September 2, 2021

Richard Powers
Acting Assistant Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Re: Strategic Consolidation, Market Power, and Efficiencies in the Media/Entertainment and Distribution Markets: Implications for Antitrust Reviews of Proposed Mergers

Dear Acting Assistant Attorney General Powers:

The American Antitrust Institute (AAI) and Public Knowledge (PK) have long advocated for strong antitrust enforcement and policies designed to promote competition and protect consumers and workers in the media and entertainment ("content") and content distribution markets.[1] AAI and PK write to the U.S. Department of Justice (DOJ) to provide analysis of the changing competitive landscapes of markets for content and distribution. These observations have direct implications for the review of current and future mergers, most immediately the proposed merger of leading content companies WarnerMedia and Discovery, which we understand is under review. This letter provides some context for major structural and technological transition in the video marketplace and moves on to address two major issues: (1) competition challenges in the video streaming markets and their implications for antitrust enforcement; and (2) lessons learned from claims that previous content and distribution mergers would generate significant short-term and long-term efficiencies (i.e., benefits), to the benefit of consumers.

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[1] The American Antitrust Institute (AAI) is an independent non-profit education, research, and advocacy organization. Its mission is to advance the role of competition in the economy, protect consumers, and sustain the vitality of the antitrust laws. For more information, *see,* www.antitrustinstitute.org. Public Knowledge (PK) is a consumer advocacy group that works at the intersection of copyright, telecommunications, and internet law to promote policies that serve the public interest. It advocates for freedom of expression, net neutrality, online privacy, affordable broadband access, digital platform competition, and other policies that benefit the public. For more information, *see*, www.publicknowledge.org.

I. Competition in Context: The Transition for the Video Marketplace

The proposed acquisition of WarnerMedia by Discovery comes in the midst of a transition for the video marketplace. Traditional Multichannel Video Programming Distributors (MVPDs) still have millions of customers, but the video market has moved towards online streaming. At the same time, the nature of theatrical releases and release windows is changing, again, with more first-run movies shifting to at-home streaming. The COVID-19 pandemic has accelerated both of these trends, as more consumers subscribe to and watch streaming video services and due to the shutdown of many movie theaters.

The shift toward online streaming highlights the stark differences between streaming and the MVPD market. At first glance, it exhibits fewer structural impediments to competition. For example, streaming services are delivered "over the top" (OTT) via a broadband internet connection and do not require dedicated physical infrastructure. Moreover, typical streaming services do not try to be "one-stop shops," and "multihoming," or viewer subscriptions to multiple services, is common. This gives consumers more choice and independent programmers more ways to reach viewers. Under the MVPD model, for example, the only way to reach Comcast customers was through Comcast. But under the streaming model, a programmer has more options.[2]

The online streaming services market has changed significantly since it first launched. For example, Netflix at the time was widely panned for splitting its popular DVD-by-mail service from its then fledgling online streaming business in 2011.[3] Cable companies were skeptical of online video as a market that could support their content and most Americans still got their TV "fix" through network TV and maybe a premium subscription or two. Today, every major media company realizes the value of streaming and a bevy of services have sprung up to offer different catalogues of content.

These companies have challenged the market leader, Netflix and include: Prime Video (2006), Hulu (2007), Paramount+ (2014), ESPN+ (2018), Disney+ (2019), Apple TV+ (2019), HBO Max (2020), Peacock (2020), and Discovery+ (2021).[4] Each of these services boasts millions of subscribers and compete for consumers' attention through an ever-shuffling catalogue of content. Moreover, streaming services offered by the large digital platforms increasingly dominate the market for some forms of content. For example, Alphabet, Facebook, and Apple hold the top three market positions, for a combined 50% share, based on revenues for news, information, and media.[5] In sum, the structural and technological landscape of the video marketplace has changed fundamentally in the last several years—shifts that should be reflected in antitrust analysis of mergers and other forms of strategic competitive conduct.

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[2] MVPDs typically enter deals to carry channels, which are already bundles of programming. Streaming services can enter deals for individual movies and TV shows.

[3] *See* Jeff Blagdon, *Behind the scenes of the Netflix DVD spinoff fiasco*, THE VERGE (Jul. 11, 2012), https://www.theverge.com/2012/7/11/3153720/netflix-qwikster-dvd-spinoff-hastings.

[4] YouTube raises different questions than other video services, relying primarily on user-generated content, rather than commissioning or creating content itself, with different kinds of content and few obvious direct competitors (e.g., Vimeo and Dailymotion). Other, smaller, services offer niche programming, such as Crunchyroll (for anime) or Shudder (for horror fans).

[5] William Turvill, *The News 50: Tech giants dwarf Rupert Murdoch to become the biggest news media companies in the English-speaking world*, PRESSGAZETTE.CO.UK (Dec. 3, 2020), https://www.pressgazette.co.uk/biggest-media-companies-world/.

II. Challenges in the Video Streaming and Platform Streaming Markets Have Implications for Competition and Warrant Monitoring and Scrutiny by Antitrust Enforcers

While competition among online video providers appears to be relatively robust today, it is important that the Discovery/WarnerMedia deal is scrutinized with awareness of the fledgling threats to competition in the video streaming marketplace. Slow and inadequate oversight risks the streaming market going the same route as cable—where consumers have little power, few options, and where consolidation and concentration reign supreme. A number of threats to competition are clear, as discussed in this section, including: (1) market power issues surrounding content and (2) the role of platforms in "gatekeeping" to limit competition.

A. Market Power Issues Involving Content: How Concentration in Intellectual Property and Loss-Leader Strategies Can Limit Competition and Entrench Dominant Players

One major competition issue that has thus far flown under the antitrust radar is the concentration of intellectual property in content. For example, Disney now controls not only the substantial catalogue of content that it has created itself, but has acquired a series of companies that further add to its existing trove, including: Pixar, Lucasfilm, Marvel, and 21st Century Fox (now 20th Century Studios). More than that, Disney also controls entertainment franchises such as Star Wars and Marvel. These franchises have large fan bases so new movies and TV shows in these franchises have almost-guaranteed audiences that, in turn, drive new subscriptions and customer retention. Other streaming services such as Paramount+ (formerly CBS All Access) have tried to replicate this model either with existing franchises (e.g., Paramount's Star Trek) or by creating new ones.[6]

When evaluating mergers in the content markets, AAI and PK urge enforcers and courts to be wary of deals that further consolidate intellectual property rights in the hands of only a few companies. Given that some degree of familiarity (a sequel, reboot, or a spinoff) is among the strongest indicators of market success, new studios cannot be expected to easily enter the market and gain a foothold. Beyond antitrust analysis, there are obvious cultural implications as well. With only a handful of outlets for the production of movies or TV shows, diverse viewpoints, visionary and original works, and art that challenges the status quo face an uphill climb. No single company should have the power to influence what consumers watch or think and talk about.

Enforcers should also be aware that content can be used as a "loss-leader" to solidify high barriers to entry in the market for streaming services. Launching a new streaming service can be a daunting task, particularly in light of the number of services consumers already subscribe to. For example, NBC's new streaming service, Peacock, was buoyed by becoming the exclusive home to stream popular show The Office. Disney+ can draw in Marvel, Star Wars, and Pixar fans through exclusive shows and Paramount+ can do the same for Star Trek. But entry without a long catalogue of already popular content requires significant financial resources. In addition to these high entry barriers, the use of content by some dominant players to cross-subsidize their streaming services should be carefully scrutinized.

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[6] Travis Clark, *The cross-platform future of Hollywood franchises is starting to take shape, as movie studios jump into streaming and Netflix builds content based on comics, games, and more*, BUSINESS INSIDER (Feb. 9, 2021), https://www.businessinsider.com/movie-studios-and-netflix-battle-for-cross-platform-franchises-2021-2.

For example, Amazon can subsidize its Prime Video service with the profits from Amazon Web Services and other lucrative services. Apple can do the same with its Apple TV+ service as a result of its high margin on devices. This has the ancillary effect of keeping consumers locked within a platform's ecosystem where, for example, the link between Prime Video and the Prime membership encourages consumers to spend more in Amazon's marketplace. Streaming services that are underwritten by dominant companies like Amazon or Apple thus may result in a prices that are far lower (or even free) than what smaller streaming rivals could charge to remain viable. This effect is fortified by dominant streaming services outcompeting their rivals for content, as illustrated by Amazon's recent high-dollar purchase of film production studio MGM. Enforcers should be aware of the use of content by dominant streaming platforms in anticompetitive ways and work to ensure that content markets exhibit sustainable and competitive market structures.

B. Platform "Gatekeeping:" The Role of Bargaining Power and Incentives to Disfavor Third Party Content Can Limit Switching and Choice, Constraining Competition and Harming Consumers

Most streaming services need to create software, or streaming apps, that viewers can run on a number of different computing devices, including smart TVs, streaming set-top boxes, mobile phones and tablets, and for laptops and desktop computers. This is different than the MVPD model that is based on the use of proprietary in-home set-top boxes to deliver programming to viewers. The challenges faced by streaming services and consumers in gaining access to different distribution channels, however, are numerous.

For example, access to content through streaming apps on mobile devices is tied inextricably to the power of two market players—Apple and Google—which extract high commission fees on sales. For example, on Apple's mobile devices (and the Apple TV platform), streaming apps must use Apple's in-app payment system for subscriptions and purchases. This gives Apple a 30% commission, a fee that raises the costs of app developers relative to what they would incur if paid directly for in-app purchases, thus raising prices to users. Moreover, if Apple (or Google) competes directly with apps (e.g., Apple Music vs. Spotify), then incentives to restrain rivals through strategic implementation of its commission system are much higher.

Ensuring that streaming services remain "cross-platform" to provide content creators with wide distribution and consumers with choice is a critical component of competition. But targeting multiple platforms can be challenging simply from a development perspective, and different policies and business models add to that complexity. For example, streaming platforms may also have incentives to disfavor third-party content if they have their own streaming service. For example, Roku, Apple, and Amazon—the three dominant streaming platforms—all operate their own streaming services. Vertical integration between content producers and distributors, including streaming device manufacturers, may raise competitive concerns.

Anticompetitive limitations on distribution through cross-platform strategies are also evident in the bargaining power of dominant digital streaming players. For example, the Wall Street Journal recently reported on a dustup between WarnerMedia and Amazon over HBO Max.[7] At its launch,

[7] Dana Mattioli & Joe Flint, *How Amazon Strong-Arms Partners Using Its Power Across Multiple Businesses*, WALL ST. J. (Apr. 14, 2021), https://www.wsj.com/articles/amazon-strong-arms-partners-across-multiple-businesses-11618410439.

Amazon pushed for HBO Max to be included as a Prime "channel," where users could sign up and watch content through Amazon, which took a hefty cut of subscription revenue. Amazon used both a carrot and a stick with WarnerMedia, itself a powerful company, to achieve this outcome. It threatened to block HBO Max from its popular Fire TV hardware (i.e., the stick) and eventually agreed to extend a lucrative cloud computing deal with WarnerMedia (i.e., the carrot).

Another example is Roku. Roku is the most popular streaming platform in the U.S.,[8] largely as a result of its ubiquitous low-cost devices and integration in television hardware and software. As an ad-supported business that requires that ad-supported apps on its platform provide it with advertising slots, the Roku model requires a great deal of negotiation and coordination with streaming services.[9] Non-ad supported, free streaming services or apps, and paid subscription apps do not have to make ad space available to Roku. Disputes over the terms of agreements with such apps, including Time Warner, Comcast NBC, and Spectrum, are therefore reminiscent of the carriage disputes that have arisen in the MVPD market.[10] To be sure, streaming customers using Roku's platform are not as "locked in" as users of the Apple iOS or Android ecosystems, which require user investment in paid apps, content, and services.[11] Nevertheless, gatekeeper issues could arise even in the Roku model, especially if other platforms shut down or focus on different market segments,[12] or if unique content makes switching more difficult.

One recent business dispute is instructive. Roku threatened to remove the YouTube TV app from its store, claiming that Google made uncompetitive demands and requested special treatment not available to other apps. Google disagreed, and countered by including YouTube TV in the main YouTube app, wagering that YouTube was such a popular app that Roku could not risk losing it.[13] This was a credible threat since a consumer might choose to buy a Chromecast or Amazon Fire TV device, rather than a Roku, if choosing Roku meant losing access to YouTube.[14] The dispute demonstrates that Roku's leverage against Google and other popular streaming services (e.g., Netflix and Disney+) may be limited. However, those limitations are highly dependent on market power of integrated platforms and streaming services, and the continued availability of alternatives.

Enforcers should also not discount the extent that consumer "fatigue and confusion" can be exploited by powerful streaming services and platforms to leverage their market power. For

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[8] Janko Roettgers, *As streaming surges globally, Roku is falling behind abroad*, PROTOCOL (April 27, 2021), https://www.protocol.com/roku-global-expansion-conviva-data ("37% of all big-screen viewing was happening on Roku streaming devices and Roku-powered smart TVs in the U.S.").

[9] This business model differs from the other streaming platforms and is similar to how broadcast networks have long worked, where local stations can air their own ads against national content.

[10] *See* Julia Alexander, *Why Peacock and HBO Max aren't on the biggest streaming platforms*, THE VERGE (July 15, 2020), https://www.theverge.com/21324139/peacock-roku-amazon-fire-tv-hbo-max-streaming-warnermedia-nbcuniversal-disney-apple; Catie Keck, The Spectrum TV app is back in Roku's channel store after being yanked, THE VERGE (August 17, 2021), https://www.theverge.com/2021/8/17/22629518/spectrum-tv-app-roku-channel-store.

[11] Video streaming apps are generally free to download, and an account with such services is typically cross-platform. Other categories of apps are much less popular on TV streaming platforms, and issues like access to platform-specific services like iMessage, or how to move photos from one platform to another, are less likely to arise.

[12] *E.g.,* the latest Apple TV device starts at $179, rather than $30, and offers several high-end features.

[13] *See,* Chris Welch, *Google goes nuclear against Roku by adding YouTube TV to the main YouTube app*, THE VERGE (May 7, 2021), https://www.theverge.com/2021/5/7/22425035/google-youtube-tv-roku-app-feud.

[14] Additionally, Google began sending free competing streaming devices to YouTube TV subscribers who were Roku users. *See,* Abner Li, *YouTube TV giving members free TiVo Stream 4K or Chromecast w/ Google TV,* 9TO5GOOGLE (July 1, 2021), https://9to5google.com/2021/07/01/youtube-tv-free-tivo-stream-4k/.

example, consumers who subscribe al la carte to multiple streaming services must keep on top of multiple billing cycles and often only want service during the run of single, favorite show (e.g., Apple TV+'s Ted Lasso). Streaming service providers exploit this phenomena, staggering top-flight shows and offering discounts to push consumers towards year-long subscriptions, automatically renewing "free trials," and using interfaces that make it easy to sign up but hard to cancel.

Moreover, enforcers should be aware both of how streaming platforms are expanding and how their market strategies are changing over time, with a focus on the exercise of platform market power to leverage a streaming service to extract supracompetitive profits. Enforcers should monitor and vigorously review integration proposals, especially in concentrated platform and streaming services markets, where incentives to foreclose rivals may be especially powerful. But they should also not forget that OTT services rely critically on services offered by dominant broadband providers. Net neutrality rules remain an essential tool to prevent such providers from manipulating capacity or service to favor or disfavor certain content. Mergers between broadband providers and internet services of all kinds, in particular high-bandwidth services like video streaming, should be viewed with skepticism.

III. The Spin Off of WarnerMedia from AT&T Three Years after Consummation Tells a Cautionary Story of the Purported Benefits from Mergers in Content and Distribution Markets

The history of changing markets in content and distribution, and the rapid and strategic consolidation that has occurred in them, has important lessons for antitrust enforcement. These lessons are reinforced by evidence from a major contested merger, AT&T-Time Warner, where the short-term and long-term efficiencies claimed by the parties at the time the deal was proposed played a key role in the litigation outcome, but the abandonment of the merger shortly after consummation likely left many benefits unrealized. This section discusses three major arguments for why the lessons of AT&T-Time Warner are critical, including: (1) the significant risk that strategic consolidation in changing content and distribution markets will not produce claimed efficiencies; (2) evidence that the deal failed to prove up substantial claimed efficiencies; and (3) analysis that the court's decision relied heavily on efficiencies claims in allowing it to move forward, with substantial risk to consumers.

A. Strategic Consolidation in Changing Content and Distribution Markets Highlights the Significant Risk That Mergers Will Not Produce the Benefits the Parties Claim They Will

Over the last several years, the DOJ has reviewed a number of horizontal and vertical mergers involving the creation and distribution of content via an expanding set of channels. These include MVPD and OTT streaming services, distributed via pay television, internet broadband, and mobile communications. With technological advances and the movement of consumers to cut the cord with pay television services, market participants have deployed various strategies to compete for consumer dollars. The latest round of consolidation in content and distribution represents a shift in strategic consolidation, reflecting the imperative of competition not only with integrated content-distribution MVPD rivals, but with streaming services from both integrated platforms and independent players.

AT&T-Time Warner's abrupt proposal to spin off of WarnerMedia to merge with Discovery illustrates how competitive strategy adapts to changing markets. The deal comes only three years after AT&T consummated its acquisition of Time Warner in mid-2018, after a controversial (and expensive) litigated vertical merger proceeding. In June of 2021, AT&T-Time Warner announced its intention to spin off WarnerMedia in a merger with Discovery to create a larger "pure play" content provider to "increase investment in content and a direct-to-consumer platform."[15] AT&T will thus revert to one company with a sole focus on content distribution and WarnerMedia-Discovery will focus on amassing a larger presence in content markets.

The WarnerMedia-Discovery deal is thus best viewed as the next iteration of consolidation in a rapidly changing sector. However, the 2016 AT&T-Time Warner proposal was *also* designed to respond to then changing market conditions, namely the competitive threat from early generation OTTs. And experts looks askance, at that time, at the benefits it was likely to prove up.[16] The companies touted the AT&T-Time Warner merger as "lead[ing] to the next wave of innovation in the converging media and communications industry," and enabling the merged company to "offer more relevant and valuable addressable advertising; innovate with ad-supported content models; and better inform content creation."[17]

AT&T's Chairman and CEO stated when the merger with Time Warner was proposed, "This is a perfect match of two companies with complementary strengths who can bring a fresh approach to how the media and communications industry works for customers, content creators, distributors and advertisers." The companies estimated significant short-term cost synergies and long-term incremental revenue opportunities that neither "could obtain on a standalone basis."[18] AT&T and Time Warner thus presented a case for integration that included short-term and long-term benefits, ideally to be passed on to consumers in the form of lower prices or higher quality and more innovation.

The unwinding of the AT&T-Time Warner merger a short time after consummation highlights an important reality for antitrust enforcers and courts. Technological advances and changing market conditions can and do motivate the type of "lane changing" in strategic consolidation that we see in WarnerMedia-Discovery. While that may be good for shareholders if those gambles pay off, short-lived mergers that do not produce the efficiencies claimed *at the time* they are proposed are decidedly risky for consumers, which antitrust enforcement is designed ultimately to protect. Enforcers and courts should recognize the increased likelihood that competitors operating in changing content and distribution markets will switch consolidation strategies shortly after a merger is consummated. This increases the risk that efficiencies claimed at the time a merger is proposed will not be realized and raises the bar on claims, especially in contested cases, that efficiencies be both "durable" and passed on to consumers. The absence of any policy or enforceable mechanism to hold merging parties' "feet to the fire" in proving up claimed benefits post-merger exacerbates this concern.

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[15] *AT&T's WarnerMedia and Discovery, Inc. Creating Standalone Company by Combining Operations to Form New Global Leader in Entertainment*, ATT.COM (May 17, 2021), https://about.att.com/story/2021/warnermedia_discovery.html.
[16] *See, e.g.,* Bharat N. Anand, *AT&T, Time Warner, and What Makes Vertical Mergers Succeed*, HBR.ORG (Oct. 28, 2016), https://hbr.org/2016/10/att-time-warner-and-what-makes-vertical-mergers-succeed.
[17] *AT&T to Acquire Time Warner*, ATT.COM (Oct. 22, 2016), https://about.att.com/story/att_to_acquire_time_warner.html.
[18] *Id.*

B. Evidence Demonstrates That Strategic Consolidation in a Dynamic Industry Can Leave Claimed Efficiencies By the Side of the Road—a Risk That Should Not Be Borne By Consumers

AT&T's dramatic loss of interest in WarnerMedia shortly after consummation is clear in the company's 2020 annual report. Of the six growth areas described therein, three would expand and improve mobile wireless growth and broadband infrastructure, one would improve corporate cost structures, and one would increase profitability from AT&T's Mexico operations.[19] The remaining area focuses on growth in media, by increasing the subscriber base for HBO Max, the rebranded HBO asset acquired through the Time Warner acquisition.

The 2020 annual report speaks volumes about the low likelihood that AT&T-Time Warner realized any of the dynamic, longer-term revenue efficiencies that in large part motivated their deal. Two and a half years is too short a period of time to fully realize efficiencies related to innovating new products or services. The diminutive value of those benefits is clear, in retrospect, in AT&T's decision to spin off WarnerMedia to again focus on distribution. Two and a half years—one of which was an anomalous pandemic year (2020)—also makes it difficult to determine whether the company made good on delivering even promised shorter-term cost synergies, although a comparison of the average pre-merger operating margin for Time Warner with post-merger operations implies that some cost savings were realized.[20]

However, evidence reveals that the AT&T-Time Warner merger was never going to create significant benefits. AT&T's communications segment dominates the integrated company's operations. Time Warner accounted for under 20% of total revenues and costs for the integrated company over the period 2019-2020, the only full years of data available. The contribution of WarnerMedia to the integrated company's overall performance was less than 6% over the same period.[21] Moreover, while the operating margin for the WarnerMedia segment increased from 25% pre-merger, on average, to 34% post-merger for the latter half of 2018, that margin dropped precipitously to 30% in 2019 and again to 27% in 2020.[22] Declining margins for WarnerMedia and a steady but low operating margin for the AT&T segment (about 22% from 2018-2020) do not tell a story of success.[23] AT&T also grew their subscriber base by just over 5% per year between 2018-2019, and 2019-2020.[24] Presumably, long-term efficiencies associated with integrating content and distribution would have, if the gamble had paid off, generated significantly higher demand for AT&T-Time Warner products and services with larger increases in subscriptions.

To be sure, companies can and do pursue many forms of consolidation to boost their competitiveness and to better position themselves in dynamic markets. And mergers that do not

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[19] AT&T INC. 2020 ANNUAL REPORT, INVESTORS.ATT.COM, at 31, https://investors.att.com/~/media/Files/A/ATT-IR-V2/financial-reports/annual-reports/2020/complete-2020-annual-report.pdf.

[20] AT&T 2020 Annual Report, *supra* note 19, at 19-32 ; AT&T INC. 2019 ANNUAL REPORT, INVESTORS.ATT.COM AT 15-27; https://investors.att.com/~/media/Files/A/ATT-IR-V2/financial-reports/annual-reports/2019/complete-2019-annual-report.pdf; and AT&T INC. 2018 ANNUAL REPORT, INVESTORS.ATT.COM, at 19-31, https://investors.att.com/~/media/Files/A/ATT-IR-V2/financial-reports/annual-reports/2018/complete-2018-annual-report.pdf.

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] *Id.*

generate the expected rewards, or fail entirely, are not at all uncommon.[25] But the risk of those outcomes should be borne by shareholders. The purpose of antitrust law is to promote competition, for the benefit of consumers. That process often involves the balancing of anticompetitive and pro-competitive effects, particularly in litigated merger cases. Retrospective evidence showing that benefits did not materialize post-merger informs the integrity of this critical calculus, with direct implications for consumers, who should not assume any risk of the failure of merged companies to deliver on their promises.

C. Deference to Efficiencies in Determining the Outcome of a Major, Contested But Short-Lived Content and Distribution Merger Has Serious Implications for Future Merger Reviews

The DOJ moved to block the AT&T-Time Warner merger based on the concern that the merged company could exercise additional leverage to charge rival video distributors higher prices for its networks and impede disruptive competition from online video distributors.[26] The complaint included the stock statement that the transaction would be "unlikely to generate verifiable, merger-specific efficiencies in the relevant markets sufficient to reverse or outweigh the anticompetitive effects that are likely to occur."[27] However, after an eight-week trial to determine whether to grant the government's request for a preliminary injunction, the District Court opined that the government had failed to make the *prima facie* case that the merger was likely substantially to lessen competition.

As part of the burden-shifting framework, the court considered the merging parties' case for the benefits they claimed would flow from the AT&T-Time Warner merger. These included cost efficiencies such as the elimination of double margins (EDM) from integrating content and distribution; and revenue efficiencies associated with innovative delivery of content to subscribers, use of targeted advertising, and delivery of content via mobile devices.[28] The merging parties contended that "the Government has the burden to account for all of defendants' proffered efficiencies as part of making its prima facie case," but the court decided that it did not need to decide who has the burden.[29] It held that the government's failure to make its case for anticompetitive effects was *independent* of the parties' claims that the merger would produce countervailing, short-term and longer-term efficiencies.[30] Yet despite the court's caveat, it is clear that efficiencies played a nontrivial role in the decision.

In purporting to root its decision in insufficiencies involving the Government's evidence, rather than in claimed countervailing efficiency evidence, the court said only that it had devalued the Government's evidence based on how the evidence had been "undermined and discredited" by defendants.[31] And in the same breath, the court "nevertheless pause[d] to mention briefly why [it

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[25] *Fools Rush In: 37 Of The Worst Corporate M&A Flops*, CBINSIGHTS.COM (Oct. 30, 2018), https://www.cbinsights.com/research/merger-acquisition-corporate-fails/.
[26] U.S. v. AT&T Inc., et al, Complaint, Case 1:17-cv-02511 (Nov. 20, 2017, D.D.C), at 6 and 8, https://www.justice.gov/atr/case-document/file/1012916/download.
[27] *Id.*, at 42.
[28] U.S. v. AT&T Inc., et al., Opinion, Civil Case No. 17-2511 (RJL) (Jun. 12, 2018, D.D.C), at 36-39.
[29] Id., at 54, n. 17.
[30] *Id.*
[31] *Id.*

was] confident that defendants will achieve considerable efficiencies."[32] Those savings, which reduced the increased costs that would be borne by rivals as a result of anticompetitive post-merger conduct, surely affected the court's decision to deny the government's request for a preliminary injunction.

In the course of muddling and "mixing" anticompetitive effects and efficiencies analysis, the court strongly acknowledged both short-term and longer-term efficiencies. While it did so with the qualifier that revenue efficiencies were inherently "more uncertain," it is clear that the promise that the merger would produce cost efficiencies was thematic in the opinion.[33] The opinion noted, for example, that "…defendants have presented persuasive, probative evidence that the merger will produce even more efficiencies than those accounted for in this Opinion…I am confident that defendants will achieve considerable efficiencies beyond those conceded by the Government.[34]

It is widely held that the AT&T-Time Warner decision unhelpfully muddied the waters on legal and economic questions surrounding burden-shifting in merger law.[35] Among other fallout, the decision has weakened vertical merger enforcement, many aspects of which are now codified in the Vertical Merger Guidelines promulgated under the Trump antitrust agencies.[36] The reasonable expectation that the court's obvious deference to efficiencies in AT&T-Time Warner will be applied to future mergers (of all types) should raise serious concern that other short-lived mergers that do not prove up claimed benefits will be incorrectly adjudicated. This risk, and its implications for competition and consumers, raises fundamental questions as to whether[??]efficiencies claims should be deemed presumptively unreliable and discounted by enforcers and courts accordingly. This includes assessing the effects of the WarnerMedia-Discovery transaction and other mergers in content and distribution.

IV. Conclusion

The foregoing analysis of evolving competition challenges in the video streaming markets, and the cautionary tale of how enforcers assess claimed efficiencies in those markets, should create clear priorities for antitrust enforcement in changing markets where market power is evident. The transitory moment in the move from traditional MVPDs to video streaming represents an opportunity to ensure that consumers are the beneficiaries of innovation, diversity, and choice in critical media, entertainment, and news. The failings of the MVPD markets were not an inevitability, but rather the result of underenforcement and under-regulation. Against this backdrop, it is particularly concerning that claims of consumer benefits—both in terms of cost savings passed through to them, and higher quality and innovation—are often fleeting in the content and distribution space.

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[32] *Id.*

[33] *See id.* at 54 n.17 (describing AT&T's "rigorous analytical process" for predicting cost savings and "strong record of meeting similar cost synergy estimates in past mergers").

[34] *Id.*, at 54-55, footnote 17; *see also id.* ("I have a high degree of confidence that defendants will generate most, if not all, of the predicted $1.5 billion in annual cost savings by 2021.").

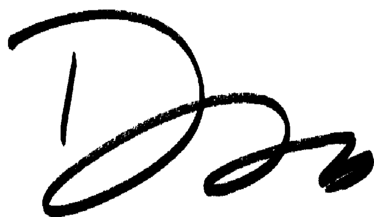
[35] *See, e.g.*, Steven C. Salop, *The AT&T/Tine Warner Merger: How Judge Leon Garbled Professor Nash*, 6 J. OF ANTITRUST ENFORCEMENT 459 (2018).

[36] U.S. Dept. of Justice and Fed. Trade Commn. VERTICAL MERGER GUIDELINES (Jun. 30, 2020), https://www.ftc.gov/system/files/documents/reports/us-department-justice-federal-trade-commission-vertical-merger-guidelines/vertical_merger_guidelines_6-30-20.pdf.

Market dynamism, strategic consolidation, and entrenched market power in content and distribution magnifies the failings of the current system of merger enforcement. Namely, plaintiffs are forced to bear the burden of essentially proving that a merger will have anticompetitive effects while merging parties must only show, under the Horizontal and Vertical Merger Guidelines, that efficiencies are only merger specific and cognizable.[37] In AT&T-Time Warner, this imbalance was painfully obvious. The government lost by failing to show that the merger would create, in effect, durable market power but the legal outcome reflected deference to the parties' claims that the merger would produce non-fleeting efficiencies. In retrospect, such efficiencies were decidedly not durable. Rebalancing is necessary—especially given the incipiency standard embedded in Section 7 of the Clayton Act—and should addressed through legislative reform.

In the meantime, the lessons learned about efficiencies from AT&T-Time Warner have serious implications for how enforcers assess merger proposals such as WarnerMedia-Discovery and other mergers involving content and distribution. Moreover, given the broader competition challenges that reside in those markets, and the lessons learned from a failure to ensure competition in the traditional MVPD markets, enforcers should be particularly vigilant.

Sincerely,



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[37] *Supra* note 36, at S.6 and U.S. Dept. of Justice and Fed. Trade Commn. HORIZONTAL MERGER GUIDELINES (Aug. 19, 2010), at S.10.