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February 26, 2002

VIA ELECTRONIC & HAND DELIVERY

William F. Caton  
Acting Secretary  
Federal Communications Commission  
445 12th Street, S.W., Room TWB204  
Washington, D.C. 20554

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OFFICE OF THE SECRETARY

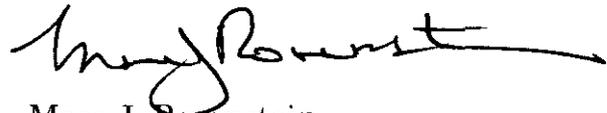
**Re: Ex parte presentation in CS Docket No. 97-80**

Dear Secretary Caton:

Pursuant to Section 1.1206 of the Commission's rules, enclosed is an original and one copy of a legal memorandum for inclusion in the record in the above-referenced proceeding. This memorandum is being filed on behalf of The Walt Disney Company, Fox Filmed Entertainment, Metro-Goldwyn-Mayer Studios Inc., Sony Pictures Entertainment Inc., Viacom Inc. and Vivendi Universal.

Kindly date-stamp the additional copy of this filing and return it to the awaiting messenger. Any questions concerning this submission should be addressed to the undersigned.

Respectfully submitted,



Mace J. Rosenstein

Enclosure

cc: Amy L. Nathan

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## MEMORANDUM

February 26, 2002

**RE: FCC Jurisdiction to Implement Protections to Prevent the Illegal Redistribution of Programming Distributed By Digital Broadcast Stations**

We have been asked to analyze whether the Federal Communications Commission ("FCC" or the "Commission") has the authority to implement protections to prevent the redistribution of programming broadcast by over-the-air digital television stations. <sup>1/</sup> For the reasons set forth below, we believe the Commission has such authority.

In the Telecommunications Act of 1996, the Congress added a new Section 336(b)(5) to the Communications Act of 1934 (the "Act"), expressly delegating to the FCC broad authority to implement a nationwide system of over-the-air digital broadcast television and directing the Commission, in order to carry out that mandate, to "prescribe such other regulations as may be necessary for the protection of the public interest, convenience and necessity." 47 U.S.C. § 336(b)(5). Congress also enacted Section 336(b)(4), which authorizes the Commission 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." *Id.* at § 336(b)(4). These statutory provisions, specifically directed to the implementation of digital broadcast television, make clear Congress' intent to confer on the Commission the authority to take such actions as it deems necessary to advance the public interest in the context of the digital transition.

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<sup>1/</sup> Existing technology can accommodate content protection for audio-video signals received by and/or displayed on digital media devices such as television receivers and monitors, set top boxes, DVD players and VCRs. As of this writing, however, the licensing entity responsible for this technology has not agreed to include a component that would protect against the illegal redistribution of broadcast programming not received by a conditional access.

There is no dispute that the public interest would be served by the protection of programming distributed *via* free, over-the-air digital television. <sup>2/</sup> Absent such protection, copyright owners could be reluctant, at best, to provide quality digital programming to broadcast stations and could, instead, restrict their digital content to cable and satellite networks or other conditional access systems that *do* enjoy the benefit of protection. As Rep. Boucher (D-Va) recently stated, "[e]nsuring [the] flow of quality content to broadcasters is critical in aiding [the] DTV transition" because a successful transition will be jeopardized unless digital broadcasters are afforded the same copy protections as those available to cable networks. <sup>3/</sup> Martin Franks, Executive Vice President of CBS, expressed the same sentiment in a hearing before the House Telecommunications Subcommittee when he stated that "without some measure of copy protection that makes unlawful piracy . . . more difficult, premium content, whether it is *Titanic* or *Survivor*, will not be made available to over-the-air broadcasters and will instead migrate to cable and satellite where its airing is more secure from piracy." <sup>4/</sup> In other words, failure to adopt protection technology comprehensively and across both over-the-air and wired distribution modalities would directly impede the development and availability of free, over-the-air digital television, contravening the Congressional mandate expressly embodied in Sections 336(b)(5) and 336(b)(4) of the Act. In order to avoid such disadvantageous outcomes for broadcasters and the public alike – and to discharge its mandate to ensure the efficient and timely transition to digital broadcasting – the Commission has authority under Sections 336(b)(5) and

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<sup>2/</sup> Congress and the Courts have cited the continuing importance of preserving free, over-the-air broadcast service as recently as the 1999 passage of the Satellite Home Viewer Improvement Act and the 2001 Fourth Circuit decision upholding the must-carry provisions therein. See *Satellite Broadcasting and Communications Assoc. v. FCC*, 275 F.3d 337, 351 (4<sup>th</sup> Cir. 2001) ("Congress concluded that the carry one, carry all rule would protect the ability of all local broadcasters to reach their audiences and thereby 'preserve free television for those not served by satellite or cable systems and . . . promote widespread dissemination of information from a multiplicity of sources.'" (citation omitted).

<sup>3/</sup> "Boucher Says Digital Tuner Mandate 'Absolutely' Is Needed," *Communications Daily*, Vol. 21, Issue 79, April 24, 2001, available at 2001 WL 5053027.

<sup>4/</sup> "New Fight Breaks Out Over Encrypting TV Broadcasts," *Communications Daily*, Vol. 21, Issue 53, March 19, 2001, available at 2001 WL 5052792. Studies have indicated that, as of early 2001, 350,000-400,000 files containing full-length movies were being downloaded *via* the Internet every day. That figure was expected to grow to *one million* downloads per day by the end of 2001. See "MPAA Says Napster-Type Problems Could Spread to TV, Films," *Communications Daily*, Vol. 21, Issue 45, March 7, 2001, available at 2001 WL 5052710.

336(b)(4) to require the implementation of protections against the illegal redistribution of broadcast programming. 5/

The authority conferred by Sections 336(b)(5) and 336(b)(4) is consistent with the Commission's authority under Title I and Title III of the Act to intervene on the redistribution protection issue because doing so would be "reasonably ancillary" to its jurisdiction over broadcasting. 6/

The Act confers upon the Commission the broad authority to "perform any and all acts, make such rules and regulations, and issue such orders . . . as may be necessary in the execution of its functions." 47 U.S.C. § 154(i). The Act separately provides that the Commission may, in the broadcast context, "[m]ake such rules and regulations and prescribe such restrictions . . . as may be necessary to carry out the provisions of this Act . . . ." *Id.* at § 303(r).

In enacting the Act, Congress intended "to confer upon the Commission sweeping authority to regulate 'in a field of enterprise the dominant characteristic of which was the rapid pace of its unfolding.'" *Office of Communication of the United Church of Christ v. FCC*, 707 F.2d 1413, 1423 (D.C. Cir. 1983) (quoting *National Broadcasting Co. v. United States*, 319 U.S. 190, 219 (1943)). The Act was meant to be a "supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy." *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940). The Commission, as the "single Government agency with 'unified jurisdiction' and 'regulatory power over all forms of . . . communication,'" is granted "broad authority" to fulfill its regulatory responsibilities. *U.S. v. Southwestern*

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5/ The Commission previously recognized the importance of copy protection for digital video content when it held that its rules pertaining to navigation devices do not preclude cable operators from requiring equipment manufacturers to incorporate copy protection technology into their products. See *In re Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices*, 15 FCC Rcd 18199, 18209 (¶¶ 25) (2000). While the Commission's declaratory ruling in this proceeding did not explicitly endorse the imposition of redistribution protection requirements on equipment manufacturers, the Commission stated clearly that it would "take appropriate action" to ensure that the implementation of copy protection technology across different sectors did not disadvantage one industry participant vis-à-vis others, to the detriment of copyright holders and, indirectly, the public. *Id.* at 18211-12 (¶¶¶ 29, 31).

6/ Significantly, Congress expressly granted the Commission expansive powers to regulate the transition to digital television through Sections 336(b)(5) and 336(b)(4). This stands in marked contrast to congressional intent in other contexts (e.g., the video description rules), where the legislative history shows that Congress expressly limited the Commission's authority. See *Implementation of Video Description of Video Programming*, 15 FCC Rcd 15230, 15273-76 (2000) (Comm'r Powell dissent).

*Cable Co.*, 392 U.S. 157, 167-68 (1968) (quoting legislative history of the Act) (footnotes omitted); see also *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 700 (1984); *Metropolitan Council of NAACP Branches v. FCC*, 46 F.3d 1154, 1162 (D.C. Cir. 1995); *United Video, Inc. v. FCC*, 890 F.2d 1173, 1182-83 (D.C. Cir. 1989); *NARUC v. FCC*, 746 F.2d 1492, 1499, 1501 (D.C. Cir. 1984); *Wold Communications, Inc. v. FCC*, 735 F.2d 1465, 1474-76 (D.C. Cir. 1984).

Consistent with this grant of "sweeping authority to regulate," the Supreme Court has recognized that the Commission has authority over matters "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting." *U.S. v. Southwestern Cable Co.*, 392 U.S. at 178. In *Southwestern Cable*, the Commission promulgated rules imposing requirements on cable television system operators in the absence of any specific statutory delegation of jurisdiction. The assumption of jurisdiction by the Commission in *Southwestern Cable* was based on the Commission's concern that "the likelihood or probability of [CATV's] adverse impact upon potential and existing [broadcast] service has become too substantial to be dismissed." *Id.* at 165 (citations omitted). Specifically, the Commission feared that cable systems' "importation of distant signals into the service areas of local stations also may 'destroy or seriously degrade the service offered by a television broadcaster,' and thus ultimately deprive the public of the various benefits of a system of local broadcasting stations." *Id.* at 175 (citation omitted). The Supreme Court found that "the Commission has reasonably concluded that regulatory authority over CATV is imperative if it is to perform with appropriate effectiveness certain of its other responsibilities." *Id.* at 173.

Broadcast copy protection raises precisely the same type of issue that the Commission confronted in *Southwestern Cable*: the lack of protection will directly and adversely affect broadcasters, and, in turn, the public. In *Southwestern Cable*, the Commission regulated the importation of distant broadcast signals by cable systems and imposed certain non-duplication requirements on cable systems in order to protect broadcast stations – and, in turn, the viability of free, over-the-air television – from audience erosion. The Supreme Court found that these aspects of cable regulation were sufficiently related to broadcasting that they fell within the ambit of the Commission's jurisdiction -- notwithstanding the lack of an express Congressional grant of authority to regulate cable systems. The protection of the content of digital broadcast transmissions, by definition, relates directly to broadcasting and therefore falls squarely within the Commission's jurisdiction; moreover, as in *Southwestern Cable*, the availability of quality programming through free, over-the-air television will be adversely affected in the absence of Commission action.

The Supreme Court has recognized and endorsed the Commission's jurisdiction to take action not only to protect television broadcasting, but more generally to advance the underlying policy imperatives of the Communications Act. In the case that the D.C. Circuit has called a "giant step beyond *Southwestern [Cable]* in relaxing the nature of the ancillarity necessary to support an assertion of Commission power

...", *NARUC v. FCC*, 533 F.2d 601, 616 (D.C. Cir. 1976), the Supreme Court agreed that the FCC had jurisdiction to impose local origination requirements on cable systems merely because the regulation served the same purposes as those imposed on broadcast stations. *U.S. v. Midwest Video Corp.*, 406 U.S. 649 (1972). Although, as noted above, implementation of broadcast redistribution protection will promote the broad policies underlying the Act in general, and the mandates of Sections 336(b)(5) and 336(b)(4) in particular, the Commission may assert its jurisdiction over this matter even without taking a step beyond the *Southwestern Cable* doctrine. The Commission can assert its jurisdiction here because -- unlike the admittedly attenuated relationship between broadcasting and the regulation of local origination on cable systems -- broadcasters, and, in turn, the public, will suffer direct adverse consequences if over-the-air digital transmissions are not protected.

In *Southwestern Cable*, the Supreme Court cited other decisions in which it had determined that the court "... may not, 'in the absence of compelling evidence that such was Congress' intention . . . prohibit administrative action imperative for the achievement of an agency's ultimate purposes.'" *Southwestern Cable*, 392 U.S. at 177-78 (quoting *Permian Basin Area Rate Cases*, 390 U.S. 747, 780 (1968) (omission in original). Compare *id.*, with *National Broadcasting Co.*, 319 U.S. at 219-220 and *American Trucking Ass'ns. v. U.S.*, 344 U.S. 298, 311 (1953). There is no indication that Congress would object if the Commission were to take steps here that clearly would advance the express Congressional goal of a timely DTV transition. To the contrary, Rep. Upton (R-Mich.) recently stated that "speeding up the DTV transition 'is [his] number one priority.'" 7/

The Commission routinely regulates various characteristics of television reception equipment, prescribing rules, for example, that (i) require manufacturers to abide by standards so that the equipment they produce is capable of receiving certain types of broadcast signals; 8/ (ii) ensure that television receivers are capable of receiving all over-the-air television channels (47 C.F.R. § 15.117(b)); (iii) require the incorporation of technology to permit blocking of certain programming based on content ("v-chip" technology) (47 C.F.R. § 15.120); (iv) require television sets to be capable of displaying closed captions (47 C.F.R. § 15.119); (v) require television set manufacturers to provide an equivalent antenna for the reception of UHF channels as that provided for VHF channels (47 C.F.R. § 15.117(e)); and (vi) establish maximum noise figures and

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7/ "Broadcasters Say Tuners, Compatibility Are Becoming Key DTV Issues," *Communications Daily*, Vol. 22, Issue 31, February 14, 2002, available at 2002 WL 5240617.

8/ See *In re Amendment of the Commission's Rules Governing Color Television Transmissions*, 41 FCC 658 (1953) (establishing NTSC transmission standard for television broadcasting).

picture sensitivity standards (47 C.F.R. §§ 15.117(f) and (g)). <sup>9/</sup> As these rules demonstrate, the Commission has not hesitated, historically, to impose regulations on equipment manufacturers. <sup>10/</sup>

Viewed against this backdrop, it is clear that, in seeking the implementation of broadcast redistribution protection, content providers are not asking the Commission to take extraordinary action, or to assume jurisdiction over issues that are not central to the rollout of DTV, or to act in a manner inconsistent with the express will of the Congress. To be sure, if this were a request for the Commission to require equipment manufacturers to, say, enter a new line of business, or to manufacture only large digital television sets based on the belief that programming looks better on a big screen, ancillary jurisdiction would not properly lie.

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In *Southwestern Cable*, the Supreme Court gave credence to the Commission's decision to take action to protect television stations based on the Commission's belief that "we are in a critical period with respect to UHF development." 392 U.S. at 176, n.44 (citation omitted). The redistribution protection issue in this proceeding similarly comes at a critical juncture for DTV. Indeed, it is a tail that could wag the dog of the DTV rollout if the broadcast redistribution issue is allowed to remain unresolved.

Absent action by the Commission to protect digital content from unauthorized reproduction, a new service that both Congress and the Commission have fostered -- DTV -- will founder. The Commission drove television broadcast stations to construct digital facilities at a pace unprecedented in the history of the rollout of new technologies on the theory that the availability of digital content would prompt consumers to acquire digital reception equipment. This theory, and the tremendous

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<sup>9/</sup> Express statutory authority has not proven to be a prerequisite for regulating equipment manufacturers. Indeed, the Commission prescribed standards for color television broadcasting in the absence of an explicit statutory mandate, *id.*, and the Commission also has established standards for other aspects of broadcasting that extend to equipment manufacturers by virtue of their relationship to broadcasters.

<sup>10/</sup> Although the Commission to date has not established DTV receiver standards, it has committed to "monitor DTV receiver designs and address any problems that may arise." *In re Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service*, 12 FCC Rcd 12809, 12856 (¶ 113) (1997). More recently, the Commission has repeated that, although it "declined to adopt technical performance standards for DTV receivers" in the past, it would "continue to monitor receiver issues throughout the transition and would take appropriate action on receiver standards if necessary." *Review of the Commission's Rules and Policies Affecting the Conversion To Digital Television*, 16 FCC Rcd 20594, 20596 (¶ 5) (2001).

financial and human resources that have been mobilized to advance it -- requires that digital broadcast stations have protected digital content to deliver to consumers.