

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 FOR CLARIFICATION; DENYING, AS MOOT,
MOTION TO INTERVENE**

THIS CAUSE is before the Court upon Plaintiffs' Motion for Clarification filed herein on December 1, 2006. [DE-1080]. The Court has carefully considered the Motion, Defendant EchoStar's Response [DE-1094], Non-Parties National Programming Service, LLC and Michael Mountford's Response [DE-1112], Plaintiffs' Reply [DE-1103], the exhibits filed in support, and is otherwise fully advised in the premises.

I. BACKGROUND

Plaintiffs brought this copyright infringement action in November 5, 1998 seeking injunctive relief pursuant to 17 U.S.C. § 502 and § 119(a)(5)(B). Plaintiffs claimed that Defendant EchoStar's retransmission via satellite of copyrighted programming owned by Plaintiffs violated Plaintiffs' copyright in their network television broadcasts. The principal issue in the action was whether EchoStar's actions violated the Satellite Home Viewer Act of 1988 ("SHVA"), Pub. L. No. 100-667, tit. II, 102 Stat. 2935 (codified as amended at 17 U.S.C. § 119), as amended by the Satellite Home Viewer Improvement Act of 1999 ("SHVIA")

(collectively “the Act”), 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).

Following a bench trial in April 2003, the Court found that EchoStar had not satisfied its burden of proving that its subscribers receiving transmission of distant network programming were “unserved households” and concluded that EchoStar had violated the Act. EchoStar appealed the Court’s subsequent entry of a limited permanent injunction, and Plaintiffs cross-appealed arguing that the Court was required as a matter of law to permanently enjoin EchoStar from using the Act’s statutory license to transmit distant signals to unserved households. The Eleventh Circuit Court of Appeals affirmed the Court in part and reversed in part, finding that EchoStar engaged in a “pattern or practice” of violations but remanding the case to this Court “for the entry of a nationwide permanent injunction as mandated by the Act.” CBS Broad. v. EchoStar Commc’ns, 450 F.3d 505, 527 (11th Cir. 2006) (hereinafter EchoStar II).

On October 20, 2006, this Court entered an Order of Permanent Injunction, pursuant to the Eleventh Circuit’s mandate, which states in relevant part:

[I]t is

ORDERED, ADJUDGED AND DECREED that, effective December 1, 2006, Defendants Echostar Communications Corporation (d/b/a DISH Network), Echostar Satellite Corporation, Satellite Communications Operating Corporation and DirectSat Corporation (collectively “Echostar”), their officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with EchoStar are hereby **PERMANENTLY ENJOINED AND RESTRAINED** from the secondary transmission, pursuant to the statutory license set forth in Section 119, Title 17, United States Code, of a performance or display of a word embodied in a primary transmission of any network station affiliated with ABC, Inc., CBS Broadcasting, Inc., Fox Broadcasting Company, or National Broadcasting Co. For the purposes of this permanent injunction, the terms “secondary transmission,” “primary transmission,” “primary network station,” and

“network station” shall have the meanings given those terms in Section 119, Title 17, United States Code.

[DE-1020].

Pursuant to the Permanent Injunction, EchoStar was directed to shut off transmission of distant network programming on December 1, 2006. On November 29, 2006, EchoStar entered into a Satellite Transponder Service Agreement (“the Agreement”) with non-party National Programming Service, LLC, under which National Programming Services will lease one of EchoStar’s satellite transponders to, among other things, retransmit distant network signals. See Ex. 3. to Pls.’s Mot. for Order to Show Cause. That same day Plaintiffs filed a Motion for issuance of an Order to Show Cause directing EchoStar and Non-Parties National Programming Service, LLC and Michael Mountford (collectively “NPS”) to show cause why they should not be held in contempt of the Court’s Permanent Injunction. [DE-1071]. Plaintiffs argued in that Motion that EchoStar and NPS should be held in contempt of the Permanent Injunction based on EchoStar’s leasing one of its transponders to NPS, giving NPS the capacity to deliver distant network signals to consumers who formerly received such signals from EchoStar, in what Plaintiffs alleged to be “a transparent sham of arranging for a third party . . . to do, with enormous technical and other assistance from EchoStar, precisely what the Permanent Injunction prohibits.” Pls.’ Mot. for Order to Show Cause, at 1.

On December 1, 2006, Plaintiffs filed the instant motion arguing an alternative basis for relief seeking clarification of the October 20, 2006 Permanent Injunction [DE-108], should the Court not grant Plaintiffs’ motion for a finding of contempt.¹

¹Magistrate Judge Seltzer issued a Report and Recommendation on Plaintiffs’ Motion for Order to Show Cause on December 15, 2006. [DE-1120]. Although the time for filing objections has not run, the Court need not wait for objections to the Report before ruling on the

II. DISCUSSION

Plaintiffs move for clarification of the Permanent Injunction to specifically address the issue of EchoStar's leasing its satellite facilities for retransmission of distant network stations. Plaintiffs argue that if there is any doubt from the Permanent Injunction as it now reads that EchoStar and NPS's conduct is prohibited by the Injunction, the Court has the authority to clarify the Order by adding a specific prohibition against EchoStar's leasing or otherwise making available its satellite facilities for retransmission of distant network stations by third parties to EchoStar customers. Pl.'s Mot. at 14. Specifically, Plaintiffs move the Court to add the following provision: "without limiting the generality of the prohibitions contained in the Permanent Injunction, the Injunction bars EchoStar from leasing or otherwise making available its satellite facilities for retransmission of distant network stations by third parties to EchoStar customers." Proposed Order, attached to Pls.' Supplemental Mem. [DE-1081].

A court has jurisdiction to "modify an injunction in adaptation to changed conditions" Hodges v. Dept. of Housing & Urban Dev., Housing Div. Dade County, Florida, 286 U.S. 106, 114 (11th Cir. 1989); see also Cook v. The Birmingham News, 618 F.2d 1149, 1151 (5th Cir. 1980). Plaintiffs contend that such relief is needed here to clarify any ambiguity in the language of the Injunction to make clear that the Agreement between EchoStar and NPS is in violation of the injunctive remedy provided by the Act and that EchoStar cannot do indirectly through NPS what it is forbidden to do on its own. What Plaintiffs seek is not really a clarification of the Injunction but rather a modification of that Order, to broaden its current scope

instant Motion for alternative relief.

to include the conduct it now complains of between EchoStar and NPS.²

Plaintiffs contend that the modification is necessary to maintain the deterrent effect of the Act's mandatory injunction, arguing that part of the effect derives from the wrongdoer's loss of revenue from customers who cancel their overall subscriptions, and that this effect is diluted if Echostar customers can obtain distant programming through NPS. Plaintiffs do not provide, and the Court does not find, any support for their contention that the injunctive remedy provided by the Act is intended to have such broad consequences. The Act provides that where a satellite carrier engages in a pattern or practice of violations of the Act, the "court shall order a permanent injunction barring the secondary transmission by the satellite carrier, for private home viewing, of an primary network station affiliated with the same network." 17 U.S.C. § 119(a)(7)(B)(I) (emphasis added). Similarly, the Eleventh Circuit, finding that EchoStar had engaged in a pattern or practice of violating the Act, directed this Court "to issue a nationwide permanent injunction barring the provision of distant network programming pursuant to the Act's statutory license." EchoStar II, 450 F.3d at 527. Neither the Act nor the mandate impose a requirement that EchoStar refrain from any business with customers formerly receiving distant network signals, nor does it prohibit other providers from transmitting those signals to those former customers who qualify as unserved under the Act.

As NPS points out, the injunction required for pattern or practice violations bars not only unlawful conduct but also what would otherwise be the legitimate provision of services under the Act, i.e. providing distant network services to unserved households. NPS Reply at 3. What

²The Court notes that Plaintiffs did not object to the language or scope of the Permanent Injunction at that time it was entered, on October 20, 2006.

Plaintiffs seek goes beyond that, seeking to bar not only EchoStar from providing such services but also unaffiliated third parties who seek to use EchoStar's already existing equipment to fill a gap in the market. Plaintiffs have not demonstrated that the agreement between EchoStar and NPS is anything but an arms-length business transaction to lease satellite space³, or that EchoStar is, at this point, anything more than a conduit for the signals which will be sent by NPS. See Nat'l Cable Tel. Ass'n v. FCC, 33 F.3d 66, 72 (D.C. Cir. 1994). That EchoStar has found a way to minimize harm to its customers and itself, and likely prevent a windfall to its competitors, does not require this Court to modify the injunctive relief entered to encompass conduct not intended to be banned by the Act or the Eleventh Circuit's mandate, and the Court does not find good cause to enter such broad relief.

Plaintiffs also argue that the modification is necessary because allowing NPS to proceed with the current Agreement with EchoStar would "vitiating the 'if local, no distant' provisions of the SHVERA."⁴ Pls.' Reply to NPS's Response, at 2. Plaintiffs assert that if the NPS/EchoStar Agreement is permitted, a household's ability to receive local-to-local service will have no bearing on whether it can receive distant network signals through EchoStar's satellite, despite the requirement of the Act and the Court's Injunction. The Court finds Plaintiffs' argument unpersuasive. The Agreement between NPS and EchoStar which would permit NPS to utilize EchoStar's satellite transponder expressly provides that it is NPS, not EchoStar, who will

³The Act contemplates that satellite carriers will lease their satellite space. See 17 U.S.C. § 119(d)(6) ("The term 'satellite carrier' means an entity that uses the facilities of a satellite or satellite service . . . and that owns or leases a capacity or service on a satellite in order to provide such point-to-multipoint distribution . . .").

⁴Plaintiffs presumably are referring to the requirement that a household qualify as unserved in order to receive transmission of distant network signals. See 17 U.S.C. § 119(a)(2)(A), (B).

determine subscriber eligibility to receive distant network signals. Ex. 3 to Pls.' Mot. for Order to Show Cause, at ¶ 3.A. Thus, the prohibition against EchoStar's transmission of distant programming remains intact. Plaintiffs have not provided any evidence that NPS's method of making those determinations is unlawful; if Plaintiffs believe NPS's provision of distant network signals and method of qualifying customers to be in violation of the Act, they may file a separate action against NPS. The Court will not expand the existing Injunction, however, to ban the conduct of third parties who have not been shown to have violated either the Act or the Court's prior orders.

III. CONCLUSION

For the foregoing reasons, the Court does not find that modification of its Order of Permanent Injunction is warranted. Plaintiff has not demonstrated a change in circumstances requiring modification of the Injunction nor that the relief sought is required by either the Act or the mandate of the Eleventh Circuit.

Accordingly, it is **ORDERED AND ADJUDGED** that Plaintiffs' Motion for Clarification [DE-1080] is hereby **DENIED**. Non-Party National Programming Service, LLP's Motion to Intervene [DE-1111] is **DENIED AS MOOT**.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 15th day of December, 2006.


WILLIAM P. DIMITROULEAS
United States District Judge

Copies furnished to:

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