

## SEPARATE STATEMENT OF COMMISSIONER KATHLEEN Q. ABERNATHY

*Re: Digital Broadcast Content Protection, Report and Order and Further Notice of Proposed Rulemaking, MB Docket 02-230 (adopted November 4, 2003)*

Today's decision is illustrative of the complex policy debates that arise as we move forward with the digital transition. In this instance, the debate centers on potential piracy problems that arise when digital content is delivered by free over-the-air broadcast signals. Not surprisingly, content providers do not want their digital TV programs pirated and retransmitted over the Internet. Critics of the broadcast flag proposal, on the other hand, warn against placing too much control over technology choice in the hands of the studios. Mindful of our ongoing obligation to speed the digital transition and to promote the viability of free over-the-air broadcasting in the digital age, we have navigated a solution that embraces protection and deters piracy without sacrificing innovation or frustrating consumer expectations.

I do recognize that there are costs, both actual and in terms of consumer expectations, that must be measured against the benefits associated with a broadcast flag solution. In this case, however, we have ensured that the costs imposed on consumers will be minimal. Unlike encryption at the source, a broadcast flag solution will not render legacy devices obsolete and will not force consumers to purchase new or additional equipment to receive their broadcast programming. Consumers will be able to continue receiving broadcast programs over their existing television receivers. In addition, existing recorders and playback devices will continue to work, and digital recordings made on legacy devices will play on future compliant machines.<sup>1</sup> Thus, we are accommodating to the greatest extent possible current consumer expectations and uses. Furthermore, members of the consumer electronics industry have indicated that the costs associated with implementing the broadcast flag will be minimal. By protecting against digital piracy, we also encourage entertainment companies to deliver via free over-the-air broadcast its most valuable programs.

I am generally cautious when it comes to government prescribing technologies or putting too much control in the hands of one industry in making such determinations. I am able to support today's decision, however, because of the changes we have made to the way transmission and recording technologies are approved. While we are asking for further comment on this issue, we set up on an interim basis a transparent, open and objective approval process that will promote the development of competition in the marketplace and foster innovation. I am hopeful that through this process and the final rules we adopt, new technologies will develop that will allow consumers flexibility in

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<sup>1</sup> I do recognize, though, that a recording made to a DVD on a new compliant device will not currently be able to be viewed on a legacy DVD player. That recording, however, can be played on the compliant device, and the existing non-compliant DVD recorder will continue to both record content and playback content recorded on that machine. As we note in the Order, moreover, this problem is not unique to the broadcast flag. For instance, other changes to DVD technology, such as a transition to high definition DVD devices, will create format compatibility problems.

how they distribute content without allowing indiscriminate redistribution of broadcast television content over the Internet.

Finally, I have previously expressed concerns about whether we have jurisdiction to adopt a broadcast flag solution, or whether this is an issue best left for Congress. As a general rule, the Commission should be wary of adopting significant new regulations where Congress has not spoken. On balance, though, I believe that given the broad congressional direction to promote the transition to digital broadcasting, a critical part of that obligation involves protection of content that is transmitted via free over-the-air broadcasting. I am hopeful that any court review of this decision can occur before the effective date of our rules.