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## The Autohop Threat: A Television Crisis And Potential Solutions To Fox Broadcasting Co. V. Dish Network, L.L.C.

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# THE AUTOHOP THREAT: A TELEVISION CRISIS AND POTENTIAL SOLUTIONS TO *FOX BROADCASTING CO. v. DISH NETWORK, L.L.C.*

*Adam Shapiro\**

## I. INTRODUCTION

Since the beginning of television, networks and viewers have shared an unspoken agreement: the networks provide quality television programs, and, in exchange, the viewers sit through commercials.<sup>1</sup> As a result, television has become the largest platform in the world for advertisers,<sup>2</sup> and television networks have come to rely heavily on sponsors.<sup>3</sup> In this model, advertisement revenue has funded audience favorites from *I Love Lucy* to *Modern Family* and nearly every show in between. Without advertisements and commercials, television, as the world knows it, would not exist.<sup>4</sup>

Despite the importance of commercials, consumers have been seeking ways to avoid them since television advertisements began.<sup>5</sup>

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1. See generally Ted Johnson, *AutoHop and the Future of the 30-Second Spot*, VARIETY (Nov. 16, 2012), <http://variety.com/2012/digital/news/autohop-and-the-future-of-the-30-second-spot-1118062270/> (describing the tension between networks and AutoHop as the technology makes skipping commercials easier).

2. *The Small Screen Captured Big Ad Revenue in 2012*, NIELSEN (Apr. 18, 2013), <http://www.nielsen.com/us/en/newswire/2013/the-small-screen-captured-big-ad-revenue-in-2012.html>. In 2012, advertisers spent \$350 billion globally on television, which “accounted for 62.8 percent of global ad dollars in 2012.” *Id.*

3. Jesse Haskins, *Commercial Skipping Technology and the New Market Dynamic: The Relevance of Antitrust Law to an Emerging Technology*, 2009 DUKE L. & TECH. REV. 6, 6 (2009).

4. See *Networks Take On Dish over Hopper*, FOX BUS. (Sep. 19, 2013), [http://video.foxbusiness.com/v/2682123510001/networks-take-on-dish-over-hopper/?playlist\\_id=932683241001](http://video.foxbusiness.com/v/2682123510001/networks-take-on-dish-over-hopper/?playlist_id=932683241001) (stating that commercials are “the life-blood of the entire television business”).

5. See Brief for Cablevision Systems Corporation as Amicus Curiae Supporting Plaintiffs-Appellants at 18, *Fox Broad. Co. v. Dish Network, L.L.C. (Dish II)*, 723 F.3d 1067 (9th Cir. 2013) (No. 12-57048) [hereinafter CSC Brief].

During a commercial break, viewers could always go to the bathroom, grab a snack, channel-surf, or simply avert their eyes.<sup>6</sup> Then, when Sony introduced the Betamax Videocassette Recorders (VCRs), a viewer could avoid commercials by recording programs on a videocassette and fast-forwarding through the commercials during playback.<sup>7</sup> After VCRs, Digital Video Recorders (DVRs) simplified the recording process, allowing viewers to record programs directly on their cable boxes, without having to use a videocassette.<sup>8</sup> DVRs also enabled viewers to fast-forward recorded programs at various speeds and utilize a “30-second skip” feature, which advances recorded programs by thirty seconds, the length of a standard commercial.<sup>9</sup> Though still a threat to the television advertisement model, these forms of commercial avoidance have become widely accepted by the television industry.<sup>10</sup> However, Dish Network (“Dish”) recently created a feature that takes commercial avoidance one step further.<sup>11</sup> Dish’s AutoHop allows viewers to select a feature that *automatically* skips *entire* commercial breaks.<sup>12</sup>

If viewers stop watching commercials, advertisers will move their dollars to new markets.<sup>13</sup> And if advertising dollars decrease, television networks will be unable to afford the production costs of high-quality programs.<sup>14</sup> To fight this new technology, Fox Broadcasting Company (“Fox”) and other broadcast networks (the “Networks”) filed suit against Dish.<sup>15</sup> However, the Networks have failed to persuade the courts to ban AutoHop thus far.<sup>16</sup>

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6. *Id.*

7. Haskins, *supra* note 3, at 7.

8. *See* Cartoon Network LP v. CSC Holdings, 536 F.3d 121, 123 (2d Cir. 2008).

9. CSC Brief, *supra* note 5, at 19.

10. *Id.*

11. *Id.*

12. *See id.* at 20.

13. *See generally* Suzanne Vranica & Christopher S. Stewart, *Mobile Advertising Begins to Take Off*, WALL ST. J., Oct. 9, 2013, <http://online.wsj.com/news/articles/SB10001424052702304066404579125292312208918> (noting that the amount of mobile advertisement spending more than doubled since last year).

14. Bradley Hamburger, *Digital Video Recorders, Advertisement Avoidance, and Fair Use*, 23 HARV. J.L. & TECH. 567, 568 (2010) (“[T]he television industry faces an ‘advertisement avoidance crisis’ that threatens to destroy the decades-old revenue model of advertiser-supported television.”).

15. *See* CSC Brief, *supra* note 5, at 1.

16. *See* *Dish II*, 723 F.3d 1067 (9th Cir. 2013); Eriq Gardner, *Fox Loses Bid to Stop Hopper’s Place-Shifting Technology*, THE HOLLYWOOD REP. (Sept. 23, 2013), <http://www.hollywoodreporter.com/thr-esq/fox-loses-bid-stop-hoppers-634791>.

This Comment discusses the Ninth Circuit's decision of *Fox Broadcasting Co. v. Dish Network, L.L.C. (Dish II)*,<sup>17</sup> and considers further measures the Networks can take to protect the television industry. Part II of this Comment looks at the factual background behind *Dish II* and its predecessor, *Fox Broadcasting Co. v. Dish Network, L.L.C. (Dish I)*.<sup>18</sup> Part III then breaks down the reasoning of the Ninth Circuit and explains why it affirmed the district court's decision to deny a preliminary injunction against Dish. Next, Part IV explores the potential negative effects that the *Dish II* decision will have on the television industry if AutoHop technology becomes more prevalent. Then, in Part V, the Comment analyzes potential solutions available to the Networks following the *Dish II* decision, which include revisiting this issue in the Supreme Court, lobbying Congress, and innovating new legal strategies. Finally, the Comment concludes that although the Networks may have some compelling arguments to reverse the Ninth Circuit decision or pass new legislation, they will likely need to battle AutoHop technology through contracts and negotiations.

## II. FACTUAL BACKGROUND

Fox is one of four major television networks that provides free broadcasts through local airwaves.<sup>19</sup> Fox owns the copyrights to the programs in its primetime block, including shows like *Glee*, *Family Guy*, and *Bones*.<sup>20</sup> In addition to distributing the network programming for free over the airwaves, Fox contracts with cable and satellite providers (the "Providers") to retransmit Fox's broadcast signal.<sup>21</sup> Sometimes these contracts include agreements involving the use of Fox's programs through a Video On Demand (VOD) function.<sup>22</sup> Fox also contracts with companies that bring Fox content to viewers through the Internet, like Hulu, Netflix, and Apple.<sup>23</sup>

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17. *Dish II*, 723 F.3d 1067 (9th Cir. 2013).

18. 905 F. Supp. 2d 1088 (C.D. Cal. 2012).

19. *Id.* at 1092.

20. *Id.*

21. *Dish II*, 723 F.3d at 1070.

22. *Id.*

23. *Dish I*, 905 F. Supp. 2d at 1092–93 (explaining that Hulu, Apple, and Netflix "allow consumers to view Fox programs via Internet streaming on their computers and mobile devices, either with or without commercials depending on the nature of the licensing agreement and the user's subscription").

In 2002, Fox executed a distribution agreement with Dish.<sup>24</sup> The agreement states:

Dish shall not “distribute” Fox programs on an “interactive, time-delayed, video-on-demand or similar basis,” though Dish may “connect[] its Subscribers’ video replay equipment.” Dish also cannot “record, copy, duplicate and/or authorize the recording, copying, duplication (other than by consumers for private home use) or retransmission” of any part of Fox’s signal.<sup>25</sup>

The parties amended the agreement in 2010 with terms stating that “Dish could provide Fox Video On Demand to its subscribers, but Dish had to ‘disable fast forward functionality during all advertisements.’”<sup>26</sup>

Dish provides customers with a set-top-box called the Hopper, which offers DVR and VOD features.<sup>27</sup> After the 2010 contract revision, Dish introduced a feature called PrimeTime Anytime (“PTAT”), which automatically records all primetime broadcast television programs and saves these programs on a satellite box.<sup>28</sup> Along with this feature, Dish offers the AutoHop function, which allows the viewer to automatically skip commercial breaks on PTAT shows.<sup>29</sup> As long as the viewers enable AutoHop, they will not need to press any button to skip commercials breaks; however, the commercials are still viewable if the user manually rewinds or fast-forwards.<sup>30</sup>

To operate the AutoHop feature, Dish technicians digitally mark the beginning and end of each commercial break.<sup>31</sup> Dish then sends the electronically-marked files to Dish consumers.<sup>32</sup> Additionally, to ensure that the commercial breaks are marked properly and AutoHop works correctly, Dish makes its own “quality assurance” copies to test each program and ensure that it has not cut off any of the actual content.<sup>33</sup>

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24. *Dish II*, 723 F.3d at 1070–71.

25. *Id.* at 1071.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* at 1072.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

After recognizing the threat posed by AutoHop, Fox and the Networks sued Dish for breach of contract and copyright infringement.<sup>34</sup> The district court denied Fox's request for a preliminary injunction, holding that Fox "did not demonstrate a likelihood of success" on its claims.<sup>35</sup> The court did hold that Dish likely breached the contract with Fox by making the quality-assurance copies; however, the court reasoned that this could be remedied with damages, and thus, a preliminary injunction was unnecessary.<sup>36</sup>

### III. THE REASONING OF THE COURT

On appeal, the Ninth Circuit determined whether the district court abused its discretion by holding that: (1) Fox was unlikely to succeed on its direct copyright infringement claim, (2) Fox was unlikely to succeed on its secondary copyright infringement claim, (3) Dish did not breach its contract with Fox, and (4) Fox did not demonstrate a likelihood of irreparable harm with the quality-assurance copies.<sup>37</sup> Although the Ninth Circuit affirmed the district court's findings on all of these issues,<sup>38</sup> this part will focus only on the first two issues: direct infringement and secondary infringement.

#### A. Direct Infringement

To determine the issue of direct infringement, the court looked at the reasoning in *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*<sup>39</sup> In *Cartoon Network*, the Second Circuit determined that when viewers used their DVRs to record programs on their cable boxes, the viewers, and not Cablevision (the provider), were directly copying the copyrighted material.<sup>40</sup> In *Dish I*, the district court recognized that Dish exceeded Cablevision's actions because "Dish decide[d] how long copies [were] available for viewing, Dish maintain[ed] the authority to modify start and end times of the primetime block, and a user [could not] stop a copy from being made

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34. *Id.*

35. *Id.*

36. *Id.* at 1073.

37. *Id.* at 1072–73.

38. *Id.* at 1073.

39. 536 F.3d 121 (2d Cir. 2008); *Dish II*, 723 F.3d at 1073.

40. *Cartoon Network*, 536 F.3d at 131.

once the recording ha[d] started.”<sup>41</sup> However, the court still felt that Dish had not reached the point of direct liability because the user was the one who ultimately enabled the PTAT feature.<sup>42</sup> Since direct infringement requires actual copying by the defendant, the court held that “the district court did not err in holding that Fox did not establish a likelihood of success on its direct infringement claim.”<sup>43</sup>

### *B. Secondary Infringement*

For secondary liability to exist in a copyright infringement case, there must be direct infringement by a third party.<sup>44</sup> Because the court found that Dish users clearly copied Fox’s copyrighted programs through the PTAT function,<sup>45</sup> Dish had to show that this copying was protected as a fair use.<sup>46</sup> To evaluate fair use, the court turned to a similar Supreme Court decision.<sup>47</sup> In *Sony Corp. of America v. Universal City Studios, Inc.*,<sup>48</sup> the Court did not hold Sony liable for secondary infringement when Sony manufactured VCRs that customers primarily used for time-shifting.<sup>49</sup> Instead, the Court found that “even the unauthorized home time-shifting of respondents’ programs is legitimate fair use.”<sup>50</sup>

The Ninth Circuit began its fair use analysis by pointing out that “commercial-skipping does not implicate Fox’s copyright interest because Fox owns the copyright to the television programs, not to the ads aired in the commercial breaks.”<sup>51</sup> Therefore, the court only considered the PTAT and not the AutoHop feature in its fair-use analysis.<sup>52</sup>

The court considered four factors to determine whether the use of copyrighted materials was a fair use: (1) the purpose and character of the use, (2) the nature of copyrighted work, (3) the amount and substantiality of the portion used, and (4) the effect of the use on the

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41. *Dish II*, 723 F.3d at 1073–74.

42. *Id.* at 1074.

43. *Id.*

44. *See id.*

45. *Id.*

46. *Id.*

47. *Id.* at 1074–75.

48. 464 U.S. 417 (1984).

49. *Id.* at 442. Time-shifting is “the practice of recording a program to view it once at a later time, and thereafter erasing it.” *Id.* at 423.

50. *Id.* at 442.

51. *Dish II*, 723 F.3d at 1075.

52. *Id.*

market.<sup>53</sup> When analyzing the first factor, “purpose and character of the use,” a court is more likely to consider the use an infringement if it is “of a commercial nature.”<sup>54</sup> In *Sony*, the Court found that time-shifting for private home use was a noncommercial use.<sup>55</sup> Since the district court in the *Dish I* case held that PTAT is used for private time-shifting as well, the first factor of fair use weighed in favor of Dish.<sup>56</sup>

The Ninth circuit relied on *Sony* again when it analyzed the second and third factors, “the nature of the copyrighted work” and “the amount and substantiality of the portion used in relation to the copyrighted work as a whole.”<sup>57</sup> The Court in *Sony* held that “time-shifting merely enables a viewer to see such a work which he had been invited to witness in its entirety free of charge[;] the fact that the entire work is reproduced, does not have its ordinary effect of militating against a finding of fair use.”<sup>58</sup> Like in *Sony*, Dish had already invited its viewers to watch Fox’s programs through Dish’s satellite boxes.<sup>59</sup> Therefore, the *Dish II* court found that even though Dish viewers had copied Fox’s entire program, the amount recorded did not hurt Dish’s fair use argument.<sup>60</sup>

The final and most important element of fair use<sup>61</sup> looks at the “effect of the use upon the potential market for or value of the copyrighted work.”<sup>62</sup> Fox merely had to “show that if the challenged use ‘should become widespread, it would adversely affect the *potential* market for the copyrighted work.’”<sup>63</sup>

The Ninth Circuit pointed out that the market harm from AutoHop could be greater than the market harm in *Sony* because Fox licensed its programs to companies like Hulu and Apple.<sup>64</sup> The fact that Dish users could find commercial-free Fox programs at no

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53. 17 U.S.C. § 107 (2012).

54. *Id.* § 107(1).

55. *Dish II*, 723 F.3d at 1075.

56. *Id.*

57. 17 U.S.C. § 107(2)–(3).

58. *Sony Corp. of Am. v. Universal City Studios*, 464 U.S. 417, 449–50 (1984) (citation omitted).

59. *See Dish II*, 723 F.3d at 1076.

60. *Id.*

61. *Id.*

62. 17 U.S.C. § 107(4).

63. *Dish II*, 723 F.3d at 1076 (quoting *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 568 (1985)).

64. *Id.*



additional cost on their satellite boxes could prevent them from purchasing the same programs through companies like Apple, Hulu, and Netflix.<sup>65</sup> However, Fox only alleged that these secondary markets would be harmed by the commercial-skipping feature and did not mention any potential harm to these markets through the PTAT function.<sup>66</sup> Additionally, although the court noted that Fox was often willing to allow Providers to give viewers free access to Fox's program through VOD, these agreements were contingent on the fast-forward function being disabled.<sup>67</sup> This suggests "the ease of skipping commercials, rather than the on-demand availability of Fox programs, causes any market harm."<sup>68</sup> Since Fox did not own a copyright over the commercials and did not allege market harm from the PTAT function, the fair use argument succeeded, and the Ninth Circuit affirmed the district court's decision.<sup>69</sup>

#### IV. ANALYSIS: THE TELEVISION CRISIS CREATED BY *DISH II*

The *Dish II* decision heightens the existing threat to advertisement-based television. AutoHop's commercial-skipping capabilities hinder the appeal of television advertising to sponsors and could reduce the amount sponsors are willing to pay the Networks for commercial airtime.<sup>70</sup> Although commercial avoidance has existed for many years without these negative affects, AutoHop threatens the television industry even more than previously accepted forms of commercial-skipping.<sup>71</sup>

These technologies differ because, unlike AutoHop, the traditional VCRs and DVRs require the viewer to manually fast-forward or skip through commercial breaks during every commercial break.<sup>72</sup> Therefore, the traditional commercial-skipping devices leave open the possibility that viewers will forget to skip commercials or simply choose not to do so.<sup>73</sup> In fact, a 2009 Nielsen

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65. See CSC Brief, *supra* note 5, at 17.

66. *Dish II*, 723 F.3d at 1076.

67. *Id.*

68. *Id.*

69. *Id.* at 1075.

70. CSC Brief, *supra* note 5, at 16.

71. *Id.* at 14.

72. *Id.*

73. See *id.* at 19.

study showed that those who recorded primetime programs on ABC, CBS, NBC, and Fox watched an average of more than 40 percent of commercials on playback.<sup>74</sup> AutoHop removes that possibility.<sup>75</sup>

Additionally, when a viewer using a DVR takes affirmative steps to skip a commercial break, the viewer must pay attention to find the end of the break.<sup>76</sup> The Networks pointed out that “[e]ven when the viewer does use fast-forward or 30-second skip, he still sees glimpses of each advertisement and can choose whether to watch an advertisement if it interests him.”<sup>77</sup> And if the viewer does not go back to watch the advertisement, sponsors still consider viewers watching commercials in fast-forward to be “important and valuable.”<sup>78</sup> For all of these reasons, AutoHop weakens advertisers’ incentives to place commercials on television.<sup>79</sup>

If advertisers stop spending on television, the networks will be forced to reduce costs in order to remain profitable.<sup>80</sup> Then, to increase profits, the networks may be forced to replace scripted shows with reality shows, games shows, and talk shows—all less expensive to produce.<sup>81</sup> Therefore, instead of selecting programs based on popularity and quality, the networks will base all programming decisions on production costs.<sup>82</sup> Furthermore, if the networks cannot cut costs sufficiently to maintain profitability, commercial-skipping and AutoHop technology could result in the “wholesale elimination of free or low-cost television.”<sup>83</sup> To overcome this threat to quality and inexpensive television, the Networks must find a way to withstand the onslaught of commercial-skipping technology and protect their advertising revenue.

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74. NIELSEN, HOW DVRs ARE CHANGING THE TELEVISION LANDSCAPE 10, available at [http://www.nielsen.com/content/dam/corporate/us/en/newswire/uploads/2009/04/dvr\\_tvlandscape\\_043009.pdf](http://www.nielsen.com/content/dam/corporate/us/en/newswire/uploads/2009/04/dvr_tvlandscape_043009.pdf).

75. CSC Brief, *supra* note 5, at 19.

76. *See id.*

77. *Id.*

78. *Id.* at 20 (quoting testimony of the president of the Association of National Advertisers); see Jaqui Cheng, *Fast-Forwarded Commercials Still Hold Value, Really!*, ARSTECHNICA (July 5, 2007), <http://arstechnica.com/uncategorized/2007/07/nbc-fast-forwarded-commercials-still-hold-value-really/> (“Viewers were reportedly just as engaged by commercials seen in fast-forward mode as they were in a normal-speed episode of NBC’s *Heroes*.”).

79. *See* CSC Brief, *supra* note 5, at 19.

80. Hamburger, *supra* note 14, at 569.

81. *Id.*

82. *Id.*

83. *Id.*

## V. POSSIBLE SOLUTIONS TO THE AUTOHOP CRISIS

The Ninth Circuit's decision leaves the Networks with three potential channels to protect their industry: (1) convince the Supreme Court to reconsider *Dish II*,<sup>84</sup> (2) lobby for new copyright legislation,<sup>85</sup> and (3) innovate new legal strategies without government interference.<sup>86</sup> This part examines the three approaches and discusses their likely results.

### A. Litigation

To best protect the future of the television industry, the Networks would have to convince the Supreme Court that AutoHop makes Dish liable for secondary infringement of the Networks' copyrights.<sup>87</sup> The Court has two avenues to reach this conclusion: (1) hold that time-shifting is not a fair use,<sup>88</sup> or (2) decide that commercial breaks are copyrightable as a compilation.<sup>89</sup>

#### 1. Time-Shifting Is Not a Fair Use

If fair use did not protect time-shifting, Dish would be liable for secondary copyright infringement whenever viewers enabled their PTAT function.<sup>90</sup> To reach this holding, the Supreme Court would have to overturn its decision in *Sony*.<sup>91</sup> Although the Court rarely overturns decisions, the Court may be willing to make such a change because the current circumstances of recorded television vastly differ from those contemplated in *Sony*.<sup>92</sup> For example, when the Court decided *Sony*, no additional home market for old television shows existed, whereas viewers today can watch old shows through the

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84. See Ned Snow, *The TiVo Question: Does Skipping Commercials Violate Copyright Law?*, 56 SYRACUSE L. REV. 27, 31–32 (arguing that Sony should be overturned), 50–54 (stating that networks should have a copyright over the commercial break) (2005).

85. See Maria A. Pallante, *The Next Great Copyright Act*, 36 COLUM. J.L. & ARTS 315, 315 (2013) (arguing that there is a “need for comprehensive review and revision of U.S. Copyright law”).

86. See Jennifer E. Rothman, *E-Sports as a Prism for the Role of Evolving Technology in Intellectual Property*, 161 U. PA. L. REV. ONLINE 317, 318 (2013) (explaining that the evolution of copyright law is too slow to keep up with the development of technology).

87. See CSC Brief, *supra* note 5, at 26–27.

88. See *Dish II*, 723 F.3d 1067, 1074–75 (9th Cir. 2013).

89. See *id.* at 1076.

90. *Id.* at 1075.

91. See *id.*

92. See Jennifer E. Rothman, *Liberating Copyright: Thinking Beyond Free Speech*, 95 CORNELL L. REV. 463, 473 n.48 (2010).

Internet or on VOD.<sup>93</sup> This change could have impacted the fair use discussion in *Sony*, especially the fourth factor, which looks at the effects on other markets.<sup>94</sup> Additionally, the Court most likely did not contemplate the advancements in time-shifting technology that would follow the *Sony* decision.<sup>95</sup>

The *Sony* holding has been a point of controversy since the Court made its 5-4 decision, so overturning *Sony* could be a real possibility.<sup>96</sup> In fact, in *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*,<sup>97</sup> the Supreme Court “clarifie[d] that *Sony* addresses the specific market circumstances of VCR distribution and its usage—and nothing else.”<sup>98</sup> In other words, *Sony* should be read very narrowly.<sup>99</sup> On the other hand, the Court may be unwilling to revoke the fair use right of time-shifting granted to viewers in *Sony* because time-shifting technology has increased many viewers’ personal enjoyment of television.<sup>100</sup>

## 2. Commercial Breaks As Copyrightable Compilations

If the Court will not overturn *Sony*, the Networks could argue that their copyrights should protect not only the television programs but also the commercial breaks. The Ninth Circuit decided in *Dish II* that Fox’s copyright on the television programs did not extend to commercials. Therefore, the court only considered whether fair use protected PTAT and did not consider whether fair use protected commercial-skipping.<sup>101</sup> However, if the Supreme Court concludes that commercials constitute a compilation protectable by copyright, the Court could focus its fair use argument on AutoHop as well.<sup>102</sup> Since the Ninth Circuit acknowledged that AutoHop harms the market for Fox programs,<sup>103</sup> the Supreme Court could then conclude

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93. *Id.*

94. *See Dish II*, 723 F.3d at 1076.

95. *See Rothman*, *supra* note 92, at 473 n.48.

96. *See id.* (suggesting that many scholars believe that if the Supreme Court revisited *Sony*, it would come out a different way); Snow, *supra* note 84, at 31–32.

97. 545 U.S. 913 (2005).

98. Snow, *supra* note 84, at 32.

99. *See id.*

100. *See id.* at 30 (“The DVR is exponentially gaining public support.”).

101. *Dish II*, 723 F.3d 1067, 1076 (9th Cir. 2013).

102. *See Snow*, *supra* note 84, at 47–51.

103. *Dish II*, 723 F.3d at 1076 (noting that the AutoHop harms the market for online distributors like Hulu and Apple).

that AutoHop infringes Fox's copyright and is not protected by a fair use defense.

A compilation must be an original work to obtain copyright protection.<sup>104</sup> In order to be original, there only needs to be a minimal amount of creativity.<sup>105</sup> In *National Football League v. McBee & Bruno's, Inc.*,<sup>106</sup> the Eighth Circuit held that a football game, "and not the inserted commercials and station breaks, constitutes the work of authorship."<sup>107</sup> Though this precedent does not bind the Supreme Court, the Court could consider this ruling to determine that commercial-break compilations should not be considered an original work.

On the other hand, the Networks could argue that commercial breaks reach the minimal level of creativity necessary for a compilation copyright.<sup>108</sup> The Networks need to be creative in their arrangement of commercials in order to make the commercial breaks profitable.<sup>109</sup> For example, "[a] two-hour television movie with all the advertisements in the first twenty minutes would not be as valuable as the same television movie containing embedded advertisements that are spread out over its broadcast."<sup>110</sup>

Though this argument could convince the Court that the commercials constitute a compilation, in order to be copyrightable as an "audiovisual work[]," the Copyright Act also requires that the work "consist of a series of related images."<sup>111</sup> It would be very difficult to argue that television programs thematically relate to the commercials that run during the programs' breaks.<sup>112</sup> Therefore, the Supreme Court would probably hold that commercials are not part of a copyrightable compilation, and that the fair use argument should not consider commercial-skipping.

### *B. Lobbying Congress*

If the Networks do not succeed in the courts, they could lobby to

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104. Snow, *supra* note 84, at 47.

105. *Id.*

106. 792 F.2d 726 (8th Cir. 1986).

107. *Id.* at 732.

108. Snow, *supra* note 84, at 50.

109. *Id.*

110. *Id.*

111. 17 U.S.C. § 101 (2000).

112. *See* Snow, *supra* note 84, at 51–54.

change copyright legislation. The purpose of copyright law, according to the Copyright Clause of the Constitution, is to promote the arts.<sup>113</sup> Since commercial-skipping threatens the art of television, the Networks could argue that Congress must pass laws to prevent AutoHop technology in order to maintain constitutional values. Furthermore, because Congress drafted the Copyright Act of 1976 before time-shifting and commercial-skipping, current law may not reflect Congress's interpretation of the Copyright Clause in light of recent technology.<sup>114</sup>

Some scholars argue that Congress needs to enact new copyright legislation to keep up with technological advances.<sup>115</sup> Under current copyright law, there are as many gaps as there are answers to questions that arise in copyright cases.<sup>116</sup> As a result, courts are forced to set policy even though the Constitution reserves that role for Congress.<sup>117</sup> When the courts choose not to take on this legislative role, these questions are simply left undecided.<sup>118</sup>

In the context of *Dish II*, the Networks could try to convince Congress to pass new laws that restrict commercial-skipping to prevent a decline in television revenue and quality programming.<sup>119</sup> If the Networks lobby for a total ban on DVRs, they will be unlikely to succeed because such technology has become so prevalent.<sup>120</sup> Instead, the Networks must convince Congress that even though DVRs are legal, the law needs to place some limits on the Providers' commercial-skipping features.<sup>121</sup> Even if the Networks cannot sway Congress to ban the AutoHop feature, Congress may be willing to

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113. See U.S. CONST. art. I, § 8, cl. 8.

114. See Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (1976).

115. Pallante, *supra* note 85, at 320 ("In the age of the Internet, where technology can so quickly affect the creation and communication of creative materials, these [congressional reviews of copyright law] may need to happen more frequently, at least if the statute remains as dense and detailed as it is today.").

116. See *id.* at 322.

117. *Id.*

118. *Id.* at 323 ("In *Sony BMG Music Entertainment v. Tenenbaum*, the First Circuit observed that Congress might wish to examine the application of the Copyright Act regarding statutory damages. In *Flava Works, Inc. v. Gunter*, a case involving streaming video, the Seventh Circuit noted the difficulty of determining when a public performance begins and stated that "[l]egislative clarification of the public-performance provision of the Copyright Act would therefore be most welcome.") (citing *Sony BMG Music Entm't v. Tenenbaum*, 660 F.3d 487, 490 (1st Cir. 2011), and quoting *Flava Works, Inc. v. Gunter*, 689 F.3d 754, 761 (7th Cir. 2012)).

119. See *Hamburger*, *supra* note 14, at 568–69.

120. See CSC Brief, *supra* note 5, at 19.

121. See *id.*

preemptively pass a law that prevents a more extreme version of AutoHop where a viewer cannot rewind to view commercials. Any type of limitation by Congress would be a positive step toward protecting the Networks' advertising dollars.

However, the major problem here is that Congress has proved unable to keep up with technological advances.<sup>122</sup> Therefore, a statute directly restricting commercial-skipping would probably be moot before it reached the President's desk.<sup>123</sup> Additionally, when Congress does pass laws concerning new technology, it tends to overcomplicate them.<sup>124</sup> Copyright laws are best kept flexible in order to adapt to developing technology.<sup>125</sup> For these reasons, congressional interference is unlikely and would only have a marginal affect if implemented.<sup>126</sup>

### C. Legal Innovation

If the Networks cannot convince the Supreme Court or Congress to help their plight against commercial-skipping technology, they will have to adopt a new approach. Despite the threats that have already risen from VCRs and DVRs, the Networks have managed to bring in revenue and create quality programs. Although AutoHop technology poses more of a threat than previous devices, the Networks still have opportunities to lessen the blow to their industry.<sup>127</sup> Below, this part looks at four alternative solutions to government interference that the Networks can and already have begun to utilize.

#### 1. Contracts to Prevent Commercial-Skipping

In order to contract around commercial-skipping, the Networks need leverage.<sup>128</sup> When negotiating with a provider like Dish, the

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122. See Rothman, *supra* note 86, at 318 (“Computers and phones become obsolete almost as soon as they are purchased, and the next big thing could transform markets and industries overnight (as iTunes and the iPhone have). The rapidity of such changes, especially in the context of computer technology and Internet applications, presents many challenges for the law, and for potential legislation in particular.”).

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. See Gregory J. Wilcox, *Dish-Disney TV Contract Dispute Has Many Customers On Edge*, L.A. DAILY NEWS, Sept. 21, 2013, <http://www.dailynews.com/media/20130921/dish-disney-tv-contract-dispute-has-many-customers-on-edge>.

128. See *id.*

networks have leverage because they can threaten not to contract with the provider altogether.<sup>129</sup> If Fox and the other networks left Dish completely, Dish would have no channels, no product, and no customers.<sup>130</sup> For example, Dish recently found itself in serious contract negotiations with the Walt Disney Company (“Disney”).<sup>131</sup> Although Disney and its advertisers would love to reach Dish’s fourteen million subscribers,<sup>132</sup> there are still another one hundred million viewers that Disney and its affiliated networks can reach without Dish.<sup>133</sup> On the other hand, Dish would hardly be able to compete against other Providers without Disney and its group of networks, which include Disney Channel, ABC, and ESPN.<sup>134</sup> Therefore, the Networks may have enough leverage to contract around commercial-skipping technology.<sup>135</sup>

## 2. Increased Product Placement

Since viewers today can more easily avoid commercials, many networks are resorting to an increase in product placement.<sup>136</sup> Product placement is an advertising staple, dating back to shows like *I Love Lucy*<sup>137</sup> and movies like *E.T.*<sup>138</sup> With product placement, networks do not have to worry about viewers skipping commercials, because the advertisements are embed in the content of the program and are therefore unavoidable.<sup>139</sup>

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129. *Id.*

130. *See id.* (“Anytime you have [Dish] involved, you know its [sic] going to be contentious. [Dish] is a one-trick pony. They provide distribution services to their customers but they don’t have anything else. There is no triple play. There is no Internet service. There is no phone service.”).

131. *Id.*

132. *Id.*

133. *See Nielsen Estimates 115.6 Million TV Homes in the U.S., Up 1.2%*, NIELSEN (May 7, 2013), <http://www.nielsen.com/us/en/newswire/2013/nielsen-estimates-115-6-million-tv-homes-in-the-u-s---up-1-2-.html>.

134. Wilcox, *supra* note 127.

135. Fox demonstrated this ability by contracting with Dish to disable the fast-forward functionality for VOD. *Dish II*, 723 F.3d 1067, 1078 (9th Cir. 2013). Although this is not the same as contracting around commercial-skipping on a DVR, it still shows the Networks’ ability to negotiate. On the other hand, the fact that Fox is litigating the issue proves it has not been able to overcome commercial-skipping through contracts thus far.

136. ENCYCLOPEDIA OF TELEVISION 580, 707 (Horace Newcomb ed., 2nd ed. 2004).

137. *I Love Lucy: Lucy Learns to Drive* (CBS television broadcast Jan. 3, 1955) (Ricky buys a new Pontiac convertible).

138. *E.T. THE EXTRA-TERRESTRIAL* (Amblin Entertainment 1982) (Elliot uses Reese’s Pieces to lure E.T. to his bedroom).

139. *See* ENCYCLOPEDIA OF TELEVISION, *supra* note 136, at 580.



However, although product placement can be an effective technique, relying on it creates several problems.<sup>140</sup> For example, to battle a decrease in revenue stream, some networks may overuse in-show advertisements, which could diminish the final product.<sup>141</sup> Additionally, product placement does not work for every advertiser; it may be simple to incorporate a car or a computer into a show, but incorporating an insurance company could be more difficult.<sup>142</sup> Finally, product placement may be effective at times, but advertisers do not consider this an “adequate replacement for traditional commercials.”<sup>143</sup> Networks will need more than in-show advertising to win the commercial-skipping battle, but it still helps the Networks maintain some of their advertising partnerships.<sup>144</sup>

### 3. Bringing Advertisers to the Online Space

Another method the Networks may use to battle commercial-skipping on television is to bring their advertisers online. Nielsen,<sup>145</sup> which in the past has monitored only television ratings, is now beginning to monitor online viewing as well.<sup>146</sup> Advertisers and networks traditionally use Nielsen ratings to determine the number of viewers watching a given show on television, so Nielsen’s new capabilities will allow the networks to make advertising deals across multiple media platforms.<sup>147</sup> In other words, when a network guarantees an advertiser a certain number of views for its commercial, the views from televisions, computers, tablets, and phones can all be tallied together.<sup>148</sup> Thus, even if commercial-skipping leads advertisers away from television and

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140. *Id.*

141. See Danny Sullivan, *Product Placement: The TV Ads Consumers Can’t Skip or Hop*, MARKETING LAND (May 28, 2013, 2:58 PM), <http://marketingland.com/product-placement-tv-ads-45729>. This article describes an episode of *New Girl* on Fox where product placement for the 2013 Ford Escape took up 5% of the total program time. This included “a not-so-subtle demonstration of its hatch that can be opened with a foot tap.” *Id.*

142. See ENCYCLOPEDIA OF TELEVISION, *supra* note 136, at 876.

143. *Id.* at 580.

144. *See id.*

145. Nielsen tracks television viewership and reports its measurements to the networks. See *TV Measurements*, NIELSEN, <http://www.nielsen.com/us/en/nielsen-solutions/nielsen-measurement/nielsen-tv-measurement.html> (last visited Feb. 22, 2014).

146. Brian Stelter, *Nielsen Will Add Mobile Viewership to Ratings*, N.Y. TIMES, Sept. 20, 2013, [http://www.nytimes.com/2013/09/20/business/media/nielsen-will-add-mobile-viewership-to-ratings.html?smid=tw-share&\\_r=2&](http://www.nytimes.com/2013/09/20/business/media/nielsen-will-add-mobile-viewership-to-ratings.html?smid=tw-share&_r=2&).

147. *See id.*

148. *See id.*

toward the online space, the online dollars will still reach the television networks.<sup>149</sup> Disney has already implemented this system, offering guarantees to advertisers for ABC, ABC Family, and ESPN that combine views from television and online.<sup>150</sup>

The problem, of course, is that if AutoHop technology becomes too prevalent, viewers may stop going online for video content because they will be able to get the same product on their televisions, commercial-free, at no extra cost.<sup>151</sup> In that case, the networks will lose audiences for commercials both on television and online.<sup>152</sup>

#### 4. Compensating Advertisers for Commercial-Skipping

Another potential solution is for the Networks to collect a fee for skipped commercials.<sup>153</sup> This technique could be used as a negotiating tool when the Networks and the Providers contract with each other.<sup>154</sup> Apple, for one, has been in discussion with television networks to create an Apple television that offers a “premium,” commercial-free service.<sup>155</sup> Under this system, users will be able to skip advertisements, but Apple will “compensate television networks for the lost revenue.”<sup>156</sup> Although Apple’s idea presents several problems as far as the goals of an advertising campaign are concerned,<sup>157</sup> it shows the sort of forward thinking and compromising that will allow the television market to survive the threat posed by commercial-skipping.<sup>158</sup>

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149. See Bill Carter, *ABC Networks Will Offer Guarantees to Advertisers Across Platforms*, N.Y. TIMES BLOG (Mar. 4, 2013, 7:02 PM), [http://mediadecoder.blogs.nytimes.com/2013/03/04/abc-networks-will-offer-guarantees-to-advertisers-across-platforms/?\\_r=1](http://mediadecoder.blogs.nytimes.com/2013/03/04/abc-networks-will-offer-guarantees-to-advertisers-across-platforms/?_r=1).

150. *Id.*

151. CSC Brief, *supra* note 5, at 17 (noting that consumers will not want “to pay a premium for commercial-free versions of programs if they can get the same effect with their DVRs”).

152. *See id.*

153. See Jessica Lessin, *Exclusive: Apple Pitches Ad-Skipping for New TV Service*, JESSICA LESSIN (July 15, 2013), <http://jessicalessin.com/2013/07/15/exclusive-apple-pitches-ad-skipping-for-new-tv-service/>.

154. *See id.*

155. *Id.*

156. *Id.*

157. Michael Grothaus, *How Interactive Product Placements Could Save Television*, FAST COMPANY, <http://www.fastcolabs.com/3014848/how-interactive-product-placements-could-save-television> (last visited Feb. 22, 2014) (“The advertiser’s goal is not to make money off someone viewing the commercial, it’s to generate brand awareness and future sales from viewers watching television.”).

158. *Id.*

## VI. CONCLUSION

Television networks will face many challenges in battle with the ever-evolving technological world. The legality of commercial-skipping certainly creates an extreme hurdle toward maintaining advertisers and the funds necessary to create quality television programs. The Networks should continue their fight to prevent commercial-skipping technology by revisiting this issue in the courts and by lobbying Congress. However, in the meantime and should those appeals fail, the Networks must be prepared to find creative solutions that protect their industry.