COMMENT

FAIR USE OR UNFAIR ABUSE: HOW COPYRIGHT LAW SHOULD ADAPT IN THE AGE OF AD-SKIPPING TECHNOLOGY*†

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† Registered trademark symbols (®) have been omitted for brevity.

I. INTRODUCTION

The excitement of catching the latest reality show, crime drama, or sitcom on television has long been tempered by the reality that a substantial amount of the allotted air time will likely be devoted to a variety of thirty-second long commercial advertisements.[1] What is more, the ratio of commercial advertising time to programming content time has only been increasing over time.[2] Indeed, for a supposed hour-long show, one source recently estimated that the number of minutes of actual programming content can typically range anywhere from forty-five minutes down to a mere thirty-nine minutes (in other words, advertisements can comprise up to 35% of the allotted program time).[3] This trend of advertisers pushing the boundaries to cram more commercials into each programming hour is not surprising given that the effectiveness of television advertisements remains especially high.[4]

Consumers have responded to these advertising efforts by finding ways to battle back and reduce their commercial viewing

1. *See* Tina M. Lowrey, L. J. Shrum & John A. McCarty, *The Future of Television Advertising*, *in* MARKETING COMMUNICATION: NEW APPROACHES, TECHNOLOGIES, AND STYLES 121–22 (Allan J. Kimmel ed., 2005) (tracing the development of the television commercial from a sixty-second long format in the 1960s to the currently popular thirty-second spot and commenting on the historical trend of an increasing number of commercial minutes relative to programming content).

2. *Id.*

3. *See* Sam Thielman, *You Endure More Commercials When Watching Cable Networks Compared to Broadcast*, ADWEEK (June 23, 2013, 10:27 PM), http://www.adweek.com/news/television/you-endure-more-commercials-when-watching-ca ble-networks-150575 (identifying networks CMT and FX as the "worst offenders," with programming per hour timed at 38:41 and 39:52, respectively).

4. *See US TV Ad Spend and Influence (Updated – Q3 2013 Data)*, MARKETING CHARTS (Dec. 23, 2013), http://www.marketingcharts.com/wp/television/data-dive-us-tv-ad-spend-and-influence-22524/ [hereinafter MARKETING CHARTS] (finding that television advertisements are the third most effective form of advertising behind only direct referrals and online consumer opinions).

time.[5] Even in the most coveted prime time network commercial spots,[6] it is estimated that consumers fast-forward through 45% of the advertising content.[7] One of the primary technological accomplices consumers use to circumvent advertisements is the digital video recorder (DVR).[8] By the end of the year 2012, it was estimated that over half of U.S. households subscribing to either a cable or satellite service (approximately 45% of total U.S. households) possessed this device.[9]

The latest development in the arsenal of weaponry facilitating commercial skipping has arrived courtesy of Dish Network's patented AutoHop technology, available commercially in a device known as a Hopper.[10] Consumers with a Hopper device incorporating the AutoHop technology can activate a feature known as PrimeTime Anytime™, which allows

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5. *See Tasting Table: Video-On-Demand Viewers Order from the Menu*, NIELSEN (Dec. 18, 2013), http://www.nielsen.com/us/en/newswire/2013/tasting-table--video-on-demand-viewers-order-from-the-menu.html (reporting that consumers watching television using a recording device only watch an average of twenty-three minutes out of a thirty-minute program). Although not explicitly stated, the implication from this study is that the seven minutes consumers do not watch are typically composed of commercials rather than programming content. Intriguingly, however, this same study found that consumers using a recording device have more viewing time than those watching a program live. *Id.* The best option for advertisers appears to be video on demand services. These services limit consumers' ability to skip advertisements, resulting in a recorded average of twenty-eight minutes of viewing time per thirty-minute program. *Id.*

6. *See* RANDOM HOUSE WEBSTER'S COLLEGE DICTIONARY 1048 (2d ed. 1999) [hereinafter RANDOM] (defining prime time as "the hours, generally between 7 and 11 P.M., considered to have the largest television audience of the day").

7. *TiVo Research & Analytics*, TIVO, http://www.tivo.com/media-research (last visited Nov. 18, 2014) [hereinafter *TiVo Research*].

8. *Discover-Cable*, TIVO, http://www.tivo.com/discover/cable (last visited Nov. 18, 2014); *see also* Sean Patterson, *Time Warner Now Has a Patent to Kill DVR Commercial-Skipping*, WEB PRO NEWS (June 20, 2012), http://www.webpronews.com/time-warner-now-has-a-patent-to-kill-dvr-commercial-skipping-2012-06. TiVo was among the pioneers of the DVR, introducing one of the first commercially sold of these devices in 1999. Peter Svensson, *DVR: Percentage of American Pay-TV Homes with Them up to Half*, HUFFINGTON POST (Nov. 30, 2012, 4:59 PM), http://www.huffingtonpost.com/2012/11/30/dvr-percentage-american_n_2220571.html.

9. *See* Svensson, *supra* note 8 (detailing the results of a survey by Leichtman Research Group). According to Svensson, these data indicate a dramatic increase over the results of a study performed by the Nielsen Group in 2007, which found at that time that only 13.5% of U.S. households owned a DVR. *Id.* The DVR's rapid penetration into the American market is perhaps best illustrated by a graphic produced by Nielsen in 2010 that shows the steep progression of DVR ownership from near 0% in 2006 to 38.1% only four years later. NIELSEN, DECEMBER 2010 STATE OF THE MEDIA: DVR USE IN THE U.S. 2 (2010), *available at* http://www.nielsen.com/content/dam/corporate/us/en/newswire/uploads/2010/12/DVR-State-of-the-Media-Report.pdf.

10. *The Dish Hopper Adds All New Feature 'Auto Hop' That Will Allow for a Commercial Skipping Option*, DISH TV BLOG, http://www.dishtvblog.com/dish-news/the-dish-hopper-adds-all-new-feature-auto-hop-that-will-allow-for-a-commercial-skipping-option/#sthash.76VNYum5.dpuf (last visited Nov. 18, 2014).

consumers to play back prime time shows free of commercials.[11] All four of the major networks (NBC, CBS, ABC, and Fox) responded to this service by instigating lawsuits in either the Second or Ninth Circuit.[12] Judges appear ill equipped to apply existing case law to this emerging ad-skipping technology. As a prime illustration of judges' aversion to addressing the fundamental issues at stake, the Ninth Circuit recently upheld a denial of a preliminary injunction against Dish on standing grounds as opposed to ruling on the underlying merits of the case concerning copyright issues.[13]

This Comment seeks to guide the judiciary in applying copyright principles to this emergent technology. In doing so, Part II.A addresses the historical evolution of copyright law in response to technological innovation in the television and movie industries. Part II.B next focuses on copyright struggles faced by the music industry to provide further guidance for the proper course of action in the current ad-skipping technology controversy. Part III uses these assimilated judicial and statutory responses from different technological areas as inspiration for a proposed solution that should ensure the

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11. *Get on Demand Access to All the Most Popular Network Shows with the Hopper®!*, DISH TV, http://dishtv.com/Technology/autohop/ (last visited Nov. 18, 2014) [hereinafter *Hopper®!*]. Perhaps in an effort to limit liability from impending lawsuits, the PrimeTime Anytime™ service is only available for shows aired on the four major broadcasting networks: NBC, ABC, CBS, and Fox. *Id.*

12. Meg James & Joe Flint, *Dish Network Is Sued over New Ad-Skip Feature*, L.A. TIMES, May 25, 2012, at B3; Matthew Belloni, *Fox, CBS, NBC Sue Dish Network over AutoHop Ad-Skipper*, HOLLYWOOD REPORTER (May 24, 2012, 1:50 PM), http://www.hollywoodreporter.com/thr-esq/fox-cbs-nbc-sue-dish-329287. The lawsuit brought by ABC's parent company, Walt Disney Co., has since been dropped after an agreement was reached that restricts Dish's ability to rebroadcast ABC and ESPN shows commercial-free until three days after their original broadcast. Alex Ben Block, *Dish Network and Disney Reach Retrans Deal over Ad-Skipping Hopper*, HOLLYWOOD REPORTER (Mar. 3, 2014, 5:03 PM), http://www.hollywoodreporter.com/news/dish-network-disney-reach-retrans-685698.

13. Ilana S. Rubel, Sebastian E. Kaplan & Armen N. Nercessian, *Ninth Circuit Opens New Questions in Copyright Law in Denying Fox's Request to Enjoin Dish Network's Ad-Skipping Service*, CYBERSPACE LAW., Aug. 2013, at 14, 14. Instead of analyzing the potential for economic harm that ad-skipping poses to television networks, the Ninth Circuit reasoned that Fox does not own the copyright to advertisements and therefore this aspect of the Ad Hopper would not be subjected to fair use scrutiny. *Id.* This reasoning seems lackluster as there is no doubt that end users of Dish's Ad Hopper and PrimeTime Anytime™ service are causing copies of Fox's copyrighted content to be made. *Id.* In the absence of a defense, both the end users and Dish would therefore be liable for copyright infringement (either directly or indirectly). *See* 17 U.S.C. § 106(1) (2012) (granting rights of reproduction exclusively to copyright holders). Accordingly, in order to adequately protect Fox's intellectual property, judges should not be able to selectively ignore any feature of the Ad Hopper that may cause economic harm to Fox. *See id.* § 107 (citing the potential for economic harm as one factor which weighs against finding a copier has a fair use defense).

viability of both the networks as well as the satellite service providers. Finally, Part IV concludes by summarizing the primary benefits that this proposed solution should have for networks, satellite service providers, and consumers alike.

II. AN OVERVIEW OF JUDICIAL AND STATUTORY COPYRIGHT LAW RESPONSES TO PAST TECHNOLOGICAL INNOVATIONS

Copyright law has long struggled to adapt to technological innovation.[14] Whenever technology and copyright collide, copyright holders generally have two avenues for recourse: the courts and the legislature.[15] This Part provides a brief overview of the congressional and judicial responses, which have attempted to reconcile the interests of copyright holders with emerging technologies, first in the context of the television and movie industries and then in the context of the music industry. This Part further explores how the actions of the judiciary, beginning with its establishment of the fair use defense in *Folsom v. Marsh*, have positioned it to be the better arbiter (as opposed to the legislature) for determining the boundaries of copyright holders' rights in the current ad-skipping technology controversy.

A. *Evolution of Copyright Law in the Era of Cable Television and Home Recording Devices*

Innovation within the television and movie industries has proven no exception to the general tension between copyright holders and technology, demonstrated as early as the 1950s by the immediate tension between commercial cable television service and copyright holders upon cable's introduction.[16] To illustrate how the tension between these industries and copyright holders has progressed over time, this subpart first addresses the historical bases for copyright law and provides an

14. *See* Ben Depoorter, *Technology and Uncertainty: The Shaping Effect on Copyright Law*, 157 U. PA. L. REV. 1831, 1840–49 (2009) (describing how technological innovation typically leads to legal delay and uncertainty in copyright law).

15. *See* Derek Khanna, *A Look Back at How the Content Industry Almost Killed Blockbuster and Netflix (And the VCR)*, TECH CRUNCH (Dec. 27, 2013), http://techcrunch.com/2013/12/27/how-the-content-industry-almost-killed-blockbuster-and-netflix/ (describing how copyright holders attempted to limit video rentals through both legislative and judicial means).

16. *See* Stanley M. Besen & Robert W. Crandall, *The Deregulation of Cable Television*, LAW & CONTEMP. PROBS., Winter 1981, at 77, 91–92 (discussing early issues involving cable television and copyright); Niels B. Schaumann, Note, *Copyright Protection in the Cable Television Industry: Satellite Retransmission and the Passive Carrier Exemption*, 51 FORDHAM L. REV. 637, 638–40 (1983) (detailing early attempts to reconcile copyright interests with the emerging cable television technology).

example of an early successful legislative effort that achieved compromise between cable television innovators and copyright holders. Next, this subpart highlights how the sparseness of statutory text regarding copyright liability has led to judicial decisions that have reshaped the conflict between copyright holders and innovators and has had especially significant impact in the area of video home recording devices.

1. Historical Underpinnings of Copyright Law and an Early Legislative Compromise with Cable Television. Copyright doctrine, finding its basis in the Constitution, has been a facet of the American legal system since the days of the Founding Fathers.[17] The constitutional provision authorizing Congress to grant protection to authors and inventors has subsequently been codified into the dual fields of copyright and patent law.[18]

At first glance, the word "authors" appearing in the Constitution may appear to indicate the drafters only intended to extend protection to writers of literary works.[19] However, the term "authors" has never been so narrowly construed.[20] To the contrary, the first Congress itself extended protection to authors of maps and charts in addition to books.[21] This liberal construction of the term "authors" has remained malleable as technology has progressed, illustrated by the incorporation of photographs as copyrightable subject matter in the mid-nineteenth century.[22] Thus, it may come as no surprise that the Townsend Amendment of 1912 modified the Copyright Act of 1909 to explicitly add motion pictures to the list of copyrightable subject matter.[23]

Forty years after copyright protection was recognized for motion pictures, one of the first major tensions between the copyright holders of the industry and technological innovation arrived in the form of cable television programming.[24] Cable television has completely revolutionized the broadcasting

17. *See* U.S. CONST. art. 1, § 8 ("Congress shall have [the] Power . . . [t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries . . . .").

18. *See generally* 17 U.S.C §§ 101–1332 (codifying copyright protection); 35 U.S.C. §§ 1–390 (codifying patent protection).

19. *See* RANDOM, *supra* note 6, at 90 (reciting the primary definition of author as "the composer of a *literary work*; writer") (emphasis added).

20. Act of May 31, 1790, ch. 15, § 1, 1 Stat. 124 (repealed 1831).

21. *Id.*

22. *See* Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 60–61 (1884) (holding that a picture of Oscar Wilde constitutes copyrightable subject matter).

23. Act of Aug. 24, 1912, ch. 356, Pub. L. No. 62-303, 37 Stat. 488.

24. Besen & Crandall, *supra* note 16, at 91–92; Schaumann, *supra* note 16, at 638–40.

industry, expanding from reaching a mere fourteen thousand homes in 1950 to sixty million subscribers in 2011.[25] Early attempts by copyright holders to declare that cable providers were infringing their rights by transmitting copyrighted works failed.[26] These issues were essentially resolved thanks to a compromise in the Copyright Act of 1976.[27] Section 111 of the Copyright Act established a compulsory licensing system for cable providers to transmit copyrighted works.[28] Although the conflict between cable services providers and television broadcast copyright holders was ultimately resolved via this legislative solution, the early struggles between these entities exemplify the uneasy tension between innovation and copyright holders which has subsequently served as a recurring theme for the television and movie industries.[29]

The following section details how the sparseness of statutory text defining copyright infringement has prompted the judiciary to take an active role in deciding the boundaries of copyright holders' rights in relation to technological innovators. This role has been especially pronounced in the area of home video recording.

2. Lack of Statutory Clarity in the Boundaries of Copyright Liability Prompts Judicial Action. As noted by the Supreme Court, "The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.'"[30] In order to encourage innovation by authors, the Copyright Act of 1976 sets forth exclusive rights to authors and copyright holders.[31] To aid courts

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25. *Evolution of Cable Television*, FCC, http://www.fcc.gov/encyclopedia/evolution-cable-television (last visited Nov. 18, 2014).

26. *See* Teleprompter Corp. v. Columbia Broad. Sys., Inc., 415 U.S. 394, 411–12 (1974) (noting that cable service providers "do not interfere in any traditional sense with the copyright holders' means of extracting recompense for their creativity or labor"). Of particular interest in the current litigation regarding ad-skipping technology is that the Supreme Court identified advertising as the traditional means for compensating broadcasters. *Id.*; *see also* Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390, 399 (1968) (holding that a cable service provider "no more than enhances the viewer's capacity to receive the broadcaster's signals").

27. Jessica D. Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857, 858–59; *see* Schaumann, *supra* note 16, at 649–52.

28. 17 U.S.C. § 111 (2012).

29. *See* Khanna, *supra* note 15 (discussing, *inter alia*, the movie industry's subsequent battle with home video rental services).

30. Mazer v. Stein, 347 U.S. 201, 219 (1954).

31. *See* 17 U.S.C. § 106A(a)–(b) (granting, *inter alia*, exclusive rights of reproduction, the right to perform or display publicly, and the right to prepare derivative works).

in enforcing these rights, the Act provides definitions of what it means to directly infringe upon one of these exclusive rights.[32] Direct infringement is perhaps the most obvious notion of infringement, with a direct infringer defined in part as "[a]nyone who violates any of the exclusive rights of the copyright owner as provided by sections 106 through 122 or of the author as provided in section 106A(a)."[33] Notably, this definition of direct infringement appears somewhat circular in that it defines infringement as the violation of statutory provisions as opposed to including any additional elements such as intent, extent of the violation, etc.[34]

While direct copyright infringement has been statutorily defined, indirect (i.e., contributory) copyright infringement has developed separately via tort law.[35] The lack of a statutory definition for contributory infringement in copyright law directly contrasts with the approach taken to protect rights over patented inventions.[36] For instance, in patent law, contributory infringement has been statutorily defined as imposing liability on a manufacturer who knowingly sells an article that is only capable of being used for an infringing purpose.[37] The corresponding standard for contributory infringement in copyright law has been stated as follows: "[O]ne 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."[38] The lack of a statutorily defined notion of contributory copyright infringement may contribute to the reason there exists great uncertainty in determining the potential for contributory infringement liability.[39]

The judiciary responded in part to the paucity of the statutory text regarding copyright infringement by establishing an exception to liability through the fair use defense in the case

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32. *See id.* § 501 (codifying the definition of direct copyright infringement).

33. *Id.*

34. *Id.*

35. *See* Fonovisa, Inc., v. Cherry Auction, Inc., 76 F.3d 259, 261–62 (9th Cir. 1996) (describing how "[t]he concept of vicarious copyright liability was developed in the Second Circuit as an outgrowth of the agency principles of respondeat superior").

36. *See* 35 U.S.C. § 271(b)–(c) (defining contributory infringement and inducement standards as applied in relation to patent law).

37. *Id.*

38. Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc., 443 F.2d 1159, 1162 (2d Cir. 1971) (footnote omitted).

39. *See infra* Part II.B.1–2 (discussing the uncertainty regarding contributory copyright infringement in the context of the music industry).

Folsom v. Marsh.[40] This doctrine is not without its critics, with one commentator characterizing Justice Story's reasoning in developing the defense of fair use as needlessly creating conflict between property and free speech rights.[41] Nevertheless, this defense was subsequently codified in 17 U.S.C. § 107, which defines the following four factors to be taken into consideration when determining whether a use is fair use:

> (1) the purpose and 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.[42]

If the legislature had independently enacted this statute it might have been prudent for courts to engage in judicial restraint and refuse to recognize a particular construction "absent some textual indication from Congress."[43] However, the judicial origins of the codified common law factors suggest that the judiciary should not be bound solely by the strict statutory text when resolving the current ad-skipping controversy.[44] This flexibility stemming from the judicial origins of the fair use doctrine suggests that the judiciary, rather than the legislature, is better suited for resolving the current ad-skipping controversy.[45]

The fair use defense proved pivotal in *Sony Corp. of America v. Universal City Studios, Inc.*, the seminal case regarding copyright infringement in the area of home recording devices.[46] When home recording devices were introduced via video cassette recorders (VCRs) in the early 1980s, the television and motion picture industries viewed this technological innovation as a crippling blow to future profits with the potential to destroy these

40. Folsom v. Marsh, 9 F. Cas. 342, 348–49 (C.C.D. Mass. 1841) (No. 4, 901). In his opinion, Justice Story further commented that "[p]atents and copyrights approach, nearer than any other class of cases belonging to forensic discussions, to what may be called the metaphysics of the law, where the distinctions are, or at least may be, very subtile and refined, and, sometimes, almost evanescent." *Id.* at 344.

41. L. Ray Patterson, Folsom v. Marsh *and Its Legacy*, 5 J. INTELL. PROP. L. 431, 438–39, 451–52 (1998).

42. 17 U.S.C. § 107.

43. CRAIG ALLEN NARD, THE LAW OF PATENTS 225 (3d ed. 2014).

44. *See* Leslie Scarman, *Codification and Judge-Made Law: A Problem of Coexistence*, 42 IND. L.J. 355, 358 (1967) (proposing that the solution to coexistence between codification and common law is to "consider codification against the backdrop of a common law which it does not wholly supersede").

45. *Id.*

46. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 456 (1984).

industries.[47] This sentiment was epitomized in graphic terms by Jack Valenti, then-president of the Motion Picture Association of America (MPAA), who testified before Congress, "I say to you that the VCR is to the American film producer and the American public as the Boston strangler is to the woman home alone."[48] In *Sony*, respondents Universal Studios and Walt Disney Studios alleged that consumers using home recording devices, marketed by Sony as Betamax video tape recorders (VTRs), violated rights conferred upon them as copyright owners under the Copyright Act.[49] However, instead of requesting relief directly from consumers, Universal and Disney sought money damages and equitable relief in the form of an injunction against Sony for manufacturing and marketing these Betamax VTRs.[50] That is, Universal and Disney were pursuing a contributory negligence claim against Sony rather than a direct infringement claim against the consumers who were ultimately in control of using the VTRs for the allegedly infringing purposes.[51]

The Supreme Court first articulated a novel legal standard, namely that the resolution of the case depended on whether or not the Betamax could be used for "significant noninfringing uses."[52] In reaching this legal standard, the Supreme Court signaled its willingness to draw parallels between patent law and copyright law by relying on patent law's treatment of contributory infringement to conclude that protection for copyrights must extend beyond "actual duplication of a . . . publication" in order to avoid granting mere symbolic, as opposed to substantive, rights.[53]

The Court then found two primary noninfringing uses for the Betamax: authorized and unauthorized time-shifting.[54] This concept of time-shifting can be defined as "recording a program off the air to watch it once at a more convenient time, and then

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47. Craig A. Grossman, *From* Sony *to* Grokster*, The Failure of the Copyright Doctrines of Contributory Infringement and Vicarious Liability to Resolve the War Between Content and Destructive Technologies*, 53 BUFF. L. REV. 141, 163 (2005).

48. *Home Recording of Copyrighted Works: Hearing on H.R. 4783, H.R. 4794, H.R. 4808, H.R. 5250, H.R. 5488, and H.R. 5705 Before the Subcomm. on Courts, Civil Liberties, & the Admin. of Justice of the H. Comm. on the Judiciary*, 97th Cong. 8 (1982) [hereinafter *Hearing on H.R. 4783*].

49. *Sony Corp.*, 464 U.S. at 420.

50. *Id.*

51. *See* Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc., 443 F.2d 1159, 1162 (2d Cir. 1971) (defining contributory infringement); *see also* 17 U.S.C. § 501 (2012) (codifying the definition of direct copyright infringement).

52. *Sony Corp.*, 464 U.S. at 442.

53. *Id.*

54. *Id.* at 443–51, 456.

erasing it."[55] The Court found that authorized time-shifting consisted of copying either noncopyrighted material or copyrighted material whose owners consented to this use, such as sports or educational broadcasting.[56] More controversially, the Court found that even unauthorized home time-shifting was protected through fair use.[57] In finding fair use applicable, the Court focused on the last of the four fair use factors, namely "the effect of the use upon the potential market for or value of the copyrighted work."[58] As the Court later stated in a separate case, "This last factor is undoubtedly the single most important element of fair use."[59] The Court sided with the district court's findings that Sony and Disney had failed to carry their burden of proof in establishing potential future harm, instead merely providing evidence of "speculative" and "minimal" harm.[60] To the contrary, the Supreme Court noted that some evidence presented to the district court tended to show that the Betamax would "aid" Sony and Disney rather than cause market harm.[61] Thus, in light of both authorized time-shifting and unauthorized time-shifting protected by fair use, the Court found the Betamax capable of significant noninfringing uses and denied Sony and Disney's claims for relief.[62]

With this Supreme Court precedent in place, the judiciary should recognize that the key conundrum facing the major television networks seeking to enjoin ad-skipping technology is how to distinguish this technology from the Betamax at issue in *Sony*.[63] The broadcasters will likely focus on the fourth fair use factor of the potential for market harm to distinguish ad-skipping technology from the Betamax.[64] Dish may argue that the time-shifting uses of the Hopper are sufficiently analogous to those of the Sony Betamax that the *Sony* decision is directly applicable.[65]

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55. Jesse M. Feder, *Is Betamax Obsolete?:* Sony Corp. of America v. Universal City Studios, Inc. *in the Age of Napster*, 37 CREIGHTON L. REV. 859, 877 (2004).

56. *Sony Corp.*, 464 U.S. at 443–44.

57. *Id.* at 455–57.

58. *Id.* at 448 n.30, 450–51.

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

60. *Sony Corp.*, 464 U.S. at 451–54 (citing Universal City Studios, Inc. v. Sony Corp. of Am., 480 F. Supp. 429, 467 (C.D. Cal. 1979)).

61. *Id.* at 453 (citing *Universal City Studios*, 480 F. Supp. at 466).

62. *Id.* at 456.

63. *See id.* at 454–56 (finding two primary noninfringing uses of the Betamax).

64. *See* 17 U.S.C. § 107 (2012) (defining the fourth fair use factor as "the effect of the use upon the potential market for or value of the copyrighted work").

65. *See* Rubel, Kaplan & Nercessian, *supra* note 13 (discussing how the Ninth Circuit denied a preliminary injunction against Dish while only addressing the time-shifting uses of the Hopper).

However, as argued in Part III, ad-skipping technology presents such a fundamentally greater threat in terms of the potential for economic harm to the television industry in comparison to the Sony Betamax that judges should not give credence to such an approach. Before reaching this argument, Part II continues by examining the case law and legislative action stemming from the contentious battles between innovators and copyright holders in the music industry to provide further guidance to the judges determining the legal fate of Dish's Hopper.

B. Judicial and Statutory Guidance from the Music Industry

Instead of relying solely on precedents from the television and movie industries in analyzing the legal repercussions of ad-skipping technologies, the judiciary could also gain valuable insight by examining how copyright law has adapted to innovations within the music industry.[66] The overarching theme throughout the available music industry case law appears to be a willingness by the judiciary to prevent innovators from escaping liability simply by adhering to the strict statutory text of the fair use provisions.[67] Apart from the judiciary, the legislature has also contributed to copyright law regarding the music industry, the rationale behind which may aid the judiciary in the current ad-skipping technology controversy.[68] In order to adequately present the lessons that experiences within the music industry have to offer, this subpart will first examine two major cases in the music industry in which technological innovators attempted to escape liability for indirect copyright infringement by invoking a fair use defense, and will conclude with a particularly noteworthy legislative solution balancing the rights of copyright holders with artists who wish to use a copyrighted work.

1. The Judiciary Signals That Sony *Has Limits.* As depicted in the movie *The Social Network*, the founder of Napster, Shawn Fanning (known as Sean Parker in the film) is

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66. *See infra* Part II.B.1–2 (discussing the holdings of two cases involving the fair use defense as applied to music-sharing technology).

67. *See* Max Stul Oppenheimer, *Yours for Keeps*: MGM v. Grokster, 23 J. MARSHALL J. COMPUTER & INFO. L. 209, 247 (2005) (arguing that the Supreme Court would not be able to find Grokster liable for copyright infringement absent overturning its prior *Sony* decision). Despite Oppenheimer's assessment, the Supreme Court did find Grokster liable within the framework of its existent precedent, suggesting that the Court was willing to construe the fair use defense such that Grokster would not be able to escape liability simply by fitting into its literal definition. *See* Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 913, 934–35 (2005) (holding Grokster liable).

68. *See infra* Part II.B.3 (suggesting the judiciary could adapt a compulsory licensing scheme for the current ad-skipping controversy).

seen describing his invention to a college student as "an internet company that let[s] folks download and share music for free."[69] Unsurprisingly, Fanning's music-sharing enabling company was not as well received by music industry executives as it was by college students, resulting in a lawsuit against Napster brought by the Recording Industry Association of America (RIAA) and eighteen record companies for contributory and vicarious copyright infringement that eventually progressed to the Ninth Circuit Court of Appeals.[70]

One of Napster's legal strategies in defending against this lawsuit was to analogize its music-sharing services to the Betamax home recording device time-shifting uses deemed permissible in the Supreme Court's *Sony* decision by claiming that its services similarly constituted fair use by allowing users to engage in "space-shifting."[71] Space-shifting refers to the scenario "where users access a sound recording through the Napster system that they already own in audio CD format."[72]

Despite Napster's attempt to characterize its technology in a manner reminiscent of the Betamax in a legal space-time-shifting continuum, the Ninth Circuit held that Napster's music-sharing service did not constitute fair use, affirming the district court's finding that "both the market for audio CDs and market for online distribution [were] adversely affected by Napster's service."[73]

While denying Napster's fair use defense, the Ninth Circuit also articulated a legal prohibition on the ability to assert a "significant noninfringing uses" defense *à la Sony* in the event that the alleged secondary infringer has knowledge of and control

69. THE SOCIAL NETWORK (Columbia Pictures 2010); *see also* Spencer E. Ante, *Shawn Fanning's Struggle*, BUS. WK., May 2000, at 197, 197–98 (profiling the then-nineteen-year-old Shawn Fanning). This article further states that at the time of its writing Napster had "the potential to create the world's biggest bootleg record collection" and described efforts to curb its rampant use by college students at 130 universities. *Id.*

70. A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1010–11 (9th Cir. 2001); *accord* Ante, *supra* note 69, at 197–98. As previously discussed, the Ninth Circuit is the same circuit court which recently rejected Fox's plea for a preliminary injunction against Dish's Ad Hopper. *See supra* note 13 and accompanying text.

71. *See Napster, Inc.*, 239 F.3d at 1019 (arguing that space-shifting constitutes fair use); Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 444, 454–56 (1984) (finding significant noninfringing uses of the Betamax). Other fair use defenses that Napster raised included arguments that users were merely sampling music and that Napster served as a legitimate distribution channel for artists who consented to Napster's use of their music. *Napster, Inc.*, 239 F.3d at 1018–19. In particular, Napster argued that new artists could benefit from Napster's potential to expose their music to a large audience. A&M Records, Inc. v. Napster, Inc., 114 F. Supp. 2d 896, 917 (N.D. Cal. 2000), *rev'd in part*, 239 F.3d 1004 (9th Cir. 2001).

72. *Napster, Inc.*, 239 F.3d at 1019.

73. *Id.* at 1018–19.

over direct infringement.[74] In essence, the Court held that Napster deviated in this regard from Sony because Napster encouraged and assisted the direct infringement while Sony was merely aware of the potential for infringing uses.[75] Professor Jane C. Ginsburg describes this distinction as a "gloss on the standard of liability."[76] Ginsburg further explains that whenever "it is possible to segregate and prevent infringing uses, it is not appropriate to exculpate the entire system by virtue of its capacity for non-infringing uses. In other words, the consequences to technology of enforcing copyright rules were different in *Sony* and in *Napster*."[77]

The judiciary should appreciate that this distinction between degrees of awareness versus knowledge and control could serve as a possible deciding factor in Dish's legal battle against the major television networks. While a conventional DVR can be analogized to the Betamax with respect to "significant noninfringing uses" in the form of authorized and unauthorized time-shifting, a court could very well conclude that Dish, which openly advertises the Hopper's ability to automatically skip over advertisements, brings Dish into *A&M Records, Inc. v. Napster, Inc.* culpability territory.[78] That is, the judiciary could find that

74. *Id.* at 1020–21.

75. *Id.* at 1020; *see* Hisanari Harry Tanaka, *Post-Napster: Peer-to-Peer File Sharing Systems: Current and Future Issues on Secondary Liability Under Copyright Laws in the United States and Japan*, 22 LOY. L.A. ENT. L. REV. 37, 59 (2001) (arguing that this Napster knowledge standard should only apply to the "encouraging/assisting category, where a potential contributory infringer has the ability to control the infringing situation").

76. Jane C. Ginsburg, *Separating the* Sony *Sheep from the* Grokster *Goats: Reckoning the Future Business Plans of Copyright-Dependent Technology Entrepreneurs*, 50 ARIZ. L. REV. 577, 582 (2008).

77. *Id.* Ginsburg further characterizes the *Sony* situation as an "all-or-nothing challenge" wherein the device is either enjoined or not. *Id.* In contrast, Ginsburg describes Napster's situation as more nuanced, in that Napster, unlike Sony with its Betamax, "could disable infringing uses by blocking access to listings of protected files, while allowing permissible uses to continue." *Id.*

78. *See* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 442, 454–56 (1984) (discussing the significant noninfringing uses of Sony's Betamax); *see also Hopper Watch Commercial-Free*, DISH, https://www.youtube.com/watch?v=a833IabwKKw (last visited Nov. 18, 2014) [hereinafter *Hopper Watch Commercial-Free*] (advertising the Hopper's ad-skipping properties). Ironically, this clip is a *commercial* (featuring a family with heavy Boston accents) that advertises the ability of the Hopper to *avoid commercials*. *Id.* Dish takes a good-natured approach to this anomaly in the clip, as evidenced when the family screams in (Boston accented) terror upon considering what their fate will be in the absence of advertisements. *Id.* It is true that Sony also advertised infringing uses of its Betamax, encouraging consumers to create a home viewing library using the device. *Sony Corp.*, 464 U.S. at 459 (Blackmun, J., dissenting). The absence of liability for Sony in light of these advertisements perhaps stems from an absence of focus on "manufacturer's intent," which has only emerged in the post-*Sony* decisions (such as *Napster*). Lital Helman, *Pull Too Hard and the Rope May Break: On the Secondary Liability of Technology Providers for Copyright Infringement*, 19 TEX. INTELL. PROP. L.J. 111, 129–30 (2010).

Dish has crossed the legal threshold between mere awareness of the potential for direct infringement by its users into impermissibly encouraging this misuse.[79] Dish's only likely rebuttal to this argument would be that it does not control any infringing uses of its Hopper device because the user must specifically activate the AutoHop feature to access the ad-skipping technology.[80]

In any event, Napster's failure to extend *Sony* to insulate itself against liability for its users' music-sharing provides a prime example of why *Sony* should not be applied in every instance where technological innovation collides with copyright holders.[81] That is, contrary to what many commentators previously thought, the *Napster* outcome proves that *Sony* did not establish a catchall "safe harbor for technologies that are capable of significant noninfringing use."[82] Accordingly, judges in the ongoing litigation between Dish and the major television networks should be cautious not to automatically jump, or, in other words, "legally auto hop," to the conclusion that the holding of *Sony* should be the controlling factor in the fate of ad-skipping technology. At a minimum, Dish should not be able to emptily assert that its Hopper is shielded by the same "significant noninfringing uses" sanctioned in *Sony* simply because the Hopper and Betamax share many of the same copying capabilities.[83] Rather, the judiciary should ensure that the potential infringement issues arising from ad-skipping technology are examined independently of those arising from its Betamax predecessor.

2. The Supreme Court Borrows from Patent Law to Establish Liability for Inducement in Copyright Infringement. Many other music-sharing services emerged in Napster's void after it lost its legal battles, such as Grokster and Morpheus.[84]

79. Tanaka, *supra* note 75, at 59.

80. *See Get the Hopper and Take Live TV Anywhere*, DISH, http://www.dish.com/redirects/promotion/offer1 (last visited Nov. 18, 2014) (including a disclaimer that the ad-skipping features must be enabled by the customer).

81. *See* A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1019 (9th Cir. 2001) (holding that Napster could not avoid liability through a fair use defense).

82. Helman, *supra* note 78, at 121 (citing Pamela Samuelson, *The Generativity of* Sony v. Universal*: The Intellectual Property Legacy of Justice Stevens*, 74 FORDHAM L. REV. 1831, 1850 (2006)). Helman further notes that many commentators viewed *Sony* as a sort of "Magna Carta" for the technological era. *Id.* (citing Jessica Litman, *The* Sony *Paradox*, 55 CASE W. RES. L. REV. 917, 951 (2005)).

83. *See Sony Corp.*, 464 U.S. at 442, 454–56 (discussing the significant noninfringing uses of the Betamax); *Hopper®!*, *supra* note 11 (describing the capabilities of the Hopper device).

84. Ginsburg, *supra* note 76, at 582–83. Technically speaking, according to Ginsburg, Morpheus and Grokster were both licensees of the same enterprise, Kazaa. *Id.*

These new enterprises attempted to fit into a legal loophole, in that they did not have a centralized directory in an attempt to make it "difficult, if not impossible, for the service to exercise control" and thereby avoid liability under the *Napster* standard of knowledge and control over the infringing use.[85] This strategy of circumventing liability via a technicality appeared to work, with the Ninth Circuit siding in favor of these Napster successors.[86]

When *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster Ltd.* was granted certiorari to the Supreme Court, there was sentiment within the legal community that Grokster would again prevail absent a major revision of the Court's precedent in *Sony*.[87] As commentator Mark Oppenheimer argued:

> Unless the Supreme Court decides to overturn *Sony*, or divines a third interpretation which the parties have not argued, it does not matter which of the two interpretations of *Sony* is chosen. Under either, there is no secondary liability for copyright infringement unless a substantial degree of primary liability, linked to the alleged secondary infringer, has been established. The record in *MGM v. Grokster*, as the decisions in all prior "file-sharing" cases, is based on the assumption that primary infringement is widespread. That assumption does not withstand scrutiny.[88]

However, despite arguments such as the one advanced by Oppenheimer, Grokster and its contemporaries were not so fortunate on the Supreme Court level: a unanimous Court held that *Sony*'s holding is irrelevant in a situation where the vicarious infringer is actively inducing the directly infringing use.[89] The concept of liability for inducement originated under patent law,[90] illustrating once again the close legal harmony

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85. *Id.* (citing Fred von Lohmann, *IAAL: Peer-to-Peer File Sharing and Copyright Law after Napster*, TECH-INSIDER (2001), http://tech-insider.org/file-sharing/research/2001/0227.html). Ginsburg further notes that this strategy runs the risk of constituting "willful blindness." *Id.* at 582 n.19 (citing *In re* Aimster Copyright Litig., 334 F.3d 643, 650 (7th Cir. 2003)).

86. Metro-Goldwyn-Mayer Studios, Inc. v. Grokster Ltd., 380 F.3d 1154, 1165 (9th Cir. 2004) (basing the holding on the fact that "Grokster [had] no ability to actually terminate access to filesharing functions"), *rev'd*, 545 U.S. 913 (2005). In its analysis, the Ninth Circuit alluded to a paradigm for vicarious liability, wherein the "dance hall operator" would be liable but the "landlord" would not. *Id.* at 1164 (quoting Fonovisa, Inc. v. Cherry Auction, Inc., 76 F.3d 259, 262 (1996)). In this paradigm, liability extends to the dance hall operator but not the landlord because "the dance hall operator has the right and ability to supervise infringing conduct while the landlord does not." *Id.* at 1164.

87. Oppenheimer, *supra* note 67, at 247.

88. *Id.*

89. *Grokster Ltd.*, 545 U.S. at 934–35.

90. *See* 35 U.S.C. § 271(b) (2012) (codifying liability for inducement with respect to patent infringement).

these two branches of intellectual property share and the willingness by the Court to expand copyright protection beyond the literal statutory text of copyright provisions and borrow from sources such as patent law to reach its intended result.[91] In determining whether inducement is present, the Supreme Court identified three factors: "(1) the defendant promoted the infringement-enabling virtues of its device; (2) the defendant failed to filter out infringing uses; (3) defendant's business plan depended on a high volume of infringement."[92]

Judges in the current litigation between Dish and the major networks should be able to apply the three-pronged inquiry into inducement that the Supreme Court articulated in the *Grokster* litigation.[93] Applying this test yields the following results. First, Dish does promote the allegedly infringing use of its device to make copies of televised programming content.[94] Second, Dish does not filter out this use.[95] Lastly, it is reasonable to assume that Dish's business plan depends on a high volume of the allegedly infringing uses.[96] Even the name Dish chose, Hopper, hints that this device's underlying purpose is to record television shows in order to watch them later with the advertisements removed ("hopped" over).[97]

Unfortunately, simply applying this three-pronged inducement test is likely insufficient to resolve the underlying legal issues in the ongoing Dish litigation, considering that Sony itself could be said to have been guilty of all three of these inducement inquiries, at least to a similar degree as Dish.[98] It is perhaps no wonder then that there is a feeling within the scholarly community that the Supreme Court's holding and reasoning in *Grokster* did little to clear up the ambiguity

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91. *See supra* notes 52–53 and accompanying text (describing how the Supreme Court established a significant noninfringing uses standard for determining copyright infringement in *Sony* based on patent law).

92. Ginsberg, *supra* note 76, at 583 (citing *Grokster Ltd.*, 545 U.S. at 939–40).

93. *Id.*

94. *Hopper Watch Commercial-Free*, *supra* note 78.

95. *See id.* (illustrating how Dish is encouraging rather than filtering this allegedly infringing use).

96. *See Hopper®!*, *supra* note 11 (describing how one of the Hopper's primary purposes is to allow consumers to watch prime time television ad-free, implying that the average consumer who purchases this device will use it for this purpose).

97. *Id.*

98. Sony actively promoted infringing uses of its Betamax, encouraging consumers through advertisements to create a home viewing library using the device. *See* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 459 (1984) (Blackmun, J., dissenting). The absence of liability for Sony in light of these advertisements may stem from an absence of focus on "manufacturer's intent," which has emerged in post-*Sony* decisions. Helman, *supra* note 78, at 130.

regarding fair use and the applicability of a "significant noninfringing uses" defense.[99] Perhaps one coherent conclusion that can be drawn from the *Grokster* decision is that the judiciary is intolerant of indirect copyright infringers who intentionally structure their enterprises in a manner to defeat copyright enforcement.[100] Thus, the judiciary should not shy away from bending the strict definitions of the fair use factors in the current ad-skipping controversy if necessary to arrive at a result that best advances the intent of copyright protection.[101]

Practically speaking, in view of this legal quagmire regarding inducement and degrees of knowledge spawned by *Napster* and *Grokster*, judges in the current litigation between Dish and the major networks should probably err in favor of Dish on the issue of "active inducement" considering that Dish's behavior in promoting the uses of its Hopper does not seem to deviate from Sony's in promoting the uses of its Betamax.[102] However, this finding would still leave open the question whether or not Dish can successfully argue that its Hopper, like Sony's Betamax, has significant noninfringing time-shifting uses that satisfy the fair use test.[103] This argument in turn will likely result in the fourth (economic) factor being the ultimate deciding factor in the fight between Dish and the major networks.[104] In Part III, the Comment will address how the Hopper fails this fourth fair use factor and how the judiciary should respond to adequately balance the interests of innovators and content owners.

Although the judiciary has taken the forefront in deciding many of the conflicts between copyright holders and technological

99. *See* Helman, *supra* note 78, at 128 (claiming that, instead, the Supreme Court's ruling "reinforced the transition of the law to an open-ended, unpredictable standard, driving legal uncertainty to a higher level").

100. Ginsburg, *supra* note 76, at 583. Professor Ginsburg further notes the contrary treatment by the Ninth Circuit, which recognized Grokster's strategy but declined to hold it liable because Grokster did not have the ability to "prevent specific infringements." *Id.*

101. *See supra* notes 87–91 and accompanying text (discussing how Grokster was held liable despite sentiment in the scholarly community that *Sony* would militate against this result).

102. *See supra* notes 92–98 and accompanying text (discussing the applicability of the three-pronged inducement inquiry to Dish and Sony).

103. *See* Rubel, Kaplan & Nercessian, *supra* note 13 (citing Fox Broad. Co. v. Dish Network L.L.C., 723 F.3d 1067, 1075 (9th Cir. 2013), *amended and superseded by* 747 F.3d 1060 (9th Cir. 2014)) (reporting that the Ninth Circuit, in upholding the denial of a preliminary injunction against Dish, held that *Sony* "directly controlled" on the first three fair use factors).

104. *See id.* (describing how the Ninth Circuit's opinion denying a preliminary injunction to Fox "avoided what many considered the most important issue: whether ad-skipping technology will dry up television's revenue stream").

innovators, the following section describes legislative actions, most notably one statutory compromise affecting the music industry, which may provide additional framework for judges deciding the current ad-skipping technology controversy.

3. A Legislative Approach to Copyright Protection Within the Music Industry. After the Supreme Court ruled in favor of the Sony Betamax, the copyright holder industries did not simply acquiesce to this judicial decision, as they could still attempt to have the Betamax regulated away through legislative action.[105] Although these regulatory efforts were ultimately unsuccessful, legislative actions have had an impact elsewhere, especially in the music industry.[106] For instance, while copyright holder industries failed to ban the practice of renting videos, they succeeded in passing through the Record Rental Amendment of 1984, which banned renting or leasing music.[107]

Aside from outright banning technologies, legislators have also fostered compromise between copyright holders and the general public.[108] One form of such a compromise is a compulsory, or mechanical, license, wherein an artist can make a recording of another artist's copyrighted music even without consent in exchange for a "congressionally prescribed license fee."[109] As discussed in Part III, a similar solution to the compulsory license can be reached in the current controversy between Dish and the major networks.[110]

105. Khanna, *supra* note 15. In Khanna's opinion, this regulatory course of action failed in light of the fact that the American public had enthusiastically begun to adopt the Betamax technology. *Id.* Thus, he cautions that copyright holders should be vigilant in pursuing legislative action against potentially infringing technology before it becomes too popular to ban. *Id.*

106. *Id.*

107. *Id.* Khanna describes the movie rental industry, epitomized by Blockbuster, as a prime example of "Permission-less Innovation" which flourished in the era of increased legal certainty in the wake of the *Sony* decision. *Id.*

108. *See* Sheldon W. Halpern, *The Art of Compromise and Compromising Art: Copyright, Technology, and the Arts*, 50 J. COPYRIGHT SOC'Y U.S.A. 273, 276–77 (2003) (describing how the legislative goal is to "implement the fundamental compromise in a way that maximizes both the public and the private good").

109. *Id.* at 279–80 (explaining how a compulsory music license is one instance where a copyright holder's interest should only be protected with respect to an economic, as opposed to personal, interest); *see also* 17 U.S.C. § 115 (2012) (codifying the compulsory license for nondramatic works).

110. *See infra* Part III.C (proposing a reasonable royalty scheme for cases involving the fair use defense).

III. A MODERN PROPOSAL: PROFIT SHARING BETWEEN SATELLITE PROVIDERS AND NETWORK BROADCASTERS IN THE AGE OF AD-LESS TELEVISION

In the current Part, the Comment first describes how the judiciary should not apply the Supreme Court's *Sony* decision to absolve Dish Network of liability regarding its Hopper device allowing consumers to automatically skip over commercials in recorded programs.[111] This Part then uses concepts from patent law and inspiration from the prior judicial treatment of indirect copyright infringement to propose a modification to the fair use defense that the judiciary could implement in the current controversy between Dish and the major broadcast networks. Finally, this Part concludes with an analogy to subscription channels that supports the viability of the Comment's proposed solution.

A. *How Ad-Skipping Technology Threatens the Viability of the Television Industry*

It may be tempting for judges to simply apply *Sony* in favor of Dish Network and thereby sanction ad-skipping technologies.[112] However, this course of action would ignore the stark reality that television broadcasters are profit-generating entities that will not continue to produce content out of pure generosity without an accompanying revenue stream.[113] At the close of the year 2012, it was estimated that advertisers spent $350 billion on global television advertising, a sum that "accounted for 62.8 percent of global ad dollars in 2012."[114] In the words of the chairman and CEO of CBS Leslie Moonves,

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111. *See* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 456 (1984) (holding that Sony's Betamax technology fell under the fair use defense); *supra* Part I (describing the basics of the Hopper device); *infra* Part III.A–B (arguing that the Hopper is dissimilar to the Betamax and should not be held as fair use).

112. *See* Fox Broad. Co. v. Dish Network L.L.C., 723 F.3d 1067, 1073 (9th Cir. 2013) (holding that the district court did not abuse its discretion in refusing to grant a preliminary injunction against the Hopper device), *amended and superseded by* 747 F.3d 1060 (9th Cir. 2014).

113. *See* 1 ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 456 (R.H. Campbell & A.S. Skinner eds., Oxford Univ. Press 1976) (1776) (establishing the notion of an invisible hand governing economics whereby "every individual . . . intends only his own gain; and he is in this, as in many other cases, led by an invisible hand to promote an end which was no part of his intention").

114. *See The Small Screen Captured Big Ad Revenue in 2012*, NIELSEN (Apr. 18, 2013), http://www.nielsen.com/us/en/insights/news/2013/the-small-screen-captured-big-ad-revenue-in-2012.html (containing commentary from the Global Head of Advertiser Solutions at Nielsen hailing television advertisements as being "widely regarded as the most efficient and effective way to reach consumers").

"Services [like Hopper] that undermine the economic fabric of our business aren't just illegal, they potentially destroy our ability to give the public what it wants."[115] Critics may dismiss Moonves's statements as overly dramatic rhetoric akin to the stark language Jack Valenti used while testifying before Congress in 1982 regarding the VCR and its potential to destroy the movie industry.[116] This position is bolstered by the fact that the benefit of hindsight makes Valenti's dire warnings appear greatly overstated.[117]

However, while the television network response to the Hopper may appear as just another overreaction by a behind-the-times industry in the face of threatening new technology, ad-skipping technology presents a fundamentally different, more menacing, threat to the television industry than the VCR posed to the film industry in the 1980s.[118] What ultimately reconciled the interests of the movie industry with Sony and its Betamax was the ability of the movie industry to harness video recording technology to its benefit in the form of videotape-based cassettes, such as JVC's VHS.[119] In contrast, it is very difficult to imagine a scenario in which television network broadcasters could benefit from technology designed to cut out advertisements.[120]

Some judges may also argue that the holding of *Sony* should apply in favor of ad-skipping technology because owners of home recording devices already have the ability to fast-forward through advertisements, and thus a device that automatically edits out commercials does not present a fundamentally different threat to the viability of the television industry.[121] To the contrary, the available data suggest otherwise, as studies have

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115. Eriq Gardner, *Dish Network's Charlie Ergen is the Most Hated Man in Hollywood*, HOLLYWOOD REPORTER (Apr. 2, 2013, 11:00 PM) (alteration in original), http://www.hollywoodreporter.com/news/dish-networks-charlie-ergen-is-432288.

116. *Hearing on H.R. 4783*, *supra* note 48.

117. *See Split Screens*, ECONOMIST, Feb. 23, 2013, at 61–62 (estimating that, even in an anemic year for profits such as 2011, the film industry still managed to sell a cool 1.28 billion tickets, nearly thirty years after Valenti's remarks).

118. *See supra* text accompanying note 115.

119. *Industry History: A History of Home Video and Video Game Retailing*, ENT. MERCHANTS ASS'N, http://www.entmerch.org/press-room/industry-history.html (last visited Nov. 18, 2014) (tracing the development of home video entertainment). According to the Entertainment Merchants Association, combined video rentals and sales surpassed box office revenues beginning in 1986, just four years after Valenti's testimony. *Id.* With the staggering success the movie industry enjoyed capitalizing on videocassettes, it seems the movie industry should actually be indebted to Sony and other video recording pioneers.

120. *See supra* text accompanying note 115 (quoting one executive claiming that this technology threatens the "economic fabric" of the television industry).

121. *See TiVo Research*, *supra* note 7 (finding that viewers fast-forward through an estimated 45% of prime time television advertisements).

shown that actively fast-forwarding through ads can actually *increase* retention of the advertising content.[122] In addition, conventional recording devices still require the viewer to take the active step of fast-forwarding from their own initiative.[123] This factor may partially explain why, although 45% of prime time advertisements are fast-forwarded, consumers are still not fast-forwarding through the majority (the remaining 55%) of these advertisements decades after *Sony* was decided.[124] If a large faction of consumers, however, gain the ability to skip advertisements automatically and in their entirety, the incentive for advertisers to continue paying exorbitant fees to networks to air their content would drop considerably.[125] Other service providers appear to have recognized the enormity of the detrimental consequences ad-skipping technology poses to television networks, as many presumably possess the technological capability to introduce devices similar to the Hopper but have refrained.[126]

B. The Fallacy of Dish's Legal Position in Relying on Sony *to Insulate Ad-Skipping Technology*

Dish's response to the harsh reality that its Hopper may dry up the major networks' advertising revenue has essentially been arguing that this technology cannot be suppressed indefinitely and a progression towards the end of the conventional commercial break is inevitable.[127] Dish also proposes using targeted advertising in lieu of traditional commercial breaks as a means of harmonizing the interests of

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122. *See* S. Adam Brasel & James Gips, *Breaking Through Fast-Forwarding: Brand Information and Visual Attention*, J. MARKETING, Nov. 2008, at 31, 32–48 (presenting data from studies showing that viewers pay more attention to advertisements while fast-forwarding and suggesting strategies for advertisers to maximize a fast-forwarded ad's effectiveness).

123. *See Hopper®!*, *supra* note 11 (discussing how the Hopper device is novel because it eliminates the need for fast-forwarding).

124. *TiVo Research*, *supra* note 7.

125. *See* Suzanne Vranica, *Ad Bowl Winners: RadioShack, Bud, Chrysler*, WALL ST. J., Feb. 3, 2014, at B1 (commenting how the 2014 Super Bowl was especially attractive to advertisers because 100 million people were expected to view the game, implying that advertising is driven mainly by the expected number of viewers).

126. *See* Gardner, *supra* note 115 (citing Time Warner Cable and DirecTV as two major players who have not released devices akin to the Hopper).

127. Scott Slavick, *IP: Hop, Skip and Jump Those Ads*, INSIDE COUNSEL (Oct. 1, 2013), http://www.insidecounsel.com/2013/10/01/ip-hop-skip-and-jump-those-ads. This argument, however, appears to contradict the reality of many copyright disputes in which nascent technologies have been quashed by copyright holders (for instance, the digital audio-tape player). Khanna, *supra* note 15.

both satellite providers and networks.[128] Dish Chairman Charlie Ergen stated in November 2013 that Dish's Hopper not only skips over commercials but also includes a feature "that can target commercials to customers in a better way and give the customer a better experience. I think, and this is my personal opinion, long-term, [the Hopper] will give broadcasters more revenue."[129]

These arguments by Dish are flawed in that they fail to take into account the reality that fair use is a *defense* to copyright infringement.[130] It is highly implausible that Dish could successfully argue that subscribers making a copy of a television show to view at a later time does not constitute literal copyright infringement.[131] Thus, the judiciary should recognize that Dish should not have the liberty of ordering television networks to adapt to emerging technology at the same time it is facilitating prima facie acts of copyright infringement.

The economic harm fair use factor guards against this kind of burden shifting by denying protection to infringement with the potential to harm the market of the copyright holder.[132] For a court to hold otherwise would improperly diminish the available returns on copyrightable material by television networks, directly contradicting the constitutionally established notion that authors should be rewarded with incentives in exchange for creating intellectual property.[133]

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128. Slavick, *supra* note 127; *see also* Brian Stelter, *Disney and Dish Wrangle Not Over Broadcast Fees, but the Future of TV*, N.Y. TIMES, Nov. 4, 2013, at B3 (reporting that Dish and Disney are negotiating a potential deal for "over the top" streaming, which would entail "streaming a bundle of television channels via the Internet").

129. Alex Ben Block, *Disney-Dish Talks Hang-Up Is the Hopper*, HOLLYWOOD REPORTER (Nov. 14, 2013, 5:00 AM) (alteration in original), http://www.hollywoodreporter.com/news/disney-dish-talks-hang-up-655793.

130. *See* Folsom v. Marsh, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841) (No. 4, 901) (introducing the judicially created fair use defense).

131. *See* 17 U.S.C. § 106A(a)–(b) (2012) (granting, *inter alia*, exclusive rights of *reproduction*, the right to perform or display publicly, and the right to prepare derivative works).

132. *See* 17 U.S.C. § 107 (codifying the four fair use factors). Also of note, the burden of proof for the fourth fair use factor varies depending on whether the use is for commercial gain. A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1016 (9th Cir. 2001) ("If the intended use is for commercial gain, that likelihood [of market harm] may be presumed. But if it is for a noncommercial purpose, the likelihood must be demonstrated." (alteration in original) (quoting Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 451 (1984))). However, this distinction between commercial and noncommercial gain is likely irrelevant in this case because the average end user of Dish's AutoHop service is not making copies of television shows for commercial gain.

133. *See* U.S. CONST. art. I, § 8, cl. 8 ("Congress shall have [the] Power . . . [t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries . . . .").

In light of the fourth fair use factor, courts should require that Dish actively overcome the assumption that Ad Hopper and associated PrimeTime Anytime™ cause economic harm to the major television networks.[134] However, given all the data presented so far about the pervasiveness and effectiveness of television advertisements, proving that ad-skipping technology does not harm the economic market for television networks seems likely to be an insurmountable task for Dish.[135]

C. *A New Legal Regime for Ad-Skipping Technology*

As argued above, Dish should not be able to rely on *Sony* and a fair use defense to insulate it from all liability for its Hopper device. On the other hand, ruling entirely in the television networks' favor and granting an injunction against the Hopper could entirely deprive the public at large of the innovation of ad-skipping technology.[136] Perhaps the easiest way to reconcile these two conflicting propositions would be to modify the fair use test for just such a situation.[137] As one legal commentator has noted, "I think a court is going to side with the networks because of the economics, though a new [legal] test might need to be fashioned because this doesn't fit the usual standards."[138]

The current fair use test, with its black and white options of either finding no liability or full liability, should be improved so that courts can find partial liability on the behalf of the infringer.[139] This modification would likely allow courts to more fairly resolve copyright disputes in lieu of the current "winner takes all" system.[140] For instance, the two possible outcomes of the pending litigation involving the Hopper using the current fair use test are either: (1) the major networks win and can force the Hopper off the market through an injunction; or (2) Dish wins and is allowed to reap the full economic benefits of the Hopper despite the repercussions to the television networks.[141]

This Comment's proposed method of improving the fair use defense is to add in the following limitation to the four factors: if

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134. *Napster, Inc.*, 239 F.3d at 1016.

135. MARKETING CHARTS, *supra* note 4.

136. *See* Khanna, *supra* note 15 (describing how the content industry nearly destroyed the video rental industry).

137. Gardner, *supra* note 115.

138. *Id.* (alteration in original).

139. *See* 17 U.S.C. § 107 (2012) (omitting an option of partial liability when considering the fair use defense).

140. *Id.*

141. *See* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 420 (1984) (resolving a similar choice of results regarding the Sony Betamax).

a fair use defense is inapplicable because of the fourth, economic, factor, a court should uphold the defense but order a reasonable royalty to be paid on all copied content.[142] The concept of a reasonable royalty already exists in patent law remedies.[143] Thus, the judiciary could adapt the existing patent law jurisprudence regarding the reasonable royalty concept to the copyright framework, as it has previously shown it is willing to do by extending liability to those who actively induce copyright infringement.[144] Drawing on the patent law treatment of a reasonable royalty, the judiciary could determine the value of a reasonable royalty for copyright infringement by "look[ing] to established (extant) royalties or, if none exist, a hypothetical negotiation between . . . a willing licensor and willing licensee."[145] Furthermore, this reasonable royalty solution draws support from its similarity to the legislature's compulsory licensing scheme in the music industry.[146] In the context of the Hopper and the PrimeTime Anytime™ service, this solution would allow both Dish and the television networks to profit from ad-skipping technology rather than Dish alone.[147]

Detractors may argue that a simpler solution would be to grant a permanent injunction to the major television networks under the Coase theorem assumption that the two sides should then come to a contractual arrangement if a mutually profitable situation exists.[148] To the contrary, both the Coase theorem itself

142. The burden of determining the number of copies of copyrighted content that require a royalty payment would fall on the party enabling the alleged infringement (Dish in this case). This burden would inherently dissuade Grokster copycats who attempt to avoid liability through creating a decentralized enterprise with no control over the number of infringing copies produced. Ginsburg, *supra* note 76, at 582–83 (citing von Lohmann, *supra* note 85).

143. *See* 35 U.S.C. § 284 (stating that "the court shall award the claimant damages adequate to compensate for the infringement, but in no event less than a reasonable royalty").

144. *See supra* notes 89–92 (describing the Supreme Court's rationale behind holding Grokster liable for active inducement).

145. NARD, *supra* note 43, at 889.

146. *See supra* Part II.B.3 (describing the legislature's enactment of a compulsory licensing scheme under which musicians can attain a compulsory license to record another artist's composition).

147. Shalini Ramachandran, *Zap! New DVR Wipes out Ads*, WALL ST. J. ONLINE (May 11, 2012, 2:22 PM), http://online.wsj.com/news/articles/SB10001424052702304070304577396470142982532 (stating that Dish currently charges an additional $10 a month for the Ad Hopper).

148. *See* E. ALLAN FARNSWORTH ET AL., CONTRACTS 606 (7th ed. 2008) (describing the Coase Theorem, which states that "when transaction costs are absent . . . and legal entitlements well-defined, parties will bargain to an allocatively efficient outcome under any remedy").

and history suggest otherwise.[149] The Coase theorem operates under the key assumption that transaction costs are small to nonexistent, a proposition that not even Professor Coase himself thought accurately reflected reality.[150]

Because transaction and bargain costs will always be present, there is no guarantee that the major networks and Dish could come to a mutually beneficial agreement even if a court could.[151] The history of technologies that have been stamped out by established industries also supports the notion that leaving negotiations up to Dish and the major networks could very well result in the abolition of ad-skipping technology.[152]

Regardless of whether television networks and Dish could come to a profit sharing agreement for ad-skipping technology on their own, the Comment's proposed modification for the fair use test would still have the added bonus of increasing predictability of the application of the fair use defense.[153] With this modification in place, the ever-present tension between technological innovators and established industries could be mitigated by a decrease in the uncertainty concerning the legality of each new innovation.[154] Uncertainty in this area of the law has been an ongoing concern, especially in the wake of the Supreme Court's opinion in the *Grokster* litigation.[155] Perhaps the current litigation between Dish and the television networks could have been avoided if the legal standards for indirect copyright infringement were less murky. Regardless, increased certainty would be beneficial: technology policy consultant Derek Khanna corroborates this point by noting that "[h]istory has demonstrated numerous times that when the legal terrain is more solid, innovation and competition flourishes."[156]

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149. *Id.*

150. *Id.*

151. *Id.*

152. *See* Khanna, *supra* note 15 (detailing how the video rental business and VCR were nearly destroyed and how the music industry did succeed in banning music and software rentals).

153. *See* Helman, *supra* note 78, at 122 (commenting on the problem of uncertainty in the area of copyright law).

154. *See id.* at 122–23.

155. *Id.*

156. Khanna, *supra* note 15. Khanna bolsters this argument by describing how David Cook opened the first Blockbuster one year after *Sony*, "with the legal issues on less precarious grounds." *Id.*

D. Drawing on the Success of Pay-TV

The solution of ordering Dish and the major television networks to share profits generated from ad-skipping technology has a major pedigree of success: premium pay-tv channels. Home Box Office (HBO) epitomizes the lucrativeness and success of such premium subscription channels.[157] In lieu of selling commercial advertising slots during its hit shows, such as *Sex and the City*, *The Wire*, and *The Sopranos*, HBO is a subscription channel which derives profits from consumers who pay an additional monthly fee for the channel.[158] For each new subscriber, HBO usually splits 50% of the profits with the cable or satellite broadcaster.[159] This profit model appears to work very well, with HBO turning over $4 billion in 2010.[160]

The HBO model appears highly similar to what the Hopper has to offer: advertisement free television in exchange for a monthly premium.[161] If Dish prevails in the lawsuits brought by the major networks, the Hopper would differ from HBO in one important aspect. That is, while HBO retains 50% of the monthly subscription fee, there would be no legal backing ensuring that the major networks would derive economic benefit from consumers who subscribe to the Hopper.[162] By modifying the fair use defense to incorporate a mandatory reasonable royalty fee for infringing uses that do not satisfy the economic harm factor, the Hopper model would more accurately mimic that of subscription television, likely leading to economic success for both Dish and the major television networks alike.[163]

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157. *Briefing HBO and the Future of Pay-TV: The Winning Streak*, ECONOMIST, Aug. 20, 2011, at 62, 62 [hereinafter *The Winning Streak*].

158. *Id.* According to THE ECONOMIST, the subscription fee for HBO in 2011 was $15 a month in addition to the fee for basic cable channels. *Id.*

159. *Id.* at 63.

160. *Id.* at 62. Perhaps even more impressively, in 2009 HBO earned one quarter of the profits of its parent, Time Warner. *Id.*

161. Ramachandran, *supra* note 147 (stating that consumers can pay $10 a month to watch primetime television ad-free); *The Winning Streak*, *supra* note 157, at 62 (stating that consumers can pay $15 a month to watch original HBO programming, which is also commercial-free).

162. *The Winning Streak*, *supra* note 157, at 63.

163. *Id.* It is hard to argue with these data indicating that, despite forgoing advertising revenue, HBO still managed to account for one quarter of the profits of Time Warner Cable. *Id.* at 62. In addition, major television networks could potentially benefit from a dual model with the Ad Hopper in place: traditional advertising revenue from consumers who decline to pay for ad-skipping services and a share of the profits from consumers who opt in to the Ad Hopper and other ad-skipping technology services. *See* Ramachandran, *supra* note 147 (stating that Dish already incorporates a dual system, charging customers $10 a month in addition to a $99 upfront fee for the Hopper, while charging customers a $6 monthly fee for traditional DVR).

Some might argue that the legal system does not need to intervene to set up a profit sharing arrangement between Dish and the major television networks because the major networks can simply withhold their programming from Dish until they receive an equitable share of ad-skipping technology profits. Indeed, contract negotiations between Dish and the major networks, such as ABC, have been strained after the introduction of the Hopper.[164] Also bolstering this position, Dish chairman Charlie Ergen seems to recognize the prudence of forming a mutually beneficial compromise between Dish and the major networks. Regarding the then-ongoing negotiations between Dish and ABC over the Hopper, Ergen reportedly rephrased the central issue as follows: "Is there a better way for us to monetize that [] is fair to the customer, but actually monetizes that in a way for you, the broadcasters, who need a dual income stream[?]"[165] Further enhancing his endorsement of profit sharing between Dish and the networks, Ergen went on to state: "We are a big believer in the dual income stream because otherwise broadcasters would have to raise their rates more . . . ."[166]

Perhaps if Dish were the only satellite or cable provider in the marketplace, chairman Ergen's remarks about a dual income stream would justify allowing Dish and the major networks to settle the dispute over ad-skipping technologies themselves. However, this is not the case, with many other satellite and cable providers seemingly poised to offer ad-skipping technologies of their own and thereby decrease the leveraging power available to the major networks to negotiate for a profit sharing arrangement.[167] Even more insidiously for the major networks, in the not-so-distant future satellite and cable providers may have the ability to offer network programming content in the absence of any contractual agreement altogether.[168]

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164. *See* Block, *supra* note 129 (describing the bitter battle between Dish and ABC in talks to renew their contractual agreement). According to *The Hollywood Reporter*, ABC claims that the Ad Hopper with its AutoHop feature has "caused 'irreparable harm' by hurting ad sales and disrupting its exclusive right to control its programming." *Id.*

165. *Id.*

166. *Id.*

167. *See* Gardner, *supra* note 115 (citing Time Warner Cable and DirecTV as two major players who probably have the technological capabilities to offer devices akin to the Ad Hopper). Based on this same article, the major networks do not have much leverage against Dish alone, either. *Id.* Indeed, the article characterizes Charlie Ergen's negotiating strategy as "a multibillion-dollar bet that Disney can't afford to walk away from Dish's 14 million subscribers." *Id.*

168. *See id.* (arguing that even if Dish and ABC could not come to an agreement, Dish could continue to stream the valuable ESPN channel held by ABC's parent company, Disney). The risk of contract-free streaming was also posed by Aereo, a company owning technology capable of "capturing over-the-air TV signals and transmitting them privately online." *Id.* The Supreme Court's recent decision ruling that Aereo's business model constitutes copyright infringement may have mitigated this risk to broadcasters for the near future, but also

IV. CONCLUSION

This Comment has provided the judiciary a proposed modification to the fair use defense as a method of resolving the ongoing conflict between Dish and major broadcast networks over Dish's Hopper device, which allows consumers to automatically skip over commercials in recorded programs. One easy way for the judiciary to verify the utility of this Comment's proposed modification to the fair use defense would be to examine the projected impact of each option regarding ad-skipping technology long after the Dish Hopper has faded from public consciousness and brand new technologies have taken its place in preserving the tension between innovators and copyright holders.[169] In examining these options, the judiciary should also recognize that Dish and the major networks will not be the only ones to have their fates determined.[170] In addition to these corporate entities, consumers stand to either gain or lose depending on how the judiciary responds to the ongoing conflict between these entities.[171] This Part therefore examines the predicted outcome for broadcasters, satellite television providers, and consumers for each of the three most likely rationales that the judiciary will follow in the ongoing ad-skipping technology litigation.[172]

First, the judiciary could decline to adopt this Comment's modified fair use test and major networks could fail to secure injunctions against the Hopper under the current fair use test.[173] This option appears to be the most likely based on the Ninth Circuit's denial of a preliminary injunction against Dish.[174] However, if this option is adopted, consumers, in addition to the major networks, would likely be on the losing end: both of these groups would likely suffer from the uncertain future of broadcast television as advertising coffers run dry.[175]

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emphasizes the need for courts to enforce copyright protection against devices such as the Hopper as well. *See* Am. Broad. Cos., Inc. v. Aereo, Inc., 134 S. Ct. 2498, 2511 (2014) (holding that Aereo's activities constituted a public performance, in violation of rights given to broadcasters by the 1976 Copyright Act).

169. *See* Depoorter, *supra* note 14, at 1841–42 (discussing the longstanding clash between technological innovators and copyright holders).

170. *See supra* notes 119–22 and accompanying text.

171. *Id.*

172. *See supra* notes 10–13 and accompanying text (discussing the preliminary ways in which the judiciary has already addressed the ad-skipping controversy).

173. *See* 17 U.S.C. § 107 (2012) (codifying the fair use defense).

174. Rubel, Kaplan & Nercessian, *supra* note 13, at 14.

175. *See* Gardner, *supra* note 115 (reporting that NBC Broadcasting Chairman Ted Harbert stated in his thoughts about the Ad Hopper: "I think this is an attack on our ecosystem").

Alternatively, courts could side with the major networks and grant injunctions against the Hopper without implementing this Comment's proposed reasonable royalty structure.[176] In this scenario, the networks would likely claim victory but at the expense of consumers, who would likely lose again as ad-skipping technology is relegated to the technology black hole that has encompassed so many other infant technologies that have fallen victim to the continuous strife between innovators and copyright holders.[177]

If, however, judges adopt this Comment's modified approach to the fair use defense, the resulting hybrid of the two preceding alternatives would benefit not only Dish and the major television networks, but consumers as well. Dish would still be able to generate revenue by charging a monthly subscription fee for the Hopper, and the networks could be compensated for lost advertising revenues through a royalty fee each time an end user taped a show with an ad-skipping feature enabled.[178] Consumers would enjoy the benefits of ad-skipping technology, and perhaps even better programming content as well.[179]

Apart from the benefits that the above-described modification to the fair use test would bestow on copyright holders, technological innovators, and consumers alike, this solution also comports with common sense. Fundamentally speaking, consumers must pay to watch broadcast television one way or another: otherwise, network broadcasters would have no incentive to develop the creative content that fills their television programming.[180] In the current broadcast television system, consumers pay to watch television programming largely in an indirect manner by also watching commercials produced by

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176. *See supra* text accompanying notes 142–47 (discussing the concept of a "reasonable royalty").

177. *See* Khanna, *supra* note 15 (describing how, even in instances where litigation ultimately failed to keep technologies off the market, the content industry has still succeeded in bankrupting some of the technological innovators through litigation costs). According to Khanna, this fate befell the first iPod, the Rio, and the first DVR, ReplayTV. *Id.* The harsh reality that seemingly unnecessary litigation has stifled past innovation again emphasizes the utility of having increased certainty in the law to avoid this phenomenon in the future. *See supra* note 156 and accompanying text.

178. *See* Ramachandran, *supra* note 147 (describing how Dish has already begun charging subscribes an additional $10 monthly fee for this additional service).

179. *See The Winning Streak*, *supra* note 157, at 62 (explaining how, in HBO's case, "[n]o advertising also means the company focuses on pleasing subscribers rather than amassing huge audiences." As the head of Time Warner, Jeff Bewkes, phrases it, "If you're not paying for television, you're not the customer . . . . You're the product.").

180. *See* U.S. CONST. art. I, § 8, cl. 8 (illustrating how the drafters of the Constitution recognized that authors and inventors should be granted congressionally sanctioned incentives to promote innovation).

advertisers who in turn compensate the networks.[181] As demonstrated by premium cable channels such as HBO, if consumers wish to forgo watching commercials they must instead pay in a more direct manner via a monthly subscription fee.[182] Thus, in order for this system to remain viable in the age of the Hopper, some form of profit sharing must be formed between Dish and the broadcast networks.[183] Judges should recognize that the law should not be blind to this reality.[184] By modifying the fair use defense to incorporate an inherent profit sharing scheme in the form of a reasonable royalty, the judiciary would not only recognize this reality, but would foster innovation by providing a streamlined solution to align the interests of technological and creative innovators.[185]

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181. SMALL SCREEN, *supra* note 114; *see also* Ramachandran, *supra* note 147.

182. *The Winning Streak*, *supra* note 157, at 62.

183. *See supra* text accompanying notes 142–47 (proposing one potential solution of imposing a reasonable royalty on ad-skipping technologies).

184. *See* Rubel, Kaplan & Nercessian, *supra* note 13, at 14 (discussing how the Ninth Circuit declined to examine the market impact of ad-skipping technology because Fox does not own the copyright to advertisements).

185. *See supra* Part III.C–D (proposing a modification to the fair use defense which would increase legal certainty and has a track record of success with subscription television).