

# AMERICAN NEEDLE, INC. v. NFL: PROFESSIONAL SPORTS LEAGUES AND “SINGLE-ENTITY” ANTITRUST EXEMPTION

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## I. INTRODUCTION

Although humans have played sports since ancient times,<sup>1</sup> the idea of the professional sports “league” is a relatively new concept.<sup>2</sup> Indeed, prior to 1876, American professional sports teams competed in a decentralized, informal system where teams set their own schedules and the rules varied from game to game.<sup>3</sup> Recognizing the inefficiencies of such a system, professional sports club owners began organizing into centralized leagues.<sup>4</sup> Initially, these leagues served basic functions, such as establishing uniform rules, creating a schedule of games, and resolving disputes between club owners.<sup>5</sup> Today, professional sports leagues such as the National Football League (“NFL”) are multi-billion dollar global enterprises,<sup>6</sup> responsible for coordinating a wide variety of activities between their member teams.

The issue confronting the Supreme Court in *American Needle, Inc. v. NFL* is whether the NFL and its thirty-two member teams are best described as separate actors or as a “single entity” for antitrust

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1. DONALD G. KYLE, *SPORT AND SPECTACLE IN THE ANCIENT WORLD* 7 (2007).

2. See Marc Edelman, *Why the Single Entity Defense Can Never Apply to NFL Clubs: A Primer On Property-Rights Theory in Professional Sports*, 18 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 891, 891–904 (2008) (discussing Major League Baseball’s progression from “club-based” property rights to a “mixed” system of private and common property rights).

3. *Id.* at 897–99.

4. *Id.*

5. *Id.* at 899.

6. Michael K. Ozanian et al. eds., *The Business of Football, 2009*, *FORBES*, Sept. 2 2009, [http://www.forbes.com/2009/09/02/nfl-pro-football-business-sportsmoney-football-values-09-nfl\\_land.html](http://www.forbes.com/2009/09/02/nfl-pro-football-business-sportsmoney-football-values-09-nfl_land.html).

purposes.<sup>7</sup> This determination is of particular importance, as the Supreme Court has held that although separate actors may violate antitrust law, a “single entity” cannot constitute the “plurality of actors” implicitly required for imposing liability under Section 1 of the Sherman Antitrust Act.<sup>8</sup> Because the Seventh Circuit’s decision to uphold the NFL’s single entity claim<sup>9</sup> was a significant departure from the holdings of other circuit courts,<sup>10</sup> the Supreme Court granted certiorari to clarify whether the NFL is a single entity, and whether similarly situated joint ventures may also qualify for antitrust exemption under the single entity rationale. In light of the far-reaching implications such immunity would have in the context of professional sports leagues, especially in the field of player contracts, some experts say *American Needle* may turn out to be the “most important legal decision in sporting history.”<sup>11</sup>

## II. FACTS

Formed in 1920 as a joint venture of already-existing professional teams, the NFL is an unincorporated, non-profit association of professional football franchises.<sup>12</sup> Each team is separately owned and controlled.<sup>13</sup> The NFL does not have ownership interest in any team, and no team or owner owns an interest in any other team.<sup>14</sup> By agreement, NFL member teams share some revenues, such as those from television contracts.<sup>15</sup> Other revenues, such as parking and concessions, are not shared.<sup>16</sup> Each individual team also owns its own intellectual property, which includes teams’ logos and marks.<sup>17</sup>

In 1963, to facilitate the licensing of their intellectual property, the teams formed a joint venture called NFL Properties (“NFLP”).<sup>18</sup>

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7. Brief of Petitioner at i, *American Needle, Inc. v. NFL*, No. 08-661 (U.S. Sept. 18, 2009).

8. A “single entity” may still be held liable for anticompetitive activity under Section 2 of the Sherman Act. *See Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768 (1984).

9. *American Needle, Inc. v. NFL*, 538 F.3d 736 (7th Cir. 2008).

10. Petition for Writ of Certiorari at i, *American Needle*, No. 08-661 (U.S. Nov. 17, 2008).

11. *See* Dan Fletcher, *Five Supreme Court Cases to Watch This Term*, TIME, Oct. 5 2009, <http://www.time.com/time/nation/article/0,8599,1927760,00.html> (“Indeed, the bargaining power of the NFL Players Union is based on antitrust legislation that the league would largely be immune to if it receives a favorable ruling from the Supreme Court.”).

12. Brief for Petitioner, *supra* note 7, at 2.

13. *Id.*

14. Petition for Writ of Certiorari, *supra* note 10, at 3.

15. Brief for Petitioner, *supra* note 7, at 2.

16. *Id.* at 3.

17. *Id.* at 4.

18. *Id.*

Petitioner American Needle, Inc., is an Illinois company that, prior to 2001, was one of several companies licensed through NFLP to manufacture and distribute hats featuring NFL team logos.<sup>19</sup> Faced with declining merchandise sales in the late 1990s, the NFL's thirty-two member teams collectively decided to change their intellectual property licensing practices in the hopes of increasing profits.<sup>20</sup> In 2000, the teams entered into an exclusive ten-year intellectual property licensing agreement with Reebok, agreeing not to grant licenses to Reebok's competitors for ten years.<sup>21</sup> Following the agreement, American Needle's license was not renewed.<sup>22</sup> Subsequently, American Needle filed suit in the United States District Court for the Northern District of Illinois, claiming that the exclusive license granted to Reebok constituted both an unlawful restraint of trade in violation of Section 1 of the Sherman Act and an attempt to monopolize under Section 2 of the Act.<sup>23</sup> Prior to discovery, the NFL and its member teams filed for summary judgment, arguing that teams act as a single entity when licensing and marketing their intellectual property, thus exempting them from Section 1 scrutiny under the Supreme Court's decision in *Copperweld Corp. v. Independence Tube Corp.*<sup>24</sup>

Conceding that "others might well disagree," the district court granted summary judgment, supporting its single entity finding by noting that "the separate ownerships [of the teams' intellectual property rights] had no economic significance in and of itself, and American Needle, Inc. does not suggest that it ever dealt with any of the teams as independent organizations."<sup>25</sup> The district court also found that the teams' single entity status defeated American Needle's claim under Section 2 of the Sherman Act.<sup>26</sup> American Needle promptly appealed.<sup>27</sup>

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19. Brief for the NFL Respondents at 10, *American Needle, Inc. v. NFL*, No. 08-661 (U.S. Nov. 17, 2009).

20. Brief for Petitioner, *supra* note 7, at 6.

21. Petition for Writ of Certiorari, *supra* note 10, at i.

22. Brief for Petitioner, *supra* note 7, at 8.

23. *Id.*

24. *Id.*; *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984).

25. *American Needle, Inc. v. New Orleans La. Saints*, 496 F. Supp.2d 941, 944 (N.D. Ill. 2007).

26. Brief of Petitioner, *supra* note 7, at 9.

27. *American Needle, Inc. v. NFL*, 538 F.3d 736, 741 (7th Cir. 2008).

### III. LEGAL BACKGROUND

Originally passed in 1890, the Sherman Antitrust Act prohibits “every contract, combination . . . , or conspiracy, in restraint of trade or commerce among the several states.”<sup>28</sup> Because nearly every business transaction inherently restricts trade by taking that transaction out of the competitive market, the Supreme Court soon realized that a practical, rather than literal, interpretation of the Act was needed.<sup>29</sup> In 1918, the Court held in *Board of Trade of Chicago v. United States* that the “true test of legality” under the Sherman Act is “whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.”<sup>30</sup> This standard became known as the “rule of reason”<sup>31</sup> and established a two-tiered system of antitrust liability.<sup>32</sup> In situations where the anticompetitive nature of an agreement is plain, the agreement is *per se* unlawful.<sup>33</sup> Such situations are generally limited to a small subset of particularly “pernicious” agreements such as price-fixing or bid-rigging agreements.<sup>34</sup> More typically, where an agreement is not plainly anticompetitive, the rule of reason applies.<sup>35</sup> In these situations, an antitrust plaintiff must establish two elements: First, that a contract, combination, or conspiracy restraining trade exists, and second, that the agreement in question is in fact unreasonable.<sup>36</sup> The antitrust plaintiff must show that the particular agreement has an actual negative effect on competition or provide facts from which an inference of negative effects can be made.<sup>37</sup> The antitrust defendant may then offer evidence of “procompetitive justifications for the restraint,” after which the Court must balance the evidence and determine whether the positive effects of the restraint outweigh the

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28. 15 U.S.C.A. § 1 (West 2008).

29. *Board of Trade of Chicago v. United States*, 246 U.S. 231, 244 (1918).

30. *Id.*

31. *See Texaco, Inc. v. Dagher*, 547 U.S. 1, 5 (2006) (“[T]his Court presumptively applies rule of reason analysis, under which antitrust plaintiffs must demonstrate that a particular contract or combination is in fact unreasonable and anticompetitive before it will be found unlawful.”).

32. *See James T. McKeown, Antitrust Developments in Professional Sports: To the Single Entity and Beyond*, 19 MARQ. SPORTS L. REV. 363, 365–66 (2009) (discussing the differences between rule of reason standard and *per se* liability).

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

negative effects.<sup>38</sup> Among the facts to be considered in rule of reason analysis are the specific facts of the business and of the restraint imposed, the condition of the business before and after the restraint, and the purpose of imposing the restraint.<sup>39</sup>

The Supreme Court's treatment of professional sports leagues in the antitrust setting has evolved over time.<sup>40</sup> The Court first addressed the issue in *Federal Baseball Club, Inc. v. National League of Professional Baseball Clubs*,<sup>41</sup> and determined that Major League Baseball was exempt from antitrust laws on the basis that professional baseball was not engaged in interstate commerce.<sup>42</sup> Since then, however, the Court has declined to extend *Federal Baseball* to other professional sports leagues, including the NFL.<sup>43</sup> In *Radovich v. NFL*, for example, the Court concluded that any antitrust exemption for the NFL should be left to the discretion of Congress.<sup>44</sup> Because Congress had previously considered, and declined, to extend exemptions to professional sports leagues other than Major League Baseball, the Court reasoned that it was Congress's intent that the Sherman Act apply to the NFL.<sup>45</sup> The language in subsequent legislation, such as the Sports Broadcasting Act of 1961,<sup>46</sup> has been interpreted by some as reinforcing that basic premise.

The issue in *American Needle, Inc. v. NFL* primarily concerns the Supreme Court's 1984 decision in *Copperweld Corp. v. Independence Tube Corp.* In *Copperweld*, the Court held that an agreement between a parent company and its wholly owned subsidiary did not violate the Sherman Act.<sup>47</sup> In arriving at its decision, the Court reasoned that because a parent and its wholly owned subsidiary have "a complete unity of economic interest," there is no need to apply the Section 1 of the Sherman Act to its inner dealings, as the Act implicates only those agreements that involve a "sudden joining of economic resources that

38. *Id.*

39. *Board of Trade of Chicago v. United States*, 246 U.S. 231, 244 (1918).

40. See LOUIS ALTMAN & MALLA POLLACK, CALLMANN ON UNFAIR COMPETITION, TRADEMARKS AND MONOPOLIES § 4:16 (4th ed. 2009)

41. *Fed. Baseball Club, Inc. v. Nat'l League of Prof'l Baseball Clubs*, 259 U.S. 200 (1922).

42. *Id.* at 209.

43. See, e.g., *Haywood v. NBA*, 401 U.S. 1204, 1205 (1971) (applying antitrust laws to National Basketball Association); *Radovich v. NFL*, 352 U.S. 445, 447-48 (1957) (holding NFL's activities "within the coverage of the antitrust laws").

44. See *Radovich*, 352 U.S. at 452 ("We . . . conclude that the orderly way to eliminate error or discrimination, if any there be, is by legislation and not by court decision.").

45. *Id.* at 450 n.7.

46. 15 U.S.C.A. § 1291 (West 2008)(granting leagues an "exemption" from antitrust laws for agreements concerning television broadcasting).

47. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 777 (1984).

had previously served different interests.”<sup>48</sup> In other words, a parent and wholly owned subsidiary are treated like a single firm, incapable of constituting the plurality of actors necessary to form a conspiracy under Section 1 of the Sherman Act.<sup>49</sup>

Following *Copperweld*, many professional sports leagues began to argue that they should be considered single entities immune from Section 1 scrutiny.<sup>50</sup> Unlike most courts of appeals, which have rejected this argument,<sup>51</sup> the Seventh Circuit has been more receptive to sports leagues’ single entity claims.<sup>52</sup> Although the Supreme Court has not yet ruled on *Copperweld*’s applicability to intra-league agreements between separately owned teams in *professional* sports leagues,<sup>53</sup> in *NCAA v. Board of Regents*<sup>54</sup> the Court applied Section 1 and the rule of reason to an agreement between separately owned and controlled sports teams in the *college* football setting.<sup>55</sup> Thus, the *American Needle* decision should help to clarify the scope of *Copperweld*’s single entity exception and resolve the current circuit split on *Copperweld*’s applicability to professional sports leagues.

#### IV. HOLDING

On review, the Seventh Circuit addressed *de novo* whether the district court properly granted summary judgment.<sup>56</sup> First, the court recognized that the Seventh Circuit had yet to definitively rule on whether professional sports leagues can be considered “single entities” under *Copperweld*.<sup>57</sup> While the circuit court acknowledged that such a determination is difficult, it recognized that the court had previously “embraced the possibility that a professional sports league *could* be considered a single entity under *Copperweld*.”<sup>58</sup> Noting that “the question of whether a professional sports league is a single entity should be addressed not only ‘one league at a time,’ but also ‘one facet

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48. *Id.* at 771.

49. *Id.* at 776–77.

50. *See, e.g.*, *NHL Players Ass’n v. Plymouth Whalers Hockey Club*, 419 F.3d 462, 470 (6th Cir. 2005); *Fraser v. Major League Soccer, L.L.C.*, 284 F.3d 47, 55 (1st Cir. 2002); *Sullivan v. NFL*, 34 F.3d 1091, 1099 (1st Cir. 1994).

51. Brief of Petitioner, *supra* note 7, at 30.

52. *See generally* *American Needle, Inc. v. NFL*, 538 F.3d 736, 741 (7th Cir. 2008); *Chicago Prof’l Sports Ltd. P’ship v. NBA*, 95 F.3d 593 (7th Cir. 1996).

53. Brief of the NFL Respondents, *supra* note 19, at 41.

54. *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85(1984).

55. *Id.* at 99–103.

56. *American Needle*, 538 F.3d at 741.

57. *Id.*

58. *Id.* at 742.

of a league at a time,”<sup>59</sup> the circuit court limited its review to the NFL teams’ agreement to collectively license their intellectual property through NFLP.<sup>60</sup>

Not convinced that the potential for competition between the NFL teams in intellectual property licensing should defeat the NFL’s single entity claim, the court held that the NFL teams function as a single source of economic power because the teams share “a vital economic interest in collectively promoting NFL football” in competition with other forms of entertainment.<sup>61</sup> Applying that analysis, the court found that because the NFL teams have acted as a single intellectual property licensing entity since 1963, the district court acted appropriately in finding that the NFL teams act as a single entity and granted summary judgment in favor of the NFL defendants.<sup>62</sup>

## V. ARGUMENTS

### A. American Needle’s Key Arguments

American Needle argues that long-standing precedent dictates that Section 1 of the Sherman Act applies to *all* agreements between separately owned and controlled competitors.<sup>63</sup> Because the NFL’s teams are separately owned and operated, it logically follows that any agreement between the NFL teams is subject to Section 1 scrutiny.<sup>64</sup> According to American Needle, the Supreme Court has, for over a century, consistently held that agreements between separately owned and controlled entities are subject to Section 1 scrutiny.<sup>65</sup> *Copperweld* did not change this custom, American Needle argues, but rather *reinforced* it by distinguishing the lack of anticompetitive risk in agreements between commonly owned and controlled corporations from those risks inherent in agreements between separately owned entities.<sup>66</sup> In support of this interpretation, American Needle points out that neither the Supreme Court nor the various courts of appeals have extended *Copperweld*’s single entity exemption outside of the

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59. *Id.* (quoting *Chicago Prof'l Sports Ltd. P'ship v. NBA*, 95 F.3d 593, 600 (7th Cir. 1996)).

60. *Id.*

61. *Id.* at 743.

62. *Id.* at 744.

63. Brief of Petitioner, *supra* note 7, at 10.

64. *Id.*

65. *Id.*

66. *Id.*

context of parent companies and their wholly-owned subsidiaries.<sup>67</sup> Furthermore, American Needle argues that because NFL teams *can* and *do* compete in various fields including licensing and merchandising, the relationship between the teams is fundamentally different from the parent/subsidiary relationship found in *Copperweld*.<sup>68</sup> Therefore, American Needle argues, the Supreme Court should reverse the Seventh Circuit's decision and apply Section 1 scrutiny in accordance with the prior holdings of the Supreme Court and the various courts of appeals.<sup>69</sup>

American Needle also argues that the Seventh Circuit's decision conflicts with Congress's intent to subject agreements between separately owned and controlled sports teams to Section 1 scrutiny.<sup>70</sup> To support its claim, American Needle points to two legislative measures, the Sports Broadcasting Act<sup>71</sup> and the Curt Flood Act,<sup>72</sup> both of which it argues are "premised" on the notion that antitrust laws apply to agreements between separately owned professional sports teams.<sup>73</sup> American Needle adds that, in the past, two different NFL Commissioners approached Congress in hopes of obtaining an antitrust exemption for the League, and each time Congress rejected the requests.<sup>74</sup>

Finally, American Needle argues that the Seventh Circuit erred in determining that the need of NFL teams to cooperate to produce football games justified classifying the NFL and its teams as a "single entity," pointing out that "while it takes two teams to play a football game . . . it does not inherently require a league—much less a league governed by cooperation among economic competitors, and even less a league that by agreement forbids competition in off-field enterprises like the licensing of intellectual property."<sup>75</sup> American Needle notes that there are many types of joint ventures held to Section 1 scrutiny that, like the NFL, create a product that cannot be

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67. *Id.* at 25; *see also* Freeman v. San Diego Ass'n of Realtors, 322 F.3d 1133, 1148 (9th Cir. 2003) (emphasizing the importance of "economic unity" in making a single entity determination); Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210, 214 (D.C. Cir. 1986) (declining to extend *Copperweld* to an agreement between "legally separate entities").

68. *See* Brief of Petitioner, *supra* note 7, at 27–28.

69. *Id.* at 28.

70. *Id.* at 31.

71. 15 U.S.C.A. § 1291 (West 2008).

72. 15 U.S.C.A. § 26b(a).

73. Brief of Petitioner, *supra* note 7, at 33–34.

74. *Id.* at 34–36.

75. *Id.* at 42–43.



created by the individual entities alone.<sup>76</sup>

### *B. NFL's Key Arguments*

The NFL argues that any decisions about the promotion of NFL football are that of a single entity.<sup>77</sup> Pointing first to *Copperweld*, the NFL argues that “substance, not form” is the appropriate test for determining whether Section 1 should apply to the NFL and its member teams.<sup>78</sup> Rather than competing against each other, the NFL asserts that the clubs are set up to produce a “single product”<sup>79</sup> that competes against other entertainment providers.<sup>80</sup> Because of this, the NFL argues each individual club’s economic power “depends, and has always depended, on the cooperation among themselves.”<sup>81</sup> Indeed, the NFL argues that the individual clubs and their respective intellectual property have little value but for their association with the league.<sup>82</sup> Furthermore, the NFL points out that the Seventh Circuit correctly determined that, in the field of intellectual property, NFL clubs have acted as a “single entity” sharing both revenues and costs for almost fifty years.<sup>83</sup> Accordingly, the NFL argues that while the league’s separately owned and controlled member teams may appear, in form, to be independent sources of power, a substantive analysis of the league reveals that it is, in practice, a single source of economic power exempt from Section 1 scrutiny.<sup>84</sup>

The NFL also refutes two specific arguments made by American Needle. First, the NFL challenges American Needle’s assertion that *Copperweld* requires a “complete unity of interest” for single entity treatment, arguing that such a standard is inconsistent with some courts of appeals decisions and would subject to Section 1 scrutiny “routine business decisions of other highly integrated entities, such as law firms whose partners rarely, if ever, have identical interests.”<sup>85</sup> Additionally, the NFL takes issue with American Needle’s claim that the Supreme Court has “repeatedly rejected” the idea that NFL and

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76. *Id.* at 44.

77. Brief for the NFL Respondents, *supra* note 19, at 16.

78. *Id.* at 13.

79. *Id.* at 22.

80. *Id.* at 25.

81. *Id.* (quoting *City of Mt. Pleasant, Iowa v. Associated Elec. Coop., Inc.*, 838 F.2d 268, 277 (8th Cir. 1988)).

82. *Id.* at 25–26.

83. *Id.* at 27–28.

84. *Id.* at 13–14.

85. *Id.* at 37–38.

its teams, as a single entity, are incapable of conspiring in restraint of trade within the league.<sup>86</sup> Specifically, the NFL challenges American Needle's reliance on *Radovich*, as that case concerned an agreement between two separate football leagues—not an *intra-league* agreement—and, the NFL argues, is not applicable to the present case.<sup>87</sup>

Finally, the NFL argues that applying the rule of reason to professional sports leagues would subject every decision of a professional sports league to potential Section 1 attack, chilling cooperation within the league “to the detriment of competition and consumer welfare.”<sup>88</sup> The NFL points to the Supreme Court's landmark decision in *Bell Atlantic Corp. v. Twombly*<sup>89</sup> for support, arguing that *Twombly* stands for the proposition that antitrust litigation “should be resolved at the earliest opportunity.”<sup>90</sup> Ultimately, by discussing another sports antitrust case, *Major League Baseball Properties, Inc. v. Salvino*,<sup>91</sup> where the litigation required three years of discovery and six years of court proceedings before summary judgment was finally granted for the defendant, the NFL makes the case that applying the rule of reason in this case will add unnecessary cost and delay while achieving the same end result.<sup>92</sup>

## VI. ANALYSIS AND LIKELY DISPOSITION

The Seventh Circuit's analysis in *American Needle* is flawed for several reasons. First, the Seventh Circuit's reliance on the “long history” of NFL teams' collective licensing (through NFLP) is inappropriate, as a prolonged lack of competition can often be the result of an illegal restraint of trade.<sup>93</sup> In addition, while the NFL teams' decision to form NFLP in 1963 may have granted NFLP the exclusive right to license NFL teams logos and trademarks, it did not take away the individual teams' ownership of their respective intellectual property.<sup>94</sup> Indeed, despite the NFLP agreement, the

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86. *Id.* at 41.

87. *Id.* at 41–43.

88. *Id.* at 49–50.

89. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

90. Brief for the NFL Respondents, *supra* note 19, at 50.

91. *Major League Baseball Properties, Inc. v. Salvino*, 542 F.3d 290 (2d Cir. 2008).

92. Brief for the NFL Respondents, *supra* note 19, at 50.

93. Brief for the United States as Amicus Curiae at 11, *American Needle, Inc. v. NFL*, No. 08-661 (U.S. May 28, 2009) (“A cartel, for example, may have a long history, but that does not insulate the agreements supporting it from antitrust scrutiny.”).

94. *Id.* at 2.

NFL's teams *can* and *do* compete in intellectual property licensing today, and because the teams' continue to own their own intellectual property, each team has the potential to compete into the future.<sup>95</sup> Furthermore, despite the existence of NFLP, the individual teams still retained the power to veto the Reebok deal if they so desired.<sup>96</sup> Thus, while the teams may have "effectively merged" their intellectual property operations through NFLP, the formation of NFLP *did not* completely eliminate the power of the NFL teams to control their intellectual property licensing, nor did it eliminate actual and potential competition as required under *Copperweld* for single-entity status.<sup>97</sup>

Second, the Seventh Circuit's expansion of *Copperweld's* single entity exception is unwarranted. Aside from the professional sports leagues themselves, it seems there is widespread skepticism of whether *Copperweld's* single entity rationale can apply to a joint activity between separately owned and operated clubs.<sup>98</sup> The NFL teams are highly integrated entities that rely on agreements between themselves to prosper and succeed. A high level of economic integration is a rationale for applying rule of reason scrutiny, not for granting single entity immunity.<sup>99</sup> The NFL's argument—that applying the rule of reason is too costly and will have chilling effects on pro-competitive decision-making—is indefensible for a number of reasons. First, there is little evidence that courts have erroneously held professional sports leagues liable for antitrust violations under the rule of reason, and the NFL has not offered any evidence suggesting that its teams have been deterred from entering into agreements for fear of antitrust liability.<sup>100</sup> Second, because the Seventh Circuit incorporated elements of the rule of reason into its "single entity" analysis, the idea that single entity analysis reduces the costs of

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95. Brief Amici Curiae for National Football League Players Association, Major League Baseball Players Association, National Basketball Players Association, and National Hockey League Players' Association in Support of Petitioner at 18–19, *American Needle*, No. 08-661 (U.S. Sept. 25, 2009).

96. See Brief for the United States as Amicus Curiae, *supra* note 93, at 2.

97. See Brief for the United States Amicus Curiae Supporting Petitioner at 6, *American Needle*, No. 08-661 (U.S. Sept. 25, 2009).

98. See *id.* at 6; Brief of Amici Curiae Merchant Trade Associations in Support of Petitioner at 19, *American Needle*, No. 08-661 (U.S. Sept. 25, 2009); Brief of the American Antitrust Institute and Consumer Federation of America as Amici Curiae in Support of Petitioner at 31, *American Needle*, No. 08-661 (U.S. Sept. 25, 2009).

99. Brief of the American Antitrust Institute, *supra* note 98, at 13.

100. Brief of the American Antitrust Institute, *supra* note 98, at 31–32.

litigation is not necessarily a slam-dunk.<sup>101</sup> Finally, whereas single entity analysis is a new and relatively undeveloped concept in case law, the rule of reason has been used for almost a century, and its principles are clear and easy to follow.<sup>102</sup>

Third, the Seventh Circuit's determination that the NFL and its member teams are immune from Section 1 scrutiny is contrary to congressional intent.<sup>103</sup> Various pieces of legislation, such as the Sports Broadcasting Act, are necessarily premised on the assumption that Section 1 applies to the NFL's activities—if Section 1 did not apply, there would be no discernable reason for the Act's existence.<sup>104</sup> Indeed, the Sports Broadcasting Act is *extremely* specific as to what kinds of conduct it exempts from the reach of Section 1, suggesting that Congress knew what it was doing.<sup>105</sup> This view is supported by the fact that Congress has repeatedly rejected the NFL's efforts for an explicit legislative exemption from the Sherman Act, while, at the same time, granting immunity to other ventures.<sup>106</sup>

Because of the pervasive analytical problems in the Seventh Circuit's decision and its departure from the findings of other circuit courts, it is unlikely the Supreme Court will uphold the Seventh Circuit's ruling. This does not mean that American Needle will ultimately be successful in its suit. The Court will likely remand the case so rule of reason scrutiny can be applied. Considering the numerous pro-competitive benefits of the NFLP that many organizations enjoy,<sup>107</sup> the NFL will be able to present a strong case in

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101. *See id.* at 32 (“[I]nsofar as the Seventh Circuit’s single-entity test is merely a surrogate for rule-of-reason analysis, then it is not obvious that it would (or should) reduce discovery burdens.”).

102. *See id.* at 17–19 (“The analytical framework for assessing otherwise anticompetitive restraints that are related to an efficiency-enhancing integration is well-settled . . . . The decision below overturns this well-accepted analytical framework . . . . In addition, the court offered no coherent guide for determining how far afield from the underlying single-entity activity immunity should extend.”).

103. Brief for the United States as Amicus Curiae Supporting Petitioner, *supra* note 97, at 23.

104. *Id.*

105. *See* 15 U.S.C.A. § 1293 (West 2008) (“The first sentence of section 1291 of this title shall not apply to any joint agreement described in such section which permits the telecasting of all or a substantial part of any professional football game on any Friday after six o'clock postmeridian or on any Saturday during the period beginning on the second Friday in September and ending on the second Saturday in December in any year from any telecasting station located within seventy-five miles of the game site.”).

106. *See* Brief of the American Antitrust Institute, *supra* note 98, at 34–35 (discussing Congress's extension of antitrust immunity to other “highly integrated” joint ventures, such as agricultural and fishermen's cooperatives and certain newspaper joint ventures.).

107. For example, the centralized licensing function of the NFLP allows organizations that

favor of upholding the agreement. Thus, while *American Needle* should shed some light on the future of the single entity defense for professional sports leagues, it seems likely that it will be quite some time before the case will be completely resolved on the merits.

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want to use the logos and marks of multiple NFL teams to purchase a license for all thirty-two teams in one transaction, reducing transaction costs for these organizations. Additionally, because the NFLP's revenues and costs are shared equally by the thirty-two member teams, teams that do not perform as well on the field are able to compete economically with the more successful franchises, helping to maintain competitive parity on the field of play. *See* Brief for the NFL Respondents, *supra* note 19, at 8.