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American Needle and the Boundaries of the Firm in Antitrust Law

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Whenever several natural persons join together to create a firm, they necessarily agree or “conspire” under Sherman Act §1. But once the enterprise is lawfully formed, antitrust law usually ignores its creators. The actions of the resulting entity are treated as those of a single unit, which “cannot conspire with itself.” This is ordinarily true regardless of the entity's legal form—whether a corporation, partnership, or other association. Under the Supreme Court’s *Copperweld* decision such conduct will be deemed “unilateral” even if it is undertaken by agreement between a corporation and its incorporated subsidiary or, by extension, between two commonly owned subsidiaries.[1] However, at least some decisions of certain organizations—such as trade associations, professional associations, and some joint ventures—are treated as concerted decisions by the members. While the Sherman Act speaks to this issue of identifying the boundaries of the single firm, it is not particularly helpful. Sherman Act §6 provides:

> The word “person”, or “persons”, wherever used in [the Sherman Act] shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.[2]

When the courts have decided when an association of multiple persons organized for profit should be considered a single firm or a combination two factors tend to stand out. The first is whether the creators or members themselves remain as separate, significant economic actors in the marketplace. The ordinary corporation's shareholders do not and are thus unlike the members of a cartel, trade association, sports league, or the like. The second key factor is whether the challenged act controls or affects the individual market behavior of the members.

Leagues of professional sports teams have faced considerable antitrust litigation over various ethical rules governing players, hiring rules affecting player eligibility for employment and competition among the teams for players, rules governing team location and other team management decisions, and rules governing a team owner's relation to other sports. In *American Needle* the Supreme Court unanimously held that a decision by the National Football League to refuse to license the intellectual property of individual NFL teams should be treated as an agreement among the teams, not as the unilateral conduct of the NFL. However, the Court also held that the legality of this act, while concerted, should be assessed under the rule of reason.[3] The unanimous decision, written by Justice Stevens, was almost certainly his last antitrust opinion for the Court.

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[1] *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984)*,

[2] 15 U.S.C. §7 (2006).

[3] *American Needle, Inc. v. National Football League*, ___ S.Ct. ___, 2010 WL 2025207 (May 24, 2010).

The NFL is itself an unincorporated association whose membership includes 32 separately owned and separately incorporated football teams. Each team owns its own intellectual property rights, primarily in trademark, to their names, colors and insignia. Prior to 1963 the individual teams had licensed these rights individually, often to outside manufacturers for use on authorized clothing such as caps and jerseys. In that year the NFL created National Football League Properties (NFLP) as a common entity to assist the teams in developing and marketing their IP rights. During that time NFLP granted numerous nonexclusive licenses to various manufacturers, including the plaintiff American Needle. In 2000, however, it began to adopt a policy of licensing exclusively and granted Reebok, a competing manufacturer, an exclusive license to manufacture NFL logoed headware for a ten year period. This contract was not only exclusive as to Reebok, it also covered the IP rights to all of the NFL teams.

The exclusivity provision in that contract, which ousted American Needle from the manufacturing of licensed, NFL logoed headware,[4] provoked this lawsuit. American Needle alleged that the exclusive provision should be treated as a concerted refusal to deal under §1 of the Sherman Act, given that the NFL team members whose individual IP rights were being licensed were all separately owned corporate entities. The district court granted the NFL summary judgment on the conspiracy issue, holding that the teams had "so integrated their operations" with respect to this facet of their conduct that they should be "deemed a single entity rather than joint venture…."[5] The Seventh Circuit affirmed, following its own precedent.[6] As the Supreme Court characterized the Seventh Circuit's opinion, it "discounted the significance of potential competition among the teams regarding the use of their intellectual property" because the teams "can function only as one source of economic power when collectively producing NFL football."[7]

The distinction between concerted and unilateral conduct in this context can be legally critical, depending on how the conduct is defined. A unilateral refusal to deal is rarely unlawful, even when the defendant is a monopolist.[8] By contrast, an exclusive dealing or output contract between a single seller (NFL) and buyer (Reebok) would be addressed under the rule of reason and could be unlawful if sufficient market share,

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[4] Neither the district court nor circuit court opinions references a finding of a relevant product market.

[5] *American Needle, Inc. v. New Orleans La. Saints*, 496 F.Supp.2d 941, 943 (N.D. Il. 2007).

[6] 538 F.3d 736, 741 (7th Cir. 2008). The Supreme Court did not cite *Chicago Professional Sports Ltd. Partnership v. NBA*, 93 F.3d 593 (7th Cir. 1996), which had established the single entity status for a similar professional sports organization in Seventh Circuit law. However, the facts differed, as we discuss later. See 7 Antitrust Law ¶1478d3 (2d ed. 2003).

[7] *American Needle*, ___ S.Ct. at ___, quoting the Seventh Circuit's opinion, 538 F.3d at 742-743.

[8] See, e.g., *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004); and see 3B Phillip E. Areeda & Herbert Hovenkamp, Anitrust Law ¶¶771-774 (3d ed. 2008).

foreclosure and lack of business justification were established.[9] However, an agreement among two or more independent actors to refuse to deal with a third party is typically characterized as a "concerted refusal" or "boycott" and subjected to a harsher but variable standard, ranging from per se illegality in the case of a "naked" boycott orchestrated in order to facilitate a cartel,[10] to fairly tolerant rule of reason treatment for "ancillary" refusals to deal in the context of a joint venture,[11] standard setting,[12] or other multilateral activities in which firms engaged in joint production refuse to deal with every rival who requests dealing.

The Supreme Court observed that, taken literally, §1 of the Sherman Act could refer to every agreement among two actors, including even that between a firm's CEO and a subordinate within the firm.[13] Congress intended to treat concerted behavior more strictly than unilateral behavior but it also:

> used this distinction between concerted and independent action to deter anticompetitive conduct and compensate its victims, without chilling vigorous competition through ordinary business operations. The distinction also avoids judicial scrutiny of routine, internal business decisions.

The Court noted that unilateral conduct is routine and universal, while concerted conduct is exceptional:

> [B]ecause concerted action is discrete and distinct, a limit on such activity leaves untouched a vast amount of business conduct. As a result, there is less risk of deterring a firm's necessary conduct; courts need only examine discrete agreements; and such conduct may be remedied simply through prohibition.[14]

Further, the factual distinction between single and multiple entities had long been held by the Supreme Court not to be the same as whether the parties were legally distinct entities. On the one side, decisions such as *Sealy* found multiple entity status in a joint venture owned and controlled by a group of different mattress manufacturers.[15] On the

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[9] See 11 Herbert Hovenkamp, Antitrust Law ¶¶1800-1805, 1822-1823 (2d ed. 2005)

[10] See 13 id. ¶2203.

[11] Id., ¶¶2210-2215.

[12] Id. ¶2230-2235.

[13] *American Needle*, ___ S.Ct. at ___.

[14] Id. at ___ & n.2, citing 7 Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶1464c (2d ed. 2003).

[15] *United States v. Sealy, Inc.*, 388 U.S. 350 (1967). The Supreme Court also gave as examples *Northwest Wholesale Stationers, Inc.* v. *Pacific Stationery & Printing Co.*, 472 U. S. 284 (1985) (cooperative of stationery retailers); *National Collegiate Athletic Assn.* v. *Board of Regents of Univ. of Okla.*, 468 U. S. 85 (1984) *(collegiate athletic association whose members were college and universities); United States* v. *Topco Associates, Inc.*, 405 U. S. 596, 609 (1972) (association of small grocery changes developing common brand in order to compete more effectively with larger chains); *Associated Press* v.

other side, the Court had also found a single entity in the case of commonly owned but separately incorporated subsidiaries.[16] These decisions examining both sides of the issue revealed that "substance, not form, should determine whether a[n] … entity is capable of conspiring under §1."[17] The Court then noted that:

> This inquiry is sometimes described as asking whether the alleged conspirators are a single entity. That is perhaps a misdescription, however, because the question is not whether the defendant is a legally single entity or has a single name; nor is the question whether the parties involved "seem" like one firm or multiple firms in any metaphysical sense. The key is whether the alleged "contract, combination … , or conspiracy" is concerted action—that is, whether it joins together separate decisionmakers. The relevant inquiry, therefore, is whether there is a "contract, combination … or conspiracy" amongst "separate economic actors pursuing separate economic interests," that the agreement "deprives the marketplace of independent centers of decisionmaking," and therefore of "diversity of entrepreneurial interests" and "thus of actual or potential competition."[18]

The Court then observed that the individual NFL teams did not appear to have the qualities suggesting a "single aggregation of economic power." In fact, their business exhibited a "separate corporate consciousness" and they did not have common objectives. Perhaps most to the point, they competed with each other "not only on the playing field, but to attract fans, for gate receipts and for contracts with managerial and playing personnel."[19] The Court noted:

United States, 326 U. S. 1 (1945) (wire service in which newspapers themselves provided and received transmitted news stories); *United States* v. *Terminal Railroad Assn. of St. Louis*, 224 U. S. 383 (1912) (association of railroads that shared critical terminal on Mississippi River). In a footnote it added professional associations composed of individual persons, including *FTC* v. *Indiana Federation of Dentists*, 476 U. S. 447 (1986); *Arizona* v. *Maricopa County Medical Soc.*, 457 U. S. 332 (1982); *National Soc. of Professional Engineers* v. *United States*, 435 U. S. 679 (1978); *Goldfarb* v. *Virginia State Bar*, 421 U. S. 773 (1975); *Allied Tube & Conduit Corp.* v. *Indian Head, Inc.*, 486 U. S. 492 (1988); *Radiant Burners, Inc.* v. *Peoples Gas Light & Coke Co.*, 364 U. S. 656 (1961) *(per curiam); Fashion Originators' Guild of America, Inc.* v. *FTC*, 312 U. S. 457 (1941). See *American Needle*, ___ S.Ct. at ___ nn. 3 & 4. Some of these cases, such as *Indiana Dentists*, *Professional Engineers*, *Goldfarb*, *Allied Tube* and *Radiant Burners* created very loose professional or standard setting organizations that could not turn their participants into a single entity under any reasonable definition.

[16] *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984)*, several of *Copperweld's* predecessor decisions, and also ¶1463. Note that Justice Stevens had dissented in *Copperweld*.

[17] *American Needle*, ___ S.Ct. at ___, quoting *Copperweld*, 467 U.S. at 773 n. 21.

[18] Id. at ___, quoting *Copperweld*, 467 U.S. at 771; and also *Fraser v. Major League Soccer, LLC*, 284 F.3d 47, 57 (1st Cir. 2002); *Freeman v. San Diego Assn. of Realtors*, 322 F.3d 1133, 1148-1149 (9th Cir. 2003); and 7 Antitrust Law ¶1462b.

[19] *American Needle*, __ S.Ct. at ___.

> Directly relevant to this case, the teams compete in the market for intellectual property. To a firm making hats, the Saints and the Colts are two potentially competing suppliers of valuable trademarks. When each NFL team licenses its intellectual property, it is not pursuing the "common interests of the whole" league but is instead pursuing interests of each "corporation itself,"[20] teams are acting as "separate economic actors pursuing separate economic interests," and each team therefore is a potential "independent cente[r] of decisionmaking." Decisions by NFL teams to license their separately owned trademarks collectively and to only one vendor are decisions that "depriv[e] the marketplace of independent centers of decisionmaking," and therefore of actual or potential competition. See *NCAA*, 468 U. S., at 109, n. 39 (observing a possible §1 violation if two separately owned companies sold their separate products through a "single selling agent").[21]

The Court also rejected the argument that the NFL was an organization "akin to a merger," creating such complete unification as to enable its teams to sell their goods as a single entity.[22] The Court then distinguished NFL promotion of its *own* brand from the various brands of the teams, who "are still separate, profit-maximizing entities, and their interests in licensing team trademarks are not necessarily aligned.[23]

The Court rejected the defendant's argument that they should be treated as a single entity because without the cooperation of all of its members teams there would be no such thing as NFL football. He observed that this might be true of many ventures, but that did not transform them into single entities for antitrust purposes. However, the Court later returned to this proposition when it determined that the rule of reason should apply.[24]

The Court found that the question whether decisions by NFLP as an entity constituted concerted action to be "closer" than whether "decisions made directly by the 32 teams" were so.[25] In this case NFLP is a separate corporation with its own

[20] Quoting *Copperweld*, 467 U. S. at 770.

[21] Id. at ___, citing and quoting *Copperweld*, 467 U.S. at 769-770; *NCAA*, 468 U.S. at 109 n. 39; and 7 Antitrust Law ¶1478a.

[22] Cf. *Texaco, Inc. v. Dagher*, 547 U.S. 1 (2006) (complete union of refining and distribution activities of two firms into one and cessation of separate operations).

[23] *American Needle*, ___ S.Ct. at ___, citing Herbert Hovenkamp, *Exclusive Joint Ventures and Antitrust Policy*, 1995 Colum. Bus. L. Rev. 1, 52–61 (1995); Zenichi Shishido, *Conflicts of Interest and Fiduciary Duties in the Operation of a Joint Venture*, 39 Hastings L. J. 63, 69–81 (1987); Joseph F. Brodley, *Joint Ventures and Antitrust Policy*, 95 Harv. L. Rev. 1521, 1526 (1982).

[24] *American Needle*, ___ S.Ct. at ___.

[25] Id. at ___.

management. Further, most of NFLP's revenues were shared equally by the teams.[26] But the Court found concerted action "at least with regards to its marketing of property owned by the *separate* teams."[27] As the Court observed:

> Apart from their agreement to cooperate in exploiting those assets, including their decisions as the NFLP, there would be nothing to prevent each of the teams from making its own market decisions relating to purchases of apparel and headwear, to the sale of such items, and to the granting of licenses to use its trademarks.[28]

As the court observed, "Agreements made within a firm can constitute concerted action covered by §1 when the parties to the agreement act on interests separate from those of the firm itself."[29] In such cases the intra firm agreement "may simply be a formalistic shell for ongoing concerted action."[30] In this case,

> decisions by the NFLP regarding the teams' separately owned intellectual property constitute concerted action. Thirty-two teams operating independently through the vehicle of the NFLP are not like the components of a single firm that act to maximize the firm's profits. The teams remain separately controlled, potential competitors with economic interests that are distinct from NFLP's financial well-being. Unlike typical decisions by corporate shareholders, NFLP licensing decisions effectively require the assent of more than a mere majority of shareholders. And each team's decision reflects not only an interest in NFLP's profits but also an interest in the team's individual profits.[31]

Indeed, "If the fact that potential competitors shared in profits or losses from a venture meant that the venture was immune from §1, then any cartel "could evade the antitrust law simply by creating a 'joint venture' to serve as the exclusive seller of their competing products."[32]

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[26] Revenue pooling, in this case by equal sharing, can raise individual concerns about competition because it reduces its member's incentive to produce as much as it can. However, when the issue arises it is most generally for firms organized into a naked cartel. See 12 Herbert Hovenkamp, Antitrust Law, Ch. 20B (2d ed. 2004).

[27] *American Needle*, ___ S.Ct. at __ (emphasis added).

[28] Id. at ___.

[29] Id. at ___, citing 7 Antitrust Law ¶1471 and Elhauge Elhauge & Damien Geradin, Global Antitrust Law and Economics 787–788 (2007).

[30] Id., citing *United States* v. *Topco Associates, Inc.*, 405 U. S. 596, 609 (1972); *United States v. Sealy, Inc.*, 388 U.S. 350, 352-354 (1967).

[31] *American Needle*, ___ S.Ct. at ___, citing Herbert Hovenkamp, *Exclusive Joint Ventures and Antitrust Policy*, 1995 Colum. Bus. L. Rev. 1, 52–61 (1995).

[32] *American Needle*, ___ S.Ct. ___, quoting *Major League Baseball Properties, Inc.* v. *Salvino, Inc.*, 542 F. 3d 290, 335 (2d Cir. 2008).

Finally, the Court concluded that while the NFL's conduct satisfied §1's agreement requirement it should be addressed under the rule of reason. "When 'restraints on competition are essential if the product is to be available at all,' *per se* rules of illegality are inapplicable, and instead the restraint must be judged according to the flexible Rule of Reason."[33] The Court found that "other features of the NFL" might serve to save such agreements from antitrust attack, even though they do not justify treating it as a single entity. However, it remanded for the lower courts to deal with what factors should go into the rule of reason determination.

Focusing on the most important administrative difference between unilateral and concerted behavior, the Court stated in a footnote that "if every unilateral action that restrained trade were subject to antitrust scrutiny, then courts would be forced to judge almost every internal business decision."[34] While that is certainly true, in the case at hand the conduct was not unilateral even if the NFL were characterized as a single entity. Rather, it involved a contract with Reebok that contained an exclusivity provision. As a result, whether the NFL is treated as a single entity or a combination of separate actors the challenge in this case would have implicated §1 as well as possibly §2 of the Sherman Act. Indeed, the Court might more properly have focused on Reebok rather than the NFL, for Reebok was the beneficiary of the exclusivity provision and was the only named competitor of American Needle. Any "monopolizing" that might have occurred in the apparel market would have been for Reebok's benefit, and to the likely detriment of the NFL.[35] For example, in an exclusive dealing case under §2 of the Sherman Act the defendant is usually the beneficiary of the exclusivity provision rather than the party upon whom it is being imposed.[36]

While the single entity conclusion in *American Needle* is important, the facts did not necessarily raise the issue of antitrust micromanagement that the Court feared. The case itself was a challenge to an exclusive trademark licensing agreement between NFL Properties and Reebok, a manufacturer of apparel. The plaintiff was a rival apparel manufacturer. Assuming that the NFL is a single entity the case would best be characterized as exclusive dealing, or more properly, an output contract in which the NFL promised to license to Reebok and no one else.[37] Such agreements are analyzed under the rule of reason and their illegality usually depends on a "foreclosure" analysis in which illegality depends on the extent to which the plaintiff has been denied access to

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[33] *American Needle*, ___ S.Ct. at ___, quoting *NCAA*, 468 U.S. at 101, and 117.

[34] Id., n. 2, citing ¶1464c.

[35] One possible difficulty of the §2 case is that the most likely market being "monopolized," which is something like "NFL licensed headwear," is not one in which the NFL participates. The plaintiff being excluded here operates in a portion of the apparel market, not in the market for professional football.

[36] E.g., *United States v. Dentsply Int'l, Inc.*, 399 F.3d 181 (3d Cir. 2005) (tooth material manufacturer violated §2 by imposing exclusive dealing on its dealers); on exclusive dealing as a §2 offense, see ¶768.

[37] See 11 Antitrust Law ¶¶1800-1803.

a properly defined relevant market. The plaintiff will lose if the foreclosure is too small or if reasonable business justifications exist for the practice. [38] For example, in *Storer* the court found a possible Sherman Act violation in an exclusive licensing for broadcast contracting.[39] Most decisions uphold the agreements.[40] For example, *Paddock*, also from the Seventh Circuit, upheld an exclusivity provision in a licensing contract from the *New York Times*, a single entity, to the *Chicago Tribune*.[41]

When does finding multilateral as opposed to unilateral conduct make a difference? The Sherman Act case law as historically developed makes two important distinctions. *First*, exclusionary conduct, or conduct that is thought to be anticompetitive because it excludes rivals from the market, may be assessed under a different standard depending on whether it is unilateral or multilateral. The most extreme case is the simple refusal to deal, which is very close to per se lawful when the conduct is "unilateral," even by a monopolist,[42] and particularly in a case such as this one where American Needle and the NFL are not even competitors.[43] It can be per se unlawful, however, if the refusal is characterized as a naked boycott. *American Needle* was not such a case; the challenged conduct was an output contract, akin to exclusive dealing. *Second*, the historical concern of §1 of the Sherman Act is collusion, or coordinated reductions in output that result in higher prices for consumers. Once again, a "naked" cartel is unlawful per se. At the other extreme, however, under United Statesa law a monopolist may set any price and output that it pleases, so its own unilateral price increase is legal per se. A single entity conclusion in *American Needle* would have given the teams free reign to engage in collusion while having relatively little impact on exclusionary practices.

The advantage of the rule of reason formulation that the Supreme Court adopted is that it preserves the best elements of both. With respect to exclusionary practices, a multilateral standard is more aggressive than a unilateral standard precisely because of the dangers of collusion. That is, we might want to scrutinize an exclusive contract involving a joint venture of distinct sellers at the upstream end more closely than one with a single market dominating firm in that position, but it would not be because of the exclusionary impact. Rather, it would be because the agreement among multiple upstream actors facilitates collusion rather than independent bidding for licenses. American Needle's complaint was based on the premise that if each team had been free to enter its own intellectual property licensing agreements it would have been in a position to win one or more of these agreements, whether exclusive or nonexclusive.

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[38] See id., ¶1821 (prima facie exclusive dealing case); ¶1822 (defenses).

[39] *Storer Cable Communications, Inc. v. City of Montgomery, Ala*., 826 F.Supp. 1338 (M.D.Ala. 1993), vacated at the parties' request on nonantitrust grounds, 866 F.Supp. 1376 (M.D.Ala. 1993).

[40] See 11 Antitrust Law ¶1803e.

[41] *Paddock Publishing, Inc. v. Chicago Tribune Co.,* 103 F.3d 42 (7th Cir. 1996), cert. denied, 520 U.S. 1265 (1997). See 11 Antitrust Law ¶1803.

[42] See, e.g., *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004); and see 3B Phillip E. Areeda & Herbert Hovenkamp, Anitrust Law ¶¶771-774 (3d ed. 2008).

[43] Courts routinely deny standing to noncompetitors in unilateral refusal to deal cases. See ¶774d.

Respecting collusion, a finding of separate entities enables us to pursue harmful collusive behavior while a single entity finding makes an output reduction in and of itself unreachable. We should not lose sight of the fact that the property interests here are team trademarks, a product that, unlike a jointly developed patent, is by nature exclusive to each team. There is no obvious reason why a group of football teams should be permitted to cartelize the licensing of their marks any more than a group of competing restaurants should be, and if a procompetitive rationale should emerge, the rule of reason should be quite sufficient to handle it.

Whether the NFL is a single entity or a "combination" of its separate teams, analysis under the rule of reason involves many of the same questions although some different ones. The plaintiff will very likely have to show a relevant market[44] and foreclosure, although truncated market analysis may be appropriate for a sufficiently suspicious restraint.[45] Indeed, some dicta in the Court's unanimous opinion may breathe new life into a "quick look" analysis of suspicious restraints that can occur "in the twinkling of an eye."[46]

In any event, defenses may be offered. In the multiple entity case there will be additional questions pertaining to the justifications for coordinated rather than individual contracting, and these differences could also be significant. There may or may not be significant competitive concerns arising from joint contracting, and there may or may not be defenses for such contracting. For example, in NCAA the Supreme Court characterized the restraint as "naked," notwithstanding its inclusion in the NCAA joint venture arrangement, whose structure was not being challenged,[47] and the Supreme Court condemned the *NCAA* restraint on truncated power analysis even though it proclaimed that it was applying the rule of reason. The Court concluded that "[t]his naked restraint on price and output requires some competitive justification even in the absence of a detailed market analysis."[48] Of course, *NCAA* involved an express output limitation (limiting each teams nationally televised games to four annually) while *American Needle* involves an exclusivity provision which may or may not reduce output

[44] We can only surmise that the relevant market issue could be important. On the demand side, customers may indeed be willing to pay more for caps bearing NFL logoes. On the supply side it would seem that a properly licensed manufacturer could at little cost substitute among headware of NFL or non-NFL logoes or no logoes at all. Of course, the need for a license could itself reduce supply substitutability. See 2B Antitrust Law ¶561 (2d ed. 2007). These questions will have to be resolved.

[45] See 7 Antitrust Law ¶1511 (2d ed. 2004).

[46] *American Needle*, ___ S.Ct. at ___, quoting *NCAA*, 468 U.S. at 109 n. 39, which was in turn quoting Phillip E. Areeda, *The Rule of Reason in Antitrust Analysis: General Issues* 38 (Federal Judicial Center, June, 1981).

[47] *NCAA*, 468 U.S. at 109.

[48] Id. at 110.

depending on the explanations for it.[49] Also significant is the fact that *American Needle* involves a trademark license, and the justification for restricted licensing of trademarks can be weighty, particularly if issues of origin or quality control are present.[50] Of course, even if exclusive trademark licenses are desirable, each separate NFL team could have granted its own individual exclusive licenses, and apparel manufacturers could then compete for one or more of these contracts.

The courts have often refused to find illegality even on a premise of separate actors and agreement. For example, in *Mid-South Grizzlies* the plaintiff, a professional football team in the failed United States Football League, requested and was denied membership in the NFL.[51] Such a case would have been treated as a unilateral refusal to deal if the NFL were a single entity, and liability for unilateral refusals is rare.[52] By contrast, "concerted refusals" to deal, sometimes characterized as "boycotts," are typically treated more harshly, particularly when the refusal is in furtherance of a naked cartel[53] or the defendants have market power.[54] At the same time, however, most refusals to deal by joint ventures with restrictive membership policies are lawful.[55] In this case the court refused to find a violation notwithstanding its conclusion that the defendant had market power, finding failure of competitive injury.[56]

On the Supreme Court's remand for rule of reason analysis, it spoke about whether "necessity of cooperation is a factor relevant to whether the agreement is subject to the Rule of Reason," relying on its 1984 *NCAA* position for that position.[57] *NCAA* had stated:

> Our decision not to apply a *per se* rule to this case rests in large part on our recognition that a certain degree of cooperation is necessary if the type of competition that petitioner and its member institutions seek to market is to be preserved.[58]

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[49] For example, exclusivity provisions can increase output if they produce additional incentives to the firms who are given the exclusive rights.

[50] See, e.g., 3 J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition §§18.5 – 18.6 (4th ed. 2009) (quality control by licensor over licensee's output).

[51] *Mid-South Grizzlies v. NFL*, 720 F.2d 772 (3d Cir. 1983).

[52] See 3B Antitrust Law ¶¶770-774.

[53] See 13 Antitrust Law ¶¶2201-2203.

[54] E.g., *Northwest Wholesale Stationers, Inc.* v. *Pacific Stationery & Printing Co.*, 472 U. S. 284 (1985); see 12 Antitrust Law ¶2211.

[55] Contrast 12 Antitrust Law ¶2214 (closed or limited membership ventures) and id., ¶¶2220-2224 (open membership ventures).

[56] *Mid-South Grizzlies*, 720 F.2d at 787-787. The court also dismissed a §2 claim, using the same reasoning. Id. at 788.

[57] *American Needle*, ___ S.Ct. at ___.

[58] *NCAA*, 468 U.S. at 101.

That invites the question whether one applies the "necessity" analysis to each restraint individually, to the joint venture as a whole, or to some amalgamation of the two. It seems quite likely that the NFL could survive if its team members licensed their separately owned IP rights individually, each setting its own terms. Indeed they had done just that for many years, and exploration of that history and the reasons for the change might be relevant under the rule of reason inquiry.[59] Should the fact that coordination is essential in some portion of the Teams' business, as it certainly is for scheduling of games, regulation of the season and numerous other matters, mean that every conceivable restraint undertaken by the teams would qualify for such treatment? Suppose that two or more teams individually acquired separate chains of restaurants; would the rule of reason apply to naked price fixing among these restaurant chains simply because the chains are owned by NFL teams? Ultimately these issues must be considered as questions about policy and not about logic. The restaurants might be seen as much more remote to the business of NFL football than are the trademark rights in team names and symbols, although the issue is far from clear.

Justice Stevens seemed persuaded by the fact that the intellectual property rights in this case were those of the individual teams, which were then licensed by the NFL under common, exclusive terms. The NFL owns its own intellectual property rights, however, and presumably the NFL's licensing of its own "NFL" mark would be a unilateral act. In both *Sealy* and *Topco*, however, the Supreme Court found concerted action when a group of manufacturers created a *common* name in a central organization and then licensed it on geographically restrictive terms back to the individual members.[60] While both *Sealy* and *Topco* have been harshly criticized, the nature of the criticism is generally not that the Supreme Court applied Section 1 of the Sherman Act, but rather that it applied the per se rule of illegality under §1. Presumably, if the defendant in either case had had substantial market shares an absolute restriction forbidding competition among them in the same territories would have been treated harshly.

The team trademarks in this case were by their nature individual.[61] But suppose that the NFL members were a group of business firms that had engaged in joint research and development leading to a valuable patent. In that case the patent would be commonly owned, but should we treat a refusal by the organization to license the patent to outsiders as a unilateral act? The issues are fundamentally different because excessive licensing by one firm could dissipate the value of the patent to other firms.

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[59] See *American Needle*, ___ S.Ct. at ___.

[60] *United States* v. *Topco Associates, Inc.*, 405 U. S. 596, 609 (1972); *United States v. Sealy, Inc.*, 388 U.S. 350, 352-354 (1967).

[61] The team logoes are highly distinctive and can be compared with one another on multiple internet sites. See, e.g., http://www.sportslogos.net/league.php?id=7; or http://www.nfl.com/teams.

Once again, this suggests the correctness of proceeding in such cases under the rule of reason.

Note that under *Copperweld*[62] sibling corporations owned by a common parent are to be treated as a single entity. In contrast, corporations that are separately owned are treated as individual entities even though their only purpose is to serve as part of the business of some umbrella organization. For example, McDonald's as franchisor may have contractual franchise relationships with thousands of individually owned McDonald's franchisees, each of which is separately incorporated and owned by a separate franchisee. In that case an agreement among the franchisees to do something would be addressable under §1 of the Sherman Act; however, a decision by McDonald's as franchisor -- for example, to purchase or not to purchase national advertising from a particular television network – would be treated as a unilateral act.

That leaves open questions that have differential impacts on differing franchisees, but where the issues are also integral to the franchisor's business. What if the franchisor imposed resale price maintenance, territorial restraints, or tying on individual franchisees. Those would in fact be exercises of the franchisor's own property rights rather than those of individual franchisees. Nevertheless, the courts have nearly always dealt with all of these claims within the franchising context as if they involved concerted action. This is so even though the only purpose for incorporating a particular MacDonald's franchisee is to serve as part of the MacDonald's franchise. Further, it is no answer to say that coordination is not "necessary" in order to deliver the product because alternative ownership forms might achieve the same result. That is also true of the NFL which could be completely owned by one large firm.

One key factor in the analysis of these cases, which the Court repeatedly emphasized, is that the NFL teams, just as franchisees, are independently owned businesses with separate economic interests that do not necessarily coincide with those of the venture as a whole.[63] Most critically, the individual teams have incentives to behave as competitors vis-à-vis one another, while the organization may have incentives to maximize joint profits by behaving as a cartel. This conclusion also has a flip side: the individual members may have an incentive to free ride on the investment of other members, while the organization has an interest that each member do its part. These concerns can be particularly relevant to the subject of intellectual property licensing.

[62] *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984); see 7 Antitrust Law ¶¶1463-1464.

[63] See Herbert Hovenkamp, *Exclusive Joint Ventures and Antitrust Policy,* 1995 Colum. Bus. L. Rev. 1, 52–61 (1995).

As the Supreme Court understood, these attributes of joint venture activity counsel against both extremes of antitrust analysis, except in very small sets of cases at the outer boundaries. At one extreme is per se illegality, which the Supreme Court adopted all too readily in decisions like *Topco*.[64] At the other extreme is finding a single entity for the sale of intellectual property rights owned by the individual teams, which the Seventh Circuit adopted too readily in *American Needle.* A single entity conclusion seems appropriate when the central organization is conducting its *own* business rather than being involved in the separate business of its individual team members. For example, the NFL has its own employees, real estate, and even its own intellectual property. As a general matter an NFL decision to fire one of its own staff members should not be considered a "conspiracy" among the individual teams. Where this line should be drawn probably cannot be answered categorically.

At the other extreme, where the Court's analysis seems too categorical, a per se rule or at least a very truncated examination seems quite appropriate for clearly naked conduct that is not integral to the delivery of the joint venturer's product. Consider the example of two teams that each owned separate restaurant chains which subsequently fixed prices. The operation of restaurants is not central to the NFL's activities, the teams are individually owned entities, distinct both legally and economically, and the restaurant chains might in fact engage in far more economic competition with each other than the teams do in the economic market for professional football. In the absence of other integrative activity price fixing in that setting does not require an elaborate rule of reason analysis.

American Needle entails that many other multi-enterprise structures are also reachable under §1. For example, the historical Visa and Mastercard joint ventures and county or municipal real estate boards all have structures that tend to be looser than that of the NFL, permitting more individualized business decision making by separate members.[65] Recently incorporated Mastercard and Visa IPOs reorganize these joint ventures as corporations, with member banks who participated in the older joint ventures remaining as shareholders, although with limited voting rights. However, these shareholders also have significant independent businesses and a rule that limits their business will be treated no differently than it was under the old structure.[66] Whether or not these member banks are able to vote on day to day business decisions, the corporation's directors are obliged to maximize the corporation's value, which occurs

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[64] *United States* v. *Topco Associates, Inc.*, 405 U. S. 596, 609 (1972).

[65] Mastercard and Visa filed a joint amicus brief in support of the NFL's position. See 2009 WL 4247980

[66] See Victor Fleischer, The Mastercard IPO: Protecting the Priceless Brand, 12 Harv. Negotiation L.Rev. 137 (2007). The larger banks actually own shares with no voting rights or only limited voting rights, but the corporation operates so as to maximize the value of the firm, which in this case would be the cartel output.

when it achieves the cartel-like output.[67] *American Needle* makes clear that corporate form under state law does not matter. The all important difference between *Copperweld* and *Sealy*[68] is that *Copperweld* involved multiple corporations with common ownership, presumably by passive shareholders who did not have independent competitive interests. The important feature of *Copperweld* is that no separate business interests other than the corporation itself were identified. By contrast, *Sealy* involved a single corporation owned by firms in the mattress manufacturing business in competition with one another, and Sealy's licensing restrictions limited their independent business. While *Sealy* may be properly criticized for not applying the rule of reason to an ancillary territorial restraint, it was properly evaluated as concerted activity. To the extent that a MasterCard or Visa shareholder also has an independent business interest whose economic decisions are restrained by the IPO, conspiratorial capacity exists. As is the case with the NCAA and the NFL, the fact that the entity was lawfully formed indicates that its acts that do not affect the individual business conduct of its shareholders will be treated as unilateral. However, any action that limits the activities of shareholders or others as independent businesses would be reachable under §1.[69]

The *American Needle* decision also suggests that decisions finding that franchisors and franchisees, or patentees and their licensees, are single entities, must be re-examined.[70] Of course, the second qualification that the Supreme Court listed, whether the relevant decision controls the individual member's behavior, still applies. For example, Visa's decision to hire a new financial officer, or the MacDonald's franchisor's decision to have an annual meeting in Charleston remain unilateral decisions, not because the individual shareholders or members of these groups lack a separate market presence, but because these decisions have no impact on the individual conduct of the members. Finally, *American Needle* also tends to ratify those decisions involving

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[67] For example, suppose that a cartel of cement producers created a corporation in which they received shares in proportion to their size. The individual members gave up all their shareholder voting rights but the board of directors, as any board, is charged with maximizing the firm's value. The cartelists have effectively created a cartel ringmaster that will very likely make the cartel perform more effectively than it had before. *American Needle* makes clear that an antitrust tribunal need not be tripped up by this legal form.

[68] *United States v. Sealy, Inc*., 388 U.S. 350 (1967) (condemning incorporated joint venture that was effectively controlled by shareholders for benefit of their separate businesses).

[69] See Herbert Hovenkamp & Christopher Leslie, The Firm as Cartel Manager (2010, manuscript available from the authors).

[70] E.g., *Williams v. I.B. Fischer Nevada*, 999 F.2d 445, 447-48 (9th Cir. 1993) (per curiam) (franchisor and franchisee single entity foreclosing franchisee's challenge to employee switching limitation, which clearly affected the business decisions of individual franchisees). *Levi Case Co., Inc. v. ATS Prods. Inc.*, 788 F. Supp. 428, 431-32 (N.D. Cal. 1992) (interpreting *Copperweld* to hold that patentee and its licensee could not conspire to monopolize market for technology covered by the license agreement).

hospitals that find the possibility of conspiratorial capacity when officers of the hospital also own separate practices and use their position on the hospital board to exclude rivals.[71]

American Needle is also not inconsistent with the Supreme Court's decision four years earlier in *Dagher*.[72] That decision refused to find an unlawful price fixing conspiracy in a joint venture of two oil producers that produced, sold, and priced gasoline from a common facility, except under the two brands of the parent companies. The *Dagher* opinion cited *Copperweld* for the proposition any challenge to the *creation* of the joint venture would have been under the rule of reason.[73] Once the venture was found to be lawfully created, the legality of its prices was not a matter of conspiracy law. The most salient fact is that in *Dagher* the joint venture participants ceased all of their separate operations in the western United States and made sales of gasoline only through the venture. The union was akin to a merger in that particular section of the country. In contrast, the individual teams in the NFL engage in significant individual business, including the development of individually held intellectual property rights.

One should not jump too hastily to the conclusion that American Needle overruled Judge Easterbrook's decision in *Chicago Professional Sports*, which the Supreme Court did not cite. There, the Seventh Circuit ultimately decided that, notwithstanding superficial similarities to the NCAA,[27] the NBA was more like a single entity than a cartel of independent teams.[28] While that decision is now qualified by the Supreme Court's *American Needle* decision, it bears mention because of the rationales that Judge Easterbrook states for the contrary position. Further, the facts were different, and the case for separate entities was stronger in *American Needle* than in *Chicago Professional Sports*.

The reasoning in *Chicago Professional Sports* looks more at the *structure* of the joint venture in relation to its members, while the Supreme Court's approach in *American Needle* looks more to the nature of the challenged restraint and the extent to which it may reflect independent and potentially anticompetitive incentives. The district court had held that the NBA could not be a single entity unless there was a "complete unity of interest,"[29] which the individual teams did not have because each was a separately owned profit-making entity. The NBA argued that it was an incorporated entity and that it should be treated as a corporate board, with the teams treated as the corporation's subsidiaries. Of course, this relationship is not the same as the parent-subsidiary relationship, for the teams are not commonly owned by their "parent." Nevertheless, it

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[71] E.g., *Weiss v. York Hosp.*, 745 F.2d at 786, 828 (3d Cir. 1984), cert. denied, 470 U.S. 1060 (1985).
[72] *Texaco, Inc. v. Dagher*, 547 U.S. 1 (2006).
[73] Id. at 6 n. 1
[27] *National Collegiate Athletic Assn. v. Board of Regents*, 468 U.S. 85 (1984).
[28] *Chicago Professional Sports Ltd. Partnership v. NBA*, 95 F.3d 593 (7th Cir. 1996).
[29] See id. at 597; and 874 F. Supp. 844 (N.D. Ill. 1995).

does produce a single product—namely, NBA basketball. The Seventh Circuit concluded:

> *Copperweld*…asks why the antitrust laws distinguish between unilateral and concerted action, and then assigns a parent-subsidiary group to the "unilateral" side in light of those functions. Like a single firm, the parent-subsidiary combination cooperates internally to increase efficiency. Conduct that "deprives the marketplace of the independent centers of decision-making that competition assumes," [*Copperweld*,] 467 U.S. at 769, without the efficiencies that come with integration inside a firm, go on the "concerted" side of the line. And there are entities in the middle: "mergers, joint ventures, and various vertical agreements" (id. at 768) that reduce the number of independent decision makers yet may improve efficiency. These are assessed under the Rule of Reason. We see no reason why a sports league cannot be treated as a single firm in this typology. It produces a single product; cooperation is essential (a league with one team would be like one hand clapping); and a league need not deprive the market of independent centers of decision making.[30]

While all of this would seem to apply equally to the *NCAA* case, where the court found an agreement of separate colleges and their football teams, the Seventh Circuit found this distinction:

> [T]he NBA has no existence independent of sports. It makes professional basketball; only it can make "NBA Basketball" games; and unlike the NCAA the NBA also "makes" teams…. [T]he NBA created new teams in Toronto and Vancouver, stocked with players from the 27 existing teams plus an extra helping of draft choices. All of this makes the league look like a single firm. Yet the 29 clubs, unlike GM's plants, have the right to secede…and rearrange into two or three leagues. Professional sports leagues have been assembled from clubs that formerly belonged to other leagues…. Moreover, the league looks more or less like a firm depending on which facet of the business one examines. From the perspective of fans and advertisers (who use sports telecasts to reach fans), "NBA Basketball" is one product from a single source…, just as General Motors is a single firm even though a Corvette differs from a Chevrolet. But from the perspective of college basketball players who seek to sell their skills, the teams are distinct….[32]

[30] *Chicago Professional Sports*, 95 F.3d at 598-599.

[32] 95 F.3d at 599. The court also likened the NBA to a franchise system, whose many business decisions are undertaken for the group as a whole; for example, we would not expect to see one McDonald's franchise compete with the others by offering pizza. Id. at 598. Of course, an important difference in the franchise setting is that the relevant agreement is presumably a vertical one between the franchiser and each franchisee separately. Antitrust would certainly look quite closely at a *horizontal*

The Seventh Circuit would thus have extended *Copperweld* to situations where a second corporation is separately owned but was created by the first corporation—at least for some purposes. The colleges in *NCAA* were unquestionably separate entities with significant functions outside of the NCAA, thus justifying their treatment as distinct. By contrast, a professional sports team typically has no other function than the provision of professional sports and, as the court pointed out, the creation of many of the separate teams is actually instigated by the parent organization.[33]

Nevertheless, many firms spun off from other firms subsequently become competitors and are quite clearly capable of collusion. The important additional point in the NBA situation is that not only were the individual teams created by the organization, they were also created exclusively for the purpose of supplying professional basketball within the ongoing, network-style NBA joint venture.

But suppose that at some later time, after relaxation of NBA rules limiting collateral activities, two or more of these NBA teams individually entered into the manufacture of sporting goods such as basketballs. Even the Seventh Circuit's rationale would not protect a subsequent price-fixing agreement in basketballs, because the teams were not created for that purpose and would thus have to be regarded as distinct entities. Further, basketball production differs from basketball game production in that the former does not require an ongoing network joint venture.[34]

The Seventh Circuit's approach seems to understate the relevance of concerted activity in a rule of reason case. Once the tribunal has concluded that the NBA is a single entity, then its output limitation (unaccompanied by any exclusionary practice directed at others) must be considered legal per se and not subjected to the rule of reason. Focusing on the particular practice under antitrust scrutiny seems more sensible. If it affected the individual teams' nonventure conduct it should be regarded as collaborative.

Nevertheless, important facts in *Chicago Professional Sports* make it different from the *American Needle* case. The dispute in the latter case involved the licensing of separately held intellectual property rights owned by each individual team. There is no

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agreement among a group of restaurants that none would sell pizza, even if the restaurants shared certain intellectual property such as a common name.

[33]See also *NFL v. North Am. Soccer League*, 459 U.S. 1074, 1077 (1982) (Rehnquist, J., dissenting from certiorari denial, arguing that NFL should be treated as single entity); *Seabury Management v. PGA of Am.*, 878 F. Supp. 771 (D. Md. 1994), aff'd in relevant part, 52F.3d 322 (4th Cir. 1995), cert. denied, 516 U.S. 867 (1995) (treating PGA as single entity).

[34]The court issued this warning:

> Sports are sufficiently diverse that it is essential to investigate their organization and ask *Copperweld*'s functional question one league at a time—and perhaps one facet of a league at a time, for we do not rule out the possibility that an organization such as the NBA is best understood as one firm when selling broadcast rights to a network in competition with a thousand other producers of entertainment, but is best understood as a joint venture when curtailing competition for players who have few other market opportunities.

95 F.3d at 600.

obvious reason for thinking that the sale of such rights requires coordination among the teams at all, and certainly not coordination that is so thorough that competition among the teams for its sale must be entirely eliminated. In contrast, Chicago Professional Sports involved a broadcasting contract between the NBA and television network NBC. Significantly, each game involves a pair of teams, so any broadcasting required some kind of understanding about revenue division. The contract in question also placed limits on the number of home games that teams could broadcast locally on "superstations," which were stations located in one place that were able to broadcast nationwide. This contract provision limited the Chicago Bulls' ability to broadcast home games on Chicago superstation WGN to twenty games per year.[74] At the time the Bulls were a very popular team and the WGN broadcasts stole audience from other NBA games broadcast by interests owned or controlled by NBC. The antitrust challenge was to the limitation on the number of games that the Bulls could place on WGN.

The issue in *Chicago Professional Sports* was not as clean as in *American Needle*. Every broadcast involved at least two teams, and the NBA had an interest in maximizing the revenue of the NBA as a whole. A separate contract for games such as the Bulls had with WGN naturally siphoned revenue away from the NBA as a group of teams to the Bulls; however, the NBA was able to charge a fee to the Bulls for engaging in such side contracting. In sum, while a certain amount of coordination was necessary for the underlying NBA broadcasting contract, competition for individual contracts was also possible, and the court explicitly rejected an argument that the Bulls were engaged in harmful free riding on the NBA and its broadcasting contract.[75]

While the issues are not the same we would nevertheless treat the teams in *Chicago Professional Sports* as multiple entities and apply the rule of reason to the restraint. That result is perhaps not compelled by *American Needle*, but it is certainly consistent. Further, while there was more essential integration in the Chicago Professional Sports situation, there was not so much more as to render individualized competition impossible or make it harmful, particularly given the NBA's ability to charge licensing fees for side contracts.

Certain activities of professional sports leagues belong entirely to the central organization and the individual teams have no role to play. For example, the NFL may decide whether to build a new building for its headquarters, hire new employees for the NFL organization, or purchase health care coverage for these employees. For such activities one might imagine that the teams would have a vote, depending on the issue's importance, but they are not in any obvious position to compete against each other with respect to such decisions. At the other extreme, the intellectual property rights in *American Needle* were owned and separately developed by the individual teams. Purchasers of football caps have a choice between caps bearing the insignia of the Minnesota Vikings, San Francisco 49ers, or Dallas Cowboys, and there is no obvious reason why these caps cannot be manufactured by separate apparel manufacturers in competition with each other. To be sure, both coordination and exclusivity may ultimately prove to be beneficial, but such analysis is classic material for antitrust's rule

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[74] Some of the facts are taken from the court's previous opinion. 961 F.2d 667 (9th Cir. 1992).

[75] See 961 F.2d at 674-677.

of reason respecting joint activity. Notwithstanding the greater amount of coordination involved in the sale of broadcast rights in *Chicago Professional Sports*, we would treat it the same way. Significantly, a finding of multiple entities leaves the issue open to antitrust inspection, and this is important when serious opportunities for anticompetitive behavior exist. By contrast, treating the NFL or NBA as a single entity makes such conduct unilateral and can serve to shield it completely from antitrust scrutiny.