

No Fox Copyright on Ads, No Copyright Cause of Action

Fox Broadcasting Company can't maintain a copyright action against Dish Network's product that enables Dish customers to skip over commercials because Fox doesn't own the copyright to the commercials, an appellate court found in affirming a trial court ruling.

In addition, the appellate court said, while it is a "much closer" question, the trial court did not err in finding that the commercial-skipping product did not violate the contract between Fox and Dish, which prohibits Dish from offering a "video-on-demand" program.

At issue are two Dish offerings—"Hopper" and "Joey." Both allow Dish customers to view prerecorded Fox programs and automatically skip over the commercials. If a Dish customer enables the feature, the viewer sees only the first and last few seconds of each commercial break. Fox sued Dish for copyright infringement and breach of contract and sought a preliminary injunction. The trial court denied the injunction and the appellate court affirmed the trial court's decision.

Both the trial court and the appellate court found that the recording of the programs is air use under the Copyright Act. The appellate court noted further that "commercial-skipping does not implicate Fox's copyright interest because Fox owns the copyrights to the television programs, not to the ads aired in the commercial breaks," the appellate court wrote. "If recording an entire copyrighted program is a fair use, the fact that viewers do not watch the ads not copyrighted by Fox cannot transform the recording into a copyright violation."

The contract between Fox and Dish prohibits Dish from distributing Fox programming "on an interactive, time-delayed, video-on-demand or similar basis." The appellate court noted it was "dubious of Dish's position" that the products are "not 'similar' to 'interactive, time-delayed, [or] video-on-demand' programming, the distribution of which is expressly prohibited" by the contract. However, the appellate court would not reverse the trial court's ruling that the product was "more akin" to a DVR than to video on demand.

Fox Broadcasting Company, et al. v. Dish Network, LLC, et al., Ninth Circuit No. 12-57048, issued July 24, 2013.