STRATEGIC
ORGANIZING
CENTER

Via USPS and Electronic Mail

August 11, 2021

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

Re: Proposed Merger of Amazon.com, Inc. and MGM

Dear Director Vedova,

The Strategic Organizing Center (SOC) is a democratic union federation representing more than 4 million workers in four affiliated unions: the Service Employees International Union, the International Brotherhood of Teamsters, the Communications Workers of America and the United Farmworkers. The SOC, formerly known as Change to Win, has engaged the Federal Trade Commission (FTC) on a number of issues in the past. Most recently the SOC and our affiliates submitted a petition on February 27, 2020, requesting the Commission to conduct a 6(b) investigation of a range of questionable practices by Amazon, and a supplemental letter on July 20, 2021 regarding troubling practices by Amazon during the COVID pandemic.

We are writing to express our concern that Amazon.com Inc.'s (Amazon) proposed acquisition of Metro-Goldwyn-Mayer Studios (MGM) would bolster Amazon's ability to leverage power across multiple lines of business related to the streaming video-on-demand (SVOD) market. Amazon has a well-documented history of leveraging its dominance in e-commerce to gain market share in vertically-adjacent markets using a range of unfair and anticompetitive practices. Amazon's current practices in SVOD and related markets – including leveraging e-commerce power to build SVOD market share, offering Prime Video at below market prices, and exclusionary use of its dominance in the streaming device and cloud computing markets – already raise serious questions of anti-competitive conduct in the specific market that would be affected by the merger.

The merger would also create further harmful vertical integration in the film industry at large. The SVOD market has expanded at a rapid pace in recent years. In the process, the production and exhibition of video content has become increasingly vertically integrated. This integration creates a power imbalance between large, vertically-integrated firms and their smaller competitors. It also creates incentives for SVOD providers to limit the content available to consumers via alternative exhibition channels, as well as film makers' access to the increasingly vital content exhibition space that SVOD providers control. SVOD providers' increasing vertical control also has implications for the integrity and diversity of content available to consumers and, by extension, freedom of expression itself.

Allowing the MGM merger would exacerbate the trend towards vertical integration and create additional opportunities for Amazon to leverage its power in the SVOD and related markets in ways that will harm film makers, consumers and other stakeholders.

There is growing recognition that vertical mergers require more regulatory scrutiny than they have received in the past to prevent the strongest market players from utilizing their dominance in ways that harm competition, innovation, and consumers. The dangers of vertical integration are particularly acute with respect to dominant digital platforms such as Amazon because of their ability to leverage their gatekeeper power in one market into multiple other lines of business. This merger presents an opportunity for the FTC to curb Amazon's expansion of power in yet another line of business and place reasonable limits on how one of the country's largest and most dominant companies is permitted to compete. For these reasons, as described more fully below, we urge the Commission to block Amazon's acquisition of MGM.

Amazon unfairly leverages its market dominance into other lines of business, including SVOD

The SVOD market is in the midst of both massive expansion and increasing vertical integration. The market is currently dominated by an oligopoly of five firms. In 2020, Netflix (20%), Amazon Prime Video (16%), Hulu (13%), HBO Max (12%), and Disney+ (11%) collectively comprised 72 percent of the entire US SVOD market.[1] Each of these firms operate their own studios as well as a streaming platform which acts as distribution channel for content they choose to acquire, or, increasingly, that they produce themselves.

In an industry in which growing concentration and vertical integration present specific dangers to consumers and producers, Amazon is not just another competitor. Unlike its SVOD rivals, Amazon is dominant in several other distinct markets including e-commerce, streaming devices, and cloud computing. Amazon has a long track record of leveraging its market dominance to gain share in vertically-adjacent markets including, as detailed below, in the SVOD market specifically.

Amazon has leveraged its e-commerce power to acquire market share in SVOD by bundling Prime delivery and Prime video

Amazon's Prime membership – which bundles free, expedited delivery with streaming video at no additional cost to consumers – is radically different from the per-month-fee model implemented by SVOD competitors. This model, which has already drawn the attention of competition authorities in Europe,[2] involves an aggressive pricing strategy that unfairly leverages Amazon's dominance in e-commerce into the SVOD market by offering streaming content at *no cost* to consumers.

---

[1]*Netflix Lost 31% of Market Share in the Last Year as Streaming Rivals Gained Ground*, WRAP PRO (April 5, 2021), available at https://www.thewrap.com/netflix-streaming-us-market-share-chart/?utm_source=newsletter&utm_medium=email&utm_campaign=first_take_5613416.
[2]*See, e.g.*, *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* at 32, FRENCH COMPETITION AUTHORITY (Feb. 21, 2019), *available at* https://www.autoritedelaconcurrence.fr/sites/default/files/commitments//19a04.pdf.

In 2005, Amazon announced Amazon Prime as a membership service offering free two-day shipping on all eligible purchases for an annual fee of $79.

In 2011, Amazon added Prime Video, an SVOD service, as a benefit to Prime membership. This gave Prime members ad-free access to 5,000 movies and TV titles in 2011. Today, Prime members have access to over 20,000 titles through this service.[3]

Amazon bundled its core Prime Video service into the pre-existing expedited shipping subscription at no extra cost. This strategy undercuts the ability of standalone SVOD services to compete: The cost of a standard Netflix subscription is currently $13.99,[4] while Amazon's monthly price for a bundled Prime membership – which includes free shipping of goods in addition to video streaming – currently stands at $12.99.[5]

Third-party research suggests that Prime Video may operate at a loss. Although Amazon does not provide a dedicated breakdown of the revenue and costs for the video components of Amazon Prime membership, an analysis of Amazon's 2016 financial statements suggests that, after accounting for only global content costs, Amazon incurred a loss in that year of $700 million on Prime Video.[6]

Amazon's leveraging of e-commerce power to acquire position in the SVOD market is evidenced, in part, by the rapid pace at which Amazon has entrenched its market position relative to competitors. Illustratively, in 2013 Amazon Prime Video accounted for only 0.6 percent of all streaming video traffic in the US.[7] In 2014, Amazon Prime Video accounted for 3 percent of all US streaming video traffic, five times greater than the previous year.[8] This rapid growth saw Amazon leapfrog SVOD competitors including Apple and Hulu,[9] and also corresponded with a 50 percent growth in US Prime memberships.[10] Since then, Amazon's bundling strategy has continued to allow the company to consolidate its SVOD market position. Presently, Amazon Prime Video is second only to Netflix in terms of US SVOD market share.[11]

Because Amazon is leveraging its e-commerce power in the SVOD market, and may be engaging in predatory pricing by operating Prime Video at a loss, Amazon should not be permitted to merge with MGM and further enhance its market power in the SVOD market.

---

[3] *How many movies and TV shows are available for free for Prime Video subscribers?* GEEK UPDATED (May 27, 2021), *available at* https://geekupdated.com/how-many-titles-are-free-for-prime-video-subscribers/.

[4] *Plans and Pricing*, Netflix, *available at* https://help.netflix.com/en/node/24926 (last accessed July 14, 2021).

[5] *The Amazon Prime Membership Fee*, AMAZON, *available at* https://www.amazon.com/gp/help/customer/display.html?nodeId=G34EUPKVMYFW8N2U (last accessed July 14, 2021).

[6] *Amazon Prime Instant Video Is a Huge Loss Leader*, MOTLEY FOOL (Feb 22, 2017), *available at* https://www.fool.com/investing/2017/02/22/amazon-prime-instant-video-is-a-huge-loss-leader.aspx.

[7] *Amazon Rising – Amazon's Streaming Video Surpasses Hulu and Apple*, QWILT (April 4, 2014), *available at* https://qwilt.com/amazon-rising-amazons-streaming-video-surpasses-hulu-and-apple/.

[8] *Id.*

[9] *Id.*

[10] *Amazon.com Announces Fourth Quarter Sales up 15% to $29.33 Billion*, AMAZON (Jan. 29, 2015), *available at* https://press.aboutamazon.com/news-releases/news-release-details/amazoncom-announces-fourth-quarter-sales-15-2933-billion/.

[11] *Netflix Lost 31% of Market Share in the Last Year as Streaming Rivals Gained Ground*, WRAP PRO (April 5, 2021).

If Amazon is permitted to complete the acquisition, the Commission should require Amazon to decouple the Prime delivery service from the Prime Video service and price its Prime Video membership to reflect its true cost.

Amazon leverages its dominance in the streaming device and cloud computing markets to exert power over its SVOD rivals

Amazon is already a market leader in streaming devices and cloud computing services used by SVOD consumers and competitors alike and has not hesitated to unfairly wield its dominance in these markets over SVOD competitors.

Streaming devices interface with televisions to provide access to various streaming services. In the market for streaming devices, Amazon's Fire TV device is a close second to market leader Roku, which account for 34 and 36 percent of this market, respectively.[12] This position gives Amazon a degree of gatekeeper power in terms of its ability to make available, or not, rival SVOD services through its digital streaming device. Recent disputes between Amazon and its SVOD peers illustrate Amazon's tendency to leverage dominance in other markets in a manner that threatens even large rivals' abilities to compete.

When the Peacock streaming service initially launched, it was not available on Amazon's Fire TV device for 14 months because of a dispute between the SVOD rivals, although Peacock was available on Apple TV and Google Chromecast. The dispute reportedly centered on which company could access user data generated via viewership of Peacock's content through the device, as well as the split of associated ad revenue.[13] Peacock and Amazon only recently reached an agreement to distribute Peacock's SVOD service through the Fire TV device.[14] Details of the agreement, including any potential concessions, are not public.

Walt Disney Co. has also fought with Amazon over the inclusion of Disney+ on Amazon's Fire TV devices. Amazon attempted to condition access on the right to sell a substantial percentage of Walt Disney Co.'s ad spaces. Because Disney+ currently does not have any ads, Amazon insisted on the right to sell advertising on other media services owned by Walt Disney Co., such as apps for its television networks, which include ABC, ESPN, and the Disney Channel.[15] The companies eventually reached a deal only after Disney+ agreed to demands to reserve a large portion of its ad space for Amazon.[16]

Another dispute, this time between Amazon and AT&T, centered on whether HBO Max content would be available on Prime Video's HBO channel.

---

[12] *Competition Among Video Streaming Services* at 8, CONG. RSCH. SERV. (Sept. 25, 2020), *available at* https://fas.org/sgp/crs/misc/R46545.pdf.

[13] *NBCUniversal's Peacock is unlikely to reach deals with Amazon and Roku by July 15 launch*, CNBC (July 9, 2020), *available at* https://www.cnbc.com/2020/07/09/nbcuniversals-peacock-unlikely-to-be-on-amazon-roku-by-july-15-debut.html.

[14] *Peacock, Amazon reach deal to add streaming app to Fire TV devices*, CNET (June 23, 2021), *available at* https://www.cnet.com/news/peacock-amazon-reach-deal-to-add-streaming-app-to-fire-tv-devices/

[15] *Amazon Clashes with Disney Over Terms for Offering Apps in Fire TV*, WALL ST. J. (Oct 3, 2019).

[16] *How Amazon Controls Virtually Everything You Watch*, AM. PROSPECT (July 9, 2021), *available at* https://prospect.org/power/amazon-web-services-controls-virtually-everything-you-watch/. *See also Amazon's Fire TV to Carry Disney+*, WALL ST. J. (Nov. 7, 2019).

AT&T reportedly wanted to be able to track consumer data more easily by providing Amazon content through a separate HBO Max app on Amazon's digital streaming devices players, as SVOD services like Netflix and Hulu do.[17] However, Amazon wanted to make HBO Max content available only through its HBO channel on Prime Video.

The dispute has now been resolved.[18] However, the months-long dispute – and the other hardball tactics described above – are examples of how Amazon conditions rivals' use of its market-dominant streaming device on granting it various additional rights including access to advertising space and SVOD consumer data.

Amazon's leverage over rivals is also greatly enhanced because all major SVOD firms in the US rely on the digital infrastructure of Amazon's AWS service to deliver content to consumers. AWS is the back-end provider for Prime Video competitors Netflix, Disney+, Hulu, Paramount+, Peacock, HBO Max, and Discovery+.[19] Amazon's dominance in cloud computing thus adds another chokepoint to the company's hold over SVOD distribution. As with its streaming device dominance, Amazon reportedly uses this potential stranglehold to gain advantages over competitors. For example, WarnerMedia, HBO's parent company, gained access to Amazon's Fire stick only by agreeing to extend an existing contract it had with AWS.[20]

Amazon may also be using anticompetitive methods to exploit the reliance of SVOD rivals on its cloud computing service. Amazon has, for example, dramatically marked up what it charges customers such as Netflix to move data from its network to another cloud provider.[21] This practice has led to accusations that the company is price gouging its AWS service to the detriment of its customers,[22] who are also, as in the case of Netflix, Amazon's direct competitors in other markets.

The market leveraging described above indicates that the SVOD market is no exception to how Amazon pursues and utilizes power in the markets where it operates. Accordingly, the acquisition of MGM should be blocked, but if it is permitted to proceed, Amazon should be required to engage SVOD rivals in a neutral way, with respect to both the streaming device and cloud computing markets, in order to prevent Amazon from leveraging its power in these markets to gain further share in the SVOD market.

Vertical integration in the SVOD market presents dangers to producers and consumers of film content

The proposed Amazon-MGM deal would exacerbate the current trend towards vertical integration among dominant SVOD firms.

---

[17] *HBO Max Is Left Out of Amazon's, Roku's Platforms at Launch*, Wall St. J. (May 27, 2020).
[18] *HBO Max, Amazon Finally Strike Deal to Bring App to Fire TV Devices*, HOLLYWOOD REP. (Nov. 16, 2020), *available at* https://www.hollywoodreporter.com/business/digital/hbo-max-amazon-finally-strike-deal-to-bring-app-to-fire-tv-devices-4071920/#:~:text=Under%20the%20new%20deal%20with,only%20complicated%20its%20brand%20positioning.
[19] AM. PROSPECT, *supra* n.16.
[20] *WarnerMedia Extended AWS Deal to Win Key HBO Max Concession*, THE INFORMATION (Jan. 8, 2021), *available at* https://www.theinformation.com/articles/warnermedia-extended-aws-deal-to-win-key-hbo-max-concession.
[21] *AWS Customers Rack Up Hefty Bills for Moving Data*, THE INFORMATION (Oct. 21, 2019), *available at* https://www.theinformation.com/articles/aws-customers-rack-up-hefty-bills-for-moving-data
[22] *AWS Accused of Gouging Customers for Networking Bandwidth*, THE INFORMATION (July 23, 2021), *available at* https://www.theinformation.com/briefings/1b7024.

As elucidated further below, this presents dangers similar to those regulators sought to eliminate in the past, including risks for competition in film production, distribution and exhibition, and consumer choice.

The growing dangers of vertically-integrated SVOD services echo those of the Paramount *oligopoly*

SVOD services have grown exponentially in importance to become the primary exhibition channel for contemporary viewers.

In 2019, there were 201 billion streaming views just in the U.S., 200 times more than the 1 billion theater admissions recorded at the North American theatrical box office market.[23] The US digital at-home market was also worth almost twice the entire North American box office in 2019.[24]

And in 2020, due to the lockdown-induced shuttering of brick-and-mortar theaters, SVOD's upward trend accelerated, with the number of SVOD subscriptions in the US increasing 32 percent to over 308 million subscriptions.[25] SVOD also represented the leading at-home viewing method, including cable TV, in terms of number of consumer subscriptions during 2020.[26] Respondents to a 2020 survey of film makers, conducted by the Center for Media and Social Impact and the International Documentary Association, also identified SVOD as the most economically-viable future distribution channel for content, over both TV and theatrical exhibition.[27] Illustratively, Netflix poured $17 billion into content in 2020, up 42 percent from $12 billion one year earlier.[28]

In addition to offering an increasingly vital exhibition space for content, the SVOD market is dominated by a small number of large players. Although there are more than 135 online services providing movies and television shows to US consumers, the top five streaming services in the US collectively accounted for 72 percent of the entire market at the end of 2020.[29] Each of these market leaders, including Amazon, is increasingly vertically-integrated. These SVOD services thus distribute content that, increasingly, their studios either produce or have acquired exclusive rights to stream.

The increasing vertical integration of the SVOD market presents dangers similar to those recognized in the *Paramount Decrees*.[30] In the 1940s, five major movie studios (Paramount, Loew's, Warner, RKO, and Fox) together distributed 75 percent of all content available through consumers' primary exhibition channel at the time: brick-and-mortar movie theaters.[31]

---

[23] *Theme Report 2020* at 16, 41, MOTION PICTURE ASS'N (March 18, 2021), *available at* https://www.motionpictures.org/wp-content/uploads/2021/03/MPA-2020-THEME-Report.pdf
[24] *Id*. at 14, 41.
[25] *Id*. at 17.
[26] *Id.*
[27] *2020 Study of US Documentary Professionals* at 17, CTR. FOR MEDIA & SOCIAL IMPACT & INT'L DOCUMENTARY ASS'N (April 2021), *available at* https://cmsimpact.org/wp-content/uploads/2016/08/CMSI_KeyFindingsReport.pdf.
[28] *Diller: Streaming has killed the movie business as we know it*, SEEKING ALPHA (July 9, 2021), *available at* https://seekingalpha.com/news/3714036-diller-streaming-has-killed-the-movie-business-as-we-know-it.
[29] *Netflix Lost 31% of Market Share in the Last Year as Streaming Rivals Gained Ground*, WRAP PRO (April 5, 2021) (providing US SVOD market leaders in order: Netflix (20%), Amazon Prime Video (16%), Hulu (13%), HBO Max (12%), and Disney+ (11%)).
[30] *United States v. Paramount Pictures, Inc*., 334 U.S. 131 (1948).
[31] Kraig G. Fox, *Paramount Revisited: The Resurgence of Vertical Integration in the Motion Picture Industry*, 21 HOFSTRA L. REV. 505, 513 (1992).

These firms' vertical integration allowed them to control both the industry's primary exhibition channel and much of the content available to US consumers, which their own studios also produced.

Recognizing the danger of a vertically-integrated film oligopoly, the Supreme Court imposed a range of obligations, known as the *Paramount Decrees*, on big studios that limited their ability to combine production and distribution practices with their exhibition business.[32] Restricting the leverage of these large players through enforcement – in combination with regulation of broadcasters in the 1970s through the Financial Interest and Syndication ("Fin-Syn") rules, which prevented television networks from owning the content they distributed in primetime[33] – allowed truly independent production, and by extension, independent expression, to proliferate in the decades that followed.[34]

The current SVOD market exhibits many of the same features that motivated the *Paramount* restrictions: a few large, dominant players that are increasingly vertically-integrated and thus own and control content production, distribution and exhibition. However, both the *Paramount Decrees* and the Fin-Syn rules have been terminated, and the SVOD market is currently unrestricted.[35] Amazon – with its vast resources and scale across numerous industries that include Prime membership and AWS cloud computing services – is uniquely positioned to exploit vertical links in its network of businesses.

In this unregulated market, large and vertically-integrated SVOD firms may amplify their power through exclusive control over film content and the imposition of expansive contracts on new content providers, which may endanger consumer choice in the streaming video market.

Vertical integration in SVOD presents acute dangers for robust consumer choice

Vertically-integrated SVOD providers are able to restrict a horizontal SVOD rivals' access to the content it produces or commissions. With the acquisition of MGM, Amazon would acquire the distribution rights to approximately 4,000 film titles and 17,000 television episodes.[36] This is a major back-catalogue and intellectual property resource that would strengthen the competitive position of Amazon's SVOD service.[37] Some of this content is already available on competing SVOD platforms such as the Disney-owned Hulu or Netflix.[38] Amazon may ultimately choose to pull this content from competing platforms if it is permitted to acquire MGM.

---

[32] The decrees were recently terminated. *Federal Court Terminates Paramount Consent Decrees*, DEP'T OF JUST. (Aug. 7, 2020), *available at* https://www.justice.gov/opa/pr/federal-court-terminates-paramount-consent-decrees.

[33] *The American Television Industry* at 21, PALGRAVE MACMILLAN (2009), *available at* https://www.filmandmedia.ucsb.edu/wp-content/uploads/2018/02/83-American-TV-Industry-copy.pdf.

[34] *Supra* n.31 at 516.

[35] Writers Guild West Comment on DOJ-FTC Draft Vertical Merger Guidelines (Feb. 26, 2020), *available at* https://www.ftc.gov/system/files/attachments/798-draft-vertical-merger-guidelines/wgaw_comment_on_draft_vertical_merger_guidelines_2262020.pdf (describing the impact of vertical integration in the media industry following the repeal of the "Fin-Syn" rules).

[36] *Amazon's $8.5 billion purchase of MGM will give it rights to James Bond, 'Legally Blonde,' 'Robocop,' 'The Handmaid's Tale,' and much more*. *Here's what the tech giant could own under the deal*, BUS. INSIDER (May 26, 2021), *available at* https://www.businessinsider.com/what-amazon-gets-mgm-deal-james-bond-tv-shows-movies-2021-5.

[37] *Amazon gets an edge with MGM content*, LIVE MINT (May 27, 2021), *available at* https://www.livemint.com/companies/news/amazon-gets-an-edge-with-mgm-content-11622110965431.html.

[38] *What MGM Deal Means For Netflix, Hulu & Disney+ Shows Amazon Will Now Own*, SCREEN RANT (May 27, 2021), *available at* https://screenrant.com/amazon-mgm-shows-own-disney-hulu-netflix/.

Indeed, the company's appetite for making content exclusive to its platform is clear from recent action such as Amazon's acquisition of exclusive rights to stream new movie content from Universal Studios for several months after a title's release.[39]

As the Seventh Circuit recognized in the seminal vertical restraint case *Toys R Us*,[40] certain products such as toys – and movies – are highly differentiated. Thus, the consumer impact of having specific movies locked up by a single firm is high. Moreover, the possibility of one or two large SVOD firms attaining exclusive control over large swaths of video content could generate network effects for these firms and even result in a single dominant platform in the SVOD market similar to the current markets for social media pages (Facebook), search (Google) and e-commerce (Amazon).

Vertical integration allows SVOD firms to impose restrictive contract terms on content providers

Another, growing problem in the vertically-integrated SVOD market is the ability of dominant SVOD firms to impose expansive contract terms on content providers, which reduce the channels through which content will ultimately be available.

In the past, content producers or distributors tended to negotiate a series of non-exclusive distribution deals with a range of exhibition channels from PayTV providers to broadcasters, educational establishments, and SVOD services themselves. Together these deals were more lucrative for producers than a single contract giving all rights to one exhibition channel.[41] With more power, however, dominant SVOD services have been able to condition access to their exhibition channel increasingly on exclusive deals with producers and distributers referred to variously as *all-rights*[42] or *worldwide*[43] rights deals. As their names suggest, these types of deals afford a wider range of exhibition rights to SVOD providers and thus often preclude producers from distributing their content, or even in some cases subsequent derivative content (e.g., sequels), via alternative exhibition channels. These deals prevent producers from realizing any of the associated economic gains of more equitable contracts that allow for multi-channel distribution.

The all-rights deals described above not only sap income from other distribution methods but can also curb the benefits of community engagement with content by, for example, restricting its availability in educational settings. In its licensing terms, Amazon has not made any provisions for educational screenings of its SVOD content.[44] In fact, generally, industry analysts note that when it comes to major SVOD providers' deals with content makers, "flexible forms of exhibition beyond the platform are rare."[45]

---

[39]*Amazon locks down some exclusive streaming rights for Universal movies*, ENGADGET.COM (July 8, 2021), *available at* https://www.engadget.com/amazon-prime-video-universal-pictures-movies-peacock-183143573.html.
[40]*Toys "R" Us v. Fed. Trade Comm'n*, 221 F.3d 928, 931 (7th Cir. 2000).
[41]*Types of distribution deals,* The Impact Field Guide and Toolkit, *available at* https://impactguide.org/impact-distribution/types-of-distribution-deals/.
[42]*Id.*
[43]*Supra* n. 43 at 66.
[44]*Amazon Prime Video Terms of Use*, AMAZON (May 4, 2021), *available at* https://www.primevideo.com/help?nodeId=202095490 (last accessed July 14, 2021).
[45]*Platform Politics: Netflix, The Media Industries, And The Value Of Reality* at 66, WORLD RECORDS J. (2021).

Market leaders including Amazon and Netflix are increasingly insistent on restrictive content licensing exclusivity in their dealings with content providers.[46] The willingness of content producers and distributers to accept SVOD deals that restrict alternative distribution indicates that SVOD services have increasingly asymmetrical power in this relationship.

Allowing the MGM merger would give Amazon expanded power to impose onerous contract terms such as all-rights provisions on content providers and is another reason the merger should not proceed. If the FTC does allow the merger to proceed, it should limit the imposition of all-rights deals by Amazon, a step that was previously taken in the Time Warner – Bright House merger.[47]

Vertically-integrated SVOD firms withhold vital consumer data from content providers

In addition to restricting content makers' rights over their product through restrictive deals, SVOD firms also withhold viewership data from content makers, which is vital for measuring the success of their work. Large SVOD firms including Amazon and Netflix consider viewership data to be proprietary and routinely refuse to share it with either filmmakers or consumers.[48] This stands in notable contrast to viewership data accessible to content makers through legacy forms of distribution, for example box office data or *Nielsen* ratings in the context of theatrical and TV exhibition, respectively. Large SVOD firms can, however, use viewership data from their platform to potentially inform the development of their own in-house studios' production.

Because they have unequal access to competitively sensitive data, SVOD firms' in-house studios and third-party producers compete on an uneven playing field for exhibition space. This practice echoes Amazon's practice of withholding access to commercial data about third-party sellers on its e-commerce platform from those sellers themselves,[49] while also using such data unfairly to inform its own competing products.[50] This is another reason the FTC should block the merger, but if it permits the merger to proceed, Amazon should be required to share viewership data with content makers with which it contracts.

Vertically-integrated SVOD firms exercise increasing creative control over content, with troubling implications for freedom of expression

SVOD firms already exercise their growing power directly over the creative parameters of content available to consumers through their platforms.

---

[46]*Exclusive or Traditional Distribution?* FILMTAKE (Sep. 29, 2020), *available at* https://www.filmtake.com/distribution/emerging-exclusivity/.

[47]*See, e.g., Justice Department Allows Charter's Acquisition of Time Warner Cable and Bright House Networks to Proceed with Conditions*, DEP'T OF JUST. (April 25, 2016), *available at* https://www.justice.gov/opa/pr/justice-department-allows-charter-s-acquisition-time-warner-cable-and-bright-house-networks

[48]*Supra* n.43 at 67.

[49]*Responses to Questions for the Record following the July 16, 2019, Hearing of the Subcommittee on Antitrust, Commercial, and Administrative Law, Committee on the Judiciary, Entitled "Online Platforms and Market Power, Part 2: Innovation and Entrepreneurship* at 8-9, *available at* https://docs.house.gov/meetings/JU/JU05/20190716/109793/HHRG-116-JU05-20190716-SD038.pdf.

[50]*See, e.g., EU says Amazon breached antitrust rules, opens second investigation into its e-commerce business*, CNBC (Nov. 10, 2020), *available at* https://www.cnbc.com/2020/11/10/eu-hits-amazon-with-antitrust-charges-for-distorting-competition.html.

The vertically-integrated studios of large SVOD providers – such as Amazon Originals – increasingly insert themselves into content production at earlier stages. They often do so as an executive producer who acquires exclusive intellectual property rights to content.

SVOD providers often place ideological and stylistic pressures on the content makers they engage. One of the motivations for tighter, top-down creative control over content accessible through SVOD platforms is to foster a recognizable, consistent brand identity.[51] This, in turn, leads to a narrowing of the types of content available to consumers as producers seeking access to SVOD platforms bandwagon to such creative pressures.[52] Research confirms that the economic inclusion and participation of diverse groups has not accompanied the rise of SVOD. In a recent survey of independent film makers conducted by the Center for Media and Social Impact and the International Documentary Association, respondents identified SVOD companies as a greater source of project financing than either traditional film studios or TV networks. Respondents also identified SVOD services as the main source of revenue for their most recent films. However, when demographically disaggregated, the survey results show that SVOD services were not Black, Indigenous, and People of Color (BIPOC) film makers' main source of funding or revenue as they were for white respondents. Instead, BIPOC film makers identified broadcast TV networks such as PBS as a more viable source of funding and revenue compared to SVOD financing.[53] This divergence points to a troubling lack of diverse voices within the increasingly vital exhibition space that SVOD providers control.

Amazon's effects in the book market may presage the danger Amazon represents to creative content in the SVOD market. Amazon is the largest book retailer in the world, and it has used this power to self-preference its own published books on its Marketplace.[54] It has also conditioned third-party booksellers' access to its sales platform on the purchase of ancillary services[55] – requirements to which sellers often acquiesce because they see the Marketplace as a necessary platform, just as film producers need studio partners.

The results of shifting power and profits to Amazon and away from publishers are highly troubling, especially for diversity of book content. Publishers are less able to invest in books with diverse or controversial content, and Amazon's pricing tactics and demands for better terms from publishers is driving increased consolidation among large booksellers.[56] Increased vertical consolidation in the SVOD industry – particularly by a company that has a track record of suppressing diversity of expression through vertical integration in another creative industry – should similarly raise concerns that diversity in film/video content will decline as this consolidation increases.

---

[51] *Supra* n.43 at 69.
[52] *Id*. at 60.
[53] *Supra* n.27 at 37-38.
[54] *'They Own the System': Amazon Rewrites Book Industry by Marching Into Publishing*, WALL ST. J. (Jan. 16, 2019).
[55] *Amazon's Taking Another Bite of the Publishing Pie*, AUTHORS GUILD (May 8, 2017).
[56] Lina Khan, *Amazon's Antitrust Paradox*, 126 YALE L.J.710, 766 (Jan, 2017).

Another threat to diversity of content is the possibility that large, vertically-integrated SVOD providers will acquiesce to political censorship. Illustratively, Netflix previously acquired and streamed uncensored, underground Chinese documentaries.[57] However, with increasing vertical control over content, Netflix has removed such third-party content and even censored its own commissioned content in response to requests from national governments including Saudi Arabia.[58] Disney, another vertically integrated SVOD giant, has also submitted to the demands of authoritarian regimes when producing its own recent, streaming-exclusive content.[59] Amazon may be more likely to appease foreign censors than a stand-alone SVOD company because it has so much more at stake than just the SVOD market; rather the operation of Amazon's entire e-commerce platform may be at risk if it resists the demands of foreign governments that can regulate multiple aspects of its business.

Amazon has already demonstrated a willingness to exercise arbitrary control over the availability of independent content on its SVOD platform. Amazon's video platform service, Prime Video Direct (PVD), previously allowed independent creators to upload their own content. This content was then accessible for Prime Video members to view, usually for a rental fee. In February 2021, however, Amazon's PVD self-publishing program ceased accepting "unsolicited licensing submissions via Prime Video Direct for non-fiction and short form content."[60] In addition, Amazon also suddenly purged many independent films from the PVD service, again without any warning or explanation.[61]

PVD had previously been a useful and lucrative distribution channel for independent documentary makers in particular. Amazon did not provide any reason for its sudden change in policy. However, some industry insiders believe the move may be the result of liabilities associated with politically sensitive or controversial independent content.[62] Another view is that Amazon leveraged the investment of the independent film community as an initial strategy to develop its brand in the film and TV space, and that independent voices no longer serve a purpose now that this has been achieved.[63]

While it is not clear why Amazon shut down independent producer and distributor access to its PVD platform, the effect is obvious: Cutting off this channel has severely impacted the ability of certain producers and distributors to finance and distribute films, and in particular has cut off one of the few avenues of access for more controversial independent films. This development may be a telling indication that Amazon is unlikely to ensure the presence of truly commercially and politically independent voices within the increasingly important exhibition space it controls.

[57] *Why I Had A Hard Time Watching* American Factory, MEDIUM (Jan. 8, 2021), *available at* https://medium.com/@karinchien/why-i-had-a-hard-time-watching-american-factory-d63918c60607.
[58] *Netflix's Bow to Saudi Censors Comes at a Cost to Free Speech*, N.Y. TIMES (Jan. 6, 2019).
[59] Nicole DeSouza, *Cut! How Hollywood self-censors on China*, THE INTERPRETER (Sept. 14, 2020), *available at* https://www.lowyinstitute.org/the-interpreter/cut-how-hollywood-self-censors-china.
[60] *Upload Prohibited: Amazon Prime Video Direct Locks Out Docs and Shorts*, FILMMAKER (Feb. 16, 2021), *available at* https://filmmakermagazine.com/111340-upload-prohibited-amazon-prime-video-direct-locks-out-docs-and-shorts/#.YOyqcklKhPZ.
[61] *Id.*
[62] *Id.*
[63] *The Amazon Prime Video Direct Purge: A Filmmaker's View*, INT'L DOCUMENTARY ASS'N (March 2, 2021), *available at* https://www.documentary.org/online-feature/amazon-prime-video-direct-purge-filmmakers-view.

Conclusion

Amazon has a well-established record of anticompetitive conduct that is only growing. Moreover, Amazon has perpetrated many of these types of unfair acts in the SVOD market itself – from bundling and below-cost pricing to gain market share for its SVOD service, Prime Video, to using its power in the device market to exclude competitors from its Fire TV stick, to engaging in troubling content-controlling behavior that has seen independent voices excluded from its Prime Video Direct platform.

Given this track record, there is little doubt that the most troubling trends in the SVOD market and in film content generally – including onerous contracting practices that shift increasing swaths of content and rights themselves to SVOD firms, and increasing vertical integration and corporate consolidation that threaten to limit diversity, political expression, and other non-mainstream forms of content – will be further embraced and exacerbated by Amazon.

For these reasons, we strongly urge the Commission to reject Amazon's acquisition of MGM. We have suggested conditions the FTC should place on Amazon if it allows the merger. These include requiring Amazon to 1) unbundle Prime Video and delivery and price Prime Video at a market rate; 2) provide competitors neutral access to its Fire TV Stick device and cloud computing services; 3) limit the imposition of all-rights contracts on content makers; and 4) share viewership data with content makers with which it contracts.

However, the best course would be to prevent Amazon from gaining an additional foothold in the SVOD market from which to expand its power over this important area of economic and cultural significance for our country.

Former studio executive Barry Diller recently summed up why it might be a bad idea for the most powerful retail company in the world to acquire MGM: "[When I ran studios] the key point of movies was to please consumers," but for a service like Amazon Prime "incentives have changed ... The system is not necessarily to please anybody. It is to buy more Amazon stuff."[64]

For the reasons stated in this letter, we urge the Commission to reject the Amazon-MGM merger.

Respectfully submitted,

Michael R. Zucker
Executive Director

Cc: Chairwoman Lina Khan
Commissioner Rohit Chopra
Commissioner Noah Joshua Phillips
Commissioner Rebecca Kelly Slaughter
Commissioner Christine S. Wilson

[64]*Supra* n.28.