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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.

REPLY BRIEF OF PETITIONERS

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INITIAL REPLY BRIEF
DECEMBER 2, 2004

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES*

Page

CASES

---

* Authorities upon which we chiefly rely are marked with asterisks.

FEDERAL STATUTES

Communications Act

LEGISLATIVE MATERIALS

FEDERAL REGULATIONS AND NOTICES

TREATISES AND ADDITIONAL AUTHORITY

GLOSSARY

ACRA	All Channel Receiver Act
Blogger	An individual, group or entity that operates a "web log." A web log, or "blog," is a website containing chronologically organized entries or postings, updated by the blogger. Each entry typically contains the main body, a date/time stamp, and title. The contents of each blog differ, depending on the interests and style of the author. Some common themes or topics of blogs include: news, commentaries, reviews, current events, and personal stories/diary-like entries.
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."
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.

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
FCC	Federal Communications Commission
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.
MPAA	Motion Picture Association of America
NAB	National Association of Broadcasters
TiVo	A brand of personal video recorder, a consumer electronic device that can be connected to a television or other device equipped with the television tuner. *See* "PVR" in Opening Brief Glossary.
UHF	Ultra High Frequency. A category of analog frequency used for television broadcasts transmissions.

VCR	Video Cassette Recorder

SUMMARY OF ARGUMENT

The FCC claims that Congress granted it "broad" ancillary authority 70 years ago to regulate television receiver design—a power the FCC never sought to exercise until now. Yet the FCC has not identified any provision of the Communications Act ("Act") giving it this authority. It has not explained how this purported authority is ancillary to any power Congress gave it to achieve the digital television ("DTV") transition. And it has not squared its assertion of authority with Congress' decision in the All Channel Receiver Act ("ACRA") to grant the FCC narrow authority to ensure that TV sets receive all channels while withholding the broader power over television sets that the Commission now claims.

The FCC argues that the ACRA was only meant to "clarify" its preexisting broad authority. However, neither Congress nor the FCC itself believed so when the ACRA was enacted; nor does this Court. The FCC testified that it was "powerless" to impose "all channel" requirements on TV receivers without a new law. Moreover, the ACRA's legislative history clearly states that Congress was "giving" the FCC this type of power for the first time. And this Court has found that Congress intended to "carefully limit" the FCC's authority, a point not addressed by the FCC's brief.

The FCC's and MPAA's challenge to *expressio unius* falters for the same reason. Having specifically enumerated when, what, and how the FCC may dictate consumer electronics design, Congress clearly marked the boundaries of FCC regulation in this field. Nevertheless, the Flag proponents assert that in each instance, Congress was merely underscoring that the FCC could act; yet Sections 302a, 303(e), and 303(s) plainly "grant" the FCC *new* authority. The FCC and MPAA essentially rely on the absence of a "general prohibition on device regulation" in the Act. MPAA Br. at 21. This reliance rings hollow, especially considering the cornucopia of regulations on devices that an imaginative agency could devise if the absence of such a ban had any meaning.

Indeed, even if the FCC had residual jurisdiction to regulate DTV receivers, the Broadcast Flag rules are not ancillary to any authority given the FCC. The FCC's reliance on Congress' command that the DTV transition must occur is undercut by the fact that Congress gave the FCC specific authority to accomplish this goal—the power to issue licensing rules, and the power to make rules with respect to ancillary and supplemental services. The FCC does not claim that what it did here falls within either of these two delegations of authority. The argument that the Broadcast Flag is necessary to achieve the DTV transition is further impeached by a glance at who makes it. Broadcasters, who have the most direct interest in the transition, have not intervened. It is left to a group of copyright

holders essentially unregulated by the FCC to argue altruistically that the rule is necessary to ensure that broadcasting remains a "viable business." *Id.* at 4, 16.

The FCC and MPAA also fail to explain why the FCC should be allowed to make new copyright policy when this is clearly Congress' exclusive province. They claim that the Broadcast Flag does not violate the no-mandates provision of the Digital Millennium Copyright Act ("DMCA"), but this is not Petitioners' argument. Rather, the provision is important as proof of the FCC's lack of authority: the FCC has trespassed into Congress' exclusive domain, restricting the fair use rights of the public by imposing a technological mandate even though Congress had declined to impose such a requirement. This is why the Supreme Court instructed that there must be "consistent deference to Congress when major technological innovations alter the market for copyrighted materials." *Sony Corp. v. Universal City Studios*, 464 U.S. 417, 429-31 (1984).

The FCC has created copyright policy by effectively foreclosing a number of otherwise fair uses of copyrighted works. The MPAA's reliance on *Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2d Cir. 2001) to counter this point is misplaced for a number of reasons. Among them, *Corley* assessed the constitutionality of a copyright law enacted by Congress, not the propriety of an unauthorized agency's attempt to make copyright policy; the FCC's rules would entirely foreclose certain fair uses, not just the "technically superior" manner of

making them; the analog equipment on which the MPAA relies for its argument that such fair uses would still be available may soon disappear after the DTV transition; and, equally important, if the FCC has the power to prohibit some copying of broadcast programs, it follows that it also has the power to prohibit all copying of such programs without being subject to the discipline of the fair use doctrine.

Finally, the FCC acted arbitrarily, and neither Flag proponent has substantiated the empty assumptions on which the Flag regime was built.

ARGUMENT

I. THE FCC HAS NO STATUTORY AUTHORITY TO IMPOSE A BROADCAST FLAG MANDATE

The FCC defends its assertion of jurisdiction with a chain of backward logic. The FCC contends that unless Congress has told the Commission it cannot regulate, it has the power to promulgate any rules that "effectuate the goals" of the Communications Act. FCC Br. at 23, 25 ("Br."); *Order* ¶ 32. The FCC claims that when Congress said it was not "'open[ing] the door to [FCC] regulation...of television receivers,'" it did not really mean that. Br. at 32. And the Commission insists that the Broadcast Flag rules' restriction of what consumers may do with DTV content *after* it is received into their homes actually regulates "the transmission of radio communications." Br. at 29. The FCC is wrong on every count.

As an initial matter, the FCC does not possess the unbridled power to propound any regulation "effectuat[ing] the goals and provisions of the Act." Br. at 23-24. Agencies do not have authority to take any action that promotes the aims of their statutes, because otherwise they "would enjoy virtually limitless hegemony"—"a result plainly out of keeping with *Chevron* and quite likely with the Constitution as well." *Ethyl Corp. v. EPA*, 51 F.3d 1053, 1060 (D.C. Cir. 1995); *see also, e.g.*, *COMSAT Corp. v. FCC*, 114 F.3d 223, 227 (D.C. Cir. 1997). The FCC's ancillary jurisdiction is not excluded from this rule. The FCC's authority under Title I is not "a general grant of power to take any action necessary and proper to those ends." *NARUC v. FCC*, 533 F.2d 601, 614 n.77 (D.C. Cir. 1976).

The FCC never explains where the Communications Act purportedly delegates the power to restrict what *household electronics devices* do with DTV *content* in consumers' homes. This lack of explanation is remarkable, particularly considering that according to the FCC, its power is the original 1934 legislation and not any provision in Congress' "'intricate and detailed'" plan to achieve the DTV transition. Br. at 25. And, even more implausibly, the Commission does not explain why in the 70 years that it supposedly had the authority it now claims, it has not once invoked it before.

The FCC attempts to rescue the Broadcast Flag with a plea for *Chevron* deference, but this is an empty gesture. Even if *Chevron* applied, the FCC does not identify an ambiguity in its statutory grant of jurisdiction, does not outline what statutory "interpretation" it is making, and does not explain why that unspoken interpretation merits deference. In fact, while *Chevron* grants deference only where a statute is ambiguous, *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 642, 649 (1990), the FCC's argument is that Congress has *unambiguously* delegated to it "broad" ancillary jurisdiction. Br. at 35.[1] The FCC cannot "bootstrap itself into an area in which it has no jurisdiction" simply by invoking *Chevron*. *Id.* at 650. The FCC is entitled to no deference at all when it has not been delegated the authority to act. *Motion Picture Ass'n of Am. v. FCC*, 309 F.3d 796, 801 (D.C. Cir. 2002) ("*MPAA*"). The plain language, structure, and purpose of the Communications Act

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[1] The MPAA also suggests, in passing, that Petitioners have not established Article III standing. MPAA Br. at 1. This suggestion warrants as little consideration as the MPAA gives it.

Petitioners' members include over 50 million consumers and librarians who purchase and use the electronics and content impacted by the Broadcast Flag rules. Petitioners were thus not required to identify evidence that specific members will be harmed, because the injury is self-evident. This is why there typically is no need for evidence of member-specific standing "in review of a rulemaking." *Sierra Club v. EPA*, 292 F.3d 895, 900 (D.C. Cir. 2002). Petitioners' standing falls well inside the long line of cases allowing consumer groups to challenge agency rules on their members' behalf. *E.g.*, *In re Center for Auto Safety*, 793 F.2d 1346, 1351 n.31 (D.C. Cir. 1986) (listing examples); *see also Office of Communication of United Church of Christ v. FCC*, 359 F.2d 994, 1001-02 (D.C. Cir. 1966); *ACLU v. FCC*, 523 F.2d 1344, 1347 (9th Cir. 1975). Indeed, the FCC has not disputed Petitioners' standing.

In any event, Petitioners' brief was clear that the Flag regime harms their members by increasing device costs, diminishing electronics' capabilities, and impairing digital content uses. *See* Pet. Br. at 6-8, 12, 18, 43-50; *see also Order* at ¶¶ 11, 26 & n.29; EFF Reply Comments at 22-24; Veridian Reply Comments at 3-5; October 21, 2003 Consumer Groups Letter at 2-3.

unmistakably demonstrate the FCC lacks authority here.

A. Congress Purposely Withheld Authority from the FCC to Impose Television Design Regulations

1. Congress' Enactment of the ACRA Forecloses the FCC's Jurisdictional Claim

Neither the FCC nor the MPAA challenge the central fact at issue here—that the Broadcast Flag rules invoke the very type of regulatory authority Congress has declined to give the Commission. In adopting the ACRA, Congress specifically modified the authorizing language to clarify that it was not granting the FCC power to meddle in the field of television design unfettered. Thus, after being criticized for considering "'performance standards'" that would have given the FCC "too great an involvement" in electronics design, Congress decided to "carefully limit[]" the FCC's authority only to ensure that televisions "adequately receiv[e] all frequencies." *Elec. Indus. Ass'n Consumer Electronics Group v. FCC*, 636 F.2d 689, 694-96 (D.C. Cir. 1980) ("*EIA*"); *see also* 47 U.S.C. § 303(s). Petitioners explained the significance of this decision, but the FCC and MPAA have failed to respond.

The reason is obvious. Congress' choice to not allow FCC authority over whether televisions are "'color sets, or have a certain size of picture tube...and so forth,'" *EIA*, 636 F.2d at 694, is "strong evidence" that Congress "did not intend the [FCC] to have the power." *Ry. Labor Execs.' Ass'n v. Nat'l Mediation Bd.*, 29

F.3d 655, 667 (D.C. Cir. 1994) (en banc); *see also MPAA*, 309 F.3d at 806; *Landers v. Nat'l R.R. Passenger Corp.*, 485 U.S. 652, 656 n.3 (1988). Indeed, the FCC concedes that Congress' decision to modify the ACRA "was made out of concern that the original draft language '***could open the door to regulation of the design of television receivers extending far beyond the objective of all-channel tuners.***'" Br. at 32 (quoting *EIA*) (emphasis added).

The FCC's concession is dispositive of this case. By the FCC's own admission, Congress did not want it regulating television receiver design "'beyond the objective of all-channel tuners.'" Br. at 32. But the Broadcast Flag rules go well past this limited authority, requiring not just televisions but a long list of household electronics to incorporate an FCC-approved "redistribution control system." *Order* ¶ 6. The FCC has thus defeated Congress' decision, and its own promise, to refrain from becoming broadly "involve[d]...in the dealings of television set manufacturers." *EIA*, 636 F.2d at 695. Not only do the Flag rules compel new technology in almost every device that can view or copy DTV content, they institute an intricate regime requiring technology makers to first go to the FCC, agree to abide by whatever conditions it deems appropriate, and obtain the Commission's blessing. *Order* at 43-45. If this is not the "general precedent for [the]...regulation of manufactured products" Congress sought to avoid in the ACRA, nothing is. S. Rep. No. 1526 (1962), *reprinted in* 1962 U.S.C.C.A.N.

1873, 1876.

Indeed, the FCC's only defense to the ACRA takes its backward reasoning to an illogical zenith. Starting with the assumption that the 1934 Communications Act silently gave it "general authority to regulate television receivers," the Commission argues that Congress could not silently repeal this general authority in 1962. Br. at 34. In the Commission's view, the ACRA was an exclamation mark, intended merely to remind the Commission that it had this general power and could apply it to a particular purpose.

Plainly, Congress did not think so. The ACRA's purpose belies the FCC's assumption that it had been given general authority to regulate television design. As the *EIA* court held, Congress adopted the ACRA to "grant[] the Commission [the]...power" to ensure that televisions adequately receive all frequencies. *EIA*, 636 F.2d at 693. The ACRA's legislative history likewise makes clear that in bestowing this limited power, Congress did not believe the FCC had any residual authority to regulate electronics design. The Senate Report declares that Congress enacted the ACRA "***to give*** the [FCC] certain ***regulatory authority*** over television receiving apparatus" and "***to authorize***" the FCC to act—not to "clarify" existing authority. S. Rep. No. 1526, *reprinted in* 1962 U.S.C.C.A.N. 1873 (emphasis added); *see* Br. at 31.

In fact, in urging Congress to adopt the ACRA, the FCC acknowledged that

without this congressional authorization, it would be "powerless to prevent the shipment in interstate commerce...of all-channel sets having only the barest capability for receiving UHF signals." Comments of FCC (May 11, 1962), *reprinted* in 1962 U.S.C.C.A.N. at 1890-91. The FCC's recognition that the ACRA ended its "powerlessness" in television design is consistent with Congress' intent that the FCC not regulate consumer electronics without first receiving Congress' express permission. Senator Javits explained: Without the ACRA,

> The FCC ***would not be authorized*** to get into such questions as picture tube size or whether all sets should be equipped for color.

Cong. Rec. 10,544 (June 14, 1962) (emphasis added).[2]

2. The Rule of *Expressio Unius* Independently Bars FCC Jurisdiction

For the same reason, the FCC is wrong that the rule of *expressio unius* does not circumscribe its authority to regulate consumer electronics. *See* Br. at 34. The FCC's argument is that reading Sections 302a, 303(e), 303(s), 303(u), 303(x), 544A, and 549 any other way than simply "clarifying" pre-existing Commission authority requires construing each of these statutory grants as a "'repeal[] by implication.'" Br. at 31. Under the FCC's theory, the Commission has had every power it now enjoys since 1934, because each of those powers was implied in Title

[2] The ACRA's legislative history is replete with congressional trepidation about unleashing FCC regulation on consumer electronics. This further confirms the absence of ancillary authority in this arena. *See, e.g.*, 108 Cong. Rec. 7438-40, 7446-47 (May 1, 1962); 108 Cong. Rec. 10,554, 10,556 (June 14, 1962); 1962 U.S.C.C.A.N. 1873, 1876.

I. The rule, however, is that an agency cannot "rely on its general authority to make rules necessary to carry out its functions when a specific [statute]...defines the relevant functions." *API v. EPA*, 52 F.3d 1113, 1119 (D.C. Cir. 1995).

Even putting aside the Commission's phenomenal charge that Congress repeatedly mobilized the machinery of bicameral legislation merely to emphasize the FCC already had some power, that is not what these provisions accomplished. For instance, the FCC argues that Section 302a was a jurisdictional clarification, Br. at 34, but the Conference Report the Commission relies on does not say this. What it says is that Congress modified the language in Section 302a to "clarify" a prior draft version, not to reaffirm that the FCC already had this power. H.R. Conf. Rep. 97-765, at 2267 (1982). Likewise, the FCC admits that Section 303(e) "***grants*** the Commission authority to regulate radio station" signal purity and quality, even though no such grant was necessary if the FCC already had this power on an ancillary basis. Br. at 30 (emphasis added). Indeed, just as with Section 303(e) and the ACRA, Congress declared that it was "***giv[ing]*** the FCC the authority" to regulate in Section 302a. H.R. Conf. Rep. 97-765, at 2266 (1982) (emphasis added).

Thus, *expressio unius* plainly precludes the power the FCC now claims. The FCC does not challenge that *expressio unius* is at its "zenith" when applied in concert with the canon that "'Congress cannot be presumed to do a futile thing,'"

Independent Insurance Agents of America, Inc. v. Hawke, 211 F.3d 638, 644 (D.C. Cir. 2000) (citation omitted), and both prongs of this test are met here. Congress has enacted numerous provisions specifying FCC jurisdiction over electronics, but the FCC does not identify the power it now seeks among these authorizations. Moreover, reading the FCC's ancillary jurisdiction to encompass the same powers authorized in Sections 302a, 303(e), 303(s), and their counterparts would render these enactments meaningless. *See Halverson v. Slater*, 129 F.3d 180, 185 (D.C. Cir. 1997). If the FCC's ancillary authority were as "broad" as the Commission claims, there would have been no need for Congress to grant it authority to regulate the "purity and sharpness of emissions" from radio station apparatuses, 47 U.S.C. § 303(e), to mandate that consumer electronics accept radio interference, *id.* § 302a, or to require that television sets "adequately receiv[e] all frequencies," *id.* § 303(s), because the FCC could have taken each of these actions under its ancillary authority without congressional intervention. Despite the FCC's assertion (Br. at 35), this was the very situation in *Hawke*, where the Comptroller of Currency unlawfully relied on his broad authority to exercise "'all such incidental powers...necessary'" to allow insurance sales, even though there was a narrower statutory provision on the same subject. 211 F.3d at 640.

Here, too, the FCC has overstepped its bounds. The Communication Act's multiple, specific provisions dictating how far the FCC may go in regulating

consumer electronics is the classic "'who, what, when, and how' laundry list governing [agency] authority" that excludes any other authority in the area. *Railway Labor*, 29 F.3d at 667. Congress has specified what the FCC may regulate: electronics devices that create or receive interference, the inclusion of all channels in TV sets, radio transmitters, set-top boxes. 47 U.S.C. §§ 302a, 303(s), 303(e), 549. And it has said when and how the FCC may regulate: when necessary to ensure channel receipt, preclude radio interference, or secure radio signal quality. *Id.* The cases the FCC and MPAA rely on confirm this reading. The MPAA cites *General Instrument Corp. v. FCC* for the proposition that "courts have upheld FCC regulation of receiving devices in the absence of express statutory authority," MPAA Br. at 21, but in that case, Congress ordered the FCC to "adopt regulations to assure the commercial availability" of certain converter boxes. 213 F.3d 724, 727 (D.C. Cir. 2000); 47 U.S.C. § 549(a).[3]

Under the glare of this evidence that Congress clearly knows how to state when it would like the FCC to regulate electronics, the FCC's challenge to *expressio unius* reduces to an assertion that a subsequent enactment can limit an agency's residual jurisdiction only if it "'specifically address[es] the topic at hand.'" Br. at 35. But the FCC's contorted contention that the "topic at hand" is

[3] The MPAA also cites *Computer & Communications Industry Ass'n v. FCC*, but the regulations there did not dictate equipment design. They forbade *common carriers* from including equipment in their transmission *rates*. 693 F.2d 198, 208, 213-14 (D.C. Cir. 1982).

the FCC's "jurisdiction, *under its ancillary authority*, to regulate television receivers...*to advance...the DTV transition*" is as off the mark as its claim that *expressio unius* has no use "'in the administrative setting.'" Br. at 34, 35 (emphasis added). Not only have the courts applied *expressio unius* to ascertain statutory meaning in numerous agency disputes[4]—including cases involving the FCC[5]—but *Hawke* cannot stand for this proposition. If Congress must define every nuance of how a regulatory power may be exercised to have addressed the "topic at hand," then *expressio unius* would never apply. And if Congress must specifically reference the FCC's ancillary jurisdiction in order to negate it, when the FCC itself characterizes this authority as power to "act in the absence of express statutory grants," Br. at 24, then the FCC really is offering the "incredible" proposition that this Court should "presume a delegation of power...absent an express withholding of such power." *Railway Labor*, 29 F.3d at 659.

B. The Broadcast Flag Rules Exceed the FCC's Ancillary Jurisdiction

In any event, even if the ACRA and *expressio unius* did not constrain the FCC's regulatory grasp, the Broadcast Flag rules would still be unlawful. The FCC acknowledges that its regulations are invalid if they do not come "within [its] general jurisdiction...to regulate interstate and foreign communications by wire

[4] *See* Pet. Br. at 40 n.18.

[5] *E.g.*, *AT&T Corp. v. FCC*, 323 F.3d 1081, 1086-87 (D.C. Cir. 2003); *Belluso v. Turner Communications Corp.*, 633 F.2d 393 397 (5th Cir. 1980).

and radio." Br. at 26; *see also Accuracy in Media v. FCC*, 521 F.2d 288, 293 (D.C. Cir. 1975).

The Flag rules do not regulate radio communications. The FCC never claims that the Broadcast Flag scheme controls DTV "signals, pictures, and sounds" while they are in the air, in transmission, or during receipt. 47 U.S.C. § 153(33). Rather, the Broadcast Flag regime restricts only what happens to these signals *after* they have been received and the "radio communication" is complete. It is perfectly possible to build DTV sets that receive DTV broadcasts with the highest clarity but do not obey the Flag rules for protecting content. In short: while the Communications Act gives the FCC authority only over interstate "communication by...radio," the Broadcast Flag rules have nothing to do with the communication itself. 47 U.S.C. § 151.

The FCC attempts to blur this distinction by asserting that the Broadcast Flag scheme only regulates "DTV receiving equipment, which is essential in the transmission of radio communications." Br. at 29. However, the FCC fails to identify a single way in which the Broadcast Flag is "essential" to how a DTV signal is transmitted or received, and its lengthy dissertation on why "radio communication" must be defined to include all "'apparatus' for the receipt of...television signals" is irrelevant. Br. at 23. What matters in the definition of "communication by radio" is the activity, not the device. As the FCC

acknowledges: It is wrong to disregard the "fundamental difference between regulation of receivers and regulation of received material." Br. at 29.

The FCC ignores this difference. The crux of the FCC's claim is that it can regulate any device that is "'part of an overall circuit of messages that are sent and received'"—regardless of whether the device is actually performing a "transmitting" or "receiving" function. Br. at 26. Under this theory, Section 151's definition of interstate "communication" by radio loses any recognizable meaning. 47 U.S.C. § 151(a). The FCC's argument *is* that it can regulate "received material," because according to the FCC, it has the right to control not just the communication, but any activity that somehow *arises from* a device receiving radio signals. Thus, the FCC could restrict fax machine copying from a received transmission, and it could specify your VCR clock's brightness if it is equipped with a television "demodulator." This is the logic the Commission's Order employs. The FCC asserts jurisdiction not to control how radio communications are received, but to provide "content protection" for "high value" DTV "programming." *Order* ¶¶ 5, 6.

The MPAA similarly attempts to dismiss the distinction between content and device regulation by claiming that DTV receivers' inclusion of "wire or radio outputs" means the Flag is "undeniably" regulating an "uninterrupted" stream of interstate communications, or "distant signals." MPAA Br. at 19, 20. But this is

not how the Broadcast Flag works. The flag works by prohibiting the transfer of protected content outside a DTV set or other device to any unprotected digital output—regardless of whether the "output" is recording the content onto a DVD for use in a consumer's second home, or moving it from her DTV to a TiVo or personal computer for viewing after work. *Order* at 40-42. Certainly these activities, which involve *storing* the received *content* on a separate non-radio non-wire medium, cannot be considered part of an "indivisible" interstate communication by radio or wire. If every movement of digital content that was once in radiowave form—including an unquestionably intrastate transfer from a consumer's living room to the den—is an "interstate" communication, then the FCC's jurisdiction has no bounds.

Not only does the FCC's stretching to control activities beyond the point of reception conflict with the rule of *Illinois Citizens* that the Commission is powerless to circumscribe non-radio "activities" that "'affect communications,'" *Illinois Citizens Comm. for Broadcasting v. FCC*, 467 F.2d 1397, 1400 (7th Cir. 1972), but this sort of wide-ranging interference with Americans' everyday lives was the very specter of regulation that Congress worried about when it enacted the ACRA.[6] This presumption against non-radio or -wire communications regulation is why Section 153(33) was written so that the word "receipt" modifies only

[6] *See supra* note 2.

"services" and not "apparatus," 47 U.S.C. § 153(33), and it is why under Section 153's definition, the FCC's ancillary authority extends only to activities that are "incidental"—or "necessary" and "appertaining to"—the transmission itself. *Id.*; *Black's Law Dictionary* 762 (6th ed. 1990). By definition, restrictions on how a television program can be recorded, redistributed, or otherwise manipulated do not "pertain to," and are not rendered "necessary" by, the program's original transmission. Post-reception restrictions on copying are the Copyright Act's task.

In this regard, the FCC's reach outside its statutory bounds is made even more obvious by the way it regulates. For the FCC to exercise ancillary jurisdiction, it is not enough that the subject falls within its primary jurisdiction. The power wielded also must be ancillary to a specific grant of authority. As the Eight Circuit has recognized, if the FCC has "no power to impose [its] rules" on a regulated entity, it has no power to enact the rules at all. *Midwest Video Corp. v. FCC*, 571 F.2d 1025, 1040 (8th Cir. 1978), *aff'd*, 440 U.S. 689 (1979) ("*Midwest II*"); *see also Southwestern Bell Telephone v. FCC*, 19 F.3d 1475, 1481 (D.C. Cir. 1994); *California v. FCC*, 905 F.2d 1217, 1240 n.35 (9th Cir. 1990). The FCC admits this point: Any jurisdiction it invokes must be "reasonably ancillary to the Commission's *specific statutory powers*." Br. at 24 (emphasis added).

Here, however, the FCC identifies no statutory power allowing it to restrict redistribution or copying of DTV programs in digital form, and there is none. The

Broadcast Flag rules fall outside the agency's ancillary jurisdiction for this reason as well, a fact the caselaw the FCC relies on confirms. Each of the prior cases involving the Commission's ancillary jurisdiction approved the regulation only where it had the power in another context.

For instance, even in *Southwestern Cable*, the FCC could control cable's broadcast signal use because Title III gave it authority to ensure exclusive broadcasting "areas or zones." *See United States v. Southwestern Cable*, 392 U.S. 157, 175 (1968). Similarly, in *Lincoln Telephone*, the FCC's general ratemaking authority allowed it to impose interim interconnection service charges until the parties submitted an agreement for "just and reasonable" review. *Lincoln Tel. & Tel. Co. v. FCC*, 659 F.2d 1092, 1107-08 (D.C. Cir. 1981); *see North Am. Telecomm. Ass'n v. FCC*, 772 F.2d 1282, 1292-93 (7th Cir. 1985) (holding company's capitalization plans to avoid subsidization of rate-regulated subsidiary).[7] In contrast, where the FCC has attempted to exercise a power that does not statutorily exist in another provision, its assertion of ancillary jurisdiction has been struck down. *E.g.*, *Midwest II*, 440 U.S. at 701; *AT&T v. Iowa Utils. Bd.*, 525 U.S. 366, 381 n.8 (1999); *California v. FCC*, 905 F.2d 1217, 1240 n.35 (9th Cir. 1990); *Illinois Bell Tel. Co. v. FCC*, 883 F.2d 104 (D.C. Cir. 1989); *NARUC v.*

[7] *See also GTE Serv. Corp. v. FCC*, 474 F.2d 724, 730, 735 (2d Cir. 1973) (regulation of common carrier provision of data services to extent affects carrier rates); *United Video v. FCC*, 890 F.2d 1173, 1186 (D.C. Cir. 1989) (syndication exclusivity rules where FCC has licensing authority and Congress specifically acquiesced in application of rules to cable).

FCC, 533 F.2d 601, 617 (D.C. Cir. 1976).

Of course, the FCC claims a broad power "to 'perform any and all acts...as may be necessary'" in Sections 154(i) and 303(r) of the Act, but this is not an answer. Br. at 23, 26. It is axiomatic that interpretative rulemaking provisions like Section 154(i) and 303(r) do not constitute "a stand-alone basis of authority." *MPAA*, 309 F.3d 796, 806 (D.C. Cir. 2002). This Court has held: "necessary and proper" rulemaking provisions "merely augment existing powers conferred upon the agency by Congress, they do not confer independent authority to [regulate]." *New England Power v. FPC*, 467 F.2d 425, 430-31 (D.C. Cir. 1972) ("*NEP*"), *aff'd* 415 U.S. 345 (1974) ; *see also, e.g.*, *Lomont v. O'Neill*, 285 F.3d 9, 16 (D.C. Cir. 2002).

Thus, the FCC's reminder that the DTV transition is an "'unambiguous command of an Act of Congress'" cannot save its rules. Br. at 25. Congress' creation of "'an intricate and detailed set of provisions for the DTV transition'" cuts *against* the FCC's assertion of ancillary jurisdiction. Br. at 25. The regulatory tools Congress gave the FCC to usher in the DTV transition are certain licensing powers and certain rules relating to "ancillary and supplemental" services—not restricting copies. For example, Section 309(j)(14)(A) prohibits the Commission from authorizing analog "television broadcast *license[s]*" beyond 2006 unless certain conditions are met. 47 U.S.C. §§ 309(j)(14)(A). Section 336

gives the Commission authority "to issue additional *licenses* for advanced television services." *Id.* § 336. And Section 337 requires the Commission to reallocate a portion of the spectrum, in part, by "commenc[ing] assignment of *licenses* for public safety services." *Id.* § 337 (emphasis added). Consequently, when the Commission adopted the Broadcast Flag rules in its flawed effort to spur the DTV transition,[8] it was not exercising an authority ancillary to the one Congress envisioned would be used. This disconnect is particularly apparent given the FCC's decision not to use the one provision related to the DTV transition, Section 336(a), that gives it a broader power to make certain rules regarding "ancillary and supplemental" DTV services—not all DTV receivers. "'When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode.'" *Christensen v. Harris County*, 529 U.S. 576, 583 (2000) (citation omitted).

In fact, to impeach the Commission's reliance on the DTV transition goal, it is enough to survey the parties invoking it before this Court. The National Association of Broadcasters, whose members have presumably the most direct interest in facilitating the transition, has not intervened. The "competitiveness" of broadcast is not at issue here, and the NAB would be curiously unconcerned about such "an obvious and substantial threat to over-the-air broadcasting" if those

[8] By frustrating consumers' use of digital content and stifling the innovative process, the Flag regulation is likely only to impede the DTV transition.

threats were actually present. MPAA Br. at 16, 18. It is only the MPAA, an organization that normally has very little business with the FCC, and whose members, far from being FCC-regulated, are the largest copyright owners in the land, that dresses itself in the cloak of an altruistic guardian of the statutory objective. That objective is fully inapposite here, however, and it is for that reason that Congress has not given the FCC the tools the Commission has appropriated.

Perhaps no other application of the Flag regime makes the FCC's departure from its "specific powers" more clear than its control over "downstream" electronics. The FCC attempts to obscure its rules' sweeping breadth by claiming that their application to "downstream" devices really only includes "*a limited subset of products.*" Br. at 29 (quoting *Order* ¶ 48) (emphasis added). But the Flag regime does not affect "only...the manufacture and distribution of DTV receivers" as claimed. MPAA Br. at 9. On their face, the regulations prohibit any DTV receiver from sending DTV content to another device unless it does so (1) through a Flag-compliant "digital output", or (2) under the "sole control" of the receiver. *Order* at 40. Once the DTV content is sent to a protected "digital output," moreover, the protection's "robustness" must remain intact. *Id.* For instance, if a consumer purchases a DTV set, not only must that device's digital outputs incorporate Flag technology, but the computer and TiVo the consumer attaches to the TV also must use FCC-approved technology.

The net effect is that the Flag regime forces ***every*** household electronics device capable of accessing or manipulating content in digital form to include FCC-approved technology to perform its intended function. This list of products, which includes DVD recorders, computers, digital VCRs, third-generation cell phones, and iPods, is hardly the "limited subset" of electronics the FCC makes it out to be. Indeed, when the FCC leaps all the way from a DTV licensing mandate to dictating the design of almost every personal electronics device, its claim that the jurisdiction exerted is simply "ancillary" to "existing powers" falls apart. *NEP*, 467 F.2d at 430-31.

II. THE FCC IMPERMISSIBLY TREADS IN THE REALM OF COPYRIGHT POLICYMAKING

The Broadcast Flag regime's foray into copyright policymaking—an activity unquestionably outside the FCC's purview—underscores the inherent danger posed by the FCC's unrestrained reading of its ancillary powers.

The FCC and MPAA first defend the Flag regime as not making new copyright policy by claiming that the DMCA's "no mandates" provision "does not...even address...the FCC's authority to adopt the broadcast flag." Br. at 43; MPAA Br. at 22. This, however, mischaracterizes Petitioners' position. Petitioners do not argue that the Flag rule violates the "no mandates" provision standing alone. The provision highlights the FCC's lack of authority. *Sony* instructs that fair use restrictions are the exclusive province of Congress. 464 U.S.

at 429-31. Yet the FCC has trespassed into Congress' exclusive domain, restricting the fair use rights of the public by imposing a technological mandate even though Congress had declined to impose such a requirement.

The Flag rule also prohibits uses that are unquestionably fair. The MPAA attempts to conceal the rules' alteration of fair use by citing *Corley*. The issue, however, is not "technological[] superior[ity]" as the MPAA contends. MPAA Br. at 24. The Broadcast Flag does not simply limit "superior" avenues toward fair use, it forecloses certain fair uses altogether.

By effectively limiting Internet transfer of digitally copied DTV programs to a handful of recipients,[9] the Flag regime eliminates fair uses that involve more widespread dissemination. Consider a "blogger" attempting to comment on a DTV program. She desires to accompany the commentary with a brief digital clip of the material—undoubtedly a fair use. Yet the Flag precludes any meaningful public dissemination unless the blogger undertakes a digital-to-analog-to-digital conversion (using the "analog hole").

This re-digitization process is itself an obstacle that defeats fair uses, even accepting the questionable assumption that average consumers will be savvy enough to re-digitize a broadcast clip. Return to the blogger example. If her

[9] The two approved Flag technologies that allow some Internet transfers severely limit the scope of the transfer, *e.g.*, only to a few devices within a personal network or to one outside computer. *See Digital Output Protection Technology & Recording Method Certifications*, FCC Order 04-193, ¶¶ 19-23 (Aug. 12, 2004).

commentary's purpose is to email others urging them to contact a media outlet that is conducting a fifteen minute live viewer poll, her effort can be defeated by the Flag's demands—her call to action may be no longer relevant by the time she has completed the digital-to-analog-to-digital process.

Further, even the theoretical opportunity to use re-digitized copies disappears once the digital transition is complete—a fact the FCC cannot dispute. In fact, the argument that the Flag permits analog copying is particularly unavailing considering that content owners are busily working to close the analog hole. *See Order* ¶¶ 17-19, 26; MPAA Br. at 11.

Of course, the MPAA suggests that the public may always petition the FCC for changes in the Flag rules if they become too burdensome. MPAA Br. at 24. This suggestion, standing alone, makes it absolutely apparent that the Commission has made copyright policy here. The FCC is *not* the appropriate forum for vindicating the right to use uncopyrighted materials. This is Congress' domain.

The MPAA counters that the FCC can "affect" copyright law,[10] MPAA Br. at 24-26, but the Broadcast Flag rules do more than that. They change the copyright policy memorialized in the DMCA, and alter the scope of fair use and

[10] Notably, this Court has cautioned otherwise. *See United Video*, 890 F.2d at 1186 n.8 ("[W]e are not saying that the Commission has a general power to affect copyright law."). *Building Owners* and *Contemporary Media*, *see* MPAA Br. at 25, are also distinguishable from the instant case because they each involved FCC regulation under specific congressional directives (Section 207 of the Telecommunications Act of 1996, and 47 U.S.C. § 308(b), respectively).

other substantive provisions of the Copyright Act. Neither the FCC nor MPAA refute the fact that balancing the nation's copyright policy is Congress' sole bailiwick.

And while the MPAA rests on *Corley* to defend the Flag regime's incursion on fair use, the question here is agency jurisdiction, not the constitutionality of a copyright law enacted by Congress addressed in *Corley*. If the FCC has jurisdiction to prohibit some digital copying of broadcast DTV programs, what stops it from prohibiting all such copying?

The answer, in the FCC's own words, is that it does not have this power. The FCC has repeatedly recognized that "the right to prevent copying" is "one of the usual incidents of copyright protection." *In re Cable Television Syndicated Program Exclusivity Rules*, 79 F.C.C. 2d 663, ¶281 (1980). Such power, the FCC admits, is strictly within the province of Congress and the courts. *See In re Proposals for Regulation of Cable Television*, 31 F.C.C.2d 115, 115-16 (1971); *see also In re Review of Rules and Policies Affecting the Conversion to Digital Television*, 16 F.C.C.R. 20594 ¶¶ 48-51 (2001). By ruling that certain fair uses of DTV content are prohibited *per se*, the Commission has used its office to afford content owners the very "incidents of copyright protection" that are Congress', and Congress' alone, to afford.

III. THE FCC IDENTIFIED NO SUBSTANTIAL EVIDENCE SUPPORTING THE NEED FOR A BROADCAST FLAG REGIME

Petitioners demonstrated in their opening brief that the Broadcast Flag regime was built on a series of unsupported assumptions—including that "mass indiscriminate redistribution" of DTV content is imminent, and that DTV programming will leave the airwaves without the Flag.[11] The FCC has not supported these assumptions.

The FCC has not pointed to any examination in the record of how content owners' distribution models function, how the models might change if Internet redistribution occurred, or what alternate revenue streams they might enjoy. Pet Br. at 53. Likewise, the FCC has not cited evidence that distribution of *any type* of full resolution DTV content over the Internet is now, or will ever be, possible.[12] The FCC cites a *press release* in the record explaining a study by the California Institute of Technology ("Caltech"), and reaches outside the record to quote a Verizon *advertisement* for fiber optic Internet service. Br. at 38 n.13, 39 n.14. These documents do not salvage the FCC's Order.

The FCC cannot rely on evidence that was not before it below, *e.g.*, *Arizona Cattle Growers' Ass'n v. USFWS*, 273 F.3d 1229, 1245 (9th Cir. 2001), and, in any

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[11] Attempting to support this latter claim, the FCC relies on a statement that "one of the petitioners" supposedly made. Br. at 37. However, the author of that statement—the Center for Democracy and Technology—is not a party to this appeal.

[12] The evidence that the FCC and MPAA point to involves *analog* television.

event, its assertions about faster download capability are palpably unrealistic. The Caltech study, for instance, was "theoretical," presuming that a single Internet user could sequester *6,000 times* the capacity of a typical DSL connection by using dedicated backbone lines available only through inter-industry cooperation. Caltech Press Release at 1. But no record evidence established that the average consumer would have access to this infrastructure at any point in the future, no more than tomorrow's consumers will be able to fill their cars' gas tanks with rocket fuel.

The FCC is thus left where it began—not entitled to deference for its unsubstantiated predictive judgments, having identified no evidence supporting a need for the regulation. *Prometheus Radio Project v. FCC*, 373 F.3d 372, 409 (3d Cir. 2004). As to the migration of programming, there are hundreds of thousands of DTV sets on the market, and computer tuner cards capable of making perfect copies of HDTV broadcasts are available for less than $200. Yet, not a single content owner has removed its DTV programming. The decision to forego a period of unregulated experimentation to determine whether there is even a need for the Flag regime was arbitrary. *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 37 (D.C. Cir. 1977). The FCC's *Order* rests on its own unsupported guesswork. *Midwest Video*, 571 F.2d at 1044-45.

CONCLUSION

For the foregoing reasons, the Court should vacate the Commission's Broadcast Flag rule.

Respectfully submitted,

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STATUTES AND REGULATIONS

Pertinent statutes and regulations are reproduced in the Addendum appended to Petitioners' Opening Brief.

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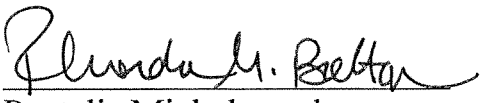

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Dated: December 2, 2004

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