

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

AUSTIN C. SCHLICK
ACTING GENERAL COUNSEL

DANIEL M. ARMSTRONG
ASSOCIATE GENERAL COUNSEL

JACOB M. LEWIS
ASSOCIATE GENERAL COUNSEL

C. GREY PASH, JR.
COUNSEL

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

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

INTERVENORS

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SUPPLEMENTAL BRIEF FOR RESPONDENT FCC

BACKGROUND

In accordance with this Court's opinion of March 15, 2005, respondent Federal Communications Commission (FCC, or Commission) submits this response to petitioners' supplemental brief and supporting affidavits regarding petitioners' standing.

This case arises from the FCC's adoption of rules requiring that digital television receivers and certain related electronic equipment have the technical capability of protecting digital television broadcast programming against mass, indiscriminate and unauthorized redistribution. These rules, which apply to equipment manufactured after July 1, 2005, are generally referred to as the "broadcast flag" rules. The Commission concluded that the rules are appropriate to protect and further Congress' plan for a transition from traditional analog broadcast television to a digital television system. *Digital Broadcast Content Protection*, 18 FCC Rcd 23550 (2003)(JA 1254)(hereafter "R&O"). Petitioners challenge the Commission's statutory authority to adopt the rules. In addition, they have argued that the rules are unreasonable and lack record support and that they conflict with copyright law.

In its March 15 opinion, the Court found that petitioners had not provided adequate information "for the court to determine conclusively whether petitioners have Article III standing." *American Library Ass'n v. FCC*, No. 04-1037 (March 15, 2005), slip op. at 3. The Court directed petitioners to file affidavits responding to several specific requests for information, emphasizing that "these affidavits must include specific facts demonstrating that there is a substantial probability that the FCC's order will 'directly affect[]' the ability of at least one of petitioners' members to make legitimate use of digital content in relation to its research or educational missions or that the FCC's order will directly affect some other judicially cognizable interest." Slip op. at 13.

DISCUSSION

The Court has raised serious questions about petitioners' standing in this case. The Commission understands that intervener MPAA will address those issues. In this brief, the Commission responds to a number of representations in the petitioners' supplemental brief and affidavits about the alleged effects of the broadcast flag rules that are erroneous or misleading and upon which this Court should not rely.

1. Internet Redistribution

A theme that runs throughout the petitioners' supplemental submissions is that the broadcast flag rules supposedly prohibit any redistribution of flag-protected digital television program content over the internet. *See, e.g.*, Supp. Br. at 10 (“[B]ecause it uses redistribution over the Internet, it would be foreclosed by the Flag.”); *id.* at 14 (“EFF will be foreclosed from these activities because the Flag prohibits distribution via the Internet”).¹

However, as we pointed out in our principal brief (Resp. Br. at 8), the Commission's broadcast flag rules are designed to address the “threat of mass indiscriminate redistribution” of high value digital broadcast content. *R&O*, 18 FCC Rcd. at 23552 ¶ 4 (JA 1256) (emphasis added). Thus the Commission specifically stated that its broadcast flag rules will “not ... foreclose use of the Internet to send digital content where it can be adequately protected from indiscriminate redistribution.” *Id.* at 23555 ¶10 (JA 1259). In

¹ *See also, e.g.*, Gordon Aff. at 4 (“I understand ... that the broadcast flag regime will preclude the transfer of flagged broadcast television content over the Internet.”); Hoon Aff. at 3 (“[T]he broadcast flag is designed to stop redistribution over the internet.”); Lessig Aff. at 2 (“I understand that the broadcast flag regime will prohibit the distribution of flagged television broadcast material on the Internet.”); McLaren Aff. at 1 (“By foreclosing the distribution of flagged content over the Internet”); Templeton Aff. at 1 (“The ... broadcast flag rule, however, would prevent flagged digital content from being transmitted over the Internet.”)

approving specific technologies to implement the broadcast flag rules, the Commission took care to “reiterate” this statement. *Digital Output Protection Technology and Recording Method Certifications*, 19 FCC Rcd 15876, 15877 ¶4 (2004)(hereafter “*Certifications Order*”). And in seeking comment on the “appropriate scope of redistribution that should be prevented” by the broadcast flag rules, the Commission again stated that it did “not wish to foreclose use of the Internet to send digital broadcast content where robust security can adequately protect the content and the redistribution is tailored in nature.” *R&O*, 18 FCC Rcd at 23578 ¶63 (JA 1282).

Applying the broadcast flag rules that are challenged in this case, the Commission has approved the TiVo Guard digital output technology for use in accordance with the broadcast flag rule, even though that technology permits limited internet distribution of flag-protected content. *See Certifications Order*, 19 FCC Rcd at 15885-87 ¶¶19-23.² The Commission explained that the limitations imposed by the owner of this technology, TiVo, Inc., currently limit the ability to redistribute programming recorded on TiVo digital video recorders to a “secure viewing group” of up to ten persons. *See id.* at 15886 ¶20.

Because petitioners turn a blind eye to the Commission’s explanation that the broadcast flag rules concern redistribution that is “mass” and “indiscriminate,” *see R&O*, 18 FCC Rcd at 23552 ¶4, they repeatedly claim that activities are precluded that in fact fall outside the rules. For example, the brief’s summary of the affidavits points to: (1) a college professor who wants to use the internet to send broadcast clips to her students and

² *See also Certifications Order*, 19 FCC Rcd at 15901-03 ¶¶57-60 (approving the use of SmartRight technology, which also can provide for distribution of protected content over the internet, although limitations currently imposed by the owner of that technology restrict the ability to redistribute protected programming on the internet).

make clips available on the university's computer network (Supp. Br. at 10); (2) a university librarian who wants to assist faculty in making clips of television programming available to students in distance learning courses on a password-protected basis (*id.* at 8-9); (3) the Vanderbilt Television News Archive that would like to make broadcast content available to 33 on-campus computers and over the internet to 100 library subscribers (*id.* at 11); (4) the Consumer Federation of America that would like to send broadcast news clips over the internet to ten meeting sites around the country (*id.* at 12); (5) and an individual who wants to transfer broadcast programming recorded onto a personal video recorder to family members (*id.* at 16).

None of those uses involves mass, indiscriminate redistribution, and thus none is necessarily prohibited by the broadcast flag rules. As noted, the Commission has already approved one technology – TiVoGuard – that permits transfer of flagged programming over the internet to a limited group. Petitioners' other examples all involve circumstances in which the individuals or institutions appear to impose significant limitations on access to their data, and it remains to be seen whether the protections associated with such limited redistribution pose any of the concerns that the broadcast flag addresses.

2. Equipment Replacement

Petitioners also contend that the broadcast flag rules will require some of their members to incur costs to upgrade or replace equipment. For example, they claim that the Vanderbilt Television News Archive “would have to spend substantial funds to replace” more than “\$100,000” of equipment if the flag rules were to go into effect. Supp. Br. 15-

16. *See* Gherman Aff. at ¶¶ 13-15.³ But the broadcast flag rules do not require persons to replace their existing receivers with flag-compliant equipment. Indeed, one of the reasons the Commission chose the broadcast flag approach to protect digital broadcast television content was that (unlike, say, encryption at the source) a flag rule would “not require replacement” of the installed base of existing equipment. 18 FCC Rcd. at 23561 ¶¶21, 24 (JA 1263, 1265).

3. “Open Source” Tuner Cards

Finally, several of the affidavits raise as the basis for their claims of injury that the broadcast flag rules will halt the production of “open source” tuner cards. *See, e.g.*, Seltzer Aff. at 7-9; Templeton Aff. That issue is currently before the FCC, having been raised specifically in the further notice of proposed rulemaking. *See R&O* 18 FCC Rcd at 23577 ¶60. Petitioner Electronic Frontier Foundation has argued to the Commission that the broadcast flag rules should not apply to such devices. The Commission has yet to decide the issue. *See id.*; EFF Comments (MB Docket No. 02-230) at 1-6 (Feb. 13, 2004).

³ *See also* Godwin Aff. at ¶10; Hoon Aff. at ¶11; Kasianovitz Aff. at ¶¶2, 9; Vogelsong Aff. at ¶¶2, 10, 12.

CONCLUSION

As explained above, many of the petitioners' statements with regard to the scope and effect of the Commission's broadcast flag rules are misleading or mistaken. Accordingly, the Court should not rely on them.

Respectfully submitted,

Austin C. Schlick
Acting General Counsel

Daniel M. Armstrong
Associate General Counsel

Jacob M. Lewis
Associate General Counsel

C. Grey Pash, Jr.
Counsel

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

April 8, 2005

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CERTIFICATE OF COMPLIANCE

Pursuant to the requirements contained in the Court's March 15, 2005 opinion in the captioned case, I hereby certify that the accompanying "Supplemental Brief for Respondent FCC" contains 1,460 words as measured by the word count function of Microsoft Word 2002.

C. Grey Pash, Jr.

April 8, 2005