Testimony of
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Intellectual Property
Committee on the Judiciary
U.S. House of Representatives

Oversight Hearing on
“Content Protection in the Digital Age: the Broadcast Flag, High-Definition
Radio, and the Analog Hole”

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Executive Summary of Testimony by Dan Glickman, Motion Picture Association of America

Protecting intellectual property is critical to the economic health of our nation. This country will prosper or it will fail in large part by how we protect our nation’s greatest assets ... the skill, ingenuity and creativity of our people.

The transition into the digital environment presents great opportunities and great challenges to the American film industry. The capabilities of digital technology enables the American film industry to provide new and better viewing choices to consumers. These same capabilities also greatly facilitate illicit use of audiovisual material, as well as other types of intellectual property. Illicit DVDs and other hard goods piracy costs the American film industry some $3.5 billion annually, and as much as two-thirds of Internet bandwidth is being used to support illicit peer-to-peer traffic in movies and other copyrighted works. Organized criminal gangs are finding movie piracy more lucrative than selling drugs.

Digital technology has made it far more easy for otherwise law abiding consumers to engage in illicit reproduction and distribution of movies, which has the same debilitating economic impact on our industry as commercial piracy. We must develop secure delivery systems so we can offer consumers the viewing options they desire while maintaining a sound fiscal base to sustain our industry.

We are embracing Digital Rights Management technologies that enable us to offer consumers more choices at a greater variety of price points. We are working with technology companies to develop and implement secure delivery systems – the DVD being a prime example – supported by technical measures and voluntary contractual relationships. However, there are some areas where private sector solutions alone will not work. Congressional action is needed to plug the analog hole and reinstitute the Broadcast Flag.
Analog hole refers to the problem created by the conversion of digital material protected by digital rights management systems to an analog format, and then back to digital. The result of this conversion process is to strip away the digital rights management protections, leaving the content "in the clear" and vulnerable to illicit reproduction and distribution. Some consumer devices are being specifically designed to take advantage of the analog hole, which impedes our ability to offer legitimate viewing choices and delays the digital transition. Legislation is needed to require that devices which convert analog material to a digital format recognize and respond to digital rights management information.

The Broadcast Flag refers to regulations adopted by the FCC that enable owners of high value content broadcast by digital TV stations to prevent the indiscriminate redistribution of that material over the Internet. The ability to control such redistribution of satellite and cable programming already exists through contractual agreements. Legislation is needed to allow the FCC to implement these regulations and place free, off-air broadcasters on a level playing field with cable and satellite distribution systems.

Both the analog hole and broadcast flag have been subject to intense, multi-industry discussions and there is broad agreement that these are issues that need to be addressed. The discussion draft legislation released by the Subcommittee is fully consistent with industry consensus on how these issues should be resolved and should be enacted promptly.

This legislation should not be combined with H.R.1201 which would in effect repeal the anticircumvention provisions of the DMCA. Such a "compromise" would be antithetical to the interests of all owners of copyrighted property and impose great harm on some of America's most important economic assets.

Chairman Smith, Ranking Member Berman, members of the Subcommittee:

On behalf of the member companies of the Motion Picture Association of America, I thank you for the opportunity to talk to you about the future of an important American industry as it transitions into the digital age.

As a former member of the Judiciary Committee, I know what it is like to be on your side of the table. As members of this esteemed Committee, you all have to make important judgments about what the laws of the land should be. And sometimes, you have to make tough calls.

Chairman Smith, you have called this hearing at a critical time for our industry, but also at a critical time for this nation.

Protecting intellectual property will become a resounding theme for our economy in the decades to come. This nation will prosper or it will fail in large part by how we protect our nation’s greatest assets...the skill, ingenuity and creativity of our people.

The American film industry, like all of the creative industries, combines capital and talent to produce intellectual property. It is not easy to create a movie. It requires lots of money, lots of skilled workers, and lots of hard work. In fact, four out of ten movies don't make back their investment. So the movie industry is fraught with risk. Despite these hurdles, the American film industry is the most successful in the world. It is one of our most important exports. It is one of our best job creators.

The member companies of the MPAA are excited about the future. They are working hard to make a successful transition to the digital world. They want people around the globe to see their product in a no-hassle, convenient and low cost way.
But while the industry embraces the many opportunities of the future, it also faces the distressing reality of piracy.

The pilfering of our films costs our industry approximately $3.5 billion dollars a year in hard goods piracy (DVD, VCD) alone. On the Internet front, it has been estimated that as much as two-thirds of Internet bandwidth in this country is consumed by peer-to-peer traffic, with much of that volume attributable to movie theft.

And it is only getting worse. Pirating DVD’s is more lucrative than selling heroin or crack cocaine for many criminal gangs. New digital technology enables criminals to download movies, burn them onto DVD discs, and then sell them on the streets or through a global storefront on the Internet with amazing speed.

The MPAA is doing its part to fight back. Using the legal tools that in many cases this Subcommittee fashioned, we work very effectively with the U.S. Department of Justice, the FBI, Customs and local law enforcement to crack down on these gangs. We also are providing more and more legal alternatives for on-line movies. We are working to help our schools teach kids that stealing on the Internet is as wrong as stealing from a store. We are investing in the future to find cutting-edge technologies that will get movies to consumers while protecting copyrights. And we are working with our colleagues in the consumer electronics, computer and online service provider industries on the development and implementation of digital rights management (“DRM”) technologies to offer consumers a wider array of choices for enjoying the content we produce.

But commercial piracy is not the only challenge we face in the new digital environment. We also must develop secure delivery systems so we can offer consumers the viewing options they desire while maintaining a sound fiscal base to sustain our industry. We are embracing DRM technologies so that we can offer consumers more choices at a greater variety of price points: one consumer may want to purchase a permanent copy of a movie while another may want to watch it only once—and at a lower price. To sustain the viability of this array of different offers, however, we must be able to maintain the distinction among them. Thus, we need to provide technical safeguards to discourage, for example, the copying of a “view once” option that has been selected by a consumer. In using the phrase "technical safeguards" I do not mean to imply that we seek absolute protection against unauthorized use of our movies. We understand that committed pirates will break any security measures we can devise and these pirates will have to be dealt with by way of criminal and civil legal remedies.

However, we can, and must, implement basic technological measures to delineate for consumers the differences among our various content offerings and to discourage what I call "casual misuse" of our intellectual property. At the end of the day, the economic impact of a thousand otherwise law abiding citizens making an extra copy of a movie they purchased and “sharing” it with a friend has the same impact as a single commercial pirate selling a thousand copies of a movie on a street corner.

In many cases, the DVD being a prime example, we have worked with the technology companies to develop and implement secure delivery systems supported by technical measures and voluntary contractual relationships. However, there are some areas where private sector solutions alone will not work. That's where we need your help.

First, you can help us plug the analog hole.

What is the analog hole?
Let me try to explain it as simply as I can.

While film content is increasingly arriving into American homes in protected digital form, such content must be converted into an analog format to be viewed on the overwhelming majority of television sets in U.S. households, which can only process and display an analog signal. When digital content protected by digital rights management technology is converted to analog form for viewing on existing analog television equipment, the content is stripped of all its protections. This analog content can then be redigitized “in the clear,” without any protections whatsoever. This redigitized and completely unprotected content can then be efficiently compressed, copied and redistributed without degradation. It can also readily be uploaded to the Internet for unauthorized copying and redistribution. Like a black hole, the analog hole sucks in all content protections, leading to two problems. First, it eliminates the “lines” or boundaries among the different viewing opportunities we are trying to bring to consumers and makes it difficult to sustain the choices for consumers that digital rights management technologies otherwise help facilitate. Second, it creates a significant loophole for our industry in the fight against piracy.

This is not an idle concern. Already, several consumer electronics devices are being conceived and brought to market purely for the reason of exploiting the analog hole. Movie studios are actively engaged in developing and offering innovative new business models to give consumers greater flexibility and more choices for how and where they access and enjoy movies and television shows. All of these models depend, however, upon a secure environment which protects this high-value content from rampant theft and redistribution. Devices that permit exploitation of the analog hole, whether by design or otherwise, undercut this framework and consequently limit the viewing choices that can be made available to consumers.

Because of the ease with which it can be exploited, the analog hole creates a gaping hole in digital rights management protections, allowing high value content to be copied and re-transmitted without limit. Of particular significance is the fact that exploitation of the analog hole requires no act of circumvention nor any unauthorized circumvention devices prohibited by the Digital Millennium Copyright Act (DMCA.) Instead, the analog hole can be exploited solely through the use of general purpose home equipment. In some cases such equipment is specifically designed to permit people to take advantage of the analog hole to defeat digital rights management measures. In other cases, analog inputs and outputs serve a legitimate purpose and the analog hole is a byproduct. Closing the analog hole would place these analog devices on an equal footing with all-digital devices by maintaining the integrity of digital rights management measures.

Legislation will be required to implement an analog hole solution to create a level playing field for device manufacturers. Legislation will help ensure that good actors are not disadvantaged by companies who do not play by the rules. Such legislation should be narrowly focused and targeted.

The MPAA and its member companies have worked closely with representatives from the computer and consumer electronics industries to reach consensus on a technological solution for the analog hole. These talks have been productive and have shown positive movement. Virtually every major consumer electronics and information technology company as well as a number of self styled “consumer” groups, including the Electronic Frontier Foundation, participated in an Analog Conversion Working Group where a broad consensus was reached on the need to address the analog hole problem and on the attributes a solution should have.

The discussion draft legislation released by the Subcommittee is consistent with that consensus. It provides for a robust analog rights signaling mechanism that does not
interfere with a consumer's ability to fully enjoy the content they receive. Known as “CGMS-A plus Veil,” Analog Copy Generation Management System (CGMS-A) coupled with the Veil Technologies Rights Assertion Mark provides a practical degree of protection from unauthorized reproduction and redistribution while not diminishing a consumer's viewing experience.

Second, Congress can help protect content by giving the Federal Communications Commission (FCC) authority to implement the broadcast flag regulations which it adopted over two years ago and that were to become effective last July. The marketplace has already anticipated that the broadcast flag will be required and many manufacturers of digital television devices are now producing equipment in compliance with the FCC broadcast flag regulations. Moreover, consumer equipment that renders high value cable and satellite programming will be required to prevent redistribution whether or not the FCC rules are reinstated. It is important to note that there has been no discernable consumer resistance to these broadcast flag compliant devices and no surge of consumer complaints.

Why has most everyone, device manufacturers and consumers alike, accepted the broadcast flag? Because it makes eminent good sense.

The broadcast flag protects free, over-the-air digital television programming from unauthorized redistribution over the Internet. It is the product of several years of negotiations among broadcasters, electronics manufacturers, computer technology and video content companies.

The broadcast flag rule is targeted and narrowly focused on a single problem. The only activity affected by the broadcast flag is the indiscriminate redistribution of digital broadcast television content over the Internet. As long as one is not trying to redistribute flagged content over the Internet, a typical consumer will not know the broadcast flag exists. Under the rule adopted by the FCC, consumers are free to continue to time-shift over-the-air television. In fact, because the rule is targeted narrowly at unauthorized redistribution, and not consumer copying, it allows an unlimited number of copies to be made – even infringing ones – provided those copies are protected against further distribution over the Internet. Even Internet retransmission is not barred outright under the rule, provided it can be done in a way that protects against indiscriminate redistribution. Picture and sound quality are also unaffected.

The protection provided by the broadcast flag will play an important role in successful transition to digital television. If program producers cannot be assured that programming licensed to broadcast television is protected as securely as programming licensed to cable and other subscription based outlets, these producers will inevitably move their programming over to such channels where protections are available through contractual arrangements. The broadcast flag is essential to a successful digital television transition and preservation of free, over-the-air digital television.

It is essential that Congress act quickly to enact narrowly crafted legislation to reinstate the FCC's Broadcast Flag ruling, and such legislation should become effective immediately. As stated above, broadcast flag compliant equipment is already being produced and is in the marketplace. Delay will materially worsen the legacy equipment problem and is completely unnecessary.

I want to emphasize that both the Analog Hole and the Broadcast Flag have been the subject of intense scrutiny by technology and content communities, as well as other interested parties, in open forums consuming literally thousands of man-hours of discussion. It is a documented fact that there is broad consensus that these are
issues that need to be addressed. There is also broad consensus on the nature of the solutions that should be considered. I believe the discussion draft legislation released earlier this week is fully consistent with that consensus and should be swiftly enacted.

Let me add one cautionary note. While we strongly support legislation that will plug the analog hole and implement the broadcast flag, we cannot support legislation that will do that at the expense of the anti-circumvention provisions of the DMCA. I would submit that efforts to include HR 1201, which would, as a practical matter, repeal Section 1201 of the DMCA, would do much more harm than good. It has been suggested by members of another committee that attaching HR 1201 to a broadcast flag would make a good compromise. In my view, that type of legislation would simply compromise efforts to fight piracy and hurt an important American industry.

Chairman Smith, Ranking Member Berman, members of the Committee, I appreciate this opportunity to discuss these matters of concern to our industry and I look forward to answering any questions you may have regarding what I have just discussed.