
Note

If It's in the Game, Is It in the Game?: Examining League-Wide Licensing Agreements After *American Needle*

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It was a cloudy morning in 1984 as an Amtrak train made its way through the Rocky Mountains on its way to Oakland, California. Three men sat deep in discussion in its dining car.¹ The first man, a then 48-year-old John Madden, had recently wrapped up a Hall of Fame and Super Bowl winning coaching career² and was transitioning to a role as a “televised NFL evangelist.”³ The other two, Trip Hawkins and Joe Ybarra, were evangelists in their own right, but instead of advocating football through the medium of television, they wanted to connect people to the game through their video game company, Electronic Arts.⁴ While Madden was intrigued by their idea, he was only interested if the finished product reflected “*real football*.”⁵ The drive to get Madden’s approval and get the game right drove the creators to make a game that included all of the teams and players, in an attempt to simulate the National Football League (NFL) as a whole.⁶ This drive became Electronic Arts’s rallying cry, inspiring the 1992 company tagline, “If

* Copyright © 2013 by Talon Powers. This piece is dedicated to the memory of Tamar Hanna Kaplan, an eternal support while writing this and the love of my life. Thank you for making me into the person I am today.

1. Patrick Hruby, *The Franchise: The Inside Story of How “Madden NFL” Became a Video Game Dynasty*, ESPN.COM (Aug. 5, 2010), <http://sports.espn.go.com/espn/eticket/story?page=100805/madden>.

2. See *John Madden*, PROFOOTBALLHOF.COM, http://www.profootballhof.com/hof/member.aspx?PLAYER_ID=255 (last visited Apr. 21, 2013) (providing the statistical, historical, and biographical arguments for John Madden’s enshrinement in the Pro Football Hall of Fame).

3. Hruby, *supra* note 1.

4. *Id.*

5. *Id.*

6. *Id.*

it's in the game, it's in the game."⁷ *Madden NFL Football's* unquestioned success led to a \$300 million dollar, five-year exclusive licensing agreement between Electronic Arts and the National Football League in 2004, which has subsequently been extended to 2013.⁸

After the Supreme Court's decision in *American Needle, Inc. v. National Football League* in 2010, however, the NFL's ability to license League intellectual property as a collective whole has been called into question.⁹ In his opinion written for a unanimous Court, Justice John Paul Stevens ruled that because individual teams have distinct interests in selling their team intellectual property, the League cannot be viewed as a single entity for the purposes of licensing team logos and merchandise.¹⁰ In Section VI of Justice Stevens's decision, however, he identifies some reasons that the League may justifiably act collectively in order to achieve certain ends tailored to "[t]he special characteristics of this industry."¹¹

If the case law that emerges from *American Needle* completely precludes the League from being treated as a single entity, any licensing agreement of the NFL or other professional sports league risks being challenged as a concerted conspiracy in restraint of trade under Section 1 of the Sherman Antitrust Act.¹² Applying the Sherman Act to activities taken by the NFL in licensing its own intellectual property in the same way it has been applied to teams collectively licensing their individual intellectual property would create problems for the NFL's agreement with Electronic Arts,¹³ for obtaining essential sponsorship money,¹⁴ for professional sports collective bargaining agree-

7. Evan Ratliff, *Sports Rule!*, WIRED.COM (Jan. 2003), <http://www.wired.com/wired/archive/11.01/sports.html>.

8. Hruby, *supra* note 1.

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

10. *Id.* at 2212–13.

11. *Id.* at 2216 (quoting *Brown v. Pro Football, Inc.*, 516 U.S. 231, 252 (1996)).

12. Sherman Antitrust Act § 1, 15 U.S.C. § 1 (2006).

13. See Lisa Pike Masteralexis, *American Needle v. National Football League and the Future of Collective Licensing Agreements in Sport*, 19 SPORT MKTG. Q. 166, 168 (2010) (arguing that the exclusive licensing agreement between the NFL and Electronic Arts rests on questionable legal ground after *American Needle*).

14. See John A. Fortunato & Shannon E. Martin, *American Needle v. NFL: Legal and Sponsorship Implications*, 9 U. DENV. SPORTS & ENT. L.J. 73, 81 (2010) (concluding that uniform sponsorship agreements may be unlikely in a world where each team can argue that it has an inherent right to contract

ments more broadly,¹⁵ and for every other major professional sports league in protecting league interests against players and renegade owners.¹⁶ While *American Needle* clearly states that the NFL cannot be uniformly treated as a single entity,¹⁷ the League acts very differently when it packages and sells team logos (as in *American Needle*) than it does when it licenses every aspect of the League together in order to create a virtual recreation of the League as a whole (as in its license with Electronic Arts).¹⁸ The distinction between the League bundling its teams' intellectual property and the League licensing itself as a whole justifies another look at whether leagues like the NFL should be granted single-entity status in limited and specific instances.

This Note argues that courts should draw a distinction between licensing agreements that bundle and sell the distinct intellectual property of a team and agreements that license the intellectual property of the League as a whole. Part I illustrates the evolution of the National Football League into a revenue-sharing organization, establishes the history of the single-entity defense in antitrust law, and explains the reasoning of both the Seventh Circuit and the Supreme Court in deciding *American Needle*. Part II examines how collective licensing functions with regard to the League and consumers and uses video game licensing to illustrate the difficulties inherent in a strict Rule of Reason analysis. Finally, Part III identifies some potential solutions and proposes an exemption following Section VI of the *American Needle* decision that would grant single-entity treatment to league-wide licensing while retaining the *American Needle* rule for packaged licensing of individual team intellectual properties. This Note concludes by arguing

competitively).

15. See Irwin A. Kishner & Julie Albinsky, *Very Much Ado About . . . Nothing: An Analysis of the Impact of American Needle v. NFL on Collective Bargaining and Merchandising in Professional Sports*, 29 ENT. & SPORTS LAW. 3, 6 (2011) (illustrating the potential for collective bargaining challenges when the NFL's uniform bargaining position is called into question).

16. See Michael A. McCann, *American Needle v. NFL: An Opportunity to Reshape Sports Law*, 119 YALE L.J. 726, 767–75 (2010) (exploring implications for other sports leagues, including the NBA and the NHL).

17. *Am. Needle, Inc. v. Nat'l Football League*, 130 S. Ct. 2201, 2212 (2010).

18. See Brief for Electronic Arts, Inc. as Amicus Curiae Supporting the NFL Respondents at 9, *Am. Needle*, 130 S. Ct. at 2201 (No. 08-661), 2009 WL 4074860 (claiming that the relationship between the League and Electronic Arts requires a unique operating relationship).

that the impact on competitive balance, the ability of a league to market itself, and the ability of a league to effectively coordinate and innovate with exclusive partners all justify single-entity treatment where the league is licensing itself as a whole.

I. THE EVOLUTION OF AND CHALLENGES TO THE NATIONAL FOOTBALL LEAGUE AS A COLLECTIVE ENTITY

The broad economic underpinnings of the NFL, the underlying facts of the case, the single-entity argument more generally, and the lower court rulings are all essential to understanding the Supreme Court's decision in *American Needle*. This Part examines each of those in turn.

A. THE GROWTH OF THE NATIONAL FOOTBALL LEAGUE AS A COLLECTIVE ENTITY

The National Football League was organized in 1920 as an unincorporated association of professional football teams.¹⁹ Prior to 1963, each team in the League made separate agreements for the marketing and licensing of its individual intellectual property.²⁰ Because individual teams operated in discrete markets of differing size and economic activity, individualized licensing risked exacerbating already existing economic imbalances across the League.²¹ NFL Commissioner Pete Rozelle viewed this as a fundamental problem, arguing that only an economically balanced league could create the competitive equity necessary for commercial success.²² After persuading a majority of the NFL's owners that promotion of the League as a whole against other forms of entertainment was in the NFL's collective self-interest, Rozelle succeeded in convincing the

19. *Am. Needle*, 130 S. Ct. at 2207.

20. *Id.*

21. See, e.g., DAVID BLEVINS, 2 THE SPORTS HALL OF FAME ENCYCLOPEDIA 836 (2012) (observing that when Pete Rozelle became Commissioner of the NFL in 1960, the NFL "consisted of 10 teams playing a 12-game schedule to half-empty stadiums, with only a few teams having television deals").

22. McCann, *supra* note 16, at 732 n.23 (citing David Harris, *Pete Rozelle: The Man Who Made Football an American Obsession*, N.Y. TIMES, Jan. 15, 1984, § 6, at 12). For an econometric analysis validating Rozelle's belief in revenue sharing as a competitive good, see Jake I. Fisher, *The NFL's Current Business Model and the Potential 2011 Lockout* 11–12 (May 4, 2010), (unpublished essay, Harvard University) <http://harvardsportsanalysis.files.wordpress.com/2009/09/the-nfl-business-model-and-potential-lockout.pdf> (arguing that revenue sharing creates the optimal conditions for teams to both create a competitive product and to maximize relative revenue).

League's teams to collectively promote the League's brand.²³ To that end, the NFL instituted a program of revenue sharing in which approximately 60% of revenues would be generated by the League itself and equally distributed among teams, while the teams would separately raise and retain the remaining 40% of League revenue.²⁴ By the 2001–02 season, the League was generating \$2.6 billion in shared revenue, an average of \$72 million for each team.²⁵ Not only are such figures substantial, but shared revenues from licensing represent the fastest growing sector of the NFL's economic model.²⁶ Such licensing arrangements have proven so successful that they are considered essential to the professional sports model.²⁷

As a component of their revenue sharing program, the League formed NFL Properties (NFLP), a distinct corporate entity tasked with “(1) developing, licensing, and marketing the intellectual property the teams owned, 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].”²⁸ From 1963 until 2000, NFLP granted headwear licenses to a number of

23. *Am. Needle Inc. v. Nat'l Football League*, 538 F.3d 736, 737 (7th Cir. 2008), *rev'd sub nom. Am. Needle*, 130 S. Ct. at 2201; *see also* McCann, *supra* note 16, at 731–32 (elucidating Rozelle's ideological vision of the NFL's future being tied to all team owners viewing themselves as stakeholders in a larger league project).

24. Fisher, *supra* note 22, at 3–4 (extrapolating based on shareholder information provided by the Green Bay Packers, who are publicly owned). The League claims to evenly share over eighty percent of total revenues. Nathaniel Grow, *American Needle and the Future of the Single Entity Defense Under Section One of the Sherman Act*, 48 AM. BUS. L.J. 449, 490 (2011) (citing Brief for the NFL Respondents at 6, *Am. Needle*, 130 S. Ct. at 2201 (No. 08-661)).

25. Ellen Terrell et al., *The Sports Industry: Football*, BUS. & ECON. RES. ADVISOR (Summer 2005), available at <http://www.loc.gov/rr/business/BERA/issue3/football.html>.

26. *See* One.Cool.Customer, *NFL Lockout 2011: The NFL's Revenue Gap Problem*, BLOGGING THE BOYS (Feb. 21, 2011, 7:01 AM), <http://www.bloggingtheboys.com/2011/2/21/2004505/nfl-lockout-2011-revenue-gap-problem> (identifying the rapid growth in revenue streams from licensing, broadcasting through the League-owned NFL Network, and non-network television contracts with Comcast and DirecTV as particularly strong sources of growth). *See generally* Clay Moorhead, *Revenue Sharing and the Salary Cap in the NFL: Perfecting the Balance Between NFL Socialism and Unrestrained Free-Trade*, 8 VAND. J. ENT. & TECH. L. 641, 642–60 (2006) (identifying the origins of, massive growth behind, and modern challenges to the NFL revenue sharing system).

27. Fortunado & Martin, *supra* note 14, at 74.

28. *Am. Needle*, 538 F.3d at 737.

vendors simultaneously, including American Needle.²⁹ While total sales of apparel in the aggregate had reached \$4 billion by 2000, the overall growth in sales of NFL products had started to decline.³⁰ Outside consultants identified the problem as a glut of licensing agreements—leading to a glut of products—and told the NFL that the appropriate response would be to enter into exclusive licensing agreements.³¹

In December 2000, the NFL teams authorized NFLP to solicit and grant exclusive licenses.³² The NFL subsequently granted Electronic Arts an exclusive video game license,³³ granted Reebok an exclusive ten-year apparel license,³⁴ and declined to renew American Needle's license.³⁵ While litigation challenging Electronic Arts's exclusive license was only initiated relatively recently and is still slowly moving through the courts,³⁶ the challenge against Reebok was brought almost immediately. American Needle filed suit against the NFL, NFLP, the individual NFL teams, and Reebok in federal district court under Section 1 of the Sherman Antitrust Act.³⁷ The NFL defendants responded by filing a summary judgment motion arguing that since the teams and the League acted as a single entity, they could not be held liable under the Sherman Antitrust Act.³⁸ The district court held that the NFL was a single entity and thus was not subject to liability under antitrust law.³⁹

B. THE ORIGINS OF THE SINGLE-ENTITY DEFENSE

The single-entity defense to the Sherman Antitrust Act stems from the Supreme Court's decision in *Copperweld Corp. v. Independence Tube Corp.*⁴⁰ In *Copperweld*, the Supreme

29. *Id.* at 737–38.

30. Terrell et al., *supra* note 25.

31. McCann, *supra* note 16, at 733 (identifying the consolidation decision as originating with apparel merchandizing expert Chuck Zona).

32. *Am. Needle, Inc. v. Nat'l Football League*, 130 S. Ct. 2201, 2207 (2010).

33. *Pecover v. Elec. Arts Inc.*, 633 F. Supp. 2d 976, 978 (N.D. Cal. 2009).

34. *Am. Needle*, 130 S. Ct. at 2207.

35. *Id.*

36. *Pecover*, 633 F. Supp. 2d at 985 (denying the motion to dismiss in part and allowing for class certification and discovery proceedings to begin).

37. *Am. Needle Inc. v. Nat'l Football League*, 538 F.3d 736, 738 (7th Cir. 2008), *rev'd sub nom. Am. Needle*, 130 S. Ct. at 2201.

38. *Id.*

39. *Id.* at 740–41.

40. McCann, *supra* note 16, at 742 (citing Ryan P. Meyers, Comment, *Partial Ownership of Subsidiaries, Unity of Purpose, and Antitrust Liability*, 68 U.

Court determined that the coordinated activity of a parent company and a wholly owned subsidiary should be viewed as the action of a single entity instead of multiple competitive entities, and thus these companies cannot be liable under Section 1 of the Sherman Antitrust Act.⁴¹ This treatment stems from two central premises. First, because the objectives of the parent and its subsidiary are common and guided “not by two separate consciousnesses, but one,” there cannot be any “agreement” in Sherman Act terms.⁴² Second, determining whether antitrust liability should apply is not a function of form, but is rather a question of whether or not there is actual competition.⁴³ The Court rejected purely formalistic distinctions as counterproductive and harmful to consumer interests.⁴⁴

The *Copperweld* Court explicitly limited its holding to the decisions of a corporation and its wholly owned subsidiary.⁴⁵ Federal courts in subsequent cases, however, have extended the single-entity shield beyond a parent-subsidiary relationship to affiliated companies and individuals.⁴⁶ The most recent Supreme Court decision on the issue prior to *American Needle, Texaco, Inc. v. Dagher*, suggests that the single-entity theory could be applied beyond a strict parent-subsidiary relationship.⁴⁷ In *Dagher*, the Court considered an arrangement between Texaco and Shell to consolidate operations and jointly share gains and losses for their operations in the western United States.⁴⁸ In the face of a Sherman Act challenge, the Court upheld the joint venture as a legitimate exercise of single-entity

CHI. L. REV. 1401, 1406 (2001)); see also *Am. Needle*, 538 F.3d at 738 (outlining the conclusion from *Copperweld*).

41. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 771 (1984).

42. *Id.* The Court illustrated this concept through a metaphor of “a multi-team of horses drawing a vehicle under the control of a single driver.” *Id.*

43. *Id.* at 772–73.

44. *Id.* at 772–74.

45. *McCann*, *supra* note 16, at 744 (citing *Copperweld*, 467 U.S. at 767).

46. See, e.g., *Jack Russell Terrier Network of N. Cal. v. Am. Kennel Club, Inc.*, 407 F.3d 1027, 1035 (9th Cir. 2005) (holding lack of ownership of regional affiliates irrelevant); *Eleven Line, Inc. v. N. Tex. State Soccer Ass’n*, 213 F.3d 198, 205 (5th Cir. 2000) (noting that in for-profit sports leagues, leagues and teams share interest); *Chi. Prof’l Sports Ltd. P’ship v. Nat’l Basketball Ass’n*, 95 F.3d 593, 597–600 (7th Cir. 1996) (finding the NBA to be a single entity); *City of Mt. Pleasant v. Associated Elec. Coop., Inc.*, 838 F.2d 268, 271, 276–77 (8th Cir. 1988) (finding cooperative power grids not in competition).

47. 547 U.S. 1 (2006).

48. *Id.* at 4.

status.⁴⁹ Writing for the Court, Justice Thomas concluded that once two separate partners entered into a joint venture, they must be able to set their prices “like any other firm.”⁵⁰ The question for the Seventh Circuit Court of Appeals and the Supreme Court in *American Needle*, therefore, was whether such a theory should extend to the NFL in the licensing of its apparel.

C. THE SEVENTH CIRCUIT’S REASONING IN *AMERICAN NEEDLE*

In response to the seemingly clear-cut question of whether or not to treat the NFL as a single entity, the Seventh Circuit instead identified ways in which the NFL is arguably both a single non-competitive entity and a combination of multiple competitive entities.⁵¹ From the perspective of the fans, the NFL is a single, entertainment-providing entity producing “one product.”⁵² From the perspective of the player-employees, however, each team is an independent entity with the ability to “hire and fire employees.”⁵³ In light of the uncertainty involved with various facets of the League operation, the Seventh Circuit focused their review on “the question of whether a professional sports league is a single entity . . . not only ‘one league at a time,’ but also ‘one facet of a league at a time.’”⁵⁴ Under this standard, the Seventh Circuit limited its examination to the organizational relationship between the NFL, the thirty-two NFL teams, and the NFLP, and the business relationship between the NFL and its teams only insofar as they pertained to the licensing of intellectual property (in this case, the licensing of team apparel).⁵⁵

In examining the substantive economic effects of the licensing agreement rather than the labeling of the constituent parts, the Seventh Circuit concluded that the NFL, through NFLP, acted as one source of economic power in the licensing of its in-

49. *Id.* at 6.

50. *Id.* at 7.

51. *Am. Needle, Inc. v. Nat’l Football League*, 538 F.3d 736, 741–44 (7th Cir. 2008), *rev’d sub nom. Am. Needle, Inc. v. Nat’l Football League*, 130 S. Ct. 2201 (2010).

52. *Id.* at 741 (quoting *Chi. Prof’l Sports Ltd. P’ship v. Nat’l Basketball Ass’n*, 95 F.3d 593, 599 (7th Cir. 1996)).

53. *Id.* at 741–42 (citing *Brown v. Pro Football, Inc.*, 518 U.S. 231, 249 (1996)).

54. *Id.* at 742.

55. *Id.*

tellectual property.⁵⁶ The Seventh Circuit determined that “American Needle’s proposed approach is one step removed from saying that the NFL teams can be a single entity only if the teams have ‘a complete unity of interest’—a legal proposition that we have rejected as ‘silly.’”⁵⁷ Finding that no team can produce a football game by itself and that “NFL teams are best described as a single source of economic power when promoting NFL football through licensing the teams’ intellectual property” to compete against other forms of entertainment, Judge Kanne held that the NFL must necessarily be exempt from liability under either Section 1 or Section 2 of the Sherman Act.⁵⁸

D. THE SUPREME COURT’S REASONING IN *AMERICAN NEEDLE*

The Supreme Court’s decision in *American Needle* further reduced the scope of inquiry down to one threshold question: “whether the NFL respondents are capable of engaging in a ‘contract, combination . . . , or conspiracy’ as defined by § 1 of the Sherman Act.”⁵⁹ Justice Stevens began by identifying Congress’s intent to treat concerted action more strictly than independent behavior because of the high likelihood of anticompetitive risk.⁶⁰ Echoing the Seventh Circuit, Justice Stevens stated that formalistic distinctions must be set aside in favor of functional considerations of how the parties involved actually behaved.⁶¹ The key distinction that needs to be ascertained under this test, he wrote, is whether or not “separate economic actors pursuing separate economic interests” have taken concerted action.⁶²

Examining the actual use and licensing of intellectual property under this framework, Justice Stevens concluded that “teams compete in the market of intellectual property.”⁶³ Because New Orleans Saints hats and Indianapolis Colts hats are directly competitive products in the marketplace, each team acts as a separate economic actor pursuing its own financial

56. *Id.* at 743.

57. *Id.* at 743 (citing *Chi. Prof'l Sports Ltd. P'ship*, 95 F.3d at 598).

58. *Id.* at 743–44.

59. *Am. Needle, Inc. v. Nat'l Football League*, 130 S. Ct. 2201, 2208 (2010).

60. *Id.* at 2208–09.

61. *Id.* at 2209–10.

62. *Id.* at 2211–12 (quoting *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767 (1984)).

63. *Id.* at 2213.

gain in the marketplace.⁶⁴ In response to the Seventh Circuit's argument that a team cannot produce a football game by itself, Justice Stevens retorted that while "two teams are needed to play a football game, not all aspects of elaborate interleague cooperation are necessary to produce a game."⁶⁵ In response to the Seventh Circuit's argument that the League is a functional single economic actor, Justice Stevens responded that "teams remain separately controlled, potential competitors with economic interests that are distinct from NFLP's financial well-being."⁶⁶ Justice Stevens concluded that so long as teams are separately owned economic actors, they cannot be seen as part of a single entity.⁶⁷

Justice Stevens's most interesting analysis, however, came in Part VI of his opinion. While he ultimately concluded that antitrust law was generally applicable, Justice Stevens drew an area of exception around "[t]he fact that NFL teams share an interest in making the entire league successful and profitable, and that they must cooperate in the production and scheduling of games."⁶⁸ Justice Stevens also argued that the attempt to achieve competitive balance is a legitimate goal that professional sports leagues like the NFL have a special interest in achieving.⁶⁹ Because Stevens determined that NFL teams were capable of collectively violating Section 1 of the Sherman Act, however, the Court rejected the single-entity defense and instead required an analysis of the licensing arrangement under the Rule of Reason.⁷⁰ Subsequently, Stevens remanded the case for consideration on those grounds.⁷¹ The Rule of Reason requires courts to evaluate whether a restraint promotes or destroys competition by "the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint is imposed; the nature of the restraint and its effect, actual or probable."⁷² While Stevens concluded at the very end of the decision that there is no basis for single-entity status to

64. *Id.*

65. *Id.* at 2214 n.7.

66. *Id.* at 2215.

67. *Id.* at 2215–16.

68. *Id.* at 2216.

69. *Id.* at 2217 (citing *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85 (1984)).

70. *Id.* at 2216.

71. *Id.* at 2217.

72. *Id.* at 2217 n.10 (quoting *Bd. of Trade of Chi. v. United States*, 246 U.S. 231, 238 (1918)).

be granted to collective licenses of league intellectual property specifically,⁷³ he potentially left an opening for a distinction to be drawn and limited single-entity protection to be established for some forms of collective activity. Part II of this Note will examine the difficulties of applying strict Rule of Reason liability to professional sports leagues, specifically in the context of the licensing of the NFL as a whole in video games.

II. THE LIMITATIONS AND LIABILITIES OF DENYING PROFESSIONAL SPORTS LEAGUES THE ABILITY TO EXCLUSIVELY LICENSE THEIR OWN INTELLECTUAL PROPERTY

While a broad extension of the *American Needle* decision would have an effect on the NFL's business model across the board and on antitrust law more generally, attempting to describe all conceivable consequences of such an extension would result in a shallow, surface-level analysis. As a result, this Note examines the consequences of entirely precluding the single-entity argument by focusing on the League's exclusive licensing agreement with Electronic Arts. This Part begins with a discussion of the economics of collective licensing and the threat that the *American Needle* framework poses to both consumers' marketplace options and to the League's ability to license itself as a whole. It then analyzes the Electronic Arts agreement under the Rule of Reason. This Part concludes by identifying the likely impacts to eliminating the exclusive licensing agreement, both in terms of broader non-compliance and competitive effects throughout the League.

A. THE NFL AND CONSUMERS' INTERESTS IN COLLECTIVE LICENSING

Sports video games, especially football video games, have generally succeeded or failed based on the strength of the license behind them.⁷⁴ Games that have attempted to compete with Electronic Arts on its own terms, by providing realistically recreated on-field action and employing former NFL legends,

73. *Id.* at 2217.

74. See Chad Lakkis, *EA Exclusive NFL License Undone? Sports Antitrust Law Professor Explains American Needle Impact*, RIPTEN (May 28, 2010, 6:36 PM), <http://www.ripten.com/2010/05/28/sports-antitrust-law-professor-explains-american-needle-verdict-impact-on-eas-exclusive-nfl-licensing-agreement> (explaining that the broad trend in sports video game sales suggests the license is the most important indicator of commercial success).

have not been able to compete with the Madden franchise.⁷⁵ Even video games that attempted to reject the NFL's realism and instead focused on the seamier, more violent, or more absurd aspects of the sport were unable to compete with Madden absent the NFL license.⁷⁶ As a consequence, the only way to create a viable football simulation is to arrange a licensing agreement that includes every team and recreates the League as a whole.⁷⁷ In a world where the League cannot license itself holistically because of a strict application of the *American Needle* rule, individual teams or divisions could splinter off to create their own rival games, creating a balkanized, fractured marketplace.⁷⁸ While it is possible that all thirty-two NFL teams would separately negotiate agreements with Electronic Arts, such a unified effort seems unlikely in light of previous attempts by owners to defy the will of the League, especially because teams would be likely to acquire strong financial benefits over the long term.⁷⁹

Instead of entering into exclusive licensing agreements, the NFL could instead adopt non-exclusive collective licensing agreements that allow teams to license themselves to multiple competing game producers. Pre-existing exclusive licenses granted by the NFL, including the Electronic Arts agreement through 2014, render any new licensing structures impossible in the short term.⁸⁰ Additionally, the expenses involved with licensing have functionally limited every major sport to one li-

75. *Id.*

76. *Id.*

77. See Brief for Electronic Arts, Inc. as Amicus Curiae Supporting the NFL Respondents, *supra* note 18, at 15 (arguing that companies pursuing an exclusivity agreement need to know if they are “buying a license or an anti-trust lawsuit”).

78. *Supreme Court Rules Against NFL Being Single Entity*, PASTAPADRE (May 24, 2010, 12:36 PM), <http://www.pastapadre.com/2010/05/24/supreme-court-rules-against-nfl-being-single-entity> (arguing that large market teams or even NFL divisions could license themselves to create competing titles). While it is arguable whether these titles would be broadly successful, experience in other sports illustrates that this sort of balkanization could happen. See *infra* note 119 and accompanying text.

79. See, e.g., *L.A. Mem'l Coliseum Comm'n v. Nat'l Football League*, 726 F.2d 1381, 1384–86, 1390 (9th Cir. 1984) (upholding a challenge by owner Al Davis attempting to move his football team to Los Angeles); *Dall. Cowboys Football Club, Ltd. v. Nat'l Football League Trust*, No. 95-9426, 1996 WL 601705 (S.D.N.Y. Oct. 18, 1996) (involving claims by the Dallas Cowboys challenging the NFLP's licensing agreement).

80. See Hruby, *supra* note 1.

censed provider, seemingly necessitating exclusivity.⁸¹ Even if these factors change over the long term, however, such non-exclusive agreements would largely eliminate the appeal for a company to sign a licensing agreement at all, because the value of the license lies in both its exclusivity and its completeness.⁸² Especially in the context of football, having the ability to exclusively license all the rights to the League is essential to having a viable product.⁸³ Further, there is no logical end-point to the process of removing licensing authority—teams, players, coaches, and stadium owners all could lose their collectively licensed status and have to be courted, negotiated with, and signed individually.⁸⁴ Such a move would not only deter video game developers from pursuing a license to create a similar game in the future, but it would likely render the attempt to make one financially infeasible—football video gaming’s nuclear winter.⁸⁵ The loss of the ability to effectively license the NFL would put both the video game market in jeopardy and the League itself into worse financial straits.⁸⁶ Regardless of potential theoretical

81. See Owen Good, *You Can Have Any Sports Video Game You Want, But There’s Only One*, KOTAKU (May 28, 2011, 8:00 PM), <http://kotaku.com/5806547/you-can-have-any-sports-video-game-you-want-but-theres-only-one> (identifying the existence of one major sports title apiece for the NFL, NBA, NHL, FIFA soccer, NASCAR, UFC, and functionally for the MLB).

82. See Brief for Electronic Arts, Inc. as Amici Curiae Supporting the NFL Respondents, *supra* note 18, at 10–11 (arguing that exclusive blanket licensing agreements are often necessary to create a new product).

83. See Lakkis, *supra* note 74 and accompanying text.

84. To a certain extent, this has already happened with certain superstars including Michael Jordan and Barry Bonds “opting out” of collective licensing by their player associations. See, e.g., Darren Rovell, *Bonds Will Be Individually Licensed*, ESPN.COM (Nov. 17, 2003, 12:09 AM), <http://sports.espn.go.com/mlb/news/story?id=1661883> (illustrating an interest in some superstar athletes to test the market and make more money through individual endorsement deals).

85. See Brief for Electronic Arts, Inc. as Amici Curiae Supporting the NFL Respondents, *supra* note 18, at 9 (arguing that Electronic Arts could not feasibly create a licensed NFL game without some ability to corral rights for players, coaches, teams, stadiums, and other essential components of the game experience).

86. *Id.* at 10–12. While it could be argued that the success of the NCAA video game diminishes the importance of player names and likenesses, this argument is a nonstarter because the NCAA has a similar exclusive licensing agreement for all the teams and conferences, and puts the likenesses of players into the game surreptitiously. See, e.g., *Hart v. Elec. Arts, Inc.*, 808 F. Supp. 2d 757, 760–66 (D.N.J. 2011) (describing and ultimately upholding Electronic Arts’s practices in creating a collegiate football game that, despite only identifying players by numbers, uses the actual biographical and physical information provided in team media guides); Good, *supra* note 81 (illustrating

alternatives, the NFL's existing licensing agreements and desire to reach mutually beneficial terms with licensing partners functionally mandate that League intellectual property will continue to be licensed exclusively.

The real losers, in either the balkanization example or the nuclear-winter example, are the consumers who watch the NFL and purchase the video games in question. If a football fan wants to virtually recreate a matchup they saw in their living room the week before, they may no longer be able to because those teams don't even occupy the same game. As well-known game sector analyst Michael Pachter argues, "Having each team negotiate the terms of a video game license would mean that there could be 32 separate games, and that potentially, only one team would appear in each."⁸⁷ A fragmented marketplace is the worst possible consumer environment, as it fills the marketplace with a glut of inferior products and risks gradually eliminating the incentive to create any new titles.⁸⁸

While many readers may not consider the ability of consumers to play the games of their choice as a viable harm, it is impossible to discount the role that the creation of video games (in particular, sports video games) have on the U.S. economy. Video game sales are a critical and growing economic sector, with \$25.1 billion in sales of video games in 2010.⁸⁹ Sports games made up 16.3% of that market, comprising a total market share of nearly \$4.1 billion dollars in sales annually.⁹⁰ As Texas Representative Kevin Brady has noted, the video game industry "has generated more than 120,000 jobs in over 34 states and is a major international player as well."⁹¹ Absent the viability of video games like Electronic Arts's Madden fran-

how Electronic Arts is the sole owner of the NCAA's intellectual property).

87. Owen Good, *What the NFL Antitrust Ruling Might Mean for Madden*, KOTAKU (May 24, 2010, 6:20 PM), <http://kotaku.com/5546408/what-the-nfl-antitrust-ruling-might-mean-for-madden>.

88. This is not a purely hypothetical situation either. See Owen Good, *Will We Have Any Baseball Video Game on Xbox 360 Next Year?*, KOTAKU (Apr. 21, 2012, 7:30 PM), <http://kotaku.com/5904056/will-we-have-any-baseball-video-game-on-the-xbox-360-next-year> (identifying how license proliferation has segmented the market, leaving an entire gaming console without any baseball simulation).

89. ESSENTIAL FACTS ABOUT THE COMPUTER AND VIDEO GAME INDUSTRY, 2011 SALES, DEMOGRAPHICS AND USAGE DATA, ENT. SOFTWARE ASS'N 11 (2011), available at http://www.theesa.com/facts/pdfs/ESA_EF_2011.pdf.

90. *Id.* at 8.

91. *Id.* at 11.

chise, the video games market could see an immediate and significant decline.⁹²

The main argument that opponents of license exclusivity advance to dispute that Electronic Arts's license is good for the marketplace and consumers is that the exclusive licensing arrangement and subsequent lack of competition has driven up prices.⁹³ A University of Michigan economics professor estimated that the amount Electronic Arts has overcharged consumers ranges from \$701 to \$926 million.⁹⁴ Michael Pachter, however, hotly disputes this figure.⁹⁵ First, Pachter argues that the calculation does not appear to be based on actual sales during the period of exclusivity, which he calculates to have added approximately \$1.18 to the total cost of the product.⁹⁶ Second, Pachter argues that the comparison itself is flawed because Electronic Arts's main competitor at the time, Take-Two Interactive, purposefully discounted its product below cost and ended up hurting themselves in the bargain.⁹⁷ Finally, Pachter argues that because all other video games exclusively license their intellectual property, it is disingenuous to claim that there is a right to a non-exclusive sports licensing agreement.⁹⁸ In any case, the economics of the situation face a drastic potential change in light of the *American Needle* decision, a licensing arrangement that may end up being counterproductive for consumers if challenged and discarded as a part of the Court's Rule of Reason analysis.

92. See *id.* at 9 (identifying Madden NFL 11 as the number two video game in the world in terms of units sold in 2010). See also Rachel Metz, *Late 'Madden' Saps August Video Game Sales*, CNS NEWS (Sept. 8, 2011), <http://cnsnews.com/news/article/late-madden-saps-august-video-game-sales> (arguing that a slight delay in the release of Madden NFL 12 in August 2011 caused a significant decline in video game sales for the month).

93. *Economist: EA's Madden Monopoly Cost Gamers up to \$926 Million*, GAMEPOLITICS (July 14, 2009), <http://www.gamepolitics.com/2009/07/14/economist-ea039s-madden-monopoly-cost-gamers-926-million>.

94. *Id.*

95. *Pachter: Economist's Claims in Madden Monopoly Case Irresponsible*, GAMEPOLITICS (July 15, 2009), <http://www.gamepolitics.com/2009/07/15/pachter-economist039s-claims-madden-monopoly-case-irresponsible>.

96. *Id.* This constitutes a tiny fraction of McKie-Mason's estimate of consumer damages.

97. *Id.*

98. *Id.*

B. RULE OF REASON ANALYSIS THREATENS EXCLUSIVE VIDEO GAME LICENSING

Part VI of Justice Stevens's *American Needle* opinion observes that a broad reading of the Rule of Reason will uphold most NFL agreements.⁹⁹ A related concern arises however—what about arrangements that presumptively would not meet the Rule of Reason? There are reasons to believe the relative market share of Electronic Arts, combined with its use of exclusive licensing agreements like the NFL agreement, could pose a problem under the standard.¹⁰⁰ The primary issue for Electronic Arts is the sheer number of exclusive licensing and publishing agreements it owns, which have secured “four different professional leagues, an entire player’s union, and a media giant.”¹⁰¹ Further, Electronic Arts has nearly locked up the football license market in its entirety, exclusively licensing collegiate football and the Arena Football League.¹⁰² In sports gaming, Electronic Arts holds 63% of all sports licenses, a prohibitive command of the market.¹⁰³ All of these factors suggest that Electronic Arts may have the market share to be considered a monopoly that could be broken up under antitrust law.¹⁰⁴ Under a Rule of Reason analysis, an organization with monopoly power and that uses that power in a predatory way will generally be struck down.¹⁰⁵

On the other hand, however, condensing licenses into the hands of one game producer, in this case Electronic Arts, may lead to efficiencies that justify the NFL’s choice to pick a single licensee.¹⁰⁶ The Rule of Reason would require the NFL to provide reason why their licensing agreement is reasonably pro-competitive instead of anti-competitive.¹⁰⁷ Electronic Arts pro-

99. *Am. Needle, Inc. v. Nat’l Football League*, 130 S. Ct. 2201, 2217 (2010) (citing *Nat’l Collegiate Athletic Ass’n v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 109 n.39 (1984)) (holding that the Rule of Reason can “sometimes be applied in the twinkling of an eye”).

100. Liron Offir, *Monopolistic Sleeper: How the Video Gaming Industry Awoke to Realize that Electronic Arts Was Already in Charge*, 8 DUQ. BUS. L.J. 91, 115 (2006).

101. *Id.* at 99 (referring to NCAA football, the Arena Football League, the NFL, FIFA soccer, the NFL Players Association, and ESPN).

102. *Id.* at 99–102.

103. *Id.* at 113.

104. *Id.* at 115.

105. Lonny S. Hoffman, *Harmar and the Ever-Expanding Scope of Legal Sufficiency Review*, 49 S. TEX. L. REV. 611, 616 (2008).

106. Masteralexis, *supra* note 13.

107. *Id.*

vided a number of reasons why their activity is pro-competitive in their brief to the *American Needle* Court: decreased transaction costs due to streamlined relations between the NFL and Electronic Arts,¹⁰⁸ the ability to effectively manage and maintain the high quality of their brand,¹⁰⁹ and the substantial innovation effects of having a year-to-year developer.¹¹⁰

Even if the NFL's exclusive licensing agreement with Electronic Arts does not meet the standards for the Rule of Reason established in *Board of Trade of Chicago v. United States* concerning monopolistic behavior,¹¹¹ the Court should exempt this specific instance because of both the unique requirements of collective and exclusive licensing in sports video games,¹¹² and the special competitive purpose protected under the deferential posture the Court has taken regarding sports in its previous jurisprudence.¹¹³ Despite Justice Stevens's claim that under Rule of Reason analysis, approval for such programs can often be done "in the twinkling of an eye," the near-monopoly held by Electronic Arts makes it highly doubtful that sports gaming would receive such a cursory examination.¹¹⁴ As will be illustrated in the next Part, the potential effects of anti-competitive behavior within the League have such deleterious consequences that it is preferable overall to treat the licensing arrangement as an acceptable single-entity practice.

C. ANTI-COMPETITIVE IMPACTS OF A STRICT APPLICATION OF *AMERICAN NEEDLE* ON THE LEAGUE

Justice Stevens took caution to emphasize the critical interests the NFL has in promoting competitive balance across the League's teams.¹¹⁵ The inherent potential for anti-competitive behavior in the application of each level of collective licensing failure, however, is nothing short of alarming.

108. See Brief for Electronic Arts, Inc. as Amici Curiae Supporting the NFL Respondents, *supra* note 18, at 14 (arguing that working exclusively with the NFL allowed for a "substantial lowering of costs" which could be passed on to consumers).

109. *Id.* at 12.

110. Masteralexis, *supra* note 13.

111. See *supra* note 72 and accompanying text.

112. See *supra* notes 81–86 and accompanying text.

113. See *supra* notes 68–69 and accompanying text.

114. *Am. Needle, Inc. v. Nat'l Football League*, 130 S. Ct. 2201, 2208 (2010) (citing *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85 (1984)).

115. See *supra* notes 68–69 and accompanying text.

First, should the collective licensing marketplace fail, the entire League would be deprived of substantial amounts of money that are shared evenly among the thirty-two NFL teams. Not only is this money important, but it is the single-fastest growing sector of the NFL economy, and teams will be driven to capture this money with or without the League.¹¹⁶ As teams increasingly pursue maximization of local revenue streams that are not part of the revenue sharing system (including stadium profits and local licenses),¹¹⁷ the core aspects of revenue sharing (in this case, the ability of the league to license itself) becomes extremely important to encouraging league-wide competitive balance. Because this shared money is generally enough to pay for the entirety of a team's salary expenses, striking a blow against the system of revenue sharing threatens competitive balance across the League.¹¹⁸

Second, the problems of holdout markets and non-compliant teams will only be exacerbated in a world where differential licensing allows for some teams to strike preferential deals while others are left without.¹¹⁹ Huge disparities in revenue streams between have and have-not teams are already beginning to develop.¹²⁰ Any move towards preferential licensing of large-market team intellectual property will only serve to exacerbate the financial differences between large-market teams, which may be able to support themselves independently or at the very least strike a much more favorable financial deal, and small-market teams, which will likely be left in the lurch.¹²¹ This risks the development of economics similar to

116. See *supra* note 26 and accompanying text.

117. See Moorhead, *supra* note 26, at 660–64 (arguing that teams are doing everything in their power to maximize the profits they can gain from local fees including tertiary licensing, ticketing, and parking fees).

118. See *id.* at 669–71 (arguing that the NFL's extreme competitive parity across all teams in the League is a direct result of the broad system of revenue sharing).

119. The licensing of soccer video games provides an excellent example of this phenomenon, as individual clubs often sign licenses away from their leagues and cause a conflicting mishmash of real and fake players, clubs, and leagues. See Prarthito Maity, *FIFA 12 Vs Pro Evolution Soccer 12 - A Review (Videos)*, INT'L BUS. TIMES, Nov. 15, 2011, available at <http://m.ibtimes.com/fifa-12-vs-pro-evolution-soccer-review-249473.html>.

120. Moorhead, *supra* note 26, at 666–68.

121. An easy analogy can be made to the creation of regional sports networks, which have given big market teams in baseball access to millions or even billions of dollars more than their rivals. See Richard Sandomir, *Regional Sports Networks Show the Money*, N.Y. TIMES, Aug. 20, 2011, at D1.

baseball, where the large markets can easily dominate because of their built-in financial advantages.¹²²

Finally, even with the NFL's hard salary cap, which limits the total salary each team may pay to all of its players, there are still substantial benefits that can and will accrue to teams with more money.¹²³ While teams are limited in the number of players they can have on their roster and the total amount of money they can pay them, they have unlimited discretion to spend their money on tertiary benefits to those players.¹²⁴ Generally speaking, teams with the highest paid coaches and higher quality facilities tend to win more often.¹²⁵ Additionally, through the use of prorated bonuses, teams can spend well above the salary cap if they have the means to do so.¹²⁶ The consequence of this is that a salary cap system designed to give smaller markets a better chance to compete has in many ways become a force that harms small-market teams, which have less room to make mistakes.¹²⁷ Because the salary cap system alone is not enough to protect the interests of small-market teams, collective licensing of the League is necessary to maintain competitive balance across the NFL.

This seemingly anti-competitive effect is arguably just the outgrowth of the fact that sports teams are nothing more than corporate entities competing in a tightly regulated form of capitalism. This argument, however, ignores years of Court precedent identifying sports as categorically different under the

122. While small-market teams in baseball can compete by exploiting undervalued assets, having a large-market team represents the easiest path to continued success. See generally MICHAEL LEWIS, *MONEYBALL: THE ART OF WINNING AN UNFAIR GAME* (2004).

123. See generally Al Lackner, *NFL Salary Cap FAQ*, ASKTHECOMMISH.COM (Aug. 29, 2011), <http://www.askthecommiss.com/salarycap/faq.asp> (illustrating the rules of the NFL's salary cap and how it functions to create year-to-year spending parity).

124. *Id.*

125. See Eric Ostermeier, *Will a New Stadium Make the Minnesota Vikings a More Successful Franchise?*, SMART POL. (Dec. 1, 2009), http://blog.lib.umn.edu/cspg/smartpolitics/2009/12/will_a_new_stadium_make_the_mi.php (demonstrating a statistical correlation between new stadiums and subsequent team success); Tom Van Riper, *The Highest-Paid NFL Coaches*, FORBES (Jan. 4, 2011, 6:00 PM), <http://www.forbes.com/2011/01/04/patriots-redskins-seahawks-business-sports-nfl-highest-paid-coaches.html> (arguing that there is a statistical correlation between coach pay and overall success).

126. See Moorhead, *supra* note 26, at 671–72 (arguing that teams with the means often use financial tricks to put the actual cost of a contract well off into the future).

127. *Id.* at 670–71.

law.¹²⁸ Even beyond what the Court has stated, however, it is difficult to see why courts should apply the Sherman Act, a piece of legislation aimed at stopping the destructive excesses of restraints on trade, in such a way that would be broadly destructive to League competitive interests.¹²⁹ A better compromise, as identified in Part III, is to judge whether the agreement licenses the League as a whole, and is pro-competitive, or if it licenses individual team intellectual property collectively, and is anti-competitive.

III. THE SELF-LICENSING EXEMPTION: LIMITED SINGLE-ENTITY STATUS FOR SPORTS LEAGUES LICENSING THEMSELVES AS A WHOLE

As illustrated above, applying a Rule of Reason analysis to the licensing of League intellectual property will result in less efficiency, less competition within the League itself, and direct harm to the consumer and the marketplace.¹³⁰ Consequently, this Part proposes an exemption to the general rule in *American Needle* allowing single-entity treatment where a professional sports league acts to license its own intellectual property while disallowing single-entity treatment as it applies to individual team intellectual property bundled and licensed collectively.

A. COURTS SHOULD EXAMINE CHALLENGES TO LICENSING ARRANGEMENTS BY FOCUSING ON WHETHER A COMPETITIVE WHOLE OR ITS CONSTITUENT PARTS HAVE BEEN LICENSED

This Part proposes a Court-imposed exemption to the general rule in *American Needle* that differentiates between licensing agreements that collectively license individual team intellectual property that has been bundled together and those agreements that license the intellectual property of the League as a whole. First, this Part argues that the rule in *American Needle* should continue to be applied in cases where directly competitive products are licensed together. Second, this Part argues that where the intellectual property being licensed represents the League as a holistic entity, such licensing agreements should be upheld against Sherman Act challenges under the Court's single-entity precedent.

128. See *supra* note 69 and accompanying text.

129. Sherman Antitrust Act § 1, 15 U.S.C. § 1 (2006).

130. See *supra* Part II.

1. The *American Needle* Rule Should Be Retained and Sherman Act Liability Should Apply to Separable Team Intellectual Property

While the application of the principles of *American Needle* too broadly beyond the facts of the case is unnecessary, on its own merits the decision is entirely defensible. When teams license their individual intellectual property through a collective entity, it precludes directly competitive market goods from entering the marketplace.¹³¹ With logos on a hat, the Colts and Saints *do* directly compete in a marketplace.¹³² In a similar fashion, attempts by the League to manage or pool the profits from individual team initiatives like fan promotions, facility and stadium use, and player appearances would facially violate this standard, because they would regulate a team from promoting itself versus other competing teams. Similarly, agreements that purport to license the League as a whole but instead merely grant the licensee the authority to recreate, reproduce, or otherwise duplicate the indicia of the various NFL teams would facially violate the standard because the license does not have to be employed in a collective fashion. So long as what is being promoted is the team itself, independent of its role in the League in a holistic competitive sense, the NFL has no authority to regulate how a team may promote and sell its intellectual property.

2. Single-Entity Status Should Be Granted When the League Licenses Itself as a Collective Entity

In contrast to situations where the thirty-two NFL teams take action outside of the competitive league framework in an attempt to promote their individual interests, instances where the League licenses itself as a holistic entity should not be understood to violate the Sherman Antitrust Act. In instances like the exclusive licensing agreement with Electronic Arts, or for that matter the League's licensing of their "NFL Network" to cable and satellite companies, the League is licensing its own intellectual property centered on the concept of the League as a whole. One possible way in which the League could conceivably license itself is by hiring a company to create and display computer simulations of upcoming games. As the simulations would lack any independent meaning outside of the schedule,

131. See *supra* Part I.D.

132. See *supra* note 64 and accompanying text.

rules, and competitive structure of the NFL, arguing that this represents a collective license of team intellectual property rather than a single license of the League itself is simply incorrect. Lacking any true economic competition between teams within the League, these examples cannot be said to be any sort of bundled intellectual property of particular constituent teams or individuals. As a result, and in order to promote the competitive balance of small- and large-market teams through revenue sharing agreements, these agreements should be identified as clear single-entity licenses that are exempted from *American Needle* and immune from Sherman Act liability.

There are a number of reasons to prefer this understanding of the League as a single entity when it acts holistically. First, the League is promoting itself as a cohesive entity rather than a series of loosely joined but ultimately competitive entities. From the perspective of individual teams, there is clearly no competition between teams, because despite separate ownership they have no value independent of each other—a single team with no one to play attracts no fans.¹³³ From the perspective of the League as a whole, the fact that teams share nearly all revenue with each other and the only revenue that is not shared is largely local revenue with minimal competitive overlap suggests that there is no actual competition between teams.¹³⁴ Second, even if it is true that an individual football game is a competitive event, the seasonal league schedule culminating in the Super Bowl literally cannot occur without a concerted effort where individual teams are subordinated to the League.¹³⁵ Finally, in instances where the League licenses itself *as a league*, it is acting as a structural unit and it reaps competitive, economic and structural benefits by acting as a single entity as opposed to a collection of thirty-two teams.¹³⁶ In the specific instance of licensing the NFL to Electronic Arts, the license in large part relies on having the corporate authority to license the League as a whole *and* the fact that the League is the center of the license.¹³⁷ It is important to distinguish these micro- and macro-level arguments from the argument in *Amer-*

133. McCann, *supra* note 16, at 751–52.

134. Grow, *supra* note 24, at 490–91.

135. *Id.* at 488.

136. See McCann, *supra* note 16, at 751.

137. See *supra* Part II.A. Electronic Arts licenses a lot more than the teams, including the League schedule, the draft and free agency rules and procedures, real life contracts and contract rules, etc.

ican Needle that teams are necessarily in economic competition with one another over the sale of their distinct intellectual property.¹³⁸ While the thirty-two teams to a certain extent subordinate their interests to the NFL on league-wide issues, doing so *does not* preclude them from licensing their individual intellectual property in separate agreements. These arguments merely conclude that because there are interests that can only be represented by the NFL as a holistic entity, those interests should be licensable by a single entity.

Opponents to this approach make a few primary arguments for why professional sports leagues cannot ever be single entities. One author contends that there are too many residual bundles of property rights held by teams for them to have a complete unity of interest, 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.”¹³⁹ In this specific case of the NFL, however, all of these financial interests are shared.¹⁴⁰ The only real remaining question is whether or not finances need to be completely shared between individual agents in such a joint venture. Based on the Court’s decision in *Texaco, Inc. v. Dagher*, however, there is no requirement that firms need to share all of their profits or even all of their interests across all aspects of their corporate identity.¹⁴¹ Additionally, the bundled property rights standard argued for here would only allow fully owned subsidiaries and a parent company to be considered a single entity, a theory which would gut the fundamental underpinnings of *Copperweld* by placing a number of parent-subsidary relationships outside of a single-entity defense (at least where some market competition exists).¹⁴² In any case, the distinction argued for in this Note allows collective licensing only in situations where the League is acting as a collective entity, which still allows teams to exercise their rights over local revenues and nullifies the entirety of this property rights concern.

138. *Am. Needle, Inc. v. Nat’l Football League*, 130 S. Ct. 2201, 2213 (2010).

139. 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).

140. Grow, *supra* note 24, at 490–91.

141. See *Texaco, Inc. v. Dagher*, 547 U.S. 1, 6 (2006).

142. See *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 771 (1984); see also *supra* note 45 and accompanying text.

A second argument against single-entity status is that there are major differences between teams, including differences between large- and small-market owners, debt-bearing and non-debt-bearing owners, and among factions who emerge in the selection of a League Commissioner.¹⁴³ While these groupings of owners suggest that there could be differences of opinion on the direction of the League, they don't demonstrate any reason why the League itself cannot be theorized as a distinct entity. If anything, this objection could be used as evidence to substantiate the bright-line distinction drawn in this Note—if there is a substantial disagreement among owners, the League likely is not licensing its own intellectual property, but is rather licensing the intellectual property of different teams in ways the teams disagree on.

A third argument against single-entity status challenges the notion that the NFL exists as a distinct legal entity when, at heart, independent and competitive entities comprise the League.¹⁴⁴ According to this analysis, any cartel could claim that they were acting through a distinct central authority and generally evade antitrust law.¹⁴⁵ This argument, however, ignores the fact that in *American Needle*, the Court clearly illustrated that some aspects of the League operation (including actions taken by the central league entity to maintain competitive balance) represented a legitimate and important central interest exercised by the League itself.¹⁴⁶ The Court, however, only affirmatively established scheduling, rules of play, and administrative guidelines as necessary for League operation.¹⁴⁷ What the Court distinguished at the end of its decision were attempts to collective license teams' "individually owned intellectual property," which it argued demanded a refusal of single-entity treatment.¹⁴⁸ In cases where what is being licensed is the NFL as a whole rather than the intellectual property of its various teams, however, these arguments lose much of their salience because the licensed good itself could not exist without the existence of a central League operation. Even under a test requir-

143. McCann, *supra* note 16, at 760–62.

144. Meir Feder, *Is There Life After Death for Sports League Immunity? American Needle and Beyond*, 18 VILL. SPORTS & ENT. L.J. 407, 422 (2011).

145. *Id.*

146. *Am. Needle, Inc. v. Nat'l Football League*, 130 S. Ct. 2201, 2217 (2010) (citing *Nat'l Collegiate Athletic Assn. v. Bd. Of Regents of Univ. of Okla.*, 468 U.S. 85, 117 (1984)).

147. *Id.*

148. *Id.*

ing that subsidiaries always be “incapable of independent action,” the Court could determine that the NFL (when licensing itself as a whole) could be understood as a single operating unit, and thus as a single entity.¹⁴⁹

A final argument against single-entity status contends that from a public policy perspective, since the unique structure of the NFL is the basis of each individual team’s profitability, there is no basis to give teams an exemption to antitrust rules as well.¹⁵⁰ This argument, however, assumes that teams are able to benefit from half participation in collective licensing arrangements like the one the League concluded with Reebok in *American Needle*. The bright-line rule proposed in this Note would eliminate that issue by turning the focus of a court’s inquiry onto whether the licensing arrangement was the NFL itself licensing the League as a single, collective entity. Additionally, this argument attempts to reject a defensible bright-line rule in order to make a larger economic point. Simply because the teams would get an economic benefit from a consistent application of the rules of single-entity to individual teams and to the League as a whole is not a good reason to reject an otherwise logical and legally consistent framework of analysis.

Understanding the League as a single entity when it licenses itself as a whole is the only way to sensibly reconcile the fact that the League is both a collection of the thirty-two teams that comprise it *and* something more. When all of the interests, the scheduling, and the very competition between teams is what is at issue, the NFL clearly acts as a single entity and should be treated as one under the Sherman Antitrust Act.

B. THE COURTS, NOT CONGRESS, SHOULD IMPLEMENT THIS TEST

Michael McCann, in a prospective article on the *American Needle* decision, concludes that because the Court has failed to fashion a bright-line rule, Congress should step in and legislate exemptions to the general prohibition against single-entity treatment of the NFL and other sports organizations.¹⁵¹ Such exemptions could protect both the Court’s attempt to draw a

149. Feder, *supra* note 144, at 422.

150. Camalla M. Kimbrough, *Upon Further Review: How the NFL’s Exclusive Licensing Agreement with Reebok Survives Antitrust Scrutiny Despite the League’s Flawed Single-Entity Defense*, 13 TUL. J. TECH. & INTELL. PROP. 235, 247 (2010).

151. McCann, *supra* note 16, at 779–80.

clear line against collusive activity hidden behind a shell company as well as the individual interests of professional sports leagues.¹⁵² Additionally, such an approach would comport with past legislative attempts to balance the interests of antitrust law and professional sports leagues.¹⁵³

While McCann's argument seems compelling on its face, it falls into a couple of traps that suggest leaving the interpretation to the courts. First, as McCann acknowledges, putting the decision in the hands of Congress opens the field up to the League's "government relations specialists, influential lobbyists, and political action committees, [who] are well-positioned to exert disproportionate influence on congressional decisionmaking."¹⁵⁴ Once the NFL begins to exert control over congressional levers on this issue, it would likely spill past the reasonable line suggested here and extend the League's authority to collective regulation of individual team licensing and beyond.¹⁵⁵ Such influence would eliminate the entire jurisprudence that has developed around sports leagues and antitrust, and could ostensibly even give League authorities leverage in undercutting the bargaining position of players or immunize the League from liability for major harms stemming from the game of football itself. Second, as McCann once again notes, allowing the NFL to change antitrust rules could prime the pump for exemptions for other businesses, gradually wearing away at the foundation of antitrust law.¹⁵⁶ The competitive interests to be protected in creating a balanced league do not and should not apply to businesses generally, which exist in a mostly unregulated market (as opposed to the closed competitive entity that is the NFL) and need the checks and balances provided by the Sherman Act. Finally, the courts will inevitably have to resolve whatever antitrust exemptions Congress creates, and it seems institutionally wasteful for the Court to interpret an act

152. *Id.* at 780.

153. *Id.*

154. *Id.*

155. See Jed Hughes, *NFL Leads All Sports Leagues in Government Lobbying and Political Involvement*, BLEACHER REP. (June 1, 2012), <http://bleacherreport.com/articles/1204804-nfl-leads-all-sports-leagues-in-lobbying-and-political-involvement> (citing a survey by First Street Research Group estimating 2011 lobbying expenditures for the NFL on issues including broadcasting rights, Internet gambling, drug testing, and player safety at \$1,620,000, which is more than the next three highest spending leagues combined).

156. McCann, *supra* note 16, at 780–81.

of Congress when it could merely create an exemption of its own accord. McCann's "institutional advantages" and "more capable record"¹⁵⁷ of Congress are not clear in a world where the courts are and will remain the primary arbiter of antitrust law in the United States, and can delineate a specific exemption with minimal fuss.

While a congressional version of the solution proposed in this Note would likely fix much of the problem this Note has identified, the risk of negative spillover effects from lobbying counsel against such a solution. Both the risk to the competitive marketplace in individual team intellectual property and the overall status of antitrust law as applied to other business interests suggest that the Court should create such a rule within its own limited and arguably special sports jurisprudence.

CONCLUSION

In *American Needle*, the Supreme Court was asked to determine whether thirty-two NFL teams, each licensing their individual and directly competitive intellectual property, could be considered a single entity for the purposes of collective licensing. The Court was well within both its jurisprudential bounds and the realm of common sense in striking down such an attempt to escape antitrust liability.

At the same time, however, this decision should not be read in such a way to completely eliminate the League's ability to be treated as a single economic actor when licensing its collective intellectual property as a competitive sports enterprise. Such an attempt to throw the baby out with the bathwater would not only risk balkanization of the League in its licensing agreements and anti-competitive fiscal distributions, but it would also risk the very existence of pro-consumer products such as in-depth, fully licensed video games. By acknowledging the distinction between the teams that comprise the NFL and the NFL itself, courts can create a rule that fairly and adequately protects the consumer and the League.

157. *Id.* at 781.