

**STATEMENT OF
COMMISSIONER MICHAEL J. COPPS
APPROVING IN PART, DISSENTING IN PART**

Re: Digital Broadcast Content Protection

Striking a balance between consumers' expectations that they will be able to turn new technologies to their advantage and content producers' expectations that they will be able to protect the products of their creative genius is a real and growing challenge as we enter the digital age. There is broad agreement about the need to protect content in this new age if we are going to enjoy the full fruits of artistic creativity. But there is the equally compelling need to guarantee that consumers are able to enjoy the expanded opportunities that accompany the development of liberating new technologies. Our world changes, old boundaries are blurred and then shattered, and new rules have to be developed that preserve traditional rights even as they accommodate new realities.

Even though today's decision does not, cannot and should not settle these huge questions of public policy that must ultimately be decided in venues other than the FCC, the larger backdrop should be kept in mind as a reminder that we are at least approaching matters of great long-term significance to the American people. An important goal of today's Commission action is to expedite the nation's long-delayed transition to digital television, but in a way that preserves a workable balance as we await longer-term guidance from Congress and the Executive Branch. We attempt to achieve this goal today by resolving a long deadlock over technologies designed to provide digital broadcast content protection. Commission action here strikes me as warranted because we are fast approaching a situation wherein new technologies will provide arguably too much power to those who would infringe and pirate the rights of digital creativity. Such digital chaos benefits neither the creators nor the consumers of what is sure to be dramatic new content.

Given digital media's susceptibility to indiscriminate mass online distribution, content producers may have significantly greater incentives to broadcast high-value content if there are in place at least basic protection technologies. If denied such protection in one medium (*e.g.*, free, over-the-air broadcast television), they will migrate their new content to other media (*e.g.*, subscription cable television). Such a result would likely discourage new digital content in the broadcast medium and also retard the statutorily-mandated transition to digital television. Neither outcome is acceptable.

But I am also guided by the need to protect consumers in our quest to encourage digital content and to expedite the digital transition. The reason we are promoting digital television, after all, is to benefit consumers, not companies. Granting a small set of companies the power to control all digital video content through a government-mandated technology in order to promote digital television is neither necessary nor wise. A broadcast flag mandate that lacked adequate protections and limits would be reprehensible public policy.

We have worked to avoid this danger with today's Order. Our decision is not ideal. No one will walk away with everything on their wish list. What we have instead is an honest attempt at a workable compromise that responds to the concerns raised by multiple commenters. We afford at least some level of content protection. We preserve a balance between the rights of consumers and the rights of creative content producers. And we resolve one challenge attending the digital television transition even as we await further guidance on the larger policy framework from Congress and the Executive Branch.

This Order is substantially different from the proposal originally submitted to the Commission. And I appreciate the constructive dialogue among my colleagues that has allowed us to reach this decision. The item we adopt today is better balanced, more sensitive to the concerns raised by consumer groups, and supportive of multiple technologies and open processes for product certification. The creators of copyrighted works are provided tools and processes with which to protect their intellectual property in the digital age. Consumers should reap the benefits of significantly more digital content on their television receivers. Tens of millions of American households depend upon free-over-the-air broadcast for their television reception and a central purpose of this decision is to ensure that they do not become second-class consumers of second-class content.

This item has been improved so that competition between protection technologies will hopefully preserve, for the most part, consumers' reasonable expectations. Consumers have a right to expect that technological advances will afford them expanded opportunities generally, and that the freedom and vitality of digital technology will open up new options for the ways in which they can receive and utilize new products and services. I discuss below those places wherein I believe we fail to protect consumer interests.

I am pleased that this Order encourages openness and competition in the digital broadcast flag system. If only one protection technology was to be available to consumers in the future, or if one technology was granted a first-mover advantage allowing it to entrench itself so firmly that new and better technologies are given no chance, we would have an intolerable result. Consumers would be forced to use a technology not because it provides consumer options or preserves fair use, but because they have no choice. Corporate interests would have trumped consumer interests. Reasonable uses of content by viewers could -- probably would -- be restricted, costs would rise and technology innovation would be hindered. I believe that today's item, although not perfect, creates an opportunity wherein consumers will have a choice of user-friendly digital content protection systems and wherein the reality of competition will encourage content providers and equipment manufacturers to develop technologies that allow reasonable consumer uses of programming such as copying, recording, and sending digital content securely over the Internet. A technology that blocks reasonable personal use of digital content will not be chosen by consumers. Nor will a technology that hampers innovation be accepted by the manufacturers of consumer electronics products.

So the fact that today's Order now allows multiple firms to have many different technologies that meet our rules was critical to our decision. We reject the notion that one industry segment should have gatekeeper control over digital content protection. Instead, we seek to establish a streamlined, open approval process with a neutral arbiter based on objective criteria. We seek multiple interoperable technologies that will promote competition and consumer choice. We seek to preserve reasonable and flexible consumer expectations and uses. And we seek to avoid stranding legacy equipment that must be replaced to receive protected content.

Words written in a Commission Order will not alone guarantee success. We must remain vigilant during the interim procedures established today and work expeditiously to develop a longer term process that includes clear technical criteria with a transparent road to approval. That is one of the principal purposes of the Further Notice that we approve today. As we move forward, we must also be careful not to chill development of software solutions generally, particularly for beneficial purposes such as software defined radio.

The competition that we build into the system and the changes from the original proposal allow me to support much of this Order. But I must dissent in part because I believe that we fail to protect consumer interests in important parts of the decision.

I dissent in part, first, because the Commission does not preclude the use of the flag for news or for content that is already in the public domain. This means that even broadcasts of government meetings could be locked behind the flag. Broadcasters are given the right to use the public's airwaves in return for serving their communities. The widest possible dissemination of news and information serves the best interests of the community. We should therefore be promoting the widest possible dissemination of news and information consistent, of course, with the copyright laws. And neither the FCC nor the broadcast flag should interfere with the free flow of non-copyrightable material. As discussed above, this Order attempts to strike a balance between preserving consumers' reasonable and flexible uses and permitting content providers a technological means to protect their copyright. But on the scale of the public interest, we must accord great weight to enabling lawful consumer and educational use of content when we are talking about something that goes to the core of America's public discourse and its civic dialogue. I understand the arguments of those who caution that precluding the flag for news and information could entail some difficult and sensitive decisions about what constitutes news and public information and what does not. Even if we are confronted with some difficult decisions, I would rather attempt the difficult than deny the free flow of news and information the widest possible dissemination.

Second, I dissent in part because the criteria we adopt for accepting digital content protection technologies fail to address some critical issues. For example, we do not expressly consider the impact of a technology on personal privacy. Improper use of the technologies could arguably allow such things as tracking personal information. The broadcast flag should be about protecting digital content, not about tracking Americans'

viewing habits. Protecting personal privacy is too important to leave to chance. We should state explicitly that we will consider this issue in the approval process and what action we would take if some approved technologies collect information about users and their viewing habits. I believe the Commission will be forced to address this anon; it would have been far preferable to do so here.

As a final matter, I note that I vote for today's Order with the understanding that it will not affect the rights or remedies available under our nation's copyright laws and cognizant that it is Congress that ultimately sets national policy in this critical and sensitive area.

Again, my thanks to the Bureau for working through an immensely complex and controversial proceeding and to my colleagues for their spirit of dialogue and cooperation that permitted us to achieve a satisfactory outcome today. We still have much to do in working through the implementation of today's Order and developing answers to the many "going forward" questions raised in the further notice. I urge all interested parties – and they are, as we know, many – to participate fully as we attempt to develop policies and procedures for moving ahead in an area wherein about the only certain thing is change.