

## SUMMARY OF ARGUMENT

The FCC has asserted jurisdiction it does not have. Bowing to a group of copyright holders led by the MPAA, the FCC promulgated a rule drafted by those corporate interests that will dictate design aspects of a vast array of consumer electronics—televisions, DVD recorders, PCs, TiVos, digital VCRs, iPods, and cell phones—for years to come. The FCC claims no specific statutory authority allowing it to meddle so radically in the nation’s processes of technological innovation, but instead cites to its latent “ancillary” jurisdiction, which the FCC astonishingly contends is boundless unless Congress specifically acts to limit it.

In fact, the FCC’s rules here flout multiple explicit limits on its jurisdiction. In the All Channel Receiver Act (“ACRA”), Congress went out of its way to ensure that the FCC would not regulate broadly in issues of television receiver design, a pattern it has repeated throughout the Communications Act. Now, however, the FCC has claimed that the Communications Act is precisely what the ACRA says it is not—“a general precedent for regulation of manufactured products.” In any case, in no circumstance can the FCC regulate an activity that is not an interstate “communication” by radio or wire, and the Broadcast Flag rules regulate neither. The Broadcast Flag does not dictate how DTV transmissions are made, but simply controls how the transmitted content can be treated *after* it is received. Likewise, the Communications Act is clear that, unless specified elsewhere, it gives the FCC authority over receipt “services,” not the receipt “apparatuses” the agency now attempts to regulate.

The FCC has not only transcended its own authority, it has also trespassed on a domain clearly not its own—copyright law. The Constitution exclusively reserves for Congress the power to create and regulate copyrights and balance the interests of copyright holders with the interest of the public in making “fair use” of copyrighted, or freely using uncopyrighted, works. Yet the FCC has taken it upon itself to legislate a new protection mechanism for digital works, notwithstanding the Supreme Court’s admonition in *Sony Corp. v. Universal City Studios*, 464 U.S. 417, 429-31 (1984):

Sound policy, as well as history, supports our consistent deference to Congress when major technological innovations alter the market for copyrighted materials. Congress has the constitutional authority and the institutional ability to

accommodate fully the varied permutations of competing interests that are inevitably implicated by such new technology.

Had the FCC required changes to the design of VCRs in the early 1980s to protect copyright holders, the Supreme Court might never have had the opportunity to decide that home video recording constitutes fair use. The FCC's *Order* would likewise preempt that debate here, giving movie studios, television networks, and broadcasters unfettered discretion to stop redistribution of their works through a technological mandate, effectively foreclosing many fair uses of those works in the process. Indeed, the Broadcast Flag upsets a specific congressional balance between copyright protection and public use. It requires the inclusion of a governmentally approved technological scheme in consumer electronics when Congress already expressly declined to adopt such a mandate in the DMCA.

Nor are the Broadcast Flag rules reasonable or supported by substantial evidence, even putting aside their serious jurisdictional flaws. They were adopted without any proof that the problem they purport to address even exists, there being no record that HDTV was or could be unlawfully distributed via the Internet. Rather, the FCC relied entirely on the self-serving statements of the Flag proponents to "conclude" that without the regime in place, undefined "high value" content would migrate from broadcast television to cable and satellite. The FCC thus engaged in the height of unreasoned decision making by putting in place expansive rules that burden consumers and, by the Commission's own admission, are not effective in stopping piracy of DTV broadcasts.