIAA's request for content protection legislation thus parallels the request by the MPAA for legislation to give the FCC the necessary statutory authority to promulgate broadcast flag rules and to re-adopt the FCC's prior rulemaking.

Both the broadcast flag and audio flag have the singular goal of preventing piracy by prohibiting the unauthorized copying and redistribution of copyrighted content that would otherwise be possible with existing and future digital broadcast receivers. BMI recognizes that the broadcasting industry is in the midst of a digital revolution, with content transmission systems migrating from analog to digital across many platforms. The transition to digital radio and digital television will doubtless be beneficial to all parties affected. especially music listeners. BMI fully supports the transition of the broadcast industry to digital transmissions and does not want to delay the process by any means.

BMI appreciates that authors and copyright owners of music and video works are concerned about the impact the transition to digital broadcasting will have on the markets for their works absent suitable protection against piracy. BMI believes that it is in the mutual interests of the music industry, the broadcasting industry and the consumer electronics industry to cooperate in the development of appropriate standards and technologies to protect against piracy in the digital arena. However, these legal regimes may have an unintentional but nevertheless severe adverse impact on the business operations of PROs unless Congress protects the right of PROs to monitor the music contained in video and audio broadcasts. BMI accordingly reaffirms its positions before the FCC in its HD Radio and broadcast flag proceedings that any regimes adopted by Congress or the FCC to protect digital broadcast content must include provisions protecting the ability of performing right organizations to continue their mission of electronically monitoring public performances of the musical works they represent. This will ensure that songwriters. composers and music publishers are paid properly when their musical works are performed via digital audio broadcasting technologies.

If Congress or the FCC adopts or approves content protection technology that mandates that broadcast receiving devices must respond to a digital rights management ("DRM") method such as a broadcast flag (or to usage rules prohibiting redistribution), BMI should nevertheless be permitted to access protected programming in order to fulfill its longstanding role of monitoring performances of music for royalty collection and distribution, and policing unlicensed performances. BMI should also be guaranteed access on reasonable and nondiscriminatory license terms to the underlying technology used in these content protection processes for these purposes.

BMI has engaged in negotiations with both the MPAA and the RIAA over reasonable legal and technical solutions to the problems presented by the regulatory regimes that they are both seeking here. We are pleased that all parties appear to reorganize the need for protection of the PRO's monitoring functions and we are grateful that Senator Smith's draft legislation contains a step in this direction for the audio flag. The landscape of technology is shifting so rapidly, however, that even if we can reach a private agreement on today's content protection technology, the costs of creating customized software/hardware applications for each succeeding generation of technology would be enormous. In the circumstances, a general statutory protection of PROs' activities should ensure the PROs have a basis for successful current and future negotiations and/or engineered solutions. We would be happy to work with the Committee on developing narrowly crafted provisions protecting these important rights for both the broadcast and audio flags.

Conclusion

In sum, BMI is concerned that if Congress legislates in the areas of broadcast and audio flags, careful heed should be taken not to overlook or trample the ability of songwriters, composers and music publishers to license their copyrights and distribute royalties. Without statutory or regulatory protection, any audio and broadcast flag content protection regime that the FCC might adopt could hamper BMI's ability to monitor public performances and collect appropriate licensing royalties. Therefore, it is critical that any new statutes or regulations protect the ability of performing right organizations to monitor television and broadcasts protected by broadcast and audio flags so that such organizations may continue to protect and account for the public performing rights of their affiliated songwriters, composers and music publishers.

Thank you, Mr. Chairman. for your leadership on these issues and for providing BMI with the opportunity to submit a written statement in the hearing record.

PREPARED STATEMENT OF GIGI B. SOHN, PRESIDENT, PUBLIC KNOWLEDGE

Chairman Stevens, Co-Chairman Inouye and other Members of the Committee, my name is Gigi B. Sohn. I am the President of Public Knowledge, a nonprofit public interest organization that addresses the public's stake in the convergence of communications policy and intellectual property law. I want to thank the Committee for permitting me to submit this statement for the record on the broadcast flag and radio content protection. I specifically want to focus on the impact of these technological mandates on consumers.

As some of you know, I served as counsel to the nine public interest and library groups that successfully challenged the Federal Communications Commission's (FCC) broadcast flag rules in the United States Court of Appeals for the District of Columbia Circuit. My organization financed and coordinated the case, which is titled *American Library Association* v. *FCC*, 406 F.3d 689 (D.C. Cir. 2005). I have attached a copy of the court's decision and a copy of petitioners' opening brief* in the case, and I respectfully request that they be placed into the record of this hearing.

Introduction

This hearing could not be more timely. Many of you and your staff members just returned from the International Consumer Electronics Show, an event that featured an amazing display of new innovative technologies and newly forged partnerships between technology companies and content companies. Here are just a few examples:

- Microsoft demonstrated new versions of its software that enables the playback of a consumer's favorite media, whether on the individual's home office monitor, living room television, or PDA. The company has also developed a new music service in conjunction with MTV, VH1, and CMT music channels.
- Innovators like DigitalDeck, NewSoft, SlingMedia, and Sony each have developed competing technologies that allow consumers to remotely watch the television playing in their living rooms on a laptop, mobile phone, or portable gaming console.
- Yahoo! announced the development of software and services that enable consumers to view, create, and share content between their mobile phones, computers and living rooms, all using the Internet.
- Google developed a distribution system to allow anyone to provide videos for free or for sale, and allow others to download that content to a computer, Apple iPod, or Sony Play Station Portable (PSP). Google has already announced content distribution agreements with large content providers like CBS and the NBA. This follows the recent success of NBC, ABC, and ESPN, which is distributing programming in partnership with Apple's iTunes.
- TiVo displayed a soon-to-be-released software update that makes it simple for consumers to watch their favorite television shows on popular players like the iPod and PSP. And soon, the next generation TiVo recorder will help consumers record over-the-air high-definition television.
- Together, XM Radio and Pioneer developed an innovative portable satellite radio player that allows consumers to automatically record their favorite songs or shows while they are being broadcast. A consumer's preferences are stored on the radio, and when connected to a computer, XM's software helps the consumer to find more information about the artists, purchase music through the new Napster, and discover other songs and shows by similar artists.

The message of the Consumer Electronics Show is clear. The market for delivering content digitally over new technologies is working. Consumers can watch and listen to the content they purchase anytime and anywhere they want. Some of that content will be protected, and consumers can decide whether that protection is flexible enough. All of these great developments happened without government intervention.

The public appetite for buying individual TV shows and songs online is growing by leaps and bounds. There are more ways than ever to watch TV and movies and listen to the radio. Sales of HDTV sets are skyrocketing.

Yet even as innovators in the content industry promote these alternative distribution technologies, the very same content industry wants Congress to step in and give it protection from the vague threat of massive copyright infringement the industry says these new technologies could facilitate. Let us be clear. The content in-

*The information referred to has been retained in Committee files.

dustry has not shown that any infringement has resulted from these technologies. And they certainly have not shown that government technology mandates will work to stop actual copyright pirates rather than prevent ordinary consumers from engaging in lawful activities.

The content industry is asking Congress to impose three technology mandates: the broadcast flag, radio content protection and an end to the analog hole. Each mandate (1) injects government into technological design; (2) places limits on lawful consumer activities; and (3) increases consumer costs by making obsolete millions of digital devices. Once consumers start to purchase devices that are compliant with these technology mandates, the costs will be enormous. For example:

- A consumer would not be able to record over-the-air local news on her broadcast-flag compliant digital video recorder in her living room and play it back on a non-compliant player in her bedroom (broadcast flag).
- A member of Congress could not e-mail a clip of his appearance on the national news to his home office (broadcast flag).
- A consumer would not be able to record analog home movies using a digital camcorder and transfer them to a computer in order to make a DVD (analog hole).
- A student would be prohibited from recording excerpts from a DVD for a college Powerpoint presentation (analog hole).
- A consumer would be unable to record individual songs off digital broadcast and satellite radio (radio content protection).
- Current versions of TiVos (and other digital video recorders), iPods (and other MP3 players), cellphones and play station portables would not work with analog hole closing compliant devices, rendering them virtually obsolete (analog hole).
- A university could not use digital TV video clips for distance learning classes (broadcast flag).

I urge the Committee to think very long and hard about trying to fix what is not broken. Ask yourselves, in light of recent marketplace developments, is it good policy to turn the Federal Communications Commission into the Federal Computer Commission or the Federal Copyright Commission? Is it good policy to impose limits on a new technology like HD Radio (that unlike digital television, consumers need not adopt) that may well kill it? Is it good policy to impose a technological mandate (like the broadcast flag and closing the analog hole) that would result in consumers having to replace most of the new devices that they just purchased?

There are better alternatives for protecting digital content than heavy-handed technology mandates. Those alternatives are a multi-pronged approach of consumer education, enforcement of copyright laws, new business models for content distribution and the use of technological tools developed in the marketplace, not mandated by government. The recent *Grokster* decision and the passage of the Family Entertainment and Copyright Act are just two of several new tools that the content industry has at its disposal to protect its content.

Technology Mandates Harm Innovation and are Costly and Inconvenient for Consumers

For Public Knowledge, its members and its public interest allies, the impact of the D.C. Circuit's decision vacating the broadcast flag rules goes far beyond the ability of citizens to make non-infringing uses of copyrighted material that they receive on free over-the-air broadcast television. Equally as important, the case limited the power of a government agency that, in the court's own words, has never exercised such "sweeping" power over the design of a broad range of consumer electronics and computer devices. This hands-off approach has fostered a robust market place for electronic devices that has in turn made this country the leader in their development and manufacture.

For this reason, any attempt to portray legislative reinstatement of the broadcast flag rules as "narrow" should be viewed with great skepticism. The rules put the FCC in the position of deciding the ultimate fate of every single device that can demodulate a television signal. The broadcast flag rules require the FCC to pre-approve television sets, computer software, digital video recorders, cellphones, game consoles, iPods and any other device that can receive a digital television signal.[1]

[1] D.C. Circuit Court Judge Harry Edwards noted this reach at oral argument when he said, "You're beyond transmission . . . I mean you're out there in the whole world regulating . . . I mean, I suppose it will be washing machines next." *ALA* v. *FCC*, Oral Argument Transcript at 31.

Thus, the broadcast flag scheme places the FCC in the position of dictating the marketplace for all kinds of electronics.

The agency has neither the resources nor the expertise to engage in this kind of determination. This type of government oversight of technology design will slow the rollout of new technologies and seriously compromise U.S. companies' competitiveness in the electronics marketplace.

Some argue that the initial FCC certification process worked because all thirteen technologies submitted to the agency were approved. However, that is a very superficial view of that process. First, it is widely known that several manufacturers removed legal and consumer-friendly features of their devices before submitting them to the FCC, largely at the behest of the movie studios. Second, the changing nature of the FCC and its commissioners is likely to make for widely varying results. Given the fervor of then-Commissioner Martin's dissent to the Commission's approval of TiVo-To-Go, it is unlikely that such technology would be certified today under Chairman Martin's FCC.[2]

The certification process also exacerbates equipment incompatibility problems caused by the broadcast flag scheme. Not only will the scheme prevent consumers from making copies of a TV show on one system and play it on another, none of the 13 different technologies approved by the FCC in its interim certification process work with each other. This means that a consumer who buys one Philips brand flag-compliant device must buy all Philips brand flag compliant devices. This raises consumer costs, and also raises serious questions about competition among and between digital device manufacturers.[3]

Proposals to mandate content protection for digital broadcast and satellite radio would similarly place the FCC in the position of mandating the design of new technologies. Draft legislation in the House gives the FCC the authority to adopt regulations governing all "digital audio receiving devices."[4] In the case of so-called High Definition (or HD) Radio,[5] this could destroy this new technology at birth. Digital broadcast radio benefits consumers through improved sound quality (particularly for AM radio) and gives radio broadcasters the capacity to provide additional program streams and metadata. Unlike digital television, however, consumers need not purchase digital broadcast receivers to continue receiving free over the air broadcast radio. Certainly, if digital radio receivers have less functionality than current analog radio receivers, consumers will reject them and the market for HD radio will die.

In the case of digital satellite radio, mandated radio content protection has the potential to cripple this increasingly popular, but still nascent, technology. XM Radio now has more than six million subscribers, and Sirius Radio last year passed the three million subscriber mark. Consumers are buying all types of receivers for those services, based in part on the new flexibility and features the equipment offers.[6] The type of content protection the recording industry seeks would likely slow this incredible growth.

The Content Industry Has Not Justified the Need for Technology Mandates

Hollywood's core justification for imposition of the broadcast flag scheme can be paraphrased thusly: if the threat of indiscriminate redistribution of "high value" high definition television content is not reduced, broadcasters will not make that content available, thus slowing this country's transition to digital TV.[7]

One of the most vocal proponents of this argument was Viacom, which told the FCC in 2002 that "if the broadcast flag is not implemented and enforced by next summer, CBS will cease providing any programming in high definition for the 2003–

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[2] For a detailed analysis of the flaws of the FCC's certifications process, *see* Center for Democracy and Technology, *Lessons of the FCC Broadcast Flag Process* (2005), found at *http://cdt.org/copyright/ 20050919flaglessons.pdf.*

[3] For a detailed discussion of these issues, see *http://www.publicknowledge.org/content/presentations/ bflagpff.ppt.*

[4] See HD Radio Content Protection Act, found at *http://static.publicknowledge.org/pdf/20051103-hd-radiodraft.pdf.*

[5] I say "so called," because calling a digital radio broadcast signal "High Definition" is quite misleading. Whereas in the television context, High Definition connotes a far clearer and sharper picture, an HD radio signal simply raises the quality of AM radio to FM standards, and permits the reception of broadcast radio in places where an analog signal would get cut off, such as in a tunnel or at a traffic light. Indeed, an "HD" quality signal is not even a CD quality signal. See, Ken Kessler, Digital Radio Sucks, it's Official, found at *http://www.stereophile.com/newsletters/.*

[6] For 2005, XM Radio forecasts a doubling of retail satellite radio receiver sales for both services to more than one billion dollars. *See http://www.ce.org/press/CEA*_pubs/861.asp.

[7] *See In the Matter of Digital Broadcast Content Protection*, FCC 03–273, 18 FCC Rcd 23550, 23553 (November 4, 2003).

2004 television season. And without the security afforded by a broadcast flag, Paramount will have less enthusiasm to make digital content available."[8]

Viacom never did carry out its threat to withhold HD programming, and the argument that the broadcast flag is necessary to encourage the broadcast of high value content and the orderly transition to digital TV transmission has been repudiated in the marketplace.[9] First, broadcasters are making "high value" content available for HDTV or, "in HD"—50 percent[10] of TV shows, including 66 percent[11] of prime time programming, is broadcast in high definition. A number of "high value" sports programming broadcasts, including Monday Night Football, the Super Bowl, the NBA Finals, the NCAA Final Four college basketball championship, Major League Baseball's All-Star Game and World Series games, all NBC NASCAR races, the U.S. Open golf tournament, and the Olympics, are broadcast in HD along with many other select sporting events throughout the year.[12] Second, the country's transition to digital TV is accelerating, not slowing down, as sales of digital TV sets continue to increase. According to the Consumer Electronics Association, sales of digital TV sets grew 60 percent to $17 billion dollars.[13] According to Forrester Research, 16 million American homes have digital television sets. In 2006, that number is expected to rise to 26 million, or one in four households.[14] Indeed, the case could be made that rather than accelerate the DTV transition, the broadcast flag could slow the transition when consumers discover that expensive new television sets have less functionality than their current sets.

The recording industry has similarly not demonstrated that radio content protection is necessary. The industry does not cite to even one instance of a digital broadcast or satellite radio transmission being copied illegally or retransmitted over the Internet. Indeed, RIAA chief Mitch Bainwol's recent testimony and comments on the subject make clear that the real rationale for seeking radio content protection is not copyright infringement, but the recording industry's displeasure over the licensing fees it receives from broadcast and satellite radio broadcasters.[15]

Broadcast Flag and Radio Content Protection Schemes Will Transform the Federal Communications Commission Into the Federal Copyright Commission

Despite the FCC's protestations to the contrary, the broadcast flag scheme and any radio copy protection scheme will necessarily involve the agency in shaping copyright law and the rights of content owners and consumers there under. Making copyright law and policy is not the FCC's job. It is Congress' job. Petitioners brief in *ALA* v. *FCC*, at 43–50, lays out this argument in great detail.

While it is true that the TV broadcast flag scheme does not completely bar a consumer from recording her favorite TV show, it does prevent consumers from engaging in other lawful activities under copyright law. For example, as the D.C. Circuit noted in *ALA* v. *FCC,* the broadcast flag would limit the ability of libraries and other educators to use broadcast clips for distance learning via the Internet that is permitted pursuant to the TEACH Act, Pub. L. No. 107–273, 116 Stat. 1758, Title III, Subtitle C, § 13301, amending 17 U.S.C. § § 110, 112 & 882 (2002). See *ALA* v. *FCC*, 406 F.2d at 697.

This and other examples highlight that while proponents of the flag may justify it as prohibiting only "indiscriminate" redistribution of content over the Internet, flag-compliant technologies actually prohibit any and all distribution, no matter how limited or legal. For example, if a member of this Committee wants to e-mail a snippet of his appearance on the national TV news to his home office, the broadcast flag scheme would prohibit him from doing so. Video bloggers and other TV watch-

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[8] *See* Comments of Viacom *In the Matter of Digital Broadcast Content Protection*, MM Docket No. 02–230 at 12 (December 6, 2002).

[9] D.C. Circuit Judge Edwards also rejected this argument. See *ALA* v. *FCC* Oral Argument Transcript at 32 (Judge Edwards: "This in no way—what you do here or not in no way impairs the ability to . . . stay on the digital deadline . . . In no way.")

[10] *http://www.ati.com/products/hdtvwonder/*.

[11] For the week of Jan. 19 to Jan. 25, ABC will broadcast 13 of 32 prime-time shows in HD. During the same week, CBS will broadcast 31 of 34 prime-time shows in HD; NBC will broadcast 32 of 50 prime-time shows in HD during the same period. For all 3 networks combined, 76 of 116 (66 percent) prime-time shows will be broadcast in HD for one week in January 2006.

[12] *http://www.cnet.com/4520–7874—1–5119938–1.html*

[13] *http://www.ce.org/Press/CurrentNews/press*_release_detail.asp?id=10913.

[14] *See, http://biz.yahoo.com/prnews/051220/nytu017.html?.v=36.*

[15] See testimony of Mitch Bainwol before House Committee on the Judiciary, Subcommittee on Courts, the Internet, and Intellectual Property for the hearing on "Content Protection in the Digital Age: The Broadcast Flag, High-Definition Radio, and the Analog Hole," November 3, 2005 at 4, found *at http:// judiciary.house.gov/media/pdfs/bainwol110305.pdf*; and Mitch Bainwol, Out P2P Paranoia, In: Platform Parity, Billboard Magazine, January 7, 2006 at 4.

dogs would similarly be unable to post broadcast TV clips on their blogs. For example, the Parents Television Council, which rates television programs according to how child friendly they are, would be prevented from posting clips from those programs for parents to see.[16]

The fact that the broadcast flag will limit lawful uses of copyrighted content was detailed in the Congressional Research Service Report entitled *Copy Protection of Digital Television: The Broadcast Flag (May 11, 2005)*. CRS concluded there that:

> While the broadcast flag is intended to "prevent the indiscriminate redistribution of [digital broadcast] content over the Internet or through similar means," the goal of the flag was not to impede a consumer's ability to copy or use content lawfully in the home, nor was the policy intended to "foreclose use of the Internet to send digital broadcast content where it can be adequately protected from indiscriminate redistribution." However, current technological limitations have the potential to hinder some activities which might normally be considered "fair use" under existing copyright law. For example, a consumer who wished to record a program to watch at a later time, or at a different location (time-shifting, and space-shifting, respectively), might be prevented when otherwise approved technologies do not allow for such activities, or do not integrate well with one another, or with older, "legacy" devices. In addition, future fair or reasonable uses may be precluded by these limitations. For example, a student would be unable to e-mail herself a copy of a project with digital video content because no current secure system exists for e-mail transmission.

CRS Report at 5.

Proposals for digital radio content protection similarly, and perhaps even more directly, place the FCC in the position of determining consumers' rights under copyright law. For example, the draft House bill gives the FCC the authority to control the unauthorized copying and redistribution of digital audio content by or over digital reception devices, related equipment, and digital networks, including regulations governing permissible copying and redistribution of such audio content.

Under this proposal, the FCC is placed in charge both of (1) determining the extent to which unauthorized copying (which is legal is some circumstances) of digital broadcast and satellite radio content is permitted; and (2) determining what kind of copying and redistribution of audio content is permissible.

Not only does this language give the FCC power to set copyright law, it also directly conflicts with copyright law, specifically the Audio Home Recording Act—which explicitly gives consumers the right to record digital radio transmissions for noncommercial use.[17]

A Technology Mandate to Close the Analog Hole is Premature, Unnecessary and Would Cause Great Consumer Confusion, Cost and Inconvenience

While this hearing does not specifically address the content industry's efforts to close the so-called analog hole through legislative means, those efforts are closely related to the broadcast flag and radio content protection initiatives, and are therefore worthy of mention.

As many of you know, a bill was introduced in the House of Representatives last year[18] that would mandate that all digital devices read and obey two specific technologies—an encryption technology called CGMS–A and a watermarking technology called VEIL. The content industry claims that both of these technologies are necessary to ensure that analog content cannot be captured and digitized for possible indiscriminate distribution over the Internet.

Preliminarily, I would note that while the CGMS–A +VEIL technology was discussed at the Analog Hole Reconversion Discussion Group, a standards group with both industry and public interest participation, it was quickly dismissed as not worthy of further consideration. Thus, this technology has not been fully vetted by industry and public interest groups. If Congress feels it must do something about the analog hole, it should refer the technology back to industry and public interest groups so CGMS–A +VEIL can be thoroughly analyzed for its impact on consumers and the cost to technology companies. In the complete absence of any such review, the one-sided imposition of such a detailed technology mandated would be unprecedented.

More importantly, the proposed analog hole fix suffers from a number of important substantive flaws. Here are just a few:

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[16] *See www.parentstv.org*.

[17] 17 U.S.C. §§1000–1010.

[18] H.R. 4569: The Digital Transition Content Security Act of 2005, 109th Cong. 2005. Found at: *<http://www.publicknowledge.org/issues/hr4569>*.

- *The analog hole technology mandate would be more intrusive than the broadcast flag*: The content industry's proposal mandates that each and every device with an analog connection obey not one, but two copy protection schemes. Thus, while the broadcast flag would put the FCC in charge of design control just for technologies that demodulate a broadcast signal, the proposal would mandate design for *every* device with an analog connector, including printers, cellphones, camcorders, etc. Like the broadcast flag, it sets in stone a copy protection technology for technologies that are always changing.
- *The analog hole mandate would obsolete millions of digital devices*. Popular portable video-playback devices like iPods, PSPs, laptops, and cell phones are all analog hole non-compliant. Using these kinds of devices in conjunction with analog video inputs is critical to the many innovative plans introduced at the CES 2006. An analog hole mandate could effectively obsolete newly purchased devices and the systems with which they work, and would require redesign of these devices.
- *The analog hole mandate would impose a detailed set of encoding rules that would restrict certain lawful uses of content*. The House bill includes tiered levels of restriction based on the type of programming (*e.g.,* pay-per-view, video on demand) that limit lawful uses in a manner that ignores the four fair use factors of 17 U.S.C. § 107. This upsets the balance established in copyright law between the needs of copyright holders and the rights of the public by placing far too much control over lawful uses in the hands of the content producers.
- *The mandate would eliminate the DMCA's safety valve*. This Committee has been the leader in ensuring that the anti-circumvention provisions of the Digital Millennium Copyright Act do not unintentionally impinge on fair use. One of the common justifications for limitations on fair use imposed by the DMCA is that the analog hole is available for individuals who, for example want to make a snippet of a DVD using a video camera held up to a video screen or connected to analog outputs on a TV set.[19] An analog hole mandate would eliminate this safety valve.

The Proper Balance Between Content Protection and Consumer Rights Should Be Set by Copyright Law and Marketplace Initiatives

I am often asked the following question: if Public Knowledge opposes the broadcast flag, radio content protection and closing the analog hole, what are better alternatives to protect digital television and radio content from infringing uses? The best approach to protecting rights holders' interests is a multi-pronged approach: by better educating the public, using the legal tools that the content industry already has at its disposal, and the technological tools that are being developed and tested in the marketplace every day. In the past year alone, the content industry has used and won several important new tools to protect content, including:

- *The Supreme Court's decision in MGM* v. *Grokster and its aftermath.* The Supreme Court gave content owners a powerful tool against infringement when it held that manufacturers and distributors of technologies that are used to infringe could be held liable for that infringement if they actively encourage illegal activity. The result has been that a number of commercial P2P distributors have gone out of business, moved out of the U.S., or sold their assets to copyright holders.
- *Lawsuits against mass infringers using P2P networks*. Both the RIAA and the MPAA continue to sue individuals who are engaged in massive infringement over peer-to-peer (P2P) networks. By their own admission, these lawsuits have had both a deterrent and educative effect.
- *Passage of the Family Entertainment and Copyright Act*. The FECA gave copyright holders a new cause of action to help limit leaks of pre-release works and

[19] See Testimony of Dean Marks, Senior Counsel Intellectual Property, Time Warner, Inc., and Steve Metalitz, Representing Content Industry Joint Commenters, before the Copyright Office in Rulemaking Hearing: Exemptions From Prohibitions On Circumvention Of Technological Measures That Control Access To Copyrighted Works, May 13, 2003 at 60–61: "I think the best example I can give is the demonstration that Mr. Attaway [MPAA Executive Vice President for Government Relations and Washington General Counsel] gave for you [Marybeth Peters, Registrar of Copyrights] earlier this month in Washington in which he demonstrated that he used a digital camcorder viewing the screen on which a DVD was playing to make a excerpt from a DVD film and have a digital copy that could then be used for all the fair use purposes . . . " (Mr. Metaliz at 60.) "I agree with everything Steve has just said about fair use copying or taking clips . . . with digital camcorders and analog camcorders being widely available . . . " (Mr. Marks at 61).

made explicit the illegality of bringing a camcorder into a movie theatre. It also provided for the appointment of an intellectual property "czar" to better enforce copyright laws.

- *Agreements by ISPs to pass on warning notices*. The war between Internet Service Providers and content companies has begun to cool. Last month, Verizon and Disney entered into an agreement by which Verizon will warn alleged copyright infringers using its networks, but will not give up their personal information to Disney.
- *Increased use of copy protection and other digital rights management tools in the marketplace*. There are numerous instances of the use of digital rights management tools in the marketplace. iTunes Fairplay DRM is perhaps the most well known, but other services that use DRM include MSN music and video, Napster, Yahoo Music, Wal-Mart, Movielink, CinemaNow and MovieFlix. The success of some of these business models are a testament to the fact that if content companies make their catalogues available in an easily accessible manner, with flexibility and at a reasonable price, those models will succeed in the marketplace, without government intervention.

These tools are in addition to the strict penalties of current copyright law, including the DMCA. To the extent that the content industries are looking for a "speed bump" to keep "honest people honest," I would contend that many such speed bumps already exist, while more are being developed every day without government technology mandates.

Finally, by far the most effective means of preventing massive copyright infringement involves the content industry doing what it took the music industry far too long to do[20]—satisfy market demand by allowing consumers to enjoy fair and flexible access to content at reasonable prices (inevitably produced in a free market). DVDs are the best example of the market working. There, a government mandate—the Digital Video Recording Act—was rejected and an industry-agreed upon fairly weak "keep honest people honest" protection system was adopted. Despite the fact that the protection system was defeated long ago, the DVD market has grown at an astounding rate—from zero in 1997 to $25,000,000,000 in sales and rentals last year. Moreover as I noted above, many other new digital music and video distribution models, developed with content industry support and industry-agreed upon content protection, are emerging in the market. We believe that these efforts make government intervention in the free market unnecessary.

Conclusion

The Consumer Electronics Show demonstrated that the content and technology industries are moving forward, together, to provide the digital content and the digital machinery that consumers are buying and enjoying. Technology mandates like the broadcast flag and radio content protection are a step backward from this progress, limiting both innovation and consumer choice while increasing costs to innovators and consumers. I urge the Committee to look at recent marketplace developments and consider whether government action here would do far more harm than good. Thank you.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

American Library Association, et al., Petitioners, v. *Federal Communications Commission and United States of America, Respondents; Motion Picture Association of America, Inc., et al., Intervenors*

CASE NO. 04–1037—ARGUED FEBRUARY 22, 2005—DECIDED MAY 6, 2005

On Petition for Review of an Order of the Federal Communications Commission

Pantelis Michalopoulos argued the cause for petitioners. With him on the briefs were *Cynthia L. Quarterman, Rhonda M. Bolton, Lincoln L. Davies,* and *Gigi B. Sohn.*

Jacob M. Lewis, Attorney, Federal Communications Commission, argued the cause for respondents. With him on the brief were *R. Hewitt Pate,* Assistant Attorney General, *Catherine G. O'Sullivan* and *James J. Fredricks,* Attorneys, *John A.*

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[20] See Keynote Address of Edgar Bronfman, Chairman and CEO of Warner Music at *http://www.tvworldwide.com/events/pff/050821/agenda.htm*. "The Music Industry, like almost every industry faced with massive and rapid transformation first reacted too slowly and moderately, inhibited by an instinctive and reflexive reaction to protect our current business and business models."

Rogovin, General Counsel, Federal Communications Commission, *Austin C. Schlick,* Deputy General Counsel, *Daniel M. Armstrong,* Associate General Counsel, and *C. Grey Pash, Jr.,* Counsel.

Christopher Wolf, Bruce E. Boyden, Mace J. Rosenstein, and *Catherine E. Stetson* were on the brief for intervenor Motion Picture Association of America, Inc.

Before: Edwards, Sentelle, and Rogers, Circuit Judges.

Opinion for the Court filed by *Circuit Judge* Edwards.

Edwards, *Circuit Judge:* It is axiomatic that administrative agencies may issue regulations only pursuant to authority delegated to them by Congress. The principal question presented by this case is whether Congress delegated authority to the Federal Communications Commission ("Commission" or "FCC") in the Communications Act of 1934, 47 U.S.C. §151 *et seq.* (2000) ("Communications Act" or "Act"), to regulate apparatus that can receive television broadcasts when those apparatus are not engaged in the process of receiving a broadcast transmission. In the seven decades of its existence, the FCC has never before asserted such sweeping authority. Indeed, in the past, the FCC has informed Congress that it lacked any such authority. In our view, nothing has changed to give the FCC the authority that it now claims.

This case arises out of events related to the nation's transition from analog to digital television service ("DTV"). Since the 1940s, broadcast television stations have transmitted their programs over the air using an analog standard. DTV is a technological breakthrough that permits broadcasters to transmit more information over a channel of electromagnetic spectrum than is possible through analog broadcasting. *Consumer Elecs. Ass'n* v. *FCC,* 347 F.3d 291, 293 (D.C. Cir. 2003). Congress has set December 31, 2006, as the target date for the replacement of analog television service with DTV. *See* 47 U.S.C. § 309(j)(14).

In August 2002, in conjunction with its consideration of the technological challenges related to the transition from analog service to DTV, the Commission issued a notice of proposed rulemaking to inquire, *inter alia,* whether rules were needed to prevent the unauthorized copying and redistribution of digital television programming. *See Digital Broadcast Copy Protection,* 17 F.C.C.R. 16,027, 16,028 (2002) ("NPRM"). Thousands of comments were filed in response to the agency's NPRM. Owners of digital content and television broadcasters urged the Commission to require DTV reception equipment to be manufactured with the capability to prevent unauthorized redistributions of digital content. Numerous other commenters voiced strong objections to any such regulations, contending that the FCC had no authority to control how broadcast content is used after it has been received. In November 2003, the Commission adopted "broadcast flag" regulations, requiring that digital television receivers and other devices capable of receiving digital television broadcast signals, manufactured on or after July 1, 2005, include technology allowing them to recognize the broadcast flag. *See Digital Broadcast Content Protection,* 18 F.C.C.R. 23,550 (2003) (codified at 47 CFR pts. 73, 76). The broadcast flag is a digital code embedded in a DTV broadcasting stream, which prevents digital television reception equipment from redistributing broadcast content. The broadcast flag affects receiver devices only *after* a broadcast transmission is complete. The American Library Association, *et al.* ("American Library" or "petitioners"), nine organizations representing a large number of libraries and consumers, filed the present petition for review challenging these rules.

In adopting the broadcast flag rules, the FCC cited no specific statutory provision giving the agency authority to regulate consumers' use of television receiver apparatus after the completion of a broadcast transmission. Rather, the Commission relied exclusively on its ancillary jurisdiction under Title I of the Communications Act of 1934.

The Commission recognized that it may exercise ancillary jurisdiction only when two conditions are satisfied: (1) the Commission's general jurisdictional grant under Title I covers the regulated subject and (2) the regulations are reasonably ancillary to the Commission's effective performance of its statutorily mandated responsibilities. *See* 18 F.C.C.R. at 23,563. The Commission's general jurisdictional grant under Title I plainly encompasses the regulation of apparatus that can receive television broadcast content, but only while those apparatus are engaged in the process of receiving a television broadcast. Title I does not authorize the Commission to regulate receiver apparatus after a transmission is complete. As a result, the FCC's purported exercise of ancillary authority founders on the first condition. There is no statutory foundation for the broadcast flag rules, and consequently the rules are ancillary to nothing. Therefore, we hold that the Commission acted outside the scope of its delegated authority when it adopted the disputed broadcast flag regulations.

The result that we reach in this case finds support in the All Channel Receiver Act of 1962 and the Communications Amendments Act of 1982. These two statutory enactments confirm that Congress never conferred authority on the FCC to regulate

consumers' use of television receiver apparatus *after* the completion of broadcast transmissions.

As petitioners point out, "the broadcast flag rules do not regulate interstate 'radio communications' as defined by Title I, because the Flag is not needed to make a DTV transmission, does not change whether DTV signals can be received, and has no effect until after the DTV transmission is complete." Petitioners' Br. at 23. We agree. Because the Commission overstepped the limits of its delegated authority, we grant the petition for review.

I. Background

The Communications Act of 1934 was "implemented for the purpose of consolidating Federal authority over communications in a single agency to assure 'an adequate communication system for this country.'" *Motion Picture Ass'n of Am., Inc.* v. *FCC,* 309 F.3d 796, 804 (D.C. Cir. 2002) (quoting S. REP. NO. 73–781, at 3 (1934)). Title I of the Act creates the Commission "[f]or the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges." 47 U.S.C. §151. Title I further provides that the Commission "shall execute and enforce the provisions" of the Act, *id.,* and states that the Act's provisions "shall apply to all interstate and foreign communication by wire or radio," *id.* §152(a).

The FCC may act either pursuant to express statutory authority to promulgate regulations addressing a variety of designated issues involving communications, *see, e.g.,* 47 U.S.C. §303(f) (granting the Commission authority to prevent interference among radio and television broadcast stations), or pursuant to ancillary jurisdiction, *see, e.g.,* 47 U.S.C. §154(i) ("[t]he Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions").

Although somewhat amorphous, ancillary jurisdiction is nonetheless constrained. In order for the Commission to regulate under its ancillary jurisdiction, two conditions must be met. First, the subject of the regulation must be covered by the Commission's general grant of jurisdiction under Title I of the Communications Act, which, as noted above, encompasses "all interstate and foreign communication by wire or radio." *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 167 (1968) (quoting 47 U.S.C. §152(a)). Second, the subject of the regulation must be "reasonably ancillary to the effective performance of the Commission's various responsibilities." *Id.* at 178. Digital television is a technological breakthrough that allows broadcasters to transmit either an extremely high quality video programming signal (known as high definition television) or multiple streams of video, voice, and data simultaneously within the same frequency band traditionally used for a single analog television broadcast. *See Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service,* 11 F.C.C.R. 17,771, 17,774 (1996). In 1997, the FCC set a target of 2006 for the cessation of analog service. *See Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service,* 12 F.C.C.R. 12,809, 12,850 (1997). Congress subsequently provided that television broadcast licenses authorizing analog service should not be renewed to authorize such service beyond December 31, 2006. *See* 47 U.S.C. §309(j)(14).

In August 2002, the FCC issued a notice of proposed rulemaking regarding digital broadcast copy protection. *See Digital Broadcast Copy Protection,* 17 F.C.C.R. 16,027 (2002) ("NPRM"). The Commission sought comments on, among other things, whether to adopt broadcast flag technology to prevent the unauthorized copying and redistribution of digital media. *See id.* at 16,028–29. The broadcast flag, or Redistribution Control Descriptor, is a digital code embedded in a digital broadcasting stream, which prevents digital television reception equipment from redistributing digital broadcast content. *See id.* at 16,027. The effectiveness of the broadcast flag regime is dependent on programming being flagged *and* on devices capable of receiving broadcast DTV signals (collectively "demodulator products") being able to recognize and give effect to the flag. Under the rule, new demodulator products *(e.g.,* televisions, computers, etc.) must include flag-recognition technology. This technology, in combination with broadcasters' use of the flag, would prevent redistribution of broadcast programming. The broadcast flag does not have any impact on a DTV broadcast transmission. The flag's only effect is to limit the capacity of receiver apparatus to redistribute broadcast content after a broadcast transmission is complete.

The NPRM also sought comments on whether the Commission had the authority to mandate recognition of the broadcast flag in consumer electronics devices. *Id.* at 16,029–30. The Commission requested commenters to address whether "this [is] an area in which the Commission could exercise its ancillary jurisdiction under Title

I of the Act." *Id.* The FCC also asked "commenters to identify any statutory provisions that might provide the Commission with more explicit authority to adopt digital broadcast copy protection rules," such as 47 U.S.C. §336(b)(4) and (b)(5), *id.,* which authorize the Commission to regulate the issuance of licenses for digital television services, *see* 47 U.S.C. §336(a)–(b).

Unsurprisingly, there was an enormous response to the NPRM. The Commission received comments from, among others, owners, producers, and distributors of broadcast television content; consumer electronics manufacturers; consumer interest groups; library associations; and individual consumers. Content owners and television broadcasters argued that, if DTV broadcast content was not protected from the threat of widespread unauthorized redistribution via networks such as the Internet, high value content would migrate from broadcast television to pay television services, which offer a more secure distribution channel. *See Digital Broadcast Content Protection,* 18 F.C.C.R. 23,550, 23,553 (2003) *("Flag Order");* Joint Reply Comments of the Motion Picture Association of America, Inc., *et al.,* 2/20/03, *reprinted in* Joint Appendix ("J.A.") 1080, 1088. But there was also overwhelming opposition to the proposed broadcast flag rules. As Commissioner Adelstein noted: "Thousands of people contacted us and urged us not to [adopt the broadcast flag regime]. Many consumers are concerned about the effect on their use and enjoyment of television, as well as their personal privacy." *See Flag Order,* 18 F.C.C.R. at 23,620 (statement of Commissioner Adelstein, approving in part, dissenting in part). Opponents of regulation argued that the threat from content redistribution was overstated in light of technological limitations to widespread Internet retransmission. *See id.* at 23,553. In addition, critics of the proposed rules expressed concerns about implementation costs and suggested that the broadcast flag both was an inadequate tool to protect content and would stifle innovation. *Id.* at 23,557.

On the question of the Commission's authority to promulgate broadcast flag regulations, proponents pointed to 47 U.S.C. §336. *See Flag Order,* 18 F.C.C.R. at 23,562. Enacted as part of the Telecommunications Act of 1996, Pub. L. No. 104–104, §201, 110 Stat. 56, 107, 47 U.S.C. §336 sets forth certain criteria pursuant to which the Commission may issue new licenses for advanced television services. Proponents also argued that, even if the Commission lacked express statutory authority under §336, the FCC was authorized to adopt broadcast flag rules pursuant to its ancillary jurisdiction. *See* Joint Comments of the Motion Picture Association of America, Inc., *et al.,* 12/6/02, J.A. 760, 798–807.

Opponents contended that the Commission lacked jurisdiction to implement broadcast flag rules. They pointed out that the plain text of §336 authorized the FCC to regulate only DTV broadcast licensees and the quality of the signal transmitted by such licensees. *See, e.g.,* Reply Comments of Phillips Electronics North America Corp., 2/18/03, J.A. 1012, 1027–28. Critics also maintained that the Commission could not rely on its ancillary jurisdiction to adopt a broadcast flag regime. As one commenter noted:

> [The] unbounded view of FCC jurisdiction [advanced by flag proponents] proves too much. Were it true, the FCC would have plenary authority to regulate consumer electronics and computer devices, and there would have been no need for Congress to delegate authority to the FCC to implement its policy objectives [in various laws authorizing the FCC to regulate specific aspects of consumer electronics].

Id., J.A. 1028–29.

In November 2003, the FCC adopted regulations requiring demodulator products manufactured on or after July 1, 2005 to recognize and give effect to the broadcast flag. *See Flag Order,* 18 F.C.C.R. at 23,570, 23,576, 23,590–91. The Commission explained:

> In this *Report and Order,* we conclude that the potential threat of mass indiscriminate redistribution will deter content owners from making high value digital content available through broadcasting outlets absent some content protection mechanism. Although the threat of widespread indiscriminate retransmission of high value digital broadcast content is not imminent, it is forthcoming and preemptive action is needed to forestall any potential harm to the viability of over-the-air television. Of the mechanisms available to us at this time, we believe that [a broadcast flag] regime will provide content owners with reasonable assurance that DTV broadcast content will not be indiscriminately redistributed while protecting consumers' use and enjoyment of broadcast video programming.

Id. at 23,552. The Commission also adopted an interim policy for approving the technologies that could be employed by demodulator products to comply with the re-

quirements of the *Flag Order* and issued a further notice of proposed rulemaking to address this and other issues. *See id.* at 23,574–79.

In explaining the source of its authority to promulgate the broadcast flag rules, the Commission did not invoke 47 U.S.C. §336. Rather, the Commission purported to rely solely on its ancillary jurisdiction under Title I of the Communications Act of 1934. *See id.* at 23,563. The Commission found that (1) television receivers are covered by Title I's general jurisdictional grant even when those receivers are not engaged in the process of communication by wire or radio and (2) flag-based regulations are reasonably ancillary to the Commission's regulatory authority to foster a diverse range of broadcast television programs and promote the transition from analog service to DTV. *See id.* at 23,563–66. The Commission acknowledged that "this may be the first time the Commission exercises its ancillary jurisdiction over equipment manufacturers in this manner." *Id.* at 23,566. The Commission nonetheless concluded that "[t]he fact that the circumstances may not have warranted an exercise of such jurisdiction at earlier stages does not undermine our authority to exercise ancillary jurisdiction at this point in time." *Id.*

Commissioner Abernathy issued a separate statement, in which she expressed her support for the *Flag Order,* but noted:

> I have previously expressed concerns about whether we have jurisdiction to adopt a broadcast flag solution, or whether this is an issue best left for Congress. As a general rule, the Commission should be wary of adopting significant new regulations where Congress has not spoken. On balance, though, I believe that given the broad Congressional direction to promote the transition to digital broadcasting, a critical part of that obligation involves protection of content that is transmitted via free over-the-air-broadcasting. I am hopeful that any court review of this decision can occur before the effective date of our rules.

Id. at 23,614 (separate statement of Commissioner Abernathy). Commissioners Copps and Adelstein dissented in part from the issuance of the *Flag Order.* Commissioner Copps dissented "because the [regulations did] not preclude the use of the flag for news or for content that is already in the public domain" and "because the criteria adopt[ed] for accepting digital content protection technologies fail to address . . . the impact . . . on personal privacy." *Id.* at 23,616–17 (Statement of Commissioner Copps). Commissioner Adelstein dissented because the regulations did "not rule out the use of the flag for content that is in the public domain." *Id.* at 23,620 (Statement of Commissioner Adelstein).

The instant petition for review, filed by nine organizations representing numerous libraries and consumers, challenges the FCC's *Flag Order* on three grounds: (1) the Commission lacks statutory authority to mandate that demodulator products recognize and give effect to the broadcast flag; (2) the broadcast flag regime impermissibly conflicts with copyright law; and (3) the Commission's decision is arbitrary and capricious for want of reasoned decisionmaking. The Motion Picture Association of America ("MPAA") intervened in support of the Commission. In its brief to the court, MPAA also contested petitioners' Article III standing. After hearing oral argument, the court requested additional submissions from the parties on the question of standing. *See Am. Library Ass'n* v. *FCC,* 401 F.3d 489 (D.C. Cir. 2005) *("Am. Library I").*

As explained below, we are now satisfied that at least one member of one of the petitioner groups has standing to pursue this challenge to the FCC's broadcast flag rules. The court therefore has jurisdiction to consider the petition for review. On the merits, we hold that the FCC lacked statutory authority to impose the broadcast flag regime. Therefore, we grant the petition for review without reaching petitioners' other challenges to the *Flag Order.*

II. Analysis

A. Standing

Before addressing the merits of petitioners' claims, we must first determine whether they have demonstrated that they have Article III standing, a prerequisite to Federal court jurisdiction. *Am. Library I,* 401 F.3d at 492. Associations such as petitioners have representational standing under Article III if (1) at least one of their members has standing, (2) the interests the association seeks to protect are germane to its purpose, and (3) neither the claim asserted nor the relief requested requires the participation of an individual member in the lawsuit. *Id.* As we noted in *American Library I,* we have no reason to doubt that petitioners satisfy the latter two requirements, and neither the FCC nor intervenor MPAA has suggested otherwise. Therefore, the focus of our inquiry here is whether at least one member of a petitioner group has standing to sue in its own right. *Id.*

In order to meet this first prong of the associational standing test, at least one member of a petitioning group must satisfy "the three elements that form the 'irreducible constitutional minimum of standing.'" *Id.* (quoting *Lujan* v. *Defenders of Wildlife,* 504 U.S. 555, 560 (1992)). These elements are: (1) injury in fact, (2) causation, and (3) redressability. *See id.* at 492–93 (citing *Defenders of Wildlife,* 504 U.S. at 560–61). The "only thing at issue in this case is the injury-in-fact prong of Article III standing, for causation and redressability are obvious if petitioners can demonstrate injury." *Id.* at 493. Furthermore, as we have already made clear,

> [w]ith regard to the injury-in-fact prong of the standing test, petitioners need not prove the merits of their case in order to demonstrate that they have Article III standing. Rather, in order to establish injury in fact, petitioners must show that there is a substantial probability that the FCC's order will harm the concrete and particularized interests of at least one of their members.

Id. (citations omitted).

In response to our decision in *American Library I,* petitioners submitted a brief, accompanied by 13 affidavits from individual members and individuals representing their member organizations, to demonstrate their standing. These materials included an affidavit executed by Peggy Hoon, the Scholarly Communication Librarian at the North Carolina State University ("NCSU") Libraries in Raleigh, North Carolina, a member of petitioner Association of Research Libraries. Affidavit of Peggy Hoon, 3/29/05, ¶ 1. Ms. Hoon's affidavit asserts that the NCSU Libraries assist faculty members who would like to make broadcast materials available to students in distance learning courses via the Internet. The affidavit states that the NCSU Libraries currently assist a professor in the Foreign Languages and Literatures Department make short broadcast clips of the Univision network's program, *El Show de Christina,* available over the Internet on a password-protected basis for use in a distance-education Spanish language course. The affidavit alleges that Internet redistribution is essential to making such clips available. *See id.* ¶ ¶ 5–10. The FCC does not dispute that the NCSU Libraries' activities are lawful. And as petitioners point out, if the regulations implemented by the *Flag Order* take effect, there is a substantial probability that the NCSU Libraries would be prevented from assisting faculty to make broadcast clips available to students in their distance-learning courses via the Internet.

At oral argument, counsel for the FCC stated explicitly that the Commission is not challenging petitioners' standing in this case. Recording of Oral Argument at 29:01–:18. In its supplemental brief, the Commission again does not raise a challenge to petitioners' standing. Instead, the Commission merely responds on the merits, taking issue with certain statements in petitioners' supplemental brief and affidavits about the breadth of the broadcast flag regime. *See* FCC Supp. Br. at 3.

Intervenor MPAA, which does challenge petitioners' standing, argues that any injury suffered by the Libraries following the FCC's implementation of the broadcast flag regulations will be "due solely to the independent . . . decisions of third parties not before this Court." MPAA Supp. Br. at 6. In other words, MPAA assumes that, because hardware manufacturers eventually might be able to gain approval for apparatus that allow for greater distribution of broadcast content in a manner that is consistent with the *Flag Order,* it will be the unavailability of this new technology and not the agency's enforcement of the broadcast flag rule that causes injury to petitioners. Thus, under MPAA's view, redress for petitioners must come from the hardware manufacturers, not the FCC. This is a specious argument.

There is clearly a substantial probability that, if enforced, the *Flag Order* will immediately harm the concrete and particularized interests of the NCSU Libraries. Absent the *Flag Order,* the Libraries will continue to assist NCSU faculty members make broadcast clips available to students in distance-education courses via the Internet, but there is a substantial probability that the Libraries will be unable to do this if the *Flag Order* takes effect. It is also beyond dispute that, if this court vacates the *Flag Order,* the Libraries will be able to continue to assist faculty members lawfully redistribute broadcast clips to their students.

In short, it is clear that, on this record, the NCSU Libraries have satisfied the requisite elements of Article III standing: injury in fact, causation, and redressability. Therefore, the Association of Research Libraries also has standing. *See Am. Library I,* 401 F.3d at 492. Because only one member of a petitioning organization must have standing in order for the court to have jurisdiction over a petition for review, *see Nuclear Energy Inst., Inc.* v. *EPA,* 373 F.3d 1251, 1266 (D.C. Cir. 2004), it is unnecessary for us to consider any of the other grounds offered by petitioners to demonstrate their standing. We therefore move to the question of whether the Commission acted in excess of its statutory authority in promulgating the *Flag Order.*

B. The Limits of the FCC's Delegated Authority Under the Communications Act

In defending the *Flag Order* and the broadcast flag regulations contained therein, the Commission contends that it

> reasonably interpreted the Communications Act as granting it jurisdiction to establish technical requirements for television receiving equipment in order to fulfill its responsibility of implementing the transition to digital television. Sections 1 and 2(a) of the Act, 47 U.S.C. 151, 152(a), confer on the agency regulatory jurisdiction over all interstate radio and wire communication. Under the definitional provisions of section 3, 47 U.S.C. 153, those communications include not only the transmission of signals through the air or wires, but also "all instrumentalities, facilities, [and] apparatus" associated with the overall circuit of messages sent and received—such as digital television receiving equipment.
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> . . .
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> . . . [T]he Commission has the authority to promulgate regulations to effectuate the goals and provisions of the Act even in the absence of an explicit grant of regulatory authority, if the regulations are reasonably ancillary to the Commission's specific statutory powers and responsibilities.

FCC Br. at 17, 23–24.

Petitioners counter that

> [t]he FCC has asserted jurisdiction it does not have . . . The FCC claims no specific statutory authority allowing it to meddle so radically in the nation's processes of technological innovation, but instead cites to its latent "ancillary" jurisdiction, which the FCC astonishingly contends is boundless unless Congress specifically acts to limit it.
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> . . . [I]n no circumstance can the FCC regulate an activity that is not an interstate "communication" by radio or wire, and the broadcast flag rules regulate neither. The broadcast flag does not dictate how DTV transmissions are made, but simply controls how the transmitted content can be treated *after* it is received . . . [T]he Communications Act is clear that, unless specified elsewhere, it gives the FCC authority over receipt "services," not the receipt "apparatuses" the agency now attempts to regulate.

Petitioners' Br. at 19–20.

As noted above, the principal issue in this case is whether the Commission acted outside the scope of its delegated authority when it adopted the disputed broadcast flag regulations. The FCC, like other Federal agencies, "literally has no power to act . . . unless and until Congress confers power upon it." *La. Pub. Serv. Comm'n* v. *FCC,* 476 U.S. 355, 374 (1986). The Commission "has no constitutional or common law existence or authority, but only those authorities conferred upon it by Congress." *Michigan* v. *EPA,* 268 F.3d 1075, 1081 (D.C. Cir. 2001). Hence, the FCC's power to promulgate legislative regulations is limited to the scope of the authority Congress has delegated to it. *Id.* (citing *Bowen* v. *Georgetown Univ. Hosp.,* 488 U.S. 204, 208 (1988)).

1. The Applicable Standard of Review

In assessing whether the Commission's *Flag Order* exceeds the agency's delegated authority, we apply the familiar standards of review enunciated by the Supreme Court in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984), and *United States* v. *Mead Corp.,* 533 U.S. 218, 226–27 (2001). In reviewing agency action under *Chevron,* "if the intent of Congress is clear," the court "must give effect to [that] unambiguously expressed intent." *Chevron,* 467 U.S. at 842–43 *("Chevron* Step One"). If "Congress has not directly addressed the precise question at issue," and the agency has acted pursuant to an express or implied delegation of authority, the agency's statutory interpretation is entitled to deference, as long as it is reasonable. *Id.* at 843–44 *("Chevron* Step Two"). The FCC argues here that the court should defer to the agency's interpretation of its ancillary jurisdiction under *Chevron,* because, in its view, the regulations promulgated in the *Flag Order* reflect a reasonable application of the agency's ancillary authority under the Communications Act. The agency's self-serving invocation of *Chevron* leaves out a crucial threshold consideration, *i.e.,* whether the agency acted pursuant to delegated authority.

As the court explained in *Motion Picture Ass'n of America, Inc.* v. *FCC,* 309 F.3d 796, 801 (D.C. Cir. 2002) *("MPAA"),* an "agency's interpretation of [a] statute is not entitled to deference absent a *delegation of authority* from Congress to regulate in the areas at issue." The court observed that the Supreme Court's decision in *Mead* "reinforces" the command in *Chevron* that "deference to an agency's interpretation of a statute is due only when the agency acts pursuant to 'delegated authority.'" *Id.*

(quoting *Mead,* 533 U.S. at 226). *See also Cal. Indep. Sys. Operator Corp.* v. *FERC,* 372 F.3d 395, 399 (D.C. Cir. 2004); *Bluewater Network* v. *EPA,* 370 F.3d 1, 11 (D.C. Cir. 2004); *AT&T Corp.* v. *FCC,* 323 F.3d 1081, 1086 (D.C. Cir. 2003); *Ry. Labor Executives' Ass'n* v. *Nat'l Mediation Bd.,* 29 F.3d 655, 670–71 (D.C. Cir. 1994) (en banc).

In *Aid Ass'n for Lutherans* v. *United States Postal Serv.,* 321 F.3d 1166 (D.C. Cir. 2003), the court explained:

> *"Chevron* is principally concerned with whether an agency has authority to act under a statute." *Arent* v. *Shalala,* 70 F.3d 610, 615 (D.C. Cir. 1995). *Chevron* analysis "is focused on discerning the boundaries of Congress' delegation of authority to the agency; and as long as the agency stays within that delegation, it is free to make policy choices in interpreting the statute, and such interpretations are entitled to deference." *Id.; see also Mead,* 533 U.S. at 226–27 (holding that *Chevron* deference is due only when the agency acts pursuant to "delegated authority").
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> . . .
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> An agency construction of a statute cannot survive judicial review if a contested regulation reflects an action that exceeds the agency's authority. It does not matter whether the unlawful action arises because the disputed regulation defies the plain language of a statute or because the agency's construction is utterly unreasonable and thus impermissible.

Id. at 1174.

Petitioners' principal claim here is that the challenged broadcast flag regulations emanated from an *ultra vires* action by the FCC. We agree. This being the case, the regulations cannot survive judicial review under *Chevron/Mead.* Our judgment is the same whether we analyze the FCC's action under the first or second step of *Chevron.* "In either situation, the agency's interpretation of the statute is not entitled to deference absent a *delegation of authority* from Congress to regulate in the areas at issue." *MPAA,* 309 F.3d at 801 (citing *Ry. Labor Executives,* 29 F.3d at 671). In this case, as explained below, the FCC's interpretation of its ancillary jurisdiction reaches well beyond the agency's delegated authority under the Communications Act. We therefore hold that the broadcast flag regulations exceed the agency's delegated authority under the statute.

2. Ancillary Jurisdiction Under the Communications Act of 1934

As explained above, the only basis advanced by the Commission as a source for its authority to adopt the broadcast flag regime was its ancillary jurisdiction under Title I of the Communications Act of 1934. *See Flag Order,* 18 F.C.C.R. at 23,563–64. As the Commission recognized, its ancillary jurisdiction is limited to circumstances where: (1) the Commission's general jurisdictional grant under Title I covers the subject of the regulations and (2) the regulations are reasonably ancillary to the Commission's effective performance of its statutorily mandated responsibilities. *See id.* at 23,563 (citing *Southwestern Cable,* 392 U.S. at 177–78).

The insurmountable hurdle facing the FCC in this case is that the agency's general jurisdictional grant does not encompass the regulation of consumer electronics products that can be used for receipt of wire or radio communication when those devices are not engaged in the process of radio or wire transmission. Because the *Flag Order* does not require demodulator products to give effect to the broadcast flag until *after* the DTV broadcast has been completed, the regulations adopted in the *Flag Order* do not fall within the scope of the Commission's general jurisdictional grant. Therefore, the Commission cannot satisfy the first precondition to its assertion of ancillary jurisdiction.

The Supreme Court has delineated the parameters of the Commission's ancillary jurisdiction in three cases: *United States* v. *Southwestern Cable Co.*, 392 U.S. 157 (1968), *United States* v. *Midwest Video Corp.,* 406 U.S. 649 (1972) *("Midwest Video I"),* and *FCC* v. *Midwest Video Corp.,* 440 U.S. 689 (1979) *("Midwest Video II").* In *Southwestern Cable* and *Midwest Video I,* the Court upheld the Commission's regulation of cable television systems as a valid exercise of its ancillary jurisdiction, but also made clear that the Commission's ancillary authority has limits. In *Midwest Video II,* the Court found that the Commission had overstepped those limits. Because *Southwestern Cable, Midwest Video I,* and *Midwest Video II* are central to our analysis of whether the Commission lawfully exercised its ancillary jurisdiction in this case, we discuss these cases in some detail.

In Southwestern Cable, the Supreme Court recognized that the Communications Act confers a sphere of ancillary jurisdiction on the FCC. *See* 392 U.S. at 177–78. The principal question presented was whether the FCC had the authority to regulate cable television systems ("CATV"), absent any express Congressional grant of

authority to the FCC to regulate in this area. *See id.* at 164–67. The Court's conclusion that the FCC did have such authority rested on two factors. First, it was beyond doubt that CATV systems involved interstate "communication by wire or radio," *id.* at 168 (quoting 47 U.S.C. §152(a)), and, thus, were covered by Title I's general jurisdictional grant. Second, the Court concluded that at least some level of CATV regulation was "reasonably ancillary to the effective performance of the Commission's various responsibilities [delegated to it by Congress] for the regulation of television broadcasting." *Id.* at 178. Because these two conditions were satisfied, the Court held that, to the degree it was in fact reasonably ancillary to the Commission's responsibilities over broadcast, the FCC had the power to regulate cable television as "public convenience, interest or necessity requires," so long as the regulations were "not inconsistent with law." *Id.* (quoting 47 U.S.C. §303(r)).

Four years later, the Court applied the two-part test enunciated in *Southwestern Cable* to review a rule adopted by the FCC providing that no CATV system with 3,500 or more subscribers could carry the signal of any television broadcast station unless the system distributed programming that had originated from a source other than the broadcast signals and the system had facilities for local program production. *See Midwest Video I,* 406 U.S. at 653–54 & n.6. The regulation was designed to increase the number of outlets for community self-expression and the programming choices available to the public. *See id.* at 654.

A closely divided Court held that the Commission's rule was a valid exercise of its ancillary jurisdiction. In an opinion by Justice Brennan, a plurality of the Court began its analysis by recognizing the two requirements for the Commission's exercise of ancillary jurisdiction: (1) that the regulation must cover interstate or foreign communication by wire or radio and (2) that the regulation must be reasonably ancillary to the Commission's effective performance of its statutorily mandated responsibilities. *See id.* at 662–63. The parties before the Court in *Midwest Video I* did not dispute that the first precondition was met. *See id.* at 662. Furthermore, the plurality concluded that the regulation was reasonably ancillary to the Commission's responsibilities for the regulation of broadcast television, because the Commission reasonably concluded that the rule would "further the achievement of long-established regulatory goals in the field of television broadcasting by increasing the number of outlets for community self-expression and augmenting the public's choice of programs and types of services." *Id.* at 667–68 (quoting Commission report accompanying the disputed regulation).

Chief Justice Burger provided the fifth vote to sustain the regulation at issue in *Midwest Video I,* but he concurred only in the judgment. Chief Justice Burger agreed that, in light of the "pervasive powers" conferred upon the Commission and its "generations of experience," the Court should sustain the Commission's authority to impose the regulation at issue. *Id.* at 676 (Burger, C.J., concurring in the result). Nonetheless, he noted: "Candor requires acknowledgment, for me at least, that the Commission's position strains the outer limits of even the open-ended and pervasive jurisdiction that has evolved by decisions of the Commission and the courts." *Id.*

Seven years later, in *Midwest Video II,* the Court considered whether another FCC effort to regulate cable television was a permissible exercise of the Commission's ancillary jurisdiction. This time the Court decided that the Commission had gone too far. The rules at issue required that cable television systems carrying broadcast signals and having at least 3,500 subscribers develop at least a 20-channel capacity, make certain channels available for third-party access, and furnish equipment for access purposes. 440 U.S. at 691. The Court held that the rules exceeded the Commission's authority. *Id.* at 708–09. Specifically, because the Communications Act explicitly directed the Commission not to treat broadcasters as common carriers, the Court concluded that it was not reasonably ancillary to the Commission's effective performance of its responsibilities relating to broadcast television for the Commission to impose common-carrier obligations on cable television systems. *See id.* at 702–05, 708–09. While the Court recognized that the statutory bar on treating broadcasters as common carriers did not apply explicitly to cable systems, the Court explained that, "without reference to the provisions of the Act directly governing broadcasting, the Commission's jurisdiction under [Title I] would be unbounded." *Id.* at 706. The Court refused to countenance such a boundless view of the Commission's jurisdiction, noting that, "[t]hough afforded wide latitude in its supervision over communication by wire, the Commission was not delegated unrestrained authority." *Id.* As the Commission correctly explained in the *Flag Order, Midwest Video II* stands for the proposition that "if the basis for jurisdiction over cable is that the authority is ancillary to the regulation of broadcasting, the cable regulation cannot be antithetical to a basic regulatory parameter established for broadcast." *Flag Order,* 18 F.C.C.R. at 23,563 n.70.

The Court's decisions in *Southwestern Cable, Midwest Video I,* and *Midwest Video II* were principally focused on the second prong of the ancillary jurisdiction test. This is unsurprising, because the subject matter of the regulations at issue in those cases—cable television—constituted interstate communication by wire or radio, and thus fell within the scope of the Commission's general jurisdictional grant under Title I of the Communications Act. However, these cases leave no doubt that the Commission may not invoke its ancillary jurisdiction under Title I to regulate matters outside of the compass of communication by wire or radio. As we have explained:

> While the Supreme Court has described the jurisdictional powers of the FCC as . . . expansive, there are limits to those powers. No case has ever permitted, and the Commission has never, to our knowledge, asserted jurisdiction over an entity not engaged in "communication by wire or radio."

Accuracy in Media, Inc. v. *FCC,* 521 F.2d 288, 293 (D.C. Cir. 1975) (additional internal quotation marks omitted) (citing *Nat'l Broad. Co.* v. *United States,* 319 U.S. 190, 219 (1943)); *see also id.* at 294 ("Jurisdiction over CATV [in *Southwestern Cable*] was expressly predicated upon a finding that the transmission of video and aural signals via the cable was 'interstate . . . communication by wire or radio.'" (quoting *Southwestern Cable,* 392 U.S. at 168)); *Midwest Video I,* 406 U.S. at 662 (making clear that the Commission's jurisdiction is limited to activities involving communication by wire or radio). This principle is crucial, because the issue here is precisely whether the *Flag Order* asserts jurisdiction over matters that are beyond the compass of wire or radio communication.

Southwestern Cable, Midwest Video I, and *Midwest Video II* are also relevant to the present controversy for a second reason. In each of these decisions, the Court followed a very cautious approach in deciding whether the Commission had validly invoked its ancillary jurisdiction, even when the regulations under review clearly addressed "communication by wire or radio." As the Seventh Circuit has noted: "The Court [in *Southwestern Cable]* appeared to be treading lightly even where the activity at issue" involved cable television, which "easily falls within" Title I's general jurisdictional grant. *Ill. Citizens Comm. for Broad.* v. *FCC,* 467 F.2d 1397, 1400 (7th Cir. 1972). The Seventh Circuit's characterization is equally apt with respect to the Court's opinions in *Midwest Video I* and *Midwest Video II.*

We think that the Supreme Court's cautionary approach in applying the second prong of the ancillary jurisdiction test suggests that we should be *at least* as cautious in this case. Great caution is warranted here, because the disputed broadcast flag regulations rest on no apparent statutory foundation and, thus, appear to be ancillary to nothing. Just as the Supreme Court refused to countenance an interpretation of the second prong of the ancillary jurisdiction test that would confer "unbounded" jurisdiction on the Commission, *Midwest Video II,* 440 U. S. at 706, we will not construe the first prong in a manner that imposes no meaningful limits on the scope of the FCC's general jurisdictional grant.

In light of the parameters of the Commission's ancillary jurisdiction established by *Southwestern Cable, Midwest Video I,* and *Midwest Video II,* this case turns on one simple fact: the *Flag Order* does not require demodulator products to give effect to the broadcast flag until *after* the DTV broadcast is complete. The *Flag Order* does not regulate the actual transmission of the DTV broadcast. In other words, the *Flag Order* imposes regulations on devices that receive communications after those communications have occurred; it does not regulate the communications themselves. Because the demodulator products are not engaged in "communication by wire or radio" when they are subject to regulation under the *Flag Order,* the Commission plainly exceeded the scope of its general jurisdictional grant under Title I in this case.

In seeking to justify its assertion of jurisdiction in the *Flag Order,* the Commission relies on the fact that the Communications Act defines "radio communication" and "wire communication" to include not only the "transmission of . . . writing, 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." 47 U.S.C. §153(33) (defining "radio communication"); *id.* §153(52) (defining "wire communication"). The *Flag Order* asserts: "Based on this language, [the Commission finds] that television receivers are covered by the statutory definitions and therefore come within the scope of the Commission's general authority outlined in [Title I] of the Communications Act." 18 F.C.C.R. at 23,563–64. The Commission thus apparently believed that, given the definitions of "wire communication" and "radio communication" in Title I, it could assert jurisdiction over television receivers even when those receivers were not engaged in broadcast transmission simply because

they are apparatus used for the receipt of communications. *See also* FCC Br. at 26. We reject this position, for it rests on a completely implausible construction of the Communications Act.

The statute does not give the FCC authority to regulate *any* "apparatus" that is associated with television broadcasts. Rather, the statutory language cited by the FCC refers only to "apparatus" that are "incidental to . . . transmission." In other words, the language of §153(33) and (52) plainly does not indicate that Congress intended for the Commission to have general jurisdiction over devices that can be used for receipt of wire or radio communication when those devices are not engaged in the process of radio or wire transmission.

The language relied upon by the Commission in the statutory definitions of "wire communication" and "radio communication" was part of the original Communications Act of 1934. *See* Pub. L. No. 73–416, §3(a)–(b), 48 Stat. 1064, 1065; *see also Southwestern Cable,* 392 U.S. at 168 (quoting this language). The Commission acknowledges that, in the more than 70 years that the Act has been in existence, it has never previously sought to exercise ancillary jurisdiction over reception equipment *after* the transmission of communication is complete. *See* Recording of Oral Argument at 34:45–35:23. This is not surprising, since the Commission's current interpretation of the statute's definitional language would render step one of the Supreme Court's two-part test for determining whether a subject is within the Commission's ancillary jurisdiction essentially meaningless.

We can find nothing in the statute, its legislative history, the applicable case law, or agency practice indicating that Congress meant to provide the sweeping authority the FCC now claims over receiver apparatus. And the agency's strained and implausible interpretations of the definitional provisions of the Communications Act of 1934 do not lend credence to its position. As the Supreme Court has reminded us, Congress "does not . . . hide elephants in mouseholes." *Whitman* v. *Am. Trucking Ass'n,* 531 U.S. 457, 468 (2001). In sum, we hold that, at most, the Commission only has general authority under Title I to regulate apparatus used for the receipt of radio or wire communication while those apparatus are engaged in communication.

Our holding is consistent with the Seventh Circuit's well-reasoned decision in *Illinois Citizens,* which concluded that the FCC may not lawfully exercise jurisdiction over activities that do not constitute communication by wire or radio. *See* 467 F.2d at 1399–1400. In that case, the Illinois Citizens Committee for Broadcasting filed a complaint with the FCC, alleging that the proposed construction of the Sears Tower in Chicago "would throw 'multiple ghost images' on television receivers in many areas of the Greater Chicago Metropolitan Area." *Id.* at 1398. The petitioners called upon the FCC to take steps to prevent this interference, including, if necessary, ordering Sears, Roebuck & Co. to cease construction of the tower until the company had taken measures to ensure that television viewers would continue to receive an adequate signal. The Commission denied the requested relief on the ground that it lacked jurisdiction over the construction of the Sears Tower, and the Illinois Citizens Committee sought review by the Seventh Circuit. *See id.* at 1398–99.

The Illinois Citizens Committee argued that, in light of *Southwestern Cable,* the FCC had the power to regulate "all activities which 'substantially affect communications.'" *Id.* at 1399. The Seventh Circuit flatly rejected this argument as unsupported by the Communications Act or judicial decisions interpreting the Act:

> While we appreciate the need for a flexible approach to FCC jurisdiction, we believe the scope advanced by petitioners is far too broad. The "affecting communications" concept would result in expanding the FCC's already substantial responsibilities to include a wide range of activities, whether or not actually involving the transmission of radio or television signals much less being remotely electronic in nature. Nothing before us supports this extension.

Id. at 1400 (footnote omitted).

In *Motion Picture Ass'n,* this court concluded that the Commission lacked authority under Title I of the Communications Act to promulgate regulations that significantly implicated program content. Focusing specifically on 47 U.S.C. §151, which is part of Title I and which the FCC conceded was the only possible source of authority that could justify its adoption of the video description rules at issue in the case, we explained:

> Under [§151], Congress delegated authority to the FCC to expand radio and wire transmissions, so that they would be available to all U.S. citizens. Section [151] does not address the *content* of the programs with respect to which acces-

> sibility is to be ensured. In other words, the FCC's authority under [§151] is broad, but not without limits.

309 F.3d at 804 (full citations omitted) (citing *Midwest Video I,* 406 U.S. at 667–68, and *Southwestern Cable,* 392 U.S. at 172). Just as no provision in Title I addresses program content, no provision in Title I addresses requirements for demodulator products not engaged in communication by wire or radio.

In sum, because the rules promulgated by the *Flag Order* regulate demodulator products after the transmission of a DTV broadcast is complete, these regulations exceed the scope of authority Congress delegated to the FCC. And because the Commission can only issue regulations on subjects over which it has been delegated authority by Congress, the rules adopted by the *Flag Order* are invalid at the threshold jurisdictional inquiry. As was true in *Aid Ass'n for Lutherans,* "our judgment in this case is the same whether we analyze the agency's statutory interpretation under *Chevron* Step One or Step Two. 'In either situation, the agency's interpretation of the statute is not entitled to deference absent a *delegation of authority* from Congress to regulate in the areas at issue.'" 321 F.3d at 1175 (quoting *MPAA,* 309 F.3d at 801). "An agency construction of a statute cannot survive judicial review if a contested regulation reflects an action that exceeds the agency's authority." *Id.* at 1174. It does not matter whether the unlawful action arises because the regulations at issue are "contrary to clear Congressional intent" as ascertained through use of the "traditional tools of statutory construction," *Chevron,* 467 U.S. at 843 n.9, or "utterly unreasonable and thus impermissible." *Aid Ass'n for Lutherans,* 321 F.3d at 1174. The FCC has no Congressionally delegated authority to regulate receiver apparatus after a transmission is complete. We therefore hold that the broadcast flag regulations exceed the agency's delegated authority under the statute.

3. Subsequent Congressional Legislation

We think that, for the reasons discussed above, the FCC *never* has possessed ancillary jurisdiction under the Communications Act of 1934 to regulate consumer electronic devices that can be used for receipt of wire or radio communication when those devices are not engaged in the process of radio or wire transmission. Indeed, in the more than 70 years of the Act's existence, the Commission has neither claimed such authority nor purported to exercise its ancillary jurisdiction in such a far-reaching way. *See Flag Order,* 18 F.C.C.R. at 23,566 ("We recognize that the Commission's assertion of jurisdiction over manufacturers of equipment in the past has typically been tied to specific statutory provisions and that this is the first time the Commission has exercised ancillary jurisdiction over consumer equipment manufacturers in this manner.")

The Commission weakly attempts to dismiss this history by suggesting that "Congressional admonitions and past Commission assurances of a narrow exercise of authority over manufacturers (such as those reflected in the [All Channel Receiver Act] and its legislative history) are properly limited to the context of those explicit authorizations. The regulations here do not fall within the subject matter of those explicit authorizations." *Id.* (footnote omitted). This cryptic statement surely cannot justify the FCC's overreaching for regulatory authority that Congress has never granted. As we held in *Aid Ass'n for Lutherans:*

> In this case, the [agency]'s position seems to be that the disputed regulations are permissible because the statute does not expressly foreclose the construction advanced by the agency. We reject this position as entirely untenable under well-established case law. *See Ry. Labor Executives' Ass'n* v. *Nat'l Mediation Bd.,* 29 F.3d 655, 671 (D.C. Cir. 1994) (en banc) ("Were courts to *presume* a delegation of power absent an express *withholding* of such power, agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with *Chevron* and quite likely with the Constitution as well.") (emphasis in original); *see also Halverson* v. *Slater,* 129 F.3d 180, 187 (D.C. Cir. 1997) (quoting *Ry. Labor Executives,* 29 F.3d at 671); *Oil, Chem. & Atomic Workers Int'l Union* v. *NLRB,* 46 F.3d 82, 90 (D.C. Cir. 1995) (same); *Ethyl Corp.* v. *EPA,* 51 F.3d 1053, 1060 (D.C. Cir. 1995) ("We refuse . . . to presume a delegation of power merely because Congress has not expressly withheld such power."); *Natural Res. Def. Council* v. *Reilly,* 983 F.2d 259, 266 (D.C. Cir. 1993) ("[I]t is only legislative intent to delegate such authority that entitles an agency to advance its own statutory construction for review under the deferential second prong of *Chevron.")* (alteration in original) (quoting *Kansas City* v. *Dep't of Hous. & Urban Dev.,* 923 F.2d 188, 191–92 (D.C. Cir. 1991)).

321 F.3d at 1174–75.

It is enough here for us to find that the Communications Act of 1934 does not indicate a legislative intent to delegate authority to the Commission to regulate consumer electronic devices that can be used for receipt of wire or radio communication when those devices are not engaged in the process of radio or wire transmission. That is the end of the matter. It turns out, however, that subsequent legislation enacted by Congress *confirms* the limited scope of the agency's ancillary jurisdiction and makes it clear that the broadcast flag regulations exceed the agency's delegated authority under the statute.

The first such Congressional enactment of note is the All Channel Receiver Act ("ACRA"), Pub. L. No. 87–529, 76 Stat. 150 (codified at 47 U.S.C. § §(s), 330(a)). Enacted in 1962, the ACRA granted the Commission authority to require that televisions sold in interstate commerce are "capable of adequately receiving all frequencies allocated by the Commission to television broadcasting." 47 U.S.C. §303(s). *See Elec. Indus. Ass'n Consumer Elecs. Groups* v. *FCC,* 636 F.2d 689 (D.C. Cir. 1980) *("EIA")* (offering an extensive review of the legislative history of the ACRA). The original version of the All Channel Receiver Act "would have given the Commission the authority to set 'minimum performance standards' for all television receivers shipped in interstate commerce." *Id.* at 694 (quoting S. REP. NO. 87–1526, at 7 (1962)). However, in response to criticism about giving the FCC such broad authority over television receiver design, the "minimum performance standards" language was deleted before the bill passed the House. The version that passed the House would have instead given the Commission the authority to require that television sets "be capable of receiving all frequencies allocated by the Commission to television broadcasting." *Id.* (quoting H.R. REP. NO. 87–1559, at 1 (1962)). FCC Chairman Newton Minnow then wrote the chair of the Senate Subcommittee on Communications expressing his concern that under the House version, "we may be powerless to prevent the shipment . . . of all-channel sets having only the barest capability for receiving UHF signals, and which therefore would not permit satisfactory and usable reception of such signals in a great many instances." *Id.* at 695 (alteration in original) (quoting the letter). The Senate amended the bill, and the version that was ultimately enacted allowed the FCC to require television receivers sold in interstate commerce to be "capable of *adequately* receiving all frequencies allocated by the Commission to television broadcasting." 47 U.S.C. §303(s) (emphasis added).

It is clear, however, that, in enacting the ACRA, Congress did not "give the Commission unbridled authority" to regulate receiving apparatus. *EIA,* 636 F.2d at 696. This was confirmed when the Commission attempted to set a standard requiring television manufacturers to take steps to improve the quality of UHF reception beyond what could be attained with then-existing technology. On review, this court ruled that the Commission overstepped its delegated authority and vacated the Commission's action. *See id.* at 698. The court held that, while the ACRA granted the Commission "limited . . . authority to ensur[e] that all sets 'be capable of *adequately* receiving' all television frequencies," Congress had intentionally restricted this jurisdictional grant to preclude wide-ranging FCC "receiver design regulation." *Id.* at 695, 696.

The All Channel Receiver Act's limited and explicit grant of authority to the Commission over receiver equipment clearly indicates that neither Congress nor the Commission assumed that the agency could find this authority in its ancillary jurisdiction. It also confirms the Commission's absence of authority to regulate receiver apparatus as proposed by the broadcast flag regulations in the *Flag Order.* If the Commission had no ancillary jurisdiction to regulate the quality of UHF reception, it cannot be doubted that the agency has no ancillary authority to regulate consumer electronic devices that can be used for receipt of wire or radio communication when those devices are not engaged in the process of radio or wire transmission.

A second Congressional enactment that confirms the limited scope of the agency's ancillary jurisdiction is the Communications Amendments Act of 1982, Pub. L. No. 97–259, §108, 96 Stat. 1087, 1091–92. As part of the Communications Amendments Act of 1982, Congress authorized the Commission to impose performance standards on household consumer electronics to ensure that they can withstand radio interference. *See* 47 U.S.C. §302a(a). The legislative history of 47 U.S.C. §302a demonstrates that this enactment was intended by Congress to give the Commission authority it did not previously possess over receiver equipment. Specifically, the Conference Report stated that, because industry attempts to solve the interference problem voluntarily had not always been successful, "the Conferees believe that Commission authority to impose appropriate regulations on home electronic equipment and systems is *now* necessary to insure that consumers' home electronic equipment and systems will not be subject to malfunction due to [radio frequency interference]." H.R. CONF. REP. NO. 97–765, at 32 (1982) (emphasis added).

The Commission argues that the legislative history of §302a indicates that the legislation's purpose was to preclude state and local regulation of radio interference. However, it is not until several paragraphs after the portion of the Conference Report quoted above that the Report noted that the legislation was *"further* intended to clarify the reservation of exclusive jurisdiction to the Federal Communications Commission over matters involving [radio frequency interference]." *Id.* at 33 (emphasis added). Congress's principal purpose in enacting 47 U.S.C. §302a was clearly to expand the Commission's authority beyond the scope of its then-existing jurisdiction, which is inconsistent with the FCC's current view that it always has had sweeping jurisdiction over receiver apparatus under Title I of the Communications Act.

III. Conclusion

The FCC argues that the Commission has "discretion" to exercise "broad authority" over equipment used in connection with radio and wire transmissions, "when the need arises, even if it has not previously regulated in a particular area." FCC Br. at 17. This is an extraordinary proposition. "The [Commission's] position in this case amounts to the bare suggestion that it possesses *plenary* authority to act within a given area simply because Congress has endowed it with *some* authority to act in that area. We categorically reject that suggestion. Agencies owe their capacity to act to the delegation of authority" from Congress. *See Ry. Labor Executives' Ass'n,* 29 F.3d at 670. The FCC, like other Federal agencies, "literally has no power to act . . . unless and until Congress confers power upon it." *La. Pub. Serv. Comm'n* v. *FCC,* 476 U.S. 355, 374 (1986). In this case, all relevant materials concerning the FCC's jurisdiction—including the words of the Communications Act of 1934, its legislative history, subsequent legislation, relevant case law, and Commission practice—confirm that the FCC has no authority to regulate consumer electronic devices that can be used for receipt of wire or radio communication when those devices are not engaged in the process of radio or wire transmission.

Because the Commission exceeded the scope of its delegated authority, we grant the petition for review, and reverse and vacate the *Flag Order* insofar as it requires demodulator products manufactured on or after July 1, 2005 to recognize and give effect to the broadcast flag.

So ordered.

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