Dish Network owner not making friends

By Eriq Gardner, Hollywood Reporter

In 1980, a few months before Charlie Ergen co-founded the company that would become Dish Network, he and a gambling buddy strode into a Lake Tahoe casino with the intention of winning a fortune by counting cards. Ergen, then 27, had bought a book called "Playing Blackjack as a Business" and studied the cheat sheets.

Unfortunately for him, a security guard caught his pal lip-syncing numbers as the cards were dealt. The two were kicked out and subsequently banned from the casino.

More than three decades later, Ergen, now 60, again stands accused of cheating the house – but this time the house is nestled in the confines of executive suites from Burbank to Beverly Boulevard. And now, Ergen's Englewood, Co.-based Dish Network, the nation's third-largest satellite/cable TV provider, a public company that's grown from a $60,000 startup to an empire with 14 million subscribers and $14 billion in annual revenue, is the entertainment industry's Enemy No. 1. With increasing frequency, Ergen has engaged in ugly, high-stakes games of chicken with Hollywood.

In his brutal battle over ballooning carriage fees with AMC, he dropped The Walking Dead and Mad Men network from the Dish system for months. He also has spent years fighting with broadcasters over the practice of distantly retransmitting TV signals without a license and even was caught violating a promise to stop that he made under oath – all while Dish was named "America's worst company to work for" by a watchdog website. But all that was just preamble to the Hopper.

In January 2012, Dish introduced the proprietary DVR service that allows consumers to “AutoHop,” or watch the entire primetime lineup of the broadcast networks commercial-free without even having to fast-forward through ads. Immediately after its introduction, CBS, NBC, ABC and Fox filed lawsuits arguing that Dish, if allowed to continue offering the Hopper, will put them out of business. The networks want a judge to grant an injunction, and Fox is appealing the denial of a shutdown while making a renewed attempt to enjoin the Hopper — after Dish added mobile capabilities amid the legal challenge.

Ergen, who is married with five kids and has seen his personal net worth swell to an estimated $10.6 billion, making him 100th on the most recent Forbes list of richest people, expresses confidence that he will win the legal fight and says it is time that the broadcasters get on board.

“Some people are averse to change, but the advertising model is going to change with or without the Hopper,” he recently told analysts. “What we’re saying to the broadcasters is, ‘There’s a way for you not to put your head in the sand.'”

The broadcasters reject the assessment.

“Services [like Hopper] that undermine the economic fabric of our business aren’t just illegal, they potentially destroy our ability to give the public what it wants,” CBS chairman and CEO Leslie Moonves tells THR. Adds NBC Broadcasting chairman Ted Harbert, “I think this is an attack on our ecosystem.”

Not surprisingly, Hopper has become extremely popular. The year before Dish began offering the service for free to customers, the company lost 166,000 subscribers. Since then, Dish added back 89,000.

“We’re a little bit like an Indiana Jones movie,” a sanguine Ergen said about his company at the All Things Digital conference Feb. 11. “We’re always in trouble. We always get out of it. We’re always going from alligators to guys with arrows to snakes. We want to win.” (Ergen declined comment for this piece.)

At a time when Big Four broadcast network ratings have hit historic lows, with Fox down 21 percent this season and NBC being beaten in the 18-to-49 demo by Univision during the February sweep, it's hard enough to pitch advertisers on delivering eyeballs to ads – as the nets will do in May at the annual $10 billion upfront presentations. It's even harder when a major satellite carrier is touting its ability to completely eliminate commercials from the viewer experience. Networks hope that if research agencies like Nielsen start placing emphasis on those who watch programming a week after an initial live telecast, it will help keep advertisers in line. But analyst Richard Greenfield asks: "C3 vs. C7? Who is kidding whom about watching commercials during DVR'd programming?"

Interestingly, such TV carriers as Time Warner Cable and DirecTV, though presumably in possession of the same technological capability, have not provided products that have triggered such industry venom. Maybe there's a reason for that.

Ergen has presented Hopper as a consumer right while simultaneously telling analysts that programmers have "devalued" content by making TV shows available on Netflix and suing ESPN for, among other things, allowing streaming. CBS is trying to rescind its licensing contract with Dish by claiming that Ergen and his top lieutenants fraudulently hid their plans for the Hopper in contract meetings in 2011. And in February, Dish claimed CBS forced The Big Bang Theory actress Kaley Cuoco to delete a sponsored tweet endorsing Hopper, even though there was no evidence the actress was pressured. At a March event honoring Moonves, Cuoco announced, "I would like to take this opportunity to say one thing: Leslie, f– the Dish Network."

As Hollywood reluctantly enters the digital age, new players like Barry Diller’s Aereo TV service are challenging traditional revenue streams and squaring off against the networks in court. (Diller’s Aereo survived an initial legal challenge April 1 when an appeals court allowed it to stay in business at least until a trial.) Even among these threats, though, Dish represents perhaps the most aggressive and well-funded disrupter. And it’s controlled by a man who has the money and inclination to take the fight to its legal and, for Hollywood, very scary conclusion. Yes, he’s known by some within his organization to be a penny-pinching loudmouth (“They treat their employees like slaves,” says one online employee review).

But it’s one thing to scream at underlings and install a scanning device to police tardiness (yes, he really did that); it’s quite another to destroy evidence and mislead judges in a courtroom — Dish has been sanctioned for such behavior.

It’s all enough to ask: If Charlie Ergen is the most hated man in Hollywood, what should the industry do about him?

Ergen now is gearing up for a fight that could answer that question. In September, a licensing agreement expires between Dish and the Walt Disney Co. The coming talks between the companies represent the first major negotiation since the introduction of the Hopper. Disney hardly wishes to bless a tech product like the Hopper by renewing its deal with Dish. But it’s nearly impossible for a media company to walk away from the billions of dollars Ergen is paying for programming.

This friend-and-foe dilemma is the essential conundrum Dish presents. Six months before its deal with Disney was set to expire, Dish wasn’t at any negotiation table but rather in a courtroom, taking Disney’s ESPN unit to trial for allegedly offering Dish competitors better prices.

Naturally, Ergen has been hailed as a hero by consumer advocates who appreciate his willingness to toy with a TV model that has become sacred to Hollywood conglomerates.

“When it comes to trying out new things and keeping costs down in a competitive market, you need a first-mover like Dish,” says John Bergmayer at Public Knowledge, a not-for-profit rights organization.

Notes Vijay Jayant, an analyst who has been following Dish for years at ISI Group: “Charlie’s attitude is, ‘At some point, they’ll negotiate with me on my terms.’ He’s bluffing until he’s not.”

If Dish exhibits a special form of aggression, observers credit this to its billionaire founder and his company’s precarious position in the competitive video-distribution industry.

Ergen was born in Tennessee to a physicist father who is credited as coining the phrase “China syndrome” to describe the containment shortcomings of a nuclear reactor accident. After playing small forward on the state university’s basketball team, he earned a business degree from Wake Forest University in 1976, then worked as a financial analyst at Frito-Lay. Two years later, at 25, he stunned his family by “retiring” — or rather, he took advantage of the discounts his future wife, Cantey McAdam, got working as a flight attendant to travel the world. He also fiddled with becoming a professional poker and blackjack player.

Then, in 1980, his buddy Jim DeFranco told him about “a big satellite dish getting signals from outer space,” according to a Wake Forest commencement address Ergen gave in 2012. Together with DeFranco and McAdam, the three sank $60,000 of their personal savings into a suburban Denver startup called EchoStar.

An avid mountain climber who has scaled Mount Kilimanjaro and Mount Everest, Ergen steadily has grown his business — now officially known as screaming-all-caps DISH — into one of the

200 largest corporations in the world, averaging about $1 billion in annual profits (Ergen controls 88 percent of voting power at the company). Dish thrived in large part by focusing on the hilly rural areas of the country, where cable TV lines did not run – and, of course, a willingness to brawl with anyone getting in the way.

Dish employees, adversaries and analysts say no one exploits the judicial system like Ergen does to gain a competitive advantage. A judge a decade ago noted that Ergen had violated a pledge made under penalty of perjury to stop distantly retransmitting local TV signals. An appeals court wrote in 2006 that there was “no indication that EchoStar was ever interested in complying with the [Satellite Home Viewer] Act,” and added, “We seem to have discerned a ‘pattern’ and ‘practice’ of violating the Act in every way imaginable.”

During the mid-2000s, when Ergen was fighting TiVo over who owned rights to DVR technology, not only did TiVo convince a court that Dish had violated a patent, but the judge in the case found it “distasteful” that Ergen’s company would “engage in an ad campaign that touted its DVRs as ‘better than TiVo’ while continuing to infringe TiVo’s patent.” In 2009, Dish officially was sanctioned by the court. (The parties later settled.)

Perhaps most notoriously, there were the irate judges who officiated Dish’s recent battle with Cablevision/AMC after Dish terminated a 15-year deal to carry the Voom networks, a suite of 21 little-watched HD channels such as Kung Fu HD and Film Fest HD. In the early days of the case, Dish was penalized for “bad faith” or “gross negligence” in the destruction of internal company emails. A visibly angry New York Supreme Court Judge Richard Lowe later threatened to launch an investigation unless Dish documents were turned over. The suit became so ugly that at one point, Dish executive Carolyn Crawford hit the father of the opposing side’s lawyer on her way out of the courtroom. She later apologized in open court.

In a sexual harassment case in Maryland in 2005, a judge wrote that “EchoStar [was] guilty of gross spoliation of evidence.” In a 2012 trademark dispute, a judge said of Dish lawyers that he had never encountered “such divisiveness or contentiousness” in his 17 years on the bench.

“Most corporations have an institutional bias against litigation and see it as necessary evil,” says one network insider. “But for Charlie, that’s how he likes to run his company. You’ll never see him suing in his home state, though. Their name is mud in Colorado. Judges are on to them.”

In fact, when Dish filed suit in May 2012 in an attempt to beat broadcasters to court and have a judge declare the Hopper legal, it did so in New York.

Dish continues to be pugnacious at every turn. The Federal Trade Commission and Justice Department are jointly pursuing a lawsuit against the company for allegedly violating telemarketing sales rules by placing unwanted calls to millions of consumers. Dish also uses every opportunity it has to tout its Hopper as the tech product so great that the networks won’t let anybody hear about it (even while telling judges that the Hopper is not so different from other DVRs).

Ambush spin is common at Dish. On industry news websites, employees regularly leave comments meant to slyly promote Dish services. One writer at AllThingsD was so fed up that in 2011, he penned a column titled, “Dear Dish Network: Your Spam Makes Me Sad. Please Stop.” The press release issued by Dish in the Kaley Cuoco flap is another example. There was no source of the alleged CBS demand to delete her tweet, and CBS flatly denied it. Pushed to corroborate such an allegation, Dish spokesman John Hall will only say, “We were contacted by someone close to the situation who told us that CBS asked her to remove the tweet.”

Barbara Roehrig worked at EchoStar during the mid-’90s and was the company’s first female senior executive. She remembers constantly sparring with Ergen, who sometimes would threaten to walk into a room and fire all the employees he called the “craziness pack.”

“The modus operandi is yelling there, and it takes a toll,” says Roehrig, adding that she still stays in touch with many in Dish’s middle management who refuse to ascend to the company’s executive ranks because of the emotional turmoil that it brings. “We’ve all been in the line of Charlie’s ranting.”

Dish was named “America’s worst company to work for” by the website 24/7 Wall Street, based on scathing reviews on the job site Glassdoor.com. Employees have been subjected to “badge reports,” where they are red-flagged for showing up minutes late. When they travel, staffers are asked to take red-eye flights, share hotel rooms and reimburse the company if they tip more than 15 percent. One field-service specialist tells THR, “In my office, you are not even allowed to use the restroom in the mornings before leaving on your route or in the evenings until you’re off the clock.” (A Dish rep says the company abandoned its badge reports in January and disputes that employees are forced to take red-eye flights and aren’t allowed bathroom breaks.)

After Dish was hit with bad press, management attempted to intervene. Dish CEO Joe Clayton sent employees an email that stated in part, “If you are happy here at DISH and believe the company is moving in the right direction, log on to Glassdoor.com and provide feedback.”

At Dish’s Colorado headquarters, company leaders shoot down questions about whether Dish truly is the meanest of mean companies.

“I think it is a challenging place to work,” admits Dave

Shull, a Dish senior VP in charge of content acquisition deals. He says it's common for meetings to get "animated" but embraces the company's aggressive ethos. "You can always be a follower, a slave to competition and hope for the best," says Shull. "Or you can lead the charge, try to expand market share and innovate. When you ski or ride horses, what happens when you sit back is that you lose control. We lean in."

After several years of growth, Dish, like the rest of the cable and satellite industry, has been facing new challenges. In 2012, pay TV providers added only a few tens of thousands of subscribers, according to analyst estimates. And the overall trajectory isn't good. In reaction, Dish has been aggressive in keeping customer bills lower than those of its rivals. Dish's subscriber-related expenses increased to $7.25 billion in 2012, up 6 percent from the previous year, which the company attributes to rising programming costs. By comparison, DirecTV spent more than $13 billion on programming in 2012 (and another $2 billion on service), about a 12 percent increase. "I'd venture to guess that Dish's programming increases are among the lowest in the business," says Jayant.

Still, that might not be enough. Dish now competes with such Internet-based TV services as Netflix and Hulu (subscribing to both costs only about a third of the $49.99 for a basic Dish package) as well as web-and-TV combos offered by the likes of Time Warner Cable and Comcast.

Unlike its rivals, Dish has struggled to expand into businesses other than satellite TV service. In 2011, it completed an acquisition of Blockbuster but couldn't leverage the brand into a viable Netflix competitor. Dish has been attempting to do more with its wireless spectrum assets, which it has paid roughly $3 billion to acquire, but has been frustrated by FCC roadblocks. The company lately has been attempting to get a wireless network service off the ground, holding talks with Google and making an aggressive bid to acquire part of 4G network pioneer Clearwire Corp.

For now, though, Dish remains a “one-trick pony,” in the words of analyst Jayant. Unlike Comcast, it doesn’t create any programming itself; unlike Time Warner Cable or Verizon, it isn’t able to offer triple play of television/Internet/phone service. What it has is the Hopper, which leads one lawyer defending the networks to conclude, “Ergen would rather ask for forgiveness than permission.”

Some legal observers believe that Dish will succeed in court. In November, a federal judge declined to grant a preliminary injunction to stop the Hopper and said that Fox faces an uphill road in arguing that Dish has committed copyright infringement and breached its contracts with the network. The judge wasn’t totally convinced of the legality of Dish’s system, however, and some attorneys believe the broadcasters ultimately will prevail.

“I think a court is going to side with the networks because of the economics, though a new [legal] test might need to be fashioned because this doesn’t fit the usual standards,” says Bryan Sullivan at Early Sullivan.

As the lawsuit plays out, Dish’s ability to stay in the game might depend on the outcome of coming carriage negotiations. Ergen will be making a multibillion-dollar bet that Disney can’t afford to walk away from Dish’s 14 million subscribers, but if it signs a new deal, it will send a signal that broadcasters have been a tad hyperbolic when it comes to the threat they allege the Hopper to be.

If the offer is not right, Dish could head down a new path. It might stream Disney’s ABC anyway, without a contract but in partnership with a company like Diller’s Aereo, whose own technology of capturing over-the-air TV signals and transmitting them privately online likely will be hashed out in a messy trial. (Dish and Aereo reportedly have held talks with each other recently.) Or Dish could abandon the quickly growing cost of licensing ESPN's live sports to further position the satellite distributor as the cheap alternative in the marketplace. But that's undoubtedly risky.

Analysts are getting a little edgy. On a recent earnings call, Dish's management was asked to address what's going to happen.

"We are a big customer of Disney's," answered Clayton. "I would not expect them to take it down with the AutoHop as the reason." Added Ergen, "Our checks are pretty big." Dish pays Disney roughly $1 billion a year for ESPN alone. But that's not quite enough to settle the analyst community. "I have no idea what is going to happen," admits Jayant.

As the recent Dish-ESPN lawsuit highlighted, thanks to "most favored nation" provisions (which guarantee that no rival will get a better deal), subscriber rates are intertwined throughout the TV industry. If Disney accepts less than market value from Dish, it likely will have to give discounts to other distributors, too. And walking away from Dish might not necessarily mean losing all 14 million pay TV consumers if some of them defect to rival services. A recent survey by Lazard Capital found that 41 percent to 48 percent of pay TV subscribers would cancel or switch their service if they lost a top broadcast network, and 35 percent would cancel if they lost ESPN. "If anything, content's leverage over distributors is strengthening," concludes analyst Barton Crockett.

The last time Disney and Dish made a deal, in 2005, the negotiations took a year. Now, there's just a few months until the license expires in September, and the very dealmakers who will be meeting with one another just sat uncomfortably side by side for three weeks in a courtroom.

Disney declines comment about whether it would look past the Hopper, whose legality likely will not be settled before the two sides need to make a deal. A Disney spokesperson says any renewal with Dish would “be consistent with established marketplace terms.” Dish’s Shull won’t say whether Ergen or his execs have met with Disney, but says he hopes that the two companies will be able to work out their differences.

Is Ergen about to get comeuppance for his nasty behavior? Or will broadcasters bow to what many believe is the inevitable evolution of the ad business? By year’s end, the outcome of the Disney-Dish negotiations could signal where the industry is headed.

“For some folks, it becomes personal,” says Shull. “For me, it’s business. There’s always some difference of opinion, but with billions of dollars at stake, greed usually wins out.”