

LEGAL RIGHTS

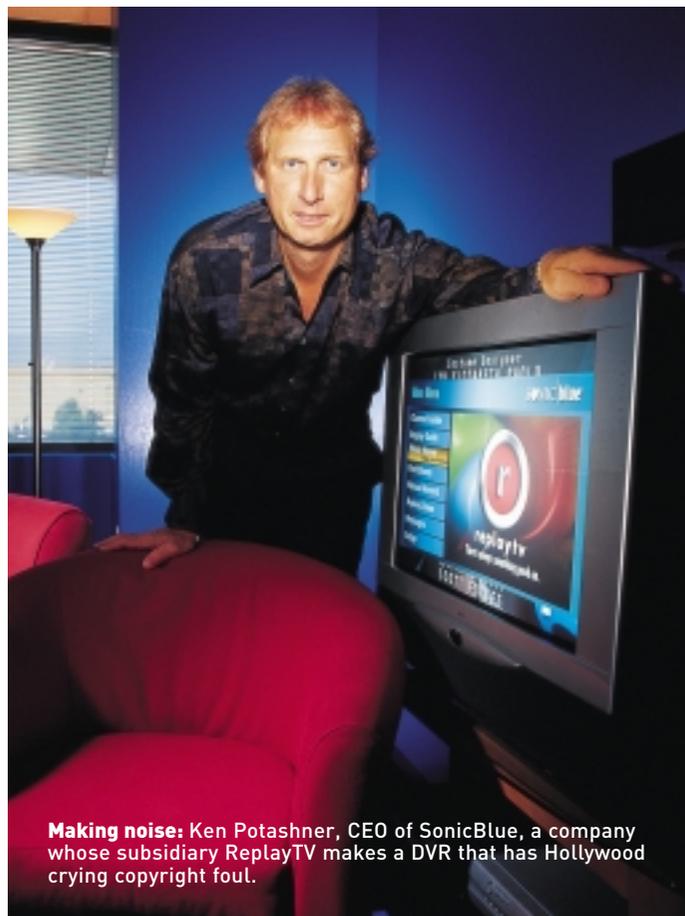
Déjà vu on the content highway.

By Joanna Pearlstein

THE computer hard drive is no longer a lowly storage device. It has grown up and been modified for the entertainment world to become the more glamorous digital video recorder (DVR), a device that supposedly presages a utopian world of digital home entertainment. With this enviable status comes the glory of being the subject of a lawsuit that could fundamentally alter consumers' rights to record and view copyrighted content.

The movie and television industries say some DVRs, also known as personal video recorders (PVRs), violate copyrights. They are concerned that owners of DVRs—which, according to the Consumer Electronics Association, are installed in just 1 percent of U.S. households that have TVs—can create digital copies of TV content, strip them of commercials, and send them to friends over the Internet.

And because DVRs are gaining in popularity just as the television industry is struggling to retain its audience and prop up revenue any way it can, it should be no surprise that every major Hollywood entity has shown up in court. Among the plaintiffs are Viacom and its subsidiaries Paramount Pictures and CBS; Disney and its subsidiary ABC; General Electric and its subsidiaries NBC and NBC Studios; and Time Warner Entertainment and its



Making noise: Ken Potashner, CEO of SonicBlue, a company whose subsidiary ReplayTV makes a DVR that has Hollywood crying copyright foul.

subsidiaries Warner Bros., the WB Television Network, and Home Box Office. They're all suing SonicBlue and its subsidiary ReplayTV, contending that its ReplayTV 4000 device violates copyrights through its Send Show feature, which lets users transmit recorded programs over a broadband connection to owners of compatible ReplayTV devices, as well as through its Commercial Advance feature, which can automatically delete commercials from recorded programming.

The suit, filed last October in a Cali-

fornia U.S. District Court, claims, "Copying programming for playback with defendants' AutoSkip effectively circumvents the means of payment to copyright owners for the programming being viewed and therefore their ability to fund it." (Representatives of the plaintiffs declined to comment for this story.)

Like DVRs from TiVo, EchoStar Communications, and Microsoft, the ReplayTV 4000 records broadcast and cable television to a hard drive and includes software to manage what programs are recorded. So why is ReplayTV being sued, while other DVR makers are not? Because the others have been careful to protect their crucial partnerships with the TV industry, and they've avoided having a dedicated Skip button on their devices.

Take TiVo, ReplayTV's most direct competitor: AOL Time Warner is its largest shareholder; Sony and NBC are other top investors. TiVo users can skip commercials, but they must use an old-fashioned Fast Forward button to do so. That's a deliberate choice, says TiVo president Morgan Guenther. "Without pissing off the industry, customers need to fast forward, so the button we have gets you through the commercials [at high speed]. We really did feel like there's a line in the sand, and we can't take on the industry ourselves, and we can't succeed

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without working with the industry.”

TiVo wants to protect its Hollywood connections—an advantage ReplayTV lacks. Before being bought by SonicBlue in February 2001 for \$123 million, its investors included NBC, Disney, Fox, Time Warner, and Showtime Networks—all plaintiffs in the suit against SonicBlue. (General Electric, NBC's parent, still owns about \$427,000 in SonicBlue stock.) In lieu of its competitor's sales lead and big backers, SonicBlue has pursued an aggressive marketing strategy, says CEO Ken Potashner. “The big difference between TiVo and us is that we're being more provocative with the features,” he says. “TiVo clearly has commercial-skipping capabilities. TiVo will clearly move to broadband-based products, but they're not marketing those features, and they're placating the networks who are also investors in TiVo.” He adds, “Sales are up because of the lawsuit.” The company had shipped about 60,000 units as of February—just 5 percent of the total DVR market, according to In-Stat/MDR; TiVo has about 435,000 subscribers to its service (see “Fast Forward,” below).

RECORDING DEALS

For 18 years, the recording of copyrighted content on videocassette recorders has been generally considered a “fair use” of that material. In the 1984 U.S. Supreme Court decision of *Sony Corp. of America v. Universal City Studios*, commonly known as the Sony Betamax dispute—the ruling that legalized the Betamax analog video recorder—Justice John Paul Stevens wrote for the majority: “Any individual may reproduce a copyrighted work for a ‘fair use’; the copyright owner does not possess the exclusive right to such a use... the sale of copying equipment, like the sale of other articles of commerce, does not constitute contributory infringement if the product is widely used for legitimate, unobjectionable purposes. Indeed, it need merely be capable of substantial noninfringing uses.” In their suit against SonicBlue, the studios claim that the automatic deletion of commercials “goes far beyond the narrowly circumscribed conduct discussed by the Supreme Court in the 1984 Sony Betamax decision.”

The Electronic Frontier Foundation, a

San Francisco organization that advocates for individual rights and technology—is suing the studios on behalf of five ReplayTV 4000 users in a California U.S. District Court. “We thought that before Hollywood goes to court and decides the fate of PVRs, some actual PVR owners should be able to defend themselves,” explains Fred von Lohmann, senior staff attorney at the EFF.

SonicBlue's supporters say DVRs aren't the first devices to let consumers skip commercials and share programs. As Mr. von Lohmann puts it, “The studios like to point out that Replay lets you share programs with others. My response is that ever since the first VCR you've had that ability. It's called the Eject button.”

COMMERCIAL BREAKDOWN

Faced with sagging revenue, the industry equates skipping commercials with theft. “Your contract with the network when you get the show is that you're going to watch the spots,” said Jamie Kellner, the CEO of Turner Broadcasting System, in an interview with *CableWorld* magazine this past spring. TBS is a plaintiff in the SonicBlue case. Mr. Kellner later allowed, “I guess there's a certain amount of tolerance for going to the bathroom.”

Gary Arlen, president of Arlen Communications, a Bethesda, Maryland, research company, calls Mr. Kellner “a whining, greedy apologist” and says, “Consumers are not stealing viewing time. They are managing it differ-

ently... same as they've done in zapping via remote control for decades.”

That's an argument the studios can't afford to agree with. In an industry where compound annual revenue growth hit just 3.8 percent between 1996 and 2001, according to a new report on the television industry from the merchant bank Veronis Suhler Stevenson, even 1 percent of households matters. A recent study from CNW Marketing Research shows that 71 percent of DVR owners, on average, skipped commercials on recorded programming, compared with 16 percent of VCR owners.

When consumers consume content in other manners, either by viewing a friend's videotape or by downloading and watching a digital copy of a program, it circumvents an audience-tracking system that allows the networks to charge what they do for commercials. Networks especially dislike digital copies because they don't degrade the way video and audio tapes do. And any decrease in the number of money-making viewers is cause for worry: in 2001, broadcast advertising declined 8.1 percent—the first decline since 1993, according to Veronis Suhler Stevenson. (However, last year was unusual; even-numbered years tend to produce more advertising, because of Olympics and elections, and around-the-clock coverage of the September 11 terrorist attacks took a toll on revenue as well.) “From their point of view, the sky is falling and there can be no alternative,” says Martin Kaplan, associate dean of the University of Southern California's Annenberg School for Communication.

Still, SonicBlue could be the least of the studios' worries. EchoStar, a satellite TV provider, includes a homegrown DVR in some of its systems and holds the largest share of the U.S. DVR market. Microsoft, which offers a DVR called UltimateTV, is reportedly adding those capabilities to the Xbox. Those companies may avoid marketing features that upset the studios. But as consumers find new ways to find the content they want and avoid the content they don't, and as ethernet connections on video recorders make their way into our living rooms, Hollywood's blood pressure is likely only to rise. ■

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