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ANTITRUST

Expert Analysis

# The NFL Must Defend Its Licensing as Joint Action

By **Elai Katz**

The U.S. Supreme Court ruled that the NFL's licensing activities constituted concerted action that is not categorically beyond the coverage of §1 of the Sherman Act, but must instead be judged under the rule of reason. The Federal Trade Commission (FTC) closed its investigation into Google's acquisition of a leading rival mobile advertising network because of significant new entry into the market by Apple.

Other recent antitrust developments of note included a decision by the U.S. Court of Appeals for the Third Circuit dismissing dental laboratories' claims that a leading artificial tooth supplier, which had been previously found liable for monopolization, conspired with its dealers in violation of antitrust laws.

### Joint Ventures

A supplier of caps and hats bearing sports teams' logos brought an antitrust suit against the National Football League (NFL) and its member teams after losing a long-standing non-exclusive license to a higher-bidding rival who obtained a 10-year exclusive license.

The plaintiff claimed that because each of the NFL teams owned its logo and trademark, the collective granting of an exclusive license constituted a conspiracy in restraint of trade that violated §1 of the Sherman Act. The U.S. Court of Appeals for the Seventh Circuit agreed instead with the NFL's argument that the teams could not have illegally conspired with one another because the league functioned as a single entity, rather than as a collaboration of separate firms, when it licensed the teams' intellectual property.

The NFL and the Seventh Circuit relied on the Supreme Court's decision in *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984), that a corporate parent and its wholly owned subsidiary cannot, as a matter of law, violate §1 of the Sherman Act because they have "complete unity of interest" and are, therefore, incapable of conspiring with each other.

The Seventh Circuit concluded that the NFL teams have acted as "a single source of economic power" when promoting NFL football through licensing the teams' intellectual property. Another significant factor was that the teams share a "vital economic interest" because the league competes with other forms of entertainment for audience members, and losing audience members would harm the individual teams.

In an unusual alignment of adversaries before the Supreme Court, both the plaintiff (the loser in the 7th Circuit) and the NFL (the winners) urged the Supreme Court to review the decision. The NFL's petition posited that highly integrated joint ventures should generally be treated as single entities under *Copperweld*, at least with respect to "core venture functions."

> The 'American Needle' opinion is a valedictory for Justice John Paul Stevens, an acknowledged antitrust authority.

In a unanimous decision handed down on May 24, 2010, the Supreme Court reversed and remanded, ruling that the NFL and its teams would not be treated as a single entity that is incapable of engaging in concerted action subject to §1 of the Sherman Act for purposes of an antitrust challenge to its intellectual property licensing arrangements. Instead, the Court stated that the decision of the NFL and its teams to grant plaintiff's rival an exclusive license to make NFL team hats is not categorically beyond the coverage of §1 and would have to be judged under the rule of reason.

The Court emphasized that it was deciding a "narrow" question: whether the NFL teams are "capable of engaging in a 'contract, combination…, or conspiracy'" in violation of §1, and would not consider whether the agreement unreasonably restrained trade.

The Court explained that the analysis of whether parties have engaged in concerted action within the meaning of §1 is one of substance rather than form. Observing that it must delve deeper than simply looking at the legal status of the entity in question, the Court stated that the key is whether the alleged contract joins together separate decision makers. The Court added that the relevant inquiry is whether there is a contract, combination, or conspiracy amongst separate economic actors pursuing separate economic interests, such that the agreement deprives the marketplace of independent centers of decision-making, and therefore of diversity of entrepreneurial interests.

Although operating a football league necessitates collaboration among the NFL's member teams, in other respects the teams are "separate, profit-maximizing entities, and their interests in licensing team trademarks are not necessarily aligned." The Court thus disagreed with the Seventh Circuit's determination that concerted activity in marketing intellectual property is necessary to produce football.

Even though the licensing arrangements were implemented through a separate corporation with separate management and revenue sharing arrangements, the 32 potentially competing teams made the licensing decisions, and each of the teams owns its individual share of the jointly managed assets—their intellectual property rights. The Court echoed a concern articulated by then-Judge Sonia Sotomayor in her concurrence in *Major League Baseball Properties Inc. v. Salvino Inc.*, 542 F.3d 290 (2d Cir. 2008), that a cartel could evade the antitrust laws by forming a joint venture to act as the exclusive seller of their competing products.

The Court indicated that the procompetitive justifications advanced by the NFL should be considered in evaluating the restraint, noting that the "interest of maintaining a competitive balance" among the teams is one consideration that "may well justify a variety of collective decisions made by the teams."

The unanimous opinion is also a valedictory for Justice John Paul Stevens, an acknowledged antitrust authority who was a prominent voice, sometimes for the majority, more recently in dissent, in many of the Court's most significant antitrust decisions in recent decades. Under his influence, the Court took a fresh look at categories of conduct that traditionally had been subjected

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to summary condemnation as per se unlawful and are today judged under the rule of reason, and, as articulated by Justice Stevens in *NCAA v. Board of Regents of the University of Oklahoma*, 468 U.S. 85 (1984), challenged the convention that a bright line separates per se condemnation from detailed rule of reason review.

*American Needle Inc. v. National Football League*, No. 08-661, 560 U.S.__, 2010-1 CCH Trade Cases ¶77,019

**Comment:** The decision reported immediately above does not change the law and should not lead to significant modification in the antitrust analysis of joint ventures and other collaborations. Yet the case may lead to efforts by some to re-examine some of the outer bounds of the application of *Copperweld*. The decision's lasting impact may also be Justice Stevens' dicta on the flexibility of the rule of reason and the courts' authority to apply that standard in a "twinkling of an eye" not only to condemn practices but also to approve them.

### Mobile Advertising

The FTC announced the closing of its investigation into the acquisition of a mobile advertising network by the leading search engine company, Google. The commission explained that even though the transaction would have combined the two leading mobile advertising networks, which sell advertising space for creators of applications for smartphones and similar mobile devices, recent entry into the market by Apple, the supplier of the most popular mobile device, the iPhone, was likely to substantially change market dynamics. The commission observed that the acquired mobile advertising network's previous leadership position in advertising (especially for the iPhone) is unlikely to be an accurate indicator of its future competitive significance.

The FTC added that competition between Google and Apple over mobile device platforms provides an incentive to encourage the development of free or low-cost advertising-supported applications for those platforms.

*Statement of the Commission Concerning Google/AdMob*, FTC File No. 101-0031 (May 21, 2010) available at www.ftc.gov

### Hub-and-Spoke Conspiracy

Dental laboratories brought antitrust claims against a leading manufacturer of artificial teeth, alleging that the manufacturer foreclosed competing artificial tooth makers from the market by reaching agreements with its dealers (who sell to the laboratories) that they would not carry competing brands of teeth. The Third Circuit had previously ruled, in a case brought by the Department of Justice, that the tooth manufacturer possessed monopoly power and unlawfully foreclosed competition by entering into exclusive dealing arrangements with its dealers. *United States v. Dentsply Int'l*, 399 F.3d 181 (3d Cir. 2005).

The Third Circuit stated that the laboratories did not carry their burden to show present injury that would entitle them to injunctive relief beyond the government's injunction. The appellate court also affirmed dismissal of the laboratories' conspiracy claims for failure to allege an agreement among the manufacturer and its dealers. The court observed that even if the laboratories had adequately identified the "hub" (the artificial tooth maker) and the "spokes" (the dealers), the "rim" connecting the spokes was missing. Allegations of merely parallel bilateral vertical arrangements between each dealer and the manufacturer were not sufficient to plausibly infer coordination among the dealers, according to the Third Circuit. The court noted that the complaint failed to allege facts supporting "a unity of purpose, a common design and understanding, or a meeting of the minds between and among" the manufacturer and all of the dealers.

The Third Circuit added that, in the absence of truly complete involvement by the dealers in the alleged conspiracy, the plaintiff laboratories were essentially bringing claims against the dealers as mere middlemen, which is precluded by the direct purchaser standing requirement set out in the Supreme Court's *Illinois Brick Co. v. State of Illinois* opinion, 431 U.S. 720 (1977). In addition, the court would not reconsider its prior decision that the laboratories did not have standing as indirect purchasers to recover lost profits from the artificial tooth manufacturer.

*Howard Hess Dental Laboratories Inc. v. Dentsply Inc.*, 602 F.3d 237, 2010-1 CCH Trade Cases ¶76,976

The Third Circuit in 'Dentsply' observed that even if the laboratories had adequately identified the 'hub' (the artificial tooth maker) and the 'spokes' (the dealers), the 'rim' connecting the spokes was missing.

### Amnesty

New legislation will extend, through June 22, 2020, added incentives for participation in the Department of Justice Antitrust Division's leniency program for the first corporation in a cartel that informs the department of an antitrust offense and cooperates with the investigation. The extended provisions reduce civil liability in private antitrust actions to single rather than treble damages for cartel participants that were accepted into the department's amnesty program and are cooperating in the private litigation.

Public Law 111-190 (June 9, 2010), amending the Antitrust Criminal Penalties Enforcement and Reform Act of 2004, CCH Trade Reg. Rep. ¶27,750

### Invitation to Collude

The FTC agreed to settle charges that the nation's leading "do-it-yourself" one-way truck rental company invited its closest rival to fix prices. The complaint alleged that in 2006 the truck-rental company's chief executive encouraged employees and dealers to tell rivals that they should match the company's price increase. The commission alleged further that, two years later the executive invited the company's main rival to collude during a conference call with industry analysts after the rival did not match a price increase.

The complaint did not allege that an agreement was reached but rather an unsuccessful unilateral attempt to conspire. It was therefore brought under §5 of the FTC Act, which prohibits unfair methods of competition but is not an "antitrust law," and unlike the Sherman Act, does not on its own terms create treble damage liability in private civil actions. In a separate statement, FTC Chairman Jon Leibowitz and Commissioners William E. Kovacic and J. Thomas Rosch stated that invitations to collude are "the quintessential example of the kind of conduct" that should be challenged under §5.

*U-Haul Int'l Inc.*, FTC File No. 081-0157, CCH Trade Reg. Rep. ¶16,461 (June 9, 2010), available at www.ftc.gov

**Comment:** The FTC has challenged several invitation-to-collude cases as unfair methods of competition, but in one case, the Department of Justice proceeded against such conduct as an "attempted joint monopolization" in violation of §2 of the Sherman Act (see *United States v. American Airlines*, 743 F.2d 1114 (5th Cir. 1984)).

### Bid Rigging

Two former executives of an insurance brokerage firm were convicted following a bench trial in February 2008 of charges that they had orchestrated and facilitated bid rigging among excess casualty insurers in violation of the Donnelly Act, New York's antitrust law, by selecting the winning bidder and obtaining losing bids from "accomplice" insurance companies.

The two former executives later claimed that during a subsequent trial of other defendants who were found not guilty of participating in the bid rigging conspiracy, they discovered that prosecutors at the New York Attorney General's Office failed to disclose substantial contradictory, exculpatory and impeaching evidence, much of it related to the testimony of cooperating witnesses. The court vacated the convictions because the evidence discrediting and contradicting key witnesses' trial testimony raised a probability that its disclosure would have produced a different result.

*New York v. Gilman*, Ind. No. 4800-2009 (N.Y. Sup. Ct., New York Co. July 2, 2010)