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19 UNITED STATES DISTRICT COURT
20 CENTRAL DISTRICT OF CALIFORNIA

21 FOX BROADCASTING COMPANY,
22 INC., TWENTIETH CENTURY FOX
23 FILM CORP., and FOX TELEVISION
HOLDINGS, INC.,

24 Plaintiffs,

25 v.

26 DISH NETWORK L.L.C. and DISH
27 NETWORK CORP.,

28 Defendants.

Case No. CV12-04529-DMG (SHx)

PUBLIC VERSION
DISH'S OPPOSITION TO MOTION
FOR PRELIMINARY INJUNCTION

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INTRODUCTION

For nearly thirty years, the American consumer has had the right in the privacy of her home to record over-the-air television broadcasts and watch them at a time that suited her family. The Supreme Court vindicated that right in *Sony Pictures, Inc. v. Universal Studios, Inc.*, 464 U.S. 417 (1984), when it held that “time-shifting” is a fair use recording of copyrighted broadcast content. The Court recognized that the copyright clause in the Constitution exists not for the lucre of the motion picture industry, but to serve the goal of the broadest possible access to free expression for all American citizens. And, despite the entertainment industry’s predictions of doom and gloom, this holding proved to be an enormous boon to that industry and everyone else and had exactly the result that the copyright clause contemplated—promotion of greater access to expression (and not incidentally, privacy) while at the same time offering greater rewards to authors for their works.

The broadcast networks want to take this all away. They once again attack any degree of consumer freedom they fear *might* impede their profits. In this case Fox is seeking in effect to abrogate *Sony*, thus eliminating time-shifting in favor of a new distribution channel called “video on demand.” The vehicle for this agenda is (again) the claim that the sky is falling on their advertising-supported business model. And (again) there is *no evidence whatsoever* that any such harm has occurred or will occur, and in fact all economic evidence is to the contrary. Despite decades of increasing use of home recording devices to time-shift *and skip commercials*, and decades of declining consumer viewing of advertising, the networks continue to enjoy their most lucrative advertising sales ever.

DISH’s introduction of its latest home recording device is not going to change this pattern of three decades for the worse, and Fox has presented no evidence that it has, or will. Fox has not shown that DISH consumers will skip more advertisements, and the evidence is to the contrary. Consumers are not infringing copyrights by using the DISH Hopper Whole Home DVR to record

1 primetime programming and skip commercials. They are watching *more* television.
2 DISH is not infringing copyrights by selling or leasing the Hopper to them. This
3 case has already been decided once, and Fox has given neither *evidence* nor good
4 reason to defy the Supreme Court. Instead, all Fox has provided is unsubstantiated
5 fear-mongering. That is not enough to abrogate Supreme Court precedent,
6 especially with the privacy and freedom of the nation’s entire television viewing
7 audience at stake. The motion for preliminary injunction should be denied.

8 **STATEMENT OF FACTS¹**

9 **A. DISH Pays For Content Watched By Its Subscribers.**

10 DISH is the nation’s third-largest pay television service provider delivering
11 satellite services to millions of families nationwide. Declaration of David Shull in
12 Support of Defendants’ Opposition to Plaintiffs’ Motion for Preliminary Injunction
13 (“Shull Decl.”) ¶2. As of June 30, 2012, DISH had more than 14 million
14 subscribers in the United States. *Id.* DISH competes with other pay television
15 service providers delivering multiple channels of video programming services,
16 including all cable television and direct broadcast satellite entertainment providers,
17 such as Comcast, TimeWarner Cable, Cox Cable, and DirecTV, as well as some
18 internet-based delivery systems such as AT&T U-verse and Verizon FiOS. *Id.* ¶3.

19 In order to retransmit content from over-the-air broadcasts of the major
20 television networks, DISH enters into retransmission consent agreements pursuant
21 to statutory licenses in the Copyright Act. *See* 17 U.S.C. §§119, 122. DISH
22 negotiates these consents with both the networks and their affiliates in order to
23 serve the various local television markets throughout the United States.² If DISH
24 does not have an agreement with a local affiliate, then the viewing audience in that
25 area cannot obtain their local stations over the DISH satellite service. Shull Decl.

26 _____
27 ¹ Fox’s facts in its brief contain numerous inaccuracies. Although space constraints prevent pointing them out in this
28 brief, they are fully addressed in the declarations supplied by DISH herewith.

² The Declaration of David Kummer, filed herewith, describes the technical aspects of the satellite television process.

1 ¶5. DISH is currently a party to retransmission agreements with each of the four
2 major commercial broadcast television networks, ABC, CBS, NBC and Fox. *Id.*

3 ¶6. In the past several years, DISH has paid [REDACTED] dollars to Fox and
4 its affiliates to retransmit the signals of the network owned and operated Fox
5 affiliates. *Id.* 2011 fees were more than [REDACTED]. *Id.* They are projected to be
6 more than [REDACTED] in 2012. *Id.*

7 The Fox retransmission agreements acknowledge DISH’s right to offer its
8 subscribers digital video recorders (“DVRs”). *Id.* ¶12. Fox expressly
9 acknowledged that DISH (then EchoStar) subscribers would connect “video replay
10 equipment.” *Id.* Ex. C at 31. Fox further agreed that DISH could authorize its
11 subscribers to record content for private home use:

12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 (emphasis added).

16 *Id.* Ex. C at 34.

17 **B. History Of Time-Shifting And Ad Skipping Devices.**

18 The first consumer DVRs were publicly introduced in 1999. Minnick Decl.

19 ¶7. DISH first began offering DVRs to its subscribers that year, with an early
20 combined satellite receiver set-top-box (“STB”) and DVR known as the
21 DISHPlayer. *Id.* ¶5. The first DISHPlayer gave DISH subscribers the ability to
22 pause live television, but did not have sufficient memory recording television
23 shows. *Id.* ¶5. In mid-1999 DISH was offering improved versions of the
24 DISHPlayer with greater storage capacity and full VCR-type functionality. *Id.* ¶8.
25 The DISHPlayer was a huge success. *Id.* ¶9.

26 Over time, the storage capacity and features of DVRs have steadily
27 increased. The original DISHPlayer had an 8 gigabyte hard drive. *Id.* ¶6. The
28 newest DVRs on the market have hard drive storage many times greater, in the

1 range of two terabytes. *Id.* ¶6. More memory is needed to store high definition
2 format shows. *Id.* ¶19. DVRs also have ad skipping capability, giving users the
3 power to fast-forward past commercials. *Id.* ¶8. This includes a thirty-second skip
4 option, which allows viewers to skip ahead by the same amount of time as a typical
5 television commercial. *Id.* ¶6. Today, the thirty-second skip feature is available on
6 most DVRs, including those from DISH, TiVo, DirecTV, Comcast, and Verizon
7 FiOS, among others. *Id.*

8 **C. Consumer Viewing Patterns.**

9 In the early 1980s, the motion picture industry first objected that home
10 recording technology would decimate the industry. Rapp Decl. ¶¶37-45. During
11 Congressional hearings in 1982, MPAA President Jack Valenti famously claimed
12 that relationship of the VCR to entertainment industry was as the “Boston Strangler
13 to a woman at home alone.” *Id.* ¶49. This was wrong in so many respects. One
14 was that widespread adoption of the VCR turned out to be a huge boon for the
15 entertainment industry, providing it with a new and lucrative distribution channel
16 for content in the form of videocassette rentals and sales. The VCR remains in 57%
17 of American households still today. Hauser Decl. ¶14.

18 A decade ago, the networks similarly labeled the next generation of home
19 recording technology, the digital video recorder, or DVR, a threat to the
20 underpinnings of free television. Rapp Decl. ¶¶46-47. Yet, the advertising revenue
21 of the four major television networks has substantially increased over that time
22 period. *Id.* ¶52. Even while storage capacity and functionality of DVRs has
23 steadily increased, commercial advertising revenue has also increased. *Id.* ¶54.

24 Thus, there has been no harm to the networks from DVR usage. The
25 American love affair with television remains strong. Rapp Decl. ¶50. The average
26 Nielsen household watches almost 8-1/2 hours of television per day, up from 6-1/2
27 hours in 1980. Rapp Decl. ¶50. And, the overwhelming majority of television
28 viewing (90%) is done live on traditional television sets. Rapp Decl. ¶95; Hauser

1 Decl. ¶12, 21. For sports, 95% percent is viewed live. Hauser Decl. ¶22. These
 2 statistics hold even though 41-43% of households with televisions have DVRs, 23.3
 3 % have two DVRs, and 5.7% have three or more DVRs. Rapp Decl. ¶¶72, 101;
 4 Hauser ¶14. Studies show that households with DVRs *consume more television*
 5 *than households without DVRs. Like other households, DVR households continue*
 6 *to watch most television live, not recorded, or they watch later the same day.* Rapp
 7 Decl. ¶¶74, 89; Hauser Decl. ¶12, 21. In DVR households, 76% of primetime
 8 viewing by individuals aged 18 to 49 occurs live. Rapp Decl. ¶74.

9 From the dawn of television, viewers have skipped ads. Hauser Decl. ¶22.
 10 Even while watching *live* television, they would change the channel, leave the room
 11 or direct their attention elsewhere the moment an ad came on the screen. *Id.* With
 12 recorded programming, viewers who prefer to avoid commercials have had the
 13 option, since the introduction of the VCR, to skip by fast-forwarding. With the
 14 DVR, people can do the same. And, the networks' business model has flourished.

15 **D. The Accused Devices: The Hopper Whole Home DVR,**
 16 **PrimeTime Anytime And AutoHop.**

17 Against this backdrop, DISH announced in January 2012 that it would carry
 18 EchoStar's latest, greatest DVR called the "Hopper." Khemka ¶3.

19 **1. The Hopper, PrimeTime Anytime, And AutoHop.**

20 **The Hopper:** The Hopper "Whole Home" High Definition DVR is currently
 21 the most technologically advanced STB/DVR that DISH offers to its subscribers.
 22 Minnick Decl. ¶13. The Hopper was announced on January 9, 2012 at the
 23 International Consumer Electronics Show ("CES") and is an award-winning DVR.
 24 *Id.* Among other awards, the Hopper won the "Best in Show" award at the CES
 25 Line Shows in New York. *Id.*; Khemka Decl. ¶7. The primary distinguishing
 26 feature of the Hopper is its "Whole Home" capability. Khemka Decl. ¶3; Minnick
 27 Decl. ¶14. The Hopper can provide satellite television service, as well as DVR
 28 functionality, to as many as four televisions in one home. Minnick Decl. ¶14. No

1 matter which television the subscriber may want to use at a particular time, the
2 subscriber’s DVR recordings will be readily available. *Id.* ¶15.

3 **PrimeTime Anytime:** On January 9, 2012, PrimeTime Anytime (“PTAT”)
4 was announced as a Hopper feature that allows a user, at his or her election, to
5 create a single timer on the Hopper to record all of the primetime programming
6 shown in high definition on any of the four major broadcast networks each or every
7 night of the week. Minnick Decl. ¶20. PTAT must be turned on by the user. *Id.*
8 DISH and EchoStar *do not* activate the PTAT feature for the user. *Id.*
9 Approximately 46% of Hopper users are using the PTAT feature on a daily basis.
10 Gerhards Decl. ¶5.³ When enabling PTAT, the user has the choice to select
11 between 1 and 4 networks to record, and may select which days of the week to
12 make the recordings. Minnick Decl. ¶24. The user also selects how many days she
13 wants to save the recordings before they are automatically deleted, with the option
14 of storage from 2 to 8 days. *Id.* A specific recording can be saved for a longer
15 period of time. *Id.* ¶34. The recordings made with the PTAT features are
16 accessible for playback in a PTAT “folder” on the Hopper, and can also be removed
17 by the user. *Id.* ¶28, 35.

18 **AutoHop:** AutoHop is an ad skipping feature that works with the PTAT
19 feature, and permits Hopper users to choose to automatically skip commercials
20 while playing back certain recorded shows. Minnick Decl. ¶53. If AutoHop is
21 available for a particular show, a red kangaroo icon will appear and the Hopper will
22 query the viewer whether to “Enable AutoHop.” *Id.* The default is “No, Thanks.”
23 *Id.* If the user selects “Yes” as the answer, she can put down the remote control and
24 watch the entire show without ads. *Id.* ¶54. At the end of each segment the DVR
25 software will automatically skip ahead to the beginning of the next segment. *Id.*

26 AutoHop functions like a souped-up version of the 30-second skip feature

27 _____
28 ³ All usage data discussed herein concerns data collected from the significant percentage of subscriber DVRs that report data to EchoStar either by telephone or through the internet. *See* Gerhards Decl. ¶¶2-4.

1 available on most DVRs. Minnick Decl. ¶55. With a succession of quick 30-
2 second skips, most DVR users cans already skip over an entire two and one-half
3 minute commercial break. *Id.* AutoHop has automated that process. *Id.* AutoHop
4 is not immediately available for use with a recording that is in progress or even for
5 same-day viewing of the recorded show; rather, it becomes active the following
6 day. *Id.* ¶56.⁴

7 **2. How PTAT And AutoHop Work.**

8 **How PTAT Works:** When the Hopper user configures the multitude of
9 PTAT customization options to suit her individual tastes, a set of timers are set to
10 record all primetime shows on each of the selected networks on each selected night.
11 Minnick Decl. ¶30. The recordings are done in approximately three-hour blocks
12 (four hours on Sunday). *Id.* The process is similar to using manual timers available
13 on most DVRs, which allow a user to select a time period to record on a particular
14 channel. *Id.* Basically, PTAT is a simplified set of timers. [REDACTED]

15 [REDACTED] *Id.* ¶62.

16 **How AutoHop Works:** [REDACTED]

17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]

21 ⁴ It is unclear whether Fox is attacking Sling with its motion. Sling is a completely separate product that allows
22 individuals to place-shift their personal television viewing through use of the internet. Minnick Decl. ¶83. Place-
23 shifting means watching in a different location than the room in which your fixed television set is located—such as
24 on a personal computer in the home office, on your mobile phone while riding on the bus, or on an iPad in a hotel
25 room. Sling technology is not new—it has been out since at least 2005. Molinski Decl. Ex. 9. “Space-shifting,” *i.e.*,
26 allowing content to be accessed on a device separate from where the original content is stored, is also recognized as a
27 fair use. *Recording Indus. Ass’n of Am. v. Diamond Multimedia Sys., Inc.*, 180 F.3d 1072, 1029 (9th Cir. 1999)
28 (holding that the portable MP3 player at issue “merely makes copies in order to render portable, or ‘space-shift,’
those files that already reside on a user’s hard drive . . . Such copying is paradigmatic noncommercial personal
use . . .”) (internal citation omitted); *ABC v. AEREO, Inc.*, 2012 U.S. Dist. LEXIS 96309, at *37 (S.D.N.Y. July 11,
2012) (identifying Sling technology as fair use). Indeed, the Register of Copyrights has stated that, for Sling
technology, “there is no need for an additional license.” SHVERA Section 109 Report at 188 (2008), available at
<http://www.copyright.gov/reports/section109-final-report.pdf>. There is no basis for finding copyright infringement
based upon a subscriber’s “paradigmatic noncommercial personal use” of Sling, and no basis for a preliminary
injunction against a product on the market for seven years.

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[REDACTED]

ARGUMENT

Preliminary injunctive relief is an “extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to seek such relief,” and is “never awarded as of right.” *Winter v. NRDC, Inc.*, 129 S.Ct. 365, 375-76 (2008). A plaintiff seeking a preliminary injunction must establish all of the following: (1) likelihood of success on the merits, (2) irreparable harm in the absence of preliminary relief, (3) that remedies available at law, such as monetary damages, are inadequate to compensate for the injury, (4) that the balance of hardships tips favors plaintiff, and (5) that an injunction is in the public interest. *Id.* at 374; *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 391 (2006). Irreparable injury must be *likely* in the absence of an injunction. *Winter*, 129 S.Ct. at 375. These traditional equitable considerations must be satisfied; an injunction does *not* follow “automatically [from] a determination that a copyright has been infringed.” *eBay*, 547 U.S. at 392-93. As set forth below, Fox has not and cannot satisfy these requisites for preliminary injunctive relief.

I. FOX IS NOT LIKELY TO SUCCEED ON ITS CONTRACT CLAIM.

Fox identifies three contractual provisions allegedly breached by PTAT and AutoHop: (1) Section 9(a) of the 2002 Agreement; (2) the Video-on-Demand

1 (“VOD”) provisions in Attachment A to the 2010 Letter Agreement; and (3)
 2 Section 5 of the 2010 Letter Agreement. Fox’s arguments depend upon blatant
 3 misquotation; they are incorrect as a matter of law and fact and should be rejected.

4 **A. DISH Is Not Breaching The 2002 Agreement.**

5 As with any other home recording device, consumers, not DISH, are the ones
 6 using the Hopper and PTAT. Consumers, not DISH, are recording the content of
 7 the retransmitted Fox broadcast television signal. Fox argues that PTAT is a breach
 8 of Section 9(a) of the 2002 Agreement, quoting it as follows: “ [REDACTED]

9 [REDACTED]
 10 MPA at 8. Fox also argues breach of another provision of that agreement, Section
 11 3(d). MPA at 8 n.4. Remarkably, Fox omits the key contractual language in both
 12 instances:

Fox’s Quotation	Full Relevant Provision
Section 9(a) of the 2002 Agreement	
<p>14 [REDACTED] 15 [REDACTED] 16 [REDACTED]. MPA at 17 8:18-21.</p>	<p>14 [REDACTED] 15 [REDACTED] 16 [REDACTED] 17 [REDACTED] 18 [REDACTED] 19 [REDACTED] 20 [REDACTED] Shull Decl. Ex. 3 at 21 34.</p>
Section 3(d) of the 2002 Agreement	
<p>22 [REDACTED] 23 [REDACTED] 24 [REDACTED] MPA at 4:13-15.</p>	<p>22 [REDACTED] 23 [REDACTED] 24 [REDACTED] 25 [REDACTED] 26 [REDACTED] 27 [REDACTED] 28 [REDACTED] Shull Decl. Ex. 3 at 31.</p>

1 As the highlighted language demonstrates, Fox expressly acknowledged and agreed
2 that DISH would authorize consumers to connect video replay equipment and make
3 recordings for private home use—precisely what is at issue here.

4 Plainly DISH is not breaching provisions in a contract (governed by New
5 York law) that expressly contemplate its authorization of consumer DVR usage.
6 *See Goldman v. Metro. Life Ins. Co.*, 5 N.Y.3d 561, 571, 841 N.E.2d 742, 746
7 (2005) (“Mere assertion by one that contract language means something to him,
8 where it is otherwise clear, unequivocal and understandable when read in
9 connection with the whole contract, is [insufficient]”).

10 **B. DISH Is Not Breaching The 2010 Letter Agreement.**

11 **1. DISH Is Not Expressly Required To Market FOX VOD.**

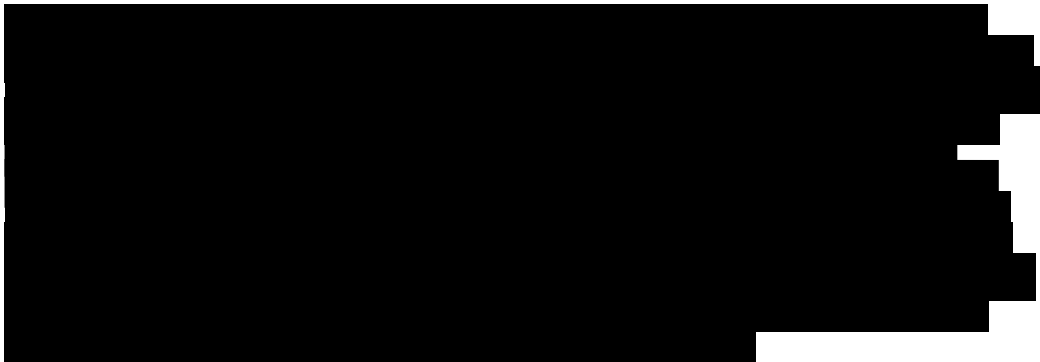
12 The 2010 Letter Agreement includes Attachment A which amends the
13 Agreement and pertains to a wide variety of matters concerning the parties’
14 relationship. Section 9 of Attachment A is the “VOD” provision. [REDACTED]

15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]

22 [REDACTED] This content is completely separate from
23 an over-the-air broadcast signal.

24 Fox argues that DISH has breached clause 4 requiring [REDACTED]
25 [REDACTED] because PTAT and AutoHop are the “equivalent” of VOD
26 without ads. But DISH did not agree to [REDACTED] independent
27 of any exploitation of the VOD content. Section 9 merely *allows* for VOD for the
28 FOX network—it does not *require* DISH to market FOX VOD. Shull Decl. Ex. 5 at

1 124.



8 Nowhere does this “make available” provision state that DISH shall, must, or will
9 distribute the VOD content—there is no such affirmative obligation. *Id.* For
10 reasons that had nothing to do with the Hopper and PTAT, Fox never provided that
11 content and this provision never became operable. Shull Decl. ¶22-25.

12 The 2010 VOD provision is an option for DISH to distribute the *FOX* VOD
13 on a nonexclusive basis on a set of minimum terms, which included the term that
14 fast-forwarding of ads be disabled. Options generally are not required to be
15 exercised—that is the whole point. *Kaplan v. Lippman*, 75 N.Y.2d 320, 325, 552
16 N.E.2d 151, 153 (1990). Because DISH did not in fact ask for, receive, or
17 distribute the *FOX* VOD content, it cannot have breached any of the conditions
18 attached to that content.

19 **2. No Obligation To Exploit Can Be Implied.**

20 Nor can any obligation to exploit this nonexclusive VOD content be implied
21 in order to trigger the [redacted] on the VOD content or otherwise.
22 New York law, which governs this contract, strongly disfavors the implication of
23 contractual obligations. *2632 Realty Dev. Corp. v. 299 Main St., LLC*, 94 A.D.3d
24 743, 745, 941 N.Y.S.2d 252, 255 (N.Y. App. Div. 2d Dep’t 2012) (“A court should
25 not imply a term which the parties themselves failed to include”). Obligations
26 cannot be implied when inconsistent with other terms. *Vacuum Concrete Corp. v.*
27 *Am. Mach. & Fdry. Co.*, 321 F. Supp. 771, 774 (S.D.N.Y. 1971). Here, there is an
28 integration clause. 2010 Letter Agreement ¶13 (“entire understanding concerning

1 the subject matter”). To imply an obligation to exploit the VOD content where
2 none was expressly stated would be inconsistent with the parties’ recitation that the
3 agreement constituted the parties’ “entire understanding.” *Vacuum Concrete*, 321
4 F. Supp. at 774. Nor is it necessary here to imply an obligation. There was much
5 other consideration flowing from DISH to Fox in these agreements.

6 New York law will not imply an obligation to exploit in a non-exclusive
7 license with no running royalty and an integration clause. *Id.* (rejecting implied
8 obligation to exploit as a matter of law) (emphasis added).⁵ Courts generally only
9 imply such obligations when the license is exclusive and royalty-bearing—when
10 the licensor would be left with a worthless property. *See id.* at 773. That is
11 obviously not the case here. Fox has numerous other means of distributing its
12 content, including its VOD content, and in fact is being paid for its primetime
13 broadcast content by DISH and its subscribers. *Vacuum Concrete* is on point:
14 under New York law, [REDACTED] applicable to PTAT can be implied.

15 **3. DISH Is Not Breaching The Anti-Circumvention Provision.**

16 Finally, Fox argues that DISH is breaching paragraph 5 of the 2010 Letter
17 Agreement by circumventing the [REDACTED] on VOD. There are
18 multiple problems with this argument. The first is fundamental: DISH is not
19 circumventing an obligation that it never had because it never chose to exploit the
20 FOX VOD license. Nor could it have frustrated this obligation by allowing fast
21 forwarding as to anything other than VOD content.

22 Nor are PTAT and FOX VOD “equivalent” as Fox would have it. Fox never
23 supplied VOD content to DISH, and DISH never offered it. Consumers enabling
24 PTAT to record retransmitted over-the-air broadcasts are paying the retransmission
25 license fee. Thus, they are paying a subscription fee for the content (unlike the
26 VOD license which is “free”). Moreover, the Hopper is a DVR that involves only

27 ⁵ *See also Contacare, Inc. v. Ciba-Geigy Corp.*, 49 A.D.3d 1215, 1216, 853 N.Y.S.2d 783, 784 (N.Y. App.Div. 2d
28 Dep’t 2008) (non-exclusive license created no duty to exploit); *Kardios Sys. Corp. v. Perkin-Elmer Corp.*, 645 F.
Supp. 506, 509-10 (D. Md. 1986) (same) (applying NY law).

1 copying by the consumer in the home. Only those particular subscribers who have
 2 purchased a Hopper can select to enable PTAT (as well as AutoHop). Once the
 3 multitude of options are configured, PTAT records a defined period of primetime
 4 programming (in contrast to VOD, where the subscriber selects one specific show
 5 for playback from a remote location). Simply stated, PTAT is a DVR feature that
 6 simplifies timers for the recording of statutorily retransmitted over-the-air broadcast
 7 content. VOD is a completely different kettle of fish.⁶

8 This leads to the third problem with Fox's argument, which is that it proves
 9 far too much. *All* of DISH's DVRs are capable of allowing consumers to record
 10 Fox's entire primetime schedule every night and then fast-forward through ads
 11 during playback, as are numerous other DVRs on the market. Shull Decl. ¶30;
 12 Minnick Decl. ¶¶41-42. PTAT and AutoHop just simplify the process. Under
 13 Fox's interpretation, *all* of DISH's existing DVRs were suddenly prohibited as of
 14 the October 2010 Letter Agreement. Plainly DISH never agreed to such a term,
 15 would not have done so (Shull Decl. ¶15), and Fox has never asserted otherwise.
 16 To the contrary, as described above, the agreements expressly contemplate the
 17 distribution by DISH of DVR recording and playback devices for private consumer
 18 home use. The general "anti-circumvention" term cannot be interpreted to prohibit
 19 a specific practice that is elsewhere expressly allowed. *Israel v. Chabra*, 12 N.Y.3d
 20 158, 168, 906 N.E.2d 374, 380 (N.Y. 2009) ("[T]he more specific clause controls
 21 the more general"); *E-Z Eating 41 Corp. v. H.E. Newport LLC*, 84 A.D.3d 401,
 22 408, 922 N.Y.S.2d 329, 335 (N.Y. App. Div. 1st Dep't 2011) ("[I]n the event of a
 23 conflict between two provisions, the specific should control over the general").

24 _____
 25 ⁶ Fox argues that DISH "admitted" that PTAT is VOD because it used the phrase "on demand" in PTAT advertising
 26 and a trademark application. MPA at 5, 8-9. Not so. The term "on demand" is frequently used in many contexts to
 27 indicate that the consumer controls the *timing* of the viewing. Shull ¶20. DISH has used it for DVRs other than the
 28 Hopper, and other DVR manufacturers also use it. Minnick Decl. ¶52. As for the "video-on-demand" language in
 the PTAT trademark application, it is common for intent-to-use applications to contain as many potential options as
 possible when filed, and this was a common term used in other DISH applications. It has now been dropped from
 this application in recognition of the fact that it is a term that can hold a particular meaning in the industry not
 applicable to PTAT. Saffer Decl. Exs. 2-3.

1 New York law allows no claim for frustration of purpose when the contract
2 specifically contemplates the behavior at issue. *Neumann. v. Metro Med. Group,*
3 *P.C.*, 161 A.D.2d 1106, 1107, 557 N.Y.S.2d 663, 664 (N.Y. App. Div. 3d Dep’t
4 1990). Since these agreements specifically contemplated DISH distribution of
5 DVRs, and everyone knows people are using DVRs to record primetime
6 programming and then play it back at a later time while skipping commercials, it is
7 plain that no breach of paragraph 5 can be found here.

8 **II. FOX IS NOT LIKELY TO SUCCEED ON ITS SECONDARY**
9 **INFRINGEMENT CLAIM.**

10 Fox argues that DISH is liable for vicarious and contributory copyright
11 infringement, including inducement to infringe, but it skips over two very important
12 steps. As a threshold matter, Fox bears the burden of establishing copyright
13 infringement, by demonstrating “(1) ownership of a valid copyright, and (2)
14 copying of constituent elements of the work that are original.” *Feist Pubs., Inc. v.*
15 *Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991). Proof of registration of the work at
16 issue is also required. 17 U.S.C. §411; *see Cosmetic Ideas, Inc. v.*
17 *IAC/Interactivecorp.*, 606 F.3d 612 (9th Cir. 2010). Fox’s motion does not identify
18 any specific registered works that it contends have been unlawfully copied by
19 anyone. And the only evidence of registration Fox offers is a handful of
20 registrations—not for the audiovisual works it generally contends have been
21 copied—but rather for *teleplays* (*i.e.* scripts). Brennan Decl. Ex. A. There is no
22 allegation that anyone has copied scripts, and no evidence that any of the allegedly
23 copied works (shows) have been registered.

24 And, in order for DISH to be found liable for secondary infringement, the
25 Court first must find that there is a direct infringer of the unspecified, apparently
26 unregistered audiovisual works. This is also a requirement for each and every type
27 of secondary infringement. *See Perfect 10 v. Amazon.com, Inc.*, 508 F.3d 1146,
28 1169 (9th Cir. 2007) (“As a threshold matter . . . Perfect 10 must establish that there

1 has been direct infringement by third parties” before we consider claims for
2 secondary infringement). Fox barely addresses this point, because it is unwilling to
3 point the finger—as it must—at the American television viewer.

4 **A. Time-Shifting By Consumers Remains Fair.**

5 In 1984, the Supreme Court held that the distribution of the so-called
6 “Betamax” home video recording and playback device did not render Sony
7 secondarily liable for contributing to the infringement of the networks’ copyrights.
8 Consumers had the right, the Court held, to make recordings of over-the-air
9 network broadcasts for the purpose of watching at another time in the privacy of
10 their own homes; such right meant that there were substantial noninfringing uses
11 for the device. *Sony*, 464 U.S. at 456. The Court observed that “[o]ne may search
12 the Copyright Act in vain for any sign that the elected representatives of the
13 millions of people who watch television every day have made it unlawful to copy a
14 program for later viewing at home, or have enacted a flat prohibition against the
15 sale of machines that make such copying possible.” *Id.*

16 In the nearly three decades since, Congress has not altered this principle as it
17 applies to claims of contributory copyright infringement. The pertinent principles
18 of *Sony* have been repeatedly recited and upheld by the Ninth Circuit and other
19 courts. *See, e.g., Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys. Inc.*,
20 180 F.3d 1072, 1079 (9th Cir. 1999) (characterizing *Sony* as “holding that “time-
21 shifting’ of copyrighted television shows with VCR’s constitutes fair use under the
22 Copyright Act, and thus is not an infringement”); *Matthew Bender & Co., Inc. v.*
23 *West Pub. Co.*, 158 F.3d 693 (2d Cir. 1998); *Lewis Galoob Toys, Inc. v. Nintendo of*
24 *Am., Inc.*, 964 F.2d 965 (9th Cir. 1992); *Vault Corp. v. Quaid Software Ltd.*, 847
25 F.2d 255, 264 (5th Cir. 1988). And, the Supreme Court recently reaffirmed *Sony* in
26 *MGM Studios, Inc. v. Grokster*, 545 U.S. 913 (2005) (“*Grokster*”).

27 In short, home video recording equipment is legal. *Sony*, 464 U.S. at 456;
28 *see Cartoon Network LP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008)

1 (hereafter “*Cablevision*”); *see also ABC, Inc. v. Aereo, Inc.*, No. 12 Civ. 1540, 2012
2 WL 2848158 (S.D.N.Y. July 11, 2012). Consumers using Hopper DVRs to record
3 primetime programming for later viewing cannot be distinguished from the
4 Supreme Court’s holding in *Sony*. Furthermore, even cursory examination of
5 subsequent precedent and evidence pertaining to the first and fourth factors of the
6 fair use test (the two most important factors) makes clear that *Sony*’s analysis holds
7 with respect to DVRs.⁷

8 **1. Time-Shifting Is Functionally Transformative.**

9 The first fair use factor is the “purpose and character of the use.” 17 U.S.C.
10 §107(1). This single factor has two components: the purpose and the character of
11 the use. The purpose of consumers here remains, as it was in *Sony*, a private
12 noncommercial one—indeed, here the consumer is even paying a subscription fee
13 for satellite retransmission. Fox does not even attempt to show that the time-shifted
14 recordings created by a DISH subscriber using PTAT are for commercial or for-
15 profit activity. Accordingly, this key component weighs wholly in favor of DISH.

16 As for the character of the use, it remains transformative. A home video
17 recording machine allows users to record television programs to “time shift.” The
18 Supreme Court stated unequivocally that “time-shifting for private home use **must**
19 **be** characterized as noncommercial, non-profit activity.” *Id.* at 449 (emphasis
20 added). The Court went on to emphasize that “time-shifting merely enables a
21 viewer to see a work which he has been invited to witness in its entirety free of
22 charge” *Id.* at 449-50. In other words, the Betamax served a transformative
23 purpose by allowing the user to record broadcast television programming and watch
24 it at a later time even though the program content was not changed at all.

25 Fox argues summarily, in a footnote, that PTAT cannot be characterized as a
26 transformative use. MPA at 19 n.14. But subsequent precedent confirms

27 _____
28 ⁷ DISH does not concede the other two factors, but they are less pertinent and given space constraints are not discussed herein. The discussion in *Sony* is equally applicable to the second and third factors here.

1 application of *Sony*'s analysis here. PrimeTime Anytime on the Hopper DVR is an
2 advance of time shifting technology, a less cumbersome vehicle for recording and
3 playing back broadcast works that the subscriber is invited to see free of charge.
4 Minnick Decl. ¶¶20, 38-42; Shull Decl. ¶30. This argument was expressly rejected
5 in *Sony* and since. Not only did the Court find the Betamax's "wholesale copying"
6 transformative, the Ninth Circuit has repeatedly found "wholesale copying" to be
7 transformative. *Kelly v. Arriba Soft Corp.*, 336 F.3d 811 (9th Cir. 2003); *Perfect*
8 *10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007).⁸

9 2. **Fox Cannot Take Away The Consumer's Right To Time**
10 **Shift By Offering Video On Demand Programming.**

11 The fourth factor requires consideration of "the effect of the [defendant's]
12 use upon the potential market for or value of the copyrighted work." 17 U.S.C. §
13 107; *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 (1994). Because the
14 consumer's use is noncommercial, *Fox* bears the burden to show "by a
15 preponderance of the evidence that some meaningful likelihood of future harm
16 exists." *Sony*, 464 U.S. at 451; *Hustler Magazine Inc. v. Moral Majority Inc.*, 796
17 F.2d 1148, 1155 (9th Cir. 1986) ("when the use is noncommercial, the copyright
18 owner must demonstrate by a preponderance of the evidence that there is 'some
19 meaningful likelihood of future harm'").⁹

20 Just as in *Sony*, however, *Fox* "fail[s] to carry [its] burden . . ." 464 U.S. at
21 451. In *Sony*, the content owners argued, in much the same vein as *Fox* here, that
22 their economic advertising model was in severe danger and that a huge threat
23 existed that, if the VCR were permitted, there would be an end to all television
24 programming as we know it. As set forth in the Rapp Declaration, the

25 _____
26 ⁸ The two cases cited by *Fox*, *Los Angeles News Serv. v. CBS Broad., Inc.*, 305 F.3d 924, 938 (9th Cir. 2002) and
27 *Elvis Presley Enter., Inc. v. Passport Video*, 349 F.3d 622, 629 (9th Cir. 2003), are wholly inapposite. Both were
cases of use with commercial purposes by commercial entities, with the character of the use being exactly the same
as the original.

28 ⁹ It is particularly appropriate that *Fox* bear the burden to negate fair use on this motion, since it refused any
meaningful discovery on the fair use issue.

1 entertainment industry has a habit of claiming that the sky is falling when new
2 technology is introduced. Rapp Decl. ¶¶41-57. As history now shows, the frantic
3 claims (“Boston Strangler”) of doom were wrong. The Court in *Sony* considered all
4 such arguments and concluded that Universal had failed to carry its burden. It
5 endorsed the district court’s view that Universal’s evidence of harm in that case was
6 “speculative” and/or “minimal.” 464 U.S. at 454.

7 The same is true here. Fox recites all of the same arguments and none has
8 any more support than it did at the time of *Sony*. Fox argues not only that its live
9 TV market will be harmed, but also that two developing markets will be harmed:
10 (1) VOD distribution and (2) internet streaming. MPA at 22-23. As set forth in
11 detail in the Declarations of Richard Rapp and John Hauser filed herewith, these
12 claims of harm are at best speculative and at worst demonstrably false. Indeed, Fox
13 provides no evidence of actual harm in any of these categories.

14 *Sony* itself takes care of Fox’s live TV market concern—there the Court
15 concluded that time-shifting by VCR would have no effect on advertising revenue,
16 and its prediction was quite correct. In fact, the networks’ advertising revenue has
17 risen over time since *Sony* and the widespread adoption of home recording
18 technology. Rapp Decl. ¶54. There is no reason to think that PTAT, which merely
19 allows a consumer to time-shift more efficiently, will cause harm where it has not
20 previously occurred. As economist Rapp and consumer behavior expert Hauser
21 point out, most TV watching remains live and those who own a DVR, such as the
22 Hopper, often watch more television. Rapp Decl. ¶76, 81; Hauser Decl. ¶12, 21.
23 Regardless, given the relatively small number of Hopper users, and particularly
24 those that activate PTAT, there is no expectation that their viewing behavior will be
25 included or reflected in the Nielsen ratings, which are what Fox and the rest of the
26 industry use to set advertising prices. Rapp Decl. ¶88-90.

27 As for Fox’s claims with respect to VOD, they are very similar to the claim
28 rejected by the Court in *Sony*. There, Universal claimed that it had established a

1 new market for videotape cassettes; it provided evidence that it had begun
2 marketing motion pictures on tape. The district court, whose findings were
3 embraced by the Supreme Court, concluded that this alleged market harm was too
4 speculative to prevent a finding of fair use. Here, Fox's VOD market is virtually
5 nonexistent. Hauser ¶¶ 28-29. More importantly, there are no FOX VOD offerings
6 on DISH, so there is no opportunity that a DISH customer will use PTAT instead of
7 watching a FOX VOD program. *Id.* Fox simply provides no evidence that this
8 market exists and will be harmed. Indeed, Fox offered its VOD to DISH for free,
9 strongly suggesting that the sole purpose of VOD is to try to abrogate *Sony* with
10 these types of arguments. Similarly, Fox provides no evidence whatsoever that
11 PTAT has any effect on its alleged internet market. Rather, evidence strongly
12 suggests that the relatively small internet market serves as a complement, not a
13 replacement, for TV viewing. Rapp Decl. ¶105. Complementary use does not
14 harm the market for the work and is fair. *See Ty, Inc. v. Publications Int'l Ltd.*, 292
15 F.3d 512, 517 (7th Cir. 2002) ("Generalizing from this example in economic
16 terminology that has become orthodox in fair-use case law, we may say that
17 copying that is complementary to the copyrighted work . . . is fair use . . .").

18 Fox relies upon what it says are new markets in internet streaming and VOD
19 content in an effort to convert a fair use into foul—or perhaps it is fowl, since Fox's
20 claims certainly have the ring of Chicken Little. Squawking the sky is falling, Fox
21 seeks to take away from consumers the right to do something they have been doing
22 for nearly three decades. These two so-called markets cannot carry that kind of
23 burden. Factually, there is no evidence of harm as outlined in the Rapp and Hauser
24 declarations. And legally, courts and commentators alike have cautioned against
25 permitting a copyright owner to usurp a market that was previously considered fair.
26 *See Castle Rock Entertainment v. Carol Publishing Group*, 150 F.3d 132, 145 n.11
27 (2d Cir. 1998) (copyright owners may not preempt exploitation of transformative
28 markets, which they would not in general develop or license others to develop, by

1 actually developing or licensing others to develop those markets.). *See also* 4
2 Nimmer § 13.05[A][4], at 13-181-13-182 (recognizing “danger of circularity”
3 where original copyright owner redefines “potential market” by developing or
4 licensing others to develop that market). Fox’s effort to undo almost 30 years of
5 consumer freedom and privacy using VOD and Hulu must be rejected.

6 **B. Ad Skipping By Consumers During Time-Shifting Remains Fair.**

7 Implicitly recognizing that PTAT and the time-shifting it offers is fair, Fox
8 focuses on the commercial skipping enabled by AutoHop, as though this were some
9 brand new ability. Commercial avoidance has been around since the dawn of the
10 broadcast television era; the very first remote control was advertised as an aid to
11 commercial skipping. Hauser ¶22. Current reports indicate that the ability to ad
12 skip by fast forwarding, 30-second skip and other methods, such as Verizon FiOS’s
13 option for 30 second, 1 minute or 5 minute skip options, is a standard feature on
14 most home recording devices now in use for many years. Minnick Decl. ¶6. Fox
15 provides no evidence to establish that this common practice, exercised by millions
16 of DISH consumers in the privacy of their homes, in order to watch programs for
17 which they paid a fee, is no longer fair.

18 **1. Ad Skipping, By Itself, Implicates No Copyright Interest.**

19 No copy of anything is made by a consumer when using the AutoHop
20 automatic ad skipping feature. Skipping without copying does not implicate any of
21 the protected rights in the bundle of copyright—there is no reproduction, no
22 distribution, and no public performance by the consumer. *See* 17 U.S.C. §106.
23 Moreover, Fox has no copyright interest in the commercials, which are owned by
24 the advertisers or ad agencies. When users enable AutoHop to skip commercials,
25 they are not skipping or altering the programming content owned and asserted by
26 Fox. Fox’s claim as to AutoHop must fail for this reason alone.

27 **2. Ad Skipping As Part Of Time-Shifting Is Fair.**

28 Fox therefore must attack PTAT, and argue that time shifting is unfair if done

1 for the purpose of commercial skipping. This argument fails as well, because Fox
2 cannot demonstrate that consumers are time shifting for the *sole* purpose of
3 purportedly unfair commercial skipping, or that even if they are, doing so would be
4 unfair.

5 [I]t could be argued that time-shifting implies a broad swath of
6 intentions for shifting prerecorded blocks of programming, both large
7 and small. Bathroom breaks must be taken, popcorn popped, and
8 nudity skipped through – especially when young children watch an R
9 rated movie with their parents. All of these varied intentions fall under
the umbrella of time-shifting, and it seems arbitrary to extract
commercial-skipping from the umbrella and expose it to the cold rain
of infringement.

10 Ethan O. Notken, *Television Remixed: The Controversy over Commercial-Skipping*,
11 16 FORDHAM INTEL. PROP. MEDIA & ENT. L.J. 899, 929. AutoHop is
12 available only on time-shifted programs the next day. There is no evidence that
13 consumers are using time-shifting solely for the purpose of ad skipping. To the
14 extent Fox locates the unfairness in skipping over an ad entirely rather than seeing a
15 snippet, numbers strongly suggest that the vast majority of Hopper users are using
16 the standard 30-second skip on playback instead of AutoHop. Rapp Decl. ¶87.

17 While Fox would have the Court believe that the issue of ad skipping in the
18 context of time-shifting is new, that is not the case. This exact issue was presented
19 squarely to the Court in *Sony*. The parties in their briefs each argued about the
20 effect of ad skipping, with Universal claiming that up to 85% of VCR playback was
21 without commercials and that such deletion would affect the market for its works,
22 and Sony arguing that 69% of playbacks actually included commercials. *Compare*
23 Molinski Decl. Ex. 5 (Brief for Pet.) at 27 n.19 *with id.* Ex. 7 (Brief for Resp.) at 23
24 n.14. And the Court considered the issue. It acknowledged that there was ad
25 skipping, yet it found that the primary use was time-shifting, and the use was
26 therefore fair. *Sony*, 464. U.S. at 432.

27 Now, here we are again, nearly thirty years later. And while the technology
28 has evolved, the ad skipping is more efficient, the arguments and the evidence are

1 the same. The outcome should be too.

2 **C. Ad Skipping Is Privileged Under The Family Movie Act.**

3 Finally, even if commercial skipping could be considered unfair, Congress
4 has expressly privileged it. The Family Movie Act (“FMA”), enacted in 2005, was
5 a response to directors’ complaints that DVD players designed to edit out adult or
6 offensive content were creating infringing derivative works. *See Huntsman v.*
7 *Soderbergh*, 2005 WL 1993421, at *2 (D. Colo. Aug. 17, 2005). Under the FMA,
8 it is not copyright infringement for a family to “make imperceptible” “limited
9 portions of audio or video content of a motion picture” in the home for private use.
10 17 U.S.C. §110(11). It also is not unlawful to sell devices that help them do so. *Id.*
11 This is exactly how AutoHop functions.

12 **D. Distribution Of A Dual-Use Device With Substantial**
13 **Noninfringing Uses Is Lawful.**

14 In *Sony*, the Supreme Court set forth the standards for proving contributory
15 infringement. A defendant contributes to infringement only if it knowingly makes
16 a substantial contribution to an act of direct infringement. For liability to be
17 established, where the alleged contribution is the sale of a product, that product
18 must not have, or even be capable of, substantial noninfringing uses. *Sony*, 464
19 U.S. at 442. This limitation on contributory infringement doctrine serves an
20 important purpose. It “absolves the equivocal conduct of selling an item with
21 substantial lawful as well as unlawful uses, and limits liability to instances of more
22 acute fault than the mere understanding that some of one’s products will be
23 misused. It leaves breathing room for innovation and a vigorous commerce.”
24 *Grokster*, 545 U.S. at 933.

25 Because time-shifting with commercial skipping is fair, the Court cannot
26 enjoin PTAT or AutoHop. Even were this Court to conclude that time shifting for
27 the *sole* purpose of skipping commercials is unfair, it still could not enjoin
28 AutoHop because it does not follow that Fox has demonstrated a lack of substantial

1 noninfringing uses. Rather, Hopper usage evidence suggests that only a very small
2 portion of PTAT users are using AutoHop at all, let alone for a singularly unfair
3 purpose. Fox has presented no survey or other evidence of Hopper users
4 demonstrating that any single one of them, let alone a predominant number, is time-
5 shifting for the *sole* allegedly unfair purpose of commercial skipping. *Compare*
6 *Sony*, 484 U.S. at 442 (suggesting that a use engaged in by less than 10% of the
7 market might suffice to immunize the VCR from liability), *with id.* at 443 (rejecting
8 dissent’s standard that would have required a majority of uses to be legal).

9 **E. Advertising Commercial Skipping Is Not Unlawful “Inducement.”**

10 In its final effort to persuade this Court to ignore *Sony*, Fox argues that DISH
11 is independently liable for “inducing” infringement. Inducement is a judicially-
12 created offshoot of contributory infringement. *Grokster*, 545 U.S. at 935-36. To
13 induce infringement, a party must act to encourage direct infringement by another
14 with a specific intent to cause infringement. *Id.* at 936.

15 But there is no evidence that anyone has purchased the Hopper for an
16 improper purpose. The only evidence Fox cites in support of its inducement theory
17 is that DISH truthfully advertised the fact that consumers can use PTAT to record
18 network shows and use AutoHop to skip commercials in those shows. This is not
19 sufficient to show inducement to infringe. Rather, as the Supreme Court
20 recognized in *Grokster*, *Sony* advertised the same benefits of its VCR: “*Sony*’s
21 advertisements urged consumers to buy the VCR to ‘record favorite shows’ or
22 ‘build a library’ of recorded programs.” *Id.* at 931. *Grokster*, like *Sony*, viewed
23 this as “no evidence” of unlawful intent to induce infringement, because neither of
24 those uses was “*necessarily infringing.*” *Id.* (emphasis added). “On those facts,”
25 the *Grokster* Court explained, “the only conceivable basis for imposing liability
26 was on a theory of contributory infringement”—one that depended on proving that
27 the VCR had no substantial noninfringing use. Just as in *Sony*, evidence that DISH
28 advertised the features of its DVR could not give rise to liability for inducement

1 absent evidence that those features were “necessarily infringing.”¹⁰

2 **III. FOX IS NOT LIKELY TO SUCCEED ON ITS DIRECT**
3 **INFRINGEMENT CLAIM.**

4 **A. Consumers Are Making The PTAT Copies, Not DISH.**

5 As set out above, PTAT is a DVR feature whereby the user views a setup
6 screen, selects (among other things) which networks and nights to record, and then
7 enables the recording. Minnick Decl. ¶¶20, 21, 23-24. This functionality exists in
8 more complex form as “timers” on numerous other DVRs sold by DISH and others.
9 *Id.* ¶38. All DISH has done is to create the software for a simplified set of timers
10 and a user interface. *Id.* ¶¶20-35. That PTAT is a choice by the consumer, rather
11 than DISH, is dispositively proven by the data showing that somewhat less than
12 50% of Hopper consumers are enabling PTAT. Gerhards Decl. ¶5 & Ex. 1.

13 The Court in *Sony* cautioned that it was especially important in cases
14 involving consumer welfare to make the correct distinctions between theories of
15 primary liability (direct infringement), and secondary liability (indirect
16 infringement). 464 U.S. at 441-42; *see also Cablevision*, 536 F.3d at 133 (“The
17 Supreme Court’s desire to maintain a meaningful distinction between direct and
18 contributory copyright infringement is consistent with congressional intent”). In
19 *Cablevision*, the Second Circuit, relying on early district court precedent from
20 within the Ninth Circuit (*Religious Tech. Ctr. v. Netcom Online Comms. Servs.*, 907
21 F. Supp. 1361, 1368-69 (N.D. Cal. 1995)), adopted what has come to be termed the
22 “volitional conduct requirement”; that is, whoever exercises their volition to make

23 _____
24 ¹⁰ Finally, even if advertising the features of DISH’s product were thought to induce acts of actual infringement by
25 consumers, Fox offers no evidence whatsoever suggesting that DISH’s purpose in advertising its DVR was to
26 intentionally encourage infringement. Not only does Fox offer no direct evidence of unlawful purpose, it cannot
27 even offer indirect evidence of such a purpose. The only evidence Fox offered is that DISH is selling a product that
28 contained features recognized by the Supreme Court as lawful nearly thirty years ago. *Grokster* specifically rejected
reliance on such sales as evidence of unlawful intent: “*Sony*’s rule limits imputing culpable intent as a matter of law
from the characteristics or uses of a distributed product.” *Grokster*, 545 U.S. at 788-89. In all events, testimony from
DISH executives makes it clear that DISH respects copyrights and has no wish to encourage infringement. Shull
Decl. ¶35. Far from pirating content, DISH has signed contracts with each of the TV networks and pays many
millions of dollars a year in royalties to those networks for content they broadcast over the air for free.

1 the copy is the party in the position to be considered a direct infringer:

2 In determining who actually ‘makes’ a copy, a significant difference
3 exists between making a request to a human employee, who then
4 volitionally operates the copying system to make the copy, and issuing
a command directly to the system, which automatically obeys
commands and engages in no volitional conduct. (*Id.* at 131)

5 Accordingly, enabling the exercise of a choice through technical means is not the
6 same as making a copy yourself. *Id.*; see also *CoStar Group, Inc. v. LoopNet, Inc.*,
7 373 F.3d 544 (4th Cir. 2004). In fact, this is the only analysis consistent with *Sony*.

8 Fox incorrectly argues that the volitional conduct requirement has not been
9 adopted by the Ninth Circuit. MPA at 11 n.6. The Ninth Circuit’s decisions in
10 cases interpreting the safe harbor provisions of the Digital Millennium Copyright
11 Act (“DMCA”) make clear that the court *does* recognize a volitional conduct
12 requirement. *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 667 F.3d
13 1022, 1035-36 (9th Cir. 2011). In that case, the court held as follows:

14 Veoh does not actively participate in or supervise file uploading
15 Rather this ‘automated process’ for making files accessible ‘is initiated
16 entirely at the volition of Veoh’s users.’ We therefore hold that Veoh
17 has satisfied the threshold requirement that the infringement be ‘by
reason of the storage at the direction of a user of material’ residing on
Veoh’s system. (*Id.* at 1035.)

18 The question of *who was responsible* for placing the copies on the system under the
19 DMCA safe harbor is exactly the same question as *who was responsible* for making
20 the copies more generally in assessing the question of direct versus contributory
21 infringement. The Ninth Circuit requires volitional conduct the same way as every
22 other circuit that has addressed this issue, and it is error to conclude otherwise.¹¹

23 **B. DISH Is Not Infringing The Distribution Right.**

24 Nor is DISH a direct infringer of the distribution right. Fox argues that the
25 *same* PTAT copy purportedly violating the reproduction right also violates Fox’s

26 ¹¹ See also *Righthaven LLC v. Democratic Underground, LLC*, 2012 U.S. Dist LEXIS 31605 (D. Nev. Mar. 9, 2012)
27 (volitional requirement for direct infringement); *Perfect 10, Inc. v. Megaupload Ltd.*, 2011 U.S. Dist LEXIS 81931
28 (S.D. Cal. July 27, 2011) (same); *Rosen v. Hosting Servs., Inc.*, 771 F. Supp. 2d 1219 (C.D. Cal. 2010) (same); *Field*
v. Google, Inc., 412 F. Supp. 2d 1106 (D. Nev. 2006) (same); *Ellison v. Robertson*, 189 F. Supp. 2d 1051 (C.D. Cal.
2002) (same).

1 exclusive right to *distribute* copies of its works under 17 U.S.C. § 106(3). This
2 argument likewise fails for two reasons; (1) there is no distribution at all when no
3 physical copy changes hands; and (2) even if there were, there is no dispute that
4 DISH is licensed (both statutorily and via the Retransmission Agreement) to deliver
5 (i.e., *distribute*) Fox’s content to its users.

6 Section 106(3) is quite specific as to what is—and is not—a “distribution” of
7 a copyrighted work. Under that section, a copyright holder has the exclusive right
8 “to distribute copies or phonorecords of the copyrighted work to the public by sale
9 or other transfer of ownership, or by rental, lease or lending.” “Copies” are in turn
10 defined as “material objects . . . in which a work is fixed . . .” 17 U.S.C. §101.
11 While courts in other circuits have occasionally misunderstood this section, as
12 evidenced by Fox’s citations at MPA 6-7, “[t]he general rule, supported by the great
13 weight of authority, is that ‘infringement of [the distribution right] requires an
14 actual dissemination of either copies or phonorecords.’ *Atlantic Recording Corp. v.*
15 *Howell*, 554 F. Supp. 2d 976 (D. Ariz. 2008) (quoting *Nat’l Car Rental Sys. V.*
16 *Computer Assocs. Int’l, Inc.*, 991 F.2d 426, 434 (8th Cir. 1993)); *see also Perfect*
17 *10 v. Amazon.com, Inc.*, 508 F.3d 1146, 1162 (9th Cir. 2007) (“distribution requires
18 an ‘actual dissemination’ of a copy”).

19 Moreover, even were this Court to accept the incorrect legal proposition that
20 all DISH has to do to violate the distribution right is to make the content available
21 for copying by the consumer, then the only distribution here cannot be the basis of a
22 claim because it is expressly *authorized*. Fox does not contend—nor could it—that
23 DISH’s delivery of Fox’s broadcast content to DISH’s customers is unauthorized.
24 To the contrary, that transmission is indisputably licensed under the agreement at
25 issue here, and subject to statutory license as well. And, the agreements expressly
26 contemplate that DISH will authorize its subscribers to use video replay equipment
27 and to make recordings for private home use. Fox does not challenge DISH’s right
28 to make, or its users’ right to receive, the retransmitted broadcasts. Even if that

1 “dissemination” could be stretched to fit the statutory definition of “distribution,” it
2 is authorized and paid for. It is the user’s *recording* of the broadcast that Fox
3 attacks: but that is actionable, if at all, only under Section 106(1).

4 **C. The Quality Control Copies Are Fair.**

5 The only copies of broadcast content that DISH is making in the entire PTAT
6 and AutoHop process are copies created for purposes of [REDACTED]

7 [REDACTED]
8 Minnick Decl. ¶¶73-76. Because these copies are made solely for the purpose of
9 assisting consumers to exercise their fair use rights, they are intermediate copies
10 made for ultimately noninfringing purposes and are thus fair. *See Sony Computer*
11 *Enter., Inc. v. Connectix Corp.*, 203 F.3d 596 (9th Cir. 2000); *Sega Enters. Ltd v.*
12 *Accolade, Inc.*, 977 F.2d 1510 (9th Cir. 1993); *Atari Games Corp. v. Nintendo of*
13 *Am., Inc.*, 975 F.2d 832 (Fed. Cir. 1992); *see also Lewis Galoob Toys, Inc. v*
14 *Nintendo of Am., Inc.*, 964 F.2d 965 (9th Cir. 1992).

15 **IV. FOX HAS NOT DEMONSTRATED A LIKELIHOOD OF**
16 **IRREPARABLE HARM BETWEEN NOW AND TRIAL.**

17 Fox must “demonstrate that irreparable injury is *likely* in the absence of an
18 injunction.” *Winter v. Natural Resources Defense Council*, 555 U.S. 7, 22 (2006).
19 The mere “possibility” of irreparable harm will not suffice. *Id.* Thus, “irreparable
20 harm is the single most important prerequisite for the issuance of a preliminary
21 injunction.” *Dominion Video Satellite, Inc. v. EchoStar Satellite Corp.*, 356 F.3d
22 1256, 1258 (10th Cir. 2004) (collecting cases); *Freedom Holdings, Inc. v. Spitzer*,
23 408 F.3d 112, 114 (2d Cir. 2005) (same). Irreparable harm must be proven with
24 actual evidence; it may not be presumed. *eBay, Inc. v. MercExchange LLC*, 547
25 U.S. 388 (2006); *Flexible Lifeline Systems, Inc. v. Precision Lift, Inc.*, 654 F.3d 989
26 (9th Cir. 2011). Fox has not proven it, and in all events DISH has disproven it.

27 **A. There Is No Irreparable Harm On The Contract Claim.**

28 Fox claims that it is entitled to an injunction in part because DISH has

1 breached the retransmission agreement. Historically, there is no irreparable harm
2 associated with a breach of contract claim. As this Court has observed, “a
3 preliminary injunction to prevent a breach of contract is an almost unheard of thing,
4 being the equivalent of specific enforcement by preliminary injunction.”

5 *Ticketmaster Corp. v. Tickets.Com, Inc.*, No. 99CV7654, 2000 WL 1887522, at *5
6 (C.D. Cal. Aug. 10, 2000).¹² And, it is plain that money damages can be calculated
7 here, where Fox has a widespread licensing program. [REDACTED]

8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]

17 **B. Fox Has Not Shown Likely Irreparable Harm On Its Copyright**
18 **Claim.**

19 In the face of Fox’s admissions in its papers that its primetime programming
20 is extensively published and marketed in almost every imaginable venue, Fox
21 cannot be heard to claim that it faces potential irreparable harm from a “loss of
22 control” over its content. MPA at 20-22. Fox has already ceded control by
23 licensing its content on such a widespread nonexclusive basis. Moreover, Fox
24 claims loss of control in markets to which the content has already been licensed—

25 ¹² See *ConWest Resources, Inc. v. Playtime Novelties, Inc.*, No. C 06-5304, 2006 WL 3346226, at *8 (N.D. Cal. Nov.
26 17, 2006) (“[A] preliminary injunction will not issue based on a breach of contract claim”); *Telephia Inc. v. Cuppy*,
27 No. C 04-03508, 2005 WL 588441, at *3 (N.D. Cal. Mar. 11, 2005) (same). Breach of contract claims do not support
28 preliminary injunctions because “the relief available for a breach of contract—money damages—is an adequate
remedy at law. *Todd v. Chase Manhattan Mortg. Corp.*, No CV 12-00129, 2012 WL 1906505, at *2 (D. Ariz. May
25, 2012); see *Flynt Distrib. Co v. Harvey*, 734 F.2d 1389, 1395-96 (9th Cir. 1984) (error to issue injunction based on
breach of contract because “money damages” provide adequate remedy).

1 VOD and IPTV. When an intellectual property holder readily licenses its content to
 2 all takers, there is no irreparable harm from supposed “loss of control.” Under such
 3 circumstances, the mantra “loss of control” is no more than a return to the
 4 presumption and lowered standard of proof discredited in *eBay* and *Winter*.

5 In post-*eBay* jurisprudence, a plaintiff with an established licensing program
 6 does not get a *permanent* injunction, let alone a preliminary one. Such plaintiffs
 7 may get damages (if they have a claim), but not an injunction. *MercExchange, LLC*
 8 *v. eBay, Inc.*, 500 F. Supp. 2d 556, 560 (E.D. Va. 2007) (“willingness to license”
 9 undercuts irreparable harm) (denying permanent injunction on remand).¹³ Thus, the
 10 Federal Circuit recently held that the structure of the video-on-demand market
 11 would not support a showing of irreparable harm in a patent case. *ActiveVideo*
 12 *Networks, Inc. v. Verizon Comms., Inc.*, No. 2011-1538, 2012 WL 3636908 (Fed.
 13 Cir. Aug. 24, 2012). The Court denied an injunction because damages were readily
 14 quantifiable:

15 ActiveVideo sells VoD hardware and software to providers of video
 16 services; Verizon markets and sells video services to end users. . .
 17 ActiveVideo does not lose market share when Cablevision loses a
 18 subscriber to Verizon, it loses the Cablevision licensing fee. . . The
 19 harm to ActiveVideo due to Verizon's infringement is readily
 20 quantifiable. When Verizon pays ActiveVideo a per month royalty for
 21 each FiOS-TV subscriber, then ActiveVideo is adequately
 22 compensated. . . The losses to ActiveVideo due to Verizon's
 23 infringement are clearly quantifiable. Moreover, ActiveVideo sought
 24 to broadly and extensively license this technology (Cablevision,
 25 Grande, and TV Guide) including a campaign to secure a license from
 26 Verizon itself. (*Id.* at *22-23.)

27 Here, it is the copyrighted content that is the relevant intellectual property, but it is
 28 operating in exactly the same market structure. The outcome can be no different.

The injunction should be denied.¹⁴

¹³ See also *Polymer Technologies, Inc. v. Bridwell*, 103 F.3d 970, 974 (Fed. Cir. 1996) (pre-*eBay* case recognizing that plaintiffs “have engaged in a pattern of granting licenses” as evidence of lack of irreparable harm); *T.J. Smith and Nephew Ltd. v. Consolidated Med. Equip, Inc.*, 821 F.2d 646, 648 (Fed. Cir. 1987) (an established history of granting licenses is “incompatible with . . . the right to exclude”).

¹⁴ Fox relies heavily on *Warner Bros. Entertainment Inc. v. WTV Systems, Inc.*, 824 F. Supp. 2d 1003 (C.D. Cal. 2011). That case, however, found the presence of an *exclusive* licensing program established irreparable harm. There was specific evidence of exclusive licensing windows for major movies harmed by the DVD streaming

1 Fox tries to revive a presumption of irreparable harm by citing *Salinger v.*
 2 *Colting*, 607 F.3d 68 (2d Cir. 2010) for the proposition that an injunction “has
 3 nearly always” issued when a likelihood of success on the merits has been shown in
 4 a copyright case. MPA at 19. Fox has not shown a likelihood of success on the
 5 merits, but even if it had, *Salinger* says that post-*eBay* irreparable harm must be
 6 proven and that there is no presumption. *Salinger*, 607 F.3d at 76-80; *accord*
 7 *Flexible Lifeline Systems, Inc. v. Precision Lift, Inc.*, 654 F.3d 989, 998 (9th Cir.
 8 2011) (“even in a copyright infringement case, the plaintiff must demonstrate a
 9 likelihood of irreparable harm as a prerequisite for injunctive relief.”); *see also*
 10 *Christopher Phelps & Assocs. LLC v. Galloway*, 492 F.3d 532 (4th Cir. 2007)
 11 (affirming denial of permanent injunction in copyright case).

12 The irreparable harm that the “plaintiff must *demonstrate*” must be
 13 “immediate” and “imminent” and not remote or speculative. *Caribbean Marine*
 14 *Servs. Co. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988); *see also Dotster, Inc. v.*
 15 *Internet Corp. for Assigned Names and Numbers*, 296 F. Supp. 2d 1159, 1162 (C.D.
 16 Cal. 2003) (“Irreparable injury is an injury that is not remote or speculative, but
 17 actual and imminent”). Fox presents no reliable evidence of actual imminent
 18 consequences from PTAT or AutoHop, and the declarations that it offers contain no
 19 specifics, only speculation. *See Praxair, Inc. v. ATMI, Inc.*, 479 F. Supp. 2d 440,
 20 443 (D. Del. 2007) (“Praxair has not provided or described any specific sales or
 21 market data to assist the court, nor has it identified precisely what market share,
 22 revenues, and customers Praxair has lost to ATMI”) (denying injunction).¹⁵

23 Fox does not present any proof, such as a survey, that there is even any
 24

25 business proposed by the defendant in that case. *Id.* at 1006-1013. No such evidence is present here. Fox also cites
 26 *WPIX, Inc. v. ivi, Inc.*, 765 F. Supp. 2d 594 (S.D.N.Y. 2011), which was recently affirmed, No. 11-788, 2012 WL
 3645304 (2d Cir. Aug. 27, 2012). The defendant in *WPIX* was, however, streaming network programming over the
 27 internet without paying retransmission fees, and the defendant’s subscribers were not counted by Nielsen. 765 F.
 Supp. 2d. at 598-99, 619. Those are two important facts not present here. Shull Decl. ¶6.

28 ¹⁵ *See also Johnson & Johnson Vision Care v. CIBA Vision Corp.*, 712 F. Supp. 2d 1285, 1289 (M.D. Fla. 2010)
 (denying permanent injunction); *Advanced Cardiovascular Sys., Inc. v. Medtronic Vascular, Inc.*, 579 F. Supp. 2d
 554, 560 (D. Del. 2008) (denying permanent injunction).

1 incremental increase in ad skipping because of the AutoHop feature. It merely
 2 makes that assumption, and offers overblown predictions of dire consequences to
 3 advertising revenues. But, the only qualitative distinction between the longstanding
 4 30-second skip feature and AutoHop is whether someone at home watching
 5 television is holding a remote control in his or hand.¹⁶

6 **C. Any Assertion Of Irreparable Harm Has Been Rebutted.**

7 Fox has failed to present any competent evidence of any incremental increase
 8 in ad-skipping with AutoHop. That is because there is no such evidence. As set
 9 forth in the opinions of DISH's two highly qualified experts Richard T. Rapp, an
 10 economist who is the former Chairman of the international economics consulting
 11 firm NERA, and John Hauser, a professor of marketing at MIT's Sloan School of
 12 Management, there is no reason to believe that the AutoHop feature will cause any
 13 meaningful increase in commercial-skipping behavior among the television-
 14 viewing public during the pendency of this litigation. Moreover, as shown in the
 15 Rapp Declaration, financial analysts who follow and report on the networks have
 16 opined that the PTAT and AutoHop features on the Hopper will have no real
 17 impact. For example, Doug Mitchelson of Deutsche Bank stated "We see minimal
 18 risk from Aereo or the Hopper cases." Rapp Decl. ¶23. Brian Weiser, Senior Vice
 19 President and Global Forecasting Director of MagnaGlobal, stated "DVRs have
 20 never been a meaningful threat because the bulk of television consumption occurs
 21 live (even in homes with DVRs)." *Id.* Ian Olgirson of SNL Kagan stated "the
 22 actual impact of AutoHop on television advertising likely will be limited, even if
 23 DISH weathers potential legal challenges." *Id.* n.31. Tony Wilbe of Janney Capital
 24 Markets stated that "ad-skipping risks [are] overstated." *Id.* ¶24.

25 Other financial metrics support this conclusion, such as the lack of reaction
 26 in the marketplace to the introduction of these DVR features. There were no

27 ¹⁶ Fox also asserts, based on hearsay in a newspaper article, that other MVPDs might adopt ad skipping technology
 28 while this case is pending. But, the article that Fox relies upon contradicts the claim. It reports that DirecTV intends
 to await the outcome of this litigation before adding any new ad skipping features. Haslingden Decl. Ex. B.

1 changes in credit ratings for the senior unsecured debt of News Corp. or CBS.¹⁷
 2 There was no stock price reaction. The collective opinion is that the Hopper poses
 3 no material risk to network television. Indeed, the up-front ad sales that
 4 immediately followed the announcement of AutoHop were a noted success for Fox.
 5 Notwithstanding that the networks are losing audience to pay-television channels,
 6 network advertising prices continue to rise. The networks do not stand to lose any
 7 audience as a result of PTAT and AutoHop. Instead, those features are likely to
 8 increase viewership of the networks' primetime shows. It is only incremental ad
 9 views lost to the networks as a result of these features that might matter, and there
 10 is no evidence that there will be any extra lost impressions. Rapp Decl. ¶82, 92.

11 There are close to 115 million television-viewing households in the United
 12 States. Rapp Decl. ¶66. Approximately 57% of those households have VCRs, and
 13 43% have DVRs. Hauser Decl. ¶14. Only 275,000 or so currently have a Hopper,
 14 which translates to 0.2% of households with television sets. Moreover, less than
 15 half of all Hopper users are enabling PTAT. And far fewer Hopper users are using
 16 AutoHop rather than the longstanding, preexisting means of commercial skipping—
 17 [REDACTED]. Gerhards Decl. ¶10.

18 At the same time, the overwhelming majority of television viewing occurs live or
 19 same-day. Fox has presented no evidence whatsoever that consumers will deviate
 20 from their preexisting viewing patterns *because of* AutoHop.

21 Moreover, any existing VCR or DVR household already has the ability to
 22 fast-forward through or 30-second skip over commercials. DISH's data shows that
 23 its subscribers with DVRs use the 30-second skip feature on approximately fifty
 24 percent of playbacks of recorded events. AutoHop is not creating ad skippers. It is
 25 a simplification of existing behavior for a minority of users. Even taking into
 26 account projected new Hopper sales during the litigation, there is no reasonable

27 ¹⁷ Fox places near exclusive reliance for its irreparable harm argument on a Moody's Investor Service Issuer
 28 Comment. As Rapp explains, the Issuer Comment provides no assessment of materiality and no Moody's credit
 rating revision has resulted from the launch of the AutoHop feature. Rapp at ¶29. See also *id.* at ¶¶19, 27-36, 54, 67.

1 basis to find that there will be any meaningful increase in ad skipping behavior.

2 Fox's claim that PTAT and AutoHop will impact its ability to license its
3 programming to VOD distributors stands up no better to the facts. MPA at 22-24.
4 MVPD's VOD offerings are only accessible by their unique subscribers. This
5 means that the value of a VOD service carried by another pay-television provider
6 will not be diminished by the availability of PTAT and AutoHop to DISH
7 subscribers—and Fox's ability to negotiate VOD licenses will not be affected. *See*
8 *ActiveVideo*, 2012 WL 3636908, at *21-23. Since DISH does not offer any
9 broadcast television network programming on a VOD basis, PTAT and AutoHop
10 cannot have an impact on Fox's VOD efforts.

11 Nor is there any merit to Fox's *ipse dixit* that its effort to exploit the internet
12 streaming market will be harmed. MPA at 20-24. Very little television is viewed
13 via the internet. And internet streaming services do not directly compete with
14 television viewing; they are complementary of television viewing. Hauser Decl.
15 ¶31; Rapp Decl. ¶105. Indeed, at the same time DVRs have become more widely
16 available, and their recording capacity has improved, there has been growth in
17 internet streaming services. Rapp Decl. ¶105.

18 **D. Fox's Delay Undercuts Any Claim of Irreparable Harm.**

19 The Hopper with PrimeTime Anytime was publicly announced with great
20 fanfare on January 9, 2012 at CES, and Fox was there. Khemka Decl. ¶3; Shull
21 Decl. ¶9. In fact, Fox knew about it beforehand. Molinski Decl. Ex. 4. Despite
22 meeting regularly with DISH after January 9, no one at Fox or any of the other
23 networks objected in any way to PTAT. Shull Decl. ¶9. AutoHop was announced
24 on May 10, 2012, with advance notice to the networks. *Id.* Ex. 2. Only then did
25 Fox (and the other networks) file suit claiming PTAT and AutoHop would destroy
26 advertiser-supported television. Fox's delay and lack of objection during the entire
27 first, and more than half of the second, quarters of 2012 precludes an injunction
28 against PTAT. *Oakland Tribune, Inc. v. Chronicle Pub. Co.*, 762 F.2d 1374, 1377

1 (9th Cir. 1985) (delay “implies a lack of urgency and irreparable harm”).¹⁸

2 **V. THE OTHER FACTORS ALSO FAVOR DISH.**

3 Fox must also establish that the balance of hardships favors it, *Perfect 10,*
4 *Inc. v. Google, Inc.*, 653 F.3d 976, 979 (9th Cir. 2011), and “that an injunction is in
5 the public interest.” *Flexible Lifeline*, 654 F.3d at 994. Neither is true.

6 **A. DISH Will Suffer Far More Hardship Than Fox.**

7 As detailed above, there is no likelihood that Fox will suffer harm during the
8 litigation. If, on the other hand, DISH is required to disable PTAT and AutoHop
9 for existing customers (akin to a recall),¹⁹ or is enjoined from providing those
10 features to future subscribers, DISH will suffer severe, immediate hardship in the
11 form of damaged customer relations, lost goodwill, and other costs. *See Hansen*
12 *Beverage Co. v. N2G Distrib., Inc.*, No. 08-CV-1613, 2008 U.S. Dist. LEXIS
13 105442, at *17 (S.D. Cal. Dec. 30, 2008) (damage to goodwill weighs against
14 injunction); *Wang Labs., Inc. v. Mitsubishi Elecs. Am., Inc.* No. CV-92-4698, 1993
15 U.S. Dist. LEXIS 15075, at *52 (C.D. Cal. June 29, 1993) (potential loss of
16 “valuable customer relations” tips balance of hardships to defendant).

17 An order to turn off PTAT and/or AutoHop would require a massive
18 campaign to notify subscribers that those features are no longer available, and
19 numerous attendant steps resulting in disruption, consumer confusion, and loss of
20 goodwill to DISH. Khemka Decl. ¶10, 11. DISH has invested time, effort, and

21 _____
22 ¹⁸ *See Kerr Corp. v. North Am. Dental Wholesalers, Inc.*, No. SACV 11-0313, 2011 U.S. Dist. LEXIS 61779, at *7
23 (C.D. Cal. June 9, 2011) (five month delay shows lack of irreparable harm); *Givemepower Corp. v. Pace*
24 *Compumetrics, Inc.*, No. 07cv157, 2007 U.S. Dist. LEXIS 20886, at *22 (S.D. Cal. Mar. 23, 2007) (two month delay
25 shows lack of irreparable harm); *Valeo Intellectual Prop., Inc. v. Data Depth Corp.*, 368 F. Supp. 2d 1121, 1128
26 (W.D. Wash. 2005) (“A three month delay in seeking injunctive relief is inconsistent with [plaintiff’s] insistence that
27 it faces irreparable harm.”); *Playboy Enters., Inc. v. Netscape Commc’ns Corp.*, 55 F. Supp. 2d 1070, 1180, 1089
28 (S.D. Cal. 1999) (five month delay in seeking injunction after retaining expert shows lack of irreparable harm);
Programmed Tax Sys., Inc. v. Raytheon Co., 419 F. Supp. 1251, 1255 (S.D.N.Y. 1976) (collecting cases where
irreparable harm denied with between two and six month delay).

¹⁹ Customers have been enabling PTAT since March and AutoHop since May. Approximately 275,000 customers
have purchased the Hopper and obtained these features; Fox’s proposed injunction would deprive them of what they
have already purchased and activated. Fox has not acknowledged—let alone attempted to meet—the higher burden
associated with a product recall. *See Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 879
(9th Cir. 2009). A recall order is akin to a mandatory injunction and “particularly disfavored.” 571 F.3d at 879.

1 millions of dollars conceiving of and developing the Hopper, PTAT and AutoHop.
2 DISH launched—at similarly great expense—a marketing campaign devoted to
3 promoting the Hopper, along with its PTAT and AutoHop features. If DISH is
4 enjoined from offering them during the course of this litigation, its marketing
5 investment will be lost. *Id.* ¶¶10, 11.

6 **B. The Public Interest Will Be Disserved By An Injunction.**

7 Fox relies on boilerplate here, reciting the public’s interest in “upholding
8 copyright protections” and in “advertising-supported television.” MPA at 25.
9 “Public policy does not advocate the liberal issuance of *preliminary* injunctions in
10 copyright infringement actions.” *Nintendo of Am., Inc. v. Lewis Galoob Toys, Inc.*,
11 16 F.3d 1032, 1038 (9th Cir. 1994). In this case those boilerplate recitations are not
12 *public* interests, but rather the private commercial interests of Fox. In contrast, the
13 real public interests at stake here are privacy, consumer autonomy and
14 technological innovation. *See Sony*, 464 U.S. at 783. Enjoining PTAT and/or
15 AutoHop will disserve the public interest. *See GMC v. Harry Brown’s, LLC*, 563
16 F.3d 312, 321 (8th Cir. 2009) (public has an interest in “consumer choice”);
17 *Fromson v. Western Litho Plate & Supply Co.*, 853 F.2d 1568, 1576 (Fed. Cir.
18 1988) (recognizing “the public interest in technological advancement”).

19 **VI. THE OLD PTAT/AUTOHOP SYSTEM IS MOOT.**

20 Fox seeks to enjoin both the “current iterations” of PTAT and AutoHop and
21 the “original” iterations. MPA at 2. The system has been changed, users are using
22 the new system, DISH has no intention of going back. Minnick Decl. ¶47, 82. The
23 old system is irrelevant to a request for injunctive relief. *See FTC v. Evans Prods.*
24 *Co.*, 775 F.2d 1084, 1088 (9th Cir. 1985).²⁰

25 **CONCLUSION**

26 For all of the foregoing reasons, Fox’s motion should be denied.

27 ²⁰ *See also Keep A Breast Foundation v. Seven Group*, No.11-cv-00570, 2011 U.S. Dist. LEXIS 78373, at *8 (S.D.
28 Cal. July 19, 2011); *BP W. Coast Prods. LLC v. Takhar Bros. Inc.*, No. CV-07-1807, 2007 U.S. Dist. LEXIS 86006,
at *3-4 (D. Ariz. Nov. 8, 2007)

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