



CBS Broadcasting v. EchoStar: The Satellite Home Viewer Act and Satellite Retransmission of Distant Network Signals

name redacted

June 5, 2007

Congressional Research Service

7-....

www.crs.gov

RL33767

Summary

On May 23, 2006, the Eleventh Circuit Court of Appeals ordered the District Court for the Southern District of Florida to enjoin EchoStar Communications Corporation from retransmitting all programming originating on any station affiliated with ABC, Inc.; CBS Broadcasting, Inc.; Fox Broadcasting Co.; or National Broadcasting Co. The district court complied, rejecting EchoStar's last-minute arguments and partial settlement agreement and ordering the injunction imposed effective December 1, 2006. At issue before the Eleventh Circuit was whether EchoStar had violated the Satellite Home Viewer Act (SHVA), as amended, which grants a limited statutory license to satellite carriers transmitting distant network signals to private homes if the subscribers cannot receive local signals, and the scope and consequences of violating SHVA.

The court of appeals determined that EchoStar engaged in a pattern or practice of violating SHVA on a nationwide scale and, consequently, that SHVA required the court to impose a nationwide injunction against EchoStar for its improper retransmission of programming. This was a different legal conclusion than that reached by the district court, which had concluded that because of EchoStar's cessation of the violation, SHVA did not require "pattern or practice" liability, and the court consequently had discretion to order EchoStar to re-analyze its subscriber base, in compliance with SHVA, and to limit termination to subscribers found ineligible under the court-supervised analysis.

Subsequent to the district court's orders implementing the court of appeals' decision, multiple bills were introduced in the 109th Congress—S. 4067, S. 4068, S. 4074, S. 4080, H.R. 6402, H.R. 6340, and H.R. 6384—that would have allowed EchoStar to recommence retransmission of distant network programming under varying circumstances. Several bills have been introduced in the 110th Congress: H.R. 602, S. 124, S. 258, and S. 760.

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Introduction

On May 23, 2006, the Eleventh Circuit Court of Appeals ordered the District Court for the Southern District of Florida to impose an injunction on EchoStar Communications Corporation¹ to cease retransmitting all programming originating on stations affiliated with ABC, Inc.; CBS Broadcasting, Inc.; Fox Broadcasting Co.; or National Broadcasting Co.² The district court complied in two orders, one granting a motion for entry of a permanent injunction and denying a settlement agreement,³ the other ordering the implementation of the injunction effective December 1, 2006.⁴ At issue before the Eleventh Circuit was whether EchoStar had violated the Satellite Home Viewer Act (SHVA),⁵ as amended, which grants a limited statutory license to satellite carriers transmitting distant network signals to private homes if the subscribers reside in unserved households, and the scope and consequences of that violation.⁶

The court of appeals held that because EchoStar was unable to disprove it had engaged in a “pattern or practice” of SHVA violations on a nationwide scale,⁷ the terms of the Satellite Home Viewer Act required that the court impose a nationwide injunction against EchoStar’s improper retransmission of distant network programming.⁸ This differs from the decision of the district court, which had concluded that so long as EchoStar was currently complying with SHVA, the court had discretion to order EchoStar to re-analyze its subscriber base, supervised by the court to ensure compliance with SHVA, and terminate all subscribers who were ineligible to receive the signals.⁹

This report briefly describes the Satellite Home Viewer Act, as amended, through the lens of the Eleventh Circuit’s ruling regarding a satellite provider’s retransmission of programming originating on distant network affiliate stations to persons who live in “unserved” households.¹⁰ It then describes the facts underpinning the court’s decision, followed by the main legal issues the court addressed and a discussion of the district court’s implementation of the court of appeals’ decision. The report concludes with possible legislative action.

¹ Doing business as DISH Network.

² *CBS Broadcasting v. EchoStar*, 450 F.3d 505 (11th Cir. 2006).

³ *Order Granting Motion for Entry of Injunction; And Denying Joint Stipulation to Enter Consent Judgment and Approve Settlement Agreement*, Case No. 98-2651-CIV-DIMITROULEAS (October 20, 2006).

⁴ *Order of Permanent Injunction*, Case No. 98-2651-CIV-DIMITROULEAS (October 20, 2006).

⁵ *Satellite Home Viewer Act of 1988* (“SHVA”), P.L. 100-667, title II, 102 Stat. 3935, codified at 17 U.S.C. § 119 (1988); amended by the *Satellite Home Viewer Improvement Act of 1999* (“SHVIA”), P.L. 106-113, 113 Stat. 1501 (1999); reauthorized by the *Satellite Home Viewer Extension and Reauthorization Act* (“SHVERA”), P.L. 108-447, 118 Stat. 2809 (2004). For more information on the Satellite Home Viewer Act, as amended, see CRS Report RS22175, *Satellite Television: Provisions in SHVERA Affecting Eligibility for Distant and Local Analog Network Signals*, by (name redacted). The FCC’s website on SHVERA can be found at <http://www.fcc.gov/mb/policy/shvera.html>. The FCC’s extensive fact sheet on Television Broadcast Channels on Satellite can be found at <http://www.fcc.gov/mb/policy/shvera.doc>.

⁶ *CBS Broadcasting v. EchoStar*, 450 F.3d 505, 508 (11th Cir. 2006). See *infra* for explanations of “unserved household” and “distant network signals.”

⁷ *Id.* at 523.

⁸ *Id.* at 527.

⁹ *CBS Broadcasting v. Echostar*, 276 F. Supp. 2d 1237, 1256 (S.D. Fla. 2003).

¹⁰ For an overview of regulations that affect local programming, see CRS Report RL32641, “*Localism*”: *Statutes and Rules Affecting Local Programming on Broadcast, Cable, and Satellite Television*, by (name redacted).

The Satellite Home Viewer Act: Satellite Retransmission of Distant Network Signals to Unserved Households

The Satellite Home Viewer Act of 1988 (SHVA), as amended, grants satellite carriers like EchoStar a *compulsory* license to retransmit copyrighted “distant network programming” to “unserved households.”¹¹ The purpose behind granting the compulsory license is to “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.”¹²

Distant network programming is programming that a satellite television subscriber receives from a network-affiliated broadcast station located outside his or her market area.¹³ An example is a person who lives in Fort Lauderdale but receives an ABC, CBS, Fox, or NBC network station from New York City.¹⁴ An *unserved household*, for the purposes of this discussion, is one in which a subscriber (1) cannot receive an over-the-air television signal at a certain level of signal intensity, (2) has received a waiver from the local affiliated network station, or (3) is grandfathered in.¹⁵

Under SHVA, the *satellite carrier* bears the burden of proving its subscribers reside in unserved households.¹⁶ If it fails to provide sufficient evidence that a household is unserved, the satellite carrier may be held liable for damages and injunctive relief.¹⁷ For households receiving an over-the-air television signal, SHVA permits two methods of determining whether a household is unable to receive a signal of requisite strength: the use of the “accurate measurements method” and the “accurate predictive model.”¹⁸ The accurate measurements method requires actual physical measurements to determine the strength of the television signal at the subscriber’s residence, performed in accordance with statutory and regulatory requirements.¹⁹ By contrast, the

¹¹ As a general rule, owners of copyrights in television programs enjoy the exclusive right to publicly perform those programs and to license others to do so. The television networks own the exclusive copyrights to numerous network television programs that EchoStar, a satellite broadcast company, retransmits to certain subscribers. *CBS Broadcasting v. EchoStar*, 265 F.3d 1193, 1201 (11th Cir. 2001). This retransmission is referred to in the statute as “secondary transmission.” See 17 U.S.C. § 119(d)(7) (incorporating by reference 17 U.S.C. § 111(f)). 17 U.S.C. § 119 (2006). This permission is granted in return for a license fee of \$0.15 per subscriber per month. *CBS Broadcasting v. Echostar*, 276 F. Supp. 2d at 1254.

¹² *CBS Broadcasting v. EchoStar*, 450 F.3d 505, 508 n. 2 (11th Cir. 2006).

¹³ *Id.* at 509 n. 1.

¹⁴ *Id.*

¹⁵ “Unserved household” is statutorily defined at 17 U.S.C. § 119(d)(10) and more precisely summarized in *CBS Broadcasting v. EchoStar* at 510. SHVA identifies five categories of unserved households. The other two categories regard subscribers who receive signals through a satellite dish on a commercial truck or recreational vehicle or transmissions by C-band services prior to October 31, 1999.

¹⁶ 17 U.S.C. § 119(a)(7)(D).

¹⁷ 17 U.S.C. § 119(a)(7).

¹⁸ The only definitive way to determine whether a household is unserved is to use the accurate measurements model, which requires onsite testing. However, if a satellite carrier uses the less expensive accurate predictive model, ILLR, courts will assume the results of that model are correct unless a television network provides evidence to the contrary. *CBS Broadcasting v. Echostar*, 450 F.3d 505, 521-22.

¹⁹ See 17 U.S.C. 119(a)(2)(B)(ii)(II).

accurate predictive model, or ILLR,²⁰ does not require home visits, yet allows the satellite carrier, through a computer model, to presumptively establish that a household cannot receive a sufficient signal and is therefore unserved.²¹

Penalties for violating SHVA vary, depending on whether they are classified as “individual violations” or “patterns of violations.” An individual violation occurs where there is a willful or repeated retransmission to *a subscriber* who is not eligible to receive the transmission.²² By contrast, a pattern of violations occurs when 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.²³ A district court has broad discretion to remedy individual violations but has less discretion in its choice of remedy for a pattern or practice of violations.²⁴

Assuming a court finds a willful or repeated pattern or practice of violations, it *must* order a permanent injunction barring retransmission by the satellite carrier of any primary transmissions from any network station affiliated with the same network, and *may* order damages not to exceed \$250,000 for each six-month period during which the pattern or practice of violations occurred.²⁵ If the violations occurred on a “substantially nationwide basis,” the court must order a permanent injunction against the satellite carrier encompassing “the primary transmissions of any primary network station affiliated with the same network”²⁶—a nationwide ban. If the violations occurred on a “local or regional basis,” the court must order a permanent injunction against the satellite carrier that bars the retransmission “in that locality or region.”²⁷

Factual Findings Regarding EchoStar’s Violation of Federal Law

At issue was whether EchoStar willfully or repeatedly violated SHVA by retransmitting distant network signals to ineligible satellite television subscribers from 1996 to 2003, and if so, whether the nature of the violations was best classified as “individual” or “pattern or practice” violations, thereby triggering different penalties. The district court examined the methodology by which EchoStar classified a household as unserved and the percentage of the carrier’s subscriber base inappropriately classified as eligible for service. The court concluded that from 1996 to 2002, EchoStar used improper methodology²⁸ to assess whether a person resided in an unserved household, with the result that 60% or more²⁹ of subscribers were ineligible for service.³⁰

²⁰ An acronym for Individual Location Longley-Rice propagation model.

²¹ 17 U.S.C. 119(a)(2)(B)(ii)(I). For details on implementing the accurate predictive model, see *Satellite Delivery of Network Signals to Unserved Households for Purposes of the Satellite Home Viewer Act: Part 73 Definition and Measurement of Signals of Grade B Intensity*, 47 CFR 73, FCC 99-14 (1999) (available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-99-14A1.pdf).

²² 17 U.S.C. § 119(a)(7)(A).

²³ 17 U.S.C. § 119(a)(7)(B).

²⁴ 17 U.S.C. § 117 (a)(7)(B)(i-ii) (“... the court *shall* order ...”)

²⁵ 17 U.S.C. § 119(a)(7)(B).

²⁶ 17 U.S.C. § 119(a)(7)(B)(i).

²⁷ 17 U.S.C. § 119(a)(7)(B)(ii).

²⁸ From 1996 to 1998, EchoStar offered distant network programming through an agreement with another satellite provider, PrimeTime24 Joint Venture, which evaluated signal strength based on a consumer’s evaluation of his or her (continued...)

Because EchoStar did not satisfy its statutory burden of proving it only retransmitted distant network signals to unserved households, the district court held that EchoStar's conduct constituted willful or repeated copyright infringement, actionable under the part of SHVA that governs "individual violations."³¹ The district court did not reach a conclusion as to whether EchoStar engaged in a pattern or practice of violations, which would trigger a permanent injunction, because "no pattern or practice currently exists that would warrant such an extreme sanction."³²

The Court of Appeals' Decision

The court of appeals overturned the district court's legal conclusion regarding EchoStar's punishment, holding that the district court was indeed obligated to issue a nationwide permanent injunction against EchoStar's retransmission of network programming as a consequence of "the inescapable conclusion, based on the district court's findings, that EchoStar did engage in a 'pattern or practice' of violations."³³ The district court erroneously concluded that the legal standard for "pattern or practice" liability required EchoStar to be currently engaged in violating SHVA.³⁴ The court of appeals held that the permanent injunction required under "pattern or practice" must be imposed, so long as a pattern or practice of statutory violations occurred at some point in time.³⁵ The court then proceeded to evaluate whether EchoStar had engaged at any time in a pattern or practice of violating SHVA.

According to the court, the standard for concluding "pattern or practice" liability under SHVA is "whenever a satellite carrier fails to carry its burden of proving eligibility [for distant network service] on a sufficient scale, and to a sufficient degree, that [a court] can presume that the satellite carrier is engaging in 'pattern or practice' of serving ineligible subscribers."³⁶ Looking at

(...continued)

signal quality. From 1998 to 1999, EchoStar evaluated new subscriber eligibility using a "red-light/green-light" method that determined eligibility based on location in an approved zip code. From 1999 to April 2002, EchoStar used a modified version of the ILLR model to determine subscriber eligibility, including consideration of Nielsen-defined "designated market areas" and interference with signal strength. From April 2002 until the district court's ruling in June 2003, the district court concluded that EchoStar undertook significant measures to comply with SHVA.

²⁹ During the Prime24 Subscribers period, at least 78% of the 331,586 subscribers were ineligible for service. Despite a promise by EchoStar's CEO, the district court found no evidence that EchoStar terminated service to any of these ineligible subscribers for compliance-related purposes. During the "red-light/green-light" time period, the court noted that of the CBS distant programming subscribers signed-up during this period, 69% received a signal of sufficient strength to no longer qualify as an unserved household on that basis. Under the September 1999 subscriber list, 72% of EchoStar's distant network subscribers (630,000 in total) were predicted to be disqualified based on signal strength, absent other factors. Under the April 2002 subscriber list, hundreds of thousands of subscribers were found to be ineligible to qualify as an unserved household on the basis of signal strength.

³⁰ *CBS Broadcasting v. EchoStar*, 450 F.3d at 512-515.

³¹ *Id.* at 516. See 17 U.S.C. § 119(a)(7)(B)(i).

³² *Id.* at 517 (quoting *CBS Broadcasting v. Echostar*, 276 F. Supp. 2d at 1254).

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 524.

³⁶ *Id.*

the legislative history of SHVA, the court determined that a threshold of 20% of subscribers being ineligible for service is a relevant marker for pattern or practice analysis.³⁷

The court of appeals, believing “that there is no other possible conclusion that can be drawn from the district court’s findings of fact,” determined that EchoStar’s prior conduct did constitute a pattern or practice of violations.³⁸ The court based this conclusion on a three main factors. First, EchoStar’s three-and-a-half year history of using inadequate procedures for assessing subscriber eligibility.³⁹ Second, EchoStar’s exceeding the 20% threshold of unlawful subscribers nationwide.⁴⁰ Third, EchoStar’s pattern of behavior, about which the court stated, “we have found no indication EchoStar was ever interested in complying with the Act.”⁴¹ The court also denied all but one of EchoStar’s 17 claims of error.⁴²

In addressing EchoStar’s assertions that the court had discretion to determine a remedy for the violations, the court found that “Congress unequivocally stated a purpose to restrict the courts’ traditional equitable authority upon a finding of a ‘pattern or practice.’”⁴³ Because the act instructs that a court shall order a permanent injunction and may order statutory damages, the court found there to be “no ambiguous statutory language in the SHVA ... [or] any legislative history that would indicate that the remedial measure chosen by Congress is anything but mandatory.”⁴⁴ As a result, on August 15, 2006, the court of appeals ordered the district court to issue a nationwide permanent injunction barring the retransmission of distant network programming pursuant to the act’s statutory license.⁴⁵

The District Court’s Orders Enforcing the Court of Appeals’ Decision

Ten days after the court of appeals decision, EchoStar and the Affiliate Associations⁴⁶ filed a Notice of Settlement between those parties in the district court. On August 31, Fox Broadcasting Company (Fox) filed a motion for entry of a nationwide permanent injunction in accordance with

³⁷ *Id.*

³⁸ *Id.* at 525. The court stated “[i]f these findings do not describe a ‘pattern or practice’ of violations, we do not know what does.” *Id.* at 526.

³⁹ *Id.*

⁴⁰ *Id.* “The best case scenario ... 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.”

⁴¹ *Id.* at 526.

⁴² *Id.* at 523. The court noted the one error, the erroneous conclusion that the act prohibits the use of multiple ILLR vendors, had no effect on the outcome. *Id.*

⁴³ *Id.*

⁴⁴ *Id.* at 525.

⁴⁵ *Id.* at 526. Note: there is nothing in the court order to indicate that non-continental states are excluded from the nationwide injunction.

⁴⁶ ABC Television Affiliates Association, CBS Television Network Affiliates Association, FBC Television Association, NBC Affiliates Association.

the court of appeals' decision. The district court issued two orders in response to Fox's motion on October 20, 2006.⁴⁷

EchoStar and the Affiliate Associations (the Settling Parties) made three arguments against the court's imposition of the injunction and in favor of granting the proposed consent agreement. First, the Settling Parties argued that Fox lacked standing to obtain relief because the act only applies to networks, not network stations, and Fox abandoned its cross-appeal to the court of appeals, thereby waiving its right to seek an injunction. Second, they argued that the nationwide permanent injunction Fox sought was overly broad, and considering the agreement between the Settling Parties, the court had discretion to enter more narrow relief. Finally, EchoStar argued that the entry of a nationwide permanent injunction would cause manifest injustice to the parties and EchoStar's customers. The district court rejected all three arguments.

The district court concluded that the question of Fox's standing was irrelevant because the court had "an obligation to implement the mandate issued by the Eleventh Circuit even without the request of any party." The district court also found that, according to controlling case law, it was unable to review or alter the mandate from the court of appeals, as the parties' settlement agreement did not present *new evidence* or an *intervening change in controlling law*, the only circumstances under which the district court held it would have discretion to review the court of appeals' mandate. The district court also concluded that implementing the law would not constitute "manifest injustice," as it would be "neither clearly erroneous nor contrary to law," the standard for a court making that finding.

As a result, the district court granted an Order of Permanent Injunction,⁴⁸ effective December 1, 2006, that permanently enjoined and restrained EchoStar from retransmitting "a performance or display of a work embodied in the primary transmission of any network station affiliated with ABC, Inc., CBS Broadcasting, Inc., Fox Broadcasting Company, or National Broadcasting Co."

Congressional Action

110th Congress

S. 124

Introduced by Senator Allard and substantively identical to S. 4074 introduced in the 109th Congress, section 2 would allow satellite broadcasters to retransmit signals originating in Denver to subscribers in two counties in Colorado that are in a local market comprised principally of counties located in another state.

⁴⁷ *Order Granting Motion for Entry of Injunction; And Denying Joint Stipulation to Enter Consent Judgment and Approve Settlement Agreement*, Case No. 98-2651-CIV-DIMITROULEAS (October 20, 2006). *Order of Permanent Injunction*, Case No. 98-2651-CIV-DIMITROULEAS (October 20, 2006).

⁴⁸ *Id.*

S. 258

Introduced by Senator Sununu, co-sponsored by Senator Gregg, and identical to S. 4068 introduced in the 109th Congress, it generally would allow a satellite broadcaster to continue retransmitting, despite the injunction, in states with a single full-power network station.

H.R. 602

Introduced by Representative Boren, it allows subscribers to receive the secondary transmissions of network stations located in Oklahoma so long as they either reside in Oklahoma but do not receive the secondary transmission of any network station located in Oklahoma or live in another state that contains a local market that includes some Oklahoma residents and the subscriber elects to receive the secondary transmission originating in Oklahoma.

S. 760

Introduced by Senator Salazar, it allows subscribers in certain counties in Colorado to receive secondary transmissions of network stations located in the state capital. It also permits subscribers who are located in a designated market area comprised primarily of counties outside of Colorado to receive retransmission of broadcast signals upon FCC approval and broadcaster agreement.

109th Congress

Multiple pieces of legislation were introduced in the second session of the 109th Congress, subsequent to the district court's order implementing the permanent injunction.

S. 4067 and H.R. 6402

Introduced by Senator Leahy and joined by 15 co-sponsors⁴⁹ in the Senate and introduced by Representative Mollohan and co-sponsored by Representative Rahall in the House, it would have allowed in several limited circumstances, subject to additional conditions, a satellite provider to continue providing distant network service despite a court's permanent injunction.

S. 4068 and H.R. 6340

Introduced by Senator Sununu and cosponsored by Senator Gregg in the Senate and introduced by Representative Bass and cosponsored by Representative Bradley in the House, it generally would have allowed a satellite broadcaster to continue retransmitting, despite the injunction, in states with a single full-power network station.

⁴⁹ Senators Akaka, Allard, Bingaman, Byrd, Clinton, Ensign, Enzi, Inouye, Johnson, Lincoln, Pryor, Roberts, Rockefeller, Salazar, and Snowe.

S. 4074

Introduced by Senator Allard, the relevant portion, section 2, with some caveats, would have allowed subscribers in two counties in Colorado to choose to receive transmissions of any network station located in Denver, regardless of whether they would otherwise qualify as an unserved household.

S. 4080 and H.R. 6384

Introduced by Senators Stevens and cosponsored by Senators Allard, Ensign, and Murkowski, in the Senate and introduced by Representative Boucher and joined by 18 co-sponsors⁵⁰ in the House, it would have permitted a court to approve a settlement agreement reached by at least one plaintiff and one defendant in litigation that resulted in the issuance of a permanent injunction.

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⁵⁰ Representatives Bass, Boren, Cubin, Deal, Doolittle, Doyle, Filner, Goodlatte, Herger, Lofgren, Mollohan, Pickering, Rahall, Stearns, Stupak, Terry, Thompson and Walden.

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