From Dallas Cap to American Needle and Beyond: Antitrust Law's Limited Capacity to Stitch Consumer Harm From Professional Sports Club Trademark Monopolies

Matthew J. Mitten
Marquette University Law School, matt.mitten@marquette.edu

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From *Dallas Cap* to *American Needle* and Beyond: Antitrust Law's Limited Capacity To Stitch Consumer Harm from Professional Sports Club Trademark Monopolies

Matthew J. Mitten*

A nearly fifty-year contemporaneous trend of increasing legal protection for sports team trademarks, collective exclusive licensing of professional sports team trademarks, and antitrust litigation regarding its validity culminated in the United States Supreme Court's 2010 decision American Needle, Inc. v. NFL, *which rejected the NFL's single-entity defense. Collective exclusive trademark licensing by professional sports leagues generally does not have significant incremental anticompetitive effects beyond the consumer harm already caused by each individual club's lawful trademark monopoly, which likely are outweighed by procompetitive benefits in many instances. However, in order for antitrust law to minimize the consumer harm caused by the extension of trademark law protection beyond its traditional boundaries to create professional sports club trademark monopolies, the collective granting of exclusive product category licenses should be invalidated under the quick-look rule of reason because this restraint has clear anticompetitive effects that are not necessary to achieve legitimate procompetitive justifications and/or which may be achieved by a substantially less restrictive alternative.*

 Professor of Law and Director, National Sports Law Institute and LL.M. in Sports Law for Foreign Lawyers Program, Marquette University Law School. I want to thank Irene Calboli and Marc Edelman for their comments on an earlier draft of this Essay and Timothy Bucher, Marquette University Law School, Class of 2012, for his excellent research assistance.

I. INTRODUCTION

This Essay will provide historical perspective and analysis of the intersection of trademark and antitrust law, its role in the development of the current multibillion dollar professional sports trademark merchandising industry, and its consumer welfare effects on sports fans.

In the 1950s, because of the increasing popularity of professional sports and corresponding revenue-generating potential, major professional sports league teams individually began to license third parties to manufacture and sell trademarked merchandise (for example, New York Yankees hats and T-shirts) to the public.[1] Beginning with the 1963 formation of National Football League Properties (NFLP), the four major North American professional sports leagues—National Football League (NFL), Major League Baseball (MLB), National Basketball Association (NBA), and National Hockey League (NHL)—each created a subsidiary to collectively sell, license, and enforce their respective member clubs' intellectual property rights, including trademark rights, and to distribute the net revenues to league clubs on a pro rata basis.[2] In the mid-1970s, in resolving federal Lanham Act trademark infringement and unfair competition claims by professional sports leagues and clubs against the sellers of unlicensed merchandise,[3] courts (following the United States Court of Appeals for the Fifth Circuit's lead in *Boston Professional Hockey Ass'n v. Dallas Cap & Emblem Manufacturing, Inc.* (*Dallas Cap II*)[4]) began significantly expanding the nature and scope of legal protection for professional sports team trademarks.[5]

Trademark infringement suits (as well as league efforts to enforce contractual restrictions on an individual club's licensing of its trademarks)[6] have spawned antitrust claims by producers of unlicensed

1. J. Gordon Hylton, *The Over-Protection of Intellectual Property Rights in Sport in the United States and Elsewhere*, 21 J. LEGAL ASPECTS SPORT 43, 47 (2011).

2. *See generally* Brandon L. Grusd, *The Antitrust Implications of Professional Sports' League-Wide Licensing and Merchandising Arrangements*, 1 VA. J. SPORTS & L. 1, 8-13 (1999).

3. 15 U.S.C. §§ 1114, 1125(a) (2006).

4. 510 F.2d 1004 (5th Cir. 1975).

5. *See infra* notes 30-40 and accompanying text.

6. *See, e.g.*, NFL Props., Inc. v. Dall. Cowboys Football Club, Ltd., 922 F. Supp. 849 (S.D.N.Y. 1996) (alleging that the Dallas Cowboys NFL club breached the NFL Trust Agreement and the NFL Properties License Agreement and violated the Lanham Act by using NFL and club trademarks in connection with sponsorship agreements in a manner likely to cause consumer confusion).

merchandise[7] (and some large market league clubs)[8] asserting that collective exclusive licensing of club trademarks constitutes an agreement among league clubs that unreasonably restrains trade in violation of section 1 of the Sherman Act.[9] In 1973, the United States District Court for the Northern District of Texas concluded in *Boston Professional Hockey Ass'n v. Dallas Cap & Emblem Manufacturing, Inc.* (*Dallas Cap I*) that collective exclusive licensing of league clubs' trademarks is not an unreasonable restraint of trade.[10] However, it was not asked to decide the threshold issue of whether collective exclusive licensing of trademarks is immune from section 1 scrutiny because a league's clubs jointly constitute a single economic entity that produces a popular product (for example, NFL football) and its associated goodwill that no club can individually produce, which is symbolized by league and club trademarks.

This nearly fifty year contemporaneous trend of increasing legal protection for sports team trademarks, collective exclusive licensing of professional sports team trademarks, and antitrust litigation regarding its validity culminated in the United States Supreme Court's 2010 decision in *American Needle, Inc. v. NFL* (*American Needle III*).[11] In *American Needle III*, the Supreme Court ruled that the NFL clubs' grant of an exclusive trademark license to a headwear manufacturer through NFLP, their jointly owned intellectual property marketing and licensing agent, is subject to judicial scrutiny under section 1 because their conduct constitutes concerted action.[12] Although NFL clubs collectively produce NFL football, which generates substantial consumer popularity, goodwill, and demand for merchandise bearing NFL club trademarks, they are separately owned and operated business entities that individually own their respective trademarks, whose agreements join together "independent centers of

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7. *See infra* notes 69-102 and accompanying text.

8. *See, e.g.*, Dall. Cowboys Football Club, Ltd. v. NFL Trust, No. 95 CIV 9426, 1996 WL 601705 (S.D.N.Y. Oct. 18, 1996) (alleging that the NFL Trust and Licensing Agreements create a price-fixing cartel that precludes free competition in pro football sponsorship and merchandising markets); *see also* Complaint, N.Y. Yankees P'ship v. MLB Enters., Inc., 97-1153-CIV-T-2513 (M.D. Fla. filed May 19, 1997) (asserting that MLB Properties is a "cartel organized at the behest of a large group of the less successful Major League Clubs" that illegally restrains trade). Both cases settled before being judicially resolved on the merits.

9. 15 U.S.C. § 1 (2006).

10. 360 F. Supp. 459 (N.D. Tex. 1973); *see infra* notes 69-70 and accompanying text.

11. 130 S. Ct. 2201 (2011).

12. *Id.*

decisionmaking."[13] The Court remanded the case to the district court for determination of whether the joint granting of an exclusive trademark license to manufacture and sell a particular category of merchandise bearing NFL club trademarks constitutes an unreasonable restraint of trade.[14]

Initially, I will trace the judicial expansion of trademark protection for names, logos, and colors used to identify sports teams (and contemporaneous congressional broadening of the Lanham Act, which provides individual professional sports clubs with broad exclusive property rights to the detriment of consumers) and briefly survey scholarly critique of this legal trend. I will then analyze the application of antitrust law to collective trademark licensing by a professional sports league, including *American Needle III*'s rejection of the NFL's single-entity defense along with its potential anticompetitive effects (prohibitions and/or restrictions on an individual club's ability to license its trademarks, higher consumer prices for officially licensed merchandise) and procompetitive benefits (reduced transaction costs, enhanced competitive balance among league clubs). My conclusion is that collective exclusive trademark licensing by professional sports leagues generally does not have significant incremental anticompetitive effects beyond the consumer harm already caused by each individual club's lawful trademark monopoly, which likely is outweighed by procompetitive benefits in many instances. However, in order for antitrust law to minimize the consumer harm caused by the extension of trademark law protection beyond its traditional boundaries to create professional sports club trademark monopolies, the collective granting of exclusive product category licenses should be invalidated under the quick-look rule of reason because this restraint has clear anticompetitive effects, and it is not necessary to achieve legitimate procompetitive justifications and/or which may be achieved by a substantially less restrictive alternative.

II. THE EVOLUTION OF SPORTS TEAM TRADEMARK MONOPOLIES

Common law trademark or service mark rights are acquired by first usage of a name, logo, or other symbol to identify one's products

13. *Id.* at 2213 (citing Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 769 (1984)).

14. *Id.* at 2216-17.

or services and to distinguish them from those of others.[15] By virtue of its adoption, usage, and public association, a professional sports club's name functions as a service mark by identifying its team as a member of a league that produces a particular brand of entertainment services (for example, Green Bay Packers for a NFL club).[16] The Lanham Act provides nationwide legal protection for federally registered marks and a federal court forum to prevent and remedy trademark infringement.[17]

Under the Lanham Act and state trademark laws, ownership of a trademark historically conferred only the right to prevent a likelihood of consumer confusion caused by another's unauthorized use of the same or similar mark to identify the same or related goods or services: "The trademark laws exist not to 'protect' trademarks, but . . . to protect the consuming public from confusion, concomitantly protecting the trademark owner's right to a non-confused public."[18] The traditional consumer protection rationale for trademark law is to facilitate consumers' ability to identify desired goods and services having a consistent level of quality and to reduce their search costs by relying upon a trademark or service mark as an indicia of origin or source of a particular brand of goods or services.[19] Consistent with these objectives, the mark owner was required to prove a likelihood of consumer confusion regarding the source or origin of the same or similar product or service to establish trademark infringement. For example, in *Indianapolis Colts, Inc. v. Metropolitan Baltimore Football*

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15. Union Nat'l Bank of Tex., Laredo, Tex. v. Union Nat'l Bank of Tex., Austin, Tex., 909 F.2d 839, 842 (5th Cir. 1990) ("Ownership of trademarks is established by use, not by registration."); White v. Bd. of Regents of the Univ. of Neb., 614 N.W.2d 330 (Neb. 2000) (finding that the university acquires rights in "Husker Authentics" by virtue of the first use of the mark in connection with advertising and sale of products to season ticket holders, alumni, and boosters).

16. Major professional sports club marks generally are either inherently distinctive or have acquired "secondary meaning" by virtue of public association with a particular team. An inherently distinctive mark is one that is coined or arbitrary in relation to the goods or services it identifies such as "Orlando Miracle" for a Women's National Basketball Association club, *In re* WNBA Enters. LLC, 70 U.S.P.Q.2d 1153 (T.T.A.B. 2003), or suggestive of the team's desired characteristics such as "Tennessee Titans."

17. 15 U.S.C. §§ 1051-1127 (2006). Federal registration provides prima facie evidence of the registrant's ownership and exclusive right to use of the mark for the subject goods or services as well as the validity of the registration.

18. James Burrough Ltd. v. Sign of the Beefeater, Inc., 540 F.2d 266, 276 (7th Cir. 1976).

19. Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23, 32 (2003) ("[T]he Lanham Act prohibits actions like trademark infringement that deceive consumers and impair a producer's goodwill. It forbids, for example, the Coca-Cola Company's passing off its product as Pepsi-Cola or reverse passing off Pepsi-Cola as its product."). *See generally* Mark A. Kahn, *May the Best Merchandise Win: The Law of Non-Trademark Uses of Sports Logos*, 14 MARQ. SPORTS L. REV. 283, 284-93 (2004).

Club Ltd. Partnership, the United States Court of Appeals for the Seventh Circuit found "Baltimore CFL Colts," the name of the Canadian Football League's new club in Baltimore, was confusingly similar to the "Indianapolis Colts" NFL club.[20] Consumer survey evidence showed that sixty-four percent of respondents who identified themselves as football fans mistakenly "thought that the 'Baltimore CFL Colts' was either the old (NFL) Baltimore Colts or the Indianapolis Colts."[21]

In contrast, although a mark (for example, Boston Bruins) identifies the source of a professional sports club's brand of entertainment services (for example, NHL hockey), courts initially ruled that it does not function as a trademark (that is, an indicia of origin or source) when affixed to unrelated or collateral products such as hats. In *Dallas Cap I*, the Northern District of Texas found that the defendant's unauthorized manufacture and sale of embroidered cloth emblems identical to NHL club marks (for example, the Bruins logo), which "are sold merely as ornamental decoration," did not constitute trademark infringement because "the evidence does not suggest that the public would be confused, misled or deceived about the source of the respective emblems."[22] It explained, "'A trademark only gives the right to prohibit the use of it so far as to protect the owner's good will against the sale of another's product as his.'"[23]

Observing that the "trademark is, in effect, the product itself," the court held that "the protection of the trademark law must give way to the public policy favoring free competition."[24] The court expressed concern that prohibiting sports team trademarks not subject to federal copyright law protection[25] from being duplicated based on federal trademark law (which grants potentially perpetual rights as long as the mark continues to be used)[26] would confer monopoly rights broader

20. 34 F.3d 410 (7th Cir. 1994).

21. *Id.* at 416.

22. 360 F. Supp. 459, 463 (N.D. Tex. 1973).

23. *Id.* at 462 (quoting Prestonettes, Inc. v. Coty, 264 U.S. 359, 368 (1924)).

24. *Id.* at 464.

25. Sports team names generally are not copyrightable because words and short phrases generally lack the minimum level of creativity required for copyright protection, which "extends only to works that 'are *the fruits of intellectual labor*.'" Syrus v. Bennett, No. 11-6117, 2011 WL 5222905, at *2 (10th Cir. Nov. 3, 2011) (quoting *The Trade-Mark Cases*, 100 U.S. 82, 94 (1879)) (finding no copyright for phrases "Go Thunder" or "Let's Go Thunder," which is merely the name of a NBA club added to widely used sports cheers).

26. Trademark rights exist indefinitely as long as a mark continues to be used and identifies the source or origin of a product or service. *Dallas Cap II*, 510 F.2d 1004, 1011 (5th Cir. 1975) ("[T]here is no reason why trademarks should ever pass into the public domain by the mere passage of time.").

than copyright law, which confers exclusive rights for only a limited period of time.[27]

"In the interest of fair commercial dealing," the court required that the defendant place an appropriate disclaimer (for example, "not authorized by National Hockey League or its [clubs]") on its emblems or packaging and/or a conspicuous indication that it was the source of the emblems.[28] Because "the public has the right to have the source of competing goods clearly distinguished when the origin may have an impact on the value of the goods," the court explained that its "remedy serves the interests of the public by preserving competition in the product while eliminating any unfair appropriation of plaintiffs' good will as originators."[29]

On appeal, the Fifth Circuit ruled that the defendant's unauthorized copying, manufacture, and sale of NHL clubs' marks creates a likelihood of consumer confusion and constitutes trademark infringement and unfair competition, thereby entitling the plaintiffs to injunctive relief.[30] It noted that a 1962 amendment to the Lanham Act broadened the scope of protection provided to trademark owners by prohibiting any unauthorized use of a trademark "likely to cause confusion, or to cause mistake or to deceive," and deleting its prior requirement that consumer confusion or deception must relate to the "source of origin of such goods or service."[31]

Rejecting the district court's conclusion that "there was no likelihood of confusion because the usual purchaser, a sports fan in his local sporting goods store, would not be likely to think that defendant's emblems were manufactured by or had some connection with plaintiffs," the Fifth Circuit held:

> The confusion or deceit requirement is met by the fact that the defendant duplicated the protected trademarks and sold them to the public knowing that the public would identify them as being the teams' trademarks. The certain knowledge of the buyer that the source and origin of the trademark symbols were in plaintiffs satisfies the requirement of the act. The argument that confusion must be as to the source of the manufacture of the emblem itself is unpersuasive, where

27. *See* 17 U.S.C. §§ 302-305 (2006).
28. *Dallas Cap I*, 360 F. Supp. at 465 (internal quotation marks omitted).
29. *Id.*
30. *Dallas Cap II*, 510 F.2d at 1013.
31. *Id.* at 1009-10 (quoting Pub. L. No. 87-772, § 17, 76 Stat. 773 (1962)).

> the trademark, originated by the team, is the triggering mechanism for the sale of the emblem.[32]

Acknowledging that its holding "may slightly tilt the trademark laws from the purpose of protecting the public to the protection of the business interests of plaintiffs," the Fifth Circuit identified three "persuasive" reasons for doing so:

> *First*, the major commercial value of the emblems is derived from the efforts of plaintiffs. *Second*, defendant sought and ostensibly would have asserted, if obtained, an exclusive right to make and sell the emblems. *Third*, the sale of a reproduction of the trademark itself on an emblem is an accepted use of such team symbols in connection with the type of activity in which the business of professional sports is engaged.... We restrict ourselves to the emblems sold principally through sporting goods stores for informal use by the public in connection with sports activities and to show public allegiance to or identification with the teams themselves.[33]

Despite the Fifth Circuit subsequently narrowing this case and the United States Court of Appeals for the Ninth Circuit characterizing this case as "an extraordinary extension of the protection heretofore afforded trademark owners" that it cannot endorse, *Dallas Cap II* is the genesis of a judicial trend of expanding the scope of trademark protection for sports team trademarks that began in the mid-1970s and has continued into the twenty-first century.[34] *Dallas Cap II* and three other contemporaneous federal and state court cases represent a significant departure from the traditional consumer protection rationale for trademark law toward a commercial misappropriation of property rationale, which recognizes a trademark as a product and confers broad property rights on its owner beyond the right to prevent likely consumer confusion regarding the origin or source of merchandise bearing the trademark.[35] For example, in *NFL Properties,*

32. *Id.* at 1012.

33. *Id.* at 1011.

34. *Compare* Ky. Fried Chicken Corp. v. Diversified Packaging Corp., 549 F.2d 368, 389 (5th Cir. 1977) (holding that trademark infringement requires a likelihood of confusion regarding a product's source, sponsorship, or affiliation and rejecting "any notion that a trademark is an owner's 'property' to be protected irrespective of its role in the operation of our markets"), *with* Int'l Order of Job's Daughters v. Lindeburg & Co., 633 F.2d 912, 919 (9th Cir. 1980) (refusing to endorse the Fifth Circuit's significantly broadened scope of trademark protection).

35. NFL Props., Inc. v. Consumer Enters., Inc., 327 N.E.2d 242 (Ill. App. Ct. 1975); NFL Props., Inc. v. Dall. Cap & Emblem Mfg., Inc., 327 N.E.2d 247 (Ill. App. Ct. 1975); Bos. Prof'l Hockey Ass'n v. Reliable Knitting Works, Inc., 178 U.S.P.Q. 274 (E.D. Wis. 1973) (finding that defendant's unauthorized use of the NHL club's federally registered "Bruins"

Inc. v. Consumer Enterprises, Inc., an Illinois appellate court found that the NFL clubs' trademarks are widely recognized and through "the extensive licensing arrangements developed and perpetuated by [the NFL] and its licensees, the buying public has come to associate the trademark with the sponsorship of the NFL or of the particular member team involved."[36] Because "a likelihood of confusion as to the source of defendant's emblems exists," it enjoined the defendant's unauthorized manufacture and sale of emblems bearing the trademarks of NFL clubs.[37] The court ruled that simply requiring a disclaimer on defendant's emblems would not adequately protect the "property rights built up through the efforts of plaintiff, the NFL and the member teams."[38]

Even within the Ninth Circuit, consumers' recognition of well-known sports team marks and belief that products bearing the marks must be league approved because of the proliferation of "officially" licensed merchandise in the marketplace has been held to be sufficient to establish the requisite likelihood of confusion that generally justifies injunctive relief against unauthorized usage of the marks on competing products rather than merely an appropriate disclaimer of sponsorship, affiliation, or approval. In *NFL Properties, Inc. v. Wichita Falls Sportswear, Inc.*, the United States District Court for the Western District of Washington ruled that the unauthorized manufacture and sale of NFL football team jerseys with the club's full name (for example, Seattle Seahawks) or nickname (for example, Seahawks) and corresponding colors is infringing because it creates a likelihood of consumer confusion regarding sponsorship or endorsement.[39] Finding a "significantly high association in the public's mind between the jerseys and the NFL or member clubs" and "that consumers purchase NFL football jersey replicas in order to associate themselves with NFL member clubs," the court enjoined defendant from selling them without authorization.[40]

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and "circled letter 'B'" trademarks on knit hats or other merchandise constitutes trademark infringement).

36. 327 N.E.2d at 246.

37. *Id.* at 247.

38. *Id.*

39. 532 F. Supp. 651 (W.D. Wash. 1982).

40. *Id.* at 658 (internal quotation marks omitted); *see also NFL Props.*, 327 N.E.2d at 250 (holding that survey evidence which shows consumers associate a mark with a particular sports team and believe merchandise to which it is affixed is "official" or authorized by the team is sufficient to establish the requisite likelihood of consumer confusion necessary to prove trademark infringement).

Two modifications of the Lanham Act expanded the scope of trademark rights and protection for sports team marks. In 1988, Congress broadened section 43(a) of the Act expressly to protect unregistered trademarks (and, by implication, federally registered trademarks) from unauthorized use that creates a likelihood of consumer confusion regarding "sponsorship or approval" or "as to the affiliation, connection, or association" as well as false designation of origin, description, or representation of products sold in interstate commerce.[41] This amendment essentially codified the broad scope of legal protection courts already had been providing to unregistered sports team marks under section 43(a) of the Lanham Act.[42]

In 1995, Congress added a provision to the Lanham Act that protects the owner of a "famous mark," which likely encompasses the trademarks of major league professional teams, from unauthorized use of its mark or similar mark that is likely to cause dilution of the mark's distinctiveness even if no actual or likelihood of confusion results.[43] The statute provides a remedy for tarnishing the goodwill associated with a famous mark by using it in a disparaging manner outside the context of permissible parody or blurring the mark's distinctiveness by using it to identify unrelated goods and services. In *Dallas Cowboys Football Club, Ltd. v. America's Team Properties, Inc.*, the Northern District of Texas found the Dallas Cowboys club's "long duration and geographic reach" of "America's Team" in connection with various products advertised and sold to the public, combined with survey evidence showing wide consumer recognition of this mark, established that it was "famous."[44] It ruled that defendant's unauthorized use of

41. 15 U.S.C. § 1125(a)(1)(A) (2006).

42. For example, in *Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd.*, 604 F.2d 200 (2d Cir. 1979), the United States Court of Appeals for the Second Circuit held that the defendant's unauthorized usage of a cheerleader uniform virtually identical to the Dallas Cowboys NFL club's distinctive and widely recognized cheerleader uniform design creates consumer confusion regarding the sponsorship or approval of a pornographic film entitled *Debbie Does Dallas*, thereby justifying injunctive relief. The court rejected the defendant's assertion that the Lanham Act requires a likelihood of consumer confusion regarding the film's origin. It was not necessary for the court to broadly expand the scope of the club's trademark rights under the Lanham Act because the defendant's unauthorized use of the cheerleader uniform design in a pornographic film violated a New York statute prohibiting dilution of a trademark by tarnishment "despite the absence of confusion as to source or sponsorship." *Id.* at 205 n.8.

43. 15 U.S.C. § 1125(c).

44. 616 F. Supp. 2d 622 (N.D. Tex. 2009).

"America's Team" on apparel inferior to officially licensed products tarnished and "blur[red] the uniqueness" of the mark.[45]

In 2008, courts again expanded the scope of trademark protection for sports team marks. In *Board of Supervisors for Louisiana State University v. Smack Apparel Co.*, the Fifth Circuit held that well-known color combinations (which were not federally registered) and other identifying indicia (for example, references to a sports team's historical accomplishments) function as a trademark if they are "in the minds of the fans and other consumers, source indicators of team-related apparel."[46] It rejected the defendant's argument that such broad recognition of a sports team's trademark rights would preclude it from manufacturing and selling competing products desired by consumers:

> "[T]he fact that a trademark is desirable does not, and should not, render it unprotectable." Smack's alleged competitive disadvantage in the ability to sell game day apparel relates solely to an inability to take advantage of the Universities' reputation and the public's desired association with the Universities that its shirts create. This is not an advantage to which it is entitled under the rubric of legitimate competition.[47]

In addition to expanding the scope of sports team trademark rights to include color combinations and other identifying insignia beyond team names and logos, several courts appear to be applying a de facto misappropriation or unjust enrichment standard in trademark infringement cases. Although courts generally require a trademark owner to prove that the unauthorized use of a sports team trademark creates a likelihood of consumer confusion regarding the source, sponsorship, or endorsement of a defendant's products, there has been a consistent judicial trend originating with *Dallas Cap II* to find infringement based largely on a defendant's intent to trade on a club's popularity by affixing an identical or substantially similar mark to unlicensed merchandise.[48] For example, in *Smack Apparel*, the Fifth Circuit held:

45. *See also* N.Y.C. Triathlon, LLC v. NYC Triathlon Club, Inc., 704 F. Supp. 2d 305 (S.D.N.Y. 2010) (holding that the defendant's unauthorized usage of the "New York City Triathlon" mark as the name of its athletic club blurred and tarnished their distinctiveness in violation of the dilution statute by creating a negative association because of the defendant's reputation for poor customer service).

46. 550 F.3d 465, 477-78 (5th Cir. 2008); *see also* Qualitex Co. v. Jacobson Prods. Co., 514 U.S. 159 (1995) (finding color alone is protectable as a trademark if it has acquired secondary meaning and is nonfunctional).

47. *Smack Apparel*, 550 F.3d at 488 (footnote omitted) (quoting Au-Tomotive Gold, Inc. v. Volkswagen of Am., Inc., 457 F.3d 1062, 1072 (9th Cir. 2006)).

48. As one court observed:

> [T]he digits of confusion—particularly the overwhelming similarity of the marks and the defendant's intent to profit from the Universities' reputation—compel this conclusion. This is so, we have noted, because Smack's use of the Universities' colors and indicia is designed to create the illusion of affiliation with the Universities and essentially obtain a "free ride" by profiting from confusion among the fans of the Universities' football teams who desire to show support for and affiliation with those teams. This creation of a link in the consumer's mind between the t-shirts and the Universities and the intent to directly profit therefrom results in an unmistakable aura of deception and likelihood of confusion.[49]

Rejecting the defendant's assertion that "absent evidence that consumers prefer licensed merchandise, it was error for the district court to conclude there was a likelihood of confusion," the Fifth Circuit determined "the inescapable conclusion is that many consumers would likely be confused and believe that Smack's t-shirts were sponsored or endorsed by the Universities" and "[w]hether or not a consumer *cares* about official sponsorship is a different question from whether that consumer would likely *believe* the product is officially sponsored."[50]

> While cases have indicated at one extreme that an alleged infringer's use of a mark with the knowledge that the public will be aware of the mark's origin is enough to establish likelihood of confusion, and at the other that likelihood of confusion occurs only where there would be confusion as to the origin of the goods themselves, the majority of courts have taken the middle ground on this issue. This middle position, which both parties recognize in this case, is that the requisite likelihood of confusion will exist where there is likelihood of confusion as to source, sponsorship or endorsement of the goods.

Bd. of Governors of the Univ. of N.C. v. Helpingstine, 714 F. Supp. 167, 172 (M.D.N.C. 1989) (citations omitted).

49. 550 F.3d at 483-84 (footnote omitted) (internal quotation marks omitted); *see also* Bos. Athletic Ass'n v. Sullivan, 867 F.2d 22, 33 (1st Cir. 1989) ("Defendants' shirts are clearly designed to take advantage of the Boston Marathon and to benefit from the good will associated with its promotion by plaintiffs. Defendants thus obtain a 'free ride' at plaintiffs' expense."); Univ. of Ga. Athletic Ass'n v. Laite, 756 F.2d 1535, 1545 (11th Cir. 1985) ("[T]he defendant's intent and the similarity of design between the two marks sufficient to support the district court's finding of a likelihood of confusion . . . ." (internal quotation marks omitted)); NFL Props., Inc. v. N.J. Giants, Inc., 637 F. Supp. 507, 518 (D.N.J. 1986) ("Defendant's intentional, willful, and admitted adoption of a mark closely similar to the existing marks 'Giants' and 'New York Giants' manifested not only an intent to confuse but raised the presumption that there was a likelihood of confusion, thus shifting the burden of proof to defendant to establish that there was no likelihood of confusion arising out of the sale of its merchandise bearing the words 'New Jersey GIANTS.'").

50. *Smack Apparel*, 550 F.3d at 484-85. *But see* Int'l Order of Job's Daughters v. Lindeburg & Co., 633 F.2d 912, 918 (9th Cir. 1980) ("We commonly identify ourselves by displaying emblems expressing allegiances. . . . Although these inscriptions frequently include names and emblems that are also used as collective marks or trademarks, it would be

The combined effects of the foregoing judicial and congressional expansion of trademark rights gives major league professional sports clubs broad exclusive rights that create trademark monopolies and limit competition in the sports trademark merchandising market. Consumers annually purchase several billion dollars' worth of licensed merchandise bearing the names and/or logos of their respective favorite major league professional sports teams. For 2010, it was estimated that the retail value of merchandise licensed by the NFL, NBA, NHL, and MLB was approximately $7.83 billion, which constitutes a substantial part of the estimated $12.5 billion retail value of all merchandise licensed by sports leagues, teams, and individual personalities in the United States and Canada.[51] Professional sports leagues are able to obtain higher royalty rates and more favorable contract terms from licensees because trademarked sports merchandise commands an estimated 46.5% higher premium than similar products.[52] In recent years, professional sports leagues and their member clubs have sought to expand their existing trademark monopolies by aggressively claiming exclusive rights to not only their respective names, logos, and color combinations, but also to slogans and symbols associated with league teams, including "America's Team,"[53] "Dawg Pound,"[54] and "Who Dat."[55]

The scope of legal protection for professional sports league and team trademark merchandising (that is, the "use of trademarks on

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naive to conclude that the name or emblem is desired because consumers believe that the product somehow originated with or was sponsored by the organization the name or emblem signifies."); *Helpingstine*, 714 F. Supp. at 173 ("[T]he court is skeptical that those individuals who purchase unlicensed tee-shirts bearing UNC-CH's marks care one way or the other whether the University sponsors or endorses such products or whether the products are officially licensed. Instead, as Defendants contend, it is equally likely that individuals buy the shirts to show their support for the University.").

51. Darren Rovell, *Publication: MLB Will Beat NFL in Licensing Revenue in '10*, CNBC (June 14, 2010, 3:38 PM), http://www.cnbc.com/id/37692194/Publication_MLB_Will_Beat_NFL_In_Licensing_Revenue_In_10. In 2008, the estimated retail value of licensed college sports merchandise was four billion dollars. Joseph P. Liu, *Sports Merchandising, Publicity Rights, and the Missing Role of the Sports Fan*, 52 B.C. L. REV. 493, 496 (2011).

52. Karen Raugust, *Retail Pricing of Licensed vs. Non-Licensed Merchandise*, LICENSING LETTER, Sept. 7, 2009.

53. *See supra* notes 44-45 and accompanying text.

54. Haw.-Pac. Apparel Grp., Inc. v. Cleveland Browns Football Co., 418 F. Supp. 2d 501 (S.D.N.Y. 2006).

55. Who Dat Yat Chat, LLC v. Who Dat? Inc., No. 10-1333, 2010 WL 4812956 (E.D. La. Nov. 17, 2010); *see* Michael McCarthy, *NFL Retreats in Saints' 'Who Dat' Trademark Dispute*, USATODAY, http://www.usatoday.com/sports/football/nfl/2010-02-02-who-dat-dispute_N.htm (last updated Feb. 3, 2010, 1:49 AM).

products unrelated to trademark owners' primary activity")[56] under the Lanham Act is narrower than the United States Olympic Committee (USOC)'s broad federal statutory right to use and license the Olympic name and marks, including the five-ring Olympic symbol, in the United States. The Ted Stevens Olympic and Amateur Sports Act (ASA) expressly gives the USOC the exclusive right to use and license the Olympic marks "for the purpose of trade, to induce the sale of any goods or services, or to promote any theatrical exhibition, athletic performance, or competition" regardless of whether unauthorized usage creates a likelihood of consumer confusion or dilution of the marks.[57] Congress has provided the USOC with exclusive property rights in the Olympic marks to further the strong public interest in promoting the participation of U.S. athletes in the Olympic Games through the activities of the USOC, and the Supreme Court has found that the ASA "directly advances these governmental interests by supplying the USOC with the means to raise money to support the Olympics and encourages the USOC's activities by ensuring that it will receive the benefits of its efforts."[58] Although there is no similar national policy interest in providing professional sports leagues and clubs with trademark monopolies and a source of funding, their existing broad trademark merchandising rights are virtually the de facto equivalent in economic terms of the USOC's statutory property rights to exclusively use and license the Olympic trademarks to fund U.S. participation in the Olympic Games.

Many trademark law scholars oppose expanding the traditional scope of trademark law protection, which is limited to preventing a likelihood of consumer confusion regarding the source or origin of a product or service, simply to prevent "free riding" (that is, misappropriation of the goodwill associated with a trademark and perceived unjust enrichment from its unauthorized use on collateral or promotional products unrelated to the mark owner's primary business activities).[59] Doing so creates inappropriately broad property rights in

56. Irene Calboli, *The Case for a Limited Protection of Trademark Merchandising*, 2011 U. ILL. L. REV. 865, 868.

57. 36 U.S.C. § 220506(c) (2006); *see also* S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm., 483 U.S. 522 (1987) (finding that the unauthorized use of "Gay Olympic Games" for an athletics competition in San Francisco constituted infringement even though there was no likely consumer confusion regarding USOC's sponsorship, endorsement, or approval of the sports event).

58. *S.F. Arts & Athletics*, 483 U.S. at 538-39.

59. *See, e.g.*, Stacey L. Dogan & Mark A. Lemley, *The Merchandising Right: Fragile Theory or* Fait Accompli*?*, 54 EMORY L.J. 461 (2005); Sheldon W. Halpern, *Trafficking in Trademarks: Setting Boundaries for the Uneasy Relationship Between "Property Rights" and*

trademarks, with resulting trademark monopolies and reduced market competition that increases consumer prices for collateral products.[60] Moreover, some scholars assert that the Lanham Act's dilution provision should not be used to confer and protect exclusive merchandising rights for famous marks.[61]

This scholarly critique has been summarized as follows:

> While rejecting this property-value justification for merchandising, some scholars have also criticized the judicial creation of the doctrine of "confusion as to the sponsorship"—now accepted as part of the Lanham Act—which they have often labeled as a type of "irrelevant confusion." Specifically, scholars have noted that this unnatural expansion of the traditional infringement standard has added to the presumption that merchandised products are, or have to be, sponsored by trademark owners. This argument is circular according to scholars, but it has led competitors to increasingly seek trademark owners' permission before using marks in order to avoid any risk of trademark infringement. On the contrary, scholars have generally argued that the use of disclaimers on unauthorized products, specifying the nonaffiliation of these goods with trademark owners, could eliminate any risk of consumer confusion, including as to products' sponsorship, yet still allow competing promotional goods to coexist in the marketplace along with officially authorized products.[62]

Scholars persuasively argue that sports team trademarks are overprotected by the Lanham Act. For example, Professor Gordon Hylton asserts:

> This type of protection is unnecessary for the production of sporting events and only results in a transfer of additional revenue to the teams and their licensees. Permitting fans to purchase unlicensed clothing bearing the name or logo of their favorite team would make it easier for less economically well-off fans to express their support for their teams.

Trademark and Publicity Rights, 58 DEPAUL L. REV. 1013 (2009); Veronica J. Cherniak, Comment, *Ornamental Use of Trademarks: The Judicial Development and Economic Implications of an Exclusive Merchandising Right*, 69 TUL. L. REV. 1311 (1995).

60. Paul J. Heald, *Filling Two Gaps in the Restatement (Third) of Unfair Competition: Mixed-Use Trademarks and the Problem with Vanna*, 47 S.C. L. REV. 783, 788 (1996) ("Granting exclusive rights in the promotional goods context permits monopoly pricing and, therefore, entails a transfer of wealth from consumers to trademark owners."). *But see* Calboli, *supra* note 56, at 891-92 ("[Some] scholars have argued that the real impact of merchandising rights on competition would be minimal because promotional products would still face competition against comparable products bearing different marks—a RED SOX t-shirt would still compete against a BOSTON UNIVERSITY t-shirt, for example—even if they are sold exclusively under the control of trademark owners.").

61. Dogan & Lemley, *supra* note 59, at 493-95.

62. Calboli, *supra* note 56, at 890 (footnotes omitted).

> It would allow a larger number of individuals to participate in the communal act of supporting a particular team or club. Teams would still be able to market their own merchandise . . . but they would not be able to exercise monopoly control over their names and symbols.[63]

Nevertheless, as Professor Irene Calboli accurately observes, "Regardless of scholarly concerns over whether merchandising rights are in accordance with the purpose of trademark law, trademark merchandising has long represented a 'fait accompli' in trademark practice."[64]

III. Application of Antitrust Law to Collective Trademark Licensing by a Professional Sports League

In contrast to a patent or copyright, "a trademark does not in any way represent a monopoly conferred upon a particular product."[65] However, under existing trademark law, a professional sports club effectively has a broad monopoly over the production, licensing, and sale of merchandise bearing its name, logo, or color combinations for a potentially perpetual period of time.[66] An individual club's aggressive enforcement of its right to prevent unauthorized usage that creates a likelihood of confusion regarding sponsorship or endorsement of merchandise bearing its trademark (even without any likely confusion regarding its origin or source) is not an antitrust violation.[67]

Rather than individually licensing (or not licensing) their respective trademarks and policing unauthorized usage (conduct which

63. Hylton, *supra* note 1, at 49-50; *see also* Liu, *supra* note 51, at 508 ("Sports fans would probably be better off if there were meaningful competition in the market for sports merchandise. They would be able to purchase such merchandise at a far lower price and choose from a far wider range of products. They would find it much easier to identify themselves with their teams. Moreover, it is hard to imagine that the sports teams themselves would now have less incentive either to sell their own officially licensed merchandise or, more generally, to invest in the quality of their teams." (footnote omitted)).

64. Calboli, *supra* note 56, at 892.

65. Car-Freshner Corp. v. Auto Aid Mfg. Corp., 438 F. Supp. 82, 86 (N.D.N.Y. 1977).

66. NFL Props., Inc. v. Wichita Falls Sportswear, Inc., 532 F. Supp. 651, 663 (W.D. Wash. 1982) ("Trademarks always grant 'product monopolies' in that they allow exclusive use of features which connote origin or sponsorship.").

67. Clorox Co. v. Sterling Winthrop, Inc., 117 F.3d 50, 61 (2d Cir. 1997) ("Efforts to protect trademarks, even aggressive ones, serve the competitive purpose of furthering trademark policies."); Drop Dead Co. v. S.C. Johnson & Son, Inc., 326 F.2d 87, 96 (9th Cir. 1963) (reasoning that infringement litigation based on "colorable similarity rather than on exact identity" of owner's trademark is the type of "aggressive competition and promotion that anti-trust laws seeks to protect, particularly within the limits of lawful monopolies granted by Congress"); Warner-Lambert Co. v. Schick U.S.A., Inc., 935 F. Supp. 130, 144 (D. Conn. 1996) (finding trademark infringement suits are not an antitrust violation unless "filed as a sham").

clearly does not violate the antitrust laws), NFL, NBA, NHL, and MLB clubs have agreed to collectively market, exclusively license, and enforce their trademark rights through a centralized league intellectual property subsidiary.[68] In *Dallas Cap I*, the Northern District of Texas rejected the defendant's contention that the NHL's then-existing collective exclusive trademark licensing arrangement was an unreasonable restraint that violated section 1 of the Sherman Act.[69] The NHL's member clubs authorized National Hockey League Services, Inc. (NHLS) to act as their exclusive trademark-licensing agent, and it licensed several manufacturers to use the clubs' trademarks on various items of merchandise. As the basis of an unclean hands defense to federal trademark infringement and unfair competition claims by the NHL and its clubs seeking injunctive relief against its unauthorized manufacture and sale of embroidered cloth emblems identical to NHL clubs' trademarks, the defendant asserted that the plaintiffs were engaging in an illegal group boycott and price fixing. The court found no evidence of any agreement among the plaintiffs to prevent the defendant from obtaining a license to affix their trademarks to merchandise meeting their minimum quality standards. It concluded that the plaintiffs' uniform royalty rate for licensing use of their trademarks "is reasonable and may be said to facilitate commerce rather to restrain it" and found no evidence that the plaintiffs had attempted to fix the price of merchandise bearing their marks.[70] However, the court did not consider the threshold issue of whether collective exclusive licensing of trademarks is immune from section 1 scrutiny because league clubs function as a single economic entity that collectively produce one product (for example, NHL hockey) whose trademarks symbolize the associated goodwill generated by all clubs.

More than forty years later, in *American Needle, Inc. v. New Orleans Louisiana Saints* (*American Needle I*), the NFL squarely raised this issue for the first time by arguing that its member clubs

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68. Grusd, *supra* note 2, at 13-18; *see, e.g.*, Gregory J. Pelnar, *Section 1 Challenges to the Properties Arms of Sports Leagues: The Single-Entity Defense, Market Definition, and the Rule of Reason from* Dallas Cowboys *to* American Needle *and Beyond*, COMPETITION POL'Y INT'L, May 2009, *available at* https://www.competitionpolicyinternational.com/section-1-challenges-to-the-properties-arms-of-sports-leagues-the-single-entity-defense-market-defi nition-and-the-rule-of-reason-from-dallas-cowboys-to-emamerican-needleem-and-beyond/.

69. 360 F. Supp. 459 (N.D. Tex. 1973). The defendant did not appeal the district court's ruling on its antitrust defense, so this issue was not considered by the Fifth Circuit. *Dallas Cap II*, 510 F.2d 1004, 1014 (5th Cir. 1975).

70. *Dallas Cap I*, 360 F. Supp. at 468.

function as a single economic entity in jointly producing NFL football and collectively licensing their intellectual property, which does not constitute the requisite concerted action under section 1.[71] The district court held that "with regard to the facet of their operations respecting exploitation of intellectual property rights, the NFL and its 32 teams are, in the jargon of antitrust law, acting as a single entity."[72] In *American Needle, Inc. v. NFL* (*American Needle II*), the Seventh Circuit affirmed, concluding that "the record amply establishes that since 1963, the NFL teams have acted as one source of economic power—under the auspices of NFL Properties—to license their intellectual property collectively and to promote NFL football."[73] According to the Seventh Circuit, a professional sports league's centralization and exclusive licensing of trademarks is legal as a matter of law without any need to analyze its net competitive effects.[74]

In *American Needle III*, a unanimous Supreme Court reversed the Seventh Circuit and ruled that "the NFL's licensing activities constitute concerted action that is not categorically beyond the coverage of § 1."[75] The Court explained that the key inquiry is whether there is an agreement "amongst 'separate economic actors pursuing separate economic interests.'"[76] In other words, "The question is whether the agreement joins together 'independent centers of decisionmaking.'"[77]

71. 496 F. Supp. 2d 941 (N.D. Ill. 2007).

72. *Id.* at 943.

73. 538 F.3d 736, 744 (7th Cir. 2008).

74. *See also* Chi. Prof'l Sports Ltd. v. NBA, 95 F.3d 593 (7th Cir. 1996) (suggesting that the determination of whether particular challenged conduct is sufficiently integrated to be considered that of a single economic entity requires facet-by-facet analysis of each league's operation). Contrary to the Seventh Circuit and before *American Needle III*, lower courts seemed unwilling to accept the single-entity defense in antitrust litigation challenging centralized league licensing or sale of its clubs' intellectual property rights. Madison Square Garden, L.P. v. NHL, No. 07 CV 8455, 2008 WL 4547518, at *13 (S.D.N.Y. Oct. 10, 2008) (observing that most courts have concluded that a professional sports league is not a separate economic entity but declining to resolve that question because the "arguments advanced by the NHL in favor of single entity status require examining facts outside the pleadings"); Shaw v. Dall. Cowboys Football Club, Ltd., No. CIV.A. 97-5184, 1998 WL 419765 (E.D. Pa. June, 23, 1998), *aff'd on other grounds*, 172 F.3d 299 (3d Cir. 1999) (finding the allegation that the NFL Sunday Ticket satellite television package (which includes all weekly games broadcasted nationwide) constitutes an agreement among the NFL's member clubs and therefore sufficiently alleges concerted action under section 1 of the Sherman Act).

75. 130 S. Ct. 2201, 2206-07 (2011).

76. *Id.* at 2212 (quoting Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 769 (1984)).

77. *Id.* (quoting *Copperweld*, 467 U.S. at 769).

Rejecting the NFL's argument that NFLP's trademark licensing decisions constitute unilateral conduct, the Court noted that the NFL clubs jointly control NFLP and have individual economic interests distinct from NFLP.[78] It explained:

> Although NFL teams have common interests such as promoting the NFL brand, they are still separate, profit-maximizing entities, and their interests in licensing team trademarks are not necessarily aligned. Common interests in the NFL brand "*partially* unit[e] the economic interests of the parent firms," but the teams still have distinct, potentially competing interests.[79]

Because each NFL club is an independently owned and operated business that owns its individual trademarks, the Court concluded: "To a firm making hats, the Saints and the Colts are two potentially competing suppliers of valuable trademarks. When each NFL team licenses its intellectual property, it is not pursuing the 'common interests of the whole' league but is instead pursuing [its own individual] interests."[80]

The Supreme Court held that the legality of collective licensing of league clubs' trademarks "must be judged under the Rule of Reason."[81] The Court recognized that a professional sports league has a "legitimate and important interest" in maintaining competitive balance among its clubs and that it is "unquestionably an interest that may well justify a variety of collective decisions made by the teams."[82] It remanded the case for determination of "[w]hat role it properly plays in applying the Rule of Reason,"[83] but otherwise provided little guidance regarding how to evaluate the net competitive effects of collective licensing of professional sports clubs' trademarks and related restraints.

In my view, the Court correctly held that a professional sports league comprised of separate, independently owned and operated for-profit member clubs is not a single economic entity immune from section 1 as a matter of law when engaged in joint marketing and

78. NFLP is a separate corporation that is independently managed and most of its revenues are distributed to NFL clubs on a pro rata basis.

79. *American Needle III*, 130 S. Ct. at 2213 (alteration in original) (citations omitted) (quoting Joseph F. Brodley, *Joint Ventures and Antitrust Policy*, 95 HARV. L. REV. 1521, 1526 (1982)).

80. *Id.* (quoting *Copperweld*, 467 U.S. at 770).

81. *Id.* at 2207.

82. *Id.* at 2217.

83. *Id.*

licensing of intellectual property.[84] Although the league's member clubs jointly produce a single product and are economically interdependent, they have diverse individual economic interests even though the goodwill associated with league games that creates consumer demand for trademarked merchandise is collectively produced. Just as mere economic value should not be used as the criterion for determining the scope of trademark rights, jointly produced economic value should not determine whether separately owned and independent professional sports league clubs are a single economic entity for purposes of collective trademark licensing. Section 1 of the Sherman Act is a necessary public law limit on collective licensing of professional sports clubs' trademarks, which the Court recognized is not per se illegal because of its potential procompetitive benefits. *American Needle III* establishes an appropriate legal framework for evaluating the net effects of collective licensing on consumer welfare by holding that restraints in connection with collective trademark licensing "must be judged according to the flexible Rule of Reason," which "'can sometimes be applied in the twinkling of an eye.'"[85]

A. *Collective Exclusive Trademark Licensing*

Similar to the *Dallas Cap* litigation, in *MLB Properties, Inc. v. Salvino, Inc.*, a defendant who was sued for trademark infringement because of its unauthorized use of MLB clubs' trademarks alleged that Major League Baseball Properties, Inc.'s (MLBP) collective trademark licensing arrangement violated section 1 of the Sherman Act.[86] MLBP is the worldwide exclusive licensing agent for all thirty MLB clubs' trademarks on retail products and acts as their agent for quality control and trademark protection. It charged "a standard royalty percentage" license for products bearing or incorporating an MLB club's trademarks "irrespective of variations in the Clubs' popularity as reflected by their respective fan bases."[87] The dollar amount of

84. As one court observed, even if the single-entity defense is "persuasive in the context of [the] NFL's role as a competitor in the entertainment business" because "[a]n individual team can offer no entertainment value without the other teams in the league," it is "somewhat less persuasive (to the undersigned, at least) when it comes to licensing NFL team logos on headwear (after all, individual teams could make their own license agreements)." Pecover v. Elecs. Arts Inc., 633 F. Supp. 2d 976, 982 (N.D. Cal. 2009).

85. 130 S. Ct. at 2216-17 (quoting NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 109 n.39 (1984)).

86. 542 F.3d 290 (2d Cir. 2008).

87. *Id.* at 303.

royalties that each licensee pays to MLBP varies with its sales rather than being uniform. Each club receives a pro rata share of the profits from licensing royalties regardless of the amount of revenues generated by the licensing of its trademarks. A prospective licensee can request and obtain from MLBP a license to use the trademarks of one, some, or all MLB clubs. MLBP did not limit the number of products it would license or the number of companies to which it granted licenses for any particular products. The defendant was licensed by MLBP to use MLB clubs' trademarks on several products, but it did not have a license to use those marks in connection with a line of plush, bean-filled bears that it called "Bammers."

Consistent with *American Needle III*'s subsequent holding, the United States Court of Appeals for the Second Circuit held that MLB's collective trademark licensing regime must be evaluated under the rule of reason.[88] The court rejected the defendant's claim that this arrangement violated the quick-look rule of reason, which applies "only 'to business activities that are so plainly anticompetitive that courts need undertake only a cursory examination before imposing antitrust liability.'"[89] Because it "'might plausibly be thought to have a net procompetitive effect, or possibly no effect at all on competition,' more than a 'quick look' is required."[90] It found that the MLB clubs' "agreement to make MLBP their exclusive licensor does not by its express terms restrict or necessarily reduce the number of licenses to be issued; it merely alters the identity of the licenses' issuer."[91] To the contrary, there was record evidence that the total number of licensees increased substantially after the formation of MLBP because licensees were able to engage in one-stop shopping for the rights to use MLB clubs' trademarks with corresponding efficiencies and reduced transaction costs, thereby having the procompetitive effect of

88. *Id.* at 316-18.

89. *Id.* at 317 (quoting Texaco Inc. v. Dagher, 547 U.S. 1, 7 (2006)).

90. *Id.* at 318 (quoting Cal. Dental Ass'n v. F.T.C., 526 U.S. 756, 771 (1999)). Similarly, in *Madison Square Garden, L.P. v. NHL*, 270 F. App'x 56 (2d Cir. 2008), the Second Circuit ruled that the owner of the New York Rangers NHL club could not use the quick-look rule of reason to prove that requiring the club to migrate its Web site to a common technology platform managed by the NHL, rather than allowing its independent operation, violated section 1. It affirmed the lower court's finding that the challenged conduct has several plausible procompetitive effects, including a standardized Web site layout to attract national sponsors and advertisers interested in uniform exposure across the NHL.com network, which is a key element of the NHL's strategy to enhance its national brand to better compete against other sports and entertainment products. *See* Madison Square Garden, L.P. v. NHL, No. 07 CV 8455, 2007 WL 3254421, at *6 (S.D.N.Y. Nov. 2, 2007).

91. *Salvino*, 542 F.3d at 318.

increasing the retail quantity of trademarked MLB merchandise available to consumers.

The Second Circuit affirmed summary judgment in favor of MLBP because the defendant did not satisfy its burden of proving that its collective, exclusive trademark-licensing program had any direct anticompetitive effects or that MLBP had market power in a properly defined relevant market. Rejecting the defendant's contention that charging a standard licensing fee for all MLB clubs' trademarks and pro rata sharing of the profits is illegal price fixing, the court ruled that this is a legitimate means of horizontal revenue sharing to achieve procompetitive effects. It explained that MLB is an "integrated professional sports league in which the competitors are not independent but interdependent, competitive balance among the teams is essential to both the viability of the Clubs and public interest in the sport, and profit sharing is a legitimate means . . . of maintaining some measure of competitive balance."[92]

The court rejected the empirically unsupported assertion of the defendant's expert economist that "MLBP quite likely exercises sufficient control over pricing licenses for use of [MLB] club marks for plush toys and similar products so that these constitute a relevant market."[93] The court was skeptical of the defendant's expert's unsupported claim that "a consumer who is unable to purchase an MLBP New York Yankee Bammer would eschew an NFL Jets Bammer and would substitute instead an MLBP Bammer representing the Boston Red Sox."[94] Contrary to his assertion, there was evidence that products bearing MLB clubs' trademarks compete with other sports collectible products in the retail marketplace. The defendant's president testified that the company sold Bammers, including ones bearing licensed NBA and NFL clubs' trademarks, to "hobby shops, sports collectible shops, Hallmark stores and retail chains," which "competed with everything in the store for shelf space."[95] MLBP's expert economist testified that "the relevant product market consists at the very least of licenses for all sports and entertainment intellectual property, rather than just for MLB Intellectual Property."[96] In his opinion:

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92. *Id.* at 331-32.
93. *Id.* at 329 (internal quotation marks omitted).
94. *Id.* at 330.
95. *Id.* at 299 (internal quotation marks omitted).
96. *Id.* at 301.

> Major League Baseball fans are separable based on their loyalty to a particular Club. In this situation, a monopoly or cartel would surely set separate royalty rates to maximize profits. Contrary to the assertions of [defendant's expert], *the very fact that MLBP does not do this indicates that it faces competition from other entertainment products and is not a cartel.*[97]

In a concurring opinion, then-Judge Sotomayor agreed it was proper to apply the rule of reason and to grant summary judgment for MLBP, but she applied the doctrine of ancillary restraints rather than the majority's legal framework. She began her analysis by disagreeing with the majority's view that MLBP's collective trademark licensing is not price fixing, observing that MLB clubs "have agreed through the exclusivity and profit-sharing clauses in the MLBP agreement not to compete with each other on the sale of trademark licenses."[98] She explained:

> Basic principles of economics teach us that as royalty rates increase, the price for licensed goods will increase, and output will decline as fewer consumers are willing to purchase licensed goods at higher prices. This is Salvino's central contention—that if the Clubs were forced to compete with each other for licensing fees, they would offer licenses at lower rates, thereby resulting in lower prices (and increased output) for licensed goods.[99]

Because a collective league trademark licensing joint venture "offers substantial efficiency-enhancing benefits that the individual Clubs could not offer on their own," Judge Sotomayor agreed that MLBP's ancillary exclusivity and profit-sharing provisions should be analyzed under the rule of reason because their competitive effects "are intertwined with the effects of the remainder of the venture."[100] She concluded that these provisions "are reasonably necessary to achieve MLBP's efficiency-enhancing purposes because they eliminate several potential externalities that may otherwise distort the incentives of individual Clubs and limit the potential efficiency gains of MLBP."[101]

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97. *Id.* at 303 (internal quotation marks omitted).

98. *Id.* at 335 (Sotomayor, J., concurring).

99. *Id.* at 336 n.3.

100. *Id.* at 337-38. Then-Judge Sotomayor agreed with the majority that "we need not and do not decide whether a successful Sherman Act claim could have been brought against MLBP with a properly supported record, including whether the procompetitive justifications for the two challenged provisions could be achieved in a substantially less restrictive manner." *Id.* at 341.

101. *Id.* at 340. Relying on the testimony of MLBP's expert, she explained:

> Most notable of these externalities is the so-called free-rider problem. Because of the interdependence of the Clubs within the setting of a sports league, free riding

However, she observed that "under the doctrine of ancillary restraints, when a challenged restraint is not reasonably necessary to achieve any of the efficiency-enhancing purposes of a joint venture, it will be evaluated apart from the rest of the venture," and "a *per se* or quick-look approach may apply" if it "serves only as naked restraint against competition."[102]

As Judge Sotomayor points out, collective exclusive trademark licensing, uniform licensing fees, and pro rata profit sharing through a league subsidiary is literally the product of a price-fixing agreement among league clubs. However, in evaluating its effects on consumers, it is important to consider that an individual club's trademark monopoly is valid under existing law, thereby providing each club with the exclusive authority to license its trademarks and to seek injunctive relief against the sale of unlicensed products bearing or incorporating its trademarks. The retail price of officially licensed sports team merchandise already is likely higher than it would be if competing unlicensed merchandise could be legally sold with appropriate disclaimers to prevent consumer confusion regarding its origin, sponsorship, or approval. Thus, the key inquiry, which may be very difficult to quantify, is how much does the standardization of royalty rates through league collective exclusive licensing increase the retail price of officially licensed merchandise bearing or incorporating league clubs' trademarks above the market price if each club established its own royalty rate?

To answer this question, it must be determined whether, absent exclusive licensing through a centralized entity, there would be intrabrand economic competition among league clubs for the licensing of their respective trademarks, which in turn depends primarily on whether consumers view league clubs' trademarked merchandise as reasonable substitutes for each other. As the *Salvino* majority observed, sports fans most likely are loyal to a particular league club and its brand of merchandise, and they would not purchase merchandise bearing a rival team's trademarks.[103] For example, a New

> would occur if one of the Clubs is able to benefit disproportionately from the actions of Major League Baseball or other Clubs in the licensing of products. This may lead to inefficiencies because the Clubs' incentive to invest in the promotion and development of their intellectual property and other licensed products may be distorted.

Id. (citations omitted).

102. *Id.* at 338.

103. *See supra* text accompanying note 94. Sports fan brand loyalty is evidenced by the fact that consumers are less likely to subscribe to a cable or satellite television provider

York Yankees fan would probably never purchase a Boston Red Sox hat for himself. If die-hard fans will not substitute any other league club's merchandise for that of their favorite team, exclusive league licensing of club trademarks does not result in any incremental consumer harm (for example, higher retail prices) beyond that already caused by lawful individual club trademark monopolies.

Some legal scholars posit that empirical evidence could be developed to establish significant intrabrand economic competition among league clubs' trademarked merchandise in particular regions of the country where two league teams play. Acknowledging it is unlikely that league teams compete nationally "in a single relevant product market limited to just their logos . . . because empirical observations indicate that many consumers . . . purchase merchandise for a 'home team' rather than for a given sport,"[104] Professor Marc Edelman posits:

> For example, within the geographic submarket of New York/Northern New Jersey, a consumers' closest substitute to buying a New York Giants cap might be a New York Jets cap . . . . Even presuming that there is a sub-segment of this population that includes 'die-hard' Giants fans who would never consider wearing a Jets cap, and visa-versa, there is also perhaps another sub-segment of the population that is glad to wear the apparel/headwear from either NFL home team.[105]

However, even if collective exclusive licensing of league clubs' trademarks reduces local or regional intrabrand economic competition for trademark licenses among some league clubs, it appears likely that there are reasonable substitutes from the perspective of licensees, which would negate the existence of a separate relevant market for a particular league's trademarked merchandise. Interbrand economic competition from other trademark licensors should preclude a centralized league licensing entity from having market power and being able to charge an artificially high, standardized royalty to trademark licensees above what an individual club could charge to

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that does not have a Regional Sports Network that shows the games of local professional teams (for example, MLB and/or NBA games), which is recognized by the Federal Communications Commission as establishing the "'must have' and nonreplicable nature" of such programming. Cablevision Sys. Corp. v. FCC, 694 F.3d 695 (D.C. Cir. 2011).

104. Marc Edelman, *Upon Further Review: Will the NFL's Trademark Licensing Practices Survive Full Antitrust Scrutiny? The Remand of* American Needle v. Nat'l Football League, STAN. J.L. BUS. & FIN. (forthcoming) (manuscript at 25), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1749644.

105. *Id.* at 26 (footnote omitted). This scholarly view is consistent with *Los Angeles Memorial Coliseum Commission v. NFL*, 726 F.2d 1381 (9th Cir. 1984), which holds that league clubs in the same locality engage in economic competition for fan support.

license its trademarks. In *Adidas America, Inc. v. NCAA*, the United States District Court for the District of Kansas dismissed a sporting goods manufacturer's complaint alleging NCAA limits on the size of manufacturer trademarks on student-athletes' uniforms illegally restrained "the market for the sales of NCAA promotional rights."[106] Similar to *Salvino*, the court concluded that an alleged market consisting of only a single source of sponsorship or merchandising rights is too narrow to constitute a relevant market:

> Adidas has failed to explain or even address why other similar forms of advertising, namely sponsorship agreements with teams or individuals competing in the National Football League, the National Basketball Association, the Women's National Basketball Association, Major League Baseball, Major League Soccer, or the Olympics, are not reasonably interchangeable with NCAA promotion rights or sponsorship agreements.[107]

League collective trademark licensing offers several procompetitive benefits with the potential for enhancing consumer welfare. In addition to reduced cost savings and increased efficiencies (for example, lower transaction and trademark rights enforcement costs) recognized by both the *Salvino* majority and concurrence, its provision of one-stop shopping for licensees facilitates the production of merchandise incorporating multiclub logos such as video games featuring league clubs and player trading cards.[108] On the other hand, there is no readily available empirical evidence that cost savings from centralized league licensing lowers retail prices for trademarked merchandise. Even if exclusive league licensing is necessary to prevent free riding by individual clubs and/or to achieve other substantial economic efficiencies, it is uncertain whether pro rata distribution of the profits to each club actually results in enhanced league-wide competitive balance or whether it is positively correlated to increased revenue sharing.[109]

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106. 64 F. Supp. 2d 1097, 1103 (D. Kan. 1999).

107. *Id.*

108. Group licenses for the use of player names, images, and other identifying characteristics, which are protected by state right of publicity laws, that are incorporated into these products can be obtained from players' unions or league intellectual property licensing arms (for example, NBA Properties). Grusd, *supra* note 2, at 11-12.

109. *See supra* note 101 and accompanying text; *see also* Edelman, *supra* note 104, at 37 ("[E]ven if competitive balance is assumed to increase consumer enjoyment of professional football, it is still doubtful whether the collective and exclusive licensing of NFL team marks actually yields competitive balance. Indeed, the NFL's collective licensing of team marks does not equalize all team revenues, but rather equalizes only one particular revenue stream." (footnote omitted)); Roger G. Noll, *"Buyer Power" and Economic Policy*,

Considering the difficulty proving that collective exclusive trademark licensing, a standard royalty based on a licensee's percentage of sales, and pro rata profit sharing (individually or in combination) significantly reduce intrabrand competition along with the probability that a sports league's trademarked products face significant interbrand competition in the licensee and retail markets as well as the existence of several potential procompetitive benefits, it appears these restrictions are legal under the rule of reason. As long as a centralized league trademark licensing entity does not limit the number of companies to which it will grant licenses for particular categories of products (and does not fix or control retail prices) and prospective licensees may obtain a license to use the trademarks of one, some, or all league clubs, it is arguable that collective exclusive licensing of professional sports club trademarks is virtually per se legal.

B. Collective Exclusive Product Categories

In comparison to the foregoing restraints, the challenged conduct at issue in the *American Needle* cases (that is, collective granting of product category exclusivity to a single licensee for a fixed, up-front licensing fee) has potentially greater anticompetitive effects without offsetting procompetitive benefits to consumers.[110] The plaintiff alleged that NFLP's December 2000 agreement with Reebok, pursuant to which Reebok would be the exclusive provider of apparel and headwear bearing the trademarks of the NFL and its individual clubs for ten years, resulted in termination of American Needle's nonexclusive license to design, manufacture, and sell headwear bearing NFL clubs' trademarks (which had been in effect for more

72 ANTITRUST L.J. 589, 617 (2005) ("[T]he added value arising from cooperation in buying inputs and selling outputs, because it does not improve competitive balance or otherwise increase the value of the sport to fans, arises purely from eliminating competition."); Pelnar, *supra* note 68, at 19 ("There is also controversy as to whether revenue-sharing promotes competitive balance because it weakens the incentives of less competitive teams to try to improve.").

110. This case has been remanded to the United States District Court for the Northern District of Illinois for resolution of whether the exclusive trademark license between NFLP and Reebok constitutes "an unreasonable restraint of trade (Section 1) or unlawful monopolization (Section 2)." Joint Status Report at 2, Am. Needle, Inc. v. New Orleans La. Saints, No. 04-CV-7806, 2011 WL 3734116 (N.D. Ill. filed June 19, 2011). In their June 19, 2011, Joint Status Report, the parties estimated that discovery would require eighteen months and that a trial would be likely to last at least two weeks. *Id.* at 3.

than twenty years) when it expired in March 2001.[111] The complaint alleged that this agreement reduced competition in the wholesale market for the distribution and sale of apparel and headwear products bearing the trademarks of NFL clubs, violating section 1.[112] In other words, "[B]ecause each of the individual teams separately owned their team logos and trademarks, their collective agreement to authorize NFL Properties to award the exclusive headwear license to Reebok was, in fact, a conspiracy to restrict other vendors' ability to obtain licenses for the teams' intellectual property."[113]

Because of the broad scope of rights currently recognized by federal trademark law and the fact that prospective licensees have no alternative means of obtaining authorization to use league clubs' trademarks in connection with the manufacture and sale of competing products, rudimentary economic analysis suggests that NFLP's grant of exclusive licensee rights in particular product categories results in fewer available consumer choices of retail products bearing the trademarks of NFL clubs and higher retail prices. There is some empirical evidence that the price of trademarked NFL headwear increased from $19.99 to $30.00 in the early 2000s and that the average price of NFL clubs' replica jerseys increased from 2002 to 2003.[114]

The aggregate retail value of NFL, NBA, NHL, and MLB trademarked merchandise declined from approximately $8.8 billion in 1996[115] to an estimated $7.83 billion in 2010,[116] which has reduced trademark-licensing royalties for clubs in these leagues. In an effort to increase their trademark licensing revenues, centralized league trademark entities are entering into more licensing agreements granting exclusive product categories[117] to obtain "a premium price through a large advance, high minimum guarantees, and potentially a

111. Complaint at 3-4, *Am. Needle*, No. 04-CV-7806, 2004 WL 3123822 (N.D. Ill. filed Dec. 1, 2004)). On October 12, 2010, NFLP entered into five-year licensing agreements beginning in April 2012, which grant Nike the exclusive right to manufacture and sell apparel, and New Era the exclusive right to manufacture and sell headwear, bearing the trademarks of the NFL and its member clubs. Edelman, *supra* note 104, at 3 n.12.

112. The complaint also alleges that this conduct constitutes attempted monopolization, monopolization, and conspiracy to monopolize in violation of § 2. Complaint, *supra* note 111, at 5-6.

113. *American Needle II*, 538 F.3d 736, 738 (7th Cir. 2008).

114. Edelman, *supra* note 104, at 23 n.136.

115. Grusd, *supra* note 2, at 5.

116. *See supra* note 51 and accompanying text.

117. Ironically, exclusive product categories best further the traditional trademark law objective of ensuring that the mark identifies goods of a consistent nature and quality because the exclusive licensee is the sole source of the licensed product.

higher royalty rate."[118] For example, the NFL and NBA recently signed exclusive interactive video game licensing agreements with Electronic Arts, and MLB entered into a similar exclusive licensing contract with 2K Sports, which reduce the total number of consumers' interactive video game choices.[119] Similarly, all four league intellectual property-licensing entities have entered into exclusive licensing agreements for trading cards, essentially forcing longtime trading card companies out of the market.[120] For example, MLBP "entered an exclusive multi-year deal to make Topps the official baseball card of [MLB, thereby] making Topps the first exclusive baseball card company of MLB in nearly 30 years," and NBAP entered into an agreement with Panini to become the NBA's exclusive trading card partner.[121]

In *Pecover v. Electronic Arts Inc.*, a pending antitrust case seeking certification as a consumer class action, the plaintiffs allege that exclusive product licensing of professional sports league clubs' trademarks for particular products has the anticompetitive effect of raising retail prices paid by consumers.[122] In their First Amended Complaint, the plaintiffs assert that, before obtaining exclusive rights to use the trademarks of the NFL and its member clubs (as well as NFL players' identities), Electronic Arts charged $29.95 for Madden NFL, an interactive professional football software product, in a competitive market.[123] Immediately after Electronic Arts' exclusive rights became effective, this resulted in the withdrawal of Take Two Interactive Software, Inc.'s NFL 2K5, a superior and less expensive competing product from the market, and it prevented other companies from developing and selling a competing interactive professional football software product, Electronic Arts increased its price for Madden NFL "nearly seventy percent to $49.95."[124] The plaintiffs also allege that "[b]ut for Electronic Arts' exclusive agreements with the NFL [and] the Players Union . . . consumers would have enjoyed

118. Meredith Ashley, *Sports Licensing: 2010 Year-in-Review*, LICENSING J., Jan. 2011, at 2.

119. *Id.*

120. *Id.*

121. *Top 125 Global Licensors*, LICENSE! GLOBAL, Mar./Apr. 2010, at 41, 45.

122. 633 F. Supp. 2d 976 (N.D. Cal. 2009) (holding that plaintiffs' allegations that an interactive software entertainment company's acquisition of exclusive licensing rights from the NFL, Arena Football League, and NCAA reduces competition in the market for interactive football software and therefore plaintiffs stated valid claims under section 2 of the Sherman Act and California antitrust law).

123. First Amended Complaint at 3, *Pecover*, 633 F. Supp. 2d 976 (No. 08-cv-02820CW), 2011 WL 2609621.

124. *Id.* at 4.

additional features and overall higher quality interactive football software."[125]

As a threshold matter, if each league club may lawfully license a single company to exclusively use its trademarks (or refuse to license any company) in connection with the production and sale of a particular merchandise (which likely results in higher retail prices than if it granted multiple licenses), are there any greater anticompetitive effects or consumer harm if all clubs collectively engage in exclusive product licensing through a central league entity? In the market for merchandise bearing or incorporating only a single team's trademark (for example, hats), an individual club has an economic incentive to compete against a collective league licensing entity only if it would receive revenues greater than its pro rata share of the profits from centralized licensing plus the costs of its individual licensing and enforcement activities. It appears that only large market or very popular clubs with strong regional or national brand loyalty (for example, New York Yankees or Dallas Cowboys) would have the economic incentive to do so, thus exclusive product category licensing likely has only a limited adverse effect on intrabrand economic competition among league clubs.[126]

Nevertheless, collective exclusive product licensing is a horizontal output restriction among league clubs, which precludes or eliminates economic competition between licensees of similar merchandise bearing or incorporating league clubs' trademarks, reduces the supply of retail products, and likely increases retail prices to the detriment of consumer welfare. In contrast to a restraint necessary to produce a product that would not exist absent cooperation among economic competitors (for example, a blanket music license),[127] this is a facially naked restraint with direct anticompetitive effects not reasonably necessary to achieve the recognized procompetitive benefits of collective trademark licensing by league clubs (for example, lower transaction and trademark rights enforcement costs, enhanced competitive balance among league clubs), which should be evaluated apart from the rest of this generally otherwise lawful

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125. *Id.* at 5.

126. The Dallas Cowboys club is the only NFL team that has exercised its right to opt out of NFLP's centralized licensing arrangement and to license its own trademarks. Pelnar, *supra* note 68, at 8.

127. Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1 (1979) (analyzing the validity of the pricing mechanism for nonexclusive blanket music licenses under the full rule of reason).

collective exclusive trademark licensing.[128] Collective exclusive product licensing is not a restraint ancillary to collective exclusive trademark licensing (which may increase the output of licensed merchandise), and it should be evaluated under the quick-look rule of reason in accordance with Judge Sotomayor's concurring opinion in *Salvino*.[129] Doing so would be consistent with the Supreme Court's determination that the NCAA's exclusive sale of football television rights is a nonancillary naked restraint that reduced output and increased prices to the detriment of consumers (apart from the rest of its lawful joint venture to internally govern intercollegiate athletics), which was illegal without the need to engage in full rule of reason analysis.[130]

To enable antitrust law to minimize the consumer harm caused by the extension of trademark law protection beyond its traditional boundaries and resulting professional sports club individual trademark monopolies, league clubs' collective granting of exclusive product licenses should be invalidated under the quick-look rule of reason because this restraint has clear anticompetitive effects that are not necessary to further any procompetitive justifications that enhance consumer welfare. The procompetitive justifications for collective exclusive trademark licensing clearly could be achieved in a substantially less restrictive manner other than by granting one licensee

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128. Some scholars assert that a league's granting of exclusive product licenses may be necessary "to avoid downstream free riding by customers or potential customers of the authorized licensee" and that "[t]o the extent that measures adopted to maintain or promote competitive balance concerns reflect an attempt to correct free riding or other externalities, those measures may provide a legitimate procompetitive reason for adopting the restraints." James T. McKeown, *The Economics of Competitive Balance: Sports Antitrust Claims After* American Needle, 21 MARQ. SPORTS L. REV. 517, 528-29 (2011) ("For example, in order to induce a licensee to more heavily promote a NFL-licensed product, NFLP may decide to grant an exclusive license for the use of the league trademarks on a category of product. NFLP might pursue this option if the league concludes that the added promotional and sales efforts by an exclusive licensee will result in more consumers switching from competing products to buy NFL-logoed products."). Even if exclusive trademark licensing for specific product categories prevents downstream free riding and increases the league's trademark licensing revenues to the economic benefit of all league clubs, it is not necessary to maintain or enhance league-wide competitive balance, and it is very doubtful that this restraint enhances consumer welfare in the retail market for trademarked merchandise. Because this is a naked restraint of trade, which is not "the core activity" of a professional sports league's trademark licensing subsidiary or "clearly ancillary" to its legitimate procompetitive conduct, the ancillary restraints doctrine and quick-look rule of reason should be applied rather than the full rule of reason. *Cf.* Texaco Inc. v. Dagher, 547 U.S. 1, 7-8 (2006) (applying full rule of reason to a lawful joint venture's "core activity" of pricing the goods is produces and sells).

129. MLB Props., Inc. v. Salvino, Inc., 542 F.3d 290, 334-41 (2d Cir. 2008) (Sotomayor, J., concurring); *see supra* notes 99-102 and accompanying text.

130. NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85 (1984).

the exclusive rights to use league clubs' trademarks in connection with particular products. For example, offering licenses with the same terms (including appropriate quality control provisions) to two or more competing companies to produce and sell merchandise bearing or incorporating league clubs' trademarks.[131]

IV. CONCLUSION

Almost forty years later, the intersection of federal trademark and antitrust law arising out of the *Dallas Cap* litigation has come full circle. It is the genesis of professional sports clubs' individual trademark monopolies that are lawful under the Lanham Act. This litigation presented courts with the first opportunity to consider whether collective exclusive licensing of league club trademarks violates section 1 of the Sherman Act. Now it is clear that collective trademark licensing by professional sports clubs is subject to judicial scrutiny under section 1. In most instances the procompetitive benefits of collective exclusive licensing of league club trademarks (for example, reduced transactions costs, efficiencies that facilitate the production and retail availability of merchandise bearing or incorporating multiple club trademarks, and enhanced competitive balance among league clubs) outweigh its relatively small incremental anticompetitive effects beyond the adverse consumer welfare effects of individual club trademark monopolies. However, collective exclusive product category licensing has significant anticompetitive effects (for example, reduced product availability and higher retail prices) without readily apparent offsetting procompetitive benefits for consumers. To minimize the consumer harm caused by the extension of trademark law protection beyond its traditional boundaries, which creates lawful individual club trademark monopolies, antitrust law should invalidate collective exclusive product category licensing under the quick-look rule of reason to ensure that consumers receive the benefits of competition among licensees manufacturing and selling league clubs' trademarked merchandise.

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131. This is a better alternative than permitting individual clubs to license their respective trademarks and retain a sufficient percentage of the royalties to provide an economic incentive to engage in licensing because it may "be an impossible task to determine accurately how much each individual team must keep to maintain sufficient incentive to sell competitively, and how much must be shared in order to maintain a sufficient level of [league-wide] competitive balance." Gary R. Roberts, *The Legality of the Exclusive Collective Sale of Intellectual Property Rights by Sports Leagues*, 3 VA. J. SPORTS & L. 52, 71 (2001).