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Shutting the Black Door: Using American Needle to Cure the Problem of Improper Product Definition

Daniel A. Schwartz
University of Michigan Law School

NOTE

SHUTTING THE BACK DOOR: USING *AMERICAN NEEDLE* TO CURE THE PROBLEM OF IMPROPER PRODUCT DEFINITION

*Daniel A. Schwartz**

Section 1 of the Sherman Act is designed to protect competition by making illegal any agreement that has the effect of limiting consumer choice. To make this determination, courts first define the product at issue and then consider the challenged restraint's impact on the market in which that product competes. When considering § 1 allegations against sports leagues, courts have tended to define products according to the structure of the leagues. The result of this tendency is that harm to competition between the leagues' teams is not properly accounted for in the courts' analyses. This, in turn, grants leagues a form of immunity to which they are not entitled under any statutory or doctrinal rule.

In reaching this conclusion, this Note reviews the business structure of sports leagues and explains why they present such a difficult challenge for courts. It then examines a number of cases in which courts, struggling with those challenges, improperly defined the product according to league structure. For each case, the Note explains the mistake that was made and how that mistake granted leagues de facto immunity. This Note concludes by arguing that the Supreme Court's recent decision in American Needle *can serve as the impetus for correcting this mistake if courts broadly interpret the meaning of the case by looking to the logic that animates it.*

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INTRODUCTION

In his opinion in *American Needle, Inc. v. National Football League*, Judge Michael Kanne commented that asserting that a single football team could produce a football game is "less of a legal argument than it is a Zen riddle: Who wins when a football team plays itself?"[1] Judge Kanne's observation succinctly presents one of the difficulties that courts face when analyzing antitrust claims against a sports league.[2] Leagues cannot possibly exist as consumers know and want them to without some degree of cooperation between competitors. Courts must therefore take into account the need for some coordination when they contemplate the applicability of antitrust laws to sports leagues. At the same time, there are very real questions about how permissive courts should be when considering sports league policies. While the need to collaborate for the purposes of making schedules and creating rules of the game is clear, can that same justification incorporate the passage of rules regarding apparel sales? Television rights? Intellectual property licensing?

Judge Kanne's words reveal the courts' worrisome tendency to dismiss as ethereal questions that have practical consequences for consumers—for example, how to define what it is that leagues sell to consumers. Though the way in which leagues are structured can make it difficult to determine when they compete economically only with other leagues and when the league members also compete against each other, one thing is certain: after the National Football League ("NFL") entered into the exclusive licensing agreement challenged in *American Needle*, the price of NFL apparel jumped substantially.[3] The view that league members do not compete internally has

1. 538 F.3d 736, 743 (7th Cir. 2008).

2. While antitrust allegations leveled against sports leagues can arise out of any number of antitrust statutes, this Note's analysis is restricted to claims brought under § 1 of the Sherman Act.

3. Brief for Petitioner at 6–7, Am. Needle, Inc. v. Nat'l Football League, 130 S. Ct. 2201 (2010) (No. 08-661), 2009 WL 3004479, at *7 (noting that a Reebok executive described the elimination of competition as "a godsend from a profitability standpoint" and explained that "[b]asic fitted caps that were selling for $19.99 a few years ago because of the price pressures are now selling for $30"); *see also* Ken Belson, *The N.F.L. Is Squeezing Discounters*

been articulated by numerous defendants in the form of the "single-entity argument,"[4] which posits that leagues act as a single entity in certain elements of their businesses and are consequently categorically immune from the antitrust laws.[5] The Supreme Court rejected this argument in *American Needle*, but the tendency of courts to define products from an industry perspective rather than from a consumer perspective often creates an effective immunity regardless of single-entity status.

This Note focuses on this problem of league-centric product definition. It argues that defining products according to league structure rather than from a consumer's perspective guarantees that courts will rule any league restraint reasonable without accurately analyzing the restraint's true effects on competition. Part I provides background information on antitrust law and observes the unique issues presented by sports leagues sued under § 1. Part II traces the manner in which numerous courts have defined the products at issue in sports-antitrust cases and explains how the overly broad and formulaic nature of their definitions has prevented a genuine analysis of competition. Part III addresses the Supreme Court's decision in *American Needle* and concludes that the logic underlying the Court's decision can serve to refocus courts in the way in which they define products.

I. THE SHERMAN ACT AND ANTITRUST POLICY

This Part provides relevant background information on the purposes and substantive elements of antitrust law. Section I.A lays out the background of the Sherman Act and describes the questions that a court analyzing a § 1 claim must answer. Section I.B elaborates on the Rule of Reason and argues that, just as courts define markets from the perspective of the consumer, they should also define the products relevant to an antitrust inquiry from the consumer's point of view. Section I.C notes how the Rule of Reason accounts for the competitive benefits created by joint ventures and explains the single-entity argument, which league defendants contend should provide categorical immunity from the antitrust laws.

A. *The Sherman Act*

The spine of federal antitrust law is the Sherman Act,[6] passed in 1890 to "curb abusive and monopolistic actions in restraint of trade."[7] Sherman Act

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over Apparel, N.Y. TIMES, Jan. 20, 2010, at B11 (describing efforts by the NFL to cut off sales by discount retailers because, inter alia, they might hurt Reebok).

4. *See, e.g.*, Deutscher Tennis Bund v. ATP Tour, Inc., 610 F.3d 820, 827 (3d Cir. 2010); St. Louis Convention & Visitors Comm'n v. Nat'l Football League, 154 F.3d 851, 856 (8th Cir. 1998); Mid-South Grizzlies v. Nat'l Football League, 720 F.2d 772, 786 (3d Cir. 1983).

5. See *infra* Section I.C for a fuller explanation of the single-entity argument.

6. Sherman Act, 15 U.S.C. §§ 1–7 (2006).

7. 1 JULIAN O. VON KALINOWSKI ET AL., ANTITRUST LAWS AND TRADE REGULATION § 1.02 (2d ed., Matthew Bender & Co. 1996 & Supp. 1999).

jurisprudence has developed along two essentially parallel lines. The first line, and the one that is central to this Note's analysis, originates in § 1's declaration that "[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce . . . is declared to be illegal."[8] It is axiomatic that this proclamation is not to be taken literally.[9] Instead, it should be understood to ask "whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition."[10] This question—does the restraint help or hurt competition?—is the key question when courts review § 1 claims.[11]

In most industries, this question is at least theoretically straightforward. In the conventionally structured market, competitors are distinct entities that are fully capable of continuing to exist and pursuing their business interests if their competitors ceased to exist. In fact, this battle for market share is the very thing that antitrust laws exist to protect. Through the promotion of competition, the best and most efficient competitors thrive, consumers accrue the greatest possible benefits, and those competitors who are less capable of competing adequately either improve or fail.[12] In this context, an agreement between two ordinary competitors not to compete—whether through the standardization of price, quality, features, or some other agreement—will likely violate the Sherman Act,[13] because the agreement will deny consumers the full benefits of competition by creating a less efficient market in which producers have less incentive to compete vigorously for market shares.

B. *The Rule of Reason*

While the questions asked by § 1 may be conceptually simple, many restraints challenged under the Sherman Act require a nuanced analysis to determine their competitive effect. Courts have developed two primary vehicles for analyzing claims of illegal collusive behavior: the per se rule and the

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8. 15 U.S.C. § 1. The applicability of the second line, which traces § 2 of the Sherman Act—dealing with monopolies and attempts to achieve them—is beyond the scope of this Note.

9. *See* Bd. of Trade v. United States, 246 U.S. 231, 244 (1918) ("But the legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence.").

10. *Id.*

11. *See* Nat'l Collegiate Athletic Ass'n v. Bd. of Regents, 468 U.S. 85, 98 (1984) (stating that the Sherman Act prohibits "only unreasonable restraints of trade").

12. *See, e.g.*, Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962) (stating that the antitrust laws were passed for the "protection of competition, not competitors" (emphasis omitted)).

13. *See, e.g.*, Palmer v. BRG of Ga., Inc., 498 U.S. 46 (1990) (holding that an agreement between competing providers of bar review courses not to compete in certain geographic regions violated § 1).

Rule of Reason.[14] The Rule of Reason, which requires courts to conduct an analysis of the totality of circumstances surrounding a challenged restraint in order to determine whether it promotes or destroys competition,[15] has been universally held to be the proper tool for analyzing § 1 claims brought against sports leagues.[16]

In practice, the Rule of Reason involves a market analysis and an analysis of the competitive effects of the restraint in controversy.[17] The purpose of the market analysis is to determine both the universe in which the accused companies operate and the competitive pressures that govern their ability to impose their will on the market through changes in prices or production levels.[18] When defining the relevant market, courts generally look to the consumer's view on the "substitutability" of alternative products for the one in question.[19] Markets are thus largely defined by the way in which the court defines the product at issue.[20]

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14. The per se rule dictates that certain types of restraints are categorical violations of the Sherman Act, because they are of a type that is "entirely void of redeeming competitive rationales." Law v. Nat'l Collegiate Athletic Ass'n, 134 F.3d 1010, 1016 (10th Cir. 1998) (internal quotation marks omitted). The per se rule has been abandoned in many contexts. *See, e.g.*, Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877 (2007) (placing vertical price restraints outside the scope of the per se rule); Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977) (removing nonprice vertical restraints from the realm of the per se rule). The per se rule now applies only to a narrow set of circumstances. *See* Daniel A. Crane, *Rules Versus Standards in Antitrust Adjudication*, 64 WASH. & LEE L. REV. 49, 55–65 (2007) (tracking the demise of the rules-based adjudication of the per se rule).

15. *Bd. of Trade*, 246 U.S. at 238.

16. The interactions among teams clearly provide an efficiency that distinguishes the sports league context from those narrow areas in which the per se rule is still appropriate. *See, e.g.*, Nat'l Hockey League Players' Ass'n v. Plymouth Whalers Hockey Club, 325 F.3d 712, 719 (6th Cir. 2003); Toscano v. PGA Tour, Inc., 201 F. Supp. 2d 1106, 1121 (E.D. Cal. 2002).

17. *See* Geneva Pharm. Tech. Corp. v. Barr Labs. Inc., 386 F.3d 485, 506–07 (2d Cir. 2004).

18. *Id.* at 496.

19. Twin City Sportservice, Inc. v. Charles O. Finley & Co., 676 F.2d 1291, 1297 (9th Cir. 1982). This focus on consumer behavior is perhaps most clearly explained by the Horizontal Merger Guidelines, which the Department of Justice and Federal Trade Commission use to evaluate the competitive effects of a merger. Under the Hypothetical Monopolist Test, regulators evaluate the market to determine whether a hypothetical monopolist, who controls all production of a given product, could institute a small but significant and nontransitory price increase ("SSNIP") without losing customers. U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 4.1.1 (2010), *available at* http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf. So long as there is an alternative product to which a sufficient number of consumers will shift such that the hypothetical increase is unprofitable, the market expands to include that product. *Id.* When no such substitutes exist, the outer bounds of the market have been discovered. *Id.* The process for establishing geographic markets is the same; the market starts small and then expands until consumers no longer drive to the next store down the road to obtain the products in question. *Id.* at § 4.2.2.

20. L.A. Mem'l Coliseum Comm'n v. Nat'l Football League, 726 F.2d 1381, 1394 (9th Cir. 1984).

This focus on the *consumer's* perception of the product market is vital. For example, while it may appear that college football and professional football are so qualitatively similar that they would be natural substitutes, the Supreme Court has held that they occupy distinct markets because they attract distinct audiences that conceive of the products as distinct entities.[21] They thus fail the substitutability test because the consumers of one product would not readily move to the other.[22] This focus on the consumer is particularly relevant in the sports-antitrust context because the lower courts tend to define products from the supply side.[23] This tendency has led courts that consider what competes in a market to focus on what the leagues claim to produce (professional sports) rather than on what the public actually consumes (live games, merchandise, etc.) [24]

C. *Joint Ventures and the Single-Entity Defense*

When the focus shifts from a conventional industry model to that of a sports league, the court must take note of certain considerations.[25] The major American sports leagues are each made up of approximately thirty independently owned companies[26] and are usually classified as joint ventures.[27] Unlike traditional markets in which the players are pure competitors that can exist independent of each other, sports leagues are composed of individually owned and operated companies that cannot exist without each other. In order for their product to exist at all, leagues must create certain rules, such as how many games should be played[28] and what should and should not constitute a penalty- or suspension-worthy offense.[29] Given this peculiar dynamic,

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21. Nat'l Collegiate Athletic Ass'n v. Bd. of Regents, 468 U.S. 85, 111–12, 112 n.49 (1984). This case is discussed in more detail *infra* in Section II.B.

22. *See id.* at 112–13.

23. *See infra* Section II.C.

24. *See, e.g.*, Major League Baseball Props. v. Salvino, Inc. (*Salvino II*), 542 F.3d 290 (2d Cir. 2008); Am. Needle Inc. v. Nat'l Football League, 538 F.3d 736 (7th Cir. 2008). These cases are discussed in more detail *infra* in Sections II.C.2 and II.C.4, respectively.

25. *See L.A. Mem'l Coliseum Comm'n*, 726 F.2d at 1391 (describing the application of the antitrust laws to sports organizations as "the difficult task of analyzing the negative and positive effects of a business practice in an industry which does not readily fit into the antitrust context").

26. *E.g.*, *Salvino II*, 542 F.3d at 294; Madison Square Garden, L.P. v. Nat'l Hockey League (*MSG I*), No. 07 CV 8455 (LAP), 2007 U.S. Dist. LEXIS 81446, at *1 (S.D.N.Y. Nov. 2, 2007).

27. Brandon L. Grusd, *The Antitrust Implications of Professional Sports' League-Wide Licensing and Merchandising Arrangements*, 1 VA. J. SPORTS & L. 1, 23 (1999).

28. *See* Andrew Brandt, Op-Ed., *What's Behind Push for 18-Game NFL Season?*, CNN.COM (Sept. 1, 2010), http://articles.cnn.com/2010-09-01/opinion/brandt.nfl.18.game.plan_1_nfl-teams-nfl-season-real-season?_s=PM:OPINION.

29. *See* Jeff Z. Klein, *G.M.'s Reject Total Ban on Hits to the Head*, N.Y. TIMES, Mar. 15, 2011, at B16; *cf.* GERALD W. SCULLY, THE MARKET STRUCTURE OF SPORTS 21 (1995) ("Team sports are naturally collusive at some minimal level. A game or a contest is a joint output. To produce it, the teams must agree on a set of rules governing the contest and on the division of revenues.").

cooperation that might otherwise violate § 1 is not only legal; it is *necessary* for the league to exist.[30] A permissive approach is therefore sensible under the policy announced by the Sherman Act, because cooperation among the member companies can promote economic competition[31] by creating "a new product by reaping otherwise unattainable efficiencies."[32] Despite this tolerance of cooperation within joint ventures that have a procompetitive effect, however, "joint ventures have no immunity from the antitrust laws."[33] When the net impact of the joint venture is to harm rather than to help the market's efficiency, joint ventures can violate § 1's prohibition on collusion between competitors.[34]

Even within the subcategory of Rule of Reason cases that deal with joint ventures, sports leagues present unique problems.[35] Most joint ventures are formed by companies seeking an otherwise unattainable efficiency but that can nevertheless compete on their own. Sports franchises, in contrast, cannot successfully exist outside of the league in which they compete. Absent the joint venture, they are not inefficient competitors; they are effectively nonentities.[36] It is with this key insight in mind that leagues have argued that courts should view them as single entities, and thus categorically incapable of violating § 1.[37]

The fundamental logic of the single-entity defense is that it is impossible for something to compete against itself.[38] The first sign that courts could be

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30. Daniel E. Lazaroff, *Sports Equipment Standardization: An Antitrust Analysis*, 34 GA. L. REV. 137, 150–51 (1999).

31. Unless otherwise indicated, all references to "competition" in this Note refer to economic competition.

32. Arizona v. Maricopa Cnty. Med. Soc'y, 457 U.S. 332, 365 (1982).

33. Nat'l Collegiate Athletic Ass'n v. Bd. of Regents, 468 U.S. 85, 113 (1984); *accord* Gen. Leaseways, Inc. v. Nat'l Truck Leasing Ass'n, 744 F.2d 588, 594 (7th Cir. 1984) ("It does not follow that because two firms sometimes have a cooperative relationship there are no competitive gains from forbidding them to cooperate in ways that yield no economies but simply limit competition.").

34. *See* 7 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 1475a (3d ed. 2010) (noting the importance of "whether the challenged act controls or affects the individual market behavior" and therefore whether the act affects competition between competitors).

35. *See id.* (noting that joint ventures such as professional sports leagues "generate distinct problems").

36. STEFAN SZYMANSKI, PLAYBOOKS AND CHECKBOOKS: AN INTRODUCTION TO THE ECONOMICS OF MODERN SPORTS, at xiv (2009) ("[I]n the business world the bankruptcy of your rivals is even better than collusion . . . . What makes the sports business different is that you cannot have a business without your rivals."); Robert C. Heintel, Note, *The Need for an Alternative to Antitrust Regulation of the National Football League*, 46 CASE W. RES. L. REV. 1033, 1043 (1996) ("A team apart from the league would generate little fan interest because it would have no one to play, so it could not survive.").

37. *See supra* note 4.

38. *See* Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 769 (1984) ("[I]t is perfectly plain that an internal 'agreement' to implement a single, unitary firm's policies does not raise the antitrust dangers § 1 was designed to police. . . . Coordination within a firm is as likely to result from an effort to compete as from an effort to stifle competition.").

receptive to the single-entity defense as applied to sports leagues appeared in Justice Rehnquist's dissent to the denial of certiorari in *National Football League v. North American Soccer League*,[39] in which he declared that "[a]lthough . . . teams compete with one another on the playing field, they rarely compete in the marketplace."[40] It was not until the Supreme Court's decision in *Copperweld Corp. v. Independence Tube Corp.*,[41] however, that the proponents of the single-entity defense obtained precedential support for their position. In *Copperweld*, the Court determined that a steel company was incapable of conspiring with its wholly owned subsidiary in a way that violated § 1.[42] Comparing a parent and its subsidiary to a team of horses collectively pulling a cart with a single driver,[43] the Court ultimately concluded that the "single entity" test adequately preserved § 1's prohibition on anticompetitive "concerted conduct" because "the ultimate interests of the subsidiary and the parent are identical, so the parent and the subsidiary must be viewed as a single economic unit."[44]

While proponents of applying the single-entity argument to professional sports leagues "believe the decision opened the door for single entity status" of sports leagues,[45] "the Supreme Court has never decided . . . how far *Copperweld* applies to more complex entities and arrangements that involve a high degree of corporate and economic integration but less than that existing in *Copperweld* itself."[46] This open question helped fuel the major argument against the application of *Copperweld* to sports leagues: unlike the parent-subsidiary relationship, in which the parent controls the subsidiary through ownership, team owners have "a diversity of entrepreneurial interests that goes well beyond the ordinary company."[47] Given the diversity of interests at work, the First Circuit held in *Fraser v. Major League Soccer* that granting

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39. 459 U.S. 1074 (1982) (Rehnquist, J., dissenting from denial of certiorari), *denying cert. to* 670 F.2d 677 (2d Cir. 1982); *see* Robert S. Jeffrey, Note, *Beyond the Hype: The Legal and Practical Consequences of* American Needle, 11 FLA. COASTAL L. REV. 667, 672 (2010) (discussing Justice Rehnquist's dissent as initially being the "only refuge" for advocates of the single-firm defense).

40. *N. Am. Soccer League*, 459 U.S. at 1077 (Rehnquist, J., dissenting from denial of certiorari). Rehnquist's view is derived in part from the argument that the NFL and other sports leagues advanced during the trial court proceedings. *See* N. Am. Soccer League v. Nat'l Football League, 505 F. Supp. 659, 674–78 (S.D.N.Y. 1980). However, the argument had not achieved widespread success and lacked any indication of support from the Supreme Court until Justice Rehnquist's dissent. Jeffrey, *supra* note 39, at 672–73.

41. 467 U.S. 752.

42. *Copperweld*, 467 U.S. at 777.

43. *Id.* at 771.

44. *Id.* at 772 n.18.

45. Jeffrey, *supra* note 39, at 674.

46. Fraser v. Major League Soccer, L.L.C., 284 F.3d 47, 56 (1st Cir. 2002).

47. *Id.* at 57. It is particularly noteworthy that this criticism was leveled against Major League Soccer ("MLS"), which is far more integrated than any other major sports league and consequently has owners with interests that are more unified than those in other leagues. Fraser v. Major League Soccer, L.L.C., 97 F. Supp. 2d 130, 138 n.10 (D. Mass. 2000) (explaining that MLS teams exist "as part of an overarching corporate structure").

leagues single-entity status would permit precisely the type of horizontal coordination that § 1 was designed to prevent.[48]

Given the contortion needed to twist a doctrine first applied in a case involving a parent corporation and its subsidiary to leagues composed of approximately thirty independently owned teams, arguments in favor of applying *Copperweld* to sports leagues were met with general skepticism[49] and were rejected by the Courts of Appeals for the First,[50] Second,[51] Eighth,[52] Ninth,[53] and D.C.[54] Circuits. However, the argument finally found a receptive forum in the Seventh Circuit in *Chicago Professional Sports Partnership v. National Basketball Association (Bulls II)*.[55] There, the court declared that "[s]ports are sufficiently diverse that it is essential to investigate their organization . . . one league at a time—and perhaps one facet of a league at a time," because it is possible that individual teams will have such a substantial overlap in interests that they are a single entity for analytical purposes.[56] For the Seventh Circuit, the key question was whether the restraint in question deprived the market of independent decisionmakers without any countervailing procompetitive benefits; it concluded that there was no reason that a league could not be considered a single entity in those aspects of its business for which it satisfied the Seventh Circuit's test.[57]

II. The Problem with Improper Product Definition in the Sporting Context

While it is clear from Part I that sports leagues present challenging questions regarding the competitive effects of a restraint under the Rule of Reason, court have faced a more fundamental and persistent problem in executing these analyses. Courts that apply the Rule of Reason to sports

48. *Fraser*, 284 F.3d at 57–58.

49. *See* McNeil v. Nat'l Football League, 790 F. Supp. 871, 880 (D. Minn. 1992); Jeffrey, *supra* note 39, at 674–75 ("[F]or years, post-*Copperweld* cases failed to complete the metamorphosis proponents of single entity treatment long desired, leaving the decision surprisingly unremarkable in the context of sports law.").

50. *Fraser*, 284 F.3d at 57.

51. N. Am. Soccer League v. Nat'l Football League, 670 F.2d 1249, 1257–58 (2d Cir. 1982) (finding that "[t]o tolerate such a loophole 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" and thus holding that restraints should be evaluated under the Rule of Reason).

52. Mackey v. Nat'l Football League, 543 F.2d 606 (8th Cir. 1976).

53. L.A. Mem'l Coliseum Comm'n v. Nat'l Football League, 726 F.2d 1381 (9th Cir. 1984).

54. Smith v. Pro Football, Inc., 593 F.2d 1173 (D.C. Cir. 1978).

55. 95 F.3d 593 (7th Cir. 1996).

56. *Chi. Prof'l Sports P'ship (Bulls II)*, 95 F.3d at 600.

57. *See id.* at 598–600. Of course, central to this holding was the simultaneous conclusion that leagues "produce[] a single product," *id.* at 598, the underlying fallacy of which this Note discusses *infra* in Part II.

leagues often improperly define the products at issue by focusing on the way in which leagues are structured rather than on the way in which consumers understand what they are buying. This mistake effectively guarantees leagues effective immunity from the antitrust laws by preventing courts from considering the effects of the challenged restraints on intraleague competition. Section II.A describes the business model of sports leagues and shows how different inputs and outputs seem to require different levels of cooperation among teams. Section II.B describes *National Collegiate Athletic Ass'n v. Board of Regents* (*NCAA*),[58] in which the Supreme Court embraced the notion that courts must look to the specific element of the business affected by the restraint when conducting a Rule of Reason analysis. Section II.C provides specific examples of cases in which the court was unable to properly identify the product at issue and explains how this mistake effectively guaranteed that the league would prevail in each case.[59]

A. *The Business of Sports*

In order to properly understand the issues at work when analyzing what sports leagues create and when they compete with one another, it is important to first understand the basic business model of American sports leagues.[60] This Note breaks down these questions by looking at what inputs the teams buy and what output the teams produce.

Inputs are those things that a producer must buy and consume in order to make its product.[61] By far the largest input for sports teams is labor, which, in the case of leagues, means the competition for players.[62] While the existence of collective bargaining has taken many of the labor issues that arise in the sports context outside the scope of antitrust laws,[63] courts that have had occasion to consider antitrust cases regarding leagues' labor policies have

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58. 468 U.S. 85 (1984).

59. This Note takes no position on whether these cases would have come out differently had the courts accounted for harm to intraleague competition. It simply argues that courts that make this mistake fail to properly account for the full competitive landscape and, as such, do not consider all of the issues relevant to a proper Rule of Reason analysis.

60. This Section reviews league business only at a high level of generality. For a thorough analysis of the specific business models of various sports in both the United States and Europe, see HANDBOOK ON THE ECONOMICS OF SPORT (Wladimir Andreff & Stefan Szymanski eds., 2006).

61. ALAN GILPIN, DICTIONARY OF ECONOMIC TERMS 109–10 (3d ed. 1973). "Output," in contrast, refers to the things produced and sold to consumers. *Id.* at 162.

62. *See, e.g.*, WIS. LEGIS. AUDIT BUREAU, GREEN BAY PACKERS FINANCIAL CONDITION REVIEW 10 (2000), *available at* http://legis.wisconsin.gov/lab/reports/GREEN%20BAY%20PACKERS.pdf (noting that player costs accounted for 68.4 percent of the Green Bay Packers' expenses in the fiscal year 1994–95).

63. *See, e.g.*, Darren Heitner, *NFL Labor Battle: To the Courts?*, SPORTS AGENT BLOG (Mar. 11, 2011, 9:36 AM), http://www.sportsagentblog.com/2011/03/11/nfl-labor-battle-to-the-courts/.

held that the constituent teams do compete with each other and are subject to antitrust laws.[64]

The two primary outputs from which leagues generate their revenue are television (in the form of payments for broadcast rights and advertising) and ticket sales.[65] As an example, the Green Bay Packers' total revenue was $63,442,000 for the fiscal year 1994–95.[66] Of that amount, $37,258,000 was derived from broadcast rights and $14,898,000 was earned from game tickets.[67] Teams also derive income from, among other things, concessions, pro shop sales, and suite and club premiums.[68] Recently some teams have sought to raise money through the sale of personal seat licenses ("PSLs"), in which teams sell to their fans the right to purchase tickets to future games.[69] Unlike the purchasing of labor inputs, for which it is relatively obvious that the teams compete, it is not immediately clear whether teams in the same league compete with each other when they make these products available to the public. On the one hand, it seems obvious that a dollar spent on one team is a dollar not spent on the other; so when a customer buys a PSL from the Giants he cannot spend that money on a Jets PSL. At the same time, it is possible that a team's interest in some circumstances is that the money be kept in the league on the theory that all teams benefit when consumers spend money within the league.

As this brief sketch demonstrates, sports leagues do not monolithically focus on the production of a single product through the economic coordination of a number of distinct corporate actors. Instead, teams buy a variety of inputs and sell a variety of outputs. Some of these purchases and sales involve coordination with other teams (such as the production of live games), while some (such as the sale of replica jerseys) do not require cooperation and, in fact, may involve direct competition with other teams in the same league.

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64. *See, e.g.*, Smith v. Pro Football, Inc., 593 F.2d 1173, 1188–89 (D.C. Cir. 1978) (declaring the NFL draft to be a violation of the Sherman Act); *see also* Chi. Prof'l Sports P'ship v. Nat'l Basketball Ass'n (*Bulls II*), 95 F.3d 593, 600 (7th Cir. 1996) ("[I]t is essential to investigate [the organization of sports leagues accused of antitrust allegations] . . . one league at a time—and perhaps one facet of a league at a time . . . .").

65. SCULLY, *supra* note 29, at 25 & nn.22 & 27.

66. WIS. LEGIS. AUDIT BUREAU, *supra* note 62, at 8.

67. *Id.*

68. *See, e.g.*, *id.*; SCULLY, *supra* note 29, at 25.

69. Sam Walker, *Mortgages on the 50-Yard Line: Tickets Cost So Much, Fans Need Bank Loans*, WALL ST. J., Nov. 13, 1998, at W11. A less common tack with the same general goal is the sale of equity seat licenses, which enable fans to pay substantially higher amounts—with financing provided by the selling teams—for permanent ownership of their seats. Kevin Clark, *At Long Last, the Sports Mortgage: In Lean Times, Teams Try 'Equity Seat Rights' to Raise Money; $220,000 for a Seat at Cal*, WALL ST. J., Sept. 29, 2009, at D8.

B. National Collegiate Athletic Ass'n v. Board of Regents

As this Note discussed in Part I, the Rule of Reason is structured around an analysis of the market as consumers understand it.[70] The logical corollary to the requirement that courts define markets according to how consumers understand them is that courts should also define products according to how the consumer understands them. Just as courts cannot understand how markets function without knowing what consumers view as their alternatives, a court's Rule of Reason analysis necessarily depends on properly understanding what the consumer is actually buying.

This attribute-specific analysis is precisely what the Supreme Court adopted in reaching its decision in *NCAA*.[71] In *NCAA*, the Boards of Regents of the University of Oklahoma and the University of Georgia sued the National Collegiate Athletic Association ("NCAA") over its rule limiting the number of college football games that could be televised and the number of times any given team could appear in a televised game.[72] The NCAA, in defending its policy, essentially argued that the product in question should be viewed as "college football" by claiming that the purpose of the limits on television appearances was that they would benefit the sport as a whole.[73] By asking the Court to treat its television limits as a means of protecting other elements of college football rather than simply a regulation on the sale of televised college football games, the NCAA effectively asked the Court to view college football as a single, undifferentiated mass in which all of its various business elements combine to create a single product. The Court rejected this argument,[74] however, and treated the product at issue as something more like "college football television rights."[75] It found that the NCAA's plan was "not even arguably tailored" to its enunciated rationales (including maintaining a competitive balance), which indicated that college

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70. *See supra* notes 17–24 and accompanying text; *see also* Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 481–82 (1992) ("The relevant market . . . is determined by the choices available to Kodak equipment owners."); Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2 (1984) (defining the market according to the *patient's* alternatives rather than the doctor's); Fishman v. Estate of Wirtz, 807 F.2d 520, 531 (7th Cir. 1986) ("A relevant market is comprised of those 'commodities reasonably interchangeable *by consumers*. . . .' " (emphasis added) (quoting United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377, 395 (1956))).

71. 468 U.S. 85 (1984).

72. *NCAA*, at 88, 91–94.

73. *See id.* at 114–17 (noting that the NCAA argued in favor of its restraint by claiming that it protected, inter alia, attendance at nontelevised games and competitive balance).

74. *Id.* at 120. While the Court rejected this argument in *NCAA*, this case stands as an exception to the generally receptive treatment that courts have given to such arguments. *See* Heintel, *supra* note 36, at 1046 (observing that "the courts have given little consideration to exactly what product the NFL, or any sports league, produces").

75. *See NCAA*, 468 U.S. at 114 (discussing the competitiveness of "college football television rights").

football could not be viewed as a single, unified product but rather must be analyzed on an element-by-element basis.[76]

C. *The Problem of Improper Product Definition*

Unfortunately, courts reviewing subsequent antitrust claims against sports leagues have not followed *NCAA*'s approach. Instead, courts applying the Rule of Reason to sports leagues routinely fixate on the league's structure when they define the products at issue in the claims. As a result, courts have opened a back door to antitrust immunity that mimics the immunity that single entities enjoy.[77] Because it is logically impossible for a single product to compete with itself, the way in which courts define the product necessarily removes intraleague competition from Rule of Reason analyses.[78] In the most basic form, this proposition is apparent from considering the differences, for example, between defining a product as "NBA Basketball" and defining it as "Houston Rockets Basketball." In the first instance, "NBA Basketball" can only compete with other sports or forms of entertainment, and its teams become, in effect, distributors of a single product that is no more capable of competing with itself than Kleenex or Pepsi. In contrast, "Houston Rockets Basketball" is an entity that might be forced to compete with other teams within the National Basketball Association ("NBA") (such as for the loyalty and business of fans in western Louisiana whose houses are a similar distance from Houston and New Orleans and who can choose between the Rockets and the New Orleans Hornets). The inevitable result of excluding intraleague competition is thus twofold: it becomes effectively impossible to prove anticompetitive effects, and any procompetitive benefits will be sufficient to justify the challenged restraint.

Unfortunately, courts that have "attempt[ed] to define the product of leagues [have] do[ne] so through generalizations that are useless in formulating the type of specific analysis required for application of antitrust law."[79] They generically declare that the product at issue is a combination of the league's initials and the sport in which the teams compete[80] (referred to

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76. *Id.* at 119.

77. See *supra* Section I.C for a discussion of the single-entity defense.

78. *Cf.* L.A. Mem'l Coliseum Comm'n v. Nat'l Football League, 726 F.2d 1381, 1394 (9th Cir. 1984) ("Is the NFL a single entity . . . which creates a product that competes with other entertainment products . . . ? Or is it 28 individual entities which compete with one another both on and off the field for the support of the consumers of the more narrow football product?").

79. Heintel, *supra* note 36, at 1046.

80. *See infra* Section II.C and accompanying text. It is not merely courts that have struggled to distinguish league structure and product definition; commentators have made the same mistake. *See* Nathanial Grow, *There's No "I" in "League": Professional Sports Leagues and the Single Entity Defense,* 105 MICH. L. REV. 183, 191 (2006) ("Professional sports teams produce a single product: the league sport."); Thomas Kennedy, Comment, *Will America's Pastime Be a Part of America's Future? An Antitrust Analysis that Enables Sports Leagues to Compete Effectively in the Entertainment Market,* 46 UCLA L. REV. 577 (1998) (speaking of

in this Note as the "League + Sport" definition) rather than conduct a substantive analysis of what products are actually consumed, which is how antitrust claims ought to be evaluated.[81]

The single-product definition underlies the larger problem with the way in which courts apply the Rule of Reason to sports leagues. The complex interrelationship between teams obscures the courts' ability to discern how teams actually behave and compete, what is actually purchased, and what the *consumer* views as the alternatives with which he or she is presented. Understanding this concededly complex economic landscape, however, is precisely what courts reviewing antitrust allegations are supposed to do.[82] And yet, by embracing the view that the NBA creates a single, unitary product that the league's member teams distribute, the courts foreclose substantive analysis and effectively immunize the league from antitrust review, because it is logically impossible for a unitary product to compete against itself.

The practical manifestation of this mistake can be revealed through an analysis of four cases: *Chicago Professional Sports Partnership v. National Basketball Association (Bulls II)*;[83] *Major League Baseball Properties, Inc. v. Salvino, Inc.*;[84] *Madison Square Garden, L.P. v. National Hockey League*;[85] and the lower courts' decisions in *American Needle v. National Football League*.[86] In these cases, courts dealing with four different restraints imposed on different parts of four different leagues made the same mistake regarding product definition and, in so doing, prevented the proper analysis from taking place.

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the products created by sports leagues only in general terms without contemplating the possibility of internal league competition).

81. *The Economic Implications of* American Needle *on Joint Ventures and Other Collaborations: A Roundtable Discussion with Gregory Leonard and Steven Schwartz*, ANTITRUST INSIGHTS (NERA Econ. Consulting, New York, N.Y.), Fall 2009, at 3 ("[A]pplication of the output test should focus on the product or products that are affected by the restriction at issue."). The tack of viewing antitrust claims through the prism of the impact of restrictions on consumers is called the "output test." *Id.* An analysis under this test attempts to understand the competitive effects from a consumer-welfare position by analyzing whether the the restriction will ultimately increase or decrease the quantity and quality of the product in question. *Id.*

82. *See* United States v. Topco Assocs., 405 U.S. 596, 622 (1972) (Burger, C.J., dissenting) ("[W]hile I would not characterize our role under the Sherman Act as one of 'rambl[ing] through the wilds,' it is indeed one that requires our 'examin[ation of] difficult economic problems.' "); *see also* Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 57–58 (1977) (holding that allegations of improper vertical price restraints must be evaluated through an economic analysis of the likely competitive benefits and harms).

83. 95 F.3d 593 (7th Cir. 1996).

84. 542 F.3d 290 (2d Cir. 2008).

85. Madison Square Garden, L.P. v. Nat'l Hockey League *(MSG II)*, No. 07 CV 8455 (LAP), 2008 U.S. Dist. LEXIS 80475 (S.D.N.Y. Oct. 10, 2008); Madison Square Garden, L.P. v. Nat'l Hockey League *(MSG I)*, No. 07 CV 8455 (LAP), 2007 U.S. Dist. LEXIS 81446 (S.D.N.Y. Nov. 2, 2007).

86. Am. Needle Inc. v. Nat'l Football League, 538 F.3d 736 (7th Cir. 2008); Am. Needle, Inc. v. New Orleans La. Saints, 496 F. Supp. 2d 941 (N.D. Ill. 2007).

1. *Bulls II*

In *Bulls II*, the Chicago Bulls and their national broadcast partner, WGN, sought to invalidate the NBA's rules regarding the number of Bulls games that could be broadcast nationally. Though this case is most often cited for Judge Easterbrook's assertion that leagues can be single entities for antitrust purposes in some contexts,[87] *Bulls II* is relevant here because this assertion was functionally irrelevant in light of the way in which the product at issue was defined. Rather than viewing televised basketball games as distinct products with unique attributes, the desirability of which are determined by the specific teams playing in them, the court opted to track the league's corporate structure and define the relevant product as "NBA Basketball."[88]

The primary problem with this definition is that it relies on the essential fiction that fans are indifferent about which teams are playing when they make their consumption decisions. This theory of product definition must make this assumption, because any attempt to account for the possibility that consumers prefer one team to another would cause an impossible fissure in the otherwise unitary "product" identified by the court. That is, as soon as a distinction is made between the Chicago Bulls and the Milwaukee Bucks, the product seems less like that of a single entity and increasingly like those of more than two dozen different sellers. This single-product proposition is not only intuitively strange, but leagues[89] and courts[90] alike have recognized its conceptual failings.

2. *Major League Baseball Properties, Inc. v. Salvino, Inc.*

The litigation between Major League Baseball Properties ("MLBP")[91] and Salvino began when MLBP learned that Salvino, a maker of branded plush toys, had produced items bearing Arizona Diamondbacks' trademarks without MLBP's consent.[92] After it received a cease-and-desist letter stating that Salvino was improperly using MLBP-owned logos, Salvino sued

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87. *See, e.g.*, *Am. Needle*, 538 F.3d at 741; *MSG II*, 2008 U.S. Dist. LEXIS 80475, at *39–40; Fraser v. Major League Soccer, L.L.C., 97 F. Supp. 2d 130, 138 (D. Mass. 2000). *Bulls II*'s acceptance of the single-entity argument is discussed *supra* in Section I.C.

88. *See Chi. Prof'l Sports P'ship* (*Bulls II*), 95 F.3d at 599–600.

89. *See, e.g.*, *MSG I*, 2007 U.S. Dist. LEXIS 81446, at *3 (noting a declaration by an National Hockey League ("NHL") executive that the NHL has struggled to "bridg[e] fan support for local teams with interest in the sport as a whole.").

90. *See, e.g.*, L.A. Mem'l Coliseum Comm'n v. Nat'l Football League, 519 F. Supp. 581, 584 (C.D. Cal. 1981) ("[S]ports fans quite often wish to spend their money on the games of a particular team, *not simply on 'NFL football,' 'NBA basketball,' or the like*." (emphasis added)).

91. MLBP is a wholly owned subsidiary of Major League Baseball ("MLB") and serves as MLB's worldwide licensing agent. Major League Baseball Props. v. Salvino, Inc. (*Salvino II*), 542 F.3d 290, 294 (2d Cir. 2008). It was formed to boost MLB's revenues by serving as a one-stop shop for all licensing arrangements. *See id.* at 297.

92. *Id.* at 294–95.

MLBP in California federal court for violations of, inter alia, § 1, claiming that MLB's exclusive licensing power was really an agreement by the member teams not to compete with each other.[93] MLBP, in turn, filed suit against Salvino in the Southern District of New York for, inter alia, trademark infringement arising out of Salvino's use of the Diamondback's trademark.[94] Salvino's suit was transferred from California to the Southern District of New York, and its affirmative claims against MLBP were converted into counterclaims.[95] MLBP moved for and won summary judgment against Salvino's counterclaims.[96]

The Second Circuit identified two primary products at issue in Salvino's claims: "MLB Entertainment Product" and "MLB Intellectual Property."[97] However, the market for MLB Entertainment Product, which consisted of the sum total of all games played,[98] was secondary to the court's analysis. Though it concluded that there was a relationship between the value of MLB's Intellectual Property and a team's on-field performance, the court nonetheless treated the market for the consumption of live events as distinct from the market for items branded with the logos and trademarks of MLB teams.[99]

The focus of the Second Circuit's analysis in *Salvino* was on the market for the purchase of MLB Intellectual Property by the retailers who determine which products will receive shelf space.[100] The thrust of MLB's argument, which the court accepted, was that MLB's policies supported the competitive process because they enabled the league to compete more effectively with other products in the entertainment market (ranging from sports paraphernalia to trinkets associated with television shows, movies, and comic book characters).[101]

Once again, however, the court's acceptance of this argument effectively presumed what was never proved: that MLB intellectual property is a single product. Though there is no doubt that goods bearing the logos of MLB teams compete against products bearing the logos of NFL and NBA teams,

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93. *Id.* at 295 (noting Salvino's allegation that the joint licensing diminished the incentive of firms to compete "through [their] trademark[s]" (internal quotation marks omitted)). MLBP's exclusive power was not subject only to external challenges. The New York Yankees also challenged MLBP's interference with their marketing efforts. *See* Kennedy, *supra* note 80, at 581.

94. *Salvino II*, 542 F.3d at 295.

95. *Id.* at 295–96.

96. Major League Baseball Props., Inc. v. Salvino, Inc. (*Salvino I*), 420 F. Supp. 2d 212 (S.D.N.Y. 2005).

97. *See Salvino II*, 542 F.3d at 296.

98. *Id.*

99. *Id.* at 332.

100. *See id.* at 330 ("[T]here seems to be no genuine dispute that the market level that is at issue in this case is the licensing level, with demand at that level being influenced by demand at the consumer level.").

101. *Id.* at 299, 334 (confirming the district court's conclusion that a centralized licensing center created certain procompetitive benefits).

there is similarly no question that there is competition between Cardinals and Cubs products in central Illinois or between Rays and Marlins products in Florida. Consideration of these forms of competition, however, is entirely foreclosed under the Second Circuit's analysis. Just as it is not possible for a unitary product to compete internally—Pizza Hut's pepperoni pizza does not compete against its sausage pizza for purposes of an antitrust analysis—this conception of the product implies that the Red Sox and Yankees do not fight over shelf space in central Connecticut. Thus, by defining the product only in terms of MLB's overall structure, the individual appeal of team merchandise is subsumed into the monolithic league product and thus does not receive individual attention in an antitrust analysis.

3. The New York Rangers Cases

The litigation between the Rangers and the NHL arose after the league announced the implementation of its New Media Strategy, which required the transfer of all individual team websites onto a single platform and server created and hosted by the league.[102] Madison Square Garden ("MSG"), the Rangers' owner, alleged that this restraint violated § 1 because it was "not reasonably necessary for the success of the NHL venture."[103] The league, relying on the district courts' decisions in *Salvino* and *American Needle*, contended that this was simply a permissible exercise of a league's power to promote its product against other forms of entertainment.[104] The court, in denying the Rangers' motion for a preliminary injunction to enjoin the league from fining the team for failure to comply with the transfer, treated the product at issue as "NHL hockey."[105] In so doing, the court again confined its focus to those benefits that would inure to the league from the policy and refused even to consider the prospective harms to competition among the teams that would also result from the New Media Strategy.[106]

The court's use of the "League + Sport" model is further evidenced by its description of the New Media Strategy as an "intrabrand restraint[]."[107]

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102. Madison Square Garden, L.P. v. Nat'l Hockey League (*MSG I*), No. 07 CV 8455 (LAP), 2007 U.S. Dist. LEXIS 81446, at *1–9 (S.D.N.Y. Nov. 2, 2007).

103. *Id.* at *14–15 (internal quotation marks omitted).

104. Brief for Defendants-Appellees National Hockey League at 54–55, Madison Square Garden, L.P. v. Nat'l Hockey League, 270 F. App'x 56 (2d Cir. 2008) (No. 07-4927-cv), 2007 WL 6514940 (arguing that the New Media Strategy had "several procompetitive effects" and citing the district courts' decisions in *Salvino* and *American Needle* for the proposition that these procompetitive effects made the policy permissible under § 1).

105. *See MSG I*, 2007 U.S. Dist. LEXIS 81446, at *17–20 (discussing the need for the league to sell itself collectively in order to compete against other leagues). The fact that this decision was rendered in the context of a motion for a preliminary injunction does not mitigate the effect of its underlying supposition. Because preliminary injunctions are evaluated on the basis of likelihood of success and possibility of irrevocable harm, *id.* at *15, refusal to consider intraleague competition can substantially skew the court's conclusions regarding the appropriateness of granting the preliminary injunction.

106. *See id.* at *17–18, *25–26.

107. *Id.* at *21.

By describing the New Media Strategy in this manner, the court brought the New Media Strategy squarely into the realm of vertical restraints[108]—and in so doing, virtually guaranteed that the NHL would prevail.[109] But this result was not reached by addressing the merits of such treatment for the NHL; rather, the court simply assumed away the substantial questions of how consumers actually understand the market and how the teams that form the NHL actually behave with respect to each other. While the court eventually announced its intent to consider the question whether the league should be treated as a single entity,[110] the league had already derived the benefits of this classification. Because the product "NHL hockey" could not possibly compete with itself, it did not matter whether the league was determined to be a single entity; the residual benefit of that status had already been conferred.

The presumptive grant of an effective immunity was particularly inappropriate in this case because MSG was uniquely exposed to intraleague competition that the court failed or refused to consider. The NHL indirectly conceded that the Rangers, one of three NHL teams in the New York metropolitan area, compete with their local rivals when it agreed to eliminate any stories about the New Jersey Devils and New York Islanders on the NHL-hosted Rangers website.[111] The recognition that local teams compete directly with each other is not isolated to hockey; leagues routinely recognize that teams in the same geographic market are forced to compete with one another by paying incumbent teams sums of money when new teams are introduced into their market.[112] By defining the product as "NHL hockey," however, the court effectively precluded consideration of the competitive harms that the

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108. Vertical restraints refer to restrictions on competition that are imposed in contracts between parties at different levels of the production chain (for example, between a producer and a retailer). BLACK'S LAW DICTIONARY 1429 (9th ed. 2009). Vertical restraints are distinct from horizontal restraints, which are restrictions that parties agree to at the same level of the production chain. *Id.*

109. The line of cases beginning with *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977), has established virtual immunity for limits on intrabrand competition so long as those restrictions have cognizable benefits for interbrand competition. *See, e.g.*, Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877 (2007). *But see* Stephen F. Ross, *Antitrust Options To Redress Anticompetitive Restraints and Monopolistic Practices by Professional Sports Leagues*, 52 CASE W. RES. L. REV. 133, 136, 139 (2001) (distinguishing the status of sports franchises from the relationship created by "conventional" franchise agreements.) The distinction between sports franchises and "conventional" franchises may raise the possibility that the analysis that is used in one context may be inappropriate in the other, although consideration of this possibility is outside the scope of this Note.

110. *See* Madison Square Garden, L.P. v. Nat'l Hockey League (*MSG II*), No. 07 CV 8455 (LAP), 2008 U.S. Dist. LEXIS 80475, at *38–42 (S.D.N.Y. Oct. 10, 2008) (withholding a decision at the summary judgment stage on single-entity treatment for the NHL until further briefing was completed).

111. *MSG I*, 2007 U.S. Dist. LEXIS 81446, at *11.

112. *See, e.g.*, L.A. Mem'l Coliseum Comm'n v. Nat'l Football League, 726 F.2d 1381, 1393 (9th Cir. 1984) (observing that the New York Giants and San Francisco 49ers received payments of $18 million when the New York Jets and Oakland Raiders joined the NFL).

New Media Strategy caused for the Rangers alone and, more importantly, to competition in general.

4. *American Needle* in the Lower Courts

NFL Properties ("NFLP") was formed in 1963 with the goal of promoting the league through more effective use of its intellectual property.[113] For years, NFLP granted licenses to a number of different apparel makers. In 2000, NFLP broke from its longstanding practice of issuing multiple licenses. In 2001, it granted Reebok an exclusive license for all NFL products and consequently declined to renew the license of American Needle, which had been a licensee for about twenty years.[114] In response to the decision to grant an exclusive license, American Needle sued the NFL, NFLP, the individual NFL teams, and Reebok, alleging that they were all part of a conspiracy in violation of § 1.[115] The NFL, citing *Bulls II* and other cases, argued that its exclusive agreement with Reebok could not violate the Sherman Act because *Copperweld* and its progeny immunized the league—acting as a single entity for purposes of promoting NFL team intellectual property—from antitrust scrutiny.[116]

Both the district court and the Seventh Circuit agreed with the NFL. The district court concluded that *Copperweld* compelled it to ask whether the exclusive sales arrangement deprived the market of independent economic competitors, and held that it did not.[117] Rather, it determined that the NFL teams had, "through the various forms of NFL Properties, acted as an economic unit" and that "[t]he economic reality is that the separate ownerships had no economic significance in and of itself."[118] According to the Seventh Circuit, reviewing the case on appeal, the district court's holding "was based on its determination that the NFL teams' collective-licensing agreement serves to promote NFL Football. And by promoting NFL football . . . the NFL teams act[] as an economic unit in such a manner that they should be deemed to be a single entity."[119] The Seventh Circuit agreed, holding that "NFL teams can function only as one source of economic power when collectively producing NFL football" and mocked any contrary argument by comparing it to a Zen riddle.[120]

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113. Am. Needle Inc. v. Nat'l Football League, 538 F.3d 736, 737–38 (7th Cir. 2008).

114. *Id.* at 738; *see also* Michael A. McCann, American Needle v. NFL*: An Opportunity To Reshape Sports Law*, 119 YALE L.J. 726, 729 (2010).

115. For purposes of this Note, the defendants are collectively referred to as "the NFL" unless otherwise specified.

116. *Am. Needle*, 538 F.3d at 738–39.

117. Am. Needle, Inc. v. New Orleans La. Saints, 496 F. Supp. 2d 941, 943–44 (N.D. Ill. 2007).

118. *Id.* at 944.

119. *Am. Needle*, 538 F.3d at 739 (second alteration in original) (internal quotation marks omitted).

120. *Id.* at 743. The same passage also rejected American Needle's argument that there could be competition between teams as one that *Bulls II* had dismissed as "silly." *Id.*

Importantly, the decisions of both the district court and the Seventh Circuit could not have been possible without the framework provided by the court's product definition. By treating the product at issue as "NFL football," the courts found that the owners of the individual teams "had no [separate] economic significance."[121] That is, the NFL could not be an improper combination of distinct loci of power, because the definition of the products precluded the possibility that teams compete against each other. Had the court defined the product more precisely—as, for example, individual NFL team intellectual property—there would have been nothing metaphysical about contemplating whether teams compete against one another to sell their intellectual property. Instead, it would have been a necessary consideration that would have precluded single-entity treatment and required a Rule of Reason analysis. From this perspective, the single-entity argument can be viewed as the final blow in a battle already decided by the court's product definition.

III. *AMERICAN NEEDLE* AND THE SOLUTION TO THE PRODUCT DEFINITION PROBLEM

The Supreme Court's opinion in *American Needle* overturned the Seventh Circuit's embrace of the single-entity defense. For the reasons described in Part II, however, it is not clear that this decision will have any impact on the ultimate disposition of antitrust cases brought against sports leagues. This Part argues that *American Needle*, if properly construed, provides the legal foundation for fixing the product definition mistake that many courts have made. Section III.A discusses the Supreme Court's decision in *American Needle* and elucidates the forces that drove the Court to overturn the lower courts. Section III.B then argues that the idea animating the Supreme Court's decision is its rejection of the unitary product definition, and concludes that the Court's logic can be the impetus for fixing the lower courts' mistakes.

A. *The Supreme Court's Decision:* American Needle, Inc. v. National Football League

Unlike the lower courts, the Supreme Court rejected the NFL's claim that it was a single entity and, accordingly, held that its "licensing activities constitute concerted action that is not *categorically* beyond the coverage of § 1."[122] The Court's decision was driven by its belief that the lower courts had "discounted the significance of potential competition among the teams regarding the use of their intellectual property" simply because the teams had to pool their efforts in certain key areas.[123] In contrast to the lower

121. *Am. Needle*, 496 F. Supp. 2d at 944.

122. American Needle, Inc. v. Nat'l Football League, 130 S. Ct. 2201, 2206 (2010) (emphasis added).

123. *See id.* at 2208.

courts, the Supreme Court found that cooperation in activities such as rule and schedule making did not preclude competition between teams acting as "separate economic actors pursuing separate economic interests" in other areas, including "in the market for intellectual property."[124] To merchandisers—the customers of NFL intellectual property—the teams represent competing sources of valuable trademarks, which are sold according to the individual interests of the team and not the league as a whole.[125] The decision to collectively sell the NFL-team intellectual property deprived the marketplace of independent decisionmakers, and thus the league could not be a single entity.[126]

The Court did not, however, deny that the teams shared an interest in promoting the NFL brand or that they would all benefit from strengthening that brand. Rather, the Court determined that this common interest was not enough to obscure the fact that "the teams still have distinct, potentially competing interests."[127] In the Court's view, two separate battles were taking place. In one, the NFL teams, acting collectively through NFLP, were trying to grow their pie by competing against other leagues and forms of entertainment.[128] In the other, the league's members were vigorously fighting for a greater share of that pie.[129] It is the existence of this second form of competition that is fundamentally at odds with the key insight of Rehnquist's dissent to the denial of certiorari in *National Football League v. North American Soccer League* and that led the Court to its conclusion that the NFL was not a single entity.[130]

Underlying the difference between the lower courts' conception of the antitrust issues in this case and the Supreme Court's conception is the different way in which they conceive the products at issue. Both the district court and the Seventh Circuit viewed the relevant product as NFL football and consequently believed that the restraints served the ultimate good of the broadly defined product. Because the product definition prevented any consideration of internal competition, the lower courts held that the NFL was a single entity. The Supreme Court, in contrast, understood that the product at

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124. *Id.* at 2213 (internal quotation marks omitted).

125. *See id.*

126. *Id.*

127. *Id.*

128. *See id.* at 2213–14 (acknowledging that "NFL teams have common interests such as promoting the NFL brand" and that this common interest partially unites the interests of the individual teams).

129. *See id.* at 2212–13 ("The teams compete with one another, not only on the playing field, but to attract fans, for gate receipts and for contracts with managerial and playing personnel."); *see also id.* at 2212–16 (discussing generally the ways each member organization acts for its own benefit rather than for the general benefit of the league).

130. The Court did not deny that the need to grow the pie was an important consideration when contemplating the application of antitrust law to the NFL's restraint. Its point was simply that the parallel competition for a greater share of the pie precludes the categorical immunity that single-entity status offers. Rather, the Court concluded, such benefits should be considered in the context of a Rule of Reason analysis. *See id.* 2216–17.

issue was intellectual property owned by the individual teams but sold collectively. By viewing the product in this narrower way, the Court escaped the trap that plagued the lower courts. Limiting the case to the market for "intellectual property" permitted the Court to consider the possibility that such competition occurs and thereby concede the possibility of a § 1 violation. Thus, by defining the product in a way that mirrored the consumer's concept of what he or she is buying, the Supreme Court fulfilled the Rule of Reason's charge to consider all possible effects of a restraint on competition.

B. *The Legacy of* American Needle

The driving force between the different conclusions reached by the lower courts and the Supreme Court was the way in which the courts conceived of the product in question. It is not mere speculation that the Supreme Court rejected the "League + Sport" model of product definition in *American Needle*. Footnote seven explicitly rebuffed the Seventh Circuit's application of this approach:

> The Court of Appeals carved out a zone of antitrust immunity for conduct arguably related to league operations by reasoning that coordinated team trademark sales are necessary to produce "NFL football," a single NFL brand that competes against other forms of entertainment. But defining the product as "NFL Football" puts the cart before the horse: Of course the NFL produces NFL football; but that does not mean that cooperation amongst NFL teams is immune from § 1 scrutiny.[131]

This fundamental insight is critically important if *American Needle* is going to have any meaningful impact on the ultimate disposition of future cases. While this decision denied the NFL categorical immunity from the antitrust laws, leagues will still be able to gain effective immunity through the "League + Sports" product definition unless courts take heed of *American Needle*'s animating rationale. Indeed, the Rule of Reason's analysis of competitive benefits and harms is invariably tied to how the product is defined.[132] Yet those courts that have had occasion to apply *American Needle* have looked only to its holding[133] and its declaration of antitrust axioms[134] in extracting a rule from it. None have yet cited it for its discussion of product

131. *Id.* at 2214 n.7.

132. *See supra* Part II.

133. *See, e.g.*, Atwater v. Nat'l Football League Players Ass'n, 626 F.3d 1170, 1177 n.9 (11th Cir. 2010); Deutscher Tennis Bund v. ATP Tour, Inc., 610 F.3d 820, 837 (3d Cir. 2010); *In re* Fla. Cement & Concrete Antitrust Litig., No. 09-23187-CIV-ALTONAGA/Brown, 2010 U.S. Dist. LEXIS 108528, at *100 (S.D. Fla. Oct. 12, 2010); Stanislaus Food Prods. Co. v. USS-POSCO Indus., No. CV F 09-0560 LJO SMS, 2010 U.S. Dist. LEXIS 92236, at *64–66 (E.D. Cal. Sept. 3, 2010).

134. *See, e.g.*, White v. R.M. Packer Co., No. 10-1130, 2011 WL 565655, at *1 (1st Cir. Feb. 18, 2011); Princo Corp. v. Int'l Trade Comm'n, 616 F.3d 1318, 1335 (Fed. Cir. 2010); Skycam, Inc. v. Bennett, No. 09-CV-294-GKF-FHM, 2010 U.S. Dist. LEXIS 135698, at *13 (N.D. Okla. Dec. 22, 2010); *In re*: Welding Fume Prods. Liab. Litig., No. 1:03-CV-17000, 2010 U.S. Dist. LEXIS 57859, at *40 n.59 (N.D. Ohio June 11, 2010).

definition, nor have any of the citing cases followed its model on this point. While one explanation for this—aside from a general reluctance or refusal to rely on dicta as guiding precedent—might be the nature of the cases presented, the way in which courts understand *American Needle* bears careful observation. If courts do not adopt a broader reading that incorporates the Supreme Court's rationale and views on product definition, *American Needle* will ultimately be of little practical relevance in curtailing the day-to-day behavior of sports leagues, because courts will continue to make the types of mistakes described in Part II. Leagues will continue to define their products under the "League + Sport" model, and, so long as courts accept those arguments, courts will also overlook the threats that league restrictions pose to intraleague competition when conducting Rule of Reason analyses.

CONCLUSION

When the Supreme Court granted American Needle's petition for certiorari, there was a great deal of expectation about what the case could mean.[135] And while its holding appears on its face to be a blow to the NFL, it is not at all clear that the denial of single-entity status will have any practical effect on the way in which the league conducts its business. At this point, the only sure thing is that the NFL will be forced to settle or to fight a protracted legal battle in which it articulates a defense under the Rule of Reason to gain the same immunity that the Supreme Court denied it as a categorical matter. This battle will be shaped by how the court defines the product at issue in the dispute. Should courts adhere to the "League + Sport" model that has been used in many cases, the inevitable result will be a form of delayed immunity for the defendants. In the most narrow construction of its holding, *American Needle* does nothing to prevent that result. However, if courts take a deeper look at the internal logic of that case, they will find that the Court was aware of the problem with product definition and, though it was not explicitly addressed in *American Needle*, sought to prevent it nonetheless. By giving force to footnote seven, courts will simultaneously give teeth to *American Needle*.

135. *See, e.g.*, Gabriel Feldman, *The Puzzling Persistence of the Single-Entity Argument for Sports Leagues:* American Needle *and the Supreme Court's Opportunity to Reject a Flawed Defense*, 2009 WIS. L. REV. 835 (arguing that the Court had the opportunity to deal a death blow to single-entity arguments by sports leagues); McCann, *supra* note 114 (arguing that the case could reshape antitrust jurisprudence as it applies to sports); Chris Sagers, American Needle, Dagher, *and the Evolving Antitrust Theory of the Firm: What Will Become of Section 1?*, ANTITRUST SOURCE, Aug. 2009, at 1 (positing that a verdict for the NFL could effectively obliterate § 1 altogether).