

2003 CEA HDTV SUMMIT

Insight From Inside the Beltway

Moderator: Michael Petricone - Vice President, Technology Policy, CEA

Panelists: Rick Chessen - Chairman, DTV Task Force, FCC
Johanna Mikes - Legislative Counsel, Office of Congressman Rick Boucher
Jessica Wallace - Counsel of the House Energy and Commerce Committee

GARY SHAPIRO

This is a panel of people that actually make the decisions that others simply talk about. They work everyday within US legislative bodies to push the digital broadcasting industry toward a future defined by consumers as well as other bodies; executive branch bodies, and independent agencies. The future they are determining will affect consumers, manufacturers, broadcasters and content providers. Their diligent efforts are evident in moves such as the FCC's recent notice of proposed rule-making regarding proposed rules for plug and play compatibility between digital cable systems and one-way digital cable television receivers. In September's draft legislation prepared by the House Energy and Commerce Committee contained many laudable provisions to accelerate the transition to digital television. Please allow me to introduce this panel's moderator. Michael Petricone who, as late as last night, I ran into in our office. He is the Vice President of technology Policy for the Consumer Electronics Association. He handles technology policy and regulatory issues for the Association; in particular, work involving Congress and the FCC. Please welcome Michael Petricone.

MICHAEL PETRICONE

Wow. So what I want to know is...how do we follow up on that last panel? We actually put a scare into them right before we went on and told them that Chairman Tauzin had shown up as a guest moderator. You know...throughout the day I think it's become clear that with a group like this that represents all the parties involved in the DTV transition, we don't necessarily agree on everything. But I think there are a few basic principles that we do agree on. Number one, the issues...the legal issues, the regulatory issues involved in this transition are enormously complex. And, number two, it is inherent that government has been, is, and will continue to be intimately involved in the DTV transition and in the direction that we go. And, therefore, following from those two points, that unless we have policy makers who understand and are comfortable with the complexities that we are dealing with we are going to have a very hard time. And, luckily we have with us today three of DC's most

2003 HDTV Summit

Insight From Inside the Beltway Panel

prominent HDTV mavens. HDTV experts from Congress, from the Commerce committee, from the FCC and I'd like to introduce them now.

First I'd like to introduce Rick Chessen, who is the Chairman of the FCC's digital television task force, and Associate Chief of the media bureau. Prior to his current position, Rick was the Vice President for policy for a start-up interactive television company called Respond TV in San Francisco. He also served as Senior Legal Advisor to FCC Commissioner Gloria Trestani, and worked in the Policy and Rules Division of the FCC cable services bureau.

Next is Johanna Mikes. She's the Legislative Counsel to Congressman Rick Boucher. She advises the Congressman on matters relating to communications, Internet, intellectual property, anti-trust, tort reform, consumer privacy and bankruptcy law – a very full portfolio. Before joining the congressman's office Johanna was attorney advisor in the Policy and Planning Division of the common carrier bureau with the FCC.

And finally, welcome Jessica Wallace, Counsel of the House Energy and Commerce Committee. Jessica was tapped for this role after serving as chief communications specialist to the Committee's Chairman Congressman Billy Tauzin. Prior to that she was a chartered associate with the lobbying firm Werner, Lipford, Bernard, McPherson and Hand working with a diverse group of clients, before Congress, the White House and numerous independent agencies.

I'd like to start with a few general questions. And first of all, given the nature of this audience and the fact that we have with us in this room DTV pioneers, literally pioneers who were instrumental in the development of this technology back from the very first days. Let me start with Rick. What is it about HDTV transition that makes it such a critical government goal? And, as we move towards HDTV what is the value to the American public in High Definition television?

RICK CHESSEN

Well...you've heard a lot about this today already from several of the speakers. I think there are several things that make it a crucial transition. Number one, if we want to have a free over-the-air broadcasting system in the future I think it really is imperative that we move from analog to digital. I

2003 HDTV Summit
Insight From Inside the Beltway Panel

think the phrase Marty Franks used this morning was “broadcasting cannot be an analog archipelago in the middle of a vast digital ocean,” or something like that. I think that is true. It’s part of what Chairman Powell called the great digital migration that all communication technologies are undergoing. So that’s number one- if we want to have a free over the air broadcasting system this really needs to happen. Number two, obviously it’s much more efficient from a public policy point of view and we are going to be able to reclaim about 25% of the analog spectrum for other uses including public safety, obviously. And so that’s another tremendous benefit for the American public. And the third benefit are more direct for the American public which are all the wonderful new services that they are going to be able to receive – the high definition services, multicasting, the interactive that, you know, hopefully will be coming down the pike. So I think that those are really the three – the efficiency, the preservation of broadcasting and the new services.

PETRICONE

Good. Jessica and Johanna, do you want to comment on that?

JESSICA WALLACE

I think that Rick did cover the three most important goals with having a successful and timely transition to digital television. There isn’t much to add in respect to efficiency, and really ensuring that broadcasters compete on a level playing field in the digital age with their competitors, cable and satellite, who are already embracing digital. We think that’s really important. The free over the air broadcasting system we have today is the envy of the world and we shouldn’t take a step backwards in the digital age and lose our ground.

JOHANNA MIKES

I would just reiterate that from my boss' perspective, Congressman Boucher, digital is an opportunity and there's going to be, you know, services and uses of television content that we haven't even envisioned and so we need to get them to the digital environment as well.

PETRICONE

OK. The one thing that this panel has is a real benefit of perspective because everybody here has been involved in the DTV transition and wrestling with these policy issues and overcoming one and dealing with the next one; you know, going back years and years. So, Jessica, I'd like to ask you when we come back for the same panel in 5 years, which we will because nobody ever changes jobs in Washington, so when we come back for the same panel what will our biggest HDTV policy challenge be?

5:44 JESSICA WALLACE

Well, I think it's important that we don't wait five years to have the next discussion. I think that it's critically important that we come back every year until the transition is successfully under way. We have to keep the pressure on. But I think that if we fast forward to five years we are going to have devices already out in the marketplace that have a DTV tuner and will have content protection for free over the air broadcasting, implementing a broadcast flag solution. And so I think the question that we need to focus on is are content providers putting out high-quality exciting programming because content is the key to a successful transition and that is what is going to incentive-ize consumers to go out a purchase new equipment.

6:33 PETRICONE

I am hoping that the biggest challenge in five years is keeping them in stock - that would be a great challenge.

6:45 RICK CHESSEN

I want to add – I do think that the whole digital rights is something that we'll be probably talking about in five years but another thing that we may be talking about that it occurred to me is hopefully in five years from now if the transition is not over and I know it's a stretch to say that but stay with me here,

2003 HDTV Summit
Insight From Inside the Beltway Panel

we'll be talking about the end game and how we get to the end game and how we finally do turn off analog in this country. Whether or not we have the 85 % test we have now or whether or not we go to a hard date, I think there are going to be, you know, some people at the end of the transition who won't have made the transition when the analog is turned off. And there's going to be, I think, some interesting policy discussions around what do we do with those people, does government get involved, does the industry get involved, or are they on their own, if so, do they get new converter boxes, what kind of converter boxes, you know there are all sorts of questions I think that have to do with what the final end game really is that I think we will be confronting around frame you talked about.

JOHANNA MIKES

I absolutely agree that the questions of analog spectrum are going to be looming through that entire period and in particularly in places like, my boss comes from a very rural district and so there's a lot of questions about five years out how far we will be on the 85% transition. I will just add that I hope that, you know, as we come back every year or five years out, that we at least recognize a positive which is a requirement of cable compatibility, I mean there's actually no requirement today that that be done, but I think had that been done earlier in this transition we might be further along in terms of seeing cable as a 70% of subscribers that they represent as a real driver for this. So, I see one real positive development, hopefully very imminently on the horizon.

PETRICONE

Good. Let me look forward a little bit and talk about what we can expect to see this year. We're in a new year. We've got a new Congress. Let's talk about what's coming up on the horizon. Rick, the FCC DVT task force, very busy year in 2002. What can we expect in 2003?

CHESSSEN

Ah...probably an even busier year in 2003. We have lot of major formal proceedings that we have ongoing starting with the broadcast flag, and the cable CE plug and play agreement, must carry, and the periodic review, which we just put out, which contains a plethora of issues of about build outs and power levels and the simulcast rule and just a whole series of rules there. We'll also have follow-up from last year, things like following up on what's happening in the market place as the result of people's commitments that they made last year. And we'll be looking at some new things, I'm sure. Looking at some new areas that, where we might be helpful in getting involved. And so, I think all those will continue to be involved formally and informally in any way we can.

PETRICONE

Good. You know that year, I think from the FCC side, the DTV policy was defined by the Powell Plan. Do we see a Powell Plan II in the works?

CHESSSEN

Well I don't know if there will be a Powell Plan II. I mean it depends on what's happening out there in the market place. I think at the time, Powell Plan I it really was a time to ask everybody holistically to get involved and do what they could to step up. And we've seen some of those parts fall into place over the last year. It really depends on sort of how things are shaping up both with the formal rule makings and with the progress that we're seeing out there in the fields. So it's probably too early to tell right now.

PETRICONE

OK. Jessica, Johanna. We'll have at least one new DTV bill coming from the Commerce Committee this spring. Do we have an estimated time of arrival? And can we get a sneak peek?

JESSICA WALLACE

We don't have a concrete time frame within which we're going to introduce the bill, this Congress, Energy and Commerce Committee right now is focusing on energy and health related items that said that transition to digital television is one of Chairman Tauzin's top priorities. He really enjoys this issue. He likes telecom issues, I think generally better than all the other ones, but at least that is what we think. Right after the Easter recess, there is a time frame within which telecom issues that are ripe for movement can be put on the committee's agenda and their schedule. So that is what we're looking at right now. I know that once we introduce the bill, we would like to move on a fairly quick timetable. Chairman Tauzin has said that legislation really needs to be through the committee and through the House by the end of August. He does have concerns with the constraints on members when we get into a presidential election year and so he really would like to move things at a quicker pace. And he understands that we need to be providing industry players and consumers a lot more certainty as to what they can be expecting. He does prefer market placed solutions, but he does think that we do need to provide some leadership in this area because Congress is the one who, and FCC, government really did start the digital transition and so he really thinks that if industry players can't arrive at some consensus then it's up to members of Congress and the FCC to help provide some certainty.

JOHANNA MIKES

I would just add that Congressman Boucher really commends the Chairman Tauzin for all the work they've put into these issues and those round tables that he convened on a bi-partisan basis with a

2003 HDTV Summit
Insight From Inside the Beltway Panel

number of industry players were extremely helpful and in moving us to some of the agreements that we do have today. And we just want to thank him for realizing that this is a bi-partisan issue and all the work that they've put in. And we look forward to working with them on the upcoming draft.

PETRICONE

Great. Now many in the room are familiar generally with the staff draft that was circulated last winter. And it was a wonderfully drafted bill because I think for every industry taking part in the DTV transition there was something on the staff draft that we loved. And there was something that scared the hell out of us. So it was just, kind of a well-balanced piece of legislation. Are you able to tell us now, will the new bill contain any major substance of differences from the staff draft?

JESSICA WALLACE

First of all, the staff draft that we circulated last Congress interestingly Chairman Tauzin and a lot of the members who were a part of the discussions on that bill really came at it from a try to see what should a consumer expect with the digital transition and it just kind of happened that the, something that you like and the something that you don't like, seemed to work out in a pro consumer type of way. So he was happy about that. The staff draft is going to serve as the template for this Congress's version. An example of changes that might take place are, I haven't talked specifically to the Chairman about each and every edit that staff is going to suggest, so I'd like to qualify that. But Chairman Tauzin, for example, is very pleased that the CEA community and the cable community were able to get together and arrive at a DTV cable compatibility agreement that ensures that sets are going to get out there and consumers are actually going to be able to enjoy plug and play. So, I haven't talked to him about the specifics of the deals, but I know he's generally very supportive of it. So I envision that part of the bill to undergo some changes to more accurately reflect the agreement that was arrived at. As long as he, after reviewing it determines that it is pro consumer. Because at the end of the day if a consumer isn't going to embrace the transition it's going to fail. Then I think the other parts, well obviously, we need to fill in the multi task, must carry component of the staff draft. The staff draft right now only has a to be supplied provision in there. The Chairman was really struggling with what to do with that provision and he sees both sides of the issue and he wasn't prepared to come out with a final solution like he did on say dual must carry or something like that. So right now staff is providing him with a variety of options taking into account everybody's arguments

and he's going to be making a determination so that piece will definitely change. But everything else, I think, is going to just have some tweaks to them. We've actually been very happy with the amount of focus that industry players and the FCC and other Congressional offices have paid on the staff draft and people are coming in with constructive recommendations instead of just saying oh that piece is horrible, you can improve on this by doing a, b, and c and all those things help. So to the extent folks have specific concerns we do encourage you all to come in to talk to us. We're always available.

PETRICONE

Great. You know, before we delve into specific issues, I had a question up here that I want to pose to the panel. Start with Rick. Question is: We heard from the last panel what they saw as the biggest hurdle today, presumably in DTV. What do you see as the biggest hurdle? And, special bonus question: Is one industry dragging its feet more than the others?

RICK CHESSEN

Let me take the first part. The biggest hurdle; I mean I'd be tempted to say one of the unusual content or copy protection, but I think the biggest hurdle right now is actually reaching consumers. And bringing consumers into this transition, in making them more engaged in the transition. And you see things like the JOA (?) report that came out last fall that reported that 40% of the American public has never heard of the DTV transition. And I think you know that is the kind of, that's kind of a sobering number that we're all excited about it and it is penetrating, but there is still a big chunk of people out there who haven't yet engaged. And as 2006 and other things are approaching, I think that that's something that we really need to focus on.

PETRICONE

Good. Johanna?

JESSICA WALLACE

I would agree that the biggest hurdle is the consumer perspective in this. I would almost call it the, up until this point its been the enhanced DVD with a big TV transition as opposed to the DVT transition. And so we really need to add the TV part back into that. And that will be, I was really heartened to walk around the floor of the consumer electronic show earlier this year and really see all the

momentum that is behind it. That we are sort of, I feel very positive that we're about to really engage on this and that will be terrific. I mean you can't underestimate the importance of consumer acceptance to this transition. I think in addition, one of the other hurdles is just that there is so much uncertainty in the marketplace that it's hard for companies to know what to do and to make viable business plans. So it's incumbent upon Congress and the FCC to complete its job as well because industry players can only go so far and they need to get things mobilized and they really do need to have some direction when they reach an impasse in discussions so I think that if FCC and Congress continue to push that that would be a big help.

PETRICONE

Absolutely. Which is a terrific segue into the next topic which is cable. On the last panel Gary was talking about just how miraculous it is that we've managed to sell so many products in a difficult economy. And I think the corollary is how miraculous it is that we've been able to sell 8 billions dollars worth of DTV stuff without the fact, with the fact that it doesn't currently work with cable systems which is the way most people get their TV. Now CE and cable manufactures currently, recently concluded an agreement that will allow national plug and play compatibility. That is a huge step forward. And due in no small part to the three policy makers we have up here and their bosses. Who made it quite clear that both parties involved that if we didn't get together and solve the issue than it would be solved for us. And that is always a good impetus for industry agreements. I guess first I'd like to ask Rick: The agreement has already been put out for notice by the FCC. It's in a comment period we most appreciate the alacrity and speed with which the commission moved on this. Is there a time frame even a general time frame by which we can expect a final commission decision?

RICK

Well that is always a difficult question to answer, especially at this point of the proceeding when it's just put out there for comment and we don't yet know what kind of record we're going to get, are we going to get objections, what kind of objections, how many objections, how vociferous the objections are. I was trying to listen carefully to Jack Valenti's comments, didn't get much of a clue there so we'll have to (laughter) see, no I meant about... So we'll have to see what comes in and what kind of record we get before we can really get a sense of when this is likely to be decided.

PETRICONE

OK. And, you know, on the Congressional side. You know again I think everybody agrees that getting cable consumers in a position where they can receive HDTV is a big step forward. What was the Congressional reaction to the agreement? You know have you heard other concerns, like those expressed by Mr. Valanty and do you have any concerns?

WALLACE

Generally, I think that Chairman Tauzin has had a positive reaction. I really haven't heard from other members of Congress about what they think, but they are just coming back from a recess and instead of being able to devote 100% of their time to telecom issues, they're battling all the health care issues and energy issues on our committee. I am interested to hear what Mr. Boucher has to say about this agreement because he along with my boss have been pushing for DTV cable compatibility for such a long time. Last Congress we added six, I think about six round tables over a course of ten months and, well initially we started covering all the issues associated with the transition to digital television but we really always focused on two and one was content protection, which Chairman Tauzin thinks is absolutely critical to the transition and the other one was DTV cable compatibility for the very reason that so many consumers get their free over the air broadcast signals that way. I think it has been generally positive. We just hope that the FCC can look at it very quickly and get it implemented to the extent that they have to craft rules, and if they need our help to let us know. The concerns of the content community, I've started to hear from them. I have not talked to the chairman yet as to what he thinks about those specific provisions. But I plan to be doing that over the next week or two.

MIKES

Congressman Boucher has been working for a long time and saw the agreement as a positive step, but there are some serious implementation and transitional problems that he is looking at. And two in particular that I will highlight here today. The first is that TV manufacturers are now less than a year and a half away from the FCC's tuner mandate deadline of July 2004. That means that they're in design and manufacturing cycles now as we speak. Unfortunately they don't have the ability to sign the consumer friendly version of the FILA (?) license that was included in that agreement until the entire agreement is implemented and blessed by the FCC so and that may very well happen after the design cycles have already taken place. So that really does leave some TV set manufacturers with no choice but to sign the original license agreement that was put forward that has some really problematic provisions for consumers which Gary Shapiro talked about on the prior panel. Congressman Boucher does have severe concerns with that original agreement. So he sees an urgent need for the FCC to make available a strip down, consumer friendly version of the FILA (?) licensing agreement that just contains the essentials of what you need to get the intellectual property protection and move forward so manufacturers can put that into their design cycles and go from there. So we really can marry that up

with the tuner mandate and have these TVs you know, solving all kinds of problems by July 2004. On the second issue that Mr. Boucher has identified is the program guide information. It is very critical for the transition that consumers have functional electronic program guides and so without a program guide the cable compatible TV is really at a loss in terms of, you know, a disadvantage that it faces against the cable side of things. So we really hopefully look for that issue to be resolved as we go forward as well.

PETRICONE QUESTION

Good. Now, of course cable compatibility is one part of the equation, but technical compatibility doesn't get you very far unless the programming is actually getting carried. And by coincidence most of the questions that I'm getting have to do with cable carriage and must carry. So let me put this out to the entire panel. What role does government have to motivate the cable companies to put digital and local broadcasters on cable systems prior to the analog show? Rick.

CHESSSEN

What role do we have in encouraging? Well I guess there was last year. (PETRICONE: "or more than encouraging") or more than encouraging. Well that's out for comment and that's, you know, that gets into there's the question of mandatory dual carriage (???) transition and that of course involves statutory issues, constitutional issues, which is where the commission sort of got off in its further notice saying that tentatively concluded that it would be unconstitutional to mandate that during the transition and then you've got policy issues. Of course part of the Powell Plan was to encourage, encourage, I guess that was your word, cable operators to carry five digital programming services that were carrying high definition or other value added services those could have been broadcast or could have been cable services. The point was to put high quality, high definition and other programming in front of consumers and whether that was broadcast or cable that would be, you know, up to the cable operators themselves. Because, I guess from the transitions point of view what we're looking for is really to get the content in front of people that's going to drive the transition and I think discovery HD and some of these other ESPN HD which people are talking about today are every bit the kind of content that's going to drive this transition. We are watching and seeing what kind of broadcasts content is carried. It becomes a question of why it's not being carried, is it not being carried because of some illicit reason or is it not being carried because of market place negotiation that is going on. And that's sort of what's the start of play is and we're hoping that the players themselves can work this out.

PETRICONE QUESTION

Good. Jessica how does, how does your boss view the must carry issue?

WALLACE

Well...taking the dual must carry issues. In the staff circulation draft we put in a prohibition for mandating dual must carry. Chairman Tauzin agreed with the tenet of conclusion of the FCC that there was a constitutional burden that could not be sustained. He does not that the cable operators have upgraded their systems to digital without any government help what so ever and they should be getting some of the benefit of that. He also has concerns about whether or not if you mandate dual carriage what's the incentive for a broadcaster to end up giving back the spectrum. Because then they'll be operating in tool and we, you know, I wouldn't want to give it back. So he thinks that there's more of an incentive if they know that they need to get that transition if they want to have must carry rights then he thinks that that is more of an incentive.

MIKES

I think it's right to view this in terms of the transitional carriage and then the ultimate carriage. I think it is something like 779 stations are broadcasting digital today and 10% or less than 10% are being carried so that's something that policy makers are watching and looking at whether the market place can handle this and what's going to be needed to get these, to get carriage and get digital content to consumers.

PETRICONE QUESTION

OK. And Rick to bounce back to you for a second. And I know it's difficult to answer the scheduling question. But any time parameters, even general, on the must carry item?

CHESSSEN

Again...it's a hard question to answer. Especially this particular question as I said hits on all three cylinders of statutory, constitutional, and policy and then each of the issues sort of relates to each other. A lot of the digital must carry issues relate to which bits should have to be carried by the cable systems. Whether it's primary video, whether it's material degradation and so you've got sort of three levels and then you've got all these issues that relate to each other. And so putting together, you know it's like a 3-D chess game, and so putting together agreement on this has been very challenging, lets say, so I don't have any better idea about when we're going to be able to make a final decision but

obviously we understand the importance of this issue as well as all the other issues that we have on our plates.

PETRICONE QUESTION

OK. You know it's almost four o'clock; we don't want people dozing off. So let's talk about DRN. The broadcast flag has become a lightning rod. Jessica and Johanna what is Congress's role in insuring that the broadcast content is protected from retransmission, while consumer's expectations are maintained? And I guess the follow-up question would be and how is this issue addressed in the draft bill that we are going to be seeing?

WALLACE

As...said before, Chairman Tauzin says, thinks that high quality content is very essential to the transition to digital television. He thinks it's one of the cornerstones and he has concerns that is content providers are concerned with the ability of consumers to take their content that they've invested a lot of money in and flip it out add it to a computer and have wide spread unauthorized redistribution that these content providers are not going to be incentivized to keep on producing high quality content for free over the air. They are going to migrate this quality programming to a closed distribution system like cable and satellite which already provide sufficient level of protection and it's why a lot of those cable networks and those satellite channels have higher quality HD programming on there. He thinks it's important to be able to keep free over the air broadcasting as strong viable competitor and they can't if the content is not there. He thinks its very important for consumers to be able to have a free over the air choice as opposed to sighting up for cable or satellite. So we actually have in the staff draft a section that implements a broadcast flag solution. And he thinks it's a critical part of the DTV bill. I know that that has led to a lot of discussions and healthy debate and he welcomes it because he thinks that it is perfectly defensible to ensure content creators that their going to be able to protect their content.

MIKES

I think there would be a real concern if we were in a world where content was being with held from over the air and just going through cable and satellite. But there are questions over how real that threat

is. I think the broadcast flag when it was originally being discussed and it was intended to preserve high quality HD content and we have to keep that in mind. You know, I have been told that it's something like 36 hours even in a broadband world to download a two-hour film in high def. So we need to look at how real this threat is. We need to sort of divorce things in today's analog environment from the world that we're trying to reach in the high definition world. We had a hearing last week where we had a display from the motion picture association of America, a very powerful display of analog piracy which really we didn't see as very related to what we were really trying to get at here with the broadcast flag. This does butt up against consumer expectations and so the need to address fair use and what consumers can do with TV content is really critical. We were pleased to see in the Chairman Tauzin draft some key protections for consumers in there that the purpose of this was to prevent unauthorized redistribution to the public over the internet. That is you were distributing it to yourself in your office or yourself in another home or as a member of Congress between your district and DC that those kinds of things are unequivocally fair uses and would be preserved in this. We also were really pleased to see the chairman recognize that some kinds of programming may not be ripe for the flag or needed. You know, the news and public affairs programming and weather alerts and things that we want to get widely disseminated. There's a number of details in this and we'll be keeping watch.

WALLACE

The issue of whether or not it's timely to look at these issues right now has come up quite a bit in our staff discussions and we'd just like to call attention to what happened in the music industry. That industry is hemorrhaging and I don't think that we have to wait for the video industry to collapse before we decide that there's a problem. It's kind of refreshing when we're a little bit forward think and try to stem a problem before it becomes impossible to contain. That's why Chairman Tauzin thinks that for moving a DTV bill that is all encompassing that it's perfectly legitimate to include reasonable protections for free over the air broadcasting.

PETRICONE QUESTION

Now Johanna in your comments you mentioned threats. You know, on network has stated that if it does not get its way in the broadcast flag proceeding currently at the FCC it will shut off the spigot on all HDTV programming. Rick, I'd like to ask you. Do you believe that's a real threat?

CHESSSEN

Well, obviously you'd have to ask them, but let me say a couple of things about it. First they were responding to, in a sense their statement was a response to a question that we did raise in the notice that you heard some of my panel talk about. Which is will content be with held in the digital age in the absence of a broadcast flag regime. And they stated that actually it would be with held in the absence of a broadcast flag regime. So it is relevant to that point which is disputed in the record and many people say this is a solution in search of a problem and what are we even thinking about doing a broadcast flag system for. Having said that even CBS in its latest filing acknowledged that the infrastructure is not there yet for the mass piracy of high definition content. And they did say I think that it could be here soon with advances in compression and internet speeds. Assuming that this summer, we haven't yet reached that point and assuming for whatever reason the FCC hasn't completed its work, I would hope that that decision might be revisited because it will not necessarily be a threat according to their own filing of mass piracy. Indeed if you put it on its standard definition, arguably it's even less protected than it would be at high definition. That would be my only comment about that.

PETRICONE QUESTION

If the threat's not rescinded I am not sure what I am going to do with my prime time hours. Take up backgammon or something. Now speaking of which Johanna mentioned the judiciary hearing last week, very lively discussion about broadcast flag and particularly the FCC's reach of jurisdiction over this issue. Rick, do you have any thoughts on that? Anybody else if you'd like.

CHESSSEN

Jurisdiction...it's out for comment. We've had two suggested grounds suggested to us which is Section 336 of the communications act where Congress told us to adopt certain regulations regarding digital television and there are some arguments about whether 336 ought to apply here. And then there's the FCC ancillary jurisdiction where again, some people argue that we do have and some people argue that we don't have ancillary jurisdiction. All that I can is that we're looking at it closely.

37:56 WALLACE

2003 HDTV Summit
Insight From Inside the Beltway Panel

Chairman Tauzin and ranking member Gingells sent a letter last July to the FCC highlighting those exact two provisions that Rick just did saying that the FCC does have absolute jurisdiction in this area to ensure that there's enough content out there so that the whole transition works without it. No one is going to buy a television set. It's going to end before it starts. Chairman Tauzin absolutely thinks that the FCC has jurisdiction on this issue.

PETRICONE

OK. Lets move on to the other pressing DRM issue which is the analog redistribution challenge. We'll call it the analog redistribution challenge. In the staff draft last year it included a firm analog shut off date. Which certainly got our industry's attention. What I am wondering is do you see that provision being in the upcoming bill and how is the analog redistribution issue going to be dealt with in legislation?

39:06 WALLACE

This issue about the analog shut off date for the out puts raised a lot of concerns at our hearing that we had last fall. It really did get members focused on the issue and that was one of the prime reasons we put it in the draft. We did want to spark debate and discussion for members and something that would impact consumers that much definitely got everybody's attention. Chairman Tauzin did have discussions with one of the consumer groups, I think it was Gene Kimmelman, was at our hearing and as well as Bob Wright from NBC. They had a whole discussion going about this provision in the bill. A lot of members voiced a lot of concerns, legitimately so, and I think, I haven't talked to the chairman yet, but there is going to be a staff recommendation that it does come out. But that doesn't mean to say that the issue doesn't go away. We do have the problem with the analog hole and there are a variety of ways to close it. Those are going to be some of the issues that are going to be up for debate this Congress. Chairman hasn't decided what he is going to do about the analog hole, but I know that he is starting to think about it quite a bit and thinks that it is something that needs to be taken care of.

PETRICONE QUESTION

Ok. Johanna, do you want to comment on that? (no) Well, I have another one for you. You boss, Mr. Boucher and Congressman Doolittle, have introduced legislation that would repeal a number of

sections of the DMCA. Just quickly, what does the bill do and why is it so urgent that this be done now?

MIKES

Thank you for the opportunity to discuss this because it is being viewed both from our extreme supporters in one way, and from our extreme opponents in one way. I think neither one is exactly right. This is a targeted measure so let me describe what HR107 does do. First it reaffirms fair use with a targeted approach to get at the anti-circumvention provisions of the DMCA section 1201, which are the provisions that really are prone to abuse and we are beginning to see some of that abuse occurring out there as it concerns printer cartridges and garage openers and things like that. Under HR107 it would not be a violation of the DMCA if you by-pass a copy protection measure for lawful purposes to exercise your fair use right or some other right that you have under about 80 pages of the copyright act are balancing the limitations on the copyright owner's exclusive rights. So for disabilities acts, as for library preservation there is a number of balances that Congress has put in on the exclusive rights of copyright holders. If you're by-passing the copy protection measures to engage in those lawful activities, you would be fine under our bill. Under our bill, if you were by-passing the protection measures to commit piracy, you are not the least bit protected under our bill, yet all of the same enforcement mechanisms that exist today would exist if HR107 were passed. Secondly the bill reaffirms the beta max standard. This is the time honored Supreme Court ruling that a manufacturer can develop and distribute technologies as long as they're capable of substantial non-infringing use. In other words, we're not going to wholesale, out law technologies because of copyright concerns that can be used for good and bad things if they've substantially good uses. We're then going to go after the bad actors and look at who's using that in inappropriate ways. This beta max principle, my boss thinks is absolute common sense, it is time tested for 20 years. It gave us the VCR, it gave us a number of very useful consumer products. Unfortunately, Mary Beth Peters, the register of copyrights, at last weeks hearing, opined that the case would have come out differently in today's world. And so we see an urgent, urgent need to make sure this is, remains the law of the land. Because it is the right test to apply. We've a labeling provision for copy protected CDs which are being introduced and slipped into the bins with other CDs and consumers don't necessarily know what they're getting and that for the \$18.99 price that this has a lot less functionality than what they're used to. That provision has received unbelievable support from almost everyone. So again, we're just giving consumers the

ability to know. We're not preventing any kind of public protection technologies being put on CDs. We're just providing a notice for consumers. And lastly, we addressed allowed some scientific research into technological protection measures because we're hearing a real need from the research community that the DMCA is being used to threaten people that are doing legitimate research activities. So there is a narrow provision that addresses that as well. So that is the bill.

PETRICONE COMMENT AND MIKES REPLY (44:30)

I have to say that I was at a conference last month where there were Silicon Valley venture capitalists. We're talking about how they're unable to fund new companies and new ideas. They have nothing to do with infringement because of the very broad reach of the DMCA and having done the legal due diligence....

MIKES REPLY

And that is the real harm and that's also one of the reasons why it is so difficult to bring these issues before other members and things is that it's theoretical. You talking about features of products that are not being introduced or not being developed because the lawyers are getting involved and that is a really scary prospect for my boss. I think that's part of the problem is that the harm is in the unknown category.

PETRICONE QUESTION

And in this industry in today's economy. For me hearing Silicon Valley VCs talking about new technologies that aren't being funded is a very sobering and unfortunate thing. So often in these debates when we talk about DRM it comes down to consumer expectations and are they legitimate and how do you preserve them. I guess the threshold question is when you talk about preserving consumer expectations, which everybody seems to agree is important whatever they may be. How are these expectations determined? How do you figure out what legitimate consumer expectations are? Rick, would you like to?

CHESSSEN

I think some are determined in court and some will be determined in the market place. I think the thing about digital is it's sort of upset the equilibrium I guess that we've developed in the analog world about everybody, content makers will make it available, under certain conditions, and consumers can use it in certain ways. And everybody sort of gotten used to the agreement and now digital is sort of upset the apple cart a little bit and it gives more power both to content providers to sort of track and control their content and also gives consumers more ability to things with that content. And so I think we're entering into this period of trying to figure out exactly what consumer expectations will be going forward in this area. And again, some of it is going to be determined, the fair use for instance, is going to be determined by the courts, as Mary Beth Peters said last week. That's four-factor analysis under the copyright act that the courts will apply. Then a lot of it will be determined in the market place about under what conditions, whatever restrictions people put on this content has to be accepted somehow by consumers. And so, I think that that whole process is going to be worked out in the coming months and years.

MIKES

I think this is the question that comes up with every new technology, so I don't think we're necessarily in some brand new environment now. There is, since 1841 the courts have recognized the doctrine of fair use. It is now obviously codified in the copyright act. And it is a four-factor test and it generally gets applied very well. The courts come down for the most part very accurate on what fair use is. The key to fair use and the key to consumer expectations, is the experimentation that you're allowed under the copyright act without the permission of the copyright owner. The way fair use works: you can test the waters, you can say, "You know what I'm going to take a look inside this robot dog and look at how it works and maybe I want it to shout "Go Hoyas!" or something." And I do that for myself. That traditionally you've had the right to do that. If you cross the line. If you start commercializing from that, if you start affecting the market for that product, the courts will say, oop no, you've crossed the line. And then you are liable for some incredibly severe penalties. It's not something people take lightly when they are entering this arena. I hear people that always assume fair use means whatever consumers say it means. It doesn't. It means what the courts say it does. They get it right and that is one of the beauties of the fair use doctrine is that is isn't set in stone anywhere because it evolves. It evolves like one of the more recent cases was thumbnail images used in internet search engines. Those were determined to be fair use because they promote the ability of users to easily get to the site which

has that content and which can then make full use of it. That is something that if policy makers and their wisdom had tried to come up with 3 or 4 or 5 years ago. I'm not sure it would have been anywhere on the radar screen. The beauty of fair use is that it evolves and the beauty is that you can experiment without the permission of the copyright owner.

PETRICONE

Jessica?

WALLACE

I would just say that fair use as a defense for copyright infringement as it is interpreted by the courts is very different from a consumer expectations which a lot of members tend to focus on. But even when you look at consumer expectations, consumers don't think with one mind. Consumer expectations change depending on who you're polling, who you're asking. And I do think that as we start migrating to a digital world that things are going to be different and that we have to evaluate carefully what are legitimate expectations and what are not. I think that the technological advances make this debate such a thorny one because all things are possible but not all things might be right.

MIKES

Let me just add that in response to what Jack Valenti was saying. We are not trying to steal anything from his house. Under our bill we're trying to ensure that his children can send rich multi-media reports to their professors. We're trying to ensure that people can access content in libraries. We're trying to show that people can use content in their homes, in the manners most convenient to them, provided they don't again step out of the bounds of these four factors and actually infringe the copyright. So, I just wanted to clarify that.

PETRICONE QUESTION

Good. Now we've talked about content, we've talked about cable. In the few minutes that we have left lets briefly talk about broadcasters. There are 1338 commercial stations in the US. According to our account 754 are on the air and of those 322 are full power, 422 are low power. Just to the panel, are you concerned by the number of waivers and slow starts among local broadcasters? And how can Congress and the FCC speed up the process of getting local broadcasters on the air? Rick?

2003 HDTV Summit
Insight From Inside the Beltway Panel

51:03 CHESSEN

Well, I mean obviously you'd rather have fewer waivers than more, but I think you have to keep it into some perspective. In the larger market it's a very different story. In the larger markets the top 30 markets where more than half the population lives, we have almost all the top four networks on the air. And on top of that we have an additional, I think...our numbers are actually higher than that. It's over 800 now, according to the FCC's count. We are continually pushing broadcasters, and I think we keep cutting into that number. The May 1st deadline we had over 800, I believe, extension requests, this time we had about 250 less. So, in six months we cut 250 off the number of waivers that we had. That's 250 broadcasters who were on the air. As far as low power thing goes again we're looking at. I think that's kind of a success story actually. We permitted broadcasters in smaller markets to come on the air not at full power, not with bearing the full cost, but a less expensive option of coming on at reduced power and then gradually phasing up as the transition continues. And a lot of broadcasters who otherwise wouldn't have been able to get on the air, I think are on the air today because of that. So I think that that's actually, I think, a success story. We do tee up in the periodic review how quickly we need them to ramp up. And if people are interested in a faster ramp up, we will look at that. Because some people have mentioned the problem with lower power and we will certainly look at that. But there will come a day when they are going to be required to go full power. I think we're trying to do everything we can. If and when we're on a good downward course as it is.

WALLACE

Chairman Tauzin has been concerned about the broadcasters getting up and running a digital. Last year he did write a letter to the FCC as they were trying to formulate their waiver process and what all that would entail. He was happy that FCC did weigh heavily to the extent that broadcasters had to make an affirmative showing that they were taking significant concrete steps forward in the transition and really needed to have the waiver. We noted that the broadcasters in the smaller rural communities do face some unique situations that aren't faced by the folks in the larger markets. But he does think it's important that all those broadcasters do get up and running. He's been pretty pleased with the FCC and their work in this area. And he actually is interested to see what they are going to do with the second periodic review on this.

2003 HDTV Summit
Insight From Inside the Beltway Panel

PETRICONE WRAP

OK. That was great. We are out of time. First, I would like to thank our panelists, not just for joining us, but for their expertise and their steady commitment to the technology of digital television.

CONFERENCE WRAP

Thank you to our panelists. As this years summit draws to an end. I'd like to thank all of you for joining us today. We hope you found it valuable use to your time and got some information. I want to remind you about something. A few things that are rather important before you leave. First of all, your feedback is important. We can always improve these conferences and we want to improve this one in the future. Please fill out the survey you'll get by e-mail in a few days. And now for the moment you all have been waiting for.... Our HDTV summit sweepstake's raffle....