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

No. 04-1037

AMERICAN LIBRARY ASSOCIATION, *ET AL.*,

PETITIONERS

V.

FEDERAL COMMUNICATIONS COMMISSION
AND
THE UNITED STATES OF AMERICA,

RESPONDENTS

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

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

A. Parties

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

B. Rulings Under Review

In the Matter of Digital Broadcast Content Protection, 18 FCC Rcd 23550 (2003) (JA 1254)

C. Related Cases

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Administrative Decisions

Statutes and Regulations

Others

Treatises

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

GLOSSARY

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

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

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BRIEF FOR RESPONDENTS

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

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

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

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

JURISDICTION

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

STATUTES AND REGULATIONS

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

COUNTERSTATEMENT OF THE FACTS

A. BACKGROUND

1. Digital Television

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

provision of 'advanced' television, or 'ATV.'" *Community Television, Inc. v. FCC*, 216 F.3d 1133, 1137 (D.C.Cir. 2000), *cert. denied*, 531 U.S. 1071 (2001).

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

"The transition to digital television is a massive and complex undertaking, affecting virtually every segment of the television industry and every American who watches television." *Second Periodic Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television*, 19 FCC Rcd 18279, 18284 ¶11 (2004) ("*Second Periodic Review*"). The FCC established 2006 as the target date for completing the DTV transition. *See Advanced Television Systems, Fifth Report & Order*, 12 FCC Rcd 12809

(1997). In the Balanced Budget Act of 1997, Congress codified that target date.[1] As the Commission's Chairman observed in September 2004, "[t]he importance of the end of the DTV transition for our country cannot be overstated. Completion of the transition will recoup a significant amount of spectrum for first-responder, public safety use and for innovative wireless broadband services – enhancing our homeland and economic security in the process." 19 FCC Rcd at 18435.

2. The Notice of Proposed Rule Making

In August 2002, noting the "unique logistical and technological challenges" of the DTV transition and out of concern that the "current lack of digital broadcast copy protection may be a key impediment to the transition's progress," the Commission began a rule making proceeding to examine whether rules were needed "to prevent the unauthorized copying and redistribution" of digital broadcast television programming. *Digital Broadcast Copy Protection*, 17 FCC Rcd 16027, 16028 ¶3 (2002)(*"NPRM"*)(JA 629, 630).

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

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

without some form of protection, and that the DTV transition could be delayed as a result because consumers would be reluctant to purchase DTV receivers and equipment if they did not have access to such programming. *NPRM*, 17 FCC Rcd at 16027 ¶1 (JA 629). *See* n. 1 above.

The Commission sought comment on a wide variety of questions relating to the need for this type of protection, the impact of a protection rule on the availability of programming for digital television and the effect on the DTV transition, technical considerations surrounding implementation of a protection rule, the impact of such a rule on consumers, and the FCC's statutory authority to adopt such a requirement. *NPRM*, 17 FCC Rcd at 16028-30 ¶¶3-10 (JA 630-32). The agency also sought comment on whether, if a digital television content protection regime is needed, what "is the appropriate technological model to be used, or whether there are alternatives" to the broadcast flag. *Id.* at 16027-28 ¶¶ 2, 4 (JA 629-30).

B. THE BROADCAST FLAG RULES

In a November 2003 *Report and Order*, the Commission adopted rules implementing the broadcast flag requirement applicable to television reception equipment that is manufactured after July 1, 2005. *Digital Broadcast Content Protection, Report and Order and Further Notice of Proposed Rule Making*, 18 FCC Rcd 23550 (2003) (JA 1254)(hereafter "*R&O*") .

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

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

broadcasting." *Id.* at 23565-66 ¶31 (JA 1269-70). Specifically, the Commission concluded that "the potential threat of mass indiscriminate redistribution [of DTV programming] will deter content owners from making high value digital content available through broadcasting outlets absent some content protection mechanism" and that "preemptive action" is needed now "to forestall any potential harm to the viability of over-the-air television." *R&O*, 18 FCC Rcd at 23552 ¶4 (JA 1256).

The Commission also determined that DTV programming "is inherently at a greater risk of widespread redistribution as compared to its analog counterpart because digital media can be easily copied and distributed with little or no degradation in quality." *R&O*, 18 FCC Rcd at 23553 ¶6 (JA 1257). Citing comments from content producers and broadcasters, the Commission further concluded that "absent redistribution control regulation for DTV broadcasts, the record indicates that content providers will be reluctant to provide quality digital programming to broadcast outlets and will instead direct such content to pay television systems that can implement adequate content protection mechanisms." *R&O*, 18 FCC Rcd at 23565-66 ¶31 (JA 1269-70). Moreover, the Commission found, the "diversion of high quality digital programming away from broadcast television will lead to an erosion of our national television structure" and "not only will free, over-the-air broadcast television deteriorate, but a critical element necessary to the success of the DTV transition – the availability of quality digital broadcast programming – will not develop." *Id.*

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

1258-59). However, the Commission concluded that "content owners are justifiably concerned about protecting all DTV broadcast content, including both standard definition and high definition formats, from indiscriminate retransmission in the future." *Id.* The Commission observed that the DTV transition was reaching a "critical juncture" because the "forthcoming availability of digital cable ready televisions with off-air reception capability will dramatically increase the number of consumers with access to DTV content and services." *R&O, Id.* ¶8 (JA 1258-59). By "taking preventative action today" in adopting the broadcast flag rules, the Commission determined, "we can forestall the development of a problem in the future similar to that currently being experienced by the music industry."[2] The Commission found that such preventative action would both address "the concerns of content owners" and "ensure the continued availability of high value DTV content to consumers through broadcast outlets." *Id.*

2. The Broadcast Flag Provisions

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

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

[3] *NPRM*, 17 FCC Rcd at 16027-28 ¶2 (JA 629-30); s*ee Final Report of the Co-Chairs of the Broadcast Protection Discussion Subgroup to the Copy Protection Technical Working Group* at 2 (June 3, 2002) ("*BPDG Final Report*") (JA 593). The report noted that "BPDG is a wholly private discussion group with no official or unofficial government standing." *Id.* n. 4. (JA 595).

The broadcast flag is a digital code that can be embedded into a digital broadcasting stream. It signals digital television reception equipment to limit the redistribution of digital broadcast content. Although the Commission considered other possible mechanisms to protect DTV content against indiscriminate redistribution, it found in the *Report & Order* that of the mechanisms currently available, the broadcast flag regime is most suitable because it "will provide content owners with reasonable assurance that DTV broadcast content will not be indiscriminately redistributed while protecting consumers' use and enjoyment of broadcast video programming." *R&O*, 18 FCC Rcd at 23552 ¶4 (JA 1256). The Commission emphasized that although the rules it was adopting "would limit the redistribution of digital broadcast television content, [they would] not restrict consumers from copying programming for their personal use." *Id.* ¶5 (JA 1256); *see also id.* at 23555 ¶¶9-10 (JA 1259). The Commission also emphasized that the rules preclude indiscriminate redistribution on the Internet, but do not "foreclose use of the Internet to send digital broadcast content where it can be adequately protected from indiscriminate redistribution." *Id.* at 23555 ¶10 (JA 1259).[4]

The broadcast flag is inserted into a DTV signal at the discretion of the broadcaster. The rules do not require broadcasters to use the broadcast flag to protect their DTV programming. *See R&O*, 18 FCC Rcd at 23568 ¶37 (JA 1272). Generally, the rules require that DTV television receivers and other devices, such as digital video cassette records or personal computer television tuner cards, that are capable of receiving

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[4] Emphasizing that it intended to limit the scope of the broadcast flag to redistribution control, the Commission established a technical restriction prohibiting broadcasters from using the flag for copy control purposes. *See R&O*, 18 FCC Rcd at 23568 ¶38 (JA 1272-73); 47 C.F.R. 73.9001.

broadcast DTV signals over-the-air or via cable television systems (collectively referred to as "demodulator products") recognize and give effect to the broadcast flag pursuant to certain "compliance" and "robustness" rules. *Id.* at 23570 ¶40 (JA 1274).

"Compliance" refers to what the covered demodulator can do with the broadcast content. If the flag is present, the content can be sent only in one of several permissible ways, including: (1) over an analog output, *e.g.* to existing analog equipment; (2) over a digital output associated with an approved content protection or recording technology, and (3) to a digital recording protected with an approved recording method. *R&O*, 18 FCC Rcd at 23571 ¶43 (JA 1275); *see* 47 C.F.R. 73.9003 – 73.9005 (JA 1293-95).

"Robustness" refers to the degree of security of the system, *i.e.*, how difficult it would be to evade or "hack" the system to defeat the content protection. Responding to commenters' criticism of industry proposals for a high level of robustness as unnecessary and threatening the interoperability of covered devices, the Commission found that establishing an "expert" level of robustness in the standard was not needed to successfully implement the broadcast flag approach and prevent frustration of the DTV transition. The Commission adopted instead an "ordinary user" robustness standard. Specifically, the rule adopted by the Commission provides that the "content protection requirements … shall be implemented in a reasonable method so that they cannot be defeated or circumvented merely by an ordinary user using generally-available tools or equipment." 47 C.F.R. 73.9007 (JA 1296). The Commission concluded that this approach will afford consumer electronics and other equipment manufacturers the maximum flexibility in innovation while ensuring adequate content security. *R&O*, 18 FCC Rcd at 23572 ¶46 (JA 1276-77).

The Commission established an interim policy, discussed below, for approving digital output content protection and recording technologies and adopted a Further Notice of Proposed Rulemaking to examine that question further. *R&O*, 18 FCC Rcd at 23574-76 ¶¶50-57 (JA 1278-80). That proceeding has not yet been concluded.

The Commission also addressed what is described as the "analog hole" problem. The "'analog hole' refers to the fact that high quality content can be transmitted over component analog outputs without content protection." *R&O*, 18 FCC Rcd at 23557-58 ¶17 (JA 1280-81). Left unaddressed, the analog hole would allow for a form of circumvention of the broadcast flag, which only protects digital outputs. The Commission pointed out, however, that this problem is not specific to DTV, but is shared by cable and satellite delivery platforms that use digital technology, and industry efforts are focusing on potential solutions. The Commission again emphasized the need to act now with respect to DTV rather than wait for the conclusion of what may be a futile search for a solution to every aspect of the problem of protecting content from unauthorized distribution:

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

Id. at 23559 ¶19 (JA 1263).

All equipment in use by consumers today will remain fully functional under the broadcast flag system. Thus, consumers can continue to use existing DTV equipment

without purchasing new or additional equipment to receive and view broadcast television signals. Moreover, as noted, consumers' ability to make and view digital copies will not be affected; the broadcast flag seeks only to prevent mass redistribution over the Internet or through similar means. *R&O*, 18 FCC Rcd at 23555-59 ¶¶9-10, 14, 20 (JA 1259-63). In addition, the Commission found that the broadcast flag-based system could be implemented "at a minimal cost to both consumers and manufacturers." *Id*. at 23559-60 ¶21 (JA 1263); *see also id*. at 23556-57 ¶14 n.29 (JA 1260-61).

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

Parties filing comments in the agency proceeding took different positions on the issue of whether the FCC possesses statutory authority under the Communications Act to adopt a content protection rule for DTV such as the broadcast flag rule. After surveying the comments, along with the relevant statutes and caselaw, the Commission concluded that it has "ancillary authority to regulate equipment manufacturers in order to effectuate a redistribution control system for DTV broadcasts." *R&O*, 18 FCC Rcd at 23563-64 ¶29 (JA 1267-68).

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

communication or such transmission of energy by radio"); *R&O*, 18 FCC Rcd at 23563-64 ¶ 29 (JA 1267-68).

In particular, the Commission relied on Supreme Court cases upholding its jurisdiction to regulate cable television systems at a time when the Communications Act contained no express authority for such regulation. The Commission pointed out that the Supreme Court had held in *United States v. Southwestern Cable Co.*, 392 U.S. 157, 177-78 (1968), that "[a]ncillary jurisdiction may be employed, in the Commission's discretion, where the Commission's general jurisdictional grant in Title I of the Communications Act covers the subject of the regulation and the assertion of jurisdiction is 'reasonably ancillary to the effective performance of [its] various responsibilities.'" *R&O*, 18 FCC Rcd at 23563 ¶ 29 (JA 1267). In addition, as the Commission noted, the Supreme Court explained in a later case that the "critical question in this case is whether the Commission has reasonably determined that its … rule will 'further the achievement of long-established regulatory goals in the field of televi sion broadcasting ….'" *Id.* at 23563 n.70, *quoting United States v. Midwest Video Corp.*, 406 U.S. 649, 667-68 (1972) (plurality opinion) (JA 1267).

The Commission concluded that "[b]oth predicates for jurisdiction [under *Southwestern* Cable] are satisfied here." *R&O*, 18 FCC Rcd at 23563 ¶ 29 (JA 1267). First, it found that television receivers are covered by its general jurisdictional grant in light of the Act's broad definition of radio and wire communi cations as including "not merely the transmission of the communi cation over the air or by wire, but also all incidental 'instrumentalities, facilities, apparatus and services' that are used for the 'receipt, forwarding and delivery' of such transmissions." *Id. quoting* 47 U.S.C. 153(33) (JA 1267); *see also*

47 U.S.C. 153(52). The Commission also found that the creation of a content redistribution protection system for DTV "is essential for the Commission to fulfill its responsibilities under the Communications Act and achieve long-established regulatory goals in the field of television broadcasting," and thus is squarely within the agency's ancillary jurisdiction. *R&O*, 18 FCC Rcd at 23565-66 ¶31 (JA 1269). Particularly relevant, the Commission pointed out, was that "Congress has woven into the Communications Act an intricate and detailed set of provisions for the DTV transition. … The statutory framework for the transition, coupled with the support in the legislative history and the Commission's ongoing and prominent initiatives in the area, make it clear that advancing the DTV transition has become one of the Commission's primary responsibilities under the Communications Act at this time." *Id.* at 23564-65 ¶30 (JA 1268-69).

Acknowledging that it had not previously exercised its ancillary jurisdiction over television equipment manufacturers, the Commission analogized the situation here to that which it faced when it first exercised jurisdiction over cable television systems in the 1960s. It noted that although the cable television industry had then been in existence for nearly 15 years without Commission regulation, "the Supreme Court found [after that lengthy period of non-regulation] that the Commission had 'reasonably concluded that regulatory authority over [cable television] is imperative if it is to perform with appropriate effectiveness certain of its other responsibilities.'" The Commission continued that it found itself "faced with the same type of situation now with respect to equipment manufacturers in that up until this point, exercise of our ancillary authority was not necessary to fulfill our responsibilities." *Id.* at 23566-67 ¶33 (JA 1270-71). However now, as the Commission explained,

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

Id. at 23565 ¶31 (JA 1269).

The Commission also found no basis for the suggestions of some commenters that the broadcast flag rules are inconsistent with statutory copyright provisions, explaining that its adoption of the broadcast flag redistribution control system for digital broadcast television content does not "alter or affect any underlying copyright principles, rights or remedies." *R&O,* 18 FCC Rcd at 23558 ¶18 (JA 1262). The Commission likewise rejected arguments that a provision of the Digital Millenium Copyright Act ("DMCA") prevents the Commission from adopting the broadcast flag rules. The provision states that "nothing in [the DMCA] shall require" that manufacturers design their equipment to respond to any particular technological protection measure. The Commission found that that the statutory language in question, 17 U.S.C. 1201(c)(3), is not a "complete prohibition on the governmental implementation of particular content protection technologies" and thus "does not forestall Commission adoption of" the broadcast flag rules. *Id.* at 23570 ¶41 (JA 1274).

Two Commissioners dissented from the *Report and Order* in part, expressing some reservations about the manner in which certain aspects of the broadcast flag were implemented. However, both of these Commissioners firmly agreed with the agency's basic conclusions that content protection of digital television programming was necessary

and within the Commission's authority. *See R&O*, 18 FCC Rcd at 23615-21 (JA 1319-25).

4. The Certifications Order

To facilitate adoption of broadcast flag technology in television receivers and related equipment by 2005, the Commission established an interim policy that allows proponents of a particular content protection or recording technology to certify to the FCC, subject to public notice and objection, that such technology is an appropriate tool to give effect to the broadcast flag. *See R&O,* 18 FCC Rcd at 23574-76 ¶¶50-57 (JA 1278-80). The Commission said it expects any approved technologies that are publicly offered to be licensed on a reasonable and nondiscriminatory basis. *Id.* at 23575 ¶53 (JA 1279).

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

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

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

SUMMARY OF ARGUMENT

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

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

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

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

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

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

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

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

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

ARGUMENT

I. STANDARD OF REVIEW

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

A. The Statutory Issue

Petitioners argue that the Commission acted outside the scope of its statutory authority in adopting the broadcast flag. To determine whether the Commission permissibly interpreted the Act as providing it authority to promulgate rules, the Court employs the familiar test outlined by the Supreme Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *See United States v. Mead Corp.*, 533 U.S. 218, 226-28 (2001). If, through the Communications Act, Congress has spoken directly to the precise issue, "that is the end of the matter," and the Court defers to the "unambiguously expressed intent of Congress." *Id.* at 842-43. If, however, the Communications Act "is silent or ambiguous with respect to the specific issue" at hand, the Commission may exercise its reasonable discretion in construing the statute. *Id.* at 843. *See AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 387, 397 (1999). "[I]t is settled law that this rule of deference applies even to an agency's interpretation of its own statutory authority or jurisdiction." *Mississippi Pwr. & Light Co. v. Mississippi*, 487 U.S. 354, 381 (1988).

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

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

B. The APA Issue

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

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

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

The text of the Communications Act puts the television reception equipment that will be subject to the broadcast flag requirement within the agency's regulatory jurisdiction. Section 1 of the Act, 47 U.S.C. 151, states that the Commission is created "[f]or the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges," and that the agency "shall execute and enforce the provisions of th[e] Act." *R&O*, 18 FCC Rcd at 23563 ¶29 (JA 1267).

Implementing that foundational purpose, section 2(a) of the Act, 47 U.S.C. 152(a), confers on the agency regulatory authority over all interstate radio and wire communication. Specifically, the statute provides that "[t]he provisions of this act shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by wire and radio … and to all persons engaged within the United States in such communication or such transmission of energy by radio …." *R&O*, 18 FCC Rcd at 23563 ¶29 n.73 (JA 1267).

Under the Communications Act's definitions, the terms "radio communication" and "wire communication" are defined broadly to include not merely the transmission of the communication over the air or by wire, but also all incidental "instrumentalities, facilities, apparatus and services" that are used for the "receipt, forwarding and delivery" of such transmissions. *R&O,* 18 FCC Rcd at 23563 ¶29 (JA 1267); *see* 47 U.S.C. 153(33)

(defining the terms "radio communication" and "communication by radio" to mean "the transmission by radio of writing, signs, signals, pictures, and sounds of all kinds, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission."). The statutory definition of "wire communication" contains essentially identical language. *See* 47 U.S.C. 153(52)(defining the terms "wire communication" and "communication by wire" to mean "the transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission."). Thus, as the Commission determined in the *Report and Order*, the FCC's jurisdiction reaches "facilities" and "apparatus" for the receipt of digital broadcast television signals by radio or wire. *See R&O,* 18 FCC Rcd at 23563 ¶29 (JA 1267).

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

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

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

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

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

Here, the Commission pointed out that it "is charged with the responsibility of shepherding the country's broadcasting system into the digital age – a goal that has become central to the Commission's Section 303(g) mandate to "[s]tudy new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest." *R&O,* 18 FCC Rcd at 23564 ¶30 (JA 1268); *see* 47 U.S.C. 309(j)(14)(A) ("[a] television broadcast license that authorizes analog television service may not be renewed … for a period that extends beyond December 31, 2006"). The Court has recognized that the DTV transition is "the unambiguous command of an Act of Congress," *Consumer Elec. Ass'n,* 347 F.3d at 843, and the evidence of this is found in "an intricate and detailed set of provisions for the DTV transition."[6] *R&O,* 18 FCC Rcd at 23565 ¶30 (JA 1269). The Commission concluded that it is "clear that advancing the DTV transition has become one of the Commission's primary responsibilities under the Communications Act at this time." *Id.*

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

[6] *See, e.g.*, 47 U.S.C. 309(j)(14) (requiring recapture of broadcast television spectrum used for analog service by end of 2006, subject to conditions); 47 U.S.C. 337 (requiring the removal and relocation of incumbent analog broadcast licensees operating on channels 60-69 after the DTV transition period terminates in order that frequencies can be used for public safety and commercial services); 47 U.S.C. 336 (broadly directing the Commission concerning the transition to digital television); 47 U.S.C. 396(k)(1)(D) (creating $20 million fund for fiscal year 2001 for transition from analog to digital technology for public broadcasting services); 47 U.S.C. 534(b)(4)(B) (digital must carry); 47 U.S.C. 544a(c)(2) (subscriber notification requirements regarding the impact that cable converter boxes may have on advanced television picture generation and display features).

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

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

1. Petitioners contend that under the definitions of radio and wire communication in Sections 153(33) and 153(52), the agency's authority extends only to apparatus used for transmission and not to apparatus used for reception. (Br. at 29-30). As the Commission correctly observed, however, construing the Act's definitions of radio and wire communication as referring only to the transmission and not to the reception of communications would "ignore the broad language of the definition, which gives a fuller meaning to the concept of 'communication' so as to include all 'instrumentalities, facilities, apparatus and services' that may be 'incidental' to the literal transmission, but which are a part of an overall circuit of messages that are sent and received." *R&O*, 18 FCC Rcd at 23564 n.75 (JA 1268). The Senate Report on the 1962 All Channel Receiver Act, upon which petitioners rely for other purposes (Br. at 32-33), reinforces the plain meaning of the statutory text in stating that "[t]elevision receivers are an essential factor in the use of

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

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

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

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

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

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

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

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

documents or to regulate automobiles simply "because the car contains a satellite radio receiver." Br. at 27-28. Petitioners ignore the fundamental difference between regulation of receivers and regulation of received material. Nothing in the broadcast flag rules regulates the copying or use of DTV programming other than through permissible regulation of DTV receiving equipment, which is essential in the transmission of radio communications. As the Commission explained, moreover, the "downstream products" that are affected by the flag rules involve a limited subset of products that perform part of the process of reception and are "different from the universe of products traditionally considered to be downstream from a reception device." *R&O*, 18 FCC Rcd at 23573 ¶48 (JA 1277). The regulated equipment is within the category of "'instrumentalities, facilities, apparatus and services' that may be 'incidental' to the literal transmission, but which are a part of an overall circuit of messages that are sent and received." *R&O*, 18 FCC Rcd at 23564 n.75 (JA 1268).

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

For example, the Commission correctly rejected petitioners' assertion (Br. at 37) that Section 303(e) of the Communications Act, 47 U.S.C. 303(e), demonstrates that the FCC's statutory authority does not extend to reception equipment. *See R&O*, 18 FCC Rcd at 23564 n.75 (JA 1268). Section 303(e) authorizes the FCC to "[r]egulate the kind of apparatus to be used with respect to its external effects and the purity and sharpness of the emissions from each station and from the apparatus therein …." Section 303(e), as the

Commission reasonably concluded, "contains no indication that Congress intended to limit the Commission's authority over radio station apparatus to the terms of that statutory provision. The mere fact that the provision grants the Commission the authority to regulate radio station apparatus along certain lines does not imply that the Commission is prohibited from regulating such apparatus under authority drawn from other portions of the statute. To hold otherwise would render the concept of ancillary jurisdiction largely meaningless." *R&O*, 18 FCC Rcd at 23564 n.75 (JA 1268).[7]

Petitioners claim more generally that a purported "regulatory mosaic" – comprised of amendments to the Communications Act beginning in 1962 relating to FCC regulation of television receivers and other equipment – demonstrates "Congress' decision to restrict FCC jurisdiction over TV receiver design." Br. at 37.[8] Again, the Commission correctly rejected similar arguments below, noting the specific, narrow focus of these legislative actions, as well as the lack of evidence in either the text or the legislative history of any of these provisions indicating that Congress intended to limit the Commission's ability to exercise its ancillary authority in other areas that were not similarly addressed through explicit statutory provisions. *See R&O*, 18 FCC Rcd at 23566 ¶32 (JA 1270). Petitioners' argument is tantamount to a claim that Congress intended through later legislation to repeal Congress' grant, in 1934, of ancillary agency authority to adopt rules regulating

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

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

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

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

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

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

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

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

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

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

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

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

In the proceeding below, the Commission rejected the argument, repeated by petitioners here, that Congress' specific statutory authorizations and requirements related to equipment design "fit[] neatly within the *expressio unius est exclusio alterius* canon of statutory construction." Br. at 38. As the Commission explained, that maxim "has little force in the administrative setting," where courts defer to an agency's interpretation of a statute unless Congress has '"directly spoken to the precise question at issue."' *Texas Rural Legal Aid, Inc. v. Legal Serv. Corp.*, 940 F.2d 685, 694 (D.C.Cir. 1991) (*quoting Chevron, U.S.A. v. NRDC*, 467 U.S. at 842.). The e*xpressio unius* canon is "simply too thin a reed to support" to support a conclusion that Congress has clearly resolved an issue. *Id.; see R&O*, 18 FCC Rcd at 23566 n.85 (JA 1270). *See also Mobile Communications Corp. v. FCC*, 77 F.3d 1399, 1405-06 (D.C.Cir.), *cert. denied*, 519 U.S. 823 (1996). This Court has explained further that the "difficulty with the [*expressio unius*] doctrine –

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

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

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

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

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

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

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

The Commission concluded in the *Report and Order* that "the potential threat of mass indiscriminate redistribution will deter content owners from making high value digital content available through broadcasting outlets absent some content protection mechanism," that "preemptive action" is needed now "to forestall any potential harm to the viability of over-the-air television," and that of the mechanisms currently available, the broadcast flag "regime will provide content owners with reasonable assurance that DTV broadcast content will not be indiscriminately redistributed while protecting consumers' use and enjoyment of broadcast video programming." *R&O*, 18 FCC Rcd at 23552 ¶4 (JA 1256). Petitioners dispute (Br. at 51-52) that the record in this proceeding supports the Commission's finding of a problem with unauthorized distribution of DTV programming that requires the adoption of the broadcast flag rules.

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

The agency record, moreover, established that movie studios and other video content producers have access to alternative media – including direct broadcast satellites, cable television, video cassettes and DVDs – that can provide more secure distribution than over-the-air television. *See R&O*, 18 FCC Rcd at 23565 ¶31 and n.82 (JA 1269)(citing to record). In light of these facts, the Commission reasonably concluded that content producers are likely to move at least their more valuable programming away from over-the-air television and onto more secure distribution channels if there is no method for them to prevent mass unauthorized distribution of their products when broadcast by over-the-air DTV stations. *Id.* As one commenter observed: "[I]t is basic economics and logic that the lack of a mechanism to prevent digital broadcast content from being copied and widely redistributed over the Internet without authorization is a significant disincentive to content owners making digital broadcast content broadly available." NFL Reply Com. at 3 (JA 1163). Numerous other commenters supported that commonsense conclusion.[12]

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[12] *See, e.g.*, CBS Affiliates Comments at 2-3 (JA 681-82)("[L]lack of copy protection in digital broadcast television will cause non-network producers to turn increasingly to subscription-

The Commission did not find that the problem of wide-scale internet redistribution of digital broadcast television programs currently exists. It likely could not have made such a finding given the nascent status of DTV broadcasting. Instead, the Commission found that the problem was "forthcoming" and that "preemptive action is needed to forestall any potential harm to the viability of over-the-air television." *Id.* at 23552 ¶4 (JA 1256). The record supports that judgment. It reflects, for example, dramatic improvements in the speed of transferring data on the Internet.[13] Even if typical Internet

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based distribution networks for distribution of their most valued programming. The risks associated with unprotected digital television broadcasting may simply be too great to warrant using broadcast television as the vehicle for such programming.); Viacom Comm. at 6 (JA 945)("Left unaddressed, this vulnerability to unauthorized redistribution could destroy television production economics …. those who produce digital content for television are apt to provide their most compelling and high-value content only to distribution platforms that can ensure the protection of their content ….Thus, the highest quality entertainment and sports programming would migrate to cable and satellite, rendering free, over-the-air television the poor stepchild of the distribution platforms, if it can even survive carrying second-rate, leftover programming."); NBC Comm. at 2 (JA 851)("[B]roadcast television's ability to drive the digital transition will continue only insofar as broadcast television can transmit quality programming. This in turn depends on the continued willingness of program providers to allow television broadcasters to transmit their programming in digital. However, unless program providers' understandable fears of digital piracy in the wake of Napster and other examples of unauthorized widespread distribution of digital content are addressed, broadcasters will not be able to transmit in digital the same quality programming currently transmitted in analog. If consumers cannot enjoy the same programming in digital that they can enjoy via analog, they are unlikely to invest the thousands of dollars necessary to upgrade their home video equipment to access digital broadcast transmissions. This will unavoidably delay the transition to digital."); *see also* ASCAP Comments at 1-2; CPB Reply Comments at 2; DGA Comments at 1-3 (JA 650-53); Banks Comments at 2 (JA 678); MPAA Comments at 6-8 (JA 772-74); MPAA Reply Comments at 2-13 (JA 1085-96); NMPA Reply Comments at 2-5; NBC Affiliates Comments at 1-3 (JA 881-83); NBC Comments at 2 (JA 851); NFL Comments at 6-12 (JA 868-74); NABA Comments at 1 (JA 884).

[13] *See, e.g.*, [*Caltech News Release "Caltech computer scientists develop FAST protocol to speed up Internet,"* (March 18, 2003)](JA 1236)("Caltech computer scientists have developed a new data transfer protocol for the Internet fast enough to download a full-length DVD movie in less than five seconds."); *see also* J. Williams, *Trends-Download An HD Movie in 5 Minutes* (May 5, 2003) (JA 1186-95) (projecting that in 3-4 years it will take less time to download a high definition movie on the Internet than to watch it).

speeds currently makes mass redistribution of digital broadcast television programming impractical, as petitioners contend, the record supports the agency's judgment about what regulatory course is needed now to address looming problems that are likely to be presented in the near future as technology rapidly develops.[14]

Petitioners' attempt to analogize this case to *Home Box Office, Inc. v. FCC*, 567 F.2d 9 (D.C.Cir.), *cert. denied*, 434 U.S. 829 (1977), is off the mark. Br. at 51. In *HBO* the Commission had adopted rules to limit the types of programming cable television systems and subscription broadcasters could offer for a fee (specifically most feature films, major sports events and certain other programming) in order to prevent competitive bidding away, or "siphoning," of this programming from free, over-the-air television. The Court reversed the Commission's action with respect to cable television because the agency had failed to demonstrate that its rules furthered "any legitimate goal of the Communications Act" and because of the burden they placed on expression by the cable television industry. *Id.* at 28, 49. As we have shown above, the Commission reasonably found here that the broadcast flag is necessary to the DTV transition – "one of the Commission's primary responsibilities." *R&O*, 18 FCC Rcd at 23565 ¶30 (JA 1269). Moreover, in this instance, the Commission has not restricted the programming any

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

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

Petitioners also rely on *HBO* to support their general contention that there was no evidence of an immediate need for FCC action to impose the broadcast flag. The record supports the Commission's determination that it was necessary to act now because waiting until the problem fully manifests itself would be too late – consumers then would be using so much equipment that lacks the broadcast flag capability that efforts to introduce content protection technology would be ineffective at that late date. *See R&O*, 18 FCC Rcd at 23559 ¶19 ("[T]he window of opportunity for adopting a flag based redistribution control regime for digital broadcast television is closing.") (JA 1263). In *HBO* there was no similar conclusion by the Commission that delay could altogether prevent effective action by the Commission. To the contrary, the Court observed in *HBO* that what it viewed as an inadequate agency record resulted, at least in part, from the Commission's choice "to regulate rather than [to] allow a period of unregulated experimentation in which data could be generated that could form a predicate for informed agency action." 567 F.2d at 37.

Notwithstanding petitioners' objection that the Commission resorted to "predict-tion" (Br. at 54), it is well established that the Commission is entitled, indeed in many cases expected, to make predictive judgments in the course of carrying out its responsibilities, and those judgments are entitled to substantial judicial deference. *See, e.g.*, *Consumer Elec. Ass'n*, 347 F.3d at 299; *Teloca tor Network of America v. FCC*, 691 F.2d 525, 538 (D.C.Cir. 1982), *quoting FCC v. WNCN Listeners Guild*, 450 U.S. 582, 594-95 (1981)("As oft has been repeated, the court will not pass upon the wisdom of the agency's perception of where the public interest lies, nor will it require 'complete factual support' in the record when the agency's ultimate conclusions necessarily rest on 'judgment and prediction rather than pure factual determinations.'").

Finally, petitioners' claims that the Commission failed to consider adequately "more effective alternatives to the Flag" and imposed a rule "whose benefit will be almost zero and whose cost is more substantial than estimated" ignores the Commission's express conclusions. Br. at 55. The only significant alternative to the flag was a form of encrypt tion, which the Commission explained would impose costs and delays (principally the obsolescence of existing televisions receivers) that made it an unacceptable alternative. *R&O*, 18 FCC Rcd at 23561 ¶24 (JA 1265). Petitioners cite no basis for their contention that the broadcast flag regime will be unreasonably costly. The Commission found to the contrary. *See Id*. at 23559-60 ¶21 (JA 1263-64); *see also id*. at 23556-57 ¶14 n.29 (JA 1260-61).

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

The Commission emphasized in the *Report and Order* that the broadcast flag "in no way limits or prevents consumers from making copies of digital broadcast television

content" and that the scope of its decision "does not reach existing copyright law." *R&O*, 18 FCC Rcd at 23555 ¶ 9 (JA 1259). The Commission further explained that the "creation of a redistribution control regime establishes a technical protection measure that broadcasters may use to protect content. However, the underlying rights and remedies available to copyright holders remain unchanged," and the broadcast flag does not "alter the defenses and penalties applicable in cases of copyright infringement, circumvention, or other applicable laws." *Id.*[15]

Nevertheless, petitioners raise two copyright-related arguments in their effort to show that the broadcast flag rules contravene specific provisions of law. First, they contend that the broadcast flag rules "contravene Congress' decision not to impose copy protection mandates" in the Digital Millenium Copyright Act, 17 U.S.C. 1201(c)(3). Br at 44. Petitioners assert that Congress "made clear in the DMCA its intention not to require equipment design to respond to any particular technological copy protection measures." Br. at 45. However, as the Commission correctly found in a response to a similar argument below, the scope of the DMCA's instruction with respect to equipment design "is specifically limited with prefatory language." *R&O*, 18 FCC Rcd at 23570 ¶41 (JA 1274).

The relevant statutory text provides:

> Nothing in this section shall require that the design of, or [the] design and selection of parts and components for, a consumer electronics, telecom-

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

> munications, or computing product provide for a response to any particular technological measure, so long as such part or component, or the product in which such part or component is integrated, does not otherwise fall within the prohibitions of subsection (a)(2) or (b)(1).

17 U.S.C. 1201(c)(3)(emphasis added); *see also* H.R. Rep. No. 105-551, 105th Cong. 2d Sess. Pt. II at 41 (1998). By its plain tems, the phrase "[n]othing in this section" establishes that Section 1201(c)(3) is "not a complete prohibition on the governmental implementation of particular content protection technologies," and "the DMCA does not forestall Commission adoption" of the broadcast flag system. *R&O*, 18 FCC Rcd at 23570 ¶41 (JA 1274). The text of the DMCA plainly does not preclude, or even address, the FCC's authority to adopt the broadcast flag rules.

Petitioners' second copyright argument, that the broadcast flag "upsets the balance between copyright and fair use" (Br. at 45), wholly ignores the Commission's repeated and explicit statements that the flag system will not prevent consumers from copying programs for their personal use. *See, e.g.*, *R&O*, 18 FCC Rcd at 23555-56 ¶¶ 9, 14 (JA 1259-61); *Certifications Order*, 19 FCC Rcd at 15910 ¶76. Insofar as petitioners' complaint is that the rules will not permit consumers to redistribute protected content in whatever manner and to whatever extent they desire, there is no fair use principle that prohibits any constraints on further use. As the Second Circuit recently held, "[w]e know of no authority for the proposition that fair use, as protected by the Copyright Act, much less the Constitution, guarantees copying by the optimum method or in the identical format of the original. … Fair use has never been held to be a guarantee of access to copyrighted material in order to copy it by the fair user's preferred technique or in the format of the original." *Universal City Studios v. Corley*, 273 F.3d 429, 459 (2d. Cir. 2001); *see also United States v. Elcom*, 203 F.Supp.2d 1111, 1131 (N.D. Cal.

2002)("Defendant has cited no authority which guarantees a fair user the right to the most technologically convenient way to engage in fair use. The existing authorities have rejected that argument.").

Pursuant to the interim procedures adopted in the order on review, the Commission has already approved 13 different technologies to implement the broadcast flag. *See Certifications Order*, 19 FCC Rcd 15876. Only two of those technologies restrict copying at all, and the Commission provided a detailed explanation why it had decided to approve those technologies despite its intention that the broadcast flag not limit ordinary consumer copying. *See id.* at 15910 ¶76. The Commission emphasized that its approval of those two technologies "should not be interpreted as precedent supporting the future adoption of technologies that impose copy restrictions on digital broadcast television content." *Id.* at ¶77. Moreover, the Commission's approval of 11 other technologies to implement the broadcast flag mandate gives both manufacturers and consumers choice – in particular, the ability to avoid any restriction on copying for personal use.

CONCLUSION

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

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December 23, 2004

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

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

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7) and D.C. Cir. Rule 32(a)(2), I hereby certify that the accompanying "Brief for Respondents" in the captioned case contains 12438 words as measured by the word count function of Microsoft Word 2002.

_____

C. Grey Pash, Jr.

December 23, 2004

STATUTORY APPENDIX

UNITED STATES CODE ANNOTATED

TITLE 17. COPYRIGHTS
CHAPTER 12--COPYRIGHT PROTECTION AND MANAGEMENT SYSTEMS

§ 1201. Circumvention of copyright protection systems

* * *

(c) Other rights, etc., not affected.--(1) Nothing in this section shall affect rights, remedies, limitations, or defenses to copyright infringement, including fair use, under this title.

(2) Nothing in this section shall enlarge or diminish vicarious or contributory liability for copyright infringement in connection with any technology, product, service, device, component, or part thereof.

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

(4) Nothing in this section shall enlarge or diminish any rights of free speech or the press for activities using consumer electronics, telecommunications, or computing products.

Title 47. Telegraphs, Telephones, and Radiotelegraphs
Chapter 5. Wire or Radio Communication
Subchapter I. General Provisions

§ 151. Purposes of chapter; Federal Communications Commission created

For 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, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communications, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is created a commission to be known as the "Federal Communications Commission", which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this chapter.

§ 152. Application of chapter

(a) The provisions of this chapter shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio, and to the licensing and regulating of all radio stations as hereinafter provided; but it shall not apply to persons engaged in wire or radio communication or transmission in the Canal Zone, or to wire or radio communication or transmission wholly within the Canal Zone. The provisions of this chapter shall apply with respect to cable service, to all persons engaged within the United States in providing such service, and to the facilities of cable operators which relate to such service, as provided in subchapter V-A.

* * *

§ 153. Definitions

For the purposes of this chapter, unless the context otherwise requires—

*** * ***

(33) Radio communication

The term "radio communication" or "communication by radio" means the transmission by radio of writing, signs, signals, pictures, and sounds of all kinds, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.

*** * ***

(52) Wire communication

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

§ 154. Federal Communications Commission

*** * ***

(i) Duties and powers

The 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.

§ 302a. Devices which interfere with radio reception

(a) Regulations

The Commission may, consistent with the public interest, convenience, and necessity, make reasonable regulations (1) governing the interference potential of devices which in their operation are capable of emitting radio frequency energy by radiation, conduction, or other means in sufficient degree to cause harmful interference to radio communications; and (2) establishing minimum performance standards for home electronic equipment and systems to reduce their susceptibility to interference from radio frequency energy. Such regulations shall be applicable to the manufacture, import, sale, offer for sale, or shipment of such devices and home electronic equipment and systems, and to the use of such devices.

(b) Restrictions

No person shall manufacture, import, sell, offer for sale, or ship devices or home electronic equipment and systems, or use devices, which fail to comply with regulations promulgated pursuant to this section.

(c) Exceptions

The provisions of this section shall not be applicable to carriers transporting such devices or home electronic equipment and systems without trading in them, to devices or home electronic equipment and systems manufactured solely for export, to the manufacture, assembly, or installation of devices or home electronic equipment and systems for its own use by a public utility engaged in providing electric service, or to devices or home electronic equipment and systems for use by the Government of the United States or any agency thereof. Devices and home electronic equipment and systems for use by the Government of the United States or any agency thereof shall be developed, procured, or otherwise acquired, including offshore procurement, under United States Government criteria, standards, or specifications designed to achieve the objectives of reducing interference to radio reception and to home electronic equipment and systems, taking into account the unique needs of national defense and security.

(d) Cellular telecommunication receivers

(1) Within 180 days after October 28, 1992, the Commission shall prescribe and make effective regulations denying equipment authorization (under part 15 of title 47, Code of Federal Regulations, or any other part of that title) for any scanning receiver that is capable of--

(A) receiving transmissions in the frequencies allocated to the domestic cellular radio telecommunications service,

(B) readily being altered by the user to receive transmissions in such frequencies, or

(C) being equipped with decoders that convert digital cellular transmissions to analog voice audio.

(2) Beginning 1 year after the effective date of the regulations adopted pursuant to paragraph (1), no receiver having the capabilities described in subparagraph (A), (B), or (C) of paragraph (1), as such capabilities are defined in such regulations, shall be manufactured in the United States or imported for use in the United States.

(e) Delegation of equipment testing and certification to private laboratories

The Commission may--

(1) authorize the use of private organizations for testing and certifying the compliance of devices or home electronic equipment and systems with regulations promulgated under this section;

(2) accept as prima facie evidence of such compliance the certification by any such organization; and

(3) establish such qualifications and standards as it deems appropriate for such private organizations, testing, and certification.

(f) State and local enforcement of FCC regulations on use of citizens band radio equipment

(1) Except as provided in paragraph (2), a State or local government may enact a statute or ordinance that prohibits a violation of the following regulations of the Commission under this section:

(A) A regulation that prohibits a use of citizens band radio equipment not authorized by the Commission.

(B) A regulation that prohibits the unauthorized operation of citizens band radio equipment on a frequency between 24 MHz and 35 MHz.

(2) A station that is licensed by the Commission pursuant to section 301 of this title in any radio service for the operation at issue shall not be subject to action by a State or local government under this subsection. A State or local government statute or ordinance enacted for purposes of this subsection shall identify the exemption available under this paragraph.

(3) The Commission shall, to the extent practicable, provide technical guidance to State and local governments regarding the detection and determination of violations of the regulations specified in paragraph (1).

(4)(A) In addition to any other remedy authorized by law, a person affected by the decision of a State or local government agency enforcing a statute or ordinance under paragraph (1) may submit to the Commission an appeal of the decision on the grounds that the State or local government, as the case may be, enacted a statute or ordinance outside the authority provided in this subsection.

(B) A person shall submit an appeal on a decision of a State or local government agency to the Commission under this paragraph, if at all, not later than 30 days after the date on which the decision by the State or local government agency becomes final, but prior to seeking judicial review of such decision.

(C) The Commission shall make a determination on an appeal submitted under subparagraph (B) not later than 180 days after its submittal.

(D) If the Commission determines under subparagraph (C) that a State or local government agency has acted outside its authority in enforcing a statute or ordinance, the Commission shall preempt the decision enforcing the statute or ordinance.

(5) The enforcement of statute or ordinance that prohibits a violation of a regulation by a State or local government under paragraph (1) in a particular case shall not preclude the Commission from enforcing the regulation in that case concurrently.

(6) Nothing in this subsection shall be construed to diminish or otherwise affect the jurisdiction of the Commission under this section over devices capable of interfering with radio communications.

(7) The enforcement of a statute or ordinance by a State or local government under paragraph (1) with regard to citizens band radio equipment on board a "commercial motor vehicle", as defined in section 31101 of Title 49, shall require probable cause to find that the commercial motor vehicle or the individual operating the vehicle is in violation of the regulations described in paragraph (1).

§ 303. Powers and duties of Commission

Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest, or necessity requires, shall--

*** * ***

(e) Regulate the kind of apparatus to be used with respect to its external effects and the purity and sharpness of the emissions from each station and from the apparatus therein;

*** * ***

(g) Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest;

*** * ***

(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter, or any international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or may hereafter become a party.

*** * ***

(u) Require that apparatus designed to receive television pictures broadcast simultaneously with sound be equipped with built-in decoder circuitry designed to display closed-captioned television transmissions when such apparatus is manufactured in the United States or imported for use in the United States, and its television picture screen is 13 inches or greater in size.

*** * ***

(x) Require, in the case of an apparatus designed to receive television signals that are shipped in interstate commerce or manufactured in the United States and that have a picture screen 13 inches or greater in size (measured diagonally), that such apparatus be equipped with a feature designed to enable viewers to block display of all programs with a common rating, except as otherwise permitted by regulations pursuant to section 330(c)(4) of this title.

§ 309. Application for license

*** * ***

(j) Use Of Competitive Bidding

*** * ***

(14) Auction of recaptured broadcast television spectrum

(A) Limitations on terms of terrestrial television broadcast licenses

A television broadcast license that authorizes analog television service may not be renewed to authorize such service for a period that extends beyond December 31, 2006.

(B) Extension

The Commission shall extend the date described in subparagraph (A) for any station that requests such extension in any television market if the Commission finds that--

(i) one or more of the stations in such market that are licensed to or affiliated with one of the four largest national television networks are not broadcasting a digital television service signal, and the Commission finds that each such station has exercised due diligence and satisfies the conditions for an extension of the Commission's applicable construction deadlines for digital television service in that market;

(ii) digital-to-analog converter technology is not generally available in such market; or

(iii) in any market in which an extension is not available under clause (i) or (ii), 15 percent or more of the television households in such market--

(I) do not subscribe to a multichannel video programming distributor (as defined in section 522 of this title) that carries one of the digital television service programming channels of each of the television stations broadcasting such a channel in such market; and

(II) do not have either--

(a) at least one television receiver capable of receiving the digital television service signals of the television stations licensed in such market; or

(b) at least one television receiver of analog television service signals equipped with digital-to-analog

converter technology capable of receiving the digital television service signals of the television stations licensed in such market.

(C) Spectrum reversion and resale

(i) The Commission shall--

(I) ensure that, as licenses for analog television service expire pursuant to subparagraph (A) or (B), each licensee shall cease using electromagnetic spectrum assigned to such service according to the Commission's direction; and

(II) reclaim and organize the electromagnetic spectrum in a manner consistent with the objectives described in paragraph (3) of this subsection.

(ii) Licensees for new services occupying spectrum reclaimed pursuant to clause (i) shall be assigned in accordance with this subsection.

(D) Certain limitations on qualified bidders prohibited

In prescribing any regulations relating to the qualification of bidders for spectrum reclaimed pursuant to subparagraph (C)(i), the Commission, for any license that may be used for any digital television service where the grade A contour of the station is projected to encompass the entirety of a city with a population in excess of 400,000 (as determined using the 1990 decennial census), shall not--

(i) preclude any party from being a qualified bidder for such spectrum on the basis of--

(I) the Commission's duopoly rule (47 C.F.R. 73.3555(b)); or

(II) the Commission's newspaper cross-ownership rule (47 C.F.R. 73.3555(d)); or

(ii) apply either such rule to preclude such a party that is a winning bidder in a competitive bidding for such spectrum from using such spectrum for digital television service.

§ 330. Prohibition against shipment of certain television receivers

(a) No person shall ship in interstate commerce, or import from any foreign country into the United States, for sale or resale to the public, apparatus described in subsection (s) of section 303 of this title unless it complies with rules prescribed by the Commission pursuant to the authority granted by that subsection: *Provided,* That this section shall not apply to carriers transporting such apparatus without trading in it.

(b) No person shall ship in interstate commerce, manufacture, assemble, or import from any foreign country into the United States, any apparatus described in section 303(u) of this title except in accordance with rules prescribed by the Commission pursuant to the authority granted by that section. Such rules shall provide performance and display standards for such built-in decoder circuitry. Such rules shall further require that all such apparatus be able to receive and display closed captioning which have been transmitted by way of line 21 of the vertical blanking interval and which conform to the signal and display specifications set forth in the Public Broadcasting System engineering report numbered E-7709-C dated May 1980, as amended by the Telecaption II Decoder Module Performance Specification published by the National Captioning Institute, November 1985. As new video technology is developed, the Commission shall take such action as the Commission determines appropriate to ensure that closed-captioning service continues to be available to consumers. This subsection shall not apply to carriers transporting such apparatus without trading it.

(c)(1) Except as provided in paragraph (2), no person shall ship in interstate commerce or manufacture in the United States any apparatus described in section 303(x) of this title except in accordance with rules prescribed by the Commission pursuant to the authority granted by that section.

(2) This subsection shall not apply to carriers transporting apparatus referred to in paragraph (1) without trading in it.

(3) The rules prescribed by the Commission under this subsection shall provide for the oversight by the Commission of the adoption of standards by industry for blocking technology. Such rules shall require that all such apparatus be able to receive the rating signals which have been transmitted by way of line 21 of the vertical blanking interval and which conform to the signal and blocking specifications established by industry under the supervision of the Commission.

(4) As new video technology is developed, the Commission shall take such action as the Commission determines appropriate to ensure that blocking service continues to be available to consumers. If the Commission determines that an alternative blocking technology exists that--

(A) enables parents to block programming based on identifying programs without ratings,

(B) is available to consumers at a cost which is comparable to the cost of technology that allows parents to block programming based on common ratings, and

(C) will allow parents to block a broad range of programs on a multichannel system as effectively and as easily as technology that allows parents to block programming based on common ratings,

the Commission shall amend the rules prescribed pursuant to section 303(x) of this title to require that the apparatus described in such section be equipped with either the blocking technology described in such section or the alternative blocking technology described in this paragraph.

(d) For the purposes of this section, and sections 303(s), 303(u), and 303(x) of this title--

(1) The term "interstate commerce" means (A) commerce between any State, the District of Columbia, the Commonwealth of Puerto Rico, or any possession of the United States and any place outside thereof which is within the United States, (B) commerce between points in the same State, the District of Columbia, the Commonwealth of Puerto Rico, or possession of the United States but through any place outside thereof, or (C) commerce wholly within the District of Columbia or any possession of the United States.

(2) The term "United States" means the several States, the District of Columbia, the Commonwealth of Puerto Rico, and the possessions of the United States, but does not include the Canal Zone.

§ 336. Broadcast spectrum flexibility

(a) Commission action

If the Commission determines to issue additional licenses for advanced television services, the Commission--

(1) should limit the initial eligibility for such licenses to persons that, as of the date of such issuance, are licensed to operate a television broadcast station or hold a permit to construct such a station (or both); and

(2) shall adopt regulations that allow the holders of such licenses to offer such ancillary or supplementary services on designated frequencies as may be consistent with the public interest, convenience, and necessity.

(b) Contents of regulations

In prescribing the regulations required by subsection (a) of this section, the Commission shall--

(1) only permit such licensee or permittee to offer ancillary or supplementary services if the use of a designated frequency for such services is consistent with the technology or method designated by the Commission for the provision of advanced television services;

(2) limit the broadcasting of ancillary or supplementary services on designated frequencies so as to avoid derogation of any advanced television services, including high definition television broadcasts, that the Commission may require using such frequencies;

(3) apply to any other ancillary or supplementary service such of the Commission's regulations as are applicable to the offering of analogous services by any other person, except that no ancillary or supplementary service shall have any rights to carriage under section 534 or 535 of this title or be deemed a multichannel video programming distributor for purposes of section 548 of this title;

(4) adopt such technical and other requirements as may be necessary or appropriate to assure the quality of the signal used to provide advanced television services, and may adopt regulations that stipulate the minimum number of hours per day that such signal must be transmitted; and

(5) prescribe such other regulations as may be necessary for the protection of the public interest, convenience, and necessity.

(c) Recovery of license

If the Commission grants a license for advanced television services to a person that, as of the date of such issuance, is licensed to operate a television broadcast station or holds a permit to construct such a station (or both), the Commission shall, as a condition of such license, require that either the additional license or the original license held by the licensee be surrendered to the Commission for reallocation or reassignment (or both) pursuant to Commission regulation.

(d) Public interest requirement

Nothing in this section shall be construed as relieving a television broadcasting station from its obligation to serve the public interest, convenience, and necessity. In the Commission's review of any application for renewal of a broadcast license for a television station that provides ancillary or supplementary services, the television licensee shall establish that all of its program services on the existing or advanced television spectrum are in the public interest. Any violation of the Commission rules applicable to ancillary or supplementary services shall reflect upon the licensee's qualifications for renewal of its license.

(e) Fees

(1) Services to which fees apply

If the regulations prescribed pursuant to subsection (a) of this section permit a licensee to offer ancillary or supplementary services on a designated frequency--

(A) for which the payment of a subscription fee is required in order to receive such services, or

(B) for which the licensee directly or indirectly receives compensation from a third party in return for transmitting material furnished by such third party (other than commercial advertisements used to support broadcasting for which a subscription fee is not required),

the Commission shall establish a program to assess and collect from the licensee for such designated frequency an annual fee or other schedule or method of payment that promotes the objectives described in subparagraphs (A) and (B) of paragraph (2).

(2) Collection of fees

The program required by paragraph (1) shall--

(A) be designed (i) to recover for the public a portion of the value of the public spectrum resource made available for such commercial use, and (ii) to avoid unjust enrichment through the method employed to permit such uses of that resource;

(B) recover for the public an amount that, to the extent feasible, equals but does not exceed (over the term of the license) the amount that would have been recovered had such services been licensed pursuant to the provisions of section 309(j) of this title and the Commission's regulations thereunder; and

(C) be adjusted by the Commission from time to time in order to continue to comply with the requirements of this paragraph.

(3) Treatment of revenues

(A) General rule

Except as provided in subparagraph (B), all proceeds obtained pursuant to the regulations required by this subsection shall be deposited in the Treasury in accordance with chapter 33 of Title 31.

(B) Retention of revenues

Notwithstanding subparagraph (A), the salaries and expenses account of the Commission shall retain as an offsetting collection such sums as may be necessary from such proceeds for the costs of developing and implementing the program required by this section and regulating and supervising advanced television services. Such offsetting collections shall be available for obligation subject to the terms and conditions of the receiving appropriations account, and shall be deposited in such accounts on a quarterly basis.

(4) Report

Within 5 years after February 8, 1996, the Commission shall report to the Congress on the implementation of the program required by this subsection, and shall annually thereafter advise the Congress on the amounts collected pursuant to such program.

(f) Preservation of low-power community television broadcasting

(1) Creation of class A licenses

(A) Rulemaking required

Within 120 days after November 29, 1999, the Commission shall prescribe regulations to establish a class A television license to be available to licensees of qualifying low-power television stations. Such regulations shall provide that--

(i) the license shall be subject to the same license terms and renewal standards as the licenses for full-power television stations except as provided in this subsection; and

(ii) each such class A licensee shall be accorded primary status as a television broadcaster as long as the station continues to meet the requirements for a qualifying low-power station in paragraph (2).

(B) Notice to and certification by licensees

Within 30 days after November 29, 1999, the Commission shall send a notice to the licensees of all low-power television licenses that describes the requirements for class A designation. Within 60 days after November 29,

1999, licensees intending to seek class A designation shall submit to the Commission a certification of eligibility based on the qualification requirements of this subsection. Absent a material deficiency, the Commission shall grant certification of eligibility to apply for class A status.

(C) Application for and award of licenses

Consistent with the requirements set forth in paragraph (2)(A) of this subsection, a licensee may submit an application for class A designation under this paragraph within 30 days after final regulations are adopted under subparagraph (A) of this paragraph. Except as provided in paragraphs (6) and (7), the Commission shall, within 30 days after receipt of an application of a licensee of a qualifying low-power television station that is acceptable for filing, award such a class A television station license to such licensee.

(D) Resolution of technical problems

The Commission shall act to preserve the service areas of low-power television licensees pending the final resolution of a class A application. If, after granting certification of eligibility for a class A license, technical problems arise requiring an engineering solution to a full-power station's allotted parameters or channel assignment in the digital television Table of Allotments, the Commission shall make such modifications as necessary--

(i) to ensure replication of the full-power digital television applicant's service area, as provided for in sections 73.622 and 73.623 of the Commission's regulations (47 CFR 73.622, 73.623); and

(ii) to permit maximization of a full-power digital television applicant's service area consistent with such sections 73.622 and 73.623,

if such applicant has filed an application for maximization or a notice of its intent to seek such maximization by December 31, 1999, and filed a bona fide application for maximization by May 1, 2000. Any such applicant shall comply with all applicable Commission rules regarding the construction of digital television facilities.

(E) Change applications

If a station that is awarded a construction permit to maximize or significantly enhance its digital television service area, later files a change application to reduce its digital television service area, the protected contour of that station shall be reduced in accordance with such change modification.

(2) Qualifying low-power television stations

For purposes of this subsection, a station is a qualifying low-power television station if--

(A)(i) during the 90 days preceding November 29, 1999--

(I) such station broadcast a minimum of 18 hours per day;

(II) such station broadcast an average of at least 3 hours per week of programming that was produced within the market area served by such station, or the market area served by a group of commonly controlled low-power stations that carry common local programming produced within the market area served by such group; and

(III) such station was in compliance with the Commission's requirements applicable to low-power television stations; and

(ii) from and after the date of its application for a class A license, the station is in compliance with the Commission's operating rules for full-power television stations; or

(B) the Commission determines that the public interest, convenience, and necessity would be served by treating the station as a qualifying low-power television station for purposes of this section, or for other reasons determined by the Commission.

(3) Common ownership

No low-power television station authorized as of November 29, 1999, shall be disqualified for a class A license based on common ownership with any other medium of mass communication.

(4) Issuance of licenses for advanced television services to television translator stations and qualifying low-power television stations

The Commission is not required to issue any additional license for advanced television services to the licensee of a class A television station under this subsection, or to any licensee of any television translator station, but shall accept a license application for such services proposing facilities that will not cause interference to the service area of any other broadcast facility applied for, protected, permitted, or authorized on the date of filing of the advanced television application. Such new license or the original license of the applicant shall be forfeited after the end of the digital television service transition period, as determined by the Commission. A licensee of a low-power television station or television translator station may, at the option of licensee, elect to convert to the provision of advanced television services on its analog channel, but shall not be required to convert to digital operation until the end of such transition period.

(5) No preemption of section 337

Nothing in this subsection preempts or otherwise affects section 337 of this title.

(6) Interim qualification

(A) Stations operating within certain bandwidth

The Commission may not grant a class A license to a low-power television station for operation between 698 and 806 megahertz, but the Commission shall provide to low-power television stations assigned to and temporarily operating in that bandwidth the opportunity to meet the qualification requirements for a class A license. If such a qualified applicant for a class A license is assigned a channel within the core spectrum (as such term is defined in MM Docket No. 87-286, February 17, 1998), the Commission shall issue a class A license simultaneously with the assignment of such channel.

(B) Certain channels off-limits

The Commission may not grant under this subsection a class A license to a low-power television station operating on a channel within the core spectrum that includes any of the 175 additional channels referenced in paragraph 45 of its February 23, 1998, Memorandum Opinion and Order on Reconsideration of the Sixth Report and Order (MM Docket No. 87-268). Within 18 months after November 29, 1999, the Commission shall identify by channel, location, and applicable technical parameters those 175 channels.

(7) No interference requirement

The Commission may not grant a class A license, nor approve a modification of a class A license, unless the applicant or licensee shows that the class A station for which the license or modification is sought will not cause--

(A) interference within--

(i) the predicted Grade B contour (as of the date of the enactment of the Community Broadcasters Protection Act of 1999 [November 29, 1999], or November 1, 1999, whichever is later, or as proposed in a change application filed on or before such date) of any television station transmitting in analog format; or

(ii)(I) the digital television service areas provided in the DTV Table of Allotments; (II) the areas protected in the Commission's digital television regulations (47 CFR 73.622(e) and (f)); (III) the digital television service areas of stations subsequently granted by the Commission prior to the filing of a class A application; and (IV) stations seeking to maximize power under the Commission's rules, if such station has complied with the notification requirements in paragraph (1)(D);

(B) interference within the protected contour of any low-power television station or low-power television translator station that--

(i) was licensed prior to the date on which the application for a class A license, or for the modification of such a license, was filed;

(ii) was authorized by construction permit prior to such date; or

(iii) had a pending application that was submitted prior to such date; or

(C) interference within the protected contour of 80 miles from the geographic center of the areas listed in section 22.625(b)(1) or 90.303 of the Commission's regulations (47 CFR 22.625(b)(1) and 90.303) for frequencies in--

(i) the 470-512 megahertz band identified in section 22.621 or 90.303 of such regulations; or

(ii) the 482-488 megahertz band in New York.

(8) Priority for displaced low-power stations

Low-power stations that are displaced by an application filed under this section shall have priority over other low-power stations in the assignment of available channels.

(g) Evaluation

Within 10 years after the date the Commission first issues additional licenses for advanced television services, the Commission shall conduct an evaluation of the advanced television services program. Such evaluation shall include--

(1) an assessment of the willingness of consumers to purchase the television receivers necessary to receive broadcasts of advanced television services;

(2) an assessment of alternative uses, including public safety use, of the frequencies used for such broadcasts; and

(3) the extent to which the Commission has been or will be able to reduce the amount of spectrum assigned to licensees.

(h) Provision of digital data service by low-power television stations

(1) Within 60 days after receiving a request (made in such form and manner and containing such information as the Commission may require) under this subsection from a low-power television station to which this subsection applies, the Commission shall authorize the licensee or permittee of that station to provide digital data service subject to the requirements of this subsection as a pilot project to demonstrate the feasibility of using low-power television stations to provide high-speed wireless digital data service, including Internet access to unserved areas.

(2) The low-power television stations to which this subsection applies are as follows:

(A) KHLM-LP, Houston, Texas.

(B) WTAM-LP, Tampa, Florida.

(C) WWRJ-LP, Jacksonville, Florida.

(D) WVBG-LP, Albany, New York.

(E) KHHI-LP, Honolulu, Hawaii.

(F) KPHE-LP (K19DD), Phoenix, Arizona.

(G) K34FI, Bozeman, Montana.

(H) K65GZ, Bozeman, Montana.

(I) WXOB-LP, Richmond, Virginia.

(J) WIIW-LP, Nashville, Tennessee.

(K) A station and repeaters to be determined by the Federal Communications Commission for the sole purpose of providing service to communities in the Kenai Peninsula Borough and Matanuska Susitna Borough.

(L) WSPY-LP, Plano, Illinois.

(M) W24AJ, Aurora, Illinois.

(3) Notwithstanding any requirement of section 553 of Title 5, the Commission shall promulgate regulations establishing the procedures, consistent with the requirements of paragraphs (4) and (5), governing the pilot projects for the provision of digital data services by certain low power television licensees within 120 days after the date of enactment of LPTV Digital Data Services Act. The regulations shall set forth--

(A) requirements as to the form, manner, and information required for submitting requests to the Commission to provide digital data service as a pilot project;

(B) procedures for testing interference to digital television receivers caused by any pilot project station or remote transmitter;

(C) procedures for terminating any pilot project station or remote transmitter or both that causes interference to any analog or digital full- power television stations, class A television station, television translators or any other users of the core television band;

(D) specifications for reports to be filed quarterly by each low power television licensee participating in a pilot project;

(E) procedures by which a low power television licensee participating in a pilot project shall notify television broadcast stations in the same market upon commencement of digital data services and for ongoing coordination with local broadcasters during the test period; and

(F) procedures for the receipt and review of interference complaints on an expedited basis consistent with paragraph (5)(D).

(4) A low-power television station to which this subsection applies may not provide digital data service unless--

(A) the provision of that service, including any remote return-path transmission in the case of 2-way digital data service, does not cause any interference in violation of the Commission's existing rules, regarding interference caused by low power television stations to full-service analog or digital television stations, class A television stations, or television translator stations; and

(B) the station complies with the Commission's regulations governing safety, environmental, and sound engineering practices, and any other Commission regulation under paragraph (3) governing pilot program operations.

(5)(A) The Commission may limit the provision of digital data service by a low-power television station to which this subsection applies if the Commission finds that--

(i) the provision of 2-way digital data service by that station causes any interference that cannot otherwise be remedied; or

(ii) the provision of 1-way digital data service by that station causes any interference.

(B) The Commission shall grant any such station, upon application (made in such form and manner and containing such information as the Commission may require) by the licensee or permittee of that station, authority to move the station to another location, to modify its facilities to operate on a different channel, or to use booster or auxiliary transmitting locations, if the grant of authority will not cause interference to the allowable or protected service areas of full service digital television stations, National Television Standards Committee assignments, or television translator stations, and provided, however, no such authority shall be granted unless it is consistent with existing Commission regulations relating to the movement, modification, and use of non-class A low power television transmission facilities in order--

(i) to operate within television channels 2 through 51, inclusive; or

(ii) to demonstrate the utility of low-power television stations to provide high-speed 2-way wireless digital data service.

(C) The Commission shall require quarterly reports from each station authorized to provide digital data services under this subsection that include--

(i) information on the station's experience with interference complaints and the resolution thereof;

(ii) information on the station's market success in providing digital data service; and

(iii) such other information as the Commission may require in order to administer this subsection.

(D) The Commission shall resolve any complaints of interference with television reception caused by any station providing digital data service authorized under this subsection within 60 days after the complaint is received by the Commission.

(6) The Commission shall assess and collect from any low-power television station authorized to provide digital data service under this subsection an annual fee or other schedule or method of payment comparable to any fee imposed under the authority of this chapter on providers of similar services. Amounts received by the Commission under this paragraph may be retained by the Commission as an offsetting collection to the extent necessary to cover the costs of developing and implementing the pilot program authorized by this subsection, and regulating and supervising the provision of digital data service by low-power television stations under this subsection. Amounts received by the Commission under this paragraph in excess of any amount retained under the preceding sentence shall be deposited in the Treasury in accordance with chapter 33 of Title 31.

(7) In this subsection, the term "digital data service" includes--

(A) digitally-based interactive broadcast service; and

(B) wireless Internet access, without regard to--

(i) whether such access is --

(I) provided on a one-way or a two-way basis;

(II) portable or fixed; or

(III) connected to the Internet via a band allocated to Interactive Video and Data Service; and

(ii) the technology employed in delivering such service, including the delivery of such service via multiple transmitters at multiple locations.

(8) Nothing in this subsection limits the authority of the Commission under any other provision of law.

(i) Definitions

As used in this section:

(1) Advanced television services

The term "advanced television services" means television services provided using digital or other advanced technology as further defined in the opinion, report, and order of the Commission entitled "Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service", MM Docket 87-268, adopted September 17, 1992, and successor proceedings.

(2) Designated frequencies

The term "designated frequency" means each of the frequencies designated by the Commission for licenses for advanced television services.

(3) High definition television

The term "high definition television" refers to systems that offer approximately twice the vertical and horizontal resolution of receivers generally available on February 8, 1996, as further defined in the proceedings described in paragraph (1) of this subsection.

§ 337. Allocation and assignment of new public safety services licenses and commercial licenses

(a) In general

Not later than January 1, 1998, the Commission shall allocate the electromagnetic spectrum between 746 megahertz and 806 megahertz, inclusive, as follows:

(1) 24 megahertz of that spectrum for public safety services according to the terms and conditions established by the Commission, in consultation with the Secretary of Commerce and the Attorney General; and

(2) 36 megahertz of that spectrum for commercial use to be assigned by competitive bidding pursuant to section 309(j) of this title.

(b) Assignment

The Commission shall commence assignment of licenses for public safety services created pursuant to subsection (a) of this section no later than September 30, 1998.

(c) Licensing of unused frequencies for public safety services

(1) Use of unused channels for public safety services

Upon application by an entity seeking to provide public safety services, the Commission shall waive any requirement of this chapter or its regulations implementing this chapter (other than its regulations regarding harmful interference) to the extent necessary to permit the use of unassigned frequencies for the provision of public safety services by such entity. An application shall be granted under this subsection if the Commission finds that--

(A) no other spectrum allocated to public safety services is immediately available to satisfy the requested public safety service use;

(B) the requested use is technically feasible without causing harmful interference to other spectrum users entitled to protection from such interference under the Commission's regulations;

(C) the use of the unassigned frequency for the provision of public safety services is consistent with other allocations for the provision of such services in the geographic area for which the application is made;

(D) the unassigned frequency was allocated for its present use not less than 2 years prior to the date on which the application is granted; and

(E) granting such application is consistent with the public interest.

(2) Applicability

Paragraph (1) shall apply to any application to provide public safety services that is pending or filed on or after August 5, 1997.

(d) Conditions on licenses

In establishing service rules with respect to licenses granted pursuant to this section, the Commission--

(1) shall establish interference limits at the boundaries of the spectrum block and service area;

(2) shall establish any additional technical restrictions necessary to protect full-service analog television service and digital television service during a transition to digital television service;

(3) may permit public safety services licensees and commercial licensees--

(A) to aggregate multiple licenses to create larger spectrum blocks and service areas; and

(B) to disaggregate or partition licenses to create smaller spectrum blocks or service areas; and

(4) shall establish rules insuring that public safety services licensees using spectrum reallocated pursuant to subsection (a)(1) of this section shall not be subject to harmful interference from television broadcast licensees.

(e) Removal and relocation of incumbent broadcast licensees

(1) Channels 60 to 69

Any person who holds a television broadcast license to operate between 746 and 806 megahertz may not operate at that frequency after the date on which the digital television service transition period terminates, as determined by the Commission.

(2) Incumbent qualifying low-power stations

After making any allocation or assignment under this section, the Commission shall seek to assure, consistent with the Commission's plan for allotments for digital television service, that each qualifying low-power television station is assigned a frequency below 746 megahertz to permit the continued operation of such station.

(f) Definitions

For purposes of this section:

(1) Public safety services

The term "public safety services" means services--

(A) the sole or principal purpose of which is to protect the safety of life, health, or property;

(B) that are provided--

(i) by State or local government entities; or

(ii) by nongovernmental organizations that are authorized by a governmental entity whose primary mission is the provision of such services; and

(C) that are not made commercially available to the public by the provider.

(2) Qualifying low-power television stations

A station is a qualifying low-power television station if, during the 90 days preceding August 5, 1997--

(A) such station broadcast a minimum of 18 hours per day;

(B) such station broadcast an average of at least 3 hours per week of programming that was produced within the market area served by such station; and

(C) such station was in compliance with the requirements applicable to low-power television stations.

§ 396. Corporation for Public Broadcasting

*** * ***

(k) Financing restrictions

(1)(A) There is hereby established in the Treasury a fund which shall be known as the Public Broadcasting Fund (hereinafter in this subsection referred to as the "Fund"), to be administered by the Secretary of the Treasury.

(B) There is authorized to be appropriated to the Fund for each of the fiscal years 1978, 1979, and 1980, an amount equal to 40 percent of the total amount of non-Federal financial support received by public broadcasting entities during the fiscal year second preceding each such fiscal year, except that the amount so appropriated shall not exceed $121,000,000 for fiscal year 1978, $140,000,000 for fiscal year 1979, and $160,000,000 for fiscal year 1980.

(C) There is authorized to be appropriated to the Fund, for each of the fiscal years 1981, 1982, 1983, 1984, 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, and 1993, an amount equal to 40 percent of the total amount of non-Federal financial support received by public broadcasting entities during the fiscal year second preceding each such fiscal year, except that the amount so appropriated shall not exceed $265,000,000 for fiscal year 1992, $285,000,000 for fiscal year 1993, $310,000,000 for fiscal year 1994, $375,000,000 for fiscal year 1995, and $425,000, 000 for fiscal year 1996.

(D) In addition to any amounts authorized under any other provision of this or any other Act to be appropriated to the Fund, $20,000,000 are hereby authorized to be appropriated to the Fund (notwithstanding any other provision of this subsection) specifically for transition from the use of analog to digital technology for the provision of public broadcasting services for fiscal year 2001.

§ 534. Carriage of local commercial television signals

(a) Carriage obligations

Each cable operator shall carry, on the cable system of that operator, the signals of local commercial television stations and qualified low power stations as provided by this section. Carriage of additional broadcast television signals on such system shall be at the discretion of such operator, subject to section 325(b) of this title.

(b) Signals required

(1) In general

(A) A cable operator of a cable system with 12 or fewer usable activated channels shall carry the signals of at least three local commercial television stations, except that if such a system has 300 or fewer subscribers, it shall not be subject to any requirements under this section so long as such system does not delete from carriage by that system any signal of a broadcast television station.

(B) A cable operator of a cable system with more than 12 usable activated channels shall carry the signals of local commercial television stations, up to one-third of the aggregate number of usable activated channels of such system.

(2) Selection of signals

Whenever the number of local commercial television stations exceeds the maximum number of signals a cable system is required to carry under paragraph (1), the cable operator shall have discretion in selecting which such stations shall be carried on its cable system, except that--

(A) under no circumstances shall a cable operator carry a qualified low power station in lieu of a local commercial television station; and

(B) if the cable operator elects to carry an affiliate of a broadcast network (as such term is defined by the Commission by regulation), such cable operator shall carry the affiliate of such broadcast network whose city of license reference point, as defined in section 76.53 of title 47, Code of Federal Regulations (in effect on January 1, 1991), or any successor regulation thereto, is closest to the principal headend of the cable system.

(3) Content to be carried

(A) A cable operator shall carry in its entirety, on the cable system of that operator, the primary video, accompanying audio, and line 21 closed caption transmission of each of the local commercial television stations carried on the cable system and, to the extent technically feasible, program-related material carried in the vertical blanking interval or on subcarriers. Retransmission of other material in the vertical blanking internal or other nonprogram-related material (including teletext and other subscription and advertiser-supported information services) shall be at the discretion of the cable operator. Where appropriate and feasible, operators may delete signal enhancements, such as ghost-canceling, from the broadcast signal and employ such enhancements at the system headend or headends.

(B) The cable operator shall carry the entirety of the program schedule of any television station carried on the cable system unless carriage of specific programming is prohibited, and other programming authorized to be

substituted, under section 76.67 or subpart F of part 76 of title 47, Code of Federal Regulations (as in effect on January 1, 1991), or any successor regulations thereto.

(4) Signal quality

(A) Nondegradation; technical specifications

The signals of local commercial television stations that a cable operator carries shall be carried without material degradation. The Commission shall adopt carriage standards to ensure that, to the extent technically feasible, the quality of signal processing and carriage provided by a cable system for the carriage of local commercial television stations will be no less than that provided by the system for carriage of any other type of signal.

(B) Advanced television

At such time as the Commission prescribes modifications of the standards for television broadcast signals, the Commission shall initiate a proceeding to establish any changes in the signal carriage requirements of cable television systems necessary to ensure cable carriage of such broadcast signals of local commercial television stations which have been changed to conform with such modified standards.

(5) Duplication not required

Notwithstanding paragraph (1), a cable operator shall not be required to carry the signal of any local commercial television station that substantially duplicates the signal of another local commercial television station which is carried on its cable system, or to carry the signals of more than one local commercial television station affiliated with a particular broadcast network (as such term is defined by regulation). If a cable operator elects to carry on its cable system a signal which substantially duplicates the signal of another local commercial television station carried on the cable system, or to carry on its system the signals of more than one local commercial television station affiliated with a particular broadcast network, all such signals shall be counted toward the number of signals the operator is required to carry under paragraph (1).

(6) Channel positioning

Each signal carried in fulfillment of the carriage obligations of a cable operator under this section shall be carried on the cable system channel number on which the local commercial television station is broadcast over the air, or on the channel on which it was carried on July 19, 1985, or on the channel on which it was carried on January 1, 1992, at the election of the station, or on such other channel number as is mutually agreed upon by the station and the cable operator. Any dispute regarding the positioning of a local commercial television station shall be resolved by the Commission.

(7) Signal availability

Signals carried in fulfillment of the requirements of this section shall be provided to every subscriber of a cable system. Such signals shall be viewable via cable on all television receivers of a subscriber which are connected to a cable system by a cable operator or for which a cable operator provides a connection. If a cable operator authorizes subscribers to install additional receiver connections, but does not provide the subscriber with such connections, or with the equipment and materials for such connections, the operator shall notify such subscribers of all broadcast stations carried on the cable system which cannot be viewed via cable without a converter box and shall offer to sell or lease such a converter box to such subscribers at rates in accordance with section 543(b)(3) of this title.

(8) Identification of signals carried

A cable operator shall identify, upon request by any person, the signals carried on its system in fulfillment of the requirements of this section.

(9) Notification

A cable operator shall provide written notice to a local commercial television station at least 30 days prior to either deleting from carriage or repositioning that station. No deletion or repositioning of a local commercial television station shall occur during a period in which major television ratings services measure the size of audiences of local television stations. The notification provisions of this paragraph shall not be used to undermine or evade the channel positioning or carriage requirements imposed upon cable operators under this section.

(10) Compensation for carriage

A cable operator shall not accept or request monetary payment or other valuable consideration in exchange either for carriage of local commercial television stations in fulfillment of the requirements of this section or for the channel positioning rights provided to such stations under this section, except that--

(A) any such station may be required to bear the costs associated with delivering a good quality signal or a baseband video signal to the principal headend of the cable system;

(B) a cable operator may accept payments from stations which would be considered distant signals under section 111 of Title 17 as indemnification for any increased copyright liability resulting from carriage of such signal; and

(C) a cable operator may continue to accept monetary payment or other valuable consideration in exchange for carriage or channel positioning of the signal of any local commercial television station carried in fulfillment of the requirements of this section, through, but not beyond, the date of expiration of an agreement thereon between a cable operator and a local commercial television station entered into prior to June 26, 1990.

§ 544a. Consumer electronics equipment compatibility

(a) Findings

The Congress finds that--

(1) new and recent models of television receivers and video cassette recorders often contain premium features and functions that are disabled or inhibited because of cable scrambling, encoding, or encryption technologies and devices, including converter boxes and remote control devices required by cable operators to receive programming;

(2) if these problems are allowed to persist, consumers will be less likely to purchase, and electronics equipment manufacturers will be less likely to develop, manufacture, or offer for sale, television receivers and video cassette recorders with new and innovative features and functions;

(3) cable operators should use technologies that will prevent signal thefts while permitting consumers to benefit from such features and functions in such receivers and recorders; and

(4) compatibility among televisions, video cassette recorders, and cable systems can be assured with narrow technical standards that mandate a minimum degree of common design and operation, leaving all features, functions, protocols, and other product and service options for selection through open competition in the market.

(b) Compatible interfaces

(1) Report; regulations

Within 1 year after October 5, 1992, the Commission, in consultation with representatives of the cable industry and the consumer electronics industry, shall report to Congress on means of assuring compatibility between

televisions and video cassette recorders and cable systems, consistent with the need to prevent theft of cable service, so that cable subscribers will be able to enjoy the full benefit of both the programming available on cable systems and the functions available on their televisions and video cassette recorders. Within 180 days after the date of submission of the report required by this subsection, the Commission shall issue such regulations as are necessary to assure such compatibility.

(2) Scrambling and encryption

In issuing the regulations referred to in paragraph (1), the Commission shall determine whether and, if so, under what circumstances to permit cable systems to scramble or encrypt signals or to restrict cable systems in the manner in which they encrypt or scramble signals, except that the Commission shall not limit the use of scrambling or encryption technology where the use of such technology does not interfere with the functions of subscribers' television receivers or video cassette recorders.

(c) Rulemaking requirements

(1) Factors to be considered

In prescribing the regulations required by this section, the Commission shall consider--

(A) the need to maximize open competition in the market for all features, functions, protocols, and other product and service options of converter boxes and other cable converters unrelated to the descrambling or decryption of cable television signals;

(B) the costs and benefits to consumers of imposing compatibility requirements on cable operators and television manufacturers in a manner that, while providing effective protection against theft or unauthorized reception of cable service, will minimize interference with or nullification of the special functions of subscribers' television receivers or video cassette recorders, including functions that permit the subscriber--

(i) to watch a program on one channel while simultaneously using a video cassette recorder to tape a program on another channel;

(ii) to use a video cassette recorder to tape two consecutive programs that appear on different channels; and

(iii) to use advanced television picture generation and display features; and

(C) the need for cable operators to protect the integrity of the signals transmitted by the cable operator against theft or to protect such signals against unauthorized reception.

(2) Regulations required

The regulations prescribed by the Commission under this section shall include such regulations as are necessary--

(A) to specify the technical requirements with which a television receiver or video cassette recorder must comply in order to be sold as "cable compatible" or "cable ready";

(B) to require cable operators offering channels whose reception requires a converter box--

(i) to notify subscribers that they may be unable to benefit from the special functions of their television receivers and video cassette recorders, including functions that permit subscribers--

(I) to watch a program on one channel while simultaneously using a video cassette recorder to tape a program on another channel;

(II) to use a video cassette recorder to tape two consecutive programs that appear on different channels; and

(III) to use advanced television picture generation and display features; and

(ii) to the extent technically and economically feasible, to offer subscribers the option of having all other channels delivered directly to the subscribers' television receivers or video cassette recorders without passing through the converter box;

(C) to promote the commercial availability, from cable operators and retail vendors that are not affiliated with cable systems, of converter boxes and of remote control devices compatible with converter boxes;

(D) to ensure that any standards or regulations developed under the authority of this section to ensure compatibility between televisions, video cassette recorders, and cable systems do not affect features, functions, protocols, and other product and service options other than those specified in paragraph (1)(B), including telecommunications interface equipment, home automation communications, and computer network services;

(E) to require a cable operator who offers subscribers the option of renting a remote control unit--

(i) to notify subscribers that they may purchase a commercially available remote control device from any source that sells such devices rather than renting it from the cable operator; and

(ii) to specify the types of remote control units that are compatible with the converter box supplied by the cable operator; and

(F) to prohibit a cable operator from taking any action that prevents or in any way disables the converter box supplied by the cable operator from operating compatibly with commercially available remote control units.

(d) Review of regulations

The Commission shall periodically review and, if necessary, modify the regulations issued pursuant to this section in light of any actions taken in response to such regulations and to reflect improvements and changes in cable systems, television receivers, video cassette recorders, and similar technology

CODE OF FEDERAL REGULATIONS
TITLE 47--TELECOMMUNICATION
CHAPTER I--FEDERAL COMMUNICATIONS COMMISSION
SUBPART M--DIGITAL BROADCAST TELEVISION REDISTRIBUTION CONTROL

§ 73.9000 Definitions.

(a) Authorized digital output protection technology means a technology approved pursuant to the procedures in § 73.9008.

(b) Authorized recording method means a recording method approved pursuant to the procedures in § 73.9008.

(c) Bona fide reseller means a party regularly engaged, or about to become regularly engaged, in the lawful commercial enterprise of selling, reselling, manufacturing, or assembling demodulators, or products incorporating demodulators, in compliance with this subpart.

(d) Broadcast flag means the redistribution control descriptor (rc_descriptor ( )) described in ATSC A/65B: " Standard: Program and System Information Protocol for Terrestrial Broadcast and Cable (Revision B)," (incorporated by reference, see § 73.8000).

(e) Computer product means a product that is designed for or permits the end user to install a wide variety of commercially available software applications thereon, such as a personal computer, handheld "Personal Digital Assistant" and the like, and further includes a subsystem of such a product, such as a graphics card.

(f) Covered demodulator product means a product that is required under § § 73.9002(a)(1) or 73.9002(b)(1) to comply with the demodulator compliance requirements, and to be manufactured in accordance with the demodulator robustness requirements.

(g) Demodulator means a component, or set of components, that is designed to perform the function of 8-VSB, 16-VSB, 64-QAM or 256-QAM demodulation and thereby produce a data stream for the purpose of digital television reception.

(h) Demodulator compliance requirements means the requirements set out in § § 73.9003 through 73.9006.

(i) Demodulator robustness requirements means the

SUBCHAPTER C--BROADCAST RADIO SERVICES
PART 73--RADIO BROADCAST SERVICES

requirements set out in § 73.9007.

(j) Peripheral TSP product means a product that is capable of accessing in usable form unscreened content or marked content passed to such product via a robust method where the manufacturer of such product has committed in writing in accordance with § 73.9002(c) that such product will comply with the demodulator compliance requirements and be manufactured in accordance with the demodulator robustness requirements.

(k) EIT means Event information table as defined in ATSC A/65B: ATSC Standard: Program and System Information Protocol for Terrestrial Broadcast and Cable (Revision B) (incorporated by reference, see § 73.8000).

(l) Marked content means, with respect to a Covered demodulator product, Unencrypted digital terrestrial broadcast content that such product has (1) received and demodulated and for which such product has inspected either the EIT or PMT and determined the broadcast flag to be present, or (2) where such product is a peripheral TSP product, received via a robust method and accessed in usable form, and for which such product either inspected the EIT or PMT and determined the broadcast flag to be present or determined through information robustly conveyed with such content that another covered demodulator product had previously so screened such content and determined the broadcast flag to be present; provided, however, that, with respect to a covered demodulator product, marked content shall not include content that has been passed from such product pursuant to § § 73.9004(a)(1), 73.9004(a)(2), 73.9004(a)(3), 73.9004(a)(5), 73.9004(a)(6), or 73.9006(b).

(m) PMT means program map table as defined in International Standard ISO/IEC 13818-1:2000(E): "Information Technology--Generic Coding of Moving Pictures and Associated Audio Information: Systems" (incorporated by reference, see § 73.8000).

(n) Robust method means, with respect to the passing of unscreened content or marked content from one product to another, a content protection method that complies with § 73.9007.

(o) Transitory image means data that has been stored temporarily for the sole purpose of enabling a

function not prohibited by this subpart but that (1) does not persist materially after such function has been performed and (2) is not stored in a way that permits copying or storing of such data for other purposes.

(p) Unencrypted digital terrestrial broadcast content means audiovisual content contained in the signal broadcast by a digital television station without encrypting or otherwise making the content available through a technical means of conditional access, and includes such content when retransmitted in unencrypted digital form.

(q) Unscreened content means, with respect to a covered demodulator product, unencrypted digital terrestrial broadcast content that such product either:

(1) Received and demodulated and for which such product has inspected neither the EIT nor the PMT for the broadcast flag; or

(2) Where such product is a peripheral TSP product, received via a robust method and accessed in usable form, and for which such product has inspected neither the EIT nor the PMT for the broadcast flag and has not determined through information robustly conveyed with such content another covered demodulator product had previously so screened such content and determined the broadcast flag to be present; provided, however, that, with respect to a covered demodulator product, unscreened content shall not include content that has been passed from such product pursuant to § § 73.9003(a)(1), 73.9003(a)(2), 73.9003(a)(3), 73.9003(a)(4), 73.9003(a)(6), 73.9003(a)(7), or 73.9006(b).

(r) User accessible bus means a data bus that is designed for end user upgrades or access, such as an implementation of a smartcard interface, PCMCIA, Cardbus, or PCI that has standard sockets or otherwise readily facilitates end user access. A user accessible bus does not include memory buses, CPU buses, or similar portions of a device's internal architecture that do not permit access to content in a form usable by end users.

§ 73.9001 Redistribution control of digital television broadcasts.

Licensees of TV broadcast stations may utilize the redistribution control descriptor described in ATSC A/65B: "ATSC Standard: Program and System Information Protocol for Terrestrial Broadcast and Cable (Revision B)," (incorporated by reference, see § 73.8000) provided they do not transmit the optional additional redistribution control information.

§ 73.9002 Sale or distribution of demodulators, covered demodulator products, and peripheral TSP products.

(a) Demodulators. No party that manufactures or imports a demodulator shall sell or distribute in interstate commerce such Demodulator unless:

(1) At the time of such sale or distribution such demodulator is itself, or is incorporated into, a product that complies with the demodulator compliance requirements and was manufactured in accordance with the demodulator robustness requirements; or

(2) Such sale or distribution is to a party that has committed in writing pursuant to paragraph (d) of this section not to sell or distribute demodulators other than in accordance with paragraphs (a)(1) or (a)(2) of this section.

(b) Covered demodulator products. No party shall sell or distribute in interstate commerce a covered demodulator product that does not comply with the demodulator compliance requirements and demodulator robustness requirements. The requirements of this paragraph shall not apply to the sale or resale of a product that was manufactured prior to the effective date of this subpart or that initially was sold or distributed in compliance with this subpart.

(c) Peripheral TSP products. No party that manufactures or imports a peripheral TSP product shall sell or distribute such peripheral TSP product in interstate commerce unless, at the time of such sale or distribution, such peripheral TSP product complies with the demodulator compliance requirements and was manufactured in accordance with the demodulator robustness requirements. The requirements of this paragraph shall not apply to the sale or resale of a product that was manufactured prior to the effective date of this subpart or that was initially was sold or distributed in compliance with this subpart.

(d) Written commitments.

(1) A written commitment to allow sale or

distribution of demodulators under paragraph (a)(2) of this section, or for a peripheral TSP product, shall be submitted to the Federal Communications Commission, Chief, Media Bureau, Attn: Broadcast Flag Written Commitment, 445 12th Street, SW., Washington, DC 20554.

(2) The information to be provided by a party filing a written commitment to allow sale or distribution of demodulators under paragraph (a)(2) of this section shall include a statement that one of the following conditions is true:

(i) The party is a bona fide reseller;

(ii) The party is a licensed digital television broadcaster; or

(iii) The party is a multichannel video programming distributor, or other party engaged, or about to become engaged, in the lawful retransmission of unencrypted digital terrestrial broadcast content pursuant to § 76.1909 of this chapter.

(3) The information to be provided by a party filing a written commitment for a peripheral TSP product shall include statements that that the party is engaged, or about to become engaged, in the lawful commercial enterprise of manufacturing such peripheral TSP product, and that such product will comply with the demodulator compliance requirements and be manufactured in accordance with the demodulator robustness requirements.

(4) It shall be a violation of this subpart, enforceable by the Commission, for any person that has filed a written commitment pursuant to paragraph (d) of this section to:

(i) In the case such commitment to allow sale or distribution of demodulators under paragraph (a)(2) of this section, sell or distribute the demodulator other than in accordance with paragraphs (a)(1) or (a)(2) of this section; or

(ii) In the case of such commitment for a peripheral TSP product, sell or distribute the peripheral TSP product other than in compliance with paragraph (c) of this section.

(5) Written commitments filed pursuant to paragraph (d) of this section will be publicly available in accordance with § § 0.441 through 0.470 of this chapter.

(e) The requirements of this section shall become applicable on July 1, 2005.

§ 73.9003 Compliance requirements for covered demodulator products: unscreened content.

(a) A covered demodulator product shall not pass, or direct to be passed, Unscreened Content to any output except:

(1) To an analog output;

(2) To an 8-VSB, 16-VSB, 64-QAM or 256-QAM modulated output, provided that the broadcast flag is retained in the both the EIT and PMT;

(3) To a digital output protected by an authorized digital output protection technology authorized for use with unscreened content, in accordance with any applicable obligations established as a part of its approval pursuant to § 73.9008;

(4) Where the stream containing such content has not been altered following demodulation and such covered demodulator product outputs, or directs to be output, such content to a peripheral TSP product solely within the home or other, similar local environment, using a robust method;

(5) Where such covered demodulator product outputs, or directs to be output, such content to another product and such covered demodulator product exercises sole control (such as by using a cryptographic protocol), in compliance with the demodulator robustness requirements, over the access to such content in usable form in such other product;

(6) Where such covered demodulator product outputs, or directs to be output, such content for the purpose of making a recording of such content pursuant to paragraph (b)(2) of this section, where such content is protected by the corresponding recording method; or

(7) Where such covered demodulator product is incorporated into a computer product and passes, or directs to be passed, such content to an unprotected output operating in a mode compatible with the digital visual interface (DVI) rev. 1.0 Specification as an image having the visual equivalent of no more than 350,000 pixels per frame (e.g. an image with resolution of 720 x 480 pixels for a 4:3 (nonsquare pixel) aspect ratio), and 30 frames per second. Such an image may be attained by reducing resolution, such as by discarding, dithering or averaging pixels to obtain the specified value, and can be displayed using video processing techniques such as line

doubling or sharpening to improve the perceived quality of the image.

(b) A covered demodulator product shall not record or cause the recording of unscreened content in digital form unless such recording is made using one of the following methods:

(1) A method that effectively and uniquely associates such recording with a single covered demodulator product (using a cryptographic protocol or other effective means) so that such recording cannot be accessed in usable form by another product except where the content of such recording is passed to another product as permitted under this subpart; or

(2) An authorized recording method authorized for use with unscreened content in accordance with any applicable obligations established as a part of its approval pursuant to § 73.9008 (provided that for recordings made on removable media, only authorized recording methods expressly approved pursuant to § 73.9008 for use in connection with removable media may be used).

(c) Paragraph (b) of this section does not impose restrictions regarding the storage of unscreened content as a transitory image.

(d) The requirements of this section shall become applicable on July 1, 2005.

§ 73.9004 Compliance requirements for covered demodulator products: marked content.

(a) A covered demodulator product shall not pass, or direct to be passed, marked content to any output except:

(1) To an analog output;

(2) To an 8-VSB, 16-VSB, 64-QAM or 256-QAM modulated output, provided that the broadcast flag is retained in the both the EIT and PMT;

(3) To a digital output protected by an authorized digital output protection technology, in accordance with any applicable obligations established as a part of its approval pursuant to § 73.9008;

(4) Where such covered demodulator product outputs, or directs to be output, such content to another product and such covered demodulator product exercises sole control (such as by using a cryptographic protocol), in compliance with the demodulator robustness requirements, over the access to such content in usable form in such other product;

(5) Where such covered demodulator product outputs, or directs to be output, such content for the purpose of making a recording of such content pursuant to paragraph (b)(2) of this section, where such content is protected by the corresponding recording method; or

(6) Where such covered demodulator product is incorporated into a computer product and passes, or directs to be passed, such content to an unprotected output operating in a mode compatible with the digital visual interface (DVI) Rev. 1.0 Specification as an image having the visual equivalent of no more than 350,000 pixels per frame (e.g., an image with resolution of 720 x 480 pixels for a 4:3 (nonsquare pixel) aspect ratio), and 30 frames per second. Such an image may be attained by reducing resolution, such as by discarding, dithering or averaging pixels to obtain the specified value, and can be displayed using video processing techniques such as line doubling or sharpening to improve the perceived quality of the image.

(b) A covered demodulator product shall not record or cause the recording of marked content in digital form unless such recording is made using one of the following methods:

(1) A method that effectively and uniquely associates such recording with a single covered demodulator product (using a cryptographic protocol or other effective means) so that such recording cannot be accessed in usable form by another product except where the content of such recording is passed to another product as permitted under this subpart or

(2) An authorized recording method in accordance with any applicable obligations established as a part of its approval pursuant to § 73.9008 (provided that for recordings made on removable media, only authorized recording methods expressly approved pursuant to § 73.9008 for use in connection with removable media may be used).

(c) Paragraph (b) of this section does not impose restrictions regarding the storage of marked content as a transitory image.

(d) The requirements of this section shall become applicable on July 1, 2005.

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§ 73.9006 Add-in covered demodulator products.

(a) Where a covered demodulator product passes unscreened content or marked content to another product, other than where such covered demodulator product passes, or directs such content to be passed to an output (e.g., where a demodulator add-in card in a personal computer passes such content to an associated software application installed in the same computer), it shall pass such content:

(1) Using a robust method; or

(2) Protected by an authorized digital output protection technology authorized for such content in accordance with any applicable obligations established as a part of its approval pursuant to § 73.9008. Neither unscreened content nor marked content may be so passed in unencrypted, compressed form via a User Accessible Bus.

(b) The requirements of this section shall become applicable on July 1, 2005.

§ 73.9007 Robustness requirements for covered demodulator products.

The content protection requirements set forth in the demodulator compliance requirements shall be implemented in a reasonable method so that they cannot be defeated or circumvented merely by an ordinary user using generally-available tools or equipment. The requirements of this section shall become applicable on July 1, 2005.

Note to § 73.9007: Generally-available tools or equipment means tools or equipment that are widely available at a reasonable price, including but not limited to, screwdrivers, jumpers, clips and soldering irons. Generally-available tools or equipment also means specialized electronic tools or software tools that are widely available at a reasonable price, other than devices or technologies that are designed and made available for the specific purpose of bypassing or circumventing the protection technologies used to meet the requirements set forth in this subpart. Such specialized electronic tools or software tools includes, but is not limited to, EEPROM readers and writers, debuggers or decompilers.

§ 73.9008 Interim approval of authorized digital output protection technologies and authorized recording methods.

(a) Certifications for digital output protection technologies and authorized recording methods. The proponent of a specific digital output protection technology or recording method seeking approval for use in covered demodulator products shall certify to the Commission that such digital output protection technology or recording method is appropriate for use in covered demodulator products to give effect to the broadcast flag. Such certification shall include the following information:

(1) A general description of how the digital output protection technology or recording method works, including its scope of redistribution;

(2) A detailed analysis of the level of protection the digital output protection technology or recording method affords content;

(3) Information regarding whether content owners, broadcasters or equipment manufacturers have approved or licensed the digital output protection technology or recording method for use; and

(4) If the technology is to be offered publicly, a copy of its licensing terms, and fees, as well as evidence demonstrating that the technology will be licensed on a reasonable, non-discriminatory basis.

(5) If any of the information is proprietary in nature, the proponent may seek confidential treatment of the proprietary portion of their certification pursuant to § 0.459 of this chapter.

(b) Initial certification window. Following the effective date of this subpart, the Commission shall issue a public notice commencing an initial certification window for digital output protection technologies or recording methods. Within thirty (30) days after the date of this public notice, proponents of digital output protection technologies or recording methods may file certifications pursuant to paragraph (a) of this section. Following close of the initial certification window, the Commission shall issue a public notice identifying the certifications received and commencing an opposition window. Within twenty (20) days after the date of this public notice, oppositions may be filed with respect to a certification.

(1) If no objections are received in response to a

proponent's certification within the twenty (20) day opposition window, the Commission shall expeditiously issue a determination indicating whether the underlying digital output protection technology or recording method is approved for use with covered demodulator products.

(2) If an objection is raised within the twenty (20) day opposition window alleging that a proponent's certification contains insufficient information to evaluate the appropriateness of the underlying digital output protection technology or recording method for use with covered demodulator products, the proponent may file a reply within 10 days after the close of the twenty (20) day opposition window. The Commission shall determine whether to dismiss the certification without prejudice or to undertake a full review of the certification's merits pursuant to paragraph (d) of this section.

(3) If an objection is raised within the twenty (20) day opposition window alleging that a proponent's digital output protection technology or recording method is inappropriate for use with covered demodulator products, the Commission shall undertake a full review of the associated certification's merits pursuant to paragraph (d) of this section. The proponent may file a reply within 10 days after the close of the twenty (20) day opposition window. In such cases, the Commission shall issue a determination indicating whether the underlying digital output protection technology or recording method is approved for use with covered demodulator products.

(c) Effect of subsequent certifications. Where a proponent of a digital output protection technology or recording method files a certification pursuant to paragraph (a) of this section subsequent to the initial certification window described in paragraph (b) of this section:

(1) If no objections are received in response to a proponent's certification within twenty (20) days after the date of public notice of the filing of such certification, the Commission shall expeditiously issue a determination indicating whether the underlying digital output protection technology or recording method is approved for use with covered demodulator products.

(2) If an objection is raised within twenty (20) days after the date of public notice of the filing of a proponent's certification alleging that such certification contains insufficient information to evaluate the appropriateness of the underlying digital output protection technology or recording method for use with covered demodulator products, the proponent may file a reply within 10 days after the close of the twenty (20) day opposition window. The Commission shall determine whether to dismiss the certification without prejudice or to undertake a full review of the certification's merits pursuant to paragraph (d) of this section.

(3) If an objection is raised within twenty (20) days after the date of public notice of the filing of a proponent's certification alleging that the underlying digital output protection technology or recording method is inappropriate for use with covered demodulator products, the proponent may file a reply within 10 days after the close of the twenty (20) day opposition window. The Commission shall undertake a full review of the certification's merits pursuant to paragraph (d) of this section. In such cases, the Commission shall issue a determination indicating whether the underlying digital output protection technology or recording method is approved for use with covered demodulator products.

(d) Commission determinations. Where the Commission undertakes a full review of the merits of a certification for a digital output protection technology or recording method, the Commission may consider, where applicable, the following factors:

(1) Technological factors including but not limited to the level of security, scope of redistribution, authentication, upgradability, renewability, interoperability, and the ability of the digital output protection technology to revoke compromised devices;

(2) The applicable licensing terms, including compliance and robustness rules, change provisions, approval procedures for downstream transmission and recording methods, and the relevant license fees;

(3) The extent to which the digital output protection technology or recording method accommodates consumers' use and enjoyment of unencrypted digital terrestrial broadcast content; and

(4) Any other relevant factors the Commission determines warrant consideration.

(e) Revocation of approval.

(1) If the security of a content protection technology or recording method approved for use in covered demodulator products has been compromised, a

person may seek revocation of such approval pursuant to § 76.7 of this chapter.

(2) Petitioners seeking revocation of a content protection technology or recording method's approval for use in covered demodulator products shall articulate in detail the extent to which the content protection or recording technology has been compromised and demonstrate why alternative measures are insufficient to address the breach in security.