

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

12 CV 4155

DISH NETWORK L.L.C.,

Plaintiff,

v.

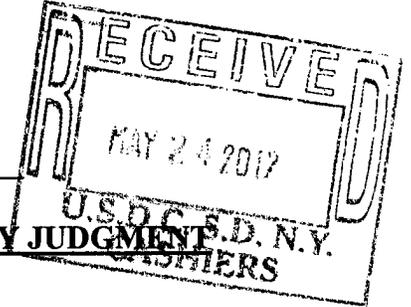
AMERICAN BROADCASTING
COMPANIES, INC., CBS CORPORATION,
the FOX ENTERTAINMENT GROUP, INC.,
FOX TELEVISION HOLDINGS, INC., FOX
CABLE NETWORK SERVICES, L.L.C., and
NBCUNIVERSAL MEDIA, L.L.C.,

Defendants.

12. Civ. _____

**DECLARATORY JUDGMENT
COMPLAINT**

WITH JURY TRIAL DEMAND



Plaintiff DISH Network L.L.C. ("DISH"), by and through its attorneys, Orrick, Herrington & Sutcliffe LLP, hereby asserts declaratory judgment claims against defendants American Broadcasting Companies, Inc. ("ABC"), CBS Corporation ("CBS"), the Fox Entertainment Group, Inc., Fox Television Holdings, Inc., Fox Cable Network Services, L.L.C., (the Fox entities are collectively referred to as "Fox"), and NBCUniversal Media, L.L.C. ("NBC") (ABC, CBS, Fox and NBC are collectively referred to as the "Major Television Networks" or "Defendants"), and alleges as follows:

NATURE OF THE CASE

1. DISH brings this Complaint seeking declaratory relief, because the Major Television Networks have threatened it with litigation intended to stifle its latest innovation, Auto Hop, that allows customers the freedom to more effectively choose to skip television commercials during certain recorded primetime shows. Even though consumers have had the option, in one form or another, to skip commercials for decades, the Major Television Networks are threatening DISH with litigation to eliminate Auto Hop, a patented technology that allows

DISH's paying subscribers to avoid commercials that they might prefer not to watch, and makes their television watching experience more meaningful and enjoyable. DISH brings this action to obtain a declaration that Auto Hop complies with DISH's bargained for contractual rights with the Major Television Networks and the copyright laws of the United States. Ultimately, this case is about freedom of consumer choice, individual families' choice to elect, if they want, to time-shift their television viewing and watch recorded television without commercials.

2. DISH is the nation's third-largest pay-television provider, delivering satellite television service to millions of families nationwide. DISH believes that it provides the highest quality programming and technology with the most choices at the best value. DISH subscribers enjoy access to a high definition ("HD") line-up with more than 200 national HD channels, many international channels, and award-winning HD and digital video recorder ("DVR") technology.

3. DISH is a party to contracts with each of the Major Television Networks that authorize DISH to re-broadcast the signals for the content shown on those networks. DISH is required to pay the Major Television Networks hundreds of millions of dollars per year in re-transmission fees, collected from its subscriber base, for the right to re-broadcast those signals – even though the Major Television Networks provide their content at no charge to television viewers with an over-the-air antenna.

4. In March 2012, DISH introduced a new HD DVR called the Hopper. The Hopper is one of the most technologically advanced DVRs on the market. It contains two terabytes of hard drive storage, and can record and store up to 2,000 hours, which is twice the capacity of any other DVR on the market. The Hopper also has PrimeTime Anytime capability, an exclusive feature that allows viewers, with one click, to record in HD all of the HD primetime TV programming on ABC, CBS, FOX and NBC. The Hopper automatically stores these shows for

eight days after they have aired, storing approximately 100 hours of primetime TV shows on the DVR hard drive, and making it easy to access episodes from the previous night, or the previous week. Viewers can record up to six programs at once and, when the Hopper is connected to companion “Joey” boxes, those recorded programs can be viewed on up to four different televisions in the home.

5. On May 10, 2012, DISH supplemented the Hopper HD DVR with an “Auto Hop” feature. Auto Hop, using patented technology, works with most shows recorded using PrimeTime Anytime. With Auto Hop, a viewer has the option to efficiently fast-forward through commercials with the touch of a button when beginning playback of a recorded PrimeTime Anytime show at or after 1 a.m. Eastern time the day after the show originally airs. Auto Hop works only with shows recorded through PrimeTime Anytime and does not work on live broadcasts.

6. With the introduction of the video cassette recorder (“VCR”), television viewers began to time-shift their television viewing to make it fit their schedules. Along with time-shifting, the VCR permitted viewers to fast-forward through commercials and other portions of a broadcast that they elected not to watch. The DVR was the next generation of VCR, providing the same generally accepted time-shifting capability, and including additional functionality, such as the ability to automatically jump forward thirty seconds at any time during playback. Auto Hop allows consumers who are already time-shifting their television viewing to skip commercials more efficiently by automatically fast-forwarding through all commercials at the touch of a button. The commercials are not erased or deleted. They remain on the recording and can be readily viewed at each customer’s individual option. The DISH Auto Hop feature does not alter or modify the broadcast signal.

7. The Major Television Networks responded to the Auto Hop feature with hostility, threatening litigation. These threats are wholly unwarranted. Auto Hop is a legitimate, legal DVR feature, and DISH is in full compliance with copyright law and its re-broadcast agreements with the Major Television Networks.

8. As described in more detail below, DISH brings this Complaint for a declaratory judgment that DISH is not directly or indirectly infringing the copyrights of the Major Television Networks and is in compliance with its contracts with the Major Television Networks.

THE PARTIES

9. DISH is a Colorado limited liability company, with its principal place of business at 9601 South Meridian Boulevard, Englewood, CO 80112.

10. ABC is a Delaware corporation with its principal place of business at 77 West 66th Street, New York, NY 10023-6298.

11. CBS is a Delaware corporation with its principal place of business at 51 West 52nd Street, New York, NY 10019.

12. Fox Entertainment Group, Inc. is a Delaware corporation with its principal place of business in Los Angeles, California. Fox Television Holdings, Inc. is a Delaware corporation with its principal place of business in Los Angeles, California. Fox Cable Network Services, L.L.C. is a Delaware limited liability company with its principal place of business in Los Angeles, California. Fox maintains offices and conducts business in New York City.

13. NBC is a Delaware limited liability company with its principal place of business at 30 Rockefeller Plaza, New York, NY 10112-0015. NBC is part of a joint venture that includes Comcast Corporation. Comcast is one of the largest cable television operators and a direct competitor to DISH.

JURISDICTION AND VENUE

14. DISH brings this action under the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202 for a judgment declaring that DISH's Auto Hop feature: (i) does not infringe on any copyrights belonging to the Major Television Networks; and (ii) does not breach any re-broadcast agreements in force between it and the Major Television Networks.

15. DISH's copyright claims arise under the Copyright Act, 17 U.S.C. §§ 101 *et seq.*, and this Court has federal question jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1338(a).

16. In addition to federal question jurisdiction over the copyright claims, there is complete diversity between the parties to support jurisdiction over the state-law contract claims, pursuant to 28 U.S.C. § 1332. The amount in controversy exceeds the jurisdictional threshold for a diversity action. In addition, the contract claims fall within the Court's supplemental jurisdiction pursuant to 28 U.S.C. § 1367(a), because the contract claims form part of the same case and controversy as the copyright claims.

17. Venue in this judicial district is conferred under 28 U.S.C. § 1391 because each Defendant resides within this district.

FACTUAL BACKGROUND

18. A DVR is a consumer electronics device that records video in digital format and saves it to a hard drive. Many set-top boxes (television signal receivers) that pay TV providers supply to their customers contain built-in DVRs. According to Nielsen data, in 2011, approximately 40% of households had DVRs.

The Hopper and PrimeTime Anytime

19. The Hopper is a best-in-class DVR offered by DISH exclusively to its satellite television customers. DISH introduced the Hopper in mid-March 2012.

20. The Hopper has been lauded by reviewers as the best whole-home DVR for its intuitive user interface, never-before-seen features and reasonable pricing. The Hopper whole-home HD DVR system makes it easy to enjoy HD programs in multiple rooms. *PCMagazine* named the Hopper an “Editor’s Choice” among DVR products and calls the award-winning and innovative Hopper “one of the best DVRs we’ve ever seen.” The Hopper also received Popular Mechanic’s “Editor’s Choice” award for outstanding achievement in new product design and innovation.

21. The Hopper’s PrimeTime Anytime capability is a feature that allows viewers, with one click, to record in HD all of the primetime HD TV programming on the Major Television Networks. The PrimeTime Anytime feature records three hours of primetime programming from each of the four Major Television Networks every night. It is expected that customers are watching more broadcast shows with PrimeTime Anytime than they were before, and that viewers are now being exposed to programs that they might have otherwise missed. Because most broadcast viewing occurs the same day, the PrimeTime Anytime feature, which makes all of primetime available for a full eight days, is expected to increase viewer exposure to the Major Television Networks’ primetime shows, and ultimately increase live viewership for the Major Television Networks. PrimeTime Anytime allows DISH customers to watch more and miss less of their favorite network television programs.

22. *ENGADGET* praises the Hopper and its PrimeTime Anytime feature “because it allows us to discover shows anytime after they first aired, so if you learn of a great new show while wasting time at the water cooler, it isn’t too late to go home and watch it or choose to save it for a later viewing. It’s a step towards a future where we can watch whatever we want without

having to plan in advance or consult a list to make sure our shows will be recorded. What else can we say? It just works.”

Dish Unveils Its Latest Innovation, Auto Hop

23. On May 10, 2012, DISH introduced a new feature, Auto Hop, as part of its PrimeTime Anytime offering on the Hopper DVR. Auto Hop is all about customer choice. DISH subscribers are given the choice to enable Auto Hop when they start the next-day playback of a program recorded using PrimeTime Anytime. With Auto Hop enabled, the subscriber has the option to automatically skip commercials during playback. The commercials are not erased or deleted from the recorded program. The commercials are still there if the customer wants to view them. Subscribers may choose not to use Auto Hop for any playback, and must affirmatively choose to skip commercials for each show that they watch. Even when Auto Hop is enabled, the customer may still view commercials by using the rewind and fast forward features during the playback of a recorded show.

24. Auto Hop is a more efficient way of achieving what consumers already do with standard DVRs. A 30-second skip feature is already standard on many DVR remote controls. It permits viewers to automatically skip ahead in a recording, at the touch of a button, completely bypassing a typical 30-second television commercial. The remote controls that come with DVRs supplied by Comcast, an NBC affiliate, can be programmed to include this 30-second skip feature. DISH has provided a 30-second skip feature for years. By pressing the 30-second skip button multiple times, a viewer can elect to bypass the full complement of commercials between show segments. Now, DISH allows the customer to opt to use an Auto Hop feature that is just an extension of this 30-second skip function. It avoids the common frustration that occurs when

viewers, using the 30-second skip or plain fast-forwarding, overshoot the commercials and fast-forward into the television programming content that they really want to watch.

25. DISH's Auto Hop feature promotes consumer autonomy. Viewers have skipped commercials for decades. Viewers commonly use the commercial break as a time to get up and momentarily leave the room. Ever since the advent of the remote control, viewers have changed channels or muted the sound during commercial breaks. And, since the advent of the VCR and DVR, viewers playing back a show have fast-forwarded through commercials. DISH is simply making it easier for viewers to refuse to be a captive audience and to exercise the well-accepted choice to skip a commercial.

26. Viewers skip commercials for a multitude of reasons. For example, many parents may choose to shield their children from commercials. They may do so for the purpose of avoiding a child's exposure to undesired promotions that are geared specifically to appeal to children or for the purpose of avoiding a child's exposure to advertisements with adult content.

27. DISH subscribers are already paying for their television service. DISH passes along hundreds of millions of dollars collected from its subscriber base to the Major Television Networks in the form of re-transmission fees. DISH's subscribers, private home viewers sitting in their living rooms, may fairly choose for themselves the content that they do and do not want to watch, and have paid for the right to do so.

28. A technology analyst for USA Today described Auto Hop as a "huge change for the media industry and a clear indication that the consumer is in control." *Dish's Auto Hop Skips Commercials in Recorded Shows*, USA TODAY, May 9, 2012.

29. DISH is not the only company to offer automatic commercial-skipping functionality to the home consumer. For example, automatic commercial-skipping is already available as an add-in to the Windows Media Center.

30. DISH does not alter the broadcasters' signals. Auto Hop is not available with live television viewing. It only becomes available at playback of a PrimeTime Anytime recording from the prior day, after 1 a.m. Eastern time.

31. DISH is party to various agreements with the Major Television Networks. These agreements authorize DISH to re-broadcast and re-transmit the Major Television Networks' television signals to DISH subscribers in exchange for annual fees in the hundreds of millions of dollars. DISH was the first company to advocate the payment of retransmission fees to broadcasters. In recent years, DISH has agreed to significant rate increases for broadcast content.

The Major Television Networks Threaten DISH with Imminent Litigation

32. The Major Television Networks have made unwarranted public attacks on the Auto Hop feature, and reserved all rights to commence litigation against DISH. According to one recent press report, all of the Major Television Networks are consulting with counsel with the intention of bringing litigation against DISH within a relatively short time.

33. Shortly after the Auto Hop feature's May 10, 2012 introduction, executives for CBS, NBC and Fox all made public remarks sharply critical of Auto Hop. These remarks were made in New York, during the television "up-fronts," at which the Major Television Networks showcase their offerings for the next television season to advertisers.

34. On May 23, 2012, The Hollywood Reporter published a news article on the Major Television Networks' plans to sue DISH. Matthew Belloni, *DISH v. TV Networks: Attorneys*

Readying Showdown over Auto Hop, THE HOLLYWOOD REPORTER (May 23, 2012),
<http://www.hollywoodreporter.com/thr-esq/dish-auto-hop-tv-networks-lawsuit-327958>.

According to that article, sources disclosed to The Hollywood Reporter “that the parent companies of the four major broadcasting networks -- Fox Broadcasting, NBCUniversal, ABC/Disney Television Group and CBS Corp. -- have begun consulting with major law firms with the expectation that litigation will be filed against Dish.” The Hollywood Reporter article goes on to note that “[t]he networks are said to be examining their DISH license agreements, looking for breaches of contract that can be alleged along with claims for copyright infringement. One top exec said a lawsuit should be expected within a month.”

35. CBS, NBC and Fox also began rejecting advertising from DISH featuring the Hopper or Auto Hop, claiming that the advertisements are contrary to their interests. These Defendants had previously accepted advertisements for the Hopper, prior to the introduction of Auto Hop.

36. Based on these statements and actions, DISH is reasonably apprehensive that it will soon be the target of litigation. And the public statements that DISH may have breached its contracts with the Major Television Networks create a real and immediate controversy over the proper interpretation of those contracts.

COUNT ONE

DECLARATORY JUDGMENT: NO COPYRIGHT INFRINGEMENT

37. DISH incorporates by reference all allegations contained in paragraphs 1 through 36 of this Complaint, as though fully set forth herein.

38. An actual controversy exists between DISH and the Major Television Networks, and DISH is reasonably apprehensive that, if it continues to provide the Auto Hop feature to its

customers using the Hopper HD DVR with PrimeTime Anytime, the Major Television Networks will commence an action against it claiming copyright infringement. DISH's provision of the Auto Hop feature to its customers does not directly or indirectly infringe copyright. Such an action by the Major Television Networks would have the potential to damage DISH and its customers who are rightfully and fairly using the Auto Hop technology to fast-forward through commercials. This controversy is of sufficient immediacy and reality to warrant the issuance of a declaratory judgment as to non-infringement.

39. A declaratory judgment on non-infringement would serve a useful purpose in clarifying or settling the legal issues between DISH and the Major Television Networks.

40. A judgment declaring that DISH is not infringing on copyrights owned by the Major Television Networks would finalize the controversy between the parties and offer them relief from uncertainty.

COUNT TWO

DECLARATORY JUDGMENT: NO BREACH OF LICENSE AGREEMENTS

41. DISH incorporates by reference all allegations contained in paragraphs 1 through 40 of this Complaint, as though fully set forth herein.

42. An actual controversy exists between DISH and the Major Television Networks, and DISH is reasonably apprehensive that, if it continues to provide Auto Hop to its customers, the Major Television Networks will commence a breach of contract action against DISH with the potential to damage DISH and its customers rightfully using the Auto Hop technology to fast-forward through commercials. The Auto Hop feature does not violate any of the contracts between DISH and the Major Television Networks. This controversy is of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.

43. A judgment that DISH, while providing the Auto Hop feature to its customers using the Hopper HD DVR with PrimeTime Anytime, remains in compliance with its agreements with the Major Television Networks, would serve a useful purpose in clarifying or settling a legal issue between DISH and the Major Television Networks.

44. A judgment declaring that DISH is not in breach of the agreements would finalize the controversy between the parties and offer them relief from uncertainty.

PRAYER FOR RELIEF

DISH prays for the following relief:

45. The Court enter a judgment declaring that DISH has not, willfully or otherwise, directly or indirectly infringed any copyright owned by the Major Television Networks by providing the Auto Hop technology to its customers for their use in playback of recorded PrimeTime Anytime shows;

46. The Court enter a judgment declaring that DISH is acting within its rights under the agreements between it and the Major Television Networks in providing the Auto Hop technology to its customers for their use in playback of recorded PrimeTime Anytime shows;

47. That DISH be awarded its costs in connection with this action; and

48. The Court grant to DISH any other and further relief as may be just and proper.

DEMAND FOR JURY TRIAL

49. DISH hereby demands a trial by jury.

Dated: New York, New York
May 24, 2012

Respectfully submitted,

ORRICK HERRINGTON & SUTCLIFFE LLP



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