

# Monopolistic Sleeper: How the Video Gaming Industry Awoke to Realize that Electronic Arts was Already in Charge

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## INTRODUCTION – THE EMERGENCE OF AN INDUSTRY

Some industries are more attractive than others, they produce healthier numbers, higher profit margins, and even have their own fan base following. One industry in particular boasted an astonishing \$7.3 billion dollars in sales last year alone, and is stated to have sold 248 million units.<sup>2</sup> This particular industry has shown growth in the last nine years that has doubled overall industry sales and almost tripled the total units sold.<sup>3</sup> This astonishing industry is none other than computer and video gaming.

There is one computer and video gaming company, though, that is as lucrative and attractive as the entire collective industry. Headquartered in Redwood City California, Electronic Arts (EA) claims to be the world's leading independent developer and publisher of interactive entertainment software for personal computers and advanced entertainment systems.<sup>4</sup> Since its inception, EA has garnered more than 700 awards for outstanding software in the United States and Europe. EA markets its products worldwide under four brand logos, and has over 33 product franchises that have reached more than a million unit sales worldwide.<sup>5</sup>

In recent years, Electronic Arts has obtained numerous exclusive licensing and partnership agreements.<sup>6</sup> By establishing these business agreements, Electronic Arts has worked its way to the top of the video and gaming industry. Exclusive partnership

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1. I would like to extend my appreciation to my family whose care, love and support helped me tremendously. I would also like to extend my deepest appreciation to Professor Kate Bohl, without whom, this article would not be possible.

2. Entertainment Software Association, *Essential Facts About The Computer And Video Game Industry, 2005 Sales, Demographics and Usage Data* (Dec. 28, 2005).

3. *Id.*

4. Electronic Arts, Global, Corporate, About EA, at <http://www.ea.com/global/corporate/aboutea>. (last visited Dec. 28, 2005).

5. *Id.*

6. Available at <http://www.info.ea.com>. (last visited July 7, 2005).

agreements have enabled Electronic Arts to develop smart business models, produce top quality products, and gain competitive advantage. Though Electronic Arts may seem to gain a competitive advantage in certain areas of the market, in actuality, these agreements do nothing more than give Electronic Arts an opportunity to gain an unfair competitive advantage and produce trade restraints. Electronic Arts has slowly been gathering partnerships and exclusivity licenses, such that rather than merely employing smart business tactics, the company has created a monopoly within the industry.

There are three independent ways to qualify as a monopoly and attract the wrong kind of legal attention. Namely, a company may enjoy an actual monopoly, may have attempted to monopolize, or participated in a conspiracy to monopolize.<sup>7</sup> To prove an attempted monopolization, an entity must have engaged in anti-competitive conduct with the specific intent to monopolize, with a dangerous probability of achieving monopolistic power.<sup>8</sup> Exclusive dealing arrangements in the context of monopolization are not illegal per se under Section 1 of the Sherman Act, but instead are subject to scrutiny under the rule of reason.<sup>9</sup>

Electronic Arts should consider taking steps to avoid being categorized as a monopoly, which may lead to punishment and government regulation. Electronic Arts may need to restructure its business model, or even release some of its exclusive licenses. If not, it will be ordered to take action that ensures there is no monopoly, such as a divestiture. Antitrust laws seek to ensure that a company's practices do not present a restraint on trade or unfair competitive practices within an industry. The remedies offered in antitrust cases against monopolies serve to protect a market from anti-competitive conduct, thereby ensuring that there is little likelihood of monopolization in the future. The Courts achieve these remedies by terminating the monopoly and denying the defending corporation the benefits of its violation. If Electronic Arts fails to make a good faith effort to avoid becoming a monopoly, it could face the same fate in antitrust lawsuits as Microsoft Corporation.<sup>10</sup> (In the Microsoft suits, the courts imposed penal-

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7. 15 U.S.C.A. § 2 (2004).

8. *Spectrum Sports, Inc. v. Shirley McQuillan*, 506 U.S. 447, 456 (1993).

9. *Chuck's Feed and Seed Co., Inc. v. Ralston Purina Co.*, 810 F.2d 1289, 1293 (4th Cir. 1987).

10. *United States v. Microsoft*, 231 F. Supp. 2d 144 (D.D.C. 2002).

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ties that resulted in Microsoft having to restructure the company as well as how it operates.)<sup>11</sup>

INDUSTRY BACKGROUND: A LOOK AT THE COMPETITION

In recent years, the computer and video gaming industry has developed into a flourishing market in which companies of many types thrive.<sup>12</sup> This industry supports a range of businesses from development studios to retail sales and beyond. There have been great developments in the computer and video game software industry in recent years.<sup>13</sup> Now video games are a staple in most households; they range from educational to recreational, and are made for all ages. The rapid growth within the industry is great for consumers because it increases competition between companies and pushes them to produce better products at extremely competitive prices.<sup>14</sup>

Unfortunately, the developments within this industry are not as beneficial to the companies involved.<sup>15</sup> When the industry booms, an increase in competition places added pressure on the companies. Businesses are spending millions of dollars on research and development in an attempt to stay ahead of their competitors. Some companies can find advantages in common places, such as producing games with higher quality graphics, enhanced game

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11. *Id.*

12. Entertainment Software Association, *Essential Facts About The Computer And Video Game Industry, 2005 Sales, Demographics and Usage Data*, at 10. "Fifteen years ago, video games were barely more than a cottage industry, if by cottage you mean the sticky back corner of a strip mall bowling alley. Last year game sales hit \$7 billion, in the same exclusive ballpark as movies (about \$9 billion). We should count ourselves lucky. The video game is a brand-new medium, and we get to see it evolve from the very beginning" Lev Grossman, *Time*, November 8, 2004 (Dec. 28, 2005). "The opportunities for our industry are vast and exciting. We are growing and broadening our audience, opening new frontiers, developing online and wireless platforms, and creating truly original and unique forms of entertainment." Douglas Lowenstein, President, Entertainment Software Association (Dec. 28, 2005). "Whether we like it or not, this is the medium of our moment. It is a medium that is telling our cultural story, and the fact that it is a primary tool of youth and adolescents means it will have a tremendous impact on how the next generation or two plays itself out..." Sheldon Brown, Visual Arts Professor and Director of the Center for Research in Computing and the Arts at the University of California, San Diego.

13. Electronic Software Association, *2005 Essential Facts*, at <http://www.theesa.com/files/2005EssentialFacts.pdf> (July 7, 2005).

14. Wikipedia, "Competition," at [http://en.wikipedia.org/wiki/Competition#Economics\\_and\\_business\\_competition](http://en.wikipedia.org/wiki/Competition#Economics_and_business_competition) (modified January 6, 2006).

15. *Id.*

play, and more affordable pricing.<sup>16</sup> Other companies must use more unique approaches to stay competitive.

In this viciously fierce arena that is dubbed an industry, one of the many ways to survive and flourish is to push out the competition. XSN, a Microsoft subsidiary, is a video game development company that learned that the gaming industry does not wait for action and these ever-hungry competitors do not hesitate to defeat rival companies.<sup>17</sup> In order to survive in this industry of rapidly changing video game development, XSN offered more than just games to its customers. It developed an online arena where players can sign in and play in leagues, tournaments, and even log their gaming statistics.<sup>18</sup> XSN competitively priced its games in the fifty-dollar range, and developed them in-house. However, Microsoft announced the closing of its XSN gaming development department in early 2004, because it could not compete with industry conglomerates.<sup>19</sup>

Take-2 Interactive, another major player within this industry and a worldwide leader of publishing interactive software games,<sup>20</sup> chose its own business model, which may have lead to its demise. Through Take-2's *RockstarGames* subsidiary, it has undertaken a strategic market approach consisting of capitalizing on the widespread market acceptance of video game consoles, as well as the growing popularity of innovative action games.<sup>21</sup> Take-2's *RockstarGames* publishing division creates new brands and sequels to existing brands with a broader consumer appeal. *Rockstar* recently released *Grand Theft Auto: San Andreas*, the highly antici-

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16. For example, Microsoft attempted to achieve this with the release of the Xbox 360 Next Generation Gaming Console which offers quality graphics, enhanced game play, and competitive pricing compared to other Next Gen products.

17. *Microsoft Ushers in a New Era of Sports Video Gaming With XSN Sports: The Power of the PC and Xbox Combine to Launch XSNsports.com*, at <http://www.microsoft.com/presspass/press/2003/aug03/08-28XSNSportsPR.mspx> (August 28, 2003).

18. *Id.*

19. Justin Calvert, *Microsoft "resting" XSN Sports this season*, at [http://www.gamespot.com/xbox/sports/amped2/news\\_6092505.html](http://www.gamespot.com/xbox/sports/amped2/news_6092505.html) (posted Mar 30, 2004).

20. Specifically, those designed for personal computers, video game consoles, as well as other handheld platforms.

21. Take-2 Interactive Software, Inc., *2004 Annual Report*, at <http://ir.take2games.com/downloads/AR2004.pdf> (accessed July 7, 2005).

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lated, and very controversial,<sup>22</sup> installment of the blockbuster *Grand Theft Auto* franchise.<sup>23</sup> According to NPDFunworld, *Grand Theft Auto: San Andreas* was the top selling video game for the PlayStation 2, selling approximately 3.6 million units in the United States for the one-month period that ended November 27, 2004.

Take-2 found a market niche in the sports sub-industry that lead to the drastic and potentially monopolistic moves of Electronic Arts. More significantly, Take-2 Interactive's troubles began when its *Globalstar* subsidiary focused on publishing sports games under an agreement with the SEGA Corporation. Following the July 2004 launch of *ESPN NFL 2K5*<sup>24</sup> for the PlayStation 2 and Xbox at a suggested retail price of under twenty dollars, it released *ESPN NHL 2K5*<sup>25</sup>, *ESPN NBA 2K5*<sup>26</sup> and *ESPN College Hoops 2K5*<sup>27</sup> for the PlayStation 2 and Xbox consoles.<sup>28</sup> According to NPDFunworld, Take-2 sold 3.4 million units of these four sports titles combined as of November 27, 2004. Of the top 20 selling video game units in 2004, Take-2's *Grand Theft Auto: San Andreas* for Playstation2 ranked number one overall.<sup>29</sup> In Addition, Take-2's *ESPN 2K5*<sup>30</sup> for Playstation2 ranked number four and for Xbox, *ESPN 2K5* ranked number ten. Take-2 was becoming a real threat within the industry, eating up shares and portions of the

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22. Wikipedia, "Grand Theft Auto series," at [http://en.wikipedia.org/wiki/Grand\\_Theft\\_Auto\\_\(series\)](http://en.wikipedia.org/wiki/Grand_Theft_Auto_(series)) (modified January 11, 2006): "The series has courted a great deal of controversy since the release of *Grand Theft Auto III*. The series generally revolves around the focus on illegal activities, in comparison with "hero" roles that most other games offer. The main character can commit a wide variety of crimes while dealing with only temporary consequences. Opponents believe that players will try to emulate this behavior, while proponents believe it provides an emotional outlet, as such actions in real life would have serious consequences. For specific incidents, see the individual game articles."

23. *Id.*

24. A game based on professional American football.

25. A game based on professional hockey.

26. A game based on professional basketball.

27. A game based on college basketball.

28. Take-2 Interactive Software, Inc., *2004 Annual Report*, at <http://ir.take2games.com/downloads/AR2004.pdf> (accessed July 7, 2005).

29. Entertainment Software Association, *see supra* note 2.

30. A game based on professional American football.

market by the day. Take-2's games have reached a variety of publicity outlets<sup>31</sup>, receiving both positive and negative commentary.

Take-2's success was short lived due to Electronic Arts' strategy of signing exclusive agreements and limiting the realm of sports gaming. Before Take-2 knew it, they began to suffer. Slowly, the ability to produce many types of games and work with many different partners was diminishing.<sup>32</sup> As it turned out, the biggest problem of all was that Take-2 could not have done anything to prevent the damage to the company.<sup>33</sup> The driving force behind its problems was Electronic Arts. Electronic Arts, through its strategic business ploys, signed exclusive licensing and partnership agreements with numerous developers, leagues, players, and even collegiate schools.

### *ELECTRONIC ARTS: A LOOK INTO THE GIANT*

Even though Electronic Arts did not aggressively pursue their strategic business models or plans until 2004, signs of what was to come were still apparent. Electronic Arts claimed \$3.129 billion in net revenues for the fiscal year ending March 2005, which is almost half of the entire industry. This was the first time Electronic Arts surpassed the three billion dollar mark.<sup>34</sup> Electronic Arts is behind thirty-one titles in the 2005 fiscal year that went platinum, compared to twenty-seven a year ago.<sup>35</sup> "Platinum" means that over one million units of a title are sold. Six of these titles sold more than five million units: *The Sims*<sup>TM</sup>, *Need for Speed*<sup>TM</sup>, *Madden NFL Football*, *FIFA*, *The Lord of the Rings*<sup>TM</sup> and *Harry*

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31. Ranging from Internet message chat boards, legal sources, and news media outlets.

32. This inference flows from Take-2's ability to produce and partner with different groups which is diminished due to Electronic Arts' exclusivity agreements. Electronic Arts is eliminating the availability of options when it comes to working with other groups or to create products in certain genres.

33. This inference stems from the theory that the damage being done to Take-2 is not self-inflicted and is uncontrollable since it is Electronic Arts which is damaging its competitors.

34. Electronic Arts, *Fourth Quarter and Fiscal Year 2005 Results*, at <http://www.info.ea.com/news/pr/pr617.pdf> (accessed July 7, 2005)

35. *Id.*

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| *Potter*<sup>TM,36</sup> Further, every single release from Electronic Arts to  
| the new Playstation Portable charted in the top ten.<sup>37</sup>

| Although Electronic Arts holds multiple exclusivity agreements  
| with many different partners, it is not the agreements themselves,  
| but rather the multitude of agreements, that suggests a monopoly.  
| Exclusive agreements allow businesses to work together while  
| protecting trade secrets, capitalizing on advantageous opportuni-  
| ties, and even assist businesses through capital investments.  
| They also close opportunities for healthy competition, shut down  
| smaller businesses that have a chance at becoming major competi-  
| tors, and help create monopolies. This article addresses two types  
| of exclusive agreements: exclusive partnership agreements<sup>38</sup> and  
| exclusive licensing agreements.<sup>39</sup> Exclusive partnership agree-  
| ments can be specific as to a single product, or they can be gen-  
| eral, so as to include all business practices of a company. In exclu-  
| sive licensing agreements, one company will contract with another  
| for the right to use the other company's assets.<sup>40</sup>

| Electronic Arts has entered into a number of business agree-  
| ments over the past six years. In 1999 Electronics Arts entered  
| into partnership agreements with the development groups Play-  
| Nation and Bottle Rocket, preventing these companies from enter-  
| ing similar agreements with others.<sup>41</sup> Then in 2004 Electronic  
| Arts signed a publishing agreement with Castaway Entertain-

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36. *Id.*

37. Electronic Software Association, *2005 Essential Facts*,  
at <http://www.theesa.com/files/2005EssentialFacts.pdf> (accessed July 7, 2005).

| 38. Exclusive partnership agreements are agreements in which one company will con-  
| tract with another company to restrict the other's ability to work with another firm.

39. Exclusive licensing agreements, on the other hand, occur usually when the other  
company is in a different industry or when the other company refuses to give up their flexi-  
bility.

40. For instance, a software development company might contract for the license to use  
a sports association's logos. It comes as no surprise, though, that Electronic Arts has its  
share of both partnership and licensing agreements.

| 41. According to the press release, "Bottle Rocket, founded in 1996 by Greg Easley and  
| Kelly Moulton, is a 35-person studio that designs and develops multiplayer trivia, predic-  
| tion, and simulation games in which fans compete on behalf of themselves and their favor-  
| ite professional and college sports teams. Most recently, Bottle Rocket designed custom  
| games and entertainment products for the NHL, MTV, HBO, MLB and The Sporting  
| News." Electronic Arts, *Electronic Arts Enters Into Exclusive Development Agreement And  
| Invests In Bottle Rocket*, at <http://www.info.ea.com/news/pr/pr81.doc> (accessed July 7, 2005).

ment, another development group.<sup>42</sup> In June of 2005, Electronics Arts partnered with Qualcomm to deliver BREW mobile games.<sup>43</sup> In August of 2000, Electronic Arts announced that it has been awarded the exclusive worldwide interactive rights to develop, publish and distribute games based on the Harry Potter book series.<sup>44</sup>

In June of 2004, Electronic Arts partnered with the development studio Oddworld Inhabitants for the publishing rights of a new release.<sup>45</sup> Oddworld Inhabitants is a development studio formed in 1994 by special effects and computer animation veterans Sherry McKenna and Lorne Lanning.<sup>46</sup> The studio was dedicated to creating the next generation of interactive entertainment.<sup>47</sup> Its unique facility in San Luis Obispo, California, has attracted top video game and animation talent from all over the world.<sup>48</sup> In a press release by EA, the company declared its excitement to partner with another major development studio; "Since its debut, the Oddworld series has become one of the most popular game franchises of all time with nearly five million units

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42. That press release identifies Castaway as "a new, independent video game development studio focused on developing world class RPG games for the PC and next-generation console systems. Headquartered in Redwood Shores, CA, Castaway is a growing company founded by a team of experienced and talented game developers from across the industry." Electronic Arts, *Electronic Arts Signs Publishing Agreement With Castaway Entertainment*, at <http://www.info.ea.com/news/pr/pr465.htm> (accessed July 7, 2005).

43. "QUALCOMM Incorporated ([www.qualcomm.com](http://www.qualcomm.com)) is a leader in developing and delivering innovative digital wireless communications products and services based on the Company's CDMA digital technology. Headquartered in San Diego, Calif., QUALCOMM is included in the S&P 500 Index and is a 2005 FORTUNE 500® company traded on The NASDAQ Stock Market® under the ticker symbol QCOM." Electronic Arts, *Electronic Arts and QUALCOMM Announce Agreement to Deliver BREW® Mobile Games*, at <http://www.info.ea.com/news/pr/pr637.htm> (accessed July 7, 2005).

44. Electronic Arts, *EA Awarded Worldwide Interactive Rights For Harry Potter: Books And Films In Agreement With Warner Bros. Consumer Products*, at <http://www.info.ea.com/news/pr/pr54.doc> (accessed July 7, 2005).

45. Raymond M. Padilla, *The End of Oddworld?*, at <http://www.gamespy.com/articles/599/599811p1.html> (March 29, 2005).

46. Oddworld, "Our Mission," at [http://www.oddworld.com/oddworld/company/ow\\_info.shtml](http://www.oddworld.com/oddworld/company/ow_info.shtml) (accessed January 12, 2006).

47. *Id.*

48. *Id.*

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sold worldwide, garnering more than 100 industry awards and gracing the cover of more than 50 magazines.”<sup>49</sup>

The partnership lasted through 2004 and part of 2005, and likely would have gone further except a problem occurred with Oddworld Inhabitants’ facility. According to an article in *GameSpy Magazine*, a decision was made by the founder of the studio to close down the facility.<sup>50</sup> “[Oddworld Inhabitants] is drastically changing the way it operates. As with many innovative minds in the business, Lanning [a co-founder of Oddworld Inhabitants] feels that the current model for game development is restrictive. Teams are becoming too big. Technical challenges are stifling creativity.”<sup>51</sup> Thus, not even a year after partnering with Electronic Arts, Oddworld stated that technical challenges were stifling creativity, and that their current model was too restrictive. It seems as if the “current model” Oddworld was referring to could be their partnership with Electronic Arts. It is almost as if Electronic Arts was grabbing hold of the industry by the neck and squeezing silently. Lanning therefore decided to move Oddworld to a facility in Berkeley, California, and has attempted to create a new model that can foster creativity without restrictions.

In the last year, Electronic Arts has used exclusive licensing agreements to strategically lock-up four different professional leagues, an entire player’s union, and a media giant. In August of 2004, Electronic Arts teamed up with Xbox and The Fédération Internationale de Football Association (“FIFA”)<sup>52</sup>, to develop FIFA games. FIFA ventures globally to include numerous competitions such as the FIFA World Cup.<sup>TM</sup> Additionally, FIFA gives financial and promotional support to develop the game and bring joy to underprivileged children worldwide.<sup>53</sup>

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49. Raymond M. Padilla, *The End of Oddworld?*, at <http://www.gamespy.com/articles/599/599811p1.html> (March 29, 2005).

50. *Id.*

51. *Id.*

52. “The Fédération Internationale de Football Association, better known as FIFA. Headquartered in Zurich, Switzerland, the eighth FIFA President, Joseph S. Blatter (Switzerland), guides the organization today with a commitment to the evolution of FIFA as a modern and dynamic association. From the founding seven in 1904, the family has today grown to 205 affiliated associations, also organized into six confederations spanning the globe.” Electronic Arts, *FIFA, XBOX And EA Team Up In The Football gaming Arena*, at <http://www.info.ea.com/news/pr/pr518.pdf> (accessed July 7, 2005).

53. *Id.*

Following the arrival of the FIFA team, Electronic Arts procured the exclusive rights to produce National Football League (“NFL”) games using its players from the exclusive agreement with the players’ union, Players Inc. Players Inc. is a subsidiary of the NFL Players Association.<sup>54</sup> It represents more than 1,800 active and 3,500 retired NFL players.<sup>55</sup> Some of the activities they deal with include retail licensing, corporate sponsorships, special events, radio and television projects, and publishing.<sup>56</sup> With these contracts, EA had the exclusive opportunity to produce games with the actual players - something that no other company could do.

If that was not enough to raise concern within the industry, in 2005, Electronic Arts retained exclusive rights to the Arena Football League (“AFL”), ESPN, and the Collegiate Licensing Company. In January of 2005, the Arena Football League and Electronic Arts entered into an exclusive agreement to produce an Arena Football League video game in time for the start of the 2006 AFL season. The agreement also allows EA to share in the proceeds of future expansion team sales.<sup>57</sup> In the same month, Electronic Arts and ESPN announced a long-term agreement for the development and marketing of EA SPORTS games that contain

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54. Electronic Arts, *EA Enters Into Exclusive Agreements With NFL And Players Inc. To Expand And Integrate Customer Entertainment Experience*, at <http://www.info.ea.com/news/pr/pr569.pdf> (accessed July 7, 2005).

55. *Id.*

56. “December 13, 2004 – Electronic Arts (NASDAQ: ERST) today announced exclusive licensing relationships with the National Football League and Players INC to develop, publish and distribute interactive football games. These five-year agreements – which EA negotiated separately – give EA the exclusive rights to the NFL teams, stadiums and players for use in its football videogames. Both agreements also include exclusive rights for console online features.” *Id.*

57. “We believe that the business model the AFL has created will provide for a new football experience for videogame fans, and provide EA with an incentive to partner with the AFL to expand the league”, said Larry Probst, Chairman and CEO of EA. “The AFL is a unique brand of football and we intend to deliver a unique football gaming experience from any the industry has seen before. We’re pleased to be working with the league during this exciting, growth-period for the AFL.” *Electronic Arts, AFL & EA Enter Into Exclusive Agreement -- EA To Produce AFL Videogame For 2006 AFL Season*, at <http://www.info.ea.com/news/pr/pr577.pdf> (accessed July 7, 2005).

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ESPN content.<sup>58</sup> With the addition of these contracts with two well-known organizations, suspicions surrounding EA's business relationships grew.

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58. Electronic Arts adds, "The agreement gives EA access to ESPN programming, personalities and integrated marketing opportunities on ESPN television programming and other ESPN properties. The ESPN integration will appear in EA SPORTS console, handheld, PC and wireless games beginning in 2006 upon the conclusion of ESPN's existing video game licensing commitments." Electronic Arts, *ESPN And EA Sign Agreement For Sports Games*, at <http://www.info.ea.com/news/pr/pr579.pdf> (accessed July 7, 2005).

In April of 2005 the Collegiate Licensing Company<sup>59</sup> (CLC) announced an exclusive licensing relationship with Electronic Arts to develop, publish and distribute interactive college football games.<sup>60</sup> CLC noted in a press release; “the six-year agreement gives EA the exclusive rights to the teams, stadiums and schools

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59. Telephone Interview with Michael Drucker, Vice President and General Counsel, the Collegiate Licensing Company (June 29, 2005).

In my conversation with Mr. Drucker, we discussed the exclusive licensing agreement from the view of the licensor. We began with the licensing process in general. The CLC represents 180 colleges and universities, the NCAA, 15 bowl games, 10 conferences, as well as the Heisman trophy. They work this way so that there is a single contract for all represented schools and so that companies seeking licenses can deal with the CLC instead of every school separately. When the CLC negotiates a contract with a proposed licensee, they have many concerns.

One major concern involves licensing rights for school logos. The primary basis for licensing the logos is so that the CLC can use the names and logos of the schools, conferences and bowl games in a number of mediums. The CLC wants to reach more audiences than just students and alumni. Another concern is that schools consent to each aspect of the deal that affects them. CLC will provide the licensee with information and images regarding the school. In turn, the licensee will produce multiple forms of media for the schools to consent to. Game developers require the school to provide certain assets necessary to make the game as authentic and realistic as possible. CLC will forward all of that to the individuals in charge at the schools and have them sign off their consent to the agreement.

Mr. Drucker also discussed some risks that the CLC considers when signing exclusivity agreements. This includes new markets that open up that spread the popularity of the schools, but which may be off limits to CLC because of the agreement. Another risk arises when a new company emerges that was not considered during negotiations, and offers more than what the bidder already has. A few factors the CLC considers before entering into a licensing agreement include: royalty rates, marketing commitments, platform commitments, monetary compensation for advertising and investments, the company's past history as an industry player, the overall attractiveness of the deal to further the CLC's goals, and the development company's attractiveness and profitability levels.

Finally, Mr. Drucker and I discussed some of the complications and barriers that may be associated with licensing agreements. For example, companies must accurately reproduce uniforms, fields, and logos. This is done through the help of “Logos on Demand,” which provides digitally mastered versions of the logo. This process ensures that the logos are done to satisfactory standards. Another major issue that arises concerns collegiate titles. For instance, NCAA by-laws do not allow the athlete's name and/or likeness to be used, which means no names can be used on the back of uniforms and the players in the game can not resemble the likeness of the real athlete. This issue is very important for the NCAA as well as the CLC, but it is hard for gaming developers to control because of the interactivity demand of the games themselves. CLC thus employs safeguards to make sure all NCAA rules and regulations are observed. This is done through constant communication with the NCAA as well as the schools. As a result, information to develop a game is bounced back and forth for almost two years, before it is complete. The CLC must also be conscious of Sherman and Lanham Act issues. In order to insulate the industry from these types of claims, they must outsource to experts in the field to safeguard themselves and curtail potential problems.

60. Rick Munarriz, *EA at Your Service*, at <http://www.fool.com/news/mft/2005/mft05111404.htm> (Nov. 14, 2005).

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for use in its best-selling college football videogames.”<sup>61</sup> The agreement is for all videogame consoles, including console online features and handheld devices.<sup>62</sup>

One could infer that CLC and the NCAA chose Electronic Arts because EA is a global leader within this industry. However, with all of these partners and exclusive licensing agreements, Electronic Arts is effectively shutting out the competition. Electronic Arts is the only game developer that can develop NCAA football, NFL, AFL, FIFA, and Harry Potter games, to name a few. In November 2005, Electronic Arts announced that it will launch a digital distribution service for games, demos, and updates through an online connection.<sup>63</sup> According to an article written by Rick Munarriz, profit margins will run wild since there will be less inventory to stock and physical product to package and distribute.<sup>64</sup> In addition, Munarriz states: “with EA likely to keep prices constant with suggested retail prices on both formats, the company’s margins on the digitally delivered games will be huge.”<sup>65</sup> Referring to EA’s comment<sup>66</sup> about this being the year for investment, perhaps a more fitting statement would be that this was the year for pure domination over an industry. On the one side, Electronic Arts can enjoy exclusive use of all of their partners to increase their share of the industry, but on the flip side, there are potential implications that EA may monopolize the industry.

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61. Pat Battle, CEO of the Collegiate Licensing Company went on to add, “Electronic Arts has been a tremendous partner, and we are thrilled that the EA SPORTS team has renewed its commitment to the college market. We look forward to seeing how EA will continue to grow its NCAA Football franchise through innovative game play, unique marketing programs and its dedicated sales force.” Electronic Arts, *CLC Grants EA Exclusive College Football Videogame License*, at <http://www.info.ea.com/news/pr/pr608.pdf> (accessed July 7, 2005).

62. “Our NCAA football franchise is a key element in our EA SPORTS brand lineup and we are pleased to have secured the NCAA license,” said Jeff Karp, Group Vice President of Marketing for Electronic Arts. “There is an unrivaled loyalty our fans have for the game, and this agreement with CLC allows EA to continue to deliver to fans the best, most innovative college football experience now and for years to come.” *Id.*

63. Rick Munarriz, *EA at Your Service*, at <http://www.fool.com/news/mft/2005/mft05111404.htm> (Nov. 14, 2005).

64. *Id.*

65. *Id.*

66. Electronic Arts, *see supra* note 35.

THE LAWS THAT GOVERN AND PROTECT THE FAIR AND  
FREE MARKET

The purpose of the Sherman Act is to prevent unwarranted and excessive restraints on interstate commerce as well as to afford protection from the control of monopolization.<sup>67</sup> In 1890, Congress passed the Antitrust Act to prevent, or at least to help control, activities within businesses that posed a restraint on fair trade and competition.<sup>68</sup> “The Act is not directed against conduct which is competitive, even severely so, but is directed against conduct which unfairly tends to destroy competition itself.”<sup>69</sup> The Act applies to every contract between a territory or state of the United States with any other territory, state or foreign nation, and deems any restraint on trade or commerce within those contracts illegal.<sup>70</sup>

Within limits, every agreement or contract by its very nature is designed to restrain trade or activity among competitors; however, once those limits are exceeded, the agreements impose restraints.<sup>71</sup> The legality of the restraint is discovered by examining the restraint itself to see if it promotes healthy competition, or if it suppresses or destroys competition.<sup>72</sup> Courts have used the “rule of reason” as the standard to apply to most anti-competitive practices to determine if the restraint on trade and competition is one that is illegal.<sup>73</sup> The “rule of reason: prohibits acts, contracts, agreements, etc. which unreasonably operate to the prejudice of public interests through undue restrictions on competition, undue obstruction to the course of trade, or injurious restraint to trade and free competition.<sup>74</sup> However, there are limited applications to this rule. Because of an exclusive agreement’s destructive effect

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67. *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 359 (1933).

68. 54 AM. JUR. 2D *Monopolies and Restraints of Trade* §1 (2005).

69. *Id.*

70. *Id.* at §5.

71. *Bd. of Trade of City of Chicago v. United States*, 246 U.S. 231, 238 (1918).

72. *Id.*

73. *Phil Tolkan Datsun, Inc. v. The Greater Milwaukee Datsun Dealers’ Adver. Ass’n., Inc.*, 672 F.2d 1280, 1284 (7th Cir. 1982).

74. *United States v. Am. Tobacco Co.*, 221 U.S. 106, 179 (1911).

on trade and competition, they will be presumed to be illegal *per se*, without inquiry regarding the “rule of reason.”<sup>75</sup>

“Per se treatment was justified only where the purpose and effect of the challenged practice ‘are to threaten the proper operation of our predominantly free-market economy,’ or where the ‘practice facially appears to be one that would always or almost always tend to restrict competition and decrease output.’”<sup>76</sup>

After analyzing the reasonableness of a restraint, a court must seek to understand the industry’s particular market structure and behavior,<sup>77</sup> so that the determination into the nature of the restraint will show positive or negative advances to competition within that industry.<sup>78</sup> “The relevant market provides the basis on which to balance competitive harms and benefits of the restraint at issue.”<sup>79</sup> Upon investigating the relevant market, the plaintiff must demonstrate that the defendant has enough market power to restrain trade.<sup>80</sup> Market power can be defined as the ability to raise the price of a product by restricting output without a total loss of sales.<sup>81</sup> “If market power is found, the court may then proceed under ‘rule of reason’ analysis to assess the pro-competitive justifications of the alleged anti-competitive conduct.”<sup>82</sup> Thus, the market power analysis acts as a screening device, and a critical step in the disposition of the case that will determine if the defendant is capable of procuring a monopoly.<sup>83</sup> The tests for determining market power are constant: “that market is composed of products that have reasonable interchangeability for the purposes for which they are produced – price, use, and qualities considered.”<sup>84</sup>

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75. *Phil Tolkan Datsun, Inc.*, 672 F.2d 1280.

76. *Id.*

77. *Los Angeles Mem’l Coliseum Comm’n v. National Football League*, 726 F.2d 1381, 1387 (9th Cir. 1984).

78. *Id.*

79. *Id.* at 1392.

80. *Jack Walters & Sons Corp. v. Morton Bldg., Inc.*, 737 F.2d 698, 702 (7th Cir. 1984)

81. *SCFC ILC, Inc. v. Visa USA, Inc.*, 36 F.3d 958, 965 (10th Cir. 1994).

82. *Id.*

83. *Id.*

84. *Id.* at 966.

Actual monopolization under Section 2 of the Sherman Act has two elements, “(1) the possession of monopoly power in the relevant market, and (2) the 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.”<sup>85</sup> A party is deemed to have monopoly power in the relevant market if it has a power to control prices or restrict competition.<sup>86</sup> “Price and competition are so intimately entwined that any discussion of theory must treat them as one. It is inconceivable that price could be controlled without power over competition or vice versa...When an alleged monopolist has power over price and competition, an intention to monopolize in a proper case may be assumed.”<sup>87</sup>

Additionally, when there are no substitutes available in the market for a product that is controlled by one interest, there is monopoly power.<sup>88</sup> Some factors that courts may use to determine monopoly power are: strength of competition, development of the industry, consumer demand, and the percentage of market share enjoyed by the alleged monopolist.<sup>89</sup>

“As a matter of law, a successful monopolization claim requires a very large market share of the relevant market. Generally, a 75-80 percent share of the market is required in order to make out a successful monopolization finding.”<sup>90</sup> “A party may have monopoly power in a particular market, even though its share is less than 50 percent.”<sup>91</sup> Market share must be proven because a charge of monopolization requires a showing of power to exclude competition; and without an accurate read of the market and how its shares are distributed, it is almost impossible to determine the presence or absence of monopoly power.<sup>92</sup>

In order to determine the relevant market, courts must look at the applicable products or services within that market, as well as,

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85. United States v. Grinnell Corp., 384 U.S. 563, 570 (1966).

86. United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377, 389 (1956)

87. *Id.* at 392.

88. *Id.* at 394.

89. Hayden Publ'g Co., Inc. v. Cox Broad.Corp., 730 F.2d 64, 69 (2d Cir. 1984).

90. Stepp v. Ford Motor Credit Co., 623 F. Supp. 583, 592 (E.D.Wisc. 1985).

91. *Hayden Publ'g Co., Inc.*, 730 F.2d at 69, n.7.

92. United States v. Consol. Laundries Corp., 291 F.2d 563, 573 (2d Cir. 1961).

the factual geographies in which it trades.<sup>93</sup> The geographic market is defined as one which includes the area where the defendant actively competes with other individuals or businesses for the distribution of the relevant product.<sup>94</sup> To prove the relevant product market, a plaintiff bears the burden of establishing the types of products that are reasonably interchangeable substitutes for the defendant's product within a suitable area of competition.<sup>95</sup> "When a product is controlled by one interest, without substitutes available in the market, there is monopoly power...[b]ut where there are market alternatives that buyers may readily use for their purposes, illegal monopoly does not exist merely because the product said to be monopolized differs from others."<sup>96</sup> In determining the interchangeability of a product for the purpose that it is produced so as to constitute relevant product market, courts will consider price, use, and qualities of the product.<sup>97</sup> Since the relevant product market may consist of smaller submarkets, the idea is to outline markets which conform to areas of effective competition as well as the realities of the practice itself.<sup>98</sup> "The 'area of effective competition' may be a small submarket supplying specialized products or services."<sup>99</sup> In analyzing the submarkets, courts look to industry and public recognition of that submarket as its own, separate economic entity, the individual products characteristics and uses, how unique the production facilities may be, if the consumers are distinct to that submarket, how sensitive they may be to price changes, and if the vendors utilized are specialized in any way.<sup>100</sup> Of these factors, the most significant is the uniqueness or exclusivity of the product's functions, and thus its uses.<sup>101</sup>

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93. *Indep. Iron Works, Inc. v. U.S. Steel Corp.*, 322 F.2d 656, 667 (9th Cir. 1963).

94. *Morton Bldgs. of Neb., Inc. v. Morton Bldgs., Inc.*, 531 F.2d 910, 918 (8th Cir. 1976).

95. *Id.*

96. *United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 394 (1956).

97. *Id.* at 404.

98. *Sargent-Welch Scientific Co. v. Ventron Corp.*, 567 F.2d 701, 710 (7th Cir. 1977).

99. *Id.*

100. *Id.*

101. *Id.*

The second element to monopolization is intent to monopolize or the willful acquiescence or maintenance of monopoly power. To meet the intent requirement, the court need not find specific intent since the end result is the necessary and direct consequence of what the defendant did.<sup>102</sup> Instead, the plaintiff must show that the defendant possessed a willful or deliberate purpose to exercise the monopoly power.<sup>103</sup> The component of “intent to monopolize” goes to whether or not the conduct in question can be described as exclusionary, anticompetitive, or predatory.<sup>104</sup> “Intent can be inferred if a defendant maintains his power by conscious and willful business policies, however legal, that inevitably result in the exclusion or limitation of actual or potential competition.”<sup>105</sup>

Along with the claim of actual monopolization, the plaintiff may also choose to bring forth a claim of attempted monopolization. To prove attempted monopolization, a plaintiff must prove (1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize, which (3) resulted in a dangerous probability of the defendant’s success of achieving monopoly power.<sup>106</sup> The specific intent demanded here is defined as “an intent which goes beyond the mere intent to do the act.”<sup>107</sup> In other words, it is necessary to find a specific intent to destroy competition or to build a monopoly.<sup>108</sup> A defendant’s conduct will allow a plaintiff to prove specific intent through a showing of engagement in unfair or predatory tactics.<sup>109</sup> As for the dangerous probability requirement, a relevant product and geographic market analysis is essential. Otherwise, there is no context to determine whether the defendant had the ability to decrease or destroy

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102. U.S. v. Griffith, 334 U.S. 100, 108 (1948).

103. Int’l Railways of Cent. America v. United Brands Co., 532 F.2d 231, 239 (2d Cir. 1976).

104. Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 602 (1985).

105. Hecht v. Pro-Football, Inc., 570 F.2d 982, 990 (D.C. Cir. 1977).

106. Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456 (1993).

107. *Aspen Skiing Co.*, 472 U.S. at 602.

108. Times-Picayune Pub. Co. v. United States, 345 U.S. 594, 626 (1953).

109. *Spectrum Sports, Inc.*, 506 U.S. at 459.

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competition.<sup>110</sup> The primary target in an investigation into the relevant market is the defendants' share of the relevant market.<sup>111</sup> "Besides market share, other factors relevant to the 'dangerous probability' analysis include: barriers to entry, potential competition, market concentration, and trends toward greater or lesser concentration."<sup>112</sup>

Exclusive dealing arrangements are not illegal per se. Meaning, they do not constitute violations of law on their face. However, if it can be proven that they substantially foreclose competition in a substantial share of the affected market, there will be a violation of antitrust laws.<sup>113</sup> The plaintiff in this situation must show that opportunities for competitors within that specified market are significantly limited by the exclusivity agreement.<sup>114</sup> The Sherman Act deals with exclusive dealing contracts, but the issue is also discussed and governed more strictly under the Clayton Act (Section 15 of the United States Code).<sup>115</sup> In support of that distinction:

[a] greater showing of anti-competitive effect is required to establish a Sherman Act violation than a [Section] 3 Clayton Act violation in exclusive-dealing or requirement contracts cases...The existence of this heavier burden is rooted in the language of two statutes; the Sherman Act speaks of actual restraints of trade while [Section] 3 of the Clayton Act speaks of effects of arrangements which may substantially lessen competition or tend to create a monopoly.<sup>116</sup>

Congress's purpose in enacting the Clayton Act was to reach particular conduct previously held by the courts to be outside the realm of the Sherman Act, but which Congress still considered

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110. Total Benefit Servs., Inc. v. Group Ins. Admin., Inc., 875 F. Supp. 1228, 1234 (E.D. La. 1995).

111. *Id.*

112. *Id.*

113. Chuck's Feed & Seed Co., Inc. v. Ralston Purina Co., 810 F.2d 1289, 1293 (4th Cir. 1987).

114. *Id.*

115. Twin City Sportservice, Inc. v. Charles O. Finley & Co., Inc., 512 F.2d 1264, 1275 (9th Cir. 1975).

116. *Id.*

dangerous to free competition in trade or commerce.<sup>117</sup> Section 3 of the Clayton Act concentrates on exclusive dealing arrangements.<sup>118</sup> The cornerstone of a Section 3 violation is the forbidden condition, agreement, or understanding of exclusivity, which touches upon the assertion as to whether competition may be substantially lessened or whether there is any tendency toward monopolistic behavior.<sup>119</sup> Under the Sherman Act, a “rule of reason” is employed to determine if the exclusive dealing agreement had an actual restraint on trade and competition.<sup>120</sup> However, when Congress enacted the Clayton Act, in order to make sure that the “rule of reason” test was not used to validate transactions of a specific nature, the following words were included: “where the effect may be to substantially lessen competition or tend to create a monopoly.”<sup>121</sup> This phrase was used, as opposed to the “rule of reason” language, because Congress felt that the Sherman Act’s test was inadequate to tackle certain transactions.<sup>122</sup>

More recently,<sup>123</sup> the Clayton Act was extended to include organizations, “enjoying a powerful, though clearly not dominant, position in the trade and doing a substantial share of the industry’s business by means of these contractual provisions.”<sup>124</sup> The use of the word “may” in the substantiation of lessening the competition or tendency to create a monopoly was intended to prevent such agreements as would “probably” lessen competition, or “probably” create an actual tendency to monopolize.<sup>125</sup>

Courts must make certain considerations in order to accurately determine whether an exclusive dealing agreement will foreclose on competition and whether a substantial share of a line of com-

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117. *McElhenney Co., Inc. v. W. Auto Supply Co.*, 269 F.2d 332, 337 (4th Cir. 1959).

118. *Times-Picayune Pub. Co.*, 345 U.S. at 608.

119. *McElhenney*, 269 F.2d at 338.

120. *Dictograph Prods., Inc. v. Fed. Trade Comm’n.*, 217 F.2d 821, 827 (2d Cir. 1954).

121. *Id.*

122. *Id.*

123. *Id.* In the early stages of the Clayton Act, if a violator was proven to be an industry leader, it was determined to be a sufficient dynamic from which to conclude that the use of an exclusive dealings contract was a violation of Section 3, and other factors were largely ignored.

124. *Id.*

125. *Standard Fashion Co. v. Magrane-Houston Co.*, 258 U.S. 346, 256 (1922).

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merce will be affected.<sup>126</sup> As the Supreme Court noted in *Tampa Electric Co. v. Nashville Coal Co.*:

First, the line of commerce<sup>127</sup> involved must be determined...Second, the area of effective competition in the known line of commerce must be charted by careful selection of the market area in which the seller operates, and to which the purchaser can practicably turn for supplies...Third, and last, the competition foreclosed by the contract must be found to constitute a substantial share of the relevant market.<sup>128</sup>

The Court continued, holding: “To determine substantiality in a given case, it is necessary to weigh the probable effect of the contract on the relevant area of effective competition, taking into account the relative strength of the parties, the proportionate volume of commerce in the relevant market area, and the probable immediate and future effects which pre-emption of that share of the market might have on effective competition therein.”<sup>129</sup> The relevant market factor is the prime issue in relation to whether or not the actual contract foreclosed on competition in a substantial share of the line of commerce involved.<sup>130</sup>

LETTING THE NUMBERS MAKE THE ARGUMENT

Through an analysis of financial information gathered from the video and gaming industry, the numbers will show Electronic Arts as the monopoly it truly is. Financial computation and valuation are key elements in determining market size and individual company market share. When valuing a business, one of the first items to look for is market capitalization, or the market cap.<sup>131</sup> Market cap refers to the cumulative value of a company’s outstanding common shares.<sup>132</sup> Market cap is calculated to show the

126. *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961).

127. The line of commerce is generally the type of goods, wares, or merchandise, etc.

128. 365 U.S. at 327.

129. *Id.* at 329.

130. *Id.*

131. Wikipedia, “Market Capitalization,” at <http://en.wikipedia.org/wiki/Market%5Fcapitalization> (last modified Nov. 24, 2005).

132. *Id.*

total value of equity a firm has in the market, and it is often a critical measurement of a company's success or failure.<sup>133</sup> However, it should be noted that market capitalization may fluctuate for reasons unrelated to performance, and therefore, other measurements should be taken into consideration along with market cap.<sup>134</sup>

The price to earnings ratio (P/E) shows the relativity between a company's stock price and the earnings of the underlying asset.<sup>135</sup> Simply put, the P/E ratio is the number of dollars the market is willing to pay for a privilege to be able to earn a dollar every year in perpetuity.<sup>136</sup> This ratio also tells investors how long it will take to recover their investment.<sup>137</sup> Some factors that may influence a P/E ratio are market expectations of a company's earnings, recent significant expenses that lower earnings, stock hype among the market, and any business advantage (such as a market niche).<sup>138</sup>

It is also important to consider a company's net sales and net income in relation to the industry to help show control and power over market share. A company's net sales figure shows the total amount of sales the company has produced. When compared to the industry average, this figure can help determine popularity among consumers. A company's net income, on the other hand, is the firm's income after subtracting the cost of goods sold, dis-

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133. *Id.* Notes on Valuation of Market Capitalization:

Market capitalization is a function of the price of a firm's stock and may not accurately reflect intrinsic value because of varying future expectations held by investors. It is common for a firm's market capitalization to exceed "book value" (shareholders' equity) because market prices tend to increase at a quicker pace than earnings accumulate due to value placed on expected future growth. For instance, in the late 1990s the shares of Internet-related companies were highly valued by the market, and tiny companies with almost no sales (but high growth) generated market capitalizations in the billions of dollars.

134. *Id.*

135. Wikipedia, "P/E Ratio," at [http://en.wikipedia.org/wiki/Price\\_to\\_earnings\\_ratio](http://en.wikipedia.org/wiki/Price_to_earnings_ratio) (last modified Dec. 13, 2005). A P/E ratio is calculated as:

$$\text{P/E ratio} = \frac{\text{Price per Share}}{\text{Earnings per Share}}$$

"The price per share (numerator) is the market price of a single share of the stock. The Earnings per share (denominator) is the Net income of the company for the most recent 12 month period, divided by number of shares outstanding." *Id.*

136. *Id.*

137. *Id.* Length is in years and this theory ignores the time value of money.

138. *Id.*

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counts, returns and allowances, and expenses, from total revenue.<sup>139</sup> Net income, unlike net sales, shows more depth into the company's operation and strategy. This figure can show how effectively a company works to minimize the expenses and costs of goods sold, while maximizing the revenues that come in from the products it sells. This figure may also help reveal a firm cornering a certain sub-market within an industry. For example, while purchasing a license agreement may raise expenses, it allows for independent control of the multiple uses of the license to create more products, and in turn, increase revenues.

Though the entertainment and games software industry is made up of many successful competitors, Electronic Arts holds a market advantage in most areas of financial computation, such as market capitalization, share price, price to earnings ratio, net sales, and net income. Some of Electronic Arts' competitors within this industry include Activision Inc., Konami Corp., Midway Games Inc., Take-Two Interactive Software, and THQ Inc.<sup>140</sup>

These six companies represent a collective sampling of the industry. Activision publishes interactive entertainment software products internationally.<sup>141</sup> This company has created, licensed, and acquired a group of brands in multiple categories, including action/adventure, action, sports, racing, role playing, simulation, first-person action, and strategy.<sup>142</sup> These brands are marketed to a variety of consumer demographics.<sup>143</sup> Konami Corp. develops, publishes, markets, and distributes video game software products worldwide for use on a plethora of gaming consoles, as well as computers, mobile phones, and online network systems.<sup>144</sup> Konami's Computer and Video Games business segment is its largest net revenue-producing segment.<sup>145</sup> Midway Games develops and publishes interactive entertainment software for a multitude of popular gaming genres such as action, adventure, driving, extreme sports, fighting, horror, role-playing, sports, shooting and

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139. Wikipedia, "Net Income," at [http://en.wikipedia.org/wiki/Net\\_income](http://en.wikipedia.org/wiki/Net_income) (last modified Dec. 22, 2005).

140. Weiss Stock Research Reports, Company: *Electronic Arts, Inc.* (Nov. 1, 2005).

141. Weiss Stock Research Reports, Company: *Activision, Inc.* (Nov. 1, 2005).

142. *Id.*

143. *Id.*

144. Weiss Stock Research Reports, Company: *Konami Corp.* (Nov. 9, 2005).

145. *Id.*

strategy.<sup>146</sup> To date, the company and its predecessors have published over four hundred titles, which are available for play on major video gaming consoles as well as personal computers. As previously mentioned, Take-Two Interactive Software also publishes, develops, and distributes interactive software games, which are designed for a variety of systems.<sup>147</sup> Finally, THQ has targeted its business mainly towards entertainment software geared for the major gaming platforms found in the home video game market.<sup>148</sup> THQ's software is based on licensing or assignment agreements from third parties and those created internally.<sup>149</sup> "[THQ] continually seeks to identify and develop titles based on content from other entertainment media, sports and entertainment personalities, popular sports and trends or concepts that have high public visibility or recognition or that reflect the trends of popular culture."<sup>150</sup>

Weiss Stock Research Reports publish relevant statistics that facilitate the table below, which shows the totals and averages of the sampling group.<sup>151</sup>

Category	Sample Total	Sample Average	Electronic Arts	Take-Two Interactive	Activision	Konami	Midway	THQ
Market Capitalization	\$28,699 Million	\$4,783.17 Million	\$17,348 Million	\$1,460 Million	\$4,269 Million	\$2,573 Million	\$1,625 Million	\$1,424 Million
Share Price	\$155.89	\$25.98	\$56.88	\$20.65	\$15.77	\$20.73	\$18.68	\$23.18

146. Weiss Stock Research Reports, Company: *Midway Games, Inc.* (Nov. 1, 2005).

147. Weiss Stock Research Reports, Company: *Take-Two Interactive Software* (Nov. 1, 2005).

148. Weiss Stock Research Reports, Company: *THQ, Inc.* (Nov. 1, 2005).

149. *Id.*

150. *Id.*

151. Weiss Stock Research Reports, Company: *Electronic Arts, Inc.* (Nov. 1, 2005); Weiss Stock Research Reports, Company: *Activision, Inc.* (Nov. 1, 2005); Weiss Stock Research Reports, Company: *Konami Corp.* (Nov. 9, 2005); Weiss Stock Research Reports, Company: *Midway Games, Inc.* (Nov. 1, 2005); Weiss Stock Research Reports, Company: *Take-Two Interactive Software* (Nov. 1, 2005); Weiss Stock Research Reports, Company: *THQ, Inc.* (Nov. 1, 2005).

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Price to Earnings Ratio	100.27	16.71	43.09	17.65	35.04	17.87	-33.96	20.58
Net Income	\$795.5 Million	\$132.58 Million	\$421.77 Million	\$80.91 Million	\$122.79 Million	\$144.38 Million	\$-42.02 Million	\$67.67 Million
Net Sales	\$9,273.58 Million	\$1,545.6 Million	\$3,062.36 Million	\$1,332.45 Million	\$1,435.67 Million	\$2,425.28 Million	\$144.92 Million	\$872.9 Million

From the chart it is clear that Electronic Arts exceeds every company in every category stated. In fact, every company in the sampling (except for Electronic Arts) falls below the average for Market Capitalization and Share Price. With the exception of Konami, the same is true for Net Income and Net Sales. The graphs show the truth behind control of the market, anticompetitive effects of too many licensing and partnership agreements, and clearly demonstrate that Electronic Arts has a monopoly within the industry.

During Fiscal 2005, Electronic Arts commanded an extraordinary 63 percent share of the sports video game market segment.<sup>152</sup> The company continues to hold exclusive agreements with FIFA, the National Football League, Players Inc., Arena Football, the Collegiate Licensing Company, ESPN, and more. In addition, Electronic Arts has partnered with a multitude of development companies, including PlayNation, BottleRocket, and Oddworld Inhabitants. Electronic Arts has also created a way to digitally distribute their media to the customer. The company does this while keeping the prices consistent with suggested retail and slashing operating costs, thereby creating huge profit margins. Electronic Arts has found a way to create opportunities that have helped lift them to the top of the industry. Unfortunately, those opportunities, when added together, show the true nature of the beast. Electronic Arts is not an opportunistic competitor, but is instead a monopolistic sleeper.

### THE PUBLIC MUST NOT STAND FOR THIS TYPE OF BEHAVIOR

As stated earlier, antitrust laws are not directed at competitive business conduct, but rather towards conduct which unfairly destroys competition, puts an excessive restraint on trade, or which

152. Jeff Hwang, *EA's New Need for Speed*, at <http://www.fool.com/news/mft/2005/mft05120804.htm> (Dec.8, 2005).

| shows the control of monopolization.<sup>153</sup> Competition within the  
| business world is the foundation of improvement, pricing, and the  
| development of our society. It is competition that helps create  
| new and improved products within the same line. When the gov-  
| ernment contracts out military production, it normally requests  
| bids to forcefully create competition amongst military defense  
| contractors.<sup>154</sup> This procedure stimulates competition and in turn  
| obligates the contractors to create better products, with improved  
| designs, for lower prices. The same is true in all aspects of busi-  
| ness, with the exception of bidding. Companies within the same  
| industry constantly create new, better, or redesigned products  
| with different pricing strategies to lure in consumers. Antitrust  
| laws help preserve the notion that without competition, products  
| will not be developed to their full potential, and end-line consum-  
| ers might not get the best price for their bargain. To relate this  
| principle to the impetus of this article, Electronic Arts is free to  
| create certain games<sup>155</sup> without the interference of industry at-  
| tempts to stimulate competition. Such attempts would subdue the  
| production intellect that is otherwise forced, through competition,  
| to make better products for less money.

| In analyzing the reasonableness of restraints on trade in prac-  
| tice, there needs to be an understanding of the relevant market.<sup>156</sup>  
| Upon investigating the relevant market, the plaintiff must dem-  
| onstrate that the defendant has enough market power to restrain  
| trade.<sup>157</sup> Through a showing of the computed values, a defendant  
| should have little problem, if any, in showing the Electronic Arts  
| holds enough power to restrain trade. All markets and industries  
| work differently and have different traditions. The business of  
| each of the industries operates in ways that will maximize its own  
| efficiency and productivity.<sup>158</sup> It is for that reason that there is a

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| 153. 54 AM. JUR. 2D. *Monopolies and Restraints of Trade* §1 (2005).

154. Government Contracts,  
at [http://www.law.cornell.edu/wex/index.php/Government\\_contracts](http://www.law.cornell.edu/wex/index.php/Government_contracts) (accessed January 12,  
2006).

155. Such as professional American football.

| 156. *Los Angeles Memorial Coliseum Comm'n.*, 726 F.2d at 1387.

| 157. *Jack Walters & Sons Corp.*, 737 F.2d at 702.

158. For example, the airline industry will have different ways of operation than the  
auto sales industry, just by the true nature of the market. The airline industry will seek to  
maximize profits by selling travel opportunities, while the auto sales industry will maxi-  
mize profits by selling cars.

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need to analyze and understand the relevant market of the restraining company before applying a “rule of reason” or a per se implication. Once a market is examined as to its workings<sup>159</sup>, an analysis of market share is necessary. The analysis helps determine if the alleged monopoly has enough market power to generate a true restraint on trade and competition within the market segment, as well as help to eliminate false positives within the system. Market power helps show strength in a market segment.<sup>160</sup> Through its exclusive agreements and partnerships, Electronic Arts is the sole manufacturer capable of distributing products in certain popular genres to the consuming public.<sup>161</sup>

“If market power is found, the court may then proceed under ‘rule of reason’ analysis to assess the pro-competitive justifications of the alleged anti-competitive conduct.”<sup>162</sup> This acts as the final phase in the critical step of filtering out false positives. Some anti-competitive conduct may actually have pro-competitive justifications. A smaller firm may have exclusive rights to a design a production pattern that allows it to create products that are better, faster, or cheaper. This smaller firm may be able to justify such restraint by proving that without this exclusive right, it would not be able to survive against the major players of the industry. By having this exclusive power, the small firm actually helps to create more competition in the industry, than if the firm did not hold such rights. In other words, if the smaller firm can prove that the restraint carries pro-competitive justifications, the restraint may be reasonable and not unfair or prejudicial. The opposite is true of Electronic Arts. Through its anti-competitive restraints, Electronic Arts is the reason why other companies cannot survive in the industry. A company of its size and stature cannot justify anti-competitive restraints as pro-competitive, claiming the need to survive in a fierce arena. In fact, Electronic Arts itself creates the ferocity.

Although exclusive licensing and partnership agreements are not illegal per se, so long as it can be proven that they substantially exclude competition in a considerable share of that particu-

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159. A market can be better understood through an analysis of its, traditions, practice of business, competitors, etc.

160. With enough strength in a market segment a company may actually influence trends, patterns, prices, products, designs, and entrance opportunities for new competitors into the industry.

161. Such as professional American football.

162. *SCFC ILC, Inc.*, 36 F.3d at 965.

lar market, there will be a violation of antitrust laws.<sup>163</sup> Electronic Arts' exclusive agreements place a chokehold on competition and free trade through their affects on the market. The company's various agreements do not allow for competing companies to create rival products, or permit smaller up-and-coming companies to enter the market with much opportunity.

As held in *U.S. v. Microsoft*, the remedies in an antitrust case must be employed for the foundation of unshackling a market from the anti-competitive conduct, terminating any illegal monopolies, denying the guilty the fruits of the antitrust violation, and ensuring that there remain no practice likely to repeat the result of monopoly in the future.<sup>164</sup> Some options courts may use to accomplish this are to: exclude the violator from entering into any new contracts which would impose constrictions on trade or competition, order divesture of the violators operations, order dissolution of exclusivity agreements in place, order a governing board to oversee operations or new acquisitions, allow for use of licenses held by the violator for a reasonable royalty fee, or impose monetary sanctions. Each of these optional remedies may be applied to Electronic Arts. Each option, in its own way, will help to create more opportunity for market competition, eliminate restrictions, and impose sanctions against those whom have wronged the system. These options will also help to defeat a giant before too much damage is done; before it destroys the notions of a free market and fair trade in the industry.

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163. *Chuck's Feed & Seed Co., Inc.*, 810 F.2d at 1293.

164. 231 F. Supp. 2d 144.