
**THE INTRA-ENTERPRISE CONSPIRACY
DOCTRINE IN *AMERICAN NEEDLE INC. V.
NATIONAL FOOTBALL LEAGUE*: ANTITRUST LAW
CONTINUES ITS PATH TOWARD RATIONALITY**

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Cite as: John O. Gunderson, *The Intra-Enterprise Conspiracy Doctrine in American Needle Inc. v. National Football League: Antitrust Law Continues Its Path Toward Rationality*, 4 SEVENTH CIRCUIT REV. 1 (2008), at <http://www.kentlaw.edu/7cr/v4-1/gunderson.pdf>.

INTRODUCTION

Thirty-two National Football League (NFL) teams battle one another each week, but each of these teams has at least one thing in common—Reebok, Inc., (“Reebok”) manufactures all of the uniforms worn during play, all of the hats and jackets worn on the sidelines, and each coach’s shirt, from Mike Holmgren’s polo shirt in Seattle to Bill Belichick’s hooded sweatshirt in New England. This is due to a trademark licensing agreement that the NFL entered into with Reebok in 2000.¹ At first blush, this arrangement might seem like a clear example of one of the great potential evils in American commerce—a monopoly. Further review of the situation (and litigation) has determined that it is not.

The primary goals of antitrust law are to protect American commerce from “restraints, monopolies, price-fixing, and price

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¹Richard Sandomir, *Reebok Strikes Exclusive Deal with N.F.L.*, L.A. TIMES, Dec. 20, 2000, available at <http://articles.latimes.com/2000/dec/20/business/fi-2360>.

discrimination”² and to create a more efficient economy.³ Antitrust law exists to prevent companies from restraining trade through the formation of trusts,⁴ conspiracies,⁵ and monopolies.⁶ These words are not defined in the Sherman Act itself, but according to Merriam-Webster’s Online Dictionary, “monopoly” means “exclusive ownership through legal privilege, command of supply, or concerted action,”⁷ a “trust” is “a combination of firms or corporations formed by a legal agreement,”⁸ and “conspiracy” is the act of “join[ing] in a secret agreement to do an unlawful or wrongful act . . .”⁹ As these definitions indicate, it is wrong to assume a Sherman Act violation at any time that there is only one competitor in a market. One example of a legal single-competitor market is the market for NFL-licensed apparel, which the Seventh Circuit Court of Appeals ruled not to be illegally monopolized by Reebok in *American Needle Inc. v. National Football League*.¹⁰

This article explains why the NFL’s exclusive licensing agreement with Reebok is considered legal and not a violation of the Sherman Antitrust Act. This article is divided into four parts. Part I provides a look at the origins behind and the history of antitrust legislation in the United States. Part II discusses the rise and fall of the intra-enterprise

² BLACK’S LAW DICTIONARY (8th ed. 2004).

³ Herbert Hovenkamp, *Distributive Justice and the Antitrust Laws*, 51 GEO. WASH. L. REV. 1 (1982).

⁴ 15 U.S.C. § 1 (2000).

⁵ *Id.*

⁶ *Id.* at § 2.

⁷ Monopoly – Definition from Merriam-Webster Online Dictionary, <http://www.merriam-webster.com/dictionary/Monopoly> (last visited December 2, 2008).

⁸ Trust – Definition from Merriam-Webster Online Dictionary, <http://www.merriam-webster.com/dictionary/Trust> (last visited December 2, 2008).

⁹ Conspiracy – Definition from Merriam-Webster Online Dictionary, <http://www.merriam-webster.com/dictionary/Conspiracy> (last visited December 2, 2008).

¹⁰ *American Needle Inc. v. National Football League*, 538 F.3d 736 (7th Cir. 2008).

conspiracy doctrine in American antitrust jurisprudence. This doctrine provided that a parent company and its wholly-owned subsidiary could satisfy the requirements of a conspiracy that could unlawfully restrain trade under the Sherman Act. Had this doctrine not been overturned by the Supreme Court in *Copperweld Corp. v. International Tube Corp.*, which ended forty years of existence for the intra-enterprise conspiracy doctrine, the NFL's exclusive licensing agreement would likely not have been upheld by the Seventh Circuit. Part II also details the *Copperweld* decision and describes how the *Copperweld* decision has been expanded in the twenty-four years since the court decided *Copperweld*. Part III explains the facts behind *American Needle Inc. v. National Football League* and details the Seventh Circuit's decision in that case. Finally, Part IV provides analysis of the Seventh Circuit's decision and explains why the court made the right decision.

I. ANTITRUST LEGISLATION

There are five main statutory bases for federal antitrust law in the United States.¹¹ These are the Sherman Act of 1890, the Clayton Act and the Federal Trade Commission Acts of 1914, the Robinson-Patman Act of 1936, and the Celler-Kefauver Amendments to the Clayton Act of 1950.¹² This section of the article will focus on the Sherman Act, as *American Needle Inc. v. National Football League* does not contain any claims made under any of the other four acts.¹³

¹¹ HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE 49 (2d ed. 1999).

¹² *Id.* at 49 n.17. The first antitrust act, the Sherman Act, is discussed further in this article. The Clayton Act and the Federal Trade Commission Act were largely aimed at deterring large businesses from engaging in "exclusionary" practices with respect to smaller businesses. *Id.* at 49. The Robinson-Patman Act made it unlawful to discriminate between purchasers via price if that discrimination resulted in reduced competition. *Id.* at 571-72. The Celler-Kefauver Amendments strengthened the Clayton Act's anti-merger provisions. *Id.* at 49.

¹³ See *American Needle*, 538 F.3d 736.

The Sherman Act was debated and passed in 1890, and at that time, most Americans lived in rural areas rather than in cities.¹⁴ Economies around the world had been very dependent on agriculture during the eighteenth century,¹⁵ and the United States was no exception.¹⁶ American farmers were very independent, often living alone on their land outside of towns and villages¹⁷ and generally only working together during the harvest.¹⁸

This fiercely independent spirit of the American farmer was understandably shocked by the Industrial Revolution during the second half of the eighteenth century.¹⁹ Rural Americans felt threatened by the economic power wielded by large firms such as railroads. These feelings were only exacerbated by the eventuality that these workers became dependent on the new, big companies to provide them with machinery needed to farm more effectively and with the transportation infrastructure to move what they produced.²⁰

There seemed to be only two options—Americans could either live with the increasingly large corporations or rely on the government to take over the corporations.²¹ Neither option proved attractive because Americans were largely as skeptical of the government as they were of large corporations.²² As a result, a third option materialized, which encouraged breaking up monopolies rather than having the government assume control.²³

¹⁴ LAWRENCE A. SULLIVAN & WARREN S. GRIMES, *THE LAW OF ANTITRUST: AN INTEGRATED HANDBOOK* 4 (2d. ed. 2006).

¹⁵ *See id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.* at 5.

This new wave of thinking produced the Sherman Act. The Sherman Act relies on two main provisions.²⁴ Section 1 of the Sherman Act makes it unlawful to contract or conspire in such a way as to restrain trade.²⁵ Section 2 of the Sherman Act goes a step farther and makes it illegal for a company to monopolize or even to attempt to monopolize.²⁶

Section 1 and Section 2 were both written using very broad terms, which leaves the statute open to interpretation by judges.²⁷ The broad language employed by the Sherman Act has achieved its goals. The path of the intra-enterprise conspiracy doctrine provides a perfect example of courts not only being able to interpret the Sherman Act broadly but also being able to reverse course when they deem it necessary.²⁸

II. INTRA-ENTERPRISE CONSPIRACY DOCTRINE

There is no language in the Sherman Act that says that two companies that are affiliated may avoid antitrust liability if they combine their efforts to compete. A literal reading of the Act would likely lead a reader to conclude that this sort of conduct should be prohibited. This likelihood seems even more probable when a statute is written broadly and invites judicial discretion as the Sherman Act does. As such, there developed a line of Supreme Court cases that prohibited this sort of conduct. The intra-enterprise conspiracy doctrine was the product of Supreme Court jurisprudence that began with *United States v. Yellow Cab Co.* in 1947 and lasted until 1984's *Copperweld Corp. v. Independence Tube Corp.* The doctrine stated that even a company and its wholly-owned subsidiary can engage in

²⁴ 15 U.S.C. §§ 1–7 (2000).

²⁵ *Id.* at § 1

²⁶ *Id.* at § 2

²⁷ SULLIVAN & GRIMES, *supra* note 11, at 7.

²⁸ *See* *United States v. Yellow Cab Co.*, 332 U.S. 218 (1947); *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984).

conduct that triggers liability under the Sherman Act.²⁹ The seemingly odd result of the intra-enterprise conspiracy doctrine is that two or more entities can act in such a way as to restrain trade—even though they have the same owner and are, presumably, operating toward the same ends. Though arguments against the doctrine arose to the Supreme Court rather frequently, it was consistently upheld for just under forty years.³⁰

A. Creation of the Doctrine: United States v. Yellow Cab Co.

In 1929, various owners of taxicab companies in Chicago, New York, and other cities commenced talks with the goal of merging some of the major cab companies.³¹ Morris Markin was the controlling shareholder of Checker Cab Manufacturing Corporation (“CCM”), which in turn owned 62% of the stock in Parmalee Transportation Company (“Parmalee”).³² Parmalee contracted with railroads and railroad terminal associations to transport passengers and luggage between the various stations in Chicago.³³ Parmalee then acquired a controlling interest in the Chicago Yellow Cab Company, Inc. (“Chicago Yellow”), which owned all of the stock of Yellow Cab Company (“Yellow”), which owned and operated all of the Yellow cabs in and around Chicago.³⁴

The next year, in 1930, Markin incorporated Cab Sales and Parts Corporation (“Cab Sales”), which owned and operated all Checker cabs in and around Chicago with licenses held by Checker Taxi Company.³⁵ Markin then acquired a large interest in DeLuxe Motor Cab Company—the third largest cab company in Chicago in 1929.³⁶

²⁹ See *Yellow Cab Co.*, 332 U.S. 218.

³⁰ See *id.*; *Copperweld*, 467 U.S. 752.

³¹ *Yellow Cab*, 332 U.S. at 220–221.

³² *Id.* at 221.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 221–222.

³⁶ *Id.* at 222.

Therefore, by 1930, Markin owned the three largest taxicab companies in Chicago.³⁷ Markin also had holdings in New York, Pittsburgh, Minneapolis, and Michigan,³⁸ therefore creating a “large, nation-wide obstacle[] in the channels of interstate trade” of the sort that the Sherman Act is designed to tackle.³⁹

The United States sued Yellow Cab, Chicago Yellow, Parmalee, Cab Sales, Checker, CCM, and Markin, claiming violations of Sections 1 and 2 of the Sherman Act.⁴⁰ *Yellow Cab* eventually made its way to the Supreme Court, and in Justice Murphy’s opinion, the Court held that “[t]he test of illegality under the Act is the presence or absence of an unreasonable restraint on interstate commerce.”⁴¹ The Court continued, saying “[s]uch a restraint may result as readily from a conspiracy among those who are affiliated or integrated under common ownership as from a conspiracy among those who are otherwise independent.”⁴² The Court held that “interrelationships of the conspirators” are unimportant in determining whether the Sherman Act applies to a particular situation.⁴³ The Court then cited its own precedent for support of the proposition that the Sherman Act concerns itself with “substance rather than form,”⁴⁴ meaning that for the purposes of the Sherman Act, what is important is that trade is restrained—it does not matter who does the restraining. The Court took a very literal interpretation of the Sherman Act and reasoned that neither who was restraining trade nor how the entities were related to one another mattered for the purposes of Sherman Act liability. As long as trade was restrained, a Sherman Act violation had occurred. Thus was born the intra-enterprise conspiracy doctrine.

³⁷ *Id.*

³⁸ *Id.* at 225.

³⁹ *Id.* at 226.

⁴⁰ *Id.* at 225.

⁴¹ *Id.* at 227.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* (citing *Appalachian Coals, Inc. v. United States*, 288 U.S. 344 (1933)).

B. Affirmation of the Doctrine: Kiefer Stewart, Timken Roller Bearing, and Perma Life Mufflers

Issues regarding antitrust liability involving conduct between two related entities did not cease with the Supreme Court's holding in *Yellow Cab*. Over the next thirty-seven years, the Court was given multiple opportunities to reverse course with regard to the holding in *Yellow Cab*.⁴⁵ The Court held firm, however, and stood by the intra-enterprise conspiracy doctrine developed *Yellow Cab*.

Interestingly, many times the Court did not take the time to revisit the rule from *Yellow Cab* and did little more than cite to *Yellow Cab* (and later to the other cases that followed its precedent) without taking a closer look as to why the rule was implemented or why it should continue to be followed.⁴⁶ Justice Jackson looked critically at the doctrine in one dissenting opinion,⁴⁷ but aside from this rather isolated example, the justices seemingly blindly followed *Yellow Cab*.

1. *Kiefer Stewart Co. v. Joseph E. Seagram & Sons, Inc.*

In 1950, the Court heard oral arguments in *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*⁴⁸ Kiefer-Stewart was an Indiana drug concern who also engaged in a liquor wholesaling business.⁴⁹ Seagram and a company called Calvert were affiliated companies that sold liquor to Indiana wholesalers.⁵⁰ Kiefer-Stewart sued, arguing that Seagram and Calvert had conspired to fix the prices at which they would sell liquor to Indiana wholesalers.⁵¹ Among the defenses raised

⁴⁵ See, e.g., *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 (1951); *Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951); *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968).

⁴⁶ See, e.g. *Kiefer-Stewart Co.*, 340 U.S. at 215; *Timken Roller Bearing Co.*, 341 U.S. at 599; *Perma Life Mufflers, Inc.*, 392 U.S. at 141–142.

⁴⁷ See *Timken Roller Bearing Co.* 341 U.S. at 606–608 (Jackson, J, dissenting).

⁴⁸ *Kiefer Stewart Co.*, 340 U.S. 211.

⁴⁹ *Id.* at 212.

⁵⁰ *Id.*

⁵¹ *Id.*

by Seagram and Calvert was the argument that because the two were affiliated companies, they were unable to violate the Sherman Act because they were actually one company and unable to conspire.⁵²

The Court cited *Yellow Cab* in declaring that common ownership does not “liberate corporations from the impact of the antitrust laws.”⁵³ With this holding, the intra-enterprise conspiracy doctrine lived on among Supreme Court jurisprudence.

2. *Timken Roller Bearing v. United States*

Another example of the intra-enterprise conspiracy doctrine came a few years later in 1951 in *Timken Roller Bearing Co. v. United States*.⁵⁴ In *Timken Roller Bearing*, the United States brought a civil action against Timken Roller Bearing Company (Timken) for allegedly violating Section 1 of the Sherman Act.⁵⁵ The case involved agreements made as far back as 1909, in which Timken made agreements with foreign companies to divide the world into territories to which the entities would provide antifriction bearings.⁵⁶ The agreements were made between 1909 and 1927, at which point Timken acquired a significant portion of British Timken, Ltd. (“British Timken”), which entered into the territorial agreements with Timken.⁵⁷ In 1928, Timken was involved in organizing Societe Anonyme Francaise Timken, a French company that also provided antifriction bearings.⁵⁸ The group then entered into agreements to “(1) allocate[] trade territories among themselves; (2) fix[] prices. . .; (3) cooperate[] to protect each other’s markets. . .; and (4) participate[] in cartels to restrict imports to, and exports from, the United States.”⁵⁹

⁵² See *id.* at 215.

⁵³ *Id.*

⁵⁴ *Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951).

⁵⁵ *Id.*

⁵⁶ *Id.* at 595.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* at 596.

Among its arguments attempting to show that the court should not have held that it restricted trade according to the Sherman Act, Timken argued that the arrangement was a joint venture, which it argued should exempt it from culpability under the Sherman Act.⁶⁰ The Court disagreed with this argument and cited to *Kiefer-Stewart* for the proposition that “[t]he fact that there is common ownership or control of the contracting corporations does not liberate them from the impact of the antitrust laws.”⁶¹

Timken Roller Bearing is significant, however, because it can be argued that this case is where chinks in the armor of the intra-enterprise conspiracy doctrine begin to appear. Though possibly only intended for companies affiliated across national borders, Justice Jackson provided a powerful dissent, in which he argued that preventing American companies from creating foreign subsidiaries (even if each only served a particular geographical area) may prevent American companies from expanding into foreign markets.⁶² Jackson went on to argue that there must be two entities in order to conspire because “a corporation cannot compete with itself.”⁶³ Jackson pointed out that in cases in which the *Yellow Cab* rule was applied, what would be legal for one company to do on its own became illegal when done by two legally separate entities.⁶⁴ According to Justice Jackson, “that result places too much weight on labels”⁶⁵ and “[the] decision [would] restrain more trade than it [would] make free.”⁶⁶

3. *Perma Life Mufflers, Inc. v. International Parts Corp.*

Though Justice Jackson voiced his disagreement with the intra-enterprise conspiracy doctrine in *Timken Roller Bearing*, the Court

⁶⁰ *Id.* at 597.

⁶¹ *Id.* at 598.

⁶² *Id.* at 606 (Jackson, J. dissenting).

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* at 607.

⁶⁶ *Id.* at 608.

was not precluded from upholding the intra-enterprise conspiracy doctrine seventeen years later when the Court heard oral arguments in *Perma Life Mufflers, Inc. v. International Parts Corp.*⁶⁷ *Perma Life Mufflers* is a notable case for two main reasons. First, the majority's opinion demonstrates that any potential movement toward overturning *Yellow Cab* and abolishing the intra-enterprise conspiracy doctrine that may have begun with Justice Jackson's dissenting opinion in *Timken Roller Bearing* had been quashed.⁶⁸ Second, *Perma Life Mufflers* is important because it shows that after over twenty years, the *Yellow Cab* decision still held strongly, as none of the Nine disagreed with its application in *Perma Life Mufflers*.⁶⁹

Perma Life Mufflers involved a set of facts similar to all of the other cases of its ilk.⁷⁰ In *Perma Life Mufflers*, a group of plaintiffs all operated muffler shops under the name "Midas Muffler Shops" pursuant to agreements entered into with Midas, Inc.⁷¹ The plaintiffs sued, claiming that Midas had conspired with, among others,⁷² its parent corporation, International Parts Corp. such that the parties had violated Section 1 of the Sherman Act.⁷³ International Parts Corp. argued that because the defendants were all part of a single business entity, they were legally allowed to act in concert as they had.⁷⁴ The Court stood firm in again reaffirming the intra-enterprise conspiracy doctrine as it held "the fact of common ownership could not save them from any of the obligations that the law imposes on separate entities."⁷⁵ Despite being asked again how a corporation can

⁶⁷ *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968).

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *See id.*

⁷¹ *Id.* at 135.

⁷² The plaintiffs also alleged that Midas, Inc. had conspired with two other subsidiaries of International Parts Corp. and six individual defendants. *Id.* These defendants are irrelevant to the analysis of the case under the intra-enterprise conspiracy doctrine.

⁷³ *Id.*

⁷⁴ *Id.* at 141.

⁷⁵ *Id.* at 141–142.

essentially collude with itself, the Court continued its bizarre line of jurisprudence that made it unlawful to do so even if the entities conspiring are held under common ownership.

Perma Life Mufflers is also very important for a second reason. Any movement toward a reversal of the Court's jurisprudence with regard to the intra-enterprise conspiracy doctrine that began with Justice Jackson's dissenting opinion in *Timken Roller Bearing* was halted, as none of the justices who wrote opinions⁷⁶ in *Perma Life Mufflers* even mentioned Justice Jackson's dissent.⁷⁷ Seventeen years had passed since *Timken Roller Bearing* had been decided, and Jackson had only been on the bench for three of those years. It seems apparent that his viewpoint questioning the rationale behind the intra-enterprise conspiracy doctrine had failed to gain any traction, and if the doctrine were going to be overturned, the doctrine's detractors would have to wait.

C. *Turning Point: Copperweld Corp. v. Independence Tube Corp.*

The Supreme Court, led by Chief Justice Berger, elected to change course with regard to the intra-enterprise conspiracy doctrine with its 1984 decision in *Copperweld Corp. v. Independence Tube Corp.*⁷⁸ Between 1955 and 1968, the predecessor to Regal Tube Co. (Regal) was located in Chicago and was a wholly owned subsidiary of C.E. Robinson Co.⁷⁹ In 1968, Lear Sigler, Inc. (Lear) purchased Regal and used it as an unincorporated division of Lear.⁸⁰ In 1972, Regal was sold to Copperweld Corp. (Copperweld).⁸¹ The sale agreement

⁷⁶ There were four separate opinions written in *Perma Life Mufflers* by Justices Black (majority), White (concurring), Marshall (concurring), Fortas (concurring in the result), and Harlan and Stewart (dissenting). It is noteworthy that by the time that *Perma Life Mufflers* was heard, Justice Jackson had been off of the bench for nearly fourteen years.

⁷⁷ *See id.*

⁷⁸ *Copperweld Corp. v. Independence Tube Corp.* 467 U.S. 752 (1984).

⁷⁹ *Id.* at 756.

⁸⁰ *Id.*

⁸¹ *Id.*

contained a five-year noncompetition clause that bound Lear and its subsidiaries not to compete with Regal in the United States.⁸² David Grohne was one of Lear's corporate officers and had previously served as vice president and general manager of Regal before Lear's acquisition of Regal.⁸³ Grohne had acted as president of Regal after it became a division of Lear after the acquisition.⁸⁴ Soon after Regal was sold to Copperweld, David Grohne sought to establish himself in the steel tubing market against his former employer, Regal, and he established Independence Tube Corp. (Independence).⁸⁵ Independence contracted with Yoder Co. (Yoder) to supply a tubing mill by the end of 1973.⁸⁶

Regal and Copperweld discovered Grohne's plans and sent a letter to Yoder that said that Copperweld would take "any and all steps which are necessary to protect [the] rights under [the] purchase agreement and to protect the know-how, trade secrets, etc., which [Copperweld] purchased from Lear Sigler."⁸⁷ Yoder then voided its acceptance to provide Grohne with a tubing mill, which caused Grohne to find another company to provide him with a mill and delayed his entry into the steel tube market for almost nine months.⁸⁸ In 1976, Independence sued Copperweld, Regal, and Yoder under Section 1 of the Sherman Act.⁸⁹ The jury returned a verdict saying, among other things, that Regal and Copperweld had conspired to violate Section 1 of the Sherman Act, but, interestingly, that Yoder had not been a part of the conspiracy.⁹⁰

The Seventh Circuit affirmed the District Court's decision, noting that Yoder's exoneration had left a parent corporation (Copperweld)

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* at 757.

⁸⁸ *Id.*

⁸⁹ *See id.* at 758.

⁹⁰ *Id.*

and its wholly owned subsidiary (Regal) as the only entities involved in the Section 1 conspiracy.⁹¹ The Seventh Circuit questioned this result, noting that conduct similar to the facts of *Copperweld* would not give rise to a cause of action if the two parties were a parent corporation and an unincorporated division of the parent.⁹² Ultimately, however, the Seventh Circuit affirmed the decision on the basis that liability ensues “when there is enough separation between the two entities to make treating them as two independent actors sensible.”⁹³

The Supreme Court granted certiorari and reversed the decision.⁹⁴ The Court examined the cases that provided the foundation for the intra-enterprise conspiracy doctrine and found other grounds that the past Courts could have used to decide *Yellow Cab* and *Kiefer-Stewart* in the same way in which they had already decided⁹⁵ and that cases that followed those two seminal cases do nothing more than cite *Yellow Cab* or *Kiefer-Stewart* also could have relied upon other bases⁹⁶ unrelated to the intra-enterprise conspiracy doctrine.

The Seventh Circuit was not alone in acknowledging the strange conclusion that a parent company was capable of conspiring with its wholly owned subsidiary to restrict trade—*Copperweld* and *Regal* were joined by the United States as amicus curiae in asking the Court to overturn *Yellow Cab*.⁹⁷ According to the Court, the chief criticism of the intra-enterprise conspiracy doctrine was that too much weight is

⁹¹ *Id.*

⁹² *Id.* at 758–59.

⁹³ *Id.* at 759 (quoting *Independence Tube Corp. v. Copperweld Corp.*, 691 F.2d 310, 318 (7th Cir. 1982), *rev'd*, 467 U.S. 752 (1984)).

⁹⁴ *Id.*

⁹⁵ *Id.* at 761 (stating that *Yellow Cab* was distinguishable based on the fact that the acquisitions were themselves illegal); *id.* at 764 (stating that *Kiefer-Stewart* was distinguishable based on the fact that subsidiaries conspired with wholesalers other than the plaintiff).

⁹⁶ *Id.* at 765 (stating that in *Timken Roller Bearing*, the defendant neither owned a majority interest in nor controlled either of the conspirators); *id.* at 766 (stating that *Perma Life Mufflers* could be decided on the same grounds as *Kiefer-Stewart*).

⁹⁷ *Id.*

given to the fact that a subsidiary is separately incorporated, causing the activity of one entity to be treated as the concerted activity of two separate entities.⁹⁸ In other words, a parent corporation could act in concert with a wholly-owned division of itself as long as that division was not itself separately established as a corporation. The Court went further, noting that Congress only intended the Sherman Act to be used on a single firm when that firm threatens monopolization⁹⁹ and that Section 1 of the Sherman Act is not intended to apply to activity that is “wholly unilateral.”¹⁰⁰

The Supreme Court also noted that “internal agreements” of companies do not arouse Sherman Act suspicion because (1) a single firm’s officers do not pursue separate economic interests, so they “do not suddenly bring together economic power that was previously pursuing divergent goals”;¹⁰¹ (2) internal coordination just as likely results from efforts to compete as from efforts to “stifle competition”;¹⁰² and (3) coordination may be required for a business to compete properly.¹⁰³ Furthermore, the Court noted its own precedent that if a subsidiary is an unincorporated division, then cooperation between it and its parent cannot violate section 1 of the Sherman Act.¹⁰⁴ The Court also pointed out that a parent and its wholly owned subsidiary have “a complete unity of interest”¹⁰⁵ in the same way that a parent company and an unincorporated division do. The Court analogized that single entities, like Copperweld and Regal, are “not unlike a multiple team of horses drawing a vehicle under the control of a single driver.”¹⁰⁶

⁹⁸ *Id.*

⁹⁹ *Id.* at 768; *see also* 15 U.S.C. § 2 (2000).

¹⁰⁰ *Id.* at 768 (quoting *Albrecht v. Herald Co.*, 390 U.S. 145, 149 (1968)). *See also* 15 U.S.C. § 1 (2000).

¹⁰¹ *Id.* at 769.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 770.

¹⁰⁵ *Id.* at 771.

¹⁰⁶ *Id.*

D. Extension of *Copperweld*

The decision in *Copperweld* signaled not only a large shift in Supreme Court jurisprudence by reversing a precedent adhered to for almost forty years, but also, in time, changed what arguments could be credibly made in front of courts with respect to single-entity issues in antitrust. In the years since the *Copperweld* decision, the “single-entity concept” has been extended far beyond its origins in which only a parent and its wholly-owned subsidiary could be declared a single entity.¹⁰⁷ Now, even affiliated companies or individuals can also be considered a single-entity with respect to the Sherman Act, depending on the circumstances of the individual case.¹⁰⁸ This extension of the *Copperweld* holding is the basis for the Seventh Circuit’s holding in favor of the National Football League, its member teams, NFL Properties, and Reebok with respect to the League’s decision to award an exclusive licensing contract with respect to headwear. This broadening of the *Copperweld* rule has been accomplished incrementally through a number of cases,¹⁰⁹ but this article will only examine two other sports-related cases to demonstrate courts’ approaches to extending *Copperweld*: *Chicago Professional Sports Limited Partnership v. National Basketball Association (Bulls II)* and *Brown v. Pro Football, Inc.*¹¹⁰

The controversy in *Bulls II* arose as a result of the Chicago Bulls’ desire to broadcast more of their games on WGN, a “superstation” based in Chicago that broadcasts nationwide to cable television subscribers.¹¹¹ During the case, the National Basketball Association (NBA) argued that the league should be treated as a single entity with

¹⁰⁷ *See id.*

¹⁰⁸ *See Chicago Professional Sports Limited Partnership v. National Basketball Association (Bulls II)*, 95 F.3d 593 (7th Cir. 2006).

¹⁰⁹ *See, e.g. Jack Russell Terrier Network v. American Kennel Club, Inc.*, 407 F.3d 1027 (9th Cir. 2004); *City of Mount Pleasant, Iowa v. Associated Electric Cooperative*, 838 F.2d 268 (8th Cir. 1988).

¹¹⁰ *Bulls II*, 95 F.3d 593; *Brown v. Pro Football, Inc.*, 518 U.S. 231 (1996).

¹¹¹ *Bulls II*, 95 F.3d at 595.

respect to granting rights to televise its games.¹¹² The Seventh Circuit pointed out in its *Bulls II* decision that the NBA's argument requires a decision to either treat the league as a single firm, thereby only applying Section 2 of the Sherman Act, or to treat the league as a joint venture, which would possibly invoke liability under Section 1 of the Sherman Act.¹¹³ Ultimately, the Seventh Circuit did not answer this question, though the court did point out that courts have come to both conclusions.¹¹⁴

Perhaps the most important statement that the Seventh Circuit made in *Bulls II* was when the court proclaimed sports to be “sufficiently diverse that it is essential to investigate their organization and ask *Copperweld*'s functional question one league at a time—and perhaps one facet of a league at a time.”¹¹⁵ The court also stated that a league may qualify as both a single entity and a joint venture at the same time, albeit for purposes of antitrust analysis of different aspects of the league.¹¹⁶ With this said, it is instructive to look another NFL case, *Brown v. Pro Football, Inc.*

Brown is slightly different from the other cases analyzed in this article. While that case does not directly implicate either the upholding or the reversal of the intra-enterprise conspiracy doctrine, the Supreme Court did analyze whether the league constituted a single employer or multiple employers for collective bargaining purposes.¹¹⁷ The Court had difficulty deciding how to characterize the league and ultimately

¹¹² *Id.* at 596.

¹¹³ *Id.* at 599.

¹¹⁴ *See id.* (“Most courts that have asked whether professional sports leagues should be treated like single firms or like joint ventures have preferred the joint venture characterization.” (citing *Sullivan v. NFL*, 34 F.3d 1091 (1st Cir. 1994); *North American Soccer League v. NFL*, 670 F.2d 1249 (2d Cir. 1982); *Smith v. Pro Football, Inc.* 593 F.2d 1173, 1179 (D.C. Cir. 1978))); *but see Bulls II*, 95 F.3d at 599 (noting that Justice Rehnquist filed a strong dissent in *NFL v. North American Soccer League* and noting also that the Fourth Circuit has concluded that the Professional Golf Association should be treated as one firm for antitrust purposes).

¹¹⁵ *Id.* at 600.

¹¹⁶ *Id.*

¹¹⁷ *See Brown*, 518 U.S. 231.

held that the league can be considered a “single bargaining employer” with respect to hiring and paying practice squad players.¹¹⁸ In *Bulls II*, Judge Easterbrook noted that despite the fact that the NFL is “‘more like a single bargaining employer’ than a multi-employer unit is not to say that it necessarily is one, for every purpose.”¹¹⁹

Having explained the basic origins of antitrust law in the United States and the rise and fall of the intra-enterprise conspiracy doctrine, it is now instructive to apply these concepts to the case at the core of this article, *American Needle, Inc. v. National Football League*.

III. AMERICAN NEEDLE INC. V. NATIONAL FOOTBALL LEAGUE

The National Football League (NFL) has been in existence for almost ninety years,¹²⁰ and during its existence, the league has become wildly successful by almost any measure, including attendance,¹²¹ television revenue,¹²² players’ salaries,¹²³ and franchise values.¹²⁴ The

¹¹⁸ A practice squad player is a player who practices with the team and can be used to supplement the team’s roster should one of the team’s regular players become unavailable due to injury or for some other reason.

¹¹⁹ *Bulls II*, 95 F.3d at 599.

¹²⁰ *American Needle, Inc. v. National Football League*, 538 F.3d 736, 737 (7th Cir. 2008).

¹²¹ In 2007, the NFL set a new paid attendance record with a total attendance of 22,256,502 including all 333 preseason, regular-season, and postseason games. This works out to an average attendance of 66,836. *NFL Sets Attendance Record in 2007*, available at <http://www.nfl.com/news/story?id=09000d5d8077f84d&template=without-video&confirm=true> (last visited November 12, 2008).

¹²² Fox pays \$4.3 billion to televise NFC games; CBS pays \$3.7 billion to televise AFC games. These contracts are for the 2006–2011 seasons and include only Sunday afternoon games. The NFL also has a contract with DirecTV that includes the 2006–2010 seasons for the satellite provider’s NFL Sunday Ticket package. *Late Season Games can be Moved to Sunday Nights*, available at <http://sports.espn.go.com/nfl/news/story?id=1918761> (last visited November 12, 2008). In addition to these contracts, the NFL has a contract to televise Monday night during the 2006–2013 seasons for \$1.1 billion per year. Steve Kroner, *Monday Night Football to leave ABC for ESPN*, S.F. CHRON., April 19, 2005, at A-1. The league also has a six-year contract worth \$3.6 billion with NBC to televise Sunday

right to produce and market officially-licensed league apparel is the basis of the lawsuit brought against the league, its member teams, NFL Properties LLC (collectively, “the NFL defendants”) and Reebok International Ltd. (Reebok) by American Needle Inc. (American Needle).¹²⁵

The NFL is an unincorporated association of thirty-two individually owned and operated franchises around the United States.¹²⁶ The NFL’s member teams play over 250 games in a given season, and it is these games that serve as the league’s product.¹²⁷ The Seventh Circuit notes that although each team is an individual unit by itself, no team can produce the league’s product—the games—alone.¹²⁸ In this way, all of the league’s teams are inextricably bound together, and each team’s individual success is linked to the success of all of the others.¹²⁹ In other words, “it makes little difference if a team wins the Super Bowl if no one cares about the Super Bowl.”¹³⁰ As

night games. Joanna Weiss, *NBC: Sunday Night’s Alright for Football*, available at http://www.boston.com/ae/tv/articles/2006/07/24/nbc_sunday_nights_all_right_for_football/ (last visited November 12, 2008).

¹²³ NFL payrolls for 2008 range between \$83.6 million (Kansas City) and \$152.4 million (Oakland). Pittsburgh’s Ben Roethlisberger is the league’s highest paid player, earning \$27.7 million between his salary (\$2.5 million) and signing bonus (\$25.2 million). Larry Weissman, *NFL Salaries ’08: Big Ben Smiling as Highest-Paid Player*, USA TODAY, available at http://www.usatoday.com/sports/football/nfl/2008-11-05-salaries_N.htm (last visited November 12, 2008).

¹²⁴ In 2008, Forbes Magazine found that the average NFL franchise is worth over \$1 billion. The league’s most valuable franchise is the Dallas Cowboys, which Forbes estimates is worth \$1.612 billion. Press Release, *Forbes*, *Forbes Announces 2008 NFL Franchise Valuations: League Average \$1 Billion For The First Time In Any Professional Sport* (Sept. 10, 2008) (on file with author).

¹²⁵ *American Needle, Inc. v. National Football League*, 538 F.3d 736 (7th Cir. 2008).

¹²⁶ *Id.* at 737.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

such, the NFL sought to promote the trademarks of its member teams and the league itself as a collective whole with the intention of competing against other forms of entertainment rather than against one another.¹³¹

As a result of this intention to compete against other forms of entertainment, the NFL teams created NFL Properties (Properties) in 1963.¹³² Properties is given the dual responsibilities of both “developing, licensing, and marketing the intellectual property the teams own[], such as their logos, trademarks, and other indicia” and “conduct[ing] and engag[ing] in advertising campaigns and promotional ventures on behalf of the NFL and [its] member [teams].”¹³³ Properties was given the power to issue licenses to manufacturers of different types of team merchandise and apparel, including flags, shirts, jerseys, and hats.¹³⁴

The last of these, the right to produce league-licensed hats, gave rise to *American Needle Inc. v. National Football League*.¹³⁵ American Needle (American Needle) owned a license to manufacture NFL headwear for over twenty years.¹³⁶ During this time, Properties allowed multiple companies to hold headwear licenses at any given time,¹³⁷ but Properties changed its policy in 2000 and elected to continue on with an exclusive headwear license.¹³⁸ Reebok was the highest bidder, was granted the license, and became the NFL’s exclusive provider of headwear as of 2001.¹³⁹ Reebok’s exclusive license will not expire until 2011.¹⁴⁰

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *See id.*

¹³⁶ *Id.* at 738.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

Upon losing its license, American Needle filed suit in the United States District Court for the Northern District of Illinois.¹⁴¹ American Needle made two separate arguments. First, it argued that the exclusive apparel license granted to Reebok violated Section 1 of the Sherman Act, because each individual franchise owns its own team logos and trademarks.¹⁴² So, when the teams charged Properties with awarding an exclusive apparel license and Properties granted that license to Reebok, the result was an illegal conspiracy “restrict[ing] other vendors’ ability to obtain licenses for the teams’ intellectual property.”¹⁴³ Second, American Needle argued that an unlawful monopoly was created when Properties granted Reebok its exclusive headwear license.¹⁴⁴ According to American Needle, this monopoly was created in the specialized market of NFL team licensing and product wholesale.¹⁴⁵

The NFL defendants moved for summary judgment with regard to American Needle’s Section 1 claim, citing the Supreme Court’s holding in *Copperweld Corp. v. Independence Tube Corp.*¹⁴⁶ The NFL defendants relied on the gradual extension of the rule laid down in *Copperweld*—affiliated companies can be considered a single entity in certain circumstances and therefore cannot violate Section 1 of the Sherman Act in those circumstances.¹⁴⁷ The NFL defendants argued that they should be considered a single entity when promoting the league through the licensing of their respective intellectual property.¹⁴⁸

Rather than file a brief in response to the NFL defendants’ motion, American Needle filed a motion for a continuance under Federal Rule

¹⁴¹ *American Needle, Inc. v. New Orleans Louisiana Saints*, 496 F.Supp.2d 941 (N.D. Ill. 2007).

¹⁴² *American Needle*, 538 F.3d at 738.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

of Civil Procedure Rule 56(f),¹⁴⁹ requested an opportunity to take discovery on the issue of the NFL defendants' single-entity defense, and listed fifty-one discovery requests.¹⁵⁰ Following a struggle regarding what evidence needed to be turned over to American Needle,¹⁵¹ the district court denied the Rule 56(f) motion and granted the NFL defendants' motion for summary judgment regarding American Needle's Section 1 claim.

The district court's ruling on the NFL defendants' summary judgment motion was largely based on the fact that Properties was established in order to "promote NFL football" through collective licensing.¹⁵² The court concluded that these efforts to promote the league as a whole through collective-licensing demonstrates that the league and its member teams "act[] as an economic unit" and therefore "should be deemed to be a single entity."¹⁵³ The court used this analysis to find that the NFL defendants, as a single entity, are unable

¹⁴⁹ Federal Rule of Civil Procedure 56(f) provides, "[if] a party opposing . . . cannot . . . present by affidavit facts essential to justify the party's opposition, the court may . . . order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had. . ." FED. R. CIV. P. 54(f). In essence, the rule allows the non-moving party to argue to the court that it is unable to respond without receiving more discovery materials from the moving party. *Id.*

¹⁵⁰ *American Needle*, 538 F.3d at 739.

¹⁵¹ The NFL defendants objected to American Needle's requests, arguing that they were not limited to the defense that they had proffered. The NFL defendants did ultimately offer a number of documents, and the court encouraged American Needle to reduce the number of documents that it had requested while it reserved judgment with regard to the objection that the NFL defendants raised. American Needle then made yet more requests, causing the NFL defendants to again object. With this further request and objection, the district court entered an order limiting discovery to the NFL defendants' single-entity defense and ordered the NFL defendants to produce all documents with respect to that issue. The NFL defendants complied; American Needle filed another motion under Rule 56(f) and made forty-nine more requests, many of them the same requests made earlier. The court then took this motion under advisement and compelled American Needle to respond to the motion for summary judgment. *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

to violate Section 1 of the Sherman Act.¹⁵⁴ As a result of this collective action, American Needle's claim failed as a matter of law.

Following its decision on American Needle's Section 1 claim, the court requested that the two sides file briefs regarding American Needle's other claim—that the NFL defendants had created an illegal monopoly under Section 2 of the Sherman Act.¹⁵⁵ Upon receipt of the briefs, the court came to the conclusion that its finding with regard to American Needle's Section 1 claim also caused the Section 2 claim to fail, because single entities, such as the NFL and its teams, can license their collective intellectual property to any number of licensees without breaking antitrust laws.¹⁵⁶

American Needle appealed the district court's decision to the Seventh Circuit on two separate grounds: (1) the district court improperly denied its Rule 56(f) motion prior to granting summary judgment, and (2) the district court incorrectly granted the NFL defendants' motion for summary judgment on both its Section 1 claim and its Section 2 claim.¹⁵⁷ The Seventh Circuit applied an abuse of discretion standard of review to American Needle's first argument¹⁵⁸ and a *de novo* standard to its second.¹⁵⁹ When an abuse of discretion standard of review is used, the appellate court must defer to the lower court's findings unless the appellate court finds that the lower court exercised too much discretion in coming to its findings. *De novo* review means that the appellate court can look at the entire record from the lower court and can come to its own independent finding if necessary. Pursuant to these standards of error, the Seventh Circuit affirmed both of the district court's findings.¹⁶⁰

With regard to its argument that the district court improperly denied its Rule 56(f) motion, American Needle claimed that the

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 740.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 741.

¹⁶⁰ *Id.* at 744.

district court allowed the NFL defendants to “control the flow of information” by refusing to order the NFL defendants to turn over documents that American Needle requested.¹⁶¹ American Needle further claimed that the district court failed to adequately explain its decision.¹⁶² The Seventh Circuit disagreed, saying that the court adequately explained itself and, thereby, did not abuse its discretion.¹⁶³ The Seventh Circuit pointed out that in order for American Needle’s motion to succeed, there needed to be some specific evidence that American Needle could have obtained that would have created a question of liability.¹⁶⁴ In other words, a party cannot simply “go fishing” and expect the other side to be ordered to turn over any evidence in its possession that goes against its argument. American Needle argued that a single entity finding is “fact intensive,” but this alone cannot require the NFL defendants to turn over any additional evidence, because just because something is “fact intensive” does not mean that the required facts are not included in what has already been turned over.¹⁶⁵

The Seventh Circuit also denied American Needle’s second argument, finding that the district court properly granted summary judgment in favor of the NFL defendants.¹⁶⁶ American Needle contended that the district court erred in concluding that the NFL defendants constitute a single entity under the rule from *Copperweld*, and so were capable of violating Section 1.¹⁶⁷ The Seventh Circuit admitted that this is a question that does not have a readily-identifiable answer, and the court pointed out that in some instances, the single-entity formulation seems apt, while in others, a professional sports league is more properly described as a joint venture among a

¹⁶¹ *Id.* at 740.

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 741.

¹⁶⁶ *Id.* at 744.

¹⁶⁷ *Id.* at 741.

collection of independently-owned teams.¹⁶⁸ The court cites to *Bulls II* in pointing out that the league is a “single source” for purposes of entertainment and that the teams produce “one product”—the league’s games.¹⁶⁹ However, the court also cites to *Brown v. Pro Football, Inc.* in pointing out that when a person seeks employment in such a league, the teams act as separate entities that each have the ability to hire and fire their own employees.¹⁷⁰

IV. ANALYSIS

The Seventh Circuit made a well-informed and considered decision in *American Needle v. National Football League*. In past cases, the idea of single-entity treatment for sports leagues has been considered, but it has not been accepted with respect to all questions and all aspects of the league.¹⁷¹ This represents a judicial minimalist viewpoint toward single-entity treatment, and courts should continue to follow this model, despite compelling arguments to treat sports leagues in other ways, such as joint ventures¹⁷² or even treating the individual franchises as separate, individual entities.

The Seventh Circuit wisely elected to follow the path begun by more recent intra-enterprise conspiracy doctrine cases and decided only what it had to in order to resolve this particular case. The effect was that the court neither over- nor under-reached while making its calculated decision in *American Needle*. Though the Seventh Circuit’s decision neither has a large direct impact on existing law nor created any new precedent to be followed by other courts, the decision in *American Needle* is important because it shows antitrust law’s continued evolution away from the seemingly incongruous results created by the intra-enterprise conspiracy doctrine.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ See *Chicago Professional Sports Limited Partnership v. National Basketball Association (Bulls II)*, 95 F.3d 593 (7th Cir. 2006).

¹⁷² See *id.* at 601–06 (Cudahy, Circuit Judge, concurring).

A. Courts Should Use Incremental Advancement of Single-Entity Status in Antitrust Cases

Judicial minimalism is the idea that each case that comes in front of a court presents its own facts and its own unique questions and these questions should be answered with respect to that particular case's facts.¹⁷³ In other words, judicial minimalists hold that court decisions should not contain broad statements of law, but rather that each case should be decided individually and that law should move and evolve slowly and incrementally. To this point in time, the single entity concept has moved in this way—*Copperweld* began the movement by allowing a parent and its wholly-owned subsidiary to be treated as a single actor with respect to questions arising under the Sherman Act;¹⁷⁴ *Bulls II* advances the idea that the National Basketball Association (NBA) could be treated as a single entity with respect to creating television contracts;¹⁷⁵ *Mt. Pleasant v. Associated Electric Co.* involves an electric cooperative that was treated as a single firm;¹⁷⁶ and even the Professional Golf Association (a collection of individual players) has been treated as a single entity.¹⁷⁷

A judicial minimalist approach to the single-entity concept will help protect against potentially unforeseen problems that can accompany unwarranted expansion of the law. For instance, the Seventh Circuit's holding in *American Needle* and the Supreme Court's holding in *Brown v. Pro Football, Inc.* demonstrate that even one league can raise questions that would be answered in different ways. In *American Needle*, the Seventh Circuit held that the league and its teams should be considered one entity with respect to

¹⁷³ See Christopher J. Peters, *Assessing the New Judicial Minimalism*, 100 COLUM. L. REV. 1454, 1455 (2000).

¹⁷⁴ *Copperweld Corp. v. Independence Tube Corp.* 467 U.S. 752 (1984).

¹⁷⁵ See *Bulls II*, 95 F.3d 593.

¹⁷⁶ See *Mt. Pleasant v. Associate Electric Cooperative*, 838 F.2d 268 (8th Cir. 1988).

¹⁷⁷ See *Seabury Management, Inc. v. Professional Golfers' Ass'n of America*, 878 F. Supp. 771 (D. Md. 1994).

trademark licensing.¹⁷⁸ However, in *Brown*, the Supreme Court noted that players coming into the league would see each team as an individual employer with the ability to hire and fire employees and sign and cut players.¹⁷⁹ Had *American Needle* been decided before *Brown*, and had the Seventh Circuit made a broad pronouncement that the NFL and its teams are to be treated as a single entity, the issues in *Brown* likely would never have been raised and considered on their own merits. The court would not have been given the opportunity to decide the case in the way in which it did, because the court would not have had the discretion to be selective regarding when to treat a professional sports league as a single entity and when to treat it as a collection of individual entities.

On the other hand, allowing courts to use their discretion to treat the league as a single entity in some cases and as separate entities in others could conceivably create confusion. Additionally, this discretion will create a situation in which courts often will not be able to rely on precedent because an independent inquiry would have to be conducted regarding each aspect of an entity. This inability to rely on precedent threatens to further burden an already busy judiciary that could benefit from a reduction in appeals and an increase in settlements. Despite this drawback, however, courts should continue to follow this path, because the league does not always act as either a single entity or a collection of separate entities at all times. This approach, while potentially inconsistent, is likely to produce the fairest results.

¹⁷⁸ *American Needle, Inc. v. National Football League*, 538 F.3d 736 (7th Cir. 2008).

¹⁷⁹ *Id.* at 741 (citing *Brown v. Pro Football, Inc.*, 518 U.S. 231, 248–249 (1996)).

B. The NFL Should Be Considered a Single-Entity With Respect to Intellectual Property Licensing for Apparel

The Seventh Circuit made the right conclusions while analyzing the NFL defendants' argument that they should be treated as a single entity with respect to potential violations under the Sherman Act in *American Needle v. National Football League*. There are three reasons why the court made the right holding: (1) the NFL and its co-defendants made a compelling argument that they produce one product, namely "NFL football;"¹⁸⁰ (2) the NFL's history indicates that it created Properties for the purpose of marketing and promoting the league and its product as a whole;¹⁸¹ and (3) the pertinent market in *American Needle* should be drawn more broadly and encompass more than simply "NFL apparel."

1. "NFL Football": A Unique Product

The Seventh Circuit held that the NFL and its member teams create a single product that can be identified as "NFL football."¹⁸² The Seventh Circuit cites to several sources of very persuasive authority in holding that NFL football constitutes a unique product that is produced by the thirty-two NFL franchises and the league itself. The Seventh Circuit points to a Supreme Court decision in which the Court quotes Robert Bork's book, *The Antitrust Paradox*, in which Bork creates a hypothetical professional lacrosse league and points out that it would be fruitless for the league to be held as violating the Sherman Act because there are no other leagues.¹⁸³ The Seventh Circuit also cites to itself in the *Bulls II* decision in which it argues that "the NBA has no existence independent of sports. It makes professional basketball; only

¹⁸⁰ *Id.* at 743.

¹⁸¹ *Id.* at 737.

¹⁸² *Id.* at 743.

¹⁸³ *Id.* (citing *National Collegiate Athletic Association v. Board of Regents*, 468 U.S. 85, 101 (quoting ROBERT BORK, *THE ANTITRUST PARADOX* 278 (1978))). Note: Bork's book was written before there was a professional lacrosse league in the United States.

it can make ‘NBA Basketball’ games”¹⁸⁴ This point about the NBA is a valid one, as NCAA basketball is a popular sport in its own right, and provides a unique experience when compared to the NBA.¹⁸⁵ In much the same way, NFL Football is a product that is distinct from NCAA football. For example, NCAA football is generally played on Saturdays as opposed to Sundays, has its own unique championship system distinct from the NFL’s,¹⁸⁶ and has separate television contracts,¹⁸⁷ among other differences.

Granted, NFL Football and college football are not exactly analogous, because the NFL features professional athletes, while (at least in theory) NCAA football features amateurs.¹⁸⁸ Perhaps the most convincing argument that NFL Football is a unique product is that two rival professional football leagues, the United States Football League (USFL)¹⁸⁹ and the XFL¹⁹⁰ have been created in the past thirty years and the fact that neither remains in existence today demonstrates that neither served as a viable alternative to the NFL.

Even leagues that were created without the intention of being a direct competitor to the NFL have failed. For example, in 1990, the World League of American Football (WLAF) was formed with the

¹⁸⁴ *Id.* (quoting Chicago Professional Sports Limited Partnership v. National Basketball Association (*Bulls II*), 95 F.3d 593, 599 (7th Cir. 2006)).

¹⁸⁵ CBS signed a contract extension with the NCAA in 1999 to pay \$6 billion for the rights to televise the NCAA basketball tournament. CBS Renews NCAA B’Ball, CNN MONEY, Nov. 18, 1999, <http://money.cnn.com/1999/11/18/news/ncaa/> (last visited November 12, 2008).

¹⁸⁶ Bowl Championship Series, <http://www.bcsfootball.org> (last visited November 12, 2008).

¹⁸⁷ See Notre Dame agrees to five-year extension with NBC, ESPN, June 19, 2008, <http://sports.espn.go.com/ncf/news/story?id=3452161> (last visited November 12, 2008).

¹⁸⁸ NCAA Operating Bylaw Art.12.01.1 (2008).

¹⁸⁹ See The History of the USFL 1982–1986, <http://www.remembertheusfl.8m.com/history.html> (last visited November 12, 2008).

¹⁹⁰ See C.W. Nevius, *Extinct: NBC, WWF pull the plug on XFL after just one season of anything-goes football*, S.F. CHRON., May 11, 2001, at A-1.

support of the NFL¹⁹¹ and lasted only two seasons.¹⁹² Two years went by before the league was resumed under the name “World League,” and some form of the revamped league continued on until 2007, when the league was disbanded.¹⁹³ Even since the league went under in 2007, the NFL has continued to play a regular season game each season in London,¹⁹⁴ from which one can infer that the failure of the league was not due to the fact that it was football being played, but rather that it was not NFL Football being played.

That NFL Football is a unique entertainment product justifies its treatment as a single entity in *American Needle*. The argument can be made that if the league were not treated as a single entity in some respects, it would be at a severe disadvantage when competing against other types of entertainment, such as network and cable television, the motion picture industry, and even popular vacation destinations, such as Disneyland. All of these other competitors in the “entertainment business” can all create their products alone, whereas NFL Football is only created when at least two teams are affiliated into a league and play one another. Furthermore, while it is conceivable that an individual team could fail economically, the league would likely go on, albeit with one fewer team.

¹⁹¹ History, <http://worldleagueofamericanfootball.com/id23.html> (last visited November 12, 2008).

¹⁹² *Id.*

¹⁹³ The league later went by the name NFL Europe and later NFL Europa but still failed. NFL Folds Europe League, to Focus on Regular-Season Games Abroad, ESPN, June 29, 2007, <http://sports.espn.go.com/nfl/news/story?id=2920738> (last visited November 12, 2008).

¹⁹⁴ Wembley to host Dolphins & Giants, http://news.bbc.co.uk/sport1/hi/other_sports/american_football/6248825.stm (last visited November 12, 2008); NFL Chargers/Saints Wembley clash sure to be a sell-out, Daily Mail Online, June 27, 2008, <http://www.dailymail.co.uk/sport/othersports/article-1029997/NFL-Chargers-Saints-Wembley-clash-certain-sell-out.html> (last visited November 12, 2008).

2. The NFL Created NFL Properties With the Goal of Promoting the Teams and the League as a Whole

Judge Kanne’s Seventh Circuit opinion in *American Needle* listed this reason as being the most important for determining that in this case, the NFL was acting as a single entity.¹⁹⁵ Judge Kanne noted 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.”¹⁹⁶ The *American Needle* opinion even goes so far as to quote NFL Properties’ Articles of Incorporation as saying that its purpose is “[t]o conduct and engage in advertising campaigns and promotional ventures on behalf of the [NFL] and the member [teams].”¹⁹⁷ Therefore, as a result of forming NFL Properties in 1963, the league has actively engaged in a collective effort to promote and further the league as a whole in its efforts to compete against other forms of entertainment. That NFL Properties was created, coupled with the mission that it was given indicates that the league was aware of its need to raise its profile as a whole in order to compete in the entertainment world.

3. The Market Should Be Drawn Narrowly for Analysis in Antitrust Cases

It may seem strange, but for the purpose of an antitrust law analysis or other competition-related liability, such as trademark violations, the market analyzed can be just as important, if not more so, than the behavior itself that is alleged to violate the law.

An example from the realm of trademark law is useful for the purpose of illustration. In *Wallace International Silversmiths, Inc. v. Godinger Silver Art Co., Inc.*, the question posed was whether one

¹⁹⁵ *American Needle, Inc. v. National Football League*, 538 F.3d 736, 744 (7th Cir. 2008).

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

producer of silverware had violated the trademark of another.¹⁹⁸ The Second Circuit's decision turned, in part, on what the relevant market for the silverware was—the court held that the relevant market was that for baroque-style silverware, not silverware in general and found no trademark violation.¹⁹⁹

For the purpose of antitrust law, the analysis should be the opposite of that used in *Wallace International Silversmiths, Inc.* If the NFL's single entity argument is accepted and the thirty-two NFL franchises are treated as a single-entity creating a single product to compete in the broad entertainment market, then it follows that the market for apparel would be similarly broadened to encompass the apparel of other entities. Under this analysis, Minnesota Vikings apparel would not be held to compete against Chicago Bears apparel; rather, the two would together compete against, for example, Major League Baseball (MLB) apparel and NBA apparel, and even licensed apparel for television shows and movies.

If the NFL's exclusive ten-year, \$250 million apparel contract²⁰⁰ with Reebok is any indication, there is a lot of money to be made in licensed-apparel. Though not exclusive like the NFL's contract, MLB signed contracts in 2003 with seven apparel manufacturers collectively worth about \$500 million over five years.²⁰¹

¹⁹⁸ *Wallace International Silversmiths, Inc. v. Godinger Silver Art Co.*, 916 F.2d 76 (2d Cir. 1990), *cert. denied*, 499 U.S. 976 (1991).

¹⁹⁹ *Id.* at 81.

²⁰⁰ Richard Sandomir, *Pro Football; Reebok Strikes Exclusive Deal With N.F.L.*, NEW YORK TIMES, <http://query.nytimes.com/gst/fullpage.html?res=9C0DE0D71039F933A15751C1A9669C8B63> (last visited November 12, 2008).

²⁰¹ Barry M. Bloom, *MLB Signs New Apparel Agreements*, MLB.COM, Aug. 4, 2003, http://mlb.mlb.com/news/article.jsp?ymd=20030804&content_id=460263&vkey=news_mlb&fext=.jsp&c_id=mlb (last visited November 12, 2008).

CONCLUSION

The Seventh Circuit's opinion in *American Needle, Inc. v. National Football League*, while not overly surprising given the trajectory of the antitrust law in the wake of *Copperweld*, provides a good example of courts resolving single entity questions as they arise and not making overly broad holdings that will handcuff courts in future situations. Courts should continue along the Seventh Circuit's path and continue to develop this area of antitrust law gradually, without making sweeping policy holdings.