AMERICAN NEEDLE UPON REMAND

Yifei He∗

∗ Yifei He: B.A., McGill University; J.D., University of Connecticut School of Law. I would like to thank Lewis S. Kurlantzick for his insight and guidance. I would also like to thank my family and friends for their support and encouragement. Finally, I would like to thank the Editorial Staff of Seton Hall Journal of Sports & Entertainment Law for their selection of my Article for publication.

INTRODUCTION

The National Football League (NFL) is a joint venture, comprised of thirty-two independently owned and operated football teams. Other than on-field competition, there is also extensive off-field competition between the teams. Each team owns its independent trademarks, creating the potential for economic competition over the sale of team merchandise.

Since 1963, however, under an agreement with National Football League Properties (NFLP),[1] each NFL team has given up the rights to trademark its team merchandise and to compete over the sale of merchandise. Under the collective agreement, NFLP has been solely responsible for licensing and marketing the trademarks and logos of each team.

The NFLP arrangement is neither new nor unique to the professional football industry. Virtually all teams in American professional sports leagues, such as Major League Baseball, the National Basketball Association, and the National Hockey League, also designate their trademark and marketing rights to a central licensor.[2]

In 2002, however, NFLP broke from the industry norm. While other central licensors tolerate the existence of multiple licensees, NFLP signed an exclusive $250 million, ten-year agreement with Reebok,[3] granting this sports apparel giant the exclusive right to license the NFL logo for use on sports paraphernalia.[4]

NFLP renewed its agreement in 2012, granting Nike and

1. National Football League Properties, whose predecessor is the National Football Trust, is the central merchandising and licensing arm of the NFL.

2. Other central licensing entities include Major League Baseball Properties, National Basketball League Properties, and National Hockey League Properties.

3. Ken Belson, *Nike to Replace Reebok as N.F.L.'s Licensed-Apparel Maker*, N.Y. TIMES (Oct. 12, 2010), http://www.nytimes.com/2010/10/13/sports/football/13nike.html?_r=0.

4. Dennis Dillon, *NFL Getting Ready to Transition to New Nike Era for Apparel*, SPORTS ILLUSTRATED (April 2, 2012), http://sportsillustrated.cnn.com/2012/*writers/dennis_dillon/04/02/nike/index.html.*

New Era an exclusive five-year contract to manufacture NFL uniforms and headwear. Subsequently, the NFL went on to ruthlessly police its contracts, adopting policies requiring every professional athlete to display the "Nike" symbol prominently before and after every game.[5] For example, in August of 2013, the NFL fined Robert Griffin III, quarterback for the Washington Redskins, $10,000 for wearing a non-logoed tee-shirt during football practice.[6]

The greatest challenge to NFLP's practice came in 2007, when American Needle Inc. (ANI), one of the apparel manufactures precluded from the football licensing business, alleged that NFLP's agreement with Reebok violated §1 of the Sherman Act.[7] In the ensuing litigation, both the U.S. District Court for the Northern District of Illinois, as well as the Seventh Circuit Court of Appeals summarily dismissed ANI's challenge. With respect to their licensing practices, the courts held that the NFL and its thirty-two teams are, "in the jargon of antitrust law, acting as a single entity."[8] Therefore, there cannot be a "joining of . . . independent sources of economic power previously pursuing separate interests."[9]

Granting certiorari in 2010,[10] the United States Supreme Court reversed and held that the NFL's licensing activities constitute concerted action subject to Sherman Act scrutiny.[11] The Court then remanded *American Needle* to the lower courts, which must now determine whether NFLP's agreement to market collectively, combined with the agreement to designate an exclusive licensee, violates §1 of the Sherman Act.[12]

Focusing on this point of contention, this Article will

---

5. Chris Yuscavage, *Robert Griffin III Refused to Wear Nike Before a Game For the Second Straight Week Yesterday*, COMPLEX SPORTS (Sept. 17, 2012), http://www.complex.com/sports/2012/09/robert-griffin-iii-refused-to-wear-nike-before-a-game-for-the-second-straight-week-yesterday.

6. Kareem Copeland, *Robert Griffin III Fined $10K by NFL for Postgame Gear*, NFL (Dec. 19, 2012), http://www.nfl.com/news/story/0ap1000000113955/article/robert-griffin-iii-fined-10k-by-nfl-for-postgame-gear.

7. The Sherman Act states that, "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce. . .is declared to be illegal." Sherman Act 15 U.S.C. §1 (2004).

8. Am. Needle v. Nat'l Football League, 560 U.S. 183, 184 (2010).

9. *Id.* at 196.

10. *Id.* at 189.

11. *Id.* at 202.

12. *Id.*; *see infra* Part III for a detailed Rule of Reason analysis.

critically evaluate NFLP's provisions under the Sherman Act. The analysis will be divided into three main parts. Part I analyzes the threshold inquiry of whether there exists market power in the market for licensing intellectual property of the NFL. Part II advocates a quick-look inquiry for ruling NFLP's provisions anticompetitive. Part III applies the rule of reason to the NFLP restrictions, noting that the anticompetitive harms substantially outweigh any procompetitive benefits and suggesting less-restrictive alternatives. Finally, this Article concludes that the current NFLP provisions pose serious harms and should be rendered illegal under § 1 of the Sherman Act.

I. MARKET POWER

It is imperative that ANI determine the existence of market power in order to characterize the NFL's agreement as a direct violation of the Sherman Act. market power ordinarily is inferred from the seller's possession of a predominant share of the market,[13] and has been defined as "the ability of a single seller to raise price and restrict output."[14] Market power is a threshold filter, because it prevents plaintiffs from pursuing a case where the defendant is unable to cause anticompetitive effects in the relevant market.[15] Only restraints that present a real possibility of anticompetitive behavior will be subject to rule-of-reason scrutiny.[16]

Applying the concept of market power, and in demonstrating the potential for anticompetitive effects, ANI must show that NFL teams exercise market power over some aspect of trademark licensing.[17] In support of its claim, ANI can demonstrate either direct evidence of market power through increased prices or secondary evidence of market power through expert findings of a narrow relevant market

13. Eastman Kodak v. Image Technical Servs., 504 U.S. 451, 464 (1992).

14. U.S. v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 391 (1956).

15. Tim Hance, Note, *Threading* American Needle*: Defining a Narrow Relevant Market for Rule of Reason Analysis in Sports Antitrust Cases*, 11 VA. SPORTS & ENT. L.J. 247, 250 (2011).

16. Gabriel Feldman, *The Puzzling Persistence of the Single-Entity Argument for Sports Leagues*, 2009 WIS. L. REV. 835, 840-41 (2009).

17. Market power is defined as "the power to control prices or exclude competition." *E.I. du Pont de Nemours*, 353 U.S. at 592.

for NFL licensed apparel.[18]

A. Direct Evidence of Market Power

In furthering its antitrust suit against the NFL, ANI can use direct evidence to show market power. Specifically, ANI can argue that, since the advent of the exclusivity agreement with Reebok in the early 2000s, NFL sports gear has increased in price.[19] In fact, a 2006 article demonstrates that the price of NFL headwear increased in the early 2000s.[20] The price of NFL clubs' replica jerseys also increased in price from 2002 to 2003.[21]

However, there are drawbacks in using direct evidence of price increases to demonstrate market power. Relying on such evidence may conflate collective conduct with exclusionary conduct.[22] While collective conduct is not illegal, as most sports leagues designate central entities to exploit collective intellectual property rights, exclusive conduct, in which the central entity further designates a sole licensee, is illegal.[23] Here, ANI's argument relies on data combining NFL's exclusionary conduct, which began in 2000 with its concerted conduct, which began in 1963.[24] Hence, the price increase from the early 2000s might not be a direct result of NFLP's exclusionary conduct.[25] Therefore, the price increase may not necessarily illustrate a joining of economic interests in a manner that illegally restrains trade under § 1 of the Sherman Act.[26]

18. 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,* 16 STAN. J.L. BUS. & FIN. 183, 204 (2011).

19. *Id.* at 205.

20. NFL gear increased in price from $19.99 to $30.00. *Id.*

21. *Id.*

22. Edelman, *supra* note 18, at 204; Michael A. Carrier, *The Rule of Reason: An Empirical Update for the 21st Century*, 16 GEO MASON L. REV. 827, 830 (2009).

23. *See* Matthew J. Mitten, *From Dallas Cap to American Needle and Beyond: Antitrust Law's Limited Capacity to Stitch Consumer Harm from Professional Sports Club Trademark Monopolies*, 86 TUL. L. REV. 901, 927 (2012); *see also infra* Part II, Section B, Subpart 1.

24. Edelman, *supra* note 18, at 204.

25. *Id.*; *see infra* Part II for a discussion of the distinction between NFLP's exclusionary conduct and its concerted conduct.

26. Edelman, *supra* note 18, at 205.

B. Secondary Evidence of Market Power

ANI can also use secondary evidence to illustrate market power by defining a narrow product market. Reason being, evidence of competitive effects can be informative regarding market definition, "just as market definition can be informative regarding competitive effects."[27] Competitive effects will be magnified in a narrower market as opposed to a broader one. Thus, in order to determine the extent of the harms stemming from NFLP's restrictions, ANI must determine the size of the market affected.[28]

Here, NFLP has restricted the entire market for the licensing of intellectual property to be used for professional football paraphernalia. Accordingly, NFLP's restrictions will be deemed anticompetitive if there is a narrow product market suited for professional football merchandise alone.[29] If, on the other hand, the market is so broad that NFLP cannot alter the "interaction of supply and demand,"[30] then its restrictions will not be deemed anticompetitive.

Applying the concept of secondary market power to successfully argue for a narrow product market, ANI must show that NFL-licensed paraphernalia constitutes a unique market and that there are no substitutes available.[31] ANI will succeed if there is a class of consumers who choose to purchase only NFL merchandise at the expense of all other entertainment products. As a result of NFLP's restrictions on the market for NFL merchandise, significant competitive harm has been imposed.[32]

By contrast, to argue for a broad product market, NFLP must show that there is no unique consumer market for NFL merchandise.[33] NFLP must show that the relevant market is that of the broader sports or entertainment product market.[34] When viewed in this context, the NFLP's restrictions would pose little to no competitive harm.

27. *Id.*

28. U.S. DEPT. OF JUSTICE & FED. TRADE COMM'N, § 2, HORIZONTAL MERGER GUIDELINES (2010).

29. Hance, *supra* note 15, at 253.

30. Nat'l Collegiate Athletic Ass'n v. Bd. of Regents, 468 U.S. 85, 98 (1984).

31. Edelman, *supra* note 18, at 206.

32. Major League Baseball Props., Inc. v. Salvino, Inc., 542 F.3d 290, 330 (2d Cir. 2008).

33. *NCAA*, 468 U.S. at 94.

34. Edelman, *supra* note 18, at 206.

Determining whether NFL teams compete with one another or with the broader entertainment market will be dispositive of the issue of market power.[35] If a narrow product definition can be established, ANI will have established the requisite market power to succeed in its suit against the NFL. The following sections will advocate for a narrow product definition based on an assessment of the relevant parameters such as practical observations as well as legal precedents evidencing a narrow product market.

1. Practical Observations

ANI could successfully argue for a narrow product definition based on the practical observation that sports teams compete directly with other franchises in their same league and region. Such observations indicate the existence of many "die-hard" football fans who root for specific NFL franchises. Such fans purchase intra-league products of the NFL rather than products of other sports leagues.[36] In turn, this selective consumer market for NFL merchandise implies the existence of a narrow product market.

On a regional basis, for example, within the geographic submarket of New York/Northern New Jersey, a football fan's closest substitute to a New York Giants cap would be a New York Jets cap, rather than a cap from another sports league, such as a New York Yankees cap.[37]

Furthermore, in regions with multiple NFL teams, such as the San Francisco Bay Area, where the San Francisco 49ers and Oakland Raiders play in close proximity, both teams are accessible to most fans.[38] Football fans would likely view 49ers and Raiders products as perfect substitutes, choosing one team over the other. Therefore, the 49ers and the Raiders would most likely compete for retail space in the San Francisco area.[39]

Finally, in regions where no local NFL teams exist, the range for competing NFL merchandise is even broader. On a national scale, NFL teams compete in a single product market

35. Hance, *supra* note 15, at 256.
36. Edelman, *supra* note 18, at 207.
37. *Id.* at 208.
38. *Id.*
39. Also, the Jacksonville Jaguars and Tampa Bay Buccaneers are two franchises within a 140-mile radius of one another. *Id.*

limited to the teams' individual logos.[40] This competition is based upon the teams' on-the-field performance, logo, and color scheme.[41] The Dallas Cowboys, with their winning tradition, frequently compete nationally with other championship teams such as the Bears, Packers, Steelers, and Raiders for fans and merchandise sales.[42]

2. Precedent Challenges

While courts have not evaluated whether NFL sports merchandise constitutes a narrow product market, challenges have been brought and could serve as a useful basis for ANI's antitrust lawsuit.[43] Indeed, plaintiffs have succeeded in arguing for unique, niche product markets catering to fans of specific sports.[44] Ultimately, ANI should look towards complaints that were filed by Jerry Jones of the Dallas Cowboys and George Steinbrenner of the New York Yankees as guidance in pursuing an antitrust lawsuit against the NFL.

In 1996, in *Dallas Cowboys v. National Football League Trust*,[45] Dallas Cowboys Owner Jerry Jones brought an antitrust suit against NFLP.[46] Jones argued for a narrow product market – that the trademarking rights for NFL merchandise "have no close substitutes and are not reasonably interchangeable in use with any other products or rights . . . ."[47] In the absence of NFLP, NFL member clubs

40. *Id.* at 209.

41. *Id.*

42. Denise Gellene, *It's Getting Easier Being Green . . . for Merchandisers*, L.A. TIMES, Jan. 25, 1997 (noting how Green Bay Packers merchandise sales increased dramatically as a result of the team's Superbowl appearance, strong history, and rich tradition); c.f. Jeff Duncan, *Delhomme Gambling on Starting Job: QB Left Saints, Home on a Mission to Find More Playing Time with Panthers*, NEW ORLEANS TIMES PICAYUNE, Jul. 20, 2003, at 3 (noting how Cowboys merchandise previously comprised of 30% of the NFL apparel market).

43. *See e.g.* Amended Complaint for Damages and Injunctive and Declaratory Relief, Dallas Cowboys v. Nat'l Football League Trust, No. 95 Civ. 9426 (2d Cir. 1996), 1996 WL 34473933.

44. *See e.g.* Int'l Boxing Club of N.Y. v. U.S., 358 U.S. 242 (1959); NCAA v. Bd. of Regents, 468 U.S. 85 (1984).

45. Amended Complaint, *supra* note 43, at ¶ 33.

46. Jones' antitrust Complaint alleged that NFLP prevented the individual NFL teams from independently exploiting their own trademarks. However, the *Dallas Cowboys* case settled before trial and before the issue of market power was could be directly addressed by the court. *Id.*

47. *Id.* at ¶ 26.

would compete with one another in the professional football merchandise market.[48]

Similarly, in 1997, George Steinbrenner sued MLBP to gain more control over the Yankees' intellectual property.[49] Like Jones, Steinbrenner alleged the existence of a narrow market reserved exclusively for the licensing of professional baseball products.[50] MLBP's restraint prevented each Club from competing with one another in the market for baseball licensing.[51] Without MLBP, the Yankees could market its own popular and distinctive "NY" brand and negotiate independent contracts with licensees.[52]

However, both Jones's and Steinbrenner's cases settled before the issue of market power was reached.[53] Thus, the Court did not make a determination as to whether Jones's or Steinbrenner's market characterizations were accurate. By contrast, the Supreme Court did reach the market power issue in *International Boxing Club of New York v. U.S.*[54] Here, the Supreme Court drew a definitive distinction between championship-boxing matches and regular boxing matches.[55] By comparing and contrasting revenues generated and consumer and supplier demand for championship versus regular boxing matches, the Court found that championship-boxing is uniquely attractive to fans and constitutes a "separate, identifiable market."[56] *International Boxing Club* therefore shows that courts will draw distinctions in market power, and thereby find separate identifiable markets, where there are different levels of demand for products in that market.

Likewise, in *NCAA v. Board of Regents*,[57] the Supreme Court drew another distinction as to the factual

48. Hance, *supra* note 15, at 273.

49. *See* Complaint Preliminary and Permanent Injunctive Relief, N.Y. Yankees v. Major League Baseball Enter., No. 97-1153-civ-T-25B (M.D. Fla. 1997), *available at* http://www.ncbusinesscourt.net/FAQ/plaintiff/COMPLAINT.htm.

50. *Id.* at ¶ 62.

51. *Id.*

52. *Id.* ¶¶ 29, 63.

53. *See* Hance, *supra* note 15, at 273.

54. Int'l Boxing Club of N.Y. v. U.S., 358 U.S. 242 (1959).

55. The Court disagreed with the argument that "any boxing contest, whether championship or not, always includes one ring, two boxers and one referee, fighting under the same rules . . . . " *Id.* at 251.

56. *Id.* at 250.

57. Nat'l Collegiate Athletic Ass'n v. Bd. of Regents, 468 U.S. 85 (1984).

circumstances illustrating the existence of market power. The Supreme Court found that the broadcast market for college football is unique and differs from the market for other entertainment products. The Court held that there are no other products that are reasonably interchangeable with college football.[58] The NCAA's complete control over college football broadcasts supports the conclusion that the NCAA possesses market power with respect to those broadcasts.[59] The fact that advertisers would be willing to pay a premium price per viewer for fans of college football "is vivid evidence of the uniqueness of this product."[60]

In dicta, the Supreme Court compared the attributes of college football to professional football, concluding that professional football in the NFL also caters to a unique demographic.[61] While many attributes of college football are most similar to, and substitutable with those of professional football, the NFL does not broadcast on Saturdays in competition with college football.[62] Instead, NFL viewers typically watch on Sundays (whereas college football viewers watch on Saturdays) and advertisers have paid premium prices to capture audiences of both college and professional football.[63] As noted, these distinctions would support ANI's argument for a distinct product market for professional football.

3. Market Power Definition in the Context of Professional Baseball

Similar to the professional football context, there has been extensive analysis over the market power for professional baseball products. However, courts have failed to reach a definitive opinion on the proper product market definition for the sport of professional baseball. Ironically, rather than hurt ANI's arguments, the cases deficiencies and their attendant criticisms support ANI's argument for a unique market for professional football products.

58. *Id.* at 111.
59. *Id.*
60. *Id.*
61. *Id.* at 111 n. 47.
62. *See* 15 U.S.C. § 1293 (1961).
63. Hance, *supra* note 15, at 265.

Major League Baseball Properties v. Salvino,[64] a Second Circuit decision, is a rare instance where a court has reached a decision on the market for sports licensing. However, the court's decision is problematic in light of an evidentiary imbalance. Whereas the defendant, MLBP, chiefly relied on market definition to advance its litigation strategy, orchestrating numerous empirical studies to support a broad market definition,[65] the plaintiff, Salvino, failed to present sufficient evidence contesting the relevant market. Here, Salvino unsuccessfully argued for the application of a quick-look analysis, asserting that MLBP's anticompetitive effects clearly overshadowed the need for a detailed assessment illustrating market power.[66] The following section will discuss the *Salvino* case and the strengths and weaknesses in asserting an anti-trust claim under a quick look analysis.

a. Quick Look Analysis v. Rule of Reason for Establishing a Narrow Market

In *Salvino*, MLBP did not grant Salvino permission to use its trademarks, preventing it from manufacturing and selling a line of MLB branded "Bammers" plush toys.[67] In response, Salvino challenged the legality of the baseball clubs' agreement to collectively designate MLBP as the exclusive licensing agent of the MLB clubs.[68] Salvino claimed that the collective agreement to designate a central licensor was so anticompetitive that it should be deemed *per se* illegal under the Sherman Act[69] or illegal under a quick look analysis.[70]

Under a quick look analysis, the plaintiff's prima facie burden of proving market power is replaced with a presumption of competitive harm from the very nature of the challenged conduct.[71] Thus, the quick look analysis relieves

64. Major League Baseball Props. v. Salvino, Inc. 542 F.3d 290 (2d Cir. 2008).

65. *Id.* at 301.

66. *Id.* at 307.

67. MLBP sent Salvino a "cease and desist letter" after learning that Salvino sold Bammers to the Arizona Diamondbacks baseball club with the Diamondbacks logo on them. *Id.* at 295.

68. *Id.*

69. The District Court rejected the *per se* approach; noting the existence of pro-competitive benefits as mentioned in *BMI*. Procompetitive efficiencies include integration of sales, monitoring, and enforcement. *See id.* at 306-07.

70. *See infra* Section III.

71. *The Truncated or Quick Look Rule of Reason*, FEDERAL TRADE COMMISSION,

the plaintiff from having to prove the relevant market and the defendant's market power.[72] By contrast, under the rule of reason, the plaintiff has the burden of demonstrating that the challenged conduct has "an actual adverse effect on competition as a whole in the relevant market."[73] Therefore, characterizing the relevant market is "an indispensable ingredient,"[74] to finding a violation under the Sherman Act.[75]

Evaluating *Salvino*, the United States District Court of the Southern District of New York dismissed Salvino's arguments, because the anticompetitive effects of MLBP's agreement were not obvious.[76] Rather than a *per se* or quick look analysis, the court held that MLBP's restrictions should instead be subject to a rule of reason inquiry.[77] Under a rule of reason inquiry, the plaintiff must establish that the defendant possesses, "the requisite market power" and thus the capacity to inhibit competition market-wide.[78]

With respect to market power, MLBP asserted what Salvino criticized as the "self-serving view,"[79] that the relevant market is the broader entertainment market. With the help of its chief economic advisor, Franklin M. Fisher, MLBP conducted extensive market research studies that supported a broad definition of the relevant product market.[80] Relying on MLBP's studies, the district court ruled in favor of MLBP and held that "Salvino ha[d] failed to offer any evidence of MLBP's actual adverse effect on the market or its sufficient market power."[81]

On appeal to the Second Circuit, Salvino again pressed its

available at http://web.archive.org/web/20100604091202/http://www.ftc.gov/opp/jointvent/3Persepap.shtm (accessed by searching for Federal Trade Commission in the Internet Archive index).

72. *Id.*

73. Major League Baseball, Inc. v. Salvino Inc., 420 F.Supp.2d 212, 219 (S.D.N.Y. 2005)(quoting Capital Imaging Assocs. P.C. v. Mohawk Valley Med. Assocs., Inc. 996 F.2d 537, 543 (2d Cir. 1993)).

74. Chicago Prof'l Sports v. Nat'l Basketball Ass'n, 95 F.3d 593, 600 (7th Cir. 1996).

75. Hance, *supra* note 15, at 283.

76. "[A] casual observer could not summarily conclude that MLBP's arrangement has an anticompetitive effect on customers." *Salvino,* F.Supp.2d at 220.

77. *Id.*

78. *Id.* at 221 (quoting K.M.B. Warehouse Distribs., v. Walker Mfg. Co., 61 F.3d 123, 129 (2d Cir. 1995).

79. *Major League Baseball Props. v. Salvino, Inc.* 542 F.3d 290, 298 (2d Cir. 2008).

80. Hance *supra* note 15, at 276.

81. *Salvino,* 420 F.Supp.2d at 221.

argument that the court should find the collectivity agreements illegal *per se* or illegal under a "quick-look" analysis.[82] Salvino argued that, under the quick look analysis, the rule of reason can be applied in the "twinkling of an eye,"[83] because the anticompetitive harms of MLBP's restraints are so "intuitively obvious,"[84] that a demonstration of market power is unnecessary.[85] Thus, Salvino "dismisse[d] as immaterial MLBP's attempts to define the relevant market . . . ."[86] Salvino argued that the existence of a naked restraint on output and price should excuse it from having to prove market power and shifts the burden to MLBP to prove that the restraint has some competitive justification.[87]

Because Salvino contended the proper test was a *per se* or quick-look analysis,[88] it did not go to the length and expense of preparing a detailed analysis of the relevant market as is needed under the rule of reason test.[89] Nevertheless, during the discovery phase of trial, Salvino's chief economic expert, Louis A. Guth, prepared a report claiming that there are no close substitutes to the intellectual property rights of MLBP.[90] Guth asserted that a "discrete choice" survey would demonstrate that consumers' product preferences would not change with either increases in price of MLBP licensed products or decreases in price of other branded products.[91]

By contrast, Fisher provided evidence (Fisher Report) that prospective licensees of MLBP "displayed interest in using intellectual property of inter alia, other sports entities and leagues."[92] Among these examples, Fisher cited: Coca-Cola choosing NFL intellectual property over MLB intellectual property for its nationwide promotional campaign; Salvino itself selling Bammers bearing the intellectual property of a

82. *Salvino,* 542 F.3d at 294.

83. Nat'l Collegiate Athletic Ass'n v. Bd. of Regents, 468 U.S. 85, 109 n.39 (1984).

84. Cal. Dental Ass'n v. FTC, 526 U.S. 756, 781 (1999).

85. Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 692 (1978).

86. *Salvino*, 542 F.3d at 308.

87. *See* Memorandum in Opposition to MLBP Motion for Summary Judgment at 8 n. 3, *Salvino* 542 F.3d 290 (No. 06-1867-cv); Salvino Response to MLBP 56.1 Statement at ¶¶ 60-61, *Salvino*, 542 F.3d 290 (No. 06-1867-cv).

88. *Salvino,* 542 F.3d at 309; *see infra* Part II for a discussion of the quick-look analysis, holding that demonstrating market power is unnecessary in this context.

89. Hance, *supra* note 15, at 275.

90. *Salvino,* 542 F.3d at 301 (quoting Expert Report of Louis A. Guth).

91. *Id.*

92. *Id.* at 330 (quoting Expert Report of Franklin M. Fisher).

wide variety of sports leagues and figures, such as the NFL, the NBA, and the NHL; and a MLBP-conducted market research study, which found that major competitors for intellectual property licensing included apparel manufactures like Nike, other sports entities like the NBA, and entertainment companies such as Warner Brothers and Disney.[93]

Notwithstanding the imbalance in the parties' cases, in the subsequent Second Circuit decision, the majority stressed the weakness in Salvino's expert report. The court criticized the Guth Report as "entirely conclusory . . . neither accompanied by any evidentiary citation nor followed by any elaboration . . . [in contrast to the] Fisher Report."[94] Given the quality of the Fisher Report, the court sided with MLBP and concluded that the MLB teams competed with the broader entertainment market in licensing its intellectual property.[95]

Evidently, MLBP went to great lengths to prepare the Fisher Report, because its primary contention was that there should be a rule of reason inquiry. By contrast, Salvino did not fully contest the issue of the relevant market, because its primary contention was that a *per se* analysis should apply. In response to MLBP's deposition on the relevant product market, Guth even admitted, "I really don't [have an opinion] . . . I'm going to leave that to an empirical analysis."[96]

In Attorney Tim Hance's article advocating a narrow product market for ANI, he has similarly argued that the *Salvino* court's analysis suffers from deficiencies.[97] Hance has noted that *Salvin*o "did not show how the MLBP's activities were anticompetitive as a whole when analyzed under the rule of reason test."[98] Therefore, "the court had no choice but to accept the MLBP's evidence of market power because it was the only evidence submitted."[99]

93. Hance, *supra* note 15, at 276. However, Hance notes that Fisher focused his survey on the licensees of MLB merchandise, rather than on the fans and consumers of products containing the MLB logo. Compared to fans, these licensees have a greater variety of options for substituting MLB-logoed apparel. *Id.*

94. *Salvino*, 542 F.3d at 311.

95. *Id.* at 333-34.

96. Hance, *supra* note 15, at 276-77 (quoting Guth's deposition).

97. *See id.*

98. *Id.*at 275-76.

99. *Id.*at 277.

Indeed, "general characterizations of the NFL's relevant market will not suffice, just as Salvino's general characterizations of the MLB's relevant market did not hold up in Salvino."[100] Given the increasing importance of intellectual property sales in sports, relevant market and empirical studies are needed for a rule of reason analysis.[101] Rather than a superficial analysis, conducting detailed econometric studies will greatly benefit future cases analyzed under the rule of reason.[102]

In summary, there is no direct precedent that supports a narrow definition of the product market for NFL branded merchandise. However, support may be gathered by observing a consumer audience unique to professional football, analyzing the holding of *International Boxing* and *NCAA,* and supplementing missing empirical data.

II. QUICK-LOOK ANALYSIS IN DETAIL

As evidenced, there is still ambiguity as to whether market power exists in the market for football licensing.[103] Notwithstanding this defect, ANI can push the courts to conduct the abbreviated "quick look" analysis using either of two tests. First, courts will apply the quick look analysis when the anticompetitive effects are so intuitively obvious that the plaintiff need only present a simplified market analysis.[104] Anticompetitive effects are so intuitively obvious when there exists such a restraint that, "no elaborate industry analysis is required to demonstrate the anticompetitive character of . . . [the defendant's] agreement."[105] Second, courts will apply a quick-look analysis when a particular restraint "is not reasonably necessary to achieve any of the efficiency-enhancing benefits" claimed and merely serves as a "naked restraint against competition."[106] The Supreme Court case, *National Collegiate Athletic Association v. Board of Regents*, is a clear demonstration of how both quick look tests can be applied.

100. *Id.* at 284.
101. *Id.* at 284-85.
102. Hance, *supra* note 15, at 284.
103. *See supra* Part I.
104. *See* Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 692 (1978).
105. *Id.*
106. Major League Baseball Props. v. Salvino, Inc. 542 F.3d 290, 338 (2d Cir. 2008).

A. National Collegiate Athletic Ass'n v. Board of Regents, Applying the Quick Look Analysis Test

In asserting the quick-look analysis against NFLP, ANI can look to the landmark case of *NCAA v. Board of Regents*.[107] This case centered on the NCAA's plan for televising college football games.[108] Under the plan, the NCAA made agreements with the American Broadcasting Company (ABC) and the Columbia Broadcasting System (CBS) for rights to telecast live college football games.[109] The plan forbade member institutions of the NCAA from making any sale of television rights except in accordance with the NCAA's agreements with ABC and CBS.[110] Under the plan, no member institution could appear on television more than six times. Additionally member schools would be prohibited from appearing in more than four national broadcasts.[111] Moreover, prices were subject to a NCAA recommended fee, even though networks could negotiate with member schools for the right to televise games.[112]

In the ensuing litigation, member institutions brought suit against the NCAA under the Sherman Act, asserting that the NCAA's broadcast restrictions violated antitrust laws.[113] The plaintiffs contended that the NCAA had "unreasonably restrained trade in the televising of college football games."[114] Both the District Court of the Western District of Oklahoma as well as the Court of Appeals for the Tenth Circuit found that the NCAA's plan violated §1 of the Sherman Act and constituted "illegal *per se* price fixing."[115]

The Supreme Court ultimately held that the NCAA plan prevented member institutions from competing against one another on the basis of price or otherwise.[116] The Court found that the restrictions were a horizontal restraint among competitors that placed an artificial ceiling on available

107. Nat'l Collegiate Athletic Ass'n v. Bd. of Regents, 468 U.S. 85 (1984).
108. *Id.* at 91-92.
109. *Id.* at 92.
110. *See id.* at 92-93.
111. *Id.* at 94.
112. *Id.* at 93.
113. *NCAA*, 468 U.S. at 95.
114. *Id.* at 88.
115. *Id.* at 97 (quoting Bd. of Regents v. NCAA, 707 F.2d 1147, 1152 (10th Cir. 1983).
116. *Id.*at 106-07.

output.[117] The restrictions also increased the price that networks paid to broadcast games. Finally, the restrictions were inconsistent with the "fundamental goal of antitrust law,"[118] as ultimate consumer demand had little bearing when setting price and output of the broadcasts.[119]

Despite noting that horizontal restraints similar to the one used by the NCAA are "presumed unreasonable,"[120] the Court stated that it would be inappropriate to apply a *per se* rule in the context of league sports, where restraints are necessary for the product to be available at all.[121] Instead, there is a need to determine whether the NCAA's restraint is merely ancillary to a legitimate purpose, or a naked restraint on competition.[122] Here, the apparent anticompetitive behavior of the NCAA created a heavy burden for the NCAA to prove that its restriction was not a classic restraint on price and output.[123]

The NCAA justified its position by establishing a need to prevent "the adverse effects of live television upon football game attendance."[124] However, the Supreme Court rejected the NCAA's argument as "inconsistent with the basic policy of the Sherman Act."[125] In essence, NCAA argued that live college games should be insulated from the full spectrum of competition because the product is not sufficiently attractive to consumers.[126] This argument is inconsistent with basic economic policies underpinning a free market;[127] advancing the proposition that "competition itself is unreasonable."[128]

Rejecting each of the NCAA's other pre-textual justifications,[129] the Supreme Court went on to hold that the NCAA's exclusive sale of football television rights is a non-

117. *Id.*at 117.
118. *Id.* at 107.
119. *NCAA*. 468 U.S. at 107.
120. *Id.* at 100.
121. *Id.* at 101.
122. *See id.* at 109-110 (stating that "naked restraint[s] on price and output requires some competitive justification even in the absence of a detailed market analysis.").
123. *Id.* at 113.*;* Hance, *supra* note 15, at 265.
124. *NCAA*, 468 U.S. at 91 n.6.
125. *Id*. at 117.
126. *Id.*
127. *Id*.
128. Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 696 (1978).
129. *See id.* at 114-20.

ancillary, naked restraint that reduced output and increased prices, to the detriment of consumers.[130]

B. Under the Quick-Look Analysis in NCAA, NFLP Violates § 1 of the Sherman Act

Similar to the Court's holding in *NCAA*, the NFL teams' collective grant of exclusive rights to a single licensee, defined as, "exclusive product category licenses,"[131] should be struck down under a quick-look inquiry. In conducting the analysis, this section will first discuss "collective exclusive trademark licensing" and how such licensing agreements have survived quick look analysis scrutiny. Specifically this section will discuss the *Salvino* case and its analysis of MPBP's use of collective exclusive trademark licensing agreements. Next, this section will discuss "collective exclusive product category licensing." Specifically, this section will discuss the NFLP's use of collective exclusive product category licensing and how such agreements pose significant risk of anticompetitive harms. Ultimately, this section concludes that the NFLP's use of collective exclusive product category licensing violates § 1 of the Sherman Act under a quick look analysis.

1. Collective Exclusive Trademark Licensing

MLBP follows the practice of collective exclusive trademark licensing. Similar to NFL teams, individual MLB clubs agree to pool their intellectual property rights, with each club relinquishing the right to market its own intellectual property.[132] As the clubs' exclusive licensing agent, MLBP then licenses the intellectual property for all of the MLB teams to multiple competing licensees.[133] Under its arrangement, MLBP also charges a "standard royalty percentage" license for products bearing a MLB club's trademark, regardless of variations in a club's popularity among consumers, and regardless of the amount of revenues generated by the licensing of a club's individual intellectual property.[134] Each club then receives an equal, pro rata share

130. *Id.*
131. Mitten, *supra* note 23, at 904.
132. *Id.* at 902.
133. *Id.* at 921.
134. *Id.* at 920.

of profits from licensing royalties.[135]

In *Salvino*, the plaintiff challenged MLBP's collective licensing arrangement and argued that it should be deemed illegal under a quick look analysis. The plaintiff argued that the arrangement is a naked restraint on both price and output,[136] and that the exclusivity and profit sharing provisions of the MLBP agreement serve no purpose but to stifle competition.[137]

As discussed *supra*,[138] a majority of the Second Circuit found no evidence of "an actual adverse effect on competition as a whole in the relevant market . . ."[139] (thereby rejecting Salvino's contention that the MLBP's provisions should be struck down under a quick look analysis).[140] The court began by "examining the nature of Salvino's contentions as to 'output' and 'price,'"[141] and determined that MLBP's arrangements "might plausibly be thought to have a net procompetitive effect, or possibly no effect at all on competition."[142] Therefore, more than a "quick look" is required.[143]

With respect to output, the court found no evidence to support Salvino's contentions. The clubs' decision to make MLBP their exclusive licensor did not "necessarily reduce the number of licenses issued," rather, "it merely alter[ed] the identity of the licenses' issuer."[144] In fact, the record showed an increase, rather than a decrease, in the licensing of the clubs' trademarks.[145]

135. *Id.*at 921.

136. *See supra* Part I, Section B, Subpart 1.

137. Major League Baseball Props. v. Salvino, Inc. 542 F.3d 290, 338 (2d Cir. 2008) (As Salvino explains, "Without the exclusivity requirement, potential licensees would have the freedom to either seek out each team for individualized arrangements or deal with all teams through the centralized agency of MLBP.").

138. *See supra* Part I, Section B, Subpart 3.

139. *Salvino*, 542 F.3d at 341 (quoting Geneva Pharms. Tech. Corp. v. Barr Labs Inc., 386 F.3d 485, 506-07 (2d Cir. 2004).

140. *See generally Salvino*, 542 F.3d at 319.

141. *Id.*

142. *Id.* (quoting Cal. Dental Ass'n v. FTC, 526 U.S. 756, 771 (1999)).

143. *Id.*

144. *Id.* at 318.

145. According to the court, the record showed that:

> When MLBP became the Clubs' exclusive licensor in 1987, there were approximately 100 licensees. . .thereafter, the number of licensees more than doubled. And in the years since, the number has continued to grow, with MLBP having, at the time of its summary judgment motion in this case, more

With respect to price, the majority rejected Salvino's contention that the standard licensing fee agreement for the Clubs' trademarks and the pro rata sharing of profits constitutes illegal price fixing.[146] MLB's revenue sharing agreement is not, in fact, an agreement on price.[147] Indeed, there has been no horizontal agreement to fix the prices of be charged to licensees.[148] Rather, profit sharing only fixes the compensation scheme for individual clubs.[149] As interdependent entities, the professional baseball entertainment product is actually enhanced and protected by fostering a competitive balance among the clubs.[150] Profit sharing is thus a legitimate means of maintaining a measure of competitive balance.[151]

In concurrence, then-Judge Sotomayor agreed that *Salvino* fails to fit within the purview of the *per se* analysis; arriving at her conclusion "using a different framework" from the majority.[152] Sotomayor held that MLBP's restrictions are ancillary to a legitimate purpose and are reasonably necessary to achieve MLBP's efficiency-enhancing objectives.[153] In particular, collective trademark licensing lowers transaction and trademark enforcement costs and offers one-stop shopping for licensees.[154] The provisions also eliminate negative externalities that may otherwise distort

> than 300 licenses outstanding for some 4,000 products in the United States, along with licenses to some 170 licensees for sales of products outside of the United States.

Id. at 319.

146. Salvino alleged that since the income from the exploitation of each team's intellectual property was equally shared among each member team, this was nothing but a horizontal price fixing scheme by individual competitors. *Salvino*, 542 F.3d at 320.

147. *Id.*

148. *Id.*

149. In her concurrence, Justice Sotomayor disagreed, stating that the elimination of price competition between the clubs for IP licensing "is the essence of price fixing." An agreement between competitors that has the *purpose* and *effect* of fixing, stabilizing, or raising prices results in the same. Were the Majority correct, "competing companies could evade the antitrust laws simply by creating a 'joint venture' to serve as the exclusive seller of their competing products. . ." *Id.* at 335.

150. This competitive balance is essential to both the viability of the clubs and public interest in the sport. *Id.*

151. *Id.* at 331-32.

152. *Salvino,* 542 F.3d at 334-41.

153. *Id.*

154. Mitten, *supra* note 23, at 926.

the incentives of MLBP and limit potential efficiency gains.[155] Accordingly, collective exclusive trademark licensing not only fails to generate substantial anticompetitive effects, but also fosters redeeming procompetitive benefits.

2. Collective Exclusive Product Category Licensing and the NFLP

The anticompetitive harms created by NFLP's restrictions, classified as "collective exclusive product category licensing," have far greater anticompetitive effects, than the collective exclusive trademark licensing agreements that were used by MLBP.[156] In pushing for a quick-look analysis, ANI must stress the differences between NFLP's provisions and MLBP's provisions. This is because NFLP not only collectively markets the teams' intellectual property, but it also designates an exclusive licensee for such purposes.[157] The agreement to grant exclusive licensee rights, in tandem with the agreement to license collectively, significantly reduces competition in the market for licensing NFL-branded apparel.[158]

Collective exclusive product category limitations, although found only in the context of professional football, are neither new nor unique to the context of football apparel as reflected in *American Needle*. NFLP created the exclusivity agreement in the face of a decline in the retail value of its various trademarked merchandise.[159] In an effort to increase trademark-licensing revenues, NFLP entered into multiple licensing agreements which granted exclusive product categories for the licensee.[160] By eliminating competing licensees, exclusive product category licensing allows designated licensees to obtain "a premium price through a large advance, high minimum guarantees, and potentially a

155. An example would be the so-called free-rider problem, whereby another Club might benefit disproportionately from the actions of MLBP in licensing the MLB brand, decreasing incentives for the MLBP to develop the intellectual property of MLB. *Salvino*, 542 F.3d at 340. For a more comprehensive discussion, *see infra* Section III.

156. Mitten, supra note 23, at 927.

157. *Id.* at 927-28.

158. *Id.*

159. From 1996 to 2010, the aggregate value of NFL, NBA, NHL, and MLB trademarked merchandise declined from approximately $8.8 billion to $7.83 billion. Meredith Ashley, *Sports Licensing: 2010 Year-in-Review*, LICENSING J. at 2 (Jan. 2011).

160. *Id.*

higher royalty rate."[161]

Here, NFLP has signed a ten-year exclusivity agreement with Reebok (now Nike and New Era) to license NFL apparel and headwear.[162] As a result, these licensees have become the exclusive provider of apparel and headwear of the NFL.[163] This arrangement necessarily implies that all other competing licensees, including ANI, are denied the opportunity to license the intellectual property of the NFL.

These collective exclusive product category limitations have clear anticompetitive harms. From the outset, the restrictions can be viewed as a collective agreement among league clubs, precluding economic competition in the licensee market.[164] As Professor Matthew Mitten has stated, "[p]rospective licensees have no alternative means of obtaining authorization to use league clubs' trademarks[.]"[165] In effect, the agreement has eliminated competing manufacturers from the wholesale market for the distribution and sale of apparel and headwear products of the NFL.[166] As a result, the supply of retail products has been reduced, leading to fewer consumer choices available for retail products bearing the trademarks of NFL clubs, with the few available sold at higher retail prices.[167]

Another example of exclusive product category licensing behavior is the NFL's exclusive interactive video game licensing agreement with Electronic Arts.[168] In *Pecover v. Electronic Arts*, a pending antitrust case,[169] plaintiffs who purchased the Madden NFL game series brought an antitrust class action against Electronic Arts (EA), alleging that EA foreclosed competition in the market for interactive football software.

Plaintiffs argued that as a result of the exclusivity agreement, sports gamers were limited to a single choice among game manufacturers, with only the NFL and EA

161. *Id.*
162. Mitten, *supra* note 23, at 927.
163. *Id.* at 928.
164. *Id.*
165. *Id.*
166. *Id.*
167. *Id.*
168. Mitten, *supra* note 23, at 929.
169. Pecover v. Electronic Arts, 633 F.Supp.2d 976 (N.D. Cal. 2009).

reaping the rewards.[170] Prior to the agreement, EA charged $29.95 for Madden NFL in a competitive market.[171] After the exclusivity agreement, other companies stopped making the software, such as Take Two Interactive, who withdrew its NFL 2K5, a popular and less expensive NFL video game.[172] Competing game manufacturers were not able to re-enter the market with non-NFL branded interactive football software.[173] Immediately afterwards, EA increased its price for Madden NFL "nearly seventy percent to $49.95,"[174] with EA now selling its interactive football software for up to $59.95.[175]

In the ensuing litigation, the United States District Court for the Northern District of California, notwithstanding the Seventh Circuit's decision in *American Needle*, favoring NFLP,[176] denied Defendant EA's motion to dismiss the alleged antitrust violations. The court observed that the series of exclusive deals between EA and the NFL "killed off" competition and "prevented [competitors] from reentering the market."[177] Given the facts presented by the Plaintiff, there existed enough plausible evidence to establish that the Defendant had behaved illegally.[178]

Along with the manifested anticompetitive harms, collective exclusive product category limitation is also not a restraint ancillary to achieve any recognized procompetitive benefits.[179] The restrictions are unnecessary to achieve such benefits as lowering transaction costs, lowering trademark rights enforcement costs, or enhancing competitive balance among league clubs.[180] Rather than designating one exclusive licensee, any procompetitive benefits sought by NFLP could be achieved in a substantially less restrictive manner.[181]

Evidently, the effects of NFLP's exclusivity provision, in tandem with its collectivity provisions, pose serious

170. Ashley, *supra* note 159, at 2.
171. First Amended Complaint at 5, *Pecover*, 633 F.Supp.2d 976 (No. C 08-2820VRW), 2011 WL 2609621.
172. *Pecover*, 633 F.Supp.2d at 980.
173. *Id.*
174. *Id.*
175. *Id.*
176. Am. Needle v. Nat'l Football League, 538 F.3d 736 (7th Cir. 2008).
177. *Pecover*, 633 F.Supp. 2d at 983.
178. Bell Atlantic Corp v. Twombly, 550 U.S. 544, 592-95 (2007).
179. *See infra* Part III. for a detailed discussion on this point.
180. Mitten, *supra* note 23, at 924.
181. *Id.* at 930.

anticompetitive harms. For these reasons, NFLP's collective, exclusive product category licensing should be deemed invalid under a quick-look rule of reason.

III. RULE OF REASON ANALYSIS

In pressing its antitrust challenge, ANI must consider the holding of *NCAA*, which held that *per se* rules of illegality are inapplicable in the context of league sports.[182] Rather, the challenged restraint should be evaluated under the "flexible Rule of Reason."[183] Accordingly, ANI's inquiry focuses on whether or not the challenged restraint enhances competition to the benefit of consumers and whether or not these restraints are reasonably necessary to achieve such efficiencies.[184]

In this regard, the Supreme Court has formulated the following test:

> [T]he court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint is imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained. . . .[185]

The Rule of Reason inquiry described in the preceding quote can be divided into the following prongs: First, what competitive harm results or is threatened by the collaborators' activities; second, what are the pro-competitive "redeeming virtues" of the challenged collaboration; third, does an "on balance" evaluation of the anticompetitive harms and procompetitive virtues suggest that the restrictions are reasonable; and fourth, are there less restrictive alternatives – that is, is the restraint reasonably necessary for the achievement of any such legitimate objectives?[186]

182. Nat'l Collegiate Athletic Ass'n v. Bd. of Regents, 468 U.S. 85, 101-03 (1984).

183. American Needle Inc. v. Nat'l Football League, 2010 WL 2025207, at *12 (May 24, 2010).

184. Stephen F. Ross, *An Antitrust Analysis Of Sports League Contracts With Cable Networks*, 39 EMORY L.J. 463, 489 (1990) (There exists "a long-standing antitrust tradition of exploring less restrictive alternatives before sanctioning agreements among competitors . . . the antitrust laws must [] condemn agreements both harmful to consumers and unnecessary to achieve efficiencies in production or distribution . . . .").

185. Bd. of Trade of City of Chicago v. U.S., 246 U.S. 231, 244 (1918).

186. PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 1502 (3d ed. 2010).

A. Competitive Harm that Results by Collaborators' Activities

Under the first prong, ANI can specify the substantial competitive harms that result from NFLP's restrictions on pricing and output. NFLP has forced each member team to relinquish control over its own individual intellectual property. Subject to the whim of NFLP, individual NFL teams are thereby unable to set prices or control output of their products.

1. Price

From the outset, ANI should note the anticompetitive harms stemming from NFLP's price restrictions. According to *U.S. v. Socony-Vacuum*, a "combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se."[187] This is because price is the "central nervous system of the economy."[188] Therefore, an agreement that "interfere[s] with the setting of price by free market forces" is illegal on its face.[189]

As mentioned, in the context of Major League Baseball, each MLB club designates MLBP to set the price of the competing clubs' merchandise, with MLBP dividing all profits generated from the sales equally among the clubs.[190] In *Salvino*, the plaintiff alleged that MLBP's price provisions constituted a horizontal agreement among competing entities to "fix the compensation [MLB clubs] receive."[191] The individual clubs have relinquished all control over the price of their own products and now receive an equal amount of revenue, "regardless of merit or individual contribution."[192]

In her concurring opinion,[193] Judge Sotomayor faults the Majority for adopting an "overly formalistic view of price

187. United States v. Socony-Vacuum Oil, 310 U.S. 150, 223 (1940).
188. *Id.* at 224 n. 59.
189. United States v. Container Corp., 393 U.S. 333, 337 (1968).
190. *See* Major League Baseball Props. Inc. v. Salvino, Inc., 542 F.3d 290, 295 (2d Cir. 2008).
191. *Id.* at 320.
192. Brief and Special Appendix for Defendant-Counter-Claimant-Appellant at 7, Major League Baseball Props. v. Salvino Inc., 542 F.3d 290 (2d Cir. 2006) (No. 06-1867-cv), 2006 WL 6174626.
193. *Salvino*, 542 F.3d at 334 (Sotamayor, J., concurring).

fixing."[194] Through their reasoning, the Majority has failed to address Salvino's contention of price fixing by MLBP.[195] Sotomayor held that, because the MLB clubs gave MLBP the sole authority to set prices for the licenses of the individual clubs, MLBP has "commandeered the rights of its members."[196] In effect, MLBP has set the price for each Club's team-specific merchandise.[197] Sotomayor analogized such conduct to that of competitors creating a pre-textual "joint venture," to serve as the exclusive seller of their competing products.[198] Based upon the aforementioned opinions, MLBP's conduct constitutes a price-restriction by competing entities.[199]

Similar to *Salvino*, NFL teams have adopted a revenue-sharing agreement that eliminates price competition.[200] The league as a whole has designated NFLP to exclusively exploit the intellectual property of all the teams.[201] In exchange, NFLP distributes the earned revenues equally among the teams, regardless of the proportion of sales generated by the intellectual property of each individual team.[202] As was held true by *Salvino*, such cooperative conduct by competing entities in the NFL is the essence of "price-fixing."[203]

2. Output

ANI should also note the significant anticompetitive harms stemming from NFLP's output restrictions. These restrictions force each NFL owner to cede control over

194. *Id.*
195. *Id.*
196. *Id.* at 326 (citing Nat'l Collegiate Athletic Ass'n v. Bd. of Regents, 468 U.S. 85, 106 n. 30 (1984)).
197. *Id.* at 336.
198. *Id.*
199. The mere agreement among competitors to exchange price *information* is a *per se* price-fixing violation of the Sherman Act. *See* United States v. Socony-Vacuum Oil, 310 U.S. 150, 223 (1940).
200. Amended Complaint, *supra* note 43, at ¶ 33.
201. *Id.*
202. If allowed to license their own intellectual property, more power teams, such as the Dallas Cowboys, would set their own prices and receive revenues exceeding their pro rata share of profits. *See id.*
203. *Salvino*, 542 F.3d at 335 (Sotamayor, J., concurring). ("[T]he effect of the agreement clearly eliminates price competition between the Clubs for trademark licenses. An agreement to eliminate price competition from the market is the essence of price fixing.").

licensing of its products to NFLP.[204] Because a relative handful of clubs account for the bulk of revenues in any given year, the arrangement stymies the clubs' individual abilities of production, and makes output unresponsive to consumer preferences.[205] As a "direct, actual, probable, and intended result . . . [NFLP has denied] individual member clubs the right freely to compete in the market."[206]

Likewise, in *Salvino*, the plaintiff contended that MLBP's collectivity arrangements are naked output restrictions.[207] In designating MLBP as the central licensor, individual MLB clubs have necessarily agreed to forgo their own output.[208] The agreement in *Salvino* is an "express agreement to reduce output,"[209] and reduces output "by its terms."[210]

A majority of the Second Circuit panel, however, disagreed that output is necessarily restricted. The Court held that, "a mere refusal to grant a license to Salvino would not suffice to support a claim of antitrust violation."[211] As a matter of fact, "the Clubs' agreement to make MLBP their exclusive licensor does not by its express terms restrict or reduce the number of licenses to be issued; it merely alters the identity of the licenses' issuer."[212] Other than Salvino, various licensees are still able to license the clubs' intellectual property through MLBP. In fact, the record showed a sizeable increase in the number of licensees for the intellectual property of MLBP; with output growing from about 100 licensees in 1987 to over 300 licensees outstanding for some 4,000 products in the United States, by 2005.[213]

Here, in contrast to Major League Baseball's collectivity arrangements, NFLP's addition of an exclusivity agreement with Reebok and Nike has absolutely lowered the licensee base. While with MLBP, multiple licensees could still compete for the intellectual property rights of the clubs, here,

204. Amended Complaint, *supra* note 43, at ¶ 4.
205. *Id.*at ¶ 74.
206. *Id.*
207. Brief and Special Appendix for Defendant-Counter-Claimant-Appellant, supra note 192, at 6.
208. *Id.*
209. Major League Baseball Props. Inc. v. Salvino, Inc., 542 F.3d 290, 318 (2d Cir. 2008).
210. *Id.*
211. *Id.*
212. *Id.* at 309.
213. *Id.* at 297-98.

NFLP has designated only Reebok (now Nike and New Era) to license the NFL teams' intellectual property. Therefore, NFLP's arrangements have far greater anticompetitive harm in reducing the marketable output.

B. Pro-Competitive "Redeeming Virtues" of the Challenged Collaboration

In evaluating ANI's antitrust challenge, Courts need to consider redeeming pro-competitive virtues of NFLP's restraint. NFLP has advanced several arguments to suggest that the pro-competitive benefits of its provisions outweigh the anti-competitive harms. However, as will be explained, NFLP's arguments rely on faulty premises that likely defeat an "on-balance" judgment of reasonableness.[214]

Similar to MLBP's arguments in *Salvino*, NFLP has justified its restrictions by relying heavily on *Broadcast Music Inc v. Columbia Broadcasting System*.[215] In *Broadcast Music*, individual artists granted licensing organizations, including the American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music Inc (BMI), nonexclusive rights to license their works.[216] In turn, ASCAP and BMI granted blanket licenses to licensees to perform all of the compositions of member artists.[217] The fees that licensees paid were usually a percentage of licensees' total revenues or a flat dollar amount.[218] Such fees were independent of the amount of music actually used by licensees.[219]

The plaintiff, CBS alleged that the ASCAP and BMI arrangements violated § 1 of the Sherman Act, because they constituted "illegal price fixing."[220] Through its arrangement with individual artists to create the blanket license, the ASCAP and BMI have set the price for use of individual artists' works.[221]

The Supreme Court disagreed with CBS. The Court

214. AREEDA & HOVENKAMP, supra note 186 at ¶ 1508.
215. Broad. Music Inc. v. Columbia Broad. Sys., 441 U.S. 1 (1979).
216. *Id.* at 5.
217. *Id.*
218. *Id.*
219. *Id.*
220. *Id.* at 6.
221. *Broad. Music,* 441 U.S. at 6.

looked to the fact that a joint selling arrangement, such as the one promoted by ASCAP and BMI, could be so efficient that it would reap otherwise unattainable efficiencies and be pro-competitive.[222] In particular, in the composition market, there existed "thousands of users, thousands of copyright owners, and millions of compositions."[223] Given this fact, a central licensing entity accomplished the goals of reducing transaction costs, integrating sales, and improving monitoring and enforcement against unauthorized copyright use, all of which would present difficult and expensive problems if left to individuals.[224] The result is that "the whole is truly greater than the sum of its parts," creating in effect, a different product.[225]

Similar to *BMI*, MLBP argued that its arrangements allowed it to reap otherwise unattainable pro-competitive efficiencies. Defendants argued that, through MLBP, the Clubs have been able to (1) reduce transaction costs, (2) integrate sales, (3) more effectively enforce and monitor its intellectual property, and (4) improve quality control.[226] MLBP's arguments, which are essentially identical to those presented by NFLP,[227] will be discussed in the order they are presented.

First, as a selling agent for the Clubs' intellectual property, MLBP allows more products to be licensed by reducing transaction costs.[228] Without MLBP, a potential licensee must approach each Club separately to negotiate licenses. The potential licensee may be unable to obtain licenses from all the Clubs.[229] The ability to offer a one-stop shop for licenses thus reduces the amount of time and effort

222. *Id.* at 20.

223. *Id.*

224. *Id.*

225. *Id.* at 21.

226. *See generally* Brief for Plaintiff-Counter-Claimant-Defendant-Appellee, Major League Baseball Props. v. Salvino Inc., 542 F.3d. 290 (2006) (No. 06-1867-cv), 2006 WL 6174627.

227. Joint Appendix, American Needle v. Nat'l Football League, No. 08-661, 2009 WL 3006320 (Sept. 18, 2009).

228. The NFLP argued that it is able to reduce transaction costs by offering a one-stop shop for the package of NFL license rights, without which licensing rights would be prohibitively expensive for licensees to acquire on their own. *Id.* at 140.

229. For example, in one year, Houston Astros refused to license rights to Topps, and that year, the Topps set of baseball cards did not include a single Astros team card. Brief for Plaintiff-Counter-Claimant-Defendant-Appellee, *supra* note 226, at 9.

required to obtain rights to the intellectual property of the MLB.[230]

Second, the Clubs have been able to integrate sales and realize efficiencies in promotions, advertising and marketing.[231] MLBP has been able to employ companies to provide marketing information, which it uses to develop campaigns and product lines for the benefit of all Clubs.[232] MLBP is also able to target and negotiate with national retailers, something a single Club that offers products bearing only its individual mark cannot do.[233]

Third, MLBP is able to achieve efficiencies in intellectual property enforcement.[234] Prior to the creation of MLBP, "there was open-season on Club marks, unauthorized merchandise was the marketplace norm, and the name 'Major League Baseball' had little identity and no commercial value."[235] Since then, MLBP has obtained thousands of trademark registrations and enforcements for MLB Club marks.[236] MLBP is able to identify from its own records and history whether a particular product is licensed and if not, whether to exercise enforcement measures.[237]

Fourth and final point, a centralized entity such as MLBP can ensure that the MLB intellectual property is used properly. In particular, the MLBP can assure that the licensees' use of the Clubs' trade dress and logos are correct and accurate, that the licensees have used the proper form, that any copyright or trademark symbol is prominently displayed, and that the product reflects the licensing agreement.[238] In line with quality control, a centralized

230. This is especially important for manufacturers of baseball cards, video games, etc.

231. The NFLP argued that NFLP's extensive marketing and promotion efforts and relationship with major retailers benefit consumers and licensees. NFLP is able to offer such market participants "centralized support" of the entire line of NFL-licensed goods. Joint Appendix, *supra* note 227, at 140.

232. *Id.*

233. *Id.*

234. The NFLP argued that NFLP is able to offer trademark registration and enforcement. For example, NFLP manages a "worldwide trademark portfolio of over 8,000 registrations and applications." The NFLP is able to provide clearance searches, send "cease and desist" letters, initiate civil litigation, and handle trademark prosecutions before the United States Patent and Trademark Office. *Id.* at 142.

235. Brief for Plaintiff-Counter-Claimant, *supra* note 226, at 7.

236. *Id.*

237. *Id.*

238. *See id.*

licensor such as MLBP saves the licensees the need to obtain quality control approvals from a myriad of separate and conflicting quality control centers of the individual MLB Clubs.[239]

1. Rebuttal to Pro-competitive Justifications

In evaluating ANI's antitrust challenge, the anti-competitive harms of NFLP's restrictions should be balanced with its procompetitive benefits.[240] This allows courts to reach an "on balance" judgment about "reasonableness."[241] This balance should be the guiding force in determining whether a Sherman Act violation has occurred.

a. Difference in BMI versus NFLP

There are important differences in the NFLP provisions, such as the exclusivity and revenue sharing obligations, which make *BMI* an inapt precedent. First, in *BMI*, artists had the ability to offer their licenses on a nonexclusive basis to BMI or ASCAP, while retaining the unfettered ability to license their products themselves.[242] By contrast, the provisions of NFLP (and also MLBP) mandate that individual teams license their intellectual property to the central entities on an exclusive basis.[243] Therefore, individual teams within the NFL actually lose the ability to license their own intellectual property.

The *Salvino* court holds that this exclusivity aspect is insignificant. The interests of each Club are interdependent and it is this "interdependence and Major League Baseball's need for *competitive balance* among the Clubs [that] distinguish the Clubs from the individual composers and publishers of music who were the subject of Broadcast Music . . . ."[244]

However, the complaints brought by Jones squarely rebut

239. Joint Appendix, *supra* note 225, at 144. (The NFLP argued that its quality control department ensures that the NFL's intellectual property is used in an appropriate manner with licensed products and that licensed products "reflect the branding goals associated with NFL football.").

240. AREEDA & HOVENKAMP, *supra* note 186, at ¶ 1507.

241. *Id.*

242. Broad. Music Inc. v. Columbia Broad. Sys, Inc., 441 U.S. 1 (1979).

243. Major League Baseball Props. v. Salvino Inc., 542 F.3d 290, 323 (2d Cir 2008).

244. *Id.* (emphasis added).

the premise that individual teams' interests are interdependent. Jones's complaint suggests that the intellectual property of the Cowboys is extremely valuable.[245] In one fiscal year alone, more than 20% of the revenue generated by NFLP from licensed products came from products bearing Cowboys marks alone.[246] Yet, the Cowboys only received one-thirtieth of the distributed profits of NFLP.[247] Evidently, Jones is not dependent upon NFLP. Rather, Jones must sacrifice his profits to subsidize less successful teams in the NFL.

Second, in *BMI*, the agreement to designate ASCAP and BMI as central licensors is premised on individual artists receiving royalties proportional to the use of their copyrights.[248] Tying royalties received to frequency of use provides individual artists with economic incentives to promote their own products. In contrast, the NFLP provisions mandate that each member team receive an equal distribution of revenues regardless of use or contribution of its individual trademarks.[249]

Such provisions have the effect of reducing the overall quality of NFL merchandise. Given the wide disparity in contributions made by each individual team, distributing revenues equally "adversely affect[s] the quality of goods available."[250] In the absence of this agreement, success in the sale of licensed merchandise would be tied to the competition for fans as well as the ability to create and distribute more desirable products. However, under NFLP's revenue-sharing policy, each team receives an equal share of revenues generated from sales of intellectual property, regardless of contribution. As a result, the teams have been deprived of the economic incentive to effectively market and promote the quality of their own brands.[251]

Such provisions also foster anti-competitiveness in the form of a free rider problem. In economics, the free-rider

245. *See* Amended Complaint, *supra* note 43 at ¶ 4.
246. *Id.* at ¶ 40.
247. *Id.*
248. Broad. Music Inc. v. Columbia Broad. Sys, Inc., 441 U.S. 1, 5 (1979).
249. For example, the Yankees contribute the highest grossing revenue out of all the MLB teams but receive the same revenue as the lowest grossing team. Complaint Preliminary and Permanent Injunctive Relief, *supra* note 49.
250. *See id.* at ¶ 13.
251. *See id.* at ¶ 41.

problem refers to a situation where some individuals consume more than their fair share of a public resource, or shoulder less than a fair share of the costs of its production.[252] An example involves a club member who goes to all the club events without ever contributing to the club's annual fund drive.[253] The free rider problem frequently surfaces in the context of NFLP's licensing practices.[254] Here, the fixed income from the NFLP is derived from the efforts of the more successful teams; thus, the lowest grossing team has less incentive to invest in the success of its own brands.

Creating free riding among individual teams also counteracts NFLP's argument that if teams were allowed to grant individual licenses, they would free-ride off of the actions of the NFLP in promoting the league brand.[255] In fact, it is doubtful whether NFLP has actually promoted its league's brand and whether such a centralized effort is superior to individualized efforts by the separate teams. In Jones's complaint, for instance, the plaintiff pointed to the bloated administrative costs NFLP imposes upon its members.[256] In one fiscal year, for instance, NFLP spent 64% of its gross revenues, generated from its own members, on direct costs and administrative expenses alone.[257] Such costs are, "to all appearances, extraordinarily and wastefully high."[258]

Clear from Jones's Complaints is the fact that less successful teams are profiting off of the successes of other teams. Each marks' value and strength "vary widely,"[259] and the contribution by each club is widely disparate.[260] As a result, the NFLP as a "cartel, hinders efficiency by creating the incentive for free-riding."[261] For these reasons, the NFLP provisions are much more anticompetitive in light of the

252. *Free Rider Problem*, PRINCETON, http://www.princeton.edu/~achaney/tmve/wiki100k/docs/Free_rider_problem.html (last visited Feb. 20, 2014).

253. *The Free Rider*, KENT STATE, http://www.personal.kent.edu/~cupton/Lectures%20in%20Microeconomics/powerpointslides/Micro%20PDF/The%20Free%20Rider.pdf.

254. Amended Complaint, *supra* note 43.

255. Brief for Plaintiff-Counter-Claimant, *supra* note 226.

256. Amended Complaint, *supra* note 43, at ¶ 4.

257. *Id.* at ¶ 39.

258. *Id.* at ¶ 38.

259. *Id.* at ¶ 40.

260. *Id.*

261. *Id.* at ¶ 47.

Sherman Act.

b. Differences in MLBP vs NFLP

The anticompetitive harms stemming from NFLP's provisions also cut deeper than those of MLBP. Whereas MLBP allows the existence of multiple licensees and ties licensing costs to revenues, NFLP limits licensing to a single licensee and segregates licensing costs from revenues.

First, in *Salvino*, although Plaintiff complained that prospective licensees, including itself, "live at the whim and caprice of MLB . . . [as MLBP] can arbitrarily exclude any [licensee] it wishes,"[262] the court disagreed and held that antitrust claimants cannot show harm merely by "showing that the plaintiff has been harmed as an individual competitor."[263] In fact, MLBP actually increased the Clubs' potential licensees base;[264] boosting the number and variety of MLB-licensed products that the Clubs would have achieved through individual licensing.[265]

By contrast, in the context of NFLP, the harm is not just to ANI as an "individual competitor," but rather, on "competition as a whole . . . ."[266] Reason being, NFLP does not tolerate multiple competing licensees, and only allows the existence of a single licensee.[267] Thus, individual licensees are, in fact, subject to the arbitrary whim of NFLP. As gatekeeper to the licensing market, NFLP can exclude, at any time, any licensee other than the one designated.

Second, MLBP's provisions require licensees to pay MLBP a percentage of the profit they receive from the overall sale of their MLB-branded products.[268] By contrast, NFLP sells licenses to licensees for a "sum certain."[269] The price for the teams' intellectual property is therefore independent of ultimate sales of NFL-branded merchandise. Rudimentary economics would suggest that because licensees pay the same

262. Brief and Special Appendix for Defendant-Counter-Claimant-Appellant, *supra* note 192, at 7.
263. *Salvino*, 542 F.3d at 308.
264. Brief for Plaintiff-Counter-Claimant, *supra* note 226.
265. *Salvino*, 542 F.3d at 308.
266. Continental T.V. v. GTE Sylvania, 433 U.S. 36, 44 (1997).
267. Mitten, *supra* note 23, at 927.
268. *Salvino*, 542 F.3d at 303.
269. Nat'l Collegiate Athletic Ass'n v. Bd. of Regents, 468 U.S. 85, 118, n. 30 (1984).

price for each individual teams' branded merchandise regardless of overall sales, NFLP's provisions limit the available consumer choices of retail products bearing the NFL teams' trademarks.[270] Similar to *NCAA*,[271] where each telecast was sold for a uniform price, regardless of quality or popularity, NFLP's controls make the price paid for the team's intellectual property unresponsive to the relative quality of the teams playing the games.[272] Ultimately, NFLP's provisions result in a market that is unresponsive to consumer demand.[273]

C. Less-Restrictive Alternatives

NFLP's provisions as it stands, fail to be less restrictive than necessary to achieve its purported procompetitive efficiencies.[274] Rather than be subject to the control and supervision of NFLP, individual NFL teams should be allowed to pursue merchandise development and innovation independent of a central entity.

In their article,[275] authors Stephen Ross and Stefan Szymanski articulate that the traditional structure of club-run leagues impose significant costs in a variety of markets where sports leagues operate.[276] With respect to *NCAA,* Ross and Szymanski faulted the Supreme Court for assuming that the presence of a member-run venture was an indispensable part of the parties' pro-competitive cooperation.[277] In particular, the Justices overlooked "the significant antitrust risks from [sports leagues'] conscious decision to operate a member-run venture . . . ."[278]

The crux of Ross and Szymanski's argument is that club-

270. Mitten, *supra* note 23, at 928.

271. *NCAA,* 468 U.S. at 118.

272. *Id.*

273. *Id.*

274. PHILLIP E. AREEDA, ANTITRUST LAW 1402 (1986). ("[I]f an agreement with any significant potential to harm competition is justified by its potential for efficiency, then the agreement must be tailored in such a fashion as to do the least harm possible to competition without giving up the efficiency gains.").

275. Stephen F. Ross & Stefan Szymanski, *Antitrust and Inefficient Joint Ventures: Why Sports Leagues Should Look More Like McDonald's and Less Like The United Nations,* 16 MARQ. SPORTS L. REV. 213 (2006).

276. *See id.* at 217.

277. *Id.*

278. *Id.* at 216.

run leagues will necessarily make decisions about organizing the league that limit the extent of economic competition.[279] In the licensing and merchandise context, economists suggest that decision-making should be left to those who have the best information.[280] However, due to the fact that sports leagues centralize all aspects of the marketing of team merchandise, individual owners cannot pursue innovative ideas in order to add revenue.[281] Instead, the licensing is done centrally with little or no participation from the individual teams.

Rather than the current set-up, vesting decision-making in entities with the best knowledge would be most efficient and responsive to consumer demand. As an example, in Jerry Jones' complaint against NFLP, Jones claimed that as a franchise owner, he should be able to maximize his licensing revenues instead of "settling" for his cut from the NFLP.[282] An owner who has invested millions in his own team has a far greater incentive to aggressively market his team.[283] One would expect, therefore, that an efficient league would divide the merchandising responsibility, and sell those parts of the activities that the teams understands best, back to the respective franchise.[284]

The model proposed by Jones is the model of the soccer clubs in the English Premier League and the Spanish Liga BBVA, whose operations are substantially similar.[285] In these soccer clubs, there is little cooperative licensing of merchandise. Instead, each individual club has its own shops and operations.[286] Without the need to serve a centralized entity, individual clubs could make independent decisions resulting in arrangements that are more efficient and profitable. Indeed, the most valuable sports franchises in the world is the Spanish soccer team Real Madrid, with an estimated value of $3.3 billion, followed closely by the soccer

279. *Id.*

280. Sanford J. Grossman & Oliver D. Hart, *The Costs and Benefits of Ownership: A Theory of Vertical and Lateral Integration*, 94 J. POL. ECON. 691 (1986).

281. Ross & Szymanski, supra note 275, at 215.

282. William J. Hoffman et. al., *Dallas' Head Cowboy Emerges Victorious in a Licensing Showdown With the N.F.L.: National Football League Properties v. Dallas Cowboys Football Club,* 7 SETON HALL J. SPORTS L. 255, 283 (1997).

283. *Id.*

284. Ross & Szymanski, *supra* note 275, at 230.

285. *Id.*

286. *Id.* at n. 61.

teams, F.C. Barcelona and Manchester United, F.C.[287]

1. Application of Ross & Szymanski's Model to the NFL

Because the NFL teams remain separate business entities, the idea inspired by Ross and Szymanski should be fully transplanted to the context of the NFL. Within the 2001 exclusivity contract with Reebok, there exists a clause that allows NFL owners to pursue new ideas for marketing or sponsorship independently with an agreed-upon share of proceeds going to the league.[288] In particular, NFLP has agreed to grant individual NFL owners the right to retain the ability to become private wholesaler, retailer and distributor of its own apparel.[289] So long as a team reaches a certain revenue threshold to be paid to the league, the team is entitled to keep any excess revenue generated.[290]

Although the team's ability to retain its own profits is a move in the right direction, there still exist anticompetitive harms rooted in revenue sharing schemes of NFLP. In particular, the profit threshold teams must reach before being able to retain their own revenues, remains prohibitively high.[291] Such threshold is determined by an average of the individual team's prior earnings, with above-average earnings being extremely rare.[292] For example, the Cowboy's share of NFL sales has been 16%, and so it must guarantee a minimum of 16% to the league, retaining the excess, if any, for itself.[293] For teams that only generate 2% or 3%, the minimal threshold is 5% and so the team must pay at least 5% to the league.[294] Therefore, these teams would rather settle for their "cut" from NFLP rather than pursue strategies maximizing individual profits.

While the new adoptions are not fool proof, it is a good

287. Michael David Smith, *Sharing the Wealth Has Made NFL Owners the Richest in the World*, NBC SPORTS (July 16, 2013), http://profootballtalk.nbcsports.com/2013/07/16/sharing-the-wealth-has-made-nfl-owners-the-richest-in-the-world/.

288. Rick Gosselin, *NFL Owners Vote to Allow Each Team to Market, Distribute Own Reebok Apparel*, DALLAS MORNING NEWS, May 24, 2001, *available at* http://www.highbeam.com/doc/1G1-74994129.html.

289. *Id.*

290. *Id.*

291. *Id.*

292. *Id.*

293. *Id.*

294. Gosselin, *supra* note 288.

start. The new marketing provisions allow teams to have even greater control of their own brands. For example, based on its ability to keep revenues from stadium sponsorships, the Dallas Cowboys generated more than $80 million in sponsorship from companies such as Ford Motor, Bank of America, PepsiCo, Dr. Pepper and Miller Brewing, almost $20 million more than any other football team.[295] Now, with the innovation in merchandising independence, teams "can decide what color and design [they] want. . .decide how many hats [they] want sold. . .[and] decide if there's one hat made and sold or 100,000 hats."[296] Given this potential for individual development, there is no reason why individual teams should not retain greater control over its own intellectual property at the expense of the outmoded central entity.

CONCLUSION

After an analysis of the myriad of possibilities on remand, it is apparent that the current NFLP provisions pose serious harms. First, the merchandising of professional football products constitutes a unique market. Second, under a quick-look inquiry, the NFLP provisions are naked restraints on price and output without ancillary benefits. Finally, from the standpoint of the rule of reason, the substantial anticompetitive effects outweigh the minimal procompetitive benefits, and less restrictive alternatives exist for fostering greater procompetitive benefits. For the reasons articulated, NFLP's provisions should be adjudged illegal under the Sherman Act.

295. Mike Ozanian, *Dallas Cowboys Lead NFL With $2.1 Billion Valuation,* FORBES (Sept. 5, 2012, 8:31 AM), http://www.forbes.com/sites/mikeozanian/2012/09/05/dallas-cowboys-lead-nfl-with-2-1-billion-valuation/.

296. *Id.*