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NO. 04-1037

United States Court of Appeals
for the District of Columbia Circuit

AMERICAN LIBRARY ASSOCIATION, ET AL.,
Petitioners,

- vs. -

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,
Respondents.

OPENING BRIEF OF PETITIONERS

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INITIAL BRIEF
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GLOSSARY

ACRA	All Channel Receiver Act
BPDG	Broadcast Protection Discussion Group. A subgroup of the CPTWG, co-chaired by individuals affiliated with the Motion Pictures Association of America and Sony, Hitachi, Intel, Mitsubishi, and Toshiba (the "5C Companies"), that developed the Broadcast Flag proposal.
Broadcast Flag scheme	The framework created by the FCC's Broadcast Flag rules, which operate by allowing broadcasters to add a small amount of data, or "flag," to their DTV transmissions, which electronic devices must recognize and obey, prohibiting the transfer of the transmitted digital content over the Internet. Petitioners refer to this conglomeration of technology and regulatory requirements as the "Broadcast Flag scheme," "Broadcast Flag regime," or "Flag regime." Petitioners refer to the data that is added to the DTV broadcast signal simply as the "flag."
CATV	Community Area Television, the precursor to present-day cable television.
CCIA	Computer and Communications Industry Association
CPTWG	Copy Protection Technical Working Group. An inter-industry consortium, founded in 1996, that explores ways to protect digital content from copying.
DMCA	Digital Millennium Copyright Act
DTV	Digital television. DTV is similar to conventional, or analog, television, but is transmitted as digital data that allows more information to be carried in the same amount of

	electromagnetic spectrum. In this way, DTV allows for enhanced picture and sound quality.
DVD recorder	A consumer electronics device capable of recording video and sound content onto an optical disc—or Digital Versatile Disc ("DVD")—in digital format.
D-VHS	Digital Very High Speed. D-VHS is the format in which digital content may be recorded onto cassette tapes for viewing on digital VCRs. One of the Broadcast Flag-compliant technologies that the FCC recently approved is a D-VHS technology.
Downstream device	Consumer electronics devices—such as DVD recorders, third-generation cellular telephones, personal video recorders, iPods, and digital VCRs—that can access and manipulate digital content from a DTV or other device capable of capturing DTV broadcast signals, such as a personal computer equipped with a digital tuner card. Under the Broadcast Flag rules, downstream or "peripheral" devices may not access flagged content unless they will keep the content's protection secure and "robust."
EFF	Electronic Frontier Foundation
EPIC	Electronic Privacy Information Center
FCC	Federal Communications Commission
HDCP	High-bandwidth Digital Content Protection. One of the copy protection methods that the FCC recently approved as "compliant" with the Broadcast Flag regime.
HDTV	High Definition ("HD") Television. A type of digital television that has significantly enhanced picture and sound detail and quality, through the use of several times the number of pixels per frame than in standard digital television.

iPod	A handheld consumer electronics device equipped with varying amounts of computer storage, allowing consumers to store files containing digital entertainment content.
Legacy DTV tuners	Digital television tuners manufactured prior to promulgation of the Broadcast Flag rules that do not contain flag circuitry. Legacy DTV tuners are fully capable of receiving, translating, and passing on digital broadcasts marked with the flag, but will not give effect to the Broadcast Flag scheme's restrictions on distribution of content. Legacy tuners thus render the Broadcast Flag regime ineffective at preventing redistribution of DTV content over the Internet.
MPAA	Motion Picture Association of America
PC	Personal Computer
PDNE	Personal Digital Network Environment. PDNE is defined as the loose "network" of computers, televisions, and other electronics devices that a single consumer might use to access digital broadcast or entertainment content. The FCC declined in the Broadcast Flag order to resolve how flagged content could be used within a PDNE.
PVR	Personal Video Recorder. A consumer electronic device that can be connected to a television or other device equipped with a television tuner. PVRs, such as the name-brand TiVo, contain digital storage capacity that allows consumers to time-shift viewing of television programs, in much the same way as traditional VCRs but without the need for VCR cassette tapes and with the advantage of superior viewer maneuverability back and forth through the stored program.
Table A	An appendix to the BPDG Co-Chairs' Report intended to serve as a list of "approved"

technologies under the Broadcast Flag proposal. Initially left blank, the Co-Chairs' Report anticipated that technologies approved as compliant with the Broadcast Flag regime would be listed on Table A. It was expected that technologies created by the 5C Companies would be included.

TABLE OF CONTENTS

JURISDICTIONAL STATEMENT

In this petition, nine not-for-profit organizations representing consumer, research, educational, and library interests seek the Court's review of a final Order issued on November 4, 2003 by the Federal Communications Commission ("FCC"). *In re Digital Broadcast Content Protection*, 18 F.C.C.R. 23,550, 68 Fed. Reg. 67,599 (2003) ("*Order*"). The FCC asserted authority to promulgate the regulations pursuant to its "ancillary" jurisdiction, citing 47 U.S.C. §§ 151, 152, 154(i)-(j), 303, 307, 309(j), 336, 337, 396(k), 403, 521, 534(b), and 544a. Each of the petitioners participated in the rulemaking proceeding below and has members whose right to make use of copyrighted information will be adversely affected, and who will very likely have to pay higher prices for certain consumer electronics equipment, as a result of the Commission's *Order*. Petitioners timely filed a petition for review on January 30, 2004.

This Court has jurisdiction pursuant to 28 U.S.C. §§ 2342(1) & 2344 and 47 U.S.C. § 405. Venue properly lies pursuant to 28 U.S.C. § 2343.

QUESTIONS PRESENTED

1. Whether the FCC exceeded its statutory authority by requiring Broadcast Flag technology to be included in digital television ("DTV") receivers and other consumer electronic devices, despite the fact that this technology operates entirely outside interstate radio communications and Congress has specifically withheld authority from the FCC to control television receiver designs.

2. Whether the FCC acted outside its statutory authority by attempting to protect copyright holders through a mandate similar to that previously rejected by Congress in the Digital Millennium Copyright Act ("DMCA"), and by usurping the prerogative of Congress to create and define the scope of copyright.

3. Whether the FCC arbitrarily and capriciously promulgated the Broadcast Flag rule in the absence of substantial evidence that it is needed, and where the technology will not resolve the problem it is intended to address.

STANDARD OF REVIEW

The Court grants no deference agency statutory interpretations that are outside the agency's delegated authority. *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649-50 (1990); *Motion Picture Ass'n of Am. v. FCC*, 309 F.3d 796, 801 (D.C. Cir. 2002) ("*MPAA*"). "To determine whether the agency's action is contrary to law, we look first to determine whether Congress has delegated to the agency the legal authority to take the action that is under dispute." *Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001). Thus, deference under *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), applies only if (1) the agency's interpretations "have the force of law," *Christensen v. Harris County*, 529 U.S. 576, 587 (2000), and (2) they are reasonable interpretations of ambiguous provisions whose effect cannot be determined by their plain "language, structure, and purpose." *Dole v. United Steelworkers of Am.*, 494 U.S. 26, 35-43 (1990). If the agency interpretation is outside its delegation, it does not have the force of law,

and the agency may claim only "respect according to its persuasiveness." *United States v. Mead Corp.*, 533 U.S. 218, 221 (2001).

STATEMENT OF THE CASE

This case involves the FCC's assertion of power—without any express statutory grant—to require electronics manufacturers to add a governmentally-approved technological scheme into a wide array of consumer products. The technological scheme at issue—the Broadcast Flag—was conceived by a consortium of movie studios and others that seek to benefit from its use. The asserted aim of the technology is to prevent "indiscriminate redistribution" of "high value" DTV programs over the Internet.

The FCC, however, mandated the technology without any proof that DTV programs have ever been placed on the Internet, and in the face of undisputed evidence that the Broadcast Flag regime will be entirely ineffective at stopping any pirate armed with an existing ("legacy") DTV tuner that does not recognize the flag. The FCC equivocated from the beginning over whether Congress had empowered it to promulgate such a rule, but nevertheless decided that it could dictate, for "the first time," how consumer electronics used in millions of American homes should be designed.

STATEMENT OF FACTS

I. DIGITAL TELEVISION AND THE BROADCAST FLAG

The Broadcast Flag rule creates a regulatory and technological framework for controlling the redistribution of DTV broadcasts received over the air by consumers. DTV works in essentially the same way as traditional analog broadcasting, but because digital signals can be compressed more tightly on the electromagnetic spectrum, DTV allows for more information to be transmitted at a higher quality and resolution. As a consequence, DTV allows the broadcast of high definition television ("HDTV"). Recognizing this potential, Congress required that television broadcast licensees switch their signals to DTV by December 31, 2006, a deadline that may be extended depending on the penetration of DTV sets among consumers at that time. *See* 47 U.S.C. § 309(j)(14).

What is the Broadcast Flag scheme? [1] Essentially, it is a mechanism for expanding the copyright protection that parties such as movie studios and broadcasters enjoy for DTV broadcasts. It achieves this by acting like an invisible tattoo on a DTV signal that requires special glasses to reveal its presence. The "flag" itself is simply a small amount of data added to the DTV signal that cannot be seen, but that with the appropriate technology can provide commands to the receiving device. *Order* ¶ 13. Thus, if a DTV signal tattooed with this "flag" is

[1] The "Broadcast Flag regime," "scheme," or "rule" includes both the actual data, or "flag," that is tattooed onto the DTV signal, as well as the FCC rules requiring use of technology to recognize this flag.

received by a television equipped to recognize its presence, the television will read the flag and obey whatever command its data carry. *Id*. ¶ 40. On the other hand, if the same "flagged" signal is received by a DTV that is not equipped with flag-recognition technology, the set will display the accompanying video content, ignoring the flag. *See id*. Accordingly, the flag embedded in the signal cannot do anything unless the device receiving the broadcast signal is equipped with flag-recognition technology. *Id*. ¶¶ 13, 39.

The FCC *Order* requires all DTV tuners, personal computers, digital VCRs, DVD recorders, and personal video recorders that are capable of directly receiving DTV signals and that have digital outputs to incorporate into their architecture the flag-recognition technology by July 1, 2005. *Id.* ¶ 35. The rule prohibits these devices from sending flagged digital content to any other downstream device that is not "compliant": Once a television equipped to read the flag recognizes its presence, the television becomes unable to send the content outside its walls unless it does so through approved protection technology . *Id*. ¶ 13.

As a practical matter, this means that the flagged digital content is thereafter blocked from distribution over the Internet, over any other managed network outside the consumer's home system, and to any other electronic device such as a cell phone, personal computer ("PC"), digital VCR, or DVD recorder unless that device is itself equipped to preserve the "robustness" of the flag. *Id*. ¶ 5.

The Broadcast Flag thus has a wide sweep. It creates a whole new regime of technical and copyright-related regulation in one stroke: design regulation of electronic consumer equipment, including PCs; restrictions on use of the Internet; licensing requirements for downstream devices; and rules that will impede consumers from engaging in lawful uses of broadcast material. *See, e.g.*, Reply Comments of Philips Electronics North America Corp., FCC Docket 02-230, at 6 (Feb. 18, 2003) ("Philips Reply Comments"); Comments of Electronic Privacy Information Center, FCC Docket 02-230, at 3 (Dec. 6, 2002) ("EPIC Comments"); Comments of Verizon, FCC Docket 02-230, at 4-5 (Dec. 6, 2002).

The effects of the scheme are equally forbidding. It increases the cost of DTV sets and downstream devices alike. While the FCC characterized the cost of the Flag regime as "minimal," *Order* ¶ 20, and the record lacked conclusive quantitative data, one thing is clear: The Flag regime costs something, and the added cost will likely be borne by consumers, if it has not been passed through already by manufacturers anticipating the rule's onset.[2] Comments of Public Knowledge and Consumers Union, FCC Docket 02-230, at 6 (Dec. 6, 2002) ("Consumers Comments"); Comments of Veridian Corp., FCC Docket 02-230, at 12-13 (Dec. 6, 2002) ("Veridian Comments"). The encryption required to preserve the Flag's "robustness" in connection with downstream devices further compounds these costs. Comments of Electronic Frontier Foundation, FCC Docket 02-230, at

[2] *See Order* ¶ 19 n.45.

15-17 (Dec. 6, 2002) ("EFF Comments"). Indeed, the FCC acknowledged that "[t]here may be additional cost[s] to implement the flag to the extent manufacturers cannot or do not rely on existing content protection technologies." *Order* ¶ 14 n.29.

The Flag requirement also increases the complexity and diminishes the functionality of a broad range of consumer electronics devices. EFF Comments at 12-14; Consumers Comments at 15. Consumers buying DTVs in the future will have to determine whether their existing peripheral devices will be compatible with Flag-equipped devices, whether Flag-compliant devices from different manufacturers are interoperable, and what uses of flagged content will be permitted. For instance, any flagged broadcast material that is recorded onto a DVD will not be viewable on existing non-flag-compliant DVD players. *Order* ¶ 21 n.47; *see also* EFF Comments at 14.

Equally important, the Flag scheme affects consumers by indiscriminately restricting uses of broadcast programming, and does so regardless of whether these programs are entitled to copyright protection, or are even copyrightable. *Id*.; Comments of Computer & Communications Industry Association, FCC Docket 02-230, at 6 (Dec. 6, 2002) ("CCIA Comments"). For example, if the Flag rules stay in place, consumers will not be able to:

- Send any portion of a flagged DTV broadcast over the Internet for any reason;

- E-mail a DTV broadcast to an office, second home, or traveling family member;

- Use uncopyrighted or newsworthy materials, such as the State of the Union Address, that have been marked with the flag to make, illustrate, or rebut an argument in an Internet discussion group, website, or "blog";

- Share a clip of a DTV broadcast with a virtual classroom during a distance learning lesson; or

- Create original works using the DTV broadcasts in ways that have not yet been conceived. No one may be able to fully assess the extent of this loss, since the new rule will halt creativity and innovation before it can blossom.

II. DIGITAL CONTENT PROTECTION AND DEVELOPMENT OF THE BROADCAST FLAG PROPOSAL

The FCC Broadcast Flag rule is an outgrowth of a broader entertainment industry effort to expand copyright protection by controlling technology design. The broadscale emergence of the digital age and the Internet in the 1990s set the stage for a new phase in the historical debate of whether additional copy protection mechanisms should be adopted to address new technologies. Industry interests in particular sought to expand their rights under the existing copyright statute through technological mandates.

In 1998, Congress spoke on the matter in the Digital Millennium Copyright Act. Lobbied heavily by content owners to ban technologies designed to circumvent encryption and other methods of protecting content from copying,[3] Congress adopted a ban on such technologies. 17 U.S.C. § 1201(a). However,

[3] *See* Pamela Samuelson, *Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to be Revised*, 14 Berkeley Tech. L.J. 519, 523, 538-39 (1999).

Congress specifically declined to mandate digital copy protection technologies, directing that:

> Nothing in . . . section [1201] shall require that the design of, or design and selection of parts and components for, a consumer electronics, telecommunications, or computing product provide for a response to any particular technological measure.

17 U.S.C. § 1201(c)(3).[4]

Following the DMCA's adoption, content owners shifted their efforts to other forums. In 1996, they helped form the Copy Protection Technical Working Group ("CPTWG"), an inter-industry consortium composed primarily of representatives from the motion picture, electronics, information technology, cable, and broadcast industries, to explore ways to control the copying of DVDs and digital cable and satellite signals. In November 2001, CPTWG expanded its focus to consider the protection of DTV programs broadcast over the air. *See* Final Report of the Co-Chairs of the Broadcast Protection Discussion Subgroup to the Copy Protection Technical Working Group, at 2 (June 3, 2002) ("*BPDG Report*"); *see also Digital Broadcast Copy Protection*, Notice of Proposed Rulemaking, 17 F.C.C.R. 16,027, ¶ 2 (2003) ("*NPRM* ").

[4] The DMCA contains one narrow exception to this policy, which requires that analog VCRs conform to certain copy control technologies. 17 U.S.C. § 1201(k). "[T]his particular provision [was] included in the bill in order to deal with a very specific situation." H.R. Conf. Rep. No. 105-796, at 68 (1998). *See also* 17 U.S.C. § 1002 (1992 technology mandate for digital audio recorders). These narrow mandates demonstrate that Congress knew well how to impose such mandates if it so desired.

To this end, CPTWG formed a subgroup, known as the Broadcast Protection Discussion Group ("BPDG"), that was charged with evaluating technical DTV copy control proposals. *BPDG Report* at 4. On June 3, 2002, the BPDG's co-chairs, along with the MPAA and the "5C Companies," [5] issued a final report recommending a "proposed solution" to protect DTV transmissions from "unauthorized redistribution" by flagging content and protecting it with approved technologies to be included on a list it dubbed "Table A." *BPDG Report* at 18-21.

This report was not a consensus effort. A number of the BPDG's members vociferously complained that the process had been hijacked by the 5C Companies and MPAA. In the words of one: "The BPDG approach has been marred by repeated and credible claims of back-room dealing by a small number of parties who have excluded most participants from real decision making."[6] In fact, the proposal offered by the BPDG co-chairs arose directly out of 14-plus hours of *exclusive* negotiations among the MPAA and the 5C Companies—negotiations that began *the day after* the BPDG held a member-wide "two hour status meeting."[7] Thus, despite the fact that most of the BPDG's "meaningful negotiations occurred behind closed doors," the FCC's rulemaking here adopted for the entire nation a

[5] "5C" is a group of companies including Sony, Hitachi, Intel, Mitsubishi, and Toshiba that had developed technologies that would give effect to the Broadcast Flag.

[6] CCIA Comments on BPDG Report (Tab P-15 to *BPDG Report*); *see also* CCIA Comments at 5; Consumers Comments at 13-14; Comments of National Cable & Telecommunications Association, FCC Docket 02-230, at 7 (Dec. 6, 2002).

[7] Comments of Zenith, Thomson, and Philips Electronics on BPDG Report (Tab P-4 to *BPDG Report*).

regulatory regime that was drafted by essentially nine corporations, with only slight changes. Comments of Philips Electronics North America Corp., FCC Docket 02-230, at 16 (Dec. 6, 2002) ("Philips Comments").

III. THE NOTICE OF PROPOSED RULEMAKING

Two months after the BPDG released its final report, the FCC issued a five-page Notice of Proposed Rulemaking that requested comment on "whether a regulatory copy protection regime is needed within the limited sphere of digital broadcast television." *NPRM* ¶ 3. The NPRM asked "whether quality digital programming is now being withheld because of concerns over the lack of digital broadcast copy protection," *id*. ¶ 3, and "[t]o what extent . . . the absence of a digital broadcast copy protection scheme [would] . . . delay or prevent the DTV transition." *Id.* ¶ 3.

It is clear that the Commission planned from the outset to draw heavily on the *BPDG Report*. The NPRM cited a "consensus" in the co-chairs' report "on the use of a 'broadcast flag' standard for digital broadcast copy protection," *id*. ¶ 2, and recognized that it was motivated not by any activity expressly within the FCC's statutory authority, but by "*the importance placed upon digital broadcast copy protection by some industry participants*." *Id*. ¶ 3 (emphasis added). While highlighting the *BPDG Report*, however, the NPRM did not actually propose adopting the Broadcast Flag. It read more like a preliminary Notice of Inquiry, seeking suggestions regarding the different types of copy protection. *Id*. ¶¶ 3-5.

And unsurprisingly, in light of the absence of any specific congressional authorization, the NPRM also sought comment regarding a more fundamental question—whether there even was a "jurisdictional basis for Commission rules dealing with digital broadcast television copy protection." *Id*. ¶ 10.

The NPRM stirred a groundswell of opposition. Literally thousands of comments were filed, the vast majority of which expressed the concerns of consumers from across the country that any Commission-mandated copy protection regulations would affect their ability to lawfully copy, redistribute, and manipulate DTV programming.[8]

Many commenters, including Petitioners here, pointed out that the Communications Act ("Act") gives the FCC no power to control how entertainment content (digital or otherwise) is treated after it has already been received in consumers' homes, and that Congress had expressly withheld from the Commission plenary authority over television design. *E.g.*, Consumers Comments at 24-28; *see also* Philips Comments at 31-33.

For their part, the MPAA and a conglomerate of entertainment companies—who were bold enough to attach to their comments *draft Broadcast Flag*

[8] *See, e.g.*, Comment of Sally Jarvis (Centreville, Va.), FCC Docket 02-230 (Sept. 19, 2002) ("I believe that the broadcast flag would interfere with legitimate use of content."); Comment of Bryce Verdier (Sonoma, Cal.), FCC Docket 02-230 (Oct. 17, 2003) ("[The Broadcast Flag p]uts too much power into the companies to decide what [I] can and cannot save to watch later."); Comment of Brian Ristuccia (Tewksbury, Mass.), FCC Docket 02-230 (Broadcast Flag will create "unnecessarily complex and expensive equipment.").

regulations built on the BPDG proposal[9]—insisted that the Commission did have jurisdiction to impose the Flag under Section 336(b)(4) and its ancillary jurisdiction. *See* Joint Comments of the Motion Picture Association of America *et al.*, FCC Docket 02-230, at 29, 33 (Dec. 6, 2002) ("MPAA Comments") (citing 47 U.S.C. § 336(b)(4)).

In letters filed with the FCC, a few members of Congress supported the Commission's jurisdiction to impose the Flag regime. These views were based primarily on Section 336 of the Act, even though that section contemplates regulations exclusively for ancillary or supplementary services.[10] But a number of other members of Congress disagreed, warning that "[w]hile Title 47 grants authorities to the FCC in respect of broadcasting, *no express authority is provided to address the complex issues of intellectual property matters in general or digital broadcast copy protection in particular*." Letter from Sen. Patrick J. Leahy, Chairman, Senate Judiciary Committee and Rep. F. James Sensenbrenner, Jr., Chairman, House Committee on the Judiciary, *et al.* to Michael K. Powell, Chairman, FCC (Sept. 9, 2002) (emphasis added) ("Leahy Letter"); *see also* Letter from Sen. John McCain to Michael K. Powell, Chairman, FCC (Oct. 16, 2003) ("McCain Letter"). Likewise, in hearings before the House Judiciary Committee,

[9] *See* MPAA Comments Att. B.

[10] *See* Letter from W.J. "Billy" Tauzin, Chairman, House Committee on Energy and Commerce, to Michael K. Powell, Chairman, FCC (July 19, 2002); Letter from Senator Ernest F. Hollings, Chairman, Senate Committee on Commerce, Science, and Transportation, to Michael K. Powell, Chairman, FCC (July 19, 2002).

Representative Howard Berman stated: "The FCC doesn't have expertise in this particular area, and so I am opposed to the FCC attempting to interpret, regulate, or otherwise limit the exclusive rights of copyright owners in the course of its broadcast flag rulemaking." *Hearing before the Subcommittee on Courts, the Internet, and Intellectual Property*, 108th Cong. Serial No. 5, at 12 (Mar. 6, 2003).

With respect to the facts, the content owners failed to answer the essential question posed by the NPRM—whether there was a problem that needed to be solved. None of the movie studios, television producers, or networks came forward with any proof that they had withheld one single program from digital broadcasting because of a lack of protection, or of a single instance of Internet redistribution of HDTV programming. In fact, each of the major networks recognized that substantial amounts of digital broadcast content are already available absent any protection whatsoever.[11] Instead, to substantiate their claim that the Broadcast Flag was needed, the networks resorted to tendering threats about what they *would* do, as if DTV broadcasts were still a thing of the future. CBS owner Viacom was most blatant in its effort to coerce FCC action:

> [I]f a broadcast flag is not implemented and enforced by Summer 2003, Viacom's CBS Television Network will not provide *any* programming in high definition for the 2003-2004 television season.

[11] *See* Comments of National Broadcasting Co., FCC Docket 02-230, at 2 (Dec. 6, 2002) ("NBC Comments"); Comments of the Walt Disney Co. and the ABC Television Network, FCC Docket 02-230, at 2 (Dec. 6, 2002) ("Walt Disney Comments"); Comments of Viacom, FCC Docket 02-230, at 3 (Dec. 6, 2002) ("Viacom Comments").

Viacom Comments at 1; *see also* Walt Disney Comments at 1; NBC Comments at 2. That threat, however, was not carried out.[12]

With respect to the Flag's effectiveness, commenters including Petitioners pointed to the primary ways pirates can circumvent it, leaving only law-abiding consumers inhibited: using "legacy" DTV tuners not equipped with flag recognition technology, and converting broadcasts from digital to analog and then back to digital (the "analog hole"). Consumers Comments at 15-17; EFF Comments at 10-11; EPIC Comments at 2; Comments of the IT Coalition, FCC Docket 02-230, at 17 n.44 (Dec. 6, 2002). The content owners recognized these vulnerabilities. In the words of the Fox Entertainment Group, the Broadcast Flag scheme alone "doesn't really ring any bells, because there are so many work-arounds." Consumers Comments at 14 n.41 (quoting Fox). As the MPAA conceded, the Broadcast Flag is powerless to stop redistribution of DTV content, and can merely make it "more difficult." Reply Comments of MPAA *et al.*, FCC Docket 02-230, at 10, 15 (Feb. 20, 2003) ("MPAA Reply Comments"); *see also* EFF Comments at 7-11.

IV. THE BROADCAST FLAG ORDER

In November 2003, the FCC issued its final Order. Pushing aside all criticism, the Commission adopted the MPAA's proposed regulations essentially

[12] Indeed, the CBS website reveals that it continues to broadcast the vast majority of its primetime programming in high definition, *see* http://www.cbs.com/info/hdtv/index.php, even as DTVs have continued to be added to American households. Viacom Comments at 10.

wholesale,[13] and required inclusion of Broadcast Flag technology in all covered electronics equipment no later than July 1, 2005. *Order* at 42.

In announcing this rule, the Commission rejected the MPAA's argument that it had express authority to require the Broadcast Flag under Section 336—the one provision of the Communications Act that directly addresses DTV rulemaking—and instead claimed that it had the power to dictate equipment design under its implicit "ancillary jurisdiction." *Order* ¶¶ 27-29. Specifically, the Commission asserted that even though the Broadcast Flag scheme plays no part in the actual reception of a DTV signal, televisions and similar devices fall generally within the FCC's statutory grasp because they are part of "radio" or "wire communications" as defined by Section 152(a) of the Communications Act. *Id.* ¶ 29.

Based on this conclusion, the FCC declared that it could use its ancillary jurisdiction as an overarching power to regulate televisions irrespective of other congressional pronouncements, so long as the FCC finds the rule "necessary" to "lead the nation into a new era of free, over-the-air digital broadcasting." *Id.* ¶ 31. Thus, instead of finding any specific authorization by Congress, the Commission boldly claimed that the *failure* of Congress to expressly withhold power gave the agency the authority to promulgate the Flag rules:

> Congress [has never] indicate[d] any intent to limit the Commission's ability to exercise its ancillary jurisdiction over

[13] The only portion of the MPAA proposal not enacted by the Commission was the MPAA's criteria for selecting "approved" technologies. *See Order* ¶¶ 36, 59.

> manufacturers except, and only by implication, in the context of regulating manufacturers with respect to their activities that Congress specifically addressed by statute.

Id. ¶ 32.

The Commission consequently explained away statutory statements limiting its authority over manufacturers on the curious premise that they did not circumscribe the implicit authorization that the Commission now discovered:

> *Accordingly, Congressional admonitions and past Commission assurances of a narrow exercise of authority over manufacturers . . . are properly limited to the context of those explicit authorizations*.

Id. ¶ 32 (emphasis added).

The FCC also glossed over the question of whether the Broadcast Flag was even needed. The Commission explicitly recognized that current technology "inhibit[s] the redistribution of HDTV over the Internet," but nevertheless decided that a Broadcast Flag regime is necessary now because "indiscriminate" DTV redistribution would be possible at an undisclosed point "in the future," forcing "high value" content off broadcast television and onto cable and satellite. *Order* ¶ 8. The FCC then brusquely discounted all claims that the Broadcast Flag would be ineffective at protecting digital content from unlawful copying on the Internet. It concluded that the Broadcast Flag was necessary as a "speed bump" to decrease the number of individuals who can share broadcast material online. *Order* ¶ 21.

Commissioners Copps and Adelstein dissented in part from the final rule. They stated that the FCC rules reached too far in blocking consumers' right to

lawfully use broadcast material. *Order* at 65. The Broadcast Flag, Commissioner Adelstein explained, has an "unlimited" and "boundless" scope that upsets the balance of current copyright law by "mandating a technological protection regime that can be used to restrict the flow of content that is in the public domain, or is not subject to copyright protection for other reasons." *Id*. at 71-72; *see also id*. at 67-68 (Copps).

The FCC declined in its final Order to adopt any definite standards and procedures for approving "compliant" technologies,[14] instead initiating a Further Notice of Proposed Rulemaking. *Id.* ¶¶ 59-65. At the same time, the FCC announced that it would consider proposals under an interim "appropriate for use" standard. *Id*. ¶ 52. Recently, the FCC approved thirteen flag "compliant" technologies under these interim proceedings. *See In re Digital Output Protection Technology & Recording Method Certifications et al.*, FCC Order 04-193 (Aug. 12, 2004) ("*Approved Technologies Order*"). The FCC's action in that proceeding underscores the harm that can be done now that the Commission has asserted general jurisdiction over electronic devices based on copyright principles. Although the FCC repeatedly claimed in its final rule that the Broadcast Flag scheme would not interfere with consumers' ability to copy flagged programs for personal use, *e.g.*, *Order* ¶ 18, many of the technologies approved do exactly that.

[14] Another important unresolved issue was the definition of a personal digital network environment ("PDNE"), and what consumers will be able to do with flagged content within their PDNEs. *See Order* ¶¶ 61, 63.

SUMMARY OF ARGUMENT

The FCC has asserted jurisdiction it does not have. Bowing to a group of copyright holders led by the MPAA, the FCC promulgated a rule drafted by those corporate interests that will dictate design aspects of a vast array of consumer electronics—televisions, DVD recorders, PCs, TiVos, digital VCRs, iPods, and cell phones—for years to come. 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.

In fact, the FCC's rules here flout multiple explicit limits on its jurisdiction. In the All Channel Receiver Act ("ACRA"), Congress went out of its way to ensure that the FCC would not regulate broadly in issues of television receiver design, a pattern it has repeated throughout the Communications Act. Now, however, the FCC has claimed that the Communications Act is precisely what the ACRA says it is not—"a general precedent for regulation of manufactured products." In any case, in 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. Likewise, the 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.

The FCC has not only transcended its own authority, it has also trespassed on a domain clearly not its own—copyright law. The Constitution exclusively reserves for Congress the power to create and regulate copyrights and balance the interests of copyright holders with the interest of the public in making "fair use" of copyrighted, or freely using uncopyrighted, works. Yet the FCC has taken it upon itself to legislate a new protection mechanism for digital works, notwithstanding the Supreme Court's admonition in *Sony Corp. v. Universal City Studios*, 464 U.S. 417, 429-31 (1984):

> Sound policy, as well as history, supports our consistent deference to Congress when major technological innovations alter the market for copyrighted materials. Congress has the constitutional authority and the institutional ability to accommodate fully the varied permutations of competing interests that are inevitably implicated by such new technology.

Had the FCC required changes to the design of VCRs in the early 1980s to protect copyright holders, the Supreme Court might never have had the opportunity to decide that home video recording constitutes fair use. The FCC's *Order* would likewise preempt that debate here, giving movie studios, television networks, and broadcasters unfettered discretion to stop redistribution of their works through a technological mandate, effectively foreclosing many fair uses of those works in the process. Indeed, the Broadcast Flag upsets a specific congressional balance between copyright protection and public use. It requires the inclusion of a

governmentally approved technological scheme in consumer electronics when Congress already expressly declined to adopt such a mandate in the DMCA.

Nor are the Broadcast Flag rules reasonable or supported by substantial evidence, even putting aside their serious jurisdictional flaws. They were adopted without any proof that the problem they purport to address even exists, there being no record that HDTV was or could be unlawfully distributed via the Internet. Rather, the FCC relied entirely on the self-serving statements of the Flag proponents to "conclude" that without the regime in place, undefined "high value" content would migrate from broadcast television to cable and satellite. The FCC thus engaged in the height of unreasoned decisionmaking by putting in place expansive rules that burden consumers and, by the Commission's own admission, are not effective in stopping piracy of DTV broadcasts.

ARGUMENT

I. THE FCC LACKS STATUTORY AUTHORITY TO IMPOSE A BROADCAST FLAG MANDATE

Agencies only have the powers that Congress gives them. *Lyng v. Payne*, 476 U.S. 926, 937 (1986); *Atlantic City Elec. Co. v. FERC*, 295 F.3d 1, 8 (D.C. Cir. 2002). Accordingly, it is "treacherous" to find a delegation of administrative power in "congressional silence." *Girouard v. United States*, 328 U.S. 61, 69 (1946). "[W]e will not presume a delegation of power based solely on the fact that there is not an express withholding of such power." *Am. Petroleum Inst. v. EPA*, 52 F.3d 1113, 1120 (D.C. Cir. 1995). The FCC, as a "creature of statute,"

Michigan, 268 F.3d at 1081, is bound by this rule: It "literally has no power to act . . . unless and until Congress confers power upon it." *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986).

Here, the FCC concedes that it lacks specific statutory authority to require the Broadcast Flag scheme. Instead, the FCC appeals to its "ancillary authority to regulate equipment manufacturers," which it claims arises from its "general jurisdictional grant in Title I of the Communications Act" over interstate "radio communications." *Order* ¶ 29. The FCC's retreat to its so-called ancillary jurisdiction is conspicuous, not only because this is "the first time" the FCC has attempted to exercise ancillary authority over electronics manufacturers, *id*. ¶ 33, but because courts have consistently construed this authority as "limited" to television broadcasting—not as a nebulous expansion of its powers generally. *Bldg. Owners & Managers Ass'n Int'l v. FCC*, 254 F.2d 89, 95 n.7 (D.C. Cir. 2001); *accord California v. FCC*, 905 F.2d 1217, 1240 n.35 (9th Cir. 1990). In marked contrast, the Commission now reads its ancillary authority as extending into every area that involves a television receiver, if Congress has not sounded a clear "intent to limit the Commission's ability to exercise its ancillary jurisdiction" in the area. *Order* ¶ 32.

The FCC's characterization of its authority rides dangerously close to a claim that "because Congress has not expressly forbidden this assertion of federal jurisdiction, the agency may assert it." *Michigan*, 268 F.3d at 1085. The fact,

however, is that Congress has spoken in the area the FCC seeks to regulate. Even assuming that the FCC could properly rely on Title I alone,[15] 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. Equally crucial, Congress has explicitly delineated the FCC's authority to regulate television receivers—rejecting the possibility that the agency should have "involvement in questions of receiver design." *Elec. Indus. Ass'n Consumer Electronics Group v. FCC*, 636 F.2d 689, 694 (D.C. Cir. 1980) ("*EIA*").

A. The FCC Does Not Have Ancillary Jurisdiction, Because the Broadcast Flag Operates Outside the Scope of Title I

The FCC erred in determining that it had ancillary jurisdiction. On its face, the Communications Act sets forth the unambiguous boundaries of FCC jurisdiction. *See Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). Specifically, Section 152(a) gives the FCC authority over "all interstate and foreign communication by wire or radio."[16] 47 U.S.C. § 152(a). Section 153

[15] It is questionable whether Title I gives the FCC autonomous rulemaking authority in the first place. The Title I rulemaking provision, Section 154(i), has been characterized simply as a housekeeping provision limited to procedural rulemaking. *See North American Telecomm. Ass'n v. FCC*, 772 F.2d 1282, 1292 (7th Cir. 1985). Thus, for the FCC to properly engage in substantive rulemaking, it must do so under Title II (common carriers), Title III (broadcasting), or another substantive grant of authority. But the Broadcast Flag rules do not properly fall within any of these substantive grants.

[16] The statutes discussed by Petitioners are reproduced in the Addendum appended hereto.

defines "radio" and "wire communications" as

> The transmission [by radio or wire] of writing, signs, signals, pictures, and sounds of all kinds [by aid of wire, cable, or other like connection between the points of origin and reception of such transmission,] including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.

Id. §§ 153(33), (52). Thus, the FCC has jurisdiction over a subject only if it is (1) a transmission or a person engaging in a transmission, (2) by radio, wire, cable, or similar connection, (3) between two or more states.

The law is clear that unless a subject falls within the scope of the FCC's general statutory authority, it cannot assert ancillary jurisdiction to regulate in the area. As this Court has explained: "[T]here are limits to [the FCC's] 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).

The recent *MPAA* case illustrates the principle. There, this Court rejected the FCC's claim of plenary authority under Sections 151, 152(a), 154(i), and 303(r)—the same general jurisdictional and rulemaking provisions the Commission relies on in this proceeding—to require the use of "video description" of television programs. *Id*. at 798. The court ruled, however, that "program content was at the core" of these rules, and that Section 151 did not allow the FCC "to regulate program content." *Id*. at 804, 807. Consequently, the FCC's reliance

on its ancillary rulemaking authority under Section 303(r) was unlawful: "The FCC cannot act in the 'public interest' if the agency does not otherwise have the authority to promulgate the regulations at issue." *Id*. at 806.

Likewise, in *Illinois Citizens Committee for Broadcasting v. FCC*, 467 F.2d 1397 (7th Cir. 1972), the Seventh Circuit held that the FCC lacked ancillary authority over objects that interfere with television transmissions. The plaintiffs in *Illinois Citizens* asserted that FCC jurisdiction over construction of the Sears Tower in Chicago was "'necessary to protect . . . an adequate signal,'" because otherwise, the tower would create "multiple ghost images" on area televisions. *Id*. at 1398, 1399. The Seventh Circuit rejected plaintiffs' claim. When courts have allowed the FCC to assert ancillary jurisdiction, the court explained, they have "tread[ed] lightly even where the activity at issue easily falls within sections 151, 152(a), 153(a) and (b), as being 'communication by wire or radio.'" Accordingly:

> [W]e do not understand how the limited extension of the Commission's jurisdiction to a hybrid activity like CATV, *but one nevertheless within the category of a signal-transmitting facility*, justifies regulation of any and all activities that "substantially affect communications."

Id. at 1400, 1401 (emphasis added); *Building Owners*, 254 F.3d at 95-96; *see also Accuracy in Media*, 521 F.2d at 293-94 (no FCC jurisdiction over Corporation for Public Broadcasting because not engaged in actual radio communications).

Even in the case that first recognized the FCC's ancillary jurisdiction, which the FCC relies upon here, *United States v. Southwestern Cable Co.*, 392 U.S. 157

(1968), the Supreme Court ruled that the FCC had rightly asserted jurisdiction over community area television ("CATV") networks only after determining that the industry was directly engaged in "interstate . . . communication by wire or radio" as defined in Section 152. *Id*. at 168. Therefore, the six-member majority held, the FCC's assertion of jurisdiction was "*reasonably ancillary* to the effective performance of [its] . . . responsibilities for the *regulation of television broadcasting*." *Id*. at 157, 169, 178 (emphasis added).

For two reasons, the Broadcast Flag rules fall outside of the definition of interstate "radio" or "wire communications" as used by the *Southwestern* court and defined in Section 153. First, no transmission is involved; and second, while "interstate communications" covers "incidental" apparatus, it does not extend to apparatus that are used for the receipt of a transmission.

First, the FCC's assumption of ancillary jurisdiction here improperly asserts control over the digital "signals, pictures, and sounds" in a way that does not regulate interstate "radio communication." This is because, by definition, the Broadcast Flag scheme does not require televisions, computers, and other devices to "give effect to the redistribution control descriptor" until *after* the DTV broadcast has been completed. *Id.* ¶ 39. The FCC rules thus do not compel broadcasters to use the flag, and a DTV broadcast does not need to contain the flag for a television viewer to receive the broadcast. *Order* ¶ 37. Similarly, a DTV set does not need to include a flag to improve reception or avoid electrical interference

from other devices. *See id*. ¶ 21. Nor do the rules regulate communications occurring by wire over the Internet: The Flag restricts the use of all *content*—even if it is only within a consumer's home—*before* that content can be transferred to *any other* digital device, including the Internet. *Id*. ¶¶ 37-38, 40. As the rule's title indicates, the Broadcast Flag scheme is a "Digital Broadcast Television *Redistribution* Control"—not a "Digital *Broadcast* Control." *Id.* at 35.

In this respect, the Broadcast Flag resembles an assertion of FCC jurisdiction over an entire automobile simply because the car contains a satellite radio receiver. By the FCC's reasoning here, because that device can receive an over-the-air signal, the agency should have the authority to control not just the radio's outputs, speakers, and volume, but also the vehicle's doors, windows, and sunroof in order to prevent "redistribution" of the transmitted program outside the car in a way that could incentivize the broadcaster to shift its "high value" content to a more secure type of vehicle. The Broadcast Flag works in precisely this fashion. It forces both the receiving device and any other DVD recorder, TiVo, or other downstream equipment to "lock up" the digital content through encryption so that it cannot be "redistributed" outside those devices' walls absent FCC approval.

Granting the FCC such wide latitude as part of its purview over interstate "communication by radio" would render meaningless the boundaries established by the Act. *See, e.g.*, *Southwestern Bell Tel. Co. v. FCC*, 19 F.3d 1475, 1481 (D.C. Cir. 1994); *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 131 (1945). If the

FCC can mandate technology in DTV sets and downstream devices, what stops it from dictating the copies a fax machine can make once connected to a consumer's communications system? *Cf. California Indep. Sys. Operator v. FERC*, 372 F.3d 395, 398 (D.C. Cir. 2004). And if the FCC can compel the lockdown of digital content after transmission simply because it was once in radiowave form, then it can order broadcasters to use video descriptions because their broadcasts involve radio transmissions.

But the FCC did not have that authority in *MPAA* or *Illinois Citizens* just as it does not here. Indeed, if the Commission can require "downstream" and "peripheral" electronics devices located within someone's home—devices that undisputedly are not engaged in interstate communication—to obey the Flag, then the FCC's jurisdiction would know almost no bounds. Section 153's use of the term "instrumentalities, facilities, apparatus, and services . . . *incidental to such transmission*" would become superfluous, because the FCC could assert authority over any electronic device, skyscraper, mountain, or tree that can impact, alter, or influence radio communications. 47 U.S.C. § 153 (emphasis added). It is a fundamental canon of statutory construction that courts must give effect to every word in a statute, not disregard them. *E.g.*, *Kilburn v. Socialist People's Libyan Arab Jamahiriya*, 376 F.3d 1123, 1127 (D.C. Cir. 2004). The FCC's imposition of the Broadcast Flag breaches this rule.

Thus, notwithstanding the FCC's claim that its imposition of a technological mandate here is "narrow," *Order* ¶ 48, the Broadcast Flag rules are the very type of measure the Seventh Circuit warned would make the FCC's implied jurisdiction "far too broad." *Illinois Citizens*, 467 F.2d at 1400. Now, as the FCC again grasps to regulate outside the Communication Act's bounds, this Court's warning from *MPAA* controls once more: "Contrary to the FCC's arguments suggesting otherwise, [Section 151] does not give the FCC unlimited authority to act as it sees fit with respect to all aspects of television transmissions." 309 F.3d at 798.

Second, the Broadcast Flag rules fall outside the definition of "radio communications" for another reason. The FCC entirely premised the Broadcast Flag scheme on the ground that "'radio communication' and 'wire communication' are defined broadly to include not merely the transmission of the communication over the air or by wire, but also all incidental . . . 'apparatus'. . . that are *used for the 'receipt . . .'* of such transmissions." *Order* ¶ 29 (emphasis added). The Communications Act does not say this.

The text of the provision makes clear that the words "receipt, forwarding, and delivery of communications" are included in a parenthetical that defines transmission "services," not transmission "apparatus." Therefore, for the FCC to have jurisdiction over some apparatus, it must be incidental to "*transmission*"—not to "receipt." *Id*. (emphasis added). Section 153's legislative history leaves no doubt as to this reading. The relevant portion of Section 153 was added as part of

the 1934 Communications Act. In connection with this new language, the Interstate Commerce Commission ("ICC") submitted a report explaining that the word "receipt" modifies only "services." The ICC wrote:

> [P]erhaps the word "services" is in itself sufficient to connote 'receipt, forwarding, and delivery of massages' [sic] etc. *It seems preferable, however, that matters of such importance should not be left to the necessity for construction, but should be as definitely stated in the bill as they are now in the act.*

Hearings of Senate Interstate Commerce Committee, S. 2910, 73d Congress, at 201 (1934) (emphasis added).

In its quest to expand its own powers, the *Order* adopts a reading of the statute that ignores Section 153's plain language and clear legislative history, as well as the interpretive rule against boundless authority—as almost everything in this area can be said to be incidental to the receipt of communication. To meet its own ends, the FCC does precisely what the Act's legislative history says it should not. The Broadcast Flag rules improperly assert jurisdiction over television receivers generally when the Commission does not have that authority.

B. The Broadcast Flag Violates Congress' Express Decision to Limit FCC Jurisdiction Over TV Receiver Design

The FCC's rules also contravene Congressional intent by regulating in an area that the legislature has specifically marked off-limits. The courts have repeatedly struck down FCC regulations announced under its ancillary jurisdiction if the rules infringe on other provisions in the Communications Act, run contrary to the intent of Congress, or claim jurisdiction that the legislature has withheld. *See,*

e.g., *FCC v. Midwest Video Corp.*, 440 U.S. 689, 701 (1979) (*"Midwest II"*) (no ancillary authority to "impose common-carrier obligations" on cable operators because Act precludes such regulation of broadcasters); *AT&T v. FCC*, 487 F.2d 865, 872 (2d Cir. 1973) (no ancillary authority to regulate "private line" rates where ratemaking authority is "specific"); *AT&T v. Iowa Utils. Bd.*, 525 U.S. 366, 381 n.8 (1999) (no ancillary jurisdiction over intrastate communications); *see also New York v. FCC*, 267 F.3d 91 (2d Cir. 2001); *Illinois Bell Tel. Co. v. FCC*, 883 F.2d 104 (D.C. Cir. 1989).

Accordingly, in *MPAA*, this Court rejected the FCC's reliance on its ancillary rulemaking authority under Section 303(r) in part because Congress had "originally entertain[ed]"—but declined—giving the Commission the authority to promulgate video description rules. 309 F.3d at 806. Simply because a regulation purports to benefit the public, the *MPAA* court ruled, does not mean that it is lawful. "The FCC must act pursuant to delegated authority *before* any 'public interest' inquiry is made under § 303(r)." *Id*. (emphasis added); *see also, e.g.*, *Southwestern Bell*, 19 F.3d at 1481; *NARUC v. FCC*, 525 F.2d 630, 644 (D.C. Cir. 1976). "[I]n our anxiety to effectuate the congressional purpose of protecting the public," the Supreme Court has explained, "we must take care not to 'extend the scope of the statute beyond the point where Congress indicated it would stop.'" *United States v. Article of Drug Bacto-Unidisk*, 394 U.S. 784, 800 (1969) (citation omitted).

In this case, Congress has not only indicated where the FCC's authority "should stop," it has expressly declined to extend the agency's powers into the field the Broadcast Flag rules now seek to occupy—television receiver design.

1. Congress Has Withheld Authority from the FCC to Regulate Television Design

Congress carefully circumscribed the Commission's authority over television receivers in the ACRA, 47 U.S.C. §§ 303(s), 330(a). Enacted in 1962, the ACRA gave the FCC authority to require that televisions sold in interstate commerce are "capable of adequately receiving all frequencies allocated by the Commission to television broadcasting." *Id*. § 303(s). This specific delegation thus confined the FCC's jurisdiction over television design to the ACRA's narrow grant of authority. By giving the FCC this specific limited power, Congress denied the Commission any authority to exert general control over television receiver design. *API*, 52 F.3d at 1119 ("[An agency cannot] rely on its general authority to make rules necessary to carry out its functions when a specific statutory directive defines the relevant functions.").[17] As the Senate Report accompanying the ACRA unequivocally explained:

> It has been argued that [the ACRA] would be a dangerous precedent which might lead to congressional control of all types of manufactured products. [But i]t must be remembered that this [Act] involves a unique situation which *would not in any*

[17] *See also, e.g.*, *Sierra Club v. EPA*, 311 F.3d 853, 861 (7th Cir. 2002); *Am. Bus Ass'n v. Slater*, 231 F.3d 1, 4 (D.C. Cir. 2000); *Nat'l Min. Ass'n v. Dep't of the Interior*, 105 F.3d 691, 694 (D.C. Cir. 1997); *Martello v. Superior Court*, 261 P. 476, 478 (Cal. 1927) ("In the grants (of powers) . . . no other than the expressly granted power passes by the grant.").

> *way constitute a general precedent for such congressional regulation of manufactured products.*

S. Rep. 1526, 87th Cong., 2d Sess. 1, 7 (1962), *reprinted* 1962 U.S.C.C.A.N. 1873, 1876 (emphasis added).

Indeed, in *EIA*, the leading case on the ACRA, this Court adopted exactly this reading. At issue was an FCC requirement that all television receivers achieve a 12 decibel "noise figure," a technical improvement of UHF television reception over present levels that was not necessary for the sets to receive UHF channels. 636 F.2d at 693. This Court struck down the FCC's regulations as "'in excess'" of its regulatory jurisdiction. *Id*. at 696 n.13. The court held that while the ACRA bestowed the Commission with "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 broad-ranging FCC "receiver design regulation." *Id*. at 695, 696.

Last year, this Court reaffirmed the rule of *EIA* by upholding the Commission's authority to reach TV sets within the narrow confines of the ACRA. *Consumer Electronics Ass'n v. FCC*, 347 F.3d 291 (D.C. Cir. 2003) considered regulations requiring all televisions of a certain size to include DTV reception by 2007. In establishing these requirements, the FCC did not invoke its ancillary jurisdiction, even though the rule that TV sets must be equipped to receive DTV transmissions is much more closely related to the DTV transition than the rule at issue here. Indeed, the FCC did not cite its ancillary jurisdiction even as a

subsidiary ground, but relied exclusively on the ACRA, and was upheld by the Court in that reliance. The Court noted that while the *EIA* case rightly found the FCC's authority over televisions to preclude mandates "for enhanced reception," the DTV receiver rule fit squarely within its statutory power to require that televisions "adequately receive" all channels—including digital ones. *Id*. at 298 & n.3.

The ACRA's limits on FCC authority to regulate television design are made even more clear by the decision of Congress to reject a broader grant of authority. Originally, Congress had proposed to give the FCC the authority "to set 'minimum performance standards' for all television receivers shipped in interstate commerce." *EIA*, 636 F.2d at 694 (citation omitted). However, when this proposal came under "considerable criticism" for "allowing the Commission too great . . . an involvement in questions of receiver design," Congress modified the language to the form in which it was enacted. *Id*. Consequently, the ACRA was adopted on twin promises: Congress' directive that it was not "open[ing] the door to regulation of the design of television receivers extending far beyond the objective of all-channel tuners," 636 F.2d at 694 (quoting ACRA hearings), and the FCC's assurance that it would not use this new power to reach beyond achieving adequate channel reception:

> The FCC has assured us that the practical need for procuring authority which would permit effective enforcement of this legislation *would not involve the Commission broadly in the dealings of television set manufacturers*.

Id. at 645 (emphasis added).

Congress' decision in the ACRA that it did not want the FCC "broadly [involved] in the dealings of television set manufacturers" forecloses the Commission's assertion of ancillary jurisdiction here. *Id.*, at 695. The FCC's new rules impose the very type of controls on television manufacturers that Congress sought to avoid. The Flag rules require manufacturers to modify their reception devices so that once a signal is received, the device cannot function as it otherwise would unless its architecture includes FCC-approved technology. *Order* ¶¶ 39-47. Manufacturers thus lose control over at least two significant aspects of equipment design. They are forced to install content redistribution control mechanisms regardless of whether they would have done so absent FCC action, and they are divested of any meaningful choice over what type of control mechanism to use.

These constraints on manufacturer choice are exactly why Congress determined it does not want the FCC invoking "unbridled authority" over television design. *EIA*, 636 F.2d at 694. If the FCC can use its ancillary jurisdiction to compel electronics manufacturers to use Flag technology, it can also impose agency-approved standards for other technical measures. But as the *EIA* court recognized, Congress "carefully limited the Commission's authority" over television design specifically because it did not want to give the FCC the "'power to require that all sets be color sets, or have a certain size of picture tube or be made with a certain size speaker and so forth.'" *Id*. at 694, 696 (quoting *All-*

Channel Television Receivers: Hearings on S.2109 Before the Subcomm. on Communications of the Senate Comm. on Commerce, 87th Cong., 2d Sess. 59 (1962) (testimony of Rep. Kenneth A. Roberts)).

Accordingly, the Commission was wrong when it determined that Congress has not "limit[ed] the Commission's ability to exercise its ancillary jurisdiction over manufacturers." *Order* ¶ 32. It is hornbook law that "'Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language.'" *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987) (citation omitted); *Russello v. United States*, 464 U.S. 16, 23-24 (1983) ("Where Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended."); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 144 (2000). Here, just as in *MPAA*, after "originally entertaining the possibility of providing the FCC with authority to [regulate television receiver designs], Congress declined to do so." 309 F.3d at 806. Thus, by expressly abandoning language in the ACRA that would have given the FCC the type of authority it now claims, Congress cannot be deemed to have delegated these powers through the Commission's residual "ancillary" authority. Congress made a "conscious choice" not to allow the FCC to regulate television receivers broadly—and that choice must be obeyed. *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 527-28 (1982).

2. Section 303 Reinforces Congress' Decision to Restrict FCC Authority Over Television Design

Reading the FCC's ancillary jurisdiction to curb, rather than expand, the agency's powers over television equipment design also comports with the overarching statutory scheme. Congress' decision to limit the FCC's authority in the ACRA was not confined to that Act alone. Rather, in *every case* where Congress has given the FCC authority to regulate television design, it has been "scrupulously clear," giving the FCC unambiguous, specific statutory power. *MPAA*, 309 F.3d at 805. The FCC concedes: "We recognize that the Commission's assertion of jurisdiction over manufacturers of equipment in the past has typically been tied to specific statutory provisions." *Order* ¶ 32.

The FCC's jurisdictional grant to regulate television receivers appears in Section 303 of the Communications Act, which is appropriately entitled "Powers and Duties of Commission." 47 U.S.C. § 303. Subdivision (s) of this provision is the ACRA. *Id*. § 303(s). Subdivision (u) directs the FCC to require that televisions be equipped with closed captioning for the hearing impaired. *Id*. § 303(u). And subdivision (x) mandates that the FCC ensure all televisions 13 inches or larger are equipped with the "V-chip," which allows parents to "block" the "display" of programs they deem inappropriate. *Id*. § 303(x).

Together, these provisions establish a clear rule for FCC jurisdiction over television design. They create a regulatory mosaic under which Congress has declined to leave television design within the FCC's ancillary authority, and will

allow the FCC to regulate televisions only after giving it a specific conveyance of power to do so. Section 303(e) undergirds the point. The FCC's "control . . . over all the channels of radio transmission" is its core Title III duty. 47 U.S.C. § 301. But even when it comes to governing transmission apparatuses that use these channels, Section 303(e) grants the FCC authority only to regulate "the kind of apparatus to be used *with respect to its external effects and the purity and sharpness of the emissions*." *Id*. 303(e) (emphasis added). The fact that Congress delimited even FCC regulation of radio transmitters shows just how far from controlling the radio spectrum the FCC has strayed with these rules on copy protection.

Indeed, Congress has repeated this pattern of specific authorizations throughout the Act for other consumer electronics devices: When the FCC regulates household devices to ensure they can withstand radio interference, it does so under Section 302a. 47 U.S.C. § 302a. When the FCC promulgates regulations on cable and satellite "set-top boxes," which consumers use to view these services, it does so under Section 549. *Id*. § 549. And when the FCC requires making televisions "cable ready," it does so in accordance with Section 544A. *Id*. § 544A.

Thus, the FCC's authority over television design fits neatly within the "familiar maxim of statutory construction" *expressio unius est exclusio alterius*, or the "'mention of one thing implies exclusion of another thing.'" *Ethyl Corp. v. EPA*, 51 F.3d 1053, 1061 (D.C. Cir. 1995) (citation omitted). Repeatedly, where

Congress has wanted the Commission to have this regulatory authority, it has said so explicitly—necessarily "implying the exclusion" of any other jurisdiction over television design. *See, e.g.*, *MPAA*, 309 F.3d at 805.

In fact, in a recent case highly analogous to this one, *Independent Insurance Agents of America, Inc. v. Hawke*, 211 F.3d 638 (D.C. Cir. 2000), this Court ruled, on this very basis of *expressio unius*, that the Comptroller of the Currency improperly determined that all national banks could act as crop insurance agents. Under the National Bank Act, all of the banks at issue enjoyed broad authority to exercise "'all such incidental powers as shall be necessary to carry on the business of banking.'" *Id*. at 640. Because, however, Congress had given only banks in certain-sized towns authority to sell insurance, the panel unanimously ruled that *expressio unius* invalidated the Comptroller's decision. "Because § 92 . . . grants [some banks] the general power to sell insurance as an agent, reading § 24 (Seventh) to authorize the sale of insurance by all national banks transgresses . . . common sense." *Id*. at 643.

Similarly here, while the FCC may claim broad authority over interstate broadcasting, Congress has always given the FCC power to dictate television design in the specific measures like Sections 303(s), (u), and (x). Under *Hawke*, this is "inarguabl[e]" evidence that the Commission's authority has been constrained. *Id*. at 644. Indeed, Congress has not just limited the FCC's television design authority under the Act, it has established this authority in a very careful

way. Section 303 does not stand alone. This provision works in conjunction with Section 330, which bolsters Section 303's structure. Specifically, Section 330 creates a uniform national television market by generally banning the interstate sale of televisions that do not comply with FCC rules adopted under three enumerated statutory provisions—Sections 303(s), (u), and (x). *Id*. As a result, there can be no doubt that the FCC has violated *expressio unius* here. Congress has prescribed a specific method for the FCC to carry out each one of its statutory grants on television design, and the agency has now erected a regulatory scheme that perfectly parallels the statute—both dictating television receiver design and banning sales of televisions that do not comply, *see Order* ¶ 32—without any statutory authorization to do so. *E.g.*, *Int'l Bhd. of Teamsters v. ICC*, 801 F.2d 1423, 1430 (D.C. Cir. 1986) ("[I]t will not do for an agency to invoke the broad purposes of an entire act in order to contravene Congress' intent embodied in a specific provision."); *In re Permanent Surface Mining Regulation Litig.*, 653 F.2d 514, 523 (D.C. Cir. 1981) (en banc).

Nevertheless, the Commission intimates that *expressio unius* does not apply because the rule is "inappropriate in the administrative context." *Order* ¶ 32 n.85. This argument proves too much. Not only have courts used *expressio unius* in myriad disputes over agency authority,[18] but it is well-settled that this tool is at its

[18] *E.g.*, *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 188 (1978); *NextWave Personal Communications, Inc. v. FCC*, 254 F.3d 130, 152-53 (D.C. Cir. 2001); *Shook v. District of Columbia*, 132 F.3d 775, 782 (D.C. Cir. 1998); *Michigan Citizens for an Indep. Press v.*

"zenith" when it applies "in tandem" with the rule "that the Congress cannot be presumed to do a futile thing." *Hawke*, 211 F.3d at 645; *Halverson v. Slater*, 129 F.3d 180, 185 (D.C. Cir. 1997). In this case, the FCC's assertion that it has ancillary jurisdiction to require the flag irrespective of Section 303 violates this "no futility" rule. If the FCC already had the authority to regulate television design in any way it wanted under its ancillary jurisdiction, then Congress' subsequent awarding of this same type of television design authority under Sections 303(s), (u), and (x) "would have been completely useless." *Hawke*, 211 F.3d at 644; *see also Halverson*, 129 F.3d at 185; *Qi-Zhuo v. Meissner*, 70 F.3d 136, 139 (D.C. Cir. 1995).

In fact, what may be most striking about the FCC's rulemaking here is that, despite the vehement urging of the MPAA, other commenters, and members of Congress, the FCC does *not* rely on the one statutory provision that could possibly be construed to give it authority to promulgate these regulations. *See Order* ¶ 66. The only provision in the statute giving the FCC express DTV rulemaking authority is Section 336(a). That provision, however, is limited to the regulation of "ancillary and supplemental services"—pay services that broadcasters can provide through "multicasting" several digital channels at once. 47 U.S.C. § 336(a). For instance, Section 336(b)(4) gives the FCC authority to "adopt such technical and

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Thornburgh, 868 F.2d 1285, 1292-93 (D.C. Cir. 1992); *see also* 2A Norman J. Singer, *Statutes and Statutory Construction* § 47:24, at 321-22 (6th ed. 2000) ("[*Expressio unius*] has been found useful in the interpretation of all types of statutes, including legislation on . . . administrative bodies.").

other requirements as may be necessary" to "assure the quality" of the ancillary signal, and Section 336(b)(2) allows the FCC to ensure "such services [are] consistent with the technology or method designated by the Commission for the provision of advanced television services." *Id*. §§ 336(b)(1), (4). This is plainly the closest provision in the Act to giving the agency power broad enough to require the Broadcast Flag, albeit with respect to a subset of DTV broadcasts—those most likely to include premium programming. However, the FCC never relied on Section 336(a), presumably because it would limit the Flag solely to ancillary services and could not reach DTV sets generally. *See id*. § 336(a).[19]

Indeed, Congress' reason for doling out in small portions the power to regulate televisions and similar devices makes both historical and common sense. Consumer electronics are a significant sector in the nation's economy, and it is a sector that thrives on entrepreneurship and invention. Disrupting the innovation that drives such an important part of our national economy is not something Congress should be presumed to do blithely. Rather, the courts have long construed the Communications Act under a presumption that Congress does not act lightly where it might stifle competitive aims: "It is highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even

[19] Nor is Section 303(g) a refuge. *See Order* ¶ 30. The FCC has never claimed that the Broadcast Flag is a "new use" of radio, or is only "experimental." Nor is this the same situation as *Southwestern*. "Cable television was an unforeseen technological innovation at the time," and so granting the FCC flexibility might have been considered appropriate. *Accuracy in Media*, 521 F.2d at 294 n.22. With DTV, however, Congress has already specified how the FCC should facilitate the transition: through licensing.

substantially, []regulated to agency discretion." *MCI Telecomm. Corp. v. AT&T*, 512 U.S. 218, 231 (1994); *Brown & Williamson*, 529 U.S. at 147. As Congress itself reminded the nation in enacting the ACRA, this narrow authority must not "in any way" be considered a "general precedent for congressional regulation of manufactured products." 1962 U.S.C.C.A.N. at 1876.

So too here, the FCC should not be permitted to keep in place its expansive Broadcast Flag rules, which threaten to dictate not just how television manufacturers make their products—but also how computer companies, DVD manufacturers, and all other manner of electronic equipment firms operate—on an unfounded claim that it has always had this authority but has simply kept it secretly, silently hidden away. *See Order* ¶ 33. "Congress does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). Nor has Congress done so for television design. Congress has spoken, and it specifically withheld the authority the Commission asserts.

II. THE BROADCAST FLAG REGIME IMPERMISSIBLY CONFLICTS WITH COPYRIGHT LAW

The Supreme Court instructed in *Sony* that it is Congress that has the authority to define the scope of copyright and "fashion[] the new rules that new technology [makes] necessary. *Sony*, 464 U.S. at 429-31; *accord Metro-Goldwyn-Mayer Studios v. Grokster, Ltd.*, 380 F.3d 1154, 1167 (9th Cir. 2004). Had the

FCC done in the 1980s what it now claims the power to do, the Supreme Court might never have had the opportunity to pass on the legality of copying by VCRs in *Sony*. Thus, the Broadcast Flag rule cannot stand for an additional reason: it contravenes Congress' intent in enacting the copyright laws and Congress' prerogative to determine the appropriate scope of copyright protection. *Midwest II*, 440 U.S. at 708 (ancillary jurisdiction improper because rules thwarted congressional goal of broadcaster editorial discretion); *see also NARUC v. FCC*, 533 F.2d 601 (D.C. Cir. 1976).

A. The FCC's Action Contravenes Congress' Decision Not to Impose Copy Protection Mandates in the DMCA

While Congress enacted the DMCA to enhance copyright protection in the digital era, it refused to do so by requiring consumer electronics devices to respond to any particular protection measure. 17 U.S.C. § 1201(c)(3).

The legislative history of the DMCA explains that there is no "affirmative mandate requiring manufacturers of consumer electronics, telecommunications, and computing products to design their products . . . to affirmatively respond to any particular technological protection measure employed to protect a copyrighted work." H.R. Rep. No. 105-551, pt. 2, at 41 (1998); *see also* S. Rep. No. 105-190, at 30-31 (1998). The import of this policy, legislators explained, was that "[t]echnology and engineers—not lawyers—should dictate product design." 144 Cong. Rec. S9936 (daily ed. Sept. 3, 1998) (remarks of Sen. Ashcroft); *see also* 144 Cong. Rec. H7100 (daily ed. Aug. 4, 1998) (remarks of Rep. Klug). Not

surprisingly, when copy protection mandate proposals were discussed by Congress subsequently, they were criticized as inconsistent with DMCA.[20]

The Broadcast Flag rules ignore all of this, however, concluding that the no-mandates provision applies only to circumvention devices. *See* Order ¶ 41. But there can be little question that, just as Congress determined in the ACRA not to meddle with television receiver design, it made clear in the DMCA its intention not to require equipment design to respond to any particular technological copy protection measure.

B. The FCC's Action Upsets the Balance Between Copyrights and Fair Use

Congress has provided copyright owners with a variety of exclusive rights in their copyrighted work, including the right to reproduce, prepare derivative works, distribute copies, perform, and publicly display those works. 17 U.S.C. § 106. However, those exclusive rights "do[ ] not give a copyright holder control over all uses." *Fortnightly Corp. v. United Artists*, 392 U.S. 390, 393 (1968). They are subject to certain limitations, including the public's ability to make "fair use" of the work. *Id.* § 107. *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994) (citation omitted). The principle of "fair use" thus balances the exclusive

[20] *See, e.g.*, *Copyright Piracy Prevention and the Broadcast Flag*: *Hearing Before the House Judiciary Subcommittee on Courts, Internet and Intellectual Property* (Mar. 6, 2003) (testimony of Edward J. Black, President and CEO, Computer & Communications Industry Association), *at* www.house.gov/judiciary/courts030603.htm.

rights of copyright owners with the competing needs of the users of that information so as "not [to] put manacles upon science." *Id.*

The DMCA was not intended to alter the balance between copyright owners' exclusive rights and the public's ability to make fair use of copyrighted works. Rather, it explicitly retained the existing "fair use" regime in the digital context. 17 U.S.C. § 1201(c)(1); *see also* H.R. Conf. Rep. No. 105-796, at 75 (1998). Indeed, in the DMCA, Congress specifically sought to foster one of the very objectives the FCC now defeats. As the Senate Report put it, the DMCA strikes a balance that aims to "make available via the Internet the movies, music, software, and literary works that are the fruit of American creative genius." S. Rep. No. 105-190, at 2 (1998). Recently, the Federal Circuit recognized the continued vitality of the fair use doctrine in the digital realm, explaining that the DMCA does not "allow any copyright owner, through a combination of contractual terms and technological measures, to repeal the fair use doctrine." *Chamberlain Group, Inc. v. Skylink Technologies, Inc*., 381 F.3d 1178, 1202 (Fed. Cir. 2004).

Now the FCC has arrogated unto itself power to protect the copyright holders that solicited its help—a power that Congress never intended it to have, and a kind of protection that Congress in the DMCA specifically sought to prevent. The very nature of the Commission's Broadcast Flag mandate contradicts its insouciant assertion that "the scope of our decision does not reach existing copyright law." *Order* ¶¶ 9, 18. The basis for the Commission's view is its

assertion that the rule has nothing to do with copying, but involves redistribution control. *Id.* at 1 n.1. This is a distinction without a difference.

To be sure, the Commission took great pains to distance the Broadcast Flag from the idea of copyright, going so far as to rename the proceeding, which was based on the work of the *Copy* Protection Technology Working Group and had initially been captioned "Digital Broadcast *Copy* Protection." Indeed, it was only after commenters cried foul at the FCC's attempt to regulate copyright that the Commission effected a cosmetic name change of the rule, replacing "copy" with "content," and "copy protection" with "redistribution control." *See Order* n.1.

To no avail. Protections against redistribution are no less a trespass of copyright than protections against copying. Copyright law protects copyright owners from unauthorized redistribution as well as from copying, and exempts fair uses whether they involve redistribution or copying. It is this protection that the Commission has decided to expand, and this delicate balance between the interests of copyright-holders and those of the public that it has stepped in to tilt. Unquestionably, the rules will constrain further use of DTV broadcasts, to the benefit of the copyright holders and detriment of all other would-be users. That is the rule's purpose, and its proponents concede as much. *E.g.*, MPAA Comments at 6-8.

Nor is the Commission's distinction between copying and redistribution even accurate, since the technologies for implementing the Broadcast Flag can rely

on copy control, and many do. In the *Approved Technologies Order*, the FCC granted requests by several applicants for approval of content protection technologies that specifically achieved the goal of "content protection" by stopping copying. The D-VHS technology, for example, limits broadcast content to one generation of copies. *Approved Technologies Order* ¶ 75. The approved "HDCP" product explicitly prohibits copying. *Id*. Even the TiVoGuard technology, approved over fierce opposition by the MPAA, limits the number of devices that may receive protected DTV content. *Id.* ¶ 20. The Commission itself conceded:

> We continue to believe that . . . a redistribution control content protection system for digital broadcast television will not interfere with or preclude consumers from copying, using or redistributing digital broadcast television content as consistent with copyright law. *We recognize, however, that certain of the above-referenced content protection technologies and recording methods are unable to effectuate redistribution control through means other than copy restraints*.

Id. ¶¶ 75-77 (emphasis added). The FCC protests too much.

Because the Commission has promulgated its rule in phases, there are several unknowns. The extent to which copying of DTV broadcasts will be permitted, and how consumers will be able to use the broadcasts, is unclear. What *is* clear is that the Commission, by virtue of its Broadcast Flag rulemaking, has granted copyright holders an irrebuttable presumption that certain uses of DTV broadcasts are not "fair use" under the copyright laws.

Perhaps the best way to illustrate how far the FCC has gone is to return to *Sony*, where the Supreme Court determined that the noncommercial home use of

VCRs for "time-shifting" the viewing of over-the-air broadcasts was a "fair use." Congress set forth a series of four factors to be weighed on a case-by-case basis to determine whether a use is "fair." *Sony*, 464 U.S. at 476. The Broadcast Flag rule, however, usurps any court's case-by-case analysis of whether a particular use is "fair" by preventing many uses from ever occurring.

We may never know whether it would be a "fair use" for consumers to transfer DTV broadcasts via the Internet from their homes to other locations for later viewing, or whether it is "fair use" for one to manipulate such a broadcast to create and distribute a parody, or to annotate a political commentary in one's "blog." Many of these uses would not merely be made more difficult or less optimal by the Commission's rule—they would be foreclosed altogether. Because broadcasters are entitled to tattoo the Broadcast Flag onto DTV signals without oversight, it is also possible that uncopyrighted works, which the Constitution intended to live on in the public domain, will nevertheless be foreclosed to the public.

Indeed, even the simple "time shifting" use approved in *Sony* within a consumer's own home is jeopardized if the only "approved" technology is HDCP or similar regimes that allow no copying. Of course, the FCC will likely respond that it has approved other less limiting technologies. But that is true only for now. If the authority to adopt the Flag is upheld, there is no guarantee that this Commission or a later one would not exercise that authority to preclude all uses.

The warning signs are already apparent in the Commission's consideration of the TiVoGuard technology.[21] One Commissioner expressed concerns with TiVoGuard's lack of "proximity controls" over redistribution of broadcasts. *See Approved Technologies Order* at 51 (separate statement of Martin, C.). The jurisdictional finding underlying the decision below allows the Commission to reconsider and nix TiVoGuard and directly interfere with any number of consumer-friendly technologies for copying and disseminating content, thereby preempting a debate over the legality of these technologies in the domain in which it properly belongs—Congress.

III. THE FCC'S CONCLUSIONS THAT THERE WAS A PROBLEM, AND THAT THE BROADCAST FLAG WOULD SOLVE IT, ARE ARBITRARY AND CAPRICIOUS

A. Standard of Review

The Court must set aside any of the FCC's factual findings, reasoning and conclusions that are "arbitrary, capricious, . . . or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Findings that are "devoid of needed factual support," *Ass'n of Data Processing Service Orgs., Inc. v. Bd. of Governors of the Federal Reserve Sys.*, 745 F.2d 677, 683-84 (D.C. Cir. 1984), or "'not supported by substantial evidence,'" *Pac. Legal Foundation v. Dep't of Transp.*, 593 F.2d 1338, 1343 (D.C. Cir. 1979) (citation omitted), are arbitrary by definition. "Substantial evidence" is more than "some" evidence; it means sufficient evidence that a

[21] The more popular TiVo digital recorder itself has not yet been considered for approval by the Commission.

reasonable mind would find adequate to support a conclusion. *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). The Court accordingly conducts a "'searching and careful'" review, *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35 (D.C. Cir. 1977) ("*HBO*") (citations omitted), "ensur[ing] that the [agency] engaged in reasoned decisionmaking." *Farmers Union Central Exchange, Inc. v. FERC*, 734 F.2d 1486, 1500 (D.C. Cir. 1984) (citations omitted).

B. The Problem That the Rule Is Supposed to Resolve Has Not Been Adequately Shown to Exist

There was not substantial evidence in the record to establish the existence of the problem the flag was adopted to remedy. A regulation that is "'perfectly reasonable in the face of a problem'" is "'highly capricious if that problem does not exist.'" *HBO*, 567 F.2d at 36 (quoting *City of Chicago v. FPC*, 458 F.2d 731, 742 (D.C. Cir. 1972)). The problem here, according to the FCC, is that the potential threat of indiscriminate redistribution of DTV broadcasts will cause "diversion of high quality digital programming," causing the "success of the DTV transition" to be threatened by the deterioration of "free, over-the-air broadcast television." *Order* ¶ 31.

In the record below, however, there was no more evidence to support these views than in *HBO*, where the Commission made rules based on a now-familiar refrain—that "high-value" programming would be "siphoned off" from broadcast television to cable. *HBO*, 567 F.2d at 32-33. The anti-siphoning measure in *HBO* lacked a reasoned basis because its underlying premise—that siphoning was a

"problem" that was likely to lead to the loss of broadcast programming—was not substantiated by the record. The FCC committed the same error here.

There was no evidence below of even a single instance where a high definition broadcast was redistributed over the Internet, or where "high-value" content was withheld because of possible redistribution. Instead, the Commission's scant three-paragraph explanation relied exclusively on self-serving statements by the Flag proponents about what would happen in the future, ignoring that DTV broadcasts have already commenced.

Nor were the forward-looking jeremiads offered by the content holders concrete. Rather, the Commission relied on bald assertions that HD programming would be diverted from broadcast television if there was no Broadcast Flag and that content owners' distribution channels would be threatened. *See Order* ¶ 6. The one prediction that appeared to be more tangible was Viacom's indecorous threat to pull its HD service if the Broadcast Flag was not adopted. Comments of Viacom at 1, 12. Viacom soon recanted, however, leaving the Commission unable to invoke even this hollow ultimatum in adopting the flag.

The Commission also did not review any of the self-interested content owners' claims with anything approaching a critical eye. *See Archenar Broadcasting Co. v. FCC*, 62 F.3d 1441 (D.C. Cir. 1995). There was no

examination of how the content owners' distribution models function;[22] no analysis of how these models might be affected if redistribution became possible on the Internet; and no explanation even of the Commission's definition of "high value" content. In short, the only basis for the Commission's conclusion that programming would migrate was a mere assumption.

The Commission also relied on assumptions in deciding that there would be "mass trading" of broadcast DTV programs on the Internet. Indeed, the broadcast flag proponents conceded that there is not presently an Internet redistribution problem, especially considering the practical constraints of downloading massive HD files,[23] and the Commission acknowledged that these constraints "will inhibit" Internet redistribution "for the immediate future." *Order* ¶ 8. Commenters similarly debunked the speculation about faster download capability in the future. *See* Letter from Mike Godwin, Public Knowledge, to Marlene Dortch, Secretary, FCC, att. (May 23, 2003).[24] The Flag proponents' rejoinder was not to offer proof, but merely to urge the Commission to hurry up before the DTV transition reached

[22] Petitioners pointed out, for example, that consumers' present ability to record analog versions of first-run television series had not prevented record sales of the same programs in boxed DVD sets. *See* Memorandum from Consumers Groups to Media Bureau, FCC Docket 02-230, at 2-3 (Sept. 23, 2003). The Commission did not respond to these comments.

[23] *See, e.g.*, Consumers Reply Comments at 6-9; Philips Comments at 13-14; Raffi Krikorian Reply Comments at 14-15.

[24] *See also* MPAA Reply Comments at 7, 10 ("There is not yet a sufficient combination of receivers, broadband connections, and pirates to create a critical mass for the widespread unauthorized redistribution of broadcast DTV content."); Disney Comments at 3 (same).

a "tipping point" and the Broadcast Flag was "too late." *See, e.g.*, MPAA Reply Comments at 9; Viacom Comments at 11.

In the absence of any evidence of past redistribution, the Commission again resorted exclusively to prediction, forecasting that redistribution would become a problem at some future point. Its basis? A conclusory statement that *analog* broadcast content is present today on the Internet, and two press releases about Internet speed improvements. *Order* ¶ 8 & n.20. Such predictive judgments are not entitled to deference where, as here, they are not adequately substantiated. *See, e.g., Prometheus Radio Project v. FCC*, 373 F.3d 372, 409 (3d Cir. 2004) ("[T]he Commission needs to undergird its predictive judgment . . . to survive arbitrary and capricious review."); *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1051 (D.C. Cir. 2002) (same). Substantiation cannot be adequate where the thing predicted for the future has undeniably not happened in the past. The record shows that the future is now—much of the major broadcast networks' programming is transmitted in HD already. The Commission cannot reasonably hang everything on predictive judgment when solid record evidence contradicts its position. *E.g., Bechtel v. FCC*, 10 F.3d 875, 880-81 (D.C. Cir. 1993).

C. The Decision to Mandate the Broadcast Flag as a Solution Was Unreasoned

Nor did the record show that the Broadcast Flag is rationally connected to the alleged problem. *HBO*, 567 F.2d at 35 (agency must "demonstrate[] 'a rational connection between the facts found and the choice made'"). The Flag

regime is fraught with flaws that allow easy circumvention by pirates, even as regular consumers remain inhibited by its constraints. For example, the Flag has no effect whatsoever on those sophisticated enough to preserve legacy DTV tuners not equipped to recognize it, nor will it prevent the redistribution of content converted from digital to analog, and then back to digital. *See Order* ¶ 17. Yet, despite the content owners' recognition of these vulnerabilities, the FCC summarily dismissed indisputably more effective alternatives to the Flag such as source encryption for premium services,[25] blithely acknowledging that the Flag is a mere "speed bump" discouraging redistribution. *Id.* ¶¶ 14, 21. But there is no rational basis for a solution that hampers so many to create a "speed bump" (if that) for the few.

The Commission also impermissibly disregarded the burdens created by the Flag. The tangible and intangible costs of the Broadcast Flag—to ordinary consumers who must pay more for flag-equipped devices while suffering the loss of current and potential future fair uses, and to society because of the mandate's chilling effect on innovation—were barely addressed or vastly understated. In contrast, the Flag's unquestionable inadequacy means this burden cannot rationally be characterized as "minimal." *Order* ¶ 21. Imposing a rule whose benefit will be

[25] *See id.* at ¶¶ 23-24 ("[C]ontent owners do not question the technical effectiveness of an encryption system.").

almost zero and whose cost is more substantial than estimated does not constitute reasoned decisionmaking. *Farmers Union,* 734 F.2d at 1500.

CONCLUSION

For the foregoing reasons, the Court should vacate the Commission's Broadcast Flag rule as arbitrary and capricious and unauthorized by law.

Respectfully submitted,

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