

DID DISH NETWORK “AUTOHOP” OUT OF FUTURE LITIGATION? A LOOK INTO THE LEGALITY OF COMMERCIAL-SKIPPING TECHNOLOGY

JENNA BARANKO*

INTRODUCTION	122
I. FOX V. DISH NETWORK	124
A. Understanding the AutoHop Technology at Issue	124
B. An Introduction to Fox v. Dish Network	125
II. THE STATUS OF COPYRIGHT LAW AND IMPLICATIONS OF THE FOX V. DISH NETWORK DECISION.....	127
A. An Overview of Precedent Cases Leading Up to Fox v. Dish Network	127
1. Sony Sets the Standard for Analyzing Time-Shifting Technologies	127
2. Precedent-setting Cases Following the Sony Decision .	128
B. The Ninth Circuit’s Fair-Use Analysis in Fox v. Dish Network and Why it Matters	131
1. The Fair-Use Analysis in Fox v. Dish Network	131
2. Implications of the Ninth Circuit’s Fair Use Analysis for Future Ad-Skipping Technologies.....	132
III. HOW TO SOLVE THE UNRESOLVED QUESTION OF THE LEGALITY OF COMMERCIAL-SKIPPING TECHNOLOGY	134
A. The Judiciary Option: How the Judiciary Should Clarify the Ad-Skipping Issue to Resolve the Current Uncertainty.....	135
B. The Legislative Option: The Need for Statutory Guidance to Resolve Judiciary-Created Confusion	137
C. The Economic Option: A Proposal for Economic Alternatives to the Traditional Model of Television Advertising.....	139
CONCLUSION.....	142

* Jenna Baranko is a J.D. Candidate at the University of Colorado Law School, Class of 2018, and the Lead Articles Editor for the Colorado Technology Law Journal (CTLJ). The author would like to thank the members of CTLJ, whose hard work made this publication possible. She would also like to thank her family and friends for all their love and support.

INTRODUCTION

Technological advancements within the telecommunications industry increasingly challenge courts to apply the use of these innovations within the traditional confines of copyright law. The fundamental purpose of copyright protection, as set forth in Article I, Section 8 of the U.S. Constitution, is to “promote the Progress of Science and useful Arts.”¹ Copyright law accomplishes this purpose by providing an author of an original expression limited protection over exclusive rights to their work.² The scope of protection reaches the author’s exclusive rights over reproduction, distribution, and public performance and display of their work.³ Notwithstanding, the reward to the owner is the secondary consideration of copyright law. Copyright protection is meant to induce creative works and motivate the authors of these works to share their creations for the benefit of the public.⁴

The grant of rights does not accord the copyright owner a monopoly over his work, as some reproductions may be considered part of the public domain.⁵ For example, an individual may reproduce a work for “fair use,” which would fall outside of the exclusive domain of the copyright holder.⁶ Fair use of a copyrighted work is defined as use by reproduction of the work “for purposes such as criticism, comment, news reporting, [and] teaching,” which “is not an infringement of copyright.”⁷ However, recent decisions on the application of copyright law to technological innovations have left the law unsettled, thereby increasing the risk that copyright law will stifle the very creativity it seeks to protect.

The recent litigation over commercial-skipping technologies between Fox Broadcasting Co. (“Fox”) and Dish Network L.L.C. (“Dish Network”) is the latest development in a string of decisions that fails to provide clear guidance on this issue. Shortly after Dish Network introduced an ad-skipping feature to its television provision services, all four of the major broadcast networks — Fox, ABC, NBC, and CBS — instigated actions against Dish Network in the Second or Ninth Circuits.⁸ Fox, the first network to file suit, brought claims of

1. U.S. CONST. art I, § 8, cl. 8.

2. See 17 U.S.C. § 106 (2012).

3. *Id.*

4. See generally *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

5. *Id.* at 433.

6. *Id.*

7. See 17 U.S.C. § 107 (2012). See also, *Campbell v. Acuff-Music, Inc.*, 510 U.S. 569 (1994).

8. Meg James & Joe Flint, *Dish Network’s AutoHop ad-skipping feature sparks lawsuits*, L.A. TIMES (May 25, 2012), <http://articles.latimes.com/2012/may/25/business/la-fi-ct-fox-dish-suit-20120525> [<https://perma.cc/XLN2-F5V5>]; Matthew Belloni, *Fox, CBS, NBC Sue Dish Network over AutoHop Ad-Skipper*, HOLLYWOOD REP. (May 24, 2012, 1:50 PM), <http://www.hollywoodreporter.com/thr-esq/fox-cbs-nbc-sue-dish-329287> [<https://perma.cc/F247-VAGA>]; Shalini Ramachandran, *Dish to Curtail Ad Skipping on*

direct and secondary copyright infringement against Dish Network, arguing that Dish Network facilitated the creation and viewing of unauthorized copies of Fox’s copyrighted programs.⁹

The Copyright Act of 1976 (“Copyright Act”) provides a statutory definition of direct infringement in order to aid courts in deciding such claims. Direct copyright infringement is defined as the reproduction, distribution, display, or performance of a copyrighted work, or preparation of a derivative work based on a copyrighted work, without authorization from the author.¹⁰ In contrast, secondary copyright infringement does not have a statutory definition and instead developed through tort law.¹¹ The common standard for secondary copyright infringement has been defined by the Second Circuit as “one who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another, may be held liable as a ‘contributory’ infringer.”¹² The absence of a clear statutory definition of secondary copyright infringement may be adding to the uncertainty surrounding how courts determine liability for secondary infringement claims brought in response to new technologies.¹³

Dish Network argued a fair-use defense against the secondary copyright infringement claim.¹⁴ In reviewing an affirmative defense of fair use, courts weigh four factors: (1) the purpose and the character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and, (4) the effect of the use upon the potential market for or value of the copyrighted work.¹⁵ Although no single factor is dispositive, the fourth fair-use factor — “potential for market harm” — carries the greatest weight.¹⁶

The Ninth Circuit missed an opportunity to provide guidance on this unsettled area of law in its analysis of Dish Network’s fair-use defense in its decision to uphold the district court’s denial of the motion. Fox and its *amici* argued that Dish Network’s ad-skipping technology is a threat to the basic economic model of the television broadcasting industry, which derives 90% of its revenue from

Hopper Devices for ABC Shows, WALL ST. J. (last updated Mar. 3, 2014, 7:44 PM), <http://www.wsj.com/articles/SB10001424052702304585004579417633645843344> [<https://perma.cc/K2MH-SQEC>].

9. *Fox Broad. Co. v. Dish Network L.L.C.*, 747 F.3d 1060, 1066 (9th Cir. 2014).

10. *See* 17 U.S.C. § 106 (2012).

11. *See Fonovisa, Inc., v. Cherry Auction, Inc.*, 76 F.3d 259, 261–62 (9th Cir. 1996).

12. *Gershwin Publ’g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971).

13. Lisa Hasenberg, *Fair Use or Unfair Abuse: How Copyright Law Should Adapt in the Age of Ad-Skipping Technology*, 52 HOUS. L. REV. 709, 716 (2014).

14. *Fox Broad.*, 747 F.3d at 1068.

15. *See* 17 U.S.C. § 107 (2012).

16. *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 566 (1985).

advertising.¹⁷ The court disregarded the harm alleged by Fox in its analysis, holding that Fox's copyright interests were not implicated by its commercials.¹⁸ By disregarding the fourth fair-use factor, the court opened a door for future litigation based on the unanswered question of how this factor is implicated with ad-skipping technologies. The Ninth Circuit court also should have directly addressed how copyright law should not be given broad interpretation to protect economic business models of industries. Unfortunately, because television service providers do not have a clear understanding of whether ad-skipping features violate copyright law, it will likely influence companies to refrain from implementing similar technology for consumers out of fear of incurring litigation.¹⁹

This Note proceeds in three parts. Part I briefly provides background into how Dish Network's commercial-skipping technology works and introduces the basic facts of *Fox v. Dish Network*. Part II follows the development of copyright law in relation to time-shifting technology by analyzing the precedential decisions that lead up to *Fox v. Dish Network* and the unanswered questions that remain following the Ninth Circuit's analysis on the secondary copyright infringement claim brought by Fox. Part III presents the argument for how courts and the legislature should provide guidance on copyright infringement claims based on commercial-skipping technologies so that copyright law does not hinder the progress and innovation it is meant to encourage. Part III further argues how the television industry should also work towards incorporating nontraditional forms of advertising to compensate for the consumer demand for fewer commercials.

I. *FOX V. DISH NETWORK*

A. *Understanding the AutoHop Technology at Issue*

In order to understand the implications of the *Fox v. Dish Network* decision, it is critical to understand the commercial-skipping technology at issue. Dish Network offers its customers a product called Hopper. Hopper is a set-top box with digital video recorder (DVR) with a feature called PrimeTime Anytime.²⁰ Once a user enables the feature, PrimeTime Anytime records all primetime

17. Brief of the ABC Television Affiliates Association et al. as Amici Curiae in Support of Appellants at 3, *Fox Broad. Co. v. Dish Network*, L.L.C., 747 F.3d 1060 (2014) (No. 12-57048), 2012 WL 6803504.

18. *Fox Broad.*, 747 F.3d at 1069.

19. Meg James and Dawn C. Chmielweski, *Networks' Fight with Dish Over Ad-Skipping Has Huge Implications*, L.A. TIMES (May 25, 2012), <http://articles.latimes.com/2012/may/25/entertainment/la-et-ct-broadcast-networks-fight-with-dish-over-adskipping-has-enormous-implications-20120525> [<https://perma.cc/BJE8-XXUM>].

20. *Fox Broad.*, 747 F.3d at 1064.

programming on the four major broadcasting networks each weeknight and saves the recordings for eight days by default.²¹ In May 2012, Dish Network introduced AutoHop, which allows users to automatically skip commercials for programs recorded with PrimeTime Anytime.²² When a user plays a PrimeTime Anytime recording, beginning the morning after the program airs, an option appears on the screen asking the user if they would like to enable the AutoHop feature.²³ If enabled by the user, AutoHop will then automatically skip over each commercial break with the viewer seeing only the first and last few seconds of each break.²⁴ Otherwise, AutoHop is not selected by default.²⁵ Significantly, the programs remain unaltered and users are able to see the commercials if they were to fast-forward or rewind to a commercial break.²⁶

The process for creating the AutoHop feature begins with Dish Network technicians manually viewing the primetime programming each night and electronically marking when the commercial breaks begin and end.²⁷ The marked files are then uplinked and transmitted to Dish Network customers and are typically available for viewing the next day.²⁸ Dish Network also transmits quality assurance copies of the uplink to three testing facilities to ensure the beginning and end of the commercial breaks were marked accurately.²⁹

Following the implementation of the AutoHop feature to Dish Network customers, Fox sued Dish Network for direct and secondary copyright infringement and sought a preliminary injunction.³⁰ Fox, which owns the copyrights to the programs that air on its network, argued that the quality assurance copies used for the AutoHop would cause Fox irreparable harm due to its potential to undermine the substantial advertising revenue received by the network.³¹

B. An Introduction to Fox v. Dish Network

The district court denied the injunction because Fox failed to demonstrate a likelihood of success on its direct and secondary copyright infringement claims.³² In support of its direct copyright infringement claim, Fox argued that Dish retained an "impermissible" degree of control over the copies through its quality

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.* at 1065.

27. *Id.*

28. *Id.* at 1065–66.

29. *Id.* at 1066.

30. *Id.*

31. *Id.*

32. *Fox Broad. Co. Inc. v. Dish Network L.C.C.*, 905 F. Supp. 2d 1088, 1111 (C.D. Cal. 2012).

assurance copies and its storage of these copies at Dish Network facilities.³³ The district court agreed that Dish Network exercises a greater degree of control over the copies because Dish Network decides for how long the copies are available for viewing, modifies the start and end times of the programs, and does not give the user an option to stop a copy from recording once it has started.³⁴ Ultimately, however, the district court was not persuaded by this argument, since the user makes the initial decision to enable the copying technology.³⁵ In upholding the district court's summary judgment decision, the Ninth Circuit agreed that the user is "the most significant and important cause" of the copy, not Dish Network.³⁶ Thus, Fox was unlikely to succeed on its claim of direct infringement because the plaintiff must show "copying by the *defendant*" to establish a claim of copyright infringement by reproduction.³⁷

The Ninth Circuit Court then reviewed the district court's holding of secondary copyright infringement for the PrimeTime Anytime and AutoHop programs.³⁸ Fox successfully established a *prima facie* case of direct infringement by Dish Network's users because Fox owns copyrights in its programs and the users make copies of these shows. Thus, the burden shifted to Dish Network to demonstrate that it was likely to succeed on an affirmative defense of fair use.³⁹

Courts analyze fair use by weighing the purpose and the character of the use, the nature of the copyrighted work, the amount and substantiality of the portion used in relation to the copyrighted work as a whole, and the effect of the use upon the potential market for or value of the copyrighted work.⁴⁰ Notably, the Ninth Circuit declined to consider the AutoHop feature in its fair-use analysis after finding that Fox does not hold copyright interests in the commercials. Instead, the circuit court focused its analysis on PrimeTime Anytime.⁴¹ The court concluded that the fair-use factors weighed in favor of fair use.⁴² Dish Network had met its burden and, therefore, the Ninth Circuit held that the district court did not err in concluding that Fox did not establish a likelihood of success on its copyright infringement claims.⁴³

33. *Id.* at 1101.

34. *Id.* at 1102.

35. *Fox Broad.*, 747 F.3d at 1067.

36. *Id.*

37. *Id.* at 1066–67 (emphasis added).

38. *Id.* at 1068.

39. *Id.*

40. *See* 17 U.S.C. § 107 (2012).

41. *Fox Broad.*, 747 F.3d at 1069.

42. *Id.* at 1069–70.

43. *Id.* at 1068.

II. THE STATUS OF COPYRIGHT LAW AND IMPLICATIONS OF THE FOX V. DISH NETWORK DECISION

A. *An Overview of Precedent Cases Leading Up to Fox v. Dish Network*

A significant reason for the uncertainty related to this area of the law is that few precedent cases have tackled the issue of time-shifting technology and its implications in copyright law since the technology's introduction in the 1980s. The first decision relating to the issue was *Sony Corp. of America v. Universal City Studios, Inc.*⁴⁴ *Sony* set the standard for how courts should examine copyright infringement claims brought in response to time-shifting technologies. While the cases that followed *Sony* provide a look into how courts deal with confrontations between copyright protection and technological innovation, they have added little guidance to how courts will determine liability for distributors of time-shifting technologies.

1. Sony Sets the Standard for Analyzing Time-Shifting Technologies

In *Sony*, Universal City Studios and Walt Disney Studios brought suit against Sony Corporation of America, the manufacturer of Betamax video tape recorders (VTR).⁴⁵ Universal and Disney alleged that customers' use of a VTR to record a program and then watch it at a later time, also known as time-shifting, constituted contributory infringement of their copyrights in their television programs.⁴⁶ Similar to the Hopper, the Betamax allowed users to record programs for later viewing, pause the program and fast-forward.⁴⁷ When a viewer pressed the pause button, the button would deactivate the recorder until released, allowing a viewer to omit a commercial from the recording.⁴⁸ The Supreme Court used the four fair-use factors to conclude that Sony's unauthorized time-shifting was fair use.⁴⁹ In its decision, the Court articulated a legal standard that premised liability on whether the technology at issue could be used for "significant noninfringing uses."⁵⁰ Because the Betamax could be used for "significant noninfringing uses," specifically the authorized and unauthorized time-shifting protected by fair use, the Court determined that Sony was not liable for secondary copyright infringement.

44. See generally *Sony Corp. of America v. Univ. City Studios, Inc.*, 464 U.S. 417 (1984).

45. *Id.* at 420.

46. *Id.* at 420–21.

47. *Id.* at 423.

48. *Id.*

49. *Id.* at 449–55.

50. *Id.* at 440.

In its fair-use analysis, the Supreme Court further addressed the argument that consumers could use the VTR technology to fast-forward through commercials, which could undermine advertising as a revenue source. The Court dismissed this argument on the basis that the viewer would have to fast-forward to avoid commercials during playback and then estimate when the commercial break has passed, making commercial skipping an onerous task for the viewer.⁵¹ There was also no evidence of any actual harm.⁵² The harm claimed by Universal and Disney caused by time-shifting was “speculative and, at best, minimal.”⁵³ Further, the Court stated that, “[u]se that has no demonstrable effect upon the potential market for, or the value of, the copyrighted work need not be prohibited in order to protect the author’s incentive to create.”⁵⁴ The Supreme Court ultimately agreed with the district court’s findings that commercial avoidance was not sufficiently widespread to create harm to advertising revenue.⁵⁵

2. Precedent-setting Cases Following the Sony Decision

Following the *Sony* decision, a California district court missed an opportunity to rule conclusively on the issue of commercial skipping in *Paramount Pictures Corp v. Replay TV*.⁵⁶ In *Replay*, copyright owners sued SONICblue, Inc. and its wholly owned subsidiary, RePlayTV, Inc., claiming that RePlayTV’s sale of a DVR that enabled consumers to copy television programs and skip commercials of the copies constituted direct and contributory copyright infringement.⁵⁷ The DVR also allowed users to send copies of televised programs to other RePlayTV owners using the Internet.⁵⁸ Before the court had a chance to determine the matter on the merits, SONICblue filed for bankruptcy and sold its RePlayTV assets to a third party that abandoned the DVRs controversial features.⁵⁹ As a result, the copyright owners agreed to voluntarily dismiss the claims against SONICblue and the court granted the plaintiff’s Motion to Dismiss.⁶⁰

Although the technology at issue was not time-shifting technology, the Supreme Court once again grappled with the balance between copyright holders’ control and technological innovation in *MGM v. Grokster*.⁶¹ In *Grokster*, the Court considered whether

51. *Id.* at 484.

52. *Id.*

53. *Id.* at 454; *see also* *Caribbean Marine Servs. Co. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988) (“Speculative injury does not constitute irreparable injury.”).

54. *Sony Corp.*, 464 U.S. at 450.

55. *Id.*

56. *See generally* *Paramount Pictures Corp. v. Replay TV*, 298 F. Supp.2d 921 (2004).

57. *Id.* at 923.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Metro-Goldwyn-Mayer Studios v. Grokster, Ltd.*, 545 U.S. 913 (2005).

distributors of free software that allows computer users to share electronic files through peer-to-peer networks could be held indirectly liable for infringing uses of copyrighted works.⁶² Copyright holders, including songwriters, music publishers, and motion picture studios, argued that the distributors, Grokster, Ltd. and Streamcast Networks, Inc., knowingly and intentionally distributed their software to aid users in the reproduction and distribution of copyrighted works.⁶³ The Court overturned the Ninth Circuit's holding that the companies were not liable because the software was capable of substantial noninfringing uses and therefore should be protected under *Sony*.⁶⁴ In its decision, the Court noted the importance of maintaining the balance stating, "[t]he more artistic protection is favored, the more technological innovation may be discouraged; the administration of copyright law is an exercise in managing the tradeoff."⁶⁵ The Court held that one who distributes a device with the purpose to cause and profit from third-party acts of copyright infringement would be held liable, which is otherwise known as the inducement rule.⁶⁶

The *Grokster* ruling set forth an important clarification of the *Sony* standard—even technology capable of substantial noninfringing uses may be held indirectly liable for copyright infringement when there is evidence of intent to profit from such infringement.⁶⁷ The Court relied on three factors to determine whether inducement is present: (1) the defendant encouraged and promoted the infringing ability of its product, (2) the defendant's failure to acquire filtering tools to diminish the infringing uses, and (3) the profitability of the defendant's business depended on a substantial amount of infringing uses.⁶⁸ However, the Court made it clear that mere knowledge of the potential for infringing use of a product or helping users with common technical support related to the product is not sufficient to establish a company's culpability.⁶⁹ A company must take active steps to encourage infringement, such as promoting an infringing use or instructing customers on how to engage in an infringing use, in order to satisfy as evidence for intent.⁷⁰ Thus, courts are more likely to impose liability upon a defendant who intends to do harm than a defendant who merely sells a product capable of some lawful use with mere knowledge of infringing potential or of actual infringing uses.

62. *Id.* at 918–19.

63. *Id.* at 920–21.

64. *Id.* at 928.

65. *Id.*

66. *Id.* at 936.

67. *Id.* at 941.

68. *Id.* at 939–40.

69. *Id.* at 937.

70. *Id.* at 938.

In 2008, the Second Circuit court in *Cartoon Network LP v. CSC Holdings, Inc.* legitimized the distribution of recording devices but failed to provide further guidance on secondary infringement claims for time-shifting technologies.⁷¹ The technology at issue was Cablevision Systems Corporation's ("Cablevision") remote storage digital video recorder system (RS-DVR).⁷² The RS-DVR allows customers to record programs on central hard drives that are kept remotely by Cablevision at a central facility and then playback these programs through their home television sets.⁷³ Cartoon Network, which owns copyrights in movies and television programs, sued Cablevision for direct copyright infringement.⁷⁴ Although the court stated that, in general, the RS-DVR was used to playback programs in real time, the court interpreted 17 U.S.C. § 106(4) of the Copyright Act as instructive that, in the determination of whether a transmission is a "performance" and "to the public," it is immaterial that the recipients receive the transmissions at different times or in different places.⁷⁵ Thus, *Cartoon Network* clarifies that service providers may avoid copyright infringement claims for violating a copyright owner's public performance right if the service provider transmits the program separately to each of its customers.

Beginning with *Sony*, past decisions suggest a trend in the courts to be reluctant to keep new technologies from the public domain and stifle further technological innovation. As new technologies created new markets for copyrighted works, the courts made clear that copyright owners were not entitled to control over these new markets.⁷⁶ Time-shifting technologies often prevailed when confronted with a copyright infringement claim.⁷⁷ Further, courts primarily premised liability on culpable conduct and intent to profit from harm through customers' infringing uses of a product.⁷⁸ In the struggle between copyright protection and technological innovation in the cases leading up to the *Fox* decision, courts seemingly favored the public availability of new technologies over enhancing copyright holders' control over their creations.

71. *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121 (2008).

72. *Id.*

73. *Id.* at 124.

74. *Id.*

75. *Id.*

76. Jane C. Ginsburg, *Copyright and Control Over New Technologies of Dissemination*, 101 COLUM. L. REV. 1613, 1615-16 (Nov. 2001).

77. See generally *Sony Corp. of America v. Univ. City Studios, Inc.*, 464 U.S. 417 (1984); *Metro-Goldwyn-Mayer Studios v. Grokster Ltd.*, 545 U.S. 913 (2005); *Cartoon Network*, 536 F.3d at 122.

78. *Grokster Ltd.*, 545 U.S. at 936; *Sony Corp.*, 464 U.S. at 417.

B. *The Ninth Circuit's Fair-Use Analysis in Fox v. Dish Network and Why it Matters*

1. *The Fair-Use Analysis in Fox v. Dish Network*

Finally, in the *Fox v. Dish Network* decision, the court declined to assess the fair-use factors in relation to the AutoHop feature and thereby missed an opportunity to address the liability television service providers could incur with such commercial-skipping services. The court stated that "[i]f recording an entire copyrighted program is a fair use, the fact that viewers do not watch the ads . . . cannot transform the recording into a copyright violation."⁷⁹ Instead, the court used the *Sony* standard as guidance for its analysis of the fair-use factors for a secondary copyright infringement claim based on the PrimeTime Anytime feature.⁸⁰ Through analyzing PrimeTime Anytime under the fair-use factors, the court found that Dish Network demonstrated a likelihood of success on its fair-use defense.⁸¹

Under the first factor, the "purpose and character of the use," Fox argued that Dish Network's use is not "transformative" in that it does not "[add] something new, with a further purpose or different character."⁸² The court rejected Fox's argument and held that Dish customers' home viewing is a noncommercial activity. PrimeTime Anytime is available only to consumers with the Hopper product who may watch the programs privately in their homes.⁸³ Similar to the court's analysis in *Sony*, the *Fox* court concluded that "time-shifting for private home use" is a noncommercial activity and therefore weighs in favor of a finding of fair use.⁸⁴

Analyzing the second and third factors, "the nature of the copyrighted work" and "the amount and substantiality of the portion used in relation to the copyrighted work as a whole," the court also relied on the *Sony* standard.⁸⁵ The court, quoting *Sony*, held that "time-shifting merely enables a viewer to see such a work which he had been invited to witness in its entirety free of charge, the fact that the entire work is reproduced, does not have its ordinary effect of militating against a finding of fair use."⁸⁶ Therefore, the court determined that both factors also weighed in favor of a finding of fair use.⁸⁷

79. *Fox Broad. Co. v. Dish Network L.L.C.*, 747 F.3d 1069 (9th Cir. 2014).

80. *Id.*

81. *Id.*

82. Brief in Support of Plaintiffs-Appellants, *supra* note 17, at 47. *See also Campbell*, 510 U.S. at 536.

83. *Fox Broad.*, 747 F.3d at 1069.

84. *Id.*

85. *Id.*

86. *Id.* at 1068 (quoting *Sony Corp.*, 464 U.S. at 451).

87. *Id.*

The court declined to analyze the market harms alleged by Fox under the fourth factor, which weighs the “effect of the use upon the potential market for or value of the copyrighted work.”⁸⁸ The court first emphasized that the market harm factor is the “most important element of fair use.”⁸⁹ The court then determined that the market harm alleged by Fox results from automatic commercial skipping, not the PrimeTime Anytime recording of primetime programs.⁹⁰ However, the court found that Fox does not own copyright interests in its commercials and therefore refrained from analysis of the market harm potential created by the AutoHop.⁹¹ The Ninth Circuit also dismissed the argument that PrimeTime Anytime harms Fox’s secondary market—the licensing of its programs to distributors such as Hulu and Amazon.⁹² Based on this analysis of the four fair-use factors, the Ninth Circuit held that the district court did not abuse its discretion in finding that Fox failed to demonstrate that it was likely to succeed on a claim of secondary infringement.⁹³

2. Implications of the Ninth Circuit’s Fair-Use Analysis for Future Ad-Skipping Technologies

The decisions leading up to the *Fox* case have given little guidance about time-shifting technologies, particularly as it relates to ad-skipping. The fact that the *Fox* court declined to assess the fair-use factors in relation to the AutoHop feature carries great significance due to the broadcasting industry’s reliance on ad-revenue to generate its broadcast content. In addition, the parties settled the dispute out of court following the Ninth Circuit’s decision on the district court’s summary judgment ruling, which eliminated the opportunity for the Supreme Court to weigh in on the *Sony* holding in light of technological advancements.⁹⁴ Following the Ninth Circuit’s ruling, the companion suit brought by ABC and CBS against Dish Network in the Southern District of New York was settled out of court before a judgment could be made on the merits.⁹⁵

The inherent differences in the fast-forwarding technologies previously at issue and the automatic skipping of the AutoHop are noteworthy. The one-time activation of the AutoHop function at the beginning of the program differs significantly from the tedious task

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* at 1070.

94. Jonathan Stempel, *Dish, Fox Settle Litigation over HopperAd-Skipper*, REUTERS (Feb. 11, 2016), <http://www.reuters.com/article/us-dish-network-twenty-first-fox/dish-fox-settle-litigation-over-hopper-ad-skipper-idUSKCN0VK27E> [<https://perma.cc/UH8W-72VT>].

95. Ramachandran, *supra* note 8; Press Release, CBS Corporation, *CBS and Dish Reach Content Carriage Agreement* (Dec. 6, 2014), <http://www.cbcorporation.com/2014/12/cbs-and-dish-reach-content-carriage-agreement/> [<https://perma.cc/CQS3-5CHJ>].

of fast-forwarding through each commercial break, which the Betamax required. Manual fast-forwarding requires greater volition on the part of the viewer. Unlike fast-forwarding, where a viewer may still see portions of the commercial content, the AutoHop removes almost all of the content so viewers only see the first and last seconds of the break. Research has also found that when DVR viewers fast-forward, they focus intently on the screen and even viewing the sped-up versions can have positive effects for advertisers.⁹⁶ It is important to note that, while ad-skipping technology has greatly advanced since *Sony*, the underlying functionality is the same. Both technologies allow consumers the ability to fast-forward through television programs that they are authorized to view.⁹⁷ Notwithstanding, because the AutoHop's time-shifting capabilities differ significantly from the VTR at issue in *Sony*, further guidance is necessary to determine how the fair-use factors apply to the new technology.

The outcome of future litigation regarding commercial-skipping technology likely will turn on the answer to the market harm question. While none of the factors are dispositive, the market harm factor carries the most significance in the fair-use analysis.⁹⁸ The question remains whether a broadcasting network could claim copyright ownership over the compilation, made up of the commercials in addition to the programming, and therefore induce a court to address the market harm factor in a fair-use defense to secondary copyright infringement. While Fox was unsuccessful in claiming copyright ownership over its commercials, other networks, such as a cable network, may have a greater chance of success on a secondary copyright infringement claim if the ad-skipping technology were to spread to cable channels. Thus, while the battle against time-shifting technology is over for now, the recent litigation demonstrated the weaknesses in Dish Network's case that may make it possible for future litigation to succeed on secondary copyright infringement claims.

Unresolved questions in copyright law relating to commercial-skipping technology may hinder the very progress and creativity that copyright seeks to incentivize. The remaining uncertainty following the *Fox* decision could hinder the introduction of new technologies that seek to make it easier for consumers to experience copyrighted works. Other television service providers will likely hesitate to introduce similar technology. In fact, DirecTV claimed to possess similar ad-skipping technology during the time of the AutoHop

96. ALLAN J. KIMMEL, *PSYCHOLOGICAL FOUNDATIONS OF MARKETING* 71 (2013).

97. Brief of Law Scholars and Professors as Amici Curiae in Support of Defendants-Appellees, at 7, *Fox Broad. Co. v. Dish Network L.L.C.*, 747 F.3d 1060 (9th Cir. 2014) (No. 12-57048), 2013 WL 431699.

98. *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 566 (1985).

litigation but has since failed to implement it following the decision.⁹⁹ Dish Network may refrain from increasing the availability of commercial skipping to other channels in its service due to the potential to be held liable for copyright infringement. Such hesitation could explain why, since the implementation of AutoHop, Dish Network has not expanded its commercial-skipping service beyond the original four broadcast networks.

Commercial-skipping technology not only increases efficiency in how viewers watch television, but also enhances competitive pressure within the television industry. For example, broadcast networks may need to continue to seek alternative ways to feature their ads in response to the consumer demand for reduction in commercials during programs. Some networks are already working to cut back commercial times during the airing of their programs.¹⁰⁰ Further, commercial-skipping technology may pressure networks to decrease the excessive consumerism of commercials in order to compete with new technologies. It may also encourage broadcast networks to follow the path of online streaming services, such as Hulu and Amazon, to further technological advancement and provide tailored advertising content to the consumer. Since copyright protection's underlying aim is to promote technological innovation, such as the AutoHop, copyright law should not stifle these advancements.

III. HOW TO SOLVE THE UNRESOLVED QUESTION OF THE LEGALITY OF COMMERCIAL-SKIPPING TECHNOLOGY

The power to provide guidance on the critical unsolved question of the legality of commercial-skipping features does not solely lie with the court. If courts are unable or unwilling to address the issue, the legislature must step in and pass law relating to ad-skipping features. In absence of such an act, the courts should seize the next opportunity to clarify the *Sony* standard in light of modern technological advancements since the VTR. Moreover, while legal solutions are one path to resolving the issue, an economic solution is possible, if not necessary. Advertisers and broadcasting networks should seek alternatives to the traditional model of televised commercials in order to combat the effects of ad-skipping technologies and meet consumer demand. A good starting point may lie in the recent advertising methods used by online video streaming service providers to target audiences based on certain characteristics.

99. Brief in Support of Plaintiffs-Appellants, *supra* note 17, at 18.

100. Ryan Waniata, *As TV Cuts Commercials, Product Placement is Worming its Way Into Your Shows*, DIGITAL TRENDS (June 11, 2016), <http://www.digitaltrends.com/movies/how-ads-are-going-underground-to-invade-your-favorite-tv-shows/> [https://perma.cc/QCH7-66KL].

A. *The Judiciary Option: How the Judiciary Should Clarify the Ad-Skipping Issue to Resolve the Current Uncertainty*

In order to clarify the *Sony* standard, courts should provide an analysis of the fair-use factors. Specifically, courts should analyze whether ad-skipping technologies create the detrimental harm claimed by Fox and other broadcasting companies under the market harm factor. The market harm factor is often the most important factor in the analysis and likely provides the best opportunity for plaintiffs to successfully demonstrate secondary copyright infringement from commercial skipping. Because the majority of broadcast television revenue is derived from advertisements, commercial skipping has the potential to diminish the amount advertisers are willing to pay broadcasting companies to distribute their commercials.¹⁰¹ AutoHop also targets the most popular programming, the programs aired during primetime, on channels that are the most dependent on advertising.¹⁰² Therefore, the market harm implications in commercial-skipping technologies play a significant role in determining whether or not a copyright infringement claim could succeed.

Even if the court had undergone a fair-use analysis of the AutoHop feature and examined the market harm implications, the outcome would likely have been the same. The AutoHop feature only allows users to automatically skip the commercials when viewing a recorded program the following day after it airs. As a result, most viewers will watch the content in real-time and will see the programs with the commercials.¹⁰³ Further, Dish's subscribers only account for 12% of broadcast homes and only 53% of those homes have DVRs.¹⁰⁴ One analyst concluded from these statistics that only 1% of advertising revenue is actually at risk.¹⁰⁵ While Fox and its *amici* argued that Dish Network's commercial-skipping service would destabilize the basic business model in the television industry, present data on ad-skipping usage does not support the contention that such an adverse effect is likely to occur.¹⁰⁶ Accordingly, the dire consequences of ad-skipping services proclaimed by Fox appear speculative and may be based more in fear than in fact.

101. Brief for Amicus Curiae Cablevision Systems Corporation in Support of Plaintiffs-Appellants, 16 (Dec. 20, 2012).

102. *Id.* at 22.

103. Anthony Crupi, *Dish Net's Ad-Zapping Service Likely to Have Little Impact*, ADWEEK.COM (May 24, 2012), <http://www.adweek.com/news/television/analyst-auto-hop-flap-much-ado-about-nothing-140762> [https://perma.cc/3DFS-8V64].

104. *Id.*

105. *Id.*

106. Brief of the ABC Television Affiliates Association, the CBS Television Network Affiliates Association, the NBC Television Affiliates, and the Fox Television Affiliates Association as Amici Curiae in Support of Appellants at 18 Fox Broad. Co. v. Dish Network L.L.C., 747 F.3d 1060 (9th Cir. 2013) (No. 12-57048), 2012 WL 6803504.

Further, the technological advancement of the AutoHop does not take it outside the reach of protection afforded by *Sony*. While the technology has significantly advanced, the end result is the same – giving consumers time-shifting capabilities through private, non-commercial home use of a product.¹⁰⁷ The capability of AutoHop to skip commercials with less action required of the viewer should not take the technology outside the realm of fair use.¹⁰⁸ Similar to the Betamax technology in *Sony*, the AutoHop allows consumers to pause, fast-forward, skip, and rewind programs they are authorized to view without altering the commercials within the programming content.¹⁰⁹ Thus, if the Ninth Circuit had analyzed AutoHop in its fair-use analysis, it is likely that the *Sony* standard would have still governed, and the court would have found the ad-skipping technology to be fair use.

A court would likely also find that the inducement rule articulated in *Grokster* would not apply to the actions taken by Dish Network to deny it protection under *Sony*. While the defendants in *Grokster* depended on users directly infringing on copyrighted works for their business model, Dish Network's commercial skipping is not the foundation of its business. Unlike the peer-to-peer networks, which relied on high volumes of users sharing copyrighted works in order to gain money from advertisers, Dish Network primarily functions as a television service provider for paying subscribers. Accordingly, the AutoHop does not make up a significant portion of its business. Along with the absence of this factor, Dish Network arguably is not promoting or encouraging an infringing use with its product. Rather, Dish Network is giving consumers a more effective means of fast-forwarding through commercials for private home-use, which they are already authorized to do. Viewing the AutoHop through the lens of precedent-setting cases, it appears that the case likely would have come out the same had the Ninth Circuit court analyzed the ad-skipping technology under a fair-use defense.

Moreover, the underlying aim of copyright protection is not to protect the basic business model of the television industry and courts should not construe copyright law so broadly as to give it such power. In fact, Congress has repeatedly acted to affirm the *Sony* decision that private in-home copying for personal use is fair use.¹¹⁰ Fox's attempt to protect its economic business model from private non-infringing conduct falls outside the scope of the Copyright Act. The Copyright Act extends incentives for authors to create works and share with the public through the provision of certain exclusive rights, but does not provide a monopoly over new markets for

107. Brief in Support of Defendant-Appellees, *supra* note 97, at 12.

108. *Id.*

109. *Id.*

110. *Id.*

copyright holders. While it is likely that the case was correctly decided, it would be beneficial for a court to clarify the standard so that television service providers will know the possible liability they might incur if they were to release similar ad-skipping technology.

However, it is unlikely that judiciary action will occur anytime soon. Following the Ninth Circuit's ruling in *Fox*, ABC, NBC, CBS, and Fox all agreed to settle their pending lawsuits against Dish Network's AutoHop, thereby eliminating further opportunities for a court to rule on the issue.¹¹¹ Television service providers have also failed to introduce other ad-skipping technologies since the *Fox* case and Dish Network has not expanded its current ad-skipping service, making it unlikely other copyright holders will institute actions against distributors of such services.

The all-or-nothing approach that would likely be taken by the judiciary is another negative consequence of relying on the judiciary to solve the ad-skipping issue. Analyzing ad-skipping technology under the fair-use test requires a finding of distributors incurring either liability or no liability, while the answer may lie somewhere in between. Without any opportunities for the judiciary to address the ad-skipping controversy on the horizon and the difficulties associated with this approach, the legislative and economic options are likely better alternatives to solving the current state of uncertainty.

B. The Legislative Option: The Need for Statutory Guidance to Resolve Judiciary-Created Confusion

Alternatively, the legislature could address copyright implications of ad-skipping technologies. Congress previously amended the Copyright Act to provide that an individual may engage in personal space shifting so that copyrighted material may be viewed "in the same place or in separate places and at the same time or at different times."¹¹² This amendment provided guidance to the telecommunications industry by addressing situations in which individuals watch copyrighted works in other locations and at other times and determining that it does not constitute copyright infringement.¹¹³

Similar guidance from Congress on the issue of ad-skipping technology would help to address the issue directly, rather than relying on the courts for a decision that likely would not be presented and decided on for years. An amendment to the fair-use provision to

111. See Ramachandran, *supra* note 8; CBS Corp., *supra* note 95; Eriq Gardner, *NBC, Dish Settle Last of the Lawsuits Over Ad-Skipping DVR*, HOLLYWOOD REP. (June 17, 2016, 7:23 AM), <http://www.hollywoodreporter.com/thr-esq/nbc-dish-settle-last-lawsuits-903915> [https://perma.cc/J7RW-KWD5].

112. 17 U.S.C. § 101 (2012).

113. *Id.*

include private time-shifting within the list of allowed fair uses would bring the Copyright Act more in line with the *Sony* precedent and clear up the legal ambiguity surrounding commercial-skipping technologies. Moreover, the text of the Constitution clearly provides that it is Congress who has the duty to define the scope of rights that copyright holders should be granted.¹¹⁴ Finally, the public could petition for rulemaking with the Federal Communications Commission or Federal Trade Commission asking for clarification on this issue.

Congress also has the ability to balance the effects of courts curtailing the scope of copyright holders' control through the provision of compensation. Unlike the judiciary, which can provide damages only on a case-by-case basis, Congress can create far-reaching compromise measures, giving copyright holders compensation in lieu of control. Often these measures have occurred in response to changes in the music industry and take the form of compulsory licenses, which permit the continued distribution of the new technology in exchange for payment to copyright owners.¹¹⁵ The first compulsory license regime was created in 1909 in response to new technology in the recording industry.¹¹⁶ The legislation allowed anyone to make a mechanical reproduction of a musical composition upon obtaining a statutory license and paying a fee once the copyright owner had authorized the first mechanical reproduction of the work.¹¹⁷ Since then, Congress has repeatedly passed legislation mandating compulsory licenses when confronted with conflicts between copyright protection and new technology.¹¹⁸ It may be in the best interest of all parties to create a similar compromise to those Congress created for the music industry. A measure that would provide a royalty fee to the broadcasting networks in exchange for cable service providers ability to distribute commercial-free programming may be the optimal solution, as it would compensate copyright holders for the loss of exclusive rights over their work created by ad-skipping technologies.

However, the legislative option carries certain disadvantages similar to the difficulties that would arise with relying on the judiciary to solve the ad-skipping issue. Primarily, legislative action is a slow-moving process that may not provide the necessary clarification before new ad-skipping technologies enter the public domain. Because it is unlikely legislative action will occur anytime soon, television service providers seeking to introduce ad-skipping technologies in the near future would still risk facing liability.

114. *Sony Corp. of America v. Univ. City Studios, Inc.*, 464 U.S. 417, 429 (1984).

115. Ginsburg, *supra* note 76, at 1626.

116. *Id.* at 1627.

117. *Id.*

118. *Id.* at 1628.

Further, it is not guaranteed that Congress would be able to provide the necessary guidance for each particular ad-skipping system with a single piece of legislation.¹¹⁹ Although Congress undoubtedly has greater flexibility than the judiciary, this flexibility still may not cover future advancements across all ad-skipping technology systems.

While a legislative option may be slow to initiate and implement, it is likely the best option for providing clear guidance on a difficult issue that courts have failed to adequately address. Instead of an all-or-nothing approach to ad-skipping technologies created by the courts, a more effective approach would be for Congress to create a legislative compromise that would compensate copyright holders without limiting the public availability of new commercial-skipping technologies.

C. *The Economic Option: A Proposal for Economic Alternatives to the Traditional Model of Television Advertising*

Rather than relying on the judiciary or the legislature to solve the problem, advertisers and networks could also continue to explore alternatives to the traditional model of television advertising. Technological advancement in data analytics and targeted advertising has already significantly altered the way in which online users view advertisements. For example, Hulu provides targeted ads based on the individual user's interests that play during its online streaming services.¹²⁰ Prior to beginning the streaming content, Hulu users are provided with two or three categories of advertising options and are able to choose which advertisement they want to see.¹²¹ YouTube also allows advertisers to target by age, gender, location, and interests of the viewer.¹²² Further, YouTube plays short video ads prior to the beginning of the YouTube video the user selected.¹²³ As a result, advertisers who use these platforms are better able to connect with their audience and engage them with their products.

Broadcasting networks should continue to work towards implementing this digital-style targeting into their programming. Several networks already have data products with targeting capabilities.¹²⁴ NBC uses a cable set-top box to collect data to tell advertisers which program on that network is likely to include their

119. Michael A. Einhorn, *Grokster v. Sony: The Supreme Court's Real Decision*, 23 ENT. & SPORTS LAW. 1, 13 (2005).

120. *Hulu for Brands*, HULU, <http://www.hulu.com/advertising/ad-product/ad-select-or/> [<https://perma.cc/D4SN-K5NL>] (last visited Dec. 3, 2017).

121. *Id.*

122. *How to Advertise with YouTube Video Ads*, YOUTUBE (Feb. 4, 2015), <https://www.youtube.com/yt/advertise/launch-ad.html> [<https://perma.cc/5BZB-DVNY>].

123. *Id.*

124. Jeanine Poggi, *Dear TV: We Love You. You're Perfect. Now Change. (But Not Too Much.)*, AD AGE (Apr. 18, 2016), <http://adage.com/article/media/future-tv-advertising/303565/> [<https://perma.cc/J95K-N7TY>].

target audience.¹²⁵ Time Warner's networks—TNT, TBS, and CNN—also offer target ads that guarantee to advertisers that brands will reach a specific audience.¹²⁶ Dish Network has also proposed the usage of targeted advertising as a substitute for traditional commercial breaks.¹²⁷ Not only would such digital-style targeting provide viewers with fewer overall commercials, it would likely increase the effectiveness of the commercials through tailoring advertisements directly to a viewer's interests. Moreover, with fewer commercials overall, it increases the chances that these targeted commercials will be impactful, providing an economic incentive for advertisers to invest in such alternative models of advertising.

Viewers are changing the way they consume television, which means that advertisers and networks should seek alternative advertising methods to correspond with the changes rather than fighting against the distribution of commercial-skipping technology. A recent survey found that 76% of U.S. households have a DVR, subscribe to Netflix, or use an on-demand service from their cable provider.¹²⁸ These viewing trends correspond with cultural changes, as society is increasingly becoming one of instant gratification and less patience for waiting.¹²⁹ Along with greater usage of instant streaming or recording services, it is estimated that consumers fast-forward through 45% of advertising content during primetime.¹³⁰ In his congressional testimony, Charlie Ergen, Chairman and Co-founder of Dish Network, argued that AutoHop technology is simply providing consumers what they want by giving them the choice to view their preferred programming while skipping what they do not want to see, such as eliminating commercials for junk food and alcohol from programs children are watching.¹³¹ Networks should work to keep up in today's fast-paced environment, through the implementation of quick, targeted ads, rather than continuing to overload programs with long commercial breaks.

125. Gerry Smith, *TV Ads Are About to Get Personal With New Targeting Tools*, BLOOMBERG TECH., <https://www.bloomberg.com/news/articles/2015-09-29/tv-ads-are-about-to-get-personal-with-new-targeting-tools> [<https://perma.cc/J9J9-9KKD>] (last updated Sep. 29, 2015).

126. *Id.*

127. Scott Slavick, *IP: Hop, Skip and Jump Those Ads*, INSIDE COUNS. (Oct. 1, 2013), <http://www.insidecounsel.com/2013/10/01/ip-hop-skip-and-jump-those-ads> [<https://perma.cc/SA2X-2E8A>].

128. Press Release, Leichtman Research Group, *72% of US Households Have a DVR, Netflix, or Use On-Demand* (Jan. 2, 2015), <http://www.leichtmanresearch.com/press/010215release.html> [<https://perma.cc/CV92-KD2Q>].

129. Christopher Muther, *Instant Gratification Is Making Us Perpetually Impatient*, THE BOS. GLOBE (Feb. 2, 2013), <https://www.bostonglobe.com/lifestyle/style/2013/02/01/the-growing-culture-impatience-where-instant-gratification-makes-crave-more-instant-gratification/q8tWDNGeJb2mm45fQxtTQP/story.html> [<https://perma.cc/3YBV-7F4X>].

130. Hasenberg, *supra* note 13, at 711.

131. *Hearing on "Future of Video" Before the H. Subcomm. on Commc'ns and Tech.*, 112th Cong. 2 (2012) (Testimony of Charlie Ergen Chairman and Co-Founder of Dish Network and Echostar).

Product placement is another option for advertisers to display ads in a manner that viewers cannot skip.¹³² The product placement phenomenon, although not new to television, can be increasingly seen within certain networks.¹³³ For example, NBC shows such as *The Voice* and *Saturday Night Live* have begun cutting back on commercial breaks in exchange for product insertion in their programs.¹³⁴ Content creators, Viacom and Turner, have also announced that they are looking to eliminate as much as 50 percent of their advertising airtime, making alternatives such as product placement a likely alternative.¹³⁵ Many advertising companies are turning to digital insertion for product placement, which occurs when CGI products and logos are inserted into programming after filming.¹³⁶ Not only can digital insertion occur in the editing process of new content, but also can be inserted retroactively into past programs.¹³⁷ Thus, because the traditional methods of product placement have been enhanced by new technology, product placement is another alternative that advertisers and broadcasting companies should seek to implement.

It is clear from the prevalence and popularity of time-shifting technologies that consumers are interested in the ability to skip through commercials during the viewing of programs. It is also evident that advertisements are an integral part of modern culture and are unlikely to disappear from television programs in the near, or even distant, future. Changing trends in television viewership and increased consumer usage of on-demand services give merit to Dish Network's argument that the current advertising model is going to change—with or without the AutoHop.¹³⁸ If a high volume of television viewers acquire commercial-skipping capabilities, such as the AutoHop, it is unlikely that advertisers will continue to pay substantial fees to have networks air their content.¹³⁹ Consequently, advertisers, along with broadcasting networks, should seek alternative solutions to displaying their ads and maximizing their ad revenue rather than rely on the courts or legislature to act in their favor.

132. Waniata, *supra* note 100.

133. *Id.*

134. *Id.*

135. *Id.*

136. Steve Rose, *As Seen on TV: Why Product Placement is Bigger Than Ever*, THE GUARDIAN (June 24, 2014), <https://www.theguardian.com/tv-and-radio/2014/jun/24/breaking-bad-tv-product-placement> [https://perma.cc/4RJS-BWNZ].

137. *Id.*

138. Slavick, *supra* note 127.

139. Hasenberg, *supra* note 13, at 730.

CONCLUSION

Advancement in time-shifting technology presents significant challenges for the application of current copyright law. Precedent-setting cases leading up to the *Fox* decision have provided little guidance since the *Sony* decision on video tape recorders and over three decades later there has been little clarification on this standard in regard to commercial-skipping technology. Recently, the Ninth Circuit court had an opportunity to clarify the *Sony* standard as it relates to commercial-skipping technology, but declined to do so on the basis that Fox did not have any copyright interests implicated in its commercials. The Ninth Circuit emphasized the fourth fair-use factor as carrying the most significance, but refrained from reviewing it in relation to the AutoHop feature. Thus, the *Fox* decision exposes the market harm factor as being potentially outcome-determinative for secondary copyright infringement claims brought in the future.

Because the law remains unsettled in the area of commercial-skipping technology, there is potential that copyright law may stifle the very creativity it seeks to promote. Since the introduction of the technology to its service in 2012, Dish Network has not expanded its commercial-skipping services beyond the four major broadcast networks. Further, no other television service providers have sought to introduce ad-skipping technology similar to the AutoHop feature. An examination into the resulting effects of the *Fox* decision clearly demonstrates that the decision is hindering the implementation of ad-skipping technology and thus, depriving the public of the benefit of the technology, contrary to the underlying aim of copyright law.

While there are several legal solutions available to fix the underlying problem of uncertainty, the solutions require action on the part of the judiciary or the legislature that may not occur anytime soon. Although an opportunity may come along for the courts to rule on this issue, it is clear that the power to determine the confines of copyright protection lies with Congress, as determined by the Constitution. Congress should therefore amend the Copyright Act's fair use provision to include time-shifting technologies and clear up the current environment of uncertainty.

Perhaps prior to the introduction of a legislative solution, advertisers and broadcasting networks should rework the conventional model of commercial viewing during television programs in order to keep up with the consumer demand for less exposure to ads. Digital-style targeting and product placement are viable alternatives to the traditional method of advertising. Not only could these methods increase the impact and effectiveness of advertisements, but they are also necessary due to an increased consumer demand for commercial-free content and the arguably inevitable evolution of traditional television advertising.

Regardless of the ultimate solution, the chilling effect on ad-skipping technology due to the *Fox v. Dish Network* holding is clear. Television service providers remain uncertain as to whether the introduction of commercial-skipping technologies will cause them to incur significant liability if copyright holders were to raise secondary copyright infringement claims. As a result, television service providers are unwilling to implement such technology in the face of this uncertainty. Nor is Dish Network seemingly willing to expand the reach of its ad-skipping technology to additional networks due to the high risk that the courts could skew the market harm factor against Dish Network in a fair-use analysis. As the dust settles over the AutoHop litigation, it remains up in the air how long the future of automatic ad-skipping technologies will continue to be uncertain based on the *Fox* decision. However, it does not appear that television viewers will be skipping for joy anytime soon.

