

Upon Further Review: How the NFL’s Exclusive Licensing Agreement with Reebok Survives Antitrust Scrutiny Despite the League’s Flawed Single-Entity Defense

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I. INTRODUCTION

Over the past few decades, sports marketing and sports advertising have developed into multibillion dollar industries in the United States.¹

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1. Christopher J. Belter & Joseph M. Hanna, *Turning a Playmaker into a MoneyMaker: The Business of Sports Product Licensing*, FOR THE DEFENSE (Oct. 2009), available at Westlaw, 51 No. 10 DRIFTD 39.

Licensing agreements lie at the heart of these industries: In 2008 alone, sports licensing sales generated an estimated \$11.92 billion.² In short, licensing entails “the sale of a right authorizing another use for something that is protected by copyright or trademark, such as a name, logo, likeness, character, phrase or design, to another party in combination with a product, service, or promotion.”³ The National Football League (NFL) in particular receives numerous benefits from granting licenses to vendors, including, inter alia, the opportunity to enhance its brand perception in the retail market.⁴

Prior to 2001, the NFL granted several companies (including Nike, Adidas, and Puma) nonexclusive licenses to produce and market NFL apparel.⁵ However, in 2002, the league’s intellectual property marketing arm, NFL Properties, entered into a ten-year, \$250 million contract with Reebok that granted Reebok exclusive rights to produce apparel bearing NFL franchise and league logos, as well as NFL franchise and league trademarks.⁶ Thus, this agreement terminated all NFL apparel licenses previously granted to any other companies. American Needle, an Illinois-based company that had possessed an NFL headwear license for twenty years prior to the Reebok agreement, filed a lawsuit, claiming that the Reebok agreement violated section 1 of the Sherman Antitrust Act, which outlaws any “contract, combination . . . or conspiracy, in restraint of trade.”⁷ The NFL managed to avoid a trial on the merits because the United States Court of Appeals for the Seventh Circuit, contrary to the rulings of previous courts, accepted the NFL’s single-entity defense, which, consequently, rendered the league incapable of violating section 1 of the Sherman Antitrust Act.⁸ However, the United States Supreme Court ultimately reversed and remanded the case, finding that the NFL is not entitled to single-entity status and that its licensing activities constitute concerted action that is subject to scrutiny under section 1 of the Sherman Act.⁹

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. Michael A. McCann, *American Needle v. NFL: An Opportunity To Reshape Sports Law*, 119 YALE L.J. 726, 733 (2010).

7. Lyle Denniston, *Pro Sports and Antitrust: Argument Preview*, SCOTUSBLOG (Jan. 12, 2010, 7:32 PM), <http://www.scotusblog.com/2010/01/pro-sports-and-antitrust-argument-preview/>; see also 15 U.S.C. § 1 (2006).

8. Nathaniel Grow, *A Proper Analysis of the National Football League Under Section One of the Sherman Act*, 9 TEX. REV. ENT. & SPORTS L. 281, 284-85 (2008).

9. *Am. Needle, Inc. v. Nat’l Football League*, 130 S. Ct. 2201, 2215, 2217 (2010).

This Comment argues that despite the NFL's flawed single-entity defense, its licensing agreement with Reebok does not run afoul of antitrust laws. Part II will describe the development of NFL Properties and its transition from granting multiple, nonexclusive apparel licenses to granting an exclusive apparel license to Reebok. Part II will also provide an introduction to section 1 of the Sherman Antitrust Act. Part III will provide a detailed discussion of *American Needle, Inc. v. NFL*. Part IV will discuss why the NFL is not entitled to absolute single-entity status and why the NFL's licensing activities constitute concerted action subject to section 1 analysis. This Comment concludes by analyzing the Reebok licensing agreement under the rule of reason and explaining why this agreement withstands antitrust scrutiny.

II. BACKGROUND

A. *The Emergence of NFL Properties as the NFL's Intellectual Property Marketing Arm*

Although the NFL made its debut in the sports world in 1920, the "modern" NFL marked its genesis in the early 1960s.¹⁰ Prior to 1961, each NFL franchise independently negotiated for television contracts, which resulted in substantial disparities in the revenue generated by big-market and small-market teams.¹¹ NFL commissioner Pete Rozelle actively sought to remedy this effect by convincing franchise owners that the league's success depended on the well-being of each franchise, "with one team's economic failure threatening all others."¹² Rozelle's efforts eventually succeeded, culminating in a 1961 agreement among the franchise owners whereby all agreed to pool together the franchises' television broadcasting rights and share equally in the resulting revenue.¹³

Rozelle's efforts further led to the creation of NFL Properties, a separate corporate entity jointly owned by each of the franchises.¹⁴

10. William J. Hoffman, *Dallas' Head Cowboy Emerges Victorious in a Licensing Showdown with the N.F.L.*: National Football League Properties v. Dallas Cowboys Football Club, et al., 7 SETON HALL J. SPORTS & ENT. L. 255, 257-58 (1997).

11. See Brett Goodman, *The Sports Broadcasting Act: As Anachronistic as the Dumont Network?*, 5 SETON HALL J. SPORTS & ENT. L. 469, 472, n.12 (1995) ("[Eleven] of the league's [fourteen] teams had signed individual contracts with CBS, two teams had done the same with NBC, and the Cleveland Browns had formed its own network. . . . The Packers, the Western Division champion in 1961, earned only \$120,000 that year, while the Washington Redskins, after finishing last in the Eastern Division, took home \$250,000.").

12. McCann, *supra* note 6, at 732.

13. Hoffman, *supra* note 10, at 258-59. Mr. Rozelle was undoubtedly influenced by the success of the American Football League's league-wide television contract in 1960.

14. *Id.* at 260.

Founded in 1963, NFL Properties is responsible for: “(1) developing, licensing, and marketing the intellectual property the teams [own], such as their logos, trademarks, and other indicia; and (2) ‘conduct[ing] and engag[ing] in advertising campaigns and promotional ventures on behalf of the NFL and [its] member [teams].”¹⁵ To further “enhance the ability of NFL Properties to market Club and League Marks,” twenty-six of the NFL’s then-existing twenty-eight franchises entered into a Trust Agreement on October 1, 1982.¹⁶ Pursuant to this agreement, each franchise transferred the exclusive commercial rights in its Club Marks to the NFL Trust.¹⁷ The trustees, in turn, entered into a licensing agreement with NFL Properties, which granted NFL Properties the exclusive right to exploit the Club Marks and NFL Marks.¹⁸ This agreement allowed NFL Properties to grant licenses to vendors who, in turn, used the marks in production and marketing of various products, including jerseys, shirts, flags, and headwear.¹⁹ Nevertheless, each franchise retained limited rights over the licensing of its Club Marks, including:

- (1) the exclusive right to use its team marks in connection with the presentation of a football game;
- (2) the nonexclusive right to use its team marks in local advertising to promote football games;
- (3) the nonexclusive right to allow third parties to use its team marks in advertisements in local sections of the team’s program; and
- (4) the nonexclusive right to use its marks in its own publications.²⁰

Under this arrangement, still in effect today, the NFL Trust receives all revenue generated from the licensing agreements entered into by NFL Properties and, after the deduction of fees, expenses, and donations to various charities, distributes the revenue equally among the franchises.²¹

15. *Am. Needle, Inc. v. Nat’l Football League*, 538 F.3d 736, 737 (7th Cir. 2008).

16. Club Marks are the “various trademarks, service marks, and trade names, including team names, helmet designs, insignia, uniforms, colors, identifying slogans, and other identifications.” League Marks are defined as “including, but not limited to ‘National Football League,’ ‘NFL,’ the emblem commonly known as the ‘NFL Shield,’ ‘American Football Conference,’ ‘AFC,’ ‘National Football Conference,’ ‘NFC,’ ‘Super Bowl,’ ‘Pro Bowl,’ [and] ‘NFL Super Pro Club.’” Hoffman, *supra* note 10, at 264 nn.50-51.

17. *Id.* at 264-65.

18. *Id.* at 265.

19. *Am. Needle*, 538 F.3d at 737-38.

20. Brandon L. Grusd, *The Antitrust Implications of Professional Sports’ League-Wide Licensing and Merchandising Agreements*, 1 VA. J. SPORTS & LAW 1, 11 (1999).

21. *Id.*

B. The Shift Toward an Exclusive Licensing Agreement with Reebok

For several years after the 1982 Trust and Licensing agreements, NFL Properties sold exclusive apparel licenses to multiple companies, including a headwear license to American Needle.²² Although NFL apparel sales generated considerable profits for the league in the 1980s, these profits steadily declined during the mid- to late-1990s.²³ The primary reason for the decline was an oversaturated market.²⁴ NFL Properties, for example, had entered into more than 350 licensing agreements with various companies, making it difficult to police the quantity and quality of products bearing Club Marks and NFL Marks.²⁵ In addition, the sports apparel market became flooded with merchandise connected to the 1996 Olympic Games in Atlanta.²⁶ Likewise contributing to an oversaturated market was the fact that high-profile apparel companies such as Nautica, Tommy Hilfiger, and Polo made their debut in the logo-branded apparel market.²⁷

In light of the steady decline in NFL apparel sales, the NFL hired Chuck Zona, a renowned apparel expert, to streamline NFL Properties' approach to licensing NFL apparel.²⁸ Based on his findings, Zona determined that NFL Properties "had executed licensing agreements with too many apparel companies, which in turn sold too many products to too many stores, thereby creating an 'inventory glut,' with NFL-licensed apparel lacking a core identity."²⁹ According to Zona, NFL Properties needed to "create the dynamic of supply and demand" in order remedy this effect.³⁰ NFL Properties sought to achieve this end in 2002, when it awarded Reebok a ten-year, \$250 million contract in which Reebok gained exclusive rights to produce and market apparel bearing NFL franchise logos and trademarks, as well as NFL logos and trademarks.³¹ American Needle filed an antitrust action alleging that this agreement violated section 1 of the Sherman Antitrust Act.³² Before analyzing the

22. McCann, *supra* note 6, at 729.

23. *Id.* at 733.

24. MARK YOST, *TAILGATING, SACKS, AND SALARY CAPS: HOW THE NFL BECAME THE MOST SUCCESSFUL SPORTS LEAGUE IN HISTORY* 128 (2006).

25. *Id.*

26. *Id.*

27. *Id.*

28. McCann, *supra* note 6, at 733.

29. *Id.*

30. *Id.*

31. *Id.*

32. *Am. Needle Inc. v. Nat'l Football League*, 538 F.3d 736, 737 (7th Cir. 2008).

details of the case, however, a discussion examining the basics of antitrust law is warranted.

C. The Reebok Licensing Agreement and the Intersection of Antitrust Law

Antitrust laws serve the important purpose of “ferreting out anticompetitive conduct” from the market.³³ The theory behind proscribing anticompetitive conduct is that “freely operating competitive markets will result in the most efficient allocation of a nation’s scarce resources and will bring consumers the widest variety of choices and the lowest possible prices.”³⁴ Section 1 of the Sherman Antitrust Act states that any contract, combination or conspiracy in restraint of trade is illegal.³⁵ Aside from certain agreements that are per se illegal, courts analyze all other agreements under the “rule of reason.”³⁶ Under a rule of reason analysis, courts will find an agreement or other restraint unlawful “if its anticompetitive effects outweigh its procompetitive benefits—that is, if it is net anticompetitive.”³⁷ As noted by the Supreme Court, the rule of reason seeks to “distinguish[] between restraints with anticompetitive effect[s] that are harmful to the consumer and restraints stimulating competition that are in the consumer’s best interest.”³⁸

The threshold issue to be determined before resorting to a rule of reason analysis, however, is whether the “challenged conduct involved a contract, combination . . . or conspiracy.”³⁹ To violate section 1 of the Sherman Antitrust Act, there must be an agreement, which necessarily requires multiple economic actors.⁴⁰ Therefore, concerted actions between multiple entities are subject to section 1 analysis. In *Copperweld Corp. v. Independence Tube Corp.*, the Supreme Court noted that Congress intended to subject concerted actions between multiple entities to rigorous section 1 scrutiny because such activity is “fraught with anticompetitive risk” and “deprives the marketplace of the independent centers of decisionmaking that competition assumes and

33. Gabriel Feldman, *The Puzzling Persistence of the Single-Entity Argument for Sports Leagues: American Needle and the Supreme Court’s Opportunity To Reject a Flawed Defense*, 2009 WIS. L. REV. 835, 838 (2009).

34. David A. Balto & Andrew M. Wolman, *Intellectual Property and Antitrust: General Principles*, 43 IDEA 395, 397-98 (2003).

35. 15 U.S.C. § 1 (2006).

36. Feldman, *supra* note 33, at 840-41. A discussion of the “per se” analysis is beyond the scope of this Comment.

37. *Id.* at 840.

38. *Id.* at 841.

39. *Id.* at 842.

40. *Id.*

demands.”⁴¹ However, the Court stated that a parent corporation and its wholly owned subsidiary is a single entity incapable of violating section 1 of the Sherman Antitrust Act.⁴² The Court reasoned that a parent corporation and its wholly owned subsidiary “have a complete unity of interest,” evidenced by the fact that they share common objectives and have a shared “corporate consciousness.”⁴³ Moreover, “[w]ith or without a formal ‘agreement,’ the subsidiary acts for the benefit of the parent.”⁴⁴ Consequently, because “coordination between a corporation and its division does not represent a sudden joining of two independent sources of economic power previously pursuing separate interests,” the *Copperweld* Court concluded that a parent and its wholly owned subsidiary are immune from section 1 scrutiny.⁴⁵

Courts have struggled to apply antitrust laws rationally and consistently to the NFL and other sports leagues because of their many unique characteristics.⁴⁶ The NFL clearly possesses some single-entity characteristics, evidenced by the fact that cooperation among NFL franchises is essential to producing the NFL product—a series of regular season and playoff games that ultimately culminates in the Super Bowl championship game.⁴⁷ Because no single franchise can produce this product alone, the franchises must make a series of agreements with each other in order to ensure the success of the NFL product against other forms of entertainment.⁴⁸

On the other hand, the NFL also possesses many joint venture characteristics. In its simplest form, a joint venture is an association of “two or more persons formed to carry out a single business enterprise for profit for which purpose they combine their property, money, effects, skill, and knowledge.”⁴⁹ Despite the need for collaboration to produce NFL Football, the NFL franchises “remain distinct legal entities with individualized ownerships.”⁵⁰ Aspects that the individual franchises retain control over include, among others, ticket prices, “personnel and salary decisions concerning players, coaches, and administrators,” and

41. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768-69 (1984).

42. *Id.* at 777.

43. *Id.* at 771.

44. *Id.*

45. *Id.* at 770-71.

46. Feldman, *supra* note 33, at 844.

47. *Id.* at 846.

48. *Id.* at 837.

49. McCann, *supra* note 6, at 737-38 (quoting 46 AM. JUR. 2D *Joint Ventures* § 1 (2006)).

50. *Id.* at 739.

revenue generated from local advertising, stadium naming, and luxury boxes.⁵¹

Prior to *American Needle*, courts consistently characterized the NFL as a joint venture, thereby subject to the rule of reason analysis under section 1 of the Sherman Act.⁵² The lower court's decision in *American Needle* marks the first time in eight-plus attempts that the NFL successfully convinced a court to accept its (flawed) single-entity defense.⁵³

III. *AMERICAN NEEDLE, INC. v. NFL*

American Needle filed suit against the NFL, NFL Properties, the individual NFL franchises, and Reebok, claiming that the exclusive licensing agreement between NFL Properties and Reebok violated section 1 of the Sherman Antitrust Act.⁵⁴ American Needle argued that because the franchises separately own their team logos and trademarks, their collective agreement to authorize NFL Properties to enter into the exclusive agreement with Reebok amounted to "a conspiracy to restrict other vendors' ability to obtain licenses for the teams' intellectual property."⁵⁵

The NFL defendants filed a motion for summary judgment on American Needle's section 1 claim, asserting that the NFL franchises were immune from liability under section 1 because they operated as a single entity.⁵⁶ The defendants based this argument on the Supreme Court's holding in *Copperweld* that a corporation and its wholly owned subsidiary are not subject to analysis under section 1 of the Sherman Act.⁵⁷

In *Am. Needle, Inc. v. New Orleans La. Saints*, the United States District Court for the Northern District of Illinois granted the NFL's

51. *Id.*

52. *Id.* at 738.

53. Grow, *supra* note 8, at 284-85; see *N. Am. Soccer League v. Nat'l Football League*, 670 F.2d 1249, 1256 (2d Cir. 1982); *Mid-South Grizzlies v. Nat'l Football League*, 720 F.2d 772, 783 (3d Cir. 1983); *L.A. Mem'l Coliseum Comm'n v. Nat'l Football League*, 726 F.2d 1381, 1388 (9th Cir. 1984); *McNeil v. Nat'l Football League*, 790 F. Supp. 871, 895 (D. Minn. 1992); *Sullivan v. Nat'l Football League*, 34 F.3d 1091, 1099 (1st Cir. 1994); *Shaw v. Dall. Cowboys Football Club Ltd.*, No. 97-CV-5184, 1998 WL 419765, at *5 (E.D. Pa. June 23, 1998); *St. Louis Convention & Visitors Comm'n v. Nat'l Football League*, 154 F.3d 851, 853 (8th Cir. 1998).

54. *Am. Needle, Inc. v. Nat'l Football League*, 538 F.3d 736, 738 (7th Cir. 2008).

55. *Id.* American Needle also argued that NFL teams "monopolized the NFL team licensing and product wholesale markets" by authorizing NFL Properties to enter into the Reebok agreement, thereby violating section 2 of the Sherman Antitrust Act.

56. *Id.*

57. *Id.*

motion for summary judgment, holding that “the NFL and the teams act as a single entity in licensing their intellectual property.”⁵⁸ The court stated that “cooperative marketing . . . serve[s] to promote NFL football,” because each franchise would be at a “competitive disadvantage with other leagues with integrated marketing” if each were responsible for protecting and marketing its own logos and trademarks in a national market.⁵⁹ Moreover, the court noted the need for competitive balance within the league, which the league accomplishes through revenue-sharing.⁶⁰ The court concluded that in promoting NFL football through a centralized licensing agreement, the NFL franchises “[act] as an economic unit” and hence should be classified as a single entity.⁶¹ Accordingly, because *Copperweld* held that single entities cannot restrain trade in violation of the Sherman Antitrust Act, the district court granted the defendants’ motion for summary judgment on American Needle’s section 1 claim.⁶²

On appeal, the Seventh Circuit affirmed the ruling of the district court.⁶³ The court acknowledged that various courts have encountered difficulties in determining the appropriate classification of professional sports leagues, since leagues exhibit characteristics of both single entities and joint ventures.⁶⁴ In light of these conflicting characteristics, the Seventh Circuit concluded that courts should address the single-entity status of sports leagues on a case-by-case basis, “one league at a time” and “one facet of a league at a time.”⁶⁵

Turning its attention to the Reebok licensing agreement, the court stated that the NFL franchises “can function only as one source of economic power when collectively producing NFL football,” mentioning the fact that no single franchise can play a football game by itself.⁶⁶ The Seventh Circuit ultimately affirmed the ruling of the district court,

58. 496 F. Supp. 2d 941, 943-44 (N.D. Ill. 2007).

59. *Id.* at 943-44.

60. *Id.*

61. *Id.* at 944.

62. *Id.* The court also granted the defendants’ motion for summary judgment on American Needle’s section 2 claim, finding that its ruling on the company’s section 1 claim necessarily disposed of its section 2 claim.

63. *Am. Needle, Inc. v. Nat’l Football League*, 538 F.3d at 744.

64. *See id.* at 742.

65. *Id.*

66. *Id.* at 743.

holding that the NFL franchises constitute a single entity for the purposes of collectively licensing their intellectual property.⁶⁷

American Needle filed a petition for a writ of certiorari to the Supreme Court and, surprisingly, the NFL respondents filed a response supporting the grant of certiorari.⁶⁸ The NFL argued that the league is entitled to single-entity status because cooperation among the franchises is essential to producing the NFL product, and because none of the franchises have economic value apart from the league.⁶⁹ The NFL's argument was that no single franchise can produce the NFL product alone; instead, "every NFL [franchise] is integrally and inherently dependent upon every other [franchise] to create NFL Football."⁷⁰ As a result, the franchises must make a series of agreements with each other, including the rules of the game.⁷¹ This interdependence among the franchises, coupled with the need for cooperation, the NFL respondents argued, renders the league a single entity immune from section 1 analysis.⁷²

By supporting the grant of certiorari, the NFL respondents hoped to ultimately obtain a uniform rule handed down by the Supreme Court that would recognize the single-entity nature of highly integrated joint ventures as well as eliminate uncertainty that chills collaboration and decision-making for the NFL and other joint ventures.⁷³ Against the recommendation of the United States government, the Supreme Court granted certiorari.⁷⁴

IV. THE SUPREME COURT DECISION IN *AMERICAN NEEDLE*

In a unanimous opinion written by Justice Stevens, the Supreme Court rejected the NFL's single-entity defense and held that the NFL's licensing activities constituted concerted action subject to Sherman Act section 1 scrutiny.⁷⁵ The Court stated that the NFL franchises "do not possess either the unitary decisionmaking quality or the single

67. *Id.* at 744. The court also affirmed the district court's ruling on American Needle's section 2 monopolization claim, stating that the NFL franchises could exclusively license their intellectual properties without running afoul of antitrust laws.

68. Denniston, *supra* note 7.

69. Brief for the NFL Respondents at 6, *Am. Needle v. Nat'l Football League*, 130 S. Ct. 2201 (2010) (No. 08-661).

70. *Id.* at 3.

71. *Id.* at 3-4.

72. *Id.* at 24-26.

73. *See generally* Brief for the NFL Respondents, *supra* note 69.

74. Denniston, *supra* note 7.

75. *Am. Needle, Inc. v. Nat'l Football League*, 130 S. Ct. 2201, 2206-07 (2010).

aggregation of economic power characteristic of independent action.”⁷⁶ In fact, the Court noted:

Each of [the teams] is a substantial, independently owned, independently managed business, whose “general corporate actions are guided or determined” by “separate corporate consciousness,” and whose “objectives are” not “common.” [The teams] compete with one another, not only on the playing field, but to attract fans, for gate receipts, and for contracts with managerial and playing personnel.⁷⁷

As applied to the facts of the case, the Court found that the franchises compete in the market for intellectual property.⁷⁸ According to Justice Stevens, “to a firm making hats, the Saints and the Colts are two potentially competing suppliers of valuable trademarks.”⁷⁹ Thus, “[d]ecisions by NFL teams to license their separately owned trademarks collectively and to only one vender are decisions that ‘depriv[e] the marketplace of independent centers of decisionmaking,’ and therefore of actual or potential competition.”⁸⁰ Thus, the Court found that such concerted action is subject to section 1 analysis, with its legality to be judged under the rule of reason.⁸¹

The Court concluded by noting that while the NFL franchises are “separate, profit-maximizing entities” whose “interests in licensing team trademarks are not necessarily aligned,” the franchises “share an interest in making the entire league successful and profitable, and that they must cooperate in the production and scheduling of games.”⁸² The Court found that such an interest could justify a variety of collective decisions made by the NFL franchises.⁸³ However, this does not mean that the franchises are immune from Sherman Act section 1 analysis: The Court found that the necessity of cooperation does not transform a concerted action into independent action.⁸⁴ Consequently, the Court ruled that all collective decisions made by the NFL franchises are subject to section 1 scrutiny and must be judged under the rule of reason.⁸⁵

76. *Id.* at 2212.

77. *Id.* at 2212-13.

78. *Id.* at 2213.

79. *Id.*

80. *Id.*

81. *Id.* at 2216.

82. *Id.*

83. *Id.* at 2217.

84. *Id.* at 2214.

85. *Id.* at 2206.

V. THE NFL'S FLAWED SINGLE-ENTITY DEFENSE: GOING BEYOND THE SUPREME COURT'S REASONING

The Supreme Court correctly concluded that the NFL is not entitled to absolute single-entity status. The NFL franchises do not share a complete unity of interest in several areas, including: “(1) individual gate receipts (including other stadium revenues); (2) corporate proceeds; (3) broadcast revenues; (4) licensing/merchandising fees; and (5) Internet/new media revenues.”⁸⁶ Furthermore, the NFL franchises actively compete against each other for fans, players, coaches, personnel, and sponsorship and naming rights.⁸⁷ The NFL franchises maintain too many private property rights independent of the need for collaboration and cooperation, and therefore the NFL should not be characterized as a single entity.

As it relates to the licensing of intellectual property, NFL franchises have divergent economic interests and compete against each other. Evidence of economic competition can be found simply by examining the terms of the licensing agreement between NFL Properties and Reebok.⁸⁸ Specifically, the agreement contains a clause that grants each NFL franchise the option “to market, sell, and distribute its own logoed apparel.”⁸⁹ Dallas Cowboys owner Jerry Jones exercised this option, and “pursuant to that option, the Cowboys were entitled to keep 100 percent of the revenue they generated over a specific threshold.”⁹⁰ This arrangement illustrates that the Cowboys (and other franchises should they choose to follow suit) compete against other franchises for the sale of franchise apparel, and therefore do not share a complete unity of interest. Similarly, the Green Bay Packers allegedly encourage the team's fans to purchase Packers paraphernalia from the team directly to avoid sharing the proceeds with the League or the other teams.⁹¹ These examples demonstrate that “cooperation between NFL [franchises] is not required for the NFL to secure an apparel contract,” which runs counter

86. 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, 925 (2008).

87. See Feldman, *supra* note 33, at 878-92.

88. *Id.* at 878.

89. *Id.*

90. *Id.* at 878-79. A simplified example: If the league earns \$1000, the Cowboys must contribute 16% of that revenue, or \$160, to the league. The Cowboys then pocket any revenue that it generates in excess of \$160.

91. Feldman, *supra* note 33, at 879 (citing Reply Brief of Plaintiff-Appellant at 13, *Am. Needle, Inc. v. Nat'l Football League*, 538 F.3d 736 (7th Cir. 2008) (No. 07-4006)).

to the *Copperweld* principle that a subsidiary will “act[] for the benefit of the parent,” thus justifying single-entity status.⁹²

Additionally, the fact that franchises retain ownership in their intellectual property arguably runs counter to the argument that the franchises “operate with a ‘shared corporate consciousness’” in terms of the licensing of their intellectual property.⁹³ In light of the divergent economic interests of the franchises, coupled with the absence of a complete unity of interest, the NFL is not entitled to single-entity status as it relates to licensing of intellectual property. Furthermore, from a public policy perspective, given the profitability of NFL franchises based on the unique characteristics of the league, the system should not provide the NFL “with a loophole to avoid complying with antitrust principles.”⁹⁴

VI. THE IMPACT OF *AMERICAN NEEDLE* ON OTHER NFL EXCLUSIVE LICENSING AGREEMENTS

In 2004, the NFL granted EA Sports an exclusive licensing deal through 2012 to produce NFL video games.⁹⁵ Consequently, other video game developers, such as 2K Sports, have been precluded from obtaining a license to produce NFL video games.⁹⁶ The Supreme Court’s ruling in *American Needle* may open the door for lawsuits against the NFL and Electronic Arts (EA) Sports, based on their exclusive licensing agreement.

The Supreme Court’s ruling may also result in lawsuits against the NFL Network, a channel created by the NFL in 2003 in an attempt to expand its broadcasting reach.⁹⁷ Prior to the creation of the NFL Network, the NFL franchises pooled all of their television rights and sold them as a package on network television to CBS, NBC, and Fox.⁹⁸ In 2006, however, the NFL announced that it would broadcast live, prime-

92. McCann, *supra* note 6, at 759; *see also* *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. at 771.

93. McCann, *supra* note 6, at 759.

94. Edelman, *supra* note 86, at 926.

95. Interview with Marc Edelman, Professor of Sports and Antitrust at the Dwayne O. Andreas School of Law at Barry University, EA Exclusive NFL License Undone? Sports Antitrust Law Professor Explains American Needle Impact (May 28, 2010), <http://www.ripton.com/2010/05/28/sports-antitrust-law-professor-explains-american-needle-verdict-impact-on-eas-exclusive-nfl-licensing-agreement/>.

96. *See id.*

97. Ross C. Paolino, *Upon Further Review: How NFL Network Is Violating the Sherman Act*, 16 SPORTS LAW.J. 1, 3 (2009).

98. Gabriel A. Feldman, *American Needle and the NFL’s Single Entity Argument*, HUFFINGTON POST (Jan. 2, 2010, 11:09 PM), http://www.huffingtonpost.com/gabriel-a-feldman/american-needle-and-the-n_b_409532.html.

time regular season games on the NFL Network, taking away these games from the networks.⁹⁹ This exclusive licensing deal with NFL Network may be challenged by network television stations that have been precluded from broadcasting certain games that the NFL Network is entitled to broadcast.

VII. WITHSTANDING ANTITRUST SCRUTINY: THE REEBOK LICENSING AGREEMENT AND THE RULE OF REASON

The fact that the NFL should not be entitled to single-entity status for the purpose of licensing intellectual property does not automatically render the Reebok agreement illegal. Instead, the agreement must be analyzed under the rule of reason. To withstand antitrust scrutiny, as noted previously, the procompetitive benefits of the agreement must outweigh its anticompetitive effects.

By collectively granting NFL Properties the exclusive right to exploit their intellectual property (which in turn granted an exclusive apparel license to Reebok), the NFL franchises arguably denied the marketplace of competition that would benefit consumers.¹⁰⁰ Opponents of exclusive licensing agreements contend that such agreements result in, *inter alia*, fewer consumer choices and increased prices.¹⁰¹ The effect of the Reebok agreement on consumer choice is unmistakable: consumers who wish to purchase NFL apparel in today's market only have Reebok from which to choose, making the actual choice whether or not to purchase at all. Furthermore, a Reebok executive in 2006 remarked, "[B]asic fitted caps that were selling for \$19.99 a few years ago because of the price pressures are now selling for \$30."¹⁰² Aside from a detrimental impact on consumers, the purpose of the Reebok licensing agreement is actually to earn money, rather than the stated purpose of promoting the game. Long-standing jurisprudence makes it clear that fixing prices for the purpose of making money is *per se* illegal and constitutes a violation of antitrust laws.¹⁰³

From a procompetitive perspective, however, "courts have typically regarded pooled licensing arrangements of the sort present between NFL teams and Reebok as enhancing competition."¹⁰⁴ This is because "[t]he

99. Paolino, *supra* note 97, at 6.

100. McCann, *supra* note 6, at 758.

101. Feldman, *supra* note 33, at 881.

102. Brief of Petitioner at 7, *Am. Needle, Inc. v. Nat'l Football League*, 130 S. Ct. 2201 (2010) (No. 08-661).

103. See *United States v. Sealy, Inc.*, 388 U.S. 350 (1967).

104. McCann, *supra* note 6, at 757-58.

pooling of license rights is thought to create a bundle that can be sold more efficiently than separately marketed rights.”¹⁰⁵ League control of licensing arguably promotes efficiency, given the fact that for small market teams, “pushing them into other markets requires a bigger infrastructure and more marketing clout,” which the NFL as a whole can provide, but would be difficult for individual teams to provide.¹⁰⁶

The procompetitive effects of the Reebok licensing agreement are also apparent from a consumer standpoint. Trademarks serve the role of conveying important product information to consumers, including the product's origin and quality.¹⁰⁷ Hence, one of the underlying principles behind trademark law is to protect consumers by reducing confusion in the marketplace.¹⁰⁸ Arguably, nonexclusive licensing agreements may breed confusion in the market by allowing free use of a mark without linking it to a single source. Furthermore, nonexclusive licensing agreements may create a free-rider problem that hurts merchants, in the sense that a vendor “could pass off a lower-quality product for another's high quality product by duping consumers into believing in the quality of all products bearing the trademark even though not all products are of equal quality.”¹⁰⁹ NFL Properties' exclusive licensing agreement with Reebok arguably reinforces the principles of reducing consumer confusion and protecting merchants, because such an arrangement has the ability to restore to the market a “sense of product certainty” and quality which was largely absent in the days before Chuck Zona streamlined NFL Properties' approach to licensing NFL apparel.¹¹⁰ Because the Reebok agreement ultimately appears to be procompetitive under the rule of reason analysis, the Reebok agreement withstands antitrust scrutiny and therefore should be sustained.

VIII. CONCLUSION

The Supreme Court in *American Needle* held that the NFL is not entitled to single-entity status under any circumstances, including the

105. *Id.* at 758.

106. Tom Van Riper, *The NFL vs. American Needle*, FORBES, (Jan. 7, 2010 6:00 AM), <http://www.forbes.com/2010/01/06/american-needle-supreme-court-business-sports-nfl.html>.

107. Veronica J. Cherniak, Comment, *Ornamental Use of Trademarks: The Judicial Development and Economic Implications of an Exclusive Merchandising Right*, 69 TUL. L. REV. 1311, 1316 (1995).

108. Luke MacDowall, *The Intersection of Trademark and Antitrust: Why Centralized Licensing Agreements Protect Consumers*, WAKE FOREST INTELLECTUAL PROPERTY LAW JOURNAL BLOG, Jan. 14, 2010, <http://ipjournal.law.wfu.edu/2010/01/14/the-intersection-of-trademark-and-antitrust-why-centralized-licensing-agreements-protect-consumers/>.

109. *Id.*

110. *Id.*

licensing of its franchises' intellectual property. This ruling may open the door for challenges against Electronic Arts (EA) Sports and the NFL Network, amongst others.

However, the Court's rejection of the single entity-defense does not automatically render the challenged conduct illegal; it only means that the agreement or restraint in question becomes subject to a rule of reason analysis under section 1 of the Sherman Act. Despite the NFL's flawed single-entity defense in *American Needle*, the Reebok licensing agreement nevertheless withstands Sherman Act section 1 scrutiny because it has net procompetitive effects. By failing to recognize the NFL as a single entity, the Supreme Court established precedent that is consistent with the goals of ferreting out anticompetitive conduct and promoting economic efficiency that ultimately benefits and protects consumers.