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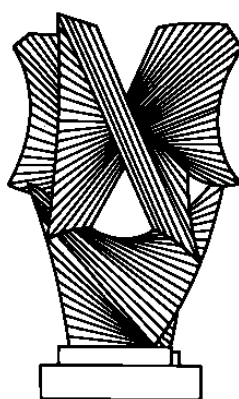
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Organizing Competition and Cooperation *after American Needle*

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Organizing Competition and Cooperation After *American Needle*

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Randal C. Picker¹

I. INTRODUCTION

In *American Needle, Inc. v. National Football League*,² in a unanimous decision by Justice Stevens, the U.S. Supreme Court concluded that the National Football Leagues' ("NFL") licensing activities constituted concerted action subject to Section 1 inquiry under the Sherman Act, even though the actual licensing itself was done via a separate corporate entity. In so deciding, the Court laid to rest the notion that the NFL and similarly organized sports leagues should be treated as a single entity wholly outside of Section 1. But the Court's opinion is substantially broader than just the relatively narrow world of sports leagues and will become the starting point for analysis of joint ventures going forward. And in directing us to examine "competitive reality" in looking at whether independent centers of decision-making have been joined together, the Court offers an open-ended formulation that will take some time to work its way through the court system.

That said, *American Needle* is the yin to *Copperweld's* yang. *Copperweld*³ held that formally separate firms wouldn't be treated as separate actors for Section 1 purposes if those firms had a unity of interest, as occurred there for a parent and its wholly owned subsidiary. *American Needle* says that a formally single entity won't be treated as such if in reality it represents concerted decision-making. Firms can't use clever entity structuring to shield what would otherwise be concerted activity from Section 1 inquiry.

II. COMPETITION AND COOPERATION IN THE NATIONAL FOOTBALL LEAGUE

The 2010 Super Bowl pitted the formerly hapless New Orleans Saints—known for years as the Aints—against Peyton Manning's Indianapolis Colts. The Super Bowl is seen as the pinnacle of competition in the United States—the ultimate game—though as Dallas Cowboy's running back Duane Thomas famously asked, "if it's the ultimate game, how come they're playing it again next year?"⁴ But the 2010 Super Bowl *was* special, even for Super Bowls, and not merely because the Saints finally won one: 106.5 million people watched Super Bowl XLIV, making it the most watched television program ever.⁵

¹ Copyright © 2010, Randal C. Picker. All Rights Reserved. Paul and Theo Leffmann Professor of Commercial Law, The University of Chicago Law School and Senior Fellow, The Computation Institute of the University of Chicago and Argonne National Laboratory.

² Slip Opinion, May 24, 2010 (online at <http://www.supremecourt.gov/opinions/09pdf/08-661.pdf>).

³ *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984).

⁴ Duane Thomas (online at http://sportsillustrated.cnn.com/multimedia/photo_gallery/0701/gallery.NFL.bestSBquotes/content.1.html).

⁵ Richard Huff, Super Bowl ratings: Saints victory over Colts was most-watched program of all time, beating 'MASH,' The New York Daily News, Feb. 8, 2010 (online at http://www.nydailynews.com/entertainment/tv/2010/02/08/2010-02-08_super_bowl_ratings_preliminary_numbers_show_highest_viewership_in_20plus_years.html).

As that suggests, the NFL is particularly good at what it does, and what it does is create competition—organize competition—to produce a compelling product. The NFL sells that product to broadcasters around the world, who in turn sell 30-second time slots to advertisers. Advertisers pay for eyeballs—especially eyeballs with attractive demographics—and so the NFL has a direct stake in the relative competitiveness of its teams. A one-sided game means fewer viewers and therefore a weaker product to sell to advertisers.

All of this necessitates a tight level of interaction among the 32 separately owned teams that compete in the NFL. They need to have common, basic rules of the game, but the need to make the product itself compelling suggests vastly more legitimate, necessary cooperation than we might otherwise see among firms competing in the same industry. A rule that you need to move the football ten yards in four downs to keep the ball is unlikely to raise any hackles. A rule like the draft that allocates negotiating rights for new players to a particular team may matter for ensuring quality competition but it also directly limits salary competition by owners for players. Rules that allocate players to teams may have the effect of creating a single purchaser for playing talent when competition might otherwise ensue.

In *American Needle*, the NFL sought to immunize all of that cooperation from inquiry under Section 1 of the Sherman Act: Extend the analysis of *Copperweld* between parent/subsidiary and treat the 32 separately-owned teams as having as sufficient unity of interest such that they should be treated as a single entity for antitrust purposes. That would immunize the NFL and its teams from Section 1 liability.

The dispute in *American Needle* itself turned on the NFL's practices for licensing NFL logos for apparel, headwear in particular. NFL teams are separately owned and each team typically owns its logos. Since 1963, the NFL has relied on a separate legal entity, National Football League Properties ("NFLP"), to do much of this licensing. In the past, NFL Properties had granted multiple licenses, including one to American Needle, but it subsequently switched course and granted an exclusive license to Reebok. American Needle responded with an antitrust lawsuit alleging that the NFL had eliminated competition among its members via NFL Properties in violation of Section 1 of the Sherman Act.

American Needle lost in the district court and then lost on appeal, 3-0, in the Seventh Circuit.⁶ American Needle then asked the Supreme Court to take the case, as did the NFL. Full stop there: as did the NFL. Even though the NFL had won going away in the appellate court, it wanted more. The NFL acknowledged that it was "taking the unusual step" of asking the Court to hear the case, even though it had already won.⁷ The Court took the case at the NFL's urging even though the Solicitor General asked the Court to decline the case.⁸

III. UNDERSTANDING UNITY OF INTEREST AND INDEPENDENT CENTERS OF DECISIONMAKING

Justice Stevens' opinion in *American Needle* directs us to examine "competitive reality" and to examine whether the agreement in question joins together independent centers of decision-

⁶ 538 F.3d 736 (7th Cir. 2008).

⁷ Brief for the NFL Respondents on Petition for Writ of Certiorari, *American Needle, Inc. v. National Football League*, p. 4 (online at http://www.scotusblog.com/wp-content/uploads/2009/03/08-661_bio.pdf).

⁸ Brief for the United States as Amicus Curiae on Petition for Writ of Certiorari, *American Needle, Inc. v. National Football League* (online at http://www.scotusblog.com/wp-content/uploads/2009/06/08-661_cert_amicus_us.pdf).

making. As applied to the NFL and NFL Properties, it is clear that the teams in the league have some shared interests, but that isn't the same thing as a full unity of interest of the sort seen in *Copperweld*. NFL teams can compete within a shared framework and the possibility of that competition seemed to carry the day.⁹ Even if it is hard to imagine a Chicagoan buying a Packers cheesehead, there must be a point midway between Chicago and Green Bay where team loyalties—and headwear purchases—are up for grabs. The Dallas Cowboys like to think of themselves as America's team and are almost certainly competing for hearts-and-minds in any part of the country without a home NFL team. The fact that some cooperation is required to create the NFL's product and that there are strong shared interests doesn't mean that all interests are shared or that cooperation is required over every aspect of the NFL's operations.

It isn't crystal clear exactly what lines are being drawn by the opinion. As to the actual operation of NFL Properties, two facts from the opinion stand out. First, the logos in question were owned by the individual teams. On those facts, NFL Properties looks like a joint sales agency for the teams. That isn't to say that the actual licensing is anticompetitive—and indeed the Court's opinion remands for a rule of reason inquiry—but rather that the licensing by NFL Properties does eliminate existing independent decision-making regarding the use of the property. Second, the Court characterizes NFL Properties as an instrumentality of the teams.

How would we apply this analysis to other situations? Consider three situations:

- Proctor & Gamble (“P&G”) sells soap to clean clothes. The market leader in this category is Tide, which P&G describes as the number one selling detergent since its introduction in 1946.¹⁰ But P&G also sells Bold—“bursts of Freshness every time you touch”—and Gain—now in Apple Mango Tango scent—and Downy and other clothes detergents. P&G competes with itself and faces critical questions as to how it should organize that competition. Should we think of P&G as a unitary entity or does that depend on how competition is organized within P&G?
- The Court draws on its decision in *United States v. Sealy*, 388 U.S. 350 (1967). That opinion characterized Sealy as a horizontal combination of mattress manufacturers dressed up in the guise of shared trademarks, licenses, and distinct marketing areas. Sealy, Inc. was seen as an instrumentality of the manufacturers and thus its operations constituted joint activity subject to Section 1.
- The Court cites in passing *Fraser v. Major League Soccer L.L.C.*, 284 F.3d 47 (1st Cir. 2002). Men's professional soccer in the United States is a late bloomer and its organization reflects that. MLS is P&G, except on a much smaller scale. That is to say, unlike the NFL where teams are separately owned, from the beginning MLS has been a single entity owning all of the teams that participate in the league. The Chicago Fire division, as it were, competes with the Columbus Crew division.

I assume that P&G is straightforward, at least on appropriately assumed facts (and I should say that I don't know its actual corporate history well). P&G's CEO has the authority—

⁹ “The teams remain separately controlled, potential competitors with economic interests that are distinct from the NFLP's financial well-being.” *American Needle, Inc. v. National Football League*, Slip Op. at 16 (U.S. May 24, 2010).

¹⁰ P&G, Tide Powder Original Ingredients (online at http://www.pg.com/productsafety/ingredients/household_care/laundry_fabric_care/Tide/Tide_Powder_Original.pdf).

indeed presumably the responsibility—to make sure that all of P&G’s detergents compete with each other in a way that maximizes profits for P&G. That might mean running each brand as a separate division with completely autonomous decision-making subject to oversight by the CEO. It might mean fully coordinated price-setting for each of the brands, but the CEO, acting on behalf of the entity, represents the unity of interests that is at the heart of the analysis in *Copperweld*. P&G need not compete with itself and there are no separate zones of decision-making that are closed if the CEO centralizes decision-making over P&G’s different soap brands.

Sealy is more interesting. As re-reading Bork makes clear, the decision doesn’t seem right on the economic merits, but that isn’t the Court’s issue here.¹¹ Like the NFL, Sealy may be a situation where some cooperation among different producers is useful. The efficient scale of assets necessary for production in the industry may be different for different types of assets and that, in turn, will have consequences for firm organization and across-firm joint ventures.

Take an extreme example to make the point. Suppose that the only place to advertise products was on the Super Bowl. That is silly, of course, though it *is* the only time that I watch television that I am actually interested in the ads themselves. But on those facts, the necessary advertising scale for any product would be national. A local restaurant couldn’t afford to advertise on the Super Bowl, but a national restaurant chain—McDonalds—could do so. Local milk producers couldn’t try to get consumers to drink more milk, but a national organization of milk producers could ask us if we “got milk?” And local mattress producers couldn’t advertise either and it is isn’t clear that a “got mattress?” campaign would do much good, but local producers might choose to invest in a national brand—Sealy—and advertise that. I don’t really know how many cows you should have per square meter or what the best way to produce mattresses is, but what should be clear is that those won’t bear any necessary relationship to the scale required to engage in efficient advertising of the relevant products. That is driven by the availability of media, content, and technology.

So, like the NFL, we could easily imagine Sealy as a situation where some assets can and should be operated and owned locally and separately while other assets—the trademarks—should be held as a common asset, controlled jointly, and operated nationally. But even if we might need a common asset, and even if it makes sense to own that through a single entity as in *Sealy*, that shouldn’t be enough to insulate that activity from characterization as joint activity subject to Section 1 analysis. As in *American Needle*, shared interests may justify the joint venture as pro-competitive but that is a separate question from whether we have separate entities acting jointly, even if the raw operation entity is a single firm such as Sealy or NFL Properties.

Now consider Major League Soccer (“MLS”). Turn on the TV—even the MLS has made it to ESPN—and it looks much like the NFL, only in much smaller venues. But the MLS owns the team trademarks and so there has never been any possibility of competition among different entities holding the marks. *American Needle* itself is careful to suggest that its analysis applies to the trademarks owned by the individual teams—and not perhaps to any trademarks owned by NFL Properties itself—but the instrumentality characterization seen in *American Needle* and in *Sealy* suggests that even marks owned by the entity itself might be subject to collective-entity analysis.

¹¹ ROBERT H. BORK, *THE ANTITRUST PARADOX*, 270-76 (1978).

The First Circuit understandably found the arrangements in the MLS to be tricky in the *Copperweld* framework and thus was happy to find a way around resolving those issues.¹² Consider for example the allocation of revenues and profits in MLS. Although individual teams can profit from their own activities, this isn't necessarily different from a divisional structure at a large company such as P&G. You could easily imagine profits being paid to employees directly involved in producing and managing Tide and those might be quite different from those paid to Downy division employees. And that structure might obtain even if both the Tide and Downy divisions remitted substantial funds to the P&G center.

We might do better to focus on authority and control rights. I take it the CEO of P&G can get up tomorrow and tell Downy to take a dive, that is, to reduce competition with Tide. This is just a reconfiguration of P&G's product strategies and is fully within the control of the CEO. In contrast, I assume that there are some firm internal limits as to how far MLS can go in controlling what happens with individual teams. If the MLS central organization started to interfere directly with decisions by the individual teams—"you can't play Donovan in the next game"—it would put at risk the integrity of its product.

Now that point cuts both ways. It suggests that we do have some irreducible areas of separate decision-making in the MLS and that therefore there is a core divergence of interest at stake even in the highly-centralized structure of the MLS. The integrity of the product requires that. (MLS, isn't, after all, wrestling and the World Wrestling Entertainment.) The question is how we should think about the control rights that MLS has allocated to individual teams. Does that create sufficient divergence of interest that MLS should be treated, at least in some regards, as a collective activity subject to Section 1? Or if individual teams have no more control rights than are required to give the product integrity and thus make the product itself, should we still treat MLS as a single-entity and therefore immune from Section 1 inquiry? *American Needle* itself does the Court's usual drive-by on issues of this sort: it cites *Fraser* and then moves on giving us no real answers as to how it thinks we should understand the organization of the MLS.

IV. CONCLUSION

I am not sure if the NFL was motivated by baseball envy—baseball, after all, has a special statutory antitrust immunity—but the NFL and its lawyers made a striking choice in looking to resolve the NFL's status as a single entity and *American Needle* resoundingly repudiated that vision. Of course, that isn't to say that the NFL won't win on the remand under a rule of reason inquiry. The Court suggests that many agreements will be necessary for football to exist and consistent with the rule of reason, but it doesn't give us any real guidance on those.

On the broader issues at stake in *American Needle*, the Court takes the next step after *Copperweld*. For Section 1 of the Sherman Act, jointness isn't a sterile, formal inquiry. The question is one of, as Justice Stevens puts it, "competitive reality." Separate entities might have enough of a unity of interest that they should be treated as one firm for Section 1. That was *Copperweld*. *American Needle* considers whether a single entity can be treated as a collective and as capable of joint action notwithstanding its formal status as a freestanding single firm and concludes that it can. *Copperweld* shrank the operation of Section 1, while *American Needle* not only doesn't extend *Copperweld* to entities like the NFL, but it instead expands the range of Section 1 by picking up joint ventures like NFL Properties. I suspect that the expansion of Section 1 in

¹² "In all events, we conclude that the single entity problem need not be answered definitively in this case." *Fraser v. Major League Soccer, L.L.C.*, 284 F.3d 47, 59 (1st Cir. 2002).

American Needle will turn out to be more important than the contraction in *Copperweld*, but we shall see.

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