WGAW Opposes the Disney-Fox Merger

The proposed Disney-Fox merger will harm content creators, consumers and competition. It is a horizontal merger of two of the largest companies in the entertainment industry that will eliminate a major competitor and potential competition in several markets. It will create a dominant firm in the markets for creative labor that can use its monopsony power to cut jobs and suppress compensation. Disney-Fox will be 85% larger than the next-largest WGAW employer by earnings and control 28% of WGAW writer earnings overall. Just three companies will control almost 60% of the market for professional audiovisual writing services. By significantly increasing concentration in feature film and television production and distribution markets, Disney will have the power to reduce output, raise prices, limit innovation and restrict competitors' access to consumers. The merger also threatens the development of the market for online streaming video services. The likely outcome of this consolidation is fewer content choices, higher prices and lower wages due to increased market power. The merger must be blocked.

- **The Combined Firm's Monopsony Power Would Reduce Compensation, Output, Employment and Innovation**

Antitrust laws apply equally to the buy and sell side of markets. According to the DOJ and FTC's *Horizontal Merger Guidelines*, "To evaluate whether a merger is likely to enhance market power on the buying side of the market, the Agencies employ essentially the same framework described above for evaluating whether a merger is likely to enhance market power on the selling side of the market."[1] Disney and Fox are already two of the largest employers in the entertainment industry; their combination will significantly enhance their power in creative labor markets.

Labor Markets for Professional Audiovisual Writers

WGAW members are professional writers of audiovisual programs for theatrical, television and digital platform exhibition. The labor market for WGAW members' writing services features a handful of large and powerful media companies that account for the lion's share of employment and earnings, followed by smaller producers. Within the broad labor market for professional audiovisual writers there are important and distinct submarkets – television (which now includes writing for digital subscription platforms like Amazon and Netflix) and theatrical. There is some movement of writers between these submarkets – much of it screenwriters attempting to enter the television submarket because of declining opportunities in the theatrical market – but there are key differences that require examination of the merger's effect on the individual submarkets.

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[1] US Department of Justice and the Federal Trade Commission, *Horizontal Merger Guidelines* at 32 (Aug. 29, 2010).

TV/Digital Writing Submarket

Writing for television and digital platforms constitutes a single labor submarket. Writers within this submarket primarily work on series, which have similar budgets, episode lengths and narrative structures. Working conditions for writers on TV and digital platform series are similar; contractual terms for weekly compensation, script fees and creative rights are comparable. Writers on TV and digital series progress from an entry level staff writer position through various writer-producer levels to the position of showrunner, or head writer. This requires writers to focus on finding series employment each year, so that they may advance in their writing careers.

The TV/digital labor submarket also includes writing for individual programs, often referred to as TV movies. These types of programs have long been made for television, and some are now being made for subscription video on demand (SVOD) platforms like Netflix and Amazon. Writer compensation for individual programs made for digital subscription platforms, including initial script fees and residual compensation, is comparable to terms for TV movies made for broadcast, cable and pay networks.

Theatrical Film Writing Submarket

The labor submarket for theatrical film writing differs from the TV/digital submarket in several ways. The minimum initial and residual compensation for a theatrical script is higher than for a TV or digital program of the same length. Theatrical film writers are also often able to negotiate initial compensation that significantly exceeds the minimum terms of the collective bargaining agreement, unlike in TV/digital, where the minimum script fees negotiated in the collective bargaining agreement are more determinative. The theatrical writing submarket includes a significant amount of development, or writing of projects that are never produced. Theatrical film writers may often work for a year or more on an individual project and typically work alone. Unlike TV/digital writers, theatrical film writers are rarely involved in the film's production.

Feature films generally have significantly higher budgets than television and digital programs, with typical budgets for major studios' distributed films ranging from $60 to $140 million, compared with $5-7 million per episode for a typical high-end TV or digital series.[2] To the extent that Netflix becomes a buyer for or commissions feature-length projects that have comparable budgets to major theatrical releases, the writing for these projects could be considered within the theatrical film writing submarket. For instance, in the last several years Netflix has released a handful of features with major studio-level budgets: *Bright* ($90 million), *War Machine* ($60 million), *Okja* ($50 million) and *Death Note* ($40-50 million).[3] The writing work for these projects was contracted under theatrical film writing terms with third-party producers, with the expectation by the writer that the film would be released initially in theaters.

It is also worth noting that writing a feature-length program for Netflix or Amazon remains an inferior substitute for theatrical film writing due to key differences in the structure of compensation. Theatrical films are generally sold or licensed in multiple secondary markets,

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[2] Maureen Ryan and Cynthia Littleton, *TV Series Budgets Hit the Breaking Point as Costs Skyrocket in Peak TV Era,* Variety (Sept. 26, 2017), https://variety.com/2017/tv/news/tv-series-budgets-costs-rising-peak-tv-1202570158/.
[3] Kayla Cobb, *Netflix Is Spending A Ton Of Money on Original Movies,* Decider (Apr. 12, 2017), https://decider.com/2017/04/12/netflix-film-spending-2017/.

producing a series of revenue-based reuse payments for writers that form a significant base of their compensation. The writer of a film that achieves global recognition has an opportunity to participate in that success as the film sells electronic or physical copies or is licensed to television or streaming services in other countries. SVOD films, in contrast, are unlikely to generate any other residual compensation for the writer or other creative labor via licensing to secondary markets due to the major streaming services' global reach and strategy of content exclusivity.

Disney-Fox Merger Harms to Creative Labor Markets

A Disney-Fox merger will eliminate a major employer and create a dominant firm with a 28% market share in the broad market for professional writers of audiovisual programming. Post-merger this employment market's HHI will increase almost 400 points.

WGAW Writer Earnings[4]				
	Pre Merger Market Share	**Pre Merger HHI**	**Post Merger Market Share**	**Post Merger HHI**
Disney	13%	158	28%	787
Fox	15%	240		
Time Warner	15%	237	15%	237
CBS-Viacom	14%	199	14%	199
Comcast	10%	107	10%	107
Sony	8%	62	8%	62
Lions Gate	3%	8	3%	8
Netflix	2%	4	2%	4
Amazon	2%	3	2%	3
Industry HHI		1027		1416

Labor market HHI measures likely underestimate anticompetitive market power because they do not account for significant search friction that limits competition between buyers of labor. Creative labor markets in the entertainment industry are free agent markets in which finding work is notoriously difficult. Not only is demand irregularly timed and skills highly variegated but idiosyncratic preferences play an outsized role in matching talent and employers. For instance, writers often specialize in writing drama or comedy and develop a professional reputation for writing a specific style of drama or comedy. On television series staffs, writers progress from the entry-level position of staff writer through writer-producer roles that include associate producer, producer, co-executive producer and executive producer. Within the broad market there is only a subset of jobs at each level available. Hiring is strongly influenced by relationships and a subjective sense of fit between the producer and the personality and competencies of the writer. In fact, an entire industry of talent agents has grown up around employment procurement.

[4] Writer earnings is a more accurate representation of employment than reports of writers working because of the varied nature of writing jobs and reporting. Writers working include those employed for months on a television staff as well as writers of a freelance script or a polish or rewrite of an existing script.

Writers, actors and directors routinely pay talent agencies 10% of their earnings, or sacrifice vastly more in profit participations, to procure employment.

The cost of searching for jobs is so burdensome that large employers can hold down compensation without losing talent. For example, the median weekly compensation of writer-producers on TV series declined 23% between 2014 and 2016,[5] yet writers continued working. Much of the decline was driven by the growth of short seasons of 6-13 episodes, compared to the traditional 22 episode season that long dominated broadcast television. Writer-producers, who are primarily paid by episode, found their weekly pay declining because of prolonged production schedules that expanded the number of weeks worked on each episode. However, by every measure – weekly compensation, annual compensation and episodic quotes, which are the fees paid to writers for each episode they work on – writers' median pay was depressed. This 23% decline at a time of record industry profits is a real world measurement of labor supply elasticity and evidence of monopsony power. The revelations by the #MeToo movement of sexual harassment and abuse in the entertainment industry provide further evidence that employers hold a level of power over creative labor that exceeds what HHI measures would suggest.

Merger Creates Anticompetitive Concentration in TV/Digital Submarket

Within the TV/digital employment submarket, Disney and Fox are even larger employers and their combination would significantly increase concentration. Post-merger, just three companies would control 63% of WGAW writing services in a TV/digital submarket that features significant search friction.

WGAW Writer TV/Digital Earnings				
	Pre Merger Market Share	**Pre Merger HHI**	**Post Merger Market Share**	**Post Merger HHI**
Disney	14%	187	30%	873
Fox	16%	252		
Time Warner	17%	292	17%	292
CBS-Viacom	16%	252	16%	252
Comcast	11%	118	11%	118
Sony	7%	51	7%	51
Lions Gate	2%	6	2%	6
Netflix	2%	5	2%	5
Amazon	2%	4	2%	4
Industry HHI		1174		1608

Writer compensation is determined by a combination of the minimum terms negotiated in the collective bargaining agreement and the overscale terms negotiated by agents in writers' individual negotiations. A combined Disney-Fox, with control of one-third of employment, will have significantly increased power over creative labor that can be used to suppress overscale compensation. The elimination of a major, directly competing buyer of creative labor reduces the ability of writers to walk away from below-quote offers, serious creative differences or

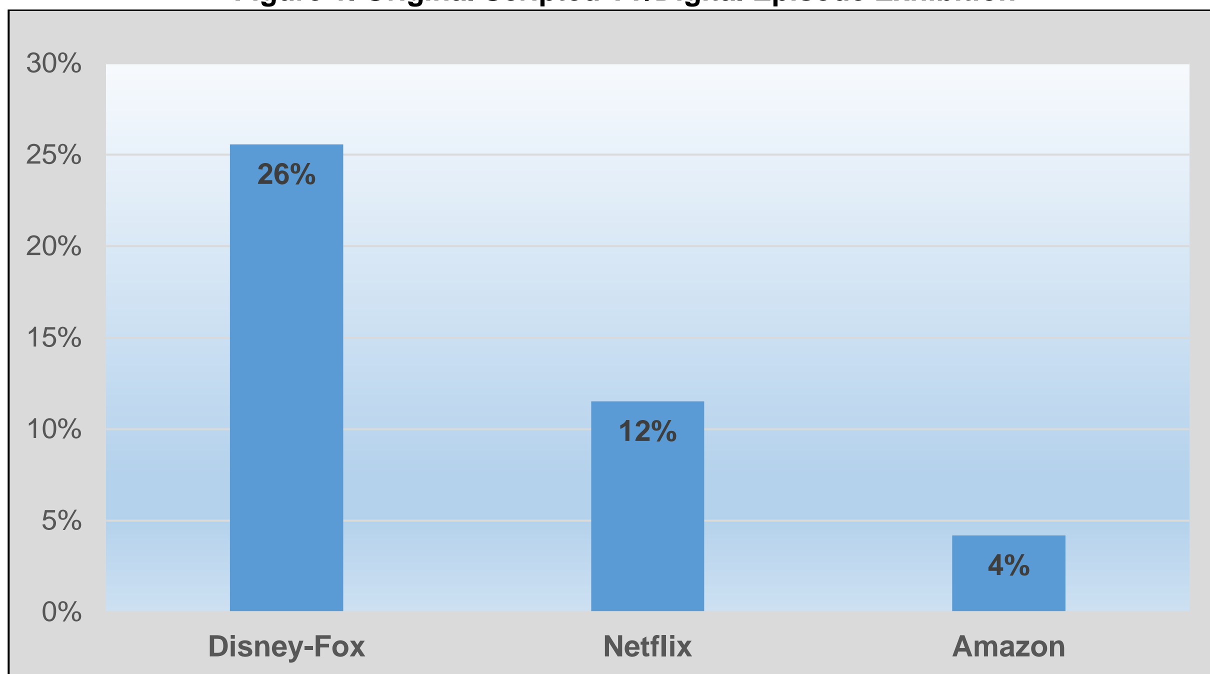
[5] Writers Guild of America West Internal Contract Bulletin, *Writers: Not Keeping Up* (Apr. 7, 2016).

abusive terms and working conditions. It also means the various agents of talent struggle to negotiate fair bargains and address grievances at the individual and industry level. A combined Disney-Fox's monopsony power will likely be exercised to cut jobs by shrinking TV series staff sizes, forcing fewer writers to do more work. The debt burden taken on by Disney to acquire Fox increases the incentive to hold down costs in order to increase profits, and labor costs are often where indebted companies look for savings.

The entrance of Netflix and Amazon, two deep-pocketed and highly-visible companies, into the production of original programming has created a misperception that the market for creative labor has become robustly competitive. Despite large overall programming budgets, Netflix and Amazon are currently only minor producers of original content, each accounting for just 2% of WGAW TV/digital earnings in 2016. In the 2016-2017 season, Amazon and Netflix each only produced roughly 100 episodes of scripted comedy and drama series. Disney-Fox in comparison, produced almost 1200 episodes. At present, aside from poaching a few high profile writer-producers, Netflix and Amazon will not function as a check on the buyer power of a combined Disney-Fox.

As exhibitors of original programming, Netflix and Amazon are larger because they release series produced by third parties. However, as shown in Figure 1, Amazon exhibited just 4% of all original scripted TV/digital episodes last season, while Netflix exhibited 12% and Disney and Fox combined exhibited 26%. Much of Netflix and Amazon's substantial programming budgets goes to licensing syndicated content produced by traditional media companies.

Figure 1. Original Scripted TV/Digital Episode Exhibition



Netflix intends to continue increasing its original programming, which means it will become a much larger producer and exhibitor in the future. However, this does not mean that the TV/digital labor submarket will become markedly more competitive. Netflix will likely concentrate production in-house as opposed to nurturing an ecosystem of competing suppliers of original content. And the entry of additional well-funded streaming competitors is growing increasingly

unlikely. As Wall Street analyst Michael Nathanson recently wrote, “[c]onventional wisdom holds that consumers will have room for around four significant OTT streaming apps,”[6] which suggests that OTT (over-the-top, or streaming) attrition and consolidation may diminish competition in the next few years.

Merger Increases Anticompetitive Leverage in Theatrical Writing Submarket

For screenwriters, the merger will result in fewer jobs at Disney-Fox itself and elsewhere, and will allow the combined company to capture an even larger share of the surplus value created by writers' labor. Screen employment overall has been stagnant in recent years, as increased globalization and the decline of the physical home video market has pressured some film studio margins. Many of the major studios have responded to this pressure by cutting development budgets for new films, or studio research and development. The focus on franchise films, which are a series of films from the same studio which take place in the same cinematic “universe,” has enabled this trend, allowing studios to reduce innovative development and employ fewer writers. These broader market trends have increased the power of large studio employers as writers compete for fewer jobs, causing average screenwriter compensation to decline. Although the theatrical writing submarket is less concentrated than the submarket for TV/digital writing, search friction enhances the monopsony power of large screen employers. As screenwriting employment occurs on a per project basis, significant effort is needed to find the next job and this pressure causes screenwriters to invest significant time and often unpaid labor in order to even compete to obtain employment.

WGAW Theatrical Employment								
	2009	**2010**	**2011**	**2012**	**2013**	**2014**	**2015**	**2016**
Disney	190	175	146	147	133	145	133	129
Fox	277	284	256	254	240	273	273	231
Warner	351	329	307	279	257	233	280	250
Universal	278	257	204	230	219	228	230	212
Sony	209	231	201	208	190	203	250	207
CBS-Viacom	256	243	222	193	206	200	201	209
All Industry	1825	1695	1639	1624	1681	1725	1854	1809

WGAW Theatrical Earnings								
$000	**2009**	**2010**	**2011**	**2012**	**2013**	**2014**	**2015**	**2016**
Disney	$34,261	$28,572	$32,266	$35,441	$38,245	$33,257	$30,637	$38,388
Fox	$55,201	$60,661	$48,392	$50,793	$45,711	$55,307	$53,963	$50,233
Warner	$81,476	$66,048	$58,555	$56,920	$41,691	$30,335	$50,995	$41,616
Universal	$54,177	$51,173	$39,546	$40,294	$37,467	$36,136	$35,001	$34,783
Sony	$49,702	$53,238	$43,877	$50,792	$33,950	$35,743	$48,487	$34,565
CBS-Viacom	$41,734	$33,280	$33,791	$29,999	$32,433	$34,050	$29,829	$35,535
All Industry	$425,397	$397,389	$366,804	$355,111	$335,126	$345,218	$377,783	$371,997

[6] Moffett Nathanson Research, *What Should Amazon Do with Prime Video*, at 1 (June 26, 2018).

Disney has been the most aggressive studio in pursuing the franchise film strategy, acquiring competitor IP in the form of Marvel Entertainment and Lucasfilm, and replacing the majority of its film slate with a smaller number of franchise features. The acquisition of competing employers and the reduction in output has increased Disney's market power as an employer. Between 2009 and 2017, Disney lowered its film output by 65%, more than double the reduction from any other major studio, and reduced its employment of writers by 32% from 2009 through 2016.[7] While writer earnings at Disney have held relatively steady or slightly increased, its theatrical film division has significantly increased in profitability, as outlined in the next section of this paper. Disney's monopsony power enables it to hire fewer writers and capture the majority of the writers' marginal revenue product. With its acquisition of another major competitor, Disney will have increased incentive and ability to exercise its monopsony power.

Fox's behavior as both a buyer of theatrical writing services and a seller of feature films offers a sharp contrast to Disney's. As discussed in the next section, Fox has maintained a varied film slate, with little reduction in output. To support this strategy, Fox continues to invest in theatrical R&D and has held writers' employment and earnings fairly steady while Disney has cut jobs. Fox is now the largest employer of theatrical writers, and the combined Disney-Fox would be more than twice the size of Warner Brothers studio, the next-largest employer in the theatrical submarket. The combined company would account for 24% of all theatrical writer earnings, and one in five theatrical jobs. Allowing Disney to purchase Fox will eliminate an important competitor that has not cut screenwriter jobs or compensation in recent years. This loss, coupled with Disney's increased power over theatrical employment, will significantly enhance its ability to suppress wages below competitive levels and the profitability of doing so.

- **Disney will Dominate the Theatrical Output Market**

A combined Disney-Fox will also harm consumers by eliminating competition and increasing concentration in several product markets. Theatrical films represent a unique consumer product market, as the DOJ recently confirmed in the AMC-Carmike Cinemas merger.[8] Despite the plethora of options available for consumers to access film content, such as via subscription streaming services, MVPD on-demand and DVD/Blu-ray, commercial theater viewing is differentiated from in-home viewing by factors such as ticket prices, screen size, audio sophistication and social experience. In addition, the available product at first-run theaters is generally not replicated by in-home services.[9] Consumers pay a higher ticket price per film to go to the theater in order to access a unique, collective viewing experience of first-run film content.

Theater owners negotiate with film studios to screen the studios' products, while studios aim to earn as much revenue as possible in this first and most lucrative release window, which often establishes a film's value as it progresses through downstream windows of television, online video licensing and home video sales. The two parties bargain over their division of the box office revenue, as well as factors such as how often or long a film plays on a theater's largest screens. The relatively standard revenue split in the domestic box office[10] – close to 50% –

[7] Complete information for 2017 is not yet available.
[8] Complaint, *United States v. AMC Entertainment Holdings, Inc. and Carmike Cinemas, Inc.,* No. 1:16-cv-02475, at 7-8 (Dec. 12, 2016).
[9] *Ibid.*
[10] Defined as the United States and Canada.

represents the studios' bargaining leverage against theater owners, which has been increasing recently as declining theatrical attendance makes theater owners more dependent on "tentpole" films.[11] Tentpoles are large-budget films with significant marketing campaigns intended to drive high turnout for a given film and are often part of a franchise of films. Disney's Marvel Cinematic Universe and Star Wars franchises are quintessential examples of this strategy. This strategy is also a reaction to the growing importance of the international film market – where action films are more easily translated – and the decline of the physical home video market.

Online feature-length programs from services like Netflix and Amazon are a separate consumer product market from theatrically-released films. Online feature films are presented to consumers as more analogous to TV movies, requiring a lower level of engagement than a theatrical viewing experience. The online market for feature-length programs, much like the market for TV movies, has tended to act as a repository for second-tier content. Indeed, Netflix has acquired distribution rights for several films from major studios following reports that the studios were nervous about the films performing poorly at the box office. For example, Paramount has pursued this strategy with *Cloverfield Paradox* and *Annihilation* and Netflix recently picked up a Universal film the studio decided not to release theatrically.[12]

In the theatrical market, Disney and Fox exercise significant market power. They are two of the largest distributors of theatrical films in the United States, and have accounted for as much as 40% of annual box office receipts, taking in 35% in 2017 and 50% in the first five months of 2018. A combined Disney-Fox would be almost twice the size of the next largest distributor and would significantly increase concentration in theatrical distribution. This market's Herfindahl-Hirschman Index (HHI) would increase by 560 points to an HHI of 1953.[13] Post-merger, three firms would account for more than two-thirds of annual box office receipts, with the other major studios, Sony and Viacom, accounting for most of the remainder.

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[11] Moffett Nathanson Research, *U.S. Theaters: Cyclical vs. Secular and Studio Leverage?* (Jan. 30, 2018).

[12] Borys Kit and Pamela McClintock, *Sources: Netflix Paid Paramount More Than $50 Million for 'Cloverfield Paradox'*, Variety (Feb. 6, 2018), https://www.hollywoodreporter.com/heat-vision/netflix-paid-paramount-more-50-million-cloverfield-paradox-1082305; Kaitlyn Tiffany, *Netflix buys Extinction, another sci-fi thriller the original studio didn't want,* The Verge (Feb. 8, 2018), https://www.theverge.com/2018/2/8/16992306/netflix-extinction-michael-pena-universal-cloverfield-paradox; Zack Sharf, *'Annihilation' on Netflix: Moviegoers Need to Take Responsibility for Paramount's Controversial Deal,* IndieWire (Feb. 26, 2018), http://www.indiewire.com/2018/02/annihilation-netflix-paramount-deal-streaming-1201932550/.

[13] Based on 2017 market shares.

U.S. and Canada Theatrical Distribution Market Share – Top Firms[14]											
	2008	**2009**	**2010**	**2011**	**2012**	**2013**	**2014**	**2015**	**2016**	**2017**	**2018 YTD[15]**
Disney	11%	12%	14%	12%	14%	15%	15%	20%	26%	22%	34%
Fox	13%	16%	15%	11%	10%	10%	18%	12%	13%	13%	15%
Warner	20%	20%	19%	18%	18%	21%	19%	17%	17%	18%	11%
Universal	13%	10%	9%	12%	13%	13%	11%	22%	14%	15%	10%
Sony	14%	14%	13%	13%	17%	11%	12%	9%	8%	10%	19%
CBS-Viacom	17%	15%	16%	19%	8%	8%	10%	6%	8%	5%	6%
Top 4→3 Firms	57%	58%	57%	53%	55%	60%	63%	71%	70%	68%	70%
Disney-Fox	24%	28%	29%	23%	24%	25%	33%	32%	40%	35%	50%

In recent years Disney, in particular, has increased its share of the domestic box office by acquiring competitors and reducing output. In 2008, the studio distributed 21 films that accounted for 11% of box office receipts. Disney then acquired Marvel Entertainment in 2009 and Lucasfilm in 2012. By 2017, Disney distributed only 8 films but captured 22% of box office. While other studios have adjusted output in response to the larger market trends, none have done so as drastically as Disney, which has cut its output by nearly two-thirds in the last ten years.

Disney-Fox Theatrical Output: Films Released											
	2008	**2009**	**2010**	**2011**	**2012**	**2013**	**2014**	**2015**	**2016**	**2017**	**2018 YTD[16]**
Disney	21	23	16	14	13	10	13	11	13	8	4
Fox	26	25	25	26	22	22	25	25	21	25	6
Warner	32	29	28	26	26	31	28	31	23	20	11
Universal	25	27	22	23	24	22	25	32	33	22	10
Sony	39	41	38	40	35	31	34	35	38	38	11
CBS-Viacom	23	16	20	18	20	15	17	13	15	15	4
Top 4→3 Firms	104	104	91	89	85	85	91	99	90	75	31
Disney-Fox	47	48	41	40	35	32	38	36	34	33	10

The ability to increase market share while reducing output is a function of Disney's anticompetitive market power over theater owners. Indeed, Disney already exercises significant market power to demand concessions from theater owners who wish to distribute its films,

[14] Box Office Mojo.
[15] Through May 31, 2018.
[16] Through May 31, 2018.

taking 65-70% of ticket sales, monopolizing each theater's largest venue[17] and crowding out other features.[18] In recent years it has become public that Disney demanded "the most onerous" terms that theater owners have seen for the right to exhibit *Star Wars: The Last Jedi* and that the studio has exerted its power to push competing films, like *The Hateful Eight,* out of theaters. By acquiring a major competitor, Disney's power will only increase with this merger and allow the company to continue its trend of cutting back on film releases. Disney's CEO has said, "We've obviously done extremely well with a less-is-more strategy and just making tentpole films," leaving little question that the merged company will further cut theatrical production.

Disney's strategy has significantly increased profits for its film division, as focusing on fewer, tentpole films decreases Disney's need to invest in theatrical development and allows it to rely instead on its market power to ensure its films' wide access in theaters. Though the prevalence of franchise features have pushed major studio film budgets upwards – 2018's Avengers: Infinity War was estimated to have a $350 million budget[19] – Disney's theatrical expenses have increased only 5% annually since 2012, the first year that Disney distributed a Marvel film theatrically.[20] During the same period, theatrical revenue increased 14% annually, and the segment's operating margin grew from 9% to 28%. Disney has used its market power as a seller to capture increased revenues and its market power as a buyer to keep a disproportionate share of these revenues as profit.

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[17] Erich Schwartzel, *Disney Lays Down the Law for Theaters on 'Star Wars: The Last Jedi'*, The Wall Street Journal (Nov. 1, 2017), https://www.wsj.com/articles/disney-lays-down-the-law-for-theaters-on-star-wars-the-last-jedi-1509528603.

[18] Anthony D'Alessandro and Anita Busch, *Quentin Tarantino Blasts Disney on Howard Stern Show As 'Force Awakens' Pushes 'The Hateful Eight' Out of Cinerama Dome,* Deadline (Dec. 16, 2015), https://deadline.com/2015/12/the-hateful-eight-star-wars-force-awakens-arclight-theater-fight-1201668018/.

[19] SNL Kagan.

[20] Disney purchased Marvel Entertainment in 2009, but Marvel movies released prior to 2012's The Avengers were distributed by Paramount pursuant to an earlier deal.

Disney Studio Entertainment Segment Financials[21]							
$000	**2012**	**2013**	**2014**	**2015**	**2016**	**2017**	**CAGR**
Theatrical Distribution	$1,635	$2,192	$2,141	$3,002	$3,616	$3,111	14%
Home Entertainment	$1,894	$1,689	$2,156	$1,843	$1,933	$1,641	-3%
TV/SVOD distribution and other	$2,223	$2,446	$2,946	$3,384	$3,691	$3,611	10%
Total Revenue	$5,752	$6,327	$7,243	$8,229	$9,240	$8,363	8%
Operating Expenses	($2,930)	($3,079)	($3,111)	($3,356)	($3,934)	($3,656)	5%
Selling, general, administrative and other	($2,150)	($2,240)	($2,312)	($2,293)	($2,655)	($2,248)	1%
Depreciation and amortization	($129)	($172)	($136)	($137)	($120)	($117)	-2%
Total Expenses	($5,209)	($5,491)	($5,559)	($5,786)	($6,709)	($6,021)	3%
Operating Income	$543	$836	$1,684	$2,443	$2,531	$2,342	34%
Operating Income Margin	9%	13%	23%	30%	27%	28%	

A combined Disney-Fox would have even more power to demand access to a wider number of screens for its movies, which would leave less room for competing films and would prevent competing studios from increasing output to offset fewer films from Disney-Fox, reducing jobs further. Competitive entry from new theater owners is also unlikely to mitigate these harms, as such activity is unlikely in markets where there is already a first-run theater.[22] As a result, consumers will have fewer choices for what they can see at the theater, and the overall quality and diversity of theatrical film products will suffer.

The merger poses a distinct threat to Fox Searchlight Pictures, which primarily finances and distributes unique, art-house films that eschew the franchise focus of Disney's theatrical lineup. Fox Searchlight films have won the Academy Award for Best Picture four times in the last decade and its films won six Academy Awards in 2018, but the division could be downsized or eliminated in favor of Disney's franchise strategy, as Disney will have "reduced incentive to initiate development of new products" in the form of non-franchise films.[23] If Disney were to transition Fox Searchlight into a direct-to-Hulu pipeline, as Disney CEO Bob Iger has publically considered,[24] consumers would lose choice in the theatrical market, and it is unclear if the SVOD business model can sustain the same level of output. In the separate SVOD product market, consumers pay a monthly subscription for libraries of content as opposed to paying to view an individual movie. Without the value provided by a theatrical run, a direct-to-Hulu version

[21] Disney Quarterly Earning and Annual Reports.
[22] Complaint, *United States v. AMC Entertainment Holdings, Inc.,* No. 1:16-cv-02475, at 25 (Dec. 12, 2016).
[23] US Department of Justice and the Federal Trade Commission, *Horizontal Merger Guidelines* at 23 (Aug. 29, 2010).
[24] Moffett Nathanson Research, *U.S. Theaters: Cyclical vs. Secular and Studio Leverage?*, (Jan. 30, 2018).

of Fox Searchlight could be limited to producing a smaller number of lower-quality films. Online viewing of entertainment content has also evolved into a heavily television-focused outlet as episodic series are better suited to encouraging consumers to keep coming back to the platform. The MPAA reported online television views increased 45% in 2017 to 160 billion, while online movie views decreased 11% and numbered only 7 billion.[25]

- **Disney Will Enhance and Entrench Its Power in the Markets for Traditional and Digital Television**

Multichannel video programming distribution (MVPDs) and virtual multichannel video programming distribution (vMVPDs) constitute the relevant national markets for wholesale television programming. Disney and Fox's broadcast and cable networks reach most households across the United States and vMVPDs, such as Sling TV, DirecTV Now and Hulu Live, reach anyone in the country with a broadband connection. As the Antitrust Division recently noted, "MVPDs and Virtual MVPDs compete most closely with each other and are distinct from other forms of video distribution, including non-linear content from SVODs and non-professional content."[26] MVPDs and vMVPDs differ from subscription video-on-demand (SVOD) services in that they offer bundles of linear network programming at a higher price-point than SVODs and rely on ad revenue as well as subscription fees. SVODs constitute a distinct but important market, given their different business model and lack of sports, news and live event programming. Many consumers treat SVODs as a complement, not a substitute, for MVPDs or vMVPDs by maintaining subscriptions to both types of services.

Traditional Pay TV

This merger enhances and entrenches Disney's power in traditional pay TV. A combined Disney-Fox will control a bundle of must-have networks that account for more than 30% of all affiliate fees, giving the company enough leverage over cable and satellite distributors to raise prices unilaterally. Disney displays unilateral power especially with regards to ESPN. Between 2012 and 2017, Disney ratcheted up ESPN affiliate fees nearly 50%, making it the most expensive cable network ever, while subscribership shrank 11%.[27] ESPN and ABC fee increases nearly derailed negotiations with Altice USA in 2017,[28] leading Disney to threaten to withhold its channels if Altice did not accept fees it deemed "exorbitant."[29] Altice ultimately conceded to what UBS estimated to be a doubling of fees for the local ABC affiliate along with increases at ESPN.[30]

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[25] Motion Picture Association of America, *2017 THEME Report* at 32 (2017).
[26] Trial Brief of the United States, *United States v. AT&T Inc., DirecTV Group Holdings, LLC, and Time Warner, Inc.,* No. 1:17-cv-02511, at 24 (Mar. 9, 2018).
[27] Calculation based on SNL Kagan data.
[28] Meg James, *ESPN is the big sticking point in Disney's dispute with New York pay-TV operator Altice*, LA Times (Sept. 28, 2017), http://www.latimes.com/business/hollywood/la-fi-ct-disney-espn-altice-optimum-20170928-story.html.
[29] Jarrett Renshaw, *Walt Disney threatens to pull ESPN, ABC from Optimum*, Reuters (Sept. 24, 2017), https://www.reuters.com/article/us-walt-disney-altice-usa-cable/walt-disney-threatens-to-pull-espn-abc-from-optimum-idUSKCN1C001V.
[30] Brooks Barnes, *A Good Day for ESPN After Disney Reaches Altice Agreement*, New York Times (Oct. 2, 2017), https://www.nytimes.com/2017/10/02/business/media/disney-espn-altice.html.

Programmer leverage is the overriding reason for horizontal mergers like this. Time Warner CEO Jeff Bewkes testified under oath that when Fox attempted to acquire Time Warner in a horizontal merger between programmers back in 2014, Fox justified the take-over on the grounds that the combined company would wield greater leverage over distributors.[31] With the enhanced leverage that Fox's assets provide, Disney will be able to demand higher affiliate fees from distributors, who will pass them on to consumers in the form of higher pay TV bills. Disney-Fox will entrench its position in traditional pay TV by forcing distributors to carry its networks in the most widely available bundles, thereby crowding out competing networks and foreclosing distribution to small and independent networks.

Programmer leverage is key to maintaining network revenues at a time of declining subscribership in traditional pay TV. The merger of Disney-Fox shares a similar logic to the mergers of Discovery-Scripps and the anticipated merger of CBS and Viacom: bulk up programmer leverage to defend network revenues by ratcheting up affiliate fees on a shrinking subscriber base. As a result, consumers who stick with the traditional pay TV bundle will pay more for a less dynamic and diverse television bundle.

Programmers claim that temporarily blacking out their networks during a contentious negotiation is economically irrational as they stand to lose hundreds of millions of dollars in affiliate fees and ad revenue. While costly, a temporary blackout resulting in an outsized increase in affiliate fees could be easily amortized across a large enough subscriber base over the life of a contract. And in addition to pressuring a specific distributor, blackouts signal a credible threat to the marketplace, which paves the way for industry-wide price increases. With control of ABC Network, ABC owned & operated stations in six of the top ten media markets, the most popular pay TV networks in kids programming and sports programming, along with 51 other pay TV networks, a Disney-Fox blackout would be extremely disruptive to a distributor. Disney-Fox would be in an even stronger position than CBS was in late 2017, for example, when it withheld the CBS Network, CBS owned & operated stations, CBS Sports, Pop and Smithsonian from Dish Network in its drive to raise retransmission fees and reverse compensation to $2.5 billion annually by 2020. That blackout was resolved in three days with CBS presumably satisfied with the progress it had made on fee increases.

Virtual Multichannel Video Programming Distribution

Virtual MVPD offerings such as SlingTV, DirecTV Now, Hulu Live and YouTube TV are innovative, pro-consumer and endangered by a combined Disney-Fox. The vMVPD marketplace is nascent; the largest vMVPD, SlingTV, has only one-tenth the subscribers of Comcast cable. Post-merger, Disney will control Hulu Live thus incentivizing Disney to use its enhanced programmer leverage to eliminate vMVPD competitors and ensure that vMVPD competition develops in ways that protect the economics of their traditional TV networks.

Disney-Fox can use its control over "must-have" programming to harm vMVPD competitors in a few ways: Disney-Fox could raise the price of content or force vMVPDs to take a larger bundle of networks than consumers want. These tactics either limit consumer appeal or raise consumer prices. Disney has a two-pronged incentive to harm vMVPDs in these ways. Doing so advantages Disney's in-house vMVPD while slowing subscriber attrition from traditional pay TV

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[31] Brian Koenig, *Leverage Doesn't Solve Problems, Time Warner CEO Says,* Law360 (Apr. 18, 2018), https://www.law360.com/media/articles/1034687/leverage-doesn-t-solve-problems-time-warner-ceo-says.

by making vMVPDs less attractive. Disney may even follow AT&T's lead in introducing a superskinny vMVPD bundle at a predatory price sustained by the company's diversified revenue base in order to drive out smaller and weaker vMVPDs. FCC regulations addressing anticompetitive harms of vertical integration between programmers and distributors, such as program access rules, do not extend to vMVPDs, leaving no protection against Disney-Fox stifling upstream competition in these ways.

Subscription Video-On-Demand

This merger eliminates potential head-to-head competition between Disney and Fox in the SVOD market, which is expected to surpass 160 million subscribers and $13 billion in revenues in the US by 2020.[32] Disney has announced plans for a Disney-branded streaming service for Disney films and family-friendly fare. And with Fox's stake in Hulu, Disney will become the majority shareholder, bringing yet another major SVOD under its control. Fox has announced a Fox News streaming service and very likely would have introduced a general entertainment SVOD along the lines of CBS All Access in the absence of this merger.

Instead of competing head-to-head with Disney, the Murdochs will become Disney's largest shareholder while holding onto Fox's leftover media assets. As horizontal shareholders, the Murdochs have every incentive to use their knowledge and influence to coordinate business strategy between Disney and New Fox. Such a situation will dampen remaining competition between the companies and may put off innovations that benefit one company at the expense of the other.

- **Reactive Consolidation Will Magnify These Harms**

This merger is taking place amidst significant consolidation across numerous markets and submarkets in which Disney and Fox participate. Time Warner has been acquired by AT&T-DirecTV, combining Time Warner's control of must-have basic cable networks, the top premium cable network, Warner Bros. studio and a stake in Hulu with the largest MVPD, second-largest wireless company and third-largest wired Internet service provider (ISP), along with vMVPD service DirecTV Now and the newly announced AT&T Watch. Another major content competitor with a major studio and valuable bundle of basic cable networks, NBC Universal, is owned by Comcast, the largest MVPD and ISP, which also owns a stake in Hulu. Viacom and CBS are currently included as a single company for purposes of this analysis due to the shared ownership of National Amusements, but may also formally reunite Viacom's film studio, suite of basic cable networks including MTV, Nickelodeon and BET with CBS's film studio, broadcast network and Showtime premium networks, in an effort to compete with the increased scale of a combined Discovery-Scripps, AT&T-Time Warner and now Disney-Fox.[33] Lionsgate, which includes a film studio, television production studio and premium cable channel Starz, has

[32] Ali Choukeir, *State of North American online video: SVOD* (Oct. 2, 2017), https://www.snl.com/web/client?auth=inherit#news/article?id=42085395.
[33] Tara Lachapelle, *Disney Lights Fire Under CBS, Redstone,* Bloomberg (Jan. 17, 2018), https://www.bloomberg.com/gadfly/articles/2018-01-17/cbs-viacom-may-be-next-as-disney-lights-fire-under-redstone.

indicated a willingness to be sold, and potential buyers include Amazon, Verizon and CBS-Viacom.[34] Wall Street firm MoffettNathanson recently called on Amazon to purchase CBS.

Further consolidation in response to the Disney-Fox merger will exacerbate many of the harms outlined in this paper. Merging programmers, including both vertically-integrated Time Warner and horizontally-integrated Discovery-Scripps and Viacom-CBS, will have greater ability to demand higher affiliate fees from MVPDs, thereby increasing consumer costs in the traditional pay TV market. In the nascent vMVPD market, these programmers will have greater ability and incentive to force vMVPDs to accept more channels in their previously skinny bundles, increasing the cost of these products and lessening their competitive advantage against both traditional pay TV bundles and the affiliated vMVPD services owned by AT&T-Time Warner and Disney-Fox. Such consolidation also reduces the likelihood of additional entry into the nascent vMVPD market, as significant swaths of the most valuable content will be locked up by entities that already own vMVPDs and have less incentive to license their content to new players in the market at competitive prices. Media Analyst Craig Moffett has estimated that AT&T's DirecTV Now and Dish's SlingTV either lose money or break even,[35] despite the clout and infrastructure of their corporate parents. With the challenges accessing programming and the punishing economics of vMVPDs, independent vMVPDs will not be able to enter the marketplace or survive for very long.

In the theatrical product market, these combinations would further reduce the number of competing film studios. For instance, a Viacom-CBS-Lionsgate merger would subsume two smaller studios that produce more varied fare – Lionsgate and CBS Films – into the major studio Paramount Pictures. This will result in fewer choices for consumers and less diversity at the theater.

As outlined above, consolidation results in the labor markets for film, television and digital platform content containing fewer buyers for writers' services, putting downward pressure on compensation, and decreasing writers' creative control and diversity of content.

Conclusion

The merger of Disney and Fox combines two of the largest competitors in the markets for television and film production, programming and distribution as well as combining smaller players in the consumer market for subscription video on demand services. The merged company would have the ability to reduce theatrical output, monopolize theater screens, increase prices for content distribution services and squeeze out independent programming. In addition, the consolidation of these dominant programmers threatens to choke off pro-consumer innovation in the nascent vMVPD market, and the New Fox broadcast network unveiled at the 2018 Upfronts will slash scripted programming by a third as it steps back from competion with the combined Disney-Fox. The consolidation would also harm the labor submarkets for film and for traditional and digital television programming, where Disney and Fox are major employers of creative talent. The result of this increase in concentration will be loss of jobs, reduction in

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[34] Anita Busch and Dawn C. Chmielewski, *Lionsgate Ripe For Takeover As Amazon, Verizon and CBS-Viacom Emerge as Potential Suitors,* Deadline (Jan. 17, 2018), http://deadline.com/2018/01/lionsgate-talks-amazon-verizon-cbs-viacom-1202244991/.

[35] Moffett Nathanson Research, *Dish Q1 2018 Earnings: Something's Gotta Give* (May 8, 2018); Moffett Nathanson Research, *AT&T and DirecTV Now: Did AT&T Really Bling? Running With Scisors (Part II)* (Nov. 29, 2016).

compensation and a loss of creativity. Finally, the combination of Disney and Fox, dwarfing its competitors in content markets, has and will continue to prompt further consolidation that would exacerbate all of these effects. In sum, the dominance of the combined company would threaten competition, innovation, consumers and writers. This merger is illegal under antitrust statutes and must be blocked.

Who We Are

WGAW is a labor organization representing more than 10,000 professional writers of motion pictures, television, radio and Internet programming, including news and documentaries. For more information on the WGAW, please visit: www.wga.org.