



**Testimony of Gigi B. Sohn, President  
Public Knowledge**

**Before the  
Subcommittee on Telecommunications and the Internet,  
Committee on Energy and Commerce**

**Hearing On:  
“The Audio and Video Flags: Can Content Protection and Technological  
Innovation Coexist?”**

**Washington, DC  
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Chairman Upton, Ranking Member Markey and other members of the subcommittee, my name is Gigi B. Sohn. I am the President of Public Knowledge, a nonprofit public interest organization that addresses the public's stake in the convergence of communications policy and intellectual property law. I want to thank the subcommittee for inviting me to testify on the audio and video broadcast flags. I specifically want to focus on the impact of these technological mandates on consumers.

I served as counsel to the nine public interest and library groups that successfully challenged the Federal Communications Commission's (FCC) broadcast flag rules in the United States Court of Appeals for the District of Columbia Circuit. My organization financed and coordinated the case, which is titled *American Library Association v. FCC*, 406 F.3d 689 (D.C. Cir. 2005). I have attached a copy of the court's decision in the case, and I respectfully request that it be placed into the record of this hearing.

### **Introduction**

This is the digital golden age for consumers. They have numerous choices for buying digital content and for buying devices on which to play that content. Far away from the copyright and technology battles in which we engage in Washington, newly forged partnerships between technology companies and content companies are revolutionizing the way we view and listen to digital media. Here are just a few examples:

- New versions of Microsoft's Media Center software enable the playback of a consumer's favorite media, whether on the individual's home office monitor, living room television, or PDA. The company has also developed a new music service in conjunction with MTV, VH1, and CMT music channels.
- Innovators like DigitalDeck, NewSoft, SlingMedia, and Sony each have developed competing technologies that allow consumers to remotely watch the television playing in their living rooms on a laptop, mobile phone, or portable gaming console.
- Yahoo! has developed software and services that enable consumers to view, create, and share content between their mobile phones, computers and living rooms, all using the Internet.
- Google has developed a distribution system to allow anyone to provide videos for free or for sale, and allow others to download that content to a computer, Apple iPod, or Sony Play Station Portable (PSP). Google has announced content distribution agreements with large content providers like CBS and the NBA. This follows the recent success of NBC, ABC, and ESPN, which distribute programming in partnership with Apple's iTunes.

- TiVo's most recent software update makes it simple for consumers to watch their favorite television shows on popular players like the iPod and PSP. And soon, the next generation TiVo recorder will help consumers record over-the-air high-definition television.
- Together, XM Radio and Pioneer developed an innovative portable satellite radio player that, like a TiVo, allows consumers to automatically record their favorite songs or shows while they are being broadcast. A consumer's preferences are stored on the radio, and when connected to a computer, XM's software helps the consumer to find more information about the artists, purchase music through the new Napster, and discover other songs and shows by similar artists.

These and many other examples demonstrate that the market for delivering content digitally over new technologies is working. Consumers can watch and listen to the content they purchase anytime and anywhere they want. Some of that content will be protected, and consumers can decide whether that protection is flexible enough. All of these great developments happened without government intervention.

The public appetite for buying individual TV shows and songs online is growing by leaps and bounds. There are more ways than ever to watch TV and movies and listen to the radio. Here are some of the newest legal services that offer consumers the opportunity to view, either for free or for a charge, content provided by the TV networks and Hollywood studios:

- Last winter, CBS Sports and the NCAA announced that they would stream the NCAA tournament for free over the Internet. Over the course of the tournament, they served up a record 268,000 simultaneous streams, with a total of 14 million streams served and 4 million unique visitors.<sup>1</sup>
- The iTunes Video store, launched in October 2005, now carries television programs from ABC, NBC, Fox and CBS, along with many cable networks. In its first five months of operation, the movie store sold more than 12 million videos at \$1.99 a piece.
- In May, ABC began offering downloads of many of its most popular shows, including *Lost*, *Alias*, and *Desperate Housewives* for free on a trial basis. Last week ABC reported that more than 11 million viewers used the service in the first month of operation.
- Services like CinemaNow and WorldCinemaOnline allow consumers to download Digital Rights Management (DRM) protected movies and TV shows to their computers. Consumers can opt for a limited time rental, or choose to

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<sup>1</sup>[http://www2.ncaa.org/portal/media\\_and\\_events/press\\_room/2006/march/20060320\\_mmod\\_rls.html](http://www2.ncaa.org/portal/media_and_events/press_room/2006/march/20060320_mmod_rls.html)

keep the movie for a higher price.

- Akimbo and MovieBeam use a special set-top box that enables the user to download and watch movies on demand, with variable pricing based on the length of viewing.
- Warner Brothers has entered into a partnership with BitTorrent to provide DRM-protected media using BitTorrent technology. This innovative model will use BitTorrent's distributed model to provide high speed downloads, and shared compensation for the content owners.

Yet even as innovators in the motion picture and recording industries promote these alternative distribution models and the technologies that facilitate them, their colleagues in Washington are asking Congress to step in and give them protection from the vague threat of massive copyright infringement the industry says these new technologies could facilitate. Let us be clear. The content industry has not shown that any infringement has resulted from these technologies. And it certainly has not shown that government technology mandates will work to stop actual copyright pirates rather than prevent ordinary consumers from engaging in lawful activities.

The content industry is asking Congress to impose three technology mandates: the TV broadcast flag, an audio broadcast flag, and an end to the analog hole. Each mandate 1) injects government into technological design; 2) restricts lawful consumer activities; and 3) increases consumer costs by making obsolete millions of digital devices. Once consumers start to purchase devices that are compliant with these technology mandates, the costs will be enormous. For example:

- A consumer would not be able to record over-the-air local news on her broadcast-flag compliant digital video recorder in her living room and play it back on a non-compliant player in her bedroom (broadcast flag).
- A member of Congress could not email a clip of his appearance on the national news to his home office (broadcast flag).
- A student would be prohibited from recording excerpts from a DVD for a college Powerpoint presentation (analog hole).
- A consumer would be unable to record individual songs off digital broadcast and satellite radio (audio flag).
- Current versions of TiVos (and other digital video recorders), and Slingboxes may not work with analog hole closing compliant devices, rendering them virtually obsolete (analog hole and broadcast flag).

- A university could not use digital TV video clips for distance learning classes (broadcast flag).

I urge the Committee to think very long and hard about trying to fix what is not broken. Ask yourselves, in light of recent marketplace developments, is it good policy to turn the Federal Communications Commission into the Federal Computer Commission or the Federal Copyright Commission? Is it good policy to impose limits on a new technology like HD Radio (that unlike digital television, consumers need not adopt) that may well kill it? Is it good policy to impose technological mandates (like the broadcast flag and closing the analog hole) that would result in consumers having to replace most of the new devices that they just purchased?

There are better alternatives for protecting digital content than heavy-handed technology mandates. An effective multi-pronged approach would utilize consumer education, enforcement of copyright laws, new business models for content distribution and the use of technological tools developed in the marketplace, not mandated by government. The recent *Grokster* decision and the passage of the Family Entertainment and Copyright Act are just two of several new tools that the content industry has at its disposal to protect its content.

### **Technology Mandates Harm Innovation and are Costly and Inconvenient for Consumers**

For Public Knowledge, its members and its public interest allies, the impact of the D.C. Circuit's decision vacating the broadcast flag rules goes far beyond citizens' ability to make non-infringing uses of copyrighted material they receive on free over-the-air broadcast television. Equally as important, the decision limited the power of a government agency that, in the court's own words, has never exercised such "sweeping" power over the design of a broad range of consumer electronics and computer devices. This hands-off approach has fostered a robust market place for electronic devices that has in turn made this country the leader in their development and manufacture.

For this reason, any attempt to portray legislative reinstatement of the broadcast flag rules as "narrow" should be viewed with great skepticism. The rules put the FCC in the position of deciding the ultimate fate of every single device that can demodulate a digital television signal. The broadcast flag rules require the FCC to pre-approve television sets, computer software, digital video recorders, cellphones, game consoles, iPods and any other device that can receive a digital television signal.<sup>2</sup> Thus, the broadcast flag scheme places the FCC in the position of dictating the marketplace for all kinds of electronics.

The agency has neither the resources nor the expertise to engage in this kind of

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<sup>2</sup>D.C. Circuit Court Judge Harry Edwards noted this reach at oral argument when he said, "You're beyond transmission...I mean you're out there in the whole world regulating\*\*\*\*I mean, I suppose it will be washing machines next." *ALA v. FCC*, Oral Argument Transcript at 31.

determination. This type of government oversight of technology design will slow the rollout of new technologies and seriously compromise US companies' competitiveness in the electronics marketplace.

Some argue that the initial FCC certification process worked because all thirteen technologies submitted to the agency were approved. That is a very superficial view of that process. First, it is widely known that several manufacturers removed legal and consumer-friendly features of their devices before submitting them to the FCC, largely at the behest of the movie studios. Second, the changing nature of the FCC and its commissioners is likely to make for widely varying results. Given the fervor of then-Commissioner Martin's dissent to the Commission's approval of TiVo-To-Go, it is unlikely that such technology would be certified today under Chairman Martin's FCC.<sup>3</sup>

The certification process also exacerbates equipment incompatibility problems caused by the broadcast flag scheme. Not only will the scheme prevent consumers from making copies of a TV show on one system and play it on another, none of the 13 different technologies approved by the FCC in its interim certification process work with each other. This means that a consumer who buys one Philips brand flag-compliant device must buy *all* Philips brand flag compliant devices. This raises consumer costs, and also raises serious questions about competition among and between digital device manufacturers.<sup>4</sup>

Proposals to mandate content protection for digital broadcast and satellite radio would similarly place the FCC in the position of mandating the design of new technologies. For example, H.R. 4861, the Audio Broadcast Flag Licensing Act of 2006 ("Ferguson bill"), gives the FCC the authority to promulgate regulations governing "all technologies necessary to make transmission and reception devices" for digital broadcast and satellite radio. In the case of so-called High Definition (or HD) Radio,<sup>5</sup> this could destroy this new technology at birth. Digital broadcast radio benefits consumers through improved sound quality (particularly for AM radio) and gives radio broadcasters the capacity to provide additional program streams and metadata. Unlike digital television, however, consumers need not purchase digital broadcast receivers to continue receiving free over the air broadcast radio. Certainly, if digital radio receivers have less functionality than current analog radio receivers, consumers will reject them and the

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<sup>3</sup>For a detailed analysis of the flaws of the FCC's certifications process, see Center for Democracy and Technology, *Lessons of the FCC Broadcast Flag Process* (2005), found at <http://cdt.org/copyright/20050919flaglessons.pdf>

<sup>4</sup>For a detailed discussion of these issues, see <http://www.publicknowledge.org/content/presentations/bflagpff.ppt>

<sup>5</sup>I say "so called," because calling a digital radio broadcast signal "High Definition" is quite misleading. Whereas in the television context, High Definition connotes a far clearer and sharper picture, an HD radio signal simply raises the quality of AM radio to FM standards, and permits the reception of broadcast radio in places where an analog signal would get cut off, such as in a tunnel or at a traffic light. Indeed, an "HD" quality signal is not even a CD quality signal. See, Ken Kessler, *Digital Radio Sucks, it's Official*, found at <http://www.stereophile.com/newsletters/>.

market for HD radio will die.

In the case of digital satellite radio, mandated radio content protection has the potential to cripple this increasingly popular, but still nascent, technology. XM Radio now has more than six and a half million subscribers, and Sirius Radio last year passed the four million subscriber mark. Consumers are buying all types of receivers for those services, based in part on the new flexibility and features the equipment offers. The type of content protection the recording industry seeks would likely slow this incredible growth.

### **The Content Industry Has Not Justified the Need for Technology Mandates**

Hollywood's core justification for imposition of the TV broadcast flag scheme can be paraphrased thusly: if the threat of indiscriminate redistribution of "high value" high definition television content is not reduced, broadcasters will not make that content available, thus slowing this country's transition to digital TV.<sup>6</sup>

One of the most vocal proponents of this argument was Viacom, which told the FCC in 2002 that "if the broadcast flag is not implemented and enforced by next summer, CBS will cease providing any programming in high definition for the 2003-2004 television season. And without the security afforded by a broadcast flag, Paramount will have less enthusiasm to make digital content available."<sup>7</sup>

Viacom never did carry out its threat to withhold HD programming, and the argument that the broadcast flag is necessary to encourage the broadcast of high value content and the orderly transition to digital TV transmission has been repudiated in the marketplace.<sup>8</sup> First, broadcasters are making "high value" content available for HDTV or, "in HD": 50%<sup>9</sup> of TV shows, including 66 %<sup>10</sup> of prime time programming, is broadcast in high definition. A number of "high value" sports programming broadcasts, including Monday Night Football, the Super Bowl, the NBA Finals, the NCAA Final Four college basketball championship, the FIFA World Cup, Major League Baseball's All-Star Game and World Series games, all NBC NASCAR races, the U.S. Open golf tournament, and the Olympics, are broadcast in HD along with many other select sporting events

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<sup>6</sup>See *In the Matter of Digital Broadcast Content Protection*, FCC 03-273, 18 FCC Rcd 23550, 23553 (November 4, 2003).

<sup>7</sup>See Comments of Viacom *In the Matter of Digital Broadcast Content Protection*, MM Docket No. 02-230 at 12 (December 6, 2002).

<sup>8</sup>D.C. Circuit Judge Edwards also rejected this argument. See *ALA v. FCC* Oral Argument Transcript at 32 (Judge Edwards: "This in no way -- what you do here or not in no way impairs the ability to . . . stay on the digital deadline. . . . In no way.").

<sup>9</sup><http://www.ati.com/products/hdtvwonder/>

<sup>10</sup>For the week of Jan. 19 to Jan. 25, ABC broadcast 13 of 32 prime-time shows in HD. During the same week, CBS broadcast 31 of 34 prime-time shows in HD; NBC broadcast 32 of 50 prime-time shows in HD during the same period. For all 3 networks combined, 76 of 116 (66%) prime-time shows were broadcast in HD for one week in January 2006.

throughout the year.<sup>11</sup> Second, the country's transition to digital TV is accelerating, not slowing down, as sales of digital TV sets continue to increase. According to the Consumer Electronics Association, sales of digital TV sets grew 60% to \$17 billion dollars.<sup>12</sup> According to Forrester Research, 16 million American homes have digital television sets. In 2006, that number is expected to rise to 26 million, or one in four households.<sup>13</sup> Indeed, the case could be made that rather than accelerate the DTV transition, the broadcast flag could slow the transition when consumers discover that expensive new television sets have less functionality than their current sets.

The recording industry has similarly not demonstrated that an audio flag is necessary. The industry does not cite to even one instance of a digital broadcast or satellite radio transmission being copied illegally or retransmitted over the Internet. Indeed, RIAA chief Mitch Bainwol's testimony and comments on the subject make clear that the real rationale for seeking radio content protection is not copyright infringement, but the recording industry's displeasure over the licensing fees it receives from broadcast and satellite radio broadcasters.<sup>14</sup> The recording industry does not even pretend that audio flag legislation is intended to do anything other than stop personal home recording.

### **Video and Audio Flag Schemes Will Transform the Federal Communications Commission into the Federal Copyright Commission**

Despite the FCC's protestations to the contrary, any video or audio broadcast flag scheme will necessarily involve the agency in shaping the rights of content owners and consumers under copyright law. Making copyright law and policy is not the FCC's job. It is Congress' job.

While it is true that the TV broadcast flag scheme does not completely bar a consumer from recording her favorite TV show, it does prevent consumers from engaging in other lawful activities under copyright law. For example, as the D.C. Circuit noted in *ALA v. FCC*, the broadcast flag would limit the ability of libraries and other educators to use broadcast clips for distance learning via the Internet that is permitted pursuant to the TEACH Act, Pub. L. No. 107-273, 116 Stat. 1758, Title III, Subtitle C, §1330, amending 17 U.S.C. §§ 110, 112 & 882 (2002). *See ALA v. FCC*, 406 F.2d at 697.

This and other examples highlight that while proponents of the flag may justify it as prohibiting only "indiscriminate" redistribution of content over the Internet, flag-compliant technologies actually prohibit any and all distribution, no matter how limited or

<sup>11</sup>[http://www.cnet.com/4520-7874\\_1-5119938-1.html](http://www.cnet.com/4520-7874_1-5119938-1.html)

<sup>12</sup>[http://www.ce.org/Press/CurrentNews/press\\_releases\\_detail.asp?id=10913](http://www.ce.org/Press/CurrentNews/press_releases_detail.asp?id=10913)

<sup>13</sup>*See*, <http://biz.yahoo.com/prnews/051220/nytu017.html?.v=36>

<sup>14</sup>*See* testimony of Mitch Bainwol before House Committee on the Judiciary, Subcommittee on Courts, the Internet, and Intellectual Property for the hearing on "Content Protection in the Digital Age: The Broadcast Flag, High-Definition Radio, and the Analog Hole," November 3, 2005 at 4, found at <http://judiciary.house.gov/media/pdfs/bainwol110305.pdf>; and Mitch Bainwol, Out, P2P Paranoia, In: Platform Parity, Billboard Magazine, January 7, 2006 at 4.

legal. For example, if a member of this Committee wants to email a snippet of his appearance on the national TV news to his home office, the broadcast flag scheme would prohibit him from doing so. Video bloggers and other TV watchdogs would similarly be unable to post broadcast TV clips on their blogs. For example, the Parents Television Council, which rates television programs according to how child friendly they are, would be prevented from posting clips from those programs for parents to see.<sup>15</sup>

The fact that the broadcast flag will limit lawful uses of copyrighted content was detailed in the Congressional Research Service Report entitled *Copy Protection of Digital Television: The Broadcast Flag (May 11, 2005)*. CRS concluded there that

While the broadcast flag is intended to “prevent the indiscriminate redistribution of [digital broadcast] content over the Internet or through similar means,” the goal of the flag was not to impede a consumer’s ability to copy or use content lawfully in the home, nor was the policy intended to “foreclose use of the Internet to send digital broadcast content where it can be adequately protected from indiscriminate redistribution.” However, current technological limitations have the potential to hinder some activities that might normally be considered “fair use” under existing copyright law. For example, a consumer who wished to record a program to watch at a later time, or at a different location (time-shifting, and space-shifting, respectively), might be prevented when otherwise approved technologies do not allow for such activities, or do not integrate well with one another, or with older, “legacy” devices. In addition, future fair or reasonable uses may be precluded by these limitations. For example, a student would be unable to email herself a copy of a project with digital video content because no current secure system exists for email transmission.<sup>16</sup>

Proposals for an audio flag for broadcast and satellite radio similarly, and perhaps even more directly, place the FCC in the position of determining consumers’ rights under copyright law. For example, the Ferguson bill gives the FCC authority to issue licenses for satellite and digital broadcast radio transmission and reception devices that must

include prohibitions against unauthorized copying and redistribution of transmitted content through the use of a broadcast flag or other similar technology, in a manner consistent with the purposes of other applicable law.

Under this proposal, the FCC is placed in charge of determining both 1) the extent to which unauthorized copying (which is legal in some circumstances) of digital broadcast and satellite radio content is permitted; and 2) determining what kind of copying and

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<sup>15</sup>See [www.parentstv.org](http://www.parentstv.org).

<sup>16</sup> CRS Report at 5.

redistribution of audio content is permissible. In other words, the FCC is given the power to control the extent to which consumers can engage in personal copying.

Not only does this language give the FCC power to set copyright law, it also directly conflicts with current copyright law, specifically the Audio Home Recording Act – which explicitly gives consumers the right to record digital radio transmissions for noncommercial use.<sup>17</sup>

### **Any Broadcast Flag Legislation Must Be Coupled With DMCA Reform and Include Public Interest Exceptions**

As discussed above, Public Knowledge believes that technology mandates like the video and audio broadcast flags are misguided industrial policies that would constitute a radical expansion of the FCC's powers while radically diminishing consumers' rights. If the first rule for policymakers in technology and copyright debates is "first do no harm," then your course of action should be to let an already thriving market continue to grow.

Nevertheless, if Congress decides to impose flag schemes for digital television and/or digital radio, it must attempt to ensure that consumer's rights under the Copyright Act and the public interest under the Communications Act are preserved. The latter is particularly critical given that Hollywood seeks to limit access to free over-the-air broadcasting, which by law exists to serve the American people with, among other things, local news and public affairs programming. Thus, any broadcast flag legislation must be coupled with legislation to permit circumvention of technological protection measures for lawful uses and must include meaningful exceptions for 1) news and public affairs programming; 2) distance education; and 3) programming in the public domain.

#### *DMCA Reform*

We urge Chairman Barton to keep his promise to consumers that the full Energy and Commerce Committee will not approve any broadcast flag legislation unless it is coupled with legislation to permit circumvention of technological protection measures for lawful uses. Because of broadcasting's special role in American society, it is imperative that consumers be able to circumvent technological protection measures like the broadcast flag in order to engage in lawful uses of that content. This is particularly important as more and more people use weblogs to comment or criticize our culture.

Public Knowledge is grateful that Chairman Barton has co-sponsored H.R. 1201, the Digital Media Consumers Rights Act. H.R. 1201 would provide an exception to the anti-circumvention provisions of the Digital Millennium Copyright Act (DMCA), for lawful uses of copyrighted content. We believe that it is a narrowly tailored law that will preserve fair use rights for the digital age. Critics contend that H.R. 1201 is an invitation to piracy – but determined pirates do not need or use fair use to engage in illegal activity.

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<sup>17</sup>17 U.S.C. §§1000-1010.

H.R. 1201 only permits lawful activity. Those who flout copyright law will continue to be subject to all the penalties that the law permits.

### *News and Public Affairs Programming*

Under the Communications Act of 1934, broadcasters are tasked with serving as public trustees in exchange for the free use of public spectrum. As part of that duty, broadcasters are tasked with providing news and public affairs programming which serve the needs of the local communities that they serve. This programming, in essence, is payback to local viewers for the right to use a valuable resource: the public airwaves.

Broadcast news and public affairs programming is also a common source of comment, criticism and follow-up news on a variety of digital media. Websites and weblogs abound with fair use clips of such broadcast programming. Such comment and criticism would not be possible under a broadcast flag scheme.

For these reasons, any broadcast flag legislation should exempt news and public affairs programming. To the extent that the studios claim the need for a broadcast flag to protect secondary markets for programming, there is no such market for news and public affairs programming, since it is outdated soon after it airs.<sup>18</sup>

The exceptions language included in the broadcast flag provision which is part of the pending Senate telecommunications reform bill, S. 2686, is wholly inadequate. That provision exempts news and public affairs programming “the primary commercial value of which depends on timeliness.” However, it is entirely up to the broadcaster to decide whether that test is met. Undoubtedly, the studios will pressure the broadcaster to decide that the primary commercial value of such programming does not depend on timeliness – ensuring that most, if not all, news and public affairs programming is flagged. This is an exception that swallows the exception.

### *Distance Education*

Any broadcast flag law must also exempt distance learning for non-profit and for-profit libraries and higher educational institutions. As more and more Americans receive their educations online, those institutions must be able to redistribute broadcast programming that is part of a distance education curriculum. For non-profit higher education institutions, the ability to do so is guaranteed by the TEACH Act, Pub. L. 107-273. While for-profit educational institutions are not protected by the TEACH Act, there is no rationale for treating these institutions differently than non-profits. Both are dedicated to distance education and both use broadcast programming to engage in that

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<sup>18</sup>One MPAA executive stated at a recent public forum that the studios opposed such an exemption because they wanted to reserve the right to sell boxed sets of shows like Meet the Press. This strains credulity, since if there was a secondary market for public affairs programming of this type, then the studios would already be selling it.

activity.

The broadcast flag provision in the Senate telecommunications reform bill also is inadequate to protect the rights of libraries and universities to engage in distance learning. Under that provision, libraries and universities must seek FCC permission before they can engage in a task that is critical to their mission, and at least with respect to non-profit libraries, protected by law.

### *Programming in the Public Domain*

The public domain is the reservoir of creative works that are no longer protected by copyright. Thus, they are free for the public to use in whatever way they please. As such they should not be subject to technological protection measures like the broadcast flag. To the extent that content owners consider the public domain to be a dumping ground of works with little commercial value, it is unlikely that this exemption will be used very often. Moreover, if content owners are concerned that a program under copyright that only uses a small bit of a public domain work would be required to be exempted, the legislative language or legislative history can be drafted to emphasize that only that programming which primarily consists of public domain materials should be exempted.

### **A Technology Mandate to Close the Analog Hole is Unnecessary and Would Cause Great Consumer Confusion, Cost and Inconvenience**

While this hearing does not specifically address the content industry's efforts to close the so-called analog hole through legislative means, those efforts are closely related to the broadcast flag and radio content protection initiatives, and are therefore worthy of mention.

As many of you know, a bill was introduced in the House of Representatives last year<sup>19</sup> that would mandate that all digital devices read and obey two specific technologies – an encryption technology called CGMS-A and a watermarking technology called VEIL. The content industry claims that both of these technologies are necessary to ensure that analog content cannot be captured and digitized for possible indiscriminate distribution over the Internet.

I will not mince words – a government mandate to close the analog hole would be profoundly anti-consumer and a radical change in the historic copyright balance. Closing the analog hole would immediately restrict lawful uses of technology and make millions of consumer devices obsolete. It would not be far-fetched to predict that closing the analog hole will cause a consumer backlash with ramifications for device manufacturers, retail stores, content producers and Congress.

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<sup>19</sup>H.R. 4569: The Digital Transition Content Security Act of 2005, 109th Cong. 2005. Found at: <<http://www.publicknowledge.org/issues/hr4569>>

Moreover, Hollywood has not clearly defined the problem it wants to fix. They have provided no evidence that use of the analog hole has resulted in any significant copyright infringement. The mere fact that a consumer can buy an analog to digital converter device is not evidence that such a device is being used illegally any more than the sale of kitchen knives indicates that they are being used for stabbings. If the concern is that certain individuals are taking analog content, digitizing it and placing it on peer-to-peer networks, then the answer is not to close the analog hole, but to use the many legal, technological and marketplace tools the industry has at its disposal to combat illegal use of those networks.

Specifically, the proposed legislation suffers from a number of important substantive flaws. Here are just a few:

- *The analog hole technology mandate would be more intrusive than the broadcast flag:* The content industry's proposal mandates that each and every device with an analog connection obey not one, but two copy protection schemes. Thus, while the broadcast flag would put the FCC in charge of design control just for technologies that demodulate a broadcast signal, the proposal would put the inexperienced and overworked Patent and Trademark Office in charge of mandating the design of *every* device with an analog connector, including printers, cellphones, camcorders, etc. Like the broadcast flag, it sets in stone a copy protection technology for technologies that are always changing.
- *The analog hole mandate would impose a detailed set of encoding rules that would restrict certain lawful uses of content.* The House bill includes tiered levels of restriction based on the type of programming (e.g., pay-per-view, video on demand) that limit lawful uses in a manner that ignores the four fair use factors of 17 U.S.C. §107. This upsets the balance established in copyright law between the needs of copyright holders and the rights of the public by placing far too much control over lawful uses in the hands of the content producers.
- *The mandate would eliminate the DMCA's safety valve.* This Committee has been the leader in ensuring that the anti-circumvention provisions of the Digital Millennium Copyright Act do not unintentionally impinge on fair use. A common justification for limitations on fair use imposed by the DMCA is that individuals who want to use excerpts of digitally protected content like DVDs can copy snippets using the analog outputs on a TV set or by recording the screen with a video camera.<sup>20</sup> An analog hole mandate

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<sup>20</sup>See Testimony of Dean Marks, Senior Counsel Intellectual Property, Time Warner, Inc., and Steve Metalitz, Representing Content Industry Joint Commenters, before the Copyright Office in Rulemaking Hearing: Exemptions From Prohibitions On Circumvention Of Technological Measures That Control Access To Copyrighted Works, May 13, 2003 at 60-61: "I think the best example I can give is the demonstration that Mr. Attaway [MPAA Executive Vice President for Government Relations and

would eliminate this safety valve.

- *The bill would mandate and unproven and disputed technology.* While the CGMS-A + VEIL technology was discussed at the Analog Hole Reconversion Discussion Group, a standards group with both industry and public interest participation, it was quickly dismissed as not worthy of further consideration. Thus, this technology has not been fully vetted by industry and public interest groups. If Congress feels it must do something about the analog hole, at a minimum it should refer the technology back to industry and public interest groups so CGMS-A + VEIL can be thoroughly analyzed for its impact on consumers and the cost to technology companies. In the complete absence of any such review, the one-sided imposition of such a detailed technology mandated would be unprecedented.

### **The Proper Balance Between Content Protection and Consumer Rights Should Be Set by Copyright Law and Marketplace Initiatives**

I am often asked the following question: if Public Knowledge opposes the broadcast flag, radio content protection and closing the analog hole, what are better alternatives to protect digital television and radio content from infringing uses? The best approach to protecting rights holders' interests is a multi-pronged approach: by better educating the public, using the legal tools that the content industry already has at its disposal, and the technological tools that are being developed and tested in the marketplace every day. In the past eighteen months alone, content industry has used and won several important new tools to protect content, including:

- *The Supreme Court's decision in MGM v. Grokster and its aftermath.* The Supreme Court gave content owners a powerful tool against infringement when it held that manufacturers and distributors of technologies that are used to infringe could be held liable for that infringement if they actively encourage illegal activity. As a result, a number of commercial P2P distributors have gone out of business, moved out of the U.S., or sold their assets to copyright holders.
- *Lawsuits against mass infringers using P2P networks.* Both the RIAA and the MPAA continue to sue individuals who are engaged in massive infringement over peer-to-peer (P2P) networks. By their own admission, these lawsuits

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Washington General Counsel] gave for you [Marybeth Peters, Registrar of Copyrights] earlier this month in Washington in which he demonstrated that he used a digital camcorder viewing the screen on which a DVD was playing to make an excerpt from a DVD film and have a digital copy that could then be used for all the fair use purposes....” (Mr. Metaliz at 60.) “I agree with everything Steve has just said about fair use copying or taking clips ... with digital camcorders and analog camcorders being widely available ...” (Mr. Marks at 61).

have had both a deterrent and educative effect. The RIAA now characterizes the P2P problem as “contained.”<sup>21</sup>

- *Passage of the Family Entertainment and Copyright Act.* The FECA gave copyright holders a new cause of action to help limit leaks of pre-release works and made explicit the illegality of bringing a camcorder into a movie theatre. It also provided for the appointment of an intellectual property “czar” to better enforce copyright laws.
- *Agreements by ISPs to pass on warning notices.* The war between Internet Service Providers and content companies has begun to cool. Last year, Verizon and Disney entered into an agreement by which Verizon will warn alleged copyright infringers using its networks, but will not give up their personal information to Disney. Verizon officials have told me that they intend to enter into similar agreements with other content providers.
- *Increased use of copy protection and other digital rights management tools in the marketplace.* As discussed above, there are numerous instances of the use of digital rights management tools in the marketplace. iTunes Fairplay DRM is perhaps the most well known, but other services that use DRM include MSN music and video, Napster, Yahoo Music, Wal-mart, Movielink, CinemaNow and MovieBeam. The success of some of these business models are a testament to the fact that if content companies make their catalogues available in an easily accessible, flexible and reasonably priced manner, those models will succeed in the marketplace without government intervention.

These tools are in addition to the strict penalties of current copyright law. To the extent that the content industries are looking for a “speed bump” to keep “honest people honest,” I would contend that many such speed bumps already exist, while more are being developed every day without government technology mandates.

Finally, by far the most effective means of preventing massive copyright infringement involves the content industry doing what it took the music industry far too long to do<sup>22</sup> – satisfy market demand by allowing consumers to enjoy fair and flexible access to content at reasonable prices (inevitably produced in a free market). DVDs are the best example of the market working. There, a government mandate –the Digital Video Recording Act-- was rejected and an industry-agreed upon fairly weak “keep honest people honest”

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<sup>21</sup>Jefferson Graham, *RIAA Chief Says Illegal Song-Sharing “Contained”*, USATODAY.COM, June 12, 2006, at: [http://www.usatoday.com/tech/products/services/2006-06-12-riaa\\_x.htm](http://www.usatoday.com/tech/products/services/2006-06-12-riaa_x.htm).

<sup>22</sup>See Keynote Address of Edgar Bronfman, Chairman and CEO of Warner Music at <http://www.tvworldwide.com/events/pff/050821/agenda.htm>. “The Music Industry, like almost every industry faced with massive and rapid transformation first reacted too slowly and moderately, inhibited by an instinctive and reflexive reaction to protect our current business and business models.”

protection system was adopted. Despite the fact that the protection system was defeated long ago, the DVD market has grown at an astounding rate – from zero in 1997 to \$25,000,000,000 in sales and rentals last year. Moreover as I noted above, many other new digital music and video distribution models, developed with content industry support and industry-agreed upon content protection, are emerging in the market. We believe that these efforts make government intervention in the free market unnecessary.

### **Conclusion**

The content and technology industries are moving forward, together, to provide the digital content and the digital machinery that consumers are buying and enjoying. Technology mandates like the broadcast flag and radio content protection are a step backward from this progress, limiting both innovation and consumer choice while increasing costs to innovators and consumers. I urge the subcommittee to look at recent marketplace developments and consider whether government action here would do far more harm than good. Thank you.

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Argued February 22, 2005

Decided May 6, 2005

No. 04-1037

AMERICAN LIBRARY ASSOCIATION, ET AL.,  
PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION AND  
UNITED STATES OF AMERICA,  
RESPONDENTS

MOTION PICTURE ASSOCIATION OF AMERICA, INC., ET AL.  
INTERVENORS

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On Petition for Review of an Order of the  
Federal Communications Commission

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*Pantelis Michalopoulos* argued the cause for petitioners. With him on the briefs were *Cynthia L. Quarterman*, *Rhonda M. Bolton*, *Lincoln L. Davies*, and *Gigi B. Sohn*.

*Jacob M. Lewis*, Attorney, Federal Communications Commission, argued the cause for respondents. With him on the brief were *R. Hewitt Pate*, Assistant Attorney General, *Catherine G. O'Sullivan* and *James J. Fredricks*, Attorneys, *John A. Rogovin*, General Counsel, Federal Communications Commission, *Austin C. Schlick*, Deputy General Counsel, *Daniel M. Armstrong*, Associate General Counsel, and *C. Grey Pash, Jr.*, Counsel.

*Christopher Wolf, Bruce E. Boyden, Mace J. Rosenstein,* and *Catherine E. Stetson* were on the brief for intervenor Motion Picture Association of America, Inc.

Before: EDWARDS, SENTELLE, and ROGERS, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* EDWARDS.

EDWARDS, *Circuit Judge:* It is axiomatic that administrative agencies may issue regulations only pursuant to authority delegated to them by Congress. The principal question presented by this case is whether Congress delegated authority to the Federal Communications Commission (“Commission” or “FCC”) in the Communications Act of 1934, 47 U.S.C. § 151 *et seq.* (2000) (“Communications Act” or “Act”), to regulate apparatus that can receive television broadcasts when those apparatus are not engaged in the process of receiving a broadcast transmission. In the seven decades of its existence, the FCC has never before asserted such sweeping authority. Indeed, in the past, the FCC has informed Congress that it lacked any such authority. In our view, nothing has changed to give the FCC the authority that it now claims.

This case arises out of events related to the nation’s transition from analog to digital television service (“DTV”). Since the 1940s, broadcast television stations have transmitted their programs over the air using an analog standard. DTV is a technological breakthrough that permits broadcasters to transmit more information over a channel of electromagnetic spectrum than is possible through analog broadcasting. *Consumer Elecs. Ass’n v. FCC*, 347 F.3d 291, 293 (D.C. Cir. 2003). Congress has set December 31, 2006, as the target date for the replacement of analog television service with DTV. *See* 47 U.S.C. § 309(j)(14).

In August 2002, in conjunction with its consideration of the technological challenges related to the transition from analog

service to DTV, the Commission issued a notice of proposed rulemaking to inquire, *inter alia*, whether rules were needed to prevent the unauthorized copying and redistribution of digital television programming. See *Digital Broadcast Copy Protection*, 17 F.C.C.R. 16,027, 16,028 (2002) (“NPRM”). Thousands of comments were filed in response to the agency’s NPRM. Owners of digital content and television broadcasters urged the Commission to require DTV reception equipment to be manufactured with the capability to prevent unauthorized redistributions of digital content. Numerous other commenters voiced strong objections to any such regulations, contending that the FCC had no authority to control how broadcast content is used after it has been received. In November 2003, the Commission adopted “broadcast flag” regulations, requiring that digital television receivers and other devices capable of receiving digital television broadcast signals, manufactured on or after July 1, 2005, include technology allowing them to recognize the broadcast flag. See *Digital Broadcast Content Protection*, 18 F.C.C.R. 23,550 (2003) (codified at 47 C.F.R. pts. 73, 76). The broadcast flag is a digital code embedded in a DTV broadcasting stream, which prevents digital television reception equipment from redistributing broadcast content. The broadcast flag affects receiver devices only *after* a broadcast transmission is complete. The American Library Association, *et al.* (“American Library” or “petitioners”), nine organizations representing a large number of libraries and consumers, filed the present petition for review challenging these rules.

In adopting the broadcast flag rules, the FCC cited no specific statutory provision giving the agency authority to regulate consumers’ use of television receiver apparatus after the completion of a broadcast transmission. Rather, the Commission relied exclusively on its ancillary jurisdiction under Title I of the Communications Act of 1934.

The Commission recognized that it may exercise ancillary jurisdiction only when two conditions are satisfied: (1) the Commission's general jurisdictional grant under Title I covers the regulated subject and (2) the regulations are reasonably ancillary to the Commission's effective performance of its statutorily mandated responsibilities. *See* 18 F.C.C.R. at 23,563. The Commission's general jurisdictional grant under Title I plainly encompasses the regulation of apparatus that can receive television broadcast content, but only while those apparatus are engaged in the process of receiving a television broadcast. Title I does not authorize the Commission to regulate receiver apparatus after a transmission is complete. As a result, the FCC's purported exercise of ancillary authority founders on the first condition. There is no statutory foundation for the broadcast flag rules, and consequently the rules are ancillary to nothing. Therefore, we hold that the Commission acted outside the scope of its delegated authority when it adopted the disputed broadcast flag regulations.

The result that we reach in this case finds support in the All Channel Receiver Act of 1962 and the Communications Amendments Act of 1982. These two statutory enactments confirm that Congress never conferred authority on the FCC to regulate consumers' use of television receiver apparatus *after* the completion of broadcast transmissions.

As petitioners point out, "the Broadcast Flag rules do not regulate interstate 'radio communications' as defined by Title I, because the Flag is not needed to make a DTV transmission, does not change whether DTV signals can be received, and has no effect until after the DTV transmission is complete." Petitioners' Br. at 23. We agree. Because the Commission overstepped the limits of its delegated authority, we grant the petition for review.

## I. BACKGROUND

The Communications Act of 1934 was “implemented for the purpose of consolidating federal authority over communications in a single agency to assure ‘an adequate communication system for this country.’” *Motion Picture Ass’n of Am., Inc. v. FCC*, 309 F.3d 796, 804 (D.C. Cir. 2002) (quoting S. REP. NO. 73-781, at 3 (1934)). Title I of the Act creates the Commission “[f]or the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges.” 47 U.S.C. § 151. Title I further provides that the Commission “shall execute and enforce the provisions” of the Act, *id.*, and states that the Act’s provisions “shall apply to all interstate and foreign communication by wire or radio,” *id.* § 152(a).

The FCC may act either pursuant to express statutory authority to promulgate regulations addressing a variety of designated issues involving communications, *see, e.g.*, 47 U.S.C. § 303(f) (granting the Commission authority to prevent interference among radio and television broadcast stations), or pursuant to ancillary jurisdiction, *see, e.g.*, 47 U.S.C. § 154(i) (“[t]he Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions”).

Although somewhat amorphous, ancillary jurisdiction is nonetheless constrained. In order for the Commission to regulate under its ancillary jurisdiction, two conditions must be met. First, the subject of the regulation must be covered by the Commission’s general grant of jurisdiction under Title I of the Communications Act, which, as noted above, encompasses “‘all interstate and foreign communication by wire or radio.’” *United*

*States v. Southwestern Cable Co.*, 392 U.S. 157, 167 (1968) (quoting 47 U.S.C. § 152(a)). Second, the subject of the regulation must be “reasonably ancillary to the effective performance of the Commission’s various responsibilities.” *Id.* at 178. Digital television is a technological breakthrough that allows broadcasters to transmit either an extremely high quality video programming signal (known as high definition television) or multiple streams of video, voice, and data simultaneously within the same frequency band traditionally used for a single analog television broadcast. *See Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service*, 11 F.C.C.R. 17,771, 17,774 (1996). In 1997, the FCC set a target of 2006 for the cessation of analog service. *See Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service*, 12 F.C.C.R. 12,809, 12,850 (1997). Congress subsequently provided that television broadcast licenses authorizing analog service should not be renewed to authorize such service beyond December 31, 2006. *See* 47 U.S.C. § 309(j)(14).

In August 2002, the FCC issued a notice of proposed rulemaking regarding digital broadcast copy protection. *See Digital Broadcast Copy Protection*, 17 F.C.C.R. 16,027 (2002) (“NPRM”). The Commission sought comments on, among other things, whether to adopt broadcast flag technology to prevent the unauthorized copying and redistribution of digital media. *See id.* at 16,028-29. The broadcast flag, or Redistribution Control Descriptor, is a digital code embedded in a digital broadcasting stream, which prevents digital television reception equipment from redistributing digital broadcast content. *See id.* at 16,027. The effectiveness of the broadcast flag regime is dependent on programming being flagged *and* on devices capable of receiving broadcast DTV signals (collectively “demodulator products”) being able to recognize and give effect to the flag. Under the rule, new demodulator products (*e.g.*, televisions, computers, etc.) must include flag-

recognition technology. This technology, in combination with broadcasters' use of the flag, would prevent redistribution of broadcast programming. The broadcast flag does not have any impact on a DTV broadcast transmission. The flag's only effect is to limit the capacity of receiver apparatus to redistribute broadcast content after a broadcast transmission is complete.

The NPRM also sought comments on whether the Commission had the authority to mandate recognition of the broadcast flag in consumer electronics devices. *Id.* at 16,029-30. The Commission requested commenters to address whether "this [is] an area in which the Commission could exercise its ancillary jurisdiction under Title I of the Act." *Id.* The FCC also asked "commenters to identify any statutory provisions that might provide the Commission with more explicit authority to adopt digital broadcast copy protection rules," such as 47 U.S.C. § 336(b)(4) and (b)(5), *id.*, which authorize the Commission to regulate the issuance of licenses for digital television services, *see* 47 U.S.C. § 336(a)-(b).

Unsurprisingly, there was an enormous response to the NPRM. The Commission received comments from, among others, owners, producers, and distributors of broadcast television content; consumer electronics manufacturers; consumer interest groups; library associations; and individual consumers. Content owners and television broadcasters argued that, if DTV broadcast content was not protected from the threat of widespread unauthorized redistribution via networks such as the Internet, high value content would migrate from broadcast television to pay television services, which offer a more secure distribution channel. *See Digital Broadcast Content Protection*, 18 F.C.C.R. 23,550, 23,553 (2003) ("*Flag Order*"); Joint Reply Comments of the Motion Picture Association of America, Inc., *et al.*, 2/20/03, *reprinted in* Joint Appendix ("J.A.") 1080, 1088. But there was also overwhelming opposition to the proposed broadcast flag rules. As Commissioner Adelstein noted:

“Thousands of people contacted us and urged us not to [adopt the broadcast flag regime]. Many consumers are concerned about the effect on their use and enjoyment of television, as well as their personal privacy.” *See Flag Order*, 18 F.C.C.R. at 23,620 (statement of Commissioner Adelstein, approving in part, dissenting in part). Opponents of regulation argued that the threat from content redistribution was overstated in light of technological limitations to widespread Internet retransmission. *See id.* at 23,553. In addition, critics of the proposed rules expressed concerns about implementation costs and suggested that the broadcast flag both was an inadequate tool to protect content and would stifle innovation. *Id.* at 23,557.

On the question of the Commission’s authority to promulgate broadcast flag regulations, proponents pointed to 47 U.S.C. § 336. *See Flag Order*, 18 F.C.C.R. at 23,562. Enacted as part of the Telecommunications Act of 1996, Pub. L. No. 104-104, § 201, 110 Stat. 56, 107, 47 U.S.C. § 336 sets forth certain criteria pursuant to which the Commission may issue new licenses for advanced television services. Proponents also argued that, even if the Commission lacked express statutory authority under § 336, the FCC was authorized to adopt broadcast flag rules pursuant to its ancillary jurisdiction. *See Joint Comments of the Motion Picture Association of America, Inc., et al.*, 12/6/02, J.A. 760, 798-807.

Opponents contended that the Commission lacked jurisdiction to implement broadcast flag rules. They pointed out that the plain text of § 336 authorized the FCC to regulate only DTV broadcast licensees and the quality of the signal transmitted by such licensees. *See, e.g.*, Reply Comments of Phillips Electronics North America Corp., 2/18/03, J.A. 1012, 1027-28. Critics also maintained that the Commission could not rely on its ancillary jurisdiction to adopt a broadcast flag regime. As one commenter noted:

[The] unbounded view of FCC jurisdiction [advanced by flag proponents] proves too much. Were it true, the FCC would have plenary authority to regulate consumer electronics and computer devices, and there would have been no need for Congress to delegate authority to the FCC to implement its policy objectives [in various laws authorizing the FCC to regulate specific aspects of consumer electronics].

*Id.*, J.A. 1028-29.

In November 2003, the FCC adopted regulations requiring demodulator products manufactured on or after July 1, 2005 to recognize and give effect to the broadcast flag. *See Flag Order*, 18 F.C.C.R. at 23,570, 23,576, 23,590-91. The Commission explained:

In this *Report and Order*, we conclude that the potential threat of mass indiscriminate redistribution will deter content owners from making high value digital content available through broadcasting outlets absent some content protection mechanism. Although the threat of widespread indiscriminate retransmission of high value digital broadcast content is not imminent, it is forthcoming and preemptive action is needed to forestall any potential harm to the viability of over-the-air television. Of the mechanisms available to us at this time, we believe that [a broadcast flag] regime will provide content owners with reasonable assurance that DTV broadcast content will not be indiscriminately redistributed while protecting consumers' use and enjoyment of broadcast video programming.

*Id.* at 23,552. The Commission also adopted an interim policy for approving the technologies that could be employed by demodulator products to comply with the requirements of the

*Flag Order* and issued a further notice of proposed rulemaking to address this and other issues. *See id.* at 23,574-79.

In explaining the source of its authority to promulgate the broadcast flag rules, the Commission did not invoke 47 U.S.C. § 336. Rather, the Commission purported to rely solely on its ancillary jurisdiction under Title I of the Communications Act of 1934. *See id.* at 23,563. The Commission found that (1) television receivers are covered by Title I's general jurisdictional grant even when those receivers are not engaged in the process of communication by wire or radio and (2) flag-based regulations are reasonably ancillary to the Commission's regulatory authority to foster a diverse range of broadcast television programs and promote the transition from analog service to DTV. *See id.* at 23,563-66. The Commission acknowledged that "this may be the first time the Commission exercises its ancillary jurisdiction over equipment manufacturers in this manner." *Id.* at 23,566. The Commission nonetheless concluded that "[t]he fact that the circumstances may not have warranted an exercise of such jurisdiction at earlier stages does not undermine our authority to exercise ancillary jurisdiction at this point in time." *Id.*

Commissioner Abernathy issued a separate statement, in which she expressed her support for the *Flag Order*, but noted:

I have previously expressed concerns about whether we have jurisdiction to adopt a broadcast flag solution, or whether this is an issue best left for Congress. As a general rule, the Commission should be wary of adopting significant new regulations where Congress has not spoken. On balance, though, I believe that given the broad congressional direction to promote the transition to digital broadcasting, a critical part of that obligation involves protection of content that is transmitted via free over-the-air-broadcasting. I am hopeful that any court review of this decision can occur before the effective date of our rules.

*Id.* at 23,614 (separate statement of Commissioner Abernathy). Commissioners Copps and Adelstein dissented in part from the issuance of the *Flag Order*. Commissioner Copps dissented “because the [regulations did] not preclude the use of the flag for news or for content that is already in the public domain” and “because the criteria adopt[ed] for accepting digital content protection technologies fail to address . . . the impact . . . on personal privacy.” *Id.* at 23,616-17 (Statement of Commissioner Copps). Commissioner Adelstein dissented because the regulations did “not rule out the use of the flag for content that is in the public domain.” *Id.* at 23,620 (Statement of Commissioner Adelstein).

The instant petition for review, filed by nine organizations representing numerous libraries and consumers, challenges the FCC’s *Flag Order* on three grounds: (1) the Commission lacks statutory authority to mandate that demodulator products recognize and give effect to the broadcast flag; (2) the broadcast flag regime impermissibly conflicts with copyright law; and (3) the Commission’s decision is arbitrary and capricious for want of reasoned decisionmaking. The Motion Picture Association of America (“MPAA”) intervened in support of the Commission. In its brief to the court, MPAA also contested petitioners’ Article III standing. After hearing oral argument, the court requested additional submissions from the parties on the question of standing. *See Am. Library Ass’n v. FCC*, 401 F.3d 489 (D.C. Cir. 2005) (“*Am. Library I*”).

As explained below, we are now satisfied that at least one member of one of the petitioner groups has standing to pursue this challenge to the FCC’s broadcast flag rules. The court therefore has jurisdiction to consider the petition for review. On the merits, we hold that the FCC lacked statutory authority to impose the broadcast flag regime. Therefore, we grant the petition for review without reaching petitioners’ other challenges to the *Flag Order*.

## II. ANALYSIS

### A. *Standing*

Before addressing the merits of petitioners' claims, we must first determine whether they have demonstrated that they have Article III standing, a prerequisite to federal court jurisdiction. *Am. Library I*, 401 F.3d at 492. Associations such as petitioners have representational standing under Article III if (1) at least one of their members has standing, (2) the interests the association seeks to protect are germane to its purpose, and (3) neither the claim asserted nor the relief requested requires the participation of an individual member in the lawsuit. *Id.* As we noted in *American Library I*, we have no reason to doubt that petitioners satisfy the latter two requirements, and neither the FCC nor intervenor MPAA has suggested otherwise. Therefore, the focus of our inquiry here is whether at least one member of a petitioner group has standing to sue in its own right. *Id.*

In order to meet this first prong of the associational standing test, at least one member of a petitioning group must satisfy “the three elements that form the ‘irreducible constitutional minimum of standing.’” *Id.* (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). These elements are: (1) injury in fact, (2) causation, and (3) redressability. *See id.* at 492-93 (citing *Defenders of Wildlife*, 504 U.S. at 560-61). The “only thing at issue in this case is the injury-in-fact prong of Article III standing, for causation and redressability are obvious if petitioners can demonstrate injury.” *Id.* at 493. Furthermore, as we have already made clear,

[w]ith regard to the injury-in-fact prong of the standing test, petitioners need not prove the merits of their case in order to demonstrate that they have Article III standing. Rather, in order to establish injury in fact, petitioners must show that there is a substantial probability that the FCC's order

will harm the concrete and particularized interests of at least one of their members.

*Id.* (citations omitted).

In response to our decision in *American Library I*, petitioners submitted a brief, accompanied by 13 affidavits from individual members and individuals representing their member organizations, to demonstrate their standing. These materials included an affidavit executed by Peggy Hoon, the Scholarly Communication Librarian at the North Carolina State University (“NCSU”) Libraries in Raleigh, North Carolina, a member of petitioner Association of Research Libraries. Affidavit of Peggy Hoon, 3/29/05, ¶ 1. Ms. Hoon’s affidavit asserts that the NCSU Libraries assist faculty members who would like to make broadcast materials available to students in distance learning courses via the Internet. The affidavit states that the NCSU Libraries currently assist a professor in the Foreign Languages and Literatures Department make short broadcast clips of the Univision network’s program, *El Show de Christina*, available over the Internet on a password-protected basis for use in a distance-education Spanish language course. The affidavit alleges that Internet redistribution is essential to making such clips available. *See id.* ¶¶ 5-10. The FCC does not dispute that the NCSU Libraries’ activities are lawful. And as petitioners point out, if the regulations implemented by the *Flag Order* take effect, there is a substantial probability that the NCSU Libraries would be prevented from assisting faculty to make broadcast clips available to students in their distance-learning courses via the Internet.

At oral argument, counsel for the FCC stated explicitly that the Commission is not challenging petitioners’ standing in this case. Recording of Oral Argument at 29:01-:18. In its supplemental brief, the Commission again does not raise a challenge to petitioners’ standing. Instead, the Commission merely responds on the merits, taking issue with certain

statements in petitioners' supplemental brief and affidavits about the breadth of the broadcast flag regime. *See* FCC Supp. Br. at 3.

Intervenor MPAA, which does challenge petitioners' standing, argues that any injury suffered by the Libraries following the FCC's implementation of the broadcast flag regulations will be "due solely to the independent . . . decisions of third parties not before this Court." MPAA Supp. Br. at 6. In other words, MPAA assumes that, because hardware manufacturers eventually might be able to gain approval for apparatus that allow for greater distribution of broadcast content in a manner that is consistent with the *Flag Order*, it will be the unavailability of this new technology and not the agency's enforcement of the broadcast flag rule that causes injury to petitioners. Thus, under MPAA's view, redress for petitioners must come from the hardware manufacturers, not the FCC. This is a specious argument.

There is clearly a substantial probability that, if enforced, the *Flag Order* will immediately harm the concrete and particularized interests of the NCSU Libraries. Absent the *Flag Order*, the Libraries will continue to assist NCSU faculty members make broadcast clips available to students in distance-education courses via the Internet, but there is a substantial probability that the Libraries will be unable to do this if the *Flag Order* takes effect. It is also beyond dispute that, if this court vacates the *Flag Order*, the Libraries will be able to continue to assist faculty members lawfully redistribute broadcast clips to their students.

In short, it is clear that, on this record, the NCSU Libraries have satisfied the requisite elements of Article III standing: injury in fact, causation, and redressability. Therefore, the Association of Research Libraries also has standing. *See Am. Library I*, 401 F.3d at 492. Because only one member of a petitioning organization must have standing in order for the

court to have jurisdiction over a petition for review, *see Nuclear Energy Inst., Inc. v. EPA*, 373 F.3d 1251, 1266 (D.C. Cir. 2004), it is unnecessary for us to consider any of the other grounds offered by petitioners to demonstrate their standing. We therefore move to the question of whether the Commission acted in excess of its statutory authority in promulgating the *Flag Order*.

**B. *The Limits of the FCC's Delegated Authority Under the Communications Act***

In defending the *Flag Order* and the broadcast flag regulations contained therein, the Commission contends that it

reasonably interpreted the Communications Act as granting it jurisdiction to establish technical requirements for television receiving equipment in order to fulfill its responsibility of implementing the transition to digital television. Sections 1 and 2(a) of the Act, 47 U.S.C. 151, 152(a), confer on the agency regulatory jurisdiction over all interstate radio and wire communication. Under the definitional provisions of section 3, 47 U.S.C. 153, those communications include not only the transmission of signals through the air or wires, but also “all instrumentalities, facilities, [and] apparatus” associated with the overall circuit of messages sent and received – such as digital television receiving equipment.

. . . .

. . . [T]he Commission has the authority to promulgate regulations to effectuate the goals and provisions of the Act even in the absence of an explicit grant of regulatory authority, if the regulations are reasonably ancillary to the Commission’s specific statutory powers and responsibilities.

FCC Br. at 17, 23-24.

Petitioners counter that

[t]he FCC has asserted jurisdiction it does not have. . . . The FCC claims no specific statutory authority allowing it to meddle so radically in the nation's processes of technological innovation, but instead cites to its latent "ancillary" jurisdiction, which the FCC astonishingly contends is boundless unless Congress specifically acts to limit it.

. . . [I]n no circumstance can the FCC regulate an activity that is not an interstate "communication" by radio or wire, and the Broadcast Flag rules regulate neither. The Broadcast Flag does not dictate how DTV transmissions are made, but simply controls how the transmitted content can be treated *after* it is received. . . . [T]he Communications Act is clear that, unless specified elsewhere, it gives the FCC authority over receipt "services," not the receipt "apparatuses" the agency now attempts to regulate.

Petitioners' Br. at 19-20.

As noted above, the principal issue in this case is whether the Commission acted outside the scope of its delegated authority when it adopted the disputed broadcast flag regulations. The FCC, like other federal agencies, "literally has no power to act . . . unless and until Congress confers power upon it." *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986). The Commission "has no constitutional or common law existence or authority, but only those authorities conferred upon it by Congress." *Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001). Hence, the FCC's power to promulgate legislative regulations is limited to the scope of the authority Congress has delegated to it. *Id.* (citing *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988)).

### 1. *The Applicable Standard of Review*

In assessing whether the Commission's *Flag Order* exceeds the agency's delegated authority, we apply the familiar standards of review enunciated by the Supreme Court in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001). In reviewing agency action under *Chevron*, "if the intent of Congress is clear," the court "must give effect to [that] unambiguously expressed intent." *Chevron*, 467 U.S. at 842-43 ("*Chevron* Step One"). If "Congress has not directly addressed the precise question at issue," and the agency has acted pursuant to an express or implied delegation of authority, the agency's statutory interpretation is entitled to deference, as long as it is reasonable. *Id.* at 843-44 ("*Chevron* Step Two"). The FCC argues here that the court should defer to the agency's interpretation of its ancillary jurisdiction under *Chevron*, because, in its view, the regulations promulgated in the *Flag Order* reflect a reasonable application of the agency's ancillary authority under the Communications Act. The agency's self-serving invocation of *Chevron* leaves out a crucial threshold consideration, *i.e.*, whether the agency acted pursuant to delegated authority.

As the court explained in *Motion Picture Ass'n of America, Inc. v. FCC*, 309 F.3d 796, 801 (D.C. Cir. 2002) ("*MPAA*"), an "agency's interpretation of [a] statute is not entitled to deference absent a *delegation of authority* from Congress to regulate in the areas at issue." The court observed that the Supreme Court's decision in *Mead* "reinforces" the command in *Chevron* that "deference to an agency's interpretation of a statute is due only when the agency acts pursuant to 'delegated authority.'" *Id.* (quoting *Mead*, 533 U.S. at 226). *See also Cal. Indep. Sys. Operator Corp. v. FERC*, 372 F.3d 395, 399 (D.C. Cir. 2004); *Bluewater Network v. EPA*, 370 F.3d 1, 11 (D.C. Cir. 2004); *AT&T Corp. v. FCC*, 323 F.3d 1081, 1086 (D.C. Cir. 2003); *Ry.*

*Labor Executives' Ass'n v. Nat'l Mediation Bd.*, 29 F.3d 655, 670-71 (D.C. Cir. 1994) (en banc).

In *Aid Ass'n for Lutherans v. United States Postal Serv.*, 321 F.3d 1166 (D.C. Cir. 2003), the court explained:

“*Chevron* is principally concerned with whether an agency has authority to act under a statute.” *Arent v. Shalala*, 70 F.3d 610, 615 (D.C. Cir. 1995). *Chevron* analysis “is focused on discerning the boundaries of Congress’ delegation of authority to the agency; and as long as the agency stays within that delegation, it is free to make policy choices in interpreting the statute, and such interpretations are entitled to deference.” *Id.*; see also *Mead*, 533 U.S. at 226-27 (holding that *Chevron* deference is due only when the agency acts pursuant to “delegated authority”).

....

An agency construction of a statute cannot survive judicial review if a contested regulation reflects an action that exceeds the agency’s authority. It does not matter whether the unlawful action arises because the disputed regulation defies the plain language of a statute or because the agency’s construction is utterly unreasonable and thus impermissible.

*Id.* at 1174.

Petitioners’ principal claim here is that the challenged broadcast flag regulations emanated from an *ultra vires* action by the FCC. We agree. This being the case, the regulations cannot survive judicial review under *Chevron/Mead*. Our judgment is the same whether we analyze the FCC’s action under the first or second step of *Chevron*. “In either situation, the agency’s interpretation of the statute is not entitled to deference absent a *delegation of authority* from Congress to regulate in the areas at issue.” *MPAA*, 309 F.3d at 801 (citing

*Ry. Labor Executives*, 29 F.3d at 671). In this case, as explained below, the FCC's interpretation of its ancillary jurisdiction reaches well beyond the agency's delegated authority under the Communications Act. We therefore hold that the broadcast flag regulations exceed the agency's delegated authority under the statute.

2. *Ancillary Jurisdiction Under the Communications Act of 1934*

As explained above, the only basis advanced by the Commission as a source for its authority to adopt the broadcast flag regime was its ancillary jurisdiction under Title I of the Communications Act of 1934. *See Flag Order*, 18 F.C.C.R. at 23,563-64. As the Commission recognized, its ancillary jurisdiction is limited to circumstances where: (1) the Commission's general jurisdictional grant under Title I covers the subject of the regulations and (2) the regulations are reasonably ancillary to the Commission's effective performance of its statutorily mandated responsibilities. *See id.* at 23,563 (citing *Southwestern Cable*, 392 U.S. at 177-78).

The insurmountable hurdle facing the FCC in this case is that the agency's general jurisdictional grant does not encompass the regulation of consumer electronics products that can be used for receipt of wire or radio communication when those devices are not engaged in the process of radio or wire transmission. Because the *Flag Order* does not require demodulator products to give effect to the broadcast flag until *after* the DTV broadcast has been completed, the regulations adopted in the *Flag Order* do not fall within the scope of the Commission's general jurisdictional grant. Therefore, the Commission cannot satisfy the first precondition to its assertion of ancillary jurisdiction.

The Supreme Court has delineated the parameters of the Commission's ancillary jurisdiction in three cases: *United*

*States v. Southwestern Cable Co.*, 392 U.S. 157 (1968), *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972) (“*Midwest Video I*”), and *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979) (“*Midwest Video II*”). In *Southwestern Cable* and *Midwest Video I*, the Court upheld the Commission’s regulation of cable television systems as a valid exercise of its ancillary jurisdiction, but also made clear that the Commission’s ancillary authority has limits. In *Midwest Video II*, the Court found that the Commission had overstepped those limits. Because *Southwestern Cable*, *Midwest Video I*, and *Midwest Video II* are central to our analysis of whether the Commission lawfully exercised its ancillary jurisdiction in this case, we discuss these cases in some detail.

In *Southwestern Cable*, the Supreme Court recognized that the Communications Act confers a sphere of ancillary jurisdiction on the FCC. *See* 392 U.S. at 177-78. The principal question presented was whether the FCC had the authority to regulate cable television systems (“CATV”), absent any express congressional grant of authority to the FCC to regulate in this area. *See id.* at 164-67. The Court’s conclusion that the FCC did have such authority rested on two factors. First, it was beyond doubt that CATV systems involved interstate “communication by wire or radio,” *id.* at 168 (quoting 47 U.S.C. § 152(a)), and, thus, were covered by Title I’s general jurisdictional grant. Second, the Court concluded that at least some level of CATV regulation was “reasonably ancillary to the effective performance of the Commission’s various responsibilities [delegated to it by Congress] for the regulation of television broadcasting.” *Id.* at 178. Because these two conditions were satisfied, the Court held that, to the degree it was in fact reasonably ancillary to the Commission’s responsibilities over broadcast, the FCC had the power to regulate cable television as “public convenience, interest or necessity requires,” so long as the regulations were “not inconsistent with law.” *Id.* (quoting 47 U.S.C. § 303(r)).

Four years later, the Court applied the two-part test enunciated in *Southwestern Cable* to review a rule adopted by the FCC providing that no CATV system with 3,500 or more subscribers could carry the signal of any television broadcast station unless the system distributed programming that had originated from a source other than the broadcast signals and the system had facilities for local program production. *See Midwest Video I*, 406 U.S. at 653-54 & n.6. The regulation was designed to increase the number of outlets for community self-expression and the programming choices available to the public. *See id.* at 654.

A closely divided Court held that the Commission's rule was a valid exercise of its ancillary jurisdiction. In an opinion by Justice Brennan, a plurality of the Court began its analysis by recognizing the two requirements for the Commission's exercise of ancillary jurisdiction: (1) that the regulation must cover interstate or foreign communication by wire or radio and (2) that the regulation must be reasonably ancillary to the Commission's effective performance of its statutorily mandated responsibilities. *See id.* at 662-63. The parties before the Court in *Midwest Video I* did not dispute that the first precondition was met. *See id.* at 662. Furthermore, the plurality concluded that the regulation was reasonably ancillary to the Commission's responsibilities for the regulation of broadcast television, because the Commission reasonably concluded that the rule would "further the achievement of long-established regulatory goals in the field of television broadcasting by increasing the number of outlets for community self-expression and augmenting the public's choice of programs and types of services." *Id.* at 667-68 (quoting Commission report accompanying the disputed regulation).

Chief Justice Burger provided the fifth vote to sustain the regulation at issue in *Midwest Video I*, but he concurred only in the judgment. Chief Justice Burger agreed that, in light of the

“pervasive powers” conferred upon the Commission and its “generations of experience,” the Court should sustain the Commission’s authority to impose the regulation at issue. *Id.* at 676 (Burger, C.J., concurring in the result). Nonetheless, he noted: “Candor requires acknowledgment, for me at least, that the Commission’s position strains the outer limits of even the open-ended and pervasive jurisdiction that has evolved by decisions of the Commission and the courts.” *Id.*

Seven years later, in *Midwest Video II*, the Court considered whether another FCC effort to regulate cable television was a permissible exercise of the Commission’s ancillary jurisdiction. This time the Court decided that the Commission had gone too far. The rules at issue required that cable television systems carrying broadcast signals and having at least 3,500 subscribers develop at least a 20-channel capacity, make certain channels available for third-party access, and furnish equipment for access purposes. 440 U.S. at 691. The Court held that the rules exceeded the Commission’s authority. *Id.* at 708-09. Specifically, because the Communications Act explicitly directed the Commission not to treat broadcasters as common carriers, the Court concluded that it was not reasonably ancillary to the Commission’s effective performance of its responsibilities relating to broadcast television for the Commission to impose common-carrier obligations on cable television systems. *See id.* at 702-05, 708-09. While the Court recognized that the statutory bar on treating broadcasters as common carriers did not apply explicitly to cable systems, the Court explained that, “without reference to the provisions of the Act directly governing broadcasting, the Commission’s jurisdiction under [Title I] would be unbounded.” *Id.* at 706. The Court refused to countenance such a boundless view of the Commission’s jurisdiction, noting that, “[t]hough afforded wide latitude in its supervision over communication by wire, the Commission was not delegated unrestrained authority.” *Id.* As the Commission correctly explained in the *Flag Order*, *Midwest Video II* stands

for the proposition that “if the basis for jurisdiction over cable is that the authority is ancillary to the regulation of broadcasting, the cable regulation cannot be antithetical to a basic regulatory parameter established for broadcast.” *Flag Order*, 18 F.C.C.R. at 23,563 n.70.

The Court’s decisions in *Southwestern Cable*, *Midwest Video I*, and *Midwest Video II* were principally focused on the second prong of the ancillary jurisdiction test. This is unsurprising, because the subject matter of the regulations at issue in those cases – cable television – constituted interstate communication by wire or radio, and thus fell within the scope of the Commission’s general jurisdictional grant under Title I of the Communications Act. However, these cases leave no doubt that the Commission may not invoke its ancillary jurisdiction under Title I to regulate matters outside of the compass of communication by wire or radio. As we have explained:

While the Supreme Court has described the jurisdictional powers of the FCC as . . . expansive, there are limits to those powers. No case has ever permitted, and the Commission has never, to our knowledge, asserted jurisdiction over an entity not engaged in “communication by wire or radio.”

*Accuracy in Media, Inc. v. FCC*, 521 F.2d 288, 293 (D.C. Cir. 1975) (additional internal quotation marks omitted) (citing *Nat’l Broad. Co. v. United States*, 319 U.S. 190, 219 (1943)); *see also id.* at 294 (“Jurisdiction over CATV [in *Southwestern Cable*] was expressly predicated upon a finding that the transmission of video and aural signals via the cable was ‘interstate . . . communication by wire or radio.’” (quoting *Southwestern Cable*, 392 U.S. at 168)); *Midwest Video I*, 406 U.S. at 662 (making clear that the Commission’s jurisdiction is limited to activities involving communication by wire or radio). This principle is crucial, because the issue here is precisely whether

the *Flag Order* asserts jurisdiction over matters that are beyond the compass of wire or radio communication.

*Southwestern Cable*, *Midwest Video I*, and *Midwest Video II* are also relevant to the present controversy for a second reason. In each of these decisions, the Court followed a very cautious approach in deciding whether the Commission had validly invoked its ancillary jurisdiction, even when the regulations under review clearly addressed “communication by wire or radio.” As the Seventh Circuit has noted: “The Court [in *Southwestern Cable*] appeared to be treading lightly even where the activity at issue” involved cable television, which “easily falls within” Title I’s general jurisdictional grant. *Ill. Citizens Comm. for Broad. v. FCC*, 467 F.2d 1397, 1400 (7th Cir. 1972). The Seventh Circuit’s characterization is equally apt with respect to the Court’s opinions in *Midwest Video I* and *Midwest Video II*.

We think that the Supreme Court’s cautionary approach in applying the second prong of the ancillary jurisdiction test suggests that we should be *at least* as cautious in this case. Great caution is warranted here, because the disputed broadcast flag regulations rest on no apparent statutory foundation and, thus, appear to be ancillary to nothing. Just as the Supreme Court refused to countenance an interpretation of the second prong of the ancillary jurisdiction test that would confer “unbounded” jurisdiction on the Commission, *Midwest Video II*, 440 U.S. at 706, we will not construe the first prong in a manner that imposes no meaningful limits on the scope of the FCC’s general jurisdictional grant.

In light of the parameters of the Commission’s ancillary jurisdiction established by *Southwestern Cable*, *Midwest Video I*, and *Midwest Video II*, this case turns on one simple fact: the *Flag Order* does not require demodulator products to give effect to the broadcast flag until *after* the DTV broadcast is complete. The *Flag Order* does not regulate the actual transmission of the

DTV broadcast. In other words, the *Flag Order* imposes regulations on devices that receive communications after those communications have occurred; it does not regulate the communications themselves. Because the demodulator products are not engaged in “communication by wire or radio” when they are subject to regulation under the *Flag Order*, the Commission plainly exceeded the scope of its general jurisdictional grant under Title I in this case.

In seeking to justify its assertion of jurisdiction in the *Flag Order*, the Commission relies on the fact that the Communications Act defines “radio communication” and “wire communication” to include not only the “transmission of . . . writing, signs, signals, pictures, and sounds” by aid of wire or radio, but also “all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.” 47 U.S.C. § 153(33) (defining “radio communication”); *id.* § 153(52) (defining “wire communication”). The *Flag Order* asserts: “Based on this language, [the Commission finds] that television receivers are covered by the statutory definitions and therefore come within the scope of the Commission’s general authority outlined in [Title I] of the Communications Act.” 18 F.C.C.R. at 23,563-64. The Commission thus apparently believed that, given the definitions of “wire communication” and “radio communication” in Title I, it could assert jurisdiction over television receivers even when those receivers were not engaged in broadcast transmission simply because they are apparatus used for the receipt of communications. *See also* FCC Br. at 26. We reject this position, for it rests on a completely implausible construction of the Communications Act.

The statute does not give the FCC authority to regulate *any* “apparatus” that is associated with television broadcasts. Rather, the statutory language cited by the FCC refers only to “apparatus” that are “incidental to . . . transmission.” In other

words, the language of § 153(33) and (52) plainly does not indicate that Congress intended for the Commission to have general jurisdiction over devices that can be used for receipt of wire or radio communication when those devices are not engaged in the process of radio or wire transmission.

The language relied upon by the Commission in the statutory definitions of “wire communication” and “radio communication” was part of the original Communications Act of 1934. *See* Pub. L. No. 73-416, § 3(a)-(b), 48 Stat. 1064, 1065; *see also Southwestern Cable*, 392 U.S. at 168 (quoting this language). The Commission acknowledges that, in the more than 70 years that the Act has been in existence, it has never previously sought to exercise ancillary jurisdiction over reception equipment *after* the transmission of communication is complete. *See* Recording of Oral Argument at 34:45-35:23. This is not surprising, since the Commission’s current interpretation of the statute’s definitional language would render step one of the Supreme Court’s two-part test for determining whether a subject is within the Commission’s ancillary jurisdiction essentially meaningless.

We can find nothing in the statute, its legislative history, the applicable case law, or agency practice indicating that Congress meant to provide the sweeping authority the FCC now claims over receiver apparatus. And the agency’s strained and implausible interpretations of the definitional provisions of the Communications Act of 1934 do not lend credence to its position. As the Supreme Court has reminded us, Congress “does not . . . hide elephants in mouseholes.” *Whitman v. Am. Trucking Ass’n*, 531 U.S. 457, 468 (2001). In sum, we hold that, at most, the Commission only has general authority under Title I to regulate apparatus used for the receipt of radio or wire communication while those apparatus are engaged in communication.

Our holding is consistent with the Seventh Circuit's well-reasoned decision in *Illinois Citizens*, which concluded that the FCC may not lawfully exercise jurisdiction over activities that do not constitute communication by wire or radio. *See* 467 F.2d at 1399-1400. In that case, the Illinois Citizens Committee for Broadcasting filed a complaint with the FCC, alleging that the proposed construction of the Sears Tower in Chicago "would throw 'multiple ghost images' on television receivers in many areas of the Greater Chicago Metropolitan Area." *Id.* at 1398. The petitioners called upon the FCC to take steps to prevent this interference, including, if necessary, ordering Sears, Roebuck & Co. to cease construction of the tower until the company had taken measures to ensure that television viewers would continue to receive an adequate signal. The Commission denied the requested relief on the ground that it lacked jurisdiction over the construction of the Sears Tower, and the Illinois Citizens Committee sought review by the Seventh Circuit. *See id.* at 1398-99.

The Illinois Citizens Committee argued that, in light of *Southwestern Cable*, the FCC had the power to regulate "all activities which 'substantially affect communications.'" *Id.* at 1399. The Seventh Circuit flatly rejected this argument as unsupported by the Communications Act or judicial decisions interpreting the Act:

While we appreciate the need for a flexible approach to FCC jurisdiction, we believe the scope advanced by petitioners is far too broad. The "affecting communications" concept would result in expanding the FCC's already substantial responsibilities to include a wide range of activities, whether or not actually involving the transmission of radio or television signals much less being remotely electronic in nature. Nothing before us supports this extension.

*Id.* at 1400 (footnote omitted).

In *Motion Picture Ass'n*, this court concluded that the Commission lacked authority under Title I of the Communications Act to promulgate regulations that significantly implicated program content. Focusing specifically on 47 U.S.C. § 151, which is part of Title I and which the FCC conceded was the only possible source of authority that could justify its adoption of the video description rules at issue in the case, we explained:

Under [§ 151], Congress delegated authority to the FCC to expand radio and wire transmissions, so that they would be available to all U.S. citizens. Section [151] does not address the *content* of the programs with respect to which accessibility is to be ensured. In other words, the FCC's authority under [§ 151] is broad, but not without limits.

309 F.3d at 804 (full citations omitted) (citing *Midwest Video I*, 406 U.S. at 667-68, and *Southwestern Cable*, 392 U.S. at 172). Just as no provision in Title I addresses program content, no provision in Title I addresses requirements for demodulator products not engaged in communication by wire or radio.

In sum, because the rules promulgated by the *Flag Order* regulate demodulator products after the transmission of a DTV broadcast is complete, these regulations exceed the scope of authority Congress delegated to the FCC. And because the Commission can only issue regulations on subjects over which it has been delegated authority by Congress, the rules adopted by the *Flag Order* are invalid at the threshold jurisdictional inquiry. As was true in *Aid Ass'n for Lutherans*, “our judgment in this case is the same whether we analyze the agency’s statutory interpretation under *Chevron* Step One or Step Two. ‘In either situation, the agency’s interpretation of the statute is not entitled to deference absent a *delegation of authority* from Congress to regulate in the areas at issue.’” 321 F.3d at 1175 (quoting *MPAA*, 309 F.3d at 801). “An agency construction of a statute cannot survive judicial review if a contested regulation

reflects an action that exceeds the agency's authority." *Id.* at 1174. It does not matter whether the unlawful action arises because the regulations at issue are "contrary to clear congressional intent" as ascertained through use of the "traditional tools of statutory construction," *Chevron*, 467 U.S. at 843 n.9, or "utterly unreasonable and thus impermissible." *Aid Ass'n for Lutherans*, 321 F.3d at 1174. The FCC has no congressionally delegated authority to regulate receiver apparatus after a transmission is complete. We therefore hold that the broadcast flag regulations exceed the agency's delegated authority under the statute.

### 3. *Subsequent Congressional Legislation*

We think that, for the reasons discussed above, the FCC *never* has possessed ancillary jurisdiction under the Communications Act of 1934 to regulate consumer electronic devices that can be used for receipt of wire or radio communication when those devices are not engaged in the process of radio or wire transmission. Indeed, in the more than 70 years of the Act's existence, the Commission has neither claimed such authority nor purported to exercise its ancillary jurisdiction in such a far-reaching way. *See Flag Order*, 18 F.C.C.R. at 23,566 ("We recognize that the Commission's assertion of jurisdiction over manufacturers of equipment in the past has typically been tied to specific statutory provisions and that this is the first time the Commission has exercised ancillary jurisdiction over consumer equipment manufacturers in this manner.").

The Commission weakly attempts to dismiss this history by suggesting that "Congressional admonitions and past Commission assurances of a narrow exercise of authority over manufacturers (such as those reflected in the [All Channel Receiver Act] and its legislative history) are properly limited to the context of those explicit authorizations. The regulations here do not fall within the subject matter of those explicit

authorizations.” *Id.* (footnote omitted). This cryptic statement surely cannot justify the FCC’s overreaching for regulatory authority that Congress has never granted. As we held in *Aid Ass’n for Lutherans*:

In this case, the [agency]’s position seems to be that the disputed regulations are permissible because the statute does not expressly foreclose the construction advanced by the agency. We reject this position as entirely untenable under well-established case law. *See Ry. Labor Executives’ Ass’n v. Nat’l Mediation Bd.*, 29 F.3d 655, 671 (D.C. Cir. 1994) (en banc) (“Were courts to *presume* a delegation of power absent an express *withholding* of such power, agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with *Chevron* and quite likely with the Constitution as well.”) (emphasis in original); *see also Halverson v. Slater*, 129 F.3d 180, 187 (D.C. Cir. 1997) (quoting *Ry. Labor Executives*, 29 F.3d at 671); *Oil, Chem. & Atomic Workers Int’l Union v. NLRB*, 46 F.3d 82, 90 (D.C. Cir. 1995) (same); *Ethyl Corp. v. EPA*, 51 F.3d 1053, 1060 (D.C. Cir. 1995) (“We refuse . . . to presume a delegation of power merely because Congress has not expressly withheld such power.”); *Natural Res. Def. Council v. Reilly*, 983 F.2d 259, 266 (D.C. Cir. 1993) (“[I]t is only legislative intent to delegate such authority that entitles an agency to advance its own statutory construction for review under the deferential second prong of *Chevron*.”) (alteration in original) (quoting *Kansas City v. Dep’t of Hous. & Urban Dev.*, 923 F.2d 188, 191-92 (D.C. Cir. 1991)).

321 F.3d at 1174-75.

It is enough here for us to find that the Communications Act of 1934 does not indicate a legislative intent to delegate authority to the Commission to regulate consumer electronic devices that can be used for receipt of wire or radio

communication when those devices are not engaged in the process of radio or wire transmission. That is the end of the matter. It turns out, however, that subsequent legislation enacted by Congress *confirms* the limited scope of the agency's ancillary jurisdiction and makes it clear that the broadcast flag regulations exceed the agency's delegated authority under the statute.

The first such congressional enactment of note is the All Channel Receiver Act ("ACRA"), Pub. L. No. 87-529, 76 Stat. 150 (codified at 47 U.S.C. §§ 303(s), 330(a)). Enacted in 1962, the ACRA granted the Commission authority to require that televisions sold in interstate commerce are "capable of adequately receiving all frequencies allocated by the Commission to television broadcasting." 47 U.S.C. § 303(s). See *Elec. Indus. Ass'n Consumer Elecs. Groups v. FCC*, 636 F.2d 689 (D.C. Cir. 1980) ("*EIA*") (offering an extensive review of the legislative history of the ACRA). The original version of the All Channel Receiver Act "would have given the Commission the authority to set 'minimum performance standards' for all television receivers shipped in interstate commerce." *Id.* at 694 (quoting S. REP. NO. 87-1526, at 7 (1962)). However, in response to criticism about giving the FCC such broad authority over television receiver design, the "minimum performance standards" language was deleted before the bill passed the House. The version that passed the House would have instead given the Commission the authority to require that television sets "be capable of receiving all frequencies allocated by the Commission to television broadcasting." *Id.* (quoting H.R. REP. NO. 87-1559, at 1 (1962)). FCC Chairman Newton Minnow then wrote the chair of the Senate Subcommittee on Communications expressing his concern that under the House version, "we may be powerless to prevent the shipment . . . of all-channel sets having only the barest capability for receiving UHF signals, and which therefore would not permit satisfactory and usable reception of such

signals in a great many instances.” *Id.* at 695 (alteration in original) (quoting the letter). The Senate amended the bill, and the version that was ultimately enacted allowed the FCC to require television receivers sold in interstate commerce to be “capable of *adequately* receiving all frequencies allocated by the Commission to television broadcasting.” 47 U.S.C. § 303(s) (emphasis added).

It is clear, however, that, in enacting the ACRA, Congress did not “give the Commission unbridled authority” to regulate receiving apparatus. *EIA*, 636 F.2d at 696. This was confirmed when the Commission attempted to set a standard requiring television manufacturers to take steps to improve the quality of UHF reception beyond what could be attained with then-existing technology. On review, this court ruled that the Commission overstepped its delegated authority and vacated the Commission’s action. *See id.* at 698. The court held that, while the ACRA granted the Commission “limited . . . authority to ensur[e] that all sets ‘be capable of *adequately* receiving’ all television frequencies,” Congress had intentionally restricted this jurisdictional grant to preclude wide-ranging FCC “receiver design regulation.” *Id.* at 695, 696.

The All Channel Receiver Act’s limited and explicit grant of authority to the Commission over receiver equipment clearly indicates that neither Congress nor the Commission assumed that the agency could find this authority in its ancillary jurisdiction. It also confirms the Commission’s absence of authority to regulate receiver apparatus as proposed by the broadcast flag regulations in the *Flag Order*. If the Commission had no ancillary jurisdiction to regulate the quality of UHF reception, it cannot be doubted that the agency has no ancillary authority to regulate consumer electronic devices that can be used for receipt of wire or radio communication when those devices are not engaged in the process of radio or wire transmission.

A second congressional enactment that confirms the limited scope of the agency's ancillary jurisdiction is the Communications Amendments Act of 1982, Pub. L. No. 97-259, § 108, 96 Stat. 1087, 1091-92. As part of the Communications Amendments Act of 1982, Congress authorized the Commission to impose performance standards on household consumer electronics to ensure that they can withstand radio interference. *See* 47 U.S.C. § 302a(a). The legislative history of 47 U.S.C. § 302a demonstrates that this enactment was intended by Congress to give the Commission authority it did not previously possess over receiver equipment. Specifically, the Conference Report stated that, because industry attempts to solve the interference problem voluntarily had not always been successful, "the Conferees believe that Commission authority to impose appropriate regulations on home electronic equipment and systems is *now* necessary to insure that consumers' home electronic equipment and systems will not be subject to malfunction due to [radio frequency interference]." H.R. CONF. REP. NO. 97-765, at 32 (1982) (emphasis added).

The Commission argues that the legislative history of § 302a indicates that the legislation's purpose was to preclude state and local regulation of radio interference. However, it is not until several paragraphs after the portion of the Conference Report quoted above that the Report noted that the legislation was "*further* intended to clarify the reservation of exclusive jurisdiction to the Federal Communications Commission over matters involving [radio frequency interference]." *Id.* at 33 (emphasis added). Congress's principal purpose in enacting 47 U.S.C. § 302a was clearly to expand the Commission's authority beyond the scope of its then-existing jurisdiction, which is inconsistent with the FCC's current view that it always has had sweeping jurisdiction over receiver apparatus under Title I of the Communications Act.

### III. CONCLUSION

The FCC argues that the Commission has “discretion” to exercise “broad authority” over equipment used in connection with radio and wire transmissions, “when the need arises, even if it has not previously regulated in a particular area.” FCC Br. at 17. This is an extraordinary proposition. “The [Commission’s] position in this case amounts to the bare suggestion that it possesses *plenary* authority to act within a given area simply because Congress has endowed it with *some* authority to act in that area. We categorically reject that suggestion. Agencies owe their capacity to act to the delegation of authority” from Congress. *See Ry. Labor Executives’ Ass’n*, 29 F.3d at 670. The FCC, like other federal agencies, “literally has no power to act . . . unless and until Congress confers power upon it.” *La. Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 374 (1986). In this case, all relevant materials concerning the FCC’s jurisdiction – including the words of the Communications Act of 1934, its legislative history, subsequent legislation, relevant case law, and Commission practice – confirm that the FCC has no authority to regulate consumer electronic devices that can be used for receipt of wire or radio communication when those devices are not engaged in the process of radio or wire transmission.

Because the Commission exceeded the scope of its delegated authority, we grant the petition for review, and reverse and vacate the *Flag Order* insofar as it requires demodulator products manufactured on or after July 1, 2005 to recognize and give effect to the broadcast flag.

*So ordered.*