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**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA**

FOX BROADCASTING COMPANY,  
et al.,

Plaintiffs,

v.

DISH NETWORK L.L.C., et al.,

Defendants.

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

**PLAINTIFFS' REPLY IN SUPPORT  
OF MOTION FOR PRELIMINARY  
INJUNCTION AGAINST DISH'S  
NEW 2013 SERVICES**

Hearing Date: April 19, 2013  
Hearing Time: 2:00 p.m.  
Courtroom: 7 (2nd Floor)

**[PUBLIC REDACTED]**

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1 **I. Introduction**

2 This is not a hard case. Fox’s license agreement with Dish says that Dish  
3 cannot retransmit Fox’s live broadcast signal over the Internet, and cannot authorize  
4 anyone else to do so. Dish has blanketed the universe with advertisements and  
5 press releases announcing it is now offering Dish subscribers live broadcast  
6 television over the Internet through the Dish Anywhere website and mobile  
7 application. Dish’s request that the Court “interpret” the license agreement as  
8 somehow allowing Internet retransmission using “Sling technology” must be  
9 rejected. As a matter of law, a contract that expressly prohibits Internet  
10 retransmission cannot be “interpreted” to allow Internet retransmission. Moreover,  
11 Dish’s “interpretation” is also conclusively rebutted by Dish’s own evidence, which  
12 shows that Dish tried to insert language expressly allowing Sling technology into an  
13 early draft, Fox struck it out, and Dish signed the contract anyway. Multiple courts  
14 have held, based on the same facts, that retransmitting broadcast programming over  
15 the Internet without authorization is illegal and irreparably harms the copyright  
16 owner. Dish should be enjoined.

17 Clearly recognizing it has no defense to the actual claim asserted in this case,  
18 Dish changes the subject to the irrelevant question of whether consumers can  
19 legally use a separate device called “Slingbox.” Dish is not a consumer. Dish is a  
20 for-profit service provider trying to attract more subscribers by offering live  
21 programming over the Internet. Dish Anywhere is not a Slingbox. Dish Anywhere  
22 is a service that allows people who subscribe to Dish Network to watch live  
23 broadcast programming on Dish’s website or by using Dish’s mobile application.  
24 A Slingbox is a standalone piece of equipment, owned by less than [REDACTED]  
25 percent of the 289 million Americans who own televisions, that does not require an  
26 ongoing monthly subscription with Dish or any other service provider.

27 Dish argues that Dish Anywhere is just an easier way for consumers to  
28 receive programming over the Internet than with a standalone Slingbox. That does



1 not make it legal. Copyright law distinguishes between what consumers can  
2 lawfully do on their own and what businesses can do for large numbers of  
3 consumers for profit. This is why a consumer can use an antenna to receive over-  
4 the-air broadcasts, but a business needs a license before it can use antennas to  
5 capture over-the-air broadcasts and retransmit them to subscribers. *Fox Television*  
6 *Stations, Inc. v. BarryDriller Content Sys., PLC*, ---F.Supp.2d---, 2012 WL  
7 6784498 at \*5 (C.D. Cal. Dec. 27, 2012) (Wu, J.). And it is why a consumer can  
8 use a VCR to record a movie to watch later, but a business cannot use a VCR to  
9 make thousands of copies of a movie and sell them. *See L.A. News Serv. v. Tullo*,  
10 973 F.2d 791, 797 (9th Cir. 1992).

11 Dish's attempt to convince the Court that all "Sling" technology has  
12 somehow been declared "lawful for use without a license" is a cynical misstatement  
13 of copyright law. Sling technology is just Dish's way of processing a video signal  
14 so it can be transmitted over the Internet. It is not a magical new invention that  
15 allows service providers to deliver live broadcast television over the Internet  
16 without a license. Moreover, Dish's argument is wrong conceptually because there  
17 is no such thing as declaring a technology lawful under copyright law. The relevant  
18 question in a copyright infringement case is whether the defendant is violating one  
19 of the copyright owner's exclusive rights – here, the right to publicly perform the  
20 copyrighted works.

21 Dish also urges the Court to reject settled law and rule that when one million  
22 Dish subscribers log onto Dish Anywhere Thursday night at 8:00 pm to watch  
23 Fox's live broadcast of *Glee* in real time over the Internet, there is no transmission  
24 to the public by Dish – just one million subscribers paying subscription fees to Dish  
25 for the privilege of privately transmitting *Glee* to themselves. Dish's claim that  
26 choosing a show to watch makes the viewer the transmitter of the show is false.  
27 Multiple courts have expressly held that the service provider who *delivers the*  
28 *content* is the transmitter, and whether the viewer initiates the transmission by

1 selecting something to watch is “immaterial.” *Warner Bros. Entm’t, Inc. v. WTV*  
2 *Sys., Inc.*, 824 F. Supp. 2d 1003, 1009-10 (C.D. Cal. 2011); *On Command Video*  
3 *Corp. v. Columbia Pictures Indus.*, 777 F. Supp. 787, 789-90 (N.D. Cal. 1991).  
4 Dish’s proposed rule would eviscerate the public performance right because *every*  
5 *method* of watching video content on a television, computer, or mobile device  
6 requires the viewer to select something to watch – for example, by using a remote  
7 control to select a television program, by using a mouse to select a program to  
8 watch on a PC, or by using a touchscreen to select a program to watch on a  
9 smartphone or tablet.

10 The fact that every Dish subscriber simultaneously watching *Glee* live on  
11 Dish Anywhere receives a stream that Dish first sent through a leased Hopper set-  
12 top box does not change the analysis. There is no viable argument that the  
13 subscribers are “using” the set-top box to “send” the transmissions, since Dish’s  
14 own evidence shows that the subscriber does not have to do anything with the set-  
15 top box to receive live programming over the Internet other than have it physically  
16 present in her home. The location of any particular piece of equipment is irrelevant  
17 to whether a performance is public because, under the plain language of the  
18 Copyright Act, to perform a work “publicly” means to “transmit or otherwise  
19 communicate a performance of the work . . . to the public, by means of *any device*  
20 *or process.*” 17 U.S.C. § 101. Dish’s system for delivering its satellite signal to  
21 subscribers over the Internet by having it first pass through a set-top box to be  
22 encoded is a device or process. Dish cannot use technological gimmickry to  
23 circumvent copyright law and the clear ban on Internet retransmission in its license  
24 agreement with Fox. *See BarryDriller*, 2012 WL 6784498 at \*5.

## 25 **II. Dish Anywhere Breaches The License Agreement.**

### 26 **A. Dish Is Prohibited From Retransmitting Fox’s Signal Over The** 27 **Internet.**

28 In the 2010 Amendment to the parties’ RTC Agreement, Dish broadly agreed

1 it would not distribute Fox’s broadcast signal to Dish subscribers via the *Internet* or  
2 *any other online technology*:

3 [REDACTED]  
4 [REDACTED]  
5 [REDACTED]  
6 [REDACTED]

7 Biard Decl. ¶ 20, Ex. B (emphasis added) (the “No-Internet Clause”). Dish  
8 Anywhere is a subscription-based, Internet streaming service that allows  
9 subscribers to watch Fox network in real time on computers or mobile devices.  
10 Singer Decl., Ex. A. Therefore, Dish is breaching the agreement by  
11 [REDACTED] Fox’s signal over the Internet.

12 The phrase “[REDACTED]  
13 [REDACTED]” cannot be read to mean Internet retransmission with Sling  
14 technology is allowed because such a reading would make the rest of the No-  
15 Internet Clause a nullity. The first sentence of the No-Internet Clause broadly  
16 prohibits Dish from retransmitting or otherwise distributing the Fox network over  
17 the Internet regardless of what technology is used. Sling technology is the sole way  
18 Dish retransmits live programming over the Internet. If the second sentence of the  
19 No-Internet Clause means that Dish is *allowed* to use Sling technology, then the  
20 first sentence is a nullity. *See Namad v. Salomon Inc.*, 74 N.Y.2d 751, 752-53  
21 (1989) (where employment contract said bonuses were “at the discretion of the  
22 management” and also “[s]uch bonuses as are awarded will be consistent with the  
23 customary policy of the company,” plaintiff could not proffer parol evidence to  
24 prove the second sentence meant he was entitled to a fixed bonus amount based on  
25 customary bonuses awarded to other employees, since that reading would render  
26 the first sentence a nullity).

27 Dish claims that the phrase “[REDACTED]  
28 [REDACTED]” somehow “mak[es] clear that Sling was not

1 prohibited.” Dish Br. at 25. But that makes no sense. That phrase is nothing more  
2 than the typical assurance that the agreed-upon contract restriction will not  
3 inadvertently curb any rights that fall outside the restriction. A provision making it  
4 clear that Sling was not prohibited would say “nothing contained herein shall be  
5 deemed to prohibit Sling.” It would *not* say “[REDACTED]  
6 [REDACTED]” because Dish has no “[REDACTED]  
7 [REDACTED]” to retransmit Fox’s signal over the Internet using Sling technology.  
8 *See BarryDriller*, 2012 WL 6784498 at \*4-5.

9 Moreover, because the parties knew about the existence of Sling products yet  
10 *did not include* language exempting Sling technology from the No-Internet clause,  
11 the Court cannot hold that Sling technology is exempt from the prohibition on  
12 Internet retransmission. When the parties “must have foreseen the contingency at  
13 issue” but failed to include the necessary language in the final contract, a court  
14 cannot impose contract terms that the parties conspicuously omitted from final  
15 agreement. *Ashwood Capital, Inc. v. OTG Mgmt., Inc.*, 99 A.D.3d 1, 8 (N.Y. App.  
16 Div. 2012) (where party to an airport concession agreement for “Terminal 6” knew  
17 that Jet Blue would be moving to Terminal 5 but failed to include a specific  
18 reference to any terminal other than Terminal 6, court would not interpret revenue  
19 sharing clause as applying to anywhere other than Terminal 6); *Dysal, Inc. v. Hub*  
20 *Props. Trust*, 92 A.D.3d 826, 827 (N.Y. App. Div. 2012) (court will not imply a  
21 term where the circumstances surrounding the formation of the contract show that  
22 the parties must have foreseen the contingency at issue).

23 Finally, it is well settled that copyright licenses must be construed narrowly  
24 and “are assumed to prohibit any use not authorized.” *S.O.S., Inc. v. Payday, Inc.*,  
25 886 F.2d 1081, 1088 (9th Cir. 1989); *PlayMedia Sys., Inc. v. Am. Online, Inc.*, 171  
26 F.Supp.2d 1094, 1099 (C.D. Cal. 2001) (“A copyright license must be interpreted  
27 narrowly”). Dish is asking the Court to turn this rule on its head and create a  
28 presumption that any use not specifically mentioned is authorized by virtue of the

1 contract's silence.

2 **B. The Court Must Disregard Dish's Parol Evidence.**

3 Dish asks the Court to find that the No-Internet provision actually allows  
4 Internet retransmission using Sling technology, even though the contract does not  
5 say that, based on supposed oral discussions between the parties during their early  
6 negotiations, draft agreements, and the undisclosed, subjective intent of Dish's  
7 chief negotiator. Dish Br. at 25-26; [REDACTED]. But extrinsic testimony and  
8 documents cannot be used to change the meaning of an unambiguous, integrated  
9 contract. "Parol evidence is inadmissible if a contract is clear on its face and  
10 sufficient alone to divine the intent of the parties." *Namad*, 74 N.Y.2d at 753; *see*  
11 *also Trustees of S. Cal. IBEW-NECA Pension Trust Fund v. Flores*, 519 F.3d 1045,  
12 1048 (9th Cir. 2008) (reversing district court for considering parol evidence that  
13 contradicted the unambiguous contract).<sup>1</sup>

14 A contract is unambiguous if, on the face of the contract, it "is reasonably  
15 susceptible of only one interpretation." *Kemelhor v. Penthouse Int'l, Ltd.*, 689 F.  
16 Supp. 205, 212-213 (S.D.N.Y. 1988). Here, the No-Internet Clause is reasonably  
17 susceptible to only one interpretation: Dish cannot retransmit or otherwise  
18 distribute Fox's broadcast signal over the Internet.

19 Because ambiguity is determined by looking at the contract language only,  
20 Dish cannot create an ambiguity by introducing parol evidence that it claims  
21 supports the argument that the second sentence of the No-Internet Clause was really  
22 a veiled reference to Sling technology. *Ashwood*, 99 A.D.3d at 9 (the court does  
23 not consider parol evidence in determining whether agreement is ambiguous).  
24 Likewise, Dish cannot create an ambiguity merely by arguing that the contract  
25

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26 <sup>1</sup> The parol evidence rule is a substantive issue of state contract law, not a rule of  
27 evidence governed by federal law. *See, e.g., Jinro Am. Inc. v. Secure Investments,*  
28 *Inc.*, 266 F.3d 993, 999 (9th Cir. 2001). The license agreement is expressly  
governed by New York law.

1 means something other than what it says. *Kemelhor*, 689 F. Supp. at 212-13 (A  
2 contract term is not ambiguous “merely because the parties ascribe varying  
3 meanings to a specific provision.”).

4 Furthermore, both the RTC Agreement and the 2010 Amendment contain  
5 broad merger and no-oral-modification clauses confirming that the parties’ signed  
6 contract “

7 [REDACTED]  
8 [REDACTED].” Biard Decl., Ex. B at 31; Ex.  
9 A at 19. This “as a matter of law bars any claim based on an alleged intent that the  
10 parties failed to express in writing.” *Ashwood*, 99 A.D.3d at 9.

11 **C. Dish’s Inadmissible Parol Evidence Proves The Parties Did Not**  
12 **Intend To Exempt Sling From The No-Internet Clause.**

13 Even if the Court were to find the No-Internet Clause ambiguous, Fox is still  
14 likely to prevail on its contract claim. To begin with, “ambiguities in contracts  
15 must be construed against the drafter.” *Guardian Life Ins. Co. v. Schaefer*, 70  
16 N.Y.2d 888, 890 (1987); *Uribe v. Merchants Bank*, 91 N.Y.2d 336, 397 (1998).  
17 Here, because Dish admits drafting the second sentence of the No-Internet Clause,  
18 which it now claims should be read as allowing Sling technology, Shull Decl. ¶ 16,  
19 any questions about the meaning of the language must be resolved in Fox’s favor.

20 In any event, the parol evidence submitted by Dish confirms that the contract  
21 prohibits Dish Anywhere. [REDACTED]

22 [REDACTED]  
23 [REDACTED]  
24 [REDACTED]  
25 Shull Decl. ¶¶ 22-23. The written correspondence and draft  
26 agreements exchanged between the parties conclusively rebut Mr. Shull’s  
27 testimony. On October 28, 2010, Dish sought to include the following language in  
28 the contract: “[REDACTED]

1 [REDACTED].” Shull Decl., Ex. 7 at 198.

2 In other words, Dish wanted to add the exact language it now asks the Court to read  
3 into the agreement. [REDACTED]

4 [REDACTED]  
5 [REDACTED]  
6 [REDACTED]

7 In the end, the final agreement did *not*  
8 contain Dish’s requested language permitting Internet retransmissions via Sling.  
9 *Id.*, Ex. 2 at 58. Therefore, based on this evidence alone, the parties clearly  
10 manifested that Sling was *not* authorized by the 2010 Amendment to the RTC  
11 Agreement. *See Dysal*, 92 A.D.3d at 827; *Namad*, 74 N.Y.2d at 753.

12 Dish’s reliance on the parties’ joint press release announcing the 2010  
13 Amendment is also misleading and irrelevant. First, the actual “joint” statement  
14 says nothing about Dish Anywhere or Dish’s Sling-enabled set top box. The  
15 reference to Dish’s DVR with built-in Sling technology appears in the *endnote* after  
16 the parties’ joint statement under the header “About DISH Network.” [REDACTED]  
17 [REDACTED]. Second, Dish’s decision to promote a Sling-enabled DVR in a press  
18 release does not change the fact that the parties’ contract prohibits Dish from  
19 offering the Fox network over the Internet. To the extent Dish wanted to promote  
20 its Internet streaming services for *non*-Fox networks, Fox was not in a position to  
21 prevent Dish from making those statements.

22 Likewise, the internal Fox email Dish trumpets (Hurst Decl., Ex. 29) is  
23 irrelevant both because it is merely commentary between executives who are not  
24 lawyers, and because the email *predates* the 2010 Amendment so therefore  
25 obviously cannot be an admission that the 2010 Amendment allows Internet  
26 retransmission. The email also makes clear that Fox intended to address Sling in  
27 “[REDACTED]” – i.e., the 2010 Amendment – which it did by banning Internet  
28 retransmission. *See id.*

Finally, it is irrelevant that Mr. Shull now claims the parties’ 2010



1 Amendment was [REDACTED]  
2 [REDACTED]” or that Dish would never have agreed to it “[REDACTED]  
3 [REDACTED]” Shull Decl. ¶ 22. In determining the parties’ intent,  
4 the court “looks to the objective meaning of contract language, not the parties’  
5 individual subjective understanding of it.” *Ashwood*, 99 A.D.3d at 6.

6 **D. Even Assuming Dish’s Subscribers Are Doing the Transmitting,**  
7 **Dish Is Still Breaching The 2002 RTC Agreement.**

8 Dish’s claim that its subscribers are really the ones retransmitting Fox’s  
9 signal over the Internet is a contrivance to circumvent the clear ban on Internet  
10 retransmission in the 2010 Amendment. But even if the Court accepted this  
11 argument, Dish still loses because it is also contractually prohibited from  
12 authorizing its subscribers to retransmit Fox’s signal.

13 The 2002 RTC Agreement states that Dish “shall not, for pay or otherwise,  
14 . . . *authorize* the . . . retransmission of any portion of any [Fox] Station’s Analog  
15 Signal without prior written permission.” Biard Decl., Ex. A at 16. Dish does not  
16 deny that it leases the Hopper with Sling to its subscribers and that it offers live  
17 Internet streaming of the Fox network only to current, paying subscribers. Singer  
18 Decl., Ex. G at 27. Dish also admits it provides the software and other services that  
19 are needed each time a Dish subscriber uses the Internet to watch Fox network.  
20 Horowitz Decl. ¶ 9 (noting that Sling Media [owned by Dish] provides the routing  
21 information each time a subscriber uses Dish Anywhere to watch Fox network  
22 online). Dish has been heavily marketing and promoting Dish Anywhere to current  
23 and prospective Dish Network subscribers. Motion at 5-8. Therefore, to the extent  
24 Dish Anywhere somehow involves subscribers transmitting Fox’s signal to  
25 themselves, Dish is obviously “authorizing” these activities.

26 Dish tries to escape the clear restrictions of the RTC Agreement by inventing  
27 peculiar, tortured definitions for the words “authorize” and “retransmission.” Dish  
28 Br. at 24. Dish claims the word “authorize” requires a formal, legal approval with



1 an express grant of rights. *Id.* That is nonsense. “It is incumbent on the court,  
2 when interpreting a contract, to give the words and phrases contained therein their  
3 ordinary, plain meaning.” *Wallace v. 600 Partners Co.*, 205 A.D.2d 202, 208 (N.Y.  
4 App. Div. 1994); *Uribe*, 91 N.Y.2d at 341 (intent of contract language should be  
5 based on “common speech”). Here, the parties used the word “authorize”  
6 throughout the contract to mean “allow,” plain and simple. For example, the RTC  
7 Agreement gives Dish the right to “[REDACTED]  
8 [REDACTED].”

9 Biard Decl., Ex. B at 28 (italics added). Dish also defined a Fox Station Subscriber  
10 as someone who is “[REDACTED]” the Fox Network on TV.  
11 Biard Decl., Ex. B at 36 (italics added). Dish “[REDACTED]” its subscribers to  
12 receive Fox television signals on their TV sets is no different than Dish  
13 “[REDACTED]” its subscribers to watch those programs over the Internet. Neither  
14 involves a formal, express grant of rights to subscribers.

15 Dish also claims the word “retransmission” can only mean the retransmission  
16 of Fox’s TV signal from a satellite to a subscriber’s set-top box in their home. Dish  
17 Br. at 24. But the language Dish cites is not a *definition* of retransmission – it is a  
18 description of the only way Dish is allowed to retransmit. Shull Decl., Ex. 1, p. 12.  
19 The contract shows the parties understood that “retransmission” can occur through  
20 *other* means, including the Internet. Section 3(f) of the RTC Agreement states “[REDACTED]  
21 [REDACTED]  
22 [REDACTED]  
23 [REDACTED]  
24 [REDACTED]

25 [REDACTED] Biard Decl., Ex. A at 14  
26 (emphasis added). Therefore, in 2002, the parties clearly understood that  
27 retransmission can occur through numerous other “[REDACTED].”  
28

Then, in the 2010 Amendment to the contract, the parties expressly

1 acknowledged that “retransmission” can occur over the Internet because the  
2 contract states that “[REDACTED]  
3 [REDACTED]  
4 [REDACTED].” Biard Decl., Ex. B at 37. Accordingly, even if Dish claims that its  
5 subscribers are the ones putting Fox’s signals on the Internet, this conduct is a  
6 “[REDACTED]” that has been “[REDACTED]” – even encouraged – by Dish. As such,  
7 it breaches the contract and should be enjoined. Biard Decl., Ex. A at 16.

### 8 **III. Retransmitting Fox’s Live Broadcast Signal Over The Internet With** 9 **Dish Anywhere Is Copyright Infringement.**

#### 10 **A. Sling Technology Has Never Been “Declared Lawful.”**

11 Even if it were not expressly prohibited by the license agreement, Dish  
12 Anywhere would still be illegal because it is an unauthorized public performance  
13 that infringes Fox’s copyrights in its programming. All of Dish’s copyright  
14 defenses rely on misstatements about the law and are therefore meritless.

15 Dish claims that “courts and the U.S. Copyright Office have declared Sling  
16 technology lawful for use without a license.” Dish Br. at 10. This is not true, and  
17 nothing cited by Dish says that. The *Diamond Multimedia* case does not “declare  
18 Sling technology lawful for use without a license.” That case had nothing to do  
19 with Sling technology or copyright infringement. Instead, it involved the question  
20 of whether a portable music player marketed in the late 1990s violated a different  
21 statute not at issue here which required certain types of recording equipment to  
22 employ an electronic copyright management system. 180 F.3d 1072, 1075 (9th Cir.  
23 1999). The language Dish relies on is dicta, not involving Sling, in which the Court  
24 indicated that copying a music file to render it portable – what the Court referred to  
25 as “space-shift[ing] – was a noncommercial, personal use. *Id.* at 1079. Sling  
26 technology does not involve copying files to make them portable. Dish Br. at 4  
27 (“DISH Anywhere/Sling does not make or store copies of broadcast shows.”).

28 The *Aereo* case similarly did not “declare Sling technology lawful for use

1 without a license.” *Aereo* involved a service that retransmitted broadcast television  
2 over the Internet using miniaturized antennas. The district court assumed in dicta,  
3 without any analysis, that a consumer could use a standalone Slingbox to view free  
4 over-the-air broadcasts over the Internet. *ABC, Inc. v. Aereo, Inc.*, 874 F. Supp. 2d  
5 373, 386 (S.D.N.Y. 2012). Likewise, the hypothetical question the Second Circuit  
6 asked Fox’s counsel in the *Aereo* case was obviously directed to a standalone  
7 Slingbox, not the subscription-based Dish Anywhere service. This is beyond  
8 dispute because Dish Anywhere had not even been announced yet when the *Aereo*  
9 appeal was argued in November 2012, and the Second Circuit’s opinion plainly  
10 references “Slingboxes” not Dish Anywhere.<sup>2</sup> *WNET Thirteen v. Aereo, Inc.*, ---  
11 F.3d---, 2013 WL 1285591 at \*1 n.2 (2d Cir. April 1, 2013).

12 Finally, the Copyright Office did not “declare Sling technology lawful for  
13 use without a license.” The section of the SHVERA Report quoted by Dish  
14 explains why the Copyright Office opposes a compulsory statutory license for  
15 Internet retransmissions. Hurst Decl., Ex. 2, pp. 218-220. A statutory license is an  
16 exception to copyright law wherein a third party can use copyrighted works without  
17 the owner’s consent in exchange for paying a royalty set by law. *Id.*, Ex. 2, p. 33.  
18 The Report used the Slingbox as an example of a way that consumers receive  
19 television over the Internet without the need for an additional *statutory* license. *Id.*  
20 Moreover, it is clear from the report that the Copyright Office was referring  
21 specifically to a standalone Slingbox, not a subscription-based Internet  
22 retransmission service powered by “Sling technology.” *Id.*, Ex. 2, p. 60.

23  
24 \_\_\_\_\_  
25 <sup>2</sup> Contrary to Dish’s insinuation, a response to a hypothetical question during  
26 argument in a different lawsuit about a topic that is not at issue in that lawsuit is  
27 not a judicial admission. See *McCaskill v. SCI Mgmt. Corp.*, 298 F.3d 677, 682-  
28 83 (7th Cir. 2002) (attorney’s brief response to a hypothetical question at oral  
argument was not a judicial admission because it did not involve a “deliberate,  
clear, and unambiguous statement evincing an intentional waiver” of the  
“arguments made in [the party’s] brief”).

1 If anything, the SHVERA Report actually rebuts Dish’s argument because  
2 the Copyright Office found that “forcing content owners to make their works  
3 available for Internet transmission through a compulsory statutory license would  
4 effectively wrest control away from program producers who make significant  
5 investments in content and who power the creative engine in the U.S. economy.”  
6 Hurst Decl., Ex. 2, p. 220. Dish’s reading of the Report as “endorsing” Sling  
7 technology as a way for service providers to offer subscription-based access to  
8 television over the Internet without having to pay for a copyright license is wrong.

9 **B. Choosing Something To Watch Does Not Make The Viewer The**  
10 **Transmitter.**

11 Dish claims it is not retransmitting Fox’s signal over the Internet, asserting  
12 that “[s]ince the end-user decides whether to access any particular program, it is  
13 only that individual user who is in a position to be the direct infringer of the public  
14 performance right.” Dish Br. at 13. This is wrong. No court has ever held that  
15 choosing a program to watch makes the viewer the transmitter under copyright law.  
16 To the contrary, every court that has considered this issue has squarely held that the  
17 service provider that delivers the content is the transmitter.

18 *On Command Video Corporation v. Columbia Pictures Indus.*, 777 F. Supp.  
19 787 (N.D. Cal. 1991) is on point. *On Command* involved a system in which a bank  
20 of VCRs, each containing a videotape of a different movie, was connected by wire  
21 to hotel guest rooms. *Id.* at 788. When a hotel guest turned her television on, she  
22 would see a list of available movies on the screen and could use her remote control  
23 to select one to watch. *Id.* When a guest selected a movie, the VCR containing that  
24 movie would start playing, and the video would be transmitted over the wire to the  
25 guest’s television set. *Id.*

26 Like Dish here, *On Command* argued that its system was not transmitting the  
27 movies. It claimed the hotel guests were simply renting the movies electronically.  
28 *On Command*, 777 F. Supp. at 789. The court found this argument to be “without

1 merit,” holding that:

2 On Command transmits movie performances directly under the  
3 language of the definition. The system ‘communicates’ the motion  
4 picture ‘images and sounds’ by a ‘device or process’ – the equipment  
5 and wiring network – from a central console in the hotel to individual  
6 guest rooms, where the images and sounds are received ‘beyond the  
7 place from which they are sent.’ . . . *The fact that the hotel guests  
8 initiate this transmission by turning on the television and choosing a  
9 video is immaterial.*

10 *Id.* at 789-90 (emphasis added).

11 *Warner Bros. Entm’t v. WTV Systems, Inc.*, 824 F. Supp. 2d 1003 (C.D. Cal.  
12 2011) is also directly on point. *WTV* involved an Internet service called Zediva  
13 that allowed customers to watch movies streamed over the Internet. Like Dish  
14 here, Zediva argued that its system was not transmitting the movies. *Id.* at 1009.  
15 Judge Walter rejected this argument, holding that the “Zediva service transmits  
16 performances of Plaintiffs’ Copyrighted Works under the language of the statute . .  
17 . . As in *On Command*, the fact that Zediva’s customers initiate the transmission by  
18 turning on their computers and choosing which of Plaintiffs’ Copyrighted Works  
19 they wish to view is immaterial.” *Id.* at 1009-10 (emphasis added).

20 As in *On Command* and *WTV*, Dish is transmitting performances of Fox’s  
21 copyrighted programs under the plain language of the statute. Dish communicates  
22 the images and sounds of Fox’s copyrighted programs through the use of a “device  
23 or process” – Dish’s satellite service, the Sling encoder chip it placed in the set-top  
24 boxes it leased to its subscribers, Dish’s Sling Media server, and Dish’s website  
25 and/or mobile applications. The images and sounds are received beyond the place  
26 from which they were sent – they are sent from Dish and received on subscribers’  
27 computers or mobile devices. As in *On Command* and *WTV*, it is immaterial that  
28 subscribers must choose a show to watch.

Dish argues that *On Command* and *WTV* are distinguishable because in those

1 cases the defendant “controlled either the transmission or the copy that was  
2 transmitted.” Dish Br. at 14. Dish is wrong. First, neither *On Command* nor *WTV*  
3 turned on the issue of who controlled the transmission. Both courts acknowledged  
4 that the *viewer* initiated the transmission (see quotations above), but still found that  
5 the service provider who delivered the content at the viewer’s request was  
6 transmitting it under the plain language of the statute. Second, just as the  
7 transmissions in *On Command* and *WTV* involved a common source (copies  
8 controlled by the service provider), the transmissions of live broadcasts that Dish  
9 subscribers receive on Dish Anywhere all have a common, centralized source  
10 (Dish’s satellite signal, which is controlled by Dish).

11 **C. The Cases Dish Cites Are Irrelevant.**

12 Dish’s citations are baffling and provide no support whatsoever for the  
13 proposition that selecting a program to watch makes the viewer the transmitter. For  
14 example, Dish cites *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir.  
15 2007) for the proposition that if “the end user decides whether to access a particular  
16 program, it is only that individual user who is in a position to be the direct infringer  
17 of the public performance right.” Dish Br. at 13. *Perfect 10* does not say anything  
18 like that at all. *Perfect 10* involved a claim that Google infringed the display right  
19 by providing links to websites containing the plaintiff’s copyrighted photographs.  
20 Infringement of the display right requires the defendant to possess and show to the  
21 public a fixed copy of the copyrighted work. *Id.* at 1160. A link is just a line of  
22 text giving the user’s computer directions to another computer where the image is  
23 stored. *Id.* Because Google was only providing links to computers that stored the  
24 images, and Google undisputedly did not have copies of the images on its own  
25 computers, the Ninth Circuit held that the display right was not infringed because  
26 Google did not have, and therefore could not be displaying, fixed copies of the  
27 plaintiff’s photographs. *Id.* at 1161. *Perfect 10* had nothing to do with the  
28 performance right or the question of whether watching a program online makes the



1 viewer the transmitter of the program.

2 Dish cites *Cablevision* for the proposition that deciding what to watch makes  
3 the viewer a transmitter. But in *Cablevision*, the Second Circuit *expressly declined*  
4 to hold that selecting a program to watch makes the viewer the transmitter. See  
5 *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121, 134 (2d Cir.  
6 2008). *Cablevision* involved both reproduction and performance right claims. As  
7 the Court knows, in analyzing the reproduction right claim, the *Cablevision* court  
8 held that the viewer who pressed the button to record a show “made” that copy, not  
9 *Cablevision*. *Cablevision* tried the same argument with respect to the performance  
10 right, claiming the remote DVR user who pressed the button to play back the  
11 recordings made the transmissions from the remote DVR server to the user’s  
12 television. *Id.* The Court declined to extend its volitional conduct analysis to the  
13 plaintiffs’ performance right claim. *Id.* (“[O]ur conclusion . . . that the customer,  
14 not *Cablevision* ‘does’ the copying does *not* dictate a parallel conclusion that the  
15 customer . . . ‘performs’ the copyrighted work.”) (emphasis added).

16 *UMG Recordings, Inc. v. Veoh Networks*, ---F.3d---, 2013 WL 1092793 (9th  
17 Cir. 2013) is also inapposite. *UMG* is about whether the defendant’s service fell  
18 within the DMCA’s safe harbor provision (not applicable here). It was not about  
19 whether watching a program online makes the viewer the transmitter of the  
20 program. To the extent it is relevant at all, *UMG* rebuts Dish’s argument that  
21 selecting something to watch makes the viewer the transmitter because the *UMG*  
22 court assumed that when a person clicks a link to select a website to view, the web  
23 hosting service – *not* the person who clicked the link – transmits the content of the  
24 website to the person’s computer. *Id.* at \*8 (“when [an] Internet user wants to  
25 access the website by clicking a link or entering the URL, all the website’s relevant  
26 content is transmitted to the user’s computer . . . . To carry out their function of  
27 making websites available to Internet users, web hosting services thus routinely  
28 copy content and transmit it to Internet users.”).

1 Dish's citation to *Columbia Pictures Industries, Inc. v. Professional Real*  
2 *Estate Investors*, 866 F.2d 278 (9th Cir. 1989) is equally confounding. That case  
3 held renting videos to hotel guests was not a public performance under the Transmit  
4 Clause, because there was no performance being received beyond the place from  
5 which it was sent. *Id.* at 282. Here, there obviously is a performance being  
6 received beyond the place from which it was sent: Fox's live broadcast signal is  
7 sent from Dish's satellite system to its subscribers' computers and mobile devices.

8 Finally, *CoStar Grp., Inc. v. LoopNet, Inc.*, 373 F.3d 544 (4th Cir. 2004)  
9 holds that to be directly liable, a defendant must be an active participant in the  
10 infringement and not merely a passive conduit like a website where people post  
11 pictures or a copy machine that is used by others to infringe.<sup>3</sup> Dish is obviously not  
12 a passive conduit here since it provides the signal that is transmitted and has  
13 specifically designed websites and mobile applications the whole purpose of which  
14 is to allow viewers to access Dish's signal over the Internet and no others. *See*  
15 *Capitol Records, LLC v. ReDigi Inc.*, ---F. Supp. 2d---, 2013 WL 1286134 at \*12  
16 (S.D.N.Y. March 30, 2013) (digital music resale service that automatically copied  
17 and distributed copyrighted music was directly liable because it was not merely a  
18 passive provider of space in which infringing activities happened to occur.)

19 **D. Dish's Proposed Rule Would Exempt All Unauthorized Television**  
20 **And Internet Transmissions From The Copyright Act.**

21 *All* television and Internet viewing requires the viewer to select something to  
22 watch. With television, the viewer typically selects the program from an on-screen  
23 program guide using a remote control. Under Dish's proposed rule, the viewer who  
24 selects the program would be the transmitter, not the cable or satellite service that  
25 delivers the programming. Thus, no public performance would occur when a cable

26 \_\_\_\_\_  
27 <sup>3</sup> Later decisions confirm that *CoStar's* rule is limited to Internet service providers,  
28 which are services that provide access to the Internet. *E.g.*, *Society of Holy*  
*Transfiguration Monastery, Inc. v. Gregory*, 689 F.3d 29, 58 n. 19 (1st Cir. 2012).



1 or satellite company retransmits a broadcast signal – the viewers would simply be  
2 privately transmitting the programs to themselves. This is exactly the opposite of  
3 what Congress intended when it enacted the Copyright Act in 1976. As recognized  
4 by the Supreme Court, one of Congress’s express goals was to make clear that  
5 retransmitting television programs without a license is copyright infringement.  
6 *Capital Cities Cable Inc. v. Crisp*, 467 U.S. 691, 709-710 (1984) (“In revising the  
7 Copyright Act . . . Congress concluded that cable operators should be required to  
8 pay royalties to the owners of copyrighted programs retransmitted by their systems  
9 on pain of liability for copyright infringement.”).

10 It does not help Dish to say that this is different because the subscriber also  
11 has to install Dish’s mobile application and Dish’s video player, and/or log into  
12 Dish’s website. Every Internet streaming service requires the customer to navigate  
13 to a website or click open a mobile application, download video player software if it  
14 is not already installed, and select something to watch. If performing these tasks  
15 makes the viewer the transmitter, then Internet retransmissions are always private  
16 performances and are exempt from copyright law. Yet it is beyond dispute that  
17 streaming broadcast television to members of the public over the Internet is a public  
18 performance. *E.g.*, *WPIX, Inc. v. ivi, Inc.*, 691 F.3d 275, 277-78 (2d Cir. 2012)  
19 (undisputed that ivi was publicly performing copyrighted television programs when  
20 it streamed those programs over the Internet to subscribers who had downloaded  
21 ivi’s “TV Player” on their computer and paid a monthly subscription fee);  
22 *Twentieth Century Fox Film Corp. v. iCraveTV*, 2000 WL 255989, at \*7 (W.D. Pa.  
23 Feb. 8, 2000) (undisputed that iCrave was publicly performing copyrighted  
24 television programs when it streamed them over the Internet to subscribers).

25 **E. Even Under Dish’s “Most Significant And Important Cause” Test,**  
26 **Dish Is The Transmitter.**

27 Even if the Court were to view the question as being whether the subscriber  
28 or Dish is “the most significant and important cause” of the Dish Anywhere

1 transmissions, the facts here lead unequivocally to the conclusion that Dish is “the  
2 most significant and important cause” of the Dish Anywhere transmissions.

3 First, Dish is the source of the Dish Anywhere transmissions. When a  
4 subscriber watches live broadcast television over the Internet on Dish Anywhere,  
5 she is receiving programming from Dish that Dish has routed through her set-top  
6 box. *See* Kummer Decl., ¶¶ 18-20; *see also* Singer Decl., Ex A. Although Dish  
7 characterizes the stream from the set-top box to the subscriber’s PC or mobile  
8 device as a second transmission made by the user, no facts support that. None of  
9 the declarations submitted by Dish say that when live programming is transmitted  
10 over the Internet the signal is somehow broken into two separate transmissions.  
11 Rather, they say that the “Sling hardware” (i.e., a computer chip in the set-top box)  
12 receives the video signal, encodes it, and sends it over the Internet. Kummer Decl.,  
13 ¶¶ 17-18. Moreover, even if there were two transmissions, the subscriber does not  
14 have to do anything to the set-top box to “send” the second transmission; her entire  
15 role is to pick a show and watch it. Supp. Singer Decl., Ex. A; Horowitz Decl.,  
16 ¶ 32. And as explained above, selecting something to watch does not make the  
17 subscriber the transmitter.

18 Second, although Dish’s jargon-filled expert declaration appears designed to  
19 try to trick the Court into believing there is a complicated, subscriber-driven  
20 activation process, Dish’s Quick Start Guide makes clear that the subscriber need  
21 only download Dish’s mobile application or log onto [www.dishanywhere.com](http://www.dishanywhere.com), and  
22 then she can watch live television over the Internet “with one click.” Supp. Singer  
23 Decl., Ex. A. Dish does everything else. Third, Dish’s own expert admits Dish, not  
24 the consumer, initiates the Internet connection between the Hopper and the  
25 subscriber’s computer. Horowitz Decl., ¶ 9 (“When the subscriber launches the  
26 application on the remote device, *Sling Media provides the routing information (IP*  
27 *address) to initiate an Internet connection directly between the home Hopper and*  
28 *the remote client.*”) (emphasis added). Because Dish is the source of the Dish

1 Anywhere transmissions, the transmissions can only be viewed on Dish’s website  
2 or mobile application, the subscriber does nothing to “send” the transmissions, and  
3 the transmissions cannot be sent without Dish initiating the Internet connection,  
4 Dish is “the most significant and important cause” of the transmissions.

5 **F. The Dish Anywhere Transmissions Are To The Public.**

6 Dish’s argument that under the Transmit Clause, a performance can only be  
7 public “if the technology can make a multi-party transmission,” Dish Br. at 15, is  
8 wrong for a whole laundry list of reasons. First, the Transmit Clause does not say  
9 that a performance can only be to the public if it is made with a technology that can  
10 make multi-party transmissions. The Transmit Clause says that to perform a work  
11 publicly is “to transmit or otherwise communicate a performance or display of the  
12 work . . . to the public, *by means of any device or process*, whether the members of  
13 the public capable of receiving the performance . . . receive it in the same place or  
14 in separate places and at the same time or at different times.” 17 U.S.C. § 101  
15 (emphasis added). A “device or process” is “one now known or later developed.”  
16 *Id.* If Congress meant to limit the definition of public performance to performances  
17 made via a “technology that can make multi-party transmissions,” then the statute  
18 would say that – but it doesn’t. *See Columbia Pictures*, 866 F.2d at 200 n.4  
19 (“Unless otherwise indicated, we assume that the legislative will is expressed by the  
20 ordinary meaning of the words used in the statute. . . . Consequently, the plain  
21 language is regarded as conclusive.”).

22 Second, limiting public performances to those where a single transmission  
23 reaches multiple recipients would require ignoring the Transmit Clause’s  
24 instruction that a performance can be to the public even if it is received in separate  
25 places or at different times. *See* 17 U.S.C. § 101. There is no such thing as two  
26 people receiving the same transmission at different times. When two people  
27 receive a transmission at different times, they are necessarily receiving *different*  
28 transmissions. *See* Jane C. Ginsburg, *Recent Developments in US Copyright Law* –

1 *Part II, Caselaw: Exclusive Rights on the Ebb?*, at 26, *Revue Internationale du*  
2 *Droit d’Auteur* (Jan. 2009) (“[I]t is not possible to transmit a performance ‘created  
3 by the act of transmission’ to members of the public ‘at different times.’ While such  
4 a ‘performance’ could be transmitted simultaneously to differently located  
5 recipients, *recipients differently situated in time cannot receive the same*  
6 *transmission.*”) (second emphasis added).<sup>4</sup> The fact that the statute says a  
7 performance can be to the public even if the people capable of receiving the  
8 performance receive it at different times confirms that Congress envisioned  
9 multiple transmissions of the same work as being a public performance. *See id.*

10 Third, Dish’s argument is the same one Judge Wu rejected just three months  
11 ago in *BarryDriller*. In that case, the defendant claimed its unauthorized Internet  
12 retransmission service was not publicly performing any programming when  
13 retransmitting it live over the Internet because each subscriber received a unique  
14 stream that went only to her private computer or mobile device. Judge Wu held  
15 that this argument was based on a misreading of the Copyright Act, explaining that  
16 “the statute provides an exclusive right to transmit a performance publicly, *but does*  
17 *not by its express terms require that two members of the public receive the*  
18 *performance from the same transmission.*” 2012 WL 6784498 at \*4 (emphasis  
19 added). To the extent Dish is relying on *Cablevision’s* interpretation of the  
20 Transmit Clause, Judge Wu’s opinion in *BarryDriller* contains a thoughtful  
21 explanation of why *Cablevision’s* analysis was incorrect. Numerous commentators  
22 agree with Judge Wu that the *Cablevision* court misread the Transmit Clause. *See,*  
23 *e.g., Ginsburg, supra*, at 26-27; 2 Goldstein on Copyright §7.7.2.2 (3d ed.)

24 Fourth, in numerous cases, courts have found a public performance even  
25 though the work was delivered to members of the public via separate transmissions.  
26 *See, e.g., BarryDriller*, 2012 WL 6784498 at \*3-5 (separate transmissions of live  
27

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28 <sup>4</sup> [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1305270](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1305270)

1 broadcast programming captured by separate antennas and sent over the Internet in  
2 separate streams was a public performance); *Columbia Pictures Indus., Inc. v. Redd*  
3 *Horne*, 749 F.2d 154, 159 (3d Cir. 1984) (separate transmissions of movies to  
4 private viewing booths was a public performance); *WTV*, 824 F. Supp. 2d at 1009-  
5 1010 (separate transmissions of movies over the Internet to viewers' computers was  
6 a public performance); *On Command*, 777 F. Supp. at 789-90 (separate  
7 transmissions of movies to separate hotel rooms was a public performance).

8 Fifth, it cannot be the law that performances of the same work delivered the  
9 public via unicast transmissions can never be public performances because that  
10 would mean no public performance could ever occur over the Internet. Whenever  
11 video is streamed over the Internet, the transmission is unicast. Even when multiple  
12 people watch the same video content over the Internet at the same time, each  
13 viewers' device receives a *separate* unicast stream. 29 Rutgers Computer & Tech.  
14 L.J. 423, 432 (2003) ("For instance, unicast streaming, the most common method of  
15 streaming media, requires 'streaming server[s] [to] establish[] . . . separate unicast  
16 streams for each client requesting access to the media.>"). Yet it is beyond dispute  
17 that delivering video content to members of the public over the Internet is a public  
18 performance. *E.g.*, *ivi*, 691 F.3d at 278; *BarryDriller*, 2012 WL 6784498 at \*3-5;  
19 *WTV*, 824 F. Supp. 2d at 1009-10; *iCraveTV*, 2000 WL 255989, at \*7.

20 Sixth, to the extent Dish is relying on *Cablevision's* interpretation of the  
21 Transmit Clause, Dish's argument fails on its own terms because *Cablevision's*  
22 holding that the remote DVR transmissions were private turned on the fact that the  
23 separate transmissions were each made from unique, subscriber-made copies. 536  
24 F.3d at 139. Dish admits that Dish Anywhere does not make any copies. Dish Br.  
25 at 4 ("Dish Anywhere/Sling does not make or store copies of broadcast shows"). In  
26 *Aereo*, the Second Circuit again confirmed that its analysis turned on the existence  
27 of unique copies, and held that when a service provider makes multiple  
28 transmissions of a program from the same copy, that is a public performance.

1 *Aereo*, 2013 WL 1285591 at \*8. Here, unlike in *Cablevision* and *Aereo*, when Dish  
2 subscribers watch live television over the Internet on Dish Anywhere, they are not  
3 watching transmissions from separate copies. They are watching transmissions  
4 from a common source, i.e., the satellite signal from Dish.

5 Finally, Dish wrongly suggests that the Dish Anywhere transmissions are not  
6 to the public because they are available only to Dish subscribers and not “the entire  
7 entertainment consuming public.” Dish Br. at 15. Dish subscribers are members of  
8 the public under the Transmit Clause. *WGN Cont’l Broad. Co. v. United Video,*  
9 *Inc.*, 693 F.2d 622, 625 (7th Cir. 1982); *BarryDriller*, 2012 WL 6784498 at \*4.

10 **G. Dish Cannot Stand In Its Subscribers’ Shoes To Assert Fair Use.**

11 Dish argues that if it is legal for consumers to use Slingboxes, it must also be  
12 legal for Dish to retransmit Fox’s programming over the Internet to its subscribers  
13 using “Sling technology.” As Dish pitches it, Dish Anywhere merely provides  
14 people who cannot figure out how to use a Slingbox a convenient way to enjoy “the  
15 same fair use rights” as the “technologically gifted.” Dish Br. at 19. The “ease”  
16 and “convenience” of Dish Anywhere compared to a Slingbox is not relevant. It is  
17 also easier and more convenient to buy a pirated videotape than it is to wait for a  
18 movie to be shown on television and record it with a VCR. That does not make  
19 pirating movies legal.

20 Moreover, Dish has cited no cases holding that using a Slingbox or watching  
21 television on a computer or mobile device is fair use. But even setting that aside,  
22 Dish’s fair use argument fails out of the box because it is entirely premised on the  
23 argument that the subscriber’s ultimate use – as opposed to Dish’s commercial use  
24 – of the program is fair. Dish Br. at 18. This is wrong as a matter of settled Ninth  
25 Circuit law. A commercial service provider is not entitled to insert itself as a  
26 middleman and make a profit selling access to copyrighted works without paying  
27 royalties to the copyright owner. Whether or not the customer’s ultimate use of the  
28 work would be fair is irrelevant. This principle has been affirmed over and over



1 again in numerous cases. For example, in *Tullo*, the defendant was a business that  
2 made unauthorized videotape copies of copyrighted news footage and sold the tapes  
3 to clients. 973 F.2d at 792. The defendant argued that the tapes were fair use  
4 because his clients' ultimate uses of the tapes were fair, i.e., research, scholarship,  
5 and private study. *Id.* at 797. The Ninth Circuit squarely rejected this argument,  
6 explaining that because the lawsuit accused the defendant of direct infringement,  
7 the ultimate uses to which the customers put the tapes were irrelevant. *Id.* See also  
8 *Zomba Enters. v. Panorama Records*, 491 F.3d 574, 582-83 (6th Cir. 2007)  
9 (commercial CD maker could not benefit from fair use arguments its customers  
10 might have); accord *Infinity Broad. Corp. v. Kirkwood*, 150 F.3d 104, 112 (2d Cir.  
11 1998) (“[C]ourts have rejected attempts by for-profit users to stand in the shoes of  
12 their customers[.]”); *Princeton Univ. Press v. Mich. Doc. Servs.*, 99 F.3d 1381,  
13 1389 (6th Cir. 1996) (same).

14 Dish's position is not only contrary to settled law, it is antithetical to the  
15 concerns that motivated Congress to pass the 1976 Copyright Act in the first place.  
16 When Congress passed the 1976 Act, it overturned two Supreme Court cases:  
17 *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 398-99 (1968),  
18 and *Teleprompter Corp. v. Columbia Broad. Sys., Inc.*, 415 U.S. 394, 413-14  
19 (1974). These cases had held that a cable company did not need a license to capture  
20 over-the-air broadcasts and retransmit them to subscribers because it was simply  
21 doing what viewers could have done for themselves. In *Fortnightly*, the Supreme  
22 Court reasoned that the cable system in that case accomplished nothing more than  
23 individuals were entitled to accomplish on their own: “If an individual erected an  
24 antenna on a hill, strung a cable to his house, and installed the necessary amplifying  
25 equipment, he would not be ‘performing’ the programs he received on his television  
26 set . . . . The only difference in the case of CATV is that the antenna system is  
27 erected and owned not by its users but by an entrepreneur.” 392 U.S. at 400.

28 Congress rejected that equivalency, reasoning that unlike individual viewers,

1 “cable systems are commercial enterprises whose basic retransmission operations  
2 are based on the carriage of copyrighted program material and . . . copyright  
3 royalties should be paid by cable operators to the creators of such programs.” *See*  
4 H.R. Rep. No. 94-1476, at 88-89 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659,  
5 5703-04. Thus, in the 1976 Act, Congress enacted the Transmit Clause and  
6 clarified that a retransmission service engages in a public performance, requiring a  
7 copyright license, when it retransmits broadcast programming to subscribers. *See*  
8 *Capital Cities*, 467 U.S. at 709-10 (“Prior to the 1976 revision, the [Supreme] Court  
9 had determined that the retransmission of distant broadcast signals by cable systems  
10 did not subject cable operators to copyright infringement liability because such  
11 retransmissions were not ‘performances’ within the meaning of the 1909 Act. In  
12 revising the Copyright Act, however, Congress concluded that cable operators  
13 should be required to pay royalties to the owners of copyrighted programs  
14 retransmitted by their systems on pain of liability for copyright infringement.”).

15 Notably, Dish is making the same argument as the unauthorized Internet  
16 retransmission service in *BarryDriller*, which was squarely rejected by Judge Wu  
17 for the same reasons explained above. The defendant in that case argued that  
18 because individual consumers could use a Slingbox to view over-the-air broadcasts  
19 on computers and mobile devices, the defendants’ service must also be legal  
20 because it was simply providing a service equivalent to what individuals could  
21 lawfully do for themselves. *BarryDriller*, 2012 WL 6784498 at \*5. Judge Wu  
22 followed the exact analysis detailed above and concluded correctly that Congress  
23 “rejected that mode of reasoning” when it enacted the 1976 Copyright Act in  
24 response to the *Fortnightly* case. *Id.*

#### 25 **H. Dish’s Laches Defense Has No Merit.**

26 Fox has not unreasonably delayed. Dish announced that it would stream live  
27 broadcast programming over the Internet on Dish Anywhere via Hopper with Sling  
28 in January of this year, and Fox filed suit and sought a preliminary injunction just



1 weeks later. Dish cannot assert a laches defense based on the fact that standalone  
2 Slingboxes have been on the market for years. Dish Anywhere is not a standalone  
3 Slingbox, as Dish’s own marketing makes abundantly clear. *E.g.*, Singer Decl.,  
4 ¶ 11, Lodged DVD, Video 1 (Dish CEO bragging that “this new Dish Anywhere  
5 capability is now much easier to use” than Dish’s earlier Sling devices); *Id.*, ¶ 15,  
6 Lodged DVD, Video 4 (Dish Vice-President explaining that Dish’s new service is  
7 better than other streaming services that require “extra hardware,” “separate apps,”  
8 or are limited to “in-home viewing only.”).

9 This case is about whether the Internet retransmission service Dish is  
10 currently offering breaches the license agreement and infringes Fox’s copyrights.  
11 It is not about whether Sling technology generally is legal. Dish has cited zero  
12 cases supporting its argument that the laches period begins to run when the  
13 technology that will be ultimately used to infringe is invented. If Dish were right,  
14 then any copyright infringement claim against a book publisher would be barred by  
15 the copyright owner’s failure to sue to stop the printing press in the year 1450.<sup>5</sup>

16 Dish’s contention that laches is presumed because Fox’s claim was brought  
17 outside the statute of limitations for copyright infringement is equally untenable.  
18 As Dish acknowledges, the statute of limitations for copyright infringement is three  
19 years from when the infringement is discovered, or should have been discovered  
20 with reasonable diligence. 17 U.S.C. § 507(b). Dish Anywhere did not exist until  
21 January 2013, so obviously Fox could not have discovered it before then. Dish’s  
22 assertion that “at least some of the purportedly unlawful conduct occurred outside  
23

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24 <sup>5</sup> The Learned Hand quotation Dish relies on for the proposition that a plaintiff  
25 cannot “lie back and wait for a product to become popular and then decide to attack  
26 it” is not on point. That quote cautions against allowing a copyright owner to say  
27 nothing about an infringing act, wait and see if the infringement makes money, then  
28 sue for a share of the money. *See Haas v. Leo Feist, Inc.*, 234 F. 105, 108  
(S.D.N.Y. 1916) (copyright owner who knew defendant was marketing an  
infringing song could not wait until the song became popular then sue to recover a  
share of the profits). It is irrelevant here since Fox is not seeking a share of the  
profits from Dish’s sale of Sling products.

1 the three year statute of limitations” makes no sense. Inventing the technology is  
2 not unlawful; what is unlawful is Dish’s act of using the technology to infringe.

3 Moreover, even if the Court were to find that Dish Anywhere is the same as a  
4 standalone Slingbox, Dish’s laches argument would still fail because Dish has not  
5 even attempted to establish prejudice. Even the cases cited by Dish make clear that  
6 laches is an affirmative defense on which the defendant bears the burden of proof.  
7 *See Danjaq LLC v. Sony Corp.*, 263 F.3d 942, 951 (9th Cir. 2001). “To  
8 demonstrate laches, the defendant must prove both an unreasonable delay by the  
9 plaintiff *and prejudice to itself.*” *Id.* (emphasis added, citations and quotation  
10 marks omitted). It is reversible error to find laches when there is no evidence of  
11 prejudice. *E.g., Huseman v. Icicle Seafoods, Inc.*, 471 F.3d 1116, 1126-27 (9th Cir.  
12 2006).

13 Courts have recognized two chief forms of prejudice in the laches context –  
14 evidentiary and expectations-based. *Danjaq*, 263 F.3d at 955. Evidentiary  
15 prejudice includes things such as lost, stale, or degraded evidence, or witnesses  
16 whose memories have faded or who have died. *Id.* Dish does not contend there is  
17 any evidentiary prejudice here, and obviously there is none since Dish Anywhere  
18 only launched three months ago, so witnesses’ memories should be fresh and  
19 relevant documents easily accessible.

20 Expectations-based prejudice is when the defendant can show that it “took  
21 actions or suffered consequences that it would not have, had the plaintiff brought  
22 suit promptly.” *Danjaq*, 263 F.3d at 955. Dish does not contend that it suffered  
23 any expectations-based prejudice. To the extent Dish attempts to argue it is  
24 prejudiced because it spent money developing Dish Anywhere based on the  
25 assumption that because nobody sued to stop the standalone Slingbox it must be  
26 legal for Dish to retransmit over the Internet as long as it used “Sling technology,”  
27 that assertion is not supported by any facts in the record and, in any event, would be  
28 unreasonable since (i) a standalone Slingbox is completely different than an

1 unauthorized Internet retransmission service; (ii) the law is clear that just because  
2 one use of a particular technology is non-infringing does not mean all uses of that  
3 technology are non-infringing, *e.g.*, *Tullo*, 973 F.3d at 797; *see also Associated*  
4 *Press v. Meltwater*, ---F.Supp.2d---, 2013 WL 1153979, at \*16 (S.D.N.Y. Mar. 21,  
5 2013); and (iii) *BarryDriller* erased any doubt that retransmitting live broadcasts  
6 over the Internet is a public performance, yet Dish launched its unauthorized Dish  
7 Anywhere service less than a month after that decision came out.

#### 8 **IV. Hopper Transfers Breaches The License Agreement.**

9 The RTC Agreement states that Dish “shall not, for pay or otherwise, . . .  
10 authorize the recording, copying [or] duplication (other than by consumers for  
11 private home use) . . . of any portion of any Station’s Analog Signal without prior  
12 written permission.” Biard Decl., Ex. A at 16. Dish does not dispute that Hopper  
13 Transfers allows Dish subscribers to make copies of Fox programs for use outside  
14 the home. Instead, Dish tries to argue that “home use” must mean something other  
15 than home use, because Los Angelinos can eat “Chicago deep dish pizza” and  
16 people can use “kitchen knives in the dining room.” Dish Br. at 28.

17 The fact that some words mean different things in different contexts does not  
18 mean that “home use” means something other than “home use” in this context.  
19 “Private home use” must be given its plain, ordinary meaning, *i.e.*, copies used by  
20 Dish subscribers in their private homes. Indeed, the Court need not look any  
21 further than Dish’s own Residential Customer Agreement where Dish expressly  
22 defines “Private Home Viewing”:

23 H. Private Home Viewing Only. DISH Network  
24 provides Services to you solely for viewing, use and  
25 enjoyment *in your private home*. You agree that no  
26 Services provided to you will be viewed in areas open to  
the public, commercial establishments or other residential  
locations.

27 Singer Decl., Ex. H at 160 (*italics added*). When Dish uses “home” as an  
28 “adjectival attributive noun” in its own subscriber agreement, it clearly means

1     *inside the subscriber's own home.* Therefore, the “private home use” restriction in  
2     the parties’ contract should be given the same, common-sense meaning.

3             Dish’s proffered definition of “private home use” also fails under a separate  
4     canon of contract interpretation. When interpreting a contract, meaning must be  
5     given to “every sentence, clause and word.” *Travelers Cas. & Surety Co. v.*  
6     *Certain Underwriters at Lloyd’s of London*, 96 N.Y.2d 583, 594 (2001).  
7     Interpretations that operate to render another word meaningless violate this  
8     principle. *Id.* Here, Dish argues that “private home use” “means the type of  
9     personal non-commercial use such as would occur at home,” including viewing in a  
10    hotel room, in a car, or at someone else’s house. Dish Br. at 28 (*italics omitted*). In  
11    other words, private viewing by a consumer *anywhere*. But this cannot be what the  
12    parties meant by a consumer’s “private home use” because it would be no different  
13    than a consumer’s “private use.” Under Dish’s definition, the word “home” would  
14    be mere surplusage and, therefore, must be avoided because it renders contract  
15    language a nullity. *Travelers*, 96 N.Y.2d at 594. Because the No-Copying Clause  
16    bars Dish from authorizing users to make copies for use outside the home, and  
17    because Dish now authorizes subscribers to copy Fox’s programs onto their iPads  
18    so they can be viewed outside the home, Hopper Transfers breaches the contract.

19            Dish’s contention that it is not “authorizing” Hopper Transfers is equally  
20    unfounded. Dish Br. at 27. Dish makes the Hopper Transfers service available to  
21    its subscribers, promotes Hopper Transfers in its marketing materials, controls how  
22    the service operates, and determines how many copies can be made for viewing  
23    outside the home. Horowitz Decl. ¶ 12; Singer Decl., Ex. B at 12, Ex. C at 16, 18.  
24    Dish’s Hopper Transfers press release explains how the new service “*lets* customers  
25    move television recordings from the DVR to an iPad for viewing without an  
26    internet connection . . . . such as on a plane.” *Id.*, Ex. B at 12 (*emphasis added*).  
27    Dish isn’t just authorizing subscribers to make copies of Fox programs for viewing  
28    outside the home, it is enabling and encouraging them. Accordingly, Hopper

1 Transfers breaches the parties' contract.

2 Finally, Dish claims that Fox somehow waived its rights under the No-  
3 Copying Clause because in 2005 Dish sold the PocketDISH, a portable video player  
4 that allowed Dish subscribers to transfer copies of programs from their DVRs onto  
5 the device for out-of-home viewing. Dish Br. at 28.<sup>6</sup> Dish's argument is a red  
6 herring. First, the PocketDISH was an obscure product and discontinued after just  
7 24 months. Kummer Decl. ¶ 31. Second, when the parties amended and extended  
8 the RTC Agreement in 2010, they included a No-Waiver Clause confirming that no  
9 failure to exercise or delay in the exercise of any rights will constitute a waiver.  
10 Biard Decl., Ex. B at 31. No-waiver provisions are enforceable under New York  
11 law. *Flushing Unique Homes v. Brooklyn Fed. Bank*, 100 A.D. 3d 956, 958 (2012).

12 **V. Fox Has Demonstrated Irreparable Harm.**

13 Irreparable harm is an injury that cannot be "remedied by a damage award"  
14 alone. *Rent-A-Center, Inc. v. Canyon Tel. & Appliance Rental, Inc.*, 944 F.2d 597,  
15 603 (9th Cir. 1991). This includes "damages [that] would be difficult to value."  
16 *Id.* The fact that damages are difficult to quantify makes them irreparable, not  
17 unduly speculative. *Gilder v. PGA Tour, Inc.*, 936 F.2d 417, 423 (9th Cir. 1991).  
18 Accordingly, the Ninth Circuit has long held that intangible injuries, such as "lost  
19 contracts and customers, and harm to [a company's] business reputation and  
20 goodwill" qualify as irreparable harm. *Stuhlberg Int'l Sales Co. v. John D. Brush*  
21 *& Co.*, 240 F.3d 832, 838 (9th Cir. 2001); *Rent-A-Center*, 944 F.2d at 603. Fox is  
22 not required to prove it already has suffered extensive damages – such a standard  
23 "would defeat the purpose of the preliminary injunction, which is to prevent an  
24 injury from occurring. *Diamontiney v. Borg*, 918 F.2d 793, 795 (9th Cir. 1990).

25 **A. Fox Did Not Unreasonably Delay In Bringing This Motion.**

26  
27 <sup>6</sup> Dish's citation to every third-party device or technology on the market that  
28 supposedly allows consumers to transfer recorded programs from a DVR to a  
mobile device is irrelevant because Fox's contract prohibiting Hopper Transfers is  
*with Dish*, not any of those third parties.

1 Dish's claim that Fox cannot be irreparably harmed because it waited "seven  
2 years" to file suit ignores the fact that Dish did not introduce the Dish Anywhere  
3 and Hopper Transfers services, or reveal its plans to promote these services on a  
4 massive scale, until *January 2013*. See Motion, pp. 5-8.

5 Moreover, Dish's brief confirms that its previous "Sling" products were  
6 barely noticed, let alone widely used, by Dish subscribers. While Dish trumpets the  
7 fact that it has "distributed over [REDACTED]" units of its ViP922 set-top box since it  
8 was introduced in April 2010 (Dish Br. at 5, 30), this statistic – when measured  
9 against the total number of Dish subscribers, which exceeds 14 million – fully  
10 confirms its status as the Edsel of set-top boxes: according to Dish's own data, less  
11 than [REDACTED] percent of its customers ever used a ViP922.<sup>7</sup> [REDACTED] list other  
12 similar products but fail to provide any information about how widely they have  
13 been used by consumers. See [REDACTED]  
14 Likewise, Dish has provided no sales figures for PocketDish, but they were  
15 presumably very low given that the product was discontinued after just 24 months  
16 on the market.

17 By comparison, Dish's Hopper set-top box is in 2 million homes. Singer  
18 Decl., ¶ 16; Lodged Video 5. Moreover, Dish is in the midst of a multi-million  
19 dollar marketing campaign for Dish Anywhere and Hopper Transfers and, as its  
20 CEO admitted, has announced its intent to "commercialize its technology at a much  
21 higher level" than it did in the past. Singer Decl., ¶ 16; DVD 5; see also Eriq  
22 Gardner, Dish Network's Charlie Ergen Is The Most Hated Man In America (The  
23 Hollywood Reporter, April 2, 2013) (describing the Hopper's popularity).<sup>8</sup>

24 **B. Injunctive Relief Is Available On Fox's Contract Claims.**

25 <sup>7</sup> Dish claims Fox undercounted the number of ViP922's in use because its  
26 estimation was based on the number of Internet-connected boxes reporting to Dish  
27 on a daily basis. Because the set-top box must be connected to the Internet for the  
28 Sling feature to work, Horowitz Decl., ¶ 8, set-top boxes not connected to the  
Internet are obviously not using that feature, making them irrelevant to the analysis.

<sup>8</sup> <http://www.hollywoodreporter.com/news/dish-networks-charlie-ergen-is-432288>.



1 Dish misstates the law in asserting that preliminary injunctive relief is never  
2 appropriate for a breach of contract claim. There is no absolute bar in this Circuit.  
3 *See John Goyak & Assocs. v. Terhune*, 299 F. App'x 739, 740 (9th Cir. 2008).  
4 Where irreparable harm is otherwise established, courts look to the applicable state  
5 law governing whether specific performance is available to enforce the contract.  
6 *See Kaiser Trading Co. v. Associated Metals & Minerals Corp.*, 321 F. Supp. 923,  
7 931 (N.D. Cal. 1970), *appeal dismissed*, 443 F.2d 1364 (9th Cir. 1971); *see also*  
8 *Oracle Corp. v. DrugLogic, Inc.*, 2011 WL 5576267, \*4 (N.D. Cal. 2011).<sup>9</sup> Here,  
9 the relevant contract – the 2010 Letter Agreement – is expressly governed by New  
10 York law, and numerous courts have recognized that preliminary injunctive relief is  
11 available to prevent a breach of contract under New York law. *See, e.g.*,  
12 *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 404 (2d Cir. 2004); *Tom Doherty*  
13 *Assocs. v. Saban Entm't, Inc.*, 60 F.3d 27 (2d Cir. 1995).

14 **C. Fox's Evidence Of Irreparable Harm Is More Than Sufficient.**

15 Dish argues that the evidence of harm to Fox is “speculative” because it is  
16 presented in declarations from Fox executives with decades of experience, because  
17 Fox has not sued other companies, and because Fox has not suffered past harms  
18 from earlier Dish products – the ViP922 and PocketDish – that were barely noticed  
19 by consumers. (Dish Br. at 32-33). None of these arguments has merit.

20 Dish completely ignores the fact that courts considering similar services that  
21 retransmitted copyrighted works over the Internet have found irreparable harm  
22 based on almost exactly the same showing that Fox has made here – evidence of the  
23 *same* kinds of injuries, set forth in declarations from executives at the plaintiff  
24 companies with the *same* level of experience. *See BarryDriller*, 2012 WL 6784498  
25 at \*6 (relying on Brennan declaration and holding that Internet streaming service

26 \_\_\_\_\_  
27 <sup>9</sup> The only authority cited by Dish on this point – a disability rights case – did not  
28 have any occasion to consider whether injunctive relief could be awarded with  
respect to a contractual claim. *See Sullivan v. Vallejo City Unified Sch. Dist.*, 731  
F. Supp. 947 (E.D. Cal. 1990).

1 irreparably harmed broadcast television networks because it would interfere with  
 2 their ability to measure and sell TV ads, undermine retransmission consent  
 3 negotiations and relationships, and unfairly compete with their proprietary internet  
 4 distribution websites and mobile applications); *ivi*, 691 F.3d at 286 (TV network  
 5 irreparably harmed by service that prevents ads from being seen by intended  
 6 audience<sup>10</sup>); *WTV Systems*, 824 F. Supp. 2d at 1012-13 (unauthorized, online  
 7 distribution of plaintiffs' movies irreparably harmed plaintiffs); *see also* Mot. at 18-  
 8 20. Furthermore, Dish's own authorities make clear that Fox need not sue all  
 9 potential infringers at the same time in order to establish irreparable harm. *See*,  
 10 *e.g.*, *Polymer Technologies*, 103 F.3d at 975 ("A patentee does not have to sue all  
 11 infringers at once. Picking off one infringer at a time is not inconsistent with being  
 12 irreparably harmed.").

13 **D. Fox's Licensing Efforts Do Not Negate Irreparable Harm.**

14 Dish's argument that Fox cannot establish irreparable harm because it has  
 15 licensed others to provide Internet streaming or digital downloads of its programs  
 16 misconstrues both Fox's argument and the cases on which Dish relies. Fox is not  
 17 arguing that Dish Anywhere and Hopper Transfers cause injury in the form of lost  
 18 royalties. Instead, Fox has shown that Dish's new services threaten actual  
 19 imminent harm to its relationships and negotiations with advertisers, licensees, and  
 20 other cable and satellite distributors – harms that cannot be measured or  
 21 recompensed by reference to royalty rates in existing license agreements. *See* Biard  
 22 Decl. ¶¶ 25-26; Brennan Decl. ¶¶ 15-22; *see also ReDigi*, 2013 WL 1286134 at \*9

23 \_\_\_\_\_  
 24 <sup>10</sup> With respect to advertising harms, Dish has nothing coherent to say. It asserts  
 25 that Internet viewing is [REDACTED], but the evidence it cites does  
 26 not remotely establish that consumers who watch programs via Internet streaming  
 27 also watch those same programs a second time using their televisions – which is the  
 28 only way their viewing would be captured by Nielsen's "C3" measurement. Dish  
 then seeks to bolster its irrelevant "[REDACTED]" point by quoting a  
 hearsay statement speculating that Nielsen might start measuring Internet viewing  
 as some unspecified time in the future – hardly proof that irreparable harm is  
 lacking. (Dish Br. 33; Rapp Decl. ¶ 42.)



1 (copyright owner “does not forfeit its right to claim copyright infringement merely  
2 because it permits certain uses of its works”). [REDACTED]

3 [REDACTED] that agreements with other MVPDs might [REDACTED]  
4 [REDACTED] for calculating damages rest on pure speculation. If this were the rule,  
5 preliminary injunctions would not have been granted in *Ivi*, *BarryDriller* and *WTV*.

6 None of the cases on which Dish relies (Dish Br. at 31) addresses these kinds  
7 of threatened harms. In *ActiveVideo*, for example, the only harm alleged was the  
8 loss of a per-subscriber license fee that occurred when the defendant, Verizon, took  
9 a subscriber away from the plaintiff’s licensee, Cablevision. See 694 F.3d 1312,  
10 1338 (Fed. Cir. 2012). Similarly, the court in *Polymer Technologies* merely  
11 observed that “*potential lost sales alone*” could not establish irreparable harm  
12 where the movant had granted a non-exclusive license to a non-party. See 103 F.3d  
13 970, 975 (Fed. Cir. 1996) (emphasis added).

#### 14 **VI. Dish Has Shown No Cognizable Hardship.**

15 Dish grossly exaggerates the hardship that a preliminary injunction would  
16 pose for Dish’s relationship with its customers. The only “goodwill” and  
17 “customer relationships” relevant to this Motion have arisen in connection with  
18 Dish’s heavy advertising and promotion of the infringing Dish Anywhere and  
19 Hopper Transfers services *since January 2013*. But it is well settled that “[w]here  
20 the only hardship that the defendant will suffer is lost profits from an activity which  
21 has been shown likely to be infringing, such an argument in defense merits little  
22 equitable consideration.” *WTV Systems*, 824 F. Supp. 2d at 1015 (quoting *Cadence*  
23 *Design Sys., Inc. v. Avant! Corp.*, 125 F.3d 824, 830 (9th Cir. 1997)).

24 Dish also misleadingly and without any evidence equates a preliminary  
25 injunction with a product “recall.” To comply with an injunction Dish would  
26 merely need to cease offering, supporting and advertising Dish Anywhere and  
27 Hopper Transfers. An injunction would not require the recall of a single set-top  
28 box or other piece of hardware.

1 **VII. Injunctive Relief Would Serve The Public Interest.**

2 Developing the Fox programs is an enormously expensive endeavor on  
3 which the jobs of thousands of creative professionals, production personnel, and  
4 trade and guild members depend. See Brennan Decl. ¶ 6. As this District  
5 recognized in *WTV Systems*, “it is virtually axiomatic that the public interest can  
6 only be served by upholding copyright protections and correspondingly, preventing  
7 the misappropriation of skills, creative energies, and resources which are invested  
8 in the protected work.” See *WTV*, 824 F. Supp. 2d at 1015 (quoting *Apple*  
9 *Computer, Inc. v. Franklin Computer Corp.*, 714 F.2d 1240, 1255 (3d Cir. 1983).

10 Television broadcasters, and the entertainment industry generally, represent a  
11 large and important part of the U.S. economy – one of its most vital and robust  
12 export industries – and the health of those businesses depends on the protections  
13 afforded by copyright law. Unauthorized content distribution systems – like Dish  
14 Anywhere and Hopper Transfers – threaten the entire ecosystem for legitimate  
15 distribution of copyrighted works. Copyright law’s protections are what make it  
16 possible for producers of high-quality television programs to recoup the enormous  
17 investments required to put their shows on the air. Without the protection that  
18 copyright law affords, the livelihoods of thousands of writers, directors, actors,  
19 technicians and crew members would be put at risk, as explained recently in the  
20 amicus brief submitted to the Ninth Circuit in this case by various film studios,  
21 record labels, music publishers, the Directors Guild of America, and the  
22 International Alliance of Theatrical Stage Employees, Moving Picture Technicians,  
23 Artists and Allied Crafts of the United States, its Territories and Canada, AFL-  
24 CIO. See Ninth Cir. Dkt. No. 24, at pp. 26-29.

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