CONTENT PROTECTION IN THE DIGITAL AGE: THE BROADCAST FLAG, HIGH-DEFINITION RADIO, AND THE ANALOG HOLE

HEARING

BEFORE THE

SUBCOMMITTEE ON COURTS, THE INTERNET, AND INTELLECTUAL PROPERTY

OF THE

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CONTENT PROTECTION IN THE DIGITAL AGE: THE BROADCAST FLAG, HIGH-DEFINITION RADIO, AND THE ANALOG HOLE

THURSDAY, NOVEMBER 3, 2005

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COURTS, THE INTERNET,
AND INTELLECTUAL PROPERTY,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 2:49 p.m., in Room 2141, Rayburn House Office Building, the Honorable Lamar Smith (Chair of the Subcommittee) presiding.

Mr. SMITH. The Subcommittee on Courts, the Internet, and Intellectual Property will come to order.

Let me make a couple of announcements at the outset. First of all, although maybe there is no need to say this, because we actually have a relatively good attendance already here, but there's also a bill on the House floor over which the Judiciary Committee has jurisdiction, and a lot of Members are over on the House floor. In fact, I just came from the House floor, and I'd say at least half the IP Subcommittee is still waiting to be heard on this particular piece of legislation. So that's where some folks are, but I do appreciate the attendance of the Members who are here already.

The second is I am going to have to leave for about a half an hour or so after my opening statement. I don't want anybody to take personal offense that I am leaving so quickly but hope to be back in time for the question period. And in my absence, Congressman Jenkins will be chairing the IP Subcommittee.

I will recognize myself for an opening statement then recognize the Ranking Member.

Today, the Subcommittee turns its attention to the role of content protection in digital media. The days of analog content are dwindling. From televisions to music collections, content is increasingly digital from its original creation to consumer playback. This digital conversion has assured the consumer that they will consistently see and hear a high quality version of a song or movie.

However, creators and content owners have been concerned that the digital transition will result in higher levels of piracy. To reduce the amount of piracy, content owners have used a variety of content protection measures on DVDs and MP3 files. Although these measures do not stop or even hinder hard-core pirates, they do seem to keep basically honest people honest. The most popular content delivery mechanisms, free over the air radio and television

broadcasts, are becoming digital by choice and by Government mandate. Content owners believe that this transition will result in more satisfied consumers but also that the transition will increase piracy unless new content protection measures are adopted.

Content owners have put forward these proposals. One, the broadcast flag to limit redistribution of over the air digital television signals; two, a high-definition radio proposal to limit redistribution of over the air digital radio signals; and three, the analog hole proposal, to address the conversion of analog signals into digital formats.

Clearly, the broadcast flag is the most well-known of the three proposals. This Committee is interested in hearing from proponents and opponents of all three of these proposals, not only to understand the need for them but also the differences in support for them. There are valid issues on both sides of the content protection debate. There are legitimate piracy concerns just as there are legitimate consumer concerns. Not everyone is a pirate, and not everyone has a right to acquire content in any way they like.

To me, content owners deserve the right to market their creations and to profit from them. Consumers have the right to use content within the bounds of the law but not an unfettered right. We hope to accomplish several things in the hearing today: one, learn about the need for such proposals; two, learn about the support for such proposals; three, learn about the impact of the proposals; and finally, if possible, understand where common ground may exist.

By unanimous consent, all Members' opening statements will be made a part of the record, and the Gentleman from California, Mr. Berman, is recognized for his opening statement.

INTRODUCTION OF WITNESSES

The Honorable Dan Glickman,
Chairman and Chief Executive Officer
Motion Picture Association of America (MPAA)

Mitch Bainwol
Chairman and Chief Executive Officer
Recording Industry Association of America (RIAA)

Gigi B. Sohn
President
Public Knowledge

Michael D. Petricone,
Vice President, Government Affairs
Consumer Electronics Association (CEA)

November 3, 2005

Our first witness is Dan Glickman, the head of the Motion Picture Association of America. As Chairman and Chief Executive Officer of MPAA, Mr. Glickman represents the interests of the U.S. film industry before the U.S. government, as well as being the U.S. movie industry's emissary to foreign capitals and foreign movie makers.

Before taking on leadership of MPAA, Mr. Glickman led the Institute of Politics at Harvard University's JFK School of Government. He also served as President Clinton's Secretary of Agriculture after eighteen years in the House, including serving as Chairman of the Permanent Select Committee on Intelligence.

Our next witness is Mitch Bainwol, the head of the Recording Industry Association of America. Mr. Bainwol joined RIAA as Chairman and CEO in September 2003. Just prior to this, he led The Bainwol Group and served as Senate Majority Leader Bill Frist's Chief of Staff.

Mr. Bainwol began his career as a budget analyst in President Ronald Reagan's Office of Management and Budget. He then served as chief of staff for U.S. Senator Connie Mack for nine years.

Mr. Bainwol has an undergraduate degree from Georgetown University and an M.B.A. from Rice University.

Our third witness is Gigi Sohn, President of Public Knowledge. Ms. Sohn is the President and Co-Founder of Public Knowledge, a nonprofit organization focusing on communications policy and intellectual property law.

Prior to her time at Public Knowledge, Ms. Sohn was an Adjunct Professor at Georgetown University and at the Cardozo School of Law in New York City.

Ms. Sohn holds a B.S. in Broadcasting and Film from Boston University and a J.D. from the University of Pennsylvania.

Our final witness is Michael Petricone, the vice president of technology policy for the Consumer Electronics Association where he manages the government affairs department.

In his position, Mr. Petricone has been responsible for representing the CE industry's position before Congress and the FCC on numerous issues including those before the Committee today.

Mr. Petricone received his law degree from Georgetown University Law Center and his undergraduate degree from Tufts University.

Mr. BERMAN. Well, thank you very much, Mr. Chairman, and thank you for holding this hearing.

There have been many positive developments in the copyright context during the past year. The Family Entertainment Copyright Act was signed into law. Well, that's mostly positive, but to provide better tools to prevent unauthorized distribution of content, the Su-

preme Court in the Grokster decision held that those that facilitate copyright infringement will be held directly accountable for their actions, and in response to judicial and legislative action, testimony at our hearing confirms that universities are adopting antipiracy technologies and instituting file sharing education programs that are greatly reducing the amount of illegal file sharing that takes place on campuses.

But even with these many advances, the fact that mass, indiscriminate distribution of unauthorized copies is still an option allows piracy to remain a potent force.

I'm not going to take the Subcommittee's time to go over the statistics on the balance of payments and for core copyright industries, how important it is to our economy, how many jobs it has, and the threat of piracy to copyright creators. What I do believe many fail to realize is that strong protection of intellectual property is also necessary to benefit the consumer. Without adequate safeguards for content, it is easier for those in the creative chain to fall prey to piracy, and this jeopardizes the authors' and creators' ability to continue engaging in additional and new creative endeavors and content creation. It just seems to me that what it's hard to penetrate into a lot of people's consciousness is very obviously true: with fewer original projects in the end, the consumer will have less choices.

Our goal is to provide consumers with a first rate, rich, abundant selection of music and movies in any format at any time and at any place. This kind of accessibility to music and movies, however, creates a tension for content owners, who though they want to widely distribute their works also need to protect the content of their works from unauthorized copying and distribution.

Content owners do need to rely on the development of new and inventive technologies for distribution in order to provide the consumer with superior selection and accessibility. We must, therefore, be careful to not allow consumer considerations or considerations thrown out in the name of consumers and technology inventors to simply trump any concerns for creators and vice versa. There must be an appropriate balance which fosters creativity of new expression, innovation of new products, and accessibility to creative works. However, with the seemingly daily advances in technology, the much needed equilibrium is off kilter, leaning away from creators.

This hearing is much different than previous discussions of piracy. Many of the issues surrounding peer-to-peer file sharing involve clearly bad actors. Here, I believe we are trying to bring the good guys into the process. We all generally agree that creators must be adequately compensated for the value of their works. I suppose the question today is how? Truly adequate compensation would probably involve providing a full performance right for sound recordings. Truly adequate protection measures would also prevent abusive use of technology when redistributing copies in both the digital or analog realm.

The passage of time and design of new functionalities and devices has compelled us to reexamine the patchwork in the Copyright Act to determine whether some of the provisions need to be altered to address lack of suitable copy protection or the need for

limitations on retransmission mechanisms. Ideally, content protection systems will be developed that are both secure for distribution but are not intrusive to the legitimate expectation of consumers.

However, as technologies become more sophisticated and gain more interactive functionalities, this balance may have to be recalibrated. We also need, in this Committee, to engage additional partners outside this Committee to help us.

The market is an exciting place right now. New technologies are emerging to help bring the consumer many additional options for how they receive their content. HD radio devices are being installed in cars. XM Satellite is a new service. Many television sets contain broadcast flag technology, and a number of players are currently in the market which can reconvert the analog signal to digital content.

We must ensure that as each of these technologies is rolled out, they are complying with the spirit of the copyright law, which at its core demands rightful compensation and adequate protection for the creator. I look forward to hearing from this distinguished panel of witnesses, and I yield back, Mr. Chairman.

Mr. JENKINS (presiding). We have on our panel of witnesses today the Hon. Dan Glickman, who is Chairman and Chief Executive Officer of the Motion Picture Association of America; Mr. Mitch Bainwol, who is Chairman and Chief Executive Officer of the Recording Industry Association of America; Gigi Sohn, who is President of Public Knowledge; and Mr. Michael Petricone, who is Vice President of Government Affairs, Consumer Electronics Association, and he is here on behalf of CEA and the Home Recording Rights Coalition.

And we will hear from Mr. Glickman first.

TESTIMONY OF THE HONORABLE DAN GLICKMAN, CHAIRMAN AND CHIEF EXECUTIVE OFFICER, MOTION PICTURE ASSOCIATION OF AMERICA

Mr. GLICKMAN. Thank you, Mr. Chairman. If I may be indulged a moment of nostalgia, I was on this Committee, as you know, for about 11 years. I sat in Mr. Issa's seat; I sat in Mr. Cannon's seat. I didn't probably fill those positions as greatly as they did. And I, of course, served with Mr. Berman for many years, and this is a terrific Committee. I'm looking at the pictures on the wall, and Mr. Hyde, Mr. Sensenbrenner, Mr. Rodino, and Mr. Brooks were all either my Chairman or Ranking Members during those years, so it is a great honor to be back here, back home.

Mr. BERMAN. You weren't around for Manny Seller?

Mr. GLICKMAN. I look like I should have been. There is not much hair here. But no, I wasn't.

Let me just make a couple of comment. One is that as Mr. Berman indicated in his remarks, the content industries—music, movies, software, publishing and similar industries—are critically important to the future of America. They are one of the few industries that America still has an undisputed leadership role in the world, and they're important in terms of job protection as well, and they're an area where we have a balance of payments surplus. So underlying all of this is an important industry both for America as well as our leadership in the world.

Number two, in this transformation to the digital world that we are in, there are gaps, there are holes that need to be filled. Otherwise, they present an enormous opportunity for massive amounts of piracy. And I think almost everybody here agrees that there are holes to be filled, and we're here to try to fill, at least in my testimony, two of these holes.

The first one is the broadcast flag, which refers to regulations already adopted by the FCC that enables owners of high value content broadcast by digital TV stations to prevent the indiscriminate redistribution of that material over the Internet. The ability to control such redistribution of satellite and cable programming already exists through contractual agreements.

There is a gaping hole when you come to broadcast over the air television. Legislation is needed to allow the FCC, which has already approved these regs, to implement them and place free, off-air broadcasters on a level playing field with cable and satellite distribution systems.

The second issue is the analog hole. That refers to the problem created by the conversion of digital material protected by digital rights management systems to an analog format, which most of our television sets in this country are right now, and then back to digital. The process of this conversion process is to strip away the digital rights management protections, leaving the content in the clear and vulnerable to illicit reproduction and redistribution.

Some consumer devices are being specifically designed to take advice of this analog hole, which impedes our ability to offer legitimate viewing choices and delays the digital transition. Legislation is needed to require that devices which convert analog material to a digital format recognize and respond to digital rights management information.

The analog hole is like a car washer. But instead of washing off the dirt, it washes off all the content protections and then makes it vulnerable to massive infringement. And this is not an idle threat. Devices that can easily exploit the analog hole are already in the marketplace. So these are two of the items that I am talking about. Mr. Bainwol, of course, will have an additional item to talk about.

The third item I want to mention is I think Congress needs to play a leadership role, and private industry will work together with the Congress to try to come up with some help in this area. The Government and the Congress has gotten involved in areas such as closed captioning, the V-chip, serial copy management, Macrovision, a whole variety of things where the standards were necessary to be set so that the marketplace could then work effectively. And I think that coming here and asking for Congressional help and leadership is something that has been done many, many times before, not to take advantage of the marketplace but to provide some clear rules.

We do believe that the marketplace will ultimately determine the success of all of our products, but we want a free marketplace, not a black marketplace. And what's happening with these unprotected areas is that we cannot participate fully in giving the consumers the access and the choices nor the work product that they need because a whole lot of the ability to do so is impeded by this gaping

hole of unprotected content. So as we go into the digital era, we want to be able to provide that protection, which we think leads to common sense rules of the road, and that's where we want to look for you in that regard.

Finally, Mr. Chairman, we are in a period of amazing and rapid change, and I want to state that I believe our industry is a technological innovator, and we're not only not scared of change; we're leading the effort. We led the effort to create the DVD world, which has changed the way consumers watch movies and television. The IPod, MP3, all sorts of items that are out there have been the results of ours and related industries.

And it's not just delivery systems. Tomorrow, a movie opens called Chicken Little. Some of you or your kids or grandkids or maybe you personally will want to go see this movie, using a new form of digital content to create new three-dimensional images on the movie screen. I think of movies like Polar Express or Star Wars, where digital technology was created by our industry to give consumers a whole array of viewing entertainment and choices that they did not have before. And whatever we've done in the past, the future is just extraordinarily open to even much greater changes and improvements in what consumers will see.

So our purpose in coming here is to say to you that we want to work together with you; we want to work together with our colleagues here at this table to come up with ways to fill this gap so that the digital content is adequately protected so that we can continue to offer these extraordinary opportunities for the American people to enjoy movies, television, movies, and other things, and thank you very much, Mr. Chairman.

[The prepared statement of Mr. Glickman follows:]

PREPARED STATEMENT OF THE HONORABLE DAN GLICKMAN

Chairman Smith, Ranking Member Berman, members of the Subcommittee:

On behalf of the member companies of the Motion Picture Association of America, I thank you for the opportunity to talk to you about the future of an important American industry as it transitions into the digital age.

As a former member of the Judiciary Committee, I know what it is like to be on your side of the table. As members of this esteemed Committee, you all have to make important judgments about what the laws of the land should be. And sometimes, you have to make tough calls.

Chairman Smith, you have called this hearing at a critical time for our industry, but also at a critical time for this nation.

Protecting intellectual property will become a resounding theme for our economy in the decades to come. This nation will prosper or it will fail in large part by how we protect our nation's greatest assets . . . the skill, ingenuity and creativity of our people.

The American film industry, like all of the creative industries, combines capital and talent to produce intellectual property. It is not easy to create a movie. It requires lots of money, lots of skilled workers, and lots of hard work. In fact, four out of ten movies don't make back their investment. So the movie industry is fraught with risk. Despite these hurdles, the American film industry is the most successful in the world. It is one of our most important exports. It is one of our best job creators.

The member companies of the MPAA are excited about the future. They are working hard to make a successful transition to the digital world. They want people around the globe to see their product in a no-hassle, convenient and low cost way.

But while the industry embraces the many opportunities of the future, it also faces the distressing reality of piracy.

The pilfering of our films costs our industry approximately $3.5 billion dollars a year in hard goods piracy (DVD, VCD) alone. On the Internet front, it has been esti-

mated that as much as two-thirds of Internet bandwidth in this country is consumed by peer-to-peer traffic, with much of that volume attributable to movie theft.

And it is only getting worse. Pirating DVD's is more lucrative than selling heroin or crack cocaine for many criminal gangs. New digital technology enables criminals to download movies, burn them onto DVD discs, and then sell them on the streets or through a global storefront on the Internet with amazing speed.

The MPAA is doing its part to fight back. Using the legal tools that in many cases this Subcommittee fashioned, we work very effectively with the U.S. Department of Justice, the FBI, Customs and local law enforcement to crack down on these gangs. We also are providing more and more legal alternatives

for on-line movies. We are working to help our schools teach kids that stealing on the Internet is as wrong as stealing from a store. We are investing in the future to find cutting-edge technologies that will get movies to consumers while protecting copyrights. And we are working with our colleagues in the consumer electronics, computer and online service provider industries on the development and implementation of digital rights management ("DRM") technologies to offer consumers a wider array of choices for enjoying the content we produce.

But commercial piracy is not the only challenge we face in the new digital environment. We also must develop secure delivery systems so we can offer consumers the viewing options they desire while maintaining a sound fiscal base to sustain our industry. We are embracing DRM technologies so that we can offer consumers more choices at a greater variety of price points: one consumer may want to purchase a permanent copy of a movie while another may want to watch it only once—and at a lower price. To sustain the viability of this array of different offers, however, we must be able to maintain the distinction among them. Thus, we need to provide technical safeguards to discourage, for example, the copying of a "view once" option that has been selected by a consumer. In using the phrase "technical safeguards" I do not mean to imply that we seek absolute protection against unauthorized use of our movies. We understand that committed pirates will break any security measures we can devise and these pirates will have to be dealt with by way of criminal and civil legal remedies.

However, we can, and must, implement basic technological measures to delineate for consumers the differences among our various content offerings and to discourage what I call "casual misuse" of our intellectual property. At the end of the day, the economic impact of a thousand otherwise law abiding citizens making an extra copy of a movie they purchased and "sharing" it with a friend has the same impact as a single commercial pirate selling a thousand copies of a movie on a street corner.

In many cases, the DVD being a prime example, we have worked with the technology companies to develop and implement secure delivery systems supported by technical measures and voluntary contractual relationships. However, there are some areas where private sector solutions alone will not work. That's where we need your help.

First, you can help us plug the analog hole.

What is the analog hole?

Let me try to explain it as simply as I can.

While film content is increasingly arriving into American homes in protected digital form, such content must be converted into an analog format to be viewed on the overwhelming majority of television sets in U.S. households, which can only process and display an analog signal. When digital content protected by digital rights management technology is converted to analog form for viewing on existing analog television equipment, the content is stripped of all its protections. This analog content can then be redigitized "in the clear," without any protections whatsoever. This redigitized and completely unprotected content can then be efficiently compressed, copied and redistributed without degradation. It can also readily be uploaded to the Internet for unauthorized copying and redistribution. Like a black hole, the analog hole sucks in all content protections, leading to two problems. First, it eliminates the "lines" or boundaries among the different viewing opportunities we are trying to bring to consumers and makes it difficult to sustain the choices for consumers that digital rights management technologies otherwise help facilitate. Second, it creates a significant loophole for our industry in the fight against piracy.

This is not an idle concern. Already, several consumer electronics devices are being conceived and brought to market purely for the reason of exploiting the analog hole. Movie studios are actively engaged in developing and offering innovative new business models to give consumers greater flexibility and more choices for how and where they access and enjoy movies and television shows. All of these models depend, however, upon a secure environment which protects this high-value content from rampant theft and redistribution. Devices that permit exploitation of the ana-

log hole, whether by design or otherwise, undercut this framework and consequently limit the viewing choices that can be made available to consumers.

Because of the ease with which it can be exploited, the analog hole creates a gaping hole in digital rights management protections, allowing high value content to be copied and re-transmitted without limit. Of particular significance is the fact that exploitation of the analog hole requires no act of circumvention nor any unauthorized circumvention devices prohibited by the Digital Millennium Copyright Act (DMCA.) Instead, the analog hole can be exploited solely through the use of general purpose home equipment. In some cases such equipment is specifically designed to permit people to take advantage of the analog hole to defeat digital rights management measures. In other cases, analog inputs and outputs serve a legitimate purpose and the analog hole is a byproduct. Closing the analog hole would place these analog devices on an equal footing with all-digital devices by maintaining the integrity of digital rights management measures.

Legislation will be required to implement an analog hole solution to create a level playing field for device manufacturers. Legislation will help ensure that good actors are not disadvantaged by companies who do not play by the rules. Such legislation should be narrowly focused and targeted.

The MPAA and its member companies have worked closely with representatives from the computer and consumer electronics industries to reach consensus on a technological solution for the analog hole. These talks have been productive and have shown positive movement. Virtually every major consumer electronics and information technology company as well as a number of self styled "consumer" groups, including the Electronic Frontier Foundation, participated in an Analog Conversion Working Group where a broad consensus was reached on the need to address the analog hole problem and on the attributes a solution should have.

The discussion draft legislation released by the Subcommittee is consistent with that consensus. It provides for a robust analog rights signaling mechanism that does not interfere with a consumer's ability to fully enjoy the content they receive. Known as "CGMS-A plus Veil," Analog Copy Generation Management System (CGMS-A) coupled with the Veil Technologies Rights Assertion Mark provides a practical degree of protection from unauthorized reproduction and redistribution while not diminishing a consumer's viewing experience.

Second, Congress can help protect content by giving the Federal Communications Commission (FCC) authority to implement the broadcast flag regulations which it adopted over two years ago and that were to become effective last July. The marketplace has already anticipated that the broadcast flag will be required and many manufacturers of digital television devices are now producing equipment in compliance with the FCC broadcast flag regulations. Moreover, consumer equipment that renders high value cable and satellite programming will be required to prevent redistribution whether or not the FCC rules are reinstated. It is important to note that there has been no discernable consumer resistance to these broadcast flag compliant devices and no surge of consumer complaints.

Why has most everyone, device manufacturers and consumers alike, accepted the broadcast flag? Because it makes eminent good sense.

The broadcast flag protects free, over-the-air digital television programming from unauthorized redistribution over the Internet. It is the product of several years of negotiations among broadcasters, electronics manufacturers, computer technology and video content companies.

The broadcast flag rule is targeted and narrowly focused on a single problem. The only activity affected by the broadcast flag is the indiscriminate redistribution of digital broadcast television content over the Internet. As long as one is not trying to redistribute flagged content over the Internet, a typical consumer will not know the broadcast flag exists. Under the rule adopted by the FCC, consumers are free to continue to time-shift over-the-air television. In fact, because the rule is targeted narrowly at unauthorized redistribution, and not consumer copying, it allows an unlimited number of copies to be made—even infringing ones—provided those copies are protected against further distribution over the Internet. Even Internet retransmission is not barred outright under the rule, provided it can be done in a way that protects against indiscriminate redistribution. Picture and sound quality are also unaffected.

The protection provided by the broadcast flag will play an important role in successful transition to digital television. 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 outlets, these producers will inevitably move their programming over to such channels where protections are available through contractual arrangements. The broadcast flag is essential to a success-

ful digital television transition and preservation of free, over-the-air digital television.

It is essential that Congress act quickly to enact narrowly crafted legislation to reinstate the FCC's Broadcast Flag ruling, and such legislation should become effective immediately. As stated above, broadcast flag compliant equipment is already being produced and is in the marketplace. Delay will materially worsen the legacy equipment problem and is completely unnecessary.

I want to emphasize that both the Analog Hole and the Broadcast Flag have been the subject of intense scrutiny by technology and content communities, as well as other interested parties, in open forums consuming literally thousands of man-hours of discussion. It is a documented fact that there is broad consensus that these are issues that need to be addressed. There is also broad consensus on the nature of the solutions that should be considered. I believe the discussion draft legislation released earlier this week is fully consistent with that consensus and should be swiftly enacted.

Let me add one cautionary note. While we strongly support legislation that will plug the analog hole and implement the broadcast flag, we cannot support legislation that will do that at the expense of the anti-circumvention provisions of the DMCA. I would submit that efforts to include HR 1201, which would, as a practical matter, repeal Section 1201 of the DMCA, would do much more harm than good. It has been suggested by members of another committee that attaching HR 1201 to a broadcast flag would make a good compromise. In my view, that type of legislation would simply compromise efforts to fight piracy and hurt an important American industry.

Chairman Smith, Ranking Member Berman, members of the Committee, I appreciate this opportunity to discuss these matters of concern to our industry and I look forward to answering any questions you may have regarding what I have just discussed.

Mr. JENKINS. Thank you, Mr. Glickman.

Mr. Bainwol.

TESTIMONY OF MITCH BAINWOL, CHAIRMAN AND CHIEF EXECUTIVE OFFICER, RECORDING INDUSTRY ASSOCIATION OF AMERICA

Mr. BAINWOL. I'd like to thank the Subcommittee for this opportunity to testify. I come before you today as the CEO of the RIAA, but my testimony today reflects the breadth of the music community.

Let me take a step back and provide some context. The sale of recorded music hit a high in 1999 before a variety of factors, chiefly, file sharing and unauthorized burning, triggered a massive slide. A recent study by Stan Liebowitz, a Texas economist, indicates that in the absence of file sharing, our revenues would have continued growing robustly. So our concern about digital theft isn't academic, and it's not paranoia. It's grounded in the painful experience of the last 6 years.

The Supreme Court's Grokster decision unanimously certainly helped, but we need to go further. That decision is catalyzing a transformation among the major P2P players to go straight and legal or to go straight into the dustbin of history. But the Grokster ruling is only part of the answer. In order for us to dig out of the hole and grow again, we need policies to protect the integrity of the digital marketplace.

And a key part of that is the emergence of digital radio across platforms. The laws for radio presumed a passive listening experience and did not anticipate radio services becoming download or on demand subscription services, but that's what's happening.

In 2003, there were virtually no digital revenues. But now, we're beginning to see significant revenue streams arise from download

services like ITunes and Wal-Mart, from rental services like Rhapsody, Napster, and Yahoo, and from mobile music offerings, all of which will amount to billions of dollars by the end of this decade, that is, unless the emerging services, these services, are cannibalized by functionality that substitutes, substitutes for download sales and rentals without paying creators equivalently.

Let me be clear: we are for technology; we are for cool devices; we're for new business models and new functionality, but we are not for clever ways to bypass fair compensation for creators. We are not for the exploitation of loopholes to rig the competitive landscape against these new business models. Radio has been a passive listening experience. Sure, people taped off the radio; they did it independently; they did it manually. The quality stunk. If you wanted a good copy, you had to go buy one. The radio service didn't provide the tool to automatically capture perfect quality songs and subsequently move them easily to play on your portable device on demand whenever and wherever you chose, until now.

With the emerging transformation of digital radio over the air, on satellite, and on the Internet, we're seeing new devices that go way beyond time shifting, beyond manual recording, and beyond current consumer expectations. These devices effectively provide ownership, and it sounds attractive, and it is, unless you're a creator.

Here's what we're not asking you to do: don't stop or delay the rollout of digital over-the-air services. Don't stop consumers from recording off the radio. Don't stop time shifting, and don't stop the invention of new recording features that allow a consumer to hit a record button when they hear a song they like.

So what are we asking you to do? First, we urge this Committee to update section 114 to ensure parity for digital radio across all platforms: satellite, cable, and Internet. The law did not contemplate convergence. It creates arbitrary advantages between platforms, and it leaves creators holding the bag.

Second, because over-the-air radio is not covered by 114, we ask that Congress grant authority to the FCC to also protect over-the-air digital radio. I would like to submit a resolution from a broad music coalition calling on Congress to do just that. Both of these necessary steps are contained in the discussion draft that was circulated by your staff. We urge you to introduce and pass legislation that accomplishes these goals.

I would like to mention one other very significant point in closing: many of our friends in the CE community, the technology and broadcast communities, have stressed the need for us to come together for a solution before we come to you, the Congress. But we have tried, and we continue to try. But these efforts have failed. The market, the market does not work. Remember, unlike the motion picture studios, we have a market failure, because we have no performance right, as Mr. Berman pointed out, for over-the-air radio, and we are subject to compulsory license over the other platforms.

Motion picture studios and broadcasters on the video side could hold back programming until they were comfortable with the content protection. We don't have that luxury. The digital marketplace offers enormous promise for fans, device manufacturers, broad-

casters of all stripes, and creators. With your help, we can realize that promise. We are ready to go to work to get that job done quickly so devices get to market, but we want to make sure that creators get the compensation they deserve, that we deserve, at a time when we are struggling to create new art.

Thank you again for this opportunity to testify.

[The prepared statement of Mr. Bainwol follows:]

PREPARED STATEMENT OF MITCH BAINWOL

STATEMENT OF MITCH BAINWOL
CHAIRMAN AND CEO
RECORDING INDUSTRY ASSOCIATION OF AMERICA
BEFORE THE
SUBCOMMITTEE ON COURTS, THE INTERNET, AND INTELLECTUAL PROPERTY
COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES
ON
CONTENT PROTECTION IN THE DIGITAL AGE: THE BROADCAST FLAG, HIGH-DEFINITION RADIO, AND THE ANALOG HOLE

November 3, 2005

Chairman Smith, Ranking Democratic Member Berman, and Members of the Subcommittee, I appreciate this opportunity to appear before the Subcommittee today to address emerging issues in the area of digital radio. I testify today not only as CEO of the RIAA, but also for the many people involved in the music business who share our views about both the promise and the risk of certain business models that will take advantage of new technology enabling the convergence of radio and download-like services.

At the outset, 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.

Issues concerning the video broadcast flag are very similar to those concerning digital radio. At the heart, it is about assuring that content licensed for broadcast does not become content permanently distributed instead, whether it is a movie or a song.

We need to make sure that our copyright law – which was written to accommodate radio business models – properly addresses technology which will allow

radio to become much more than a passive listening experience. Digital radio can be delivered over lots of different platforms, including over-the-air, satellite, cable, and Internet; but it is the same service to the consumer. New and proposed functionality in all these platforms will allow each of these types of radio services to become a download or distribution service. And with their ability to enable automatic, organized copying and permanent storage of individual songs, these services will replace the sale of downloads or subscriptions by competitive distribution services such as Napster, Rhapsody, and iTunes.

What we are talking about here is not casual recording by listeners. We are talking about technologies that allow broadcast programs to be automatically captured and then disaggregated, song-by-song, into a massive library of music, neatly filed in a digital jukebox and organized by artist, song title, genre and any other classification imaginable. Listeners will be able to build entire collections of content without the need to ever purchase any of it; indeed, they won't even have to listen to it. This is not fair use. It is not time-shifting. The resulting harm from loss of sales threatens to rival or even surpass that of peer-to-peer ("P2P") file-sharing, which has already devastated the music and other content industries. 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.

The recent Supreme Court ruling in the *Grokster* case recognized the liability of companies that encourage and induce online piracy, and offers the promise of a brighter future for creators of music and fans. We can't allow that future to be dampened by new

business models that cannibalize the creative content they depend on. We are absolutely fine with any and all new radio features that give consumers more flexibility – but like their competitors in the download and subscription space, they need to be licensed in the marketplace. The record companies have shown a great willingness over the past few years to license new and creative services to bring more choices to consumers. We look forward to evaluating new business models that expand the capabilities of radio broadcasts. But it needs to be done in the marketplace at fair rates.

The law as it now stands was written for a traditional radio service – that is, a service that broadcasts music for passive listening, not as a download service. Payment under the law is very different for a broadcast as opposed to a download. Radio services are entitled to a statutory license, if a license is even required. Download services, however, must be licensed in the marketplace. When a radio service adds features to effectively become a download service, it should not be allowed to merely use the radio license without paying the same marketplace price that download services pay. It is unfair to the legitimate distribution services and retailers, and it is unfair to the copyright owners who deserve fair compensation.

The convergence of radio and downloading capability, while providing great opportunities, requires changes in the law that protect against a company transforming its radio service into a distribution service without the appropriate license. There are two components to implementing these changes: readdressing the license this Committee passed into law for satellite, cable, and Internet radio services; and enabling the FCC to appropriately address over-the-air digital radio services which are not covered by this license.

License granted to satellite, cable, and Internet services

Recognizing the unprecedented threats of piracy imposed by new methods of digital distribution, Congress used the Digital Performance Rights Act (DPRA) and Digital Millennium Copyright Act (DMCA) to grant owners of sound recording copyrights a limited digital performance right. While artists and record labels were finally compensated for the broadcast *performances* of their work, the same law granted a limited license for satellite, cable, and Internet services to use these works after paying a compulsory licensing fee. In an effort to allow satellite services to establish themselves, the law provided them this compulsory license without the full range of requirements imposed upon other digital broadcast platforms. It is now clear that satellite radio, especially with proposed features allowing permanent copying and disaggregation, presents the same issues as these other digital platforms and should be brought into conformity.

Other services operating under the same statutory license are prohibited from enabling listeners to make copies of the songs broadcast in their programs. The lack of similar prohibitive language for satellite broadcasters has provided them an unfair competitive advantage. Congress must address this discrepancy so that all statutory licensees have the same obligation to safeguard content and its providers.

Satellite radio should also not be able to rely on the Audio Home Recording Act (AHRA) as an excuse to create an unlicensed download service. The AHRA was passed by Congress in 1992 to address "serial copying" by digital audio tape recorders, not to address downloading functionality that facilitates the making of personal collections that substitute for sales. The small royalties provided by the AHRA were never intended to

substitute for the marketplace licenses afforded download services. Congress's attention to one small category of digital recorders dictates against application of the AHRA to an unintended medium. At the same time, it underscores the need for Congress to continue to protect creative content in a fast-evolving digital marketplace.

Over-the-air digital broadcasts

Importantly, the digital performance right granted to artists and labels does not extend to over-the-air digital broadcasts. This lack of a performance right means we only derive revenue from the sale of music listeners ultimately buy. Yet, unfettered copying and storing features on this platform will displace those sales. If listeners are able to instantly make a free copy of the song they are listening to, they will see little reason to purchase it. We know this from the P2P experience.

The consequences go beyond a record company's bottom line. The parties affected by this uncompensated copying include artists, songwriters, music publishers, studio musicians, engineers, and the many others who help bring music to the public. In addition, broadcasters and retailers themselves will lose an important new source of revenue by failing to provide a "buy" button enabling consumers to purchase the music they want to own. And they also risk losing a significant portion of their listeners who build up personal libraries of music and choose to listen to that instead of radio broadcasts. The loss of listeners means the loss of advertisers who will see diminishing returns on this platform. The availability of free music further threatens the growth of licensed on-demand download services struggling to provide the same content at a reasonable price. And, of course, the loss of sales ultimately affects consumers, as companies are no longer able to invest in the production of new content.

In this instance, it is not possible to rely on market forces to level the playing field. Artists and labels have no leverage to withhold content since they don't have a performance right for over-the-air radio and are subject to a compulsory license for performances over the other platforms. This lack of a market solution, and because over-the-air broadcasters are not covered by the copyright license, requires that the FCC, the regulatory agency that controls the signal for over-the-air radio, be granted the jurisdiction to address these issues. We want to ensure parity and require over-the-air digital broadcasters to follow the same rules as those set by you for their competitors in section 114 of the Copyright Act. We would urge that any grant of jurisdiction impose the same rules on over-the-air broadcasters as are imposed on competitor services based on any changes to the copyright license that you choose to make.

In requesting these changes we note that the lack of a performance right for over-the-air radio is unfair in its own right. But to allow this absence of a performance right to give radio services the unbridled ability to add download features – for which competitor services must pay market prices – is to add insult to injury.

We also want to be clear that 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, and Congress, expect from radio.

Finally, we are not seeking a delay in the rollout of new technology. Like everyone, we see the promise in exciting new platforms, and we want to see them in the

marketplace soon. But we need to ensure that any rollout occurs in a responsible way that respects the rights of content providers and the legitimate business concerns of other competing platforms. We continue to encourage those in the digital radio business to work with us. These services have built multi-billion dollar companies through grants of extremely low royalty rates (or even, for over-the-air radio, no royalty rates) and rely on our continued ability to provide desirable content. That ability will only come with appropriate protection and market compensation.

Simply, services that operate as broadcast stations should not offer features that enable song-by-song disaggregation and permanent storage in digital libraries without paying the same market prices that licensed download services pay. Satellite and over-the-air radio broadcasters 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. To ensure the appropriate and responsible rollout of these new technologies, Congress should grant jurisdiction to the FCC to require parity with all of the conditions prescribed in section 114 and in equal measure for all platforms.

Thank you.

Mr. JENKINS. Thank you, Mr. Bainwol.
Ms. Sohn.

TESTIMONY OF GIGI B. SOHN, PRESIDENT, PUBLIC KNOWLEDGE

Ms. SOHN. Thank you, Mr. Chairman, Ranking Member Berman, and the Members of the Subcommittee for inviting me to testify today. For those of you who don't know what Public Knowledge is, we are a nonprofit public organization that seeks to represent the public in debates over copyright law and communications policy.

We are living in a time of great technological innovation and artistic abundance, and consumers, your constituents, are the beneficiaries. Consumers have never had so much choice, so much flexibility, and so much opportunity to become creators themselves. IPods and other MP3 players provide a fun and convenient way to listen to music, books, and pod casts. TiVO, ITV and Slingbox allow you to watch your favorite TV shows when and where you want. New services like satellite digital radio and digital broadcast radio are giving consumers more opportunities to hear the music they love and the news and information they desire.

As the DTV transition kicks into high gear, we will be able to choose from a multiplicity of program streams of high definition news, sports, and entertainment. The opportunities for the content industry to profit from these new digital services are increasing every day. Sales of DVDs are generating enormous revenues. ITunes just announced in just a few short weeks, it has sold 1 million programs for use on its new video IPod. And Mr. Bainwol said yesterday in an interview that he estimates that legitimate online song purchases could supplant CD retail losses by 2007.

As the content industry has ramped up its online delivery of content, it has been testing a variety of protection measures that provide both security for the industry and flexibility for consumers. Despite all this exciting activity, however, we are here today to discuss three draft bills that could bring this technological and artistic renaissance to a grinding halt.

The first bill would reinstate the FCC's vacated broadcast flag rule. This would give the agency unprecedented control over technological design. It would make them the arbiter of the rights of content owners and the public under copyright law. Ask yourselves: is it good policy to turn the Federal Communications Commission into the Federal Computer Commission or the Federal Copyright Commission? Should the FCC decide which technologies will succeed in the marketplace and which will fail?

The flag scheme would prohibit lawful uses of content, not just indiscriminate redistribution, including use of broadcast TV excerpts online and distance learning; for example, the Parents' Television Council, a TV watchdog, makes available clips of its favorite and least favorite TV shows on its Website. The flag scheme would prevent this way of educating parents about the shows their children watch. Nor could Members of Congress email broadcast TV news appearances to their home offices. Moreover, the flag scheme will cause great consumer inconvenience, confusion, and cost, because different approved technologies are not compatible with each other.

We have similar concerns about the second draft bill, which would place the FCC in the position of mandating content protection for digital satellite and broadcast radio. This legislation would permit the FCC to extinguish the long-protected consumer right to record radio transmissions for personal use. Furthermore, because the draft bill would impose limits on digital broadcast radio technology that, unlike digital TV, consumers need not adopt, those limits may well kill this fledgling technology. Why would consumers buy an expensive new digital broadcast radio receiver when it would have less functionality than their analog receiver?

Lastly, we must oppose the sweeping draft proposal to close the analog hole. Be assured there is no industry or other consensus on the CGMS-A plus veil technology mandated in the bill. Their prohibitions would require redesign of a whole range of currently legal consumer devices. Importantly, it would also restrict lawful uses of analog content. This is critical, because the content industry itself has touted the analog hole as a safety valve for making fair use of digital media products where the DMCA has rendered illegal the circumvention of technological locks.

Should Congress close that hole without amending the DMCA to protect fair use, consumers' rights to access digital copyrighted works would be eroded even further. For this reason, if Congress should move forward with any of these proposals, they must be considered in conjunction with H.R. 1201, which seeks to preserve consumers' rights under the DMCA.

Now, just because Public Knowledge opposes the three draft bills does not mean we oppose all content protection efforts. There are far better alternatives to the heavy-handed technology mandates proposed today. They include a multipronged approach of consumer education, enforcement of copyright laws, and use of technological tools and new business models developed in the marketplace. The recent Grokster decision and the passage of the Family Entertainment and Copyright Act, spearheaded by Mr. Smith, are just two of the several new tools that the content industry has at its disposal to protect content.

Members of the Subcommittee, these proposals are controversial and do not reflect consensus. I am confident that after careful deliberation and with input from the public, you will conclude that the marketplace, not the Government, is the best arbiter of what technologies succeed or fail and that Congress, and not the FCC, is the correct arbiter of the balance between content protection and consumer rights.

Thank you.

[The prepared statement of Ms. Sohn follows:]

PREPARED STATEMENT OF GIGI B. SOHN

Statement of Gigi B. Sohn, President
Public Knowledge

Before the
House Judiciary Committee
Subcommittee on Courts, the Internet and Intellectual Property

Oversight Hearing on
"Content Protection in the Digital Age: The Broadcast Flag, High-Definition Radio, and the Analog Hole"

Washington, DC
November 3, 2005

Chairman Smith, Ranking Member Berman and other members of the Subcommittee, my name is Gigi B. Sohn. I am the President of Public Knowledge, a nonprofit public interest organization that a nonprofit organization that addresses the public's stake in the convergence of communications policy and intellectual property law. I want to thank the Subcommittee for inviting me to testify on content protection in the digital age, and to comment on what I hope to be the first of many discussions on three draft pieces of legislation before the subcommittee, the Broadcast Flag Authorization Act (BFAA), the HD Radio Content Protection Act (HDRCPA) and the Analog Content Protection Act (ACPA).[1]

Introduction and Summary

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 respectfully request that a copy of the court's decision and a copy of petitioners' opening brief in the case be placed into the record of this hearing.

For Public Knowledge, its members and its public interest allies, the D.C. Circuit's decision vacating the broadcast flag rules is about much more than the ability of citizens to make non-infringing uses of copyrighted material that they receive over free over-the-air broadcast television. It is about limiting 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.

For the past seventy years, Congress has never given the FCC such unbounded authority to control technological design. This has fostered a robust market place for electronic devices that has in turn made this country the leader in their development and manufacture. The broadcast flag scheme would put a government agency in the position of deciding what software and hardware technologies will come to market and which will fail.

I urge this subcommittee to think very long and hard before granting the FCC broad power to engage in this kind of industrial policy. Ask yourselves, is it good policy to turn the Federal Communications Commission into the Federal Computer Commission or the Federal Copyright Commission? I am confident that with the opportunity for public input and serious deliberation and an opportunity for public input, you will decide that the marketplace, not the government, is the best arbiter of what technologies succeed or fail, and that Congress, not the FCC, is the correct arbiter of the proper balance between content protection and consumer rights.

I similarly urge this subcommittee to weigh the costs to consumers of proposals to mandate content protection for digital satellite and broadcast radio and to mandate

[1] I would like to thank Neil Chilson, Public Knowledge's legal intern, Heidi Wachs, Public Knowledge's legal fellow, and Fred Von Lohmann and Seth Schoen of the Electronic Frontier Foundation for their assistance with this testimony.

content protection to close the analog hole. Efforts to limit what consumers can record over digital radio technologies suffer from many of the same maladies as the TV broadcast flag -- specifically government control over technology design. In addition, the proposed radio content protection legislation permits the FCC extinguishes the long-protected consumer right, guaranteed by the Audio Home Recording Act, to record transmissions for personal use. Furthermore, because the draft bill will impose limits on a new technology -- so called HD Radio – that, unlike digital television, consumers need not adopt, those limits may well kill this fledgling technology. Why would a consumer buy an expensive new digital broadcast radio receiver when it would have less functionality than the current analog receiver?

The broad, sweeping draft legislation to close the analog hole suffers from the same problem; it puts the government in the role of making industrial policy, and will severely limit consumers' ability to make lawful uses of copyrighted content. Like the broadcast flag, the legislation mandates a one-size-fits-all technology that has not been the subject of public or even inter-industry scrutiny. The prohibitions in the legislation would require redesign of a whole range of currently legal consumer devices, including DVD recorders, personal video recorders and camcorders with video inputs. Importantly, the existence of the analog hole has been touted as a "safety valve" for making fair use of digital media products where circumventing the technological locks has been rendered illegal by the Digital Millennium Copyright Act. Should Congress close that hole without amending the DMCA to protect fair use, consumers' rights to access digital copyrighted works will be eroded even further.

There are better alternatives for protecting digital content than the heavy-handed technology mandates proposed here today. Those alternatives are a multi-pronged approach of consumer education, enforcement of copyright laws and 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, which you spearheaded, Mr. Chairman, are just two of several new tools that the content industry has at its disposal to protect its content.

Any Legislation to Reinstate the Broadcast Flag or Impose Radio Copy Protection Should be Considered in Regular Order

As a preliminary matter, I would like to address an important procedural issue. If this subcommittee and the Congress ultimately decide to legislate with regard to the broadcast flag and digital radio copy protection, it should do so in regular order, and not as part of a budget resolution or appropriations bill. These matters are not germane to the budget and appropriations processes. Indeed, they are far too important and controversial to be legislated on a spending bill. If Congress ultimately decides that it must try and legislate broadcast flag and radio content protection mandates, it should do so only after considerable debate and public input.

There is considerable evidence the public is greatly concerned with the government's efforts to mandate digital television and radio content protection for digital devices. Over 5000 individual consumer comments were filed in opposition to the flag at the FCC -- where so many consumer comments are rare -- and tens of thousands of

citizens have contacted their Congressional representatives over the past 6 months (since the D.C. Circuit's decision) urging that the TV flag not be reinstated. Clearly, this is an issue that deserves a full and fair hearing, and not to be simply attached to a spending bill.[2]

An FCC-imposed Broadcast Flag Scheme and/or Radio Content Protection Scheme 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 making a copy of 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, it actually prohibits any and all distribution, no matter how limited or legal. For example, if a member of this subcommittee wants to email 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 would similarly be unable to post broadcast TV clips on their blogs. Imagine how much different the debate around broadcast decency would have been had bloggers and others not been able to post a clip of the now-infamous Janet Jackson Superbowl halftime performance?

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

[2] Moreover, Public Knowledge believes that any debate about technological mandates of the kind proposed here would be incomplete without a thorough consideration of how these mandates, together with the anticircumvention provisions of the DMCA, place limits on consumer rights and technological innovation. It has been suggested that H.R. 1201, "The Digital Media Consumers Rights Act" as introduced in the House Committee on Energy and Commerce, may provide a proper balance to the legal limitations imposed on consumers and innovators. Clearly this is a debate that deserves full public attention.

> 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 email herself a copy of a project with digital video content because no current secure system exists for email transmission.
>
> CRS Report at 5.[3]

Thus, it strains credulity to say, as the FCC has, that the broadcast flag scheme does not put the agency in the position of determining copyright owners and consumers' rights under copyright law. It is Congress' duty, not the FCC's, to find the proper balance of those rights.

The regulatory scheme proposed under the HDRCPA similarly, and perhaps even more directly, places the FCC in the position of determining consumers' rights under copyright law. Section 101(a) of the draft 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. If this language is not giving the FCC power to set copyright policy, then it is hard to imagine what language would do so.

The Broadcast Flag and Radio Content Protection Schemes Would Give the FCC Unprecedented Control over a Wide Variety of Consumer Electronics and Computer Devices

The BFAA has been referred to by some as "narrow," because it purports to do nothing more than reinstate the FCC rule vacated by the D.C. Circuit in *ALA v. FCC*. However, for the reasons discussed below, the FCC rule is anything but narrow.

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[3]The equipment incompatibility problems caused by the broadcast flag scheme are myriad, and should be taken into account by this subcommittee as it considers the BFAA. In addition to the compatibility problems discussed in the CRS report (*e.g.*, the inability to make copies on one system and play it on another), for example, none of the 13 different technologies approved by the FCC in its interim certification process are able to 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. For a detailed discussion of these issues, *see* http://www.publicknowledge.org/content/presentations/bflagpff.ppt

As the D.C. Circuit recognized in *ALA v. FCC*, the broadcast flag gave the agency unprecedented "sweeping" authority over consumer electronics and computer devices. In a nutshell, it puts the FCC in the position of deciding the ultimate fate of every single device that can demodulate a television signal. Thus, not only must television sets be pre-approved by the FCC, the agency must also pre-approve computer software, digital video recorders, cellphones, game consoles and even iPods if they can receive a digital television signal. 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 US companies' competitiveness in the electronics marketplace.

Some would argue that the initial certification process worked because all thirteen technologies submitted to the FCC 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.[4]

The HDRCPA would similarly place the FCC in the position of mandating the design of new technologies. The plain language of the draft bill gives the FCC the authority to adopt regulations governing all "digital audio receiving devices." In the case of so-called High Definition (or HD) Radio[5] this could have the unintended consequence of destroying this new technology at birth. Digital broadcast radio benefits consumers through improved sound quality (particularly for AM radio) and the ability for radio broadcasters 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. Moreover, because the HDRCPA also applies to digital satellite radio, it has the potential to cripple this increasingly popular, but still nascent, technology.

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[4] 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

[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/.

Legislation to Close the Analog Hole is Premature, Unnecessary and Would Further Tip the Copyright Balance Against Consumers

The Analog Content Protection Act is a detailed and extremely complicated technology mandate that deserves further consideration by my organization.

Preliminarily, I would note that this is the first time in the recent discussion over digital content protection that CGMS-A + VEIL technology have been proposed. While the CGMS-A + VEIL technology was discussed at the Analog Hole Reconversion Discussion Group, it was quickly dismissed as not worthy of further consideration. Thus, unlike the broadcast flag, this technology has not been fully vetted by industry and public interest groups.

Accordingly, we are quite surprised that CGMS-A + VEIL is being presented today as a fully formed, mature proposal to Congress. 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.

Based on a preliminary analysis of the ACPA, I would like to make the following brief substantive points:

- *The ACPA would impose an inflexible, one size fits all technology mandate that is more intrusive than the broadcast flag:* The ACPA 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 ACPA 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 ACPA would impose a detailed set of encoding rules that would restrict certain lawful uses of content.* The proposal's tiered levels of restriction based on the type of programming (*e.g.*, pay-per-view, video on demand) limit lawful uses in a manner that ignores the four fair use factors of 17 U.S.C. §107. Thus, the draft legislation 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.

- *Would eliminate the DMCA's safety valve.* One of the common justifications for limitations on fair use imposed by the anti-circumvention provisions of 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 the TV screen.[6] The ACPA would eliminate that safety valve.

- *The exception for legacy devices renders the ACPA ineffective.* The ACPA exempts from its grasp the millions of legacy devices with analog connectors. It is unlikely that any action to try to close the analog hole will be effective. There are millions of video recording devices in homes that will operate for years and not be covered by this act. At the same time, the ACPA will discourage sales of new products because consumers will realize that the newer technologies will have less functionality than older technologies.

- *Must be considered in the context of broadcast flag legislation.* Without broadcast flag legislation, the ACPA would be an ill-considered technology mandate that will increase costs and limit consumer rights; together with a broadcast flag mandate, the ACPA would allow nearly complete control over what consumers may do with content they have purchased or otherwise received legally.

Copyright Law and Marketplace Initiatives are Better Vehicles for Finding the Proper Balance Between Content Protection and Consumer Rights than are Government-imposed Technological Mandates

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

[6] 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.)

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 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.* It is apparent that 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," [footnote about stopping real pirates] 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 piracy is for the content industry to do what it took the music far too long to do[7] – satisfy market demand for easy access to content at reasonable prices (which a free market will inevitably produce) that consumers can enjoy fairly and flexibly. 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

[7] 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."

and rentals last year. As I noted above, new music and movie digital download services are just now emerging in the market. We sincerely believe these efforts, if supported vigorously by the content industry, along with industry-agreed upon protection, will make government intervention in the free market unnecessary.

Conclusion

The draft bills presented here today reflect a vision of the future where government places itself squarely in the middle of technological design, and where consumers rights to make lawful uses of copyrighted content are determined by a government agency that is tasked with regulating our nation's communications system. That vision is antithetical to the largely successful and generally balanced system we have now, where the marketplace is the driver of technological innovation, and copyright law, developed by Congress, governs consumers' rights. Because this vision of the future so radically departs from the present, I urge this subcommittee to proceed slowly, with great deliberation and with input from the public given great weight.

I want to again thank Chairman Smith, Ranking Member Berman and the other members of the Subcommittee for holding this hearing to discuss how to balance digital content protection with consumer rights to make lawful uses of copyrighted works. I look forward to answering any questions you may have.

Mr. JENKINS. Thank you, ma'am.
Mr. Petricone.

TESTIMONY OF MICHAEL PETRICONE, VICE PRESIDENT OF GOVERNMENT AFFAIRS, CONSUMER ELECTRONICS ASSOCIATION

Mr. PETRICONE. Good afternoon. On behalf of the Consumer Electronics Association and the Home Recording Rights Coalition, I appreciate the opportunity to appear today.

Each proposal on today's agenda addresses unrelated issues, and each carries different concerns for our industry. Although we have worked constructively with the content industry on past legislation, the proposals before you reflect no prior effort to achieve consensus. Indeed, I read two of these bills for the first time when I checked my email during halftime of Monday night's football game. I received the third bill on Tuesday morning.

First, the Broadcast Flag Authorization Act: this language is close to a reinstatement of what the FCC did in its order. We are concerned that it grants discretion to the FCC to change everything in the future. Also, we believe it is deficient in not addressing ways in which the flag could be misused. We urge the Committee to include narrow exceptions for local news and broadcast public affairs programming and allow schools and libraries to use broadcast excerpts for distance learning.

If Congress is going to provide more protection to copyright holders, it should also safeguard the rights of consumers to enjoy works that they lawfully acquire. That is why should Congress move forward with any proposals discussed today, H.R. 1201 should be part of the package.

Next, the Analog Content Protection Act: this draft is immensely broad, complicated, and confusing. After 48 hours, experts in our industry are still unsure of which products are covered and what key provisions mean. What is clear is that this bill would impose a massive Government design mandate on every product capable of digitizing analog video signals, not just PCs and televisions but those found on airplanes, automobiles, medical devices, and technical equipment.

A key concern is that one of the required copy protection technologies is largely unknown as to its cost, operation, and licensing status. In addition, all key decisions will be left up to the Patent and Trademark Office. With due respect, it is unclear how the PTO could make these decisions or who would exercise oversight over its judgments.

Regrettably, the analog hole bill is an incomprehensible and impractical proposal which the MPAA did not share with us, which I doubt not even Mr. Glickman can fully explain but which he would like you to adopt. We urge you to reject this half-baked proposal.

I say regrettably, because the fact is that the CE industry has long been prepared to address the analog hole issue. It has worked with MPAA members toward consensus solutions. But without consensus from all affected industries in an open and fair process, we cannot support this legislation.

Finally, the HD content protection act: let me start by expressing my disappointment that Mr. Bainwol would characterize consumers of radio as pirates. We cannot understand how he can say that ordinary consumers sitting in the privacy of their homes can use new radios to, quote, boldly engage in piracy with little fear of detection, unquote.

As Mr. Bainwol is well aware, recording radio programs for later enjoyment is a legitimate fair use activity that Americans have engaged in for decades. For this reason, the proposal to lock down free over-the-air radio is especially pernicious. Unlike the video flag, this proposal is aimed at stopping private, noncommercial recording of lawfully acquired content. The only apparent way to accomplish this is through encryption.

Please understand that the rollout of terrestrial digital radio is well underway. Over 500 stations are broadcasting digitally. Over 25,000 radios will be on the market by year end with tens if not hundreds of thousands to follow in 2006. Since no encryption system currently exists, an encryption requirement would render both the transmission infrastructure and the initial radios obsolete, stopping the rollout of this exciting technology in its tracks.

The satellite radio provision is equally damaging. This bill would destroy the utility of new consumer products that, like the VCR or the TiVO, will enhance Americans' lives and broaden the market for entertainment programming. A TiVO customer can disaggregate recordings. Why can't consumers wishing to record radio use similar technology?

As you may know, XM and Sirius have announced new handheld devices that will allow their subscribers to enjoy music when they don't have access to a satellite signal, such as while at work or on an airplane. These products will be fully compliant with the Audio Home Recording Act, on which royalties will be paid to the music industry, and satellite companies will continue to pay additional millions in performance royalties. But that is apparently not enough for the RIAA, which would like to change section 114 to get even more money and limit the functionality of these products so that consumers will have little interest in them.

In essence, the RIAA is trying to use this bill to leverage the satellite radio industry on the eve of negotiations for a new performance royalty, and without saying so, RIAA is trying to gut the Audio Home Recording Act written by this Subcommittee. As we have long feared, having been emboldened by a judicial victory against real pirates, the music industry now sets its sights on ordinary consumers.

I respectfully urge you to reject the RIAA's efforts to vilify consumers and cajole the Subcommittee into repealing basic consumer rights established by the Audio Home Recording Act. In short, we see no justification to undo the provisions of the AHRA and the DMCA that were specifically enacted by Congress to address digital and satellite radio services. There is no reason for Congress to give further consideration to the third leg of this legislation.

And as we consider these bills, please do not ignore the larger issue of U.S. competitiveness. While other countries are developing their technology industries to compete with America, we face a con-

tent industry campaign to suppress new technologies on arbitrary grounds. This is a trend that ought not to be considered.

Thank you, Mr. Chairman, for the opportunity to appear today. We have worked collegially with the content industry when they have been willing to do so. We look forward to working with you and your staff on the important issues that have been raised today.

[The prepared statement of Mr. Petricone follows:]

PREPARED STATEMENT OF MICHAEL PETRICONE

Before the
House Committee on the Judiciary
Subcommittee on Courts, the Internet, and
Intellectual Property

"Content Protection in the Digital Age: The Broadcast flag,
High-Definition Radio, and the Analog Hole"
November 3, 2005

Statement of Michael Petricone
for
The Consumer Electronics Association and
The Home Recording Rights Coalition

On behalf of the Home Recording Rights Coalition and the Consumer Electronics Association, I greatly appreciate the subcommittee's invitation to appear today. The issues you have posed for discussion are vitally important. At CEA, we have more than 2,000 members who contribute more than $120 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. To varying degrees, each of the proposals that we have been asked to discuss today carries the potential to put the future usefulness of these products at risk, and to make our customers very, very, unhappy.

The Home Recording Rights Coalition was founded almost 25 years ago, in response to a court decision that said copyright proprietors could use the legal process to enjoin the distribution of a new and useful product – the VCR. This court decision was later reversed by the U.S. Supreme Court. Even the motion picture industry has admitted that it is glad that the VCR was allowed to come to market. But we constantly face concerns over consumers' ability to obtain newer and more capable products. After saying they will never do so again, the entertainment industry keeps coming back to the

Congress with proposals to subject new legitimate consumer products to prior restraints on their usefulness in the hands of consumers.

I want to assure the subcommittee that we evaluate each initiative on a case by case basis, and indeed we have worked with the content industry to propose legislation jointly. From 1989 through 1992, for example, we worked with the Recording Industry Association of America and other rights holders to draft and propose legislation that was enacted as the Audio Home Recording Act of 1992 (the "AHRA"). In developing this legislation we worked very closely with this subcommittee and its staff.

Similarly, 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.

The HRRC and several 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.

This Hearing Is About Three Very Different Subjects

The first thing our experience teaches us is that each of the three issues noticed for this hearing is a very different subject, and one of these actually imports an additional subject not even mentioned in the hearing notice or invitation. If I can emphasize one

fundamental point, it is that these subjects should not be conflated or confused. Each is a separate and distinct issue, whether perceived from the content side as a "problem," from the "technology" side as a potential "burden," or from the consumer side as an obstacle to the legitimate and quiet enjoyment of products and services at home.

The "Broadcast Flag Authorization Act"

The proposals for a "broadcast flag" emerged from two forums in which CEA, the HRRC, and various members have been very active – the Advanced Television Systems Committee (ATSC), and the Copy Protection Technical Work Group (CPTWG). In ATSC committees, members of the content community for years advocated a "descriptor" for the purportedly limited purpose of marking content, to enable 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 not meant to govern 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 highly controversial and contentious. The pros and cons were finally 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, and which the language circulated by the subcommittee would reinstate.

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

- First, 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.

- Second, 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.

- Third, the flag regulations were invalidated before they ever took effect. The legislation circulated by the subcommittee does not automatically put those regulations into force; it would be up to the FCC to decide whether to do so. Accordingly, it should be clearly understood that, if this legislation is enacted into law, manufacturers must be given a commercially reasonable period of time to manufacture and include the necessary circuitry in their devices.

This draft language comes closer to a narrow reinstatement of what the FCC originally did in its broadcast flag order. It is an improvement over previous MPAA drafts--which made their way to us indirectly—that perhaps unintentionally would have given the FCC unacceptably broad power to regulate all transmissions over digital networks, inside or outside the home. However, we believe that if Congress is going to provide more protection to the media industry, then it also should simultaneously safeguard the rights of consumers to enjoy the copyrighted works that they lawfully acquire. That is why, should Congress move forward with the broadcast flag legislation, or with any of the three legislative proposals being discussed at this hearing, HR 1201 should be part of the package.

The "Analog Content Protection Act"

Whatever superficial similarity may exist between the Broadcast Flag and the "Analog Hole," there is one overriding fundamental difference: The "analog hole" restricts home copying, not just Internet retransmission. To be sure, the nature of the problem from the content provider perspective is different, but the potential consequences of the "solution," from the technology and consumer perspective, also are much more invasive and serious. An "analog hole" solution would impose a technology mandate, directly by legislation, on virtually *every* product and piece of software capable of digitizing analog video signals, and on every digital device capable of storing them.

The analog hole issue affects more than just free, over-the-air broadcasts. Every set-top box from a cable or satellite service has "component analog" outputs that render either HDTV or (depending on the product) standard definition video from digitally transmitted sources.[1] For about the first 5 years that HDTV was available, this "component analog" interface was the *only* way of moving an HDTV program from a set-top box to a device that could display HDTV, and it was the only HD-capable external interface on HDTV receivers. This interface probably is still the way a majority of U.S. cable and satellite subscribers receive HDTV (as well as digitally transmitted standard definition) signals.[2]

[1] Hence, the proposal is somewhat misnamed – it is addressed primarily to protecting digital content as rendered by analog interfaces, not "analog content."
[2] Whereas HDTV is transmitted only digitally, many HDTV receivers use technically "analog" displays such as cathode ray tubes ("CRTs") to show the picture. Even when entirely "digital" displays became popular, the prevailing interface from set-top boxes and into HDTVs remained "component analog" until the last few years. Some experts still prefer the "CRT" presentation; which display mode is best is a matter of opinion.

At present, we know of no products in the consumer marketplace that are configured to digitize or record from this interface, which involves three separate wires and a great deal of bandwidth. Notwithstanding, content owners have been concerned that in the future consumers may be able to digitize and record all content coming out of a set-top box, including Video On Demand and Pay Per View content that otherwise might (consistent with FCC "Encoding Rules") be classified as "no copy" material.

The HRRC has been aware of this issue for almost a decade, and has offered to work with the content community to explore legislation to address it, subject to two main provisos:

- First, any technology employed must be well known and fully vetted within any industry whose products would be affected; and its implementation must not damage ordinary consumer use of present and future products, or the advance and uses of technology; and

- Second, the technology must be subject to Encoding Rules governing its use, so as to protect reasonable and customary consumer home recording and other practices.

We only received this draft legislation on Monday night, so obviously have not had any chance to gather comments on it. But it is evident that there are many potential problems and uncertainties with this very lengthy draft, and each one of them will and should undergo extensive analysis and consideration before the Congress even thinks about acting. Among the most obvious:

- The scope of the legislation is so broad that it would be appear to cover just about any component or piece of software code that can function as an "analog to digital converter." Hardware and software performing this function are found in a great variety of products that have nothing to do with television – airplanes, automobiles, medical devices, PCs, measurement equipment, and many, many, more. Yet, essentially, any such component or software would have to be configured to look for certain codes, and to be

licensed and technically equipped to encrypt the output. Devices receiving this output would then have to be licensed and equipped to *decrypt* it.

- Two technologies, "CGMS-A" and "VEIL," would be specified to work in tandem. VEIL is present as a backstop for the stripping out of CGMS-A encoding, which is said to be relatively easy to do. However, the result of the VEIL technology would be to achieve a default *no copy* result even where the content provider did not intend to, or should not be allowed to, prevent copying.[3] While the CGMS –A technology is relatively well understood, VEIL is largely unknown as far as its cost, functionality, and potential interference with ordinary and legal consumer product uses.

- Although CGMS-A has a long history of actual use in consumer electronics products, the VEIL technology is largely an unknown entity in this respect - particularly as to key concerns such as implementation cost, burdens on devices that would have to detect or preserve it, any intellectual property rights covering the technology, and if applicable, any license terms, fees and conditions for its use.

- There are lengthy "Compliance" and "Robustness" rules to constrain the operation of downstream products. The cumulative effect on products' operation and cost would need to be carefully examined.

- As in the case of the Broadcast Flag, there would need to be a process to qualify encryption technologies for downstream protection. Unlike the case of the Flag, however, the subject here is not just televisions that process regulated signals; it would be the output of *all* devices capable of processing an analog signal to produce a digital result. This raises issues as to how many such technologies should be qualified; how such a great variety of converter components might operate with a great variety of decryption devices, and whether the operation of some non-TV products – either intentionally or by mischief – could be brought to a sudden and disastrous halt.

- Many key decisions would be left arbitrarily up to the Patent & Trademark Office. It is not clear what policy basis or preparation would equip the PTO to make these decisions, or who would exercise oversight over its judgments.

I expect that given time, my members will identify additional issues with this hugely complex draft bill which, at the moment, is largely incomprehensible even to

[3] While both of these technologies, and others, have been examined in Work Group sessions of the CPTWG, the problems inherent in applying them including the unacceptable default result from VEIL and the difficulty in defining a scope of covered devices – are also very familiar, and there is no consensus in the technical community that this combination is appropriate as a mandated solution.

those who have long been involved in developing technology solutions for the video industries.

However, this is not to say that CEA or HRRC will necessarily oppose some ultimate version of the "analog hole" legislation.

As I said, we have for years offered to discuss some legislative approach to address the analog hole. The draft you have circulated, however, is *not* one that has been discussed or previously shared with CEA or the HRRC, and so does not represent or resemble a multi-industry consensus. We adamantly oppose its enactment in its current form.

The "HD Radio Content Protection Act"

Although the hearing notice suggested that this hearing would focus on a new terrestrial Digital Audio Broadcast service called "HD Radio", we now see that the proposed "HD Radio Content Protection Act," in addition to crippling or destroying the emerging market for digital audio broadcasting, is also aimed at crippling or destroying established and popular satellite radio services. With this amount of notice it is possible to make only some very basic, but I hope very clear, comments.

First, 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 just now being launched. Whatever consumers will be able to do with these services in the future – including the recording, indexing, storing, and compilation of playlists -- 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, it has declined to grant phonorecord producers any right or control of whether their albums are broadcast 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. As a result, the United States remains a world leader in developing new broadcast and consumer technologies and services.

Second, Congress did address the advent of digital recording by passing a law in 1992 that went in a different and opposite direction. As you know, the Audio Home Recording Act provides for a royalty payment to the music industry on Digital Audio Recording devices and media. While the AHRA addressed the ability of devices to make digital copies from digital copies, it never imposed any constraints on the first copies that consumers were ***explicitly allowed*** to make in return for that royalty payment. Yet, inexplicably, this draft is completely silent about the existence of the AHRA, and about any need to confirm, modify or repeal it if this bill were to become law. (We expect that some in the music industry receiving AHRA royalties might oppose doing away with their royalty pool.)

Apparently the Recording Industry Association of America, which took the lead in working with us on the Audio Home Recording Act, has forgotten that the AHRA exists. 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 ...."[4]

In addition to establishing a royalty fund, the AHRA gave technical oversight authority to the Department of Commerce, not the Federal Communications Commission or the Patent and Trademark Office. Proposing a complete overhaul of the laws regarding recorders from satellite and terrestrial radio services without addressing or amending the AHRA is like moving city hall without telling the mayor.

Specifically, the proposals for locking down terrestrial and satellite radio broadcasts are harsh, intrusive, and completely unacceptable, as is the notion of impairing these services or making them more expensive for consumers. The proposal to lock down free, terrestrial radio broadcasts seeks the coloration of the video Broadcast Flag, but it is nothing of the sort. Unlike the video "flag", the proposal, as previously presented by the RIAA to the FCC, is specifically aimed at frustrating the long-accepted, reasonable, private and noncommercial practices of consumers ***inside the home***. Moreover, the only apparent way to accomplish this would be require encryption either at the source of the broadcast or when the broadcasts are first received in the home. This would make digital radio programs incompatible with most of the existing stereo equipment that is in almost every home today. (Source encryption would also make useless the many models of digital radio receivers that are today being sold to "early adopters," and indeed would stop this service from being established for at least several

[4] *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.

years.[5]) The RIAA never explained to the FCC how it could accomplish its objectives in a non-intrusive manner, and it has not done so now.

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 ***last year*** – and even then it did not disclose what specific technology would be imposed on consumers, and it still has not done so. During that time the FCC has found no evidence of harm to copyright holders from digital radio broadcasting. No matter what technology is ultimately 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 long and hard for several years.

I must emphasize that the rollout of terrestrial digital radio is well underway. Over 500 stations are broadcasting digitally, and over 25,000 radios have been produced—not to mention chips and components that have been ordered and new products on assembly lines. Since no encryption system currently exists, an encryption requirement would instantly render these radios obsolete.

Determining an encryption standard will take at least a year, during which time no radios could be manufactured and broadcasters will be forced to the sidelines with their new digital transmitters. Essentially, an encryption requirement would stop the rollout of this exciting new technology dead in its tracks.

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[5] What about those consumers who already have purchased digital radios designed to receive unencrypted broadcasts? Does this post-launch encryption proposal portend that Congress next will have to consider consumer subsidies for digital radio converters? More to the point, how can the consumer electronics industry provide consumers with sufficient incentives to invest in new technologies such as digital radio if consumers perceive, with justification, that these new products may soon be regulated into obsolescence?

The proposal to suddenly lock down satellite radio comes even more "out of the blue." There is no indication that new devices to be rolled out by these services 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.

As in the case of Digital Audio Broadcasts, this bill seems aimed at destroying the utility of new consumer products that, like the VCR or TiVo, will likely have the effect of enhancing consumers' lives and broadening the market for entertainment programming. Exciting new products are on the market that will allow XM and Sirius customers to record and index the content they lawfully paid for, much like a radio TiVo. There is no evidence of harm to the content community – indeed, these products do not allow recordings to be moved off the device in digital form. Yet again, these provisions will make illegal the manufacture and consumer enjoyment of these innovative technologies.

These provisions would not only outlaw products that are on the verge of introduction, but also existing products like the XM MyFi which was introduced at last year's International Consumer Electronics Show. Essentially, all these products do is allow subscribers to "place-shift," so that they can listen to programming they have paid for outside the car or the home, just like portable FM radios. Once again, the record labels have demonstrated no evidence of actual harm that would justify such a massive government intrusion into consumers' private, noncommercial home recording practices, or the right of entrepreneurs to build new products.

Moreover, we do not understand on any reasoned ***policy*** basis the proposals to undo, in section 114 of the Copyright Act, a host of provisions that Congress adopted just a few years ago in the Digital Millennium Copyright Act.

At best, these changes appear calculated solely to give the recording industry a litigation advantage in a royalty rate proceeding scheduled to begin next year. As representatives of an industry that manufactures receivers for this fledgling satellite radio industry, we see no reason for Congress to stack the deck in proceedings that will be moving forward under existing law. In essence, with this provision RIAA is trying to resolve a business dispute by statute. Just last year, congress created the Copyright Royalty Board to resolve these very types of business disputes. We suggest that Congress should simply let the Copyright Royalty Board do its work, and not deny consumers the benefit of digital technology and new devices.

In short, we see no justification to undo the provisions of the AHRA and the DMCA that were specifically enacted by Congress to address digital and satellite radio services. There is no reason for the Congress to give further consideration to this third leg of the legislation.

* * *

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 this Subcommittee to address these important issues. We have worked collegially with the content industries when they have been willing to do so. We appreciate being asked to be here today and look forward to working with you and your staff as you examine the important issues that have been raised for discussion today.

Mr. JENKINS. Thank you, sir.

The Chair at this time will pass to the Ranking Member, the Gentleman from California, Mr. Berman, for questions.

Mr. BERMAN. Thank you very much, Mr. Chairman.

Mr. Petricone, your members led in forming the broadcast flag working group, so there, I take it you have a relative comfort in that flag technology. Would you favor a similar technology in the HD radio context?

Mr. PETRICONE. Two things: first of all, our members, we are a large organization. We represent over 2,000 companies. Our members had differing views on the broadcast flag. As a result, we took no position before the FCC. As far as addressing digital radio, I can't give you an association position on that right now, but I can tell you that that would be much less intrusive to consumers than, for example, an encryption proposal that would require encryption at the source.

Mr. BERMAN. To the extent you're thinking that a sort of voluntary negotiations in this area would be better than that proposal, what incentives do your Members have to sit at the table, given that the RIAA has no performance right and therefore no leverage? My thought is that you would not support us trying to prevent the rollout of new technologies during the time that you were trying to reach a deal on content protection; am I wrong about that?

Mr. PETRICONE. The fact is there has been no overture by the RIAA to discuss, you know, anything of that sort with us. As a matter of fact, you know, the FCC has been considering the digital radio standard for a number of years. It was an open public standards proceeding, and, you know, at no time did the RIAA participate, as they easily could have, and raise the necessity for these issues. As you said, you know, the video broadcast flag was the result of a long, multi-industry process with consensus among the stakeholders. And there has been no similar process on the digital radio side.

Mr. BERMAN. Ms. Sohn, you cite in your testimony the ability to use digital rights management tools as a reason not to support legislation to close the analog hole. But over in the Commerce Committee, you're supporting legislation that would legalize the manufacture and distribution of tools to defeat those very technologies. Isn't the entire point of the analog hole proposal that the fact that these digital rights management technologies are rendered completely ineffective when DRM-protected content is converted to analog for viewing on analog equipment? How is the existence of DRM an argument that nothing should be done on the analog hole?

Ms. SOHN. Well, I think I need to clarify that. H.R. 1201 does not permit the circumvention of DRM for unlawful uses. It only permits it for lawful uses. We do not support infringing activity. We only support the circumvention for lawful uses.

Mr. BERMAN. Well, I mean, that's your interpretation of 1201. I mean, sometimes, when I hear you and Public Knowledge and others who take the same position advocate, it is in order to protect legitimate copying, fair use activities, you create your own hole, digital or analog, to allow mass, indiscriminate redistribution of digital content.

Ms. SOHN. Well, I believe that conduct should be punished through a multipronged approach, including strong enforcement of copyright laws. And Public Knowledge has been almost alone——

Mr. BERMAN. Right now, the law has a fair use defense, and there's a copyright law. Why do you need a new law?

Ms. SOHN. Well, because if you circumvent a technological lock for the purpose of making fair use, you're a criminal. And certainly, if you plug up the analog hole——

Mr. BERMAN. My understanding of the DMCA is that it makes it quite clear that it doesn't seek to change fair use law.

Ms. SOHN. Well, that's not its effect, unfortunately, and there have been several documented cases where somebody broke a technological lock so they could play a DVD that was tethered to a particular machine on another machine, and that was something that was found to be criminal under the DMCA.

Mr. BERMAN. Well, 1201 has a provision which says it shall not be a violation of the Copyright Act to manufacturer or distribute a hardware or software product capable of substantial noninfringing uses, not limited to substantial noninfringing uses, not only substantial noninfringing uses but simply capable of. So in other words, it's okay to do this because you're going to protect some fair use, and the fact that the result of utilizing this technology is a mass, indiscriminate redistribution of copyrighted material is sort of beside the point.

Ms. SOHN. It's not beside the point. What my organization really has a problem with and why we brought the case challenging the FCC's broadcast flag rules is that it's a one-size-fits-all Government technology mandate. We do not oppose digital rights management technologies that come up in the marketplace. And there are lots of those technologies that are working right now. I mean, ITunes fair play obviously is the best example, but Movie Flix and Cinema Now, I mean, they're all over the place.

Mr. BERMAN. I realize my time is up, Mr. Chairman, but just to say that as I understand the court decision, it did not conclude that the broadcast flag rule was arbitrary and capricious or anything else. It simply said without a legislative statement, the FCC didn't have the authority to promulgate that rule.

Ms. SOHN. That is absolutely correct.

Mr. BERMAN. So that court decision did not reach your conclusion on this issue.

Ms. SOHN. Absolutely. It just decided on jurisdictional grounds, but I would urge that it would be very, very bad policy to put the FCC in the position of dictating technological design and essentially deciding what the copyright laws mean for the consumer.

Mr. BERMAN. What if they just dictated technological standards, and any technology that met those standards would be okay.

Ms. SOHN. That seems to me to be the exact same thing. I don't see the difference.

Mr. BERMAN. Oh, it's not mandating a particular technology.

Ms. SOHN. Well, but isn't that what the broadcast flag is? That's exactly what it is.

Mr. BERMAN. And I ask you what if it took that approach?

Ms. SOHN. I would have to see exactly what the proposal is. I really can't comment on it.

Mr. JENKINS. The gentleman from California, Mr. Issa.

Mr. ISSA. Following up on that line of questioning, the FCC's job is to set standards, isn't it, basically, how we broadcast, where we broadcast, compatibility between the transmission and receivers? If not for the FCC, wouldn't we have both PAL and NTSC operating, you know, indiscriminately, each broadcaster deciding which TV type he wanted to lead to?

So I really have to ask, isn't it a core responsibility of the FCC to set standards for technology that then foster the real use of the airwaves, which, of course, is both for entertainment and for information and for public information in times of distress, such as a hurricane, the deliverance of information? Isn't all of that consistent with the FCC's rule, and I would take it that you would all agree to that, wouldn't you? Can I find any disagreement here? Good.

Ms. SOHN. Well, sir, certainly they have——

Mr. ISSA. I was pausing for that moment.

Ms. SOHN. They certainly have the right to set standards for the actual transmissions, okay? They have the authority to regulate, you know, communication over wire and radio. And what the court found was that when it comes to, you know, dictating technological design after the transmission is captured, that was far more sweeping and far more far-reaching than the FCC had ever done before. So you're talking about regulating the standard of the transmission. They've always had the right to do that.

Mr. ISSA. Mr. Petricone, the companies you represent in fact make these receivers. I presume that the manufacturers of Sirius and XM Radio that are now downloading, storing, they're both making storage devices off of digital transmissions so that you can have—XM to Go, of course, is the better known of the two brands from the standpoint of storage. Isn't that critical that if they're going to store that that, in fact, be protected?

Mr. PETRICONE. The devices that you're referring to, first of all, they comply with the Audio Home Recording Act, and second of all, my understanding is that there is no opportunity, there is no way to move a digital copy of the material off the device. And if I can go back to your previous question, you know, I think I share your view of the critical role of the FCC. But we strongly prefer that standards enacted by the FCC arise from open, fair industry consensus processes, you know, that were properly vetted and developed by industry and led by the private sector. You know, again, the broadcast flag is certainly an example of that, as is, for example, the DTV standard.

Mr. ISSA. Well, following up on that, at the present time, for audio, there seems to be a challenge between—I mean, NAB doesn't seem, on either standard, NAB is reluctant to do broadcast flag, and they're not represented at the table here.

But ultimately, wouldn't you all say that a scheme, standard to protect illicit use of copyrighted material, even when broadcast, and when I say illicit, I'm saying outside of existing fair use statutes, including the Betamax case, isn't in fact that critical to the growth of digital over analog? Your company—the companies you represent manufacture those very new sets. They're moving toward

digital. Isn't the success of digital in fact a higher quality product while maintaining the status quo under the laws?

Mr. PETRICONE. Right, but I think our other concern is a scheme that would, in fact, make the new digital product less functional than the old analog product that would, of course, mitigate in the opposite direction.

Mr. ISSA. No, I appreciate it.

Mr. Glickman, maybe flipping to the other side of the same coin, isn't the availability of content for digital broadcast dependent on—and I'll say it in anticipation of where we want this to end up, maintaining the status quo under Sony Betamax, that although there is a fair use established by the Supreme Court and I think kept and held by us that in fact, you do not want to have that taken to essentially original master quality suddenly available for rebroadcast?

Mr. GLICKMAN. That is correct, as modified by the Grokster decision, which I think has made, you know, some revisions to the Sony Betamax decision. But let me go back to your——

Mr. ISSA. I would say it didn't, because certainly, I have Sony videotape recorders, and I'm very comfortable that their marketing plan did not depend on stealing anything from anyone.

Mr. GLICKMAN. That is correct. You are correct. But it obviously created some additional standards on how you use——

Mr. ISSA. Grokster, to all of us on the dais, including your old seatmates here, very much has told us where the other side of the same standard now is.

Mr. GLICKMAN. If I may just respond two things: number one is if you look back at the FCC decision, notwithstanding the issue of whether they had the legal authority or not, the FCC decided because of the threat of mass indiscriminate redistribution that would happen that the harm that would be created out there was significant enough that it was an appropriate place for them to come in and set standards.

And by the way, it's been set in the aftermarket before. The V-chip is a perfect example of that it. The other thing is that if you have the substantial redistribution, what is likely to happen is that all those millions of Americans who have regular television sets that get their programming over the air, they will find the likelihood that that programming will move much faster to cable, to satellite, and to the other things, because, I mean, that's frankly where the marketplace will be. And so, what the FCC was trying to do was to try to kind of slow that train until, in fact, we got to the digital world.

Mr. ISSA. Let me just ask one final question on this series. I started off with a red light, so I really don't know how much time I have.

Mr. JENKINS. Without objection, the gentleman will be allowed one more question.

Mr. ISSA. Thank you, Mr. Chairman.

For the record, when we talk about the analog hole today versus, for example, an analog cable transmission, aren't we talking—I'll ask it as a question, what quality are we really talking about? In other words, in my digital set top box with recording that I have from both coasts, I have one on both coasts from each of my pro-

viders, if I take an analog output to a TV, but instead of a TV; I output to a videotape recorder; again, my Sonys I've had for years. As a consumer, I see no difference in the quality of that output, low res output, analog, and the low res output I'd get if I never went through my cable box and simply went directly to my analog.

For the consumer, isn't there an expectation that those two are equivalent and thus should be treated equivalent by the people on this dais for purposes of the prior standards we all dealt with for analog recording and time shifting and video tape recording and the like? Is that a fair assumption?

Mr. GLICKMAN. I'm not an expert, obviously, in the quality of the material, but I think consumers expect the quality regardless of whether they get it on analog or digital. But what we've got here is a situation where they're going to be run through the digital system material that is unprotected, and that is not in their interests at all.

Mr. ISSA. I certainly agree, and maybe Mr. Petricone, as the more technical on the machine side, the analog outputs, again, we clearly have, under the Digital Millennium Copyright Act, we clearly moved a little bit away from beta standard because it could be easily digitally recorded, copied 1,000 times identically and redistributed. But on the analog output, which is part of what this hearing is today, how are we to view closing that, in other words, flagging it if, in fact, it's going to my—and I have to stick to the most basic I think my constituents understand—my Sony video tape recorder to be recorded and put in my briefcase and taken from Washington, where I have no time to watch it, to California where I might.

Mr. PETRICONE. We have no objection to addressing the analog hole issue and in fact have worked extensively with the content industry in the past to do that.

I think what our issue is with the current draft is the fact that it was not, you know, their version of working with us is apparently coming up with this immensely complex, incredibly, you know, nearly incomprehensible program, not sharing it with us and then running to you and asking you to enact it. You know, again, that is not the kind of private sector driven consensus based process that we would like to see here.

Mr. GLICKMAN. Mr. Issa, could I just add one comment?

Mr. ISSA. With the Chairman's indulgence, sure.

Mr. GLICKMAN. I just would mention that we have two companies—I think they're both members of Mr. Petricone's association; I'm not positive, but Thompson and IBM who have sent letters to the Chairman indicating their support for this legislation. I would like those to be part of the record.

Mr. SMITH [presiding]. Okay; without objection, they'll be made a part of the record.

Mr. ISSA. Thank you, Mr. Chairman.

Mr. SMITH. Thank you, Mr. Issa.

The gentleman from Virginia, Mr. Boucher, is recognized for his questions.

Mr. BOUCHER. Well, thank you very much, Mr. Chairman, and I can't resist the opportunity to welcome back to this Committee our former colleague, Dan Glickman, with whom we spent many

years in productive pursuits here, and I hope this will be the first of many appearances that you will have.

Mr. GLICKMAN. We were together on many issues.

Mr. BOUCHER. We were, and I'm looking for some opportunity for us to join forces again here.

But I want to thank you very much and the other witnesses as well for sharing your views with us today. Let me just make several points, and these will kind of be a context for the questions I'll ask. First, I do not harbor hostility toward the broadcast flag. I understand the logic of it. I think it is important that high value programming be made available for over the air digital broadcast, and I perceive the problem that the motion picture studios have in making that content available for the over-the-air broadcast if there is no assurance that it is not going to be uploaded to the Internet.

So I comprehend that argument, and I don't have basic hostility to the broadcast flag. I do, however, have a couple of views regarding it. The first of those is that it ought to be considered in the broader context of assuring the provision of fair use rights for the purchasers of digital media and ensuring, in fact, the right of consumers when they have purchased content lawfully to make use of that content as long as they're not infringing the copyright of the copyright holder.

And H.R. 1201, which I've introduced, along with others, contains that set of guarantees. The position I have just announced, I can add, is the position of the Chairman of the Committee on Energy and Commerce, to which H.R. 1201 has been principally referred, and I assume the Committee at some point, perhaps next year, will begin a series of hearings on that set of issues.

The second thing I would say about the broadcast flag is that it seems to me that there are certain kinds of programming that should not be flagged at all: news programming, in my view, should not be flagged. If someone wants to excerpt a small piece from a news program and put that on the Internet, send it to friends, if the rare occasion happens, and the local TV station covers me doing something, and it turns out to be particularly good, an even rarer event still, I might want to email that to my mother and say aren't you proud of me now? [Laughter.]

And my 81-year-old mother uses e-mail, I am proud to say.

But under a strict version of the broadcast flag, if that news program was flagged, I would not be able to upload that excerpt to the Internet.

It seems to me also that public affairs programs generally should not be flagged and should be available for excerpts of it or perhaps all of it to be emailed, and there doesn't seem to me to be any particular harm to a content owner if we permit that. And Mr. Glickman, at the proper time, I'm going to ask you to respond to those recommendations.

Point number two: I think this Subcommittee should take up and report a comprehensive reform of music licensing issues. We primarily need to be addressing section 115, but perhaps the section 114 problems Mr. Bainwol has suggested and others have recommended to us could also be considered in that broader context. And I know that Mr. Bainwol's association also would like to see

us address the section 115 issues, as would others. And so, I would commend, Mr. Chairman, that idea to you, and hopefully, we can move forward with that legislation in the near term.

The third point I would make is that the argument for the broadcast flag, which I have articulated perhaps not perfectly, in my view does not extend to digital radio. It seems to me that piracy from radio broadcasts are not the primary problem that you face. Peer-to-peer is probably a bigger concern, but perhaps the Supreme Court decision in Grokster will help you address that. I hope it does.

The bigger problem might be if someone is intent on committing piracy that they would simply go and buy a CD, and they would use the CD for the same purpose that you're suggesting they might use a digital radio broadcast. The CD, after all, doesn't involve waiting. You can put it in your tray right away and go ahead and do whatever it is you're going to do with it. It's a better quality product than the digital broadcast, which has undergone compression, and probably would be better than MP3 but not CD quality.

And it seems to me that most of the radio stations are just playing the same 20 songs over and over, and once you've recorded them, what are you going to do then? You go buy a CD in all likelihood. So, I mean, the CD really is the bigger issue, and so, I'm not sure the case has been made that we ought to embark on this notion of a broadcast flag for digital radio.

I would also note that unlike the TV flag, which has the sole purpose of preventing uploading to the Internet, your proposal for a radio flag would dramatically affect the ability of the person at home who is receiving the broadcast to engage in copying. It's a dramatic assault on fair use.

And so, as you may have detected from these remarks, I'm not quite sold on the idea yet. And I will ask you at the proper time for your comments on that.

Mr. SMITH. Would the Gentleman from Virginia like an extra minute?

Mr. BOUCHER. Yes, would the Chairman be so kind as to grant an extra minute?

Mr. SMITH. Without objection, the Gentleman is recognized for an additional minute.

Mr. BOUCHER. Thank you very much, Mr. Chairman.

I would also note that the bill that has been put forward, Mr. Bainwol, would prevent the scrolling features on the new devices that XM and Sirius are getting ready to introduce from functioning. These are features that allow you to categorize by artist, by genre, et cetera, much the way that IPod does, and I think those devices would be rendered dead on arrival were your bill to become law. As I read section 8(b) of the bill, that information could not be used for scrolling purposes.

Finally, let me say I have not had time to review and reflect on the analog hole bill. I just saw that yesterday. I am concerned that it is a far reaching technology mandate that would apply to any device that has the ability to convert an analog signal back to digital, including, by the way, a personal computer, and so, personal computers would have to contain this mandated technology, and I can

assure you that before we get to the point of doing that, we're going to have to have a lot more conversation.

Now, with those comments, let me give both Mr. Glickman and Mr. Bainwol an opportunity, if the Chairman permits, to comment on what I've said about the broadcast flag for television and the broadcast flag for radio.

Mr. SMITH. If you all would answer the question, and then, we will go to the next Member.

Mr. GLICKMAN. I enjoyed working with you, and while we disagree on some of these issues, you're a person that I feel comfortable working with, and we should continue to do that.

First of all, broadcast flag: I think it's clear that what the FCC said is that broadcast flag in no way limits or prevents customers from making copies of digital broadcast television content. If you want to watch and use TiVO, TiVO has been certified as proper remote access, so that is protected under the flag.

The issue here is that, as you know, that satellite and cable under contractual arrangements have a different ability in terms of redistribution than broadcast does. So what we are trying to do is to provide equal, fair, and balanced treatment, so they are all treated the same way. Now, that does not necessarily have to mean that your grandmother or aunt or sister, you cannot work out some sort of arrangement to, in fact, send—in fact, I would like to see your 15-second snippets from the House or anywhere else.

But I am just saying that there's got to be relatively equal treatment here, because if there's not, I am telling you it will all move away from broadcast television, and that will be a dagger in the heart of an awful lot of people who don't have access to cable or satellite, including people who live in small towns in rural America, so that's my point there. But I appreciate your general support for the concept of it, and we want to, you know, continue to work with you on it.

You know, on the issue of 1201, we strongly oppose your position on that for a lot of reasons. One is the circumvention provisions, particularly as it relates to the scientific area, which you put in there. It looked like they're wide enough to drive a Mack truck through, because there's a lot of ambiguity in that particular provision. And we've talked a lot about fair use before, and the fact is that under our laws, if you get one, you don't get another one for free in the world. You know, any kind of product that you buy, you don't get an extra product for free.

But, look, I understand where you're coming from here and will continue to talk to you about it. I don't want to mislead you, however. You haven't persuaded me today about 1201.

Mr. BAINWOL. It's my turn. Just to clarify, my last name is Bainwol. I have been called worse things, though, so that's fine.

Let me take a moment and kind of reframe where we are from a financial standpoint. Gigi characterized a story in the press that was a bit misleading. To put the context again, the sale of recorded music was about $14.6 billion in 1999. We're under $12 billion in physical. In 2005, we'll lose more on physical than we will gain from this wonderful marketplace that's arising on the digital side. So we're still sliding down. With a little luck, 2005 will be our down year, and we'll begin climbing out. And our future is predi-

cated on having a rate of growth on the digital side that exceeds the rate of loss on the physical side.

And we think we can get there, but we can get there only if the right policies are in place. We've got lots of problems. We're not short of problems. We've got, obviously, P2P, which we think we're beginning to get a handle on. We've got the physical piracy that we're dealing with. But along comes this new functionality.

In the old days, you had radio, and you had ownership. Now, obviously, with 114, you've got satellite, you've got cable, you've got Internet. You have this convergence going on where basically, radio is going to be available on all of these platforms and over the air, and radio, on over-the-air, of course, we don't have a performance right, we don't get paid. All of a sudden, you've got this new device that in effect replicates what you can do on ITunes.

So the consumer will have a choice: do I want to go on ITunes and spend 99 cents to buy a new track; you know, I saw Nine Inch Nails. Maybe that's it; maybe it's something else. Or do you go onto your new device and say gee, I can mark it, I can keep it, I can move it to my device, and I don't have to pay for it, and it's part of a playlist, and I've got it, I've got possession of the thing.

The challenge is as radio converges across platforms, you end up with an ability to replace the sale. No sane human being, few sane human beings would go and choose to pay for something when they can replicate that experience for nothing.

Our challenge now is to make sure that this functionality, which can cause enormous harm at a very difficult time for us is treated in a fashion where it's either licensed or compensated for fairly.

Mr. SMITH. Thank you, Mr. Boucher.

Without objection, by the way, I'd like for the full introductions of the witnesses to be made a part of the record. And Mr. Glickman, let me address my first question to you and say at the outset, I may be at a slight disadvantage, because you may have already these questions, and if so, feel free to tell me, and I'll go to the next one.

I was just curious, though, Mr. Glickman, how you thought the typical consumer felt about the broadcast flag and the analog hole, assuming they've thought about it at all, but let's assume an educated consumer, and are they for it, or are they opposed to it? What is your experience?

Mr. GLICKMAN. You know, I haven't done any survey research on this, but my guess would be is that since the bulk of consumers have analog television sets now, and they want to maintain high quality content, digital content that's coming down the road, that they would be upset to know that because of this analog hole, you could have massive redistribution of unprotected digital content. They wouldn't like that.

I don't know whether they've thought about specifically this particular technology or not. But I think if they did think about it, they would probably worry about it, given all of the advances that are occurring in content, both television and movies.

On the broadcast flag, my guess is that if consumers of over the air television, which there are millions of in this country, particularly in underserved areas would know that, the content providers and the distributors would likely shift to cable and satellite be-

cause the content can be massively redistributed. That would upset them very much, because they could end up with nothing, perhaps, except maybe public broadcasting or other kinds of channels that would not necessarily fit on those new mediums.

So I think they would be concerned about it, and you know, that's my judgment right now.

Mr. SMITH. Okay; thank you, Mr. Glickman.

Mr. Petricone, it's my understanding, I think I recall, that the membership of the Consumer Electronics Association either is neutral about or supports the broadcast flag. Is that a fair statement?

Mr. PETRICONE. Mr. Chairman, again, we are a large association. We represent over 2,000 members, and we have members with differing views on the broadcast flag issue. When the issue was before the FCC, we took a neutral position.

Mr. SMITH. You're not going to go any farther than that? Do you want to say anything about a majority of the members or members you've talked to or anything like that?

Mr. PETRICONE. You know, Mr. Chairman, it's sometimes being in a trade association is difficult, and sometimes, you have members, and it seems to happen more often than one would like, that have very strong positions on an important issue, and when that happens, the best thing to do is to generally stay out of it.

Mr. SMITH. It seems like you're a good politician, too. All right.

Mr. Bainwol, what has been the reaction from the satellite and the broadcasters to your proposal? If they've had concerns, what are those concerns? And on the other side, who supports your proposal?

Mr. BAINWOL. Well, we've had discussions with the satellite folks and broadcasters. You know, if I die and come back, I'd love to be a broadcaster in the radio context. I get free spectrum; I get free content, and I have an ability here potentially to replicate what ITunes does and not have to pay for the product.

So, you know, they're not terribly anxious to come to an arrangement here. Because we have no performance right, they don't have to pay us. There's no reason for them to come to the table. So we've reached out to them over the last two and a half years in a very aggressive fashion, but it's very hard to compel them to act.

The satellite folks are in a similar situation. Of course, we have a performance right there, but that pays for the performance, not for distribution. What's going on here is the conversion of radio to a mechanism to take performance and turn it into a distribution to replace ownership. So the satellite folks also, they're engaged also. We're in reasonable discussions, but I don't know that we'll get across the finish line in terms of reaching an agreement.

Satellite and over-the-air, they're fighting for market position, they're fighting to compete, and they want to use this functionality in this competition, and we're left out there holding the bag. All we want is compensation. We want to avoid harm. It's been a very difficult time for us in the last 6 years, and this functionality is very cool and very meaningful. Fans deserve to have it but not at our expense. Let's find a way to make it work. We can't get them to the table, though, to come to a deal. That's why we need help.

Mr. SMITH. Okay; thank you, Mr. Bainwol.

Ms. Sohn, let me ask you about three activities, and it's my understanding, I believe, that you have indicated support for them in your testimony, but let me just go through these three and see what you think about them, and I'm assuming that Public Knowledge does support them, but I just want to double-check with you. First of all, suits against P2P users who upload and download copyrighted files.

Ms. SOHN. If they do so on a massive scale, yes, a large scale.

Mr. SMITH. Well, how do you define large scale?

Ms. SOHN. Well, certainly more than one, but, you know, hundreds of files. You know, it's basically—I have to say that both the recording industry and the motion picture industry actually have done a pretty good job of going after mass file——

Mr. SMITH. At the risk of making Mr. Boucher nervous, what about a dozen or two files?

Ms. SOHN. You know, I really don't want to sort of parse numbers, but I don't think that that's necessarily a very good use of their resources.

Mr. SMITH. So you're talking about the real abusers.

Ms. SOHN. The real pirates, yes, the real abusers, absolutely.

Mr. SMITH. What about the use of some DRM technologies like Apple's Fair Play?

Ms. SOHN. Absolutely. As long as it comes up in the marketplace, we are for it. If it's Government-mandated, we're against it.

Mr. SMITH. Okay; what about the passing on of warning notices by ISPs?

Ms. SOHN. Well, we actually put out a public statement applauding the agreement between Disney and Verizon to do so.

Mr. SMITH. Has Public Knowledge always supported those three actions?

Ms. SOHN. Yes, since the very beginning.

Mr. SMITH. You have; okay. Thank you very much.

Ms. SOHN. Could I just make one comment——

Mr. SMITH. Yes.

Ms. SOHN.—about whether consumers care? Because I think this is really important. At the FCC alone, there were between 5,000 and 7,000 consumer comments opposing the broadcast flag filed. So, you know, when you don't actually have digital television, Mr. Glickman is right. People don't really know what you might be missing. But certainly, of those who are tech savvy, they did weigh in. And I do know that in addition, tens of thousands of constituents have weighed in with their Members opposing the reinstatement of the broadcast flag over the last 6 months.

Mr. SMITH. Okay; thank you, Ms. Sohn.

The gentlewoman from California, Ms. Lofgren, is recognized for questions.

Ms. LOFGREN. Thank you, Mr. Chairman. And thanks to the witnesses for being here.

It's great to hear your comments. As with my colleagues, I think it's important to put my questions in a context. I have been a Member of this Subcommittee for many years, and I think that there is unanimity among each Member that we should do what we can to support content owners from being ripped off. I mean, that is an important principle, and those rights need to be protected. I also

have two other concerns when it comes to proposals, and I'll just state them.

First, consumers have rights, too, and if in our efforts to protect content owners, we don't also acknowledge the rights of consumers, and that's a problem for me, and there's a second issue which is probably rooted in Silicon Valley, where I come from: if we, in outlining a scheme, have the impact of impeding the development of technology, then, that is a huge problem, because we wouldn't be here; we wouldn't have CDs; we wouldn't have a lot of things if we had impeded the development of technology, so I'm always on the lookout for that.

Along getting to my first point or second point of consumers, I have some skepticism about the broadcast flag proposal, and it's not just about fair use; it's about lawful use. And I'm wondering both for RIAA and MPAA, how you would assure consumers that, say, for example, they have a right to take—we watch the Daily Show when I stay up that late with Jon Stewart where he will do a clip of one politician and then a clip of something else. I mean, theoretically, if you flag it, you couldn't do that.

There's another issue which is not fair use which is just non-infringing use. I mean, there is material that is in the public domain. And theoretically, you could control, through technology, what you do not have the right to control through the law. I'm wondering how you would address those two issues if the broadcast flag were to go forward.

Mr. GLICKMAN. Well, thank you.

First of all, I agree with you. These are questions of balance. I served on that row, and I know what it's like to try to bring folks together, and sometimes, you can't reach agreement as an industry, and that's why, you know, Congress has a leadership role on some of these issues, as you did in the V-chip and other kinds of things, where you came in and tried to deal with this issue.

And in terms just mentioning impeding the development of technology, there are a multitude of technologies. There are technologies of delivery devices. There's also technologies of content, and people want to see the most modern and new ways of movies and television, and so, there's technology in that area as well. And so, I don't want to put just technology in a little box. It just depends on the delivery system. It also involves the content that's produced out there.

The only thing I would tell you is that I would read from the FCC decision itself. They say, A, we wish to reemphasize that our action herein in no way limits or prevents consumers from making copies of digital broadcast television content. The goal will not interfere with or preclude consumers from copying broadcast program and using it or redistributing it within the home or similar personal environment as consistent with copyright law.

So, I mean, that is from the FCC decision, and of course, that's basically the decision that we want to see you reauthorize, put into statute. And, you know, obviously, common sense has to be underlying anything that we do in this area, and, you know, we would hope to work with you to make sure that would be the case.

Ms. LOFGREN. Mr. Bainwol?

Mr. BAINWOL. Yes, I would simply add in terms of the technology by which we would solve this problem, we're agnostic. In a perfect world, in an ideal world, we'd do that with encryption at the source. We understand that's probably too late, so a flag approach or some other approach is probably fine.

But the bottom line is I would echo Dan's words about common sense. We are perfectly fine to build in common sense adjustments to accommodate genuine fair use concerns. What we're not fine with is allowing radio to morph into an ITunes or a Rhapsody substitution where we get no payment.

And let me just use this moment to put all this into context. I hear a lot of talk about AHRA, which was, you know, before I was involved in this business, but 1992; that was about serial copying. To give you a sense of context here, AHRA probably provides the music world a couple million bucks a year; I don't know if that's precisely right, but order of magnitude, that's right; a couple of million dollars a year, okay?

Right now—two years ago, you had no download market. Right now, we're dealing with about 7 million downloads a week in the legitimate download market: ITunes, Wal-Mart, the other services. In that context, according to public reports, the music world gets somewhere between—about two-thirds. So in a given week, you can do the math: we do okay.

The bottom line is in about 3 days, we capture what we would get under AHRA. So AHRA comes nowhere near approximating the loss of value. We are in a hole. Creators have suffered huge losses.

Ms. LOFGREN. If I may, and I know the red light is on, and the Chairman will allow the other two witnesses to answer, I'm sure, but——

Mr. SMITH. Without objection, the gentlewoman is yielded another minute.

Ms. LOFGREN. Are we having a second round of questions, Mr. Chairman, or not?

Mr. SMITH. Not necessarily.

Ms. LOFGREN. Then I will just state I have many questions that I perhaps can send to the witnesses. I'll just note that the mandating in the analog hole bill of particular technology is almost always a mistake to mandate, for the Government to decide a set of technologies. I mean, we should never vote to do that. I wonder if the other two witnesses could address the question. I thank the Chairman for the extra minute.

Ms. SOHN. I'd like to address the part of your question I think to Mr. Glickman that talked about fair use and the broadcast flag, and I would just simply refer everybody to the CRS report for Congress entitled Copy Protection of Digital Television: the Broadcast Flag. And just indulge me for a second.

It says 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 might be prevented when otherwise approved technologies do not allow for such activities or do not integrate with one another or with older legacy devices.

So there is definitely—and Mr. Glickman did not answer—I don't remember whose question it was exactly; I think it was Mr. Boucher's question about exceptions for news programming. You're never going to package news programming for later sale on DVD. Nobody wants to see, you know, the DVD package of the nightly news. And I think it's important, we have troubles because of the FCC's involvement, I think the very least, you have to answer the question what's your objection to not flagging news and public affairs programming? I don't want to diss the broadcasters, but that's not the kind of high value programming that Mr. Glickman and his members are referring to.

Mr. PETRICONE. If I can just address the issue of whether the AHRA applies in this context to these new technologies, you know, under the AHRA, the definition of a digital audio copied recording includes digital reproductions of digital musical recordings, whether that reproduction is made directly from another digital musical recording or indirectly from a transmission.

As a matter of fact, Mr. Bainwol's predecessor told the Senate the AHRA will eliminate the legal uncertainty about audio home 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 digital audio equipment by manufacturers and importers. It will thus allow consumer electronics manufacturers to introduce new audio technology into the market without fear of infringement lawsuits. So, you know, for the RIAA to come back now with its extraordinarily narrow reading of what the AHRA said is frankly revisionist history.

If I can also add, Mr. Bainwol keeps saying that digital radio essentially turns radio into ITunes. What you get with digital radio is current radio, except it sounds somewhat better. In other words, the DJ talks over the first 10 seconds of the Led Zeppelin, and then, the last 10 seconds of the song fades into the ad for Pizza Hut.

So, again, if that's what you're comfortable with, that's fine, but that's in no way replication of what you're getting from, say, an ITunes type service.

Mr. BAINWOL. Mr. Chairman, if I may, there are so many inaccuracies riddled in that statement. I'm not sure where to begin. I know we don't have a whole lot of time, but just on the functionality issue, you didn't say I could; may I proceed?

Mr. SMITH. Yes, Mr. Bainwol. Please. Actually, we're going to give the Gentlewoman from California an additional minute for you to respond.

Mr. BAINWOL. I'm just a touch overenthusiastic here, but, you know, what you can do with this device, the key thing is you don't have to listen to the song. You can see the tracks, and you can say I'm going to mark that track and store it into my device here along with my other stuff and create a playlist and listen to it whenever I want. It's essentially a tethered download. And it creates an incentive to keep the subscription going alive, because you only have it so long as you have the subscription.

So this is not radio, you know, the disc jockey talking over the thing. You can amass a wonderful library that is a substitution for a purchase at a time where we can't afford to give our music away.

Mr. SMITH. Thank you, Mr. Bainwol. Thank you, Ms. Lofgren.

This is what we wanted today was a healthy discussion. I don't know whether we're really getting to that fourth goal that I had for today's hearing about common ground yet, but we're working on that.

The gentleman from Utah, Mr. Cannon, is recognized for his questions.

Mr. CANNON. Thank you, Mr. Chairman.

I would like to apologize to you and the other Members of the Committee and also our panel for not having been able to be here for the whole hearing. Mr. Issa pointed out this is the most fair panel we could have had on this issue just before he left, and I appreciate that, and I just want Mr. Petricone, who was very anxious to respond, if you would like to respond to Mr. Bainwol, you're welcome to do so on my time.

Mr. PETRICONE. I just wanted to clarify, the digital radio, the terrestrial digital radio service is not a subscription service. It's free, over-the-air radio, again, like you're getting today, except that it sounds better.

On the satellite end, which I know is also a concern of Mr. Bainwol's, you know, what Mr. Bainwol is referring to is an ongoing royalty dispute between his members and the satellite industry. And just last year, Congress created the Copyright Royalty Board to handle these types, these exact types of business disputes. And we suggest that the Copyright Royalty Board be allowed to do its work, do what you set it up to do and that consumers not be deprived of new products and digital technologies. Thank you.

Mr. CANNON. Let me let Mr. Bainwol respond to that, but let me just ask a question, and if you could deal with the question and the process, I'd appreciate that, Mr. Bainwol, but certainly, you're welcome to respond to that on my time.

But let me ask: the FCC's broadcast flag rules were very narrowly tailored to prevent unauthorized mass, indiscriminate redistribution of digital video content over the Internet, and the HD radio proposal would cover unauthorized redistribution over digital networks. Could this mean that it would sweep in wide area networks such as universities, local area networks such as offices, or home networks? In other words, does the term digital networks need to be explicitly defined in this legislation to move it forward?

And if you could also respond to the fact that we've had lots and lots of institutional discussion about the broadcast flag on video, and those discussions have not been participated in. We haven't had the same discussion on audio. And could you discuss just briefly whether we don't need to go back and have some more extended discussions? And then, of course, you're welcome to respond to Mr. Petricone.

Mr. BAINWOL. Okay; I'm going to try to keep my wits about me, but I think I have three points to make. The first is Michael gets confused between a performance and a distribution. We don't get paid on over-the-air radio. We do get paid on satellite for a performance. We're not being paid to replicate an ITunes purchase, so that's a key distinction.

Two, in terms of your concerns about universities and LANs, we're perfectly happy to work with drafters to make sure that the

language captures only that which is necessary to capture to make sure that the piracy problem is not——

Mr. CANNON. And here, you know, I'm torn about whether a kid in a dorm room can grab something and then put it on his local area network for a kid three dorms down. That's awkward. That may be the worst case, but in a home, if you're capturing and then replaying it, it seems to me that we need to have some——

Mr. BAINWOL. We're perfectly fine with flexibility to make sure that that home context is taken care of.

That third piece here that I think I have to just drive home, because it separates the case of motion picture and video broadcast from us, there is a market failure. We do not have a performance right. We have a compulsory license on the 114 side. There's nothing we can do to say if you don't give us the right protection, you don't get the programming.

We're stuck, and because we're stuck, we need help. I wish it weren't the case. In a perfect world, if you could give us a grant of a performance right, I think we would be pretty thrilled, and so would a bunch of artists around this country. But that's going to take some time. In the meantime, we're trying to dig out of a hole, and if we don't get this thing right, we're going to have a huge impact on the creativity of this country.

A third of the artists that were signed to labels were lost in the last 6 years. Now, it's time we do something to make sure that the investment in content and content innovation is protected.

Mr. CANNON. But, I mean, there are a lot of problems behind that statement about losing your artists to signed contracts that go way beyond the legislation we're dealing with here.

Mr. BAINWOL. No, I'm making the point that the consequence of a failed decision here——

Mr. CANNON. No, I understand the point. But there are a lot of failures, and I've been arguing with your industry for a very long time about some of the fundamental problems that are going on here, including how you generate creativity in the market as opposed to in the part that we control.

So anyway. Thanks. We do need to work on, I think, language, and maybe we can come up with something, but Ms. Sohn, in your testimony you argue that if a Member of this Subcommittee wants to email a snippet of his appearance on national TV, and I hope this question hasn't been asked, but I actually would like to know that's off a broadcast flag scheme, that would prohibit him from doing so.

Does the same concern extend to cable and satellite snippets? If so, what position do you take on the distribution through those media? So, would TiVO To Go service, which is certified as broadcast flag compliant, enable a Subcommittee Member enable himself to email himself a new snipped, or could future technologies to facilitate that activity be certified as broadcast compliant?

Ms. SOHN. Let me see if I fully understand the question. All I can say is that the first part of your question, you know, under the broadcast flag rule, you would not be able to do that. You would not be able to email yourself a snippet. You can now email a cable or satellite program. That is not prohibited. Did I answer that

sufficiently?

Mr. CANNON. And in part because I see that my time has expired, and I apologize, Mr. Chairman, for going over and yield back if there were theoretically something to yield back.

Mr. SMITH. Thank you, Mr. Cannon.

The gentleman from Massachusetts, Mr. Meehan, is recognized for his questions.

Mr. MEEHAN. Thank you, Mr. Chairman.

And Mr. Petricone, if you get a work-related email during the Monday Night Football game on Monday, I want you to know you're going to have the rest of the evening to work on that email, because the Patriots are going to be ahead of the Colts by four touchdowns. You don't have to watch the second half.

Mr. PETRICONE. Congressman, I grew up in northwestern Connecticut. I'm a big Patriots fan, and I certainly hope you're right.

Mr. MEEHAN. Mr. Glickman, it's great to have you back before the Committee. You were an outstanding Member of Congress. The MPAA seeks Congressional ratification of both the FCC's Broadcast Flag Order and its companion Digital Content Protection Technology Approval Order.

Now, as you know, the technology approval order in that order, Chairman Martin expressed concern that the non-assert clause in some of the technological agreements could hinder competition and suppress innovation. I'm curious: do you believe from your perspective that licensing agreements issued pursuant to Government mandated rules, the essential purpose of which is to protect intellectual property should be permitted to contain provisions which expressly require licensees to surrender their own intellectual property as a prerequisite to enabling a Government mandated license?

And I'm curious, it seems isn't such a provision completely inconsistent with protecting the intellectual property rights that is, in essence, the essence of the proposed legislation to fix the problem?

Mr. GLICKMAN. Well, to be honest with you, we have not taken a specific position on that, and I'm going to have to get back to you on that. As a general proposition, we don't think that the FCC's ruling is inconsistent with the flexibility that you talked about, but can't answer the question quite candidly right now.

Mr. MEEHAN. Would anyone else like to comment on it?

Mr. GLICKMAN. I will get you an answer shortly.

Mr. MEEHAN. Okay; thanks, Dan.

Thank you, Mr. Chairman.

Mr. CANNON [presiding]. The Gentleman yields back.

Does the Gentleman from Florida have questions?

Mr. Wexler is recognized for 5 minutes.

Mr. WEXLER. Thanks.

First, I'd like to compliment all four witnesses, because I think each one of you has been an extremely effective analyst, spokesperson for your point of view, and even though you have differing points of view, I think the Subcommittee has learned a great deal from them.

In the context of trying to figure out the equities or the balance in terms of the competing points of view, I would like, if I could, to ask Mr. Petricone: if I understand your position correctly, and obviously, you'll tell me if I don't, but if I understand your position correctly, you articulate that Congress should move forward with

the broadcast flag legislation with any of the three proposals, including H.R. 1201, which has been referred to and Mr. Boucher specifically talked about.

If my analysis is correct, if that's what occurred, if that's what Congress did, then, in effect, we'd be passing legislation that collectively repealed the DMCA and then, depending on whose point of view you buy, either make it impossible to close the analog hole and implement the broadcast flag or at least make it more difficult to close the analog hole and implement the broadcast flag. So if we did that, and if this Subcommittee, if we were trying to balance the interests, why or how would that be a fair resolution?

Mr. PETRICONE. Let me first start off by saying, you know, again, I represent the technology industry. We are an intellectual property industry. We invent things. That's what we do. So I'm keenly aware of the need for strong intellectual property protections. As far as H.R. 1201, clearly, we view it differently. It does not allow decryption for infringing purposes. Again, we believe that is entirely consistent with consumer fair use and the kind of fair use that ought to be protected.

We believe that linking H.R. 1201 with the kind of narrow broadcast flag approach that I previously discussed, you know, would balance, again, protecting the copyright holders and giving them additional protections but also protecting consumers and allowing them to make use of content that they have lawfully acquired.

Mr. WEXLER. Would you agree that as it relates to the effect of 1201, on one hand, and I think Mr. Glickman said it from his point of view, the hole is so large you could drive a truck through, would you agree that—and you have a different point of view, obviously, but the net effect of 1201 has got to either be we entirely make it impossible to close the analog hole, or we make it a little bit more difficult to close it or somewhere in between. But clearly, there's no effect of 1201 that makes it more likely to close the hole. Is that a fair statement?

Mr. PETRICONE. Again, I think you're talking about a balance between perfect control of one's intellectual property, and, you know, on the other side, no control. And what we believe 1201 does is merely allows consumers, lawful consumers, to do with their works, with their lawfully acquired property, the things they ought to be able to do anyway.

So does it move away from perfect control of IP, well, yes, it does. But it does it in a way that protects rights that consumers have and should have.

Mr. WEXLER. Thanks.

Mr. CANNON. The gentleman yields back.

Do you want to——

Mr. BERMAN. Yes, Mr. Chairman, I'd ask unanimous consent that anyone who wants to ask an additional question preceded by a short statement be allowed to. [Laughter.]

Mr. CANNON. With the reservation of an objection if the statement gets too long, without objection, so ordered.

Mr. BERMAN. Yes; Mr. Chairman, if I may be recognized, I want to—we've touched on this, but I think it's so new, and it's so interesting, and it shows how something done for one purpose gets totally twisted to another purpose.

And I want to go back to this issue of the satellite services. In effect, a wonderful new technology that provides an incredible diversity of music and programming, XM and Sirius, linked up with an interactive service that allows in the case of XM, I think it's Napster that allows people to buy what they've heard now is coming featured with a new device made by one of your member companies which in effect allows you never to listen to one piece of music that's coming on the satellite radio; to have it recorded 50 hours of programming, 50 hours, about 750 songs, to get a list of those songs, and to decide which of those songs you now want to make copies of for your library, disaggregate, delete, save, without listening to the program, and for the price of your monthly subscription or the monthly service.

This is not what was intended when we granted the license for satellite radios. That was a performance license, not a mechanical. It was not intended to be for, in effect, reduced by 98 percent per copy situation. The long-term consequences of that are going to end up not only killing the traditional sales models but the online services programs and the downloading and the ITunes and all of this other stuff.

And so, there's a real problem out here which can't just be passed off. You're now replacing sales, whether they're the traditional kinds of sales or the online sales, with this kind of a mechanism. And my question is what do you say to that? No. [Laughter.]

Mr. PETRICONE. Thank you.

I think what you just described in audio terms is what I do with my TiVO on a daily basis. And I guess what I say is I think that's okay, you know.

Mr. BERMAN. Your TiVO, to get your television programming, so you can watch it, right.

Mr. PETRICONE. I index.

Mr. BERMAN. Right.

Mr. PETRICONE. I disaggregate. It gives me more control of my programming.

Mr. BERMAN. So you have no reason to go to the retail store and buy TV programming.

Mr. PETRICONE. As a matter of fact, I end up watching a lot more TV, and I think almost everybody would agree that the TiVO is a wonderful invention loved by millions of Americans.

But I think, again, what I think you're talking about here is a licensing dispute between the satellite companies, XM and Sirius, and Mr. Bainwol and his members. And, you know, our approach, I guess, is to ensure that that licensing dispute is resolved through the mechanisms in part that you have set up. But the solution is not to deprive consumers of these new digital technologies and functionality which we think will expand the market for digital music.

Mr. BERMAN. Just to respond, I am a little off the point of the specifics of this hearing, but it has come up in this context; it's indicative of a particular problem. I don't think this proposed legislation does it; Mr. Bainwol, though, did you want to make any comment about that?

Mr. BAINWOL. You know, there is a licensing process that we will go through as it relates to the performance, again, but this is not

about the performance. And we keep on getting lost; let's be candid here: this is about substituting for a distribution, either a purchase of a CD or a rental from Yahoo or a purchase from an ITunes or a Wal-Mart. That's totally different.

And our concern here is not just satellite. There's a convergence across platforms, over the air and then also across platforms under 114, where you're getting this radio functionality where you can do the substitution. When you aggregate that together, what that really means is a very major challenge in terms of these new models that are trying to get some traction. Those models are essential to our future, and if we blow them up, that is damaging not only to ITunes and to Yahoo and Rhapsody but to creators as well.

Mr. BOUCHER. Mr. Chairman?

Mr. SMITH [presiding]. Thank you, Mr. Berman.

Yes, Mr. Boucher.

Mr. BOUCHER. I guess the question is who's next? [Laughter.]

Mr. SMITH. I can see some eagerness for additional questions.

The Gentleman from Virginia is recognized.

Mr. BOUCHER. Thank you very much, Mr. Chairman.

Let me just comment on that conversation that the XM and Sirius signals can only be recorded on the XM and Sirius devices, and those devices presently and as they're being designed for the next generation, as I understand it, do not have digital outputs. And so, once the recording takes place, it's on that portable device, and that's where it stays.

Mr. BAINWOL. But it becomes your IPod substitute. You can move your other material into that device, take it with you. This is mine, which we think is a pretty cool thing. You put it into that device. You marry up those songs that you marked without listening to. It's not like the old days, when you pressed a button. You're not listening; you're marking the songs you want with metadata, and then, you're marrying it up in a consolidated library, taking that little portable device with you wherever you want.

It's really cool. It's a fantastic little device. The problem is it's something that it really isn't, and that is it is radio becoming ITunes.

Mr. BOUCHER. I have a limited period of time here. Let me just note this, and then, I'm going to pass to the real question I want to ask, which is to Mr. Glickman.

Every time that music is transmitted by satellite by XM or Sirius, the compensation goes to the recording industry, to all copyright holders. This is all done pursuant to licensing. So if the compensation isn't right, and if people are making this greater use of it, I'm sure that's going to get reflected in the negotiations down the road. I need to leave this and go on to another subject.

Mr. Glickman, I just want to give you an opportunity to respond to the question I asked earlier, which you gave a terrific answer. I listened to every word of it, but I didn't hear the answer to the real question. And so, let me phrase the——

Mr. GLICKMAN. Is this the answer you wanted or the real answer? [Laughter.]

Mr. BOUCHER. No, it was just any answer you choose to give. But I'd like it addressed to the question, and the question is this: I see no reason why, if we're going to authorize a broadcast flag, we

should allow the flag to be applied to news. Ms. Sohn said it very well: nobody packages news for later CD sales or DVD sales. And it should not be applied to public affairs programming.

Let me give an example, just this example: I'm on the road. I'm a candidate for reelection. My opponent, clever as he is, well funded, as I am sure he will be, keeps producing these troublesome television ads, and because I'm constantly on the road with my laptop, my staff wants to be able to email these TV ads to me.

Now, my opponent is not gracious enough to give us a hard copy of these things. We have to record them off the air. And so, what my staff does is record it off the air, convert that ad into an email, send me the email. Now, if that's flagged, they can't do that. So it's a public affairs program, this ad is, and I could cite many, many other examples.

So my question to you is I don't think your industry is harmed if we authorize the broadcast flag and do it in a way that says that news and public affairs programming is not eligible to be flagged, and I would just like your response to that.

Mr. GLICKMAN. I'm willing to talk to you about it. I would say this, that again, I want to make sure there is parallel treatment between cable, satellite and over-the-air broadcast, because if there's not, then, nature abhors a vacuum, and the vacuum will come in there. Second of all, I would say that there are an awful lot of video news services now out in the marketplace, as I'm sure you're aware much more than when I was in this business.

And so, the market has come in to fill that gap fairly adequately, but, you know, look: the heart of our position is we want nothing that will, in fact, cause the end of over the air television to occur during this time period.

Mr. BOUCHER. Okay; so we'll talk about it.

All right, thank you very much. Thank you, Mr. Chairman.

Mr. SMITH. Thank you, Mr. Boucher.

Does the gentlewoman from California have an additional question? She is recognized.

Ms. LOFGREN. I referred to it just briefly before my time ran out on the first set of questions, but I'd like to ask the Mr. Petricone, is that how you pronounce it?

Mr. PETRICONE. Petricone.

Ms. LOFGREN. Petricone.

On the so-called analog hole, you know something, I really hate that. It's like we're in the analog world right now, and I don't feel that I'm in a hole, but I'll just state that.

The bill refers to CGMS-A and veil technologies, and it also, in section 107, says the Patent and Trademark Office can adopt improvements to veil technology but that they shall be limited to adjustments or upgrades solely to the same underlying veil technology. Now, what strikes me about this is, number one, I don't know whether these technologies have been through some sort of industry standard setting process or how they arrive; whether this is just a Government mandate, and how we're going to envision technology innovation with this draft provision.

Do you have a comment on that?

Mr. PETRICONE. Sure; before I comment on that, I'd just like to comment on something Mr. Bainwol said. Mr. Bainwol and I agree

on something, which is the MyFi device he has in front of him is an incredibly cool device. It was introduced last year at the Consumer Electronics Show. The consumer response has been terrific. There has been no indication of harm to the recording industry. It's a great product.

Ms. LOFGREN. Well, maybe he'll hold it up again, and we can——

Mr. BAINWOL. Time shifting is really cool. Distribution is not.

Mr. PETRICONE. The down side, unfortunately, is that under this bill we're looking at today, that product would be illegal. Section A would permit recording only in increments of no less than 30 minutes' duration, and that records for longer than 30 minutes. And this is an issue our industry faces. Every time we try to introduced a product that allows consumers to use content in a new and more flexible way, like MyFi, like Slingbox and so on, we either face legislative hurdles or litigation, and frankly, it is becoming a very difficult environment for American innovators, and that is Exhibit A.

As far as responding directly to your question, our concern, I think, is a slightly different concern, and that is CGMS-A is widely known within the technology industry. It's been talked about; we understand it. Veil is largely unknown. We're not sure how it operates. We're not sure what the impact would be on plain and ordinary and regular uses of devices. I guess most critically, we have no idea what the licensing and intellectual property situation is and where it would be used, who would require licenses. And that is one of our most significant reservations about this bill.

Ms. LOFGREN. You don't know who holds the patent, if anyone?

Mr. PETRICONE. At this point, we do not know, so both from the patent side and the operational side, veil is a bit of a mystery to us.

Mr. GLICKMAN. May I disagree?

Ms. LOFGREN. Sure.

Mr. GLICKMAN. And not that I'm—there's more acronyms in this business than there are even in the Pentagon, but just so that you know, this didn't come out of the blue. There have been extensive discussions with a variety of working groups, technical working groups from the industry, and I'm talking about the technology industry, and as I've indicated, too, the largest companies, neither of whom, I understand, have an interest in these technologies; IBM and Thompson endorsed it as a way to try to deal with this problem.

And then, but what we've done in the legislation is we have thought that the appropriate people to try to issue the regs were the Patent and Trademark Office.

Ms. LOFGREN. Well, it's a very unusual role for the Patent Office to play and one I would be very—given the state of pendency at the Patent Office and the other problems they have, I would be very reluctant to assign something like that to the Patent Office at this point.

Mr. GLICKMAN. But we would be willing to work with this Committee to massage this if necessary, but the idea was that through a long period of time, a lot of technology companies said this is a way to——

Ms. LOFGREN. If I may, and maybe people can give some thought to this, I think we almost always do better if there's private sector standard setting, and there can be a multiplicity of standards, and let the market select which standard works best. And you could, I guess, have somebody certify it, but so far, that process has served, you know, all of us pretty well, and I would recommend that we think through alternatives such as that.

Mr. GLICKMAN. If I just—I don't disagree with you, but in some cases, especially in this interface between technology and content, as you know, because you represent so much of this, it's very, very difficult to get people together. Mr. Bainwol has talked about this. And in certain cases, the Government and the Congress have engaged in the areas to try to get some standards involved. We think this is a case that's appropriate to do that, because we're not very sanguine that this is going to happen without it.

Mr. BERMAN. Would the Gentlelady yield?

Ms. LOFGREN. Yes.

Mr. BERMAN. It seems to me back early this year, we had this bill that mandated a technology that allowed certain technology users to filter out frames from——

Ms. LOFGREN. So parents could take the smut out of movies?

Mr. BERMAN. I didn't vote for that legislation, offended by the idea of mandating a technology; I'm not sure that was the general position.

Ms. LOFGREN. It wasn't a mandate. It allowed the technology to be used, to correct the record.

Mr. BERMAN. Yes, it said if you're going to do something, you've got to do it this way.

Mr. BOUCHER. Parents had the option; isn't that correct?

Ms. LOFGREN. That is correct.

I will just say we've got a long ways to go on all of this. I am more than eager to work with everybody for a solution that works. But I do think that if the Government is going to start micromanaging the technology, we're heading down a road that will probably not be pleasing to us several years from now and that there are ways that maybe we can work through incentives and disincentives in some ways that will be useful that private standard setting might actually be helpful. And I appreciate the Chairman's allowing the second questioning.

Mr. SMITH. Thank you, Ms. Lofgren.

Thank you to all of the witnesses today as well. This has been very informative, obviously. There has been a little bit more difference of opinion on the part of the Members than is usual, just as there has been a difference of opinion on the part of the panelists as well, but it has all been informative, and we will move forward with your good expertise in mind.

Thank you all for being here, and the Subcommittee stands adjourned.

[Whereupon, at 4:37 p.m., the Subcommittee adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

STATEMENT OF THE HONORABLE HOWARD BERMAN, A REPRESENTATIVE IN CONGRES FROM THE STATE OF CALIFORNIA, AND RANKING MEMBER, SUBCOMMITTEE ON COURTS, THE INTERNET, AND INTELLECTUAL PROPERTY

There have been many positive developments in the copyright context during the past year. For example, The Family Entertainment Copyright Act was signed into law to provide better tools to prevent unauthorized distribution of content; the Supreme Court in the Grokster decision held that those that facilitate copyright infringement will be held directly accountable for their actions; and in response to judicial and legislative action, testimony at subcommittee hearing confirms that that universities are adopting anti-piracy technologies and instituting file-sharing education programs that are greatly reducing the amount of illegal file-sharing that takes place on campuses. But even with these many advances the fact that mass indiscriminate distribution of unauthorized copies is still an option allows piracy to remain a potent force.

In addition to providing us with movies, sound recordings and television programs, the core copyright industry accounts for over six (6) percent of the U.S. gross domestic product - which translates into employing more then 5.48 million workers and over $626 billion dollars. As a result, allowing rampant piracy to continue has the potential to severely harm the American economy. It is already a grave threat to all copyright creators. Therefore, we need robust protection of creativity to support everyone—from the most famous artists, to the unrecognized set designer; from the shareholders and executives of studios and R&D record companies, to the many thousands of hourly wage earners who work for them.

Perhaps what many fail to realize is that strong protection of intellectual property is also necessary to benefit the consumer. Without adequate safeguards for content, it is easier for those in the creative chain to fall prey to piracy, and this jeopardizes the authors' and creators' ability to continue engaging in additional and new creative endeavors and content creation. Clearly, with fewer original projects, in the end, the consumer will have less choices.

Our goal is to provide consumers with a first rate, rich and abundant selection of music and movies, in any format, at any time and at any place. This kind of accessibility to music and movies, however, creates a tension for content owners, who though they want to widely distribute their works, also need to protect the content of their works from unauthorized copying and distribution. Content owners do need to rely on the development of new and inventive technologies for distribution in order to provide the consumer with superior selection and accessibility. We must, therefore, be careful to not allow consumer considerations and technology inventors to trump our concerns for creators, and vice versa. There must be an appropriate balance which fosters creativity of new expression, innovation of new products and accessibility to creative works. However, with the seemingly daily advances in technology, the much needed equilibrium is off-kilter, leaning away from creators.

This hearing is much different that previous discussions of piracy. Many of the issues surrounding Peer-to-Peer file sharing involved clearly bad actors. But here, I believe, we are trying to bring the "good guys" into the process.

We all generally agree that creators must be adequately compensated for the value of their works. I suppose the question today is how. Truly adequate compensation would probably involve providing a full performance right for sound recordings. Truly adequate protection measures would also prevent abusive use of technology when redistributing copies in both the digital or analog realm.

The passage of time and design of new functionalities in devices has compelled us to re-examine the patchwork in the Copyright Act to determine whether some of the provisions need to be altered to address lack of suitable copy protection or

the need for limitations on retransmission mechanisms. Ideally content protection systems will be developed that are both secure for the distribution but are not intrusive to the legitimate expectation of consumers. However, as technologies become more sophisticated and gain more interactive functionalities, this balance may have to be recalibrated. We may also need to engage additional partners (Commerce) to help us.

The market is an exciting place right now. New technologies are emerging to help bring the consumer many additional options for how they receive their content - HD radio devices are being installed in cars, XM Satellite has a new service, many television sets contain broadcast flag technology and a number of players are currently in the market which can re-convert the analog signal to digital content. We must ensure that as each of these technologies is rolled out they are complying with the spirit of the copyright law - which at its core demands rightful compensation and adequate protection for the creator.

I look forward to hearing from the witnesses to describe the challenges they face - and the effect legislation would have on helping them meet those challenges.

STATEMENT OF THE HONORABLE JOHN CONYERS, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN

A creator's right to their intellectual property would be meaningless without the ability to enforce it. It is Congress's job to make sure that copyright owners are able to protect their content from theft, whether it is in analog or digital form.

It is worth repeating that copyrighted content serves as this nation's number one export. The sale of music, movies, games, books, and other media provides our economy with billions of dollars in annual revenues. Creators of such content depend on their ability to sell their work in order to employ thousands of artists, writers, and programmers in this country.

Unfortunately, the same technologies that enhance our educational and entertainment experiences are being used to deprive creators of their livelihoods. Several software programs were written for the sole purpose of allowing free access to copyrighted content. The copyright laws, in general, and the Digital Millennium Copyright Act, in particular, have helped combat these acts of theft.

While these laws have encouraged copyright owners to release their content in digital form, a new problem has arisen. Creators have developed technology to protect their work, but not all devices obey such technology. If creators cannot ensure the viability of their anti-piracy efforts, they will be resistant to transitioning away from analog content and toward digital content. Such resistance would be unfortunate but understandable; that is why we must ensure there are no loopholes in copyright law.

In closing, I would suggest that the need to plug loopholes in the law should not be used to trade on other proposals. Providing necessary content protection is directly related to the transition to digital; without such protection, there will be no digital content and no need for new electronic devices.

STATEMENT OF THE HONORABLE ADAM SCHIFF, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

JUDICIARY COMMITTEE
SUBCOMMITTEE ON COURTS, THE INTERNET AND INTELLECTUAL PROPERTY

INTERNATIONAL RELATIONS COMMITTEE
SUBCOMMITTEE ON THE MIDDLE EAST AND CENTRAL ASIA
SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS
SUBCOMMITTEE ON INTERNATIONAL TERRORISM AND NONPROLIFERATION

DEMOCRATIC STUDY GROUP ON NATIONAL SECURITY
CO-FOUNDER AND CO-CHAIR

SENIOR WHIP

ADAM B. SCHIFF
29TH DISTRICT, CALIFORNIA

WASHINGTON OFFICE:
326 CANNON HOUSE OFFICE BUILDING
WASHINGTON, DC 20515
(202) 225-4176
FAX: (202) 225-5828

DISTRICT OFFICE:
BRALEY BUILDING
35 SOUTH RAYMOND AVENUE
SUITE 205
PASADENA, CA 91105
(626) 304-2727
FAX: (626) 304-0572

WEB ADDRESS AT:
house.gov/schiff

Statement of Representative Adam B. Schiff

Judiciary Subcommittee on Courts, the Internet, and Intellectual Property
Oversight Hearing on "Content Protection in the Digital Age: The Broadcast Flag, High-Definition Radio, and the Analog Hole."
November 3, 2005

I'd like to thank Chairman Smith and Ranking Member Berman for convening this important hearing.

The digital age holds the promise of new and exciting experiences for consumers, including the delivery of high-quality content on technologically-advanced devices and gadgets. These new capabilities, however, will greatly facilitate illicit use if important preventive actions are not taken in the immediate future.

Illicit DVDs and other hard goods piracy already cost our film industry $3.5 billion annually. Not to mention the costs of online piracy of movies and songs – with over 60 percent of all Internet traffic in the U.S. attributed to peer-to-peer usage and over ninety percent of these networks consisting of unauthorized copyrighted files. The transmission of unprotected digital content will only further enable mass piracy – and of high quality copies of works.

I am pleased that the content industries have worked with technology companies to develop and implement a number of secure delivery systems with Digital Rights Management technologies. However, cooperation has been lacking in other areas and significant gaps still exist while we continue to lose valuable time.

I am concerned that while some of the stakeholders acknowledge that Internet redistribution of digital content and the analog hole are real problems, they have yet to embrace any of the solutions proposed in the discussion drafts. If the parties are not able to resolve the outstanding issues themselves, Congress may be forced to step in with a less than ideal resolution. The status quo, however, is unacceptable.

I am pleased that the basic outline of the Broadcast Flag has been approved in principle by a large and diverse group of consumer electronics and technology companies. Legislation permitting the implementation of these principles should be enacted quickly and with an immediate effective date to ensure that high quality television programming is protected. An effective date tied to the official digital transition down the road is unwise, and will only hurt consumers by rendering a number of legacy devices useless. Furthermore, attempts to include portions of H.R. 1201 -- a proposal that will legalize the hacking of copy protection measures – should be wholly rejected.

THIS STATIONERY PRINTED ON PAPER MADE OF RECYCLED FIBERS

The parties must redouble their efforts to find the right solution to the "analog hole." A specific technological solution has been proposed, and I am hopeful that discussions can achieve industry consensus. Congress should then act to require implementation of this solution in order to prevent high value content from being stolen, illegally copied, and transmitted.

Finally, the transmission of digital radio signals will provide for easier duplication of digital copies of music and the ability to "disaggregate" individual songs from a radio broadcast in order to avoid purchasing music on a per song basis. If left unchecked, this will undermine the widely successful per-song download services such as iTunes and the iPod. A number of methods for implementing a protection system for digital radio have been proposed, and action should be taken to prevent the inappropriate redistribution or disaggregation of such broadcast recordings on the Internet or to other devices.

As the prevalence of digital content continues to increase, we must step-up our vigilant oversight in this area. In particular, I urge the Chairman and Ranking Member to convene a second oversight hearing on this issue three months from now in order to examine whether the parties have engaged in good-faith negotiations to address these outstanding issues. If progress has not been made, Congress will be forced to intervene. We must work to ensure that consumers continue to receive the highest quality content and technologically-advanced devices, while guaranteeing that all creative work is protected and secure.

LETTER FROM FRED VON LOHMANN, SENIOR STAFF ATTORNEY FOR INTELLECTUAL PROPERTY, ELECTRONIC FRONTIER FOUNDATION

November 3, 2005

Dear Chairman Smith:

We understand that, in his testimony on the subject of "Content Protection in the Digital Age," scheduled for today before the Subcommitee on Courts, the Internet, and Intellectual Property, Dan Glickman states that the Electronic Frontier Foundation

> participated in an Analog Conversion Working Group where a broad consensus was reached on the need to address the analog hole problem and on the attributes a solution should have.

We write to correct the possible inference either that the Analog Reconversion Discussion Group (to which Mr. Glickman refers) reached a "consensus" supporting legislation, or that our participation in groups like ARDG indicates agreement with MPAA's legislative agenda.

The ARDG was limited by its charter to technical issues surrounding content reconversion. No statement was collectively agreed regarding the necessity to address "the analog hole problem," and no consensus on this principle was ever sought or gathered. As the ARDG Co-Chairs' Final Report states:

> The ARDG was formed as a discussion body with no specified procedures for assessing, judging, or determining consensus opinions. The process provided a valuable forum for discussion, collecting information and exchanging ideas. As it was a data gathering exercise, there is no implied or intended evaluation or opinion expressed about any of the technologies discussed or to the state of the industry overall.

The three consumer groups that attended ARDG put our concerns and criticisms on record in the ARDG Final Report, on-line at <http://www.cptwg.org/html/ARDG%20Final%20M-2-04.htm>.

Each group observed that public policy considerations were, by design, not discussed at ARDG. For example, Public Knowledge and the Center for Democarcy and technology observed that "otherwise legal uses of content could be technically precluded by the adoption of" legally-mandated watermark technology. We observed that "copyright holders have, in the past, trumpeted the existence of the 'analog hole' as a means of protected the public's rights to make copies for fair use and other purposes."

EFF has always opposed and continues to oppose attempts to place wide-reaching restrictions on digitization technology in general, and the specific technical and legislative approach taken by the draft Analog Content Protection Act in particular.

Sincerely,

Fred von Lohmann
Senior Staff Attorney for Intellectual Property

454 Shotwell Street · San Francisco, CA 94110 USA
+1 415 436 9333 +1 415 436 9993 www.eff.org info@eff.org

STATEMENT OF BROADCAST MUSIC, INC.

November 9, 2005

STATEMENT OF BROADCAST MUSIC, INC. ON "CONTENT PROTECTION IN THE DIGITAL AGE: THE BROADCAST FLAG, HIGH-DEFINITION RADIO, AND THE ANALOG HOLE"

BEFORE THE SUBCOMMITTEE ON COURTS, THE INTERNET AND INTELLECTUAL PROPERTY OF THE HOUSE COMMITTEE ON THE JUDICIARY

Broadcast Music, Inc. ("BMI") hereby submits this written statement for inclusion in the record for the oversight hearing on "Content Protection in the Digital Age: The Broadcast Flag, High-Definition Radio and the Analog Hole".

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 RIAA and the MPAA in protecting their copyrighted works from digital theft. BMI joined in support of the broadcast flag in the FCC rulemaking proceeding. However, BMI is concerned that the content protection legislation sought by the MPAA and the RIAA will unintentionally interfere with BMI's ability to perform its core business. Therefore, BMI proposes that Congress legislatively exempt PRO's monitoring activities from any civil and criminal penalties that would otherwise inhibit this necessary function and mandate reasonable access to the technology used by content owners to control redistribution of their transmissions once they are received by consumers. Songwriters' and

music publishers' interests should not be overlooked or trampled in a rush to encrypt, encode or otherwise limit the technical ability of consumers to access broadcast data. An exemption should be adopted for PROs for the purpose of licensing, recompensing and/or reinforcing music copyright rights. BMI believes that such an exemption is warranted because BMI's activities are designed to enforce and license copyrights, which are the same policy goals underpinning the legislation now before Congress.

STATEMENT OF BMI

Mr. Chairman, BMI commends you for holding a hearing on content protection in the digital age. "Content" protection is merely another way of referring to copyright protection. As you know, BMI is a key player in the digital copyright 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. As a result, the majority of BMI's affiliated songwriters are the ultimate "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 web

sites, 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 distributes all the license fees it receives as royalties to the individual songwriters, composers and music publishers it represents whose works were publicly performed, less overhead and reasonable revenues. BMI operates as a non-profit making business and does not retain earnings. Instead BMI returns all license fees collected, less operating expenses, as royalty distributions back to its affiliated songwriters, composers, and music publishers. 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 launched a new effort of collecting broadcast performance data centered around the patented technology of monitoring musical performances through the technique of "fingerprinting". This technology, known as BlueArrow[SM] creates a unique fingerprint of sound recordings using a sophisticated algorithm, and, by a secure transmission of the work, compares the fingerprint to a vast library of previously identified works for identification purposes. As discussed below, this secure distribution function is imperiled by the legislation currently before Congress.

In 2004 the Recording Industry Association of America ("RIAA") asked the Federal Communications Commission ("FCC") to adopt HD Radio content protection mechanisms and proposed two specific content protection regimes for digital audio broadcasts that would comply

with a set of "usage rules" proposed by the RIAA. Specifically, the RIAA proposed that digital audio broadcasts either be encrypted or protected by an audio protection flag similar to the Broadcast Flag regulation that had recently been previously adopted by the FCC for video programming content. The RIAA is concerned that HD Radio will become a source of rampant piracy unless there are controls on the ability to record and redistribute digital broadcasts. In response, the National Music Publishers' Association ("NMPA") also asked the FCC to refrain from authorizing the launch of new digital audio broadcasting services without adequate protection for the underlying musical works.

In their testimony last week, the RIAA is now proposing legislation through which Congress will give the FCC specific authority to adopt these rules. The RIAA's request for HD Radio protection comes on the heels of requests by the Motion Picture Association of America ("MPAA") for similar protection for broadcast television programming when it is broadcast digitally free over the air ("HD Television"). This protection took the form of the FCC's Broadcast Flag regulations and the FCC's companion Plug and Play regulations which protect cable programming. As you know, the U.S. Court of Appeals for the D.C. Circuit held that the FCC exceeded its statutory authority in promulgating the Broadcast Flag rules.

The MPAA is now proposing legislation to give the FCC the necessary authority for its Broadcast Flag rules and to adopt the FCC's rulemaking. In addition, MPAA appears to be seeking detailed legislation to address the "Analog Hole" problem which arises when analog television broadcasts are digitized and redistributed. In its testimony, the MPAA states that the Analog Hole and Broadcast Flag technologies were the products of inter-industry negotiations; however, PROs were not included in those working groups.

What all of these legal regimes have in common is 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, in part because of Congressional mandate, with content transmission systems migrating from analog to digital across many platforms. The transition to HD Radio and HD Television will doubtless be beneficial to all parties affected, especially music listeners. BMI fully supports the transition of the broadcast industry to digital transmissions. At the same time, BMI appreciates that authors and copyright owners of sound recordings and musical works as well as audiovisual works are concerned about the impact this transition will have on the markets for their works without suitable protection against piracy. Without a doubt, the conversion to digital broadcasting is introducing new challenges to creative industries interested in protecting their intellectual property. Therefore, 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 performing right organizations unless Congress acts to protect the right of PROs to monitor 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.[1]

BMI's primary concern in this proceeding is the protection of its affiliates' rights. In order to protect these rights and in order to make accurate royalty distributions BMI must *not* be technologically prohibited from freely monitoring analog and/or digital radio and television airplay. If Congress or the FCC were to adopt or approve HD Radio, HD Television or Analog Television content protection technology that mandates that broadcast receiving devices must respond to a digital rights management ("DRM") method such as an encryption technology or a broadcast flag (or to usage rules prohibiting redistribution), BMI should be permitted to decode or decrypt any such DRM method if necessary 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 terms to the technology used in these content processes for these purposes.

While BMI (and ASCAP) have engaged in negotiations with the MPAA over reasonable access to content and/or technical solutions to the problems presented by the technical and regulatory regimes that the MPAA is proposing here, these discussions have not yet borne fruit. 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 technology would be enormous. In the circumstances, a general statutory protection of PROs' activities provides the PROs a basis for successful current and future negotiations and/or engineered solutions.

[1] The Register of Copyrights has consistently referred to the PROs as working well. *See, e.g.*, "Copyright Office Views on Music Licensing Reform," Hearing Before the Subcomm. on Courts, the Internet, and Intellectual

CONCLUSION

Accordingly, BMI is concerned that if Congress legislates in the areas of Broadcast Flag, HD Radio, or Analog Hole, it should pay careful heed not to overlook or trample the rights of one group of copyright owners (e.g., songwriters, composers and music publishers) to the benefit of other owners (e.g., the movie companies and major labels). As drafted, the proposals on the table would do just that. Without a recognized statutory or regulatory exemption, whatever HD Radio and Broadcast Flag content protection regime Congress might adopt (or might direct the FCC to adopt) will hamper BMI's ability to monitor public performances and collect appropriate licensing royalties. Therefore, it is critical that any new statutes or regulations allow performing right organizations, such as BMI, an exemption for the purpose of monitoring HD Radio, HD Television and Analog Television broadcasts 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.

Property of the House Comm. on the Judiciary, 109th Cong., 1st Sess. 14 (2005).

LETTER FROM THOMAS M. BRACKEN, VICE PRESIDENT, WORLDWIDE MARKETING AND COMMUNICATIONS, THOMSON SERVICES SBU TO THE HONORABLE LAMAR SMITH, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS, AND CHAIRMAN, SUBCOMMITTEE ON COURTS, THE INTERNET, AND INTELLECTUAL PROPERTY

Thomson
Services SBU

3233 East Mission Oaks Blvd.
Camarillo, CA 93012
USA

phone +1 (805) 445-7230
fax +1 (805) 445-1141
www.thomson.net

Thomas M. Bracken
Vice President
Worldwide Marketing and Communications

The Honorable Lamar Smith
Chairman
House Subcommittee on Courts, the Internet, and
Intellectual Property
B-352 Rayburn House Office Building
Washington, D.C. 20515-6219

November 2, 2005

Dear Chairman Smith:

As your Subcommittee begins consideration of legislation to address the "analog hole," we wanted to let you know that this issue is important to both the entertainment industry and to electronics manufacturers.

With more than 8,000 U.S. employees, Thomson provides technology, systems and services to help content creators, content distributors and users of its technology realize their business goals and optimize their performance in a rapidly changing technology environment. We offer services and products under our Technicolor, Grass Valley, RCA, and THOMSON brands that help our clients reach millions of American consumers. Our products include billions of finished DVD movies that are sold throughout the world, the management of digital signals through dozens of broadcast and cable networks, and digital electronics products that are found in millions of consumer homes.

As an industry leader, we have worked on many cross-industry efforts over the years to bring the benefits of secure digital technology to consumers. As we make this transition, however, the legacy of unprotected analog connections creates a troubling problem known as the "analog hole." In essence, this "hole" allows for digital entertainment to be played in analog form and then digitized without the original content protection technology that insures that performers, writers, producers, and content owners are paid for their work. Thomson acknowledges that the "analog hole" is a problem and one that has not been readily solved by voluntary efforts.

Thomson has reviewed the "CGMS-A plus Veil" technical solution that has been proposed as an "analog hole" remedy and we believe this solution to be a viable option. We have also discussed the need for a legislative answer to this problem with the Motion Picture Association of America and believe that the proposed legislation is a good starting point for resolution of "analog hole" issues.

We look forward to your Subcommittee's review of the proposed legislation. We would be pleased to work with Committee staff to answer specific questions about the proposal.

Sincerely yours,

Thomas M. Bracken
Vice President

TECHNICOLOR grass valley RCA THOMSON

cc:
The Honorable Howard Berman, Ranking Democrat
Subcommittee on Courts, the Internet and Intellectual Property

The Honorable James F. Sensenbrenner, Jr., Chairman
Committee on the Judiciary

The Honorable John Conyers, Jr., Ranking Democrat
Committee on the Judiciary

STATEMENT OF THE NATIONAL ASSOCIATION OF BROADCASTERS

The National Association of Broadcasters hereby submits this statement to the House Judiciary Committee's Subcommittee On Courts, The Internet, and Intellectual Property. NAB supports the provisions of the discussion draft before the Subcommittee giving authority to the Federal Communications Commission to reinstate the DTV broadcast flag previously adopted by the Commission. In contrast, with regard to the portions of the draft related to copy protection for new digital audio broadcasts and receivers, NAB has reservations. As explained below, NAB is concerned that such anti-copying measures would almost certainly stall the digital radio transition without solving the unauthorized copying problems of the recording industry.

The DTV Broadcast Flag

NAB supports Congress' providing the FCC with specific authority to re-instate its regulations implementing a broadcast flag for digital television adopted in 2003. The DTV broadcast flag mechanism 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. Although the D.C. Circuit Court of Appeals ultimately decided that the FCC lacked authority to impose these regulations, the policy remains valid and should be implemented. This Subcommittee and the Congress as a whole should endorse legislation making the FCC's authority to promulgate regulations in this area clear.

The DTV flag will help insure that high value digital video programming will not migrate off free, universal, over-the-air television to platforms that can assure protection for such programming against widespread, unauthorized and indiscriminate internet distribution. Without such protection, NAB fears that content owners will withhold high-value productions from broadcast television and thus that the television medium that is available for free to all in this country will be reduced to carrying second-rate shows rather than continuing to be the envy of the world as it is today. The flag can preserve, for the benefit of all viewers, the ability of free television to attract and broadcast high quality content. Consumers win when today's system of free broadcast television remains robust and of the highest quality.

It is particularly important that the protection of the broadcast flag apply to all programming on broadcast stations, and thus NAB opposes any attempt to exempt local broadcasters' news or public affairs programs from the protection of the flag. While broadcasters freely and widely distribute their news and public affairs programming, they should retain the right to protect their copyrighted news and public affairs programs, which typically are the main or only product of local broadcasters. Unauthorized internet redistribution could well eviscerate the program exclusivity of news or public affairs programs of stations in local markets, as well as undermine the original broadcast and its accompanying revenue by re-distributing programs across time zones, thus allowing Internet viewing *before* the original show is seen on local stations in western U.S. markets. Such results would wreak havoc on stations' audience ratings and advertising revenues, not to mention their network relationships.

It would be ironic indeed if the DTV broadcast programming that is produced in the new digital format (whose claim to fame is high quality) by DTV broadcasters (who will have spent billions to convert to DTV) could wind up degraded by compressed re-distribution and distributed to the detriment of those stations and networks.

It is important to recognize that the DTV flag will not prevent consumers from copying broadcast footage for personal and family use. The flag is intended to prevent indiscriminate and widespread Internet distribution that could result in commercial copying and re-sale should not be facilitated by considering an exemption of broadcasters' news products from the protection of the broadcast flag.

In sum, NAB also supports Congress' giving the FCC authority to re-instate the DTV flag because the flag protects consumers' expectations about freely copying television content for personal use in the digital world.

Digital Radio and Copy Protection

In contrast to our support of the DTV broadcast flag, NAB has concerns about current proposals for digital radio copy protection. At the outset, NAB wants to make clear that it opposes piracy in all shapes and forms. Broadcasters are, themselves, victims of piracy of their content and their signals and support efforts to protect both, and to prosecute violators.

The Recording Industry Association of America's (RIAA) has expressed concerns regarding the possibility of indiscriminate recording and distribution of musical recordings from digital radio broadcasters. NAB here raises several points about RIAA's proposals. We see significant differences between the RIAA proposals and the DTV broadcast flag. We are concerned that these proposals could well slow new digital radio service yet fail to achieve meaningful benefit.

NAB is greatly concerned that developing and implementing a technical system to provide copy protection, particularly one involving encryption of the broadcast signal, would have an inevitable negative impact on the digital radio transition cur-

rently being rolled out. Arriving at a consensus on a technical copy protection mechanism would not be a simple or swift matter.

Most troubling is RIAA's suggestion of encrypting the digital radio signal. This is likely to 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 IBOC by manufacturers now ready to roll out IBOC receivers would harm broadcasters and threaten the public's receiving the advantages of digital radio. There has been as of yet 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.

Encryption of IBOC transmissions, even at this early stage, would likely result in obsolescence of millions of units of IBOC 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 IBOC 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 precludes 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 IBOC 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; here there is neither.

For the foregoing reasons, there remain serious questions about both the need for additional legislation to protect sound recordings with respect to over-the-air digital broadcasts and the methods by which that protection should be accomplished.

AMERICAN LIBRARY ASSOCIATION V. FEDERAL COMMUNICATIONS COMMISSION, 406 F.3D 689

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued February 22, 2005 Decided May 6, 2005

No. 04-1037

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

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. 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 C.F.R. 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 requirements 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.
>
> . . . .
>
> . . . [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.
>
> . . . [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").
>
> . . . .
>
> 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 1'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 accessibility 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. §§ 303(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.

ANALOG HOLE LEGISLATION DISCUSSION DRAFT 11/03/05

ANALOG CONTENT PROTECTION ACT OF 2005

109TH CONGRESS
1ST SESSION

To amend title 35, United States Code, to require certain analog conversion devices to preserve digital content security measures.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

TITLE I

Section 101. No person shall

(a) manufacture, import, offer to the public, provide or otherwise traffic in any –

(1) analog video input device that converts into digital form an analog video signal that is received in a covered format, or an analog video signal in a covered format that is read from a recording on an inserted storage medium, unless any portions of such device that are designed to access, record or pass the content of the analog video signal within that device: (i) detect and respond to the rights signaling system with respect to a particular work by conforming the copying and redistributing of such work to the information contained in the rights signaling system for such work in accordance with the compliance rules set forth in section 201 and the robustness rules referred to in section 202; and (ii) pass through or properly reinsert and update the CGMS-A portion of the rights signaling system or coding and data pertaining to CGMS-A and pass through the VEIL portion of the rights signaling system in conformance with such compliance rules and robustness rules; or

(2) analog video input device that does not convert into digital form an analog video signal that is received by such device in a covered format, or an analog video signal in a covered format that is read from a recording on an inserted storage medium, unless such device: (i) preserves, passes through or properly reinserts the CGMS-A portion of the rights signaling system or coding and data pertaining to CGMS-A and passes through the VEIL portion of the rights signaling system in conformance with the compliance rules set forth in section 201 and the robustness rules referred to in section 202, and (ii) outputs the analog video signal in a covered format.

(b) manufacture, import, offer to the public, provide or otherwise traffic in any technology, product, service, device, component, or part thereof, that—

(1) is primarily designed or produced for the purpose of modifying or causing an analog video input device to no longer conform to the requirements set forth in subsection (a);

(2) has only limited commercially significant purpose or use other than to modify or cause an analog video input device to no longer conform to the requirements set forth in subsection (a); or

(3) is marketed by that person or another acting in concert with that person with that person's knowledge for use in modifying or causing an analog video input device to no longer conform to the requirements set forth in subsection (a).

Section 102. Exceptions.

Section 101 shall not apply to a particular[1] product or device that:

(a) was legally manufactured and sold as new prior to the effective date of this title and is subsequently offered for sale or otherwise trafficked in, provided that such product or device has not been modified, subsequent to the effective date, so that a product that was previously in compliance with Section 101 is configured in a manner such that the modified product or device is no longer in compliance with that section;

(b) was legally manufactured and sold as new in compliance with Section 101 at the time of such sale and is subsequently modified, upgraded, or refurbished and offered for sale or otherwise trafficked in, provided that such product or device has not been modified or configured in a manner such that the product is no longer in compliance with that section; or

(c) is a device capable solely of displaying programs and such device cannot be upgraded or readily modified so as to incorporate transmission, redistribution or recording capabilities.

Section 103. Encoding Rules.

No person shall encode a program, or cause a program to be encoded, using the rights signaling system unless such encoding conforms to the following requirements:

(a) The rights signaling system may be encoded so as to prevent or limit copying, redistribution, or both, of prerecorded media, video on demand, pay-per-view, subscription-on-demand, and undefined business models that are comparable to any of the foregoing;

(b) The rights signaling system may not be encoded so as to prevent first generation of copies as are permitted under Title II of pay television transmissions, non-premium subscription television, free conditional access delivery, and undefined business models that are comparable to any of the foregoing, but the rights signaling system may be encoded so as to prevent or limit further copying of any of the foregoing (including comparable undefined business models) redistribution of any of the foregoing, or both;

[1] This is to clarify that the exception pertains to specific individual devices and not on a "model or version" basis.

(c) The rights signaling system may not be encoded so as to numerically limit copying as permitted under Title II of a non-conditional access broadcast transmission and undefined business models that are comparable to a non-conditional access broadcast transmission, but the rights signaling system may be encoded so as to prevent redistribution of any of the foregoing; and

(d) The VEIL portion of the rights signaling system may only be encoded in program formats described in subsection (a) until 12 months following the effective date as established in Section 106; thereafter the VEIL portion of the rights signaling system may be encoded in any and all program formats, provided, however, that under all circumstances if a person encodes a program or causes a program to be encoded with the VEIL portion of the rights signaling system, then that person shall also encode the program or cause the program to be encoded with the CGMS-A portion of the rights signaling system.

Section 104.

Whenever requested by an owner or authorized licensee of a live event or copyrighted audiovisual work to transmit the rights signaling system for a transmission of such live event or copyrighted audiovisual work, any person making a transmission of such live event or copyrighted audiovisual work shall include in its transmission the rights signaling system and shall not deactivate or alter without authorization the rights signaling system, provided that the rights signaling system is requested and applied in compliance with the encoding restrictions set forth in Section 103.

Section 105. Definitions.

For purposes of this title:

(a) "analog video input device" means a hardware device of a type distributed to individuals for use by individuals, and any firmware or software provided with, and specific to the operation of, that device, whether or not included with or as part of some other device, and any software or firmware that may be configured with or added to another device that is designed (i) to receive an analog video signal in a covered format or to read an analog signal in a covered format from a recording on an inserted storage medium, and (ii) to record or digitize such signal, or to alter such signal in a way that affects the state or passage of the rights signaling system if present in such signal. Analog video input device shall not include a professional device as defined below.

(b) "commercial advertising messages" shall mean, with respect to any service, program, or schedule or group of programs, commercial advertising messages other than (i) advertising relating to such service itself or the programming contained therein, or (ii) any advertising which is displayed concurrently with the display of any part of such program(s), including but not limited to "bugs," "frames" and "banners."

(c) "comparable" means, when used in connection with a defined business model and an undefined business model, that such undefined business model approximates such defined business model more closely than it approximates any other defined business model;

(d) "compliance rules" means the rules provided for in section 201;

(e) "conditional access delivery" means any delivery, whether analog or digital, of a service, program, or schedule or group of programs via any commercially-adopted access control method, including digitally-controlled analog scrambling systems, whether now or hereafter in commercial use, but conditional access delivery does not include any service, program, or schedule or group of programs, that is a further transmission of a non-conditional access broadcast transmission that, substantially simultaneously, is made by a terrestrial television broadcast station located within the United States, regardless of whether such further transmission is itself subject to a commercially-adopted access control method;

(f) "covered format" means any analog video format for which the rights signaling system is specified, provided that such specification is included on Table X in accordance with the procedures established pursuant to section 202;

(g) "defined business model" shall mean prerecorded media, video-on-demand, pay-per view, pay television transmission, subscription-on-demand, non-premium subscription television, free conditional access delivery, or non-conditional access broadcast transmission;

(h) "free conditional access delivery" shall mean a conditional access delivery, as to which viewers are not charged any fee, other than government-mandated fees, for the reception or viewing of the programming contained therein;

(i) "non-conditional access broadcast transmission" means a broadcast transmission, including an over-the-air transmission for reception by the general public using radio frequencies allocated for that purpose, whether analog or digital, that is not subject to a commercially-adopted access control method;

(j) "non-premium subscription television" means an analog or digital delivery of a service, or schedule or group of programs, including those which may be offered for sale together with other services, or schedule or group of programs, for which subscribers are charged a subscription fee for the reception or viewing of the programming contained therein, other than pay television and subscription-on-demand. Such term shall include, without limitation, basic cable service and extended basic cable service.

(k) "pay-per-view" shall mean an analog or digital delivery of a single program or a specified group of programs, as to which each such single program is generally uninterrupted by commercial advertising messages and for which recipients are charged a separate fee for each program or specified group of programs. The term "pay-per-view"

shall also include delivery of a single program as described above for which multiple start times are made available at time intervals which are less than the running time of such program as a whole. If a given delivery qualifies both as pay-per-view and a pay television transmission, then such delivery shall be deemed, for purposes of this title, pay-per-view rather than a pay television transmission;

(l) "pay television transmission" shall mean an analog or digital transmission of a service or schedule of programs, as to which each individual program is generally uninterrupted by commercial advertising messages and for which service or schedule of programs subscribing viewers are charged a periodic subscription fee, such as on a monthly basis, for the reception of such programming delivered by such service whether separately or together with other services or programming, during the specified viewing period covered by such fee. If a given delivery qualifies both as a pay television transmission and pay-per-view, video-on-demand, or subscription-on-demand then such delivery shall be deemed, for purposes of this title, pay-per-view, video-on-demand or subscription-on-demand rather than a pay television transmission;

(m) "prerecorded media" shall mean the delivery of one or more programs, in prerecorded form, whether in analog or digital format, on packaged media, such as VHS tapes and DVD discs or on other optical media or storage devices;

(n) "professional device" means a device that is designed, manufactured, marketed and intended for use by a person who regularly employs such a device for lawful business or industrial purposes, such as making, performing, displaying, distributing or transmitting copies of audiovisual works on a commercial scale at the request of or with the explicit permission of the copyright owner. If a device is marketed to or is commonly purchased by persons other than described in the foregoing sentence, then such device shall not be considered a "professional device";

(o) "program" means an audiovisual work, in analog or digital format, as defined in section 101 of title 17, United States Code, that is offered for transmission, delivery or distribution, either generally or on demand, to subscribers, purchasers or the public at large, or otherwise for commercial purposes;

(p) "redistribution" [consider whether need definition of redistribution to ensure that it clearly covers retransmission]

(q) "rights signaling system" means Content Generation Management System—Analog ("CGMS-A") supplemented by Video Encoded Invisible Light technology ("VEIL") ;

(r) "robustness rules" means the minimum robustness requirements established pursuant to section 202;

(s) "subscription-on-demand" means the delivery of a single program or a specified group of programs for which (i) a subscriber is able, at his or her discretion, to select the time for commencement of exhibition thereof; (ii) where each such single program is generally

uninterrupted by commercial advertising messages; and (iii) for which program or specified group of programs subscribing viewers are charged a periodic subscription fee for the reception of programming delivered by such service during the specified viewing period covered by the fee. In the event a given delivery of a program qualifies both as a pay television transmission and subscription-on-demand, then such delivery shall be deemed, for purposes of this title, subscription-on-demand rather than a pay television transmission.

(t) "undefined business model" means the transmission, delivery or distribution of a program or programs that does not fall within the definition of any defined business model;

(u) "video-on-demand" means a delivery of a single program or a specified group of programs for which (i) each such individual program is generally uninterrupted by commercial advertising messages; (ii) recipients are charged a separate fee for each such single program or specified group of programs; and (iii) a recipient is able, at his or her discretion, to select the time for commencement of exhibition of such individual program or specified group of programs. In the event a delivery qualifies as both video-on-demand and a pay television transmission, then such delivery shall be deemed, for purposes of this title, video-on-demand.

Section 106. Effective date.

This Act shall be effective 12 months from the date of its enactment, provided that if such date is earlier than 18 months from the date of first introduction of legislation containing this title, then this Act shall be effective 18 months from the date of first introduction of the legislation containing this title.

Section 107.

(a) If upon petition by any interested party the Patent and Trademark Office determines that the VEIL portion of the rights signaling system has become materially ineffective in a way that cannot be adequately remedied by existing technical flexibility in the embedding function of the VEIL portion of the rights signaling system, then the Patent and Trademark Office shall have the authority to adopt commercially reasonable improvements to the detection function of the VEIL portion of the rights signaling system in order to maintain the functionality of the rights signaling system as contemplated in this legislation. Such improvements, if adopted, shall be adopted by a formal, expedited rulemaking proceeding and shall be limited to adjustments or upgrades solely to the same underlying VEIL technology of the existing rights signaling system.

(b) In a rulemaking described in subsection (a), the Patent and Trademark Office shall encourage representatives of the film industry, the broadcast, cable and satellite industry, the information technology industry, and the consumer electronics industry to negotiate in good faith in an effort to reach agreement on such commercially reasonable improvements to the detection function of the VEIL portion of the rights signaling

system. The Patent and Trademark Office shall cause such negotiation process to be open and public in which all potentially affected parties are invited to participate through public notice. The Patent and Trademark Office shall cause any agreement for which there is substantial consensus of the parties on all material points to be published and a final rule adopted.

(c) In determining whether or not to adopt commercially reasonable improvements to the detection function of the VEIL portion of the rights signaling system, including an agreement of the parties as described in subsection (b), the Patent and Trademark Office shall consider the impact on content owners, content distributors, consumers, manufacturers, and competition generally in all affected markets resulting from the failure to adopt such improvements, as well as from the adoption of such improvements. As part of this determination, the Patent and Trademark Office shall inquire into the licensing terms under which improvements would be licensed with the presumption that the licensing terms shall impose no materially greater burdens than those terms already established for the VEIL portion of the rights signaling system, the intellectual property rights implicated by the improvements, and the effect of the improvements on interoperability of consumer audiovisual products (including consumer electronic and information technology products capable of receiving, displaying or recording programs). The Patent and Trademark Office shall require those parties participating or filing comments in this determination process to disclose any material intellectual property rights in improvements under consideration and shall impose a bar to making material misrepresentations in the process. The Patent and Trademark Office shall determine the appropriate timetable for implementation of any improvements adopted consistent with the provisions of this legislation, giving due consideration to the generally accepted manufacturing cycle of 18 months in case involving improvements that require material changes to the design or implementation of detectors. After issuance of a final rule, petitions for reconsideration shall be permitted by the Patent and Trademark Office.

Section 108. Civil Remedies.

(a) Civil actions. - Any person injured by a violation of section 101 may bring a civil action in an appropriate United States district court for such violation.

(b) Powers of the Court. - In an action brought under subsection (a), the court -

(1) may grant temporary and permanent injunctions on such terms as it deems reasonable to prevent or restrain a violation, but in no event shall impose a prior restraint on free speech or the press protected under the 1st amendment to the Constitution;

(2) at any time while an action is pending, may order the impounding, on such terms as it deems reasonable, of any device or product that is in the custody or control of the alleged violator and that the court has reasonable cause to believe was involved in a violation;

(3) may award damages under subsection (c);

(4) in its discretion may allow the recovery of costs by or against any party other than the United States or an officer thereof;

(5) in its discretion may award reasonable attorney's fees to the prevailing party; and

(6) may, as part of a final judgment or decree finding a violation, order the remedial modification or the destruction of any device or product involved in the violation that is in the custody or control of the violator or has been impounded under paragraph (2).

(c) Award of Damages.

(1) In general. - Except as otherwise provided in this title, a person committing a violation of section 101 is liable for either -

(A) the actual damages and any additional profits of the violator, as provided in paragraph (2), or

(B) statutory damages, as provided in paragraph (3).

(2) Actual damages. - The court shall award to the complaining party the actual damages suffered by the party as a result of the violation, and any profits of the violator that are attributable to the violation and are not taken into account in computing the actual damages, if the complaining party elects such damages at any time before final judgment is entered.

(3) Statutory damages. - At any time before final judgment is entered, a complaining party may elect to recover an award of statutory damages for each violation of section 101 in the sum of not less than $200 or more than $2,500 per device, product, component, offer, or performance of service, as the court considers just.

(4) Repeated violations. - In any case in which the injured party sustains the burden of proving, and the court finds, that a person has violated section 101 within three years after a final judgment was entered against the person for another such violation, the court may increase the award of damages up to triple the amount that would otherwise be awarded, as the court considers just.

(5) Innocent violations. -

(A) In general. - The court in its discretion may reduce or remit the total award of damages in any case in which the violator sustains the burden of proving, and the court finds, that the violator was not aware and had no reason to believe that its acts constituted a violation.

(B) Nonprofit library, archives, educational institutions, or public broadcasting entities. -

(i) Definition. - In this subparagraph, the term "public broadcasting entity" has the meaning given such term under section 118(g) of title 17, United States code.

(ii) In general. - In the case of a nonprofit library, archives, educational institution, or public broadcasting entity, the court shall remit damages in any case in which the library, archives, educational institution, or public broadcasting entity sustains the burden of proving, and the court finds, that the library, archives, educational institution, or public broadcasting entity was not aware and had no reason to believe that its acts constituted a violation.

Section 109. Criminal Offenses and Penalties.

(a) In General. - Any person who violates section 101 willfully and for purposes of commercial advantage or private financial gain -

(1) shall be fined not more than $500,000 or imprisoned for not more than 5 years, or both, for the first offense; and

(2) shall be fined not more than $1,000,000 or imprisoned for not more than 10 years, or both, for any subsequent offense.

(b) Limitation for Nonprofit Library, Archives, Educational Institution, or Public Broadcasting Entity. - Subsection (a) shall not apply to a nonprofit library, archives, educational institution, or public broadcasting entity (as defined under section 118(g) of title 17, United States Code).

(c) Statute of Limitations. - No criminal proceeding shall be brought under this section unless such proceeding is commenced within five years after the cause of action arose.

Title II

Section 201. Compliance Rules.

(a) Definitions.

Where a capitalized term is not defined in this section, the definition of the corresponding lower-case term in Section 105 shall apply.

(1) "Analog Video Signal" means a signal conforming to one of the specifications listed on Table X , as such list may be amended from time to time in accordance with the procedures established pursuant to Section 202.

(2) "Authorized Digital Output Method" means an output method listed on Table Y, as such list may be amended from time to time in accordance with the procedures established pursuant to Section 202.

(3) "Authorized Recording Method" means a recording method listed on Table Z, as such list may be amended from time to time in accordance with the procedures established pursuant to Section 202.

(4) "Bound Recording Method" means a method for recording content that effectively and uniquely associates such recording with a single Analog Video Input Device (using a cryptographic protocol or other effective means) so that such recording cannot be accessed in usable form by another product (except where the content of such recording is passed to another product as permitted under these requirements).

5) "Computer Product" means a device that is designed for or permits the end user to install a wide variety of commercially available software applications thereon, such as a personal computer, handheld "personal digital assistant" and the like, and further includes a subsystem of such a product, such as a graphics card.

(6) "Constrained Image" means an image having the visual equivalent of no more than (i) 350,000 pixels per frame (e.g. an image with resolution of 720 x 480 pixels for a 4:3 (non-square pixel) aspect ratio) and (ii) 30 frames per second, where such an image may be attained by reducing resolution, such as by discarding, dithering or averaging pixels to obtain the specified value, and can be displayed using video processing techniques such as line doubling or sharpening to improve the perceived quality of the image.

(7) "Copy Unlimited No Redistribution Content" means, with respect to an Analog Video Input Device, the visual content of an Analog Video Signal received by such device via transmission from a source external to that device, or by reading a recording of such signal from an inserted storage medium, with a rights signaling system encoding indicating "copy control restrictions not asserted but redistribution of the work is intended to be limited" as defined in Table W, or the result of combining such content with any content other than Copy One Generation Content or Copy Prohibited content, which content has not been passed from such device to an analog or digital output pursuant to Section 201(d) or recorded by such device using an Authorized Recording Method pursuant to Section 201(c), both of the foregoing in a manner permitted under the minimum robustness requirements established pursuant to section 202.

(8) "Copy One Generation Content" means, with respect to an Analog Video Input Device, the visual content of an Analog Video Signal received by such device via transmission from a source external to that device, or by reading a recording of such signal from an inserted storage medium, with a rights signaling system encoding indicating "one generation of copies may be made" as defined in Table W, or the result of combining such content with any content other than Copy Prohibited Content, which

content has not been passed from such device to an analog or digital output pursuant to Section 201(d) or recorded by such device using an Authorized Recording Method pursuant to Section 201(c), both of the foregoing in a manner permitted under the minimum robustness requirements established pursuant to section 202.

(9) "Copy Prohibited Content" means, with respect to an Analog Video Input Device, (i) the visual content of an Analog Video Signal received by such device via transmission from a source external to that device, or by reading a recording of such signal from an inserted storage medium, with a rights signaling system encoding indicating "no copying is permitted" as defined in Table W or (ii) content received by such device as Copy One Generation Content that has been recorded using a Bound Recording Method pursuant to Section 201(c)(2)(B), or (iii) the result of combining either of the foregoing content with any other content, which content, whether content described in clause (i), (ii), or (iii), has not been passed from such device to an analog or digital output pursuant to Sections 201(d)(1) or 201(d)(2).

(b) Detecting.

In relation to any Analog Video Signal received by an analog video input device subject to Section 101(a)(1), where such receipt is via transmission from a source external to that device or by reading a recording of such signal from an inserted storage medium, such analog video input device shall detect or cause to be detected the presence of the rights signaling system in such Analog Video Signal and, if the rights signaling system is present in such Analog Video Signal, shall determine, or cause to be determined, based on information conveyed by the rights signaling system, whether the content contained in such Analog Video Signal is Copy Unlimited No Redistribution Content, Copy One Generation Content, or Copy Prohibited Content as defined in this section and in Table Wl and shall abide by the relevant recording, output and passing rules set forth in subsections (c), (d), and (e), below.

(c) Recording.

(1) Copy Prohibited Content. An Analog Video Input Device shall not record or cause the recording of Copy Prohibited Content in digital form except for retention for a period not to exceed 90 minutes from initial receipt of each unit of such content, including retention and deletion on a frame-by-frame, minute-by-minute or megabyte-by-megabyte basis, using a Bound Recording Method, and provided that such content shall be destroyed or otherwise rendered unusable prior to or upon expiration of such period.

(2) Copy One Generation and Copy Unlimited No Redistribution Content. An Analog Video Input Device shall not record or cause the recording of Copy One Generation Content or Copy Unlimited No Redistribution Content in digital form except

(A) using an Authorized Recording Method listed on Table Z, in accordance with any obligations set out in Table Z applicable to such Authorized Recording Method or

(B) using a Bound Recording Method, in which case Copy One Generation Content so recorded becomes Copy Prohibited Content with respect to that device.

(3) Transitory Image. These requirements do not prohibit temporary storage of data for the sole purpose of enabling a function not prohibited by these requirements where such stored data (a) does not persist materially after such function has been performed and (b) is not stored in a way that permits copying or redistribution of such data for other purposes.

(d) Outputs.

(1) Analog Outputs. An Analog Video Input Device shall not pass, or direct to be passed, Copy Prohibited Content, Copy One Generation Content or Copy Unlimited No Redistribution Content to an analog output except

(A) as an Analog Video Signal that is passed with:
(i) in the case of Copy Prohibited Content, the rights signaling system encoding indicating "no copying is permitted," as defined in Table W and X;
(ii) in the case of Copy One Generation Content, the rights signaling system encoding indicating "one generation of copies may be made," as defined in Table W and X, or
(iii) in the case of Copy Unlimited No Redistribution Content, the rights signaling system encoding indicating "copy control restrictions not asserted but redistribution of the work is intended to be limited," as defined in Table W and X; or

(B) where such device is incorporated into a Computer Product, to a VGA output or to a similar output that was widely implemented as of May 1, 2001 that carries uncompressed video signals with a resolution less than or equal to a Constrained Image to a computer monitor.

(2) Digital Outputs. An Analog Video Input Device shall not pass, or direct to be passed, Copy Prohibited Content, Copy One Generation Content or Copy Unlimited No Redistribution Content to a digital output except

(A) to an output protected by an Authorized Digital Output Method listed on Table Y, in accordance with any obligations set out in Table Y applicable to such Authorized Digital Output Method;
(B) for the purpose of making a recording (pursuant to Sections 201(c)(1) and 201(c)(2)), where such content is protected, including during transmission, by the corresponding Authorized Recording Method pursuant to compliance and robustness rules applicable to such Authorized Recording Method.

(e) Passing via Other than an Output (Add-in Devices).

Where an Analog Video Input Device passes Copy Prohibited Content, Copy One Generation Content or Copy Unlimited No Redistribution Content from such Analog Video Input Device to another product, other than via an output pursuant to Section 201(d), it shall so pass such content protected in accordance with the minimum robustness requirements established pursuant to section 202.

Section 202. Implementing Regulations.

No later than 90 days after enactment of this Act, the Patent and Trademark Office, in consultation with the Register of Copyrights, shall adopt regulations to establish –

(a) minimum robustness requirements to ensure the content security preservation requirements set forth in section 201 are implemented in a reasonable method so that they cannot be defeated or circumvented by the use of generally available tools or equipment, and can only with difficulty be defeated or circumvented by use of professional tools or equipment;

(b) criteria and procedural rules to govern the certification and removal of Analog Signals in Table X, and approved Protection Technologies in Tables Y and Z; and

(c) arbitration rules necessary for purposes of resolving disputes under (c) above and for resolving disputes concerning comparable undefined business models under Section 103.

Section 203. Savings Clause.

The Patent and Trademark Office may implement regulations for analog conversion devices, provided that such rules are consistent with Title 17, United States Code.

ANALOG CONTENT PROTECTION ACT OF 2005

Section-by-Section Summary

The Analog Content Protection Act of 2005 is intended to close the "analog hole," which is a term that describes the removal of content security technical measures which occurs when digital content is converted to an analog format and then reconverted to a digital format. The analog hole prevents copyright owners from effectively using technical measures to prevent misuse of their property, thereby limiting the availability of entertainment and other content to consumers in digital formats. By "plugging" the analog hole, this legislation will encourage the distribution of digital content to consumers, including the development of new content delivery business models, and support the penetration of broadband networks over which digital content is delivered.

Section 101(a)(1) prohibits the manufacture and distribution of devices which convert video signals from analog to digital formats and that do not detect and respond to rights signaling information designating the degree to which the content may be copied and/or redistributed. Such devices must also retain specified rights signaling information on video signals passing through the devices. The rights signaling information referred to and specified in this Act is limited to CGMS-A, which is a widely available analog copy management technology, coupled with VEIL, which is a technology encoded invisibly into the active analog video picture and used to signal in a secure manner that the video content is copyrighted.

Section 101(a)(2) prohibits the manufacture and distribution of other devices which do not preserve the specified rights signaling information (i.e., CGMS-A plus Veil) contained in analog video signals.

Section 101(b) prohibits the manufacture and distribution of devices which circumvent the specified rights signaling technology referred to in subsection (a) and are intended for that purpose, have only limited commercially significant purposes other than to circumvent, or are knowingly marketed as a circumvention device. This anti-circumvention provision is similar to that contained in Section 1201 of the DMCA.

Section 102 exempts from the prohibitions in Section 101 devices manufactured or sold prior to the effective date of the prohibition, legally manufactured and sold devices that are upgraded or refurbished, and devices that are only capable of displaying video content and that do not copy or redistribute the content.

Section 103 establishes "encoding rules" which prohibit video content owners from using the specified rights signaling information to prevent copying and redistribution of certain types of programming. These encoding rules are similar to those contained in Section 1201(k)(2) of the DMCA. Content owners may prevent all copying and redistribution of pre-recorded content such as DVDs and content delivered by video-on-demand/pay-per-view premium program services, but must allow at least one generation of copying of content delivered by other types of delivery services including premium cable and satellite services, and must permit unlimited copying of over-the-air broadcast content.

Section 104 requires transmitters of live events or copyrighted audiovisual works, upon the request of the owner of the live event or copyrighted work, to include the specified rights signaling information in their transmissions.

Section 105 provides definitions of the technical terms used in this title.

Section 106 specifies that the requirements of this Act shall become effective 12 months from date of enactment or 18 months from the date of first introduction, whichever is later.

Section 107 provides a procedure for upgrading the VEIL rights signaling technology in the event it should become ineffective. Upon petition by an interested party the Patent and Trademark Office is directed to adopt commercially reasonable improvements in the VEIL technology. Open, public negotiations among interested parties is encouraged and the Patent and Trademark Office is required to adopt upgrades on which there is substantial consensus of the parties. In reaching decisions, it must consider the impact on content owners, content distributors, consumers, manufacturers and competition generally in all affected markets. Any upgraded technology must have licensing terms that impose no materially greater burdens than those already established for the existing VEIL technology.

Section 108 provides civil remedies for violations of Section 101. Injured parties may bring civil actions for temporary and permanent injunctions, impoundment of non-complying products and actual or statutory damages. Triple damages may be awarded for repeated violations and damages may be reduced where the court finds that violations were innocent. These civil remedies are modeled on those provided in the DMCA for violations of Section 1201.

Section 109 provides criminal penalties for willful violations of Section 101 for purposes of commercial advantage or private financial gain. Criminal penalties may be a fine of not more than $500,000 or imprisonment for not more than 5 years, or both, for first offenses, and a fine of not more than $1,000,000 or imprisonment for not more than 10 years, or both, for subsequent offenses. These criminal remedies are modeled on those provided in the DMCA for willful violations of Section 1201.

Section 201 specifies compliance rules with respect to detecting the specified rights signaling information, the recording of copy prohibited, one generation copy only and unlimited copy but no redistribution content (personal video

recording devices may make temporary copies of copy prohibited content to accommodate pause functions), and passing video content with the specified rights signaling information through analog and digital outputs.

Section 202 directs the Patent and Trademark Office to adopt minimum robustness requirements, criteria and procedural rules governing certification of compliant technologies and rules for arbitrating disputes no later than 90 days after enactment of this Act.

TABLE W Analog Hole Rights Signaling System Detection & Content Protection Response

	(Step 1) CGMS-A State Detected	(Step 2) RCI State Detected (redistribution control bit to be detected with CGMS-A)	(Step 3) VEIL Detected	Rights Assertion Description	Technical Content Protection Response
1	Not Present	Not Present	No	No copy or redistribution control is being asserted	No Technical Protection Applied
2	Not Present	Not Present	Yes	**INCONSISTENT STATE*** - Rights are being asserted so the CGMS-A and RCI must have been stripped**	VIEW ONLY – Protect as Copy Prohibited Content
3	(0,0) Copy Control Not Asserted	Not Present	No	No copy or redistribution control is being asserted	No Technical Protection Applied
4	(0,0) Copy Control Not Asserted	Not Present	Yes	**INCONSISTENT STATE*** - Rights are being asserted so the CGMS-A was probably tampered and/or the RCI was probably stripped	VIEW ONLY – Protect as Copy Prohibited Content
5	Not Present	(0) Redistribution Control Not Asserted	No	It appears that no copy or redistribution control is being asserted	No Technical Protection Applied
6	Not Present	(0) Redistribution Control Not Asserted	Yes	**INCONSISTENT STATE*** - Rights are being asserted so the CGMS-A and/or RCI were probably stripped or tampered	VIEW ONLY – Protect as Copy Prohibited Content
7	(0,0) Copy Control Not Asserted	(0) Redistribution Control Not Asserted	Yes	**INCONSISTENT STATE*** - Rights are being asserted so the CGMS-A and/or RCI were probably tampered	VIEW ONLY – Protect as Copy Prohibited Content
8	(0,0) Copy Control Not Asserted	(1) Redistribution Control Asserted	Detection Unnecessary	No numeric copy control is being asserted but redistribution control is being asserted	Protect as Copy Unlimited No Redistribution Content
9	Not Present	(1) Redistribution Control Asserted	Detection Unnecessary	It appears that no numeric copy control is being asserted but redistribution control is being asserted	Protect as Copy Unlimited No Redistribution Content
10	(1,0) Copy One Generation	Detection Unnecessary	Detection Unnecessary	Numeric copy control is being asserted and redistribution control is implied by CGMS-A state	Protect as Copy One Generation Content
11	(0,1) Copy No More	Detection Unnecessary	Detection Unnecessary	Numeric copy control is being asserted and redistribution control is implied by CGMS-A state	VIEW ONLY— Protect as Copy Prohibited Content
12	(1,1) Copy Never	Detection Unnecessary	Detection Unnecessary	Numeric copy control is being asserted and redistribution control is implied by CGMS-A state	VIEW ONLY – Protect as Copy Prohibited Content

*Content owners would be prohibited from encoding V-RAM in content upon which copy control and/or redistribution control is not being asserted.
**Except in the case of analog legacy computer monitor display signals, such as RGB VGA, that have no means for conveying CGMS-A or RCI, but where it would be consistent to treat these digitized display signals as VIEW ONLY.

BROADCAST FLAG LEGISLATION DISCUSSION DRAFT 11/03/05

BROADCAST FLAG AUTHORIZATION ACT OF 2005

109TH CONGRESS
1ST SESSION

To ratify the authority of the Federal Communications Commission to implement a Broadcast Flag.

Be it enacted by the Senate and House of Representative of the United States of America in Congress assembled,

SECTION 101. AUTHORITY

(a) 47 U.S.C. Section 303 is amended to add a new subsection (x) to read as follows:

(x) The FCC shall have the authority with respect to digital television receivers to adopt such additional regulations and certifications as are necessary, with the exclusive purpose of implementing the Report and Order in the matter of Digital Broadcast Content Protection, FCC 03-273, which was adopted by the Commission on November 4, 2003, effective January 20, 2004.

(i) RATIFICATION.-- The Report and Order in the matter of Digital Broadcast Content Protection, FCC 03-273 which was adopted by the Commission on November 4, 2003, effective January 20, 2004, and the Order in the matter of Digital Output Protection Technology and Recording Method Certifications FCC 04-193 which was adopted by the Commission on August 4, 2004, is ratified and shall become effective on {the DTV transition date/April 7, 2009}.

(ii) The Commission may reconsider, amend, repeal, supplement, and otherwise modify any such regulations and certifications, in whole or in part only for the purposes set forth in this Section (x).

Section 102. SAVINGS CLAUSE

The Federal Communications Commission may implement regulations for digital broadcast content protection for transmissions, provided that such rules are consistent with Title 17, United States Code.

HD RADIO LEGISLATION DISCUSSION DRAFT 11/03/05

HD RADIO CONTENT PROTECTION ACT OF 2005

109TH CONGRESS
1ST SESSION

To amend title 35, United States Code, to implement usage rules and to prevent disaggregation of certain audio content.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Title I. FEDERAL COMMUNICATIONS COMMISSION

Section 101. Federal Communications Commission. The Federal Communications Commission -

(a) has authority to adopt such regulations governing digital audio broadcast transmissions and digital audio receiving devices that are appropriate 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 necessary to address issues such as those under consideration in the proceeding on the Notice of Inquiry In the Matter of Digital Audio Broadcasting Systems and their Impact on the Terrestrial Radio Broadcast Service, MM Docket No. 99-325, provided, however, that adoption of any digital audio regulations pursuant to this section shall not delay the adoption of final operational rules for digital audio broadcasting; and

(b) may reconsider, amend, repeal, supplement, and otherwise modify any such regulations and certifications, including those identified in paragraph (a) of this section, in whole or in part for such purposes.

Section 102. Savings Clause.

The Federal Communications Commission may implement regulations for digital audio broadcast transmissions, provided that such rules are consistent with Title 17, United States Code.

TITLE II. SECTION 114 AMENDMENTS

Section 201. Title 17, United States Code, is amended as follows:

(1) by striking Section 114(d)(2)(B) and the preamble to Section 114(d)(2)(C)

(2) by redesignating Sections 114(d)(2)(A)(i) through (iii) as Sections 114(d)(2)(A) through (C).

(3) by redesignating Sections 114(d)(2)(C)(i) through (ix) as Sections 114(d)(2)(D) through (L).

(4) by striking in Section 114(d)(2)(H) ", except that the requirement of this clause shall not apply to a satellite digital audio service that is in operation, or that is licensed by the Federal Communications Commission, on or before July 31, 1998".

(5) by striking in Section 114(d)(2)(K) ", except that the requirement of this clause shall not apply to a satellite digital audio service that is in operation, or that is licensed under the authority of the Federal Communications Commission, on or before July 31, 1998, to the extent that such service has designed, developed, or made commitments to procure equipment or technology that is not compatible with such technical measures before such technical measures are widely adopted by sound recording copyright owners".

(6) by striking in Section 114(d)(2)(L) "shall not take effect until 1 year after the date of the enactment of the Digital Millennium Copyright Act and" and ", or in the case in which devices or technology intended for receiving the service provided by the transmitting entity that have the capability to display such textual data are not common in the marketplace".

(7) by striking Section 114(d)(2)(I) and inserting "(I) the transmitting entity takes no affirmative steps to authorize, enable, cause or induce the making of a phonorecord by the transmission recipient and uses reasonably available technology to prevent copying of the transmission, except for permitted recording;"

(8) by inserting after Section 114(j)(15) "(16) "Permitted recording" means recording of a performance licensed under this section where technological measures used by the transmitting entity and incorporated into the recording device –

"(A) permit recording only of specific programs, channels or time periods as selected by the user in increments of no less than thirty minutes duration, where no more than 50 hours of recorded material is stored at any one time, and recorded material is deleted or otherwise made inaccessible on a first-in, first-out basis;

"(B) do not permit recording or playback based on information concerning specific sound recordings, artists, genres or other user preferences;

"(C) do not permit the automated disaggregation of the copyrighted material contained in any recording of a transmission program;

"(D) effectively prevent access to the recorded material other than as described in this paragraph; and

"(E) do not permit the redistribution, retransmission or other exporting of recorded material from the device by digital outputs or removable media.