

DISH's Technologies Not Infringing But Do Breach Fox's Contract

DISH Network's DVR technologies do not infringe on Fox Broadcasting Company's copyrights, but provisions in a 2002 contract prohibit some of DISH's activities, a federal district court found in ruling on cross-motions for summary judgment.

Fox filed a copyright infringement and breach of contract case against DISH Network over its services that allow consumers to time shift television programs, skip advertisements, and transmit programs to mobile devices. The breach of contract claim is based in part on a 2002 agreement between Fox and DISH that contains a "no copying provision except in private homes."

Fox argued that the Supreme Court's decision in *American Broadcasting Companies, Inc. v. Aereo* was a "game changer that governs the outcome of its copyright claims" in the case. Not so, the district court said.

In this case, the subscriber is gaining access "to her home STB/DVR and the authorized recorded content on that box," the court wrote. "Any subsequent transfer of the programming by DISH Anywhere takes place after the subscriber has validly received it, whereas Aereo transmitted its programming to subscribers directly, without a license to do so." Here, Dish had a license to the programming.

However, the inquiry did not stop with the copyright claim. The court said Fox's claims for the feature, which allows content to be uploaded onto mobile devices including out of the home, does breach the 2002 contract. "Given our knowledge of current technologies, it may seem absurd that a contract would allow subscribers to use DISH Anywhere on their mobile devices inside the home, but not the moment they step outside the home. Those are terms, however, to which the parties agreed."

The court dismissed Fox's copyright claim for the function that allowed subscribers to skip advertisements. "AutoHop neither copies nor distributes anything—it skips ads," the court noted. Thus, there is no copyright infringement. Again, as to the contract claim, the court found Fox may be entitled to royalties for the advertisement-free copies.

As to the time shifting feature, the court found it was neither copyright infringement nor a breach of contract.

Fox Broadcasting Co. v. DISH Network, LLC, C.D. Calif. No. 12-4529, filed January 20, 2015

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