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19 **UNITED STATES DISTRICT COURT**  
20 **CENTRAL DISTRICT OF CALIFORNIA**  
21 **SOUTHERN DIVISION**

22 ECHOSTAR SATELLITE  
23 CORP., et al.,

24 Plaintiffs/  
25 Counterclaim  
26 Defendants,

27 v.

28 NDS GROUP PLC, et al.,

Defendants/  
Counterclaim  
Plaintiffs.

No. SA CV 03-950 DOC(JTL)

**ECHOSTAR'S OBJECTIONS TO  
NDS'S SEPARATE PROPOSED  
JURY INSTRUCTIONS**

Date: April 9, 2008  
Time: 8:30 a.m.  
Dept: Judge David Carter  
Courtroom 9D

1 Plaintiffs EchoStar Satellite Corporation, EchoStar Communications  
2 Corporation, EchoStar Technologies Corporation, and NagraStar LLC (collectively  
3 referred to as “Plaintiffs” or “EchoStar”) for their objections to Defendants NDS’s  
4 Separate Proposed Jury Instructions state as follows:<sup>1</sup>

5  
6 **“Stipulated Facts,” NDS’s Sep. Prop. Jury Instr. at 3-4:**

7 Plaintiffs object to Defendants’ Proposed Instruction “Stipulated Facts” on  
8 the following grounds:

9 This Court’s January 16, 2008 Order establishes that Tarnovsky did not use  
10 the alias xbr21 to make the December 23, 2000 posting. January 16, 2008 Order 1)  
11 Granting in Part and Denying in Part Defendants’ Motions for Partial Summary  
12 Judgment on a) The “xbr21” Posting; b) the “NiPpEr2000” Posting and the Nipper  
13 Aliases; c) the Distribution Network, Dependent Claims and § 17200 Claim; and d)  
14 Damages After February 2001 or for Piracy of Cards Other Than the DNASP-II,  
15 ROM 3 Card; 2) Granting in Part and Denying in Part Plaintiffs’ Motion for  
16 Summary Judgment on Defendants’ Counterclaims; 3) Granting the Parties Leave  
17 to Amend the Complaint & Answer; 4) Granting Plaintiffs’ Motion to Reclassify  
18 Documents; 5) Granting Defendants’ Request to Compel; 6) Reopening Discovery;  
19 7) Ordering Supplemented Interrogatory Responses (“Jan. 16 Order”) at 17.

20 However, whether Defendants are liable for damages arising out of this direct  
21 “reposting” or “republication” of the nipperclauz.txt, originally posted on  
22 December 21, 2000, is still at issue.

23 The January 16, 2008 Order also establishes that there is a genuine issue of  
24 material fact as to the extent of the harm caused by the hacking of the ROM 3 card,  
25 and whether it in turn necessitated a global card swap of the entire DNASP-II  
26 system – including ROM 2, ROM 3, ROM 10, ROM 11. Jan. 16 Order at 29-41.

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<sup>1</sup> NDS did not number their Separate Proposed Jury Instructions, therefore they are referenced herein by title.

1 Plaintiffs therefore propose as an alternative their own Separate Proposed  
2 Jury Instruction No. 2. EchoStar's Sep. Prop. Jury Instr. at 4-5, No. 2.

3  
4 **“Reverse Engineering,” NDS's Sep. Prop. Jury Instr. at 5-6:**

5 Plaintiffs object to Defendants' Proposed Instruction “Reverse Engineering”  
6 on the grounds that the last paragraph of the instruction will mislead the jury as to  
7 the correct law related to reverse engineering (“For all times relevant to this  
8 litigation, the law permitted one company to reverse engineer another company's  
9 technology.”).

10 The law does not permit one company to freely and without limitation  
11 reverse engineer the technology of another. Rather, a company must obtain the  
12 technology that is reversed engineered through lawful means; the reverse  
13 engineering must be for lawful purposes; and the act of reverse engineering must  
14 not itself violate protections afforded the technology. *See* 17 U.S.C. § 1201(f)(1)  
15 (“a person who has *lawfully* obtained the right to use a copy of a computer program  
16 may circumvent a technological measure that effectively controls access to a  
17 particular portion of that program for the sole purpose of identifying and analyzing  
18 those elements of the program that are necessary to achieve interoperability of an  
19 independently created computer program with other programs...to the extent any  
20 such acts of identification and analysis do not constitute infringement under this  
21 title”)(emphasis added); *see also Bonito Boats, Inc. v. Thundercraft Boats*, 489 U.S.  
22 141, 159, 109 S. Ct. 971, 982 (1989) (federal patent law protects against  
23 unauthorized reverse engineering of patented technology).

24 Moreover, the unlawful conduct in which Plaintiffs have alleged Defendants  
25 engaged encompasses multiple acts in addition to reverse engineering, which do not  
26 require as a predicate unlawful reverse engineering. This instruction is therefore  
27 unnecessary, and Plaintiffs request that the Court decline to charge the jury with  
28

1 this instruction. If the Court charges the jury with this instruction, Plaintiffs  
2 propose striking the last paragraph of the instruction.

3  
4 **“Digital Millennium Copyright Act – 17 U.S.C. § 1201(a)(1)(A),” NDS’s Sep.**  
5 **Prop. Jury Instr. at 7-8:**

6 Plaintiffs object to Defendants’ Proposed Instruction “Digital Millennium  
7 Copyright Act – 17 U.S.C. § 1201(a)(1)(A)” as it misstates the law. Although the  
8 DMCA does not explicitly provide for vicarious liability for circumvention of a  
9 technological measure, a defendant may be liable for the circumvention done by  
10 another person through common law principles of vicarious liability. *See Metro-*  
11 *Goldwyn Mayer Studios, Inc. v. Grokster*, 545 U.S. 913, 931, 125 S. Ct. 2764, 2776  
12 (2005) (“One infringes contributorily by intentionally inducing or encouraging  
13 direct infringement, and infringes vicariously by profiting from direct infringement  
14 while declining to exercise a right to stop or limit it. Although ‘[t]he Copyright Act  
15 does not expressly render anyone liable for infringement committed by another,’  
16 these doctrines of secondary liability emerged from common law principles and are  
17 well established in the law.”) (internal citations omitted). Because these doctrines  
18 of secondary liability are at issue, Defendants’ Proposed Instruction “Digital  
19 Millennium Copyright Act – 17 U.S.C. § 1201(a)(1)(A)” is inappropriate and  
20 instead it is necessary to instruct the jury as to the full scope of potential liability for  
21 violations of the DMCA.

22 Plaintiffs therefore propose as an alternative their own proposed Jury  
23 Instruction No. 7. EchoStar’s Sep. Prop. Jury Instr. at 14-15, No. 7.

24  
25 **“17 U.S.C. § 1201(a)(1)(A) - Geographical Boundary,” NDS’s Sep. Prop. Jury**  
26 **Instr. at 9-10:**

27 Plaintiffs object to Defendants’ Proposed Instruction “17 U.S.C. §  
28 1201(a)(1)(A) - Geographical Boundary” because it misstates the law or will

1 mislead the jury as to the correct law. United States copyright law applies to an act  
2 of infringement completed within the United States even though a “primary  
3 activity” outside the boundaries of the United States which does not constitute an  
4 infringement cognizable under United States copyright law is not a basis of  
5 copyright infringement liability. *Subafilms, Ltd. v. MGM-Pathe Communications*  
6 *Co.*, 24 F.3d 1088, 1099 (9th Cir. 1994). However, a defendant may be liable for  
7 copyright infringement consummated in the United States when some conduct  
8 leading to that infringement occurred outside the United States. *E.g., GB*  
9 *Marketing USA, Inc. v. Gerolsteiner Brunnen GmbH & Co.*, 782 F. Supp. 763  
10 (W.D. N.Y. 1991) (German company liable for copyright infringement where it  
11 affixed the offending water bottle labels in Germany but sold the water bottles to an  
12 American company for distribution). Therefore, Defendants’ Proposed Instruction  
13 “17 U.S.C. § 1201(a)(1)(A) - Geographical Boundary,” which states that “[c]onduct  
14 that did not occur entirely within the United States cannot be a violation of the  
15 DMCA,” misstates the law. Instead, a defendant can be liable for a copyright  
16 infringement that was consummated in the United States, even when conduct that  
17 lead to the infringement occurred outside the United States.

18 Plaintiffs therefore request that the Court decline to give any geographic  
19 limitation instruction, and particularly Defendants’ Proposed Instruction, because it  
20 is contrary to the law. If the Court charges the jury with Defendants’ Proposed  
21 Instruction “17 U.S.C. § 1201(a)(1)(A) - Geographical Boundary,” at a minimum,  
22 Plaintiffs request that the parties and the Court fashion and appropriate, specific  
23 instruction concerning any admitted evidence of conduct that occurred outside the  
24 United States.

1 **“17 U.S.C. § 1201(a)(1)(A) – Time Restriction,” NDS’s Sep. Prop. Jury Instr.**  
2 **at 11-12:**

3 Plaintiffs object to Defendants’ Proposed Instruction “17 U.S.C. §  
4 1201(a)(1)(A) – Time Restriction” on the grounds that it is premature and the  
5 wording of this instruction is confusing. If Plaintiffs introduce evidence of conduct  
6 that violates 17 U.S.C. § 1201(a)(1)(A) which occurred prior to October 28, 2000,  
7 then an instruction regarding the date that the 17 U.S.C. § 1201(a)(1)(A) became  
8 effective may be appropriate, and the parties and the Court should at that time  
9 fashion an appropriate, specific instruction concerning any admitted evidence  
10 concerning conduct that occurred before October 28, 2000.

11  
12 **“Digital Millennium Copyright Act - 17 U.S.C. § 1201(a)(1)(A) – Damages –**  
13 **Actual Damages and Defendants’ Profits,” NDS’s Sep. Prop. Jury Instr. at 13-**  
14 **14:**

15 Plaintiffs object to Defendants’ Proposed Instruction “Digital Millennium  
16 Copyright Act - 17 U.S.C. § 1201(a)(1)(A) – Damages – Actual Damages and  
17 Defendants’ Profits” on the grounds that the last paragraph is premature for the  
18 reasons stated above in Plaintiffs’ Objections to Defendants’ Proposed Instruction,  
19 “17 U.S.C. § 1201(a)(1)(A) – Time Restrictions.” If the Court charges the jury  
20 with Defendants’ Proposed Instruction “17 U.S.C. § 1201(a)(1)(A) – Time  
21 Restriction,” or Plaintiffs’ proposed alternative, Exhibit “C” hereto, Plaintiffs  
22 further object to Defendants’ Proposed Instruction “Digital Millennium Copyright  
23 Act - 17 U.S.C. § 1201(a)(1)(A) – Damages – Actual Damages and Defendants’  
24 Profits” because it is duplicative of Defendants’ Proposed Instruction entitled “17  
25 U.S.C. § 1201(a)(1)(A) – Time Restriction.” Plaintiffs therefore propose as an  
26 alternative Plaintiffs’ Proposed Separate Jury Instruction No. 8; this instruction is  
27 identical to Defendants’ Proposed Instruction “Digital Millennium Copyright Act -  
28 17 U.S.C. § 1201(a)(1)(A) – Damages – Actual Damages and Defendants’ Profits,”

1 with the exception of Defendants' proposed temporal scope language (*i.e.*,  
2 "Plaintiff may only recover for damages for conduct that occurred after October 28,  
3 2000 for this claim.") EchoStar's Sep. Prop. Jury Instr. at 16-17, No. 8.

4  
5 **"Digital Millennium Copyright Act - 17 U.S.C. § 1201(a)(2)," NDS's Sep. Prop.**  
6 **Jury Instr. at 15-16:**

7 Plaintiffs object to Defendants' Proposed Instruction "Digital Millennium  
8 Copyright Act - 17 U.S.C. § 1201(a)(2)" as it misstates the law or will mislead the  
9 jury as to the correct law. Computer software or code is protected by Title 17,  
10 United States Copyright Law. 17 U.S.C. § 101 ("Literary works" are works, other  
11 than audiovisual works, expressed in words, numbers, or other verbal or numerical  
12 symbols or indicia, regardless of the nature of the material objects, such as books,  
13 periodicals, manuscripts, phonorecords, film, tapes, disks, or cards, in which they  
14 are embodied."); *see also Apple Computer, Inc. v. Franklin Computer Corp.*, 714  
15 F.2d 1240, 1249 (3d Cir. 1983) ("A computer program, whether in object code or  
16 source code, is a "literary work" and is protected from unauthorized copying,  
17 whether from its object or source code version"); 1-2 Nimmer on Copyright § 2.04.  
18 Because the copyrighted work at issue is code, it is necessary and appropriate for  
19 the jury to understand that computer software code is protected by Title 17.

20 Plaintiffs therefore propose their Separate Proposed Jury Instruction No. 10.  
21 EchoStar's Sep. Prop. Jury Instr. at 20-21, No. 10.

22  
23 **"17 U.S.C. § 1201(a)(2) - Geographical Boundary," NDS's Sep. Prop. Jury**  
24 **Instr. at 17-18:**

25 Plaintiffs object to Defendants' Proposed Instruction "17 U.S.C. § 1201(a)(2)  
26 - Geographical Boundary" for the reasons set forth in their objection to Defendants'  
27 Proposed Jury Instruction entitled "17 U.S.C. § 1201(a)(1)(A) - Geographical  
28 Boundary." *Supra* at 5.

1  
2 **“17 U.S.C. § 1201(a)(2) – Time Restriction,” NDS’s Sep. Prop. Jury Instr. at**  
3 **19-20:**

4 Plaintiffs object to Defendants’ Proposed Instruction “17 U.S.C. § 1201(a)(2)  
5 – Time Restriction” on the grounds that it is likely to mislead or confuse the jury  
6 concerning an element that Plaintiffs must prove to prevail on their 17 U.S.C. §  
7 1201(a)(2) claim (*i.e.*, that Defendants’ unlawful conduct occurred on or after June  
8 6, 2000). However, Defendants have the burden of proof on their Statute of  
9 Limitations Affirmative Defense. Model Civ. Jury Instr. 9th Cir. 1.2 (2007).  
10 Therefore Plaintiffs propose as an alternative their Separate Proposed Jury  
11 Instruction No. 28. EchoStar’s Sep. Prop. Jury Instr. at 61-62, No. 28.

12  
13 **“Digital Millennium Copyright Act - 17 U.S.C. § 1201(a)(2) – Damages –**  
14 **Actual Damages and Defendants’ Profits,” NDS’s Sep. Prop. Jury Instr. at 21-**  
15 **22:**

16 Plaintiffs object to Defendants’ Proposed Instruction “Digital Millennium  
17 Copyright Act - 17 U.S.C. § 1201(a)(2) – Damages – Actual Damages and  
18 Defendants’ Profits” on the grounds that the last paragraph of this instruction  
19 misstates the law or will mislead or confuse the jury. As noted above, Defendants  
20 have the burden of proof on their Statute of Limitations Affirmative Defense;  
21 including Defendants’ proposed reference to the statutory period in this instruction  
22 will tend to mislead or confuse the jury as to which party as the burden of proof on  
23 Defendants’ affirmative defense. Also, Defendants’ proposed reference to the  
24 geographic boundary misstates the law regarding the geographical limitations of  
25 liability for violations of the DMCA. Moreover, if the Court charges the jury with  
26 Defendants’ Proposed Instruction “17 U.S.C. § 1201(a)(2) – Time Restriction” or  
27 Plaintiffs’ Separate Proposed Jury Instruction No. 28, there is no need to repeat the  
28 substance of that instruction. Likewise, if the Court charges the jury with

1 Defendants' Proposed Instruction, "17 U.S.C. § 1201(a)(2) – Geographic  
2 Boundary," or an appropriate alternative, there is no need to repeat the substance of  
3 that instruction.

4 Plaintiffs therefore propose as an alternative their Separate Proposed Jury  
5 Instruction No. 11. EchoStar's Sep. Prop. Jury Instr. at 22-23, No. 11.

6  
7 **"Digital Millennium Copyright Act - 17 U.S.C. § 1201(a)(2) – Damages –**  
8 **Statutory Damages," NDS's Sep. Prop. Jury Instr. at 23-24:**

9 Plaintiffs object to Defendants' Proposed Instruction "Digital Millennium  
10 Copyright Act - 17 U.S.C. § 1201(a)(2) – Damages – Statutory Damages" for the  
11 reasons set forth in their objections to Defendants' Proposed Instruction "Digital  
12 Millennium Copyright Act – 17 U.S.C. § 1201(a)(2) – Damages – Actual Damages  
13 and Defendants' Profits," above. Plaintiffs therefore propose as an alternative their  
14 Separate Proposed Jury Instruction No. 12. EchoStar's Sep. Prop. Jury Instr. at 24-  
15 25, No. 12.

16  
17 **"47 U.S.C. § 605(a) – Time Restriction," NDS's Sep. Prop. Jury Instr. at 25-26:**

18 Plaintiffs object to Defendants' Proposed Instruction "47 U.S.C. § 605(a) –  
19 Time Restriction" on the grounds that it will tend to mislead or confuse the jury  
20 concerning an element that Plaintiffs must prove to prevail on their 47 U.S.C. §  
21 605(a) claim (*i.e.*, that Defendants' unlawful conduct occurred on or after June 6,  
22 2000). However, Defendants have the burden of proof on their Statute of  
23 Limitations Affirmative Defense. Model Civ. Jury Instr. 9th Cir. 1.2 (2007).  
24 Therefore Plaintiffs propose as an alternative their Separate Proposed Jury  
25 Instruction No. 28. EchoStar's Sep. Prop. Jury Instr. at 61-62, No. 28.

1 **“Communications Act – 47 U.S.C. § 605(a) – Damages – Actual Damages and**  
2 **Defendants’ Profits,” NDS’s Sep. Prop. Jury Instr. at 27-28:**

3 Plaintiffs object to Defendants’ Proposed Instruction “Communications Act –  
4 47 U.S.C. § 605(a) – Damages – Actual Damages and Defendants’ Profits” on the  
5 grounds that the last paragraph of this instruction is misleading. As noted above,  
6 Defendants have the burden of proof on their Statute of Limitations Affirmative  
7 Defense. Including reference to the statutory period in this instruction will tend to  
8 mislead or confuse the jury as to which party has the burden of proof on  
9 Defendants’ affirmative defense. Moreover, if the Court charges the jury with  
10 Defendants’ Proposed Instruction “47 U.S.C. § 605(a) – Time Restriction” or  
11 Plaintiffs’ Separate Proposed Jury Instruction No. 28, there is no need to repeat the  
12 substance of those instructions. Therefore, Plaintiffs propose as an alternative their  
13 Separate Proposed Jury Instruction No. 13. EchoStar’s Sep. Prop. Jury Instr. at 26-  
14 27, No. 13

15  
16 **“Communications Act – 47 U.S.C. § 605(a) – Damages – Statutory Damages,”**  
17 **NDS’s Sep. Prop. Jury Instr. at 29-30:**

18 Plaintiffs object to Defendants’ Proposed Instruction “Communications Act –  
19 47 U.S.C. § 605(a) – Damages – Statutory Damages” for the reasons set forth in  
20 their objections to Defendants’ Proposed Instruction “Communications Act – 47  
21 U.S.C. § 605(a) – Damages – Actual Damages and Defendants’ Profits,” above.  
22 Plaintiffs propose their Separate Jury Instruction No. 14. EchoStar’s Sep. Prop.  
23 Jury Instr. at 28-29, No. 14.

24  
25 **“California Penal Code § 593d(a) – Time Restrictions,” NDS’s Sep. Prop. Jury**  
26 **Instr. at 31-32:**

27 Plaintiffs object to Defendants’ Proposed Instruction “California Penal Code  
28 § 593d(a) – Time Restrictions” on the grounds that it will tend to mislead or

1 confuse the jury concerning an element that Plaintiffs must prove to prevail on their  
2 California Penal Code § 593d(a) claim (*i.e.*, that Defendants’ unlawful conduct  
3 occurred on or after June 6, 2000). However, Defendants have the burden of proof  
4 on their Statute of Limitations Affirmative Defense. Model Civ. Jury Instr. 9th Cir.  
5 1.2 (2007). Therefore, Plaintiffs propose as an alternative their Separate Proposed  
6 Jury Instruction No. 28. EchoStar’s Sep. Prop. Jury Instr. at 61-62, No. 28.

7  
8 **“California Penal Code § 593d(a) – Geographic Limitation,” NDS’s Sep. Prop.**  
9 **Jury Instr. at 33-34:**

10 Plaintiffs object to Defendants’ Proposed Instruction “California Penal Code  
11 § 593d(a) – Geographic Limitation” on several grounds. First, it misstates the law  
12 with respect to the extraterritorial application of California’s penal code. California  
13 Penal Code § 27 states that it is applicable to, *inter alia*, “1) All persons who  
14 commit, in whole or in part, any crime within this state; and ... 3) All who, being  
15 without this state, cause or aid, advise or encourage, another person to commit a  
16 crime within this state, and are afterwards found therein.” Moreover, California  
17 Penal Code § 778(a) imposes liability on one who, with the intent to commit a  
18 crime, engages in any conduct within the state of California in execution or part  
19 execution of that person’s intent, even if the crime is ultimately consummated out  
20 of the state. Therefore, one may be liable under the California Penal Code for  
21 conduct that occurred outside the state of California.

22 Second, territorial application of the California Penal Code is a question for  
23 the court, not the jury. *People v. Betts*, 34 Cal. 4th 1039, 1048; 103 P.3d 883, 888  
24 (2005).

25 Finally, Plaintiffs object to Defendants’ citation in support of their Proposed  
26 Instruction “California Penal Code § 593d(a) – Geographic Limitation,” to Judicial  
27 Council of California Jury Instructions 14.71.1, because such an instruction does  
28 not appear to exist.

1 Defendants' Proposed Instruction "California Penal Code § 593d(a) –  
2 Geographic Limitation" is wholly inappropriate because it misstates the law and  
3 because there is no need to provide an instruction regarding the territorial  
4 application of California Penal Code § 593d(a). Plaintiffs therefore request that the  
5 Court not charge the jury with Defendants' Proposed Instruction "California Penal  
6 Code § 593d(a) – Geographic Limitation."

7  
8 **"California Penal Code § 593d(a) – Damages – Actual Damages," NDS's Sep.  
9 Prop. Jury Instr. at 35-36:**

10 Plaintiffs object to Defendants' Proposed Instruction "California Penal Code  
11 § 593d(a) – Damages – Actual Damages" on the grounds that the last paragraph of  
12 this instruction misstates the law or will mislead or confuse the jury. As noted  
13 above, Defendants have the burden of proof on their Statute of Limitations  
14 Affirmative Defense; including reference to the statutory period in this Instruction  
15 will tend to mislead or confuse the jury as to which party has the burden of proof on  
16 Defendants' affirmative defense. Moreover, if this Court charges the jury with  
17 Defendants' Proposed Instruction entitled "47 U.S.C. § 605(a) – Time Restriction"  
18 or Plaintiffs' Separate Proposed Instruction No. 28, there is no need to repeat the  
19 substance of those instructions.

20 Additionally, as noted above, Defendants' inclusion of an instruction  
21 regarding the territorial application of California Penal Code § 593d(a) is improper.  
22 Plaintiffs therefore propose as an alternative their Separate Jury Instruction No. 16.  
23 EchoStar's Sep. Prop. Jury Instr. at 33-34, No. 16.

24  
25 **"California Penal Code § 593e(b) – Time Restrictions," NDS's Sep. Prop. Jury  
26 Instr. at 37-38:**

27 Plaintiffs object to Defendants' Proposed Instruction "California Penal Code  
28 § 593e(b) – Time Restrictions" on the grounds that it will tend to mislead or

1 confuse the jury concerning an element that Plaintiffs must prove to prevail on their  
2 California Penal Code § 593e(b) claim (*i.e.*, that Defendants' unlawful conduct  
3 occurred on or after June 6, 2000). However, Defendants have the burden of proof  
4 on their Statute of Limitations Affirmative Defense. Model Civ. Jury Instr. 9th Cir.  
5 1.2 (2007). Therefore, Plaintiffs propose as an alternative their Separate Proposed  
6 Jury Instruction No. 28. EchoStar's Sep. Prop. Jury Instr. at 61-62, No. 28.

7  
8 **“California Penal Code § 593e(b) – Geographic Limitation,” NDS's Sep. Prop.**  
9 **Jury Instr. at 39-40:**

10 Plaintiffs object to Defendants' Proposed Instruction “California Penal Code  
11 § 593e(b) – Geographic Limitation” on several grounds. First, it misstates the law  
12 with respect to the extraterritorial application of California's penal code. Cal. Penal  
13 Code § 27 states that it is applicable to, *inter alia*, “1) All persons who commit, in  
14 whole or in part, any crime within this state; and ... 3) All who, being without this  
15 state, cause or aid, advise or encourage, another person to commit a crime within  
16 this state, and are afterwards found therein.” Moreover, California Penal Code §  
17 778(a) imposes liability on one who, with the intent to commit a crime, engages in  
18 any conduct within the state of California in execution or part execution of that  
19 person's intent, even if the crime is ultimately consummated out of the state.  
20 Therefore, one may be liable under the California Penal Code for conduct that  
21 occurred outside the state of California.

22 Second, territorial application of the California Penal Code is a question for  
23 the court, not the jury. *Betts*, 34 Cal. 4th at 1048; 103 P.3d at 888.

24 Finally, Plaintiffs object to Defendants' citation in support of their Proposed  
25 Instruction “California Penal Code § 593e(b) – Geographic Limitation,” to Judicial  
26 Council of California Jury Instructions 14.71.1, because such an instruction does  
27 not appear to exist.

1 Defendants' Proposed Instruction "California Penal Code § 593e(b) –  
2 Geographic Limitation" is wholly inappropriate because it misstates the law and  
3 because there is no need to provide an instruction regarding the territorial  
4 application of California Penal Code § 593d(a). Plaintiffs therefore request that the  
5 Court not charge the jury with Defendants' Proposed Instruction "California Penal  
6 Code § 593e(b) – Geographic Limitation."

7  
8 **"California Penal Code § 593e(b) – Damages – Actual Damages and**  
9 **Defendants' Profits," NDS's Sep. Prop. Jury Instr. at 41-42:**

10 Plaintiffs object to Defendants' Proposed Instruction "California Penal Code  
11 § 593e(b) – Damages – Actual Damages and Defendants' Profits" on the grounds  
12 that the last paragraph of this instruction will mislead or confuse the jury. As noted  
13 above, Defendants have the burden of proof on their Statute of Limitations  
14 Affirmative Defense. Including reference to the statutory period will tend to  
15 mislead or confuse the jury as to which party has the burden of proof on  
16 Defendants' affirmative defense. Moreover, if the Court charges the jury with  
17 Defendants' Proposed Instruction "California Penal Code § 593e(b) – Time  
18 Restrictions" or Plaintiffs' Separate Proposed Jury Instruction No. 28, there is no  
19 need to repeat the substance of those instructions.

20 Additionally, as noted above, Defendants' inclusion of an instruction  
21 regarding the territorial application of Cal. Penal Code § 593e(b) is improper.  
22 Therefore, Plaintiffs propose as an alternative their Separate Jury Instruction No.  
23 17. EchoStar's Sep. Prop. Jury Instr. at 35-36, No. 17.

24  
25 **"California Penal Code § 593e(b) – Damages – Statutory Damages," NDS's**  
26 **Sep. Prop. Jury Instr. at 43-44:**

27 Plaintiffs object to Defendants' Proposed Instruction "California Penal Code  
28 § 593e(b) – Damages – Statutory Damages" for the reasons set forth in their

1 objections to Defendants' Proposed Instruction "California Penal Code § 593e(b) –  
2 Damages – Actual Damages and Defendants' Profits." Plaintiffs therefore propose  
3 as an alternative their Separate Jury Instruction No. 18. EchoStar's Sep. Prop. Jury  
4 Instr. at 37-38, No. 18.

5  
6 **"California Penal Code § 593e(b) – Damages – Punitive Damages," NDS's Sep.**  
7 **Prop. Jury Instr. at 45-47:**

8 Plaintiffs object to Defendants' Proposed Instruction "California Penal Code  
9 § 593e(b) – Damages – Punitive Damages" on the grounds that it is premature, and  
10 may only be appropriate if evidence has been admitted concerning Defendants'  
11 conduct that occurred outside of the state of California. NDS's Sep. Prop. Jury  
12 Instr. at 46; EchoStar's Sep. Prop. Jury Instr. at 39-41, No. 19. *See also* BAJI  
13 14.71.1 "Punitive Damages—Out-of-State Conduct" (2004 New). Therefore  
14 Plaintiffs propose as an alternative their Separate Proposed Jury Instruction No. 19.  
15 EchoStar's Sep. Prop. Jury Instr. at 39-41, No. 19.

16  
17 **"RICO – 18 U.S.C. § 1962(c) – Introduction," NDS's Sep. Prop. Jury Instr. at**  
18 **48-49:**

19 Plaintiffs object to Defendants' Proposed Instruction "RICO – 18 U.S.C. §  
20 1962(c) – Introduction" on the grounds that it is unnecessary and duplicative of the  
21 parties' Joint Proposed Jury Instruction Nos. 1 and 5, as well as Plaintiffs' Separate  
22 Proposed Jury Instruction No. 20 and Defendants' Separate Proposed Jury  
23 Instruction entitled "RICO – 18 U.S.C. §1962(c)." EchoStar and NDS's Joint Prop.  
24 Jury Instr. at 2, 10 Nos. 1, 5; EchoStar's Sep. Prop. Jury Instr. at 42-44, No. 20;  
25 NDS's Sep. Prop. Jury Instr. at 50-54.

26 Joint Proposed Jury Instruction No. 1 instructs the jury to follow the law as  
27 provided by the Court. Joint Proposed Jury Instruction No. 5 instructs the jury that  
28 the party with the burden of proof on any claim must prove it by a preponderance of

1 the evidence. Finally, Plaintiffs' Separate Proposed Jury Instruction No. 20 and  
2 Defendants' Separate Proposed Jury Instruction "RICO – 18 U.S.C. § 1962(c)"  
3 both begin by instructing the jury that Plaintiffs have alleged that Defendants have  
4 violated 18 U.S.C. § 1962(c), and that Plaintiffs have the burden of proof on this  
5 claim. Defendants' Separate Proposed Jury Instruction "RICO – 18 U.S.C. §  
6 1962(c) – Introduction" is nothing more than a compilation of instructions that will  
7 have already been given to the jury, therefore it is duplicative and should not be  
8 given.

9 **"RICO – 18 U.S.C. § 1962(c)," NDS's Sep. Prop. Jury Instr. at 50-54:**

10 Plaintiffs object to Defendants' Proposed Instruction "RICO – 18 U.S.C. §  
11 1962(c)" on the grounds that it will tend to mislead or confuse the jury as to the  
12 elements that Plaintiffs must establish to prevail on their RICO claims.

13 Defendants' Proposed Instruction "RICO – 18 U.S.C. § 1962(c)" begins by  
14 laying out the five basic elements of a RICO claim. The elements are then followed  
15 by a series of definitions and attempts to further explain terms in the five elements.  
16 Buried within these definitions, Defendants' Proposed Instruction "RICO – 18  
17 U.S.C. § 1962(c)" introduces four additional "elements" – although these alleged  
18 additional elements are simply clarification of the five basic elements of a RICO  
19 claim. The structure of Defendants' instruction, combined with the length and form  
20 of the definitions, will mislead or confuse the jury regarding the actual elements  
21 that Plaintiffs must prove to prevail on their RICO claims.

22 Plaintiffs therefore propose as an alternative their Separate Proposed Jury  
23 Instruction No. 20. Plaintiffs' Proposed Jury Instruction No. 20 lays out each  
24 element and their respective subparts in a simplified, streamlined structure that will  
25 allow the jury to more readily understand the elements of Plaintiffs' RICO claims.  
26 EchoStar's Sep. Prop. Jury Instr. at 42-44, No. 20.

1 **“RICO, 18 U.S.C. § 1962(c) – Racketeering Activity: Criminal Copyright**  
2 **Infringement, 18 U.S.C. § 2319, 17 U.S.C. § 506(a) – Proof of Registration,”**  
3 **NDS’s Sep. Prop. Jury Instr. at 57-58:**

4 Plaintiffs object to Defendants’ Proposed Instruction “RICO, 18 U.S.C. §  
5 1962(c) – Racketeering Activity: Criminal Copyright Infringement, 18 U.S.C. §  
6 2319, 17 U.S.C. § 506(a) – Proof of Registration” on the grounds that it will tend to  
7 mislead and confuse the jury as to the elements of Plaintiffs’ RICO claims. 17  
8 U.S.C. § 411 requires registration of a copyright prior to instituting a civil  
9 infringement proceeding. However, failure to register a copyright pursuant to 17  
10 U.S.C. § 411 is not a bar to Plaintiffs’ RICO claim because Plaintiffs seek damages  
11 for Defendants’ racketeering activity based in part on Defendants’ criminal  
12 violation of 17 U.S.C. § 506(a). *See Perfect 10, Inc. v. Cybernet Ventures, Inc.*,  
13 167 F. Supp. 2d 1114, 1127 (D. Cal. 2001) (a party’s inability to seek civil  
14 enforcement of copyright infringement does not prevent that party from seeking  
15 civil enforcement of RICO based on criminal copyright infringement). Therefore  
16 Plaintiffs propose that the Court not charge the jury with Defendants’ Proposed  
17 Instruction “RICO, 18 U.S.C. § 1962(c) – Racketeering Activity: Criminal  
18 Copyright Infringement, 18 U.S.C. § 2319, 17 U.S.C. § 506(a) – Proof of  
19 Registration.”

20  
21 **“RICO, 18 U.S.C. § 1962(c) – Racketeering Activity: Criminal Copyright**  
22 **Infringement, 18 U.S.C. § 2319, 17 U.S.C. § 506(a) - Elements,” NDS’s Sep.**  
23 **Prop. Jury Instr. at 59-60:**

24 Plaintiffs object to Defendants’ Proposed Instruction “RICO, 18 U.S.C. §  
25 1962(c) – Racketeering Activity: Criminal Copyright Infringement, 18 U.S.C. §  
26 2319, 17 U.S.C. § 506(a) - Elements” on the grounds that the definition of  
27 “willfully” is not supported by any case law or statute, nor does it comport with  
28 standards of criminal intent. An act is committed “willfully” if it is done on

1 purpose; there is no requirement of knowledge that the law “forbids” the act. *See*  
2 *United States v. Morales*, 108 F.3d 1031, 1037 (9th Cir. 1997) (“Willfulness  
3 requires that an act be done knowingly and intentionally, not through ignorance,  
4 mistake or accident.”). Plaintiffs therefore propose as an alternative their own  
5 Separate Proposed Jury Instruction No. 21. EchoStar’s Sep. Prop. Jury Instr. at 45-  
6 46, No. 21. In the alternative, Plaintiffs propose replacing Defendants’ definition of  
7 willfulness with the definition set forth in *Morales*, 108 F.3d at 1037.

8  
9 **“RICO, 18 U.S.C. § 1962(c) – Racketeering Activity: Misconduct in**  
10 **Connection with Access Devices, 18 U.S.C. § 1029,” NDS’s Sep. Prop. Jury**  
11 **Instr. at 61-63:**

12 Plaintiffs object to Defendants’ Proposed Instruction “RICO, 18 U.S.C. §  
13 1962(c) – Racketeering Activity: Misconduct in Connection with Access Devices,  
14 18 U.S.C. § 1029” because it excludes certain definitions that are necessary to  
15 provide the jury with a complete instruction concerning the law. In order to clarify  
16 Defendants’ Proposed Instruction, Plaintiffs therefore propose as an alternative  
17 their Separate Proposed Jury Instruction No. \_\_. EchoStars’ Sep. Prop. Jury Instr.  
18 at \_\_, No. \_\_.

19  
20 **“RICO, 18 U.S.C. § 1962(c) – Time Restriction,” NDS’s Sep. Prop. Jury Instr.**  
21 **at 66-67:**

22 Plaintiffs object to Defendants’ Proposed Instruction “RICO, 18 U.S.C. §  
23 1962(c) – Time Restriction” on the grounds that it will tend to mislead or confuse  
24 the jury concerning an element that Plaintiffs must prove to prevail on their 18  
25 U.S.C. § 1962(c) claim (*i.e.*, that Defendants’ unlawful conduct occurred on or after  
26 June 6, 2000). However, Defendants have the burden of proof on their Statute of  
27 Limitations Affirmative Defense. Model Civ. Jury Instr. 9th Cir. 1.2 (2007).  
28 Plaintiffs therefore propose as an alternative their Separate Proposed Jury

1 Instruction No. 28. EchoStar’s Sep. Prop. Jury Instr. at 61-62, No. 28.

2  
3 **“RICO, 18 U.S.C. § 1962(c) – Actual Damages,” NDS’s Sep. Prop. Jury Instr.**  
4 **at 68-69:**

5 Plaintiffs object to Defendants’ Proposed Instruction “RICO, 18 U.S.C. §  
6 1962(c) – Actual Damages” on the grounds that the last paragraph will mislead or  
7 confuse the jury. As noted above, Defendants have the burden of proof on their  
8 Statute of Limitations Affirmative Defense. Including reference to the statutory  
9 period in this instruction will tend to mislead or confuse the jury as to which party  
10 has the burden of proof on Defendants’ affirmative defense. Moreover, if the Court  
11 charges the jury with Defendants’ Proposed Instruction entitled “RICO, 18 U.S.C. §  
12 1962(c) – Time Restriction” or Plaintiffs’ Sep. Prop. Jury Instr. No. 28, there is no  
13 need to repeat the substance of those instructions. Plaintiffs therefore propose as an  
14 alternative their Separate Jury Instruction No. 23. EchoStar’s Sep. Prop. Jury Instr.  
15 at 50-51, No. 23.

16  
17 DATED: April 9, 2008

18 Respectfully submitted,

19  
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21  
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