FOURTH SUPPLEMENT TO MEMORANDUM 2024-24

Antitrust Law: Status Update (Experts, Panelists, and Public Comment)

This supplement presents additional information about individuals presenting the expert reports on Mergers and Acquisitions and Technology Platforms, presented at the Commission's June 20, 2024, meeting and the individuals or organizations serving on a panel to respond to the expert reports.[1] It also includes additional public comment that the staff has received relative to the Antitrust Study.

The biographical information on the panelists and the public comment are attached as Exhibits to this supplement.

Exhibits *Exhibit page*

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EXPERTS

The expert report on Mergers and Acquisitions (Group 2) will be presented by Professor John Kwoka and Professor Prasad Krishnamurthy. Professor Kwoka's biographical information can be found in Memorandum 2023-11, at page 8. Professor Krishnamurthy's biographical information can be found in Memorandum 2023-7, at page 10.

The expert report on Technology Platforms (Group 5) will be presented by David Kesselman and Abiel Garcia.[2] David Kesselman's biographical information can be found

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[1] Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission's website (www.clrc.ca.gov). Other materials can be obtained by contacting the Commission's staff, through the website or otherwise. The Commission welcomes written comments at any time during its study process.

Any comments received will be a part of the public record and may be considered at a public meeting. However, comments that are received less than five business days prior to a Commission meeting may be presented without staff analysis.

[2] In addition to biographical information on Abiel Garcia, Group 5 provided information on two contributors that the group had not previously provided to the Commission:

> Kevin Teruya is a Co-Chair of the Antitrust & Competition Practice at Quinn Emanuel and a partner in the firm's Los Angeles office. He specializes in complex business litigation, focusing on antitrust, unfair competition, and intellectual property matters. He has litigated numerous cases on behalf of plaintiffs and defendants in state and federal courts in California and other states across the country. He has been named as a "Top Antitrust Lawyer" by the Daily Journal, a "Super Lawyer" by Super Lawyers, and one of the 500

in Memorandum 2023-11, at page 5. Abiel Garcia's biographical information is below:

> Abiel Garcia is a partner at Kesselman Brantly Stockinger. Abiel represents both plaintiffs and defendants in antitrust litigation. He also advises clients on antitrust compliance matters. He has been named as "One to Watch" by Best Lawyers and is a former officer of, and advisor to, the California Lawyer's Association Antitrust and Unfair Competition Law's Section, a member and former officer of the executive committee of the antitrust section of the Los Angeles County Bar Association, and a contributing-author to the California State Antitrust and Unfair Competition Law treatise. Before joining Kesselman Brantly Stockinger, Abiel was an associate at a large corporate law firm and was also a Deputy Attorney General for California's Department of Justice, Office of the Attorney General.

PANELISTS

At the June meeting, following presentation of the expert working group reports, four individuals or organizations will participate in a panel to present responses to the expert reports.

On behalf of the Chamber of Progress:[3] Professor Jonathan Barnett

In his own capacity: Professor John Newman

On behalf of Yelp:[4] David Segal, Peter Curzon, and James Daire

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leading plaintiff financial lawyers in the nation by Lawdragon. He is a former officer of and advisor to the executive committee of the antitrust section of the State Bar of California, a member and former officer of the executive committee of the antitrust section of the Los Angeles County Bar Association, and a former member of the editorial board of the California State Bar antitrust treatise.

Brantley Pepperman is an associate in Quinn Emanuel's Los Angeles office. Brantley represents both plaintiffs and defendants in antitrust, class action, and other complex litigation. He has been named a "Rising Star" in antitrust litigation by Super Lawyers and serves as a contributor to the annual *California State Antitrust and Unfair Competition Law* treatise. Brantley first joined the firm in 2018 and previously served as a law clerk to the Honorable Christina A. Snyder of the United States District Court for the Central District of California. He earned his law degree from Loyola Law School and his bachelor's degree in international relations from the University of Southern California.

[3] According to its website, the Chamber of Progress "is a new tech industry coalition devoted to a progressive society, economy, workforce, and consumer climate. [The Chamber of Progress] back[s] public policies that will build a fairer, more inclusive country in which all people benefit from technological leaps." The website also indicates "[t]he Chamber's corporate partners range from large multinational companies to smaller startup businesses across a variety of technology industries."

The Chamber of Progress has previously submitted public comment relating to the expert report of Technology Platforms that can be found as an Exhibit to the Second Supplement to Memorandum 2024-24 at page EX 85. The Chamber also commissioned a study by Professor Barnett that was submitted to the Commission and can be found as an Exhibit to Memorandum 2024-5 at page EX 4.

[4] According to its website, "Yelp connects people with great local businesses. With trusted local business information, photos and review content, Yelp provides a one-stop local platform for consumers to discover, connect and transact with local businesses of all sizes by making it easy to request a quote, join a waitlist or make a reservation, and make an appointment or purchase. Yelp was founded in San Francisco in 2004."

On behalf of Google:[5] Aaron Benjamin.

PUBLIC COMMENT

The staff has received a number of public comments relating to the Antitrust Study. The most recent comments are attached as Exhibits to this memorandum.

If the staff receives additional public comments, the comments will be provided in another supplemental memorandum.

Vincent Gonzales, Realtor

This comment was submitted by Vincent Gonzales who is a realtor. This comment expresses concerns about the impact of reforms relating to technology platforms on small businesses.

Writers Guild of America West

This comment was submitted by the Writers Guild of America West (WGAW) and expresses concerns about the consolidation of companies in the media industry.

According to the comment letter, WGAW is a labor union representing over 11,000 writers in the television, film, news, and streaming video industries. More information about WGAW can be found on its website.

Respectfully submitted,

Sharon Reilly
Executive Director

[5] According to its website, Google's "mission is to organize the world's information and make it universally accessible and useful."

Biographies of Panelists

Professor Jonathan Barnett

Jonathan Barnett is the Torrey H. Webb Professor of Law at the University of Southern California, Gould School of Law. He specializes in antitrust and intellectual property law and policy, with a focus on technology markets, and directs the law school's Media, Entertainment & Technology Law Program. He is the author of several books, over 30 articles in scholarly journals, and tens of policy briefs and opeds on antitrust and IP legal and policy issues. He regularly speaks on these issues at conferences and roundtables for academic, industry, and policy audiences. He joined USC in 2006 after practicing law at an international law firm based in New York. He is a graduate of Yale Law School.

Professor John Newman

John Mark Newman is currently a professor at the University of Miami School of Law, where he teaches and writes primarily on antitrust issues, with a particular focus on digital markets. He has served in both federal antitrust agencies, most recently as Deputy Director of the U.S. FTC Bureau of Competition. In that role he oversaw, among other matters, the FTC's monopolization cases against Meta and Amazon and its merger challenges against Meta and Microsoft. He began his career as a trial attorney with the U.S. Department of Justice Antitrust Division. Professor Newman also serves on the advisory boards for the American Antitrust Institute and the Institute for Consumer Antitrust Studies, and on the editorial board of the American Bar Association's Antitrust Law Journal.

David Segal

David Segal joined Yelp in 2023 and serves as Vice President for Public Policy. He previously co-founded and led Demand Progress, an NGO that works on internet freedom and corporate power concerns. He has served as a member of the Providence, RI City Council, and the Rhode Island House of Representatives.

Peter Curzon

Peter Curzon joined Yelp in 2011 and serves as Vice President, Business Development. Peter has led partnerships with leading technology companies across advertising, commerce, data licensing, and M&A. He was previously a technology investment banker at Thomas Weisel Partners.

James Daire

James Daire joined Yelp in 2019 and is an Associate Director, Legal. James heads Yelp's litigation team and was previously a partner in the intellectual property, technology, and data group at Reed Smith.

Aaron Benjamin

Aaron Benjamin has been with Google for over five years, where he leads competition policy for the US and Americas. Before joining Google, Aaron represented and counseled technology firms at the law firm of Wilson Sonsini in Palo Alto. Aaron holds a J.D. from Georgetown University Law Center and was a Third-Year Visiting Student at Harvard Law School.

California Law Revision Commission
c/o Legislative Counsel Bureau
925 L Street, Suite 275
Sacramento, CA 95814

June 5th, 2024

RE: California Law Revision Commission - Study B-750 (Antitrust Law), Technology Platforms Report

Dear Executive Director Reilly and Members of the California Law Revision Commission:

I am reaching out as a small business owner concerned about the California Law Revision Commission's Technology Platforms Report being discussed on Thursday, June 20th.

I've worked as a full-time realtor with Keller Williams Realty—Roseville for just under a decade, and I lead a local group of young professionals through the Roseville Chamber of Commerce. Several years back, I launched the Placer County Business Connection Network to unite business owners throughout the region. We are entrepreneurs, restaurant owners, hoteliers, and non-profit leaders who meet monthly to share best practices and promote business opportunities within our diverse communities.

Realtors like me and many small businesses in my community heavily depend on referrals generated through online reviews and search engines. For example, my Google Business Profile immediately pops up when people search for real estate agents in my area. This free Profile is filled with dozens of five-star reviews along with direct links to my website, contact information, and social media channels. Online visibility has played a huge role in my ability to reach new clients.

I'm concerned that your report and the recommendations you make to the legislature will focus entirely on competition between and among large online platforms and other big companies. These are important considerations, but it is equally important to consider how your policies will impact small businesses that rely on these platforms, especially those of us who benefit tremendously from free platform services and visibility. Policies that seek to break apart platforms or limit their impact, especially their free services like Google Business Profile, will significantly affect my business and many others.

I am not concerned about competition between big tech companies or the Fortune 1000. I am very concerned that small businesses could become the overlooked roadkill of someone's grand competition vision.

Sincerely,

Vincent Gonzales
Realtor
Keller Williams Realty Roseville

June 12, 2024

California Law Revision Commission
c/o Legislative Counsel Bureau
925 L Street, Suite 275
Sacramento, CA 95814

Writers Guild of America West Literature Submission and Comments
RE: Antitrust Law – Study B-750 of the California Law Revision Commission

The Writers Guild of America West (WGAW) is pleased to submit the attached materials to the California Law Revision Commission in the course of its ongoing study and forthcoming recommendations to the state legislature to update state antitrust law. The WGAW is a labor union representing over 11,000 writers in the television, film, news, and streaming video industries.

Decades of consolidation in the media industry have enabled a handful of companies to amass significant power in the industry's labor markets and use this oligopsony power to push down wages for creative workers. Pay and working conditions became so dire that in 2023, 11,500 writers went on strike for nearly five months to fight for their livelihoods. Unless antitrust agencies and lawmakers step in, further consolidation among dominant media firms is on the horizon, putting one of California's key industries in further peril. In its recommendations to update state antitrust law, the Commission has the opportunity to strengthen the state's ability to protect competition in this vital industry.

To illustrate the level of consolidation in our industry and the failure of existing antitrust law to prevent anticompetitive mergers and conduct, we submit to the Commission the following research reports and comment letters published by the WGAW in recent years. What follows is a brief overview of the issues and policy recommendations made in the literature attached.

1. **Broken Promises: Media Mergers and the Case for Antitrust Reform**
   WGAW, December 2021
2. **The New Gatekeepers: How Disney, Amazon, and Netflix Will Take Over Media**
   WGAW, August 2023
3. **Broken Promises Bulletin: How the WBD Merger Hurts Workers and Diversity**
   WGAW, January 2023
4. **Comment on DOJ-FTC Request for Information on Merger Enforcement**
   WGAW, April 2022
5. **Comment on Draft FTC-DOJ Merger Guidelines**
   WGAW and American Federation of Musicians, September 2023

Deregulation and antitrust underenforcement over the last several decades have allowed for multiple waves of vertical and horizontal consolidation in the media industry, leaving fewer and fewer players controlling content production and distribution. The 1993 repeal of the federal Financial Interest and Syndication Rules (Fin-Syn), which had limited

broadcast networks' ability to produce or control the primetime content they aired, unleashed vertical integration among content producers and distributors. A swath of mergers of TV networks and production studios followed, significantly decreasing independent content on broadcast networks. Amid the growth of streaming video and the entry of tech firms like Netflix and Amazon into the media industry, some of the legacy players merged with cable and internet companies (such as Comcast-NBC Universal) and others combined (Disney-Fox). The remaining handful of companies are now focused on dominating the market via pure vertical integration and self-supply for their streaming services, making more consolidation likely and positioning a few powerful companies to be gatekeepers of the media industry.

These gatekeepers have used their increased market power and vertical control of content production and distribution to disadvantage their competitors, raise prices for consumers, limit creative innovation, and push down wages for creative workers. In 2023, writers went on strike after dominant media firms leveraged their power to worsen compensation models and employment practices that had been industry standards for decades. In streaming video, employers used their power to increase job precarity and impose new compensation models that cut out all other industry participants—including writers and independent producers—from sharing in the benefit of the industry's growth. While writers won important compensation gains and protections through their historic strike, the tremendous market power wielded by a handful of employers continues to pose an urgent threat to writers and the industry.

In the last year, all of the major streamers have raised their subscription prices, and many announced intentions to reduce content spending.[i] Absent competitive market dynamics—where such actions from one firm could encourage competitors to increase spending or lower prices to capture market share—the industry's excessive concentration allows an oligopoly of streamers to move in unison on price and spending strategy and leaves consumers to pay more for less.

Despite these anti-competitive conditions, Wall Street continues to demand even more consolidation in the industry. As WGAW's *The New Gatekeepers* report discusses, Disney, Amazon, and Netflix, having increased market control through acquisition and vertical integration, are prime candidates for future mergers, and each has demonstrated that it will abuse its position of dominance when given the opportunity. Significant further consolidation in our industry would be extremely harmful and would result in additional rounds of reactive consolidation, as the few remaining companies seek to scale up in response.

Weak antitrust law and lax enforcement at the state and federal levels have allowed rampant consolidation in the media industry to go virtually unchecked for decades, failing to prevent numerous anticompetitive mergers or to address harmful conduct. High thresholds for presumptions of market power; vertical mergers treated as inherently less likely to cause harm; reliance on econometric evaluation of price impacts; permitting anti-labor harms to be offset by theoretical consumer benefits; and simply failing to consider labor markets entirely have all contributed to the current dearth of competition in media. Too often, promised merger benefits are never realized, and post-merger companies face little or no repercussions for harms including lower wages, higher consumer prices, fewer or worse consumer choices, and less innovation.

With its recommendations to the California state legislature, the Commission has the opportunity to strengthen protections against anticompetitive mergers and harmful conduct, and set an example for the rest of the country. We urge the Commission to incorporate the following priorities into its recommendations:

- Orient law and enforcement towards preventing further consolidation that would harm workers in California's media industry. This must include consideration of worker impacts in mergers, disregarding claimed "efficiencies" and other attempts to "offset" consolidation's harms to workers, and lower barriers to prove antitrust violations such as greater deference to direct evidence of market power.
- Enhance enforcement against abuses of dominance such as self-preferencing, discriminatory conduct, tying, and predatory pricing.
- Conduct regular merger retrospectives and market investigations in key industries such as media and entertainment. Such investigations must allow for corrective measures up to and including structural separations and unwinding mergers proven anticompetitive after the fact.
- Empower the state's antitrust enforcers with clear jurisdiction to regulate anti-competitive behavior in concentrated markets.

Strong state antitrust law is urgently needed as the media industry's few dominant players continue to abuse their position of dominance with workers, consumers, and competitors, and threaten to consolidate even further. Given the significance of the media industry to California's economy, it is critical that the state protect competition in the sector. Strengthened state antitrust law would be an important step to support a vibrant, competitive environment for workers and audiences of the content that writers create.

Respectfully submitted,

Laura Blum-Smith
Director of Research and Public Policy
Writers Guild of America West

Rachel Torres
Political and Legislative Director
Writers Guild of America West

Natalie Schuman
Senior Research and Policy Analyst
Writers Guild of America West

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[i] Kerry Flynn, *Amazon joins flood of streaming service price hikes for 2024*, Axios (December 28, 2023), https://www.axios.com/2023/12/28/amazon-prime-netflix-disney-peacock-streaming-subscription; Alexandra Canal, *2023 was the year your streaming bill got (a lot) more expensive,* Yahoo!Finance (December 16, 2023), https://finance.yahoo.com/news/2023-was-the-year-your-streaming-bill-got-a-lot-more-expensive-165706892.html; MoffettNathanson, *U.S. Media: In The Belly of the Content Spend Slowdown* (March 8, 2024).

BROKEN PROMISES

Media Mega-Mergers and the Case for Antitrust Reform

December 2021

Writers Guild of America West | Los Angeles, CA | wga.org

EX 7

Introduction

Across the U.S. economy, lax antitrust enforcement has given a green light to rampant consolidation, leaving markets across the economy dominated by a few large firms. Federal regulators have demonstrated a deep bias toward merger approval, giving undue deference to speculative economic theories of claimed merger "efficiencies." Too often, the promised merger benefits are never realized, while post-merger companies face little or no repercussions for breaking these promises. Instead, these mergers lead to lower wages, higher consumer prices, fewer or worse consumer choices, and less innovation.

"Media is the poster child for failures of antitrust enforcement."

Media is the poster child for the failures of antitrust enforcement. The past 12 years have seen unprecedented levels of vertical and horizontal consolidation among television distributors and film and television producers, with large mergers alone totaling over $400 billion in deal value.[1] This report provides the evidence of this failure through the lens of the five largest media and telecommunication mergers of the past decade—**Comcast and NBCUniversal (2011); AT&T and DirecTV (2015); AT&T and Time Warner (2018); Charter, Time Warner Cable, and Bright House (2016); and Disney and Fox (2018)**. Over and over, these companies promised lower prices and more choice for customers. However, once regulators cleared the mergers, consumers saw price hikes at AT&T-DirecTV, less diversity of content at Disney-Fox, and fewer streaming choices at AT&T-Time Warner. Less than three years after merger approval, AT&T announced plans to spin off WarnerMedia to reality TV giant Discovery in May 2021, heralding the next wave of media consolidation. Amazon followed a week later with a plan to purchase film and television studio MGM; still more reactive consolidation is guaranteed amid a sudden frenzy of deal speculation.

The time for complacency is over. We are long overdue for systemic changes to the merger review process and enforcement regime in recognition of the harms that years of consolidation have wrought.

MARKET POWER: ECONOMY-WIDE AND SECTOR-SPECIFIC

Uncontrolled merger activity has caused an accumulation of market power across the U.S. economy.[2] A record $2.4 trillion in merger and acquisition ("M&A") deals occurred in 2015, nearly eight times that of 1985; the record for number of deals was broken two years later.[3] In the last two decades, this rampant merger activity has increased concentration in 75% of U.S. industries, with an average increase of 90%.[4] Extreme concentration levels have been documented in markets ranging from meat packing to medical devices and banking to broadband.[5]

The buildup of market power has eroded innovation and performance. Rates of entrepreneurship and business startups have declined across industries, wages are stagnant, and workers change jobs at lower rates,[6] business investment has declined, and productivity growth has slowed,[7] yet U.S. industry profits have been abnormally high, with ever-fewer firms accounting for a greater share of those profits.[8]

EX 8

The Broken Promises of Five Media Mergers

The media and telecommunications industry produces and distributes film, television, and online video programming—including local and national news, sports, and entertainment. The industry has also been subject to perennial efforts toward market dominance through vertical integration. Movie studios in the early twentieth century used ownership of theater chains to strangle independent theaters and producers, television studios and networks merged after repeal of the Financial Interest and Syndication Rules in 1993, and then those combined studios and networks were swallowed by cable and internet companies. In merger after merger, already-massive companies have been allowed to strengthen their control over media by promising increased competition, lower prices, more and better products, but consistently producing the opposite.

The mergers of Comcast and NBCUniversal, AT&T and DirecTV, AT&T and Time Warner, Charter, Time Warner Cable, and Bright House, and Disney and Fox were all approved by the Department of Justice ("DOJ"), the Federal Communications Commission ("FCC"), or the judiciary, despite posing threats to competition and the public interest. The mergers were approved—sometimes despite the explicit recognition of possible harms—because of over-estimated benefits and mistaken faith that company promises could prevent those harms. Many organizations, including the Writers Guild of America West, warned of the dangers of approving each of these mergers. With the benefit of time, we can now document the failures of the current regulatory review process and the substantial harms these mergers caused.

THE CONSUMER WELFARE STANDARD AND THE DECLINE OF COMPETITION ENFORCEMENT

The **consumer welfare standard**, popularized in the 1970s, narrowly focused U.S. antitrust enforcement on short-term consumer price increases in defining illegal mergers or behaviors. Courts and enforcers have widely adopted this standard with the result that mergers are often approved on the basis of "efficiencies" that will lower a company's costs and speculatively deliver lower costs to consumers, even if the merger will significantly decrease competition. It is now widely recognized that the consumer welfare standard has failed to protect competition across many industries and markets.

Comcast-NBCUniversal

In December 2009, as internet-delivered video programming promised to expand video competition, Comcast Corporation announced it would buy a majority stake in NBCUniversal for $13.75 billion, combining the largest provider of cable and internet services with NBCUniversal's two broadcast networks, 26 local television stations, numerous national cable networks, major movie and TV studios, and a 32% stake in Hulu—then the most popular site for online television.[9]

The Washington Post
Democracy Dies in Darkness

FCC: Comcast to pay $800,000 for violating NBCU Venture conditions

During the merger review, Comcast CEO Brian Roberts claimed that the merged company "will have no incentive or ability to restrict competition" and "will not present any potential harm in any marketplace."[10] The merger was approved with an extensive

list of time-limited conditions and commitments from Comcast despite broad recognition of the potential for harm to competitive markets.[11] It did not take long for those harms to manifest.

Anticompetitive Effects

- **Comcast discriminated against rival programmers and distributors.**
  Comcast almost immediately began wielding its enhanced market power over competing programmers and distributors. Rival news provider Bloomberg claimed that Comcast was refusing to place Bloomberg News in the same channel neighborhood as Comcast's affiliated cable news networks, MSNBC and CNBC.[12] Comcast faced similar complaints from The Tennis Channel, Estrella TV, and beIN Sports,[13] later also moving to replace competing Cinemax with its own movie channel, Hitz.[14] Comcast was also accused of refusing to supply programming to a smaller online video provider.[15]

- **Comcast violated pro-competitive broadband requirement.**
  In 2012, the FCC fined Comcast-NBCU for violating its merger commitment to offer and promote a reasonably priced standalone broadband product, a measure intended to prevent Comcast from damaging online video competition.[16]

- **Comcast limited access to TV network apps and rival vMVPDs.**
  When programmers started offering streaming access to their content for customers with MVPD subscriptions, Comcast refused to enable several premium network apps on its own and third-party set-top boxes.[17] Comcast also developed a video streaming device for broadband-only customers that blocks access to rival virtual MVPDs (vMVPDs).[18]

Comcast's post-merger history, even before its merger conditions expired, shows the futility of trying to predict and control how a powerful company can harm competition when incentivized to do so.

AT&T-DirecTV

In May 2014, AT&T announced plans to acquire satellite provider DirecTV for $48.5 billion and over $18 billion in debt, making it the largest satellite TV operator and largest pay TV company in the U.S.[19] AT&T claimed the transaction would allow the merged company to offer bundled broadband, video, and wireless service, and asserted that the lower programming costs and higher revenue per user from bundles would incentivize AT&T to expand its broadband footprint.[20]

Despite acknowledging the potential harms, the FCC approved the merger with conditions, giving significant deference to AT&T's argument about the pro-competitive benefit of a new bundle, and agreed, based on technical economic analysis, that the merger would put downward pressure on prices for broadband and video bundles.[21] This analysis stands at odds with the real-life outcomes.

ars technica

AT&T loses nearly 1 million TV customers after raising DirecTV prices

Price increases helped drive 946,000 customers away from AT&T.

Anticompetitive Effects

❌ **Customers did not want AT&T-DirecTV bundles.**

After an initial increase from pushing former AT&T U-verse customers toward DirecTV,[22] AT&T's total video subscriber base began to shrink, eventually declining 20% a year.[23] AT&T Entertainment Group CEO John Stankey later described the hyped combination of DirecTV and wireless service as an "unnatural bundle" with low customer appeal in an attempt to excuse its failure.[24]

❌ **AT&T-DirecTV raised consumer prices.**

The merger significantly diminished the competitive impact of U-verse video, one of the few overbuilders[25] to add competition to wired pay TV services. To compensate for DirecTV's shrinking subscriber base and the rising cost of programming, AT&T *raised* annual prices for video service by approximately $238.80 and promotional rates by $120 and eliminated promotional discounts.[26]

In early 2021, AT&T partly sold off DirecTV now valued at just $16.25 billion.[27] For the $67 billion merger price tag, millions more homes could have been wired for fiber broadband than the limited expansion commitment required as a condition of the merger's approval.[28] Instead, AT&T's attempt to buy market dominance set the stage for its next acquisition.

AT&T-Time Warner

In October 2016, AT&T announced its intention to acquire Time Warner Inc., a media conglomerate with five of the top twenty basic cable networks including TNT and TBS, pay TV network HBO, Warner Brothers film and TV studio, and a stake in streaming service Hulu. The total transaction value, including net debt, was $108.7 billion.[29]

VICE

AT&T Jacks Up TV Prices Again After Merger, Despite Promising That Wouldn't Happen

AT&T insisted that post-merger "efficiencies" would likely result in lower, not higher rates.

The companies claimed that the merger would lead to billions of dollars in "synergies," along with "new products, better services, more innovation, ever-fiercer competition, and lower consumer prices."[30] The federal court denied a DOJ attempt to block the merger, rejecting the agency's position that cable prices would increase and that the merged entity would have increased incentive to withhold programming from rivals.[31] Despite the court's opinion, the company proceeded to do exactly that.

Anticompetitive Effects

❌ **AT&T raised prices (again) and pushed layoffs.**

The merged company's staggering debt load increased pressure to boost revenues and cut costs. AT&T raised prices on DirecTV Now five times in three years while reducing channel packages, raised administrative fees on wireless bills by an estimated $800 million,[32] and increased the cost of cancelling services.[33] The merged company also conducted significant layoffs in 2019 and 2020.[34]

AT&T reduced choice and pulled content from competitors.
Post-merger, AT&T blacked out HBO and Cinemax on Dish and SlingTV,[35] shut down a series of streaming services serving distinct consumer niches,[36] and withdrew Warner content from Netflix in order to fuel its own vertically integrated streaming service, HBO Max.[37] In December 2020, AT&T directed the entire 2021 Warner Bros. theatrical slate to HBO Max, reducing revenue for theater owners and foreclosing other streaming services from access to the content.[38]

Like the DirecTV purchase, this merger failed its stated goals. Three months after the DirecTV sell-off, AT&T announced a plan to spin off Time Warner to reality TV giant Discovery for $43 billion[39] to create a larger competitor in what is becoming the dominant media market of streaming.

Charter-Time Warner Cable-Bright House Networks

In May 2015, Charter Communications announced an agreement to acquire Time Warner Cable and Bright House Networks for $67 billion, ultimately transforming Charter into the second-largest cable company, second-largest internet provider, and third-largest video provider.[40]

THE VERGE

Charter's higher bill fees could cost some customers nearly $100 each year

Charter argued that the transaction would have no negative impact on competition or prices and would incentivize broadband expansion, and bring faster internet speeds and more affordable service.[41] The reviewing agencies, including several state public service commissions, approved the merger with targeted conditions that ultimately failed to ensure the claimed consumer benefits.

Anticompetitive Effects

Charter reduced choice and raised prices.
Following the merger, Charter removed lower-speed and lower-price broadband options particularly valued by low-income consumers.[42] In 2018, Charter raised prices for broadband, increased broadcast TV surcharges, cable box fees, and some premium package prices,[43] then hiked broadcast TV surcharges again only four months later.[44]

Charter failed to complete promised broadband expansion.
In 2018, the New York Public Service Commission found that Charter had made little progress toward its legally binding commitment to broadband expansion in New York and rescinded regulatory approval for the merger, eventually reaching a settlement wherein Charter agreed to meet its original commitment by 2021.[45] In California, public advocates similarly sought to reopen the state's merger proceeding because Charter refused to provide data to independently verify its broadband expansion progress.[46]

Even conditions focused on investment, rather than behavior, failed to ensure the intended consumer benefit, while consumers also suffered from fewer choices and higher prices.

Disney-Fox

In December 2017, The Walt Disney Company reached a deal to acquire most of 21st Century Fox, including its film and TV studios, most of Fox's popular cable networks, and Fox's share of Hulu. The combination created one company controlling nearly one-third of the cable network market,[47] a 35–40% share of the domestic theatrical box office,[48] and a nearly 30% share of the labor market for professional writers of film and TV programming.[49]

Los Angeles Times

Cinemas worry Disney may leave 'Fight Club' and other Fox classics out of theaters

Bob Iger, Disney CEO, claimed that the merger would increase customer choice, saying "[...] not only will [the consumer] be getting more great content, high-quality content, but they'll be getting it in ways that they demand."[50] The DOJ approved the transaction in June 2018, requiring only that Disney divest Fox's regional sports networks. Shortly thereafter, a predictable cascade of harms unfolded.

Anticompetitive Effects

- ✗ **Disney reduced choice at theaters and threatens independent film.**
  Immediately following the combination with Fox, the new company announced that it would close the Fox 2000 film label and reorient some of 20th Century Fox studio's output toward streaming distribution.[51] Disney later also closed Fox's Blue Sky animation studio, which competed with Disney-owned Pixar and Disney Animation studios.[52] Disney has also removed popular Fox library titles from circulation, depriving many independent theaters of key content.[53]

- ✗ **Disney prioritized its own services.**
  Disney used its increased control of content to launch its own streaming service, Disney+, withdrawing valuable programming from Netflix and ensuring that more customers can only watch Disney content on Disney platforms. Disney also banned Netflix from advertising on its entertainment networks, a major advantage for Disney's streaming service.[54]

- ✗ **Disney has harmed labor through layoffs and monopsony power.**
  Just six months after the merger's official closure, Disney had already announced layoffs for close to 400 workers; analysts predicted that the merger would eventually cost 3,000 jobs.[55] In addition, Disney has exercised its market power over content suppliers to unilaterally push creators and other entertainment industry participants to forego their participation in future licensing revenues on Disney shows.[56]

Disney now operates two of the four largest streaming services in the country, Disney+ and Hulu. Permitting the company to buy a top competitor gives consumers, competitors, and creators an ominous preview of a future dominated by three or four companies controlling content.

Post-Mergers: The State of Media & Telecommunications Markets

Waves of vertical and horizontal consolidation in the media industry have left fewer and fewer players controlling content production and distribution. As deregulation and antitrust underenforcement replaced limits on content ownership and vertical integration, media conglomerates used their market dominance to undermine competition, control terms in labor markets, and decide what content consumers could see.

"Despite record profits for these media conglomerates, median episodic pay for TV writer-producers is nearly the same as it was in 1995."

Disney, AT&T, Comcast, and National Amusements (the parent company of CBS-Viacom) own three of the four major broadcast networks as well as the CW, control nearly two-thirds of basic cable affiliate fees,[57] and accounted for close to 70% of domestic box office in recent years.[58] Despite record profits for these media conglomerates, median episodic pay for TV writer-producers is nearly the same as it was in 1995.[59] Meanwhile, screenwriters contend with reduced theatrical output and fewer creative opportunities.

While the emergence of the online video market, with its lower barriers to entry, temporarily increased competition and led to more quality content, it also spurred the traditional media and telecommunications companies to assert control with even more consolidation. The COVID-19 pandemic then sharply accelerated the growth of streaming video and its importance for content players. The remaining handful of conglomerates, plus Netflix, are now focused on dominating the market via a pure vertical integration model in which one company controls content from production to distribution. This has profound anticompetitive implications.

When content is produced only for an affiliated streaming service, writers have fewer opportunities to sell their ideas, pressuring creativity and wages. By withholding their content from existing, nascent, or potential competitors, streaming media companies raise barriers to entry and reduce competition among existing players while competing content producers must go through vertically integrated streamers to reach customers. Meanwhile, streaming devices like Roku, Amazon Fire, and Apple TV (also affiliated with streaming services) jockey to establish a gatekeeper position between content and consumers using their market power across multiple lines of business. Disney and Netflix alone already control over 70% of domestic streaming revenue, allowing them to wield significant power over the streaming video market—which will soon be the dominant market for video programming.[60] Further horizontal and vertical integration is almost certain; the recent Discovery-WarnerMedia and Amazon-MGM merger announcements are only the beginning.

In this future, the remaining players will reduce content output, leaving fewer and more costly choices for consumers, while their increased monopsony power over creators compounds the damage to creativity and diversity. We need meaningful change to address these accumulated harms of consolidation, and to prevent more.

EX 14

Conclusion: Reform Merger Review, Reinvigorate Antitrust Enforcement

Current antitrust practice, distorted by the consumer welfare standard's narrow focus on prices, has allowed previously unthinkable mergers and failed to address harmful conduct. Merging companies promise benefits and downplay harms, but acquisitions repeatedly result in foreseeable anticompetitive outcomes that hurt consumers and workers. The system is fundamentally broken, and damage is evident across myriad industries in addition to media and telecommunications. Antitrust reforms must address the structural problems in law and practice in order to prevent more anticompetitive mergers and reinvigorate competition across the American economy. Policymakers should consider the following recommendations:

- **Codify an alternative to the consumer welfare standard** that clearly prioritizes the maintenance of competitive market structures for consumers, competitors, and new entrants.
- **Reintroduce structural presumptions and bright-line rules in vertical and horizontal mergers,** including a presumption against dominant firms acquiring nascent or potential competitors. Shift the burden of proof onto merging parties, minimize weight given to "efficiencies" arguments, and eliminate the use of behavioral conditions in merger approvals.
- **Lower barriers to prove antitrust violations** including greater deference to direct evidence of market power or anticompetitive effects, and establish that erroneous non-enforcement is a greater threat to competition than erroneous enforcement.
- **Conduct regular merger retrospectives and market investigations.** Such investigations must allow for corrective measures up to and including structural separations and unwinding mergers proven anticompetitive after the fact.
- **Review effects on workers in every merger and market investigation.** Antitrust law and rules should include specific guidance for evaluating labor market effects and monopsony power.
- **Enhance enforcement against abuses of dominance** such as self-preferencing, discriminatory conduct, tying, and predatory pricing.
- **Increase funding for antitrust enforcers** and empower them with clear jurisdiction to regulate anti-competitive behavior in concentrated markets.

These changes to antitrust policy would protect consumers and labor from the harms of concentrated power, and would create a path back to competitive markets for the economy as a whole.

About Us

The Writers Guild of America West (WGAW) is a labor union representing writers of motion pictures, television, radio, and internet programming, including news and documentaries. Founded in 1933, the Guild negotiates and administers contracts that protect the creative and economic rights of its members. It is involved in a wide range of programs that advance the interests of writers, and is active in public policy and legislative matters on the local, national, and international levels.

Appendix 1: Large Vertical and Horizontal Mergers in Media and Consumer Telecommunications, 2009-2020

Announcement Date	Completion Date	Buyer	Target or Issuer	Deal Value ($M)[61]	Industry
10/22/2016	6/14/2018	AT&T	Time Warner	$85,407	Movies and Entertainment
12/14/2017	3/20/2019	Disney	Fox	$71,300	Movies and Entertainment
5/26/2015	5/18/2016	Charter Communications	Time Warner Cable & Bright House Networks	$67,100	Cable and Satellite
5/18/2014	7/24/2015	AT&T	DIRECTV	$48,500	Cable and Satellite
9/22/2018	10/9/2018	Comcast	Sky	$40,000	Cable and Satellite
4/29/2018	4/1/2020	T-Mobile	Sprint	$26,000	Wireless Telecommunications
9/17/2015	6/21/2016	Altice N.V.	Cablevision Systems	$17,700	Cable and Satellite
7/31/2017	3/6/2018	Discovery Communication	Scripps Networks	$14,600	Movies and Entertainment
12/3/2009	1/29/2011	Comcast	NBCUniversal	$13,750	Movies and Entertainment
8/13/2019	12/4/2019	CBS	Viacom	$12,000	Movies and Entertainment
2/5/2015	4/1/2016	Frontier Communications	Verizon's wireline operations	$10,540	Integrated Telecommunication Services
1/27/2016	1/17/2017	Nexstar Broadcasting	Media General	$4,600	Broadcasting
6/30/2016	12/8/2016	Lions Gate Entertainment	Starz	$4,400	Movies and Entertainment
10/30/2012	12/21/2012	Disney	Lucasfilm	$4,050	Movies and Entertainment
8/31/2009	12/31/2009	Disney	Marvel Entertainment	$4,000	Movies and Entertainment
4/28/2016	8/22/2016	NBCUniversal Media	DreamWorks Animation SKG	$3,800	Movies and Entertainment
5/22/2017	1/24/2018	RCN/Grande	Wave Broadband	$2,365	Cable and Satellite
8/15/2016	2/1/2017	TPG Capital	RCN Telecom Services & Grande Communications	$2,250	Cable and Satellite
7/6/2017	12/29/2017	Liberty Interactive	HSN	$2,100	Movies and Entertainment
7/10/2017	1/4/2018	Atlantic Broadband	MetroCast Communications	$1,400	Cable and Satellite
3/3/2016	12/21/2016	AMC Entertainment	Carmike Cinemas	$1,200	Movies and Entertainment
4/4/2017	3/9/2018	Liberty Interactive	General Communication	$1,120	Integrated Telecommunication Services
8/7/2018	8/7/2018	AT&T	Otter Media	$1,000	Cable and Satellite

Endnotes

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The New Gatekeepers

How Disney, Amazon, and Netflix Will Take Over Media

August 2023

EX 21

Executive Summary

The rise of streaming video over the past decade provided some amount of increased competition and a greater diversity of content than ever before. However, deregulation and mergers have laid the groundwork for a future of increased market power that could soon leave just three companies controlling what content is made, what consumers can watch, and how they can watch it. Disney, Amazon, and Netflix are positioning themselves to be the new gatekeepers of media, growing through acquisitions and using their increased power to disadvantage competitors, raise prices for consumers, and to push down wages for creative workers. Pay and working conditions for writers have become so dire, and media conglomerates so unresponsive, that 11,500 writers went on strike in May 2023. Without intervention, these conglomerates will seize control of the media landscape and the streaming era's advances for creativity and choice will be lost.

These new gatekeepers have amassed market power through mergers and other anti-competitive practices, offering an alarming window into the future of media.

- **Disney** has grown through a series of multibillion-dollar acquisitions, using its power to reduce film output, shut down competing studios, foreclose independent content from its distribution networks, expand control of the labor market, and force creators to give up financial participation in future licensing revenue.
- **Amazon** has gained a sizeable footprint in media in a short time by utilizing the well-documented playbook critical to its ascendance as a tech company. Though anticompetitive behavior and vertical integration, Amazon has harmed competitors, privileged its related business, and abused employer leverage to underpay writers.
- **Netflix** was once an innovative competitor, but is now using its position as the largest streaming service in the world to abuse its leverage as an employer, decrease innovative content spending and raise prices for consumers. The company has cut out independent producers and severely underpaid writers in multiple areas, and a series of recent acquisitions signal its intent to further increase dominance and market power in order to reduce innovative content investment.

Streaming video is now the dominant distribution platform for content, but it is largely unregulated, taking the problems of vertical integration and media consolidation to the extreme. Streaming's dominant employers have used their leverage to erode the sustainability of writing work; further consolidation could result in fewer writers able to earn a living and diminished variety in the marketplace of ideas. It is crucial that antitrust agencies and lawmakers take the following actions to protect the future of media:

1. Block further consolidation;
2. Proactively investigate anti-competitive issues and outcomes; and
3. Increase regulation and oversight in streaming.

EX 22

Introduction

In 1970, three broadcast networks controlled American television programming. ABC, CBS, and NBC had used their control over the distribution chain of television networks and stations to “restrain and monopolize” prime time entertainment, and viewers could only watch what these three entities deemed worthwhile.[1] In response, federal agencies acted to break up the monopoly with the Financial Interest and Syndication Rules (Fin-Syn), sharply limiting the networks’ ability to produce or control the content for their own networks. This antitrust action produced the 1970s “golden era” of television that challenged social and political narratives of the time—the result of a dynamic market of independent producers competing to hire writers, and the three networks competing for ideas.

Since then, a succession of new technologies—cable television, home video, and streaming—has altered the landscape for video programming, with the “increased competition” used to justify deregulation. The rise of online video spurred the creation of more content, more streaming services, and greater diversity of choice than ever before. But within a few short years, professional video programming is likely to once again be monopolized. Disney, Amazon, and Netflix are perfectly positioned to become the new gatekeepers of media, and are being urged by Wall Street to do so.

Rather than compete, Disney, Amazon, and Netflix—like other Big Tech companies Apple, Facebook, and Google—have increased market share and leverage through acquisitions, wielding their control of related markets, and underpricing their services to achieve dominance. Each is now taking anti-competitive vertical integration to an extreme, turning its streaming service into a walled garden for self-produced content—a model built for and dependent on restricting the availability of independent content from competing producers, underpaying creators, and, above all, making future consolidation the name of the industry game.

Spurred on by a blatant Wall Street demand for consolidation, Disney, Amazon, and Netflix are prime candidates for future mergers. Each has demonstrated that it will abuse a position of dominance to disadvantage competing producers and streaming services, reduce output, creativity, and choice in content, and push down wages for creative workers. Unless antitrust agencies and lawmakers prevent future merger activity by dominant firms and step in to preserve and protect the competitive environment for other streaming services, the future of content is in peril.

Disney: Gatekeeper of Content Production

The Walt Disney Company is the most powerful legacy media conglomerate, growing through acquisition after acquisition to establish unparalleled labor market power and a gatekeeper position in streaming. In 1995, Disney became a vertically integrated film and television studio through its $19 billion acquisition of the ABC broadcast network—taking advantage of the repeal of the Fin-Syn rules two years before, which had discouraged vertical control in television distribution.[2] The company then proceeded to swallow four competing film and television studios between 2006 and 2019: Pixar ($7.4 billion), Marvel Entertainment ($4 billion), Lucasfilm ($4 billion), and Twentieth Century Fox ($71.3 billion), along with acquiring a majority share in Hulu.[3] With each merger, Disney gained market share and leverage against its competitors and its workers, becoming the second-largest distributor of television and online series, the largest employer of television and digital writers, and the second-largest employer of theatrical writers after Netflix.[4]

Major Disney Acquisitions (1995-2019)

1995	2006	2009	2012	2019
($19 bn.)	($7.4 bn.)	($4 bn.)	($4 bn.)	($71.3 bn.)

Sources: The New York Times, The Observer.

Disney's growing power in an increasingly concentrated market has produced a host of anti-competitive behavior.

- **Reduced output and innovation:** Acquisitions of competing film studios facilitated a sharp decline in Disney's film output—65% between 2009 and 2017—and its employment of writers, with tentpole features reducing the need for innovative research and development while Disney still dominated US box office.[7] Shortly after buying Fox, Disney also shuttered Fox's Blue Sky Studios animation company—a competitor with Disney's own in-house animation studios.[8]

- **Increased vertical integration in streaming:** Following the Fox acquisition, Disney led a trend in aggressively withdrawing library content from other distributors like Netflix in order to funnel its content to flagship streaming service Disney+, with other studios like Time Warner and NBC Universal following Disney's lead.[9] Moreover, Disney's streaming services are now almost exclusively homes for Disney-produced original content, foreclosing these two major streaming services as potential markets for independent producers. In the 2021-2022 season, every original scripted series made for Disney+ was self-produced, along with the vast majority of series on Hulu.[10] This vertical integration will have profound implications for the content production market and for the writers who must sell content to Disney's studios in order to get their work onto Disney's platforms. Industry analyst firm MoffettNathanson anticipates Disney's dominance, projecting that Disney will represent 42% of all domestic streaming subscribers and 49% of domestic streaming revenue by 2025.[11]

- **Increased Prices:** Disney has very quickly become a dominant player in streaming; in August 2022, the company's total streaming subscribership surpassed Netflix's.[12] In a preview of the future,

VERTICAL INTEGRATION: DIMINISHED COMPETITION

Original scripted series for each major subscription streaming service are now primarily produced and distributed by the same company. This emphasis on distributing self-produced content decreases competition across the media landscape, foreclosing opportunities for independent producers and distributors. Non-vertically integrated producers face long odds when trying to sell content to streaming services that are focused on distributing primarily from their own affiliated studios. Meanwhile, new or smaller streaming services can't access the premium content that dominant players are using for their own services. For instance, in addition to pulling Warner content from competing streaming services to launch HBO Max, AT&T also directed the entire 2021 Warner Bros. theatrical slate to HBO Max, foreclosing any open market for the content.[5] As Wall Street analyst firm MoffettNathanson notes, "[T]he streamers have decided to build out and own their own copyright, which accentuates the need to consolidate."[6]

this milestone was followed by an announcement of a 14% to 43% price increase across Disney's streaming services, with more yet to come.[13] The company does not expect to lose many customers despite the fee hikes, reflecting the market power it has already established.[14]

- **Power over creative workers:** Shortly after merging with Fox, Disney unilaterally pressured creators and other entertainment workers to forego their participation in future licensing revenue on Disney shows, a decades-long industry practice for the creative forces behind Disney's valuable content.[15] Disney's size and power, along with its vertical integration, allowed the company to cut pay without losing talent, as writers negotiating against a massive combined producer-distributor cannot walk away from the distributor's poor terms without also leaving the show they created. Disney's labor market dominance is compounded by the powerful intellectual property it has acquired; for instance, writers who want to work on *Star Wars, Indiana Jones*, or most Marvel projects (including *Black Panther, Iron Man, Captain America, Daredevil*, and *X-Men*) have no choice but to work for Disney.

Disney has plainly demonstrated the strategies it will pursue to gain market power, and the harm that will result from its exercise of that power. In ongoing pursuit of its gatekeeper dominance in streaming, Disney could seek to buy another competing studio or increase its labor market power by acquiring still more valuable intellectual property. The company is poised to control half of the domestic streaming market even before potential acquisitions, with a corresponding level of control over what content gets made and what stories writers can sell to earn a living.

> **"[T]he streamers have decided to build out and own their own copyright, which accentuates the need to consolidate."**
> **- MoffettNathanson**

Amazon: Gatekeeper of Content Distribution

Though Amazon is a newer entrant, in a short period of time it has gained a sizeable footprint in multiple media businesses. Amazon has utilized the well-documented playbook of anti-competitive business practices that have been critical to its ascendancy as a tech company to also become the third-largest video subscription service in the U.S.[16] and a leading gatekeeper in the entertainment industry. Exploitative practices Amazon has employed include predatory pricing, aggressive acquisitions, and establishing, then abusing, its position between competitors and consumers.

- **Integration and acquisition:** Amazon entered the media industry with its Prime Video streaming service in 2006 and followed with its ad-supported streaming service Freevee in 2019.[17] Prime Video is available at no additional cost to a majority of Amazon's 200 million global Prime shipping subscribers,[18] competing less through quality investments and innovation than through leveraging Amazon's size and power in other markets such as e-commerce. The company followed its initial entry with aggressive moves into adjacent businesses. Amazon Studios was founded in 2010 to produce content for the service, and the company introduced Amazon Fire TVs and Fire TV Sticks in 2014 followed by the Amazon Channels store in 2015, positioning Amazon as an intermediary between competing

GeekWire

Amazon closes $8.5B MGM deal, its second-largest acquisition ever

STREAMING AGGREGATION: THE NEW CABLE BUNDLE

Today, nearly 90% of households use streaming devices and smart TVs such as Amazon Fire TV, Roku, and Apple TV+ to access both affiliated and third-party streaming services on their televisions.[19] Amazon's Fire TV platform is tied with Roku's as the largest operators in streaming video devices, each with a 36% market share.[20] This dominance makes access to the Fire TV platform critical for streaming services to reach widespread distribution.

Negotiations between streamers and devices echo carriage negotiations between networks and cable companies. However, they lack even the modest regulation of cable to mitigate the ability and incentive of a vertically integrated company to harm its competitors.

Amazon, Apple, Roku and others also offer "channel stores" where customers can subscribe to their own and third-party apps, offering smaller streamers access to larger customer bases in exchange for a cut of their subscription fees. Some smaller streamers source a substantial share of their domestic subscriber bases through Amazon; the Amazon Channels store accounts for 31% of subscribers to Paramount+ and 63% of subscribers to Showtime.[21]

third-party streaming services and viewers who access content through Amazon devices and its service.[22] Like Disney, Amazon's streaming business forecloses independent competitors in production and distribution. Amazon Studios has never produced a show for an unaffiliated service or network, and during the 2021-2022 season, 86% of online scripted content on Amazon platforms was self-supplied.[23] Most recently, Amazon acquired the historic Metro-Goldwyn-Mayer (MGM) Studios and its valuable library of intellectual property in 2022[24] to bolster its relatively anemic content catalog. This array of interconnected media businesses reaches the entire content value chain, giving the company both the ability and incentive to disadvantage third-party competitors in each market—from content production (Amazon Studios, MGM), to content distribution (Prime Video, Freevee, MGM+), to streaming aggregation/devices (Amazon Channels and Fire TV).

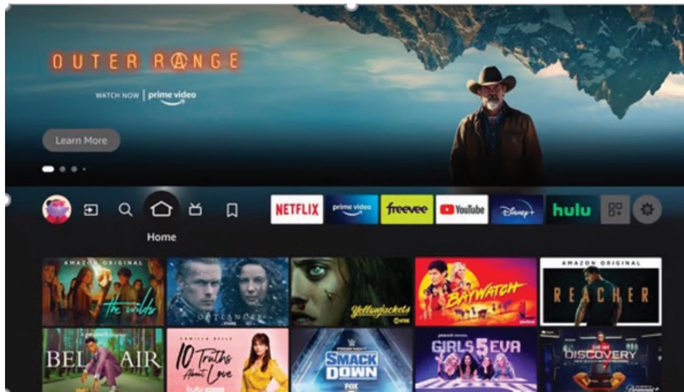
Amazon Media Expansion

Sources: CNET, TechCrunch, Business Insider, Variety

- **Extracting tolls from competitors:** Amazon has been aggressive in using its gatekeeper position to extract tolls from competitors, just as it does in e-commerce with sellers. The company has leveraged its control of viewers with Fire devices to make burdensome demands of third-party streaming services. In exchange for making third-party streaming services available via the Fire interface, Amazon has reportedly demanded that those streaming services license content to Amazon-owned Freevee, provide Amazon shares of their services'

advertising inventory, and give Amazon 15% to 45% of their monthly revenues.[25] The company has also tried to keep content from unaffiliated streamers like HBO Max within Amazon Channels, where Amazon sells access to other streaming services and demands 30% to 50% of third-party services' monthly revenues.[26] As a gatekeeper, Amazon hosts an unlevel playing field where it can privilege its own services in user interfaces or potentially harvest valuable viewership data of competitors to inform its own content decisions and advertising strategies.

- **Abusing dominance to harm competitors and benefit related businesses:** For several months after the launch of HBO Max in 2020, customers were unable to gain access to the service through Amazon devices. The dispute reportedly stemmed from HBO executives' attempts to retain control of their streaming service over Amazon's demand to keep HBO Max on Amazon Channels, where Amazon would control the user experience and access to viewership data.[27] News commentary suggested that the lack of availability on Amazon Fire devices notably slowed subscriber growth for HBO Max,[28] and when a deal was finally reached months later, the terms reportedly included an extension of WarnerMedia's contract with Amazon Web Services.[29]



Amazon Fire Interface. Source: *The Verge*.

- **Abusing employer leverage:** Amazon claimed that Prime Video had fewer than 45 million domestic subscribers for years—even after analysts estimated it had crossed that threshold[30]—in order to underpay the higher residuals that would be due to writers if the service had more than 45 million subscribers. Only after the Writers Guild of America West (WGAW) filed an Unfair Labor Practice charge against the company with the National Labor Relations Board demanding subscriber information did Amazon finally concede to pay higher residuals based on higher subscriber numbers beginning in July 2021.

Having extended its reach into every corner of media, Amazon has shown the role it seeks to play. It will use its gatekeeper position to determine what services consumers can access on its TVs and devices, and to extract fees from all sides. Amazon's purchase of Metro-Goldwyn-Mayer Studios—its second-largest ever acquisition—shows that the company's intent is to bring its platform monopoly playbook to dominate media.

Netflix: Gatekeeper in Employment

Netflix offers another alarming preview of the future in media. Originally the upstart competitor, innovating and prompting competitive responses from the traditional studios, Netflix has become a powerful incumbent focused on raising prices, vertically integrating, and exerting its dominance over workers.

Netflix pioneered the distribution of movies and television series via online streaming, providing consumers with an alternative to costly cable packages. Though it initially offered licensed movies and series from other studios, Netflix ventured into exclusive original programming in 2011, enlivening competition with traditional networks, buying content from third parties, and increasing employment opportunities for writers. Early investments included premium television series developed in partnership with mid-sized producers such as *House of Cards*, produced

by Media Rights Capital, increasing the market for independent content.[31] In contrast to its competitors, Netflix experimented with production and distribution models by ordering shows straight-to-series and releasing all episodes of a season simultaneously.[32] Netflix also displayed a willingness to give creators significant latitude, to cater to niche audiences with shows like the original comedy *Grace and Frankie*, and to revive cancelled series such as the cult-classic *Arrested Development* after its cancellation by Fox.[33]

Now the largest streaming service in the world with over 220 million paid subscribers,[34] Netflix is no longer a pro-competitive player. The company is pursuing a strategy of pure vertical integration and strategic acquisitions, abusing its leverage as an employer, decreasing innovative content spending, and raising prices for consumers.

- **Integration and acquisitions:** When it embarked on original programming, Netflix bought original content from a healthy market of independent content producers, with almost all of its original series that season produced by third parties. But the company has steadily increased its share of self-produced content; in the 2021-2022 season Netflix had a 29% share of original online scripted series and 61% of those series were self-produced.[35] Like Amazon, Netflix has never produced a series for another distributor. By pursuing this strategy of vertical integration, Netflix seeks to decrease the price it pays for content—as it stated to investors, producing content in-house "avoid[s] the markup 3rd party studios charge us" and cuts out the "studio middleman."[36] This behavior eliminates earnings for independent producers and the writers who create for them, and increases Netflix's control of the production market. Signaling its intent to increase its dominance and market power, Netflix has now acquired multiple companies in related sectors: film production studio Albuquerque Studios ($30 million), animation studios Scanline VFX and Animal Logic, intellectual property catalogs Millarworld ($30 million) and The Roald Dahl Story Company ($686 million),[37] as well as video game studios Night School Studio, Next Games ($72 million), and Boss Fight.[38]

Netflix Media Acquisitions (2016-2022)

2016	2018	2021	2021	2022
($30 mn.)	($30 mn.)	(undisclosed)	($686 mn.)	(undisclosed)

Sources: Yahoo Finance, The Motley Fool, What's On Netflix, Fierce Video

- **Abusing employer leverage:** Netflix has rapidly grown in market share as an employer, rising from being a new entrant to the largest employer of screenwriters and the largest employer of writers for online series (followed by Disney) within just seven years.[39] With increasing leverage over workers, the company has reportedly set a low ceiling on experienced writers' pay, and has attempted to severely underpay writers for their work during series' post-production. Netflix's power is such that it can impose these subpar terms of employment on even the most powerful writer with responsibility for running a given show. Both of these practices appear to be spreading to other major employers, illustrating the ease of tacit coordination among the handful of powerful buyers in the writing labor market. This behavior parallels the "industry-wide standardization of

certain contract terms...in ways that favor publishers over authors" that featured significantly in the U.S. District Court's decision to block the acquisition of Simon & Schuster by Penguin Random House.[40] Finally, Netflix systematically "negotiated" artificially low license fees with itself on more than one hundred original theatrical projects in order to underpay the screenwriters who were due a royalty-like shares of the fees called "residuals." Following a lengthy challenge from the WGAW, Netflix agreed to pay out approximately $42 million in unpaid residual compensation to several hundred writers on those projects.[41]

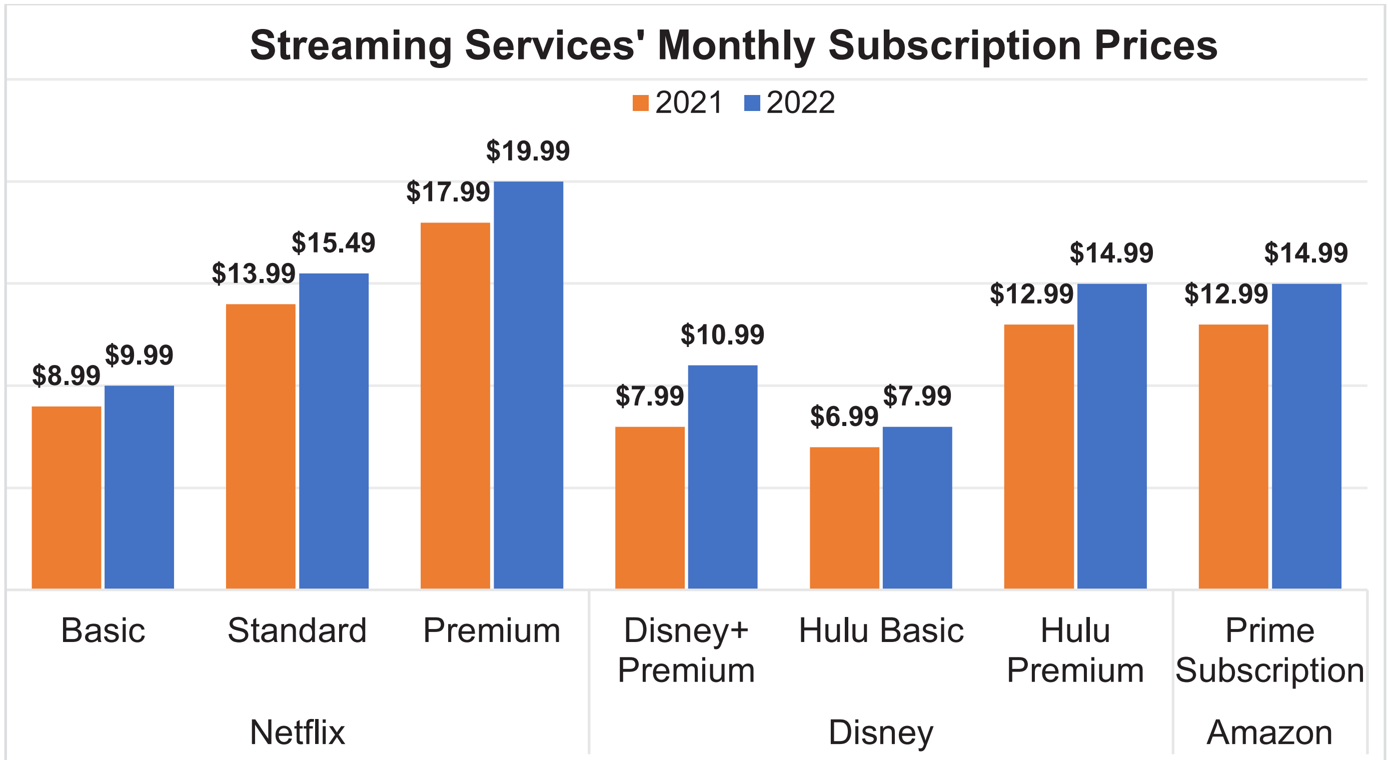
- **Control over creative labor:** If a show produced for Netflix is cancelled—sometimes despite apparent popularity[42]—it is virtually impossible for writers to take the show to other platforms. Thus far, no show wholly produced by Netflix has moved to another service. Only a few shows that are produced by other studios, like *Tuca & Bertie* and *One Day at a Time*, have had the option of moving to another channel or service. Netflix also popularized the now-standard practice among streaming services of releasing limited, if any, viewership information, decreasing writers' and other talents' leverage in employment negotiations by denying them crucial information about the success of their own work.[43]
- **Reduced investment in content:** Netflix's subscriber growth has recently begun to slow; in response, the company is seeking to cut costs on content. Wall Street firms have praised Netflix's transition away from competitive content investment, celebrating its ability to execute layoffs and reduce spending, especially in "niche programming" and "content exploration."[44]
- **Increased subscription fees:** Netflix is facing increasing demands from Wall Street to raise subscription rates. Netflix has already raised the price of all three U.S. tier subscriptions by 11% in the past two years, and more than 25% on its premium subscription in the past three years.[45] Industry analysts have noted that Netflix's ability to raise prices and maintain low subscriber churn is illustrative of its pricing power.[46] As one analyst speculated, "[T]hough initial acceleration to the platform was driven by original content, the new wave of acceleration will likely be driven by pricing."[47]

INVESTOR'S BUSINESS DAILY

TECHNOLOGY

Netflix Price Hikes Popular With One Group: Wall Street Analysts

Netflix's recent actions offer a preview of its future as a content gatekeeper. No longer committed to competitive innovation, the company will slash programming and underpay workers, abusing its dominant position to offer consumers less content—and less innovative content—for more money.



Sources: *The Verge*, *Investor Business Daily*.

The Future of Media

Without Intervention, the Gatekeepers Will Seize Control

Disney, Amazon, and Netflix are positioning themselves as the key gatekeepers of media and its vital marketplace of ideas: the dominant firms who decide what content gets made, what consumers can watch, and how they can watch it. The path to this future will be charted by snowballing consolidation; less creativity, choice, and innovation in content; increased downward pressure on writer pay; and higher prices for consumers. Vertical integration means that players in the entertainment market must have both production and streaming distribution arms to remain competitive, a significant hurdle for new entrants, smaller competitors, and independent producers. Meanwhile, each round of consolidation will cause still more reactive consolidation. Some streamers will exit the market or be bought by others. Paramount, Sony, and Warner Bros. Discovery are not likely to remain competitors in scripted online video for much longer, with Wall Street analysts predicting these companies will be candidates for consolidation.[48] Paramount is disadvantaged by a comparative lack of scale, Sony by a lack of vertical integration, and Warner Bros. Discovery appears to be already withdrawing from its investment in HBO Max.

> **Forbes**
>
> **As SVOD Growth Slows, Industry Consolidation Is Looming**

> **"This has to become a less competitive industry...they need to consolidate"**
> **- Michael Nathanson**

Wall Street, with its rapacious demand for profits, is unenthusiastic about even the current level of competition in streaming video, and insists on further consolidation in order to lower spending on content and enable higher prices. Wall Street analyst Michael Nathanson argued recently that "This has to become a less competitive industry...they need to consolidate,"[49] while another analyst recommends that Disney sell Hulu and buy Netflix.[50] If a few competitors drop out of the streaming business, the few services remaining will be able to reduce content spending and increase subscription prices without a commensurate loss of customers. Recent price hikes at Netflix, Disney+, and Hulu are only the beginning; Wall Street is pushing media towards an environment of comfortable collusion among a small number of mega-firms.

Meanwhile, the labor market for writing is already squeezed by employer abuse that grows worse with the increasing power of media gatekeepers. In recent years, employer abuses including shorter and more precarious employment for lower-level writers and caps on experienced writer pay have spread through the industry to become "standard," threatening writers' ability to sustain careers. The accumulation of market power enables these companies to undervalue writing services and the writers who supply them. Further consolidation will leave writers with only a few potential employers, and these dominant content buyers will have a significantly decreased incentive to innovate. Writers will see even more downward pressure on their wages, and fewer will be able to make a living from their writing, in turn reducing output, creativity, and diversity of content.

Action is Required to Protect Competition

When the Fin-Syn rules were abandoned, deregulation was justified based on the growth of basic cable, which purported to offer more competition for broadcast networks. However, this deregulation was almost immediately followed by more consolidation, with production entities, broadcast networks, and cable networks combining into a handful of media conglomerates. A few related regulations, such as Program Access and Dual Network rules,[51] remain in place in an effort to counter the anti-competitive incentives of vertical integration and the importance of a multiplicity of voices in media, respectively.

But the past few years have seen streaming video replace cable and broadcast as the dominant distribution platform for content, taking the problems of vertical integration and media consolidation to the extreme without any regulation at all. For instance, while the Dual Network rule prohibits Disney from owning two of the four major broadcast networks and have thus prevented Disney from buying the Fox broadcast network, no such rule precludes Disney from owning Disney+ and Hulu—two of the four largest streaming services in the U.S.—or from combining them into a single entity, as the company has suggested it may do in the coming years.[52] The Federal Communication Commission regularly investigates the state of competition in broadcast and cable along with key public interest issues like diversity in media ownership, but no regulatory body is currently overseeing such questions—or creating Fin-Syn-like protections—in streaming video. Recent moves from the Department of Justice and the Federal Trade Commission to aggressively target harmful mergers and unfair methods of competition are a promising shift after years of inaction, but more action is needed.

Media's history is rife with attempts at monopolization. When regulators and enforcers in the 1970s saw an environment similar to today's, with three powerful companies controlling content, they stepped in. The Federal Communications Commission and the Department of Justice, through regulation and antitrust enforcement, crafted

the Fin-Syn rules, ushering in a "golden age" of independent production. The current environment calls for similarly bold, sweeping action.

Recommendations

Antitrust agencies and lawmakers must pursue multiple paths of action to address the accumulation of gatekeeper power and its threat to the future of media:

1. Block further consolidation. Disney, Amazon, and Netflix have all demonstrated that they view acquisitions as a key strategy for gaining market power, and Wall Street actively demands consolidation in this market to increase profits. These three gatekeepers are likely candidates for future merger activity which would increase their control over what content is made, how consumers can access it, and how creators are compensated for it. Any mergers in media and entertainment involving significant streaming players should be blocked, including acquisitions of smaller or potential competitors.

2. Proactively investigate anti-competitive issues and outcomes. As detailed above and in the WGAW's *Broken Promises* report,[53] rounds of anti-competitive mergers and the growing power of key gatekeepers are pushing media towards extreme vertical integration and a future of tight control by just a few firms. Antitrust agencies should thoroughly investigate the state of competition in this industry, including merger outcomes that have reduced competition, how vertical integration is increasing the power of these gatekeeper firms, and the monopsony power of media employers.

3. Increase regulation and oversight in streaming. The media and entertainment industry plays a key role in U.S. society and culture, where the free exchange of ideas and diversity of content support the broader public interest. As content has moved from regulated markets of broadcast and cable to the unregulated venue of streaming, the government oversight that is crucial to maintaining effective and healthy competition—particularly in an industry that tends toward consolidation—has failed to keep up. Whether through agency rulemaking or legislation, new rules against anti-competitive self-preferencing behavior or rules requiring a certain level of independent content on streaming services are necessary to level the playing field.

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How the Warner Bros. Discovery Merger Hurts Workers and Diversity

"Nothing good has ever happened to either consumers or labor when massive companies consolidate."
— Mike Schur, creator of *Parks and Recreation* and *The Good Place*[1]

On April 8, 2022, the Discovery WarnerMedia transaction closed, creating a new entity that, according to the company's press release, "will be able to invest in more original content," and "create more opportunity for underrepresented storytellers and independent creators."[2] **But less than a year later, the company has instead cancelled, pulled, or written off $2 billion in content[3] and laid off hundreds of workers[4]** in what appears a frantic attempt to justify the consolidation and mitigate the company's $50+ billion in debt.[5] The company has cut content ranging from *Snowpiercer*, one of the last scripted series on TNT,[6] projects in pre-production or development including JJ Abrams' *Demimonde* series at HBO[7] and *Kill the Orange-Faced Bear* at TBS (cancelled a week before production),[8] and already-filmed features such as *Batgirl*.[9] The company also pulled dozens of already-released features and series from HBO Max entirely.[10]

The casualties of this mega-merger include numerous projects created by, featuring and/or centering the experiences of women and people of color, including *Batgirl*, one of very few mainstream superhero films to feature a Latina lead actress;[11] *Full Frontal with Samantha Bee*, one of a handful of woman-hosted late-night shows;[12] *Gordita Chronicles*, a series about a Dominican immigrant family whose showrunner was a Latina woman;[13] *Tuca & Bertie*, an animated series featuring two lead women of color,[14] and *Chad*, a series about Middle Eastern Americans created by and starring Iranian American comedian Nasim Pedrad.[15]

Meanwhile, CEO David Zaslav's board appointments have uniformly been white men.[16] **The Warner Bros. Discovery merger sharply illustrates how consolidation increases the power of gatekeepers at the expense of marginalized voices.** As *One Day at a Time* writer and co-creator Gloria Calderón Kellett put it, "[TV industry consolidation] is erasing Brown stories."[17]

This ill-advised merger is already a clear disaster for the content creators who have lost jobs and a potential employer, as well as for the consumers who are faced with a poorer, less-diverse content landscape. As *Insecure* creator Issa Rae put it, consolidation results in "[l]ess risk-taking, fewer decision-makers and fewer options for creators."[18] Yet Wall Street continues to demand that the media companies combine; media analyst Michael Nathanson argued recently that "[t]his has to become a less competitive industry...they need to consolidate."[19]

The series of mergers that led us here—first the $85 billion AT&T-Time Warner merger and then the $43 billion WarnerMedia Discovery merger—have each promised to create a better competitor, but have instead left the merged entity debt-burdened and focused on cutting costs to rationalize these disastrous business decisions. Yet media's merger mania shows no sign of slowing; the latest industry speculation is that Comcast may next seek to acquire Warner Bros. Discovery.[20] **Absent government intervention, this cycle of reactive consolidation will likely continue until it leaves just three or four companies controlling all content, while content creators and consumers pay the price for these costly mergers.**

WRITERS OF CANCELLED PROJECTS SPEAK OUT

"I got into television to counter the negative mainstream stereotypes about Latino communities and tell stories like *Gordita Chronicles*, which features a young Dominican girl who immigrates with her family to Miami. The showrunner and I did everything in our power to set the show up for success, and the first season was showered with positive reviews and strong viewership numbers. But after the merger, HBO Max was given a new mandate from its Discovery leadership to cut costs and *Gordita Chronicles* was cancelled just five weeks after first airing, and will now even be removed from the platform. The studio executives claimed the cancellation reflected HBO 'rebranding'—by implication, away from shows about Latino families. This merger has provided pretty stark and immediate evidence that industry consolidation not only harms diversity and inclusion, but can also contribute to the erasure of U.S. Latinos."

— **Claudia Forestieri**, Creator and Executive Producer of *Gordita Chronicles*

"I originally created *Tuca & Bertie* for Netflix, but when they cancelled it after just one season, we fought to get the series picked up at Warner's Adult Swim network. The women-led series had been a cult hit and a critical darling—the Warner execs knew it needed advertising support and time to grow viewers in the male-dominated adult animation space. But the merger went through right before the most recent season launched, and almost everyone who worked on the *Tuca & Bertie* marketing team was laid off. Then several of the show's main executives at Adult Swim and HBO Max left in the turmoil. Planned marketing projects to promote the new season didn't happen. Then we learned the show had been cancelled. It's already harder for shows centered on women, and this merger cost us the support we needed to thrive."

— **Lisa Hanawalt**, Creator and Executive Producer of *Tuca & Bertie*

"I created a drama that focused on women lawyers and advocates who fought against a culture of sexual harassment and corruption in the U.S. military, achieving historic gains after the murder of Mexican-American soldier Vanessa Guillén at Fort Hood. After a competitive bidding process with multiple outlets, I sold *Whistleblower* to HBO Max in February 2021. During development, we received only compliments from our executives. The leads were three BIPOC women, and it was a story I was excited to tell. Despite it all, the series was cancelled soon after the merger, before it went into production. The press speculation is that the new company is focusing more on what's seen as 'Middle America' content. But Black, Asian, and Latinx communities are Middle America too."

— **Moisés Zamora**, Creator and Executive Producer of *Whistleblower*

WGAW's original report "Broken Promises: Media Mega-Mergers and the Case for Antitrust Reform," is available on wga.org.

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Writers Guild of America West Comment
on DOJ-FTC Request for Information on Merger Enforcement

The Writers Guild of America West (WGAW) is pleased to submit the following comments in response to the Request for Information on Merger Enforcement by the Federal Trade Commission and Antitrust Division of the Department of Justice. The WGAW is a labor union representing over 11,000 writers in the television, film, news, and streaming video industries. Our members have worked through decades of consolidation that transformed a somewhat competitive industry into one controlled by only a handful of companies who exert significant monopsony power over entertainment industry labor. The WGAW has participated in numerous media and telecommunications merger reviews by federal and state agencies. Our comments will focus on the failure of the current Horizontal Merger Guidelines (HMG) and Vertical Merger Guidelines (VMG) to prevent anticompetitive mergers, the guidelines' lack of attention to vertical harms and non-price effects, and their particular neglect of labor market harms.

The media and entertainment industry offers compelling evidence of these failures. Corporate consolidation accelerated with the repeal of the Financial Interest and Syndication Rules in 1993; TV networks merged with production studios and almost completely squeezed out smaller, independent production companies from access to broadcast distribution. After Internet-streamed video introduced new competition, cable and Internet companies responded by bulking up already enormous television and movie conglomerates to form behemoths like Comcast-NBCU and AT&T-Time Warner. Most recently, incumbent media companies have consolidated further in response to the growth of streaming video, prompting the current wave of mergers including Disney-Fox, WarnerMedia-Discovery, and Amazon-MGM.

These most recent tie-ups are an attempt to establish walled content gardens within media's mega corporations, with the largest companies all oriented toward pure vertical integration and self-supply for their new streaming services including Disney+ (Disney), HBO Max (Warner Bros. Discovery), Peacock (Comcast), and Paramount+ (Paramount Global). Disney, for instance, hires writers to produce scripted programming that will only be distributed on Disney-owned streaming services Hulu or Disney+. With tech companies Amazon and Apple, the vertical integration of their streaming services extends from production to distribution, even encompassing the devices consumers use to watch the content. This level of vertical integration excludes independent competitors and sets up powerful content and streaming device companies as gatekeepers in the media industry, setting the stage for still more harmful mergers until just three or four companies control what content gets made.

The creation of these gatekeepers limits competition and opportunities for writers. In media, large employers have the power to hold down wages and set terms for content creation. The labor market for writers features worker abuses like late payment of compensation and stagnant wages despite increased demand and consumption of video content. Merger effects on workers have long been ignored and we welcome the agencies' attention to this important facet of competition policy. WGAW's comment will respond to the agencies' RFI questions regarding anticompetitive mergers, structural presumptions, nonprice effects, and labor markets.

The Existing Guidelines and their Weak Presumptions Have Failed to Prevent Numerous Anticompetitive Mergers

Question 2.e. "How frequently have unchallenged mergers or mergers that were subject to remedies resulted in a lessening of competition, and how does that lessening of competition typically manifest?"

The current guidelines have failed to prevent numerous anticompetitive mergers and acquisitions due to their high thresholds for blocking transactions and their unfounded assumption that vertical mergers are more likely to be pro-competitive. Over the last dozen years, more than $400 billion worth of merger and acquisition deals have been completed in media production or distribution.[1] Many of these mergers have caused significant harm, increasing the power of these corporations to the detriment of writers and competition.

The Disney-Fox merger, for example, was followed by harms to streaming services that compete with Disney, to writers that work for the company, and to the variety and choice of content in media overall. Disney purchased Fox's film and TV studios, most of its cable networks, and its share of Hulu. The merger created a company with significant market power in theatrical content and TV distribution, as well as nearly 30% of the labor market for professional TV and film writers at the time. Following the merger, Disney pulled back content it had licensed to a rival, Netflix, while banning that rival from advertising on its television entertainment networks. The company now owns two of the four largest streaming services in the domestic market, Disney+ and Hulu. Post-merger, Disney pressed creators and other workers to forego future licensing revenue on Disney shows, and closed the competing Fox animation studio.

Similarly, Comcast's merger with NBCUniversal resulted in vertical harms including multiple instances of customer foreclosure. Despite the company's claims that it would not engage in anticompetitive behavior and an extensive list of government-imposed conditions meant to preclude harms, soon after the merger Comcast began discriminating against unaffiliated cable networks by refusing to place them in the same channel neighborhood as its own networks. It also violated a commitment to offer an affordable standalone broadband service meant to protect online video competition, leading to an unprecedented fine by the FCC. Comcast also used its leverage to interfere with rivals' access to customers; the company limited competing TV networks' ability to place their apps on its own and third-party set-top boxes.

For additional examples of mergers in media and telecommunications that lessened competition, caused numerous harms and prompted additional mergers, please see WGAW's report, *Broken Promises*, included as an appendix to this comment.

This history of harmful approved mergers suggests several changes for merger review:

- First, the long-term trend toward greater concentration in media and telecommunications should be considered when evaluating individual transactions because these mergers have led to a loss of choice for workers and consumers while consistently catalyzing defensive mergers from the remaining firms in these markets.
- Second, new guidelines should contemplate retrospective review of consummated mergers, including unwinding mergers proven to have harmed competition after the fact.

[1] For this and more details on Disney-Fox and Comcast-NBCUniversal deals, see attached, Writers Guild of America West, *Broken Promises* (2021) ("*Broken Promises*").

- Third, antitrust enforcement has been far too lenient, focusing on perceived dangers of false positives, or overenforcement, while underappreciating the profound danger of false negatives. Revitalizing enforcement will require stronger presumptions to block mergers similar to these and other anticompetitive transactions approved in recent years.

Question 5.b. "Does the structural presumption in the guidelines accurately reflect current understanding of the characteristics of mergers that prove to be anticompetitive?"

Question 5.c./d. "What specific metrics or observable features of a transaction, firm or market should trigger a presumption that a horizontal or non-horizontal merger is anticompetitive?"

The current standards in the guidelines have failed to stop numerous anticompetitive mergers, as detailed in the WGAW's *Broken Promises* report. This is a product both of presumptions that set too high a standard for mergers to be deemed worthy of concern and of the current "rule of reason" approach that allows the likelihood of and incentives toward anticompetitive behavior—if recognized at all—to be disregarded or outweighed by theoretical efficiencies.

The current presumption in the HMG describes a moderately concentrated market as one with a Herfindahl-Hirschman Index ("HHI") between 1500 and 2500, and a highly concentrated market as one with an index above 2500.[2] The Guidelines go on to say that increases of 100 index points or more in moderately or highly concentrated markets "often warrant scrutiny," while mergers resulting in highly concentrated markets that involve an increase of more than 200 points in HHI are subject to a rebuttable presumption that the merger is "likely to enhance market power." As implemented, this standard—identifying the most extreme levels of concentration as merely "likely" to cause harm while allowing merging companies to offset this presumption with claimed efficiencies—ensures that almost any merger can be approved. As noted above, these thresholds have failed to prohibit numerous harmful mergers and have contributed to the current concentration and market power of the media oligopoly.

Furthermore, the cautious language in the VMG implies that vertical mergers are often pro-competitive even if they increase the incentive and ability to harm rivals. After describing combinations where there is an incentive and ability to foreclose rivals, they state that, "Mergers for which these conditions are met *potentially* raise significant competitive concerns and *often* warrant scrutiny."[3] This deference is unwarranted; mergers that would result in a company with the ability and incentive to harm competition through foreclosure are especially deserving of and should *always* receive scrutiny by the agencies. The Vertical Guidelines also assert that "vertical mergers often benefit consumers through the elimination of double marginalization (EDM), which tends to lessen the risks of competitive harm." Despite this claim, past experience has

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[2] U.S. Department of Justice & The Federal Trade Commission, *Horizontal Merger Guidelines*, 18 (Aug. 19, 2010) available at https://www.justice.gov/atr/public/guidelines/hmg-2010.pdf ("*Horizontal Merger Guidelines*").

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seen companies raise prices after vertical integration; following the AT&T-Time Warner merger, the combined company raised prices for DirecTV customers five times in three years.[4]

The current guidelines' deference to efficiencies, which in both horizontal and vertical mergers have been used to 'outweigh' the reduction in competition, further weakens the existing presumptions and subjects many merger reviews to dueling economic models of price impacts. The current Horizontal Guidelines, to cite just one instance, say that, "a primary benefit of mergers to the economy is their potential to generate significant efficiencies and thus enhance the merged firm's ability and incentive to compete, which may result in lower prices, improved quality, enhanced service, or new products."[5] However, the claims about increased efficiencies that have been used to justify mergers have often failed to materialize. As the WGAW's *Broken Promises* report describes, recent media mergers have led to higher prices and reduced choices for consumers. In the case of the AT&T-DirecTV merger, the companies presented economic analysis that predicted lower prices for broadband and video bundles, yet the company raised prices after the merger. As discussed further below, in some cases promised "efficiencies" such as EDM are actually labor market harms masquerading as pro-consumer outcomes.

The agencies must craft stringent presumptions delineating anticompetitive mergers, including the following:

- As others including the Open Markets Institute have argued, lower thresholds for horizontal mergers along the lines of those in the 1968 Guidelines would be a step in the right direction.[6] The Disney-Fox and AT&T-DirecTV mergers, for instance, would have been challenged under the 1968 thresholds.
- The agencies should adopt a strong presumption against vertical mergers in which the combined company would have an incentive and ability to engage in anticompetitive actions or in which one firm is in a concentrated market. This includes, but is not limited to, the possibility that a merged company will engage in foreclosure, coordination with rivals, or acquire emerging or potential competitors.
- Any mergers within even moderately concentrated markets or involving companies with market power in adjacent markets should be carefully examined, if not blocked outright. The same goes for industries in which there is a tendency toward monopoly or oligopoly, such as media and telecommunications.
- Large technology companies also warrant greater scrutiny given their well-known history—as currently under investigation by authorities in the U.S. and around the world—of leveraging their businesses for anticompetitive ends.
- Finally, given the disadvantages that workers have (as discussed further in Section 4), any thresholds for labor market concentration should be lower than those for product markets or seller power.

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[4] *Broken Promises*, at 5.
[5] *Horizontal Merger Guidelines* at 29.
[6] *Comments on Draft Vertical Merger Guidelines of Open Markets Institute & American Economic Liberties Project*, Matter Number P810034 (filed Feb. 2020), https://www.ftc.gov/system/files/attachments/798-draft-vertical-merger-guidelines/comment_to_ftc-doj_re_vertical_merger_guidelines.pdf.

Nonprice Harms and Vertical Integration Have Been Significantly Neglected in Merger Review

> ***Question 2.a. "Has the guidelines' framework been interpreted unduly narrowly as focusing primarily on the predicted price outcome of a merger? Are there nonprice effects that are not adequately analyzed by analogy to price effects, and how should the guidelines address such effects? What evidence should the guidelines consider in evaluating these effects?"***
>
> ***Question 12.f. "Do the current guidelines adequately identify the full range of non-horizontal mergers that may harm competition? Should the guidelines address the acquiring firm's market power in markets adjacent to the target's business?"***

Enforcement of the current Horizontal and Vertical Merger Guidelines has focused narrowly on predicted price outcomes when considering evidence of potential anticompetitive effects, including in the context of vertical mergers.[7] This has led enforcers to discount harms to variety, choice, innovation, and potential competition. The media industry and its history of concentration offers evidence of these harms as content distribution markets are not only consolidated, but highly vertically integrated into production markets in ways that threaten competition but that may not be immediately evident in the form of price effects. In order to promote competition in media and other industries, new guidelines must give adequate weight to nonprice harms such as variety, choice, innovation, and potential competition, as well as recognizing the significant anti-competitive potential of vertical integration.

After waves of horizontal and vertical consolidation in media, a few companies dominate the market for distribution of scripted content and they do so by primarily distributing content they produce. As linear television is mature and starting to decline, these companies have reoriented toward online streaming as the future of content distribution, aided by acquisitions. In 2019, Disney bought most of Fox's businesses in preparation for launching its Disney+ streaming service.[8] Other traditional media incumbents Comcast NBCUniversal, Paramount Global, and Warner Bros. Discovery, joined by tech companies including Netflix and Amazon, also seek to dominate streaming video through a pure vertical integration model—producing and delivering their content directly to consumers. In the 2020-2021 season, the top three distributors represented a 57% market share of television and online scripted series and most major distributors produced at least 79% of the series they exhibited.[9]

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[7] For examples of regulators discounting nonprice effects arguments during merger review, see sections on AT&T-Time Warner and AT&T-DirecTV transactions in *Broken Promises*.

[8] Thomas Franck, *Iger Says Disney Bought Fox Because of Value It Adds to Streaming Service: 'The Light Bulb Went Off,'* CNBC (Apr. 12, 2019), https://www.cnbc.com/2019/04/12/disney-wouldnt-have-bought-fox-assets-without-streaming-plans-iger-says.html.

[9] Writers Guild of America West Internal Data, 2022. Based on WGA-covered scripted series.

Television and Online Scripted Series by Distributor, 2020-2021		
	Market share	**% Self-Supplied**
Paramount Global[10]	21%	79%
Disney	20%	81%
Netflix	16%	64%
Warner Bros. Discovery	11%	85%
Comcast-NBCU	9%	92%
Amazon	4%	82%
Other	19%	41%

Amazon and Apple also participate in segments further down the content value chain as streaming platform aggregators, selling branded devices that consumers use to stream content and aggregating access to competing streaming services. Comcast similarly operates a streaming aggregation platform and provides devices to its broadband-only customers. These adjacent businesses provide the companies with sizeable consumer bases they can leverage to compete in streaming despite comparatively smaller investments in content.[11] This market environment threatens competition in ways that do not manifest immediately as price effects, but that threaten variety, innovation, and future competition.

Vertical Integration of Key Entertainment Conglomerates							
	Studios/ Prod. Cos.	**Broadcast Network**	**Cable Networks**	**Streaming Service**	**Streaming/ App Aggregation**	**Internet/ Telecom Service**	**E-Commerce**
Disney	X	X	X	X			
Comcast-NBCU	X	X	X	X	X	X	
Paramount Global	X	X	X	X			
Warner Bros. Discovery	X	X[12]	X	X			
Netflix	X			X			
Amazon	X			X	X		X
Apple	X			X	X		

[10] Majority owner of Paramount Global, formerly known as ViacomCBS.

[11] In 2021, Apple and Amazon spent $966 million and $8.2 billion on content, respectively, compared to Netflix's $13.6 billion. Seth Shafer, *Apple TV+ Content Spend Keeps Climbing*, S&P Capital IQ (Jan. 26, 2022), https://www.capitaliq.spglobal.com/web/client?auth=inherit#news/article?KeyProductLinkType=2&id=68551555; Deana Myers, *Amazon's Content Budget Projection Rises with Sports, Originals Focus,* S&P Capital IQ (July 28, 2021), https://www.capitaliq.spglobal.com/web/client?auth=inherit#news/article?KeyProductLinkType=2&id=65654070; Deana Myers, *Netflix Amortized Content Spend Estimated at $13.60B in 2021,* S&P Capital IQ (Sept. 14, 2021), https://www.capitaliq.spglobal.com/web/client?auth=inherit#news/article?KeyProductLinkType=2&id=66550873.

[12] Warner Bros. Discovery owns 50% of The CW, a broadcast network that predominantly airs syndicated content.

In this context, independent producers must compete with affiliated studios to sell content to the studios' streaming services, leaving them with few opportunities for accessing consumers and reducing the availability of third-party content for consumers. Meanwhile, a new competitor in streaming distribution would have difficulty licensing the third-party premium content it needs to offer a competitive service. The Disney-Fox and AT&T-Time Warner mergers, for instance, were both immediately followed by those companies withdrawing their content from competing services like Netflix and Amazon in favor of launching Disney+ and HBO Max.[13] And in order to reach the end consumer, new streaming distribution entrants must strike deals with platform gatekeepers Amazon Fire, Roku, or Apple TV to have their apps available on the services, a barrier that reportedly inhibited the launches of HBO Max and Peacock.[14] This market structure and the mergers that created it raise substantial barriers to entry, reduce innovation in content production, and hurt variety and choice.

However, these anticompetitive harms have not necessarily resulted in immediate consumer price impacts; many well-funded companies' streaming plans involve foregoing short-term profits in order to gain market share.[15] Pre-Discovery spinoff AT&T recently disclosed that its decision to withhold Time Warner-affiliated content from third-party streaming services cost the company $1.2 billion in quarterly revenue despite the company's claim—one accepted by the court—that its goal post-merger would continue to be wide distribution of Time Warner content.[16] Big Tech companies like Apple and Amazon, in addition to Comcast, offer their streaming services at no additional cost to customers of their other businesses in bundles that both obscure consumer prices and reduce competition. Apple and Amazon offer Apple TV+ and Prime Video at no additional cost to customers who purchase Apple devices and Amazon Prime memberships respectively.[17] Comcast-NBCU bundles its streaming services with its broadband

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[13] Michelle Castillo, *Disney Will Pull Its Movies From Netflix and Start Its Own Streaming Services,* CNBC (Aug. 8, 2017), https://www.cnbc.com/2017/08/08/disney-will-pull-its-movies-from-netflix-and-start-its-own-streaming-services.html; Sarah Perez, *Disney+ Gains the Marvel Series From Netflix and New Parental Controls*, TechCrunch (Mar. 1, 2022), https://techcrunch.com/2022/03/01/disney-gains-the-marvel-series-from-netflix-and-new-parental-controls/; Ben Munson, *HBO Max Expects Subscriber Impact From Amazon Channels Exit*, Fierce Video (Aug. 11, 2021), https://www.fiercevideo.com/video/hbo-max-expects-subscriber-impact-from-amazon-channels-exit.

[14] HBO Max and Peacock customers were unable to access the new streaming services through Amazon devices when they launched in 2020 because the companies had not reached agreement. Peacock and HBO's disputes reportedly stemmed from executives' desires to keep their streaming services outside of Amazon Channels to retain control of the user experience and viewership data. News commentary suggested that the lack of Amazon Fire carriage notably slowed subscriber growth at these services, and when HBO Max finally reached a deal with Amazon months later, the terms included an extension of WarnerMedia's contract with Amazon Web Services, its cloud computing platform.

[15] Doug Shapiro, *One Clear Casualty of the Streaming Wars: Profit*, Medium (Oct. 27, 2020), https://dougshapiro.medium.com/one-clear-casualty-of-the-streaming-wars-profit-683304b3055d; Edmund Lee, *Netflix Will No Longer Borrow, Ending Its Run of Debt*, N.Y. Times (Jan. 19, 2021), https://www.nytimes.com/2021/01/19/business/netflix-earnings-debt.html.

[16] Jon Brodkin, *AT&T is Doing Exactly What it Told Congress it Wouldn't Do with Time Warner*, Ars Technica (Feb. 4, 2020), https://arstechnica.com/information-technology/2020/02/att-lost-1-2b-by-preventing-time-warner-shows-from-airing-on-netflix/.

[17] Sarah Saril, *How To Get Apple TV Plus For Free With The Purchase Of A New Apple Device, PS5, or T-Mobile Plan*, Business Insider (Dec. 16, 2021), https://www.businessinsider.com/guides/streaming/apple-tv-plus-deals.

and cable products.[18] Additionally, Amazon's MGM acquisition will strengthen the conglomerate's clout in its other businesses and give it further advantages over other streaming services, without necessarily resulting in a price increase. These tactics, which increase customer lock-in, can have a profound influence on the ability of new firms to enter the market and on the ability of rival products to compete, without providing a clear-cut negative price impact to consumers.

In addition, numerous mergers have posed harm to future competition, either by making further consolidation more likely or by acquiring a potential competitor. Amazon and Discovery's announcements to acquire MGM and WarnerMedia, respectively, were both likely a reaction to previous mergers, as well as a catalyst for more merger speculation among top independent studios—A24, LeBron James' SpringHill Entertainment, Legendary Entertainment, Lionsgate, and Imagine Entertainment.[19] The Disney-Fox merger eliminated potential head-to-head competition between the two companies in the SVOD market, as Fox likely would have launched its own general entertainment streaming service absent the merger. Without intervention, these waves of consolidation will likely result in a future where a small number of companies decide what content gets made for consumers.

- ➢ To protect the future of competition in the media industry, revised Merger Guidelines must place greater emphasis on nonprice harms as well as take into consideration existing market structures and adjacent or relevant businesses belonging to vertically integrated firms.
- ➢ Mergers in heavily vertically integrated markets and those involving dominant firms or firms integrated through multiple levels of a relevant supply chain should be highly suspect. Antitrust enforcement's narrow focus on consumer prices has heavily discounted harms to variety, choice, and potential competition, in addition to near-total neglect of labor markets.

The Guidelines as Interpreted Have Resulted in Substantial Harm to Labor; New Guidelines Must Effectively Evaluate and Protect Labor Markets in Merger Review

Question 9.d. "Do the guidelines set forth a sufficient framework to analyze mergers that may lessen competition in labor markets and thereby harm workers?"

Question 14.d. "Where a merger is expected to generate costs savings via the elimination of 'excess' or 'redundant' capacity or workers, should the guidelines treat these savings as cognizable 'efficiencies'?"

The current Horizontal Merger Guidelines and Vertical Guidelines do not provide a sufficient framework for the agencies' review of mergers that may harm competition in labor markets; indeed, they do not mention labor at all, or provide any discussion of the ways in which labor markets operate differently from product markets. Numerous mergers have been approved with no public agency assessment of how they would harm workers. Moreover, the existing

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[18] Jon Brodkin, *AT&T Takes Some Time Warner Shows off Netflix, Makes them Exclusive to HBO Max,* Ars Technica (Jul. 9, 2019), https://arstechnica.com/information-technology/2019/07/att-starts-restricting-time-warner-shows-to-its-own-streaming-service/.
[19] Scott Roxborough, *Why Production Companies in 2022 Will Need to Get Big or Go Home*, The Hollywood Reporter (Dec. 29, 2021), https://www.hollywoodreporter.com/business/business-news/entertainment-consolidation-trend-2022-1235059819/.

Guidelines have themselves resulted in significant harms to labor through their reliance on the consumer welfare standard and price effects. Countless mergers have been justified by claims that the companies will achieve "efficiencies" that will be passed along to consumers in the form of lower prices. However, these "efficiencies" are often job cuts or increased monopsony power that allows companies to hold down labor costs.

The AT&T-Time Warner and Disney-Fox media mergers, for instance, were followed by well-documented and substantial layoffs.[20] Still other aspects of what the companies claimed to be "efficiencies" or "elimination of double marginalization" have actually represented systematic underpayment of creative labor. In the AT&T-Time Warner trial, Judge Leon wrote of his confidence "that defendants will achieve considerable efficiencies"[21] and noted that "without the interference of bargaining friction, AT&T will be able to deliver [Time Warner] content to its customers in more innovative ways."[22] In addition to thousands of post-merger layoffs, including at Time Warner channels like TruTV,[23] the company made the unilateral decision to put Time Warner films on HBO Max when the COVID-19 pandemic closed theaters. This decision, funneling Time Warner content to an affiliated streaming service bundled with AT&T wireless internet, foreclosed an open market for the Time Warner films and resulted in underpayment of key talent.[24]

The concept of frictionless access to upstream inputs that underpins the theory of EDM, for instance, represents a significant harm to writers and other talent across the entertainment industry. Under the WGA collective bargaining agreement, writers are entitled to royalty-like compensation called "residuals" whenever content they write is reused. These residuals are critical to writers as freelance workers, sustaining their careers in between periods of employment on different series or film projects and ensuring that writers share in the long-term value of content they create when their employers benefit from its reuse. Specifically, when film or TV content is licensed to a streaming service, the writer of that content is entitled to a share of the revenue received by the content producer. However, virtually all of the leading employers in media and entertainment are now pursuing a strategy of primarily distributing their own self-produced content rather than licensing their content to third parties. When a content producer is licensing its content to its own affiliated streaming service, the company can underpay itself in order to underpay residuals. This has become a widespread and harmful practice that the Writers Guild must expend significant effort to combat in order to ensure that its members are appropriately compensated. To illustrate, CBS All Access (now Paramount+) had licensed dozens of series from parent company Paramount Global at below-market prices, underpaying

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[20] *Broken Promises* at 5, 7.
[21] United State of America v. AT&T Inc., 310 F. Supp. 3d 161, 191 (D.D.C. 2018), aff'd sub nom. United States v. AT&T, Inc., 916 F.3d 1029 (D.C. Cir. 2019).
[22] Id. at 183.
[23] Jon Brodkin, *AT&T's "Headcount Rationalization"—i.e. Job Cuts—Hits Thousands More Workers*, Ars Technica (June 17, 2020), https://arstechnica.com/tech-policy/2020/06/att-cuts-over-3400-jobs-in-latest-round-of-headcount-rationalization/; Patrick Hipes & Nellie Andreeva, *TruTV Latest WarnerMedia Division To See Layoffs*, Deadline (May 28, 2019), https://deadline.com/2019/05/trutv-layoffs-restructuring-warnermedia-1202623141/;Tony Maglio, *Adam Conover Blames AT&T-Time Warner Merger for Cancellation of 'Adam Ruins Everything'* (Jan. 19, 2022), https://www.thewrap.com/why-was-adam-ruins-everything-canceled-adam-conover-blames-att-video/.
[24] Sarah Whitten, *'Matrix' Co-Producer Sues Warner Bros. Over Same-Day HBO Max Streaming Release*, CNBC (Feb. 7, 2022), https://www.cnbc.com/2022/02/07/matrix-co-producer-sues-warner-bros-over-hbo-max-streaming-release.html.

writers in the process. After a lengthy dispute, WGAW reached a settlement with CBS in 2021 for $3.4 million in underpaid residuals and interest.[25]

The lack of reference to labor markets in the existing HMG and VMG both reflects and contributes to the severe neglect of labor and labor markets in established antitrust practice. Antitrust agencies must stop viewing mergers that harm labor as pro-competitive; in order to do so, impacts on labor need to be explicitly evaluated in each and every merger and market investigation. New guidelines should:

- Set forth an explicit framework for evaluating competition in labor markets and mergers that may diminish that competition.
- Discuss how to define labor markets and what the exercise of market power in labor markets may look like.
- Clearly state that projected "efficiencies" in mergers that come from worker harms are not pro-competitive and cannot be offset by consumer benefits, if any.

Question 5.g. "Should separate metrics be considered or specified for markets involving labor, based on the unique characteristics of such markets (e.g., search frictions typically greater than those present in product/service markets)?"

Currently, the HMG state, "To evaluate whether a merger is likely to enhance market power on the buying side of the market, the Agencies employ essentially the same framework described above for evaluating whether a merger is likely to enhance market power on the selling side of the market."[26] However, labor markets have characteristics that make them distinct from product markets, and that make labor markets significantly less competitive than product markets. This necessitates a separate set of metrics for labor markets, allowing for the presumption of employer market power at lower levels of concentration. The labor markets for professional entertainment industry writers illustrate this dynamic: powerful media companies are able to hold down wages and impose lower-quality terms and conditions of employment even absent overwhelming market shares, causing significant harm to writers.

The submarket for professional writers of television and digital series within the overall labor market includes writing for serialized content on online services such as Netflix, Amazon, and HBO Max as well as for traditional television networks like ABC, FX, and Starz. In this labor market, four companies control 62% of WGAW writing services by earnings. The submarket for theatrical writing includes feature-length content intended for movie theaters and major streaming services; the largest four employers have a 49% market share.[27] While the current HMG would characterize both of these submarkets' HHIs as "unconcentrated," significant

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[25] Cynthia Littleton, *WGA Sets $3.4 Million Settlement With CBS for All Access Streaming Residuals* (Apr. 15, 2021), https://variety.com/2021/tv/news/wga-cbs-streaming-settlement-all-access-1234952956/.

[26] *Horizontal Merger Guidelines* at 32.

[27] There is some movement of writers between these submarkets, primarily screenwriters attempting to enter the television submarket due to declining opportunities in the theatrical market, but key differences distinguish the two submarkets. Writing for television and digital platforms is primarily on episodic series, with compensation characterized by either weekly pay or per episode rates paid weekly and writers progressing from an entry level staff writer position through various writer-producer levels to the position of showrunner, or head writer. On the other hand, the labor submarket for theatrical writing has different terms and characteristics: the minimum initial compensation for a theatrical script is higher, many more writers work on projects that are never produced (known as 'development') and theatrical writers work alone and are typically not involved in the film's production.

search frictions, intellectual property acquisitions, and information asymmetries decrease competition for writers' work and allow employers to exert monopsony power.

WGAW Writer Earnings, 2020				
	TV/Digital		Theatrical	
	Market Share	HHI	Market Share	HHI
Disney	23%	509	13%	179
Warner Bros. Discovery	14%	209	10%	99
Netflix	10%	91	16%	251
Paramount Global	15%	237	9%	88
Comcast	9%	75	8%	65
Sony	6%	40	9%	78
Amazon	3%	7	3%	10
Industry HHI		1185		801

Creative labor markets in the entertainment industry are free agent markets in which finding work is notoriously difficult. Demand is irregularly timed, skills are highly variegated, and idiosyncratic preferences play an outsized role in matching talent and employers. Writers often specialize in writing drama or comedy, even developing reputations for writing specific styles within those categories. Writers on television and digital series progress from entry-level staff writer positions through writer-producer job titles including producer, supervising producer, co-executive producer, and executive producer, with only a subset of appropriate jobs available at each level within the broader TV/digital submarket. Hiring is also strongly influenced by relationships and a subjective sense of the "fit" between the employer and the personality and competencies of the writer. Writers of theatrical content in particular frequently invest significant time and often unpaid labor in order to even compete to obtain employment. Finding jobs is so difficult that a majority of writers hire talent agents to help them.

Employers in media and entertainment have further bolstered their market power over labor through vertical integration and by accumulating valuable intellectual property. Disney exemplifies this strategy, having purchased Marvel Entertainment in 2009, Lucasfilm in 2012, and Twentieth Century Fox in 2018. Netflix, as part of its increasing investment in self-produced original content, acquired a comic book publisher called Millarworld in 2017[28] and the Roald Dahl catalog in 2021.[29] Mostly recently, Amazon's acquisition of MGM gives it control of a massive library of valuable intellectual property developed over MGM's nearly 100 years in business. All of these IP acquisitions further limit writers' ability to choose between employers, as well as reducing the market for innovative new stories. In other words, any writer who wants to work on a Star Wars or Marvel's Avengers property has no option for an employer other than Disney.

The transition to streaming as the primary market for distribution of entertainment content as well as for writing employment has enhanced employers' ability to impede writers' bargaining leverage further through information asymmetry. Viewership information has become notably scarce in a streaming world, both for the public in general and for the workers on streaming

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[28] Chaim Gartenberg, *Netflix Buys Comic Book Publisher Millarworld in Company's First Acquisition* (Aug. 7, 2017), https://www.theverge.com/2017/8/7/16106574/netflix-comic-book-publisher-millarworld-first-acquisition-kick-ass-kingsman.

[29] Ryan Browne, *Netflix Buys the Entire Catalog of 'Charlie and the Chocolate Factory' Author Roald Dahl* (Sep. 22, 2021), https://www.cnbc.com/2021/09/22/netflix-buys-roald-dahl-catalog.html.

series. Historically, Nielsen ratings in television and box office returns for theatrical films would represent a publicly known measure of success for a given piece of content. But most streaming services only haphazardly report viewership information, meaning that the creator of a series for Apple TV or HBO Max may never know how successful their show was or how much value it created for the streaming service. Without publicly available measures of success, writers' ability to assess their leverage is diminished, increasing the market power of their employers.

All of these attributes of the labor markets for professional entertainment industry writing services diminish competition between employers and reinforce that market power can be exerted at lower levels of concentration in labor markets. To address this issue, new guidelines should:

- Consider lower structural presumptions in the case of supply-side markets.

Question 9.e. "In addition to employers' ability and incentive to exert downward pressure on wages via employment restrictions, what other signs of an uncompetitive labor market should the guidelines consider?"

Question 9.g. "In addition to wages, salaries and other financial compensation, what aspects of workers' terms and conditions of employment should be considered?"

In order to support effective enforcement against mergers that would harm labor markets, new guidelines should give specific and concrete examples of how market power over labor may be observed. The entertainment industry offers numerous examples, including reducing wages below competitive levels, unfair labor practices, and employers with the ability to impose onerous terms and conditions of employment.

Employers may exert market power over labor by reducing wages below competitive levels, or paying labor below their marginal revenue product. For instance, from 2015 to 2019, the six largest companies in the entertainment industry (Comcast, Disney, Time Warner, Fox, Paramount Global, and Netflix) recorded $50 billion or more in combined operating profits every single year,[30] benefitting from rising demand for the content writers create. The number of professional scripted series increased from 281 in 2013-2014 to over 350 in 2017-2018[31] and writers' employers increased revenue and profits by licensing series to streaming services and foreign networks.[32] At the same time, the median weekly compensation of writer-producers on television and online series declined 23% between 2014 and 2016, and 16% between 2014 and 2018.[33] Much of the decline was driven by the increasing prevalence of short seasons of 6-13 episodes, compared to the traditional 22-episode season that long dominated broadcast television. Employers are able to hire some writers for precarious, short-term employment while stretching other writers' per-episode payments over longer periods, depressing their weekly pay. Meanwhile, in screen employment, demands for writers to work for free—either to obtain employment or to support further employment—are endemic. Employers' ability to hold down

[30] Company SEC filings.
[31] WGAW analysis.
[32] For instance, in 2014 Les Moonves, CEO of CBS Corporation notes on an earnings call that "Just as we did with Amazon for *Under the Dome* and *Extant*, we presold the SVOD rights for [Zoo], this time to Netflix, meaning that *Zoo* will be immediately profitable for us." CBS Corporation, "Earnings Call: Q2 2014 Results" (Aug. 7, 2014), http://seekingalpha.com/article/2398995-cbss-cbs-ceo-leslie-moonves-on-q2-2014-results-earnings-call-transcript?part=single.
[33] WGAW analysis.

wages without losing access to talent at a time of record industry health and unparalleled investment in content provides real-world evidence of monopsony power.

Aside from these broad trends, the industry is also rife with examples of individual employer abuses that illustrate large employers' ability to set terms and conditions for employment or to underpay creative workers without experiencing competitive pressure. Following the Disney-Fox merger, Disney unilaterally pushed creators and other entertainment industry participants to forego their participation in future licensing revenues on Disney shows. In doing so, Disney altered a longstanding model for talent participation in series profits and cut those creative workers off from a share in the gains of a successful Disney show.[34] Netflix entered original content production less than a decade ago, and after growing to become the fourth-largest TV/digital employer has recently sought to pay writers below the minimum compensation set by the Guild's collective bargaining agreement for certain periods of work on its series.

Amazon has likewise used its power to underpay writers. Under the WGA collective bargaining agreement, writer residuals for original content made for subscription streaming services like Netflix and Amazon increase as the services distributing that content grow in subscribers: residuals for the largest services with more than 45 million domestic subscribers are 50% higher than residuals in the next subscriber tier of 20 to 45 million subscribers. However, Amazon refused for years to pay writers residuals that reflect its scale even as the company proclaimed the success of Amazon Prime to investors and the public.[35] Amazon insisted to the Guild that Prime Video had fewer than 45 million domestic subscribers from 2017 until 2021 and refused to support that claim with any actual subscriber numbers; meanwhile analysts estimate that Amazon had well over that number of paid U.S. subscribers since at least 2017.[36] Only in July 2021, after the Guild filed an Unfair Labor Practice charge against the company with the National Labor Relations Board demanding subscriber information did Amazon finally concede to paying residuals in the highest subscriber tier for a streaming service.

Time Warner's expansion of its HBO service into the online streaming market with HBO Max provides another example of existing employer power. When Time Warner launched HBO Max in 2020, the company insisted that the scripts written for original HBO Max series be paid at a lower rate than all other HBO programming. While the HBO Max service includes HBO Max originals like *Raised by Wolves* side-by-side with HBO linear originals like *Succession*, the company demanded a two-tier wage system for writers of the different series.

In addition, labor market power in media and entertainment can be observed in decreased creativity, variety, and innovation. Major theatrical employers have responded to the decline of the physical home video market and increased globalization by cutting development budgets for new films, or studio research and development. The rise of franchise films—series of films from the same studio taking place in the same cinematic "universe"—facilitates this trend, allowing studios to reduce innovative development and employ fewer writers. Disney, having made a series of competing studio acquisitions in the form of Marvel, Lucasfilm, and Fox exemplifies this strategy.

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[34] Stephen Battaglio, Wendy Lee, *The Backend of the Backend? Disney Wants to Limit Profit Participation on its New TV Shows*, L.A. Times (Sept. 12, 2019), https://www.latimes.com/entertainment-arts/business/story/2019-09-12/disney-tv-shows-backend-profit-participation-changes.
[35] Rachel Siegel, *The Amazon Stat Long Kept Under Wraps Is Revealed: Prime Has Over 100 Million Subscribers*, The Washington Post (Apr. 18, 2018), https://www.washingtonpost.com/news/business/wp/2018/04/18/the-amazon-stat-long-kept-under-wraps-is-revealed-prime-has-over-100-million-subscribers/.
[36] Seth Shafer, *Profile: Amazon Prime Video (US) 2021*, S&P Market Intelligence (July 13, 2021).

Labor markets for professional entertainment industry writers illustrate some of the many forms that employer market power can take. New guidelines should incorporate the following as evidence of employer market power:

- Employers' ability to exert downward pressure on wages.
- Employers' ability to impose onerous terms and conditions of employment.
- The presence of unfair labor practices.
- Decreased innovation and variety.

Conclusion

The existing Merger Guidelines, and our framework for antitrust enforcement broadly, have profoundly failed to protect competition in markets across the U.S. They have done so by setting high thresholds for presumptions of market power or anticompetitive mergers, allowing companies to claim pro-competitive benefits from mergers that harm competition in labor markets, assuming vertical mergers are inherently less likely to cause harm, overly prioritizing econometric evaluation of price impacts, and simply failing to explicitly consider labor markets at all. The DOJ and FTC should issue guidelines that provide strong, bright-line presumptions against vertical and horizontal mergers, eliminating consideration of "efficiencies," and give due consideration to vertical and non-price harms. Moreover, new guidelines must provide a robust framework for assessing competition in and merger impacts on labor markets, including discussion of labor market definition and separate metrics for assessing competition levels.

Respectfully submitted,

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Encl: *Broken Promises: Media Mega-Mergers and the Case for Antitrust Reform*

Writers Guild of America West and American Federation of Musicians
Comment on Draft FTC-DOJ Merger Guidelines

Writers Guild of America West (WGAW) and American Federation of Musicians (AFM) are pleased to submit the following comment to the Federal Trade Commission and Antitrust Division of the Department of Justice ("the Agencies") regarding the Draft Merger Guidelines ("Draft Guidelines") issued on July 19, 2023. The WGAW is a labor union representing over 11,000 writers in the television, film, news, and streaming video industries. AFM is the largest organization in the world representing 70,000 professional musicians playing in orchestras, bands, clubs, and theater—both on Broadway and on tour. AFM members make music for film, television, commercials, and sound recordings.

WGAW and AFM strongly support the Draft Guidelines, which make critical changes to the merger review process to promote effective antitrust enforcement and prevent harmful mergers. WGAW and AFM's comment will focus on the Draft Guidelines' inclusion of labor markets in merger review and offer some suggestions to strengthen worker protections.

The Draft Guidelines Meaningfully Incorporate Labor Market Harms in Merger Review

The Draft Guidelines take an important step forward by explicitly including labor markets in merger review. The impact of mergers and other anticompetitive behavior on workers has long been ignored in antitrust enforcement, to disastrous effect. In media, decades of mergers and vertical integration have harmed writers and musicians and have given employers tremendous market power which they have used to decrease workers' pay, worsen working conditions, and capture an increasing share of the value of writers' and musicians' work.

Many of the issues that led to the current nationwide strike of 11,500 screen and television writers, which began on May 2, 2023, reflect the types of labor market harms detailed in the Draft Guidelines. In the past few years, writers have seen their inflation-adjusted pay decline despite growth in industry profits.[1] Writers have been increasingly pushed into shorter-term, precarious employment, and in streaming video, employers have used their power to impose new compensation models that cut out all other industry participants—including writers and independent producers—from sharing in the benefit of the industry's growth. Many of these changes are departures from compensation models that had been industry standards for decades. The entertainment industry's major employers—including Disney, Comcast-NBCUniversal, Paramount Global, Warner Bros. Discovery, Netflix, Amazon, and Apple—refused to meaningfully negotiate these and other key issues, leading the members of WGAW and Writers Guild of America East (jointly, "WGA") to authorize a strike that has continued for more than four months.

WGAW and AFM are encouraged that numerous elements of the Draft Guidelines support greater scrutiny of mergers on the basis of their harms to workers, including but not limited to:

- **The Draft Guidelines move away from the consumer welfare standard and a deference to so-called "efficiencies," including a commitment not to "credit vague or speculative claims" or "benefits outside the relevant market."[2]** Numerous mergers in media have been approved on the speculative basis that they would bring efficiencies that would lower prices for consumers despite their likelihood of causing harm, including in labor markets.[3] In just one example, the AT&T-Time Warner merger purported to result in "considerable efficiencies,"[4] and innovation via elimination of double marginalization that would benefit consumers.[5] Not only did these consumer benefits fail to materialize, the merger caused significant harm in other markets, including thousands of worker layoffs[6] and underpayment of key talent on Time Warner films.[7]

- **The Draft Guidelines rightfully acknowledge that mergers may be anticompetitive at lower Herfindahl-Hirschman Index ("HHI") levels in labor markets than consumer markets**. As WGAW has written to the FTC before,[8] numerous characteristics of the labor market for writers in the professional entertainment industry increase employer market power beyond what a pure market share or HHI assessment would suggest. Writers are free agents in markets where finding work is notoriously difficult, with irregular demand, narrow job availability by genre and writer title, and an outsized role for idiosyncratic preferences in matching talent with employers. Information asymmetries and vertical integration between content producers and distributors further increase the market power of employers. And as the Draft Guidelines correctly note, mergers themselves can lower demand for workers, further complicating the use of market share to assess levels of competition.[9] For example, Disney's series of horizontal mergers (Marvel Entertainment in 2009 and Lucasfilm in 2012) allowed the company to reduce its employment of writers by 32% from 2009 through 2016.[10]

- **The Draft Guidelines call for the Agencies to evaluate whether mergers will increase the risk of coordination or entrench a firm in a dominant position.** There is evidence that labor markets for writing and musical services are vulnerable to tacit coordination from the few powerful employers, with terms that favor employers over writers and musicians—many at issue in the current WGA strike—spreading among employers to become "standard." For instance, low ceilings on experienced writer pay and severe underpayment for work during series post-production are both practices that depart from historical practice in the industry and appear to have spread from Netflix to other major employers, illustrating both Netflix's market hegemony and the ease of tacit coordination among major employers.

- **The Draft Guidelines establish greater scrutiny of vertical integration**. The media and entertainment sector is heavily characterized by vertical integration and aptly illustrates the attendant harms. The industry's major employers are all vertically integrated conglomerates, combining content production and distribution arms, and increasingly focused on distributing their own content. This forecloses competition from independent producers and distributors, and leads to wage suppression for writers, musicians, and other industry workers.

In these and other ways, the Draft Guidelines represent significant progress and should facilitate better enforcement against harmful mergers and anticompetitive actions in media and entertainment along with other industries.

The Guidelines Should be Strengthened

While the Draft Guidelines substantially further antitrust enforcement and address some worker concerns, the Agencies should take additional steps to strengthen them.

Lower Structural Presumptions

The Agencies should consider lower levels for the Guidelines' structural presumptions. The Draft Guidelines focus their proposed structural presumption on post-merger HHI over 1,800 or market share over 30% along with an HHI increase greater than 100. While this is an improvement over the current structural presumption threshold, anticompetitive market power can exist—and mergers should be viewed skeptically—at lower thresholds. For instance, a merger between Comcast-NBCUniversal and Warner Bros. Discovery would leave the combined company with less than 30% of domestic subscription streaming revenue,[11] but would still significantly reduce consumer choice and worker leverage.

Unions and Labor Market Harms

We commend the Agencies' inclusion of labor organizations as sources of data during merger review. The Draft Guidelines should go further in recognizing a given merger's impact on collective bargaining when examining harms to labor markets, particularly when workers at both merging firms are under the same or similar collective bargaining agreements. A merger of employers typically enhances employer leverage in collective bargaining because the employers no longer compete against one another to obtain a labor contract and avert a work stoppage.

Even when multiple employers negotiate together with a single labor union, as they do in the entertainment industry, a merger can increase the employers' relative bargaining power. A small number of major employers have an increased ability to coordinate and agree in bargaining to resist union demands. Between negotiating cycles, these employers face less competition for workers' labor, which increases their ability to resist improvements in wages and working conditions. During the past decade, entertainment industry employers—their bargaining power enhanced through rounds of consolidation—have significantly depressed writers' "overscale" compensation"—that portion of compensation in excess of union minimums, which is negotiated individually by agents. Experienced writers have traditionally earned multiples of the union minimum, but powerful employers have been able to demand that even these most experienced writers work at or near the same minimum pay as writers who are just starting out. As a consequence, the WGA has been forced to negotiate—and now to strike over—elements of writer pay that had previously been left to individual overscale negotiations.

The growing consolidation of media companies, and the vertical integration of content producers and distributors, has also led to disputes among the bargaining parties in the period between contract negotiations. For example, WGAW filed an unfair labor practice charge with the National Labor Relations Board against Amazon for withholding the number of Amazon Prime video subscribers in an effort to underpay writers whose residuals payments were tied to subscriber tiers.[12] WGAW also filed arbitration claims against Paramount[13] and Netflix[14] for

undervaluing “imputed” license fees to vertically-integrated streaming services. Each of these disputes stems directly from the increasing consolidation of the media companies and should be considered evidence of employer market power.

Beyond Future Merger Transactions

Stronger guidelines are necessary to guard against future harmful mergers. But even the existing level of consolidation and vertical integration in the media industry is unacceptable and demands regulatory oversight. We urge the Agencies to investigate consummated mergers and anticompetitive conduct using the frameworks laid out in the Draft Guidelines.

For more information regarding the harmful impacts of past media mergers and vertical integration in the media industry, please see the following WGAW reports, included as appendices to this comment:

- *The New Gatekeepers: How Disney, Amazon and Netflix will take over Media* (August 2023)
- *How the Warner Bros. Discovery Merger Hurts Workers and Diversity* (January 2023)

Conclusion: The Agencies Should Enforce these Principles Aggressively

The Draft Guidelines are a clear improvement to the current guidelines and, if implemented, will establish fundamental protections for both workers and consumers. Numerous harmful media industry mergers might have been blocked, and their harms prevented, had these Draft Guidelines been in place at the time of merger review. The updated guidelines are urgently needed, as Wall Street continues to demand more consolidation in the media industry. As WGAW’s *The New Gatekeepers* report discusses, Disney, Amazon, and Netflix are prime candidates for future consolidation, and each has demonstrated that it will abuse its position of dominance—with workers, consumers, and competitors—when given the opportunity. Just in the past year, analysts have speculated that Apple will buy Disney[15] and Comcast-NBCUniversal will buy Warner Bros. Discovery.[16] Any of these mergers would be extremely harmful and would result in additional rounds of reactive consolidation, as the few remaining companies seek to scale up in response.

It is critical that the Agencies consider how any future proposed mergers in this industry would impact writers, musicians, and other industry workers. These Draft Guidelines are an important step in strengthening enforcement to foster a vibrant, competitive environment for workers and audiences of the content that writers and musicians create.

Respectfully submitted,

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[1] For more details, see Writers Guild of America, *Writers Are Not Keeping Up* (Mar. 14, 2023), available at https://www.wgacontract2023.org/updates/bulletins/writers-are-not-keeping-up.
[2] U.S. Department of Justice & Federal Trade Commission, Merger Guidelines, Section IV.3
[3] Writers Guild of America West, *Broken Promises* (2021) available at https://www.wga.org/uploadedfiles/news_and_events/public_policy/broken-promises-merger-report.pdf.
[4] United State of America v. AT&T Inc., 310 F. Supp. 3d 161, 191 (D.D.C. 2018), aff'd sub nom. United States v. AT&T, Inc., 916 F.3d 1029 (D.C. Cir. 2019).
[5] Id. at 183.
[6] Jon Brodkin, *AT&T's "Headcount Rationalization"—i.e. Job Cuts—Hits Thousands More Workers*, Ars Technica (Jun. 17, 2020), https://arstechnica.com/tech-policy/2020/06/att-cuts-over-3400-jobs-in-latestround-of-headcount-rationalization/; Patrick Hipes & Nellie Andreeva, *TruTV Latest WarnerMedia Division To See Layoffs*, Deadline (May 28, 2019), https://deadline.com/2019/05/trutv-layoffs-restructuringwarnermedia-1202623141/; Tony Maglio, *Adam Conover Blames AT&T-Time Warner Merger for Cancellation of 'Adam Ruins Everything,'* TheWrap (Jan. 19, 2022), https://www.thewrap.com/why-was-adam-ruins-everything-canceled-adam-conover-blames-att-video/.
[7] Sarah Whitten, *'Matrix' Co-Producer Sues Warner Bros. Over Same-Day HBO Max Streaming Release*, CNBC (Feb. 7, 2022), https://www.cnbc.com/2022/02/07/matrix-co-producer-sues-warner-brosover-hbo-max-streaming-release.html.
[8] Writers Guild of America West, *Writers Guild of America West Comment on DOJ-FTC Request for Information on Merger Enforcement* (Apr. 21, 2022), available at https://www.wga.org/uploadedfiles/news_and_events/public_policy/wgaw_comment_on_doj-ftc_rfi_on_merger_enforcement.pdf.
[9] "[L]oss of competition through a merger of two firms may lead the merged firm to…lay off or stop hiring workers." U.S. Department of Justice & Federal Trade Commission, Merger Guidelines, Appendix 2.D.
[10] Writers Guild of America West, *WGAW Opposes the Disney-Fox Merger* (2017), available at https://www.wga.org/uploadedfiles/news_and_events/public_policy/wgaw_disney-fox_merger_white_paper.pdf.
[11] MoffettNathanson, 2Q 2023 SVOD Subscriber estimates.
[12] Writers Guild of America West, *WGAW Letter to FTC Opposing Amazon-MGM Merger* (Dec. 21, 2021), available at https://www.wga.org/uploadedfiles/news_and_events/public_policy/Amazon-MGM_Letter_to_FTC.pdf.
[13] Cynthia Littleton, *WGA Sets $3.4 Million Settlement With CBS for All Access Streaming Residuals* (Apr. 15, 2021), https://variety.com/2021/tv/news/wga-cbs-streaming-settlement-all-access-1234952956/.
[14] Katie Kilkenny, *Writers Guild Arbitration With Netflix Yields $42M in New Residuals for Members*, The Hollywood Reporter (Aug. 4, 2022), https://www.hollywoodreporter.com/business/business-news/wga-netflix-residuals-42-million-writers-1235192877/.
[15] Tony Owusu, *Analyst Expects Disney to Be Bought By This Tech Giant,* TheStreet (Jul. 11, 2023), https://www.thestreet.com/markets/mergers-acquisitions/analyst-expects-disney-to-be-bought-by-this-tech-giant.
[16] Tom Wilton, *Warner Bros. Discovery Just Gave You a Reason Not to Buy Its Stock,* The Motley Fool (Oct. 13, 2022), https://www.fool.com/investing/2022/10/13/warner-bros-discovery-just-gave-you-a-good-reason/.