

**SEPARATE STATEMENT OF COMMISSIONER KEVIN J. MARTIN,
APPROVING IN PART, CONCURRING IN PART**

*Re: Digital Output Protection Technology and Recording Method Certifications,
Order (August 4, 2004)*

I support this Order's approval of over a dozen technologies for use in digital television equipment to give effect to the "broadcast flag."

I write separately to express my concern with two issues. First, I fear that the "non-assert" clause in the DTCP adopter agreement could hinder competition and suppress innovation. We acknowledge in the Order that DTCP is the only publicly-offered output protection technology we approve that permits copying, and is "therefore likely to become the primary" standard for the foreseeable future. As a result, anyone who wants to build products for this market must sign the DTCP license. Yet, the license requires that companies give up any intellectual property rights they have in the DTCP technology before signing. Therefore a party may have to choose between the lesser of two evils: either don't participate in the relevant product market, or compete, but give up your intellectual property rights. I am concerned this result may be anti-competitive, may discourage future investment in intellectual property, and may generally be counter to good public policy.

Second, I am concerned that Tivo's technology does not include sufficient constraints. All of the other technologies requesting approval from us have adopted proximity controls or similar mechanisms to limit content redistribution outside the home at this time. I ultimately want to enable a person's digital networking environment to extend beyond the home. I fear, however, that we may be acting prematurely in concluding that Tivo's affinity controls are sufficient to protect against widespread redistribution. I therefore would have conditioned approval of Tivo's technology on adoption of proximity controls at this time, and continued to study whether its device limits and affinity controls provide adequate protection.