

ERNEST F. HOLLINGS, SOUTH CAROLINA, CHAIRMAN

DANIEL K. INOUE, HAWAII
JOHN D. ROCKEFELLER IV, WEST VIRGINIA
JOHN F. KERRY, MASSACHUSETTS
JOHN B. BREAUX, LOUISIANA
BYRON L. DORGAN, NORTH DAKOTA
RON WYDEN, OREGON
MAX CLELAND, GEORGIA
BARBARA BOXER, CALIFORNIA
JOHN EDWARDS, NORTH CAROLINA
JEAN CARNAHAN, MISSOURI
BILL NELSON, FLORIDA

JOHN McCAIN, ARIZONA
TED STEVENS, ALASKA
CONRAD BURNS, MONTANA
TRENT LOTT, MISSISSIPPI
KAY BAILEY HUTCHISON, TEXAS
OLYMPIA J. SNOWE, MAINE
SAM BROWNBACK, KANSAS
GORDON SMITH, OREGON
PETER G. FITZGERALD, ILLINOIS
JOHN ENSIGN, NEVADA
GEORGE ALLEN, VIRGINIA

KEVIN D. KAYES, DEMOCRATIC STAFF DIRECTOR
MARK BUSE, REPUBLICAN STAFF DIRECTOR

United States Senate

COMMITTEE ON COMMERCE, SCIENCE,
AND TRANSPORTATION

WASHINGTON, DC 20510-6125

July 19, 2002

The Honorable Michael K. Powell
Chairman
Federal Communications Commission
445 12th Street, S.W.
Suite 8C453
Washington, DC 20554

Dear Chairman Powell:

I am writing to urge that you implement a 'broadcast flag' solution to protect digital content delivered over the broadcast airwaves. I believe the Commission has the authority, pursuant to specific statutory provisions in the Communications Act, as well as under its general public interest authority, to implement such a solution for the benefit of the digital television transition and consumers across America.

For the better part of a decade, the U.S. copyright industries, the consumer electronics industry, and the information technology industry have been engaged in negotiations over how best to protect copyrighted content transmitted over a variety of platforms, such as DVD players, analog VCRs, digital broadcast television, and the Internet. Notwithstanding some limited successes (for example with respect to copy protection for DVD players, conditional access systems for cable and satellite distribution, and analog VCRs) these talks have largely languished as technology has advanced. And as technology has advanced, copy protection schemes developed voluntarily in the marketplace have not kept pace. While the advance of technology has undeniably benefitted consumers, it also has facilitated piracy. The content industries are understandably reluctant to provide their top quality products in digital form in areas (such as over-the-air digital television) where potential piracy is a real threat.

This reluctance has real and adverse consequences for the digital television transition, for consumers, and for the broadcast industry. Absent robust protection, copyright owners may increasingly restrict their best television programming to cable and satellite networks, which are conditional access systems that can accommodate digital rights management ("DRM") solutions

that protect content. As you know, Congress and the Commission have mandated that local broadcasters construct digital facilities – at a significant cost – premised on the notion that widespread, high quality digital content will lead consumers to purchase digital television sets. But broadcast stations that have spent considerable capital to upgrade their facilities are currently denied access to a broad consumer base as consumers are unwilling to pay thousands of dollars for digital television reception equipment, when there is little high quality, digital broadcast content available in the absence of agreement on copy protection technologies.

In light of this growing problem, I am pleased that the leading representatives of the affected industries have come together to solve this problem. Broad multi-industry consensus has emerged around the appropriateness and feasibility of the ‘broadcast flag’ technology since it was originally proposed by a coalition of the motion picture studios and equipment manufacturers late last year. This consensus originated in talks organized by the Broadcast Protection Discussion Group (BPDG), which was set up in November 2001 specifically for the purpose of seeking input from all affected companies and interest groups on the technological merits of the “flag” proposal. The final report submitted by group Co-Chairs from Intel, Mitsubishi, and Fox on June 3, 2002 confirm that the fundamental technological aspects of the ‘broadcast flag’ proposal are now both fully understood and supported by numerous affected industry participants.

These developments represent a considerable achievement by the private sector. I would particularly like to commend the consumer electronics and information technology industry representatives for negotiating in good faith and agreeing on the need to protect digital broadcast content from redistribution over the Internet. Moreover, the representatives of the content industries warrant praise for agreeing to a proposed technological solution that allows consumers to make physical copies of digital content for use on compliant devices (consumer electronics devices designed to comply with the ‘broadcast flag’ technology), regardless of where those devices may be. This give and take by affected industry parties is exactly what I had hoped to achieve through introduction of broad bipartisan legislation earlier this year. While we do not want to have to legislate in this area, the industries must know that the government stands ready to ratify consensus agreements, and to step in if no agreements can be reached after a reasonable time is given for negotiations to move forward.

Indeed, additional legislation to protect digital content has already been announced in the House, on the heels of the successful ‘roundtables’ conducted by House Energy and Commerce Committee Chairman Billy Tauzin. I have discussed this matter with Chairman Tauzin, and look forward to working with him, and ranking member Dingell on this and other critical issues associated with the digital television transition. Similarly, our ranking member, Senator McCain has a long standing interest in this area and I expect that we will work together this August toward the development of DTV legislation.

With respect to a ‘broadcast flag,’ however, the FCC may act absent legislation. Such implementation is clearly authorized by statutory provisions in the Communications Act specifically delegating to the FCC wide authority to facilitate the digital television transition. For example, 47 U.S.C. § 336(b)(4) authorizes the FCC 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,” and 47 U.S.C. § 336(b)(5) grants the FCC the authority to prescribe regulations relating to advanced television services “as may be necessary for the protection of the public interest, convenience, and necessity.” It is beyond dispute that the public interest would be served by regulations protecting digital broadcast content; while at the same time preserving lawful consumer use of that content such as making a physical copy for time and/or device shifting purposes.

Moreover, I must note that intervention is consistent with the FCC’s authority under Title I of the Communications Act, which provide jurisdiction that is “reasonably ancillary” to its specific grants of authority over numerous telecommunications issues. Specifically, Title I grants the FCC the authority “to perform any and all acts, makes such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.” 47 U.S.C. § 154(i).

When the Commission acts to implement a ‘broadcast flag’ solution, it is critical that the views of all relevant interested parties, including consumer groups, be incorporated through the standard notice and comment process at the FCC to protect digital broadcast television from piracy. Any solution, and the process that led to it, must be credible and transparent. At the same time, however, given the central importance of broadcast content protection in expediting the digital television transition, it is imperative that the FCC quickly arrive at a final resolution and implementation.

Thank you for your quick attention to this important public interest matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Ernest F. Hollings". The signature is written in a cursive, flowing style with a large initial "E".

Ernest F. Hollings
Chairman