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THE ANTITRUST ANALYSIS OF THE AMERICAN SPORT LEAGUES – THE RELEVANT ISSUES AND LAWSUITS FOR NCAA, NBA AND NFL

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Introduction

The world of professional sport has been growing at an enormous rhythm in the last decade, both in term of social appeal and of economic power.

Economically speaking, the sports clubs and leagues around the world have seen their revenues and impact on the nations in which they operate, skyrocket in just the last few years. Yet for these reasons, this huge increase in economic power that the various subjects of the athletic world are obtaining, needs to be matched by a growing level of both regulation and control over operations and actions of teams and leagues or associations.

In the European football world, for example, we have seen in the last years the establishment of the Financial Fair Play (FFP), a system of regulation with the purpose of limiting, in one way or another, the economic and financial power of the teams who play under Union of European Football Associations (UEFA) jurisdiction. The FFP was established in order to grant teams a fair and equal play field, to let them not just survive in a revenue growing world, but also allow them to prosper in this world.

But the focus of this present work is not on the European side of the sports world, rather, we will face what are the rules, the system that control and adjust the overseas, American, sport leagues.

Indeed, as we have been witnesses of the enormous growth of "our" sport leagues, this kind of expansion has happened also, and we may say in grater terms, in the United States.

The purpose of this work will be focusing on the functioning of the main professional and non-professional American sports associations, and to how those are regulated and adjusted over time. We will also focus on the history of antitrust claims and lawsuits that actually helped and are still helping the system improving and adapting to the quick changes of society and economies.

In Chapter I, we are going to face the argument around the principal non-professional or amateur sports association in the United States, the NCAA. The focus of the analysis over the National Collegiate Athletic Association will be over the tumultuous relationship that its participants, the amateur athletes, have with the Association itself over the rules restraining their compensation. There will be then an analysis of the most relevant case in NCAA's history, the lawsuit brought in by Mr. Edward O'Bannon against the NCAA, always regarding the compensation rights of student-athletes.

Chapter II will then face the rules and standards of two of the biggest and richest professional sport leagues not just in America, but in the world, the National Basketball Association (NBA) and the National Football League (NFL). Here we will analyze the current rules of the two leagues and the stages that brought to the formulation of the modern agreements between players and team owners. The focus will be on the subject of the existence of an exemption from antitrust scrutiny for the leagues due to the existence of that agreement, the Collective Bargaining Agreement. There will be an in-depth analysis on two of the more controvert issues in American sports, the labor exemption and players eligibility rules.

Finally, Chapter III, will examine the issue of intellectual property rights in the United States sports leagues. There will be an analysis on the history of lawsuits regarding property rights and property systems in the United States leagues and Associations. Ultimately, we will focus and have a view over the most relevant case on property right in American sports, the decision of US Supreme Court over American Needle v. NFL[1].

[1] American Needle, Inc. v. National Football League, 560 U.S. 183 (2010)

CHAPTER 1
NCAA RULES AND ANTITRUST LITIGATIONS

1.1History of the NCAA

The NCAA (National Collegiate Athletic Association) was founded in 1906, by the name of Intercollegiate Athletic Association of the United States (IAAUS), and took its final name in 1910. “The NCAA was founded to protect young people from the dangerous and exploitive athletics practices of the time”, so states the NCAA on its official website.

The association started because of the fact that American football (simply football from here on) was in danger of being abolished as a result of being deemed as too dangerous for the athletes. Just to give some numbers, only during the 1905 season alone, 18 college and amateurs players died during games. This was of great relevance, to the point that US president, Theodore Roosevelt, decided to gather a group of football representative to agree on reforms to try and improve the safety of the game of college football.

At the time the NCAA was founded, and even today, there was a principle which was considered paramount, and that we will focus on further in this paper, the concept of amateurism.

In 1921, the first national championship event took place (Track and Field Championship) and it started expanding, including other sports and all the college associations and conferences associated. The great leap came in 1942, year in which the NCAA had acquired the power to set its rules, and in 1952 when it started regulating the live television coverage of college football to protect attendance in the stadiums. The form of the NCAA that we know today was established in 1973, with the reorganization into three divisions, each representing a different level of competition.

Nowadays the NCAA considers itself as an “organization dedicated to the well-being and lifelong success of college athletes”. Its members are 1.117 colleges and universities, grouped in more than 100 athletics conferences, composed of almost 40 different affiliated sports organizations. The teams are spread throughout the US and the number of those is enormous, as described in NCAA official website: “Nearly half

a million college athletes make up the 19,750 teams that send more than 52,500 participants to compete each year in the NCAA's 90 championships in 24 sports across 3 divisions."[2]

Of the 1.117 schools, approximately 350 compete in Division I, which is itself divided into two subdivisions for the purposes of football competition, one of which is the FBS (Football Bowl Subdivision).

Division I comprehend 32 conferences, which can enact and enforce conference-specific rules, consistent with the NCAA's own rules.

As stated before, the foundation of the NCAA is the fact that all its participants are distinguished by the status of amateurs, and that each of them is defined as a Student-Athlete.

The standards set for eligibility are, especially for Division I athletes, are strongly related to academic success, "For Division I student-athletes who will enroll in August 1, 2016 and later, the requirements to compete in the first year will change. In addition to the above standards, students must: (1) Earn at least a 2.3 grade-point average in core courses; (2) Meet an increased sliding-scale standard (for example, an SAT score of 820 requires a 2.5 high school core course GPA); (3) Successfully complete 10 of the 16 total required core courses before the start of their seventh semester in high school. Seven of the 10 courses must be successfully completed in English, math and science."[3]

To understand the amazing evolution of the NCAA, we can point out the increase and the splitting in its revenue stream during the recent years. See table 1:

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[2] NCAA Official Web Site – 2019 – www.ncaa.org - http://www.ncaa.org/about/resources/media-center/ncaa-101/what-ncaa

[3] NCAA Official Web Site – 2019 – www.ncaa.org - http://www.ncaa.org/student-athletes/play-division-i-sports

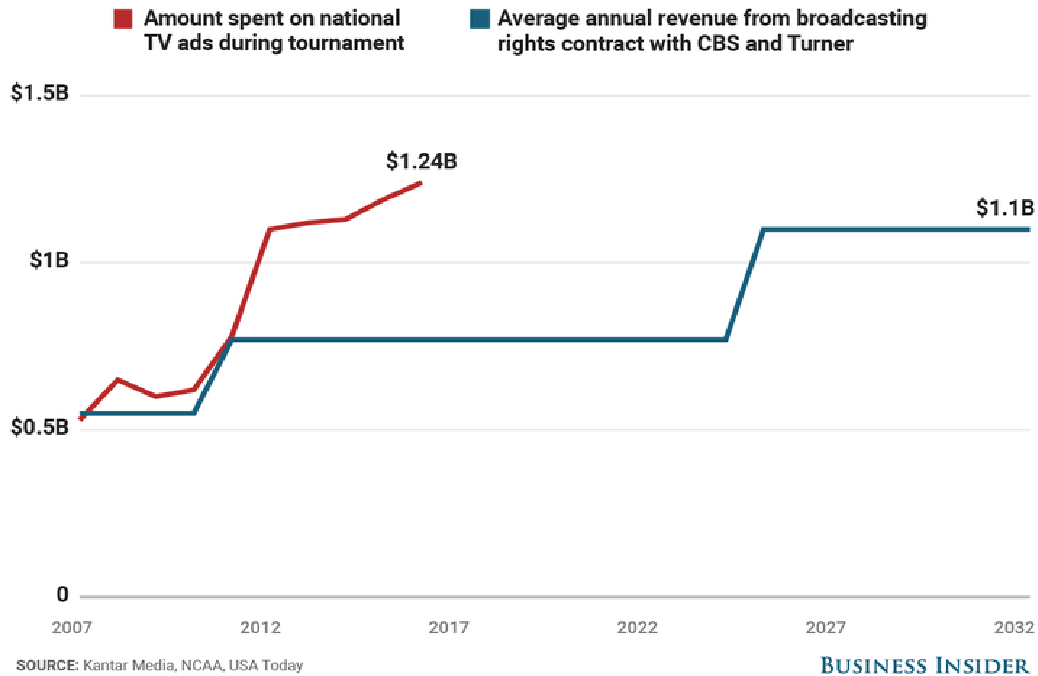

Table 1

If we wanted to have a clear vision of what the NCAA's revenues come from, we can see that for year 2017, of the $1.1 billion, more than $800 million are due to lucrative TV rights deals with CBS and Turner, which also owns CNN (two of the major sports networks in the USA). In 2010, the parties agreed to acquire the rights of the men's basketball tournament for $10.8 billion in 14 years, the deal was than extended in 2016 for $8.8 billion until 2032, making it a grand total of $19 billion for the period 2010-2032. If we were to split the sources of the annual revenues of the NCAA in 2017 we will have the already mentioned $800 million coming from the *television and marketing right fees*, which are more or less the 80% of the total. The second biggest voice of revenue comes from the aggregate incomes of people who go to games in person, $130 million, meaning that only 13% comes from actual *attendance at the live event*. The remaining revenues, almost $100 million are from the sum of *net investment, sales, facilities and other contribution*. As for the 2017 expenses, the NCAA actually spent most of its revenues, mostly on distribution payments to Division I schools ($560 million) and expenses for Division I championships and programs ($94 million). Needless to say, furthermore, that NCAA is still considered a

"501(c)(3) organization, meaning that the government considers it a nonprofit and it does not pay federal income taxes.[4]

Consistently to what happens for NCAA basketball, also the FBS has seen its revenues skyrocket in the last years. "In 2012, ESPN Tuesday had reached an agreement with "the group that will administer the new college football playoff" to broadcast that playoff and each of its six associated bowls for 12 seasons, from 2014 through 2025. A multi-year contract with ESPN for the College Football Playoff with a value of $5.64 billion."[5]

All of these revenues are generated mainly by the five major conferences of American college football, there are, in fact, five conferences which generate the highest revenues, known as the Power Five Conferences (PFC), each generating hundreds of millions in addition to the money that the NCAA is already distributing to them. And of course, their revenues are projected to increase.

In the following are listed the PFCs and revenues they generate: **The Atlantic Coast Conference (ACC)** (Boston College Eagles, Clemson Tigers, Duke Blue Devils, Florida State Seminoles, Georgia Tech Yellow Jackets, Louisville Cardinals, Miami Hurricanes, North Carolina Tar Heels, North Carolina State Wolfpack, Notre Dame Fighting Irish, Pittsburgh Panthers, Syracuse Orange, Virginia Cavaliers, Virginia Tech Hokies, Wake Forest Demon Deacons) that generates revenues for $465 million. Like most other power conferences, the ACC saw a boost in total revenues in the 2018 fiscal year of about 11% from the previous year.[6]

The Big Ten Football Conference (BTC) (Indiana, Maryland, Michigan, Michigan State, Ohio State, Penn State, and Rutgers, while the West comprises Illinois, Iowa, Minnesota, Nebraska, Northwestern, Purdue, and Wisconsin) has recorded nearly $759 million in revenue for the 2018 financial year. This figure represents a year-on-

[4] Kirshner, Alex - Here's how the NCAA generated a billion dollars in 2017 - sbnation.com – 8 March 2018 - https://www.sbnation.com/2018/3/8/17092300/ncaa-revenues-financial-statement-2017.
[5] Hinnen, Jerry - ESPN reaches 12-year deal to air college football playoffs - www.cbssports.com – 21 November 2012 - https://www.cbssports.com/college-football/news/espn-reaches-12-year-deal-to-air-college-football-playoffs/.
[6] McGuire, Kevin - ACC revenue reaches $465 million but distributions lag behind other power conferences - https://collegefootballtalk.nbcsports.com – 24 March 2019 - https://collegefootballtalk.nbcsports.com/2019/05/24/acc-revenue-reaches-465-million-but-distributions-lag-behind-other-power-conferences/.

year revenue increase of 48% for the BTC and exceeds any comparable annual figure amongst its NCAA rivals.[7]

The Big 12 Conference (B12C) (Oklahoma, Texas, Oklahoma State, Kansas, TCU, Kansas State, West Virginia, Texas Tech, Iowa State and Baylor. That's right, the "B12C" is standing at a total of 10 teams) revenue creeps up to $373.9 million in 2018.[8]

The Pac-12 Conference (Arizona Wildcats, Arizona State Sun Devils, California Golden Bears, Colorado Buffaloes, Oregon Ducks, Oregon State Beavers, Stanford Cardinal, UCLA Bruins, USC Trojans, Utah Utes, Washington Huskies, Washington State Cougars) reports the financial performance for the financial year 2017-2018, highlighted by total revenues of $497M.[9]

Finally, the **Southeastern Conference** (Alabama, Arkansas, Auburn, Florida, Georgia, Kentucky, LSU, Mississippi, Mississippi State, Missouri, South Carolina, Tennessee, Texas A&M, and Vanderbilt) reports a total revenue of approximately $627.1 million for the 2017-18 fiscal year.[10]

The Power 5 Conferences' combined annual revenues differences between the fiscal year 2014 and 2018 shows us the complete level of increase in revenues in just a four-year span: Fiscal Year 2014: $1.57 billion, Fiscal Year 2018: $2.75 billion.

In the light of the above, there has been, and there is a growing desire of the athletes in defending their interests, desire which is corroborated by the increasing number of lawsuits and articles which promote solutions to nowadays NCAA's model.

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[7] Levy, Joe - Big Ten conference hits US$759m in revenue - www.sportspromedia.com – 17 May 2019 - http://www.sportspromedia.com/news/ncaa-big-ten-conference-us759m-revenue-college-football-big-12-southeastern.

[8] Fischer, Bryan - Big 12 revenue creeps up to $373.9 million in 2018, still nearly half of SEC's total take - collegefootballtalk.nbcsports.com – 10 May 2019 - https://collegefootballtalk.nbcsports.com/2019/05/10/big-12-revenue-creeps-up-to-373-9-million-in-2018-still-nearly-half-of-secs-total-take/.

[9] Pac-12 Conference - Pac-12 announces 2017-18 financial results - pac-12.com – 20 May 2019 - https://pac-12.com/article/2019/05/20/pac-12-announces-2017-18-financial-results.

[10] SEC staff - SEC announces 2017-18 revenue distribution - www.secsports.com – 2019 - https://www.secsports.com/article/25900249/sec-announces-2017-18-revenue-distribution.

1.2 NCAA's History of Lawsuits

In order to understand how the most recent cases have been and are able to alter NCAA's rules, or simply the mind sets of NCAA's insiders or fans, it is important to have a view of some of the first and most important lawsuits against the Association. The relationship of the NCAA with the antitrust and the Courts started to be of a certain relevance in the seventies, more specifically in 1974 and 1975, when two lawsuits were set by different plaintiffs.

On the specific we are talking about the College Athletic Placement Service Inc v. NCAA[11] case of 1974, and the Jones v. NCAA[12] of 1975.

These two cases are the first examples of internal to the NCAA plaintiffs starting to speak up on various issues around the NCAA rules and actions.

The two lawsuits faced two different issues, the first one was about an NCAA rule that prevented high school students from paying scholarships services under amateurism, while the second one was brought up by a hockey player, Stephen A. Jones, who suited the NCAA for having deemed the plaintiffs as not eligible for compensation based on his athletic stipend. Even if the two complaints were different from each other, the courts' judgements were very similar. The District Court on New Jersey claimed that NCAA's bylaws were set with the purpose of "preserving the educational standards in member institutions, and not for any commercial purpose"[13], while the District Court of Massachusetts held that the rules could not be challenged because "the actions of the NCAA in setting eligibility guidelines has no nexus to commercial or business activities."[14] Those two cases, laid the foundation for the following lawsuits, underlining the "non-commercial" and "non-business" purpose of the NCAA.

The two examples also show that, since its foundation and going forward, the NCAA seems to be protected by a veil, which does not allow any kind of antitrust litigation, since its amateurism and so non-commercial purpose are the foundation of the Association. Nonetheless the history of NCAA's litigation, was far from being over, since the number and relevance of subsequent cases increased a lot in the following years. In fact, another case of great relevance in NCAA lawsuit landscape, not only for

[11] College Athletic Placement Service, Inc. v. National Collegiate Athletic Association, 506 F.2d 1050 (3rd Cir. 1974).
[12] Jones v. National Collegiate Athletic Association, 392 F. Supp. 295 (D. Mass. 1975).
[13] College Athletic Placement Service, Inc. v. National Collegiate Athletic Association, 506 F.2d 1050 (3rd Cir. 1974).
[14] Jones v. National Collegiate Athletic Association, 392 F. Supp. 295 (D. Mass. 1975).

its ending, but also for its further uses and citations in various cases, is without a doubt the *NCAA v. Board of Regents of the University of Oklahoma* of 1984.[15] The Board of Regents of University of Oklahoma and University of Georgia, suited the NCAA because it was "limiting the number of games that any member school could play on national television."[16] The main reason for this lawsuit came from the idea that the NCAA's television plan, was effectively imposing prices which were much lower than the level that teams could impose in absence of the challenged rules. The NCAA was setting ceilings of the total number of games that could be televised (reducing the total output) while increasing the price of each game. The NCAA was acting in form of a cartel, cutting out from any economical and strategical decision the institutions (the colleges), which where the main actors of the games that were televised. The Plaintiffs were, in brief, stating that NCAA's rules of price and output restriction violated the Sherman Act.

The Sherman Act is the United States antitrust law regulating competition in the markets to protect consumers and producers. For the purpose of these and following cases we will focus on Sherman Act's Section 1, which prohibits agreements in restraint of trade such as price-fixing, refusals to deal, bid-rigging.

The first rule of the Sherman Act Section 1 states that "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal"[17].

The Court of Appeals which defined the case, stated, that the television plan "constituted illegal per se price fixing"[18], questioning NCAA rules for one of the first times in NCAA history. The Court studied the three NCAA's procompetitive arguments, that they brought in in order to justify the challenged restraint of trade. The Court rejected the first argument, which was the favor of live attendance, stating that "since the plan involved a concomitant reduction in viewership the plan did not result in a net increase in output and hence was not procompetitive"[19].

Secondly, the promotion of athletically balanced competition purpose was faced agreeing that "any contribution the plan made to athletic balance could be achieved by less restrictive means."[20]

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[15] NCAA v. Board of Regents, 468 U.S. 85 (1984).
[16] Id.
[17] Sherman Act §§ 1-7, 15 U.S.C. §§ 1-7 (2006).
[18] NCAA v. Board of Regents, 468 U.S. 85 (1984).
[19] Id.
[20] Id.

Third, the Court of Appeals affirmed that the plan “entirely eliminated competition between producers of football and hence was illegal per se”[21] refusing to justify its presumption of effective television programming.

Nonetheless, even if the result of the lawsuit was a “victory” for the plaintiffs, there was still main advantage for the NCAA, that came from the fact that it could start hanging onto certain phrases in dicta with the purpose of solidifying a “procompetitive presumption” about amateurism under antitrust law. Two dicta were set after the final word of the judge, regarding the procompetitive presumption of amateurism and the non-commercial nature of the NCAA in the case. The presumption of amateurism and the rules that are needed to safeguard the NCAA system are of primary importance for both the Courts and the NCAA itself, and is no mystery that those two dicta put their foundations on the amateurism principle.

Indeed, the first dicta expresses that some sort of horizontal restraint on competition “are essential if the product is available at all”, and that “in order to preserve the character and quality of the ‘product,’ athletes must not be paid, must be required to attend class, and the like.”[22]

The second dicta comes from the Board of Regents decision, which underlines the fact that “The NCAA plays a critical role in the maintenance of a revered tradition of amateurism in college sports and […] the preservation of the student-athlete in higher education adds richness and diversity to intercollegiate athletics and is entirely consistent with the goals of the Sherman Act.”[23]

With those dicta, came also the misinterpretation of the actual wording of the case. In Board of Regents, the NCAA’s amateurism rules ‘can’ be viewed as procompetitive.” The exact language uses “the word “can” rather than “must” and using it in the context of determining the proper test for reviewing NCAA conduct, it is not clear that the Board of Regents court concluded the NCAA’s no-pay rules were procompetitive.”[24] By saying this, the Court is indirectly allowing the NCAA from protecting its rules from future challenges against them, protection coming from an actual misreading of the actual text of the Court of Board of Regents.

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[21] NCAA v. Board of Regents, 468 U.S. 85 (1984).

[22] Baker III, Thomas A. J.D., Ph.D. Edelman, Marc J.D., Watanabe, Nicholas M. Ph.D - Debunking the NCAA’s Myth That Amateurism Conforms with Antitrust Law: A Legal and Statistical Analysis – 2017 - Forthcoming, Tennessee Law Review, 2018- Pag. 7.

[23] NCAA v. Board of Regents, 468 U.S. 85 (1984).

[24] Edelman, Marc - A Short Treatise on Amateurism and Antitrust Law: Why the NCAA's No-Pay Rules Violate Section 1 of the Sherman Act – 2013 - Case Western Reserve Law Review.

The subsequent lawsuits, after Board of Regents, are indeed children of this procompetitive presumptions, and not of the loss of the NCAA against the plaintiffs. Over time many federal circuits changed what was a simple presumption, into an exemption of pro-competitiveness.

Three cases are of good relevance in understanding the effect of Board of Regents' cause. First one is McCormack v. NCAA,[25] a case where the plaintiffs challenged the NCAA for having banned the athletes from the football program for having been paid by the university. The Court ruled in favor of the NCAA underlining the fact that "rules that determine player eligibility enhance public interest in intercollegiate athletics."[26] The Court also added that "The NCAA markets college football as a product distinct from professional football", and that "The eligibility rules create the product and allow its survival in the face of commercializing pressures; the goal of the NCAA is to integrate athletics with academics. Its requirements reasonably further this goal."[27]

Another case is Banks v. NCAA[28], in which the plaintiff, Braxton Lee Banks, sued the NCAA for the practice which restrains athletes from being eligible for college sports, after choosing to be declared eligible for a professional draft. The Court was strong on the point that "the no-agent and no-draft rules are vital and must work in conjunction with other eligibility requirements to preserve the amateur status of college athletics, and prevent the sports agents from further intruding into the collegiate educational system."[29]

Another case, chosen as the last example of post Board of Regent case, is Smith v. NCAA.[30] The plaintiff, Renee M. Smith, alleged that "the National College Athletic Association's bylaw prohibited her from participating in athletics while enrolled in a graduate program outside her undergraduate institution."[31] The Court's final idea was that "NCAA eligibility rules existed to ensure fair competition and enhance public

[25] David R. McCormack, et al., Plaintiffs-appellants, v. National Collegiate Athletic Association, Defendant-appellee, 845 F.2d 1338 (5th Cir. 1988).

[26] Baker III, Thomas A. J.D., Ph.D. Edelman, Marc J.D., Watanabe, Nicholas M. Ph.D - Debunking the NCAA's Myth That Amateurism Conforms with Antitrust Law: A Legal and Statistical Analysis – 2017 - Forthcoming, Tennessee Law Review, 2018 - Pag. 8.

[27] David R. McCormack, et al., Plaintiffs-appellants, v. National Collegiate Athletic Association, Defendant-appellee, 845 F.2d 1338 (5th Cir. 1988).

[28] Banks v. NCAA, 977 F.2d 1081, U.S. (7th Cir. 1992).

[29] Id.

[30] Smith v. Nat'l Collegiate Athletic Association, 139 F.3d 180 (3d Cir. 1998).

[31] Id.

interest in intercollegiate athletics and therefore were not designed to provide the NCAA with a commercial advantage."[32]

As we can see from these examples, the NCAA, even though had to face a "defeat" in Board of Regents' case, kept on maintaining its almost super legem status, counting on two major principles: the preservation of amateurism and its non-commercial nature.

Nonetheless, it is not a surprise that even if the NCAA seemed to be an "unbeatable obstacle", players, coaches and others, did not stop trying to making their rights prevail in the following years. Most specifically, in the years that corresponded with the enormous increase in revenues for NCAA's television rights, mainly for Basketball and Football, the attention of athletes and public opinion over the rights of the amateur student-athletes grew very quickly. One of the most important and "game changing" decisions over NCAA rule-set, was taken in 2014 and 2015 with the O'Bannon v. NCAA case.

1.3 O'Bannon vs NCAA

The O'Bannon decision is an important step forward for both college-athletes' rights and sports law jurisprudence because it recognizes that NCAA rules limiting college-athlete pay, may violate section 1 of the Sherman Antitrust Act.[33]

The bench trial in O'Bannon v. NCAA[34] is a milestone in reshaping the idea of college athletes since the institution of the association in the early year of 1900. The case results, even if did not result in major economic value for both the plaintiffs and the NCAA, set the foundation for the new idea of "liberalization" of the figure of student-athletes in relation with their status of amateurs and with the multitude of restrictions that they were forced to obey.

The O'Bannon litigation began in 2009 when Edward O'Bannon, a former college basketball player of University of California Los Angeles (UCLA), sued the NCAA, Electronic Arts Inc. and the Collegiate Licensing Company for inappropriate and

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[32] Baker III, Thomas A. J.D., Ph.D. Edelman, Marc J.D., Watanabe, Nicholas M. Ph.D - Debunking the NCAA's Myth That Amateurism Conforms with Antitrust Law: A Legal and Statistical Analysis – 2017 - Forthcoming, Tennessee Law Review, 2018 - Pag. 9.

[33] Edelman, Marc, The District Court Decision in O'Bannon v. National Collegiate Athletic Association: A Small Step Forward for College-Athlete Rights, and a Gateway for Far Grander Change – Washington and Lee Law Review – 2014 - Pag 2321.

[34] O'Bannon v. NCAA - 09-3329 (N.D. Cal. 2014).

illegal use of his Name, Image and Likeness (NIL from here on) rights in the videogame NCAA Basketball 09.

The complaint was based on the fact that for the Plaintiffs, Mr. O'Bannon, jointly with other twelve former NCAA football and basketball players, the Defendants were profiting from and using illegally all of the former players' NIL rights, without any correlated form of compensation or allowance. From January 15 2010, "the Northern District of California consolidated the substance of the complaint with another lawsuit, Keller v. Electronic Arts[35], which claims related to O'Bannon ones."[36]

The complaint of the plaintiffs was that the NCAA was fixing the price of former student athletes' images at zero and . . . boycotting former student athletes in the collegiate licensing market"[37], not allowing them to participate in any deal on their own NIL rights with third party actors.

NCAA's rules on student compensation define that the NCAA "prohibits any student-athlete from receiving financial aid based on athletics ability that exceeds the value of a full "grant-in-aid."[38] The full "grant-in-aid" is then defined as "financial aid that consists of tuition and fees, rooms and board, and required course-related books."[39] The NCAA did not allow any kind of accessory compensation for its student-athletes, with the prerogative of maintaining the principle of amateurism as a milestone. NCAA, reinforced from the previous seen case, McCormack v. NCAA, in which was not found guilt for banning from college a group of athletes paid by the university, was enforcing rules in his favor, that did not allow students to receive any kind of compensation that exceeded the pre-set level of remuneration denoted in the scholarship. The violation of those rules would have resulted in the loss of the athlete's eligibility and amateur status, not allowing him to compete in the college sport market anymore in the future. As a last point, the NCAA also prohibited any student athlete from receiving "compensation from outside sources based on athletic skills or ability."[40] This means that an athlete can still earn money from any kind of job unrelated to his athletic capabilities, but he is not allowed to monetize from his athletic abilities.

[35] Keller v. Electronic Arts Inc., 10-15387 (9th Cir. 2013)

[36] Edelman, Marc, The District Court Decision in O'Bannon v. National Collegiate Athletic Association: A Small Step Forward for College-Athlete Rights, and a Gateway for Far Grander Change – Washington and Lee Law Review – 2014 – Pag 2323.

[37] Id. 2322.

[38] O'Bannon v. NCAA - 09-3329 (N.D. Cal. 2014) – Pag 19.

[39] Id. 19.

[40] Id. 20.

With these premises, the Court used a three-step approach to understand the actual illegality or excessively strictness of the challenged rules. This approach is a *burden-shifting process*, in which each part in question, the plaintiffs and the defendants, have to uphold the purposes for their actions and accuses to the other part.

In the first step, the plaintiffs had to show the actual reasons for challenging the rules imposed by the NCAA. The main point of the plaintiffs is to set that the restraints were excessively harsh, following the idea that "a restraint violates the rule of reason, if the restraint's harm to competition outweighs its procompetitive effects."[41]

The plaintiffs set that they were restrained in two different markets, the "college education market" and the "group licensing market", which represented the market in which colleges recruit their student-athletes and the market in which televisions and others compete for licenses of the NILs. The "college education market" was defined as not substitutable because of the uniqueness of the Division I schools offer. The only other opportunities are "Divisions II and III, and associations like the NAIA, USCAA, NJCAA, or NCCAA which differ significantly in both price and quality from those offered by FBS and Division I schools"[42] In relation to the "group licensing market" the Court set that, because the students-athletes are not permitted by NCAA's bylaws to deal with television for the licensing of their NILs, the NCAA is affectively restraining them, acting, for NCAA's own expert, Dr. Rubinfeld "as a cartel that imposes a restraint on trade in this market"[43], not allowing them to obtain the profits that are generated by their NILs.

The second step was on the defendants' side, where the part had to define the procompetitive justifications for the challenged restraint, justifications that were: the preservation of amateurism, the maintenance of the competitive balance, the integration between academics and athletics.

Concerning the preservation of amateurism, the motivation of the NCAA is that, maintaining the amatorial status of the athletes, not allowing them to receive any compensation, is the most important thing, not just to define them from their fellow professional colleagues, but also to preserve the consumer demand for college sports, which would be altered in the moment athletes were able to earn money from their athletic performances. The evidence presented at the trial actually suggests the

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[41] Tanaka v. University of Southern California, 252 F.3d 1059 (9th Cir., 2001).

[42] O'Bannon v. NCAA - 09-3329 (N.D. Cal. 2014) – Pag 53.

[43] Id. 56.

opposite. Mr. Neal Pilson, NCAA's broadcasting industry expert, testified that "the popularity of college sports is driven by feelings of "loyalty to the school" and by the "people who live in the region or the conference."[44] NCAA president Dr. Mark Emmert, noted that much of the popularity of the sport "stems from the fact that the fan base has an opportunity to cheer for someone from their region of the country."[45] Nonetheless, the Court established that the NCAA could define that its rules were actually procompetitive if the Association could have proven that "maintaining amateurism increased overall consumer demand for college sports."[46] The NCAA, still, was not able to give any kind of relevant evidence over if its challenged rules did actually favor the consumer demand. Also, considering one of the alternatives given to the rules, that we will see further in this analysis, the NCAA "failed to present any evidence whatsoever that payment to college athletes of less than $20,000 per year, or payment to college athletes via a trust, would harm consumer demand to view college sports."[47] In spite of the above, the Court still found that the NCAA's restrictions were partially justified by the fact that they limited the payment of large sums of money to student, yet the Court did not justify "the rigid prohibition on compensating student-athletes, in the present or in the future, with any share of licensing revenue generated from the use of their names, images, and likenesses.

Another motivation for the restraint, is based on the fact that the set of rules and restraints are up to maintain a strong degree of competitiveness and a sufficient level of competitive balance among the teams that compose the Division I basketball and FBS football. These rules actually do not seem to be associated with increases or decreases of competitive balance, in fact, the amount of money that may be spent as the athletes' compensation, is instead spent to increase the budget on coaching, recruiting and training facilities. As one of Plaintiffs' economic expert, Dr. Roger Noll testified, "Little evidence supports the claim that NCAA regulations help level the playing field. At best, they appear to have had a very limited effect, and at worst they have served to strengthen the position of the dominant teams."[48] Connected to the competitive balance, there was also the belief that allowing schools to increase the cap

[44] Id. 33.
[45] Id. 33.
[46] Edelman, Marc, The District Court Decision in O'Bannon v. National Collegiate Athletic Association: A Small Step Forward for College-Athlete Rights, and a Gateway for Far Grander Change – Washington and Lee Law Review – 2014 – Pag 2327.
[47] Id. 2334.
[48] O'Bannon v. NCAA - 09-3329 (N.D. Cal. 2014) – Pag 83.

of compensation for students, would bring to an increase of disparities between the schools that have an higher revenue source, coming from the history of winning teams, or have a bigger relationship with sponsors, and the schools who do not have the same economic power. This is actually half true, because those kinds of differences are already present in today's NCAA structure, as we can see for the Power Five Conferences, which are splitting the market to their favor and gathering most of the Division I basketball and FBS football revenues, other than having the higher chances on recruiting the best players. Most importantly, Dr. Noll's analysis did not show that consumer demand for the NCAA's product would decrease if FBS football or Division I basketball teams were less competitively balanced than they currently are.[49] The only motivation, as for the amateurism preservation, is tied to the restriction on payment of large sums of money, which could bring the risk of "potentially 'create a wedge' between student-athletes and others on campus."[50]

Third motivation is the integration between academics and athletics, or the integration between student athletes and "simple" students. NCAA's position underlines the fact that, by allowing student-athletes to receive extra compensation compared to their fellow non-athlete colleagues, a sense of disparity would arise, bringing to an inter-collegiate division of the two categories of students. That said, the NCAA has not shown that the specific restraints challenged in this case, are necessary to achieve these benefits.[51] In addition, the plaintiffs replied by underlining that the NCAA's restraint does not help student-athletes integration into their academic communities. Another of the experts who followed the case, Prof. Ellen Staurowsky of Drexel University, noted that those differences have existed "for many years, the NCAA argue the college athletes are just like any other students on campus – that is simply not true, they are not recruited in the same ways, they are not retained in the same ways, they may not be able to pursue the degree they want to pursue, as a result of that athletic scholarship."[52]

As an example of the already clear difference between athletes and non-athletes, came in 2014, when was discovered that for many years, the University of North Carolina allowed his student-athletes to take "fake classes" and inflate their grades in order to

[49] Id. 84.
[50] Id. 39.
[51] Id. 87.
[52] The Federalist Society - O'Bannon v. NCAA: Intellectual Property, Antitrust, & College Sports - youtube.com – 31 Jan 2019 - https://www.youtube.com/watch?v=iKrIpi9pqBk.

remain eligible for the sports programs. "Counselors saw the paper classes and the artificially high grades they yielded as key to helping some student-athletes remain eligible."[53] This was the result of the great difference between the lifestyles of the athletes' respect to the non-athletes'. The number of hours per day that an athlete dedicates to practice are far more than the ones of regular students, thus disparity already exists, and not simply on the economic and financial ground.

Even though, as we said above, some of NCAA's procompetitive justifications were accepted by the Court. The protection of student-athletes from receiving huge amount of money, may have an actual procompetitive effect, by differentiating the student and amateurs, from professionals.

The third and last step of the approach involved the plaintiffs once more, as foreseen in the rule of reason process. Here the issue was to show an alternative to the challenged restraint, with the objective to limit the strictness of NCAA's rules. In fact, since the NCAA produced a number of motivations that proven to partially justify its restrictions (both regarding the fact that the challenged rules were limiting the student-athletes from receiving large amounts of money, bringing them closer to the figure of a professional athlete rather than an amateur), the plaintiffs had to show that these procompetitive goals can be achieved in "other and better ways"-- that is, through "less restrictive alternatives."[54]

The plaintiffs proposed a list of three less restrictive alternatives with the purpose of reducing the level of restraint of the rules limiting compensation and possibility to profit from the exploitation of student-athletes NIL rights. Of the three alternatives promoted, only the third, the allowance for athletes to receive money from endorsement, was not accepted by the Court as "less restrictive". The Court, together with the judgement of Mark Emmert (President of the NCAA at the time of the lawsuit and even today), underlined that "Allowing student-athletes to endorse commercial products would undermine the efforts of both the NCAA and its member schools to protect against the 'commercial exploitation' of student-athletes."[55]

While, for the first and second alternative, the Court judgement was positive accepting the solutions proposed by the plaintiffs.

[53]Ganim, Sara and Sayers, Devon - UNC report finds 18 years of academic fraud to keep athletes playing - edition.cnn.com – 23 Oct 2014 - https://edition.cnn.com/2014/10/22/us/unc-report-academic-fraud/index.html.
[54] O'Bannon v. NCAA - 09-3329 (N.D. Cal. 2014) – Pag 90.
[55] Id. 47.

The first alternative would allow the colleges to raise the total grant-in-aid limit to allow schools to award stipends, derived from specified sources of licensing revenue, to student-athletes.[56] The Court, in accepting the proposed alternative, underlining the fact that “a stipend capped at the cost of attendance would not violate the NCAA’s own definition of amateurism as it would only cover educational expenses” and that “none of the evidence presented at trial suggests that consumer demand for the NCAA’s product would decrease if schools were to provide such stipends to student-athletes once again.”[57]

In order to have a clearer view to consumer demand variation related to increases in stipends, it is worth to digress on one of the subsequent studies that were made after the O’Bannon case, the research by Thomas A. Baker III, Marc Edelman and Nicholas M. Watanabe.[58] The study aimed to show that increases in stipend and other variables has various effects on consumer demand, both for live attendance and television viewership. The study is based on the use of a set of dependent variables (those that measure the demand for home college football games and those that analyze the viewership numbers for telecasts of NCAA college football games) and independent variables (number of wins and losses, the increase in stipend an athlete received from the previous year, measures in the quality of viewing such as the weather and the time of the year data, if the game is aired on cable or on no-cost tv, and income per capita and population density in the region of the team). For the purpose of our analysis, the study underlines that both for live attendance and television viewership, “stipend did not have a significant statistical relationship with attendance. In other words, there is no discernable change in attendance based on changes in the amounts that schools paid to their student-athletes.”[59]

In the light of the above, the first proposal was accepted by the Court as a valid less restrictive alternative to the restrained challenge.

Regarding the second alternative, “allow schools to deposit a share of licensing revenue into a trust fund for student-athletes, which could be paid after the student-

[56] Id. 43.

[57] Edelman, Marc, The District Court Decision in O’Bannon v. National Collegiate Athletic Association: A Small Step Forward for College-Athlete Rights, and a Gateway for Far Grander Change – Washington and Lee Law Review – 2014 – Pag 2335.

[58] Baker III, Thomas A. J.D., Ph.D. Edelman, Marc J.D., Watanabe, Nicholas M. Ph.D - Debunking the NCAA’s Myth That Amateurism Conforms with Antitrust Law: A Legal and Statistical Analysis – 2017 - Forthcoming, Tennessee Law Review, 2018.

[59] Id. 25.

athletes graduate or leave school for other reasons"[60], the Court's judgement was positive as for the first alternative. The Court found that the evidence failed to show that allowing payments of this nature would hurt consumer demand for college sports, as far as these payments were limited in amount, equal for all players based on the use of their names, images, and likenesses, and not actually paid to the athletes until after they left school. In the specific, the final decision was around the idea that holding compensation in trust for student-athletes while they are enrolled, would not erect any new barriers to schools' efforts to educate student-athletes or integrate them into their schools' academic communities"[61] and that consumer demand would not change if student-athletes were allowed, after leaving college, to receive limited and equal shares of licensing revenue generated from the use of their names, images, and likenesses during college."[62]

The Court's final decision was to allow the creation of a trust in which shares of revenues over NIL rights could be deposited and then distributed after the student leaves college, capped at a maximum of $5,000 per year (so a maximum of $20,000 since the four-year duration of the academic course).

The Court decision was then appealed by the NCAA to the United States Court of Appeal of the Ninth Circuit in 2015.

1.4 O'Bannon Appeal to the Ninth Circuit

The NCAA appealed the decision taken by the Northern District of California to the Ninth Circuit Court of Appeal the 17th March 2015.

In this appeal, the NCAA argued that the dicta in Board of Regents made the Association "exempt from antitrust scrutiny."[63] The NCAA's was claiming that under Board of Regents', any further decision over antitrust accusation should be faced applying the "per se" ruling, which consist in simply rejecting the accusation. The Court of Appeal refused this proposal accentuating that "a restraint that serves a procompetitive purpose can still be invalid under the Rule of Reason if a substantially less restrictive rule would further the same objectives equally well."[64]

[60] O'Bannon v. NCAA - 09-3329 (N.D. Cal. 2014)– Pag 42.
[61] Id. 44.
[62] Id. 46.
[63] O'Bannon v. NCAA, 14-16601 (9th Cir. 2015) – PAG 30.
[64] Id. 31.

The other argument of the NCAA to the previous decision came from the fact that Sherman Act Section 1 applies on “restraints of trade or commerce”[65], and since the compensation rules that are applied by the NCAA are regulating the eligibility rather than the commercial activity of athletes, they should not be subject to any scrutiny (both antitrust or Sherman Act).

In the Court’s evaluation on the argument, three examples were used to explaining why the NCAA’s argument was considered not credible. In first place, as Phillip Areeda and Herbert Hovenkamp show in their *Antitrust Law: An Analysis of Antitrust Principles and Their Application,* the recent idea of commerce is rather broad, and it has the possibility of “including almost every activity from which the actor anticipates economic gain.”[66] The concept of commercialism and economic gain anticipation of the NCAA was defined for the first time in the second example that the Court used. In Agnew v. NCAA[67], the Seventh Circuit Court underlined that was not credible that “big-time college football programs competing for highly sought-after high school football players do not anticipate economic gain from a successful recruiting program.”[68]

Also, the Ninth Circuit addressed the decision in Smith v. NCAA, where the noncommercial nature of NCAA’s limits was questioned once more. In this case the rules restraining compensation had the effect of regulating an activity which was not limited to eligibility of the student, rather it regulated also the commercial and business activity of the student-athlete. The action of regulating the “labor of student-athletes, which is the main component of NCAA’s product” is a price fixing because the “rules setting the price for that labor cut into “the heart of the NCAA’s business.”[69]

For the reasons shown above the Court for the Ninth Circuit decided that the “compensation rules are within the ambit of the Sherman Act.”[70]

Since the Court defined that the challenged rules need the rule of reason analysis, and that the NCAA arguments were not valid enough to allow the dismission of the case, the Ninth Circuit started the evaluation of the two alternatives suggested by the

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[65] Id. 33.

[66] Areeda, Phillip, Herbert Hovenkamp, Roger D. Blair, John L. Solow, and Einer Elhauge. Antitrust Law: An Analysis of Antitrust Principles and Their Application. New York: Aspen Law & Business, 2000 (4th ed. 2013).

[67] Agnew v. National Collegiate Athletic Association, 683 F.3d 328 (7th Cir. 2012).

[68] Id.

[69] Baker III, Thomas A. J.D., Ph.D. Edelman, Marc J.D., Watanabe, Nicholas M. Ph.D - Debunking the NCAA’s Myth That Amateurism Conforms with Antitrust Law: A Legal and Statistical Analysis – 2017 - Forthcoming, Tennessee Law Review, 2018 – Pag 12.

[70] O'Bannon v. NCAA, 14-16601 (9th Cir. 2015) – PAG 37.

Northern District of California Court (increase of the grant-in-aid or deferred compensation for use of NIL rights).

The Majority in O'Bannon's Appeal, accepted the first alternative option, basing its judgement on the previous evaluation made by Northern District of California, that defined that increments in total grant-in-aid for student-athletes, would not reduce consumer demand for college sports and would not interfere with the integration of the athletes in their academic communities. However, the major modification was on the second proposed alternative (allowing the foundation of a trust in which all profits from NIL rights of the athletes would be gathered and provided in deferred compensation at a total of $5,000 per-year). The motivation for the rejection of the alternative came from the idea that the approach was not "virtually as effective" as the first for the preservation of the amatorial status of the athletes. Indeed, the Court denoted that "being a poorly-paid professional athlete is not the same as being an amateur."[71]

In the end, the Court of the Ninth Circuit declared that they changed the decision of the District Court, not allowing "schools to pay up to $5,000 per year in deferred compensation"[72] and most importantly, it finally affirmed the "not over-the-rules status" of the NCAA. Indeed, in one of its final decisions, the Court of Appeals, underlined that the "NCAA is not above the antitrust laws, and courts cannot and must not shy away from requiring the NCAA to play by the Sherman Act's rules."[73]

Is important to underline, that not all of the Court agreed with the final judgement. Some dissented with the final decision of the Court, for example Chief Judge Sidney Runyan Thomas, dissented in part.

He based his idea on the fact that "three experts presented by the NCAA testified that providing student-athletes with small amounts of compensation above their cost of attendance, most likely would not have a significant impact on consumer interest in college sports."[74]

Stressing the minimal impact that the second alternative would have on the demand, he underlined, that even NCAA's own expert witness, Neal Pilson, judged it positively. An excessively high level of compensation may lead to negative effects to the demand

[71] Baker III, Thomas A. J.D., Ph.D. Edelman, Marc J.D., Watanabe, Nicholas M. Ph.D - Debunking the NCAA's Myth That Amateurism Conforms with Antitrust Law: A Legal and Statistical Analysis – 2017 - Forthcoming, Tennessee Law Review, 2018 – Pag 14.

[72] O'Bannon v. NCAA, 14-16601 (9th Cir. 2015) – PAG 63.

[73] Id. 63.

[74] Id. 65.

of consumers for college athletics, but "paying student-athletes $5,000 per year in trust most likely would not have a significant impact on such demand."[75]

The Majority also dismissed another testimony, one of the experts, Dr. Rascher, that demonstrated that after the increase of Olympics athletes and Baseball players' salaries, the demand did not decrease, but on the contrary, it grew up. Judge Thomas, concluded saying that "the Majority does not offer any evidentiary support for the distinction, nor explain how or why the District Court clearly erred in crediting this testimony."[76]

In his disagreement, Judge Thomas, stressed the idea that the Majority focused too much on the preservation of amateurism, rather than on allowing student-athletes to be compensated for their NILs. Permitting students to receive some sort of compensation is 'virtually as effective' in preserving popular demand for college sports as not allowing compensation. "In terms of antitrust analysis, the concept of amateurism is relevant only insofar as it relates to consumer interest."[77]

The Chief Judge Thomas, insisted that the NCAA's motivations were not always plausible. In consideration of the increasing revenues generated, the defense which is based on the idea that "this multi-billion dollar industry would be lost if the teenagers and young adults who play for these college teams earn one dollar above their cost of school attendance"[78], Judge Thomas, underlined the strong lack of credibility of this thesis, dissenting in part with the Court's final decision.

To corroborate O'Bannon's decision, further litigations were brought by other plaintiffs. One on the most recent, is the NCAA Grant-in-Aid Cap Antitrust Litigation, which was concluded in 2019 and that is further explained.

1.5 NCAA Grant-in-Aid Cap Antitrust Litigation

The O'Bannon case's results, brought to the surface the fact that NCAA was exercising his monopsony power, that is the high bargaining power in the market. The NCAA could exploit this power to negotiate lower prices with any actor in the market, increasing its margins, reducing its costs, and generating higher revenues.

[75] Id. 65.
[76] Id. 67.
[77] Id. 68.
[78] Id. 72.

The proof of the exercise of monopsony power came from the fact that the NCAA was actually setting compensation limits, which exceeded the necessary level of strictness. Since O'Bannon, the NCAA found that more and more people were starting to focus on the subject of compensating the student-athletes, and on the idea that setting those limits was actually bringing strong anticompetitive effects on the system.

Those criticism also came from insiders of the NCAA, such as the presidents and chancellors of the Power Five Conferences, whom in 2013 were asking for more autonomy in multiple areas for some of the following reasons: "reducing the accusations of exploitation of student-athletes, desiring to avoid the consequences of those accusations, having the chance to spend the "extra resources" to effectively improve supports for student-athletes."[79]

Yet, since then, the Power Five managed to increase the level of the grant-in-aid, resulting in higher compensations for student-athletes, compensation that is still capped by NCAA's rules.

For all the reasons above, in 2019, a group of plaintiffs composed of current and former FBS and Division I basketball players, brought, to the Court for the Northern District of California, an antitrust litigation about the grant-in-aid cap of the National Collegiate Athletic Association, to try and answer the upcoming question on the subject.

As for the previous case, the main Defendants' motivation is the "principle of amateurism" which is considered as the principal driver of consumer demand.

The substantial difference between the two cases is that, while for O'Bannon the main subject was compensation deriving from the economical exploitation of NIL rights, here we face the compensation as is, meaning the remuneration of athletes for their athletic services to the colleges. The central point is the concept of "pay for play", and the Defendants stated that "Amateurism is, by definition, not paying the participants",[80] justifying the challenged compensation limits.

Nonetheless, the history of NCAA shows that some forms of "collateral" compensation already exist, in many forms and means, such as the "Students Assistance Fund (SAF) and the Academic Enhancement Fund (AEF), which in 2018,

[79] In Re: National Collegiate Athletic Association Athletic Grant-in-Aid Cap Antitrust Litigation –14-md-02541 CW - N.D. Cal. 2019 .

[80] Id. 21.

distributed a cumulated sum of more than $130 million to assist student-athletes in meeting their financial needs."[81]

Other means of payment regard the refunds to the athletes' families for attending the live events (up to four thousand dollars per member) other than compensation coming from other entities, such as Olympic bodies for participation to tournaments. In brief, all of these and other similar situations, clearly are to be considered as forms of "extra payments" which come in form of cash stipends.

As for O'Bannon case, Defendants tried to justify the compensation limits.

First witness, the economic expert Dr. Elzinga, stated that "the difference between amateurism and professionalism is that […] true student-athletes are amateur in the sense that they are not being paid to play"[82]; this first consideration was considered irrelevant because of the fact that the amount of money that a single athlete can already receive, reaches the hundreds and thousands of dollars, and yet this had never modified negatively the consumers perceptions and demand on college sports.

To increase the dose, another economic expert, Dr. Rascher, through two natural experiments, underlined that increases in compensation do not have negative impact of consumer demand.

The first experiment was conducted by evaluating that the increase in grant-in-aid cap of the Power Five conferences did not led to revenues or demand contraction, rather to an increase of both.

Second experiment was based on the University of Nebraska Post-Eligibility Opportunities (PEO) program, which allowed post-eligibility aid from the university up to $7,500. No consumer demand reduction was noticed after this rule introduction."[83]

On the Plaintiffs' side, Survey Expert Dr. Hal Poret, attempted to measure the potential impact of consumer behavior on additional compensation. This was based on a test on different scenarios involving additional compensation sources. The result was that each scenario, implemented individually did not negatively affected consumer demand."[84]

As a conclusion to the first part of this trial, the idea was that the actual distinction between a student-athlete and a professional, was yes, the unlimited payment the

[81] Id. 24.
[82] Id. 30.
[83] Id. 34-35.
[84] Id. 38-39.

second category can receive, but the current limits challenged by the Plaintiffs are far more restrictive than needed in order to protect the Association and thus maintaining a procompetitive effect.
Exactly as was for O'Bannon, also the integration subject was evaluated, and the same motivations were given. In brief, the fact that a student-athlete could receive an extra compensation would not bring a resentment between them and the non-athletes, because some forms of economic, cultural and social differences already exist inside a college campus. Furthermore, the lifestyle and habits of an athlete are considerably different than those of a non-athlete, making the "integration justification" non acceptable for the challenged compensation limit.
As the final step, alternatives were proposed by the Plaintiffs, with the selection of a solution which was slightly modified by the Court. The new alternative of the challenged rules, was to change the caps on Education-Related payments, imposing that: "the NCAA would still be able to limit grants-in-aid to the full cost of attendance and limit compensation and benefits unrelated to education, but forced the NCAA limits on awards and incentives, as long as the limits are not lower than its limits on athletic performance awards now or in the future."[85]
This new set of limitations was far less strict than before, in fact, even if the limit on performance-related compensation was still up, the increase of the limit on education-related compensation would enhance the student-athletes' connection to academics. The expansion would be limited to education benefits only, resulting in a way that would not allow unlimited cash payments, as we see in professional sports. In addition, it would eliminate the resources spent on compliance and enforcement in connection to the maintenance of such caps.
Nonetheless, the NCAA would still retain the power to regulate the way in which each university sets those caps and supplies them to student-athletes, not significantly impacting the NCAA's ability to have a control over college sports.
By setting the new compensation requirement on education side, the NCAA would reduce the risk of demand deflation, while maintaining the "Principle of Amateurism" and bringing back the value of actual education for a category of students, the student-athletes, which seemed to have lost interest in the non-sports side of college, "the key

[85] Id. 55-56.

point is linking what we're doing to the pursuit of the educational opportunities of the individual involved."[86]

So, to have a final and clearer overview, the decision of the Court was to remove limitations on most of the education-related benefits provided on top of a grant-in-aid, yet with the power to keeping on limiting the non-education-related benefits.

1.6 Final Considerations

What we have being analyzing here, is the evolution of a sports Association, which has been both on the economic and on the regulation side. Since its foundation, the NCAA has been promoting its ideals of protection, integration and aggregation of students, providing them both the instruments to practice their sports as well as the education that the college can yield. But even if this system was, and has been, successful for many years, it now has to face the advent of increased revenues that come from sport events, especially basketball and football.

In fact, if we watch what has been happening worldwide in the last decade, we can clearly see that the actual money that rotates around the biggest sports association has increased at an unbelievable rate. Just to give some examples, the principal English soccer championship, the Premier League, triplicated its revenues in 10 years, passing from approximately £1.5 billion in the year 2006 to £4.8 billion in 2017(see table 2), while, to go back in the US, the National Basketball Association (NBA) went from $2.6 billion to $8 billion from 2002 to 2018(see table 3). But while for those realities all of that money can be shared to all the participants, so players, coaches, trainers, franchises or clubs, the same is not correct in the NCAA, since the key point is the "Principle of Amateurism" and not "Pay to Play".

[86] Id. 59.

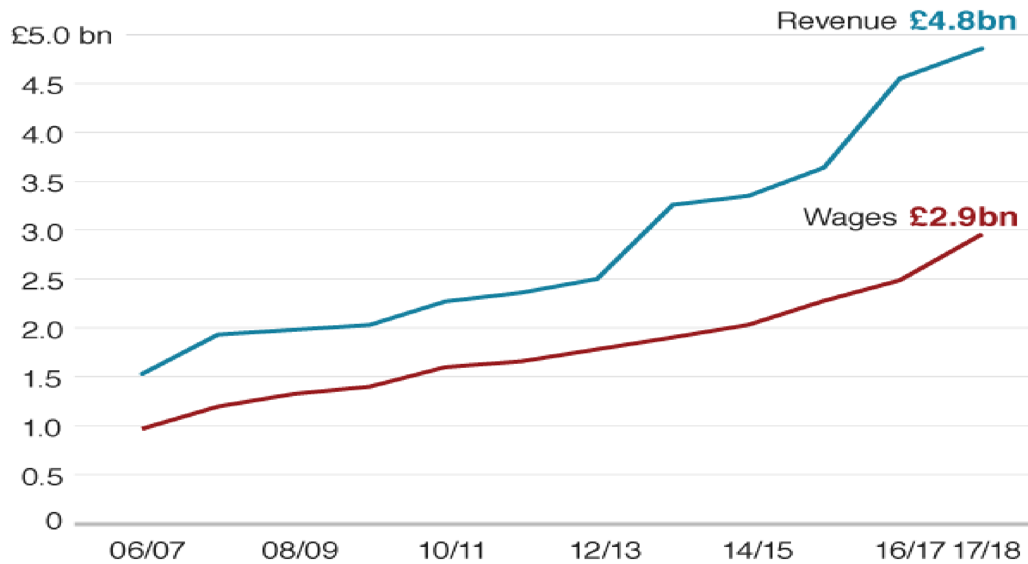

table 2 - https://www.bbc.com/news/business-48042814

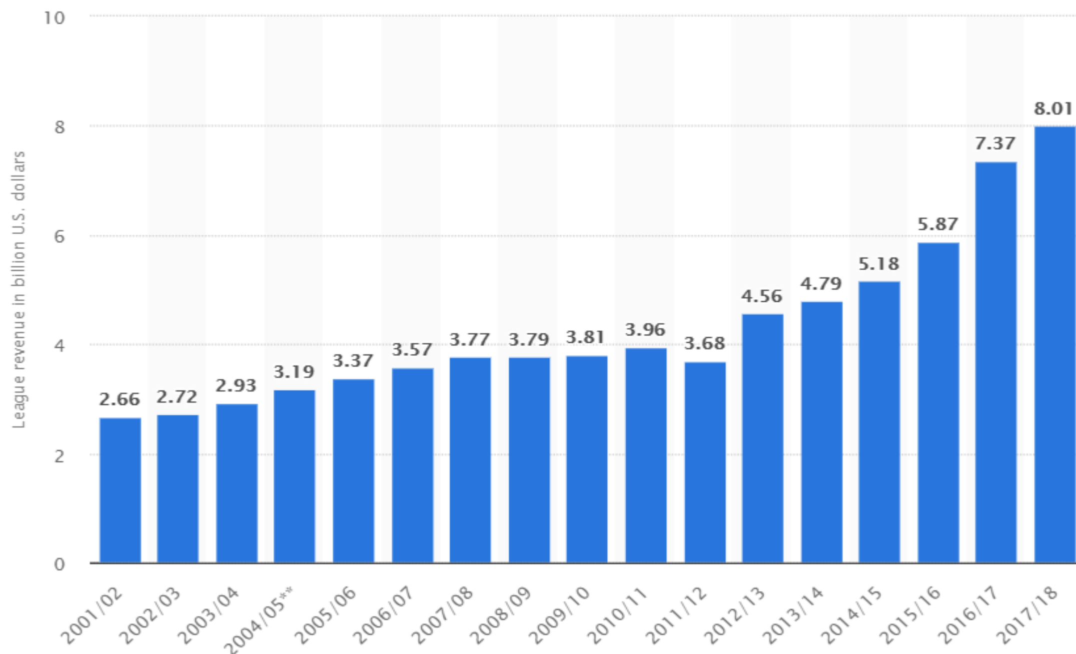

table 3 - https://www.statista.com/statistics/193467/total-league-revenue-of-the-nba-since-2005/

The new interest of sponsors and media to college basketball and football, brought in, in a really short time, a huge amount of money, amount that is in the majority generated by the athletes, which do not have, or have limited access to it.

As we have seen, the same athletes, or former athletes, want now to be taken in consideration in the economic talks around the NCAA, want to receive part of what they generate for their colleges in terms of image, recognition and revenues. And while some steps have been made, as proved in the two cases discussed, the wave has not stopped, on the contrary, it has just begun. The fact that the most recent case (NCAA Grant-in-Aid Cap Antitrust Litigation) was defined in March 2019, and it is still discussed, sets a pretty clear view on the future of the NCAA.
The attention on the NCAA's system is always bigger, politicians and rule makers are studying and analyzing how to allow students to put their hands on that "slice of the pie" they generate, without risking to destroy the organization in which they play.

CHAPTER 2

NBA AND NFL RELATIONSHIP WITH THE PLAYERS' ASSOCIATIONS

2.1 Introduction

Since we understood the not always idyllic relationship between the NCAA and its components, we also have to set that, for many of the players of the college sports, considering in the specific those who generate more attention and revenues, the basketball and football players, the main objective of their college performance is to be selected by one of the major American football or basketball leagues: the National Basketball Association (NBA) and the National Football League (NFL). Those two leagues represent the point of arrival for many of those athletes that play in the college environment, seeking a brighter future in their sport.

The National Basketball Association was born in 1946 with the name of Basketball Association of America (BAA) and took the name of NBA after the merger with the National Basketball League (NBL) in 1949. In the 1960s the Association saw a rival league challenging its growth, the American Basketball Association (ABA), that was trying to unseat the NBA from its throne of most successful basketball league of the US. In 1976, the two rival leagues merged, the NBA growth was unstopped and unstoppable. During the eighties, with the Magic Johnson-Larry Bird rivalry, and in the nineties with the advent of the legend of Michael Jordan the NBA reached its top popularity and importance. Yet, the growth of the NBA was nonetheless gradual, since the number of teams that composed the NBA consisted of eight teams until 1961, when the Chicago Packers joined the league, and reached the actual number of 30 teams in 2004, when the Charlotte Bobcats, joined the NBA as the last participant.

Modern NBA is divided in 2 conferences, Eastern and Western, each composed of 15 teams. Each team plays 82 games against the others in the regular season, defining a record of wins and losses. The first 8 record teams for each conference (16 in total) play each other in the playoffs. The first round of playoffs consists of four inter-conference match-ups which make up a bracket, based on "seedings" (the first team is the first seed, the second the second seed and so forth), in which the first plays the eighth, the second the seventh and forth (1-8, 2-7, 3-6, 4-5). At the end of the year, the winners of Eastern and Western playoff bracket, play the NBA Finals, a series of games, up to 7, which determines the championship winner for the season.

The National Football Association is the most followed football league in the United States, and in general, one of the most popular sports leagues in the world. Its history began in 1920 in Ohio, when a group of fourteen teams, gave birth to the American Professional Football League (APFL), which changed its name to the final NFL in 1922. The Association faced, as we have seen for the "basketball colleague", many years in which, expansion teams were added, and other leagues were trying to challenge its growing popularity in the United States. Yet at the end of the 1950s the League had a virtual monopoly in the football market, after mergers with at least three competitor Leagues, which became an actual monopoly in 1970, when the last merger, with the American Football League (AFL) took place, bringing the number of teams in the circuit to 26, which became the todays 32 in 2002 with the introduction of the Houston Texans.

The NFL is divided into 2 conferences, the American Football Conference (AFC) and the National Football Conference (NFC) both composed of 16 teams, and of four divisions each composed by 4 teams. Each team plays 16 games during a 17-week span, which define the record of wins and losses for each team. The best six teams for each conference (12 total) take part in the playoffs which end with the final game, one of the most followed sport events in the world, the Super Bowl. The latest, "between the Los Angeles Rams and the New England Patriots was watched by about 98.2 million people".

The playoff "bracket" is set by assigning the first four seeds between the champions for each division (in order of their regular season record) and then by the so-called "wild-cards", which are the second and third best record teams for each conference. Each team plays the other following the reverse order such as in the NBA (1-6, 2-5, 3-4) in the first round and then advance until the Super Bowl.

The main asset of those teams is, of course the players that compose the rosters. In order to recruit and acquire players, both the Leagues follow a similar process called "draft". The draft is an annual event in which each team has the right to pick players coming from colleges or which played as professionals internationally, to join the following year's roster. Without entering in the specific, that we will discuss later, the differences between the NBA and NFL drafts lie in the number of "rounds" of which the draft themselves are composed of.

The NBA draft is composed of two rounds of thirty picks, two per team. The order of the pick (which is the most important factor during a draft to choose the best players),

meaning which team can select at each pick, is based on the previous year's results. The better result the team obtained in the just finished season, the lower the pick would be. For example, the best record team will always pick as the thirtieth in both of the rounds. Nonetheless, the rules change when considering the higher picks. Because of the risk of the reduction of competitive balance, meaning that the franchises which have the lower record during the regular season, may start to purposely lose games to get the higher picks (the so called "tanking"), and of the chance that "not so bad" teams could have the chance to pick at the first spots, an aleatory system was introduced during the years. In a few words, "in its latest attempt to minimize claims of injustice, the NBA reconfigured both the Lottery's weighting formula and its selection methodology".[87] The most recent "draft lottery" system is based on the fact that the teams that did not make the playoffs (14 teams), have a chance to receive a pick between the fourteenth and the first. This system, introduced in 1993 and modified in 2019, consists on the extraction of four out of fourteen ping pong balls, which create 1001 combinations of numbers (the order of the extraction is irrelevant, meaning that 1-2-3-4 is the same as extracting 4-3-2-1). To each team is then assigned a number of those combination, giving them the actual percentage of picking for first, for second and so forth.

In the 1993 model, the number of combinations and percentages were selected as it is shown in the following table:

[87] McCann, Michael A. - Illegal Defense -The Irrational Economics of Banning High School Players from the NBA Draft - Virginia Sports and Entertainment Law Journal – 2006

TABLE 5: NBA DRAFT LOTTERY PROBABILITIES

NBA Team with the . . .	Number of Ping-Pong Balls	Likelihood of Obtaining 1st Pick Overall	Likelihood of Obtaining 2nd Pick Overall	Likelihood of Obtaining 3rd Pick Overall	Cumulative Likelihood of Obtaining 1st, 2nd, or 3rd Pick Overall
worst record	250	25.00%	21.55%	17.84%	64.39%
2nd worst record	200	20.00%	18.91%	17.22%	56.13%
3rd worst record	157	15.70%	15.84%	15.70%	47.24%
4th worst record	120	12.00%	12.71%	13.43%	38.14%
5th worst record	89	8.90%	9.77%	10.82%	29.49%
6th worst record	64	6.40%	7.21%	8.26%	21.87%
7th worst record	44	4.40%	5.06%	5.93%	15.39%
8th worst record	29	2.90%	3.38%	4.03%	10.31%
9th worst record	18	1.80%	2.12%	2.56%	6.48%
10th worst record	11	1.10%	1.30%	1.58%	3.98%
11th worst record	07	0.70%	0.83%	1.02%	2.55%
12th worst record	06	0.60%	0.71%	0.87%	2.18%
13th worst record	05	0.50%	0.60%	0.73%	1.83%

McCann, Michael A. - Illegal Defense -The Irrational Economics of Banning High School Players from the NBA Draft - Virginia Sports and Entertainment Law Journal – 2006

The latest number of combinations assigned to each team was changed for the 2019 draft, in which the three worst record teams had the same probability to pick first (14% or 140 combinations) and so forth until the fourteenth, which has 5 combinations assigned and 0.5% to pick as first. “Regardless of its present incarnation, the NBA Draft is the exclusive means by which desirable amateur players can enter the NBA”.[88] This system is set to allow the league to make the worst teams pick the possible future superstars and become the future top teams of the league. The concept of circularity and competitive balance is central in the NBA, such as it is in the NFL.

The NFL draft is far easier than the NBA’s. It is composed of seven rounds with thirty-two picks, so each team can select seven times during a draft. The order of choice for each team is “determined by the reverse order of finish in the previous season”.[89] The winner of the final championship (the “Super Bowl”) and the runner-up, respectively get the last and the second last choice. The playoffs teams will select in order of their

[88] McCann, Michael A. - Illegal Defense -The Irrational Economics of Banning High School Players from the NBA Draft - Virginia Sports and Entertainment Law Journal – 2006

[89] NFL Football Operations Web Site – The Rules of the Draft https://operations.nfl.com/the-players/the-nfl-draft/the-rules-of-the-draft/ – 2019

elimination from the tournament, while the non-playoff teams will pick in the order of their regular season final positioning.

From this first analysis of both the history and the rules of the NBA and the NFL, we can see that the two leagues have much in common between each other. As we will analyze further on, the regulation systems are based on the same criteria, the existence of an agreement between the Leagues themselves and the players.

In order to fully comprehend the impact of those leagues, we have to underline that they are both considered as two monopolies, as they represent the major and almost unique professional sports leagues in the US, with their only competitor, the overseas leagues, which cannot offer the same level of both players, coaches and facilities. Furthermore, the revenues generated by the NBA and the NFL, of which the majority comes from the television agreements and sponsorships, have skyrocketed in the last years. The NBA had reached an $8 billion for the 2017/18 season[90], while the NFL's revenues have reached almost $9 billion in 2019.[91]

2.2 History of the Collective Bargaining Agreements (CBA)

Concerning the differences with the NCAA, the main dissimilarity lays on the fact that the participants of both the NBA and the NFL are professionals and not amateurs like in college sports. This means, of course, that the players receive compensation and salaries, which reach the million dollars per year for each player in the league. Just to give some examples, the highest paid NFL player in 2018 was the quarterback for the Atlanta Falcons, Matt Ryan, who signed a 5 years contract with the value of $30 million per year, which is $10 million less than the amount of money on the $40.2 million contract of the NBA superstar Stephen Curry for the 2019-2020 season. As for this reason, it is pretty clear that while the NCAA's lawsuits were based on the lack of compensation for student-athletes, the purposes of the lawsuits for "professional plaintiffs" are completely different.

As stated before, the NBA and the NFL set their bases and rules on the presence of agreements between the employers, the leagues themselves, and the employees, the players. In fact, the leagues' rule books are written because of the work of two opposite yet complementary forces, the Associations and team owners, and the Players

[90] Gough, Cristina - Total NBA league revenue* from 2001/02 to 2017/18 (in billion U.S. dollars) – 2019 - https://www.statista.com/statistics/193467/total-league-revenue-of-the-nba-since-2005/

[91] Rovell, Darren - NFL Teams Share $8.78 Billion in Revenue - https://www.actionnetwork.com/nfl/nfl-2018-19-revenue - 2019

associations, which regularly stipulate Collective Bargaining Agreements (CBA) in order to protect the interest of both the parts. As it is clearly defined in one of the lawsuits that we will see on the detail later, "The NBA/NBPA (National Basketball Players Association) agreement is just such a unique bundle of compromises. The draft and the salary cap reflect the interests of the employers in stabilizing salary costs and spreading talent among the various teams. Minimum individual salaries, fringe benefits, minimum aggregate team salaries, and guaranteed revenue sharing reflect the interests of the union in enhancing standard benefits applicable to all players".[92]

The presence of the CBAs is of fundamental importance for the preservation of the leagues, the double purpose is to protect the players, by setting the rules and limits that are enforced by the Associations, both economic and social (time tables, etc.), and to allow the leagues to operate with the minimum risk of complaints by the insiders.

During the history, many CBAs were stipulated for both the leagues.

For the NBA, the first CBA was introduced in 1970, with the following reviews of 1973, 1976 and 1980, setting the foundations for a new relationship between players and team owners. The first important step was actually in 1983, where the CBA agreed to the sharing of revenues between the parties, introduced the modern salary cap and eliminated the No-Trade clauses.[93] This CBA was of great importance because the concept of the modern salary cap is vital for the NBA's survival, other than it was more than once questioned in many lawsuits that we will see further. In brief, the salary cap is no more than the maximum amount of money that each team can spend on players contracts. So, the salary cap defines that each team in the league has the same kind of resources as the other 29 teams, to put together the best team possible to compete in the championship.

The history of CBAs, which in today's NBA are renewed every six years, was not always made of easy negotiations. In fact, to give an example, "the National Basketball Association (NBA) team owners locked out the players in the summer of 2011"[94] The reasons for the 2011 lockout, or the late beginning of the season due to CBA's negotiations, were that the owners were claiming that they were facing a constant

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[92] Wood v. National Basketball Association 809 F.2d 954 (2d Cir. 1987)

[93] Coon, Larry – NBA Salary Cap FAQ - http://www.cbafaq.com/salarycap.htm - 2019

[94] Parlow, Matthew J. - Lessons from The NBA Lockout: Union Democracy, Public Support, and the Folly of the National Basketball Players Association - Marquette University Law School Legal Studies Research Paper Series – 2014 – Pag. 2

money loss, and that the players, represented by the NBPA, did not see the asked changes from the previous CBA.

The point of the negotiations was focused on "the division of the league's revenue between the owners and players, contract lengths and amounts, salary cap provisions, and revenue sharing among the teams".[95]

Even if we stated that the CBA is a meeting point between two different party interests, the 2011 lockout results, indicated that the NBPA concessions to the other part were much more consistent than the owners'. The loss of the players' union could be explained in two ways. The first explanation was that the "NBA players did not prepare well financially for an extended lockout"[96] meaning that after almost 150 days, many of them were not able to sustain their lifestyles and agreed on less favorable terms, and that players became "too emotional in their negotiations",[97] putting aside the mere economical purposes of the deal. Nonetheless, the CBA is still the milestone of NBA exitance, indeed, 2011 CBA was renewed in 2017 until 2024, without any kind of "hard negotiation".

As for the NBA, also the National Football League has its players represented by a union, the National Football League Players Association (NFLPA), which negotiates the CBA with the NFL team owners. The history of NFL CBAs was actually characterized by an enormous number of strikes almost since the foundation of the players union in 1968.

In 1971, Ed Garvey, the executive director of NFLPA, sued the NFL to eliminate the *Rozelle Rule*, in what was one of the major cases in US sports history, "*Mackey v. NFL*[98]. The *Rozelle Rule*, "which required NFL clubs to compensate any club from which they hired away a player whose contract had expired"[99], set the tone for the major win of the players in the history, which came in 1977.

In 1982, "A 57-day-long strike began after two games"[100], with the result of a new CBA which granted players more benefits and health coverage. Yet "darkest year in NFL history"[101] was 1987, when after a strike, the NFL decided to sign "replacement players" to let the NFL start the season again. As a result of the strike, which lasted 24

[95] Id. Pag. 3
[96] Id. Pag. 72
[97] Id. Pag. 72
[98] Mackey v. National Football League 543 F.2d 606 (8th Cir. 1976).
[99] Clarett v. NFL 306 F. Supp. 2d 379 (S.D.N.Y. 2004)
[100] ESPN Associated Press - NFL labor history since 1968 - https://www.espn.com/nfl/news/story?page=nfl_labor_history - 2011
[101] Id.

days, the third game of the season was not played, while the fourth, fifth and sixth were played by substitute players. The actual conclusion of this strike was gradual, with many lawsuits claims of players against the NFL, which culminated in 1993 with the beginning of negotiations and agreement on the CBA.

The 1993 CBA was then extended (with many modifications) until 2008, year of the death of Gene Upshaw, NFLPA executive director. After two CBA-less years, a new CBA was finally defined. It is still active today, as it will expire in 2020, and includes modifications to leagues revenue distribution, other than multiple benefits and health improvements for the players.

From the light of the above, the main point of the NBA and NFL regulation is around the existence and modification of the Collective Bargaining Agreements over time. The CBAs grant protection to both parts and give a clear definition of the boundaries of the rules that the leagues can modify, in terms of minimum and maximum compensation to players, length of the regular and post-seasons (the playoffs), sponsorship agreement and revenue sharing.

Yet as we saw, such as the NCAA, the relationship between the players and the leagues have been turbulent over the years. Lock-outs and strikes seen during CBAs negotiations are very good examples of this not always perfect relationship.

It is important to discuss the history of the most relevant lawsuits which determined both the league structure and defined the NBA and NFL as important monopolistic institutions.

2.3 The First Lawsuits, The Free Agency and *Rozelle Rule* Issues

The American sports leagues, both amateur, like the NCAA, and professional, as the NBA and NFL, constitute a sort of "positive cartel", made of rules that may seem anti-competitive to preserve the league itself. The idea is that "Professional sports are built around competition, but the industry would not exist without collusion".[102] If monopolies are generally saw as negative for any kind of industry, sports industries have flourished around the concept of controlled cartels and monopolies. Professional

[102] Farzin, Leah - On the Antitrust Exemption for Professional Sports in the United States and Europe, 22 Jeffrey S.Moorad Sports L.J. 75 - (2015) – Pag. 75

leagues create those monopolies through contracts and deals between their participants, the teams, but collude between each other, because "Economic cooperation between clubs is done with the purpose of maintaining athletically balanced competition between them. Without such balance, there is no product for sale".[103]

For what concerns American sports leagues, the collusion of the components of a given American league are based on the same paradigms: the players trade and acquisition, the territorial rights rules, the sponsorships and media deals. By mixing those traits, the leagues have been testifying the success of their actions, that can be seen in the continuous refreshing of the winning teams, in a form of "you need to lose to win in the future" process. Sports organizations thrive on competitive balance and the value of the teams that compose them, "For them to exist, outcomes of matches and games must be unpredictable, so competition between teams or athletes must be as balanced as possible".[104]

Yet the NBA, NFL, but also the other leagues such as the National Hockey League (NHL) and Major League Baseball (MLB), have a major advantage in respect to the other industry in the market. The presence of an agreement (CBA) which is defined through the cooperation between employers (team owners) and employees (players) empower the leagues with an antitrust exemption.

Even though the antitrust exemption is an important factor, the leagues have more than once faced antitrust lawsuits claims on their behalf, lawsuits usually brought up by players which at the time did and did not play professionally in the league. The exemption, is, indeed, not complete as it can be seen. The only league which is totally protected from antitrust scrutiny is the MLB, while the other three, still have an exemption, but each case needs a rule of reason scrutiny in order to be evaluated by the courts and to "justify their anticompetitive actions based on the nature of their industry".[105]

One of the first, and yet most important cases, both for the direct impact at the time of the final judgement, and also for future implications, is Robertson v. NCAA of 1970[106]. The lawsuit was filed by former NBA superstar Oscar Robertson and other former NBA players (John Havlicek, Wes Unseld and more) and had two major effects at the

[103] Id. Pag. 78
[104] Id. Pag 107
[105] Id. Pag 107
[106] Robertson v. National Basketball Association, 556 F.2d 682 (2d Cir. 1977)

time: it postponed the merger between the NBA and the ABA, expected in 1970 to 1976, and introduced the concept of free agency for those players who had a "reserve clause" in their contract. The reserve clause was no more than a trade restriction for a player. In fact, the clause had the purpose of ting a player to a determined team indefinitely. Only the team had the power, through trades, contract termination or unconditional release to let the reserved player leave and become a "free agent". The settlement on the reserve clause, allowed players to become free agents, yet giving the team for which the lastly play the "right of first refusal" or free agency restriction, to match any kind of offer received by the player, so keeping him in the team.

Robertson's results did affect the 1970's NBA and put the foundation for the exponential growth of the NBA to the point that we know today. The process of free agency, allows the movement of players, especially the star players, after the expiration of their contract, helping the continuous modification of the NBA's landscape. Just to give an example of the impact of free agency, in 2010, one of the most important players of the history of the NBA, LeBron James, became free agent and had to decide his future team. ESPN, one of the major sports media channels in the US, made a show out of this, called, of course, "The Decision", in which James would have announced his decision. The program was followed by almost 10 million viewers[107] and generated "$6 million in advertising revenue"[108]

The NFL was going on the same direction as the NBA. One of the most important allegations came in 1976, when John Mackey sued the NFL on the subject of the "*Rozelle Rule"* in Mackey v. NFL.[109] The dispute gravitates around the concept of labor exemption which is certain sense immunizes the NFL.

As we have seen, the US legislation which regulates the anti-competitive behavior is controlled by the Sherman Act, both Section I and Section 2. To have a reminder, Section I states that "every contract, combination in the form of trust…in restraint of trade or commerce…is hereby declared to be illegal"[110], while Section II forbids monopoly by considering that "every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other persons .. . shall be deemed guilty

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[107] Yanan, Travis - Thursday Cable Ratings: All LeBron, All The Time; Plus Bethenny Up, Futurama Settles & More - https://tvbythenumbers.zap2it.com/sdsdskdh279882992z1/thursday-cable-ratings-all-lebron-all-the-time-plus-bethenny-up-futurama-settles-more/56848/ - 2010

[108] Starting Blocks, The Plain Dealer - LeBron James' 'Decision' generated $6 million in ad revenue - https://www.cleveland.com/ohio-sports-blog/2010/07/lebron_james_decision_generate.html - 2019

[109] Mackey v. National Football League 543 F.2d 606 (8th Cir. 1976).

[110] Sherman Act 15 U.S.C. § 1 (1988)

of a felony."[111] Yet, since many labor organizations were hit by Sherman Act ruling, a new Act was stipulated, with the purpose of protecting the labor activities and labor union, the Clayton Act of 1914[112], which, in brief "provides that both labor unions and labor activities are protected from the Sherman Act"[113], providing a practical exemption from antitrust scrutiny to all labor unions.

The last Act coming in aid of unions is the Norris-LaGuardia Act[114], which provides exemption from the unions, giving decisional power to federal courts on labor disputes. Starting from those statues, the Supreme Court established exemption to antitrust for any kind of Association where the process of rule-making was made through a Collective Bargaining Agreement between the employers and the employees or the unions that represent them. This kind of exemption takes the name of "nonstatutory exemption".

Another importance step-forward from the predefined Acts and exemptions, is the enaction of the National Labor Restriction Act (NLRA)[115], which, protects the bilateral value of the agreement. The main purpose of the NLRA is to "provide unions protection against the unilateral action of an employer from the commencement of negotiations until impasse is reached"[116]. With the word "impasse", it is defined the moment in which, during any labor negotiation, the two parts dissent in any of the points of the agreement, and the dealing is interrupted or postponed.

Premises set, we can now analyze in depth the case over mentioned, Mackey v. NFL. The case, brought by NFL players lead by John Mackey, was claiming that the so called "*Rozelle Rule",* the rule that obliged any team willing to sign a free agent, not only to deal with the player on the amount of his compensation, but also to reach an economic agreement with the player's former team, was unlawful. The district court of Minnesota, immediately understood that, in order to comprehend if the antitrust exemption applied to the case, it had to decide if in the making of the rule, there has been any kind of agreement between the parts involved. Yet, since the rule in discussion did not "deal with 'wages, hours and other terms or conditions of

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[111] Sherman Act 15 U.S.C. § 2 (1988)

[112] Clayton Act, § 6, 38 Stat. 730, 731 (1914) (current version at 15 U.S.C. § 17) (1994)

[113] Bryant, Denise K., (1997) - Brown v. Pro Football, Inc.: You Make the Call, 4 Jeffrey S.Moorad Sports L.J. 87
Available at: http://digitalcommons.law.villanova.edu/mslj/vol4/iss1/5 – Pag. 90

[114] Norris-LaGuardia Act, § 4, 47 Stat. 70, 70 (1932) (current version at 29 U.S.C. § 104) - (1994)

[115] U.S.C. § 158 (1994),

[116] Bryant, Denise K., (1997) - Brown v. Pro Football, Inc.: You Make the Call, 4 Jeffrey S.Moorad Sports L.J. 87
Available at: http://digitalcommons.law.villanova.edu/mslj/vol4/iss1/5 – Pag. 96

employment' but with inter-team compensation"[117] was not considered as a mandatory subject of the CBA, and that the imposition of the rule was set by the NFL itself, without any "bona fide arm's-length bargaining" in any of negotiation of 1963, 1968 and 1970. The rule was than considered as a restriction to trade, violating Section I of the Sherman Act.

Brought in front of the Eighth Circuit of Appeal of the United States, after deciding the fact that the Per Se rule did not apply to the subject, the Court decided to define the case using the Rule of Reason analysis. The Court applied a "three prong tests" to determine if the exemption could be actually applied. The test had the purpose of clarifying if the restraint affected only the parts of the CBA, was considered an exemption of a mandatory part of the CBA and the "agreement must be a product of bona fide arm's length bargaining".[118]

In applying the rule of reason analysis, testimonies underlined that, absent the Rule, players' salaries would have increased and player movement would be more consistent. Two economists, Carrol Rosenbloom and Charles de Keado, testified that the increased possibility of player movement would increase the economic offers to them other than, by not requiring to pay "unreasonable compensation" to former teams, players could negotiate contracts with multiple teams at the end of their previous contract.

The Defendants (the NFL) supported the reasonability of the rule by asserting a number of justifications. The main three defenses underlined three concepts. The first idea was that the removal of the rule would bring an advantage for "bigger market" teams in attracting free agents, through which "that competitive balance throughout the League would thus be destroyed"[119]. The second concept was the protection of teams in terms of the expenses on scouting and development of younger players, effort that would be almost eliminated without the rule. The third justification suggested that in the elimination of the rule the result would be an "increased player movement and a concomitant reduction in player continuity; and that the quality of play in the NFL would thus suffer"[120].

The Court, once analyzed the justifications, found that the rule did not have significant effect on the maintenance of any form of competitive balance and that the rule results

[117] Mackey v. National Football League, 407 F. Supp. 1000, 1002 (D. Minn. 1976)
[118] Mackey v. United States, 543 F.2d 606 (8th Cir. 1976).
[119] Id.
[120] Id.

brought to a far stricter regulation than necessary in the market of NFL. In addition, the concern was that the defendants were considering in their justification only the movement of better players, which are the ones who actually move the balances of the teams' values, while the *Rozelle Rule* was applied to every player. Furthermore, the rule was perpetual, and restricted players movement during the whole duration of their career. Yet the most important factor was, that the player which wanted to change team in free agency, did not have any "procedural safeguards"[121], meaning that had no control on the level of compensation that his former team was requesting on the acquiring one, resulting in the chance that the owner could ask completely "out-of-market" amounts of money, that made the player virtually stuck in the status quo.
Because of the motivations above, the Eighth Circuit held that the *Rozelle Rule* "unreasonably restrained trade in violation of the Section I of the Sherman Act" [122] and was therefore declared forbidden.
As we can see, the very two first major lawsuits after the creation of unions of players (NBPA and NFLPA) resulted in two wins for the plaintiffs, in two very distinct subject. The modifications to the NBA and NFL rules were, and still are, of major importance for the landscape of professional sport leagues. As we already seen, the impact of free agency for the NBA world and allowing the NFL players to "choose" their faith at the expiration of their contracts, was of primary importance for nowadays success of the leagues, where the movement of one, two or more "key players" can modify the league almost instantly, making the concept of "unpredictability" even more accentuated, bringing a growing interest in the league itself.
The cases also started to question the actual "exemption" from antitrust scrutiny of the NBA and NFL, in front of those agreements set almost only by the leagues' unilateral decisions.

2.4 The Nonstatutory Labor Exemption Issues

The next step in the understanding of the relationship between players and leagues is the concept of what happens in the circumstance of a negotiation impasse, when the deal seems to not find a solution. The subject was faced more than 10 years after the Mackey lawsuit in Wood v. National Basketball Association[123] where the plaintiff,

[121] Id.
[122] Id.
[123] Wood v. National Basketball Association 809 F.2d 954 (2d Cir. 1987)

Leon Wood, a former NBA players, contended that "the salary cap, college draft, and prohibition of player corporations, violate Section 1 of the Sherman Act[124], and are not exempt from the Sherman"[125].
In the plaintiff's mindset, all of those NBA operations were not the result of an agreement between owners and players, yet they were caused by horizontal agreement between competitors (the owners themselves), in order to limit the competition of college basketball players who were in the process of entering the NBA as professionals. The point in Wood's claim was that in absence of the rules that obliged the NBA teams to sign college players through draft, which made the total maximum compensation limited for the first years that they would have played, the same players would have signed richer contracts. Indeed, the rules concerning the draft did not allow players to sign contracts that were comparable to their "veteran" colleagues. In form of example, as it is showed in the following tables, for the NBA seasons 2001 to 2004, the maximum per year compensation for an NBA player was set at the 25% of the total team cap available, while for the "rookies", the players just picked from the draft, that maximum salary was far lower, other than decreasing in base of the pick number of the player.
Other than the "draft players restrictions", Wood was claiming that also the presence of the salary cap, the total amount spendable per team, was limiting the bargaining chances of the players that could have asked for higher compensations in absence of the rule.

[124] Sherman Act 15 U.S.C. § 1 (1988)
[125] Wood v. National Basketball Association 809 F.2d 954 (2d Cir. 1987)

Table 2 - Maximum NBA Salary

"MAXIMUM NBA SALARY" = THE GREATER OF THE LISTED AMOUNT *OR* THE LISTED PERCENT OF THE TEAM'S SALARY CAP				
YEARS IN NBA	DEFINED MAXIMUM SALARY*	01-02	02-03	03-04
1	$9,000,000 or 25% of cap	$10,625,000	$10,067,750	$10,960,000
1	$9,000,000 or 25% of cap	$10,625,000	$10,067,750	$10,960,000
2	$9,000,000 or 25% of cap	$10,625,000	$10,067,750	$10,960,000
3	$9,000,000 or 25% of cap	$10,625,000	$10,067,750	$10,960,000
4	$9,000,000 or 25% of cap	$10,625,000	$10,067,750	$10,960,000
5	$9,000,000 or 25% of cap	$10,625,000	$10,067,750	$10,960,000
6	$9,000,000 or 25% of cap	$10,625,000	$10,067,750	$10,960,000
7	$11,000,000 or 30% of cap	$12,750,000	$12,081,300	$13,152,000
8	$11,000,000 or 30% of cap	$12,750,000	$12,081,300	$13,152,000
9	$11,000,000 or 30% of cap	$12,750,000	$12,081,300	$13,152,000
10+	$14,000,000 or 35% of cap	$14,875,000	$14,094,850	$15,344,000

McCann, Michael A. - Illegal Defense -The Irrational Economics of Banning High School Players from the NBA Draft - Virginia Sports and Entertainment Law Journal – 2006

Table 3 - Rookie Salary Scale for Players Selected in the 2004 Draft

YEARS 1-3: 1ST ROUND PICK SALARIES ASSUME PLAYER AGENT NEGOTIATED MAXIMUM (120 PERCENT) AVAILABLE SALARY
YEAR 4: FOR 1ST ROUND PICKS, TEAMS HAVE OPTION TO EXTEND CONTRACTS FOR THE 4TH YEAR FOR THE AMOUNT LISTED
YEAR 5: FOR 1ST ROUND PICKS, TEAMS THAT PROVIDE A QUALIFYING OFFER FOR THE 5TH YEAR RETAIN RIGHT OF FIRST REFUSAL

Pick	1st Year Salary	2nd Year Salary	3rd Year Salary	Cumulative Guaranteed Earnings Years 1-3	Team's 4th Year Option	Cumulative Earnings Years 1-4	Team's 5th Year Qualifying Offer
1	$4,179,720	$4,493,160	$4,806,720	$13,479,600	$6,061,274	$19,540,874	$7,879,656
2	$3,739,680	$4,020,120	$4,300,560	$12,060,360	$5,427,307	$17,487,667	$7,082,635
3	$3,358,320	$3,610,200	$3,862,080	$10,830,600	$4,881,669	$15,721,269	$6,404,750
4	$3,027,840	$3,254,880	$3,481,920	$9,764,640	$4,404,629	$14,169,169	$5,809,705
5	$2,741,880	$2,947,440	$3,153,120	$8,842,440	$3,995,003	$12,837,443	$5,297,374
6	$2,490,360	$2,677,200	$2,863,920	$8,031,480	$3,631,451	$11,662,931	$4,844,355
7	$2,273,400	$2,443,920	$2,614,400	$7,331,720	$3,320,339	$10,652,059	$4,452,574
8	$2,082,720	$2,238,960	$2,396,200	$6,717,880	$3,046,694	$9,764,574	$4,106,944
9	$1,914,480	$2,058,000	$2,201,640	$6,174,120	$2,804,889	$8,979,009	$3,800,625
10	$1,818,720	$1,955,160	$2,091,480	$5,965,360	$2,666,637	$8,531,997	$3,631,960
11	$1,727,760	$1,857,360	$1,986,960	$5,572,080	$2,636,696	$8,208,776	$3,609,637
12	$1,641,360	$1,764,480	$1,887,600	$5,293,440	$2,601,113	$7,894,553	$3,579,131
13	$1,559,280	$1,676,280	$1,793,160	$5,028,720	$2,563,426	$7,592,146	$3,543,835
14	$1,481,400	$1,592,400	$1,703,520	$4,777,320	$2,522,913	$7,300,233	$3,509,372
15	$1,407,240	$1,512,840	$1,618,320	$4,538,400	$2,480,885	$7,019,285	$3,468,277

McCann, Michael A. - Illegal Defense -The Irrational Economics of Banning High School Players from the NBA Draft - Virginia Sports and Entertainment Law Journal – 2006

The first fallacy in Wood's claims was in the fact that, on the contrary of what he established, the draft, the salary cap and so forth, are not the result of any kind of horizontal agreement between competitors, but they are "are embodied in a collective

agreement between an employer or employers and a labor organization reached through procedures mandated by federal labor legislation".[126]

Furthermore, Wood's theory would have allowed any dissatisfied employee to bargain at any level individually, interrupting the policy of the collective bargaining that was the fil rouge of the NBA's own survival. He attacked the cap and the draft because they would have been a disadvantage for new employees, in this case the rookies coming from college.

On the Second Circuit of Appeals Court's point of view, this kind of antitrust claim "conflicted with national labor policy".[127] If Wood's claim would have been accepted, since the leagues and players would have received unlimited right of economic offer and demand, the level of efficacy of the league would have been undermined, with the risk of the league's own destruction, other than "increase the chances of strikes by reducing the number and quality of possible compromises"[128] in the negotiations of the further CBAs.

As more than once underlined, the CBAs are negotiated through a great number of compromises between the parties. The draft and salary cap represent the employers' interests in cost saving while maintaining a competitive balance, spreading talent among the league, and with that, increase the interest and revenues of the league. While on the other side of the agreement, minimum salaries, benefits and right on revenue sharing for the players represented by the unions.

As a last critique to Wood's claim, the Court underlined that, normally the higher salaries in a firm are based on hierarchy and seniority, and the benefits are reserved to older and more experienced employers, while "the burdens to the newer".[129] In addition to the over mentioned reasons, the Court found that the claims were regarding "mandatory subjects of collective bargaining, and were protected by the nonstatutory labor exemption"[130], meaning that the claims did went in opposition with one of the three prongs proposed in Mackey v. NFL.

For the multiple reasons above, the claim was than not considered eligible for any further analysis and rejected by the Court.

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[126] Id.
[127] Id.
[128] Id.
[129] Id.
[130] Bryant, Denise K., (1997) - Brown v. Pro Football, Inc.: You Make the Call, 4 Jeffrey S.Moorad Sports L.J. 87
Available at: http://digitalcommons.law.villanova.edu/mslj/vol4/iss1/5 – Pag. 101

Another clear example of the strength of the antitrust exemption of the leagues can be evaluated in Powell v. National Football League[131].

Here the plaintiff, a former NFL player for the New York Jets, filed a lawsuit against the NFL for antitrust violations. He alleged that free agents had faced restriction in the bargaining with new teams, and since the former CBA had expired "no labor exemption from the antitrust laws shielded the player restraints from antitrust scrutiny"[132].

The Court gave two different answers to the accusation. The first was that the labor law would have kept giving protection from antitrust accusation during negotiations, even in case of previous expiration of the agreement, and that nonstatutory labor exemption extends beyond impasse, meaning that the NFL was not violating any kind of antitrust rule or law. The CBA, expired or not, is and will be considered as a product of bona fide transactions between two parts, which are required of maintaining the status quo until the point of the stipulation of a new agreement.

Yet more than once the concept of nonstatutory exemption was questioned. In National Basketball Association v. Williams[133], during the negotiations for the 1995 CBA, a group of players, guided by Charles Williams, was demanding the elimination of three provision from the text of the future Collective Agreement: the college draft, the revenue sharing/salary cap system and the right of first refusal. The right of first refusal is a rule that allows the team that is losing a player due to free agency to match any other teams' offer and retain the right for that players. In this situation, the NBPA was refusing any kind of negotiation with the NBA owners until the expiration of previous CBA. To this refusal to trade, the NBA answered by suing Williams for two reasons. The owners underlined that the imposition of the previous rules did not violate antitrust laws "under the nonstatutory exemption"[134], and that, even if any kind of antitrust scrutiny was applied, the rules were still lawful.

In agreeing with the employers (owners), the Court refused Williams thesis and, following the result in Powell v. NFL, held that the "nonstatutory labor exemption "precluded an antitrust challenge to various terms and conditions of employment

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[131] Powell v. National Football League 930 F.2d 1293 (8th Cir. 1989).

[132] LexisNexis - Law School Case Brief
Powell v. Nat'l Football League - 678 F. Supp. 777 (D. Minn. 1988) - https://www.lexisnexis.com/community/casebrief/p/casebrief-powell-v-nat-l-football-league - 2019

[133] National Basketball Association v. Williams, 45 F.3d 684 (2d Cir. 1995)

[134] Bryant, Denise K, (1997) - Brown v. Pro Football, Inc.: You Make the Call, 4 Jeffrey S.Moorad Sports L.J. 87
Available at: http://digitalcommons.law.villanova.edu/mslj/vol4/iss1/5 – Pag. 102

implemented after impasse"[135], meaning that the reach of stall of the negotiations, which can happen purposely or casually, does not expire the exemption from antitrust scrutiny.

When 1987 NFL Collective Bargaining Agreement expired, the league and the NFLPA started to negotiate the terms of the new one. While the deal was still on definition, in 1989, the owners decided the constitution of the "Developmental Player Squads" (DPS) which "was composed of practice and replacement players, in addition to the 47 players on the regular season roster".[136] The players of those teams would have received a different treatment than their common NFL colleagues in terms of compensation.

While salaries for NFL players were set through "individual negotiations"[137], the compensations for developmental players were instead established by a fixed salary.

The players and owners, in negotiating the terms of the compensation for developmental players, reached an impasse, while the DPS program was nonetheless implemented. In fact, on 17 May, 1989 the "NFL Management Council agreed to pay developmental squad players a fixed salary of $1,000 per week".[138]

Since the decision of imposing restrictions to total salary, Anthony Brown and others, sued the 28 NFL teams for violations of the Sherman Act. The US District Court for the District of Columbia had to once more face the issue of nonstatutory labor exemption.

This case sets the discussion on whether the exemption actually protected the NFL from antitrust scrutiny for the actions made over salary collectivization in Developmental squads during the 1989 season. The District Court, favoring for the plaintiffs, affirmed that the Resolution G-2, which is the name that was given to the amendment, to the case, was not exempt from scrutiny since the CBA that would have shielded it, expired two years before, in 1987.

The main problem of the case arose as in the previous lawsuits. Is the value of the exemption after an impasse is reached still valid? We can say that "Without an endpoint at expiration, the terms of a collective bargaining agreement and the

[135] Id. Pag. 102
[136] Brown v. Pro Football, Inc., 50 F.3d 1041, 1046 (D.C. Cir. 1995).
[137] Bryant, Denise K., (1997) - Brown v. Pro Football, Inc.: You Make the Call, 4 Jeffrey S.Moorad Sports L.J. 87
Available at: http://digitalcommons.law.villanova.edu/mslj/vol4/iss1/5 – Pag. 105
[138] Brown v. Pro Football, Inc., 782 F. Supp. 125 (D.D.C. 1991)

applicability of the nonstatutory labor exemption remain in perpetual limbo"[139]. The extension of the nonstatutory labor exemption after expiration would undermine various rights and interests of the parts involved in a Collective Bargaining Agreement. If the agreement was valid also after its deadline, the parts may have the possibility of unilaterally impose rules, other than not allowing the unions to shield themselves from further restraints through contracts of the CBA.

In claiming their position, the plaintiffs, appealed to the three-parts Mackey test, evaluating that the case satisfied all prongs. The DPS program clearly was affecting the parts of the bargaining (the owners and the players). The components of the claim were mandatory items in the case, as the salary of players is mandatory in a CBA. Third, the "parties did bargain at arm's length and in good faith to impasse"[140], thus meaning that the purpose was to willingly reach a point in which an impasse allows owners to maintain the status quo, blocking the deal.

On the light of the above, the District Court took the parts of the plaintiffs, obliging the owners "from ever setting a uniform salary for any players" in the future. Yet in the appeal, the US Court of Appeal for the District of Columbia Circuit reversed the court's decision, giving lawfulness to the owners' salary fixing and allowed them with the preservation of exemption. The Court understood that the exemption was "implemented in order to resolve the conflict between labor policies favoring collective bargaining and antitrust policies favoring free markets"[141], and that it extended beyond impasse.

Even if the majority of the Court parted for the Defendants (the NFL owners), some dissented with the final decision. One of the Judges involved in the case, Judge Stevens, asserted that the main reasons of the owners' complaints regarded competitive rather than regulatory interests, and that just by that definition, the exemption should not have been granted. In addition, the decision of extending the exemption to post CBA expiration (or after impasse reached) would allow the employers/owners to "unilaterally impose employment terms, which violate antitrust law, without the threat of antitrust liability"[142]

[139] Id.
[140] Id.
[141] Bryant, Denise K., (1997) - Brown v. Pro Football, Inc.: You Make the Call, 4 Jeffrey S.Moorad Sports L.J. 87
Available at: http://digitalcommons.law.villanova.edu/mslj/vol4/iss1/5 – Pag. 106
[142] Id. Pag 114

The Court in Brown v. NFL gave the employers the chance to impose unilateral rules without risking an antitrust scrutiny. This decision was effectively extending the antitrust nonstatutory labor exemption over the point of impasse, leading the way to an increased protection of only one part of the two represented in the CBA, the employers.

This decision's results may lead to a great disincentive for both the parts to further negotiate on collective agreements, since the employers are not only protected, yet favored in not agreeing. The results of Brown v. NFL were scary, specifically on the subject of risking not to see the negotiation of further CBA by the National Football Association, whose terms would have been unilaterally imposed and would have been nonnegotiable by the players association (union), whose only protection would have remained lock outs and strikes.

Fortunately, as seen before, in 1993 the CBA was finally signed, with the conjoined work of both the parts. Nonetheless, the lawsuits between players and leagues had effect in shaping the leagues as we know today, since many were directed to the CBAs which are the backbone of the NBA and NFL.

One of the further litigations was always questioning the CBA, but this time it was facing one of the most controversial issues around professional sports leagues in the US, the players eligibility.

2.5 The Players Eligibility Issue

With the term player eligibility are considered the characteristics that a player or aspirant player must have in order to play in a professional league such as the NBA an NFL. The rules that define the parameters of eligibility are set in the rules of the league, of course decided trough the CBAs. The rules can be modified over time and can change the strategic and decisional plans of the teams. Nowadays "the NBA and the NFL are the only major sports organizations that prohibit players from entrance until a prescribed period after high school graduation"[143].

In the last revision of the eligibility rules, the NFL draftees, have to have left their high schools for at least three years in order to be picked by any team. The NFL eligibility rule's premises are mainly based of four issues. The first is that the younger players

[143] McCann, Michael A. and Rosen, Joseph S. - Legality of Age Restrictions in the NBA and the NFL – 56 Case Western Reserve Law Review – 2006

are lacking of "mental or physical maturity to play in the NFL"[144]. The second and the third motivations are that youngsters are both more injury prone and that they would damage the league by reducing the total level of the product offered. The fourth issue set by the NFL is that, if considered eligible for the draft, the chance of using steroids, in order to increase their performance would increase. Yet, even if U.S. District Court for the Southern District of New York has not accepted these ideas, they still remain valid "in the rationales of NFL eligibility rule"[145].

On the NBA side, the eligibility rules are less strict than the cousins of the NFL. To be eligible for the NBA draft, a player must have left high school for at least one year. The NBA eligibility rule, has been integrated relatively later in the CBA. In fact, until 2005, the NBA could pick also players coming directly from high school, actually with pretty good result (Kobe Bryant and LeBron James, two of the best players to ever play the game, where picked directly from their high schools).

The introduction of the eligibility rule in the NBA, created not few perplexities and controversies, since many considered that the league was creating a "de facto minor-league system (i.e., Division I college basketball)"[146], where to pick future players, without spending any money in development.

The eligibility cases that regard the age of the athletes coming from college brought to the surface many questions about the rules that concerned how the draft are defined, both for the NBA and the NFL.

The first case of eligibility "problem" came in 1971, when the rule on eligibility in the NBA "required that players be four years removed from high school"[147] before being allowed to declare himself eligible for the draft. Yet since the rule had not been bargained, the plaintiff, Spencer Haywood, challenged it and won by making the Court consider the rule as unlawful and *per se* forbid.[148] Similarly, the NFL draft system was questioned in 1984 in Boris v. United States Football League[149], where the Court held that a "professional football league could not unilaterally impose a rule requiring that a player complete college before entering its draft"[150].

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[144] Id. Pag. 2
[145] Id. Pag. 2
[146] Id. Pag. 3-4
[147] Id. Pag. 9
[148] Denver Rockets v. All-Pro Management 325 F. Supp. 1049 (D. Cal. 1971).
[149] Boris v. United States Football League 1984 Trade Cas. (CCH) P 66,012, (D. Cal. 1984)
[150] McCann, Michael A. and Rosen, Joseph S. - Legality of Age Restrictions in the NBA and the NFL – 56 Case Western Reserve Law Review – 2006 – Pag. 10

Notably, the most relevant case around the concept of eligibility for drafts happened in 2004. The plaintiff, Maurice Clarett, former college football player for Ohio State University, was claiming that, even if he had not played for the requested three years in college football, was "physically qualified to play professional football"[151] and the rules that were restricting his participation to the NFL draft were a per se antitrust violation, since it was restraining trade under the Section I of the Sherman Act.

In order to make his accusations reliable, Clarett appealed to the repeatedly mentioned Mackey three prongs test to verify if the rule was exempt from antitrust scrutiny. First, he underlined that, the exclusion of athletes that were not in the NBA, so that made them not actual actors in the composition and negotiation of the CBA, clearly was the proof that the CBA did not affected only parties of the CBA itself, but also third parties, such as Clarett. Secondly, the plaintiff stressed that, since the eligibility rule was not involving neither wages nor hours of employment, the rule "does not concern a mandatory subject of collective bargaining"[152] As the third and last test, Clarett argued that the eligibility rule was "neither collectively bargained nor was the product of arms-length negotiation"[153]. In fact, the previous CBA, the one signed in 1993, and not revised (it would have been revised in 2006), actually was not containing the rule. In evaluating Clarett's claim for the case, the Court, led by Judge Scheinderlin, was satisfied by the plaintiff's allegations and allowed the antitrust scrutiny.

The case was a victory for Clarett, since the Court held that the effects of the rule were anticompetitive, other than limited the access of talented players in the market for futile reasons, and that a list of less restrictive alternative may exist in contraposition to the strictness of the rule challenged.

In spite of the above, the NFL appealed to the Court of Appeals for the Second Circuit resulted in a rejection of the first decision. The Court of Judge Sotomayor was prone of giving the antitrust protection to the NFL draft eligibility rule, in form of the prementioned labor exemption. In the Court's opinion, "the NFL age eligibility rule comprised a mandatory bargaining subject" and then was clearly in the jurisdiction of the CBA, and that "Clarett and similarly situated players would procure a tangible effect on the wages and working conditions of the current NFL players"[154].

[151] Clarett v. NFL 306 F. Supp. 2d 379 (S.D.N.Y. 2004).
[152] McCann, Michael A. and Rosen, Joseph S. - Legality of Age Restrictions in the NBA and the NFL – 56 Case Western Reserve Law Review – 2006 – Pag. 12
[153] Id. Pag. 13
[154] Id. Pag. 14

The final result of the case was that, despite of the initial judgement of the district court, “the order of the district court designating Clarett eligible to enter this year's NFL draft is Vacated”[155], meaning that Clarett and other fellow plaintiffs, were not allowed to be eligible for the 2004 NFL, and yet, since the NCAA’s rules do not allow to hire an agent, or be declared eligible for any professional draft, they were not allowed to play another year of college football.

2.6 Final Considerations

The concept of eligibility rule, even though the decision about Clarett clearly defined that both the leagues and the courts are reluctant to allow high school players to once more directly access the NBA and NFL without passing through the colleges, is a more than current topic.

During one of his speeches, current NBA Commissioner, Adam Silver, has stated that the subject of reducing the players eligibility age from 19 to 18 years old (meaning they would not need that one year of college after having graduated from high schools), is something they are evaluating. Yet it will not “come immediately, but when I weight the pros and cons… I think that sort of tips the scale of my mind that we should take a serious look at lowering our age limit to 18 (year old)”.

As we saw above, the American professional sports leagues are huge and strong entities, which create a lot of wealth, but are also source of many controversies. The way in which they define their rules, in which they modify those rules, and the power that they give to players associations, are issues of incredible relevance not just for the world of sports itself, but for the US legislation and antitrust laws.

The attention to how to handle the problems that regard the functioning of those leagues has to be extremely accurate in order not to destroy the, many times subtle balance that exists between the leagues, the owners of the teams, the players, the staff and also the fans, which are the main reasons for why those leagues have prospered so quickly in the last couple of decades. Further actions against the leagues’ operations, need to improve the balance that is put in discussion by the growing revenue stream of the last years, rather than risking to break it.

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[155] Clarett v. NFL 369 F.3d 124 (2d Cir. 2004)

CHAPTER 3
THE INTELLECTUAL PROPERTY RIGHTS IN AMERICAN SPORT LEAGUES

3.1 Introduction

The world of American Sports, in which we consider the main professional leagues, which are the National Basketball Association (NBA), the National Football League (NFL), the National Hockey League (NHL), the Major League Baseball (MLB) and also the "newcomer" American league for soccer, the Major League Soccer (MLS), is, as seen, full of contradictions and adversities between who actually controls them, the owners of the teams and the actual controllers of the leagues, and who makes them famous and successful, the players. As we saw, the relationship between those two parts has been stormy, and many times really hard to be handled. The common point of the two parties is defined by the existence of a Collective Bargaining Agreement, which is stipulated by the owners and players and sets the rules of the leagues, in order to protect each other's interests.

What we have not taken in consideration in the previous chapters is the relationships that the leagues have with a third party, which identifies with those who actually allow the various Associations to be so successful and, most importantly, extremely rich.

We can consider this party in general as all the subjects who are not directly involved in the creation of the product, who are not involved in the stipulation of the CBAs and, in general, do not directly increase the practical athletic value of the leagues. Sponsors, merchandising and apparel firms, fans and any other figure that is close to the definition of "viewers" of the sports are the components of these category.

In this chapter we will focus on the relationship between the leagues and the other firms who bring economic value to the leagues in terms of sponsorship, and production of apparel on behalf of the leagues themselves, underlining the concept of "single entity" of the leagues.

The focal point, that we will see in more detail further on, will be on the lawsuit brought in by an American firm, American Needle, who produced the NFL apparel for many years and that has been excluded from this deal since the year 2000.

As in previous chapters, the point of continuity will be the relationship that the leagues have in terms of antitrust exclusion and in general with the antitrust authority which should limit the Associations behavior in respect of the Sherman Act, so in relation to

any activity that limits, completely or partially, competition in the markets in which the NBA, NFL, MLB, NHL or MLS participate.

3.2 History of Sport Leagues Single Entity Lawsuits

The American sports leagues, regardless of which we are talking about, have a common point between each other, they are composed of a multitude of teams or franchises (30 for the NBA, 32 for the NFL and so forth), which compete between each other during a season, with the purpose of being the national champions, and with that, the best team of the year.

The fact that the leagues are composed of teams which, sportingly speaking, are competitors, is the main factor in understanding the potential impact of the further lawsuits that we will see later on. Indeed, the definition of the teams, is that they are "separate, independently owned and operating for-profit members of each league", and that "each of the respective member clubs has a voice and vote concerning the league's constitution and bylaws"[156], meaning that, they do not simply compete for the best result on the court or on the pitch, but also in the decisional aspects of the leagues, so in their structures, rules and operational decisions.

These definitions set the tone for the further analysis on the leagues' relationship with various plaintiffs, on the subject of the so-called "single entity" definition of the leagues themselves. With the appellative single entity, it is defined the fact that the clubs that compose the leagues, should be viewed as entities which are completely integrated with the Association of which they are part. This definition is crucial, because it actually affects the relationship between the leagues and the antitrust rules. In fact, if the definition of single entity of the leagues is correct, they should be, together with the clubs, considered as an "integrated single business enterprise whose conduct is not covered by Section 1"[157] of the Sherman Act.

In some of the lawsuits brought in front of the US Courts over time, the concept of single entity of the leagues, has been both accepted and rejected, defining the base of the most recent and relevant trial regarding property rights, American Needle v. NFL of 2010[158].

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[156] Mitten, Matthew J. - American Needle Inc v NFL - Marquette University Law School Legal Studies Research Paper Series - Research Paper No. 12-14 – 2012 – Pag 2

[157] Id. pag 2

[158] American Needle, Inc., v. National Football League, 538 F.3d 736, 744 (7th Cir. 2008)

The first case in which the immunity from the antitrust scrutiny was questioned was in 1973, in Boston Professional Hockey Association Inc. v. Dallas Cap & Emblem Manufacturing, Inc.[159]

The case was set by a group of NHL teams, after they did deny the defendants' Dallas Cap and Emblem Manufacturing, Inc to produce the league's merchandise, which was managed by the league's licensing agent NHLS (National Hockey League Services). Even after the NHL had not allowed the two companies to produce and sell the official merchandising, the Defendants kept on manufacturing the products. The case was brought in front of the District Court of Texas, which did not grant the plaintiffs the payment from the defendants for damages, leading to the appeal to the United States Fifth Circuit of Appeals.

The accusation of the NHL teams in front of the Fifth Circuit Court, was that the "manufacture and sale of the team symbols constitutes an infringement of the plaintiffs' registered marks"[160] The Court of appeal reversed the District Court decision, underlining that "all plaintiffs except one established a cause of action for registered mark infringement" [161]and remanding the further decisions to the district courts. This decision was the first example of the definition of the binomial leagues-teams as a single economic entity, in the sense that, the economic value generated by the trademarks, both of the league (the NHL) and of the teams, is shared between the whole system as if it was a single association.

Another case was, contrary to what happened in the previous, much more straight forward in the definition of the single entity status of the league, which was the NHL once more. In San Francisco Seals, Ltd. v. National Hockey League[162], the District Court of California granted the immunity from the antitrust scrutiny, underlining that, the refusal of the relocation of the team which played in San Francisco, the Seals, to Vancouver, did not violate the Sherman Act Section 1. Since the main purpose of both the NHL and the teams that compose it is to bring to the consumers the best product

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[159] Boston Professional Hockey Association Inc. v. Dallas Cap & Emblem Manufacturing, Inc. - (360 F.Supp. 459 (N.D.Tex. 1973))

[160] Boston Professional Hockey Association v. Dallas Cap and Emblem Mfg., Inc. 510 F.2d 1004 (1975).

[161] Id.

[162] San Francisco Seals, Ltd. v. National Hockey League (379 F. Supp. 966 (C.D. Cal. 1974)

possible, which are the hockey games, the Court "held that the league's refusal to permit the relocation was not a conspiracy to restrain trade as a matter of law".[163]
The idea set by these two cases, was the leitmotiv of the following lawsuits brought in front of the various District Courts during the eighties and nineties, meaning that the single entity status was almost always granted to the leagues.
Yet, there were some exceptions. To give some examples, in 1981 the US Court of Appels for the Second Circuit, stated that the leagues may not be considered single entities jointly with the teams. In North American Soccer League v. National Football League, [164] the Court held that, rather than a single economic entity, the NHL teams are different actors, since they did not completely share their revenues, especially those which are generated by merchandising and sponsorships. The teams were for the first time saw as *"separated"*, with the idea that they are "separate economic entities engaged in a joint venture"[165] rather than a compact and joint actor, and that by this new definition, they are subject to antitrust scrutiny and challengeable under Sherman Act Section 1. Even though this decision may have led to a new definition of leagues, the Supreme Court, led by Judge Rehnquist, kept on with the old definition, that the NFL teams in this case, still operate as a single entity, because they "compete with one another on the playing field, they rarely compete in the market place"[166] and so, any kind of activity that is external to the games, and in general any non-sport-related activity, is exempt from antitrust scrutiny.
Very similar to this case, is Los Angeles Memorial Coliseum v. NFL[167] of 1984. Here the Ninth Circuit Court of Appeals set that the definition of the teams as a single entity is only half true, since they are more similar to a joint venture, rather then a single joint subject. The Court had effectively determined that the NFL teams, even if as underlined before, have to be efficient and cooperative to produce the best possible product for consumers, still are "sufficiently independent and competitive with one another to warrant rule of reason scrutiny under § 1 of the Sherman Act"[168]. The issue

[163] Mitten, Matthew J. - American Needle Inc v NFL - Marquette University Law School Legal Studies Research Paper Series - Research Paper No. 12-14 – 2012 – Pag 4
[164] North American Soccer League v. National Football League, 670 F.2d 1249 (2d Cir. 1981)
[165] Mitten, Matthew J. - American Needle Inc v NFL - Marquette University Law School Legal Studies Research Paper Series - Research Paper No. 12-14 – 2012 – Pag 5
[166] U.S. Supreme Court - National Football League V. North American Soccer League, 459 U.S. 1074 (1982)
[167] Los Angeles Memorial Coliseum v. NFL 726 F.2d 1381 (9th Cir.)
[168] Mitten, Matthew J. - American Needle Inc v NFL - Marquette University Law School Legal Studies Research Paper Series - Research Paper No. 12-14 – 2012 – Pag 5

of this case, similarly to the San Francisco Seals', was the relocation of the NFL franchise, the Raiders, from Oakland to Los Angeles. The decision set by the court, contrarily to what had happened before, allowed this relocation, since the decision of the NFL of not allowing it would have been a restriction of trade under Section 1 of the Sherman Act.

Yet one of the most relevant cases on this subject is Copperweld Corp. v. Independence Tube Corporation [169]of 1984. In this case, which was considered as a base for further defenses of single entity definitions by the American sport leagues, the issue regarded the fact that any parent company could not conspire against one of its subsidiary companies, since they actually acted as a single entity in any of the relevant markets. The case, analyzed and concluded by the United States Supreme Court, created a very strong precedent in the single entity definition. Since the two firms in question were not independent and totally separated, they operated "like a multiple team of horses drawing a vehicle under the control of a single driver".[170]

By this definition, the Supreme Court was underlining two factors. The first was that two or more companies, that are a parent and one or more subsidiaries, are seen as a single company, meaning that "multiple corporations with common ownership […] do not have independent competitive interests."[171]

The second was that under this decision, any conduct taken by one of the two companies, would be considered as unilateral, since, once more, there is no kind of separation in terms of antitrust scrutiny, between the parent, and any other fully owned subsidiary.

But as seen before, the decision of the Court did not completely clarify the definition of sports leagues as single entities. Two other cases, prior to American Needle, once more questioned the antitrust exemption.

In Sullivan v. NFL[172], the owner of the New England Patriot, Billy Sullivan, claimed that the NFL policies which did not allow public ownership, brought him to sell the team to a much lower price that he could have asked for in absence of the rule. Sullivan was, in fact, trying to sell some of the team's shares to public, but that was not allowed by NFL bylaws. The United States Court of Appeals for the First Circuit held that the

[169] Copperweld Corp. v. Independence Tube Corp. (467 U.S. 752 (1984))
[170] Id.
[171] Hovenkamp, Herbert - American Needle and the Boundaries of the Firm in Antitrust Law – University of Iowa College of Law Legal Studies Research Paper Series – 2010 – Pag. 14
[172] Sullivan v. NFL (34 F.3d 1091 (1st Cir. 1994))

definition set by Copperweld did not apply to this particular case, because the league was acting considering its "individual economic interests rather than the league's collective economic interests"[173], and held in favor of the plaintiff (Sullivan).
An important step forward was made in 1996 with a lawsuit brought against the National Basketball Association. In Chicago Professional Sports Limited Partnership v. National Basketball Association[174], the Seventh Circuit Court set the actual foundations for future claims against sports leagues. Contrarily to what happened in previous cases, where the focus on the activity and structure of the subject in question was limited or inexistent, here the Court underlined the importance of the fact that the actual governance and structure of the leagues must be the foundation of any lawsuit. This new way of approaching antitrust claims on the sport leagues means that, in those situations in which some kind of rule or action is challenged or questioned, the final decision will not be based only on the mere fact that there is any precedent that allows the Defendant to be "safe" from an antitrust scrutiny. Any specific situation would then be evaluated singularly. Each time a conduct is challenged, it will be required a "facet by facet analysis of each league's operations."[175]
Nonetheless, the final testimonies of the Judges who followed the case, still underline the different views over the case's results. The case in question regarded the market of broadcasting rights, especially those related to the local television, which were broadcasting the Chicago Bulls games during the Michael Jordan era. Judge Easterbrook, one of the Judges involved in the case, kept on stressing the concept that the sports leagues are more like single entities rather then separated firms when they play in the market of televisions and broadcast in general. This came from his idea that "from the perspective of fans and advertisers (who use sports telecasts to reach fans), "NBA Basketball" is one product from a single source even though the Chicago Bulls and Seattle Supersonics [two of the NBA's clubs] are highly distinguishable…"[176]
On the other side, some were of the opposite opinion, like another of the Judges involved in the scrutiny of the case, Judge Cudahy. His statement, against the definition of the NBA as a single entity subject, was based on the actual differences

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[173] Mitten, Matthew J. - American Needle Inc v NFL - Marquette University Law School Legal Studies Research Paper Series - Research Paper No. 12-14 – 2012 – Pag 6
[174] Chicago Professional Sports Limited Partnership v. National Basketball Association, (95 F.3d 593 (7th Cir. 1996))
[175] Mitten, Matthew J. - American Needle Inc v NFL - Marquette University Law School Legal Studies Research Paper Series - Research Paper No. 12-14 – 2012 – Pag 8
[176] Id. Pag. 8

between the revenues and the sharing of those revenues. He underlined that since the NBA teams have different and independent owners, and that "revenue is not shared in fixed proportion, the teams both retain independent economic interests and make decisions in concert"[177], meaning that the groupage of the teams and the league into one single big entity is not the reality of the facts.

Since it is clear that historically the definition of American leagues as single entities have brought to the surface different ideas and views, we can also see the different results of the many lawsuits brought to the attribution to the various leagues of a demi-exemption from antitrust scrutiny. On the light of the most recent and relevant cases, especially Copperweld and Chicago Professional Sports Limited Partnership, the final idea is that the leagues are actually single entities that operate to grant the best product possible. Yet while doing this, they, in higher or lower degrees, are limiting competition in certain aspects of the markets in which they act, be it the sports market, or any other one.

Getting closer to the one of the most important cases, American Needle v. NFL, we have to define that the apparel company, had already faced the harsh task of suing the NFL, or better, one of its participants. The motivations for the lawsuits, are approximately the same of the following against the NFL, the exclusion of the apparel company from the production and selling of NFL official merchandising in favor of the only exclusive licensing company, Reebok.

The result of this first case, American Needle v. New Orleans Saints[178], was indeed pretty straight forward, since the Court of the Northern District of Illinois set that the NFL's decision to single handedly decide to exclude someone from the production of its property was not to be challenged under antitrust scrutiny. The idea was once more that, the "the NFL and the teams act as a single entity in licensing their intellectual property"[179] and so there was no space for further accusations against both the league and the team in question, the New Orleans Saint.

[177] Id. Pag 8-9
[178] American Needle v. New Orleans Saints 496 F. Supp. 2d 941, 943 (N.D. Ill. 2007)
[179] Id.

3.3 History of Property Systems in American Sports

Before entering in the detail of American Needle v. NFL, which we have defined as the natural prosecution of the 2007 case American Needle v. New Orleans Saints, another important definition has to be clarified. The property systems in US sports leagues, have been changing two times over history, bringing it to the model we nowadays know.

There have been three different property systems in American sports: the club-based private property system, the league-based common property system and the mixed-mode property system.[180]

The first system adopted was the *"club-based property system"*, or *"no unity of interest system*", in which the control from the league on the club ownership and operations was minimal and actually rather inexistent. This first view of property system was used by the oldest American sport leagues, which were the baseball ones, and consisted in the total control of anything inherent the league's actions and operations to the teams. There was then a minimal cooperation between the teams, which could actually decide almost anything, also their opponents. Each franchise could have different schedules, different lengths of the season and so forth.

The main problem of this system came from two factors, the "lacking of competitive balance between teams and the gambling problems among players and managers."[181] The decline of this model was on the horizon and became actually the reality around 1920, after the merger between the National and the American Baseball Leagues into the Major League Baseball (MLB) that we know today. With the merger, a new figure was defined, the commissioner. The new figure of the commissioner set the rise of the new property system, since it strongly reduced the power of control and operation of the teams. The commissioner had the power to "investigate alleged wrongdoing and to punish any conduct suspected as detrimental to the best interests of the national game of baseball"[182] and then changed the control from the team to the league itself.

The second form of property system was indeed the exact opposite. The change of paradigm indicated that the control passed from the teams to the league. The *"League-*

[180] Edelman, Marc - Why the "Single Entity" Defense Can Never Apply to NFL Clubs: A Primer on Property-Rights Theory in Professional Sports – 2008 - Fordham Intell. Prop. Media & Ent. L.J. http://law.fordham.edu/publications/article.ihtml?pubID=200&id=2758. – pag 897

[181] Id. Pag. 898

[182] Id. Pag. 899

based property system", or *"complete unity of interest system*", was in vogue in during the nineties, and was created "with the aid of sophisticated lawyers."[183]

This new system of property control was implemented mainly for the last-born American league, the one which offered actually the less followed sport in the US, the Major League Soccer (MLS). The idea of this system is the closest possible to the idea of an actual single entity league, with a common mission and with a complete sharing of all the resources needed and generated. The "father" of this model, Alan Rotherburg, had the aim to create a league in which the team owners were not simple owners but more like "investors-operators, financing and operating an entire soccer entity under a single voice."[184]

This new model had the purpose of not incentivizing the differences between the participating teams. Each franchise would have received the exact same shares of revenues generated as the others, "irrespective of each clubs' on-the-field performance."[185]

This model, which seemed to be as close as possible to the concept of Communism, meant to create a league where teams did compete on the soccer pitch, but that in reality did not bring any kind of economic or social advantage in winning championships and in attracting new and better players. This, of course, would have meant that the owners of the teams, which we have said, were more investors rather than actual controllers and owners, had not strong incentive in participating.

The main advantage of this model would have been the great reduction of operating expenses, since the low need of "front-office functional and administrative employees."[186]

But since the model had not the purpose of creating an appealing and championship creating league, very few investors were interested in participating, and the model that was promoting the concept of single entity leagues died before being born.

As it can be understood by its name, the last model, the *"mixed-model*", or *"partial unity of interest system*", is the convergence between the first two models, and the model that professional American sport leagues are applying today.

The system was defined to resolve the two main problems of its predecessors, the reduced cooperation and so balance between the teams, and the minimum attraction of

[183] Id. Pag. 900
[184] Id. Pag. 900
[185] Id. Pag. 901
[186] Id. Pag. 901

investors and sponsors. The mixed property system is exactly what we see today, so a league which has certain degree of control over its team-owners, which cooperate, through the Collective Bargaining Agreements (CBA), in order to make the league more attractive, balanced and unpredictable.

The strength of this system was, even if each team had strong incentive to compete at the highest possible level, meaning to beat its opponents, this is not always the truth. As we said, the concept of unpredictability is a milestone of the professional sport leagues, since "fans do not want to attend a seemingly pre-determined contest."[187]

The concept of this model is around the fact that still, owners maintain a good degree of independency, especially on the property rights.

The clubs' relationship is regulated by two agreements, the first, as said, is the presence of a CBA, stipulated by teams and players. The second is the "league constitution (or league agreement) which sets forth the relationship between individual clubs."[188]

Furthermore, the institution of the figure of the commissioner is another crucial milestone, since it is the representant of the league interests and it has the power of aligning financial and non-financial rules and issues, the promotion of safety and welfare of the players.

Yet the most interesting and important side of this system is the sharing of certain property rights "at the league level, while maintaining other property rights privately at the club level"[189] . The different streams of revenues are divided into five categories, each one concerning one specific source. Of the five categories that are defined, which are the allocation of stadium revenues, the allocation of corporate proceeds, the allocation of broadcast revenues, the allocation of internet revenues and allocation of licensing and merchandising fees, the last one is, of course, the category that we are interested in.

Nonetheless, the first four allocation systems are of a degree of relevance in understanding the single entity rationale of the American sport leagues. The first category, the allocation of any revenue that is generated by tickets or stadium-related incomes is different between the leagues. For example, the NFL's revenues are split in "60 percent designated for the home club and approximately 40 percent placed in a "visitor's" pool, which is split equally among all clubs"[190]. The second allocation of

[187] Id. Pag. 904
[188] Id. Pag. 905-906
[189] Id. Pag. 911
[190] Id. Pag. 912

revenues, the corporate proceeds, regard the agreements on local sponsorships. As for the previous category, the contracts are made with any kind of sponsor, and most importantly, "clubs actively compete against one another to obtain the most profitable of these agreements"[191], meaning that there is no joint purpose in selecting the sponsor and that teams do not act as single entities. The allocation of television rights are another important aspect, if not the most important in the generation of revenues for the leagues. Here we see the difference between local agreements, which are of course stipulated independently by each team and whose revenues are not shared among the other teams, and national agreements, which are defined at league's level and grant a sharing of revenues which "benefits all clubs, irrespective of market size"[192]. The fourth allocation model regard the internet and media revenues, which is a business whose revenues' generation have skyrocketed in the last decade. As for the first and second category, there is no single unity of interest, since each individual team can generate revenues from its own sources, without the obligation of sharing the income. But as stated before, the case-relevant category of revenue allocation is the one regarding the licensing and merchandising fees. Those sources of revenues are defined as the "fees from "reproducing an image, or portion thereof of any copyrighted property for a fee to the rights holder."[193]

This allocation of resources system saw the light in 1963, when the NFL instituted the NFL Properties (NFLP) to manage the intellectual property rights on behalf of both the league in general and for each team individually. Even if the presence of the NFLP, and the equal sharing of revenues coming from licensing trademarks, some NFL teams have gained income coming from independent concessions from apparel firms, underlining the minimum unity in this category of revenue allocation. This means, once more, that, even if in a lower degree, teams tend to compete on this subject, rather than operating as a whole.

What stands out from all of this, is that, over time, the leagues have tried, and in a certain sense they succeeded, to create and develop the most efficient and effective system possible, to create the bigger value, both economic and athletic, from the teams that compose the leagues themselves.

[191] Id. Pag. 914
[192] Id. Pag. 918
[193] Id. Pag. 920

It is also true, that the teams are not all the same, they have different size, both in term of fan base and also on geographical location. If we want to consider the NBA as an example, it is true that the game is built to allow each team to win, nonetheless the Los Angeles Lakers and the Boston Celtics, two of the teams which have bigger and richer markets, since they play in two of the most populated cities in the US, have won respectively 16 and 17 championships in their history. This is the result of the maybe unbridgeable gap that divide different teams.

The fact that teams do represent different markets and have different economic possibilities, also shows that independent actions may be justified by the fact that, who can have more, wants to receive it. The motivations above show that actually in the last years, the idea that leagues can be considered as single entities has shifted, the number of property rights that each team posses and the growing revenues that are generated, lure owners in looking for ways to monetize from what their team may generate.

In addition to this, since the popularity and profitability made American sports leagues so rich and famous around the world, it will be "a twisted sense of irony if the unique property-rights system […] which is so profitable, also were to provide them with a loophole to avoid complying with antitrust principles."[194]

3.4 American Needle Vs National Football League

Premises set, it is now important to describe in detail the principal and most relevant case regarding property rights in the American sports market. The American Needle v. National Football League[195] [196], which we have seen is the child of a previous claim, also set by American Needle (AN) against the NFL and one of its participant team, the New Orleans Saints, has the power to radically change the modern landscape of not only the NFL property right system, but of all the professional leagues'.

The relationship between the NFL and AN started many years ago, in the sixties. In fact, in 1963 the NFL decided to establish the NFL Properties (NFLP) as a "common entity to assist the teams in developing and marketing their intellectual property rights."[197] Before the creation of the NFLP the teams could license their rights

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[194] Id. Pag. 926

[195] American Needle, Inc., v. National Football League, 538 F.3d 736, 744 (7th Cir. 2008)

[196] American Needle, Inc. v. National Football League, 560 U.S. 183 (2010)

[197] Hovenkamp, Herbert - American Needle and the Boundaries of the Firm in Antitrust Law – University of Iowa College of Law Legal Studies Research Paper Series – 2010 – Pag. 2

individually for the production of their products, with the use of their own images and colors. When the new NFL-affiliated company was born, it started to grant to various companies that requested it, the non-exclusive rights and licenses. One of the firms that received the rights to produce NFL products was AN.

The business relationship went on until 2000, year in which the NLFP decided to sign an exclusive agreement with a single firm for the production of headwear. Reebok, would have had the exclusive right to produce the "NFL logoed headwear for a ten-year period"[198], receiving both the exclusive right for the NFL products as well as the whole teams' headwear.

This, jointly to the "loss" against the New Orleans Saints, set the basis for the claim second against the NFL. The accusation was that they were restricting trade as they were refusing to trade with them, refusal to trade that is a clear violation of Section 1 of the Sherman Act. The Plaintiff's (AN) allegation was that, even if the league itself (the NFL) had the right to give exclusive license to any given company, it did not have the right to force all the other individually owned teams to accept that same agreement. The separated teams, always in the Plaintiff's idea, must have the right to negotiate with whoever they want on the subject of their own intellectual property rights.

The allegations of AN were based on the concept that the NFL was horizontally agreeing, not passing through the teams when deciding to whom concede its property rights. The accusations that AN was making against the NFL were regarding six antitrust markets. Two were regarding the market were to obtain the licenses for the trademark of the NFL teams in general and of the licenses of the headwear. Other two markets were capturing the sale of both general apparel and headwear of the NFL products. The last two markets were the manufacturing of the apparel products in general and the headwear products, always with the NFL licenses.

The first Court that gave a judgement over the accusation was, as underlined before, the Northern District of Illinois in the lawsuit against the New Orleans Saints[199], in 2007. In that circumstance the Lower Court sided for the Defendants, who claimed for the single entity of actions, and that what they did was not else than acting joint venture-like, thus like a single actor and not in violation of the Sherman Act. In taking this decision, the District Court was citing the words of another seen case, the Chicago Professional Sports Partnership, which was underlining that "with regard to licensing

[198] Id. Pag. 2

[199] American Needle v. New Orleans Saints 496 F. Supp. 2d 941, 943 (N.D. Ill. 2007)

intellectual property, the NFL and its 32 teams are, in the jargon of antitrust law, acting as a single entity."[200]

In addition to this, the NFL's defense was based also on two facts, the first that, AN "failed to allege a restraint of trade in any relevant antitrust market"[201] and the second based on the declarations of two testimonies.

The two experts called from the NFL were Dr. Frankiln M. Fisher, professor at the Massachusetts Institute of Technology, and Gary Gertzon, Senior Vice President of Business Affairs and General Counsel of NFLP. The first testimony declared that the defendants, the NFL teams, do not compete against each other on the licensing of their property rights, rather they do compete with "other entertainment products."[202]

The second speaker's opinion, since was made by a direct insider of the NFL, was more specific on the side of cost efficiencies. He stressed that the level of cooperation and integration requested by the league is enormous but fundamental nonetheless. Without the rule challenged, some teams may take more advantage than others, while the main goal of the NFL is to "compete with other entertainment providers by increasing the visibility of NFL Football."[203] rather than risking to self-destruct by competing with itself.

Given this accusations and defenses, as said before, the Court held for the NFL and allowed the single entity defense to the defending party. The plaintiff then appealed to the US Seventh Circuit Court of Appeals trying to overturn the first decision of the district court. But oppositely the Court affirmed the first judgement on the single entity status of the NFL and its teams.

The Seventh Circuit Court, which was following the steps taken by the lower district court, stressed the concept that the "league appears to be a joint venture between independently owned teams"[204] and that, since the process of allowing the NFLP to have almost carte blanche in the decision of the licensee was established in 1963, and that the teams have been acting jointly on this issue since then, and so, the violation and restriction of trade are not of the case.

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[200] Edelman, Marc - Upon Further Review: Will the NFL's Trademark Licensing Practices Survive Full Antitrust Scrutiny? The Remand of American Needle v. Nat'l Football League - Stanford Journal of Law, Business & Finance - Pag 193

[201] Id. Pag. 190

[202] Id. Pag. 192

[203] Id. Pag. 192-193

[204] Id. Pag. 194

Nonetheless, the case was far from being over, since American Needle asked for the United States Supreme Court for an nth judgement.
The process of the Supreme Court in the evaluation of this case was different from what the lower Court did. The Court asserted that the decision on whether an action is legal or illegal, especially in a many times confused world, which is the one of sport leagues, should be taken under a better evaluation of the case in question, so under a Rule of Reason analysis of the case.
The basic point of the analysis made by the Court is that the fact that the football team that are part of the NFL should not have any right to cartelize in their trademark licensing, since this, in any other normal market, would be of course scrutinized as an antitrust violation. Even if some procompetitive justification would have emerged, the rule of reason would still apply. The Court stressed this concept by making the comparison with the restaurant market, they stated that "there is no obvious reason why a group of football teams should be permitted to cartelize the licensing of their marks any more than a group of competing restaurants."[205]
Furthermore, the desirability of the NFL trademark licenses makes the teams very strong players in this market. Allowing the teams to participate in the market as single and individual contractors, may already be considered as a "more competitive or "less restrictive alternative"[206], since the value that will be created by teams, would, with all probability, not destroy or reduce the value that is created at the moment, where the control of the property rights is given to the NFLP.
Another important aspect of the decision of the Supreme Court is that, since we have already seen that the teams are individually owned and may not have the same exact interests, both in the athletic and in the economic markets, they tend to compete with each other, and they are incentivized to do so. This happens for two main reasons. The first, pretty simple, is that each team wants to be considered better the others to attract better players to win championships. The second motivation for competition, is that the team owners, those who economically invest in the team, want to gather the richer sponsors, sell to the best bidder, in brief, earn as much money as possible. This aspect concerns strongly the issue of intellectual property rights. In fact, since we have seen that is of the NFL interest to act as a cartel, so reducing the power of the teams in order

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[205] Hovenkamp, Herbert - American Needle: the Sherman Act, Conspiracy, and Exclusion - The CPI Antitrust Journal – 2010 – Pag. 5
[206] Id. Pag. 6

to reduce costs and be more efficient, the teams would likely have much more advantages in competing with each other. In addition, the differences that exist between teams, so the geographic location, the fan base, the history and so forth, create a bunch of teams that may receive a much higher stream of revenues than the others who do not have the same possibilities. To give an example of the huge difference is team's value, the "The NFL's most recognizable team, the Dallas Cowboys, is valued at $4.2 billion while the Buffalo Bills, the least valuable NFL team, is still worth $1.5 billion"[207].

For who produces the apparel of the NFL teams, there is an actual difference between whose name they are writing on a hat or a t-shirt, because, "to a firm making hats, the Saints and the Colts are two potentially competing suppliers of valuable trademarks"[208]. In other words, the NFL was treating all of his participants as the same, in terms of total economic value generated and impact of fans and firms.

Even though the league's claims were about the fact that there was single goal of both itself and the teams, it was actually not true. The independence of ownership and the different possibilities, gives the teams "incentive to make business decisions reflecting their respective individual self-interests rather than the best interests of the league as a whole"[209].

In fact, the league's limitation on the licenses, exclusive or non-exclusive, may have costed teams money that they could have earned absent the NFLP restriction on individual agreements. More specifically, the exclusivity agreement made with Reebok, excluded from the equation a list of other possible parts (as American Needle), who could have made offers for the production of official apparel for the NFL, thus generating more money for the league.

The final decision of the Supreme Court, still did not gave a definitive answer to the question of whether the single entity of the teams is granted, or whether the contract with Reebok is illegal and restrains trade and thus should be forbidden. The decision of the Court, was to remand the case to the lower Northern District Court of Illinois for further proceedings and to be evaluated under a "full review of the NFL's joint

[207] Cook, Christopher L. - American Needle, Inc. v. National Football League and its Effect on Professional Sports - Journal of Business & Technology Law – 2017 – pag 313

[208] Hovenkamp, Herbert - American Needle: the Sherman Act, Conspiracy, and Exclusion - The CPI Antitrust Journal – 2010 – Pag. 3

[209] Mitten, Matthew J. - American Needle Inc v NFL - Marquette University Law School Legal Studies Research Paper Series - Research Paper No. 12-14 – 2012 – Pag 12

licensing practices"[210], yet allowing the rule of reason scrutiny, leaving open doors not just for this case, but for further ones, in the issue of property rights.

3.5 What Happens After the Supreme Court's Decision?

The aftermath of the Supreme Court decision may require some time to be actually relevant in the sport system, yet they placed the first stone for further claims or accusation over too strict leagues' rules.

The decision take by the court, regarding different issues, may have various effects on "sport practitioners in at least four important aspects"[211].

First, the opening to the possibility to challenge some behaviors of the leagues, those who may restrict competition, or bring to an increase in prices, in a discrimination and so on, will be challengeable under the rule of reason scrutiny to evaluate if they are in violation of the Section 1 of the Sherman Act. This would mean that in the moment that, if any kind of unlawful behavior would be supposed, "such conduct would remain subject to review under antitrust law's full Rule of Reason."[212]

The decision would also affect the existing leagues, in the sense that if they want to "engage in collective practices that are likely to harm consumers"[213], they would not be permitted to do so, if they did not receive an antitrust exemption, such as the non-statutory labor exemption seen in the previous chapter.

Also, for not existing leagues, or better, for those who are on the road of forming a new league, this decision will not allow them to avoid antitrust scrutiny.

Finally, the power of players association will increase. They could start using the antitrust scrutiny as a "threat" when "unable to obtain acceptable terms in collective bargaining"[214], or when some of the existing rules may harm the players, since the constantly changing environment makes old rules, always older.

But even though these effects may apply, time will pass, and furthermore, what happened to American Needle? The decision of the Supreme Court was to go back to lower courts for further and complete new scrutiny, where the plaintiff had to prove the elements for the illegality of the rule.

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[210] Edelman, Mark - Ruling May Have Impact In Other Areas Of Sports Business- Street&Smith Sports Business Journal – 2010 – pag 20
[211] Id. Pag. 20
[212] Id. Pag. 21
[213] Id. Pag. 21
[214] Id. Pag. 21

Since the Supreme Court imposed the rule of reason scrutiny, not just American Needle, but any other plaintiff in the future will have to fulfill the requirements to effectively prove the unlawfulness of determined rules.
The elements that will be required are the fact that the defendant has enough *"market power",* so it can "control prices or exclude competition"[215], that the rule generates *"net anticompetitive effects",* so through the burden shifting analysis (plaintiff-defendant-plaintiff's alternatives), the plaintiff has to show that the challenged rule's anticompetitive effects outweighs the procompetitive effects that brings to the system, and that the behavior brings actual *"antitrust injury"* to the consumers, so that consumers receive worse or more costly product that they would receive in absence of the rule.
The fact that a plaintiff has to prove all of those elements, still makes the leagues protected, because those can be hard elements to be proven.
For what regards the market power, it seems unlikely that American Needle may be able to show the anticompetitive behavior of the NFL. This is because, usually, "consumers of sports apparel/headwear purchase merchandise for a "home team" rather than for a given sport."[216] Showing the actual reduction of price, or the exclusion from competition may be hard, since the market for football apparel is not limited to just football. In fact, they may also compete with basketball, baseball, hockey and soccer apparel markets. The example to make is that, excluding those diehard fans who only buy one team's product, normal fans tend to buy the products that show the name or colors of their city's team. For some of the bigger market cities, as New York, the producers of the apparel for the NBA team, the New York Knicks, do not compete just with other NBA teams, yet also with the other sports team. The competition will be also against the NFL teams, the Jets and Giants, and with the baseball teams, the Yankees and the Mets.
In order to show market power, then, a plaintiff has to show the price variations in all sports markets, not just in football, if we consider the American Needle case.
In regard of the second element, the net anticompetitive effects, here the plaintiff can underline the fact that, since the league's rule is "preventing individual teams from

[215] Edelman, Marc - Upon Further Review: Will the NFL's Trademark Licensing Practices Survive Full Antitrust Scrutiny? The Remand of American Needle v. Nat'l Football League - Stanford Journal of Law, Business & Finance - Pag 201
[216] Id. Pag. 207

"offering certain consumers merchandise options."[217] By agreeing on exclusive terms with one single firm (Reebok), the NFL is effectively eliminating from the deal all the other interested firms, and "eliminating price competition between the teams for trademark licensing"[218] by doing so.

While, for the last element, the antitrust injuries, the plaintiff in case American Needle, may prove injury by defining an important concept. The agreement affectively excludes some from the market and thus does not allow any kind of competition, strongly harming those firms who may not have the economic strength to participate in a bid for the complete production of the NFL apparel, and that then will never be able to acquire the licensing rights of the NFL's apparel.

3.6 Final Considerations

The history of property rights in the US has been long and controversial, and the paradigm changed many times while multiple plaintiffs were defending their interests. We have seen that the issue of the single entity of the leagues has been used in the same way as the non-statutory labor exemption analyzed in the previous chapter. By defining itself as a unique and independent actor, the NFL and other professional leagues, jointly with the teams that composed them, were granted the right of a virtual antitrust exemption for the decision of the licensing of theirs and of the teams' property rights.

The final decision of the Supreme Court, which is actually both not final, and not a decision, the one of remanding to lower courts the judgement, using the rule of reason analysis, is nonetheless of incredible relevance, not just for external plaintiffs, such as American Needle, but also for other parties. The decision of making "trademark licensing practices subject to review under Section 1 of the Sherman Act"[219] sets the tone for a new landscape in NFL sharing of resource and revenues, other than excluding the antitrust exemption from the equation.

The fact that now the leagues lost their exemption, and moreover, there are punishable if violate the rules under antitrust scrutiny, grants new power to the players association

[217] Id. Pag. 211
[218] Id. Pag. 211
[219] Id. Pag. 221

to “threaten” the league in the negotiation of collective bargaining agreements, or grant better results in the “negotiating premium television agreement”[220].

[220] Cook, Christopher L. - American Needle, Inc. v. National Football League and its Effect on Professional Sports - Journal of Business & Technology Law – 2017 – pag 323

Conclusions

The American sports industry has grown extremely fast over the last few years, and this huge and quick growth has created many issues and controversies between its participants and stakeholders. The level of the athletes that make the leagues so great, the level of visibility that those athletes have and the money that they and the leagues generate, have brought, over the years, to the rise of many claims and lawsuits by both parts to make their interests and rights prevail. This interest in preserving each part's rights and in creating an efficient and effective playing field, are the sparks that, as we saw, brought to the attempt of modifying the rules that limited and restrained the subjects of the leagues.

For the Amateur players, the student-athletes, that are part of the NCAA system, the exclusion from the revenue-sharing was the main complaint. The Association huge increase in revenues coming both from media rights and intellectual property rights, in terms of Names, Images and Likeness (NILs), paved the way to the big number of lawsuits that former players brought on behalf of their colleagues. The O'Bannon v. NCAA's lawsuit, was the big watershed between a system in which student-athletes economic rights were close to none, to a new system, in which some of the wealth generated by their activity, may also be granted to them. The effect generated by the case was, that, for the first time, it opened the doors to the possibility of seeing the non-professional athletes being paid. The result is an enormous step forward in the world of amateur sports. By being able to receive an amount, even if limited, of compensation coming from their athletic abilities, athletes may have changed the way in which the NCAA both operates and is seen on the outside. An athlete which receives money from his activity, may result in a more transparent and clear, other than by a more efficient, system, in which those who are part of it, are actually willing to be part of it for as long as possible, rather than passing by as fast as possible to than leave and become professionals. The fact that the antitrust exemption that the NCAA virtually had, was not granted anymore, is a huge step forward for the American amateur athletes, and system in general, since it allows who actually generate the money, to have access to a part of it.

Similarly, the evolution of the relationship between the professional sport leagues' team owners and their players is a central topic in modern antitrust sports analysis. The modifications to Collective Bargaining Agreements (CBA), tools that have the goal of protecting those who actually negotiate, so the owners and players, are of extreme

importance in the functioning of the leagues. As for the NCAA, also the professional "colleagues" have seen their revenues skyrocket, and of course, with that, the level of interest that the players and owners have in receiving part of the wealth that is generated. The exitance of a protection system allows both parts to act freely, without the risk of being deceived or mislead by the behavior of the opposite part. Yet also the issue of protection of the players who want to enter the league, so the young athletes, is the focus of the recent NBA and NFL reasonings. The fact the content of the CBA does not allow fresh-from-high-school players to be part of the professional leagues, is also an important subject of discussion in modern days. Indeed, as cited, the modification over the rules that the leagues adopt, are continuous, since the same commissioner of the NBA, Adam Silver, is evaluating the possibility of modifying the rules, and allow the entrance of high school players in the league once more.
Lastly, the evolution of how the leagues are defined and handled in front of antitrust courts is another subject of great relevance. Understanding the impact that the sponsors and merchandising-related companies can have on the revenues of the professional leagues is of primary importance. The analysis over the Chicago Professional Sports Limited Partnership case, which regarded media rights and, more specifically on the American Needle case, is fundamental in underlining the interest and attention that both the virtual exemption from antitrust scrutiny and the ouster from the markets of any player generates. Both are strong competition restrictions, and, of course, unlawful ways of protecting the league and reducing the total amount of money that the leagues can generate. What stands from both the cases, is that the protection of the league is senseless if done without an adequate understanding of the parts involved and of the possible effects that may be generated.
The final purpose of this work was to analyze who the American sport leagues are made, and have evolved over time. How they faced the not always easy to handle issue of face an enormous stream of revenues. Revenues that are generated by a multitude of actors, who, of course, want to take the most from what they do.
The antitrust scrutinies and the lawsuits that have seen the light in the history of professional and non-professional sport leagues are the proof of the attempt from players and interested-parts in enforce their rights, to make a better, more efficient and more peaceful playground for them and for posterity.

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SUMMARY

The purpose of this work will be focusing on the functioning of the main professional and non-professional American sports associations, and to how those are regulated and adjusted over time. We will also focus on the history of antitrust claims and lawsuits that actually helped and are still helping the system improving and adapting to the quick changes of society and economies.

The first chapter of this work will focus on the NCAA's relationship with its student-athletes. The NCAA (National Collegiate Athletic Association) was found in 1906 to protect young people from the dangerous and exploitive athletics practices of the time. Nowadays the NCAA considers itself as an "organization dedicated to the well-being and lifelong success of college athletes". Its members are 1.117 colleges and universities, grouped in more than 100 athletics conferences, composed of almost 40 different affiliated sports organizations. The teams are spread throughout the US and the number of those is enormous, as described in NCAA official website: "Nearly half a million college athletes make up the 19,750 teams that send more than 52,500 participants to compete each year in the NCAA's 90 championships in 24 sports across 3 divisions."[221]

To have an idea of the economic value that the NCAA has, we can see that its revenues reached for year 2017 $1.1 billion, of which more than $800 million are due to lucrative TV rights deals with CBS and Turner. The deal was then extended in 2010, when the parties agreed to acquire the rights of the men's basketball tournament making it a grand total of $19 billion for the period 2010-2032

Consistently to what happens for NCAA basketball, also the FBS (Division I of college football) has seen its revenues sky rocket in the last years. "In 2012, ESPN Tuesday had reached an agreement with "the group that will administer the new college football playoff" to broadcast that playoff and each of its six associated bowls for 12 seasons, from 2014 through 2025. A multi-year contract with ESPN for the College Football Playoff with a value of $5.64 billion."[222]

[221] NCAA Official Web Site – 2019 – www.ncaa.org - http://www.ncaa.org/about/resources/media-center/ncaa-101/what-ncaa

[222] Hinnen, Jerry - ESPN reaches 12-year deal to air college football playoffs - www.cbssports.com – 21 November 2012 - https://www.cbssports.com/college-football/news/espn-reaches-12-year-deal-to-air-college-football-playoffs/.

All of these revenues are generated mainly by the five major conferences of American college football, there are, in fact, five conferences which generate the highest revenues, known as the Power Five Conferences (PFC). In the light of the above, there has been, and there is a growing desire of the athletes in defending their interests, desire which is corroborated by the increasing number of lawsuits and articles which promote solutions to nowadays NCAA's model.

In order to understand how the most recent cases have been and are able to alter NCAA's rules, or simply the mind sets of NCAA's insiders or fans, it is important to have a view of some of the first and most important lawsuits against the Association.

Two cases gave the kick off to the many lawsuits were College Athletic Placement Service Inc v. NCAA[223] case of 1974**,** and the Jones v. NCAA[224] of 1975. Even if the two complaints were different from each other, the courts' judgements were very similar. The District Courts claimed that NCAA's bylaws were set with the purpose of "preserving the educational standards in member institutions, and not for any commercial purpose"[225], and that the rules could not be challenged because "the actions of the NCAA in setting eligibility guidelines has no nexus to commercial or business activities."[226] Those two cases, laid the foundation for the following lawsuits, underlining the "non-commercial" and "non-business" purpose of the NCAA.

Another fundamental case was *NCAA v. Board of Regents of the University of Oklahoma* of 1984.[227] The NCAA was setting ceilings of the total number of games that could be televised (reducing the total output) while increasing the price of each game. The NCAA was acting in form of a cartel, cutting out from any economical and strategical decision the institutions (the colleges), which where the main actors of the games that were televised. The Plaintiffs were, in brief, stating that NCAA's rules of price and output restriction violated the Sherman Act.

The Sherman Act is the United States antitrust law regulating competition in the markets to protect consumers and producers. The first rule of the Sherman Act Section 1 states that "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign

[223] College Athletic Placement Service, Inc. v. National Collegiate Athletic Association, 506 F.2d 1050 (3rd Cir. 1974).
[224] Jones v. National Collegiate Athletic Association, 392 F. Supp. 295 (D. Mass. 1975).
[225] College Athletic Placement Service, Inc. v. National Collegiate Athletic Association, 506 F.2d 1050 (3rd Cir. 1974).
[226] Jones v. National Collegiate Athletic Association, 392 F. Supp. 295 (D. Mass. 1975).
[227] NCAA v. Board of Regents, 468 U.S. 85 (1984).

nations, is declared to be illegal"[228]. The case (Board of Regents) resulted into a victory for the plaintiffs, yet set some dicta that would have been used as a defense from the NCAA in future lawsuits.

Other three cases are useful to understand the effect of Board of Regents' cause. First one is McCormack v. NCAA,[229] where the Court ruled in favor of the NCAA underlining the fact that "rules that determine player eligibility enhance public interest in intercollegiate athletics."[230] The Court also added that "the goal of the NCAA is to integrate athletics with academics. Its requirements reasonably further this goal."[231]

Another case is Banks v. NCAA[232]. Here the Court was strong on the point that "the no-agent and no-draft rules are vital and must work in conjunction with other eligibility requirements to preserve the amateur status of college athletics"[233]

Another case, chosen as the last example of post Board of Regent case, is Smith v. NCAA.[234] The Court's final idea was that "NCAA eligibility rules existed to ensure fair competition and enhance public interest in intercollegiate athletics and therefore were not designed to provide the NCAA with a commercial advantage."[235] Yet One of the most important and "game changing" decisions over NCAA rule-set, was taken in 2014 and 2015 with the O'Bannon v. NCAA case**.**

The bench trial in O'Bannon v. NCAA[236] is a milestone in reshaping the idea of college athletes since the institution of the association in the early year of 1900. The case results, even if did not result in major economic value for both the plaintiffs and the NCAA, set the foundation for the new idea of "liberalization" of the figure of student-athletes. The complaint of the plaintiffs was that the NCAA was fixing the price of former student athletes' images at zero and . . . boycotting former student athletes in

[228] Sherman Act §§ 1-7, 15 U.S.C. §§ 1-7 (2006).
[229] David R. McCormack, et al., Plaintiffs-appellants, v. National Collegiate Athletic Association, Defendant-appellee, 845 F.2d 1338 (5th Cir. 1988).
[230] Baker III, Thomas A. J.D., Ph.D. Edelman, Marc J.D., Watanabe, Nicholas M. Ph.D - Debunking the NCAA's Myth That Amateurism Conforms with Antitrust Law: A Legal and Statistical Analysis – 2017 - Forthcoming, Tennessee Law Review, 2018 - Pag. 8.

[231] David R. McCormack, et al., Plaintiffs-appellants, v. National Collegiate Athletic Association, Defendant-appellee, 845 F.2d 1338 (5th Cir. 1988).
[232] Banks v. NCAA, 977 F.2d 1081, U.S. (7th Cir. 1992).
[233] Banks v. NCAA, 977 F.2d 1081, U.S. (7th Cir. 1992).
[234] Smith v. Nat'l Collegiate Athletic Association, 139 F.3d 180 (3d Cir. 1998).
[235] Baker III, Thomas A. J.D., Ph.D. Edelman, Marc J.D., Watanabe, Nicholas M. Ph.D - Debunking the NCAA's Myth That Amateurism Conforms with Antitrust Law: A Legal and Statistical Analysis – 2017 - Forthcoming, Tennessee Law Review, 2018 - Pag. 9.
[236] O'Bannon v. NCAA - 09-3329 (N.D. Cal. 2014).

the collegiate licensing market"[237], not allowing them to participate in any deal on their own NIL rights with third party actors.

The trial, that followed the three burden shifting steps of the rule of reason analysis, ended with the decision of the Court of the Northern District of California. Since allowing payments would not hurt consumer demand for college sports, as far as these payments were limited in amount and those payments would not erect any new barriers to schools' efforts to educate student-athletes or integrate them into their schools' academic communities"[238], was allowed the creation of a trust in which shares of revenues over NIL rights could be deposited and then distributed after the student leaves college. The Court decision was then appealed by the NCAA to the United States Court of Appeal of the Ninth Circuit in 2015.

In this appeal, the NCAA argued that the dicta in Board of Regents made the Association "exempt from antitrust scrutiny."[239] The Court of the Ninth Circuit declared that they changed the decision of the District Court, not allowing "schools to pay up to $5,000 per year in deferred compensation"[240] and most importantly, it finally affirmed the "not over-the-rules status" of the NCAA. Indeed, in one of its final decisions, the Court of Appeals, underlined that the "NCAA is not above the antitrust laws, and courts cannot and must not shy away from requiring the NCAA to play by the Sherman Act's rules."[241] To corroborate O'Bannon's decision, further litigations were brought by other plaintiffs. One on the most recent, is the NCAA Grant-in-Aid Cap Antitrust Litigation, which was concluded in 2019.
The substantial difference between the two cases is that, while for O'Bannon the main subject was compensation deriving from the economical exploitation of NIL rights, here we face the compensation as is, meaning the remuneration of athletes for their athletic services to the colleges. The central point is the concept of "pay for play".
After an analysis similar to the previous case's, the Court affirmed that there will not be caps on education-related payments, imposing that: "the NCAA would still be able to limit grants-in-aid to the full cost of attendance and limit compensation and benefits unrelated to education, but forced the NCAA limits on awards and incentives, as long as the limits are not lower than its limits on athletic performance awards now or in the

[237] Id. 2322.
[238] Id. 44.
[239] O'Bannon v. NCAA, 14-16601 (9th Cir. 2015) – PAG 30.
[240] O'Bannon v. NCAA, 14-16601 (9th Cir. 2015) – PAG 63.
[241] Id. 63.

future."[242] Nonetheless, the NCAA would still retain the power to regulate the way in which each university sets those caps and supplies them to student-athletes, not significantly impacting the NCAA's ability to have a control over college sports. So, to have a final and clearer overview, the decision of the Court was to remove limitations on most of the education-related benefits provided on top of a grant-in-aid, yet with the power to keeping on limiting the non-education-related benefits.

Since we understood the not always idyllic relationship between the NCAA and its components, we also have to set that, for many of the players of the college sports, considering in the specific those who generate more attention and revenues, the basketball and football players, the main objective of their college performance is to be selected by one of the major American football or basketball leagues: the National Basketball Association (NBA) and the National Football League (NFL).

In order to fully comprehend the impact of those leagues, we have to underline that they are both considered as two monopolies, as they represent the major and almost unique professional leagues, in their sports, in the US. Furthermore, the revenues generated by the NBA and the NFL, of which the majority comes from the television agreements and sponsorships, have skyrocketed in the last years. The NBA had reached an $8 billion for the 2017/18 season[243], while the NFL's revenues have reached almost $9 billion in 2019.[244] Concerning the differences with the NCAA, the main dissimilarity lays on the fact that the participants of both the NBA and the NFL are professionals and not amateurs like in college sports. This means, of course, that the players receive compensation and salaries, which reach the million dollars per year for each player in the league.

The NBA and the NFL set their bases and rules on the presence of agreements between the employers, the leagues themselves, and the employees, the players. In fact, the leagues' rule books are written because of the work of two opposite yet complementary forces, the Associations and team owners, and the Players associations, which regularly stipulate Collective Bargaining Agreements (CBA) in order to protect the interest of both the parts. The presence of the CBAs is of fundamental importance for

[242] Id. 55-56.
[243] Gough, Cristina - Total NBA league revenue* from 2001/02 to 2017/18 (in billion U.S. dollars) – 2019 - https://www.statista.com/statistics/193467/total-league-revenue-of-the-nba-since-2005/
[244] Rovell, Darren - NFL Teams Share $8.78 Billion in Revenue - https://www.actionnetwork.com/nfl/nfl-2018-19-revenue - 2019

the preservation of the leagues. The double purpose is to protect the players, represented by players associations (National Basketball Players Association of NBPA for the NBA and National Football League Players Association or NFLPA for the NFL), by setting the rules and limits that are enforced by the Associations, both economic and social (time tables, etc), and to allow the leagues to operate with the minimum risk of complaints by the insiders.

The history of negotiations of CBA was not always made of easy negotiations. For example, "the National Basketball Association (NBA) team owners locked out the players in the summer of 2011"[245] because the owners were claiming that they were facing a constant money loss, and that the players, represented by the NBPA, did not see the asked changes from the previous CBA. Similarly, the NFL had its issues around negotiations over CBAs. The "darkest year in NFL history"[246] was 1987, when after a strike, the NFL decided to sign "replacement players" to let the NFL start the season again. As a result of the strike, which lasted 24 days, the third game of the season was not played, while the fourth, fifth and sixth were played by substitute players.

From the light of the above, the main point of the NBA and NFL regulation is around the existence and modification of the Collective Bargaining Agreements over time. The CBAs grant protection to both parts and give a clear definition of the boundaries of the rules that the leagues can modify, in terms of minimum and maximum compensation to players, length of the regular and post-seasons (the playoffs), sponsorship agreement and revenue sharing.

Yet as we saw, such as the NCAA, the relationship between the players and the leagues have been turbulent over the years. Lock-outs and strikes seen during CBAs negotiations are very good examples of this not always perfect relationship.

It is important to discuss the history of the most relevant lawsuits which determined both the league structure and defined the NBA and NFL as important monopolistic institutions.

The American sports leagues, both amateur, like the NCAA, and professional, as the NBA and NFL, constitute a sort of "positive cartel", made of rules that may seem anti-

[245] Parlow, Matthew J. - Lessons from The NBA Lockout: Union Democracy, Public Support, and the Folly of the National Basketball Players Association - Marquette University Law School Legal Studies Research Paper Series – 2014 – Pag. 2
[246] Id.

competitive to preserve the league itself. The idea is that "professional sports are built around competition, but the industry would not exist without collusion".[247] Furthermore, the presence of an agreement (CBA) which is defined through the cooperation between employers (team owners) and employees (players) empower the leagues with an antitrust exemption. Even though the antitrust exemption is an important factor, the leagues have more than once faced antitrust lawsuits claims on their behalf, lawsuits usually brought up by players which at the time did and did not play professionally in the league.

One of the first, and yet most important cases, both for the direct impact at the time of the final judgement, and also for future implications, is Robertson v. NCAA of 1970[248]. The most relevant result of the case was that it helped the introduction of the concept of free agency for those players who had a "reserve clause" in their contract. The reserve clause was no more than a trade restriction for a player. Robertson's results did affect the 1970's NBA and put the foundation for the exponential growth of the NBA to the point that we know today.

The NFL was going on the same direction as the NBA. One of the most important allegations came in 1976, when John Mackey sued the NFL on the subject of the "*Rozelle Rule"* in Mackey v. NFL.[249] The dispute gravitated around the concept of labor exemption which is certain sense immunizes the NFL. The case, brought by NFL players lead by John Mackey, was claiming that the so called "*Rozelle Rule",* the rule that obliged any team willing to sign a free agent, not only to deal with the player on the amount of his compensation, but also to reach an economic agreement with the player's former team, was unlawful. The district Court of Minnesota considered the rule as a restriction to trade, violating Section I of the Sherman Act. Brought in front of the Eighth Circuit of Appeal of the United States, the Court held that the *Rozelle Rule* "unreasonably restrained trade in violation of the Section I of the Sherman Act" [250] and was therefore declared forbidden.

This first two cases had the important effect to also starting questioning the actual "exemption" from antitrust scrutiny of the NBA and NFL, in front of those agreements

[247] Farzin, Leah - On the Antitrust Exemption for Professional Sports in the United States and Europe, 22 Jeffrey S.Moorad Sports L.J. 75 - (2015) – Pag. 75
[248] Robertson v. National Basketball Association, 556 F.2d 682 (2d Cir. 1977)
[249] Mackey v. National Football League 543 F.2d 606 (8th Cir. 1976).
[250] Id.

set almost only by the leagues' unilateral decisions. The issue around antitrust exemption was questioned in many cases, from Wood v. National Basketball Association[251] where the plaintiff contended that "the salary cap, college draft, and prohibition of player corporations, violate Section 1 of the Sherman Act[252], and are not exempt from the Sherman"[253], to Powell v. National Football League[254] where the plaintiff alleged that free agents had faced restriction in the bargaining with new teams, and since the former CBA had expired "no labor exemption from the antitrust laws shielded the player restraints from antitrust scrutiny"[255].

This last case made a problem rise, is the value of the exemption after an impasse is reached still valid, or, in more simple terms, are the leagues still exempt from scrutiny when a CBA has expired, and a new one is negotiated? We can say that "without an endpoint at expiration, the terms of a collective bargaining agreement and the applicability of the nonstatutory labor exemption remain in perpetual limbo"[256]. In Brown v. Pro Football Inc,[257] the US Court of Appeal for the District of Columbia Circuit affirmed that the exemptions from antitrust scrutiny did extended after impasse. This would have given the possibility to the owners of teams to decide to never renegotiate a CBA if they were satisfied by the previous one. Yet in 1993 the CBA was finally signed, with the conjoined work of both the parts.

Another issue that is related to the rules of NBA and NFL is the so-called "players eligibility issue". In fact, for the NFL, draftees have to have left their high schools for at least three years in order to be picked by any team, while for NBA, a player must have left high school for at least one year. The introduction of the eligibility rule in the NBA, created not few perplexities and controversies, since many considered that the league was creating a "de facto minor-league system (i.e., Division I college basketball)"[258], where to pick future players, without spending any money in development. One of the most relevant case over these rules came out in Clarett v.

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[251] Wood v. National Basketball Association 809 F.2d 954 (2d Cir. 1987)
[252] Sherman Act 15 U.S.C. § 1 (1988)
[253] Wood v. National Basketball Association 809 F.2d 954 (2d Cir. 1987)
[254] Powell v. National Football League 930 F.2d 1293 (8th Cir. 1989).
[255] LexisNexis - Law School Case Brief
Powell v. Nat'l Football League - 678 F. Supp. 777 (D. Minn. 1988) - https://www.lexisnexis.com/community/casebrief/p/casebrief-powell-v-nat-l-football-league - 2019
[256] Id.
[257] Brown v. Pro Football, Inc., 50 F.3d 1041, 1046 (D.C. Cir. 1995).
[258] Id. Pag. 3-4

NFL[259] where the plaintiff was claiming that, even if he had not played for the requested three years in college football, was "physically qualified to play professional football"[260]. The result of the case was that Clarett and other fellow plaintiffs, were not allowed to be eligible for the 2004 NFL. Even though the result closed the doors to the eligibility of college players to professional sports, current NBA Commissioner, Adam Silver, has stated that the subject of reducing the players eligibility age from 19 to 18 years old is something the NBA is evaluating.

The attention to how to handle the problems that regard the functioning of those leagues has to be extremely accurate in order not to destroy the, many times subtle balance that exists between the leagues, the owners of the teams and the players.

Indeed, as we saw, the relationship between those two parts has been stormy, and many times really hard to be handled. Another fundamental issue is the one that faces the relationships that the leagues have with a third party, which identifies with those who actually allow the various Associations to be so successful and, most importantly, extremely rich, Sponsors, merchandising and apparel firms, fans and any other figure that is close to the definition of "viewers" of the sports are the components of these category.

It is important to understand the fact that the leagues, in the matter of their relationship with the antitrust are seen as "*single entities*", or that they should be, together with the clubs, considered as an "integrated single business enterprise whose conduct is not covered by Section 1"[261] of the Sherman Act. During the history of the professional leagues, the concept of single entity of the leagues, has been both accepted and rejected, defining the base of the most recent and relevant trial regarding property rights, American Needle v. NFL of 2010[262].

For example, in Boston Professional Hockey Association Inc. v. Dallas Cap & Emblem Manufacturing, Inc[263]**,** the Fifth Circuit of Appeal Court established that the binomial leagues-teams has to be seen as a single economic entity, in the sense that,

[259] Clarett v. NFL 306 F. Supp. 2d 379 (S.D.N.Y. 2004).
[260] Clarett v. NFL 306 F. Supp. 2d 379 (S.D.N.Y. 2004).
[261] Mitten, Matthew J. - American Needle Inc v NFL - Marquette University Law School Legal Studies Research Paper Series - Research Paper No. 12-14 – 2012 – Pag 2
[262] American Needle, Inc., v. National Football League, 538 F.3d 736, 744 (7th Cir. 2008)
[263] Boston Professional Hockey Association Inc. v. Dallas Cap & Emblem Manufacturing, Inc. - (360 F.Supp. 459 (N.D.Tex. 1973))

the economic value generated by the trademarks, both of the league (the NHL) and of the teams, is shared between the whole system as if it was a single association.
Yet some further lawsuits opened the doors to the separation of the leagues from the teams from the single entity definition. In fact, even if the decision to separate the leagues from the teams have almost always been reversed by Appeal Court, in North American Soccer League v. National Football League, [264] and in Los Angeles Memorial Coliseum v. NFL[265] the lower district Courts underlined that since the two actors did not completely share their revenues, especially those which are generated by merchandising and sponsorships, they were are more similar to a joint venture, rather than a single joint subject.
Nonetheless, one of the most relevant cases over single entity protection is Copperweld Corp. v. Independence Tube Corporation[266] of 1984, where the Supreme Court underlined two major factors. The first was that two or more companies, that are a parent and one or more subsidiaries, are seen as a single company, meaning that "multiple corporations with common ownership [...] do not have independent competitive interests."[267] The second was that any conduct taken by one of the two companies, would be considered as unilateral, since, once more, there is no kind of separation in terms of antitrust scrutiny, between the parent, and any other fully owned subsidiary. Another case gave approximately the same results. In Chicago Professional Sports Limited Partnership v. National Basketball Association[268]. Yet in this last lawsuit, the Court set that from than on Each time a conduct is challenged, it will be required a "facet by facet analysis of each league's operations."[269], requiring, in brief, the rule of reason analysis of the case.
Other than claims against the leagues, also the leagues themselves have modified their structure over time. We passed from a "club-based property system" where the full control of the league was on teams' behalf, to a "league-based property system", which proposed exactly the opposite, the leagues' control, to the system that we now today,

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[264] North American Soccer League v. National Football League, 670 F.2d 1249 (2d Cir. 1981)
[265] Los Angeles Memorial Coliseum v. NFL 726 F.2d 1381 (9th Cir.)
[266] Copperweld Corp. v. Independence Tube Corp. (467 U.S. 752 (1984))
[267] Hovenkamp, Herbert - American Needle and the Boundaries of the Firm in Antitrust Law – University of Iowa College of Law Legal Studies Research Paper Series – 2010 – Pag. 14
[268] Chicago Professional Sports Limited Partnership v. National Basketball Association, (95 F.3d 593 (7th Cir. 1996))
[269] Mitten, Matthew J. - American Needle Inc v NFL - Marquette University Law School Legal Studies Research Paper Series - Research Paper No. 12-14 – 2012 – Pag 8

the mixed-mode, which we can consider as the convergence between the first two models. This last and more recent model is bases on the concept that the clubs' relationship is regulated by two agreements the CBA and the "league constitution (or league agreement) which sets forth the relationship between individual clubs."[270]

The most interesting and important side of this system is the sharing of certain property rights "at the league level, while maintaining other property rights privately at the club level"[271]. Thus, teams result in bigger and smaller ones, meaning that each one may have different goals, both in terms of athletic and economic results. This change of paradigm brought to the idea that the definition of leagues as single entities has shifted. In fact, it will be "a twisted sense of irony if the unique property-rights system […] which is so profitable, also were to provide them with a loophole to avoid complying with antitrust principles."[272]

The most important case, son of this change of paradigm, is American Needle v. National Football League[273] [274]. The relationship between the NFL and American Needle, started many years ago, in the sixties. In fact, in 1963 the NFL decided to establish the NFL Properties (NFLP) as a "common entity to assist the teams in developing and marketing their intellectual property rights."[275] When the new NFL-affiliated company was born, it started to grant to various companies that requested it, the non-exclusive rights and licenses. One of the firms that received the rights to produce NFL products was American Needle. The business relationship went on until 2000, year in which the NLFP decided to sign an exclusive agreement with a single firm for the production of headwear. Reebok, would have had the exclusive right to produce the "NFL logoed headwear for a ten-year period"[276].

American Needle, then, sued the NFL since it was horizontally agreeing, not passing through the teams when deciding to whom concede its property rights. The result of this case, even if was not a clear victory for the plaintiffs, brought to a sensible change in the mindset of Judges in front of further cases over the subject of property rights.

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[270] Edelman, Marc - Why the "Single Entity" Defense Can Never Apply to NFL Clubs: A Primer on Property-Rights Theory in Professional Sports – 2008 - Fordham Intell. Prop. Media & Ent. L.J. http://law.fordham.edu/publications/article.ihtml?pubID=200&id=2758. – Pag. 905-906

[271] Id. Pag. 911

[272] Id. Pag. 926

[273] American Needle, Inc., v. National Football League, 538 F.3d 736, 744 (7th Cir. 2008)

[274] American Needle, Inc. v. National Football League, 560 U.S. 183 (2010)

[275] Hovenkamp, Herbert - American Needle and the Boundaries of the Firm in Antitrust Law – University of Iowa College of Law Legal Studies Research Paper Series – 2010 – Pag. 2

[276] Id. Pag. 2

The basic point of the analysis made by the Supreme Court is that the fact that the football team that are part of the NFL should not have any right to cartelize in their trademark licensing, since this, in any other normal market, would be of course scrutinized as an antitrust violation. Even if some procompetitive justification would have emerged, the rule of reason would still apply. The Court stressed this concept by making the comparison with the restaurant market, they stated that "there is no obvious reason why a group of football teams should be permitted to cartelize the licensing of their marks any more than a group of competing restaurants."[277]

In future claims, the plaintiffs will not be dismissed because of the exemption of the professional leagues from antitrust scrutiny, rather they will be required to show that defendants acted unlawfully. They will have to prove that the defendant has enough "market power", so it can "control prices or exclude competition"[278], that the rule generates "net anticompetitive effects", and that the behavior brings actual "antitrust injury" to the consumers.

The final decision of the Supreme Court, which is actually both not final, and not a decision, the one of remanding to lower courts the judgement, using the rule of reason analysis, is nonetheless of incredible relevance, not just for external plaintiffs, such as American Needle, but also for other parties. The decision of making "trademark licensing practices subject to review under Section 1 of the Sherman Act"[279] sets the tone for a new landscape in NFL sharing of resource and revenues, other than excluding the antitrust exemption from the equation.

The final purpose of this work was to analyze who the American sport leagues are made, and have evolved over time. How they faced the not always easy to handle issue of face an enormous stream of revenues. Revenues that are generated by a multitude of actors, who, of course, want to take the most from what they do.

The antitrust scrutinies and the lawsuits that have seen the light in the history of professional and non-professional sport leagues are the proof of the attempt from players and interested-parts in enforce their rights, to make a better, more efficient and more peaceful playground for them and for posterity.

[277] Hovenkamp, Herbert - American Needle: the Sherman Act, Conspiracy, and Exclusion - The CPI Antitrust Journal – 2010 – Pag. 5

[278] Edelman, Marc - Upon Further Review: Will the NFL's Trademark Licensing Practices Survive Full Antitrust Scrutiny? The Remand of American Needle v. Nat'l Football League - Stanford Journal of Law, Business & Finance - Pag 201

[279] Id. Pag. 221