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Via USPS and Electronic Mail

November 22, 2021

Holly Vedova, Acting Director
Bureau of Competition
Federal Trade Commission
600 Pennsylvania Ave., NW
Washington, DC 20580
antitrust@ftc.gov

Before 12,560 people as of November 19, 2021.

Dear Director Vedova,

We are writing to provide new research indicating that the proposed $8.5 billion acquisition by Amazon.com, Inc. of Metro-Goldwyn Mayer Studios (MGM) may substantially lessen competition in the streaming video market and complimentary markets if it is allowed to proceed, and thus should be opposed by the Federal Trade Commission (FTC).[1]

The proposed merger between Amazon and MGM has both vertical and horizontal aspects. The merger is vertical because Amazon operates a vertically-integrated streaming video-on-demand (SVOD) business that includes a leading distribution platform for streaming content, Prime Video. Amazon also operates in two complementary markets: It produces and sells leading streaming devices, Amazon's Fire devices, which allow viewers to access multiple competing streaming platforms, and it provides essential cloud computing services, including to all of its major SVOD competitors. The merger is also horizontal because Amazon already controls, acquires and produces substantial content in the streaming video market, and MGM would add substantially to Amazon's total content library.

Evidence indicates the merger would harm competition in both vertical and horizontal ways. As described in more detail below, our new research indicates:

1) **Amazon leads SVOD companies in controlling and producing content that is distributed exclusively through Amazon, which shuts out rival streamers.** Amazon has approximately 35,000 titles that are offered only on its platform, and the MGM merger would give Amazon control of the world's largest contemporary film library,[2] comprising an additional 21,000 titles. Industry data indicate Amazon has more content in development and production than other streamers, and its content-development budget is expected to further increase relative to peers.

[1] 15 U.S.C. §18.
[2] Darrel Satzman, *Hefty Price Draws No Bids For Valuable MGM Archive*, LA BUSINESS JOURNAL, Jan. 28, 2002, https://labusinessjournal.com/news/2002/jan/28/hefty-price-draws-no-bids-for-valuable-mgm-archive/.

Amazon's current control over massive amounts of streaming content means the merger is likely to give Amazon greater incentive and power to exclude and discriminate against its competitors.

2) **Amazon's content choices threaten to degrade the film-making ecosystem that supplies film content, which will lead to lower quality and choice for consumers.** Amazon makes film content decisions based on whether the content drives customers into its retail ecosystem, which has caused it to cancel popular and culturally ground-breaking new programming. Amazon's influence on the health and diversity of the film-making industry is likely to be negative if the company is permitted to grow larger.

3) **Amazon is expanding its aggressive acquisition of distribution rights from filmmakers faster than rivals, leading to a greater possibility that an even larger share of video content will be available only on Amazon's platform.** Amazon is aggressively pursuing exclusivity deals with filmmakers at a faster pace than rivals, and it restricts exhibition of its content in educational settings. Examples show that Amazon has acquired distribution rights that force new films directly to its streaming platform, bypassing movie theaters, even for films with high-profile filmmakers and stars. Because MGM's content is currently available for distribution through other channels, including for educational screenings, the merger could have particularly negative impacts on the distribution of MGM content currently available outside of Amazon's platform.

4) **Exorbitant cloud computing exit fees and other discriminatory tactics make Amazon's ability to leverage its current power in complementary markets a material risk for streaming competitors.** Research indicates Amazon charges rivals exorbitant fees for certain cloud computing services that deter them from exiting Amazon's AWS service. Information on Amazon's pricing practices shows that the company has used aggressive discounting to help its Fire products become the market-leading streaming devices (tied with Roku) and then has used this market leverage to exclude or seek to exclude rivals from access to consumers.

5) **Data regarding estimated cost per title indicate Amazon Prime is priced below or far below all major rivals and probably priced below cost.** Pricing and title comparisons show Amazon may be pricing Prime Video below cost, a predatory tactic that allows Amazon to undercut rivals and prevent new entrants into the market who are unable to finance their streaming business from other lines of business. This pricing power could allow Amazon to drive rivals out of the market and raise prices in the future.

6) **Bolstering Amazon's dominance of SVOD content could allow Amazon to utilize Prime Video to definitively monopolize e-commerce.** Amazon already occupies a dominant position in the retail e-commerce market, holding 41 precent with its nearest competitor at a distant 7 percent, and further data show Amazon uses Prime Video as a tool to enhance its retail position. Because Amazon already utilizes exclusionary and arguably predatory tactics to gain advantages over its rivals in the SVOD and complementary markets, and the merger would significantly strengthen

Amazon's control over the SVOD content market, the merger with MGM may enable Amazon to illegally acquire unquestionable monopoly status in the retail e-commerce market.

The new data and research detailed below, which provide evidence of Amazon's current market position and tactics, clearly indicate that allowing Amazon to acquire a large, historically- and culturally- valuable film library would substantially bolster its power in the streaming content market as well as adjacent or complimentary business lines, would greatly enhance Amazon's incentive and ability to exclude and discriminate against rivals, and may even position Amazon to illegally monopolize the e-commerce market. Accordingly, the merger with MGM should be blocked.

1. **Amazon leads SVOD companies in controlling and producing content that is distributed exclusively on Amazon's platform which shuts out rival streamers.**

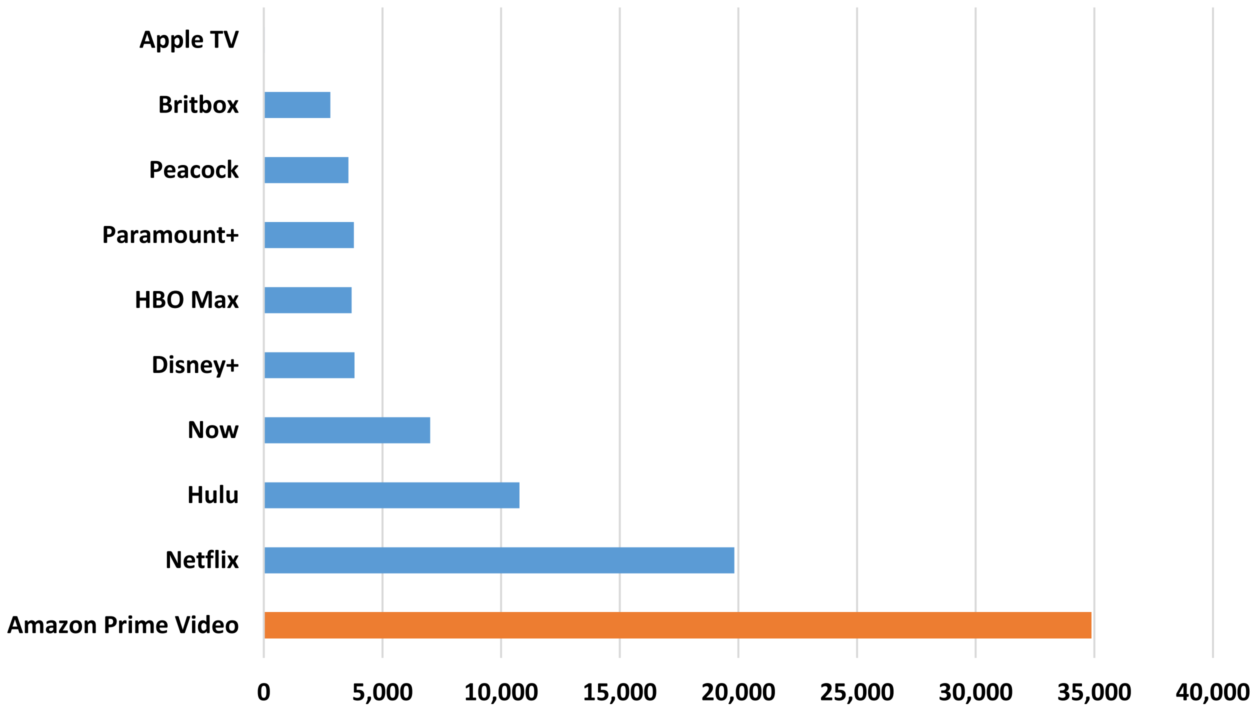
Currently, Amazon has approximately 35,000 titles that are offered only on its platform, and the MGM merger would give Amazon control of the world's largest contemporary film library,[3] comprising an additional 21,000 titles. Amazon also has more content in development and production than other competing streamers, and its content-development budget is expected to further increase relative to peers. Amazon's current control over massive amounts of streaming content means the merger is likely to give the company greater incentive and power to exclude and discriminate against its competitors.

Amazon has the largest number of titles that currently appear only on its streaming platform compared to other streamers.

Streaming video companies may control the content they exhibit on their platforms in multiple ways. One way is simply to acquire content and make it available only on their own platforms. Data show that, compared to any other streaming company, Amazon has the highest number of distinct titles, meaning the titles are currently not available to be streamed on any other competing platform.[4] As reflected in Figure 1 below, as of July 2021 there were 34,887 movie and TV titles distinct to the Amazon Prime Video platform. Amazon's closest competitor is a distant second with just under 20,000 titles.[5]

[3] *Id.*
[4] They may be unavailable on other platforms for multiple reasons, including that other platforms don't want to include the content in their libraries, but content may also be unavailable because the streaming company that owns the title refuses to make it available through licensing or other arrangements to other streamers.
[5] *Number of distinct titles (#) by SVOD service,* AMPERE ANALYSIS, July 2021, https://www.ampereanalysis.com/products/about/analytics-svod.

Figure 1: Distinct titles by streaming service, 2021

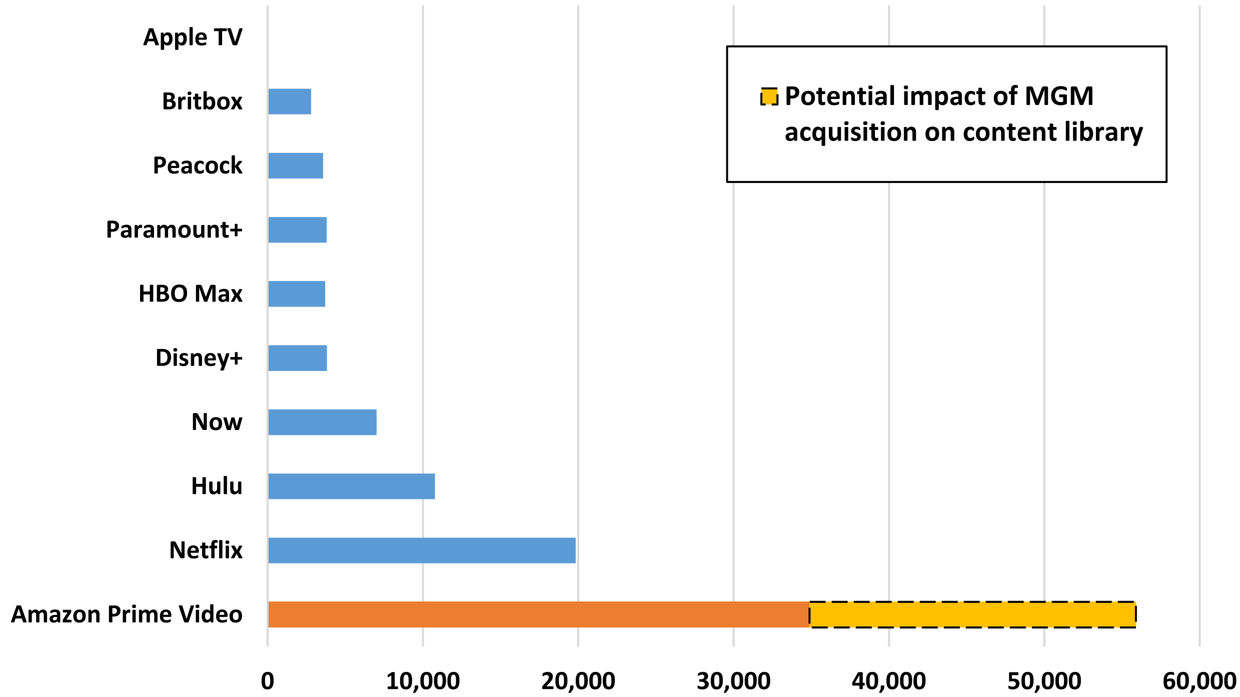


Source: Ampere Analysis

Amazon's possession of the largest number of distinct titles among streaming companies points towards a high degree of content exclusivity, and further exclusion if Amazon's content library is allowed to grow through the acquisition of MGM. MGM's film library includes approximately 4,000 movies and 17,000 TV shows.[6] As Figure 2 illustrates, if Amazon made these titles available only on its own streaming platform, this would increase the number of distinct titles available only on Amazon's platform by 60 percent, to a total of approximately 56,000 titles.

[6] Aaron Pressman, *By buying MGM, Amazon gets these 8 blockbuster movies,* FORTUNE, May 26, 2021, https://fortune.com/2021/05/26/amazon-mgm-library-hit-films-library/.

Figure 2: Distinct titles by streaming service, including potential impact of MGM acquisition, 2021



Source: Ampere Analysis, author's projection.

This new library would give Amazon significantly more power to discriminate against or exclude competitors from showing popular and culturally significant content – everything from *The Wizard of Oz* and *James Bond* to *Legally Blond* – on their rival platforms. And Amazon has every incentive to make its platform the exclusive source for this content: Viewers seeking access to these titles would also be additional subscribers to Prime and, importantly for Amazon, additional customers for its retail platform.[7]

Amazon is already a leading in-house producer of content, which gives it further exclusive control over content.

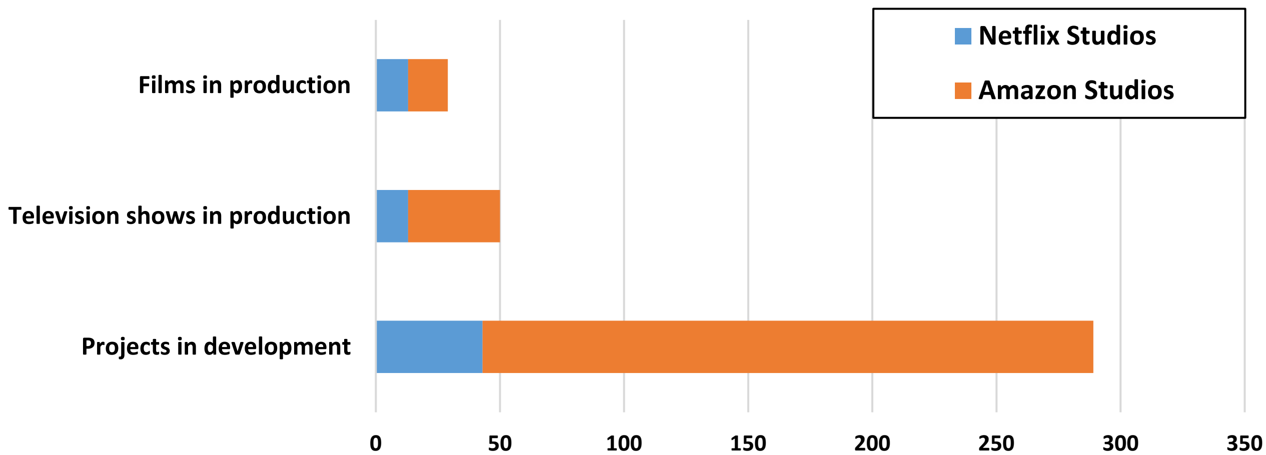
Amazon produces substantial amounts of content in-house, a mark of deep vertical integration and further exclusive control over content. Streaming companies tend to retain exclusive control over content they produce themselves rather than distributing it to other platforms.[8] Further, Amazon is the only leading SVOD service that has been a content producer as well as a distributor since the time it

[7] *See infra* section 2 regarding the emphasis Amazon places on using streaming video to drive customers to its retail platform.
[8] *See, e.g. Only on Netflix*, NETFLIX, https://www.netflix.com/browse/genre/839338.

launched its streaming platform.[9] Since then, Amazon has steadily increased its in-house production activity. In 2020, Amazon produced 17 percent of its upcoming TV series in-house, compared with 12 percent for Netflix, the second-largest producer.[10]

And data show Amazon is driving to increase its in-house content at a rapid speed. As Figure 3 below depicts, Amazon far outpaces competitors in content currently in development or production. According to industry data, while Amazon currently has 246 in-house productions in the development phase (meaning, in the planning or scripting phase), rival Netflix has only 43. [11] Amazon Studios also currently has more films and television shows in production (actually filming) than at Netflix Studios.[12]

Figure 3: In-house content currently in development and production, Amazon and Netflix, November 2021



Source: IMDBPro

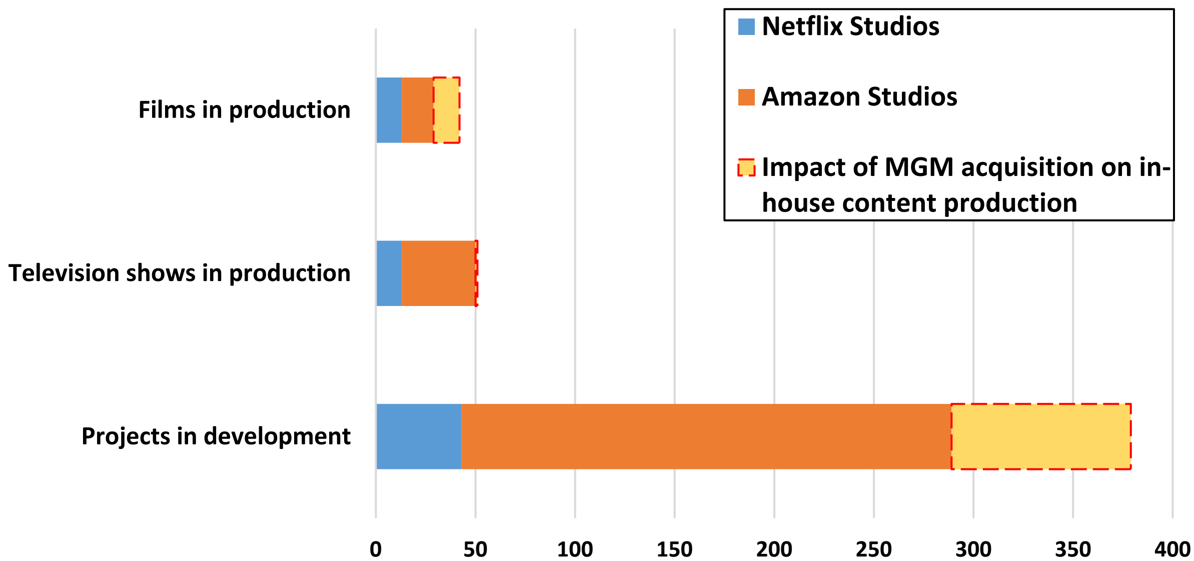
Amazon is also increasing its investment in content at a significant pace as measured by spending on licensed and in-house produced content. Morgan Stanley projects that, even without the acquisition of MGM, Amazon's content investment budget will grow at a compound annual growth rate of 15 percent through 2023.[13] In 2022, Amazon Studios will release titles including a *Lord of the Rings* TV series, which

[9] *See, e.g.* commentary in Ken Basin, *The Business of Television*, ROUTLEDGE, July 11, 2018, https://books.google.com/books?id=jbJjDwAAQBAJ&newbks=0&printsec=frontcover&pg=PT42&dq=amazon+started+its+studio+before+its+streaming+service&hl=en&source=newbks_fb#v=onepage&q=amazon%20started%20its%20studio%20before%20its%20streaming%20service&f=false.
[10] Olivia Deane, *Amazon commissioning overtakes Netflix for first time,* AMPERE ANALYSIS, May 2, 2020, https://www.ampereanalysis.com/insight/amazon-commissioning-overtakes-netflix-for-the-first-time.
[11] *Amazon Studios profile*, IMDBPRO, last accessed Nov. 10, 2021, https://pro.imdb.com/company/co0319272/filmography, and *Netflix Studios profile*, IMDBPRO, last accessed Nov. 10, 2021, https://pro.imdb.com/company/co0650527/?ref_=instant_co_1&q=netflix%20stud.
[12] *Id*.
[13] *Media: Shaken or Stirred – What's the Future of the Movie Business?*, MORGAN STANLEY at 18, October 18, 2021.

is set to be the most expensive series ever made.[14] Amazon reportedly spent $465 million on season one of *Lord of the Rings* alone.[15]

As reflected in Figure 4, industry data show that Amazon would also absorb a significant amount of ongoing in-house production activity with the acquisition of MGM. This includes 90 projects currently in development at MGM Studios.[16]

Figure 4: In-house content currently in development and production, Amazon, MGM and Netflix, November 2021



Source: IMDBPro

Currently, Amazon already has the largest and fastest-growing collection of titles available only on its own streaming platform. The prospect of Amazon acquiring a trove of additional MGM content to build on Amazon's existing vast library should raise alarm bells. Such control clearly gives Amazon the ability and incentive to exclude rivals (as it already does), but with control over MGM's vast library, Amazon may acquire enough market power over streaming content to raise prices for SVOD competitors or for SVOD consumers. Thus, the MGM merger risks enhancing Amazon's power in the SVOD market in ways that may harm rivals and raise prices for consumers.

2. **Amazon's content choices threaten to degrade the film-making ecosystem that supplies film content, which will lead to lower quality and choice for consumers.**

[14] Geoff Weiss, *Amazon's 'Lord Of The Rings' Prequel, The Most Expensive TV Series Ever, To Debut Sept. 2022,* TUBE FILTER, August 3, 2021, https://www.tubefilter.com/2021/08/03/amazon-lord-of-the-rings-september-2022/.
[15] *Id.*
[16] *Metro-Goldwyn-Mayer (MGM) profile,* IMDBPRO, https://pro.imdb.com/, (last accessed Nov. 16, 2021).

Amazon makes film content decisions based on whether it drives customers into its retail ecosystem, which has caused it to cancel popular and culturally ground-breaking new shows. This indicates Amazon's influence on the health and diversity of the film-making industry is likely to be negative if Amazon is permitted to acquire MGM.

Leaked documents suggest Amazon elevates retail marketing concerns over diversity and quality of content

Amazon appears to measure the "success" of in-house produced video content based on whether it believes the video content has motivated customers to sign up for Prime membership on its e-commerce platform, which has implications for consumer choice and diversity in film content. Leaked internal documents show that Amazon linked content choices to whether that content pulls in new retail subscribers. Specifically, Amazon appeared to examine whether a specific show or film is a new Prime member's "first stream" to determine whether that content is successful in driving the consumer into the Prime retail ecosystem, and it has canceled popular and critically-acclaimed shows with important, diverse content when that content is not "first stream."[17]

Internal documents reveal that Amazon discontinued two early, critically-acclaimed Amazon Studios productions that portrayed transgender and gender-equality issues – "Transparent" and "Good Girls Revolt," respectively – after new Prime subscribers failed to stream this content as their "first stream" often enough.[18] In the case of "Good Girls Revolt," the decision to cancel was reportedly made by an all-male team at Amazon Studios led by its then-president, Roy Price.[19] The creator of the show, Dan Calvo, expressed surprise at Amazon's decision given the critical success of the show, which Amazon executives had told him was a metric they cared about.[20] Amazon's refusal to share overall viewership data with filmmakers meant that Calvo was unable to point to any data to make a case against cancellation. The cancellation was surprising because third-party analysis suggested the show had the strongest following among the 'female aged 18-to-49' demographic of any Amazon content.[21]

It is unclear how many other filmmakers have been excluded from Amazon's SVOD platform in this arbitrary manner. But the leaked information indicates Amazon has both the incentive and the ability to exercise its control over content in a manner that may limit consumer choice in important ways by tying content choice to retail success rather than elevating values such as quality and diversity. Allowing Amazon to acquire a further, substantial swath of video content would position Amazon to exercise even greater dominance in the SVOD market, which could negatively impact the quality and diversity of

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[17] Jeffrey Dastin, *Exclusive: Amazon's internal numbers on Prime Video, revealed*, REUTERS, March 15, 2018, https://www.reuters.com/article/us-amazon-com-ratings-exclusive/exclusive-amazons-internal-numbers-on-prime-video-revealed-idUSKCN1GR0FX. *See also* Bryn Sandberg and Lesley Goldberg, *'Good Girls Revolt' Creator Slams Amazon Over Cancellation: "They Run Some People Out,"* HOLLYWOOD REP., Dec. 7, 2016, https://www.hollywoodreporter.com/tv/tv-news/good-girls-revolt-creator-slams-amazon-cancellation-they-run-some-people-953552/.

[18] REUTERS, *supra* n.17.

[19] HOLLYWOOD REP., *supra* n.17.

[20] *Id.*

[21] *Id.*

video content available to consumers, and, relatedly, degrade the health of the market for video content.

3. **Amazon is expanding its aggressive acquisition of distribution rights from filmmakers faster than rivals, leading to a greater possibility that an even larger share of video content will be available only on Amazon's platform.**

Amazon is completing aggressive deals that take the maximum distribution rights – including educational distribution – from filmmakers at a faster pace than rivals. When it makes deals with filmmakers, Amazon often seeks to acquire various, expansive bundles of distribution rights such as wall-to-wall exclusive distribution rights in the U.S. (including educational and community showings), exclusive distribution rights for certain time periods, and worldwide geographic rights, for example. Amazon also appears to be signing contracts with creators for exclusive distribution rights to their future content far more frequently than other SVOD companies: Industry data show that, as of November 2021, Amazon's use of such exclusivity deals has increased at a compound annual growth rate of 50 percent since 2018. This is double the growth rate of Amazon's closet rival Netflix in terms of this contractual practice.[22]

Exclusive distribution or "all-rights" deals are harmful to filmmakers and consumers and are increasingly common. In February 2020, French Minister of Culture Frank Riester called out streaming platforms, including Amazon Prime Video explicitly, for their practice of buying "all rights without limitation of territory or duration."[23] To prevent this practice, French law now provides that contracts negotiated with streamers must include standard clauses that limit the extent to which these companies can make content exclusive to their platform.[24]

In the U.S., however, there are no restrictions on forming exclusive or all-rights distribution agreements for content, and several recent examples illustrate Amazon's proclivity and power to conclude all-rights deals. In 2017, Amazon Studios secured exclusive rights to four different films with Woody Allen.[25] The contract granted Amazon exclusive worldwide distribution rights and also permitted Amazon to seek to shorten the window for the content's theatrical release below 90 days.[26]

[22] Data provided by *Studio System* database show that Netflix has increased its use of exclusive overall, production and development deals for content at a compound annual growth rate of 25 percent (2018-2021 YTD). In 2021, for example, Netflix has so far concluded 17 of said deals compared to seven in 2018. Over the same period, Studio System data show that Amazon has increased its use of exclusive overall, production and development deals for content at a compound annual growth rate of 50 percent. In 2021, Amazon has so far concluded 10 of said deals, growing from a 2018 base of just two according to *Studio System*. *Studio System database*, https://app.studiosystem.com/ (last accessed November 10, 2021).
[23] Frank Riester, *Speech by Minister of Culture, on the occasion of his hearing by the Committee on Cultural Affairs and Education of the National Assembly on the audiovisual bill,* MINISTÈRE DE LA CULTURE, Feb. 26, 2020, https://www.culture.gouv.fr/en/Presse/Discours/Discours-de-Franck-Riester-ministre-de-la-Culture-prononce-a-l-occasion-de-son-audition-par-la-Commission-des-Affaires-culturelles-et-de-l-Educat.
[24] *Decree No. 2021-793 concerning on-demand audiovisual media services,* EUROPEAN COMMISSION, 22 June, 2021, https://ec.europa.eu/growth/tools-databases/tris/en/search/?trisaction=search.detail&year=2020&num=825.
[25] Compl. at 8, *Gravier Productions Inc., v. Amazon Content Services*, 1:19-cv-01169 (S.D.N.Y. July 31, 2019).
[26] Compl., Ex. A at 4, *Gravier Productions Inc.,* 1:19-cv-01169.

In a recent deal for distribution of the Eddie Murphy film *Coming to America 2*, Amazon did block the movie from being distributed through channels other than its SVOD platform, including movie theaters. The studio that produced this content – Paramount Pictures – had originally intended for it to have theatrical distribution.[27] However, after Amazon acquired the worldwide rights to distribution for a reported $125 million,[28] this title was released exclusively on Amazon's SVOD platform with no theatrical release.[29]

Amazon is also pursuing exclusive streaming rights with respect to highly sought-after sports content as well. It is seeking to acquire exclusive rights to stream selective sporting events including Thursday night NFL football in the U.S., English Premier League Football matches in Europe, and other popular sports events in Italy, Germany, and India that it hopes will drive viewers to its e-commerce platform.[30]

Indeed, although some streaming platforms choose to release content in theaters before providing it to stream on their platforms, Amazon has a unique incentive to horde content just for its platform: attracting viewers to Prime Video in order to drive them to Amazon's retail platform. As Jeff Bezos famously said, "When we win a Golden Globe, it helps us sell more shoes."[31] These examples also illustrate Amazon's power to demand exclusivity over content and shut down alternative means of distribution even for well-established Hollywood figures. In comparison, the ecosystem of small and up-and-coming film makers and production companies has virtually no bargaining power to retain any distribution rights whatsoever. Filmmakers express concern that SVOD companies' exclusive deals will drive consolidation in the filmmaking industry.[32] Fewer content-providers would, in turn, amplify Amazon's power and limit consumer choice. Amazon's current use of its market power to demand expansive distribution rights already harms filmmakers and consumer choice.

Moreover, an Amazon acquisition of MGM would threaten MGM content – both current and planned – because Amazon could impose exclusive distribution policies on MGM's films that are currently available through venues other than Amazon's streaming platform. At present, content from MGM's library is available for educational distribution. Swank Motion Pictures currently licenses content from MGM's library for use in educational settings,[33] and it is also currently possible to request educational use of MGM content through the studio's media licensing portal.[34] Similarly, MGM has theatrical and other distribution rights to at least 16 upcoming films that are either awaiting release or are in production,

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[27] Anthony D'Allessandro, *Paramount Sets Arrival Date For 'Coming To America 2,'* DEADLINE, Feb, 11, 2019, https://deadline.com/2019/02/eddie-murphy-coming-to-america-2-release-date-1202554776/.
[28] Brent Lang, Matt Donnelly, *Eddie Murphy's 'Coming 2 America' Moves From Paramount to Amazon Studios',* VARIETY, Oct. 13, 2020, https://variety.com/2020/film/news/eddie-murphys-coming-2-america-moves-from-paramount-to-amazon-studios-1234799523/.
[29] *Id.*
[30] *See, e.g., Brace for the Amazon effect on live sport*, THE ECONOMIST, April 10, 2021, https://www.economist.com/business/2021/04/10/brace-for-the-amazon-effect-on-live-sport.
[31] Angela Watercutter, *Amazon's Hollywood Ambitions Are Very Old-School,* WIRED, July 8, 2021, https://www.wired.com/story/amazon-old-school-hollywood/#:~:text=Out%20of%20everything%20Jeff%20Bezos,isn't%20Amazon's%20core%20business.
[32] *See, e.g.,* Viktoria Vas, Gerda Binkyte, *How Are the Major Streaming Services Reshaping the Film Industry*, COPENHAGEN BUS. SCHOOL at 102, May 9, 2018, https://research-api.cbs.dk/ws/portalfiles/portal/59779720/433283_Final.pdf.
[33] *Swank Public Libraries Movie Licensing USA*, https://www.swank.com/public-libraries/faq/#whatwedo5.
[34] *MGM content licensing*, https://clips.mgm.com/home.

including titles such as *Legally Blonde 3*.[35] If Amazon acquires MGM, however, Amazon seems particularly likely to halt both theatrical and educational distribution of MGM content and confine distribution to its platform. Not only does Amazon generally not permit educational use of its content,[36] but it also has a strong incentive to drive customers to its streaming platform and thereby connect them to its retail platform. Eliminating educational distribution would deprive certain consumers such as students or people with low income who rely on libraries for media of the opportunity to view MGM content. Keeping planned and future MGM films out of movie theaters would limit consumer choice and increase Amazon's SVOD market share and power.

4. **Exorbitant cloud computing exit fees and other discriminatory tactics make Amazon's ability to leverage its current power in complimentary markets a material risk for streaming competitors.**

Research indicates Amazon charges rivals exorbitant fees for certain cloud computing services that deter rivals from exiting Amazon's AWS service. Information on discounts shows Amazon has used aggressive discounting to help its Fire streaming devices reach the top spot in the market for such devices – currently tied with Roku – and then has used its Fire TV leverage to exclude rivals in multiple ways, leading some competitors to identify the possibility of Amazon leveraging its dominance as a material risk. Amazon's current exclusionary practices signal that Amazon will exclude rivals from these complementary markets if the merger is allowed to proceed.

Amazon charges fees exponentially higher than other services for rivals to move data from Amazon's cloud computing service, making AWS reliance a material risk for rivals.

Amazon Web Services (AWS) provides back-end computing services for major streaming rivals including Netflix, Disney, HBO, and Hulu. Amazon itself publicly acknowledges that market-leader Netflix is one of AWS' largest customers, and notes that this competitor "relies on AWS."[37] This relationship has become a material competitive risk for companies that compete against Amazon simultaneously in the SVOD market, and Amazon has actively leveraged this reliance by making it costly for SVOD competitors to switch to alternative cloud computing providers.

AWS clients incur fees known as "egress fees" when moving data out of Amazon's cloud or to AWS servers in different geographic regions. An analysis of publicly available AWS pricing information shows that the egress fees Amazon charges AWS customers for moving data out of its cloud to another provider greatly exceed industry norms, with business users of AWS in the US paying 80 times Amazon's costs for egress fees.[38] Meanwhile, the majority of other cloud providers in the industry, including Microsoft Azure and Google Cloud, substantially discount or entirely waive egress fees when sending

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[35] *Studio System database*, https://app.studiosystem.com/ (last accessed Nov. 10, 2021).

[37] *Netflix on AWS*, AWS, Nov. 2021, https://aws.amazon.com/solutions/case-studies/netflix/.
[38] Matthew Prince, Nitin Rao, *AWS's Egregious Egress*, THE CLOUDFLARE BLOG, July 23, 2021, https://blog.cloudflare.com/aws-egregious-egress/.

traffic from their network to a peer service.[39] Industry observers have described this Amazon practice as a form of "price gouging" aimed at deterring customers from defecting to rival services.[40]

In corporate filings, Netflix acknowledges that its reliance on AWS services has become a material competitive risk and alludes to the difficulty it experiences reducing its reliance on Amazon's service:

> Currently, we run the vast majority of our computing on AWS. Given this, along with the fact that we cannot easily switch our AWS operations to another cloud provider, any disruption of or interference with our use of AWS would impact our operations and our business would be adversely impacted. While the retail side of Amazon competes with us, we do not believe that Amazon will use the AWS operation in such a manner as to gain competitive advantage against our service, although if it was to do so it could harm our business.[41]

Similarly, Fubo, a relative newcomer to the streaming industry, also relies on AWS for cloud computing services and identifies its use of AWS as a material risk to its business.[42] By exploiting reliance on its cloud service, Amazon also raises costs for its SVOD rivals, who incur its exorbitant egress charges when transferring data to AWS servers in a different geographic region. Internal AWS sales figures show that Netflix's spending on egress fees increased by over 50 percent between 2017 and 2018.[43] In 2018, Netflix spent more than any other AWS customer on egress fees, with the exception of the social media company Pinterest. Since 2018, the egress fees AWS charges in North America and Europe have not dropped even as research indicates that key egress costs in those geographic areas over the same period have fallen by over 50 percent.[44]

The reliance of other SVOD companies on AWS and Amazon's exorbitant egress fees produce significant revenue for Amazon. It is estimated that Netflix's AWS cloud services expenses could be $84 million per month, which would make them Netflix's second-largest cost, behind the costs associated with content.[45]

As this shows, Amazon's existing vertical integration and power in the cloud computing market already give Amazon the ability and incentive to prejudice its competitors. By raising rivals' costs through an input Amazon controls, Amazon is engaging in classic anticompetitive behavior, even without the addition of MGM to its business portfolio. Adding additional content to Amazon's library, while Amazon

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[39] *Id.*
[40] Kevin McLaughlin, *AWS Accused of Gouging Customers for Networking Bandwidth*, THE INFORMATION, June 2021, https://www.theinformation.com/briefings/1b7024?rc=zz6ile.
[41] Netflix, Inc. Form 10-K for the period ended Dec. 31, 2020, at 10, https://www.sec.gov/ix?doc=/Archives/edgar/data/1065280/000106528021000040/nflx-20201231.htm.
[42] *See* fuboTV, Inc. Form 10-K for the period ended Dec. 31, 2020, at 17, https://www.sec.gov/Archives/edgar/data/1484769/000149315221006813/form10-k.htm.
[43] Kevin McLaughlin, Amir Efrati, *AWS Customers Rack Up Hefty Bills for Moving Data*, THE INFORMATION, Oct. 21, 2019, https://www.theinformation.com/articles/aws-customers-rack-up-hefty-bills-for-moving-data?rc=zz6ile.
[44] THE CLOUDFLARE BLOG, *supra* n.38.
[45] Faraz Ali, *NETFLIX pays $1 Billion/year to Amazon*, LINKEDIN, Sept. 22, 2020, www.linkedin.com/pulse/netflix-pays-1-billionyear-amazon-faraz-ali/.

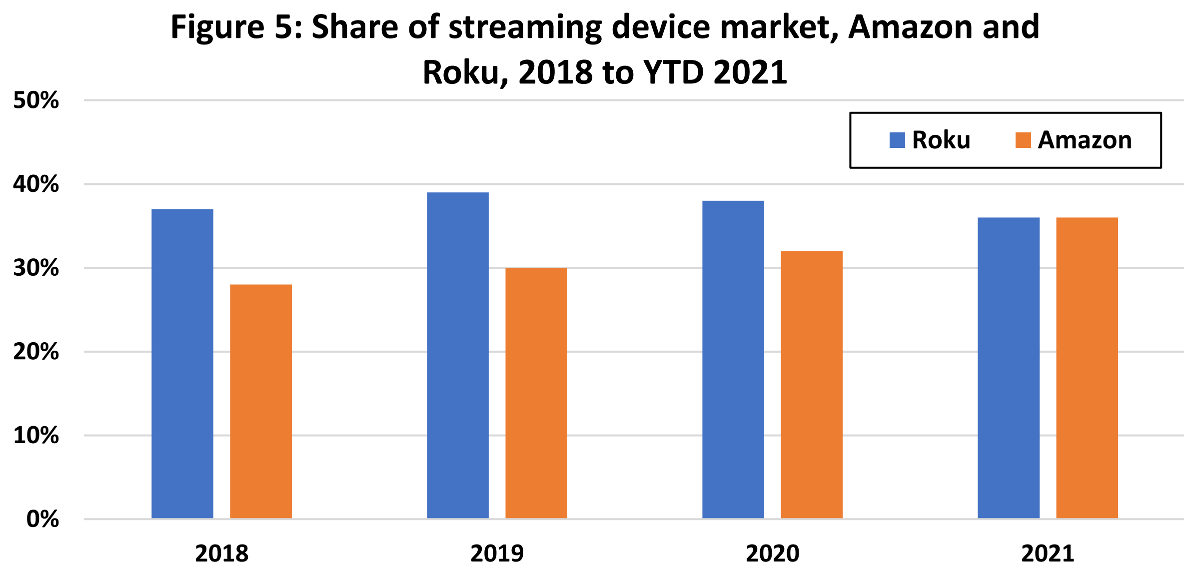
is already discriminating against rivals in an adjacent market, would further empower Amazon to discriminate against rivals and result in harm to competition.

Amazon used arguably predatory tactics to gain streaming device market power and now uses that power in several exclusionary ways against rivals.

As Figure 5 shows, Amazon is tied as of 2021 with Roku as leader of the U.S. market for streaming devices.[46]

To acquire its dominant position in the streaming device market, Amazon has utilized several aggressive, arguably anticompetitive business practices. Amazon has refused to sell rival streaming products, including Apple and Google's streaming devices, on its dominant e-commerce marketplace.[47] Amazon's closest competitor in streaming devices, Roku, reported to shareholders that the possibility Amazon will refuse to promote or offer the Roku device on its retail platform is a material risk.[48] Amazon has also reportedly taken deliberate steps to make it difficult for Prime viewers to watch Prime on rivals' services and devices.[49] Finally, as detailed in an earlier SOC letter to the Commission,[50] Amazon has leveraged its dominance in the complementary streaming device market by refusing to permit SVOD rivals to access consumers through its Fire devices unless they agree to terms highly favorable to Amazon regarding, for example, advertising revenue and the control of user data in exchange for access.[51]

[46] Amazon Fire devices include Firestick, Fire TV and Fire Kindle, all of which potentially provide viewers to multiple subscriber platforms to the extent Amazon allows such access through its Fire devices.
[47] Ian Morris, *Amazon's Ban On Apple TV and Google Chromecast: The Truth Behind The Spin*, FORBES, Oct. 2, 2015, https://www.forbes.com/sites/ianmorris/2015/10/02/amazons-ban-on-apple-tv-and-google-chromecast-the-truth-behind-the-spin/?sh=2289b5862905.
[48] Roku, Inc., Form 10-K for the period ended Dec. 31, 2020, at 21, https://www.sec.gov/ix?doc=/Archives/edgar/data/1428439/000156459021009021/roku-10k_20201231.htm.
[49] FORBES, *supra* n.47.
[50] *SOC Letter to the FTC on Proposed Merger of Amazon.com, Inc. and MGM*, THE SOC, Aug. 11, 2021, https://thesoc.org/what-we-do/soc-letter-to-ftc-on-amazon-mgm-merger.
[51] See *Peacock, Amazon reach deal to add streaming app to Fire TV devices*, CNET, June 23, 2021, https://www.cnet.com/news/peacock-amazon-reach-deal-to-add-streaming-app-to-fire-tv-devices/, *Amazon Clashes with Disney Over Terms for Offering Apps in Fire TV*, WALL ST. J., Oct 3, 2019. *See also 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. (Amazon refused to distribute HBO Max for six months after its launch, thereby curtailing its growth as a new consumer offering. In mid-November 2020, Amazon suddenly granted HBO Max access to its Fire devices, but only after WarnerMedia agreed to extend a pre-existing contract with AWS).



Source: Parks Associates market research.

Amazon also regularly discounts its Fire streaming devices[52] and even sells this and other technology below cost in an apparent strategy to gain market share. [53] Research from 2012 shows, for example, that Amazon was then losing approximately $2.00 on every Kindle Fire device sold.[54] Third-party research also shows Amazon devices are offered at discount more often than at regular prices.[55] Although Amazon has told Congress, under oath, that it "does not offer its private brand products at a regular price below the cost of goods,"[56] tellingly, Jeff Bezos has also said publicly, "We want to make money when people use our devices, not when they buy our devices."[57]

These tactics are classic exclusionary activity, and because they are taking place before Amazon has acquired MGM, the Commission not need predict or speculate about whether Amazon has the ability or incentive to discriminate against and exclude rivals in this complementary market, because it is already doing so.

5. **Data regarding estimated cost per title indicate Amazon Prime is priced below or far below all major rivals and likely priced below cost.**

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[52] *E.g., Amazon Devices up to 60% off: Fire TV Stick, Fire Tablets, Echo, Kindle!*, WRAL, Nov. 5, 2021, https://www.wral.com/amazon-kicks-off-early-black-friday-deals-with-up-to-60-off-amazon-devices-fire-tv-stick-fire-tablets-echo-kindle/19955670/.
[53] *Amazon sells the Kindle Fire at a loss because it makes so much money on media*, VENTURE BEAT, Jan. 19, 2012, https://venturebeat.com/2012/01/19/amazon-sells-the-kindle-fire-at-a-loss-because-it-makes-so-much-money-on-media/.
[54] *Amazon sells the Kindle Fire at a loss because it makes so much money on media*, VENTURE BEAT, Jan. 19, 2012, https://venturebeat.com/2012/01/19/amazon-sells-the-kindle-fire-at-a-loss-because-it-makes-so-much-money-on-media/.
[55] Sean Hollister, *Amazon doesn't sell Echo speakers at a loss, says Bezos — unless they're on sale*, THE VERGE, July 29, 2020, https://www.theverge.com/2020/7/29/21347121/amazon-echo-speaker-price-undercut-rivals-loss-sale-antitrust-hearing.
[56] https://docs.house.gov/meetings/JU/JU05/20190716/109793/HHRG-116-JU05-20190716-SD038.pdf
[57] Austin Carr, *Amazon Loses Money On Tablets, It's All Going To Plan*, THE FAST COMPANY, Sept. 7, 2012, https://www.fastcompany.com/3001110/amazon-loses-money-tablets-its-all-going-according-plan.

Pricing and title comparisons show Amazon is probably pricing Prime Video below cost, a predatory tactic that allows Amazon to undercut rivals and prevent new entrants into the market who are unable to finance their streaming business from other lines of business. This could allow Amazon to drive rivals out of the market and raise prices in the future.

Amazon offers Prime Video SVOD service at no extra cost to U.S. consumers as part of its Prime membership program even though, unlike other "free" SVOD services such as Peacock,[58] Prime Video is not supported by advertising revenue. Although Amazon does not provide a full breakdown of the revenue and costs for the video components of Amazon Prime membership in its financial statements, the consensus view among analysts is that Amazon operates its streaming service at a loss.[59] Competition authorities outside of the U.S., including in France, have singled out this business model and how it contrasts with many of the company's SVOD competitors.[60]

Calculations show Amazon Prime is priced far below competitors. As Figure 6 shows, even if one ascribes the entire Prime subscription price to the SVOD component of Prime membership (thereby assuming the price for Prime fulfillment-and-delivery cost as zero), Amazon's price-per-title still falls far below its competitors. Based on this extreme assumption, Amazon's video price is still significantly lower than all of its primary competitors, at just under $0.50 per 1,000 titles.

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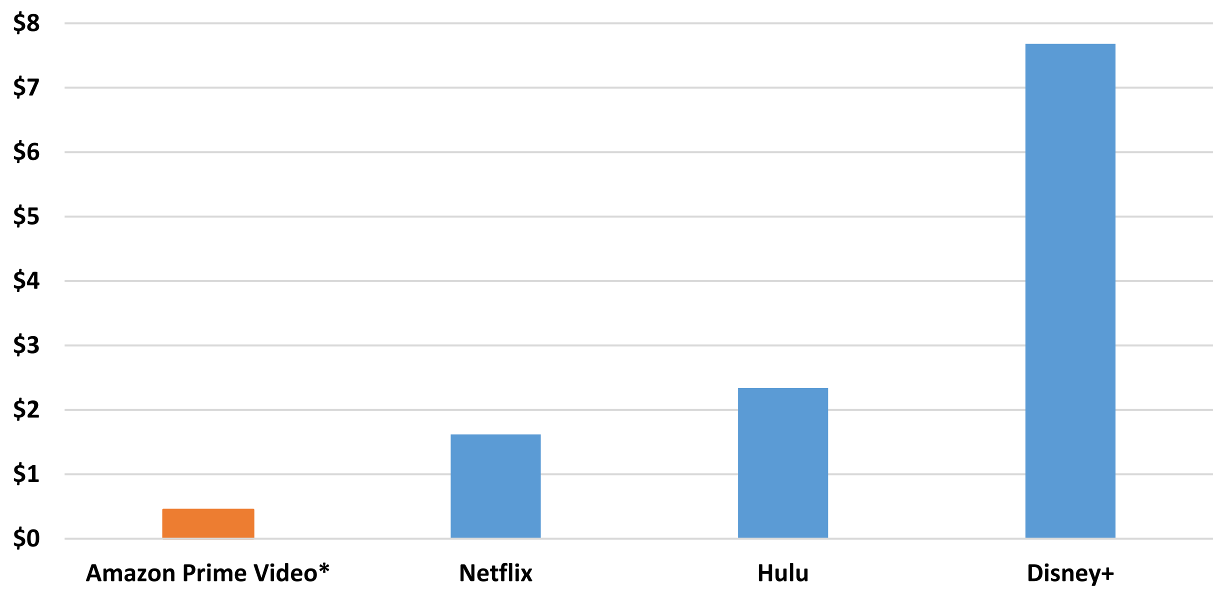
[58] Dade Hayes, *Peacock Took In $118M In Ad Revenue In 2020, But $914M Loss Met Expectations, Per New Comcast Filing*, DEADLINE, March 9, 2021, https://deadline.com/2021/03/peacock-made-118-million-ad-revenue-lost-914-million-2020-comcast-1234710237/.
[59] *See, e.g.* Adam Levy, *Amazon Prime Instant Video Is a Huge Loss Leader*, Motley Fool, Feb. 22, 2017, https://www.fool.com/investing/2017/02/22/amazon-prime-instant-video-is-a-huge-loss-leader.aspx; *Was Prime Video A Loss Leader Or Loss Loser?*, THE ENTERTAINMENT STRATEGY GUY, Feb. 5, 2021, https://entertainmentstrategyguy.com/2021/02/05/was-prime-video-a-loss-leader-or-loss-loser-most-important-story-of-the-week-5-feb-21/.
[60] *Avis n° 19-A-04 du 21 février 2019 relatif à une demande d'avis de la commission des Affaires culturelles et de l'Éducation de l'Assemblée nationale dans le secteur de l'audiovisuel*, French Competition Auth., Feb. 21, 2019, at 32, https://www.autoritedelaconcurrence.fr/sites/default/files/commitments//19a04.pdf.

Figure 6: Streaming service cost per 1,000 titles, selected streaming services, 2021



Source: Number of titles in respective streaming library / cost of subscription (2021).
*This figure ascribes the entire cost of Prime membership to the Prime Video SVOD service component and zero to the expedited shipping service element of the Prime program, an extreme assumption to illustrate the low cost-per-title relative to Amazon's SVOD competitors. Figures include only titles that are available to subscribers without an additional fee.

Data compiled by Ampere Analysis from 2021 suggest that approximately 36 percent of Prime members actively stream content from Prime Video.[61] Other market research has indicated that as little as 10 percent of Prime members subscribed primarily to use the SVOD service.[62] These figures suggest the portion of Prime prices attributable to video are even lower than estimated above.

Pricing its SVOD service far below competitors – and likely below cost – unfairly disadvantages Amazon's current rivals and raises entry barriers to potential new rivals who will be unable to compete at below-cost prices. Amazon is prepared to spend $8.5 billion to add substantially to its film stable, but it is implausible that the cost of MGM was generated by, or will be recovered by, Prime Video subscription fees under Amazon's current model. Amazon's strategy of operating a line of business unprofitably for long periods of time is a recognizable predatory tactic the corporation has used repeatedly to grow its vast market power, and which it uses to favor its products and services and unfairly prejudice its rivals in the SVOD market.

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[61] Ampere Analysis projects there are currently 53.4 million active Prime Video users in the US. *See* Henry Beckwith, *Video Insight: SVoD subscriptions in the US (2007-2021)*, AMPERE ANALYSIS, Nov. 2, 2021, https://www.ampereanalysis.com/insight/video-insight-svod-subscriptions-in-the-us-2007-2021. This is 36 percent of the estimated number of Prime subscribers in the US. Brian Dean, *Amazon Prime User and Revenue Statistics (2021)*, BACKLINKO, Oct. 22, 2021, https://backlinko.com/amazon-prime-users.
[62] Marianne Wilson, *The No. 1 reason people subscribe to Amazon Prime is…*, CSA , July 25, 2018, https://chainstoreage.com/technology/the-no-1-reason-people-subscribe-to-amazon-prime-is.

6. Bolstering Amazon's dominance of SVOD content could allow Amazon to utilize Prime Video to definitively monopolize e-commerce

As of October 2021, Amazon holds a dominant 41 percent share of the US retail e-commerce market. Amazon's next closest competitor, Walmart, holds just 7 percent of the US retail e-commerce market.[63] Amazon grew exponentially during the pandemic, posting a whopping 220 percent increase in profits in the first quarter of 2021 compared to Q1 of 2020.[64]

Amazon's ability to attract shoppers to its Prime membership program is key to enabling the company to acquire market share in e-commerce. Prime members make the majority of purchases on Amazon's Marketplace. In October 2020, for example, Amazon Prime members accounted for an estimated 68 percent of Amazon shoppers.[65] Prime shoppers also tend to spend four times more than non-Prime shoppers on Amazon.[66]

One of the ways in which Amazon attracts consumers to the Prime program is by investing in the SVOD component of Prime membership. Internal documents leaked to Reuters show that Amazon makes SVOD content decisions on the basis of whether they attract consumers to sign up as Prime members.[67]

These documents show that the company attributed just one popular title, *The Man in the High Castle*, as having attracted 1.15 million new Prime sign-ups. With MGM, Amazon would be acquiring an immense and lucrative film library[68] – which includes scores of popular movie titles such as the James Bond movies, *Rain Man*, and *Hannibal,*[69] and in-demand television such as *Vikings, The Handmaid's Tale* and *Fargo.*[70] Thus the opportunities for Amazon to scale up its Prime membership base, and by extension its market share in retail e-commerce, are considerable.

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[63] *Market share of leading retail e-commerce companies in the United States as of October 2021,* STATISTA, Oct. 29, 2021, https://www.statista.com/statistics/274255/market-share-of-the-leading-retailers-in-us-e-commerce/.
[64] Amazon.com, Inc. Form 10-Q for the period ended March 31, 2021, at 4 https://www.sec.gov/ix?doc=/Archives/edgar/data/1018724/000101872421000010/amzn-20210331.htm.
[65] Tonya Garcia, *Amazon Prime member total reaches 142 million in U.S. with more shoppers opting in for a full year, data shows*, MARKET WATCH, Jan. 20, 2021, https://www.marketwatch.com/story/amazon-prime-member-total-reaches-142-million-in-u-s-with-more-shoppers-opting-in-for-a-full-year-data-shows-11611073132.
[66] Marc Bain, *Prime has never been more important to Amazon*, QUARTZ, May 3, 2021, https://qz.com/2004369/the-pandemic-made-prime-even-more-valuable-to-amazon/.
[67] Jeffrey Dastin, *Exclusive: Amazon's internal numbers on Prime Video, revealed*, Reuters, March 15, 2018, https://www.reuters.com/article/us-amazon-com-ratings-exclusive/exclusive-amazons-internal-numbers-on-prime-video-revealed-idUSKCN1GR0FX.
[68] Darrel Satzman, *Hefty Price Draws No Bids For Valuable MGM Archive*, LA BUSINESS JOURNAL, Jan. 28, 2002, https://labusinessjournal.com/news/2002/jan/28/hefty-price-draws-no-bids-for-valuable-mgm-archive/.
[69] Bond movies are the first, fourth, fifth and seventh highest grossing movies produced by MGM, Rain Main is the second highest, and Hannibal is the sixth. https://www.the-numbers.com/box-office-records/worldwide/all-movies/theatrical-distributors/mgm.
[70] https://www.imdb.com/search/title/?companies=co0071026.

It is no secret that Amazon's historical growth strategy has emphasized taking market share regardless of profitability[71]– and it is equally clear that this strategy has succeeded. Amazon not only sacrificed overall profitability but has also, many believe, operated several business segments below cost or at a loss in order to establish greater presence and market share in those segments, including logistics (Prime Delivery)[72] and Prime Video.[73] Both of these specific growth tactics support the thesis that the primary purpose of Prime, for Amazon, is to drive customers to its e-commerce platform to enable it to become even more dominant in retail e-commerce.

Although being a monopoly is not in itself illegal, Amazon may not acquire or maintain a monopoly through predatory or exclusionary means. As described above, the MGM merger is likely to significantly bolster Amazon's control over SVOD content in ways that could enable substantial exclusion of rivals. This is in addition to Amazon's existing exclusionary tactics in complementary markets (cloud computing and streaming devices) as well as arguably predatory pricing practices that have enabled Amazon's growth in both Prime segments, delivery/logistics and streaming video. The evidence on these practices, together with data on Amazon's current retail e-commerce dominance, suggest that permitting this acquisition could position Amazon to utilize its SVOD position unfairly to acquire unquestionable monopoly status in the retail e-commerce market.

Conclusion

The research detailed above shows that Amazon already controls substantial video content distinct to its Prime platform at numbers that far exceed competitors, and is a leading in-house producer of content. Prominent rivals of Amazon who are also its customers in cloud computing and streaming devices have identified their reliance on Amazon as a material risk to their business, indicating the ability Amazon currently has to exclude and discriminate against rivals. The number of content deals with exclusivity rights for Amazon is growing at a high rate, and the fact that Amazon can divert films from theater releases to exclusive platform distribution even for high-profile filmmakers and film stars shows that most filmmakers are increasingly unlikely to retain any significant distribution rights in deals with Amazon. At the same time, Amazon appears to elevate retail marketing concerns over diversity or quality of content, because it has canceled shows that do not appear to drive new customers into retail e-commerce. Finally, even using extremely conservative estimates of Prime Video's subscription price, Amazon's price of less than $.50 per 1,000 titles is significantly below all major competitors, suggesting Amazon is attempting to undercut rivals to gain market share by pricing Prime Video below cost.

Amazon's broad-ranging tactics across its business, which the company has utilized to grow its market power in the SVOD and other markets, in conjunction with Amazon's immense content library, indicate that Amazon is striving to become not only the world's largest retailer but also the world's largest

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[71] *See* Bezos 1997 Annual Letter to Shareholders, https://venturebeat.com/wp-content/uploads/2010/09/amzn_shareholder-letter-20072.pdf; Henry Blodget, *14 Years Ago Jeff Bezos Told You How To Take Over The World,* BUS. INSIDER, Nov. 16, 2011, https://www.businessinsider.com/jeff-bezos-told-you-how-to-take-over-the-world-2011-11.
[72] Ralf W. Seifert and Richard Markoff, *Bezos' big bet – going for market share over profits,* IMD, Nov. 2019, https://www.imd.org/research-knowledge/articles/Bezos-big-bet-going-for-market-share-over-profits/.
[73] *See supra* n.59 and accompanying text.

streaming video company. Our research indicates Amazon is well on its way. The MGM merger would bolster Amazon's position in streaming content, which would augment Amazon's power to exert even greater leverage over rivals and filmmakers in myriad ways. Such growth is almost certain to harm the ecosystem of filmmakers on which consumers, in turn, depend for socially- and culturally-relevant content. The merger between MGM and Amazon should be blocked because it would clearly enhance Amazon's power and ability to exclude and discriminate against rivals, and would be likely to negatively affect the market for film content and, ultimately, consumer quality and choice.

Respectfully submitted,

Michael R. Zucker
Executive Director

cc: Chair Lina Khan
Commissioner Noah Joshua Phillips
Commissioner Rebecca Kelly Slaughter
Commissioner Christine S. Wilson