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RESEARCH PAPER NO. 10-33

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AMERICAN NEEDLE V NFL: U.S. PROFESSIONAL CLUBS ARE SEPARATE ECONOMIC THREADS WHEN JOINTLY MARKETING INTELLECTUAL PROPERTY

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(July 2010)

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American Needle v NFL: U.S. Professional Clubs Are Separate Economic Threads When Jointly Marketing Intellectual Property

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International Symposium on Sports Law
60th Congress of the International Association of Legal Science
Istanbul, Turkey
May 13, 2010

Electronic copy available at: http://ssrn.com/abstract=1645364

One of the most difficult issues regarding the legal regulation of the United States sports industry is whether (and, if so, how) §1 of the Sherman Act,[1] a provision of the U.S. antitrust laws prohibiting concerted action unreasonably restraining trade, applies to professional sports league rules and internal governance decisions (for example, the centralization and exclusive licensing and sale of its member clubs' intellectual property rights). In *American Needle, Inc. v. National Football League*,[2] the U.S. Supreme Court recently considered this issue for the first time.[3] The Court held that the National Football League (NFL) clubs' grant of an exclusive trademark license to a headwear manufacturer through National Football Club Properties (NFLP), their jointly owned intellectual property marketing and licensing agent, is not immune from judicial scrutiny under §1. The Court resolved a relatively narrow issue, but its ruling suggests that other aspects of a U.S. professional sports league's cooperative operations and internal governance also are subject to §1.[4]

This article initially will briefly describe how the four major U.S. professional sports leagues are structured and internally governed as well as their underlying business models, including revenue sharing among their respective clubs. Next it will provide a historical overview of U.S. professional sports league centralized licensing and internal regulation of intellectual property rights along with antitrust challenges thereto, which set the stage for *American Needle*. The article then will consider the parties' arguments and the Supreme Court's ruling in *American Needle* and briefly describe the author's reasons for concluding this case was decided correctly.

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[1] 15 U.S.C. §1.

[2] __ U.S. __, 130 S. Ct. 2201 (2010).

[3] The Court previously has considered only whether the business activities of professional sports leagues are subject to the antitrust laws (*Flood v. Kuhn*, 407 U.S. 258 (1972); *Radovich v. NFL,* 352 U.S. 445 (1957)) and how to resolve the conflicting requirements of the antitrust and labor laws in professional sports labor disputes. *Brown v. Pro Football, Inc.*, 518 U.S. 231 (1996).

[4] For example, league member clubs' joint decisions regarding the ownership, number, and geographical location of teams.

Structure and Governance of U.S. Professional Sports Leagues

The NFL, Major League Baseball (MLB), National Basketball Association (NBA), and the National Hockey League (NHL) are each comprised of separate, independently owned and operated for-profit member clubs, which collectively produce their respective brands of athletic competition. Each league was formed in the late 1800s or early 1900s when a group of existing independent clubs banded together to play games against each other and govern their business affairs in an agreed centralized manner. Each league is autonomously governed,[5] and each of their respective member clubs has a voice and vote concerning the league's constitution and bylaws, selection of the league commissioner, and significant internal league governance decisions. There is no single

In the words of the late George Halas, one of the NFL's founders who owned the Chicago Bears club:

> [O]ur league for me was then — and still is — best exemplified as a wheel. . . . In 1920 [before the NFL was formed], we were 12 independent spokes. But spokes, if they are to serve a useful purpose and make a contribution, must have a rim. A spoke may weaken, even break, but the rim prevents collapse. Our league was and is our rim.[6]

The member clubs of the NFL, NBA, NHL, and MLB are geographically dispersed throughout the U.S.; some NBA (Toronto), NHL (Calgary, Edmonton, Ottawa, Montreal,

[5] In the U.S. there is no government body that directly regulates professional sports. Unlike the prevailing model of European internal sports governance, there is no national federation that exercises plenary governing authority over all levels of professional and amateur competition for each sport within the U.S.

[6] Chris Harry, *NFL Owners in a League of Their Own*, ORLANDO SENTINEL, Mar. 17, 2002, at C1.

Toronto, Vancouver) and MLB (Toronto) clubs are in Canada.[7] Most of each league's respective clubs are given an exclusive home geographical territory (i.e., generally there is only one league club in a city or its 75-mile radius). However, some clubs in the same league share a large metropolitan area (for example, the NFL's New York Giants and New York Jets). Major league clubs are located in cities with significantly different populations and economic bases; for example, large metropolitan areas such as New York City, Los Angeles, and Chicago as well as much smaller cities like Cleveland, Milwaukee, and Pittsburgh. Thus, league clubs' respective revenue-generating potential from ticket sales, concessions, parking fees, sponsorships, merchandising rights, and game broadcasts within differing local markets varies considerably and significantly impacts their individual finances.

As a means of preventing significant disparities in local revenue streams from inhibiting or destroying on-field competitive balance among their teams by adversely affecting a small market club's ability to pay high salaries to attract the best players to its team, the NFL, MLB, NBA, and NHL have implemented varying degrees of revenue sharing among their member clubs.[8] The NFL currently has the most significant degree of revenue sharing among its member clubs (approximately 80%), which provides the Green Bay Packers, located in a small city of approximately 100,000 people, with the financial resources to compete effectively on the field with large market clubs such as its rival the Chicago Bears, which is based in a metropolitan area of almost ten million people. In 1982 testimony before Congress, former NFL commissioner Pete Rozelle stated "revenue sharing is the key to maintaining geographic and competitive

[7] Currently the NFL has 32 member clubs; the NBA, NHL, and MLB each have 30 clubs.

[8] This is particularly important for the financial stability of Canadian MLB, NBA, and NHL clubs that earn local revenues in Canadian dollars while paying player salaries in relatively more valuable U.S. dollars, based on historical exchange rates for these currencies.

balance in professional football and ensure[s] that each club, irrespective of the size of its community, stadium, or television market, has a comparable opportunity to field a championship team."[9]

Historical Overview of Centralized Intellectual Property Licensing and Antitrust Litigation

In an effort to achieve on-field competitive balance resulting in close, exciting games between its teams, which enables the league to better compete with other forms of entertainment for consumer patronage, each major U.S. professional sports league centrally sells or licenses a significant part of its clubs' intellectual property rights and distributes the net revenues to the clubs on a pro rata basis (i.e., each club gets the same amount regardless of its on-field success or popularity). The sale or licensing of sports-related intellectual property rights such as trademarks, service marks, and copyrights currently generates billions of dollars in annual revenues for U.S. major professional leagues and clubs.[10] These revenues are derived from various sources such as the sale of television, radio, and Internet broadcasting rights for sports events, club trademark licensing agreements, and league, team, or event sponsorship deals with advertisers. In each league, revenues from the sale of national television and broadcasting rights as well as the centralized licensing of club trademarks are shared pro rata among league clubs.[11] The NHL and

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[9] See William J. Hoffman, Comment, *Dallas' Head Cowboy Emerges Victorious in a Licensing Showdown with the NFL*: National Football League Properties v. Dallas Cowboys Football Club, 7 SETON HALL J. SPORT L. 255, 262 (1997).

[10] For example, the estimated value of the NFL's existing television contracts are as follows: CBS and Fox (a total of $8 billion through 2011); NBC ($600,000,000 annually through 2012); ESPN ($1.1 billion annually through 2013); and DirecTV ($3.5 billion for the NFL Sunday Ticket package through 2010). Major League Baseball's (MLB) television contracts will generate approximately $5.3 billion through 2013.

[11] Gate receipts from ticket sales frequently are also shared between the home and visiting teams in an agreed percentage.

MLB have consolidated and centrally license their clubs' Internet rights with net revenues equally shared among league clubs.

The exclusive licensing or sale of pooled broadcasting, trademark, and/or Internet rights by a central league entity, along with corresponding restrictions on the licensing or sale of these rights by individual clubs,[12] is designed to (and often does) maximize the total revenues available to be distributed pro rata to the league's clubs. This form of revenue sharing has the procompetitive objective of enhancing a sports league's ability to engage in interbrand economic competition with other providers of entertainment by better equalizing revenues and competitive balance among its member clubs. However, to achieve these objectives, league rules limit or prohibit individual clubs from selling or licensing these intellectual property rights, which reduces or eliminates intrabrand economic competition among league clubs. These restrictions have generated antitrust suits alleging violations of §1 of the Sherman Act by the U.S. government and private parties such as individual league clubs[13] or third parties such as broadcasters and prospective trademark licensees.

In a 1953 lawsuit against the NFL,[14] the United States government alleged that a provision of the NFL's bylaws that effectively prohibited its member clubs from broadcasting

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[12] A club that violates these restrictions may be liable for breach of contract and fiduciary duty, tortious interference with contractual relationships, and trademark infringement. *NFL Properties, Inc. v. Dallas Cowboys Football Club, Ltd.*, 922 F. Supp. 849 (S.D.N.Y. 1996).

[13] The pro rata revenue shares received by the most popular individual league clubs or those in the largest markets may be significantly less than the percentage of league revenues generated by the intellectual property associated with those clubs, which has caused some NFL and MLB clubs to assert that league-imposed restrictions on their individual sale of sponsorship and merchandising rights or licensing of their trademarks violate the antitrust laws. See, e.g., *Dallas Cowboys Football Club, Ltd. v. NFL Trust*, 1996 WL 601705 (S.D.N.Y. 1996) (alleging that NFL Trust and Licensing Agreements create a price-fixing cartel that precludes free competition in pro football sponsorship and merchandising markets); Complaint, *New York Yankees Partnership v. Major League Baseball Enterprises, Inc*, 97-1153-CIV-T-2513 (M.D. Fla. Filed May 19, 1997) (asserting that MLB Properties is a "cartel organized at the behest of a large group of the less successful Major League Clubs" that illegally restrains trade). Both cases settled before being judicially resolved on the merits.

[14] *U.S. v. NFL*, 116 F. Supp. 319 (E.D. Pa. 1953).

games into each other's home territories was an unreasonable restraint that violated §1 of the Sherman Act. A federal district court held that the bylaws constituted an agreement among NFL clubs, which satisfied §1's concerted action requirement. Although it characterized the challenged restraint as geographical market allocation among competitors that generally is per se illegal, the court applied the more flexible rule of reason, which balances the particular restraint's anticompetitive and procompetitive effects to determine its reasonableness (i.e., net competitive significance). Although it ruled that most of the broadcast restrictions unreasonably restrained trade and enjoined them from continuing, the court concluded that prohibiting telecasts into a club's home territory when it was playing at home was a reasonable means of protecting its live gate attendance that prevented a stronger, more popular club's unrestricted sale of television broadcasting rights from harming weaker clubs and the league as a whole.

Observing that professional sports are a unique business, the court explained:

> On the playing field, of course, [league clubs] must compete as hard as they can all the time. But it is not necessary and indeed it is unwise for all the teams to compete as hard as they can against each other in a business way. [If this occurred], the stronger teams would be likely to drive the weaker ones into financial failure. If this should happen not only would the weaker teams fail, but eventually the whole league, both the weaker and the stronger teams, would fail, because without a league no team can operate profitably.[15]

In a related 1961 case the same court ruled that the NFL clubs' agreement to begin collectively selling television broadcast rights to all their games through the league and to distribute the net revenues pro rata violated its 1953 injunction because this agreement

[15] Id. at 323.

eliminated competition among the clubs for the sale of television rights.[16] In response, the NFL successfully lobbied the U.S. Congress for a limited antitrust exemption that expressly permits what this judicial decree prohibited. The Sports Broadcasting Act of 1961[17] allows professional sports league clubs to pool and sell or transfer "all or any part of the rights of such league's member clubs in the sponsored telecasting of the games."[18] This legislation permits league clubs to eliminate competition among themselves, which facilitates their sharing of free over-the-air network television broadcast revenues and helps maintain the league's competitive balance, product integrity, and existence.

In *Copperweld Corp. v. Independence Tube Corp.*,[19] an important 1984 case with significant implications for whether §1 should apply to agreements among professional sports clubs, the Supreme Court held that legally separate business entities with a "complete unity of interest," such as a parent corporation and its wholly owned subsidiary, are not subject to §1.[20] It reasoned that this business arrangement is "like a multiple team of horses drawing a vehicle under the control of a single driver;" therefore, there is no sudden joining of previously diverse economic forces raising the prospect of collusive anticompetitive conduct. The court observed that internal coordination within a single business enterprise is often necessary for effective

[16] *U.S. v. NFL*, 196 F. Supp. 445 (E.D. Pa. 1961).

[17] 15 U.S.C. §129, et seq.

[18] Courts have construed the term "sponsored telecasting" narrowly. *Shaw v. Dallas Cowboys Football Club, Inc.*, 172 F.3d 299, 300 (3d Cir. 1999) (package sale of television broadcast rights to satellite distributor not "sponsored telecasting" immune from antitrust scrutiny); *Chicago Prof'l Sports Ltd. Partnership v. NBA*, 808 F. Supp. 646, 650 (N.D. Ill. 1992) ("sponsored telecasting" encompasses only "free television," such as "national network and local over-the-air broadcasting provided at no direct cost to viewers," not league's pooled television rights contract with cable television programming service).

[19] 467 U.S. 752 (1984).

[20] The Court explained that the Sherman Act contains a "basic distinction between concerted and independent action," with the result that anticompetitive independent conduct by a single economic entity does not violate § 1.

competition and that its internal organizational structure is irrelevant to the resulting anticompetitive consequences. Although there is no complete unity of interest between professional sports league clubs as there is between a corporate parent and wholly owned subsidiary some of *Copperweld*'s reasoning suggests the clubs are a single economic entity for purposes of §1 of the Sherman Act.[21]

After *Copperweld* there have been several §1 challenges by private parties to sports league or governing body restrictions on the usage, licensing, or sale of sports-related intellectual property rights by its members. In *National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma*,[22] the Supreme Court held that an agreement among the National Collegiate Athletic Association (NCAA)'s member universities not to individually sell television rights to their college football games violated §1.[23] Applying the "quick look" rule of reason (which does not require detailed market analysis regarding a restraint's anticompetitive effects), the Court ruled that the NCAA's exclusive college football television plan fixed the price of televised college football games and artificially limited their total number without furthering a procompetitive economic justification such as maintaining on-field competitive balance.

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[21] In *Brown v. Pro Football, Inc.*, 518 US 231, 248 (1996), a case that did not directly consider whether a professional sports league is subject to §1, the Supreme Court observed "that the clubs that make up a professional sports league are not completely independent economic competitors, as they depend upon a degree of cooperation for economic survival."

[22] 468 U.S. 85 (1985).

[23] Universities are primarily institutions of higher education that have formed amateur sports associations such as the NCAA to regulate their intercollegiate athletics competition, a product with enormous popularity and commercial appeal in the U.S. Although not their purpose, university intercollegiate basketball and football programs effectively serve as training ground and feeder system for the NBA and NFL. Unlike the member clubs of a professional sports league, universities have a separate existence independent of their joint production of sports competitions so their collective conduct is clearly subject to judicial scrutiny under §1 and does not raise the "single entity" defense at issue in *American Needle*.

In *Chicago Professional Sports Limited Partnership v. National Basketball Association*,[24] the United States Court of Appeals for the Seventh Circuit suggested the "single entity" defense may bar a §1 challenge to a professional sports league's limits on an individual club's sale of television rights to its home games. The Chicago Bulls wanted to broadcast all its home games not shown as part of the NBA's national television package on "superstation" WGN based in Chicago, but telecast throughout the U.S. on cable networks. During the 1990s, the Bulls, led by Michael Jordan and other talented players, won four NBA championships. This enhanced the national popularity of the Bulls and caused the NBA to limit the number of Bulls games televised on WGN to 15 to 20 per year and assess a "tax" on each Bulls broadcast in an effort to limit the adverse effects on other NBA clubs' home attendance, which the Bulls claimed violated §1. In defense, the NBA argued that it was a single economic entity when producing and telecasting its games.[25]

Writing for the majority of the three judge panel, Judge Easterbrook observed that the NBA is closer to a single firm than a group of independent firms when acting in the broadcast market:

> Whether the NBA itself is more like a single firm, which would be analyzed only under § 2 of the Sherman Act [which prohibits monopolization or attempted monopolization], or like a joint venture, which would be subject to the Rule of Reason under § 1, is a tough question under *Copperweld*. It has characteristics of both. Unlike the colleges and

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[24] 95 F.3d 593 (7th Cir. 1996).

[25] Other federal appellate courts previously rejected this defense when raised by other U.S. professional sports leagues in antitrust litigation challenging different types of restraints. *Sullivan v. NFL*, 34 F.3d 1091 (1st Cir. 1994); *Los Angeles Memorial Coliseum v. NFL*, 726 F.2d 1381, *cert. denied*, 469 U.S. 990 (1984); *North American Soccer League v. NFL*, 670 F.2d 1249 (2d Cir. 1981), *cert. denied*, 459 U.S. 1074 (1982).

universities that belong to the National Collegiate Athletic Association . . . the NBA has no existence independent of sports. It makes professional basketball; only it can make "NBA Basketball" games . . . From the perspective of fans and advertisers (who use sports telecasts to reach fans), "NBA Basketball" is one product from a single source even though the Chicago Bulls and Seattle Supersonics [two of the NBA's clubs] are highly distinguishable . . .[26]

Judge Cudahy, however, disagreed:

As long as teams are individually owned and [all] revenue is not shared in fixed proportion, the teams both retain independent economic interests and make decisions in concert. Where this is the case, there is a strong argument that sports leagues should be treated as joint ventures rather than single entities because there remains a potential that league policy will be made to satisfy the independent economic interests of some group of teams, rather than to maximize the overall performance of the league. . . .[27]

Despite their differing views regarding whether §1 should apply, all three judges agreed that the NBA is sufficiently integrated that full rule of reason analysis, which requires the plaintiff to satisfy the difficult burden of proving the challenged restraint substantially reduces

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[26] Id. at 599.

[27] Id. at 606. See also *Madison Square Garden, L.P. v. NHL*, 2008 WL 4547518 (S.D.N.Y.) at *13 (observing that most courts have concluded that a professional sports league is not a separate economic entity, but declining "to resolve the question at this juncture" because " arguments advanced by the NHL in favor of single entity status require examining facts outside the pleadings."); *Shaw v. Dallas Cowboys Football Club, Ltd.*, 1998 WL 419765 (E.D. Pa. 1998), *aff'd on other grounds*, 172 F.3d 299 (3d Cir. 1999) (allegation that NFL Sunday Ticket satellite television package of all weekly games broadcast nationwide constitutes an agreement among the NFL's member clubs sufficiently alleges concerted action under §1 of the Sherman Act).

economic competition in a properly defined relevant market, should be applied to its television superstation broadcasting limits by the lower court on remand.[28]

Consistent with this judicial view, in *Major League Baseball Properties, Inc. v. Salvino, Inc.*,[29] the United States Court of Appeals for the Second Circuit recently held that a §1 claim challenging Major League Baseball Properties' (MLPB) centralized trademark licensing program must be evaluated under the full rule of reason. The court rejected the claim of a manufacturer of plush filled bears called "Bammers" that MLBP's refusal to grant it a trademark license violated the "quick look" rule of reason. The Second Circuit noted that the Supreme Court "has applied quick-look analysis only 'to business activities that are so plainly anticompetitive that courts need only undertake only a cursory examination before imposing antitrust liability,'" and that "if an arrangement 'might plausibly be thought to have a net procompetitive effect, or possibly no effect at all on competition,' more than a 'quick look' is required."[30] The MLB clubs' agreement establishing MLBP as the exclusive licensor of their trademark rights did not expressly limit or necessarily reduce the number of licenses issued to third parties. To the contrary, the total number of licensees increased substantially after the formation of MLBP, thereby having the procompetitive effect of increasing the quantity of trademarked MLB merchandise available to consumers.[31] The Second Circuit affirmed summary judgment in favor of MLBP because the rejected licensee did not prove that MLBP's centralized licensing program

[28] This case subsequently settled before it was reconsidered by the lower court.

[29] 542 F.3d 290 (2d. Cir. 2008).

[30] *Id.* at 318.

[31] The court concluded that one-stop shopping for trademark licensing rights and MLBP's pro rata distribution of profits to MLB clubs to maintain league competitive balance are additional procompetitive effects of centralized, exclusive trademark licensing.

was anticompetitive, or establish that MLBP had market power in the relevant market because there were no reasonable substitutes for products bearing MLB clubs' trademarks (which would have created a rebuttable presumption that the challenged conduct was anticompetitive).

Similarly, in *Madison Square Garden, L.P. v. NHL*,[32] the Second Circuit ruled that the owner of the New York Rangers NHL club could not use the "quick look" rule of reason to prove that requiring the club to migrate its website to a common technology platform managed by the NHL, rather than allowing its independent operation, violated §1. It affirmed the lower court's finding that the challenged conduct has several plausible procompetitive effects, including a standardized website layout to attract national sponsors and advertisers interested in uniform exposure across the NHL.com network, which is a key element of the NHL's strategy to enhance its national brand to better compete against other sports and entertainment products.[33]

<u>*American Needle v. NFL*</u>

In *American Needle*, the NFL argued that its member clubs function as a single economic entity in jointly producing NFL football and collectively licensing their intellectual property, which does not constitute the requisite concerted action under §1. Relying on *Copperweld* and *Chicago Professional Sports*, the Seventh Circuit agreed and concluded "the record amply establishes that since 1963, the NFL teams have acted as one source of economic power-under the auspices of NFL Properties-to license their intellectual property collectively and to promote NFL football."[34] According to the Seventh Circuit, a professional sports league's centralization

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[32] 270 Fed. Appx. 56, 2008 WL 746524 (2d. Cir.).

[33] *Madison Square Garden, L.P. v. NHL*, 2007 WL 3254421 (S.D.N.Y.) at *6.

[34] 538 F.3d 736, 744 (7th Cir. 2008).

of intellectual property rights and their exclusive licensing or sale is legal as a matter of law without the need to analyze its competitive effects as a matter of fact under the full rule of reason as done by courts in *Salvino* and *Madison Square Garden*.

In its appeal to the Supreme Court American Needle, whose NFL headwear license of more than 20 years was not renewed after NFLP granted an exclusive 10-year license to Reebok in 2001, argued that agreements between "separately owned and controlled sports teams, whose interests and decisionmaking are *not* inherently unitary" are subject to §1 under *Copperweld*. It asserted that "because the teams have separate profits and losses, each team has an overriding interest in maximizing its own individual profits, *i.e.*, a fundamental interest that differs from the interests of the other teams and the league as a whole." Each NFL club owns its trademarks and, absent their centralized trademark licensing agreement, are actual and/or potential competitors in the licensing and sale of intellectual property. For example, the Dallas Cowboys club opted to independently sell its own trademarked apparel and to pay a minimum contribution to the NFL clubs' shared revenue pool generated by trademark licensing. After Reebok was granted an exclusive trademark license, the price of NFL branded headwear increased from $19.99 to $30, which American Needle argued is the anticompetitive effect of the NFL clubs' agreement to collectively and exclusively license their individually owned trademarks that should be judicially invalidated under §1.

In response, the NFL asserted the Seventh Circuit correctly held that its member clubs, despite being separately owned and operated, are not independent sources of economic power. Rather, the NFL clubs collectively produce a product (which no club could produce unilaterally) that competes against other forms of entertainment. The NFL argued that "each club's economic value derives from its membership in the NFL and its role in the production of NFL Football;"

therefore, "[b]ecause the NFL and its member clubs function as one source of economic power when collectively producing NFL Football, they also function as a single economic entity in promoting that product, including through the collective licensing of their intellectual property" such as the clubs' trademarks.

In an amicus brief[35] on behalf of American Needle, the U.S. government observed that "[t]he NFL and its teams - like most professional sports leagues – 'comprise a hybrid arrangement, somewhere between a single company (with or without wholly owned subsidiaries) and a cooperative arrangement between existing competitors.' "[36] Acknowledging that "because of its hybrid nature, there is no 'one 'right' characterization" for all the conduct of a professional sports league," the government argued:

> "Single-entity treatment for the teams and the league is appropriate with respect to a restraint on an aspect of their operations if, but only if, two conditions are satisfied. First, the teams and the league must have effectively merged the relevant aspect of their operations, thereby eliminating actual and potential competition among the teams and between the teams and the league in that operational sphere. Second, the challenged restraint must not significantly affect actual or potential competition among the teams or between the teams and the league outside their merged operations."

Regarding its proposed application of this standard, the U.S. government contended:

> "If [American Needle] is challenging the teams' decisions to form [NFL Properties] or to

[35] This is a "friend of the court" brief, which often are filed by the U.S. government in cases pending before the U.S. Supreme Court.

[36] Fraser v. MLS, 284 F.3d 47, 58 (1st Cir.) (Boudin, J.), *cert. denied*, 537 U.S. 885 (2002).

make [NFL Properties] their exclusive licensing agent, then those actions should be held to be concerted action. If [American Needle] challenges the choice to offer only a blanket license, or the choice to have only a single headwear licensee, the lower courts should consider whether the teams had already effectively merged their licensing activities and whether those choices affected actual or potential competition in other, non-merged activities."

During oral argument the Supreme Court justices appeared skeptical that a professional sports league's centralized licensing or sale of its clubs' intellectual property rights is an unreasonable restraint of trade—even if exclusive rights are granted—but they appeared uncertain whether it should be immune from scrutiny under §1 of the Sherman Act. The Court seemed reluctant to subject every agreement among league clubs, including playing and equipment rules and game scheduling as well as all administrative decisions by the league commissioner (for example, purchasing office furniture from a single supplier) to rule of reason analysis. On the other hand, many justices appeared hesitant to rule broadly that all collective decisions relating to the production or promotion of a professional sports league's brand of athletic competition are not subject to §1.

In *American Needle*, a unanimous Supreme Court ruled that "the NFL's licensing activities constitute concerted action that is not categorically beyond the coverage of §1" and that its legality "must be judged under the Rule of Reason."[37] Construing *Copperweld*, the Court explained that the key inquiry is whether there is an agreement "amongst 'separate economic

[37] 130 S. Ct. at 2206-2207. The Court reiterated that a professional sports league has a "legitimate and important interest" in maintaining competitive balance among its clubs and that it is "unquestionably an interest that may well justify a variety of collective decisions made by the teams." Id. at 2217.

actors pursuing separate economic interests.'"[38] In other words, "[t]he question is whether the agreement joins together 'independent centers of decisionmaking.'"[39] Observing that each NFL club is an independently owned and operated business that owns its individual trademarks, the Court concluded that the clubs are at least potential competitors with each other in the sports trademark licensing market.

Rejecting the NFL's argument that NFLP's trademark licensing decisions are unilateral conduct, the Court noted that the NFL clubs jointly control NFLP[40] and have individual economic interests distinct from NFLP. The Court explained:

> "Although NFL teams have common interests such as promoting the NFL brand, they are still separate, profit-maximizing entities, and their interests in licensing team trademarks are not necessarily aligned. Common interests in the NFL brand '*partially* unit[e] the economic interests of the parent firms, but the teams still have distinct, potentially competing interests."[41]

Although there are reasonable legal and economic arguments on both sides of this issue, I believe the Supreme Court correctly held that a professional sports league comprised of separate, independently owned and operated for-profit member clubs is not a single economic entity immune from §1 as a matter of law when engaged in joint marketing and licensing of intellectual property.[42] Although the league's member clubs jointly produce a single product and are

[38] Id. at 2212.

[39] Id. at 2212.

[40] NFLP is a separate corporation that is independently managed and most of its revenues are distributed to NFL clubs on a pro rata basis.

[41] Id. at 2213.

[42] On the other hand, if a professional sports league is governed by an entity that wholly owns and controls all of its member clubs or by an independent company with separate ownership and control from its clubs (similar to the

economically interdependent, they have diverse economic interests and "the history of sports leagues is replete with examples of business decisions that reflect club self-interest rather than the best interests of the league as a whole."[43] Although there is legitimate concern about being over inclusive and subjecting all agreements among league clubs to §1, the difficulty of identifying a principled basis for characterizing collective conduct as that of a single economic entity suggests that being under inclusive in determining the proper scope of §1 is a greater evil from a consumer welfare perspective. It is better to characterize a lawfully integrated professional sports league governed by separate and independently owned clubs as a joint venture whose alleged anticompetitive conduct is subject to §1 antitrust scrutiny under the full rule of reason.[44] This will subject anticompetitive conduct by a professional sports league's member clubs to §1 liability, while permitting them to make predominantly procompetitive joint decisions that enhance the league's ability to compete in the U.S. entertainment market.

National Association for Stock Car Auto Racing's business model), there would be the requisite complete unity of interest under *American Needle* and *Copperweld* to justify characterizing it as a single economic entity. See generally Stefan Szymanski and Stephen F. Ross, *Fans of the World, Unite! A (Capitalist) Manifesto for Sports Consumers* (2008).

[43] Brief of the American Antitrust Institute and Consumer Federation of America as Amici Curiae in Support of Petitioner at p. 7.

[44] Texaco, Inc. v. Dagher, 547 U.S. 1 (2006).