COMMENTS

A Substantive Test For Sherman Act Plurality: Applications for Professional Sports Leagues

The first two sections of the Sherman Act create a fundamental distinction between plural and unilateral business conduct. Section 1 prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States."¹ Section 2 punishes "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States."² Unilateral conduct by a single entity can be found illegal under section 2, but can never be found illegal under section 1.

This difference in treatment reflects distinct concerns about the dangers to competition that inhere in plural and unilateral conduct. Section 1 prohibits certain concerted actions that would restrain trade. Section 2 does not prohibit all unilateral actions that would restrain trade; instead, it prohibits only actions that are or threaten to become monopolistic. Because the two sections prohibit different kinds of conduct, the determination of plurality often governs the legal standards applied to business conduct. How defendants are characterized in number thus can greatly affect their potential antitrust liability.

Until recently, the plurality of actors necessary to trigger scrutiny under section 1 could be found if more than one legally distinct entity participated in the alleged violation. Yet, in *Copperweld Corp. v. Independence Tube Corp.*,³ the Supreme Court held that a parent and its wholly owned subsidiary must be viewed as a single enterprise for Sherman Act purposes, and are incapable

¹ 15 U.S.C. § 1 (1982).

² *Id.* § 2.

³ 104 S. Ct. 2731 (1984).

of conspiring to violate section 1.⁴ The Court found single-entity status appropriate because a parent and its wholly owned subsidiary have identical economic interests.⁵ Under this standard, joint action by separate firms might be considered unilateral and immune from section 1 even though the firms are not commonly owned.

This standard may change the antitrust consequences of joint activities by firms with similar interests. One such activity is the "joint venture," which may comprise cooperative activity at the production or marketing stage. Another more complicated form is the professional sports league. A sports league brings together several legally distinct and independently owned firms (the individual clubs) to create a single product: sporting events. In an obvious sense, the individual clubs are on-field rivals and have divergent interests. But because the clubs must cooperate to produce the league product, they have a common interest in collective decisions about the way to make the product. Clubs are also economically interdependent because they agree to share certain revenues. After *Copperweld*, the unity of interest among clubs in a league, which varies in extent according to the terms of the particular league agreement, might make the clubs a single entity for section 1 purposes.

This comment argues that *Copperweld*, by adopting a new approach to the plurality question, compels a fresh attempt to categorize joint firm conduct as either unilateral or concerted. Because sports leagues present a particularly difficult example of that broad problem, this comment examines their status in light of *Copperweld*. It concludes that some forms of coordinated conduct among the member clubs of a professional sports league should be treated as unilateral, while other forms should be treated as concerted and fully subject to section 1 of the Sherman Act.

Part I examines *Copperweld* and proposes a new approach to the plurality issue based on its reasoning. The proposed test looks to the substantive economic interests of the entities involved to determine whether a plurality of actors exists. Part II briefly outlines the structure of sports leagues. Part III critically reviews current approaches to the plurality characterization of sports leagues, arguing that these approaches do not survive *Copperweld*. Part IV applies the proposed plurality test to professional sports leagues by

⁴ *Id.* at 2745.

⁵ *Id.* at 2742.

examining three types of league decisions that might be challenged on antitrust grounds.

I. A SUBSTANTIVE TEST FOR SHERMAN ACT PLURALITY

In *Copperweld*, a corporation and its wholly owned subsidiary agreed to try to exclude one of the subsidiary's competitors from the market.⁶ In a flat rejection of the "intraenterprise conspiracy" doctrine, the Supreme Court held that section 1 of the Sherman Act does not extend to agreements between commonly owned corporations.⁷ In the Court's view, a parent and its subsidiary are a single enterprise with "a complete unity of interest. Their objectives are common, not disparate; their general corporate actions are guided or determined not by two separate corporate consciousnesses, but one. They are not unlike a multiple team of horses drawing a vehicle under the control of a single driver."⁸ In arriving at this view, the Court set out an important new standard for determining plurality under the Sherman Act.⁹

⁶ *Id.* at 2735.

⁷ The "intraenterprise conspiracy" doctrine, to which the Supreme Court gave credence at times, enabled courts to find a section 1 conspiracy between commonly owned entities, such as a parent and its wholly owned subsidiary. *See, e.g.,* *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 141-42 (1968). Most courts stopped short of finding conspiracy between other legally distinct but affiliated entities, such as a corporation and its officers. *See Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71, 82-83 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970). On the doctrine generally, *see* LAWRENCE SULLIVAN, *HANDBOOK ON THE LAW OF ANTITRUST* § 114 (1977); Areeda, *Intraenterprise Conspiracy in Decline*, 97 HARV. L. REV. 451 (1983); Handler & Smart, *The Present Status of the Intracorporate Conspiracy Doctrine*, 3 CARDOZO L. REV. 23, 73 (1981); McQuade, *Conspiracy, Multicorporate Enterprises, and Section 1 of the Sherman Act*, 41 VA. L. REV. 183 (1955); Note, *"Conspiring Entities" Under Section 1 of the Sherman Act*, 95 HARV. L. REV. 661 (1982).

⁸ 104 S. Ct. at 2742.

⁹ The plurality determination itself addresses only a threshold issue: it classifies the parties involved, for antitrust purposes, as belonging to one single entity or as each standing on its own, independent and apart from others. This determination is crucial, however, because it affects the substantive rules of liability to be applied. Two examples illustrate this point. First, in cases under section 1—which applies only to concerted conduct—courts often apply *per se* rules to invalidate agreements, such as price fixing between horizontal competitors, that are sufficiently anticompetitive to offend the Sherman Act regardless of any possible justification for their use. *See United States v. Container Corp. of Am.*, 393 U.S. 333 (1969); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940). These *per se* rules do not apply to violations of section 2, which governs unilateral conduct.

Second, section 2 requires that the firm's conduct threaten monopolization in order to be illegal; this in turn requires some degree of actual or potential market domination by the defendant. *See, e.g., United States v. Grinnell Corp.*, 384 U.S. 563, 570 (1966). Section 1 has no such requirement, and conspiring firms may violate that section even though their market power is negligible.

A. The *Copperweld* Test

The *Copperweld* Court refused to rest its determination of plurality on the number of *legal* persons involved. The Court explained that the formal structure of a business has little to do with the purposes of the Sherman Act. A business structure may be adopted, for example, to obtain tax advantages or to improve the effectiveness of management—considerations unrelated to the firm's potential to restrain trade.¹⁰ The Court instead looked to the substance of the arrangement to determine whether classifying it as plural would further the purposes of section 1. In doing so, the Court developed an analysis that applies to all coordinated conduct, regardless of the formal legal relationship of the actors.

The Court began with the premise that Congress intended the Sherman Act to require different standards of scrutiny for plural and unilateral actions. This can be seen in the structure of the Act: unilateral conduct is illegal only if it threatens monopolization of a market, even though it may have lesser anticompetitive effects.¹¹ Plural conduct, on the other hand, is illegal if its anticompetitive effects outweigh its procompetitive benefits, even if the conduct poses no danger of monopolization.¹²

The Court explained that Congress decided to treat concerted conduct more sternly than unilateral conduct because concerted conduct is especially "fraught with anticompetitive risk."¹³ Although the behavior of a single firm in the marketplace can sometimes restrain trade and reduce competition, those effects are often merely the natural result of the firm's efforts to maximize its com-

¹⁰ *Copperweld*, 104 S. Ct. at 2743.

¹¹ *Id.* at 2740. Section 2 is not limited solely to unilateral conduct; it also reaches "conspiracies to monopolize." See 15 U.S.C. § 2 (1982). In *Copperweld*, the Supreme Court acknowledged this, but explained that the essential difference between sections 1 and 2 is that section 1 reaches *only* plural conduct. 104 S. Ct. at 2740 n.13.

¹² This is not to say that market power is irrelevant to the determination of whether plural activity *violates* section 1. For example, tying arrangements are per se illegal if the defendant's share of the market for the tying product gives it "sufficient economic power" with respect to that product to "appreciably restrain free competition in the market for the tied product." *Fortner Enters., Inc. v. United States Steel Co.*, 394 U.S. 495, 499 (1969) (quoting *Northern Pac. Ry. v. United States*, 356 U.S. 1, 6 (1958)).

Outside of the tying context, however, the Court in *Copperweld* admitted that the difference in the standards applied to unilateral and plural conduct leaves a "gap" in the Sherman Act's prohibition of unreasonable restraints of trade. The same degree of restraint may be effected by a combination of firms or by a single firm which possesses equivalent market power. Yet the restraint would be subject to judicial scrutiny only in the first case. See 104 S. Ct. at 2744.

¹³ 104 S. Ct. at 2741.

petitiveness in the marketplace.¹⁴ The firm's efforts are valuable, and may compensate for any anticompetitive side effects. Concerted conduct, on the other hand, is capable of anticompetitive effects without any compensating efficiencies. In addition, concerted activity necessarily diminishes the number of independent economic actors, thereby "depriv[ing] the marketplace of the independent centers of decisionmaking that competition assumes and demands . . . [and] reduc[ing] the diverse directions in which economic power is aimed."¹⁵ The Court therefore found that, to effectuate Congress's purpose, conduct should be deemed unilateral when it is unlikely to reduce the number and diversity of centers of economic power in the marketplace, and when its beneficial efficiencies are highly likely to outweigh its anticompetitive effects. Conduct should be considered plural when it has the opposite effects.¹⁶

The Court concluded that coordinated conduct meets the unilateral paradigm when the actors exhibit a preexistent and relatively permanent unity of economic interest. The Court drew an analogy to agreements among the officers or unincorporated divisions of a corporation, which do not "raise the antitrust dangers that § 1 was designed to police" because the parties "are not . . . pursuing separate economic interests."¹⁷ Instead those agreements serve to promote competition by allowing the agreeing parties to maximize the efficiency of the entire operation.¹⁸ The Court stated that a "business enterprise should be free to structure itself in ways that serve efficiency of control, economy of operations, and other factors dictated by business judgment without increasing its exposure to antitrust liability."¹⁹

Under this unity-of-interest test, the Court held that agreements between a parent and its wholly owned subsidiary fall outside the scope of section 1. The coordinated acts of these firms do not "suddenly bring together economic power that was previously pursuing divergent goals."²⁰ Because the parent and the subsidiary have "a complete unity of interest" that is already established at the time of any subsequent coordinated activity, their joint conduct is likely to be motivated by an intent to create effi-

¹⁴ *Id.* at 2740 & n.14.

¹⁵ *Id.* at 2741.

¹⁶ *Id.* at 2740-41.

¹⁷ *Id.* at 2741-42.

¹⁸ *Id.*

¹⁹ *Id.* at 2743.

²⁰ *Id.* at 2741.

ciencies rather than by an intent to restrain trade.²¹

On the other hand, the Court made clear that conduct is plural when the actors involved do not have a *preexistent* unity of economic interest. At four points in the opinion the Court reiterated that the identifying characteristic of concerted conduct is a sudden joining of sources of economic power that previously pursued divergent goals.²² It is not sufficient to escape section 1 scrutiny that the parties to the coordinated activity may coincidentally share an identical economic interest in the results of some particular coordinated activity. The identity of interest must be more permanent.²³ It is the preexistence and stability of this unity of interest that increases the probability that the net effect of the coordinated conduct will be to create procompetitive and beneficial efficiencies, rather than merely to effectuate an anticompetitive restraint of trade.

B. A Proposed Interpretation

In *Copperweld*, the Supreme Court decided only the narrow question of whether a parent corporation and its wholly owned subsidiary are separate entities that can conspire to violate the Sherman Act. Yet the cooperation between a parent and its subsidiary is only one instance of the broader relationship between coordinated activity and competition. The ability to cooperate underlies the ability to compete. Nearly all competitive entities are formed by separate individuals who join together in coordinated activity.²⁴ An engineer and a salesman may form a partnership to make and sell computers, two officers of a firm may agree on the firm's business strategy, or two divisions of a corporation may cooperate to develop a new product. To classify such cooperation as unilateral or plural is to address the critical question of when cooperation becomes anticompetitive. *Copperweld* addresses this larger problem by developing an approach to plurality that applies outside the parent-subsidiary situation.

The Court described two categories of coordinated activity within antitrust law: unilateral and concerted. The difference between the two turns on whether the cooperating parties share a preexistent unity of economic interest. But the Court's opinion in *Copperweld* left two important questions unresolved. First, the

²¹ *Id.* at 2742.

²² *Id.* at 2741-42.

²³ *Id.* at 2742 (a parent and subsidiary "always" have unity of purpose).

²⁴ See ROBERT BORK, *THE ANTITRUST PARADOX* 264-67 (1978).

Court did not decide whether unity of economic interest can exist in the absence of common ownership.²⁵ Second, the Court did not analyze forms of business organization that exhibit varying degrees of unity of economic interest, and thus fall somewhere along the continuum between the two paradigms. Nevertheless, the approach developed by the Court in *Copperweld* may be used to address these two questions.

First, the Court's analysis suggests that a joint business enterprise may display a unity of economic interest even without an ownership relation among the parties to the enterprise. One example is an agreement among the shareholders of a corporation. No shareholder owns any other shareholder, yet the agreement would not be subject to scrutiny under section 1 because the shareholders have unity of economic interest with regard to the operations of the corporation.²⁶

Another example of such an enterprise is the traditional partnership. Indeed, the Court itself classified as unilateral the coordinated conduct of partners in *Arizona v. Maricopa County Medical Society*.²⁷ There the Court explained that "the partnership is regarded as a single firm competing with other sellers in the market" because the partners "pool their capital and share the risks of loss

²⁵ The Court expressly declined to consider "under what circumstances, if any, a parent may be liable for conspiring with an affiliated corporation it does not completely own." 104 S. Ct. at 2740. Yet some statements in *Copperweld* might be taken to suggest that parties to concerted action can be considered a single entity only when one party is able to control the other. See Note, *The Long Awaited Death Knell of the Intraenterprise Doctrine*, 30 VILL. L. REV. 521, 564 (1985) (suggesting that *Copperweld* confers single-entity status to relationships of less-than-complete ownership if the parent corporation can "exert full control" over the subsidiary). For example, the Court noted that a parent ultimately controls its wholly owned subsidiary, 104 S. Ct. at 2742, even though it delegates some degree of managerial discretion to the subsidiary. However, the Court expressly rejected the so-called "single entity" test, which would have made the plurality determination turn on the amount of control actually exercised by the parent over the subsidiary. *Id.* at 2742 n.18. In addition, if one party's control over the other were dispositive of the plurality question, agreements between coordinate officers or divisions of a firm would be plural conduct. Such a finding would conflict with the Court's rejection of the intraenterprise conspiracy doctrine. Thus, rather than emphasizing control, *Copperweld* makes clear that the essential factor in the plurality determination is the degree of unity of economic interest among the parties to the activity. *Id.* at 2741-43. This does not mean that one party's ability to control the other is irrelevant. Certainly the decisionmaking structure of a joint business enterprise will often reflect its degree of unity of economic interest since parties to coordinated conduct will usually cede decisionmaking power to one another only when the two share identical economic interests.

²⁶ Cf. *Tunis Bros. Co. v. Ford Motor Co.*, 763 F.2d 1482, 1496 (3d Cir. 1985) (holding that employees are incapable of conspiring among themselves or with their firm in violation of section 1 unless they are acting outside the interests of the firm for their own interests).

²⁷ 457 U.S. 332 (1982).

as well as the opportunities for profit.”²⁸ Partners have a unity of economic interest because their preexistent partnership agreement provides that the consequences of their economic conduct will affect each of them in substantially the same way. Any subsequent coordinated activity among partners which relates to the conduct of the partnership must therefore be regarded as unilateral.

These examples suggest that parties to coordinated conduct have a unity of economic interest whenever a relatively permanent relationship exists that fixes the proportions in which they share in the profits and losses of their joint conduct.²⁹ Under such a relationship, the parties to the enterprise have identical economic interests in the outcome of later coordinated decisions about the joint enterprise, thus indicating that the parties’ conduct is unilateral.³⁰

This definition of “unity of interest” best serves the purpose of the plurality requirement as it was explained in *Copperweld*. Under an agreement fixing the proportions of the parties’ returns, each party’s gain or loss is tied solely to the *overall* profitability of

²⁸ *Id.* at 356. The Second Circuit took the same position in *Konik v. Champlain Valley Physicians Hosp.*, 733 F.2d 1007, 1012 n.3 (2d Cir.), *cert. denied*, 105 S. Ct. 253 (1984), where it stated that a professional corporation of anesthesiologists should be regarded as a single entity because its members shared the risk of gain or loss.

²⁹ The original agreement or arrangement which establishes unity of economic interest among the parties to a joint enterprise will *always* be subject to section 1 scrutiny. Because the agreement establishes a relationship between parties that eliminates plurality between them, the agreement must be viewed as similar to a merger. See *Copperweld*, 104 S. Ct. at 2745 (“A corporation’s initial acquisition of control will always be subject to scrutiny under § 1 of the Sherman Act.”).

³⁰ For example, if *A* and *B* have a preexistent arrangement such that *A*’s profits are always proportional to *B*’s, then with any incremental change in *A*’s profits, *B*’s profits will change proportionally. The parties to such an agreement have identical economic interests even though its terms give them unequal shares of net profit. For example, the parties may agree to split net profits in a given ratio, say 60/40. Since the profit-maximizing output is achieved where marginal revenue (MR) equals marginal cost (MC), see R. LEFTWICH & R. ECKERT, *THE PRICE SYSTEM AND RESOURCE ALLOCATION* 289 (8th ed. 1982), partner *A* sees the optimal output where .6(MC) equals .6(MR), or MC = MR. Likewise, *B* sees the optimal output where .4(MC) equals .4(MR), which is also where MC = MR. Thus, *A* and *B* have identical economic interests in production decisions because they will both seek to follow a course of action which will maximize the net profits of the partnership.

The arrangement described above is distinguishable from a venture in which *A* and *B* split the cost of producing a product, but agree to sell it in exclusive territories. See, e.g., *United States v. Topco Assocs.*, 405 U.S. 596 (1972). Such a venture is not truly joint, because each party stands to make proportionally variable profits. The different demand schedules in the two markets determine different levels of marginal return for any given quantity of output. Thus, although *A* and *B* share the same marginal cost schedule, the fact that they face different marginal revenue schedules leads each of them to a different optimal output when they attempt to equate MC and MR.

the joint activity.³¹ This will lead the parties to structure their coordinated conduct on the basis of the competitiveness of the whole operation. While there may be some risk that the parties will restrain competition through their joint conduct, just as there is in a parent-subsidiary arrangement, the ability of such parties to structure their business free of section 1 carries net procompetitive benefits. Like parties to a common ownership or partnership arrangement, parties to this kind of agreement are best described as a single competitor in the marketplace.³²

The Court's approach in *Copperweld* also provides a basis for analyzing coordinated conduct within cooperative business organizations, such as joint ventures or sports leagues, that exhibit a unity of economic interest with respect to some aspects of their operations, but not with respect to others. These organizations fall somewhere along the continuum between the two categories of coordinated activity identified in *Copperweld*. The Court's reasoning in *Copperweld* suggests that such enterprises should be treated as single entities for those activities in which they share a preexistent unity of economic interest, but not for activities in which that unity is lacking. Thus, if a business organization has an arrangement distributing the economic effects of its conduct to its members in fixed proportions, any coordinated decision concerning that conduct should be viewed as unilateral. Cooperation among the same members over matters falling outside the preexistent arrangement should be viewed as concerted and subject to scrutiny

³¹ See *supra* note 30. This line of reasoning distinguishes true partnership behavior from that of a traditional cartel. When a cartel undertakes to set prices above the competitive level, all participants will share an interest in raising prices, because all participants expect to experience increased profits. However, the interests of the cartel members will not be identical. Because neither costs nor revenues are divided among the members in fixed proportions, the participants will have no incentive to work together to maximize the profits of the group *as a whole*. Moreover, participants in a traditional cartel lack a preexistent agreement which would ensure unity of economic interest over a series of coordinated economic decisions and not just with respect to the decision to fix prices.

Because a cartel lacks unity of economic interest as defined in *Copperweld*, the approach to the section 1 plurality determination suggested in this comment will have no immunizing effect on the kinds of cartel agreements traditionally subjected to section 1. See, e.g., *Broadcast Music, Inc. v. CBS*, 441 U.S. 1, 5 (1979) (organization of composers that issued blanket license for members' work and distributed royalties in accordance with nature and amount of use of their work); *United States v. Sealy, Inc.*, 388 U.S. 350, 352 (1967) (joint licensing agreement with territorial divisions); *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 595-96 (1951) (territorial allocation by partially integrated firms); *Associated Press v. United States*, 326 U.S. 1, 4 (1945) (members of news collection organization pay to use news pooled by other members). None of these cases involved preexistent agreements in which the parties had agreed to share profits and losses in fixed proportions.

³² See *Copperweld*, 104 S. Ct. at 2740-44.

under section 1.³³

Firms that are part of a joint venture, for example, have an identity of interest within the parameters of the venture where its terms specify their proportional shares in the profits and losses of their joint actions.³⁴ Their preexistent relationship fixes their economic interests with regard to joint decisions; they will seek to maximize the common profits of their joint action. Once in such a relationship, the parties essentially act as one decisionmaking unit, and should be regarded as a single enterprise under the *Copperweld* test.³⁵ But to the extent their cooperative decisions operate on profits not subject to the agreement, the parties fall under the plural paradigm.

A professional sports league presents a more complicated mixture of unilateral and concerted conduct. The league constitution defines the arrangement among the individual clubs that establishes their economic interests with respect to league decisions.

³³ The idea of treating a business organization as a single entity for some purposes but not for others is not new. Advocates of the "potential economic competition" test for sports league plurality assert that league conduct should be viewed as concerted when it affects matters involving potential economic competition among clubs, and as unilateral when such potential competition is not implicated. See *infra* notes 67-76 and accompanying text. Also, at least one court has suggested that two corporations could be viewed as a single entity with respect to a joint project to make a new product if they had agreed to "share the risks of loss as well as the opportunities for profit," although presumably they would be viewed as separate entities for all other purposes. *Northrop Corp. v. McDonnell Douglas Corp.*, 705 F.2d 1030, 1053 (9th Cir.) (quoting *Arizona v. Maricopa County Medical Soc'y*, 457 U.S. 332, 356 (1982)), cert. denied, 464 U.S. 849 (1983). Other courts have suggested that employees may conspire with one another or with their firm where they are acting outside the interests of the firm for their own interests. *Tunis Bros. Co. v. Ford Motor Co.*, 763 F.2d 1482, 1496 (3d Cir. 1985); *Greenville Pub. Co. v. Daily Reflector, Inc.*, 496 F.2d 391, 399-400 (4th Cir. 1974); see also Roberts, *Sports Leagues and the Sherman Act: The Use and Abuse of Section 1 to Regulate Restraints on Intraleague Rivalry*, 32 UCLA L. Rev. 219, 253-54 (1985) (sports leagues may be single entities for some purposes and not for others).

³⁴ The concept of a joint venture discussed here does not encompass cartel arrangements that have sometimes been condemned by courts under the label "joint venture." The proposed test gives section 1 immunity only to activities fashioned in the same manner as a traditional joint venture or partnership—an undertaking in which the parties pool their capital for a limited purpose and share proportionally in the prospects for profit and loss. See *Tiffany Constr. Co. v. Hancock & Kelley Constr. Co.*, 24 Ariz. App. 504, 539 P.2d 978 (1975); *Rivett v. Nelson*, 158 Cal. App. 2d 268, 322 P.2d 515 (1958); Comment, *Joint Venture or Partnership*, 18 *FORDHAM L. REV.* 114, 118, 123 (1949). The Uniform Partnership Act states that an agreement to share gross returns is not itself a distinguishing feature of a partnership, whereas an agreement to share profits may be. UNIF. PARTNERSHIP ACT § 7(3-4), 6 U.L.A. 38 (1914). The Supreme Court has confronted many joint production arrangements that did not exhibit the characteristics of a traditional joint venture or a partnership. See *supra* note 31 and cases cited there. Although such arrangements were labeled "joint ventures," the analysis of those cases is not affected by the test proposed here.

³⁵ See *supra* note 30.

Yet, because the terms of these constitutions vary from league to league, and because it is sometimes difficult to pinpoint whether the product (sporting events) is produced by the individual clubs or by the league as a whole, these arrangements offer an excellent hard case for applying the substantive plurality test. The remainder of the comment is devoted to applying the *Copperweld* test to professional sports leagues.

II. THE STRUCTURE OF SPORTS LEAGUES

All professional sports leagues exhibit a dual financial and decisionmaking structure. On the one hand, clubs are separately owned businesses with a wide degree of autonomy in day-to-day operations, and they bear the economic consequences of their individual decisions in gate revenues and operating costs. On the other hand, many critical league decisions are made collectively, and the economic consequences of those decisions are often distributed among the clubs in the form of shared revenues.

Leagues have this dual structure because the nature of consumer demand for professional sports requires some aspects of league production to be undertaken collectively and others independently. On the one hand, *some* degree of collective decision-making is necessary for clubs in a league to coordinate a championship race. Otherwise leagues would present nothing more than a random series of contests between separate clubs.³⁶ On the other hand, fan loyalty to a club depends on the perception that the club competes independently against other clubs—a perception that would be lacking if all clubs were commonly owned.³⁷ Thus, some aspects of the demand for the professional sports product, such as the interest in a championship, require cooperation; other aspects, such as fan loyalty, require competition. In short, the nature of the sports league's product dictates that the league neither be fully integrated as one firm, nor divided into completely isolated firms.

³⁶ Obviously, fans are more interested in the outcome of games that have immediate consequences for the championship. Indeed, two commentators have argued that the two most important influences on fan attendance are the population of the franchise location and the team's standing in the league championship race. J. MARKHAM & P. TEPLITZ, *BASEBALL ECONOMICS AND PUBLIC POLICY* 72-73 (1981); see also HENRY DEMMERT, *THE ECONOMICS OF PROFESSIONAL TEAM SPORTS* 11-15 (1973).

³⁷ See *Antitrust Policy and Professional Sports: Oversight Hearings on H.R. 823, H.R. 3287 and H.R. 6467 Before the Subcomm. on Monopolies & Commercial Law of the House Comm. on the Judiciary*, 97th Cong., 1st & 2d Sess. 290-91 (1982) (NFL statement) (arguing that consolidated ownership of all league clubs would injure local fan identification) [hereinafter cited as *Antitrust Policy and Professional Sports*].

Sports leagues accommodate these conflicting needs for unity and autonomy through contractual integration among their member clubs. These contracts allocate decisionmaking authority between individual clubs and the collective league organization. Through revenue-sharing agreements, they also create a financial structure of economic interdependence. This section explains how the legal, organizational, and financial structures of professional sports leagues often give clubs similar substantive interests in league decisions.

A. Legal Structure

A professional sports league is not an independent legal entity, but instead consists of a set of contractual relationships among individual clubs. A sports league is typically an unincorporated association,³⁸ which at common law lacks the independent legal existence necessary to enter into contracts or own property, and its assets and liabilities are only those of its individual members.³⁹ Nonetheless, common law doctrine⁴⁰ and cases dealing specifically with sports leagues⁴¹ recognize that the association's constitution and by-laws constitute a legally enforceable contract among the members of the league. These compacts may include promises to participate in league games under league rules, to share revenues in a certain manner, not to invade another team's territory, and to abide by the decisionmaking processes set forth in the constitution.

Clubs themselves take a variety of legal forms. They have been organized as closely held corporations, subchapter S corporations, publicly held corporations, ordinary partnerships, limited partnerships, and sole proprietorships.⁴² Regardless of their legal form, the

³⁸ See, e.g., NATIONAL FOOTBALL LEAGUE CONST. & BY-LAWS 9 (1976) ("An Unincorporated Association Not for Profit"); UNITED STATES FOOTBALL LEAGUE CONST., at title page (1982) (same).

³⁹ HOWARD OLECK, NON-PROFIT CORPORATIONS, ORGANIZATIONS, & ASSOCIATIONS §§ 50, 52 (4th ed. 1980); see, e.g., *Krall v. Light*, 240 Mo. App. 480, 489, 210 S.W.2d 739, 745 (1948).

⁴⁰ See, e.g., *Savoca Masonry Co. v. Homes & Son Constr. Co.*, 112 Ariz. 392, 395, 542 P.2d 817, 820 (1975); *Libby v. Perry*, 311 A.2d 527, 532 (Me. 1973).

⁴¹ See, e.g., *Professional Sports, Ltd. v. Virginia Squires Basketball Club, Ltd. Partnership*, 373 F. Supp. 946, 950 (W.D. Tex. 1974); *Riko Enters. v. Seattle Supersonics Corp.*, 357 F. Supp. 521, 524 (S.D.N.Y. 1973); *United States v. NFL*, 116 F. Supp. 319, 321 (E.D. Pa. 1953).

⁴² See *NASL v. NFL*, 505 F. Supp. 659, 662-63 (S.D.N.Y. 1980) (chart showing forms of ownership of football and soccer teams), *rev'd*, 670 F.2d 1249 (2d Cir.), *cert. denied*, 459 U.S. 1074 (1982); J. MARKHAM & P. TEPLITZ, *supra* note 36, at 83-84 (same for ownership of

salient feature of all clubs is that each one is owned and operated separately from any other club in the same league.⁴³

B. Organizational Structure

League constitutions divide league operations into three categories: activities controlled primarily by the individual clubs, activities controlled by the collective decisions of the league, and activities governed by a combination of league and club decisions. League agreements typically maintain club autonomy in those aspects of the club's activity which resemble the day-to-day operation of a business. Each club selects and deals with personnel individually within the confines of league-approved contracts and player-trading rules.⁴⁴ In some leagues, the club chooses its playing location within the territory allocated by the league and negotiates its own stadium lease. A club usually has exclusive power to sell broadcast rights for home games to be shown within its own territory, and, in one league, all rights to broadcast pre-season games.⁴⁵

baseball teams).

⁴³ See, e.g., UNITED STATES FOOTBALL LEAGUE CONST. art. IX, § 9.1(a) (1982) (clubs must be separately owned).

⁴⁴ Restraints on a club's power to negotiate with individual players are found both in the club's contract with the player and in agreements among clubs. Most leagues use standardized contracts for all players. These contracts are the product of agreement between the clubs as a group and the players' collective bargaining unit. See generally J. WEISTART & C. LOWELL, *THE LAW OF SPORTS* §§ 6.01-11 (1979 & Supp. 1985) (describing the development of collective bargaining in professional sports). Most contracts contain clauses creating in the club an option to renew the player's contract at the end of its term or to assign the contract to another team either by trade or sale. See *id.* §§ 3.12-13.

Restraints on negotiation not included in club-player contracts include the player draft and the "no tampering" rule. Clubs agree, through a draft, to give each club the exclusive right to negotiate with certain new players. Once a player has signed with a club, league by-laws usually prohibit other clubs from "tampering" or negotiating with him. *Id.* § 5.03(b)-(c).

⁴⁵ In major league baseball, clubs control all rights to regular season games that are not sold as part of the league network television and radio agreements. The league controls the rights to national telecasts of the regular season, playoff, and World Series games. Clubs can also prevent the broadcast within their territory of another club's game if that broadcast is not part of the league package. See SELECT COMM. ON PROFESSIONAL SPORTS, *INQUIRY INTO PROFESSIONAL SPORTS*, H.R. REP. NO. 1786, 94th Cong., 2d Sess. 45-46 (1977) [hereinafter cited as *INQUIRY INTO PROFESSIONAL SPORTS*]; J. MARKHAM & P. TEPLITZ, *supra* note 36, at 66; see also Horwitz, *Sports Broadcasting*, in *GOVERNMENT AND THE SPORTS BUSINESS* 276-79 (R. Noll ed. 1974). Few clubs have developed markets for non-network broadcasting of games beyond their own territories, J. MARKHAM & P. TEPLITZ, *supra* note 36, at 66, but there is some indication that more clubs are doing so. See *Baseball 1983*, BROADCASTING, Feb. 28, 1983, at 54 (clubs developing joint "superchannel ventures").

In professional football, clubs have exclusive control of only the local radio broadcast of their home and away games. The league controls all other broadcasting rights, including negotiation of the network television package. See Kurlantzick, *Thoughts on Professional*

The club determines ticket prices for its games and controls the sale of concessions.⁴⁶

On the other hand, club activities are subject to collective decisionmaking rules in several areas. Some decisions, such as amendments to the constitution, club relocation, and league expansion, require the approval of a fixed proportion of the membership.⁴⁷ Other decisions, including negotiation of the league television contract, game scheduling, playing rules changes, and arbitration of player-club disputes, are delegated to a league commissioner or some subset of the membership.⁴⁸ The league constitution, as the original agreement among the clubs, binds clubs to decisions made pursuant to these established decisionmaking rules.

C. Financial Structure

The financial structure of professional sports leagues involves both explicit and implicit economic interdependence among member clubs. The explicit interdependence takes the form of league agreements to pool and share revenues. The implicit interdependence results from various non-financial league agreements that shape the product of each club and thus affect each club's financial success.

All sports leagues share revenues to some extent, although the sources and proportion of shared revenues vary from league to league. At least four kinds of revenue are shared in most leagues: proceeds from the sale of broadcasting rights, fees paid by new members of the league, gate receipts, and league merchandising proceeds. This revenue sharing takes different forms for different sources of revenue. The revenues from the league's network television contract, for example, are consolidated into a central fund from which each club takes an equal share regardless of the frequency of its television appearances.⁴⁹ New members pay entrance

Sports and the Antitrust Laws: Los Angeles Memorial Coliseum Commission v. National Football League, 15 CONN. L. REV. 183, 199 (1983); see also NATIONAL FOOTBALL LEAGUE CONST. art. X (1976); UNITED STATES FOOTBALL LEAGUE CONST. art. X, §§ 10.1-10.3 (1982).

⁴⁶ See, e.g., Los Angeles Memorial Coliseum Comm'n v. NFL, 519 F. Supp. 581, 582 (C.D. Cal. 1981) (detailing autonomy of NFL clubs), *aff'd*, 726 F.2d 1381 (9th Cir.), *cert. denied sub nom.* NFL v. Oakland Raiders, 105 S. Ct. 397 (1984).

⁴⁷ See, e.g., NATIONAL FOOTBALL LEAGUE CONST. art. XXV, § 25.1(A) (1976) (amendment procedures).

⁴⁸ See, e.g., *id.* art. VIII, § 8.9 (1976) (commissioner has "exclusive authority" to sell national broadcasting rights); *id.* art. XIII, § 13.1 (commissioner's game schedule is binding even without clubs' approval).

⁴⁹ For descriptions of television revenue allocation in major league baseball, see INQUIRY INTO PROFESSIONAL SPORTS, *supra* note 45, at 45-46; Chass, *Shared Revenue a Key*

fees that are also shared equally among existing clubs.⁵⁰ The gate receipts for a league game, however, are divided in unequal proportions between the clubs participating in the game.⁵¹ Because not all revenues are shared, and because some shared revenues are divided unequally, the degree of overall explicit financial interdependence differs from league to league.⁵²

Issue, N.Y. Times, June 18, 1982, at A19, col. 1. For the same in professional football, see NATIONAL FOOTBALL LEAGUE CONST. art X, § 10.3 (1976); UNITED STATES FOOTBALL LEAGUE CONST. art. X, § 10.2 (1982); *Professional Sports Antitrust Immunity: Hearings Before the Senate Comm. on the Judiciary on S. 2784 and S. 2821*, 97th Cong., 2d Sess. 43 (1982) (statement of Pete Rozelle, NFL Commissioner) [hereinafter cited as *Professional Sports Antitrust Immunity*]. For professional hockey, see *Antitrust Policy and Professional Sports*, *supra* note 37, at 666 (statement of John Ziegler, NHL President).

The network television contract provides a significant source of revenue for many leagues. In baseball, during the years 1975 to 1977, approximately 13%, or \$29 million, of the leagues' annual revenue came from network broadcasting revenues. J. MARKHAM & P. TEPLITZ, *supra* note 36, at 44. That amount has increased substantially in recent years. See *Sports Has Become More Than a Game; It's Serious Business*, L.A. Times, Mar. 29, 1983, at III-1, col. 5 (new television contract to provide between \$900 million and \$1 billion over five years). At the same time, local pay television is providing a source of increasing revenue to individual clubs. See *Baseball 1983*, *supra* note 45, at 51 (sale of regional broadcasting rights increased by 46% between 1982 and 1983).

In 1980, the average NFL team received 40% of its gross revenue from the league's network broadcasting contracts. NATIONAL FOOTBALL LEAGUE, A SUMMARY OF NATIONAL FOOTBALL LEAGUE ECONOMICS: 1970-1980, at 9 (1982) (profits included \$5.5 million in television and radio revenues and \$6.2 million in ticket sales). In 1984, USFL clubs each received approximately \$1 million, or about 40% of an average USFL club's operating expenses, from the sale of the league's television package. See *Pact Aids U.S.F.L. But More Is Needed*, N.Y. Times, June 24, 1984, at S7, col. 5.

For the 1981-82 season, only about 20% of the NBA's gross revenue came from network television; close to 80% came from ticket sales. See *Sports Has Become More Than a Game*, *supra*, at III-1, col. 1.

⁵⁰ See Ferguson, *An Accountant Profiles A Sports Franchise*, MGMT. ACCT., May 1979, at 13, 14 (examples of NBA entrance fees); *Football's Place Under the Sun*, N.Y. Times, July 1, 1984, § 6 (Magazine), at 19 (USFL clubs shared \$31 million in expansion fees in 1983); cf. UNITED STATES FOOTBALL LEAGUE CONST. art. III, § 3.3(c) (1982) (two-thirds of clubs shall determine "franchise fee" for new entrants). Incumbent clubs also receive revenue from the sale of player contracts to the new club. See, e.g., NEW ENGLAND PATRIOTS FOOTBALL CLUB, INC., 1975 ANNUAL REPORT 3.

⁵¹ The proportion allocated to local and visiting teams varies from 60-40 in the NFL to approximately 85-15 in major league baseball, with all proceeds going to the home team in basketball and hockey. See *Antitrust Policy and Professional Sports*, *supra* note 45, at 666 (statement of John Ziegler, NHL President); *INQUIRY INTO PROFESSIONAL SPORTS*, *supra* note 37, at 45. The USFL has recently changed from a 60-40 split to a flat fee arrangement, with the visiting team taking \$100,000 per game. Letter from Gary Kaplan, USFL counsel, to James Brock (Jan. 4, 1985) (on file with *The University of Chicago Law Review*) (explaining amendment to UNITED STATES FOOTBALL LEAGUE CONST. art. XII, § 1 (1984)).

⁵² Approximately 97% of all NFL revenues are pooled for sharing. *Professional Sports Antitrust Immunity*, *supra* note 49, at 34 (statement of Pete Rozelle, NFL Commissioner). Major league baseball earmarks about 12.5% of all revenues for sharing. J. MARKHAM & P. TEPLITZ, *supra* note 36, at 46. The NBA shares no more than 20% percent of all league revenues, since revenues from ticket sales, which account for 80% of the league's income,

Clubs in a sports league also exhibit implicit financial interdependence because of collective decisions that determine the character of the league's product, and thus affect its attractiveness to consumers. For example, league agreements prohibiting competitive bidding for players might prevent the gravitation of the best talent to the richest clubs. These agreements effectively subsidize a club's acquisition of new players and, by providing parity among the teams, distribute gate receipts among all clubs.⁵³ Competitive balance on the playing field also increases overall revenues for the clubs in the league by making contests less predictable and more interesting to fans.⁵⁴

Yet, even with both explicit and implicit economic interdependence, clubs within a sports league will achieve different financial results because of variations in costs. Although the costs of operating the league organization (such as the commissioner's salary) are shared equally,⁵⁵ none of the substantial operating costs of the individual clubs is shared. The differences in operating costs among the clubs create disparities in profits, despite the tendency of revenue sharing to equalize club revenues.⁵⁶

This brief account of the structure of sports leagues illustrates their unusual character. In some aspects of league business, the member clubs work closely together to reach collective decisions, and the clubs share the financial burden of those decisions in roughly the same proportions. For other aspects of league business, each club acts separately and bears the financial consequences of

are kept by the home team. See *Sports Has Become More Than a Game*, *supra* note 49, at III-1, col 1. (estimating that unshared gate revenues account for 80% of all NBA revenues).

⁵³ See H. DEMMERT, *supra* note 36, at 10-15; *Smith v. Pro-Football, Inc.*, 593 F.2d 1173, 1201 (D.C. Cir. 1978) (MacKinnon, J., concurring in part and dissenting in part) (attributing NFL success to "competitive balance" achieved "in large part" by player draft). But see Quirk & Hodiri, *The Economic Theory of a Sports League*, in GOVERNMENT AND THE SPORTS BUSINESS, *supra* note 45, at 58 ("the rules structure of professional sports is relatively ineffective in balancing playing strengths"); Comment, *Sport in Court: The Legality of Professional Football's System of Reserve and Compensation*, 28 UCLA L. REV. 252, 285 n.216 (1980) (criticizing the competitive balance theory).

⁵⁴ Collectively determined playing rules can also affect club revenues by making the game more exciting and thus increasing fan interest. For example, narrower goalposts can make football scores closer, the three-point play in basketball can lower average point spreads, and the designated hitter in baseball can increase the number of base hits. See generally BENJAMIN RADER, *AMERICAN SPORTS: FROM THE AGE OF FOLK GAMES TO THE AGE OF SPECTATORS* (1983) (discussing game changes that enhanced the league product).

⁵⁵ See, e.g., UNITED STATES FOOTBALL LEAGUE CONST. art. III, § 3.10 (1982).

⁵⁶ See, e.g., A SUMMARY OF NATIONAL FOOTBALL LEAGUE ECONOMICS, *supra* note 49, at 13 (ranking NFL clubs on the basis of operating profit); *Los Angeles Memorial Coliseum Comm'n v. NFL*, 726 F.2d 1381, 1390 (9th Cir.), *cert. denied sub nom. NFL v. Oakland Raiders*, 105 S. Ct. 397 (1984).

its decisions. The dual nature of professional sports leagues makes them especially hard to classify as unilateral or plural under the Sherman Act. In some respects, they seem to stand as single entities; in other respects, they seem to be composed of a plurality of separate actors.

III. A CRITIQUE OF CURRENT APPROACHES TO SPORTS LEAGUE PLURALITY

Some activities of professional sports leagues have been successfully challenged under section 1 of the Sherman Act, but few courts have ruled explicitly on the applicability of the single-entity defense. No case has addressed the issue since the Supreme Court's decision in *Copperweld*.⁵⁷ The existing cases and commentary contain at least three distinct approaches to sports league plurality. First, some courts have held that the collective economic organization of a sports league never constitutes a single entity immune from section 1. Second, some courts have argued that a league should be considered a single entity only with regard to activities in which its clubs are not potential economic competitors. Third, some commentators have suggested that professional sports leagues should be considered the equivalent of a single firm for all purposes under section 1. None of these approaches is consistent with the *Copperweld* test.

A. Leagues as Plural Entities

The Ninth and Second Circuits have rejected the single-entity defense in different contexts. The Ninth Circuit case, *Los Angeles Memorial Coliseum Commission v. NFL*,⁵⁸ involved a league rule which barred the Oakland Raiders from moving to Los Angeles without the approval of other clubs in the league. The Second Cir-

⁵⁷ Most courts have subjected intraleague agreements to section 1 scrutiny without directly confronting the single-entity issue, thereby assuming, without actually deciding, that sports leagues are plural entities. See, e.g., *Hennessey v. NCAA*, 564 F.2d 1136, 1147 (5th Cir. 1977); *Mackey v. NFL*, 543 F.2d 606, 616-18 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977); *Linseman v. WHA*, 439 F. Supp. 1315, 1320 (D. Conn. 1977); *Kapp v. NFL*, 390 F. Supp. 73, 80-82 (N.D. Cal. 1974), *aff'd*, 586 F.2d 644 (9th Cir. 1978), *cert. denied*, 441 U.S. 907 (1979); *United States v. NFL*, 116 F. Supp. 319, 321 (E.D. Pa. 1953). An assumption of plurality was also implicit in the most recent Supreme Court case dealing with sports leagues, where the Court condemned under section 1 the joint television plan of an amateur football league. See *NCAA v. Board of Regents*, 104 S. Ct. 2948 (1984).

⁵⁸ 726 F.2d 1381 (9th Cir.), *cert. denied sub nom. NFL v. Oakland Raiders*, 105 S. Ct. 397 (1984) [hereinafter cited as *Raiders*]. For a discussion of restrictions on club relocation, see *infra* notes 95-99 and accompanying text.

cuit case, *NASL v. NFL*,⁵⁹ concerned an NFL rule prohibiting club owners from investing in the clubs of another league. Without restricting the plurality determination to the context of the particular rule at issue, both courts held that the collective decisions of a sports league are *always* concerted activity subject to section 1.⁶⁰

The courts offered several reasons for holding that sports league conduct is always plural. First, the Ninth Circuit pointed to the "intraenterprise conspiracy" doctrine, which suggested that a section 1 conspiracy can exist even between commonly owned corporations if they are distinct legal entities.⁶¹ The court reasoned that if common ownership does not preclude scrutiny under section 1, such scrutiny should not be precluded by the lesser affiliation of clubs in a sports league.⁶² Second, both the Second and Ninth Circuits relied on prior cases holding that league restraints on player-club negotiations violate section 1, inferring from those decisions that leagues are subject to section 1 for all purposes.⁶³ Third, noting that the Supreme Court has applied section 1 to other kinds of associations formed for the purpose of cooperative production, both courts held that the cooperation among clubs necessary to produce sporting events is not sufficient to characterize a league as a single entity.⁶⁴ Indeed, the Ninth Circuit declared that league organization is not even necessary to the product: because individual clubs could, in theory at least, produce games

⁵⁹ 670 F.2d 1249, cert. denied, 459 U.S. 1074 (1982).

⁶⁰ *Raiders*, 726 F.2d at 1389-90; *NASL*, 670 F.2d at 1257-58. Several commentators have reached the same conclusion. See Blecher & Daniels, *Professional Sports and the "Single Entity" Defense Under Section One of the Sherman Act*, 4 WHITTIER L. REV. 217 (1982); Glick, *Professional Sports Franchise Movements and the Sherman Act: When and Where Teams Should be Able to Move*, 23 SANTA CLARA L. REV. 55 (1983); Kurlantzick, *supra* note 45, at 191; see also *Professional Sports Antitrust Immunity*, *supra* note 49, at 417-24 (prepared statement of Louis B. Schwartz). Some other commentators suggest that section 1 scrutiny is appropriate but do not discuss the single-entity defense. See Leavell & Millard, *Trade Regulation and Professional Sports*, 26 MERCER L. REV. 603 (1975); Comment, *The SuperBowl and the Sherman Act: Professional Team Sports and the Antitrust Laws*, 81 HARV. L. REV. 418 (1967).

⁶¹ See *supra* note 7 and accompanying text.

⁶² *Raiders*, 726 F.2d at 1388.

⁶³ *Id.*; *NASL*, 670 F.2d at 1257.

⁶⁴ *Raiders*, 726 F.2d at 1388; *NASL*, 670 F.2d at 1257. The cases cited by the courts include *Broadcast Music, Inc. v. CBS*, 441 U.S. 1 (1979) (association of music composers formed for the purpose of selling blanket license for all member compositions); *United States v. Sealy, Inc.*, 388 U.S. 350 (1967) (cooperative of regional mattress manufacturers formed for the purpose of licensing a national trademark); *Associated Press v. United States*, 326 U.S. 1 (1945) (cooperative of newspapers formed for the purpose of sharing news). For a critique of the Ninth Circuit's use of these cases, see Weistart, *League Control of Market Opportunities: A Perspective on Competition and Cooperation in the Sports Industry*, 1984 DUKE L.J. 1013, 1055-60.

through some form of cooperation other than membership in a league, their product has "independent value."⁶⁵

Copperweld completely undermines this approach. To begin with, the Supreme Court rejected a "legal entities" approach to plurality under section 1, thus eliminating the basis for the Ninth Circuit's analogy to the intraenterprise conspiracy doctrine.⁶⁶ By offering a new plurality test, *Copperweld* also casts doubt on any inferences from the prior sports league cases that confronted the plurality issue only indirectly. Furthermore, *Copperweld* uses the substantive economic interests of the cooperating parties as the crucial factor in determining plurality, not the necessity of their cooperation in the production process.

B. The Potential Economic Competition Test

The second approach to sports league plurality equates the absence of potential economic competition among league clubs with an absence of section 1 plurality.⁶⁷ Under this approach, a collec-

⁶⁵ The court explained that while "cooperation is necessary to produce a football game . . . this does not mean 'that each club can produce football games only as a member of the NFL.'" *Raiders*, 726 F.2d at 1390 (quoting *Los Angeles Memorial Coliseum Comm'n v. NFL*, 519 F. Supp. 581, 584 (C.D. Cal. 1981)). However, the court's statement that individual club matches have independent value is true only to a limited extent, for it ignores the fact that the procession toward a league championship tremendously augments the value of each match as an individual product. See *supra* note 36 and accompanying text.

⁶⁶ A recent commentator has argued that *Copperweld* validates the blanket rejection of the single-entity defense used by the Ninth and Second Circuits. See Lazaroff, *The Antitrust Implications of Franchise Relocation Restrictions*, 53 *FORDHAM L. REV.* 157, 163-69 (1984). Lazaroff argues that separate ownership and "differen[ces in] attitude" that exist between clubs imply that leagues fail the *Copperweld* test. *Id.* at 167. But see Roberts, *supra* note 33, at 250-54 (arguing that *Copperweld* immunizes some league activities). However, Lazaroff's approach fails to recognize that the degree of unity of interest among clubs will vary for different aspects of league operations. See *infra* notes 86-89 and accompanying text.

⁶⁷ See *NASL v. NFL*, 505 F. Supp. 659, 677 (S.D.N.Y. 1980), *aff'd in part and rev'd in part*, 670 F.2d 1249 (2d Cir.), *cert. denied*, 459 U.S. 1074 (1982); *San Francisco Seals, Ltd. v. NHL*, 379 F. Supp. 966, 969-70 (C.D. Cal. 1974); *Raiders*, 726 F.2d at 1406 (Williams, J., concurring in part and dissenting in part). One district court has used the potential competition approach to reject the single-entity defense with respect to an intraleague agreement regulating activities involving significant competition among clubs. In *Robertson v. NBA*, 67 F.R.D. 691, 694 n.3 (S.D.N.Y. 1975), the court held that the NBA's player draft and reserve rules were subject to section 1 scrutiny because they involved league activities in markets within which clubs were competitors. Because the league's clubs compete for player services, the court reasoned, there was potential for anticompetitive activity.

Potential competition figures heavily in the approaches of many commentators as well. See, e.g., J. WEISTART & C. LOWELL, *supra* note 44, at 701 (franchise relocation decisions should be immune from section 1 because clubs are not "true economic competitors"); Blecher & Daniels, *supra* note 60, at 238 (no single-entity status because clubs in same area "compete vigorously").

tive decision is considered plural when it relates to an area of potential economic competition among individual clubs. A collective decision is considered unilateral when it relates to matters where the potential for competition is lacking.⁶⁸

Two federal district courts used this approach when faced with the same kinds of league practices for which the Second and Ninth Circuits found the single-entity defense inappropriate: restraints on territorial relocation⁶⁹ and limits on interleague investment.⁷⁰ The district courts first defined the market affected by the challenged league rule, then determined whether the market was

⁶⁸ The existence of potential economic competition between clubs in a sports league has been a recurring theme elsewhere in the antitrust jurisprudence of the industry and has been an issue in two contexts: first, in deciding whether traditional rules of illegality for horizontal agreements between competitors can be applied to sports leagues; and second, in determining whether league decisions restricting league membership are incapable of anticompetitive effect and thus cannot violate section 1 even under a reasonableness standard.

In the first context, some courts have held that the per se prohibition against group boycotts under section 1 does not apply to sports leagues because clubs are not potential economic competitors. See *Smith v. Pro-Football, Inc.*, 593 F.2d 1173 (D.C. Cir. 1978); *Mackey v. NFL*, 543 F.2d 606 (8th Cir. 1976), cert. dismissed, 434 U.S. 801 (1977); *Kapp v. NFL*, 390 F. Supp. 73 (N.D. Cal. 1974), aff'd, 586 F.2d 644 (9th Cir. 1978), cert. denied, 441 U.S. 907 (1979). They reasoned that although a group boycott among clubs as competitors would be inherently anticompetitive, among clubs as noncompetitors it might have procompetitive effects. *Smith*, 593 F.2d at 1180-81; *Mackey*, 543 F.2d at 619; *Kapp*, 390 F. Supp. at 82. But see *Denver Rockets v. All-Pro Management*, 325 F. Supp. 1049 (C.D. Cal. 1971) (applying per se rule to an NBA player negotiation rule).

The potential economic competition approach also has been used successfully to argue that league actions restricting membership are incapable of restricting competition and thus do not violate section 1 under any standard. Two courts have rejected section 1 challenges to league decisions denying applications for membership in the league. *Mid-South Grizzlies v. NFL*, 720 F.2d 772 (3d Cir. 1983) (newly organized club denied NFL franchise), cert. denied, 104 S. Ct. 2657 (1984); *Levin v. NBA*, 385 F. Supp. 149 (S.D.N.Y. 1974) (NBA refusal to approve sale of franchise). Both courts noted that in applying to join the league, the plaintiffs did not seek to compete with clubs in the league, but to join them in the business of producing professional sport. *Grizzlies*, 720 F.2d at 785; *Levin*, 385 F. Supp. at 152. The *Levin* court reasoned that denial of a franchise thus could not prevent any competition that would have existed otherwise. 385 F. Supp. at 151-52. In contrast, the Third Circuit in *Grizzlies* recognized that economic competition between members of the NFL is possible, as, for example, when clubs compete for fan revenue in shared territories. 720 F.2d at 787. However, because the particular applicant in *Grizzlies* would not have been geographically capable of competing with other NFL clubs for fan revenue, its exclusion from the league did not have the effect of restraining economic competition. *Id.* at 786-87.

⁶⁹ See *San Francisco Seals, Ltd. v. NHL*, 379 F. Supp. 966, 969-70 (C.D. Cal. 1974). *Seals* differed from the *Raiders* case, though, because the club challenging the territorial restriction in *Seals* sought to move to a location not already occupied by another league club. In *Raiders*, the club desired to relocate to an already occupied area. This distinction is critical under the test proposed in Part IV of this comment. See *infra* notes 95-99 and accompanying text.

⁷⁰ See *NASL v. NFL*, 505 F. Supp. 659 (S.D.N.Y. 1980), aff'd in part and rev'd in part, 670 F.2d 1249 (2d Cir.), cert. denied, 459 U.S. 1074 (1982).

one in which the league clubs could be economic competitors. Because the courts determined that clubs within a single league could not be economic competitors within the identified market, the league actions were characterized as unilateral. For example, one court found that the market relevant to a rule prohibiting a hockey franchise relocation was the national market for professional hockey games before live audiences. The court determined that clubs within a league do not compete economically with each other in that market. Rather, the clubs within a league act as a unit in competition with other sports leagues. The clubs in the hockey league thus were "acting together as one single business enterprise."⁷¹

Although the inquiry into potential economic competition might often lead to results consistent with the *Copperweld* test, it differs in both its focus and its results. The potential competition test focuses predominantly on market definition. Judges must examine the market actually affected by the challenged practice and can find single-entity status only in those markets where potential competition does not exist. Defining the appropriate product market is often an extremely difficult undertaking, however, especially where unconventional products such as sporting events are involved.⁷² Moreover, *Copperweld* says that the plurality determina-

⁷¹ *Seals*, 379 F. Supp. at 969. The court noted that the club challenging the restraint expected to remain a member of the league following its relocation. However, only by withdrawing from the league would that club place itself in a position of economic competition with the league members. *Id.* The league rule, of course, imposed no restraints on the relocation of clubs that chose to withdraw from the league.

⁷² To illustrate the difficulty of market definition, consider the distinction drawn by one dissenting appellate court judge between "downstream" and "upstream" activities. See *Raiders*, 726 F.2d at 1406 (Williams, J., concurring in part and dissenting in part). "Upstream" activities are those in which clubs are bidders for inputs to production, such as player services. "Downstream" activities are those taking place at the end of the production process, in which clubs sell the league product. In upstream markets clubs have "significant identities" apart from the rest of the league and they compete directly for production inputs. However, clubs do not compete in downstream markets, according to this view, because the joint nature of the league's product creates an interdependence among clubs that is inconsistent with economic rivalry. *Id.*; see also J. MARKHAM & P. TEPLITZ, *supra* note 36, at 13 (arguing that there is less potential for competition among clubs in output markets than in input markets); J. WEISTART & C. LOWELL, *supra* note 44, at 702 (same).

As a tool for isolating potentially competitive sports markets, the "upstream/downstream" approach gives inconsistent results. For example, the sale of tickets and concession items is clearly a downstream activity insofar as it involves league "output," yet two clubs in geographical proximity will probably compete for fan revenue. See *Raiders*, 726 F.2d at 1390; *NASL*, 505 F. Supp. at 666. The sale of network broadcasting rights is also a downstream activity, but in the absence of an intraleague agreement for joint negotiation of a network contract, individual clubs would probably compete vigorously for television revenues. On the other hand, the solicitation of investment capital is clearly an upstream activ-

tion depends on the nature of the economic relationship between the cooperating parties, not on the limits of the markets for particular products.

In addition, the results of this approach are only partly consistent with *Copperweld*. Although the potential for competition between parties *may* indicate that they have different economic interests, the absence of potential competition does *not* signify their unity of economic interest. *Copperweld*'s definition of plurality as the "sudden joining of economic resources that had previously served different interests"⁷³ cannot be read to mean that plurality exists only where the parties could be competitors.⁷⁴ Such a definition of plurality would be inconsistent with a vast number of section 1 cases scrutinizing agreements between parties that could only loosely be described as potential competitors, especially in the field of vertical restraints.⁷⁵ Indeed, *Copperweld* itself endorsed a finding of plurality in a vertical agreement between a manufacturer and its distributor.⁷⁶

C. Leagues as Single Entities

A third approach to sports league plurality, which some commentators endorse, finds leagues to be single entities for all purposes relating to the production of sports matches.⁷⁷ Under this

ity, yet at least one court has taken the view that individual clubs within a league do not compete with each other for such capital. *NASL*, 505 F. Supp. at 666, 684-85.

⁷³ *Copperweld*, 104 S. Ct. at 2742.

⁷⁴ At least one appellate court, however, has used a potential competition approach even after *Copperweld*. In *Weiss v. York Hosp.*, 745 F.2d 786 (3d Cir. 1984), *cert. denied*, 105 S. Ct. 1777 (1985), a doctor challenged the decision of a hospital's medical staff to deny him hospital privileges. The court found that the staff's decision constituted concerted conduct because the individual doctors on the staff were capable of competing with each other. *Id.* at 813-16. On the other hand, the staff and the hospital were not considered entities capable of conspiring with each other because they had no interest in competition with each other. *Id.* at 817.

⁷⁵ For example, the Supreme Court has evaluated resale price maintenance agreements and tying arrangements under section 1 despite the fact that such agreements typically bind economic actors at different levels of the production and distribution process. *See, e.g., California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980) (resale price maintenance agreement); *Fortner Enters., Inc. v. United States Steel Corp.*, 394 U.S. 495 (1969) (tying arrangement).

⁷⁶ 104 S. Ct. at 2739.

⁷⁷ *See* R. BORK, *supra* note 24, at 278-79; Grauer, *Recognition of the National Football League as a Single Entity Under Section 1 of the Sherman Act: Implications of the Consumer Welfare Model*, 82 MICH. L. REV. 1 (1983); *see also* Bork, *Resolved: Present Antitrust Restraints on Pricing Should Be Relaxed*, 41 ANTITRUST L.J. 5, 13 (1971); Kempf, *The Misapplication of Antitrust Law to Professional Sports Leagues*, 32 DE PAUL L. REV. 625, 628-31 (1983). The "potential economic competition" and "essential agreement" tests are not

approach, agreements between separate firms engaged in cooperative production of a single product should be completely legal if the product cannot be produced without such contractual integration.⁷⁸ This approach begins with the premise that "the only legitimate goal of antitrust is the maximization of consumer welfare";⁷⁹ in other words, all economic activity that promotes consumer welfare should be lawful. Agreements that are essential to creating a new product cannot reduce the economic efficiency of production, since by definition the production is impossible without them. As a result, they do not reduce consumer welfare. According to this view, because cooperation among clubs is essential to their productive activity, sports leagues are examples of "essential" contractual integration between firms. Thus, they should always be considered single entities for section 1 purposes.⁸⁰

Although *Copperweld's* plurality test emphasizes the efficiency associated with a firm's ability to structure its internal affairs, the Court did not adopt a pure efficiency approach like the "essential agreement" test. The Court looked to the existence of unity of economic interest among the parties to that conduct, and not to the cooperation necessary for production.

mutually exclusive. Some commentators have relied upon both rationales simultaneously. See, e.g., J. WEISTART & C. LOWELL, *supra* note 44, § 5.11(a)(1); Roberts, *supra* note 33, at 251-52. The arguments are closely related. Financial interdependence may be an "essential feature" of league sports, since leagues need competitive balance in talent. Interdependence reduces the possibility of economic competition among clubs, since competition could weaken or destroy the on-field competitive balance.

⁷⁸ The district court in *NASL*, 505 F. Supp. at 666, relied in part on an "essential agreements" rationale for its holding that the NFL is a single entity. The court stated that: [the] single economic entity concept finds some support in the [notion] that joint activity, inherently necessary to produce a marketable . . . product, creates a single, "separate seller" of that product [A] professional sports team cannot play or market itself. The sports league's product can exist only as the result of joint effort. In that context, I conclude that there is no combination in restraint of trade

505 F. Supp. at 688 (emphasis in original). The court does not seem to have recognized that this rationale is at odds with the potential competition rationale it espouses elsewhere in the opinion. See *id.* at 677. Under the potential competition approach, a sports league is a single entity only with respect to those aspects of its operation which do not involve interclub economic competition. Under the essential agreements approach, on the other hand, a sports league is a single entity for all activities necessary for producing the league product.

The district courts in *NASL* and *Seals* also used "essential agreement" rhetoric to distinguish intraenterprise conspiracy cases from sports league arrangements. *NASL*, 505 F. Supp. at 688; *Seals*, 379 F. Supp. at 970. Their use of the concept is much more limited than the "essential agreement" test described here, insofar as the district courts did not hold that plurality was lacking in league agreements solely because the agreements were intrinsic to league production.

⁷⁹ R. BORK, *supra* note 24, at 7.

⁸⁰ See *id.* at 278-79; Grauer, *supra* note 77, at 19; cf. *supra* note 65 (considering whether individual club matches have independent value).

Furthermore, the "essential agreement" test is unworkable because no adequate standard exists for determining which sports league agreements are essential to league production. Some agreements may appear necessary to enhancing output, when in fact they lead to considerable inefficiencies. For example, an agreement that restricts the ability of players to negotiate with clubs enhances club revenue and stabilizes the distribution of playing talent among clubs. In this sense, it might be essential to league production. But to the extent clubs exert cartel power in the player services market, the agreement creates social costs.⁸¹ The "essential agreement" approach could be applied with any confidence only after first inquiring about the minimum degree of restriction needed to maintain league survival without excessive social costs. Consequently, this approach would make the threshold plurality test as complicated as the merits of the antitrust claim.

The "essential agreement" standard also conflicts with *Copperweld's* specific reservation of section 1 scrutiny for challenges to business practices that involve contracts between the defendant firm and third parties. In these situations, section 1 plurality always exists on the basis of the contract.⁸² Sports leagues would always be susceptible to section 1 attack on the basis of contracts with players,⁸³ television networks, or stadium owners.⁸⁴ Under the "essential agreement" approach, however, a contract with a third party could be treated as unilateral action, exempt from section 1 scrutiny, if it is "essential" to production. Contracts with players might also fall into this category.⁸⁵

⁸¹ See R. LEFTWICH & R. ECKERT, *supra* note 30, at 461, 475-85 (discussing social costs of monopsony in professional baseball).

⁸² The Court explained that the existence of such contracts in prior cases finding conspiracy between commonly owned firms could have provided plurality even without the intraenterprise conspiracy doctrine. For example, in one case finding a resale price-fixing conspiracy between two commonly owned subsidiaries, the Court observed that even if plurality was not found between the subsidiaries, the involvement of wholesalers who purchased from them made the price-fixing scheme concerted and subject to section 1. *Copperweld*, 104 S. Ct. at 2738 n.9 (citing *Albrecht v. Herald Co.*, 390 U.S. 145, 149-50 & n.6 (1968)).

⁸³ See *supra* note 44 (describing player restraints). League constitutions usually contain a covenant among the clubs that they will include "in every contract between any member club and its employees, including coaches and players, a clause in which the parties to the contract agree to be bound by the Constitution and By-Laws of the League." UNITED STATES FOOTBALL LEAGUE CONST. art. III, § 3.11(d) (1982). Arguably, then, players become third parties to all league covenants controlling player relations, and are able to challenge those covenants as concerted activity under section 1.

⁸⁴ Such contracts are being challenged in a pending antitrust suit brought by the USFL against the NFL. See *Attorneys Discuss Aspects of U.S.F.L. Suit Against N.F.L.*, N.Y. Times, Oct. 21, 1984, § 5, at 12, col. 1.

⁸⁵ See Grauer, *supra* note 77, at 40-41 (because the NFL is a single entity "any re-

IV. A NEW APPROACH TO SPORTS LEAGUE PLURALITY

The three approaches to sports league plurality outlined in the previous section cannot survive the Supreme Court's decision in *Copperweld*. The Court's new test is more closely linked to the aims of a plurality determination: cooperating parties are consolidated as one or cleaved into many, depending on whether the parties exhibit a unity of economic interest. And as noted previously, parties to a joint enterprise will exhibit unity of economic interest when collective decisions are made pursuant to a preexisting arrangement which allocates the economic effects of the decisions in fixed proportions among the parties.

A. Sports Leagues Under the *Copperweld* Test

When the *Copperweld* test is applied to sports leagues, it is clear which league activities should be considered unilateral and which should be considered concerted for section 1 purposes. League activities are unilateral when they bear primarily on revenues which intraleague agreements distribute in fixed proportions among clubs and when they bear only slightly or not at all on each club's independent costs. Only this kind of coordinated conduct will have a predictably uniform effect on the profits of the member clubs, giving each club the same incentive to maximize the overall profits of the league.⁸⁶ Because clubs have substantial unity of eco-

straint on the player market caused by the draft" is legal). The problem of third-party contracts appears to have been ignored by some commentators, particularly those who advocate the single-entity defense with regard to player-league disputes. See *id.*; Note, *The N.F.L.'s Final Victory Over Smith v. Pro-Football, Inc.: Single Entity-Interleague Economic Analysis*, 21 CLEV. ST. L. REV. 541 (1978). But see J. WEISTART & C. LOWELL, *supra* note 44, at 693 (section 1 applies where league "joins with outsiders" to restrain competition).

⁸⁶ See *supra* notes 29-33 and accompanying text. The initial league agreement setting forth revenue-sharing provisions, which establishes unity of economic interest among league members, will always constitute plural action subject to section 1 challenge as a "merger" of previously separate economic entities. Nonetheless, a plaintiff could not use a merger theory to attack a single-entity action of the league. A claim that revenue-sharing provisions constitute an anticompetitive "merger" would bring into question only the competitive effect of the merger itself, and not the effect of decisions relating to revenue made after clubs merged, so long as the proportional allocation of revenues among clubs remains stable.

For example, a frustrated applicant for membership in the league who desired a franchise in an unoccupied territory could not challenge the expansion decision under section 1 because the league acts as a single entity with regard to such decisions. See *infra* notes 100-03 and accompanying text. The plaintiff could instead challenge the league's revenue-sharing agreement itself as an unlawful merger between clubs, but this claim would be wholly different from a group boycott claim against the league's decision not to expand.

A merger challenge itself is unlikely to be successful for two reasons. First, the major revenue-sharing agreements within leagues—those covering network television reve-

conomic interest on these matters, under the *Copperweld* approach collective decisions about such conduct should be considered unilateral and exempt from scrutiny under section 1.⁸⁷

On the other hand, sports leagues do *not* exhibit unity of economic interest when collective decisions bear significantly on costs, on revenues that are shared in variable proportions, or on revenues that are not shared at all. In these areas, the member clubs have disparate economic interests in the results of their collective decisions. Where unity of interest is lacking, the clubs are not operating in a manner resembling a traditional partnership or joint venture, so plurality is present. Thus, under the proposed *Copperweld* approach, such league practices should remain subject to section 1 scrutiny.

One example of unilateral league action is a joint decision about television broadcasting. Most leagues exhibit unity of economic interest with respect to television revenues, which have little effect on costs and are shared equally among the member clubs.⁸⁸ Because each club's share of television revenues is fixed in proportion, member clubs have identical incentives to maximize these revenues.⁸⁹ In contrast, local merchandising receipts typically are not shared at all. Here, collective action should be treated as plural because each club has special economic interests which differ from the interests of other clubs. Although these examples are straightforward, some others are more complicated and are worth considering as further illustrations of the *Copperweld* test.

nues—have been immunized from section 1 by special legislation. See 15 U.S.C. § 1291 (1982). Second, a section 1 challenge to league revenue sharing in and of itself is likely to fail on the merits. Revenue-sharing agreements in sports leagues have important procompetitive effects insofar as they contribute to league stability. A number of courts have admitted that the need to maintain a balance of playing talent among clubs could be a valid basis for restrictive league agreements. See *Mackey v. NFL*, 543 F.2d 606, 621 (8th Cir. 1976), cert. dismissed, 434 U.S. 801 (1977); *United States v. NFL*, 116 F. Supp. 319, 323-24 (E.D. Pa. 1953).

⁸⁷ Cf. Roberts, *supra* note 33, at 296-97 (arguing that section 1 applies to sports leagues only where the decision challenged was made by a small minority of clubs motivated by "independent economic interests" conflicting with those of the "league as a whole").

⁸⁸ See *supra* note 49 and accompanying text.

⁸⁹ For example, the NBA recently renegotiated its network and cable television contracts. See *Basketball: Business is Booming*, Bus. Wk., Oct. 28, 1985, at 73, 82. By reducing the number of games televised over cable and regional systems from 170 to 75, the league hopes to eliminate oversaturation and increase the value of its network broadcasts. *Id.* The equal division of television revenues among clubs gives each club an interest in maximizing the league's total revenues from *all* television broadcasts—network and cable. If clubs did not share the revenues from their own cable broadcasts, no club would have an incentive to select a mix of network and cable broadcasts that would be optimal for all clubs.

B. Applications for Specific League Decisions

When a league decision or agreement is challenged, the determination of whether it constitutes unilateral or plural conduct must proceed through three steps. The first step is to identify the league's economic activities that are affected by the decision. The second step is to determine whether the clubs in the league exhibit a preexistent unity of economic interest in those activities. If unity of interest is found, the decision should be treated as unilateral. If the decision affects some areas of activity where unity of interest is lacking, however, a third step is required to judge whether the effect on such activities is significant enough to warrant the conclusion that the league decision constitutes plural conduct. When the league decision has more than a minimal impact on activities in which the clubs have divergent interests, it should be treated as plural conduct because the clubs will no longer have unity of interest in its consequences. To show how this three-step inquiry works in practice, this discussion examines three kinds of agreements among clubs within a professional sports league: playing rules, territorial restrictions on club movement, and restrictions on league expansion.

1. *Playing Rules.* A league's playing rules provide the consistency necessary for a meaningful championship race and determine the character of a league's product. Leagues make decisions about playing rules in committees⁹⁰ or by membership vote.⁹¹ These collective decisions may be subject to antitrust challenge. For example, players could assert that a certain rule effectively makes them unable to sell their services to the league, thus amounting to a group boycott.⁹² However, application of the *Copperweld* approach suggests that decisions about rules should always be considered unilateral.

To demonstrate this, assume initially that a league constitution establishes perfect revenue sharing: all club revenues, including ticket sales, broadcast sales, and miscellaneous income are pooled and divided among the clubs in fixed proportions.⁹³ With

⁹⁰ See J. MARKHAM & P. TEPLITZ, *supra* note 36, at 43 (discussing baseball playing rules committee).

⁹¹ See, e.g., UNITED STATES FOOTBALL LEAGUE CONST. art. XI, § 11.2 (1982).

⁹² See, e.g., *Neeld v. NHL*, 594 F.2d 1297 (9th Cir. 1979) (challenging the NHL's prohibition of one-eyed players); *Linseman v. WHA*, 439 F. Supp. 1315 (D. Conn. 1977) (challenging age requirements).

⁹³ It is not necessary for unity of economic interest that revenues be divided equally, so long as they are divided according to proportions that are fixed during the period at issue. See *supra* notes 29-33 and accompanying text.

such an agreement, clubs voting on a rule change will exhibit a unity of economic interest: the clubs will seek to devise rules that maximize total league revenues since they will benefit proportionally from increased revenues. Playing rules primarily affect fan interest in the sport, which reveals itself as revenue. In a league with perfect revenue sharing, clubs will act like a single firm by selecting playing rules that maximize revenue. Hence, a league's rules decisions should be treated as unilateral conduct.

If the revenue-sharing assumption is relaxed, the interests of clubs will diverge only slightly. The effect of a rule change on each club's costs continues to be negligible. As for revenues, substantial non-uniform effects on clubs are possible but unlikely, since playing rules have an across-the-board effect on consumer demand. Even if some clubs benefit more than others, this effect will be unpredictable, and will create at most a minimal divergence of interests at the time of the decision.⁹⁴ Thus, *Copperweld* suggests that the conduct should still be treated as unilateral, since the rules decisions have only a minimal impact on activities in which the clubs have divergent interests, but have a strong impact on an area of shared interest: the league product itself.

2. *Relocation Restrictions.* All leagues establish territorial restrictions on the location of their clubs. Usually, the league constitution establishes the geographical area in which a member club has the exclusive right to present games, and clubs are prohibited from relocating outside of this area without the approval of some proportion of the league membership.⁹⁵ A relocation restriction

⁹⁴ For example, a playing rule might be proposed that would give a club an immediate and substantial edge as an on-field competitor. Thus, a football club with excellent kickers might want a rule narrowing football goalposts whereas a club with poor kickers would not. Because on-field superiority implies greater financial success for a club, see *supra* note 36, in the short run clubs could have divergent financial interests in such a rule. Over time, however, this divergence will disappear.

⁹⁵ In major league baseball, the National League establishes the exclusive area of each club as the city limits of the franchise's location plus ten miles in all directions. The American League establishes it as the one hundred mile radius around the club's park. Within this area no other club of the same league may locate. A club may locate its franchise in a city already occupied by a club of the other league so long as its playing field is at least five miles from that of the incumbent club. Furthermore, if the city has a population of less than 2.4 million, three-quarters of the clubs in the incumbent club's league must approve the relocation decision. See J. MARKHAM & P. TEPLITZ, *supra* note 36, at 3.

In football, the NFL establishes a club's exclusive territory as the city in which it is located plus seventy-five miles in all directions. NATIONAL FOOTBALL LEAGUE CONST. art. IV, § 4.1 (1976). The USFL establishes it merely as "the area in which the club is located and for which it holds a franchise and plays its home games." UNITED STATES FOOTBALL LEAGUE CONST. art. IV, § 4.1 (1982). Formerly, both the NFL and USFL constitutions prevented relocation of any franchise without the approval of three-quarters of the league member-

rule could be challenged under the Sherman Act in several ways. A club could allege that such a rule restrains competition from clubs that might otherwise occupy the same territory.⁹⁶ Also, stadium operators might conceivably challenge such a rule as a group boycott.⁹⁷

Under the proposed *Copperweld* analysis, league denial of a club's relocation cannot be considered the action of a single entity because the relocation decision implicates significantly different economic interests among the various clubs, even if the league agreement provides for perfect revenue sharing. The divergence of

ship. NATIONAL FOOTBALL LEAGUE CONST. art. IV, § 4.3 (1976); UNITED STATES FOOTBALL LEAGUE CONST. art. IV, § 4.3 (1982) (also requiring the assent of "any member club whose home territory would be affected" by the move). The NFL provision was ruled a violation of section 1 in *Raiders*, 726 F.2d at 1401. Shortly thereafter, the NFL Commissioner established criteria to govern the vote on relocation. Memorandum from Pete Rozelle to NFL Club Presidents (Dec. 21, 1984), reprinted in *Professional Sports Community Protection Act of 1985: Hearings on S. 259 and S. 287 Before the Senate Comm. on Commerce, Science and Transportation*, 99th Cong., 1st Sess. 69-71 (1985) (statement of Pete Rozelle).

In basketball, requests for relocation are considered by a committee of five of the league's club owners, and the committee's decision to allow relocation must then be ratified by a majority of the league's clubs. See, e.g., *NBA Group OKs Kings' Move West*, Chicago Tribune, Apr. 4, 1985, at IV-1, col. 1. Relocation to a territory already occupied by an NBA team also requires the approval of the club presently in the area. See Kurlantzick, *supra* note 45, at 184 n.4.

In hockey, the NHL defines each club's exclusive area as the city in which it is located and the surrounding fifty-mile radius. See Note, *Antitrust Analysis in Professional Sports Management Cases: The Public Cries "Foul!"* 25 ARIZ. L. REV. 995, 1001 n.29 (1983). Transfers of location require the unanimous consent of the NHL membership. See Kurlantzick, *supra* note 45, at 184 n.4.

⁹⁶ Analysts disagree whether clubs sharing the same metropolitan area compete for live attendance. Compare Noll, *Attendance and Price Setting*, in GOVERNMENT AND THE SPORTS BUSINESS, *supra* note 45, at 154 (exclusive territorial rights restrict competition in large cities) and Blecher & Daniels, *supra* note 60, at 232 (clubs in the same area compete) with J. MARKHAM & P. TEPLITZ, *supra* note 36, at 24 (price elasticity of demand for games played in different home parks within the same city is extremely low).

Several aspects of existing league agreements support the former position. The USFL and NBA constitutions prohibit a club from relocating to an already occupied territory without the assent of the incumbent club. See *supra* note 95. And in the baseball leagues each club has the right to prevent unauthorized broadcasts by other clubs into its own territory. See *supra* note 45. Also, baseball schedules are designed to minimize the number of times that clubs in the same city play home games on the same day. See CHICAGO NATIONAL LEAGUE BALL CLUB, 1980 FORM 10-K ANNUAL REPORT, pt. 1, item 1. If there were no potential for competition between clubs in the same geographical area, these rules would be unnecessary.

⁹⁷ The stadium operators' theory would be that a relocation rule restricts competition among clubs for the purchase of their services. Stadium operators may also be able to challenge relocation rules under other theories. In *Raiders*, 726 F.2d at 1393-94, the Los Angeles Coliseum claimed that the NFL's relocation rule operated to restrain competition among stadiums to obtain football clubs as tenants. In effect, the Coliseum seems to have been alleging that the NFL rule operated to create a cartel among stadiums, of which it was an unwilling member.

interests exists because the relocation decision affects each club's costs differently.

An example demonstrates this divergence of interests. Imagine that club *A* proposes to move from its present location to a city presently unoccupied by another club. The other clubs in the league should approve the move if it will result in a net increase in total league revenues.⁹⁸ Such an increase might come from increased ticket sales in the new location, for example. On the other hand, club *A*'s decision to move is based on more than a desire to increase gross revenues: club *A* wishes to maximize its profits. Thus, it will desire relocation when its share of league revenues in the new city minus its costs in the new city exceed its share of the league revenues in the old city minus its costs there. A club will prefer relocation, despite the league's opposition, in those situations where the cost savings of relocation exceed any loss in its revenue.⁹⁹

Where club *A* seeks to relocate into territory already occupied by club *B*, the disparity of interests may be even more pronounced. Again, the other clubs in the league should approve the move if it will result in a net increase in total league revenues. However, *B* may oppose the move because its costs may be increased by *A*'s intrusion; in this situation, both *A* and *B* have interests that are distinct from those of the other clubs.

If a significant fraction of league revenues are not shared in consistent proportions, the interests of the various clubs diverge even further. Even if television revenues are equally shared, gate receipts may be unequally shared between the home and visiting teams. When *A* proposes to move into *B*'s territory, the other clubs still look only at the net effect of the move on shared revenues. If

⁹⁸ This decision becomes more complicated when the effect of the move on future expansion proceeds is taken into account. If the city to which club *A* wants to relocate is a potential market for a new team, then the potential net gains from expansion—the expansion fees which are equally shared—become a factor weighing against allowing relocation. In fact, the loss of future expected expansion proceeds may have figured in the NFL vote to prohibit the Oakland Raiders from moving to Los Angeles. See *Professional Sports Antitrust Immunity*, *supra* note 49, at 209 (testimony of Pete Rozelle, NFL Commissioner, in district court).

⁹⁹ The importance of costs in the club's location decision is demonstrated by the substantial amount of bidding among municipalities for professional sports franchises. Quite often cities attempt to lure teams with favorable lease terms, new facilities, and the like. See *Cities Play Hardball to Lure Teams*, L.A. Times, June 30, 1984, at I-1, col. 1; *At Whose-er Dome and Elsewhere, the Stakes Keep Getting Higher*, Wash. Post, July 11, 1983, at D1, col. 4. Indeed, a favorable loan deal may have influenced the Oakland Raiders' 1982 move to Los Angeles. See *Raiders—L.A.'s in the Black With A Silver Lining*, L.A. Times, June 30, 1984, at I-22, col. 1.

the other clubs expect to share lower gate receipts when they play at *A*'s or *B*'s location (because *A* and *B* may compete for fans), they would prefer that *A* remain where it is. Club *B* might have more reason to oppose the move than does the rest of the league if *A*'s intrusion reduces *B*'s local revenues by more than it increases *B*'s share of pooled revenues. In making its decision, club *A* also continues to look at more than pooled revenues: even if costs remain constant, *A* will desire to move if its expected increase in unshared revenues exceeds any decrease in its share of pooled revenues.

Each of these examples demonstrates a divergence of interests and suggests that professional sports leagues should not be considered single entities under section 1 with regard to challenges to league territorial restraints. Regardless of the degree to which a league shares revenues, this conclusion holds insofar as individual clubs do not uniformly bear the costs of the relocation decisions. Furthermore, if the relocation decision affects revenues that are not shared in fixed proportions, the divergence of interest among the clubs increases.

3. *New Franchise Restrictions.* All league constitutions establish a decision rule for the entry of new clubs into the league, usually by requiring the approval of a large proportion of the membership.¹⁰⁰ Unsuccessful applicants have challenged such agreements as concerted refusals to deal that restrain potential economic competition among clubs.¹⁰¹ Conceivably, consumers or municipalities could challenge the rule on the same grounds, alleging that it restricts league output and raises prices.

The analysis here tracks the analysis of relocation restrictions. The creation of a new franchise in an unoccupied territory should have no significant effect on the costs experienced by incumbent members of the league. Whether unity of economic interest exists will therefore depend on whether the franchise decision primarily affects revenues that are shared in consistent proportions. Under an initial assumption of perfect revenue sharing, all clubs have identical interests because expansion affects only the revenues of existing clubs and not their costs. They will vote for expansion if collectively they perceive that the added revenues from expansion

¹⁰⁰ See, e.g., NATIONAL FOOTBALL LEAGUE CONST. art III, § 3.1(b) (1976) (admission of new members requires approval of three-fourths of league members); UNITED STATES FOOTBALL LEAGUE CONST. art. III, § 3.1(b) (1982) (same).

¹⁰¹ See, e.g., *Mid-South Grizzlies v. NFL*, 720 F.2d 772 (3d Cir. 1983), *cert. denied*, 104 S. Ct. 2657 (1984).

(more games, a more exciting playoff race, and entrance fees paid by the new club) will outweigh the decrease in revenues associated with expansion (lower shared revenues by virtue of more sharing clubs, degradation of playing quality from the dilution of playing talent, and relatively lower shared ticket revenues from games played against the new team). In these circumstances, the clubs display a unity of economic interest in a decision to create a new franchise, and their decision should be treated as that of a single entity.

If the new franchise would be located in an area already occupied by another club, however, unity of economic interest breaks down. Under perfect revenue sharing, the incumbent club experiences no effect on revenue peculiar to that club, but it may have special cost concerns.¹⁰² If these are so minimal as to be insignificant, then the league remains a single entity for Sherman Act purposes. As they become more significant, the interests of league members diverge, rendering the location decision plural under the *Copperweld* test.

When the assumption of perfect revenue sharing is relaxed, divergence of interest increases further. Assume that new franchise fees and television revenues are shared equally among the members of the league, gate receipts are unequally shared between the home and visiting teams, and merchandising receipts are retained by the home team. The primary effect of the decision to admit a new franchise will be on the equally shared revenues. The existing teams have relatively similar interests in gate receipts from the new franchise because all of them, as visiting teams, will take the same proportion of those receipts.¹⁰³ Thus, if the new franchise will be located in an unoccupied area, the league decision is that of a single entity.

If another team is already occupying the area, however, the relative interests of the clubs diverge as they do in a relocation decision. The incumbent club may expect lower revenues and possibly higher costs after the intrusion of a new club, while these effects will not matter to the other clubs. For this reason, a league decision about expanding into an already occupied territory should

¹⁰² For example, clubs may bid for local inputs to production, such as stadium facilities, meaning that the presence of another club in the same city could increase the incumbent club's costs by decreasing his monopsony power.

¹⁰³ However, existing clubs may have distinct interests in deciding whether the league should expand because expansion may require them to sell player contracts to the new club. The perceived costs and revenues associated with those transactions might be quite different among clubs.

not be considered the action of a single entity. But, if the league shares local revenues to such an extent that the effect on the incumbent club's revenues is imperceptible, and if the new franchise does not impose significant costs on the incumbent club, the league decision about expansion should still be considered unilateral and thus exempt from section 1.

CONCLUSION

Copperweld Corp. v. Independence Tube Corp. stands for an approach to the plurality requirement of section 1 that depends upon the substantive economic interests of the parties to cooperative activity. If the parties have unity of economic interest with regard to the activity, as do a parent corporation and its wholly owned subsidiary, *Copperweld* prescribes that it is in the interest of competition to consider the activity unilateral and thus protected from section 1 challenge. This comment has argued that, even without common ownership, unity of interest may exist when the parties have agreed to share proportionally in the gains and losses of their concerted activity. It is both consistent with *Copperweld* and in the interest of competition to exempt from section 1 liability the actions of groups whose relationship is governed by such agreements.

An examination of professional sports leagues demonstrates that this principle works to protect some aspects of league operations from section 1 scrutiny. More specifically, those aspects of league operations in which the members of a league make collective decisions which operate on revenues that are shared in fixed proportions, and not on unshared costs, should be exempt from section 1. All other agreements among clubs should be treated as concerted conduct subject to challenge under section 1 of the Sherman Act.

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