

ANTITRUST TRADE AND PRACTICE

Expert Analysis

Why Antitrust Has Little or No Role In the Sports Carriage Fights

While relatively rare, negotiating battles between Regional Sports Networks (RSNs)—who presumably have exclusive rights to content for a team or a group of teams—and broadcast distributors can be very frustrating for fans. And, when it does happen, we in the antitrust bar find ourselves fielding the question “isn’t that an antitrust violation to refuse to supply or carry, depending on where the offer is directed?” Two recent disputes offer a window into whether and when antitrust regulators will police negotiations between RSNs and distributors to protect downstream consumers.

The first dispute involved SportsNet LA, the exclusive live broadcasting partner of the Los Angeles Dodgers, and multichannel video programming distributors in the Los Angeles area, including DirecTV, Cox Communications, Charter Communications, and now-parent AT&T. After each of the multichannel video distributors failed to reach an agreement with SportsNet LA,



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the Department of Justice brought suit, alleging that the distributors had unlawfully exchanged bargaining information to increase their leverage in negotiations. The second dispute involved YES, the Yankees Entertainment and Sports Network, and Comcast. In contrast to the SportsNet LA conflict, the DOJ did not step in when negotiations between the parties broke down. Comcast did not carry the YES network during the 2016 season, and the parties reached an agreement in January 2017, just in time for the 2017 season.

A closer comparison of these two examples may not calm down affected fans, but it may at least explain what the U.S. antitrust laws do and do not protect against.

Rise of RSNs

Regional sports networks pay teams a negotiated fee for the right to broadcast that teams’ games. While

RSN’s have historically been independently owned, some teams have found that it is more efficient and financially attractive to take control of their own regional networks and directly offer their content to distributors.¹ These networks are known as Individual Regional Sports Networks (IRSNs), and have become more popular in recent years after the success of the New England Sports Network (NESN), owned

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by the Red Sox, and the Yankees Entertainment and Sports Network (YES), owned by the Yankees. SportsNet LA, the Dodgers network, is the newest of these ventures. Given the popularity of sports, and the rise of home viewership via cable and satellite television, possessing this control, and directly negotiating with distributors, can be very profitable for sports franchises depending, of course, on the costs of creating and delivering the product.

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One of the reason IRSNs can be potentially lucrative in baseball flows from a feature in baseball's revenue sharing scheme. Major League Baseball typically collects about one-third of the broadcast revenue that any team generates. But when a team owns its own channel, the money is considered "potential," not guaranteed, because it is dependent on how the team manages its broadcasting, its finances, and the network as a whole.² Thus, the bulk of this revenue is not subject to revenue sharing rules, and can be kept by the franchise.

Policing Negotiations

In a negotiating context, the marketplace for sports broadcasting content can, in theory, involve a single seller and a single buyer, or a very limited number of buyers. To the untrained eye, this may appear to be an area for antitrust scrutiny; after all, are not the antitrust laws about how companies behave in the marketplace? The short answer is no, as it relates to bilateral negotiations between companies, irrespective of their market positions. In economic parlance, the outcome of these types of negotiations are simple wealth transfers between the buyer and the seller, with no change from the consumers' perspective. In other words, in the straightforward context where a single seller and buyer are duking it out over price and terms—and nothing else—the antitrust laws are not implicated. But, sometimes, there is more going on, or at least allegedly, which is where the difference between the Yankees and Dodgers carriage disputes had some antitrust significance.

SportsNet LA and YES Disputes

In the SportsNet LA dispute, the DOJ brought suit against four distributors

after negotiations between SportsNet LA and each of those distributors broke down. The DOJ alleged that the distributors had shared competitively sensitive information with each other in an attempt to increase their bargaining leverage with SportsNet LA.³ The alleged anticompetitive effect of this conduct was that each distributor was less pressured to reach a deal with SportsNet LA, because they did not fear losing subscribers to a rival distributor, and that this resulted in SportsNet LA not being carried by distributors in the LA area, depriving fans of the ability to watch Dodger games.⁴

The issue, then, was one of alleged collusion among rival distributors under §1 of the Sherman Act, who would typically compete for the right to have SportsNet LA as a component of their cable package. The DOJ alleged that by sharing competitively sensitive information, the distributors knew that their failure to reach a deal would not lead subscribers to jump to a different distributor.⁵ The protection offered by this alleged information sharing allowed each distributor to bow out of negotiations for carrying the SportsNet LA package, thereby harming consumers.

The dispute between YES and Comcast is at the other end of the spectrum. Comcast and YES failed to come to a deal about Comcast carrying the YES network before the 2016 MLB season, with Comcast alleging that the price for the YES channel was too high.⁶ YES fought back against this, encouraging Yankees fans to switch their television providers to DirecTV or Verizon Fios, who did carry the YES network but who had smaller customer bases in the region. Each party was able to exert bargaining leverage on the other, and they reached a deal in time for the 2017 season. But because there was

no alleged collusion among Comcast and its potential rivals (like DirecTV or Verizon Fios) antitrust regulators did not police the negotiations. If and how the negotiations were resolved between YES and Comcast was a matter for private contract, as they did not implicate any compromise of a competitive process in the marketplace.

While this all seems rather rudimentary to antitrust lawyers, our informal survey has shown that this is not so for others, namely fans—including lawyers. In the United States, sports content is typically understood as competing for carriage with a wide variety of other entertainment products.⁷ Moreover, how one firm sets the price of its product is not the subject of antitrust scrutiny. For fans, this means having faith that consumer demand will ensure that IRSNs and distributors don't hold each other up in negotiations.



1. Stephen Dixon, "A Channel Worth Changing? The Individual Regional Sports Network: Proliferation, Profits, Parity, and the Potential Administrative and Antitrust Issues That Could Follow," 33 J. Nat. Assoc. Admin. Law Jud. (2013).

2. Id.

3. Complaint at 2-3, *U.S. v. DirecTV Group Holdings*, Case No. 2:16-cv-08150 (C.D. Cal. 2016).

4. Id. at 9-10.

5. Id.

6. Meg James, "Yankees Fans Strike Out as YES Network-Comcast Battle Heats Up," Los Angeles Times (March 9, 2016), available at <http://www.latimes.com/entertainment/envelope/cotown/la-et-ct-fox-yankees-network-comcast-battle-sports-costs-20160308-story.html>.

7. *Chicago Prof. Sports Partnership v. NBA*, 95 F.3d 593 (7th Cir. 1996).