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American Needle, Inc. v. National Football League

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In *American Needle, Inc. v. National Football League*, 130 S.Ct. 2201 (2010), the Supreme Court held that the NFL acting through its incorporated subsidiary NFL Properties, Inc. (NFLP) was not a single entity but rather a combination of its 32 individual member teams for purposes of the plaintiff's antitrust challenge to an exclusive licensing agreement. The teams had licensed their trademarks and insignia exclusively to NFLP, which then issued a single exclusive license for the production of logo-bearing caps to Reebok, thus ousting American Needle or anyone else from producing NFL caps.

The *American Needle* decision could conceivably rest on alternative rationales for its separate entity conclusion. These are (1) the teams are separately owned profit centers capable of competing with each other; (2) the particular agreement challenged in this case restrained the ability of the teams to market their IP rights individually; (3) the teams themselves made the decision to combine their IP rights and enter an exclusive agreement.

The Supreme Court's decision depends on propositions (1) and (2) but not proposition (3). Indeed, the question of who actually "controlled" NFLP's decision making was not all that important. Rather, the relevant question was who is controlled. Both lower courts had strongly emphasized control and so did the NFL in its main brief to the Supreme Court. The district court observed that the individual teams had placed their intellectual property rights in trust to NFL properties, and that there was no evidence that this organization had ever "dealt with any of the teams as independent organizations." 496 F.Supp.2d at 944 (N.D.Ill. 2007). The Seventh Circuit repeated that point. See 538 F.3d 736, 740-741 (7th Cir. 2008). The NFL's merits brief to the Supreme Court emphasized that "[v]irtually every significant decision about the production and promotion of NFL Football is controlled by the League" rather than the individual teams. Brief for Respondents, 2009 WL 3865438 (Nov. 17, 2009).

For the Supreme Court, however, the important question was not who controlled NFL Properties. Rather it was that NFLP was making decisions regarding "the teams separately owned intellectual property." 130 S.Ct. at 2215. The Court did note that each of the teams owned a share in NFLP and that they had agreed to cooperate in setting up the NFLP in order to exploit their IP rights; however, without that agreement "there would be nothing to prevent each of the teams from making its own maket decisions…." Id. at 2214.

The Supreme Court also quoted the Ninth Circuit's observation that "[a]lthough the business interests of" the teams 'will often coincide with those of the" NFLP "as an entity in itself, that commonality of interest exists in every cartel.'" 130 S.Ct. at 2215, quoting *Los Angeles Memorial Coliseum Comm'n v. NFL,* 726 F.2d 1381, 1389 (9th Cir. 1984). The Ninth Circuit's observation suggests the importance of who is controlled rather than who does the controlling. A cartel seeks to maximize the profits of the cartel group as a whole. By contrast, individual members of the cartel seek to maximize their own individual profits, which they can do by undercutting the cartel, typically by producing more than its cartel output assignment or by charging less than the cartel price. The question of competitive harm does not depend on who makes the day to day price and output decisions, but rather on the cartel manager's ability to force its price and output decisions upon the individual members.

In sum, the NFL arrangement is potentially anticompetitive not because the individual teams had control, but rather because they lacked it. If each team had relevant control it could have deviated from the price or output decisions of the group – that is, it could have cheated on any cartel agreement, something that would tend to make the cartel fall apart. For example, if the agreement between NFLP and Reebok had been nonexclusive, preserving each team's individual right to license its IP separately, our concerns about competition would have been much less. The fact that the individual teams lacked the power to do this meant that the central organization could much more effectively control the conduct of the individual members. NFLP as an entity became a very effective cartel management device precisely because under the arrangement the individual teams lacked the power to make their own agreements on the side.

The managers of a business corporation are charged with maximizing the value of the firm, which is to say that they have the same charge as the manager of a cartel. Individual shareholders might want to do different things, pushing the firm in different directions, but ultimately the duty that befalls corporate managers is to maximize the firm's value. Consider the reorganizations of the MasterCard and Visa bank card associations. Historically, the organizations were formed as joint ventures among card-issuing banks, but the banks themselves had both separate ownership and significant business outside the MasterCard or Visa ventures. Under this structure both the Visa and MasterCard joint ventures had conspiratorial capacity, and they faced antitrust litigation aimed at a variety of practices, including an agreement under which member banks in each venture were forbidden from issuing competitors' cards, but with an exception for one another. This restraint on the issuing of others' cards was unsuccessfully challenged by Discover as a concerted refusal to deal. Later litigation by the United States government proved more successful, however. There have also been challenges to card issuer agreements setting the interchange and merchant acceptance fees that finance credit card transactions, and to the "all cards" policy that requires those accepting Visa or MasterCard credit cards to take that firm's debit cards as well.

Today both MasterCard and Visa have substantially reorganized, changing their structure from a contractual joint venture agreement among independent issuing member banks to a corporation in which these issuing banks are major shareholders with very limited voting rights. For example, in the MasterCard venture Class A shares, with full voting rights, were issued to the public in an IPO and are publicly traded. Banks that issue MasterCards are not permitted to hold Class A shares, however, at least for a defined time period. Issuing banks hold Class B shares, which have no voting rights and class M shares, which have no voting rights with respect to routine business, although they do have veto power over major transactions that affect the structure of the firm. The Visa structure is roughly similar.
These seemingly odd schemes stand the dual class voting structure found in some corporations on its head. Typically when a corporation has two classes of voting shares the intent is to give insiders a greater amount of control than other shareholders have. Very likely the inverted structure was

designed to transform MasterCard and Visa into single entities, with “control” vested in the nonbusiness shareholders while the principal stake holders were merely “controlled.” But if that was the purpose, *American Needle* makes clear that it almost certainly failed. The all important question is not Who votes on day-to-day business, but rather, Whose decisions are controlled. To the extent that collusive anticompetitive activity is part of the plan – and this post does not suggest that it is — the managers of MasterCard and Visa have incentives that are aligned in precisely the same way as the managers of an efficient cartel are aligned. They do not have to worry about the deviating, potentially cartel-upsetting actions of individual card-issuing banks because these banks lack control.

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