



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

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*”).

³ U.S. Department of Justice & The Federal Trade Commission, *Vertical Merger Guidelines*, 5 (June 30, 2020) available at https://www.ftc.gov/system/files/documents/reports/us-department-justice-federal-trade-commission-vertical-merger-guidelines/vertical_merger_guidelines_6-30-20.pdf. Emphasis added.

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.

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

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

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 Brodtkin, *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

¹⁸ Jon Brodtkin, *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

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 Brodtkin, *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.cnn.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

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 2017²⁸ 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

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 2017-2018³¹ 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.

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*



BROKEN BROKEN PROMISES

Media Mega-Mergers and
the Case for Antitrust Reform

December 2021

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 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.

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

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

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.

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

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.

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 overbuilders²⁵ 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

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 billion³⁹ 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

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.

THE VERGE

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

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.

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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