IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 04-1037

AMERICAN LIBRARY ASSOCIATION, *ET AL.*,

PETITIONERS

V.

FEDERAL COMMUNICATIONS COMMISSION
AND
THE UNITED STATES OF AMERICA,

RESPONDENTS

ON PETITION FOR REVIEW OF AN ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

R. HEWITT PATE
ASSISTANT ATTORNEY GENERAL

MAKAN DELRAHIM
DEPUTY ASSISTANT ATTORNEY GENERAL

CATHERINE G. O'SULLIVAN
JAMES J. FREDRICKS

UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, D. C. 20530

JOHN A. ROGOVIN
GENERAL COUNSEL

AUSTIN C. SCHLICK
DEPUTY GENERAL COUNSEL

DANIEL M. ARMSTRONG
ASSOCIATE GENERAL COUNSEL

JACOB M. LEWIS
ASSOCIATE GENERAL COUNSEL

C. GREY PASH, JR.
COUNSEL

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D. C. 20554
(202) 418-1740

CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

A. Parties

According to the Commission's records, the parties, intervenors, and amici appearing below and before this Court are listed in petitioners' brief.

B. Rulings Under Review

In the Matter of Digital Broad Content Protection, 18 FCC Rcd 23550 (2003) (JA __)

C. Related Cases

The order on review has not previously been before this Court. Counsel are not aware of any related cases pending in this or any other Court.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Administrative Decisions

Statutes and Regulations

Others

Legislative Materials

** Authorities principally relied upon are marked with asterisks.*

GLOSSARY

ACRA	All Channel Receiver Act
ATSC	Advanced Television Systems Committee
BPDG	Broadcast Protection Discussion Subgroup
CPTWG	Copy Protection Technical Working Group
DMCA	Digital Millenium Copyright Act
DTV	digital television
FCC	Federal Communications Commission
ICC	Interstate Commerce Commission

IN THE
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

No. 04-1037

AMERICAN LIBRARY ASSOCIATION, *ET AL.*,

PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION
AND
THE UNITED STATES OF AMERICA,

RESPONDENTS

MOTION PICTURE ASSOCIATION OF AMERICA, *ET AL.*,

INTERVENORS

ON PETITION FOR REVIEW OF AN ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

BRIEF FOR RESPONDENTS

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

This case arises from an FCC determination that, in order to further the transition of the nation's television broadcasting system from analog to digital operation, it is necessary for digital television receivers and certain related electronic equipment to have the technical capability of protecting digital broadcast programming against wide-scale

unauthorized redistribution. These capabilities are generally referred to as the "broadcast flag." The issues presented here are:

- Whether the FCC reasonably concluded that the Communications Act provides authority for it to adopt broadcast flag rules.
- Whether the particular rules the Commission adopted were reasonable and supported in the record
- Whether the rules conflict with copyright law.

JURISDICTION

This court has jurisdiction pursuant to 47 U.S.C. 402(a) and 28 U.S.C. 2342(1).

STATUTES AND REGULATIONS

Pertinent statutes and regulations are set out in the Statutory Appendix to this brief.

COUNTERSTATEMENT OF THE FACTS

A. BACKGROUND

1. Digital Television

In 1987, the FCC began formal consideration of the policy and engineering issues attendant to developing technical requirements for a new "advanced" television system for the nation. As the Court has explained, although the previous standard for television broadcasting "proved to be workable for more than fifty years, in light of the development of new broadcasting technologies, the emergence of competing standards, and the growing popularity of cable television, members of the television broadcasting industry petitioned for a rulemaking in 1987 for the adoption of a new and improved standard for

provision of 'advanced' television, or 'ATV.'" *Community Television, Inc. v. FCC,* 216 F.3d 1133, 1137 (D.C.Cir. 2000).

The advanced television standard that the Commission ultimately adopted was a digital standard. *See Advanced Television Systems, Fourth Report & Order,* 11 FCC Rcd 17771 (1996). Digital television, or DTV, is a "significant technological breakthrough" that allows broadcasters to transmit either one video programming signal of extremely high quality or multiple streams of "video, voice and data simultaneously, and to provide a range of services dynamically," within the same frequency band traditionally used for a single analog television broadcast signal. *Id.* at 17772 ¶5. DTV broadcasting also permits more efficient use of spectrum, so that a substantial amount of spectrum that previously was used only for television broadcasting may be rededicated to other uses. DTV provides the public the benefit of brilliant pictures and vivid sound, as well as innovative new technologies and services developed through competition – while viewers continue to enjoy "free, universally available, local broadcast television." *Advanced Television Systems, Fifth Report & Order,* 12 FCC Rcd 12809, 12811 ¶5 (1996).

"The transition to digital television is a massive and complex undertaking, affecting virtually every segment of the television industry and every American who watches television." *Second Periodic Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television*, 19 FCC Rcd 18279, ____ ¶11 (2004) ("*Second Periodic Review*"). The FCC established 2006 as the target date for completing the DTV transition. *See Advanced Television Systems, Fifth Report & Order,* 12 FCC Rcd 12809

(1997). In the Balanced Budget Act of 1997, Congress codified that target date.[1] As the Commission's Chairman observed in September 2004, "[t]he importance of the end of the DTV transition for our country cannot be overstated. Completion of the transition will recoup a significant amount of spectrum for first-responder, public safety use and for innovative wireless broadband services – enhancing our homeland and economic security in the process." 19 FCC Rcd at ____.

2. The Notice of Proposed Rule Making

In August 2002, noting the "unique logistical and technological challenges" of the DTV transition and out of concern that the "current lack of digital broadcast copy protection may be a key impediment to the transition's progress," the Commission began a rule making proceeding to examine whether rules were needed "to prevent the unauthorized copying and redistribution" of digital broadcast television programming. *Digital Broadcast Copy Protection*, 17 FCC Rcd 16027, 16028 ¶3 (2002)("*NPRM*")(JA __).

The Commission pointed out that, as a technical matter, digital television content is more susceptible to unauthorized copying and distribution than traditional analog broadcasting content, that content providers for digital broadcast television therefore had indicated they would not provide high quality programming for digital broadcasting

---

[1] Section 309(j)(14) of the Communications Act, 47 U.S.C. 309(j)(14), sets forth conditions under which the transition to digital broadcasting will take place. These conditions could be met as early as December 31, 2006. *See generally Consumer Elec. Ass'n v. FCC*, 347 F.3d 291 (2003)(discussing factors "jeopardizing" this target date). One of the conditions that could lead to extension of the December 2006 date in individual television markets is if 15 percent or more of the television households in a market do not have either a television receiver capable of receiving digital television service signals or an analog television with digital-to-analog converter technology capable of receiving digital television service signals. *See* 47 U.S.C. 309(j)(14)(A)(iii)(II)(a), (b).

without some form of protection, and that the DTV transition could be delayed as a result because consumers would be reluctant to purchase DTV receivers and equipment if they did not have access to such programming. *NPRM*, 17 FCC Rcd at 16027 ¶1 (JA __). *See* n. 1 above.

The Commission sought comment on a wide variety of questions relating to the need for this type of protection, the impact of a protection rule on the availability of programming for digital television and the effect on the DTV transition, technical considerations surrounding implementation of a protection rule, the impact of such a rule on consumers, and the FCC's statutory authority to adopt such a requirement. *NPRM*, 17 FCC Rcd at 16028-30 ¶¶3-10 (JA __). The agency also sought comment on whether, if a digital television content protection regime is needed, what "is the appropriate technological model to be used, or whether there are alternatives" to the broadcast flag. *Id.* at 16027-28 ¶¶ 2, 4 (JA __).

B. THE BROADCAST FLAG RULES

In a November 2003 *Report and Order*, the Commission adopted rules implementing the broadcast flag requirement applicable to television reception equipment that is manufactured after July 1, 2005. *Digital Broadcast Content Protection, Report and Order and Further Notice of Proposed Rule Making*, 18 FCC Rcd 23550 (2003) (JA __)(hereafter "*R&O*") .

1. The Need For A Content Protection Technology For Digital Television

The Commission determined that "creation of a redistribution control protection system … is essential for the Commission to fulfill its responsibilities under the Communications Act and achieve long-established regulatory goals in the field of television

broadcasting." *Id.* at 23565-66 ¶31 (JA __). Specifically, the Commission concluded that "the potential threat of mass indiscriminate redistribution [of DTV programming] will deter content owners from making high value digital content available through broadcasting outlets absent some content protection mechanism" and that "preemptive action" is needed now "to forestall any potential harm to the viability of over-the-air television." *R&O*, 18 FCC Rcd at 23552 ¶4 (JA __).

The Commission also determined that DTV programming "is inherently at a greater risk of widespread redistribution as compared to its analog counterpart because digital media can be easily copied and distributed with little or no degradation in quality." *R&O*, 18 FCC Rcd at 23553 ¶6 (JA __). Citing comments from content producers and broadcasters, the Commission further concluded that "absent redistribution control regulation for DTV broadcasts, the record indicates that content providers will be reluctant to provide quality digital programming to broadcast outlets and will instead direct such content to pay television systems that can implement adequate content protection mechanisms." *R&O*, 18 FCC Rcd at 23565-66 ¶31 (JA __). Moreover, the Commission found, the "diversion of high quality digital programming away from broadcast television will lead to an erosion of our national television structure" and "not only will free, over-the-air broadcast television deteriorate, but a critical element necessary to the success of the DTV transition – the availability of quality digital broadcast programming – will not develop." *Id.*

The Commission acknowledged that some commenters had argued that technological constraints currently inhibit the redistribution of HDTV programming and that content protection rules are not yet necessary. *See R&O*, 18 FCC Rcd at 23554 ¶8 (JA

__). However, the Commission concluded that "content owners are justifiably concerned about protecting all DTV broadcast content, including both standard definition and high definition formats, from indiscriminate retransmission in the future." *Id.* The Commission observed that the DTV transition was reaching a "critical juncture" because the "forthcoming availability of digital cable ready televisions with off-air reception capability will dramatically increase the number of consumers with access to DTV content and services." *R&O, Id.* ¶8 (JA __). By "taking preventative action today" in adopting the broadcast flag rules, the Commission determined, "we can forestall the development of a problem in the future similar to that currently being experienced by the music industry."[2] The Commission found that such preventative action would both address "the concerns of content owners" and "ensure the continued availability of high value DTV content to consumers through broadcast outlets." *Id.*

2. The Broadcast Flag Provisions

In the *NPRM* the Commission had recognized that an inter-industry group composed of representative from the consumer electronics, information technology, motion picture, cable television and broadcast industries, had recently proposed a standard for protection of digital broadcast content known as the "ATSC flag" or "broadcast flag."[3]

---

[2] *See, e.g.*, U.S. General Accounting Office, *File Sharing: Selected Universities Report Taking Action To Reduce Copyright Infringement*, GAO-04-503 at 4-6(May 2004)(describing widespread use of computer networks for unauthorized downloading of "more than 2.6 billion copyrighted files (mostly sound recordings) each month ….").

[3] *NPRM*, 17 FCC Rcd at 16027-28 ¶2; s*ee 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 Final Report*")(JA __). The report noted that "BPDG is a wholly private discussion group with no official or unofficial government standing." *Id.* n. 4. (JA __).

The broadcast flag is a digital code that can be embedded into a digital broadcasting stream. It signals digital television reception equipment to limit the redistribution of digital broadcast content. Although the Commission considered other possible mechanisms to protect DTV content against indiscriminate redistribution, it found in the *Report & Order* that of the mechanisms currently available, the broadcast flag regime is most suitable because it "will provide content owners with reasonable assurance that DTV broadcast content will not be indiscriminately redistributed, while protecting consumers' use and enjoyment of broadcast video programming." *R&O*, 18 FCC Rcd at 23552 ¶4 (JA __). The Commission emphasized that although the rules it was adopting would limit the redistribution of digital broadcast television content, they would not restrict consumers from copying programming for their personal use." *Id.* ¶5; *see also id.* at 23555 ¶¶9-10 (JA __). The Commission also emphasized that the rules preclude indiscriminate redistribution on the Internet, but do not "foreclose use of the Internet to send digital broadcast content where it can be adequately protected from indiscriminate redistribution." *Id.* at 23555 ¶10 (JA __).[4]

The broadcast flag is inserted into a DTV signal at the discretion of the broadcaster. The rules do not require broadcasters to use the broadcast flag to protect their DTV programming. *See R&O,* 18 FCC Rcd at 23568 ¶37 (JA __). Generally, the rules require that DTV television receivers and other devices, such as digital video cassette records or personal computer television tuner cards, that are capable of receiving

---

[4] Emphasizing that it intended to limit the scope of the broadcast flag to redistribution control, the Commission established a technical restriction prohibiting broadcasters from using the flag for copy control purposes. *See R&O,* 18 FCC Rcd at 23568 ¶38; 47 C.F.R. 73.9001 (JA __)

broadcast DTV signals over-the-air or via cable television systems (collectively referred to as "demodulator products") recognize and give effect to the broadcast flag pursuant to certain "compliance" and "robustness" rules. *Id.* at 23570 ¶40 (JA __).

"Compliance" refers to what the covered demodulator can do with the broadcast content. If the flag is present, the content can be sent only in one of several permissible ways, including: (1) over an analog output, *e.g.* to existing analog equipment; (2) over a digital output associated with an approved content protection or recording technology, and (3) to a digital recording protected with an approved recording method. *R&O,* 18 FCC Rcd at 23571 ¶43 (JA __); *see* 47 C.F.R. 73.9003 – 73.9005 (JA __).

"Robustness" refers to the degree of security of the system, *i.e.*, how difficult it would be to evade or "hack" the system to defeat the content protection. Responding to commenters' criticism of industry proposals for a high level of robustness as unnecessary and threatening the interoperability of covered devices, the Commission found that establishing an "expert" level of robustness in the standard was not needed to successfully implement the broadcast flag approach and prevent frustration of the DTV transition. The Commission adopted instead an "ordinary user" robustness standard. Specifically, the rule adopted by the Commission provides that the "content protection requirements … shall be implemented in a reasonable method so that they cannot be defeated or circumvented merely by an ordinary user using generally-available tools or equipment." 47 C.F.R. 73.9007 (JA __). The Commission concluded that this approach will afford consumer electronics and other equipment manufacturers the maximum flexibility in innovation while ensuring adequate content security. *R&O,* 18 FCC Rcd at 23572 ¶46 (JA __).

The Commission established an interim policy, discussed below, for approving digital output content protection and recording technologies and adopted a Further Notice of Proposed Rulemaking to examine that question further. *R&O*, 18 FCC Rcd at 23574-76 ¶¶50-57 (JA __). That proceeding has not yet been concluded.

The Commission also addressed what is described as the "analog hole" problem. The "'analog hole' refers to the fact that high quality content can be transmitted over component analog outputs without content protection." *R&O*, 18 FCC Rcd at 23557-58 ¶17. Left unaddressed, the analog hole would allow for a form of circumvention of the broadcast flag, which only protects digital outputs. The Commission pointed out, however, that this problem is not specific to DTV, but is shared by cable and satellite delivery platforms that use digital technology, and industry efforts are focusing on potential solutions. The Commission again emphasized the need to act now with respect to DTV rather than wait for the conclusion of what may be a futile search for a solution to every aspect of the problem of protecting content from unauthorized distribution:

> While an immediate "analog hole" solution is not forthcoming, the window of opportunity for adopting a flag based redistribution control regime for digital broadcast television is closing. The number of legacy devices existing today is still sufficiently small that content owners remain willing to provide high value content to broadcast outlets. At some point, however, when the number of legacy devices becomes too great, that calculus will change. By acting now, the Commission can protect both content and consumers' expectations.

Id. at 23558 ¶18 (JA __).

All equipment in use by consumers today will remain fully functional under the broadcast flag system. Thus, consumers can continue to use existing DTV equipment without purchasing new or additional equipment to receive and view broadcast television

signals. Moreover, as noted, consumers' ability to make and view digital copies will not be affected; the broadcast flag seeks only to prevent mass redistribution over the Internet or through similar means. *R&O*, 18 FCC Rcd at 23556-59 ¶¶9-10, 14, 20 (JA __). In addition, the Commission found that the broadcast flag-based system could be implemented "at a minimal cost to both consumers and manufacturers." *Id*. at 23559-60 ¶21; *see also id*. at 23556-57 ¶14 n.29 (JA __).

3. The FCC's Authority To Adopt The Broadcast Flag Rules

Parties filing comments in the agency proceeding took different positions on the issue of whether the FCC possesses statutory authority under the Communications Act to adopt a content protection rule for DTV such as the broadcast flag rule. After surveying the comments, along with the relevant statutes and caselaw, the Commission concluded that it has "ancillary authority to regulate equipment manufacturers in order to effectuate a redistribution control system for DTV broadcasts." *R&O*, 18 FCC Rcd at 23563-64 ¶29 (JA __).

This authority derived, the Commission reasoned, from its broad grant of authority under the Communications Act to regulate interstate wire and radio communications "so as to make available, so far as possible, to all the people of the United States … a rapid, efficient, Nation-wide, and world-wide wire and radio communication service …." 47 U.S.C. 151; *see also* 47 U.S.C. 152(a)(stating that the provisions of the Communications Act "shall apply to all interstate and foreign communication by wire and radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such

communication of or such transmission of energy by radio"); *R&O*, 18 FCC Rcd at 23563-64 ¶ 29 (JA __).

In particular, the Commission relied on Supreme Court cases upholding its jurisdiction to regulate cable television systems at a time when the Communications Act contained no express authority for such regulation. The Commission pointed out that the Supreme Court had held in *United States v. Southwestern Cable Co.*, 392 U.S. 157, 177-78 (1968), that "[a]ncillary jurisdiction may be employed, in the Commission's discretion, where the Commission's general jurisdictional grant in Title I of the Communications Act covers the subject of the regulation and the assertion of jurisdiction is 'reasonably ancillary to the effective performance of [its] various responsibilities.'" *R&O*, 18 FCC Rcd at 23563 ¶ 29 (JA __). In addition, as the Commission noted, the Supreme Court explained in a later case that the "critical question is whether the Commission has reasonably determined that its … rule will 'further the achievement of long-established regulatory goals in the field of television broadcasting ….'" *Id.* at 23563 n.70, *quoting United States v. Midwest Video Corp.*, 406 U.S. 649, 667-68 (1972) (plurality opinion) (JA __).

The Commission concluded that "both predicates for jurisdiction [under *Southwestern* Cable] are satisfied here." *R&O*, 18 FCC Rcd at 23563 ¶ 29 (JA __). First, it found that television receivers are covered by its general jurisdictional grant in light of the Act's broad definition of radio and wire communications as including "not merely the transmission of the communication over the air or by wire, but also all incidental 'instrumentalities, facilities, apparatus and services' that are used for the 'receipt, forwarding and delivery of such transmissions.'" *Id. quoting* 47 U.S.C. 153(33) (JA __); *see also* 47

U.S.C. 153(52). The Commission also found that the creation of a content redistribution protection system for DTV "is essential for the Commission to fulfill its responsibilities under the Communications Act and achieve long-established regulatory goals in the field of television broadcasting," and thus is squarely within the agency's ancillary jurisdiction. *R&O*, 18 FCC Rcd at 23565-66 ¶31 (JA __). Particularly relevant, the Commission pointed out, was that "Congress has woven into the Communications Act an intricate and detailed set of provisions for the DTV transition. … The statutory framework for the transition, coupled with the support in the legislative history and the Commission's ongoing and prominent initiatives in the area, make it clear that advancing the DTV transition has become one of the Commission's primary responsibilities under the Communications Act at this time." *Id.* at 23564-65 ¶30 (JA __).

Acknowledging that it had not previously exercised its ancillary jurisdiction over television equipment manufacturers, the Commission analogized the situation here to that which it faced when it first exercised jurisdiction over cable television systems in the 1960s. It noted that although the cable television industry had then been in existence for nearly 15 years without Commission regulation, "the Supreme Court found [after that lengthy period of non-regulation] that the Commission had 'reasonably concluded that regulatory authority over [cable television] is imperative if it is to perform with appropriate effectiveness certain of its other responsibilities.'" The Commission continued that it found itself "faced with the same type of situation now with respect to equipment manufacturers in that up until this point, exercise of our ancillary authority was not necessary to fulfill our responsibilities." *Id.* at 23566-67 ¶33 (JA __). However now, as the Commission explained,

> absent redistribution control regulation for DTV broadcasts, the record indicates that content providers will be reluctant to provide quality digital programming to broadcast outlets and will instead direct such content to pay television systems that can implement adequate content protection mechanisms. The diversion of high quality digital programming away from broadcast television will lead to an erosion of our national television structure. Moreover, not only will free, over-the-air broadcast television deteriorate, but a critical element necessary to the success of the DTV transition – the availability of quality digital broadcast programming – will not develop.

Id. at 23565 ¶31 (JA __).

The Commission also found no basis for the suggestions of some commenters that the broadcast flag rules are inconsistent with statutory copyright provisions, explaining that its adoption of the broadcast flag redistribution control system for digital broadcast television content "does not alter or affect any underlying copyright principles, rights or remedies." *R&O,* 18 FCC Rcd at 23558 ¶18 (JA __). The Commission likewise rejected arguments that a provision of the Digital Millenium Copyright Act ("DMCA") prevents the Commission from adopting the broadcast flag rules. The provision states that "nothing in [the DMCA] shall require" that manufacturers design their equipment to respond to any particular technological protection measure. The Commission found that that the statutory language in question, 17 U.S.C. 1201(c)(3), is not a "complete prohibition on the governmental implementation of particular content protection technologies" and thus "does not forestall Commission adoption of" the broadcast flag rules. *Id.* at ____ ¶41 (JA __).

Two Commissioners dissented from the *Report and Order* in part, expressing some reservations about the manner in which certain aspects of the broadcast flag were implemented. However, both of these Commissioners firmly agreed with the agency's

basic conclusions that content protection of digital television programming was necessary and within the Commission's authority. *See R&O*, 18 FCC Rcd at 23615-21 (JA __).

4. The Certifications Order

To facilitate adoption of broadcast flag technology in television receivers and related equipment by 2005, the Commission established an interim policy that allows proponents of a particular content protection or recording technology to certify to the FCC, subject to public notice and objection, that such technology is an appropriate tool to give effect to the broadcast flag. *See R&O,* 18 FCC Rcd at 23574-76 ¶¶50-57 (JA __). The Commission said it expects any approved technologies that are publicly offered to be licensed on a reasonable and nondiscriminatory basis. *Id.* at 23575 ¶53 (JA __).

In an August 2004 order implementing the interim procedures, the Commission approved 13 different output protection technologies and recording methods, concluding that they fulfill the criteria established in the *Report and Order* to protect content marked with the broadcast flag. *Digital Output Protection Technology and Recording Method Certifications*, 19 FCC Rcd 15876 (2004)("*Certifications Order*"). The technologies approved in these certifications allow for transmission of protected broadcast content from television receivers to a variety of devices such as TiVo digital video recorders, devices that record DVDs and memory cards, and digital magnetic video tape recorders, as well as in home networks connecting computers or other consumer electronic devices. *See id.* at 15879-903 ¶¶5-60. The Commission emphasized that its approval was limited to the use of these technologies for broadcast flag purposes only, and that it was not countenancing any "extension of our redistribution control content protection system for digital broadcast television into areas outside the intended scope" of those rules. Indeed,

the Commission stated that it intended to "closely monitor the deployment of these content protection technologies … to ensure that such aggrandizement does not occur." *Id.* at 30.

In the course of discussing its action in that certification order, the Commission emphasized again the primacy of "maintaining the proper balance between protecting digital broadcast content and promoting its use and enjoyment by consumers …." *Certifications Order*, 19 FCC Rcd at 15910 ¶75. The Commission acknowledged that among the 13 technologies it was approving to implement the broadcast flag were two that employed copy restraints. The Commission explained that there were special circumstances relating to its approval of these two technologies and that its approval "should not be interpreted as precedent supporting the future adoption of technologies that impose copy restrictions on digital broadcast television content." *Id.* at 15910 ¶76.

SUMMARY OF ARGUMENT

1. The Commission reasonably interpreted the Communications Act as granting it jurisdiction to establish technical requirements for television receiving equipment in order to fulfill its responsibility of implementing the transition to digital television. Sections 1 and 2(a) of the Act, 47 U.S.C. 151, 152(a), confer on the agency regulatory jurisdiction over all interstate radio and wire communication. Under the definitional provisions of section 3, 47 U.S.C. 153, those communications include not only the transmission of signals though the air or wires, but also "all instrumentalities, facilities, [and] apparatus" associated with the overall circuit of messages sent and received – such as digital television receiving equipment. Furthermore, sections 4(i) and 303(r) of the Act, 47 U.S.C. 154(i), 303(r), vest the Commission with authority to establish rules that are necessary to carry out its specific responsibility for effectuating the transition to digital television.

The legislative history of the Communications Act confirms that Congress intended to grant the FCC broad authority over equipment used in connection with radio and wire transmissions. Under court decisions including *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968), the Commission has discretion to exercise such authority when the need arises, even if it has not previously regulated in a particular area.

Petitioners are mistaken when they assert that Congress precluded the broadcast flag rules by adopting legislation specifically addressing *different* technical requirements for television receivers and other communications equipment. None of those statutory provisions addresses protections against redistribution of digital broadcast programming, or demonstrates a congressional understanding that the FCC lacks general rulemaking

authority over television receiving equipment. Congress has sometimes clarified the agency's authority to establish technical requirements or overridden the agency's exercise of discretion on particular technical matters, but it has never withdrawn the relevant regulatory authority conveyed under the core jurisdictional provisions of the Act.

2. The Commission also reasonably concluded that the broadcast flag requirements are appropriate to protect and further Congress's plan for a transition from traditional analog television to a digital television system, which will provide higher-quality pictures and sound while making available additional radio spectrum for new uses.

Consistent with extensive comments in the agency record, the FCC concluded that a side effect of the move from analog broadcast technology to digital broadcast technology is the creation of new opportunities for widespread, unauthorized redistribution of broadcast television programming over the Internet and in other ways. Absent some new form of protection, digital broadcast television programming would be comparatively less secure against such widespread, unauthorized redistribution than programming distributed over other television systems such as satellite and cable – technologies that compete against broadcast television for programming. In light of those considerations, the Commission permissibly determined that a failure to provide digital broadcasters some technical means of protecting against unauthorized redistribution would cause content owners to withhold their higher-value content from the digital broadcast television medium, and thus endanger the success of the statutorily mandated DTV transition as well as compromise the public interest in the availability of high-quality programming via free, over-the-air television. The Commission identified broadcast flag

technology as a currently available technology that can prevent these harms at acceptable cost.

The FCC's adoption of content-protection requirements thus rests on rational and permissible predictions about the communications industry and valid communications-policy objectives. The agency may make action to avoid these predicted harms before they materialize on a large scale. It also was unnecessary for the Commission to await a perfect solution to the clear redistribution problem before taking action to address it.

Finally, the broadcast flag rules do not conflict with the Digital Millenium Copyright Act, 17 U.S.C. 1201)(c)(3), or any principle of copyright law. Although the DCMA does not itself require any particular technology for copy protection, that statute does not prevent the FCC from requiring such technologies under the separate authorization of the Communications Act. The broadcast flag rules also leave undisturbed the general policies embodied in the copyright laws. The requirement of installing broadcast flag technology in digital television receiving equipment need not interfere with consumers' ability to copy digital broadcast programs for their personal use. Furthermore, the copyright laws and fair use doctrine do not encompass a right to engage in unlimited redistribution of copyrighted material.

ARGUMENT

I. STANDARD OF REVIEW

This case involves both deferential *Chevron* review of the FCC's interpretation of the Communications Act, and deferential "arbitrary and capricious" review of the Commission's regulatory policy decisions.

A. The Statutory Issue

Petitioners argue that the Commission acted outside the scope of its statutory authority in adopting the broadcast flag. To determine whether the Commission permissibly interpreted the Act as providing it authority to promulgate rules, the Court employs the familiar test outlined by the Supreme Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *See United States v. Mead Corp.*, 523 U.S. 218, 226-28 (2001). If, through the Communications Act, Congress has spoken directly to the precise issue, "that is the end of the matter," and the Court defers to the "unambiguously expressed intent of Congress." *Id.* at 842-43. If, however, the Communications Act "is silent or ambiguous with respect to the specific issue" at hand, the Commission may exercise its reasonable discretion in construing the statute. *Id.* at 843. *See AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 387, 397 (1999). "It is settled law that this rule of deference applies even to an agency's interpretation of its own statutory authority or jurisdiction." *Mississippi Pwr. & Light Co. v. Mississippi*, 487 U.S. 354, 381 (1988).

Canons of statutory construction are relevant in *Chevron* analysis if "employment of an accepted canon of construction illustrates that Congress has a *specific* intent on the issue in question …." *Michigan Citizens for an Independent Press v. Thornburgh*, 868

F.2d 1285, 1292-93 (D.C.Cir.), *aff'd by an equally divided Court*, 493 U.S. 38 (1989). "If, however, the statute is ambiguous, then *Chevron* step two 'implicitly precludes courts picking and choosing among various canons of construction to reject reasonable *agency* interpretations." *Halverson v. Slater*, 129 F.3d 180, 184 (D.C.Cir. 1997).

B. The APA Issue

Petitioners also challenge the reasonableness of the particular broadcast flag rules chosen by the Commission. The Court must uphold the Commission's action in the face of such a challenge unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). This "[h]ighly deferential" standard of review "presumes the validity of agency action;" the Court "may reverse only if the agency's decision is not supported by substantial evidence, or the agency has made a clear error in judgment." *AT&T Corp. v. FCC*, 220 F.3d 607, 616 (D.C. Cir. 2000) (internal quotations omitted); *see also Bell Atlantic Telephone Cos. v. FCC*, 79 F.3d 1195, 1202-08 (D.C. Cir. 1996). The Court must affirm the Commission's decision if the agency examined the relevant data and articulated a "rational connection between the facts found and the choice made." *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotations omitted).

II. THE COMMISSION ACTED WITHIN ITS AUTHORITY UNDER THE COMMUNICATIONS ACT.

A. The Statutory Text Defining Wire And Radio Communication Includes Equipment Subject To The Broadcast Flag Requirement.

The text of the Communications Act puts the television reception equipment that will be subject to the broadcast flag requirement within the agency's regulatory jurisdiction. Section 1 of the Act, 47 U.S.C. 151, states that the Commission is created "[f]or the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges," and that the agency "shall execute and enforce the provisions of th[e] Act." *R&O*, 18 FCC Rcd at 23563 ¶29 (JA __).

Implementing that foundational purpose, section 2(a) of the Act, 47 U.S.C. 152(a), confers on the agency regulatory authority over all interstate radio and wire communication. Specifically, the statute provides that "[t]he provisions of this act shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by wire and radio … and to all persons engaged within the United States in such communication or such transmission of energy by radio …." *R&O*, 18 FCC Rcd at 23563 ¶29 (JA __).

Under the Communications Act's definitions, the terms "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 "instrumentalities, facilities, apparatus and services" that are used for the "receipt, forwarding and delivery" of such transmissions. *R&O*, 18 FCC Rcd at 23563 ¶29 (JA __); *see* 47 U.S.C. 153(33)

(defining the terms "radio communication" and "communication by radio" to mean "the transmission by radio of writing, signs, signals, pictures, and sounds of all kinds, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission."). The statutory definition of "wire communication" contains essentially identical language. *See* 47 U.S.C. 153(52)(defining the terms "wire communication" and "communication by wire" to mean "the transmission 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."). Thus, as the Commission determined in the *Report and Order*, the FCC's jurisdiction reaches "facilities" and "apparatus" for the receipt of digital broadcast television signals by radio or wire. *See R&O*, 18 FCC Rcd at 23563 ¶29 (JA __).

B. The Communications Act Gives The Commission Authority To Exercise Jurisdiction To Accomplish The Purposes Of The Act.

The Communications Act also expressly confers upon the Commission the authority to "perform any and all acts, make such rules and regulations, and issue such orders … as may be necessary in the execution of its functions." 47 U.S.C. 154(i). It similarly provides in the specific context of radio communications under Title III of the Act that the Commission has authority to "[m]ake such rules and regulations and prescribe such restrictions … as may be necessary to carry out the provisions of this Act …." 47 U.S.C. 303(r). Courts have long established that under these provisions the Commission has the authority to promulgate regulations to effectuate the goals and provisions of

the Act even in the absence of an explicit grant of regulatory authority, if the regulations are reasonably ancillary to the Commission's specific statutory powers and responsibilities.

In *Southwestern Cable*, for example, the Supreme Court upheld the Commission's authority to impose regulations restricting the operation of cable television systems in the absence of an express statutory grant. The Commission had acted on the basis of its concern that the importation of distant signals by cable system operators into the service area of local television stations could "destroy or seriously degrade the service offered by a television broadcaster, and thus ultimately deprive the public of the various benefits of a system of local broadcasting stations." 392 U.S. at 175. The Supreme Court affirmed the Commission's assumption of jurisdiction on the ground, among others, that the FCC's exercise of "regulatory authority over [cable television] is imperative if the Commission is to perform with appropriate effectiveness certain of its other responsibilities," *i.e.*, the preservation of a nationwide system of free, over-the-air broadcast television stations. *Id.* at 173. This Court and others have reached similar conclusions as to the Commission's authority to act in the absence of express statutory grants.[5]

---

[5] *See, e.g., United Video, Inc. v. FCC*, 890 F.2d 1173, 1183 (D.C.Cir. 1989) (upholding Commission's authority to reinstate syndicated exclusivity rules for cable television companies as ancillary to the Commission's authority to regulate television broadcasting); *Rural Tel. Coalition v. FCC*, 838 F.2d 1307, 1315 (D.C. Cir. 1988) (upholding Commission's authority to adopt rules establishing a "Universal Service Fund" in the absence of specific statutory authority as ancillary to its responsibilities under Sections 1 and 4(i) of the Communications Act, "to further the objective of making communications service available to all Americans at reasonable charges"); *North American Telecomm. Ass'n v. FCC*, 772 F.2d 1282, 1292-93 (7th Cir. 1985) ("Section 4(i) empowers the Commission to deal with the unforeseen – even if [] that means straying a little way beyond the apparent boundaries of the Act – to the extent necessary to regulate effectively those matters already within the boundaries") (citations omitted); *Lincoln Tel. & Tel. Co. v. FCC*, 659 F.2d 1092, 1109 (D.C. Cir. 1981) ("The instant case

Here, the Commission pointed out that it "is charged with the responsibility of shepherding the country's broadcasting system into the digital age – a goal that has become central to the Commission's Section 303(g) mandate to "[s]tudy new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest." *R&O*, 18 FCC Rcd at 23564 ¶30; *see* 47 U.S.C. 309(j)(14)(A) ("[a] television broadcast license that authorizes analog television service may not be renewed … for a period that extends beyond December 31, 2006"). The Court has recognized that the DTV transition is "the unambiguous command of an Act of Congress," *Consumer Elec. Ass'n*, 347 F.3d at 843, and the evidence of this is found in "an intricate and detailed set of provisions for the DTV transition."[6] *R&O*, 18 FCC Rcd at 23564 ¶30 (JA __). The Commission concluded that it is "clear that advancing the DTV transition has become one of the Commission's primary responsibilities under the Communications Act at this time." *Id.*

---

was an appropriate one for the Commission to exercise the residual authority contained in Section 154(i) to require a tariff filing...."); *GTE Serv. Corp. v. FCC*, 474 F.2d 724, 731 (2d Cir. 1973)(holding that "even absent explicit reference in the statute, the expansive power of the Commission in the electronic communications field includes the jurisdictional authority to regulate carrier activities in an area as intimately related to the communications industry as that of computer services, where such activities may substantially affect the efficient provision of reasonably priced communications service").

[6] *See, e.g.*, 47 U.S.C. 309(j)(14) (requiring recapture of broadcast television spectrum used for analog service by end of 2006, subject to conditions); 47 U.S.C. 337 (requiring the removal and relocation of incumbent analog broadcast licensees operating on channels 60-69 after the DTV transition period terminates in order that frequencies can be used for public safety and commercial services); 47 U.S.C. 336 (broadly directing the Commission concerning the transition to digital television); 47 U.S.C. 396(k)(1)(D) (creating $20 million fund for fiscal year 2001 for transition from analog to digital technology for public broadcasting services); 47 U.S.C. 614(b)(4)(B) (digital must carry); 47 U.S.C. 544a(c)(2) (subscriber notification requirements regarding the impact that cable converter boxes may have on advanced television picture generation and display features).

As explained above, the subject of the broadcast flag rules comes within the FCC's general jurisdiction under the Communications Act to regulate interstate and foreign communications by wire and radio. 47 U.S.C. 152(a). Therefore, because the broadcast flag rules "were reasonably adopted in furtherance of [the] valid communications policy goal" of implementing the DTV transition, they fall under the Commission's 4(i) and 303(r) powers unless they are inconsistent with some other provision of law – a subject we address in Part II, below. *United Video, Inc. v. FCC*, 890 F.2d 1173, 1183 (D.C.Cir. 1989), *citting FCC v. National Citizens Comm. For Broadcasting*, 436 U.S. 775, 796 (1978).

C. Petitioners' Claims That The Commission Erred In Construing Its Jurisdiction Have No Foundation.

1. Petitioners contend that under the definitions of radio and wire communication in Sections 153(33) and 153(52), the agency's authority extends only to apparatus used for transmission and not to apparatus used for reception. (Br. at 29-30). As the Commission correctly observed, however, construing the Act's definitions of radio and wire communication as referring only to the transmission and not to the reception of communications would "ignore the broad language of the definition, which gives a fuller meaning to the concept of 'communication' so as to include all 'instrumentalities, facilities, apparatus and services' that may be 'incidental' to the literal transmission, but which are a part of an overall circuit of messages that are sent and received." *R&O*, 18 FCC Rcd at 23564 n.75 (JA __). The Senate Report on the 1962 All Channel Receiver Act, upon which petitioners rely for other purposes (Br. at 32-33), reinforces the plain meaning of the statutory text in stating that "[t]elevision receivers are an essential factor in the use of

the spectrum, and, as such, are clearly within the ambit of congressional legislation." S.Rep. No. 1526, 87th Cong., 2d Sess. 5 (1962)(emphasis added).

Petitioners base their attempt to limit Congress' jurisdictional grant largely on a letter from the Interstate Commerce Commission (ICC), contained in hearings on legislation that became the Communications Act of 1934. The ICC letter, they contend, "leaves no doubt" that the Commission lacks authority to regulate apparatus for reception of radio signals. In fact, the ICC letter supports the FCC's finding of regulatory jurisdiction. The purpose of the ICC letter cited by petitioners was to ensure that the new legislation vesting the ICC's jurisdiction over wire communications and the Federal Radio Commission's jurisdiction over radio communications in the new FCC would not inadvertently change existing law. *See Hearings on S. 2910 Before the Senate Comm. on Interstate Commerce*, 73d Cong., 2d Sess. 200 (1934). The ICC letter describes that existing law, which it sought to preserve, as follows:

> The [Interstate Commerce] Act applies to telegraph, telephone, and cable companies operating by wire or wireless and 'transmission' includes the transmission of intelligence through the application of electrical energy or other use of electricity, whether, by means of wire, cable, radio apparatus, or other wire or wireless conductors or appliances, and all instrumentalities and facilities for and services in connection with the receipt, forwarding, and delivery of messages, communications or other intelligence so transmitted ….

Hearings on S. 2910 at 201 (emphasis added). That language makes clear that, consistent with the text of Section 153(33) and (52), the ICC understood the jurisdiction being passed to the FCC to reach "all instrumentalities and facilities for … the receipt, forwarding, and delivery of messages, communications or other intelligence …." If any inference can be drawn as to the meaning of 47 U.S.C. 153(33) and 153(52) from the

ICC's letter to a committee of the Congress in 1934, it is that apparatus for the reception of transmissions was intended to be included within the statutory definitions of wire and radio communications. Certainly, petitioners cite nothing in the legislative history that supports their contrary interpretation.

Petitioners cite several cases that supposedly illustrate that the Commission's jurisdiction over radio and wire communication should be narrowly construed, but none is relevant here. *See* Br. at 24-25. In *MPAA v. FCC*, 309 F.3d 796, 804-05 (D.C.Cir. 2002), for example, the Court held that the Commission lacked authority to adopt "video description" rules because they "significantly implicated" program content, and specific provisions of Communications Act expressly prevent regulation of program content. The broadcast flag rules, by contrast, protect the integrity of broadcast digital transmissions without affecting the content of the programs.

In *Illinois Citizens Comm. for Broadcasting v. FCC*, 467 F.2d 1397 (7th Cir. 1972), on which petitioners also rely, the court affirmed the Commission's determination that it lacked jurisdiction over construction of a tall office building alleged to affect television reception, rejecting the argument of petitioners there that the Commission's authority extended beyond "communication by wire and radio" to "all activities which 'substantially affect communications ….'" *Id.* at 1399. In this case, the Commission reasonably concluded that it possesses jurisdiction over television receiving equipment because it is within the Act's definition of "communication by wire and radio," not because it "affects" such communication.

Petitioners also suggest that, under the jurisdictional interpretation of the *Report and Order*, the FCC could in the future assert jurisdiction to regulate the copying of faxed

documents or to regulate automobiles simply "because the car contains a satellite radio receiver." Br. at 27-28. Petitioners ignore the fundamental difference between regulation of receivers and regulation of received material. Nothing in the broadcast flag rules regulates the copying or use of DTV programming other than through permissible regulation of DTV receiving equipment, which is essential in the transmission of radio communications. As the Commission explained, moreover, the "downstream products" that are affected by the flag rules involve a limited subset of products that perform part of the process of reception and are "different from the universe of products traditionally considered to be downstream from a reception device." *R&O*, 18 FCC Rcd at 23573 ¶48 (JA __). The regulated equipment is within the category of "'instrumentalities, facilities, apparatus and services' that may be 'incidental' to the literal transmission, but which are a part of an overall circuit of messages that are sent and received." *R&O,* 18 FCC Rcd at 23564 n.75 (JA __).

2. Petitioners next argue that, even if the Commission otherwise would have jurisdiction under Sections 1-3, 4(i) and 303(r) to require the broadcast flag technology in DTV receivers, Congress elsewhere has specifically addressed that issue and precluded Commission regulations. That argument too is incorrect.

For example, the Commission correctly rejected petitioners' assertion (Br. at 37) that Section 303(e) of the Communications Act, 47 U.S.C. 303(e), demonstrates that the FCC's statutory authority does not extend to reception equipment. *See R&O*, 18 FCC Rcd at 23564 n.75 (JA __). Section 303(e) authorizes the FCC to "[r]egulate the kind of apparatus to be used with respect to its external effects and the purity and sharpness of the emissions from each station and from the apparatus therein …." Section 303(e), as the

Commission reasonably concluded, "contains no indication that Congress intended to limit the Commission's authority over radio station apparatus to the terms of that statutory provision. The mere fact that the provision grants the Commission the authority to regulate radio station apparatus along certain lines does not imply that the Commission is prohibited from regulating such apparatus under authority drawn from other portions of the statute. To hold otherwise would render the concept of ancillary jurisdiction largely meaningless." *R&O*, 18 FCC Rcd at 23564 n.75 (JA __).[7]

Petitioners claim more generally that a purported "regulatory mosaic" – comprised of amendments to the Communications Act beginning in 1962 relating to FCC regulation of television receivers and other equipment – demonstrates "Congress' decision to restrict FCC jurisdiction over TV receiver design." Br. at 37.[8] Again, the Commission correctly rejected similar arguments below, noting the specific, narrow focus of these legislative actions, as well as the lack of evidence in either the text or the legislative history of any of these provisions indicating that Congress intended to limit the Commission's ability to exercise its ancillary authority in other areas that were not similarly addressed through explicit statutory provisions. *See R&O*, 18 FCC Rcd at 23566 ¶32 (JA __). Petitioners' argument is tantamount to a claim that Congress intended through later legislation to repeal Congress' grant, in 1934, of ancillary agency authority to adopt rules regulating

---

[7] Section 303(e) had its origins in the Radio Communications Act of 1912, Sec. 4 Third and Fourth, 37 Stat. 302 (1912) ; *see also* Radio Act of 1927, Sec. 4(e), 44 Stat. 1162. There is also nothing in the text of those statutes to support a claim that the predecessor provisions of Section 303(e) were intended to establish a limitation on regulatory authority.

[8] The statutory provisions to which petitioner refer include – 47 U.S.C. 302a; 303(s), 303(u), 303(x), 544a, and 549.

radio and wire communications receiving equipment. Such a claim runs up against "[t]he cardinal rule … that repeals by implication are not favored." *Traynor v. Turnage,* 485 U.S. 535, 547 (1988) (quoting *Morton v. Mancari,* 417 U.S. 535, 549-50 (1974)). A later statute displaces an earlier one only when the later statute "expressly contradict[s] the original act" or such a construction "is absolutely necessary ... in order that [the] words [of the later statute] shall have any meaning at all." *Id.* at 548 (*quoting Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976)); *see also Wood v. United States*, 41 U.S. (16 Pet.) 342, 363 (1842) (there should be a "manifest and total repugnancy in the provisions, to lead to the conclusion that the [more recent laws] abrogated, and were designed to abrogate the [prior laws]"). Petitioners do not even suggest that such inconsistency exists here.

This also s not a case where Congress can be seen, in the subsequent statutes cited by petitioners, to be narrowing the scope of a broad statute that may have a range of meanings. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143-44 (2000). Instead, the provisions of the Act that petitioners invoke were enacted either to clarify the agency's authority or to direct the agency to exercise its clear authority in a particular manner – not to confine the agency's regulatory reach.

Petitioners rely heavily, for example, on the All Channel Receiver Act (ACRA), in which Congress authorized the FCC to require that television receivers "be capable of adequately receiving all frequencies allocated by the Commission to television broadcasting …."[9] Petitioners assert that in this 1962 legislation "Congress carefully circumscribed

---

[9] Pub.L.No. 87-529, 76 Stat. 150 (*codified at* 47 U.S.C. §§303(s), 330(a)).

the Commission's authority over television receivers. …." Br. at 32. Congress did no such thing. As this Court determined in *Electronic Industries Ass'n v. FCC*, 636 F.2d 689 (D.C.Cir. 1980), Congress itself established a reception standard for television receivers in ACRA because "it did not want the Commission establishing performance standards for television." *Id.* at 693. That understanding is consistent with the legislative history of the bill that became ACRA, which the Court noted had originally authorized the FCC to set "'minimum performance standards' for all television receivers shipped in interstate commerce." *Id.* at 694. This language was modified in the final legislation to authorize the Commission to require that television sets be "capable of adequately receiving all frequencies allocated … to television broadcasting." *Id.* That change 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 ….'" *Id.; see* S.Rep. No. 1526, 87 Cong., 2d Sess. at 8 (1962). The goal of Congress in modifying the language of ACRA during the legislative process thus was to ensure that that ACRA itself would not authorize or encourage the Commission to establish general "performance standards" for televisions sets.[10]

Additional provisions of the Act that petitioners offer as their evidence that Congress intended to deny the Commission general jurisdiction to regulate electronic

---

[10] It is also well-established that Congress intended in adopting ACRA to replace the Commission's contentious channel allocation solution for the UHF-VHF competitive problem with an equipment solution. *See Electronic Industries*, 636 F.2d at 691 n.2 (describing ACRA as a response to the FCC's "deintermixture" policy of the late 1950s and early 1960s that sought to resolve the competitive imbalance between UHF and VHF television stations by reallocating all stations in certain communities to UHF channels); *see also* S.Rep. No. 1526 at 7; Longley, *The FCC and the All-Channel Receiver Bill of 1962*, JOURNAL OF BROADCASTING, Vol. XIII, No.3 at 293 (1969).

devices (other than transmitting equipment) similarly do not support that thesis. Section 302a of the Act, 47 U.S.C. 302a, provides the Commission with specific authority to regulate the manufacture, import and sale of devices that are capable of emitting radio-frequency energy capable of producing harmful interference, as well as to establish "performance standards" for "home electronic" equipment to reduce their susceptibility to interference. Nothing in the text of that statute or in the legislative history cited by petitioners indicates that Congress intended by enacting Section 302a to limit the Commission's authority to regulate outside the scope of that provision. In fact, the legislative history indicates that the statute was "intended to clarify the reservation of exclusive jurisdiction to the [FCC] over matters involving [radio frequency interference]," and that "[s]uch matters shall not be regulated by local or state law …." H.R. Conf. Rep. No. 97-765, 97th Cong., 2nd Sess. 33 (1982); *see Freeman v. Burlington Broadcasters, Inc.*, 204 F.3d 311, 321 (2d Cir.), *cert. denied*, 531 U.S. 917 (2000).

Sections 303(u) and 303(x), 47 U.S.C. 303(u), (x), respectively, direct the FCC to mandate that television receivers be equipped to display closed captioning for the benefit of hearing impaired viewers, and to permit viewers to block the reception of violent or adult programming. There is no evidence that Congress intended to do anything more than to override the FCC's past exercise of its regulatory discretion –specifically the agency's former decisions to have closed captioning and the reception of violent or adult programming resolved voluntarily by the industry. *See Implementation of the Television Decoder Circuitry Act of 1990*, 6 FCC Rcd 2419 (1991); *Technical Requirements to*

Enable Blocking of Video Programming, 12 FCC Rcd 15573 (1997).[11] Petitioners claim (Br. at 41) that because Congress should not be presumed to do a futile thing, these statutory provisions must demonstrate that the Commission lacks authority to regulate television receivers absent specific Congressional action. However, because in each case there were clear purposes for Congressional action unrelated to the Commission's general authority to regulate television receivers, there is no basis for that sort of futility claim.

In the proceeding below, the Commission rejected the argument, repeated by petitioners here, that Congress' specific statutory authorizations and requirements related to equipment design "fit[] neatly within the *expressio unius est exclusio alterius* canon of statutory construction." Br. at 38. As the Commission explained, that maxim "has little force in the administrative setting," where courts defer to an agency's interpretation of a statute unless Congress has '"directly spoken to the precise question at issue."' *Texas Rural Legal Aid, Inc. v. Legal Serv. Corp.*, 940 F.2d 685, 694 (D.C.Cir. 1991) (*quoting Chevron, U.S.A. v. NRDC*, 467 U.S. at 842.). The e*xpressio unius* canon is "simply too thin a reed to support" to support a conclusion that Congress has clearly resolved an issue. *Id.; see R&O*, 18 FCC Rcd at 23566 n.85 (JA __). *See also Mobile Communications Corp. v. FCC*, 77 F.3d 1399, 1405-06 (D.C.Cir.), *cert. denied*, 519 U.S. 823 (1996). This Court has explained further that the "difficulty with the [*expressio unius*] doctrine –

---

[11] Petitioners also contend that 47 U.S.C. 330, which prohibits importation or interstate shipment of equipment that does not comply with the requirements 47 U.S.C. 303(s), (u) and (x), further demonstrates Congress' intent to limit the Commission's authority. That section, however, simply provides a clear procedure to enforce the substantive provisions to which it applies. If those provisions themselves do not limit the Commission's authority beyond their terms, and we have shown above that they do not, there is no basis to claim that Section 330 creates any such limitations.

and the reason it is not consistently applied … is that it disregards several other plausible explanations for an omission." *Clinchfield Coal Co. v. Federal Mine Safety & Health Rev. Comm'n*, 895 F.2d 773, 779 (D.C.Cir.), *cert. denied*, 498 U.S. 849 (1990). Congress may well have intended "that in the second context the choice should be up to the agency. Indeed, under *Chevron*, 467 U.S. at 842-44, 104 S.Ct. at 2781-82, where a court cannot find that Congress clearly resolved an issue, it presumes an intention to allow the agency any reasonable interpretative choice." *Id.* Here, Congress has provided the FCC with broad authority under the Communications Act and, contrary to petitioners' claims, Congress has not specifically limited the Commission's authority to adopt regulations such as the broadcast flag.

Petitioners' reliance (Br, at 39) on *Independent Insurance Agents of America, Inc. v. Hawke*, 211 F.3d 638 (D.C.Cir. 2000), is similarly misplaced. The Court held there that a broad statute can be narrowed by subsequent legislation "'where the scope of the earlier statute is broad but the subsequent statutes more specifically address the topic at hand.'" *Id.* at 643, *quoting FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 144 (2000). Here, the "topic at hand" is the Commission's jurisdiction, under its ancillary authority, to regulate television receivers as an essential element of radio communications in order to advance the important statutory goal of the DTV transition. None of the statutory provisions cited by petitioners addresses that question. Furthermore, whereas *Hawke* rejected a statutory construction that "would render two other related statutes meaningless …, " 211 F.3d at 643-44, the Commission here has not rendered meaningless the equipment statutes upon which petitioners rely. Those statutes advance unrelated purposes such as directing the FCC to resolve a matter in a particular way (in the case of

ACRA), clarifying the agency's authority (in the case of 47 U.S.C. 302(a)), or mandating that certain matters be resolved by regulation rather than voluntary industry action (47 U.S.C. 303(u), (x)).

III. THE COMMISSION'S DECISION TO ADOPT BROADCAST FLAG RULES WAS RATIONAL AND CONSISTENT WITH COPYRIGHT LAW.

In addition to disputing the FCC's understanding of its jurisdiction and regulatory power, petitioners claim that the agency unlawfully exercised any power it does possess to regulate digital reception equipment. This line of attack on the broadcast flag rules is unfounded as well.

A. The Commission Reasonably Concluded That The Broadcast Flag Rules Are Necessary To The Success Of The Transition To Digital Television.

The Commission concluded in the *Report and Order* that "the potential threat of mass indiscriminate redistribution will deter content owners from making high value digital content available through broadcasting outlets absent some content protection mechanism," that "preemptive action" is needed now "to forestall any potential harm to the viability of over-the-air television," and that of the mechanisms currently available, the broadcast flag "regime will provide content owners with reasonable assurance that DTV broadcast content will not be indiscriminately redistributed, while protecting consumers' use and enjoyment of broadcast video programming." *R&O*, 18 FCC Rcd at 23552 ¶4 (JA __). Petitioners dispute (Br. at 51-52) that the record in this proceeding supports the Commission's finding of a problem with unauthorized distribution of DTV programming that requires the adoption of the broadcast flag rules.

Despite their arguments here, one of the petitioners has acknowledged elsewhere that "[t]he threat of digital redistribution is particularly acute for movie studios and other video content producers because their business models are highly dependent on 'repurposing' programming" and that "substantial unauthorized redistribution of content – could substantially diminish the value of a film or TV series." *Implications of the Broadcast Flag: A Public Interest Primer (version 2.0), A Report of the Center for Democracy and Technology* at 6 (Dec. 2003).

The agency record, moreover, established that movie studios and other video content producers have access to alternative media – including direct broadcast satellites, cable television, video cassettes and DVDs – that can provide more secure distribution than over-the-air television. *See R&O*, 18 FCC Rcd at 23565 ¶31 and n.82 (JA __)(citing to record). In light of these facts, the Commission reasonably concluded that content producers are likely to move at least their more valuable programming away from over-the-air television and onto more secure distribution channels if there is no method for them to prevent mass unauthorized distribution of their products when broadcast by over-the-air DTV stations. *Id.* As one commenter observed: "[I]t is basic economics and logic that the lack of mechanism to prevent digital broadcast content from being copied and widely redistributed over the Internet without authorization is a significant disincentive to content owners making digital broadcast content broadly available." NFL Reply Com. at 3 (JA __). Numerous other commenters supported that commonsense conclusion.[12]

---

[12] *See, e.g.*, CBS Affiliates Comments at 2-3 (JA __)("[L]lack of copy protection in digital broadcast television will cause non-network producers to turn increasingly to subscription-based distribution networks for distribution of their most valued programming. The risks associated with unprotected digital television broadcasting may simply be too great to warrant

The Commission did not find that the problem of wide-scale internet redistribution of digital broadcast television programs currently exists. It likely could not have made such a finding given the nascent status of DTV broadcasting. Instead, the Commission found that the problem was "forthcoming" and that "preemptive action is needed to forestall any potential harm to the viability of over-the-air television." *Id.* at 23552 ¶4 (JA __). The record supports that judgment. It reflects, for example, dramatic improvements in the speed of transferring data on the Internet.[13] Even if typical Internet speeds currently makes mass redistribution of digital broadcast television programming impractical, as

---

using broadcast television as the vehicle for such programming.); Viacom Comm. at 6(JA __)("Left unaddressed, this vulnerability to unauthorized redistribution could destroy television production economics …. those who produce digital content for television are apt to provide their most compelling and high-value content only to distribution platforms that can ensure the protection of their content ….Thus, the highest quality entertainment and sports programming would migrate to cable and satellite, rendering free, over-the-air television the poor stepchild of the distribution platforms, if it can even survive carrying second-rate, leftover programming."); NBC Comm. at 2 (JA __)("[B]roadcast television's ability to drive the digital transition will continue only insofar as broadcast television can transmit quality programming. This in turn depends on the continued willingness of program providers to allow television broadcasters to transmit their programming in digital. However, unless program providers' understandable fears of digital piracy in the wake of Napster and other examples of unauthorized widespread distribution of digital content are addressed, broadcasters will not be able to transmit in digital the same quality programming currently transmitted in analog. If consumers cannot enjoy the same programming in digital that they can enjoy view analog, they are unlikely to invest the thousands of dollars necessary to upgrade their home video equipment to access digital broadcast transmissions. This will unavoidably delay the transition to digital."); *see also* ASCAP Comments at 1-2; CPB Reply Comments at 2; DGA Comments at 1-3; Banks Comments at 2; MPAA Comments at 6-8; MPAA Reply Comments at 2-13; NMPA Reply Comments at 2-5; NBC Affiliates Comments at 1-3; NBC Comments at 2; NFL Comments at 6-12; NABA Comments at 1 (JA __).

[13] *See, e.g.,* [*Caltech News Release "Caltech computer scientists develop FAST protocol to speed up Internet,"* (March 18, 2003)](JA ___)("Caltech computer scientists have developed a new data transfer protocol for the Internet fast enough to download a full-length DVD movie in less than five seconds."); *see also* J. Williams, *Trends-Download An HD Movie in 5 Minutes* (May 5, 2003)[Attach. to 5/7/2003 Letter from Bruce Boyden to Marlene Dortch] (projecting that in 3-4 years it will take less time to download a high definition movie on the Internet than to watch it).

petitioners contend, the record supports the agency's judgment about what regulatory course is needed now to address looming problems that are likely to be presented in the near future as technology rapidly develops.[14]

Petitioners' attempt to analogize this case to *Home Box Office, Inc. v. FCC*, 567 F.2d 9 (D.C.Cir. 1977), is off the mark. Br. at 51. In *HBO* the Commission had adopted rules to limit the types of programming cable television systems and subscription broadcasters could offer for a fee (specifically most feature films, major sports events and certain other programming) in order to prevent competitive bidding away, or "siphoning," of this programming from free, over-the-air television. The Court reversed the Commission's action with respect to cable television because the agency had failed to demonstrate that its rules furthered "any legitimate goal of the Communications Act" and because of the burden they placed on expression by the cable television industry. *Id.* at 28, 49. As we have shown above, the Commission reasonably found here that the broadcast flag is necessary to the DTV transition – "one of the Commission's primary responsibilities." *R&O*, 18 FCC Rcd at 23565 ¶30 (JA __). Moreover, in this instance, the Commission has not restricted the programming any distributor may present. Rather, the broadcast flag allows program suppliers to bargain with DTV broadcasters (as well as

---

[14] Recent market developments provide support beyond the record for the Commission predictive judgment in this regard. Verizon, for instance, recently announced deployment of fiber optic lines that will be available to three million residential and business customers in six states by the end of 2005 that will provide Internet download speeds up to 10 times as fast as typically available now. *See* http://newscenter.verizon. com/proactive/newsroom/release.vtml?id=87633 (visited 10/22/2004). Verizon describes its service as providing the capability to download "purchased digital movies in a flash." *Id.* Absent content redistribution protection technology such as the broadcast flag, digital movies that have not been purchased, and the redistribution of which is unauthorized, could be downloaded to homes equipped with Verizon's fiber optic lines with the same speed.

other potential buyers such as satellite operators and cable systems) with the assurance that program content can be protected by any of the potential buyers at the buyer's option. The Commission reasonably concluded that if DTV broadcasters, alone among the potential buyers, were unable to offer program suppliers that assurance, then the DTV transition would be threatened because DTV broadcasters would be unable to acquire the most attractive programming that encourages consumers to acquire DTV receivers.

Petitioners also rely on *HBO* to support their general contention that there was no evidence of an immediate need for FCC action to impose the broadcast flag. The record supports the Commission's determination that it was necessary to act now because waiting until the problem fully manifests itself would be too late – consumers then would be using so much equipment that lacks the broadcast flag capability that efforts to introduce content protection technology would be ineffective at that late date. *See R&O*, 18 FCC Rcd at 23559 ¶19 ("[T]he window of opportunity for adopting a flag based redistribution control regime for digital broadcast television is closing.") (JA __). In *HBO* there was no similar conclusion by the Commission that delay could altogether prevent effective action by the Commission. To the contrary, the Court observed in *HBO* that what it viewed as an inadequate agency record resulted, at least in part, from the Commission's choice "to regulate rather than to allow a period of unregulated experimentation in which data could be generated that could form a predicate for informed agency action." 567 F.2d at 37.

Notwithstanding petitioners' objection that the Commission resorted to "predictiction" (Br. at 54), it is well established that the Commission is entitled, indeed in many cases expected, to make predictive judgments in the course of carrying out its responsi-

bilities, and those judgments are entitled to substantial judicial deference. *See, e.g.*, *Consumer Elec. Ass'n*, 347 F.3d at 299; *Telocator Network of America v. FCC*, 691 F.2d 525, 538 (D.C.Cir. 1982), *quoting FCC v. WNCN Listeners Guild*, 450 U.S. 582, 594-95 (1981)("As oft has been repeated, the court will not pass upon the wisdom of the agency's perception of where the public interest lies, nor will it require 'complete factual support' in the record when the agency's ultimate conclusions necessarily rest on 'judgment and prediction rather than pure factual determinations.'").

Finally, petitioners' claims that the Commission failed to consider adequately "more effective alternatives to the Flag" and imposed a rule "whose benefit will be almost zero and whose cost is more substantial than estimated" ignores the Commission's express conclusions. Br. at 55. The only significant alternative to the flag was a form of encryption, which the Commission explained would impose costs and delays (principally the obsolescence of existing televisions receivers) that made it an unacceptable alternative. *R&O*, 18 FCC Rcd at 23561 ¶24 (JA __). Petitioners cite no basis for their contention that the broadcast flag regime will be unreasonably costly. The Commission found to the contrary. *See Id*. at 23559-60 ¶21; *see also id*. at 23556-57 ¶14 n.29 (JA __).

B. The Broadcast Flag Rules Do Not Conflict With Copyright Law.

The Commission emphasized in the *Report and Order* that the broadcast flag "in no way limits or prevents consumers from making copies of digital broadcast television content" and that the scope of its decision "does not reach existing copyright law." *R&O*, 18 FCC Rcd at 23555 ¶ 9 (JA __). The Commission further explained that the "creation of a redistribution control regime establishes a technical protection measure that broadcasters may use to protect content. However, the underlying rights and remedies avail-

able to copyright holders remain unchanged, and the broadcast flag does not "alter the defenses and penalties applicable in cases of copyright infringement, circumvention, or other applicable laws." *Id.*[15]

Nevertheless, petitioners raise two copyright-related arguments in their effort to show that the broadcast flag rules contravene specific provisions of law. First, they contend that the broadcast flag rules "contravene Congress' decision not to impose copy protection mandates" in the Digital Millenium Copyright Act, 17 U.S.C. 1201(c)(3). Br at 44. Petitioners assert that Congress "made clear in the DMCA its intention not to require equipment design to respond to any particular technological copy protection measures." Br. at 45. However, as the Commission correctly found in a response to a similar argument below, the scope of the DMCA's instruction with respect to equipment design "is specifically limited with prefatory language." *R&O*, 18 FCC Rcd at 23570 ¶40 (JA __).

> The relevant statutory text provides:
>
> Nothing in this section shall require that the design of, or the design and selection of parts and components for, a consumer electronics, telecommunications, or computing product provide for a response to any particular technological measure, so long as such part of component, or the product in which such part or component is integrated, does not otherwise fall within the prohibitions of subsection (a)(2) or (b)(1).

17 U.S.C. 1201(c)(3)(emphasis added); *see also* H.R. Rep. No. 105-551, 105th Cong. 2d Sess. Pt. II at 41 (1998). By its plain tems, the phrase "[n]othing in this section" establishes that Section 1201(c)(3) is "not a complete prohibition on the governmental imple-

---

[15] Two of petitioners have recently acknowledged that the "Commission has sought to steer clear of enforcing copyright law as a whole through its broadcast-flag regulation and has also expressed its intention not to alter the contours of copyright law." *Opposition of Consumer Groups to the Petition for Partial Reconsideration by MPAA*, FCC Dkt. No. 04-63 (Sept. 27, 2004).

mentation of particular content protection technologies," and "the DMCA does not forestall Commission adoption" of the broadcast flag system. *R&O,* 18 FCC Rcd at 23570 ¶40 (JA __). The text of the DMCA plainly does not preclude, or even address, the FCC's authority to adopt the broadcast flag rules.

Petitioners' second copyright argument, that the broadcast flag "upsets the balance between copyright and fair use" (Br. at 45), wholly ignores the Commission's repeated and explicit statements that the flag system will not prevent consumers from copying programs for their personal use. *See, e.g.*, *R&O*, 18 FCC Rcd at 23555-56 ¶¶9, 14 (JA __); *Certifications Order,* 19 FCC Rcd at 15910 ¶76. Insofar as petitioners' complaint is that the rules will not permit consumers to redistribute protected content in whatever manner and to whatever extent they desire, there is no fair use principle that prohibits any constraints on further use. As the Second Circuit recently held, "[w]e know of no authority for the proposition that fair use, as protected by the Copyright Act, much less the Constitution, guarantees copying by the optimum method or in the identical format of the original. … Fair use has never been held to be a guarantee of access to copyrighted material in order to copy it by the fair user's preferred technique or in the format of the original." *Universal City Studios v. Corley*, 273 F.3d 429, 459 (2d. Cir. 2001); *see also United States v. Elcom,* 203 F.Supp.2d 1111, 1131 (N.D. Cal. 2002)("Defendant has cited no authority which guarantees a fair user the right to the most technologically convenient way to engage in fair use. The existing authorities have rejected that argument.").

Pursuant to the interim procedures adopted in the order on review, the Commission has already approved 13 different technologies to implement the broadcast flag. *See Certifications Order*, 19 FCC Rcd 15876. Only two of those technologies restrict copying

at all, and the Commission provided a detailed explanation why it had decided to approve those technologies despite its intention that the broadcast flag not limit ordinary consumer copying. *See id.* at 15910 ¶76. The Commission emphasized that its approval of those two technologies "should not be interpreted as precedent supporting the future adoption of technologies that impose restrictions on digital broadcast television content." *Id.* at ¶77. Moreover, the Commission's approval of 11 other technologies to implement the broadcast flag mandate gives both manufacturers and consumers choice – in particular. the ability to avoid any restriction on copying for personal use.

CONCLUSION

For the foregoing reasons, the Court should deny the petition for review.

.

Respectfully Submitted,

R. Hewitt Pate
Assistant Attorney General

Makan Delrahim
Deputy Assistant Attorney General

Catherine G. O'Sullivan
James J. Fredricks
Attorneys

United States Department of Justice
Washington, D. C. 20530

John A. Rogovin
General Counsel

Austin C. Schlick
Deputy General Counsel

Daniel M. Armstrong
Associate General Counsel

Jacob M. Lewis
Associate General Counsel

C. Grey Pash, Jr.
Counsel

Federal Communications Commission
Washington, D. C. 20554
(202) 418-1740
Fax (202) 418-2819

November 3, 2004

In The
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMERICAN LIBRARY ASSOCIATION, *ET AL*, PETITIONERS	)	
v.	)	**No. 04-1037**
FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA RESPONDENTS	)	

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7) and D.C. Cir. Rule 32(a)(2), I hereby certify that the accompanying "Brief for Respondents" in the captioned case contains 12559 words as measured by the word count function of Microsoft Word 2002.

C. Grey Pash, Jr.

November 3, 2004

STATUTORY APPENDIX