U.S. Supreme Court Rules that National Football League's Exclusive Trademark Licensing Regime Is Subject to Rule of Reason Review

The U.S. Supreme Court today, in *American Needle, Inc. v. National Football League*, 560 U.S. ___ (2010), unanimously reinstated a challenge to an intellectual property licensing joint venture of the 32 teams of the National Football League ("NFL"). The Court held that the teams are competitors at least with respect to the licensing of their intellectual property and, therefore, that a combination of those activities must be judged under the rule of reason. The NFL had argued that the joint venture — NFL Properties — was a single entity under *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984), and therefore could not be challenged under Section 1 of the Sherman Act. With today's holding, the Court reaffirmed its commitment to a "functional" analysis of such arrangements rather than a formalistic reliance on legal labels or structures. As a result, the decision is likely to have a significant impact well beyond the sports league context, shaping litigation and client counseling in the areas of joint ventures, trade associations, and intellectual property licensing.

Background

Plaintiff American Needle, Inc. ("American Needle") was one of several manufacturers that held a license to manufacture headwear bearing the logos of the various NFL teams. However, in 2000, NFL Properties, a corporate entity formed by the NFL teams to license and market team intellectual property and engage in advertising and other promotional activities, received authorization from the teams to hold a competitive bidding process for an exclusive license to create NFL-logoed headwear. As a result of that bidding process, in 2001 the NFL entered into an exclusive licensing agreement with Reebok International Ltd. ("Reebok"), under which Reebok received a 10-year exclusive license to produce and market headwear with NFL team logos, and cancelled all previously existing licenses (including American Needle's).

American Needle sued the NFL and Reebok, arguing that the exclusive license agreement violated Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 & 2 (2006). The United States District Court for the Northern District of Illinois granted summary judgment in favor of the NFL, and American Needle appealed. The U.S. Court of Appeals for the Seventh Circuit affirmed, holding, among other things, that "the NFL teams are best described as a single source of economic power when promoting NFL football through licensing the teams' intellectual property." Because the teams function as a single entity in the licensing context, the Seventh Circuit held they could not be liable under Section 1 because Section 1 requires a conspiracy, necessitating the participation of more than one entity.

American Needle petitioned for a writ of certiorari. The NFL, the winning side in the Seventh Circuit, took the unusual step of urging the Court to grant certiorari to address whether the NFL teams are a single entity. The Supreme Court granted certiorari to determine whether the 32 teams of the NFL are in fact a single entity for licensing purposes.

The Opinion of the Court

On May 24, 2010, the Court unanimously reversed the Seventh Circuit. After setting out in detail the distinction between Sections 1 and 2 of the Sherman Act, the Court observed that the test for whether concerted action exists does not depend on "formalistic distinctions" regarding "whether the parties involved are legally distinct entities," but instead depends on "a functional consideration of how the parties involved in the alleged anticompetitive conduct actually operate." The Court rejected the "single entity" terminology, stating, "[T]he question is not whether the defendant is a legally single entity or has a single name; nor is the question whether the parties involved 'seem' like one firm or multiple firms in any metaphysical sense." Rather, quoting Section 1 of the Sherman Act, *Copperweld*, and a First Circuit decision, the Court held that "[t]he relevant inquiry . . . is whether there is a 'contract, combination . . . , or conspiracy' amongst 'separate economic actors pursuing separate economic interests' such that the agreement 'deprives the marketplace of independent centers of decisionmaking,' and therefore of 'diversity of entrepreneurial interests.'"

Applying this standard, the Court found that each NFL team is "a substantial, independently owned, and independently managed business." Perhaps most significantly for the analysis in this particular case, the Court found that the teams were competitors in the market for intellectual property. The Court observed that the teams are "potentially competing suppliers of valuable trademarks" to producers of logoed apparel, and thus that, "Decisions . . . to license their separately owned trademarks collectively and to only one vendor are decisions that 'depriv[e] the market of independent centers of decisionmaking,' and therefore of actual or potential competition."

The Court dismissed the argument that the NFL teams had effectively merged their rights by forming NFL Properties, holding that "[a]n ongoing § 1 violation cannot evade §1 scrutiny simply by giving the ongoing violation a name and label." Likewise, the Court found that the fact that the teams had made joint licensing decisions since 1963 was irrelevant, observing, "[A] history of concerted activity does not immunize conduct from §1 scrutiny." The Court made clear that joint ventures receive no special leniency in antitrust analysis, stating, "A 'contract, combination . . . or conspiracy,' §1, that is necessary or useful to a joint venture is still a 'contract combination . . . or conspiracy' if it 'deprives the marketplace of independent centers of decisionmaking.'"

The Court did allow that the "NFL teams share an interest in making the entire league successful and profitable, and that they must cooperate" in many areas. Because of this, the Court stated that "the restraint must be judged according to the flexible Rule of Reason." The Court seemed to invite a "quick-look" analysis on remand, observing, "[D]epending on the concerted activity in question, the Rule of Reason may not require a detailed analysis; it 'can sometimes be applied in the twinkling of an eye.'"

The Impact of the Decision

The immediate impact of this decision is to expose the NFL (and by extension every other professional sports league) to antitrust suits over joint business activities that are not essential to presenting the core product — sports exhibitions — that requires their cooperation in the first place. While certain activities, such as broadcasting, are governed by more specific rules, sports leagues should think long and hard about entering into exclusive licensing contracts or other arrangements that could be construed as limiting competition in an area where the teams could be expected to compete without undermining the overall viability of the league.

The same is true with respect to joint business activities in other spheres. The decision indicates that the courts are required to examine a joint activity closely to determine whether it may "deprive[] the marketplace of independent centers of decisionmaking" and not rely on formalistic labels to determine whether Section 1 concerted action is present. It goes without saying that participants in such ventures, and those who counsel them, should do the same.

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