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# SECOND CIRCUIT REVIEW

# ANTITRUST ANALYSIS APPLIED TO MODERN TELECOMMUNICATIONS STATUTE

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Despite being enacted in the 19th century, the Sherman Antitrust Act is showing few signs of its age. The Sherman Act is sometimes described as a "common law statute,"[1] as judicial interpretations of the statute continue to evolve with technology and adapt to modern economic realities. In this month's column, we discuss *PrimeTime 24 Joint Venture v. NBC*,[2] which dramatizes the intersection between first antitrust principles and emerging telecommunications practices.

In *PrimeTime*, an opinion written by Chief Judge Ralph K. Winter, and joined by Judges Dennis G. Jacobs and Robert W. Sweet (sitting by designation), the Second Circuit held that PrimeTime 24 Joint Venture (PrimeTime) stated a claim under §1 of the Sherman Act.[3] PrimeTime had brought a private antitrust suit against NBC, ABC, CBS and FOX, as well as their affiliates' trade associations, other related business entities and the National Association of Broadcasters (NAB) (collectively, "the networks"). PrimeTime alleged that the networks had violated the Sherman Act through: (1) concerted "sham" challenges brought pursuant to the Satellite Home Viewer Act solely to impose costs upon PrimeTime, and (2) concerted refusals to license copyrighted television programming in order to restrain commercial trade.

**Telecommunications Environment**

Television consumers have historically received programming through direct broadcasts from stations owned and operated by the network companies. These television programs are free to the consumer and are funded with advertising revenues. With the introduction of cable and satellite television, however, new technologies emerged to improve reception quality over greater geographical distances and to increase programming options. Cable and satellite distributors typically charge users an access fee. But because network television programs retain mass appeal, cable and satellite operators must include copyrighted network programming with their menu of offerings. Under the copyright laws, cable and satellite operators require a commercial license or some other form of valid permission to distribute network programming.

Seeking to accommodate both the networks' copyright interests and consumers' interests in receiving satellite programming, Congress passed the Satellite Home Viewers Act of 1988 (SHVA).[4] The SHVA mandates that networks license their signals to satellite broadcasters for distribution to viewers who could not otherwise receive sufficiently strong broadcast signals, in exchange for a statutorily fixed fee from the satellite operator. The standard under the SHVA for triggering this licensing duty is not a "subjective rule of reception quality," but rather an "objective signal-strength rule."[5] Under the statute, satellite providers initially designate the households for which they claim a right to a network license, but local broadcasters seeking to limit distribution of copyrights programming may challenge the satellite operators' estimate of the signal-strength received by the designated households.[6]

Thus, the SHVA provide a procedural framework through which satellite operators and the networks may safeguard their interests. Under the SHVA, when a broadcaster initiates a signal-strength challenge, satellite carriers must either pay to test its subscribers' reception strength for that network's broadcast, or otherwise terminate service. If the satellite carrier transmits copyrighted programming to a household that is being sufficiently served through direct over-the-air broadcasts, then the satellite operator must terminate service. If, however, the satellite carrier demonstrates that subscribers would not otherwise be served by the networks, it is entitled to reimbursement for the costs of defending the broadcaster's challenge.[7] PrimeTime's antitrust allegations centered around these SHVA's signal-strength provisions.

**Antitrust, Copyright Interests**

PrimeTime retransmits network broadcast signals both to satellite dish owners and to satellite distributors. When PrimeTime filed its complaint, it was the only satellite carrier of network programming neither owned nor controlled by network or cable television interests.[8] PrimeTime asserted two principal antitrust claims against the networks — a "sham" litigation claim and a "concerted refusal to deal" claim, both in alleged violation of §1 of the Sherman Act.[9]

First, PrimeTime claimed that the networks intentionally abused the SHVA's signal-strength challenge provisions, "by filing baseless challenges for the purpose of raising PrimeTime's cost structure and thereby reducing competition" from PrimeTime.[10] Specifically, the networks premised their signal-strength challenges on a common NBC subscriber list, even though PrimeTime provided different lists to each network. Because network affiliates broadcast from different geographical points, the signal-strength contours for each of the SHVA challenges should have differed from network to network. PrimeTime alleged that the purpose of using the common NBC subscriber list was to over-challenge subscribers, and thus to increase PrimeTime's costs in seeking to obtain statutory broadcasting licenses.[11]

Second, PrimeTime alleged a concerted refusal to license PrimeTime, even though each defendant had an economic incentive to deal with PrimeTime individually. In particular, the complaint claimed that the NAB, bargaining on behalf of all defendants, had initially offered a license at a cost calculated to be too high for PrimeTime. Yet, when PrimeTime agreed to discuss the price, NAB immediately withdrew its offer. Furthermore, the NAB allegedly copied a letter to its members directing them to boycott PrimeTime, while the networks discouraged their affiliates from negotiating with PrimeTime and refused to do so themselves.[12]

In granting a motion to dismiss, Judge Lawrence M. McKenna of the Southern District of New York ruled that the defendants' actions were protected by the Noerr-Pennington doctrine,[13] which derives from two U.S. Supreme Court cases decided in the 1960s.[14] Under the Noerr-Pennington doctrine, good-faith litigation activity falls within the penumbra of the First Amendment and is immune from antitrust challenge.[15] As

Judge McKenna noted, litigation to enforce a valid copyright is an example of conduct that is protected under Noerr-Pennington.[16]

Analogizing the SHVA procedures providing for signal-strength challenges to a prelitigation "threat" letter,[17] Judge McKenna held that the networks' concerted use of statutory signal-strength challenges was protected petitioning activity under Noerr-Pennington.[18] Indeed, the district court said that "the case for immunity is particularly strong" where, as here, the challenged conduct was undertaken pursuant to a statutory scheme for monitoring and enforcing federally protected copyrights. Nor did the district court consider the networks' signal-strength challenges to fall within an exception to Noerr-Pennington for "sham" litigation. Judge McKenna concluded that PrimeTime had failed to allege that the use of the NBC list was unreasonable or that "defendants knew that challenges based on this list would be meritless."[19]

With respect to the group boycott claim, the district court held that the complaint alleged nothing more than rejection of a settlement offer, which was likewise shielded by Noerr-Pennington. Judge McKenna reasoned that PrimeTime's efforts to negotiate with the networks were functionally equivalent to an attempt to avoid liability for infringing copyrights, and that the networks were under no obligation to negotiate with, or grant a license to, PrimeTime.[20] Accordingly, the district court dismissed the complaint for failing to state a claim upon which relief could be granted.

**Noerr-Pennington Scope**

Reviewing the district court's dismissal de novo, the Second Circuit reversed. The Court held that PrimeTime had properly stated a claim that the networks abused the SHVA challenge provisions for anticompetitive ends, and that they were not eligible for Noerr-Pennington immunity. Moreover, the complaint's allegations of concerted refusals to deal with PrimeTime amounted to more than mere "settlement" activity, and were likewise actionable under the Sherman Act.

- **"Sham" Litigation.** First, the Second Circuit acknowledged that a good-faith SHVA challenge by a network to a PrimeTime subscriber cannot violate the Sherman Act. Indeed, even if the networks coordinated in making good-faith SHVA challenges, it is "beyond question" that no antitrust action would lie.[21] In reaching this conclusion, the Second Circuit first interpreted the SHVA and its legislative history. According to the Court, because Congress anticipated coordinated signal-strength challenges, it would be "anomalous" to read the Sherman Act to forbid what the SHVA clearly permits.[22] Second, the Court determined that Noerr-Pennington protection independently attaches to good-faith SHVA challenges. In fact, the Sherman Act itself has been read to allow parties with shared legal rights, such as copyright owners, to defend their individual copyrights in good faith against common infringers who may be competitors.[23]

Thus, the Second Circuit reasoned, only a copyright violator would gain by denying copyright holders the right to engage in cooperative efforts to enforce their rights. "Where common legal or fact issues exist, the sharing of costs or other coordinated activity avoids

wasteful duplication of effort and has no discernible effect on lawful competition."[24] And while SHVA challenges are distinguishable from petitions to the government, prelitigation threat letters, and administrative and judicial proceedings — all of which have been held to enjoy Noerr-Pennington immunity — signal-strength challenges are nonetheless a "form of action authorized by statute and a preliminary step to resort to litigation if necessary."[25] Moreover, because any costs imposed on satellite carriers to participate in signal-strength tests are counterbalanced by a statutory entitlement to reimbursement if the challenge does not succeed, SHVA challenges constitute "a litigation skirmish in miniature."[26]

**No 'Shams' Allowed**

However, neither the SHVA nor Noerr-Pennington permits "sham" challenges to be interposed "without regard to the merits and for the purpose of imposing upon a satellite carrier unnecessary costs as a means of limiting that carrier's ability to operate and compete."[27] First, the Second Circuit discerned no hint in the text or legislative history of the SHVA that Congress intended broadcasters to institute frivolous signal-strength challenges. Rather, while contemplating cooperation among copyright holders in enforcing their rights under the SHVA, Congress specifically noted its objection to broadcasters abusing SHVA procedures to effectuate "anti-competitive ancillary restraints."[28]

Second, the Court observed that traditional antitrust principles lead to the parallel conclusion that "sham" litigation is "predatory, without any redeeming efficiency benefitting consumers."[29] To establish the "sham" exception to Noerr-Pennington in a single-litigation fact pattern, the plaintiff must show that the litigation is: (1) "objectively baseless," and (2) "an attempt to interfere directly with the business relationships of a competitor through the use of the governmental process — as opposed to the outcome of that process — as an anticompetitive weapon."[30] In single-litigation "sham" cases, the objective component of this test is frequently emphasized. For, as the Second Circuit noted in *PrimeTime*, the mere fact that concerted action is genuinely intended to influence governmental action cannot, in itself, trigger Noerr-Pennington protection. Otherwise, horizontal price agreements would be immunized if price-fixing competitors genuinely desired to propose their price to governmental ratemakers.[31]

**Test for 'Sham' Actions**

But, the Second Circuit ruled in *PrimeTime*, where the defendant is accused of bringing a series of baseless legal proceedings rather than a single sham action, the second, more subjective prong predominates. Here, the test becomes prospective rather than retrospective: "Were the legal filings made, not out of a genuine interest in redressing grievances, but as part of a pattern or practice of successive filings undertaken essentially for purposes of harassment?"[32] Under this standard, the objective merits of the litigation become "immaterial," and the relevant issue is whether the litigant harbors a "policy" or "purpose" of injuring a market rival.[33]

Applying this test, the Second Circuit concluded that PrimeTime stated a valid "sham" claim. First, PrimeTime alleged that the networks had submitted a series of SHVA

challenges without considering their merits. For instance, because all of the networks' challenges were based upon NBC station lists, ABC, CBS and FOX had challenged thousands of subscribers who did not even receive their programming. Since the SHVA specifies that networks must pay for signal-strength tests conducted outside of their predicted contour regions,[34] these challengers could not have been eligible for statutory reimbursement. Similarly, the complaint alleged that the networks conspired to submit enormous volumes of simultaneous challenges so that PrimeTime could not determine which tests it was responsible for funding. In short, PrimeTime's complaint adequately alleged "'the filing of frivolous objections . . . simply in order to impose expense and delay,' the 'classic example' of a sham."[35]

The Second Circuit also rejected the networks' argument, credited by the district court, that PrimeTime's "sham" allegation should be dismissed as a matter of law because two other federal courts had ruled in favor of the networks in SHVA actions against PrimeTime. For example, in a nationwide copyright action against PrimeTime, the District Court for the Southern District of Florida rejected PrimeTime's "unclean hands" defense, which substantially overlapped with PrimeTime's sham allegations in the case at bar.[36] Moreover, the Florida action determined that PrimeTime had engaged in a pattern or practice of violating the networks' copyrights and issued an injunction against PrimeTime. The Fourth Circuit Court of Appeals later affirmed a similar "pattern or practice" finding and grant of equitable relief against Prime Time.[37] Given this history, it seems at first remarkable that a court could hold that SHVA challenges initiated by these same networks against this same alleged copyright infringer may be characterized as a "sham."

The Second Circuit was unimpressed with this argument, however, because the Florida district court's rejection of PrimeTime's "unclean hands" defense entailed no more than an "equitable weighing" process, which neither compelled nor precluded an injunction against PrimeTime in that case.[38] According to the Court, such balancing analysis is not dispositive of whether properly alleged abuses of SHVA challenges in a collateral action can constitute an antitrust violation. Moreover, while PrimeTime for its part had engaged in a pattern and practice of violating the networks' copyrights, the networks for their part may have engaged in baseless signal-strength challenges to harm PrimeTime, and thus PrimeTime's conduct would "appear to go more to the damages suffered by the respective parties than to liability."[39]

• **Concerted Refusals to Deal.** The complaint also alleged that PrimeTime had attempted to negotiate individually with each of the network-affiliated stations but that, in violation of the Sherman Act, the networks conspired to ensure that no affiliate would enter into discussions with PrimeTime. Specifically, the complaint alleged that NBC and ABC discouraged their affiliated stations from dealing with PrimeTime, and that many of the affiliated stations sent identical rejection letters to PrimeTime.[40]

Under well-settled authority, concerted refusals to deal, group boycotts and other horizontal agreements among direct competitors have been held to be per se antitrust violations.[41] These authorities do not exempt copyright owners from liability.[42] The district court held, however, that Noerr-Pennington protection applied to this claim as well because

the networks' alleged refusals to deal "amounted to the rejection of a settlement offer, which constitutes protected petitioning activity."[43]

The Second Circuit doubted that PrimeTime's attempts to deal individually with the networks and stations constituted mere attempts to settle the SHVA challenges. Indeed, PrimeTime's initial offer predated the copyright infringement suits.[44] Furthermore, PrimeTime's offers to negotiate with the various stations may have been prospective proposals concerning licensing in the future, rather than any attempt to bring existing legal actions to a conclusion.[45]

Again interpreting the Noerr-Pennington doctrine, the Second Circuit emphasized that horizontal agreements among competitors that would violate the Sherman Act absent litigation "can not be immunized by the existence of a common lawsuit." Thus, while coordinated efforts to litigate (and, by extension, to settle) copyright actions against a common infringer may be permissible, copyright holders cannot agree to limit licensing rights to the infringer before, during, or after the lawsuit.[46] Accordingly, the networks' alleged conduct was not shielded by Noerr-Pennington simply because SHVA challenges were pending, and thus PrimeTime's "refusal to deal" claim was properly stated under the Sherman Act.

**Alternative Arguments**

The networks alternatively argued that it was the SHVA itself, not their own anticompetitive conduct, to which PrimeTime was really objecting. The Second Circuit dismissed any argument that the SHVA prevents competition by forcing networks and stations to make signal-strength challenges, or by preventing them from individually licensing their product to satellite carriers. Rather, the Court observed, the SHVA merely authorizes signal-strength challenges and simply does not require networks and stations to license satellite carriers.[47]

The networks also claimed that PrimeTime failed to allege "antitrust injury," which requires harm not merely to a competitor but to competition itself.[48] PrimeTime's alleged damages were that it had been injured in its business and property, including through lost profits and goodwill, incursion of substantial and unnecessary expenses, and by being threatened with elimination. The alleged harm to competition was that the networks' conspiracies reduced national network competition with alternative programming, and local stations' competition with alternative distribution systems, thereby eliminating price competition, restricting output and programming options, and reducing the quality of television broadcasting.[49]

Finally, the Second Circuit summarily rejected the defendants' argument that PrimeTime lacked antitrust standing. Because PrimeTime competes directly with the networks' owned-and-affiliated stations in distributing network programming, and because it is a customer of the networks, standing was adequately alleged.[50] Having reinstated the Sherman Act claims, the Second Circuit reversed the district court's decision not to exercise supplemental jurisdiction over PrimeTime's state law claims.[51]

**Narrow Interpretation**

With its ruling in *PrimeTime*, the Second Circuit signaled that it will not broadly interpret the scope of Noerr-Pennington immunity, nor otherwise allow legal processes to be abused as an incident to anticompetitive conduct under the Sherman Act. Most striking is the fact that the Second Circuit determined that PrimeTime stated a plausible claim of "sham" copyright litigation by the networks — even though sister federal courts had recently enjoined PrimeTime from continuing to engage in a pattern or practice of infringing the copyrights of these same networks.[52] In broader view, perhaps, *PrimeTime* illustrates the continuing vitality of age-old antitrust principles in a modern era of rapid technological change. This "common law statute" should be expected to remain a source of interesting and important commercial litigation in the 21st century.

## ENDNOTES

1. See, e.g., William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. Pa. L. Rev. 1479, 1517 (1987( (citing Judge Richard Posner's view that the Sherman Act is a common law statute which must be interpreted flexibly); *see also National Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 688 ((1978) (Sherman Act invites "courts to give shape to the statute's broad mandate by drawing on common-law tradition").

2. 2000 U.S. App. LEXIS 15916 (2d Cir. July 7, 2000).

3. 15 U.S.C. §1; *see generally* Sherman Antitrust Act, ch. 647 §§1-8, 26 Stat. 209 (1890) (*codified as amended at* 15 U.S.C. §§1-7).

4. Pub. L. No. 100-667, 102 Stat. 3935 (Nov. 8, 1988), *codified at* 17 U.S.C. §119. The SHVA was amended by the Satellite Home Viewer Improvement Act of 1999, Pub. L. No. 106-113, 113 Stat. 1501, 1501A-526 to 1501A-545 (Nov. 29, 1999). Because PrimeTime's complaint alleged acts occurring under the earlier statute, the 1999 amendments did not apply to the Second Circuit's analysis. *See PrimeTime*, 2000 U.S. App. LEXIS 15916 at 4 n.1.

5. *PrimeTime*, 2000 U.S. App. LEXIS 15916 at 5 (citing 17 U.S.C. §119(a)(2)(B); id. §119(d)(10)); *see also ABC, Inc. v. PrimeTime 24*, 184 F.3d 348, 352 (4th Cir. 1999) ("The very terms of the SHVA define eligible households by means of an objective, measurable standard."); *CBS Broadcasting, Inc. v. PrimeTime 24 Joint Venture*, 48 F. Supp. 2d 1342, 1355 (S.D. Fla. 1998).

6. *See* 17 U.S.C §119(a)(8).

7. *See id*.

8. *PrimeTime*, 2000 U.S. App. LEXIS 15916 at 2.

9. To state a claim under 15 U.S.C. §1, a plaintiff must allege "a combination or some form of concerted action between at least two legally distinct economic entities" that "constituted an unreasonable restraint of trade either per se or under the rule of reason." *Capital Imaging Assocs. v. Mohawk Valley Med. Assocs.*, 996 F.2d 537, 542 (2d Cir. 1993).

10. *PrimeTime*, 2000 U.S. App. LEXIS 15916 at 7.

11. *See id*. at 8.

12. *See id*. at 8-9.

13. *See PrimeTime 24 Joint Venture v. NBC.*, 21 F. Supp. 2d 350, 357, 359 (S.D.N.Y. 1998).

14. *See Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 136-38 (1961) (right to petition legislature immune from antitrust challenge whether or not petition seeks to promote competition); *see also United Mine Workers v. Pennington*, 381 U.S. 657, 669-71 (1965) (similar).

15. *See California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508, 510-11 (1972) ("It would be destructive of rights of association and of petition to hold that groups with common interests may not, without violating the antitrust laws, use the channels and procedures of state and federal agencies and courts").

16. *See Columbia Pictures Indus., Inc.* v. *Redd Horne, Inc.*, 749 F.2d 154, 161 (3d Cir. 1984).

17. *See McGuire Oil Co.* v. *Mapco, Inc.*, 958 F.2d 1552, 1560 (11th Cir. 1992) (concerted threat letters to institute litigation protected under Noerr-Pennington); *Coastal States Mktg., Inc.* v. *Hunt*, 694 F.2d 1358, 1367-68 (5th Cir. 1983) (same); *see also* 1 Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law § 205(e) (rev. ed. 1997) ("It would be anomalous and socially counterproductive to protect the right to sue but not the right to threaten a lawsuit.").

18. *See PrimeTime*, 21 F. Supp.2d at 356-57.

19. *Id.* at 359-60.

20. *See id.* at 357-59 (citing *Columbia Pictures Indus., Inc.* v. *Professional Real Estate Investors, Inc.*, 944 F.2d 1525, 1528-29 (9th Cir. 1991), *aff'd*, 508 U.S. 49 (1993) (applying Noerr-Pennington to settlement offers)).

21. *PrimeTime*, 2000 U.S. App. LEXIS 15916 at * 12-13.

22. *See id.* at * 13. Interpreting the SHVA's legislative history, the Second Circuit determined that signal-strength challenges are a "form of copyright enforcement" and an "integral part of the SHVA's design." *Id.* at * 13-14 (citing H.R. Rep. No. 100-887(I), at 14, 19-20 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5611, 5617, 5622-23).

23. *See Columbia Pictures Industries, Inc.* v. *Redd Horne, Inc.*, 749 F.2d 154, 161 (3d Cir. 1984); *Edward B. Marks Music Corp.* v. *Colorado Magnetics, Inc.*, 497 F.2d 285, 290-91 (10th Cir. 1974); *Alberto-Culver Co.* v. *Andrea Dumon, Inc.*, 466 F.2d 705, 711 (7th Cir. 1972); *cf. Sharon Steel Corp.* v. *Chase Manhattan Bank, N.A.*, 691 F.2d 1039, 1052-53 (2d Cir. 1982).

24. *PrimeTime*, 2000 U.S. App. LEXIS 15916 at * 16.

25. *Id.* at * 20.

26. *Id.*

27. *Id.* at ** 13, 16-17 (citing *California Motor Transp. Co.* v. *Trucking Unlimited*, 404 U.S. 508, 516 (1972); Robert H. Bork, The Antitrust Paradox 347-64 (1978))

28. *See* H.R. Rep. No. 100-887(I), at 20 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5611, 5623 ("Although the [House Judiciary] Committee expects and approves of . . . cooperation in achieving compliance with the [SHVA], any restraints ancillary to such activities would be governed by existing law.").

29. *PrimeTime*, 2000 U.S. App. LEXIS 15916 at * 16.

30. *Professional Real Estate Investors, Inc.* v. *Columbia Pictures Indus.*, 508 U.S. 49, 60 (1993) (citations, internal quotation marks and alterations omitted); *USS-POSCO Indus.* v. *Contra Costa County Bldg. & Constr. Trades Council, AFL-CIO*, 31 F.3d 800, 811 (9th Cir. 1994).

31. *See Allied Tube & Conduit Corp.* v. *Indian Head, Inc.*, 486 U.S. 492, 503 (1988); *see also FTC* v. *Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 424-25 (1990).

32. *PrimeTime*, 2000 U.S. App. LEXIS 15916 at * 22 (emphasis supplied) (quoting *USS-POSCO Indus.* v. *Contra Costa County Bldg. & Constr. Trades Council, AFL-CIO*, 31 F.3d 800, 811 (9th Cir. 1994)).

33. *Id.* at * 22-23.

34. *See* 17 U.S.C. § 119(a)(8)(D).

35. *City of Columbia* v. *Omni Outdoor Advertising*, 499 U.S. 365, 380 (1991).

36. *See CBS Broad. Inc.* v. *PrimeTime 24 Joint Venture*, 48 F. Supp.2d 1342, 1359 (S.D. Fla. 1998).

37. *See ABC, Inc.* v. *PrimeTime 24, J.V.*, 184 F.3d 348 (4th Cir. 1999).

38. *PrimeTime*, 2000 U.S. App. LEXIS 15916 at * 25-26.

39. *Id.* at *26.

40. *See id.* at * 26-27.

41. *See id.* at * 27 (citing *NYNEX Corp.* v. *Discon, Inc.*, 525 U.S. 128, 135-36 (1998); *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207, 212 (1959)).

42. *See Broadcast Music, Inc.* v. *Columbia Broadcasting Sys., Inc.*, 441 U.S. 1, 19 (1979).

43. *PrimeTime*, 21 F. Supp.2d 350, 358 (S.D.N.Y. 1998) (citing *Columbia Pictures Inc.* v. *Professional Real Estate Investors, Inc.*, 944 F.2d 1525, 1527-33 (9th Cir. 1991), *aff'd*, 508 U.S. 49 (1993)).

44. *See PrimeTime*, 2000 U.S. App. LEXIS 15916 at * 28.

45. See *id.*

46. *See id.* at * 29 (citing *NYNEX Corp.* v. *Discon, Inc.*, 525 U.S. 128, 136 (1998); *Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.*, 441 U.S. 1, 19 (1979); *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207, 212-13 (1959)).

47. *See id.* at * 31.

48. *See Atlantic Richfield Co.* v. *USA Petroleum Co.*, 495 U.S. 328, 334 (1990) ("plaintiff can recover only if the loss stems from a competition-reducing aspect or effect of the defendant's behavior").

49. *See PrimeTime*, 2000 U.S. App. LEXIS 15916 at * 31-32.

50. *See id.* at * 32.

51. *See id.* at * 32-33 (citing *Field* v. *Trump*, 850 F.2d 938, 950 (2d Cir. 1988)).

52. See *ABC, Inc.* v. *PrimeTime 24, J.V.*, 184 F.3d 348, 350 (4th Cir. 1999); *CBS Broad. Inc.* v. *PrimeTime 24 Joint Venture*, 48 F. Supp.2d 1342, 1357, 1360-63 (S.D. Fla. 1998).

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