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POST POST-PARAMOUNT DECREES: The Evolution of Antitrust Concerns as the Film Industry Transforms

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I. INTRODUCTION

In 1948, a decade-long antitrust investigation into the leading film studios resulted in the Paramount Decrees¹, a consent decree that shattered the studio cartel and changed Hollywood forever—or did it? After seventy years of evolution in the film industry and antitrust law, the Department of Justice determined that the Paramount Decrees were no longer necessary, with the federal court striking down the Decrees in 2020.²

In addition to breaking up the collusive cartel between the five major studios, the Decrees put an end to a slew of what was once considered highly anticompetitive activity. This included practices such as block booking, circuit dealing, requiring unreasonable clearances and price minimums, and most importantly, requiring studios to divest from owning theaters.³ The Decrees prompted the end of the Golden Age of Hollywood, bringing about the breakdown of the studio system, creating an open creator marketplace where directors and actors could shop for production studios instead of being tied down, and allowing for the independent cinema boom that began in the late sixties and continues today.

However, a lot has changed since the Decrees were enacted and continues to change after they have ended. While changes in antitrust law made some provisions of the Decree moot, changes in the film industry itself have had the most impact on the obsolescence of the Decrees and new antitrust concerns.⁴ While studios can potentially reinvest in theaters, they will more likely continue vertical integration in the streaming platform market, where both traditional studios and tech companies are emerging as fully integrated from production to exhibition. The streaming market is currently competitive, but recent mergers like Disney/FOX and Amazon/MGM have contributed to a more consolidated market.⁵

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1. United States v. Paramount Pictures, 334 U.S. 131 (1948).
 2. United States v. Paramount Pictures, Inc., No. 19 MISC. 544 (AT), 2020 WL 4573069 (S.D.N.Y. Aug. 7, 2020).
 3. *Paramount*, 334 U.S. at 148, 153, 159–60, 175.
 4. For example, many of the practices outlawed by the Decrees, like block booking and circuit dealing, are now analyzed under a rule of reason analysis. See David I. Gelfand and Linden Bernhardt, *Vertical Restraints: Evolution from Per Se to Rule of Reason Analysis*, CLEARY GOTTlieb STEEN & HAMILTON LLP (Nov. 16, 2017), <https://www.clearygottlieb.com/~media/organize-archive/cgsh/files/2017/publications/aba-antitrust-section-fall-forum-vertical-restraints-evolution-from-per-se-to-rule-of-reason-analysis-11-16-17.pdf>.
 5. See, *infra* Part IV.A; Carly Hallman, *Every Company Disney Owns: A Map of Disney's Worldwide Assets*, TITLEMAX, <https://www.titlemax.com/discovery-center/money-finance/companies-disney-owns-worldwide> [https://perma.cc/2GDA-LU7M] (last visited Sept. 16, 2024); *Amazon's Major Acquisitions Over the Years*, REUTERS (May 26, 2021, 7:16 AM), <https://www.reuters.com/technology/amazons-major-acquisitions-over-years-2021-05-26/>.

Additionally, the summer blockbuster phenom “Barbenheimer” reinvigorated movie theaters, and, while unlikely, this surge in popularity may have studios think again about reinvesting in theaters.⁶ While there is potential for consumer harm, especially in underserved markets, with the reintroduction of practices like block booking and setting minimum prices, the threat of antitrust regulation and oversight, even in the absence of the Decrees, is likely to prevent a return to cartel behavior.

While this Comment cannot tackle the extensive breadth of behaviors and concerns potentially stemming from the revocation of the Paramount Decrees, it does take a look at the most salient changes in the film industry since the investigation into and revocation of the Decrees. Part II provides a brief overview of the 1948 Paramount action and the resulting consent decrees, and Part III covers the government’s justifications for revoking the Decrees in 2020. Part IV analyzes major changes in the film industry since the revocation, and finally, Part V examines how some of these changes could lead to consumer harm in light of the revocation, taking particular note of the resurgence of block booking and circuit dealing in theaters and the open-ended question of how streaming fits into the picture.

II. THE PARAMOUNT DECREES

United States v. Paramount (1948) was a landmark Supreme Court antitrust case that broke up the Golden Age of Hollywood studio monopoly after a decades-long investigation by the government. In 1938, after various issues with the FTC and continued allegations of monopolization, the Department of Justice filed suit against the ‘Big Five’ (major defendants), Paramount Pictures, Loew’s/Metro-Goldwyn-Mayer (MGM), Warner Bros., 20th Century Fox, and RKO Pictures, and the ‘Little Three,’ Universal Pictures, Columbia Pictures, and United Artists.⁷ The studios and government attempted multiple failed settlements before the Paramount Consent Decrees, commonly referred to as the Paramount Decrees, were affirmed 7–1 and enacted in perpetuity on May 3, 1948.⁸ The Decrees busted up the Hollywood studio cartel and prohibited a slew of behavior that, at the time was deemed anticompetitive, designating those practices illegal *per se* for the studio-defendants.⁹

The biggest restriction on the studios at the time was the requirement that studios be divested of their theaters, thus ending the commonplace vertical integration of production, distribution, and exhibition. The Decrees mandated that the major defendants sell off their theaters to new, independent

6. See Lindsey Bahr, *The Story Behind Barbenheimer, the Summer’s Most Online Movie Showdown*, ASSOCIATED PRESS (July 14, 2023, 10:08 AM), <https://apnews.com/article/barbenheimer-barbie-vs-oppenheimer-61a6ec6c67359b851ddecc6d655b5ab>.

7. *Paramount*, 334 U.S. at 140.

8. *Id.* at 165.

9. *Id.* at 159, 161.

companies.¹⁰ In addition to requiring the selloff of studios' own theaters, the Decrees also put significant restrictions on the behaviors and tactics studios used when negotiating with third-party theaters for the distribution and exhibition of their films. The Decrees explicitly prohibited block booking, circuit dealing, and price minimums, while also prohibiting 'unreasonable clearances.'¹¹ Block booking refers to the practice of studios licensing films to theaters in a group, or 'block,' instead of negotiating each film separately, conditioning the licensing of one film on the inclusion of another.¹² The Court found this practice anticompetitive and illegal per se as it contributed to the studios' monopoly power.¹³ The Court also found that the practice of circuit dealing was an unlawful restraint on trade. Circuit dealing is the practice by which studios licensed their films to be exhibited to multiple theaters under one agreement, either based on geography or theater-owner.¹⁴ The Court held that this practice stifled competition and prevented smaller competitors from obtaining licenses for the choice first-run films, and that this practice was also a source of monopoly power by "the pooling of the purchasing power of an entire circuit in bidding for films."¹⁵ Other practices outlawed by the Decrees include requiring unreasonable clearances for licensure, which contributed to the studio cartel's attempts to maintain monopoly power, and stipulating to minimum prices, a function of the studios' conspiracy.¹⁶

These restrictions and mandates led to the breakdown of the "studio system," where, because of vertical integration, all processes related to movie making were orchestrated by the studio, giving them significant power in making contracts with filmmakers and actors. This move beckoned a new era of Hollywood, known as 'New Hollywood,' which led to the rise of independent cinema and released creators from the studio system licenses of the Golden Age, resulting in new competitors and more consumer choice. Instead of the vertically integrated industry, the film industry evolved into a marketplace of creators with choice among many production and distribution companies, some legacy film studios, some New Hollywood indie companies, and more recently Big Tech companies venturing into filmmaking. These companies are now also met with various nationwide theater chains and independent theaters that compete vigorously against each other and the streaming market.

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10. *United States v. Paramount Pictures*, 85 F. Supp. 881, 899 (S.D.N.Y. 1949) ("We also approve of the further proposal of the plaintiff that the plaintiff and the defendants shall submit plans calling for such divestiture of theatres as may comply with the requirements of the Supreme Court regarding local monopolies and illegal fruits.").
 11. *Id.* at 897–98.
 12. Gerald F. Phillips, *Block Booking-Perhaps Forgotten, Perhaps Misunderstood, but Still Illegal*, ENT. & SPORTS LAW., Summer 1987, at 3, 4.
 13. *Paramount*, 334 U.S. at 156–57 (1948).
 14. *Id.* at 153–55.
 15. *Id.* at 154.
 16. *Id.* at 143–44, 147.

The Decrees were enacted, as commonplace at the time, with no set end date—remaining the law in perpetuity. While only the Defendants were subject to the specific requirements and mandates of the Decrees, these practices became industry standard and laid the groundwork for studio behavior for over seventy years.¹⁷

III. THE REVOCATION OF THE DECREES

In 2018, the Department of Justice Antitrust Division announced an initiative to terminate hundreds of outdated “legacy” antitrust judgments.¹⁸ Until 1979, when the Division began to enter final judgments with a ten-year sunset provisions, many judgments, including the Paramount Decrees, did not include an express termination date.¹⁹ The Division decided to review these and 1300 other legacy judgments to terminate these perpetual consent decrees by “identify[ing] those that no longer serve to protect competition,” due to changes in the law, economics, and industry conditions.²⁰ Shortly after this press release, the Division announced the review of the Paramount Decrees, with a sixty day public comment period “inviting interested persons, including motion picture producers, distributors, and exhibitors, to provide the Division with information or comments relevant to whether the Paramount Consent Decrees still are necessary to protect competition in the motion picture industry.”²¹ The revocation of the Decrees was vehemently opposed by some industry insiders, particularly independent movie theaters and theater associations.²²

On August 7, 2020, just over two years after the Division announced the review of the Decrees, the United States District Court for the Southern District of New York issued its decision terminating the decrees, effective immediately except for a two-year sunset period on block booking and circuit dealing.²³ The Court cited three main justifications for why the termination of the Decrees was in the public interest: (1) the necessity of the Decree, (2)

17. Ephrat Levini and Michael J. de la Merced, *How Beyoncé and Taylor Swift Struck a New Kind of Movie Deal*, N.Y. TIMES (Oct. 7, 2023), <https://www.nytimes.com/2023/10/07/business/dealbook/how-beyonce-and-taylor-swift-struck-a-new-kind-of-movie-deal.html>.

18. *Department of Justice Announces Initiative to Terminate “Legacy” Antitrust Judgments*, DEPT. OF JUSTICE (Apr. 25, 2018), <https://www.justice.gov/opa/pr/departement-justice-announces-initiative-terminate-legacy-antitrust-judgments> [https://perma.cc/D4YS-MJQN].

19. *Id.*

20. *Id.*

21. *Department of Justice Opens Review of Paramount Consent Decrees*, DEPT. OF JUSTICE (Aug. 2, 2018), <https://www.justice.gov/opa/pr/departement-justice-opens-review-paramount-consent-decrees> [https://perma.cc/GQ98-S5TE].

22. *United States v. Paramount Pictures, Inc.*, No. 19 MISC. 544 (AT), 2020 WL 4573069, at *1 (S.D.N.Y. Aug. 7, 2020).

23. *Id.* at *8.

changes in the motion picture industry, and (3) changes in antitrust law.²⁴ The Court explained that the Decrees were no longer necessary since they resulted in the breakup of the film studio cartel and the end of the collusion seventy years ago.²⁵ The Court further analyzed the many changes to antitrust law and the film industry over this time that rendered the Decrees gratuitous.²⁶

A. *Changes in Antitrust Law*

Between 1948 and 2020, multiple changes to antitrust law resulted in the Decrees upholding old practices and delivering regulation already present in other antitrust enforcement measures. The Court held that the potential for future violation by the studios was low, given the vast changes in antitrust law and analysis since 1948.²⁷ These changes to the structure of analyzing potential antitrust violations created a system that was not only incompatible with current practice but also inequitable, as only the covered studios from 1948 were subject to its provisions.

Most notably, practices that were considered per se illegal and completely prohibited by the Decrees, such as circuit dealing and block booking, are now analyzed under a rule of reason approach.²⁸ Therefore, the prohibition of these practices by the Decrees completely restrict the still-existing covered firms from engaging in block booking and circuit dealing, whereas studios not covered by the Decrees can engage in these practices subject to a rule of reason analysis on competitive effects. Additionally, vertical integration, such as controlling the production, distribution, and exhibition of a film, is analyzed under a rule of reason analysis, and large mergers are now automatically subjected to FTC review.²⁹ Even without the Decrees, there would still be significant industry oversight as it is likely any merger or acquisition regarding production and exhibition would cross the reporting threshold.³⁰ Consequently, the Decrees had the potential to prohibit competition-positive or competition-neutral vertical integration by studios that would not substantially lessen competition and would otherwise pass a rule of reason analysis. Beyond the changes to the

24. *Id.* at *4-6.

25. *Id.* at *3.

26. *Id.*

27. *Id.* at *7.

28. *Id.* at *6.

29. *Merger Review*, FEDERAL TRADE COMMISSION, <https://www.ftc.gov/news-events/topics/competition-enforcement/merger-review> [<https://perma.cc/8LKS-WRYR>] (last visited Sept. 16, 2024) (“Although there are some exemptions, for the most part current law requires companies to report any deal that is valued at more than \$101 million to the agencies so they can be reviewed.”).

30. *Paramount*, 2020 WL 4573069 at *6; see e.g., *Cineworld to Buy Regal Cinemas in Blockbuster Deal*, BBC (Dec. 5, 2017), <https://www.bbc.com/news/business-42234673> [<https://perma.cc/F7AZ-DWH7>] (highlighting Cineworld’s new “cinema giant” group thanks to a \$3.6 billion acquisition of Regal Cinemas).

particular conduct prohibited by the Decrees, the Court found that current antitrust laws and regulations, outside of the Decrees, were sufficient to regulate the film industry and deter anticompetitive conduct.³¹

Finally, the Court noted that existing antitrust law, specifically the Sherman Act, which prohibits attempted monopolization and collusion, effectively deterred studios from engaging in the anticompetitive activity that resulted in the cartel and collusion in the 1930s and 1940s.³² Because of the increase in penalties for per se violations of antitrust laws, the threat of being criminally prosecuted for violations of the Sherman Act was sufficient to prevent studios from attempting monopolization of the exhibition industry.³³ And regardless of the revocation of the Decrees, the United States' or private plaintiffs would still have the advantage of the Court's rulings in both the 1948 and 2020 *Paramount* litigation, should anticompetitive conduct be alleged.³⁴

B. *Changes in the Film Industry*

The Court also considered the many ways in which the film industry has changed over the lifetime of the Decrees and concluded that these changes resulted in an industry where the Decrees are no longer necessary.³⁵ Primarily, the Decrees resulted in the end of the studio system, busting up the cartel and requiring the Big Five studios to sell off their theaters.³⁶ As a result, none of the big theater chains— AMC, Cinemark, and Regal—are owned by a production company.³⁷ Production and exhibition are already separated, and will likely stay that way.³⁸ Furthermore, exhibition is not tied to movie theaters, as

31. *Paramount*, 2020 WL 4573069 at *7.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.* at *4-6.

36. *United States v. Paramount Pictures*, 85 F. Supp. 881, 899 (S.D.N.Y. 1949).

37. See BBC, *supra* note 30 (sharing Regal Cinema's acquisition by a British theater conglomerate). AMC is a public corporation traded on the NYSE with no majority shareholder after Chinese company the Wanda Group sold off most of its holdings in 2021. Rebecca Rubin, *Wanda Group No Longer Majority Shareholder in AMC Theaters*, VARIETY (Mar. 12, 2021, 7:59 AM), <https://variety.com/2021/film/news/china-wanda-group-amc-theatres-1234929145> [<https://perma.cc/F6MG-F8GZ>]. Cinemark is also a publicly traded corporation, with its largest investors being investment groups like Vanguard and Wellington. *Institutional Owners and Shareholders*, FINTEL, <https://fintel.io/so/us/cnk> (last visited Sept. 16, 2024); see also Chris Kolmar, *10 Largest Movie Theater Chains Worldwide*, ZIPPPIA (Apr. 24, 2023), <https://www.zippia.com/advice/largest-movie-theater-chains> [<https://perma.cc/33U2-A6RN>] (noting that AMC, Regal, and Cinemark were the top three cinema chains in the United States in 2022 and also the number one, number three, and five worldwide by revenue).

38. *Paramount*, 2020 WL 4573069 at *8 (“Because the Decrees ended the collusion and required the Major Defendants to separate their film distribution and theater operations, and the industry no longer uses sequential theatrical runs, it is unlikely that any collective attempt by Defendants to once again monopolize the theater market

it was in the 1940s, and there are many, many ways for studios to exhibit their films. In the 1950s and 1960s, studios began to license and exhibit their films for release on television, the 1970s brought the VHS tape and on-demand video, which was streamlined with 1990s' DVD, and completely turned on its head with the rise of streaming in the 2010s and 2020s.³⁹ Because of the wide variety of exhibition methods, the commonplace 1930s practice of subsequent theater runs, highly crucial to the anticompetitive activity of the cartel, had died off, with only a handful of “dollar theaters” remaining across the United States.⁴⁰

The competitors in the film production industry have also changed drastically since the dawn of the Decrees. RKO, one of the original Big Five, is no longer in existence.⁴¹ Further, in addition to the dozens of successful independent production companies that came about as a result of the Decrees, international media giant The Walt Disney Company—the parent company of Marvel, Lucasfilm, former FOX properties, and a myriad of independent production companies—was the leading film distributor in 2018 but a small competitor when the review of the cartel began.⁴² In addition to Disney and the New Hollywood indie companies, streaming service production companies have increased output exponentially and none of these competitors are subjected to the Decrees.⁴³ Therefore, the Court explained, the Decrees impose legal constraints on the remaining Defendants that do not apply to many of their competitors.⁴⁴

C. *Unconvincing Comments*

Finally, the Court addressed the many comments submitted by movie theaters, theater associations, film societies and institutions, and even the Writers

would or could reoccur.”)

39. *The History of Film: The 1950s*, FILMSITE, <https://www.filmsite.org/50sintro.html> [<https://perma.cc/CV8Z-7F74>] (last visited Sept. 16, 2024) (“The first Hollywood feature film to be broadcast on US television (on November 3, 1956), during prime-time, was *The Wizard of Oz* (1939).”); Olivia Harlow, *Rise and Fall of the VHS*, APERTURE, <https://kodakdigitizing.com/blogs/news/rise-and-fall-of-the-vhs> [<https://perma.cc/JC24-96LE>] (last visited Sept. 16, 2024) (explaining the history of the VHS tape and its replacement by DVDs).
40. See Zoey Miller, *There Are No More Dollar Theaters in Central Ohio*, COLUMBUS NAVIGATOR (Oct. 16, 2017), <https://www.columbusnavigator.com/no-dollar-theaters-central-ohio> [<https://perma.cc/8EWF-2VM5>]; Danny Gallagher, *The Curtain Has Closed Forever on the Last Dollar Movie Theater in DFW*, DALLAS OBSERVER (Jan. 6, 2022), <https://www.dallasobserver.com/arts/its-official-north-texas-has-no-more-dollar-theaters-13121238> [<https://perma.cc/T6YS-N3UG>].
41. See *History*, RKO PICTURES, <https://rko.com/history-2/> [<https://perma.cc/49BZ-PANN>] (last visited Sept. 24, 2024) (while RKO’s operation as a fully functional studio ended in 1957 after its acquisition by General Tire, the company has over the subsequent decades partnered in the release of sequels and re-releases of its classic titles).
42. See Hallman, *supra* note 5.
43. See *infra* Part IV.A.
44. *United States v. Paramount Pictures, Inc.*, No. 19 MISC. 544 (AT), 2020 WL 4573069, at *5 (S.D.N.Y. Aug. 7, 2020).

Guild of America, ultimately finding the concerns and pleas of those opposing the revocation to be unconvincing.⁴⁵ The biggest concerns from theaters centered around the permission of block booking and circuit dealing in the absence of the Decrees.⁴⁶

As to block booking, the Court noted that most markets have multiple movie theaters with multiple screens simultaneously showing movies from multiple distributors.⁴⁷ Therefore, it is less likely that engaging in block booking negotiation tactics by studios would result in harm similar to that of the 1930s and 1940s.⁴⁸ Because of the much larger opportunity for films to be exhibited at theaters, the Court did not see block booking as a threat to pushing independent films out of exhibition channels.⁴⁹ Further, the Court again noted that there are many other distribution methods that did not exist in the 30s and 40s, like streaming, television, and DVDs, which means that even if block booking foreclosed a particular theater market from exhibiting an independent film, there are multiple alternative exhibition methods for consumers to access the content.⁵⁰

The Court reiterated its arguments from the analysis to discount concerns regarding circuit dealing. The Court reasoned that because the studios no longer own the theaters, it is less likely that circuit deals would be struck, as now instead of negotiating with their own subsidiary, a studio must make a deal with AMC or Cinemark to engage in circuit dealing, which functioned via collusion and was ended and prohibited by antitrust law.⁵¹

In finding the comments unconvincing, the Court did not completely dismiss the theater industry's concerns, but again echoed the capabilities of current antitrust law to effectively govern the industry absent the Decrees:

That is not to say that any given merger between distributors and theaters, or any particular set of film licensing practices, would necessarily be lawful—only that the Government and courts have the tools to carefully assess potential threats to competition in the movie industry as they arise without the need to rely on these outdated court orders.⁵²

45. *Id.* at *7. See generally *Paramount Consent Decree Review Public Comments 2018*, DEPT. OF JUSTICE, <https://www.justice.gov/atr/paramount-consent-decree-review-public-comments-2018> [<https://perma.cc/23AW-L97P>] (last visited Sept. 16, 2024).

46. See e.g., Writers Guild of America, West, Inc., *Comments Of Writers Guild Of America, West, Inc., In re Antitrust Consent Decree Review: The Paramount Consent Decrees*, (Oct. 4, 2018), <https://www.justice.gov/media/976256/dl?inline>; Independent Cinema Alliance, *Comments of the Independent Cinema Alliance to the Department of Justice, Antitrust Division concerning the Paramount Consent Decrees* (Oct. 4, 2018), <https://www.justice.gov/media/977356/dl?inline>.

47. *Paramount*, 2020 WL 4573069 at *8.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.* at *8.

52. *Id.*

IV. CONTINUED CHANGES AFTER THE PARAMOUNT DECREES

Notwithstanding the drastic changes to the industry between the Decrees enactment and their revocation, the industry has continued to evolve and change in ways unbeknownst to the regulators in 2018. These changes, some thanks to the continued evolution of the industry and national economy in light of the global pandemic and others due to studios and theaters taking action in light of the Decree revocation, may have antitrust implications not imagined when the Decrees were revoked.

A. *The Unprecedented Growth of Streaming*

While alternative exhibition methods have been providing consumers access to movies outside of theaters since the 1960s, none have been nearly as disruptive as the rise of streaming services.⁵³ As cited by the government and the Court in their decision to revoke the Paramount Decrees, streaming services already posed significant changes to the industry throughout the 2010s, with the leading streaming service Netflix growing to almost 100 million global subscribers in its first ten years.⁵⁴ However, during the Department of Justice's review of the Paramount Decrees, the entire world was hit by the COVID-19 pandemic which sparked an unprecedented amount of growth in the streaming industry, as theaters were shuttered amid stay-at-home orders.⁵⁵ Since the DOJ announced review of the Paramount Decrees, Netflix subscribers have increased by more than one hundred million.⁵⁶ Prominent studios Paramount and NBCUniversal launched new streaming services Paramount+ and Peacock, along with WarnerMedia's streaming revamp creation HBOMax (now known simply as MAX).⁵⁷ Overall, there are hundreds of streaming services, and the

53. See, e.g., A.O. Scott, *How Streaming Has Rewritten the Script for Movies*, N.Y. TIMES (Dec. 7, 2022), <https://www.nytimes.com/2022/12/07/business/dealbook/movies-hollywood-streaming-services.html>.

54. Trefis Team, *Netflix Subscriber Growth Continues Unabated, As Margins Improve*, FORBES (Jan. 19, 2017, 2:22 PM), <https://www.forbes.com/sites/greatspeculations/2017/01/19/netflix-subscriber-growth-continues-unabated-as-margins-improve/?sh=7b67b80452dd> [<https://perma.cc/479J-6GEB>] (Netflix started streaming services in January 2007, amassing 49.3 million U.S. subscribers and 93.8 global subscribers by the end of 2016).

55. See Pamela McClintock, *U.S. Lost 2,000-Plus Movie Theater Screens Amid Pandemic*, THE HOLLYWOOD REPORTER (Mar. 9, 2023, 9:00 AM), <https://www.hollywoodreporter.com/movies/movie-news/movie-theater-screen-losses-ticket-prices-1235346523> [<https://perma.cc/Q2MC-NHNU>].

56. Todd Spangler, *Netflix Falls Short of Q2 Subscriber Expectations Worldwide, Stock Dives*, VARIETY (July 16, 2018, 1:13 PM), <https://variety.com/2018/digital/news/netflix-q2-2018-subscriber-misses-expectations-1202874317> [<https://perma.cc/54NG-MNT8>]; Jennifer Maas, *Netflix Adds Nearly 9 Million Subscribers in Q3; Streamer Says Ad-Supported Plans Up Nearly 70% From Q2*, VARIETY (Oct. 18, 2023, 1:03 PM), <https://variety.com/2023/tv/news/netflix-subscribers-q3-earnings-1235760620> [<https://perma.cc/KPR3-QGLT>].

57. NBCUniversal released Peacock on April 15, 2020. Julia Alexander, *NBCUniversal*

top market shares are occupied by a conglomeration of legacy studios' attempts to stay relevant in the market alongside big-tech-era companies pushing themselves into the prestige film industry.⁵⁸ Top streaming services Amazon Prime Video and Netflix each hover around 20 percent market share, MAX at 14 percent, and Disney's Disney + and Hulu rounding out the top five at 11 percent and 10 percent—a far cry from the presumptive monopoly of the theaters in the Paramount age, but not entirely unconcentrated.⁵⁹

The studios coming out of streaming service tech companies have had noteworthy success crafting award-caliber films produced and distributed internally, and exhibited on their platforms along with a careful and limited theater release to abide by Academy rules.⁶⁰ For example, Amazon Studio's *Manchester by the Sea* (2016) became the first movie distributed by a streaming service to be nominated for Best Picture at the Academy Awards, followed behind Netflix's *Roma* (2018) and many more before AppleTV+'s *CODA* finally took home the top Oscar in 2021.⁶¹ Of note, however, is that *CODA*

Officially Enters the Streaming Wars with Peacock Launch, THE VERGE (Apr. 14, 2020, 12:00 PM), <https://www.theverge.com/2020/4/14/21220728/peacock-streaming-service-launch-date-price-comcast-xfinity-flex> [https://perma.cc/P42N-D7U2]. Paramount+ launched on March 21, 2021. Cynthia Littleton, *Paramount Plus to Launch March 4 in U.S. and Latin America*, VARIETY (Jan. 19, 2021, 6:00 AM), <https://variety.com/2021/tv/festivals/paramount-plus-streaming-debut-march-4-viacomcbs-1234887452> [https://perma.cc/J7G5-MQHJ]. HBOMax rebranded to just "MAX" on May 23, 2023. *What Is Max? The Streaming Home of HBO*, HBO, <https://www.hbo.com/hbo-and-max> [https://perma.cc/9ZN9-VUEV] (last visited Sept. 16, 2024).

58. Streaming service platform market share (as of July 2024): Amazon Prime Video – 22%, Netflix – 22%, MAX – 14%, Disney+ – 11%, Hulu – 10%, Paramount+ – 9%, AppleTV+ – 9%, all others combined – 3%. *Market Shares of Selected Subscription Video-on-Demand (SVOD) Services in the United States in 2nd Quarter 2024*, STATISTA (July 11, 2024), <https://www.statista.com/statistics/496011/usa-svod-to-tv-streaming-usage/>. In late 2023, Disney bought out NBCUniversal/Comcast's 33% stake in Hulu to combine Disney+ and Hulu into a single streaming platform. Todd Spangler, *Disney+, Hulu Merged App to Launch Next Month for Bundle Subscribers, Bob Iger Says*, VARIETY (Nov. 8, 2023, 1:43 PM), <https://variety.com/2023/digital/news/disney-hulu-merged-app-launch-december-1235784927> [https://perma.cc/KS4C-S4ZE]. While both the Disney+ and Hulu apps exist separately, most Hulu content is available on Disney+ as of March 2024. Brian Welk, *So What Is and Isn't Available from Hulu on the Merged Disney+ App?*, INDIEWIRE (March 27, 2024, 5:30 PM), <https://www.indiewire.com/news/analysis/what-isnt-available-from-hulu-merged-disney-plus-app-1234968472/#:~:text=It's%20official%3A%20Disney%2B%20and%20Hulu,with%20more%20on%20the%20way.>
59. STATISTA, *supra* note 58.
60. As explained in further detail below, eligibility for consideration in the Academy Awards has traditionally only required a seven-day theatrical release in one market. *96th Academy Awards of Merit Complete Rules*, OSCARS.ORG, https://www.oscars.org/sites/oscars/files/96o_complete_rules.pdf.
61. Brent Lang, *Amazon Makes Oscar History as First Streaming Service Best Picture Nominee*, VARIETY (Jan. 24, 2017, 6:19 AM), <https://variety.com/2017/film/awards/amazon-oscars-manchester-by-the-sea-1201967617> [https://perma.cc/X3LQ-PKSV]; Tara Bitran,

only had a box office revenue of \$2.2 million, with a short post-Sundance Film Festival premier theatrical run in approximately forty cities upon its release on AppleTV+.⁶² As streaming service studios continue to produce and distribute highbrow, Oscar-quality content, it is likely they will continue to push theatrical releases no more than required by the Academy.⁶³

Furthermore, the average person subscribes to 2.8 streaming services, with almost 10 percent of people subscribing to more than five different streaming services at a given time.⁶⁴ This rise in streaming, in sheer number of subscribers along with the increase in consumer options and household subscriptions, has given streaming services—and thus studios—an incredible amount of access to consumers, surpassing traditional alternative exhibition methods in ways that the early days of streaming could not rival. The basic monthly subscription rates of all seven of the streaming services occupying the top market share are cheaper than the average new-release Blu-ray or movie theater ticket.⁶⁵

Oscars: 'Roma' Lands Netflix its First Best Picture Nom, THE HOLLYWOOD REPORTER (Jan. 22, 2019, 6:06 AM), <https://www.hollywoodreporter.com/news/general-news/roma-makes-history-as-first-best-picture-oscar-nom-netflix-1177013> [https://perma.cc/C7M2-UZ9W]; Todd Spangler, *Apple is First Streamer to Win Best Picture Oscar for 'CODA'*, VARIETY (Mar. 27, 2022, 8:34 PM), <https://variety.com/2022/film/news/apple-best-picture-oscar-coda-1235213717> [https://perma.cc/5NH8-34DD].

62. See Tom Bruggeman, *'CODA' Has Changed Oscar Movies' Release Strategies Forever*, INDIE WIRE (Mar. 29, 2022, 5:00 PM), <https://www.indiewire.com/features/general/coda-changed-oscar-movies-release-strategies-1234712039> [https://perma.cc/Q6FE-KCM7].
63. *But see infra* Part IV.B (analyzing a recent post-pandemic movie theater rebound). The Academy is supporting a return to theater release with its new regulations requiring a significantly broader theater release for eligibility beginning January 1, 2024. Clayton Davis, *Oscars to Require 'Expanded Theatrical Run' to Qualify for Best Picture Beginning in 2025*, VARIETY (June 21, 2023, 3:12 PM), <https://variety.com/2023/film/awards/oscar-theatrical-expansion-requirements-best-picture-1235651334> [https://perma.cc/P7XQ-JDDL].
64. Emily Glover, *Nearly 50% Of People Pay For Streaming Services They Don't Use, According To New Forbes Survey*, FORBES (Mar. 9, 2023, 9:58 AM), <https://www.forbes.com/home-improvement/internet/streaming-survey/#:~:text=According%20to%20the%20survey%20findings,services%20the%20average%20person%20uses> [https://perma.cc/QRM7-JSXX].
65. While *The Batman* (2022) is available to purchase on Blu-ray for \$14.99 at Target, <https://www.target.com/p/the-batman-blu-ray-dvd-digital/-/A-85991036> [https://perma.cc/Q2ZC-WAFY] (last visited Sept. 16, 2024), and AMC's average movie theater ticket price to see the new release in March 2022 was \$14.50, Anthony D'Alessandro, *'Batman' AMC Surge Pricing Postmortem: Exhibitor Not The First Major To Hike Ticket Prices On A Superhero Pic; Making Sense Of The Madness*, DEADLINE (Mar. 6, 2022, 11:31 AM), <https://deadline.com/2022/03/batman-spiderman-movie-ticket-price-increase-amc-1234972159/> [https://perma.cc/QPE8-RK7B], whereas all of the basic streaming service subscriptions, including Amazon Prime Video and MAX which currently stream *The Batman*, start at less than \$10 per month, Rob Lever, *Best Streaming Services of 2023*, U.S. NEWS & WORLD REPORT (July 22, 2024), <https://www.usnews.com/360-reviews/technology/streaming-services>.

Consequently, for the price of just one DVD or ticket to the theater, consumers can gain access to hundreds of new release and legacy titles.

Moreover, in the studios' attempts to continue the distribution of their films during the pandemic, they inadvertently (or perhaps intentionally) disrupted the crucial exclusivity element of theater release. Dozens of films shifted to a very short theatrical run followed by a quick streaming service release, some used a video-on-demand or "premium" streaming service option—most notoriously the later-litigated release of *Black Widow* concurrently to Disney+ and theaters—many forwent theater release altogether, instead dropping the movies directly to their own or a third-party platform.⁶⁶ Notably, Warner Bros. made the one-year plan to drop all of its 2021 new releases onto their parent company's streaming service, HBOMax, at the same time they hit theaters.⁶⁷ Another blow to theater exclusivity, in contrast to the subsequent theater runs of the Golden Age, is that many non-newly released films are available on multiple streaming services. So, while Netflix or Hulu "originals" may only be available on their home platform, movies that came out before the streaming era are often available on multiple platforms to stream with subscriptions as well as on video-on-demand to rent.⁶⁸

The permeation of streaming services into the movie exhibition industry has certainly been transformational in the way studios connect consumers with their content. Even more, it has changed rapidly and drastically since the DOJ's investigation into the Paramount Decrees and the district court's decision to repeal them.

B. *A Movie Theater Renaissance?*

Since the Department of Justice began review of the Paramount Decrees, movie theaters have seen their worst year at the box office in almost forty years, along with the highest per movie average domestic gross since *Avatar* in 2010.⁶⁹ Surpassing 2022's domestic yearly box office by the fall, 2023 brought

66. Anthony D'Alessandro, *Disney Shifts 'Black Widow' & 'Cruella' To Day & Date Release In Theaters And Disney+, Jarring Summer Box Office*, DEADLINE (Mar. 23, 2021, 11:30 AM), <https://deadline.com/2021/03/black-widow-cruella-disney-plus-theaters-day-and-date-release-1234720116> [<https://perma.cc/LT8V-V697>]; see also *List of Films Impacted by the COVID-19 Pandemic*, WIKIPEDIA, https://en.wikipedia.org/wiki/List_of_films_impacted_by_the_COVID-19_pandemic (last visited Sept. 16, 2024).

67. Todd Haselton, *Warner Bros. Will Launch Every 2021 Movie on HBO Max at the Same Time They Hit Theaters*, CNBC (Dec. 3, 2020, 4:06 PM), <https://www.cnbc.com/2020/12/03/warner-bros-to-release-every-2021-movie-on-hbo-max-at-the-same-time-as-theaters.html> [<https://perma.cc/2TWX-57GR>].

68. See, e.g., *10 Things I Hate About You* (1999), JUSTWATCH. <https://www.justwatch.com/us/movie/10-things-i-hate-about-you>. As of Nov. 26, 2023, *10 Things I Hate About You* (1999) is available on the streaming platforms Disney+ and Amazon Prime Video, as well as available to rent for a fee from AppleTV+ and YouTube.

69. See *Domestic Yearly Box Office*, BOX OFFICE MOJO, https://www.boxoffice Mojo.com/year/?sort=year&ref_=bo_yl_resort#table [<https://perma.cc/H3VB-3VUM>] (last

to theaters multiple Marvel Cinematic Universe films,⁷⁰ highly awaited action series sequels,⁷¹ animated films featuring fan-favorite characters,⁷² concert films from the biggest pop stars in the world,⁷³ and the cultural phenomenon that was “Barbenheimer,” the concurrent release of Warner Bros. and Greta Gerwig’s *Barbie* and Universal and Christopher Nolan’s *Oppenheimer*.⁷⁴ Barbenheimer, a collection of two vastly different films by two beloved “auteurs” bringing “original” (as in non-sequel, non-franchise) movies to theaters, not only generated a combined \$960 million in revenue domestically, but also potentially sparked a return to theaters for consumers, especially young film goers.⁷⁵ With 80 percent of *Barbie* theater audiences being under age thirty-five along with the film being the highest grossing movie by a sole female director, it is possible that we are entering a new era with the revival of the movie theater.⁷⁶

Beyond the numbers, revered filmmakers are noting this shift, advocating for theater-only releases, and making creative decisions specifically with the theater-viewer in mind. New Hollywood icon Francis Ford Coppola, the man behind the 1970s hits *Apocalypse Now* and *The Godfather* series, has a hunch “that we’re on the verge of a golden age [of cinema],” noting that people filling big theaters to see new, original movies is a victory for cinema.⁷⁷

visited Sept. 16, 2024) (showing that, as of November 2023, the average domestic box office earnings of the 492 films released year to date in 2023 is over \$15.8 million, the highest since 2010 when *Avatar*, the highest grossing film of all time, was released, which averaged over \$16.2 million).

70. Disney’s Marvel Cinematic Universe is the highest grossing franchise of all time, which released *Ant-Man: Quantumanium* and *The Marvels* in theaters in 2023. *Franchises (US & Canada)*, BOX OFFICE MOJO, <https://www.boxofficemojo.com/franchise> [<https://perma.cc/8EHL-QYST>] (last visited Sept. 16, 2024).
71. Box office note on mission impossible and Indiana Jones sequel *Domestic Box Office for 2023*, BOX OFFICE MOJO, <https://www.boxofficemojo.com/year/2023> [<https://perma.cc/3SGT-YTBQ>] (last visited Sept. 16, 2024). *Indiana Jones and the Dial of Destiny* and *Mission Impossible – Dead Reckoning Part 1* released as the fifth and seventh respective films in their franchises.
72. As of November 2023, animated features *Spider-Man: Across the Spiderverse* and the *Super Mario Bros. Movie* are in the top three domestic box office gross for the year. *Id.*
73. Taylor Swift and Beyoncé released concert films in the fall of 2023. Lisa Respers France, *Beyoncé and Taylor Swift Understand the Power of Concert Films*, CNN (Oct. 7, 2023, 10:34 AM), <https://www.cnn.com/2023/10/07/entertainment/taylor-swift-beyonce-movies-plc/index.html> [<https://perma.cc/WPT9-6DYQ>].
74. See Bahr, *supra* note 6; Rebecca Rubin, ‘Barbenheimer’ Fever: Meet the Film Lovers Turning ‘Barbie’-‘Oppenheimer’ Double Features Into the Movie Event of the Year, VARIETY (July 17, 2023, 9:55 AM), <https://variety.com/2023/film/features/barbenheimer-fans-barbie-oppenheimer-double-features-1235665491> [<https://perma.cc/MC5K-GF44>].
75. Sara Chernikoff, *Are Movie Theaters Making a Comeback? How ‘Barbenheimer’ Boosted Movie Morale*, USA TODAY (Aug. 10, 2023, 10:19 PM), <https://www.usatoday.com/story/entertainment/movies/2023/08/10/barbenheimer-breaks-box-office-records-are-theaters-making-comeback/70562644007> [<https://perma.cc/C3PM-BGXV>].
76. *Id.*
77. Christian Zilko, *Francis Ford Coppola Predicts ‘We’re on the Verge of a Golden Age’ of*

Christopher Nolan and his wife, producer Emma Thomas, have been noted by others in the industry as “champions of the cinematic experience” for their part in *Barbenheimer*, with Nolan directing *Oppenheimer* specifically for optimal viewing on 70mm film in an IMAX theater.⁷⁸ His continued effort to shoot in IMAX, an experience truly only available in the theater, did not go unnoticed. Notably, some fans drove several hours to see *Oppenheimer* in one of the only thirty theaters across the world capable of showing the film on 70mm IMAX, some even attending 6:00 am showings for a chance to see the film the way Nolan intended.⁷⁹ Others have had a less optimistic view: Director Martin Scorsese revealed concerns that studios are thwarting original stories and creative expression—however, this comes with the caveat that his recently theatrically released film *Killers of the Flower Moon*, AppleTV+’s first major theatrical release, has been the director’s third best box office opener ever, bringing in over \$100 million on a nearly three and a half hour film.⁸⁰

It is not only filmmakers supporting a return to the theater. Recent changes by the Academy of Motion Pictures and Sciences to the eligibility rules for the Academy Awards will require that films have an “expanded theatrical run” to be nominated for the coveted Best Picture Oscar.⁸¹ Previously, films met eligibility requirements for Academy Awards consideration by exhibiting the film “for paid admission in a commercial motion picture theater” in a minimum theatrical run of seven consecutive days in one of six qualifying U.S. metro markets.⁸² However, the Academy Board of Governors made a change

Cinema after ‘Barbie’ and ‘Oppenheimer’ Success, INDIE WIRE (July 30, 2023, 1:45 PM), <https://www.indiewire.com/news/general-news/francis-ford-coppola-barbie-oppenheimer-new-golden-age-cinema-1234889826> [https://perma.cc/HNP2-ZBYR].

78. Chris Gardner, *Christopher Nolan Recalls Being Told “You Make the World a Better Place” by Man Who Thought He Was Aaron Sorkin*, THE HOLLYWOOD REPORTER (Apr. 27, 2023, 10:22 PM), <https://www.hollywoodreporter.com/movies/movie-news/christopher-nolan-oppenheimer-award-cinemacon-speech-1235404632> [https://perma.cc/Z9T2-WH8V].
79. See Bilal Qureshi, *Nolan Fans Are Traveling Hours to See ‘Oppenheimer’ in Its Intended 70mm IMAX Format*, NPR (July 24, 2023, 4:29 PM), <https://www.npr.org/2023/07/24/1189831555/nolan-fans-are-traveling-hours-to-see-oppenheimer-in-its-intended-70mm-imax-form>; Lindsey Bahr, *Christopher Nolan Breaks Down the Best Ways to Watch a Movie, ahead of His ‘Oppenheimer’ Release*, THE ASSOCIATED PRESS (June 4, 2023, 5:56 AM), <https://apnews.com/article/oppenheimer-christopher-nolan-0f8c1fdc4a358decee6105cac91a90ae>.
80. *Killers of the Flower Moon*, BOX OFFICE MOJO, <https://www.boxofficemojo.com/title/tt5537002> [https://perma.cc/6ABT-BQBF] (last visited Sept. 16, 2024); Etan Vlessing, *Martin Scorsese Talks Impact of Hollywood Blockbusters on Cinema: “Well, the Industry Is Over”*, THE HOLLYWOOD REPORTER (Sept. 25, 2023, 8:25 AM), <https://www.hollywoodreporter.com/movies/movie-news/martin-scorsese-hollywood-blockbusters-cinema-1235598189> [https://perma.cc/R7YF-F4BC].
81. Davis, *supra* note 63.
82. OSCARS, *supra* note 60 (96th Academy Awards of Merit Complete Rules, Rule Two (2) (c-d) notes qualifying areas include Los Angeles County, the Bay Area, New York City,

to the eligibility qualifications for films aspiring to compete for the Best Picture award: starting with films to be released in 2024, Best Picture eligibility now requires a seven-day theatrical run in either ten of the top fifty U.S. markets, or eight of said U.S. markets and two of the top fifteen international markets, all within the first forty-five days of its initial release.⁸³ While not as extensive of a reach as streaming, which can get into every consumer's home, this move by the Academy requires filmmakers and studios to provide access for more consumers to see new releases in theaters nationwide, compared to current rules which allow many international, arthouse, or streaming-backed films to only premiere theatrically in Los Angeles or New York. Setting aside the potential that the Academy itself is engaging in anticompetitive strategic entry deterrence by promulgating Best Picture eligibility requirements regarding theatrical releases,⁸⁴ a salient motive behind the shift is to support and encourage the exhibition of films in movie theaters, with the Academy "hop[ing] that this expanded theatrical footprint will increase the visibility of films worldwide and encourage audiences to experience our art form in a theatrical setting."⁸⁵

While the theatrical film exhibition industry is yet to return to its pre-pandemic numbers, movie theaters are slowly but surely bouncing back, perhaps evolving into a new type of exhibition in the wake of streaming, Barbenheimer, and the pandemic.⁸⁶ As industry insiders and the Academy push for consumers to watch their favorite movies on the big screen, continued growth in traditional exhibition might raise familiar antitrust concerns.

V. ANTITRUST CONCERNS IN THE MODERN FILM INDUSTRY

In publicizing their motion to terminate the Paramount Decrees, Assistant Attorney General Makan Delrahim announced that "the [Antitrust] Division will review the vertical practices initially prohibited by the Paramount decrees using the rule of reason," further pledging that "[i]f credible evidence shows a practice harms consumer welfare, antitrust enforcers remain ready to act."⁸⁷ However,

Chicago, Miami, and Atlanta; screenings must also take place at least three times per day, with one showing between 6:00 pm and 10:00 pm during the seven-day consecutive qualifying run).

83. Davis, *supra*, note 63.

84. See generally Armando Marin III, "And the Oscar Goes to . . .": Why the Academy Awards May Create Antitrust Drama with Proposed Eligibility Rule Changes, 42 CARDOZO L. REV. 645 (2021) (analyzing the potential anti-competitiveness of an extended theatrical eligibility period amidst DOJ warnings to the Academy in 2019).

85. Davis, *supra* note 63.

86. Sarah Whitten, *Movie Theaters Aren't Dying—They're Evolving*, CNBC (Feb. 25, 2023, 9:00 AM), <https://www.cnbc.com/2023/02/25/movie-theaters-evolving-not-dying.html> [<https://perma.cc/PH9S-MFBT>] (describing various changes to the theater experience in the wake of the pandemic and theater closures amidst new technology and consumer innovations).

87. Alex Weprin, *Justice Department Moves to Terminate Paramount Consent Decrees*,

despite these assurances and the Court's determinations, the world—and the film industry—is a different place than it was three years ago. These changes, as outlined in the sections above, could result in different antitrust concerns and consumer harm than those imagined by the government and the Court in 2020.

A. *Rule of Reason Conduct Analysis*

In their review of the Paramount Decrees, neither the government nor the court saw block booking as a legitimate or likely threat to competition or consumer harm.⁸⁸ However, now that the two-year sunset period has waned, studios have not hesitated to return to block booking, circuit dealing, and price maintenance practices. It is foreseeable that studios could begin to bundle and tie their films together on a wide scale with minimum prices, which could result in independent distributors being pushed out of out of small markets, negatively impacting consumer welfare.

1. The Resurgence of Block Booking

At its core, the practice of block booking is a form of tying arrangement. It is no longer a per se antitrust violation but is instead analyzed with regard to the market power in the tying product.⁸⁹ Therefore, presumably any uses of block booking that resulted in consumer harm or decreased competition would be reviewed by the courts for antitrust violations. However, case-by-case judicial review of block booking practices under a rule of reason analysis poses potential problems.⁹⁰ As noted by the government, “a vertical antitrust claim based on a single film would require a court to determine whether that film or any film (for that matter) has or could have market power. However, defining the relevant market for this kind of analysis is not clear cut.”⁹¹ Mark Marciszewski argued that the DOJ was “completely misguided” in its analysis to consider the entire exhibition market, including not only theatrical exhibition but also streaming and at-home media.⁹² The relevant market could instead be defined as the collective theatrical market, looking at how much market share a distributor has in the top grossing films of the year, or more narrowly by looking at the market power of an

THE HOLLYWOOD REPORTER (Nov. 18, 2019, 1:45 PM), <https://www.hollywoodreporter.com/business/business-news/justice-department-moves-terminate-paramount-consent-decrees-1255858> [<https://perma.cc/XX4B-YEBT>].

88. *United States v. Paramount Pictures, Inc.*, No. 19 MISC. 544 (AT), 2020 WL 4573069, at *6 (S.D.N.Y. Aug. 7, 2020).

89. *Ill. Tool Works Inc. v. Independent Ink, Inc.*, 547 U.S. 28, 35 (2006).

90. Mark Marciszewski, *The Paramount Decrees and Block Booking: Why Block Booking Would Still Be A Threat to Competition in the Modern Film Industry*, 45 VT. L. REV. 227, 257 (2020).

91. Memorandum in Support of Motion of the United States for an Order Terminating Antitrust Judgments at 24, n.21, *United States v. Paramount Pictures, Inc.*, No. 19 MISC. 544 (AT), 2020 WL 4573069 (S.D.N.Y. Aug. 7, 2020) (No. 1:19-mc-0054).

92. Marciszewski, *supra* note 90 at 260.

individual film compared to other theatrical releases.⁹³ Each of these potential market definitions comes with difficulties and the result of a market power analysis could vary widely based on which definition a court employs.

The market definition is especially crucial to a rule of reason analysis of block booking because it involves a studio using its presumed market power of one film to leverage its other, less desirable theatrical releases. Given the film exhibition industry's extensive scope—thanks to the accessibility of streaming services—it is unlikely that a distributor or film could ever hold significant market power against all other films and exhibition methods. However, that does not necessarily foreclose harm to consumers and competition.

In 1983, long after the Decrees were enacted but decades before they were repealed, Roy W. Kenney and Benjamin Klein published *The Economics of Block Booking*, which took a closer look at the economic explanation for block booking practices in three industries, including the practices prohibited in *Paramount* and *Loew's*, dealing with block booking in television distribution and exhibition.⁹⁴ Kenney and Klein rebuke theories that block booking permits monopoly extension or operates as a subtle form of price discrimination and argue that instead, block booking, as engaged in by film distributors pre-*Paramount*, reduces transaction and brand-name costs while simplifying negotiation with an average pricing scheme necessary in industries with a high degree of product quality variance.⁹⁵

For example, a studio might have four fall release films it is licensing to theaters, including films with a \$200 million budget, \$150 million budget, \$40 million budget, and \$10 million budget. If using an average pricing scheme, the studio may offer one contract offering all four films to a theater for \$100,000 for four weeks. The \$200 million budget film is probably expected to generate the most ticket sales and thus is more valuable to the theater compared to the \$10 million budget film. Therefore, in this average pricing model, the theater is overpaying for the lower-value film while underpaying or getting a deal on the high-value film. Kenney and Klein note that block booking “serves to prevent buyers from rejecting parts of a package of products that has been average-priced,” so exhibitors cannot keep the benefit they gain from the average-pricing of the blockbuster while cutting out the overpriced lower-value films.⁹⁶ The necessity of average pricing relies on the incentive structures between distributors and exhibitors and the unknown quality variance of films before release. This is still prevalent today, as small budget 2023 releases *Megan* and *Missing* brought in domestic revenue almost eight and over four times larger than their respective budgets, while *Aquaman and the Lost Kingdom* and *The Marvels* failed to even

93. *Id.* at 258–77.

94. Roy W. Kenney and Benjamin Klein, *The Economics of Block Booking*, 26 J. OF L. & ECON. 497, 497 (1983). *See generally* United States v. Lowe's, 371 U.S. 38 (1962).

95. Kenney and Klein, *supra* note 94, at 497–500, 539–40.

96. *Id.* at 539.

recoup their budgets.⁹⁷ Still, even in light of this block booking explanation, the film industry looks much different today than it did in 1983, and producers and distributors might be employing block booking in ways that are inconsistent with seeking benefits from the reduction of transaction costs and ease of negotiation in the post-*Paramount* era.

In addition to the arguments dismissing the *Paramount* economic interpretations of block booking, many have argued that it is unlikely that studios will return to block booking practices after the breakup of the cartel. However, in the year since the sunset period ended, block booking has already started to make its return. Nevertheless, modern block booking looks a little different from the block booking of the Golden Age, where studios would package large blocks of films together. Instead, studios post-Decrees seem to be block booking on a smaller and more strategic scale.⁹⁸

For example, Universal Pictures employed various block booking strategies during *Oppenheimer*'s blockbuster release. First, Universal utilized block booking in the very traditional manner of tying the theatrical run of *Oppenheimer*, long predicted to be one of the most popular movies of the summer, to its significantly less-anticipated and knowingly more risky film *Bros*, a gay romantic comedy film released by the studio during fall of 2022.⁹⁹ As a result, *Bros* played at over 3,300 theaters, close to *Oppenheimer*'s 3,600 theater release, but with a box office gross of only \$14.8 million on a \$22 million budget. While block booking does not guarantee that consumers come to watch a studio's film, it does guarantee that the movie gets shown, and considering the discrepancy between the number of theaters and box office revenue, it is likely that many theaters played *Bros* in empty theaters. While the court correctly noted that block booking's harm to consumers and competition is greatly lessened due to the wider availability of theaters and alternative exhibition methods, situations like *Oppenheimer* and *Bros* indicate that harm is still possible. Despite much of the theater industry being comprised of multiplex theaters owned by Cinemark, Regal, and AMC, there are still plenty of regions of the United States where independently-owned, single-screen theaters are commonplace. With only one screen, a studio could foreseeably monopolize the exhibition market in an area if an up-and-coming blockbuster

97. See *2023 Box Office List*, IMDB, https://www.imdb.com/list/ls538889077/?sort=release_date%2Cdesc [https://perma.cc/BM5N-PAMU] (last visited Sept. 16, 2024).

98. Whereas in the past studios block-booked sets of ten films together, today's studios only require a handful of hits to remain profitable for the year, thus putting emphasis on the success of those films instead of distributing dozens per year. Tyler Riemenschneider, *'Don't Run Up the Stairs!': Why Removing the Paramount Decrees Would Be Bad for Hollywood*, 13 OHIO ST. BUS. L.J. 334, 337, 350 (2019).

99. Perf Damage Podcast, *The Paramount Decrees are Gone! What's Next for Movies?* at 37:00, <https://perfdamage.buzzsprout.com/2024293/episodes/13602140-the-paramount-decrees-are-gone-what-s-next-for-movies-episode-32> (Sept. 16, 2023).

was enticing enough, foreclosing any opportunity for the theater to show films distributed by independent studios—and for consumers to see them.

While this kind of block booking is not likely to limit consumer choice in large markets, such as cities with multiple movie theaters or even with theaters that have multiple screens, it is easy to see how this practice may push small-market theaters into a corner. The resulting choice would be between spending two weeks rolling the next *Bros* to an empty theater in anticipation of the next *Oppenheimer* or missing out on blockbusters to retain autonomy and choice.

Universal also engaged in a form of block booking that did not exist in the Golden Age of Hollywood but has arisen specifically due to the plethora of exhibition methods, including IMAX. As previously mentioned, Christopher Nolan wanted viewers to see *Oppenheimer* in IMAX, and Universal did everything to make that possible.¹⁰⁰ Specifically, Universal's IMAX block booking deal forced the early retreat from IMAX of *Mission: Impossible – Dead Reckoning Part One*, which only showed one week in most IMAX theaters.¹⁰¹ Considering IMAX tickets are typically double the price of a traditional screening, it is no wonder some speculate that this early exit from IMAX played a part in the film's disappointing box office turnout.¹⁰² This novel method of block booking could potentially result in harm to competition, as a studio or group of studios may be able to entirely squeeze independent producers and distributors out of these large scale theatrical exhibitions, ultimately suppressing other studio's ability to utilize expensive IMAX filming techniques or even lowering potential box office revenue as to reduce the output of independent studios.

2. Circuit Dealing and Price Maintenance

Interestingly, 2023 also brought the resurrection of circuit dealing and price maintenance, but not via studios. Instead, singer-songwriters Taylor Swift and Beyoncé paved the way—engaging in circuit dealing and price maintenance with their theatrically-distributed concert films.¹⁰³ Instead of employing a studio, Swift self-produced her concert film *Taylor Swift: The Eras Tour* and negotiated directly with AMC and Cinemark for its exhibition in their theaters.¹⁰⁴ Beyoncé did the same with AMC for *Renaissance: A Film By Beyoncé*.¹⁰⁵ While the the-

100. *Id.* at 38:45.

101. *Id.*

102. See ReelBlend, *Is Mission Impossible Dead Reckoning a Failure?*, CINEMABLEND (Aug. 4, 2023), <https://www.cinemablend.com/podcasts/is-mission-impossible-dead-reckoning-a-failure> [https://perma.cc/2RBZ-6ZHJ].

103. Levini and de la Merced, *supra* note 17.

104. *Id.*

105. *Id.*; Jake Coyle, *Beyoncé Is Pulling a Taylor Swift and Releasing a Renaissance Tour Concert Film with AMC Theatres*, FORTUNE (Oct. 3, 2023, 9:58 AM), <https://fortune.com/2023/10/03/beyonce-renaissance-world-tour-movie-amc-theatres> [https://perma.cc/VFL7-HR86].

ater chains were likely ecstatic to fill showtimes after the fall theatrical release lineup waned due to the SAG-AFTRA strike, the popstars negotiated terms in ways thought unlikely before the Decrees were revoked.¹⁰⁶

Swift and Beyoncé engaged in classic circuit dealing by negotiating with AMC and Cinemark to strike nationwide deals, instead of the theater-by-theater negotiation commonplace before the sunset period ended.¹⁰⁷ While Delrahim finds that this process is “much more efficient and allows for innovative practices such as the Taylor Swift deal with AMC,” potential risks accompany a studio dive back into circuit dealing.¹⁰⁸ For example, there is now a clear advantage to prioritize negotiating with AMC, Cinemark, and Regal—the three largest theater chains which comprise the majority of screens in the country—over negotiating with smaller chains or independently owned theaters. When studios had to negotiate with each individual theater and had to show the film to theaters before purchase, studios were equally incentivized to distribute their films to theaters based on geographic region and consumer base. Now, the costs of negotiating with individual theaters or local and regional chains are significantly higher than simply striking a deal for all of nearly 2,000 theaters owned by the trio. While this kind of widescale negotiating could in fact be increasing output by requiring fewer barriers to successful negotiation resulting in large distribution contracts, the behavior still has the potential to be anticompetitive if the circuit dealing negotiations foreclose the market for independent distributors or theaters. A closer look into the potential exclusion of smaller competitors, whether the behavior will push them entirely out of the

106. The American actors’ union Screen Actors Guild – American Federation of Television and Radio Artists (SAG-AFTRA) was on strike from July 14, 2023, until November 9, 2023, and due to prohibitions on promoting Alliance of Motion Picture and Television Producers (AMPTP) projects, multiple finished project slated for Fall 2023 release were delayed for promotional purposes, including *Dune Part 2*, *Challengers*, and *The Bikeriders*. Andrew Dalton & Krysta Fauria, *Hollywood’s Strikes are Both Now Over as Actors Reach Deal with Studios and Return to Work with Writers*, ASSOC. PRESS (Nov. 9, 2023, 12:38 PM), <https://apnews.com/article/actors-strike-ends-hollywood-5769ab584bca99fe708c67d00d2ec241>; Sonaiya Kelley, *All the Major Movies and TV Shows Delayed by the Strikes*, L.A. TIMES (Oct. 23, 2023 4:46 PM), <https://www.latimes.com/entertainment-arts/business/story/2023-09-19/tv-shows-movies-delayed-list-writers-strike-sag-aftra> [<https://perma.cc/JH7A-K7LE>]; Rebecca Rubin, *Austin Butler and Tom Hardy Drama ‘The Bikeriders’ Delays Theatrical Release Due to Strike*, VARIETY (Oct. 17, 2023 10:57am), <https://variety.com/2023/film/news/austin-butler-tom-hardy-bikeriders-delay-theatrical-release-strike-1235759359/> [<https://perma.cc/5FDM-WLWC>]. While, as addressed in Part II, only the defendant-studios from the 1948 action were subject to the requirements of the Decrees, the rules proscribed by the Decrees, including those on circuit dealing, price maintenance, and unreasonable clearances, became “de facto standards for the industry” over time, and Makan Delrahim explained that “Swift and Beyoncé may not have been able to make the deals they did if the decrees were still in effect.” See Levini and de la Merced, *supra* note 17.

107. Levini and de la Merced, *supra* note 17.

108. *Id.*

market, and a potential increase concentration will be necessary to determine whether this behavior is truly anticompetitive.

Swift and Beyoncé also made use of other practices previously prohibited and disfavored during the Decrees-era, including setting price minimums and other unreasonable clearances.¹⁰⁹ Continuing with her well-known practice of including “easter eggs” within her work, tickets to Swift’s concert film were available nationwide for the price of \$19.89 for adults—a nod to the artist’s birth year and fifth album—and \$13.13 for children—a nod to her lucky number.¹¹⁰ This minimum price standard, again negotiated on behalf of all of a chain’s theaters, accompanied a stipulation on the film’s showings: that the film not be shown during the week, only on the weekend.¹¹¹ Swift purportedly restricted the showtimes to reduce the number of “half empty auditoriums” and instead recreate the “concert extravaganza” in full theaters.¹¹² However, this behavior gives power back to studios and distributors to put stringent requirements on theaters to show their films, reflecting to practices of the Golden Age.

B. *The Integration of Exhibition*

The biggest concerns and antitrust violations addressed by the Decrees contemplated the bust-up of the cartel, required dissolution of production-distribution-exhibition integrated companies, and forced the Big Five to sell off their theaters—an order that seemingly cautioned subsequent studios from acquiring or developing their own theaters.¹¹³ However, as previously noted, current exhibition is completely different than it was in the 1940s, meaning the production-distribution-exhibition market looks completely different. Thus, for some companies, the market is already vertically integrated. Yet, the changes highlighted in Part IV show that changes subsequent to the revocation of the Decrees and the COVID-19 pandemic altered exhibition priorities over the last three years, leaving open questions about if and how studios may attempt to gain further control over the exhibition of their films.

1. Will Studios Buy Theaters?

In accordance with the Decrees’ most formidable restraint on studios, perhaps the loudest concern from the industry at large, reflected by many of the comments submitted to the Department of Justice, is whether studios are going to attempt to acquire theaters. Some argue there is little to no risk for studios to

109. *United States v. Paramount Pictures*, 334 U.S. 131, 141 (1948).

110. Rebecca Rubin, *Why Isn’t Taylor Swift’s ‘Eras Tour’ Playing in Theaters During the Week?*, VARIETY (Oct. 16, 2023, 12:30 PM), <https://variety.com/2023/film/news/taylor-swift-eras-tour-concert-film-only-playing-weekends-1235757893> [<https://perma.cc/N3HZ-TD9U>].

111. *Id.*

112. *Id.*

113. Many have noted, including Makan Delrahim, that while the Decrees were only binding on the studios that were defendants to the 1948 litigation, the restrictions from the Decrees became the industry standard. *See, e.g.,* Levini and de la Merced, *supra* note 17.

attempt a broad reentry into the theater exhibition market, evidenced by the fact that over the last seventy years, studios not subject to the Decrees did not pursue this business model, evidencing a lack of interest and perceived low profitability of the theater industry since they were otherwise free to do so. However, many are still skeptical of relaxing regulations and standards that could spark a return to the independent film exclusion of the Golden Age.¹¹⁴

The primary concern of those opposed to the revocation of the Decrees is that enabling vertical integration, combined with the restoration of block booking and circuit dealing practices, creates an environment ripe for anticompetitive abuse of independent theaters and creators from large studios.¹¹⁵ For example, in their 25-page comment to the Department of Justice, the Independent Cinema Alliance, a coalition that represents 236 independent cinema companies, shared an express concern regarding the harm to independent theaters and their consumers due to anticompetitive conduct by unchecked oligopolies in distribution and exhibition.¹¹⁶ The Independent Cinema Alliance “does not see distributor ownership of cinemas as the primary mischief to be avoided, provided critically that the theatre-by-theatre licensing mandate is preserved and respected.”¹¹⁷ The Writers Guild of America, West expressed even more traditional concerns about the potential for vertically integrated studios, worrying that studios could again preference their own films with practices such as reserving the best showtimes or biggest theaters for their “in-house” films.¹¹⁸

The leading response to these concerns is that studios have not had any interest in acquiring or developing theaters for decades. This argument offers several points of strong evidence: (1) non-covered studios, like Disney, never attempted to command their own theater chains or acquire established theater companies, (2) movie theaters are much less profitable by share of the exhibition market now than in the 1940s, and (3) studios have alternative ways to exhibit their own films.¹¹⁹ However, while none of the traditional big stu-

114. Liana Minassian, *After 70+ Years, Hollywood's Major Studios Are Allowed to Leave "Hotel California": Why the District Court Was Correct in Terminating the Paramount Consent Decrees*, 55 LOY. L.A. L. REV. 1167, 1211 (2022). See generally *Paramount Consent Decree Review Public Comments 2018*, DEPT. OF JUSTICE (Dec. 20, 2018), <https://www.justice.gov/atr/paramount-consent-decree-review-public-comments-2018> [<https://perma.cc/HUJ2-M824>].

115. See generally sources cited *supra* note 46.

116. Independent Cinema Alliance, *supra* note 46 at 14 (“But the primary beneficiaries of the Decrees – independent cinemas and their patrons – do not need protection specifically from “vertical integration.” They need protection from anticompetitive abuse by all players with market power and a natural tendency to exploit it. That means the shrinking distribution oligopoly and the shrinking exhibition oligopoly and the looming streaming oligopoly.”).

117. *Id.* at 17.

118. Writers Guild of America, West, Inc., *supra* note 46 at 6.

119. Some studios have acquired individual theaters, more for brand and marketing purposes than broad exhibition purposes, such as Disney’s El Capitan Theater

dios have shown explicit interest in this kind of vertical integration, the same cannot be said of the burgeoning big tech studios. Both Amazon and Netflix engaged in negotiations for the purchase of Landmark Theaters—the largest theater chain specializing in independent cinema in the country—from Mark Cuban and Todd Wagner in 2018.¹²⁰ Neither company ended up purchasing the chain.¹²¹ It sold to Cohen Media Group, a small production and distribution company owned by Charles S. Cohen.¹²² But evidence exists that Amazon and Netflix, now full-fledged studios churning out content, have attempted to enter the traditional exhibition industry.¹²³ With both companies competing against legacy studios for awards and prestige, which require extended theatrical runs per the Academy's new rules, it is likely the incentives may soon outweigh the risks in the fragile theater market. This is especially true for Amazon, which has long been in the business of vertical acquisition.¹²⁴

Notably, Sony Pictures Entertainment acquired boutique movie theater chain Alamo Drafthouse Cinema, with its 35 dine-in and bar-accompanied theaters in June 2024.¹²⁵ So while the possibility of studios, especially big tech studios, buying theaters at a larger scale certainly exists, supporters of the revocation are likely correct that this prospect is unlikely and any subsequent harm is not inherent with vertical integration. However, skeptics are equally correct that when combined with potentially anticompetitive clearances, the threat for consumer harm remains. Nevertheless, one may consider whether ordinary

and Netflix's recent remodel of The Egyptian Theater, both in Los Angeles, California. *The History of the Theater*, THE EL CAPITAN THEATER HOLLYWOOD, <https://elcapitantheatre.com/about-us> [<https://perma.cc/893Z-K3RD>] (last visited Sept. 16, 2024); Omar Younis, *Netflix Unveils \$70 Million Restoration of Historic Hollywood Theater*, REUTERS (Nov. 9, 2023, 12:29 AM), <https://www.reuters.com/lifestyle/netflix-unveils-70-million-restoration-historic-hollywood-theater-2023-11-08/>.

120. See Lizzie Plaugic, *Netflix Has Reportedly Considered Buying Theaters to Screen Its Movies*, THE VERGE (Apr. 19, 2018, 1:37 PM), <https://www.theverge.com/2018/4/19/17258114/netflix-theaters-landmark-mark-cuban-buying-screenings-oscars-cannes> [<https://perma.cc/YV26-BXS8>]; Spencer Soper, et al., *Amazon Reportedly in the Running to Acquire Landmark Movie Chain*, THE SEATTLE TIMES (Aug. 16, 2018, 5:29 PM), <https://www.seattletimes.com/business/amazon-reportedly-in-the-running-to-acquire-landmark-movie-chain>.

121. Alex Fang, *A Trade Between Billionaires: Mark Cuban Sells Landmark Theatres Chain To Film Buff Charles Cohen*, FORBES (Dec. 5, 2018, 4:47 PM), <https://www.forbes.com/sites/alexfang/2018/12/05/billionaires-mark-cuban-sell-landmark-theatres-charles-cohen/?sh=171a0dac6219> [<https://perma.cc/DLP3-7S27>].

122. *Id.*

123. *Id.*

124. Davis, *supra* note 63 (discussing Academy rule change); REUTERS *supra* note 5 (highlighting Amazon's top acquisitions over the last 20 years, including of MGM, a legacy studio and defendant in the Paramount Decrees litigation).

125. Brett Lang, *Sony Pictures Buys Alamo Drafthouse*, VARIETY (June 12, 2024, 11:00 AM), <https://variety.com/2024/film/news/sony-pictures-buys-alamo-drafthouse-cinemas-1236035292/> [<https://perma.cc/R7KF-8B3M>].

merger policy against vertical mergers would be sufficient to limit harm posed by potential film industry mergers.¹²⁶

2. What About Streaming?

Largely missing from the above discussion, inconspicuous as an elephant in the room, is the answer to the question, “what about streaming?” With over 99 percent of U.S. households subscribing to at least one streaming service, no discussion of modern film exhibition is complete without addressing streaming’s impact.¹²⁷ While the government cited streaming as a technological evolution in the industry that created alternative exhibition methods thereby reduced the need for the Decrees, absent from any government or court opinion is an outlook on the anticompetitiveness of streaming services in the film industry and the already vertically integrated structure of these producing, distributing, and exhibiting streaming companies.

The streaming industry is currently competitive.¹²⁸ Expected to reach revenues of over \$43 billion in 2024, almost every major production studio has joined tech giants in developing their own streaming services.¹²⁹ Out of the dozens of streaming services currently available, Amazon Prime Video, Netflix, MAX, Disney+, and Hulu all occupy double-digit market shares.¹³⁰ Many movies are being exhibited direct-to-streaming, including high budget projects. Movies with theatrical releases frequently end up on streaming services in almost half the amount of time than pre-pandemic.¹³¹ However, the streaming industry is in a constant state of innovation, development, and acquisition. In November 2023, Disney announced it would acquire the remaining shares of Hulu from Comcast, thereby becoming the sole owner of the platform, as well as plans to combine Hulu with its in-house streaming service, Disney+, a combined streaming

126. DEPT. OF JUSTICE & FED. TRADE COMM., MERGER GUIDELINES, 13–18 (2023).

127. Ana Durrani, *Top Streaming Statistics 2024*, FORBES (Aug. 15, 2024, 3:20 PM), <https://www.forbes.com/home-improvement/internet/streaming-stats/#:~:text=An%20overwhelming%2099%25%20of%20U.S.,Apple%20TV%2B%20topping%20the%20charts> [https://perma.cc/62NP-85H9].

128. See STATISTA, *supra* note 58 (estimated HHI index from approximate market share values as of October 2023 is slightly under 1500, with an HHI of under 1500 being considered “competitive” and 1500–2000 being “moderately concentrated”).

129. Durrani, *supra* note 127.

130. STATISTA, *supra* note 58.

131. See Stuart Kilmartin, *The 10 Most Expensive Movies to Debut on a Streaming Platform*, SCREENRANT (June 11, 2022), <https://screenrant.com/most-expensive-movies-streaming-platform> [https://perma.cc/VLQ5-NG3F]; Travis Clark, *How Major Hollywood Studios Are Shifting Their Streaming Strategies as the Theater Industry Stages a Comeback*, BUSINESS INSIDER (May 11, 2022, 9:54 AM), <https://www.businessinsider.com/how-long-movies-play-in-theaters-before-streaming-2022-5> [https://perma.cc/G9C7-WX4Y] (noting that many theatrically-released films are hitting streaming platforms after only a 45 day theater exhibition, compared to the more standard 75–90 day exclusive theatrical release before the COVID-19 pandemic).

platform which could rival Amazon Prime and Netflix for the largest content catalogue and most users in the industry.¹³² But, in the race to win subscribers, streaming services have not been as profitable as once imagined. Noting that Disney+ actually lost subscribers in the first quarter of 2023, Alex Sherman declared that “the Streaming Wars are over.”¹³³ Indie Wire claims that Netflix and Hulu are the only streaming services that turned a profit in 2022.¹³⁴

Streaming also functions differently than traditional theatrical exhibition in that some platforms originally only streamed third-party content (before Netflix ventured into production), most host a variety of in-house and third-party content, and some offer streaming-only content produced or distributed in-house. After the Decrees, theaters only showed third-party content and acted purely as distributors. Accordingly, there are different antitrust considerations when trying to regulate this mode of exhibition.

Furthermore, traditional anticompetitive behaviors and concerns like block booking and circuit dealing do not translate to the all-digital streaming market. Streaming is non-exclusionary—any number of consumers can watch the new straight-to-Netflix movie at the same time, whereas theaters can only accommodate as many consumers that fit in their theaters for as many showtimes that can run. Foreclosing consumers from being able to consume media is a lesser concern in this kind of industry than it is in one with physical and geographic constraints. Thus, potential harm to consumers is likely to arise from smaller competitors being pushed out of the market by anticompetitive conduct, eventually resulting in lower output and decreased consumer choice. In dealing with such a novel, dynamic, and uncertain industry, it is no wonder that competition and consumer welfare are ambiguous and difficult to decipher when it comes to the role of streaming services in the broader film industry.

Still, many industry insiders have spoken up with concerns. In August 2023, amidst the writers’ strike, the WGA West released a fifteen-page report

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132. David Hamilton, *Disney to Acquire the Remainder of Hulu from Comcast for at Least \$8.6 Billion*, ASSOCIATED PRESS (Nov. 2, 2023, 2:08 PM), <https://apnews.com/article/disney-hulu-401cb68495d3c8d7edc1143a556e3f01>; Georg Szalai, *Disney+ and Hulu Combined Own Most Popular Titles in U.S.: Study*, HOLLYWOOD REPORTER (Dec. 11, 2023, 1:30 AM), <https://www.hollywoodreporter.com/business/digital/disney-plus-hulu-catalog-most-popular-titles-us-ampere-1235724835/> [https://perma.cc/2S37-P5H9]; Spangler, *supra* note 58; see STATISTA, *supra* note 58 (Disney+ and Hulu’s combined subscriber count nears the market shares of Amazon Prime Video and Netflix, but it is unknown how much overlap there is between subscribers of the two platforms).
133. Alex Sherman, *The Streaming Wars are Over and It’s Time for Media to Figure Out What’s Next*, CNBC (May 11, 2023, 9:49 AM), <https://www.cnbc.com/2023/05/10/streaming-wars-are-over-whats-next.html> [https://perma.cc/BBS9-BEY8].
134. Tony Maglio, *Ranking the Winners in the Streaming Wars, by Revenue and Subscribers*, INDIE WIRE (Mar. 10, 2023, 10:30 AM), <https://www.indiewire.com/features/general/whos-winning-the-streaming-wars-revenue-subscribers-netflix-disney-1234813738> [https://perma.cc/QK2R-7B44] (analysis does not include small streaming services like Britbox and Crunchyroll, which do not report financials).

entitled *The New Gatekeepers: How Disney, Amazon, and Netflix Will Take Over Media*.¹³⁵ The report asks antitrust enforcers and regulators to: (1) block further consolidation in the industry, (2) proactively investigate potential anti-trust violations, and (3) increase regulation and oversight, to which the WGA argues there is very little at present.¹³⁶ Some also predict that the behavior of the current top streaming services is analogous to studio behavior during the Golden Age; thus, if the industry goes unregulated and unchecked, similar anticompetitive behavior will ensue.¹³⁷ This concern is bolstered by not only vertical mergers, but horizontal mergers, like HBO/Discovery and Disney/Hulu, which demonstrate that continued acquisition and consolidation is very possible.¹³⁸ Combined with privacy concerns associated with consumer data and digital platforms, these concerns may very well warrant closer oversight, despite the currently unconcentrated industry.¹³⁹ While the streaming market is currently competitive, continued mergers and acquisitions could consolidate current industry leaders and push the market into something more concentrated—and a closer look at behavior may be warranted.

However, given the high-output state of streaming and the oversight of DOJ merger review, it is likely that significant changes to the industry would be necessary before it is launched into an anticompetitive state requiring additional oversight. As streaming services continue to adapt their business models to become—or in Netflix’s case, stay—profitable by increasing monthly subscription prices, introducing “ad-tier” subscription plans, and merging with other streaming platforms, it will be important to keep an eye on the competitive-state of streaming and consumer welfare.¹⁴⁰

135. *The New Gatekeepers: How Disney, Amazon, and Netflix Will Take Over Media* (Aug. 2023), WRITERS GUILD OF AMERICA, WEST, https://www.wga.org/uploadedfiles/news_and_events/public_policy/GatekeepersReport23.pdf.

136. *Id.* at 2.

137. Megan Elizabeth Norris, *Now Streaming: How Streaming Services Are Following in the Antitrust Footsteps of Hollywood’s Golden Age*, 31 U. MIAMI BUS. L. REV. 160, 175 (2022).

138. See also Winston Cho, *Wall Street’s M&A Sharks Are Getting Ready for a Feeding Frenzy of Hollywood Deals*, HOLLYWOOD REPORTER (Sept. 6, 2023, 4:45 AM), <https://www.hollywoodreporter.com/business/business-news/hollywood-deals-consolidation-1235582948/> [<https://perma.cc/VU3U-NVQM>] (noting favorable conditions for continued mergers and acquisitions in the film industry).

139. Norris, *supra* note 137 at 185.

140. See Todd Spangler, *Price Storm: Why All Major Streaming Services Have Hiked Rates This Year*, VARIETY (Nov. 8, 2023, 9:45 AM), <https://variety.com/2023/digital/news/streaming-service-price-increase-1235784311> [<https://perma.cc/T5QZ-MCGC>]; Mikey O’Connell and Lesley Goldberg, *Commercials Are Streaming’s New Norm, and Creators Aren’t Happy: “It’s Almost Worse Than Broadcast*, HOLLYWOOD REPORTER (Jan. 31, 2024, 7:45 AM), <https://www.hollywoodreporter.com/tv/tv-features/amazon-prime-video-ad-tier-streaming-commercials-anger-writers-1235810317> [<https://perma.cc/RXJ6-5X2W>] (sharing creator responses to new advertisement supported tiers of subscriptions to streaming services Prime Video, Netflix, MAX, and Disney+); Aislinn Murphy, *Paramount, Warner Bros Discovery Discuss Merger; Would Consolidate Streaming*

VI. CONCLUSION

For seventy years, the Paramount Decrees—either by legal bind or industry standard—reigned over the film industry. This sparked a period of growth and innovation resulting in the breakdown of the studio system and the rise of independent cinema. But over time, thanks in part to this innovation and subsequent changes in antitrust law, the need for such stringent industry oversight and the per se illegality of these practices lessened. In response, the Decrees were revoked, but the industry did not stop changing. The last three years have been riddled with major developments in the film industry, as the consequences of both the Decrees revocation and the global pandemic settle.

The industry has wasted no time in jumping back to these previously restricted practices. Although still examined under a rule of reason analysis, the abuse of these practices could foreseeably result in consumer harm and harm to competition, specifically in the now flourishing independent production industry and rebounding theater industry. Block booking, circuit dealing, and clearances—when leveraged by studios with market power and influence over theater circuits—have the potential to reduce consumer choice. This anti-competitive harm is only amplified by the possibility of additional big tech studios entering the theater exhibition industry. Even though studios buying theaters outright remains unlikely, the exhibition renaissance shuffles into a new era of old practices like block booking, circuit dealing, price maintenance, and clearances—all to the benefit of studios and the detriment of consumers.

Antitrust concerns in the film industry do not stop there. The unprecedented growth of streaming has complicated traditional industry antitrust analysis and the applicability, or lack thereof, of the Decrees. Moreover, amidst the threat of continued media conglomerate consolidation, the industry could also fall back into a vertically integrated production-distribution-exhibition cartel, this time with streaming exhibition at the forefront.

Only time will tell whether studios will take a full-fledged dive back into their anticompetitive conduct of the past, but new developments in the industry show some cause for concern for consumer welfare. Still, one can hope that the ultra-competitive market and threat of antitrust enforcement that kept non-Decree-defendant studios in check for decades will prevent the industry-wide competitive activity that was rampant in the Golden Age of Hollywood.

Services, FOX BUSINESS (Dec. 21, 2023, 1:34 PM), <https://www.foxbusiness.com/markets/paramount-warner-bros-discovery-discuss-merger-would-consolidate-streaming-services> [https://perma.cc/YCR5-SPK3] (discussing the potential merge of Paramount+ and MAX amidst negotiations of a merger between parent companies Paramount and Warner Bros Discovery).