

16TH ASCOLA CONFERENCE
SUBMISSION OF DRAFT PAPER

**STREAMING DISNEY + AND COMPETITION IN THE FANTASY WORLD: THE
ACQUISITION OF 21ST CENTURY FOX BY WALT DISNEY IN BRAZIL**

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1 BRIEF OVERVIEW OF THE AUDIOVISUAL MARKET

Entertainment has always been part of human life, even when there was no thought of the existence of a “cultural industry”.⁴ Since the 20th century, the media and technology revolution have increased the possibilities of expanding the distribution channels of so-called cultural "products" or "goods"⁵.

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⁴ Benjamin and Marcuse, from the Frankfurt School, wrote about the theme in “The work of art in the Era of Technical Reproducibility” and “About the affirmative character of culture”. In: MARCUSE, Herbert. *Sobre o caráter Afirmativo da Cultura*. In: **Cultura e Sociedade**. Paz e Terra. Rio de Janeiro. 1997 e BENJAMIN, Walter. *A Obra De Arte Na Era De Sua Reprodutibilidade Técnica*. In: **Magia E Técnica, Arte E Política**: ensaios sobre literatura e história da cultura. São Paulo: Brasiliense, 1985. The concept of “cultural industry” was coined specially by Adorno and Horkheimer in “Dialética do Esclarecimento”. In: ADORNO, Theodor; HORKHEIMER, Max. **A Dialética do Esclarecimento**. Rio de Janeiro: Jorge Zahar, 1985.

⁵ Such distribution had an impact on the so-called massification of culture. In: FABIANO, Luiz Hermenegildo. *Indústria Cultural e Educação Estética: reeducar os sentidos e o gesto histórico*. In: ZUIN, Antonio Álvaro Soares; PUCCI, Bruno; RAMOS-DE-OLIVEIRA, Newton (orgs) **A educação danificada: contribuições à teoria crítica da educação**. Petrópolis/São Carlos: Vozes/UFSCAR, 1998. p. 161.

The social and economic changes of the 1990s redirected the focus of traditional industries to knowledge-intensive activities, such as the dynamic services sector, increasing the capacity to generate work and add value. Among these activities, the knowledge and creativity industry stand out, a protagonist in society, improving competition among companies⁶.

In this creative industry, the generation of value translates into continuous innovation and reinvention of processes, directly associated with producing new materials, which is observed mainly in the United States, Japan and Europe⁷. However, albeit to a lesser extent, the audiovisual market is growing worldwide.

In 2019, Brazil was in the eleventh position in the ranking of countries with the largest audiovisual market⁸ according to a report issued by United Nations Conference on Trade and Development - UNCTAD and the perspective for the year 2020 was reaching the fifth place due to the growing synergy with the United States' film industry⁹.

This is because of the well-known popularity and dissemination of the Hollywood film market, which has the following famous companies: i) Sony Pictures Entertainment, ii) The Walt Disney Company (Disney), iii) 21th Century Fox (21CF), iv) Paramount Pictures Comporation, v) Warner Bros Entertainment e vi) DreamWorks Animation, which besides producers are also distributors of the most viewed films around the world¹⁰.

⁶ BANCO NACIONAL DO DESENVOLVIMENTO ECONÔMICO E SOCIAL. **A economia criativa e o mercado audiovisual**. 2016. Available at: <https://www.bndes.gov.br/wps/portal/site/home/conhecimento/noticias/noticia/animacao-audiovisual>. Accessed: 01 de aug. 2020.

⁷ SEBRAE. **Mapeamento e impacto econômico do setor audiovisual no Brasil**. 2017. Available at: <https://www.sebrae.com.br/sites/PortalSebrae/bis/mapeamento-e-impacto-economico-do-setor-audiovisual-no-brasil,5859a25df13f8510VgnVCM1000004c00210aRCRD>. Accessed: 30 jul. 2020.

⁸ According to GLOBENEWSWIRE, until the year 2027, growth of US\$ 518.26 billion is expected in such a market. GLOBENEWSWIRE. **Global Pro AV Market to reach US\$ 518.26 Billion by end of 2027 – Coherent Market Insights**. May, 2020. Available at: <https://www.globenewswire.com/news-release/2020/05/26/2038642/0/en/Global-Pro-AV-Market-to-reach-US-518-26-Billion-by-end-of-2027-Coherent-Market-Insights.html>. Accessed: 30 jul. 2020.

⁹ ONU NEWS. **Brasil deverá ser quinto maior mercado audiovisual do mundo em 2020**. Jan. 2019. Disponível: <https://news.un.org/pt/story/2019/01/1655242>. Accessed: 01 de aug. 2020.

¹⁰ LEGOUX, et. al. The effect of critical reviews on exhibitors' decisions: do reviews affect the survival of a movie on screen? *International Journal of Research in Marketing*, v. 33, n. 2, 2016, *apud* PEREZ, Julia Taunay; REIS, Everton Rodrigues; NAKANO, Davi Noboru. Estimador de bilheteria de produções cinematográficas brasileiras: uma abordagem do aprendizado de máquinas. **Observatório Itaú Cultural**. Available at: https://portal-assets.icnetworks.org/uploads/attachment/file/100184/Estimador_bilheteria_pt_4_AF.pdf. Accessed: 01 aug. 2020.

In Brazil, the audiovisual market has been dealt with by public policies since 1910 with the use of cinema in teaching and scientific research, highlighting the installation of the National Museum's film library with the films of the Rondon Commission in the center of the country¹¹. It is worth remembering the provision in article 145 of the 1988 Federal Constitution, which indicates that it is up to the State to guarantee everyone the full exercise of cultural rights and access to the sources of national culture.

Given the context outlined, being a creative economy sector, the audiovisual industry reached a size comparable to the country's pharmaceutical and textile industries, corresponding to 1.67% of the national GDP, adding more than R\$ 20 billion to the economy and generating about 300 thousand direct and indirect jobs¹². The six years before 2018, even with the economic crisis, continued to expand, growing around 7% per year¹³. In other words, the data only reinforce what we all already know: entertainment is part of our lives, as are other essential goods and services.

Brazilians are, by nature, very creative and close to mechanisms of entertainment. The Special Secretaire of Culture¹⁴ announced in 2019 that Brazil would have surpassed the goal of releasing 150 films a year, three years ahead of what was forecast for 2020. Therefore, without going into qualitative merit, an important goal of the National Culture Plan established by Law 12.343/2010 was reached. Such achievement had an impact, even in the generation of jobs and the inclusion in the whole national territory, as we can evaluate through the available data, despite noticing a direct impact of the coronavirus that imposed measures of social distance influencing all cultural industrial in Brazil and in the world.

The moment of global sanitary emergency that has been plaguing the country since March 2020 has generated obstacles for this market, whether due to the interruption of audiovisual production, cancellation of all major international and national film festivals,

¹¹ ANESP (Associação Nacional dos Especialistas em Políticas Públicas e Gestão Governamental). **Política audiovisual em tempos de COVID-19: arte e indústria em confinamento**. May, 2020. Available at: <http://anesp.org.br/todas-as-noticias/2020/5/22/politica-audiovisual-em-tempos-de-covid-19-arte-e-industria-em-confinamento>. Accessed: 30 jul. 2020.

¹² Ibid., 2020.

¹³ FILHO, E. M. et al. **O impacto econômico do setor audiovisual brasileiro. Tendências Consultoria Integrada**. São Paulo: Motion Pictures Association America Latina. Oct. 2016. Available at: http://www.icabrasil.org/2016/files/557-corporateTwo/downloads/LOW_ESTUDO_MPAAL_21x30_06-06-16.pdf. Accessed: 25 aug. 2020.

¹⁴ SECRETARIA ESPECIAL DA CULTURA. **Brasil ultrapassa meta de lançar 150 filmes por ano até 2020**. Fev., 2019. Available at: <http://cultura.gov.br/brasil-ultrapassa-meta-de-lancar-150-filmes-nacionais-por-ano-ate-2020/>. Accessed: 01 aug. 2020.

suspension of premieres and film releases, and also to the closure of the activities of 577 movie theaters in Brazil¹⁵.

In this scenery of uncertainty about the future, even the acquisition of 21st Century Fox (21CF) by The Walt Disney Company (Disney), object of this study, had to change its “naturally predicted” route, as will be seen below.

2 THE WALT DISNEY COMPANY (“Disney”) AND 21ST CENTURY FOX (“21CF”): DETAILS ABOUT THE OPERATION IN BRAZIL

I like the impossible because there is less competition. Walt Disney

Starring animations billionaire box office, like Frozen I and II, Toy Story 3 and 4, the Incredibles 2, Finding Dory, among other films that marked the childhood of many, Disney has been a company for almost 100 years on the market, founded in 1923 by the brothers Walt and Roy O. Disney.

Disney is one of the largest conglomerates in the world in mass media and entertainment, also operating in parks and products such as Disneyland, which opened in 1955, and currently has hotels, sea cruises and an immense number of products children and adults, including books, appliances, games and digital apps.¹⁶

Expanding its “empire” with major acquisitions, Disney acquired Pixar Animation Studios in 2006 for US\$ 7.4 billion¹⁷; in 2009, Marvel Entertainment for US\$ 4,2 billion¹⁸; in 2012, Lucasfilm por US\$ 4,06 billion¹⁹ and its grand franchise Star Wars.

¹⁵ APELO às autoridades impacto do covid-19 no audiovisual e solicitação de medidas emergenciais. **Telaviva**. Mar., 2020. Available at: https://telaviva.com.br/wp-content/uploads/2020/03/OFICIO_MEDIDAS-EMERGENCIAIS_ANCINE.pdf. Accessed: 01 aug. 2020.

¹⁶ THE WALT DISNEY COMPANY. **Disney Parks, Experiences and Products**. Mar., 2019. Available at: <https://dpep.disney.com/about-us/>. Accessed: 29 jul. 2020.

¹⁷Id., **Disney To Acquire Pixar**. Jan., 2006. Available at: <https://www.thewaltdisneycompany.com/disney-to-acquire-pixar/>. Accessed: 30 jul. 2020.

¹⁸Id., **Disney To Acquire Marvel Entertainment**. Aug., 2009. Disponível: <https://www.thewaltdisneycompany.com/disney-to-acquire-marvel-entertainment/>. Accessed: 10 aug. 2020.

¹⁹Id., **The Walt Disney Company Completes Lucasfilm Acquisition**. Dec., 2012. Available at: <https://www.thewaltdisneycompany.com/the-waltdisney-company-completes-lucasfilm-acquisition/>. Accessed: 10 aug. 2020.

However, the recent target of the Mickey Mouse company - the most famous mouse in the world - is the 21CF.

It is important to explain that 21CF is a conglomerate of multinational mass media companies, based in New York, constituted in 2013 from the News Corporation's two companies' division, which was founded by Rupert Murdoch²⁰ in 1980. The company provides services in segments of cable network programming, television and filmed entertainment²¹.

Among its assets is Fox Entertainment Group - owner of the film studios of 20th Century Fox (now 20th Century Studios), Fox television network and Fox News Channel. 21CF had its name purposely related to 20th Century Fox studios, representing renewal and dynamism. In the words of Rupert Murdoch²²:

21st Century Fox is a name that draws upon the rich creative heritage of Twentieth Century Fox, while also speaking to the innovation and dynamism that must define each of our businesses through the 21st century. Our new name is inspired by the very first company we acquired nearly 30 years ago as our initial foray into the awe-inspiring world of entertainment

In this scenery, in December 2017 Disney announced in the U.S. that it intended to buy the 21CF for US\$ 52.4 billion, considerably expanding its already extensive portfolio. This undertaking was reviewed by the United States Department of Justice (DOJ/US) and the acquisition agreement was only finalized on March 20, 2019²³.

²⁰Keith Rupert Murdoch is an Australian-American businessman, a majority shareholder in News Corporation. In 2015, he was ranked the 32nd most powerful person in the world and the 76th greatest fortune in the world by Forbes magazine. #28 Rupert Murdoch & Family. **Forbes**. Available at: <https://www.forbes.com/profile/rupert-murdoch/#77372827b1af>. Accessed: 28 sep. 2020.

²¹ KRAFCZYK, Marius Peter. A media and entertainment colossus: the acquisition of 21st Century Fox by The Walt Disney Company. 2019. 98 p. **Dissertação de mestrado**. Gestão Empresarial. Fundação Getúlio Vargas, São Paulo. 2019.

²² RUPERT Murdoch renames News Corp entertainment arm 21st Century Fox. **The Guardian**. Apr. 2013. Available at: <https://www.theguardian.com/media/2013/apr/17/rupert-murdoch-21st-century-foc-news-corp>. Accessed: 24 aug. 2020.

²³ JEONG, Suk Joo. Disney's Acquisition of Fox and the Changing Media Environment in the U.S. **Journal of Convergence for Information Technology**. Vol. 10, n. 1, pp. 28-34, 2020. DOI: <https://doi.org/10.22156/CS4SMB.2020.10.01.028>. Available at: <https://www.koreascience.or.kr/article/JAKO202011563174231.page>. Accessed: 10 aug. 2020.

As a result, the superheroes Deadpool and X-Men found themselves under the same roof as Captain America and his companions, heroes with the highest grossing film in cinema history: The Avengers (“The Avengers”)²⁴.

The operation in the United States included the acquisition of television channels and in addition to its own channels and ESPN, Disney now has National Geographic, FX and its variations (National Geographic Wild, FXM, FXX)²⁵.

It is important to highlight the acquisition of Fox Television Studio, which produces traditional programs (The Simpsons and Modern Family) and also the gains related to the Hulu streaming platform: before the transaction, Disney and 21CF each held 30% of the company's shareholding control. After the operation, Disney became the majority with 60% participation in the control of the online streaming platform²⁶⁻²⁷.

Hence, leading with 16.23% market share²⁸ in the box office market in the United States in 2018, the company positioned itself even ahead of its five, now four, largest competitors in the country, since 21CF held 11.56% participation in this market²⁹. Furthermore, market power could eventually be inferred from its own earnings: in 2018 Disney was the box office leader in 2018 with \$7.3254 billion, behind only Disney's own record of \$7.6053 billion in 2016³⁰.

With such economic power, it was necessary to do an antitrust analysis in Brazil.

In Brazil, the companies submitted to the assessment of the Administrative Council for Economic Defense - CADE in July 2018 a proposal for the acquisition of 21CF

²⁴ VINGADORES: Ultimo bate recorde de bilheteria. **Forbes**. Apr., 2019. Available at: <https://forbes.com.br/last/2019/04/vingadores-ultimo-bate-recorde-de-bilheteria/>. Accessed: 10 aug. 2020.

²⁵ THE WALT DISNEY COMPANY. **Fiscal Year 2019 Annual Financial Report**. Sep., 2019. Available at: <https://thewaltdisneycompany.com/app/uploads/2020/01/2019-Annual-Report.pdf>. Accessed: 10 aug. 2020.

²⁶ Ibidem., Sep., 2019.

²⁷ JEONG, Suk Joo. Disney's Acquisition of Fox and the Changing Media Environment in the U.S. **Journal of Convergence for Information Technology**. Vol. 10, n. 1, pp. 28-34, 2020. DOI: <https://doi.org/10.22156/CS4SMB.2020.10.01.028>. Available at: <https://www.koreascience.or.kr/article/JAKO202011563174231.page>. Accessed: 10 aug. 2020.

²⁸ On market share and relevant market: “Substantial market share (or market share) is closely related to the performance of a dominant position in a given relevant market; however, it is a necessary condition, but not sufficient for its viability”. (DOMINGUES, Juliana Oliveira; GABAN, Eduardo Molan. **Direito Antitruste**. 4^a ed. São Paulo: Saraiva, 2016).

²⁹ RICHTER, Felix. **Statista**. Disney-Fox Deal to Shake Up the Movie Industry. Jul., 2018. Available at: <https://www.statista.com/chart/12307/market-share-of-major-film-studios/>. Accessed: 01 aug. 2020.

³⁰ THE WALT DISNEY COMPANY. **The Walt Disney Studios Hits \$7 Billion in Global Box Office for 2018**. Dec., 2018. Available at: <https://thewaltdisneycompany.com/the-walt-disney-studios-hits-7-billion-in-global-box-office-for-2018/>. Accessed: 01 aug. 2020

by Disney since they reached the criterion that at least one of the groups / companies recorded in the last balance sheet annual gross revenue or total turnover in the country equivalent to (or greater than) 750 million reais, while the other group registered at least 75 million reais³¹.

The justification was that the acquisition of 21CF by Disney would allow improvements in the production of content to users, in new forms of distribution and a reduction of US \$ 2 billion in the costs of the activities of the companies involved, arising from the efficiencies generated worldwide with the business combination. Then, there would be the possibility of additional investments in technology and content, according to the companies' declaration to CADE.

Disney claimed that it could expand its creative activities and narrative capabilities and its global presence by delivering more attractive entertainment experiences and responding to consumer demand for content consumption, as well as diversifying its presence in growing markets around the world.

Although, the acquisition implied competitive concerns, including the potential exercise of negotiating power in relation to small pay-TV operators³². Some companies intervened in the case, such as Simba Content Intermediação e Agenciamento de Conteúdos Ltda., which later announced its withdrawal as an interested third party, Warner Media LLC, Sky Serviços de Banda Larga Ltda. and the NeoTV Association. Such companies generally claimed that Disney's acquisition of 21CF could strengthen the companies' dominant position and generate other anti-competitive effects in certain relevant markets, raising sports channels as a concern.

CADE's General Superintendence verified that the proposed operation would generate horizontal overlaps and vertical integrations that deserved to be verified in some

³¹ CADE. Ato de Concentração n. 08700.004494/2018-53. **Site do Conselho Administrativo de Defesa Econômica – CADE**. 2018. Available at: <https://bityli.com/0a7F6>. Accessed: 02 aug. 2020.

³² It is worth mentioning the case of the administrative proceeding generated by Neo TV in the Economic Law Secretariat of the Ministry of Justice against Globosat, accusing it of anti-competitive practices. At the time, the outcome of the case, in 2006, took place with the signing of a Term of Commitment for Termination, so that Globosat would have to offer, both to non-affiliates and its affiliates, the same products and prices. In the following year, 2007, in the face of Neo TV's allegations of non-compliance by Globosat, Globosat presented a new agreement proposal to CADE, in which, among other stipulations, Net TV could offer 20% of its subscribers the package of Globosat's "basic mini" channels and would have "a one-year grace period in five-year contracts to achieve 80% adherence to the new package". The proposal was accepted by CADE. (ERDELYI, Maria Fernanda. Cade approves new rules for selling Globosat channels. **Conjur**. fev. 2007. Available em: https://www.conjur.com.br/2007-fev-28/cade_aprova_novas_regras_venda_canais_globosat. Accessed em: 28 sep. 2020).

markets, other than the distribution markets for home entertainment, licensing for consumer products, music licensing, licensing for publications and video games.

Two markets stood out and drew attention for the possible presence of relevant overlap that could generate sufficient market power to alter competitive variables: i) the markets for distribution of films for cinema exhibition and ii) those for the operation and licensing (or supply) of channels for pay TV.

After analysis, considering the probability of the potential use of market power and the potential rivalry, it was concluded that the market for distribution of films for cinema exhibition would tend to generate problems, as companies face strong rivalry. CADE understood that no more unfavourable terms of trade could be imposed on national exhibitors than those that could be imposed before the transaction³³.

Therefore, the competitive concern turned to the pay-tv programming market, more specifically in relation to basic sports channels³⁴, remembering that this market had been in the focus of CADE in the past.³⁵

In view of the identification of significant barriers to entry in the pay-tv market for basic sports channels and the absence of a new agent on the horizon that could represent effective rivalry, the acquisition highlighted concerns about the bargaining power that companies (Disney and 21CF) - bargaining power - they would have in relation to small pay-tv operators.

³³ CADE. Ato de Concentração n. 08700.004494/2018-53. **Site do Conselho Administrativo de Defesa Econômica – CADE**. 2018. Available at: <https://bitly.com/0a7F6>. Accessed: 02 aug. 2020.

³⁴ The General Superintendence of CADE decided to consider the monopoly power resulting from the operation and carry out analysis in relation to channels of the same genre. Of nine genres, there was a horizontal overlap in relation to children and basic sports and, due to the existence of other programmers with significant participation in the first, there would be no competitive concerns in relation to this.

³⁵ In the football universe, in 2010, it was signed between the so-called “Clube dos 13” (C13) and the CADE Performance Commitment Term, which put an end to the administrative process (nº 08012.006504 / 1997-11) that was being processed at the Law Secretariat Economic, established to investigate possible anti-competitive practices of associations of football clubs and television stations in the negotiation of broadcasting rights for the Brazilian football championships. Among the obligations assumed by C13, the following stand out: to refrain from using “preference clause” or another of the same nature in the new marketing contracts for the rights to broadcast CBFA games, in the five modalities; to define clear and objective criteria in the bidding process for the sale of transmission rights. With regard to TV Globo, the advantage, until then, of 10% applied on the value of other competitors' proposals was removed, precisely because it violated the rule of not using a preference clause, insofar as this type of clause mitigates market competition.(CADE, Processo Administrativo nº 08012.006504/1997-11, Requerentes: União dos Grandes Clubes do Futebol Brasileiro – Clube dos treze, Advogado: Ricardo Inglez de Souza. Relator: Conselheiro Fernando de Magalhães Furlan. **Site do Conselho Administrativo de Defesa Econômica – CADE**. Available at: <https://bitly.com/B7cmi>. Accessed: 28 sep. 2020).

The reduction in the number of economic agents in the basic sports channels market resulting from the Proposed Operation brings, in fact, competitive concerns because they are the last in a series of events that represent an increase in the concentration level of the sports channel programming market. With the recent departure of Esporte Interativo from the market, of five sports channels available until the middle of this year for Pay TV subscribers, there are now only three.³⁶.

In addition to the likely effect on prices identified by CADE, it was noted that there would be an impact on quality and diversity, with a reduction in incentives for variety and investments in content production, in addition to the limitation of programs. From this analysis, it was concluded that there would be significant risks of decreasing the well-being of viewers of sports channels via pay-tv.

After making the mentioned considerations and an analysis, CADE approved the operation in February 2019 with restrictions, highlighting the need to sell the Fox Sports channel to allow the market structure to maintain competitive pressure with three sports channels for Brazilian consumers, SporTV, ESPN and a new company that acquired Fox Sports. In addition, Disney has agreed not to hire the sports leagues currently broadcast by the Fox Sports channel for a certain period, not to reacquire the assets that are sold and to offer the future buyer the option to license the trademark for free³⁷.

³⁶ CADE. Voto - Ato de Concentração n. 08700.004494/2018-53. Ato de Concentração. Procedimento Ordinário. Requerentes: The Walt Disney Company (Brasil) Ltda. e Twenty-First Century Fox, Inc. Aquisição e controle. Mercados de Produção, licenciamento e programação de conteúdo audiovisual para TV por Assinatura e para distribuição cinematográfica. Sobreposições horizontais. Altas barreiras e rivalidade insuficiente no mercado de programação para TV por Assinatura. Possibilidade e probabilidade de exercício de poder de mercado. Remédios comportamentais propostos inicialmente pelas Requerentes mitigam as preocupações concorrenciais. Aprovação condicionada ao cumprimento de restrições comportamentais unilateralmente impostas. Conselheira Relatora: Polyanna Ferreira Silva Vilanova, 27 fevereiro de 2019. **Site do Conselho Administrativo de Defesa Econômica – CADE.** Available at: <https://bityli.com/VnkYS>. Accessed: 02 aug. 2020.

³⁷ CADE. Voto - Ato de Concentração n. 08700.004494/2018-53. Ato de Concentração. Procedimento Ordinário. Requerentes: The Walt Disney Company (Brasil) Ltda. e Twenty-First Century Fox, Inc. Aquisição e controle. Mercados de Produção, licenciamento e programação de conteúdo audiovisual para TV por Assinatura e para distribuição cinematográfica. Sobreposições horizontais. Altas barreiras e rivalidade insuficiente no mercado de programação para TV por Assinatura. Possibilidade e probabilidade de exercício de poder de mercado. Remédios comportamentais propostos inicialmente pelas Requerentes mitigam as preocupações concorrenciais. Aprovação condicionada ao cumprimento de restrições comportamentais unilateralmente impostas. Conselheira Relatora: Polyanna Ferreira Silva Vilanova, 27 fevereiro de 2019. **Site do Conselho Administrativo de Defesa Econômica – CADE.** Available at: <https://bityli.com/VnkYS>. Accessed: 02 aug. 2020.

However, even with the efforts of the requesting parties, the sale was not successful due to the specific market characteristics and the global health emergency scenario. Lastly, the sale of the Fox Sports channel could not be achieved due to the lack of interest from third parties.

The divested business, in this case, the Fox Sports do Brasil channel, incurred losses due to the presence of high costs from 2016 unaccompanied by the increase in advertising revenue³⁸. The channel would not sustain itself as a viable business if it was separated from the whole of the company, which alienated two interested companies³⁹. Besides that, the pandemic of the new coronavirus compromised the budget of many companies and held back investments.

Given these two reasons and the fact that the companies did not measure efforts to comply with what had been established, the operation was revised to establish behavioural remedies⁴⁰ that would allow the acquisition that, in general, would be beneficial⁴¹.

In this new scenario, it was established in May 2020⁴², under penalty of a fine, that Disney would distribute through at least one of the channels the sporting events listed in the agreement for three years from the date of signature of the agreement or until the expiration date of the Disney or 21CF contract in relation to the broadcast rights, whichever comes first.

³⁸ VAQUER, Gabriel. Disney assume Fox Sports com déficit milionário de R\$ 120 milhões. **UOL**. Jun., 2020. Available at: <https://www.uol.com.br/esporte/ultimas-noticias/2020/06/01/disney-assume-fox-sports-com-deficit-milionario-de-r-120-milhoes-veja.htm?cmpid=copiaecola>. Accessed: 15 aug. 2020.

³⁹ CADE. Ato de Concentração nº 08700.004494/2018-53. Interessado Não Qualificado. Ato de concentração. Procedimento ordinário. Requerentes: The Walt Disney Company (Brasil) Ltda. e Twenty-First Century Fox, Inc. Aquisição e controle. Mercados de produção, licenciamento e programação de conteúdo audiovisual para tv por assinatura e para distribuição cinematográfica. Sobreposições horizontais. Revisão de remédio estrutural (desinvestimento) que não obteve sucesso em sua implementação. Aprovação condicionada ao cumprimento de restrições comportamentais estabelecidas em acordo em controle de concentrações. [...]. Conselheiro Relator: Luis Henrique Bertolino Braidó, may, 2020. **Site do Conselho Administrativo de Defesa Econômica – CADE**. Available at: <https://bityli.com/q9WYN>. Accessed: 15 aug. 2020.

⁴⁰ About it: CABRAL, Patrícia Semensato. **Remédios Antitruste em atos de concentração**: uma análise da prática do CADE. 2014. 105 f., il. Dissertação (Mestrado em Economia do Setor Público) - Universidade de Brasília, Brasília, 2014. Available at: <https://repositorio.unb.br/handle/10482/17512?locale=fr>. Accessed: 29 sep. 2020.

⁴¹ The review of the transaction was provided for in clauses 3.1 and 14.3 of the ACC signed in February 2019 with CADE.

⁴² CADE. Acordo em Controle de Concentração - Ato de Concentração nº 08700.004494/2018-53. Requerentes: The Walt Disney Company (Brasil) Ltda. e Twenty-First Century Fox, Inc. May, 2020b. **Site do Conselho Administrativo de Defesa Econômica – CADE**. Available at: <https://bityli.com/GqddI>. Accessed: 15 aug. 2020.

Besides that, Disney should ensure that Fox Sports do Brasil remains an attractive option for consumers until January 1, 2022, offering at least its main channel separately from the others licensed by it, while maintaining the use of the trademark in a consistent way. In addition, Disney should show the events of the Copa Libertadores da América, without prejudice to the distribution of such events on other channels or media.

Lastly, if Disney chooses to end distribution of the Fox Sports do Brasil channel in January 2022, it will return the Fox Sports trademark to its owners or successors without opposing its use or licensing, even if it is by Fox Corporation or third parties authorized.

The agreement was signed with CADE and the acquisition was concluded, apparently bringing positive impacts to consumers in the market in which Disney and 21CF operate, given the potential increase in the variety of content available and new forms of distribution.

Furthermore, if the forecast is met, the decrease in costs will lead to new developments in technology and innovation. In particular, the acquisition stands out for football fans who will be able to see the best events on both channels, including those that were exclusive to one or another other channel.

3 THE CONSEQUENCES OF THE TRANSACTION AND STREAMING DISNEY +

Of all the consequences to Brazilians lovers of soccer to lovers of the world of superheroes, the global operation between Disney and Fox, at first in the United States, had an impact in several countries, including Brazil. One of the aspects of the acquisition also reverberated in Brazil, despite of not having received much attention, refers to the online streaming service, whose growth has been exponential.

It is not difficult to notice that many people have subscribed to the streaming platforms, which offers a range of films, series and television programs online, without commercials, on demand, in other words, with the entire portfolio available to the user, so that they can watch whatever they want and whenever they want, mainly in pandemic times.

Given this convenience, as well as the more accessible prices of these platforms, the expansion of this type of technology has reached more and more users. Cable television, which generally represents a significant part of the profit of the audiovisual market conglomerates, has been losing more and more viewers, who are transmuting to streaming

services. It was this service that made Netflix - a 1997 DVD rental company - the largest online streaming company⁴³.

In a market with so many specificities, only another company (or economic group) of considerable market power could do it: Disney. It turns out that, unlike Netflix, which released ninety-three films in 2018, Disney released ten. It is in this context of technological advancement that Disney announced, in August 2017 – months before announcing the acquisition of 21CF – that it would also launch its streaming service, inserting itself in the changing scenario that the entertainment industry finds itself.

Given these considerations, it appears that the purchase of 21CF may not only be, but also, a strategy for its growth in this market: the acquisition of Pixar in 2006 was important for Disney to recreate its animations, and the acquisitions of Lucasfilm - and the Star Wars franchise - and Marvel, certainly, were extremely relevant for the company to strengthen its base portfolio.

Following the same track record, the acquisition of 21CF tends to strengthen Disney's reach around the world, especially since the acquired company has a huge international network that corresponds to three hundred and fifty channels in one hundred and seventy countries⁴⁴.

Thereby, it is not difficult to notice the irradiation of the possible effects of this acquisition. With all the portfolio expansion acquired by Disney, its strategy of launching itself on streaming platforms gains strength, offering consumers three service options: Disney Plus (Disney +), launched in November 2019, more targeted to family programs, including National Geographic programs, the productions of the famous Pixar, Marvel and Lucasfilm; ESPN Plus, started in 2018 for sports consumers; and Hulu, which had 30% of its assets acquired by Disney through the purchase of 21CF (totaling 60%)⁴⁵.

The great bet for the success of Disney +, the most recently launched platform, for Bob Iger, Disney CEO, is the affinity that its consumers demonstrate to its content. It is precisely in the strength of his brand – including Marvel, Pixar, Star Wars and National

⁴³ JEONG, Suk Joo. Disney's Acquisition of Fox and the Changing Media Environment in the U.S. **Journal of Convergence for Information Tecnology**. Vol. 10, n. 1, pp. 28-34, 2020. DOI: <https://doi.org/10.22156/CS4SMB.2020.10.01.028>. Available at: <https://www.koreascience.or.kr/article/JAKO202011563174231.page>. Accessed: 10 aug. 2020.

⁴⁴ Ibid., 2020.

⁴⁵ Ibid., 2020.

Geographic – that Iger maintains his optimism with the launch of the platform, forecasting about sixty to ninety million subscribers, against the one hundred and fifty millions of Netflix⁴⁶.

It is undeniable that Netflix, the leader in the streaming service, has felt some intimidation not only by Disney, but also by other companies that have developed and invested in this service⁴⁷, such as Amazon, which has been in the market for years, but with great expansion in worldwide in 2016, and the newcomer in this market: Apple. We remember that Apple announced, in March 2019, the launch of Apple TV +.⁴⁸

In Brazil, some issues have made it difficult for Disney + to enter the market. Announced on Twitter (official company account) the launch of the platform Disney + in November 2020, in Latin America, including Brazil, “Claro” - a telephone company that also offers cable television services, including the “Claro Video” and “Now” -, put obstacles to the new platform, starting a litigation, following a complaint lodged by “Claro” - in Anatel – Nacional Telecommunications Agency⁴⁹.

According to “Claro”, Law 12.485/2011, known as “Lei da TV Paga” or “Lei do SeAC”, which determines the mandatory minimum national content on television channels by subscription, should be applied to companies that offer online streaming services⁵⁰. In the complainant's argument, Fox Latin America and Topsports Ventures, by linking their channels to a subscription system via the internet – online streaming services, such as Disney +, would be causing damage to competition by providing this service without complying with the legal and regulatory obligations of the SeAC Law (Conditional Access Service), including regarding its portfolio.

⁴⁶ DISNEY CEO Bob Iger on Netflix and the Fox deal. **CNBC**. Apr., 2019. Available at: <https://www.cnbc.com/video/2019/04/12/disney-ceo-bob-iger-on-netflix-and-the-fox-deal.html>. Accessed: 15 aug. 2020.

⁴⁷ JEONG, Suk Joo. Disney’s Acquisition of Fox and the Changing Media Environment in the U.S. **Journal of Convergence for Information Technology**. Vol. 10, n. 1, pp. 28-34, 2020. DOI: <https://doi.org/10.22156/CS4SMB.2020.10.01.028>. Available at: <https://www.koreascience.or.kr/article/JAKO202011563174231.page>. Accessed: 10 aug. 2020.

⁴⁸ APPLE unveils Apple TV+, the new home for the world’s most creative storytellers. **Site da Apple**. Mar., 2019. Available at: <https://www.apple.com/newsroom/2019/03/apple-unveils-apple-tv-plus-the-new-home-for-the-worlds-most-creative-storytellers/>. Accessed: 15 aug. 2020.

⁴⁹ ANATEL. Processo nº 53500.022476/2019-45. **Site da Anatel – Agência Nacional de Telecomunicações**. Available at: <https://bit.ly/3kZEA17>. Accessed: 30 aug. 2020.

⁵⁰ Capítulo V da Lei 12.485 de 2011, artigos 16 a 24.

However, a great discussion revolves around whether the SeAC Law is applicable on the modality of online streaming services, an especially relevant issue since the amount of national content provided by law is determined according to the hours of content shown on the weekly schedule - which evidently does not seem viable in the on-demand format⁵¹.

As noted above, not only would Disney + have barriers to be overcome, but also Netflix itself: in 2019, the company together with “Globo” defended in the Federal Senate so that streaming services would not participate in the application of the legislation⁵². The discussion at ANATEL, which included the analysis of 177 contributions from companies and associations, ended on September 9, 2020, with the vote of the Counsel Emmanoel Campelo⁵³.

Thus, the entire ANATEL’s Directors voted for the non-inclusion of Programmed Audiovisual Content Offers via the Internet through Subscription (sVOD) as a Conditional Access Service (SeAC), regulated by Law 12.485⁵⁴. According to the vote of Counselor Emmanoel Campelo, “insofar as there is a need to contract a telecommunication service in order to enjoy access to channels over the internet, the characterization of SeAC, itself a telecommunication service, is excluded”.

Therefore, the entry of Disney + as a new player in the streaming market on demand in Brazil seems to no longer have so many barriers, leaving fans of the company of the most memorable castle of the children's imagination each day more anxious for the arrival of the new platform, considering, also, the broad portfolio acquired from 21CF

As known, it is not only on the streaming market that the acquisition of 21CF by Disney has consequences. It had a great impact on sports channels programming summoning the attention specially of Brazilian soccer lovers. Since the 11th of January 2021, Disney

⁵¹ CLARO tenta barrar na justiça estreia do Disney+ no Brasil. **Disney Plus Brasil**. Jul., 2020. Available at: <https://disneyplusbrasil.com.br/claro-tenta-barrar-na-justica-estrela-do-disney-no-brasil/>. Accessed: 15 aug. 2020.

⁵² VALENTE, Jonas. Senado pode mudar regras para TV paga e online; entenda a polêmica. **Agência Brasil**. Aug., 2019. Available at: <https://agenciabrasil.ebc.com.br/geral/noticia/2019-08/senado-pode-mudar-regras-para-tv-paga-e-online-entenda-polemica>. Accessed: 10 aug. 2020.

⁵³ Emmanoel Campelo had requested views at the 888th Collegiate Meeting, presented at the 10th Extraordinary Meeting.

⁵⁴ ANATEL. **Anatel delibera sobre enquadramento de conteúdos pagos na internet**. Sep. 2020. Available at: <https://www.anatel.gov.br/institucional/component/content/article/104-home-institucional/2653-anatel-delibera-sobre-enquadramento-de-conteudos-pagos-na-internet>. Accessed: 10 sep. 2020.

decided to remove all the live news programs from Fox Sports channel, taking “Fox Radio Sports” off the air. Actually, another news programs were already closed⁵⁵.

This decision may be a consequence of CADE’s decision to maintaining Fox Sports channel until 2022, despite of all the channel dues. Therefore, this change is followed by the idea of reducing the losses, which means that a great part of the staff were fired.

According to Disney, the ESPN will be hosting all the news programs, including some journalists originally from Fox Sports, and Fox Sports will only be responsible to transmit great sports events like “Libertadores da America”, “Premier League”, “LaLiga”, “Liga Europa”, “Campeonato Português”, “Campeonato Argentino”, which were all transferred from ESPN. In addition, “MotoGP”, “Nascar” and “Copa do Nordeste” will continued being transmitted by Fox Sports.

Brazilian soccer fans will now have a little less news programs to keep up to date on their favorite teams. However, the most affected were certainly the employees laid off Fox Sports Channel⁵⁶. **4 PRELIMINARY CONSIDERATIONS**

The entertainment and creativity market continues to grow with the reduction of barriers, which inserts it, more and more, in the world market. Such growth must be observed even in Brazil. In 2020, however, this market - as well as others - faced additional and unimagined challenges (such as measures of social isolation that impacted many studio productions) that slowed its progress without paralyzing it.

On the national scene, the acquisition of 21CF by Disney suffered some problems. Thus, the focus of this study was the transaction submitted to CADE in 2019, and

⁵⁵ See VAQUER, Gabriel. Disney encerra programas exclusivos do Fox Sports: canal ficará exclusivo para eventos. **Uol Esporte vê TV**. Available at: <https://www.uol.com.br/esporte/ultimas-noticias/2021/01/11/disney-encerra-programas-do-fox-sports-canal-ficara-exclusivo-para-eventos.amp.htm>. Accessed: 29 jan. 2021.; VIERIRA, Renan. Fox Sports deixa de ter programas e vira canal de reprises e jogos ao vivo. **Observatório da TV**. Available at: <https://observatoriodatv.uol.com.br/noticias/fox-sports-deixa-de-ter-programas-e-vira-canal-de-reprises-e-jogos-ao-vivo>. Accessed: 29 jan. 2021; DISNEY encerra programação da Fox Sports no Brasil. **IstoÉ**. Available at: <https://istoe.com.br/disney-encerra-programacao-da-fox-sports-no-brasil/>. Accessed: 29 jan. 2021.

⁵⁶ ANDRADE, Vinícius. Após acabar com programas do Fox Sports, Disney inicia nova leva de demissões. **Notícias da TV UOL**. Available at: <https://noticiasdatv.uol.com.br/noticia/televisao/apos-acabar-com-programas-do-fox-sports-disney-inicia-nova-leva-de-demissoes-49254>. Accessed: 29 jan. 2021; VIEIRA, Renan. Disney promove onda de demissões na ESPN e na Fox Sports. **Observatório da TV**. Available at: <https://observatoriodatv.uol.com.br/noticias/disney-promove-onda-de-demissoes-na-espn-e-no-fox-sports>. Accessed: 29 jan. 2021; RENÓ, Julia, Com demissões e mudanças na programação, como ficará a Fox Sports? **Comunique-se Portal**. Available at: <https://portal.comunique-se.com.br/como-ficara-a-fox-sports/>. Accessed: 29 jan. 2021.

its effects, mainly in relation to pay TV sports channels. This is because, with the acquisition, in addition to the likely effect on prices, there would allegedly be a potential impact on quality and diversity, with reduced incentives for variety and investments in content production, in addition to the limitation of programs.

Thus, the transaction was conditioned to the sale of the Fox Sports channel. However, the competitive remedy was not successful for the reasons explained above: i) the channel sold separately incurred losses, ii) the health emergency hurt the economy and iii) the buyer who was interested was not accepted by CADE. Therefore, the agreement signed had to be reconsidered.

In May 2020, the structural remedy originally established in February 2019 was revised, behavioural remedies were determined, and it is generally expected that the transaction will bring efficiencies in the production of content to users, in new forms of distribution and additional investments. in technology, without harming consumers of sports channels due to the lack of sale of Fox Sport.

One of the direct consequences of the acquisition of 21CF, the increase in the Disney portfolio, which, in addition to further diversifying the content distributed, promises to launch the streaming service Disney + in Brazil, and to compete, for example, with major players in this market, such as the Netflix and Amazon Prime platforms.

And as a famous passage from the film The Lion King 3 says “to get what you want, you must look beyond what you see”, so it has been the story of Disney, leaving the antitrust authorities to analyse the company's strategies with a look pro-competition technical and innovation.

5 OUR PROPOSAL FOR THIS PAPER

In times of pandemic caused by Sars-Cov-2 since the beginning of 2020, the market changed completely, mainly the digital sector and that is one of the reasons that we can see the streaming growing up in Brazil. Although, it is important to increase competition in this market in general, offering people more content and options. One of important topics that arises with this growth of streaming platforms is the exclusivity of content. The differentiation of the content and portfolio looks to be the mainly way that they can compete.

Specially on pandemic world and all the closed movie theatres, the exclusivity of releases – movies or series – may be a great opportunity of getting more subscribers.

This kind of competition, among exclusive content, may result in exclusive anticompetitive agreements between producers, studios, and the streaming platforms. These agreements can be expensive to platforms, if a great producer force them to pay higher fees for the exclusivity, but the opposite can happen too: powerful streaming platforms may force the studios to agree with this exclusive distribution of the content⁵⁷. In both cases, is necessary to study the potential effects on consumers of this exclusivity agreements.

Our proposal to finish this draft paper is to work on that topic, bringing an antitrust analysis of this possible scenarios through case studies and comparative legislation not only in Brazil, but around the world.

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⁵⁷ WIPO. **Streaming Wars**. Available at: https://www.wipo.int/edocs/infogdocs/creative_industries/en/streaming-wars/#streaming-wars. Accessed: 05 feb. 2021.

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