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

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13 FOX BROADCASTING COMPANY,  
TWENTIETH CENTURY FOX FILM  
14 CORP., and FOX TELEVISION  
HOLDINGS, INC.

15 Plaintiffs,

16 v.

17 DISH NETWORK L.L.C.,  
18 DISH NETWORK CORP., and  
ECHOSTAR TECHNOLOGIES  
19 L.L.C.

20 Defendants.  
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Case No. 12-CV-04529-DMG (SH)

**PLAINTIFFS' SUPPLEMENTAL  
BRIEF IN OPPOSITION TO  
DEFENDANTS' MOTION TO  
COMPEL PRODUCTION OF  
DOCUMENTS**

1 **I. Introduction**

2 Dish's motion to compel is meritless and should be denied. Dish's claim that  
3 it needs to review millions of documents generated by Fox's advertising sales  
4 department – including five years' worth of emails, internal correspondence, draft  
5 agreements, back-and-forth with advertisers, and the like – in order to prove that  
6 Dish's commercial-free VOD service, PrimeTime Anytime ("PTAT") did not  
7 "destroy" Fox's advertising business is absurd. There are many less burdensome  
8 and intrusive ways of proving the existence of an ongoing business. Moreover,  
9 Dish's suggestion that showing that Fox still has an advertising business will  
10 somehow bolster its fair-use argument is just wrong. Although market harm is a  
11 factor in the fair-use analysis, proof of damages is not required, nor is proof that the  
12 copyright owner's business was "destroyed" prior to trial. Rather, fair-use market  
13 harm looks at how the market will be impacted if the defendant's copying is not  
14 stopped and therefore becomes widespread. Moreover, Fox is already producing its  
15 advertising revenues and communications with advertisers that mention PTAT or  
16 PTAT's commercial-erasing feature AutoHop. Dish sells television advertising and  
17 directly competes with Fox for advertising dollars. Dish refused to compromise or  
18 narrow this request because it is not actually looking for anything in particular – it  
19 just wants to rifle through a competitor's confidential business documents.

20 The rest of Dish's requests fare no better. Dish cannot explain how Fox's  
21 outdated financial projections – made long before PTAT launched – are relevant to  
22 any claim or defense in this case. Dish's claim that it needs documents discussing  
23 alternative advertising models like product placement to show Fox could make  
24 money in other ways notwithstanding Dish's infringement is a non-starter since that  
25 isn't a defense. And there is no reason Dish needs to know how many people  
26 streamed or downloaded particular episodes of *The Simpsons*, *Glee*, and other Fox  
27 programs from each and every distributor website because Fox is not seeking  
28 damages based on lost streams or downloads.

1 **II. Dish Is Not Entitled To Virtually Every Scrap Of Paper Produced By**  
2 **Fox's Advertising Sales Department Within The Last Five Years.**

3 As explained in Fox's portion of the joint stipulation, Dish's request for  
4 documents relating to upfront advertising will require Fox to gather, review, and  
5 produce literally millions of documents – a project that will cost hundreds of  
6 thousands of dollars and take months to complete. A production of this magnitude  
7 is unduly burdensome on its face, harassing, and wholly unjustified here given that  
8 the documents Dish seeks are only marginally if at all relevant to the claims and  
9 defenses in this case. *See* Fed. R. Civ. P. 26(b)(2)(C) (court may limit discovery  
10 where the burden and expense outweigh the likely benefit).

11 Asserting a fair-use defense does not automatically entitle Dish to copies of  
12 the majority of the work product generated by Fox's advertising sales department  
13 during the past five years. Dish claims these documents could help show that its  
14 unauthorized services did not negatively impact Fox's advertising business, but that  
15 is not how the fair-use market harm analysis works. Fair-use market harm does not  
16 focus on the copyright owner's financial losses during the litigation. It is a  
17 *forward-looking* analysis that asks what the impact on the market would be if the  
18 defendant's conduct became widespread. *Harper & Row Publishers, Inc. v. Nation*  
19 *Enters.*, 471 U.S. 539, 568 (1985) (to negate fair use one need only show that if the  
20 challenged use should become widespread, it would adversely affect the *potential*  
21 market for the copyrighted work"); *Monge v. Maya Magazines, Inc.*, 688 F.3d  
22 1164, 1181 (9th Cir. 2012) (same, and finding market harm factor met because  
23 "[u]nrestricted and widespread reproduction of [defendant's] conduct would not  
24 only undermine the ability of celebrities to market images of themselves, but would  
25 also create incentives to pirate intellectual property"); *Soc'y of the Holy*  
26 *Transfiguration Monastery, Inc v. Gregory*, 689 F.3d 29, 64 (1st Cir. 2012)  
27 (rejecting argument that defendant's copying was fair use because copyright owner  
28 could not show specific lost sales or lost profits caused by the infringement, and

1 holding that if the court were to find that defendant’s copying was fair use, it  
2 “unquestionably would affect the market for translations of ancient religious texts,  
3 likely discouraging other institutions from investing in and expending the time,  
4 effort, and resources necessary for producing works . . . .”); *see also* 4 MELVILLE B.  
5 NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.05[A][4] at 13-198.4.4(1)  
6 (REV. ED. 2013) (fair-use market harm factor does not merely raise the question of  
7 damages but rather “the issue of whether unrestricted and widespread conduct of  
8 the sort engaged in by the defendant . . . would result in a substantially adverse  
9 impact on the potential market, or value of, the plaintiff’s present work”).

### 10 **III. Fox’s Outdated Financial Projections Are Irrelevant.**

11 Fox’s outdated, historical financial projections are irrelevant. The examples  
12 Dish uses in its portion of the joint stipulation to illustrate relevance do not  
13 withstand serious scrutiny. Dish asserts that one way to “test” whether its  
14 unauthorized services have harmed Fox’s business is to “compare the financial  
15 projections that Fox made for 2012 and 2013 against Fox’s actual revenues for  
16 those same years.” Joint Stip. at 17. This is wrong analytically. To ascertain  
17 whether Dish’s services might have already impacted Fox’s revenues (assuming  
18 that were relevant), one would compare Fox’s *actual financial results* from before  
19 and after Dish’s services entered the market. One would not compare Fox’s actual  
20 results to Fox’s historical projections, since that comparison would not reveal  
21 anything about the impact Dish’s services had on Fox’s business.

22 Dish also argues that “it will be difficult for Fox to claim these features [i.e.,  
23 Dish’s unauthorized commercial-free VOD and streaming services] destroyed  
24 Fox’s ad-based ecosystem if it met or exceeded its financial projections.” Joint  
25 Stip. at 17. This is also wrong. Projections are just estimates. Projections made  
26 before Fox learned that Dish would start infringing are not proof of how Fox would  
27 have done in the absence of infringement. Here is an example that illustrates this  
28 point. Suppose Dish projected back in 2009 that in 2014 it would lose 10% of its

1 subscribers due to cord-cutting (i.e., consumers cancelling their cable/satellite  
2 subscriptions). Now suppose cord-cutting did not turn out to be a big issue, but  
3 instead a power outage at Dish's facilities disrupted service and caused Dish to lose  
4 2% of its subscribers. Does the fact that Dish exceeded its 2009 projection mean  
5 that the power outage did not impact Dish's business? Of course not.

6 **IV. Granular Viewing Statistics Are Not Relevant To Fox's Reasonable**  
7 **Royalty Claim.**

8 Dish does not need statistics about how many people streamed or  
9 downloaded particular episodes of each Fox program using various Internet  
10 platforms such as Hulu, Netflix, Amazon, and iTunes because Fox is *not* seeking  
11 actual damages for lost sales, lost revenues, lost streams, or lost downloads, as it  
12 has told Dish multiple times. In its portion of the joint stipulation, Dish implies that  
13 Fox's reasonable-royalty claim is just another way of seeking these damages. *See*  
14 *Joint Stip.* at 45. It isn't. Fox's reasonable-royalty claim seeks, as a remedy for  
15 Dish's infringement, the amount that Fox would charge *Dish* if forced to license  
16 *Dish* the rights it is currently exploiting without permission – specifically, the right  
17 to stream Fox's live programming over the Internet, and the right to copy Fox's  
18 programs in order to create a commercial-free VOD service. *See Fox Broad. Co. v.*  
19 *Dish Network LLC*, 747 F.3d 1060, 1073 (9th Cir. 2014); Order re Plaintiffs'  
20 Motion for Preliminary Injunction re Dish's New 2013 Services (Sept. 23, 2013),  
21 ECF No. 196, at 9-10. The reasonable royalty is the royalty rate that *Dish* should  
22 have been paying Fox; it has nothing to do with total lost revenues from third  
23 parties like Amazon, which Fox is not seeking to recover.

24 **V. Dish Has Failed To Submit An Expert Declaration.**

25 Dish contends that it needs outdated projections, granular viewing statistics,  
26 every communication generated by Fox's 100-person advertising sales department,  
27 and the various other documents sought in its motion in order to analyze fair-use  
28 market harm, irreparable injury, and lost profits damages (which Dish knows Fox is

1 not seeking). This analysis is supposedly being conducted by Dish's expert,  
2 Richard Rapp. Yet, tellingly, Mr. Rapp has not submitted a declaration stating that  
3 these documents are necessary for his analysis. This omission is particularly  
4 noteworthy since just last week Dish filed a declaration from Mr. Rapp claiming  
5 that he needed *other* documents sought by a different motion. That declaration was  
6 not served with Dish's portion of the joint stipulation, was filed at the last minute in  
7 an apparent attempt to ambush Fox, and wholly failed to demonstrate that the  
8 documents sought were relevant. But setting those defects aside, the important  
9 point is that Mr. Rapp did not say anything in that declaration about needing  
10 outdated projections, viewing statistics, or millions of advertising-related  
11 documents to conduct his analysis. This proves that Dish's claimed need for these  
12 documents is completely fabricated.

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Dated: June 16, 2014

Jenner & Block LLP

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