

## NFL Collective Licensing Agreements Subject to Antitrust Attack as Contracts in Restraint of Trade

**By: Deborah A. Coleman, Esq. and Rex W. Miller, II, Esq.**

The NFL's joint licensing of intellectual property is subject to antitrust scrutiny, the U.S. Supreme Court decided in *American Needle, Inc. v. National Football League et al.* As for any joint venture, agreements between joint venture partners that are not reasonably necessary to achieve the pro-competitive goal of the joint venture will be subject to claims that their purpose or effect is unreasonably to restrain trade.

The NFL case arose from the complaint of American Needle, a headwear manufacturer, against the NFL, the 32 separate NFL teams, and National Football League Properties (NFLP). In 1963, the teams formed NFLP as their exclusive agent to collectively develop, license, and market the intellectual property of all NFL teams. Over the years, NFLP has generated substantial revenue which has been shared equally among the teams or given to charity. Participation in NFLP is voluntary.

Before 2000, NFLP granted non-exclusive licenses to multiple vendors, including American Needle. In 2000, however, the NFL teams voted to authorize the granting of exclusive licenses. NFLP granted Reebok International Ltd. an exclusive 10-year license to manufacture and sell trademarked headwear for all 32 NFL teams and did not renew the non-exclusive license to American Needle. American Needle challenged the agreements between the NFL teams, NFLP and Reebok as an illegal conspiracy in violation of Section 1 of the Sherman Act.

The NFL teams did not dispute that they collectively licensed their trademarks and other intellectual property through NFLP, but the NFL, the 32 teams, and the NFLP asserted that they were a single economic enterprise and, therefore, legally incapable of conspiring. Both the trial court and the Court of Appeals accepted NFL's argument and found that the 32 teams comprised a single entity because cooperation between the teams was necessary to produce NFL football.

The U.S. Supreme Court reversed, and ordered that American Needle's antitrust case continue. The issue before the Court was whether the collective licensing approach implemented through NFLP was concerted action that could be found to be an unlawful conspiracy in restraint of trade. The Court noted that concerted action among potential competitors is inherently fraught with anticompetitive risk, insofar as it deprives the marketplace of independent centers of decision making.

The Court found that an apparel manufacturer, such as American Needle, might consider the 32 separate NFL teams as potentially competing suppliers of valuable trademarks. The decision by the NFL teams to collectively license their separately-owned trademarks therefore deprives the market of independent decision makers. As with any league or organization, common interests of the members partially unite the economic interests of the members; however, the teams remain separate profit-seeking entities that would be competitors in the market for intellectual property but for the agreement to collectively license through NFLP. As a result, the licensing agreement constitutes concerted action subject to antitrust review.

The Court's conclusion that the NFLP licensing agreements constitute concerted action does not necessarily mean that the agreements are unlawful. Whether the collective licensing arrangement is an unreasonable restraint of trade remains to be decided. Determining whether NFLP's particular agreements are an unreasonable restraint of trade will require an assessment of both the procompetitive and anticompetitive purposes and effects of that agreement. Previewing that analysis, the Court noted that while league wide agreements are necessary to produce football, it does not follow that concerted marketing of intellectual property is likewise necessary. On the other hand, the Court recognized that

## NFL Collective Licensing Agreements Subject to Antitrust Attack as Contracts in Restraint of Trade

maintaining a competitive balance among athletic teams is a legitimate and important interest that provides a justification for many collective decisions.

The *American Needle* decision is a reminder that creating a joint venture does not earn participants antitrust immunity for every agreement that they enter into with each other, or every action that the joint venture takes. When competitors pool intellectual property or other resources, even with the best of intentions, antitrust guidance is essential.

Copyright 2010 Hahn Loeser & Parks LLP

*Deborah A. Coleman is a partner in the Cleveland office of Hahn Loeser & Parks LLP. She focuses her practice on complex commercial litigation, particularly with regard to antitrust and intellectual property issues. Deborah frequently serves as a mediator or arbitrator for complex business disputes throughout the country, in addition to providing counsel and representation on issues involving professional ethics.*

*Rex W. Miller, II, is an associate in the Columbus office of Hahn Loeser & Parks LLP. He is licensed to practice in Ohio and before the United States Patent and Trademark Office. Rex has a technical background in electrical engineering, and practices in the Intellectual Property group focusing on the protection and enforcement of intellectual property rights through patents, trademarks, and trade secrets.*