Notre Dame Law Review

Volume 80 | Issue 1 Article 12

11-1-2004

To Promote Profit in Science and the Useful Arts: The Broadcast Flag, FCC Jurisdiction, and Copyright Implications

Robert T. Numbers

Follow this and additional works at: http://scholarship.law.nd.edu/ndlr

Recommended Citation

Robert T. Numbers, *To Promote Profit in Science and the Useful Arts: The Broadcast Flag, FCC Jurisdiction, and Copyright Implications*, 80 Notre Dame L. Rev. 439 (2004).
Available at: http://scholarship.law.nd.edu/ndlr/vol80/iss1/12

This Note is brought to you for free and open access by NDLScholarship. It has been accepted for inclusion in Notre Dame Law Review by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.

TO PROMOTE PROFIT IN SCIENCE AND THE USEFUL ARTS: THE BROADCAST FLAG, FCC JURISDICTION, AND COPYRIGHT IMPLICATIONS

*Robert T. Numbers II**

INTRODUCTION

Controversy surrounds the broadcast flag regulations adopted by the Federal Communications Commission (FCC or Commission) in November 2003. Broadcast flag proponents view the regulations as "essential to protecting high-quality content distributed through unprotected digital television broadcasts."[1] Opponents, on the other hand, believe the regulations are an "ineffective solution to a non-existent problem" which will "impose genuine and substantial costs on consumers and innovators" while harming the First Amendment freedoms enjoyed by the public.[2]

The FCC adopted the broadcast flag regulations to address the concerns of content providers that over-the-air digitally broadcast content would be subject to indiscriminate redistribution across the Internet. While the regulations address an issue which could be a serious problem in the future, the Commission has exceeded its jurisdiction. Additionally, the regulations disrupt the balance established

---

* Candidate for Juris Doctor, Notre Dame Law School, 2005; B.A., Wake Forest University, 2002. I would like to thank Professors Patricia L. Bellia and A.J. Bellia for their assistance in my Note writing process. My thanks go out to the members of the *Notre Dame Law Review* for their assistance in the preparation of this Note for publication. Most of all, my thanks go out to my wife, Caroline, and my parents, Marley and Tom Numbers, for their love, support, friendship, and guidance.

1 CTR. FOR DEMOCRACY & TECH., IMPLICATIONS OF THE BROADCAST FLAG: A PUBLIC INTEREST PRIMER 3 (Rev. 2.0 2003), *available at* http://www.cdt.org/copyright/031216broadcastflag.pdf.

2 Comments of Electronic Frontier Foundation at 2, *In re* Digital Broad. Content Protection, 18 F.C.C.R. 23,550 (2003) (MB Docket No. 02-230) [hereinafter Comments of Electronic Frontier Foundation].

by copyright law between an author's monopoly and the public interest.

This Note will discuss the FCC's jurisdiction to adopt these rules as well as the effect the rules will have on copyright law. Part I discusses the broadcast flag's background issues, including the differences between digital and analog television and a general overview of the broadcast flag regulations. Part II analyzes the claims put forward by broadcast flag proponents supporting the FCC's authority to promulgate these regulations. Broadcast flag proponents believe that certain statutory provisions give the FCC jurisdiction over these issues. In reality, these regulations are related to an entirely different area of the digital television transition. Additionally, the Commission believes it has ancillary jurisdiction to prescribe these rules, but in comparing the circumstances surrounding the broadcast flag to the circumstances which typically allow the exercise of ancillary jurisdiction, it is clear that the broadcast flag does not satisfy these requirements. Due to the extraordinary issues raised by these regulations, they will not be entitled to the higher level of deference usually given by the courts to administrative agency decisions. Finally, Part III discusses issues raised by the broadcast flag regulations related to copyright.

Content providers have repeatedly challenged technological developments in the broadcast industry.[3] The unregulated transmission of digital music files across the Internet has made the content industry aware of the impact unregulated transfer of digital content can have

3 The FCC involved itself in copyright during the development of cable television systems. Jonathan Weinberg, *Digital TV, Copy Control, and Public Policy*, 20 CARDOZO ARTS & ENT. L.J. 277, 278 (2002). Broadcasters viewed this new form of technology as "unfair competition [which] deprived them of control and compensation" for their product. *Id.* at 278–79. After losing in the courts, the broadcast industry turned to the FCC, which promulgated rules requiring cable broadcasters to obtain "retransmission consent" from broadcasters on a program-by-program basis. *Id.* at 279. Over the next several years the FCC continued to regulate this area of cable television because, in its view, the lack of such regulation would jeopardize "'the continued supply of television programming . . . fundamental to the continued functioning of broadcast and cable television alike.'" *Id.* at 280 (quoting 36 F.C.C.2d 143, 169 (1972)).

The advent of the video tape recorder also brought a legal challenge by the broadcast industry. In *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), Universal City Studios alleged Sony was responsible for copyright infringement because home viewers had used Sony's Betamax product to record copyrighted television shows. *Id.* at 420. Universal City felt the continued, unrestricted sale of the Betamax would have a negative effect on the value of its copyrights. *Id.* at 425. The Court, through the statutory fair use analysis found in 17 U.S.C. § 107, determined that the use of the Betamax for unauthorized time shifting, in this case, was a fair use of copyrighted material and therefore not a copyright infringement. *Id.* at 454–55.

upon their profits. These regulations are an attempt to protect the content industry's interests by controlling emerging digital technology. The government or private industry must eventually resolve the issue of digital copy protection, but the legislature, not an administrative agency, is the appropriate branch to address the economic, social, and constitutional issues that arise in its consideration.

I. Background

A. *Digital Versus Analog*

1. Analog Technology

Analog television has been the primary method of broadcasting for decades.[4] To broadcast in analog, broadcasters convert a video image into rows of pixels, coding each pixel so that once the information is sent over the airwaves, a home television can reassemble the pixels to display the image.[5]

The quality of analog material will decrease as a user makes subsequent copies.[6] The content industry was able to keep control over their copyrighted materials because the quality of these copies would decline.[7] This method of copy protection has been obviated by the advent of digital technology.

2. Digital Television

One of the main differences between the two systems of broadcasting is that digital television uses a smaller sized pixel than analog television.[8] The smaller pixel size allows over four times the detail in the image that is broadcast.[9] The digital signal is compressed so that more information, and a higher quality image, can be sent across a

4 HowStuffWorks, Inc., *How Digital Television Works: Understanding Analog TV, at* http://electronics.howstuffworks.com/dtv1.htm (last visited Sept. 8, 2004).

5 *Id.*

6 Stephen M. Kramarsky, *Copyright Enforcement in the Internet Age: The Law and Technology of Digital Rights Management*, 11 DEPAUL-LCA J. ART & ENT. L. & POL'Y 1, 4 (2001).

7 Peter S. Menell, *Envisioning Copyright Law's Digital Future*, 46 N.Y.L. SCH. L. REV. 63, 105 (2003) ("The principal content industries—publishing, sound recording, film, and television industries—formed, developed, and thrived around analog technology platforms in part because they inherently impeded unauthorized reproduction and distribution of works of authorship.").

8 PBS Online, Inc., *Digital TV: A Cingley Crash Course—Hip to be Square, at* http://www.pbs.org/opb/crashcourse/resolution/pixel.html (last visited Sept. 8, 2004).

9 *Id.*

smaller amount of bandwidth.[10] Unlike an analog signal, the binary format allows for unlimited reproduction without degradation of the picture.[11]

B. *What Is the Broadcast Flag?*

The broadcast flag copy protection system is comprised of both technical standards and federal regulations.[12] There are two elements to the recent content protection system established by the FCC. The first is the recognition of the Advanced Television Systems Committee (ATSC) Flag as the appropriate method for broadcasters to use if they desire to encrypt their programs.[13] The second portion of the system is the requirement that "demodulators integrated within, or produced for use in, DTV reception devices . . . must recognize and give effect to the ATSC flag. . . . This necessarily includes PC and IT products that are used for off-air DTV reception."[14] The regulations require any device capable of receiving a digital television signal over the air, including personal computers, to be able to recognize the broadcast flag and restrict the redistribution of flagged material over the Internet.

1. ATSC Flag

The Broadcast Protection Discussion Subgroup (BPDG), a committee comprised of "more than 80 representatives from the consumer electronics, information technology, motion picture, cable and broadcast industries," created the ATSC or broadcast flag.[15] The flag is code embedded into a digital television signal which does not affect the image on the screen.[16] Broadcasters can set the flag to either an "on" or "off" position to indicate if the broadcaster wishes to restrict the consumer's ability to redistribute the program.[17]

The FCC felt the broadcast flag was the best of the available options to protect digital content.[18] The FCC adopted numerous assertions of the Motion Picture Association of America (MPAA) regarding

10 PBS Online, Inc., *Digital TV: A Cingley Crash Course—Bandwidth Squeeze*, *at* http://www.pbs.org/opb/crashcourse/digital_v_analog/squeeze.html (last visited Sept. 8, 2004).

11 Menell, *supra* note 7, at 109.

12 *See* CTR. FOR DEMOCRACY & TECH., *supra* note 1, at 3.

13 *In re* Digital Broad. Content Protection, 18 F.C.C.R. 23,550, 23,559–60 (2003) (rep. & order).

14 *Id.* 23,570.

15 *Id.* 23,556.

16 CTR. FOR DEMOCRACY & TECH., *supra* note 1, at 10.

17 *Id.*

18 *In re Digital Broad. Content Protection*, 18 F.C.C.R. at 23,556–60.

the effects of the flag. The FCC agreed with the MPAA that "an ATSC flag system would only limit redistribution of content and not prevent consumer copying."[19] The FCC and MPAA felt the impact of the flag on the price of reception devices would be minimal.[20] Consumers will still be able to view flag encoded programs on legacy devices (devices built prior to the implementation of the regulations) without purchasing additional equipment,[21] although the Commission acknowledged in a footnote that the flag may make it impossible for a viewer to record a program on a flag compliant device and then view it on a noncompliant device.[22] While the FCC focused on what it and the MPAA viewed as the positive features of the broadcast flag, not everyone was in agreement.

The FCC adopted this standard despite a great deal of criticism regarding unresolved issues in the formulation of the broadcast flag.[23] Certain commentators were concerned with a perceived lack of openness and transparency during the proceedings in which the broadcast flag was adopted.[24] There were other groups which doubted the MPAA's suggestion that there would be a low cost for transition to this new system.[25] There were also concerns that the flag "would stifle in-

19 *Id.* at 23,556–57 (quoting Comments of Motion Picture Association of America, Inc. et al. at 12, *In re* Digital Broad. Content Protection, 18 F.C.C.R. 23,550 (2003) (MB Docket No. 02-230)).

20 *Id.* (quoting Reply Comments of Motion Picture Association of America, Inc. et al. at 16, *In re* Digital Broad. Content Protection, 18 F.C.C.R. 23,550 (2003) (MB Docket No. 02-230)).

21 *Id.* (quoting Comments of Motion Picture Association of America, Inc. et al. at 27, *In re* Digital Broad. Content Protection, 18 F.C.C.R. 23,550 (2003) (MB Docket 02-230)).

22 *See infra* note 129 and accompanying text.

23 *In re Digital Broad. Content Protection*, 18 F.C.C.R. at 23,557–58.

24 *Id.* at 23,557. (citing Comments of Philips Electronics North America Corp. at 25–26, *In re* Digital Broad. Content Protection, 18 F.C.C.R. 23,550 (2003) (MB Docket No. 02-230)).

> The process by which the BPDG Co-Chairs' Report discussed only a single proposal was flawed. Moreover, that proposal does not adequately accommodate consumer fair use expectations, and threatens both competition and innovation. . . . Most meaningful negotiations occurred behind closed doors among a small group of participants. The proponents of any particular content protection regime must not also be its judge and jury. No one subset of industry should be left to determine whether a specific technological solution works.

Comments of Philips Electronics North America Corp. at 2526, *In re* Digital Broad. Content Protection, 18 F.C.C.R. 23,550 (2003) (MB Docket No. 02-230)).

25 *Id.* (citing Comments of Veridian Corp. at 1213, *In re* Digital Broad. Content Protection, 18 F.C.C.R. 23,550 (2003) (MB Docket No. 02-230)).

novation."[26] Numerous groups raised concerns that the broadcast flag would impact fair use and other copyright issues.[27]

Additionally, groups are concerned that the broadcast flag is an inadequate tool to protect digital television because it can be circumvented through the use of digital to analog converters or legacy devices.[28] The threat posed by digital to analog converters is known as the "analog hole." The analog hole is a process through which a television viewer receives a digital signal and then transmits the content to an analog recording device.[29] Although the analog medium will degrade over time, an individual can reconvert the first analog copy (which will be fairly high quality) to a digital format.[30] The owner of this digital copy will be able to reproduce and redistribute the digital copy without a decrease in picture quality. These digitized analog copies of digital television broadcasts can be freely redistributed regardless of the presence of the broadcast flag in the original content. The availability of this lower quality digital content enables Internet redistribution to occur more freely.[31] Infringers are willing "to sacrifice picture quality in order to reduce download times."[32] Despite these concerns, the FCC adopted the flag system.

The flag itself does not regulate the ability of consumers to redistribute the materials, but simply signals devices which recognize the flag whether or not to allow redistribution.[33] Hence, in order to implement the broadcast flag, the FCC has put forward a series of regulations for demodulator devices related to the broadcast flag that will go into effect after July 2005.

> "While the cost of the circuitry for processing the broadcast flag would be small, it would not be inconsequential, and would, moreover, be borne by users who have no need to access protected content because for content to remain protected, the circuitry must be implemented on myriad devices whether or not they are actually used with protected content. . . . These costs will burgeon into a significant tax on all consumers and a disincentive to purchase upgraded equipment."

Comments of Veridian Corporation at 1213, *In re* Digital Broad. Content Protection, 18 F.C.C.R. 23,550 (2003) (MB Docket No. 02-230)).

26 *In re Digital Broad. Content Protection*, 18 F.C.C.R. at 23,557.

27 *Id.* at 23,558.

28 *Id.* at 23,557.

29 *Id.* at 23,557–58.

30 Kramarsky, *supra* note 6, at 5.

31 *See* Comments of Electronic Frontier Foundation, *supra* note 2, at 5–6.

32 *Id.* at 6.

33 CTR. FOR DEMOCRACY & TECH., *supra* note 1, at 10.

2. Regulation of Demodulator Devices

After the FCC's deadline, digital television demodulators must meet several compliance requirements. First, the demodulators must screen digital television signals for the presence of the broadcast flag.[34] Second, the device must "encrypt any flagged content using 'authorized technology.'"[35] Next, the device must restrict the consumer's ability to record the encrypted programs to devices which meet certain FCC guidelines.[36] These devices must only allow redistribution of encoded digital content to other devices which comply with the FCC's regulations.[37]

II. Rebutting the Case for FCC Jurisdiction

The FCC's ability to proscribe the broadcast flag rules has caused conflict on Capitol Hill. Senator Ernest F. Hollings believes the broadcast flag regulations are clearly within the Commission's jurisdiction to help implement the transition to digital television.[38] The Chairmen of the House and Senate Judiciary Committees, in contrast, believe the Commission lacks the authority to address the intellectual property issues raised by the broadcast flag.[39] The FCC notes proponents of the broadcast flag suggest § 336 of the Communications Act

---

34 *In re Digital Broad. Content Protection*, 18 F.C.C.R. at 23,570–71; Ctr. for Democracy & Tech, *supra* note 1, at 11.

35 *In re Digital Broad. Content Protection*, 18 F.C.C.R. at 23,571; Ctr. for Democracy & Tech, *supra* note 1, at 11.

36 *In re Digital Broad. Content Protection*, 18 F.C.C.R. at 23,571; Ctr. for Democracy & Tech, *supra* note 1, at 11.

37 *In re Digital Broad. Content Protection*, 18 F.C.C.R. at 23,571; Ctr. for Democracy & Tech, *supra* note 1, at 11.

38 Letter from Senator Ernest F. Hollings, Chairman of the Senate Commerce Committee, to Michael K. Powell, Chairman, Federal Communications Commission 2–3 (July 19, 2002), *available at* http://bpdg.blogs.eff.org/archives/hollings-powell.pdf. The Senator finds that 47 U.S.C. § 336(b)(4)–(5), as well as the Commission's ancillary jurisdiction, give the Commission authority to promulgate these rules. *Id.* These sections are discussed *infra* in Parts II.A and II.B, respectively.

39 Letter from Representative James F. Sensenbrenner et al., Chairman of the House Committee on the Judiciary, to Michael K. Powell, Chairman, Federal Communications Commission (Sept. 9, 2002), *available at* http://judiciary.senate.gov/special/FCCbdcastflag.pdf; *see also Piracy Prevention and the Broadcast Flag: Hearing Before the Subcomm. on Courts, The Internet, and Intellectual Prop. of the House Comm. on the Judiciary*, 108th Cong. 3 (2003) [hereinafter *Piracy Prevention & the Broadcast Flag*] (statement of Rep. Berman, Member, House Comm. on the Judiciary) ("I am unaware of any precedent for the FCC interpreting the Copyright Act as part of an FCC rulemaking or in any other capacity.").

authorizes this action.[40] The Commission asserts that regulations are appropriate under its ancillary jurisdiction to put forward regulations which are "reasonably ancillary to the effective performance of [the Commission's] various responsibilities."[41] When these arguments are reviewed, it is clear that the legislative intent of the power extended to the FCC does not allow the promulgation of the broadcast flag rules.

A. *Specific Statutory Authorization*

Broadcast flag proponents suggest two sections of the Telecommunications Act that allow the FCC to enact the flag rules. The first supposed authorization comes from the FCC's authorization to "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."[42] Second, proponents argue the FCC's power to "prescribe such other regulations as may be necessary for the protection of the public interest, convenience, and necessity" gives the Commission the power to prescribe these regulations.[43] Out of context, these statutory grants seem to provide the FCC with the ability to prescribe the rules. When read in context with the surrounding language, however, they clearly do not allow the Commission to create the broadcast flag rules.

Sections 336(b)(4) and 336(b)(5) authorize additional licenses for the broadcast of digital television.[44] The broadcast flag regula-

---

40 *See In re Digital Broad. Content Protection*, 18 F.C.C.R. at 23,562. The specific section at issue is 47 U.S.C. § 336(b)(4)–(5). The FCC conspicuously declined to address whether or not they agree with the proponents' argument on these provisions, instead placing all of their justification on the ancillary jurisdiction argument. *Id.* at 23,563

41 *Id.* (quoting United States v. Southwestern Cable Co., 392 U.S. 157, 178 (1968)).

42 47 U.S.C. § 336(b)(4) (2000).

43 *Id.* § 336(b)(5).

44 *See id.* § 336(a)–(b). The section states:

> (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

tions have nothing to do with authorizing additional licenses for the broadcast of digital television. Therefore, these sections cannot be the basis for the FCC's jurisdiction to proscribe copy protection regulations. Congress has explicitly limited § 336(b)(4) to technical requirements to ensure signal quality for digital television.[45] The broadcast flag has no impact on signal quality; its implementation is directed to copy protection. The legislative history of § 336(b)(4) and (b)(5) indicates these sections "deal with spectrum regulation, signal quality, and the duties of licensees."[46] Section 336(b)(5), which grants broad authority to prescribe regulations, deals with enforcing the provisions of 336(a).[47] Section 336(a) deals with eligibility for a license to broadcast digital television and ancillary services that will be provided by those broadcasters.[48] Providing additional licenses to the public for digital television is in no way related to protecting the content that is broadcast by the individuals with the licenses.

> 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.

Id.

45 *See id.* § 336(b)(4).

46 Comments of the American Library Association et al. at 19, *In re* Digital Broad. Content Protection, 18 F.C.C.R. 23,550 (2003) (MB Docket No. 02-230); *see* H.R. CONF. REP. NO. 104-458, at 159–61 (1996).

47 *See* 47 U.S.C. § 336(b)(5) (2000).

48 *See id.* § 336(a).

After reviewing statutes that supposedly grant the FCC the ability to prescribe these rules, it is clear that they are not as broad as broadcast flag proponents would like them to be. The regulations do not authorize the FCC's creation of the broadcast flag. The FCC believes that even if there is no specific statutory grant to promulgate the broadcast flag, it has ancillary jurisdiction to prescribe the rules.[49]

B. *Ancillary Jurisdiction*

The FCC has ancillary jurisdiction to make rules when it does not have an express legislative directive to do so. The FCC's ancillary jurisdiction was first recognized by the Supreme Court in *United States v. Southwestern Cable Co.*[50] In *Southwestern*, the FCC promulgated rules which restricted expansion of cable television services.[51] The broadcast of Los Angeles television signals into the San Diego market was alleged to have impacted the viewing audience of Midwest Television, a company with a license to broadcast in San Diego.[52] Midwest asserted these actions would "reduce the advertising revenues of local stations, and that the ultimate consequence would be to terminate or to curtail the services provided in the San Diego area by local broadcasting stations."[53] Despite having no specific statutory authority to do so, the Commission began regulating within this area.[54] Although the Commission could not actually predict the effect of these broadcasts, it based its authority on substantial likelihood of a negative impact upon current television providers.[55] The Court held that in creating the FCC, Congress had intended

> "to maintain, through appropriate administrative control, a grip on the dynamic aspects of radio transmission," . . . [and therefore] conferred upon the Commission a "unified jurisdiction" and "broad authority." Thus, "[u]nderlying the whole [Communications Act] is recognition of the rapidly fluctuating factors characteristic of the evolution of broadcasting and of the corresponding requirement

49 *See In re* Digital Broad. Content Protection, 18 F.C.C.R. 23,550, 23,563 (2003) (rep. & order).

50 392 U.S. 157 (1968).

51 *Id.* at 160.

52 *Id.* at 160 n.4.

53 *Id.*

54 *Id.* at 165.

55 *Id.* (quoting Microwaved-Served CATV, 38 F.C.C. 683, 713–14 (1965) (first rep. & order)).

that the administrative process possess sufficient flexibility to adjust itself to these factors."[56]

Therefore, to ensure the "orderly development of . . . local television broadcasting," the Court held the FCC had authority to prescribe rules "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting."[57] This authority allows the Commission to "issue 'such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law,' as 'public convenience, interest, or necessity requires.'"[58]

The Court later expanded this power in *United States v. Midwest Video Corp.* (*Midwest I*).[59] The regulation at issue in this case was one which mandated that "'no [cable television] system having 3,500 or more subscribers shall carry the signal of any television broadcast station unless the system also operates to a significant extent as a local outlet by cablecasting and has available facilities for local production and presentation of programs other than automated services.'"[60] In a plurality opinion, the Court held that the critical question was whether the Commission determined its rules would "'further the achievement of long-established regulatory goals . . . by increasing the number of outlets for community self-expression and augmenting the public's choice of programs and types of services.'"[61]

Chief Justice Burger, while agreeing in the result, was unsettled by the FCC's regulation. In his view it "strain[ed] the outer limits of even the open-ended and pervasive jurisdiction" of the Commission.[62] The Chief Justice felt the "explosive development" of cable television required a "comprehensive re-examination of the statutory scheme."[63] In the Chief Justice's view, Congress, not the Commission and the Courts, should take the lead in regulation to ensure that all pertinent policy issues were considered.[64]

---

56 *Id.* at 172–73 (quoting FCC v. Pottsville Broad. Co., 309 U.S. 134, 138 (1940)) (citations omitted).

57 *Id.* at 177–78.

58 *Id.* at 178 (quoting 47 U.S.C. § 303(r) (1968)).

59 406 U.S. 649 (1972) (plurality opinion).

60 *Id.* at 653–54 (plurality opinion) (quoting 47 C.F.R. § 74.1111(a) (1970) (repealed 1974)).

61 *Id.* at 667–68 (plurality opinion) (quoting Microwaved-Served CATV, 2 F.C.C.2d 725, 1863 (1966) (second rep. & order)).

62 *Id.* at 676 (Burger, C.J., concurring).

63 *Id.* (Burger, C.J., concurring).

64 *Id.* (Burger, C.J., concurring).

While historically the FCC enjoyed broad ancillary jurisdiction, the Supreme Court acknowledged in *FCC v. Midwest Video Corp.*[65] that "the Commission was not delegated unrestrained authority."[66] The Court returned to the *Southwestern* decision and determined it was consistent with the Communications Act because the regulations in *Southwestern* were "imperative" to achieve its statutory objectives.[67] The Court emphasized the fact that Congress had previously voiced its "disapproval" of the effects of the FCC's regulations.[68] The *Midwest Video* decision limits the Commission's ancillary jurisdiction to situations in which ancillary jurisdiction is necessary for the Commission to achieve its statutory objectives or responsibilities.

In the case of the broadcast flag, the FCC asserts its regulations are reasonably ancillary to the performance of its responsibilities because

> [t]he Communications Act charges the Commission with responsibility for developing a broadcasting system that is made available on a fair, efficient and equitable basis in communities throughout the United States. Within the Commission's mandate for the regulation of television broadcasting are the long established regulatory goals of increasing the number of outlets for community self-expression and augmenting the public's choice of programs and types of services. In addition, the Commission is charged with the responsibility of shepherding the country's broadcasting system into the digital age . . . [making] it clear that advancing the DTV transition has become one of the Commission's primary responsibilities under the Communications Act at this time.[69]

In sum, the FCC feels rulemaking regarding the broadcast flag is reasonably ancillary to its responsibilities because without this content protection system "content providers will be reluctant to provide quality digital programming to broadcast outlets" which, in the Commission's opinion, will cause "over the air broadcast television [to] deteriorate" and frustrate the success of the digital television transition.[70]

In fact, Congress has charged the Commission with ensuring that the digital television transition takes place, and this transition "is not a market-driven migration to a new technology, but rather the unambig-

65 440 U.S. 689 (1979).

66 *Id.* at 706.

67 *Id.* at 706–07.

68 *Id.* at 708.

69 *In re* Digital Broad. Content Protection, 18 F.C.C.R. 23,550, 23,564 (2003) (rep. & order) (footnotes omitted).

70 *Id.* at 23,565.

uous command of an Act of Congress."[71] The Commission is charged with seeing the public through to the digital television age by ensuring that all analog broadcast licenses expire on or before December 31, 2006.[72] Once the licenses expire, the Commission is to reclaim these elements of the broadcast spectrum and auction off the spectrum to new, non-broadcast, service carriers.[73] While the Commission claims it needs broadcast flag regulations to shepherd the country into the digital television era, a more accurate characterization of the Commission's responsibilities is that Congress has charged the Commission with recapturing the analog broadcast spectrum.

Courts have previously upheld the Commission's authority to require manufacturers to install components to assist this transition. In *Consumer Electronics Ass'n v. FCC*, the Commission's order requiring televisions thirteen inches or larger be equipped with tuners which are able to receive and decode digital television signals was upheld.[74] While the *Consumer Electronics Ass'n* decision allows the Commission to regulate demodulator equipment, on closer examination, there are numerous differences between the regulations in *Consumer Electronics Ass'n* and the broadcast flag that require a different result in the context of the broadcast flag.

The most striking difference between the two cases is that in *Consumer Electronics Ass'n* the court found an explicit statutory grant of authority to regulate this type of equipment.[75] Unlike in *Consumer Electronics Ass'n*, we have already seen the Commission does not have any explicit statutory authority over digital television copy protection.[76] In fact, when it comes to the rights of copyright holders the Constitution is clear: "[I]t is Congress that has been assigned the task of defining the scope of the limited monopoly that should be granted to authors or to inventors in order to give the public appropriate access to their work product."[77] As a result, "as new developments have occurred in this country, it has been the Congress that has fashioned the new rules that new technology made necessary. . . . [T]he protec-

---

71 Consumer Elecs. Ass'n v. FCC, 347 F.3d 291, 301 (D.C. Cir. 2003).

72 47 U.S.C. § 309(j)(14)(A) (2000).

73 47 U.S.C.S. § 309(j)(14)(C) (Lexis 2002 & Supp. 2004)

74 *Consumer Elecs. Ass'n*, 347 F.3d at 293.

75 *Id.* at 297 (citing the All Channel Receiver Act, 47 U.S.C. § 303(s) (2000), which gives the Commission the "authority to require that apparatus designed to receive television pictures broadcast simultaneously with sound be capable of adequately receiving all frequencies allocated by the Commission to television broadcasting").

76 *See supra* Part II.A.

77 Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984).

tion given to copyrights is wholly statutory."[78] The lack of explicit congressional authority for the Commission to regulate copy control casts substantial doubt on the FCC's authority to enact the broadcast flag regulations.[79]

FCC action was necessary in *Consumer Electronics Ass'n* because the inability of a large number of households to receive digital television signals would delay the end of analog broadcast licenses.[80] Congress required that the FCC end all analog broadcasts by December 31, 2006,[81] as long as at least eighty-five percent of the homes in every market had "at least one television receiver capable of receiving the digital television service signal[s]."[82] If this goal was not reached by the specified date, the Commission would be required to extend licenses past the congressionally mandated date.[83]

In the case of the broadcast flag, there is no similar tangible danger. There are no provisions in the statutes related to content which require the Commission to delay the digital conversion.[84] The FCC contends the reluctance of broadcasters to put forward over-the-air broadcasts of digital programming in the absence of copy controls would cause "an erosion of our national television structure."[85] The result, according to the FCC, would be an inability to "foster a diverse radio service that serves local communities throughout the country."[86] This argument, while compelling in theory, ignores the current reality of the digital television transition.

In 2002, in the absence of any copy controls or redistribution prevention, over 2000 hours of prime-time over-the-air digital television

---

78 *Id.* at 430–31.

79 In *AT & T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999), the Supreme Court seemed to indicate that while Congress can implicitly delegate authority to an administrative agency, the agencies must issue rules that contain a reasonable limitation on their authority consistent with the purposes of the statute providing the grant. Lisa Schultz Bressman, Schecter Poultry *at the Millennium: A Delegation Doctrine for the Administrative State*, 109 YALE L.J. 1399, 1415 (2000). In this case it is likely that the Commission's authority to promulgate rules in the area would have to conform to the constitutional bounds of copyright laws, if not the statutory boundaries established by Congress.

80 *Consumer Elecs. Ass'n*, 347 F.3d at 301 (quoting Digital Tuner Order, 17 F.C.C.R. 15,977, 15,994 (2002)).

81 47 U.S.C. § 309(j)(14)(A) (2000).

82 *Id.* § 309(j)(14)(B)(iii)(II)(a).

83 *Id.*

84 *Id.*

85 *In re* Digital Broad. Content Protection, 18 F.C.C.R. 23,550, 23,565 (2003) (rep. & order).

86 *Id.* at 23,566

were available on 490 local television stations,[87] a fifty percent increase from the previous year.[88] For the 2004–2005 television season, also in the absence of any copy control or redistribution prevention mechanisms, broadcasters produced over 2500 hours of digital television programming.[89] Moreover, the reach of this programming is extremely broad, with 1292 stations undertaking digital broadcasting.[90] These broadcasters provide 99.69% of American households with an over-the-air digital television signal.[91] These numbers indicate that while broadcasters might be reluctant to introduce digital over-the-air programming without copy protections, they are still moving forward in a way that provides almost all Americans with an ample amount of digital programming. The sheer number of Americans who currently receive the signals indicates that the lack of copy controls has not caused "an erosion of our national television structure"[92] or an inabil-

---

87 Press Release, National Association of Broadcasters, Amount of Over-The-Air HDTV Programming Reaches an All-Time High (Oct. 2, 2002), *available at* http://www.nab.org/pressrel/default.asp.

88 *Id.*

89 Nat'l Ass'n of Broads., *HDTV Programs on the Air*, *at* http://www.digitaltvzone.com/hdtv_programs_on_air/index.html (last visited Oct. 17, 2004). The major networks are broadcasting the following programs in high definition during the 2004–2005 television season: ABC: *According to Jim, The Benefactor, Complete Savages, Desperate Housewives, The George Lopez Show, Hope & Faith, Less Than Perfect, Life with Bonnie, Lost, My Wife and Kids, NYPD Blue, The Practice, Rodney, 8 Simple Rules, Monday Night Football*, NBA Finals, The Stanley Cup Finals, *The ABC Big Picture Show*, and *ABC Saturday Night Movies*; NBC: *Crossing Jordan, ER, Father of the Pride, Hawaii, Joey, Law and Order, Law and Order Criminal Intent, Law and Order SVU, Las Vegas, LAX, Medical Investigations, Third Watch, The Tonight Show with Jay Leno*, the Summer Olympics, the VISA Triple Crown, NASCAR's Daytona 500, and made for TV movies; CBS: *CSI, CSI: Miami, CSI: NY, Clubhouse, Center of the Universe, Dr. Vegas, Everybody Loves Raymond, JAG, Joan of Arcadia, Judging Amy, The King of Queens, Listen Up, Still Standing, Two and a Half Men, Without a Trace*, NFL Playoff games, SEC College Football, AFC Divisional Playoffs, NCAA Men's Basketball Tournament games, The Masters, the U.S. Open, and the *Young and the Restless*; FOX: Fox plans to air at least half of its prime time schedule in 720p and Dolby Digital 5.1. Also, "FOX intends to air up to six NFL games in HD each week in addition to all playoff games and the Super Bowl. PAX is also taking the lead in multicasting on its digital channels, including prime time programming"; WB: *Angel, Everwood, Gilmore Girls, One Tree Hill, Reba, Summerville, What I like About You.* WB also plans to air *Lord of the Rings: Fellowship of Ring* in HD in November, 2004. *Id.*

90 Nat'l Ass'n of Broads., *59 Stations Make Transition to DTV*, *at* http://www.digitaltvzone.com/news/news_items/08_14_04.html (last visited Oct. 17, 2004).

91 *Id.*

92 *In re* Digital Broad. Content Protection, 18 F.C.C.R. 23,550, 23,565 (2003) (rep. & order).

ity to "foster a diverse radio service that serves local communities throughout the country."[93]

With ninety-nine percent of the public currently being provided with over twenty-five hundred hours of digital television programming, it is unlikely the broadcast flag would increase the number of outlets for community self-expression or augment the public's choice of programs and types of services by more than a nominal amount. Additionally, the content industry has not committed to increasing the amount of digital programming available if the broadcast flag is adopted.[94] The broadcast flag regulations are not necessary to achieving the Commission's statutory responsibilities. Therefore the regulations fail the test established in *Midwest I* and should not be viewed as reasonably ancillary.

C. *The Broadcast Flag Regulations Are Not Entitled to* Chevron *Deference*

Under the *Chevron* doctrine, courts typically give administrative agency decisions a high level of deference.[95] A recent Supreme Court decision, combined with the extraordinary nature of the FCC's regulations, call into question whether the broadcast flag decision is entitled to *Chevron* deference.

In *FDA v. Brown & Williamson Tobacco Corp.*,[96] the Supreme Court explained that the usual assumption that congressional silence is an invitation for an administrative agency to "'fill in statutory gaps' . . . is not plausible where 'extraordinary' issues about the scope of the agency's jurisdiction are concerned."[97] While the Court set out no particular criteria to determine when an issue goes from ordinary to extraordinary, the determination "would turn on an effort to uncover Congress's intent regarding the most appropriate interpreter [of legislation]."[98] This determination requires the court to analyze "the divi-

---

93 *Id.* at 23,586.

94 Reply Comments of the Electronic Frontier Foundation at 8, *In re* Digital Broad. Content Protection, 18 F.C.C.R. 23,550 (2003) (MB Docket No. 02-230), *available at* http://www.eff.org/IP/video/HDTV/20030218_reply_comments.pdf.

95 In *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the Supreme Court determined that "courts have a duty to defer to reasonable agency interpretations not only when Congress expressly delegates interpretative authority to an agency, but also when Congress is silent or leaves ambiguity in a statute that an agency is charged with administering." Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 833 (2001).

96 529 U.S. 120 (2000).

97 Merrill & Hickman, *supra* note 95, at 844 (quoting *Brown & Williamson*, 529 U.S. at 159).

98 *Id.* at 913.

sion of authority as between different agencies and different levels of government . . . [and] a consideration of the historical evolution of the agency's mandate and the implications to be drawn from related post-enactment legislation."[99]

The authority to regulate and protect copyrighted materials is explicitly given to Congress through the Constitution's Intellectual Property Clause.[100] Congress used its constitutionally-authorized power to promulgate numerous statutes regarding copyright and copyright protection.[101] Thus, historically, authority in this area rests with Congress and not with the FCC. The FCC's admission that it has never before engaged in these types of regulatory activities weighs against classifying this decision as an "ordinary" issue of jurisdiction.[102]

The existence of an implicit grant of authority from Congress to enact the broadcast flag is further called into question because a bill proposing this type of legislation was considered in the Senate. Senator Ernest F. Hollings proposed the Consumer Broadband and Digital Television Promotion Act,[103] which would have required all digital media devices sold in the United States to contain copy protection equipment specified by the Commission.[104] Congress never acted on the bill either in Committee or on the Senate floor. If an implicit grant of authority clearly existed, it would be unlikely that the FCC would need this explicit grant of authority. All of these factors indicate that the promulgation of the broadcast flag rules constitute an extraordinary issue concerning the FCC's jurisdiction and therefore the Commission's rule should not be entitled to *Chevron* deference, and instead be reviewed de novo.[105] As discussed above, the Commission's arguments regarding its jurisdiction do not stand up to scrutiny and therefore the regulations should be invalidated.

Administrative agency decisions raising constitutional questions are also on questionable ground regarding *Chevron* deference.[106] The canon of avoidance of constitutional questions "says that when faced with a choice between two interpretations of a statute, one that does not raise a serious constitutional question and one that does, the

---

99 *Id.*

100 U.S. CONST. art. I, § 8, cl. 8.

101 *See* 17 U.S.C. § 101 (2000).

102 *See In re* Digital Broad. Content Protection, 18 F.C.C.R. 23,550, 23,566 (2003) (rep. & order).

103 S. 2048, 107th Cong. (2002).

104 Declan McCullagh, *Anti-Copy Bill Hits D.C.*, WIRED NEWS, Mar. 22, 2002, *at* http://www.wired.com/news/politics/0,1283,51245,00.html?tw=wn_story_related.

105 *See* Merrill & Hickman, *supra* note 95, at 836.

106 *Id.* at 914–15.

court should [choose] the interpretation that does not raise any serious constitutional question[s]."[107] At times, the Supreme Court has indicated this canon of construction trumps the *Chevron* doctrine.[108] The broadcast flag regulations raise serious First Amendment questions because of the impact of the regulations on copyright law.[109] Therefore, because of the constitutional questions raised by the regulations, any statutory interpretation which may give the Commission authority should be interpreted as not providing the Commission with this jurisdiction.

III. COPYRIGHT CONCERNS

> I am not convinced that we have adhered to our well-meaning pronouncements.[110]

Although the Commission asserts "the scope of [the broadcast flag] decision does not reach existing copyright law," it clearly does.[111] In their comments on the order, a number of Commissioners voiced their concerns about the ruling's possible effect on copyright issues.[112] The copy controls resulting from the Commission's regulations impact the core of modern copyright law and the constitutional issues surrounding it. The copyright concerns raised by the broadcast flag fall into two broad categories: first, the broadcast flag's impact on the public domain and, second, the broadcast flag's effect on fair use.

A. *Restrictions on the Public Domain*

The creator of an individual work will determine whether the broadcast flag will be used to protect his or her work. The work's creator is thus able to restrict the public's use of the work regardless of whether it qualifies for copyright protection.

---

107 *Id.* at 914.

108 *Id.* (citing Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs, 531 U.S. 159, 172–74 (2001); Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 574–75 (1988)).

109 *See infra* Parts III.A, III.B.

110 *In re* Digital Broad. Content Protection, 18 F.C.C.R. 23,550, 23,620 (2003) (rep. & order) (Commissioner Jonathan S. Adelstein, approving in part and dissenting in part).

111 *Id.* at 23,555.

112 *See id.* at 23,616–17 (Commissioner Michael J. Copps, approving in part and dissenting in part) (noting that the commission had not precluded the use of the flag for non-copyrightable material); *id.* at 23,620 (Commissioner Jonathan S. Adelstein, approving in part and dissenting in part) ("I am not convinced that we have adhered to our well-meaning pronouncements [that this decision will have no effect on copyright law].").

While copyright protection has expanded recently, there are still certain limitations on what qualifies for copyright protection. At the very minimum, for a work to qualify for the exclusive rights arising under the copyright clause, it must possess some sort of originality.[113] The courts have not announced specific guidelines for what actually qualifies as an original work and "the requisite level of creativity is extremely low."[114] Despite the low standard, the Supreme Court has concluded there will be some works that will not meet this constitutionally-mandated standard.[115] The practical effect of the broadcast flag regulations is that broadcasters can choose to protect works that do not meet the originality standard, and therefore should be in the public domain. This effectively eliminates the originality requirement of copyright law in the context of digital television.

The broadcast flag also challenges another constitutionally-mandated element of copyright: the limited times doctrine. In accord with the constitutional power to proscribe copyright limitations on works for "limited times,"[116] Congress has established the duration of an author's copyright.[117] The Supreme Court has held that a time prescription qualifies as a "limited time" so long as it is "'confine[d] within certain bounds,' 'restrain[ed],' or 'circumscribe[d].'"[118] The broadcast flag regulations make no mention as to how long the flag will apply to any particular work or how the demodulators will determine if a work's copyright has expired. Therefore the limit on the public's use and dissemination of a work is subject to no boundary, or at best, to the goodwill of the content provider to deactivate the broadcast flag. Neither of these scenarios would seem to qualify under the *Eldred* definition of "limited times." By failing to address these issues, the Commission effectively issued a perpetual copyright restricting many of the rights the public should enjoy after a copyright expires.

These standards also significantly challenge the idea/expression dichotomy at the core of copyright legislation. This dichotomy, em-

113 Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 346 (1991).

114 *Id.* at 345.

115 *Id.* at 358 ("We conclude that the statute envisions that there will be some fact-based works in which the selection, coordination, and arrangement are not sufficiently original to trigger copyright protection.").

116 U.S. CONST. art. I, § 8, cl. 8.

117 *See* 17 U.S.C. § 302(a) (2000).

118 Eldred v. Ashcroft, 537 U.S. 186, 199 (2003) (quoting SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (London, J.F. & C. Rivington 7th ed. 1785)).

bodied in 17 U.S.C. § 102(b),[119] "'strike[s] a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author's expression.'"[120] The broadcast flag protects *every* element of a work, both the ideas and the method of expression. This is especially disturbing in light of the fact that the Commission did not exempt news programming from the auspices of broadcast flag regulation.[121] Under the broadcast flag regime, everything from local government meetings to images of important national events will be restricted in their use by the public.[122] Images such as the fall of the Berlin Wall, the protests in Tiananmen Square, and the September 11 attacks might not be available for public use, except in those ways which the content provider and those designing flag-compliant technology allow them to be used. Inherent economic value of broadcasts should not strip the inherent constitutional rights of the public to make fair use of these programs.

B. Fair Use Implications

> With today's technology, [the broadcast flag] would prevent the student from e-mailing [a school project containing marked content] because a secure system does not yet exist for e-mailing. But as soon as that technology is developed, and I believe it will be, then that would be made possible as well. . . . This is a technological issue, not a policy issue.[123]

While copyright holders exercise a monopoly on certain exclusive rights, these rights are subject to the limits of the fair use doctrine.[124] The public can use copyrighted works "for purposes such as criticism, comment, news reporting, teaching (including multiple copies for

---

119 "In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work." 17 U.S.C. § 102(b) (2000).

120 Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 556 (1985) (quoting Harper & Row Publishers, Inc. v. Nation Enters., 723 F.2d 195, 203 (2d Cir. 1983)).

121 *In re* Digital Broad. Content Protection, 18 F.C.C.R. 23,550, 23,558 (2003) (rep. & order).

122 *See id.* at 23,616–17 (Commissioner Michael J. Copps, approving in part and dissenting in part).

123 *Piracy Prevention & the Broadcast Flag, supra* note 39, at 58, 66 (testimony of Fritz Attaway, Attorney for MPAA), *available at* http://www.cdt.org/copyright/20040213flagcomments.pdf (last visited Oct. 31, 2004).

124 17 U.S.C. § 107 (2000).

classroom use), scholarship, or research" without infringing on the author's copyright.[125] Congress codified the common law doctrine and laid out a four-part, fact-specific test to determine what qualifies as a fair use.[126]

The broadcast flag takes this determination away from both consumers and the courts. *Sony Corp. of America v. Universal City Studios*[127] established one of the most common methods of fair use. Time shifting consists of recording a program at one time and watching it at a later time.[128] The broadcast flag would restrict the ability of consumers to make full use of these recordings. The Commission stated that "currently, content recorded onto a DVD with a flag-compliant device will only be able to be viewed on other flag-compliant devices and not on legacy DVD players."[129] Instead of fair use being determined by courts, it will be determined by the quantity and quality of technology a consumer owns and, as Mr. Attaway, the attorney for the MPAA, noted above, the development of technology. The Commission called this a "single, narrow example" and felt that the incompatibility of legacy and flag-compliant devices "is outweighed by the overall benefits gained in terms of consumer access to high value content."[130] This contrasts with the Supreme Court's decree that determinations of fair use should not be reduced simply to technical rules.[131]

This mandate will also freeze out fair uses yet to be developed. "If, for example, the federal government had in 1972 imposed a mandate on devices capable of recording analog television, and had judiciously followed the borders of fair use precedents of the day, such a mandate would almost certainly have prohibited . . . the first consumer VCR."[132] The next VCR, Internet, or e-mail cannot be contemplated by the Committee and these regulations could delay or defeat such innovations.

---

125 *Id.*

126 *Id.* The four factors are: the purpose and character of the use, the nature of the copyrighted work, the amount and substantiality of the portion used in relation to the copyrighted work as a whole, and the effect of the use upon the potential market for or value of the copyright. *Id.*

127 464 U.S. 417 (1984).

128 *Id.* at 423.

129 *In re* Digital Broad. Content Protection, 18 F.C.C.R. 23,550, 23,559 n.47 (2003) (rep. & order).

130 *Id.*

131 Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577 (1994) ("The task is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis.").

132 Comments of Electronic Frontier Foundation, *supra* note 2, at 14.

Additionally, the broadcast flag will significantly frustrate the exemption in copyright law for libraries. Congress has provided libraries with specific exemption from copyright law in order to compile an archive of the cultural record.[133] These archives are used "to research changes in public opinion, dress, and social trends, and by the broadcasters themselves to do research for news stories."[134] Often, the recordings are used away from the library where they are stored.[135] Any recordings of broadcasts made on flag-compliant devices would be inaccessible to library patrons using legacy devices.[136] This is especially disconcerting because "[l]ibraries are a primary source of information for under-served populations such as remote rural communities, recent immigrants, the poor, and the homeless."[137] Fair use and research abilities should not be limited simply to those who have the means to afford the newest technology. While the Commission is right in that its rules will not affect the ability of a defendant to make a fair use defense,[138] the effect of these regulations is to defeat the ability of ordinary consumers to make fair use of a copyrighted work in the first place.

The public's inability to make any fair use of copyrighted works raises severe First Amendment concerns. The Supreme Court has said the fair use exceptions are essential to a constitutionally-acceptable balance between the Copyright Clause and the First Amendment.[139] Under a broadcast flag regime, the fair use safety valve under previous copyright law will be turned off until technology can determine a "secure" method to transfer encrypted information. Once the appropriate technology has been created, the public can only make use of the information if it can obtain and use this technology. It is antithetical to the values of the First Amendment to restrict the realm of those who can fully express themselves to that segment of the population that can afford the newest technology.

The broadcast flag regulations will have an adverse impact on the ability of the public to make fair use of copyrighted materials. Under

---

133 17 U.S.C. § 108 (2000).

134 Comments of Association of Research Libraries at 16, *In re* Digital Broad. Content Protection, 18 F.C.C.R. 23,550 (2003) (MB Docket No. 02-230), *available at* http://www.arl.org/info/frn/copy/brflagcomment.pdf.

135 *Id.* at 16–17.

136 *Id.*

137 *Id.* at 1.

138 *See In re* Digital Broad. Content Protection, 18 F.C.C.R. 23,550, 23,555 (2003) (rep. & order) ("[T]his decision is not intended to alter the defenses and penalties applicable in cases of copyright infringement, circumvention, or other applicable laws.").

139 *See* Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 560 (1985).

the broadcast flag regime, a bureaucracy will determine, in advance, what constitutes fair use. The flag will limit the public's ability to watch a pre-recorded program on more than one device, stifle innovation, and limit the public's access to information from public libraries. Despite the FCC's "well-meaning pronouncements,"[140] the broadcast flag is most definitely an important policy issue and not a technological issue.

C. *Broader Copyright Implications*

The broadcast flag regulations are a continuation of a larger debate regarding the best legal methods to control copyrights in the digital age. Those supporting the broadcast flag regulations believe that "the most efficient legal regime . . . is that which permits copyright owners to maximize control over the terms and conditions of use of their digital property."[141] Those who own the copyrights of digital works believe this new regime is necessary because of the ease with which unauthorized copies of their work can be redistributed.[142] The content owners argue unauthorized redistribution reduces both their control over their property and their incentive to produce further works.[143] The content producers assert that without the broadcast flag their only option is to refuse to broadcast digital television programs in the absence of this encryption technology.[144] The broadcast flag gives copyright owners the ability to unilaterally determine the level of access consumers are granted to their content beyond the rights established by copyright law.[145]

The broadcast flag is an attempt by the content industry to commodify every conceivable use of its digital product. The end result of the commodification is to create a market for these uses where consumers will have to gain an express or implied license to use digital works in ways they were previously allowed to use without any consent.[146] The broadcast flag regulations accomplish this goal by protecting copyrighted material previously exempted from copyright protection.[147] Additionally, once consumers purchase one flag com-

140 *See supra* note 110 and accompanying text.

141 Julie E. Cohen, Lochner *in Cyberspace: The New Economic Orthodoxy of "Rights Management,"* 97 MICH. L. REV. 462, 464 (1998).

142 *Id.* at 473.

143 *Id.*

144 *See supra* note 85 and accompanying text. *But see supra* notes 87–91 and accompanying text.

145 Cohen, *supra* note 141, at 470–72; *see supra* Parts III.A, III.B.

146 Cohen, *supra* note 141, at 511–12.

147 *See supra* notes 126–30 and accompanying text.

pliant device, they will most likely have to upgrade all of their digital devices to ensure compatibility throughout their homes.[148]

Content providers create these protection methods because of the expense of enforcing their rights and the inability to adequately monitor the use of their works.[149] Digital rights management technology like the broadcast flag solves these problems by "replac[ing] the uncertain terrain delineated by fair use and other statutory exemptions with a menu of neatly defined, individually priced usage rights from which consumers may choose."[150] The ordinary consumer, in effect, will have no choice but to use digital content the way that the content provider dictates.[151]

The argument that the market will simply choose the product that best balances the interests of the copyright owner and the public domain is flawed. Consumers must overcome serious collective action problems in order to have an effect on the marketplace.[152] Because of the uneven market power between copyright owners and the public, the owners can force into the marketplace products that protect their interests at the expense of the public.[153] Additionally, once products with the technology preferred by the content industry have been broadly introduced into the market, it may be difficult for consumers to "vote with their feet" for a change in the technology because there may be no adequate substitute products.[154] In this way, the broadcast flag regulations strengthen the rights held by current copyright owners at the expense of the public and future authors.[155]

CONCLUSION

The FCC has attempted to resolve the important issue of the unauthorized redistribution of digital television programming through the adoption of the broadcast flag regulations. Despite its well-meaning intentions, the Commission has gone beyond its jurisdiction and invaded the area of copyright law. The statutory provisions broadcast flag proponents assert give the Commission jurisdiction are related to signal clarity and do not give the commission the authority to promulgate these rules.[156] Nor does the FCC have ancillary jurisdiction to

148 *See supra* note 137 and accompanying text.
149 *See* Cohen, *supra* note 141, at 519.
150 *Id.* at 532.
151 *Id.* at 529.
152 *Id.* at 536.
153 *See id.* at 533.
154 *Id.* at 530.
155 *Id.* at 558.
156 *See supra* Part II.A.

adopt these rules. The courts have held that ancillary jurisdiction is appropriate where the regulations are necessary to fulfill the Commission's responsibilities.[157] The broadcast flag regulations are not necessary to ensure that the transition to digital television broadcasts is completed by the January 1, 2007, deadline.[158]

The regulations will also conflict with a number of established copyright principles. They will let content providers avoid the originality requirement of copyright law as well as challenge the limited times doctrine and the idea/expression dichotomy.[159] Fair use will also fall victim to the broadcast flag regulations because the border of fair use will be determined by the content industry and the type of technology the consumer owns.[160]

The broadcast flag is one element in the larger debate over the commodification or propertization of copyright. The voice of the public has not been heard in both the broadcast flag debate and other digital rights management debates. Moreover, rights which the public has previously enjoyed are being eliminated for the economic benefit of the content industry. In essence, these digital rights management technologies are modifying copyright law so that its main focus is no longer "[t]o promote the Progress of Science and the Useful Arts,"[161] but instead to promote the profit of science and useful arts.

Much like the situation facing Chief Justice Burger in *Midwest Video*, the explosive development of digital television and the ease with which users can redistribute digital content requires a comprehensive reevaluation of the copyright laws. This reevaluation is a complicated balancing act between the needs of the content industry and the interests of the public. For this reason, Congress, and not administrative agencies, should take the lead in determining the most appropriate manner to address these issues.

157 *See supra* Part II.B.
158 *See supra* Part II.B.
159 *See supra* Part III.A.
160 *See supra* Part III.B.
161 U.S. CONST. art. I, § 8, cl. 8.