[US] FCC's Jurisdiction to Adopt Broadcast Flag Rule Challenged

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In order to avoid the "napsterization" of digital television broadcasts, the FCC in November 2003 adopted a new, controversial, and extraordinarily broad regulatory regime (known as the "broadcast flag scheme"). This regulatory regime mandates the use of "authorized" content protection technologies by virtually every consumer electronics product and computer product - including digital television sets, digital cable set-top boxes, direct broadcast satellite ("DBS") receivers, personal video recorders (PVRs), DVD recorders, D-VHS recorders, and computers with tuner cards. (A full-featured tuner card makes a computer into a digital television, PVR, and VCR in one).

The broadcast flag is a set of bits embedded in a digital stream (a standard adopted by the Advanced Television Systems Committee) that signals "the bits following this set of bits are to be protected." The flag is itself a very simple signal. It is the implementation of the flag that matters. Specifically, the order requires that all devices manufactured after July 2005 that can receive TV signals (including PCs equipped with a tuner card) (1) check for the presence of the flag; (2) store and record flagged content using "authorized technologies"; and (3) allow transmissions through digital interfaces (and only protected digital interfaces) only to other devices that have an approved copy-protection system installed. As a practical matter, this means that the flagged digital content is thereafter blocked from distribution (1) to any other electronic device (like a cell phone or PC or DVD recorder) unless that device is itself compliant with the flag scheme, or (2) over the internet. Until the FCC can settle on a new regime for approval of "authorized" technologies, it itself is deciding (with a great deal of input from the content industry) which copy protection technologies manufacturers are allowed to use.

In the course of defending its authority to regulate equipment manufacturers in order to effectuate the flag scheme, the FCC has broadly asserted that it has had jurisdiction since 1934 over any device that is "associated with the overall circuit of messages sent and received over all interstate radio and wire communication." In other words, FCC is claiming that anything that has some relationship with a US wire or radio communication is subject to its design authority. This breathtaking assertion sweeps within its boundaries all computers, car radios, VCRs, portable music devices, and bedside alarm clocks. The FCC's jurisdiction to adopt the flag rule has been challenged in a lawsuit brought by consumer groups before the

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federal D.C. Circuit Court of Appeals. That court heard arguments in late February 2005, and observers are confident that the FCC will be found to have lacked jurisdiction to enter the rule. The broadcast flag issue will likely be the subject of Congressional legislation in the coming year -- and we will begin again at the beginning.

FCC Report and Order and further Notice of proposed Rulemaking In the matter of Digital Broadcast Content Protection (MB Docket 02-230), 4 November 2003

http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-03-273A1.pdf?date=031104

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