No. 12-57048

IN THE
UNITED STATES COURT OF APPEALS
FOR THE
NINTH CIRCUIT

FOX BROADCASTING COMPANY, INC., TWENTIETH CENTURY FOX FILM CORP., AND FOX TELEVISION HOLDINGS, INC.,

Plaintiffs-Appellants,

v.

DISH NETWORK L.L.C. AND DISH NETWORK CORP.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Central District of California
Case No. 12-cv-04529
District Judge Dolly M. Gee

BRIEF OF PLAINTIFFS-APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, and to enable the Court to evaluate possible disqualification or recusal, Appellants certify as follows: Appellant Fox Broadcasting Company is an indirect, wholly-owned subsidiary of News Corporation, a publicly traded company. No publicly held company owns 10% or more of News Corporation stock. Appellant Twentieth Century Fox Film Corp. is also an indirect, wholly-owned subsidiary of News Corporation, a publicly traded company. No publicly held company owns 10% or more of News Corporation stock. Appellant Fox Television Holdings, Inc. is also an indirect, wholly-owned subsidiary of News Corporation, a publicly traded company. No publicly held company owns 10% or more of News Corporation stock.

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JURISDICTIONAL STATEMENT

This is an action for violations of the Copyright Act, 17 U.S.C. Section 101, and breach of contract. The district court had jurisdiction over the copyright claims under 28 U.S.C. Section 1331 and the contract claims under 28 U.S.C. Section 1367. The court denied the preliminary injunction sought by Plaintiffs-Appellants Fox Broadcasting Company, Twentieth Century Fox Film Corporation, Inc. and Fox Television Holdings, Inc. (collectively, "Fox") on November 7, 2012. ER 632. This Court has jurisdiction under 28 U.S.C. Section 1292(a). Fox timely filed its notice of appeal on November 9, 2012. F.R.A.P. 4(a)(1)(A); ER 665.

STATEMENT OF ISSUES

1. Dish offers its subscribers a service called PrimeTime Anytime ("PTAT") that records all primetime network broadcast programming every night. The district court found that, among other things, Dish selects the channels, times, and specific copyrighted programs to be included in each night's recording. Did the district court err in holding, without precedent, that Dish does not infringe because the subscriber, not Dish, is the "most significant and important cause" of the recording, even though all the subscriber does is press one button once to receive nightly recordings in perpetuity?

2. Dish is contractually prohibited from copying Fox programming or from distributing it on a "video-on-demand" ("VOD") or similar basis except pursuant to a specific license that prohibits fast-forwarding during commercials. Was it error for the district court, in finding no likelihood of success on the contract claims, to: (i) ignore its own findings that Dish participates in and is involved in the PTAT copying, (ii) interpret the term "distribute" as requiring copies to change hands, when the term plainly refers to distributing programming over the Dish Network, (iii) find that PTAT is not VOD, when all the evidence established that it was, including Dish's own, under-oath admission, and (iv) ignore Fox's argument that including an automatic commercial-skipping service (AutoHop) with PTAT breached Dish's promise not to take any action to circumvent the contract?

3. The district court found that Dish infringes Fox's copyrights when it copies Fox programs every night to enable AutoHop's ad-skipping functionality, and that such ad-skipping functionality irreparably harms Fox. Was it error for the court to ignore its own findings and refuse to enjoin Dish on the theory that the irreparable harm does not "flow from" the infringing copies?

4. This Court has held that fair use requires a case-by-case analysis and cannot be determined using bright-line rules. Did the district court err in

applying a bright-line rule, without analyzing the fair use factors, that recording television programs to view later is always a fair use, even if it includes building a massive library of all primetime network programming for later on-demand viewing in a commercial-free format?

5. The main source of financing for Fox's primetime broadcast television programming is the sale of commercials. PTAT with AutoHop completely eliminates these commercials upon playback – diminishing their value, threatening Fox's ad-supported television model, and disrupting Fox's licensing relationships in secondary, non-broadcast markets. Do these irreparable harms, which also threaten third parties and the public, support a preliminary injunction?

INTRODUCTION

Dish is a satellite television distribution service that contracts to carry Fox's programming. Dish is contractually prohibited from distributing Fox programming on a VOD or "similar" basis, except pursuant to a specific license that requires disabling of fast-forwarding during commercials. Dish recently launched PTAT, an unauthorized service that copies the entire primetime schedule for all four major broadcast networks every night, and then makes this nearly 100-hour library of programs available to subscribers for up to eight days on demand. The PTAT service includes AutoHop, a

feature that eliminates all commercials when PTAT recordings are played back, using a process that relies on additional unauthorized copies of the programs. PTAT is not a DVR and AutoHop is not fast-forwarding. This appeal does *not* challenge VCRs, DVRs, or viewers' ability to select and record programs for later viewing ("time-shifting"). Nor does it challenge viewers' ability to fast-forward through commercials when they watch programs they selected and recorded with DVRs. What it does challenge is Dish's wholesale copying of Fox's copyrighted primetime programming in order to offer its subscribers an on-demand library of commercial-free programs, in violation of copyright law and its contractual obligations.

The district court wrongly denied Fox's request to preliminarily enjoin Dish's bootleg VOD service. ***First***, the district court erred in finding Dish not liable for direct copyright infringement, even though Dish set up and runs the PTAT service, picks the networks included in the service, hand-picks each show to be recorded regardless of whether the subscriber has any interest in watching it, and determines how long each recording is available for viewing before deleting it. The district court relied on a strained reading of the much-criticized *Cablevision*[1] case to hold that despite Dish's active participation in the copying, it is not the "most significant and important" cause of the

[1] *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008).

copying because Dish subscribers press a button once to sign up for the PTAT service. Under this standard, any infringing service can now escape direct liability as long as its customers "press a button" to sign up.

Second, the district court erred in finding no breach of the contract provision prohibiting Dish from distributing Fox programs via any service "similar" to VOD, even though the court also found that PTAT was, in fact, a VOD "hybrid." The court's stated reason – that Dish does not technically "distribute" the programming in question – makes no sense because the contract expressly defines Dish as a "distributor." In doing so, the court also ignored a *sworn admission* by Dish that PTAT is a "video-on-demand service," and ignored that PTAT – a "library" of recently-aired programs available for "on demand" viewing – squarely fits Dish's own definition of VOD. The court did not even address Fox's separate claim that PTAT breaches Dish's additional promise not to take any steps "whatsoever" to circumvent the contract.

Third, the court correctly found the copying of Fox programs during the AutoHop process was copyright infringement and breaches the contract. It also found that Dish's ad-skipping service irreparably harms Fox. But, paradoxically, the court concluded that while the *benefits* enjoyed by Dish from its ad-skipping service "flow from" the infringing AutoHop Copies, the

irreparable *harms* to Fox from ad skipping do not "flow from" the AutoHop Copies because the harms come later in the chain of causation. This reasoning was legally and logically erroneous.

Fourth, the court erred in summarily rejecting Fox's secondary infringement claims on the ground that subscribers' use of PTAT to create massive libraries of copyrighted programs and then eliminate all commercials upon playback is fair use. Instead of conducting the required fact-specific fair use analysis, the court blindly held that under *Sony*[2], the PTAT copying was a fair use as a matter of law – even though *Sony* involved 1970s VCR technology that is not even close to PTAT, which is a service and not, by any stretch, a device like a VCR or DVR.

Here, Dish's unauthorized, commercial-free VOD service is anything but fair, and the need to enjoin it could not be greater. PTAT and AutoHop cut the legs out from under the ad-supported broadcast television business model, devalue Fox's commercial air time in the eyes of advertisers, block Fox's own advertising efforts, usurp Fox's control over the timing and manner in which Fox has chosen to exploit its copyrighted works, and threaten to disrupt Fox's ability to license its programs and recoup its massive investment. Fox is not "crying wolf." Independent broadcast

[2] *Sony Corp. of Am. v. Universal City Studios*, 464 U.S. 417 (1984).

stations, advertisers, and experts agree. Moody's, a "big three" credit rating agency, recently warned that if AutoHop is deployed and widely used, it "will have broad negative credit implications across the entire television industry" and could "destabilize the entire television eco-system."[3] Even Dish's chairman admitted, in an interview after this lawsuit began, that PTAT is "not good" for broadcasters and puts the entire television "ecosystem" in jeopardy.[4]

STATEMENT OF THE CASE

Fox sued Dish for copyright infringement and breach of contract on May 24, 2012, and moved for a preliminary injunction on August 22, 2012. The motion was argued on September 21, 2012. On November 7, 2012, the district court denied the motion. Fox appealed two days later.

STATEMENT OF FACTS

A. Fox's Copyrighted Programming.

Fox owns the copyrights in numerous broadcast television programs, including popular and critically acclaimed primetime series such as *Glee*, *The*

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[3] ER 360-363.
[4] ER 597.

Simpsons, *Family Guy*, *Touch*, and *Bones* (the "Fox Programs").[5] ER 255, 270-303. The Fox Programs cost hundreds of millions of dollars to produce and acquire. ER 346.

The main distribution channel for the Fox Programs is the Fox Network, a national broadcast television network. The Fox Network has more than 200 television-station affiliates (some of which are owned by Fox), which broadcast programming over the airwaves, free of charge, to virtually anyone with a working antenna and a television. Approximately 54 million Americans receive broadcast television over the air. Under this business model, Fox's programming costs are borne largely by advertisers who pay for the right to show advertisements during commercial breaks in the programs. ER 255-257.

Consumers also receive Fox programming, including the commercials, through paid subscriptions to cable, telco and satellite television distributors like Dish. ER 257. These multichannel video programming distributors are known as "MVPDs." ER 256, 1359. On behalf of the television stations it owns, Fox grants these MVPDs the right to retransmit Fox's over-the-air broadcast signal to their subscribers in exchange for a fee. ER 1538-39.

[5] "Primetime" is the evening block of television programming that attracts the most viewers. For the Fox Network, primetime is 8:00 p.m. to 10:00 p.m. Eastern, Monday through Saturday. On Sundays, primetime begins an hour earlier. ER 257.

These retransmission fees cover only a small fraction of Fox's programming costs as compared to commercial advertising revenues. ER 347.

B. Fox Licenses Its Programming For Distribution In Secondary Markets After The Original Broadcast.

Fox licenses to various third parties the right to distribute the Fox Programs after they air on primetime television in what are known as secondary markets, such as VOD, Internet streaming, digital downloads, and DVD and Blu-ray discs. ER 258-261. Fox carefully orchestrates where and when its programs can be viewed, streamed, downloaded and purchased so that it can earn different revenue streams from the programs. ER 262-263. Fox also controls the number of commercials shown during the programs when they are distributed in secondary markets, to maximize advertising revenue and ensure that price-sensitive consumers have access to advertising-supported versions of the programs. ER 262-263.

For example, Fox licenses to MVPDs the right to offer their subscribers a library of previously aired television programs for "on demand" viewing, usually starting the day after the program airs. ER 258-259. Fox requires such VOD licensees to disable fast-forwarding during commercials when a Fox Program is shown on VOD. *Id.*

Fox also licenses certain websites to stream Fox Programs over the Internet. These licenses similarly require that fast-forwarding during commercials be prevented. ER 258-260.

Finally, Fox licenses online merchants (e.g., Apple iTunes Store and Amazon.com) to offer ultra-premium digital downloads of the Fox Programs, the day after they air, with no commercials. ER 260.

C. Fox's Limited Grant of Rights to Dish.

Dish is authorized to retransmit the Fox Network broadcast signal via satellite pursuant to a 2002 license agreement (the "RTC Agreement"). ER 1540-1541. The RTC Agreement imposes several important restrictions and conditions on Dish's retransmission rights.

First, the Agreement prohibits Dish from copying any portion of the Fox Network transmission (including the Fox Programs) without Fox's written permission (the "No-Copying Clause"). ER 1556.

Second, there are strict limits on Dish's ability to offer VOD. Under the 2002 RTC Agreement, Dish is not allowed to offer any Fox Programs on a "time-delayed, video-on-demand or similar basis" (the "No-VOD Clause"). ER 1551, 1553-1554. In a 2010 amendment to the RTC Agreement, Fox agreed to a narrow exception by making its primetime series "available to DISH on a VOD basis" (the "Limited VOD License") without requiring any

additional license fees. ER 1594. In exchange, Dish agreed to "*disable fast forward functionality during all advertisements,*" acknowledging that "fast-forward disabling is a *necessary condition* to distribution of the Fox broadcast content via VOD." *Id.* (emphases added).

Third, the same 2010 amendment broadly prohibits Dish from frustrating or circumventing Fox's rights under the RTC Agreement. It states that "[a]t no time during the Term may any of the Fox Parties or DISH take *any action whatsoever* intended to frustrate or circumvent, or *attempt* to frustrate or circumvent, the protections granted to the other Party[.]" ER 1568 (emphasis added) (the "No-Circumvention Clause").

D. Dish's Unauthorized Commercial-Free VOD Service.

In 2012, Dish introduced PTAT with a multi-million-dollar advertising campaign essentially touting PTAT as a VOD service. Dish's press release said PTAT provides "On Demand access for 8 days to all HD programming that airs during primetime hours on ABC, CBS, FOX, and NBC without needing to schedule individual recordings." ER 368, 385. Dish also promoted the PTAT VOD service as "commercial-free," boasting that it had "created commercial free TV." ER 396-401.

(1) How PTAT Works.

PTAT is a service that provides viewers with a rolling on-demand library containing all of the primetime network programming aired by the four major broadcast networks. Every night, PTAT records the entire primetime lineup of all four networks and saves all the programming to the hard drive of the subscriber's set-top box for eight days, after which it is automatically deleted. The service is exclusive to subscribers who lease Dish's top-of-the-line Hopper set-top box with two terabytes of storage.

[redacted]

The subscriber only needs to enable PTAT once, by pressing a single button, and it will continue to record all of the programs selected by Dish every night in perpetuity.

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[6] The employees technically work for Dish's agent and sister company, EchoStar. References to Dish include EchoStar. ER 1120, 1540-1541.

PTAT is not a DVR. Subscribers do not select, schedule, or record particular programs they want to watch. PTAT records only the networks allowed by Dish, only at the times selected by Dish, and only the programs selected by Dish. ER 1129, 1654-1656, 1662. [redacted] As Dish brags in an online promotional video, PTAT "does the work for you" by providing on demand access to all primetime television programs "without needing to schedule individual recordings." ER 368.

And, unlike a DVR, subscribers do not have the ability to *stop* the PTAT recording while it is in progress, even if they do not want to watch the programs being recorded. ER 1656. From twenty minutes before the recording begins until it is over for the night, the subscriber cannot disable PTAT. ER 472-473, 1664.

Underscoring the fact that PTAT is not a DVR, the Hopper set-top box *also* includes an *actual* DVR – which Dish refers to as the "personal DVR" (ER 366, 379-381) – that subscribers can use to schedule, select, and record specific programs from any channel included in their subscription. The "personal DVR" is not at issue in this case.

PTAT does not automatically start and stop recording at the same time each night. The start and end time of each night's recording of each network

is determined by Dish employees based on which programs are airing. If more than fifty percent of a program falls within primetime hours, a Dish employee marks it for inclusion in PTAT. ER 1129, 1662. This means that at Dish's discretion the recording of a network can begin before 8:00 and end after 11:00, for example, when the 2012 Olympics were broadcast on NBC. ER 1662-1663.

(2) AutoHop Makes The PTAT Recordings Commercial-Free.

Dish subscribers can watch PTAT recordings without commercials using AutoHop. AutoHop is nothing like the traditional fast-forward or 30-second skip feature found in many DVRs. As Dish put it, "once you have chosen AutoHop for your show, you can put the remote control down; you've enabled AutoHop's patented technology to skip the commercials during your show automatically." ER 1385. AutoHop works *only* with PTAT; consumers cannot use AutoHop to skip commercials on programs they record themselves with their "personal DVR." ER 1138, 560.

[redacted]

[redacted]

To make AutoHop work properly, Dish makes multiple unauthorized copies of the Fox Programs (the "AutoHop Copies"). As part of the process of identifying the commercial breaks in the programs, Dish technicians review the recorded programs and verify that the announcement files accurately cause every commercial to be skipped on playback. ER 1614, 1620, 1661-1662.

It is no secret that PTAT and AutoHop are designed to take business away from Fox's existing distribution channels. Dish Senior Vice President David Shull has publicly expressed frustration at having to compete with digital platforms that are licensed by Fox to distribute broadcast television programs online, in commercial-free formats (iTunes) and to mobile devices (Hulu, iTunes). ER 592. And Dish's Vice President, Vivek Khemka, boasted about PTAT: "I don't think you'd ever need Hulu Plus or Hulu after this." ER 372, Lodged DVD.

E. Fox's Lawsuit And Dish's Post-Litigation Changes To PTAT.

In July 2012, Dish distributed a software update that altered the PTAT settings so that the user can now de-select individual broadcast networks or days of the week from inclusion in PTAT, and can opt to save the recordings

for less than eight days. The default settings, however, still record all four networks every night of the week and save each night of programming for eight days. ER 1127, 1663, 1667. [redacted] These changes were designed to provide the illusion of user "control" when in fact Dish still runs the show. For example, even though the changes appear to allow the user to delete PTAT recordings, in fact when the user clicks a button to delete a program, only the *link* on the user interface disappears; *the Dish-made recording itself is not erased at all.* ER 1130.

F. The District Court Denies Fox's Preliminary Injunction Motion.

The district court held that Dish could not be liable for direct infringement based on the PTAT recordings because even though Dish designed, controlled, and largely operated the service – including selecting the networks to be recorded and the timing of the recording, and handpicking the programs to be included in the recording – in the court's eyes the subscriber who "pressed the button" to enable PTAT was the "most significant and important cause of the copy." ER 647-650 (Order at 16-19).

The district court also found that Fox was unlikely to succeed on its claim that Dish was in breach of the No-VOD Clause because, as the court read the RTC agreement, the restriction on VOD applied only to the

"distribution" of VOD "copies" that physically change hands. ER 658 (Order at 27). The district court did not consider Fox's claim that Dish was in breach of the No-Circumvention provision because, in the court's view, Fox did not argue this claim enough and there was not enough evidence in the record on it. ER 657 (Order at 26 n. 14).

The district court found that the AutoHop Copies were likely infringing and in breach of the No-Copying Clause, that the AutoHop Copies were used to enable ad skipping, and that Fox had shown evidence of irreparable harm from AutoHop such as a loss of control of its copyrighted works and potential lost advertising revenues. ER 654-656, 658-659, 662-663 (Order at 23-25, 27-28, 31-32). Nevertheless, the district court held that this irreparable harm did not count because it stemmed from the ad skipping, not directly from the infringing copies that made the ad skipping possible. ER 663 (Order at 32).

The district court summarily rejected Fox's secondary infringement claims. Without analyzing any of the fair use factors set out in the Copyright Act (which this Court has held *must* be considered), the court held that using PTAT to create a library of all primetime programs every night for commercial-free viewing is a fair use under *Sony*. ER 632-633, 642-643 (Order at 1-2, 11-12).

Finally, the district court found that Dish's unauthorized copying harmed Fox's opportunities to negotiate future licenses and its relationships with licensees – classic irreparable harms. ER 655 (Order at 24). However, the court decided that these harms were calculable, based on the mistaken belief that Fox grants its licensees a general right to copy the programs and use them however they want, and therefore there must be a "market value" for the right to copy that Dish could simply pay. ER 663 (Order at 32).

SUMMARY OF ARGUMENT

It was error for the district court to hold that Dish does not directly infringe Fox's copyrights when it makes the PTAT copies. No court has ever held that direct infringement requires a showing that the defendant's conduct was "the most important and significant cause of the copy." Not only did the court use the wrong legal standard, its application of that standard is unfathomable. Dish designed its service so that PTAT will record only the specific networks selected by Dish, and Dish employees handpick each program to be recorded, regardless of whether the subscriber has any intent to watch it. The subscriber only needs to turn the service on one time. Under no rational reading of these facts is the subscriber's button-pressing "the most important and significant cause" of the PTAT recording. If button-pressing were the test for direct infringement, any website or electronic service selling

pirated music, movies, or television shows would be immune from liability for direct infringement as long as the consumer had to click a button before the infringing copy was made or the infringing performance streamed.

Under the actual legal standard, Dish is a direct infringer. A plaintiff alleging direct copyright infringement need only prove ownership of a copyright and copying by the defendant, which Fox did here. In cases where a defendant is sued for providing access to an automated system that third parties can use to infringe – for example, a copy machine or an Internet site – some courts have required that the defendant be an active participant in the infringement and not merely a passive conduit that automatically responds to user commands. This Court has never adopted such a standard. In any event, even if the Court were to adopt this standard and apply it here, the undisputed facts and the district court's findings clearly establish that Dish actively participates in the PTAT copying and is no passive conduit.

Equally erroneous were the district court's rulings that Dish's conduct does not breach the RTC Agreement. ***First***, Dish's nightly copying of Fox's primetime programming for PTAT breaches the No-Copy Clause. ***Second***, the court was wrong to reject Fox's claim of breach of the No-VOD clause. Its stated reason – that Dish does not "distribute" the programming in question – makes no sense in this context. Moreover, although the court did

not reach the question of whether PTAT is VOD or "similar" under the No-VOD clause, Dish's under-oath admissions, advertising, and expert testimony, and the district court's findings all irrefutably establish that PTAT is VOD or, at bare minimum, "similar" to VOD. ***Third***, by creating massive libraries of programming for viewing on demand and without commercials, Dish is breaching the Limited VOD License, which only allows Fox-provided VOD and requires that fast-forwarding be disabled during commercials. ***Fourth***, Dish is breaching the No-Circumvention Clause. Contrary to the court's statement, this point was fully addressed by the briefs. Moreover, there was no shortage of evidence because Dish openly markets PTAT with AutoHop as commercial-free VOD, which clearly undermines the contractual protections granted to Fox.

It was also error for the district court to refuse to enjoin Dish's illegal creation of the AutoHop Copies on the ground that the ad skipping, but not the illegal copying that made the ad skipping possible, was the immediate cause of Fox's harm. The court found that Fox's irreparable harm flowed from AutoHop's commercial skipping functionality which, in turn, flowed from the AutoHop Copies. These findings should have compelled the conclusion that the AutoHop Copies would cause Fox irreparable harm.

Injunctive relief is not limited to situations where the infringement is the immediate trigger of the plaintiff's harm, as the court appeared to believe.

The district court also erred by rejecting Fox's secondary infringement claims on the theory that the subscribers' use of PTAT to create massive libraries of recorded programs for on-demand, commercial-free viewing is a fair use. The court did not even discuss the fair use factors set out in the Copyright Act before reaching this conclusion. Fair use requires a case-by-case analysis of those factors, all of which weigh against finding fair use here.

Finally, Fox submitted substantial evidence that its harms were irreparable. There was no evidence that Fox grants licenses to MVPDs allowing them to copy Fox programming for a commercial-free VOD service. Even if Fox did license those rights to some MVPDs, that does not impose a de facto compulsory license requiring Fox to grant those same rights to another MVPD. The district court's finding to the contrary was clear error.

ARGUMENT

I. Standard of Review

To prevail on a motion for a preliminary injunction, the movant must show that it "is likely to succeed on the merits, that [it] is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [its] favor, and that an injunction is in the public interest."

Winter v. Natural Res. Def. Council, Inc. 555 U.S. 7, 20 (2008). Alternatively, an injunction should issue if there are "serious questions going to the merits" and a "balance of hardships that tips sharply towards the plaintiff," so long as the plaintiff "also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest." *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134-35 (9th Cir. 2011).

An order denying a preliminary injunction is reviewed for abuse of discretion. *Associated Press v. Otter*, 682 F.3d 821, 825 (9th Cir. 2012). In deciding whether the district court has abused its discretion, the Court reviews legal issues *de novo* and findings of fact for clear error. *See id.* "A decision based on an erroneous legal standard or a clearly erroneous finding of fact amounts to an abuse of discretion." *Id.* at 824 (quoting *Pimental v. Dreyfus*, 670 F.3d 1096, 1105 (9th Cir. 2012)).

II. The District Court Erred When It Found That Dish Did Not Infringe.

The district court applied the wrong legal standard when it held that Dish is not directly liable for the PTAT copies because it is not "the most significant and important cause" of the copying. ER 650 (Order at 19). As the source of this rule, the court cited Prosser's treatise on torts, (ER 650 (Order at 19)), which is not widely used for copyright law given that it does not address copyright law, and copyright law and the relevant technology

have advanced significantly since Prosser was last published in 1984. Moreover, the phrase quoted by the district court was not a rule for determining liability; it was from a comment in the preamble to a discussion of proximate cause in the negligence context (not an issue here). *See* W. Page Keeton et. al., Prosser and Keeton on the Law of Torts, § 42, p. 276 (5th ed. 1984). The district court also misapplied its own standard, since the facts make perfectly clear that Dish plays by far the largest role in the copying process. All that a subscriber does is sign up for PTAT.

The district court's conclusion that the subscriber pressing the button was the "most significant and important" cause of the infringement appears to be derived in part from the Second Circuit's much-criticized holding in *Cablevision.* In that case, the court held that Cablevision's remote storage DVR ("RS-DVR") did not infringe because the subscriber who selected and recorded programs using the RS-DVR supplied the necessary element of volition, not Cablevision. 536 F.3d at 131. The Cablevision RS-DVR operated like a set-top DVR or VCR in that the viewer could use a remote control to select and record any program on any channel included in his Cablevision subscription. *Id.* at 125. The principal difference was that the storage was on a central server. *Id.* Finding the RS-DVR to be functionally equivalent to a VCR, the Second Circuit reasoned that "the operator of the

VCR, the person who actually presses the button to make the recording, supplies the necessary element of volition, not the person who manufactures, maintains, or, if distinct from the operator, owns the machine." *Id.* at 131. Thus, the court concluded: "We do not believe that an RS–DVR customer is sufficiently distinguishable from a VCR user to impose liability as a direct infringer on a different party for copies that are made automatically upon that customer's command." *Id.*

Cablevision has been widely criticized for placing undue emphasis on the user's act of "pressing the button," creating a loophole for infringers to exploit copyrighted works for profit so long as they design a system that requires the consumer to press a button before the work is copied, displayed, or performed. *See, e.g.*, 13 Nimmer on Copyright § 13.08 (2012) (criticizing the Second Circuit's focus on button-pressing as the dispositive factor, and noting that "the constrained posture of the case renders its precedential value questionable"); Jane C. Ginsburg, *Recent Developments in US Copyright Law – Part II, Caselaw: Exclusive Rights on the Ebb?*, p. 15, Colum. Public Law & Legal Theory Working Papers, Paper 08158 (2008)[7] (Cablevision's volitional conduct analysis "could herald the development of business models designed to elude copyright control over the exploitation of works,

[7] http://lsr.nellco.org/cgi/viewcontent.cgi?article=1050&context=columbia_pllt (last visited Dec. 11, 2012).

particularly in a technological environment in which pervasive automation is increasingly foreseeable.").

Moreover, numerous courts – including courts within the Second Circuit ostensibly following *Cablevision* – have rejected a formulaic rule that liability for infringement turns solely on whether the user "presses the button" to initiate the infringement. *See, e.g., Arista Records LLC v. Usenet.com, Inc.*, 633 F. Supp. 2d 124, 148-49 (S.D.N.Y. 2009) (rejecting argument that file distribution service that delivered downloads of pirated music at users' request could not be a direct infringer); *Capitol Records, Inc. v. MP3tunes, LLC*, No. 07-9931, 2009 WL 3364036 at *3 (S.D.N.Y. Oct. 16, 2009) (rejecting argument that website could not be a direct infringer because users must "push[] a button" to upload, transfer, or stream songs); *Perfect 10 Inc. v. Megaupload Ltd.*, No. 11-0191, 2011 WL 3203117 at *4 (S.D. Cal. July 27, 2011) (rejecting argument that website operator could not be directly liable because its users had to log in to upload and download the pirated content); *see also Blackwell Publishing, Inc. v. Excel Research Group, LLC*, 661 F. Supp. 786, 791-93 (E.D. Mich. 2009) (copyshop that assembled and sold infringing coursepacks could not avoid direct liability by having customers press the start button to make their own copies).

Cablevision's aberrant "button pressing" rule is not the law in this Circuit, nor should it be. But even if it were, it would not apply in this case because PTAT is not user-operated equipment that automatically copies programs selected by the user like a DVR or VCR when a button is pressed; it is a service in which Dish employees volitionally choose which programs to record each night, including those a subscriber may have no interest in ever watching. *See Cablevision*, 536 F.3d at 131 ("a significant difference exists between making a request to a human employee, who then volitionally operates the copying system to make the copy, and issuing a command directly to a system, which automatically obeys commands and engages in no volitional conduct"). In fact, the *Cablevision* court explicitly acknowledged that the result would have been different if Cablevision had "actively select[ed]" the individual programs available for viewing as it did with its VOD service – which is exactly what Dish does here. *Id.* at 132.

The district court found it irrelevant that Dish selects the networks and individual programs recorded on PTAT. Instead, the court focused on the fact that Dish has no control over what programs are aired on the Fox Network, stating that "[i]f Fox chooses to change its primetime lineup on a particular night, Dish may allow or disallow the PTAT recording, but it cannot control which programs will be broadcast." ER 648 (Order at 17). But whether Dish

controls what programs Fox airs is irrelevant to the question of whether Dish selects and copies those programs when they do air. The fact that Dish "may allow or disallow the PTAT recording" depending on what programs are aired is the *entire point*, since it shows that Dish, not the consumer, is controlling which programs are recorded and which are not. *See Cablevision*, 536 F.3d at 132; *see also CoStar Group, Inc. v. LoopNet, Inc.*, 373 F.3d 544, 549-50, 556 (4th Cir. 2004) (suggesting Internet service provider could be directly liable for infringement if it were to "search out or select photographs for duplication").

If volitional conduct is required for direct infringement, it is easy to establish. As the cases cited by the district court make clear, a defendant is a direct infringer as long as it is an active participant in the infringement, and not merely a passive conduit like the owner of a copy machine or Internet service whose only act is to passively provide an automatic system that others use to infringe. *See LoopNet*, 373 F.3d at 550 ("to establish direct liability under [the Copyright Act], something more must be shown than mere ownership of a machine used by others to make illegal copies"); *Religious Technology Center v. Netcom On-line Communications Service*, 907 F. Supp. 1361, 1370 (N.D. Cal. 1995) ("Although copyright is a strict liability statute,

there should still be some element of volition or causation which is lacking where a defendant's system is merely used to create a copy by a third party.").

Here, the district court found that Dish "participat[es] in," is "involve[d] in" and "exercises control over" the copying. ER 649-650 (Order at 18-19). Dish's active participation – which includes not only designing the system but also selecting the channels, times, and specific programs for copying – far exceeds the level of participation other courts have found sufficient. *See, e.g., Arista Records*, 633 F. Supp. 2d at 148-49 (volitional conduct found where file distribution service took "active steps" to distribute copyrighted music, including using automated screening and human review to block certain content, and was "not merely a 'passive conduit'"); *Playboy Enters., Inc. v. Russ Hardenburgh, Inc.*, 982 F. Supp. 503, 513 (N.D. Ohio 1997) (holding that where website encouraged users to upload files and screened the files before they could be downloaded, "[t]hese two facts transform Defendants from passive providers of a space in which infringing activities happened to occur to active participants in the process of copyright infringement"); *Megaupload*, 2011 WL 3203117 at *4 (website operator was "more than a passive conduit" and could be liable as a direct infringer when it created websites to streamline access to different types of media, encouraged and paid its users to upload media and paid affiliated website to catalogue

files); *MP3tunes*, 2009 WL 3364036 at *3 (collecting and organizing links to music files for users to download with the knowledge that many of the files are infringing was sufficient volitional conduct).

The district court's ruling that the subscriber's single click of a button outweighed all of Dish's volitional conduct is not supported by any case ever decided by any court, including *Cablevision*. If the Order is affirmed, it will be the law of this Circuit that any company can exploit copyrighted works without paying for them as long as it designs a system that requires someone else to press a button before the infringing act occurs. For example, any website selling pirated music, movies, or television would be immune from direct liability as long as it required the user to click a button before it copied a file or streamed a song, movie, or show. Any cable, satellite, or Internet television retransmitter would be free to distribute copyrighted television programs without a license because viewers must press a button to turn on their television sets. This is not the law, nor should it be.

III. The District Court Erred When It Found That Fox Was Unlikely To Succeed On Its Contract Claims.

A. Dish Breached The No-Copying Clause.

The No-Copying Clause states:

> [Dish] shall not, for pay or otherwise, record, copy, duplicate and/or authorize the recording, copying, duplication (other than by consumers for private

> home use) or retransmission of any portion of any Station's Analog Signal . . . .

ER 1556. This plainly prohibits Dish from copying any Fox programming. ER 658 (Order at 27).[8] As discussed above, Dish makes the PTAT copies of Fox Programs. The district court should have found that this breaches the No-Copying Clause and enjoined the copying.[9] And, as the court correctly observed, a breach of the parties' contract – a copyright license – "also constitutes infringement." ER 641-642 (Order at 10-11).

B. The Court Erred In Interpreting The No-VOD Clause.

The district court misinterpreted the term "distribute" as used in the No-VOD Clause. Relying on the definition of distribution under the Copyright Act, the court held that "Fox has not established that Dish engages in any distribution because the PTAT copies are made by users, remain in private homes, and do not change hands." ER 656, 658 (Order at 27, 25). As

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[8] Fox accepts the district court's reading of the No-Copying Clause to the extent it recognizes a *Sony* fair use exception for users who select and record programs to watch at a later time. ER 658 (Order at 27). But that has no bearing here because the PTAT copies are made by Dish, not its subscribers, and even if subscribers were making the copies, PTAT goes far beyond the permissible "time-shifting" addressed by *Sony*.

[9] The RTC Agreement is governed by New York law, which permits injunctive relief for breach-of-contract claims. *See Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 404 (2d Cir. 2004); *Wisdom Import Sales Co., L.L.C. v. Labatt Brewing Co. Ltd.*, 339 F.3d 101, 107-08, 115 (2d Cir. 2003).

used in the RTC Agreement, however, "distribute" cannot possibly require copies to change hands.[10]

The No-VOD Clause states:

> [DISH] acknowledges and agrees that it shall have *no right to distribute* all or any portion of the programming contained in any Analog Signal on an interactive, time-delayed, *video-on-demand or similar basis*; provided that Fox acknowledges that the foregoing shall not restrict [DISH's] practice of connecting its Subscribers' video replay equipment[.]

ER 1553-1554 (italics added).

The contract does not define "distribute." However, it does define Dish Network as a "television *distribution* system" and a "*distribution* system for video programming." ER 1551 (emphasis added). It gives Dish the right to retransmit signals from Fox-owned television stations over Dish's "distribution system for video programming . . . currently known as 'DISH Network.'" *Id.* Accordingly, when the term "distribute" is used in the RTC Agreement, it must be understood as the parties clearly understood it – i.e., Dish distributes programming by transmitting it over the Dish Network. That is why Dish and other cable, telco, and satellite television companies call

[10] Contract interpretation is a question of law subject to *de novo* review. *Bay Area Typographical Union, Union 21 v. Alameda Newspaper, Inc.*, 900 F.2d 197, 199 (9th Cir. 1990).

themselves "multichannel video programming *distributors*" or MVPDs. *See, e.g.*, ER 634 (Order at 3), 257-258, 1557.

The court's definition of "distribute" cannot be correct because it would produce absurd results: Dish would be operating as a self-described "programming distributor" even though by the court's definition it does not "distribute" any programming because when it retransmits programming over the Dish Network copies of the programs do not change hands. It is well-settled that "a contract should not be interpreted to produce an absurd result." *Cole v. Macklowe*, 99 A.D.3d 595, 596 (N.Y. App. 2012).

As the district court correctly noted, contracts must be "read and interpreted as a whole," "construed to effectuate the parties' intent," and interpreted objectively, rather than relying on the "subjective expectations" of the parties. ER 657 (Order at 26) (citing New York law, which governs the RTC Agreement). But there are other equally important rules that the district court ignored, such as (1) "[w]hen the terms of a written contract are clear and unambiguous, the intent of the parties must be found within the four corners of the contract," (2) "a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms," and (3) "[c]ourts may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the

parties under the guise of interpreting the writing." *Dysal, Inc. v. Hub Props. Trust*, 92 A.D.3d 826, 827 (N.Y. App. 2012) (internal quotations and citations omitted).

By interpreting the term "distribute" contrary to how the parties were clearly using it in their agreement, the district court ran afoul of these rules. The court should have found that Dish "distributes" Fox programs through PTAT and proceeded with its breach of contract analysis by determining whether PTAT is "video-on-demand or similar."

C. PTAT Breaches the No-VOD Clause.

(1) The District Court Found That PTAT Is A VOD Hybrid And Involves More Than Connecting Users' DVRs.

Even though the district court never reached the question of whether PTAT qualified as something "similar" to VOD under the No-VOD Clause, it effectively answered that question when it found that PTAT is "a hybrid of DVR and VOD." ER 660 (Order at 29). Logically, a service that is a VOD *hybrid* must at least be *similar* to VOD. Therefore, based on the court's own finding, PTAT is "similar" to VOD and thus breaches the No-VOD Clause. The court's findings also establish that operating the PTAT service is not the same as merely connecting users' DVRs. *E.g.*, ER 648-650 (Order at 17-19). Thus, this Court should hold that the district court erred in its interpretation of

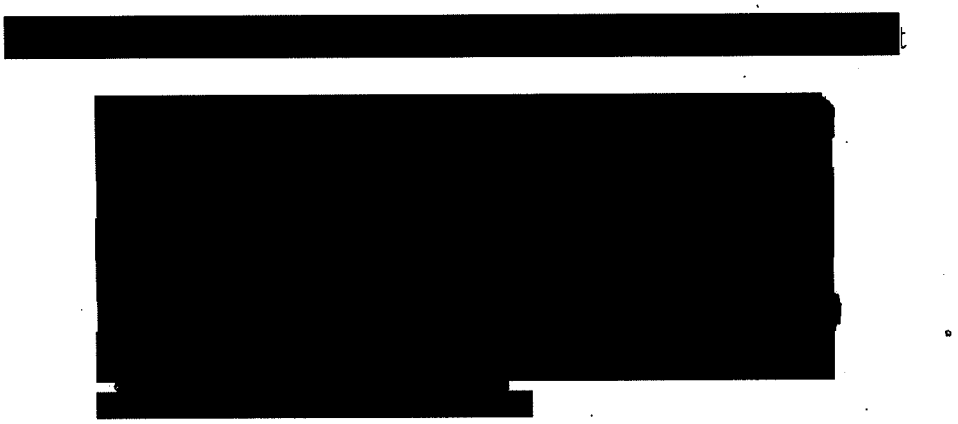
the No-VOD Clause, and should reverse with instructions to enter a preliminary injunction against PTAT. This can be done without disturbing the court's factual findings.

(2) PTAT Is VOD.

Even though the district court effectively found that PTAT is *similar* to VOD – which establishes Dish breached the contract – the court should have also found that PTAT is a full-fledged VOD service. Instead, the court disregarded direct evidence and made factual findings that contradict the record.

First, Fox proffered a sworn statement by Max Gratton, a Dish employee, *admitting* that PTAT is a VOD service. In Dish's service mark application to the U.S. Trademark Office, Mr. Gratton repeatedly stated under oath – as recently as January 2012 – that PTAT is a "*video-on-demand service*." ER 569, 572, 574, 586, 588 (emphasis added). But the district court brushed aside this admission in a footnote, stating that the "meaning of VOD is subject to reasonable dispute" and that the court would rely on its own conclusions rather than "how PTAT has been described in the media or otherwise." ER 661 (Order at 30 n.17). Mr. Gratton's statement was a party admission, not a description in the media.

Moreover, the meaning of VOD was not in dispute. According to Dish's own expert, VOD is a "service where the content is not broadcast, but *stored in a library*, which users can access *on-demand*" and "content offerings include *recently aired television programs*." ER 1262-1263 (emphasis added). PTAT squarely fits that definition because it provides Dish subscribers with a library of pre-recorded content consisting of recently-aired programs that the user can select from and watch on demand. ER 561.



ER 1368. Again, that is exactly how PTAT works: Dish selects the networks available with PTAT and each program to be recorded; Dish decides which programs to make available commercial-free; and Dish controls how long the PTAT recordings are available for on demand viewing. ER 377-380, 1129, 1655-1657, 1659, 1662-1664, 1667.

The district court erroneously found that PTAT is not VOD because "Dish does not decide what programs are available in the PTAT 'library[.]'" ER 661 (Order at 30). But the court expressly found that Dish *does* decide

what programs are available in the PTAT library. ER 648 (Order at 17) ("If Fox chooses to change its primetime lineup . . . Dish may allow or disallow the PTAT recording . . . ."); *see also* ER 1129, 1662.

The district court also stated that PTAT is not VOD because "it resides on the user's local DVR and is not transmitted from a remote supplier's library of collected works." ER 661 (Order at 30). [redacted]

The district court's finding that PTAT is not VOD also contradicts the plain language of the RTC Agreement. [redacted]

The district court accepted Dish's characterization of PTAT as merely a DVR feature that simplifies the process of setting timers. ER 36, 661 (Order

at 30), 1128. The Hopper User Guide, however, distinguishes PTAT from DVR timers, referring to PTAT in one section as "on demand access" to previously-aired primetime programs and, in a separate section, explaining that "[a] timer is your instruction telling the satellite TV receiver the programs you want to watch in the future . . . you select a specific program on a specific channel, and tell the receiver how often you want to record that program." ER 472, 474. Dish spent tens of millions of dollars advertising PTAT as providing "*On Demand* access for 8 days to all HD programming that airs during primetime hours on ABC, CBS, FOX and NBC, *without needing to schedule individual recordings*." ER 385-386 (emphasis added). This is VOD, not a timer.

In short, the district court reached its conclusion that PTAT is *not* VOD by (1) disregarding Dish's unrebutted, sworn admission that PTAT is VOD; (2) finding a dispute over the definition of VOD where none exists; (3) contradicting its own prior finding that Dish selects the programs to be included in PTAT; (4) finding that VOD libraries must be stored remotely even though Dish's executive and expert say VOD libraries can be stored locally; and (5) finding that PTAT is akin to a DVR timer even though Dish's manual and ad campaign say it is not. This is clear error.

D. PTAT with AutoHop Breaches the Limited VOD License.

Under the Limited VOD License, Fox granted Dish a narrow license to provide Fox programs to Dish subscribers on a VOD basis for no additional fee as long as Dish agreed to "*disable fast forward functionality during all advertisements*" and that "fast-forward disabling is a *necessary condition* to distribution of the Fox broadcast content via VOD." ER 659 (Order at 28), 1594 (emphases added). PTAT's AutoHop feature "indisputably constitutes ad-skipping." ER 659 (Order at 28). Therefore, "[i]f PTAT is, as Fox asserts, a VOD offering, then Dish's breach seems clear[.]" ER 660 (Order at 29). As discussed above, the district court erred in finding that PTAT is not VOD under the Limited VOD License and, when this error is corrected, the breach is clear. ER 569, 572, 574, 586, 588.

E. Dish Breached The No-Circumvention Clause.

The No-Circumvention Clause states:

> At no time during the Term may any of the Fox Parties or DISH take *any action whatsoever* intended to frustrate or circumvent, or *attempt* to frustrate or circumvent, the protections granted to the other Party pursuant to any provision of this [RTC Agreement].

ER 1568 (emphasis added). By prohibiting anything "similar" to a VOD service for Fox programming, and by imposing a "necessary condition" that "DISH will disable fast forward functionality during all advertisements" if it

offers Fox programming via the narrow, approved VOD license, the parties obviously meant to protect against ad skipping any time Fox Programs are distributed though a service that resembles VOD. ER 1553-1554, 1594.

In a footnote, the district court ruled that "the parties devote minimal argument to this claim in their briefs and the record lacks substantial evidence addressing this particular provision." ER 657 (Order at 26, n.14). However, this claim was fully addressed in Fox's motion, Dish's opposition, and Fox's reply. ER 1511, 912-914, 870-871.

Moreover, there is plenty of evidence that Dish tried to frustrate and circumvent the contract. For example, [redacted] Unwilling to meet the conditions of the Limited VOD License, Dish simply helped itself to Fox's copyrighted works and developed a service that it openly markets as commercial-free VOD. *E.g.*, ER 373-374, 592-595, 368, 385. Dish users who sign up for PTAT get the same experience as an authorized VOD service: they are able to click through a series of electronic menus on their television screens and select, for "on demand" viewing, recently-aired programs from the major broadcast networks that Dish has sorted and organized by network, episode, and air date. ER 371-372; Lodged

DVD (describing PTAT demo video showing look and feel of PTAT versus regular VOD). The contract protects Fox against Dish offering VOD without commercials, and Dish's conduct was plainly intended to circumvent that protection. Thus, Dish is in breach of the No-Circumvention Clause. ER 1568.

IV. The District Court Should Have Enjoined Dish From Making The Infringing AutoHop Copies.

The district court correctly found that the AutoHop Copies likely infringe Fox's copyright and breach the RTC Agreement. ER 654-655, 659 (Order at 23-24, 28). The court also found that these illegal copies are "used to perfect the functioning of AutoHop" and that the functioning of AutoHop (i.e., ad skipping) "flow[s] from" the copies and benefits Dish. ER 654, 662 (Order at 23, 31). Finally, the court found evidence "that some irreparable harms, such as [Fox's] loss of control over its copyrighted works and loss of advertising revenue, may stem from the ad-skipping use to which the QA [AutoHop] copies are put." ER 663 (Order at 32).

Nonetheless, despite finding that the AutoHop Copies, Dish's ad-skipping service, and injuries to Fox from ad skipping are lined up like dominoes, the district court somehow found that knocking down the first domino would not be the cause of the last domino falling. The court refused to enjoin Dish because it concluded that "the record does not show that those

[irreparable] harms flow from the QA [AutoHop] copies themselves," but instead are "a result of the ad-skipping itself." ER 663 (Order at 32). This paradoxical conclusion that the ad-skipping harms to Fox do *not* "flow from" the AutoHop Copies – even though the ad-skipping benefits to Dish *do* "flow from" the AutoHop Copies – is both logical and legal error. ER 654, 663 (Order at 23, 32).

It is hornbook law that if a defendant's wrongful act causes an event that harms the plaintiff, then the wrongful act is a cause of the harm – even if it is not "the most immediate trigger." Dan B. Dobbs, Paul T. Hayden and Ellen M. Bublick, *Dobbs' Law of Torts*, § 208 (2d ed. 2012). Further, this Court applies an especially broad standard to determine what conduct is within the causal chain that should be enjoined. In *M.R. v. Dreyfus*, 697 F.3d 706, 728-29 (9th Cir. 2012), the Court held that conduct "inflicts cognizable irreparable injury for purposes of a preliminary injunction" as long as it "will exacerbate" or create "an increased risk" of irreparable injury. *Id.*; *id.* at 739.

To support its myopic view of causation, the district court relied exclusively on *MySpace, Inc. v. Wallace*, 498 F. Supp. 2d 1293, 1306 n.3 (C.D. Cal. 2007). But *MySpace* undermines the district court's conclusion because there the court found that MySpace's irreparable harm was the "result" of the defendant's fraudulent email scam despite a long chain of

causation. MySpace alleged the defendant's spamming activities "clogged" the MySpace website, which "degraded the user experience," which then caused users to complain, thereby harming MySpace's goodwill and reputation. *Id.* at 1305. Acknowledging this sequence of dominoes culminated in harm to MySpace, the court enjoined the defendant from ever using MySpace or creating a MySpace account in the first place. *Id.* at 1307.

Similarly, it is often the case that irreparable harm in a copyright case stems from a chain of events that begins with infringement and ultimately culminates in harm. For example, in *WPIX, Inc. v. ivi, Inc.*, 691 F.3d 275 (2d Cir. 2012) ("*ivi*"), the Second Circuit affirmed a preliminary injunction against a service that streamed copyrighted broadcast programming over the Internet without authorization. The court found irreparable harm because the ripple effects of unauthorized Internet retransmissions would "threaten to destabilize the entire industry." *Id.* at 286. As just one example, the court found that because the defendant could stream programs to viewers outside of their local markets, this would fragment and divert the number of local viewers, which in turn would weaken advertisers' ability to target specific demographic audiences, which in turn would weaken the plaintiffs' negotiating position with advertisers and weaken the value of local advertising, causing irreparable harm. *Id.* at 285-86.

Here, Fox established – and the district court found – a much simpler causal sequence than in *ivi:* The illegal AutoHop Copies enable and "perfect" ad skipping, and that ad skipping irreparably harms Fox. *See* ER 654-655, 659, 662-663 (Order at 23-24, 28, 31-32). The district court's refusal to enjoin the copying on these facts was reversible error.

V. The District Court Erred When It Held That *Sony* Barred Fox's Secondary Infringement Claims.

The district court did not consider Dish's potential secondary liability at all because it found that any copying of Fox's programs by Dish subscribers using the PTAT service constituted "time shifting" and was *ipso facto* a fair use under *Sony*. ER 642-643 (Order at 11-12). The court's failure to conduct a fair use analysis was reversible error. *See Perfect 10, Inc. v. Amazon.com*, 487 F.3d 701, 720 (9th Cir. 2007) (fair use "requires a case-by-case analysis" and "is not to be simplified with bright-line rules") (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577-78 (1994)).

As the district court's analysis of fair use in connection with the Auto Hop Copies illustrates, there is no basis for a conclusion that the PTAT copying is not a fair use. Accordingly, if this Court finds it necessary to reach secondary liability, it should find that on the existing record PTAT copying is not a fair use.

A. PTAT Copying Goes Far Beyond The Time-Shifting At Issue in *Sony*.

The district court correctly noted that the Supreme Court's 1984 decision in *Sony* was a fact-specific holding based, in the district court's words, on a finding that "there was no evidence that [making copies for time-shifting purposes] decreased television viewing or adversely impacted the value of the copyrighted works." ER 643 (Order at 12). But the court then erroneously elevated *Sony*'s fact-driven conclusion, based on a record that closed in 1979, to a timeless axiom – that any copying in the home automatically qualifies as a protected fair use, *regardless* of the scope of the copying, its commercial benefit to the consumer, or its impact on the ability of the copyright owner to license its works for competing uses in the marketplace.

Fair use is an affirmative defense as to which Dish bears the burden of proof. *Campbell*, 510 U.S. at 590. Because the copying done by Dish's PTAT service is nothing like the "time-shifting" of individual programs addressed by the Supreme Court in *Sony*, Dish did not and cannot meet its burden of proof on fair use.

In *Sony*, the Supreme Court held that the fair use defense protected the particular type of "time-shifting" at issue in that case, which the Court defined narrowly as "the practice of recording a program *to view it once* at a later

time, *and thereafter erasing it*." 464 U.S. at 423 (emphasis added). *Sony* did not hold that all personal or in-home use of a VCR was *per se* fair, nor did it recognize an inherent "right" to eliminate commercials from the playback of recorded programs. Rather, the Supreme Court found the film studio plaintiffs in that case had not established a likelihood of market harm under the fourth fair use factor based on the Court's consideration of narrowly defined conduct involving a specific product with limited capabilities.[11]

PTAT creates nightly libraries of primetime broadcast shows and, when used with AutoHop, allows for the elimination of all commercials during the playback of these programs. Under its default settings, PTAT copies 12-24 shows per night (easily more than 100 per week) – regardless of whether the user ever intends to watch them. PTAT thus creates a storehouse of recorded programs for the user to browse and choose from another day. The *Sony* Court never endorsed the creation of these kinds of libraries of copyrighted content. To the contrary, *Sony* strongly indicated that "library-building"

[11]The *Sony* Court also relied on the fact that many copyright owners – including professional sports leagues and PBS – did not object to the recording of their broadcast programs. The plaintiff studios' works in *Sony* represented only "a small portion of the total use" of VCRs. 464 U.S. at 434, 456. No such concern is present here, since PTAT and AutoHop operate only on the primetime programs of the four major broadcast networks, and all four networks have sued Dish.

would not constitute a fair use. *Id.* at 423-24 & nn.3-4 (evidence showed that few consumers used Betamax VCR to build a library of recorded shows).

To the extent Dish subscribers use PTAT to watch programs commercial-free with AutoHop, the copies likewise are not being made solely for the purpose of time-shifting but rather to watch without commercials – a different purpose not present to any significant degree in *Sony*. In discounting the potential harm associated with the skipping of commercials by Betamax users, the *Sony* Court explicitly tied its analysis to the "tedious" and cumbersome 1970s technology:

> It must be remembered, however, that to omit commercials, Betamax owners must view the program, including the commercials, while recording. To avoid commercials during playback, *the viewer must fast-forward and, for the most part, guess as to when the commercial has passed.* For most recordings, either practice may be too tedious.

464 U.S. at 453 n.36 (emphasis added). Here, by contrast, Dish subscribers who use PTAT with AutoHop do not need to fast-forward at all; AutoHop eliminates entire commercial breaks automatically without any guesswork. It is designed and marketed so that 100% of AutoHop users see no commercials – a result far different from the blind fast-forwarding done by Betamax users in the late 1970s.

B. All Four Factors Weigh Strongly Against Fair Use.

Under 17 U.S.C. § 107, courts consider four non-exclusive factors in conducting a fair use analysis: (1) the purpose and character of the defendant's use; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work. *See Elvis Presley Enters. v. Passport Video*, 349 F.3d 622, 627 (9th Cir. 2003). An analysis of these factors as applied to the facts already found by the district court makes clear that PTAT copying is not a fair use.

(1) Purpose And Character Of The Use.

Following the Supreme Court's decision in *Campbell*, the touchstone of the first factor analysis has been whether the defendant's use is "transformative." A use is transformative if the new work "adds something new, with a further purpose or different character." *Campbell*, 510 U.S. at

579-80.[12] Where, as here, the copier is using the entire work for the same entertainment purpose as originally intended, the copies merely "supersede[] the objects of the original" and the use is not transformative. *Id.* at 579-89 (internal quotation marks and citation omitted).

(2) Nature Of The Copyrighted Works.

Creative comedies and dramas like Fox's programs are "within the core of ... copyright's protective purposes." *Campbell*, 510 U.S. at 586. The district court itself reached the same conclusion in its fair use discussion of the AutoHop Copies: "the creative nature of the copyrighted works entitles them to heightened protection and also cuts against a finding of fair use." ER 653 (Order at 22).

(3) Amount And Substantiality Of The Portion Taken.

The third factor – the amount and substantiality of the portion copied – also favors Fox because PTAT copies primetime programs in their entirety. *See Wall Data Inc. v. Los Angeles Cnty. Sheriff's Dep't*, 447 F.3d 769, 780

[12] PTAT copying also is presumptively unfair because it is commercial in nature. PTAT/AutoHop substitutes for services that charge for on-demand and commercial-free viewing by allowing subscribers to access a library of commercial-free programming on demand "without paying the customary price." *See Harper & Row Pub., Inc. v. Nation Enters.*, 471 U.S. 539, 561-62 (1985) (exploitation of a copyrighted work "without paying the customary price" is commercial use); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1015 (9th Cir. 2001) (consumer copying "to save the expense of purchasing authorized copies" is commercial in character). Additionally, fair use does not protect a "noncommercial" use when the plaintiff shows "either that the particular use is harmful, or that if it should become widespread, it would adversely affect the potential market for the copyrighted work. *Sony*, 464 U.S. at 451.

(9th Cir. 2006) ("'verbatim' copying of the entire copyrighted work …weighs against" fair use); *see also* ER 653 (Order at 22).

(4) Impact On Potential Markets For And Value Of The Fox Programs.

As the district court itself found, PTAT with AutoHop harms existing, legitimate markets for the licensed distribution of Fox's copyrighted works. ER 653-655 (Order at 22-24). The market harm analysis under the fourth factor is not limited to current harm, the harm that will occur before trial, or even the harm that Dish alone ultimately may cause. A copyright owner "need only show that if the challenged use 'should become widespread, it would adversely affect the potential market for'" or value of the copyrighted work. *Harper & Row*, 471 U.S. at 568 (quoting *Sony*, 464 U.S. at 451) (emphasis omitted). This factor thus requires the court to consider "not only the extent of market harm caused by the particular actions of the alleged infringer, but also whether unrestricted and widespread conduct of the sort engaged in by the defendant … would result in a substantially adverse impact on the potential market for the original." *Campbell*, 510 U.S. at 590 (quoting Nimmer on Copyright § 13.05[A] [4], p. 13-102.61 (1993)); *Monge v. Maya Magazines, Inc.*, 688 F.3d 1164, 1182 (9th Cir. 2012).

As Fox demonstrated and the district court found, PTAT copying in conjunction with AutoHop commercial-skipping interferes with existing and

growing markets for the distribution of Fox's programming in multiple ways. ER 655-656 (Order at 24-25). Creating an eight-day, on-demand library of all of Fox's primetime programming injures existing and potential markets for authorized on-demand services. Copying that programming for commercial-free playback undermines authorized, commercial-free distribution, such as through iTunes and Amazon. And eliminating viewers' exposure to a show's advertisements altogether – in contrast to the manual fast-forwarding on an advertisement-by-advertisement basis that occurs with a standard DVR – deprives Fox of the opportunity to interest viewers in its commercials, and thus to earn advertising revenue through its main channel of distribution. *See* ER 265-267, 346-347.

The PTAT copying at issue here differs in all these respects from the narrowly defined time-shifting of individual programs that was approved as a fair use based on the factual record in *Sony*. Because markets for licensed distribution of on-demand and commercial-free programming did not even exist in 1984 – just as VOD and the Internet did not yet exist – the *Sony* Court had no occasion to consider the effect of consumer copying on other markets for the licensed distribution of television programs to consumers.

Ignoring these critical differences between Dish's service and the Betamax, the district court simply assumed that any home copying by

consumers was privileged as "time-shifting." ER 638-643 (Order at 7-12). Other courts applying *Sony* have disagreed, finding that unauthorized copying that substitutes for licensed copies in ways that *Sony* time-shifting did not are not protected as fair uses. *E.g.*, *Agee v. Paramount Commc'ns, Inc.*, 59 F.3d 317, 323 (2d Cir. 1995) (rejecting *Sony*-based fair use defense where defendant's unlicensed uses provided value to defendants "apart from time-shifting"); *In re Aimster Copyright Litig.*, 334 F.3d 643, 647 (7th Cir. 2003) (unauthorized copying for purposes of library building or commercial skipping is "unquestionably infringing"). The district court should have taken the same approach.

C. The Court Should Hold That Fox Has Established Likely Success On Its Vicarious Infringement Claim.

Because all four fair use factors argue against treating the PTAT copies as fair use (for reasons largely confirmed by the district court's analysis of the AutoHop Copies), this Court should outright reverse the district court's fair use determination regarding PTAT. The Court also should hold that Fox has established a likelihood of success on its vicarious infringement claim, as Dish made no effort to contest that claim on the merits in the district court. ER 891-936.

Dish is vicariously liable for copyright infringement by its subscribers because it has the right and ability to control their infringing activity and

derives a direct financial benefit from their activity. *See MGM Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930 (2005); *see also A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1023 (9th Cir. 2001) ("[f]inancial benefit exists where the availability of infringing material 'acts as a draw for customers'"). Dish admittedly launched its PTAT service to obtain a competitive advantage over its competitors – to draw new customers to its service by offering an alternative to the licensed VOD services and commercial-free copies available through Fox, Hulu, iTunes and Amazon.com. ER 654-655 (Order at 23-24). Furthermore, Dish's pervasive control over the operation of PTAT makes clear that it has the ability to prevent infringing uses of the service by its customers. *See*, *supra*, Section II.[13]

[13] Fox also established a likelihood of success on its inducement claim because Dish has actively encouraged and assisted its subscribers to copy Fox's primetime schedule every night using PTAT. *See Grokster*, 545 U.S. at 936-37. It has done so through its nationwide advertising campaigns urging consumers to use PTAT and AutoHop to view these programs commercial-free – to "watch shows, not commercials," as its billboards beckon. Such advertising constitutes "[t]he classic instance of inducement." *Id.* at 937. Dish also is liable for contributory infringement because it plainly has "actual or constructive knowledge" that, once enabled, PTAT copies the networks' entire primetime broadcast television schedule every night – indeed, that is the very purpose for which Dish advertises the service. *See Napster*, 239 F.3d at 1019-20. And Dish plainly makes a substantial contribution to the copying accomplished by PTAT by providing the "site and facility" for this copying to occur. *Id.* at 1022.

VI. Fox Met The Standard For A Preliminary Injunction.

A. Fox Will Suffer Irreparable Harm Absent An Injunction.

Irreparable harm is an injury that cannot be "remedied by a damage award" alone. *Rent-A-Center, Inc. v. Canyon Tel. & Appliance Rental, Inc.*, 944 F.2d 597, 603 (9th Cir. 1991). This includes "damages [that] would be difficult to valuate[.]" *Id.* This Court has long held that intangible injuries, such as "lost contracts and customers, and harm to [a company's] business reputation and goodwill" qualify as irreparable harm. *Stuhlbarg Int'l Sales Co. v. John D. Brush & Co.*, 240 F.3d 832, 838 (9th Cir. 2001); *Rent-A-Center*, 944 F.2d at 603.

Here, the district court found that Dish's ad-skipping VOD service will cause "some irreparable harms" to Fox, including Fox's "loss of control over its copyrighted works[.]" ER 663; Order at 32. The district court also found that Dish's ad-skipping service threatens "to reduce the value of the right to copy the Fox Programs and undermine[s] Fox's relationships with licensees who pay for that right." ER 655 (Order at 24). These findings, standing alone, support an injunction against PTAT and AutoHop.

Even though the district court stopped short of discussing all the irreparable harms that threaten Fox, the record, as well as recent cases from the Central District of California and the Second Circuit addressing identical

injuries, confirm that Fox will be irreparably harmed if a preliminary injunction does not issue.

(1) Dish Is Harming Fox's Right To Exclusively Control The Commercial Exploitation Of Its Works.

The Copyright Act grants the copyright owner the right to license "any subdivision" of its exclusive rights (17 U.S.C. § 201(d)), which "may be chopped up . . . no matter how small" (*Silvers v. Sony Pictures Entm't., Inc.*, 402 F.3d 881, 884, 887 (9th Cir. 2005)). Therefore, as the district courts in this circuit have recognized, copyright owners like Fox "have the exclusive right to decide when, where, to whom, and for how much they will authorize transmission of their [Copyrighted Works] to the public." *Warner Bros. Ent. v. WTV Sys.*, 824 F. Supp. 2d 1003, 1012 (C.D. Cal. 2011) (citations omitted). Interfering with a copyright owner's ability to control the timing and channels of distribution for its work invariably causes injury that is difficult to quantify. *Salinger v. Colting*, 607 F.3d 68, 81, 82 (2d Cir. 2010) (infringement of copyright owner's "right *not* to speak, for even minimal periods of time, unquestionably constitutes irreparable injury") (internal quotations and citations omitted); *Jacobsen v. Katzer*, 535 F.3d 1373, 1381-82 (Fed. Cir. 2008) ("Copyright licenses are designed to support the right to exclude . . . [and] money damages alone do not support or enforce that right . . . . [B]ecause a calculation of damages is inherently speculative, these types

of license restrictions might well be rendered meaningless absent the ability to enforce through injunctive relief"). For these reasons, injunctive relief "has nearly always" been issued upon a finding of likelihood of success on the merits in a copyright case. *Salinger*, 607 F.3d at 76.

Fox's control over the timing and manner in which its programs are distributed is an essential and valuable right because it maximizes Fox's ability to recoup the enormous, risky investment needed to produce high-quality, primetime programming. ER 262-264; ER 1547. It allows Fox to generate multiple revenue streams from different sets of advertisers (*e.g.*, initial broadcast ads, VOD distribution ads, and Internet streaming ads). *Id.* It also allows Fox to provide ad-supported versions of its programs to price-sensitive consumers, while giving other consumers a choice to pay a premium for commercial-free versions, thereby increasing Fox's overall audience. *Id.* Dish's PTAT service wrests this control away from Fox.

The *WTV Systems* case is directly on point. In that case, the defendants operated an unauthorized service that transmitted plaintiffs' copyrighted movies over the Internet. 824 F. Supp. 2d at 1005-1008. The court observed that "[e]ach of the Plaintiffs has its own strategy for structuring their respective distribution windows" for when their motion pictures are released in theaters, on cable or satellite television, on VOD, online, or on DVD, and

held that the defendants, by prematurely making plaintiffs' works available on the Internet without authorization, "interfere[d] with Plaintiffs' *ability to control the use and transmission of their Copyrighted Works*, thereby causing irreparable injury to Plaintiffs." *Id.* at 1006, 1012-13 (emphasis added).

Here, Fox's loss of control over its programs is even more troubling because Dish's infringing service will likely be adopted by Dish's competitors if Dish is not enjoined. ER 349-50. DirecTV – the largest satellite television provider in the United States with nearly 20 million subscribers – already "has access to technology that could allow millions of subscribers to automatically skip commercials" and is "waiting to see the outcome" of this lawsuit in deciding whether to use it. *Id.* This proliferation will amplify and accelerate Fox's loss of control over its copyrighted works. ER 265.

And, just as in *WTV Systems*, Fox's loss of control over how its programs are distributed threatens "to confuse consumers about video on demand products, and to create incorrect but lasting impressions with consumers about what constitutes lawful video on demand exploitation" of Fox's copyrighted works, "including confusion or doubt regarding whether payment is required" for access to those works. *WTV*, 824 F. Supp. 2d at 1013; ER 268. With each passing day, Dish subscribers are becoming

accustomed to having unpaid access to commercial-free, on-demand Fox programming, resulting in false expectations and disdain for ad-supported television. *See Grokster*, 545 U.S. at 929 (explaining that "the indications are that the ease of copying songs or movies using software like Grokster's and Napster's is fostering disdain for copyright protection").

(2) Dish's Conduct Threatens Fox's Ad-Supported Business.

The threat to Fox's broadcast television business is simple: because PTAT with AutoHop completely eliminates all commercials upon playback – unlike fast-forwarding – the value of Fox's commercial air time is diminished, threatening the main source of financing for the Fox Programs. While Fox's motion was pending, the Second Circuit analyzed a nearly identical threat in *ivi*, where the defendant's unauthorized streaming service caused viewers to watch television broadcasts from other cities, so that local ads were seen by the wrong audiences. 691 F.3d at 285-286. Finding a threat of irreparable harm, the *ivi* court held that "[b]roadcast television stations and networks earn most of their revenues from advertising" and when ads are not seen by the intended audience, this would "weaken plaintiffs' negotiating position with advertisers and reduce the value of [plaintiffs'] local advertisements." *Id.* These threats "would be difficult to measure and monetary damages would be insufficient to remedy the harms," further

supporting the need for a preliminary injunction. *Id.* at 286 ("because the harms affect the operation and stability of the entire industry, monetary damages could not adequately remedy plaintiffs' injuries").

Here, the harm faced by Fox is far more pronounced because the commercials are not being viewed by the wrong audience, they are being *eliminated altogether*. Fox submitted extensive evidence in the district court to establish these threats to its ad-supported business.

First, Fox executives with decades of experience in the broadcast television business detailed how PTAT with AutoHop will reduce the value of Fox's product (*i.e.*, commercial advertising on the Fox Network) in the eyes of advertisers and threaten Fox's primary source of financing for primetime programs. ER 254-269, 344-352, 1535-1550.

Second, the Association of National Advertisers ("ANA") – which represents "400 companies and 10,000 brands that collectively spend over $250 billion in marketing and advertising" – confirmed that "[i]f Dish's AutoHop service is not stopped, it will impact advertisers' buying decisions and negotiating positions during the next year" and will impact what advertisers will pay for air time on broadcast networks. ER 341-343. If Dish is not enjoined and similar services proliferate, millions of television viewers

will stop seeing commercials, further reducing what advertisers are willing to pay. *Id.*; ER 265-267.

Third, Journal Communications, an independent owner of 13 broadcast television stations in eight states (including affiliates of the major broadcast networks) agreed that PTAT and AutoHop "pose a serious threat to Journal's broadcast television stations and the entire ad-supported business model of broadcast television." ER 251-252. Further exacerbating the threatened harm, Dish recently revealed that it is implementing a new technology that would not only skip the broadcast networks' commercials, but replace them with Dish's own advertising. ER 610-612.

Fourth, in May, 2012, Moody's Investor Service issued an independent report warning that if Dish's new AutoHop service were deployed and widely used, it "*will have broad negative credit implications across the entire television industry*" and "*could destabilize the entire television eco-system.*" ER 351-352, 360-363 (emphasis added).

Fifth, Dish chairman Charlie Ergen *admitted* that the PTAT and AutoHop services were "not good" for broadcasters and threatened to harm the entire television "ecosystem." ER 596-598.

Finally, the most immediate threat to Fox's goodwill and the marketability of its programming is the obliteration of Fox's own

advertisements by Dish's unlawful service. ER 1549-1550. A critical element of the Fox Network's self-promotion and marketing strategy includes advertisements for Fox Programs during commercial breaks. *Id.* Fox uses that time, especially during hit shows, to promote new shows and other network programming. *Id.* By eliminating these ads for Dish subscribers, PTAT and AutoHop undermine and threaten Fox's ability to market and promote its brand and programming. *Id.* As this Court has previously recognized, disruptions to "advertising efforts . . . would be difficult to valuate and thus constitute[] possible irreparable harm." *Rent-A-Center*, 944 F.2d at 603.

(3) Dish Is Disrupting Fox's Non-Broadcast Businesses.

Dish's infringing services also threaten to disrupt Fox's non-linear (*i.e.*, non-television) distribution of its primetime programs. As Dish concedes, Fox earns more than [redacted] million annually from digital distribution of its programs (through Internet streaming sites such as Hulu Plus and digital download services such as iTunes). ER 961-962. [redacted] At the same time, Dish's Vice President of Product Management – the person in charge of marketing PTAT and

AutoHop – publicly confirmed that Dish's services compete directly with Fox's existing digital distribution business. *See* ER 372; Lodged DVD.

In *WTV Systems*, the district court found that the defendants' unauthorized distribution of plaintiffs' motion pictures over the Internet – during a window of time when the films were not available online – irreparably harmed the plaintiff studios (1) by interfering with the studios' "grants of exclusivity to their licensees"; (2) by impairing the studios' "ability to negotiate similar agreements in the future"; (3) by injuring the studios' "relationships, including the goodwill developed with their licensees"; and (4) by depriving the studios of revenue and "jeopardiz[ing] the continued existence" of their licensees' businesses. 824 F. Supp. 2d at 1012-13.

The same is true here. Dish's unauthorized distribution of commercial-free Fox Programs will disrupt Fox's business relationships and negotiations with legitimate licensees who pay for the right to distribute commercial-free versions of the Fox Programs over the Internet. ER 1548-1549. Indeed, the district court already found this would occur. ER 655 (Order at 24).

Fox's VOD licensing business is also threatened. If Dish is allowed to continue with its *unauthorized* service, other MVPDs will perceive Fox's *authorized* VOD license as less valuable or will adopt their own competing

services, hurting Fox's negotiation leverage. *Id.* ER 264, 349-351, 1548. None of this evidence has been rebutted.

B. The District Court's Holding That Fox's Harm Was Calculable In Damages Was Both Legally Wrong And Based On Facts Not In The Record.

In connection with its analysis of the AutoHop Copies, the district court held that the harm to Fox was calculable in money damages, and therefore not irreparable, because Fox's licensing agreements with other companies "show[] that copies of the Fox programs have a market value that the other companies already pay in exchange for the right to use the copies." ER (Order at 32). This analysis is clearly erroneous whether applied just to the AutoHop Copies or to PTAT with AutoHop more generally.

First, the record shows that in fact Fox *never* licenses MVPDs such as Dish the right to copy Fox's programs while they are being broadcast, especially not for purposes of providing commercial-free versions to MVPD subscribers via standard television. ER 258-261. Fox carefully controls the scope and timing of its licensing to third parties and has never given an MVPD the right to do what Dish is doing. *Id.* at 262-63. The district court's conclusion to the contrary is not supported by any evidence and is clearly erroneous.

Second, to the extent Fox enters into license agreements with third parties that allow for the next-day distribution of copies of certain Fox Programs on the Internet, the district court's finding that such licensing conduct precludes irreparable harm would still be reversible error. The mere existence of licenses that grant *different* rights than the right the infringer has usurped does not preclude a finding of irreparable harm. *See eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 393 (2006) (rejecting an argument that a plaintiff who licensed its intellectual properly could never establish irreparable harm).

C. The Balance Of Hardships Decidedly Favors Fox.

Dish "cannot complain of the harm that will befall it when properly forced to desist from its infringing activities." *Triad Sys. Corp. v. Southeast Express Co.*, 64 F.3d 1330, 1338 (9th Cir. 1995). Moreover, the narrow injunction requested by Fox does not threaten to cause significant hardship to Dish's lawful business activities. [redacted]

D. Public Policy Favors An Injunction.

The Supreme Court has made clear that upholding copyright protection is in the public interest. *Eldred v. Ashcroft*, 537 U.S. 186, 212 n.18 (2005). The viability of advertising-supported television is also a matter of public interest. *See Satellite Broad. Commc'ns Ass'n v. FCC*, 275 F.3d 337, 343 (4th Cir. 2001). By blocking television commercials, PTAT and AutoHop will cause fewer advertisers to buy commercials and erode the main source of financing for broadcast television. ER 350-351, 342-343. They also threaten to cut off consumers from valuable sources of commercial, political, and public interest information. ER 268-269, 342.

CONCLUSION

For the foregoing reasons, the district court's order denying a preliminary injunction should be reversed and this Court should remand with instructions to enter the preliminary injunction requested by Fox.

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STATEMENT REQUESTING ORAL ARGUMENT

Pursuant to Federal Rule of Appellate Procedure 34(a), Appellants request that oral argument of this appeal be permitted. Oral argument will assist this Court in deciding the appeal.

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CERTIFICATE OF COMPLIANCE

I certify that, pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Ninth Circuit Rule 32-1, the foregoing Opening Brief is proportionately spaced, has a typeface of 14 points or more, and contains 13,986 words.

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CERTIFICATE OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Counsel for Appellants states that there are no related cases pending in this Court.

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I hereby certify that on December 13, 2012, a copy of the foregoing Brief of Plaintiff-Appellants was served by U.S. Mail and Messenger.

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