

2009-1374

**United States Court of Appeals
for the Federal Circuit**

TIVO INC.,

Plaintiff-Appellee,

v.

ECHOSTAR CORPORATION, ECHOSTAR DBS CORPORATION,
ECHOSTAR TECHNOLOGIES CORPORATION, ECHOSPHERE LIMITED LIABILITY
COMPANY, ECHOSTAR SATELLITE LLC, and DISH NETWORK CORPORATION,

Defendants-Appellants.

*Appeal from the United States District Court for the Eastern District of
Texas in case no. 2:04-CV-01, Judge David Folsom.*

**BRIEF OF *AMICUS CURIAE* AGRICULTURAL
ORGANIZATIONS IN SUPPORT OF PLAINTIFF-
APPELLEE IN FAVOR OF AFFIRMANCE**

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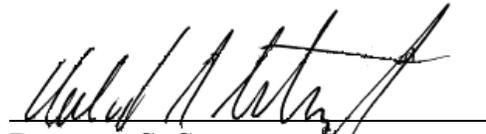
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SEPTEMBER 17, 2010

CERTIFICATE OF INTEREST

Pursuant to Federal Rule of Appellate Procedure 26.1 and Federal Circuit Rule 47.4, counsel for amici curiae certifies the following:

1. The full name of every party or amicus represented by me is:
American Corn Growers Association; The Federation of Southern Cooperatives/Land Assistance Fund; National Association of Farmer Organized Committees; National Grange of the Order of Patrons of Husbandry.
2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:
None.
3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the parties or amici curiae represented by me are:
None.
4. The names of all law firms and the partners or associates that appeared for the parties or amici now represented by me in the trial court or agency or are expected to appear in this court are:
Constantine Cannon LLP, Robert S. Schwartz, Seth D. Greenstein, Mitchell L. Stoltz.



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INTEREST OF THE AMICI¹

Amici are organizations that represent America's rural and agricultural communities. Our constituents depend on receiving the benefits of innovation in tools, agricultural methods, software, plant and animal genetics, medicine, and telecommunications. As such, they have an interest in maintaining a patent system that creates incentives for innovation and the practicing of inventions by inventors, and encourages the diffusion of innovation throughout society.

Our constituents are primarily individuals and groups with limited resources: family farms, rural communities, and individual inventors. Farmers and ranchers are natural tinkerers who invent out of necessity and use what they invent. They are also avid users of innovative technologies that were developed by others. They must often do business with large corporations with greater resources and market power in the markets for agricultural products and in the markets for innovation. As innovators and implementers, they have a strong interest in rules that make patent enforcement *efficient* and *cost-effective*, so that patents will benefit smaller entities as well as larger ones. They also have an interest in preventing wealthier trading partners or competitors from prolonging court proceedings or avoiding the effect of injunctions. A patent system that benefits all inventors and users without

¹ Permission to file this brief was granted by the Court's order of May 14, 2010.

regard to their resources will assure that innovation is encouraged wherever it is found, and that its benefits will flow to all.

The American Corn Growers Association (“ACGA”) is America’s leading progressive commodity association representing the interests of corn producers in 35 states. Since its inception in 1987, the ACGA has worked tirelessly to enhance farm income and protect rural communities. The ACGA recognizes that farmers here and abroad need to have the opportunity to be rewarded for their time, investment, and commitment to feeding the world. The ACGA has long understood how unique the business of farming is. The ACGA has become a key player in the development of farm and trade policy along with production issues such as seed patent law, GMO policies and many other issues that affect farmers.

Since 1967, the Federation of Southern Cooperatives/Land Assistance Fund (“Federation/LAF”) have remained true to their founding purposes of helping people to help themselves through cooperatives. The Federation has helped family farmers, especially those of color, remain and develop their landholdings as a key to rural community development. They have accepted the challenge of working with the poorest, most neglected and isolated people in the rural Southeast to help them make a difference in their lives and livelihoods.

The National Association of Farmer Elected Committees (“NAFEC”) exists to promote and improve the farmer elected committee system for the local administration of Farm Security Administration (“FSA”) programs. County Committees provide the spark and imagination as well as the local judgment needed in adopting and administering FSA programs. NAFEC works with the U.S. Congress and the administration to provide fairness for county committees and employees in the FSA offices. NAFEC has won the friendship of many within the Congress and the executive branch through its continued efforts to promote the interests of American farmers and ranchers.

The National Grange of the Order of Patrons of Husbandry (“the Grange”) is the nation’s oldest national agricultural organization, with grassroots units established in 2,700 local communities in 40 states. The Grange’s 200,000 members provide service to agriculture and rural areas on a wide variety of issues, including economic development, education, family endeavors, and legislation designed to assure a strong and viable Rural America. It was formed in the years following the American Civil War to unite private citizens in improving the economic and social position of the nation's farm population. Over the past 143 years, it has evolved to include non-farm rural families and communities.

Thus, the *amici* have an interest in the rules of law at issue in this appeal.

ARGUMENT

I. THE DISTRICT COURT SHOULD HAVE DISCRETION TO ENFORCE ITS INJUNCTIONS.

Civil contempt is what gives force to an injunction, including an injunction under the Patent Act. Maintaining a meaningful right to exclude others from the use of a patented invention (as opposed to a mere right of compensation for such use) is the great equalizer of the patent system, because it makes obtaining a patent equally valuable to patentees who sell their own products as it is to those who primarily license their patents. The availability of contempt proceedings should make enforcement less expensive for a patentee with limited resources. Thus, where irreparable injury, the balance of harms, and the public interest favor granting an injunction in the first place, the courts should have broad discretion to enforce injunctions through contempt proceedings based on the same factors that went into the injunction analysis. These include the infringer's candor and the importance of a first-mover advantage in the market for the patented product.

A. Reliable Enforcement is Vital to the Patent System.

A district court's ability to proceed via contempt is critical to the patentee's right to exclude infringing competitors. *Cont'l Paper Bag Co. v Eastern Paper Bag Co.*, 210 U.S. 405, 429-30 (1908) (“[I]t has been the judgment of Congress from the beginning that the sciences and the useful arts could be best advanced by

giving an exclusive right to an inventor. . . It hardly needs to be pointed out that the right can only retain its attribute of exclusiveness by a prevention of its violation.”).

A rule that limits the district courts’ discretion to proceed via contempt diminishes the right to exclude, and the value of a patent. *KSM Fastening Sys., Inc. v. H.A. Jones Co.*, 776 F.2d 1522, 1530 (Fed. Cir. 1985) (“[T]o require in each instance the patentee to institute a new infringement suit diminishes the significance of the patent and the order of the court holding the patent to be valid and infringed.” (quoting *McCullough Tool Co. v. Well Surveys, Inc.*, 395 F.2d 230, 233 (10th Cir. 1968))).

B. Reliable Enforcement is Especially Vital to Practicing Entities.

A rule that constrains the district court’s ability to enforce an injunction via contempt would especially disadvantage patentees who practice their own inventions and who use their patents to gain advantage over competitors, rather than primarily to derive licensing revenue. In markets where customers tend to remain with the same supplier for long periods, whether because of long-term contracts, infrastructure investments, or simple loyalty, the first-mover advantage that a patent confers is irreplaceable. These situations are commonplace in agricultural markets. If a competitor can continue to market a modified but still

allegedly infringing product while the patentee is compelled to litigate each modification at a new trial, the patentee may lose the opportunity to establish a loyal customer base. Conversely, if an infringer can continue marketing a modified product while pursuing a new infringement trial, the marketplace advantage gained by the competitor can easily outweigh the cost of damages or sanctions imposed later on. Thus, for practicing entities in markets prone to long-term customer relationships, the right to exclude is effectively lost if it cannot be enforced quickly.

After *eBay, Inc. v. MercExchange, L.L.C.*, injunctions are available in patent cases only if the district court finds that the plaintiff will suffer an irreparable injury for which monetary damages will not compensate, and that “the balance of hardships between the plaintiff and defendant” favors granting the injunction. 547 U.S. 388, 391 (2006). Loss of the first-mover advantage to a competitor creates an irreparable harm. In this case, the district court, when it granted the injunction, found that “Plaintiff’s primary focus is on growing a customer base specifically around the product with which Defendants’ infringing product competes,” and that “as Plaintiff is a relatively new company with only one primary product, loss of

market share and of customer base as a result of infringement cause severe injury.”

A213.²

The district court’s discretion to enforce its injunctions via contempt preserves an irreplaceable first-mover advantage for practicing entities vis-à-vis their competitors. TiVo brought its original suit in 2004, and was granted an injunction (later stayed by this Court) in 2006. Throughout that period, and to this day, EchoStar has been able to sell devices that the district court has found to be infringing, gaining market share all along. Even if TiVo is ultimately awarded substantial damages in a new trial, its headstart, which should have been guaranteed by its patent, has been lost. In contrast, entities that primarily license their patents are not directly impacted by the loss of first-mover advantage, and their losses can be compensated monetarily as a reasonable royalty.

A ruling in favor of EchoStar would constrain the availability of contempt proceedings to circumstances so narrow as to make enforcement of patent injunctions meaningless, and would have a disproportionate impact on those who invent primarily to improve their own competitiveness.

² “A” refers to the parties’ Joint Appendix.

C. The District Court Should Be Able to Consider the Entire Record When Deciding Whether Contempt Proceedings Are Warranted.

A finding in favor of EchoStar would raise problems similar to those that Judge Newman identified in her concurrence in *KSM*. She observed that limiting trial courts' discretion to proceed via contempt could "make the settlement of a patent-infringement action by consent decree a futile, meaningless gesture which will discourage such settlements in the future." 776 F.2d at 1535 (Newman, C.J., concurring in part). Likewise, a rigid rule restricting the use of contempt proceedings to determine whether a modified product infringes has the potential to make obtaining an *injunction* a futile gesture, *even when* the prospect of irreparable harm justifies an injunction under *eBay*.

Judge Newman noted that many circuits had adopted flexible standards for deciding whether contempt is appropriate, with "a plain relation to the facts of the particular case." This flexibility allows the courts to balance the competing interests of preserving the value of the patent (and respect for the court's orders) with a competitor's right to "invent around." *Id.*; *see also PPG Indus., Inc. v. Guardian Indus. Corp.*, 75 F.3d 1558, 1567 (Fed. Cir. 1996) (noting "the strong public policy favoring the enforcement of patent rights"). The majority opinion in *KSM* also acknowledged that a universal test for whether to proceed via contempt would be unworkable. *KSM*, 776 F.2d at 1526 ("An enjoined party under a narrow

decree will not be permitted to escape on a purely ‘in rem’ theory that only a particular device is prohibited, where it is evident that the modifications do not avoid infringement and were made for the purpose of evasion of the court's order.”).

Given the importance of preserving a patentee’s first-mover advantage, the district court properly took the surrounding circumstances into account in deciding to hold a contempt hearing. Specifically, the court noted that “EchoStar has gained millions of customers *since this Court’s injunction issued*, customers that are now potentially unreachable by TiVo.” A27.

The court also acknowledged EchoStar’s lack of candor to the court, which had the effect of allowing it to usurp TiVo’s first-mover advantage: In its request to stay the injunction, “EchoStar represented that without the stay it would be unable to provide DVR service and would risk losing a significant portion of its existing or potential customers.” *Id.* at 6. However, in the same month, EchoStar “began downloading modified software into its customers’ DVRs,” an act that EchoStar now claims was non-infringing and in compliance with the injunction. *Id.* By claiming that an injunction would cause it immediate hardship, and later asserting that at no time did it have to suffer the hardship of disabling the infringing units, EchoStar was able to postpone any enforcement of the injunction

– and any need even to disclose its modification – for nineteen months while steadily gaining market share.

District courts should be permitted to take these and similar facts into account, in parallel with the “more than colorably different” test, in determining whether a contempt proceeding is appropriate. In light of Judge Newman’s concurring analysis in *KSM*, the majority’s recognition of the need to consider “surrounding circumstances,” and the importance of maintaining a patentee’s right to exclusivity in a crucial time period, the district court’s finding of contempt was warranted, and this Court should uphold that decision. *See Additive Controls & Measurement Sys., Inc. v. Flowdata, Inc.*, 154 F.3d 1345, 1349 (Fed. Cir. 1998).

II. PRESERVING DISTRICT COURTS’ DISCRETION TO CRAFT EFFECTIVE INJUNCTIONS PRESERVES THE VALUE OF PATENTS.

The Court’s review of the “disablement provision” in this case will affect district courts’ ability to craft injunctions that are appropriate to the circumstances of each case. Because this ability strengthens the rights guaranteed by a patent, and can make the right to exclude more efficient, the Court should take caution not to impose new restrictions on it.

A. “Disablement” And Similar Injunctions Can Preclude Future Infringement And Restore The Status Quo.

Courts have broad discretion in crafting injunctions. *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 193 (1949) (“The measure of the court’s power in civil contempt proceedings is determined by the requirements of full remedial relief.”). This flexibility is a basic tenet of courts’ traditional equity jurisdiction. *Weinberger v. Romero Barcelo*, 456 U.S. 305, 312 (1982) (“Flexibility rather than rigidity” is the “essence of equity jurisdiction”); *Holmberg v. Armbrecht*, 327 U.S. 392, 396 (1946) (“equity eschews mechanical rules; it depends on flexibility”). As the Supreme Court recently reaffirmed, traditional equity principles apply with equal force to injunctions granted under the Patent Act. *eBay*, 547 U.S. at 394; *see also Abbott Labs. v. TorPharm, Inc.*, 503 F.3d 1372, 1379 (Fed. Cir. 2007).

Discretion becomes vital where an adjudicated unit’s infringement status can change. If a non-infringing unit can become infringing through some later modification or because of where it is used, or if an item’s infringement status will be hard to determine, then an effective injunction may have to prohibit sales of all of the adjudicated items, or require court review and clearance of modifications. This Court has upheld such injunctions. *Johns Hopkins Univ. v. CellPro, Inc.*, 152 F.3d 1342, 1366 n.31 (Fed. Cir. 1998) (where defendant’s “propensity to infringe

has been sufficiently established,” district court had injunctive power over all units of infringing design, including those that were neither used in the United States nor exported and thus did not infringe); *Spindelfabrik Suessen-Schurr v. Schubert & Salzer Maschinenfabrik Aktiengesellschaft*, 903 F.2d 1568 (Fed. Cir. 1990) (affirming injunction that prohibited defendant from marketing any adjudicated machine, even if modified, until it sought permission from the court and proved by clear and convincing evidence that the modification was non-infringing).³

In addition, a district court can use its equitable power to “restor[e] the status quo.” *Porter v. Warner Holding Co.*, 328 U.S. 395, 402 (1946). An injunction such

³ EchoStar’s conduct in this case, described *supra* at 9-10, and in other cases, displays a propensity to flout court orders. *See CBS Broad. Inc. v. EchoStar Commc’ns Corp.*, 276 F. Supp. 2d 1237, 1246 (S.D. Fl. 2003) (“It appears that [an EchoStar executive] elected instead to break [his] promise to the Court.”); *CBS Broadcasting Inc. v. EchoStar Commc’ns Corp.*, 450 F.3d 505, 523, 526 (11th Cir. 2006) (criticizing EchoStar’s “scattershot approach [on appeal] . . . on patently unmeritorious claims of error”); *Air Commun. & Satellite Inc. v. Echostar Satellite Corp.*, 38 P.3d 1246, 1254 (Colo. 2002) (“The evidence demonstrates that EchoStar’s communication was misleading and coercive.”); *Dominion Video Satellite, Inc. v. EchoStar Satellite L.L.C.*, 430 F.3d 1269, 1278 (10th Cir. 2005) (affirming district court’s sanctioning of EchoStar counsel under 28 U.S.C. § 1927, which provides that “[a]ny attorney . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys’ fees reasonably incurred because of such conduct,” and further finding EchoStar’s appeal of an arbitration award to be frivolous and inviting plaintiff to seek attorneys’ fees as sanction); *EchoStar Satellite Corp. v. Brockbank Ins. Servs.*, No. 00-MK-1513, 2004 U.S. Dist. LEXIS 31130 (D. Colo. Feb. 4, 2004) (“EchoStar’s action rises to the level of conscious wrongdoing.”); *EchoStar Satellite Corp. v. Young Broad. Inc.*, 16 F.C.C.R. 15070, 15076 (Aug. 2, 2001) (“EchoStar failed in its duty of candor We admonish EchoStar for this abuse of process.”).

as the one upheld in *Johns Hopkins* and the “disablement” provision ordered by the district court in this case, may serve that function, at least in part. An injunction that denies the infringer the benefit of infringing units already manufactured or sold can provide some remedy for the loss of first-mover advantage resulting from an infringement.

Flexibility in crafting injunctions also allows district courts to resolve infringement suits with more finality and to avoid prolonging litigation. This is an important factor in maintaining the value of patents for entities with limited resources. The district court in this case considered and rejected an injunction applying only to the infringing *software* on EchoStar’s DVRs because it concluded that such an injunction would lead to “interminable disputes” over whether the infringement had actually been ended, while disablement would assure that it had. A15. For this reason too, this Court should maintain the district courts’ ability to issue injunctions such as the “disablement” provision and to enforce them as written.

This Court’s opinion in *KSM* does not prohibit injunctions like the “disablement provision” that go beyond a simple order not to infringe. *See KSM*, 776 F.2d at 1528. To the extent that *KSM* or later precedents may be read to prohibit such orders categorically, they are in conflict with Supreme Court precedent maintaining the courts’ broad flexibility to craft equitable remedies, a

principle applied explicitly to Patent Act injunctions in *eBay*. Given the importance of this issue to maintaining the value of patent injunctions, the Court should clarify that district courts can issue such injunctions when circumstances warrant.

B. “Disablement” Injunctions Should Not Be Categorically Precluded As “Injunctions Against Infringement.”

A “disablement” or “recall” injunction is categorically different from an “injunction broadly to obey the statute,” which may be overbroad. *N.L.R.B. v. Express Pub. Co.*, 312 U.S. 426, 435 (1941); *see also Int’l Rectifier Corp. v. IXYS Corp.*, 383 F.3d 1312, 1316 (Fed. Cir. 2004). An injunction like the one in this case, which applies only to units already adjudicated as infringing, is not the same as an injunction against *all* possible future infringements of the patent. The latter could “subject the defendant to contempt proceedings if he shall at any time in the future commit some new violation unlike and unrelated to that with which he was originally charged,” and this is rightly recognized as unfair. *N.L.R.B.*, 312 U.S. at 435-36. But the former is limited to a finite group of products *already subject to litigation*, and does not inherently raise a problem of fair notice. The Court should be careful not to conflate an impermissible “obey the law” injunction with a “disablement” or recall injunction, which has been upheld by this Court where the facts of the case warrant, and should continue to be available.

III. AN ENJOINED PARTY SHOULD NOT BE PERMITTED TO COLLATERALLY ATTACK THE INJUNCTION IN A CONTEMPT PROCEEDING WHEN THE INJUNCTION COULD HAVE BEEN CHALLENGED EARLIER.

This Court should avoid making patent enforcement more expensive and less efficient, and thus less available to patentees with limited resources. Upholding the principle that a party bound by an injunction cannot challenge the scope of the injunction in a contempt proceeding if it could have done so earlier will help to prevent a deep-pocketed infringer from usurping a first-mover advantage, and avoid relitigation of the injunction itself.

A. Collateral Attack Should Not Be Allowed When It Amounts To Relitigation of the Injunction.

The basic principle that a party may not collaterally attack the scope or validity of an injunction during contempt proceedings if it could have raised the same arguments earlier is well established. *See United States v. Rylander*, 460 U.S. 752, 757 (1983) (holding that a challenge to an order that could have been raised earlier “may not be raised for the first time in a contempt proceeding”); *Western Water Mgmt., Inc. v. Brown*, 40 F.3d 105, 108 (5th Cir. 1994). The issue in this appeal is whether a party should be excused from this rule by later claiming that the injunction was ambiguous. *See EchoStar En Banc Br.* at 51-52. The basis of the enjoined party’s challenge is key: if the thrust of their contempt defense is that the

injunction was impermissibly overbroad, it amounts to a request for re-litigation of the injunction itself. The district court was right to reject this.

Fundamentally, EchoStar's claim that the disablement provision of the injunction is ambiguous (and that EchoStar therefore could not have known that it should appeal the injunction) is based on the assertion that any order to "disable the DVR functionality" in specified units *must* be impermissible, so could not have meant what it plainly said. (As discussed above, such injunctions, tailored to address the party's actual conduct, are permissible and not facially overbroad.) Thus, EchoStar's claim that the injunction is ambiguous is, in reality, an attempt to relitigate the scope of the injunction. If validated by this Court, such bootstrapping would set a highly dangerous precedent that would degrade the value even of post-*eBay* injunctions, and hence would diminish the value of patents, particularly to practicing entities.

The Court should not allow disguised collateral attacks of this nature in a contempt proceeding, so as to let a defendant obtain reconsideration of an injunction after a long and unnecessary delay. This harms patentees in two ways: by denying the benefits of exclusivity at least until a contempt proceeding is held, and by multiplying litigation costs for the patentee.

B. Where Facts Suggest The Enjoined Party Was Aware Of And Assumed The Risk Of Contempt, Collateral Attack Should Be Foreclosed Regardless Of Possible Alternative Interpretations.

The Court also should not permit claims of ambiguity to foreclose a contempt proceeding when the record shows that the enjoined party was aware that its conduct may be infringing. In arguing for a stay of the injunction, EchoStar represented to this Court that it would have no choice but to “disable DVR functionality” and would lose “\$90 million per month” if the injunction were not stayed. A6105, 6107. When it made those representations, it *already* had an opinion of counsel that its design-around would not infringe. EchoStar knew or should have known that its interpretation of the “disablement” provision to permit continued operation of the adjudicated units with modified software rendered the provision superfluous – if EchoStar was not required to disable DVR functionality in adjudicated units once the software was modified, then the disablement provision is identical to the non-infringement provision.

Given these strong signals that EchoStar knew of the risk of contempt, the district court was justified in holding EchoStar responsible. Upholding that decision would promote respect for a court’s orders and make patent injunctions more effective. *See Maggio v. Zeitz*, 333 U.S. 56, 68-69 (1948) (“The procedure to enforce a court’s order commanding or forbidding an act should not be so inconclusive as to foster experimentation with disobedience.”).

IV. GOOD FAITH BY ANY NAME IS NOT A DEFENSE IN CIVIL ENFORCEMENT PROCEEDINGS.

Good faith is not a defense to contempt. This well-established principle is vital to maintaining a viable patent system (and civil litigation in general), especially for plaintiffs with limited resources. An intent element, whether stated or implied, makes enforcing an injunction more complex, more expensive, slower, and less certain – thus, it makes injunctions less valuable *ab initio*. This Court should not read a good faith element into the standard of *California Artificial Stone Paving Co. v. Molitor* based solely on the word “wrongfulness.” Likewise, the Court should not create a good faith element *sub rosa* by allowing a defendant’s self-serving evidence of its subjective good faith to raise a “fair ground of doubt” as to violation of an injunction. 113 U.S. 609, 618 (1985).

A. There Is No Willfulness Element In Civil Contempt.

“The absence of willfulness does not relieve from civil contempt.” *McComb*, 336 U.S. at 191; *see also Waffenschmidt v. Mackay*, 763 F.2d 711, 726 (5th Cir. 1985) (“[G]ood faith is irrelevant as a defense to a civil contempt order.”). EchoStar concedes this basic principle, EchoStar En Banc Br. at 36-37, but nonetheless argues that the Supreme Court’s phrase “a fair ground of doubt as to the *wrongfulness* of the defendant’s conduct” implies a “culpability” requirement. *Id.* (quoting *Cal. Artificial Stone*, 113 U.S. at 618).

The Court should not adopt such a strained principle. Nothing else in the *California Artificial Stone* opinion even alludes to an intent element. This suggests that the word “wrongfulness” simply refers to the fact of infringement, not to the defendant’s intent. Violating an injunction, in that court’s terminology, is inherently wrongful. Implying an intent element from that single word would run counter to the numerous Supreme Court and other precedents holding that intent is irrelevant. Imposing an intent element would add delay and expense to the enforcement of injunctions, which are already available only in egregious circumstances, making them less valuable and less useful.

B. Subjective Good Faith Does Not Create A Fair Ground of Doubt As To The Wrongfulness Of A Defendant’s Conduct In A Contempt Proceeding.

The Court should also reject EchoStar’s position that a defendant’s “good-faith efforts” along with an “objectively reasonable basis” as evidenced by an opinion of counsel are sufficient to create a “fair ground of doubt” and thus preclude a contempt finding. EchoStar En Banc Br. at 37 (*quoting Cal. Artificial Stone*, 113 U.S. at 618). Adopting this theory and the low threshold of an opinion from friendly counsel would effectively impose an intent element on enforcement of an injunction, with dire consequences for inventors and the patent system.

The evidence EchoStar presented in support of its “reasonable basis” illustrates why such a pretext would be unworkable. The authors of the analyses

“did not have the benefit of the actual source code that implemented the modifications.” A24. Accepting such opinions as establishing a “fair ground of doubt” as to whether EchoStar violated the injunction would effectively stretch the standard to “any conceivable ground of doubt.” Like adding an explicit intent requirement to the contempt rule, this would create “confusion and endless litigation” at the expense of inventors. *See Bate Refrigeration Co. v. Gillett*, 30 F. 683, 684-685 (C.C.N.J. 1887) (“The motives which impelled the acts, honestly mistaken conceptions of right to do them, or the erroneous advice of counsel, and all other excuses, may be properly considered only in awarding punishment. . .”).

CONCLUSION

In deciding this appeal, the Court should bear in mind the potential effects of its decision on the incentive to obtain and enforce patents for inventive small businesses, individuals with limited resources, and those who seek to protect their own first-mover advantage against competitors. Prolonging court proceedings to enforce a patent and allowing an infringer to buy time before accounting for its infringement will make patents less valuable and less efficient as a means of

driving innovation. Under the facts of this case, the district court did not abuse its discretion, and this Court should affirm the judgment of contempt.

Respectfully submitted,

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Dated: September 17, 2010

**United States Court of Appeals
for the Federal Circuit**
TIVO v. ECHOSTAR, 2009-1374

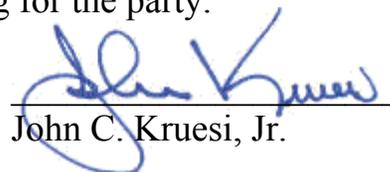
**DECLARATION OF AUTHORITY PURSUANT TO
28 U.S.C. § 1746 AND FEDERAL CIRCUIT RULE 47.3(d)**

I, John C. Kruesi, Jr., being duly sworn according to law and being over the age of 18, upon my oath depose and say that:

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September 17, 2010



John C. Kruesi, Jr.

**United States Court of Appeals
for the Federal Circuit
TIVO v. ECHOSTAR, 2009-1374**

CERTIFICATE OF SERVICE

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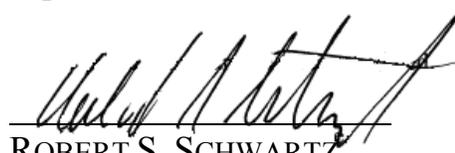
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September 17, 2010

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