WRITERS GUILD OF AMERICA WEST

BROKEN PROMISES

Media Mega-Mergers and the Case for Antitrust Reform

December 2021

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

Introduction

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

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

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

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

MARKET POWER: ECONOMY-WIDE AND SECTOR-SPECIFIC

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

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

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 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.

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 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.

Anticompetitive Effects

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

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

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

AT&T-Time Warner

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


VICE

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

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

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

Anticompetitive Effects

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

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

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

Charter-Time Warner Cable-Bright House Networks

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

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

Anticompetitive Effects

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

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

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

Disney-Fox

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


Los Angeles Times

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

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

Anticompetitive Effects

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

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

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

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

Post-Mergers: The State of Media & Telecommunications Markets

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

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

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

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

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

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

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

[1] See Appendix 1.

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[7] *Beyond Antitrust* at 8-9.

[8] *Reviving Merger Control* at 11, 15-18.

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[12] FCC Public Notice, *Media Bureau Announces Filing of Complaint by Bloomberg, L.P. Against Comcast Cable Communications*, MB Docket No. 11-104 (June 20, 2011); In the Matter of Bloomberg L.P. v. Comcast Cable Communications, LLC, *Memorandum Opinion and Order*, MB Docket No. 11-104, 28 FCC Rcd. 14346 (2013).

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