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Second Circuit Applies Sherman Act to Satellite Broadcasting Issues

CASENOTE: SECOND CIRCUIT APPLIES SHERMAN ACT TO SATELLITE BROADCASTING ISSUES
Primetime 24 Joint Venture v. National Broadcasting Co., 219 F.3d 92 (2d Cir. 2000).

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IN A DISPLAY of the timeless utility of the Sherman Act, the Second Circuit recently applied the 110 year-old statute[1] to the modern issue of satellite television transmission.[2] In the 1960's the Supreme Court began interpreting the Sherman Act to allow the combined efforts of members of an industry to influence government action even though their efforts were designed to eliminate competition.[3] This practice of granting antitrust immunity for joint petitioning activities became known as the Noerr-Pennington doctrine. In order to prevent abuse of the Noerr-Pennington immunity, courts have established that parties are not protected from antitrust charges when they initiate government processes to interfere with the business of their competitor.[4] This type of behavior constitutes a "sham," and evidence of it causes parties to lose their Noerr-Pennington immunity. Neither does the doctrine allow group boycotting or other horizontal agreements except in the narrow instance that the behavior constitutes protected petitioning activity.[5] Recently the Second Circuit applied the Noerr-Pennington doctrine in *PrimeTime 24 Joint Venture v. National Broadcasting Co.* Here, the appellate court reversed a motion to dismiss granted by the district court in favor of the appellees, the major U.S. television networks (ABC, CBS, NBC, and Fox), and several related groups

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[1] 15 U.S.C. § 1 (2000) (enacted in 1890).

[2] PrimeTime 24 Joint Venture v. Nat'l Broad. Co., 219 F.3d 92 (2d Cir. 2000).

[3] *See* E. R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961); United Mine Workers v. Pennington, 381 U.S. 657 (1965); *see also* Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508 (1971).

[4] *Noerr*, 365 U.S. at 144.

[5] *PrimeTime*, 219 F.3d at 102.

(hereinafter referred to as "the Networks").[6] The Second Circuit then reinstated PrimeTime 24 Joint Venture's ("PrimeTime's") claim under Section 1 of the Sherman Act.[7] The Court reasoned that PrimeTime, a large national satellite television provider, had stated both a claim under the sham exception to the Noerr-Pennington doctrine and a claim for concerted refusal to deal.[8] Although PrimeTime had repeatedly demonstrated a lack of respect for the copyright interests of the networks,[9] the Second Circuit correctly recognized that the appellees' efforts to protect their copyright interests had perhaps gone too far. The court wisely refused to extend the Noerr-Pennington immunity on the facts of this case.

Historically, network owned or affiliated stations have provided television programming.[10] In recent years, satellite and cable technologies have introduced a wider range of programming choices and an improved quality of reception for viewers.[11] Unlike network broadcasts, which are supported by advertisers, satellite broadcasts generate revenue by collecting service fees from the subscriber households.[12] Despite the variety of satellite content, consumers continue to demand network programming, and satellite operators are at a competitive disadvantage if they are unable to provide it.[13] Because network programming is copyrighted, satellite providers must obtain a license before retransmitting the network signal.[14]

In an effort to balance the interests of consumers with the copyright interests of the networks, Congress passed the Satellite Home Viewers Act of 1988 (SHVA)[15] and the Satellite Home Viewer Improvement Act of 1999.[16] Under the SHVA, networks must license their signals to satellite operators to provide service

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[6] *Id.* at 95.

[7] *Id.*

[8] *Id.* at 101, 103.

[9] *See* ABC, Inc. v. PrimeTime 24 Joint Venture, 184 F.3d 348, 350 (4th Cir. 1999); CBS Broad. Inc. v. PrimeTime 24 Joint Venture, 48 F. Supp. 2d 1342, 1357 (S.D. Fla. 1998).

[10] *PrimeTime*, 219 F.3d at 95.

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] 17 U.S.C. § 119 (1995).

[16] Satellite Home Viewer Improvement Act of 1999, Pub. L. No. 106-113, 113 Stat. 1501, 1501A-526 to 1501A-545 (Nov. 29, 1999). The court did not consider the amendments because the alleged acts occurred under the earlier statute. *See Prime Time*, 219 F.3d at 96 n.1.

to viewers who "cannot receive, through the use of conventional, stationary, outdoor rooftop receiving antenna, an over-the-air signal of . . . Grade B intensity as defined by the Federal Communications Commission . . ."[17] and have not received cable service in the preceding 90 days.[18] The statute establishes the amount of the royalty fee to be paid for the license.[19] Under the SHVA, satellite operators determine the households that they are entitled to serve.[20] The local network broadcaster may challenge a satellite provider's transmission to a household that is believed to fall within the Grade B contour.[21] In response to the broadcaster's challenge, the satellite operator must either halt service to that household or conduct a signal-strength test.[22] If the test results indicate a signal weak enough to permit satellite service, the network broadcaster must reimburse the satellite provider for the test.[23]

PrimeTime alleged that "appellees, in concert with themselves and with coordination by the NAB [National Association of Broadcasters], intentionally abused the SHVA's signal-strength challenge provision by filing baseless challenges for the purpose of raising PrimeTime's cost structure and thereby reducing competition from it."[24] Allegedly, all of the Networks initiated numerous signal-strength challenges based upon a single subscriber list that was unique to the broadcast location of a particular NBC station.[25] Using a single list would result in over-challenging because each of the network signals emanates from a different location and, therefore, each would have a different Grade B contour.[26] PrimeTime also alleged "a concerted refusal to deal in that appellees agreed among themselves not to license content to PrimeTime, notwithstanding the fact that it would be in their interests, acting individually, to do so."[27] Specifically, PrimeTime contended that the Networks engaged in a group

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[17] 17 U.S.C. § 119(d)(10)(A) (2000).

[18] *See PrimeTime*, 219 F.3d at 96.

[19] *See* 17 U.S.C. § 119(b)(1)(B).

[20] *See id.* § 119(a)(8).

[21] *See id.* § 119(a)(8)(A).

[22] *See id.* § 119(a)(8)(A)(i)-(ii).

[23] *See id.* § 119(a)(8)(B)(ii).

[24] *PrimeTime*, 219 F.3d at 96.

[25] *Id.*

[26] *Id.*

[27] *Id.* at 97.

boycott after PrimeTime attempted to negotiate licensing agreements with each broadcaster.[28]

Judge McKenna, of the Southern District of New York, granted a motion by the Networks to dismiss the claim based upon the rationale that the Noerr-Pennington doctrine, which permits a good faith concerted effort to enforce copyrights, protected the Networks' conduct.[29] The lower court held that "the allegations of excessive, willful misuse of the SHVA signal-strength testing provisions did not fall within the sham exception to Noerr-Pennington."[30] The judge compared the challenges to pre-litigation "threat letters" and held that they constituted protected petitioning conduct under Noerr-Pennington.[31] In also rejecting the concerted refusal to deal claim, Judge McKenna found that the complaint alleged nothing more than the rejection of a settlement offer.[32] The court reasoned that PrimeTime was seeking to avoid liability for copyright infringement by attempting to negotiate for a licensing arrangement and, therefore, under Noerr-Pennington, the Networks were under no obligation to negotiate.[33]

After reviewing the dismissal de novo,[34] the Second Circuit reinstated the claim.[35] The court found that the onslaught of signal-strength challenges could constitute a sham, which would dissolve the Networks' Noerr-Pennington immunity.[36] Likewise, the court regarded the concerted denial of licensing to PrimeTime as potentially anti-competitive behavior not excused by Noerr-Pennington.[37]

First, the Second Circuit determined that PrimeTime adequately alleged a sham in the form of the "filing of frivolous objections . . . simply in order to impose expense and de-

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[28] *Id.* at 102 (citing NYNEX Corp. v. Discon, Inc., 525 U.S. 128, 135-136 (1998) ("'a horizontal agreement among direct competitors' [is] a classic per se violation of the Sherman act."); and Klor's Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 212 (1959) ("Group boycotts, or concerted refusals . . . to deal . . . , have long been held to be [per se antitrust violations].")).

[29] *PrimeTime*, 219 F.3d at 95.

[30] *Id.* at 97.

[31] *Id. See* McGuire Oil Co. v. Mapco, Inc., 958 F.2d 1552, 1560 (11th Cir. 1992) (holding that Noerr-Pennington protects the use of concerted letters to threaten a lawsuit).

[32] *Id.*

[33] *Id.*

[34] *Id.* at 98.

[35] *Id.* at 104.

[36] *Id.* at 101.

[37] *Id.* at 103.

lay . . . ."[38] To determine the sham issue, the court considered "whether the legal challenges 'are brought pursuant to a policy of starting legal proceedings without regard to the merits and for the purpose of injuring a market rival.'"[39] After considering the allegations that the Networks had engaged in a concerted effort to overwhelm PrimeTime with numerous signal-strength challenges for households outside the predicted Grade B contours, the court concluded that the claim had merit.[40] If proven, this sham would negate the Networks' Noerr-Pennington defense.[41]

Second, regarding the group boycott element of the claim, the court considered PrimeTime's allegations that the appellees worked together to assure that none of the network affiliated or owned stations would negotiate with PrimeTime.[42] The alleged activity was determined to constitute a "'horizontal agreement among direct competitors,' a classic per se violation of the Sherman Act."[43] While recognizing the rights of copyright owners to coordinate efforts to enforce their rights, the court held that "copyright holders may not agree to limit their individual freedom of action in licensing future rights to . . . an infringer before, during, or after the lawsuit [for copyright infringement]."[44] The court was convinced that PrimeTime's efforts to negotiate a licensing agreement could be viewed prospectively rather than as an attempt to settle previous copyright litigation.[45] Viewed prospectively, the Networks' "concerted refusal to license copyrighted programming to PrimeTime in order to prevent competition from it is a boycott that, if proven, violates the Sherman Act."[46]

The Second Circuit's refusal to widen the scope of the Noerr-Pennington doctrine is sound. This case illustrates why the sham exception to the Noerr-Pennington doctrine exists. Established industry groups must not be allowed to use the legal system as a club to beat upstart technologies into submission,

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[38] *Id.* at 101.

[39] *Id.* (citing USS-POSCO Indus. v. Contra Costa County Bldg. & Constr. Trades Council, AFL-CIO, 31 F.3d 800, 811 (9th Cir. 1994)).

[40] PrimeTime 24 Joint Venture v. Nat'l Broad. Co., 219 F.3d 92, 101 (2d Cir. 2000).

[41] *Id.*

[42] *Id.*

[43] *Id.* at 102.

[44] *Id.* at 103.

[45] *Id.* at 102.

[46] *Id.* at 103.

particularly when Congress has enacted legislation recognizing the public's interest in the success and development of those new technologies.

With the passage of the SHVA, Congress asserted the importance of satellite television for Americans who live beyond the reach of local network broadcasters. The SHVA represents a compromise that gives consumers the network access upon which they rely, while respecting the copyright interests of the networks. Submitting bad-faith signal-strength test challenges potentially upsets the balance between the two interests. If satellite operators drop customers rather than conduct the costly tests or if wasteful expenditures drive them out of business, the scales tip against the consumer.

Additionally, the antitrust regulations against sham litigation and group boycotts serve an important purpose in the development of new technologies. If courts permit existing industry groups to use the legal system to place emerging technologies at a disadvantage, progress will be stifled. Granted, network groups may work together to enforce their existing copyrights, but the Second Circuit correctly recognized the difference between litigating past infringements and negotiating future programming licensing, which is made compulsory under the SHVA.

Finally, this case demonstrates the durability of the century-old Sherman Act. The Act has been called a "common law statute"[47] because "judicial interpretations of the statute continue to evolve with technology and adapt to modern economic realities."[48] As *PrimeTime 24 Joint Venture v. Nat'l Broad. Co.* illustrates, the law will allow for good-faith protection of copyright interests; however, it will not allow those copyright holders to protect their interests by abusing antitrust principles. The court focused squarely on the anti-competitive behavior of the appellees and refused to be swayed by PrimeTime's history of copyright infringement as demonstrated in other federal courts.[49] This case does, however, reserve the rights of each of the parties to

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[47] *See* William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 13 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).

[48] Martin Flumenbaum & Brad S. Karp, *Antitrust Analysis Applied to Modern Telecommunications Statute*, 224 N.Y.L.J. 17 (2000).

[49] ABC, Inc. v. PrimeTime 24 Joint Venture, 184 F.3d 348, 350 (4th Cir. 1999); CBS Broad. Inc. v. PrimeTime 24 Joint Venture, 48 F. Supp. 2d 1342, 1357 (S.D. Fla. 1998).

argue prior misdeeds, such as a pattern of copyright infringement, as part of the damages phase of the trial.[50] By narrowly construing the Noerr-Pennington doctrine, the court demonstrated that it would not allow monopolies to use the veil of antitrust immunity to further purely anti-competitive interests.

This case has applications beyond the satellite industry. The monopoly power granted to intellectual property owners has always been limited because of the potential for anti-competitive behavior. In an age when new communications technologies, such as the Internet, increase the potential for intellectual property infringement, the Second Circuit has indicated that justice is not served by expanding the rights of copyright owners to allow them to violate antitrust principles in order to protect their property. Protecting intellectual property is best approached by enforcing the existing rights of owners not by expanding the limited monopoly that they already enjoy. Thus, despite the new challenges presented by emerging technologies, the Sherman Act remains on solid footing in an ever-changing economy.

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[50] *PrimeTime*, 219 F.3d at 102.


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