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July 29, 2004

**BY ELECTRONIC FILING**

Marlene H. Dortch, Esquire  
Secretary  
Federal Communications Commission  
445 12th Street, NW  
Washington, DC 20554

**Re: Notification of *Ex Parte* Communication  
MB Docket No. 04-63**

Dear Ms. Dortch:

This is to advise you, in accordance with Section 1.1206 of the FCC's rules, that I transmitted the attached "TiVo Response to the NFL" on Wednesday, July 28, 2004, to Susan Mort of the Media Bureau and the members of the Commissioners' staff listed on Attachment A.

As required by Section 1.1206(b), as modified by the policies applicable to electronic filings, one electronic copy of this letter is being submitted for the above-referenced docket.

Very truly yours,



James M. Burger

**ATTACHMENT A**

**Commissioner Abernathy's Office**

Stacy Robinson Fuller

**Commissioner Adelstein's Office**

Johanna Miles Shelton

**Commissioner Martin's Office**

Catherine Crutcher Bohigian

**Commissioner Copps' Office**

Jordon Goldstein



## TiVo RESPONSE TO THE NFL

- TiVo's application should be considered on the security of its technology to give effect to the broadcast flag and not on conclusory statements and unsubstantiated copyright and commercial retransmission claims that are not the subject of this proceeding – and each of which would be a violation of TiVo's subscription agreement.
- The NFL fails to make any case that TiVo's carefully controlled remote access feature will result in indiscriminate redistribution. Functionality should not be denied to consumers in general based on unsupported concerns that some consumers may potentially attempt to misuse it.
- TiVo's application does not permit commercial users to send NFL games in "real time" to a large number of sports bars in distant markets as the NFL speculates. TiVo requires its subscribers to register their devices, agree to a subscriber agreement (which, among other things, restricts use of content to a subscriber's personal, non-commercial use), and can revoke any subscriber who violates that agreement. TiVo thus has the "standards" that the NFL claims are necessary to ensure that the members of the secure viewing group are (1) members of the subscriber's family or "normal circle of social acquaintances" or (2) using the content for their personal use.
- TiVo's remote access does not enable real-time streaming of content, even SDTV content, across the Internet. TiVo records digital content in the format in which it is received and does not allow its users to change the recording quality. Because the content is encrypted, stored content cannot be transcoded into any other compressed format. Moreover, limitations on upload speeds (128 – 256 kbs) would prevent residential users from being able to access MPEG-2 files real-time over the Internet at SDTV resolution (350,000 pixels per frame - see §73.9003(a)(7)). Typical SDTV MPEG-2 bandwidth is 2-8 Mbs per second; an order of magnitude greater than typical residential upload speeds.<sup>1</sup> Thus, based on the bandwidth requirements streaming to a single user is not possible. Consequently, streaming to two users is clearly impossible as it doubles the bandwidth required, let alone to multiple users as the NFL speculates.

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<sup>1</sup> Indeed, if the theoretic streaming of SDTV is such a serious threat by few thousand TiVo owners why is the NFL still in business? Today anyone with a PC and a capture card could digitize unprotected over the air analog (see e.g., [www.snapstream.com](http://www.snapstream.com)), or simply downconvert the MPEG-2 HDTV, transcode it and stream it to millions a la iCrave as noted in the NFL letter. (iCrave transmitted and the Snapstream product transmitted video with far less resolution than even SDTV – because it isn't possible to reliably transmit full resolution SDTV over the Internet in real-time.) More importantly, because of the analog hole, even if and when analog TV ends, millions of viewers will be able to do the same without purchasing a number of TiVo DVRs, paying for the service, registering with TiVo, and agreeing to the restrictions in TiVo's subscription agreement.

- The continued use of the number 19 is simply wrong and misleading, as noted in TiVo's waiver process submitted to the Commission, it has yet to grant any waiver of the 10 device limit and it has agreed to restrict such waivers to a maximum of one-tenth of one percent of TiVo subscribers, among other restrictions.
- The NFL has adequate forums to enforce their copyright and licensing rights. Such enforcement is not the FCC's responsibility. As noted in our earlier response to the NFL, their real problem is one they have adequate remedies they use today against commercial establishments violating the copyright law by publicly performing their copyrighted games.
- Waiting until some indefinite time in the future will be seriously damaging to TiVo despite the NFL's claim. TiVo is competing in the DVR market against much larger companies, including those owned by MPAA members. (See attached story in today's *USA Today*.) If the Commission denies TiVo's ability to innovate in this space, it could well be seriously harmed resulting in a reduction of competitive offerings to the consumer.
- In the unlikely event the Commission decides that it does need to determine the scope of NFL's copyrights, TiVo can readily implement changes to its system since (a) TiVo has granular control over every device; and (b) because it simply isn't possible to stream TiVo encrypted MPEG-2 over the Internet and TiVo users are not permitted to violate copyright. Hence, it wouldn't be "taking anything away" from users to impose any restriction the FCC later might decide is reasonable.
- All technologies are not equal. TiVo has supplied the FCC with a very high bar of security to support its application. The FCC certainly can distinguish among technologies that are secure enough to permit remote access of DTV broadcast content.
- The FCC set the ground rules for broadcast protection – limit indiscriminate redistribution. TiVo's application does that and much more.

## Will DVR rivals outrun TiVo?

By David Lieberman, USA TODAY

Posted 7/28/2004 12:14 AM Updated 7/28/2004 2:55 AM [http://www.usatoday.com/tech/news/2004-07-28-tivo-cov\\_x.htm](http://www.usatoday.com/tech/news/2004-07-28-tivo-cov_x.htm)

When analyst Bruce Leichtman looks at TiVo ([news](#) - [web sites](#)), the company that pioneered digital video recorders (DVRs) in 1999, he thinks of Moses.

Like the biblical hero, the tiny Alviso, Calif.-based company has spent years leading a small band of true believers through television's vast wasteland. They're passionate about their TiVos, which blend a hard drive and software in ways that make it easy to capture and watch shows on your own schedule and to pause a TV show while it's on.

Now, after years of losing money, TiVo can see the land of milk and honey. DVRs are poised to emerge as a hot item this holiday shopping season. By 2008 more than 20% of all households will have one, up from 3% at the end of 2003, according to PricewaterhouseCoopers.

"That inflection point for DVRs is really happening," says TiVo CEO Michael Ramsay.

But although TiVo "built this category and led everybody to the Promised Land, the company may not get there with them" - at least not with the success early fans envisioned - says Leichtman, who's president of the Leichtman Research Group.

As DVRs take off, a host of deep-pocketed TiVo competitors - cable, satellite, computer and consumer electronics companies - are poised to blitz the market with affordable DVRs using their own software and services. Many are packaged with other hot features, such as built-in DVD writers.

Some believe that TiVo became too cocky about its slick user interface and hip brand vs. rivals. TiVo has become as synonymous with DVRs as Xerox is with photocopiers - as with "Xeroxing," "TiVoing" is now a verb.

Still, after five years in the market, TiVo provides its service directly to just 724,000 DVRs as of April. Those who buy from TiVo pay \$150 or more for a set-top box equipped with a hard drive and choose to pay \$13 a month or \$300 for the life of the box for the software and daily updated programming data. TiVo records an additional 872,000 subscriptions providing service to DirecTV (DTV) clients with hard drive-equipped satellite TV receivers.

Even those numbers are murky (story, right). And time is running out for TiVo to show whether it can make good on early vows to dominate the market.

Lots of investors are showing worry. TiVo stock closed Tuesday at \$5.10, less than half of its more than \$12 value in February - and far from its heady Internet bubble peak above \$70 in early 2000.

Among the issues:

- DirectTV.** TiVo's relationship with the No. 1 satellite company is starting to look shaky.

DirectTV has heavily promoted TiVo service to its 12.6 million customers as a \$5-a-month extra for subscribers who buy set-top decoders with built-in DVRs.

But TiVo investors worried what might happen when Rupert Murdoch took control of DirecTV early this year. Many thought they saw the writing on the wall last month when DirecTV sold its 3.4 million TiVo shares.

Their big fear will come true early next year: DirecTV plans to introduce a DVR service from another company Murdoch controls, NDS Group, an executive familiar with the company's plans

says. DirecTV subscribers will be able to buy a decoder equipped with a DVR designed either for TiVo or for NDS, at least until 2007, when TiVo's arrangement with DirecTV expires.

(The No. 2 satellite company, EchoStar (DISH), has its own DVR service. TiVo has sued for patent infringement.)

A shift in DirecTV's marketing focus "could substantially slow TiVo subscriber growth," J.P. Morgan Chase analyst Barton Crockett notes in a recent report. He predicts that TiVo's share of the DVR market will drop to 19% in 2009 from 40% this year.

Some investors wonder whether Murdoch really wants to buy TiVo and is angling to lower the price.

Ramsay says that "despite all the rhetoric," his relationship with DirecTV "is highly productive and executing according to plan."

•**Cable.** Operators control the programming to about 67% of all homes. But, after years of talks, TiVo still doesn't have a deal to license its software to a major cable company, something it has long identified as a top priority.

Operators are loath to let an independent company get between them and their viewers or advertisers.

Now Comcast (CMCSA), Time Warner (TWX), Cox (COX) and others are ready to promote digital set-top decoders with built-in DVRs and their own services.

They got a late start: The leading supplier of cable set-top decoders, Motorola (MOT), started shipping DVR-equipped boxes only in September. And it's just beginning to send out the boxes operators want most - ones with two tuners, enabling users to watch one live show while recording another.

"2004 is TiVo's year, because 2005 is cable's year," Forrester Research's Josh Bernoff says.

Operators see DVRs as a lure to get subscribers to also buy digital programming packages - a prerequisite for DVR service - and to keep them from defecting to satellite.

They're impressed with what they've seen at Time Warner, which gets most of its DVR-equipped boxes from Scientific-Atlanta. About 500,000 customers since 2002 have signed up for its DVR service, which typically costs \$10 on top of the digital cable TV fee.

TiVo has some features cable doesn't. For example, TiVo users can program their DVRs to jump forward in 30-second increments, skipping ads instead of just fast-forwarding through them. They can also connect to wireless home networks.

Still, many TV viewers prefer cable's lower price and the convenience of having everything in one box.

About 11% of people who express a strong interest in buying a DVR opt for the \$10-a-month cable box option, while only 5% like TiVo's model, according to a survey Leichtman commissioned in June.

To be sure, TiVo is still trying to get into cable's door. While Ramsay won't say how close he is, he says that he's "trying to modulate expectations."

•**Gadget makers.** You don't necessarily need a DVR to enjoy the benefits of a DVR.

For example, personal computer manufacturers are building units capable of storing and retrieving TV shows, along with digital music and photos, for use in a home entertainment system.

Dell (DELL), Gateway (GTW), Sony (SNE), Toshiba and Hewlett-Packard (HPQ) are among the companies offering units with Microsoft's (MSFT) new Windows Media Center Edition operating system, which enables the hard drive to function much like a DVR.

In addition, consumer electronics companies including Sony, Toshiba and Panasonic are configuring DVD recorders with hard drives so owners can easily record shows and save them to a disc.

#### TiVo fights back

Despite all the coming competition, TiVo's not giving up on the mass market yet. Ramsay expects to add 1.5 million TiVo subscriptions in this fiscal year, which ends Jan. 31, to the 1.3 million reported this past year.

It's planning a big campaign to win subscribers during the holiday shopping season.

It'll start in August with an ambitious ad campaign. TiVo also will offer rebates that will take the cost of its most basic DVRs - ones that record 40 hours of programming on a hard drive - to about \$100. That's about half of what it costs TiVo to make them.

TiVo has already warned analysts that it will spend an extra \$50 million on subscriber acquisition this year. That's a big deal for a company that lost \$32 million on \$141 million in revenue last year. Executives say TiVo's operating loss this fiscal year could hit \$90 million, up from \$22.5 million.

But TiVo says it can recoup those losses in less than a year from the subscription fees. The bottom line: Each customer represents a lifetime value to TiVo of \$230.

Ramsay's also eager to show advertisers, particularly during the elections and Olympics, how TiVo can deliver information about who watches what far faster, and with more depth, than Nielsen does with its ratings.

"TiVo's value to the industry hasn't been shown yet," says Richard Doherty of The Envisioneering Group. "This is the last summer they'll be able to make that case before these other (DVR) products come in."

#### Keeping options open

Yet even as TiVo tries to salvage its original market-leader strategy, it also is beginning to change its tune.

Ramsay wants to convince Wall Street that TiVo also can do just fine by appealing mostly to a niche audience of early adopters. It can sell DVRs with lots of sexy features - models for high-definition TVs are on the way - and license its service to consumer electronics manufacturers.

"The retail and consumer electronics component of our business is a big deal," Ramsay says.

Looking ahead, Ramsay expects a "major catalyst" for growth to come from new units that combine DVD recorders with DVR hard drives. The hope is that millions of VCR owners will go digital as the price of those units falls to under \$200 from about \$500.

Ramsay's also excited about the possibility of striking deals with companies that want to transmit shows via broadband for people to watch on their TVs.

"It's an area that's ripe for development," he says. "It's fascinating and can be a huge opportunity."

Indeed, Ramsay says that TiVo now is "almost in hypergrowth mode" and will finally report its first net profit in the year ending January 2006. But he won't say whether, to meet that goal, he might have to cut his investment in the future: marketing and R&D.

He could face a new set of problems if his consumer electronics allies create products that enrage Hollywood and others. Studios and the National Football League are already challenging TiVo's effort to win Federal Communications Commission approval for a device that would enable subscribers to copy recorded TV shows to their computers. They say it's a small step from PCs to unlicensed distribution over the Internet.

With all of these pressures, TiVo needs more friends to buy into its slick user interface and chic brand. If the company can't make them, then Ramsay may have no choice but to emulate Moses and pray for a little divine intervention.