ORAL ARGUMENT HELD FEBRUARY 22, 2005

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DOCKET NO. 04-1037

AMERICAN LIBRARY ASSOCIATION, et al.,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, et al.,
Respondents.

MOTION PICTURE ASSOCIATION OF AMERICA, INC., et al.,
Intervenors for Respondent.

ON PETITION FOR REVIEW OF AN ORDER OF
THE FEDERAL COMMUNICATIONS COMMISSION

SUPPLEMENTAL BRIEF OF INTERVENOR MOTION PICTURE ASSOCIATION OF AMERICA, INC.

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SUMMARY OF ARGUMENT

Petitioners again have failed to establish standing to bring this petition for review. The Court should not be taken in by the volume of Petitioners' submission on standing. None of the declarations—not one—withstands scrutiny. Petitioners' declarations hypothesize potential injury contingent on future events, rather than demonstrate present injury caused by the regulation. And they presume, rather than demonstrate, that the Broadcast Flag regulation prohibits the transmissions in which they wish to engage. In fact, several technologies now permit what Petitioners wish to accomplish, and others may follow. Moreover, Petitioners have failed to address the fact that the regulation permits analog outputs. Petitioners also allege, falsely and without basis, that the regulation will force them to upgrade all of their equipment.

Petitioners' claims of harm rely on mere conjecture concerning possible future harms. Furthermore, the alleged harms are not fairly traceable to the regulation because they depend on the future acts or omissions of third parties not before the Court, namely technology manufacturers. In such circumstances, the proponents of standing have a significantly more rigorous burden, and Petitioners here fail to meet it.

A close examination of each of Petitioners' declarations confirms this analysis. It also reveals that Petitioners, in submitting their declarations here, have made an important concession: the problem the FCC was concerned about, indiscriminate

redistribution of digital broadcast content, is imminent. The FCC was therefore required to act to propel the digital transition forward.

ARGUMENT

I. Petitioners' Allegations of Harm Are Conclusory and Conjectural

Petitioners are associations claiming, for the most part, standing to sue on behalf of their members. An association has standing to sue on behalf of its members if "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977). The first test is met if a member of the association meets "the irreducible constitutional minimum" of first, "injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical;" second, "a causal connection between the injury and the conduct complained of . . . ;" and third, "it must be likely, as opposed to merely 'speculative,' that the injury will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (internal quotation marks omitted). The burden is on Petitioners to demonstrate that they have standing to challenge the Broadcast Flag regulation. *See Rainbow/PUSH Coalition v. FCC*, 330 F.3d 539, 542 (D.C. Cir. 2003). "A federal court is powerless to create its own jurisdiction by embellishing otherwise deficient allegations of standing." *Whitmore v. Arkansas*, 495 U.S. 149, 155-56 (1990).

Even accepting the factual allegations in their declarations as true, *see Sierra Club v. EPA*, 292 F.3d 895, 899 (D.C. Cir. 2002), Petitioners are still unable, after four attempts, to demonstrate that they will suffer any cognizable harm from the Commission's regulation as properly understood. Petitioners are not injured parties but interest groups that are philosophically opposed to any content protection, including the Broadcast Flag. Their declarations simply confirm that injury in fact rarely arises from "abstract questions of wide public significance." *Warth v. Seldin*, 422 U.S. 490, 499-500 (1975).

For the reasons explained below, this Court should find that Petitioners lack standing to proceed with their petition for review.[1]

A. Petitioners' Allegations Are Conclusory and Misdescribe the Broadcast Flag Regulation

Petitioners rely heavily on three erroneous assumptions made throughout the submitted declarations. First, several of the declarations summarily assert that the Broadcast Flag regulation will interfere with their future intended use of digital broadcast content because it will prohibit all transmissions of such content over the Internet. *See* Cooper Aff. ¶ 12; Gordon Aff. ¶ 8; Hoon Aff. ¶ 10; Lessig Aff. ¶ 5; Schlaver Aff. ¶ 3; Templeton Aff. ¶ 3. The regulation does not sweep so broadly. In fact, the Commission expressly stated that its order did not "foreclose use of the Internet to send digital broadcast content where it can be adequately protected from

[1] Regardless of the outcome of the Court's inquiry into Petitioners' standing, the declarations submitted here are outside the record and cannot be considered in order to supplement the administrative record on the merits. *See Northwest Environmental Defense Center v. Bonneville Power Admin.*, 117 F.3d 1520, 1528 (9th Cir. 1997).

indiscriminate redistribution." JA 1259. The Commission has subsequently approved thirteen technologies for use with digital television receivers, two of which allow transmissions over the Internet.[2] None of the declarants address whether the technologies approved for use with the Internet meet their needs, and none claim that future technologies will be unavailing. Such unsupported allegations are reminiscent of the declarants' statements in *Rainbow/PUSH Coalition* that identified as harms an unspecified "loss of 'job opportunities'" and "deprivation of 'program service in the public interest.'" *Rainbow/PUSH Coalition v. FCC*, 330 F.3d 539, 544 (D.C. Cir. 2003). Here, as in *Rainbow/PUSH Coalition*, a mere unsupported claim of harm from an agency action is insufficient.

Second, declarants assume that their desired uses can only be made by means of digital outputs; few consider the availability of analog outputs on their receivers or the important fact that the regulation does not extend to analog outputs at all. Unprotected analog outputs are permitted under the regulation, even for new, compliant digital television receivers. *See* 47 C.F.R. §§ 73.9003(a)(1), 73.9004(a)(1). It is very likely that the declarants' current equipment—such as DVD recorders—has analog inputs and outputs, and will continue to function compatibly with other equipment for the lifespan of such products.

Some declarants express a fear that analog outputs may no longer be available when their current receivers expire. *See* Godwin Aff. ¶ 12; McLaren Aff. ¶ 14. Mere fear is not sufficient to create standing. *See Northwest Airlines, Inc. v. FAA*, 795 F.2d

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[2] *See Digital Output Protection Technology & Recording Method Certifications*, Order, 19 FCC Rcd 15876 (2004). Two more technologies are pending.

195, 202 (D.C. Cir. 1986). It is possible that analog outputs may some day be protected—a result the MPAA favors—but this Court must consider the regulation that is currently before it. To the extent Petitioners' claims depend on potential future conditions, they are insufficiently "real and immediate" to confer standing. *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983). Two declarants assert that using analog outputs is "difficult and time-consuming," but neither provides any support for that notion. *See* McLaren Aff. ¶ 14; Templeton Aff. ¶ 10. In fact, using analog outputs is as simple as inserting a plug.[3]

Third, several declarants assert, without basis, that the Broadcast Flag will force them to upgrade all of their audiovisual equipment. *See* Gherman Aff. ¶¶ 8-9; Godwin Aff. ¶ 10; Hoon Aff. ¶ 11; Kasianovitz Aff. ¶¶ 2, 9; Vogelsong Aff. ¶¶ 2, 10, 12. But as the Petitioners themselves recognize, the Broadcast Flag has absolutely no effect at all on existing equipment. *See, e.g.*, Pet. Br. at 54 (Broadcast Flag "has no effect whatsoever on those sophisticated enough to preserve legacy DTV tuners not equipped to recognize it"). The adoption of the Broadcast Flag will force no immediate upgrades. Nor did the declarants identify any specific future upgrades that would be necessary. In any event, "[a]llegations of possible future injury do not satisfy the requirements of Article III" because they are not "concrete in both a qualitative and temporal sense." *Whitmore v. Arkansas*, 495 U.S. 149, 156, 158 (1990).

[3] In any event, Petitioners have no right to access content in unencrypted digital form. *See Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 459 (2d Cir. 2001).

B. Petitioners' Claims of Harm Are Conjectural, Hypothetical, and Not Fairly Traceable to the Broadcast Flag Regulation

The Broadcast Flag regulation does not govern the behavior of Petitioners as consumers of digital broadcast television. Rather, it only applies to manufacturers and distributors of digital television receivers. Assuming *arguendo* that Petitioners wish to engage in legitimate activities[4] but no technology is currently available that meets their needs, that absence is due solely to the independent manufacturing decisions of third parties not before this Court. For example, Declarant Gordon wishes to e-mail digital broadcast clips to her students. *See* Gordon Aff. ¶ 6. The Commission has not barred e-mail transmissions of digital broadcast content *per se*, as long as "robust security can adequately protect the content and the redistribution is tailored in nature." JA 1282. The decision to develop a technology that will allow secure e-mailing of digital broadcast clips rests entirely with third parties, such as technology proponents.

Petitioners' claims of harm therefore depend on speculation that technologies addressing their needs will not be developed in time. Such conjecture is not sufficiently "actual or imminent" to give rise to Article III standing, however. While the Court must take the factual allegations made by declarants as true for the purposes of determining standing, *see Sierra Club*, 292 F.3d at 899, it may reject as overly speculative "allegations that are really predictions" of future harm, *United Transp. Union v. Interstate Commerce Comm'n*, 891 F.2d 908, 912 (D.C. Cir. 1989). The

[4] Whether such activities are "fair uses" pursuant to 17 U.S.C. § 107 cannot be determined on this record. A determination of fair use is dependent on the precise facts at issue and "calls for case-by-case analysis." *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994).

court does not have to credit claims of harm just because "the party (and the court) can 'imagine circumstances in which [the party] *could* be affected by the agency's action.'" *Northwest Airlines, Inc. v. FAA*, 795 F.2d 195, 201 (D.C. Cir. 1986). By issuing an opinion in such a case, the Court risks "deciding a case in which no injury would have occurred at all" to any of the declarants. *Lujan*, 504 U.S. 555, 564 n.2 (1992).

Standing is particularly tenuous when it relies upon "future actions to be taken by third parties." *United Transp. Union*, 891 F.2d at 912. Not only are the predictions of "imminent" harm conjectural in such an instance, but the causality link between the agency's action and the alleged injury is also undermined. For example, in *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976), the Supreme Court held that plaintiffs—indigents and organizations composed of indigents—did not have standing to challenge an IRS revenue ruling, because it was unclear that hospitals would take advantage of the favorable tax treatment offered by the ruling. *Id.* at 42-43. Similarly here, it is unclear how many technology proponents will submit transmission and recording technologies to the FCC, and what features those technologies may offer. *See also America West Airlines, Inc. v. Burnley*, 838 F.2d 1343, 1344 (D.C. Cir. 1988) (overcrowding at airports not traceable to agency approval of merger); *Florida Audobon Society v. Bentsen*, 94 F.3d 658, 670 (D.C. Cir. 1996) (no standing where injury depended on actions of numerous third parties). This is not a case where "the record presented substantial evidence of a causal relationship between the government policy and the third-party conduct." *National Wrestling Coaches Ass'n v. Dept. of Educ.*, 366 F.3d 930, 941 (D.C. Cir. 2004). Petitioners'

allegations make clear that, for the most part, Petitioners desire features that may be permissible under the regulation but have not yet been implemented in an approved technology. The absence of such permissible features can hardly be attributed to the FCC; it is due entirely to third parties.

As explained further below, the injury alleged here by many of the declarants is therefore speculative future injury that may or may not come to pass at all, depending on 1) the features of the technologies that third-party manufacturers submit to the FCC for approval, 2) how long the declarants' legacy television receivers last, 3) the length of time unprotected analog outputs remain available, and 4) whether declarants' plans to post clips of high-resolution digital broadcast television programs come to fruition. The fact an injury lies in the future "lessen[s] the concreteness of the controversy and thus [militates] against a recognition of standing." *Harrington v. Bush*, 552 F.2d 190, 208 (D.C. Cir. 1977). Petitioners' speculation here does not meet the "significantly more rigorous burden" to establish standing when future injuries are alleged. *United Transp. Union*, 891 F.2d at 913.

II. Petitioners' Specific Allegations of Harm Fail to Demonstrate Article III Standing

A close examination of the declarations submitted by Petitioners demonstrates that, even assuming in each instance that the contemplated uses are legitimate, which we do not concede, each falls short of meeting the "significantly more rigorous burden" for future allegations of injury. All of declarants' proffered harms either lie in the distant future, are bare allegations, or are based on misconceptions of the regulation.

A. Replacing Equipment

A number of the declarants allege that the Broadcast Flag regulation will force them to replace their existing equipment. *See* Gherman Aff. ¶ 15; Godwin Aff. ¶ 10; Hoon Aff. ¶ 11; Kasianovitz Aff. ¶¶ 2, 9; Seltzer Aff. ¶ 31; Vogelsong Aff. ¶¶ 2, 10, 12. For the reasons noted above, these statements are at best speculative. For example, Declarant Paul M. Gherman of the Vanderbilt University Library admits that the Vanderbilt Television News Archive currently uses "analog television tuner cards," Gherman Aff. ¶ 8, which would be unaffected by the Broadcast Flag. Gherman furthermore provides no allegation concerning whether other Archive equipment has analog inputs, which remain unaffected by the regulation. Gherman's statement that the Archive would "be forced to buy entirely new equipment" by the regulation, Gherman Aff. ¶ 15, as opposed to natural obsolescence, is thus a mere conclusion without any supporting evidence.

Other allegations of harm are similarly unsupported. *See* Hoon Aff. ¶ 11; Kasianovitz Aff. ¶¶ 2, 9; Vogelsong Aff. ¶¶ 2, 10, 12. None of the declarants indicate why replacement of their equipment will be necessary, given that the Flag is transparent to current equipment, and given the current prevalence of analog inputs on DVD burners and players. Although Declarant Mike Godwin asserts that his current DTV receiver has no analog outputs, his current receiver will be unaffected by the Flag, and he fails to note whether his other equipment lacks analog inputs. *See* Godwin Aff. ¶ 10. Declarant Diana Vogelsong fails to state whether American University's current content protection method, Blackboard, *see* Vogelsong Aff. ¶ 7, has been submitted for FCC approval as a digital output protection technology, or

whether any of the thirteen approved technologies would meet American University's needs.[5]

B. Making Digital Broadcast Programs Available to Students and Faculty

Some of the declarants assert that they wish to make broadcast television content available to students or researchers over the Internet or University computer networks. *See* Gherman Aff. ¶ 2; Gordon Aff. ¶ 7; Hoon Aff. ¶¶ 8, 12; Vogelsong Aff. ¶ 12. However, no declarant has specified how, exactly, the regulation will interfere with planned uses. Internet and local area network transmissions are not prohibited by the Broadcast Flag regulation. Yet Declarant Gherman of the Vanderbilt University Library claims that the Flag regulation "will prevent Vanderbilt University from streaming licensed broadcast news over the internet to subscribers," and "will also preclude us from making our collection available to the Vanderbilt faculty and student body over the thirty-three computers that are currently able to electronically access the archive from the campus library." Gherman Aff. ¶ 2.[6] Gherman does not state whether any technology that has already been approved by the Commission for use with digital broadcast content, or analog connections on the Archive's existing equipment, would fulfill either or both of these needs.

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[5] Vogelsong asserts in passing that such recordings are protected by the TEACH Act, 17 U.S.C. § 110, or other copyright law, but without further detail concerning the proposed use that cannot be determined.

[6] Gherman asserts a right to engage in such activities under 17 U.S.C. § 108(f)(3), Gherman Aff. ¶ 16, but it is not clear that the transmission of an unencrypted digital copy qualifies as "distribution by lending of a limited number of copies and excerpts" pursuant to that section. In any event, according to Gherman, the streaming is licensed from the network.

Declarant Rebecca Gordon states that the Flag regulation will interfere with her plans to use "a digital video recorder ('DVR') such as a Tivo to capture broadcast video clips." Gordon Aff. ¶ 6. Gordon does not specify whether she has a digital television or not, or what kind of inputs and outputs her TiVo will have. If it has analog inputs and outputs, which is likely for today's Tivo devices, her recording and retransmission of content will be unaffected by the Broadcast Flag. Declarant Vogelsong does not identify any specific plans to use digital broadcast television at all; she notes only that "[o]ur faculty are making increasing use of broadcast television and the internet in their courses." Vogelsong Aff. ¶ 12. Such "'some day' intentions" will not suffice to demonstrate injury. *Lujan*, 504 U.S. at 564.

Declarant Peggy E. Hoon states that she and the North Carolina State University Libraries will be thwarted from "assisting faculty members in using broadcast clips as part of their distance education courses." Hoon Aff. ¶ 2. However, neither Hoon nor the NCSU Libraries have prudential standing to "assert[ ] the rights or legal interests of others in order to obtain relief from injury to themselves." *Warth v. Seldin*, 422 U.S. 490, 509 (1975). Furthermore, even if prudential standing exists, Hoon has made no allegation of harm. She does not state whether the broadcast clips in question are made using digital outputs, whether the protection technology NCSU uses, WebCT, *see* Hoon Aff. ¶ 8, has been submitted to the Commission for approval, or whether another technology would serve her needs.

C. Transmission of Clips of Digital Broadcast Programs Over the Internet

Some declarants express a desire to transmit digital broadcast television content over the Internet outside of the educational context. Declarants Mark Cooper and Paul Schlaver state that they wish to convene "Internet town hall meetings" and display broadcast television clips during them. *See* Cooper Aff. ¶¶ 3, 12; Schlaver Aff. ¶ 2. Declarant Brad Templeton asserts that, at some indeterminate time in the future, he may wish to obtain recorded programs from family and friends. *See* Templeton Aff. ¶ 3. Again, these declarants make only conclusory and unsupported assertions that their contemplated uses are prohibited by the regulation. In addition, Templeton's "some day" intentions are not sufficient for standing.

D. Use of Digital Broadcast Programs on Weblogs

Some of the declarants express a desire to perhaps some day post broadcast television content on their Internet "blogs." *See* Godwin Aff. ¶ 8; Lessig Aff. ¶ 4; McLaren Aff. ¶ 12; Seltzer Aff. ¶¶ 25, 32. It is unlikely that approved technologies would permit web postings of protected digital broadcast television through digital outputs or recordings. Yet no declarant asserts that his or her *current* equipment lacks the capability to make clips of broadcast television or makes a credible claim that he or she will lack analog outputs and inputs on future equipment. Furthermore, none of the declarants has yet actually posted to their blogs broadcast television clips that they recorded, let alone digital broadcast televison clips. McLaren has obtained content from other websites. McLaren Aff. ¶¶ 7-9. Lessig has posted "video clips," but not "broadcast television clips," although he alleges an

unspecific plan to do so. Lessig Aff. ¶ 4. The EFF has "recorded" programs but not posted them. *See* Seltzer Aff. ¶ 25.

E. Equipment Manufacture or Repair

Finally, several declarants assert that they build, test, and repair consumer electronics and computer equipment. They claim that the Broadcast Flag regulation will interfere with these efforts. *See* Kelliher Aff. ¶ 2, Seltzer Aff. ¶¶ 14, 28, 31; Templeton Aff. ¶ 2. Regardless of the truth of the declarants' allegations, however, manufacturing and repair is not pertinent to the Petitioners' purposes. Petitioners have presented themselves to this Court not as manufacturers but as consumers and librarians. *See* Pet. Br. at 1. All three of the declarants are members of the EFF, which described itself in Petitioners' opening brief as "a nonprofit public interest organization dedicated to protecting civil liberties and free expression in the digital world." *Id.* at 2. The EFF has a diverse membership, but there is no evidence in the record that it has particular expertise in manufacturing or repair of computers and consumer electronics. *See Humane Society of the U.S. v. Hodel*, 840 F.2d 45, 57 (D.C. Cir. 1988). Permitting the petition to go forward on such a basis would make the EFF "no more than a law firm seeking to sue *in its own name* on behalf of a client (or a firm member) alleging injury from governmental action wholly unrelated to the firm." *Id.* at 58.[7]

[7] Nor can EFF claim harm from the Broadcast Flag regulation's impact on its attempts to undermine that regulation through its "Digital Television Liberation Project." *See* Seltzer Aff. ¶ 5; EFF: Television Front of Liberation Digital, *available at* http://www.eff.org/broadcastflag/. Such boot-strapping has been rejected by this Court in other contexts. *See National Treasury Employees Union v. United States*, 101 F.3d 1423, 1429 (D.C. Cir. 1996).

III. Petitioners Have Conceded That, Absent the Broadcast Flag Regulation, Widespread Use of Digital Television Programming Over the Internet Is Imminent

Regardless of the outcome on the issue of Petitioners' standing, Petitioners' supplemental submissions importantly contradict the arguments that Petitioners had previously made to this Court in opposition to the Broadcast Flag regulation. Although this Court cannot consider the Petitioners' factual allegations in its resolution of the merits, it can take cognizance of the tension between those allegations and Petitioners' earlier arguments.

In their opening brief, Petitioners challenged the relationship of the Broadcast Flag to the digital transition and questioned whether there was even "a problem that needed to be solved." Pet. Br. at 14. On reply, Petitioners went even further and denied there was any evidence "that distribution of *any type* of full resolution DTV content over the Internet is now, or will ever be, possible." Reply Br. at 27. Petitioners' submissions on standing, however, make it clear that even Petitioners' own members believe this argument to be meritless. The declarants express an intention to use digital broadcast television clips in Internet town hall meetings, on their Internet "blogs," in Internet lessons, and even by e-mail.

Petitioners therefore now admit that the easy copying and retransmission of digital broadcast programs will be concomitant with the digital transition, and they are bound to all the consequences of that admission. The capability to widely redistribute digital broadcast content, for good or ill, cannot be denied. Petitioners thus concede the very harm the Commission was concerned with and sought to manage by the Flag. The Commission has found that the digital transition depends

on consumer purchases of digital television sets in large enough numbers to meet the deadlines established by Congress, which in turn depends on the availability of high-quality programming on broadcast television.[8] The Commission's regulation was thus essential to its congressionally directed goal of furthering the digital transition. It seeks to prevent the harm to broadcast television and the digital transition that Petitioners themselves have identified by adopting a narrowly targeted solution: stopping only the "indiscriminate redistribution" of digital broadcast content. *See* JA 1259. Petitioners have not demonstrated that they are harmed by the Commission's actions.

CONCLUSION

Petitioners lack standing, and this Court therefore has no choice but to dismiss the petition for review for lack of subject-matter jurisdiction.

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[8] *See* JA 629; *Review of the Commission's Rules & Policies Affecting the Conversion to Digital Television*, Second Report & Order & Second Mem. Op. & Order, 17 FCC Rcd 15978, 16020 (2002) (separate statement of Chairman Powell).

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation specified in the Court's March 15, 2005 opinion in this matter because this brief contains 3,996 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2002 in 12-point Palatino Linotype.

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Dated: April 8, 2005

CERTIFICATE OF SERVICE

I, April Hughes, hereby certify that on April 8, 2005, I caused true and correct copies of the Supplemental Brief of Intervenor Motion Picture Association of America, Inc., to be served upon the following parties by next-day third-party courier delivery:

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