

[US] Disney, Fox and Warner's alliance in sports streaming blocked by District Court decision

IRIS 2024-8:1/7

Mario Gheza
European Audiovisual Observatory

On 16 August 2024, the US District Court Judge Margaret Garnett issued a temporary injunction freezing the launch of the streaming service planned by Walt Disney Co., Fox Corp. and Warner Bros. Discovery.

For a monthly fee of USD 43, the three players planned, with the signature of a non-binding term sheet on 6 February 2024, to launch their new platform dedicated to live sports competitions. However, on 8 April 2024, a direct competitor called "Fubo", which also offers sports content, filed a complaint against the alliance, accusing it of violating competition law.

According to Fubo, the new platform would represent too large a share of American sports rights broadcast nationally (at least 60%) including some of the major sports leagues (NBA, NFL, MLB, etc.). As a reminder, Walt Disney Co. owns the ESPN+, Hulu and Max subsidiaries, which have significant influence in the sports streaming industry. This phenomenon is referred to as "bundling", the definition of which is given in the court decision : "The term "bundling" in the pay TV ecosystem refers to the practice by programmers of packaging several of their networks together to be distributed either together (to at least some degree), or not at all. For example, in exchange for the rights to distribute ESPN to subscribers, Disney might require a distributor to also carry its entertainment channels like the Disney Channel or Freeform; and if that distributor does not want to carry these other channels, it does not get to distribute ESPN. Hence, ESPN is "bundled" with Disney Channel and Freeform."

According to Fubo, the situation would force it to carry non-sports channels that it does not want or risk losing contracts it has with certain channels. Carrying unwanted channels would force it to cover its licensing costs by charging higher prices for its services than it would like.

Fubo also argued that having a single platform like Venu would generally lead to higher prices due to a monopolistic situation and would undermine the negotiating power of third-party video distributors. This monopolistic situation would be reinforced by a "Non-Compete" agreement which forbids the joint venture from "owning any form of equity interest, including a revenue-sharing or profit-sharing interest, in a commercial venture, where the focus of the

commercial venture is the operation of a sports-centric distributor similar to the Venu Sports platform, for a period of three years from the Launch Date." The result would be the dependency of millions of American consumers on these services.

For the injunction to be upheld, Fubo had to demonstrate an irreparable harm. To prove this, the company argued that launching an anti-competitive platform like Venu Sports would result in a loss of 300 000 to 400 000 subscribers (30% of their total audience). The defendants offered three main arguments in response to Fubo's charges of imminent harm. First, they asserted that Fubo's claims of irreparable harm lacked credibility. Second, they said Fubo's alleged harms were the result of its own "weak" business, and that its failure was likely to be imminent regardless of any action taken by the joint venture. Finally, they argued that any purported harm to Fubo could be remedied by money damages later.

Judge Margaret Garnett upheld Fubo's arguments for blocking the platform's launch because "Fubo is likely to successfully prove its claims that the partnership will violate competition law" stating also that "Fubo and American consumers will suffer irreparable harm absent an injunction". For Fubo's CEO, the said "ruling is a victory not only for Fubo but also for consumers. This decision will help ensure that consumers have access to a more competitive marketplace with multiple sports streaming options". Direct TV, another player in the market, indeed supported Fubo's complaint by arguing that the greater the flexibility of pay-TV distributors, the better the offer will be.

According to the American press, the three companies intend to appeal this decision in court. They believe that "Venu Sports is a pro-competitive option that aims to enhance consumer choice by reaching a segment of viewers who currently are not served by existing subscription options".

This decision is part of a context where many streaming players are joining forces to have a particularly attractive offer. This is, for example, also the case of the cable operator Comcast offering its "StreamSaver" service, which includes Netflix, Apple TV+ and Peacock.

This decision comes a few days before the planned launch of the platform.

FuboTV Inc. et al. v. The Walt Disney Company et al.

https://www.scribd.com/document/759675195/Fubo-v-Disney-Fox-Warners#fullscreen&from_embed

