

REPLAYTV ZAPS ADS AND PERMITS SHOW SWAPPING.

GET READY FOR THE NEXT BIG COPYRIGHT BATTLE

The VCR has been, by all accounts, one of the most successful consumer electronics products of the past three decades. And though one can be found perched near a TV set in almost every American household, the venerable VCR, with its analog tapes and clock blinking "12:00," is looking a bit tired in our digital, Internet-ready age.

Into the breach have stepped two innovative Silicon Valley companies—TiVo and Sonicblue—intent on reimagining the VCR and changing the way Americans experience television with the help of the DVR, or digital video recorder, a new breed of device that takes time-shifting to a new level. Consider Sonicblue's ReplayTV RTV 4040, shipping now for \$700, or the Philips HDR312 TiVo Personal Video Recorder, available for \$300. Both units download the electronic equivalent of *TV Guide* into electronic memory, so there is no need to program the unit, per se—you simply choose the programs you want to record from a simple menu, and the DVR does the rest. If the special musical episode of *Buffy the Vampire Slayer* goes almost ten minutes over its time slot (it did), your DVR knows and automatically adjusts the recording time. You can even have your DVR seek out and record programs by actor, director, or genre—collect all of Woody Allen's films, say, or create your own "all Westerns" station.

The ReplayTV DVR, however, provides two additional features that its competitors have not had the courage to offer for fear of attracting Hollywood's ire. First, the ReplayTV offers Commercial Advance, a feature that automatically skips commercials for recorded shows (TiVo offers only fast-forward, like most VCRs). Second, the ReplayTV connects to your home computer network and broadband Internet connection, enabling you to send recorded programs to other ReplayTV units in your house and, more important, to other ReplayTV owners over the Internet. Now, if a fellow ReplayTV owner emails you about last night's episode of *Law & Order*, you can download it from his or her ReplayTV if you missed it.

These last two features snagged the litigation trip wire and brought down the wrath of Hollywood. In the fall of

2001, around the time the ReplayTV 4000 line of products was launched, four copyright infringement lawsuits were filed against the ReplayTV and its manufacturer, Sonicblue, in federal district court in Los Angeles. The lawsuits all seek injunctions aimed at sweeping the ReplayTV off the market.

The plaintiffs arrayed against the ReplayTV include every major movie studio, every major television network, and several major cable networks. The law firms representing the plaintiffs are also among some of the nation's best known—Wilmer, Cutler & Pickering; Proskauer Rose; McDermott, Will & Emery; and O'Melveny & Myers.

These cases are not unlike the 1979 Betamax lawsuit, in which two movie studios filed a copyright infringement lawsuit seeking damages and an injunction against manufacture and distribution of Sony Betamax VCRs. The suit maintained that Betamax VCRs allowed consumers to make unauthorized copies of television programs. In fact, Jack Valenti, top lobbyist for the Motion Picture Association of America, went so far as to declare that "the VCR is to the American film producer and the American public as the Boston [S]trangler is to the woman home alone." Fortunately for both American film producers and the American public, a 5-to-4 majority of the Supreme Court ultimately sided with Sony (*Sony Corp. v Universal City Studios, Inc.* (1984) 464 US 417), and the VCR swept the nation and the world. The result, ironically enough, was a torrent of new revenue for Hollywood in the form of prerecorded videotape sales.

But Hollywood never warmed to time-shifting—the practice of recording television for later viewing. So in 2001 the Hollywood forces gathered for another assault, aimed at rolling back the effect of the Supreme Court's ruling in the Betamax case. This time the target would be a new, improved time-shifting device, the ReplayTV DVR.

According to one of the complaints, the ReplayTV DVR represents "an unlawful plan by defendants to arm their customers with—and continuously assist them in using—unprecedented new tools for violating plaintiffs' copyright interests...." In the eyes of the plaintiffs, the ReplayTV DVR threatens the financial foundations of the television and film industries. Though stopping short of Valenti's famous Boston Strangler quote, the complaints frame the ReplayTV DVR as a looming threat to the multibillion-dollar film and TV industry.

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First, ReplayTV owners skip commercials, undermining the basis of free television in America (never mind that a majority of Americans now pay for cable). Second, DVRs could undermine the notion of prime time, with its premium rates for ad spots. After all, what difference does it make whether a show is aired at 8:00 P.M. or 3:00 A.M.? Either way, it'll be waiting for you on your ReplayTV whenever you're ready to watch it. Third, the ability to share programs with other ReplayTV owners creates a vast private archive of television. Rather than purchasing season five of the *X-Files* on DVD, ReplayTV owners might just rely on the reservoir of *X-Files* episodes amassed by other ReplayTV owners. All the comfortable assumptions of television executives appear to be upset by this upstart innovation.

But pity not the poor Hollywood executive. Technological change disrupts the comfortable assumptions of executives in virtually every industry every day.

It is hard to see why Hollywood's business models should be exempt from the disruptive effects of innovation any more than the railroad industry should have been rescued from the internal combustion engine. But more significant, what's bad for today's Hollywood executive will almost certainly be a boon to tomorrow's copyright owners. A century of experience teaches that new technologies, no matter how disruptive in the short run, have invariably expanded the revenue pie for copyright owners in the long run.

At the dawn of the 20th century, for example, the music industry was dominated by sheet-music publishers. The rise of recording technology effectively wiped them out, giving birth to the modern (and much larger) music industry. The revolutions brought by radio broadcasting, color television, cable television, and the VCR each taught the same lesson.

But to return from the realm of policy to the lawyer's question, does it violate copyright law? Just as in the Sony Betamax case, the answer turns on two distinct, but related, questions. First, are ReplayTV owners violating copyright law when they time-shift and share programs broadcast on television? The fact that Hollywood has sued only ReplayTV's maker, rather than ReplayTV users, raises the second question: Can Sonicblue be held liable for infringements that may be committed by its customers?

The first question is destined to gather the better sound bites. In the words of Laurence Pulgram of Fenwick & West in San Francisco, who is leading the defense of the ReplayTV, "If dodging commercials is against the law, you'd have to strap people in their chairs and snatch the remote out of their hands." Andy Wolfe, chief technical officer of Sonicblue, puts the matter more bluntly: "Obviously the networks don't like it if I go to the bathroom during a commercial, but I am still allowed to do it." After all, the Supreme Court held that time-shifting constituted a "fair use" under copyright law,

notwithstanding the fast-forward button on Sony's Betamax VCR. An automatic commercial-skipping feature, in fact, has been available on certain higher-end analog VCRs for several years, without legal protest from copyright owners.

As for the Send Show feature that allows one ReplayTV owner to send a show to another, this ability is limited to a list of 15 people, and it blocks the sharing of pay-per-view content. As a result, this ability is not terribly different from the ability to swap copies of last night's *ER* episode with a coworker on videotape, or the ability of AOL subscribers to exchange digital files through AOL's Instant Messenger service.

But it is the second question—when can a technology vendor be held liable for the infringements of its customers?—that is the more important one, with implications for virtually all technology companies. If these companies can be held liable for every infringement committed by a customer, on pain of ruinous damage awards and injunctions

that sweep products off the market, innovation would grind to a halt. Xerox, for example, would never have built a photocopier, nor would Netscape have shipped a Web browser. In 1984 the Supreme Court in the Betamax case struck a more sensible balance: A technology vendor will not be liable for the infringements of its customers so long as its products are "capable of substantial noninfringing uses." 464 US at 442.

In the ReplayTV litigation, Hollywood is arguing for a very different rule, urging the court to hold Sonicblue liable for copyright infringement because "they could have designed the ReplayTV 4000 to prevent or greatly limit" the infringing activities of ReplayTV owners. This "could have designed it differently" rule would be devastating to technology companies, effectively deputizing them into the role of copyright police. Technology companies would be put to a Hobson's choice—either take your chances proving a negative in court ("Your Honor, there was nothing more we could have done to protect copyrights") or invite Hollywood's lawyers into engineering meetings, in hopes of securing prior approval for new technologies.

ReplayTV is already getting a glimpse of this dystopian alternate reality, a reality where copyright litigators pick through design decisions after the fact, looking for any evidence that the engineers failed to take an opportunity to add more "policeware" to the product. According to Pulgram, the plaintiffs have already demanded to see all the internal design documents that led up to the ReplayTV 4000 series, seeking evidence that the product could have been designed more to Hollywood's liking.

Technology companies take note—this case is not just about whether couch potatoes can skip commercials. Whatever the outcome, it could influence not just the future of television but the course of innovation for decades to come. ■

Why should Hollywood be exempt from the disruptive effects of innovation any more than the railroad industry was?