

Insert on p479, the following:

The district court's judgment was reversed by a divided panel, 933 F.2d 1136 (9th Cir. 2019), *cert. pending*, 19-1098 (pending conference: updates at <https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/19-1098.html>)

The majority accepted the view that fans who do not subscribe to Sunday Ticket have access to, at most, two to three local games each Sunday afternoon, in any given geographic area. But there is no option for NFL fans to watch any of the other 7 to 10 games played each Sunday afternoon which are not available on free, over-the-air television, except to buy the entire package of NFL games from DirecTV. The complaint alleges that absent the agreements among NFL clubs and between the NFL and DirecTV, the telecasts broadcast solely on Sunday Ticket would be available through other distributors. Additionally, each NFL team could make its own arrangements for telecasts of its games, and could contract with competing distribution channels or media, including other cable, satellite or internet carriers or competing networks. As a result of competition, the complaint alleges, a greater number of telecasts of NFL games would be created, and those telecasts would be more accessible to more viewers at lower prices.

The majority rejected the NFL's arguments as to why this complaint should be dismissed for failure to state a claim. First, it distinguished lawful exclusive distribution agreements, characterizing the NFL's scheme as an agreement among rival clubs to pool separate property rights and license these rights vertically through one distributor. Second, it found the NFL's efforts to distinguish *American Needle*, which involved separately owned intellectual property. Absent an agreement, the majority noted that individual clubs could contract to telecast their own games without league agreement (and, indeed, did so prior to 1961). Turning to output measurement, the court concluded that the plaintiffs have plausibly alleged that the output in this case is the number of telecasts of games, and that the defendants' interlocking agreements reduce that output.

In determining that the complain alleged an injury to competition in a relevant market, the majority concluded that "professional football games have no substitutes (as fans do not consider NFL games to be comparable to other sports or forms of entertainment), *see L.A. Mem'l Coliseum Comm'n v. Nat'l Football League*, 726 F.2d 1381, 1393 (9th Cir. 1984), [so that] the defendants in this case have effective control over the entire market for telecasts of professional football games."