ABA SECTION OF ANTITRUST LAW

Ass'n:

The Newsletter of the Trade,Sports & Professional Associations Committee

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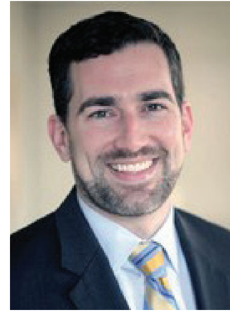

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Welcome back to another edition of *Ass'n*, the Newsletter of the ABA Section of Antitrust Law's Trade, Sports and Professional Associations Committee. As we approach this year's Section Spring Meeting, we are happy to bring you a set of insightful updates on antitrust developments in the association world, and to invite you to participate in the ongoing discussion that is the work of our Committee.

2015 and the beginning of 2016 saw a vibrant extension of the highly active litigation and enforcement climate we saw beginning in 2014. This edition of *Ass'n* includes insights into a number of these developments.

This edition includes terrific commentary on the StubHub antitrust suit by Schiff Hardin's Matthew Kennison, an interesting analysis of the implications of *O'Bannon* for antitrust issues in standard-setting activities by Timothy Bergin at Potomac Law Group, and a look into state attorney general work in New York on ticket selling practices, by Justin Cohen of Wilson Sonsini. Our material comes directly from our members, and we are, as always, happy to talk with any of you about ideas you have for pieces to be included in the next issue of *Ass'n*.

We hope that, after you read our commentary in the newsletter, you will check out the active programming and updates the Committee has to offer. We have worked hard to stock our busy schedule of panels and brown bags with practical, usable guidance and insights, and to offer Section members engaging, free programming that adds to your ability to counsel clients.

We have continued our focus on sports law, with successful programming on developments following *American Needle*, and on antitrust and consumer protection litigation in the ultimate fighting, rodeo, golf caddy, and fantasy sports area. We have also convened several panels offering special content on the antitrust issues faced by different types of non-sports trade associations, including a panel focused on the needs of in-house trade association counsel and a panel on challenges for tech industry associations. Finally, we have internationalized our offerings, through discussions on trade association antitrust issues outside the U.S. and the addition of Canadian and other perspectives to other topical panels.

The Committee will be sponsoring the Spring Meeting session "Play Ball: What Rules are Reasonable?" focusing on developments in the NCAA and other sports-related cases, and the panel will be moderated by our Vice Chair Gary Kubek. We hope you will join us for that session on Wednesday, April 6th, at 3:30pm.

We have also continued our effort to ensure that the Committee's space on the Section's CONNECT platform is stocked with timely and interesting updates from the association world. We would encourage you to check out the CONNECT page, and to join the Committee while you're at it. In addition to our written material, the CONNECT page is a great place to find out about upcoming programming, interact with others in the Committee, and find recordings of previous programs.

We hope you enjoy this edition of *Ass'n*, and I welcome you to take part in the life of our Committee. Reach out to me or to any of our Committee Vice Chairs or our YLR to find out how you can get involved. We look forward to hearing from you!

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Court Rejects StubHub's Antitrust Suit Against Golden State Warriors and Ticketmaster

Matthew P. Kennison[1]

On March 29, 2015, StubHub sued Ticketmaster and the Golden State Warriors in federal court in San Francisco. *StubHub, Inc. v. Golden State Warriors,* LLC, No. C 15-1436 MMC. StubHub alleged violations of both U.S. and California antitrust laws. While the allegations related to several activities specific to the two defendants, the complaint also described contractual provisions in place between Ticketmaster and most other NFL, NHL and NBA teams.

StubHub alleged that the challenged arrangements involved two separate markets, the Primary Ticket Platform and the Secondary Ticket Exchange. StubHub defined a Primary Ticket Platform as the distribution and support services for the *first sale* of tickets at face value by the team to fans on a season ticket or individual game basis. Secondary Ticket Exchanges were defined to be network distribution and support service for ticket *resales* by the original purchaser of the tickets. The complaint cited support for these market definitions in their use by both the Department of Justice and the Federal Trade Commission in earlier, unrelated antitrust actions against Ticketmaster.

According to the original complaint, Ticketmaster "has exclusive, league-wide deals with the NBA, NFL, and NHL for both Primary Ticket Platform and Secondary Ticket Exchange services." StubHub alleged specifically that "Warriors' fans cannot purchase primary tickets to Warriors regular season or playoff games without conducting the transaction through Ticketmaster." The complaint also alleged that Ticketmaster is the only provider of Primary Ticket Platform services for 25 other NBA teams, 25 NHL teams and all 32 NFL teams.

The complaint further alleged that the Warriors forced all season ticket holders to agree to the following provision in its standard terms and conditions:

> "Sale or resale of any [Warriors] tickets by unauthorized means is prohibited . . . . Authorized resale of your tickets via online means is limited to [Ticketmaster's] NBAtickets.com."

The Warriors allegedly enforced this provision by threatening to refuse to sell future playoff or subsequent season tickets to

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their season ticket holders who did not comply; monitoring the resale of season tickets on StubHub and elsewhere; allowing only Ticketmaster's Secondary Ticket Exchange to integrate technically with Ticketmaster's Primary Ticket Platform; and making allegedly misleading public statements regarding the security of non-Ticketmaster Secondary Ticket Exchanges while designating the Ticketmaster exchange as the only "official" one.

StubHub argued that Ticketmaster had market power, indeed "long-standing dominance," in Primary Ticket Platform markets. Again, the complaint relied on, among other things, prior findings to that effect by the federal antitrust authorities. The complaint also alleged that the Warriors, who are the only source for Primary Tickets, "wield substantial market power" over tickets to Warriors games through the Primary Ticket Platform. The complaint argued that the Primary Ticket Platform is a relevant market because, for Warrior fans, tickets to other entertainment events, including other NBA games, are not substitutes. Finally, the complaint alleged harm to competition, ultimate consumers and StubHub itself.

Given these factual allegations, StubHub asserted six claims for relief:

1. **Illegal tying under Sherman Act Section 1.** The alleged tying product was Warriors tickets sold over the Primary Ticket Platform and the allegedly tied product was Secondary Ticket Exchange services for those Warriors tickets. The complaint alleged that the Warriors and Ticketmaster used their power in the tying product to coerce purchases of the tied product through the onerous resale ticket terms and conditions. In addition to those elements of a per se tying claim, the complaint alleged a rule of reason tying claim as well.

2. **Other violations of Sherman Act Section 1.** StubHub alleged that a series of agreements between and actions by the defendants resulted in diminished competition and price increases in the market for Secondary Ticket Exchange services for Warriors tickets. This claim alleged both per se and rule of reason violations.

3. **Conspiracy to monopolize the market for Secondary Ticket Exchange services for Warrior tickets in violation of Sherman Act Section 2.** This claim made the same allegations of conspiracy and overt acts as described above. In addition, this claim alleged that the defendants had the specific intent to monopolize that market.

4. **Violation of the Cartwright Act, California's antitrust law.** This claim essentially repeated the allegations of Claims 2 and 3.

5. **Violation of California's Unfair Competition Law Section 17200.** This claim re-alleged several of the specific acts by the defendants alleged earlier that foreclose the Secondary Ticket Exchange services market to StubHub and constituted unfair business practices.

6. **Tortious interference with prospective economic advantage**. Because of the various actions of the defendants, such as delay in delivery of the original tickets or delivery in non-transferable paperless format, StubHub argued that defendants had made it prohibitively difficult to compete in the Secondary Ticket Exchange market.

The Warriors and Ticketmaster filed separate motions to dismiss StubHub's original complaint. Each defendant argued that StubHub improperly defined the relevant market as including only Warriors tickets. Defendants argued that such "single-brand" markets are highly disfavored in antitrust law, and that the failure to include all reasonable substitutes for Warriors tickets made the alleged market insufficient as a matter of law.

On June 30, 2015, StubHub responded by filing its First Amended Complaint. Although much of the Amended Complaint remained unchanged, StubHub added an "Industry Background" section in which it attempted to address these market definition shortcomings. StubHub alleged that Warriors tickets had no economic substitutes because they were the only tickets that provided entry to professional basketball games that take place in the Bay Area, that there was virtually no cross-elasticity of demand between Warriors tickets and tickets to other entertainment events, and that this lack of substitutability was reflected by the fact that defendants had been able to increase ticket prices by more than a small, but significant, non-transitory amount (estimated at 30%) over the last two seasons.

Ticketmaster and the Warriors each moved to dismiss the First Amended Complaint, arguing that StubHub's attempt to bolster its relevant market allegations were still legally insufficient, as it inescapably resulted in a single-product relevant market. The defendants asserted that consumer preference alone, even when characterized by intense customer loyalty, cannot create a separate market, and thus the Amended Complaint must be dismissed.

Ticketmaster thereafter supplemented its submission with a "Statement of Recent Decision," citing *Right Field Rooftops*, *LLC v. Chicago Cubs Baseball Club LLC*, No. 15 C 551, 2015 WL 5731736 (N.D. Ill. Sept. 30, 2015). In that case, the Northern District of Illinois dismissed monopolization claims against the Chicago Cubs because plaintiffs had failed to plead a plausible relevant market. Citing to its April 2015 decision on a motion for preliminary injunction, the district court held that arguments of consumer preferences fall short of rendering it plausible that there exist no interchangeable substitutes for live Cubs games. See *Right Field Rooftops, LLC* v. *Chicago Baseball Holdings, LLC*, 87 F. Supp. 3d 874, 887 (N.D. Ill. 2015) ("While the Court accepts that there are some die-hard Cubs fans that would never attend a White Sox game, that does not mean that Cubs games constitute their own market.").

On November 5, 2015, Judge Chesney decided the motions in the *StubHub* case without argument, dismissing all claims on two separate grounds. *Stubhub, Inc. v. Golden State Warriors, LLC*, No. C 15-1436 MMC, 2015 WL 6755594 (N.D. Cal. Nov. 5, 2015). First, she held that StubHub's proposed product markets were not cognizable as a matter of law, finding that the alleged "primary" and "secondary" ticket markets were in fact one market, as a "price differential does not suffice to support the existence of two separate markets, since 'the scope of the relevant market is not governed by the presence of a price differential between competing products.'" *Id*. at 6. Judge Chesney also found that StubHub's complaint failed for the additional reason that StubHub had improperly defined the market as containing only Warriors tickets. Since a producer has a "natural monopoly" over the production and sale of its own product, it "cannot be the basis for antitrust liability." *Id*. at 7.

StubHub appealed Judge Chesney's decision to the Ninth Circuit Court of Appeals on December 1, 2015, USCA Case No. 15-17362. Briefing on the appeal is currently scheduled to begin in June 2016.

Implications Of *O'Bannon v. NCAA* for Joint Standard-Setting

Timothy W. Bergin[1]

In *O'Bannon v. NCAA*, 802 F.3d 1049 (2015), the Ninth Circuit held that the National Collegiate Athletic Association (NCAA), as a joint venture among its competing members, did not violate federal antitrust law by limiting remuneration of students for participating in intercollegiate athletics to the full cost of a college education. The court thus reversed a ruling below requiring that the NCAA further allow deferred payment (up to $5000) to college athletes for related commercial use of their names, images and likenesses. While *O'Bannon* is undoubtedly a "momentous case" for intercollegiate athletics (*id*. at 1052), it is also instructive regarding antitrust treatment of joint ventures generally, and standard-setting organizations in particular.

A joint venture, like a cartel, is typically a collaboration among actual or potential competitors, but unlike a price-fixing cartel, which is subject to *per se* antitrust liability, a joint venture may pass muster under the antitrust rule of reason even if it retrains price competition among its members. A joint venture is distinguished from a cartel to the extent that a joint venture fosters procompetitive efficiency through substantial integration of its members' economic activity, such as joint purchasing, production, or marketing, or joint research, standard-setting, or licensing. Under the antitrust rule of reason, procompetitive benefits may justify any restraints on competition among joint venturers that are reasonably necessary to achieve such benefits. Courts are more likely to find such justification to the extent the joint venture itself faces competition and thus lacks market power (power to maintain non-competitive pricing, by restraining output or purchasing).

Irrespective of market power, a joint venture may incur antitrust liability under the "quick-look" rule of reason if any restraint on price competition among its members is not reasonably necessary to achieve procompetitive ends. Thus, in *NCAA v. Board of Regents of University of Oklahoma*, 468 US 85 (1983), while characterizing the NCAA as a procompetitive joint venture generally, the Supreme Court condemned under the antitrust rule of reason, for lack of substantial procompetitive justification, NCAA rules restricting the number of televised college football games (reducing output of a joint product) and fixing the price charged to television networks (under contracts otherwise negotiated by colleges individually).

By contrast, the Ninth Circuit held in *O'Bannon* that the NCAA did provide substantial procompetitive justification for its "price-fixing" rule restricting remuneration of college athletes. The court agreed that the rule was reasonably necessary to preserve the tradition of "amateurism" as an essential component of each joint "product" – comprised of intercollegiate athletics – marketed by NCAA-member colleges, adding to its public appeal and differentiating it from professional sports. The court rejected the claim that the rule was overly broad, rendered unreasonable by a less restrictive alternative (paying college athletes only a modest sum, and only after they leave college), because the alternative was not "'virtually as effective'" as

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the challenged rule in serving its procompetitive purpose. 802 F.3d at 1074-76 (adding that viable alternatives should not increase costs significantly, and that "courts should not use antitrust law to make marginal adjustments to broadly reasonable market restraints").

The *O'Bannon* decision seems anomalous if viewed as exonerating an agreement among otherwise competing joint venturers to fix the price at which they individually purchase inputs (recruit student athletes) for a product they sell individually. A procompetitive joint venture among purchasers typically involves *joint* purchasing, resulting in transaction cost savings and economies of scale,[2] while the hallmark of an anticompetitive cartel among purchasers is agreement on a maximum price to be paid individually (which generally reflects an attempt to exploit joint market power). Thus, in *Law v. NCAA*, 134 F.3d 1010 (10th Cir. 1998), an NCAA rule capping compensation payable by its members individually to their own entry-level assistant coaches was condemned under quick-look antitrust review.

Alternatively, *O'Bannon* can be viewed as recognizing procompetitive justification for a particular "product standard" set by the NCAA, relating to inputs purchased by its members individually for products they produce jointly, with the twist that the standard at issue, amateurism, requires non-compensation of college athletes beyond the full cost of attending college. The Supreme Court recognized in the *University of Oklahoma* case that the NCAA plays an important procompetitive role in setting intercollegiate athletic "product standards" such as amateurism, academic criteria, the size of teams and rules of the game, etc. (although the issue in that case involved sales restrictions rather than product standards). The Ninth Circuit essentially held in *O'Bannon* that the restriction on price competition among NCAA members in recruiting student athletes was justified by the procompetitive role of the amateurism standard for products comprised of intercollegiate athletics.

Standards for professional services are likewise typically set by joint ventures among competitors, as are technological standards for product safety and performance or – particularly in the case of smartphone components and other high-tech products (as well as intercollegiate athletics) – product compatibility within networked systems of interoperable complementary products. In these contexts as well, standard-setting may generally be procompetitive but nonetheless may raise antitrust issues relating to price collusion or market exclusion.

On the one hand, in *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978), even bona fide safety and quality concerns could not justify a professional association's ethical standard barring any competitive bidding by its member engineers – a standard that, unlike the amateurism standard in *O'Bannon*, was not ancillary to any procompetitive provision of a joint product or service. And a trade association's rigid quality standard (high or low) that restricts marketplace choice without substantial procompetitive justification may be viewed as simply a cartel's device for restraining price competition. *See Standard Sanitary Mfg. Co. v. United States*, 226 U.S. 20 (1912) (standard that restrained sale of products with minor defects); *United States v. American Radiator & Standard Sanitary Corp.*, 433 F.2d 174, 186 (3d Cir. 1970) (standard that excluded lower-quality products); *National Macaroni Mfgrs. Assn. v. FTC*, 345 F.2d 421 (7th Cir. 1965) (standard that restrained quality and cost of input purchased).

On the other hand, a professional association's ethical standard constraining misleading advertising of competitive pricing may be justified under the antitrust rule of reason. *See California Dental Assn. v. FTC*, 526 U.S. 756 (1999). And a broad joint venture among competing suppliers of computer operating systems that undertakes to standardize system specifications and inputs, in part through competitive bidding by input suppliers, does not necessarily violate antitrust law (irrespective of market power) so long as it engages simply in joint price-shopping for purposes of selecting standard inputs, rather than restraining purchasing of non-standard inputs by its members individually (a distinction not drawn in *O'Bannon*, which involved joint production as well as joint standards). *See Addamax Corp. v. Open Foundation, Inc.*, 152 F.3d 48 (1st Cir. 1998) (resolving case on other grounds).

A similar antitrust issue may arise in any high-tech industry to the extent that a standard-setting organization (SSO) – a type of joint venture among its members (including competitors) – seeks specific price-cap commitments in advance (*ex ante*) from holders of patent rights that may need to be licensed to manufacturers if their products are to meet technology standards under consideration by the SSO. While a few SSOs have pursued this policy, most SSOs have required simply a general commitment from patent-holders, as a condition of approving industry standards incorporating their patented technology, that their standard-essential patents (SEPs) will be available for licensing to standard-implementers on 'fair/reasonable and non-discriminatory' (F/RAND) terms. This approach postpones specification of those terms, including a maximum royalty rate and base, until after adoption of patent-based standards, and

[2] *See Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 295 (1985).

after substantial investments by manufacturers for the purpose of meeting those standards, in reliance on F/RAND commitments by SEP-holders. As a result, manufacturers undertaking to meet such standards are effectively locked-in to obtaining licenses of SEP rights on terms that remain to be determined (*post hoc*), under amorphous F/RAND criteria, through negotiation, arbitration, or litigation that may be contentious and protracted.[3]

This problem may be mitigated to the extent that an *ex ante* approach by SSOs – seeking voluntary commitment by SEP-holders to specific license terms prior to incorporating patented technology into industry standards – is justifiable under the antitrust rule of reason. The *ex ante* scenario is potentially procompetitive to the extent it may (1) foster price competition among SEP-holders (where more than one patented technology merits consideration in setting a particular standard), (2) increase utilization of SEPs – thus increasing output (and the volume of SEP royalty streams) – by making the patented technology a more cost-effective and widely implemented industry standard, and (3) avoid conferring market power on SEP-holders, or enhancing their bargaining leverage, under the *post hoc* scenario, which can undermine efficient negotiation of license terms, substantially increase transaction costs of licensing SEPs, and forestall widespread implementation of industry standards.

Joint negotiation by prospective licensees, through their SSO, of specific SEP license terms (to bind SEP-holders at least) can be analogized to joint purchasing by competitors that may be procompetitive to the extent it reduces transaction costs and increases output. In a similar vein, the First Circuit recognized in *Addamax* that joint selection *ex ante*, by competing members of a broad SSO, of a price-competitive input (license to use proprietary software) for a product the SSO sought to standardize could plausibly be justified as ancillary to procompetitive launching of improved products. This view is supported by the Ninth Circuit's vindication in *O'Bannon* of the NCAA's restriction on the price payable by its competing members individually for a key input (student athletic service) to their joint products (intercollegiate athletic competition) – as reasonably necessary in providing those distinctive products in accord with a procompetitive standard set by NCAA members jointly. Accordingly, under *Addamax* and *O'Bannon*, procompetitive standard-setting by SSO members may justify their ancillary joint price-shopping and bargaining for SEP license terms that include specific caps on royalty rates.

While it may thus be permissible in some circumstances for an SSO to negotiate specific terms for licensing patent rights prior to incorporating SEPs into industry standards, antitrust exposure may arise unless any such bargaining is confined to providing non-coercive guidance regarding license terms that may be acceptable to most SSO members. All SSO members should nonetheless remain free to select technology individually (both in voting on an industry standard and in making their own products) and to negotiate license terms individually, whether upon failure of joint negotiations or otherwise (and potential IP licensors should be so informed by the SSO). Any agreement or pressure among SSO members to forgo independent decision-making that would otherwise be exercised in this regard might be viewed as potentially restraining technological innovation by jointly imposing infra-competitive license terms – suppressing anticompetitively the price paid for licenses of patented technology.

Accordingly, if an SSO, by vote of its members, (i) accepted or (ii) rejected license terms (maximum royalties) sought by a SEP-holder *ex ante*, dissenting or wavering members should each remain fully free to (i) utilize competing technology rather than technology covered by the SEP or (ii) utilize the SEP technology, on any license terms that become or remain available, rather than any competing technology that a majority of SSO members may approve as an appropriate industry standard. Preserving such freedom of independent decision-making may ensure that ongoing competition, in both price and technological quality, is the ultimate determinant of an industry standard.

Freedom to negotiate individually was an important element of the Supreme Court's decision in *Broadcast Music, Inc. v. CBS*, 441 U.S. 1 (1979), holding that a joint venture among potentially competing copyright-holders to package together their respective copyrights under a blanket license (authorizing unlimited use of their collective musical compositions, for a price independent of the amount or type of music used), and to allocate blanket licensing revenues among members, did not involve per se unlawful price-fixing – although the joint venture encompassed both joint 'purchasing' (non-exclusive licensing) of IP inputs from its members and joint 'selling' (non-exclusive licensing) of the assembled product. The Court held that this joint licensing activity could be justified under the antitrust rule of reason as ancillary to procompetitive assembly and marketing of a distinctive product, the blanket license, providing an efficient alternative to negotiating multiple licenses with individual

[3] *See generally* J.L. Contreras, Fixing FRAND: A Pseudo-Pool Approach to Standards-Based Patent Licensing, 79 Antitrust L.J. 47, 48-55, 67-69, 88-90 (2013); U.S. Department of Justice and the Federal Trade Commission (DOJ/FTC), Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition, ch. 2 (April 2007) (hereinafter, "Policy Statement") (available at justice.gov/atr).

copyright-holders (reducing transaction costs), but not restraining licensing by the joint venturers individually.[4]

Negotiation of SEP license terms by SSOs *ex ante* may likewise reduce licensing transaction costs and foster procompetitive development of interoperable products, provided that SSO members remain fully free to negotiate individually. The federal antitrust enforcement agencies have accordingly recognized that such negotiations may be permissible under the antitrust rule of reason.[5] The agencies have similarly recognized latitude for physicians, through their professional associations, jointly to provide insurers with information supporting increased remuneration of physicians under health insurance plans – so long as physicians do so non-coercively, in that they remain free to decide individually, unencumbered by any anticompetitive agreement or pressure among competing physicians, whether to participate in any particular health insurance plan.[6]

Freedom of SSO members to act independently should be preserved not only in any joint negotiation of SEP licensing terms, but also in implementing any standard approved by an SSO. Whatever the justification for approving a particular standard, it should be effectuated by regulators adopting it or by marketplace actors individually choosing to be guided by it, rather than by preemptive agreement among potentially competing members of an SSO. In *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co*., 364 U.S. 656 (1961), the Supreme Court held that an agreement among SSO members to exclude non-standard products from the market (by denying gas to users of a disapproved gas burner) may amount to a per se antitrust violation (boycott). Courts have likewise indicated that procompetitive justifications for joint standard-setting do not likely extend to any agreement among competitors to adhere to the standards approved.[7] Similarly, in *Polygram Holding, Inc. v. FTC*, 416 F.3d 29 (D.C. Cir. 2005), the court condemned, under quick-look antitrust scrutiny, a collateral agreement between joint venturers, in promoting a new product jointly, to restrain promotion of competing products they marketed individually – analogous to SSO members constraining the market for competing technology by agreeing to use individually only technology promoted by the SSO as a putative industry standard.[8]

The *O'Bannon* decision, by comparison, permitted a joint venture to enforce a standard restraining arguable innovation (and competitive bidding) *within* the joint venture, where doing so was ancillary to the *joint production* and continuing integrity of its distinctive products (amateur intercollegiate athletics). While the standard, by restricting compensation of college athletes, may have restrained innovative commercial use of their names, images and likenesses (by authorized third-party providers of computer applications simulating products jointly produced by NCAA members), the NCAA had no occasion to restrict its members from competing outside their joint venture, as by also participating in some intercollegiate sports through a hypothetical Non-amateur Collegiate Athletic Association.

Similarly, an SSO may arguably restrain innovation simply by successfully promoting standardization of a particular technology, yet can presumably avoid antitrust liability so long as it adheres to a fair and objective standard-approval process.[9] Antitrust exposure

[4] *Cf. Major League Baseball Properties, Inc. v. Salvino*, 542 F.3d 290 (2d Cir. 2008) (trademark-licensing joint venture among sports league franchises had plausible procompetitive justification for restricting licensing by its members individually -- to prevent 'free-riding' on a joint entertainment product and promote competitive balance among members, adding to the appeal of their joint product); *O'Bannon*, 802 F.3d at 1059, 1072 (competitive balance among NCAA members not substantially promoted by challenged rule); *University of Oklahoma*, 468 U.S. at 117-19 (same); *American Needle, Inc. v. NFL*, 560 U.S. 183 (2010) (because similar trademark-licensing joint venture did not preclude licensing by members individually, its blanket licensing reflected concerted action among potentially competing members, subject to the antitrust rule of reason); *Texaco, Inc. v. Dagher*, 547 U.S. 1 (2006) (joint venturers' collaborative uniform pricing of separate brands of gasoline produced by the joint venture readily withstood quick-look antitrust scrutiny).

[5] DOJ/FTC Policy Statement, *supra* note 3, at 37, 52-56. *Cf. Sony Elec., Inc. v. Soundview Tech., Inc*., 157 F. Supp. 2d 180 (D. Conn. 2001) (declining to dismiss patent-holder's antitrust claim that pursuant to price-fixing conspiracy, SSO members agreed not to negotiate licenses individually).

[6] *See* Statements of Antitrust Enforcement Policy in Healthcare (DOJ/FTC August 1996) (available at justice.gov/atr), Statement No. 5. *See also International Healthcare Management v. Hawaii Coalition for Health*, 332 F.3d 600, 605-07 (9th Cir. 2003) (endorsing similar approach). *Cf. Arizona v. Maricopa County Medical Assn*., 457 U.S. 332 (1982) (holding that physicians may not agree among themselves on maximum fees for services they provide individually under health insurance plans, expressing concern that physicians could thereby dictate the level of their remuneration by insurers).

[7] In addition to the *Addamax* case, *see Consolidated Metal Prod., Inc. v. American Petroleum Institute*, 846 F.2d 284, 291-92 & n.23, 296 (5th Cir. 1988) (danger to competition small so long as "users choose freely to rely on [SSO] approval" and are not constrained by agreement or undue pressure to use only approved products); *Schachar v. American Acad. of Ophthalmology*, 870 F.2d 397, 398-99 (7th Cir. 1989) (similar as to surgical procedure called into question by professional association); *cf. Standard Sanitary* and kindred cases addressed *supra*.

[8] *Cf. Princo Corp. v. ITC*, 616 F.3d 1318, 1336, 1339 (Fed. Cir. 2010) (en banc) (joint venture sharing cost and risk of pursuing research and development had plausible procompetitive justification for restricting member from exploiting or undermining joint investment by individually promoting competing technology); *id*. at 1352-53 (dissenting opinion) (such '[a]greements not to compete are … of particular concern where, as here, the competitors collectively enjoy a monopoly position and set standards for an industry" through licensing *vel non* of their patented technologies).

[9] *See Allied Tube & Conduit Corp. v. Indian Head, Inc*., 486 U.S. 492, 501 (1988); *American Society of Mechanical Engineers v. Hydrolevel Corp*., 456 U.S. 556, 576-77 & n.15 (1982).

increases, however, to the extent SSO members jointly restrain competitive choice of technology in ways beyond simply approving standards, whether by coercively enforcing standards (as in *Radiant Burners*) or by agreeing not to use non-approved technology individually (particularly if participants jointly have market power). With those caveats, SSO members may have ample latitude under the antitrust rule of reason to negotiate SEP licensing terms jointly, prior to incorporating SEPs into approved industry standards. As *O'Bannon* demonstrates, optimal procompetitive standard-setting may be inextricably intertwined with the cost of inputs for a standardized product.

New York Attorney General Investigating Ticket Sale Practices of Sports and Entertainment Companies

Justin A. Cohen[1]

On January 28, 2016, New York Attorney General Eric Schneiderman ("NYAG") announced that his office is opening an investigation into the ticket-selling practices of sports and entertainment companies, including the National Football League. In a 43-page report entitled *Obstructed View: What's Blocking New Yorkers from Getting Tickets* (hereafter, the "Report"), the NYAG's office criticized these ticket selling practices as deceptive, unfair, and having the result of excluding average fans from purchasing tickets at face value, if they can purchase tickets at all. The Report focuses on a number of industry practices, including reserved tickets for pre-sale promotions and brokers using bots to get around ticket purchase limits, but this note will focus on ticket resale price floors employed by the NFL and condemned in the Report.

The NFL, along with Ticketmaster, operates an online platform for secondary ticket sales, called the NFL Ticket Exchange, which is described as the "only NFL approved ticket exchange for tickets" on its Facebook page. The Report states that the NFL Ticket Exchange sets price floors on ticket resales, which often prohibit a ticketholder from selling his or her ticket for below the face value. The NYAG expresses two primary concerns with this set of practices. First, consumers are not informed that the tickets they are purchasing are not priced at face value, and are thus deceived into thinking they are paying a price set by the NFL or the NFL home team. Second, price floors artificially raise prices and do not allow for lack of demand for particular games or seats to impact pricing.

The Report recommends that the New York legislature act to put in place resale markup caps and that industry participants, such as the NFL Ticket Exchange, increase transparency regarding the fact that purchasers are not buying tickets at face value.

Some legal analysts believe that the Report may lead to antitrust problems for the NFL. University of New Hampshire School of Law Professor Michael McCann writes that the NYAG could potentially bring claims under an illegal resale price maintenance theory or by alleging that the NFL, NFL teams, and Ticketmaster have conspired to fix prices.[2] Professor McCann, however, quickly notes that there is recent precedent suggesting that such litigation may be fruitless. In November 2015, Judge Maxine Chesney of the Northern District of California, dismissed an antitrust lawsuit brought by StubHub against Ticketmaster and the Golden State Warriors. In that case, StubHub alleged that the agreement between the Warriors and Ticketmaster to become the Warriors' exclusive ticket resale partner violated Sections 1 and 2 of the Sherman Act. However, Judge Chesney disagreed, finding that every manufacturer has a natural monopoly in its own product and the sale of that product cannot be the basis for antitrust liability.[3]

Because the prospects of antitrust litigation are uncertain, the more prudent course if the NYAG wants to change teams' ticket–selling practices may be to work with the New York legislature to implement the changes and recommendations outlined in the Report. Such an approach may lead to consumers having better access and paying lower prices for tickets to the sports events and concerts that they want to attend.

[1] Justin A. Cohen is an associate in the New York office of Wilson Sonsini Goodrich & Rosati.

[2] Michael McCann, "Breaking down N.Y.'s investigation into NFL ticket sale practices," Sports Illustrated (Jan. 28, 2016), http://www.si.com/nfl/2016/01/28/nfl-ticket-prices-investigation-eric-schneiderman.

[3] *StubHub, Inc. v. Golden State Warriors, LLC*, No. C 15-1436 MMC, 2015 WL 6755594 (N.D. Cal. Nov. 5, 2015).