

Fox Broad. Co. v. Dish Network, LLC,
723 F.3d 1067 (9th Cir. 2013)
amended and reh'g en banc denied, 747 F.3d 1060 (9th Cir. 2014)

Year	2013
Court	United States Court of Appeals for the Ninth Circuit
Key Facts	Defendant Dish Network, LLC (Dish) developed and distributed the <i>Hopper</i> , a digital video recorder (DVR) with video on-demand capabilities. At the same time, Dish introduced a feature called PrimeTime Anytime with AutoHop. PrimeTime Anytime allowed subscribers to set a single timer to record primetime programming on major broadcast networks, including plaintiff Fox Broadcasting Co.'s (Fox's) programs. Dish subscribers had to enable the service, and copies were stored on the DVR for a number of days pre-selected by Dish. AutoHop allowed subscribers to automatically skip commercials, after the time points of those commercials were indexed by Dish, using "quality assurance" copies of Fox's works. Fox alleged direct and contributory infringement, and the district court denied Fox a preliminary injunction because it had not established a likelihood of success on the merits of its claims. Fox appealed.
Issue	Whether the copying and storage for later use of Fox programming, as facilitated by Dish Network's <i>PrimeTime Anytime</i> service, constituted fair use.
Holding	First, the appeals court held that Dish was not directly liable for their customers' copying and storage of Fox's programming. Then, relying heavily on <i>Sony Corp. of Am. v. Universal City Studios, Inc.</i> , 464 U.S. 417 (1984), the court held that Dish was not secondarily liable because Dish customers' use of <i>PrimeTime Anytime</i> to copy television programming was fair use. Rejecting plaintiff's assertion that the copying was done for library-building, the court found that <i>PrimeTime Anytime</i> was used for time-shifting for private home use and was a noncommercial, nonprofit activity under <i>Sony</i> . It also found that Dish customers engaged in time-shifting of programs that they had already been invited to view in their entirety, free of charge. Therefore, the fact that customers copied entire programs did not weigh against a finding of fair use. The "market harm" analysis differed slightly from that of <i>Sony</i> because a secondary market existed for Fox's programming through licenses with distributors such as Hulu and Apple, while no such market existed in <i>Sony</i> . However, the court still found that there was no harm, noting that Fox often charged no additional fee for providers to offer its programming on demand.
Tags	Ninth Circuit; Film/Audiovisual; Format shifting/Space Shifting; Internet/Digitization
Outcome	Preliminary ruling, mixed result, or remand

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