

An Antitrust Attack on EA's Exclusive Licensing Strategy

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OUTLINE

1. EA Sports Overview
2. US Antitrust Overview
3. *Pecover v EA*
4. Making an Antitrust Claim Today
5. Practical Impact of Exclusive Licenses
6. **Game:** EA–FIFA Negotiation

Electronic Arts Inc: An Overview

EA's Best Selling Sports Games



Sales & Revenue

Two of the best selling sports video games in history:

1. **FIFA:**
 - a. **Sales:** 325 million units sold (February 2021)
 - b. **Revenue:** ~\$20 billion (lifetime)
2. **NFL (Madden):**
 - a. **Sales:** 130 million units sold (August 2018)
 - b. **Revenue:** ~\$4 billion (lifetime)

Strategy: Exclusive License Agreements

1. **FIFA:** Under the 2013 agreement, EA Sports paid FIFA ~\$150 million/year for exclusive rights to the FIFA brand and World Cup.
2. **NFL (Madden):** Under the 2021–26 agreement, EA Sports will pay the NFL \$300 million/year for exclusive rights to the NFL brand, including its teams, logos, and players.

Federal Antitrust Law: *The Sherman Antitrust Act*

The Sherman Antitrust Act (1890)

Section 1: Restraint of Trade or Commerce

*“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 hereby declared to be illegal.**”*

Section 2: Monopolizing an Industry

*“Every person who shall **monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce** among the several States, or with foreign nations, shall be **deemed guilty of a felony.**”*



Constituent Elements of Each *Sherman Act* Offence

Section 1 Elements: Conspiracy between Competitors

- A. the **charged conspiracy was knowingly formed** and was in existence at or about the time alleged;
- B. the **defendant knowingly joined the charged conspiracy**; and
- C. the charged conspiracy either **substantially affected interstate or foreign commerce** or occurred within the flow of interstate or foreign commerce.

Defining the Competitive Market

1. The entire video game industry?
2. Sports video games in general?
3. Video games for that specific sport?

Section 2 Elements: Unilateral Actions by Single Entity

- A. **possession of monopoly power** in the relevant market; and
- B. **willful acquisition or maintenance of that power** as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.



Section 2 Argument: Essential Facilities Doctrine

The Claim:

The essential facilities doctrine *"imposes liability when **one firm, which controls an essential facility, denies a second firm reasonable access to a product or service that the second firm must obtain in order to compete with the first.**"*

Alaska Airlines, Inc v United Airlines, Inc (1991)

Thus, a monopolist that unilaterally refuses to deal faces potential liability under section 2 of the *Sherman Act*.



Four Factors:

1. **control** of the essential facility **by a monopolist**;
2. a **competitor's inability** practically or reasonably **to duplicate** the essential facility;
3. the **denial of the use** of the facility to a competitor; and
4. the **feasibility of providing** the facility to competitors

MCI Communications v AT&T (1983)



Pecover et al v Electronic Arts Inc (2008)

The Claim

- Class action lawsuit filed against EA in the Northern District of California, seeking to represent all “Madden” purchasers
- The plaintiffs alleged that EA’s series of exclusive licenses with the NFL, NFLPA, NCAA, and AFL foreclosed competition in the football video game market and thus violated s 2 of the *Sherman Act*
- Specifically, the plaintiffs made an essential facilities argument, stating that **“the names and logos of actual teams and players are essential to market interactive football software.”**



Initial Court Findings & Ultimate Resolution

1. EA’s motion to dismiss was unsuccessful with respect to the alleged section 2 *Sherman Act* violation.
2. **“Interactive video football software”** is a recognizable product market for the purposes of the *Sherman Act*.
3. In 2012, the plaintiffs and EA settled the dispute for \$27 million, which included the following condition:
 - **Licensing Restrictions:** EA agreed not to sign exclusive licensing contracts with the NCAA or the AFL.

Renewing the Antitrust Claim Against EA: Part I

The Football Video Game Landscape Today

- EA has an **exclusive license agreement** with the NFL and NFLPA
- EA has an **exclusive license agreement** with the Collegiate Licensing Company (the “CLC”) to be the “**exclusive developer of simulation college football video game experiences**”
 - However, EA does not have an agreement with the NCAA, meaning that EA does not have the right to use player names or likeness
- The AFL no longer exists, so developing a competitive “Arena Football” video game appears highly unlikely

Thus, EA has the market on interactive football video games cornered:

- EA Sports “Madden” NFL Football = #2 all-time best selling sports video game
- EA Sports “College Football” is set to launch in 2024



Renewing the Antitrust Claim Against EA: Part II

Two Claims Against EA:

1. Essential Facilities Doctrine

- EA continues to hold an exclusive license over the names and logos of actual NFL teams and the names and likeness of NFL players, which is essential to marketing a competitive interactive NFL video game.
- Thus, EA has an impermissible monopoly in this space due to its control of and resulting inability of competitors to access an essential facility in the relevant market.

2. General Monopolization Due to Exclusive Licensing

- EA's exclusive license agreements with the NFL and the CLC provide that EA is to be the "exclusive developer of simulation" NFL and college video game experiences (respectively).
- To develop a competing game, a developer would require a license from the NFL and/or CLC, which would breach the EA agreement.
- Thus, competitors are effectively prohibited from developing a game in the football simulation market, creating a monopoly for EA.

Game Development Impact: Stifling Innovation

Titles Lost due to Exclusive Licensing Agreements

1. **NFL 2K**: discontinued in 2005 after EA reached an exclusive licensing deal with the NFL.
2. **NFL Gameday**: also discontinued in 2005 due to EA's exclusive licensing deal with the NFL.
3. **MVP Baseball**: discontinued in 2005 after Take-Two Interactive reached an exclusive licensing deal with the MLB.

Exclusive Licensing can Create an Inferior Product?

- PGA Tour 2K23 vs EA Sports PGA Tour 23:
 - 2K Sports has the **exclusive rights to multiple big-name PGA golfers**, including Tiger Woods.
 - EA Sports has the **exclusive rights all four PGA Major Tournaments**, including the Masters.

No Incentive to Innovate

- Consumers complain that EA Sports releases essentially the same game year-over-year with their FIFA, Madden, and NHL series'.
- EA Sports "NHL" did not introduce the "Frostbite" engine until NHL 22, despite the superior engine being available for previous iterations
- **Competition Act** (Canada): designed to **promote adaptability** (and thus **innovation**) in the economy.



Re-Negotiating the EA–FIFA Exclusive License Agreement



FACTUAL SITUATION

1. EA and FIFA have been partners for nearly 30 years.
2. Since 2013, EA has paid FIFA ~\$150 million/year for the exclusive right to use FIFA branding, including exclusive rights to the “World Cup”. FIFA is requesting ~\$250 million/year for a new exclusive rights agreement.
3. If no agreement is reached, each company will have to come up with an independent strategy in the soccer video game space. Please see your “Bargaining Chips”.

EA & FIFA REPRESENTATIVES

*Please read the “Bargaining Chips” provided to you. Assume any contract would be a **4-year partnership**.*

TIMELINE

1. **3–5 minutes:** come up with a range of acceptable offers with your team. Select 1–2 people as your negotiation representative(s).
2. **2–3 minutes:** Representatives to negotiate an exclusive agreement. If no agreement is reached, reconsider your acceptable range with your group.
3. **1–2 minutes:** Discuss with your group and come back to the negotiation with your final offer.

Bargaining Chips

EA SPORTS

1. FIFA is requesting ~\$250 million/year to sign a 4-year agreement, so your **negotiating ceiling need not be higher than \$250 million/year**.
 - a. The previous deal paid FIFA ~\$150 million/year, so your **negotiating floor should be at least \$150 million/year**.
2. Even without the FIFA license, EA sports has **300+ licenses in the soccer space**, including:
 - a. a **long-term license with FIFPRO**, allowing EA to continue using the names and likeness of thousands of real-world soccer players;
 - b. **exclusive licenses** with UEFA Champions League, CONMEBOL Libertadores, Premier League, Bundesliga, and LaLiga Santander
3. **EA Sports FC 24 is likely to launch without competition**, providing EA with an additional year to grow its unrivaled market dominance.
4. **Get creative**: recommend a **non-exclusive partnership** if necessary to retain World Cup rights moving forward.

FIFA

1. FIFA is requesting ~\$250 million/year to sign a 4-year agreement, so your **negotiating ceiling need not be higher than \$250 million/year**.
 - a. The previous deal paid FIFA ~\$150 million/year, so your **negotiating floor should be at least \$150 million/year**.
2. Although **EA has a license with FIFPRO** for the names and likeness of real-world soccer players, it is **NOT exclusive**, meaning that **other developers can make a competing soccer game**.
 - a. **Source**: at least **four different publishers** are ready to negotiate with FIFA about new soccer titles.
3. Without the EA partnership, FIFA has the ability to **market their brand (and the World Cup rights) to multiple partners**, rather than signing an exclusive license agreement:
 - a. FIFA could create an **auction** for its partnership rights, entertaining **bids from multiple parties**.
 - b. FIFA could **simultaneously partner with multiple developers**.
 - c. **Source**: FIFA may be able to command **more money by signing multiple non-exclusive deals**.
4. FIFA is considering **making its own “non-simulation” soccer game**.