

DIGITAL STREAMING AND ANTITRUST

Dr. Jay Ezrielev

Founder, Elevecon

Testimony Before the House Judiciary Subcommittee on Administrative State, Regulatory Reform, and Antitrust

January 7, 2026

Mr. Chairman and Members of the Committee, thank you for the opportunity to testify today on competition and consumer choice in digital streaming. I am Jay Ezrielev, founder of the economic consulting firm Elevecon. I am also an adjunct professor at Antonin Scalia Law School at George Mason University. From 2018 to 2020, I worked at the Federal Trade Commission (FTC) as the economic advisor to Chairman Joseph Simons.

Why Digital Streaming Raises Interesting Antitrust Questions

The focus of my testimony is antitrust analysis of digital streaming. Digital streaming competition has drawn the attention of politicians, critics, and the public because of the significant rise in popularity of digital streaming. There is also significant interest in digital streaming because of competing attempts by Netflix and Paramount to acquire Warner Brothers Discovery (WBD). Each of these companies offers digital streaming services. The two deals also have significant vertical components as each company creates and distributes video content. WBD has announced plans to spin off its cable TV business (including CNN) prior to being acquired by Netflix. WBD has accepted the deal with Netflix, but Paramount has launched a hostile bid to acquire WBD.

The Netflix/WBD and Paramount/WBD deals raise significant antitrust policy questions about their effects. Critics have suggested that both deals would diminish digital streaming competition. Critics have also raised concerns that Netflix, if successful at acquiring WBD, would divert Warner Brothers' film distribution away from theatrical releases toward digital streaming, although Netflix claims that it plans to continue theatrical releases of such films.

These deals are also significant because they have the potential to transform how we consume video content. The way we watch videos is changing rapidly with a significant shift to digital streaming and away from cable and satellite. Both the Netflix/WBD and Paramount/WBD deals may further accelerate the shift toward digital streaming. Thus, antitrust review of the two deals may determine how the marketplace for video content distribution evolves over time.

Traditional Role of Antitrust

Before I turn to the analysis of digital streaming competition, it is first important to discuss the role of antitrust enforcement. Antitrust seeks to unleash the full power of markets to generate economic progress and prosperity. Markets under a capitalist system are the greatest prosperity-producing mechanisms in the history of mankind. Entrepreneurs identify money-making opportunities and make a risky investment in the hope of getting rich. They often fail, but they sometimes succeed in spectacular ways, making a great deal of money for themselves and generating prosperity for others. Adam Smith identified this effect in the *Wealth of Nations*, 250 years ago, writing how an “invisible hand” was leading individuals motivated by their own gain to create economic wealth for others.

Antitrust embraces markets’ role in generating economic progress. It does not seek to displace a business’s judgment about the best way to allocate capital to generate value for its enterprise. Instead, antitrust has a limited but critical role in making sure that enterprises do not take actions that generate private gains at the expense of eliminating competition. Antitrust law prohibits mergers when private value generated by a merger comes from eliminating competition rather than through greater efficiencies and innovation.

Antitrust Scope Expansion

There has been a recent shift in antitrust enforcement from the traditional role of preventing harm to competition to pursuing broader policy goals. This shift began under the Biden administration. Biden administration FTC Chair Lina Khan and Assistant Attorney General for the DOJ Antitrust Division Jonathan Kanter embraced the “New Brandeis School” that calls for an expanded role of antitrust enforcement in pursuit of policy goals such as protecting democratic institutions, preserving liberty, and combatting social and economic ills, including income inequality, the rise of dominant corporations, imbalances among competitors, unfair treatment of workers, and concentration of economic power.¹

The Biden administration antitrust enforcers were willing to extend the frontiers of antitrust to pursue the administration’s policy agenda, transcending traditional antitrust.² For example, in September 2024, the FTC brought a lawsuit against the three largest pharmacy benefit managers (PBMs) that accused the companies of “unfair rebating practices.”³ This

¹ Ezrielev, J. (2024, November 14). Trump’s Election Flips the Script on Antitrust. Barron’s. <https://www.barrons.com/articles/trump-antitrust-lina-khan-ftc-90a9d1f9?st=BtRx9h>

² *Id.*

³ FTC Press Release, *FTC Sues Prescription Drug Middlemen for Artificially Inflating Insulin Drug Prices* (Sep. 20, 2024), <https://www.ftc.gov/news-events/news/press-releases/2024/09/ftc-sues-prescription-drug-middlemen-artificially-inflating-insulin-drug-prices>.

case illustrates the agency's willingness to use Section 5 of the FTC Act in ways that extend beyond traditional harm to competition analysis. In its lawsuit, the FTC does not allege any decrease in competition among rival PBMs.

While it is still early days, it appears that the antitrust enforcement agencies under the current administration are continuing the Biden administration's policies of enforcing an expanded scope of antitrust in pursuit of a broad policy agenda that goes beyond preventing harm to competition. For example, the FTC under the current administration continues to pursue the "unfair rebating practices" case against the PBMs. In addition, states' attorneys general have increasingly pursued their own antitrust agendas that exceed the normal bounds of antitrust of preventing harm to competition.⁴

This expansion in the scope of antitrust enforcement risks harming economic growth. Pursuing a policy agenda that seeks to condemn conduct that antitrust enforcers deem "unfair" impairs normal market forces that seek economic growth and prosperity. Forcing market participants to adhere to conduct that enforcers deem fair or equitable could supplant a business's judgment about the best way to increase value for its enterprise. Such policies will restrain innovation and diminish economic progress.

Antitrust Analysis of Digital Streaming

Antitrust analysis of the potential Netflix/WBD and Paramount/WBD deals should focus strictly on whether the deals would cause significant harm to competition. The enforcers should avoid the pursuit of an alternative policy agenda that goes beyond preventing harm to competition. Pursuing alternative policy agendas when there is no harm to competition preempts market judgment about the best way to generate value, which chills dynamism and innovation to the detriment of economic progress.

If neither digital streaming deal raises significant antitrust issues (based on potential harm to competition), antitrust enforcement should allow free market forces to find the best way to invest in content creation and distribution of content that generates the most value and best meets market demand. This is especially important for distribution of video content where markets have undergone significant change and are continuing to do so. Free markets are best equipped to meet the challenges of changes in demand and evolving technology as market participants have the expertise and financial motive to allocate assets to serve market demand in the most efficient way.

The antitrust enforcement agencies should allow the markets to choose the digital streaming deals that generate the greatest value for shareholders, unless the enforcers

⁴ See, e.g., Morgan Lewis Insight, *State Attorneys General Increase Antitrust Enforcement* (Apr. 23, 2025), <https://www.morganlewis.com/pubs/2025/04/state-attorneys-general-increase-antitrust-enforcement>.

determine it is appropriate to challenge deals based on evidence of likely harm to competition. Antitrust enforcers should not put their thumb on the scale to determine whether Netflix or Paramount should acquire WBD based on the enforcers' views of which deal would be best for the public. The decision of who will acquire WBD should be made by WBD shareholders. Antitrust enforcement should not interfere with this process (unless antitrust enforcers challenge one or both deals based on compelling evidence of likely harm to competition).

The antitrust enforcers should not use the threat of a potential challenge of either of the deals to extract consents from the merging parties, unless the enforcers have compelling evidence of likely harm to competition. Such extraction of merger settlements may weaken the ability of markets to reach deals that generate greatest value.

Is There a Compelling Digital Streaming Antitrust Case Against the Proposed Mergers?

How likely is a compelling antitrust case against either deal based on a reduction in digital streaming competition? It is hard for me to assess the strength of a case against the proposed deals because I have not reviewed the evidence that the enforcers may use in challenging either of the two deals. That said, I would be highly skeptical of a case against either deal based on a structural presumption approach (presumption of substantial lessening of competition based on an increase in market concentration in the relevant market) for assessing competitive effects.⁵ My skepticism is based on several reasons.

First, mere evidence of an increase in market concentration is not a reliable indicator of substantial lessening of competition. Prior to the Biden administration and the 2023 Merger Guidelines, the federal antitrust enforcement agencies used such increases in market concentration only as an initial starting point for conducting a further investigation of potential merger effects.⁶

Second, defining relevant markets is not a precise science. One could arrive at different relevant market definitions based on sometimes arbitrary assumptions and different market definition methodologies. Significant competition may come from outside the relevant market. For example, if the antitrust enforcement agencies define the relevant market to be Subscription Video on Demand (SVOD) streaming services, that would

⁵ OECD Directorate for Financial and Enterprise Affairs Competition Committee, *The Use of Structural Presumptions in Antitrust – Note by the United States* (Dec. 4, 2024), <https://www.justice.gov/atr/media/1410851/dl>.

⁶ See U.S. Dep't of Justice & Federal Trade Comm'n, *2023 Merger Guidelines* (2023), https://www.ftc.gov/system/files/ftc_gov/pdf/2023_merger_guidelines_final_12.18.2023.pdf and U.S. Dep't of Justice & Federal Trade Comm'n, *2010 Horizontal Merger Guidelines* (2010), <https://www.justice.gov/atr/file/810276/dl?inline=>.

exclude consideration of competition from other (non-subscription based) digital streaming services and applications such as YouTube and TikTok. The merging parties in either deal may face significant competition from non-subscription-based digital streaming services. For example, if Netflix increased its subscription fees, a significant number of consumers may leave Netflix and watch video content on YouTube instead. Restricting the relevant market to SVOD streaming would only tell a part of the story on digital streaming competition.

Third, even under a SVOD streaming services relevant market, a market definition most favorable for an enforcement case against the Netflix/WBD and Paramount/WBD deals, the current static market shares of each of the companies appear to be relatively small.⁷ Such small shares do not suggest that there is likely to be compelling empirical evidence of harm to digital streaming competition from either deal.

Fourth, that both Netflix and WBD offer SVOD streaming services does not mean that the two streaming services provide a significant competitive constraint on each other. The analogous argument applies to SVOD services of Paramount and WBD. Many consumers may not view Netflix and HBO Max as significant substitutes for their consumption of video streaming because they want to subscribe to both services. Consumers may also not view Netflix and HBO Max as significant substitutes because the content of the two services is sufficiently differentiated, and a significant share of consumers may not view the two services as reasonably interchangeable.

Fifth, current market shares may not be meaningful gauges of long-term competitive significance if the market is undergoing significant changes and market shares are not stable over time. Entry, exit, and shifting consumer preferences can significantly alter the market's competitive dynamics and may lead to significant shifts in market share among market participants. The dynamic nature of competition in the relevant market (including significant entry, exit, and expansion by market participants) suggests that assessing competitive effects based on static competition models and static shares would yield unreliable results.

Sixth, either of the proposed mergers may generate significant efficiencies that would counterbalance any harmful effects associated with an increase in market concentration.

⁷ See, e.g., evoca.tv, *Streaming Service Market Share (2026) – Revenue Data* (Dec. 19, 2025), <https://evoca.tv/streaming-service-market-share/>.