

**You Say You Want An  
eVolution:  
Recent Developments  
in the Online  
Music Industry**

The nascent online music industry is facing a multitude of challenges, from intellectual property battles to the David and Goliath struggles between major and independent labels and paid and free music content providers, to develop distribution methods that can be monitored and protected. Although the illegal sale of pirated music remains a \$4 billion worldwide problem, there are signs that creative marketing strategies and new avenues of enforcement are making inroads into the crisis. In early September, the British Phonographic Industry launched the official UK Download Chart, which provides a weekly listing of the top twenty singles individually purchased from UK-based legal online music services. Besides providing record labels with an online market snapshot, the

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## **FCC Approves Development of TiVoGuard: Technology allows TiVo Subscribers to Transfer Recorded TV Programs over the Internet**

The Federal Communications Commission last month unanimously approved technology being developed by TiVo, a digital television recording service, that allows its subscribers to transfer recorded programming over the Internet.

TiVo asked the FCC for permission to develop TiVoGuard Digital Output Protection Technology: digital video recorders that allow subscribers to transfer over the Internet recorded television programs to as many as nine playback devices, provided all of the devices share the same TiVo subscriber account.

Although TiVo is still developing the technology and it is not yet available to TiVo subscribers, companies that create and distribute entertainment content are concerned that the technology could disrupt longstanding advertising models and facilitate copyright infringement.

The TiVo digital recording service, which allows viewers to edit out commercials, already has forced advertisers to change the way they deliver their messages. Companies that create and distribute entertainment content say that the ability to stream programming over the Internet to remote locations further threatens programming models based on local advertising revenue. "Technologies that enable redistribution of copyrighted TV programming beyond the local TV market disrupt local advertiser-supported broadcasting and harm TV syndication markets – essential elements supporting the U.S. local broadcasting system," the Motion Picture Association of America said in a statement issued in response to the FCC's decision.

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sponsors of the online chart hope that the chart's existence will encourage young music fans to support their favorite bands by legally purchasing the bands' singles online.

On September 21, California approved a new law that makes it a criminal offense to anonymously distribute copyrighted material on the Internet, the first measure of its kind in the United States. The measure, SB 1506, amends the California Penal Code to make it a crime for anyone to knowingly disseminate a commercial recording or audiovisual work to more than ten other people without disclosing his or her e-mail address and the title of the recording or audiovisual work. Interestingly, in addition to a fine of up to \$2,500 and/or up to one year imprisonment for adult offenders, the amendment includes fines of \$250 for first or second offenses and a fine of up to \$1,000 and/or imprisonment for a third or subsequent offense by a minor.

Implementation of such innovative marketing strategies and enforcement methods is finally making headway as the record labels collaborate with the online

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The issue is that advertisers target their TV commercials to certain local areas and TiVoGuard would allow subscribers to transfer these commercials out of their target local area, diluting the effectiveness of the advertisements. In addition, broadcasters price advertising based in part on Nielsen reporting of local watching habits and using TiVoGuard to transfer locally-recorded content to another location could skew these figures.

Further, entertainment content creators told the FCC that TiVoGuard poses a threat to copyrighted works because it allows mass indiscriminate distribution of broadcast content. In its White Paper submitted to the FCC, the MPAA argued that "TiVoGuard ignores...the legal limitations – such as restricted grants of rights from talent, owners of sound recordings, sports leagues, and others – that can prevent a copyright owner or broadcaster from authorizing redistribution of programs to additional U.S. markets or to other countries or territories beyond those contemplated by the original broadcast distribution agreement." The FCC disagreed.

In approving TiVoGuard, the FCC said that it sought a balance between the threat of mass, indiscriminate redistribution and protection of consumers' use and enjoyment of digital broadcast content. The FCC explained that TiVoGuard limits redistribution of protected content to a secure viewing group of devices that belong to the same TiVo subscriber and are associated with the same TiVo service account. TiVo accomplishes this through methods that include encryption and regular authentication of its recording devices. The FCC found these security features are sufficient to allow TiVo to go forward with developing TiVoGuard.

The FCC's decision, which only allows TiVo to develop TiVoGuard, is not a safe harbor from liability if TiVoGuard, once developed, disrupts longstanding advertising models or facilitates copyright infringement. Entertainment content creators will be watching carefully the development and eventual use of TiVoGuard to see if the FCC was wrong when it ruled that the technology has enough content protection features in place.



music providers. An instructive example of the music industry's online evolution is the catalogue of the Beatles – the best-selling recording group in history – may soon be available for the first time via paid online music service as a result of the fact that traditional music industry giants are embracing the power and influence of Internet distribution.

In 1976, Apple Computer was sued by the Beatles for infringing on the Beatles' Apple Corps trademark, and, as part of the settlement, the Beatles permitted the computer company to continue to use the "Apple" name in exchange for Apple Computer's promise not to enter the music business. Two subsequent lawsuits by Apple Corps against Apple Computer followed: in 1989, after Apple Corps sued Apple Computer for its entry into the music software market, Apple Computers paid Apple Corps \$26.5 million and agreed not to use the Apple trademark in music-related ventures; and, in 2003, Apple Corps filed the current lawsuit as a result of the launch of Apple Computers' online music store, iTunes. Interestingly, because of iTunes' success, and because Apple Corps knows it can obtain the best price from Apple Computer as part of a likely third settlement, Apple Computer now stands the best chance to obtain the rights to sell the Beatles catalogue online.

The possible addition of the Beatles catalogue would only add to iTunes' domination of the paid digital music realm. With about one million songs available via iTunes, Apple is dominating the online music market with a 70% market share and sales of over 125 million digital downloads. Despite such daunting figures, competitors such as Sony with connect.com and Microsoft, which launched its own online music

store, MSN Music, in early September with 500,000 songs, continue to enter the market, or, as in the case of the original online music pioneer, eMusic, to offer unique niche services to music purchasers. EMusic, which was sold last year to private investors by Vivendi Universal and also features about 500,000 songs, recently launched a revamped music store which offers primarily independent labels and artists and features an online panel of music critics to assist buyers with song selection.

The existence of eMusic – and its 70,000 subscribers – is significant in an industry in which 80% of the worldwide catalogue demand is owned by four labels (and their sub-labels) (EMI Records, Vivendi Universal, Warner and Sony BMG). Independent-based eMusic offers its subscribers music in the MP3 file format – a sale format not used by major labels who prefer file formats with greater licensing and copy protection safeguards. Unlike traditional vinyl records or CDs, that are playable on any brand of record or CD player, there are many different file formats for digital music on the Internet, and the larger music services, such as Apple's iTunes, incorporate coding into their file formats that attempts to prevent buyers from, for example, transferring the songs onto any portable player other than Apple's iPod.

EMusic's creative counterpart, GarageBand.com, founded by former Talking Head's keyboardist, Jerry Harrison, provides another example of how the online



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music business is evolving from an artist's standpoint. Although some paid music services such as iTunes allow independent artists to create bio and album pages to sell their music, GarageBand.com, a free service, provides a unique forum for musical artists to critique each other's songs in exchange for posting their own music. Just as eMusic's independent status allows the service to provide music in the more flexible MP3 format, GarageBand.com's niche allows the service to boast a massive library of over 1.8 million songs. Ali Partovi, CEO of GarageBand.com, reports that "the

primary role of the music industry is to have artists be heard above the rest .... The Internet has the service and tools to find the needle in the haystack." GarageBand.com's formula has proven successful for at least 15 bands that have been signed by major labels as a result of their popularity on the website. As stated by Mark Ghuneim, president and CEO of Wired Set Records, "major labels are using the Internet to break artists, and so are independent musicians", making the online music services an "absolutely essential" element of launching a musical artist's career today.

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