

Choose your plan: Amazon's acquisition of MGM and the streaming wars for our cinematic heritage

Those of us who know the cinema and its history have to share our love and our knowledge with as many people as possible. And we have to make it crystal clear to the current legal owners of these films that they amount to much, much more than mere property to be exploited and then locked away. They are among the greatest treasures of our culture, and they must be treated accordingly.

Martin Scorsese, 'Il Maestro', *Harper's Magazine*, March 2021

In March 2022, Amazon announced the completion of its acquisition of MGM for just shy of US\$8.5 billion,¹ two days after the European Commission approved it unconditionally under the EU Merger Regulation.² The same day as the announcement from Amazon, Politico reported that the US antitrust regulator, the Federal Trade Commission (FTC), would not be challenging the acquisition.³ However, the responsibility of the FTC is not to approve a transaction as such; thus, if potentially anticompetitive practices subsequently emerge, the FTC may act. As Betsy Lordan, FTC

1. 'MGM Joins Prime Video and Amazon Studios', Amazon Press Release, 17 March 2022 <<https://www.aboutamazon.com/news/entertainment/mgm-joins-prime-video-and-amazon-studios>>.

2. Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation). In a press release, 15 March 2022 (IP/22/1762, Case No. M.10349), the Commission stated that 'the transaction, as notified, would not significantly reduce competition in the markets for (i) the production and supply of AV content, (ii) the wholesale supply of TV channels, (iii) the retail supply of AV services, (iv) the production and licensing of distribution rights to third-party distributors of films for theatrical release and (v) the provision of marketplace services' <https://ec.europa.eu/commission/presscorner/detail/en/ip_22_1762>.

3. This outcome came when the five-person Commission did not proceed to vote on the matter and the statutory deadline for review under the Hart-Scott-Rodino Act subsequently expired, thus allowing Amazon to complete the acquisition. See further L Nysten, 'US Antitrust Enforcers Won't Challenge Amazon's MGM Deal, Dashing Hopes of Monopoly Critics', *Politico*, 17 March 2022 <<https://www.politico.com/news/2022/03/17/u-s-antitrust-enforcers-amazons-mgm-deal-00018252>>. See further J Flint et al., 'Amazon Moves to Force FTC Antitrust Decision on MGM Deal', *The Wall Street Journal*, 3 March 2022. Although the FTC Chair, Linda Khan, is an outspoken critic of Amazon (see in particular, LM Khan, 'Amazon's Antitrust Paradox' (2017) 126 *Yale Law Journal* 564), the background to the FTC's inaction is that the fifth and final place on the FTC Committee is still vacant, meaning that it is essentially 'deadlocked' in any challenge by its composition of two Democrats and two Republicans. It seems somewhat unlikely, certainly at this stage, but there is of course the possibility that once the fifth place is filled, a retrospective challenge may be made. See further the discussion in D Lee, 'Amazon Closes \$8.45bn Deal to Acquire Film Studio MGM', *Financial Times*, 17 March 2022 <<https://www.ft.com/content/e13b8ce0-fe99-4143-99cd-af59a30bf0cf>>.

spokesperson, affirmed: '[T]he Commission ... may challenge a deal at any time'.⁴ While individually Amazon and MGM are not yet major competitors in the streaming market, in view of the rapidly developing and changing landscape, the FTC's role in enforcing antitrust laws means that, in many respects, the streaming business is not necessarily a done deal.

Despite the apparent 'dominance' of Amazon in daily life, there are reasons why the acquisition of MGM and its merger with Prime Video and Amazon Studios might not necessarily raise anticompetitive issues ... at least, not yet. First, Amazon's activity is spread across a range of sectors; secondly, Amazon is simply (as yet) too small in the audio-visual (AV) sector to raise concerns; and finally, and perhaps more critically, Amazon is still considered a distributor, not a manufacturer.⁵ Therefore, the vertical relationship in the MGM acquisition, in that MGM is a 'maker', potentially limits the reach of competition and antitrust frameworks. The European Commission sets this out in the determination that any horizontal overlaps between Amazon and MGM in the sector are 'limited' in that '[t]he parties are primarily active in different parts of the AV content value chain and where both parties are active, their combined market shares are low'.⁶ When it comes to the consideration of the vertical links, the Commission states that 'MGM's content cannot be considered as must-have', and at the same time 'a wide variety of alternative content exists', thus concluding that 'Amazon faces strong competition from other players'.⁷ Essentially, the issue is about consumer access to products in the sector (and not even the diversity of products within the sector). But what does the MGM acquisition mean to Amazon's status as a distributor and service provider, but not a producer? And, importantly, what does the acquisition mean for creators and audiences? But perhaps the most immediate question is, why are the arts not a 'must-have'?

Amazon has been quite forthcoming that the acquisition was motivated by MGM's intellectual property,⁸ not least of which is the *James Bond* franchise, among others.⁹ MGM's intellectual property is a tool in Amazon's strategy for maintaining customers for its (various) services; that is, as 'commodities to be traded and hoarded in order to capture subscriptions'.¹⁰ That strategy is about bundling key intellectual property (like *James Bond*) with an Amazon Prime subscription to ensure customers maintain those subscriptions to free shows as well as potentially buy other content while they are there. At the same time, that may mean that other shows that are not made by the

4. Betsy Lordan, in a statement to *Variety*, quoted in T Spangler, 'Following Amazon's MGM Acquisition Close, FTC Warns It May "Challenge a Deal at Any Time"', *Variety*, 17 March 2022 <<https://variety.com/2022/biz/news/ftc-may-challenge-amazon-mgm-deal-1235208241/>>.

5. See further the critique of the multiple roles Amazon plays practically in LM Khan, 'Amazon's Antitrust Paradox' (2017) 126 *Yale Law Journal* 564.

6. IP/22/1762, 15 March 2022.

7. *Ibid.*

8. Amazon Press Release, 26 May 2021 <<https://www.aboutamazon.com/news/company-news/amazon-and-mgm-have-signed-an-agreement-for-amazon-to-acquire-mgm>>.

9. Other key franchises included in the acquisition are the *Rocky* franchise, the *Legally Blonde* franchise, and the newer *Vikings* franchise. See further details at <<https://mgm.com>>. See further the discussion in P Kafka, 'Why Amazon is Paying Nearly \$9 Billion for MGM and James Bond', *Vox*, 17 March 2022 <<https://www.vox.com/recode/22451787/amazon-mgm-james-bond-streaming-netflix-analysis>>.

10. N Russell, 'Jeff Bezos Thinks Our Cultural Heritage is Just "Intellectual Property"', *The Guardian*, 29 May 2021 <<https://www.theguardian.com/commentisfree/2021/may/29/jeff-bezos-amazon-mgm-cultural-heritage>>.

provider or one of its affiliates could simply become unavailable to consumers if not supported by an ongoing, significant audience, leading potentially to a flattening of content and the predominance of certain proven commercial content. Once again, it is all about branding, and that is not necessarily good for consumer welfare.

The full MGM catalogue includes reportedly in excess of 4000 film titles and 17,000 television episodes. And indeed, this is also the reason why the acquisition suggests a particular direction in streaming that may ultimately have an impact upon consumers, with an emphasis on building upon existing intellectual property, rather than producing novel (and potentially uncertain) stories. This is not just about being risk-averse; the audio-visual industry is becoming decidedly algorithmic in its approach to content-generation.¹¹ Indeed, the emphasis becomes more about brands (and trade marks and merchandising) rather than creativity and story. An emphasis on brands is more about consumer markets than consumer welfare. And this is why leaving the consolidation of the streaming market to competition alone really misses a major plot-line for consumers and creators alike.

There is disquiet in the industry that the type of productions that might be funded could become much more limited and ultimately restricted to proven business models, such as pre-branded franchises, when production and distribution start to be consolidated in the one entity. Lucas Shaw, entertainment journalist for Bloomberg News, argues: 'Most movie studios won't fund adult dramas anymore because they aren't as lucrative as pre-branded comic book adaptations ... or as reliable as sequels. If studios do make them, it's usually on a tight budget – or for a streaming service.'¹² As Shaw explains, 'Hollywood producers and representatives are worried this Amazon deal will take away one of the few studios willing to release a \$50 million drama in theaters', noting the loss of another major movie studio in 20th Century Fox, through its acquisition by Disney.¹³

Then there is the question of consumer access to the content already available. In consolidating, access to shows across different streaming providers is becoming less likely. While previously Netflix, for example, could rent shows from Disney, this is becoming less likely with the advent of Disney+ as a major player. And similarly, content from production companies is increasingly locked into streaming partners or mergers. For Amazon, this makes the acquisition of MGM more critical¹⁴ as the potential for renting titles, a big part of the current business model, becomes more uncertain. Indeed, the streaming landscape has been continuing to change quickly. In December 2021, the European Commission approved the merger of the AT&T-owned WarnerMedia with Discovery Inc¹⁵ (thus combining the streaming services HBO Max and Discovery+ as

11. For example, artificial intelligence is increasingly being applied in pre-production and distribution decisions, as well as in script development, leading to concerns about algorithmic bias as well as loss of diversity in product. For example, see the survey of ways in which artificial intelligence is applied in greenlighting film production in Pei-Sze Chow, 'Ghost in the (Hollywood) Machine: Emergent Applications of Artificial Intelligence in the Film Industry' (Spring 2020) *NECSUS*.

12. L Shaw, 'When Amazon Buys MGM, Hollywood Fears the Loss of Another Studio', *Bloomberg*, 14 November 2021 <<https://www.bloomberg.com/news/newsletters/2021-11-14/amazon-is-buying-mgm-why-hollywood-is-on-edge>>.

13. *Ibid*.

14. A Watercutter, 'Amazon Finally, Officially Owns MGM. Now What?', *Wired*, 18 March 2022 <<https://www.wired.com/story/mgm-amazon-acquisition/>>.

15. Case number M.10343. The merger was also cleared in the United States, following the expiration of the Hart-Scott-Rodino Act statutory waiting period: *Reuters*, 'Discovery-WarnerMedia Deal

well as over 100 network brands) to create the new company Warner Bros. Discovery in a transaction expected to complete by April (and thus producing a meaningful competitor for Netflix and similar in the process¹⁶). Thus, for Amazon to persist meaningfully in this space, MGM became a comparatively modest but essential acquisition.

This also means that for consumers, access to cultural forms, collective identities and cultural heritage as recorded and facilitated through film and television, becomes similarly uncertain, restricted ‘behind fluctuating monthly fees’.¹⁷ As Martin Scorsese has lamented, ‘[A]t this point, we can’t take anything for granted. We can’t depend on the movie business, such as it is, to take care of cinema’.¹⁸ In the ‘mass visual entertainment business’, as Scorsese describes the motion picture industry, ‘the emphasis is always on the word “business,” and value is always determined by the amount of money to be made from any given property’.¹⁹ In that sense, even creativity becomes a type of branding for any streaming service, where independent and art cinema becomes reconciled with the business model of selection and curation: ‘[E]verything from *Sunrise* to *La Strada* to *2001* is now pretty much wrung dry and ready for the “Art Film” swim lane on a streaming platform’.²⁰

The developments in streaming more widely mean that consumers may need to subscribe to several different services in order to get the content they desire. At the moment, this has been translating into increases in subscription fees.²¹ But it is not implausible that eventually there may exist a more complex landscape of cross-licensing, or consumers opting for short-term subscriptions for particular shows, leading to unwelcome uncertainty in the streaming business model. Similarly, we are seeing already the cycling of shows between different platforms when those shows are not owned outright by a streaming service.²² That current opportunity means that it is particularly important

Clears US Antitrust Review’, *Reuters*, 9 February 2022 <<https://www.reuters.com/business/media-telecom/discovery-warnermedia-deal-clears-antitrust-review-2022-02-09/>>. Notably, the AT&T acquisition of Time Warner had in fact been challenged by the Department of Justice in 2018, but the acquisition was approved by the courts in *United States v AT&T*, 310 F.Supp.3d 161 (DDC 2018), aff’d 916 F.3d 1029 (DC Cir 2019).

16. G Szalai, ‘Discovery-WarnerMedia Merger Gets US Antitrust Clearance’, *The Hollywood Reporter*, 9 February 2022 <<https://www.hollywoodreporter.com/business/business-news/discovery-warnermedia-merger-gets-u-s-antitrust-clearance-1235089790/>>.

17. N Russell, ‘Jeff Bezos Thinks Our Cultural Heritage is Just “Intellectual Property”’, *The Guardian*, 29 May 2021 <<https://www.theguardian.com/commentisfree/2021/may/29/jeff-bezos-amazon-mgm-cultural-heritage>>.

18. M Scorsese, ‘Il Maestro’, *Harper’s Magazine*, March 2021.

19. *Ibid.*

20. *Ibid.*

21. Indeed, Amazon increased the subscription fees for Prime in the US in February 2022, with UK fees stable but under review: E Shovelin, ‘Amazon Prime Membership Prices Will Rise 17% in the US But Costs in Britain Are the Same as in 2014 – So Will a Hike Soon Happen Here?’, *This is Money*, 11 February 2022 <<https://www.thisismoney.co.uk/money/bills/article-10498689/Amazon-Prime-prices-rise-customers-Britain.html>>.

22. This is also an issue in the Amazon acquisition of MGM, in that Ted Turner, who bought MGM in 1985, owns much of MGM’s ‘Golden Age’ cinema, over which he maintained control in the 1986 sale of MGM and United Artists. Importantly, the United Artists sale included the *Rocky* and *James Bond* franchises which comprise some of the key intellectual property for Amazon. See further the discussion in A Durkee, ‘Amazon Closes MGM Deal – But Here’s Why You Still Won’t Find *Wizard of Oz* or *Gone With The Wind* On There’, *Forbes*, 17 March 2022 <<https://www.forbes.com/sites/alisondurkee/2022/03/17/amazon-closes-mgm-deal—but-heres-why-you-still-wont-find-wizard-of-oz-or-gone-with-the-wind-on-there/?sh=6ee81a194479>>. See also the analysis of the assets comprising the deal, as well as previously

for independent producers to negotiate granting rights on only a temporary basis, rather than being branded permanently by the streaming provider (for example, by Netflix or other major brands). Indeed, this may be the kind of fracturing and recalibration of the market that will ultimately be produced by an increasingly crowded and unstable streaming environment.²³ And there is a precedent for this, in the legacy (and response to) the original theatre distribution models – that is, the Paramount Decrees.

The Hollywood studio system was disrupted in 1948 by the antitrust regulators in *United States v Paramount Pictures*,²⁴ which created the Paramount Decrees. The Decrees, among other things, prevented production companies from owning exhibition companies and thus controlling the entire process and life of a film, from production to distribution to exhibition. The case followed an investigation into the studio system and the practice of block booking, whereby the major production studios would block book multiple films to theatres in one transaction, forcing theatres to take unseen (known as blind bidding) content from the studio in order to secure exhibition rights for the main feature. Block booking allowed studios to generate a lot of cheaper, inferior content at a confirmed profit no matter the quality, by selling it with the main feature, thus making productions more profitable overall. The Paramount Decrees were terminated in 2020,²⁵ after the Trump Administration Department of Justice requested immediate termination of the Decrees, despite considerable comments and responses from the industry raising concerns for the industry if the Decrees were modified or lifted.

Initiated in 2018, the rationale for the review and subsequent termination included the ‘considerable change’ in the motion picture industry and the perception of increased consumer accessibility through streaming: ‘[C]onsumers today are no longer limited to watching motion pictures in theatres ... After an initial theatre run, today’s consumers can view motion pictures on cable and broadcast television, DVDs, and over the Internet through streaming services’.²⁶ But as the Roosevelt Institute response to the review points out, ‘this point should instead be used as a reason to maintain the decrees as they have been successful so far, and considerable similar decrees for the newer methods for content distribution’.²⁷ Citing examples of consolidation in the streaming landscape, the submission notes, ‘This indicates not that the Paramount Decrees are obsolete, but rather that they are more necessary than ever’.²⁸

Indeed, what is happening in subscription services if not a kind of direct-to-consumer block booking? In a response to the review, stating their opposition to any substantial

unpublished archival footage, in R Rubin, ‘Bond, “Survivor” and those “Apprentice” Tapes: 5 Burning Questions about Amazon and MGM’s Mega-Deal’, *Variety*, 27 May 2021 <<https://variety.com/2021/film/news/amazon-mgm-deal-questions-1234983039/>>.

23. I have expressed some of these observations previously in an interview with Chris Stokel-Walker for *Wired*: C Stokel-Walker, ‘*Star Trek: Discovery* is Tearing the Streaming World Apart’, *Wired*, 19 November 2021 <<https://www.wired.co.uk/article/star-trek-discovery-season-4-netflix>>.

24. 334 US 131 (1948).

25. *United States v Paramount Pictures Inc*, WL 4573069 (SDNY 2020).

26. The US Department of Justice, The Paramount Decrees Review <<https://www.justice.gov/atr/paramount-decree-review>>.

27. Comment to the Department of Justice Antitrust Division on its review of the Paramount Consent Decrees, The Roosevelt Institute, October 2018 <<https://www.justice.gov/atr/page/file/1102686/download>>.

28. Comment to the Department of Justice Antitrust Division on its review of the Paramount Consent Decrees, The Roosevelt Institute, October 2018 <<https://www.justice.gov/atr/page/file/1102686/download>>.

modification, The Open Markets Institute explicitly notes the comparable consumer considerations in the current streaming wars.²⁹ Referring to the AT&T–Time Warner merger, which the Department of Justice had challenged unsuccessfully just a few months earlier,³⁰ the Open Markets Institute raises concerns regarding Amazon’s movement into the audio-visual sector: ‘Amazon’s main goal ... is to be able to promote its own films over those of independent filmmakers and rival studios.’³¹ And with this comes an almost inevitable impact on the creative talent within the industry. In the review response from the Writers Guild of America West, the significance of the changing industry structure on screenwriters is made clear: ‘For the screenwriters, the increased market power and reduced output from major studios has meant fewer jobs, lower compensation and less creativity.’³² The Guild cites further the potentially negative impact of the film franchise business model, which is such a key feature of the Amazon press around the MGM acquisition, and the consequent reduction of investment in new films and ultimately chilling effect on creativity: ‘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’.³³ And for the consumer, the implications are potentially far-reaching. In its submission to the review, the Independent Cinema Alliance notes the importance of independents in delivering consumer choice and welfare: ‘[M]otion picture consumers benefit enormously because, compared to big circuits, independents vitally contribute more diverse content, in more diverse places, more inexpensively, and in more diverse and creative ways’.³⁴ As the Alliance explains, ‘For independents it is a labor of love, and they are being forced out of business in growing numbers’.³⁵

Despite the regular claims to the contrary, competition is not concerned with creativity and diversity of product. Expecting the market to take account of creativity is not only naïve but also, quite literally, unsustainable; for the most part it just emphasizes speed, and the proliferation of product and consumption, rather than creativity. Competition regulation is largely concerned with the state of the market; that is, the diversity of the market players, rather than the product itself, or even, it would seem, the consumer. To swim against the stream, so to speak, intellectual property protection is all too easily aligned with claims to control when in fact meaningful intellectual property can be a relevant ethical resource in film and television. Arguably, it becomes the more relevant tool for ensuring diversity in creative output in circumstances where the makers, from authors to

29. Comment of the Open Markets Institute on the Paramount Decrees, October 2018 <<https://www.justice.gov/atr/page/file/1102821/download>>.

30. The AT&T acquisition of Time Warner was challenged in 2018 but ultimately approved by the courts in *United States v AT&T*, 310 F.Supp.3d 161 (DDC 2018), aff’d 916 F.3d 1029 (DC Cir 2019).

31. Comment of the Open Markets Institute on the Paramount Decrees, October 2018 <<https://www.justice.gov/atr/page/file/1102821/download>>.

32. Comments of Writers Guild of America, West, Inc, 4 October 2018, p 4 <<https://www.justice.gov/atr/page/file/1102781/download>>.

33. *Ibid.* The response notes also that ‘writing a feature-length program for Netflix or Amazon remains an inferior labor market substitute for theatrical film writing due to differences in the structure of compensation’ (p 5).

34. Comments of the Independent Cinema Alliance to the Department of Justice, Antitrust Division concerning the Paramount Consent Decrees, 4 October 2018 <<https://www.justice.gov/atr/page/file/1102561/download>>.

35. *Ibid.*

performers, continue to have an interest in the dissemination of that output. The management of that interest thus becomes key to the ethics of the industry. The problem with the popular discourse on competition and intellectual property in streaming is that, like most things these days, it has become over-simplified into an adversarial war of opinion.

If we learn anything from the streaming wars, it is that we cannot afford to leave the diversity of our cultural heritage to competition alone.

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