

Testimony of

**Andrew Setos
President of Engineering
Fox Entertainment Group**

**Before the Senate Commerce, Science and
Transportation Committee**

**Hearing on
“Broadcast and Audio Flag**

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Good morning, Chairmen and Members of the Committee. My name is Andrew Setos, and I am the President of Engineering of the Fox Entertainment Group. Thank you for inviting me to participate in this hearing.

As this Committee is well aware, Congress will soon mandate that broadcast television stations abandon the analog spectrum and begin broadcasting exclusively in digital form by 2009. This final step in the DTV transition will bring many benefits to consumers, by eliminating the current confusion that is inevitable in a mixed analog/digital world. However, the benefits of the digital transition will be meaningless to those same consumers unless we can also assure them that high-quality content will continue to be available to them on free over-the-air broadcast. This requires that DTV stations themselves be able to assure content providers of a reasonably equivalent level of protection to that provided by cable and satellite—and even the Internet. At the moment, DTV stations cannot provide this assurance, because DTV is legally obligated to broadcast content in-the-clear with no protection, while cable, satellite and Internet service providers offer content providers a wide variety of conditional access- and DRM-based content protection systems. This imbalance places the long-term viability of free over-the-air digital television in doubt and is certainly not in the public interest.

To correct this imbalance, it is essential that DTV stations be able to offer content providers some level of protection against indiscriminate redistribution across networks such as the Internet. The Broadcast Flag regulation promulgated by the FCC in 2003, after a years-long process of discussion and debate, is the one mechanism that can achieve that goal, and accordingly, we urge you to reinstate the regulation as soon as possible.

The past decades have seen an explosion in consumers' options to enjoy audiovisual content. Focusing on television alone, where there were once just three broadcast television networks, we now have hundreds—if not thousands—of cable, satellite, cable-like and Internet-based services. It seems that every day there is news of a new and innovative way for consumers to enjoy television programming, such video-on-demand services (VOD), video iPod and even watching shows on cell phones.

All of these “television services” compete by offering consumers something that they want to see. Unfortunately, the digital revolution has also created the opportunity for theft of that content on an unprecedented scale. Millions of users of so-called “peer-to-peer file-sharing services” upload and download copies of ad-free favorite television

shows, like *The Simpsons*, *House*, *American Idol*, and *24*, as well as popular sporting events, over the Internet. These programs are, of course, the lifeblood of over-the-air broadcast television stations, which rely on high quality content to attract viewers.

Currently, digital free over-the-air broadcasts are legally required to be transmitted “in the clear,” with no protection whatsoever from being redistributed. The process to upload content to the Internet—formerly a process that could be performed only by a relatively sophisticated and motivated pirate—is far easier, and more accessible today than it was even a few years ago. And for those who point out—admittedly, correctly—that DTV signals take a long time to be captured, compressed and redistributed over the Internet today, here is a cautionary tale: Twelve years ago, it took eight hours to download a single song; today, an individual with no computer savvy can do it in less than a minute with a click of the mouse.

Cable, satellite, ISP/telco, and other distributors of television programming have already recognized how important this issue is to ensure the digital future by voting with their dollars. These companies have spent millions on the design, deployment and maintenance of increasingly sophisticated content protection systems based on conditional-access, link protection or software DRM-based technologies. By contrast, DTV stations, at present, are legally barred, and from a practical standpoint are unable to offer content providers anything comparable. It is not hard to predict that without additional measures to safeguard high-value digital content, broadcast stations will soon find it difficult or even impossible to attract high-value programming. Sports leagues and entertainment programming producers will, naturally, choose to offer their programs on a service that can offer protection against indiscriminate redistribution.

Although some so-called “consumer groups” state that the enactment of broadcast flag legislation would be detrimental to the viewing public, which we believe it does not, the real threat to consumers who currently enjoy and benefit from watching their local broadcast channels is the slow demise of free over-the-air broadcast. Without national content, local broadcast stations would struggle to attract viewers and ultimately to stay in business. For millions of Americans, local broadcast stations are the sole source of news and entertainment. But even for consumers who subscribe to a cable or satellite service, local broadcast stations are the only source of televised local news coverage and editorial content. They televise local sporting events, weather reports (including emergency weather reports), and traffic updates. They are the source of information about community issues and local political races. Local television broadcasts are part of our heritage. They are uniquely American, and they are democratic (small “d”) at their essence.

Foreseeing these challenges and understanding the value of local television, I, along with my engineering colleague, began to look at how we could protect in-the-clear digital broadcast. As we looked at possible solutions we set up a basic set of criteria:

1. The regime should be invisible to the consumer.

2. The regime should allow consumers to make time shifted-copies of free over-the-air television programs.
3. The regime should be flexible enough to allow for the competitive market place to develop innovative protection technologies as well as allow for content to be transmitted securely in a network environment.
4. The regime should be of *de minimis* cost to the manufacturer and thus to the consumer.
5. The regime should work at the smallest component part of the digital ATSC receiver to ensure that it had no impact on any other component part of a computer or consumer electronic device.
6. The regime should not obsolete the digital television receivers that were already in the market place and in consumers' homes.

After settling on a solution that met all of these goals that we now call the Broadcast Flag, we presented this regime to a group of CE and IT manufacturers. Thus began the long process which evolved into a large and more diverse group of consumer electronics, computer technology, and video content companies known as the Broadcast Protection Discussion Group.

That conceptual framework developed by the Broadcast Protection Discussion group was the seed for the FCC's Broadcast Flag regulation. But it took time to get there, and it took a great deal of work—almost three years. Indeed, in preparing for this hearing, I was reminded that four years ago, the President and Chief Operating Officer of News Corporation, Peter Chernin, sat before this very Committee and expressed his hope that cross-industry negotiations would yield a solution acceptable to all of the participants. I am pleased to sit here today and report that they did. Over the years since Mr. Chernin's testimony in 2002, the members of the working group crafted the basic outline of the regulatory regime. Even so, the FCC didn't accept it whole cloth, but following still more discussion and debate—a process in which took into account the views of many consumer group—ultimately constructed a regulation that most of the parties to the negotiations viewed as an acceptable compromise of interests. Those that continued to disagree with substantive details of the regulation filed motions to reconsider and appeals. These were held in abeyance pending the outcome of an appeal based on a challenge to the FCC's jurisdiction.

Unfortunately, in May of 2005, the D.C. Circuit ruled that the FCC lacked jurisdiction to enact the Broadcast Flag regulation. The Court did not offer any view on the substance of the Flag, for that issue was not before it. Nor did the Court offer any view on the wisdom of the Broadcast Flag as a matter of policy, for that issue is not within its purview. Rather, the Court held merely that the FCC could enact such a regulation only if Congress authorized it to do so.

The Broadcast Flag legislation that we support does just that: it reinstates the FCC's Broadcast Flag regulation, thereby reinstating the carefully crafted multi-industry pact. It also reinstates the pending motions to reconsider and the substantive appeals, leaving all parties exactly where they were before last May's ruling.

Although the regulation has drawn criticism, that criticism is, in my view, misguided or misinformed. Much of it can be dispensed with by focusing on what the Flag will not do:

- It will not restrict home recording of DTV.
- It will not restrict the movement of recorded DTV shows in the personal digital network, no matter if you are upstairs at home, in your car or boat, or at a permanent or temporary vacation spot. The FCC has already approved some Flag-compliant technologies to enable that movement.
- It will not restrict the making of multiple physical copies. It does not restrict the unending physical copying of those copies. And it does not restrict where such physical copies may be played or to whom they are lent or given.
- It will not render obsolete or change the feature set of even one DTV product that has been sold to consumers to date. Not one.
- It will not affect the viewers' experience as they view their televisions or make their home recordings.
- It will not stifle innovation. Nor will it establish the FCC as the “Federal Computer Commission.” The FCC’s role under the regulation is simple and narrow: to consider proposals for specific protection methods for DTV content containing the Broadcast Flag and to approve those that provide a reasonable level of protection. Prior to the decision striking down the regulation, the FCC has already proven its ability to ably exercise this simple, well-defined role by approving 13 different protection methods—many of them developed precisely for the purpose of protecting DTV. This is stimulation of innovation—not stifling of it.

Indeed, a broad range of digital devices, including digital recorders and personal digital networking devices, already comply with the Flag’s rules. Examples include PVRs, D-VHS, DVD recorders, and computers and related technologies. Many other devices that do not even exist yet can be made to comply with the Flag’s rules. Wired or wireless, software or hardware, any future innovation complying with the Flag can receive, record and otherwise process digital television signals.

Ultimately, the Broadcast Flag Regulation will have little or no impact on consumers’ legitimate consumption and enjoyment of free over-the-air digital television. It will not interfere with a consumer making unlimited copies in a variety of media; it will facilitate a variety of home networking technologies and a variety of reasonable remote access technologies, as well as new technologies that have not yet even been conceived. In addition to protecting local broadcasting and helping to ensure the viability of the digital transition, the Broadcast Flag Regulation will stimulate American technological prowess in content protection and management technologies.

Thank you once again for the opportunity to address this important matter. I would be pleased to answer any questions.