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Section 1 Challenges to the Properties Arms of Sports Leagues: The Single-Entity Defense, Market Definition, and the Rule of Reason from *Dallas Cowboys* to *American Needle* and Beyond

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I. INTRODUCTION

The merchandising/licensing units of sports leagues have been challenged as violations of Section 1 of the Sherman Act in a series of lawsuits since the mid-1990s. The Dallas Cowboys, New York Yankees, and New York Rangers have all brought such actions against their respective leagues. The first two suits were settled, the third is ongoing. The Seventh Circuit's recent *American Needle* decision is notable as the NFL's motion for summary judgment was granted on the grounds that the league and its teams are a "single entity" with respect to the licensing of intellectual property. However, what constitutes a single entity is a hotly disputed subject which *American Needle* has petitioned the U.S. Supreme Court to address. This article discusses Section 1 challenges to the centralized exclusive licensing of league and franchise intellectual property, tests for identifying a single entity, and the rule of reason analysis of MLB Properties in *Salvino*. It concludes with some observations on issues raised in these Section 1 cases.

Each of the four major North American professional sports leagues—the National Football League ("NFL"), National Basketball Association ("NBA"), National Hockey League ("NHL"), and Major League Baseball ("MLB")—has established a venture to centralize the licensing of league and club trademarks ("Club Marks"). For example, the NFL has NFL Properties, while MLB has MLB Properties (collectively, "Properties"). Teams did not originally grant the Properties ventures exclusive rights to Club Marks, but they eventually did. Today, the Properties arm of each of these leagues is the league's exclusive centralized trademark licensing organization, with some minor exceptions.

On August 18, 2008, the Seventh Circuit affirmed the district court's grant of summary judgment to the NFL Defendants in a case brought by *American Needle*, which alleged that NFL Properties' exclusive licensing agreement with Reebok violated Section 1 of the Sherman Antitrust Act.² The district court had ruled that "the NFL and the teams act as a single entity in licensing their property" and, therefore, since a

¹ Vice President, Compass Lexecon. I thank Eric Hill for preparing the graphics. All remaining errors are mine.

² *American Needle Inc. v. National Football League*, 538 F.3d 736 (August 18, 2008).

conspiracy must involve more than one entity, there could be no illegal conspiracy in restraint of trade in violation of Section 1.³ For more than two decades, the NFL had argued the single-entity defense as a defendant in a host of Section 1 antitrust cases, only to fail to persuade the court. At last, the NFL prevailed.

American Needle has petitioned the U.S. Supreme Court to answer two questions: (1) “Are the NFL and its member teams a single entity that is exempt from the rule of reason claims under Section 1 of the Sherman Act simply because they cooperate in the joint production of NFL football games, without regard to their competing economic interests, their ability to control their own economic decisions, or their ability to compete with each other and the league?” and (2) “Is the agreement of the NFL teams among themselves and with Reebok International, pursuant to which the teams agreed not to compete with each other in the licensing and sale of consumer headwear and clothing decorated with the teams’ respective logos and trademarks, and not to permit any licenses to be granted to Reebok’s competitors for a period of ten years, subject to a rule of reason claim under Section 1 of the Sherman Act, where the teams own and control the use of their separate logos and trademarks and, but for their agreement not to, could compete with each other in the licensing and sale of Team Products?”⁴

Thus, the Supreme Court has the opportunity, if it chooses to do so, to add some clarity to the murky question: What constitutes a single entity?

II. WHAT CONSTITUTES A SINGLE ENTITY?

The Supreme Court addressed the single-entity question in *Copperweld*, but that case was much simpler since it concerned a wholly-owned subsidiary and thus there was a “complete unity of interest.”⁵ The question of what constitutes a single entity when the entities at issue are less than wholly-owned is the source of much disagreement.⁶ Typically, the initial focus is on whether there is a unity-of-interest. If the entities fail the unity-of-interest test, courts will sometimes consider whether the entities share a common decision-making structure or whether the economic realities justify treating the entities as a single entity.

³ American Needle Inc. v. National Football League, 496 F.Supp.2d 941, 944 (July 11, 2007).

⁴ American Needle Inc. v. National Football League, Petition for a Writ of Certiorari (November 17, 2008), at ii.

⁵ Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984).

⁶ Compare Grow (2006, 2008), who concludes that sports leagues share a ‘unity of interest’ and face ‘economic realities’ in the form of competition with other forms of entertainment (although there is virtually no competition between teams in the same league except in the hiring of players and coaches), and therefore should be considered single-entities in non-labor matters, with Edelman (2008a, 2008b), who argues that sports leagues fail the ‘unity of interest’ test and thus should not be treated as single entities. See, Nathaniel Grow, *There’s No ‘I’ in ‘League’: Professional Sports Leagues and the Single Entity Defense*, 105 MICHIGAN L REV. 183 (2006); Nathaniel Grow, *A Proper Analysis of the National Football League Under Section One of the Sherman Act*, 9 TEXAS REV. OF ENTERTAINMENT & SPORTS L. 281 (2008); Marc Edelman, *Single-Entity Sports Ruling: ‘Needle’ in a Haystack*, 239 N.Y. L.J (January 2, 2008a); 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 (2008b).

Dean Williamson of the Antitrust Division of the U.S. Department of Justice warns that “one can define anything as a single entity” and, in fact, one could “define a cartel of otherwise competing corporate entities as a single entity and, in turn, extend to it the legal protections that status as a single entity implies”—and thus it is critical “to operationalize a concept of a single entity that discriminates between conspiracies and agglomerations of entities joined in legitimate business arrangements.”⁷ He argues that *Copperweld* and the succeeding case law can be boiled down to a two-stage single-entity test. The first stage is an economic unity test: Does the candidate single entity satisfy the test of economic unity (as opposed to a unity-of-interest test)? If the answer is yes, the candidate entity should be treated as a single entity. If the answer to the economic unity question is no, the second question is: Do the parties contribute complementary inputs? If the answer is yes, the candidate entity should be treated as a single entity. If the answer is no, it should not. Cartels would fail the second stage test—cartel participants contribute substitute, not complementary, inputs.

Williamson notes that “teams can be understood as contributors of complementary inputs when it comes down to the production of games.”⁸ However, a more difficult question is whether teams are contributing complementary or substitute inputs into the production of merchandise bearing Club Marks. They are complementary in the sense that the value of, say, merchandise bearing the Boston Red Sox logo may be higher if similar merchandise bears the logo of their rivals, the New York Yankees. On the other hand, they are substitute inputs in the sense that an apparel maker that puts the logo of one team on its apparel could have put the logo of another team on it instead (assuming the apparel maker could contract with individual teams). Therefore, Williamson’s two-stage test fails to provide clear guidance on the single-entity question as it applies to the Properties arms of sports leagues.

The premier North American sports leagues consist of independent teams and, therefore, can be usefully viewed as joint ventures. The question of when a joint venture is to be viewed as a single entity in a Section 1 case is a hard one to which the Supreme Court offered some insights in its *Dagher* decision, which concerned the question whether Equilon, a joint venture between Texaco and Shell Oil which set the price at which the venture’s products would be sold, engaged in a *per se* violation of Section 1 of the Sherman Act.⁹ The Supreme Court argued that there was no horizontal price-fixing agreement because Texaco and Shell did not compete with one another in the relevant market (i.e., gasoline sales to western service stations) except via the joint venture. Thus, the Court was interested in whether the joint ventures’ members were competitors prior to forming the venture. Furthermore, the Court observed that “the challenged business

⁷ Dean V. Williamson, *Organization, Control and the Single Entity Defense in Antitrust*, EAG 06-4, Economic Analysis Group Discussion Paper, Antitrust Division, U.S. Department of Justice (January 2006), at 1.

⁸ *Id.* at 21.

⁹ *Texaco Inc. v. Fouad N. Dagher*, No. 04-805 (S.Ct 2/28/2006).

practice involves the core activity of the joint venture itself—the pricing of the very goods produced and sold by Equilon” and, therefore, “the ancillary restraints doctrine, which governs the validity of restrictions imposed by a legitimate joint venture on non-venture activities ... has no application here.”¹⁰

The *Dagher* decision raises the question of what are the core functions of sports leagues. The usual answer is something like “to produce games culminating in the crowning of a league champion.” But is a core function the sale of tickets to those games? Except for the playoffs, teams set their own ticket prices. Is a core function the sale of broadcast rights to those games? Only the NFL has comprehensive national broadcast contracts. In the NBA, NHL, and MLB, individual teams negotiate to broadcast some of their games in their respective local markets. Moreover, the Sports Broadcasting Act gives the NFL, NBA, NHL, and MLB an antitrust exemption to negotiate national broadcast contracts. Why is the Sports Broadcasting Act needed if negotiating national broadcast contracts is a core function of the leagues? Is a core function of the league the centralized sale of intellectual property rights? The premier sports leagues existed for decades before their member teams assigned exclusive rights to their intellectual property to the leagues’ merchandising units.

On the competitors test, the justification for treating sports leagues as single entities is even more tenuous. If leagues are single entities in certain respects, then member teams should not have been competitors prior to forming the venture in question. Yet, teams clearly have in the past, and continue today, to compete for players and coaches—so leagues are not single entities with respect to labor policies. Moreover, a look at the history of the NFL and other leagues shows that, indeed, prior to assigning exclusive rights to the league, teams did compete in the sale of merchandise. For example, Mark Yost reports that “NFL team merchandise has been for sale since 1957, when the Los Angeles Rams opened the league’s first team store” and that, “[f]or years, merchandising was an unorganized business, with individual teams taking care of most of their own products and advertising, thus giving the NFL very little control over the quality, quantity, and types of products being made and sold.”¹¹

Similarly, in his informal history of the team-licensed hat, Glenn Bischoff explains that in 1946 American Needle’s Bruce Kronenberger pitched to Chicago Cubs owner Phil Wrigley the idea of selling Cubs fans the same caps as those worn by Cubs players.¹² Kronenberger and Wrigley struck a deal in which the Cubs would buy the caps from American Needle on consignment, so American Needle had to take back whatever did not sell. Subsequently, New Era and the Kaufman/MacAuliffe Cap Company became suppliers for a number of teams. Bischoff notes that, at this time,

¹⁰ *Id.*

¹¹ MARK YOST, TAILGATING, SACKS, AND SALARY CAPS: HOW THE NFL BECAME THE MOST SUCCESSFUL SPORTS LEAGUE IN HISTORY, 122-23 (2006).

¹² Glenn Bischoff, “The Team Licensed Cap: An Informal History,” 4 Team Licensing Business 40 (January 1992).

“individual teams cut their own cap and uniform deals,” as “[t]his was decades before the leagues got involved in the licensing process.”¹³

Today, teams in the same league still compete in the sale of sponsorships and stadium-naming rights. Teams also compete for fans. Many, if not most, sports fans do not live near any particular city with a franchise and thus are free agents in deciding which team to support—whether by attending a game, watching it on television, or purchasing team-branded merchandise.¹⁴

If sports leagues are not single entities with respect to non-labor activities, then such activities, if challenged on Section 1 grounds, are examined under a rule of reason, which entails a delineation of the relevant product and geographic markets, an examination of the harm to competition, pro-competitive effects, and less restrictive alternatives.

III. FROM DALLAS COWBOYS TO AMERICAN NEEDLE

The formation of the Properties and their grant of exclusive rights to Club Marks are generally believed to have increased the Leagues’ bargaining power with potential licensees, resulting in higher prices. On the other hand, the Properties are believed to generate cost savings by the elimination of duplicate sales forces. Moreover, the revenue derived by the Properties is distributed equally to teams, thereby allegedly promoting competitive balance. Such revenue-sharing greatly impacts the licensing revenues of teams with vast fan support, such as the NFL’s Dallas Cowboys and MLB’s New York Yankees. In the 1990s, both teams filed lawsuits against their respective leagues and member teams alleging that the grant of exclusive rights to Club Marks to the Properties violates Section 1 of the Sherman Act.

NFL Properties was formed in 1963, but did not receive exclusive rights to Club Marks until 1982. On November 6, 1995, the owner of the Dallas Cowboys, Jerry Jones, filed an antitrust lawsuit against the NFL in the Southern District of New York alleging that the NFL Trust to which owners passed exclusive rights to their Club Marks in 1982 and which then granted the exclusive rights to NFL Properties was “a classic price-fixing cartel that has eliminated free competition among NFL clubs” and that, “[i]n the absence of the cartel established by the Trust Agreement and Licensing Agreement, the NFL

¹³ *Id.* at 40.

¹⁴ Winfree et al. (2004) analyze the impact on MLB team attendance of the distance to the closest substitute MLB team. They document that “the closer two teams are, the lower the attendance is at each team relative to two teams that are farther apart” and, “when a new team moves into the area of an existing team, there is an additional initial reduction in attendance for the incumbent team.” See, Jason A. Winfree, Jill J. McCluskey, Ron C. Mittelhammer & Rodney Fort, *Location and Attendance in Major League Baseball*, 36 APPLIED ECON. 2117 (2004), at 2117. Winfree et al. also observe that attendance of the San Francisco Giants fell more than 32 percent when the Kansas City Athletics moved to Oakland in 1968. On the other hand, in 1965, Bud Selig did a study of the impact on attendance at Milwaukee Braves games after the Washington Senators moved to Minneapolis in 1961 and concluded that the reduction in attendance was less than 5 percent. See, ANDREW ZIMBALIST, IN THE BEST INTERESTS OF BASEBALL? THE REVOLUTIONARY REIGN OF BUD SELIG, 200 (2006).

member clubs would compete with one another, and with the NFL, in the professional football sponsorship market and the professional football merchandise market, leading to competitive pricing and increased output.”¹⁵

Moreover, the complaint alleged that the grant of exclusive rights to Club Marks “is not reasonably necessary to serve any legitimate, pro-competitive goal,” such as the promotion of competitive balance because: (1) the sale of Club Marks is a relatively small source of revenue and the lawsuit is not challenging the equal-sharing of television revenue, which accounts for the bulk of club revenue; (2) the equal-sharing of profits, rather than promoting competitive balance, encourages free-riding by poorly-performing teams as it gives them little incentive to improve; and (3) competitive balance can be achieved in a much less restrictive and anticompetitive manner via the reverse-order player draft and a salary cap.¹⁶ Furthermore, the complaint alleged that the grant of exclusive control over Club Marks diminishes teams’ incentives to increase the value of those Marks and such bundling does not produce a superior product.

On May 6, 1997, the New York Yankees launched a similar antitrust lawsuit over MLB Properties in U.S. District Court in and for the Middle District of Florida, Tampa Division, alleging that, “[o]n or about January 1, 1984 the Major League Clubs, acting on the insistence of the less successful Clubs, established a cartel to control certain licensing of the marks of all (at that time) 26 Clubs (including the Yankees), as well as the marks of Major League Baseball and its events (such as the silhouetted batter logo and the All-Star Game and World Series marks) and the marks of the American and National Leagues” and that this cartel “was established by the Clubs pursuant to an Agency Agreement signed with MLB Properties, the vehicle created for operation of the cartel.”¹⁷ The Agency Agreement was renewed and amended periodically, and the 1995 Agency Agreement designated MLB Properties as the exclusive agent for the promotional and retail licensing of Club Marks.

The Yankees alleged that, since at least January 1, 1984, the defendants have operated “a horizontal cartel, through which the Major League Clubs have agreed not to compete with each other and thereby to fix prices and to reduce output below competitive levels in the (i) professional baseball retail licensing markets and (ii) the professional baseball sponsorship markets.”¹⁸ In the absence of the cartel, “the Major League Clubs would compete with one another in the markets for professional baseball trademark licensing, sponsorships, and retail and wholesale merchandise—which

¹⁵ Dallas Cowboys Football Club v. National Football League Trust, complaint filed in U.S. District Court, Southern District of New York (November 6, 1995), at 1 & 7.

¹⁶ *Id.* at 8.

¹⁷ New York Yankees v. Major League Baseball Enterprises, complaint filed in U.S. District Court in and for the Middle District of Florida, Tampa Division (May 6, 1997), at 16.

¹⁸ *Id.* at 28.

would in turn lead to more competitive pricing, increased output, improved quality, and greater market efficiency.”¹⁹

Furthermore, the alleged cartel is not reasonably necessary to serve any legitimate or pro-competitive goal, but rather diminishes the incentives of unsuccessful clubs to improve their on-field performance and work to increase the value of their Club Marks. Finally, the Yankees alleged that defendants’ “actions to restrict and prevent competition in trademark licensing, corporate sponsorships, and retail and wholesale baseball merchandise sales are unrelated to, and outside the reasonable scope of, any exception the business of baseball may have from the antitrust laws.”²⁰

Both cases settled prior to trial on terms generally favorable to the Cowboys and Yankees.²¹ In fact, the NFL’s deal with Reebok in 2001 allowed each team to decide whether to market its Club Marks on its own or through NFL Properties. Only the Dallas Cowboys have decided to opt out of NFL Properties and do their own marketing.

The Dallas Cowboys’ and New York Yankees’ Section 1 challenges to the Properties arms of their respective leagues share a number of key points: (1) the lawsuit was filed after the grant of exclusive rights (although the Yankees contend that the MLB Properties cartel existed prior to the exclusivity grant of 1995); (2) both teams alleged narrow product-market definitions based on an alleged lack of close substitutability; (3) the challenged activities allegedly resulted in higher prices due to the restriction of output, not higher quality; (4) the grant of exclusive rights allegedly led to free-riding and a diminished incentive to improve team quality and increase the value of Club Marks, not to an increase in competitive balance; and (5) both defendant leagues settled on terms favorable to the team. Given both cases settled at an early stage, it is unknown whether the NFL and MLB at some point in the litigation would have asserted a single-entity defense (and, in the case of MLB, that its actions fall within its antitrust exemption). One can speculate, however, that if the NFL and MLB were confident that the court would find them to be single entities, they would not have settled on nearly as favorable terms as they did.²²

The *American Needle* litigation, although providing a victory for the NFL, was quite different from the Dallas Cowboys litigation in a number of ways. First, the plaintiff, American Needle, was a headwear maker that licensed from NFL Properties

¹⁹ *Id.* at 19.

²⁰ *Id.* at 4.

²¹ For more information about the Dallas Cowboys and New York Yankees lawsuits, see Gregory J. Pelnar, *Antitrust Analysis of Sports Leagues*, 61-67, unpublished manuscript (October 12, 2007), available at SSRN: <http://ssrn.com/abstract=1021365>.

²² Hale emphasizes the NFL’s extensive revenue-sharing in arguing that the NFL could have used the single entity defense. Hale applies the ‘economic interests standards’ and contends that the NFL Trust Agreement fails to represent a joining of divergent economic interests. J. Scott Hale, *Jerry Jones versus the NFL: An Opportunity to Apply Logically the Single Entity Defense to the NFL*, 4 Sports L.J. 1 (1997).

until the league decided to award an exclusive contract, which Reebok won and thus American Needle's license was not renewed.

Second, American Needle's Section 1 challenge did not pertain to the NFL teams' grant of exclusive rights to NFL Trust, but to the decision that NFL Properties would award an exclusive contract. American Needle's Section 1 allegation, as explained by the Seventh Circuit, was that, "because each of the individual teams separately owned their team logos and trademarks, their collective agreement to authorize NFL Properties to award the exclusive headwear license to Reebok was, in fact, a conspiracy to restrict other vendors' ability to obtain licenses for the teams' intellectual property."²³

Third, the NFL decided to fight, rather than settle, and offered a single-entity defense in asking the District Court for the Northern District of Illinois, Eastern Division, for summary judgment. The district court agreed with the NFL and the teams that they act as a single entity in their licensing of intellectual property because their collective licensing agreement serves to promote NFL football. The district court concluded that the NFL and the member teams were so integrated in their operations that they should be deemed a single entity, as opposed to a joint venture whose members are cooperating for a common purpose.

American Needle appealed to the Seventh Circuit, which agreed with American Needle that "when making a single-entity determination, courts must examine whether the conduct in question deprives the market place of the independent sources of economic control that competition assumes."²⁴ The appeals court, however, characterized American Needle's proposed single entity approach as requiring a complete unity-of-interest, which the court rejected, noting that *Copperweld* does not hold that only conflict-free enterprises can be single entities. Moreover, the appeals court disagreed with American Needle that a relevant consideration is whether the NFL teams could compete against one another when licensing and marketing their intellectual property. As a result, contrary to American Needle's assertion, the NFL teams have not deprived the market of independent sources of economic power. The Seventh Circuit explained:

"Certainly the NFL teams can function only as one source of economic power when collectively producing NFL football.... It thus follows that only one source of economic power controls the promotion of NFL football; it makes little or no sense to assert that each individual team has the authority, if not the responsibility, to promote the jointly produced NFL football. Indeed, the NFL defendants introduced uncontradicted evidence that the NFL teams share a vital economic interest in collectively promoting NFL football. After all, the league competes with other forms of entertainment for an audience of finite (if

²³ American Needle, *supra* note 2, at 738.

²⁴ American Needle, *supra* note 2, at 742.

extremely large) size, and the loss of audience members to alternative forms of entertainment necessarily impacts the individual teams' success...

But most importantly, the record amply establishes that since 1963, the NFL teams have acted as one source of economic power—under the auspices of NFL Properties—to license their intellectual property collectively and to promote NFL football.”²⁵

American Needle has appealed the decision to the U.S. Supreme Court, and although defendants in subsequent litigation against sports leagues have cited American Needle in support of their single-entity defense, other courts have not embraced the single-entity defense for sports leagues. Thus, unless the U.S. Supreme Court rules on American Needle, it is possible that the NFL and its member teams will be held to be a single entity with respect to the licensing and marketing of intellectual property, but the NBA, NHL, and MLB (and their respective member teams) will not—a result with as much economic logic as the antitrust exemption possessed by MLB, but not the NFL, NBA, and NHL.

IV. BEYOND AMERICAN NEEDLE

American Needle was cited (unsuccessfully) as a precedent by the NHL in a motion to dismiss the Section 1 claim brought by Madison Square Garden (“MSG”), owner of the NHL’s New York Rangers, in the District Court for the Southern District of New York. MSG argued that the NHL began as a legitimate joint venture which produced a product—major league men’s professional ice hockey competition—that no one team could produce on its own. The NHL has engaged in other legitimate activities such as negotiating labor agreements with players, negotiating national television broadcasting arrangements, promulgating and enforcing agreed rules of play, and scheduling ice hockey contests. However, over time, the NHL has taken steps to restrict competition between and among member teams and between the member teams and the NHL in numerous areas that are not necessary to the purpose of the NHL joint venture, including licensing, merchandise sales, advertising, broadcasting, and new media (e.g., internet).

Due to the lack of close substitutes, the relevant markets, according to MSG, include a market or submarket for: (1) the licensing of NHL and NHL Club Marks for use on apparel, merchandise, and memorabilia; (2) the sale of NHL-branded and NHL club-branded apparel, merchandise, and memorabilia; (3) the licensing of NHL and NHL Club Marks for use in corporate advertising and sponsorships; and (4) the licensing of broadcasting, rebroadcasting, or other distribution rights to live or recorded NHL games, as well as game highlights, footage, and related ancillary programming, over media such as cable and satellite television, the internet, and wireless handheld

²⁵ American Needle, *supra* note 2, at 743-44.

devices, either by licensing those rights to content aggregators or by offering programming directly to consumers. Rather than seek monetary damages, MSG's goal was to limit the NHL's activities to those reasonably necessary to produce major league men's professional ice hockey contests and those with a pro-competitive purpose.

While MSG's lawsuit bears a resemblance to those brought by the Dallas Cowboys and New York Yankees, a key difference is that MSG had entered into a Consent Agreement with the NHL when it purchased the Rangers in 1995. In this agreement, MSG agreed to be bound by the NHL Constitution, NHL Bylaws, all NHL Rules and Regulations, as well as to honor the NHL's territorial allocations and restrictions. With one exception, the exclusivity grants challenged by MSG occurred prior to MSG's purchase and thus the district court ruled they were covered by the Consent Agreement. The exception was the New Media Strategy, which the NHL clubs approved in June 2006 by a vote of 25-3, with one absence and one abstention.

The NHL offered a single-entity defense, arguing: "The settled law relating to sports-league joint ventures ... is that leagues are best viewed as 'single entities' with respect to joint marketing decisions like the NHL's New Media Strategy" and "[t]he most applicable case—also ignored by MSG—is *American Needle*, in which a former licensor of NFL intellectual property claimed that the NFL violated the Sherman Act by collectively exploiting the teams' logos and marks."²⁶ In addition, the NHL argued:

"... the Member Clubs chose to structure the League so as to have only *one* center of decision-making—the NHL Board of Governors—determining the exclusive territory of each team, the scope of the particular rights granted to each team, and what degree and type of exclusivity would attach to their franchises... Thus, when the Member Clubs chose to collectively market NHL hockey and related products through exclusive territories, it was nothing more than the organizational decision of a single enterprise regarding how it would operate...

Likewise, the Member Clubs' decisions about how to market and sell NHL products (whether broadcasts, merchandise, or new media) are jointly made—i.e., they do not flow from independent centers of decision-making. The court's analysis in *American Needle* ... is instructive."²⁷

Moreover, even if the Defendants are not held to be a single entity, the Supreme Court's *Dagher* decision implies that the New Media Strategy is not an unreasonable restraint of trade because "[t]here is nothing more 'core' to any sports-league joint

²⁶ *Madison Square Garden, L.P. v. National Hockey League*, Defendants' Memorandum of Law in Opposition to Plaintiff's Motion for Preliminary Injunction (October 12, 2007), at 3 & 13.

²⁷ *Madison Square Garden, L.P. v. National Hockey League*, Memorandum of Law in Support of Defendants' Motion to Dismiss or in the Alternative for Partial Summary Judgment (June 2, 2008), at 18-19.

venture than cooperation among its clubs as to how they will sell the valuable intellectual property and other rights that only their joint effort can create.”²⁸

On October 10, 2008, the district court denied the NHL’s motion to dismiss the New Media Strategy claim on single-entity grounds, finding that “[a]t this early stage of litigation, there is no evidence in the record on the crucial question of market definition, let alone the inquiry into how the NHL actually operates as an economic actor in that market... Therefore the NHL’s arguments in favor of dismissal cannot be resolved at the pleading stage, and the motion is denied.”²⁹ However, the district court added:

“To be sure, MSG faces a tall order in making its case. This Court has already observed that agreements among parents of a joint venture not to compete in the market in which a joint venture operates have generally been upheld... The reasonableness of the restraint, however, is evaluated under the rule of reason.”³⁰

A recent rule of reason analysis of MLB Properties further highlights the challenges of proving a Section 1 violation against one of the Properties.³¹ The single-entity defense was not raised, and the case proceeded under a rule of reason analysis. MLB Properties (“MLBP”) obtained summary judgment on the antitrust claim, which suggests that if the U.S. Supreme Court shoots down the single-entity defense, sports leagues’ Properties arms may likely prevail in a Section 1 challenge under a rule of reason analysis.

MLB Properties prevailed, at least in part, due to the extreme position alleged by the plaintiff, Salvino, Inc., which produced and sold small plush bean-filled bears, known as “Bammers,” featuring MLB club logos—without MLB Properties’ consent. MLB Properties sent Salvino a cease-and-desist letter on November 3, 1999, and shortly thereafter Salvino filed an antitrust lawsuit in the U.S. District Court for the Central District of California alleging that the organization of MLB Properties and its licensing activities are a *per se* violation of Section 1 of the Sherman Act, but even if not a *per se* violation, would be found to be an unreasonable restraint on competition under a quick look analysis.

The California court transferred the case to the District Court for the Southern District of New York, where MLBP was suing Salvino for trade duress, breach of contract, and unfair competition. On November 16, 2005, the district court disagreed that a *per se* or quick look is the appropriate standard of review, concluding instead that “the rule of reason is the appropriate review of Salvino’s claim.”³² Since “Salvino has not offered any evidence of an adverse effect on competition resulting from MLBP’s

²⁸ Madison Square Garden, *supra* note 26, at 3.

²⁹ Madison Square Garden v. National Hockey League, No. 07 Civ. 8455 (S.D.N.Y. October 10, 2008), at 33.

³⁰ *Id.* at 33-34.

³¹ Major League Baseball Properties, Inc. v. Salvino, Inc., 542 F.3d 290 (September 12, 2008).

³² Major League Baseball Properties, Inc. v. Salvino, Inc., 420 F.Supp.2d 212, 220 (November 16, 2005).

licensing authority,” the district court concluded that Salvino “cannot demonstrate under the rule of reason that MLBIP places unreasonable restraints on trade” and, therefore, MLBIP’s motion for summary judgment was granted.³³

Salvino appealed. On September 12, 2008, the U.S. Court of Appeals for the Second Circuit rejected Salvino’s argument that the district court “should not have required evidence with regard to market power or actual adverse effect on competition but should instead have held MLBIP’s activities either illegal *per se* or illegal under a quick-look analysis.”³⁴ In particular, the Second Circuit noted that (1) “what Salvino refers to as ‘price fixing’ is in fact profit sharing by interdependent entities” and (2) “Salvino adduced no evidence of any reduction of or agreement to reduce ‘output’.”³⁵

According to the Second Circuit, the equal sharing of revenue from the licensing of MLB Intellectual Property has a pro-competitive rationale—the promotion of competitive balance—which even Salvino acknowledges, and thus “it would defy reason for this Court to accept Salvino’s contention that any anticompetitive aspects of the Clubs’ agreement on the equal division of MLBIP’s licensing profit are at all apparent, much less so obvious that the agreement should have been held illegal *per se* or upon a quick look.”³⁶ However, in a concurring opinion, Judge Sotomayor disagreed with some of the majority’s reasoning:

“It is undisputed that the Clubs have agreed through the exclusivity and profit-sharing clauses in the MLBIP agreement not to compete with each other on the sale of trademark licenses. Instead, they have agreed to give MLBIP the sole authority to set prices for all Major League Baseball licenses and to share equally in the proceeds from those licensing sales. While the MLBIP agreement does not specify a price to be charged, the effect of the agreement clearly eliminates price competition between the Clubs for trademark licenses. An agreement to eliminate price competition from the market is the essence of price fixing...

Nevertheless, the majority contends that this “so-called ‘price’ restriction is not in fact an agreement on ‘price’ but rather an agreement for the sharing of profits.” ... Were the majority correct, competing companies could evade the antitrust laws simply by creating a “joint venture” to serve as the exclusive seller of their competing products. So long as no agreement explicitly listed the prices to be charged, the companies could act as monopolists through the “joint venture,” setting prices together for their competing products, because the majority would

³³ *Id.* at 220-21.

³⁴ Salvino, *supra* note 31 at 294.

³⁵ *Id.* at 309.

³⁶ *Id.* at 334.

categorize these actions formalistically as only an agreement to share profits. The antitrust laws are not so rigid as to permit such easy evasion.”³⁷

The Second Circuit also observed that “there was ample evidence in the record that prospective licensees of MLB Intellectual Property displayed interest in using intellectual property of, inter alia, other sports entities and leagues,” and, therefore, “unlike the NCAA’s unique product, college football, there are available substitutes for MLB Intellectual Property.”³⁸ The court noted that MLBP’s economic expert, Franklin Fisher, “opined that MLBP lacked power in the relevant market, which he defined as no narrower than the market for the licensing of intellectual property related to sports and certain entertainment products.”³⁹

The Second Circuit affirmed the district court’s ruling, but commented: “We express no view as to what the outcome would be of a case in which a plaintiff challenging the Clubs’ centralization of licensing functions in MLBP as their exclusive licensing agent adduced admissible evidence as to the reasonableness of that practice.”⁴⁰ The outlines of such a rule of reason analysis are sketched in Judge Sotomayor’s concurring opinion:

“The present dispute is significantly more complex than two competitors creating a “joint venture” for the sole purpose of fixing prices. Here, the MLBP joint venture offers substantial efficiency-enhancing benefits that the individual Clubs could not offer on their own, including decreased transaction costs on the sale of licenses, lower enforcement and monitoring costs, and the ability to one-stop shop (i.e., to purchase licenses from more than one Club in a central location). These procompetitive benefits, MLBP maintains, could not exist without the exclusivity and profit-sharing agreements, the two provisions challenged by Salvino as price fixing. In other words, MLBP argues that even if the effect of the exclusivity and profit-sharing agreements is to eliminate price competition between the Clubs, the purpose of these agreements is to achieve other significant procompetitive benefits, which outweigh any harm from the price restraint...

As noted by the majority, we need not and do not decide whether a successful Sherman Act claim could have been brought against MLBP with a properly supported record, including whether the procompetitive justifications for the two challenged provisions could be achieved in a substantially less restrictive manner.”⁴¹

³⁷ *Id.* at 335.

³⁸ *Id.* at 330.

³⁹ *Id.* at 330.

⁴⁰ *Id.* at 334.

⁴¹ *Id.* at 337 & 341.

V. SOME OBSERVATIONS

This review of Section 1 challenges to the Properties arms of sports leagues raises a host of issues, a few of which will be discussed below.

A. *Observation #1:*

If it is true that the creation of the Properties led to higher prices, then courts should be extremely cautious in granting a single-entity defense to sports leagues. A number of commentators have argued that the collective sale of intellectual property by sports leagues has increased their bargaining power or had the effect of eliminating competition. For example, Roger Noll states that “the added value arising from cooperation in buying inputs and selling outputs, because it does not improve competitive balance or otherwise increase the value of the sport to fans, arises purely from eliminating competition.”⁴² Gary R. Roberts writes that “[t]he exclusive collective sales of television (or any intellectual property) rights inevitably will have some anticompetitive effect from forcing buyers of those rights to have to deal with and acquire the rights from only one source” and “[t]his will inevitably reduce the amount of the rights that are sold and will increase the price of those rights—all to the detriment of consumers.”⁴³ J. Scott Hale argues that “[t]he team owners (including the Dallas Cowboys) ... agreed to join the Trust Agreement because they believed that the League as a whole would gain additional leverage by bargaining as a unit and that the gains received and split equally would exceed what the teams could accomplish individually.”⁴⁴

There are several scenarios in which collective sales of intellectual property by sports leagues could lead to higher prices. Three key factors are: (1) the extent to which the grant of exclusive rights to the Properties arm eliminates competition between teams, which would tend to shift the supply curve inward; (2) the extent to which the centralization of sales increases productive efficiency, which would tend to shift the supply curve outward; and (3) the extent to which the centralization of sales improves product quality, which would tend to shift the demand curve outward. These three factors can combine in a number of ways to lead to higher prices.

Figure 1 illustrates a scenario where the grant of exclusive rights eliminates competition among teams, does not generate productive efficiencies, and does not result in higher product quality. The supply curve shifts inward from S to S' , resulting in a reduction in output from Q to Q' and an increase in price from P to P' .

⁴² Roger G. Noll, *'Buyer Power' and Economic Policy*, 72 ANTITRUST L. J. 589, 617 (2005).

⁴³ Gary R. Roberts, *The Legality of the Exclusive Collective Sale of Intellectual Property Rights by Sports Leagues*, 3 Virginia J. OF SPORTS & L. 52, 77 (2001).

⁴⁴ Hale, *supra* note 22, at 10.

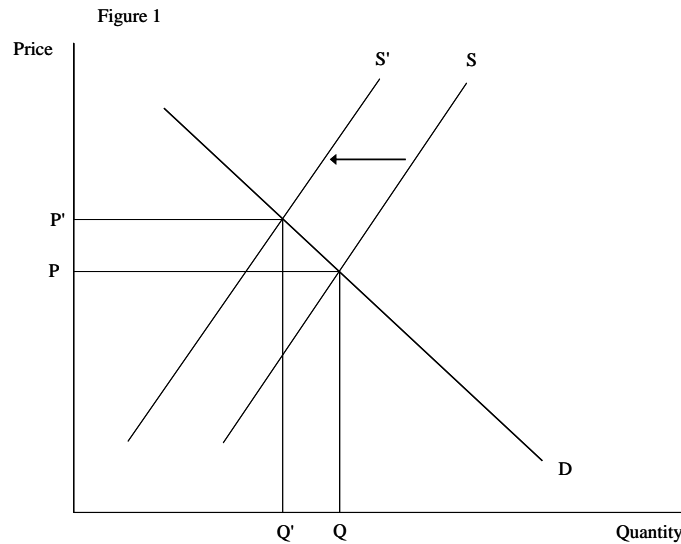


Figure 2 illustrates a scenario where teams did not compete prior to the grant of exclusive rights (and thus there is no effect on competition), where the centralization of sales generates productive efficiencies, and where a higher quality product is produced. Both the demand and supply curves shift outward, from D to D'' and from S to S'' , respectively, and the overall effect is an increase in output from Q to Q'' , higher product quality, and an increase in price from P to P'' .

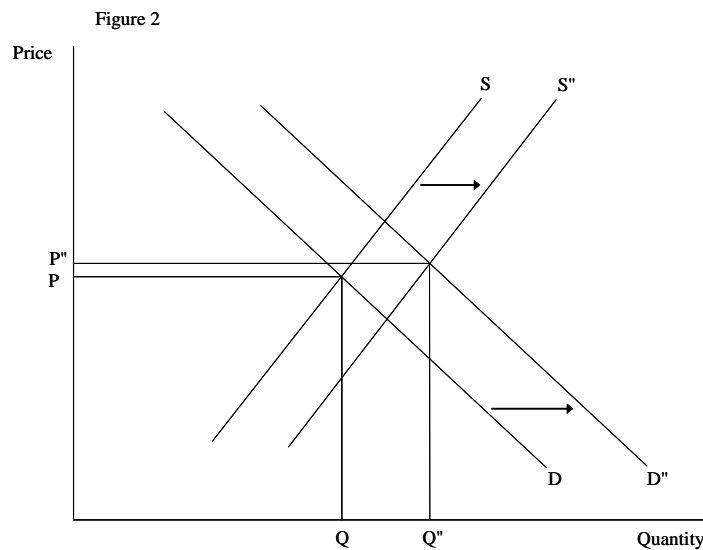
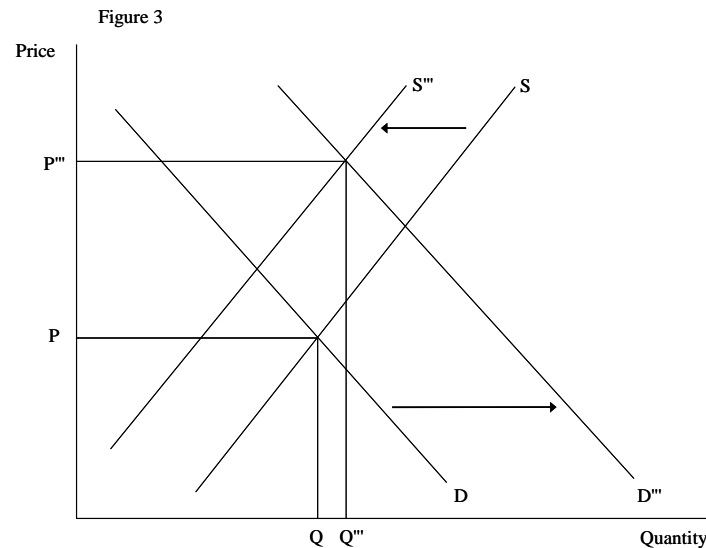


Figure 3 illustrates a scenario where the grant of exclusive rights eliminates competition among teams, does not generate productive efficiencies, and yields a higher quality product. The result is an inward shift of the supply curve from S to S''' and an

outward shift in the demand curve from D to D''' , leading to an increase in output from Q to Q''' and an increase in price from P to P''' .



In short, a number of commentators have argued that the Properties arms of sports leagues have led to higher prices. While there are scenarios in which such a price increase can occur without the elimination of competition between teams, courts should require evidence on the extent to which teams were competing with each other prior to the grant of exclusive rights to the Properties.

B. Observation #2:

The organization and economic realities of sports leagues have changed over time, so it is of interest not only whether the league is a single entity but also when it became a single entity. The court in *American Needle* held that the NFL is a single entity with respect to the marketing of intellectual property and NFL teams have acted as the source of one economic power since the formation of NFL Properties in 1963. However, NFL Properties did not receive exclusive rights until 1982. In *Dallas Cowboys*, the “cartel” was alleged to have formed in 1982.

Was the NFL a single entity even before the formation of NFL Properties? One argument is that the NFL has been a single entity since its creation in 1920 because only the league can produce the NFL brand. Under this argument, this single entity chose to have each team do its own licensing of Club Marks until 1963, when it decided that NFL Properties would be formed to do some of the work on a nonexclusive basis. In 1982, it decided that NFL Properties should do so on an exclusive basis. The problem with this argument, as Williamson (2006) points out, is that anything can be defined to be a single

entity.⁴⁵ One can call the pre-1963 or pre-1982 NFL a single entity, but if teams were independently marketing their Club Marks (even if inefficiently or ineffectively), it may be somewhat of a stretch to say that the league and its member teams were functioning as a single entity with respect to the marketing of their intellectual property.

Thus, a court seriously considering whether a sports league is a single entity should think about when the league would have become a single entity.

C. Observation #3:

The single-entity defense forces the court to make a yes/no decision on the single-entity question; whereas, economically, the single-entity question is a more/less question and it is unclear what the cut-off level is, or should be. When the court is presented with a single-entity defense, it is asked to give a yes or no answer (or to answer that the evidence is insufficient to answer yes, which has the same effect as no). With the exception of a wholly-owned subsidiary, the economic answer is rarely so straightforward.

Williamson (2006) emphasizes the importance of the allocation of residual control rights, but in the case of sports leagues, they are complex.⁴⁶ League members voted to grant exclusive rights to the Properties and these agreements are amended and renewed every few years, so if enough members want to take back these rights, they can amend the agreements to their satisfaction. Thus, residual control rights may lie with the Properties, but only until the end of the current agreement. If the league members granted irrevocable residual control rights for perpetuity to the Properties, the single-entity question may be easier to answer, but they did not.

D. Observation #4:

The unity-of-interest and economic-realities tests for a single entity are too vague to be useful. The unity-of-interest test is straightforward in the case of a wholly-owned subsidiary, but in all other cases, the question arises as to: (1) how to measure unity-of-interest; and (2) what is the unity-of-interest threshold above which the single-entity defense should prevail. One argument is that revenue-sharing is an indicator of unity-of-interest since the more revenue generated, the more revenue is equally-shared. However, it is circular reasoning to argue that the Properties' revenues are equally-shared among teams, thereby at least contributing (if not creating) a unity-of-interest, which thereby enables the league and its member teams to offer a single-entity defense to Section 1 challenges to the Properties.

Even if one excludes the Properties from the calculation of the extent of revenue-sharing, there is still the question of how much revenue has to be shared before the league and its member teams are a single entity. Moreover, it would be possible (but

⁴⁵ Williamson, *supra* note 7.

⁴⁶ *Id.*

possibly quite inefficient) to separate revenue-sharing from the Properties. In other words, a less restrictive alternative would be for each team to license its Club Marks and then for all the teams to pool their licensing revenues and redistribute them equally among all teams. Therefore, revenue-sharing does not require the existence of the Properties—but teams would lack an incentive to aggressively market their Club Marks (i.e., almost all of the return on their marketing would go to the other teams) and teams would have strong incentives to cheat by underreporting the revenues from their Club Marks.

Likewise, the economic-realities single-entity test is too vague to be useful. The economic realities of sports leagues have changed over time and may be a function of a league's policies. For example, when a sports league is formed, each member team is typically granted a territory to generate fan interest. Thus, each team plays an important role in creating the league brand, and limited revenue-sharing means that teams capture much of the return on their investments. As a sports league matures and fan interest flourishes, the league may take a greater relative role in promoting the league brand. Furthermore, if the extent of revenue-sharing increases over time and revenue-sharing serves as a disincentive for teams to aggressively compete with each other for fans and maximize the value of their Club Marks, then evidence that teams do not compete with one another is not evidence that the league and its member teams are a single entity, but rather a consequence of the league policy approved by the members. In other words, if a league's policies create a disincentive for teams to compete with each other for fan interest and in the licensing of Club Marks, then one would expect to observe teams not competing with each other in those areas.

Another alleged economic reality favoring the single-entity defense is the need for competitive balance. However, there is a question about the need for competitive balance or about the extent of competitive balance needed to sustain fan interest given, for example, the extreme popularity of the English Premier League despite the fact that the same teams tend to dominate year after year. There is also controversy as to whether revenue-sharing promotes competitive balance because it weakens the incentives of less competitive teams to try to improve.

For example, one academic study examines the effect of MLB's increased revenue redistribution over the period 1996-2001 via increased sharing of local revenues and implementation of a luxury tax and concludes that "redistribution lowered salaries by approximately 22 percent without affecting league balance."⁴⁷ Also, Andrew Zimbalist points out that in the case of Major League Baseball, "[d]uring 2003, five of the seven bottom-payroll teams actually lowered their opening day salaries by a total of \$62.6

⁴⁷ John L. Solow & Anthony C. Krautmann, *Leveling the Playing Field or Just Lowering Salaries? The Effects of Redistribution in Baseball*, 73 SOUTHERN ECON. J., 947.(2007)

million, despite receiving \$63.1 million in revenue-sharing profits.”⁴⁸ Of course, free-riding is not the only explanation. It is possible that the low-payroll teams slashed payroll in an effort to field a higher-quality team in the future.

Moreover, sports leagues have offered a competitive balance defense to a variety of activities widely-believed to be anticompetitive. For example, in an antitrust lawsuit brought by the World Hockey Association, the National Hockey League defended its reserve clause which bound each player to one team for the duration of his career (thereby limiting players’ options and thus depressing players’ salaries) to the need to maintain competitive balance. The district court rejected this claim by observing that in the past 20 years the Montreal Canadians had won the Stanley Cup 12 times, the Toronto Maple Leafs four times, the Detroit Red Wings three times, and the Chicago Blackhawks once.⁴⁹

Similarly, the NFL cited the need to maintain competitive balance for its “Rozelle Rule” which had the effect of discouraging teams from signing other teams’ free agents, thereby lowering player salaries, an argument the district court rejected, noting that the Rozelle Rule applied to all players, not just elite ones.⁵⁰ In fact, a law journal article by Salil Mehra and T. Joel Zuercher advocates: (1) “at the narrowest, the competitive balance argument should no longer avail defendants in sports antitrust cases under the rule of reason,” (2) “more broadly, future antitrust courts should cast a more skeptical eye toward ‘aesthetic’ arguments like competitive balance, given that there is scant proof of a hard nexus with financial results,” and (3) “most broadly, the empirical weakness of the competitive balance argument warrants judicial skepticism beyond antitrust criticisms.”⁵¹

In short, the unity-of-interest and economic-realities tests are too vague to reliably identify single entities.

E. Observation #5:

The lack of a clear test for a single entity may lead to differential treatment of the Properties across sports leagues, much like the term “interstate commerce” led to an antitrust exemption for MLB, which was then denied to the NFL, NBA, and NHL. Faulty tests can lead to faulty inferences. In its 1922 decision in *Federal Base Ball Club of Baltimore v. National League*, the U.S. Supreme Court addressed the question of whether or not the business of baseball is or is not interstate commerce.⁵² Since the Sherman Act covers only interstate commerce, a finding that the business of baseball is not interstate commerce

⁴⁸ Zimbalist, *supra* note 14, at 200.

⁴⁹ *Philadelphia World Hockey Club v. Philadelphia Hockey Club*, 351 F. Supp. 462 (E.D. Pa. 1972).

⁵⁰ *Mackey v. National Football League*, 543 F.2d 606 (8th Cir. 1976).

⁵¹ Salil K. Mehra & T. Joel Zuercher, *Striking Out ‘Competitive Balance’ in Sports, Antitrust, and Intellectual Property*, 21 BERKELEY TECH. L. J. 1499 (Fall), at 1541, (2006).

⁵² *Federal Base Ball Club of Baltimore v. National League*, 259 U.S. 200 (1922).

would essentially exempt MLB from the antitrust laws. The Court reasoned that the “business is giving exhibitions of base ball, which are purely state affairs,” and “the fact that in order to give the exhibitions the Leagues must induce free persons to cross state lines and must arrange and pay for their doing so is not enough to change the character of the business” or, in other words, “the transport is a mere incident, not the essential thing” and “[t]hat to which it is incident, the exhibition, although made for money would not be called trade of commerce in the commonly accepted use of those words.”⁵³

Later courts recognized the illogic of this decision, with the result that MLB secured an antitrust exemption which subsequent courts denied to the NFL, NBA, and NHL.⁵⁴ It would be unfortunate if faulty single-entity tests led to the faulty inference that the NFL is a single entity with respect to the licensing of Club Marks, and subsequent courts, recognizing the faulty reasoning, denied the single-entity defense to the NBA, NHL, and MLB.

F. Observation #6:

The question of whether teams within a sports league compete with each other needs greater economic study given its importance to the single-entity issue, and the question of whether sports leagues compete with each other and with other forms of entertainment in a broad entertainment market needs greater economic study given its importance in a rule of reason analysis.

In the single-entity defense, league members are argued not to compete with each other, but to compete as a single entity, along with the league, in a broad entertainment market. Yet, the *American Needle* decision contains no substantive discussion of the economic evidence regarding the extent to which NFL teams competed with each other prior to the formation of NFL Properties, or prior to the grant of exclusive rights to Club Marks to NFL Properties. Nor is there a discussion of the extent to which the Dallas Cowboys franchise, which opted-out of NFL Properties to market its Club Marks on its own, competes with NFL Properties. The appeals court did note that the NFL “competes with other forms of entertainment for an audience of finite (if extremely large) size, and the loss of audience members to alternative forms of entertainment necessarily impacts in the individual teams’ success.”⁵⁵

In contrast, the district court in *Madison Square Garden v. NHL*, in denying the NHL’s motion for summary judgment on single-entity grounds, noted that “there is no evidence in the record on the crucial question of market definition, let alone the inquiry into how the NHL actually operates as an economic actor in that market.”⁵⁶

⁵³ *Id.* at 208-09.

⁵⁴ The ‘interstate commerce’ antitrust exemption is discussed in more detail in Pelnar, *supra* note 21 at 30-34.

⁵⁵ *American Needle*, *supra* note 2, at 743.

⁵⁶ *Madison Square Garden* *supra* note 29, at 33.

In a rule of reason analysis of a sports league's activities, the plaintiff typically argues that there are no good substitutes for the product in question and thus the relevant market is very narrow, whereas the defendant league argues that it competes in a broad entertainment market. Yet, the economic evidence produced on these questions is sometimes scant. In several recent cases, courts have criticized plaintiffs' economic experts for their lack of rigorous economic analysis on the relevant market question.

In *MLB Properties v. Salvino*, the appeals court for the Second Circuit commented that the plaintiff's expert, Louis A. Guth, "testified that the relevant market could be determined by conducting a 'discrete choice survey' of consumers to determine whether changes in the prices of various products would affect the consumers' product preferences ...; however, Guth had conducted no empirical studies of any kind..."⁵⁷ The court also noted: "While Guth had not conducted the empirical studies that he testified were needed before he could do more than make guesses as to what might be substitutable for MLB Intellectual Property licenses, there was ample evidence in the record that prospective licensees of MLB Intellectual Property displayed interest in using intellectual property of, inter alia, other sports entities and leagues."⁵⁸

In *Kentucky Speedway v. NASCAR*, the district court excluded the testimony of the plaintiff's economic expert due to his relevant market analysis (or lack of analysis).⁵⁹ The case concerned an alleged conspiracy between NASCAR and International Speedway Corporation to deny Kentucky Speedway the opportunity to host a NEXTEL Cup race (NASCAR's top-tier series). The District Court for the Eastern District of Kentucky, Northern Division at Covington, excluded the testimony of Professor Andrew Zimbalist, who had considered only the BUSCH NASCAR race (NASCAR's second-tier series) as a possible substitute for a NEXTEL Cup race. The district court agreed with the defendants that other means of entertainment should have been considered as possible substitutes for attendance at, or television viewing of, a NEXTEL Cup race. After observing that the cost to a family of four of attending a NEXTEL Cup race would be about \$400, the court noted: "Yet, no studies were done to determine whether such a family might patronize a Bengals or Reds game or some other sports event, instead of a NEXTEL race, if that cost were to be raised by \$20 (5%)."⁶⁰

In short, there is an unfortunate lack of rigorous econometric studies testing the extent to which: (1) teams in the same sports league compete with one another; (2) a league and its member teams compete with other sports leagues and their member teams; and (3) a league and its member teams compete with other forms of entertainment. In the absence of such studies, courts should be cautious in drawing conclusions on these issues.

⁵⁷ Salvino, *supra* note 31, at 301.

⁵⁸ *Id.*, at 330.

⁵⁹ *Kentucky Speedway, LLC vs. National Association of Stock Car Auto Racing, Inc.*, Civ. 05-138 (January 7, 2008).

⁶⁰ *Id.*, at 7.

G. Observation #7:

If sports leagues are denied the single-entity defense, their Properties arms may survive a rule of reason analysis. The appeals court's decision in *Salvino* suggests that Section 1 challenges to the Properties arms of sports leagues may likely fail a rule of reason analysis. Despite the anticompetitive potential of the centralization of the licensing of Club Marks, there are strong pro-competitive rationales for such centralization. Although there may be a less-restrictive alternative, that alternative may be quite inefficient. As a result, the denial of the single-entity defense by a court in no way suggests that the challenged activity will fail a rule of reason analysis.

VI. CONCLUSION

All four of the major North American sports leagues engage in the centralized licensing of Club Marks. This practice has been challenged as a violation of Section 1 of the Sherman Act. The two major lawsuits from the 1990s were brought by the Dallas Cowboys and the New York Yankees, and the NFL and MLB chose to settle. Today, the New York Rangers have a similar lawsuit against the NHL. Other recent Section 1 challenges have been brought by former or prospective licensees.

In *American Needle*, the NFL convinced the court that the league and its member teams are a single entity and thus its unilateral actions cannot constitute an antitrust conspiracy. The court in *Madison Square Garden*, on the other hand, found that there was not sufficient evidence in the record to decide the single-entity question in the case of the NHL. However, there is no clear and reliable single-entity test, so permitting Section 1 challenges to the Properties arms of sports leagues to fail based on such a test may be unwise, especially when one considers that leagues may be able to offer strong pro-competitive rationales for their Properties arms under a rule of reason analysis, as MLB did in *Salvino*.