450 F.3d 505, 38 Communications Reg. (P&F) 701, 78 U.S.P.Q.2d 1865, 19 Fla. L. Weekly Fed. C 596, 2006 Copr.L.Dec. P 29,182
(Cite as: 450 F.3d 505)

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Briefs and Other Related Documents

United States Court of Appeals,Eleventh Circuit.
CBS BROADCASTING, INCORPORATED, Fox Broadcasting Company,
Plaintiffs-Counter-Defendants-Appellees,
FBC Television Affiliates Association, ABC Television Affiliates Association, NBC Television Affiliates, CBS Television Affiliates Association,
Plaintiffs-Counter-Defendant
s-Appellees-Cross-Appellants,
ABC, Inc., Plaintiff,
National Broadcasting Company,
Plaintiff-Counter-Defendant,
v.
ECHOSTAR COMMUNICATIONS CORPORATION, dba DISH Network, EchoStar Satellite Corporation, Satellite Communications Operating Corporation, Direct SAT Corp.,
Defendants-Counter-Claimants
-Appellants-Cross-Appellees.
No. 03-13671.

May 23, 2006.

Background: Television network operators and affiliated stations brought suit alleging that satellite carrier was retransmitting their programs to "served" households and thereby infringing their exclusive right to control retransmission of their programs. Following bench trial, the United States District Court for the Southern District of Florida, No. 98-02651-CV-WPD,William P. Dimitrouleas, J., 276 F.Supp.2d 1237, found that carrier had not satisfied its burden of proving that households at issue were unserved, but determined that it was not obligated to issue nationwide permanent injunction, and instead issued injunction ordering carrier to use different method for determining whether its subscribers were unserved households. Parties appealed.

Holdings: The Court of Appeals, Tjoflat, Circuit Judge, held that:

6(1) rule used by carrier to determine eligibility to receive distant network programming violated Satellite Home Viewer Act (SHVA);

7(2) use of model which included interference did not comply with Act;

9(3) Act did not prohibit use of multiple vendors in assessing subscriber eligibility;

10(4) Satellite Home Viewer Improvement Act (SHVIA) applied to require present eligibility; and

15(5) carrier engaged in "willful or repeated" violations, requiring permanent injunction.

Affirmed in part, reversed in part, and remanded.

West Headnotes

[1] Federal Courts 170B ⚿844

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)5 Questions of Fact, Verdicts and Findings
170Bk844 k. Credibility of Witnesses in General. Most Cited Cases
Appellate courts reviewing cold record give particular deference to credibility determinations of fact-finder who had opportunity to see live testimony.

[2] Federal Courts 170B ⚿814.1

170B Federal Courts
170BVIII Courts of Appeals

170BVIII(K) Scope, Standards, and Extent
170BVIII(K)4 Discretion of Lower Court
170Bk814 Injunction
170Bk814.1 k. In General. Most Cited Cases
Scope of injunction is reviewed for abuse of discretion.

[3] Copyrights and Intellectual Property 99⇐86

99 Copyrights and Intellectual Property
99I Copyrights
99I(J) Infringement
99I(J)2 Remedies
99k72 Actions for Infringement
99k86 k. Permanent Relief. Most Cited Cases
Television networks did not have to prove irreparable harm to obtain permanent injunction against satellite carrier's infringement of their exclusive right to control retransmission of their programs. 17 U.S.C.A. § 101 et seq.

[4] Copyrights and Intellectual Property 99⇐76

99 Copyrights and Intellectual Property
99I Copyrights
99I(J) Infringement
99I(J)2 Remedies
99k72 Actions for Infringement
99k76 k. Persons Entitled to Sue. Most Cited Cases
Stations affiliated with television network operators had standing to bring suit alleging that satellite carrier was retransmitting networks' programs to " served" households and thereby infringing their exclusive right to control retransmission of their programs. 17 U.S.C.A. § 501(e).

[5] Jury 230 ⇐13(1)

230 Jury
230II Right to Trial by Jury
230k13 Legal or Equitable Actions or Issues
230k13(1) k. In General. Most Cited Cases

Jury 230 ⇐14(11)

230 Jury
230II Right to Trial by Jury
230k14 Particular Actions and Proceedings
230k14(11) k. Injunction in General. Most Cited Cases
There is no right to jury trial when plaintiffs seek purely equitable relief such as injunction.

[6] Copyrights and Intellectual Property 99⇐67.1

99 Copyrights and Intellectual Property
99I Copyrights
99I(J) Infringement
99I(J)1 What Constitutes Infringement
99k67.1 k. Motion Pictures and Other Audiovisual Works. Most Cited Cases
Household is "served" with respect to particular television network, and thus not eligible under Satellite Home Viewer Act (SHVA) to receive distant network programming, if that household receives any signal of Grade B or better, regardless of its source; Act's definition of unserved household is not limited to primary network station in household's Nielsen-defined designated market area (DMA). 17 U.S.C.A. § 119(d)(10)(A).

[7] Copyrights and Intellectual Property 99⇐67.1

99 Copyrights and Intellectual Property
99I Copyrights
99I(J) Infringement
99I(J)1 What Constitutes Infringement
99k67.1 k. Motion Pictures and Other Audiovisual Works. Most Cited Cases
Satellite carrier's use, in determining eligibility of potential subscribers under Satellite Home Viewer Act (SHVA), of model which included signal interference did not comply with Act, where most current "cookbook" provided by Federal Communications Commission (FCC) specifically and clearly omitted interference. 17 U.S.C.A. § 119(a)(2)(B)(ii)(I).

[8] Federal Courts 170B ⇐915

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)7 Waiver of Error in Appellate Court
170Bk915 k. In General. Most Cited Cases
Claim that action of Federal Communications Commission (FCC) was ultra vires was waived, where issue was not raised in appellant's initial brief.

[9] Copyrights and Intellectual Property 99⊂⊃67.1

99 Copyrights and Intellectual Property
99I Copyrights
99I(J) Infringement
99I(J)1 What Constitutes Infringement
99k67.1 k. Motion Pictures and Other Audiovisual Works. Most Cited Cases
So long as satellite carrier uses vendors whose models comply with Federal Communications Commission's (FCC) Individual Location Longley-Rice (ILLR) guidelines to determine eligibility under Satellite Home Viewer Act (SHVA) to receive distant network programming, carrier may utilize as many different vendors as it would like. 17 U.S.C.A. § 119(a)(2)(B)(ii)(I).

[10] Constitutional Law 92 ⊂⊃253(4)

92 Constitutional Law
92XII Due Process of Law
92k253 Nature of Acts Prohibited in General
92k253(4) k. Retrospective Laws and Decisions; Change in Law. Most Cited Cases

Copyrights and Intellectual Property 99 ⊂⊃2

99 Copyrights and Intellectual Property
99I Copyrights
99I(A) Nature and Subject Matter
99k2 k. Constitutional and Statutory Provisions. Most Cited Cases
Satellite Home Viewer Improvement Act (SHVIA) did not, by incorporating method for determining whether household was unserved and thus eligible for distant network programming, impose retroactive obligation on satellite carriers with respect to customers signed up before Act's passage, in violation of due process; rather, Act provided evidentiary tool to enable carriers to prove what they were always required to prove, that household could not receive signal of Grade B or better. U.S.C.A. Const.Amends. 5, 14; 17 U.S.C.A. § 119(d)(10)(A).

[11] Copyrights and Intellectual Property 99⊂⊃67.1

99 Copyrights and Intellectual Property
99I Copyrights
99I(J) Infringement
99I(J)1 What Constitutes Infringement
99k67.1 k. Motion Pictures and Other Audiovisual Works. Most Cited Cases
For household to be eligible for distant network programming, for purposes of Satellite Home Viewer Improvement Act's (SHVIA) proscription against satellite carrier's transmission of such programming to "served" households, household must be presently unserved, not just unserved at time it signed up. 17 U.S.C.A. § 119(a)(2)(B).

[12] Copyrights and Intellectual Property 99⊂⊃86

99 Copyrights and Intellectual Property
99I Copyrights
99I(J) Infringement
99I(J)2 Remedies
99k72 Actions for Infringement
99k86 k. Permanent Relief. Most Cited Cases
Although provision of Satellite Home Viewer Act (SHVA) authorizing permanent injunction against willful or repeated "pattern or practice" of satellite carrier in delivering network programming to ineligible subscribers does not define term "pattern or practice," 20% ineligibility proportion set forth in legislative history is relevant marker. 17 U.S.C.A. § 119(a)(7)(B)(i).

[13] Copyrights and Intellectual Property 99⊂⊃86

99 Copyrights and Intellectual Property
99I Copyrights
99I(J) Infringement
99I(J)2 Remedies
99k72 Actions for Infringement
99k86 k. Permanent Relief. Most Cited Cases
Provision of Satellite Home Viewer Act (SHVA) authorizing permanent injunction against willful or repeated "pattern or practice" of satellite carrier in delivering network programming to ineligible subscribers applies even if illegal activity has ceased by close of trial. 17 U.S.C.A. § 119(a)(7)(B)(i).

[14] Copyrights and Intellectual Property 99⇐ 83(1)

99 Copyrights and Intellectual Property
99I Copyrights
99I(J) Infringement
99I(J)2 Remedies
99k72 Actions for Infringement
99k83 Evidence
99k83(1) k. Presumptions and Burden of Proof. Most Cited Cases
In action under Satellite Home Viewer Act (SHVA), seeking permanent injunction against willful or repeated "pattern or practice" of satellite carrier in delivering network programming to ineligible subscribers, carrier has burden of proof, so that finding that satellite carrier failed to carry its burden of establishing eligibility is tantamount to finding of ineligibility. 17 U.S.C.A. § 119(a)(7)(B)(i).

[15] Copyrights and Intellectual Property 99⇐ 86

99 Copyrights and Intellectual Property
99I Copyrights
99I(J) Infringement
99I(J)2 Remedies
99k72 Actions for Infringement
99k86 k. Permanent Relief. Most Cited Cases
Satellite carrier engaged in "willful or repeated" violations of Satellite Home Viewer Act (SHVA) and Satellite Home Viewer Improvement Act (SHVIA), warranting permanent injunction, where more than 20% of its subscribers were ineligible to receive distant network programming, carrier used inadequate procedures for assessing subscriber eligibility, and carrier disregarded limitations of its statutory license and sought to avoid its statutory obligations at every turn. 17 U.S.C.A. § 119(a)(7)(B)(i).

[16] Copyrights and Intellectual Property 99⇐ 86

99 Copyrights and Intellectual Property
99I Copyrights
99I(J) Infringement
99I(J)2 Remedies
99k72 Actions for Infringement
99k86 k. Permanent Relief. Most Cited Cases
Upon finding of "pattern or practice" of satellite carrier in delivering network programming to ineligible subscribers in violation of Satellite Home Viewer Act (SHVA), permanent injunction is mandatory. 17 U.S.C.A. § 119(a)(7)(B)(i).

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Appeals from the United States District Court for the Southern District of Florida.

Before TJOFLAT and HILL, Circuit Judges, and MILLS[FN*], District Judge.

FN* Honorable Richard Mills, United States District Judge for the Central District of Illinois, sitting by designation.

TJOFLAT, Circuit Judge:
The Satellite Home Viewer Act of 1988 ("SHVA"), Pub. L. No. 100-667, tit. II, 102 Stat. 3935 (codified as amended at 17 U.S.C. § 119), as amended by the Satellite Home Viewer Improvement Act of 1999 ("SHVIA") (collectively, the "Act"), Pub. L. No. 106-113, § 1001 *et seq.*, 113 Stat. 1501, 1501A-523, gives satellite carriers a compulsory, statutory license to transmit copyrighted distant network programing[FN1] to " unserved households," that is, households unable to receive network programing at a specified level of intensity through the use of conventional rooftop antennas.[FN2] This case involves claims by network stations CBS Broadcasting, Inc. ("CBS") and Fox Broadcasting Company ("Fox"), and network affiliate associations ABC Television Affiliates Association, ***509** CBS Television Network Affiliates Association, FBC Television Association, and NBC Television Affiliates Association (collectively, "networks"),[FN3] that defendant EchoStar, a satellite carrier doing business as DISH Network,[FN4] is retransmitting their programs to "served" households and thereby infringing their exclusive right, under the Copyright Act, to control the retransmission of their programs.

FN1. "Distant network signals are network stations from outside a subscriber's market area. For example, a person who lives in Fort Lauderdale but receives an ABC, CBS, Fox or NBC network station from New York City is receiving 'distant network programming' or 'distant network stations.' " *CBS Broad., Inc. v. EchoStar Commc'ns Corp.*, 276 F.Supp.2d 1237, 1241 (S.D.Fla.2003).

FN2. In its report, the House Committee on Energy and Commerce stated that it " believes that this approach will satisfy the public interest in making available network programming in these (typically rural) areas, while also respecting the public interest in protecting the network-affiliate distribution system." H.R.Rep. No. 100-887(II), at 19-20 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5577, 5648. *See also ABC, Inc. v. PrimeTime 24 Joint Venture,* 184 F.3d 348, 350-51 (4th Cir.1999); *CBS Broad., Inc. v. PrimeTime 24 Joint Venture,* 48 F.Supp.2d 1342, 1355 (S.D.Fla.1998).

FN3. The Affiliate Associations are voluntary membership trade associations comprised of network stations that are affiliates with the respective networks. Plaintiffs ABC, Inc. ("ABC") and National Broadcasting Company, Inc. ("NBC") were dismissed and are no longer parties to the case.

FN4. As of April 2002, EchoStar provided satellite television services to over nine million Americans, including both local network subscribers under the compulsory license in 17 U.S.C. § 122, and distant network subscribers under the Act. EchoStar provided distant network programming to about 1.2 million subscribers.

In *CBS Broadcasting, Inc. v. EchoStar Communications Corp.*, 265 F.3d 1193 (11th Cir.2001) (*EchoStar I*), we vacated the district court's preliminary injunction upholding the networks' claims and ordering EchoStar to cease transmitting the programs to "served households," *id.* at 1193, and remanded the case to the district court for a trial on the networks' application for injunctive relief pursuant to the Act. On remand, the district court found at the conclusion of the bench trial that EchoStar had not satisfied its statutory burden of proving that the households at issue were unserved. *CBS Broad., Inc. v. EchoStar Commc'ns Corp.*, 276 F.Supp.2d 1237, 1248 (S.D.Fla.2003). In fact, in the district court's

judgment, the evidence indicated that EchoStar had been retransmitting the networks' programs to thousands of *served* households. *Id.* at 1253-54. Given these findings, the networks asked the court permanently to enjoin EchoStar from any use of the Act's statutory license for distant network programing. The court denied their request, and instead issued an injunction ordering EchoStar to use a different method for determining whether its subscribers are unserved households. *Id.* at 1254-55.[FN5] EchoStar now appeals the court's injunctive order and its grant of summary judgment to the networks on EchoStar's counterclaims. The networks cross-appeal, contending that the district court was required as a matter of law permanently to enjoin the carrier from using the statutory license.

FN5. In addition to prescribing a method for determining subscriber eligibility, the court held that none of EchoStar's current subscribers were eligible for grandfather status pursuant to 17 U.S.C. § 119(e). *CBS Broad., Inc.*, 276 F.Supp.2d at 1257.

We organize this opinion as follows. In Part I, we explain the statutory licensing scheme the Act created and the burden of proof a satellite carrier must satisfy to permit the court to find that the subscribers at issue are eligible to receive distant network programming. In Part II, we review how the trial proceeded, the district court's findings of fact, and its legal conclusions. In Part III, we address both EchoStar's and the networks' claims of error. Despite reversing the district court's determination that EchoStar's use of two vendors was unlawful, we affirm on the remainder of EchoStar's claims and the court's conclusion that EchoStar engaged in a "willful or repeated" violation of the Act. We also hold that the court erred in not finding a "willful or repeated pattern or practice" of statutory violations, and in not barring EchoStar from further use of the license. In Part IV we briefly conclude.

***510** I.

The scheme the Act created is set out in considerable detail in *EchoStar I.* We reiterate what was said there only to set the stage for the discussion that follows.

As noted, SHVA created a compulsory, statutory license for satellite carriers to retransmit copyrighted network programming ("secondary transmission") for private home viewing to "persons who reside in unserved households." 17 U.S.C. 119(a)(2)(B)(i).[FN6] SHVIA defines "unserved households" by dividing them into five categories, the first three of which are pertinent here:

FN6. Subject to provisions not relevant here, SHVA as amended, states that
(A) In general.-... [S]econdary transmissions [i.e., retransmissions] of a performance or display of a work embodied in a primary transmission made by a network station shall be subject to statutory licensing under this section if the secondary transmission is made by a satellite carrier to the public for private home viewing, with regard to secondary transmissions the satellite carrier is in compliance with the rules, regulations, or authorizations of the Federal Communications Commission governing the carriage of television broadcast station signals, and the carrier makes a direct or indirect charge for such retransmission service to each subscriber receiving the secondary transmission.
(B) Secondary transmissions to unserved households.-
(i) In general.-The statutory license provided for in subparagraph (A) shall be limited to secondary transmissions of the signals of no more than two network stations in a single day for each television network to persons who reside in unserved households.
17 U.S.C. §§ 119(a)(2)(A), (B)(i). SHVA's definition of "unserved households " was altered by the SHVIA amendment. The amended definition is controlling in

this case.

1. Households that "cannot receive, through use of conventional, stationary, outdoor rooftop receiving antenna, an over-the-air signal of a primary network station affiliated with that network of Grade B intensity as defined by the Federal Communications Commission under section 73.683(a) of title 47 of the Code of Federal Regulations, as in effect on January 1, 1999." *Id.* § 119(d)(10)(A).
2. Households that receive a waiver from each network station affiliated with a particular network that is predicted to deliver a Grade B or better signal to the subscriber's residence. *Id.* § 119(d)(10)(B), (a)(14), (a)(2)(B).
3. Households that (a) receive a signal of less than Grade A intensity for a particular network and (b) received satellite service of that network's signals on October 31, 1999 or had such service terminated for SHVA ineligibility between July 11, 1998 and October 31, 1999 ("grandfathered subscribers"). *Id.* §§ 119(d)(10)(c), (e).[FN7]

FN7. The fourth and fifth categories are:
4. Subscribers who receive distant signals through a satellite dish located on a commercial truck or recreational vehicle, and who satisfy the strict statutory documentation requirements. *Id.* § 119(d)(10)(D), (a)(12).
5. Subscribers who receive "secondary transmissions by C-band services of network stations that [the subscriber] received before any termination of such secondary transmissions before October 31, 1999." *Id.* § 119(d)(10)(E), (a)(2)(B)(iii).

Anticipating that litigation would ensue over whether households are served or unserved, Congress, as part of the SHVIA amendment, instructed that the courts may use two methods to resolve the issue: the "Accurate measurements" method and the "Accurate predictive model." The " Accurate measurements" method requires actual physical measurements to determine the strength of the television station's signal at the subscriber's residence. *Id.* § 119(a)(2)(B)(ii)(II). These measurements***511** must follow the procedures elaborated in 47 U.S.C. § 339 and 47 C.F.R. § 73.686, including measuring the signal intensity at a "minimum of five locations as close as possible to the specific site where the site's receiving antenna is located." 47 C.F.R. § 73.686(d)(1)(ii). The " Accurate predictive model" for determining signal intensity is "the Individual Location Longley-Rice [ILLR] model set forth by the Federal Communications Commission." 17 U.S.C. § 119(a)(2)(B)(ii)(I). [FN8] If used, the ILLR model permits the satellite carrier to avoid having to make time-consuming physical measurements of the signal intensity at a subscriber's residence by allowing the carrier to establish presumptively that a household cannot receive at least a Grade B signal and is therefore unserved. *See* 17 U.S.C. § 119(a)(2)(B)(ii)(I); *EchoStar I,* 265 F.3d at 1200. But ILLR determinations are nothing more than presumptive-eligibility is ultimately based on the signal strength a household actually receives, as measured by on-site testing. *See* 17 U.S.C. § 119(a)(2)(B)(ii)(I) (indicating that the ILLR model is to be used "[i]n determining presumptively whether a person resides in an unserved household"); H.R. Rep. 106-464, at 97 (1999) (Conf.Rep.) (Joint Explanatory Statement of the Committee of Conference) ("[C]ourts should rely on the FCC's ILLR model to presumptively determine whether a household is capable of receiving a signal of Grade B intensity .... [T]he ultimate determination of eligibility to receive network signals shall be a signal intensity test pursuant to 47 C.F.R. § 73.686(d), as reflected in new section 339(c)(5) of the Communications Act of 1934.").

FN8. Prior to the SHVIA amendment, SHVA limited the statutory license to " secondary transmissions to persons who reside in unserved households," 17 U.S.C.A § 119(a)(2)(B) (West, Westlaw through November 28, 1999 amendments), but did not set out specific ways in which a satellite carrier could demonstrate whether a household was unserved. The FCC

adopted ILLR as a method for determining signal strength in February 1999. *See EchoStar I,* 265 F.3d at 1204.

The Act makes abundantly clear that it is the satellite carrier who bears the burden of proving that its subscribers are, in fact, unserved. 17 U.S.C. § 119(a)(7)(D).[FN9] Plaintiff network stations have no obligation to put on any evidence demonstrating a violation of the terms of the statutory license. To the extent networks put on affirmative evidence of ineligibility, a satellite carrier cannot simply rebut or impeach that evidence. The satellite carrier must provide additional evidence that its challenged subscribers are unserved. Thus, a satellite carrier may be found to have violated the Act even if a court does not find that its subscribers are "served." A violation occurs so long as a carrier does not satisfy its burden of proving that its subscribers are " unserved."

FN9. This provision states:
Burden of proof.-In any action brought under this paragraph, the satellite carrier shall have the burden of proving that its secondary transmission of a primary transmission by a network station is to a subscriber who is eligible to receive the secondary transmission under this section.
17 U.S.C. § 119(a)(7)(D).

The Act contemplates two categories of violations as it relates to the secondary transmission of distant network service to served households: "Individual violations" and "Pattern[s] of violations." An " Individual violation" occurs where there is a " willful or repeated secondary transmission ... to a subscriber who is not eligible to receive the transmission under this section." *Id.* § 119(a)(7)(A) . A district court has broad discretion to remedy such violation(s). *See id.; id.* §§ 502-506, 509. A ***512** "Pattern of violations" arises where "a satellite carrier engages in a willful or repeated pattern or practice of delivering [distant network service] to subscribers who are not eligible to receive the transmission under this section." *Id.* § 119(a)(7)(B). The Act grants a court no discretion in its choice of remedy for a "pattern or practice" of violations.[FN10] Upon finding such a "pattern or practice," the Act instructs that "the court shall order a permanent injunction barring the secondary transmission by the satellite carrier, for private home viewing, of the primary transmissions of any primary network station affiliated with the same network, and the court may order statutory damages of not to exceed $250,000 for each 6-month period during which the pattern or practice was carried out. " *Id.* § 119(a)(7)(B)(i).[FN11]

FN10. EchoStar contends that courts retain their traditional equitable discretion regardless of the Act's explicit limitations. As we discuss *infra,* we disagree.

FN11. The scope of the permanent injunction depends on the scope of the " pattern or practice" of violations. Where the "pattern or practice" has been carried out on a "substantially nationwide basis," the Act mandates a nationwide injunction. *See* 17 U.S.C. § 119(a)(7)(B)(i). A local or regional "pattern or practice" results in a permanent injunction limited to "that locality or region." *See id.* § 119(a)(7)(B)(ii).

II.

Despite not having the burden of proof at trial, plaintiffs presented affirmative evidence, in the form of expert testimony from Jules Cohen as well as ILLR analyses of EchoStar's subscribers at various points in time, tending to demonstrate that EchoStar has provided, and continues to provide, distant network service to ineligible households. EchoStar responded with the testimony of company executives, as well as that of Dr. Charles Jackson, an expert whose testimony was intended to criticize plaintiffs' expert testimony and whom the court determined lacked credibility. *CBS Broad. Inc.,* 276 F.Supp.2d at 1244, 1252 n. 10. The court specifically and correctly noted that merely impeaching the plaintiffs' affirmative evidence would be insufficient given defendant's statutory

burden. *Id.* at 1244. After evaluating the evidence presented by the parties, the court made the following findings of fact and conclusions of law. FN12

FN12. We summarize only those findings that are relevant to this appeal.

A. Findings of Fact

1. EchoStar's History of Compliance Procedures

From March 1996 to July 1998, EchoStar offered distant network programming through an agreement with another satellite provider, PrimeTime 24 Joint Venture. PrimeTime 24 utilized a subjective method of determining subscriber eligibility based simply on a potential subscriber's qualitative evaluation of her television signal. In 1998, the United States District Court for the Southern District of Florida issued first a preliminary, then a permanent injunction requiring PrimeTime 24 to terminate the delivery of distant network signals to subscribers who had been signed up using this subjective method. Days after the entry of the injunction, EchoStar terminated its agreement with PrimeTime 24 and canceled its subscribers' PrimeTime 24 distant network programming packages. EchoStar then switched virtually all subscribers to new, EchoStar-designed distant network programming packages.

After EchoStar terminated its relationship with PrimeTime 24, it began evaluating new-subscriber eligibility through a ***513** system referred to as the " red-light/green-light method." Under this system, each zip code was designated as either a red-light or a green-light zip code based on predicted signal strength. A household in a red-light area was presumptively ineligible for service. EchoStar claims that it refused to sign up subscribers who lived in red-light zip codes unless the subscribers obtained a valid waiver from the network station. The district court found, however, that EchoStar presented no real evidence that its determination of whether zip codes were red-light or green-light areas was reasonably calculated to prevent signups of ineligible subscribers. Additionally, the court found that EchoStar's customer service representatives were able to override the red-light/green-light designations-that is, even if a subscriber was in a red-light zip code, a customer service representative still had discretion to sign up that subscriber for distant network programming.

EchoStar began using the ILLR model to determine subscriber eligibility in 1999. Echostar's ILLR methodology involved the following three relevant factors: First, until October 2000, EchoStar utilized a "DMA Rule" by which it only used the ILLR model to consider the signal strength of network stations in a given household's Nielsen-defined designated market area ("DMA"). In other words, even if a household received a Grade B or higher signal from network stations outside a household's DMA, EchoStar would consider it potentially unserved. Additionally, EchoStar included interference in its ILLR analyses until January 2002. FN13 Finally, EchoStar utilized (and continues to use) two vendors-Decisionmark and Dataworld-for its ILLR analysis. So long as one vendor indicates that a household cannot receive a Grade B signal, EchoStar considers the household to be unserved. FN14

FN13. Incorporating interference in the ILLR analysis can potentially result in weaker predicted signal strength, as the model would then factor in the predicted presence of interfering signals from other stations.

FN14. The two vendors might differ in their ILLR output as a result of database inaccuracies. *CBS Broad. Inc.*, 276 F.Supp.2d at 1250.

The district court found that recently, EchoStar has taken significant measures to ensure compliance with the Act. Customer service representatives are trained and are no longer able to override system determinations of subscriber ineligibility. Additionally, EchoStar uses a backup compliance

system and, on a monthly basis, reanalyzes all new subscribers to ensure eligibility. EchoStar terminates distant network programming to any subscribers found to be ineligible.

2. Analysis of EchoStar's Subscriber Base

Plaintiffs presented analyses of EchoStar subscriber lists at different points in time. The analyses were supervised and explained by plaintiffs' expert witness, Jules Cohen.

a. PrimeTime 24 Subscribers

In an effort to dissuade the district court from issuing the original injunction in this case, EchoStar's CEO, Charles Ergen, made a formal pledge under penalty of perjury in September 1999. In that pledge, he promised that for each of the subscribers that had originally been signed up for EchoStar's distant network programming using the subjective PrimeTime 24 method, EchoStar would (1) determine if they were served or unserved using the ILLR method and (2) terminate all ineligible subscribers. To comply with this promise, EchoStar submitted a list of its ***514** 331,586 PrimeTime 24 subscribers to Decisionmark, an ILLR vendor, for an ILLR analysis. EchoStar received the analysis the following month.

The analysis revealed that of the 331,586 total subscribers signed up for distant network programming with EchoStar pursuant to the agreement with PrimeTime 24, the percentages of Grade A subscribers were 61% (ABC), 60% (CBS), 58% (Fox), and 60% (NBC).[FN15] These totals amount to more than 258,000 former PrimeTime 24 subscribers (approximately 78% of the total) who were predicted to receive a Grade A signal from at least one of the four networks. Contrary to Ergen's promise, the district court found no evidence that EchoStar terminated service to *any* of these subscribers for compliance-related purposes. *CBS Broad., Inc.,* 276 F.Supp.2d at 1245-46.

FN15. We believe it is worth re-emphasizing: An unserved household is one that cannot receive a Grade B signal, let alone the stronger Grade A variety. 17 U.S.C. § 119(d)(10)(A). Subscribers receiving a Grade A signal are not even eligible for grandfather status pursuant to section 119(e).

b. Red-Light/Green-Light Subscribers

The district court found that during the period in which EchoStar utilized the red-light/green-light methodology, it signed up a substantial number of subscribers in the ineligible red-light zip codes. For example, between November 1988 and March 1999 EchoStar signed up 62,374 red-light subscribers for CBS distant network programming and 63,979 red-light subscribers for Fox distant network programming. An ILLR analysis of this group of subscribers shows that 167,000 are predicted to receive a Grade B or better signal.[FN16] Of the CBS distant programming subscribers signed up during this period, 69% were predicted to receive at least a Grade B signal and 41% were predicted to receive a Grade A signal. *Id.* at 1242.

FN16. EchoStar objects to an ILLR analysis of subscribers signed up before the ILLR methodology was incorporated into the Act via the SHVIA amendment as an impermissible retroactive application of the amendment. As discussed, *infra,* we disagree.

c. September 1999 Subscriber List

Along with its submission of PrimeTime 24 subscribers, EchoStar submitted a list of all of its distant network receiving subscribers as of September 1999. The results were no more encouraging. Of its 879,808 distant network subscribers, 53% were predicted to receive a Grade A signal for ABC, 51% for CBS, 48% for Fox and 52% for NBC. An additional 18% for ABC, 21% for CBS, 12% for Fox, and 27% for NBC were predicted to receive a Grade B signal. As of

September 1999, 72% of EchoStar's distant network subscribers (630,000 subscribers), regardless of the compliance method used to enroll them, were predicted to receive a Grade A signal from at least one of the four networks. The district court found no evidence that EchoStar, despite receiving the analysis in October 1999, terminated any of the 630,000 Grade A subscribers for compliance reasons. *Id.* at 1245.

d. April 2002 Subscriber List

During the course of pre-trial discovery, EchoStar provided the plaintiffs with a list of its subscribers as of April 25, 2002. Plaintiffs submitted the list for ILLR analysis under Cohen's supervision. This analysis showed that hundreds of thousands of EchoStar's distant network programming subscribers are predicted to receive signals of Grade A or B. Of the 898,847 ABC subscribers, 50.9% (457,584) were predicted to receive a Grade B or better signal from an ABC station; 28.5% (255,980) of ***515** those were Grade A. Of the 864,494 CBS subscribers, 55.7% (481,659) were predicted to receive a Grade B or better signal from a CBS station; 28.2% (244,022) of those were Grade A. Of the 993,490 Fox subscribers, 38.7% (383,987) were predicted to receive a Grade B or better signal from a Fox station; 25.8% (256,741) of those were Grade A. Of the 867,240 NBC subscribers, 56.4% (489,315) were predicted to receive a Grade B or better signal from an NBC station; 29.6% (256,503) of those were Grade A. *Id.* at 1243.[FN17]

FN17. The court also considered the impact that grandfather status and waivers might have on the analysis assuming that all of EchoStar's claims to such subscriber eligibility were valid. This analysis revealed more of the same: Of the 898,847 ABC subscribers, 26.5% (238,048) were predicted to receive a Grade B or better signal from an ABC station; 18.3% (164,409) of those were Grade A. Of the 864,494 CBS subscribers, 26.9% (232,699) were predicted to receive a Grade B or better signal from a CBS station; 17.6% (152,140) of those were Grade A. Of the 993,490 Fox subscribers, 20.2% (200,422) were predicted to receive a Grade B or better signal from a Fox station; 15.8% (156,906) of those were Grade A. Of the 867,240 NBC subscribers, 28.1% (243,342) were predicted to receive a Grade B or better signal from an NBC station; 18.8% (163,011) of those were Grade A. *CBS Broad., Inc.*, 276 F.Supp.2d at 1244.

B. Conclusions of Law[FN18]

FN18. Prior to trial, in an order dated March 24, 2003, the district court granted summary judgment to the networks on EchoStar's counterclaims. EchoStar had sued alleging tortious interference, unfair competition, and conspiracy to commit tortious interference and unfair competition based on statements made by plaintiffs, plaintiffs' counsel, local network affiliates and the National Association of Broadcasters. The court concluded that, based on Florida law-which both parties agreed should apply-"EchoStar has failed to present evidence that raises a general [sic] issue of material fact that would establish that Plaintiffs possessed the requisite intent and that EchoStar was harmed by the statements at issue." Order at 8.

The district court concluded that "EchoStar has failed to meet its burden of proving that its subscribers are 'unserved households,' " within the meaning of the Act. *Id.* at 1248.[FN19] The court noted that, after a trial in which EchoStar presented no ILLR analysis or on-site signal intensity measurements, EchoStar had failed to prove that *any* of its subscribers cannot receive a network signal of at least Grade B strength. *Id.* Moreover, the court found fault with EchoStar's ILLR

methodology. *Id.* at 1249-50. First it found the " DMA Rule" to be an improper method to ensure compliance with the Act. Additionally, it found that EchoStar's use of interference in its ILLR model from May 2000 to January 2002 was improper.[FN20] Finally, the court found that EchoStar's past and ***516** present use of two ILLR vendors, whereby EchoStar always chooses the vendor that designates a subscriber as unserved whenever there is a discrepancy, was, and continues to be, unlawful.

FN19. The court fluctuated in its conclusions as to whether it found that EchoStar had in fact provided service to ineligible households or that EchoStar had failed to satisfy its burden of demonstrating that its subscribers were unserved. *Compare id.* at 1253 (" EchoStar has failed to present credible evidence, either in the form of an ILLR analysis or signal intensity measurements, that any of its subscribers are unserved as defined under SHVA.") *with id.* at 1248-49 ("Mr. Cohen's testimony and reports ... support the conclusion that hundreds of thousands of EchoStar's distant network programming subscribers are not unserved households."); *id.* at 1252 ("EchoStar has provided service to a large number of subscribers who have been incorrectly issued grandfather status."). As we discuss, *infra,* the distinction is immaterial in this context. The two conclusions are equivalent violations of the statute.

FN20. In May 2000, the FCC issued a First Report and Order and published a " cookbook" describing how the ILLR model is to be employed. The May 2000 publications eliminated interference as a factor to be included in the model. *CBS Broad., Inc.,* 276 F.Supp.2d at 1249. The Act permits reliance on the ILLR model " set forth by the [FCC] ... as that model may be amended by the Commission over time .. . to increase the accuracy of that model." 17 U.S.C. § 119(a)(2)(B)(ii)(I).

The court also found that "EchoStar has not met its burden in showing that any of its distant signal subscribers meet the grandfathering requirements," of section 119(e). *Id.* at 1250. As previously indicated, to be eligible for grandfather status, a subscriber must (1) have been a subscriber on October 31, 1999 or have had distant network service terminated pursuant to the Act between July 11, 1998 and October 31, 1999 *and* (2) receive a signal of *less than* Grade A intensity. 17 U.S.C. § 119(e). EchoStar presented no evidence that its putative grandfathered subscribers receive a signal of less than Grade A intensity, no list of subscribers as of October 31, 1999 and no list of subscribers terminated, for Act compliance reasons, between July 11, 1998 and October 31, 1999. More importantly, EchoStar did present testimony that it does not have a list of its subscribers as of October 31, 1999. *CBS Broad., Inc.,* 276 F.Supp.2d at 1251 . Thus, because EchoStar had not demonstrated that any of its subscribers were eligible for grandfather status, and conceded that it did not have the data necessary ever so to prove, the court refused to acknowledge any alleged grandfather subscribers as eligible, *id.* at 1251-52, and held that "EchoStar subscribers are no longer entitled to grandfather status," *id.* at 1257.[FN21]

FN21. As part of its discussion, the court concluded that eligibility for grandfather status depends upon the strength of signal a subscriber *currently* receives, not the strength of signal received on October 31, 1999. *CBS Broad., Inc.,* 276 F.Supp.2d at 1251. In other words, eligibility for grandfather status can change over time as the signal strength a household receives changes. We believe that this is the correct interpretation of the statutory language and is consistent with our conclusion, discussed *infra,* that the Act imposes a requirement of continual subscriber eligibility based on the strength of network signal that a given household

receives.

Finally, the district court concluded that EchoStar " failed to prove that any of its subscribers are eligible because they have obtained waivers from the relevant network stations," pursuant to 17 U.S.C. § 119(a)(14). *Id.* at 1252. EchoStar again made use of its "DMA Rule" in this context and only sought waivers from stations in a subscriber's DMA. Because EchoStar did not consider subscribers who received Grade B or stronger signals from stations outside the subscribers' DMA to be served, they did not seek waivers from those stations. The court, however, concluded that "[f]or a particular household to have a valid waiver with respect to a particular network, it is necessary to obtain a waiver from every station affiliated with that network that the ILLR model predicts to deliver a Grade B signal to the household." *Id.* Thus, because EchoStar did not present evidence that it had obtained waivers from all relevant stations, the court held that EchoStar did not carry its burden of proving that any of its subscribers were unserved on account of valid waivers. *Id.*

As a result of these findings, the district court concluded that EchoStar's conduct and failure to satisfy its statutory burden amounted to a "willful or repeated" copyright infringement, which was actionable pursuant to 17 U.S.C. § 119(a)(7)(A). *Id.* at 1253.[FN22] The court declined, however, to ***517** find that EchoStar engaged in a "pattern or practice" of violations. According to the Act, upon such a finding, "the court shall order a permanent injunction" barring the satellite carrier from providing distant network service of any network station affiliated with the infringed-upon network. 17 U.S.C. § 119(a)(7)(B)(i). The court did not find it necessary to determine conclusively whether EchoStar had ever engaged in a "pattern or practice" of violations, because "no such pattern or practice currently exists which would warrant such an extreme sanction." *Id.* at 1254. Accordingly, the court crafted an injunction designed to remedy the willful or repeated individual violations of the Act. *Id.* at 1255-58.

FN22. The district court found that EchoStar's action constituted "willful or repeated" violations under two interpretations of "willful or repeated." The court first noted that "[i]n order to prove willfulness, 'it is necessary only to show that a person knew it was doing the acts in question, not that the person knew those acts were wrong.' " *CBS Broad. Inc.,* 276 F.Supp.2d at 1253 (quoting *CBS Broad., Inc.,* 48 F.Supp.2d at 1356). The court also found that EchoStar had acted willfully under a gross negligence standard for willfulness. *Id.* EchoStar did not challenge either interpretation and we therefore need not resolve the issue here. We pause only to note that the strict-liability-like former definition may be inconsistent with our prior opinion in which we referred to a "willful desire to avoid compliance," *EchoStar I,* 265 F.3d at 1204. Regardless, we are confident that the record demonstrates that EchoStar knew what it was doing and knew it was not in compliance with the Act.

III.

[1] Both EchoStar and plaintiffs appealed. We address EchoStar's appeal before moving on to the plaintiffs' claim that EchoStar engaged in a "pattern or practice" of violations and, as a result, the district court was obligated by the statute to issue a permanent, nationwide injunction. We review the district court's findings of fact for clear error and its interpretation of the SHVA *de novo. See United States v. Pistone,* 177 F.3d 957, 958 (11th Cir.1999) ("The interpretation of a statute is a question of law subject to *de novo* review."); Fed.R.Civ.P. 52(a) (" In all actions tried upon the facts without a jury or with an advisory jury ... [f]indings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.").[FN23]

FN23. The district court relied upon the

testimony of the networks' expert witness, Jules Cohen, throughout its Findings of Fact and Conclusions of law, and specifically questioned the credibility of EchoStar's expert witness, *see CBS Broad., Inc.,* 276 F.Supp.2d at 1244, 1252 n. 10. Because "[a]ppellate courts reviewing a cold record give particular deference to credibility determinations of a fact-finder who had the opportunity to see live testimony," *Owens v. Wainwright,* 698 F.2d 1111, 1113 (11th Cir.1983), we do not second guess the court's judgments.

A.

[2][3][4][5] In this appeal, EchoStar has alleged a staggering seventeen claims of error.[FN24] Despite EchoStar's apparent characterization of the trial as one of gross mismanagement, utter incompetence, and widespread chaos, we find the district court's orders and opinions to be generally thoughtful, careful, and well-reasoned. We applaud the court's efforts in dealing with a complicated, technical matter-oftentimes in spite of, rather than with the aid of, defendant's cooperation. We find the vast majority of EchoStar's claims to be completely without merit and address those briefly in the margin.[FN25]

FN24. In EchoStar's opening brief, these claims are sometimes clearly correlated to section headings, and other times they are overlapping and/or only tangentially mentioned in the course of discussing another alleged error and left for this court to discover and evaluate.

FN25. EchoStar contends that the district court erred by "entering an overly broad permanent injunction," because the court ruled that none of EchoStar's subscribers had valid waivers and none were properly considered "grandfathered" or could ever be considered "grandfathered." *See CBS Broad., Inc.,* 276 F.Supp.2d at 1257. The scope of an injunction is reviewed for abuse of discretion. *Simmons v. Conger,* 86 F.3d 1080, 1085 (11th Cir.1996). As we discuss, *infra,* we agree with the district court's conclusion that the "DMA Rule" is inconsistent with the Act, and therefore EchoStar has not carried its burden of proving that any of its subscribers have valid waivers from all the necessary network stations. EchoStar also claims that the injunctive requirement of a " written waiver" is infeasible given electronic record-keeping and the possibility of waiver-by-failure-to-respond. Neither we, nor plaintiffs, read into the court's injunction an inflexibility that would make it inconsistent with those realities.

With respect to grandfathered subscribers, because EchoStar failed to provide any evidence that any of its subscribers met any of the criteria for grandfathered status, and represented that it did not have the data to do so, the district court committed no error in concluding that none of the subscribers were or could ever be demonstrated to be grandfathered. EchoStar attempts to counter by suggesting that "it is literally impossible that not one of EchoStar['s] subscribers is ' grandfathered.' " Appellant's Reply Brief at 12. The argument is too clever by half. EchoStar seems to overlook the fact that it simply does not matter whether this is true; EchoStar, not the networks, and certainly not the court, has the burden of demonstrating that any given subscriber is grandfathered. Accordingly, we cannot say that the district court abused its discretion in crafting the injunction.

EchoStar makes a related argument that, by denying subscribers their duly-earned grandfathered status, the court deprived them of their property without due process of law. EchoStar relies primarily on language in *EchoStar I,* that "[e]ligibility [for grandfathered status] belongs to the subscriber, and nothing is said in the statute about carriers." 265 F.3d at 1212.

Even assuming that this language vests in subscribers a property interest for which they are entitled to due process, it is certainly not a right to receive service from EchoStar. EchoStar's current subscribers are free to seek grandfathered eligibility from another satellite carrier so long as it can be proven that they qualify. We therefore reject EchoStar's constitutional argument.

EchoStar further maintains that the district court erred by admitting Jules Cohen's testimony in violation of Fed.R.Evid. 702 because his testimony was based on ILLR analyses performed by Decisionmark. A trial court's decision to admit expert testimony is reviewed for abuse of discretion. *A.A. Profiles, Inc. v. City of Fort Lauderdale,* 253 F.3d 576, 581 (11th Cir.2001). EchoStar does not contest that Cohen was qualified as an expert. Fed.R.Evid. 703 provides that if "facts or data in the particular case upon which an expert bases an opinion or inference" are " of a type reasonably relied upon by experts in the particular field," then "the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted." We cannot say that the district court abused its discretion in determining that it was reasonable for Cohen to rely on Decisionmark's model output as the basis for his testimony.

EchoStar also claims that the court erred by not requiring the networks to prove irreparable harm before entering a permanent injunction. Under the Copyright Act, however, a plaintiff need not show irreparable harm in order to obtain a permanent injunction, so long as there is past infringement and a likelihood of future infringement. *See Pac. & S. Co. v. Duncan,* 744 F.2d 1490, 1499 (11th Cir.1984). Moreover, the district court *did* find that the networks demonstrated harm due to EchoStar's delivery of illegal distant network programming to served households, because the number of viewers attributed to a particular television station determines the price it can charge advertisers. If a Nielsen household receives a network from a different city, then that household will not be counted as a viewer of the *local* network affiliate, causing harm to that affiliate.

EchoStar further argues that the district court prejudiced EchoStar by denying critical discovery and refusing to continue the trial, despite numerous discovery motions remaining pending until the eve of trial. Discovery rulings will not be disturbed absent an abuse of discretion and substantial harm to the party seeking relief. *See Arabian Am. Oil Co. v. Scarfone,* 939 F.2d 1472, 1477 (11th Cir.1991). We do not find that the court's discovery rulings and scheduling decisions were abuses of discretion that substantially harmed EchoStar.

EchoStar also claims that the district court erred by finding that the networks had proven their ownership of the copyrights in question, and by entering a nationwide permanent injunction based on television programs which aired before EchoStar provided distant network programming. This argument is meritless. In its opinion vacating the preliminary injunction, this court stated that "[t]he Networks own the copyright or exclusive rights in numerous television programs broadcast by CBS, Fox, ABC, and NBC network stations." *EchoStar I,* 265 F.3d at 1196. The district court did not err by reaching the same conclusion on remand. We also agree with the district court's March 31, 2003 Order addressing this argument.

EchoStar next argues that the Affiliate Associations do not have standing to bring this action. Individual affiliate stations have standing pursuant to 17 U.S.C. § 501(e). We agree with the district court that the Affiliate Associations meet the requirements for representational standing under *Hunt v. Washington State Apple Advertising Commission,* 432 U.S. 333, 97

S.Ct. 2434, 53 L.Ed.2d 383 (1977).

EchoStar also asserts that the court erred by granting summary judgment to the networks on EchoStar's counterclaims, *see supra* note 18. In reviewing a district court's grant of summary judgment, we view the evidence in the light most favorable to the non-moving party. *See Chapman v. Am. Cyanamid Co.,* 861 F.2d 1515, 1518 (11th Cir.1988). "Where the circumstantial evidence and reasonable inferences drawn therefrom create a genuine issue of material fact for trial, summary judgment is improper." *Id.* at 1518-19. "However, an inference based on speculation and conjecture is not reasonable." *Id.* at 1518. We agree with the district court that the evidence presented by EchoStar purportedly establishing intent and harm was "nothing more than speculation" and "mere belief." As such, no trier-of-fact, based on the evidence presented and the reasonable inferences that could be drawn therefrom, could find that EchoStar made out a claim for tortious interference, unfair competition, or a conspiracy to commit either. Nor does EchoStar point to any outstanding discovery requests that would have produced any evidence capable of altering this conclusion.

Lastly, EchoStar claims that the district court erred in striking EchoStar's jury trial demand days before trial. There is no right to a jury trial, however, when the plaintiffs seek purely equitable relief such as an injunction. *See Ford v. Citizens & S. Nat'l Bank,* 928 F.2d 1118, 1121-22 (11th Cir.1991). A request for attorney's fees does not change that result. *See Whiting v. Jackson State Univ.,* 616 F.2d 116, 122 n. 3 (5th Cir.1980). It therefore was not reversible error for the district court to strike EchoStar's demand.

***519** 1. EchoStar's ILLR Methodology

EchoStar claims that the district court erred in its interpretation of the Act and its application to three components of EchoStar's ILLR methodology. Although we reject Echostar's first two arguments, we agree that the Act does not proscribe the use of multiple vendors. Because this determination has no bearing on EchoStar's failure to carry its statutory burden of proof, it does not impact the ultimate disposition of this case.

a. "DMA Rule"

[6] EchoStar claims that, contrary to the district court's determination, the Act endorses the "DMA Rule."[FN26] Thus, EchoStar contends that so long as the network station in a household's Nielsen-defined DMA does not provide a Grade B or better signal, the household is properly considered unserved. The district court concluded, however, that if a household receives *any* signal of Grade B or better, regardless of its source, the household is served with respect to that network. We agree with the district court's interpretation of the Act.

FN26. Relatedly, EchoStar claims that if the Act prohibits the "DMA Rule," it " improperly expands the affiliates' contractual rights." Appellants Brief at 33. This argument is bewildering. Even if it is factually correct, we have difficulty understanding why Congress is not free to define the scope of *EchoStar's statutory right.* Evidently, according to EchoStar, it is perfectly legitimate for Congress to *constrict* any contractual right the affiliate may have had by granting satellite carriers a statutory license, but an expansion of anyone else's right is wholly inappropriate. We disagree.

***520** The Act defines "unserved household" with respect to a given network as one that "cannot receive ... an over-the-air signal of *a primary network station* affiliated with that network of Grade B intensity." 17 U.S.C. § 119(d)(10)(A) (emphasis added). The definition is not limited to "

the primary network station in the household's DMA." It refers to the signal of any network station. The plain meaning of the statute is not altered by EchoStar's oblique reference to 17 U.S.C. § 122(j)(2)'s definition of "local market," which is somehow supposed to shed light on the meaning of " local service area" as used in 17 U.S.C. § 501(e). Not only is this end-around unconvincing, it is unnecessary given the clear language of the statute. Thus, we agree with the district court that EchoStar's use of the "DMA Rule" was in violation of the Act.

b. Use of Interference

[7][8] EchoStar also objects to the district court's conclusion that the use of interference in the ILLR model was improper after May 2000. We agree with the district court's resolution of this issue. As the court noted, in May 2000, the FCC issued a First Report and Order that made modifications to the ILLR model and provided a step-by-step " cookbook" describing how the model was supposed to be run. A prior "cookbook" had included interference, but the May 2000 and July 2002 " cookbooks" specifically and clearly omitted it. After the SHVIA amendment, the Act permits use of the ILLR model "set forth by the [FCC] ..., as that model may be amended by the Commission ... to increase the accuracy of that model." 17 U.S.C. § 119(a)(2)(B)(ii)(I).[FN27] Accordingly, the use of any ILLR method that does not comply with the specific procedures the FCC establishes for the model cannot be said to conform to the Act's requirements. Therefore, because EchoStar's model included interference and thereby did not conform to the FCC's specifications, it did not comply with the Act and the district court could have determined that the non-compliant model provided no presumptive evidence of eligibility.

FN27. In its reply brief, EchoStar contends that removing interference from the ILLR model is beyond the scope of the FCC's authority. The argument runs as follows: because the Act only permits the FCC to improve the accuracy of the model, and removing interference unequivocally worsens the accuracy of the model, the FCC action was *ultra vires,* and should be invalidated pursuant to *Chevron U.S.A., Inc. v. Natural Res. Defendant. Council, Inc.,* 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). This distinct administrative law issue was not raised in EchoStar's initial brief and is therefore waived. Moreover, even if the argument had not been waived, EchoStar points us to nowhere in the record where this issue was specifically raised and litigated. Absent an exhaustive bench trial and considering the deference due to administrative agencies in the conduct of their technological expertise, we would be extremely reluctant to determine that it was plain error to conclude that the FCC acted within the scope of its authority.

c. Use of Two Vendors

[9] EchoStar claims that it was error to hold that the Act prohibits the use of multiple ILLR vendors in assessing subscriber eligibility. The district court concluded that "EchoStar could have chosen either of these two competent vendors to check the ILLR status of its subscribers," *CBS Broad., Inc.,* 276 F.Supp.2d at 1250, but because EchoStar used both vendors to exploit inconsistencies between the two, it acted unlawfully. We find nothing in the Act to support this conclusion. The statute provides that " [i]n determining presumptively whether a person resides in an unserved household ..., a court shall rely on the [ILLR] model set forth by the [FCC]." 17 U.S.C. § 119(a)(2)(B)(ii)(I). ***521** So long as a satellite carrier uses vendors whose models comply with the FCC's ILLR guidelines, the carrier may utilize as many different vendors as it would like. We note, however, that the ILLR model is only a presumptive determination of eligibility, and the satellite carrier bears the ultimate burden of proving that a household is unserved. Unless there is evidence that one model is more accurate than another-which, in this case, EchoStar's witnesses did not suggest-when the models produce

conflicting results, it would be difficult to conclude that a satellite carrier has satisfied its burden of proof. In such circumstances it would likely be necessary to obtain an accurate measurement pursuant to section 119(a)(2)(B)(ii)(II) to demonstrate subscriber eligibility.[FN28] Thus, while EchoStar's use of two ILLR vendors may negatively affect its ability to satisfy its burden, it is not necessarily unlawful to do so.

> FN28. In this regard, we find it hard to believe that EchoStar could benefit by using two vendors aside from being alerted to households for which EchoStar might want to conduct an on-site measurement. Utilizing a second vendor will not likely provide the necessary proof that a household, deemed served by the first vendor, is presumptively unserved. Moreover, inconsistencies between the vendors could possibly force the court to question whether a household, which would have been presumptively unserved based on the first vendor alone, should be considered presumptively unserved.

2. Retroactive Application and Present Eligibility

Finally, EchoStar argues that SHVIA's ILLR provisions either do not apply retroactively to customers signed up before SHVIA was passed, or if they do apply retroactively, they do so in violation of the Fifth and Fourteenth Amendments of the United States Constitution. Relatedly, EchoStar argues that the district court erred by interpreting the Act "to imply an obligation upon satellite carriers to constantly re-test and re-qualify subscribers each time" the model changes or the model input, such as station power or antenna direction, changes. We address these arguments separately.

[10] EchoStar contends that any requirement that it qualify its subscribers by an ILLR model cannot be applied to subscribers who signed up prior to the incorporation of the ILLR provisions into the Act. So applying the SHVIA amendment, according to EchoStar, would be unconstitutionally retroactive. We do not see how this could possibly be so. Neither the Act nor the district court's opinion imposes any requirement that EchoStar ever use an ILLR model in any way. All the Act requires-and has ever required-is that EchoStar subscribers be unserved. The definition of an "unserved household" was originally, and continues to be, a household that "cannot receive, through the use of a conventional outdoor rooftop receiving antenna, an over-the-air signal of grade B intensity (as defined by the Federal Communications Commission) of a primary network station affiliated with that network. " Pub. L. No. 100-667, tit. II, § 202, 102 Stat. 3935, 3957; 17 U.S.C. § 119(d)(10)(A). Prior to the SHVIA amendments, courts may or may not have regarded ILLR results as presumptive indications of signal strength. The amendment simply made that presumption clear. But the touchstone of eligibility has always been whether a given household actually receives a Grade B or stronger network signal. By incorporating the ILLR into the Act, Congress gave satellite carriers a relatively cheap and convenient method of presumptively establishing eligibility. It allowed the satellite carriers to satisfy its burden of proof-which could then be rebutted***522** if the network station performed an actual measurement-without on-site testing at every household. To the extent the ILLR model exposed households that were previously considered unserved as served, those households were never *actually* entitled to service. As such, SHVIA did not apply a retroactive obligation on satellite carriers. Rather it provided an evidentiary tool to enable the carriers to prove what it was always required to prove.

[11] EchoStar raises a related but distinct concern: it does not believe that the Act imposes an obligation to re-test and re-qualify subscribers once they have already been qualified.[FN29] According to Echostar, so long as a subscriber is eligible (apparently, presumptively or actually) upon sign-up, the subscriber is always and forever eligible. We do not interpret the Act to impose such a one-time-only requirement. To begin, we note that the Act is drafted in the present tense,

without qualification; it limits the license to transmissions "to persons who *reside* in unserved households." 17 U.S.C. § 119(a)(2)(B)(i) (emphasis added); *see also id.* § 119(a)(2)(B)(ii)(I) (prescribing use of ILLR model to "determin[e] presumptively whether a person *resides* in an unserved household" (emphasis added)); *id.* § 119(a)(2)(B)(ii)(II) (providing for use of on-site measurements "to determine whether a person *resides* in an unserved household" (emphasis added)). The clear indication is that a person must *always reside* in an unserved household, not just initially.

> FN29. EchoStar believes this is the consequence of interpreting the SHVIA ILLR amendments to apply "retroactively." As we discussed, we do not believe SHVIA imposed any new requirement on the satellite carrier and therefore cannot be said to have required carriers to re-test and re-qualify existing subscribers. Because the argument is phrased in terms of re-testing upon changes in station power and antenna direction, however, we interpret the argument as an objection to the on-going qualification requirement with respect to changes in inputs such as signal strength that can affect whether the ILLR model presumptively establishes eligibility and whether a given household is, in fact, served. EchoStar argues that it is only obligated to demonstrate eligibility at sign-up regardless of any changes in conditions that might affect that determination.

We recognize the possibility, however, that a person can be said to be "residing" in an unserved household, regardless of current conditions, if a household were deemed forever "unserved" so long as it met the eligibility requirements at sign-up. We therefore look to the definition of "unserved household." All three relevant definitions refer to present criteria: either a household that (1) "*cannot* receive" a Grade B signal; (2) "*is* subject to a waiver;" or (3) "*does not receive* a signal of Grade A intensity" and otherwise qualifies for grandfathered status. *Id.* § 119(d)(10) (emphasis added). None of these definitions refer to sign-up, despite the ease with which Congress could have included such a qualification if that had been its intention.

We note, moreover, that there is no requirement that network stations challenge a subscriber at the time of sign-up or any specified period of time thereafter. EchoStar's interpretation, however, would either transform the ILLR model into *de facto* conclusive evidence of eligibility (because it would be difficult to rebut the presumption with an actual measurement done at a later time if eligibility referred only to eligibility at sign-up) or force networks to perform on-site measurements for every subscriber at the time of sign-up-the latter being a requirement that appears nowhere in the Act. Accordingly, we conclude that the Act imposes a requirement that a household be presently ***523** unserved, not unserved solely at sign-up, as EchoStar suggests.

3. Summary

Of EchoStar's seventeen claims of error, we find only the district court's determination that the Act proscribes the use of multiple ILLR vendors to be incorrect. Because we do not believe this decision had any effect on EchoStar's inability to demonstrate that it has not willfully or repeatedly infringed upon plaintiffs' copyright-nor, as we discuss, *infra,* on our determination that EchoStar engaged in a "pattern or practice" of violations-we do not need to remand for any reconsideration in light of this conclusion.

Before we move on to plaintiffs' cross-appeal, we pause briefly to comment on defendant's approach. While it is not normally the place for courts to second guess the strategic decisions of counsel, we do note that, here, EchoStar may have been better served by focusing on and developing its serious objections, as opposed to its scattershot approach that ultimately wasted limited space on patently unmeritorious claims of error.

450 F.3d 505, 38 Communications Reg. (P&F) 701, 78 U.S.P.Q.2d 1865, 19 Fla. L. Weekly Fed. C 596, 2006 Copr.L.Dec. P 29,182
(Cite as: 450 F.3d 505)

B.

Plaintiffs also appealed, challenging the district court's conclusion that, because EchoStar is not currently engaging in a "pattern or practice" of violations, it was not obligated to issue a nationwide permanent injunction prescribed by the statute.[FN30] EchoStar contends that the district court's ruling was permissible because the court retained a measure of discretion not to issue the permanent injunction despite the mandatory language in the statute. EchoStar also suggests that the remedy does not apply so long as it is not currently engaging in a "pattern or practice" of violations.
We disagree with both contentions. Because we come to the inescapable conclusion, based on the district court's findings, that EchoStar did engage in a "pattern or practice" of violations, we find that the district court erred in not entering a permanent injunction.

> FN30. The district court's findings of fact and conclusions of law dealt with all of EchoStar's subscribers throughout the United States. Thus, any violations are on a "substantially nationwide" scale rather than "local or regional" indicating that, to the extent 17 U.S.C. § 119(a)(7)(B) comes into play, it is through subsection (i) rather than (ii).

1. Requirements for "Pattern or Practice" Liability

[12] According to the Act:
If a satellite carrier engages in a willful or repeated pattern or practice of delivering a primary transmission made by a network station ... to subscribers who are not eligible to receive the transmission ..., then ... if the pattern or practice has been carried out on a substantially nationwide basis, the court shall order a permanent injunction barring the secondary transmission by the satellite carrier, for private home viewing, of the primary transmissions of any primary network station affiliated with the same network ....

17 U.S.C. § 119(a)(7)(B)(i). The Act itself provides no further explanation as to what constitutes a "pattern or practice," except to indicate that it can occur on a nationwide, regional, or local scale. *See id.* at §§ 119(a)(7)(B)(i), (ii).
We find some guidance, however, in the legislative history of the Act:It is not the intent of this statute to subject a satellite carrier to "pattern or practice" liability as a result of good faith mistakes, provided that the carrier is reasonably diligent in avoiding and correcting violations through an internal ***524** compliance program that includes methods of confirmation of household eligibility ....
In view of the possibilities for error which would occur despite reasonably diligent efforts to avoid them ..., it is the intent of this statute that no pattern or practice be found if ... less than 20% of the subscribers to a particular network station (on either local, regional, or national bases) are found ineligible.

H.R.Rep. No. 100-887(I), at 19 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5577, 5622; *see also CBS Broad. v. PrimeTime 24 Joint Venture,* 48 F.Supp.2d 1342, 1357 (S.D.Fla.1998). Thus, while the statute itself does not automatically impose " pattern or practice" liability where the 20% threshold is met, nor does it preclude a finding of " pattern or practice" where the threshold is not reached, we believe the 20% ineligibility proportion to be a relevant marker for "pattern or practice" analysis.

[13] EchoStar would have us forgo even this preliminary inquiry of whether a "pattern or practice " ever existed because the district court found that " no ... pattern or practice currently exists," *CBS Broad. Inc.,* 276 F.Supp.2d at 1254, and EchoStar reads the Act to impose a requirement of an ongoing "pattern or practice" before section 119(a)(7)(B)(i) is triggered. It reads the statutory language, "[i]f a satellite carrier *engages* in a willful or repeated pattern or practice," 17 U.S.C. § 119(a)(7)(B) (emphasis added), as foreclosing application of the section so long as a satellite carrier ceases (most of) its illegal activity, presumably anytime before the close of trial. We do not believe this is the best reading of the statute. Rather than imposing an obligation on the networks

to identify violations, bring suit, conduct discovery, and complete a full trial, all before the satellite carrier decides to become SHVA compliant-we read the statute as imposing liability "[i]f a satellite carrier [*ever*] engages in a willful or repeated pattern or practice" of statutory violations. *Id.* The moment a satellite carrier engages in what can be said to be a "pattern or practice" of violations, it makes itself eligible for the specified remedy, regardless of when it is found to have been doing so. *Cf., e.g.,* 18 U.S.C. § 1621 (indicating that the crime for perjury occurs where a duly sworn individual "states or subscribes any material matter which he does not believe to be true" but not requiring a defendant to be "stat[ing]" or " subscrib[ing]" at the time of his perjury trial).

[14] We also note that there is no requirement that a court find that the satellite carrier engage in a " pattern or practice" of actually providing distant network service to served households. This is again a function of the statutory burden of proof. While we do not find it particularly intuitive to think of a satellite carrier as engaging in "pattern or practice" of failing to prove that its subscribers are unserved, we have but little choice. The statute specifically mandates that "[i]n *any action* brought under this paragraph," the satellite carrier has the burden of proof. *Id.* § 119(a)(7)(D) (emphasis added). A requirement that a satellite carrier actually engaged in a "pattern or practice" of serving served households is inconsistent with that burden allocation. Accordingly, we presume, for the purpose of evaluating "pattern or practice" liability, that a finding that a satellite carrier failed to carry its burden of establishing eligibility is tantamount to a finding of ineligibility. Section 119(a)(7)(B) liability is triggered whenever a satellite carrier fails to carry its burden of proving eligibility on a sufficient scale, and to a sufficient degree, such that we can presume that the satellite carrier is engaging in a "pattern or practice" of serving ineligible subscribers.

***525** 2. EchoStar Engage in a "Pattern or Practice"

[15] Based on these guidelines, we now must determine if EchoStar ever engaged in a "pattern or practice" of statutory violations. Because the district court found EchoStar's current practices to be substantially compliant, it did not believe it necessary to determine if EchoStar's prior conduct constituted a "pattern or practice" of violations. *See CBS Broad., Inc.,* 276 F.Supp.2d at 1254. Ordinarily we would remand to the district court to make this determination in the first instance. We believe, however, that there is no other possible conclusion that can be drawn from the district court's findings of fact.

We first note the length of time over which the district court found EchoStar to be using inadequate procedures for assessing subscriber eligibility. When EchoStar first began offering its own distant network packages in July 1998, it utilized the red-light/green-light method-a method for which the district court found "no evidence [that would indicate that it] was reasonably calculated to prevent signups of ineligible subscribers." *Id.* at 1241. Even after EchoStar switched to the ILLR model, it utilized the illegitimate "DMA Rule" through October 2000, and unlawfully considered " interference" from at least August 2000 through January 2002. In other words, at no point from when EchoStar began offering distant network programming through January 2002 did it use a compliance method capable of reliably assessing subscriber eligibility.[FN31]

> FN31. This says nothing of the unlawful PrimeTime 24 qualitative assessment that generated distant network subscribers for EchoStar from March 1996 to July 1998.

This three-and-half year period of unlawful eligibility screening predictably led to a sizeable number of subscribers for whom EchoStar was unable to establish eligibility. We start with the ILLR analysis of EchoStar's April 2002 subscriber list. The best case scenario, which takes as valid EchoStar's claims of waivers and grandfathered status (the same ones regarding which the district court found EchoStar failed to carry its burden of establishing), indicates that, on a nationwide basis,

EchoStar is presumptively providing illegal service to 26.5% of its subscribers receiving ABC distant network programming, 26.9% for CBS, 20.2% for Fox, and 28.1% for NBC. Thus, even for the network with the lowest percentage of violations, factoring in claims of eligibility that the district court found not to have been established, EchoStar exceeds the 20% threshold on a nationwide basis. While we believe this may very well be sufficiently objectionable, we glean some additional inculpatory conclusions from the district court's opinion: "The Court finds that EchoStar has failed to meet its burden of proving that its subscribers are 'unserved households.' " *Id.* at 1248; "EchoStar has failed to present any evidence ... that any of its subscribers are unserved as defined under SHVA." *Id.* at 1253; "[T]he Court's [findings] support the conclusion that hundreds of thousands of EchoStar's distant network programming subscribers are not unserved households." *Id.* at 1249; "Plaintiff's evidence indicates that a significant percentage of EchoStar's distant network programming subscribers receive a signal of Grade B intensity or better." *Id.* at 1253; " Echostar has not met its burden in showing that any of its distant signal subscribers meet the grandfathering requirements." *Id.* at 1250; " EchoStar has also failed to prove that any of its subscribers are eligible because they have obtained waivers from the relevant network stations." *Id.* at 1252. If these findings do not describe a "pattern or practice" of violations, we do not know what does. *Cf.* ****526** ABC, Inc. v. PrimeTime 24 Joint Venture,* 184 F.3d 348, 354 (4th Cir.1999) ("Since PrimeTime could prove that virtually none of its thousands of subscribers in the Raleigh-Durham market was eligible for satellite service, the district court held-and we agree-that the carrier had engaged in a 'pattern or practice' of infringement.").

As if the magnitude of its ineligible subscriber base were insufficiently disconcerting, we have found no indication that EchoStar was ever interested in complying with the Act. Indeed, based on the district court's findings, we seem to have discerned a "pattern" and "practice" of violating the Act in every way imaginable. Whether it be overriding compliance determinations of ineligibility (more than 12,500 "red zone" subscribers per month), *CBS Broad., Inc.,* 276 F.Supp.2d at 1242; making pledges under oath to terminate ineligible subscribers and then failing to present any evidence that this corrective action was taken, *id.* at 1244-45; blatantly disregarding FCC alterations to the ILLR model after it was specifically put on notice of such changes, *id.* at 1250; or failing to disconnect subscribers it initially recognized to be ineligible for grandfather status based on an atextual " reinterpretation" of the statutory provision, *id.* at 1251; EchoStar has disregarded the limitations of its statutory license and sought to avoid its obligations under the Act at every turn. Accordingly, we have no trouble concluding that EchoStar has engaged in a nationwide "pattern or practice of delivering a primary transmission made by a network station ... to subscribers who are not eligible to receive the transmission under this section." 17 U.S.C. § 119(a)(7)(B).

3. Mandatory Nature of the Remedy

[16] The Act instructs that, upon a finding of a " pattern or practice" of violations, a "court *shall order* a permanent injunction barring the secondary transmission by the satellite carrier, for private home viewing, of the primary transmissions of any primary network station affiliated with the same network." 17 U.S.C. § 119(a)(7)(B)(i) (emphasis added). Despite the facially mandatory nature of the provision, EchoStar argues that the district court had discretion to issue the injunction, and properly exercised that discretion in not issuing the injunction in this case. In making this argument, EchoStar relies primarily on *Hecht Co. v. Bowles,* 321 U.S. 321, 64 S.Ct. 587, 88 L.Ed. 754 (1944), for the proposition that, if Congress is going to remove courts' traditional equitable discretion, "an unequivocal statement of its purpose would have been made." 321 U.S. at 329, 64 S.Ct. at 591; *see also id.* at 330, 64 S.Ct. at 592 ("We do not believe that such a major departure from that long tradition as is here proposed should be lightly implied."). We believe there are important differences between the statute in *Hecht* and the one before us that lead us to conclude that Congress removed courts'

discretion upon a finding of a "pattern or practice" of violations.

The *Hecht* Court interpreted section 205(a) of the Emergency Price Control Act of 1942, 50 U.S.C. § 901 *et seq.*, (repealed 1956), which provided that, upon finding of certain conditions, "a permanent or temporary injunction, restraining order, or other order shall be granted without bond." The Court found statutory language ("or other order") and legislative history suggesting that Congress had not intended to remove courts' traditional equitable discretion. 321 U.S. at 328-29, 64 S.Ct. at 591. Unlike *Hecht* here there is no ambiguous statutory language in the SHVA and we are unaware of any legislative history that would indicate that the remedial measure chosen by Congress is anything but mandatory. *Cf.* H.R.Rep. No. 106-464, at 94 (1999) (Conf.Rep.) ("The section 122 li***527** cense contains remedial provisions parallel to those of Section 119, including a 'pattern or practice' provision that *requires* termination of the Section 122 statutory license as to a particular satellite carrier if it engages in certain abuses of the license." (emphasis added)). Moreover, section 119(a)(7)(B)(i) itself contemplates both mandatory and discretionary remedies: Upon the same finding of a "pattern or practice," "the court *shall* order a permanent injunction" whereas "the court *may* order statutory damages." 17 U.S.C. § 119(a)(7)(B)(i) (emphasis added). Absent evidence to the contrary, we presume that Congress understood what it was doing when it instructed courts to provide a specific remedy and permitted courts to provide another. Accordingly, we find that Congress unequivocally stated a purpose to restrict the courts' traditional equitable authority upon a finding of a "pattern or practice." *Accord ABC, Inc.* 184 F.3d at 354-55.[FN32] Because, as discussed, we come to the unavoidable conclusion that EchoStar engaged in a "pattern or practice" of SHVA violations, we hold that the district court is required to issue a nationwide permanent injunction barring the provision of distant network programming pursuant to the Act's statutory license.

FN32. This discussion is not altered by the Supreme Court's recent decision in *eBay, Inc. v. MercExchange, L.L.C.*, --- U.S. ----, 126 S.Ct. 1837, 164 L.Ed.2d 641 (2006). There the Court, in invalidating the Federal Circuit's "general rule that courts will issue permanent injunctions against patent infringement absent exceptional circumstances," *id.*, 126 S.Ct. at ----, 2006 WL 1310670, at *1 (quoting *MercExchange, L.L.C v. eBay, Inc.*, 401 F.3d 1323, 1339 (Fed.Cir.2005)) (internal quotation marks omitted), specifically found that "[n]othing in the Patent Act indicates that Congress intended" a departure from traditional equitable principles, *id.*, 126 S.Ct. at ----, 2006 WL 1310670, at *2. As discussed, we do find such congressional intent in the SHVA. Because the Court in *eBay* said nothing of Congress's ability to remove unambiguously courts' traditional equitable discretion, the opinion has no bearing on this case.

IV.

For the foregoing reasons the judgment of the district court is AFFIRMED in part and REVERSED in part, and we REMAND the case to the district court for the entry of a nationwide permanent injunction as mandated by the Act.

SO ORDERED.

C.A.11 (Fla.),2006.
CBS Broadcasting, Inc. v. EchoStar Communications Corp.
450 F.3d 505, 38 Communications Reg. (P&F) 701, 78 U.S.P.Q.2d 1865, 19 Fla. L. Weekly Fed. C 596, 2006 Copr.L.Dec. P 29,182

Briefs and Other Related Documents (Back to top)

• 03-13671 (Docket) (Jul. 21, 2003)

END OF DOCUMENT

Westlaw.

276 F.Supp.2d 1237

Page 1

276 F.Supp.2d 1237, 16 Fla. L. Weekly Fed. D 537, 67 U.S.P.Q.2d 1545, 2003 Copr.L.Dec. P 28,639
(Cite as: 276 F.Supp.2d 1237)

United States District Court,S.D. Florida.
CBS BROADCASTING, INC. et al., Plaintiffs,
v.
ECHOSTAR COMMUNICATIONS CORPORATION et al., Defendants.
No. 98-2651-CIV.

June 10, 2003.

Television network operators and affiliated stations sued satellite carrier for copyright infringement. The District Court, Dimitrouleas, J., held that: (1) carrier failed to prove that its distant network programming subscribers were unserved households, and (2) injunctive relief was warranted.

Judgment for plaintiffs.

West Headnotes

[1] Copyrights and Intellectual Property 99⇐ 83(1)

99 Copyrights and Intellectual Property
99I Copyrights
99I(J) Infringement
99I(J)2 Remedies
99k72 Actions for Infringement
99k83 Evidence
99k83(1) k. Presumptions and Burden of Proof. Most Cited Cases
Satellite carrier, accused of violating copyright in television network programming, has burden at trial of proving that its transmission of distant network programming comes within compulsory license granted by Satellite Home Viewer Act (SHVA), i.e., goes only to unserved households. 17 U.S.C.A. § 119(a)(5)(D).

[2] Copyrights and Intellectual Property 99⇐ 48.1

99 Copyrights and Intellectual Property
99I Copyrights
99I(E) Transfer
99k48.1 k. Compulsory License; Copyright Royalty Tribunal. Most Cited Cases
Satellite carrier failed to prove that its distant network programming subscribers were unserved households, within meaning of compulsory license, granted under Satellite Home Viewer Act (SHVA), to retransmit copyrighted network programming; carrier improperly applied Individual Location Longley-Rice (ILLR) model to determine eligibility of potential subscribers, improperly used two eligibility determination vendors, failed to show ineligible subscribers qualified for grandfather status, and failed to prove that any subscribers qualified under waiver or RV/commercial truck exceptions. 17 U.S.C.A. § 119(a)(2, 11), (e).

[3] Copyrights and Intellectual Property 99⇐ 67.1

99 Copyrights and Intellectual Property
99I Copyrights
99I(J) Infringement
99I(J)1 What Constitutes Infringement
99k67.1 k. Motion Pictures and Other Audiovisual Works. Most Cited Cases
Satellite carrier's retransmission of television network programming to subscribers who were not unserved households, within meaning of compulsory license granted under Satellite Home Viewer Act (SHVA), was willful and repeated; carrier had used improper analysis to determine potential subscribers' service status, and knowingly failed to terminate subscribers who did not qualify for grandfather status. 17 U.S.C.A. § 119(a)(5)(A).

[4] Copyrights and Intellectual Property 99⇐ 86

99 Copyrights and Intellectual Property
99I Copyrights
99I(J) Infringement

99I(J)2 Remedies
99k72 Actions for Infringement
99k86 k. Permanent Relief. Most Cited Cases

Despite satellite carrier's past retransmission of television network programming to subscribers who were not unserved households, in willful and repeated violation of Satellite Home Viewer Act (SHVA), carrier was not currently engaging in " pattern or practice" of violating SHVA, such as would warrant permanent injunction of all retransmissions; carrier was currently making legitimate efforts to determine whether subscribers qualified as unserved. 17 U.S.C.A. § 119(a)(5)(B)(i).

[5] Copyrights and Intellectual Property 99⇐ 73

99 Copyrights and Intellectual Property
99I Copyrights
99I(J) Infringement
99I(J)2 Remedies
99k72 Actions for Infringement
99k73 k. Nature of Remedy. Most Cited Cases

Copyright Act grants broad discretion to court in fashioning appropriate remedy for violation of Satellite Home Viewer Act (SHVA). 17 U.S.C.A. § 119(a)(5)(A).

[6] Copyrights and Intellectual Property 99⇐ 86

99 Copyrights and Intellectual Property
99I Copyrights
99I(J) Infringement
99I(J)2 Remedies
99k72 Actions for Infringement
99k86 k. Permanent Relief. Most Cited Cases

To be entitled to permanent injunction under Copyright Act, copyright owner must show past infringement and threat of future infringement by defendant; irreparable harm from such infringement is presumed. 17 U.S.C.A. § 502(a).

[7] Copyrights and Intellectual Property 99⇐ 86

99 Copyrights and Intellectual Property
99I Copyrights
99I(J) Infringement
99I(J)2 Remedies
99k72 Actions for Infringement
99k86 k. Permanent Relief. Most Cited Cases

Satellite carrier's continued provision of distant network programming to subscribers who were signed up under unlawful methods gave rise to risk of future infringement of copyrights in network programming, and thus warranting granting of permanent injunctive relief. 17 U.S.C.A. § 502(a).

David Michael Rogero, Coral Gables, FL, Thomas P. Olson, Natacha D. Steiner, Maya Alexandri, A. Stephen Hut, Jr., C. Colin Rushing, Mark L. Bieter, Katherine A. Fleet, Kyle M. DeYoung, Howard M. Shapiro, Wilmer, Cutler & Pickering, Nory Miller, Jenner & Block, Washington, DC, Reid L. Phillips, David Kushner, Wade H. Hargrove, Brooks, Pierce, McLendon, Humphrey & Leonard, Raleigh, NC, for plaintiffs.

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David Michael Rogero, Coral Gables, FL, Thomas P. Olson, Natacha D. Steiner, Wilmer, Cutler & Pickering, Washington, DC, Nory Miller, Jenner & Block, Washington, DC, for plaintiff/counter-defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

DIMITROULEAS, District Judge.

THIS CASE came on for non-jury trial on April 11, 14, 15, 16, 17, 21, 22, 23, 24, and 25, 2003. The Court has carefully considered the arguments of counsel, the evidence presented, and the testimony of the witnesses. The Court has also determined the credibility of witnesses and is otherwise fully advised in the premises.

Pursuant to Rule 52(a) of the Federal Rules of Civil Procedure, the Court makes the following Findings of Fact and Conclusions of Law. To the extent, if any, that the Findings of Fact as stated may be deemed Conclusions of Law, they shall be considered Conclusions of Law. Similarly, to the extent the matters expressed as Conclusions of Law may be deemed Findings of Fact, they shall be considered Findings of Fact.

I. INTRODUCTION

1. This is a copyright infringement action in which the Plaintiffs seek injunctive relief pursuant to 17 U.S.C. § 502 and § 119(a)(5)(B). Plaintiffs also seek costs and reasonable attorneys' fees pursuant to 17 U.S.C. § 505.

2. Plaintiff CBS Broadcasting, Inc. ("CBS") is a New York corporation with its principal place of business in New York, New York. Plaintiff Fox Broadcasting Company ("Fox") is a Delaware corporation with its principal place of business in Los Angeles, California. CBS and Fox operate the CBS and Fox television networks, respectively, which provide CBS and Fox network programming to television stations nationwide that are affiliated with CBS and Fox networks.

3. Plaintiffs ABC Television Affiliates Association, CBS Television Network Affiliates Association, FBC Television Affiliates Association and NBC Television Affiliates Association are voluntary membership trade associations representing network stations that are affiliates with their respective networks.

4. Defendant EchoStar Communications Corporation is a Nevada corporation. Defendants EchoStar Satellite Corporation and Satellite Communications Operating Corporation are Colorado corporations and subsidiaries of EchoStar Communications Corporation. The fourth defendant, DirectSat Corporation, a Delaware corporation, has merged with EchoStar Satellite Corporation. All defendants have their principal place of business in Littleton, Colorado. (The Court will refer to all the defendants collectively as "EchoStar.") EchoStar has 8.5 million customers. It has eight satellites orbiting the earth at 22,000 miles over the equator.

5. Plaintiffs claim that EchoStar's retransmission via satellite of copyrighted programming owned by Plaintiffs violates Plaintiffs' copyright in its network television broadcasts.[FN1] The principal issue is whether EchoStar's actions are permitted by the Satellite Home Viewer Act ("SHVA"), as amended by the Satellite Home Viewer Improvement Act ("SHVIA"),[FN2] which grants a limited statutory license to satellite carriers transmitting distant network signals to private homes if the subscribers are "unserved households." 17 U.S.C. § 119(a)(2)(A), (B).

FN1. The Court has previously determined, in its Order dated March 31, 2003, that each of the plaintiffs has standing under the Copyright Act to pursue this copyright infringement lawsuit against EchoStar.

FN2. The Court will refer to both the Satellite Home Viewer Act and the Satellite Home Viewer Improvement Act collectively as SHVA unless otherwise indicated.

II. PROCEDURAL HISTORY

6. On October 19, 1998, EchoStar filed suit in Colorado against CBS, Fox, NBC and ABC seeking a declaratory judgment that EchoStar's method of qualifying subscribers for distant network programming complied with the law. On

November 5, 1998, the Plaintiffs filed their complaint in this Court alleging that EchoStar was infringing Plaintiffs' copyrights by providing distant network programming to "served" households in violation of SHVA. The Colorado district court granted Plaintiffs' motion to transfer the suit filed by EchoStar to Florida and the Colorado litigation was consolidated with this action.

7. On September 29, 2000, the Court entered a preliminary injunction against EchoStar. On November 22, 2000, the Eleventh Circuit stayed the enforcement of the preliminary injunction. On September 17, 2001, the Eleventh Circuit vacated the preliminary injunction holding. The case was then remanded to this Court.

8. EchoStar filed a Motion for Summary Judgment on February 3, 2003. Plaintiffs filed a Motion for Summary Judgment on All Counts of Their Complaint and Count I of EchoStar's Counterclaim on February 4, 2003. Plaintiff's also filed a Motion for Summary Judgment on Counts II-V of EchoStar's Counterclaim on February 4, 2003. The Court granted Plaintiffs' Motion for Summary Judgment on Counts II-V of EchoStar's Counterclaim on March 24, 2003. The Court denied both EchoStar's Motion for Summary Judgment and Plaintiffs' Motion for Summary Judgment on All Counts of Their Complaint and Count I of EchoStar's Counterclaim on March 31, 2003. In that Order on Motions for Summary Judgment, the Court stated that all Plaintiffs had standing to proceed in this case. The Court further indicated that the issues to be decided at trial would be whether EchoStar is in violation of SHVA, whether a threat of future violation exists and whether EchoStar has engaged in a "willful or repeated pattern or practice."

9. Plaintiff ABC was dismissed from this case on April 15, 2002. Plaintiff NBC was dismissed on November 25, 2002.

III. FINDINGS OF FACT

A. *EchoStar and Distant Network Programming*

10. EchoStar is a satellite carrier within the meaning of the Satellite Home Viewer Act ("SHVA"), 17 U.S.C. § 119, as amended by the Satellite Home Viewer Improvement Act ("SHVIA").

11. EchoStar operates a Direct Broadcast Satellite (" DBS") service called "DISH Network," which offers satellite television, programming to subscribers who receive programming using small satellite dishes.

12. EchoStar retransmits the signals of network stations in two different ways: on a "local-to-local" basis and as distant signals. Local-to-local retransmission refers to the satellite delivery of network stations to a subscriber within the subscriber's own local market. EchoStar currently offers local-to-local programming in approximately 62 out of the 210 U.S. television markets.

13. Distant network signals are network stations from outside a subscriber's market area. For example, a person who lives in Fort Lauderdale but receives an ABC, CBS, Fox or NBC network station from New York City is receiving "distant network programming" or "distant network stations. "

14. EchoStar sells distant ABC, CBS, Fox and NBC network programming to customers throughout the United States. As of April 2002. EchoStar had approximately 1,180,000 distant network subscribers.

B. *EchoStar's Past Compliance Efforts*

1. Subscribers signed up during Prime Time 24 Period

15. From approximately March 1996 until approximately July 19, 1998, EchoStar offered distant network programming pursuant to an agreement with Prime Time 24 Joint Venture (" Prime Time 24"). During this period, subscribers were signed up using a subjective method which depended on the viewer's opinion concerning the quality of his or her picture.

16. In December 1996, CBS, Fox and other plaintiffs brought suit against PrimeTime 24. In 1998, this Court issued a preliminary injunction, and then a permanent injunction, requiring PrimeTime 24 to terminate the delivery of distant network signals to subscribers who had been signed up illegally. On July 19, 1998, days after the entry of the preliminary injunction, EchoStar terminated the delivery of the PrimeTime 24 distant network programming package to its subscribers and switched virtually all of the customers receiving the PrimeTime 24 network programming to its own, new distant network station packages, called DISH Nets East and DISH Nets West. On August 25, 1998, Michael Schwimmer, EchoStar's Vice President of Programming wrote affiliate station managers asking them to waive any interest in litigating EchoStar implementation of a red light/ green light method instead of an ILLR method. The letter placed a burden on the station managers to object to this proposal within one (1) week.

2. Red Light/ Green Light Method

17. EchoStar claims that after its break with PrimeTime 24, it implemented a "red light/ green light" zip code system to determine which subscribers were eligible for distant network programming. A red light/ green light system means that the satellite provider would refuse to sign up subscribers in a "red light" zip code for distant signals, unless they obtained a waiver from the station.

18. However, EchoStar presented no evidence that its red light/ green light system was reasonably calculated to prevent signups of ineligible subscribers. In fact, Richard Biby, an outside vendor, testified that he was directed to use a 95% confidence factor in running Longley-Rice. This setting will shrink the predicted coverage areas of TV stations.

19. Further, Michael Hawkins, EchoStar's former employee on whom it relied to prepare four declarations submitted to this Court during 1999-2000 about SHVA compliance matters, testified that comparing EchoStar's red light zip codes to the area shown by the Individual Location Longley-Rice ("ILLR") model was like comparing a "golf ball to a softball." That is, the red light area defined by EchoStar was much smaller that the ILLR-predicted Grade B area.

20. Additionally, even if a Customer Service Representative ("CSR") was advised that a subscriber was in a red light zip code, the CSR was able to sign up the subscriber for distant network signals anyway.

21. Further, Plaintiffs' expert witness, Jules Cohen, P.E., asked Decisionmark to analyze EchoStar's signups during the period that EchoStar claims it used the red light/ green light method, using the monthly signup lists and the red light zip code list provided by EchoStar.[FN3] Mr. Cohen's testimony and expert reports support the conclusion that EchoStar signed up large numbers of subscribers in the forbidden red light zip codes. In January 1999, for example, EchoStar signed up 17,380 new subscribers for Fox distant stations in red light zip codes. See Cohen Supp. Expert Report, Table 4. That same month, EchoStar signed up 14,622 new subscribers for distant CBS stations in red light zip codes for that network. *See* Cohen Supp. Expert Report, Table 3. Overall, during the five months from November 1998 through March 1999, EchoStar signed up 62,374 subscribers in red light zip codes for CBS distant stations and 63,979 subscribers in red light zip codes for Fox distant stations.

> FN3. The Court finds that the zip code list provided to Plaintiffs by EchoStar does constitute a list of red light zip codes used by EchoStar during the red light/ green light period.

22. Additionally, an ILLR analysis of this same group of subscribers shows that EchoStar signed up 167,000 subscribers during these five months predicted to receive a signal of Grade B or better. For example, the ILLR analysis showed that 69% of EchoStar's customers signed up for CBS distant stations during this period are predicted by ILLR to receive a signal of at least Grade B intensity, and

that 41% are predicted to receive a signal of Grade A intensity.

3. ILLR Methodology

23. The methodology was named Individual Location Longley-Rice ("ILLR") by the Federal Communications Commission ("FCC") in February 1999. EchoStar asserts that it has been using the ILLR methodology since 1999 to determine which new subscribers are eligible for distant signals. From the time EchoStar began using ILLR until October 2000, EchoStar ignored many stations that are predicted by the ILLR model to deliver Grade B or better signals to EchoStar subscribers by excluding all network stations that are not in the same Nielsen-defined DMA as the subscriber. Also, EchoStar continued to include interference in its ILLR analysis until January 2002. Finally, EchoStar uses two vendors, Dataworld and Decisionmark, to verify the ILLR status of its subscribers.

24. In May 2002, EchoStar provided Plaintiffs with a complete list of its subscribers as of April 25, 2002.[FN4]

> FN4. On October 2, 2001, Plaintiffs served discovery requests on EchoStar seeking a complete list of EchoStar's subscribers as of October 2001. Plaintiffs filed a motion to compel the October 2001 subscriber list, which was granted. However, when asked for the requested copy of the October 2001 list, EchoStar stated that it had not retained a copy of the October 2001 list. The April 2002 list is the only complete subscriber list supplied by EchoStar to Plaintiffs (other than EchoStar's initial list of subscribers in October 1998).

25. Mr. Cohen, Plaintiffs' expert witness, supervised an Individual Location Longley-Rice ("ILLR") analysis by Decisionmark of the April 2002 subscriber list. Mr. Cohen is a qualified expert, and he was a credible witness. In May, 2000, the FCC relied on Mr. Cohen's work and published part of his study in an order on land use and land cover. Additionally, Mr. Cohen's reliance on Decisionmark, a competent ILLR vendor also used by EchoStar, to make the necessary ILLR predictions was reasonable.

26. The ILLR model takes into account terrain and, for UHF stations, land use and land cover, to determine the likely signal strength from any given television transmitter to a particular household.

27. In running the ILLR model, the first step is " geocoding," which employs a very large database of street names and addresses throughout the country to generate a latitude and longitude for each address. Geocoding produces accurate latitude and longitude for the vast majority of households, although it is not as precise for "Rural Route" or " General Delivery" addresses. Mr. Cohen testified that there were only approximately 43,000 of these rural route addresses in the database and that any deviations would have had a *de minimus* effect on his calculations and opinions. In theory one could visit the location and use a Global Positioning System ("GPS") meter to get a more precise latitude and longitude for each location; however, that solution is not practical for large volumes of addresses.

28. Once the geocoding process had generated a latitude and longitude for a household, the Longley-Rice predictive model is used to predict the signal strength of the household. This is called the "Individual Location" Longley-Rice model because the prediction is made on a "point-to-point" basis from the television transmitter to the household. Levels of intensity of over-the-air signals, such as "Grade A" or "Grade B," are objective measures of signal strength, expressed in a unit of measure called dBu.

29. Any errors in the geocoding process discussed by EchoStar's witnesses would have a *de minimus* effect on the outcome of the ILLR analysis supervised by Mr. Cohen.

30. The ILLR analysis supervised by Mr. Cohen shows that EchoStar has hundreds of thousands of illegal distant network programming subscribers for

each of the four networks. On a network-by-network basis, the Decisionmark ILLR analysis supervised by Mr. Cohen showed the following:
(i) 457,584 (or 50.9%) of the 898,847 subscribers were predicted to receive at least a Grade B signal from an ABC station (excluding stations owned and operated by ABC, Inc.);
(ii) 481,659 (or 55.7%) of the 864,494 CBS subscribers were predicted to receive at least a Grade B signal from a CBS station;
(iii) 383,987 (or 38.7%) of the 993,490 Fox subscribers were predicted to receive at least a Grade B signal from a Fox station; and
(iv) 489,315 (or 56.4%) of the 867,240 NBC subscribers were predicted to receive a Grade B signal from an NBC station (excluding stations owned and operated by NBC).

31. For each network, hundreds of thousands of subscribers are predicted to receive the more powerful signal of Grade A intensity; 255,980 for ABC; 244,022 for CBS;256,741 for Fox; and 256,503 for NBC.[FN5]

> FN5. The numbers in Paragraphs 30-33 reflect the corrected ILLR which includes the following changes: (1) for "General Delivery" and similar non-street addresses, this analysis uses street addresses from filed "Address 2" where a usable address is present; (2) no rounding upwards of dBu.

32. Even when EchoStar's claims of waivers and grandfather status are treated as valid, the ILLR analysis shows high numbers of illegal subscribers to distant network programming for each of the four networks. Taking into account the waiver and grandfather claims, the ILLR analysis showed that:
(i) 238,048 (or 26.5%) of the 898,847 subscribers were predicted to receive at least a Grade B signal from an ABC station (excluding stations owned and operated by ABC, Inc.);
(ii) 232,699 (or 26.9%) of the 864,494 CBS subscribers were predicted to receive at least a Grade B signal from a CBS station;
(iii) 200,422 (or 20.2%) of the 993,490 Fox subscribers were predicted to receive at least a Grade B signal from a Fox station; and
(iv) 243,342 (or 28.1%) of the 867,240 NBC subscribers were predicted to receive a Grade B signal from an NBC station (excluding stations owned and operated by NBC).

33. For each network, a large number of subscribers are predicted to receive the more powerful signal of Grade A intensity, even when treating as valid EchoStar's waiver and grandfather claims, 164,409 for ABC; 152,140 for CBS; 156,906 for Fox; and 163,011 for NBC.

34. EchoStar attempted to rebut the ILLR analysis conducted by Decisionmark and supervised by Mr. Cohen. Noting that EchoStar has the burden of proving that each of its subscribers resides in an " unserved household" and that merely criticizing Plaintiffs' ILLR analysis would be insufficient to meet this burden, the Court finds that EchoStar's criticisms of the ILLR analysis presented by Plaintiffs are without substance.

35. First, the Court finds that Dr. Charles Jackson, EchoStar's primary witness presented to criticize the Cohen/Decisionmark ILLR analysis, while qualified in this field, lacked credibility based on the manner in which he answered questions asked by Plaintiffs' counsel.

36. Further, EchoStar argues that it was inappropriate to use the ILLR model (and current specifications for the locations and power of TV transmitters) for subscribers who were initially signed up at previous times. However, the Court finds that the effect on the ILLR analysis due to changes in the characteristics of TV transmitters is *de minimus.* Similarly, the effects of stations changing from one network to another network (for example, a CBS affiliate station changing to an NBC affiliate station) on the ILLR analysis would also be *de minimus.*

37. Also, the Court agrees with Mr. Cohen's testimony that the difference in the depression angle testified to by EchoStar witness, William Hammet,

also had a *de minimus* effect on the ILLR analysis.

4. The Ergen promise and the 1999 Decisionmark ILLR analysis

38. In an effort to dissuade this Court from issuing a preliminary injunction, EchoStar CEO Charles Ergen made a formal pledge, under penalty of perjury, in September 1999 that each of the subscribers that EchoStar originally signed up using the unlawful "do you like your picture?" method would be checked by Decisionmark using the ILLR model and that all ineligible subscribers would be terminated.

39. EchoStar did send a list of its former PrimeTime 24 subscribers in September 1999 to Decisionmark for ILLR analysis. That list contained approximately 331,000 subscribers. In addition to sending Decisionmark a list of former PrimeTime 24 subscribers as of late September 1999, EchoStar also sent Decisionmark other lists created as of that time: (1) a list of all of EchoStar's roughly three million subscribers, whether or not they received distant network signals; and (2) a list of all of EchoStar's roughly 893,000 subscribers receiving distant network stations.

40. EchoStar received Decisionmark's ILLR analysis sometime in October 1999. Although it had promised the Court that it would turn off the former PrimeTime 24 subscribers shown to be Grade A or Grade B by the Decisionmark analysis (other than those that had waivers or signal tests), EchoStar made no report in any later court filing about the results of the Decisionmark ILLR analysis. In November, 1999, the copyright law was amended.

41. When Plaintiffs sought to obtain the Decisionmark analysis, EchoStar filed a motion to quash. Plaintiffs then filed a motion seeking production of the Decisionmark ILLR data, which was granted by the Magistrate Judge on April 9, 2003, two days before trial began. As a result of that Order, Decisionmark made the documents from its ILLR analysis available on a File Transfer Protocol ("FTP") Internet site.

42. Mr. Cohen, worked with two different database experts (one from Decisionmark and one from Plaintiffs' law firm) to ensure that the Decisionmark ILLR analyses were interpreted properly.

43. Among the total of 331,586 PrimeTime 24 subscribers, the ILLR analysis showed that the percentages of Grade A subscribers were 61% (ABC), 60% (CBS), 58% (Fox) and 60% (NBC). Further, the Decisionmark ILLR analysis showed that EchoStar was delivering distant network stations to more than 258,000 former PrimeTime 24 subscribers who were predicted to receive a Grade A signal from at least one of the four networks. In other words, if EchoStar had kept Mr. Ergen's promise to the Court in the September 1999 declaration, it would have terminated one or more distant network stations to more than 258,000 subscribers. And this figure does not include those predicted to be Grade B but not Grade A, who may later have been grandfathered after the enactment of SHVIA on November 29, 1999, if they had still been subscribers on October 31, 1999.

44. As a percentage of the total of 879,808 distant signal subscribers, those predicted to receive a Grade A signal were 53% for ABC, 51% for CBS, 48% for Fox and 52% for NBC. The percentage predicted to receive at least a Grade B signal, but not a Grade A signal, were 18% for ABC, 21% for CBS, 12% for Fox and 27% for NBC. Further, the Decisionmark ILLR analysis showed that EchoStar was delivering distant network stations to more than 630,000 subscribers who were predicted to receive a Grade A signal from at least one of the four networks. Thus, if EchoStar had turned off all of its Grade A subscribers, it would have terminated one or more distant network stations to more than 630,000 subscribers, amounting to 72% of its total distant subscribers and 21% of its total customer base of three million. Again, this does not include subscribers predicted to be Grade B but below Grade A.

45. No credible evidence was presented to the Court to support the contention that EchoStar turned off distant signals for compliance reasons to any of the more than 258,000 former PrimeTime 24 Grade A subscribers that Decisionmark told EchoStar about

in October 1999. Nor is there any credible evidence that EchoStar turned off distant signals for compliance reasons to any of the more than 630,000 Grade A subscribers that Decisionmark told EchoStar about at that time.

46. It appears that EchoStar executives, including Mr. Ergen and David Moskowitz, when confronted with the prospect of cutting off network programming to hundreds of thousands of subscribers, elected instead to break Mr. Ergen's promise to the Court. During his testimony, Mr. Ergen stated that EchoStar intended to run its distant network programming subscribers through a Decisionmark ILLR analysis, but, as Mr. Ergen was aware of the possibility that the law regarding the subscribers could change (as he was lobbying for such a change), EchoStar decided to wait for the new law (anticipating the passing of SHVIA, which would grandfather certain subscribers). However, when Mr. Ergen made his promise to the Court, he did not qualify that promise by stating that he would not follow through if the new legislation was passed.

47. Further, the Court notes that when Mr. Moskowitz, an EchoStar executive who worked closely on SHVA compliance, was questioned during his deposition about the 1999 Decisionmark ILLR analysis, he paused for an unusually long period of time and then answered the questions concerning the ILLR analysis in a vague manner, unable or unwilling to give any details on the results of the analysis or EchoStar's actions following the analysis.

5. EchoStar's claims of mass turnoffs of ineligible distant network subscribers

48. Mr. Ergen and other EchoStar witnesses testified concerning alleged mass turnoffs of illegal distant network programming subscribers between the time that EchoStar ended its relationship with PrimeTime 24 and early 2002. However, EchoStar witnesses also admitted that EchoStar does not have a single list of subscribers whose distant network programming was terminated by EchoStar for compliance reasons nor other documentation of such mass turnoffs for compliance reasons. Instead, EchoStar points to its monthly lists of disconnected subscribers, submitted to the networks pursuant to SHVA reporting requirements, as proof that EchoStar conducted large-scale compliance terminations.

49. The Court rejects the monthly lists as proof of compliance-related terminations. As Mr. Ergen and Mr. Povenmire admitted, subscribers stop receiving distant network stations for a wide variety of reasons, including involuntary disconnections for failure to pay one's bills as well as voluntary disconnections because the subscriber has chosen to switch to cable, to switch to DirecTV, to switch to local-to-local service, to switch to C-band dish, to switch to over-the-air reception or to cancel EchoStar (or just their distant network subscription) because the household concludes in can no longer afford it. Both Mr. Ergen and Mr. Povenmire acknowledge that it is impossible to determine from EchoStar's monthly subscriber lists which subscribers had their service disconnected for any particular reason. Therefore, an increase in the numbers of subscribers on a monthly disconnect report is insufficient evidence that large numbers of subscribers were terminated for compliance reasons.

C. *EchoStar's Compliance Efforts Today*

50. The Court finds that, with the exception of its use of two vendors, EchoStar is currently taking reasonable steps to ensure that only those potential subscribers that are eligible under the law are signed up for distant network programming. Robert **Lee** of the CBS Affiliates Association, a witness for Plaintiffs, testified that EchoStar today is making legitimate efforts to qualify subscribers.

51. Mr. Povenmire described in detail and demonstrated for the Court EchoStar's current qualification process. EchoStar currently involves many people and departments in its efforts to ensure its compliance, including more than 7,000 Customer Service Representatives ("CSR"), each of whom is responsible for utilizing the ILLR databases to qualify new customers who wish to receive distant network channels. EchoStar provides each CSR with training and graphic screens designed to

prevent misuse. Also, CSRs can no longer tinker with the system in order to approve ineligible households for distant network programming.

52. Additionally, in an effort to eliminate any inadvertent activation errors, EchoStar has instituted a back-up compliance system (the "WAC" or "Exemption Reporting" process). At the end of each month, EchoStar reviews all the people that were signed up in that previous month and reanalyzes them in order to disconnect any ineligible subscribers. EchoStar also "requalifies" subscribers anytime a subscriber attempts to modify network programming or moves to a new household.

53. At then end of each month, EchoStar goes through all the people who were signed up for networks in that previous month, and reanalyzes them. If any ineligible subscriber is identified, EchoStar promptly terminates distant network programming to such subscribers.

IV. CONCLUSIONS OF LAW

A. *The Satellite Home Viewers Act*

54. In 1988, Congress amended the Copyright Act to include the Satellite Home Viewers Act ("SHVA"). SHVA creates a narrow exception to a network's exclusive copyright over its programming in the form of a compulsory license allowing satellite carriers to retransmit copyrighted network programming for private home viewing to persons residing in "unserved households." 17 U.S.C. § 119(a)(2)(B). Congress sought to achieve two goals in enacting this provision: (1) to provide network programming to the small number of households that otherwise lacked access to it; and (2) to preserve the existing network/ affiliate television distribution system by preventing satellite delivery of network programming to other households. H.R.Rep. No. 100-187, pt. 2 at 20 (1988); *see ABC, Inc. v. PrimeTime 24 Joint Venture,* 184 F.3d 348, 350-351 (4th Cir.1999); *CBS Broadcasting, Inc. v. PrimeTime 24 Joint Venture,* 48 F.Supp.2d 1342, 1355 (S.D.Fla.1998).

55. As stated above, the satellite carrier's license is limited to "unserved households." Under SHVA, an unserved household was described as a residence that:
(A) cannot receive, through the use of a conventional, stationary, outdoor rooftop receiving antenna, an over the air signal of a primary network station affiliated with that network of Grade B intensity (as defined by the Federal Communications Commission) of a primary network station affiliated with that network, and
(B) has not, within 90 days, before the date on which that household subscribes, ... subscribed to a cable system that provides the signal of a primary network station affiliated with that network.

17 U.S.C. § 119(a)(2) (1996). The Satellite Home Viewers Improvement Act ("SHVIA"), enacted in November 1999, renewed SHVA's existing statutor y copyright license and altered the definition of unserved household. *CBS Broadcasting, Inc. v. EchoStar Communications Corp.,* 265 F.3d 1193, 1198 (11th Cir.2001). Now, under the SHVIA amendments, "unserved household" is defined in five different ways.

56. First, an unserved household means a household that "cannot receive, through use of conventional, stationary, outdoor rooftop receiving antenna, an over-the-air signal of a primary network station affiliated with that network of Grade B intensity as defined by the Federal Communications Commission under section 73.683(a) of title 47 of the Code of Federal Regulations, as in effect on January 1, 1999." [FN6] 17 U.S.C. § 119(d)(10)(A). Second, a household is unserved if it receives a waiver from each network station affiliated with a particular network that is predicted to deliver a Grade B or better signal to the subscriber's residence. 17 U.S.C. § 119(d)(10)(B). Third, the term unserved household includes subscribers who receive a signal of less than Grade A intensity for a particular network and who received satellite service of that network's signals on October 31, 1999 or had such service terminated for SHVA ineligibility between July 11, 1998 and October 31, 1999 ("grandfathered subscribers"). 17 U.S.C. § 119(d)(10)(C). Fourth, an unserved household includes subscribers who receive distant signals

through a satellite dish located on a commercial truck or recreational vehicle, and who satisfy the strict documentation requirements. 17 U.S.C. § 119(d)(10)(D). Finally, a exemption exists for secondary transmissions by C-band services of network stations that a subscriber to a C-band service received before any termination of such secondary transmissions before October 31, 1999.[FN7] 17 U.S.C. § 119(d)(10)(E).

FN6. The Grade B standard found in the first definition of unserved household has been a part of SHVA since its enactment in 1988.

FN7. C-band service is defined as "a service that is licensed by the Federal Communications Commission and operates in the Fixed Satellite Service under part 25 of title 47 of the Code of Federal Regulations." 17 U.S.C. § 119(a)(2)(B)(iii)(II). This provision is not relevant to EchoStar's small-dish service.

[1] 57. A satellite carrier, such as EchoStar, has the burden at trial of proving that its transmission of distant network programming goes only to unserved households. 17 U.S.C. § 119(a)(5)(D); *CBS Broadcasting, Inc. v. EchoStar Communications,* 265 F.3d at 1201; *CBS Broadcasting Inc. v. PrimeTime 24,* 48 F.Supp.2d at 1356; *ABC, Inc.,* 184 F.3d at 352.

58. Congress has provided two methods to be used by a Court in determining the signal intensity at a particular location: (1) predictions made using a computer model approved by the FCC called the Individual Location Longley-Rice ("ILLR") model (17 U.S.C. § 119(a)(2)(B)(ii)(I)); and (2) signal intensity measurements, following FCC-prescribed procedures, in the vicinity of the subscriber's home (17 U.S.C. § 119(a)(2)(B)(ii)(II)). The first method allows a satellite provider to establish presumptively that a subscriber qualifies as unserved where the ILLR model establishes that the residence cannot receive a Grade B over-the-air signal of a primary network station. 17 U.S.C. § 119(a)(2)(B)(ii)(I); *CBS Broadcasting, Inc. v. EchoStar Communications Corp.,* 265 F.3d at 1200.

B. *EchoStar's Compliance with SHVA*

[2] 59. The Court finds that EchoStar has failed to meet its burden of proving that its subscribers are " unserved households." First, EchoStar has failed to show that its distant signal subscribers cannot receive an over-the-air signal of Grade B intensity. EchoStar did not present at trial any ILLR analysis of its distant network signal subscribers nor did EchoStar present any results of signal intensity measurements at the homes of representative subscribers.[FN8] Additionally, Mr. Cohen's testimony and reports, as discussed in the Court's Findings of Facts, support the conclusion that hundreds of thousands of EchoStar's distant network programming subscribers are not unserved households. The Court notes that Mr. Cohen's direction to Decisionsmark to round dBu levels to 47 when the result was above 46.5, but below 47, was improper.[FN9] However, Mr. Cohen corrected this error, and his conclusion that a large number of EchoStar's distant network subscribers are ineligible was not disturbed by the error. Finally, the Court finds that the use of NAD83 is appropriate (as opposed to NAD27) to calculate data points; however, the effect of any possible use of NAD27 by Decisionmark in the ILLR analysis of the April 2002 subscriber list would be *de minimus* and would not affect Mr. Cohen's conclusions regarding the large number of ineligible subscribers; the difference between NAD83 and NAD27 results in a difference of one hundred (100) feet or less in an actual location.

FN8. An engineering firm hired by EchoStar, Hammett & Edison, did perform a small-seale ILLR analysis of 956 EchoStar subscriber locations. However, as William Hammett testified, the purpose of that analysis was not to present an audit of the eligibility of EchoStar distant network programming subscribers. Rather, the purpose of the study was to illustrate the fact that different vendors sometimes produce different results when

performing an ILLR analysis.

FN9. A dBu level of 47 is the cutoff for determining Grade B eligibility. Approximately 12,000 customers had a dBu initially rounded up to 47 by Mr. Cohen. Similar *de minimus* amounts of customers had a dBu rounded up to 56 and 64 for higher numbered television channels.

60. Additionally, no basis exists in SHVA nor in the FCC's directives concerning the ILLR model to support the use of the "DMA rule." From the time EchoStar began using ILLR until October 2000, EchoStar, in running potential subscribers through the ILLR model, failed to consider stations that were predicted by the ILLR model to deliver a Grade B or better signal to its subscribers because these stations were not in the same Nielsen defined DMA as the subscribers. The Court finds that use of the "DMA Rule" is improper and that EchoStar's ILLR methodology was flawed during the time that it was applying the "DMA Rule." Further, EchoStar presented no evidence that it turned off any ineligible subscribers it had previously signed up while using the "DMA Rule."

61. Next, the Court finds that EchoStar's use of interference after May 2000 was improper. In May 2000, the FCC issued a First Report and Order in which it made certain modifications to the ILLR model and published a detailed "cookbook" prescribing, on a step-by-step basis, how the model is to be employed. FCC First Report & Order, May 2000 at A-2. The FCC's detailed directions explained how to calculate whether an individual household was unserved. Although the FCC had previously indicated that interference was to be included in the ILLR model, the FCC's May 2000 order changed the use of interference. The FCC reaffirmed the point when it later issued OET (Office of Engineering and Technology) Bulletin 72 in July 2002, which repeated the same "cookbook" directions, again excluding any consideration of interference.

62. Consideration of interference can only help EchoStar by treating a subscriber with a relatively weak (but above Grade B) signal as unserved because of the predicted presence of interfering signals from other stations. The FCC is aware of the issue of interference, since in another "cookbook " about how to use the Longley-Rice model for a different purpose, it provided specific directions on how to take interference into account. *See* OET Bulletin 69 ("Longley-Rice Methodology for Evaluating TV Coverage and Interference") (July 1997). Had the FCC wished to include interference in the current ILLR model, it would have done so.

63. Further, EchoStar was advised by Decisionmark of the FCC's May 2000 ruling that the ILLR model no longer included interference. In fact, Mark Castagneri of EchoStar sent an email dated July 27, 2000 to several other EchoStar employees, attaching a memo prepared by Jane Schlegel of Decisionmark. In that memo, Ms. Schlegel indicated that "[i]nterference calculations were eliminated." Additionally, in a follow-up email dated July 31, 2000, Mr. Castagneri indicated that " [b]asically, interference is out and LU/LC is in for calculating signal strength." Mr. Castagneri attached an earlier email from Ken Franken of Decisionmark making the same "cookbook" point discussed above-that the FCC-prescribed recipe for ILLR analysis precludes use of interference. Mr. Franken's email indicated that the FCC official most knowledgeable about the ILLR program, Bob Eckert, agreed that interference was no longer part of the ILLR model after the May 2000 Order.

64. Accordingly, EchoStar's use of interference at all times after August 2000 (at the latest) was in knowing violation of applicable legal standards.

65. Additionally, the Court finds that EchoStar's past and present use of two vendors, Dataworld and Decisionmark, to perform the ILLR analysis of potential subscribers is improper. EchoStar could have chosen either of these two competent vendors to check the ILLR status of its subscribers; however, EchoStar choose to use both vendors in order to exploit inaccuracies in the databases of either company to its own benefit. In every case in which the two vendors differ as to eligibility, EchoStar took the vendor that predicted the household to be unserved. Therefore, a subscriber was only turned down for distant network

programming if found to be ineligible by both vendors. The Court finds that this particular practice of using two vendors, which always favors the satellite carrier and never favors the network station, is unlawful. Further, the Court finds that EchoStar's ILLR analysis of its subscribers during the period that it used two vendors (up to the present) is fundamentally flawed and that EchoStar signed up subscribers using the two vendor method who should not have been considered eligible for distant network programming. Certainly, there are times that one vendor's database will be more current; for example, after September 11, 2001, the New York City antenna for local stations was moved to a lower and different location, presumably affected the signal strength. Additionally, a tower in Scott's Bluff, Nebraska, recently collapsed. A translator recently went down in Oregon. Conversely, a higher tower was constructed in Salisbury, Maryland in 2001, Those changes were not shown to be captured more frequently by either vendor; therefore, any deviation would be *de minimus*. Finally, since 1999, Nielsen has moved 103 counties into different DMAs. This change also had a *de minimus* effect.

66. Further, the Court finds that EchoStar has not met its burden in showing that any of its distant signal subscribers meet the grandfathering requirements. Section 119(e) provides:
(e) Moratorium on copyright liability. Until December 31, 2004, a subscriber who does not receive a signal of Grade A intensity (as defined in the regulations of the Federal Communications Commission under section 73.683(a) of title 47 of the Code of Federal Regulations, as in effect on January 1, 1999, or predicted by the Federal Communications Commission using the Individual Location Longley-Rice methodology described by the Federal Communications Commission in Docket No. 98-201) of a local network television broadcast shall remain eligible to receive signals of network stations affiliated with the same network, if that subscriber had satellite service of such network signal terminated after July 11, 1998, and before October 31, 1999, as required by this section, or received such service on October 31, 1999.

17 U.S.C. § 119(e).

67. In essence, this grandfathering provision contains two requirements: (1) the subscriber either has to have been a customer *on* October 31, 1999 or has to have had distant network service terminated " as required by this section" after July 11, 1998 and October 31, 1999; and (2) the customer has to be below Grade A as predicted by the ILLR model.

68. First, EchoStar executive Rex Povenmire testified that EchoStar does not have any list of its distant signal subscribers as of October 31, 1999. Nor did EchoStar present a list of subscribers who were terminated after July 11, 1998 and before October 31, 1999.

69. Second, EchoStar has presented no ILLR study showing that its supposedly grandfathered subscribers are predicted to receive less than a Grade A signal.

70. Also, EchoStar continued to serve distant network subscribers who, even if they originally qualified, no longer qualified for grandfather status, according to the testimony of Rex Povenmire and Suzanne Beall.

71. In December 2000, EchoStar announced that it was going to terminate distant networks to any grandfathered subscriber who under the ILLR model existing in December 2000 was predicted to receive a Grade A signal from one or more networks. According to Mr. Povenmire, all existing distant network grandfathered subscribers were requalified under the ILLR model existing at that time and those subscribers who were predicted to receive a Grade A signal from one or more networks were identified for possible termination of such distant network programming. As a part of this process, the subscribers who were identified had their "grandfather" service code (or specialty flag) removed from the subscriber's account.

72. EchoStar received numerous complaints from subscribers who were targeted to be disconnected from one or more networks who believed that they still qualified to receive distant network programming because they had received a Grade B signal as of October 31, 1999. As a result of the complaints, EchoStar did not terminate distant

network programming to any of these subscribers because it concluded that under SHVIA, a subscriber who received a Grade B signal of a network and who was a subscriber as of October 31, 1999 continued to be grandfathered and thus eligible for distant network programming. However, EchoStar's interpretation of the grandfathering provision of SHVIA is incorrect. That provision states that grandfather status applies only to a "subscriber who does not receive a signal of Grade A intensity." 17 U.S.C. § 119(e). Thus, any subscriber who currently receives a Grade A signal does not qualify for grandfather status.

73. Mr. Povenmire further testified that in February, 2002, EchoStar again requalified all of its existing distant network subscribers using the ILLR model existing at the time, and those subscribers who were predicted to receive a Grade A signal had his or her grandfather service code (or specialty flag) removed from his or her account. However, there is no indication that such subscribers were terminated from distant network service.

74. Currently, EchoStar only re-qualifies a subscriber with a grandfather service code (or specialty flag) if the subscriber requests a change in programming or receives other services by EchoStar. If such a re-qualification shows that a subscriber is predicted to receive a Grade A signal from any network for which the subscriber had previously enjoyed grandfather status, the subscriber's distant network programming for such network is disconnected as part of EchoStar's monthly WAC process and the grandfather service code (or specialty flag) is removed from the subscriber's account.

75. Based on the above description of EchoStar's process of issuing grandfather status to its distant network subscribers, EchoStar has provided service to a large number of subscribers who have been incorrectly issued grandfather status.

76. Next, the Court finds that EchoStar has also failed to prove that any of its subscribers are eligible because they have obtained waivers from the relevant network stations. For a particular household to have a valid waiver with respect to a particular network, it is necessary to obtain a waiver from every station affiliated with that network that the ILLR model predicts to deliver a Grade B signal to the household.

77. EchoStar failed to obtain complete waivers for several years. Instead, EchoStar improperly considered viewers to be waived based on consent only from the station in the subscriber's own Nielsen-defined designated market area ("DMA"). As EchoStar Vice President Suzanne Beall testified:
Q: There was a time, wasn't there, when EchoStar was processing waivers manually; isn't that right?
A: Correct.
Q: And at that time when EchoStar was processing waivers manually, as a matter of company policy, EchoStar would only seek waivers from the station-from the DMA station, the station in the DMA, in which the subscribers resided; is that correct?
A: I believe, yes.

4/17/03 Aft. Tr. 123-24. This practice continued through at least early 2000.

78. Further, at trial EchoStar simply presented a massive list of subscribers as to which it claimed waivers. However, it did not present any credible testimony that it had obtained waivers from each station predicted to deliver a signal of Grade B intensity to each subscriber or to any particular subscriber. [FN10] Accordingly, EchoStar has failed to prove that any of its 1.2 million distant network subscribers are "unserved households" because they have obtained waivers from stations. Additionally, EchoStar's methods both of sending bulk waivers without the customer's requesting one and of placing the burden on stations to object to a waiver are questionable practices.

FN10. EchoStar indicated during its opening statement that it would offer an expert witness, Dr. Rausser, to describe an "audit" of a fraction of EchoStar's waiver claims; however, Dr. Rausser was not called as a witness at trial. Instead, EchoStar asked Dr. Charles Jackson to summarize Dr. Rausser's report. Dr.

> Jackson is not a statistician and it appears that his only familiarity with Dr. Rausser's work is a reading of Dr. Rausser's report before testifying. As discussed above, the Court found that Dr. Jackson lacked credibility and his brief account of Dr. Rausser's report, which was not entered into evidence, does not assist EchoStar in meeting its burden of proof as to waivers.

79. Finally, EchoStar has defaulted in proving that any of its subscribers are eligible under the RV/commercial truck exception. This exception is limited to persons who have strictly complied with the documentation requirements of section 119(a)(11). *See* Conference Report, Intellectual Property and Communications Omnibus Reform Act of 1999, H.R. Rep. 106-464 at 99 (1999) ("To prevent abuse of this provision, the exception for recreational vehicles and commercial trucks is limited to persons who have strictly complied with the documentation requirements set forth in section 119(a)(11)."). Those documentation requirements are as follows:
(B) Documentation Requirements. A recreational vehicle or commercial truck shall be deemed to be an unserved household beginning 10 days after the relevant satellite carrier provides to the network that owns or is affiliated with the network station that will be secondarily transmitted to the recreational vehicle or commercial truck the following documents:
(i) Declaration. A signed declaration by the operator of the recreational vehicle or commercial truck that the satellite dish is permanently attached to the recreational vehicle or commercial truck, and will not be used to receive satellite programming at any fixed dwelling.
(ii) Registration. In the case of a recreational vehicle, a copy of the current State vehicle registration for the recreational vehicle.
(iii) Registration and license. In the case of a commercial truck, a copy of
(I) the current State vehicle registration for the truck; and
(II) a copy of the valid, current commercial driver's license, as defined in regulations of the Secretary of Transportation under section 383 of title 49 of the Code of Federal Regulations, issued to the operator.
17 U.S.C. § 119(a)(11).

80. Again, EchoStar has simply produced a list of 12,000 customers that it claims are entitled to this exemption. The only witness who mentioned anything about the required documentation was Rex Povenmire, who said that he had looked at 12 of the subscribers allegedly falling under the RV/commercial truck exemption, but he stated that he did not know what to look for because he never reviewed the documentation provisions. Accordingly, EchoStar has failed to prove that any of its subscribers are eligible under the RV/ commercial truck exemption.

C. *Willful or Repeated Violations*

[3] 81. Under SHVA, a copyright violation exists where a satellite carrier makes either "willful" or " repeated" transmissions of a network station's television programming to subscribers who do not reside in an unserved household. 17 U.S.C. § 119(a)(5)(A). In order to prove willfulness, "it is necessary only to show that a person knew it was doing the acts in question, not that the person knew those acts were wrong." *CBS Broadcasting, Inc. v. PrimeTime 24 Joint Venture,* 48 F.Supp.2d at 1356. Under this standard, EchoStar's violations of the unserved household were clearly willful. Even if the "willful or repeated" standard requires a finding of gross negligence, EchoStar's violations also meet this standard. *See ABC, Inc.,* 184 F.3d at 353 ("For unlicensed transmission to be repeated within the meaning of SHVA, the satellite carrier must have acted with gross or aggravated negligence.").

82. The grounds for finding that EchoStar's violations are "willful or repeated" include the following:
(1) EchoStar has failed to present credible evidence, either in the form of an ILLR analysis or signal intensity measurements, that any of its subscribers are unserved as defined under SHVA.
(2) Plaintiffs' evidence indicates that a significant percentage of EchoStar's distant network programming subscribers receive a signal of Grade B intensity or better.
(3) EchoStar incorrectly incorporated the DMA

Rule into its ILLR analysis until October 2000.
(4) EchoStar's use of interference after May 2000 was unlawful.
(5) EchoStar improperly employs two vendors to perform ILLR analyses on potential subscribers and only refuses distant network programming to a subscriber if that subscriber is found ineligible by both vendors.
(6) EchoStar did not establish that any of its subscribers qualify for grandfather status; to the contrary, EchoStar was aware that many of these subscribers receiving service as grandfathered subscribers were predicted to receive a Grade A signal, yet such subscribers were not terminated.
(7) EchoStar failed to present credible evidence to support its claims that many of its subscribers have received waivers or have properly established they qualify for the RV/ commercial truck exception.

D. *Pattern or Practice*

[4] 83. Under SHVA, if a satellite carrier is found to have engaged in a "willful or repeated pattern or practice" of transmission to households that are not unserved, and
(i) if the pattern or practice has been carried out on a substantially nationwide basis, the court shall order a permanent injunction barring the secondary transmission by the satellite carrier, for private home viewing, of the primary transmissions of any primary network station affiliated with the same network....

17 U.S.C. § 119(a)(5)(B)(i).

84. The Court finds that, even if a pattern or practice existed at the time this case was filed, no such pattern or practice currently exists which would warrant such an extreme sanction. The current qualification system employed by EchoStar's CSRs and applied to every potential distant network subscriber is a reasonable system to prevent ineligible households from receiving distant network programming (other than EchoStar's use of two vendors). Additionally, EchoStar's WAC system further ensures that no new ineligible households are signed up. Finally, EchoStar makes royalty payments ($0.15 per subscriber per month) twice a year to the copyright office and has paid over $40,000,000 so far. Such efforts by EchoStar to comply with the law support the conclusion that no pattern or practice of willful or repeated violations exists that would warrant a nationwide injunction barring the transmission of distant network stations. Even Robert **Lee** of the CBS Affiliate Association noted that today EchoStar is making legitimate efforts to qualify subscribers.

E. *Injunctive Relief*

[5] 85. When a satellite carrier has committed individual violations, a court may award any of the remedies provided by sections 502 through 506 and 509 of the Copyright Act, with certain limitations concerning damages. 17 U.S.C. § 119(a)(5)(A). Section 502(a) authorizes the Court to "grant temporary and final injunctions on such terms as it may deem reasonable to prevent or restrain infringement of a copyright." 17 U.S.C. § 502(a). Therefore, the Copyright Act grants broad discretion to the court in fashioning a remedy that the Court deems appropriate under the circumstances of a particular case. *CBS Broadcasting, Inc. v. PrimeTime 24 Joint Venture,* 48 F.Supp.2d at 1360.

[6] 86. To be entitled to a permanent injunction under the Copyright Act, a copyright owner must show past infringement and the threat of future infringement by the defendant. *CBS Broadcasting, Inc. v. PrimeTime 24 Joint Venture,* 48 F.Supp.2d at 1358; *Pacific & Southern Co. v. Duncan,* 744 F.2d 1490, 1499 (11th Cir.1984); *Walt Disney Co. v. Powell,* 897 F.2d 565, 567-68 (D.C.Cir.1990); *Morley Music Co. v. Cafe Continental, Inc.,* 777 F.Supp. 1579, 1583 (S.D.Fla.1991). Accordingly, there is a presumption of irreparable harm from copyright infringement. *CBS Broadcasting, Inc. v. PrimeTime 24 Joint Venture,* 48 F.Supp.2d at 1358.

87. However, even if the existence of harm were relevant to Plaintiffs' case, the Court finds that Plaintiffs have demonstrated that they suffer economic injury from EchoStar's illegal transmissions of network programming. Plaintiffs'

witnesses testifying by deposition explained that local networks depend on the sale of advertising for their revenues. Further, it is likely that some illegal EchoStar distant signal subscribers will be Nielsen households and, as a result of the receipt of the distant signals, the local affiliates will have less Nielsen-reported viewing because these households will report (for example) viewing *C.S.I.* from the CBS station in New York City rather than from their local CBS station. Lower Nielsen ratings means lower advertising revenues. Therefore, although Plaintiffs need not show the existence of harm in order to obtain a permanent injunction in this case, Plaintiffs have sufficiently established that such harm exists.

[7] 88. As discussed above, past infringement of Plaintiffs' copyrighted works has been established in this case. Further, a threat of future infringement exists in this case as EchoStar continues to provide distant network programming to subscribers who were signed up under unlawful methods and who are ineligible for such service; additionally, EchoStar continues to use two vendors to perform ILLR analyses, which the Court has found unlawful. Therefore, a permanent injunction against EchoStar is appropriate in this case.

89. A separate Final Judgment will be entered herein consistent with the Court's Findings of Fact & Conclusions of Law.

FINAL JUDGMENT FOR PLAINTIFFS

THIS CAUSE is before the Court upon the non-jury trial on April 11, 14, 15, 16, 17, 21, 22, 23, 24, and 25, 2003. For the reasons expressed in this Court's Findings of Fact and Conclusions of Law, separately entered today, it is **ORDERED AND ADJUDGED** as follows:

1. EchoStar's Motion for Judgment Pursuant to Rule 52(c) of the Federal Rules of Civil Procedure [DE 807] is hereby **DENIED**;

2. EchoStar's Sealed Request for Declaratory Ruling is hereby DENIED;

3. Judgment is hereby entered in favor of the plaintiffs, CBS Broadcasting, Inc., Fox Broadcasting, Inc., ABC Television Affiliates Association, CBS Television Network Affiliates Association, FBC Television Affiliates Association and NBC Television Affiliates Association, and against the defendants, EchoStar Communications Corp., EchoStar Satellite Corp., Satellite Communications Operating Corp. and DirectSat Corp., on Plaintiffs' Complaint for copyright infringement;

4. Judgment is hereby entered in favor of counter-defendants, CBS Broadcasting, Inc., Fox Broadcasting, Inc., ABC Television Affiliates Association, CBS Television Network Affiliates Association, FBC Television Affiliates Association and NBC Television Affiliates Association, and against counter-plaintiffs, EchoStar Communications Corp., EchoStar Satellite Corp., Satellite Communications Operating Corp. and DirectSat Corp., on Count I for declaratory relief of Defendants' counterclaim brought in this case;

5. *ILLR analysis of current subscriber list.* For the purposes of this Order, EchoStar shall run each of its distant network subscribers, as of the date of this Order, through the ILLR propagation model. In running this ILLR analysis and any future ILLR analyses of potential subscribers, EchoStar is prohibited from applying the "DMA rule" and using interference; similarly, EchoStar must chose one vendor to run all ILLR analyses of its subscribers, including the analysis for the purposes of this Order.

6. *Compliance with the Copyright Act.* EchoStar shall not deliver ABC, CBS, Fox, or NBC television network programming to any customer that does not live in an "unserved household" as defined in 17 U.S.C. § 119(d)(10), to any business or to any customer for other than "private home viewing," unless permitted to do so pursuant to a specific exception provided for in 17 U.S.C. § 119 which does not conflict with this Order. EchoStar shall also strictly comply with the monthly reporting requirements of 17 U.S.C. § 119(a)(2)(C).

7. To ensure compliance with this Order, EchoStar shall not provide ABC, CBS, Fox, or NBC network programming by satellite to:

a. Any customer predicted by the ILLR propagation model, run for the purposes of this Order in the manner specified in Paragraph 5, to be served by an ABC, CBS, Fox or NBC primary network station, without first either (i) obtaining the written consent of the affected station(s) as

described in Paragraph 8 below, or (ii) providing the affected station(s) with copies of signal strength intensity tests showing that the household cannot receive an over-the-air signal of grade B intensity as defined by the FCC from any station of the relevant network, as described in Paragraph 9 below.

b. Any business or other non-household entity.

8. *Waivers.* If EchoStar wishes to provide ABC, CBS, Fox or NBC programming to a particular household by written consent, it must obtain and maintain records of such consent from each affected station. With respect to a particular household, the term "affected station" shall mean any television station of the relevant network that is predicted by the ILLR model, run for purposes of this Order, to serve the household. If EchoStar contends that it is serving a particular subscriber through written consent of the affected stations it shall so indicate on any subscriber list provided to any plaintiff pursuant to Section 119, and provide any affected station on request, within 10 business days, with a copy of such written consent.

9. *Signal intensity test procedures.* Before conducting any signal intensity test for purposes of establishing that a household cannot receive an over-the-air signal of Grade B intensity with a conventional outdoor rooftop receiving antenna, EchoStar shall give each affected station (as defined in Paragraph 8) at least 15 business days written advance notice of its intention to conduct the test and of the time and place at which the test will be conducted, along with any instructions, chart, form or other documents that EchoStar or its designee intends to use in carrying out or recording such test. For purposes of determining eligibility under this paragraph, the signal of each affected station must be tested. EchoStar shall not provide ABC, CBS, Fox or NBC network programming to any subscriber otherwise ineligible to receive such programming under this Order based on any signal intensity test that has not been conducted in accordance with the requirements set forth in this Paragraph. EchoStar shall not represent to any person that any signal intensity test conducted other than in compliance with this Paragraph enables it to provide network programming to any person.

10. *Testing by stations.* With respect to households predicted by the ILLR model as not likely to receive a signal of Grade B intensity: if an ABC, CBS, Fox or NBC network station, after giving 15 business days written advance notice to EchoStar of its intention to conduct a test and of the time and place at which the test will be conducted, conducts a signal strength test in the manner described in Paragraph 9 showing that the household can receive a signal of Grade B intensity. EchoStar shall terminate service of the pertinent network to the affected subscriber with 60 days of receiving the test results.

11. *Termination of service to existing subscribers predicted to receive Grade B or better signals.* With respect to any EchoStar subscriber to whom EchoStar delivered ABC, CBS, Fox or NBC network programming by satellite as of the date of this Order and who is predicted by the ILLR model to receive a signal of Grade B intensity or better from at least one station of the relevant network, EchoStar shall come into compliance with Paragraphs 6 and 7 above no later than August 11, 2003.

12. EchoStar subscribers are no longer entitled to grandfather status pursuant to 42 U.S.C. § 119(e) due to EchoStar's failure to create a list of subscribers receiving distant network programming on October 31, 1999. Because no such list exists, it is impossible to determine which subscribers are properly receiving grandfather status.

13. *Provision of post-turnoff subscriber lists.* For purposes of monitoring EchoStar's compliance with this Final Judgment and Permanent Injunction, EchoStar shall provide ABC, CBS, Fox and NBC, no later than November 14, 2003, with a list, in standard electronic format, of the names and street addresses, including county and zip code, along with predicted dBu levels using the ILLR model, of each subscriber to whom EchoStar provides programming of that network as of October 1, 2003. For any subscriber pursuant to Paragraph 8 (waivers) and Paragraph 9 (signal intensity testing), EchoStar shall so indicate on the list and thereafter provide necessary documentation within 10 days after receiving a request by an affected station. These lists shall be used for the sole purpose of determining EchoStar's compliance with this Final Judgment and Permanent Injunction and/or determining whether to grant consent to delivery of network programming to the listed subscribers.

14. *Compliance reporting.* EchoStar shall file and

serve on Plaintiffs an initial report, within 15 days of the entry of this Final Judgment and Permanent Injunction, setting forth in detail the manner in which EchoStar is complying with this Final Judgment and Permanent Injunction. EchoStar shall file and serve similar compliance reports, containing updated information, on the first day of every other month thereafter until June 1, 2006, or such other time as the Court may hereafter order.

15. *Local-to-local re-transmissions.* Nothing in this Final Judgment and Permanent Injunction shall prevent EchoStar from engaging in otherwise lawful secondary transmissions of a network station to customers in that station's local market (as defined in 17 U.S.C. § 122(j)). EchoStar shall provide each network (separately as to each station carried) with accurate subscriber names and addresses pursuant to 17 U.S.C. § 122(b) of all subscribers receiving local-to-local re-transmissions of network stations affiliated with that network, and shall not accept subscriber names or addresses that it has reason to believe have been falsified to make the customer appear eligible to receive network programming by satellite on a local-to-local basis.

16. *RV and commercial truck exception.* Notwithstanding any other provision of this Final Judgment and Permanent Injunction, EchoStar shall not be prohibited by this Order from re-transmitting an ABC, CBS, Fox or NBC network station to a recreational vehicle or commercial truck (as defined by 17 U.S.C. § 119(d)(11)) as to which EchoStar has *strictly complied* with the requirements of Section 119(d)(11). EchoStar shall not re-transmit a network station to any person based on information or documentation that it has reason to believe has been falsified to make the customer appear eligible to receive network programming pursuant to Section 119(d)(11).

17. *Persons bound.* This Final Judgment and Permanent Injunction shall be binding on each of the EchoStar defendants, their officers, agents, servants, employees and attorneys, and on all those in active concert or participation with them who receive actual notice of this order by personal service or otherwise.

18. Any pending motions are denied as moot;

19. The Clerk shall close this case, however, the Court retains jurisdiction to hear any appropriate post-judgment motions.

S.D.Fla.,2003.

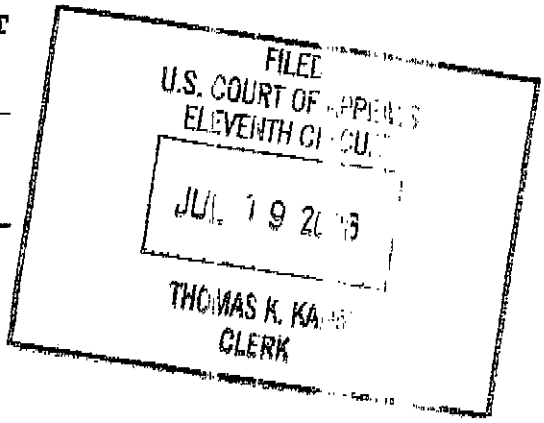
CBS Broadcasting, Inc. v. EchoStar Communications Corp.

276 F.Supp.2d 1237, 16 Fla. L. Weekly Fed. D 537, 67 U.S.P.Q.2d 1545, 2003 Copr.L.Dec. P 28,639

END OF DOCUMENT

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT



No. 03-13671-DD

CBS BROADCASTING, INC.,
FOX BROADCASTING COMPANY,

Plaintiff-Counter-Defendant-Appellee,

FBC TELEVISION AFFILIATES ASSOCIATION,
ABC TELEVISION AFFILIATES ASSOCIATION,
NBC TELEVISION AFFILIATES,
CBS TELEVISION AFFILIATES ASSOCIATION,

Plaintiffs-Counter-Defendants-Appellees-
Cross-Appellants,

ABC, INC.,

Plaintiff,

NATIONAL BROADCASTING COMPANY,

Plaintiff-Counter-Defendant,

versus

ECHOSTAR COMMUNICATIONS CORPORATION,
d.b.a DISH Network,
ECHOSTAR SATELLITE CORPORATION,
SATELLITE COMMUNICATONS OPERATING CORPORATION,
DIRECT SAT CORP.,

Defendants-Counter-Claimants-Appellants-Cross-Appellees.

On Appeal from the United States District Court for the Southern District of Florida

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ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC
(Opinion _____, 11th Cir., 19__, _____F.2d_____)

Before: TJOFLAT and HILL, Circuit Judges, and MILLS*, District Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

UNITED STATES CIRCUIT JUDGE

ORD-42
(12/01)

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 03-13671-DD

CBS BROADCASTING, INC.,
FOX BROADCASTING COMPANY,

Plaintiffs-
Counter-Defendants-
Appellees,

FBC TELEVISION AFFILIATES ASSOCIATION,
ABC TELEVISION AFFILIATES ASSOCIATION,
NBC TELEVISION AFFILIATES,
CBS TELEVISION AFFILIATES ASSOCIATION,

Plaintiffs-
Counter-Defendants-
Appellees
Cross-Appellants,

versus

ECHOSTAR COMMUNICATIONS CORPORATION,
d.b.a DISH Network,
ECHOSTAR SATELLITE CORPORATION,
SATELLITE COMMUNICATONS OPERATING CORPORATION,
DIRECT SAT CORP.,

Defendants-
Counter-Claimants-
Appellants
Cross-Appellees.

On Appeal from the United States District Court for the
Southern District of Florida

ORDER:

(✓) The motion of Appellants, EchoStar Communications Corp. etc., for (x) stay () recall and stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

( ) The motion of Appellant, EchoStar Communications Corp. etc., for (x) stay () recall and stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including _____, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

UNITED STATES CIRCUIT JUDGE

ORD-45

United States Court of Appeals

Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Thomas K. Kahn
Clerk

For rules and forms visit
www.ca11.uscourts.gov

August 07, 2006

Mark A. Nadeau
Squire, Sanders & Dempsey, LLP
40 North Central Avenue Suite 2700
Phoenix AZ 85004

Appeal Number: 03-13671-DD
Case Style: CBS Broadcasting v. Echostar Communications
District Court Number: 98-02651 CV-WPD ()

The following action has been taken in the referenced case:

The enclosed order has been ENTERED.

Sincerely,

THOMAS K. KAHN, Clerk

Reply To: Elora Jackson (404) 335-6173

Administrative File

August 07, 2006

Appeal Number: 03-13671-DD
Case Style: CBS Broadcasting v. Echostar Communications
District Court Number: 98-02651 CV-WPD ()

TO: Mark A. Nadeau

CC: Cynthia A. Ricketts

CC: Debora Lynn Verdier

CC: David M. Rogero

CC: Thomas P. Olson

CC: A. Stephen Hut, Jr.

CC: C. Colin Rushing

CC: Katherine A. Fleet

CC: Reid L. Phillips

CC: David Kushner

CC: Wade H. Hargrove

CC: Administrative File

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 98-2651-CIV-DIMITROULEAS

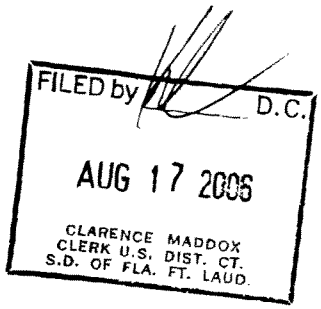
CBS BROADCASTING INC., et al.,

Plaintiffs,

vs.

ECHOSTAR COMMUNICATIONS CORPORATION, et al.,

Defendants.
_____/



ORDER DENYING MOTION TO STAY

THIS CAUSE is before the Court upon the parties' Joint Motion to Stay Implementation of the Court of Appeals May 23, 2006 Order and Mandate for 45 Days to Allow the Parties to Engage in Settlement Discussions, filed herein on July 25, 2006.[1] [DE-993]. The Court has carefully considered the Motion and being otherwise fully advised in the premises, it is

ORDERED AND ADJUDGED that the Joint Motion to Stay Implementation of the Court of Appeals May 23, 2006 Order and Mandate [DE-993] is hereby **DENIED**.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 17 day of August, 2006.

WILLIAM P. DIMITROULEAS
United States District Judge

[1]The Court notes that although the instant Motion was filed on July 25, 2006, it was not received in Chambers until August 16, 2006, after a review of the docket in this matter.

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Copies furnished to:

David M. Rogero, Esq.
Thomas P. Olson, Esq.
Mark A. Nadeau, Esq.
Cynthia A. Ricketts, Esq.

United States District Court
Southern District of Florida

NOTICE: A few Judges do not participate in FaxBack, and thus require litigants to accompany motions with envelopes. Visit the court's website at: www.flsd.uscourts.gov or call the Help Line (305) 523-5212 for an updated listing of participating Judges.

CM/ECF COMING EARLY 2006

The United States District Court for the Southern District of Florida is planning to implement the Case Management/Electronic Case Files (CM/ECF) system. CM/ECF will provide electronic noticing via e-mail and user-friendly electronic case filing features. CM/ECF will replace FaxBack noticing; therefore attorneys will be asked to register for CM/ECF at some point later this year. To keep current with CM/ECF developments please view our website at www.flsd.uscourts.gov.

Notice of Orders or Judgments

Date: 08/17/06

To: Cynthia A. Ricketts (aty)
40 N Central Avenue
Suite 2700
Phoenix, AZ 85004

Re: Case Number: 1:98-cv-02651 Document Number: 994

NOTE: **If you are no longer an attorney in this case, please disregard this notice.**
Be sure to promptly notify the Clerk of Court in writing of any changes to your name, address, law firm, or fax number. This notification should be sent for each of your active cases.
If this facsimile cannot be delivered as addressed, or you have ANY problems with this fax transmission, please call the Help Line (305) 523-5212 and the problem will be rectified. Since this transmission originated from the Clerk's Office, JUDGES CHAMBERS SHOULD NOT BE CONTACTED.

Number of pages including cover sheet: 3

DECLARATION OF DAVID MOSKOWITZ

1. I am the Executive Vice President and General Counsel for EchoStar Satellite LLC ("EchoStar"). I am responsible for the legal affairs of EchoStar and its subsidiaries, including the course of this litigation, and its impact on EchoStar's subscribers. As such, I have knowledge of the following facts and, if called as a witness, I could and would competently testify as follows:

2. In *CBS Broadcasting, Inc. v. EchoStar Communications Corp.*, 450 F.3d 505 (11th Cir. 2006), the Eleventh Circuit ordered the District Court to enter a permanent nationwide injunction prohibiting EchoStar from providing distant network programming pursuant to the compulsory license in the Satellite Home Viewers Act, 17 U.S.C. § 119(a)(2)(A), (B)(i) (1995), which was subsequently amended by the Satellite Home Viewer Improvement Act of 1999. 450 F.3d at 527.

3. If the permanent nationwide injunction is entered, EchoStar will be forced to disconnect distant network programming for hundreds of thousands of subscribers.

4. As a practical matter, the termination of this programming would be a complex, time-consuming, and costly process. The costs of disconnection and reconnection are irretrievable, even in the event that the Eleventh Circuit's decision is reversed by the Supreme Court.

5. The abrupt disconnection of hundreds of thousands of subscribers will result in severe and irreparable damage to EchoStar's business goodwill. EchoStar will have less credibility with existing subscribers if it is forced to take the channels away. Additionally, a large number of subscribers who are deprived of access to network broadcast programming are likely to cancel their remaining EchoStar satellite services, and are unlikely to resubscribe even in the event that the Eleventh Circuit's decision is reversed by the Supreme Court.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 17th day of July, 2006, at Englewood, Colorado.

DAVID MOSKOWITZ