CBS Broadcasting, Inc. v. EchoStar Communications Corp. 450 F.3D 505 (11TH CIR. 2006)

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CBS BROADCASTING, INC. V. ECHOSTAR COMMUNICATIONS CORP.

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I. INTRODUCTION

In a case involving satellite retransmission of terrestrial broadcast network signals, the United States Court of Appeals for the Eleventh Circuit considered what actions constituted a "pattern or practice" of violations under the Satellite Home Viewer Act of 1988 ("SHVA") sufficient to institute a permanent, national injunction against the defendant satellite broadcaster.[1] The question before the Court was whether a satellite network's use of the network signals constituted a statutorily defined licensed use or a violation of network copyright interests.[2] In the case at issue, CBS Broadcasting, Inc. ("CBS") and Fox Broadcasting Company ("Fox"), along with network affiliate associations ABC Television Affiliates Association, FBC Television Association, and NBC Television Associates Association (collectively "networks" or "appellees") brought suit in the United States District Court for the Southern District of Florida claiming that EchoStar (d.b.a. "DISH Network") infringed on their exclusive right to control the retransmission of their programs by retransmitting a distant network signal to satellite subscribers.[3] Although network

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1. CBS Broad., Inc. v. EchoStar Commc'ns Corp., 450 F.3d 505 (11th Cir. 2006).
2. *Id*. at 508-09.
3. *Id*. Distant network signals are signals from outside a given subscriber's network area. *Id*. at 509 n.1. A Florida resident receiving a network signal from New York via satellite is receiving a distant network signal. *Id*.

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affiliates of ABC and NBC were represented in the action, the networks themselves were dismissed from the case.[4]

II. BACKGROUND

In its analysis, the Eleventh Circuit examined the statutory regulations governing satellite broadcast and defendant EchoStar's history of practice leading to the litigation at issue.[5]

A. Statutory Regulations

The SHVA created a statutory license that allowed satellite carriers to retransmit copyrighted network programming as a secondary transmission in order to provide network programming to viewers residing in "unserved households."[6] Households are generally considered "unserved" if they do not receive a defined signal strength through a rooftop antennae.[7] The Satellite Home Viewer Improvement Act of 1999 (SHVIA) articulates two models that may be used by a satellite company to determine whether a household is "served": the "accurate measurements model" and the "accurate predictive model."[8]

1. Accurate Measurements Model

The "accurate measurements model" requires the satellite company to make accurate physical measurements of signal strength at the subscriber's residence.[9] Using this method, signal intensity must be measured at a "minimum of five locations as close as possible to the location of the site's receiving antenna."[10]

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4. *Id.* at 509 n.3.

5. *Id.* at 510-19.

6. *Id.* at 510.   Secondary transmissions are transmissions of a broadcast signal which are not made by the original network stations. *Id.* at 510 n.6. Signals originating from a network station are known as primary transmissions. *Id.*

7. *CBS Broad.*, 450 F.3d at 510.

8. *Id.*

9. *Id.*

10. *Id.* at 511 (quoting 47 C.F.R. § 73.686(d)(1)(ii) (2006)).

2. Accurate Predictive Model

The "accurate predictive model" is an alternative to the accurate measurements model that allows the satellite carrier to avoid time-consuming individual physical measurements of signal intensity.[11] In making these "accurate predictions," satellite carriers utilize the FCC's predictive models of signal strength, which permit the satellite carrier to presumptively establish that a household cannot receive at least a sufficient signal – typically "Grade B".[12] The Court eventually found that these presumptive models have limited utility because retransmission eligibility under the SHVIA is still ultimately rooted on the signal strength actually received by the household and not a predicted strength under a predictive model.[13]

3. Evidentiary Burdens and Violations Under the SHVA and SHVIA

The SHVA as amended by the SHVIA (collectively "the Act") places the burden of proving subscriber eligibility on the satellite carriers, but places no evidentiary obligations on the network stations originating the signal.[14] Networks may nevertheless put forth evidence of a satellite subscriber's ineligibility.[15] When networks offer this evidence of subscribers' ineligibility, carriers must provide additional proof that the subscribers are unserved.[16]

The amended SHVA defines two categories of violations regarding secondary transmission of distant network service to served households.[17] An "individual violation" occurs with willful or repeated secondary transmissions to a satellite subscriber who is not eligible to receive such transmissions.[18] These individual violations may be remedied by the broad, equitable discretion of the district courts.[19] A "pattern of violations" occurs where the

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11. *Id.*
12. *Id.*
13. *CBS Broad.*, 450 F.3d at 511.
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *CBS Broad.*, 450 F.3d at 512 n.10.

satellite carrier has engaged in a willful or repeated pattern or practice of delivering distant network service to ineligible households.[20] Courts have no discretion in remedying patterns of violations.[21] In these situations, the Act requires the court to permanently enjoin the satellite carrier from utilizing secondary transmissions of any primary network station affiliated with the complaining network.[22] The court may order damages of up to $250,000 for each six-month period the satellite carrier engaged in the pattern or practice.[23]

B. EchoStar's History of Practice

Between March 1996 and July 1998, defendant EchoStar offered distant network programming through an agreement with (another satellite provider) PrimeTime 24 Joint Venture ("Prime Time 24").[24] While operating under this agreement, PrimeTime 24 determined the eligibility of potential subscribers based on the potential subscriber's qualitative evaluation of her television signal.[25] In 1998, the District Court for the Southern District of Florida issued a permanent injunction that terminated PrimeTime 24's delivery of distant network signals to subscribers who had signed up for satellite service under this method.[26]

1. Red-Light/Green-Light Determinations

Following this judgment, EchoStar terminated its relationship with PrimeTime 24 and began evaluating the eligibility of potential customers by a "red-light/green-light" method.[27] Regardless of a customer's designation, EchoStar's representatives could override these designations and grant service to ineligible

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20. *Id.* at 512.
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.* The Eleventh Circuit defined "distant network signals" as signals received from outside the subscriber's market area. *Id.* at 508 n.1.
25. *CBS Broad.*, 450 F.3d at 512.
26. *Id.*
27. *Id.* at 512-13.

customers.[28]

2. *EchoStar's Predictive Methodology*

In 1999, EchoStar created a predictive model to presumptively determine whether a given household was unserved.[29] This model consisted of three relevant factors. First, EchoStar utilized a designated market area rule ("DMA Rule") whereby only signal strength from network stations within the household's Nielson-defined market area would be considered in the analysis regardless of whether statutorily sufficient signals from other markets were available.[30] Second, EchoStar considered signal interference in determining whether a potential customer's signal was sufficient.[31] Third, EchoStar employed two vendors for its analysis and found eligibility where at least one of the two analyses considered the household to be unserved.[32]

3. *EchoStar Subscribers*

The district court also analyzed EchoStar's subscriber base.[33] The evidence established that, 78% of the 331,586 subscribers who had signed with EchoStar's distant network service pursuant to the PrimeTime 24 agreement were predicted to receive a Grade A signal from at least one of the four major networks.[34] The Court emphasized that under the Act, an unserved household cannot

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28. *Id.* at 514.
29. *Id.* at 513.
30. *Id.*
31. *CBS Broad.*, 450 F.3d at 513
32. *Id.*
33. *Id.* at 513-14.
34. *Id.* at 514. The plaintiffs presented evidence to the district court that showed that under the "red-light/green-light" policy, EchoStar signed up over sixty thousand red-light subscribers for both the CBS and Fox networks. *Id.* The district court also analyzed the list of distant network subscribers submitted by EchoStar and determined that, as of September 1999, 72% of EchoStar's total subscribers could receive Grade A signal from at least one of the four networks. *Id.* A subsequent updated subscriber list provided by EchoStar revealed that, by April 2002, 28.5% of ABC subscribers, 28.2% of CBS subscribers, 25.8% of Fox subscribers, and 29.6% of NBC subscribers were predicted to receive a Grade A signal. *Id.* at 514-15.

receive a Grade B signal, much less the stronger Grade A signal.[35]

4. *District Court Conclusions*

The district court found that EchoStar failed to prove that any of its retransmission subscribers were unserved.[36] The court also found that EchoStar's "DMA Rule" was improper, that its use of two vendors to determine eligibility was unlawful, and that no other statutory exception applied.[37] The court concluded that EchoStar's actions amounted to a "willful or repeated" copyright infringement but not a "pattern or practice" of violations.[38] In its holding, the court expressed their belief that no pattern or practice existed to warrant the "extreme sanction" of the statute's mandatory, permanent injunction against the satellite carrier.[39] Thus, the district court declined to permanently enjoin EchoStar from rebroadcasting network signals.[40] Both parties appealed this judgment.[41]

III. LEGAL ANALYSIS

The Eleventh Circuit characterized EchoStar's appeal as a belief that the trial before the district court was grossly mismanaged and utterly incompetent.[42] The plaintiffs claimed that EchoStar engaged in a pattern or practice of violations for which the district court was obliged to remedy with a permanent, nationwide injunction.[43]

The Eleventh Circuit dismissed the majority of EchoStar's seventeen claims of error but considered the carrier's appeal with regard to the predictive model methodology and retroactive application of the Act.[44]

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35. *Id.* at 514 n.15.
36. *Id.* at 515.
37. *CBS Broad.*, 450 F.3d at 515-16.
38. *Id.* at 516-17.
39. *Id.* at 517.
40. *Id.*
41. *Id.*
42. *Id.*
43. *CBS Broad.*, 450 F.3d at 517
44. *Id.* at 519.

A. EchoStar's Predictive Methodology

In its predictive methodology, EchoStar utilized several techniques which were questioned by the Court: the "DMA Rule" that limited the scope of analysis to a subscriber's market area, a consideration of interference have led to a weaker predicted signal, and the use of two vendors of predictive services that granted EchoStar two opportunities to find a given household to be unserved.[45]

1. DMA Rule

In striking down the DMA rule as illegal, the district court found that if a household received a Grade B or better signal, regardless of that signal's source, the household is served with respect to that network.[46] EchoStar claimed the Act endorsed the DMA Rule to prevent expansion of the affiliates' contractual rights.[47]

The Eleventh Circuit disagreed with EchoStar and upheld the district court's finding that the eligibility for secondary retransmission under the SHVA must be determined by the strength of the signal and not the source of the signal.[48] The court found that the revised Act's clear language, defining unserved households as households that "cannot receive. . . an over-the-air signal of a primary network station," could not be altered by EchoStar's oblique references to "local markets."[49]

2. Use of Interference

The district court concluded that the FCC does not allow consideration of interference in predictive models.[50] The Eleventh Circuit found that the Act permitted use of the predictive model set forth by the FCC, and the use of a method in nonconformity with

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45. *See id.* at 513.

46. *Id.* at 519.

47. *Id.* at 519 n.26.

48. *Id.* at 519.

49. *CBS Broad.*, 450 F.3d at 520 (quoting 17 U.S.C. § 119(d)(10)(A) (2006)).

50. *Id.* at 520.

the FCC's procedures does not comply with the Act.[51] EchoStar could not rely on its non-compliant model as presumptive evidence of eligibility.[52]

3. EchoStar's Use of Dual Predictive Model Vendors

The district court held that the Act prohibited EchoStar's simultaneous use of two vendors in assessing subscriber eligibility.[53]   The court found that EchoStar had used these multiple vendors in order to unlawfully exploit inconsistencies between the vendors' reports.[54] While the Eleventh Circuit found that this practice created difficulties in determining whether EchoStar had fulfilled its burden of proving households to be unserved, the Act did not support a conclusion that this practice was unlawful.[55]

B. Retroactivity and Present Eligibility

EchoStar alleged that the predictive model requirements of the Act were being applied retroactively to its customers.[56]   The Eleventh Circuit disagreed by holding that the Act requires customers to be "unserved" and does not require any use of a predictive model.[57] The court concluded that the Act was not a retroactive obligation, but an evidentiary tool enabling satellite carriers to prove that they met their existing obligations.[58]

EchoStar also challenged the district court's determination that the SHVA imposes an obligation to "re-test and re-qualify subscribers" with each change in the FCC predictive model.[59] EchoStar contended that subscribers, once eligible, were forever eligible.[60]   The Eleventh Circuit disagreed and determined that

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51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.*
55. *CBS Broad.*, 450 F.3d at 521.
56. *Id.*
57. *Id.*
58. *Id.* at 522.
59. *See id.* at 521-22.
60. *Id.* at 522.

EchoStar's interpretation of the SHVA could create a de facto conclusive model of consumer eligibility or force networks to perform on-site measurements for each new subscriber.[61] The Court held the SHVA requires all subscribers be presently unserved.[62]

C. Summary of EchoStar's appeal

Overall, the Eleventh Circuit disagreed only with the district court's interpretation of the SHVA, and found no statutory proscription of EchoStar's use of multiple predictive model vendors.[63] The Eleventh Circuit nevertheless declined to remand on this issue, as the Court did not find that this interpretation had an impact on EchoStar's inability to disprove willful or repeated infringement of the plaintiffs' broadcast signal copyrights.[64]

D. The Networks' Appeal

The plaintiff networks and affiliates filed a cross-appeal challenging the district court's conclusion that EchoStar had not been engaging in a "pattern or practice" of violations (a finding under which the court was not obligated to issue a nationwide permanent injunction).[65] EchoStar argued that the district court, despite mandatory and contrary statutory language, retained discretion over whether to issue a permanent injunction.[66] EchoStar also argued that the statutory remedy did not apply as long as the company was not currently engaging in a "pattern or practice" of violations.[67] The Eleventh Circuit disagreed with EchoStar's contentions and found that the district court erred by not entering a permanent injunction.[68]

To determine whether EchoStar had engaged in a "pattern or

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61. *CBS Broad.*, 450 F.3d at 522.

62. *Id.* at 522-23.

63. *Id.* at 523.

64. *Id.*

65. *Id.*

66. *Id.*

67. *CBS Broad.*, 450 F.3d at 523.

68. *Id.*

practice" of violations, the Eleventh Circuit first analyzed the SHVA language regarding the definition of "pattern or practice."[69] The Court found that the SHVA provisions require that 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 [them]," and if the pattern or practice has been carried out on a substantially nationwide basis, the court shall order a permanent injunction barring these secondary transmissions.[70] The court also examined the legislative history of the SHVA and concluded that Congress did not intend for liability to adhere as a result of good faith mistakes, provided that the violating carrier acts reasonably diligently in correcting the violations.[71]

EchoStar contended that for "pattern or practice" provisions to apply, the violation must be ongoing at the time of the trial.[72] The Court dismissed this argument and found that under this interpretation, satellite carriers could avoid the statutory injunction by becoming SHVA compliant before the completion of the plaintiff's trial.[73] The Court concluded that the networks' statutory remedy becomes available the moment a satellite carrier engages in "pattern or practice," regardless of when this pattern or practice occurred.[74] The Court held that in determining whether a pattern or practice of violations has occurred, a satellite carrier's failure to establish eligibility under their burden of proof is "tantamount to a finding of ineligibility."[75] Liability is triggered when the satellite carrier fails in this burden to a sufficient scale and degree that "pattern or practice" may be presumed.[76]

After determining the definition of "pattern or practice" of violations, the Eleventh Circuit turned to the question of whether EchoStar meets that definition.[77] The Court first analyzed the length of time in which EchoStar had used inadequate procedures

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69. *Id.*
70. *Id.* (quoting 17 U.S.C. § 119(a)(7)(B)(i) (2006)).
71. *Id.* at 523-24.
72. *Id.* at 524.
73. *CBS Broad.*, 450 F.3d at 524.
74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.* at 525.

to assess subscriber eligibility.[78] EchoStar had used deficient methods of determining subscriber eligibility from July 1998 until January 2002 and received subscribers for whom eligibility could not be established.[79] Over 20% of subscribers in each of the major networks were presumptively ineligible for service.[80] Significant percentages of EchoStar's subscribers were capable of receiving a statutorily sufficient signal, and EchoStar was unable to provide evidence that any of its subscribers were unserved or met exception requirements.[81] The Court concluded, "If these findings do not describe a 'pattern or practice' of violations, then we do not know what does."[82]

The Court found no indication that EchoStar was ever interested in complying with the SHVA.[83] Rather, EchoStar had violated the Act in "every way possible," by overriding compliance determinations of ineligibility, blatantly disregarding changes in the FCC predictive model, and generally "[seeking] to avoid its obligations under the Act at every turn."[84] Ultimately, the Court found for the plaintiffs, concluding that EchoStar had engaged in the nationwide "pattern or practice" of delivering primary transmissions to ineligible households.[85]

The Eleventh Circuit next rejected EchoStar's argument that the district court, in crafting its injunction, retained its equitable powers despite contrary statutory language.[86] The Court found no ambiguous statutory language or legislative history to indicate any remedy other than the mandatory injunction required by Congress through the SHVA.[87] Because EchoStar engaged in a "pattern or practice" of violations, the Court held that the district court was required to issue a nationwide permanent injunction barring EchoStar's provision of distant network programming pursuant to

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78. *Id.*

79. *CBS Broad.*, 450 F.3d at 525.

80. Courts do not find a pattern of practice where fewer than 20% of subscribers are ineligible. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* at 526.

84. *Id.*

85. *CBS Broad.*, 450 F.3d at 526.

86. *Id.*

87. *Id.*

the SHVA.[88]

IV. CONCLUSION

In addressing EchoStar's appeal, the Eleventh Circuit dismissed the majority of EchoStar's claims and found specifically that EchoStar's DMA rule and consideration of interference in its predictive model was inappropriate.[89]   The Court reversed the district court's holding regarding EchoStar's multiple predictive model vendor use and found that while the practice was indeed legal, it did nothing to help EchoStar's case.[90]   Finally, the court held that, because the use of a predictive model was never a requirement under the Act, its application could not be unconstitutionally retroactive.[91]

In addressing CBS' cross-appeal, the Eleventh Circuit concluded that EchoStar engaged in a "pattern or practice" of violations and, even more, found that no other conclusion was possible.[92] Therefore, the Court remanded the cause for the entry of a permanent, nationwide injunction against EchoStar.[93]

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88. *Id.* at 527.
89. *Id.* at 519-20.
90. *Id.* at 519.
91. *CBS Broad.*, 450 F.3d at 521.
92. *Id.* at 527.
93. *Id.*