

1 JENNER & BLOCK LLP  
Richard L. Stone (Bar No. 110022)  
2 Andrew J. Thomas (Bar No. 159533)  
David R. Singer (Bar No. 204699)  
3 Amy M. Gallegos (Bar No. 211379)  
633 West 5th Street, Suite 3600  
4 Los Angeles, CA 90071  
rstone@jenner.com  
5 ajthomas@jenner.com  
dsinger@jenner.com  
6 agallegos@jenner.com

7 Attorneys for Plaintiffs  
8 Fox Broadcasting Company, Twentieth  
Century Fox Film Corp., and  
9 Fox Television Holdings, Inc.

10  
11 **UNITED STATES DISTRICT COURT**  
12 **CENTRAL DISTRICT OF CALIFORNIA**  
13 **WESTERN DIVISION**  
14

15 FOX BROADCASTING COMPANY, INC.,  
TWENTIETH CENTURY FOX FILM  
16 CORP., and FOX TELEVISION  
HOLDINGS, INC.

17 Plaintiffs,  
18

19 v.

20 DISH NETWORK L.L.C. and  
DISH NETWORK CORP.,

21 Defendants.  
22

Case No. CV-12-04529 DMG (SHx)

**PLAINTIFFS' MEMORANDUM  
OF POINTS AND AUTHORITIES  
IN SUPPORT OF MOTION FOR  
PRELIMINARY INJUNCTION**

Hearing Date: Sept. 21, 2012  
Hearing Time: 9:30 a.m.  
Courtroom: 7 (2nd Floor)

[Notice of Motion and Motion;  
Supporting Declarations with  
Exhibits; Notice of Lodging; and  
Proposed Order filed concurrently]

**PUBLIC REDACTED VERSION**

24 Plaintiffs Fox Broadcasting Company, Inc., Twentieth Century Fox Film  
25 Corp., and Fox Television Holdings, Inc. (collectively, "Fox") respectfully submit  
26 the following Memorandum of Points and Authorities in support of their Motion  
27 for Preliminary Injunction against defendants DISH Network L.L.C. and DISH  
28 Network Corp. (collectively, "Dish").

**TABLE OF CONTENTS**

1

2

3 I. INTRODUCTION..... 1

4 II. FACTUAL BACKGROUND ..... 2

5 A. Fox Distributes Its Programs To Consumers In Numerous

6 Ways ..... 2

7 B. Fox’s Limited And Conditional Grant Of Rights To Dish..... 4

8 C. Dish’s PrimeTime Anytime Video On Demand Service ..... 4

9 D. In Violation Of Dish’s License, PrimeTime Anytime Strips

10 Commercials From Fox’s Programs And Delivers The

11 Programs To Mobile Devices ..... 7

12 III. ARGUMENT ..... 8

13 A. Fox Is Likely To Succeed On Its Breach Of Contract Claim..... 8

14 B. Fox Is Likely To Succeed On Its Direct Infringement Claim ..... 9

15 1. Dish’s PrimeTime Anytime And AutoHop Exceed The

16 Scope Of Dish’s Retransmission License And Constitute

17 Copyright Infringement ..... 9

18 2. PrimeTime Anytime Infringes Fox’s Copyrights ..... 10

19 a. Dish infringes the Section 106(1) reproduction right..... 10

20 b. Dish also infringes the Section 106(3) distribution

21 right ..... 13

22 3. The AutoHop Service Unlawfully Copies Fox's Programs. .... 14

23 C. Alternatively, Fox Is Likely To Prove Secondary

24 Infringement By Dish ..... 15

25 1. Dish Is Liable For Inducing Copyright Infringement ..... 15

26 2. Dish Is Liable For Vicarious Infringement ..... 16

27 3. Dish’s Is Liable for Contributory Infringement ..... 17

28 4. Dish's Conduct Is Not Protected By The Fair Use Doctrine..... 17

D. Fox Will Suffer Irreparable Harm In The Absence Of An

Injunction ..... 19

1. Dish’s Conduct Harms Fox’s Right To Exclusive Control..... 20

2. Dish’s Conduct Disrupts Fox’s Ability To Distribute Its

Programs ..... 22

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

3. Dish’s Conduct Threatens Fox’s Ad-Supported Business Model..... 23

E. The Balance Of Hardships Weighs Decidedly In Favor Of Fox ..... 24

F. Public Policy Favors The Issuance Of An Injunction Against Dish..... 25

IV. CONCLUSION ..... 25

DEADLINE.COM

## TABLE OF AUTHORITIES

### Cases

1		
2		
3		
4	<i>A&amp;M Records, Inc. v. Napster, Inc.</i> ,	
5	239 F.3d 1004 (9th Cir. 2001).....	passim
6	<i>Alliance for the Wild Rockies v. Cottrell</i> ,	
7	632 F.3d 1127 (9th Cir. 2011).....	8
8	<i>Arista Records LLC v. Lime Group LLC</i> ,	
9	784 F. Supp. 2d 398 (S.D.N.Y. 2011) .....	16, 17
10	<i>Arista Records LLC v. Myxer Inc.</i> ,	
11	Case No. CV 08–3935–GAF (JCx),	
12	2011 U.S. Dist. LEXIS 109668 (C.D. Cal. April 1, 2011) .....	11
13	<i>Arista Records LLC v. Usenet.com, Inc.</i> ,	
14	633 F. Supp. 2d 124 (S.D.N.Y. 2009).....	13, 17
15	<i>Atlantic Rec’g Corp. v. XM Satellite Radio, Inc.</i> ,	
16	2007 WL 136186 (S.D.N.Y. Jan. 19, 2007).....	13, 14
17	<i>Berster Tech, LLC v. Christmas</i> ,	
18	2012 WL 33031 (E.D. Cal. Jan. 6, 2012).....	20
19	<i>Cadence Design Sys., Inc. v. Avant! Corp.</i> ,	
20	125 F.3d 824 (9th Cir. 1997).....	24
21	<i>California v. Tahoe Regional Planning Comm’n</i> ,	
22	766 F.2d 1319 (9th Cir. 1985).....	25
23	<i>Campbell v. Acuff-Rose Music, Inc.</i> ,	
24	510 U.S. 569 (1994) .....	19
25	<i>Capitol Records, Inc. v. MP3Tunes, LLC</i> ,	
26	821 F. Supp. 2d 627 (S.D.N.Y. 2011).....	17
27	<i>Cartoon Network LP v. CSC Holdings, Inc.</i> ,	
28	536 F.3d 121 (2d Cir. 2008).....	11
	<i>Columbia Pictures Indus., Inc. v. Fung</i> ,	
	2009 WL 6355911 (C.D. Cal. Dec. 21, 2009) .....	16
	<i>Dielsi v. Falk</i> ,	
	916 F. Supp. 985 (C.D. Cal. 1996) .....	11
	<i>eBay, Inc. v. Bidder’s Edge, Inc.</i> ,	
	100 F. Supp. 2d 1058 (N.D. Cal. 2000) .....	20

1	<i>eBay Inc. v. MercExchange, L.L.C.</i> ,	
2	547 U.S. 388 (2006) .....	19
3	<i>Eldred v. Ashcroft</i> ,	
4	537 U.S. 186 (2005) .....	25
5	<i>Elvis Presley Enter., Inc. v. Passport Video</i> ,	
6	349 F.3d 622 (9th Cir. 2003).....	19
7	<i>Fonovisa, Inc. v. Cherry Auction, Inc.</i> ,	
8	76 F.3d 259 (9th Cir. 1996) .....	17
9	<i>Frank Music Corp. v. Metro-Goldwyn-Mayer, Inc.</i> ,	
10	772 F.2d 505 (9th Cir. 1985).....	10
11	<i>Harper &amp; Row Publishers, Inc. v. Nation Enters.</i> ,	
12	471 U.S. 539 (1985) .....	19
13	<i>John Goyak &amp; Assocs. v. Terhune</i> ,	
14	299 Fed. App'x 739 (9th Cir. 2008) .....	8
15	<i>LGS Architects, Inc. v. Concordia Homes of Nev.</i> ,	
16	434 F.3d 1150 (9th Cir. 2006) .....	10
17	<i>Los Angeles News Serv. v. CBS Broad., Inc.</i> ,	
18	305 F.3d 924 (9th Cir. 2002).....	19
19	<i>Los Angeles New Service v. Tullo</i> ,	
20	973 F.2d 791 (9th Cir. 1992) .....	15
21	<i>MDY Indus., LLC v. Blizzard Entm't, Inc.</i> ,	
22	629 F.3d 928 (9th Cir. 2010).....	10
23	<i>MGM Studios, Inc. v. Grokster, Ltd.</i> ,	
24	518 F. Supp. 2d 1197 (C.D. Cal. 2007).....	19, 20
25	<i>MGM Studios, Inc. v. Grokster, Ltd.</i> ,	
26	545 U.S. 913 (2005) .....	passim
27	<i>Monge v. Maya Magazines, Inc.</i> ,	
28	– F.3d –, 2012 WL 3290014 (9th Cir. Aug. 14, 2012) .....	19
	<i>Nintendo of Am., Inc. v. Lewis Galoob Toys, Inc.</i> ,	
	16 F.3d 1032 (9th Cir. 1994).....	25
	<i>Perfect 10, Inc. v. Megaupload, Ltd.</i> ,	
	2011 WL 3203117 (S.D. Cal. July 27, 2011) .....	11, 13, 18
	<i>Playboy Enters. v. Russ Hardenburgh, Inc.</i> ,	
	982 F. Supp. 503 (N.D. Ohio 1997).....	13

1	<i>Princeton Univ. Press v. Michigan Document Servs., Inc.</i> ,	
2	99 F.3d 1381 (6th Cir. 1996).....	13, 15
3	<i>RCA/Ariola Int’l, Inc. v. Thomas &amp; Grayston Co.</i> ,	
4	845 F.2d 773 (8th Cir. 1988) .....	13
5	<i>RCA Records v. All-Fast Sys., Inc.</i> ,	
6	594 F. Supp. 335 (S.D.N.Y. 1984).....	13
7	<i>Religious Technol. Center v. Netcom On-Line Commc’n Servs., Inc.</i> ,	
8	907 F. Supp. 1361 (N.D. Cal. 1995) .....	11
9	<i>Rent-A-Center, Inc. v. Canyon Television &amp; Appliance Rental, Inc.</i> ,	
10	944 F.2d 597 (9th Cir. 1991).....	20
11	<i>Salinger v. Colting</i> ,	
12	607 F.3d 68 (2d Cir. 2010).....	19
13	<i>Satellite Broad. Commc’ns Ass’n v. FCC</i> ,	
14	275 F.3d 337 (4th Cir. 2001).....	25
15	<i>Sony Corp. of America v. Universal City Studios, Inc.</i> ,	
16	464 U.S. 417 (1984) .....	17
17	<i>Stewart v. Wachowski</i> ,	
18	574 F. Supp. 2d 1074 (C.D. Cal. 2005).....	11
19	<i>Stuhlbarg Int’l Sales Co. v. John D. Brush &amp; Co.</i> ,	
20	240 F.3d 832 (9th Cir. 2001).....	20
21	<i>Sun Microsystems, Inc. v. Microsoft Corp.</i> ,	
22	188 F.3d 1115 (9th Cir. 1999).....	10
23	<i>Triad Sys. Corp. v. Southeast Express Co.</i> ,	
24	64 F.3d 1330 (9th Cir. 1995).....	24
25	<i>Warner Bros. Entm’t v. WTV Systems, Inc.</i> ,	
26	824 F. Supp. 2d 1003 (C.D. Cal. 2011).....	passim
27	<i>Winter v. Natural Res. Defense Council</i> ,	
28	555 U.S. 7 (2008) .....	8
	<i>WPIX, Inc. v. ivi, Inc.</i> ,	
	765 F. Supp. 2d 594 (S.D.N.Y. 2011).....	20, 23
	<i>Zomba Enters. v. Panorama Records, Inc.</i> ,	
	491 F.3d 574 (6th Cir. 2007).....	15

1	<b>Statutes</b>	
2	17 U.S.C. § 106.....	9, 13
3	17 U.S.C. § 107.....	19
4	17 U.S.C. § 119.....	10
5	47 U.S.C. § 325(b)(1)(A) and (b)(3)(C).....	3
6	Fed. R. Civ. P. 65(c) .....	25

7	<b>Treatise</b>	
8	3 M. Nimmer & D. Nimmer, <i>Nimmer on Copyright</i> § 10.15[A] (2012) .....	10

9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

DEADLINE.COM

1 **I. INTRODUCTION**

2 In March 2012, Dish launched an unauthorized video on demand service for  
3 primetime broadcast television called PrimeTime Anytime in violation of the  
4 express terms and conditions of its contracts with Fox and federal copyright law.  
5 Dish’s service makes an unauthorized copy of the entire primetime schedule for all  
6 four major broadcast networks every night, and then makes this nearly 100-hour  
7 library of programs available to subscribers for up to eight days. Dish touts its new  
8 service as providing “unprecedented” “on demand access” to primetime television.

9 In May 2012, Dish began making these bootleg copies of the networks’  
10 primetime programs (including Fox’s copyrighted programs) available to Dish  
11 subscribers with “AutoHop,” a feature that strips out all of the networks’  
12 commercials from the PrimeTime Anytime copies of broadcast programs using a  
13 process that makes even further unauthorized copies of the programs. In marketing  
14 its new video on demand service, Dish boasts to consumers that it has “created  
15 commercial-free TV.” Dish’s conduct infringes Fox’s exclusive copyrights and  
16 breaches the parties’ contracts that *expressly prohibit* Dish from copying Fox’s  
17 programs or providing a commercial-free video on demand service.

18 Last month, [REDACTED], Dish forced on its subscribers a  
19 software update that made cosmetic changes to the PrimeTime Anytime settings in  
20 an attempt to camouflage the copyright infringement that Dish commits every  
21 night with its service. While the software update effectively concedes that  
22 PrimeTime Anytime as originally distributed and operated by Dish was infringing,  
23 it does not solve the problem: PrimeTime Anytime still breaches the parties’  
24 contracts and infringes Fox’s copyrights on a massive scale, night after night.

25 The need for a preliminary injunction could not be greater. PrimeTime  
26 Anytime and AutoHop cut the legs out from under the advertiser-supported  
27 broadcast television business model, devalue Fox’s commercial air time in the eyes  
28 of advertisers, usurp Fox’s control over the timing and manner in which Fox has

1 chosen to exploit its copyrighted works, and threaten to disrupt Fox’s ability to  
2 license its programs and recoup its massive investment. Dish’s chairman admitted,  
3 in an interview after this lawsuit began, that PrimeTime Anytime and AutoHop are  
4 “not good” for broadcasters and put the entire television “ecosystem” in jeopardy.<sup>1</sup>  
5 A major credit rating agency agrees. In May 2012, Moody’s issued an independent  
6 report warning that if AutoHop were deployed and widely used, it “will have broad  
7 negative credit implications across the entire television industry” and “could  
8 destabilize the entire television eco-system.” Haslingden Decl. ¶¶ 23-24, Ex. D.

9 The Court should preliminarily enjoin Dish from offering or operating both  
10 the original and current iterations of PrimeTime Anytime and AutoHop.

## 11 II. FACTUAL BACKGROUND

### 12 A. Fox Distributes Its Programs To Consumers In Numerous Ways.

13 Fox owns the copyrights in numerous broadcast television programs,  
14 including popular and critically-acclaimed primetime series such as *Glee*, *The*  
15 *Simpsons*, *Family Guy*, *Touch*, and *Bones* (the “Fox Programs”). Brennan Decl.  
16 ¶¶ 2-3, Ex. A. The Fox Programs cost hundreds of millions of dollars to produce  
17 and acquire. Haslingden Decl. ¶ 6.

18 The main distribution channel for the Fox Programs is the Fox Network, a  
19 national broadcast television network. The Fox Network has more than 200  
20 television station affiliates (some of which are owned by Fox) which broadcast  
21 television programming over the airwaves, free of charge, to virtually anyone with  
22 a working antenna and a television. Approximately 54 million Americans receive  
23 broadcast television over the air. Under this business model, Fox’s programming  
24 costs are borne largely by advertisers who pay for the right to show advertisements  
25 during commercial breaks in the programs. Brennan Decl. ¶¶ 4-10.

26 Fox also makes its broadcast programming, including the commercials,  
27 available to consumers who receive their television through paid subscriptions to

28 <sup>1</sup> Singer Decl., Ex. I, “Dish Chief: TV Needs to Change,” *Wall St. Journal*, 6/8/12.

1 cable, telco and satellite television distributors like Dish. Brennan Decl. ¶ 12. Fox  
2 grants these distributors the right to retransmit Fox’s over-the-air broadcast signal  
3 to their subscribers. In exchange for this “retransmission consent,” Fox is entitled  
4 by federal law to charge cable and satellite distributors a retransmission consent  
5 fee or seek other consideration. *Id.*; 47 U.S.C. § 325(b)(1)(A) and (b)(3)(C).  
6 These fees, however, cover only a small fraction of Fox’s programming costs as  
7 compared to commercial advertising revenues. Haslingden Decl. ¶¶ 7-10.

8         After Fox Programs first air on primetime television, Fox makes them  
9 available to consumers through a variety of formats and media, with and without  
10 commercials, at different price points. For example, eight days after a Fox  
11 Program first airs on television, users with a computer and high-speed Internet  
12 access can watch it “on demand” (*i.e.*, whenever they want) for free on websites  
13 licensed by Fox, such as fox.com and hulu.com. Brennan Decl. ¶ 14(c). Fox  
14 Programs distributed for free online contain fewer commercials than the television  
15 broadcast, but the ability to fast-forward through commercials is disabled. *Id.*

16         Paying subscribers of certain cable and satellite providers have the added  
17 benefit of next-day video on demand (“VOD”) access to the Fox Programs on  
18 television or via the Internet. These versions also have commercials that cannot be  
19 skipped. *Id.* ¶ 14(a-b). Consumers who pay an additional \$7.99 per month can  
20 subscribe to Hulu Plus, a premium online streaming service that provides next-day  
21 on-demand access to the Fox Programs, plus the ability to watch the programs on  
22 mobile devices such as iPhones, iPads and other smart phones and tablets. *Id.*  
23 ¶ 14(b & d). These versions also contain commercials that cannot be skipped. *Id.*

24         Finally, consumers can pay for and download ultra-premium versions of the  
25 Fox Programs in a commercial-free format from online vendors such as the Apple  
26 iTunes Store and Amazon.com. These versions are typically available the day  
27 after a Fox Program is initially broadcast, and they can be viewed, commercial-  
28 free, on mobile devices. Brennan Decl. ¶ 14(e).

1 **B. Fox's Limited And Conditional Grant Of Rights To Dish.**

2 Fox and Dish are parties to a July 1, 2002 license agreement (the  
3 "Retransmission Consent" or "RTC" Agreement). Biard Decl. ¶ 14. Pursuant to  
4 the RTC Agreement, Fox, on behalf of its owned and operated stations, has granted  
5 Dish the limited right to retransmit the Fox Network broadcast signal to Dish's  
6 satellite television subscribers. *Id.* Ex. A, p. 18 (RTC Agreement § 2). The RTC  
7 Agreement also imposes several restrictions and conditions on Dish's  
8 retransmission rights. Significantly, it prohibits Dish from recording, copying or  
9 duplicating any portion of the Fox Network transmission (including the Fox  
10 Programs) without Fox's written permission. *Id.* Ex. A, p. 22 (RTC Agreement  
11 § 9(a)). It also requires that Dish retransmit Fox's broadcast "[REDACTED]  
12 [REDACTED]" *Id.*, p. 19 (RTC Agreement § 3(d)).

13 Between 2002 and 2010, the RTC Agreement strictly prohibited Dish from  
14 offering any Fox Programs to subscribers on a "[REDACTED]  
15 [REDACTED]" *Id.* (RTC Agreement § 3(d)). In a 2010 amendment, however, Fox  
16 agreed to a narrow exception for its authorized VOD service as long as Dish  
17 agreed to "[REDACTED]  
18 [REDACTED]" *Id.* Ex. B, p. 60 (emphases added).

20 **C. Dish's PrimeTime Anytime Video On Demand Service.**

21 Instead of exercising its rights under the narrow VOD Clause that restricts  
22 commercial-skipping, Dish created and launched its own unlicensed, commercial-  
23 free VOD service in the form of PrimeTime Anytime. Brennan Decl. ¶¶ 17-18. In  
24 March 2012, Dish began leasing to its subscribers a set-top box called the Hopper  
25 Whole-Home HD DVR System (the "Hopper"), described by Dish as "the most  
26 advanced set-top box in the industry." Singer Decl. ¶ 5, Ex. A at 14.<sup>2</sup> The Hopper

27 <sup>2</sup> Some 275,000 Dish customers currently have the Hopper with PrimeTime  
28 Anytime, and Dish projects the number will increase to 1.3 million customers by  
the end of 2013. Singer Decl., [REDACTED], Ex. M (8/9/12 article).

1 is no ordinary digital video recorder (“DVR”). The Hopper contains a “massive”  
2 2-terabyte hard drive that, until Dish updated its software a few weeks ago, was  
3 “partitioned” into two recording systems. *Id.* ¶ 6, Ex. A at 15. Part of the hard  
4 drive functioned like a traditional DVR, allowing users to select and record  
5 television programs for playback at a later time. *Id.* ¶ 6. Dish has described this  
6 portion of the Hopper as the “personal DVR.” *Id.* ¶ 6, Ex. A at 16-18.

7 The other part of the Hopper was “reserved” for PrimeTime Anytime, Dish’s  
8 “New Must-Have Feature” that distinguishes the Hopper from a traditional DVR.  
9 *Id.* ¶ 7, Ex. E. Dish has characterized PrimeTime Anytime as a “video on demand  
10 service” that gives subscribers “On Demand access for 8 days to all HD  
11 programming that airs during primetime hours on ABC, CBS, FOX, and NBC  
12 without needing to schedule individual recordings.” *Id.* ¶¶ 12 Ex. A at 22, Ex. F at  
13 212. Once the user turns on PrimeTime Anytime, all of the primetime programs  
14 from each network – including the Fox Programs – are “delivered to” and copied  
15 every night on the Hopper hard drive, and until a few weeks ago, did not even take  
16 up any of the “personal DVR” hard drive space *Id.* ¶ 7, Ex. E, Ex. A at 18.

17 To implement PrimeTime Anytime, Dish changed the architecture of its  
18 satellite system by assigning the local broadcasts of the four major networks to the  
19 same satellite transponder, and it engineered the Hopper software to allow the four  
20 major broadcast networks to be captured by a single tuner and recorded  
21 simultaneously. [REDACTED]  
22 [REDACTED]

23 As Dish stated under oath when it registered the PrimeTime Anytime service  
24 mark with the U.S. Trademark Office, PrimeTime Anytime is “a video on demand  
25 service.” Singer Decl. ¶ 28, Ex. F at 212. All significant aspects of this “service”  
26 are controlled by Dish, not the user. Dish decides which channels are available for  
27 PrimeTime Anytime (currently FOX, ABC, CBS, and NBC); which programs to  
28 record each evening; where the programs are saved (*i.e.*, the portion of the Hopper

1 “reserved” for PrimeTime Anytime); what time to begin recording each network;  
2 what time to stop recording each network; the minimum and maximum length of  
3 time recordings are stored (currently two to eight days); and to record each  
4 program in high definition (which uses more hard drive space) instead of standard  
5 definition. *Id.* ¶¶ 12-26, Exs. A and [REDACTED].

6 Unlike when a subscriber uses the Hopper’s “personal DVR” function, users  
7 of the PrimeTime Anytime service do not select, schedule, or record the particular  
8 programs they want to watch. In fact, once PrimeTime Anytime is enabled, users  
9 do not have the ability to *stop* the service from recording all primetime television  
10 broadcasts from that network or delete any PrimeTime Anytime program until after  
11 the recording is finished. *Id.* Exs. A and [REDACTED]. In short,  
12 PrimeTime Anytime takes the decision-making away from the user and, as Dish  
13 touts in an online promotional video, the Hopper with PrimeTime Anytime “does  
14 the work for you” providing on demand access to all primetime television  
15 programs “without needing to schedule individual recordings.” *Id.* ¶ 13.

16 On July 20, 2012, Dish distributed a software update (denominated S217) to  
17 all Hopper subscribers. The update altered the PrimeTime Anytime settings so that  
18 the user can now de-select individual broadcast networks from inclusion in  
19 PrimeTime Anytime.<sup>3</sup> The default settings, however, still record all four networks  
20 every night of the week. [REDACTED]

21 [REDACTED]  
22 [REDACTED]  
23 [REDACTED]  
24 [REDACTED]  
25 [REDACTED]

26 <sup>3</sup> [REDACTED]  
27 [REDACTED]  
28 [REDACTED]

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

[REDACTED]  
[REDACTED]  
The recent software update – [REDACTED]  
[REDACTED] – proves Dish can modify the operation of PrimeTime Anytime at will.

**D. In Violation Of Dish’s License, PrimeTime Anytime Strips Commercials From Fox’s Programs And Delivers The Programs To Mobile Devices.**

On May 10, 2012, Dish “activated” the AutoHop feature of its PrimeTime Anytime service. In its press release, Dish explained that “AutoHop is an extension of the Hopper’s PrimeTime Anytime capability” and allows Dish subscribers to “watch many of those shows commercial-free.” Dish advertises its PrimeTime Anytime service as “commercial-free” and promotes itself as having “created commercial free TV.” Singer Decl. ¶¶ 35-37, Exs. G-H. [REDACTED]

[REDACTED]  
[REDACTED] Dish decides which programs to offer in a commercial-free format and when to make them available to subscribers. *Id.*; [REDACTED]

Dish’s Senior Vice President, David Shull, has complained publicly that, prior to launching PrimeTime Anytime, Dish was “frustrated” at having to compete with “digital platforms such as Hulu and iTunes” that are licensed by Fox to distribute broadcast television programs online, in commercial-free formats (iTunes) and to mobile devices (Hulu, iTunes). *Id.* ¶ 34, Ex. G. When combined with AutoHop and Dish’s Sling Adapter (a device that transmits the Hopper’s contents over the Internet), Dish’s unlicensed, infringing PrimeTime Anytime service achieves Dish’s goal of adding “value” to its satellite television service by reaping the benefits of a broad license for which it never paid. Dish’s Vice President, Mr. Khemka, revealingly boasted in a recent interview: “I don’t think you’d ever need Hulu Plus or Hulu after this.” *Id.* ¶ 33.

### III. ARGUMENT

1  
2 Fox may obtain a preliminary injunction by establishing that it “is likely to  
3 succeed on the merits, that [it] is likely to suffer irreparable harm in the absence of  
4 preliminary relief, that the balance of equities tips in [its] favor, and that an  
5 injunction is in the public interest.” *Winter v. Natural Res. Def. Council, Inc.* 555  
6 U.S. 7, 20 (2008). Alternatively, an injunction also should issue if Fox can show  
7 “serious questions going to the merits” and a “balance of hardships that tips  
8 sharply towards the plaintiff,” so long as Fox “also shows that there is a likelihood  
9 of irreparable injury and that the injunction is in the public interest.” *See Alliance*  
10 *for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134-35 (9th Cir. 2011).

11 These standards apply to injunction motions based on copyright or breach of  
12 contract claims. *See, e.g., Warner Bros. Entm’t v. WTV Systems, Inc.*, 824 F. Supp.  
13 2d 1003, 1008 (C.D. Cal. 2011) (copyright); *John Goyak & Assocs. v. Terhune*,  
14 299 Fed. App’x 739, 740 (9th Cir. 2008) (contract).

#### 15 A. Fox Is Likely To Succeed On Its Breach Of Contract Claim.

16 PrimeTime Anytime and AutoHop violate the RTC Agreement in multiple  
17 ways, and none of these breaches is affected, let alone cured, by Dish’s recent  
18 software updates. *First*, by copying Fox’s entire primetime schedule every night,  
19 both PrimeTime Anytime and AutoHop violate Section 9(a) of the RTC  
20 Agreement stating that Dish “[redacted]” any portion  
21 of the Fox broadcast television signal. Biard Decl. Ex. A, p. 22.

22 *Second*, by allowing subscribers to use PrimeTime Anytime with AutoHop  
23 to watch the Fox Programs “on demand” without any commercials, Dish violates a  
24 key restriction of the VOD Clause. The VOD Clause requires that Dish “[redacted]  
25 [redacted]” and confirms that such fast-  
26 forward disabling “[redacted]  
27 [redacted]” *Id.* Ex. B, p. 60 (VOD Clause § 4) (emphases added).<sup>4</sup> Despite

28 <sup>4</sup> Even if PrimeTime Anytime somehow were not subject to the restrictions of the

1 these express conditions, Dish has made its breaches the centerpiece of its  
2 marketing campaign. It boasts that PrimeTime Anytime “creates an on-demand  
3 library of approximately 100 hours of primetime TV shows.” Singer Decl. Ex. E.  
4 Dish further brags PrimeTime Anytime with AutoHop provides the subscriber with  
5 “commercial-free TV” and uses large billboards urging users to “Watch Shows Not  
6 Commercials.” *Id.* Exs. A at 36-38 and J.

7 *Third*, when the parties amended the RTC Agreement in 2010 to add the  
8 VOD Clause, they included a provision expressly prohibiting Dish from taking or  
9 attempting to take “[REDACTED]  
10 [REDACTED]” to Fox under the VOD Clause. Biard Decl. Ex. B, p. 34  
11 (2010 Amendment § 5). By providing its subscribers with a “[REDACTED]  
12 [REDACTED]” Dish is breaching this provision.

13 **B. Fox Is Likely To Succeed On Its Direct Infringement Claim.**

14 To establish copyright infringement, a plaintiff must show (1) ownership of  
15 a valid copyright and (2) violation by the defendant “of at least one of the  
16 exclusive rights granted to copyright owners” under 17 U.S.C. § 106. *A&M*  
17 *Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1013 (9th Cir. 2001); *WTV Systems*,  
18 824 F. Supp. 2d at 1008. Fox meets both of these requirements. *First*, Fox owns  
19 valid copyrights in the programs at issue. Brennan Decl. ¶¶ 2-3, Ex. A  
20 (registration certificates). *Second*, Dish’s conduct violates Fox’s exclusive rights.

21 **1. PrimeTime Anytime And Autohop Exceed The Scope Of Dish’s**  
22 **Retransmission License And Constitute Copyright Infringement.**

23 Where a licensee exceeds the scope of its license in a manner that implicates  
24 one of the licensor’s rights under copyright law – here, the reproduction and  
25 distribution rights in the Fox Programs – the licensee is liable for copyright

26  
27 VOD Clause, it still would breach Section 3(d) of the RTC Agreement which  
28 prohibits Dish from distributing the Fox Programs on any “[REDACTED]  
[REDACTED]” Biard Decl. Ex. A, p. 19. PrimeTime Anytime  
is, at the very least, a “[REDACTED]

1 infringement. *Sun Microsystems, Inc. v. Microsoft Corp.*, 188 F.3d 1115, 1121  
2 (9th Cir. 1999) (“[i]f ... a license is limited in scope and the licensee acts outside  
3 the scope, the licensor can bring an action for copyright infringement”); 3 M.  
4 Nimmer & D. Nimmer, *Nimmer on Copyright* § 10.15[A] (2012) (same); *MDY*  
5 *Indus., LLC v. Blizzard Entm’t, Inc.*, 629 F.3d 928, 939- 41 (9th Cir. 2010) (breach  
6 of contractual conditions that limit scope of license is copyright infringement).

7 As described above, the RTC Agreement and 2010 amendment expressly  
8 limit the scope of Dish’s license to retransmit Fox’s broadcast signal.<sup>5</sup> The  
9 agreement prohibits Dish from copying the Fox Programs; and while it permits  
10 Dish to offer VOD to its subscribers, the VOD rights are expressly conditioned on  
11 Dish disabling any fast-forwarding of commercials during VOD playback. By  
12 ignoring these conditions and restrictions, Dish has committed both a breach of  
13 contract and copyright infringement. *See, e.g., LGS Architects, Inc. v. Concordia*  
14 *Homes of Nev.*, 434 F.3d 1150, 1154-57 (9th Cir. 2006) (preliminary injunction  
15 granted where licensee reproduced and displayed architectural plans for a project  
16 outside scope of license); *Frank Music Corp. v. Metro-Goldwyn-Mayer, Inc.*, 772  
17 F.2d 505, 511 (9th Cir. 1985) (hotel infringed copyright by publicly performing  
18 music with representations of movie scenes, where its license expressly prohibited  
19 the use of accompanying visual representations with the licensed music).

20 **2. PrimeTime Anytime Infringes Fox’s Copyrights.**

21 **a. Dish infringes the Section 106(1) reproduction right.**

22 Fox has never authorized Dish to make copies of the Fox Programs. To the  
23 contrary, the RTC Agreement forbids it. *See* Section II.C, *supra*. Accordingly,  
24 Dish’s operation of its PrimeTime Anytime service to make unauthorized copies of  
25 all Fox primetime broadcast programs, on an eight-day rolling basis, manifestly

26 <sup>5</sup> Once a satellite television provider obtains retransmission consent to carry a  
27 broadcaster’s signal under federal communications law, the Copyright Act  
28 provides a narrow statutory license to publicly perform the underlying copyrighted  
programs contained in the retransmission. 17 U.S.C. § 119. This statutory public  
performance license is *not* a license to *reproduce* or *distribute* the works.

1 violates the reproduction right.

2 Because there is no state of mind or harm requirement, copyright  
3 infringement is widely recognized as a “strict liability tort.” *E.g., Stewart v.*  
4 *Wachowski*, 574 F. Supp. 2d 1074, 1092 n.78 (C.D. Cal. 2005); *accord Dielsi v.*  
5 *Falk*, 916 F. Supp. 985, 992 (C.D. Cal. 1996) (“a general claim for copyright  
6 infringement is fundamentally one founded on strict liability”).<sup>6</sup>

7 Dish engineered its PrimeTime Anytime service to accomplish the  
8 wholesale, unauthorized recording of primetime programs en masse. [REDACTED]

9 [REDACTED]  
10 [REDACTED] By its own admission, Dish  
11 participates in and controls all relevant aspects of the copying process. Singer  
12 Decl., Ex. A at 1-4, [REDACTED] The  
13 customer does not select the particular programs PrimeTime Anytime records, nor  
14 when those programs can be accessed. Dish chooses which networks are  
15 recordable by PrimeTime Anytime; Dish picks the recording start times and stop  
16 times for each network; it controls when the copied programs are available in a  
17 commercial-free format; and it controls the minimum and maximum lengths of  
18 time they are available for viewing (currently two and eight days). *Id.* Once  
19 PrimeTime Anytime starts recording a program, users cannot stop the copying

20 <sup>6</sup> Although some courts have held that a defendant nonetheless must engage in  
21 some “volitional” conduct to be liable for direct infringement, *e.g., Cartoon*  
22 *Network LP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008), those decisions do  
23 not help Dish for three reasons. **First**, two courts in this District recently declined  
24 to adopt this additional requirement because the Ninth Circuit has not adopted it  
25 and because “copyright infringement is a strict liability offense.” *WTV Systems*,  
26 824 F. Supp. 2d at 1011; *Arista Records LLC v. Myxer Inc.*, 2011 U.S. Dist. LEXIS  
27 109668 (C.D. Cal. April 1, 2011) (Feess, J.) (same). **Second**, courts in this Circuit  
28 that have recognized a volition requirement have deemed it clearly satisfied where  
the defendant participates in the copying as more than a mere “passive conduit” or  
“storage” service. *Perfect 10, Inc. v. Megaupload, Ltd.*, 2011 WL 3203117, at \* 4  
(S.D. Cal. July 27, 2011); *see also Religious Technol. Center v. Netcom On-Line*  
*Comm’n Servs., Inc.*, 907 F. Supp. 1361, 1369 & n.12 (N.D. Cal. 1995) (equating  
“volition” with “causation” and declining to find direct infringement where  
operator of an Internet service “merely acts as a passive conduit for information,”  
akin to the “phone company”). **Third**, Dish’s ongoing and pervasive control over  
the PrimeTime Anytime service easily satisfies any volition requirement.

1 process – even if they have no desire to watch a particular program. Singer Decl.,  
2 Exs. B at 109-110 and [REDACTED]

3 [REDACTED]  
4 [REDACTED]  
5 [REDACTED] Although Dish has tried to obscure its role in the copying  
6 by updating its software to have the user check off a few more settings at the  
7 outset, the updates do not alter the infringement analysis and only underscore  
8 Dish’s pervasive control over all aspects of PrimeTime Anytime. [REDACTED]

9 [REDACTED]  
10 [REDACTED]  
11 Even if copyright infringement were not strict liability and Fox were  
12 required to show that Dish engaged in some volitional conduct to be liable for  
13 infringement of the reproduction right, Dish is so actively and extensively involved  
14 in copying copyrighted works that any such requirement is easily met. [REDACTED]

15 [REDACTED]  
16 [REDACTED]  
17 [REDACTED] Indeed, the only act of supposed volition by the user was the mere one-  
18 time act of turning on the service. [REDACTED]

19 [REDACTED]  
20 [REDACTED]  
21 [REDACTED] Once  
22 enabled, the user need never touch the remote control’s record button again:  
23 PrimeTime Anytime copies the entire primetime schedule every night – regardless  
24 of whether the user intends to watch all or any of the programs – and stores it on  
25 the portion of the Hopper hard drive allocated to PrimeTime Anytime for a period  
26 of time delimited by Dish. From the moment the switch is flipped, Dish – as its  
27 website assures visitors – “do[es] the work for you.” *Id.* ¶ 13.

28 Dish’s extensive and ongoing control over the copying process leaves no

1 doubt that it is liable for direct infringement. *See Princeton Univ. Press v.*  
2 *Michigan Document Servs., Inc.*, 99 F.3d 1381, 1389 (6th Cir. 1996) (business that  
3 copied and assembled materials into coursepacks and sold them to students was  
4 liable for direct infringement, even though business did so at the request of  
5 professors); *see also Perfect 10, Inc. v. Megaupload Ltd.*, 2011 WL 3203117, at \*4  
6 (S.D. Cal. July 27, 2011) (holding that direct infringement can be shown where a  
7 website operator encourages infringement by its users, is aware of widespread  
8 infringement taking place through its service, and acts to “streamline users’ access  
9 to different types of media”).<sup>7</sup>

10 **b. Dish also infringes the Section 106(3) distribution right.**

11 Because Dish is actively and directly involved in the unauthorized  
12 distribution of digital copies of Fox’s works, it is also liable for direct infringement  
13 of the distribution right under 17 U.S.C. 106(3). *See Arista Records LLC v.*  
14 *Usenet.com, Inc.*, 633 F. Supp. 2d 124, 148 (S.D.N.Y. 2009) (internet service  
15 operator was liable for direct infringement of distribution right where it “actively  
16 participated” in copying songs for use by its subscribers); *Atlantic Rec’g Corp. v.*  
17 *XM Satellite Radio, Inc.*, 2007 WL 136186, at \*5-\*7 (S.D.N.Y. Jan. 19, 2007).<sup>8</sup>

18 In *XM Satellite*, the court considered a satellite radio broadcaster’s “XM +  
19 MP3” service, which automatically generated a copy of every broadcast song in the  
20 memory of the user’s radio receiver, which the user could save and use  
21 interchangeably with other MP3 files. *Id.* at \*2-\*3. The court held XM was not  
22 immune from liability as the seller of a digital audio recording device, because XM

23 <sup>7</sup> *See generally RCA/Ariola Int’l, Inc. v. Thomas & Grayston Co.*, 845 F.2d 773,  
24 781 (8th Cir. 1988) (retailers who assisted customers in making copies on an audio  
25 tape recording machine were liable for direct infringement); *RCA Records v. All-*  
26 *Fast Sys., Inc.*, 594 F. Supp. 335, 338 (S.D.N.Y. 1984) (retail copy service that  
operated audio cassette copying machine was liable for direct infringement, even  
though copies were made at the request of customers).

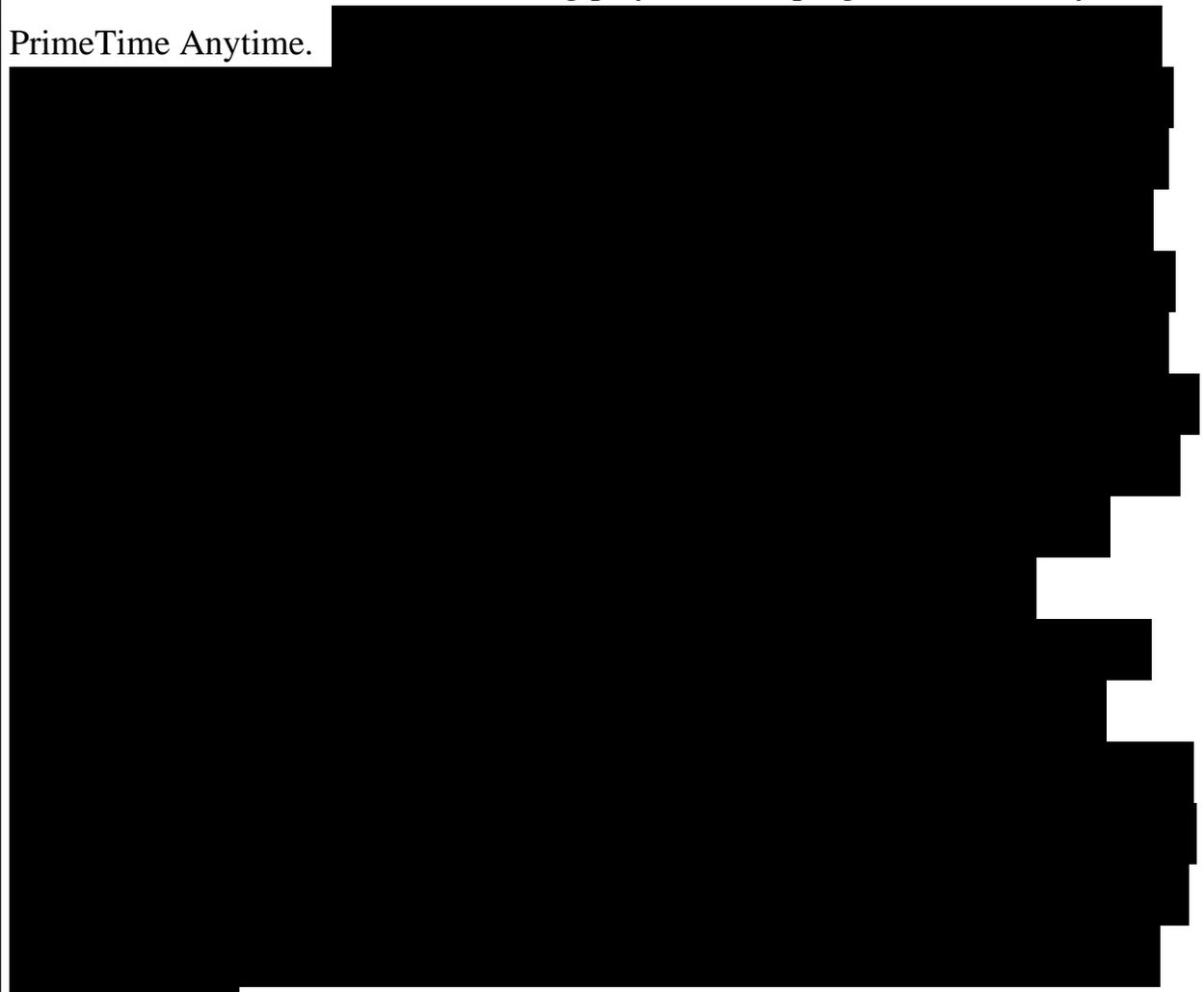
27 <sup>8</sup> *See also Playboy Enters. v. Russ Hardenburgh, Inc.*, 982 F. Supp. 503, 513 (N.D.  
28 Ohio 1997) (Internet bulletin board service was liable as direct infringer where it  
encouraged users to upload copyrighted images and caused copies to be moved to  
an area where they could be downloaded by others).

1 controlled the copying and playback functions and thereby acted as a “music  
2 distributor” to its subscribers.” “By broadcasting and storing this copyrighted  
3 music on [users’ devices] for later recording by the consumer, XM is both a  
4 broadcaster and a distributor, but is only paying to be a broadcaster.” *Id.* at \*6.<sup>9</sup>

5 **3. The AutoHop Service Unlawfully Copies Fox’s Programs.**

6 In May 2012, Dish rolled out its AutoHop feature, which eliminates with the  
7 click of a button all commercials during playback of a program recorded by

8 PrimeTime Anytime.



24 These unauthorized copies – made directly by Dish every night as

25 \_\_\_\_\_  
26 <sup>9</sup> [Redacted]

27 *see A&M*  
28 *Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1011-14 (9th Cir. 2001) (Napster users who uploaded files to a central search index “for others to copy” violated the copyright owners’ distribution rights).

1 part of its commercial service – are plainly infringing.<sup>10</sup>

2 \* \* \* \* \*

3 If the Court finds that Dish is directly infringing Fox’s copyrights with its  
4 PrimeTime Anytime and AutoHop services, Dish cannot assert a fair use defense  
5 that might be asserted by one of its subscribers. “[C]ourts have ... properly  
6 rejected attempts by for-profit users to stand in the shoes of their customers making  
7 non-profit or noncommercial uses.” *Michigan Document Servs.*, 99 F.3d at 1389;  
8 *accord Los Angeles News Service v. Tullo*, 973 F.2d 791, 797-98 (9th Cir. 1992)  
9 (same); *see also Zomba Enters. v. Panorama Records, Inc.*, 491 F.3d 574, 582-83  
10 (6th Cir. 2007) (for-profit, commercial maker of karaoke CDs could not stand in  
11 the shoes of its customers or benefit from fair use arguments they might have).

12 **C. Alternatively, Fox Is Likely To Prove Secondary Infringement By Dish.**

13 Even if the Court were to accept Dish’s attempt to shift responsibility to its  
14 customers – by claiming that the subscribers, and not Dish, make the PrimeTime  
15 Anytime copies – Dish nevertheless would be secondarily liable for its subscribers’  
16 unauthorized copying of the Fox Programs because (1) Dish actively encourages  
17 and induces massive infringement, (2) Dish derives a direct financial benefit from  
18 offering the PrimeTime Anytime service which it controls, and (3) Dish knows  
19 about and materially contributes to its subscribers’ unauthorized copying.<sup>11</sup>

20 **1. Dish Is Liable For Inducing Copyright Infringement.**

21 Dish is liable for inducement because it has actively encouraged and assisted  
22 its subscribers to infringe Fox’s copyrights by using PrimeTime Anytime to copy  
23

24 <sup>10</sup>

A large black rectangular redaction covers the text of footnote 10, spanning from line 24 to line 27.

25  
26  
27  
28 <sup>11</sup> Of course, Dish cannot blame its customers for Dish’s own contract breaches or  
its admitted, unauthorized copying of Fox’s programs during the AutoHop process.

1 the entire nightly schedule of primetime broadcast television. In *Grokster*, the  
2 Supreme Court held that inducement of copyright infringement constitutes a  
3 distinct cause of action. It is established where the defendant (1) engaged in  
4 purposeful conduct that encouraged copyright infringement, with (2) the intent to  
5 encourage such infringement. See *MGM Studios, Inc. v. Grokster, Ltd.*, 545 U.S.  
6 913, 936-37 (2005) (“one who distributes a device with the object of promoting its  
7 use to infringe copyright, as shown by clear expression or other affirmative steps  
8 taken to foster infringement, is liable for the resulting act of infringement by third  
9 parties”); *Arista Records LLC v. Lime Group LLC*, 784 F. Supp. 2d 398, 422  
10 (S.D.N.Y. 2011) (same); *Columbia Pictures Indus., Inc. v. Fung*, 2009 WL  
11 6355911, at \*6 (C.D. Cal. Dec. 21, 2009) (inducement shown by “purposeful acts  
12 aimed at assisting and encouraging others to infringe copyrights”).

13 Through its nationwide advertising blitz to promote PrimeTime Anytime and  
14 AutoHop, Dish clearly “intended and encouraged” that its services be used to  
15 infringe. *Grokster*, 545 U.S. at 940 n.13. Dish promotes PrimeTime Anytime and  
16 AutoHop by emphasizing those features’ ability to copy every primetime program  
17 of the four major broadcast networks every single night, and then make those  
18 programs available commercial-free to subscribers on demand. See Section II.D,  
19 *supra*; Singer Decl., Ex. A at 14-15, 36-38. As the Supreme Court explained in  
20 *Grokster*, “advertisement or solicitation that broadcasts a message designed to  
21 stimulate others to commit violations [of copyright]” constitutes “[t]he classic  
22 instance of inducement.” *Id.* at 937.

## 23 **2. Dish Is Liable For Vicarious Infringement.**

24 A defendant is liable for vicarious copyright infringement if it (1) has the  
25 right and ability to control its subscribers’ infringing activity and (2) derives a  
26 direct financial benefit from their activity – regardless of the defendant’s  
27 knowledge or state of mind regarding the infringement. *Grokster*, 545 U.S. at 930;  
28 *Fonovisa*, 76 F.3d at 262. Here, Dish admittedly has launched its PrimeTime

1 Anytime service to obtain a competitive advantage over its competitors – to draw  
2 new customers to its satellite television service by offering an alternative to the  
3 licensed video on demand services available through Fox, Hulu, iTunes and  
4 Amazon.com. Singer Decl. ¶¶ 33-34. Furthermore, Dish’s pervasive control over  
5 the operation of PrimeTime Anytime makes clear that it has the ability to stop all  
6 of the unauthorized copying at issue. *See* Section II.C, *supra*.

7 **3. Dish Is Liable For Contributory Infringement.**

8 A defendant is liable for contributory copyright infringement if it “knows or  
9 has reason to know” of direct infringement of another and “materially contributes  
10 to the infringing conduct.” *Napster*, 239 F.3d at 1019-20; *accord Lime Group*, 784  
11 F. Supp. 2d at 432. Dish plainly has “actual or constructive knowledge” that, once  
12 enabled for a broadcast network, PrimeTime Anytime copies the network’s entire  
13 primetime broadcast television schedule every night – indeed, that is the very  
14 purpose for which Dish advertises the service. Dish plainly makes a substantial  
15 contribution to the copying accomplished by PrimeTime Anytime because – by  
16 providing the Hopper with PrimeTime Anytime and enabling it to copy the entire  
17 primetime lineup of all four major broadcast networks every night – Dish provides  
18 the “site and facility” for infringing activity. *Napster*, 239 F.3d at 1022.<sup>12</sup>

19 **4. Dish’s Conduct Is Not Protected By The Fair Use Doctrine.**

20 To the extent the Court finds that Dish’s subscribers are responsible for  
21 some of the unauthorized copying at issue, Fox expects Dish will argue, in reliance  
22 on the Supreme Court’s 1984 decision in *Sony Corp. of Am. v. Universal City*  
23 *Studios*, 464 U.S. 417 (1984) (“*Sony-Betamax*”), that its subscribers have not  
24 engaged in direct copyright infringement by enabling the PrimeTime Anytime and

25  
26 <sup>12</sup> *See also Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 264 (9th Cir. 1996)  
27 (material contribution shown where operators of a swap meet provided essential  
28 support services); *Capitol Records, Inc. v. MP3Tunes, LLC*, 821 F. Supp. 2d 627,  
648 (S.D.N.Y. 2011) (contributory liability established where defendants’ system  
was “the sole instrumentality of their subscribers’ infringement”); *Usenet*, 633 F.  
Supp. 2d at 155 (same); *Lime Group*, 784 F. Supp. 2d at 434 (same).

1 AutoHop features on the ground that any copying of television programs on a DVR  
2 automatically qualifies as a fair use. Because this argument radically misreads  
3 *Sony-Betamax* and ignores the factual context of that decision, Dish cannot meet its  
4 burden to defeat a preliminary injunction under the fair use doctrine.<sup>13</sup>

5 In *Sony-Betamax*, the Supreme Court held 5-4 that the particular type of  
6 “time-shifting” at issue – user copying of individual television programs to view  
7 later and then erase – was a fair use because such conduct in the early 1980s did  
8 not harm existing or potential markets for the copyrighted works. 464 U.S. at 421.  
9 The Court relied on the fact that many copyright owners – including professional  
10 sports leagues and PBS – did not object to the recording of their programs and that,  
11 because of the cumbersome nature of the technology, very few consumers actually  
12 used VCRs to fast-forward through commercials. *See id.* at 424, 453 n.36.

13 Here, by contrast, recording all Fox Programs every night, and eliminating  
14 all commercials on playback – thus creating a commercial-free VOD service that  
15 competes directly with other services licensed by Fox – is a fundamentally  
16 different use of copyrighted programming than *Sony-Betamax* considered, and  
17 compels a much different fair use analysis. **First**, PrimeTime Anytime facilitates  
18 the copying of a nightly library of programs *regardless* of whether the user desires  
19 to watch a particular program at a later time. For programs the user has no  
20 intention of watching later, there is no time-shifting at all. **Second**, to the extent  
21 Dish subscribers follow Dish’s encouragement that PrimeTime Anytime and  
22 AutoHop be used in tandem, the PrimeTime Anytime copies are *not* made solely  
23 for the purpose of time-shifting. Instead, they are made for the purpose of viewing  
24 the programs later *without commercials* – a qualitatively different purpose that  
25 changes the analysis of the fourth fair use factor, market harm. **Third**, all four of

---

26 <sup>13</sup> To the extent Dish asserts fair use or any other affirmative defense, it bears the  
27 burden of proof on a motion for preliminary injunction, just as it would bear the  
28 burden of proof at trial. *E.g., Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146,  
1158 (9th Cir. 2007).

1 the major broadcast networks – 100% of those affected by PrimeTime Anytime  
2 and AutoHop – clearly object to Dish’s service and have sued Dish.

3 *Finally*, as explained in Section III.D below, PrimeTime Anytime and  
4 AutoHop threaten existing and potential markets for the licensed distribution of  
5 Fox’s copyrighted works, especially if such conduct becomes widespread.  
6 Potential market harm – which the Ninth Circuit and Supreme Court have  
7 recognized as a critical and often determinative factor – compels the conclusion  
8 that using PrimeTime Anytime and AutoHop is not a fair use.<sup>14</sup> *See Monge v.*  
9 *Maya Magazines, Inc.*, – F.3d –, 2012 WL 3290014 (9th Cir. Aug. 14, 2012) (“to  
10 negate fair use one need only show that if the challenged use should become  
11 widespread, it would adversely affect the *potential* market for the copyrighted  
12 work”) (quoting *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539,  
13 568 (1985)); *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 587-89 (1994).

14 **D. Fox Will Suffer Irreparable Harm In The Absence Of An Injunction.**

15 Injunctive relief “has nearly always” been issued upon a finding of  
16 likelihood of success on the merits in a copyright case. *Salinger v. Colting*, 607  
17 F.3d 68, 76 (2d Cir. 2010). That is because the factual circumstances of a violation  
18 of a “right to *exclude*” plainly render monetary remedies inadequate in a wide  
19 range of circumstances. *Id.* at 82 (quoting *eBay Inc. v. MercExchange, L.L.C.*, 547  
20 U.S. 388, 395 (2006)); *accord MGM Studios, Inc. v. Grokster, Ltd.*, 518 F. Supp.  
21 2d 1197, 1214-20 (C.D. Cal. 2007) (*Grokster II*). Accordingly, irreparable harm is

22  
23 <sup>14</sup> The remaining fair use factors are not addressed because they necessarily weigh  
24 against Dish. *First*, the wholesale copying of a complete library of primetime  
25 programs cannot seriously be characterized as a “transformative” use. *See Los*  
26 *Angeles News Serv. v. CBS Broad., Inc.*, 305 F.3d 924, 938 (9th Cir. 2002)  
27 (rebroadcast of copyrighted news footage was not transformative); *Elvis Presley*  
28 *Enter., Inc. v. Passport Video*, 349 F.3d 622, 629 (9th Cir. 2003) (uses that “serve  
the same intrinsic entertainment value” as the copied work are not transformative).  
*Second*, the nature of the copyrighted works at issue – creative comedies and  
dramas that are “within the core of copyright’s protective purposes” – weighs  
decidedly in favor of Fox. *Campbell*, 510 U.S. at 586. *Third*, the amount and  
substantiality of copying clearly favors Fox since PrimeTime Anytime copies  
primetime programs in their entirety. *See generally* 17 U.S.C. § 107.

1 established where an infringing defendant's activities threaten to impair a  
2 copyright owner's control over its copyrighted works, threaten the goodwill and  
3 business reputation of the plaintiff, or threaten to cause loss of business, loss of  
4 business opportunities, or consumer confusion. *See, e.g., Warner Bros. Entm't v.*  
5 *WTV Systems*, 824 F. Supp. 2d at 1012 (irreparable harm shown where defendant's  
6 DVD "rental" business that streamed movies over the Internet without  
7 authorization interfered with plaintiffs' ability to negotiate licenses for legitimate  
8 video on demand services); *WPIX, Inc. v. ivi, Inc.*, 765 F. Supp. 2d 594, 617-20  
9 (S.D.N.Y. 2011) (finding irreparable harm where defendant's unauthorized  
10 retransmission of broadcast television threatened to cause "destruction" of the  
11 "value of licensed programming" through unauthorized dissemination, to disrupt  
12 "advertising models," and to interfere with "plaintiffs' licensing of their own and  
13 other websites to perform their content").<sup>15</sup> Dish's recent conduct threatens to visit  
14 all of these harms upon Fox.

### 15 **1. Dish's Conduct Harms Fox's Right To Exclusive Control.**

16 The Copyright Act grants the copyright owner the exclusive right to control  
17 how, when, where, to whom, and for what price (if any) it will disseminate its  
18 copyrighted works. *See WTV Systems*, 824 F. Supp. 2d at 1012; *Grokster II*, 518 F.  
19 Supp. 2d at 1218. Fox's control over the timing and manner in which its programs  
20 are distributed is an essential and valuable right because it maximizes Fox's ability  
21 to recoup the enormous, risky investment needed to produce high-quality,  
22

---

23 <sup>15</sup> *See also Stuhlberg Int'l Sales Co. v. John D. Brush & Co.*, 240 F.3d 832, 841  
24 (9th Cir. 2001) (threatened loss of prospective customers or goodwill supports a  
25 finding of irreparable harm); *Rent-A-Center, Inc. v. Canyon Television &*  
26 *Appliance Rental, Inc.*, 944 F.2d 597, 603 (9th Cir. 1991) ("intangible injuries,  
27 such as damages to ... goodwill qualify as irreparable harm"); *Berster Tech, LLC*  
28 *v. Christmas*, 2012 WL 33031, at \*10 (E.D. Cal. Jan. 6, 2012) (plaintiff's "inability  
to use its intellectual property completely" rises to the level of irreparable harm,  
which is also established by "intangible injuries" such as "damage to ... goodwill  
... lost business opportunities, the loss of opportunities to negotiate other license  
agreements ... and consumer confusion"); *eBay, Inc. v. Bidder's Edge, Inc.*, 100 F.  
Supp. 2d 1058, 1066 (N.D. Cal. 2000) (lost customer goodwill is irreparable  
because it is "neither easily calculable nor easily compensable").

1 primetime programming. Brennan Decl. ¶¶ 19-25. It allows Fox to generate  
2 multiple revenue streams from different sets of advertisers (initial broadcast, VOD  
3 distribution, and Internet streaming). *Id.* It also allows Fox to provide advertising-  
4 supported versions of the programs to price-sensitive consumers, while giving  
5 other consumers a choice to pay a premium for commercial-free versions, thereby  
6 maximizing Fox’s overall audience. *Id.*; Biard Decl. ¶ 36. Dish’s PrimeTime  
7 Anytime and AutoHop services wrest this control away from Fox.

8 In *WTV*, the defendants operated an unauthorized website and service that  
9 transmitted plaintiffs’ copyrighted motion pictures over the Internet. 824 F. Supp.  
10 2d at 1005-1008. The court observed that “[e]ach of the Plaintiffs has its own  
11 strategy for structuring their respective distribution windows” for when their  
12 motion pictures are released in theaters, on cable or satellite television, on VOD,  
13 online, or on DVD, and held that the defendants, by prematurely making plaintiffs’  
14 works available on the Internet without authorization, “interfere[d] with Plaintiffs’  
15 *ability to control the use and transmission of their Copyrighted Works*, thereby  
16 causing irreparable injury to Plaintiffs.” *Id.* at 1006, 1012 (emphasis added).

17 Here, Fox’s loss of control over its programs is even more troubling because  
18 Dish’s infringing service will likely be adopted by Dish’s competitors if Dish is not  
19 enjoined. Haslingden Decl. ¶¶ 14-16.<sup>16</sup> This proliferation will amplify and  
20 accelerate Fox’s loss of control over its copyrighted works. Brennan Decl. ¶ 30.<sup>17</sup>

21 And, like the plaintiff film studios in *WTV Systems*, Fox’s loss of control  
22 over how its programs are distributed creates confusion in the marketplace and  
23 changes consumer attitudes toward the cost and availability of high quality

24  
25 <sup>16</sup> [REDACTED]

26  
27 <sup>17</sup> DirecTV – the largest satellite television provider in the United States with  
28 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. Haslingden Decl. ¶ 15.

1 television programming. Dish's services threaten "to confuse consumers about  
2 video on demand products, and to create incorrect but lasting impressions with  
3 consumers about what constitutes lawful video on demand exploitation" of Fox's  
4 copyrighted works, "including confusion or doubt regarding whether payment is  
5 required" for access to those works. *WTV*, 824 F. Supp. 2d at 1013. If Dish  
6 continues to provide its subscribers with PrimeTime Anytime and AutoHop, Dish  
7 subscribers will become accustomed to having free access to commercial-free on  
8 demand programming. Brennan Decl. ¶¶ 39-40. This will give consumers false  
9 impressions and expectations about what constitutes lawful exploitation of the Fox  
10 Programs. *See Grokster*, 545 U.S. at 929 (holding that "the indications are that the  
11 ease of copying songs or movies using software like Grokster's and Napster's is  
12 fostering disdain for copyright protection").

13 **2. Dish's Conduct Disrupts Fox's Ability To Distribute Its Programs.**

14 Dish's conduct encroaches directly and ominously on existing licensed  
15 services for the digital streaming or download of the Fox Programs – with reduced  
16 commercials or no commercials – thereby undermining Fox's ability to distribute  
17 its copyrighted works through authorized, legitimate channels.

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

26 The same is true here. By making its bootleg, on-demand library of  
27 primetime programming available in a commercial-free format, Dish threatens to  
28 diminish the perceived value of Fox's legitimate VOD and digital licenses and the

1 appeal of VOD advertising. Brennan Decl. ¶¶ 26-29. Dish’s infringement also  
2 threatens to disrupt Fox’s ability to negotiate with third party licensees and  
3 advertisers. Biard Decl. ¶¶ 40-41; *WPIX*, 765 F. Supp. 2d at 620 (defendants’  
4 unsanctioned service that allowed viewers to watch plaintiffs’ television program  
5 online caused irreparable harm because “the ability of plaintiffs to profit from  
6 sanctioned sources would inevitably drop”).<sup>18</sup> In a video posted on Dish’s website,  
7 Dish Vice President Vivek Khemka publicly predicts, “*I don’t think you’d ever*  
8 *need Hulu Plus or Hulu after this.*” Singer Decl. ¶ 33. Intentionally diverting  
9 customers in this manner will disrupt Fox’s licensing relationships and devalue the  
10 licenses Fox grants. Biard Decl. ¶¶ 40-41; *see, supra*, Section II.D.

### 11 3. Dish’s Conduct Threatens Fox’s Ad-Supported Business Model

12 In a *Wall Street Journal* interview after this lawsuit was filed, Dish chairman  
13 Charlie Ergen admitted that the PrimeTime Anytime and AutoHop services were  
14 “not good” for broadcasters and threatened to harm the entire television  
15 “ecosystem.” Singer Decl. Ex. I. If Dish’s PrimeTime Anytime and AutoHop  
16 services are not enjoined, fewer viewers will see the commercials during Fox  
17 Programs, and the amount advertisers will be willing to pay for commercials  
18 inevitably will fall. Brennan Decl. ¶¶ 31-35; *WPIX*, 765 F. Supp. 2d at 618 (noting  
19 that fewer viewers means advertisers will pay less for commercials and that the  
20 resulting harm is difficult to calculate and thus irreparable). The Association of  
21 National Advertisers agrees that AutoHop will harm advertisers and affect what  
22 they are willing to pay for advertisements. Liodice Decl. ¶¶ 5-8. If Dish is not  
23 enjoined, and its competitors begin offering services similar to PrimeTime

---

24  
25 <sup>18</sup> In *WPIX v. ivi*, the defendant captured over-the-air broadcasts of television  
26 programming and, without the copyright owners’ consent, streamed those  
27 broadcasts to subscribers over the Internet. The court found that because  
28 defendant’s service allowed viewers to watch stations from other cities, “the  
amount local advertisers would be willing to pay to advertise during plaintiffs’  
broadcasts would fall.” *Id.* at 617. Holding these losses were irreparable because  
they were “notoriously difficult to prove and nearly impossible to quantify,” the  
court issued an injunction. *Id.*

1 Anytime and AutoHop, millions of television viewers will stop seeing  
2 commercials. *Id.*; Brennan Decl. ¶¶ 31-35. A massive reduction in viewer  
3 impressions would lead advertisers to pay less for or stop purchasing broadcast  
4 television commercials altogether, threatening incalculable harm to Fox. *Id.*  
5 Ultimately, if advertisers are no longer willing to finance broadcast programming,  
6 it will become economically infeasible to sustain the broadcast television business  
7 model that now exists in the United States. *Id.*

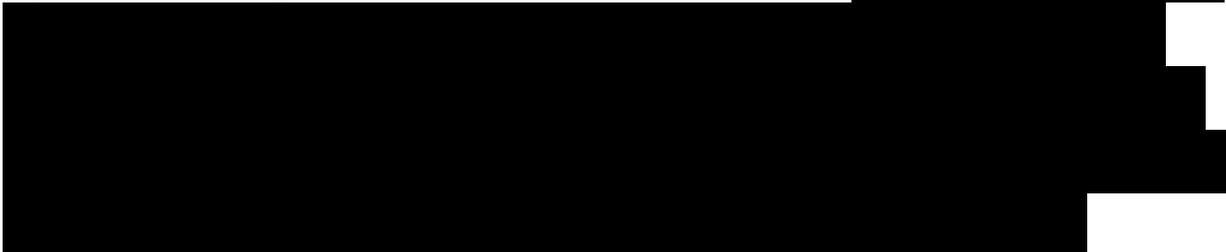
8 Journal Communications, owner of 13 broadcast television stations (and  
9 affiliates of the major broadcast networks) faces many of the same threatened  
10 injuries if Dish's conduct is not enjoined. Smith Decl. ¶¶ 4-8. And, because Dish  
11 sells its own local television advertising for cable channels that are not subject to  
12 commercial skipping, Dish now competes unfairly with Journal in those markets.  
13 *Id.* Even worse, Mr. Ergen recently revealed that Dish is implementing a new  
14 technology on the Hopper that would not only block the networks' commercials,  
15 but replace them with Dish's own advertising. Singer Decl. Ex. N. Thus, Dish  
16 plans to divert Fox's commercial advertising revenue into its own pockets.

17 These looming injuries are not mere speculation. In May, 2012, Moody's  
18 Investor Service issued an independent report warning that if Dish's new AutoHop  
19 service were deployed and widely used, it "*will have broad negative credit*  
20 *implications across the entire television industry*" and "*could destabilize the entire*  
21 *television eco-system.*" Haslingden Decl. ¶¶ 23-24, Ex. D (emphasis added).

22 **E. The Balance Of Hardships Weighs Decidedly In Favor Of Fox.**

23 Dish "cannot complain of the harm that will befall it when properly forced to  
24 desist from its infringing activities." *Triad Sys. Corp. v. Southeast Express Co.*, 64  
25 F.3d 1330, 1338 (9th Cir. 1995); *see also Cadence Design Sys., Inc. v. Avant!*  
26 *Corp.*, 125 F.3d 824, 830 (9th Cir. 1997) ("[w]here the only hardship that the  
27 defendant will suffer is lost profits from an activity which has been shown likely to  
28 be infringing, such an argument in defense merits little equitable consideration").

1 Moreover, the narrow injunction requested by Fox does not threaten to cause  
2 significant hardship to Dish's lawful business activities. 

3   
4  
5  
6  
7 **F. Public Policy Favors The Issuance Of An Injunction Against Dish.**

8 The Supreme Court has made clear that upholding copyright protection is in  
9 the public interest. *Eldred v. Ashcroft*, 537 U.S. 186, 212 n.18 (2005); *Nintendo of*  
10 *Am., Inc. v. Lewis Galoob Toys, Inc.*, 16 F.3d 1032, 1038 (9th Cir. 1994) (“public  
11 policy favors the issuance of injunctions in intellectual property infringement  
12 lawsuits”). The viability of advertising-supported television is also a matter of  
13 public interest. *See Satellite Broad. Comm. Ass'n v. FCC*, 275 F.3d 337, 343 (4th  
14 Cir. 2001) (upholding the importance of “free television for those not served by  
15 satellite or cable”). By blocking television commercials, PrimeTime Anytime and  
16 AutoHop will cause fewer advertisers to buy commercials and erode the main  
17 source of financing for broadcast television. Haslingden Decl. ¶ 17-22.

18 **IV. CONCLUSION**

19 Fox respectfully requests that the Court enter the proposed injunction.

20 DATED: August 22, 2012

JENNER & BLOCK LLP

21  
22 By: \_\_\_\_\_ /s/

23 Richard L. Stone  
24 Attorneys for Plaintiffs  
25  
26  
27  
28