Splitting the Uprights: How the Seventh Circuit's American Needle Holding Created a Circuit Split and Exempted the NFL from Antitrust Scrutiny, and Why the Supreme Court Should Overturn the Seventh Circuit

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Recommended Citation
Derek Taylor, Splitting the Uprights: How the Seventh Circuit's American Needle Holding Created a Circuit Split and Exempted the NFL from Antitrust Scrutiny, and Why the Supreme Court Should Overturn the Seventh Circuit, 6 DePaul J. Sports L. & Contemp. Probs. 143 (2010) Available at: https://via.library.depaul.edu/jslcp/vol6/iss2/2

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SPLITTING THE UPRIGHTS: HOW THE SEVENTH CIRCUIT'S AMERICAN NEEDLE HOLDING CREATED A CIRCUIT SPLIT AND EXEMPTED THE NFL FROM ANTITRUST SCRUTINY, AND WHY THE SUPREME COURT SHOULD OVERTURN THE SEVENTH CIRCUIT

Derek Taylor*

INTRODUCTION

"'[American Needle] could easily turn out to be the most significant sports law decision ever.'"\(^1\)

—Dean Gary Roberts

"'[T]he notion of concerted action liability in the field of professional sports is at best confusing.'"\(^2\)

—Judge Michael S. Kanne

Against a convoluted backdrop, I will attempt, as many courts have before me, to analyze the perplexing, potentially groundbreaking single entity issue. Recently, the Seventh Circuit held in American Needle v. NFL that the National Football League's (NFL) thirty-two teams acted as a single entity when they banded together to collectively license intellectual property rights to merchandisers.\(^3\) When deciding whether the NFL's conduct was subject to Sherman Act Section

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3. Id. at 744.
One or Section Two, the Seventh Circuit could have defined the conduct to be one of three types along a continuum, either that of (1) a single entity, (2) a joint venture, or (3) an agreement. Rather than characterize the teams' conduct as an agreement or joint venture, the Seventh Circuit said the NFL teams acted as a single unit through the NFL, which means Section One does not apply. The Seventh Circuit's holding creates a circuit split, as several circuit courts have held that sports leagues are not single entities and a recent Second Circuit opinion applied the rule of reason to MLB's collective licensing of intellectual property. As the paper will show, because of the circuit split and the effect of the Seventh Circuit's decision, the Supreme Court, after recently granting certiorari in American Needle, should now overturn it. Even if the Court does not overturn the Seventh Circuit, Congress may soon retrench by making the NFL subject to antitrust scrutiny even for television licensing by revoking the federal statute it enacted in 1961. California Representative Maxine Waters recently told NFL Commissioner Roger Goodell that it is now time for "Congress to take a look at your antitrust exemption," saying she believes it should be removed.

The United States' legal structure is similar to the NFL's or any other major sports league's structure. The NFL's head office creates rules for all teams and players to follow. Congress similarly creates rules for states and citizens to follow. Federal courts then enforce the rules when citizens break them. NFL referees apply the NFL rules when deciding whether to penalize a team or player, or allow play to continue. If courts misapply the law or inconsistently apply the law so as to create a circuit split, the Supreme Court occasionally weighs in to resolve the ambiguity in the law by looking to Congress' legislative

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4. As discussed later, Judge Easterbrook's 1996 Chicago Bulls decision expressed the continuum of conduct. Chi. Prof'l Sports Ltd. P'ship v. NBA, 95 F.3d 593, 598 (7th Cir. 1996). The continuum might look like the following:

<table>
<thead>
<tr>
<th>SINGLE ENTITY</th>
<th>JOINT VENTURE</th>
<th>HORIZONTAL AGREEMENT</th>
</tr>
</thead>
<tbody>
<tr>
<td>Section Two applies</td>
<td>Section One Rule of Reason Applies</td>
<td>Section One Per Se or Rule of Reason Applies</td>
</tr>
</tbody>
</table>

5. Id.


intent. Similarly, the head official or NFL rulemaking committee, with guidance from the NFL's intent, sometimes clarifies an ambiguous field of play rule for teams to follow and referees to enforce. Congress enacted the Sherman Act to protect economic competition for consumers' benefit. The NFL, too, designed playing rules to benefit its consumers—football fans. But what happens when NFL referees make calls that simply are not in the NFL rulebook?

For instance, suppose the NFL playing rules do not prohibit a certain action. A select group of referees, however, start penalizing that action each time they see it. Even though the NFL writes rules to prohibit all actions it believes will harm the game of football or football players, one group of referees continues to penalize an unwritten action. Other referees, however, do not penalize the action because the NFL rules do not prohibit that action. They believe that the only prohibited conduct is that conduct the NFL expressly disallows in the NFL Rules. And until the NFL writes a rule to prohibit that conduct, not only is it legal, but players and teams should engage in that conduct when it will benefit the team. Meanwhile, the head of the officiating committee recognizes the refereeing split, but refuses to address it and instead allows the two groups of referees to call games differently. Fans, teams, and players are all outraged because the refereeing split creates two sets of rules and compromises the integrity of the game.

Recent court decisions have created a similar split in the sports leagues' collective licensing context. Sports leagues—like the NFL—create collective agencies to sell individual team's intellectual property rights. Buyers of these rights then use the license to sell merchandise bearing an NFL team's logo to NFL fans. Even though separate, competing individuals own each NFL team, the NFL collectively requires each team to allow a single agency to sell its valuable property rights to merchandisers. The single agency then occasionally enters into an exclusive deal with a single merchandiser so that one merchandiser then creates all the NFL merchandise that fans may purchase to support their team. No one else may offer products that are more creative or less expensive because the exclusive deal eliminated competitors.

Without acquiring a given team's intellectual property rights, a merchandiser cannot sell a product bearing that team's logo. Thus, because the NFL's collective licensing agent sells all NFL teams' property rights to a single, behemoth merchandiser—like Reebok—smaller merchandisers have no opportunity to compete, at least legally.
With surprising regularity, appellate courts continue to decide whether sports leagues are single entities differently. The Supreme Court has not stepped in to resolve the circuit split. After recently asking the Solicitor General for advice in reviewing a petition for certiorari in the American Needle case, the Court has decided to hear American Needle. Congress, until Rep. Waters' comments in late October 2009, continued to sit on the sidelines, even though it previously acted to exempt a very similar practice by sports leagues from antitrust law.

In Part I, this paper will describe how U.S. sports leagues sell intellectual property rights. Part II will then explain the relevant antitrust law, why collective licensing presents an antitrust problem, and how the Seventh Circuit created a circuit split by granting the NFL the single entity defense. Finally, in Part III, I will call on the Supreme Court to resolve the single entity circuit split, and illustrate how Congress can override the Court if it disagrees with the Court's resolution of the split.

PART I: SPORTS LEAGUES' COLLECTIVE LICENSING AGENCIES

The United States has four major sports leagues: the NFL, Major League Baseball (MLB), National Hockey League (NHL), and National Basketball Association (NBA). Each league is similarly structured. Wealthy individuals typically own franchises. Each franchise is a member of its respective league. Each franchise remains responsible for hiring coaches, players, and employees, and then training each of these individuals to promote on-field play in order to lure fans into stadium seats to generate revenue. To attract fans, owners give their collection of individuals an identity. The identity is a team name. A catchy, aesthetically-appealing logo helps fans identify with the team they support. So rather than calling a favorite team "the collection of players named Tony Romo, Marion Barber III, Roy Williams, DeMarcus Ware, and others owned by Jerry Jones," one can simply say "the Dallas Cowboys" and point to the famous Cowboys' Star. A collective identity conveniently lends itself to marketing the "Dallas Cowboys" name alongside the Star on apparel for fans to wear to show their support.

10. Associated Press, supra note 8.
Some teams are more popular than others, sell more merchandise, and generate more revenue. With more revenue, these teams could spend more money to acquire better football talent. And better on-field talent typically gives a team a better chance to win games.\(^{13}\)

Professional sports leagues, though, must ensure that teams are generally equal.\(^{14}\) If one team consistently annihilated its competitors, fans would lose interest. After all, fans are drawn to sports in large part because they offer an uncertain outcome. Professional sports leagues have devised a variety of plans to make teams more financially even.\(^{15}\)

As some waiters in restaurants “pool” their tips at the end of a shift and split them equally, sports leagues decided that teams would do the same after selling trademark licenses to merchandisers.\(^{16}\) Rather than each team fending for itself and keeping its own merchandising revenues, the teams collectively sell their intellectual property rights through a single entity, and then share the revenues equally from each sale. For instance, MLB’s agreement requires all “Clubs . . . [to] appoint MLBP as their exclusive agent worldwide to conduct, for their benefit, directly or indirectly . . . all (i) Promotional Licensing Activities; (ii) Retail Licensing Activities; [and] (iii) licensing of all Content . . . .”\(^{17}\) MLBP is Major League Baseball Properties, Inc., and it alone licenses all MLB teams’ intellectual property rights to merchandisers. The MLB agreement expressly stated that “each of the Clubs hereby agrees that it will not grant any third party the right to use, or license for use, any of its Content or its Media Rights to Games during the term of this Agreement.”\(^{18}\) The Agreement is only

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13. Perhaps the timing of my Dallas Cowboys analogy is poor. Even with superior talent, and a higher payroll relative to other teams, the Cowboys have managed to define mediocrity over the past fifteen years.

14. Andrew Zimbalist, May the Best Team Win: Baseball Economics and Public Policy 88 (2003). Zimbalist explains that “high payrolls greatly increase the probability of strong team performance, while low payrolls greatly lower this probability.” Id. Leagues, therefore, strive to balance competition so that no one team will consistently beat opponents.

15. Many leagues use a variety of devices to achieve competitive balance, including a salary cap, player draft, or revenue-sharing agreement. In MLB, which does not have a salary cap, the owners indicated in 2002 that they wanted three devices in the new collective bargaining agreement to promote competitive balance: a luxury tax, an increase in revenue sharing, and a worldwide player draft. See Andrew P. Hanson, The Trend Toward Principled Negotiation in Major League Baseball Collective Bargaining, 12 Sports L. J. 221, 233 (2008).


18. Id. at § 2.7.
effective upon a three-fourths vote of the member-Clubs. It provides that MLBP sells the Clubs’ content to a merchandiser, and after it deducts its commission and expenses for acting as the exclusive agent, the Clubs agree that MLBP will pay the remaining income “in equal shares out of the MLBP Accounts” to each Club. At least three-fourths of the teams agreed that all thirty MLB teams would use an exclusive licensing agent and thereafter share revenues equally, which MLB teams now do.

MLB is not alone in granting exclusive licenses. Each of the four major U.S. sports leagues does so with different exclusive agent names. The NFL’s agent is called NFL Properties, the NHL’s is NHL ICE, and the NBA’s is NBA Properties, Inc. Of the four sports leagues, only MLB still has no salary cap. A salary cap is meant to maintain competitive balance between a league’s teams by capping salary expenses of each team so that no one team exorbitantly spends to acquire superior talent. But the leagues with salary caps still agree to use an exclusive licensing agent, purportedly for competitive balance.

Thus, currently, all major sports employ an exclusive licensing agent. Collective agents then sell licensing rights to merchandisers so they can create apparel for the consuming public. NFL Properties, for example, licensed all NFL teams’ licenses for headwear to a single merchandiser, Reebok. Because of the exclusive license, smaller merchandisers, like American Needle Inc., have alleged that they lost the chance to compete in the NFL headwear market.

A critical issue for collective licensing by sports leagues is whether antitrust law even governs the conduct at all. If sports leagues’ collective licensing conduct is not permissible, it will be because it violates antitrust law.

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19. Id. at § 3. The teams agreed not to allow any rule changes affecting all teams without three-fourths of the teams approving the change.

20. Id. at § 7.7.


27. Id.
A. Section One: Agreements Unreasonably Restraining Interstate Trade

1. Restraints of Trade

The first Section One element requires an agreement, the central focus of this paper. But before exploring the first element in-depth, the second and third elements deserve brief attention. The "restraint of trade" element, "if read in the narrowest possible way . . . could be deemed . . ." to prohibit any agreement between businesses. The Supreme Court, however, adopted a "rule of reason" analysis in United States v. Standard Oil for most Section One violations so that only agreements unreasonably restraining trade are illegal. "[B]ecause of their pernicious effect on competition and lack of any redeeming virtues," some agreements "are conclusively presumed to be unreasonable and therefore illegal . . . ." In other words, if a given agreement imposes a naked restraint on trade, courts will declare it per se illegal, without inquiring into the restraint's reasonableness. Courts can identify these naked restraints only "after considerable experience with certain business relationships" and can then declare them per se illegal each time they see them. Generally, horizontal restraints on competition have no purpose other than stifling competition. Horizontal restraints are agreements among competitors, for example, agreements between competing manufacturers, competing

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28. Congress enacted the Sherman Act in 1890 to free economic competition from undue restraints of trade and to prevent businesses from monopolizing markets. Standard Oil Co. v. United States, 221 U.S. 1, 59-60 (1911). The Sherman Act boasts two primary sections designed to combat these harms. Id. at 49-50. The first section states that "[e]very contract, combination . . ., or conspiracy, in restraint of trade or commerce among the several states . . . is declared to be illegal." 15 U.S.C. § 1 (2004). Section One aimed to prohibit individuals or businesses from making agreements designed to unduly restrain economic competition. Id. at 59-60. To show that another violated this provision, then, an individual must show that (1) two or more entities made an agreement (2) in restraint of trade (3) affecting interstate commerce. 15 U.S.C. § 1. Because Congress wrote the Act broadly and without guidance as to what conduct satisfies each element, courts further defined each of these elements. See, e.g., Standard Oil Co., 221 U.S. at 59-60.

33. Topco, 405 U.S. at 609, 611.
34. Id. at 607-08.
35. Id. at 608.
distributors, or competing retailers. Thus, *per se* restraints require no economic analysis.

In contrast, rule of reason cases, or cases where the agreement at hand is not obviously an unreasonable restraint of trade, require a court to balance competitive effects. Specifically, a court must balance a practice's anticompetitive effects against its procompetitive justifications. The analysis requires both the plaintiff and defendant to bear the burden of proof at times. Initially, the plaintiff must show that the defendant's agreement has an anticompetitive—or substantially adverse—effect on competition. If the plaintiff does so successfully, then the defendant must offer procompetitive justifications for its conduct. If the defendant shows procompetitive justifications, then the plaintiff may respond by showing that the defendant could engage in less restrictive conduct to achieve its desired goal. If each party meets its burden, the fact-finder must weigh the anticompetitive effects against the procompetitive justifications to determine if the conduct is reasonable. Thus, the rule of reason differs from *per se* analysis because courts do not categorically determine that the challenged conduct is anticompetitive without considering any procompetitive justifications.

The determination of whether challenged conduct deserves rule of reason analysis, then, is critical. In the cases involving sports leagues, courts characterize the leagues as needing horizontal restraints of some sort to offer a product at all. In *NCAA v. Board of Regents*, the Supreme Court noted that "[h]orizontal price fixing and output limitation are ordinarily condemned as a matter of law under an 'illegal *per se* approach . . . .'" It recognized, however, that because the competitive sports industry requires horizontal restraints on competition if the product—competition itself—is to be available at all, sports' leagues otherwise *per se* illegal horizontal restraints deserve rule of reason review. Thus, in *Board of Regents*, even though the

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36. See id.
38. Id. at 50 n.16.
40. Id.
41. Id.
42. Id.
43. Id.
44. Id. at 1017.
45. Id. at 1018.
47. Id. at 100-01, 103.
NCAA-member schools agreed through the NCAA to limit individual schools’ ability to negotiate television contracts, thereby horizontally limiting output, the Court applied rule of reason review to the NCAA’s conduct. A sports-related characterization, then, saved the NCAA from per se illegality. It did not, however, save the NCAA from illegality under the rule of reason.

After networks began to televise football games, NCAA schools began to worry that live attendance at non-televised games would suffer. Through the NCAA, the member schools agreed to contract exclusively with ABC and CBS for a four-year period from 1982-1985. The schools also agreed to limit the number of appearances any one team may have and to set the number of games that the networks must broadcast. While each network had to broadcast at least 82 games during each two-year period, from 1982-1983 and 1984-1985, no single university could appear more than six total times in a given year or four times nationally. In response to the plan, several of the prominent programs banded together to form a group to negotiate separately with networks for television appearances. After the new group successfully negotiated a deal with NBC, the NCAA threatened to sanction any participating universities in football and other sports, as well. Because the NCAA prohibited individual schools from negotiating with networks outside of the plan, prices were higher and output—televised games—was lower than it would have been.

After narrowly defining the affected market as telecasts for college football, the Court went on to find the NCAA’s restrictive television plan unreasonable for several reasons. The Court first reasoned that “since broadcasting rights to college football constitutes a unique product for which there is no ready substitute, there is no need for collective action in order to enable the product to compete against nonexistent competition.” The Court also rejected the NCAA’s purported justification in protecting live attendance at games since the Sherman Act is designed to foster competition. Thus, “the Rule of Reason does not support a defense based on the assumption that com-

48. Id. at 98, 103.
49. Id. at 115.
50. Id. at 92.
51. Id. at 94.
52. Id.
53. Id. at 94-5.
54. Id.
55. Id. at 106-08.
56. Id. at 115. In this case, the “collective action” was the agreement between the NCAA-member institutions through the NCAA to restrict television output.
petition itself is unreasonable.’” The Court also rejected the NCAA’s argument that it needed the plan for competitive balance. This justification failed both because the NCAA did not show that the television plan actually equalized competition and because it was not even tailored to serving that interest in the first place. Instead, the plan merely imposed a restriction “on one source of revenue that is more important to some colleges than to others.” The NCAA’s plan was, therefore, illegal under the Sherman Act primarily because it eliminated competition and did not actually promote competitive balance. Even the Court’s sports-based rule of reason could not save the NCAA from antitrust liability.

2. Agreement

a. Agreements and Combinations

Section One of the Sherman Act requires concerted action that unreasonably restrains interstate trade. “The Sherman Act contains a ‘basic distinction between concerted and independent action.’” Section Two condemns certain conduct by single firms approaching or attaining monopolization. When conduct results from concerted activity, however, Section One applies “more sternly than unilateral activity under § 2.” Congress treated concerted activity more strictly because it is “inherently fraught with anticompetitive risk” when “two or more entities that previously pursued their own interests separately are combining to act as one for their common benefit.” Horizontal agreements to fix prices, allocate markets, or rig bids are deemed per se illegal because they interfere with the free market’s operation.

57. Id. at 117 (quoting Nat’l Soc’y of Prof’l Eng’rs v. Unites States, 453 U.S. 679, 696 (1978)).
58. Id. at 117-9.
59. Id. at 119-20.
60. Id. at 120.
61. As I explained above, Section One has three elements, the second of which is that the agreement restraining trade must also affect interstate commerce. For over 80 years, the Court said baseball did not affect interstate commerce. See, e.g., Fed. Baseball Club of Baltimore v. Nat’l League of Prof’l Base Ball Clubs, 259 U.S. 200, 208 (1922); Toolson v. New York Yankees, Inc., 346 U.S. 356, 357 (1953); Flood v. Kuhn, 407 U.S. 258, 283-85 (1972). Congress did, however, recently pass the Curt Flood Act, which makes baseball “subject to the antitrust laws” just like other sports. 15 U.S.C. § 26b (a) (2002). The second element of Section One is, therefore, given in the sports context when each professional league plays games in multiple U.S. states and Canada.
64. Id. at 767-68.
65. Id. at 768.
66. Id. at 768-69.
67. See id. at 768.
i. Single entity status: Copperweld

A firm's internal coordination between officers, directors, and employees is unilateral action. Coordination between a corporation and one of its own unincorporated divisions is also unilateral action. In Copperweld v. Independence Tube, the Supreme Court held that action between a parent company and its wholly owned subsidiary was that of a single enterprise not subject to Section One. The Court reasoned that a corporation should not be punished because it clothes one of its subunits in different clothing—as a corporation rather than an unincorporated subdivision. The "corporation has complete power to maintain a wholly owned subsidiary in either form."

If the Court had held otherwise, it would force corporations to create subunits as unincorporated divisions rather than as wholly owned corporations, depriving consumers of the benefits of corporations over unincorporated divisions. Thus, when the parent company "may assert full control at any moment if the subsidiary fails to act in the parent's best interests," the two act as a single unit. Single units do not fall within Section One, and therefore do not face rule of reason review. If a firm acts as a single entity, the plaintiff's claim, if any, must arise from Section Two's prohibition against monopolization. As the Court in Copperweld explained, a plaintiff must produce stronger evidence and a court must engage in more thorough analysis to find an antitrust violation under Section Two.

68. Id. at 769.
69. Id. at 770.
70. Id. at 771.
71. Id. at 773-4.
72. Id. at 772.
73. Id. at 772-3. The Court explained the benefits in saying, "[s]eparate incorporation may reduce federal or state taxes or facilitate compliance with regulatory or reporting laws. Local incorporation may also improve local identification. Investors or lenders may prefer to specialize in a particular aspect of a conglomerate's business. Different parts of the business may require different pension or profit-sharing plans or different accounting practices." Id. at 773 n.20.
74. Id. at 771-2.
75. Id.
76. Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 767-8 (1984). A single firm, under Section Two review, may be aggressive and efficient. It may, therefore, take consumers from an inefficient competitor without violating antitrust laws. It is important for courts to distinguish between superior firms increasing in size as opposed to firms using anticompetitive tactics to increase size. A plaintiff, then, must provide evidence to define the market, prove the firm has monopoly power in that market, and show that a firm used an illegal practice to obtain or maintain monopoly power.
ii. Sports leagues' conduct as the result of a Section One agreement

In the sports context, federal circuit courts are split on whether sports leagues are single entities. This section will organize the sports league decisions into: (1) cases where courts have found an agreement and (2) cases where courts have found the conduct to be that of a single entity.

In Board of Regents, the Supreme Court held that the "NCAA is an association of schools which compete against each other to attract television revenues, not to mention fans and athletes." The Court also said that "participating in an association which prevents member institutions from competing against each other on the basis of price or kind ..." creates "a horizontal restraint-an agreement among competitors on the way in which they will compete with one another." The NCAA-member Division-I Universities therefore did have an agreement, even though they acted through the NCAA—a separate, private entity. Board of Regents was decided on June 27, 1984. Copperweld—the Court's seminal single entity case—was decided on June 19, 1984, only eight days before Board of Regents. Yet the Court did not even mention the single entity issue in Board of Regents, a case involving 187 universities acting through the voluntary NCAA. Instead, the Court exempted the NCAA from otherwise per se treatment. As noted, the Court's approach to a sports league engaging in a horizontal restraint was to examine it under rule of reason analysis rather than the per se rule.

Over thirty years ago, the Los Angeles (L.A.) Coliseum lost its tenant, the Rams, to the city of St. Louis. It then began negotiating with Oakland Raiders' owner Al Davis to move the Raiders to L.A. But NFL rules required unanimous approval of all twenty-eight NFL team owners for a franchise to move. When the owners met regarding the Raiders' move to L.A., twenty-two owners voted against the

78. Id. (emphasis added).
79. Id.
80. Id. at 85.
81. Copperweld Corp., 467 U.S. at 752.
82. See generally Bd. of Regents, 468 U.S. 85.
83. See id. at 103.
84. Id.
85. L.A. Memorial Coliseum Comm. v. NFL et. al., 726 F.2d 1381, 1384 (9th Cir. 1984).
86. Id.
87. Id. In 1979, the NFL owners met and changed the rule to require three-fourths owners' approval rather than unanimous consent. Id. at 1385.
move and five teams abstained. Davis would have needed twenty-four votes favoring the move to prevail. Davis and the Coliseum challenged the NFL’s rules as a Section One antitrust violation, which ultimately led to the Ninth Circuit. In defense, the NFL argued that it operates as a joint venture and is therefore a single entity not subject to Section One. Davis and the Coliseum countered that the NFL was a league comprised of “28 separate legal entities [acting] independently.”

Both the district court and Ninth Circuit agreed with Davis and the Coliseum. The Ninth Circuit held that if it now tolerated such a loophole, it “would permit league members to escape antitrust responsibility for any restraint entered into by them that would benefit their league or enhance their ability to compete even though the benefit would be outweighed by its anticompetitive effects.” It also found, as the Supreme Court had, that merely labeling an agreement a “joint venture” does not save it from antitrust scrutiny because “every agreement and combination in restraint of trade could be so labeled.” The court noted that while the NFL must cooperate to produce the NFL season, limited cooperation does not then preclude Section One scrutiny. Because “NFL clubs do compete with one another off the field as well as on to acquire players, coaches, and management personnel[,]” Section One applies. The court applied rule of reason review to the NFL’s league rule and upheld the jury’s finding, which was that the NFL rule was unnecessary. Thus, rule of reason review determined whether the rule violated Section One. Had the court deemed the NFL teams to be acting as a single entity, it would have dismissed the complaint. The Ninth Circuit therefore held that the NFL teams formed an agreement restraining trade.

Ten years later, in Sullivan v. NFL, the New England Patriots’ owner challenged the NFL’s rule requiring three-fourths of its owners to approve all transfers of NFL team ownership to anyone other than family members. Sullivan wanted to sell 49% of his ownership to

88. Id.
89. Id. at 1385.
90. Id. at 1387.
91. Id.
92. Id. at 1387-8.
93. Id. at 1388.
94. Id. (citing Timken Roller Bearing Co. v. United States, 341 U.S. 593, 598 (1951)).
95. L.A. Memorial Coliseum Comm., 726 F.2d at 1389.
96. Id. at 1390.
97. Id. at 1390-8.
98. Id. at 1095.
the public as publicly traded stock. He never sought the needed approval because he believed it would be futile based on his discussions with Commissioner Pete Rozelle. Sullivan instead brought a Section One action, and won a $38 million jury verdict. Rather than assent that the teams acted as a single entity, the NFL first argued that its teams "do not compete against each other for the sale of their ownership interests." Like the Ninth Circuit, the First Circuit held that "it is well established that NFL clubs also compete with each other, both on and off the field, for things like fan support, players, coaches, ticket sales, local broadcast revenues, and the sale of team paraphernalia." The NFL argued that the Supreme Court's Copperweld decision required the court to find that the NFL is a single entity. In response, the First Circuit reiterated that NFL teams do compete, on and off the field, and therefore "pursue diverse interests and thus are not a single enterprise under § 1." It then applied the rule of reason. The court reversed and remanded only because the plaintiff discussed prior cases involving the NFL, and the court felt these cases, coupled with the jury instructions, might have misled the jury. Given a new trial, the court felt the jury could properly weigh the NFL's proffered justifications against the anticompetitive harms of the rule.

Recently, the Sixth Circuit rejected a sports league's single entity argument. The NHL Player's Association (NHLPA) challenged an Ontario Hockey League (OHL), a professional major-junior hockey league with teams in Canada and the United States, rule prohibiting teams from carrying more than three "overage players." The OHL required overage players to be registered under either the Canadian Hockey Association or USA Hockey Player's Registration. The

99. Id.
100. Id. at 1096.
101. Id. The court reduced this amount to $17 million, and then trebled this amount to $51 million for Sullivan. Id.
102. Id. at 1098.
103. Id.
104. Id. at 1099. The Ninth Circuit's decision in L.A. Memorial Coliseum Comm. came four months before the Court decided Copperweld. The NFL must have believed that Copperweld precluded section one scrutiny for an organization structured like the NFL. So it raised the argument in this First Circuit case, Sullivan.
105. Id.
106. Id. at 1111.
107. Id. at 1113
108. Id. at 1113-4.
110. Id. Overage players are those twenty years old or older.
111. Id.
NCAA simultaneously prevented players holding either registration from playing for an NCAA college hockey team.\textsuperscript{112}

Together the two rules prohibited OHL teams from signing NCAA players because they would not have either of the required registrations.\textsuperscript{113} Two twenty-year old hockey players challenged the OHL rules under Section One.\textsuperscript{114} Although the OHL did not argue that it was a single entity, the Sixth Circuit nonetheless held that “[j]ust as the National Football League could not be accurately characterized as a ‘single economic entity,’ neither could the OHL, which exists only as constituted by its twenty member teams.”\textsuperscript{115} The OHL’s adoption of the challenged rule thus represented “an agreement between multiple actors, as required by Section 1 of the Sherman Act.”\textsuperscript{116}

Like other circuit courts, the Sixth Circuit then reviewed the OHL’s conduct under the rule of reason.\textsuperscript{117} The players’ claim against the OHL failed because they could not demonstrate antitrust injury emanating from the OHL rule.\textsuperscript{118} Similarly, an alleged conspiracy between the OHL and NHL failed because they did not show requisite antitrust injury.\textsuperscript{119}

In September of 2008, one month after the Seventh Circuit decided the \textit{American Needle} case to be discussed later in the paper, the Second Circuit joined the First, Sixth, and Ninth Circuits with its decision in \textit{MLBP v. Salvino}.\textsuperscript{120} \textit{MLBP} acts exclusively to collectively license all intellectual property for the 30 MLB teams.\textsuperscript{121} Salvino makes and sells stuffed plush animals similar to “beanie babies” that bear MLB team logos.\textsuperscript{122} Until 1998, Salvino secured licenses from MLB before selling merchandise bearing MLB logos.\textsuperscript{123} In 1998, however, MLB learned that Salvino sold the plush animals to a MLB club without obtaining a license from \textit{MLBP}.\textsuperscript{124} \textit{MLBP} sent Salvino a cease-and-desist letter in 1999 and Salvino responded by filing an antitrust suit, alleging both Section One and Two violations.\textsuperscript{125}

\begin{itemize}
  \item \textsuperscript{112} \textit{Id.}
  \item \textsuperscript{113} \textit{Id.}
  \item \textsuperscript{114} \textit{Id. at} 467-9.
  \item \textsuperscript{115} \textit{Id. at} 470 (internal citations omitted).
  \item \textsuperscript{116} \textit{Id.}
  \item \textsuperscript{117} \textit{See id. at} 471.
  \item \textsuperscript{118} \textit{See id. at} 473-4.
  \item \textsuperscript{119} \textit{Id. at} 475-6.
  \item \textsuperscript{120} \textit{MLBP Props., Inc. v. Salvino, Inc.}, 542 F.3d 290 (2nd Cir. 2008).
  \item \textsuperscript{121} \textit{Id. at} 294.
  \item \textsuperscript{122} \textit{Id.}
  \item \textsuperscript{123} \textit{Id.}
  \item \textsuperscript{124} \textit{Id. at} 295.
  \item \textsuperscript{125} \textit{Id.}
\end{itemize}
Salvino’s Section One claim accused the MLB teams’ agreements to collectively license and equally share revenues of reducing output, diminishing the products’ quality and number of choices to consumers, and raising prices by suppressing price competition.\textsuperscript{126} MLBP moved for summary judgment, and the district court granted its motion, dismissing Salvino’s Section One Claim.\textsuperscript{127} The district court held that the rule of reason applied, and not the per se or quick look rules, but Salvino had failed to meet its burden to show anticompetitive effects of the MLB teams’ agreement to designate MLBP as the collective licensing agent.\textsuperscript{128}

On appeal, Salvino argued that the district court should have applied either the per se or quick look rule.\textsuperscript{129} The Second Circuit agreed with the district court that “antitrust challenges to the operations of sports leagues have generally been analyzed by the court under the rule of reason, rather than being held illegal per se . . . .”\textsuperscript{130} The rule of reason applied to the MLB teams’ agreement even though the teams “do not operate separately or independently but rather are interdependent entities in an organization that is highly integrated.”\textsuperscript{131} While Salvino only argued that the district court erred in applying the rule of reason, and did not also argue that it incorrectly applied the rule of reason, the Second Circuit nonetheless examined the district court’s rule of reason application and said it was correct.\textsuperscript{132} The Second Circuit also emphasized that MLBP was willing to license “the intellectual property of some or all of the Clubs, or of any single Club” and that “the number of licenses granted has multiplied” since it began collectively licensing intellectual property.\textsuperscript{133}

The Second Circuit limited its holding to the facts before it, and “express[ed] no opinion as to what the outcome would be [if] a plaintiff . . . adduced admissible evidence as to the reasonableness . . .” of the MLB teams centralizing intellectual property licensing in MLBP.\textsuperscript{134} The Second Circuit, therefore, upheld the district court’s opinion dismissing Salvino’s Section One claim because it believed the district court had correctly applied the rule of reason and Salvino had

\begin{enumerate}
\item \textsuperscript{126} Id.
\item \textsuperscript{127} Id. at 295-6.
\item \textsuperscript{128} Id. at 306-8.
\item \textsuperscript{129} Id. at 309.
\item \textsuperscript{130} Id. at 332.
\item \textsuperscript{131} Id.
\item \textsuperscript{132} Id. at 334.
\item \textsuperscript{133} Id. at 323. 326. Thus, the MLB teams’ agreement to license seems to significantly differ from the NFL teams’ agreement, which I discuss later in the context of American Needle. \textit{See infra} at pg. 36.
\item \textsuperscript{134} Id.
\end{enumerate}
failed to meet his initial burden to show the anticompetitive effects of the MLB plan. Thus, the First, Second, Sixth, and Ninth Circuits have all held that sports leagues’ rules are agreements between member clubs subject to the rule of reason, and not single entity action subject to Section Two.

iii. Sports leagues’ conduct as that of a single entity subject to Section Two

Even though several federal appellate courts apply rule of reason analysis to sports leagues’ conduct, a few courts continue to dismiss Section One claims because they believe sports leagues are single entities. The NFL recently signed a four-year extension with DirecTV for the NFL Sunday Ticket Package that pays the NFL $1 billion annually. The deal is exclusive: only DirecTV may broadcast all of the NFL’s games in one place and offer the service to fans for a fee. The NFL teams collectively consummated the deal with DirecTV through a single agent, NFL Properties. Thus, all thirty-two NFL teams agreed to allow NFL Properties to sell each team’s intellectual property to merchandisers.

No Section One violation is possible here because Congress has expressly allowed collective licensing for TV broadcast rights in its 1961 “Sports Broadcasting Act.” The Act expressly exempts from antitrust law any joint agreement by or among persons engaging in or conducting the organized professional team sports of football, baseball, basketball, or hockey, by which any league of clubs participating in [these sports] contests sells or otherwise transfers all or any part of the rights of such league’s member clubs in the sponsored telecasting of the games of [such sports].

135. Id. at 334.
136. See id.; see also L.A. Memorial Coliseum Comm. v. NFL et. al., 726 F.2d 1381 (9th Cir. 1984); see also Sullivan v. NFL, 34 F.3d 1091 (1st Cir. 1994); see also NHLPA v. Plymouth Whalers Hockey Club, 419 F.3d 462 (6th Cir. 2005). In November of 2007, the Southern District of New York, sitting in the Second Circuit, also applied rule of reason review to the NHL’s New Media Guide, which therefore establishes that it believed the NHL teams agreed to employ the challenged restraints. See generally Madison Square Garden v. NHL, No. 07 CV 8455(LAP), 2007 WL 3254421 at *8 (S.D.N.Y. 2007).
138. Id.
139. Id.
141. Id. (emphasis added).
Sports leagues are therefore expressly allowed to form collective agencies to sell television broadcast rights. The Act limits permissible collective action to "telecasting," and not also to the collective licensing of team intellectual property rights. Congress has not enacted a similar exemption for collective licensing of team intellectual property rights. Despite several circuit courts holding that sports leagues' actions are agreements and despite Congress's failure to enact legislation allowing collective action in any context other than broadcasting, the Seventh Circuit has found two different sports leagues to be acting as single entities.

First, in 1996, Judge Easterbrook faced an ongoing legal wrangle between the NBA and Chicago Bulls. Amid their great success in the 1990s, the Bulls wanted to broadcast many of their games on the WGN superstation. The NBA, however, had contracted with NBC for all teams to broadcast a large portion of NBA games, leaving only fifteen games for the Bulls to broadcast on WGN. While sports leagues do have the power to collectively agree on TV broadcasting rights under the Sports Broadcasting Act, the NBA attracted antitrust scrutiny by trying to curtail the Bulls' WGN transmissions after it allowed the Bulls to select a broadcaster for select games.

The district court held that Copperweld does not apply to the NBA when it lacks "complete unity of interest." On appeal, the Seventh Circuit recognized that whether the NBA is a joint venture subject to Section One or a single entity subject to Section Two "is a tough question under Copperweld." The Seventh Circuit first held that the Sports Broadcasting Act reopens the Sherman Act when a party does not comply with the Act's policy. Facing antitrust scrutiny, the

142. Id. The Act’s legislative history indicates that Congress passed the Act to exempt “joint agreements under which a league sells or transfers pooled television rights of its member clubs to a purchaser.” H.R. Rep. No. 1178, at 3 (1961). Before Congress passed the Act, the NFL’s agreement to collectively sell broadcasting rights was illegal under Section One. See id. at 2.


144. Chi. Prof'l Sports Ltd. P'ship v. NBA, 95 F.3d 593, 595 (7th Cir. 1996).

145. Id. at 595-96.

146. Id.


148. Chi. Prof'l Sports Ltd. P'ship, 95 F.3d at 596. The NBA attempted to control cable retransmission in the Bulls' home market for WGN games, even though its contract with NBC allowed the Bulls to select a network. Id.

149. Id. at 598.

150. Id. at 599.

151. Id. The Act allows a league to collectively license telecasts and avoid antitrust liability, but the league will incur additional responsibilities and tax ramifications by licensing games. In
NBA argued that it was acting as a single entity and should not be subject to Section One treatment. The Seventh Circuit believed a sports league could be acting as a single entity in some contexts but acting as a joint venture or as multiple entities in another, making it necessary to judge each league's conduct on a case-by-case basis. But "when acting in the broadcast market . . .," the court believed "the NBA is closer to a single firm than to a group of independent firms."

As mentioned at the beginning of the paper, Judge Easterbrook also discussed three points along a spectrum that indicate the type of conduct in which parties engage. Conduct, therefore, could be that of a single entity, a joint venture between competitors, or a horizontal agreement between competitors. Judge Easterbrook, however, later failed to mention the possibility that the NBA acted as a joint venture when he said, "the NBA is closer to a single firm than to a group of independent firms." According to his initial formulation of the spectrum, it would seem that if the NBA is not acting as a single entity, but is also not acting in a wholly independent manner, then it must be acting as a joint venture—the mid-point on the action spectrum. Judge Easterbrook said that the lower court should apply full rule of reason review even after he said he thought the NBA acted as a single entity.

In a concurring opinion, Judge Cudahy criticized the majority opinion. As the First, Second, Sixth, and Ninth Circuits illustrated, Judge Cudahy explained that a single entity finding immunizes the defendant from Section One treatment. Judge Cudahy's concurrence, therefore, disagreed with the majority opinion because it failed to properly depict the "continuum of economic integration." Judge Easterbrook should have either placed the NBA in the middle of that continuum, thus requiring full rule of reason analysis, or characterized this case, the NBA did not want to be the licensor, but instead the regulator of licensing. It wanted to regulate how each team individually licensed games. The NBA, therefore, did not act as a licensor so as to avoid antitrust liability.

152. Id.
153. Id. at 599-600.
154. Id. at 600.
155. Id. at 598.
156. Id. at 600.
157. To see an illustration of the continuum, see Continuum, supra note 4.
158. Id. at 600-01.
159. Id. at 601 (Cudahy, J., concurring).
160. Id.
161. Id.
the NBA as a single entity not subject to Section One. Instead, Judge Easterbook characterized the NBA as a single entity and remanded the case to the district court for rule of reason review.

In August of 2008, the Seventh Circuit decided *American Needle v. NFL*, and *American Needle* forms the basis of this paper because the court found the NFL to be acting as a single entity in the collective licensing context. The NFL teams agreed in 1963 to allow NFL Properties LLC to collectively license each team’s intellectual properties rights. Until 2000, NFL Properties allowed several merchandisers to produce headwear bearing NFL logos. It then required vendors to submit bids for an exclusive headwear license. Reebok, as a large apparel manufacturer, won the bidding war. American Needle, and other headwear merchandisers, lost their headwear licenses. American Needle then filed an antitrust suit against the NFL, the NFL’s teams, NFL Properties, and Reebok. For its Section One claim, American Needle argued that the NFL teams and Reebok agreed to eliminate headwear competition because each NFL team could individually sell licenses but each team instead chose to collectively license to a single headwear licensee. American Needle also argued that the NFL teams illegally monopolized team licensing and product wholesale by agreeing to allow NFL Properties to collectively license intellectual property rights.

With Easterbrook’s 1996 *Chi. Prof’l Sports* decision as precedent, the NFL argued that *Copperweld* mandates that it have single entity status. In a summary judgment proceeding, the district court agreed, thereby rejecting the Section One claim. It also dismissed American Needle’s Section Two monopolization claim because a single entity may collectively license intellectual property “without running afoul of the antitrust laws.”

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162. Id. at 601-02.
163. Id. at 600-01.
164. Am. Needle Inc. v. NFL, 538 F.3d 736 (7th Cir. 2008).
165. Id. at 737. Two years after Congress enacted the Sports Broadcasting Act, then, the NFL agreed to allow collective licensing for intellectual property. The Act, again, only allows collective action for broadcasting rights. 15 U.S.C. §1291 (2008).
167. Id.
168. Id.
169. Id.
170. Id.
171. Id.
172. Id.
173. Id. at 739-40.
174. Id.
On appeal, the Seventh Circuit acknowledged that "American Needle’s argument leads us into murky waters" and limited its decision to the facts before it. American Needle argued that the court must look to how the challenged conduct deprives the market of independent sources of economic control because *Copperweld* was concerned with the anticompetitive effects collective action introduces into the market. The court agreed with American Needle. American Needle also argued that a single entity determination turns "entirely on whether the league’s members can compete with one another when licensing and marketing their intellectual property." The Seventh Circuit did not agree because it believed it was only one step away from requiring NFL teams to have "complete unity of interest" to be a single entity, which would be "silly."

The Seventh Circuit "could not fault the district court for not considering whether the NFL teams could compete against one another when licensing and marketing their intellectual property." Hence, on appeal, the Seventh Circuit thought the district court need not even consider whether NFL teams compete against each other in the headwear market or the extent to which they do. Because the "NFL teams share a vital economic interest in collectively promoting football," the court believed that "nothing in § 1 prohibits the NFL teams from cooperating so the league can compete against other entertainment providers." It therefore found the NFL teams to be acting as a single entity.

Had the Court found an agreement and applied the rule of reason, the plaintiff would have demonstrated the anticompetitive effects of collective licensing and the defendant would have proffered procompetitive justifications for the rule. American Needle could then show that the NFL could meet its objective of promoting NFL football through less restrictive means. In other words, the NFL teams

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175. *Id.* at 741.
176. *Id.* at 742.
177. *Id.* at 742.
178. *Id.*
179. *Id.* at 743.
180. *Id.*
181. *Id.* (emphasis added).
182. *Id.* at 743.
183. *Id.* at 744.
184. *Id.*
could still promote football without a collective licensing agent for intellectual property.\footnote{186. \textit{Am. Needle Inc.}, 538 F.3d at 744. The NFL might be more effectively promoted if more popular teams secure more lucrative deals than less popular teams. The NFL does not say why it needs to promote each team equally rather than promoting the more popular teams over the less popular. It seems as though the more popular teams would secure more profitable deals, or at least generate greater profit, acting alone than the equal share they receive after NFL Properties secures a deal by collectively licensing each team.\n
\textit{Id.}}

The Seventh Circuit also upheld the district court’s dismissal of the Section Two claim, ruling that, as a single entity, “NFL teams are free under § 2 to license their intellectual property on an exclusive basis, even if the teams opt to reduce the number of companies to whom they grant licenses.”\footnote{187. \textit{Id.}} In one fell swoop, the Seventh Circuit immunized the NFL from antitrust scrutiny, and while it said it determines single entity status on a case-by-case basis, it found the NFL to be a single entity without ever citing its sister courts’ decisions in \textit{L.A. Memorial Coliseum Comm., Plymouth Whalers, or Salvino}, where the courts held the NFL, NHL, and MLB were not acting as single entities.\footnote{188. \textit{Id.}} The Seventh Circuit also failed to mention that Congress did pass a statute to allow collective licensing for television broadcasting, but has not for collective licensing of intellectual property.\footnote{189. See generally \textit{Am. Needle Inc.}, 538 F.3d 736.} Instead the Seventh Circuit legislated from the bench to immunize the NFL from antitrust scrutiny.

Without competition, Reebok can limit supply, force fans to take the products it offers or leave them, and also likely increase prices for NFL hats. Fans are not happy about it. Just one month before the \textit{American Needle} decision, Tampa Bay Buccaneers fans voiced their unhappiness with Reebok’s limited headwear supply in an online blog.\footnote{190. \textit{JScott, NFL Should Rethink Reebok Exclusive Rights Deal, Buc’Em.com}, July 14, 2008, http://www.bucem.com/2008/7/14/569711/nfl-should-rethink-reebok.} One fan said that MLB fans can turn to a number of headwear companies when buying a hat, including Nike, New Era, and Twins Franchise, to name a few.\footnote{191. \textit{Id.}} But NFL fans can only turn to Reebok.\footnote{192. \textit{Id.}} The blame for fans’ displeasure, according to the fan and
several other discontent fans, “falls squarely on Reebok and the
NFL’s ignorance.” Thanks to the Seventh Circuit, though, no court
ever reviewed the anticompetitive effects of the NFL-Reebok agree-
ment to see how the exclusive deal harms fans. American Needle filed a petition for certiorari on November 17,
2008. On June 29, 2009, the Supreme Court granted certiorari to hear
American Needle. B. Section Two: Illegal use of Monopoly Power

Even if a sports league did act as a single entity in developing a
collective licensing agent—or if a court decides that it did—the
league must still ensure that it does not violate Section Two’s prohibi-
tion against illegal monopolies.

Under Section Two, “[e]very person who shall monopolize, . . . at-
tempt to monopolize, . . . combine, or conspire with any other person
. . . to monopolize any part of [interstate trade or commerce]” is guilty
of a felony. A single actor’s conduct, then, is “governed by § 2
alone . . .” and is unlawful if it actually monopolizes a market or at-
ttempts to monopolize it by threatening actual monopolization.
Thus, antitrust laws will not “dampen the competitive zeal of a single
aggressive entrepreneur” unless that entrepreneur poses a danger of
monopolization. The possession of monopoly power alone does not
constitute a Section Two violation. Instead a firm must both (1) pos-
sess monopoly power in the relevant market and (2) willfully acquire
or maintain that power in a way other than simply acquiring it through
a superior product or service.

Monopolies may enter into exclusive contracts, but only to a limited
extent. The Supreme Court prohibits using monopoly power to ex-
clude competitors from the marketplace. In other words, if a single
entity with monopoly power attempts to willfully acquire or maintain
its monopoly power by engaging in conduct designed to eliminate

193. Id. The “ignorance” to which this fan refers is likely a criticism of the NFL for not
procuring a headwear deal that responds to consumer demand. The blogger desires greater se-
lection, which is not possible when Reebok alone manufactures hats.
195. See Associated Press, supra note 7.
198. Id. at 768.
200. See Verizon Comms. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 408-09
(2004).
competitors in a market, it is guilty of a Section Two illegal monopoly.\(^{201}\)

The Court has found a sports league to be a monopoly. In *Board of Regents*, the Court recognized that "[w]hen a product is controlled by one interest, without substitutes available in the market, there is monopoly power."\(^{202}\) Even though the Court did not need to examine the NCAA’s monopoly power when the plaintiff brought a Section One claim, it nevertheless concluded that the NCAA held a monopoly over college football telecasts—a market it narrowly defined.\(^{203}\) In *American Needle*, a collective licensing agent holds all intellectual property rights for every team. Assuming a league’s teams are acting as a single entity, the single entity must possess monopoly power over the league.

Just as the NCAA held a monopoly over college football telecasts, NFL Properties holds a monopoly over NFL teams’ intellectual property rights. When it then sells the intellectual property rights for a product to a single merchandiser, the merchandiser holds a monopoly over that product. The agreement between the NFL and Reebok, for example, gives Reebok alone the right to create headwear bearing NFL logos. Selling headwear rights to Reebok alone appears to exclude all other competitors from the market, which gives Reebok a monopoly over NFL hats. Just as the Supreme Court defined the market narrowly in *Board of Regents* to be college football telecasts, it might also define the market in *American Needle* to be NFL headwear, and not all sports headwear.\(^{204}\) The NFL teams’ agreement and subsequent exclusive license with Reebok creates two monopolies: the NFL’s monopoly over all thirty-two NFL teams’ intellectual property and Reebok’s monopoly over the NFL headwear market.

While the Trademark Act gives a trademark owner the right to use and sell the trademark, it “cannot be legally used as a device for [Section Two] violation.”\(^{205}\) A trademark-holder, then, may not use the trademark to monopolize or attempt to monopolize a market.\(^{206}\) Under Section Two, even if a sports league is a single entity, it might still violate Section Two if it wields its trademark to gain monopoly power and foreclose competition in a market.

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201. See id.
203. Id.
204. See id. at 112.
206. See id.
Sports leagues are not single economic entities. In fact, they are rife with competition. While they band together to offer on-field competition as a product, they still compete with one another on and off the field. To settle the circuit split, the Supreme Court should overturn the Seventh Circuit’s decision in *American Needle* and deem collective licensing to be a joint venture between teams subject to the rule of reason. Alternatively, if the Court carves out a single entity exemption for some sports leagues, they should still face Section Two scrutiny. If Congress disagrees, it can pass a statute exempting collective licensing for intellectual property from antitrust scrutiny. As the law now stands, however, sports leagues outside the Seventh Circuit’s jurisdiction face Section One scrutiny when they agree to collectively license intellectual property.

A. *Sports leagues’ conduct violates Section One*

Just as the NCAA member-schools horizontally agreed through the NCAA to prevent each school from competing to attract television revenue in *Board of Regents*,207 so too do sports teams when they agree through their league to prevent each team from competing to attract merchandisers. Under *Copperweld*, a corporation can designate one of its wholly owned subsidiaries as a separate corporation and still maintain complete power over it.208 But a sports league is not similarly structured. Each team is individually owned and each team owner had complete power over his team until the teams’ agreed on collective licensing. Owners must comply with NFL rules if they want to play in the NFL. They are not, however, required to join an agreement that arguably violates the Sherman Act. Instead, even though it may not be economically lucrative, they could withdraw from the NFL and either play in another league or form their own league to compete with the NFL, or use their popularity as a bargaining chip to convince the other NFL teams not to require collective licensing.209

As explained before, the Supreme Court decided *Board of Regents* only eight days after it decided *Copperweld*.210 Yet it still believed the

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209. Teams can do this, even if it would not be economically wise.
210. See supra notes 80-82 (and accompanying text).
NCAA member-schools horizontally agreed to eliminate competition for TV broadcasting. Out of respect for the NCAA’s proffered goal—offering competition as a product—the Court applied the rule of reason instead of per se review to the NCAA’s otherwise facially illegal agreement. The Court was right to deem the teams’ conduct an agreement. Likewise, the NFL offers competition between teams as its product. It also collectively licenses to promote competitive balance. Its conduct, like the NCAA’s conduct, should be reviewed under the rule of reason to see if the anticompetitive effects outweigh the procompetitive. If they do not, then the NFL should alter its plan to pass Section One scrutiny.

The current NFL plan under attack in American Needle is also unlike MLB’s plan in the Second Circuit’s Salvino decision because it is more anticompetitive. The NFL’s plan does not allow NFL Properties to sell intellectual property of a single club and the number of headwear licenses has not multiplied since it began collectively licensing. The NFL admits that it seeks to sell the intellectual property of all thirty-two teams when it says that its goal is to “ensure that marks identifying all 32 member clubs are developed, protected, and included on the products of each of its consumer product licensees.” The NFL’s collective licensing agreement is not responsive to consumer demand because it always sells the marks of all thirty-two teams together, refusing to sell the mark of a single team. Also, before NFL Properties granted only one headwear license to Reebok, it granted multiple licenses to merchandisers. The exclusive agreement with Reebok is not now increasing the number of licenses sold. In Salvino, the Second Circuit emphasized each of these points in upholding the district court’s rule of reason application. The Seventh Circuit, however, did not apply the rule of reason, even though the NFL agreement seems to be more restrictive than MLB’s agreement was in Salvino.

B. Single Entity Sports Leagues as Monopolies

NFL Properties controls intellectual property for all thirty-two NFL teams. No merchandiser can sell NFL apparel without first acquiring

211. Bd. of Regens, 468 U.S. at 99.
212. See MLB Props., Inc. v. Salvino, Inc., 542 F.3d 290, 323, 326 (2nd Cir. 2008). The decrease in the number of licenses rests on the assumption that, again, the relevant market is NFL headwear, so only headwear licenses—and not also other NFL apparel licenses—matter, for the sake of this argument.
214. Id. at *6.
a license from NFL Properties. NFL Properties is, therefore, the sole supplier of licensing rights. If the Supreme Court defines the market narrowly to be NFL headwear, the NFL has 100% control of the market. That is, by definition, a monopoly.215 A plaintiff, like American Needle, must still show that a sports league’s collective licensing agent abuses monopoly power in the relevant market to prove a Section Two claim.216 Plaintiffs should show that the NFL teams’ agreement prevents each team from competing against one another and that NFL Properties’ exclusive deal with Reebok excludes headwear competitors.217 NFL Properties, which equally distributes revenue to NFL teams, and Reebok, the sole merchandiser who can sell hats bearing NFL logos, benefit from the deal as they exclude competitors from the headwear market. Even if the NFL teams act as a single entity through NFL Properties, they cannot use a trademark to monopolize an industry.218 Thus, even under Section Two review, a sports’ leagues collective licensing to a single licensee violates antitrust laws. The Sherman Act should apply to sports leagues’ collective action, unless Congress decides to immunize sports leagues from antitrust scrutiny for collective licensing.

C. A Call to Congress

Hopefully the Supreme Court will soon reaffirm219 its subtle stance in Board of Regents220 showing that it does not believe sports leagues’ conduct constitutes action by a single entity, while also reaffirming the First, Second, Sixth, and Ninth Circuits’ opinions.221 Congress enacted the Sports Broadcasting Act in 1961, reopening the Sherman Act in a way that directly affected sports leagues. Within the last few years, Congress addressed MLB’s common law antitrust exemption by making major league baseball subject to the antitrust laws just like the other major professional sports.222 So if Congress can act to resolve a glaring legal inconsistency, it could also do so in the context of collective licensing. When Congress did not include

215. See id.
217. See id.
219. See Associated Press, supra note 7.
221. See L.A. Memorial Coliseum Comm., 726 F.2d at 1390 (9th Cir.); see also Sullivan, 34 F.3d at 1099 (1st Cir.); see also Plymouth Whalers Hockey Club, 419 F.3d at 470 (6th Cir.).
collective licensing of intellectual property in its statutory antitrust exemption, the following Latin maxim may apply: *expression unius est exclusion alterius*.[223] It means "that to express or include one thing implies the exclusion of the other."[224] Here, because Congress did not also expressly include "collective licensing," it intended to exclude it from its statutory exemption allowing collective broadcasting.[225] If Congress desires to add collective licensing to the exemption, it can do so. Or, as Rep. Waters recently suggested, perhaps Congress should repeal the NFL's limited antitrust exemption altogether.[226] The NFL would then no longer receive preferential treatment from Congress and would be on equal footing with any other American business, where it must seek out deals without running afoul of the Sherman Act. Without Congressional action, the Seventh Circuit seemingly legislates from the bench and exempts collective licensing from Section One treatment. Its decision substantially differs from that of the First, Second, Sixth, and Ninth Circuits, as well as from the Supreme Court's *Board of Regents* decision.

**Conclusion**

Sports leagues' collective licensing agencies are agreements between member teams. Collective licensing agreements concentrate intellectual property in the hands of a single agent. In the NFL's case, it then exploited the intellectual property rights of all NFL teams to a single merchandiser, eliminating competition between teams marketing their intellectual property and between headwear manufacturers. Collective licensing harms many of the teams who might ordinarily sell rights at more lucrative prices than those they receive under the collective licensing agreement. Additionally, without competitors, a single merchandiser has no incentive to innovate, so it offers consumers fewer options.

At the very least, courts should be able to review league collective licensing under the rule of reason. Now that the Supreme Court will hear *American Needle*, it can provide guidance to other circuit and lower courts facing sports leagues' agreements. Each court addressing the single entity issue in the sports context seems to mention how

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224. *Id.*
225. See *SR 1087*, *supra* note 142; *see HR 1178*, *supra* note 143. While Congress never contemplated exempting collective licensing of intellectual property when it passed the Sports Broadcasting Act, it passed the Act to allow sports leagues to engage in only one form of otherwise illegal conduct—collective broadcasting.
tough, difficult, muddy, or confusing the issue is. It is time for the Court to unmuddy the murky waters. If the Court does grant sports leagues single entity status, it should carefully review the conduct under Section Two. Otherwise, sports leagues will be free to act without regard to bedrock antitrust principles. Only Congress should be able to provide antitrust immunity.