**STATEMENT OF COMMISSIONER JONATHAN S. ADELSTEIN, APPROVING IN PART AND DISSENTING IN PART**

*Re: Digital Broadcast Content Protection, Report and Order and Further Notice of Proposed Rulemaking, MB Docket 02-230*

Today's action presents a difficult and complex challenge. It is no small matter to require for the first time a content protection system for free broadcast television delivered over the public airwaves. Presented, as we have been, with a perceived threat that stands to undermine the very broadcast system that has benefited our society since its inception in 1927, I am willing to take that bold step. And being a firm believer in technological innovation, I believe this step can be done in a way that benefits all and ushers in a new and innovative era of digital television.

But this step deserves careful consideration and broad public debate. I dissent in part, as I do not believe we have fully achieved our goal of creating an effective and appropriately tailored pro-consumer digital broadcast television protection regime.

Although we have recently endorsed a copy protection system for cable plug-and-play devices, we should not automatically assume that such a model should apply directly in the broadcast context. Instead, we should start by taking a step back and examining the nature of broadcast television and the implications of requiring a content protection regime. Indeed, not all consumers have the desire or ability to afford cable or other pay television services. These are the very consumers who may find it difficult to replace equipment as content protection technologies change over time. Yet, these are also the people who would benefit the most from high value content being available on the public airwaves. It is these stakeholders whose interest is foremost in my mind as I analyze today's Order.

This item confronts us with the current conditions facing the entertainment industry. Without question, the indiscriminate mass redistribution of copyrighted works over the Internet may well violate our nation's copyright laws and strikes at the core economic equation for creators. Such redistribution is happening today with analog and down-resolutioned entertainment content. While the entertainment industry acknowledges that the actual economic threat attributable to the widespread indiscriminate sharing of digital television files is not imminent, they ask us to act today as a precaution for the future. They say without protection, high value content will not be made available on the broadcast medium. Given the circumstances and the potential harm to creators, it is appropriate to offer some baseline protection.

At the same time, our action should not give content providers a sense of complacency to avoid actively seeking out new and evolving business models that embrace exciting new technologies and unleash opportunities for eager consumers. There is no telling what effect the prominent offering and marketing of lawful and

affordable Internet-based alternatives could have on offsetting piracy, particularly in light of recent efforts to step up consumer education and enforcement.

Taking preemptive action to impose a mandated content protection regime inherently carries some risk. It is well known that the entertainment industry in the past has feared technological advances that have matured to the benefit of their industry. We must be careful not to cut off through preemptive regulation innovation that would lead to products and technologies that benefit consumers, manufacturers, and the creative community alike.

I have confidence that if we do this right, a digital broadcast content protection system can carry out this vision and become a winning solution for all. I appreciate the willingness of my colleagues and the Bureau to engage in a constructive dialogue on the implications of various proposals. I believe today's result is better because of that dialogue. I continue to have concerns with certain aspects of this decision, which I outline below.

Today we put in place a regime to afford basic protection against the mass indiscriminate online redistribution of digital television content. Our action makes several important improvements over some proposals that were initially offered. Most notably, we have taken steps to assure that no single technology or set of companies is given a government endorsement to control all digital television reception and downstream distribution and recording. Our procedures ensure that no industry segment has veto power over the approval of technologies for use with the flag. As we seek further comment on a long-term technology approval process, we have sought to establish interim procedures that are open and transparent. We have specified that the initial approval of technologies will be pursuant to functional requirements and a non-exhaustive list of objective criteria, without providing any entity a potentially dangerous first-mover advantage. Recognizing the steady convergence of computing and consumer electronics equipment in the home, our procedures are not intended to provide a regulatory advantage to anyone.

As technologies come forward for approval, I will pay particular attention to the competitive impact and the manner in which the content protection technology binds other downstream networking or recording technologies, and the impact of the particular authentication method on consumers and their privacy protections. Given the potential use of licensing terms to stifle competition, I expect licenses will be made available on fair, reasonable and nondiscriminatory terms, and will contain adequate dispute resolution procedures where objections arise. Should any one technology become the *de facto* standard for all digital television equipment, a closer examination by the Commission may be required.

It is my fervent hope that a variety of strategies and technologies will be deployed to help reach our ultimate goal of preserving high value content on broadcast television while providing maximum interoperability, portability, and ease of use for consumers. Consumers will benefit from broad choice among competing interoperable content

delivery and protection technologies, as manufacturers can be expected to build the products most likely to be embraced by consumers. I would be concerned if technologies came before us that presumed that every consumer engaged in unlawful redistribution or that restricted or required a payment for legitimate activities that consumers do today.

Nor should the current analog world necessarily be the model for what consumers can reasonably expect to do in a digital world. We are undertaking the digital television transition to benefit consumers and usher in opportunities for new and innovative ways consumers can watch, record and enjoy television. A digital world is likely to accommodate more consumer uses of content that do not run afoul of the copyright laws, and as-yet-undetermined innovative features for time and space shifting, excerpting, and transferring content lawfully. We have no way of knowing who or what will be the next TiVo-like innovation to come forward and be enthusiastically embraced by consumers.

My fear with today's action is that one technology could become the gatekeeper across various communications platforms and could curtail technological innovation. That one technology, for example, could bind consumers to watch content at particular times, on particular devices, or subject to other terms and conditions that are more than a "speed bump" in a consumer's viewing and enjoying of digital television. Should that occur, consumer frustration and backlash is likely, and would serve neither product manufacturers nor the entertainment industry. Another fear of mine is that consumers, reporters, libraries, educators, the disabilities community, or other entities who today use copyrighted material in numerous lawful ways without the prior permission of the copyright owner, will be subjected to a system of preapproval or payment for the continued exercise of those legally protected uses. Worse yet, that the resulting technologies could intrude upon the personal privacy of consumers by collecting information about users or their viewing habits.

Thousands of people contacted us and urged us not to take this preemptive action. Many consumers are concerned about the effect on their use and enjoyment of television, as well as their personal privacy. Given the possibility that the Digital Millennium Copyright Act might apply, content protection technologies have the potential to override lawful uses of digital content. With the case-specific and evolutionary nature of fair use, it is a hard concept to define technologically and not impact it legally. Yet the Commission has no authority to do the latter.

Under the regime adopted today, the Commission has not yet examined the full impact of any particular content protection technology. Provided alternatives exist, a technology that unduly restricts reasonable personal use of television content is not likely to be embraced by consumers. On the other hand, we can expect consumers to gravitate toward technologies that preserve flexible consumer uses of digital content. By locking down content too tightly or imposing too great a cost on consumers, consumer adoption suffers, resulting in manufacturers losing incentives to innovate and the entertainment industry failing to benefit from new channels for content delivery. For this reason, I expect technologies will come forward that will preserve consumers' reasonable expectations, including the secure distribution of broadcast television excerpts or files

over the Internet in a manner consistent with copyright law. In the end, I hope our adoption of a broadcast flag protection regime does not end up costing consumers greatly, through direct expense, reduced functionality of legacy devices, or the loss of innovative ways of watching, recording, or using digital television.

Everyone benefits if consumers embrace and invest in digital television equipment. I would not want to see our adoption of the flag slow consumer acceptance of the digital transition or discourage computer developers from enabling the reception and downstream use of digital television through computing hardware and software solutions. To the extent that today's action adds to the complexities of buying digital television equipment or home networking solutions, I encourage all parties to work with retailers to increase consumer awareness.

I would have preferred to step gradually into this delicate space. I am concerned, for instance, that our action today will adversely affect accountability of the broadcast media. Despite technological advances, the public airwaves are still limited in the number of interference-free channels that can broadcast in each community. Adding a content protection regime that restricts the flow of digital television content could very well lead to less public accountability of what is broadcast over the air. For example, absent a mandated content protection regime, consumers might have been in a position to e-mail the Commission an excerpt of a show they believe is in violation of our indecency rules. It remains unclear whether consumers can do so after today's action.

I dissent in part because I believe we fail to protect the public interest in some key ways. First, I must dissent from the unlimited scope of today's protection regime. The Order does not rule out the use of the flag for content that is in the public domain. The flag was presented as a means of preventing the illegal mass redistribution of digital broadcast content over the Internet. By not limiting use of the flag only to copyrighted works, I believe our scope not only exceeds the purposes for which we take preemptive action but also fails to reflect the record before us of the perceived threat and potentially supersedes the balance of copyright law. While the item professes not to affect copyright law, by mandating a technological protection regime that can be used to restrict the flow of content that is in the public domain, or is not subject to copyright protection for other reasons, I am not convinced that we have adhered to our well-meaning pronouncements. Presumably, there is some greater public good in the wide dissemination of non-copyrightable works or works for which the copyright protection has expired. If the barrier to the unleashing of high value content on digital broadcast television is Internet piracy, then I fail to see how a regime that could end up locking up public domain or non-copyrightable works is carefully focused to achieve that result.

Nor do I take lightly a government-required protection regime that could restrict the free flow of news or public affairs programming which is at the heart of public discourse in our society. Our country has a long history of promoting widespread public access to broadcast television. In return for the free use of the spectrum, broadcasters are expected to serve their local communities. Consistent with copyright law, the wider the dissemination of news and public affairs programming, the better our communities and

our democracy are served. The lawful consumer and educational use of content for scholarship, commentary, criticism, teaching, research, or other socially beneficial purposes should not be hindered. I see little threat to content creators from a parent e-mailing to family members and friends a local television news clip of a son or daughter receiving a community service award, or a teacher choosing to show his or her classroom a rebroadcast of a space shuttle launch using an Internet connection.

Nor do I see a persuasive reason to restrict the free flow of political speech which yields important societal benefits. By subjecting, say, the State of the Union address to mandated redistribution control technologies, have we not undermined a core value of our society? I search in vain for record support or a reason to lock up political speech from widespread distribution. Because I believe the Order's boundless scope insufficiently addresses these values, I dissent.

I also dissent to the failure of our interim criteria for examining digital content protection technologies to address important consumer issues. I would have explicitly indicated that the Commission will consider the impact of a technology on personal privacy and not accept any technology that intrudes too greatly into this space. While we are free to examine privacy implications under our non-exhaustive list of criteria, given the importance of improper use of information about consumers' viewing habits, I would have made our intention to protect consumer privacy explicit and unmistakable.

By going forward with today's adoption of a broadcast flag regime to address a perceived threat, the Commission could have put in place a way to evaluate whether we are achieving the goal that underlies our regulatory action – the availability of high value content on free over-the-air broadcast television. Such efforts would benefit the Commission should the flag be the just the first in a series of requests to mandate even further content protection measures.

Content providers have raised a real concern that the threat of indiscriminate online redistribution of digital television content will hold back high value content from our nation's public airwaves. By providing some basic assurance that the high value content that is broadcast over digital television will not be widely and indiscriminately redistributed online, we give greater incentive for content producers to make that content available on free over-the-air television.

Not many people a decade ago foresaw the Internet's rapid evolution into a tool of consumer empowerment for both legitimate and harmful uses. As we take steps to protect free over-the-air digital broadcast television against the powers of the Internet, we must be cautious, for the sake of consumers and the entertainment industry itself, not to trample its lawful use or inadvertently stifle the next innovative distribution model that could revolutionize the entertainment industry.