

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DISH NETWORK L.L.C.,

Plaintiff,

v.

AMERICAN BROADCASTING
COMPANIES, INC., CBS CORPORATION,
the FOX ENTERTAINMENT GROUP, INC.,
FOX TELEVISION HOLDINGS, INC., FOX
CABLE NETWORK SERVICES, L.L.C., and
NBCUNIVERSAL MEDIA, L.L.C.,

Defendants.

12 Civ. 4155 (LTS) (KNF)

**DECLARATION OF ELYSE D. ECHTMAN IN SUPPORT
OF DISH NETWORK L.L.C.'S MOTION FOR AN
ANTI-SUIT INJUNCTION AND TEMPORARY RESTRAINING ORDER**

Pursuant to 28 U.S.C. § 1746, ELYSE D. ECHTMAN hereby declares:

1. I am a member of the bar of this Court and a partner at Orrick, Herrington & Sutcliffe LLP, attorneys for DISH Network L.L.C. ("DISH"). I submit this declaration in support of DISH's Motion for an Anti-Suit Injunction and Temporary Restraining Order.
2. DISH commenced this action against all four major television networks on May 24, 2012 at 4:06 p.m. Eastern Daylight Time. A copy of DISH's time-stamped complaint is attached hereto as Exhibit 1. The Complaint sets forth declaratory judgment claims that DISH's Hopper digital video recorder ("DVR") and its Auto Hop commercial-skipping feature for recorded shows do not directly or indirectly infringe the defendants' copyrights and that DISH is in compliance with its re-transmission agreements with the defendants.
3. By this motion, DISH seeks an anti-suit injunction, pursuant to Rule 65 of the Federal Rules of Civil Procedure, enjoining defendants Fox Entertainment Group, Inc., Fox

Television Holdings, Inc. and Fox Cable Network Services, L.L.C. (collectively “Fox”), CBS Corporation (“CBS”) and NBCUniversal Media L.L.C. (“NBC”) from proceeding with later-filed copyright infringement and breach of contract actions brought in the Central District of California. DISH further seeks a temporary restraining order against Fox which is currently attempting to expedite its later-filed California action.

4. DISH brought its action in this Court, because certain of its contracts with defendants designate this Court as a mandatory forum for disputes between the parties, certain of those contracts designate New York law as the governing law, and ABC, CBS and NBC have headquarters in the Southern District of New York, while Fox has a substantial presence in New York and its parent company, News Corporation, has its headquarters here.

The Hopper and AutoHop

5. On May 10, 2012, DISH added an “AutoHop” commercial-skipping feature to its latest high definition DVR known as the “Hopper.” The top executives of the major television networks responded to AutoHop with strongly critical statements to the press. For example, Les Moonves, the Chairman of CBS, called the AutoHop “illegal.” Tim Molloy, *CBS’s Moonves on Dish’s Auto Hop: ‘It’s Illegal’*, REUTERS (May 27, 2010), available at <http://news.yahoo.com/cbss-moonves-dishs-auto-hop-illegal-193411443.html>. A copy of this article is attached hereto as Exhibit 2.

6. A May 23, 2012 news article in The Hollywood Reporter reported that “the parent companies of the four major broadcasting networks -- Fox Broadcasting, NBCUniversal, ABC/Disney Television Group and CBS Corp. -- have begun consulting with major law firms with the expectation that litigation will be filed against Dish” and that “[t]he networks are said to be examining their Dish license agreements, looking for breaches of contract that can be alleged along with claims for copyright infringement. One top exec said a lawsuit should be expected

within a month.” Matthew Belloni, *DISH vs. TV Networks: Attorneys Ready for Showdown over Auto Hop*, THE HOLLYWOOD REPORTER (May 23, 2012), <http://www.hollywoodreporter.com/thr-esq/dish-auto-hop-tv-networks-lawsuit-327958>. A copy of this article is attached hereto as Exhibit 3.

The Fox, CBS and NBC Later-Filed Actions

7. Fox filed a copyright infringement and breach of contract action against DISH on May 24, 2012 that was file-stamped at 1:35 p.m. Pacific Daylight Time, or 4:35 p.m. Eastern Daylight Time. A copy of the civil cover sheet and the complaint filed in *Fox Broadcasting Company, Inc., Twentieth Century Fox Film Corp, and Fox Television Holdings, Inc. v. DISH Network L.L.C. and DISH Network Corp.*, Case No. 12-CV-04529 (C.D. Cal.) is attached hereto as Exhibit 4.

8. NBC filed a copyright infringement action against DISH on May 24, 2012 that was file-stamped at 2:32 p.m. Pacific Daylight Time, or 5:32 p.m. Eastern Daylight Time. A copy of the complaint filed in *NBC Studios, L.L.C., Universal Network Television, L.L.C., Open 4 Business Productions L.L.C., and NBCUniversal Media, L.L.C. v. DISH Network Corporation and DISH Network L.L.C.*, Case No. 12-CV-04536 (C.D. Cal.) is attached hereto as Exhibit 5.

9. CBS filed a copyright infringement action against DISH on May 24, 2012 that was file-stamped at 3:29 p.m. Pacific Daylight Time, or 6:29 p.m. Eastern Daylight Time. A copy of the complaint filed in *CBS Broadcasting Inc., CBS Studios Inc., and Survivor Productions L.L.C. v. DISH Network Corporation and DISH Network L.L.C.*, Case No. 12-CV-4551 (C.D. Cal.) is attached hereto as Exhibit 6.

10. When Fox filed its action, it submitted an *ex parte* application by order to show cause to shorten the time to hear a motion for expedited discovery in support of a prospective

preliminary injunction motion. In Fox's application, Fox noted that it is "mindful that [its] Application is being filed before a holiday weekend and that the Court is closed on Monday, May 28, 2012," however, Fox requested a briefing schedule that required substantive opposition papers from DISH "no later than Wednesday, May 30, 2012." A copy of Fox's *ex parte* application to shorten time is attached hereto as Exhibit 7.

11. This litigation among DISH and the networks has received extensive press coverage. The Los Angeles Times reported that "[t]he major broadcast networks' legal skirmish with satellite television service Dish Network over its new ad-skipping device is shaping up to be a titanic struggle with enormous implications." Meg James & Dawn C. Chmielewski, *Networks' Fight with Dish over Ad-Skipping has Huge Implications*, L.A. TIMES, May 25, 2012, <http://www.latimes.com/entertainment/envelope/cotown/la-et-ct-broadcast-networks-fight-with-dish-over-adskipping-has-enormous-implications-20120525,0,4852990.story>. A copy of this article is attached hereto as Exhibit 8.

The Re-Transmission Agreements Between DISH And Defendants

12. DISH is a party to re-transmission agreements with the defendants. Certain of those agreements designate venue for a dispute in this Court and certain of those agreements designate New York law as the choice of law, as shown in the following chart:

Network	Mandatory Venue Clause	Governing Law	Time Network Filed Suit
FOX	n/a	New York	4:35 EDT - 29 minutes after DISH filed
NBC	n/a	New York	5:32 EDT - 86 minutes after DISH filed
CBS	New York or Colorado	Colorado	6:29 EDT - 143 minutes after DISH filed

ABC	New York	New York	n/a
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13. The relevant clauses from the re-transmission agreements are excerpted below.

Based on confidentiality provisions in those agreements, it would be inappropriate to publicly file the entirety of the agreements with this Court.

14. DISH's agreement with Fox provides:

30. Miscellaneous. This Agreement and the license granted by Network to Affiliate under this Agreement are limited by, and subject to, League Restrictions. This Agreement shall be governed by and construed in accordance with the laws of the State of New York applicable to contracts made and fully performed therein, except to the extent that the parties' respective rights and obligations are subject to mandatory local, State and Federal laws or regulations. Any provision of this Agreement which logically would be expected to survive termination or expiration, shall survive for a reasonable time period under the circumstances, whether or not specifically provided in this Agreement. The failure of either party to insist upon strict performance of any provision of this Agreement shall not be construed as a waiver of any subsequent breach of the same or similar nature. Except as otherwise expressly provided, all rights and remedies reserved to either party shall be cumulative and shall not be in limitation of any other right or remedy which such party may have at law or in equity.

15. DISH's agreement with NBC provides:

10.08 Governing Law

This Agreement and all collateral matters shall be construed in accordance with the laws of the State of New York applicable to agreements made and to be performed therein.

16. DISH's agreement with CBS provides:

18. Applicable Law. This Agreement shall be governed by and construed under and in accordance with the laws of the State of Colorado, without regard to conflict of law rules thereof, subject to applicable provisions of the Communications Act of

1934, as amended, and applicable rules, regulations and orders of the Federal Communications Commission. The federal and state courts located in the city and state of Denver, Colorado and the Southern District of New York shall have exclusive jurisdiction to hear and determine any claims, disputes, actions or suits that may arise under or out of this Agreement and each party hereby waives its right to make any claim to the contrary. The provisions of this Section 18 shall survive the termination or cancellation of this Agreement.

17. DISH's agreement with ABC provides:

21. Governing Law and Jurisdiction.

(a) The obligations of EchoStar and Broadcaster under this Agreement are subject to all applicable federal, state and local laws, rules, and regulations (including, but not limited to, the Communications Act of 1934 and the Act, each as amended from time to time, and the rules and regulations of the FCC.

(b) This Agreement and all collateral matters relating thereto shall be construed in accordance with the laws of the State of New York, applicable to agreements fully made and to be performed entirely within such State, without regard to principles of conflicts of law.

(c) The Federal and state courts located in the County of New York in the State of New York shall have exclusive jurisdiction to hear and determine any claims, disputes, actions or suits which may arise under or out of this Agreement and each party hereby waives its right to make any claim to the contrary.

Certification of DISH's Compliance with this Court's Individual Rules 2(b)(i)(A) and 2(b)(ii)

18. My partner, Peter Bicks wrote to counsel for Fox, CBS and NBC on Friday, May 25, 2012, the day after the California suits were filed, and requested that those defendants agree to dismiss, transfer or stay their later-filed California cases in deference to the first-filed suit in this Court. In the absence of such an agreement, Mr. Bicks asked that Fox, CBS and NBC commit, at a minimum, to hold their California actions in abeyance pending a determination of proper venue by this Court. That letter specifically disclosed, "[i]n the absence of such consent, DISH will have no choice but to move for relief before Judge Swain." Mr. Bicks suggested that confer by telephone and schedule a time to talk over the three-day weekend. A copy of DISH's May 25 letter is attached hereto as Exhibit 9.

19. Fox's counsel, David R. Singer at Jenner & Block LLP sent a responsive letter to Mr. Bicks the same day. Mr. Singer represented that Fox would be moving to dismiss this action and characterized DISH's declaratory judgment action as a "sham." Notwithstanding Fox's own order to show cause, Mr. Singer offered to schedule a telephone call no earlier than Tuesday, May 29, 2012, or Wednesday, May 30, 2012. Mr. Singer's letter did not respond to DISH's

request that Fox agree to hold its action in abeyance. A copy of Mr. Singer's May 25 letter is attached hereto as Exhibit 10.

20. On Saturday, May 26, 2012, I sent Mr. Singer a follow-up email seeking a specific response to DISH's request that Fox's California action be voluntarily held in abeyance. In light of Fox's order to show cause submission, we again requested the courtesy of a telephone call to meet and confer over the weekend. We offered to postpone the time for our call if Fox would agree to hold its order to show cause in abeyance. A copy of my May 26 email message is attached hereto as Exhibit 11.

21. On Sunday, May 27, 2012, I sent Mr. Singer another email requesting a specific response to DISH's request that Fox agree to hold its order to show cause in abeyance. In addition, I proposed that the parties speak by telephone on Monday, May 28, 2012 at 2 p.m. Eastern. A copy of my May 27 email message is attached hereto as Exhibit 12.

22. Mr. Singer responded by email later that day, specifically refusing to stay Fox's California action or to take Fox's order to show cause off of the calendar. Mr. Singer also refused to speak on the telephone prior to Tuesday, May 29. Mr. Singer's email message further set forth the basis for Fox's disagreement with DISH over the priority of DISH's first-filed action. A copy of Mr. Singer's May 27 email message is attached hereto as Exhibit 13.

23. I responded to Mr. Singer by email on May 28, 2012. I offered to speak with Mr. Singer by telephone at any time that day or in the early morning of Tuesday, May 29, 2012. I advised Mr. Singer that at this point DISH had no choice but to file a motion for relief with this Court seeking, among other things, an order temporarily restraining Fox from proceeding on an expedited basis in California. I asked Mr. Singer to provide the name of a colleague located in

New York who might be available to appear in Court on Tuesday, if necessary. A copy of my May 28 email message is attached hereto as Exhibit 14.

24. Late on Monday, May 28, 2012, Amy Gallegos at Jenner & Block, a colleague of Mr. Singer, sent me an email that, among other things, identified counsel in Jenner & Block's New York office. A copy of Ms. Gallegos's May 28 email message is attached hereto as Exhibit 15.

25. With respect to CBS and NBC, we did not receive an immediate response to Mr. Bicks's letter of May 25, 2012. In order to ensure that the letter was received, I sent follow-up copies by fax and email. On May 27, 2012, counsel for CBS and NBC, Robert Rotstein of Mitchell Silberberg & Knupp LLP, responded by email confirming receipt of the letter. Mr. Rotstein wrote that he would provide a substantive response during the following week. A copy of Mr. Rotstein's email is attached hereto as Exhibit 16.

26. On Monday, May 28, 2012, I wrote to Mr. Rotstein by email to provide him with an update on DISH's meet and confer process with counsel for Fox. I advised Mr. Rotstein that, because of Fox's position with respect to its California order to show case, DISH was left with no choice but to move for a temporary restraining order on Tuesday, May 29, 2012, and that in the interest of avoiding duplicative motion practice, DISH would also be seeking an anti-suit injunction against CBS and NBC by the same motion. I also asked Mr. Rotstein to identify a colleague in New York whom we might contact in the event that an appearance is necessary today. Mr. Rotstein identified his colleague Jane G. Stevens. A copy of the email chain between me and Mr. Rotstein is attached hereto as Exhibit 17.

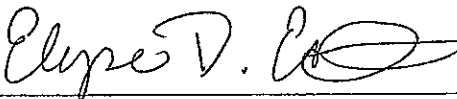
27. We have provided counsel for Fox, CBS and NBC with copies of DISH's motion papers prior to submitting them to Chambers.

28. DISH does intend to submit papers in Fox's California action today requesting that the district court in that case decline to entertain Fox's order to show cause.

29. No previous application for the same or similar relief has been made, and no other provisional remedy with respect to the matters raised herein has been sought or secured before this or any other Court.

I declare under penalty of perjury that the forgoing is true and correct.

Executed on May 29, 2012



Elyse D. Echtman