

**WRITTEN STATEMENT**

**of**

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**on**

**“Copyright Piracy Prevention and the Broadcast Flag”**

**Before the  
Subcommittee on Courts, the Internet and Intellectual Property  
Committee on Judiciary  
U.S. House of Representatives**

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Good morning, Chairman Smith, Congressman Berman, and members of the Subcommittee. I am Ken Ferree, Chief of the FCC's Media Bureau. I am pleased to be here this morning to discuss the issue of digital broadcast copy protection, and specifically the Federal Communications Commission's pending inquiry on a "broadcast flag" or other copy protection systems for protecting digital broadcast content from improper redistribution.

## **I. THE DIGITAL MIGRATION**

Virtually every industry the Commission regulates is undergoing a revolution. Technological innovation, the development of new consumer markets, and new competitive entry are changing the face of the communications landscape. This revolution demands new legal and regulatory approaches. We are at a crossroad in communications as technology drives policymakers, industry, and American citizens to migrate from the predominately analog realm to the modern digital world. This "Digital Migration," in the words of Chairman Michael Powell, is at the foundation of the Commission's policy agenda.

As a part of this digital migration, 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. Unlike some technology advances, however, the DTV transition is not purely a marketplace phenomenon. The Congress and the FCC have been involved in the DTV transition from the beginning. The FCC launched its "advanced television" proceeding in 1987. Since then, the FCC has been continuously involved in helping shepherd the nation's broadcast service migration to digital transmission by, among other things, adopting

a standard for digital broadcasting, creating a DTV Table of Allotments, awarding DTV licenses, establishing operating rules for the new service, and overseeing the physical build-out.

We are entering into a critical stage of the transition. The key pieces of the puzzle are finally falling into place. Without being melodramatic, it is apparent that our efforts over the next two years may well set the course for television broadcasting in the twenty-first century. The Commission has actively participated in the DTV Roundtable discussions held by Energy and Commerce Committee Chairman Billy Tauzin and Ranking Member John Dingell, as well as Subcommittee Chairman Fred Upton and Ranking Member Edward Markey. These roundtables brought the industries together to advance the dialogue regarding the DTV transition.

In addition, Chairman Powell set forth a voluntary plan in April 2002 that the Commission believes has – and will – provide an immediate boost to the DTV transition. (As a courtesy to the Subcommittee members, the voluntary plan is attached at Appendix 1.) In relevant part, the so-called Powell DTV Plan seeks to advance two key policy objectives: (1) increasing the level of compelling digital content available to American consumers; and (2) providing convenient access to that content to consumers. Virtually every industry involved has made real commitments to the challenges posed in the Powell DTV Plan in order to advance the transition.

The broadcast networks were asked to provide HD or other “value-added DTV programming” during at least half of their prime-time schedule. The top four network affiliates in the top 100 markets were asked to be capable of passing through all HD programming, if their

network provides such programming, and to promote their DTV programming on their analog channels. On the cable side, cable systems with 750 MHz or higher were asked (1) to offer to carry up to five broadcast or other digital programming services that carried HD or other “value-added DTV programming” during at least 50% of their prime time schedule, (2) to provide subscribers with the option of acquiring a single set-top box that allows the display of high definition programming, and (3) to market the digital television options consumers have through their cable systems. DBS companies were asked to carry up to five digital programming services that carried HD or other “value-added DTV programming” during at least 50% of their prime-time schedule. Finally, consumer electronics manufacturers and retailers were asked (1) to commit to meeting the demand for cable set-top boxes that allow for the display of HD programming, (2) to include over-the-air DTV tuners in new TV receivers on a phased-in basis, (3) to include digital inputs on new HD-capable TV receivers, and (4) to market the broadcast, cable and satellite DTV options at point-of-sale.

Indeed, as stated below, there has been a marked increase in the amount of HD programming available over the last year, and that content is more accessible to consumers through cable and satellite. Additionally, over-the-air DTV tuners will be available under the Commission’s mandate beginning in 2004. The transition and the positive benefits for American consumers could really pick up steam if we can keep the train on track.

## **II. CONTENT IS A KEY**

One of the key pieces of the puzzle – perhaps *the* key piece of the puzzle – is content. Consumers need a reason to invest in the digital transition. They have a very good analog

system now. Why should they switch? Content. They will invest in digital when they see content that is significantly better than what they have available in analog today. That content could be high-definition. It could be multicasting. It could be interactive. Or it could be a combination of all three. The important thing is that it be significantly *better* than analog and that there be *enough* of it to make their investment worthwhile.

The good news is that over the last year the amount of HD programming available to viewers has grown dramatically. Indeed, the amount of HD programming during broadcast primetime is up about 50 percent over a year ago. We have also seen many premier sporting events broadcast in HD during the past year—including the Olympics, the Super Bowl, the Masters and the U.S. Open tennis tournament. This year, we have been told, the NBA Finals, the Stanley Cup, and Monday Night Football will be added to the mix of broadcast HD content. We have also seen a rise in HD programming on cable and satellite.

However, many content providers say we are living on borrowed time. They assert that soon we will reach a critical mass of DTV receivers and fast broadband connections to permit the widespread unauthorized redistribution of broadcast DTV content over the Internet – the “Napsterization” of video, as some have called it. When that happens, these parties argue, they will be forced to protect their high-value content by removing them from broadcast distribution channels and making them available only on better-protected digital platforms like cable and satellite.

### III. COPY PROTECTION AND BROADCAST FLAG

This is how the Commission became involved in these copy protection issues. We have no desire to duplicate the work of the U.S. Copyright Office. But the Commission does have an interest in keeping the digital television transition on track and maintaining the vitality of our free, over-the-air television service. So when content providers, Members of Congress and others warned that we may be on the verge of losing compelling broadcast content, these claims have to be taken seriously.

In late 2001, an inter-industry working group attempted to develop a technical solution to the problem, specifically focusing on the possibility of a “broadcast flag” system. On June 3, 2002, the working group issued its Final Report, describing at length the issues on which the private-sector participants were able to reach a consensus and those on which they were not. It was in this context that, on August 8, 2002, the FCC issued its *Notice of Proposed Rulemaking* on digital broadcast copy protection (appended hereto at Appendix 2).

The *Notice* makes no proposals, but simply lays out the issues in a neutral manner. Indeed, it does not even assume that a problem exists. The first issue raised in the *Notice* is whether a DTV copy protection regime is even necessary—that is, whether content providers’ piracy concerns have caused or will cause them to withhold high quality content from broadcast channels, and whether the lack of such programming will delay the DTV transition.

If a problem is found to exist, the Commission then asked whether it can and should adopt a “broadcast flag” or other copy protection mechanisms to address it. As for how such a

system would work, the Commission asked neutral questions about compliance and robustness rules, technical impediments, and enforcement issues. The Commission also sought comment on the impact a content protection mechanism would have on consumers—both on their ability to make copies of broadcast television content and on the technology in their homes. Finally, the FCC sought comment on its authority to adopt rules in this area. It cited two possible jurisdictional bases: (1) its ancillary jurisdiction, and (2) Section 336 of the Communications Act, in which Congress authorized the FCC to adopt certain rules relating to the DTV transition.

The comment period in the proceeding closed on February 18, 2003. In all, the Commission received more than 6,000 comments, most of them from individual citizens. For many American citizens, the initiation of the Commission's inquiry was their first opportunity to register their comments and viewpoints with the Commission. We also heard from content producers, broadcasters, the computer and consumer electronics industries, consumer groups and many others. I think it is safe to say that virtually every issue raised in the *Notice* is the subject of contention. Our staff is now reviewing the record and beginning the process of developing a recommendation for the full Commission's consideration.

#### **IV. CONCLUSION**

It is difficult to predict when the Commission's inquiry of this critical DTV issue will be complete or to speculate as to the potential results. The Commission approaches this task with an open mind, keeping the public interest at the forefront. At this point, we have drawn no conclusions that a "broadcast flag" system is necessary or appropriate, or that the Commission has jurisdiction to adopt such a system. Nevertheless, I believe it is entirely fitting and proper

that the Commission undertake this examination. The transition to digital television is a national priority. The Commission is directly and deeply involved in trying to make that transition as quick and painless as possible for the American people. If content protection issues are potentially impeding us from reaching that goal, the Commission is obliged to examine them. We will, of course, keep this Committee apprised of important developments as we proceed, and we look forward to working with you. Again, thank you for the opportunity to testify today. I will be happy to answer any questions you may have.