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American Needle, Inc. v. National Football League et al.: **Supreme Court Flags the NFL...But the Play is Under Review**

If you bought an "official NFL" cap with your favorite pro football team's logo during the last 10 years, you may have noticed that it was manufactured by Reebok. That's because since December 2000, Rebook has enjoyed an exclusive license from National Football League Properties ("NFLP") to make all "officially licensed" NFL head ware. But it wasn't always like that.

Until 1963, the National Football League teams individually arranged to license their own trademarks and IP. Then in 1963, the NFLP was formed, and from 1963 to December 2000, the NFLP granted non-exclusive licenses to a number of vendors to manufacture team apparel. This resulted in competition — not just on the playing field — but among teams who sought the substantial revenues generated by the sale of clothing bearing their respective insignia. One of those vendors was American Needle, Inc., which enjoyed considerable revenue from making NFL hats. That revenue stream came to a grinding halt when Reebok received its exclusive license to make head ware. Not surprisingly, American Needle sued the NFL, the teams, and Reebok.

The case wafted through the courts, eventually winding up in the Supreme Court after the Seventh Circuit held that that under the antitrust laws, the teams were a single entity incapable of conspiring with themselves[1].

On May 24, 2010, in a long-awaited decision, the U.S. Supreme Court threw its judicial penalty flag against the NFL, ruling that the NFL and the 32 teams that comprise the league are not a "single entity" immune from scrutiny under Section 1 of the Sherman Act. Competition between team members is not limited to the gridiron, the Court decreed, when the teams function as a single source of economic power for purposes of promoting the NFL through licensing their intellectual property. In one of his last opinions before retiring, Justice Stevens wrote for a unanimous Court that the "focus is on 'substance, not, form,'" and the NFL teams "do not possess either the unitary decisionmaking quality or the single aggregation of economic power characteristic of independent action." The Court went on to observe that each of the 32 teams "is a substantial, independently owned, and independently managed business. '[T]heir general corporate actions are guided or determined' by 'separate corporate consciousnesses,' and '[t]heir objectives are' not 'common.'"

Using the New Orleans Saints and the Indianapolis Colts as an example, Justice Stevens pointed out that to a hat manufacturer, these two teams compete in the "market for intellectual property," as they are "two potentially competing suppliers of valuable trademarks." The Saints and Colts are also independent decisionmaking centers, so the

league's decision to license its members' "separately owned trademarks collectively and to only one vendor are decisions that 'depriv[e] the marketplace...of actual or potential competition." Even if it takes two teams to play a football game, "it does not follow that concerted activity in marketing intellectual property is necessary to produce [all aspects of NFL] football." The Court viewed the NFLP as the "instrumentality" used to carry out the teams' cartel goals, and thus the fact that the "teams here control the NFLP" made its actual decisionmaking more nominal than required for independent action.

Despite the lack of cart blanche immunity from concerted action scrutiny under the Sherman Act, the issue of whether the NFL and its teams have actually *violated* Section 1 remains to be determined, as the Court threw its red flag and ordered the case remanded so that the replay cameras of the district court could focus more closely to see if the actions in question violate the factually intense Rule of Reason. In that regard, the Court went out of its way to suggest that the ultimate ruling by the district court might well turn out to be more akin to a finding of no infraction/no penalty, stating:

> [T]he Rule of Reason may not require a detailed analysis; it "can sometimes be applied in the twinkling of an eye."
> Other features of the NFL may also save agreements amongst the teams. We have recognized, for example, "that the interest in maintaining a competitive balance" among "athletic teams is legitimate and important"... While that same interest applies to the teams in the NFL, it does not justify treating them as a single entity for [Section 1 of the Sherman Act] purposes when it comes to the marketing of the teams' individually owned intellectual property. It is, however, unquestionably an interest that may well justify a variety of collective decisions made by the teams. What role it properly plays in applying the Rule of Reason to the allegations in this case is a matter to be considered on remand.

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[1]Observing that joint ("concerted") action is required by the nature of the sport (after all, it takes two teams to play football in the first place), the Seventh Circuit lobbed a quotable piece of football/antitrust verbiage into its opinion: "Asserting that a single football team could produce a football game...is a Zen riddle: Who wins when a football team plays itself?"

For questions regarding licensing of Intellectual Property, please contact:

Tom Polcyn	314-552-6331	tpolcyn@thompsoncoburn.com
Steve Ritchey	314-552-6232	sritchey@thompsoncoburn.com

For questions regarding Antitrust law, please contact:

Dale Joerling	314-552-6058	djoerling@thompsoncoburn.com

Ed Harvey 314-552-6049 eharvey@thompsoncoburn.com

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