Questions for the Record from Mr. Scott Fitzgerald

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1. ***Critics of Netflix argue that owning Warner Bros. intellectual property could cause Netflix to limit or altogether foreclose, competitor access to content, or movie theater's access to theatrical releases of Warner Bros. films. Is that an issue we should be concerned with, and could behavioral remedies address this concern?***

Could Netflix foreclose rival streaming services—or substantially increase licensing fees—by restricting their access to Warner Bros. (WB) properties such as Harry Potter? Relatedly, could Netflix foreclose movie theaters from showing WB first-run films? These concerns fall within a class of antitrust harm called "input foreclosure." Consider a supply chain where, at the top (input) level, WB competes with other studios in the production of movies and shows. At the bottom (output) level are the various distribution channels for these movies and shows including streaming services, movie theaters, cable TV, etc. The incentive to foreclose downstream rivals from accessing an input post-merger, in this case movies and shows produced by WB, depends on several considerations. First, what is the margin that the input supplier (e.g., Netflix-WB) receives for the product downstream (e.g., movie licensing fees)? If this margin is relatively high, then the incentive to foreclose is relatively low because a firm faces a high opportunity cost to its foreclosure scheme. Second, how much market power does the firm have upstream and downstream? If the firm competes vigorously with other input suppliers (e.g., other studios), then the ability to "control" the downstream market through foreclosing its inputs (e.g., movies and shows) is mitigated because downstream outlets (e.g., other streaming services and movie theaters) have competitive options. Relatedly, for the scheme to work, a firm must expect to pick up a significant number of customers from foreclosing a downstream rival (e.g., Netflix expects to gain more subscribers from denying movie theaters access to a new Harry Potter movie).

Overall, the goal of input foreclosure is to increase the demand for a firm's downstream product (e.g., Netflix) while, simultaneously, decreasing the demand for rivals' products (e.g., Hulu, Paramount+, movie theaters)—given that, post-merger, these rivals no longer have access to valuable inputs (e.g., WB films and shows) or must pay significantly

more for access, i.e., "raise rivals' costs." Yet the *ability* and *incentive* to foreclose rivals largely boils down the amount of market power at both the input and output levels of the supply chain.[1] Thus, accurately measuring market power at both the input and output levels will be critical to assess whether input foreclosure is a material concern for this deal. If the conclusion is that Netflix faces limited competition upstream and downstream, then this raises the likelihood that input foreclosure could be a profitable strategy post-merger.

Ultimately, if regulators conclude that input foreclosure poses a substantial concern, the parties and the government would likely be able to reach a negotiated, behavioral remedy, as is common these type of cases. For example, Netflix could commit to maintaining third-party access to portions of WB's library that were previously licensed outside of HBO Max for a defined period (e.g., five to ten years), with pricing resolved through arbitration. Similar arbitration commitments were adopted by the merging parties in both the Comcast–NBC Universal and AT&T–Time Warner transactions based on concerns over potential input foreclosure.[2]

2. ***The Alliance for Open Media (AOM) is a standard-setting body upon which many streaming services can be built. DOJ leadership has raised concerns that "mandatory, royalty-free cross-licensing . . . allows a group of dominant implementers to fix the price of royalties at zero." Streaming services could use AOM to devalue intellectual property related to video compression. Are you concerned that AOM could lead to less innovation and less competition?***

Could a consortium of businesses that form a royalty-free cross-licensing patent pool cause anticompetitive harm? Taking a step back, fundamentally, an inherent tension is created when businesses that are marketplace rivals form an organization to cooperate. On one hand, a coalition of businesses, such as, trade associations and standard setting

[1] *See, e.g.*, U.S. DEPARTMENT OF JUSTICE & FEDERAL TRADE COMMISSION, VERTICAL MERGER GUIDELINES (2020) (while the guidelines were rescinded by the prior administration, they represent an excellent source for understanding the incentive effects related to input foreclosure).
[2] *See, e.g.*, Dennis W. Carlton et al., *A Retrospective Analysis of the AT&T/Time Warner Merger*, 65 J.L. & ECON. S461 (2022) (detailing the impact of these commitments).

groups, can create standards, certifications, and other measures that lean on their collective expertise to solve potential information problems. On the other hand, consumer-harming collusion could emerge when an organization jointly negotiates or gatekeeps on behalf of all its members.

Indeed, in reflection of this tension, some of the earliest federal antitrust cases involved trade associations. In *Eastern States Retail Lumber Dealers Association*,[3] an association of retail lumber dealers located across various states effectively boycotted wholesale dealers, who sold directly to consumers, via an information sharing scheme, i.e., an implicit blacklist. As a result of the boycott, the Supreme Court found that "the trade of the listed wholesalers is hindered or impeded; that competition is suppressed and the natural flow of commerce interfered with as the direct result of the circulation of the official reports [among the association members] in the manner stated."[4] The Court emphasized that when information is shared among competitors with the purpose and effect of inducing collective refusals to deal, the line from lawful cooperation to unlawful collusion has been crossed. *Eastern States* thus illustrates a recurring challenge in antitrust law: distinguishing between group activity that facilitates informed, independent decisionmaking and conduct that operates as a mechanism for coordinated exclusion.

This challenge is also reflected in the U.S. Federal Trade Commission's (FTC) and Department of Justice's (DOJ) *Guidelines for Collaborations Among Competitors*.[5] While the long-standing guidance was withdrawn in 2024, it still offers useful insights on permitted versus illicit coordination. Importantly, the guidelines emphasize that associations can effectuate both procompetitive and anticompetitive effects.[6]

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[3] Eastern States Retail Lumber Dealers' Association v. U.S., 34 S.Ct. 951 (1914).
[4] *Id*. at 955.
[5] U.S. FED. TRADE COMM'N & U.S. DEP'T OF JUSTICE, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS § 4.2 (Apr. 2000), https://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf.
[6] *Id*. at 1 ("[C]ollaborations often are not only benign but procompetitive."); *id*. § 2.2 ("[A]greements may limit independent decision making or combine the control of or financial interests in production, key assets, or decisions regarding price, output, or other competitively sensitive variables, or may otherwise reduce the participants' ability or incentive to compete independently.").

The Alliance for Open Media (AOM) is a consortium of firms that operates a patent pool requiring members to grant royalty-free cross-licenses. AOM lists its steering committee members as Amazon, Apple, Cisco, Google, Intel, Meta, Microsoft, Mozilla, Netflix, Nvidia, Samsung, and Tencent,[7] where the steering committee "is responsible for the leadership and general management of AOMedia, including setting its mission, vision and objectives."[8] Additional members of AOM include Adobe, Disney, LG, Roku, Snap, Vimeo, and Zoom. The organization's stated objective is "to develop open standards and software under a royalty-free patent policy and permissive copyright license."[9]

As it pertains to royalty-free patent pools, DOJ leadership has recently raised concerns that while "mandatory, royalty-free cross-licensing…can have procompetitive characteristics," there is a real concern that a consortium of "dominant implementers that collectively possess market power…can be competitively harmful."[10] Moreover, having a royalty-free cross-licensing mandate "allows a group of dominant implementers to fix the price of royalties at zero."[11] In turn, this could funnel industries into a standard that is controlled by the market incumbents with the danger that innovation will be ossified if there is little incentive to develop alternative standards.

The central challenge lies in navigating the tension between the procompetitive benefits of standards and the risk that they entrench incumbents in welfare-reducing ways. A proper assessment must consider the proper counterfactual—namely, the state of the world absent the cross-licensing consortium. Would innovation be greater, particularly among smaller or nascent firms? Would incumbent technologies face more meaningful competitive challenges? Or instead do consumers benefit from lower prices and broader adoption made possible by royalty-free cross-licensing? Answering these questions

[7] Alliance for Open Media, Members, https://aomedia.org/about/members.
[8] Alliance for Open Media, Organization, https://aomedia.org/about/organization.
[9] Alliance for Open Media, Welcome to the Alliance for Open Media, https://aomedia.org/about/story.
[10] U.S. Department of Justice, *Deputy Assistant Attorney General Dina Kallay Delivers Keynote at Concurrences Dinner in New York* (Sep. 19, 2025), https://www.justice.gov/opa/speech/daag-dina-kallay-delivers-keynote-concurrences-dinner-new-york.
[11] *Id*.

requires more information about licensing costs and competitive conditions in the affected technology markets.

A related concern arises when organizations are formed to advance the collective interests of marketplace rivals—namely, when those rivals control the organization's leadership or serve on its steering committee. This dynamic is currently being tested in litigation stemming from X Corp.'s antitrust complaint against a trade association of advertisers, the Global Alliance for Responsible Media (GARM).[12]

Specifically, after Elon Musk completed his acquisition of Twitter for $44 billion on Oct. 27, 2022,[13] GARM contacted Musk and the platform to express concerns regarding Twitter's content moderation policies.[14] According to X, when GARM failed to secure the changes it wanted, certain members boycotted X or sharply curtailed their ad spending.[15] Although, X executives attempted to address these concerns, the parties ultimately reached an impasse. In August 2024, X filed an antitrust lawsuit against GARM and several members including Mars, Nestlé, Colgate-Palmolive, and CVS. Within days of the filing, GARM abruptly disbanded and maintained that the alliance was "a small, not-for-profit initiative," where the "recent allegations…unfortunately misconstrue its purpose and activities."[16]

X's complaint against GARM rests on two core allegations: first, that the advertiser consortium engaged in an unlawful group boycott, and second, that GARM leveraged the collective market power of its members to coerce changes to the platform. The complaint

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[12] Second Amended Complaint, X Corp v. World Federation of Advertisers et al., Case 7:24-cv-00114 (Feb. 6, 2025), https://storage.courtlistener.com/recap/gov.uscourts.txnd.393003/gov.uscourts.txnd.393003.77.0_3.pdf.

[13] *See, e.g.*, Todd Olmstead, *Twitter Purchased by Elon Musk: A Timeline of How It Happened*, WALL STREET JOURNAL (Oct. 28, 2022), https://www.wsj.com/story/twitter-purchased-by-elon-musk-how-it-went-down-72a07de3.

[14] Second Amended Complaint, supra note 12, ¶ 108 ("Rakowitz [Initiative Lead of GARM] invoked the threat of a boycott in his written communications with Twitter to induce Twitter to attend to GARM's demands, which Rakowitz communicated to Twitter days later on November 8, 2022, propounding a set of questions for Twitter relating to Twitter's adherence to the Brand Safety Standards that Rakowitz characterized as having 'been sourced by the GARM Steer Team via their relevant membership base.'"); *id*. ¶ 123 ("At the December 1, 2022, meeting with GARM and WFA, which representatives from Mars and Nestlé, among others, attended, Twitter agreed to take certain steps to adhere to the GARM Brand Safety Standards. While some members of the GARM Steer Team were pleased with the concessions made by Twitter, other members of the Steer Team were not.").

[15] *Id*. ¶ 137.

[16] Press Release, *Statement on the Global Alliance for Responsible Media (GARM)*, WORLD FEDERATION OF ADVERTISERS (Aug. 9, 2024), https://wfanet.org/leadership/garm/about-garm.

also draws on findings by the House Judiciary Committee, which concluded that GARM engaged in a series of coordinated actions against multiple platforms, including Twitter and Spotify, in order to, not protect brand safety, but to influence platform speech policies and shift bargaining power towards advertisers.[17]

GARM, in turn, has defended its conduct as a lawful and appropriate exercise of a trade association's role.[18] It denies orchestrating a boycott, emphasizing that only a fraction of its members actually engaged in a boycott. Moreover, GARM contends that it only advised members and, like a standard-setting organization, provided guidance to facilitate business decisions and to promote brand safety.[19] According to GARM, adoption of these standards was voluntary, and members were free to accept or reject the association's recommended safety thresholds.[20]

With respect to AOM, a central question is the role and influence of the steering committee—specifically, whether its actions amounted to joint negotiation among competitors or instead represented bona fide cooperative standard setting. Perhaps unsurprisingly, the European Union (EU) investigated AOM's licensing practice but ultimately closed the inquiry on priority grounds, while emphasizing the closure "is not a finding of compliance or non-compliance of the conduct in question with EU competition

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[17] *See* GARM'S HARM: HOW THE WORLD'S BIGGEST BRANDS SEEK TO CONTROL ONLINE SPEECH, INTERIM STAFF REPORT OF THE COMMITTEE ON THE JUDICIARY, U.S. HOUSE OF REPRESENTATIVES, July 10, 2024, https://judiciary.house.gov/media/press-releases/how-worlds-biggest-brands-seek-control-online-speech at 17 ("In response to pressure from its members over COVID-19 statements made on Joe Rogan's podcast, GARM pressured Spotify to punish Mr. Rogan by applying GARM's standards on Mr. Rogan's content."); *id*. at 20 ("On February 10, 2022, Mr. Rakowitz emailed Spotify that he had debriefed the GARM Steer Team and requested another meeting to address outstanding questions. … The sole sticking point for Spotify was that it wanted the meeting to be between Spotify and GARM, while Mr. Rakowitz wanted to invite the entire [GARM] Steer Team."); EXPORTING CENSORSHIP: HOW GARM'S ADVERTISING CARTEL HELPED CORPORATIONS COLLUDE WITH FOREIGN GOVERNMENTS TO SILENCE AMERICAN SPEECH, INTERIM STAFF REPORT OF THE COMMITTEE ON THE JUDICIARY, U.S. HOUSE OF REPRESENTATIVES, June 27, 2025, https://judiciary.house.gov/media/press-releases/report-how-garms-advertising-cartel-helped-corporations-collude-foreign [hereinafter SECOND HOUSE REPORT] at 1 ("The Committee's oversight revealed the extent to which GARM uses its market power to act as a cartel.").

[18] Brief in Support of Defendants' Joint Motion to Dismiss for Failure to State a Claim, X Corp. v. World Federation of Advertisers, Case 7:24-cv-00114 (May 14, 2025), https://storage.courtlistener.com/recap/gov.uscourts.txnd.393003/gov.uscourts.txnd.393003.161.0.pdf at 2 ("Yet GARM is just a group of advertisers and platforms—of which Twitter was a member—that worked together to facilitate online advertising.").

[19] *Id*. at 5 ("In September 2020, GARM published its Brand Safety Floor and Suitability Framework (the 'Framework') to improve transparency in ad placements on online platforms.").

[20] *Id*. at 4 ("Participation in GARM was voluntary for both advertisers and platforms.").

rules."[21] Several commentators have nonetheless questioned whether AOM's licensing policies are truly "royalty-free" and whether they promote, rather than inhibit, innovation.[22]

This discussion is not intended to suggest that AOM has caused competitive harm or stifled innovation. Rather, it situates AOM within the broader context of trade associations and standard setting organizations. While collaboration among competitors can generate substantial efficiencies, it also carries a nontrivial risk of anticompetitive coordination. The history of antitrust enforcement demonstrates that the boundary between lawful cooperation and unlawful collusion can be crossed, particularly where governance structures—such as steering committees composed of marketplace rivals—facilitate the exercise of collective market power. Ultimately, as in most contested cases, the legality of the conduct turns on the evidence of how the organization operates in practice.

[21] *See* Foo Yun Chee, *Tech Group AOM's Video Licensing Policy No Longer in EU Antitrust Crosshairs*, REUTERS (May 23, 2023), https://www.reuters.com/technology/eu-antitrust-regulators-drop-probe-into-tech-groups-video-licensing-policy-2023-05-23.

[22] *See, e.g.*, Council for Innovation Promotion, *Fact Check: The Myth of So-Called "Royalty Free" and "Open" Standards*, Oct. 30, 2025, https://c4ip.org/fact-check-the-myth-of-so-called-royalty-free-and-open-standards (advancing the argument that "even if the patent owners do not charge a royalty, they may demand valuable non-monetary consideration. AOMedia, for example, requires users of the standard to agree to license back any applicable patents at a zero royalty. While this may not be a problem for users who do not own relevant intellectual property, it imposes a high cost on users who own valuable patents. This will be a strong disincentive for such a user to develop future iterations of that technology."); Jim Harland, *Standards at Risk: When "Open" Isn't Really Open*, LINKEDIN (Nov. 25, 2025), https://www.linkedin.com/pulse/standards-risk-when-open-isnt-really-jim-harlan-jd-mba-vvolc (highlighting AOM's gatekeeping role in developing standards while asking "[t]o what extent is a technology's long-term role determined by its technical merit, and to what extent is it shaped by the institutional pathway it enters?").