

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

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA-WESTERN DIVISION

FOX BROADCASTING COMPANY,  
Inc., et al.,

Plaintiffs,

v.

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

Defendants.

) CV 12-04529-DMG (SHx)

) ORDER

---

This matter is before the Court to determine DISH’s Motion to Compel Production of Documents in Response to Request for Production No. 3 (Set One), DISH’s Motion to Compel Production of Documents in Response to Request for Production No. 6 (Set One), Nos. 28-30 (Set Two), Nos. 24, 31, 32, 35-41 (Set Three), and Non-Parties Netflix, Inc.’s and Amazon.com Inc.’s Motion for Protective Order. Oral argument was held on July 25, 2014.

**I. BACKGROUND**

1  
2 On June 2, 2014, Defendants DISH Network L.L.C. (DISH), et al. filed a  
3 Motion to Compel Production of Documents and a Joint Stipulation regarding  
4 Defendant's Motion to Compel Production of Documents in Response to  
5 Request for Production No. 3 (Set One), seeking production of all of Plaintiff  
6 Fox Broadcasting Company's (Fox) retransmission consent (RTC) agreements  
7 with other multichannel video programming distributors (MVPDs) and Local TV  
8 Station Affiliate Agreements. Supplemental Memoranda were filed on June 9,  
9 2014. Additionally, Defendants filed the Declarations of Richard Rapp and Julie  
10 Shepard, and an Appendix of Previously Submitted Documents. Plaintiffs also  
11 filed Declarations of Michael Baird, Amy Gallegos, and Michael H. Page, and an  
12 Objection to the Declaration of Richard Rapp.

13 On June 16, 2014, Defendants filed a Motion to Compel Production of  
14 Documents regarding Request for Production No. 6 (Set One), Nos. 28-30 (Set  
15 Two), Nos. 24, 31, 32, 35-41 (Set Three), and a Supplemental Memorandum in  
16 Support of Defendant's Motion. Defendants sought the production of Fox's  
17 forecasts, projections, and budget comparisons for the past seven years,  
18 documents discussing or evidencing product placement advertising, embedded  
19 advertising, and alternative advertisement models, upfront presentations and  
20 agreements, documents sufficient to show scatter market advertising rates,  
21 documents showing program views of Fox's primetime programming, and views  
22 of Fox's primetime programming on Hulu, Netflix, TV.com, Amazon Prime,  
23 Vudu, Apple iTunes, and Cinema Now. Plaintiffs filed a Supplemental Brief in  
24 Opposition to Defendant's Motion to Compel Production of Documents on June  
25 16, 2014. Additionally, Defendants filed an Appendix of Previously Filed  
26 Documents in Support of Defendant's Motion to Compel on June 16, 2014. On  
27 June 17, 2014, Defendants filed a Joint Stipulation for Defendant's Motion to  
28 Compel Production of Documents.

1 On July 7, 2014, Non-Parties Netflix, Inc. (Netflix) and Amazon.com Inc.  
2 (Amazon) filed a Motion for Protective Order, seeking to prevent the disclosure  
3 of documents showing program views of Fox's primetime programming on  
4 Netflix and Amazon Prime to DISH. On July 7, 2014, Netflix and Amazon also  
5 filed Non-Parties' Letter to Hon. Judge Stephen J. Hillman and Declarations of  
6 Bobbie J. Wilson, Christopher Carrier, and Brad Beale. On July 15, 2014,  
7 Defendants filed an Opposition to Non-Parties Netflix and Amazon's Motion for  
8 Protective Order.

### 9 **III. STATEMENT OF FACTS**

10 Defendant DISH is an MVPD, providing video programming services to  
11 customers for a subscription fee (Joint Stipulation 6). DISH is a party to a  
12 retransmission agreement with Fox, a major broadcast network, authorizing  
13 DISH to retransmit television signals for local TV stations owned and operated  
14 by Fox (*Id.*). DISH and other MVPDs also enter into separate RTC agreements  
15 with independently owned local Fox stations, or affiliates, who pay to broadcast  
16 Fox content and sell advertising time (*Id.* at 6-7).

17 Fox filed this lawsuit for breach of contract and copyright infringement  
18 against DISH on May 24, 2012, asserting that DISH DVR features including  
19 PrimeTime Anytime (PTAT), AutoHop, Hopper Transfers, and Sling Adapter  
20 breach the parties' retransmission agreements and violate copyright laws (*Id.* at  
21 7). Fox seeks preliminary and permanent injunctive relief, reasonable royalties,  
22 and disgorgement (*Id.* at 8, 16). Fox's August 2012 and February 2013 motions  
23 for injunctive relief were denied (*Id.* at 8).

24 On September 21, 2012, DISH served Request for Production of  
25 Documents No. 3, seeking all of Fox's affiliate and RTC agreements for the past  
26 seven years. Fox objected on the grounds that the information sought is protected  
27 by attorney-client privilege or attorney work product doctrine, is irrelevant and  
28 outside the scope of discovery, is overly broad and unduly burdensome, and

1 includes confidential or proprietary information (*Id.* at 5, 9). During meet and  
2 confer, Fox disagreed with DISH that affiliate and RTC agreements are relevant  
3 to defendants' fair-use market harm defense, reasonable royalty claim, and  
4 irreparable harm assertions (*Id.* at 10). Furthermore, Fox asserted that producing  
5 these documents would be too burdensome as it would require the production of  
6 1900 agreements, consuming hundreds of hours and costing tens to hundreds of  
7 thousands of dollars (*Id.* at 33).

8 DISH seeks affiliate and RTC agreements to conduct a market analysis of  
9 Fox's copyrighted work to demonstrate lack of harm from DISH's conduct  
10 disputing that the agreements are privileged, unduly burdensome, and irrelevant  
11 (*Id.* at 11). Additionally, DISH is amenable to a protective order that makes the  
12 agreements accessible only to its outside counsel in order to acquire evidence  
13 that can rebut any of Fox's generalized assertions of market harm in regard to the  
14 likelihood of future damages (*Id.* at 13, 22).

15 Fox also objected to DISH's Request for Production No. 6 (Set One)  
16 served on September 21, 2012, Nos. 28-30 (Set Two) served on April 9, 2013,  
17 and Nos. 24, 31, 32, 35-41 (Set Three) served on July 23, 2013 on the grounds  
18 that the requests are overly broad and unduly burdensome, seek information  
19 protected by attorney-client privilege, common interest privilege, or attorney  
20 work-product doctrine, seek irrelevant information, and seek confidential or  
21 proprietary information protected by privacy and non-disclosure rights.

22 Fox estimated that it would cost between \$520,000 and \$1.04 million to  
23 house, prepare, and produce the 600 GB to 2 TB of data sought by Request Nos.  
24 24 and 31 (Set Three) alone, excluding costs associated with having attorneys  
25 review 4.4 million to 15 million documents for relevance and privilege, which  
26 Fox estimates would consume thousands of person-hours and cost hundreds of  
27 thousands of dollars (*Id.* at 19; Declaration of Amy Gallegos ¶ 3-4).

28

1 Fox has already produced its financial information for 2007-2010  
2 (Molinski Decl. Ex. 13, at 76). Fox has additionally produced its total revenue  
3 from digital distribution as well as detailed viewing information for Hulu and  
4 Hulu Plus (Molinski Decl. Ex 17, at 106). Moreover, Fox has produced “its  
5 profit and loss statements showing the proportion of its revenues that come from  
6 ad sales on the Fox network versus other revenue sources” (Molinski Decl. Ex.  
7 16, at 101). Fox has also provided DISH with its total advertising sales revenues  
8 for 2007-2013 and its average CPM (cost per 1,000 impressions) advertising  
9 rates for 2012-2013 and 2013-2014 seasons (Molinski Decl. Ex. 17, at 104; Joint  
10 Stipulation 21). In addition to its advertising sales numbers, Fox has produced all  
11 negotiation communications that mention DISH’s services and all of its VOD  
12 and streaming license agreements with DISH’s competitor MVPDs, the only  
13 agreements Fox asserts are relevant to its market-harm claims (Joint Stipulation  
14 3; Joint Stipulation 23). Fox has also agreed to produce documents showing  
15 Fox’s total revenues from its affiliates on an annual basis for the past seven years  
16 (Page Decl. Ex. 8, at 41).

#### 17 **IV. DISCUSSION**

##### 18 **A. Fox is not required to produce its RTC agreements with other** 19 **MVPDs and affiliate agreements with local TV stations which** 20 **Defendants seek in their Request for Production No. 3 (Set One)**

21 In order to assess actual harm resulting from DISH’s features to Fox’s  
22 business, DISH seeks to analyze the market value of the copyrighted works and  
23 its effect on statutory damages (Joint Stipulation 17). DISH filed a Declaration of  
24 Richard Rapp in support of its Motion to Compel, which opines that all affiliate  
25 and RTC agreements to which Fox is a party are relevant to an economic  
26 analysis of potential harm to Fox as well as DISH’s defenses of fair use, damages  
27 or royalties, and injunctive relief (Rapp Dec. ¶ 5).

28

1 Mr. Rapp, an economist, asserts that no economist could assess the impact  
2 of DISH features on Fox's retransmission revenues without reviewing all  
3 available agreements to determine the differences between the affiliate and RTC  
4 agreements before and after the DVR features took effect (Rapp Dec. ¶ 8).  
5 Because Fox indicated that RTC agreements have become increasingly more  
6 important as a revenue stream, Mr. Rapp concluded that it is necessary to  
7 examine all agreements relating to Fox's revenue streams to understand the  
8 impact of DISH's features on the value of Fox's copyrighted works at issue  
9 (Rapp Dec. ¶ 10).

10 However, Mr. Rapp makes conclusory statements regarding the need for  
11 these documents. Mr. Rapp does not persuade the court that RTC and affiliate  
12 agreements are necessary (in addition to Fox's financial records and revenue data  
13 reflecting income from various revenue streams) to conduct market harm,  
14 reasonable royalty, and irreparable harm analyses. While Mr. Rapp asserts that  
15 DISH needs all RTC and affiliate agreements in Fox's possession to understand  
16 the bundles of rights stemming from these agreements, he fails to sufficiently  
17 address why Fox's financial records do not provide adequate data for market  
18 analysis or to demonstrate whether DISH's unique features caused Fox's  
19 revenues to decrease. He also does not address how other fluctuating factors that  
20 may influence the terms of Fox's future revenues, such as Nielson ratings, the  
21 economy, seasonal changes, venues, unpredictable consumer and competitor  
22 behavior, and many other factors, could be discounted by analyzing RTC and  
23 affiliate agreements instead of aggregate revenue data. Additionally, Mr. Rapp's  
24 Declaration should have been filed with the joint stipulation.

25 At oral argument, DISH asserted that the standard way for it to show a  
26 lack of damages would be to cite a lack of material change in the terms of Fox's  
27 agreements, which would indicate that DISH did not adversely affect Fox's  
28 business. However, any changes in Fox's agreements since the implementation

1 of DISH's services do not eliminate the potential effects of other factors on the  
2 market for Fox's copyrighted works and revenues.

3 Furthermore, RTC and affiliate agreements do not establish affirmative  
4 evidence of fair use because they do not account for the effect of any future  
5 "unrestricted and widespread conduct of the sort engaged in by" DISH on the  
6 potential market. *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590  
7 (1994). Unlike the market for parodies of a song in *Campbell* and the market for  
8 discrete screen shots of a video game, DISH's services concern the market for  
9 Fox's entire copyrighted primetime programming as originally produced. *See*  
10 *Sony v. Bleem*, 214 F.3d 1022, 1029 (9th Cir. 2000). Hence, the definition of the  
11 market for Fox's primetime programming is far broader than the market  
12 definitions in *Campbell* and *Bleem*. Therefore, DISH cannot contest the  
13 existence of a market, and lack of impairment to the market, for Fox's primetime  
14 programming based on these precedents, where the allegedly infringing works  
15 occupy a significantly smaller or different market than the copyrighted works.

16 Fox seeks to produce only RTC agreements it contends were affected by  
17 DISH's infringement, and is willing to stipulate that those agreements not  
18 produced were not affected (Joint Stipulation 3, 25). Fox asserts that RTC and  
19 affiliate agreements DISH seeks in Request for Production No. 3 are not relevant  
20 to the damages Fox claims, or to a fair use analysis (*Id.* at 3-4). Fox asserts that  
21 DISH is not entitled to all of its confidential agreements with MVPDs and  
22 affiliate TV stations, but only agreements relevant to specific markets DISH is  
23 allegedly harming, and not the entirety of its financial records relating to the  
24 value of its copyrighted works (*Id.*).

25 Fox argues that its RTC and affiliate agreements are not relevant to the  
26 calculation of a reasonable royalty because they do not address rights analogous  
27 to VOD and streaming rights (*Id.* at 5, 28). Fox also asserts that the highly  
28 sensitive economic terms of its affiliate agreements with local TV stations are

1 irrelevant to the fair use analysis since Fox does not argue that DISH's features  
2 harm the affiliate agreement market and DISH cannot prove fair use by  
3 analyzing the value of the copyrighted works in the affiliate market (*Id.* at 27).

4 Fox additionally asserts that RTC agreements are "highly confidential and  
5 subject to nondisclosure agreements," and that DISH seeks these documents to  
6 acquire the terms of its competitors' agreements regarding retransmission rights,  
7 which Fox claims are irrelevant to this matter (*Id.* at 24). While DISH asserts that  
8 "Fox has not indicated that it is withholding responsive documents because it  
9 cannot secure the approval from the other parties to these agreements," Fox  
10 states that DirecTV, one of DISH's MVPD competitors, objects to disclosure of  
11 its RTC agreement with Fox to DISH (*Id.* at 22, 25).

12 Fox claims that obtaining consent from hundreds of third parties prior to  
13 disclosure and production of 300 RTC agreements as well as 1,600 affiliate  
14 agreements, renewals, or amendments is unduly burdensome compared to the  
15 benefit of the information to be obtained to DISH (*Id.* at 32-33). Fox estimates  
16 that producing these documents would require hundreds of hours and cost tens to  
17 hundreds of thousands of dollars (*Id.* at 33). Fox has already produced its  
18 financial records and license agreements relevant to this matter, and the  
19 additional benefit of financial data from RTC and affiliate agreements does not  
20 outweigh the burden of producing them.

21 Furthermore, Fox asserts that it is not seeking actual damages since  
22 "harms caused by Dish's infringement are irreparable and unquantifiable," but  
23 Fox is seeking a reasonable royalty based on the value of the rights on which  
24 DISH is infringing if Fox was compelled to license those rights to DISH (*Id.* at  
25 28). Since a reasonable royalty is calculated by determining the value of similar  
26 rights on the open market, licenses dissimilar in subject matter or scope to those  
27 at issue are irrelevant to the assessment of a reasonable royalty (*Id.* at 29-30).  
28 Fox asserts that affiliate and RTC agreements sought are not discoverable



1 because they do not address the specific rights Fox claims are infringed by  
2 DISH's features (*Id.* at 30). Fox also asserts that "courts within this circuit have  
3 held that a plaintiff seeking statutory damages under the Copyright Act is not  
4 required to produce evidence of its profits from the works being infringed" (*Id.*).

5 The court concludes that DISH is not entitled to Fox's RTC agreements  
6 with other MVPDs and affiliate agreements with local TV stations to prepare its  
7 defenses, as there is insufficient relevance to justify the burden of production.  
8

9 **B. Fox is not required to produce the following documents which**  
10 **Defendants seek in their Request for Production Nos. 6 (Set**  
11 **One), 28-30 (Set Two), 24, 31 (Set Three): its forecasts,**  
12 **projections, or budget comparisons; documents discussing or**  
13 **evidencing product placement, embedded advertising, or**  
14 **alternative advertising models; and upfront presentations and**  
15 **agreements and documents showing scatter market advertising**  
16 **rates**

17 DISH seeks Fox's forecasts, projections, and budget comparisons for the  
18 past seven years to disprove Fox's assertions of adverse impact on its advertising  
19 sales and negotiations (Joint Stipulation 10). Fox asserts that these documents are  
20 irrelevant to the claims and defenses in this case and would be unduly  
21 burdensome to produce (*Id.* at 25). Fox asserts that estimates of its future  
22 financial performance will not serve to prove or disprove fair-use market harm to  
23 its copyrighted works if products similar to DISH's services become widespread  
24 and that Fox's financial records and advertising revenues already provided can  
25 demonstrate whether Fox's works have been adversely impacted by DISH  
26 products.

27 Additionally, DISH seeks the production of documents discussing or  
28 evidencing product placement, embedded advertising, and alternative advertising

1 models. However, Fox asserts that these documents are not relevant since it is  
2 not required to mitigate the effect of DISH's conduct on its business model under  
3 fair use market harm or irreparable harm analysis (*Id.* at 37).

4 Moreover, DISH seeks the production of Fox's upfront presentations and  
5 agreements, as well as documents sufficient to show scatter market advertising  
6 rates and sales volumes in order to prepare its defenses. However, Fox is not  
7 seeking compensatory damages (*Id.* at 24). DISH does not persuasively explain  
8 why the financial records and aggregate advertising sales data that Fox has  
9 already produced are not sufficient to allow DISH to prepare defenses  
10 challenging Fox's irreparable harm and reasonable royalty claims. Financial and  
11 revenue data can demonstrate the impact of DISH services on the market and  
12 value of Fox's copyrighted works (*Id.* at 13).

13 Fox has indicated that producing its upfront presentations and agreements,  
14 as well as documents showing scatter market advertising rates and sales volumes,  
15 would be unduly burdensome. Fox estimates that DISH's requests covers most of  
16 the business documents generated by its 100-person advertising sales  
17 department, approximately 600 GB to 2 TB of data or fifteen million documents  
18 that would take months and between \$520,000 and \$1.04 million dollars to  
19 gather, review, and produce (*Id.* at 16, 19).

20 Moreover, Fox asserts that the burden of producing scatter market data  
21 would equal or exceed that of producing documents relating to upfront  
22 agreements since Fox is not in possession of documents that summarize this  
23 information (Molinski Decl. Ex. 23, at 152). Despite asserting that these  
24 documents are not relevant to any claim or defense in this matter, Fox has agreed  
25 to provide some documents covered by these requests that will provide DISH  
26 with the information it seeks, including total advertising sales revenue from the  
27 years 2007 to 2013 and all communications with advertisers that mention PTAT  
28 or AutoHop (Joint Stipulation 16-17, 20-21).

1 When evaluating a fair-use defense, the Court considers whether the use  
2 adversely affects “the potential market for the copyrighted work.” Harper & Row  
3 Publishers, Inc. v. Nation Enters., 471 U.S. 539, 568 (1985) (quoting Sony Corp.  
4 of Am. v. Universal City Studios, Inc., 464 U.S. 417, 451 (1984) (emphasis  
5 omitted). Similarly, Fox’s irreparable harm claim relates to harm that is difficult  
6 to quantify as it consists of future damages Fox will allegedly suffer if DISH’s  
7 unique features are adopted by other MVPDs. Since Fox is not seeking  
8 compensatory damages, but only a reasonable royalty under the Copyright Act,  
9 Fox’s documents addressing its projections, product placement, embedded  
10 advertising, alternative advertising models, upfront presentations and  
11 agreements, and scatter market advertising rates, are not conducive to proving or  
12 disproving the claims and defenses in this matter. Moreover, at oral argument,  
13 DISH conceded that documents concerning advertising are not relevant to the  
14 claims and defenses in this matter.

15  
16 **C. Fox is not required to produce documents reflecting program**  
17 **views of Fox’s primetime programming, including program**  
18 **views of Fox’s primetime programming on Hulu, Netflix,**  
19 **TV.com, Amazon Prime, Vudu, Apple iTunes, and Cinema Now**  
20 **which Defendants seek in their Request for Production Nos. 32,**  
21 **35-41 (Set Three)**

22 DISH seeks documents regarding program views of Fox’s primetime  
23 programming to demonstrate a lack of adverse impact on viewership of Fox  
24 programming (*Id.* at 43). However, Fox already produced aggregate streaming  
25 data and total advertising revenue for 2011 to 2013 (*Id.* at 38-39).

26 Furthermore, DISH seeks documents regarding program views of Fox’s  
27 primetime programming via individual online services, including Hulu, Netflix,  
28 TV.com, Amazon Prime, Vudu, Apple iTunes, and Cinema Now to demonstrate

1 that alternative viewing platforms may be responsible for any adverse impact on  
2 Fox's diminished advertising revenues (*Id.* at 43). However, Fox asserts that  
3 these documents are not relevant to any claims or defenses in this matter since it  
4 is not seeking compensatory damages related to lost revenues from a decrease in  
5 viewership on online platforms (*Id.* at 49).

6 Similarly, irreparable harm cannot be proven or disproven with documents  
7 regarding program views, especially via individual online services, since it  
8 consists of harms that are intangible or difficult to calculate (*Id.*). These  
9 documents are also irrelevant to the calculation of a reasonable royalty claim,  
10 which would consist of the value of a license for rights to use Fox's copyrighted  
11 programming as DISH is currently utilizing it, not lost royalties (*Id.* at 50-51).  
12 Moreover, a fair-use market harm defense would consist of adverse impact on  
13 the potential market for Fox's copyrighted programming from widespread use of  
14 Fox's copyrighted works consistent with how those works are being employed  
15 by DISH's services at issue (*Id.*).

16 At oral argument, DISH asserted that viewership information is necessary  
17 to ascertain existing consumer behavior to show a lack of harm from widespread  
18 conduct under the fair-use market-harm analysis. However, DISH has not  
19 persuaded this court that changes in viewership are relevant to showing that  
20 market-wide implementation of services like those at issue will not have a  
21 substantially adverse impact on the potential market for Fox's primetime  
22 programming. Fox already produced aggregate streaming data, and any  
23 additional benefit to DISH from production of individualized viewership data  
24 does not outweigh the burden of producing many more documents irrelevant to  
25 the claims and defenses in this case.

1           **D. Fox is not required to produce Non-Parties Netflix’s and**  
2           **Amazon’s confidential subscriber viewing and download**  
3           **information of Fox programming**

4           If the movant shows that its confidential commercial information qualifies  
5 for protection and would result in harm if disclosed, the requesting party has the  
6 burden of showing that the “information is relevant to the subject matter of the  
7 lawsuit and is necessary to prepare the case for trial.” Nat’l Academy of  
8 Recording Arts and Sciences, Inc. v. On Point Events, LP, 256 F.R.D. 678, 681  
9 (C.D. Cal. 2009). If the requesting party shows that the information is relevant to  
10 the litigation, the court then weighs “the injury that disclosure might cause to the  
11 property against the moving party’s need for the information.” *Id.*

12           Here, Non-Parties assert that revealing the requested information to DISH  
13 would materially prejudice them because the information could be used to outbid  
14 the Non-Parties by obtaining insight into how they value specific programs,  
15 predicting what programs are likely to attract more viewers, revealing how best  
16 to market DISH services, and understanding how to best compete against Non-  
17 Parties by gaining insight into their licensing arrangements (Motion for  
18 Protective Order 6).


19           Non-Parties assert that an Outside Litigation Counsel Only designation  
20 will not sufficiently safeguard the confidential information, particularly  
21 considering that aggregate industry-wide data is more conducive to fair-use  
22 market harm analysis and irreparable harm (*Id.*). Non-Parties further assert that  
23 viewership data is irrelevant to the forward-looking fair-use market harm  
24 analysis or the calculation of statutory damages and disgorgement, which depend  
25 on the value to Fox’s copyrighted works as utilized by DISH’s services, since  
26 changes in viewership do not establish or disprove damages to Fox from DISH’s  
27 services (*Id.* at 6-8).

1 The Non-Parties' confidential commercial information further warrants  
2 protection because they have no vested interest in the litigation and the  
3 requesting party is a competitor. More to the point, DISH has not persuaded this  
4 court that individual online services' viewership data is relevant to its defenses.

5 **V. ORDER**

6 For the foregoing reasons, the Court denies Defendant's Motions to  
7 Compel Production of Documents, and grants Non-Parties' Motion for Protective  
8 Order.

9 DATED: August 11, 2014

10  
11   
12 \_\_\_\_\_  
13 STEPHEN J. HILLMAN  
14 UNITED STATES MAGISTRATE JUDGE  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28