

Antitrust News & Notes

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DOJ and FTC File Joint Amicus Brief in *American Needle, Inc. v. National Football League*

By Robert Boxie

Amicus briefs were recently filed in the high-profile case of *American Needle, Inc. v. National Football League*, No. 08-0661 (U.S. S.Ct.), urging the United States Supreme Court to reevaluate the decision of the U.S. Court of Appeals for the Seventh Circuit. The court of appeals held that Respondent NFL and its member teams, acting through the National Football League Properties (NFLP), functioned as a “single entity” as articulated in *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984), for purposes of Section 1 of the Sherman Act, in the licensing and marketing of the teams’ trademarks, logos, and other intellectual property. Petitioner American Needle, Inc., whose 20-year headwear license with the NFL had not been renewed, challenged the actions of the NFL as violating Section 1, which prohibits concerted action unreasonably in restraint of trade, in granting exclusive headwear licenses to petitioner’s competitor, Reebok International, Ltd. (Reebok). The briefs, one filed jointly by the Department of Justice (DOJ) and the Federal Trade Commission (FTC) and the other by the American Antitrust Institute and the Consumer Federation of America, are in support of petitioner American Needle.

Back in 1963, the NFL and its member teams, in order to promote the NFL brand and further the success of the league as a whole, formed the NFLP and granted it the exclusive right to award licenses to vendors to exploit the teams’ intellectual property — i.e., logos, trademarks — which each

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team separately owns, and to manufacture and sell various consumer products.

For many years, the NFLP granted headwear licenses to multiple vendors, including American Needle, allowing them to manufacture and sell baseball caps and hats bearing the teams’ marks and logos. American Needle had an NFL headwear license for over 20 years, but in December 2000, authorized by a vote from the teams, the NFLP entered into an agreement with Reebok whereby Reebok became the exclusive headwear licensee for the next 10 years. NFLP did not renew American Needle’s headwear license or the licenses of other headwear vendors.

Responding to the loss of its license, American Needle filed an antitrust action against the NFL, NFLP, the individual NFL teams, and Reebok (collectively, “respondents”). In their complaint, they alleged that the NFLP’s decision to enter into an exclusive headwear license with Reebok and collectively market their intellectual property violated sections 1 and 2 of the Sherman Act. See 15 U.S.C. Section 1 (prohibiting any “contract, combination . . . or conspiracy, in restraint of trade”) and Section 2 (prohibiting monopolies). In reply, the NFL respondents argued that they were a single

economic enterprise incapable of conspiring with one another within the meaning of the antitrust laws, at least with respect to collectively licensing their marks and logos as a means of promoting their entertainment product — NFL football games.

At the trial level, the district court permitted limited discovery on whether the NFL functioned as a “single entity” in licensing its marks and logos, and thereafter, granted summary judgment to them on their Section 1 claims. The district court found that the NFL and its teams act as a “single entity” in licensing their intellectual property, reasoning “in that facet of their operations they have so integrated their operations that they should be deemed to be a single entity rather than joint ventures cooperating for a common purpose,” in promoting the NFL.¹

The Seventh Circuit affirmed. In its ruling, the court acknowledged the difficulty in categorizing professional sports leagues like the NFL, stating that “in some contexts, a league seems more aptly described as a single entity immune from antitrust scrutiny, while in others a league appears to be a joint venture between independently owned teams that is subject to review under [Section] 1.”² The court framed the question of whether a sports league is a single entity by looking “not only one league at a time, but also one facet of a league at a time,” and limited its review to the actions of the NFL “as they pertain to the teams’ agreement to license their intellectual property collectively via NFLP.”³ The court agreed that in making a single-entity determination, courts must examine whether the conduct in question deprives the marketplace of the independent sources of economic control that competition assumes. The court nevertheless concluded that even if “the several NFL teams could have competing interest regarding the use of their intellectual property that could conceivably rise to the level of potential intra-league competition, those interests do not necessarily keep the teams from functioning as a single identity.”⁴ Relying on its own

precedent, the court reasoned that the NFL teams can function as one source of economic power when collectively producing NFL football in competing against other forms of entertainment and in licensing their intellectual property, as they have been doing so since 1963, and found no Section 1 violation.⁵

At the heart of this case is the “separate entities” requirement as expressed in *Copperweld* and its applicability to the NFL. In *Copperweld*, the Court held that a parent corporation and its wholly-owned subsidiary are a “single enterprise” for antitrust purposes, concluding that the parent-subsidiary relationship does not yield the anti-competitive risks that the Sherman Act was designed to prevent because there is a “complete unity of interest.”⁶

The *amicus* brief, relying on Supreme Court precedent, makes a compelling case for, in the very least, a remand of the Seventh Circuit’s decision. The DOJ/FTC brief takes a functional approach to the issue of “single entity” status, noting the difficulties in analyzing hybrid organizations like the NFL to the extent that they have merged certain aspects of their operations. They urge the Court to vacate the judgment of the Seventh Circuit and remand the case back to the lower courts for a more complete analysis (and development of the record) of American Needle’s claim under Section 1 and the NFL’s licensing agreement. The brief rejects the positions of both parties. American Needle’s primary argument is that Section 1 applies to all agreement between separately owned and controlled entities and that the challenged agreement is the very essence of concerted activity by multiple entities, since it requires the approval of all 32 teams. The DOJ/FTC rejects such an inflexible standard because it does not take into account the unique nature of joint ventures like the NFL.

Similarly, the NFL’s position is that professional sports leagues should be deemed single entities and exempt completely from Section 1, at least with respect to core venture functions, notwithstanding that the venture participants are separately owned and may not always have a complete unity of interest. The DOJ/FTC also rejects this position because it cannot be supported on a record that did not fully consider the application of Section 1 as they

¹ *Am. Needle, Inc. v. New Orleans Louisiana Saints*, 496 F. Supp. 2d 941, 943 (N.D. Ill. 2007). The district court later granted summary judgment on American Needle’s Section 2 claim based on its earlier finding that the NFL and its member teams acted as a “single entity.”

² *Am. Needle, Inc. v. Nat’l Football League*, 538 F.3d 736, 741 (7th Cir. 2008).

³ *Id.* at 742.

⁴ *Id.* at 743.

⁵ *Id.* at 744. The court of appeals also affirmed the district court’s rejection of American Needle’s Section 2 claims.

⁶ *Copperweld*, 467 U.S. at 771.

relate to this specific agreement and the NFL and its member teams, and any exemptions from the statute are better addressed in Congress as opposed through judicially-created ones.

The DOJ/FTC proposes its own test to determine whether the NFL and its teams act as a “single entity.” Single-entity treatment is appropriate if and only if (1) the teams and the league have effectively merged the relevant aspect of their operations, thereby eliminating actual and potential competition among the teams and between the teams and the league in that operational sphere, and (2) the challenged restraint must not significantly affect actual or potential competition among the teams or between the teams and the league outside their merged operations.

The Court may choose to decide the question of “single entity” status on narrow grounds, looking only at the particular activity of the league in licensing its products. It could also, however, take a broader view, looking at the NFL as a whole and decide a new test for (or an expansion of) the “single-entity” doctrine. The Supreme Court’s decision in this case could potentially bring clarity to an area that has long been clouded by differing interpretations of the scope of Section 1 as they relate to the activities of the NFL and other professional sports leagues. ■

Justice Department Puts the Brakes on Google Books Settlement, Citing Antitrust Concerns

By Kathryn Codd

Google is facing continued antitrust scrutiny, as the Department of Justice filed a Statement of Interest objecting to Google’s proposed settlement of a class action suit pertaining to its Google Book Search Project. The Google Book Search Project began in 2004 as the Google Print Library Project, a collection of partnerships with publishers and libraries to digitize their print collections.⁷ The project expanded over time to include expanded partnerships, search features, and other digital interactive technologies.

⁷ History of Google Books, www.books.google.com/intl/en/googlebooks/history.html.

In 2005, however, the Authors Guild and the Association of American Publishers brought a class action suit against Google in the United States District Court for the Southern District of New York, claiming that scanning books for use in the Google books collection violated copyright laws.⁸ Google released a proposed settlement of the class action suit in October 2008. The proposed settlement would require Google to pay \$125 million in exchange for rights allowing Google to display books online and profit by selling access to individual texts or subscriptions to the collection.⁹ Under the settlement, the profits from such sales would be shared with authors and publishers.

Critics of Google’s proposed settlement include the Open Book Alliance, in which Amazon, Microsoft, and Yahoo participate.¹⁰ These critics argue that the settlement raises significant antitrust concerns, claiming that Google would hold an exclusive license to orphan books — those whose authors or copyright holders cannot be located — which would allow Google to control price and access to the collection. Further, those competitors without access to orphan works could not compete in the digital library marketplace.

The Department of Justice filed its Statement of Interest in the proposed settlement on September 18, 2009.¹¹ The Justice Department’s concerns with the proposed settlement, in addition to those expressed by critics, are threefold. First, the settlement appears to require that publishers and authors agree to an industry-wide revenue sharing formula that would be applicable to all works in the collection.¹² At present, publishers compete over the terms by which they sell books to distributors, including Google. The Justice Department indicated that this competition could be

⁸ Miguel Helft, *Justice Dept. Opens Antitrust Inquiry Into Google Books Deal*, NEW YORK TIMES, Apr. 29, 2009, at B5.

⁹ *Justice Department, States Object to Google Book Search Settlement*, 1118 TRADE REGULATION REPORTS 3 (CCH 2009).

¹⁰ Terry Frieden, *Justice Department urges court to reject Google book deal*, CNN.com, Sept. 19, 2009, www.cnn.com/2009/TECH/09/19/google.books/.

¹¹ Statement of Interest of the United States of America Regarding Proposed Class Settlement, *The Authors Guild, Inc. et al. v. Google Inc.*, 1:05-cv-08136-DC (S.D.N.Y. Sept. 18, 2009).

¹² *Id.* at 19-20.

drastically reduced or eliminated by the settlement's proposal of a fixed royalty rate.

Second, the Justice Department expressed concern that the proposal requires Google to set default prices for books governed by the settlement.¹³ Such an arrangement also restricts Google's ability to provide discounted prices.

Finally, the proposed settlement gives publishers who participate in the Google Book Search Project the ability to control prices for orphan books.¹⁴ Because these publishers distribute works for which the rightsholders are typically known, the settlement effectively gives them the right to set the prices at which some of their competitors' books — those of unknown rightsholders — are sold. The Justice Department noted that the settlement may incentivize publishing companies to set the prices of orphan books too high to compete with those books distributed by the publishers, thereby reducing competition.

The Justice Department ultimately recommended that the district court reject the proposed settlement in its current form.¹⁵ It did express its support, however, for greater distribution of and access to copyrighted works, including orphan works.¹⁶ With this in mind, the Justice Department encouraged the parties involved to continue negotiating modifications to the proposed settlement to address the legal concerns.¹⁷ ■

FTC and DOJ Announce Plans to Review the Horizontal Merger Guidelines

By Armita Cohen

On September 22, 2009, the Federal Trade Commission (FTC) and the Department of Justice (DOJ) announced plans to review and update the government's Horizontal Merger Guidelines (the "Guidelines"). As part of this review, the agencies will solicit public comments on the existing Guidelines and hold a series of public workshops to discuss possible revisions to the Guidelines. If the

Guidelines are updated, this would be the first revision to the Guidelines in 17 years.

The government's announcement is not surprising given the Obama administration's pledge to take a tougher stance on mergers. The Guidelines set forth the framework and standards the government uses in analyzing the competitive effects of horizontal mergers and acquisitions, and are relied upon by courts interpreting federal antitrust laws, including Section 7 of the Clayton Act, Section 1 of the Sherman Act, and Section 5 of the Federal Trade Commission Act; although they were last revised in 1992. FTC Chairman Jon Leibowitz commented that the Guidelines explicitly state that they are to be revised from time to time and that "the time has come" to review and update the Guidelines. Accordingly, the purpose of the workshops is to determine whether the Guidelines reflect the agencies' current enforcement practices and are in line with current economic and legal conditions.

The FTC posted a series of questions on its website to guide public discussion on the Guidelines and has solicited written comments in response to these questions. Commentators are asked to consider these questions from two perspectives: whether revisions to the areas in question result in Guidelines that are more in line with actual enforcement practices and whether revisions will result in a more efficient merger review process. Workshop participants will be selected in part based on the written comments the government receives in response to these questions.

Assistant Attorney General Christine A. Varney of the Antitrust Division of the DOJ commented that the agencies intend to retain the basic "hypothetical-monopolist" test in defining relevant markets and the Herfindahl-Hirschman Index (HHI) to measure market concentration. Varney also stated, however, that the agencies are interested in receiving comments on how the HHI thresholds could be made more useful to businesses.

The agencies are also interested in receiving comments on the following broad topics: market definitions, market concentration, and competitive effects. With respect to market definitions, the agencies are interested in

¹³ *Id.* at 21-22.

¹⁴ *Id.* at 22.

¹⁵ *Id.* at 27.

¹⁶ *Id.* at 1.

¹⁷ *Id.* at 4.

receiving comments on whether the Guidelines should be revised to include a more detailed discussion of how the hypothetical-monopolist test for market definitions is applied. The agencies are also accepting comments on whether the definition of geographic market should be revised so that the market is defined by the location of customers rather than the site of production.

As for market concentration, the agencies are seeking comment on how market shares and market concentration should be measured in changing markets. Individuals have also been asked to comment on whether the Guidelines should be revised to more fully explain how the government uses evidence about anti-competitive effects that are not based on market concentration. For example, the agencies have asked how the government should treat historical evidence of actual or attempted coordination in an industry.

Finally, with respect to competitive effects, the agencies intend to review existing guidelines regarding unilateral effects in markets with differentiated products, the vulnerability of consumer groups to price discrimination, whether the government should consider the non-price effects of mergers in evaluating a transaction, and the

use of direct evidence that is not based on inferences drawn from increases in market concentration, such as evidence of the post-merger competitive effects of consummated mergers.

The agencies will host the first series of the public workshops on December 3, 2009, in Washington, DC. Subsequent workshops will be held in Chicago, New York City, and San Francisco, with a final workshop being held in Washington, DC, on January 26, 2010. The FTC has provided details about commenting on the Guidelines and attending the Workshops on its website at www.ftc.gov/bc/workshops/hmg/index.shtml. ■

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