American Needle v. NFL: Why a Contextual Approach Must be Invoked when Tackling the "Single Entity" Question

By: Niki Ghazian

I. INTRODUCTION

Competition can be concisely defined by one word: 'rivalry'.[1] Logically then, it follows that at minimum, two independent actors are required to prompt a rivalry. Establishing whether two independent actors subsist, may initially guise itself as an uncomplicated inquiry. Yet, even analogizing this determination within its utmost natural realm can prove itself to be cumbersome: Does a back-up quarterback rival his own teammate, the starting quarterback? Certainly, at practice the backup player separately competes against the starting player for his position. However, on game day, when both players face an opposing team, they share a mutual goal – to win as teammates. Rationally, even when potential competitors are united by a common interest, their conduct within that context will unvaryingly and mutually be driven toward that goal. Nonetheless, much legal debate and litigation, has ensued from difficulties in ascertaining this within the scope of law and economics. Can an economically complex, multifaceted enterprise, harbor a symbiotic relationship between actual competitors, guised as inner-firm cooperation?

In 2007, the National Football League ("NFL"), acquired 3.2 billion in revenues solely from the retail sales of 'Official NFL' apparel.[2] In 2001, the NFL acting collectively on behalf its teams, granted an exclusive apparel license to *Reebok*. Consequently, this exclusive licensing deal sparked the controversy arising in *American Needle v. NFL*.

[1] Merriam-Webster Dictionary, 2010

[2] Retail sales of NFL-licensed merchandise in the U.S. and Canada topped $3.2 billion in 2007, according to the Licensing Letter's Sports Licensing Report, published by EPM Communications Inc., in New York.

A. *American Needle v. NFL,* Factual & Procedural Background

On May 24, 2010, The United States Supreme Court rendered its opinion on an antitrust action brought by American Needle Inc., against the National Football League, which arose from the NFL's decision in 2001, not to renew a non-exclusive apparel licensing deal with American Needle. The National Football League Properties, or "NFLP", an unincorporated entity whose sole function is to develop, license, and market the NFL's intellectual property,[3] opted to instead sign an exclusive, and lucrative deal with Reebok International, Ltd., for the manufacturing of all NFL apparel.[4] The decision to grant an exclusive license to Reebok, a co-defendant to the complaint, was made by all 32 NFL teams. According to American Needle, this exclusive deal established a barrier to entry within the NFL apparel marketplace, and thus was a violation of Section 1 "The Sherman Act," U.S.C. 15. Which makes "[e]very contract, combination … or, conspiracy, in restraint of trade" a felony. Further, American Needle argued that there was also a Section 2 violation, alleging that the NFL was using its market power illegally by means of acting as a monopoly when granting an exclusive license to Reebok.[5] The NFL invoked the "single entity" defense, citing *Copperweld v. Independence Tube Corp.*, and asserted that the 32 NFL teams and NFLP were incapable of conspiring in violation of Section 1 of the Sherman Act, "because they are a single economic enterprise, at least with respect to the challenged conduct."[6] This defense moves to invoke a paradigm of contextual analysis of the alleged antitrust violation, which is the central discussion of this article.

Procedurally, the United States District Court for the Northern District of Illinois, and the United States Court of Appeals for the Seventh Circuit, both held in favor of the NFL, utilizing a contextual approach to analyzing the single entity defense. The District Court's holding, resonated the NFL's "single entity" argument., and in granting summary judgment,

---

[3] *American Needle v. National Football League,* 538 F. 3d 736 (7th Cir. 2008)

[4] *Id.*

[3] **U.S.C. 15 § 1 Trusts in Restraint of Trade illegal**

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony.."

U.S.C. 15 § 2 Monopolizing trade a Felony

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several States... shall be deemed guilty of a Felony... "

[6] *Id.*

concluded that the 32 NFL teams "are a single economic enterprise, at least with respect to the conduct challenged." The court furthered this subjective approach by finding that the NFL teams and NFLP "have so integrated their operations, that they should be deemed a single entity rather than joint ventures cooperating for a common purpose."[7] Also, The District Court found that the general market was impacted by the broadly defined product of NFL Football, rather than American Needle's narrow claim that the market impacted and the product therein was NFL Apparel. Thus, the court held the NFL acted as a single entity within the context of the impacted market, because their collective act "exploited NFL intellectual property rights" in an effort to further the product of NFL Football.[8]

The Court of Appeals affirmed the lower court's decision, and expanded to articulate the gravity of contextualizing the challenged conduct. The Court reasoned that "in some contexts a league seems more aptly described as a single entity,"[9] and that courts must examine the conduct at issue. Further, the court recognized that the NFL licensed their intellectual property collectively since 1963, and thus reasoned that "NFL teams share a vital economic interest in collectively promoting NFL football… to compete with other forms of entertainment." Thus the court rendered a broad characterization, that the product was not NFL apparel, but rather NFL Football, noting that the production of NFL Football could only be carried out jointly.[10] The District court's determination that the product at issue is NFL Football, generally, coupled with the assertion that the market is entertainment broadly, led them to their logical conclusion: Collective bargaining of intellectual property is a necessary component to promoting the product of NFL Football. Accordingly, the court reasoned that "it makes little sense to assert that each individual team has the authority [or] … responsibility to promote the jointly produced [product] NFL Football," thus making their joint efforts in such a context, unviable to Section 1 scrutiny.

The United States Supreme Court meandered from the lower courts' decisions to accept the NFL's "single entity" argument. Justice Stevens, writing for the court, opined that the single entity argument is inapplicable to the case, because the "intra-firm agreements" made by the NFL teams "may simply be a formalistic shell for ongoing concerted action."[11] The court furthered this idea by pointing out that the NFL teams which authorize the NFLP's licensing decisions are actually competitors, contending that "The teams remain separately controlled, potential competitors with economic

[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] *Id.*

interests that are distinct from NFLP's financial well-being."[12] The Supreme Court cited *Sealy* and concluded that the NFLP is therefore "an instrumentality" of the teams in their effort to collude. The court rebutted NFL's contention that under *Copperweld*, a parent and a subsidiary cannot conspire, by determining that the NFL and NFLP lacked a "complete unity of interest" to make such a claim under *Copperweld.*[13] Thus, finding that the duality requirement of Section 1 had been satisfied, the court granted certiorari, and gave *American Needle* the prima facie showing[14] they needed to proceed with their antitrust suit against the NFL.

B. NFL Properties Background

National Football League Properties, or "NFLP", was established in 1963, as the first professional sports league properties division, created by then commissioner Pete Rozelle.[15] The function of the NFLP is to develop, license, police trademark infringement, and market exclusive NFL team licenses. The 32 teams, each with their own names, colors, logos, trademarks, and other related intellectual property, licensed said property on an individual basis, prior to the inception of the NFLP in 1963. Moreover, before the exclusive licensing right for apparel was granted to Reebok in 2001, the NFLP granted non-exclusive licenses for such apparel to multiple vendors and manufacturers, such as American Needle.[16] The revenues collected by the NFLP, as a result of such licensing deals, is pooled into a trust and distributed equally amongst the 32 NFL teams. In the past, few teams have contested the stipulations of The Trust Agreement, which relinquishes Intellectual Property Rights from the individual teams onto the NFLP. Those teams whom in the past, have claimed their market value was stifled by this collective licensing process, failed to prevail on their claim in court.[17]

The benefits of collective league-based bargaining, for licensing property is inherent: the heightened ability to coordinate resources and efforts; the ability for increased quality control over approved merchandise; efficiency in distribution of product; and increased control in enforcement of

[12] *Id.*
[13] *Copperweld Corp. v. Independence Tube Corp.,* 467 U.S. 771 (1984)
[14] *American Needle v. National Football League,*538 F. 3d 736 (7th Cir. 2008)
[15] THE BUS. OF SPORTS 47, (Scott R. Rosner & Kenneth L. Shropshire eds., 2004)
[16] *American Needle v. National Football League,*538 F. 3d 736 (7th Cir. 2008)

[17] *National Football League v. Dallas Cowboys Football Club,* 922 F.Supp. 849 (1996). Dallas Cowboys owner Jerry Jones , unsuccessfully challenged the legality of the NFL Trust and the NFLP's collective licensing of team marks as an antitrust violation.

trademark infringement claims against unlicensed manufacturers.[18] The sole ownership of league-wide Intellectual Property gives the NFLP greater leverage in ensuring the greatest value is attributed to NFL teams' copyrights, and each licensing deal. In 2001, 2.5 billion dollars worth of NFL licensed products were sold. The NFLP profited approximately 8.5% of the total sales, and distributed those earnings equally to individual teams.[19] Thus with the teams benefiting from these royalties, there would be little incentive for any club to bypass the pooling of resources within the NFLP arms, juxtaposed to incurring the costs of resources in licensing their logos individually.[20] Licensees equally benefit from this collective bargaining, as it adds value to their goods through the exclusivity of their license, which is enhanced by encompassing all NFL teams as a whole, rather than one individual team.[21]

II. Relevant Market: NFL Football or NFL Apparel?

Perhaps the most complex and significant entanglement within *American Needle*, is the task of identifying a definitive market, for the purposes of establishing injury resulting from the trust formed by NFL and Reebok. American Needle asserts a narrowly drawn marketplace, one which solely consists of the manufacturing and distribution of 'official' NFL apparel.[22] Respondent, National Football League, retorts that the impacted market is much broader than NFL apparel specifically. NFL claims that the actual product they generate is universally 'NFL Football', which competes with other forms of entertainment, and can only be made available through the horizontal cooperation and coordination of NFL teams. Behind the NFL's broad spectrum definition, is the premise that NFL apparel is an ancillary byproduct of their primary good 'NFL Football'.[23] It is undisputed however, that the NFL embodies chameleon-like qualities with respect to its brand and marketplace versatility, enabling it to dabble within numerous markets.

Identifying the industry an entity occupies, is pertinent to accurately predicting market conduct, as well as the impact of that entity's operation. When a firm is multifaceted and operates in numerous markets, it must be stratified within the market which it *primarily* competes in[24]. The eminence of 'NFL Football' is the vital component to the NFL's ability to compete

[18] THE BUS. OF SPORTS 47, (Scott R. Rosner & Kenneth L. Shropshire, eds., 2004)
[19] *Id.*

[20] *Id.*
[21] *Id. at 177-183*
[22] *American Needle v. National Football League,* 538 F. 3d 736 (7th Cir. 2008)
[23] *American Needle v. National Football League,* 538 F. 3d 736 (7th Cir. 2008)
[24] ANTITRUST POLICIES and ISSUES 69, (Roger Sherman, 1978)

within markets beyond the scope of entertainment. 'Official' NFL goods would not conduct demand, let alone possess any market power as a distinguishable brand, without the fundamental clout of 'NFL Football'. This concept can be analogized within the operation of other entertainment enterprises, such as Warner Bros., whose main product is movies, also competing within the market of entertainment. If Warner Bros., granted exclusive rights to McDonald's, to promote their most recent feature film, they would not be considered a firm competing in the fast-food industry; but rather a firm competing as a form of entertainment.[25] If *Indiana Jones* lacked notoriety as a movie within the entertainment market, it would be incapable of fruitfully branching into secondary markets, since the original product would lack capital as an identifiable brand. Therefore, when courts aim to determine a product's primary marketplace, they must consider the market in which said product originally garnered its utility as a brand. Any secondary markets which a product competes within should be regarded as collaterally resulting, and therefore a derivative marketplace. NFL's primary and most formidable product is 'NFL Football', jointly produced by the NFL teams as an aggregate venture, collectively competing within the market of entertainment. The viability of various 'Official' NFL goods, which compete within a multitude of secondary markets, survives dependently upon the central product of 'NFL Football'.

A. NFL's 'Unique' Natural Monopoly: No Market Substitute for 'Official' NFL Goods

In judicial retrospect, courts have considered an entity as being 'unique' in a multitude of ways, such as retaining a quality which "renders [the product] impossible to replace."[26] This legal definition has been articulated within the economic realm, as a product lacking any homogenous[27] competition, or a market substitute. Thus, the 'unique' nature

[25] "When a studio like Disney tries to get a sponsorship deal from McDonald's or Burger King for a movie such as *The Lion King,* it competes in that market with Warner Brothers and its *Batman*, or Universal and its *Jurassic Park." LEVELING THE PLAYING FIELD,* League Restraints on Team Licensing, *287 (Paul C. Weiler, 2000)*

[26] Dallas Cowboys Football Club, Inc. v. Harris, 348 SW 2d 37 - Tex: Court of Civil Appeals, Dallas 1961, The court held that the definitions offered in trial for "Unique" were too broad, and instead relied on the definition from *Philadelphia Ball Club v. Lajoie,* 202 Pa. 210, 51 A. 973, 58 L.R.A. 227, Unique: "Shown to be of such character as to render it impossible to replace…"

of a product, by its very existence, can subsequently suppress any potential competition, and acquire market power exclusively.

Market power results when an established entity impedes on the ability of other rival firms to enter and compete within its respective market.[28] This barrier to entry can be attained in one of two ways: First, it can be achieved artificially, by means of unilateral conduct or illicit collusions,[29] resulting in anticompetitive market restraints. Finally, it can occur naturally, where product differentiation[30] is so skewed, that the good is deemed to be unique, and therefore lacks any rivalry in the form of interchangeable market substitutes. As a result, prospective competitors become unsustainable and incapable of competition.[31] A firm that possesses a unique product may assert market power, and inadvertently cast a barrier to entry into that market, resulting in a Monopoly[32]. When a product is inherently so unique by its nature that it lacks a market substitute, this matchless characteristic naturally bars entry into the market; so much so, that "the differentiated product may be a relevant market unto itself."[33] Natural Monopolies are not subject to antitrust scrutiny, and are conversely often found to have efficient economic restraints.[34] Each year, the NFL drafts the nation's top football athletes into

---

[27] ECONOMIC ANALYSIS FOR LAWYERS 505 (Henry N. Butler, Christopher Drahazol, 2006) Homogenous product: A product of one firm that is identical to the product of every other firm in the industry. Consumers see no difference in units of the product offered by alternative sellers.

[28] *Id.* At 509, Market power: A situation characterized by barriers to entry of rival firms, giving an established firm control over price and therefore profit levels.

[29] ECONOMIC ANALYSIS FOR LAWYERS 501 (Henry N. Butler, Christopher Drahazol, 2006) Collusion: Agreement among firms to avoid various competitive practices,… The Sherman Act prohibits collusion and conspiracies to restrain interstate trade.

[30] ANTITRUST POLICIES and ISSUES 70, (Roger Sherman) "*Product Differentiation* is even more difficult to measure. It reflects the extent to which similar products are differentiated in consumers' minds."

[31] THE ANTITRUST PARADOX: A Policy at War with Itself, "Competition: may be read as the process of rivalry."

[32] Monopoly: Market structure characterized by a single seller of a well defined product for which there are no good substitutes and (b) high barriers to the entry of other firms into the market for the product.
ECONOMIC ANALYSIS FOR LAWYERS 509 (Henry N. Butler, Christopher Drahazol, 2006)

[33] THE ECONOMICS OF ANTITRUST INJURY AND FIRM-SPECIFIC DAMAGES 20, (Kevin S. Marshall, 2008)
citing, AREEDA & HOVENKAMP, *supra* note 1, § 18.02d7 (Supp.2005)

their league, merely as assets in advancing their product of 'NFL Football'. Nonetheless, courts have held that the NFL constitutes nothing more than a natural monopoly[35], and have held that a contextual approach should be invoked when assessing an antitrust claim regarding the NFL's conduct.[36] Courts have also recognized a level of communication and collective action as being necessary to attaining the mutually-driven goal of advancing the unique product of 'NFL Football'. Thus, many courts have refrained from considering inter-league club deliberations as constituting collusion under The Sherman Act.[37]

Competition as a dynamic process,[38] should ideally be unrestrained by monopoly. This economic equilibrium allows consumers to dictate the flow of supply, and determine what sellers should produce, based on their knowledge of the true costs of alternative goods. However, it is wrong to assume that a Sherman Act violation has occurred anytime there is only one competitor in a certain market.[39] When a product is unique, such as 'Official

---

[34] MICROECONOMICS 42, (Louis Kaplow & Steven Shavell, 2004) "In some circumstances, it is substantially cheaper for just one company to produce a good in large quantity than for many companies to produce it in smaller quantities. The result is what is referred to as natural monopoly.";
THE ECONOMICS OF ANTITRUST INJURY AND FIRM-SPECIFIC DAMAGES 7, (Kevin S. Marshall, 2008) "Given such scarcity, all societies are confronted with the problem of determining 1) what and how much to produce; 2) how to produce; and 3) for whom to produce … Thus, perfect competition minimizes waste…"

[35] *American Football League v. National Football League*, 323 F. 2d 124 (4th Circuit 1963), the AFL claimed that the NFL was a monopoly and brought an antitrust action therein. The Fourth Circuit Court held that the NFL was a natural monopoly and thus did not violate antitrust laws.

[36] *Id. At 130,* "In very different contexts, the relevant market has been found to be a single city, a group of cities, a state, or several states.."

[37] *Id.,* at 134, "[Club Owners'] conversations were not conspiratorial acts .. They grew out of informal talks among friends and business associates about their mutual problems… ";
Chicago Pro. Sports Ltd. Partnership v. NBA, 961 F. 2d 667 - Court of Appeals, 7th Circuit 1992

[38] Competition as a dynamic process: A term that denotes rivalry or competitiveness between or among parties, each of which seeks to deliver a better deal to buyers when quality, price, and product information are all considered. Competition implies a lack of collusion among sellers.
ECONOMIC ANALYSIS FOR LAWYERS 501 (Henry N. Butler, Christopher Drahazol, 2006)

[39] John O. Gunderson, *The Intra- Enterprise Conspiracy Doctrine in* American Needle Inc. v. National Football League*: Antitrust Law Continues its Path Toward Rationality,* 2 SEVENTH CIRCUIT REV. 1 (2008)

NFL' products, there is no market substitute in the form of an alternative good. Lacking homogenous products or market substitutes for authentic NFL Football goods, consumers inherently are limited to one choice.[40] Consequently, for prospective competitors, there is little benefit, or efficiency, in producing goods which consumers do not seek out, even if such products in theory were products of a more competitive market.[41]

III. NFL PROPERTY RIGHTS

The product of 'NFL Football' has established itself at the pinnacle of the entertainment market. Rising incrementally each year, the NFL's gross annual revenue was at $8 billion in 2009.[42] The process, in which these earnings are dispersed amongst the NFL's 32 teams, relies upon the Mixed-Mode System of league-property ownership. Fundamental to a free market economy, is the unambiguously defined ownership of private property. [43] A property ownership system is efficient when it is endowed with the qualities of: "(1) universality – every resource is owned; (2) exclusivity – the owner of property may exclude all others from using it; and (3) transferability – it is costless for possessors of property rights to exchange their rights."[44] This section outlines the model in which revenue generated from 'NFL Football' is allocated to clubs; specifically, the types of profits and private ownerships attributed to an individual club, compared to those owned communally by the NFL teams.

A. The MIXED-MODE PROPERTY OWNERSHIP SYSTEM

The dynamic benefit of obtaining property with well-defined rights is the incentive to invest in the creation, management, or improvement of some resource over time. [45] This is perhaps why in the past, an entirely communal property model of sports league ownership has failed to interest investors.[46]

---

[40] Choice: The act of selecting among alternatives.
ECONOMIC ANALYSIS FOR LAWYERS 501 (Henry N. Butler, Christopher Drahazol, 2006)

[41] ANTITRUST POLICIES and ISSUES 16, (Roger Sherman, 1978)
[42] http://www.nytimes.com/2009/08/23/sports/football/23labor.html
[43] ECONOMIC ANALYSIS FOR LAWYERS 17 (Henry N. Butler, Christopher Drahazol, 2006)
[44] *Id.* at 18
[45] *Id.*
[46] Marc Edelman, *Why the "Single Entity" Defense Can Never Apply to NFL Clubs: A Primer on Property-Rights Theory in Professional Sports,* (2008).
http://law.fordham.edu/publications/article.ithtml?pubID=200&id=2758
Marc Edelman, Esq., is a Sports Law professor at New York Law School and Seton Hall University.

The league-based common property system, also known as the MLS[47] model, was sold in shares investor-operators, instead of individual club owners.[48] These shares are then distributed evenly amongst shareholders. Thus, shareholders profited equally from the league, akin to NFL teams profiting equally from the NFLP. Irrevocably, for purposes of §1 analysis, these investor-operators had a complete unity of interest necessary to be deemed a single economic entity. This model should have proven to be lucrative because owners would have enjoyed lower operating expenses than more privatized league ownership models.[49] However, MLS eventually abandoned this model because it failed to attract enough interested investors, presumably because it lacked any form of privatized property as an incentive to induce. Eventually, this league model was replaced by the Mixed-Mode System.

The Mixed-Mode system of league ownership strikes a balance between entirely privatized property ownership, and communal property ownership.[50] This equilibrium of ownership rights functions roundly, because it boasts enough private ownership to induce prospective club owners, yet reserves enough property on a community level to facilitate cooperation amongst clubs.[51] Individual NFL teams derive roughly 40% of their total annual revenues from gate receipts.[52] Profits which are entirely privately owned by the club, are revenues derived from the sale of: gate receipts, concession stands, stadium parking, as well as luxury suite leases, local broadcasting rights, and local sponsorships of stadiums.[53] In fact, the only type of revenue which is pooled into the NFL trust and distributed communally, are revenues drawn from the collective licensing of NFL team trademarks and new media rights.[54] Based on this model, individual clubs own a majority of their property privately, and the earnings which they share communally are shared in an equal manner, implicit of distinctly drawn ownership rights.

B. TELEVISION BROADCASTING RIGHTS ACT of 1961 - The "Pooling Effect"

As discussed, NFL teams enjoy privatized profit from securing local broadcasts of their games. Also, television contracts procured for the

[47] Major League Soccer
[48] *Id.* at 900
[49] *Id.* at 901
[50] *Id.* at 901
[51] *Id.* at 903, "Given that the private-property system has led to sub-optimally low levels of cooperation, and the common-property system has struggled to lure investors, most sports businesses have converged upon a middle-ground solution that includes both private and commonly-held property rights."
[52] THE BUS. OF SPORTS 361, (Scott R. Rosner & Kenneth L. Shropshire, eds., 2004)
[53] *Id.* The *Redskins* secured a $200 million dollar stadium deal from naming their stadium *FedEx Stadium.* The earnings from stadium deals are kept by the individual club owner.
[54] *Id.,* Video Games, are an example of New Media Rights.

broadcast of national games, were done privately by individual clubs prior to 1964.[55] In 1964, the NFL sold its pooled broadcast rights to CBS[56] for more than $1,000, 000 in revenues, per NFL team, an unprecedented broadcasting deal obtained by any previous individual club effort.[57] This deal was not subject to antitrust scrutiny, as it was shielded by a congressional act. In 1961, congress had enacted The Sports Broadcasting Act[58], an antitrust exemption protecting sports leagues from culpability when collectively securing broadcasting deals. This exception was granted subsequent to an opposing decision by the Supreme Court, which found leagues subject to Section 1 scrutiny within the broadcasting context.

The economic basis for the lucrative earnings garnered from such dealings, is attributed to the "pooling effect" of collective bargaining. In essence, by pooling together, teams avoid interclub competition, which can depreciate the individual value of their broadcasts.[59] Individual clubs also minimize their costs, by merging their operations, such as obtaining staff for securing those deals. The unity of interest between clubs in such a context lies within the utility of pooling their efforts to maximize their profits. The efficiency derived from the pooling effect of operating collectively in certain markets, is a premise which the NFL may rely on as a platform for their petition before congress. Currently, a congressional exemption for the NFL's collective licensing of their intellectual property is the only means of appeal possible in countering *American Needle's* finding of 'duality'.

IV. THE INTRA-ENTERPRISE DOCTRINE: From RISE to DEMISE, and its RESURRECTION in *AMERICAN NEEDLES*

Section 1 of The Sherman Act requires a showing of duality, between separate actors, which together would necessarily make the act of collusion legally feasible. Thus determining whether an entity acts unilaterally or jointly is legally determinative to Section 1 analysis. Procedurally, lacking a prima facie showing of duality, a §1 violation is deemed unviable and will generally end on a Motion for Summary Judgment, in favor of the defendant.

[55] Marc Edelman 918, *Why the "Single Entity" Defense Can Never Apply to NFL Clubs: A Primer on Property-Rights Theory in Professional Sports.*

[56] Columbia Broadcast System

[57] Marc Edelman 918, *Why the "Single Entity" Defense Can Never Apply to NFL Clubs: A Primer on Property-Rights Theory in Professional Sports.*

[58] *See* Sports Broadcastng Act, 15 U.S.C. §1291 (2000) ("The antitrust laws . . . shall not apply to any joint agreement by or among persons engaging in or conducting the organized profession team sports … by which any league of clubs … sells or otherwise transfers all or any part of the rights of such league's member clubs in the sponsored telecasting of the games..)

[59] Marc Edelman 918, *Why the "Single Entity" Defense Can Never Apply to NFL Clubs: A Primer on Property-Rights Theory in Professional Sports.*

In an apparent form, such a duality usually consists of two or more legally independent firms colluding, and thus is easily identifiable in satisfying the duality requirement of §1 of The Sherman Act. Precariously, in the past competing entities have conspired to restrain competition, and in an attempt to circumvent antitrust scrutiny, comprised formalistic shells of a pseudo single entity.[60] Courts have repeatedly found instances where a Sherman Act violation has occurred under the guise of a supposed single entity, which was in fact controlled by a cohort of competitors, mainly using the merger as a tool for ongoing concerted actions.

In 1947 the Supreme Court enacted the Intra-Enterprise Doctrine[61], in an effort to counter such illusive methods of trade which could potentially harm competition. Adhering to this antitrust paradigm for nearly forty years, the courts held that even a company and its wholly-owned subsidiary can be considered two separate entities, for §1 purposes. This doctrine was birthed within the holding of *U.S. v. Yellow* Cab, in which the Supreme Court held that a merger through a common ownership of prominent taxicab companies in New York, Pittsburgh, Minneapolis, Michigan and Chicago, constituted an unreasonable restraint on interstate commerce, and amounted to a §1 violation. The court held that Morris Markin, who had acquired majority shares in various taxicab companies, had created a "large, nation-wide obstacle" impeding on markets within "[the] channels of interstate trade."[62] It was consequently concluded by the court, that common ownership of separate entities was an irrelevant factor in determining whether restraints on market competition were imposed by the conduct in controversy. Therefore, the court concluded that a parent and its wholly-owned subsidiary, when acting in concert, could be considered a duality engaging in illicit conduct under §1 of The Sherman Act. The Supreme Court reasoned that the Sherman Act concerns itself with "substance" of the questioned conduct, "rather than [the] form" of an entity.[63] The court sought to uphold the Congressional intent fundamental to the creation of The Sherman Act, which aimed to prevent competitive restraint on markets effecting interstate commerce. During the period in which the Intra-Enterprise Doctrine was the controlling law, the court rebutted the 'joint venture' defense of alleged conspirators by asserting that common ownership of two firms could not "liberate corporations from the impact of the antitrust laws."[64] Thus, although two firms may have been mutually owned, and operating towards producing one

[60] *United States v. Sealy, Inc.,* 388 U.S. 350, 87 S.Ct. 1847, 18 L.Ed.2d 1238 (1967)

[61] *United Statesv. Yellow Cab Co.,* 332 U.S. 218 (1947)

[62] *Id.* at 226

[63] John O. Gunderson, *The Intra- Enterprise Conspiracy Doctrine in* American Needle Inc. v. National Football League*: Antitrust Law Continues its Path Toward Rationality,* 2 SEVENTH CIRCUIT REV. 1 (2008) , (citing Appalachian Coals, Inc. v. United States, 288 U.S. 344 (1933)).

[64] *Id.* at 9, (citing Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951)).

common product, their interrelationship based actions could still give rise to scrutiny under §1 of The Sherman Act.

A. The Demise of The Intra-Enterprise Doctrine in *Copperweld Corp., v. Independence Tube Corp.,*

The Supreme Court began to shift away from the Intra-Enterprise Doctrine in 1962, with its ruling in *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co.,* wherein the court confoundedly held that several agricultural cooperatives, owned by the same group of farmers, were in essence a single entity within the context of their joint marketing efforts. Certainly, apart from the benefits of collectively marketing their produce, the farmers were separately competing in aspects such as hiring manual labor and harvesting their produce. The court explained that the three cooperative entities were "in practical effect, one organization," even though the controlling farmers "ha[d] formally organized themselves into three separate legal entities."[65] Thus the court allowed the farmers to jointly function as a single entity within the context of processing and marketing their produce, without such actions being considered a cartel.[66]

Finally, In 1984 the Supreme Court formally overruled the Intra-Enterprise Doctrine in *Copperweld Corp. v. Independence Tube Corp.*, wherein the interrelations of a parent and a subsidiary were considered. The court delved into the issue of whether a parent and its wholly owned subsidiary were capable of conspiring in violation of §1 of The Sherman Act. The facts of *Copperweld* surrounded the acquisition of Regal Tube Co., a wholly-owned subsidiary of Lear Sigler,Inc., by Copperweld Corp. When Lear sold Regal to Copperweld in 1972, a contracted condition of the transaction was a five-year noncompetition clause that barred Lear from competing with Regal or utilizing any trade secrets, which were part of the consideration the contract was based on. One year following Copperweld's acquisition of Regal, former vice president and general manager of Regal, David Grohne, sought to establish his own tubing corporation in competition with Regal, and thus incorporated Independence Tube Corp. in 1973. When Regal and Copperweld became aware of David Grohne's new operation, they took steps in barring Grohne's ability to produce his goods by conspiring with his suppliers. In 1976, Grohne's company, Independence Corp., sued Copperweld and Regal under Section 1 of the Sherman Act. [67] Thus, the

[65] American Needle, Inc., v. National Football League et all. 2010 WL 2025207 (citing *Sunkist Growers, Inc. v. Winkler & Smith Citrus Products Co.,* 370 U.S. 19,82 S.Ct. 1130, 8 L.Ed.2d 305 (1962))

[66] " …farmers could join together into *one* organization for the collective processing and marketing of their fruit and fruit products without the business decisions of their officers being held combinations or conspiracies…," *Sunkist Growers, Inc. v. Winkler & Smith Citrus Products Co.,* 370 U.S. 19,82 S.Ct. 1130, 8 L.Ed.2d 305 (1962).

[67] *Id.* at 13, (citing Copperweld Corp. v. Independence Tube Corp. 467 U.S. 752 (1984)).

conduct in question was between Copperweld and Regal, a parent and its wholly-owned subsidiary, respectively. Procedurally, both District court and the Seventh Circuit held in favor of Independence Corp., on the grounds that there was enough separation between the two entities to render them two independent actors.[68]

Once the case reached the Supreme Court, it was decided that the internal agreements of Regal and Copperweld did not trigger culpability under the Sherman Act. The court reasoned that an antitrust violation is not necessarily afoot merely because the coordinated conduct of a parent and its wholly owned subsidiary may have resulted in anticompetitive effects. Justice Berger, writing for the court explained that if such a faulty reasoning were adhered to, even agreements between corporate executives and officers could be susceptible to antitrust scrutiny. Clearly, these were not "the antitrust dangers §1 was designed to police."[69] The court cited three distinct reasons which rationalized this holding: (1) a single firm's officers firm's officers lack a separation of economic interest, so they cannot seek to merge economic powers that pursue different goals; (2) Internal coordination often results from an effort to compete; and (3) Such coordination is often necessary to a firm's ability to successfully compete in their relevant market.[70] Thus, the court concluded that a parent and its wholly owned subsidiary have "a complete unity of interest" which renders their conduct unilateral, and legally incapable of conspiracy under section 1 of the Sherman Act.[71]

B. *Copperweld's* "Single Entity" Analysis Juxtaposed to *American Needle's* Ressurrection of the defunct Intra-Enterprise Doctrine

Yellow Cab's analysis, pertaining to the duality requirement of the Sherman Act was overruled in *Copperweld Corp. v. Independence Tube Corp.*, in 1984. Consequently the Intra-Enterprise Doctrine was abandoned. The current implications resulting from the Supreme Court's duality finding in *American Needles*, marks a digression in antitrust jurisprudence by inadvertently resurrecting a premise germane to the outdated Intra-Enterprise Doctrine. In the Supreme Court's brief, Justice Stevens regresses by citing the decision in *Yellow Cab*, stating that "corporate interrelationships … are not determinative of the applicability of the Sherman Act, because the Act is aimed at substance rather than form."[72] Implicitly stating, that substance

[68] *Id* at 14 (citing Copperweld Corp. v. Independence Tube Corp. 467 U.S. 752 (1984))
[69] *Copperweld Corp. v. Independence Tube Corp.* 467 U.S. 752 (1984).
[70] *Id.* at 15.
[71] *Id* at 5.
[72] American Needle, Inc., v. National Football League et all. 2010 WL 2025207 (citing *Unite States v. Yellow Cab Co., 332 U.S. 218, 67 S.Ct. 1560, 91 L.Ed. 2010 (1947))*

being, the anticompetitive effects produced by the allegedly culpable conduct of the NFL. This reversion in reasoning by the Supreme Court, wholly disregards *Copperweld's* converse and crucial rationalization, and its explicatory key points: An antitrust violation is not necessarily occurring merely because a parent and its wholly owned subsidiary's inner-agreements unintentionally have imposed anticompetitive restraints on the market. It is evident that this judicial digression summoned in *American Needle*, conjures a notion fundamental to the legally void Intra-Enterprise Doctrine era, which necessarily assumed a conspiracy anytime intra-firm coordination resulted in an anticompetitive burden on the market.

Citing *Copperweld*, the Supreme Court asserts that when alleging a single entity defense, a parent and its wholly-owned subsidiary must have a "complete unity of interest." Lacking this complete unity of interest, it is presumed that the market is being deprived of independent centers of decision-making. Once again, the court neglects the benefits derived from the pooling effect of bargaining collectively when licensing league-wide intellectual property. It can be safely inferred that when licensing their respective team logos, each individual teams' primary goal, is securing a licensing deal which maximizes their profit. As discussed, one of the benefits of "the pooling effect" which results from collective-bargaining, is that prospective licensees cannot pit clubs against each other. Effectively, this prevents the value of each individual teams' intellectual property from being driven down. Thus, the complete unity of interest amongst NFL teams is to affix as much value to their individual logos, and in doing so collectively, they maximize their market utility.

The court also concludes that the "NFLP is therefore an instrumentality of the teams,"[73] because the teams remain separately controlled, potential competitors with economic interests that are distinct from the NFLP's financial well-being. However, the factual circumstances of the NFLP's composition and function suggests otherwise, for the following reasons: (1) As discussed, revenues generated from the NFLP's licensing deals are *equally* distributed amongst all NFL teams, suggesting equal interest amongst teams in regards to NFLP's deals; (2) The "pooling effect" of collective bargaining, ensures the success of the NFLP's financial well-being, which is based on the unanimous league-wide objective of securing profit-maximizing licensing deals; (3) The NFLP's objective of securing profit-maximizing licensing deals is a goal immutably common to every individual team. Hence, the NFLP functions as a macrocosm of the 32 teams' undivided interest in licensing intellectual property. The NFLP functions as a communal vehicle for securing the most financially lucrative licensing deals on behalf of a cohesive of equally interested components, which together compete as a form of entertainment.

[73]

In their amicus brief, American Needle asserts that entities are incapable of conspiracy only if they have "effectively merged the relevant aspect of their operations, thereby eliminating actual and potential competition … in that sphere."[74] In regards to this, the Supreme Court stresses that the NFL has not merged the aspect of their operation at issue, "because the teams still own their own trademarks and are free to market those trademarks as they see fit." This assertion overlooks NFL's "Trust Agreement[75]" which was created in 1982, and serves to relinquish individual teams' Intellectual Property rights, vesting them exclusively onto the NFLP.[76] Thus, since each NFL team is contractually bound to 'The Trust Agreement', securing individual national sponsorships for their respective trademarks would constitute a breach of contract.[77] The court also alleges that since the 32 individual NFL teams "compete" for fans, players, and other forms of revenue, they are to be universally considered competing entities lacking a complete unity of interest, necessary to the single entity defense in *Copperweld.* While this may be true in an overly broad sense, the essential question is whether the entities have a complete unity of interest within that *particular* economic division in question. Looking to the 'substance'[78] of an action intrinsically requires assessing the circumstances wherein the conduct occurred. Although NFL teams compete in some apparent instances, such as athletic competition during games, there are instances wherein the teams must engage as a joint venture to maximize their utility as a wholly integrated form of entertainment.[79]

V. CONTEXTUALIZING THE "SINGLE ENTITY" ARGUMENT: Why a BRIGHT-LINE Approach is INEFFICIENT within Antitrust Jurisprudence

[74] *American Needle, Inc., v. National Football League* et all. 2010 WL 2025207

[75]" Effective October 1, 1982,… Member Clubs entered into a trust agreement which created the NFL Trust. The Trust Agreement provided that each Member Club would transfer to the NFL Trust the exclusive right to use its 'Club Marks' for commercial purposes."
"NFLP gives Sponsors the right to use the Club Marks and NFL Marks in advertising, promotion, and packaging to promote themselves as an "Official Sponsor".

[76] *Id.*

[77] National Football League v. Dallas Cowboys, 922 F. Supp. 849 - Dist. Court, SD New York 1996

[78] *Unite States v. Yellow Cab Co., 332 U.S. 218, 67 S.Ct. 1560, 91 L.Ed. 2010 (1947)*

[79] *Brown v. Pro Football Inc.,* 518 U.S., at 248, 116 S.Ct. 2116 (1996).

As the Seventh Circuit has previously acknowledged,[80] sports leagues often consist of such diversity in their economic range, that it is "essential to investigate their organization and ask *Copperweld's* functional question one league at a time … [and] one facet of a league at a time."[81] This affirmation supports the theory that courts must invoke a subjective approach in characterizing a league's questioned conduct, within the scope of Section 1. A fluid application of the law, when narrowly applied to the facts and context of each case, ensures optimized accuracy in such judicial proceedings.[82] Conversely, universal holdings which classify a Sports League's structure can potentially impede on the efficiency of the judicial process. Generalizations pertaining to the economic makeup of a multifaceted enterprise, entails overlooking unique issues arising from various divisions of an elaborate economic apparatus. Disavowing the factual implications of each case, may perhaps result in the misapplication of The Sherman Act, by means of encompassing conduct unintended for such regulation.

A. A Contextual Approach to "Unity of Interest": *Brown v. NFL* & *Chicago Pro. Sports Ltd., Partnership v. NBA*

Prior to deciding in *American Needle* that the NFL's internal dealings rendered it a duality, the Supreme Court by and large, avoided explicitly generalizing Sports-League structures. Within a short period of time, between 1992 and 1996, the Supreme Court delivered two dissimilar findings pertaining to League structure, for query under Section 1 of the Sherman Act. First, in *Chicago Pro. Sports Ltd. Partnership v. NBA*, the court concluded that within the context of collectively marketing and securing nation-wide television broadcasts for its games, the NBA functioned as a single entity.[83] In the concurring opinion of *Chicago*, the court attributes this elasticity in interpretation under Section 1 of The Sherman Act, to the legal theory of

---

[80] *Chicago Pro. Sports Ltd. Partnership v. NBA,* 961 F. 2d 667 - Court of Appeals, 7th Circuit 1992.

[81] John O. Gunderson, *The Intra- Enterprise Conspiracy Doctrine in* American Needle Inc. v. National Football League*: Antitrust Law Continues its Path Toward Rationality,* 2 SEVENTH CIRCUIT REV. 1 (2008) , (citing Chicago Pro. Sports Ltd. Partnership v. NBA, 961 F. 2d 667 - Court of Appeals, 7th Circuit 1992).

[82] Peters, Christopher J. , *Assessing the New Judicial Minimalism*, Colombia Law Review, Vol. 100 p. 1454, 2000.

[83] *Chicago Pro. Sports Ltd. Partnership v. NBA,* 961 F. 2d 667 - Court of Appeals, 7th Circuit 1992.

Judicial Minimalism.[84] Fundamental to the core of Judicial Minimalism, lies the notion that courts are inextricably bound to applying laws in a manner which delivers a judgment distinctively attributed to the particular and unique facts of each case. Concisely, jurisprudential changes should occur gradually, rather than abruptly from broad judgments, which can effectively produce overly-inclusive precedent. Shortly after *Chicago*, the Supreme Court decided *Brown v. Pro. Football Inc.*,[85] and held that within acting in its capacity as an employer, NFL teams lack a 'unity of interest' for consideration as a single entity under the umbrella of the NFL. Ostensibly, *Chicago* and *Brown* diverge in their conclusions. However, it is by examining the analytical foreground by which the Supreme Court achieved these conclusions, which wholly demonstrates the flexibility inherent to Judicial Minimalism.

1. *Chicago Pro. Sports Ltd. Partnership v. NBA*

The controversy leading to the suit in *Chicago* arose during the 1990-91 NBA season when one of the 27 NBA teams, the Chicago Bulls, allowed a local station, WGN to televise 25 of its regular-season games. Although WGN was a local public station in Chicago, it was referred to as a 'super station' because it also aired as a cable channel nationwide. Thus, the games which were allocated to the Bulls' for the purpose of situating local broadcasts for, were consequently then competing for an audience with other NBA games airing simultaneously on cable. This caused a dissymmetrical distribution of captured television audience for nearly all other NBA games. Most NBA teams could not comparatively compete with the popularity of the Bulls', who at that time had on their roster players such as Michael Jordan and Scottie Pippen. As a result, the NBA teams, apart from the Chicago Bulls and the New Jersey Nets, jointly decided that network television rights for televising NBA games nationally must be licensed and authorized exclusively by the collective consent of the NBA. This trust was adopted in 1990, and soon thereafter gave rise to the action brought by the Chicago Bulls against the NBA, which alleged violation of Section 1 of the Sherman Act.

The court's inquiry called upon the rule within *Copperweld*, in determining whether "a sports league [is] a single entity."[86] The court reasoned that

[84] "This represents a *judicial minimalist* viewpoint toward single entity treatment ... courts should continue to follow this model despite compelling arguments to treat sports leagues ... as joint ventures." *Chicago Pro. Sports Ltd. Partnership v. NBA,* 961 F. 2d 667 - Court of Appeals, 7th Circuit 1992.

[85] *Brown v. Pro Football Inc.,* 518 U.S., at 248, 116 S.Ct. 2116 (1996).

[86] *Chicago Pro. Sports Ltd. Partnership v. NBA,* 961 F. 2d at 679 - Court of Appeals, 7th Circuit 1992.

although the teams "have separate owners," and engage in competition when hiring their own players and staff, that this aspect of their function is "no more relevant that would be the decision by a large retailer to compensate managers of its stores with percentages of local profits."[87] Further, it was accordingly taken into consideration whether or not the NBA teams are actually "a joint venture adopting strategies that [fostered] its competition" against other forms of entertainment.[88] The court reasoned that the telecast of NBA games operates no differently than a television show like *Star Trek* would; requiring the agreement of the many producers involved in acquiring a deal for the exclusive grant of those television episodes to networks.[89] It can also be deduced that the millions of viewers which tune into the Super Bowl each year, would not continue to do so if the Dallas Cowboys were positioned as an unparalleled NFL goliath, slated to win every year.
Citing *National Football League v. North American Soccer League*, Justice Rehnquist's dissent emphasized that "cooperation off the field is essential to [producing] intense rivalry on it – rivalry that is essential to the sport's attractiveness" in competing for an audience with other sports and other entertainment forms.[90]

Subsequently, the court in *Chicago* affirmed that the NBA, acting in the context of marketing its games, must be considered a single entity in order to resourcefully promote itself amongst other forms of entertainment. With respect to this judgment's precedential effects upon the jurisprudence of Antitrust, the court acknowledged that "wrongly condemning a beneficial practice may exceed the costs of wrongly tolerating a harmful one." The *Chicago* court hence conceptualized the importance of employing the Judicial Minimalist theory of review for determining league duality under Section 1. The failure to appreciate the precedential implications arising from broadly drawn judgments is central to the Supreme Court's critical flaw, in its review of *American Needle.*

VI. The PRECEDENTIAL RAMIFICATIONS OF the Supreme Court's 'Duality' finding in *AMERICAN NEEDLE*

Jurisprudential economics refers to the process of a judiciary driven by *stare decisis*, applying economic theories in determining the effects of an

---

[87] *Id.* at 672, citing *Rothery Storage & Van Co. v. Atlass Van Lines, Inc.,* 792 F.2d 210 (D.C.Cir.1986)
[88] *Chicago Pro. Sports Ltd. Partnership v. NBA,* 961 F. 2d 667 672 - Court of Appeals, 7th Circuit 1992.

[89] *Id.* at 672
[90] *Id.*

entity on a particular market.[91] Ultimately, there are some applicatory tensions which arise in reconciling economic principles within the body of antitrust laws. Economic principles must be applied in a subjective manner in order to produce accurate findings. Contrastingly, the high courts are often "driven by the value it attaches to stare decisis,"[92] thus basing their judgments at least to some extent, on the underpinnings of past factual circumstances. Subsequently, failing to apply antitrust laws narrowly, can lead to "the clarity of microeconomics [being] … compromised, contorted, and even ignored by jurisprudential economics,"[93] within later antitrust cases. This section discusses the precedential ramifications of *American Needle*, as well as some of the anticompetitive effects which may arise, as relevant to the Rule of Reason Analysis[94] of Section 1 of The Sherman Act.

A. 'Free-Riding'

Under Section 1, once duality has been established, the Plaintiff has the duty to ascertain the anticompetitive effects of the defendant's conduct, and prove that there is an alternative 'less restrictive' method of producing their product. Defendant must demonstrate that the pro-competitive effects of their operation, outweighs the consequential restrictions imposed on their relevant market. Additionally, the defendant may allege pro-competitiveness of their conduct serves to counter a potentially anticompetitive conduct that would likely occur absent their behavior, producing a more dire effect.

In theory, if NFL teams are permitted to deviate from the collective bargaining model of the NFLP, when licensing their Intellectual Property, a form of 'free-riding' is likely to occur. "Free-riding is the diversion of value from a business rival's efforts without payment."[95] Thus if a prominent NFL team like the Indianapolis Colts[96] secures a multi-million-dollar deal with

[91] THE ECONOMICS OF ANTITRUST INJURY AND FIRM-SPECIFIC DAMAGES 307, (Kevin S. Marshall, 2008)
[92] *Id.*
[93] *Id.* at 315
[94] "… Rule of Reason Analysis … the critical reasons that horizontal restraint on competition are essential if the product is to be available at all," *American Needle, Inc., v. National Football League* et all. 2010 WL 2025207, 11
[95] *Chicago Pro. Sports Ltd. Partnership v. NBA,* 961 F. 2d 667 672 - Court of Appeals, 7th Circuit 1992

[96] Indianapolis Colts' 2009 Season Statistics, http://www.nfl.com/teams/statistics?team=IND

Nike, and a competitively inadequate team like the Oakland Raiders[97] secures a deal for considerably less with *Under Armour* , 'free riding' will ensue. This phenomenon will occur precisely when the teams match up to play a televised game. The binary nature of 'NFL Football' as a product, results in contending teams being inescapably showcased together during games, with their respective fans converging to wholly form their audience. Resultantly, a less popular team is likely to draw a larger television audience than usual, during games in which they play against teams that possess more prominence and allegiance of fans. Consequently, when the Raiders match up to play a team like the Colts, their licensee *Under Armour* will 'free-ride' and benefit unjustly by the parasitical advertisement of their brand to an audience of a superior team. Thus, property rights become poorly defined as "economic actors are able to "use other NFL teams to capture a greater audience without paying for them."[98] On the contrary, *Nike* will be contractually injured because their expenditure will fail to produce the intended benefits derived from the exclusive promotion they bargained for. Accordingly, the courts should not foster a system which enables corporations to be unjustly enriched by receiving "the benefit of this [this type of] promotion without paying the cost."[99] In the absence of the unitary form of NFLP's licensing model, greater market evils, such as 'Free Riding' are likely to prevail.

B. *American Needles*: A PRECEDENTIAL CATALYST for a FLOOD-GATE of LITIGATION

As discussed, the production of a unique good may cause great difficulty for a new entrant to capture sales within that market.[100] Thus, the higher the measure of a product's differentiation is, the less likely it is that a market substitute exists for that product. This notion is attributed to the plummet in sales of football video games which are not authorized 'Official NFL' goods. In 2004, NFL granted exclusive licensing to EA Sports for the creation of Madden NFL, the 'Official NFL' football video game. This exclusive license cost EA Sports $300 million dollars. Madden NFL has sold 70 million copies and rung up more than $2 billion in sales since it came out in 1989, making

[97] Oakland Raiders' 2009 Season Statistics, http://www.nfl.com/teams/oaklandraiders/statistics?season=2009&team=OAK&seasonType=

[98] ECONOMIC ANALYSIS FOR LAWYERS 20 (Henry N. Butler, Christopher Drahazol, 2006) Poorly Defined Property Right – Without proper legal protection of property rights "economic actors are able to use them without paying for theml"

[99] *Chicago Pro. Sports Ltd. Partnership v. NBA,* 961 F. 2d 667 672 - Court of Appeals, 7th Circuit 199

[100] ANTITRUST POLICIES and ISSUES 70, (Roger Sherman, 1978)

the series one of the best-selling in the video game industry's history.[101] Prior to this exclusive deal, the NFL licensed video games to a multiplicity of companies,[102] most of which have failed to sustain themselves lucratively since EA's exclusive license was obtained. Under *American Needle*, such entities, who have suffered from the NFLP's numerous exclusive deals, now have a prima facie showing to bring an action against the NFL under Section 1. It is undoubtedly imminent that plaintiffs will rise forth, claiming antitrust injury against the NFL. However, it is unlikely that these claims will survive the Rule of Reason analysis needed to prevail under the Sherman Act. Thus, it is probable that the looming flood-gate of antitrust litigation will prove itself as a fruitless and unjust load upon the NFL, as well as the courts.

VII. CONCLUSION

The Supreme Court significantly shifted antitrust jurisprudence in a perilous direction, when rendering their decision in *American Needle.* Succinctly, this judicial erroneousness resulted from: (1) Disregarding the review theory of Judicial Minimalism, thus entailing a broad application of antitrust law; (2) Failing to discern a 'unity of interest' wherein property is owned *communally* and *equally* dispersed, within specific facets of an entity; (3) Failing to distinguish the 'unique' product of 'NFL Football' wholly competes through unilateral conduct within the relevant market of entertainment. An exemption granted by congress which immunizes the NFL's method of licensing intellectual property -- akin to the Sports Broadcasting Act -- is the sole remedial measure for circumventing this inopportune precedent.

[101] http://articles.latimes.com/2009/apr/17/entertainment/et-madden-games17
[102] Some examples include: *NFL Blitz, All Pro Football 2K8, etc.*