WGAW WRITERS GUILD OF AMERICA WEST

December 21, 2021

Holly Vedova
Director, Bureau of Competition
Federal Trade Commission
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Dear Director Vedova:

The Writers Guild of America West (WGAW or the Guild) strongly opposes Amazon.com Inc.'s proposed acquisition of Metro-Goldwyn Mayer Studios (MGM). Amazon is already integrated through the entire content value chain, from content production to televisions, and the company has a track record of abusing its dominance across these and other markets. Amazon's acquisition of MGM will threaten competition in the streaming market and in the larger media and entertainment ecosystem. We urge the Federal Trade Commission (FTC) to block this merger.

The Writers Guild of America West is a labor union that represents close to 11,000 professional writers who create the majority of scripted programming for motion pictures, television, and streaming services. Guild members write hundreds of movies and original scripted shows each year. The WGAW is responsible for negotiating a collective bargaining agreement on behalf of its membership with major studios every three years; both Amazon and MGM are signatories to that contract.

WGAW has repeatedly highlighted the negative effects of vertical and horizontal consolidation on entertainment writers. Merger after merger in media and entertainment has been approved, and the potential harms to competition consistently come to fruition while the promised merger benefits never materialize. We urge the FTC to consider the harmful effects of the acquisition not only on industry competition, but also on the creative workforce, as the Department of Justice (DOJ) did recently in its antitrust lawsuit challenging Penguin Random House's acquisition of Simon & Schuster. If Amazon's acquisition is approved, consolidation will accelerate in an already concentrated market, harming creators, competitors and consumers.

The Amazon-MGM Merger Is Part of a Wave of Vertical Integration in Streaming

Vertical and horizontal consolidation, aided by deregulation and lax antitrust enforcement, has long limited competition in media and entertainment. Following the repeal of the Financial

Interest and Syndication Rules (Fin-Syn)[1] in the early 1990s, major content producers merged with TV networks and later cable and internet companies, drastically reducing the amount of independent programming and leaving only a handful of buyers for writers' work.[2] The emergence of the online video market, led by Netflix and Amazon, temporarily increased competition and led to historic levels of quality content, providing a new distribution channel particularly for unaffiliated content and non-vertically integrated producers. In the 2013-2014 TV season, fewer than 20 professional scripted series were distributed on subscription streaming services; by 2018-2019 that number had increased to over 100. However, the growth of streaming also spurred traditional media and telecommunications companies to consolidate, with another wave of mergers including AT&T-Time Warner (2018), Disney-Fox and Viacom-CBS (2019).

The few remaining companies, having launched their own streaming services and withdrawn content from competitors, are now focused on pursuing dominance through a pure vertical integration model in which they alone control the content from production to distribution. The COVID-19 pandemic heavily impacted series distributed in the 2020-2021 season as media companies were unable to produce new content for months. In the 2019-2020 and 2020-2021 seasons, three companies distributed 59% and 57% of TV and digital series respectively—and the vast majority of those series were owned by the distributors.

Market Share of Television and Online Scripted Series by Distributor		
	2019-2020	**2020-2021**
National Amusements	20%	21%
Disney	19%	20%
Netflix	20%	16%
AT&T/ Time Warner	12%	11%
Comcast/ NBCU	9%	9%
Amazon	5%	4%
Other	15%	19%

Percentage of Self-Supplied Television and Online Scripted Series by Distributor		
	2019-2020	**2020-2021**
National Amusements	86%	79%
Disney	79%	81%
Netflix	50%	64%
AT&T/Time Warner	80%	85%
Comcast/NBCU	90%	92%
Amazon	83%	82%
Other	24%	41%

[1] Fin-Syn Rules, established by the FCC in 1970, prevented television networks from owning the content they distributed in primetime.
[2] Writers Guild of America West, Comment Letter to FTC Chairman Joseph Simons re: FTC Vertical Integration Hearings (Dec. 28, 2018), p. 2.

Meanwhile, the COVID-19 pandemic sharply accelerated the growth of streaming and its importance for media conglomerates, with 43% of TV and digital series in the 2020-2021 season made for streaming services—a sharp increase from 22% just five years earlier. Although the traditional media companies have increased their output in streaming with the launches of Disney+, HBO Max, Peacock, and the re-branded Paramount+, their strategy of vertical integration raises barriers to entry for new competitors in content exhibition and reduces competition among content producers, making further consolidation more likely.

Market Share of Online Scripted Series by Distributor		
	2019-2020	**2020-2021**
Netflix	50%	38%
Disney	14%	19%
Apple	11%	12%
Amazon	14%	9%
National Amusements	4%	8%
AT&T/Time Warner	4%	7%
Comcast/ NBCU	0%	5%
Other	3%	2%

Decreased competition among content producers also has a corresponding impact in labor markets, where major employers in media and entertainment already exert monopsony power over writers and put downward pressure on compensation. Creative labor markets in the entertainment industry are free agent markets in which finding work is exceedingly difficult; irregularly timed demand, highly variegated skills, and idiosyncratic preferences hamper matching between talent and employers and contribute to high search frictions that limit competition between employers.[3] As a result, large employers can hold down compensation with low risk of losing talent: the median weekly compensation of writer-producers declined 23% between 2014 and 2016 and 16% between 2014 and 2018, at a time of peak demand for programming and record profits for entertainment companies.[4] This trend has been exacerbated by further concentration and vertical integration. Shortly after acquiring Fox, Disney unilaterally pushed creators and other entertainment industry participants to forego their participation in future licensing revenues on Disney shows.[5] Netflix, which has been sharply increasing scale as a producer, recently sought to pay writers below the minimum compensation set by the Guild's collective bargaining agreement. Lack of competition among content producers also limits creativity and choice by leaving just a few companies to decide what projects are made and

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[3] For instance, writers often specialize in writing drama or comedy and develop reputations for writing in particular styles. On television staffs, writers have a variety job titles reflecting experience levels, starting with the entry-level staff writer position and progressing through the writer-producer roles that include producer, supervising producer, co-producer and executive producer. Within the labor market for writers who create professional audiovisual content, there are only a subset of jobs available at each level.

[4] WGAW analysis of covered scripted programming.

[5] Stephen Battaglio, Wendy Lee, *The Backend of the Backend? Disney Wants to Limit Profit Participation on its New TV Shows*, The Los Angeles Times (Sept. 12, 2019), https://www.latimes.com/entertainment-arts/business/story/2019-09-12/disney-tv-shows-backend-profit-participation-changes.

whose stories are told. Absent intervention, the online media landscape will become increasingly consolidated, competition among content producers will diminish, and labor market abuses will increase.

The Amazon-MGM Merger Will Harm Competition

In this context, Amazon's proposed acquisition of MGM is highly concerning. Amazon's array of interconnected businesses already reaches the entire content value chain, from production of content through Amazon Studios, to exhibition through the Prime Video subscription streaming service and the ad-supported IMDbTV, to distribution of other streaming services through Amazon Channels and the Amazon Fire platform, and even manufacturing and selling its own smart TVs.[6] The company has major market shares in several of these businesses; Amazon's Prime Video subscription service is the third-largest in the U.S. with a 20% market share,[7] enjoying advantages over its competitors such as inclusion for no additional cost to a majority of Amazon's 200 million global Prime shipping subscribers.[8] Amazon's FireTV devices are tied with Roku's as the largest competitors in streaming video distribution, each enjoying a 36% market share.[9]

Amazon also owns and operates a cloud computing business, Amazon Web Services (AWS), which competitors including all major U.S. movie studios and all major streaming services rely on.[10] This is all in addition to Amazon's massive online shopping segment, where it controls 41 percent of e-commerce retail transactions in the U.S.[11] These businesses give the company numerous tools it can leverage to harm its competitors in online content exhibition and production, and Amazon's history illustrates that it has the incentive and willingness to do so.

Amazon Will Likely Restrict Licensing of MGM Content to Third Party Distributors

MGM is one of the few remaining mid-sized media companies not owned by a major conglomerate and not focused on self-distribution. Founded in 1924, it is one of the oldest studios in Hollywood and owns a marquee library of 4,000 films and 17,000 TV episodes including *James Bond, Rocky, Tomb Raider, The Pink Panther, Stargate, Fargo, Robocop, The Silence of the Lambs,* and *Legally Blonde.* Robust libraries are a valuable and limited resource in the streaming world, providing new entrants with substantial back catalogs of content to retain subscribers as well as popular intellectual property to develop into new exclusive original content. MGM also owns a premium pay TV network Epix and an associated over-the-top (OTT)

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[6] Brian Heater, *Amazon Is Releasing Its Own TVs With Alexa Built In,* TechCrunch (Sept. 9, 2021), https://techcrunch.com/2021/09/09/amazon-is-releasing-its-own-tvs-with-alexa-built-in/.
[7] MoffettNathanson, *U.S. Media & Internet: Blue Skies for Now*, Jan. 15, 2021.
[8] Taylor Soper, *Amazon Now Has 200 Million Prime Members, Bezos Reveals in Annual Shareholders Letter*, GeekWire (Apr. 15, 2021), https://www.geekwire.com/2021/amazon-now-200-million-prime-members-bezos-reveals-annual-shareholders-letter/.
[9] Alex Sherman, *How Roku Used the Netflix Playbook to Beat Bigger Players and Rule Streaming Video*, CNBC (Jun. 19, 2021), https://www.cnbc.com/2021/06/18/how-roku-dominated-streaming-anthony-woods-new-content-obsession.html.
[10] David Dayen, *How Amazon Controls Virtually Everything You Watch*, The American Prospect (Jul. 9, 2021), https://prospect.org/power/amazon-web-services-controls-virtually-everything-you-watch/.
[11] Karen Weise and Michael Corkery, *People Now Spend More at Amazon Than at Walmart*, The New York Times (Aug. 17, 2021), https://www.nytimes.com/2021/08/17/technology/amazon-walmart.html.

on-demand version of the channel. Currently, MGM licenses its library content to multiple third parties including Netflix, HBO Max, Hulu and Paramount+, and produces original content for other streamers and TV networks including *The Handmaid's Tale* for Hulu.

This proposed acquisition would give Amazon increased incentive to direct MGM's library and output towards its own affiliated streaming services instead of third-party distributors, reducing consumer choice and variety and raising barriers for competing services and new entrants in both production and distribution. MGM's assets could also draw subscribers to Amazon's streaming services and related businesses like the Fire platform, strengthening its market power relative to competitors.

Amazon Has a Record of Abusing Its Dominance in Media

Amazon also has a well-documented history of anti-competitive behavior in relevant markets, wielding gatekeeper leverage against new entrants and existing competitors, and employing practices consistent with those the company has used to entrench power in other industries. As noted above, Amazon both competes with and distributes third-party streaming services. Amazon's power as a streaming distributor—through Amazon Channels and the Amazon Fire platform—gives the company ability and incentive to disadvantage Amazon Prime Video's competitors.

Over 83% of households use streaming devices and smart TVs like Roku, Amazon Fire TV, and Apple TV to access both affiliated and third-party streaming content on their televisions.[12] As such, carriage on the Fire platform is critical for streaming services, particularly new entrants, to reach widespread distribution among consumers. Similarly, Amazon Channels serves as a "store" where customers can subscribe to third-party apps, offering smaller streamers access to larger customer bases in exchange for a cut of subscription fees. Some smaller streamers source a substantial share of their domestic subscriber bases through Amazon Channels; the Channels store accounts for 31% of Paramount+ subscribers and 63% of Showtime's.[13] Amazon has been aggressive in using this gatekeeper position to extract tolls from competitors.

In negotiations for its Fire devices, Amazon has reportedly demanded 15% to 45% of revenue from third-party services, shares of advertising, and content for its ad-supported IMDb TV streaming service.[14] The company has also tried to keep content from third-party apps within Amazon Channels, where Amazon demands 30% of monthly revenues from competing streamers and controls the user experience and data.[15] These terms present significant disadvantages for Amazon's competitors in streaming exhibition, and attempts to push back have led to disputes. HBO Max and Peacock, for instance, had not reached agreements with Amazon before their launches in 2020; customers were unable to access the new streamers through Amazon devices for several months. Peacock and HBO's disputes reportedly stemmed

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[12] MoffettNathanson. *U.S. Media and Roku: Green Lights and Yellow Flags*, July 20, 2020.
[13] MoffettNathanson, *U.S. Streaming Media: What is Your RPU?*, July 8, 2021.
[14] Todd Spangler, *Why HBO Max, Peacock Are Deadlocked in Talks With Roku and Amazon,* Variety (Jul. 14, 2020), https://variety.com/2020/digital/news/hbo-max-peacock-roku-amazon-streaming-1234703977/.
[15] David Dayen, *How Amazon Controls Virtually Everything You Watch*, The American Prospect (Jul. 9, 2021), https://prospect.org/power/amazon-web-services-controls-virtually-everything-you-watch/.

from executives' desires to keep their streaming services outside of Amazon Channels to retain control of the user experience and viewership data.[16] News commentary suggested that the lack of Amazon Fire carriage notably slowed subscriber growth at these services,[17] and when HBO Max finally reached a deal with Amazon months later, the terms included an extension of WarnerMedia's contract with AWS.[18] These disputes echo carriage negotiations between networks and cable companies—except without even the modest regulation of cable to mitigate the ability and incentive of a vertically integrated company to harm its competitors.

Amazon has also used its power to harm writers through underpayment of compensation negotiated through the collective bargaining agreement. 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, who are freelance workers, sustaining careers in between periods of employment on different series or film projects. Residual compensation also ensures that when writers' employers benefit from rerunning popular content, licensing it to foreign television networks, or keeping content on streaming services for years, the writers of that content share in its long-term value. The 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.[19] 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, while industry analysts estimated that Amazon had well over that number of paid U.S. subscribers since at least 2017.[20] Only 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 beginning in July 2021.

If Amazon is permitted to acquire MGM, it will have another set of tools and even more leverage to use against writers and competitors across the entertainment industry and the streaming ecosystem.

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[16] Peter Kafka, *Why Streaming Devices and Streaming Networks Are Fighting over Your Eyeballs*, Recode (Nov. 25, 2020), https://www.vox.com/recode/21686514/hbo-max-roku-amazon-peacock-streaming-wonder-woman.

[17] Todd Spangler, *HBO Max's 80 Million Household Dead Spot: Why Streamer Isn't on Roku or Amazon Fire TV,* Variety (May 27, 2020), https://variety.com/2020/digital/news/why-hbo-max-not-available-roku-amazon-fire-tv-1234615984/.

[18] Jessica Toonkel, *WarnerMedia Extended AWS Deal to Win Key HBO Max Concession*, The Information (Jan. 8, 2021), https://www.theinformation.com/articles/warnermedia-extended-aws-deal-to-win-key-hbo-max-concession.

[19] 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/.

[20] S&P Capital IQ, Seth Shafer, *Profile: Amazon Prime Video (US) 2021* (Jul. 13, 2021).

FTC Should Block the Amazon-MGM Merger

Amazon's acquisition of MGM would significantly harm competition in video streaming exhibition and production, giving the merged company greater incentive and ability to harm its competitors and raising barriers for new entrants. In addition, merger approval will almost certainly trigger reactive consolidation as competitors respond to Amazon's increased market power—news of the deal immediately triggered speculation about Lionsgate and STX Entertainment as acquisition targets.[21] Without intervention, the level of vertical integration in media and entertainment makes increasingly likely that further waves of consolidation will leave just three or four companies controlling what content gets made. This outcome will enhance employer ability and power to put downward pressure on pay for the creative workforce, decrease content output and creativity, and reduce choice for consumers. The Writers Guild of America West strongly urges the FTC to block this merger.

Sincerely,

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Cc: Chair Lina M. Khan
Commissioner Noah Joshua Phillips
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[21] Brooks Barnes, *MGM Looks to Amazon as the Hollywood Studio Tries to Find a Buyer*, The New York Times (May 17, 2021), https://www.nytimes.com/2021/05/17/business/mgm-amazon.html; Etan Vlessing, *Lionsgate Vice Chair: "There's Great Scarcity Value" in Being a Major Indie Studio Now*, The Hollywood Reporter (Sept. 21, 2021), https://www.hollywoodreporter.com/business/business-news/lionsgate-vice-chair-theres-great-scarcity-value-in-being-a-major-indie-studio-now-1235017742/.