# SECOND SUPPLEMENT TO MEMORANDUM 2024-46

## Antitrust Law: Status Update (Panelists, Slides, and Public Comment)

This supplement presents information about individuals and organizations serving on a panel to speak on topics addressed by the expert reports, as well as public comments and slides submitted to date.[1] The staff anticipates at least one panelist will submit additional materials, which will be provided to the Commission in a supplemental memorandum.

The biographical information on the panelists and public comment is attached as Exhibits to this supplement.



## PANELISTS

At the October meeting, the following panelists will speak on a variety of subjects relating to the Antitrust study.

Professor Daniel L. Rubinfeld will speak about "abuse of dominance."

The following individuals will speak about artificial intelligence (AI): Professors Robin Feldman and Tejas Narechania in their individual capacities, and Adam Cohen on behalf of OpenAI. According to its website, "OpenAI's is an AI research and deployment company [whose] mission is to ensure that artificial general intelligence benefits all of humanity."

Gene Burrus will speak on behalf of the Coalition for App Fairness about competition in the application (app) developer market. According to its website, the coalition

[1] Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission's website (www.clrc.ca.gov). Other materials can be obtained by contacting the Commission's staff, through the website or otherwise. The Commission welcomes written comments at any time during its study process.

Any comments received will be a part of the public record and may be considered at a public meeting. However, comments that are received less than five business days prior to a Commission meeting may be presented without staff analysis.

encourages regulators and legislators to "recognize that every app developer, regardless of size or the nature of their business, is entitled to compete in a fair marketplace…."

Dan Robbins and Aren Megerdichian will speak on behalf of the Motion Picture Association and make comments on several expert working group reports.[2] A description of the Motion Picture Association is found below.

The following individuals will speak on the healthcare and pharmaceutical industries: Professors Robin Feldman and Katherine Gudiksen in their own capacities, and Michelle Rivas, on behalf of the California Pharmacists Association. According to its website, the California Pharmacists Association "is the largest state association representing the pharmacy profession in all practice settings." Its "mission is to advance the practice of pharmacy for the promotion of health."

## PUBLIC COMMENT

Motion Picture Association

On October 3, 2024, the Motion Picture Association submitted a public comment that includes a supporting economic study and is responsive to the expert working group reports on Concentration in California, Mergers and Acquisitions, Consumer Welfare, and Single Firm Conduct.

According to its public comment:

> The Motion Picture Association, Inc. (MPA) is a not-for-profit trade association founded in 1922 to address issues of concern to the motion picture industry. Its members are: Netflix Studios, LLC; Paramount Pictures Corporation; Sony Pictures Entertainment, Inc.; Universal City Studios, LLC; Walt Disney Studios Motion Pictures; and Warner Bros. Entertainment, Inc. These companies and their affiliates are producers and distributors of filmed entertainment in the theatrical, television, and home-entertainment sectors. These companies, plus some new entrants in the market such as Prime Video & Amazon MGM Studios and Apple Studios, along with other producers and distributors including companies like Lionsgate and Legendary, comprise California's world-leading motion picture and television sector (a.k.a. Hollywood).

The Motion Picture Association hired Compass Lexecon to provide a report on the competitiveness of the audiovisual sector. According to its website:

> Compass Lexecon provides unparalleled support to clients facing complex antitrust and competition issues. We bring together a global team of expert economists whose collective knowledge and experience ensure we deliver clear, powerful, and persuasive analysis that judges, juries, and regulators around the

[2] The expert working group reports can be found on the Commission's Antitrust Study webpage.

world can rely on.

Chamber of Progress

On October 7, 2024 the Chamber of Progress submitted a public comment that is responsive to the expert working group report on Artificial Intelligence. According to its website the Chamber of Progress:

> …is a new tech industry coalition devoted to a progressive society, economy, workforce, and consumer climate. [The Chamber of Progress] back[s] public policies that will build a fairer, more inclusive country in which all people benefit from technological leaps.

The website also indicates:

> The Chamber's corporate partners range from large multinational companies to smaller startup businesses across a variety of technology industries

Respectfully submitted,

Sharon Reilly
Executive Director

Sarah Huchel
Staff Counsel

# BIOGRAPHIES OF PANELISTS

**Gene Burrus**

Gene Burrus is the General Counsel for the Coalition for App Fairness. With more than 20 years of experience at the cutting edge of digital platform competition issues all over the world, Gene is a recognized leader in developing and executing on legal, regulatory and legislative strategies to advance his clients' interests. Gene spent 15 years at Microsoft, managing antitrust compliance with American and European orders and decrees, then led efforts to apply the same antitrust laws to, and develop cases against, Microsoft's competitors around the world. Recently, Gene led Spotify's legislative strategy, lobbying, and advocacy efforts to open up the mobile app ecosystem to free competition and to unleash innovators. While at American Airlines, Gene led the litigation team's successful defense against the Department of Justice's landmark predatory pricing case and managed regulatory efforts for the acquisitions of TWA and Aerolineas Argentinas. Gene is an experienced litigator, including defending Exxon in trial against a number of its California dealers. Gene also acted as an external senior advisor with McKinsey and Company's Regulatory Strategy Group, providing strategic advice to businesses dealing with competition regulators around the world. Gene received his law degree from the University of Virginia and has a bachelor's degree in Aerospace Engineering from the University of Oklahoma. Gene is licensed to practice law in California and Washington.

**Adam Cohen**

Adam Cohen is OpenAI's recently-joined Chief of Economic Policy. From 2010 until 2024 he was Director of Economic Policy at Google. Adam previously was an economics correspondent for Dow Jones and the Wall Street Journal based in London and Brussels. He holds an AB from Harvard University and a Master's degree from the London School of Economics.

**Katherine Gudiksen**

Katie Gudiksen, Ph.D., is the Executive Editor for The Source on Healthcare Price and Competition, a website providing up-to-date and easily accessible information about healthcare price and competition in the United States, and Adjunct Professor at the University of California Law San Francisco. Dr. Gudiksen is an expert in healthcare reform and the drivers of healthcare costs, with a special interest in market consolidation and state policies to address market power. She has helped draft model legislation to improve state merger review processes and to prohibit anticompetitive terms in contracts between

insurers and health systems. Her current work focuses on evaluating the options states have to restrict excessive provider prices, including cost-growth benchmarks and state public options. Her work has been published in *Health Affairs, Frontiers in Health Services, the Harvard Journal on Legislation,* and *the New England Journal of Medicine,* and covered by media outlet such as the *Financial Times* and *The Wall Street Journal*. She has successfully worked with various state policymakers and stakeholders by commenting on bill language, presenting to various state agencies and officials, testifying as expert witness at state legislative hearings, and participating in briefings and informational sessions in California, Nevada, Connecticut and Oregon.

**Aren Megerdichian**

Aren Megerdichian is an Executive Vice President at Compass Lexecon. Aren provides economic consulting services to clients on a wide range of matters involving litigation and regulatory investigations. Dr. Megerdichian has presented his findings on competition, regulation, and enforcement to the Federal Communications Commission, the Department of Justice, the Federal Trade Commission, and the California Public Utilities Commission. Prior to joining Compass Lexecon in 2010, Dr. Megerdichian served as an Associate Lecturer with the College of Business at San Diego State University and a Teaching Associate and Lecturer with the Department of Economics at the University of California, San Diego. He holds a Ph.D. in Economics from the University of California, San Diego. Dr. Megerdichian's fields of expertise include industrial organization and econometrics.

**Tejas N. Narechania**

Tejas N. Narechania is a Professor of Law at the University of California, Berkeley School of Law. His scholarly focus is on the institutions of technology law and policy (including, for example, telecommunications regulation, platform governance, and intellectual property), among other subjects. He is also a Faculty Co-Director of the Berkeley Center for Law & Technology. Before joining Berkeley Law, Professor Narechania clerked for Justice Stephen G. Breyer of the Supreme Court of the United States (2015–2016) and for Judge Diane P. Wood of the U.S. Court of Appeals for the Seventh Circuit (2011–2012). He has also advised the Federal Communications Commission on network neutrality matters, where he served as Special Counsel (2012–2013). He has a J.D. from Columbia Law School, where he earned the Ruth Bader Ginsburg Prize and was the Executive Notes Editor of the *Columbia Law Review*. He also has a B.S. (Electrical Engineering and Computer Science) and a B.A. (Political Science) from the University of California, Berkeley. Professor Narechania's research projects have appeared in

the *California Law Review* (and the *California Law Review Online*), the *Columbia Law Review* (and the *Columbia Law Review Forum*), and the *Michigan Law Review* (and the *Michigan Law Review Online*), among other outlets. His projects have been cited by the White House, in the work of the Supreme Court and the federal Courts of Appeals, as well as in the New York Times and the Washington Post, among other venues.

**Michelle Rivas**

Michelle Rivas is the Executive Vice President of Government Relations & Corporate Affairs for the California Pharmacists Association (CPhA). Michelle leads the CPhA government affairs and its public policy unit, the Center for Advocacy. The Center for Advocacy is responsible for representing pharmacists, pharmacy technicians, and student pharmacists in advancing the interests of the profession and the patients they serve. Ms. Rivas oversees activities in the State Capitol and before the California State Board of Pharmacy. Ms. Rivas has over twenty years of legislative, grassroots, and advocacy experience, primarily in the health professions. Her health policy experience began in the government relations office of the California Medical Association. She learned the workings of the capitol during her tenure in the legislative office of Governor Pete Wilson before an extensive 16-year career with the California Dental Association as manager of political and external affairs.

**Daniel Robbins**

Dan Robbins serves as Senior Vice President and Associate General Counsel for the Motion Picture Association, Inc. (MPA). MPA represents the interests of the U.S. motion picture, television, and streaming sectors throughout the world. One of his responsibilities at MPA is global antitrust compliance. He has also served as an appointed member of the California Commission on Uniform State Laws for 17 years and as president of the Uniform Law Commission (ULC) from 2021-23. He chairs the ULC's Antitrust Study Committee and its Pre-merger Notification Act Drafting and Enactment Committees. He is also a member of the American Law Institute. He received a BA in economics from Vanderbilt University and a J.D. from the University of California, Los Angeles School of Law.

**Professor Daniel L. Rubinfeld**

Prof. Daniel L. Rubinfeld is the Robert L. Bridges Professor of Law and Professor of Economics Emeritus at the University of California, Berkeley and Professor of Law at NYU. He served from June 1997 through December 1998 as chief economist and Deputy Assistant Attorney General for Antitrust in the U.S. Department of Justice. Dan is the

author of a variety of articles relating to antitrust and competition policy, law and economics, and public economics, as well as two textbooks, *Microeconomics,* and *Econometric Models and Economic Forecasts.* He has consulted for private parties and for a range of public agencies including the Federal Trade Commission, the Antitrust Division of the Department of Justice, and various State Attorneys General. He has been a fellow at the National Bureau of Economic Research (NBER), the Center for Advanced Studies in the Behavioral Sciences, and the John Simon Guggenheim Foundation. Professor Rubinfeld teaches courses in antitrust and law and statistics (co-taught with Judge Katherine Forrest), and is a member of the American Academy of Arts and Sciences and a research fellow at NBER. He is a past President of the American Law and Economics Association.

MPA

**MOTION PICTURE ASSOCIATION**

October 3, 2024

The Honorable Ambassador David Huebner, Chairperson
and Honorable Commissioners and Executive Director Reilly
California Law Revision Commission
c/o Legislative Counsel Bureau
925 L Street, Suite 275
Sacramento, California 95814

Re: Antitrust Law - Study B-750 - Comment On Behalf of the Motion Picture Association, Inc.

Dear Chairperson Huebner, Commissioners and Executive Director Reilly,

The Motion Picture Association, Inc. (MPA) is a not-for-profit trade association founded in 1922 to address issues of concern to the motion picture industry. Its members are: Netflix Studios, LLC; Paramount Pictures Corporation; Sony Pictures Entertainment, Inc.; Universal City Studios, LLC; Walt Disney Studios Motion Pictures; and Warner Bros. Entertainment, Inc. These companies and their affiliates are producers and distributors of filmed entertainment in the theatrical, television, and home-entertainment sectors. These companies, plus some new entrants in the market such as Prime Video & Amazon MGM Studios and Apple Studios, along with other producers and distributors including companies like Lionsgate and Legendary, comprise California's world-leading motion picture and television sector (a.k.a. Hollywood).

MPA appreciates the opportunity to comment on the California Law Revision Commission's (CLRC) study on California's antitrust laws, Study B-750. The CLRC has been assigned an ambitious task and we recommend that it only seek changes that are supported by strong objective evidence delivered through a balanced process and that are narrowly tailored to avoid unintended consequences and ensure legislative passage. We believe this should be grounded in recognition of the purpose of the antitrust laws - namely to protect competition and ultimately consumers.

This comment and its supporting economic study, plus certain exhibits from the American Bar Association Antitrust Section and the Uniform Law Commission, address six topics: (i) the overall working group process; (ii) potential preemption by the Copyright Act; (iii) the working group report on concentration; (iv) the working group report on mergers and acquisitions; (v) the working group report on single firm conduct (i.e., monopolization); and (vi) the working group report on consumer welfare.

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## I. The Working Group Process

The CLRC was given a massive assignment in Study B-750, but it has very limited resources. To address this limitation, it sought the assistance of outside volunteers and hired a consultant. In announcing the formation of the working groups, CLRC Staff Memo, dated March 9, 2023, (CLRC March Memo) indicated that "[e]ach group will prepare an *objective* (emphasis in original) report on the topic addressed by the group. The reports will not make recommendations." CLRC March Memo at page 3. The memo goes on to say that the concentration working group "will be preparing an *empirically* based description of the degree and effect of business concentration in California." (emphasis supplied) CLRC March Memo at page 4.

Unfortunately, while all the working group participants are talented and respected individuals, some of the groups are very imbalanced and failed to prepare reports that are objective and free from recommendations. We highlight some specific concerns later in this letter.

A review of all the state's antitrust laws, which dates to 1907 at least, is a massive undertaking. We sympathize with the CLRC's Herculean task. However, in some meetings we have heard commissioners suggest that the creation of recommendations be delegated to the private working groups. We believe that would be imprudent for several reasons, including the lack of balance in some of the groups that will be discussed later. Biased groups create biased proposals that reduce potential legislative success. If the CLRC wants to have the private working groups prepare the legislative recommendations, it must at least ensure balance within each group. If the CLRC plans to move in that direction, MPA would be glad to work with the CLRC to ensure there is balance.

## II. Potential Preemption by the Copyright Act

State antitrust laws are generally not preempted by federal antitrust law. See *California v. ARC America Corp.*, 490 U.S. 93 (1989). However, unlike federal antitrust laws, the Copyright Act contains a section that expressly preempts contrary state laws. 17 U.S.C. § 301. Accordingly, state antitrust and unfair competition laws may, as applied to copyright works, be preempted by the Copyright Act. See *Orson, Inc. v. Miramax Film Corp.*, 189 F.3d 377, 385 (3rd. Cir. 1999) (en banc) (invalidating Pennsylvania's unfair competition law limiting exclusive theatrical licenses to 42 days and holding that a state may not regulate copyright owners' "exclusive rights" to "distribute and perform" copyrighted motion pictures).

Some proposals made to the CLRC may be preempted and unconstitutional as applied to copyrighted works. For example, the New York antitrust proposal and the single firm conduct working group both suggest regulating exclusive contracts. When applied to copyright licenses, this is likely preempted and unconstitutional. MPA is willing to work with CLRC to avoid this undesirable outcome.

## III. The Concentration Report

As noted above and explained in the CLRC March Memo, the working group reports were to be *objective*, and the concentration report was to be based on *empirical* evidence.

Unfortunately, while the authors are impressive professionals who are well respected, the group lacked balance. Two authors are career antitrust plaintiffs' lawyers, one was a distinguished long-time antitrust prosecutor, another is an academic who is very critical of the healthcare sector and the final member is a respected economist at the Progressive Policy Institute. There were no participants from the business community, the state or U.S. Chambers or from the defense bar.

Given the bias, the report unsurprisingly reads like an indictment of California's businesses. It suggests that concentration levels are too high from "waves" of merger activity, innovation and market entry are limited, and firms routinely mistreat their workers. The comments appear to be general, high-level and without empirical support, as discussed in detail below.

MPA cannot offer economic details on the operations of the other sectors like healthcare and pharmaceuticals, food and agriculture, or the technology sector (which is likely the state's largest sector but was omitted from the report). Similarly, we cannot offer much insight into other areas of the entertainment sector such as music, video games and live events such as Taylor Swift or Beyonce concerts, except to say that these forms of entertainment generally compete with motion pictures and television series for consumer entertainment. However, we can offer further insights and data into our part of the entertainment sector, the production and distribution of motion pictures and television series (audiovisual content).

### A. The Concentration Report's Limited Treatment of the Audiovisual Sector

The 47-page concentration report (Concentration Report) only devotes about four paragraphs to audiovisual content. While we agree with some of the points made in the Concentration Report, we strongly disagree with its conclusion that M&A activity has left the sector overly concentrated.

We agree with the Concentration Report's conclusion that "[t]he entertainment industry is a significant engine of California's revenue and employment." It notes that "[t]he California film and television production industry produces over 700,000 jobs in California with nearly $70 billion in wages and brings in some $100 billion in tourism." Concentration Report at page 39.[1] We also acknowledge that the pandemic and the strikes in 2023 caused significant harm to the sector and Southern California's economy. Everyone in the sector is working hard to emerge from the impact of those events.

[1] These employment and wage figures appear to include direct and indirect employment. When limited to direct employment and wages, the figures are smaller and total about 258,860 jobs with $42.6B+ in wages.

We also agree that the sector is undergoing "seismic changes." Concentration Report at page 41. The theatrical market was seriously damaged by the pandemic, but the market has been rebounding over the last few years with popular movies such as *Barbie*, *Top Gun: Maverick*, *Inside Out Two*, *Deadpool & Wolverine*, *Dune II*, *Despicable Me 4*, *It Ends With Us*, *A Quiet Place: Day One* and Academy Award winners *Oppenheimer* (2024 Best Picture) and *Everything Everywhere All At Once* (2023 Best Picture).

Optical disc sales and rentals have been falling and cable numbers are down, but there is massive new entry and competition in the streaming sector. Netflix pioneered this sector, and many significant companies have entered this highly competitive and robust market. There are now over 200 movie and television streaming services including Netflix, Disney+, Peacock, Max, Hulu, Paramount+, Prime Video, Crunchyroll, and Apple TV+.

We strongly disagree, however, with the conclusion on page 42 that "waves of mergers" have left the sector overly concentrated. Importantly, while the superficial descriptions of concentration in the report sound dramatic, they don't suggest actual concentration and are based on outdated data. For example, the Concentration Report argues that the "Big 6" media companies control a majority of the media. It identifies these six companies as Disney, National Amusements, News Corp., Sony, Comcast and Time-Warner. The citation for this reference is an undated blog post from a marketing company that appears to be from November 7, 2016. (The post speaks of AT&T's potential acquisition of Time-Warner, which closed in 2018, and has since been divested, and notes that Sumner Redstone runs National Amusements. Mr. Redstone passed away in 2020.) The post consists primarily of listing the companies owned by entertainment companies in 2016. There is no consistent data in the post for measuring the claim. Even if the claim were true in 2016, this might only mean that six companies controlled 51%. This translates into merely 8.5% each, which is not a large market share. Assuming the other 49% is controlled by companies smaller than the "Big 6", the overall market would not be concentrated.

Elsewhere in the same paragraph, the report claims that "[t]he three largest mega-entertainment companies" are "Comcast, Disney and Netflix," but the report does not provide any market share data for these companies or for any of the others mentioned above. Further, the report fails to note significant new entrants in the sector such as Amazon Studios, Apple Studios and You Tube TV as well as new competition from social media sites such as Tik Tok, Instagram and You Tube.

### B. Response: Audiovisual Sector Economic Report

To provide a more rigorous and scientific review of the competitiveness of the audiovisual sector, MPA engaged Compass Lexecon, a highly respected economic consulting firm, to review industry data on key indicators of competitiveness in the market. The report is attached to this letter as Exhibit A.

The report analyzes key metrics commonly used by economists to assess the competitive health of industries including prices, output, quality, innovation and entry. It concludes that the audiovisual market is dynamic and exhibits signs of being highly competitive. Importantly, it

finds clear evidence that new entrants and technologies can quickly gain share. This dynamism and competition provide significant benefits to consumers.

It also concludes that the audiovisual labor market, where workers are represented by at least 45 unions, functions in a healthy manner and provides benefits to workers. (While the sector had a double strike last year due in part to challenging and novel artificial intelligence issues, such events are rare. Our last double strike occurred in 1960, when the Screen Actors Guild (SAG) was led by a young then-Democrat named Ronald Reagan.)

The report begins with a section on industry background. It explains the key stages of content production and distribution. It then outlines the industry participants and explains the sector's key role in California's economy.

The report then explores the role of entry and innovation in the sector. It details significant innovations over the last 25 years along with substantial new entry into the markets. New entrants include Netflix, Prime Video & Amazon MGM Studios, Apple Studios and Apple TV+, and over 200 new streaming sites by a vast array of companies.

The report then examines output and quality in the sector. It finds that the amount of content available and being consumed has generally increased over time except for reductions associated with the pandemic and the 2023 strikes. It also finds that quality has increased via new innovations such as 4K, HDR, advanced sound processing, content personalization algorithms and improved user interfaces.

Finally, the report analyzes prices and labor markets. It finds that prices are competitive and have been declining or relatively flat when adjusted for inflation (even when not accounting for improvements in quality, which would result in even lower inflation-adjusted prices). It also finds that the industry pays wages above the national average, that wages have been growing faster than the national average, and that over 45 unions represent the workers.

In sum, at least with respect to the audiovisual sector in California, the report demonstrates that the audiovisual industry is competitive with strong entry, innovation, output and competitive prices. The Concentration Report, on the other hand, is a biased and superficial indictment that relies heavily on outdated or suspect evidence such as the 2016 blog post from a marketing firm.

## IV. Mergers and Acquisitions

The mergers and acquisitions (M&A) working group report (M&A Report) is thoughtful and, unlike some other groups, followed the instructions in the CLRC March Memo to refrain from specific recommendations.

As noted in the M&A Report, states can enforce the federal merger law, the Clayton Act. States may challenge mergers even if the federal government has already approved them. California has successfully exercised these rights. See *California v. American Stores*, 495 U.S. 271 (1990) (successful California challenge to a supermarket merger after the FTC had already approved the deal).

While the state can challenge national and local mergers under the Clayton Act, California has also passed two laws recently that provide greater notice and enhanced review in two areas of specialized concern. In 2022 the state passed the Health Care Quality and Affordability Act, which requires certain healthcare entities to provide advance notice and information about certain healthcare mergers and their impact on competition and drug costs. In 2023 California passed a similar law for the grocery and pharmacy sectors.

As noted in the M&A Report and more recently in testimony from the Uniform Law Commission (ULC), the ULC has recently completed and recommended to all states the Antitrust Pre-Merger Notification Act (Act) to facilitate efficient state review of national mergers in a manner that reduces costs for all parties and enhances certainty for the business community.

Under the federal Hart Scott Rodino Act (HSR), any merger with a transaction value over $120M must file a detailed form and other materials with the federal antitrust enforcers. While the states may enforce the Clayton Act, they are not entitled to access the forms absent party consent or subpoenas and litigation. As a result, the states are often months behind the federal government in merger review and cooperation between the states is impaired. At the same time, businesses who seek certainty may be surprised after receiving federal approval to be later sued by a state or group of states.

The Act solves these problems by requiring a party that makes an HSR filing to make the same filing with the AG in the state of its principal place of business and any state where it had over $24M in net sales the prior year. This way states where the merger may have an effect, get early notice and transaction details. They can cooperate in the investigation and save costs. The Act makes these filings confidential and prohibits fee collection on them, two critical issues for the business community. The goal of the Act is to enhance early review of deals that may impact certain states, reduce the costs of litigating over the filings and provide all parties with enhanced deal certainty.

The Act was drafted over two years with substantial input from enforcers and businesses. The ULC had input from three state enforcers, the DOJ Antitrust Division, the FTC, the ABA and multiple business lawyers.

The Act was endorsed this summer by the American Bar Association Antitrust Section, a non-partisan group of experts. This endorsement is attached as Exhibit B. The Act was also approved unanimously this summer by the California Commission on Uniform State Laws and approved by a vote of the states at the ULC Annual Meeting by a margin of 45-1. (Only Alabama voted "no." California voted "yes.") A copy of the final Act is attached as Exhibit C. (The vote was in July, but the final Act is dated September because the Act also had to successfully pass through the ULC's Legislative Style Committee chaired by California Commissioner Diane Boyer Vine. That happened in September.)

The need for the Act has also been recognized by three of the CLRC's working group reports: the M&A Report, the Exemptions and Immunities Report and more recently by the AI Report, which states that "[e]arly information-gathering through simultaneous notification of transactions to federal and state enforcers . . . will be an important tool in furthering [the] goal of . . . more

closely monitoring cloud and AI markets for potentially harmful strategic consolidation." AI Report at page 9.

The ULC recommends that California adopt the Act. MPA agrees with the ABA, the ULC and the California Commission on Uniform State Laws. MPA believes the Act is a reasonable and moderate proposal that should be enacted in California and other states.

The M&A Report also mentions two other potential changes. First, it notes the state could pass its own state merger law with a different standard than the Clayton Act. The M&A Report also notes that "it is arguable whether such amendment is necessary given that California antitrust authorities can challenge mergers under the Clayton Act." M&A Report at page 17. MPA agrees with this point in the M&A Report and would oppose a different version of the Clayton Act for California. Most mergers bring efficiencies and benefits for consumers. New state laws that differ from federal merger law will increase the cost and uncertainty around these deals.

Second, the M&A Report notes that California could create its own merger and acquisition notice regime at lower levels than the HSR filing threshold. In 2021, something similar was proposed in legislation in New York. That bill would have required any transaction over $9.2M to provide detailed notice to the AG and allow for AG rulemaking. In contrast to its support for the ULC Act, the American Bar Association Antitrust Section raised considerable concerns with the New York bill in the attached letter. See Exhibit D.

MPA shares the ABA's concerns. The bill would have required tens of thousands of smaller transactions to secure AG approval. Many of these have no competitive impact. For example, if a studio agreed to pay a book author $10M for the exclusive rights to make a movie from the book, such an acquisition would need to be reported to the AG under the New York bill. Unsurprisingly, the New York bill generated massive business opposition and failed. A similar bill failed in Maryland in 2023. MPA and many other businesses would oppose this change in California.

In sum, California can and does enforce federal merger law under the Clayton Act and it has adopted new M&A laws in 2022 and 2023. MPA supports the ULC Pre-merger Notification Act for adoption. MPA strongly opposes any other change to California merger law.

## V. The Single Firm Conduct (Monopolization) Report

The single firm conduct working group is comprised of thoughtful and highly respected professionals. While more balanced than the concentration working group, it also lacks direct current representation from the business sector or defense bar.[2]

The group's report (Single Firm Report) correctly notes that federal monopolization law is covered by Section 2 of the Sherman Act and the thousands of cases that interpret it. It also

[2] While all the working group members are currently academics, several previously served in key roles at the federal antitrust agencies and one served as the General Counsel of Intel from 2009-14. However, the group lacks current representation from businesses, trade associations, chambers of commerce or the defense bar.

correctly notes that California does not prohibit monopolization, and this is the biggest difference between federal and California antitrust law.

### A. The Working Group Correctly Rejects the Flawed New York Bill

One proposal to address this issue is New York's "Twenty-First Century Anti-Trust Act." This bill is sponsored by a highly respected New York Senator, but written by a radical national advocacy group, the American Economic Liberties Project (AELP). The bill adopts a more extreme version of the EU and China's "abuse of dominance" antitrust standard for monopolization. As the Single Firm Report correctly notes, the bill has been criticized by the New York City Bar Association and in the attached report (ABA Report) by the American Bar Association Antitrust Section. See Exhibit D. MPA and many other business groups share the concerns expressed in the thoughtful and thorough ABA Report. Also, as noted earlier in Section II, the bill may be preempted as applied to copyrighted works.

Similarly, the Single Firm Report rejects the New York approach due to its ambiguity and likelihood to "protect competing businesses, even at the expense of consumers and workers." Single Firm Report at p. 14. MPA agrees with the working group's conclusion to reject the New York approach.

It is important to note that the New York bill has failed four years in a row. MPA has opposed the bill in New York for four years and would oppose a bill like it in California.

### B. The Single Firm Report's Proposed Legislative Framework is Ambiguous and Would Create Massive Uncertainty by Rejecting Longstanding Core Concepts of Monopolization Law

Contrary to the express instruction in the CLRC March Memo to avoid legislative recommendations, the working group offered its own recommended legislative framework. Unfortunately, like the New York bill, it is fatally ambiguous and would create enormous uncertainty by creating a whole new standard and by rejecting core longstanding elements of monopolization law such as relevant market and market share.

While some recent monopolization cases have been criticized by some, there is general agreement that monopolization law is intended to prevent a single firm from acquiring or maintaining monopoly power in a relevant market by anticompetitive conduct.

The first step in evaluating a firm's market power is to define the relevant market. This entails identifying those products or services that competitively constrain each other. If the firm's product or service has no or few reasonably interchangeable substitutes and there are significant barriers to entering the market, the relevant market may be defined to be narrow, and the firm may be found to have high market share, indicating it may have market power over the product or service. In contrast, if there are many reasonably interchangeable substitutes, a broader market definition would be defined, and it would be less likely that the firm has the ability to profitably raise its price. Unfortunately, the working group's framework abandons this tool. See Single Firm Report at page 18.

The concept of relevant markets has long been critical in antitrust law. It is not a recent creation of the current conservative Supreme Court. Instead, it has been used for about 76 years and can be traced to the Supreme Court's decision in *Columbia Steel Co. v. U.S.*, 334 U.S. 495 (1948) and has been the subject of unanimous decisions by the Warren Court, likely our most liberal Court. See, e.g., *Walker Process Equip. v. Food Mach. & Chem*., 382 U.S. 172, 177 (1965) ("Without a definition of that market, there is no way to measure [a defendant's] ability to lessen or destroy competition.") Abandoning this core antitrust concept as the working group suggests would be a serious mistake.

The next step is to measure the firm's share of the relevant market. While there is no precise threshold, the cases typically require at least a super majority share. In the famous case of *U.S. v. Alcoa*, 148 F.2d 416, 424 (2nd Cir. 1945), Judge Learned Hand opined that while controlling 90% "is enough to constitute a monopoly; it is doubtful whether 60% or 64% would be enough; and certainly 33% is not." The Supreme Court endorsed this standard one year later in *American Tobacco Co. v. U.S.*, 328 U.S. 781, 814 (1946). The liberal Warren Court later endorsed this practice of inferring power from high market share. See *U.S. v. Grinell Corp.*, 384 U.S. 563, 571 (1966) ("[t]he existence of such [monopoly] power ordinarily may be inferred from the predominant share of the market.") Like the concept of relevant market, while market share is used by the current conservative Court, it is a longstanding and effective tool that has been applied by liberal Courts.

The use of market share not only helps courts assess market power, but it also helps guide firm behavior. Firms with market power have additional obligations that don't burden smaller firms. If your firm has a high market share, you must pay special attention to these obligations. If your firm's share is small, you don't have this additional compliance obligation and risk.

Unfortunately, the working group's proposal rejects the use of market share and market power. See Single Firm Report at page 18. This is a major mistake. It rejects about 80 years of thoughtful learning and hundreds of court decisions.

Instead of being focused on firms with monopoly power, the current proposal applies to all firms, no matter how small. All firms, even small businesses with no real ability to harm competition, would need to comply with the proposal's three plus pages of new and ambiguous rules. If adopted, the proposal would cause major confusion and uncertainty in the courts and with businesses trying to comply with the law. Both liberal and conservative Supreme Court justices have cautioned against such ambiguity. Justice Breyer once noted that "antitrust rules are court-administered rules. They must be clear enough for lawyers to explain to their clients." *Town of Concord v. Boston Edison Co.*, 915 F.2d 17, 22 (1st Circuit 1990).[3] Similarly, Chief Justice Roberts has emphasized the need for clear antitrust rules. *Pacific Bell Telephone v. Linkline Comm.*, 555 U.S. 438, 452 (2009) ("We have repeatedly emphasized the importance of clear rules in antitrust.")

Finally, as noted above in Section II, the proposal may be preempted and unconstitutional as applied to copyrighted works.

[3] Justice Breyer was nominated to the Supreme Court from the First Circuit by President Clinton in 1994.

For these key reasons and others, MPA is opposed to the Single Firm Report's legislative proposal. Like the failed New York bill, we believe the proposal is far too controversial and flawed to be enacted. However, MPA does recognize that the lack of a monopolization provision in California law is the greatest difference between California and federal law and thus is a key issue for the CLRC to address. We are willing to constructively work with the CLRC in a balanced way to address this issue.

## VI. Consumer Welfare Working Group

Antitrust law should continue its focus on protecting consumers from harm while also continuing to protect workers from conduct like no-poach agreements. As noted in the concentration group's report, we have active enforcement on those issues that should continue. See Concentration Report at pages 7-8. MPA is opposed to reorienting the goals of antitrust away from consumers. For example, the law should not be refocused to protect competitors instead of competition.

## VII. Conclusion

Thank you for considering our concerns and comments. We hope this letter, the economic report on our sector and the other attachments are helpful in your work on the antitrust study. As noted above, MPA is willing to engage constructively in your process to ensure you receive balanced input to ensure that changes to California antitrust law are thoughtful, fair and passable.

Sincerely,

Dan Robbins

**Dan Robbins**
SENIOR VICE PRESIDENT, ASSOCIATE GENERAL COUNSEL

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**EXHIBIT A**

# An Economic Analysis of Indicators of Competition in the Audiovisual Industry

**Prepared on Behalf of the Motion Picture Association**

Aren Megerdichian, Ph.D.
Compass Lexecon

October 3, 2024

## Contents

## I. INTRODUCTION

This report assesses the competitive health of the audiovisual industry by analyzing economic outcomes, and concludes that the audiovisual industry is dynamic and shows signs of being a highly competitive industry.[1]

One approach to assessing competition is based on an empirical analysis of economic outcomes. This report analyzes metrics on outcomes that are commonly used by economists to assess the competitive health of an industry—including prices, output, quality, innovation, and entry. A hallmark of a competitive industry is that products that provide more value to consumers thrive and grow in the marketplace and gain share quickly, a key characteristic present in the audiovisual industry. Most recently, this dynamic is clearest with the growing share of time consumers spend with content from online streaming services and short-form video content.

The empirical evidence supports the conclusion that the audiovisual industry is dynamic and exhibits signs of being highly competitive, providing numerous benefits to consumers of audiovisual content. Furthermore, the empirical evidence is consistent with the conclusion that the audiovisual labor market is functioning in a healthy manner, which provides benefits to workers within the industry. The remainder of this report is structured as follows:

- Section II provides an overview of the audiovisual industry, including a discussion of the key stages of content production and distribution, as well as a summary of the industry participants, which encompasses tens of thousands of companies in the United States. Section II also documents the economic importance of the audiovisual industry in California.
- Section III presents economic evidence supporting that the audiovisual industry is dynamic and exhibits signs of a highly competitive industry. Over

[1] This report focuses on motion pictures, television, and other audiovisual content, hereafter collectively termed "the audiovisual industry." Other organizations within the entertainment industry, such as gaming, music, and live events, are not within the scope of this report. However, these sectors of the entertainment industry also compete for the attention of consumers of audiovisual content and for advertiser spending.

the past decade, significant technological advances have driven substantial changes in how content is produced, who is producing content, and how it is being distributed to consumers. The empirical evidence on outcomes in the audiovisual industry—including entry and growth in OTT services, competition from short-form video, increasing output and quality, and competitive pricing in the audiovisual industry—supports the conclusion that the audiovisual industry is well-functioning, dynamic, and exhibits signs of being a highly competitive industry.

- Section IV addresses the competitive health of the audiovisual labor market, by analyzing key metrics, including employment levels and wages. New distribution technologies and services have lowered barriers to entry for entertainment talent to reach consumer audiences. Unionization in the audiovisual industry gives workers collective bargaining power to negotiate employment terms with production and streaming companies. These factors have contributed to stable employment levels and stable or increasing wages in the audiovisual industry.
- Section V concludes, finding that the empirical evidence supports that the audiovisual industry exhibits signs of a dynamic and highly competitive industry, benefiting both consumers and workers in the industry.

## II. INDUSTRY BACKGROUND

The audiovisual industry encompasses a wide range of content that is created and distributed to consumers. This background section provides a summary of audiovisual content production and distribution, as well as a discussion of the numerous firms and organizations that participate in the industry. An important phenomenon in the audiovisual industry throughout its history is entry of and competition from new forms of production and distribution, including most recently short-form, user-generated video. These points are introduced in this section and are discussed in more detail in Section III. Finally, this section

summarizes the importance of the audiovisual industry in California, noting that it contributes billions of dollars in spending and about two hundred thousand jobs annually in the state.

### A. Key Stages of Content Production and Distribution

There are a handful of key stages to the production and distribution of motion pictures and television (TV) content in the United States:[2]

- **Preparation and Research & Development (R&D).** This stage includes pre-greenlight activities including developing a script, packaging talent, budgeting production scenarios, and developing visual presentations required to pitch and greenlight the project. It also includes R&D of new technologies that might be used in the project.
- **Pre-production.** This stage covers the steps after greenlighting involved in defining detailed plans and processes for production. It includes virtual production and previsualization, which are used to plan more efficient principal photography and ensure the seamless combination of physically and digitally produced elements.
- **Production.** This stage involves capturing and creating content on set, on location, in animation, and visual effects. It includes lights, cameras, sets, talent, grips, green screens, and large media files.
- **Post-production and Mastering.** Often the lengthiest part of the creation process, this includes steps such as editing, adding visual effects, mixing/editing audio, color grading, and creating international masters.
- **Marketing and Distribution.** This stage includes preparing and delivering numerous variants of the content to the owner's distribution partners for

[2] MPA, "The American Motion Picture and Television Industry – Creating Jobs, Trading Around The World," 2022, available at https://www.motionpictures.org/wp-content/uploads/2024/03/MPA_Economic_contribution_US_infographic-1.pdf, p. 1; MovieLabs, "The Evolution of Media Creation – A 10-Year Vision for the Future of Media Production, Post and Creative Technologies," available at https://movielabs.com/prodtech/ML_2030_Vision.pdf, p. 8.

onward delivery to consumers. Delivery includes theatrical distribution, physical media (optical disc), multichannel video programming distributors (MVPDs), broadcasters, and over-the-top (OTT) internet-based distribution services, such as audiovisual streaming services.

In addition, the rapidly changing audiovisual landscape has given rise to other types of content, including short-form audiovisual content.[3] While the creation process for short-form content can follow some of the same production processes described above, content can also be created more rapidly from a user filming a short video and posting it online. In contrast to such short-form content production, longer-form TV and film content require substantially higher production costs, resulting in substantially more uncertain returns and risk.[4] Popular platforms that distribute short-form content include YouTube, TikTok, Facebook, and Instagram.[5] Recent trends suggest that consumers' preferred length of short-form videos is a

[3] While there is not a precise delineation between short- and long-form content, audiovisual content of a few minutes in length or shorter are often considered short-form. See Tamilore Oladipo, "Ask Buffer: What is Short-Form Video, and How Can You Use It?," *Buffer*, May 30, 2023, available at https://buffer.com/resources/short-form-video/.

[4] Vogel (2020) notes that "[m]any, if not most, films do not earn any return, even after taking account of new-media revenue sources; it is the few big winners that pay for the many losers […] [I]n a statistical sense, most major-distributed films do no better than to break even financially, with extreme deviations from this mean in both directions. […] Movies, in other words, have a low probability of earning high revenues, and a high probability of earning low revenues. […] This leads to an estimate that perhaps 10% of movies (released by the majors) earn about 85% of the industry's total profits and that exhibition on a large number of screens can as easily lead to rapid failure as to quick and great success." See Harold L. Vogel, Entertainment Industry Economics, *Cambridge University Press,* 10th ed., 2020, pp. 163-167.

[5] Facebook and Instagram are considered social media platforms, but users are spending much of their time on these platforms viewing video content. In 2023, Facebook users' share of minutes spent on video was 46.9 percent, and Instagram's was 55.9 percent. See Variety VIP+, "The Race to Replace TV: A deep-dive data exploration of the new viewing trends revving up U.S. screens," Special Report, First Edition, July 2024, available at https://read-vip.variety.com/html5/reader/production/default.aspx?pubname=&edid=a535829d-aadc-4265-8ade-05912388ed23, p. 11.

TikTok is a social media platform that allows users to create, share, and discover short-form audiovisual content across a wide range of genres, including comedy, music/dance, and education. See Griffin LaFleur, "TikTok," *TechTarget*, available at https://www.techtarget.com/whatis/definition/TikTok.

few minutes.[6] As described in greater detail in the following section, audiovisual content distributed through social media and other OTT providers—referred to as social video or short-form content—is growing rapidly and competing with more traditional audiovisual content distribution.

### B. Industry Participants

The audiovisual industry consists of several key types of industry participants that work to bring audiovisual content to consumers:

- **Content Creators.** Production studios create motion picture and television audiovisual content through pre- and post-production processes. They include Walt Disney Company, Sony Pictures, Warner Bros, Paramount, and Universal,[7] as well as numerous other production studios, such as AGC Studios, A24 films, Miramax, ArcLight Films, and Lionsgate Films, each of which produce a variety of motion pictures, including many that are commercially and/or artistically successful.[8] Recently, streaming platforms,

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YouTube hosts video content of varying length, including full-length feature films that are available as part of its premium subscription plans, and YouTube Shorts that are videos that are no longer than 60 seconds. See YouTube, "YouTube Premium & streaming limits," available at https://support.google.com/youtube/answer/7361503?hl=en&co=GENIE.Platform%3DDesktop; Extreme, "Succeeding with YouTube Shorts: a comparison with TikTok and Instagram Reels," October 1, 2024, available at https://madebyextreme.com/insights/youtube-shorts-quick-guide.

[6] One survey found that 55 percent of respondents mostly watched videos on social media that are a "few minutes long," 16 percent of respondents mostly watched videos that are "30 minutes or more," and 29 percent mostly watched videos that are "60 seconds or less." See Variety VIP+, "The Race to Replace TV: A deep-dive data exploration of the new viewing trends revving up U.S. screens," Special Report, First Edition, July 2024, available at https://read-vip.variety.com/html5/reader/production/default.aspx?pubname=&edid=a535829d-aadc-4265-8ade-05912388ed23, p. 21.

[7] Harold L. Vogel, Entertainment Industry Economics, *Cambridge University Press,* 10th ed., 2020, pp. 97-98.

[8] Independent File & Television Alliance, "Membership Directory," available at https://ifta-online.org/membership-directory/; Harold L. Vogel, Entertainment Industry Economics, *Cambridge University Press,* 10th ed., 2020, pp. 97-98; The Economist, "The rise and rise of A24, a champion of storytelling on screen," September 1, 2022, available at https://www.economist.com/culture/2022/09/01/the-rise-and-rise-of-a24-a-champion-of-storytelling-on-screen.

such as Netflix, Amazon Studios, and Apple Studios, have entered the production-side of content creation, often financing and producing full-length, high-budget motion pictures.[9] And, as described earlier, audiovisual content is also created on a smaller scale by individuals and small groups.

- **Exhibitors, MVPDs, Streaming Services, and Other OTT Distribution.** There are hundreds of services that distribute audiovisual content to consumers through multiple channels, including traditional movie theaters, cable and satellite video services, OTT streaming services, and other OTT distribution such as social media platforms. Movie theater "exhibitors" include Regal Entertainment Group, AMC Entertainment, Cinemark USA, Marcus Corp,[10] and independent local theaters.[11] There are numerous MVPDs, including services from Comcast Xfinity, Charter Spectrum TV, Cox, DISH, DirecTV, and Verizon FiOS.[12] Virtual MVPDs (or vMVPDs) services include YouTube TV, Hulu + Live TV, DirecTV Now, Sling TV, and fuboTV.[13] Over 200 OTT streaming services exist in the marketplace including larger, well known streaming services such as Netflix, Hulu, Apple TV+, Amazon Prime, Disney+, Max, Paramount+, Tubi, and Peacock, as well as niche audiovisual OTT services such as Crunchyroll, which streams Japanese animation (anime) content, AfroLandTV and In The Black Network, which stream movies and TV shows with largely African-American-centric content, and Faithlife TV,

[9] Id.

[10] Id., pp. 96-97.

[11] See, e.g., Homero Rosas Navarrete, "Top Independent Movie Theaters in LA," *Do LA,* January 10, 2024, available at https://dola.com/p/top-independent-movie-theaters-in-la. Independent theaters are often known as smaller "mom-and-pop" theaters not owned by the major chains such as Regal Cinemas. The National Association of Theatre Owners defines independent members as companies with no more than 75 screens. See National Association of Theatre Owners, "FAQs," available at https://theatreowners.org/faqs/.

[12] Frankie Karrer, "MVPD and vMVPD: Differences & Similarities Explained," *mntn,* available at https://mountain.com/blog/mvpd-vmvpd/.

[13] Symphony AI, "Virtual Multichannel Video Programming Distributors (vMVPDs)," available at https://www.symphonyai.com/glossary/media/vmpd-virtual-multichannel-video-programming-distributor/.

which specializes in streaming Christian content.[14] Various OTT content-sharing sites and social media platforms such as YouTube, Instagram, Facebook, and TikTok have also have become important channels of content distribution. See discussion in Section III.

- **Labor Unions and Guilds.** Labor unions and guilds play an important role in the audiovisual industry by negotiating labor contract terms and compensation for their members.[15] Labor unions negotiate with content creators' bargaining organization, the Alliance of Motion Picture and Television Producers (AMPTP).[16] Some of the main labor unions include Directors Guild of America (DGA), International Cinematographers Guild (ICG), International Alliance of Theatrical and Stage Employees (IATSE), SAG-AFTRA (Screen Actors Guild merged with American Federation of Television and Radio Artists), and Writers Guild of America (WGA).[17] Members of the AMPTP, which includes members of the Motion Picture Association (MPA), negotiate with more than 45 unions, operating under 64 collective-bargaining agreements.

### C. The Audiovisual Industry Plays an Important Role in California's Economy

The audiovisual industry—comprised of the companies and organizations described above—is an important industry within the state of California. A report by the California Film Commission (CFC) noted that between 2009 and 2022, the film and television industry

[14] Crunchyroll, available at https://www.crunchyroll.com/about/; AfroLandTV, available at https://www.afrolandtv.com/about; In The Black Network, "About Us," available at https://itbn.intheblacknetwork.tv/about/; Faithlife TV, available at https://faithlifetv.com/.

[15] Harold L. Vogel, Entertainment Industry Economics, *Cambridge University Press,* 10th ed., 2020, pp. 146-147.

[16] Id.

[17] Id.

employed about 200,000 people per year in California.[18] Film and television projects approved under CFC's tax credit program (Program 3.0), which represent a subset of California's film and television production, have generated a total of $7.3 billion in California in-state spending (through expenditures and wages paid) since Program 3.0 started on July 1, 2020.[19] As of June 30, 2023, projects that were approved under the 2022-2023 fiscal year contributed an estimated $3.1 billion in spending in California.[20] Similarly, MPA reported that in 2022 alone, key film and television companies paid out almost $17.5 billion to 68,235 vendors in California.[21] Since 2017, key film and television companies have paid on average $11.6 billion per year to local vendors in California.[22]

California competes with other states and countries for audiovisual production—e.g., motion picture and television series shooting locations. The economic attractiveness of California compared to other locations can be a determinative factor in how many movies and shows are produced in the state versus out of state. Primarily driven by lower production costs outside California and incentive programs offered by other states to attract studios, "decentralization" of production away from California has been occurring for many years but accelerated during the 2023 labor strikes.[23] The ongoing move away from California adversely impacts employees and companies that rely on the audiovisual industry in California.

[18] California Film Commission, "Film and Television Tax Credit Programs Progress Report," December 2023, available at https://cdn.film.ca.gov/wp-content/uploads/2024/04/Progress-Report-2023.pdf, pp. 3-6. See also analysis presented in Figure 22.

[19] Id., pp. 13-14.

[20] Id.

[21] MPA, "California – Economic Impact of the Motion Picture & TV Industry," April 2024.

[22] Id.

[23] Otis College "Report on the Creative Economy," May 2024, available at https://www.otis.edu/about/initiatives/documents/otis-college-report-creative-economy-may-2024.pdf, p. 2.

## III. THE ECONOMIC EVIDENCE SHOWS THE AUDIOVISUAL INDUSTRY IS DYNAMIC AND HIGHLY COMPETITIVE

A competitive industry provides benefits to consumers of the goods and services sold by firms in that industry. Competition reflects supply-side conduct that raises consumer welfare through innovation and output. A hallmark of a competitive industry is that consumers can move rapidly to products that provide more value. Thus, the competitive health of an industry and the benefits or harms to consumers can be assessed directly and reliably by analyzing economic outcomes such as prices and output in that industry. While a full consumer welfare analysis is outside the scope of this report, the empirical evidence on outcomes in the audiovisual industry—including entry and growth in OTT services that deliver content to consumers anytime, anywhere, competition from short-form video, increasing output and quality, and pricing that is consistent with a competitive industry—supports the conclusion that the audiovisual industry is well-functioning, dynamic, and exhibits signs of healthy competition.

### A. The Audiovisual Industry Is Dynamic and Highly Innovative

The audiovisual industry has been, and continues to be, dynamic and highly innovative. There have been technological advances in production and distribution through a proliferation over time of different ways in which consumers can access audiovisual content. Key examples include the shift from videotape to DVD and Blu-ray, and the shift from DVD and Blu-ray to streaming services and OTT access to audiovisual content from anywhere using any device.

There has been innovation in the production and post-production of audiovisual content. In the 1980s, motion pictures began to move from film reels to digital film, which created benefits such as ease of storage, reduced storage costs, reduced production/editing costs, and allowing for higher frame rates to be filmed.[24] Moreover, advances in computer-

[24] History of Film, "Film vs Digital - Film Photography and Digital Cinematography," available at http://www.historyoffilm.net/film-making/film-vs-digital/. Notably, it was not until the early 2000s that digital films were more commercially shot and shown in cinemas. See Id.; Shelby Burr, "When did movie theaters stop using film?," *Legacy Box,* available at https://legacybox.com/blogs/analog/when-did-movie-theaters-stop-using-film; and Europa

generated imagery (CGI)—that is, the application of computer graphics technologies to generate imagery—have led to advances in visual effects for many genres of TV and film.[25] There is also an effort—known as "2030 Vision"—to advance interoperable, secure, cloud-based production technologies with the goal of enhancing efficiency and promoting competition through interoperability and reducing so-called walled gardens in the industry.[26]

The entry and growth of OTT audiovisual distribution services have significantly changed the competitive landscape. OTT services, which include companies such as Netflix, Amazon, Apple TV, Hulu, Max, and YouTube TV, as well as more niche services such as Crunchyroll, AfroLandTV, In The Black Network, and Faithlife TV, among many others, are additional ways for consumers to access audiovisual content anywhere, anytime.[27] These services allow consumers to access massive content libraries almost instantly on a wide variety of devices, both in and out of the home.

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Distribution, June 22, 2006, available at https://www.europa-distribution.org/files/bruxelles/digital_cinema_figures.pdf.

[25] For examples of advancements in video CGI over the years, see Stikky Media, "The History of CGI in Movies," May 19, 2020, available at https://www.stikkymedia.com/history-of-cgi-in-movies/; and Ros Tibbs, "Timeline: A brief history of CGI in the movies," *Far Out*, February 28, 2023, available at https://faroutmagazine.co.uk/timeline-history-of-cgi-movies/.

[26] MovieLabs, "The 2030 Vision: A bold 10-year vision for the adoption of new technologies to aid in content production, post and VFX," available at https://movielabs.com/production-technology/the-2030-vision/. A few of the goals of the 2030 Vision include: (1) facilitating direct access between recording equipment and cloud storage to allow the seamless transfer of media files directly from production sets to directors, producers, and executives; (2) integrating software tools that allow artists to directly work on media files stored on the cloud services, eliminating the need to transfer files locally between machines, and the need for a powerful local machine to process artist work; and (3) streamlining the archival process of content and files by moving archive libraries onto the cloud, allowing intellectual property to be stored and retrieved easily. See MovieLabs, "2030 Vision Series - The Evolution of Media Creation," available at https://movielabs.com/prodtech/ML_2030_Vision.pdf, pp. 10, 18-29.

[27] Between July 2021 and August 2024, Nielsen reported that streaming services' share of total TV usage had grown from 28.3 percent to 41.0 percent. See Nielsen, "Amid the fragmented TV landscape, time spent with content is the best planning data there is," January 2024, available at https://www.nielsen.com/insights/2024/amid-the-fragmented-tv-landscape-time-spent-with-content-is-the-best-planning-data-there-is/; Nielsen, "The Gauge – TV viewing trends in the U.S.," available at https://www.nielsen.com/data-center/the-gauge/; Nielsen, "Streaming claims largest piece of TV viewing pie in July," August 2022, available at https://www.nielsen.com/insights/2022/streaming-claims-largest-piece-of-tv-viewing-pie-in-july/.

In addition to distribution, new entrants such as Apple, Netflix, and Amazon have had a significant impact on the marketplace through their production of content that has achieved both critical and commercial success.[28] Examples include the series *Stranger Things* (Netflix) and *The Boys* (Amazon Prime), both of which attracted millions of views within weeks of their releases.[29] Similarly, films like Apple TV's *Killers of the Flower Moon* earned critical acclaim, including 10 academy award nominations, and became one of the most watched movies across all streaming services in the first week of February 2024.[30]

From an economic perspective, OTT services, which have grown to become ubiquitous in the United States, allow subscribers to more easily start and stop service and switch to new services based on changes in subscribers' preferences and/or changes in the prices, quality, and variety of content available on the services. These factors in part

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[28] OTT services that produce content both for distribution through their own streaming service or through other streaming services include Amazon Prime Video, Apple TV+, Crackle, Discovery+, Disney+, Max, Hulu, Netflix, Paramount+, Peacock, and YouTube Premium.

[29] In 2019, *Strangers Things*' third season was viewed by a record of 26.4 million U.S. viewers during its release over the July 4 holiday weekend. *The Boys* reached an audience of 4.1 million within the first 10 days of release. See Sarah Whitten, "Nielsen says new 'Stranger Things' season had record 26.4 million US viewers in first four days," *CNBC*, July 11, 2019, available at https://www.cnbc.com/2019/07/11/stranger-things-had-record-viewership-in-first-four-days.html; Dade Hayes, "Amazon Prime Viewing Added To Nielsen, Which Reveals 'The Boys' Numbers," *Deadline*, October 21, 2019, available at https://deadline.com/2019/10/amazon-prime-viewing-added-to-nielsen-which-reveals-the-boys-numbers-1202765075/.

[30] ABC, "'Killers of the Flower Moon' is nominated for 10 Oscars including best picture, best director," available at https://abc7chicago.com/2024-oscars-killers-of-the-flower-moon-winner-academy-awards/14476601/; John-Anthony Disotto, "Killers of the Flower Moon is the most popular title on streaming this week — Apple TV Plus Original snaps the top spot from Oscars "Best Picture" rival, The Holdovers," *iMore,* February 2, 2024, available at https://www.imore.com/music-movies-tv/killers-of-the-flower-moon-is-the-most-popular-title-on-streaming-this-week-apple-tv-plus-original-snaps-the-top-spot-from-oscars-best-picture-rival-the-holdovers.

One other notable example is Netflix's *The Irishman*, which also earned 10 academy award nominations for its merits and was watched by more than 26 million Netflix accounts within its first seven days of release. See Michael Hinman, "'The Irishman' earns 10 Oscar nominations," *The Riverdale Press,* January 17, 2020, available at https://www.riverdalepress.com/stories/the-irishman-earns-10-oscar-nominations,71013; Frank Pallotta, "Here's how many subscribers watched Netflix's 'The Irishman' in its first week," *CNN,* December 11, 2019, available at https://www.cnn.com/2019/12/10/media/the-irishman-netflix-viewership/index.html.

contribute to higher churn rates incurred by OTT services.[31] In response, to compete for viewers' attention, content distributors are incentivized to create and/or procure content and provide a wide range of content to users with near-instant access and at competitive prices, including by offering ad-supported tiers at lower prices.[32]

Many of these marketplace dynamics create benefits for consumers and industry participants. The fact that the audiovisual industry has moved from physical formats to OTT formats during recent decades is the result of innovation in the industry to adapt to new technologies and consumers' changing preferences for how they access content. The move to OTT has also helped combat digital piracy, although piracy continues to be a significant problem for the industry and is a source of competition for legal sources of audiovisual distribution.[33]

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[31] As of Q1 2024, Netflix had a monthly churn rate of two percent, Apple TV+ had eight percent churn, Amazon Prime had four percent churn, and Peacock had 8.7 percent churn. For additional churn rates for OTT services, see Scott Hurff, "Churn Rates for Streaming Services: How Sticky Are Hulu, Disney+, Netflix, and Apple TV+? (Updated Q1 2024), *Churnkey*, December 13, 2023, available at https://churnkey.co/blog/churn-rates-for-streaming-services/.

According to Parks Associates, between Q1 2020 and Q3 2022, the churn rate for OTT streaming services grew from 40 percent to 45 percent (defined as subscribers who cancelled service as a percentage of the subscriber base), largely driven by high churn rates in less popular services: "Today's streamers tend to subscribe to one or more foundational services—typically Netflix, Amazon Video, or Hulu—and then subscribe to three or more additional services each offering unique and differentiated material. Consumers hold on to the services that they use the most and jump among the others, paying for a program or season and then canceling when they are finished." See Parks Associates, "OTT streaming Trends to Watch in 2022," available at https://www.parksassociates.com/bento/shop/whitepapers/files/ParksAssoc-OTTStreamingTrends_2022-WP.pdf; Parks Associates, "Parks: Video Streaming Providers Battle 50% Churn," January 17, 2024, available at https://www.parksassociates.com/blogs/in-the-news/parks-video-streaming-providers-battle-50-churn.

[32] For example, Netflix currently offers an ad-supported tier at $6.99/month, which is less than half the price of its standard tier ($15.49/month). Similarly, Peacock offers an ad-supported tier at $7.99/month, and an ad-free tier at $13.99/month. See Netflix, "Plans and Pricing," available at https://help.netflix.com/en/node/24926; and Peacock, "Pick a Plan. Cancel Anytime," available at https://www.peacocktv.com/plans/all-monthly.

[33] U.S. Chamber of Commerce, "Impacts of Digital Piracy on the U.S. Economy," June 15, 2019, available at https://www.uschamber.com/technology/data-privacy/impacts-of-digital-piracy-on-the-u-s-economy; Brett Danaher, Michael D. Smith, and Rahul Telang, "Piracy Landscape Study: Analysis of Existing and Emerging Research Relevant to Intellectual Property Rights (IPR) Enforcement of Commercial-Scale Piracy," *USPTO Economic Working Paper No. 2020-02*, April 16, 2020, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3577670.

Short-form audiovisual content distributors, including, e.g., TikTok, YouTube, Facebook, and Instagram, also provide significant competition for consumer attention. These services have emerged over the last decade as prominent alternatives for consumers to obtain content. According to a *Variety VIP+* special report, "Hollywood needs to wake up to social video," referring to it as a "paradigm shift."[34] In just the two years between 2022 to 2024, the sum of average hours per day spent by users watching video on the top-five social media platforms increased from 7.63 hours to 10.23 hours.[35] Andrew Wallenstein, President and Chief Media Analyst of *Variety VIP+*, explains:

> More recently, the transformation has reached a height where the explosion of short-form video on social media is now competing more directly with content viewing on streaming services. […] Scripted content, gaming and now social video are all part of the same attention economy, each vying daily for consumer eyeballs. Entertainment companies must reckon with how intellectual property can thrive in this new paradigm, an increasingly fragmented media landscape.[36]

In sum, the growth of short-form content has provided additional ways in which consumers can enjoy content and has placed competitive pressure on the more traditional content distributors.[37]

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[34] Variety VIP+, "The Race to Replace TV: A deep-dive data exploration of the new viewing trends revving up U.S. screens," Special Report, First Edition, July 2024, available at https://read-vip.variety.com/html5/reader/production/default.aspx?pubname=&edid=a535829d-aadc-4265-8ade-05912388ed23, p. 2. Social video includes all time spent with online video activities on social network platforms (excluding YouTube) via any device.

[35] Id, pp. 8-9. Figures represent the sum of average hours that a user from each social media platform spends watching videos. It does not represent the average amount of time a typical user spends per day watching videos on social media. Specifically, 10.23 hours in 2024 represents the sum of average hours per day spent watching video on top-5 social media platforms: 2.48 hours per day by TikTok users; 2.46 hours per day by Instagram users; 2.28 hours per day by Facebook users; 2.08 hours per day by YouTube users; 0.93 hours per day by Discord users.

[36] Id., p. 2.

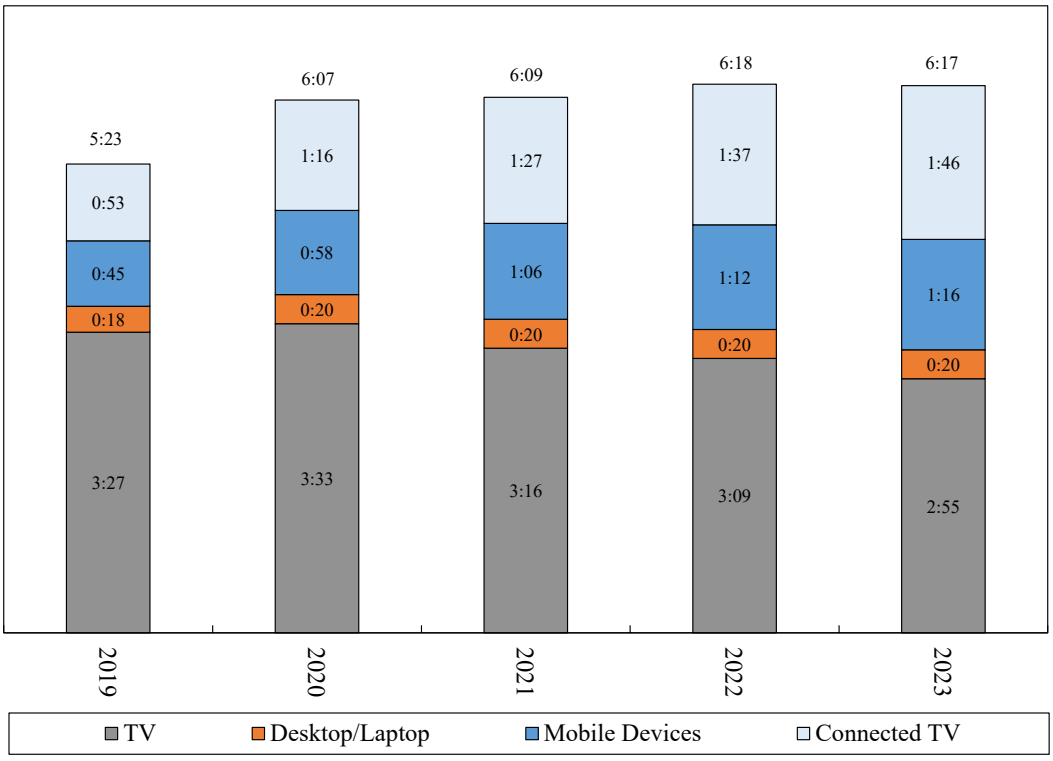
[37] See, e.g., John Koetsier, "Netflix vs TikTok: The Battle Between Long And Short," *Forbes,* May 17, 2022, available at https://www.forbes.com/sites/johnkoetsier/2022/05/17/netflix-vs-tiktok-the-battle-between-long-and-short/.

### B. Entry and Innovation in the Industry Have Brought New Products and Services to Consumers

The analysis below provides empirical evidence, based on multiple data sources documenting the market dynamics in the audiovisual industry, that entry and innovation in the industry have led to a material shift in the way audiovisual content is consumed by U.S. consumers. This shift includes both the devices on which audiovisual content is consumed and the OTT services that deliver audiovisual content to consumers. The data signal a dynamic marketplace that is undergoing change and bringing new, improved products and services to consumers.

The devices on which consumers access their entertainment is changing. The consumption of audiovisual media by U.S. adults on a mobile device increased from 45 minutes in 2019 to 76 minutes in 2023, and the consumption of audiovisual media by U.S. adults on connected TVs has doubled between 2019 and 2023. See figure below.

**Figure 1 – Average Time Spent Per Day With Video by U.S. Adults**




**Notes:** Time spent with each medium includes multitasking—e.g., one hour on a mobile phone while watching TV is counted as one hour for mobile phone and one hour for TV.

**Source:** Estimates by eMarketer.

The shift towards consuming audiovisual content on mobile devices is also apparent from the large amounts of wireless broadband being used for streaming services. Ericsson estimates that audiovisual apps represented over 40 percent of mobile traffic volume in North America.[38] A GSMA survey shows that the share of mobile internet users who engaged in watching "free online video" on at least a monthly basis increased from approximately 55 percent to approximately 70 percent between 2019 and 2022, and the share of those who do so on at least a weekly basis increased from approximately 45 percent to approximately 60 percent over the same period.[39] Mobile service providers recognize the growing demand for streaming audiovisual content on wireless networks and offer plans that facilitate these consumption habits.[40]

Consumers increasingly obtain content from OTT/internet-based streaming and social media. Between 2021 and 2023, the average time spent per day on OTT and social video has increased from about two hours per day to 2.50 hours per day, while time spent on traditional TV has decreased from about 3.27 hours per day to three hours per day.[41] Furthermore, a survey conducted by Hub Entertainment on audiovisual consumption habits indicated that

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[38] Ericsson Mobility Report, June 2023, available at https://www.ericsson.com/49dd9d/assets/local/reports-papers/mobility-report/documents/2023/ericsson-mobility-report-june-2023.pdf, pp. 16-17.

[39] GSMA, "The State of Mobile Internet Connectivity 2023," available at https://www.gsma.com/r/wp-content/uploads/2023/10/The-State-of-Mobile-Internet-Connectivity-Report-2023.pdf, p. 77.

[40] For example, T-Mobile notes that "[v]ideo is the number one way people use wireless data […]," and it offers "Binge On" to its subscribers, in which detectable video streaming is optimized for a subscriber's mobile device, allowing them to "watch up to three times more video using the same amount of high-speed data." Also, customers with qualifying plans can stream unlimited video from streaming services such as YouTube, Netflix, Hulu, Sling, and ESPN, among others, "without ever touching their high-speed data." See T-Mobile, "Unlimited video streaming with Binge On," available at https://www.t-mobile.com/tv-streaming/binge-on.

[41] Variety VIP+, "The Race to Replace TV: A deep-dive data exploration of the new viewing trends revving up U.S. screens," Special Report, First Edition, July 2024, available at https://read-vip.variety.com/html5/reader/production/default.aspx?pubname=&edid=a535829d-aadc-4265-8ade-05912388ed23, p. 7. The data is based on information from eMarketer, February 2024 Forecast, among U.S. adults 18+. Traditional TV includes all time spent watching TV live, digital video recorder (DVR) and other pre-recorded video (e.g., video downloaded from the internet but saved locally). Subscription OTT video includes all time spent watching video on subscription video on demand (SVOD) via any device. Social video includes all time spent with online video activities on social network platforms (excluding YouTube) via any device.

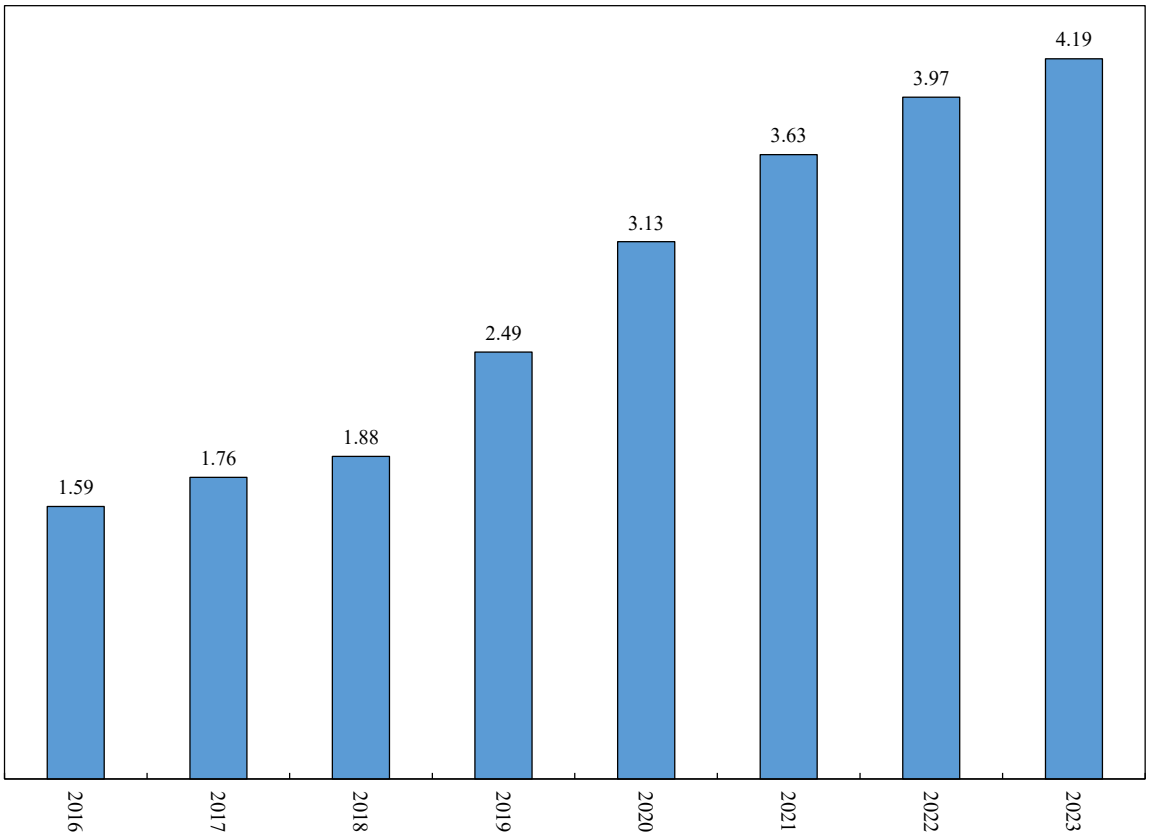
between 2022 and 2023, the share of respondents who reported spending less time watching "regular" TV shows and films due to watching non-premium online videos had increased from 55 percent to 58 percent for 13-24 year olds and from 29 percent to 36 percent for respondents ages 35 and over.[42] This is further evidence of share gains by new OTT options available in the marketplace relative to traditional distribution channels. This signals an increase in the number of ways in which consumers can access audiovisual content.

Additional evidence of a changing marketplace and consumer preferences is the continued shift towards obtaining audiovisual content from OTT services, as demonstrated by the average number of concurrent online video subscriptions per household in the United States, which grew from about 1.6 in 2016 to 4.2 in 2023.[43] See figure below.

[42] Variety VIP+, "The Race to Replace TV: A deep-dive data exploration of the new viewing trends revving up U.S. screens," Special Report, First Edition, July 2024, available at https://read-vip.variety.com/html5/reader/production/default.aspx?pubname=&edid=a535829d-aadc-4265-8ade-05912388ed23, p. 7. The original source is Hub Entertainment. The data is based on a survey fielded in December 2023 among U.S. respondents 13-74 with broadband access and who watch non-premium online video.

[43] Online video includes OTT video streaming services (e.g., Netflix and ESPN+) and vMVPDs (e.g., YouTube TV and Sling TV).

**Figure 2 – Average Online Subscriptions per Household**




**Notes:** Represents the average number of concurrent online video subscription services per online video household.

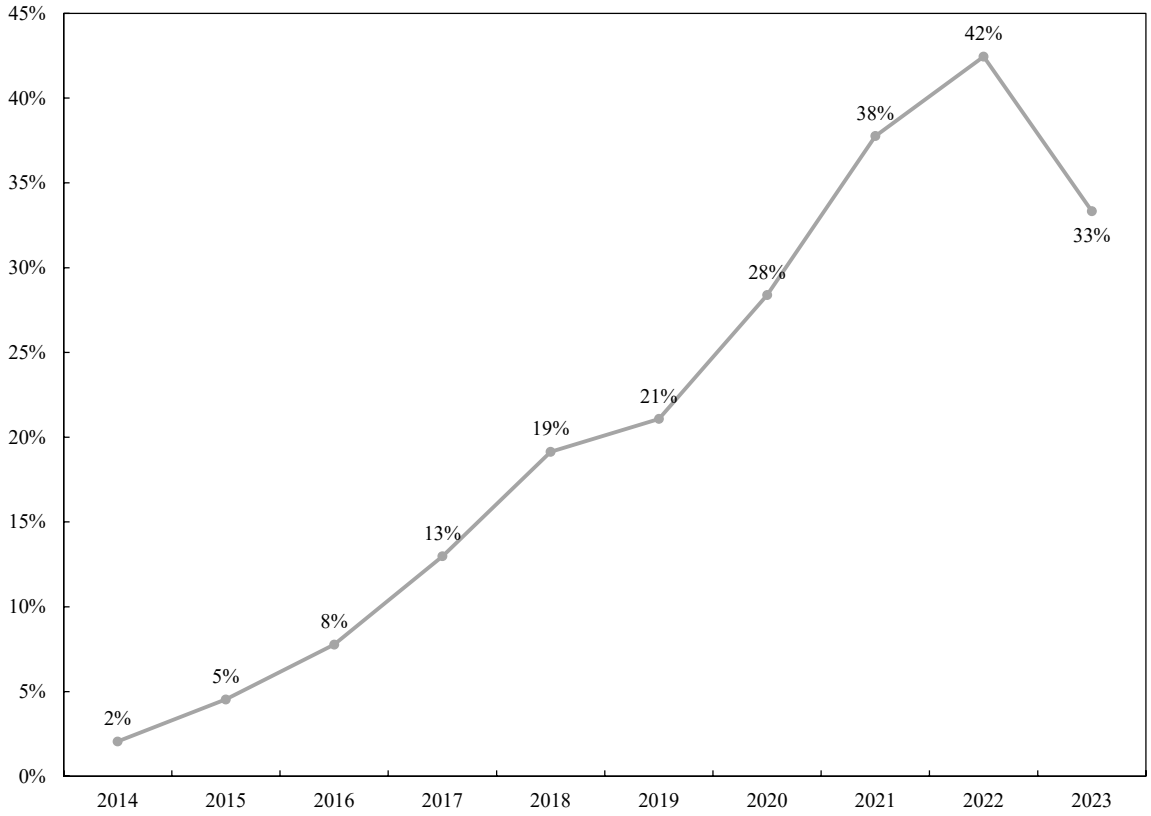
**Source:** Omdia.

The shift towards OTT services is also apparent from the shift towards production of TV content for OTT services, which has increased dramatically. Between 2014 and 2022, the share of TV shows released via OTT services (i.e., streaming services) increased from 2 percent to 42 percent, with some decline in the share in 2023 due to the impact of the labor strikes on scripted content.[44] Moreover, the estimated costs that streaming services—Netflix, Apple TV+, Paramount+, Peacock, Max, Disney+, Hulu, and Amazon Prime Video—incur each year to create or acquire content has increased substantially from $6.2 billion in 2014 to $43.0 billion in 2022, representing a nearly 7-fold increase. See figures below. This demonstrates the significant amount of investments in content creation and procurement by

[44] Traditional TV unscripted content release volume was steady in 2023.

the streaming services, resulting in increased amount and variety of content available to consumers.

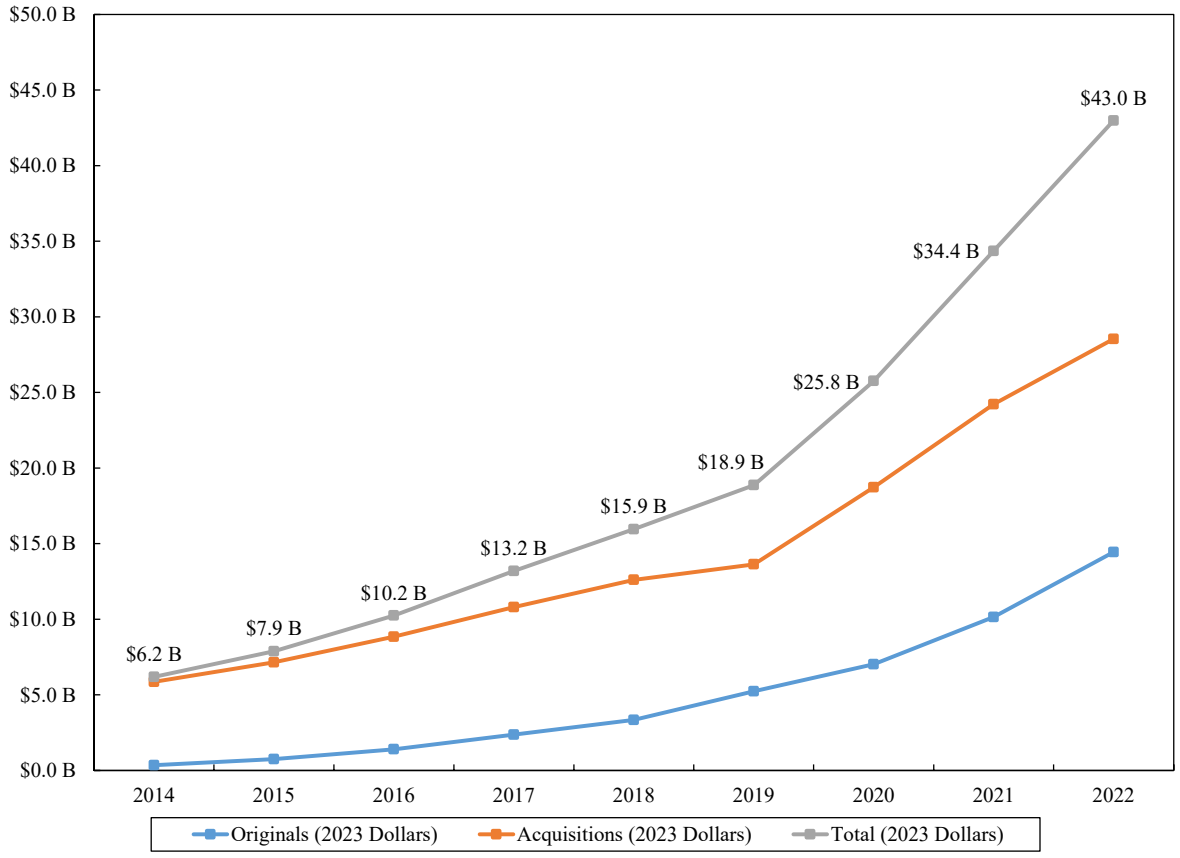
**Figure 3 – OTT Digital Releases as a Share of All TV Releases**




**Notes:** Share of digital releases is calculated by dividing the number of digital releases by the total number of traditional and digital releases.

**Source:** MPA.

**Figure 4 – Streaming Platform Content Costs (2023 Dollars)**




**Notes:** Analysis includes Netflix, Paramount+, Apple TV+, Peacock, HBO Max/Max, Amazon Prime Video, Disney+, and Hulu SVOD. Costs are adjusted to 2023 dollars using U.S. Bureau of Labor Statistics CPI All Items (excl. food & energy).

**Source:** S&P Capital IQ Pro; U.S. Bureau of Labor Statistics (series CUUR0000SA0L1E).

Finally, Nielsen reports that streaming services' share of total TV usage has increased over time. Between May 2021 and April 2024, streaming services' share of total TV usage increased from 28 percent to 38.4 percent.[45] In May 2021, Nielsen noted that only five

[45] Streaming services reported by Nielsen include Netflix, YouTube, Hulu, Amazon Prime, Disney+, Tubi, Max, Roku Channel, Peacock, Paramount+, and Pluto. See Nielsen, "Amid the fragmented TV landscape, time spent with content is the best planning data there is," January 2024, available at https://www.nielsen.com/insights/2024/amid-the-fragmented-tv-landscape-time-spent-with-content-is-the-best-planning-data-there-is/; and Nielsen, "Nielsen Launches The Media Distributor Gauge, First Convergent TV Comparison of its Kind," May 2024, available at https://www.nielsen.com/news-center/2024/nielsen-launches-the-media-distributor-gauge-first-convergent-tv-comparison-of-its-kind/.

streaming services accounted for more than one percent of total TV usage.[46] By August 2024, Nielsen reported that this figure increased to more than ten streaming services.[47] YouTube's share of total TV usage increased from 6 percent to more than 10 percent during this period, overtaking Netflix's share of 7.9 percent in August 2024 and making it the service with the largest share of streaming TV viewing in the United States.[48]

### C. Additional Metrics on Output in the Audiovisual Industry

The empirical evidence on output and quality—through the volume, variety, and diversity of audiovisual content, especially on OTT services—shows that the audiovisual industry is generating more output and higher quality content over time, which is being consumed by U.S. consumers who are spending more time viewing audiovisual content. The audiovisual industry is also releasing more films over time. In this section, I present additional data on output as measured through consumer transactions at movie theaters and for physical media and through supply-side measures such as the number of titles produced.

U.S. theater admissions have declined over the last two decades, with a precipitous drop in admissions during the COVID-19 pandemic, which saw theaters close doors as a result of lockdowns.[49] See figure below. Theaters have also faced competition from new

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[46] Nielsen, "Amid the fragmented TV landscape, time spent with content is the best planning data there is," January 2024, available at https://www.nielsen.com/insights/2024/amid-the-fragmented-tv-landscape-time-spent-with-content-is-the-best-planning-data-there-is/.

[47] Nielsen, "The Gauge – TV viewing trends in the U.S.," available at https://www.nielsen.com/data-center/the-gauge/.

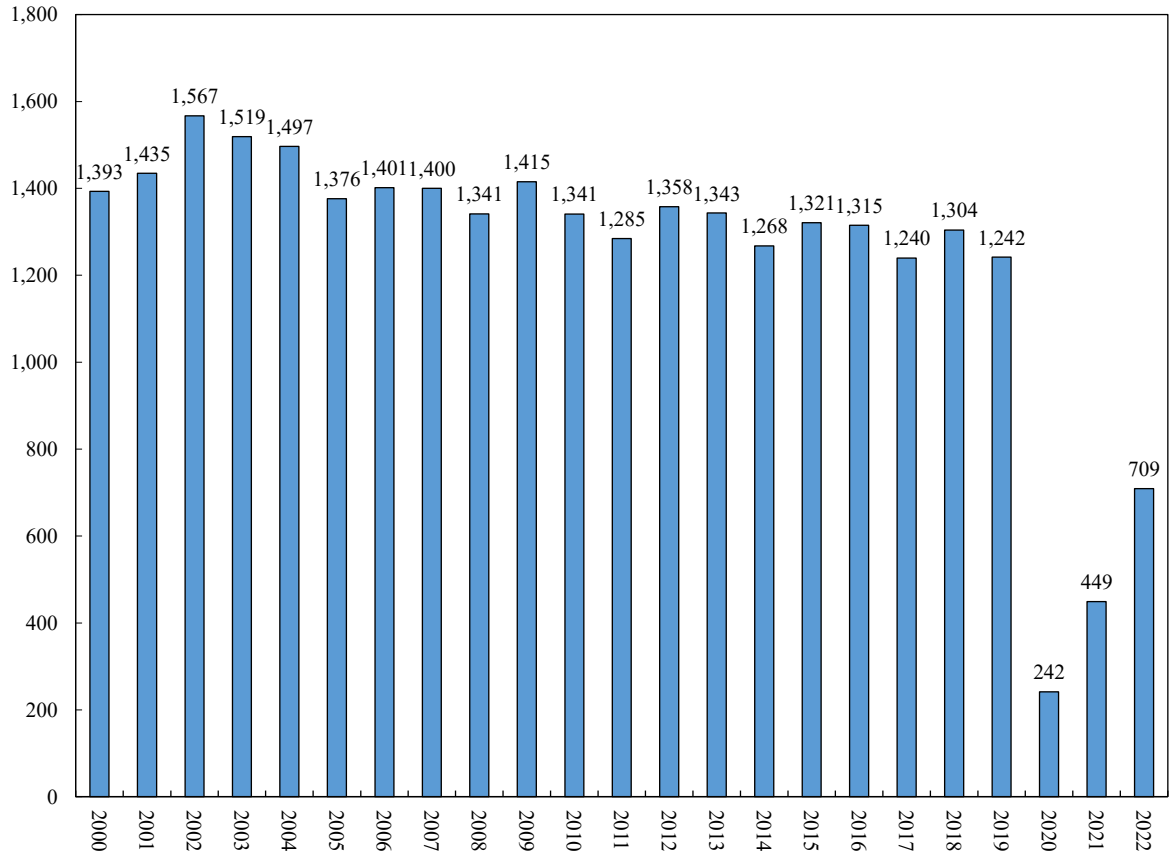
[48] Nielsen, "Amid the fragmented TV landscape, time spent with content is the best planning data there is," January 2024, available at https://www.nielsen.com/insights/2024/amid-the-fragmented-tv-landscape-time-spent-with-content-is-the-best-planning-data-there-is/; Nielsen, "Nielsen Launches The Media Distributor Gauge, First Convergent TV Comparison of its Kind," May 2024, available at https://www.nielsen.com/news-center/2024/nielsen-launches-the-media-distributor-gauge-first-convergent-tv-comparison-of-its-kind/; Nielsen, "The Guage – TV viewing trends in the U.S.," available at https://www.nielsen.com/data-center/the-gauge/.

Note that streaming TV usage does not include short-form and user-generated content, which comprises a large majority of content consumed on YouTube.

[49] Ryan Faughnder, "AMC and Regal close all U.S. theaters amid coronavirus crisis," *Los Angeles Times,* March 16, 2020, available at https://www.latimes.com/entertainment-arts/business/story/2020-03-16/as-l-a-theaters-close-due-to-coronavirus-amc-reduces-capacity-to-50.

online digital formats for consuming audiovisual content, which, as discussed previously, have increased substantially over the past two decades. This has led to a decline in the consumption of motion picture content at U.S. theaters that is offset to some degree by increasing consumption of content in other sectors of the audiovisual industry.

**Figure 5 – U.S./Canada Theater Admissions (millions)**



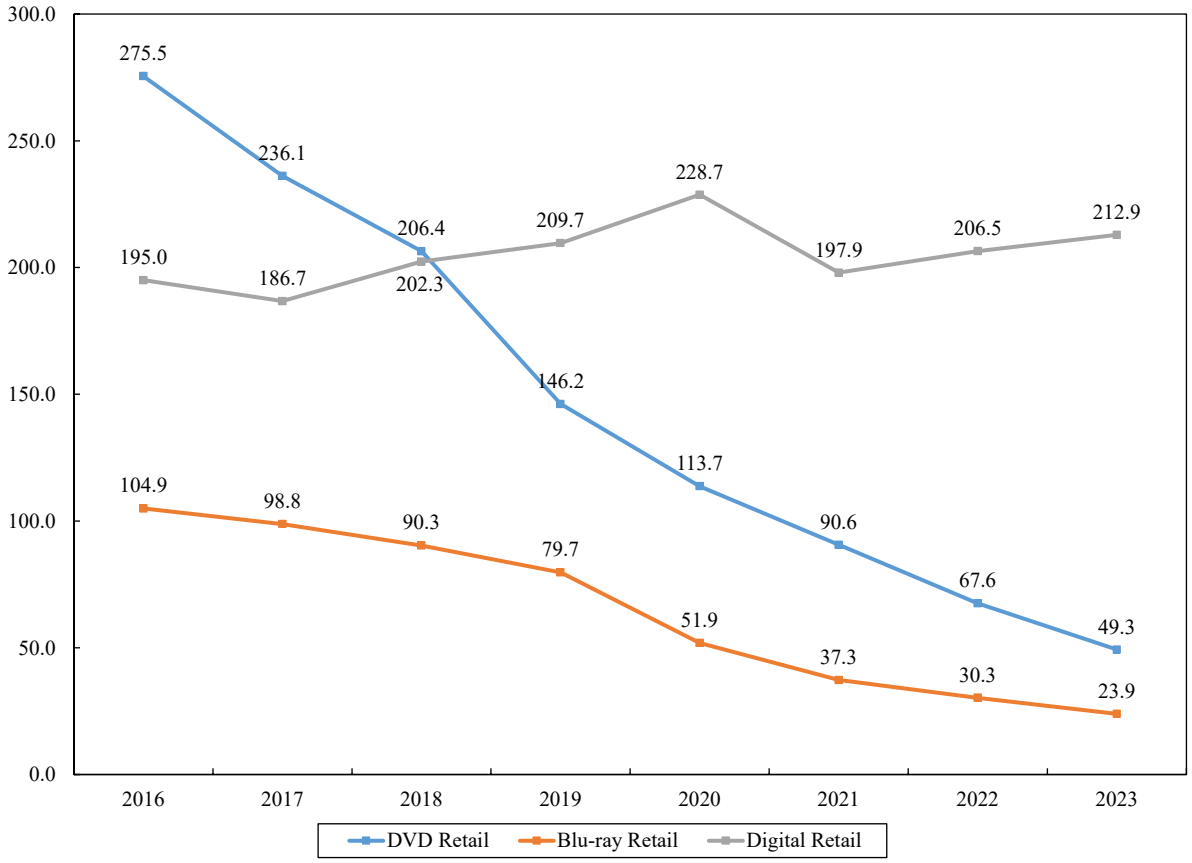

**Notes:** Theater admissions are calculated as Box Office divided by Average Ticket Prices.

**Sources:** Comscore (Box Office); National Association of Theater Owners (Average Ticket Prices).

The substitution by U.S. consumers from legacy formats to newer formats is evidenced by DVD/Blu-ray and digital forms of purchasing and renting content, such as motion pictures. Between 2016 and 2023, physical DVD and Blu-ray transactions declined, while the number of digital transactions increased. The same trends are seen in rental activity. Over time, the number of physical DVD and Blu-ray rentals has decreased, while digital

rentals have increased. See figures below. Retail and rental offerings are facing competition from streaming services and other OTT service offerings.

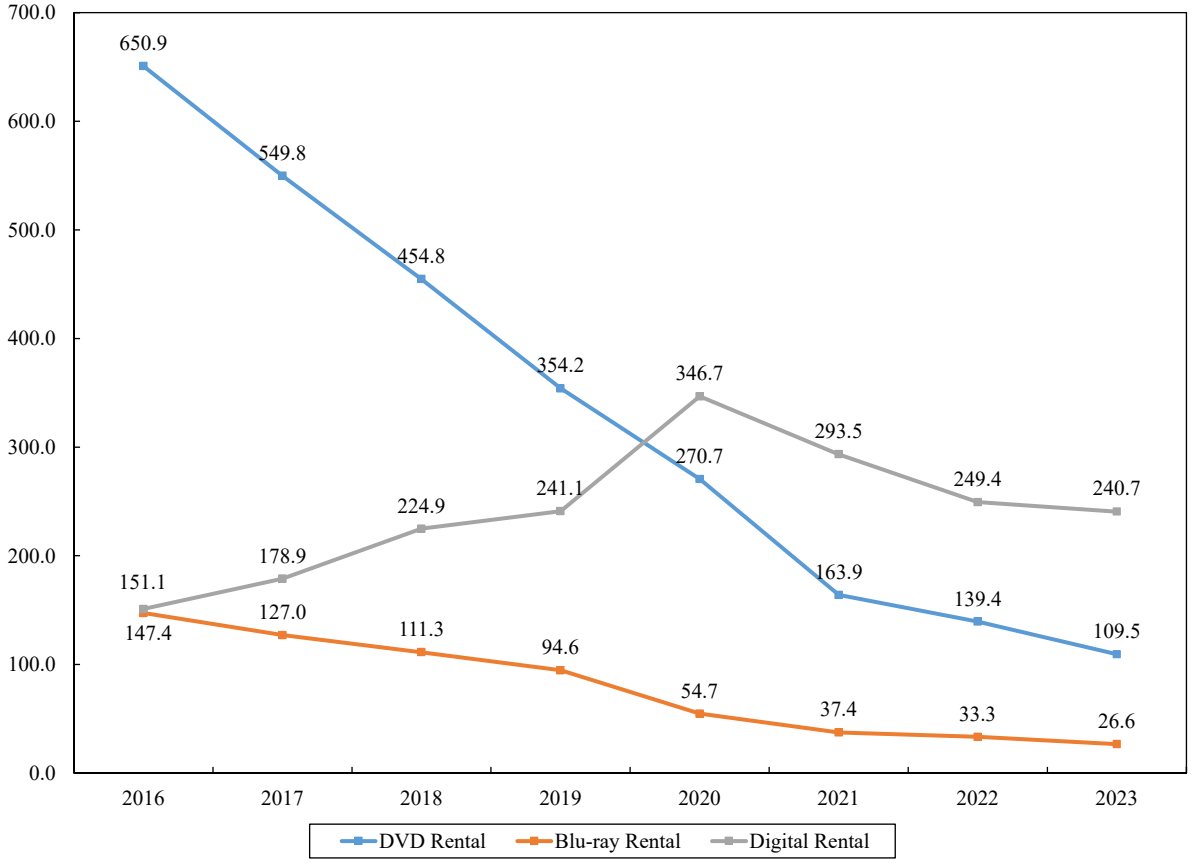
**Figure 6 – Number of Movie and TV Retail Transactions (millions)**




**Notes:** Digital retail purchase is a method of selling digital content that gives the customer "ownership." Content may be downloaded or streamed. Digital purchase is also known as "download-to-own" (DTO), "electronic sell-through" (EST) and "digital sell through." Digital transactions refer to the sum of single episodes and bundles (not episodes within bundles) sold.

**Source:** Omdia.

**Figure 7 – Number of Movie and TV Rental Transactions (millions)**




**Notes:** Digital rental is a method of renting digital content whereby customers choose content on an a-la-carte basis and pay to watch it for a limited period. Digital rental is also known as pay-per-view (PPV) and VOD. PPV content can be downloaded or streamed. Digital rental numbers exclude consumption within pay-TV set-top box (STB) or pay-TV VOD. Digital transactions refer to the sum of single episodes and bundles (not episodes within bundles) rented.

**Source:** Omdia.

As described earlier, consumers benefit from a highly dynamic marketplace that provides alternative, more convenient ways to consume audiovisual content—in particular online, or OTT, access to that content. As a result, online audiovisual consumption has grown substantially. Between 2016 and 2023, the number of online video subscriptions has quintupled from 115.5 million accounts to nearly 471 million accounts.[50] During the same

[50] Online audiovisual includes OTT video streaming services (e.g., Netflix and ESPN+) and vMVPDs (e.g., YouTube TV and Sling TV). Subscription refers to an active account to a subscription service, excluding free trials. For standalone services, this number represents active paying accounts at the end

period, the number of online movie views and transactions grew from about 10 million per year to almost 45 million per year, and the number of online series views and transactions grew from 79 million to over 390 million per year. And the number of online video households increased from approximately 73 million in 2016 to over 112 million in 2023. See figure below. The rapid reallocation of shares from traditional physical media and legacy media outlets to new technologies and new entrants is a key sign of healthy competition in this industry.[51]

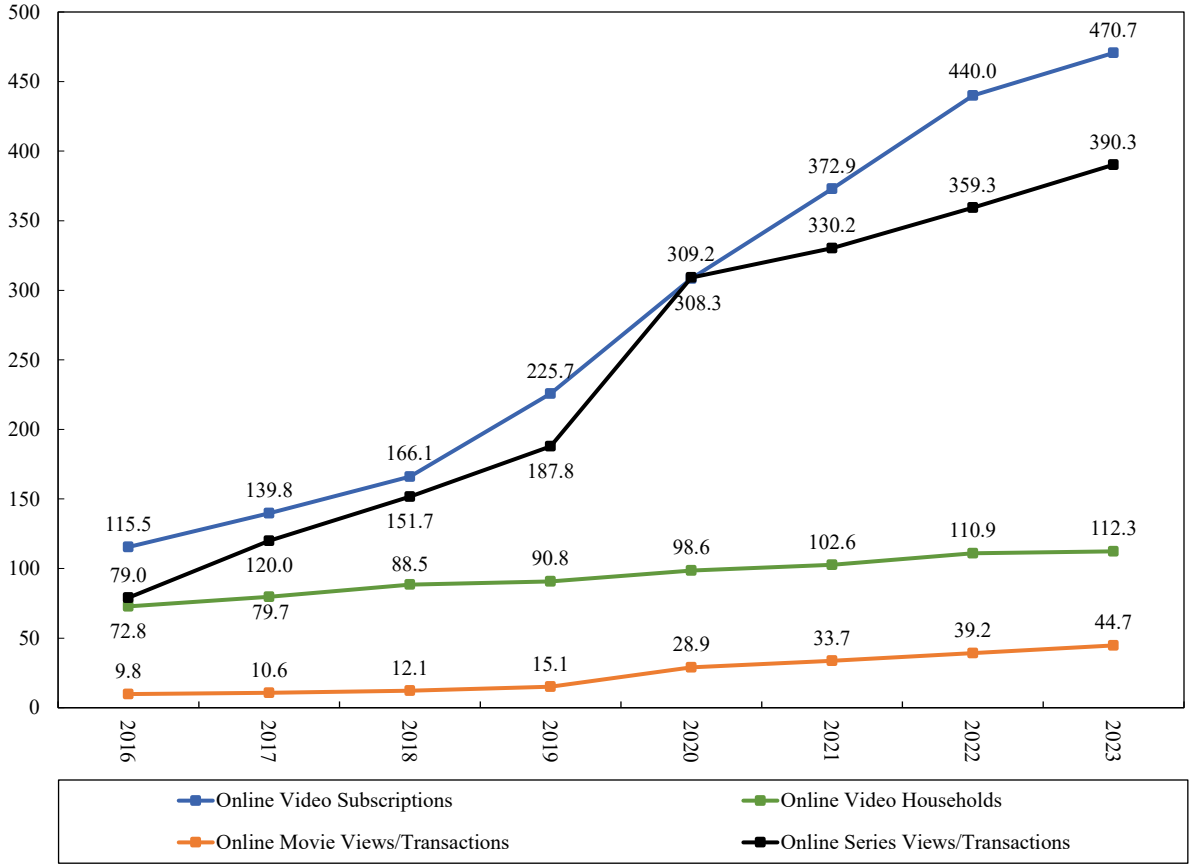
of the period. For bundled services, this number represents an account that has been used at least once in the last month of the period.

Online video households are the total number of households that subscribe and pay for one or more online video subscription services. It includes online channels and vMVPDs. It excludes advertising-based services that do not include a subscription fee.

Views/Transactions are the total transactional, ad-supported, and subscription views and transactions of series/movie content across online video subscription services. Views are calculated per month and include content delivered by near video on demand (nVOD), video on demand (VOD), internet protocol video on demand (IPVOD), and push video on demand (push-VOD). It excludes viewing of OTT-delivered content on a set-top box or connected TV.

[51] For estimates of the declines in MVPD subscribership, see Colin Dixon, "MVPD's lost 2M subs in Q1 2024. Can SVOD bundles stop the rot?" *nScreenMedia,* May 20, 2024, available at https://nscreenmedia.com/mvpd-vmvpd-q1-2024/. Between 2016 and 2024 Q1, the number of U.S. households with cable, satellite, or telco TV declined from approximately 99 million to approximately 55 million, representing a decline of 44 percent during the period. See also Nielsen, "Streaming claims largest piece of TV viewing pie in July," August 2022, available at https://www.nielsen.com/insights/2022/streaming-claims-largest-piece-of-tv-viewing-pie-in-july/. Streaming services' share of U.S. TV viewership increased from 28.3 percent to 34.8 percent between July 2021 and July 2022, while cable and broadcast shares declined within the same period.

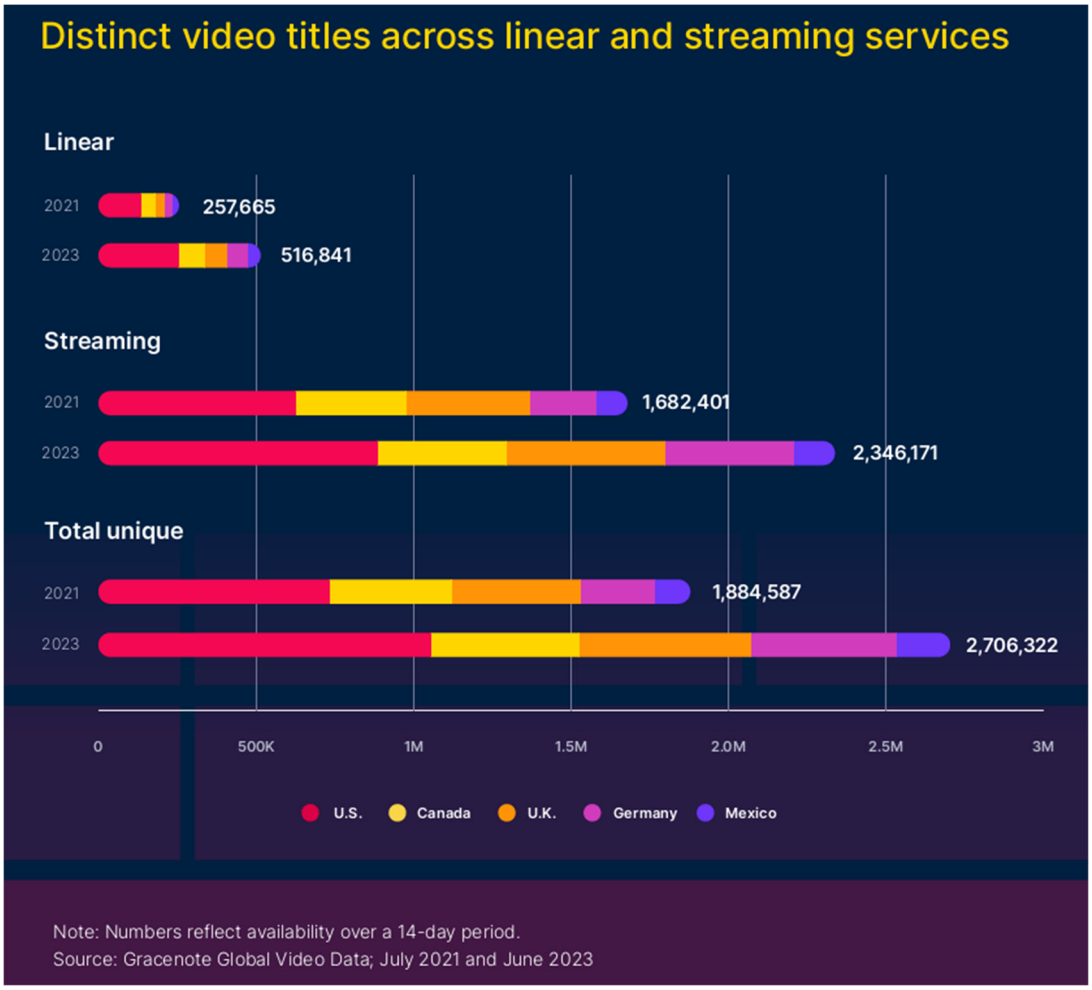
**Figure 8 – Participation in Online Video (millions)**




**Source:** Omdia.

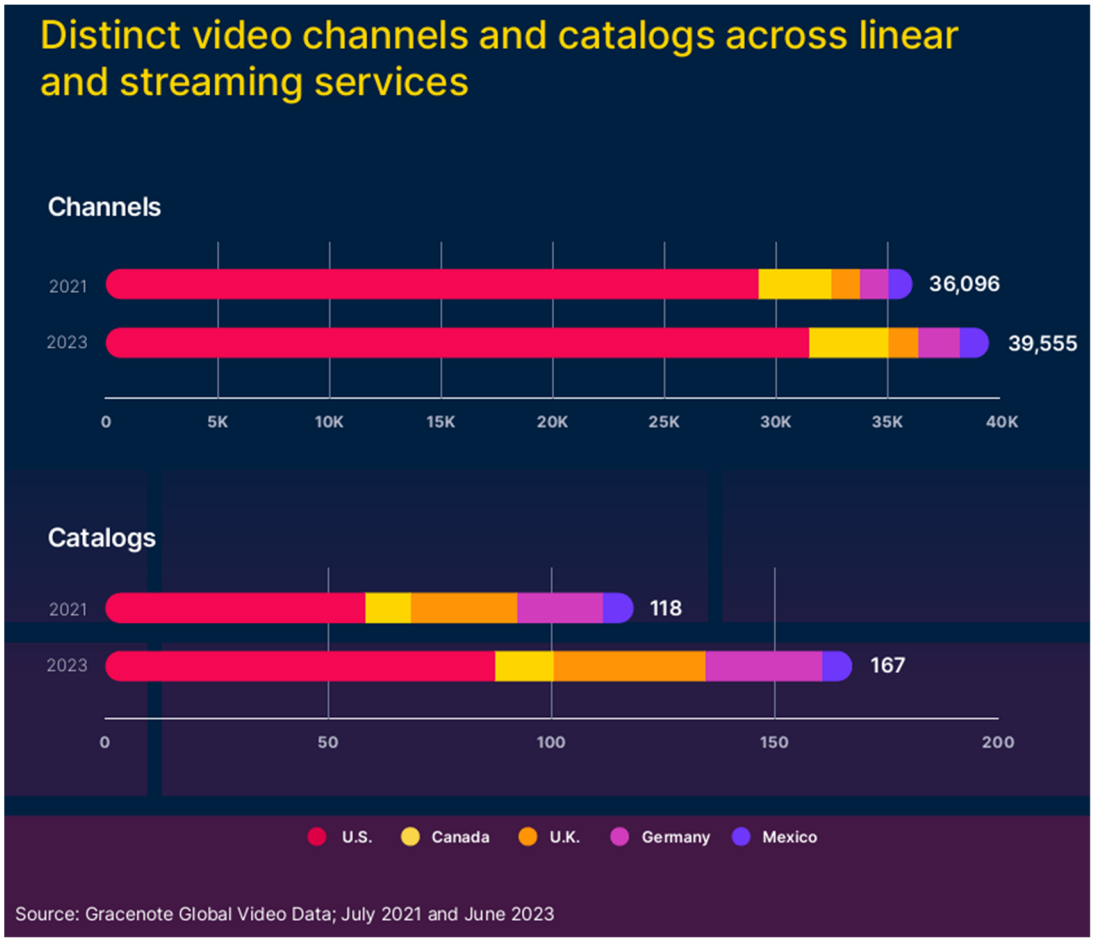
Another way to assess the choices available to consumers is by examining the amount and variety of content available to consumers in the marketplace. During just the two years between 2021 and 2023, the number of distinct audiovisual titles increased dramatically across both linear and streaming services. The number of distinct video channels and catalogs across both linear and streaming services also increased substantially between 2021 and 2023. See figures below reproduced from Nielsen.

**Figure 9 – Distinct Video Titles**




**Source:** Nielsen, "State of Play," 2023, available at https://www.nielsen.com/insights/2023/data-driven-personalization-2023-state-of-play-report/, p. 3.

**Figure 10 – Distinct Video Channels and Catalogs**




**Source:** Nielsen, "State of Play," 2023, available at https://www.nielsen.com/insights/2023/data-driven-personalization-2023-state-of-play-report/, p. 6.

Moreover, the number of OTT audiovisual content sites available in the United States has grown substantially. Between 2012 and 2024, the number of OTT audiovisual content sites available has nearly tripled from 76 to 211.[52] See figure below. These counts include a large variety of OTT sites from which consumers can access audiovisual content, such as YouTube TV, DirecTV Stream, Sling TV, fuboTV, Netflix, Hulu, Apple TV+, Amazon

[52] This represents the unique number of streaming sites with film or TV content accessible in the United States. These sites include subscription-based sites, electronic sell-through, advertising video-on-demand, and user-generated content sites (e.g., Facebook). Subscription and advertising video-on-demand sites make up the majority of total unique sites. Sites are counted by individual URLs (e.g., aetv.com, play.aetv.com, and aecrimecentral.com count as three separate sites), and are based on MPA's criteria for counting a site—the site has movies and/or TV content. The counts exclude sports-only sites, such as NFL Game Pass.

Prime Video, Disney+, Max, Paramount+, Tubi, and Peacock, as well as more niche OTT services, and video-sharing and social media sites such as YouTube, Twitch, Facebook, and TikTok. Streaming services have enhanced quality for consumers by offering 4K content,[53] HDR technology,[54] advanced sound processing (e.g., Dolby Atmos),[55] content personalization algorithms,[56] and improved user interfaces.[57]

[53] Netflix's first 4K content became available in 2014. Since then, all Netflix original content has been produced in 4K. See Adrian Pennington, "Does Netflix's 4K-Only Rule Limit the Creativity of Its Originals?," *NAB Amplify*, July 13, 2021, available at https://amplify.nabshow.com/articles/does-netflixs-4k-only-rule-limit-the-creativity-of-its-originals/.

HBO Max (now rebranded as "Max") added 4K content in 2020. See Chris Welch, "Wonder Woman 1984 will be the first title that HBO Max streams in 4K," *The Verge*, December 1, 2020, available at https://www.theverge.com/2020/12/1/21813364/wonder-woman-1984-4k-ultra-hd-dolby-vision-atmos-announced.

Many other streaming services also offer 4K content. See, for example, Kourtnee Jackson, "Best Streaming Service for 4K Content," *CNET*, August 4, 2024, available at https://www.cnet.com/tech/services-and-software/best-streaming-services-for-4k-content/.

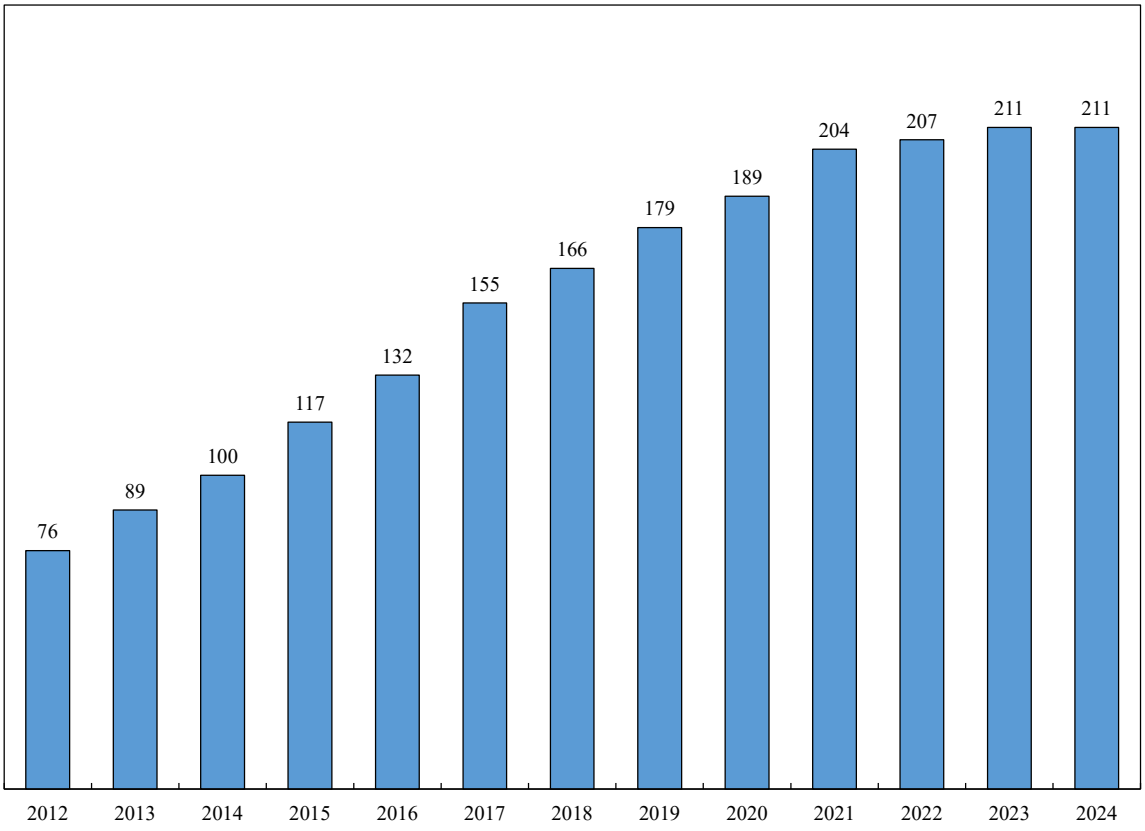
[54] See, for example, Al Griffin, "Netflix quietly rolled out an HDR upgrade for 4K TVs – here are the details," *Techradar*, December 1, 2023, available at https://www.techradar.com/televisions/netflix-quietly-rolled-out-an-hdr-upgrade-for-4k-tvs-here-are-the-details; Apple, "About 4K, HDR, HDR10+, and Dolby Vision on your Apple TV 4K," available at https://support.apple.com/en-us/102339.

[55] Dolby, "Where to watch content in Dolby Atmos," available at https://www.dolby.com/experience/home-entertainment/faqs/where-to-watch-content-in-dolby-atmos/.

[56] Netflix, "How Netflix's Recommendations System Works," available at https://help.netflix.com/en/node/100639; Hulu, "Personalization Features on Hulu," available at https://help.hulu.com/article/hulu-personalized-recommendations.

[57] Todd Spangler, "Amazon Is Giving Prime Video's User Interface a Much-Needed Redesign," *Variety*, July 18, 2022, available at https://variety.com/2022/digital/news/amazon-prime-video-redesign-user-interface-1235317952/.

**Figure 11 – Number of Film/TV Unique Sites, United States**




**Notes:** 2024 reflects data as of Q1 2024. Website counts excludes all websites with a general content focus of "Sport" or "Sports." Social media websites (Facebook, Google, TikTok, Twitch, and YouTube) are included.

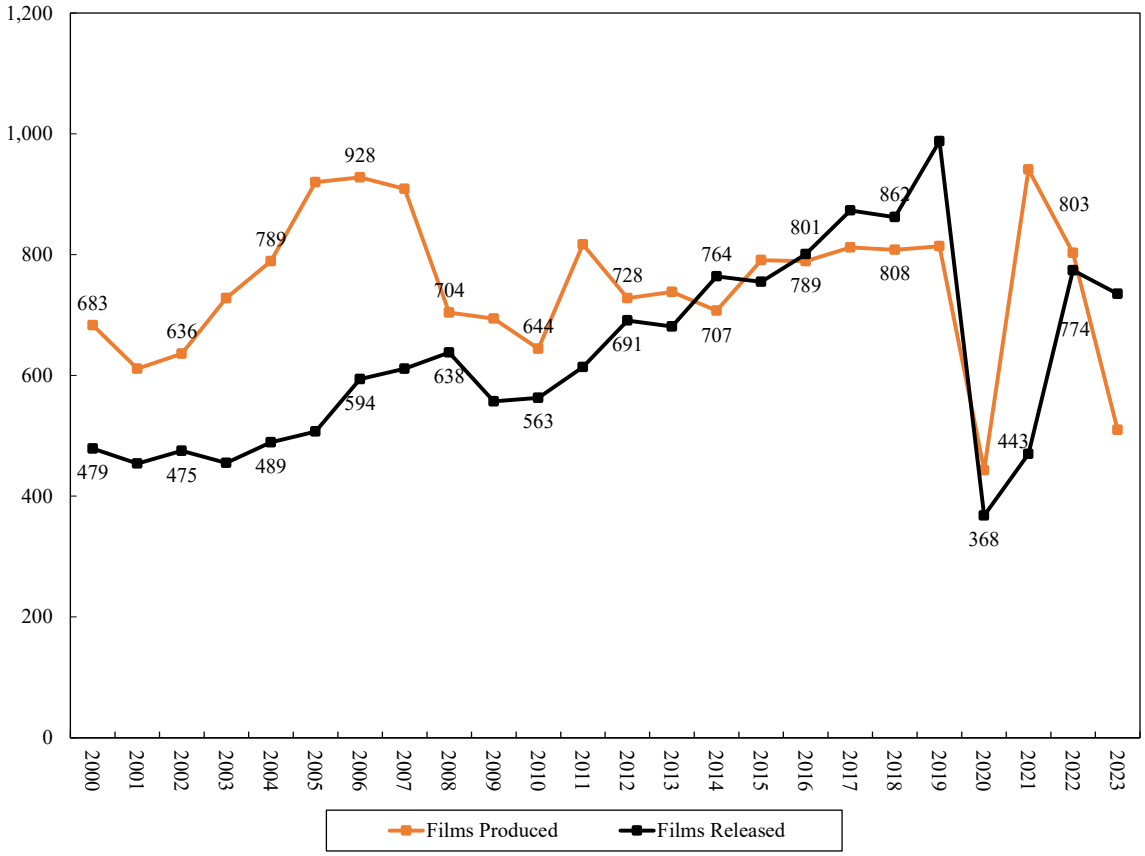
**Source:** Compass Lexecon and MPA analysis of Omdia data.

The number of motion picture films produced, which includes films that were intended to be released in theaters or on streaming services, increased between 2000 and 2007, but suffered during the Great Recession that started in 2008, and declined substantially during the COVID-19 pandemic.[58] Films released in the United States, which include films shown in theaters for the first time in a given year, and re-releases, generally increased from 2000 to

[58] Figures are based on data collected by MPA. Feature films entering production reflect full-length feature films in English that began production in the reported year by a U.S. production company (including co-productions). The counts include films that were made for or by an online video service, but do not include student films, documentaries, films created for straight-to-DVD or Blu-ray release.

2019, but also declined substantially during the COVID-19 pandemic.[59] There was also a marked decline in films produced and released in 2023 due to the labor strikes. See figure below.

**Figure 12 – Films Produced & Released**




**Notes:** Films released includes both new and reissued films.

**Sources:** Comscore; MPA.

The amount of content produced generally has increased over time. The number of scripted original series, total original series, and online exclusive films increased between

[59] Figures are based on data reported by Comscore – Box Office Essentials. It includes all titles that opened and earned any studio reported U.S./Canada box office revenue in theaters in the year. Historical data is regularly updated by Comscore. New feature films include films released domestically for the first time, while re-releases include any film released for the first time in previous years including anniversary releases and double-features. Non-feature films include Oscar shorts, TV shows, and event showings. Films produced and released are not a matched dataset. For example, films released includes international films released in the United States and films produced includes films that have not yet released in theaters, including films made for streaming services.

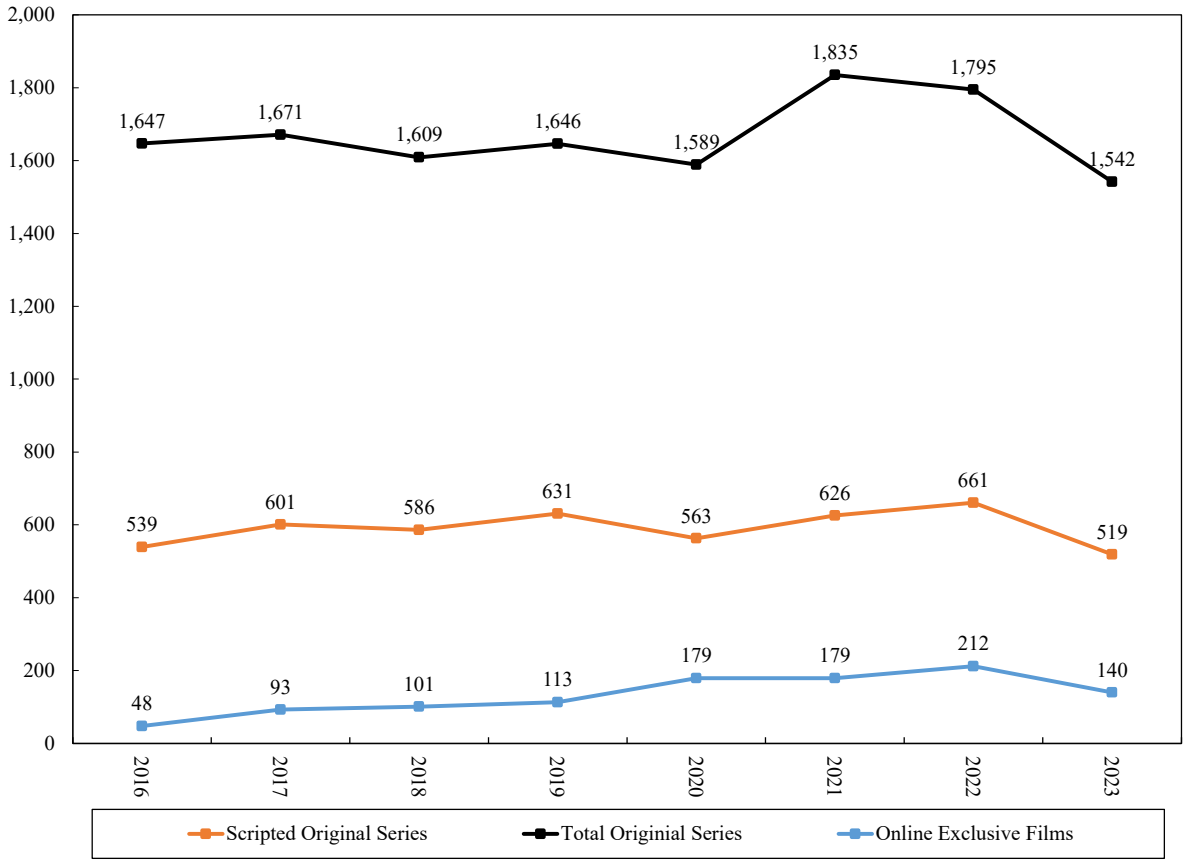
2016 and 2022.[60] However, due to the 2023 labor strikes, the number of series and online exclusive films that were produced and distributed declined. See figure below.

[60] Figures are based on data collected by MPA. Scripted original series are full-length original scripted series in the English language released in the reported year by a U.S. production company (including co-productions). These estimates cover broadcast, cable, and online outlets. They exclude library, daytime dramas, one-episode specials, non-English language/English-dubbed, children's programs, and short-form content (<15 mins.). Estimates are compiled based on a number of sources, such as MPA member studios, film offices, and third-party sources, including Ampere Analysis and Variety Insight.

Total original series are full-length original scripted and unscripted series in the English language released in the reported year by a U.S. production company (including co-productions). Compiled based on a number of sources, including MPA member studios, film offices, and third-party sources, including Ampere Analysis and Variety Insight. In addition to scripted original series, these estimates include daytime dramas, children's programs, and unscripted series including news and talk shows. Multiple seasons of a series in one year are counted only once.

Online exclusive films are full-length (greater than 70 minutes) original films that were released exclusively in the United States on the following streaming services: Amazon Prime Video, Apple TV+, Discovery+, Disney+, Hulu, Max, Netflix, Paramount+, Peacock, and Shudder. Films with any theatrical release, including limited release, are not included.

**Figure 13 – Original Series and Online Films Released**




**Source:** MPA.

Finally, there is a vast amount of short-form audiovisual content available to consumers. As described earlier, such short-form content is increasingly becoming an important aspect of the audiovisual consumption experience for consumers. Because users can generate and post their own content, the number of short-form videos released on social media platforms and OTT video-sharing sites is significantly higher than that of long-form content released through streaming services or theaters. One source estimates that about 34

million videos are posted on TikTok on a daily basis.[61] Similarly, another source estimates that there are currently 14 billion public videos available on YouTube.[62]

### D. Prices in the Audiovisual Industry Are Consistent with Pricing Expected in a Dynamic and Highly Competitive Industry

Another outcome to examine in an assessment of the competitive health of an industry is pricing to consumers. In analyzing prices, it is important to account for changing quality, technology, and investment to quantify the full outcome for consumers. Economists typically use the metric of consumer welfare to balance the effects of changing prices, quality, and technology. While a full consumer welfare analysis is outside the scope of this report, the analysis presented below shows that prices in real terms in the audiovisual industry—including Blu-ray and DVD, digital transactions, streaming services, and MVPDs—are consistent with pricing expected in a dynamic and highly competitive industry. Several of the most prominent types of video content are free to consumers, including broadcast television, free ad-supported streaming services like Pluto and Tubi, and YouTube.

We begin with one area where prices have increased. Movie theater ticket prices in real terms have increased by under one percent per year between 2000 and 2022. See figure below. However, over time, the theater experience for consumers has changed with innovative viewing formats, such as 3D viewing experiences and premium large-format viewing experiences (e.g., IMAX).[63] Improved theater experiences and higher quality

[61] Raj Vardhman and Florence Desiata, "13 Insightful Statistics on How Many Videos are Uploaded to TikTok Daily," *Tech Jury,* November 17, 2023, available at https://techjury.net/blog/how-many-videos-are-uploaded-to-tiktok-daily/.

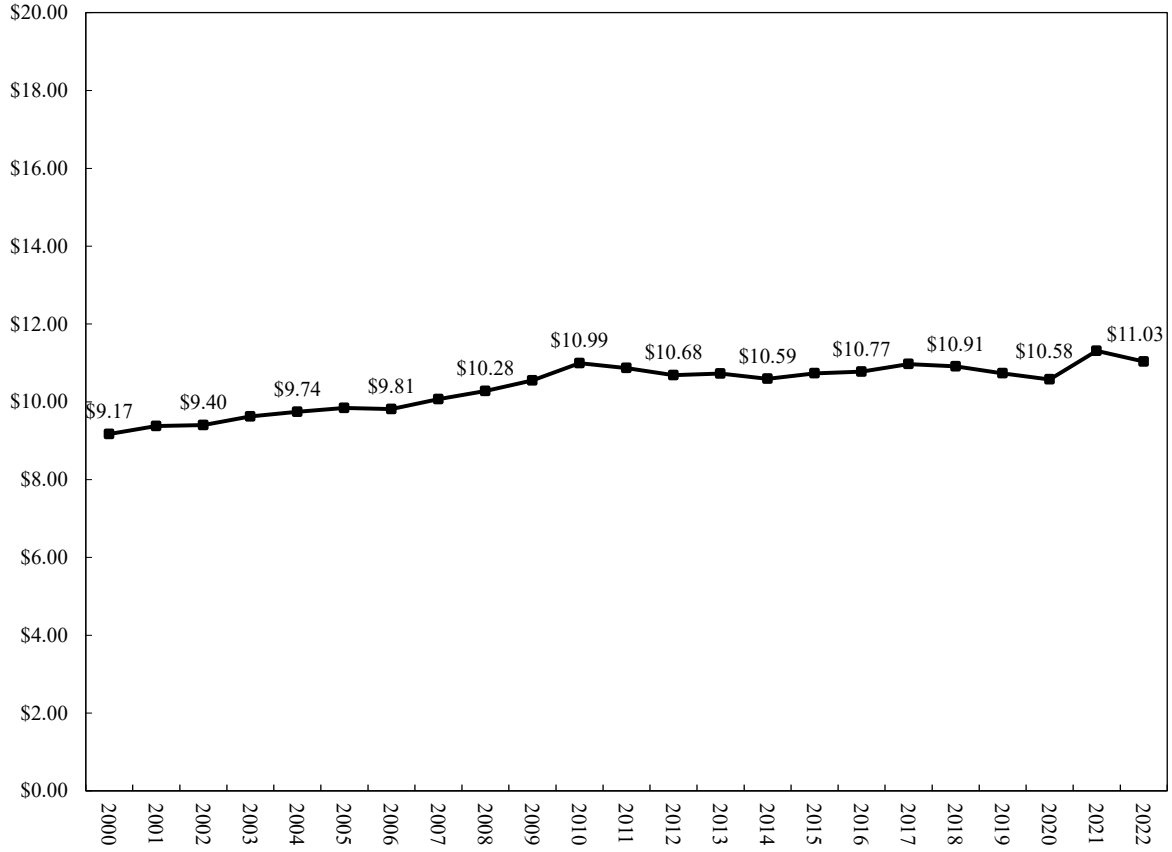
[62] Ryan McGrady, "What We Discovered on 'Deep YouTube'," *The Atlantic,* January 26, 2024, available at https://www.theatlantic.com/technology/archive/2024/01/how-many-videos-youtube-research/677250/.

[63] Filmgrail, "Cinema Experience Reimagined: Engaging the Modern Audience," December 6, 2023, available at https://filmgrail.com/blog/cinema-experience-reimagined-engaging-the-modern-audience/. See also, Daniel Loria, CinemaCon 2022: Tech Providers Innovate Beyond the Pandemic, *Box Office,* April 26, 2022, available at https://www.boxofficepro.com/innovating-beyond-the-pandemic-cinema-technology-providers-are-ready-to-meet-audience-demand-with-the-industrys-latest-innovations/; Sergio Julian Gomez, "5 technologies that will mark (or not) the future of movie theaters," *Panorama Audiovisual.com*, June 9, 2022, available at https://www.panoramaaudiovisual.com/en/2022/06/09/5-tecnologias-marcaran-futuro-salas-cine/ (discussing various technological advancements that has helped improved movie theatre experiences, such as 4DX, LED projectors, High Frame Rate scenes).

production of motion pictures should be taken into account when examining movie theater ticket prices over time. Although real theater prices have increased slightly, a full analysis of quality-adjusted theater prices would account for changing quality and declining demand due to improved at-home viewing experience from low-cost, large-screen, high-definition television sets.[64]

[64] Between January 2014 and December 2023, CPI data shows that the price of televisions decreased by almost 75 percent. (Source: Bureau of Labor Statistics, Televisions, U.S. city average, all urban, seasonally adjusted (series CUSR0000SERA01).) The trend towards large TV screens—namely one in every five produced worldwide measuring 60 inches or larger—is partly attributable to consumers "mimic[king] the cinema experience while in the comfort of [their] own home" especially when combined with the availability of multiple streaming services. See "Why TV Screens Are Going Extra Large," *Wired Insider* (originally published by *Wired UK*), available at https://www.wired.com/sponsored/story/why-tv-screens-are-going-extra-large/. Omdia reports that the weighted average size of televisions had grown to 52 inches by September 2023. See David Hsieh, "The weighted average size of shipped LCD TV displays shifted to 52 inches in September 2023," *Omdia*, November 8, 2023, available at https://omdia.tech.informa.com/blogs/2023/nov/the-weighted-average-size-of-shipped-lcd-tv-displays-shifted-to-52-inches-in-september-2023.

**Figure 14 – U.S. Movie Theater Ticket Prices (2023 dollars)**

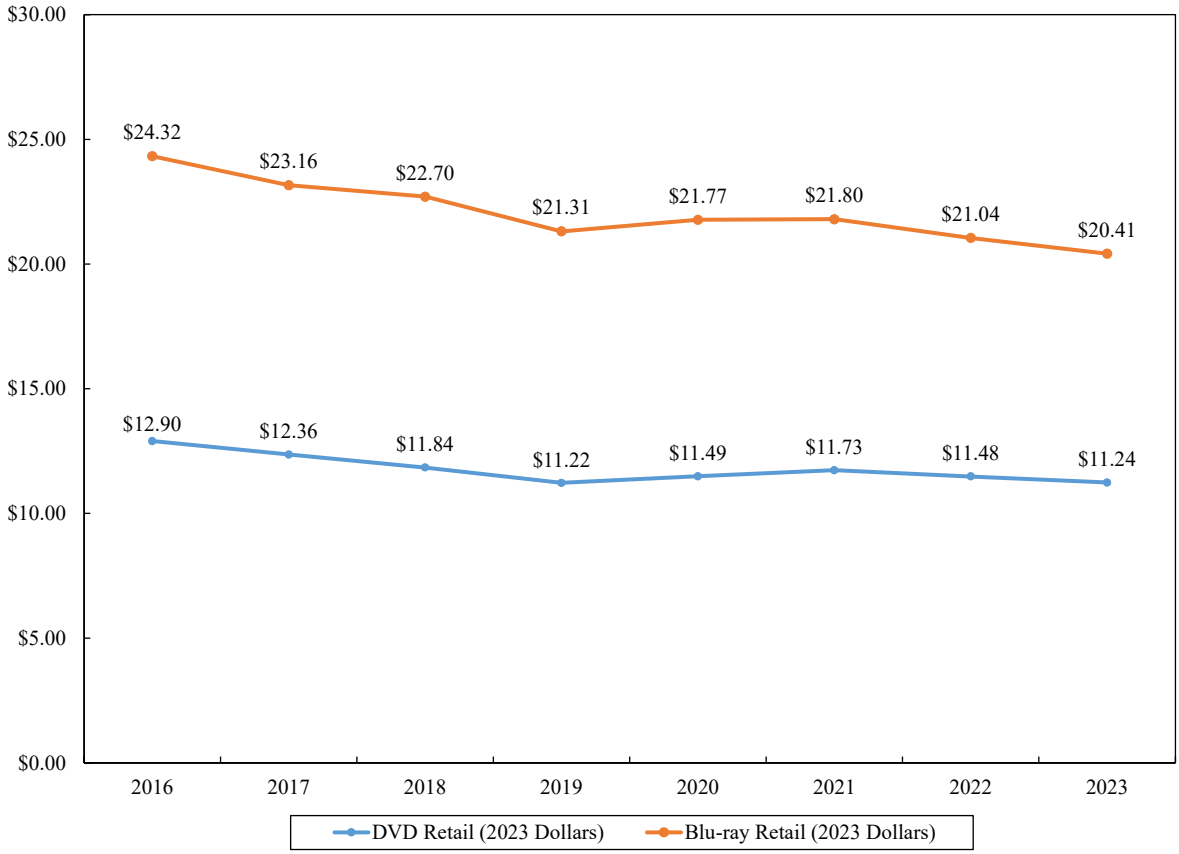



**Notes:** Prices adjusted to 2023 dollars using U.S. Bureau of Labor Statistics CPI All Items (excl. food & energy).

**Sources:** National Association of Theatre Owners; U.S. Bureau of Labor Statistics (series CUUR0000SA0L1E).

Next, consider retail prices for DVDs, Blu-ray, and digital video rentals. DVD and Blu-ray retail prices in real terms declined between 2016 and 2023. Digital video retail prices also have declined during the same period. Also, DVD and Blu-ray rental prices in real terms declined between 2016 and 2023. The real price for digital video rentals also decreased during the period. See figures below.

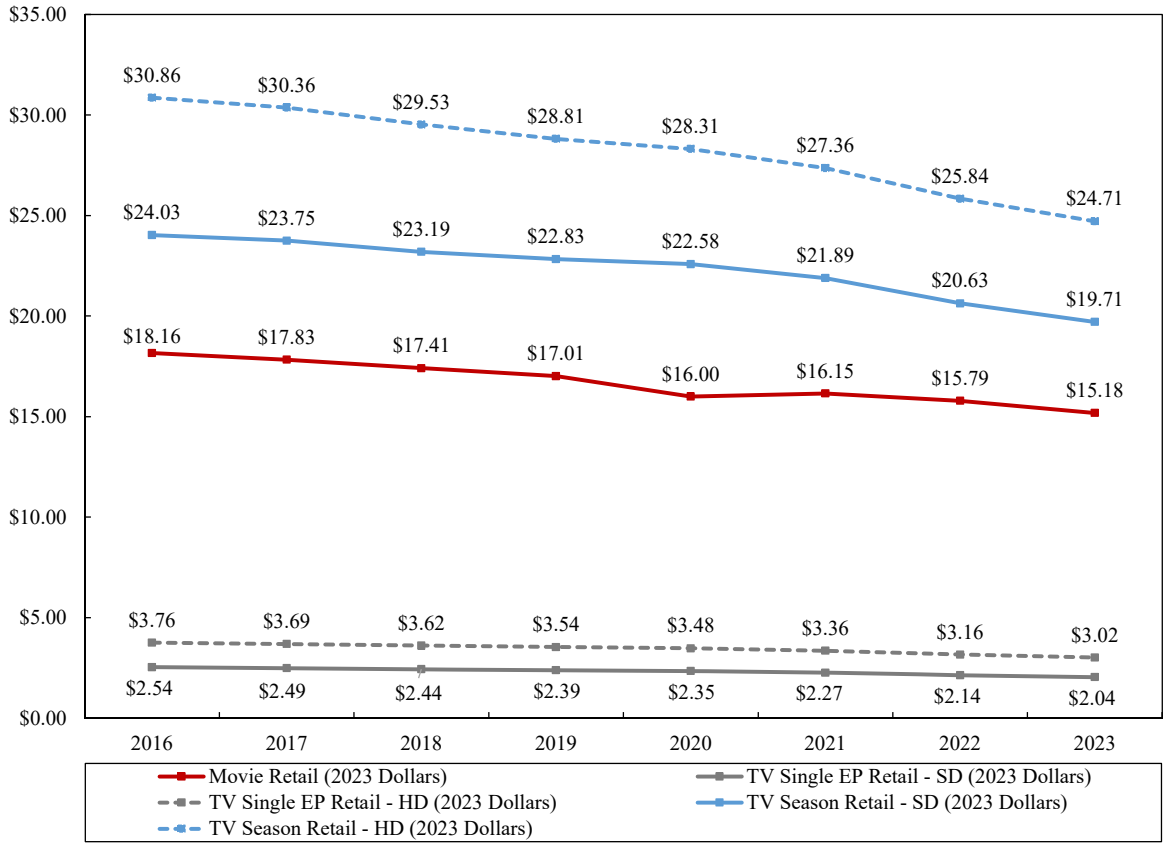
**Figure 15 – Average Movie and TV Retail Prices, DVD and Blu-ray**




**Notes:** Prices adjusted to 2023 dollars using U.S. Bureau of Labor Statistics CPI All Items (excl. food & energy).

**Sources:** Omdia; U.S. Bureau of Labor Statistics (series CUUR0000SA0L1E).

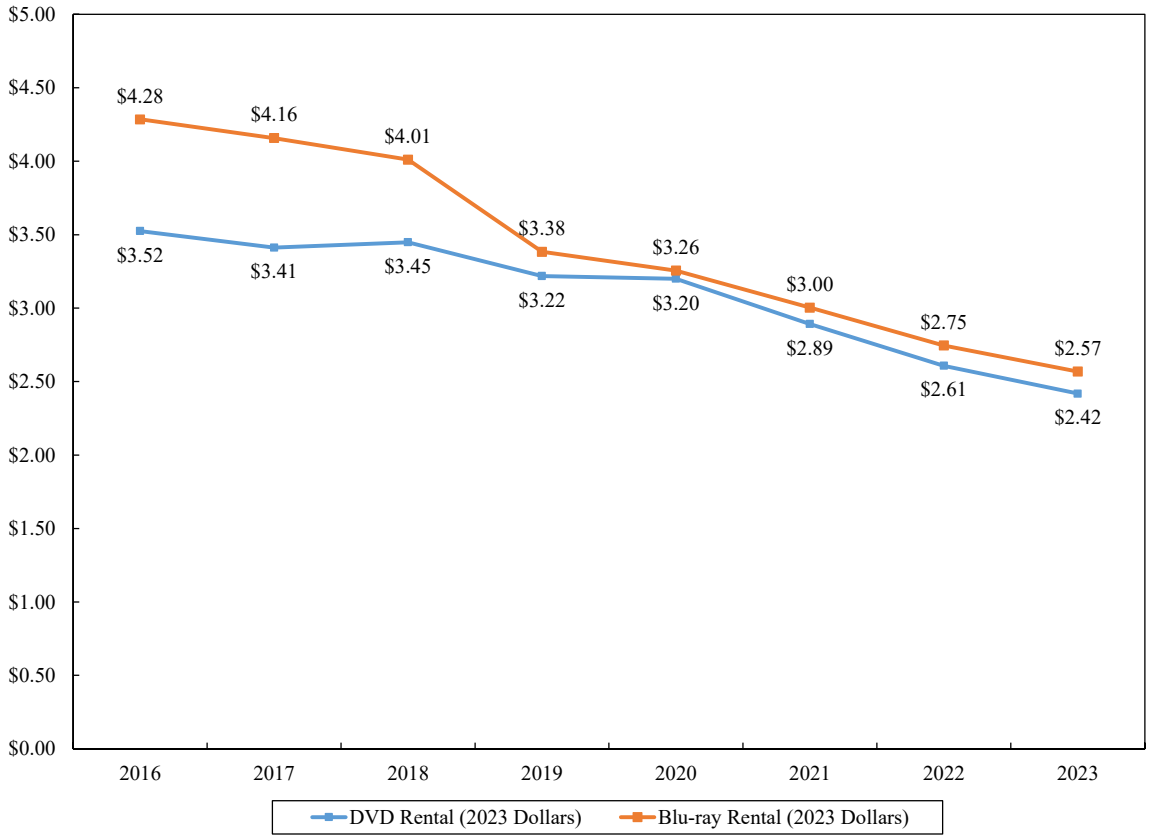
## Figure 16 – Average Movie and TV Retail Prices, Digital




**Notes:** Prices adjusted to 2023 dollars using U.S. Bureau of Labor Statistics CPI All Items (excl. food & energy).

**Sources:** Omdia; U.S. Bureau of Labor Statistics (series CUUR0000SA0L1E).

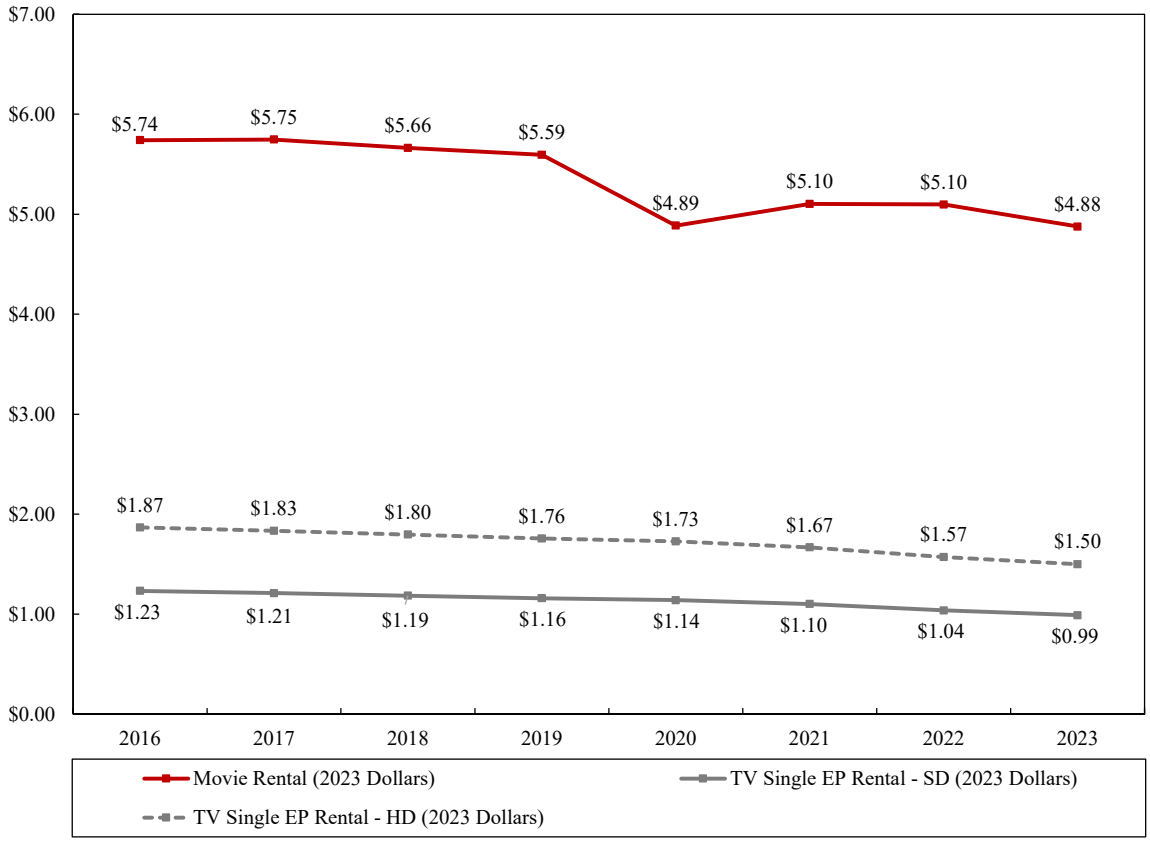
**Figure 17 – Average Movie and TV Rental Prices, DVD and Blu-ray**




**Notes:** Prices adjusted to 2023 dollars using U.S. Bureau of Labor Statistics CPI All Items (excl. food & energy).

**Sources:** Omdia; U.S. Bureau of Labor Statistics (series CUUR0000SA0L1E).

**Figure 18 – Average Movie and TV Rental Prices, Digital**




**Notes:** Prices adjusted to 2023 dollars using U.S. Bureau of Labor Statistics CPI All Items (excl. food & energy).

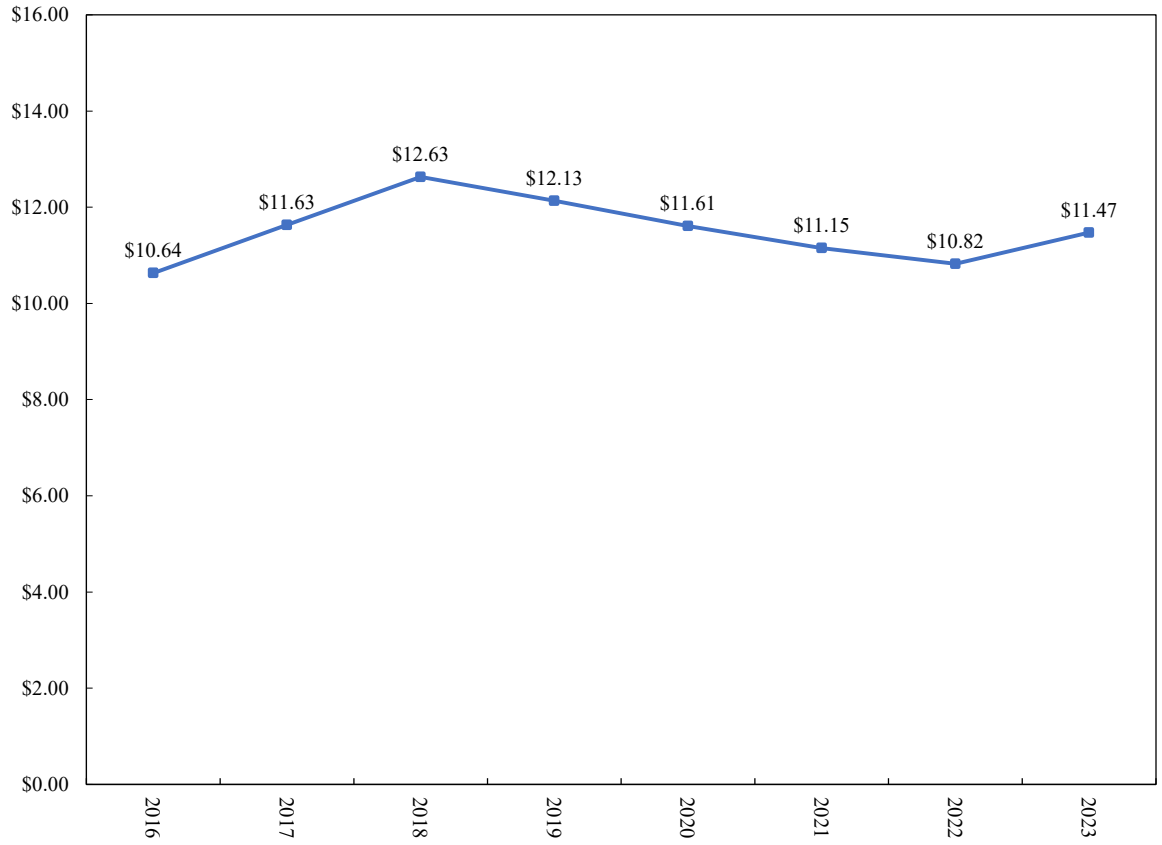
**Sources:** Omdia; U.S. Bureau of Labor Statistics (series CUUR0000SA0L1E).

Average revenue per unit (ARPU)—often used by economists as a measure of approximate effective prices paid by consumers—in real terms for online video services, which includes OTT streaming services (e.g., Netflix and ESPN+) and vMVPDs (e.g., YouTube TV and Sling TV), declined between 2018 and 2022, and increased by about one percent per year between 2016 and 2023.[65] See figure below. Service-delivery improvements, technological developments such as the rollout of 4K Ultra HD content on

[65] ARPU is the average revenue per subscriber per month, including both subscription revenues and/or advertising revenues. For example, Netflix offers various subscription plans ranging from $6.99 per month with ads, to $22.99 per month (see Netflix, "Choose the plan that's right for you," available at https://www.netflix.com/signup/planform). Netflix's ARPU would be calculated as the sum of all revenues in a month divided by the total number of subscribers across all plans in that month.

many services, and the amount and variety of content available on streaming services are improvements in quality, but are not accounted for in ARPU.[66]

**Figure 19 – U.S. Online Video Average Revenue Per User (2023 dollars)**




**Notes:** Prices adjusted to 2023 dollars using U.S. Bureau of Labor Statistics CPI All Items (excl. food & energy). Online Video ARPU is the average revenue per unit and is equivalent to the average revenue generated by each subscriber in a given period. Omdia calculates OTT video ARPU using OTT subscription revenue and average OTT subscribers during the period.

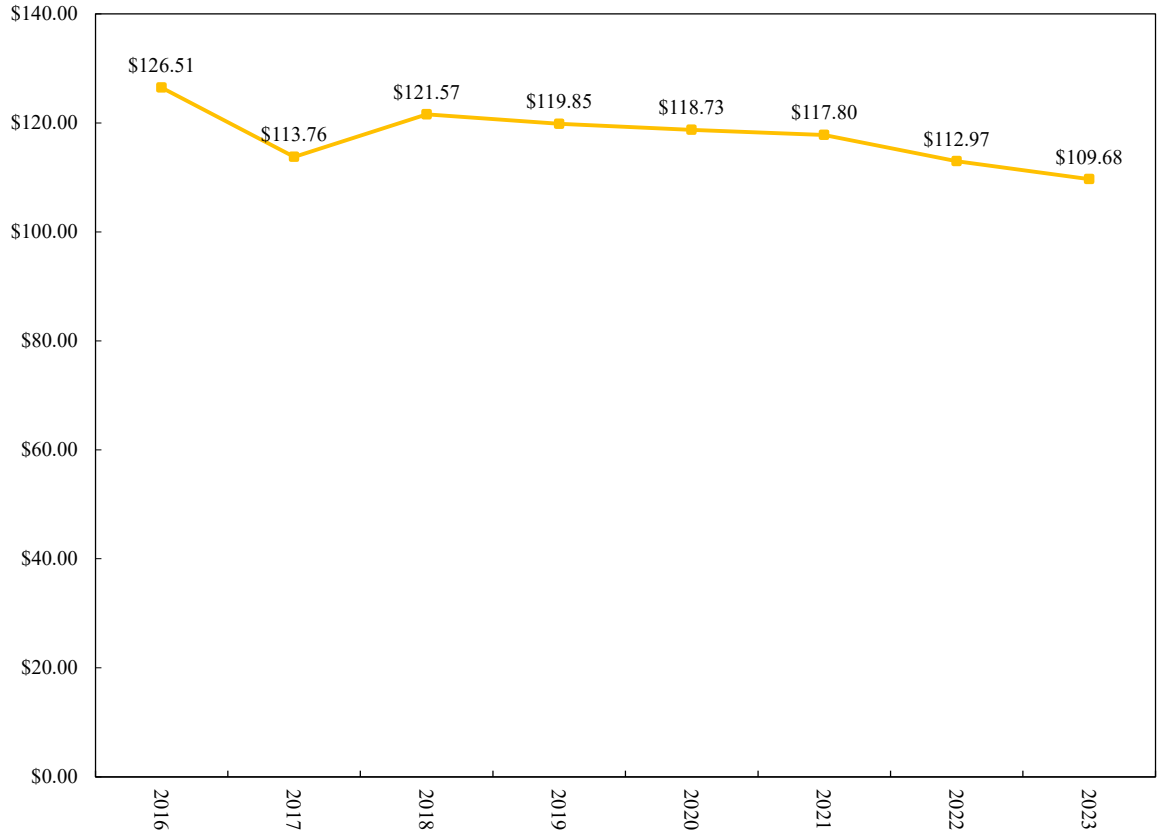
**Sources:** Omdia; U.S. Bureau of Labor Statistics (series CUUR0000SA0L1E).

ARPU in real terms for MVPDs, which includes cable companies (e.g., Comcast and CableOne), satellite (e.g., Dish and DirecTV), and IPTV (e.g., Frontier and AT&T U-Verse TV), declined by approximately two percent per year from 2016 to 2023. See figure below.

[66] As described in Section III.C above, OTT streaming services have made various advancements over the past decade, both in terms of the quality of the video and audio delivered to viewers, as well as the quality of the user interfaces of the streaming platforms, making it easier for users to quickly find content.

As shown earlier, consumers have been increasing subscriptions to OTT services and decreasing subscriptions to MVPDs which indicates a healthy competitive process for video entertainment.

**Figure 20 – U.S. MVPDs Average Revenue Per User (2023 dollars)**




**Notes:** Prices adjusted to 2023 dollars using U.S. Bureau of Labor Statistics CPI All Items (excl. food & energy).

**Sources:** Omdia; U.S. Bureau of Labor Statistics (series CUUR0000SA0L1E).

In conclusion, new technologies and distribution channels and services in the audiovisual industry have emerged over the past two decades in response to technological and innovation shocks to the industry. The empirical evidence documented in this section establishes that competition in the audiovisual industry, as exhibited through the reallocation of share to new technologies and services, is robust. There is substantial evidence of entry and innovation, growing output and quality, and pricing consistent with a dynamic and highly competitive industry.

## IV. THE AUDIOVISUAL INDUSTRY EXHIBITS SIGNS OF A WELL-FUNCTIONING LABOR MARKET

This section presents economic analyses supporting that the audiovisual industry exhibits signs of being a well-functioning labor market, which provides benefits to workers within the industry.

As described above, there has been a shift in audiovisual content production and consumption towards new OTT distribution technologies. This shift has lowered barriers to entry for entertainment talent to reach consumer audiences. In addition, unionization in the audiovisual industry gives workers collective bargaining power to negotiate employment terms with production and streaming companies, including the members of AMPTP, the collective bargaining organization responsible for negotiating industry-wide guild and union contracts.[67] The unions have claimed great success from their recent negotiations.[68] Strong union representation contributes to favorable outcomes for workers in the audiovisual industry.

This section analyzes key metrics with respect to labor markets—employment levels and wages—to assess the health of the labor market. The empirical evidence shows stable employment levels and stable or increasing wages in the audiovisual industry, and points to an audiovisual labor market that is functioning in a healthy manner.

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[67] Alliance of Motion Picture and Television Producers, "Welcome," available at https://www.amptp.org/. As described earlier, members of AMPTP, which includes MPA's members, negotiate with more than 45 unions, operating under 64 collective-bargaining agreements.

[68] WGA, "The Campaign," available at https://www.wgacontract2023.org/the-campaign/what-we-won; Lisa Richwine and Dawn Chmielewski, "Hollywood writers guild ends strike ahead of final contract vote," *Reuters*, September 27, 2023, available at https://www.reuters.com/world/us/hollywood-writers-guild-calls-end-strike-wednesday-2023-09-27/ ("The WGA said the estimated value of the deal was $233 million per year. […] Writers appeared to have won concessions across the board, with raises over the three years of the contract, increased health and pension contributions, and AI safeguards.").

Suzy Woltmann, "Everything You Need to Know About the SAG-AFTRA + AMPTP Negotiations," *Backstage*, December 6, 2023, available at https://www.backstage.com/magazine/article/sag-aftra-strike-negotiations-explained-76246/ ("According to SAG, the new three-year deal is valued at more than $1 billion, and includes ''above-pattern' minimum compensation increases, unprecedented provisions for consent, and compensation that will protect members from the threat of AI.' The deal also comes with additional compensation for streaming shows, a boost in pension and health caps, and increased pay for background performers.").

### A. Employment in the Motion Picture and Television Industry Does Not Indicate an Adverse Labor Market for Workers

Based on data from MPA, the audiovisual industry directly employed approximately 900,000 people nationwide between 2016 and 2019.[69] MPA typically categorizes and analyzes wages in the audiovisual industry under two categories: production and distribution.[70] Nationwide employment in both categories has been stable over time. See figure below.[71] The exception occurred during the COVID-19 pandemic, in which both production and distribution roles saw substantial declines in employment reflecting restrictions forcing production studios to pause production-related activity, and traditional distribution channels to shutter.[72]

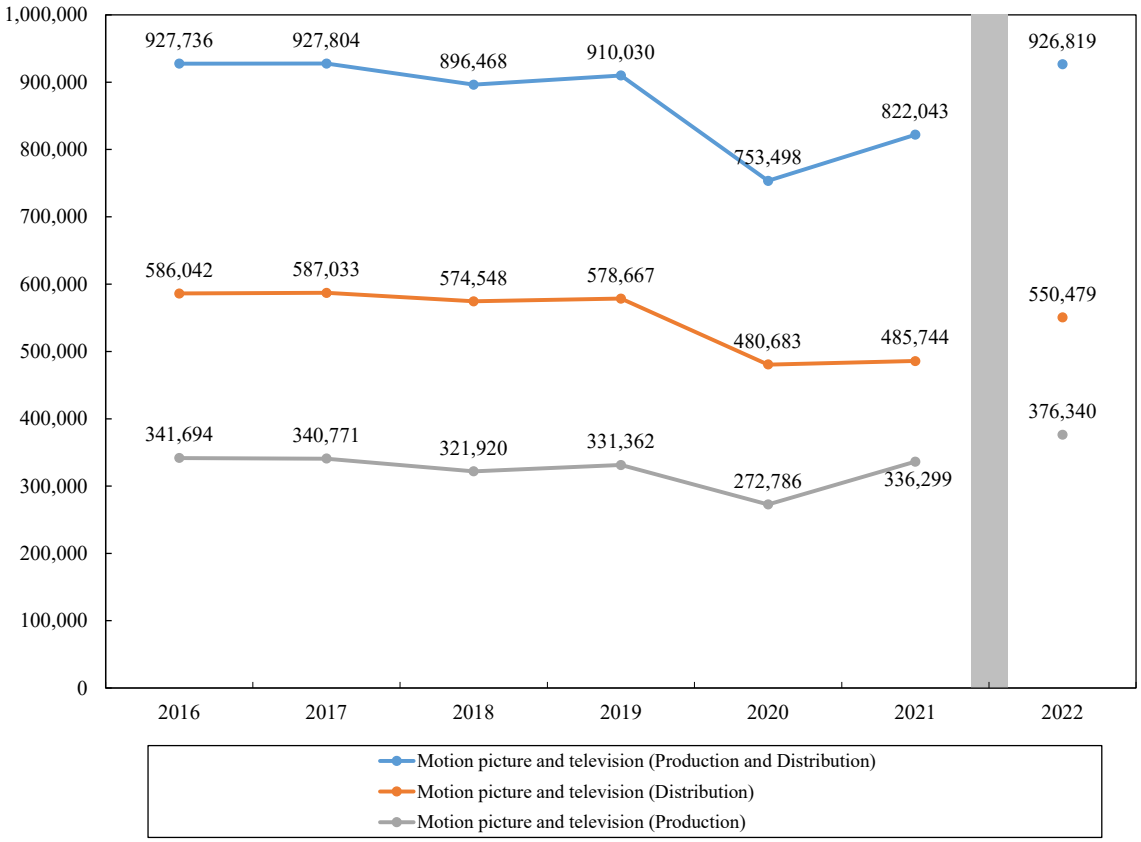
[69] MPA, "The American Motion Picture And Television Industry Creating Jobs, Trading Around The World," 2022, available at https://www.motionpictures.org/wp-content/uploads/2024/03/MPA_Economic_contribution_US_infographic-1.pdf. Direct employees are employees who directly participate in the motion picture and television industry, such as production staff, movie theater staff, and television broadcasting staff.

[70] Production-related roles are those that involve producing, marketing, and manufacturing motion pictures, television shows, and audiovisual content. Distribution-related roles are those related to distributing motion pictures, television shows, and audiovisual content to consumers. See Id. and Section II.

[71] 2022 NAICS code revisions introduced code 516210 (Media Streaming Distribution Services, Social Networks, and Other Media Networks and Content Providers), which replaced and consolidated many existing NAICS codes related to distribution. Prior to this change, MPA analysis estimated the share of each NAICS category that was related to production or distribution of motion pictures and television. This methodology underestimated distribution-related industry wages because the categories were overweighted by lower-wage roles, despite motion picture and television roles generally paying substantially more. As a result of the 2022 NAICS revisions, the new category more closely aligns with the motion picture and television roles related to distribution and is now mostly comprised of the higher-paying motion picture and television roles. Consequently, while the NAICS code revisions did not have substantial effects on employment level data, the wage data for distribution-related roles now more accurately represents wages in the industry. Comparisons between 2021 and 2022 should be avoided. See NAICS Association, "516210 - Media Streaming Distribution Services, Social Networks, and Other Media Networks and Content Providers," available at https://www.naics.com/naics-code-description/?v=2022&code=516210.

[72] Nellie Andreeva, "Los Angeles Production Grinds To A Halt Amid Covid-19 Surge; Netflix Is Latest Major Studio To Pause Filming," *Deadline*, January 4, 2021, available at https://deadline.com/2021/01/los-angeles-production-shutdown-covid-19-surge-netflix-is-latest-major-pauses-filmng-true-story-family-reunioni-1234664678.

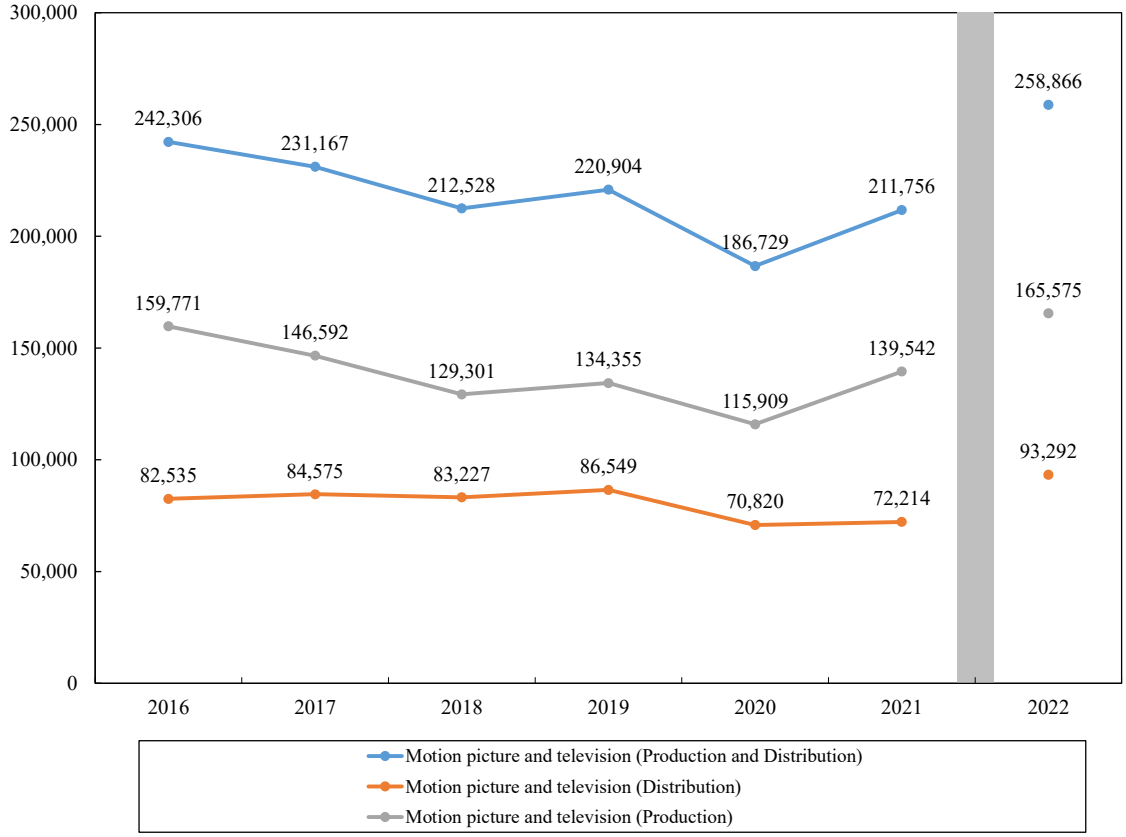
**Figure 21 – Audiovisual Direct Employment, United States**




**Source:** MPA analysis of U.S. Bureau of Labor Statistics data.

While distribution-related employment exceeds production-related employment nationwide, production-related roles employ substantially more people in California. Between 2016 and 2019, over 200,000 people were employed in the audiovisual industry in California, with over 60 percent related to production activity. Similar to the nationwide trends, the Californian audiovisual labor market saw material declines as a result of COVID-19, but has also recovered. See figure below.

**Figure 22 – Audiovisual Direct Employment, California**



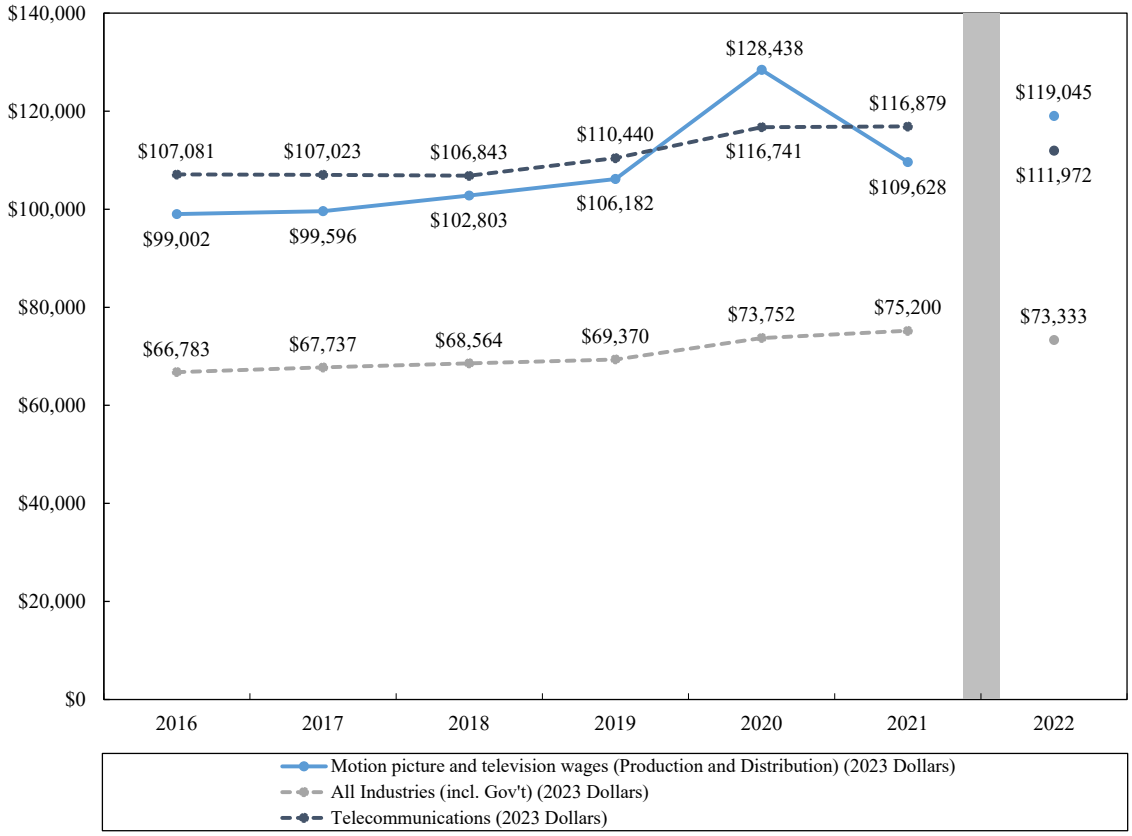

**Source:** MPA analysis of U.S. Bureau of Labor Statistics data.

### B. Wages in the Audiovisual Industry Are Above National Average Wages

The audiovisual industry pays higher average wages than many other industries, and wages in the industry have increased over time. This appears to have coincided with the growth of OTT distribution platforms over the past decade, including the substantial increase in content spending by streaming services (see Figure 4). As shown in the figure below, average direct real wages in the U.S. audiovisual industry have exceeded average wages in the United States since at least 2016. Prior to the COVID-19 pandemic and the effects of government-mandated shutdowns on the audiovisual industry, the growth of direct real wages in the motion picture and television industry outpaced the national average across all industries. Between 2016 and 2019, national real wages in the audiovisual industry grew at an average annual rate of 2.4 percent per year, compared to 1.3 percent per year across all

industries. Moreover, U.S. real wages in the audiovisual industry are in line with wages in other highly-skilled sectors with union representation, such as telecommunications.[73]

**Figure 23 – Average Direct Wages By Industry, United States (2023 Dollars)**




**Notes:** Wages are adjusted to 2023 dollars using U.S. Bureau of Labor Statistics CPI All Items (excl. food & energy).

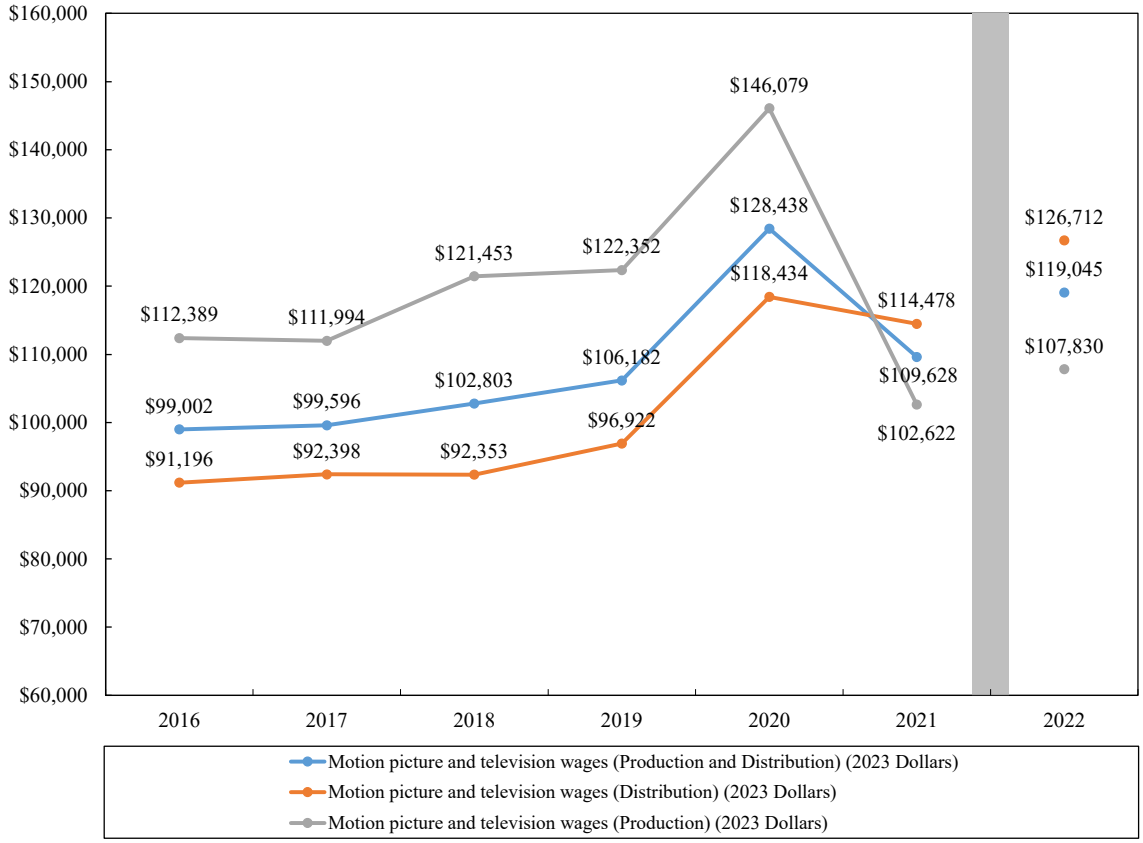
**Sources:** MPA analysis of U.S. Bureau of Labor Statistics data; U.S. Bureau of Labor Statistics (series ENUUS00050010 "All industries including government"; series ENUUS000505517 "Telecommunications"; and series CUUR0000SA0L1E "CPI All Items (excl. food & energy)").

The following figure provides a breakdown of U.S. audiovisual direct real wages. Setting aside the substantial volatility in real wages in 2020 and 2021 resulting from the

[73] For example, approximately 42 percent of AT&T's 149,900 employees are represented by a union. See AT&T Inc., Form 10-K for the fiscal year ended December 31, 2023, pp. 6-7, available at https://otp.tools.investis.com/clients/us/atnt2/sec/sec-show.aspx?FilingId=17303532&Cik=0000732717&Type=PDF&hasPdf=1.

effects of the COVID-19 pandemic, both distribution-related and production-related real direct wages in the audiovisual industry grew between 2016 and 2019.

**Figure 24 – Breakdown of Audiovisual Direct Wages, United States (2023 Dollars)**

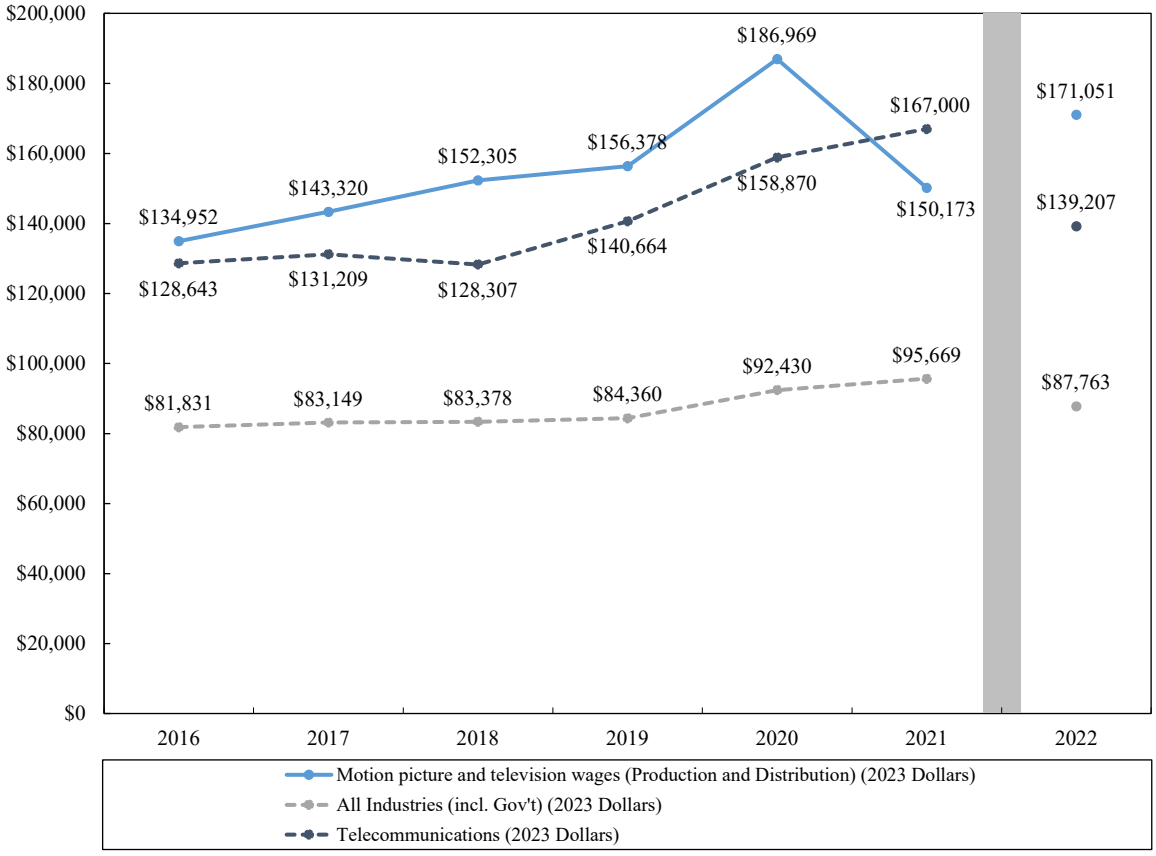



**Notes:** Wages are adjusted to 2023 dollars using U.S. Bureau of Labor Statistics CPI All Items (excl. food & energy).

**Source:** MPA analysis of U.S. Bureau of Labor Statistics data; U.S. Bureau of Labor Statistics (series CUUR0000SA0L1E).

Trends in real wages in the audiovisual industry are more pronounced in California. In 2022, audiovisual direct real wages were substantially higher than California's average real wages across all industries. Again, setting aside the effects of the COVID-19 pandemic on real wages in 2020 and 2021, between 2016 and 2019, real wages across all industries in California grew at an average of 1.0 percent per year, while real wages in the audiovisual industry grew at an average rate of 5.0 percent per year. See figure below. Moreover, California wages in the audiovisual industry are in line with wages in other highly-skilled sectors with strong union representation, such as telecommunications.

**Figure 25 - Average Direct Wages By Industry, California (2023 Dollars)**

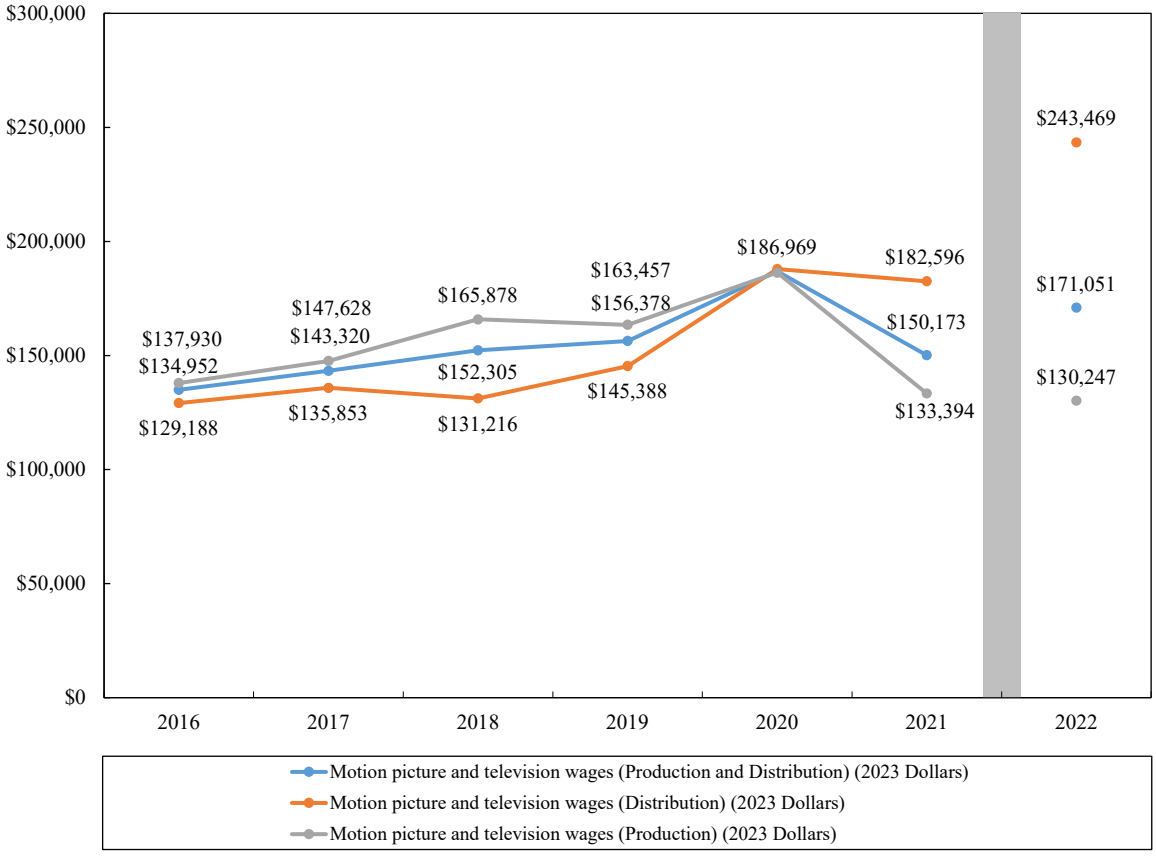



**Notes:** Wages are adjusted to 2023 dollars using California's CPI - All Items.

**Sources:** MPA analysis of U.S. Bureau of Labor Statistics data; U.S. Bureau of Labor Statistics (series ENU0600050010 "All industries including government"; series ENU06000505517 "Telecommunications"; and State of California analysis of U.S. Bureau of Labor Statistics data, https://www.dir.ca.gov/oprl/cpi/entireccpi.pdf.

The following figure provides a breakdown of audiovisual direct real wages in California. Real wages for both production-related and distribution-related workers in the audiovisual industry grew between 2016 and 2019. Trends beyond 2019 are substantially influenced by the effects of the COVID-19 pandemic. The average distribution-related real wage in California in 2022 was over $243,000, almost 2.8 times higher than the average wage across all industries in California.

**Figure 26 – Breakdown of Audiovisual Direct Wages, California (2023 Dollars)**




**Notes:** Wages are adjusted to 2023 dollars using California's CPI - All Items.

**Sources:** MPA analysis of U.S. Bureau of Labor Statistics data; State of California analysis of U.S. Bureau of Labor Statistics data, https://www.dir.ca.gov/oprl/cpi/entireccpi.pdf.

## V. CONCLUSION

This report highlights signs of robust competition in the audiovisual industry that benefit consumers, and also provides insight into the competitive health of the broader industry, including the labor market. The empirical evidence supports the conclusion that the audiovisual industry is a dynamic and highly competitive industry with numerous participants providing an increasingly diverse array of content across new and innovative delivery platforms, benefitting consumers. Furthermore, the empirical evidence demonstrates that the audiovisual labor market is an important employer in California, is a well-functioning labor market, and pays wages above the average of other industries.

**EXHIBIT B**

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Re: **Proposed Uniform Law on State Premerger Notification**

Dear President Berg:

I am writing on behalf of the American Bar Association, Antitrust Law Section, as the Chair-Elect. The Council of the Section, its governing body, has voted to support the proposed Uniform Law on State Premerger Notification that is being presented at the Uniform Law Commission's Annual Meeting in Boston, Massachusetts from July 19, 2024 to July 25, 2024 for final consideration. Thank you for the opportunity to have two of our members serve as American Bar Association advisers to the Drafting Committee.

Respectfully,

Steven J. Cernak
2023-24 Chair-elect, ABA Antitrust Law Section

Cc: Dan Robbins, Chairman ULC Drafting Committee
Emilio Varanini – via email

**EXHIBIT C**

# Uniform Antitrust Pre-Merger Notification Act

drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

*WITH PREFATORY NOTE AND COMMENTS*



September 16, 2024

## ABOUT ULC

The **Uniform Law Commission** (ULC), also known as National Conference of Commissioners on Uniform State Laws (NCCUSL), now in its 133rd year, provides states with non-partisan, well-conceived and well-drafted legislation that brings clarity and stability to critical areas of state statutory law.

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## Antitrust Pre-Merger Notification Act

The committee appointed by and representing the National Conference of Commissioners on Uniform State Laws in preparing this act consists of the following individuals:

| | |
|---|---|
| Dan Robbins | California, *Chair* |
| Steven L. Willborn | Nebraska, *Vice Chair* |
| Levi J. Benton | Texas |
| William H. Clark Jr. | Pennsylvania |
| Parrell D. Grossman | North Dakota |
| Jess O. Hale | Tennessee |
| Lyle W. Hillyard | Utah |
| Ryan Leonard | Oklahoma |
| Kimberly A. Lowe | Minnesota |
| John J. McAvoy | District of Columbia |
| Cory J. Skolnick | Kentucky |
| Nora Winkelman | Pennsylvania, *Division Chair* |
| Timothy J. Berg | Arizona, *President* |

### Other Participants

| | |
|---|---|
| Daniel A. Crane | Michigan, *Reporter* |
| Deborah A. Garza | Virginia, *American Bar Association Advisor* |
| Sohan Dasgupta | District of Columbia, *American Bar Association Section Advisor* |
| Emilio Varanini | California, *American Bar Association Section Advisor* |
| Diane Boyer-Vine | California, *Style Liaison* |
| Tim Schnabel | Illinois, *Executive Director* |

Copies of this act may be obtained from:

Uniform Law Commission
111 N. Wabash Ave., Suite 1010
Chicago, IL 60602
(312) 450-6600
www.uniformlaws.org

# Antitrust Pre-Merger Notification Act

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## Antitrust Pre-Merger Notification Act

### Prefatory Note

Since 1976, the federal Hart-Scott-Rodino Act ("HSR"), 15 U.S.C. Section 18a, has required companies proposing to engage in most significant mergers or acquisitions to file a notice with the two federal antitrust agencies—the Federal Trade Commission and the Justice Department's Antitrust Division—at least 30 days (or, in the case of acquisitions out of bankruptcy or cash tender offers, 15 days) prior to closing. The HSR filing includes both a form detailing information, such as the corporate structure of the parties, and additional documentary material, such as presentations about the merger to the company's board of directors. In 2023, the Federal Trade Commission proposed new regulations increasing the amount of material required to be submitted in the form and additional documentary material. As of this writing, the regulations have not been finalized.

The HSR filing allows the federal antitrust agencies to scrutinize mergers before they are consummated. Prior to HSR, the agencies often learned of a merger after it had already closed, and then spent months or years investigating the transaction. If the agencies ultimately decided to challenge the merger's legality through a lawsuit, the only possible remedy was to unscramble a deal often years after it had closed, and the businesses had become integrated. This was not an optimal situation for the agencies, the businesses, or the public. HSR shifted most merger reviews to the pre-merger phase, allowing earlier and more efficient engagement between the agencies and the merger parties.

State Attorneys General ("AGs") also have a legal right to challenge anticompetitive mergers, both under the federal Clayton Act and their own state antitrust laws. *See California v. American Stores Co*., 495 U.S. 271 (1990). States often play an important role in merger investigations and challenges, either in parallel with the federal agencies, or on their own. However, the AGs do not have access to the HSR filings. Further, HSR's strict confidentiality provisions prohibit the federal agencies from sharing HSR filings with the AGs. Most AGs have the right to subpoena HSR filings under their state laws, but that requires that they first become aware that an HSR filing of interest has been made, and then go through a cumbersome and time-consuming process to issue a subpoena and wait for compliance. In some cases, the merging parties voluntarily waive the HSR's confidentiality restrictions to allow AGs to obtain access to filing materials, however that process can take some time to negotiate. As a result, by the time most AGs obtain access to HSR filings, the federal agencies and parties are often far along in the process of investigation and negotiation. This puts the AGs at a significant disadvantage in the process of merger review. It also creates additional costs and uncertainties for the merging parties because federal approval does not foreclose a later state challenge. For example, in the *American Stores* case noted above, California sued to block a merger that the Federal Trade Commission had already approved.

In response to these shortcomings, some states have considered legislation that would create a state-specific pre-merger notification requirement for all transactions in every sector. However, some of these proposals would impose obligations additional to the HSR obligations on merging parties and potentially move state antitrust review out of sync with federal antitrust

review. For example, a proposed bill in New York would have imposed a 60-day waiting period to close the deal, in contrast to HSR's 30-day waiting period. It also would have dramatically lowered the filing threshold by an order of magnitude for all transactions in every sector, which would have significantly increased the burden on both businesses and the AG's office. A similar bill was introduced in Maryland in 2023. The business community has reacted with alarm to the prospect of burdensome and idiosyncratic state-specific pre-merger notification provisions that apply to all transactions in every sector. Both bills failed to pass. A new antitrust bill including new merger regulations was introduced in New York in May, 2024 and new merger rules have been proposed in California by stakeholders in an antitrust review process managed by the California Law Revision Commission.

The Uniform Antitrust Pre-Merger Notification Act is intended to address the concerns of both the AGs and business communities by creating a simple, non-burdensome mechanism for AGs to receive access to HSR filings at the same time as the federal agencies, and subject to the same confidentiality obligations. Under the act, covered persons—defined as persons who have their principal place of business or at least a specified threshold of annual revenues in the state—must provide their HSR filing (both the basic form and, under certain enumerated circumstances, the additional documentary material) to the AG contemporaneously with their federal filing. The material filed with the AG is subject to essentially the same confidentiality protections applicable to the federal agencies, except that an AG that receives HSR materials may share them with any other AG whose state has also adopted the act. The anticipated effect is to facilitate early information sharing and coordination among AGs and the federal agencies, subject to confidentiality obligations and without imposing any significant burden on either the merging parties or the AGs. It is also anticipated that the AGs may facilitate information exchange and coordination by establishing a secure central database or repository for HSR filings accessible to AGs whose states have adopted the act.

As of the time of this writing, there is a robust national debate concerning the past and future of antitrust policy, including whether there should be a significant invigoration of anti-merger enforcement. This proposal takes no side in that debate. By providing AGs earlier, confidential access to HSR filings, it is not intended to suggest any view on the merits of the mergers they may review or how they should wield their investigatory and litigation powers. Nor is the goal of minimizing the burden on business meant to suggest any view on the optimal level of merger activity or regulatory review of mergers. Rather, this act is animated by a spirit of good government—of respecting the role of the states in the merger review process, of the need for confidentiality, and of advancing the efficiency of the process for the benefit of all parties involved.

Similarly, this act is not intended to supplant or preempt existing sector specific pre-merger reporting requirements that many states have in certain areas (for example, health care) and the act is not intended to limit a state's ability to challenge smaller local mergers that do not meet the HSR thresholds.

## Uniform Antitrust Pre-Merger Notification Act

### Section 1. Title

This [act] may be cited as the Uniform Antitrust Pre-Merger Notification Act.

### Section 2. Definitions

In this [act]:

(1) "Additional documentary material" means the additional documentary material filed with a Hart-Scott-Rodino form.

(2) "Electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

(3) "Filing threshold" means the minimum size of a transaction that requires the transaction to be reported under the Hart-Scott-Rodino Act in effect when a person files a pre-merger notification.

(4) "Hart-Scott-Rodino Act" means Section 201 of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. Section 18a[, as amended].

(5) "Hart-Scott-Rodino form" means the form filed with a pre-merger notification, excluding additional documentary material.

(6) "Person" means an individual, estate, business or nonprofit entity, government or governmental subdivision, agency, or instrumentality, or other legal entity.

(7) "Pre-merger notification" means a notification filed under the Hart-Scott-Rodino Act with the Federal Trade Commission or the United States Department of Justice Antitrust Division, or a successor agency.

(8) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any other territory or possession subject to the

jurisdiction of the United States.

***Legislative Note:*** *It is the intent of this act to incorporate future amendments to the cited federal law in paragraph (4). A state in which the constitution or other law does not permit incorporation of future amendments when a federal statute is incorporated into state law should omit the phrase ", as amended". A state in which, in the absence of a legislative declaration, future amendments are incorporated into state law also should omit the phrase.*

**Section 3. Filing Requirement**

(a) A person filing a pre-merger notification shall file contemporaneously a complete electronic copy of the Hart-Scott-Rodino form with the Attorney General if:

(1) the person has its principal place of business in this state; or

(2) the person or a person it controls directly or indirectly had annual net sales in this state of the goods or services involved in the transaction of at least 20 percent of the filing threshold.

(b) A person that files a form under subsection (a)(1) shall include with the filing a complete electronic copy of the additional documentary material.

(c) On request of the Attorney General, a person that filed a form under subsection (a)(2) shall provide a complete electronic copy of the additional documentary material to the Attorney General not later than [seven] days after receipt of the request.

(d) The Attorney General may not charge a fee connected with filing or providing the form or additional documentary material under this section.

**Comment**

The goals of the filing requirement are (a) to ensure that the HSR form and the additional documentary material are filed with one state and (b) to provide notice through the form alone to every state that might have a significant interest in the proposed merger. Subsection (a)(1) is directed to the first goal; subsection (a)(2) to the second goal.

This section uses a well-established criterion to determine when a person has a filing obligation in a state. Where a company has its principal place of business is a well-understood concept from federal diversity jurisdiction. In the Supreme Court's unanimous decision in *Hertz*

*Corp. v. Friend*, 559 U.S. 77, 92-93 (2010), it described the term as follows:

> We conclude that "principal place of business" is best read as referring to the place where a corporation's officers direct, control, and coordinate the corporation's activities. It is the place that Courts of Appeals have called the corporation's "nerve center." And in practice it should normally be the place where the corporation maintains its headquarters—provided that the headquarters is the actual center of direction, control, and coordination, i.e., the "nerve center," and not simply an office where the corporation holds its board meetings (for example, attended by directors and officers who have traveled there for the occasion).

Annual net sales from income and expense statements is a widely utilized measure of economic activity borrowed from the HSR regulations. As noted in the definitions, the filing threshold refers to the minimum size of transaction threshold for determining reportability under the HSR that the Federal Trade Commission adjusts annually by rule pursuant to Section 7A(a)(2) of the Clayton Act, as amended by the HSR. For reference, in 2024 the minimum size of transaction threshold promulgated by the FTC was $119.5 million. Hence, for illustrative purposes, a party that made an HSR pre-merger notification in 2024 and did not have its principal place of business in a state that enacted this act would need to determine whether its 2023 annual net sales in the state were at least 20% of $119.5 million. If so, the party would be obligated to make a filing in the state pursuant to subsection (a)(2). To the extent that both the acquiring and acquired persons are required to report a transaction under the HSR, both persons might be required to file with the same AG if both persons fell within the coverage of this act.

The reference in subsection (a)(2) to the annual net sales in the state being those of "goods or services involved in the transaction" is intended to limit the filing obligation under subsection (a)(2) to circumstances where the filing party's economic activity in the state is in the same business category as assets involved in the acquisition. Consistent with the requirements of federal law concerning reporting by corporate parents of the activities of entities they control directly or indirectly (see, for example, 16 C.F.R. 801(a)(1)), the obligation under subsection (a)(2) is triggered if the reporting party controls entities that have the requisite sales in the state. For example, if a holding company was the reporting party under HSR, and that company owned a subsidiary that had the requisite amount of sales in the state of the goods or services involved in the transaction, the reporting requirement under subsection (a)(2) would be triggered. However, if the parent company or its subsidiaries had the requisite amount of sales in the state, but those were not in the same goods or services as those involved in the transaction, there would be no reporting requirement under subsection (a)(2).

Subsection (b) obligates a person that has its principal place of business in a state to provide both the HSR form and the additional documentary material to the state's AG contemporaneously with the HSR filing. In other states where the party meets the annual net sales threshold, the person need only provide the basic HSR form with their initial filing, although the AG may then request the additional documentary material under subsection (c). The reason for this structure is to prevent AGs from being inundated with voluminous additional documentary material that they have no interest in reviewing. To the extent an AG does not

receive the additional documentary material with the initial filing but is interested in reviewing that material sooner than the time allowed for a party to submit that material upon receipt of a request, the AG may request that material from the AG of the party's state of principal place of business under Section 6 (assuming that that state has also passed this act).

The spirit of this act is to facilitate more timely and efficient AG receipt of materials relating to potentially interesting mergers without imposing significant additional burdens on the business community. Accordingly, subsection (d) prohibits the charging of fees for simply making available to the AG information that the AG already could procure by subpoena, for which it could not charge the company a fee. Although reviewing merger filings requires resources, this act is not designed to impose additional costs on AG offices. To the contrary, by facilitating quick and efficient receipt of HSR files, the act will save the AG time and resources previously consumed in bargaining with merging parties over HSR waivers or subpoenaing HSR files. Further, the confidentiality provisions of this act are designed to facilitate information sharing and collaboration among the AGs and the federal antitrust agencies, and among the AGs themselves. More efficient inter-agency collaboration should reduce duplication of effort and allow existing resources to be deployed more efficiently in merger review.

Separately from a filing fee, some state statutes permit the AG to recover investigatory costs from investigation subjects in certain contexts. Subsection (d) is not meant to affect the operation of those statutes. To the extent that an AG seeks recovery of investigation costs (as opposed to a filing fee) pursuant to a separate statute, subsection (d) does not bar such fee recovery.

It is expected that the information being provided pursuant to this act will be used for and retained in connection with an investigation of the transaction. It is further expected that states availing themselves of the act will cooperate with merging parties in working out a mode of filing that parallels any federal process for filing the HSR notice and documents.

Finally, it is expected that if there is an investigation in connection with the transaction notified under the act, such an investigation will begin promptly upon receipt of all the information provided under the act consistent with the act's goals of enhanced efficiency and reduced cost and uncertainty. Unreasonable delay will also adversely affect the state's ability to challenge a transaction. For example, see *State of New York v. Meta Platforms, Inc.*, 66 F.4th 288, 301 (D.C. Cir. 2023) (applying laches to dismiss state challenges to Facebook's acquisition of Instagram and WhatsApp because of respective eight- and six-year delays in bringing the suit).

**Section 4. Confidentiality**

(a) Except as provided in subsection (c) or Section 5, the Attorney General may not make public or disclose:

(1) a Hart-Scott-Rodino form filed under Section 3;

(2) the additional documentary material filed or provided under Section 3;

(3) a Hart-Scott-Rodino form or additional documentary material provided by the attorney general of another state;

(4) that the form or the additional documentary material were filed or provided under Section 3, or provided by the attorney general of another state; or

(5) the merger proposed in the form.

(b) A form, additional documentary material, and other information listed in subsection (a) are exempt from disclosure under [cite to state's freedom of information act].

(c) Subject to a protective order entered by an agency, court, or judicial officer, the Attorney General may disclose a form, additional documentary material, or other information listed in subsection (a) in an administrative proceeding or judicial action if the proposed merger is relevant to the proceeding or action.

(d) This [act] does not:

(1) limit any other confidentiality or information-security obligation of the Attorney General;

(2) preclude the Attorney General from sharing information with the Federal Trade Commission or the United States Department of Justice Antitrust Division, or a successor agency; or

(3) preclude the Attorney General from sharing information with the attorney general of another state that has enacted the Uniform Antitrust Pre-Merger Notification Act or a substantively equivalent act. The other state's act must include confidentiality provisions at least as protective as the confidentiality provisions of the Uniform Antitrust Pre-Merger Notification Act.

***Legislative Note:*** *A state may need to amend its freedom of information act to conform to this act.*

## Comment

Confidentiality is highly important for this act and the entire HSR filing process. The HSR materials contain confidential and valuable information. Improper disclosure could jeopardize the transaction and harm competition. In addition, it could pose securities law problems and allow unfair competition, or even facilitate collusion. These protections mirror protections that are imposed on the federal agencies which also receive the information.

This section ensures that AGs use the HSR materials only for legitimate investigatory and law enforcement purposes, and do not disclose any HSR material except for those permissible purposes. The fact that an HSR filing has been made is included in the covered confidentiality obligations. In other words, an AG may not disclose even the fact that two parties are proposing to merge (other than in an administrative proceeding or judicial action) if that information has become known only through compliance with this act. Section 5 is not meant to prevent AGs from publicly disclosing information that is already in the public domain.

To the extent that confidential material needs to be disclosed in a judicial document such as a complaint, it is customary practice for any confidential material to be redacted in the public version of the document, with the unredacted version filed under seal. It is anticipated that AGs will continue to follow that practice, even as to complaints filed before a court has had an opportunity to implement a protective order.

Subsection (d)(1) is intended to preserve any other confidentiality or information-security obligations, whatever their source, in addition to those set forth in this act. Subsections (d)(2) and (3) are intended to allow AGs to communicate freely with their federal and state counterparts concerning merger review in circumstances where both the states and federal agencies have access to the same confidential information. The term information in these subsections is intended to include economic and legal analyses that are commonly used in merger review. For example, one AG may wish to share an economic analysis of relevant data with federal and state counterparts to enhance efficiency and reduce wasteful duplication.

This section uses the phrase “substantively equivalent” to describe another state’s law that would be sufficiently like the enacting state’s law to warrant the kind of interstate collaboration envisioned by this act. Another expression—“substantially similar”—is sometimes used in legislation. The use of “substantively equivalent” instead is intended to signal that, whatever the form of another state’s law, that law must contain the substantively significant components of the enacting state’s law, without material alteration, for the information sharing and collaboration envisioned by this act to occur.

Finally, an explanatory comment on the relationship between subsections 4(d) and 5(a): 5(a) permits the AG of one state to share the HSR materials with the AG of another state that has adopted a substantively equivalent law. By contrast, subsection 4(d) allows for information-sharing among or between AGs who already have access to the HSR materials. This subsection was added to make clear that work product or other information derived from HSR materials may be shared with federal enforcers or other AGs whose states have enacted a substantively equivalent law, thus guaranteeing the confidentiality of the information. For example, if the AG

of State A had an economist perform a regression analysis based on data provided in the HSR filing received pursuant to this act, that analysis could be shared with the AG of another state that also enacted the act, or a substantively equivalent act.

**Section 5. Reciprocity**

(a) The Attorney General may disclose a Hart-Scott-Rodino form and additional documentary material filed or provided under Section 3 to the attorney general of another state that enacts the Uniform Antitrust Pre-Merger Notification Act or a substantively equivalent act. The other state's act must include confidentiality provisions at least as protective as the confidentiality provisions of the Uniform Antitrust Pre-Merger Notification Act.

(b) At least two business days before making a disclosure under subsection (a), the Attorney General shall give notice of the disclosure to the person filing or providing the form or additional documentary material under Section 3.

**Comment**

This section does not require the HSR form or additional documentary material to be delivered individually to each AG. It is hoped that an AG, or the AGs collectively, may establish a secure central electronic database of the materials that can be shared only with AGs entitled to receive the materials. The establishment of a secure central database would not conflict with the confidentiality provisions of this act.

Section 5(b) is intended to allow a party to challenge the disclosure when appropriate.

**Section 6. Civil Penalty**

The Attorney General may [impose][seek imposition of] a civil penalty of not more than $[10,000] per day of noncompliance on a person that fails to comply with Section 3(a), (b), or (c). A civil penalty imposed under this section is subject to procedural requirements applicable to the Attorney General, including the requirements of due process.

***Legislative Note:*** *A state should determine whether to use "impose" or "seek imposition of" based on whether that state's laws permit its attorney general to impose a civil penalty directly or require the attorney general to seek imposition of a civil penalty in an appropriate proceeding.*

**Comment**

The sanctions provision is intended to incentivize compliance with the act without being disproportionately punitive. A $10,000 per day fine is intended to serve as a limit rather than an automatic penalty. In determining whether any fine should be levied and its amount, the AG in the first instance, and then any reviewing court, should consider factors such as: (1) whether the non-compliance was intentional, negligent, accidental, or excusable; (2) whether the non-compliance materially impaired the AG's ability to engage in merger review; and (3) whether other states have imposed, or are likely to impose, sanctions for violations of their laws with respect to the same transaction. The provision for monetary sanctions is not meant to prevent a court of competent jurisdiction from ordering such equitable relief as the court may deem appropriate.

It should be kept in mind that, while both the acquiring and acquired party to a transaction may have HSR filing obligations, and both may also have filing obligations under this act, in some circumstances (such as a hostile takeover) the parties may file their HSR notifications at different times, and therefore make their notifications under this act at different times.

**Section 7. Uniformity of Application and Construction**

In applying and construing this uniform act, a court shall consider the promotion of uniformity of the law among jurisdictions that enact it.

**Section 8. Transitional Provision**

This [act] applies only to a pre-merger notification filed on or after [the effective date of this [act]].

**Section 9. Effective Date**

This [act] takes effect …

**EXHIBIT D**

AMERICAN BAR ASSOCIATION
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June 14, 2021

Via Email:
weintrau@nysenate.gov

Senator Michael Gianaris
Deputy Majority Leader, 12th District
New York State Senate
c/o Jennifer N. Weintraub, M.A.
Legislative Director

**SUBJECT: Comments on Proposed New York Donnelly Act Amendments**

Dear Senator Gianaris:

On behalf of the American Bar Association Antitrust Law Section, I am pleased to submit the attached comments on the proposed Donnelly Act Amendments in Senate Bill S933A, Assembly Bill A1812A, and Assembly Bill A3399.

Please note that these views are being presented only on behalf of the Antitrust Law Section. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and should not be construed as representing the policy of the American Bar Association.

If you have any questions after reviewing this document, I will be happy to provide further comments.

Sincerely,

Gary P. Zanfagna
Chair, Antitrust Law Section

Attachment

# COMMENTS OF THE AMERICAN BAR ASSOCIATION ANTITRUST LAW SECTION ON CERTAIN ASPECTS OF NEW YORK SENATE BILL 933A, NEW YORK ASSEMBLY BILL 1812A, AND NEW YORK ASSEMBLY BILL 3399

June 14, 2021

*The views stated in this submission are presented on behalf of the Antitrust Law Section; they have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and therefore should not be construed as representing the policy of the American Bar Association.*

The Antitrust Law Section of the American Bar Association (the Section) respectfully submits these comments concerning the premerger notification requirements of New York Senate Bill 933A ("S933A") and its counterpart in the New York State Assembly, New York Assembly Bill 1812A ("A1812A") (both referred to as the "Twenty-First Century Anti-Trust Act"), and the unilateral conduct provisions of S933A, A1812A, and New York Assembly Bill 3399 ("A3399").[1] The Section is available to provide additional comments or assistance in any other way that the New York State Senate or New York State Assembly may deem helpful and appropriate.

The Antitrust Law Section is the world's largest professional organization for antitrust and competition law, trade regulation, consumer protection and data privacy as well as related aspects of economics. Section members, numbering over 7,600, come from all over the world and include attorneys and non-lawyers from private law firms, in-house counsel, non-profit organizations, consulting firms, federal and state government agencies, as well as judges, professors, and law students. The Section provides a broad variety of programs and publications concerning all facets of antitrust and the other listed fields. Numerous Section members have extensive experience and expertise regarding similar laws of non-U.S. jurisdictions. For nearly thirty years, the Section has provided input to enforcement agencies around the world conducting consultations on topics within the Section's scope of expertise.[2]

[1] S933A, 2021-2022 Regular Sess. (N.Y. 2021), *available at* https://www.nysenate.gov/legislation/bills/2021/s933/amendment/a; A1812A, 2021–22 Regular Sess. (N.Y. 2021), *available at* https://www.nysenate.gov/legislation/bills/2021/a1812/amendment/a; A3399, 2021–22 Regular Sess. (N.Y. 2021), *available at* https://www.nysenate.gov/legislation/bills/2021/A3399.

[2] Prior comments submitted by the Section have been archived online and can be accessed on its website at: https://www.americanbar.org/groups/antitrust_law/resources/comments_reports_amicus_briefs/.

## I. Executive Summary

### A. S933A and A1812A Premerger Notification

The Section appreciates the opportunity to comment on S933A and its Assembly counterpart, A1812A. The Section has substantial concerns about the premerger notification requirements of S933A and A1812A and strongly recommends that New York not pass S933A or A1812A into law as currently drafted.

New York, like all other states, does not have a general premerger notification requirement that must be satisfied before parties can close their transactions. S933A and A1812A would introduce such a requirement, but its ambiguity and scope would burden not only private parties, but also the State's resources; duplicate, rather than complement, work done by federal antitrust authorities as is done today; subject parties to an unnecessary risk of penalties; and potentially chill commerce in the State.

The federal law that has required premerger reporting since 1978, the Hart-Scott-Rodino ("HSR") Act, already obligates merging parties to file notifications with the federal antitrust authorities and wait the requisite period under the statute before closing. In the Section's experience, there is already strong cooperation between federal and state antitrust authorities, including the Office of the New York Attorney General ("NY AG"). In a large number of merger investigations, state attorneys general, including the NY AG, investigate mergers alongside the federal antitrust authorities, namely, the U.S. Department of Justice Antitrust Division ("DOJ") and the Federal Trade Commission ("FTC").

As drafted, S933A and A1812A would result in submission of perhaps tens of thousands of premerger notifications to New York. By comparison, the federal antitrust authorities receive approximately 2,000 premerger notifications each year and on average determine that less than 3% require a significant investigation, and even fewer merit enforcement. In other words, with far narrower reporting requirements than S933A or A1812A and more than 40 years of experience in reviewing premerger notifications, the federal authorities determine that more than 97% of transactions do not merit an extended review because they are not problematic under the competition laws. The DOJ and FTC allow more than 97% of notified transactions to close within 30 days, and more than 50% of deals in fewer than 30 days. S933A and A1812A would extend the waiting period to 60 days for all deals, whether they are problematic or not.

The Section believes that to effectively review the filings it would receive under S933A or A1812A, New York would have to devote significant resources. Many of those resources would be wasted in that most would go to reviewing transactions that are not likely to be problematic, that have little nexus to New York, or that the federal authorities have also reviewed, amounting to duplicative review.[3]

[3] The Section has previously advocated against duplicative, unnecessary, and parallel premerger regimes that cover a jurisdiction. *See* ABA, Section of Antitrust Law, Comments of the ABA Section of Antitrust Law and Section of International Law in Response to the COMESA Competition Commission's Request for Comments on the Proposed Draft Guidelines to the COMESA Competition Regulations, 2004 (June 2013),

Although there are limited examples of some state-level merger reporting requirements that involve industries or markets likely to be of particularly local concern, the Section is not aware of any U.S. state or territory (or international sub-country level government unit) having ever implemented as broad a premerger reporting requirement as the one in S933A or A1812A.

S933A and A1812A also raise questions as to the low jurisdictional threshold, which could result in over-reporting and a worsening of the burden on the State, or lead parties to forgo transactions or structure them in ways that would undermine benefits for residents in New York.

The Section also notes that a number of provisions of S933A and A1812A do not comport with International Competition Network ("ICN") principles. The ICN is a global body of 141 national and multinational competition authorities devoted exclusively to improving antitrust laws around the world.[4] In particular, the ICN has developed and refined Recommended Practices for Merger Notification and Review Procedures that are recognized globally as the gold standard for how merger review regimes should be designed and operated. Developing nations or nations without merger review look to the ICN to help develop merger review regimes that balance a healthy business environment with vigorous merger enforcement. As detailed below, the provisions of S933A and A1812A do not comport with a number of ICN standards. The Section notes that the United States was a founding member of ICN and submits that U.S. merger review standards ought to comport with ICN values.

The Section recommends that the New York State Legislature not adopt S933A or A1812A as currently drafted.[5] However, if it does, the Section suggests that the bill include a notice period before the statute and any implementing rules would take effect. The notice period would allow the NY AG time to develop and receive public comment on implementing rules. It would also avoid unfair prejudice to parties that negotiated a transaction before S933A or any implementing rules are put in place.

By way of example, President Ford signed the HSR Act into law on September 30, 1976. The HSR Act featured a 150-day notice period before it became effective, but the DOJ and FTC were unable to issue implementing rules by the 150-day deadline. The DOJ and FTC received hundreds of public comments on several versions of the rules, which resulted in "substantial revisions." In the interim, the DOJ and FTC issued transitional rules that exempted any transaction from the HSR Act's reporting requirements until 30 days following the effective date of the final rules. The final rules were published on February 14, 1978, and became effective on August 30,

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https://www.americanbar.org/content/dam/aba/administrative/antitrust_law/v4/at_comments_comesa_201306.pdf ("Also, it seems reasonable to assume that, following the example of the European Commission, if a filing is made before the COMESA Competition Commission, this would render unnecessary any national individual filings before the Member States' national agencies. It would be advisable to acknowledge that expressly in the draft Guidelines.").

[4] ICN, What is the ICN?, https://www.internationalcompetitionnetwork.org/about/.

[5] The Section also understands that the New York State Bar Association issued a report in 2018 that opposed many of the merger notification provisions of S933A and A1812A. *See* New York State Bar Ass'n, Donnelly Act Review Committee (Oct. 12, 2018), ("[T]there appears to be no need for a legislative solution because the NY AG already has the ability to access materials submitted as part of the HSR process . . . Accordingly, the NY AG already has the tools to gather the necessary materials to conduct its merger investigations and ensure that mergers comply with New York law. Therefore, the Mergers Committee believes there is no need to revise the Donnelly Act to require merging parties to provide the same premerger notification materials that they provide to the federal agencies.").

1978. Therefore, approximately two years elapsed between the time the HSR Act was passed and the time transactions became subject to the HSR Act. Likewise, more than seven months passed between publishing of the final rules (after several draft rounds had been published) and parties becoming subject to the reporting obligations of the HSR Act.[6] If the New York State Legislature adopts S933A or A1812A, the Section urges it to amend the bill such that it does not take effect until at least one year after the NY AG issues final implementing rules.

### B. S933A, A1812A, and A3399 Unilateral Conduct Provisions

The Section also appreciates the opportunity to comment on the provisions of S933A, A1812A, and A3399 that add prohibitions of certain unilateral business conduct. S933A and A1812A would add two separate unilateral conduct prohibitions. One prohibits "monopolization" as well as attempts to monopolize and conspiracies to monopolize. This prohibition is modeled on Section 2 of the federal Sherman Act, which many states have emulated. The other prohibition, which also is contained in A3399, is modeled on the competition law of the European Union, which many other countries have emulated. That provision prohibits "abuse of dominance." The Section has concerns about adopting an abuse of dominance prohibition, which has never been adopted by a jurisdiction with an adversarial legal system.

Adopting a prohibition based on Section 2 allows the New York courts to benefit from, and freely adopt, federal case law precedent. Adopting an abuse of dominance prohibition forces New York courts to construct parallel rules and standards. While New York courts could look to interpretations of courts in other countries, their use of administrative systems means that those countries have not confronted critical issues in private litigation, and it means that those countries' interpretations of substantive law could be deemed inappropriate for New York.

For the most part, the two types of unilateral conduct provisions cover the same ground; both prohibit improper conduct through which a dominant firm maintains its dominant position. Unlike an abuse of dominance provision, a provision modeled on Section 2 also prohibits improper conduct through which a firm achieves a position of dominance or attempts to do so. Whether and how an abuse of dominance provision would prohibit conduct not proscribed by a provision modeled on Section 2 would be a matter for the New York courts to determine. An abuse of dominance prohibition could be interpreted to prohibit conduct for reasons other than its anticompetitive effects, and potentially even to permit the regulation of prices. Both the uncertainty from such a prohibition and its potential undesirable reach are concerning to the Section.

## II. S933A and A1812A Premerger Notification Comments

### A. S933A and A1812A Increase Burdens with the Review of Many Transactions That Do Not Lessen Competition

A relatively small number of mergers and acquisitions (M&A) implicate significant antitrust issues. As set forth in the ICN's Recommended Practices for Merger Notification and

[6] Statement of Basis and Purpose for the Final HSR Rules, 43 Fed. Reg. 33450 (1978) https://www.ftc.gov/sites/default/files/documents/hsr_statements/43-fr-33450/780731fr43fr33450.pdf.

Review Procedures, the goal of a premerger notification law should be to allow non-problematic transactions to proceed expeditiously, while also allowing for reasonable investigation of transactions that present antitrust issues.[7] Premerger notification is a blunt instrument in that all such notification regimes result in many more transactions being notified to government agencies than the number of transactions that necessitate a serious investigation, let alone an enforcement action (e.g., a divestiture, behavioral remedy, or litigation).[8]

The HSR Act includes exceptions, and the DOJ and FTC have adopted a number of additional good-sense exceptions or changes to HSR filing rules to reduce reporting of transactions unlikely to raise competition issues. Even with these measures, the overwhelming majority of the filings that the DOJ and FTC receive are non-problematic transactions.

Under the HSR Act, parties to a notifiable transaction must observe a 30-day (or in limited cases, 15-day) "waiting period" before closing. Until that waiting period ends, federal law prohibits the parties from consummating a notifiable transaction. At the end of the HSR waiting period, one of three events typically occurs.[9]

- Second Request. The DOJ or FTC can extend the waiting period by issuing a "Second Request," which is a subpoena for documents, data, and other information. The DOJ and FTC issue Second Requests only in those transactions that merit a substantial antitrust investigation.

- Natural Expiration of the Waiting Period. If the DOJ and FTC take no action to extend the waiting period by issuing a Second Request, the parties are free to close the transaction.

- Early Termination. The DOJ and FTC have discretion to grant early termination of the HSR waiting period, which, if granted, allows transacting parties to close their deal ahead of the end of the statutory waiting period.

[7] ICN, Recommended Practices for Merger Notification, at 11, https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/MWG_NPRecPractices2018.pdf.
[8] *Id.*
[9] In limited circumstances, a buyer may choose to withdraw its filing, and resubmit it to the DOJ and FTC within two business days without paying another filing fee. Transacting parties sometimes employ this strategy if the DOJ or FTC needs more time to investigate and there is some likelihood of avoiding or narrowing a Second Request investigation.

Table 1 below reports the number of transactions reported under the HSR Act, the number of Second Requests issued, and the number of transactions that were subject to a waiting period of 30 days or less.

**Table 1**[10]

| | 2015 | 2016 | 2017 | 2018 | 2019 | Average |
|---|---|---|---|---|---|---|
| HSR Transactions Reported (Adjusted)[11] | 1,754 | 1,772 | 1,992 | 2,028 | 2,030 | 1,915 |
| Second Requests Issued | 47 | 54 | 51 | 45 | 61 | 52 |
| % of Transactions Receiving Second Request | 2.7% | 3.0% | 2.6% | 2.2% | 3.0% | 2.7% |
| Waiting Period Lasted 30 Days or Less | 1,754 | 1,778 | 2,001 | 2,066 | 2,028 | 1,925 |
| # of Transactions in which ET was Requested | 1,366 | 1,374 | 1,552 | 1,500 | 1,507 | 1,460 |
| % of Transactions with ET Requested | 78% | 78% | 78% | 74% | 74% | 76% |
| # of Transactions in which ET was Granted | 1,086 | 1,020 | 1,220 | 1,170 | 1,107 | 1,121 |
| % of All Transactions in which ET was Granted | 62% | 58% | 61% | 58% | 55% | 59% |
| % of Transactions Involving an ET Request that was Granted | 80% | 74% | 79% | 78% | 73% | 77% |

Over the last five years, just 2.7% of transactions, on average, received a Second Request that extended the waiting period.[12] In other words, in more than 97% of transactions the DOJ and FTC determined that there were either no competition issues or that any such issues did not necessitate further investigation. With the advent of a premerger notification process in S933A and A1812A, New York similarly would be devoting resources to the review of numerous transactions that do not raise substantive competition concerns—and duplicating efforts and resources already spent at the federal level.

### B. Specific Features of the S933A/A1812A Reporting System Itself Exacerbate Burden Concerns

#### 1. Low Filing Threshold

As noted above, the DOJ and FTC currently receive filings for approximately 2,000 transactions each year based on the current minimum federal filing thresholds, which are indexed to inflation. HSR Act filings are required only if the value of a transaction exceeds a minimum

[10] U.S. Dep't Justice & Fed. Trade Comm'n, HSR Annual Report, Fiscal Year 2019, Appendix A, https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-bureau-competition-department-justice-antitrust-division-hart-scott-rodino/p110014hsrannualreportfy2019.pdf.

[11] The DOJ and FTC report both the number of transactions reported and the number of transactions reported that were eligible for a Second Request ("adjusted"). Table 1 reports the latter number, which excludes the transactions detailed in Footnote 2 of the DOJ & FTC HSR Annual Report from the denominator in the Second Request calculation. *Id*. On average over the last five years, the DOJ and FTC have received filings in 62 transactions that were not eligible to receive a Second Request. Since the criteria that make those transactions ineligible for a Second Request are not necessarily present in S933A or A1812A, Table 1 is likely conservative in that it undercounts the number of filings that New York would have to review under S933A or A1812A.

[12] Over the last 10 years (2010-2019), the DOJ and FTC issued Second Requests in 3.1% of transactions (adjusted). Since 2000, that number is 2.96%, and ranges from a high of 4.5% in 2009 to a low of 2.1% in 2000.

threshold set at $92 million in 2021. The minimum transaction value threshold in S933A and A1812A would adjust for inflation and be just $9.2 million currently, which is much lower than even the *original* federal threshold of $15 million that took effect more than 40 years ago in 1978.[13] $15 million in 1978 dollars is roughly equivalent to $61 million today. In other words, S933A and A1812A adopt a reporting threshold more than *six times smaller* than the original HSR Act threshold that took effect in 1978.

Although there are various sources of deal volume, parties to transactions reported to Bloomberg 6,147 deals involving U.S. companies in 2020 that were valued at $9.2 million or more. Expanding to global deals, a number of which could be caught by the jurisdictional requirements of S933A and A1812A, that number grows to more than 47,000.[14] And even these figures underestimate the potentially reportable transactions under S933A and A1812A. Parties might not report confidential deals to Bloomberg's database, and these figures do not capture large dollar value stock trades (e.g., by mutual funds or other institutional investors) that could trigger filing requirements due the lack of an exemption for de minimis (in terms of percentage ownership) passive investments in the bills—an exemption that is part of the HSR Act.[15] As such, S933A and A1812A could result in New York receiving between at least 3 and 20 times the number of filings that the federal agencies receive and likely many more.

### 2. Longer Effective Waiting Period

As drafted, S933A and A1812A require that merging parties file their notification "no later than 60 calendar days before closing of the acquisition." This is in effect a waiting period that must be observed prior to closing and one that is double the typical 30-day waiting period under the federal HSR Act. For the many transactions that do not raise substantive concerns discussed above, this timing creates unnecessary delay.

The ICN recommends that merger review systems permit non-problematic transactions to proceed "expeditiously" and that initial review periods should expire within six weeks (42 days) or less.[16] Under the federal system, not only are the waiting periods shorter, but merging parties can request that the DOJ and FTC terminate the waiting period early (such early termination is

[13] The Section understands Section 10(a)(i) of S933A and A1812A to set New York's "size of transaction" threshold at 10% of the HSR Act size of transaction threshold ($92 million in 2021), i.e., $9.2 million in 2021. However, the reference to 15 U.S.C. § 18a(a)(2) is ambiguous as there are multiple thresholds under that portion of the HSR Act. The Section recommends that S933A and A1812A be clarified, presumably to refer to the threshold in 15 U.S.C. § 18a(a)(2)(B)(i), and reference $50 million as adjusted (i.e., $92 million for 2021). While the Section agrees that merger thresholds ought to be indexed to some measure of growth, for the reasons set forth herein, the absolute value of the threshold is too low.

[14] Based on Bloomberg terminal data available just prior to the finalization of this comment.

[15] To illustrate just how significant such institutional investor trades could be, one investment fund cautioned the FTC that a proposed change to its HSR rules (i.e., removing a certain limitation that does not exist in S933A or A1812A) could result in 400–500 HSR filings for that business alone. Letter from Sandra Boss, Senior Managing Dir., Global Head of Investment Stewardship, BlackRock to FTC (Feb. 1, 2021), https://downloads.regulations.gov/FTC-2020-0085-0014/attachment_1.pdf.

[16] ICN, Recommended Practices for Merger Notification, at 11, https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/MWG_NPRecPractices2018.pdf.

also known as "ET").[17] Approximately 74% of transactions involve a request for ET, and the DOJ and FTC grant ET in 57% of transactions.[18] Although the agencies do not publish statistics about the timing of their ET grants, in the experience of the Section, historically many grants of ET occur within 7–14 days of the HSR filing as the federal authorities have become efficient in their review of transactions. In summary, the federal waiting period lasts no more than 30 days for 97% of transactions and it lasts less than 30 days for nearly 60% of transactions.[19]

For the 97% of transactions each year that do not present competition issues, S933A and A1812A likely would double the waiting period beyond what is already required. And for the 57% of deals that receive ET from the federal authorities, the waiting period under S933A and A1812A would be three to four times longer than it is today. The Section submits that S933A and A1812A are not consistent with ICN principles and questions whether there is a justification sufficient to impose a longer waiting period on the numerous non-problematic transactions captured by the S933A and A1812A premerger reporting system.[20]

The effect of delaying non-problematic transactions is not costless. Non-problematic M&A can have significant procompetitive consequences that benefit consumers, including New York consumers. Examples include lower costs; new product options; saving a failing company from going out of business; improved operations, investment, or R&D; or sales into new geographies. Moreover, as detailed below in Section II.E, the low jurisdictional thresholds in S933A and A1812A would capture non-problematic transactions such as mutual fund acquisitions of public company shares, which are typically time-sensitive transactions. Delay in closing these transactions could harm those funds' performances, limit their ability to achieve their stated investment objectives, and increase risk for investors, harming the more than 50% of households with such investments, e.g., pension plans and individual savings for retirement.[21] Delaying the closing of all transactions notifiable under S933A and A1812A—most of which would be non-problematic—would necessarily delay benefits from reaching consumers in New York, nationwide, and globally. The Section also observes that over-enforcement could chill investment (including transactions in New York), deter procompetitive transactions, or unnecessarily discourage R&D, to the detriment of long-term consumer welfare.

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[17] Grants of ET are public and are published on the FTC's website. A common reason why transacting parties do not request ET is that they do not want the fact of their deal to be disclosed publicly.

[18] ET is requested in only about 74% of transactions. As noted in the prior footnote, parties sometimes do not request ET out of concern over public disclosure. The agencies grant ET in 57% of all transactions filed, but do so in 77% of cases involving an ET request. In other words, but for concerns over public disclosure, many more transactions would likely receive ET and therefore have an even shorter HSR waiting period.

[19] The waiting period for certain transactions is just 15 days. By federal statute, the waiting period is just 15 days for deals involving cash tender offers and acquisitions pursuant to Section 363 of the Bankruptcy Code.

[20] *See e.g.*, ICN Recommended Practices, §§ II.B. ("Initial notification requirements and/or practices should be implemented so as to avoid imposing unnecessary burdens on parties to transactions that do not present material competitive concerns.").

[21] Letter from Sandra Boss, Senior Managing Dir., Global Head of Investment Stewardship, BlackRock to FTC (Feb. 1, 2021), https://downloads.regulations.gov/FTC-2020-0085-0014/attachment_1.pdf.

### C. The Magnitude of the Burden on New York Resources Will Be Significant

In FY2020, the FTC reported that it had 1,160 full-time equivalent employees, with a total budget of $332 million. For FY2021, the DOJ's Antitrust Division requested a budget of $188.5 million and reported 782 positions. Combined, the budget of the DOJ and FTC is more than $520 million and the agencies employ more than 1,900 individuals. Although the amount of work varies by transaction, broadly speaking, in merger reviews, agency lawyers, economists, and other staff review filings, analyze party data, review business documents, conduct independent research, and conduct interviews of third parties, among other tasks, to determine whether a transaction requires more investigation or enforcement.

By comparison, the Section understands that the budget for the *entire* Office of the New York Attorney General is just $272 million,[22] and the Antitrust Bureau of NY AG employs approximately 20 individuals, less than 1% of the NY AG's total workforce.[23] Although both DOJ and FTC have missions outside of merger review, so does the New York Antitrust Bureau. Indeed, the Section's experience with the New York Antitrust Bureau is that the bulk of its work relates to investigations of anticompetitive conduct rather than merger reviews. Although there are limited exceptions, given its limited resources, when the New York Antitrust Bureau is involved in merger reviews it typically works alongside the DOJ or FTC staff (or other state attorneys general staff), relying on federal agency staff to a substantial degree to handle much of the "heavy lifting" attendant to merger reviews. Of course, like all state attorneys general, the Section understands that the New York Antitrust Bureau conducts its own investigations and comes to its own independent enforcement decisions.

Given that S933A and A1812A may result in New York receiving exponentially more filings than the DOJ and FTC receive under the HSR Act, it is highly questionable that New York would have the staffing to handle the influx of filings and to investigate potentially anticompetitive transactions. Without a concomitant increase in resources to allow for this, S933A and A1812A would burden parties with notifications that will sit idle and only serve to increase administrative burdens and delay closings in contravention of ICN merger review principles.[24] It is worth noting that the State also could incur additional administrative costs in having to constantly interpret and provide guidance on its premerger notification system. By statute, regulation, and informal interpretations, the DOJ and FTC have articulated, in part through experience and trial-and-error, a number of exemptions to the HSR rules. Currently, the FTC has a dedicated staff of nine for

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[22] Ryan Tarinelli, "$272M: NY Legislature to Approve Funding Increase for State AG's Office," Law.com, Apr. 7, 2021, https://www.law.com/newyorklawjournal/2021/04/07/272-million-ny-legislature-to-approve-funding-increase-for-state-ags-office/.

[23] Antitrust Bureau Staff Directory, https://ag.ny.gov/antitrust/antitrust-bureau-staff-directory; NY AG, Our Office, https://ag.ny.gov/our-office#:~:text=In%20fulfilling%20the%20duties%20of,matters%20affecting%20their%20daily%20lives (reporting that the NY AG employs more than 1,800 individuals).

[24] Appropriately tailored merger notification threshold tests are necessary to "limit the expenditure of public and private resources by avoiding notification and review of mergers that are unlikely to raise any competition concerns" and help prevent "unnecessary transaction costs and commitment of competition agency resources without any corresponding enforcement benefit." ICN, Recommended Practices for Merger Notification, at 3, https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/MWG_NPRecPractices2018.pdf.

processing filings and interpreting the HSR regulations, and that office has issued more than 4,000 informal interpretations of reporting requirements and exemptions.

### D. State-Level Premerger Notification Should Not Duplicate Efforts

The Section submits that given the substantial cost and burden of a premerger notification system to New York and to merging parties, such a system should be implemented in a manner that does not duplicate the reviews already occurring under the existing laws.[25] Today there is close coordination between the state attorneys general, including the New York Antitrust Bureau, and the federal antitrust authorities.[26] Indeed, the policies of both federal agencies strongly encourage close cooperation with the state attorneys general.[27] In any given merger investigation, cooperation between the DOJ or FTC and the state attorneys general reduces the burden of multiple, simultaneous, inconsistent investigations on the merging parties. It is almost always in the merging parties' interest, for example, to waive any federal confidentiality protections so that the DOJ and FTC can coordinate and communicate with any investigating state attorneys general. Moreover, states can simply use their existing investigative powers to subpoena all materials submitted to the DOJ or FTC. As a result, merging parties typically give state attorneys general reviewing the transaction access to all of the documents, data, and other information produced to the DOJ and FTC. The DOJ, FTC, and state attorneys general already:

- jointly investigate mergers and acquisitions,
- jointly incorporate the ideas and input in developing investigatory requests and subpoenas,
- jointly interview or depose witnesses,
- share or allocate responsibility for portions of the investigation,
- jointly consider settlement proposals, and
- share documents and data.

To the extent that New York merely desires to codify a requirement to provide a copy of all HSR filings to the NY AG, the Section does not believe that would be a significant burden to

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[25] *See e.g.*, ICN Recommended Practices, §§ II.B., II.E. ("Initial notification requirements and/or practices should be implemented so as to avoid imposing unnecessary burdens on parties to transactions that do not present material competitive concerns.") ("Where possible, cooperating agencies should seek to coordinate administrative aspects of proposed remedies of common interest to avoid unnecessarily duplicative requirements and unnecessary costs and burdens.").

[26] *See e.g.*, Fed. Trade Comm'n, Protocol for Coordination in Merger Investigations, https://www.ftc.gov/tips-advice/competition-guidance/merger-investigations ("To the extent lawful, practicable and desirable in the circumstances of a particular case, the Antitrust Division or the FTC and the State Attorneys General will cooperate in analyzing the merger. This protocol is intended to set forth a general framework for the conduct of joint investigations with the goals of maximizing cooperation between the federal and state enforcement agencies and minimizing the burden on the parties."); U.S. Dep't of Justice, Antitrust Division Manual, ch. VII, § C, at VII-9, 5th Ed. 2017, https://www.justice.gov/atr/file/761161/download ("The Division is committed to cooperating with state attorneys general. Effective cooperation between the Division and the states benefits the public through the efficient use of antitrust enforcement resources. Cooperation with the states gives the Division the benefit of local counsel who know the local markets well. It also promotes consistent enforcement and minimizes the burden of duplicative investigations.").

[27] *Id.*

merging companies. However, the need to subject parties to an entirely different state-level premerger notification regime, which is in large part duplicative of the work occurring under the existing HSR framework, is not obvious. If New York were interested in pursuing investigations of transactions that are not reportable under the HSR Act and mostly impact only New York, the Section respectfully submits that its premerger notification scheme should be more narrowly tailored.

### E. Low Jurisdictional Nexus Could Worsen Burdens or Chill New York Commerce

The Section acknowledges that the recent changes to S933A's jurisdictional requirements are an improvement over the prior version of the bill, which determined jurisdiction with reference to NY CPLR Sections 301 and 302. Jurisdiction under these statutes—particularly Section 302, which pertains to long-arm jurisdiction—depends on the specific facts of each case and does not provide a bright-line rule that would clearly indicate to an acquiring or acquired person when it is subject to reporting requirements under original S933, Section 10(a)(ii). When possible, jurisdictional requirements should delineate which transactions are reportable by establishing bright-line standards based on objective criteria.

However, the Section observes that the jurisdictional thresholds in the revised Section 10 (a)(ii) are low relative to global norms and potentially risk significant excess merger reporting to the NY AG.[28] The Sections recommend these thresholds be raised considerably. The low merger reporting thresholds are likely to result in an excessive buildup of merger notifications where the NY AG will have to divert its time and resources towards reviewing transactions that primarily impact other states, a national market, or even foreign jurisdictions, and that have little or no impact on the competitiveness of markets in New York. Further, such thresholds could risk discouraging investment in the New York economy, as they may deter companies from pursuing beneficial transactions involving New York. The ICN Recommended Practices provide guidance for the appropriate thresholds, noting that they should be at a level sufficient to "screen out transactions that are unlikely to result in appreciable competitive effects."[29]

The Section understands that if New York were an independent nation, its economy would rank as the 10th largest country in the world with a GDP of approximately $1.7 trillion.[30] S933A and A1812A require a filing if *either* the acquirer or acquired company has assets or annual net sales in New York of $9.2 million. By comparison:

- France, the world's 7th largest economy (GDP, $2.9 trillion) requires a premerger control filing only if the parties' combined worldwide sales exceed ~$183 million and each party's sales in France exceed $61 million.

[28] For example, current U.S. threshold for merger reporting is USD 92 million based on the transaction's valuation, which is 10-times larger (per the language of S933A) than the New York threshold.
[29] ICN Recommended Practices, § II.B.
[30] *Total Gross Domestic Product for New York*, FRED Economic Data, https://fred.stlouisfed.org/series/NYNGSP.

- Italy, the world's 8th largest economy (GDP, $2.1 trillion), requires a premerger filing only if the parties' combined sales exceed $607 million, and each party has more than $36 million in Italian sales.

- Canada, which has an economy roughly the size of New York (GDP, $1.8 trillion), requires a premerger control filing only if the combined assets or sales from assets in or into Canada exceed $330 million and the target's assets in Canada exceed $77 million.

- Switzerland, which has an economy roughly half the size of New York (GDP, $0.8 trillion), requires a premerger filing only if the parties' combined global sales exceed $2.2 billion or Swiss sales exceed $557 million, and both parties' sale exceed $111 million in Switzerland.[31]

Even a number of countries with economies that are multiple times smaller than New York set a far higher bar for merger control than the pending bills. Simply put, S933A and A1812A set a bar for premerger control filings that is lower than many comparable jurisdictions. And unlike the United States and New York, the Section not aware of another major jurisdiction that requires concurrent and duplicative filings for more localized geographies within it.[32]

The Section also submits that jurisdiction should not exist based solely on the acquiring company's assets or annual net sales in New York. According to the ICN, "[n]otification should not be required solely on the basis of the acquiring firm's local activities, for example, by reference to a combined local sales or local assets test that may be satisfied by the acquiring entity alone irrespective of any significant local activity by the business to be acquired."[33] A few examples are instructive.

- A hospital system with a nationwide footprint and a corporate headquarters in Indiana ("HospitalCo") owns two rural hospitals in Upstate New York with $50 million in New York sales. Unrelated to the New York operations, HospitalCo plans to acquire a rural hospital in New Mexico for $30 million.

- A Texas-based software company ("CodeTECH") helps restaurants in the U.S. manage municipal regulatory compliance. CodeTECH has $15 million in revenue in New York. CodeTECH plans to expand into Europe by purchasing a company there for $100 million with similar software.

- An Ohio-based restaurant holding company with no New York sales plans to purchase an Upstate New York restaurant chain with $12 million in New York sales for $30 million.

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[31] *Projected GDP Ranking 2021*, STATISTICS TIMES, https://statisticstimes.com/economy/projected-world-gdp-ranking.php. The filing thresholds for the illustrative countries have been converted to U.S. dollars.

[32] If a filing is required in the European Union, Member States cannot require a filing (or even review the transaction). If Member State filings are required, but a European Commission filing is not, the Commission will not engage in a duplicative, concurrent review.

[33] ICN Recommended Practices, § II.C.

Each of these transactions lacks a significant nexus to New York by both parties, let alone an anticompetitive effect. The ICN recommends that "many jurisdictions require significant local activities by each of at least two parties to the transaction as a prerequisite for mandatory merger notification. This approach represents an appropriate material nexus screen since the likelihood of adverse effects from transactions in which only one party has a significant local presence is sufficiently remote that the burdens associated with notification are normally not warranted."[34]

Moreover, the low threshold and lack of exceptions in S933A and A1812A could have substantial negative impacts on financial markets as it would capture a number of purely financial transactions that are not likely to affect competition. For example, investment management corporations manage index funds, mutual funds, or exchange-traded funds ("ETFs") that track a specific basket of underlying investments. An index fund might hold the stock of large cap corporations, companies listed on the S&P 500, bonds, commodities, or some combination of those assets. It might hold hundreds or thousands of such assets. According to a recent report, approximately 52% of American households own some market investment, mostly from mutual funds.[35] If a large investment fund were to acquire 0.1% of the stock of a public company on the open market valued at $10 million, it could trigger a S933A/A1812A filing if the target company has assets or sales in New York valued at $9.2 million. An investment management corporation purchasing securities on the open market typically would not know or have access to information about the target's sales or assets in New York or any other state. Therefore, it would not be able to determine whether its purchase would require a filing under S933A/A1812A.

### F. Any Delegation of Rulemaking to the NY AG Should Be Narrowly Tailored

While the Section acknowledges that flexibility in a premerger notification system is important because not every transaction scenario can be contemplated, the delegation of rulemaking authority to the NY AG in S933A and A1812A does not appear to be limited in any way. The NY AG is empowered not only to define terms in the statute and create reporting exemptions, but also to "adopt, promulgate, amend, or rescind other rules or regulations to carry out the purposes of this subdivision." Unlike the DOJ's Antitrust Division and FTC, which have exclusive focus on enforcement of the antitrust laws, the NY AG is a politically elected position with a broad mandate that covers "the legal rights of the citizens of New York, its organizations and its natural resources."[36] The Section cautions that rulemaking authority in a premerger notification regime should be narrowly tailored to promote enforcement of the State's competition laws and not be a vehicle for achieving social and political agendas untethered to competition.

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[34] *Id.*

[35] Teresa Ghilarducci, Most Americans Don't Have a Real Stake in the Stock Market, Forbes, Aug. 31, 2020, https://www.forbes.com/sites/teresaghilarducci/2020/08/31/most-americans-dont-have-a-real-stake-in-the-stock-market/?sh=a2bc90711545.

[36] Letitia James, N.Y. Atty. Gen., Our Office, https://ag.ny.gov/our-office#:~:text=As%20head%20of%20the%20Department,organizations%20and%20its%20natural%20resources.

### G. S933A's and A1812A's Labor Amendment Is Unnecessary and Not Sufficiently Limited to Harm that Results from Anticompetitive Conduct

Under S933A and A1812A, as amended, the NY AG "shall consider such transaction's effects on labor markets" (the "Labor Amendment"). The Section considers the Labor Amendment unnecessary, duplicative, and costly. Section 7 of the Clayton Act makes transactions unlawful if "the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." Notably, Section 7 applies to "any line of commerce or in any activity affecting commerce in any section of the country." Its application is not limited to output markets, input markets, or labor markets. The Section therefore submits that the Labor Amendment is unnecessary and duplicative.

In addition, the Section submits that S933A and A1812A do not sufficiently limit the scope of the NY AG's transaction review to antitrust issues. As quoted above, the NY AG must consider the "transaction's effects on labor markets." Therefore, S933A and A1812A instruct the NY AG to consider "effects" but they fail to limit the NY AG's inquiry in either magnitude or scope. M&A transactions can result in "effects" in labor markets that are not anticompetitive effects. The Section submits that the antitrust laws should be concerned only with those transactions that have an anticompetitive effect.

## III. S933A, A1812A, and A3399 Unilateral Conduct Comments

### A. Introduction

Long before the first antitrust statute, common law decisions in New York condemned bid rigging.[37] In 1888, states began enacting statutes directed specifically at agreements between competitors to suppress competition in commerce. Congress acted more slowly than some of the states, but the Sherman Act became law on July 2, 1890 and its substantive prohibitions of the Sherman Act remain exactly as they were enacted on that day. Sherman Act Section 1 prohibits concerted conduct to suppress competition, including bid rigging, and Section 2 prohibits conduct by a single firm (unilateral conduct) to destroy competition. Most states have since adopted two parallel prohibitions, mirroring the Sherman Act, but New York's 1899 Donnelly Act—now codified as General Business Law Section 340—still contains a single prohibition directed to concerted conduct.

Antitrust bills pending in the New York State Legislature—S933A, A1812A, and A3399—would add prohibitions of certain unilateral business conduct. S933A and A1812A would add two separate unilateral conduct prohibitions. One would make it unlawful "to monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize any business, trade or commerce or the furnishing of any service in this state." This language is from

[37] *See, e.g.*, Wilbur v. How, 8 Johns. Cas. 444 (Sup. Ct. N.Y. Cty. 1811).

Section 2 of the 1890 Sherman Act,[38] so a large body of federal case law would guide New York courts on every aspect of applying this provision.[39]

All three bills would add an "abuse of dominance" prohibition, the unilateral conduct prohibition in effect in the European Union and many other countries. S933A and A1812A would make it unlawful "for any person or persons with a dominant position in the conduct of any business, trade or commerce or in the furnishing of any service in this state to abuse that dominant position." A3399 declares that: "Any abuse by one or more persons of a dominant position in the conduct of any business, trade, or commerce, or in the furnishing of any service in this state is hereby declared to be against public policy, illegal, and void." A3399 also lists conduct that might constitute an abuse, including "directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions." A3399 adopts the language of Article 102 of the Treaty on the Functioning of the European Union, and the other bills use similar language towards the same end.[40]

If New York were to adopt an abuse of dominance prohibition, its courts would not have case law to provide guiding or limiting principles. Perhaps because abuse of dominance is a concept that is unfamiliar to U.S. courts, S933A and A1812A (but not A3399) would empower the NY AG "to adopt, promulgate, amend, and repeal rules" to "carry out the purposes of" the abuse of dominance prohibition. S933A and A1812A further provide that the NY AG must transmit proposed rules to the New York State Legislature, either chamber of which then has the opportunity prevent the rule from taking effect.

The Section has no concern about New York adopting a prohibition of unilateral business conduct that harms competition and creates or maintains a monopoly. It is anomalous for New York to lack such a prohibition. The Section, however, recommends that the New York State Legislature consider carefully the desirability of inserting an abuse of dominance prohibition into an adversarial system that includes private damages litigation. This sort of prohibition heretofore

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[38] "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . . ." 15 U.S.C. § 2, originally enacted as ch. 647, § 2, 26 Stat. 209 (1890).

[39] New York courts construe the Donnelly Act "in light of Federal precedent and given a different interpretation only where State policy, differences in the statutory language or the legislative history justify such a result." X.L.O. Concrete Corp. v. Rivergate Corp., 83 N.Y.2d 513, 518 (1994).

[40] "Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.

Such abuse may, in particular, consist in:

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
(b) limiting production, markets or technical development to the prejudice of consumers;
(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts."

Consolidated Treaty on the Functioning of the European Union, art. 102, 2008 O.J. C 11 5/47.

Article 102 originally went into force in 1958 as Article 86 of the EEC Treaty. No authentic English version existed until the United Kingdom joined the European Economic Community in 1973.

has been adopted only in administrative systems where the prohibition would be enforced by a government agency.[41]

### B. Scope and Coverage of the Two Prohibitions under Consideration

A unilateral conduct law modeled on Section 2 of the Sherman Act is inherently broader than an abuse of dominance law because it reaches exclusionary conduct that *creates* a dominant market position,[42] or that *dangerously threatens to create* a dominant market position,[43] while an abuse of dominance prohibition applies only to conduct by an *already-dominant company*.[44] That said, both prohibitions, as they have been interpreted by jurisdictions around the world, apply in similar fashion to exclusionary conduct by already-dominant firms—a large area of overlap. Within that area of overlap, both prohibitions invite the courts (or administrative agencies) to make law in particular cases by incorporating and applying norms of marketplace behavior, such as competition on the merits.

S933A and A1812A would prohibit both abuse of dominance and monopolization. Since the two prohibitions are framed in different language, New York courts would need to carefully parse their language and, over time, material differences likely would emerge. Indeed, A3399 goes so far as to declare that its abuse of dominance prohibition must "be construed independent of" Section 2 case law, and it further encourages divergence from Sherman Act case law by specifying that no showing of harm to consumers is required under the dominance prohibition.

Although the New York courts are not obliged to follow the lead of other countries, abuse of dominance provisions have been interpreted to prohibit both the exclusionary conduct prohibited by Section 2 of the Sherman Act and "exploitative conduct," which uses monopoly power in a manner that offends social norms unrelated to competition. Regarding the latter, abuse

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[41] Over the past decade, some countries with abuse of dominance prohibitions have implemented private rights of action, but no country has any substantial case law on standalone damages actions under abuse of dominance prohibitions. The EU authorized damages under member state laws in 2014. Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union. [2014] O.J. L 349/1. Private litigation in these countries generally does not provide for extensive discovery, and this regime anticipates that damages actions normally will follow administrative determinations of violations. Thus far, private damages actions have been confined almost entirely to cartels. It is too early to tell whether the EU's push for more private enforcement will impact the substantive legal doctrine, as some have observed in connection with Section 2 of the Sherman Act.

[42] "The offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." United States v. Grinnell Corp., 384 U.S. 563, 570–71 (1966).

[43] The offense of "attempted monopolization under § 2 of the Sherman Act" requires "proof of a dangerous probability that they would monopolize a particular market and specific intent to monopolize." Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 459 (1993).

[44] *See, e.g.*, JONATHAN FAULL & ALI NIKPAY, EDS., THE EC LAW OF COMPETITION 228 (1999) (Article 102 "does not prevent the mere creation or possession of a dominant position. As the wording clearly states, it prohibits 'abuses' of such a dominant position.").

of dominance prohibitions are interpreted in other countries to prohibit unfairly high prices, as discussed below.

### C. Monopolization and Dominance Thresholds

The starting point for both monopolization and abuse of dominance analysis is when does a firm have sufficient control of a market to violate the law. Under Section 2 of the Sherman Act, the offense of monopolization is committed when a company uses improper conduct to obtain or maintain a degree of market control termed "monopoly power."[45] The case law interpreting Section 2 holds that a large market share is necessary for monopoly power,[46] but a high market share alone is not sufficient.[47] For example, a company with a large market share in an industry that is easy to enter would not have "monopoly power." Firms found by the Supreme Court to be monopolies under Section 2 all had market shares well in excess of 50%. However, the offense of attempted monopolization requires only that monopoly power is threatened, not that it is achieved.

Under an abuse of dominance law, the offense is committed when a firm with a "dominant" market position engages in improper conduct. In some older European cases, firms were found to be dominant despite having market shares below 50%, but decades of international cooperation have produced a substantial degree of convergence.[48] As a result, the European Commission's application of the dominance threshold is not easily distinguishable from the U.S. monopoly power threshold,[49] although a few other countries apply a lower dominance threshold.

In 2017 the ICN (which is made up of national enforcement agencies around the world) promulgated a consensus-based analytical framework for dominance cases. This document reflects substantial agreement around the world on what dominance/monopoly means and how it is assessed. Critically, the document states that "[a]t most one firm in any relevant market can

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[45] *See supra* note 42.

[46] *See, e.g.*, Bailey v. Allgas, Inc., 284 F.3d 1237, 1250 (11th Cir. 2002) ("A market share at or less than 50% is inadequate as a matter of law to constitute monopoly power."); Blue Cross & Blue Shield United of Wis. v. Marshfield Clinic, 65 F.3d 1406, 1411 (7th Cir. 1995) ("Fifty percent is below any accepted benchmark for inferring monopoly power from market share.").

[47] *See, e.g.*, Am. Council of Certified Podiatric Physicians & Surgeons v. Am. Bd. of Podiatric Surgery, Inc., 185 F.3d 606, 623 (6th Cir. 1999) ("market share is only a starting point for determining whether monopoly power exists, and the inference of monopoly power does not automatically follow from the possession of a commanding market share").

[48] *See, e.g.*, Differences and Alignment: Final Report of the Task Force on International Divergence of Dominance Standards of the ABA Antitrust Law Section (Sept. 1, 2019) 36 ("While the market shares associated with some past dominance cases in Europe are decidedly lower than those associated with monopoly cases in the United States, more recent enforcement actions of both the United States and the EC have alleged market shares at or above 70 percent."), https://www.americanbar.org/content/dam/aba/administrative/antitrust_law/comments/october-2019/report-sal-dominance-divergence-10112019.pdf.

[49] *See, e.g.*, Frances Dethmers & Jonathan Blondeel, *EU enforcement policy on abuse of dominance: Some statistics and facts*, 38(4) EUR. COMPETITION L. REV. 147, 149 (2017) ("the Commission's enforcement policy is clearly focused on companies with so-called super dominant shares in excess of 70%").

possess" a dominant or monopoly position.[50] This document would be a useful reference for New York courts applying an abuse of dominance prohibition.

Notably, A3399 does not provide guidance to the courts as to how high the dominance threshold is meant to be set. In the end, the New York courts applying A3399 will have to make a choice. They might interpret the legislation to command a dominance threshold lower than the monopoly threshold under Section 2 of the Sherman Act. Or they might determine that dominance and monopoly are indistinguishable legal concepts, so the thresholds should be the same.

S933A and A1812A set a dominance threshold, and the Section is concerned that it is set too low. A seller with a share of 40% is presumed dominant, as is a buyer with a share of 30%. In addition, S933A and A1812A permit dominance to be established without regard to market shares when a firm can "dictate" contractual terms. Any firms using standard contract terms downloaded from the Internet could be found to be dominant. The Section believes that S933A and A1812A would set the dominance threshold substantially lower than it is currently set in Europe and would convert ordinary business disputes into antitrust damages cases.

### D. Exclusionary Abuse of an Existing Dominant Position

International scholarship and cooperation among enforcement agencies over decades has produced a substantial degree of convergence on substantive law and policy relating to unilateral exclusionary conduct. Remaining divergence in enforcement is due as much to differences in legal systems and societal attitudes as to differences in law and policy. From 2017 to 2019, an ABA Task Force explored the extent to which monopolization and dominance standards have converged and remaining divergence.[51]

In comparing substantive law and practice between Europe and the United States, the ABA Task Force found some areas of divergence, and these differences could motivate a preference for either an abuse of dominance prohibition or a prohibition modeled on Section 2 of the Sherman Act.[52] European antitrust law is more apt to impose a duty to deal, especially on an essential facility theory,[53] and European law, but not U.S. law, recognizes the offense of "margin squeeze" in which a dominant company's price for an input sold to downstream rival might be deemed to be exclusionary. As compared with U.S. law, European antitrust law demands a lesser showing of anticompetitive impact from practices like exclusive dealing and loyalty discounts. Also, as

[50] International Competition Network, Unilateral Conduct Workbook—Chapter 2: Analytical Framework for Evaluating Unilateral Exclusionary Conduct ¶ 11 (May 2017), https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/07/UCWG_UCW_Ch2.pdf .

[51] *See supra* note 48.

[52] *Id.* at 41–61.

[53] A difference on refusal to deal seems significant even if it is difficult to pinpoint. *See id.* at 43–46. Europe limits forced dealing to exceptional cases but seems to declare many cases exceptional. The United States seems to force dealing only when it was undertaken voluntarily in the first instance. *See* Verizon Commc'ns v. Law Offices of Curtis V. Trinko, 540 U.S. 398, 409 (2004) (describing the conduct condemned in *Aspen Skiing* as: "The unilateral termination of a voluntary (*and thus presumably profitable*) course of dealing suggested a willingness to forsake short-term profits to achieve an anticompetitive end."); Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985) (upholding a jury verdict of a Section 2 violation from terminating voluntary arrangement).

compared with U.S. law, European antitrust law is more receptive to claims that tying and related practices use monopoly in one market to gain an advantage in a related market. Most of these points of divergence are not discernable from black letter statements of the law but can be seen in case outcomes.[54]

Although the Sherman Act does not use the word "competition," its purpose of protecting the competitive process was immediately understood by courts interpreting it. The legality of practices under the Sherman Act has always been judged by how they were understood to affect the competitive process, and not by how they affect particular competitors. In Sherman Act cases, courts work to distinguish injuries resulting from the rigors of competition from those injuries resulting from the destruction of competition.[55] New York courts surely would interpret a prohibition based on Section 2 of the Sherman Act with the same understanding, but there is no assurance that they would interpret an abuse of dominance prohibition in the same way. Nothing in the wording of the bills directs the courts to focus on the competitive process or on consumer welfare. Indeed, A3399 invites courts to sacrifice the interests of consumers by declaring that: "No showing of harm to consumer welfare shall be required to sustain a claim . . . ."

S933A and A1812A describe what constitutes an abuse of dominance in terms of impact on competitors. For example, they make refusing to deal an abuse when it has "the effect of unnecessarily excluding or handicapping actual or potential competitors." This makes refusing to deal essentially per se unlawful for dominant firms, notwithstanding possible legitimate business reasons for refusing. S933A and A1812A further declare that "pro-competitive effects shall not . . . cure competitive harm," and thus appears to make impact on the competitive process irrelevant when a competitor is harmed. The Section strongly cautions against any statutory language that can be construed to protect competitors rather than competition.

### E. Non-Exclusionary Abuse of Dominance

Nearly all enforcement actions of abuse of dominance laws challenge exclusionary conduct, but jurisdictions with abuse of dominance prohibitions also recognize the possibility of a non-exclusionary abuse of dominance. If New York were to adopt an abuse of dominance prohibition, New York courts could read the legislation to authorize challenges to non-exclusionary abuses.

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[54] The difference on margin squeeze is black letter law, as the Supreme Court rejected that theory of liability under Section 2 of the Sherman Act. *See* Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc., 555 U.S. 438 (2009). In addition, Section 2 does not condemn the use of a monopoly in one market merely to gain a competitive advantage in another. *See Trinko*, 540 U.S. at 415 n.4; Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 459 (1993).

[55] "Competition, which fosters innovation and tends to lower prices for consumers, directly pits one producer against another. When individual firms go head-to-head, one might wish that the rules of the Marquis of Queensberry, which ensure fair play, would be uppermost in the competitors' minds. The antitrust laws, however, safeguard consumers by protecting the competitive process. Those laws, unlike the Marquis of Queensberry rules, are not designed to protect competitors from one another's conduct." Geneva Pharm. Tech. Corp. v. Barr Labs. Inc., 386 F.3d 485, 489 (2d Cir. 2004) (footnote omitted). *See* NYNEX Corp. v. Discon, Inc., 525 U.S. 128, 135 (1998) ("the plaintiff here must allege and prove harm, not just to a single competitor, but to the competitive process, *i.e.*, to competition itself").

The principal category of non-exclusionary conduct that has been held to come within the ambit of abuse of dominance prohibitions is what is termed "exploitative" abuse. In short, exploitative abuse is charging unfairly high prices. The concept of exploitative abuse has been viewed with alarm by many Americans. One reason is that exploitative abuse seems oxymoronic: abuse of dominance laws do not prohibit dominance in of itself, and yet they can be construed to authorize punishment for charging monopoly prices, even though it is a normal and expected behavior of a monopoly.[56] A second reason is that enforcement against exploitative abuse offends a basic tenet of the rule of law[57] that a statute must provide guidance for its compliance if its violation will result in penalties. In Europe, the legal test for exploitative abuse is unfairness, and this concept is never reduced to specific rules or standards, even though a finding of unfairness is punishable by the imposition of a large fine.[58]

A final reason is that American antitrust takes a different view than much of the world on monopoly and monopoly prices. The Sherman Act is predicated on the view that:

> The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices—at least for a short period—is what attracts "business acumen" in the first place; it induces risk taking that produces innovation and economic growth. To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct.[59]

It bears noting that enforcement agencies in countries with abuse of dominance prohibitions use them sparingly against exploitative abuses. They do not regulate monopoly pricing generally, but rather intervene in exceptional cases, usually involving some sort of regulatory gap or failure.[60] Enforcement agencies rarely seek to impose anything like traditional cost-based price regulation, and they often merely try to bring domestic prices into line with those in adjacent countries.[61]

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[56] "[I]t would seem natural to expect a monopolist to charge the monopoly price. Interfering with such a pricing policy would be tantamount to interfere with dominance as such." Nils Wahl, *Exploitative High Prices and European Competition Law—A Personal Reflection in* THE PROS AND CONS OF HIGH PRICES 47, 51 (Swedish Competition Authority 2007).

[57] *See, e.g.*, JOSEPH RAZ, THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 214 ("the law must be capable of guiding the behaviour of its subjects" (italics removed)), 218 ("the law should conform to standards designed to enable it effectively to guide action") (2d ed. 2009).

[58] Gregory J. Werden, *Exploitative abuse of a dominant position: A bad idea that now should be abandoned*, EUR. COMPETITION J. (forthcoming).

[59] Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004).

[60] *See, e.g.*, Case C-372/19, SABAM v. Weareone.World BVBA, EU:C:2020:598, Opinion of Advocate General Pitruzzella, ¶¶ 22–27; Case 177/16, AKKA/LAA v. Konkurences Padome, EU:C:2017:286, Opinion of Advocate General Wahl, ¶¶ 48–50, 101–06.

[61] *See, e.g.*, Case 177/16, AKKA/LAA v. Konkurences Padome, EU:C:2017:689 (Judgment of the Court of Justice of the Economic Union on reference from a Latvian court approving of efforts to bring Latvian music licensing fees in line with those of Estonia and Lithuania).

### F. Importing Law from an Administrative Regime into an Adversarial System

Due to the differing legal frameworks between the U.S. adversarial system and the largely administrative systems enforcing abuse of dominance laws, New York judges confronting a private lawsuit or agency enforcement action alleging abuse of dominance would have to create standards and protections from scratch. In Europe and most countries that have adopted the European model of competition law, an administrative agency has the power to order companies to change their conduct and the power to impose fines. For example, the European Commission regularly imposes multi-billion-dollar fines for violations of competition law. Administrative agency actions under competition law are subject to court review but the courts themselves do not conduct trials, find facts, or craft remedies. Moreover, unlike the U.S. Federal Trade Commission, administrative competition agencies outside the United States do not conduct trial-type hearings.

Although many jurisdictions have abuse of dominance laws, the passage of any of the three pending antitrust bills would make the State of New York the first jurisdiction to adopt an abuse of dominance prohibition in an adversarial system. With the provision already in Section 340 authorizing private damages actions, and the explicit provision of class action relief in all three bills, New York also would become the first jurisdiction to adopt an abuse of dominance prohibition in a regime of private damages litigation. Thus, the passage of any of the three pending antitrust bills would require New York's courts to craft legal machinery essential for civil litigation over abuse of dominance.

New York courts are perfectly capable of doing what is needed, as they have had to do much the same thing with many other laws written by the legislature. But the process takes time, and there is no telling what will come out of it. With every new cause of action, the courts must allocate and calibrate litigation burdens. For every type of potentially abusive conduct, the courts would have to determine what allegations are sufficient to state a claim and what evidence is sufficient to proceed to trial. For cases that get to trial, the courts must determine the legal standards judges or juries use to decide the cases. Because abuse of dominance laws in other jurisdictions are enforced administratively, the case law of those jurisdictions does not address many of the questions that the New York courts will have to answer.

Private commercial litigation presents a challenge quite unlike anything encountered in an administrative system. Businesses bring lawsuits to promote the interests of their shareholders—not the public interest, so Sherman Act cases evolved rules to assure that the public interest in competition is always served. As noted above, courts work to distinguish injuries resulting from the rigors of competition from injuries resulting from the destruction of competition. While distinguishing the two can be difficult, not distinguishing them can be disastrous. If the law protects individual competitors rather than competition, it inevitably does so at the expense of consumers who benefit from low prices and innovation spurred by competition.[62]

[62] *See* Grappone, Inc. v. Subaru of New England, Inc., 858 F.2d 792, 794 (1st Cir. 1988) ("[T]he antitrust laws exist to protect the competitive process itself, not individual firms. And, the antitrust laws protect the competitive process in order to help individual consumers by bringing them the benefits of low, economically efficient prices, efficient production methods, and innovation." (citations omitted)).

To assure that the law protects competition rather than individual competitors, administrative systems rely on the judgment of enforcement agencies. Without civil litigation enforcing private rights of action, the courts in jurisdictions with abuse of dominance laws have not had to develop the sort of limiting principles that control antitrust litigation in the United States. If New York were to adopt an abuse of dominance prohibition, its courts would be confronted with private litigation brought by self-interested plaintiffs that stand to benefit at the expense of consumers. The courts could develop rules and standards under an abuse of dominance prohibition much like those developed under the Sherman Act. If they fail to do so, or even hesitate to do so, an abuse of dominance prohibition could become an instrument for suppressing competition rather than protecting it. And if New York law authorizes the award of treble damages for unfair pricing, litigation would explode, and business investment could be redirected to other states besides New York.

### G. Recommendation

Section 2 of the Sherman Act allows conduct to be challenged and remedied if it maintains a monopoly, creates a monopoly, or threatens to create a monopoly. In contrast, an abuse of dominance prohibition is applicable only in the first of these three categories. Section 2 of the Sherman Act serves only to protect the competitive process, but an abuse of dominance prohibition could be understood to do other things as well. If New York opts for an abuse of dominance prohibition, it should insert language to assure that it does not become a tool for protecting individual competitors from competition or for regulating prices. As it stands now, S933A and A1812A appear designed to protect individual competitors rather than protect competition.

Furthermore, the precise implications of an abuse of dominance law are unknowable. Indeed, uncertainty is the only certain consequence of adopting such a law. The State of New York should be mindful of the uncertainty it could be creating because uncertainty discourages investment and innovation.

Dissatisfaction with current federal law on exclusionary conduct has spurred legislative proposals in Congress but pinpointing problems and finding corresponding solutions is not easy. New York could contribute to the effort, as it did with the January 1880 report of Special Committee on Railroads of the New York Assembly (chaired by A. Burton Hepburn),[63] which first documented abuses by Standard Oil Company and paved the way for the first antitrust legislation.[64]

## IV. Conclusion

The Section appreciates this opportunity to provide its views on the above aspects of S933A, A1812A, and A3399 and is available for any further consultation the New York State Legislature may deem helpful and appropriate.

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[63] A. Burton Hepburn, Chair, Report of the Special Committee on Railroads, appointed under a Resolution of the Assembly to Investigate Alleged Abuses in the Management of Railroads Chartered by the State of New York (1880).

[64] *See* GREGORY J. WERDEN, THE FOUNDATIONS OF ANTITRUST: EVENTS, IDEAS, AND DOCTRINES 7–8 (2020).

CHAMBER OF PROGRESS

October 7, 2024

Sharon Reilly, Executive Director
California Law Revision Commission
925 L Street, Suite 275
Sacramento, CA 95814

Dear Executive Director Reilly and Members of the California Law Revision Commission:

I write today out of alarm by your recent *Expert Report: Artificial Intelligence*[1] and the A.I. working group's proposal that the Commission consider that California adopt rules based on Europe's Digital Markets Act (DMA).

While the working group argues that "the digital gatekeepers in Europe are already complying with" the DMA, it is vital for the Commission to understand just how harmful the DMA has been to European consumers.

**The Digital Markets Act has created a second-class digital society in Europe**, and would do the same for California residents. The DMA's approach should be firmly rejected, not mimicked.

**The CLRC should prioritize consumer welfare, not competitor welfare**

The *Expert Report* proposes a digital regulator to implement DMA-style policies, including:

*(1) rival app stores allowed access to mobile OS;*
*(2) mobile OS must provide the same functionality for third-party apps as its own;*
*(3) reader apps must be available for all developers;*
*(4) developers may link out and distribute content on the web;*
*(5) consumers may port their data out of a platform;*
*(6) realtime continuous data feed of their own activities is available to end users and business users; and*
*(7) ranking and ordering results must be fair and unbiased.*

[1] *See* http://www.clrc.ca.gov/pub/2024/MM24-47.pdf

A closer look shows how unworkable and harmful these provisions are.

For example, following years of lobbying by gaming companies, the DMA now requires mobile operating systems to allow third-party app stores. Dutch government agencies have determined that such third-party applications pose an unacceptable cybersecurity risk[2]. Policy should not force this choice on consumers - they should be able to determine for themselves to opt for open or closed systems.

In addition, requiring "the same functionality" to third-party apps has the perverse effect of fewer innovations coming to market and will deny California consumer access to the latest developments - ironically, many of them from leading California companies.

Lastly, requiring results to be "fair and unbiased" creates an impossibly vague standard. Search engines optimize for *relevance* not fairness or bias. A search engine determines relevance based on a variety of factors including search history and geographic location. A digital regulator forcing search engines to optimize for anything else necessarily means a less relevant, lower quality experience for consumers.

Under the DMA, a Google search is forbidden from returning clickable links to Google Maps. This is to prevent Google from "biasing" search results towards its Maps product, but the end result is a worse user experience. In fact, European internet users find this so frustrating that they have developed browser plugins to circumvent the DMA and re-enable clickable Maps links[3].

Similarly, the DMA now limits large search engines from allowing direct booking of hotels. The goal is to benefit mid-sized hotel search platforms. The early evidence from Europe is that DMA-style mandates for "fair and unbiased" search has hurt hotels and consumers alike: "hotels in DMA regions have experienced a 30% drop in clicks and a 36% decrease in direct bookings compared to non-DMA markets[4]."

**Experience with the DMA demonstrates record consumer harm**

European tech regulation, including the DMA, has slowed or prevented consumers from accessing innovative products there. Threads, a social network that is designed to be less vitriolic than X, did not launch initially in Europe "because of upcoming regulatory uncertainty.[5]" Instead of questioning whether denying Europeans a more hospitable

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[2] *See* https://www.reuters.com/technology/number-agencies-have-concerns-about-sideloading-iphone-apple-says-2024-03-01/

[3] *See* https://chromewebstore.google.com/detail/google-search-maps-button/

[4] *See* https://ppc.land/the-dmas-impact-on-hotel-distribution-reduced-visibility-and-increased-reliance-on-intermediaries-pen_spark/

[5] *See* https://www.politico.eu/article/why-europeans-dont-have-threads-yet-twitter-meta/

social network was a good idea, a European politician stated at the time "The fact that Threads is still not available for EU citizens shows that EU regulation works.[6]"

European tech regulation has also led Meta to announce it will not be releasing future versions of its powerful open source AI model Llama. This is particularly chilling for innovation because Llama is freely available. European developers may not build applications on it, and consumers cannot benefit from applications that never get developed.

For its part, Apple is not releasing its innovative and privacy-optimized suite of Apple Intelligence products to market thanks to uncertainty over the DMA's interoperability rules. There is no timeline for a European release of these advanced features. Californians, in contrast, will be able to access them this fall.

European style regulatory ambiguity would only harm California consumers. The Commission should reject it.

**Europe is a tech failure, California should not follow its lead**

Despite decades of effort, European policy has consistently failed to generate a thriving technology sector. Silicon Valley - a distinctly Californian phenomenon - arose through a light touch regulatory environment that allowed investment and innovation to flourish, and for California consumers to benefit from world-leading companies bringing world-changing products to market.

Importing failed European policies to California would set California's technology sector back, leaving consumers much worse off.

Sincerely,

Todd O'Boyle
Senior Director of Technology Policy

[6] *See* https://www.theverge.com/23789754/threads-meta-twitter-eu-dma-digital-markets

# The growth of generative AI

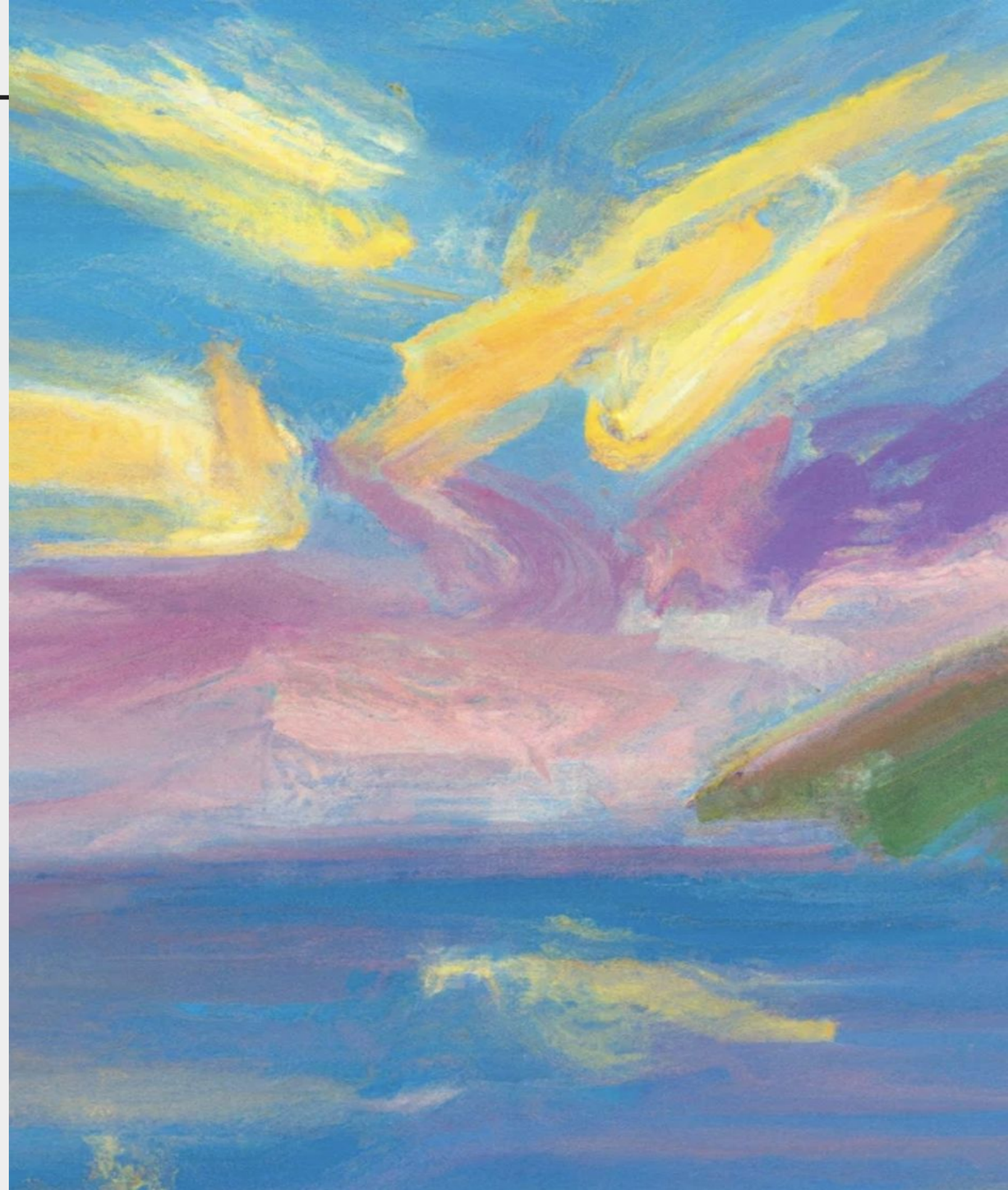
An overview of increasing technological capabilities and intense competition

Adam Cohen
Chief of Economic Policy, OpenAI
October 10, 2024

OpenAI

# Who we are

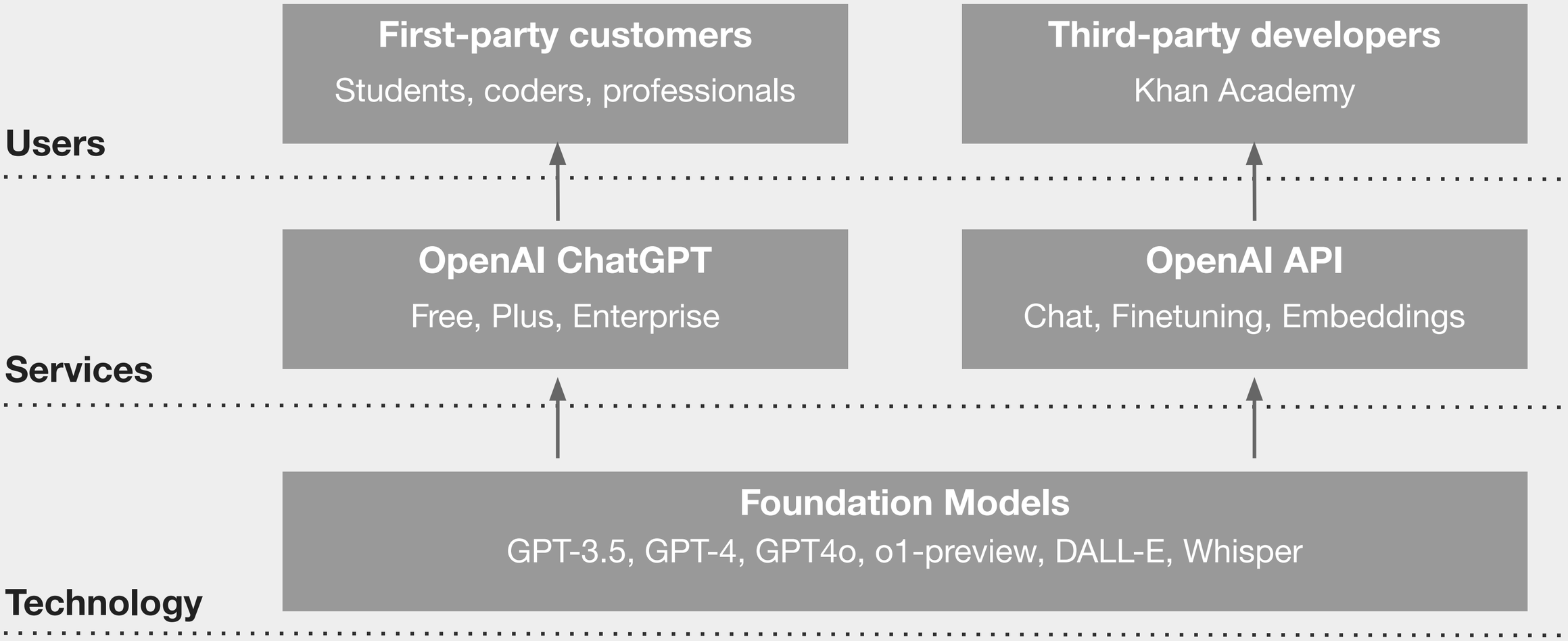
- Founded in 2015. First became widely known with the launch of ChatGPT in Nov. 2022
- We’re building artificial intelligence that helps people solve hard problems
- We research, develop, and release cutting-edge AI technology as well as tools and best practices for safety, alignment, and governance
- We want to ensure AI can benefit the most people possible – through better healthcare and education, more scientific discoveries, better public policies and services, improved productivity, and new tools for creativity



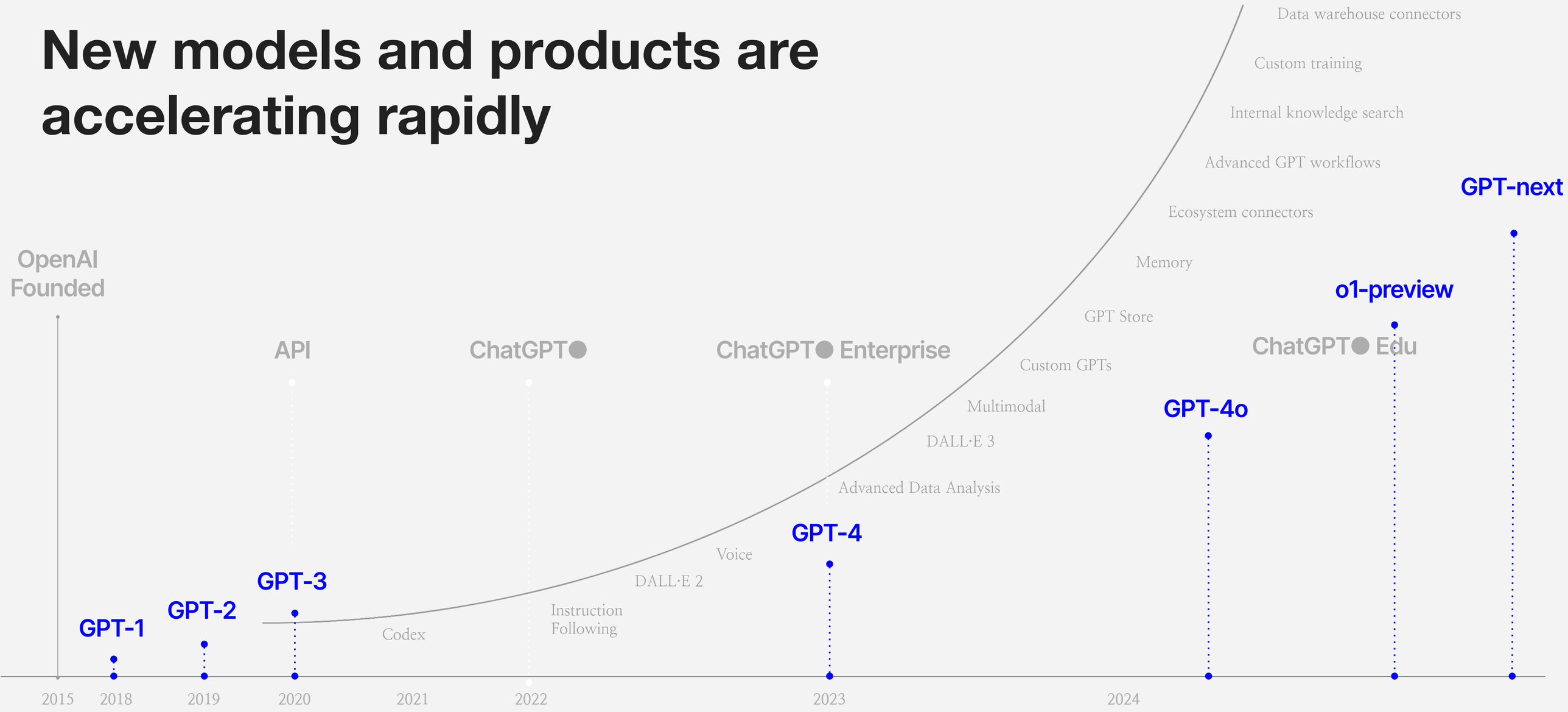
# OpenAI technologies

We develop leading foundation models and make their capabilities available in safe and beneficial ways to people around the world

# OpenAI


First-party customers
Students, coders, professionals
Third-party developers
Khan Academy
Users
OpenAI ChatGPT
Free, Plus, Enterprise
OpenAI API
Chat, Finetuning, Embeddings
Services
Foundation Models
GPT-3.5, GPT-4, GPT4o, o1-preview, DALL-E, Whisper
Technology

# New models and products are accelerating rapidly



# Building safer systems

We conduct rigorous testing, engage external experts for feedback, build and reinforce safety and monitoring systems, and provide resources to help people use our models responsibly.

- ✅ **Red-teaming and evaluations**: probe the systems to map and evaluate risks
- ✅ **Safety monitoring systems**: detect unwanted content and complement human review of specific incidents
- ✅ **Tools for users**: system cards; Moderations API
- ✅ **Learning from feedback**: continuously improve our model outputs, moderation systems, and usage policies based on user input and feedback

# What do you need to build an LLM?

## Training data

- Publicly available data sets, crawled data, open-source data, including text, images, video
  - OpenAI provides a simple opt-out for AI training
- Proprietary data sets, including data obtained via agreement and data from other tech products
- Synthetic data

## Engineers

- AI engineers are in short supply
- US, Canada: undergrad CS grew 4x from 2010 to 2022, but master's and PhD declined since 2018
- China led AI patents in 2023 with 61% vs 21% from US; US share of AI patents down from 54% in 2010

## Computing power

- Model training requires large clusters of computing power and specialized chips – GPUs in particular
  - Demand for GPUs far outpacing supply
- Data centers need energy, with US use for AI expected to reach 93 TWh in 2030, up from 4 TWh in 2023
  - Total US energy production was 4,178 TWh in 2023

## Funding

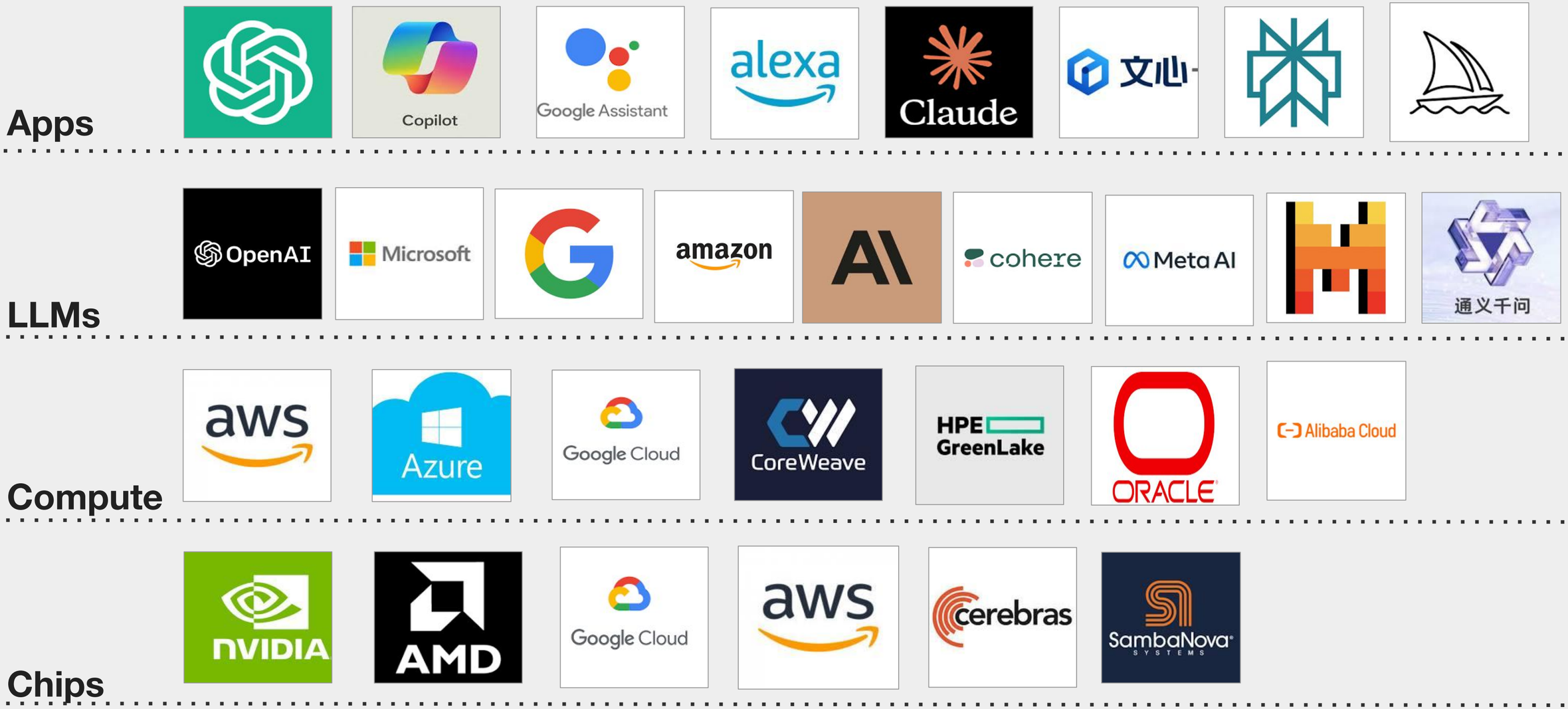
- VC funding for AI up from ~$1bln in 2019 to over $25bln in 2023
  - 61 notable AI models originated in the US in 2023, compared with 21 in the EU and 15 in China
- Training costs are rising, with estimates that Google's Gemini Ultra model cost over $190mln
- Estimates that Gen AI developers spend over 80% of capital raised on computing costs



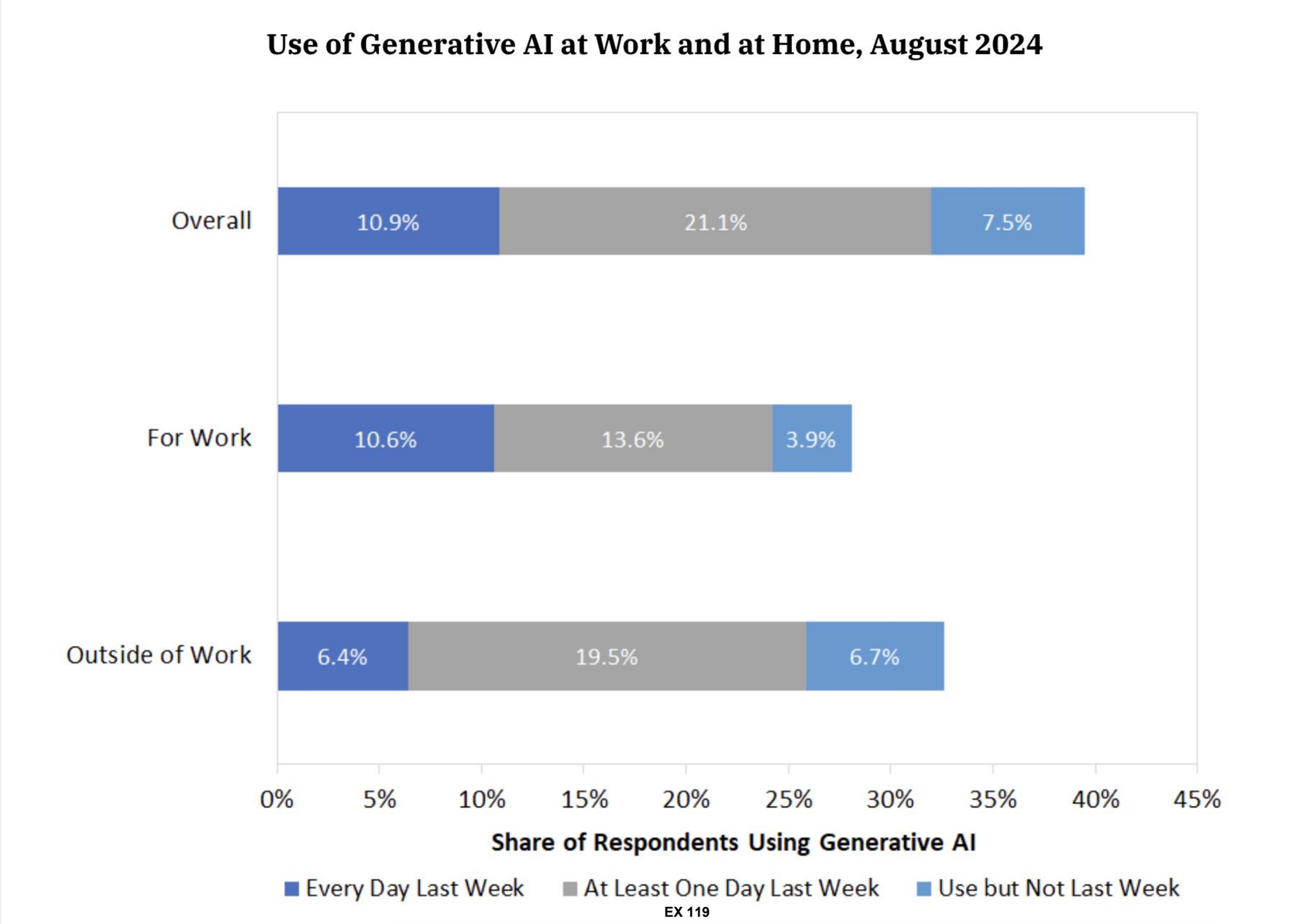


sources: Stanford's AI Index 2024 report, Andreessen Horowitz, and Goldman Sachs

# Current industry “stack”



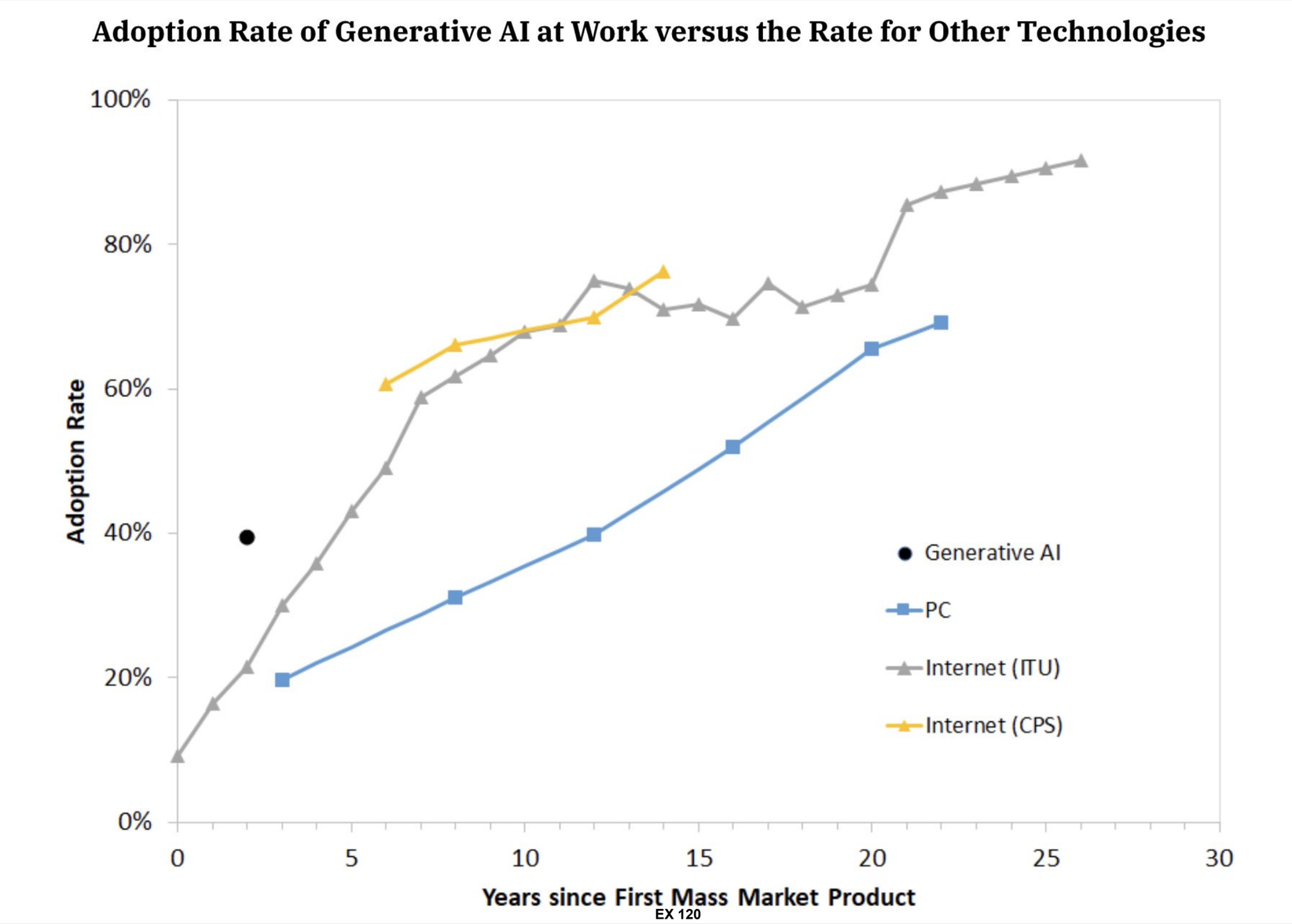
# Generative AI adoption




EX 119

source: Federal Reserve Bank of St. Louis

# Generative AI adoption



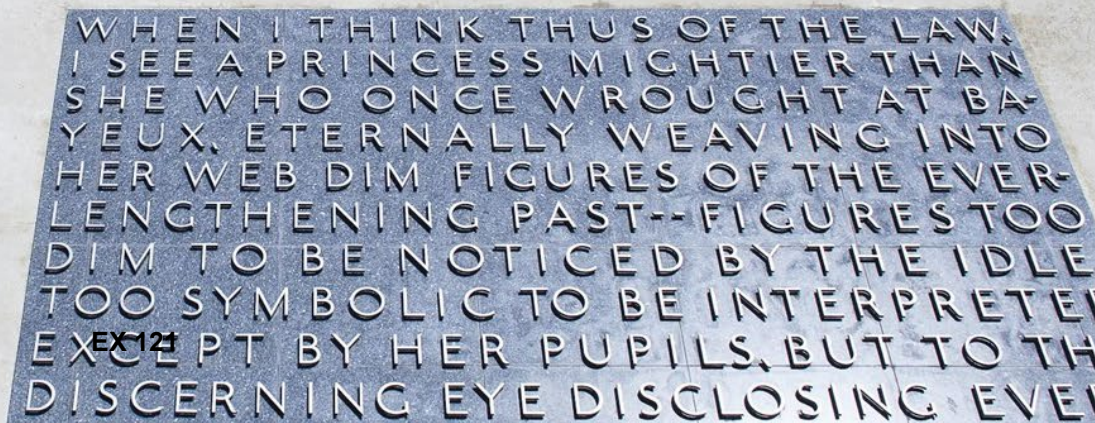

EX 120

source: Federal Reserve Bank of St. Louis

Berkeley Law

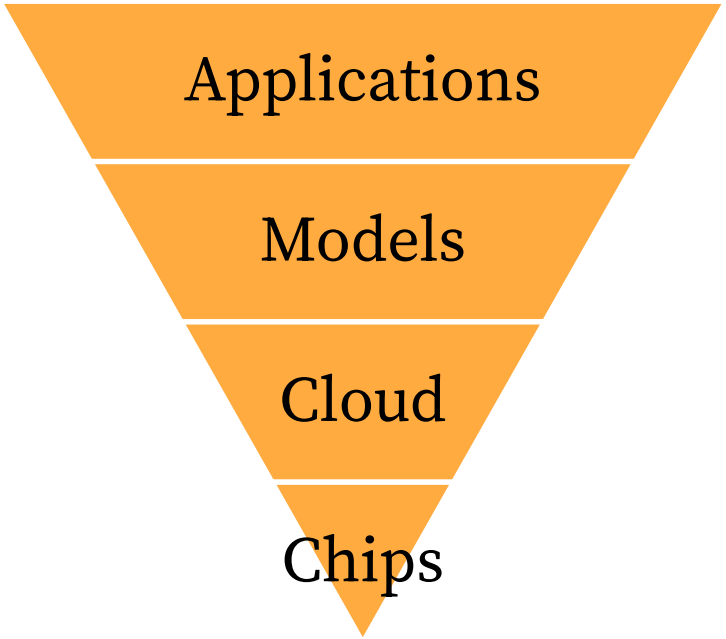
# Competition & AI

Tejas N. Narechania (Sept. 23, 2024)



# Thanks & Some Background

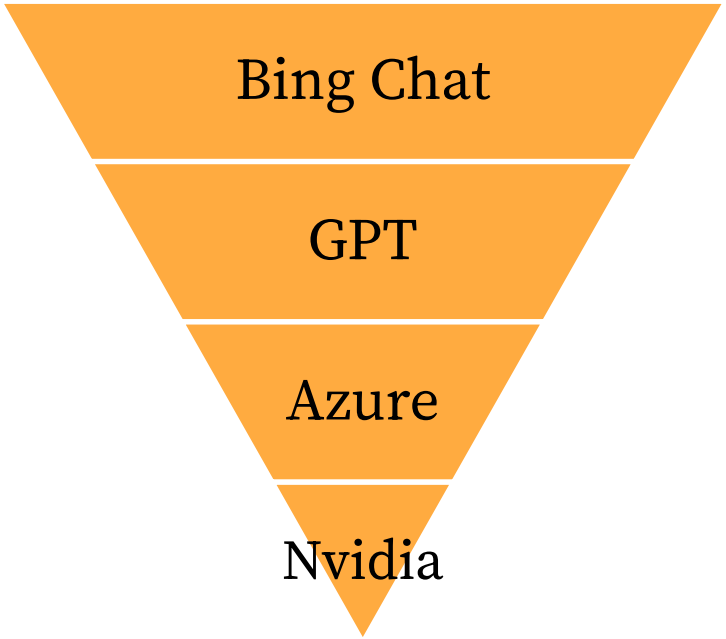
- About me.
- My remarks build on existing and co-authored work, including works-in-progress, with
  - Ganesh Sitaraman (*An Anti-Monopoly Approach to Governing Artificial Intelligence*);
  - Scott Shenker, Fiona Scott Morton, and Dirk Bergemann (*in progress, cloud-focused*); and,
  - Solo-Authored (*Machine Learning as Natural Monopoly*).
- Of course, anything I say and any errors I make belong to me, not my co-authors. And I don't speak for UC Berkeley or its Law School.




# The AI Technology Stack

- The market for AI applications seems rich and thriving. So why am I here?
- Hiding just below the application “layer” is an increasingly concentrated set of inputs to AI.
- Applications are built atop AI models. Models are developed using computational infrastrcuture (cloud). That infrastructure needs hardware (chips).

# The AI Technology Stack

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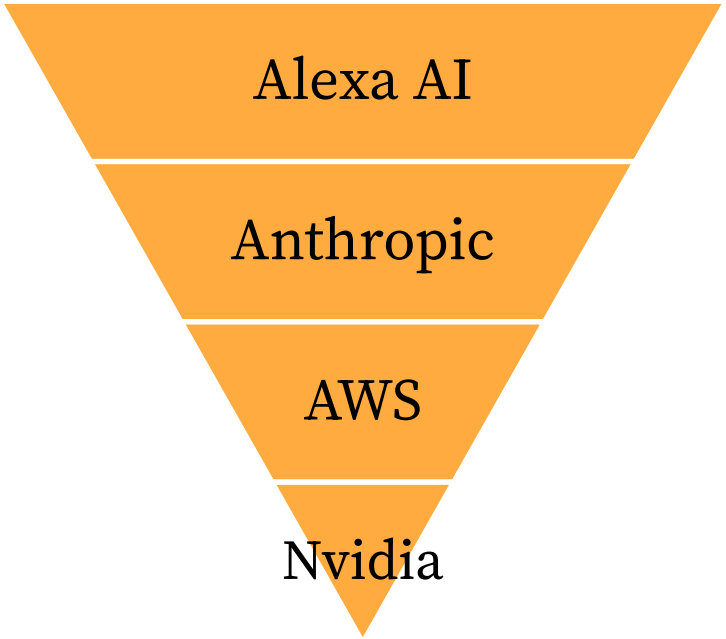


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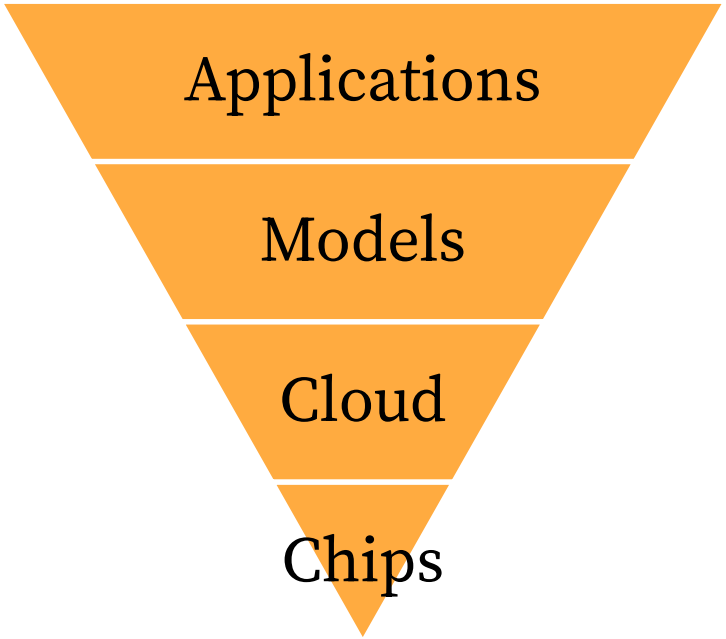


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- Hiding just below the application “layer” is an increasingly concentrated set of inputs to AI.
- Applications are built atop AI models. Models are developed using computational infrastrcuture (cloud). That infrastructure needs hardware (chips).
- **Concentration in this stack, or supply chain, is concerning.**

# Microprocessing Hardware (Chips)

- Federal regulators have already recognized dangers of concentration in this context.

# Microprocessing Hardware (Chips)

- The design, production, and sale of microprocessing hardware is highly concentrated, particularly as to GPUs.
- GPUs, of course, are not everything. But they are a lot.
- Concentration concerns in the GPU market include
  - pricing;
  - tying (to ASICs?); and,
  - vertical leveraging.
- Many of these concerns are implicated by the U.S. Department of Justice's investigation.

# Microprocessing Hardware (Chips)

- In terms of manufacturing, the CHIPS and Science Act (2022) aims to foster, through subsidies and other programs, new domestic competition.

# Computational Infrastructure (Cloud)

- Cloud is complex. It includes a continuum of services from commodity processing power to “application” (or OS) level services.
- No matter how you slice it, the market for cloud services is (highly) concentrated, dominated by Microsoft (Azure), Amazon (AWS), and Google.
- So far, most of the concerns raised here regard switching, and focus on egress fees.
  - See, e.g., UK Ofcom / CMA.
- But perhaps CMA recently (tacitly?) acknowledged that this is more complicated than it seems . . .

# Computational Infrastructure (Cloud)

- Many existing enterprise cloud workloads depend upon a suite of services that encompass both commodity processing power (hardware) and suite of auxiliery software services that is often customized for *both* specific customer needs and the hardware stack it employs. (AWS, for example, has hundreds of these applications.)
- Engineering costs and efficiencies may be a more important challenge to switching than fees.
- And it's not clear that those switching costs can be easily smoothed over, given different hardware implementations across providers (among other things).
- That is, perhaps there are important vertical efficiencies here.

# Computational Infrastructure (Cloud)

- But . . .
- Emerging compute-intensive workloads, including AI model training, are comparatively less dependent on this auxiliary software. They seem inherently more portable.
- How do we facilitate (and maintain) greater portability in this subsector, with an eye to growing competition (by nurturing smaller cloud providers)?
- “Smaller” is still big: Oracle, IBM, etc.

# Computational Infrastructure (Cloud)

- Some ideas include:
  - technical standards for interoperability;
  - facilitating “cross-cloud services”; and,
  - post-hoc review.

- We also should track vertical integration / vertical relationships (with chip production) in this space. Even if we can keep AI workloads portable, there will be nowhere to take them unless hardware is available to putative competitors.

# Models

- Model development is structurally inclined towards concentration.
  - Narechania, Machine Learning as Natural Monopoly (2022).
  - But it's not just me saying it!
  - Schmid, Sytsma, and Shenk, *Evaluating Natural Monopoly Conditions in the AI Foundation Model Market*, RAND Research Report (2024) [SSS].
  - Vipra and Korinek, *Market Concentration Implications of Foundation Models*, Brookings Center on Regulation and Markets Working Paper (2023).

# Models

**Table 4.1. Criteria for Natural Monopoly in the Context of Pre-Trained Foundation Models**

| Criteria | Definition | Indicators |
|---|---|---|
| Product homogeneity | A homogeneous product is one that is perfectly substitutable: A consumer will be indifferent to the exchange of one version for another one and will base purchasing decisions solely on price. | Limited product variation (at pre-trained foundation model level) |
| Economies of scale | Economies of scale exist when the average cost of production decrease when its production increases. | High cost of training relative to variable costs |
| Sunk cost | Sunk costs exist when the value of an investment in an asset is worth less than an alternative use of the investment. | Low resale value of initial compute, data, labor, and foundation model |
| Network effects | Network effects exist when the utility of a good or service increases as the number of users grows (i.e., with scale). | Community-led development |
| Economies of scope | Economies of scope exist when the total cost of producing two or more distinct products within a single firm is less than the total costs of producing those products within more than one firm. | Firms have multiple products using common foundation model |

Source: SSS, tbls. 4.1, 5.2

# Models

**Table 5.2. Application of Natural Monopoly Criteria to the Status Quo Market**

| Natural Monopoly Criteria | Foundation Model Variable | Status Quo Market |
|---|---|---|
| Homogeneous good | Limited product variation (at pre-trained foundation model level) | Yes |
| Economies of scale | Cost of training relative to variable costs | High |
| Sunk cost | Resale value of initial compute, data, labor, and foundation model | High |
| Network effects | Community-led development | Moderate |
| Economies of scope | Firms have multiple products using common foundation model | High |
| **Case for a natural monopoly** | | **Strong** |

Source: SSS, tbls. 4.1, 5.2

# Models

- Concerns about model-layer concentration include
  - pricing (cost *and* data);
  - quality (think safety or bias);
  - vertical leveraging; and,
  - monopolization via network effects.

# Models: What About Open Source?

- One, some open-source models tend to be smaller and less good.
- Two, some open-source models are released with strings attached.
  - Llama 3.1, for example, includes an express scale restriction.
  - But it's a high ceiling (700MM users).
- Three, some open-source models are released by entities with equities elsewhere in the stack, and might thus be used to entrench dominance there.
- The bottom line is we'll see. There's more to the future of competition in model development than open source. Overall, I am skeptical that much model competition will emerge.

# Models: What Else is There?

- Does model improvement continue to scale with compute and data?
- Do input costs (hardware, compute, labor, data) remain high?
- If scale runs out (no such indication so far, see GPT), and if compute costs drop (stack interdependencies!), then competition seems likely. Otherwise, concentration seems likely to persist.
    - See also SSS tbl. 5.3.

# Applications

- There are a lot of applications.
- But we should watch for self-preferencing-like behavior.
  - The possibility that model-owners will undercut application developers, either through copying or preferencing, may undermine application-layer innovation in the long run.

# Beyond Competition

- Concentration has implications beyond the usual concerns, including
  - security and resilience (think single points-of-failure in critical infrastructure);
  - equality (think bias and discrimination in model development); and
  - democracy (think control over information ecosystems).

Berkeley Law

# Competition & AI

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# Abuse of Dominance

Daniel L. Rubinfeld

Robert L. Bridges Professor of Law and Professor of Economics, University of California, Berkeley

Professor of Law, NYU, Retired

October 10, 2024

# Current EU Law

- Focus – abuse of market dominance - Article 102 of the Treaty of the Functioning of the European Union
- Requires market definition
- Dominance requires 40% market share or greater
- No clear meaning as to what constitutes abuse
- Allows for a variety of anticompetitive practices utilizing an imprecise economics-based definition of abuse
- Exclusionary abuse (effects on competitors that adversely affects consumer welfare)
- Consumer welfare should mean economic welfare

# The European Commission Perspective

- Draft Guidelines on Exclusionary Abuses
  - A move away from the 2008 Guidelines (a more economics effects-based approach towards Article 102), which had mixed results in the courts
  - Less focus on consumer harm
  - A dominant firm in its defense can attempt to show no exclusionary effects
  - Suggests three categories of potential anticompetitive practices
  - Would rely more heavily on EU case law

# The Proposed New Guidelines

- Continues to utilize an abuse of dominance approach
- Moves away from an economics-oriented effects based approach
- More easily applicable to digital markets

# Overall

- Must show that conduct departs from competition on the merits
- No requirement of proof that the conduct resulted in direct consumer harm
- No de minimis threshold on consumer impact

# Conduct presumed to lead to exclusionary effects

- Exclusive supply or purchasing agreements
- Exclusivity rebates
- Predatory pricing
- Margin squeeze
- Some tying arrangements

# Naked Restraints

- No rationale except restricting competition
- Example – Dismantling infrastructure of a competitor
- Example – Payments directed towards postponing or cancelling the launch of competitive products

# UK Competition and Markets Authority

- Competition Act of 1998 – Anticompetitive practices include abuse of a dominant position
- Further authorization – the Enterprise and Regulatory Act of 2013
- Goal:  To ensure effective competition or prevent consumer harm
- Coverage: competition, innovation and consumer welfare

# UK – Abuse of dominance cases

- Google – abuse of dominant position in advertising technology
- Education Software Solutions – abuse of a dominant position in the supply of management information systems
- Pharma – Excessive and unfair pricing

# The Proposed New York 21st Century Bill

- Dominant position (a market share of 40% or greater) – having the unilateral power to set prices, terms, or conditions
- Arguably - goes beyond Sherman Section 2 conduct
- Includes monopoly leveraging, predatory pricing, foreclosure, excessive pricing
- Includes exclusive dealing and tying

EX 152

# Competition and Antitrust Law Enforcement Reform Act

- Prohibits exclusionary conduct that presents an appreciable of harming competition  when the market share is greater than 50 percent or the firm or otherwise has significant market power (adds new Section 26A into section 7 of the Clayton Act)
- Does not use the phrase “abuse of dominance”