

Streaming Wars: The Mouse Strikes Back

Elliot Schochet and Alec Brownlee

Student Fellows

Institute for Consumer Antitrust Studies
Loyola University Chicago School of Law

Introduction

While sports have always been a major source of revenue for some of America's largest television broadcasters, the streaming wars have raised the stakes even higher. In the era of DVRs and binging, sports are of special interest to broadcasters because a vast majority of viewers tune in live.¹ This has caused sports to dominate live television ratings. In 2024, 82 out of the top 100 viewed television broadcasts were sporting events.² Furthermore, 44% of cable subscribers said they would cancel their subscriptions if they had access to live sporting events via streaming services.³

Given sports ability to drive viewership, it should come as no surprise that several high-profile streaming services have recently invested billions into broadcast rights.⁴ This includes brands like Amazon Prime, Netflix, and Apple. The entry of these new players has increased the level of competition in a market which had traditionally been dominated by the major networks and ESPN.

¹ Magnite Team, *Magnite Research Finds 68% of CTV Viewers Use At Least One Live Streaming TV Service*, Magnite, Feb. 16, 2022 <https://www.magnite.com/press-es/magnite-ctv-live-research/>.

² Anthony Crupi, *NFL Owns 72 of TV's Top 100 As Politics Loosens Sports' Grip*, Sportico, Jan. 3, 2025 <https://www.sportico.com/business/media/2025/nfl-owns-73-of-top-100-broadcasts-election-undermine-sports-tv-dominance-1234822548/>.

³ Magnite, *supra* note 1.

⁴ Tom Burrows, *Why Netflix has joined Apple, Amazon, Disney, and other streamers in the battle for live sport*, The Athletic, May 25, 2024 <https://www.nytimes.com/athletic/5508954/2024/05/26/netflix-nfl-streaming-apple-amazon-disney/>.

As the landscape for sports broadcasting shifts, so do the antitrust implications of these agreements. This article covers the rapid rise and fall of Venu Sports, a proposed joint sports streaming venture between Disney, Fox, and Warner Bros. Discovery. In addition to covering the antitrust concerns that ultimately caused the death of Venu, this article will discuss the fallout and aftermath including Disney's acquisition of the original Plaintiff, FuboTV. This proposed acquisition has resulted in further antitrust litigation that will be examined below.

Venu: Meet the Key Players

In response to the streaming industry's entry into the market, three key legacy broadcasters banded together and announced their own all-sports streaming service. In February of 2024, Disney, Fox, and Warner Bros. Discovery announced a joint venture called "Venu."⁵ Unlike other pre-existing live TV packages, Venu would only broadcast sporting events. Between the three companies, Venu would have the rights to broadcast games from the major four pro sports leagues and several of the major college athletic conferences. Venu would control over half of the TV rights for all major and college sports in the country.⁶ To fully understand Venu's potential dominance, it is worth briefly examining what broadcast rights each company bring to the table.

Disney first dipped their toes into sports broadcasting in 1995 when they purchased ABC and ESPN.⁷ Since then, they have repeatedly secured large broadcasting deals with the NFL,

⁵ The Walt Disney Company, *Venu Sports Introduced as Name for Forthcoming Sports Streaming Service*, May 16, 2024, <https://thewaltdisneycompany.com/venu-sports-streaming-service-bundle/>.

⁶ Winston Cho, *FuboTV Wins Bid to Block Disney-Fox-Warner Sports Streaming Platform Over Antitrust Concerns*, The Hollywood Reporter, Aug. 16, 2024, <https://www.hollywoodreporter.com/business/business-news/fubotv-block-disney-fox-warner-sports-streaming-platform-1235976026/>.

⁷ Josef Adalian, *Inside the 1995 Media Merger That Changed Disney Forever*, Vulture, Jul. 12, 2024, <https://www.vulture.com/article/disney-abc-merger-bog-iger-michael-eisner.html>.

NBA, MLB, NHL, and multiple high profile collegiate athletic conferences. Disney currently broadcasts sports programming both through linear TV (on ESPN and ABC) as well as through their various streaming platforms such as ESPN+ and Hulu. These deals have allowed Disney to cultivate an especially close relationship with various leagues, with some even speculating that NBA Commissioner Adam Silver will be tapped to be the company's next CEO.⁸

Just a year prior to Disney's acquisition of ABC/ESPN, Fox also began heavily pursuing sports broadcasting rights. Their first big splash was a \$1.6 billion deal to carry NFL games.⁹ Since then, Fox Sports has blossomed and currently has deals in place to air the NFL, MLB, college football, college basketball, and NASCAR.¹⁰ Like Disney, Fox currently broadcasts programming both on linear TV as well as through their own streaming platform. Notably, when Disney purchased 20th Century Fox in 2019, Fox was not willing to include Fox Sports in the deal.¹¹

The last member of the trio, Warner Bros. Discovery, has the most diverse catalogue of sports offerings. The sports division originated as an arm of Turner Broadcasting Systems.¹² In 1996, Time Warner purchased Turner and made Turner Sports into its own division.¹³ In 2022, after AT&T acquired Time Warner, Turner sports was renamed to TNT Sports which is what it

⁸ Charlie Gasparino, *NBA's Adam Silver, former Disney Executives on Short List to Replace Bob Iger*, Fox Business, Mar. 4, 2023, <https://www.foxbusiness.com/media/nbas-adam-silver-former-disney-executives-short-list-replace-bob-iger>.

⁹ Associated Press, *How Fox's 25 Seasons of Covering the NFL Changed the Game*, May 11, 2019, <https://www.chicagotribune.com/2018/12/27/how-foxs-25-seasons-of-covering-the-nfl-changed-the-game/>.

¹⁰ Fox Sports, *Fox Sports Press Pass: Properties*, Jan. 30, 2025 <https://www.foxsports.com/presspass/about/#>

¹¹ Emily St. James, *Here's what Disney Owns After the Massive Disney/Fox Merger*, Vox, Mar. 20, 2019,

<https://www.vox.com/culture/2019/3/20/18273477/disney-fox-merger-deal-details-marvel-x-men>.

¹² Michael Schneider, *What the End of the Turner Brand Could Mean for Its Channels*, Variety, Mar. 12, 2019,

<https://variety.com/2019/tv/news/turner-brand-time-warner-tnt-tbs-trutv-1203160652/>

¹³ *Id.*

is known as today.¹⁴ In addition to more traditional sport offerings such as the MLB, NHL, and NBA, TNT Sports also broadcasts the NCAA March Madness basketball tournament, professional golf, All Elite Wrestling, and the United States National Soccer teams. TNT Sports broadcasts on linear TV through channels such as TNT and TBS as well as through various streaming platforms such as Max and Discovery+.¹⁵

Fubo's Lawsuit

Our last key player in this story is Fubo TV. Fubo was founded in 2015 with the goal of being an all-sports streaming service.¹⁶ Unlike other live TV packages that offered a wide variety of channels, Fubo planned to only offer the most popular sports channels. Fubo hypothesized that by only licensing networks that carried sports, they would be able to keep costs low in comparison to cable plans. Instead of forcing sports fans to pay for hundreds of non-sports channels they never watch, Fubo thought they could offer them a more appealing and more cost-effective product.

Unfortunately for Fubo, many of these sports networks were owned by large conglomerates such as Disney, Fox, and Warner Bros. Discovery.¹⁷ Instead of allowing Fubo to license certain channels, these companies engaged in a take it or leave it tactic called “bundling”. Bundling requires licensees such as Fubo to either purchase the rights to all of a company’s channels or none of them. Upon the announcement of Venu, Fubo filed suit in the Southern

¹⁴ Alex Weprin, *So Long WBD Sports, Hello TNT Sports*, The Hollywood Reporter, Jan. 18, 2024, <https://www.hollywoodreporter.com/business/business-news/tnt-sports-launches-wbd-sports-rebranded-nba-march-madness-1235791804/>.

¹⁵ Dade Hayes, *Max Adding Live Sports Tier*, Deadline, Sep. 19, 2023, <https://deadline.com/2023/09/max-adds-live-sports-tier-bleacher-report-streaming-nba-nhl-1235550358/>.

¹⁶ FuboTV Inc. v. The Walt Disney Company, No. 24-CV-01363, (S.D.N.Y. Aug. 16, 2024) at p. 2.

¹⁷ *Id.*

District of New York seeking injunctive relief under the Clayton Act. They requested the judge either temporarily block Venu’s launch or enjoin Venu’s parent companies from enforcing certain contractual restraints in their pre-existing licensing deals with Fubo.¹⁸

Fubo argued Venu’s parent companies were engaged in the anticompetitive practice of tying by forcing them to license the rights to a variety of non-sports channels (that their users rarely watch) as a condition to obtaining licenses for key sports channels such as ESPN or TNT. The forced licensing drove up costs for Fubo and therefore for its subscribers. As of August 2024, Fubo had still yet to turn a quarterly profit.¹⁹

Venu’s parent companies argued that the joint venture was actually a pro-competitive measure since they will each continue to independently license their networks to other distributors. Furthermore, they claimed that they had extensive measures in place to prevent the sharing of sensitive business information and collusion.²⁰

According to the trial court judge, the antitrust problem presented in this case could be stated “simply”. In her opinion, Judge Margaret Garnett wrote, “If (Venu) is allowed to launch, it will be the only option on the market for those television consumers who want to spend their money on multiple live sports channels they love to watch, but not on superfluous entertainment channels they do not”.²¹ After an expedited five-day discovery process, Judge Garnett concluded Fubo’s claims were meritorious and granted their injunction, thereby blocking Venu’s launch.

¹⁸ *Id.* at p. 1.

¹⁹ *Id.* at p. 3.

²⁰ *Id.* at p. 4.

²¹ *Id.*

Judge Garnett stated that all three of its parent companies explicitly agreed to “stay clear” of supporting a similar platform for the next three years.²² She also observed that if Venu was allowed to launch, its parent companies would have a “monopolistic runway” that would give them powerful incentives to stifle competition and raise prices on consumers and distributors alike.²³

In response to Defendants’ assertion that Venu would increase competition, she noted that Fubo’s anti-competitive concerns were shared by a “range of voices” including competitors, non-profit consumer advocacy organizations, members of Congress, and the Department of Justice.²⁴ Defendants were unable to produce any third-party that shared their view of Venu’s pro-competitive potential.²⁵ Given the overwhelming evidence in Fubo’s favor, even those with little background in antitrust law can understand why Judge Garnett blocked Venu’s launch by granting the injunction.

Compounding the Problem

Following the injunction, Venu’s parent companies quickly appealed the decision. Just an hour before oral arguments were set to begin in January of 2025, it was announced that the case had been settled. In exchange for dropping the suit, Venu’s parent companies would each pay Fubo \$220 million.²⁶

²² *Id.*

²³ *Id.* at p. 5.

²⁴ *Id.* at p. 67.

²⁵ *Id.*

²⁶ Steven Salop, *Did the Mouse Outfox the Fox? The Fubo Settlement, Disney, and the Death of the Venu Sports-Streaming Venture*, Promarket, Jan. 15, 2025, <https://www.promarket.org/2025/01/15/did-the-mouse-outfox-the-fox-the-fubo-settlement-disney-and-the-death-of-the-venu-sports-streaming-venture/>.

This was not even the most notable term of the settlement agreement. In addition to paying Fubo and agreeing to offer them a substantial loan, Disney pursued one of the oldest tricks in the monopolist playbook: they announced they were acquiring a majority stake in Fubo.²⁷ Less than a week after this settlement was reached, Venu's parent companies issued a statement that they would no longer pursue the joint venture with one another.²⁸

Continuing Antitrust Issues in Sports Streaming

After Fubo settled its antitrust lawsuit against Disney, Fox and Warner Bros, over their proposed joint venture sports app Venu, Disney moved to Fubo. On January 6, 2025, Disney announced that it was combining Hulu with the Independent sports streamer, Fubo.²⁹ Disney will buy a 70 percent stake in Fubo, and Fubo's multi-channel platform will absorb the Disney-Owned Hulu service over next year. This agreement also includes a \$220 million payment to FUBO from Disney, Fox, and Warner Bros. Additionally, the deal includes a \$145 million loan from Disney to Fubo to be issued in 2026.³⁰

Fubo will gain access to ESPN, ESPN2, ESPNU, ACC and SEC Networks, and ESPN+.³¹ The deal also ensures that FUBO employees will maintain its day-to-day operations, with no real change to their corporate operations structure. Fubo will continue to operate as its own publicly traded company and it still has the power to negotiate tv-content deals on behalf of

²⁷ *Id.*

²⁸ *Id.*

²⁹ Eric Fisher, *Disney Buys Fubo, Killing Venu Lawsuit*, FRONT OFFICE SPORTS, Jan. 6, 2025, <https://frontofficesports.com/disney-buys-fubo-killing-venu-lawsuit/>.

³⁰ *Id.*

³¹ *Id.*

Fubo and Hulu live tv, Disney's live tv streaming service. The deal also requires that Disney's, Warner's, and Fox's proposed project, Venu Sports, will not move forward.³²

It is not often that former courtroom adversaries decide to join forces, especially when Fubo made such serious anticompetitive allegations against Disney. The CEO of Fubo, David Gandler, has even been quoted at a court hearing in 2024, that Venu Sports would effectively render Fubo bankrupt.³³

The most obvious purpose of this merger from Disney's perspective was to dispose of Fubo's lawsuit. This also holds true for Fubo due to the high cost of litigation. Rather than succumbing to excess legal fees, both Disney and Fubo got what they wanted from this deal. Fubo gained a partner in one of the largest and most internationally renowned media corporations, and Disney gained another strategic partner in the tv-streaming industry. Another potential reason for this sudden change of heart, is Fubo's lackluster financial situation. At the close of 2024, Fubo suffered a \$55 million loss from its operations.³⁴

Both Disney and Fubo's interests are aligned in gaining a strategic advantage against their TV streaming rival, YouTube TV. YouTube TV is an actual competitor of both Disney and Fubo because it offers live sports packages that provides similar channels both Disney and FUBO offer like ESPN and ESPN+. At the end of 2024, YouTube TV boasted more than 8 million subscribers, which ranks it fourth amongst pay-tv companies.³⁵ On the other hand, Fubo

³² Nitish Pahwa, *Disney's Sports Merger Reveals a Grim Truth About the Future of Television*, SLATE, Jan. 17, 2025, <https://slate.com/technology/2025/01/disney-fubo-hulu-merger-live-sports-monopoly.html.d>.

³³ Lucas Manfredi, *Fubo Says It Could Be Pushed to Insolvency with Venu Sports Launch as Preliminary Injunction Trial Comes to a Close*, YAHOO FINANCE: THE WRAP, Aug. 13, 2024, <https://finance.yahoo.com/news/fubo-says-could-pushed-insolvency-211055191.html>.

³⁴ Fisher, *Disney Buys Fubo, Killing Venu Lawsuit*, FRONT OFFICE SPORTS, Jan. 6, 2025,

³⁵ Brad Adgate, *YouTube TV Is Forecasted To Be The Largest Pay-TV Distributor In 2026*, FORBES, Apr. 9, 2024, <https://www.forbes.com/sites/bradadgate/2024/04/07/youtube-tv-is-forecast-to-be-the-largest-pay-tv-distributor-in-2026/>.

only had approximately 1.613 million subscribers by the end of 2024.³⁶ Additionally, Hulu Live TV, Disney’s live service Tv streaming partner, has about 4.5 million subscribers.³⁷ Combining forces with Disney will allow Fubo to amass approximately 6.2 million US-based subscribers.³⁸ The Disney-Fubo merger effectively propels Fubo subscriber count onto equal ground with YouTube TV.

Public Reaction to the Disney/FuboTv Merger

Most of the public was surprised and caught off guard when news of this merger broke due to the year-long litigation involving both companies. Rick Ellis, a tv journalist declared that this merger was a case of ‘even if you could have beaten them, just join them, and see what you can get’.³⁹ Other television companies like DirecTV and Satellite TV provider EchoStar viewed the merger with suspicion. DirectTV authored a letter to the U.S. District Court Judge Margaret Garnett, the presiding judge in Fubo’s lawsuit against Disney, claiming that the dismissal of the lawsuit does not resolve any of the antitrust issues surrounding Venu Sports, and Disney’s anti-competitive conduct.⁴⁰ Direct TV stated, “by this settlement, defendants [Disney] pay off and seek to subsume the very competitor that raise these antitrust violations to the Court.”⁴¹

³⁶ FUBO TV EDITORS, *Fubo Closed Q3 2024 With 21% Year-over-Year Revenue Growth and 1.613M Subscribers in North America*, FUBO TV’S NEWS DETAILS (Nov. 1, 2024), <https://ir.fubo.tv/news/news-details/2024/Fubo-Closed-Q3-2024-With-21-Year-over-Year-Revenue-Growth-and-1.613M-Subscribers-in-North-America/default.aspx#:~:text=Fubo%20exceeded%20revenue%20guidance%20in.subscribers%2C%20up%209%25%20YoY.>

³⁷ Brian Dean, *Hulu Viewership and Subscriber Statistics: How Many People Watch Hulu?*, BACKLINKO (May 22, 2024), <https://backlinko.com/hulu-users>.

³⁸ Fisher, *Disney Buys Fubo, Killing Venu Lawsuit*, FRONT OFFICE SPORTS.

³⁹ Pahwa, *Disney’s Sports Merger Reveals a Grim Truth About the Future of Television*.

⁴⁰ Reuters, *DirecTV Challenges Dismissal of Fubo’s Claims against Venu Sports*, THOMSON REUTERS PRODUCTS, Jan. 9, 2025, <https://www.reuters.com/business/media-telecom/directv-challenges-dismissal-fubos-claims-against-venu-sports-2025-01-09/>.

⁴¹ *Id.*

Providers like DirecTV and EchoStar put forth a respectable argument, if major corporations like Disney can simply buy their way out of their legal troubles and purchase their competitors, this sets a dangerous precedent. Competition in the industry will drastically decrease if mergers like this keep occurring.

Disney's Continuing Antitrust Issues

It is important to note that Disney has faced other legal issues over the past couple of years due to its ownership within the live service streaming tv-industry. In 2022, YouTube TV subscribers filed an antitrust class action in the Northern District Court of California alleging that since Disney acquired Hulu, prices for live-streaming Tv have become unreasonable. The suit alleges that Disney's imposition of certain channels is anti-competitive in nature.⁴² The proposed class sought to represent nearly 5 million YouTube TV subscribers and seeks an injunction prohibiting Disney from engaging in anti-competitive practices.⁴³ Litigation is still ongoing, but Presiding U.S. District Court Judge Edward Davila has held that Disney may have imposed anti-competitive terms on its rivals by forcing them to carry ESPN as part of the cheapest bundle they offer.⁴⁴ This case further illustrates the anti-competitive nature of Disney's live streaming services. It will be interesting to see if this case results in some sort of penalties against Disney, if they settle the case with the YouTube TV subscribers, or if Disney pulls off a similar move and attempts to purchase YouTube TV.

Even with the Fubo-Disney merger and the dismissal of Fubo's antitrust lawsuit, Disney's day in court regarding Venu is not over. On January 14, A Fubo subscriber filed a

⁴² *Biddle v. Walt Disney Co.*, 5:22-cv-07317-EJD, (N. Dist. Cal 2022) p. 1.

⁴³ *Id. at 1.*

⁴⁴ Winston Cho, *Disney Owns Both Hulu and ESPN. A Court Considers Whether That Violates Antitrust Laws*, (2024), <https://www.hollywoodreporter.com/business/business-news/disney-owns-both-hulu-and-espn-a-court-considers-whether-violates-antitrust-laws-1235932388/>.

lawsuit against Disney in the Southern District Court of New York for alleged antitrust violations stemming from Disney’s live-streaming tv practices.⁴⁵ In the fifty-page complaint, the subscriber is seeking class action status for anyone who subscribed to Fubo TV after January 1, 2021. The plaintiff claims that since Disney owns and controls must-have sports channels like ESPN, ESPN+, and ESPN 2, that Disney has immense power over other competitors in the live-streaming industry, like Fubo.⁴⁶

The Plaintiff argues that Disney’s ownership of ESPN and Hulu enable it to “extract monopoly rents in the Streaming Live TV market.”⁴⁷ The complaint discusses four ways that Disney restricts competition. The plaintiff first alleges that Disney’s live-streaming policies and tactics restrict competition because Disney forces other streaming services to carry Disney’s non-ESPN content, in order for these other streaming services to use ESPN.⁴⁸ The second argument alleges that Disney’s practices harm competition because they force streaming companies to include ESPN as part of their “base” or “cheapest” package for consumers.⁴⁹ The third argument declares that Disney restricted competition by inflating prices by its Most-Favored-Nations Clauses. Most favored-nations clauses are stipulations in a contract that require one tv provider give the other party it contracted with the same benefits and conditions it has offered other providers.⁵⁰ These clauses reduce the amount of tv programming that consumers have access to because each company that uses these clauses essentially is offering the same services and

⁴⁵ Jill Goldsmith, *The Drama Continues As Disney Sued By Fubo Subscriber For Antitrust Violation*, DEADLINE, Jan. 14, 2025, <https://deadline.com/2025/01/fubo-subscriber-sues-disney-espn-antitrust-violation-1236257174/>.

⁴⁶ *Id.*

⁴⁷ *Unger v. The Walt Disney Co.*, 1:25-cv-00375, (S. Dist. NY 2025). p. 1.

⁴⁸ *Id.* at 1-2.

⁴⁹ *Id.*

⁵⁰ *Id.*

content just on different platforms.⁵¹ The fourth argument states that Disney provided anticompetitive discounts to companies like Hulu, that Disney itself owns.⁵²

The complaint's allegations are similar to Fubo's original antitrust suit against Disney. Fubo's original complaint outlined the unfair and uncompetitive nature of Disney's streaming policies. Even though the bulk of Fubo's complaint was centered around Venu, Disney, Warner Bros and Fox's proposed joint ventures streaming service, the complaint mentions that Disney's conduct is monopolistic and extremely anti-competitive. Like Unger's new lawsuit, Fubo alleged that Disney forced Fubo to carry several non-sports channels, that Fubo's customers did not know of and frankly did not want, on the condition that Fubo would gain access to ESPN only Fubo carried these undesired channels.⁵³

Conclusion

It is evident that Disney's live streaming policies, strategies, and tactics are subject to a substantial amount of scrutiny. Despite Disney resolving its legal issues with Fubo through their merger, Disney faces challenges on multiple fronts. From the new Fubo subscriber lawsuit to other TV providers like DirecTV and EchoStar, Disney continues to face antitrust issues for the foreseeable future.

⁵¹ Ike Brannon, *MFN Clauses and TV Programming*, CATO INSTITUTE, Sep., 2024, <https://www.cato.org/regulation/fall-2024/mfn-clauses-tv-programming>.

⁵² Unger, 1:25-cv-00375 at 2.

⁵³ Fubo Tv Editors, *Fubo Sues The Walt Disney Company, FOX Corp., Warner Bros. Discovery and Affiliates for Antitrust Practices*, Fubo Tv: News and Details, Feb. 2024. <https://ir.fubo.tv/news/news-details/2024/Fubo-Sues-The-Walt-Disney-Company-FOX-Corp.-Warner-Bros.-Discovery-and-Affiliates-for-Antitrust-Practices/default.aspx>