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BRINGING BALANCE TO THE ANTITRUST FORCE: Revising the *Paramount* Decrees for the Modern Motion Picture Market

Jonathan A. Schwartz

Abstract

Concentration of market power is nothing new in the media industries—and neither is government intervention to break it up. For over seventy years, the entertainment industry has operated under the shadow of agreements between the historically powerful film studios and the Department of Justice to stay out of the exhibition market, where the studios had cemented their dominance in the naissance of the American film industry. During the same period, however, understandings of antitrust law have evolved and what was once a discrete "film" industry has ballooned into a massive entertainment marketplace. While today's streaming and technology giants battle the threat of increased regulatory oversight and calls for bolder antitrust enforcement, the general trend of legal and practical developments suggests a far less bleak outlook than that of their Hollywood progenitors.

In fact, the policies and arguments supporting the consent decrees that emerged from the 1948 *Paramount* decision have been severely weakened with the passing of time. The acceleration of diversification in content and content providers has created new industry leaders like Netflix, HBO, and Hulu—and a proliferation of innovative competitors like Quibi and Peacock—that are apparently excused from *Paramount*'s constrictions. Instead, the *Paramount* Decrees' narrow focus risks stifling the competitive flexibility of "traditional" producers and distributors of theatrical feature films as they seek to combat these new market entrants. In short, the *Paramount* Decrees appear obsolete given the realities of the film industry today.

This Article argues for revisions to, or rescission of, the *Paramount* Decrees in order to better align the permissible activities of traditional film

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studios with those of their modern competitors. It provides a thorough review of the concerns underlying the Supreme Court's holding in 1948 and determines that the Court's concerns have been undercut either by subsequent developments in antitrust law or the practical realities of new and dynamic market entrants. While the Court's anticompetitive concerns may still be valid, they appear misplaced when focused solely on those parties still subject to the Decrees. Future antitrust enforcement will instead need to reframe the picture in order to more accurately address risks of market concentration.

Table of Contents

Introduction 47
I. Overview: The Department of Justice Reviews the Decrees 49
II. A Brief History of Antitrust and the Hollywood Studio System 51
  A. *A Brief Overview of Antitrust Law* 52
    1. Consent Decrees as an Antitrust Remedy 54
    2. Modern Antitrust Jurisprudence 55
  B. *The Film Industry Before* Paramount 57
    1. Market Definitions in the Studio System 59
      a. The Production Market 60
      b. The Distribution Market 61
      c. The Exhibition Market 62
    2. Pre-War Antitrust Inquiries and the National Industrial Recovery Act 63
III. The *Paramount* Decision and its Legacy 68
  A. *Challenged Activities and Asserted Problems* 70
    1. Conspiracy to Monopolize Distribution and Exhibition 70
      a. Price-Fixing 70
      b. Clearances and Runs 71
      c. Pooling Agreements and Joint Ownership 72
      d. Formula Deals and Master Agreements; Franchises 73
      e. Block Booking 74
      f. Discriminatory Contractual Provisions 74
    2. Monopolization of Exhibition 75
    3. Divorcement and Divestiture 77
  B. *The Practical Impact of the* Paramount *Decrees* 78
    1. The Studio System Disentangles 78
    2. Television and Conglomeratization 81
  C. *The Decrees Since* Paramount 84
IV. Reconsideration of the Decrees 87
  A. *Revisiting the* Paramount *Concerns* 90
  B. *Market Definition Expansion* 91
  C. *Tying Agreements and Interbrand Competition* 94

1. *Loew's*, *Illinois Tool Works* and *Bentley* 97
2. The Contested Status of the *Paramount* Holding 103
V. The Future of the *Paramount* Decrees 104
A. *Rescinding or Modifying the Decrees* 104
1. The Ban on Exhibition Entry Should Be Lifted 106
2. Block Booking Should be Reasonably Permitted 108
3. The Residual Contractual Limitations Should Remain in Place 109
Conclusion 110

Introduction

> "We don't have a monopoly. Anyone who wants to dig a well without a Hughes bit can always use a pick and shovel."
>
> –Howard Hughes

Media industries have long had a tumultuous relationship with government regulators. These industries are uniquely vulnerable to economic pressures that encourage concentration and consolidation, leading to a historically persistent tendency to turn information technologies into economic markets, and markets into collusive or monolithic empires.[1] Nonetheless, each successive empire has been "challenged or broken into pieces, if not blown up altogether," laying the foundation for the next generation of media companies to repeat the successes and failures of the past.[2] Just as the federal government's breakup of the Hollywood "studio system" in 1948 assisted the entertainment industry's downward spiral and led to a prescient "crisis of confidence" among the industry's elite,[3] so too are today's new media leaders expressing concerns over the future of their own market power.[4]

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1. Tim Wu, The Master Switch: The Rise and Fall of Information Empires 7 (2011). This is largely due to information technologies' high and growing fixed costs alongside low and declining marginal costs, network effects, excess supply, price deflation from competition, high risk, economies of scope and high levels of government involvement due to its recognition as a public good. Eli M. Noam, Who Owns The World's Media?: Media Concentration and Ownership around the World 11–13 (2016).
2. Wu, *supra* note 1, at 11.
3. Todd McCarthy, Howard Hawks: The Grey Fox of Hollywood 453 (1997).
4. Late last year, Facebook founder and CEO Mark Zuckerberg was recorded telling employees, in response to a political candidate's proposal to break up the company, "We care about our country and want to work with our government to do good things. But look, at the end of the day, if someone's going to try to threaten something that existential, you go to the mat and you fight." Matt Stevens, *Zuckerberg Hates Warren's Plan to Break Up Facebook. She Doesn't Care.*, N.Y. Times (Oct. 1, 2019), https://www.nytimes.com/2019/10/01/us/politics/elizabeth-warren-mark-zuckerberg-facebook.html# [https://perma.cc/W9YY-L3VJ].

Amid the contemporary fervor over antitrust enforcement and the breakup of "big tech,"[5] the entertainment industry waits in particularly unique stasis. Many of these large technology firms have moved in on traditional film studios' market shares by streaming an unprecedented volume of content through their web-based platforms directly to consumers around the globe. Much of their growth, however, can be traced back to the breakup of the original Hollywood studio system and to the series of consent decrees that ensured those original players would stay out of the exhibition market. As regulators, scholars, and commentators debate how to apply antitrust law to these "big tech" entertainment companies, it is important to take into account the entertainment industry's history of antitrust enforcement and the final remnant of that 1948 market disintegration: the *Paramount* Decrees. The Department of Justice is in the midst of such a review, having announced in 2018 a willingness to reconsider the Decrees in light of industry changes and in 2019 its intent to ultimately terminate those Decrees. If media's past truly is media's prologue, such an evaluation and result can shed light on opportunities to make procompetitive adjustments to the entertainment industry beyond intrusive meddling in the free market.

With this perspective in mind, this Article argues that, as the film industry has evolved into a broader media market, the prior limitations enforced literally and symbolically by the *Paramount* Decrees should be scrutinized and revised to encourage competition between old and new media, as the DOJ has seemingly concluded. In Part I, this Article considers the recent reconsideration of the *Paramount* Decrees by the Department of Justice. In Part II, it provides background on relevant antitrust law and places into historical context the Department of Justice's seminal 1948 case against the studios. In Part III, it reviews the concerns of the *Paramount* Court and discusses the subsequent market impact of the Decrees. In Part IV, it evaluates changes in both the entertainment industry and the underlying legal doctrine to conclude they are no longer consistent with the initial purposes of the Decrees. In Part V, it suggests a route for modifying the Decrees to better address competitive realities.

In reviewing this Article, consider that whatever one's view of the underlying industries involved, the role of antitrust law should remain the same: to bring balance to market forces, not leave them in the darkness of a distant past.[6]

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5. *See, e.g.*, Matt Stoller, *The Great Breakup of Big Tech Is Finally Beginning*, GUARDIAN (Sept. 9, 2019), https://www.theguardian.com/commentisfree/2019/sep/09/the-great-break-up-of-big-tech-is-finally-beginning [https://perma.cc/V5GV-2KUH].

6. *See* STAR WARS: EPISODE III—REVENGE OF THE SITH (Lucasfilm Ltd. 2005) ("You were supposed to bring balance to the force . . . not leave it in darkness!").

I. Overview: The Department of Justice Reviews the Decrees

In 1948, the Department of Justice (DOJ) executed one of the most consequential unwindings of American industry concentration by means of the Sherman Act and antitrust law. The "*Paramount* Decrees" encapsulated over ten years of antitrust actions by the Department of Justice against the nation's largest film production, distribution, and exhibition companies. While the Supreme Court and the Southern District of New York debated the best remedy for numerous business practices both courts deemed anticompetitive, the eight film studio defendants voluntarily agreed not only to cease activities that had brought stability to an industry built on risk and uncertainty, but also to fundamentally restructure the industry's exhibition operations, laying the groundwork for the emergence of television networks, the conglomeratization of content production and distribution, and the evolution of technology-fueled independent content platforms.

On August 2, 2018, the Department of Justice announced it was reviewing the Decrees as part of a broader initiative to "free[] American businesses, taxpayers, and consumers from the burden of judgments that no longer protect competition."[7] As one of 1300 "legacy" judgments—pre-1979 final judgments lacking a sunset provision or termination date—the *Paramount* Decrees risked "no longer protect[ing] competition because of changes in industry conditions, changes in economics, changes in law, or for other reasons."[8] Indeed, industry press responded by reflecting on nearly 70 years of industry developments, including growth of "direct-to-consumer streaming options," which were inconceivable at the time the decrees were enacted.[9] In recent decades, the Decrees have increasingly "created a sense of uncertainty of whether they apply to certain types of distribution and exhibition," both of which have undergone major developments since the single-screen cinemas at issue in the 1930s and 1940s.[10] On November 22, 2019, antitrust regulators finally announced their intent to file a motion to terminate the longstanding Decrees, permitting "a two-year transition period for block-booking and circuit dealing to allow the

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7. Press Release, U.S. Dep't of Justice, Department of Justice Announces Initiative to Terminate "Legacy" Antitrust Judgments (Apr. 25, 2018), https://www.justice.gov/opa/pr/department-justice-announces-initiative-terminate-legacy-antitrust-judgments [https://perma.cc/ZD2S-KEJF]; Press Release, U.S. Dep't of Justice, Department of Justice Opens Review of Paramount Consent Decrees (Aug. 2, 2018), https://www.justice.gov/opa/pr/department-justice-opens-review-paramount-consent-decrees [https://perma.cc/EJ7R-LN6Q].
8. Press Release, Department of Justice Announces Initiative to Terminate "Legacy" Antitrust Judgments, *supra* note 7.
9. Ted Johnson, *DOJ Will Review 70-Year-Old Consent Decrees That Regulate How Studios, Exhibitors Do Business*, Variety (Aug. 2, 2018), https://variety.com/2018/politics/news/consent-decrees-department-of-justice-1202893374/ [https://perma.cc/SGF8-ACFK].
10. *Id.*

theatre and motion picture industry to have an orderly transition to the new licensing changes."[11]

In the decades since the *Paramount* decision, the entertainment industry has experienced extensive evolutionary development. The corporatization of formerly "mogul"-centric studios and the subsequent rise of independent distributors led to an explosion of new, original content that justified secondary markets in home video purchases and rentals.[12] As the quality and speed of consumer Internet access improved, new competitors found success offering entertainment content by "streaming" audiovisual media through website platforms.[13] Throughout these shifts in the production, distribution, and exhibition markets, upstream players adapted by participating in extensive vertical integration—talent representation filled gaps in downstream firms' operations formally and informally, and guilds became increasingly aggressive in lawful collective action.[14]

In light of these changes, the DOJ's desire to revisit and ultimately terminate the Decrees appears logical and, potentially, procompetitive. When viewed through the lens of modern antitrust law, the old concerns that justified the *Paramount* Decrees seem to have waned and been replaced by pressing new concerns which may ultimately be enflamed by continuation of the Decrees' imbalanced treatment of the surviving film studios and their competitors. By modifying or eliminating the Decrees, the DOJ would remove the threat of antitrust litigation from entities whose market power has been severely diminished, and create a potential new avenue of competition to revamp the old establishment into this generation's digital underdogs.

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11. Press Release, Dep't of Justice, Department of Justice Files Motion to Terminate Paramount Consent Decrees (Nov. 22, 2019), https://www.justice.gov/opa/pr/department-justice-files-motion-terminate-paramount-consent-decrees [https://perma.cc/33MP-HELC]. The decision garnered mixed reactions from film industry observers, with independent operators expressing particular concern about the impact on booking schedules. *See, e.g.*, *The Journal*, *The End of the Film Industry's Paramount Decrees*, Wall Street J. (Nov. 27, 2019, 5:38 PM), https://www.wsj.com/podcasts/the-journal/the-end-of-the-film-industry-paramount-decrees/fe35a4ec-c699-4df3-bdfa-c149240da209 [https://perma.cc/2CXN-DQNH].
12. *See generally* Peter Biskind, Easy Riders, Raging Bulls (1998); Peter Biskind, Down and Dirty Pictures (2005).
13. *See, e.g.*, Richard Alleyne, *YouTube: Overnight Success Has Sparked a Backlash*, Telegraph (July 31, 2008, 10:00 PM), https://www.telegraph.co.uk/news/uknews/2480280/YouTube-Overnight-success-has-sparked-a-backlash.html [https://perma.cc/HTN9-L6QE].
14. This particular conflict is playing out in real-time as the Writers Guild of America has in the past year openly accused talent agencies of anticompetitive behavior. *See* Writer's Guild of Am. West, No Conflict, No Interest 2 (2019), https://www.wga.org/uploadedfiles/members/member_info/agency_agreement/wga_no_conflict_no_interest_19.pdf [https://perma.cc/XT26-DJ7J].

II. A Brief History of Antitrust and the Hollywood Studio System

By the midtwentieth century, the DOJ sought to rectify a simple economic injustice and a fatal legal transgression: "the defendants, both individually and collectively, had monopolized important segments of the motion picture industry."[15] In its quest to democratize this industry, the DOJ focused on eight film studios with varying degrees of individual market power across three distinct markets: production of feature films, distribution of feature films to exhibitors, and exhibition of feature films to public consumers.[16] The courts divided the studios into five "major" defendants, firms with fully integrated operations across the three markets, and three "minor" defendants, large nonintegrated firms distinctly lacking exhibition operations.[17] The "minors" were further subdivided: two firms produced and distributed films, and one firm solely distributed films.[18]

By 1953, each of these firms would acquiesce to the Supreme Court's determination of anticompetitive behavior, signing a series of consent decrees with the DOJ.[19] While differing in some respects, the *Paramount* Decrees collectively proscribed specific anticompetitive practices and contractual provisions commonly utilized by all eight defendants. Most invasively, the Decrees

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15. Brief for Appellant at 11, United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948) (No. 79) [hereinafter "Paramount Brief"].
16. United States v. Paramount Pictures, Inc., 334 U.S. 131, 140 (1948); *see also* Paramount Brief, *supra* note 15, at 21 ("The eight distributor-defendants comprise by far the most important distributors of motion pictures in the United States.").
17. *Paramount*, 334 U.S. at 140 ("The five majors, through their subsidiaries or affiliates, own or control theatres; the other defendants do not.").
18. *Id.* The "major" studios included the titular defendant Paramount Pictures, Inc.; Loew's, Inc. (then-parent company of film studio Metro-Goldwyn-Mayer); Radio-Keith-Orpheum Corporation (then-parent company of RKO Radio Pictures); Warner Bros. Pictures, Inc.; and Twentieth Century-Fox Film Corporation. These firms "produce[d] motion pictures, and their respective subsidiaries or affiliates . . . distribute[d] and exhibit[ed] films." The "minor" studios were Columbia Pictures Corporation and Universal Corporation (then-parent company of Universal Pictures), which produced and distributed feature films, and United Artists Corporation, which only distributed films. *Id.*
19. *See* United States v. Paramount Pictures, Inc., 1948–49 Trade Cas. (CCH) ¶ 62,335 (S.D.N.Y. 1948) [hereinafter, "RKO Decree"]; United States v. Paramount Pictures, Inc., 1948–49 Trade Cas. (CCH) ¶ 62,377 (S.D.N.Y. 1949) [hereinafter, "Paramount Decree"]; United States v. Loew's, Inc., 1950–51 Trade Cas. (CCH) ¶ 62,765 (S.D.N.Y. 1951) [hereinafter, "Warner Bros. Decree"]; United States v. Loew's Inc., 1950–51 Trade Cas. (CCH) ¶ 62,861 (S.D.N.Y. 1951) [hereinafter, "Twentieth Century-Fox Decree"]; United States v. Loew's, Inc., 1952–53 Trade Cas. (CCH) ¶ 67,228 (S.D.N.Y. 1952) [hereinafter, "Loew's Decree"]; United States v. Loew's, Inc., 1950–51 Trade Cas. (CCH) ¶ 62,573, 63,680–63,682 (S.D.N.Y. 1950) [hereinafter, "Columbia/Universal/United Artists Decrees"] [hereinafter collectively the "*Paramount* Decrees"].

divested the majors of their theater holdings, expelling them entirely from the exhibition market they had helped create and grow.[20]

While the efficacy of the Court's determination and the Decrees' pro-competitive consequences have been extensively critiqued,[21] the Decrees have until this past year remained largely in place.[22] Through industry shifts, new technologies, and corporate mergers, the original defendant studios have mostly survived, albeit in substantially different forms.[23] Contemporaneously, nonparty entertainment firms have developed and metastasized in the shadow of the Decrees. The scope of their deterrence is unclear; while not party to the Decrees, new players in the industry remained acutely aware that "going too far in their pacts" may "tempt scrutiny" of the kind outlined by the Supreme Court.[24] Regardless, the *Paramount* decision and the subsequent Decrees have remained immensely consequential commentaries on the legal contours of economic strategies for firms entering the film industry.

A. *A Brief Overview of Antitrust Law*

The Sherman Act[25] condemns anticompetitive actions taken unilaterally to further individual monopolies[26] or multilaterally to unnaturally restrict competition among firms.[27] Despite its blunt statutory language proscribing "[e]very" anticompetitive action, the Supreme Court has interpreted the

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20. *See* United States v. Paramount Pictures, 85 F. Supp. 881, 896 (S.D.N.Y. 1949) ("[T]he divorcement we have determined to order appears to be the only adequate means of terminating the conspiracy and preventing any resurgence of monopoly power on the part of the remaining defendants.").
21. *See, e.g.*, Arthur De Vany, Hollywood Economics: How Extreme Uncertainty Shapes the Film Industry 139–89 (2004); Robert W. Crandall, *The Postwar Performance of the Motion-Picture Industry*, 20 Antitrust Bull. 49 (1975).
22. *But see infra* Subpart III.C.
23. *See infra* Subpart III.B.2; *see also* Jeffrey C. Ulin, The Business of Media Distribution: Monetizing Film, TV, and Video Content in an Online World 4 (3d ed. 2019) ("There are a finite number of major studios (i.e., Sony, Disney, Paramount, Universal, Warner Bros, Fox, and MGM) . . . .").
24. *See* Eriq Gardner, *The Real Impact of Getting Rid of the Paramount Consent Decrees*, Hollywood Rep. (Aug. 16, 2018), https://www.hollywoodreporter.com/thr-esq/real-impact-getting-rid-paramount-consent-decrees-1134938 [https://perma.cc/T7T6-HVKD] ("If Disney wished to tempt scrutiny by conditioning the license of the latest *Avengers* film on a theater accepting its other movies, Disney would probably point to how indie producers have access to Netflix and other alternative distribution markets.").
25. Sherman Antitrust Act, ch. 647, 26 Stat. 209, 209 (1890) (codified as amended at 15 U.S.C. §§ 1–7 (2012)).
26. Section 2 of the Sherman Act addresses "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the Several States." 15 U.S.C. § 2 (2012).
27. Section 1 of the Sherman Act restricts "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States." 15 U.S.C. § 1.

Sherman Act to "outlaw only unreasonable restraints."[28] As such, unless a practice is "one that would always or almost always tend to restrict competition and decrease output" and thus be deemed per se illegal,[29] a restraint is analyzed "under the so-called 'rule of reason,'"[30] which requires the factfinder to determine whether the anticompetitive consequences of the restraint outweigh its procompetitive benefits.[31] Activities like price fixing, output restraints, market divisions, and, in certain circumstances, refusals to deal invite per se condemnation.[32] Other less categorical activities, including tying agreements, exclusive dealing, and sufficiently productive rival business collaborations, receive some version of a rule of reason analysis.[33]

The Courts are not the only entities preserving and effectuating fair competition principles. The DOJ and the Federal Trade Commission (FTC) actively pursue firms violating the Sherman Act and its sister statutes, Section

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28. State Oil Co. v. Khan, 522 U.S. 3, 10 (1997). *Compare* United States v. Trans-Mo. Freight Ass'n, 166 U.S. 290, 328 (1897) (declaring literal prohibition of all agreements in restraint of trade), *with* United States v. Joint Traffic Ass'n, 171 U.S. 505, 568 (1898) (reconsidering *Trans-Mo. Freight Ass'n*, otherwise "there would scarcely be an agreement or contract among business men that could not be said to have . . . some bearing upon interstate commerce, and, possibly, to restrain it").
29. Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co., 472 U.S. 284, 289–90 (1985).
30. Arizona v. Maricopa Cty. Med. Soc'y, 457 U.S. 332, 343 (1982); *see also* Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 66–67 (1911) (describing the "rule of reason" as involving an element of public interest).
31. *See* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 886 (2007) ("In its design and function the rule [of reason] distinguishes between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest.").
32. *See* United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 218 (1940) (price fixing); *Maricopa*, 457 U.S. at 345–48 (same); Palmer v. BRG of Ga., 498 U.S. 46, 49–50 (1990) (market divisions); NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 99–101 (1984) (output restraints); FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 435–436 (1990) (boycotts); Klor's Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 212–14 (1959) (same); Fashion Originators' Guild of Am. v. FTC, 312 U.S. 457, 465 (1941) (same).
33. *See* Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 15–18 (1984) (establishing a "quasi per se" rule for anticompetitive tying agreements—a single seller of two separate products based on an independent demand test, with market power in the tying market and preclusion of a substantial volume of sales in the tied market); FTC v. Motion Picture Advert. Serv. Co., Inc., 344 U.S. 392, 394–396 (1953) (anticompetitive exclusive dealing); Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 8–9 (1979) (productive business collaboration); *Nw. Wholesale Stationers*, 472 U.S. at 294–98 (same). In some cases, courts apply a form of "quick look" review, a cursory review of procompetitive justifications for per se anticompetitive actions or a truncated review of both procompetitive justifications and anticompetitive consequences in circumstances that may ostensibly demand a full rule of reason review. *See, e.g.*, *Maricopa*, 457 U.S. at 351–54; Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 692 (1978) (eschewing an "elaborate industry analysis").

5 of the FTC Act[34] and the 1914 Clayton Act.[35] Furthermore, the DOJ engages in routine merger reviews developed in light of competition law and embodied in the Horizontal Merger Guidelines, last updated in 2010.[36] The Guidelines "reflect the congressional intent that merger enforcement should interdict competitive problems in their incipiency," while also "avoiding unnecessary interference with mergers that are either competitively beneficial or neutral."[37] Normative analysis under the Guidelines focuses on both unilateral and coordinated effects in whatever market is determined to be of particular concern in the combination,[38] but subject to a quantitative market concentration analysis based on the Herfindahl-Hirschman Index, the sum of the squares of each firm's market share.[39]

1. Consent Decrees as an Antitrust Remedy

The parallel enforcement powers of the judiciary, the Department of Justice and the Federal Trade Commission intersect in the use of consent decrees as alternative remedial measures. The consent decree "represents an agreement between the Government and a defendant to settle a pending antitrust action," wherein the government terminates its suit in exchange for the defendant's willing acceptance of "specific limitations on his future conduct."[40] The FTC or DOJ can, anytime during the course of an agency investigation or a court proceeding, "instead settle with the parties" in this way, "which is in fact how the bulk of cases are ultimately handled."[41] The decree is not an adjudication on the merits, and no formal record of the private negotiations is publicly produced.[42]

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34. 15 U.S.C. § 45(a)(1) (2006) ("Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.").
35. *See* 15 U.S.C. §§ 13–14, 18–19 (2012). The Clayton Act § 2 provided a more pointed statute addressing price discrimination, while § 3 proscribed exclusive dealing, and §§ 7–8 imposed new merger regulations. These provisions were later revised by the Robinson-Patman Act in 1936, the Celler-Kefauver Act in 1950 and the Hart-Scott-Rodino Act in 1976. *See* Einer R. Elhauge & Damien Geradin, Global Antitrust Law and Economics 12 (3d ed. 2018).
36. U.S. Dep't of Justice & FTC, Horizontal Merger Guidelines, § 1 (2010), https://www.justice.gov/atr/horizontal-merger-guidelines-08192010 [https://perma.cc/NYV7-HNYL] [hereinafter "Horizontal Merger Guidelines"].
37. *Id.*
38. Elhauge & Geradin, *supra* note 35, at 1001. The market is itself determined by the hypothetical monopolist test, or the "small but significant and non-transitory increase in price ('SSNIP')" test. *Horizontal Merger Guidelines*, *supra* note 36, § 4.1.1; *see also* Louis Kaplow, *Why (Ever) Define Markets?*, 124 Harv. L. Rev. 437, 465–66 (2010).
39. Elhauge & Geradin, *supra* note 35, at 998.
40. Note, *Flexibility and Finality in Antitrust Consent Decrees*, 80 Harv. L. Rev. 1303, 1303 (1967).
41. Elhauge & Geradin, *supra* note 35, at 14 n.14.
42. Note, *supra* note 40, at 1303–04.

While interested third parties have an opportunity to present their objections to the consent decree to either the DOJ or the relevant court, the judge's role is still largely "ceremonial; he brings to the *accord* a passive spirit and his imprimatur."[43] This is not to say there is a lack of judicial review; under the Tunney Act, or the Antitrust Procedures and Penalties Act, a "district court may approve [a consent] decree only if it first determines that the decree is in 'the public interest.'"[44] Furthermore, parties subject to such decrees can file motions to modify or vacate, appealing to the supervising court's "general equitable power over its decrees" and providing a showing of sufficiently "substantial and unforeseen change of circumstances."[45]

Similarly, the Department of Justice may itself seek to unilaterally "terminate antitrust judgments that no longer protect competition."[46] Such a power is particularly salient when addressing the DOJ's roughly 1300 "legacy" judgments—final judgments entered into by the Antitrust Division until 1979, when it adopted the "general practice of including sunset provisions that automatically terminate judgments, usually 10 years from entry."[47] While the consent decree remedy allows both the government and plaintiffs to dispose of cases quickly and without the administrative costs of antitrust suits, there nonetheless exists the concern that, "with the passage of time, some of these [decrees] seem increasingly oppressive to one or both parties. Defendant may feel that technological innovation, increases in competition, or changes in circumstance make the decree an unwarranted—and perhaps even an anticompetitive—burden."[48]

2. Modern Antitrust Jurisprudence

In recent decades, antitrust jurisprudence has increasingly distanced itself from the more enthusiastic interventionism characterizing the first sixty years of the Sherman Act's existence.[49] Modern antitrust analysis begins with a functional presumption that:

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43. *Id.* at 1304 (citing Walton Hamilton & Irene Till, Antitrust in Action 88 (1940)).
44. Lloyd C. Anderson, *United States v. Microsoft, Antitrust Consent Decrees, and the Need for a Proper Scope of Judicial Review*, 65 Antitrust L.J. 1, 9 (1996).
45. Note, *The Modification of Antitrust Consent Decrees*, 63 Harv. L. Rev. 320, 320 (1949). *See also* Thomson Reuters, *Consent Decree*, Federal Control of Business, Ch. XV § 183 (2017).
46. *Judgment Termination Initiative*, Dep't of Justice (Mar. 6, 2020), https://www.justice.gov/atr/JudgmentTermination [https://perma.cc/JF78-WSPN].
47. Press Release, Department of Justice Announces Initiative to Terminate "Legacy" Antitrust Judgments, *supra* note 7.
48. Note, *supra* note 40, at 1304–05.
49. In earlier decades, courts largely debated how to balance a per se invalidation with a rule of reason analysis in light of then-Circuit Judge Taft's prescient warning that:

> [T]here are some cases in which the courts, mistaking, as we conceive, the proper limits of the relaxation of the rules for determining the unreasonableness of restraints of trade, have set sail on a sea of doubt, and have assumed the

> [M]ere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system . . . . To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive *conduct*.[50]

Based on this understanding of a limited, noninvasive antitrust law, courts have shown a growing tendency to defer to independent business judgment as a reasonable basis for adopting ostensibly anticompetitive activities and agreements outside the auspices of the Sherman Act.[51] Antitrust jurisprudence is thus treated less as a set of prophylactic principles and more as an array of tools to address specific forms of misconduct.[52] Actual harm to competition in the form of reduced consumer welfare is a key element that must be alleged and proven, as "the antitrust laws were passed for the protection of competition, not competitors."[53]

> power to say, in respect to contracts which have no other purpose and no other consideration on either side than the mutual restraint of the parties, how much restraint of competition is in the public interest, and how much is not.

United States v. Addyston Pipe & Steel Co., 85 F. 271, 283–84 (6th Cir. 1898).

50. Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004).
51. *See, e.g.*, Novell, Inc. v. Microsoft Corp., 731 F.3d 1064, 1075 (10th Cir. 2013) (explaining, in an opinion by now-Supreme Court Justice Gorsuch, "[t]o avoid penalizing normal competitive conduct, then, we require proof not just that the monopolist decided to forsake short-term profits . . . we *also* require a showing that the monopolist's refusal to deal was part of a larger anticompetitive enterprise"); Four Corners Nephrology Assocs., P.C. v. Mercy Med. Ctr. of Durango, 582 F.3d 1216, 1224–25 (10th Cir. 2009). *See also* Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 597–98 (1986) (requiring that petitioners alleging predatory pricing provide evidence that "ten[ds] to exclude the possibility that petitioners underpriced respondents to compete for business rather than to implement an economically senseless conspiracy. In the absence of such evidence, there is no 'genuine issue for trial' under Rule 56(e) . . . .") (internal citations and quotations omitted); Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 764 ("In sum, [t]o permit the inference of concerted action on the basis of receiving complaints alone and thus to expose the defendant to treble damage liability would both inhibit management's exercise of independent business judgment and emasculate the terms of the statute.") (citing Edward J. Sweeney & Sons, Inc. v. Texaco, Inc., 637 F.2d 105, 111 n.2 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981)).
52. *See generally* United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001) (providing an illustration of courts couching new types of markets and competitive tactics in traditional antitrust doctrines to determine anticompetitive agreements and activities in violation of Section 1 and Section 2 of the Sherman Act, respectively).
53. Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 254 (1993) (quoting Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962) (internal emphasis and quotations omitted)). The debate over the proper characterization of "consumer welfare" is alive and well, but contemporary court analyses still lean heavily on price theory to determine whether consumers will benefit from lower prices. *See* Herbert J. Hovenkamp, *Whatever Did Happen to the Antitrust Movement?*, 94 Notre Dame L. Rev. 583, 585–86 (2018). *But see* Lina M. Khan, *The Separation of Platforms and Commerce*, 119 Colum. L. Rev. 973, 1026 (2019) (claiming a "turn away from structuralism"

Similarly, the most recent revisions to the federal merger guidelines departed measuredly from predecessors by, as some practitioners described it, "articulat[ing] the enforcement philosophy that [was] already ascendant in Washington, D.C." without adopting any radically progressive positions.[54] For example, it revised its Herfindahl-Hirschman Index thresholds for determining anticompetitive market concentration upward to align enforcement with market realities.[55] Doing so would, in theory, provide "a greater level of detail" to "assess the potential competitive impact of horizontal mergers," and engender an emphatically "pro-enforcement perspective" that could possibly "blunt various tools that merging parties have used successfully in the past to defeat horizontal merger challenges."[56] Despite these attempts to advance regulatory interests—for example, by broadening market definition from an "essential step (first or otherwise) in the Agencies' substantive analysis" to a proxy for "line of commerce" without a "specific product market"[57]—courts have been slow to take up this pro-enforcement mantle,[58] leading to trends of continued (and in some cases, accelerating) concentration across U.S. industries.[59]

B. *The Film Industry Before* Paramount

In the sixty years following the passing of the Sherman Act, courts proceeded to develop much of their antitrust jurisprudence by cracking down on the budding motion picture industry.[60] Key cases defining the contours of antitrust law[61] would emerge from the judiciary's pursuit, and ultimate curbing, of

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in contemporary antitrust doctrine and a growing interest in "dynamic concerns about innovation").

54. *U.S. Antitrust Agencies Propose New Merger Guidelines*, DAVIS POLK & WARDWELL LLP: CLIENT NEWSFLASH (Apr. 22, 2010), https://www.davispolk.com/files/files/Publication/47ce9abd-cc08-4b2b-af1c-468f5e56150b/Preview/PublicationAttachment/411fc1f3-ee39-4dc7-8e85-4c5caf15444a/042210_antitrust.NF.html [https://perma.cc/K69B-Z3EV].
55. *Id.* The "unconcentrated" HHI level was raised from 1000 to 1500, and "highly concentrated" was increased from 1800 to 2500. *Id.*
56. *Id.*
57. James A. Keyte & Kenneth B. Schwartz, *"Tally-Ho!": UPP and the 2010 Horizontal Merger Guidelines*, 77 ANTITRUST L.J. 587, 591 (2011).
58. *Compare A Continued Role for Market Definition in Merger Cases*, HOGAN LOVELLS: ANTITRUST, COMPETITION, AND ECON. REG. ALERT (Jan. 4, 2012), https://s3.amazonaws.com/documents.lexology.com/b739f5f2-be77-4f84-9b82-972ad38c1b37.pdf [https://perma.cc/VLJ8-WD7L], *with* Kaplow, *supra* note 38 and accompanying text.
59. Luigi Zingales, *Towards a Political Theory of the Firm*, 31 J. OF ECON. PERSP. 113, 120 (2017).
60. DE VANY, *supra* note 21, at 139 ("Few know that motion pictures is a judicially supervised industry.").
61. *See, e.g.*, Interstate Circuit, Inc. v. United States, 306 U.S. 208 (1939); United States. v. Griffith, 334 U.S. 100 (1948); FTC v. Motion Picture Advert. Serv. Co., 344 U.S. 392 (1953); Theatre Enters., Inc. v. Paramount Film Distrib. Corp., 346 U.S. 537 (1954). Media industries generally continue to serve as particularly ripe laboratories for evolving concepts within antitrust law. *See, e.g.*, Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007);

the practices of a small number of innovative, headstrong industrialists playing in the sandbox of "a brand new kind of industry, an information industry."[62] Relying on broad principals, and lacking greater specification from Congress, antitrust law has historically been forced to absorb new, technologically advancing marketplaces, competitors and modes of competition into its starkly analog doctrines.[63] Similarly, the *Paramount* Decrees remained in place as an increasingly unfamiliar remnant of a period of industrial history that may no longer be relevant to regulating today's entertainment marketplace.

The relevance of the *Paramount* Decrees to protecting competition in today's entertainment industry seems, on the surface, remote at best. No competitors outside of the Decrees' eight defendants, including content behemoth the Walt Disney Company,[64] streaming hegemon Netflix,[65] and ecommerce giant Amazon,[66] are signatories to the Decrees. Furthermore, the *Paramount* defendants shrank from the original eight leading studios holding 65 percent of the national motion picture market in the mid-1940s to six studios diminished in stature, power and prestige by 1988.[67] Today, the surviving *Paramount* signatories are continually under threat of sale or bankruptcy, and are more likely to pursue mergers or joint ventures than accrual of independent market power.[68]

Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 398 (2004); Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1 (1979); Associated Press v. United States, 326 U.S. 1 (1945).

62. De Vany, *supra* note 21, at 139.

63. Congress often prefers to apply preexisting legal regimes to new technologies, having similarly permitted courts to drop computer software into copyright law's "literary works" category and thus subjecting courts to another line of painful legal accommodations, reversals, and handwringing. *See* Atari Games Corp. v. Nintendo of Am., Inc., 975 F.2d 832, 838 (Fed. Cir. 1992).

64. *Domestic Box Office for 2018*, Box Office Mojo, https://www.boxofficemojo.com/year/2018/?grossesOption=calendarGrosses [https://perma.cc/LFG4-4PUV] (showing that Walt Disney Studios released the three top-grossing feature films of 2018 and five of the top ten spots, with the next leading studio claiming only two such spots).

65. Seth Fiegerman, *Netflix Adds 9 Million Paying Subscribers, but Stock Falls*, CNN Business (Jan. 17, 2019, 7:01 PM), https://www.cnn.com/2019/01/17/media/netflix-earnings-q4/index.html [https://perma.cc/9N75-LGLW] (estimating Netflix's global subscriber base at 139 million); Todd Spangler, *Netflix Spent $12 Billion on Content in 2018. Analysts Expect That to Grow to $15 Billion This Year*, Variety (Jan. 18, 2019, 2:56 PM), https://variety.com/2019/digital/news/netflix-content-spending-2019-15-billion-1203112090 [https://perma.cc/423K-MJUA].

66. Anne Thompson, *Amazon Rules Sundance, Spending $41 Million as Traditional Distributors Lie Low*, IndieWire (Jan. 31, 2019, 1:21 PM), https://www.indiewire.com/2019/01/sundance-market-amazon-studios-netflix-hbo-platforms-1202039431 [https://perma.cc/6YWH-BAMR] (illustrating Amazon's strategy to outspend traditional film distributors at the 2019 Sundance Film Festival for exclusive streaming rights).

67. United States v. Loew's Inc., 705 F. Supp. 878, 880 n.2 (S.D.N.Y. 1988) (noting this came as a result of "the winding up of RKO and the merger of UA with M-G-M (the successor to Loew's)").

68. Paramount's market share hit a strikingly low 4.78 percent in 2017 before bouncing

In practice, however, these industry developments are only relevant to the extent a judge in the Southern District of New York determines that they are. Whether an activity transgresses the restrictions of the *Paramount* Decrees depends on whether or not the activities are "likely unreasonably to restrain competition in either the motion picture distribution or exhibition industries."[69] This inquiry is materially different, and possibly at odds, with the DOJ's determination that the Decrees should be rescinded or otherwise modified. Setting the groundwork for this analysis can be interpreted in two prongs. First, it must be determined whether the concerns addressed by the decrees are still relevant today. Second, it must be determined whether the decrees may have taken on additional regulatory functions in the modern marketplace, benefitting competition or blocking anticompetitive behaviors.

It is thus necessary to compare the circumstances under which the Decrees were enacted with the competitive paradigm that reigns today.

1. Market Definitions in the Studio System

During the early twentieth century, the American film industry developed into what became known as the "studio system," a "consolidation of corporate power" in the "Big Eight" *Paramount* defendants who presided over integrated or dominant operations in—from upstream to downstream—the production, distribution and exhibition markets.[70] At its core, each studio

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back to 6.44 percent in 2018. *See Box Office History for Paramount Pictures*, NUMBERS, https://www.the-numbers.com/market/distributor/Paramount-Pictures [https://perma.cc/BG59-GQGN]. While the studio and its corporate parent Viacom celebrated this rebound, it has yet to return to an economic position remotely equivalent to its status during the *Paramount* litigation. *See* Stuart Winchester, *Viacom Posts Strong First-Quarter 2019 Financial Results*, VIACOMCBS (Feb. 5, 2019), https://www.viacom.com/news/viacom-earnings-q1-2019-earnings [https://perma.cc/UX22-3M2V]; *see also* Dealbook, *MGM Files for Bankruptcy Protection*, N.Y. TIMES (Nov. 3, 2010, 10:51 AM), https://dealbook.nytimes.com/2010/11/03/m-g-m-files-for-bankruptcy [https://perma.cc/4JCF-QLT9]. *But see* Amy Chozick & Brooks Barnes, *Paramount Was Hollywood's 'Mountain.' Now It's a Molehill.*, N.Y. TIMES (Jan. 17, 2019), https://www.nytimes.com/2019/01/17/business/media/paramount-pictures.html [https://perma.cc/WS48-MKH6]; Meg James & Ryan Faughnder, *Viacom Exploring Sale of Minority Stake in Paramount Pictures*, L.A. TIMES (Feb. 23, 2016, 7:56 PM), https://www.latimes.com/entertainment/envelope/cotown/la-et-ct-viacom-exploring-sale-of-minority-stake-in-paramount-pictures-20160223-story.html [https://perma.cc/YL25-Z88Z]; Edmund Lee, *CBS and Viacom to Reunite in Victory for Shari Redstone*, N.Y. TIMES (Aug. 13, 2019), https://www.nytimes.com/2019/08/13/business/cbs-viacom-merger.html [https://perma.cc/WT3Q-LC86]; Mike Fleming, Jr., *MGM Believes 'Creed II's Knockout Opening Weekend Sets Up Studio For Film-Slate Growth*, DEADLINE (Nov. 26, 2018, 10:46 AM), https://deadline.com/2018/11/mgm-creed-ii-success-film-expansion-plans-annapurna-james-bond-1202508842 [https://perma.cc/XCJ9-FPUX].

69. United States v. Loew's Inc., 882 F.2d 29, 33 (2d Cir. 1989).

70. THOMAS SCHATZ, THE GENIUS OF THE SYSTEM: HOLLYWOOD FILMMAKING IN THE STUDIO ERA 69–70 (1988).

was a "financing and distribution machine[] that bankroll[ed] production, and then dominate[d] the distribution channels to market and release the films [it] finance[d]."[71] Vertical integration into exhibition served to mitigate the risks of contracting in advance of completing a film product. By ensuring access to the retail market, studios entrenched their upstream market power, allowing each studio to "maintain its stable of stars and to finance and produce its pictures reliably."[72] Thus, by 1940, "the Hollywood studio system had been perfected as a machine for producing, distributing, and exhibiting films at a guaranteed rate of return—if not on every film, on the product in the aggregate."[73]

a. The Production Market

For their production operations, the studios contracted exclusively with actors, writers and directors, with renegotiations taking place when high-performing employees garnered box office success to use as leverage.[74] The larger the studio's resources, the greater the studio's economies of scale: each studio could more efficiently produce feature films by using and replacing inputs—including talent, equipment, and capital—over the course of a planned production schedule.[75] By 1927, the studios had adopted a "central-producer system," in which an executive in charge of production would manage a hierarchy of producers filming new product throughout the year.[76] This specialization, however, also led to the development of a small number of independent producers who acted as nonstudio suppliers of film product.[77] Despite attempts to minimize the influence of these independent producers,[78] the studios would ultimately embrace the economic efficiency of a "unit production" system that put more power in the hands of individual producers within the studio and independent producers hired from outside.[79] This relatively open entry into production would be recognized by the Court in *Paramount* as a reason to dismiss claims of monopolization of that market.[80]

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71. Ulin, *supra* note 23, at 4.
72. De Vany, *supra* note 21, at 162.
73. Wu, *supra* note 1, at 162.
74. Schatz, *supra* note 70, at 42.
75. Ulin, *supra* note 23, at 19.
76. Schatz, *supra* note 70, at 48.
77. *Id.* at 125–27.
78. The early studio heads sought to preserve the "industry's traditional power structure," and, in the studio system's early years, agreed at times to withdraw support from large independent producers such as David O. Selznick in an effort to bring them in-house. *Id.* Such activities were not, however, discussed in the *Paramount* case.
79. *Id.* at 161–62.
80. "Although marketing patterns were dictated by the five majors, the industry was not entirely regimented. Production departments engaged in rivalry for stories and stars." Michael Conant, Antitrust in the Motion Picture Industry 83 (1960).

b. The Distribution Market

The "most defining element of a studio is its distribution arm."[81] Unlike firms engaged in production or exhibition, distributors "will not invest (generally) in a film without obtaining and exercising distribution rights"[82]: control of intellectual property that allows distributors to manage the economic return of the film through different channels of consumption, including the largest channel, exhibition. The general goal of distribution is to drive "repeat consumption of the same product" by "creating exclusive or otherwise distinct periods of viewing in the context of ensuring the product is released and customized worldwide."[83] Traditional distribution thus relied on four factors: time, repeat consumption, differential pricing and exclusivity.[84] Early studio distribution models focused on first-run and subsequent run theaters in primary and secondary markets.[85] For example, by 1920, an "A" feature with a larger budget and more recognizable actors, writers, or directors would begin its run in affiliated or independent "downtown deluxe theaters" for several weeks or months until the ticket sales began to slump.[86] At that point, the reel would circulate to independently owned, small-town and rural theaters, where it would more likely be paired with supporting materials like newsreels, shorts, or "low-grade" features rotated weekly.[87] As studios ramped up production (both in volume and variety), executives worked to build audience interest in reliable genres and stars to ensure "the audience stayed loyal through the programmers."[88] This market influence provided leverage in negotiations with exhibitors, giving studios an increasingly viable role in distributing their own product. The Big Eight studios would ultimately "comprise by far the most important distributors of motion pictures in the United States," distributing "approximately 78 percent of the features ('Westerns' excluded) distributed by all national distributors in the United States," in the 1943 to 1944 season, and receiving "approximately 97 percent of the total film rental paid by all the affiliated theatres."[89]

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81. Ulin, *supra* note 23, at 4.
82. *Id.*
83. *Id.* at 5.
84. *Id.*
85. Schatz, *supra* note 70, at 21.
86. *Id.*
87. *Id.*
88. Scott Eyman, Lion of Hollywood: The Life and Legend of Louis B. Mayer 118 (2012).
89. Paramount Brief, *supra* note 15, at 21–22. "From 71 to 81 percent of that rental went to the five major defendants as distributors, from 26 to 15 percent went to the other three distributor-defendants, and only from 2½ to 4½ percent went to independent distributors." *Id.* at 22.

c. The Exhibition Market

While the core of the studios' power lay in the distribution market, the crown jewel of their empire was their presence in the exhibition market. Having started their entertainment careers as exhibitors, most of the founding members of the studio system had an affinity for the "retail" business.[90] Beginning in 1919, Paramount Pictures began acquiring theaters, followed quickly by Loew's, Warner Brothers Pictures, Fox and RKO.[91] Coinciding with the invention of "talkie" motion pictures in the 1920s, the studios' exhibition expansion spurred "years of tremendous growth and prosperity for the movie industry."[92] By 1928, musical scores and sound effects had become the standard in feature films[93] and studios were increasingly efficient at acquiring and converting theaters to accommodate growing public demand.[94] By the early 1930s, "the studios owned more than 70 percent of [first-run theaters in America's ninety-two largest cities]."[95] By 1945, the majors would hold interests in 3137 of the 18,076 theaters in the United States, or 17.35 percent, representing 45 percent of "the total domestic film rental received by all eight distributor-defendants, as compared with the less than 5 percent of such rental paid by the five largest unaffiliated theatre circuits."[96]

During this period, "the money poured in . . . and not even the October 1929 stock market collapse slowed its momentum" at first.[97] The studios experienced their best year in 1930 despite the oncoming Great Depression,[98] in large part because of record theater admissions and the increasing volume of first-run theaters under direct studio control.[99] As the leading theater-holders, Warner Brothers and Fox pushed their theater holdings to over 500 each, while Paramount expanded to over 1000.[100] Though the Depression would eventually hit those same industry leaders the hardest,[101] possession of theaters provided a consistent outlet for studio goods. It also provided the studios with ample leverage when negotiating with independent theater chains and

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90. MGM's Louis B. Mayer, in particular, reveled in his own experience as a small-town exhibitor, when he honed his "knack for retail" and developing product "not [for] the big cities, but [for] the provinces, where people knew what they liked and were willing to pay for it." EYMAN, *supra* note 88, at 37, 76–77.
91. Paramount Brief, *supra* note 15, at 14–15.
92. SCHATZ, *supra* note 70, at 69.
93. *Id.* at 98.
94. *Id.* at 65–66.
95. WU, *supra* note 1, at 163.
96. Paramount Brief, *supra* note 15, at 19–20.
97. SCHATZ, *supra* note 70, at 66.
98. *Id.* at 69.
99. Collectively, the *Paramount* defendants earned $55 million in combined profits. *Id.* at 159.
100. *Id.* at 98.
101. *Id.* at 159. All three of these studios would face significant financial hardship resulting from the drop in attendance during the Depression. *Id.*

circuits,[102] many of which first developed in response to the hard bargaining of the studios.[103]

2. Pre-War Antitrust Inquiries and the National Industrial Recovery Act

With the demise of the Edison Trust's film patent monopoly and the slowdown in foreign film production following the First World War, the "Big Eight" *Paramount* defendants emerged as battle-scarred victors of a highly competitive period from the mid-1910s through the 1920s.[104] The result was a realignment of industry power from the late 1920s into the early 1930s around these triumphant studios' increasingly consolidating operations. Led by Paramount Pictures and its founder Adolph Zuckor, the studios developed a broad array of standardized market practices that would economize production and more efficiently utilize corporate resources.[105] Starting in 1919, Zuckor sought to stabilize Paramount's growth through "block booking" and "blind bidding."[106] These activities—essentially tying agreements requiring

102. De Vany, *supra* note 21, at 169.

103. Kraig G. Fox, Note, *Paramount Revisited: The Resurgence of Vertical Integration in the Motion Picture Industry*, 21 Hofstra L. Rev 505, 509 (1992) ("By 1917, the First National Exhibitors Circuit was formed. This was the first national merger of high quality first run theaters. 'Circuit booking, as it came to be called, became a recognized method of defense on the part of exhibitors against the dominant producers.'") (citing John Izod, Hollywood and the Box Office 1895–1896, 48–49 (1988); Gerald E. Phillips, *The Recent Acquisition of Theater Circuits by Major Distributors*, 5 Ent. & Sports L. 1, 2 (1987); Mae Dena Huettig, Economic Control of the Motion Picture Industry 22 (1944)).

104. *See* Wu, *supra* note 1, at 72–73. Competition in the production and exhibition markets, in particular, created a surprisingly diverse product marketplace, allowing consumers access to a range of "[s]pecialty films . . . for every niche market perceived." *Id.* at 73.

105. Schatz, *supra* note 70, at 69. "[B]ecause the studios were forced to streamline operations and rely on their own resources, their individual house styles and corporate personalities came into much sharper focus." *Id.* at 70.

106. Wu, *supra* note 1, at 164. *See also infra* Subpart III.A.1.e. Paramount Pictures became the first archetypal, fully-integrated studio, filling the power vacuum in the nascent film industry after the Edison Trust failed to successfully monopolize the film production patent market in the early 1900s. Paramount first appeared in 1914 from the consolidation of five separate distribution exchanges, returning $35,000 and 65 percent of each film's profits to producers distributing through the exchange. Adolph Zuckor and his Famous Players-Lasky company was one of these participating producer-exhibitors. A successful garment designer, Zuckor had begun accumulating theaters in 1903 with an arcade on 14th Street in New York City, followed by an expansion throughout the northeast. Zuckor then entered the production market, starting with Broadway stage productions and culminating in the first feature-length films embodying "a kind of 'canned' theater." After the Edison Trust dismissed his request for a license to use its equipment for feature productions, Zuckor defied their patent monopoly and moved independently into feature production with substantial success. By 1916, Zuckor had begun the process of merging with the second-largest Paramount distributor, Lasky Feature Play Company, and buying substantial stock in Paramount itself. That same year, Zuckor maneuvered

exhibitors to acquire rights to certain less-desirable films in order to acquire rights to more-desirable films—were part of a series of contractual agreements developed to manage the risk of widely releasing films to diverse audiences around the country without knowing each product's precise level of consumer demand in advance. While facially weighing in the studios' favor, these agreements aligned studio and exhibitor incentives to overcome a shared information problem.[107] As both parties discovered consumer demand for the product upon release and over the lifetime of the film through ticket sales, the distributing studio was ensured a minimum return on its investment, incentivizing the continued production of product for exhibitors to showcase.[108] In large part, these activities foreshadowed the studios' eventual decision to vertically integrate, which simply "substitute[d] internal control for contracts."[109] The studios, then, appeared to be acting as rational firms overcoming economic obstacles through bargaining.[110]

The DOJ began taking notice of the industry's consolidation and integration—particularly the maneuverings of the studios and rival theater circuits as they battled for control of the exhibition market.[111] Apart from "ensur[ing] access to screens for the exhibition of their own pictures,"[112] the studios' exhibition growth threatened to inhibit independent producers from competing with the studios further upstream.[113] On top of outright purchases, studios began adopting new contractual terms that gave "exhibition preferences to their own pictures and to those of the other major studios."[114] As such provisions became the norm, the DOJ launched antitrust suits against both the studios and the independent circuits as early as 1929 to attack these practices.[115]

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an outright acquisition of the remainder of Paramount Pictures, setting the stage for the Hollywood studio system. *See* NEAL GABLER, AN EMPIRE OF THEIR OWN: HOW THE JEWS INVENTED HOLLYWOOD 22–38 (1988).

107. DE VANY, *supra* note 21, at 150–151. *See infra* Subpart III.A.1.

108. DE VANY, *supra* note 21, at 150–151.

109. *Id.* at 151.

110. Ronald H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386, 391–93 (1937).

111. "By the 1920s, [theater circuits] had gained substantial market domination by engaging in anti-competitive practices of their own. As a natural consequence of the power that these circuits had gained, 'control of these cinemas meant control of the [entire] industry, and they became targets for purchase by the big producers.'" Fox, *supra* note 103, at 509 (quoting IZOD, *supra* note 103, at 40–41).

112. *Id.* (citing Ralph Cassady, Jr., *Impact of the Paramount Decision on Motion Picture Distribution and Price Making*, 31 S. CAL. L. REV. 150, 156 (1958)).

113. *Id.*; *see* CONANT, *supra* note 80, at 37.

114. Fox, *supra* note 103, at 510. The provisions were broad and inventive; they included "using extended clearances, creating overly broad zones for affiliated exhibitors, and refusing to exhibit pictures produced by independent producers." *Id. See also infra* Subpart III.A.1.a.

115. *See, e.g.*, United States v. Paramount Famous Lasky Corp., 34 F.2d 984 (S.D.N.Y. 1929), *aff'd* 282 U.S. 30 (1930); *see also* United States v. First Nat'l Pictures, Inc., 34 F.2d 815 (S.D.N.Y. 1929), *rev'd*, 282 U.S. 44 (1930). Two of the DOJ's other more prominent

The studios were not unaware of the DOJ's interest in their activities. When William Fox sought to combine Fox Film Corporation with Loew's—a move that would have restructured the film industry and made Fox the most powerful studio in the world—he was aware it "would naturally rouse the interest of the antitrust division of the Justice Department."[116] He preemptively sought out Assistant Attorney General William Donovan, the "odds-on favorite to become attorney general during the Hoover administration" and "solicit[ed] his approval" of the merger.[117] Despite some minor successes and narrowly-drafted consent decrees, the DOJ's early cases had little lasting impact on the collaborative—or rather, collusive—practices increasingly normalizing among the studios.[118]

The Great Depression and the Second World War provided a brief, and ultimately profitable, respite for the *Paramount* defendants. While the industry believed itself "Depression-proof" after the Big Eight's then-record $55 million in profits in 1930, profits plummeted to $6.5 million in 1931 and fell further to net losses of $26 million in 1932.[119] By 1933, however, "the stock value of the five majors fell from nearly a billion dollars in 1930 to under $200 million," with Paramount, Fox and RKO falling into bankruptcy or receivership by 1933.[120] Paramount Pictures would undergo a fiscal reorganization resulting in a decrease of assets to $117 million and the ousting of its founding figurehead Adolph Zuckor,[121] Fox would be forced to liquidate much of its holdings

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suits included charges against distributors and exhibitors in the Los Angeles and Chicago markets. *See* United States v. Fox W. Coast Theaters, 1932–1939 Trade Cas. (CCH) ¶ 55,018 (S.D. Cal. 1932); *see also* United States v. Balaban & Katz Corp., 1932–1939 Trade Cas. (CCH) ¶ 55,001 (N.D. Ill. 1932).

116. Gabler, *supra* note 106, at 114–15.

117. *Id.* ("A few weeks later Fox's attorney phoned to tell that one of Donovan's associates had just given them the verbal sanction . . . Fox's merger seemed assured."). Antitrust scrutiny was treated as a tool by members of the industry, as well: in response to the Fox-Loew's proposal, MGM studio chief Louis B. Mayer lobbied his own connections in the DOJ to deny the merger, before later withdrawing his complaints after Fox brought Mayer into the merger as a profit participant. *Id.* at 116.

118. The early consent decrees showed signs of what would come in the *Paramount* Decrees, enjoining defendants from engaging in unfair discrimination in theater zoning, as well as "(1) granting unreasonable clearances; (2) restraining unaffiliated theaters from contracting for first run pictures; (3) acquiring the management or booking control, without a substantial proprietary interest, of motion picture theaters; and (4) leasing more first run pictures than is reasonably necessary for the conduct of their respective businesses." Fox, *supra* note 103, at 510 n.40.

119. Schatz, *supra* note 70, at 159.

120. *Id.*

121. *Id.*; Gabler, *supra* note 106, at 237–38. Notably, Zuckor would be replaced by Sam Katz, a Chicago exhibitor who was the head of the firm's large exhibition holdings. Zuckor would later be brought back to the studio in a figurehead capacity in 1936. *Id.* at 238.

after succumbing to "creditors and lawsuits,"[122] obliging its founder William Fox to hand the company over to Chase National Bank,[123] and Warner Brothers would siphon off a quarter of its corporate worth between 1930 and 1933 to cover losses.[124] Loew's, with a much smaller chain of theaters, "was not hit so heavily by costs for sound conversion, and once the Depression cut into attendance and revenues, Loew's was not faced with the kind of mortgage payments that drove its competitors to the brink."[125]

Amidst this freefall, the studio system found refuge in the policies of President Franklin Delano Roosevelt and the National Recovery Administration. The National Industrial Recovery Act (NIRA) went into effect in 1933, ultimately "sanctioning certain monopoly practices among major U.S. industries" in order to promote economic recovery.[126] As a result, "the long-standing but informal collusion among the Big Eight to control the marketplace now had government sanction."[127] The Big Eight collaborated to establish a trade association, the Motion Picture Producers and Distributors Association (MPPDA) and a NIRA-required Code of Fair Competition, which "committ[ed] to paper such unwritten laws as blind bidding and block booking," as well as zoning and clearance policies that specified where and for how long a film would play.[128] Under the protection of the NIRA, the "loose affiliation of movie companies" became "a codified, regulated totality."[129] In function, the NIRA "provided federal approval and support of the studio system both as a widespread strategy for market control and, within the studio-factories themselves, as a specific mode of production."[130] By the time the NIRA was found to be unconstitutional in 1935,[131] the Big Eight had regrouped, consolidated and rebounded.[132] This sanctioned system "signaled Hollywood's coming of age," and brought on the Golden Age of Hollywood—the period during the late 1930s resulting in "a remarkable run of pictures that were equally successful as commercial commodities, as popular entertainment, and as cinematic art."[133]

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122. Gabler, *supra* note 106, at 116–17.
123. *Id.* at 418.
124. Schatz, *supra* note 70, at 159.
125. *Id.* at 98.
126. *Id.* at 160.
127. *Id.*
128. *Id.*
129. *Id.* However, it is worth noting that the NIRA "authorized labor organizing and collective bargaining," to counteract the policy's potential for worker exploitation, allowing the development of filmmaking unions. *Id.*
130. *Id.*
131. *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).
132. Schatz, *supra* note 70, at 160.
133. *Id.* at 161. Furthermore, the support of the White House engendered similar support for the country's efforts to combat Nazi Germany even before entering World War II. The studios interpreted President Roosevelt's "veiled offer"—that though the United States "will remain a neutral nation . . . [e]ven a neutral cannot be asked to close his mind or

Despite the increasingly warm relationship between Washington and the studios throughout the 1930s, the Department of Justice remained wary of the firms' business activities. The industry was quickly recovering from the Depression, and its control over the production, distribution, and exhibition markets produced unprecedented gains. Theater attendance rebounded to eighty million per week in 1935 and first-run production was once again "heating up."[134] Furthermore, during the War, "record numbers of people flocked to movie theaters, and the companies with the most theaters—Paramount, Fox, and Warners—made the most money."[135] Paramount, with a "whopping 1,400" theaters, had particular success.[136]

On July 20, 1938, the DOJ filed its original complaint against the studios, charging twenty-eight violations of the Sherman Act in eight different actions[137] on behalf of independent exhibitors.[138] Amended on November 14, 1940,[139] to focus solely on the five integrated majors,[140] the complaint charged the studios with violating the Sherman Act by illegally restraining trade through widespread adoption of a litany of anticompetitive practices including block booking and discriminatory zoning.[141] Attorney General Thurman Arnold's goal, clearly stated, was to divorce the studios from their first-run theaters, which he viewed as establishing a "vertical cartel like the vertical cartels of Hitler's Germany, Stalin's Russia."[142] Naturally, the studios balked

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his conscience"—as an opportunity to throw their weight behind the White House's agenda. GABLER, *supra* note 106, at 343. Warner Bros. and Loew's, for example, offered their filmmaking resources to the president, "in connection with the movie of national defense and foreign policy in which [Roosevelt was] interested." *Id.* These actions would ultimately earn the studios the favor of both the President and the public. *Id.* at 346.

134. SCHATZ, *supra* note 70, at 177.

135. EYMAN, *supra* note 88, at 381.

136. *Id.*

137. Paramount Brief, *supra* note 15, at 5.

138. SCHATZ, *supra* note 70, at 298. Roosevelt's Attorney General Thurman Arnold had just finished bringing suits against the "big three" automobile producers General Motors, Ford and Chrysler, and the American Medical Association when he turned his attention to Hollywood. WU, *supra* note 1, at 164; *see also* United States v. Gen. Motors Corp., 26 F. Supp. 353 (N.D. Ind. 1939); United States v. Am. Med. Ass'n, 110 F.2d 703 (D.C. Cir. 1940). An antitrust stalwart, Arnold believed that monopolies and cartels in nearly every industry had overtaken what was "once a nation of small businesses and farms." WU, *supra* note 1, at 163. *But see* THURMAN W. ARNOLD, THE FOLKLORE OF CAPITALISM 211 (1937) (describing U.S. antitrust law as a moral vanity rather than an enforceable principle).

139. Paramount Brief, *supra* note 15, at 5.

140. SCHATZ, *supra* note 70, at 298.

141. *See* Fox, *supra* note 103, at 510–11.

142. WU, *supra* note 1, at 164.

at the notion of destroying the market-stratifying institutions and processes they had built.[143]

Despite this posturing, the studios agreed to negotiate with the DOJ and the five majors entered consent decrees on November 20, 1940.[144] The decrees created "an arbitration system . . . under which independent exhibitors could secure a hearing . . . of complaints that unreasonable licensing restrictions of a specified character had been placed upon them by a consenting defendant as a film distributor."[145] The decrees further established preliminary prohibitions on blind-bidding, unreasonable clearances, and forced rentals, and limitations on block booking and refusals to deal.[146] Falling short of Arnold's desired end, "[t]he only provision of the decree restricting the activities of the consenting defendants as theatre operators was a prohibition against their engaging in a general program of theatre expansion for a three-year period," with no prohibitions on their activities in the production market.[147] At the end of the three-year period, the DOJ had the right "to request the divorcement relief originally sought."[148]

Like its earlier consent decrees, the DOJ's 1940 decree suffered the fate of irrelevance and failed to alter the competitive landscape of the film industry. "At the expiration of the decree's three year life, affiliated circuits still controlled exhibition, and independent production had gained no advances."[149] As a result, the DOJ revived its interest in the *Paramount* case in the summer of 1944 and "asked the District Court for the Southern District of New York to impose all of the remedies of the amended complaint"—including divestiture of the majors' exhibition assets.[150]

III. The *Paramount* Decision and its Legacy

By the 1940s, the Big Eight's coercive practices in the distribution market and leverage in the exhibition market tilted the competitive landscape in favor of their integrated studio system. From 1931 to 1940, the studios' combined profits totaled $128.2 million (with MGM alone accounting for $93.2 million) and soared to $398.8 million during the period from 1941 and 1946.[151] This surge in profits during the Second World War was heavily tied to the majors' theater holdings, with Paramount, Fox, and Warner Bros. having "built up chains of 1,400, 635 and 500 theaters, respectively."[152] The Big Eight controlled

143. Gabler, *supra* note 106, at 408.
144. Paramount Brief, *supra* note 15, at 7.
145. *Id.* at 8 (citation and footnote omitted); *see also* United States v. Paramount Pictures, Inc., 1940–1943 Trade Cas. (CCH) ¶ 56,072 (S.D.N.Y. 1940), at 289–94.
146. *See Paramount Pictures*, 1940–1943 Trade Cas. (CCH) at 289–94.
147. Paramount Brief, *supra* note 15, at 9; *see also id.*
148. Paramount Brief, *supra* note 15, at 9.
149. Fox, *supra* note 103, at 512.
150. *Id.* at 512–13.
151. Schatz, *supra* note 70, at 359.
152. *Id.* In comparison, MGM's take during the same period fell to $81.5 million from 135

62 percent of domestic film production and 52 percent of distributed features in 1940.[153] By 1944, the majors accounted for 73 percent of domestic ticket sales and, "when coupled with the strategic advantages of vertical integration," held "a power to exclude competition from these markets when desired."[154]

The Department of Justice was aware that, despite the 1940 consent decrees, "[t]he studios had never fully eliminated block booking and blind bidding" and returned to both illicit activities when the initial decrees expired.[155] In 1945, the antitrust suits were resumed, with a particular focus on the exhibition market. The agency expanded its claims to include unaffiliated theater circuits of 150 to 300 theaters, which had themselves "worked out privileged deals with one or more studios and had come to control certain cities or market areas."[156] The goal was clear and aggressive: to "eliminat[e] . . . these special arrangements as part of a wholesale effort to dis-integrate the movie industry," and lay the groundwork for "an industry in which movies were produced and sold on a picture-by-picture and theater-by-theater basis."[157]

The *Paramount* case was the amalgamation of the eight separate actions first brought by the Department of Justice in 1938. These early efforts eventually culminated in a 1948 Supreme Court decision prohibiting all eight defendants from a slew of integrative contracting and dealing tactics, and divesting the majors of their exhibition assets.[158] Building on a three-judge District Court holding,[159] the Supreme Court affirmed that "the defendants had violated § 1 and § 2 of the Sherman Act," through conspiracy to monopolize and actual monopolization of the distribution and exhibition markets.[160] As a result, the defendants would willingly agree to terms that subjected them to "injunctive restrictions that hinder the vertical integration of the production, distribution and exhibition of motion pictures."[161]

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theaters. *Id.*

153. De Vany, *supra* note 21, at 156–57. Notably, foreign imports reduced their control to 49 percent of produced features. *Id.*

154. United States v. Paramount Pictures, Inc., 85 F. Supp. 881, 894 (S.D.N.Y. 1949).

155. Schatz, *supra* note 70, at 411.

156. *Id.*

157. *Id.* at 411–12.

158. De Vany, *supra* note 21, at 141. Specifically, the arguments implied that this vertical integration was "substitut[ing] internal controls for [the same] contracts" believed to be anticompetitive. *Id.* at 151. The formal end of the case occurred in 1949, after the District Court returned to the case and carried out the instructions of the Supreme Court. *See Paramount Pictures*, 85 F. Supp. at 898–900.

159. United States v. Paramount Pictures, Inc., 334 U.S. 131, 140 (1948).

160. *Id.* at 140, 178. Despite the DOJ's initial charge of monopolization of the production market, the Supreme Court observed that the District Court's finding that the production market was sufficiently open and competitive had not been challenged. *Id.* at 140.

161. United States v. Loew's Inc., 882 F.2d 29, 30 (2d Cir. 1989) (permitting Warner Bros. relief from the consent decrees).

A. *Challenged Activities and Asserted Problems*

The Court's analysis rested squarely on the effects and implications of the firms' anticompetitive practices, rather than any overtly malicious intent. Despite defendant Columbia Pictures' "earnest argument" that the restrictions would "greatly impair its ability to operate profitably," for example, the Court insisted that "the policy of the anti-trust laws is not qualified or conditioned by the convenience of those whose conduct is regulated."[162] Similarly, the Court denied the defense that competitive circumstances push market participants to take anticompetitive actions, stating that "acquiescence in an illegal scheme is as much a violation of the Sherman Act as the creation and promotion of one."[163] The riskiness of the specific industry at issue was implicitly deemed irrelevant.

Drawing from traditional antitrust doctrines, the *Paramount* Court outlined the studios' anticompetitive behaviors and couched their collective impact in the studios' desire to unlawfully control the distribution and exhibition of feature films.

1. Conspiracy to Monopolize Distribution and Exhibition

a. Price-Fixing

The Supreme Court affirmed the holding of the District Court that "two price-fixing conspiracies existed—a horizontal one between all the defendants, [and] a vertical one between each distributor-defendant and its licensees."[164] The studios thus created two concerns for the Court—first, that they had engaged in an initial activity that is "illegal *per se*,"[165] and second, that they sought to expand this tactic to "regiment an entire industry by licenses containing price-fixing agreements."[166]

The vertical price-fixing conspiracy was found by the District Court, which noted that the distributor-defendants engaged in resale price maintenance to "maintain a stipulated minimum admission price."[167] In doing so, the exhibitors agreed "to the minimum price level at which it will compete against other licensees," creating a price structure "which regulates the licensees' ability to compete against one another in admission prices."[168] Because "a copyright may no more be used than a patent to deter competition between rivals in the exploitation of their licenses," the license contracts were deemed

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162. *Paramount*, 334 U.S. at 159.
163. *Id.* at 161.
164. *Id.* at 142.
165. *Id.* at 143 (citing United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940)).
166. *Id.* (citing United States v. U.S. Gypsum Co., 333 U.S. 364, 400 (1948)).
167. *Id.* at 143–44 (quoting United States v. Paramount Pictures, Inc., 70 F. Supp. 53, 61 (S.D.N.Y. 1946)).
168. *Id.* (quoting *Paramount Pictures*, 70 F. Supp. 53 at 61).

outside of the pecuniary reward for a copyright holder's legal monopoly and thus "but a part of the general plan to suppress competition."[169]

The horizontal price-fixing conspiracy thus arose out of the finding that this resale price maintenance tactic was baked into the licensing contract provisions of the distributor-defendants.[170] Even without an express agreement, the Court asserted that "[i]t is enough that a concert of action is contemplated and that the defendants conformed to the arrangement."[171] The conformity of the studios' agreements appeared to satisfy their contemplation. As such, the same concerns over price-fixing and copyright abuse applied to the studios as a collective.[172]

b. Clearances and Runs

Based on the District Court's findings, the Court determined that all eight defendants used clearances[173] "to protect a particular run of a film against a subsequent run," which was not always anticompetitive and did not always result in fixing of admission prices.[174] However, such clearances were only reasonable restraints of trade "when not unduly extended as to area or duration."[175] The studios had adopted "many clearances [that] had no relation to the competitive factors which alone could justify them," as evidenced by the "fixed and uniform character . . . without regard to the special circumstances" of each agreement.[176] Thus, the Court held that the studios' activities amounted to "a conspiracy to restrain trade by imposing unreasonable clearances."[177]

The Court thus approved of the District Court's seven nonexclusive factors to determine whether a clearance was unreasonable: the admission prices of the theatres involved; the character and location of the theatres, "including size, type of entertainment, appointments, transit facilities, etc.;" the management and operation policies of the theaters involved, including "double features, gift nights, give-aways, premiums, cut-rate tickets, lotteries, etc.;" the theaters' rental and license terms and the distributor's corresponding revenues; the degree of competition among the involved theaters; disregarding of distributor or independent circuit-affiliation; and the requirement of "substantial competition"

169. *Id.* at 144 (citing *Gypsum*, 333 U.S. at 401, to draw a parallel between its holding for patentholders and the copyright holders in this case).
170. *See Paramount Pictures*, 70 F. Supp. 53 at 61.
171. United States v. Paramount Pictures, Inc., 334 U.S. 131, 142 (1948).
172. *Id.* at 143 ("What was said [in *Gypsum*] is adequate to bar defendants, through their horizontal conspiracy, from fixing prices for the exhibition of films in the movie industry.").
173. "A clearance is the period of time, usually stipulated in license contracts, which must elapse between runs of the same feature within a particular area or in specified theatres. Runs are successive exhibitions of a feature in a given area, first-run being the first exhibition in that area, second-run being the next subsequent, and so on . . . ." *Id.* at 144 n.6.
174. *Id.* at 144–45; *see also Paramount Pictures*, 70 F. Supp. 53 at 62.
175. *Paramount*, 334 U.S. at 145.
176. *Id.* at 146; *see also* United States v. Paramount Pictures, Inc., 66 F. Supp. 323, 353 (S.D.N.Y. 1946).
177. *Paramount*, 334 U.S. at 147.

between the involved theatres.[178] Going forward, the defendants would need to show "the special needs of the licensee for the competitive advantages [the particular clearance] affords."[179] While not presumptively illegal, clearances were deemed "too potent a weapon to leave in the hands of those whose proclivity to unlawful conduct has been so marked" without such a showing, and would certainly be disallowed "so long as the exhibitor-defendants own theatres."[180]

c. Pooling Agreements and Joint Ownership

The Court affirmed the District Court's finding that the defendants engaged in two types of anticompetitive pooling agreements.[181] The first were among the defendant studios and their affiliates, which served to "eliminate competition *pro tanto* both in exhibition and in distribution of features" between the defendants.[182] The second were between the defendants' exhibition assets and independent exhibitors, often through leases of theatres wherein compensation was determined "by a percentage of profits earned by the theatres in the pool."[183] These agreements, the Court held, "were bald efforts to substitute monopoly for competition and to strengthen the hold of the exhibitor-defendants on the [exhibition market] by alignment of competitors on their side."[184] While the former served to "naturally direct the films to the theatres in whose earnings they were interested," the latter had "the effect of nullifying competition," and similarly, "making more effective the competition of the group against theatres not members of the pool."[185]

Similarly, the Court affirmed the District Court's findings of potentially anticompetitive joint ownership agreements[186] that either caused defendant and affiliate theaters to operate "collectively rather than competitively," or eliminated "putative competition between [defendants] and the other [previously independent] joint owners."[187] Like the pooling agreements, joint management resulted in a "natural gravitation of films . . . to the theatres in whose earnings the distributors have an interest," thus becoming a device for strengthening the defendants' competitive positions in the exhibition market

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178. *Id.* at 145–46.
179. *Id.* at 148.
180. *Id.* at 147. The Court emphasized its exercise of equity power to "uproot all parts of an illegal scheme—the valid as well as the invalid—in order to rid the trade or commerce of all taint of the conspiracy," in order to raise the obligations of the studios. *Id.* at 148.
181. *Id.* at 149. Pooling agreements are arrangements whereby theatres managed by two or more parties, "normally competitive, were operated as a unit . . . the profits being shared according to prearranged percentages." *Id.*
182. *Id.*
183. *Id.*
184. *Id.*
185. *Id.*
186. *Id.* Joint ownership agreements are similar to pooling agreements, but subject theatres to management by a joint committee. *Id.*
187. *Id.* at 150.

by forging an alliance in the distribution market.[188] The Court recognized that these were not express agreements to grant preferences, but they nonetheless were a "working arrangement or business device that has that necessary consequence," thus potentially amounting to unreasonable restraints of trade.[189]

The Court ultimately held that such agreements required a thorough rule of reason analysis,[190] outlining that termination of such agreements would be appropriate in circumstances (i) where the joint ownership acquisitions "were the fruits of monopolistic practices or restraints of trade," (ii) if "utilized as part of the conspiracy" even if "lawfully acquired," (iii) if the independent co-joint owner would have otherwise been a viable independent competitor, or (iv) if a lawfully-acquired joint ownership otherwise resulted in monopolization.[191]

d. Formula Deals and Master Agreements; Franchises

The Court first held that two defendants, Paramount and RKO, enacted formula deals[192] with both affiliate and independent theater circuits, which permitted circuits to "allocate playing time and film rentals among the various theatres."[193] Defendants also engaged in similarly anticompetitive master agreements[194] that allowed participating circuit exhibitors to unilaterally allocate film rentals and playing times among its associated theaters.[195] Both agreements were held to be unlawful restraints of trade, as they favored larger circuits and chains over independent theaters by putting a "premium on the size of the circuit" and by "eliminat[ing] the possibility of bidding for films theatre by theatre."[196] The Court deemed these agreements a "misuse of monopoly power" that tainted competitive markets with anticompetitive activities in unrelated, monopolized areas, "stifling competition" and "diverting the cream of the business" to the largest operators.[197]

While the District Court banned franchises as well,[198] the Supreme Court was unable to determine that they were illegal per se.[199] The District Court

188. *Id.* at 151.
189. *Id.*
190. *Id.* at 152 ("[T]he District Court made no inquiry into the circumstances under which a particular interest had been acquired.").
191. *Id.* at 152–53.
192. "A formula deal is a licensing agreement with a circuit of theatres in which the license fee of a given feature is measured, for the theatres covered by the agreement, by a specified percentage of the feature's national gross." *Id.* at 153.
193. *Id.* at 153–54.
194. "A master agreement is a licensing agreement or 'blanket deal' covering the exhibition of features in a number of theatres, usually comprising a circuit." *Id.* at 142 n.4.
195. *Id.* at 154.
196. *Id.* 154–55 (citing United States v. Griffith, 334 U.S. 100 (1948)).
197. *Id.*
198. *Id.* at 155. "A franchise is a licensing agreement, or series of licensing agreements, entered into as part of the same transaction, in effect for more than one motion picture season and covering the exhibition of features released by one distributor during the entire period of the agreement." *Id.* at 142 n.4.
199. *Id.* at 156.

had found that "a period of more than one season was too long and the inclusion of all features was disadvantageous to competitors," but to the Supreme Court, the record lacked sufficient evidence.[200] While the *Paramount* Court recognized such agreements may be expansive enough to "discriminate against some independents in favor of others," it remanded the issue to be reevaluated by the lower court.[201]

e. Block Booking

The Court held that all defendants except United Artists engaged in block booking,[202] which was held to be an unlawful "enlargement of the monopoly of the copyright,"[203] and inconsistent with the public-facing purpose of copyright law.[204] Similar to the Court's holdings in patent cases involving tying clauses, block booking was held to "increase[] the market for some [films]," such that "[e]ach [stood] not on its own footing but in whole or in part on the appeal which another film may [have] ha[d]."[205] Thus, while films can be sold in blocks or groups, there cannot be a requirement "express or implied, for the purchase of more than one film."[206]

The Court also commented on the closely related practice of blind-selling.[207] Approving of the District Court's holding that the practice "does not appear to be as inherently restrictive of competition as block-booking, although it is capable of some abuse," such agreements must include "an option to reject a certain percentage of their blind-licensed pictures within a reasonable time after they shall have become available for inspection."[208]

f. Discriminatory Contractual Provisions

The Court culminated its analysis by citing nine types of commonly used contractual provisions that amounted to "discriminatory practices [that] are

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200. *Id.* at 155.
201. *Id.* at 156.
202. Block booking is tying agreement in which a distributor licenses "one feature or group of features on condition that the exhibitor will also license another feature or group of features released by the distributors during a given period. The films are licensed in blocks before they are actually produced." *Id.* at 156.
203. *Id.* at 157–58.
204. *Id.* at 158 (quoting *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932) ("The sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labor of authors . . . . But the reward does not serve its public purpose if it is not related to the quality of the copyright.") (internal quotation marks omitted)).
205. *Id.*
206. *Id.* at 159.
207. "Blind-selling is a practice whereby a distributor licenses a feature before the exhibitor is afforded an opportunity to view it." *Id.* at 157 n.11.
208. *Id.*

included among the restraints of trade which the Sherman Act condemns."[209] Specifically, the Court condemned[210]:

> Clauses "suspen[ding the] terms of a contract if a circuit theatre remained closed for more than eight weeks with reinstatement without liability on reopening;"
> Clauses "allowing large privileges in the selection and elimination of films;"
> Clauses "allowing deductions in film rentals if double bills are played;"
> Moveovers[211] and extended runs;
> Road show[212] privileges;
> Clauses "allowing overage and underage";[213]
> Permitting "unlimited playing time;"
> Obligations to exclude foreign and independently produced films;
> Clauses permitting the exhibitor to challenge the "classification of features"—i.e., top quality features or secondary features—for rental purposes.[214]

On remand, the District Court would be obliged to evaluate each of these provisions in turn. Notably, the defendants countered that such agreement terms were devised by the large circuit exhibitors with whom they were dealing and competing. Nonetheless, the Court held, acquiescence in the scheme amounted to a violation in and of itself.[215]

2. Monopolization of Exhibition

While the Court's conspiracy holdings were based on individual activities with anticompetitive consequences, the Court's monopolization holding addressed the collective culmination of these actions: the self-perpetuating studio system structure. "[W]hen the starting point is a conspiracy to effect a monopoly through restraints of trade," the Court explained, "it is relevant to determine what the results of the conspiracy were even if they fell short of monopoly."[216] Whether the firms were organized "for the purpose of achieving a 'national monopoly'" was neither necessary nor sufficient to determine the existence of a monopoly under the Sherman Act;[217] it was "the relationship of the unreasonable restraints of trade to the position of the defendants"

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209. *Id.* at 160.
210. *Id.* at 159–60.
211. "A moveover is the privilege given a licensee to move a picture from one theatre to another as a continuation of the run at the licensee's first theatre." *Id.* at 160 n.13.
212. "A road show is a public exhibition of a feature in a limited number of theatres, in advance of its general release, at admission prices higher than those customarily charged in first-run theatres in those areas." *Id.* at 160 n.14.
213. "Underage and overage refer to the practice of using excess film rental earned in one circuit theatre to fulfill a rental commitment defaulted by another." *Id.* at 160 n.15.
214. *Id.* at 159–60.
215. *Id.* at 161; *see also* Interstate Circuit v. United States, 306 U.S. 208, 231 (1939).
216. United States v. Paramount Pictures, Inc., 334 U.S. 131, 171 (1948).
217. *Id.*

that would amount to a monopoly and demand "[p]arity of treatment of the unaffiliated and the affiliated" firms.[218]

Reflecting the market definition articulated in the government's brief,[219] the Court focused its denouncement of the defendants' "monopoly in exhibition and more particularly monopoly in the first-run phase of the exhibition business."[220] This submarket was considered the key to success in the film industry: "[T]he question here is not *what* the public will see or *if* the public will be permitted to see certain features. It is clear that under the existing system the public will be denied access to none . . . . The central problem presented by these cases is which exhibitors get the highly profitable first-run business."[221] The "aim of the conspiracy," as the Court described it, "was exclusionary" and "designed to strengthen [the studios'] hold on the exhibition field."[222] By using "interdependent" contractual provisions such as minimum admission prices, clearances, and runs, the "relative playing positions of all theatres in a certain area" were fixed, allowing for uniform "minimum price provisions . . . based on playing position." The first-run theatres were therefore "required to charge the highest prices, the second-run theatres the next highest, and so on."[223] Thus, through their presence in the exhibition market, the defendants shored up the business viability of each run, giving it "as near a monopoly of the patronage as possible."[224] Because this "strategic position [was] maintained, as a result of practices which constitute unreasonable restraints of trade," monopolization

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218. *Id.* at 172.
219. "The pattern of exploitation of a first-class film in metropolitan centers is one in which the greatest film rental is derived from the first-run theatres and progressively lesser rentals are received from subsequent exhibitions . . . . The larger first-run film rental is of course a direct reflection of the proportionately greater box-office receipts of the first-run theatre resulting from the protection against competition of other theatres in the area which the run, clearance and minimum admission price provisions afford." Paramount Brief, *supra* note 15, at 23.
220. *Paramount*, 334 U.S. at 167.
221. *Id.* at 166–67 (emphases added). The Court impliedly recognized that the studios had operated "as an incomplete cartel," generating 60 percent of domestic feature films and distributing 75 percent of all domestic features, excluding second-tier Westerns. CONANT, *supra* note 80, at 82. While they only controlled 17 percent of domestic theaters, that 17 percent represented mostly "noncompeting circuits" in the "largest downtown and neighborhood theaters in the country," and 45 percent of the defendants' total domestic film rental. *Id.*
222. *Paramount*, 334 U.S. at 170.
223. *Id.* at 170–71.
224. *Id.* at 171. The Court observed that, "in the 92 cities of the country with populations over 100,000 at least 70 per cent [sic] of all the first-run theatres are affiliated with one or more of the five majors," though "there is always competition in some run even where there is no competition in first runs." *Id.* at 167–68. "In cities between 25,000 and 100,000 populations the five majors have interests in . . . about 60 per cent [sic]" of first-run theaters. *Id.* at 168. "In about 300 additional towns, mostly under 25,000, an operator affiliated with one of the five majors has all of the theatres in the town." *Id.*

was clear and actionable.[225] Thus, it was the first-run exhibition market that was the key to the studios' monopoly, as it constituted "the cream of the exhibition business" and "the core of the present cases."[226]

Notably, the Court rejected holding vertical integration of the three markets—production, distribution and exhibition—illegal per se.[227] Instead, the Court determined that vertical integration can be deemed in contravention of the Sherman Act if it was either a "calculated scheme to gain control over an appreciable segment of the market and to restrain or suppress competition, rather than an expansion to meet legitimate business needs,"[228] or if the firm's vertical integration, "though unexercised," provides a "power to exclude competition . . . coupled with a purpose or intent to do so."[229] Such an intent could be determined by size ("itself an earmark of monopoly power . . . [that] carries with it an opportunity for abuse"), past exercise of such a power, whether the "nature of the market to be served" is subject to abuse by vertically integrated firms, or whether "the leverage on the market which the particular vertical integration creates or makes possible" amounts to such monopoly power.[230]

3. Divorcement and Divestiture

In making such a sweeping declaration of the illegality of the defendants' positions in the exhibition market, the Court rejected the District Court's supposition that the "root of the difficulties lay not in theatre ownership but in those unlawful practices" explicitly condemned.[231] The District Court proposed a bidding system whereby exhibitors would bid picture-by-picture for the opportunity to show individual films.[232] Divestiture of theaters—the

225. *Id.* at 171 (citing United States v. Griffith, 334 U.S. 100 (1948)).

226. *Id.* at 172–73. The Court further supported its conclusion by noting that (i) "'specific intent' is not necessary to establish a 'purpose or intent' to create a monopoly but that the requisite 'purpose or intent' is present if monopoly results as a necessary consequence of what was done." *Id.* at 173 (citing United States v. Griffith, 334 U.S. 100 (1948)); (ii) "the existence of power 'to exclude competition when it is desired to do so' is itself a violation of § 2 [of the Sherman Act], provided it is coupled with the purpose or intent to exercise that power." *Id.* (citing Am. Tobacco Co. v. United States, 328 U.S. 781, 809–11 (1946)); and (iii) the text of the Sherman Act plainly rejects restraints irrespective of the volume of trade or commerce involved, and for "any part" of trade of commerce. *Id.* at 173 (citing United States v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 224–225 (1940)).

227. *Id.* at 173–74.

228. *Id.* at 174 (citing United States v. Reading Co., 253 U.S. 26, 57 (1920)).

229. *Id.*

230. *Id.*

231. *Id.* at 170 (citing United States v. Paramount Pictures, 66 F. Supp. 323, 332 (1946)).

232. *See Paramount Pictures*, 66 F. Supp. at 353. The District Court's hesitation to endorse a full-throated dissolution of the studios' exhibition holdings was in part as a result of their admitted inexperience with the film industry: "It is argued that the steps we have proposed would involve an interference with commercial practices that are generally acceptable and a hazardous attempt on the part of judges—unfamiliar with the details of business—to remodel its delicate adjustments which have hitherto provided the

remedy sought by the DOJ—would, according to the lower court, result in a loss to "the public" of the defendants' "good service" based on their "demonstrated experience and skill in operating what must be regarded as in general the largest and best equipped theatres."[233] To the lower court, the proposed bidding system "render[ed] such a harsh remedy as complete divestiture [of the studios' exhibition businesses] unnecessary, at least until the efficiency of that system has been tried and found wanting."[234]

The Supreme Court, however, disagreed: "enjoining continuance of the unlawful restraints" or dissolving the studios' conspiratorial arrangements failed to provide the requisite restitution the Court felt was warranted.[235] While not obliging divestiture outright, the Court remanded the inquiry to the District Court to find some way to ensure that "the fruits of the conspiracy which are denied the independents . . . be denied the five majors."[236] By rejecting the District Court's only alternatively proposed remedy, the Supreme Court essentially signaled to the studios that the lower court would be given full authority to "break up the studios and force them to sell their theater chains," as the DOJ had always intended.[237] By the time the case returned to the District Court, it was seemingly inevitable that divorcement "appear[ed] to be the only adequate means of terminating the conspiracy and preventing any resurgence of monopoly power on the part of the remaining defendants."[238] The only remaining issue was how the District Court would rule on the divestiture plans to be submitted by the defendants "as may comply with the requirements of the Supreme Court regarding local monopolies and illegal fruits."[239]

B. *The Practical Impact of the* Paramount *Decrees*

1. The Studio System Disentangles

Following the Supreme Court's condemnation, the Big Eight broke ranks. Before the District Court could reconsider its remedy, RKO and Paramount negotiated individual consent decrees with the DOJ that ejected them from the exhibition market.[240] By voluntarily entering the decrees, Paramount

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public with what is a new and great art. But we see nothing ruinous in the remedies proposed." *Id.* at 357.

233. *Id.* at 353.
234. *Id.*
235. United States v. Paramount Pictures, Inc., 334 U.S. 131, 171–72 (1948).
236. *Id.* at 172.
237. De Vany, *supra* note 21, at 141.
238. United States v. Paramount Pictures, 85 F. Supp. 881, 896 (1949).
239. *Id.* at 899.
240. *See* Paramount Decree, *supra* note 19; *see also* RKO Decree, *supra* note 19. "[RKO owner Howard] Hughes eviscerated a strong company . . . [when he] instantly kowtowed to Justice Department pressure to separate RKO's theater chain from studio operations, thus breaking ranks with the four other majors and leading the way for the splintering of the true studio system." McCarthy, *supra* note 3, at 468.

and RKO avoided any requirement to seek court approval to reenter exhibition in the future.[241] The District Court ultimately aligned its opinion with the Supreme Court[242] and issued a final decree against the remaining six defendants[243] with divorcement and divestiture supplements for the three recalcitrant majors, barring them from reentering exhibition.[244]

In the short term, the studios moved to divest themselves of their theater chains. Paramount Pictures and RKO created distinct exhibition companies—United Paramount Theaters and RKO Theaters Corporation—whereas MGM sold its theaters to its parent company Loew's, Inc., Fox sold its assets to National Theaters, Inc., and Warner Bros. sold its theaters to the Stanley Warner Corporation.[245] The newly created exhibition entities were barred from acquiring additional theaters or entering the distribution market without petitioning the District Court and "showing that any such engagement shall not unreasonably restrain competition in the distribution or exhibition of motion pictures."[246] By 1954, all five majors had separated their exhibition holdings,[247] but the subsidiaries would continue to hemorrhage individual theaters throughout the decade.[248]

The immediate financial losses belied a greater concern: without guaranteed exhibition platforms to support their upstream market power, the studio system would unravel. Indeed, "[f]or years, movie companies had actually been real estate companies" as opposed to producers and distributors of entertainment product.[249] Where the pre-*Paramount* studio system relied on "temporal and spatial separation of markets,"[250] reinforced by the activities now banned by the *Paramount* Decrees, the post-*Paramount* world would separate the production and distribution markets from exhibition and outlaw industry practices that "conserved on information and exchange costs" between the markets.[251]

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241. De Vany, *supra* note 21, at 174 n.120. The minors—Universal, United Artists and Columbia—would similarly escape such a restriction, which befell the remaining majors.
242. *Paramount Pictures*, 85 F. Supp. at 898–900.
243. *See* Columbia/Universal/United Artists Decrees, *supra* note 19.
244. *See* Loew's Decree, *supra* note 19; Warner Bros. Decree, *supra* note 19; Twentieth Century-Fox Decree, *supra* note 19.
245. *See* Charles H. Grant, *Anti-Competitive Practices in the Motion Picture Industry and Judicial Support of Anti-Blind Bidding Statutes*, 13 Colum.-VLA J.L. & Arts 349, 361 (1989).
246. Warner Bros. Decree, *supra* note 19, at 64, 273, 64, 266.
247. It took Loew's until 1959, however, to complete the divorcement due to complications with its debt. Conant, *supra* note 80, at 107–09.
248. *Id.* at 112.
249. Eyman, *supra* note 88, at 397. "[B]y 1948, investment in theaters, i.e., real estate, accounted for 93 percent of the investment in the American movie industry," whereas "production was only five percent." *Id.*
250. Conant, *supra* note 80, at 58.
251. De Vany, *supra* note 21, at 170. *See also supra* note 107 and accompanying text.

Traditional antitrust theory would expect demonopolization to increase output, reduce prices and decrease profits below monopolistic levels, but the actual result was less simplistic. The largest producers of films, now unable to "contract forward for the exhibition of motion pictures," could no longer rely on such guaranteed returns to "contract backward [and] maintain a stable of creative talent."[252] Untethered from their "veritable thralldom," a steady stream of upstream performers, writers, and directors began "participating in profits and starting their own production companies."[253] Looking at their upstream costs, the studios recognized that "staggering investments in overhead—back lots with their wardrobe departments, acres of props, contract players, and so on," were quickly appearing to be, by necessity, "thing[s] of the past."[254] These "diseconomies of large scale" became acute without monopoly profits to buttress them, and the studios responded by paring down their production and distribution apparatuses.[255]

Major studio production declined throughout the decade. Output by the five majors fell 52 percent between 1940 and 1956, while output from the Big Eight fell 32 percent.[256] The resulting excess capacity "in the form of idle studios and underutilized systems of nation-wide distribution exchanges" spurred demand for the previously-maligned independent producers to fill the exhibition void.[257] The exhibition market also compensated for unfilled demand by increasing its intake of foreign imports and films by independent producers.[258] By 1957, 58 percent of the Big Eight studios' productions were helmed by independent producers, compared to roughly 10 to 12 percent in 1949.[259] In many ways, the Decrees plunged the industry "back into the open state it had emerged from in the 1920s," creating a system of "one-shot deal[s]" coming together on a picture-by-picture basis, with different creative and business parties assembling to execute each feature film.[260] By the Department of Justice's measurements, therefore, the *Paramount* Decrees were an unmitigated success.[261]

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252. *Id.* at 171.
253. Biskind, Easy Riders, *supra* note 12, at 19.
254. *Id.* *See also* Schatz, *supra* note 70, at 478 (explaining cost-saving tactics adopted by film studio executives "increasingly concerned about their loss of control over the changing movie industry, with its wide-open markets and rising budgets, its free-lance talent and packaging agents, its outside deals and location shoots," which "signaled the end . . . of the efficient, regulated, studio-based mode of production").
255. *See* Conant, *supra* note 80, at 115.
256. *Id.* at 122. This difference is attributed in part to the slightly increased production of United Artists, which favored an independent producer model over centralized production and was well-suited to fill the output gap left by its competitors. Similarly, Columbia held production at a constant rate. De Vany, *supra* note 21, at 171–72.
257. Conant, *supra* note 80, at 114.
258. Theater grosses peaked in 1947 at $1.565 billion. De Vany, *supra* note 21, at 171.
259. *See* Conant, *supra* note 80, at 117–18.
260. Wu, *supra* note 1, at 165.
261. *See* Conant, *supra* note 80, at 110 (noting that the Justice Department concluded in

2. Television and Conglomeratization

The more salient ramifications of the *Paramount* Decrees arose in the opportunities disintegration provided to substitute products. Indeed, the *Paramount* case was the first experience for the twentieth century information industries to observe "the awesome power of the state" to strip competitors of their market power and lay industries bare for new entrants.[262] While the Decrees themselves sought only to lower entry barriers into the distribution and exhibition markets, the *Paramount* decision itself laid the groundwork for decades of product and consumer migration that broadened the market from a feature film industry to an entertainment industry.

In the first instance, the Decrees ensured that the severely weakened studios could not stymie the concurrent advent of television and forced the industry to adapt to the rising medium. The growth of the television market decreased demand for film products, creating downward pressure on studios' theatrical ticket revenues.[263] Second, and conversely, it created a new avenue for studios to sell their products by licensing their features to burgeoning television networks.[264] Many studios eagerly sold the television rights to feature films they believed could never again draw a theatrical audience, hoping to offset their hemorrhaging theatrical revenues by cashing in on prior successes.[265] In doing so, however, the studios ultimately gave away valuable assets that placed their ongoing theatrical efforts at a distinct disadvantage to the television medium's ability to attract audiences: the studios were now competing against their own product.[266] By 1950, more than one billion dollars would be spent by consumers on television sets—and twice that amount in 1951—while

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1953 that, because "[t]he production-distribution firms deal at arm's length with their former circuits," the "divorcement has been effective").

262. Wu, *supra* note 1, at 164.

263. Movie attendance had already been falling, from 80 million attendees per week in 1946 to 67 million in 1948. The studios were aware this had much to do with "other possibilities for diversion" as it did with the "changing of audience tastes." Eyman, *supra* note 88, at 400.

264. By February 1958, 3700 pre-1949 feature films had been sold or leased to television stations for approximately $220 million. Conant, *supra* note 80, at 137. Both Columbia Pictures and Loew's attempted to self-release their older feature films. Warner Bros., RKO, Twentieth Century-Fox, Paramount and Universal sold substantial portions of their old film libraries or partnered with third parties for television distribution. *Id.*

265. *See* Schatz, *supra* note 70, at 479. Other studios, however, made the more dramatic (and strategic) decision to reallocate production facilities vacated by the dissolution of the feature film production line to enter directly into television production. *Id.* at 477–78. One such studio was the growing Walt Disney Studio, whose flagship television show *Disneyland* became a hit and provided promotion for an increasingly successful theme park. *Id.*

266. "In 1957, a sharp decline in motion picture attendance, even of pictures that received high critical praise, was attributed to the rivalry of the best of the pre-1949 films then being shown on television." *Id.*

movie patrons dwindled to fifty million guests per week.[267] This shift would lay the groundwork for competition in the exhibition and distribution markets by these same entities for the next half-century.

The second implication was the creation of a more consumer-responsive, demand-centric content industry. The loss of the studios' grip on their machine-like screen-booking procedures meant theaters could support an influx of content from independent producers. New, original ideas would very quickly reach theatrical audiences and compete for attention.[268] Concurrently, without the studios to enforce it, the industry's Production Code—which regulated content, quality, and technical standards for feature films—fell into irrelevance.[269] With these seismic shifts, "[t]he same upheavals that had left the studios bruised and battered made room for fresh blood in the executive suites."[270] Despite attempts by senior studio executives to lean more heavily into their reliable genre films to generate substantially outsized returns and cover losses from other pictures,[271] "[t]he old men who ran the studios were increasingly out of touch with the vast baby boom audience that was coming of age in the '60s . . . The studios were still churning out formulaic genre pictures," big-budget epics, and "an endless stream of Doris Day and Rock Hudson vehicles."[272]

This cavalcade of change meant the studios were in dire financial shape by the late 1960s.[273] Amidst the economic and cultural tumult, "the conglomerates were circling beneath the chop, looking for dinner [and] Hollywood watchers looked on gloomily as studio after studio became no more than an appetizer for some company whose primary business was insurance, zinc

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267. A. Scott Berg, Goldwyn: A Biography 460 (1989).

268. *See generally* Biskind, Easy Riders, *supra* note 12 (describing the sudden arrival of risky and culturally transformative feature films in the late 1960s and early 1970s).

269. Conant, *supra* note 80, at 113 ("The majors had used the [Production Code Administration, the industry's agency of self-censorship,] to bar the entry of novel pictures of many types. Following divorcement, the control which the major distributors had exercised through ownership of first-run theaters was lost [and films denied P.C.A. approval] were successfully produced and distributed.").

270. Biskind, Easy Riders, *supra* note 12, at 21.

271. This tendency laid the groundwork for the modern blockbuster model and "tentpole" method of feature slate programming. As one studio executive at the time said, "M.G.M. suffers from nothing that two or three hits can't cure. Or let the next *Ben Hur* be a smash—and we'll record profits for five years on that alone." Conant, *supra* note 80, at 127 (internal citation omitted). *See also* Edward Jay Epstein, The Big Picture: Money and Power in Hollywood 229–35 (2006) (describing how studios use opening weekend attendance to determine whether the film will drive profit).

272. Biskind, Easy Riders, *supra* note 12, at 20. Indeed, in March 1949—a year after the Supreme Court's *Paramount* decision—Paramount founder Adolph Zucker was given an honorary Academy Award, "Hollywood's way of handing him a gold retirement watch." Berg, *supra* note 267, at 447.

273. Biskind, Easy Riders, *supra* note 12, at 20. "Attendances, which hit an all-time high of 78.2 million a week in 1946, plunged to a low of 15.8 million a week in 1971. Box office was down, inventories were up. Money was tight, therefore costly to borrow." *Id.*

mining, or funeral homes."[274] One by one, the Big Eight fell victim to conglomeratization, a corporate strategy seeking diversification of assets, with the studios providing a high-risk, high-reward portfolio asset to balance against stable widget businesses, as well as intellectual property that could be utilized in merchandising, theme parks, and other consumer goods businesses.[275]

Teetering on the brink of collapse, Paramount Pictures was purchased by industrial conglomerate Gulf + Western Industries Corporation before being sold to multimedia company Viacom (today, ViacomCBS) in 1994.[276] Twentieth Century-Fox would survive under semi-independence until 1985 when Rupert Murdoch's NewsCorp purchased the studio; it would then be sold in 2018 to the Walt Disney Company.[277] RKO was sold to General Tire and Rubber Company in 1955, but would be dissolved soon afterward: it has since been revived as a small, independent production company.[278] Warner Bros. would eventually merge with publishing company Time, Inc., forming Time Warner, which would itself be purchased by AT&T in 2018.[279] MGM and United Artists would both be bought, reorganized, and sold by several corporate parents—with MGM ultimately taking control of United Artists' label and library.[280] MGM would emerge from a bankruptcy in 2011 by signing cofinancing and codistribution deals with other studios.[281] Universal would be purchased by talent agency Music Corporation of America and lean heavily into television production before going through a series of sales to Matsushita Electronic (now Panasonic), drink distributor Seagram, General Electric and ultimately cable company

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274. *Id.* at 20–21.

275. Wu, *supra* note 1, at 235 (describing how the Big Eight defendants have been bought and sold by corporations "typically holding a film studio, cable networks, broadcast networks, publishing operations, [and] perhaps a few theme parks").

276. *Id.* Notably, it would be Paramount Pictures who once again set the standard for the studios in the post-*Paramount* age, when it the studio's Barry Diller, a former television executive, developed the "high concept" feature film. His colleagues Michael Eisner and Jeffrey Katzenberg would go on to bring this notion to both the Walt Disney Company and DreamWorks with varying success. James B. Stewart, Disney War 29–33 (2005).

277. *See* Epstein, *supra* note 271, at 15; s*ee also* Matthew E. Schwartz, *Disney Officially Owns 21st Century Fox*, NPR (Mar. 20, 2019), https://www.npr.org/2019/03/20/705009029/disney-officially-owns-21st-century-fox [https://perma.cc/2X49-9V7B].

278. *See* Richard B. Jewell with Vernon Harbin, The RKO Story 245 (1982).

279. *See* Joe Bel Bruno, *AT&T Buys Time Warner in Transformative Hollywood Deal for Cord-Cutting Age*, The Hollywood Rep. (Oct. 22, 2016, 5:13 PM), https://www.hollywoodreporter.com/news/at-t-time-warner-deal-940706 [https://perma.cc/B4YB-5NMH].

280. Ben Fritz, *MGM Buys Back United Artists, Adds Peter Liguori to Board*, L.A. Times (Mar. 22, 2012, 11:30 AM), https://latimesblogs.latimes.com/entertainmentnewsbuzz/2012/03/mgm-buys-back-united-artists-peter-liguori-joins-studios-board.html [https://perma.cc/9BW8-3GZL].

281. *See* Dealbook, *supra* note 68.

Comcast, where it would be combined with television network NBC to form NBCUniversal.[282] Columbia Pictures would be purchased by Sony in 1989.[283]

The studios thus "survive[d]—as production plants, as distribution companies, as familiar trademarks," but the economic structure of "Hollywood's classical age" had undoubtedly come to an end.[284]

C. *The Decrees Since* Paramount

The Decrees have not remained static bars against vertical integration for their entire seventy-year lifespan. Roughly fifteen years after the *Paramount* decision, the decrees received their first modifications on behalf of the newly-formed exhibition firms made up of theaters "formerly affiliated with the five integrated distributor defendants."[285] By 1963, Stanley Warner Pictures and National General Corporation, respective successors to Warner Bros. and Twentieth Century-Fox's exhibition holdings, gained temporary permission to enter the production and distribution markets.[286] By 1974, the remaining exhibition successors would be allowed to bypass the court approval process outlined in the Decrees.[287]

In the early 1980s, the court expanded its permissive stance and began drawing down the restrictions on the studio defendants, having addressed "approximately five hundred acquisition hearings" arising from the exhibition market for "over six hundred theatres throughout the United States" by 1980.[288] Prior to the 1980s, exceptions to the studios were granted on an exceptionally narrow basis.[289] The 1980s, however, saw a "laissez-faire attitude" to antitrust enforcement develop within the DOJ, culminating in an "explosion of purchasing in 1985" while the *Paramount* Decrees "were allowed to sit idle

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282. *See* WU, *supra* note 1, at 235.
283. Geraldine Fabrikant, *Deal Is Expected for Sony to Buy Columbia Pictures*, N.Y. TIMES (Sept. 26, 1989), https://www.nytimes.com/1989/09/26/business/deal-is-expected-for-sony-to-buy-columbia-pictures.html [https://perma.cc/W2L8-9XJK].
284. SCHATZ, *supra* note 70, at 481.
285. *See* United States v. Paramount Pictures, Inc., 1974–2 Trade Cas. (CCH) ¶ 75,378 (S.D.N.Y. 1974) (permitting the circuits to "acquire and operate theatres which are newly constructed by or for them without showing to the satisfaction of the Court and the Court finding that the acquisition will not unduly restrain competition as heretofore required").
286. *See* United States v. Loew's Inc., 1969 Trade Cas. (CCH) ¶ 72,767 (S.D.N.Y. 1969).
287. *See Paramount Pictures*., 1974–2 Trade Cas. (CCH) ¶ 75,378.
288. United States v. Paramount Pictures, Inc., 1980–2 Trade Cas. (CCH) 63,553 (S.D.N.Y. 1980).
289. *See* United States v. Loew's Inc., 1972 Trade Cas. (CCH) 74,017 (S.D.N.Y. 1972) (permitting Columbia Pictures, who had not owned theaters previously, limited permission to purchase theaters for a specific programming run predicated on using the physical theaters); *see also* Michael Conant, *The Paramount Decrees Reconsidered*, 44 LAW & CONTEMP. PROBS. 97 (1981).

and unenforced."[290] Loew's would receive some reprieve in 1980 to return to motion picture production and distribution, with continued restrictions on self-distributing.[291] In 1981, Columbia Pictures took the previously unthinkable step of purchasing a 48 percent interest in the Walter Reade theater chain, tempting—but ultimately evading—DOJ scrutiny.[292]

Instead of cracking down on this exhibition market activity, the DOJ initiated its first formal reconsideration of the *Paramount* Decrees. The Assistant Attorney General William Baxter considered all consent decrees over 10 years old, and evaluated whether they were "out of date, anticompetitive, or based on theories out of favor with the Reagan Administration."[293] Within a year, the Justice Department announced that it had determined that the decrees had "outlived their usefulness," and would no longer be enforced.[294]

The DOJ's position represented a general realignment of priorities in antitrust law commentary that would reverberate throughout courts for the next two decades. The DOJ had become increasingly hostile to the "wrongheaded, fuzzy, unworkable, protectionist, and perverse" nature of restrictive antitrust doctrine, but pursued nonenforcement over revision.[295] Updates to the vertical merger guidelines prompted both an explosion in mergers[296] and a swift response from Congress, which requested—to no avail—that the Justice Department withdraw provisions it found "inconsistent with the congressional purpose in adopting antitrust laws."[297] The belief that antitrust law's foundational principle of increasing "consumer welfare" could be achieved through increasing *either* producer or consumer welfare was gaining widespread acceptance.[298]

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290. Fox, *supra* note 103, at 524.
291. *See* Conant, *supra* note 289, at 95.
292. *See* Fox, *supra* note 103, at 526.
293. *Id.* (quoting *Antitrust Division Begins Review of Old, Discredited Consent Decrees*, ANTITRUST & TRADE REG. REP. (BNA), No. 1032, at A-16 (Sept. 24, 1981)).
294. Andrew L. Yarrow, *The Studios' Move on Theaters*, N.Y. TIMES (Dec. 25, 1987), https://www.nytimes.com/1987/12/25/business/the-studios-move-on-theaters.html [https://perma.cc/6V6Q-8EQQ].
295. *See* Eleanor M. Fox & Lawrence A. Sullivan, *Antitrust—Retrospective and Prospective: Where Are We Coming From? Where Are We Going?*, 62 N.Y.U. L. REV. 936, 941–42, 944–45 (1987).
296. Merger activity increased from 3001 mergers in 1986 to 3487 mergers in 1988. *See* Fox, *supra* note 103, at 521.
297. John J. Flynn, *The "Is" and "Ought" of Vertical Restraints After* Monsanto Co. v. Spray-Rite Service Corp., 71 CORNELL L. REV. 1095, 1147 (1986). The Justice Department would also file an amicus brief in *Monsanto* encouraging the Supreme Court to overturn per se illegality of resale price maintenance and apply rule of reason. *See* Brief for the United States as Amicus Curiae in Support of Petitioner, Monsanto Co. v. Spray Rite Serv. Corp., 465 U.S. 752 (1984) (No. 82-914).
298. ROBERT H. BORK, THE ANTITRUST PARADOX 90–106 (1978); *see also* Fox, *supra* note 103, at 524 n.146; *supra* note 53 and accompanying text.

Studios took advantage of this new permissiveness, engaging in a series of mergers and acquisitions that ultimately led the DOJ to announce its willingness to support any studio's challenge to provisions of the decrees.[299] This period showed studios that they no longer needed to have "fear of instigating a new round of legal battles with the Justice Department" each time they sought to maneuver around the Decrees' limitations.[300]

However, the industry shifted less drastically than expected and the kind of massacre of the exhibition market feared by *Paramount* purists never came to pass. Despite the DOJ's willingness to support private action against the Decrees, the DOJ found that "the studios were not interested enough to push for changes in court on their own," and the DOJ was not itself "prepared to expend resources to terminate the decrees" unilaterally.[301] Perhaps surprisingly, "the studios never got back into the theater business in a serious way—probably because they didn't see any need to rock the boat as long as they kept growing."[302] Simpler than navigating the snares of the Decrees, studios focused

299. Fox, *supra* note 103, at 527; *see also* De Vany, *supra* note 21, at 174; Michael E. DeBow, *Judicial Regulation of Industry: An Analysis of Antitrust Consent Decrees*, 1987 U. Chi. Legal F. 353, 363 (1987). In 1983, Columbia Pictures teamed with television network CBS, Inc., and premium cable network Home Box Office (HBO) on a joint venture to create a new film studio, TriStar Pictures, combining the resources of a production firm and two exhibitors. *See* Judi Hasson, *HBO, CBS, Columbia May Become New Movie Giant*, United Press Int'l (Sept. 14, 1983), https://www.upi.com/Archives/1983/09/14/HBO-CBS-Columbia-may-become-new-movie-giant/3059432360000 [https://perma.cc/WHG6-XP3M]. Subsequently, in 1986, TriStar purchased Loew's theatrical exhibition assets and received temporary injunctive relief based on the newly acquired firm's *Paramount* Decree obligations. *See* Fox, *supra* note 103, at 527; United States v. Loew's Inc., 1980–1981 Trade Cas. (CCH) 63,662 (S.D.N.Y. 1980); *see also* Loew's Decree, *supra* note 19. Warner Bros. would follow suit in 1986, receiving total relief from its Decree in order to reenter the exhibition business through a new subsidiary, despite reluctance by the District Court to completely remove the Decree's limitations. *Compare* United States v. Loew's Inc., 882 F.2d 29, 39 (2d Cir. 1989) (granting total relief), *with* United States v. Loew's Inc., 705 F. Supp. 878 (S.D.N.Y. 1988) (providing limited relief but obliging the distribution and exhibition dealings to be done at arm's length). The relief provided to Warner Bros. was "free, through its interest in Cinamerica, to add to its exhibition holdings in the future," but the consent judgment "[was] not affected in any other respect." *Loew's Inc.*, 882 F.2d at 34.

300. Fox, *supra* note 103, at 526. Notably, while the DOJ became less concerned with the confluence of the production and distribution markets with the exhibition market, states responded with statutory fixes to safeguard certain provisional elements of the Decrees. *See* Aljean Harmetz, *Film Studios Buying Up Theaters in Major Cities*, N.Y. Times (Oct. 23, 1986), https://www.nytimes.com/1986/10/23/arts/film-studios-buying-up-theaters-in-major-cities.html [https://perma.cc/RZ8F-MJYG].

301. Al Delugach, *Justice Won't Oppose Theater Ban on Studios: Antitrust Chief Says Industry Isn't Interested in Seeking Change in Court*, L.A. Times (Feb. 7, 1985, 12:00 AM), https://www.latimes.com/archives/la-xpm-1985-02-07-fi-5402-story.html [https://perma.cc/X4FY-H49A].

302. Peter Caranicas, *Do Studios Want Back into the Theater?*, Variety (June 12, 2010,

on maintaining the upward trajectory of home entertainment revenue, which rose rapidly in the 1980s.[303] While there may be benefits to gaining "[c]ontrol of the theatrical window," such as hedging against the unpredictability of subsequent window revenues, it seems that, for the most part, the studios have accepted that traditional theatrical "[e]xhibition is not [their] business" and would subject them to an entirely new business segment they are not prepared to manage.[304] Indeed, today's fully vertically integrated entertainment firms are mostly moderately sized independent companies without the scope and scale of the major studios.[305] Over time, the studios—now increasingly managed as intellectual property portfolios[306]—have accepted that they are in "the movie business," not "the retail business."[307] Instead, the modern theatrical exhibition business has itself consolidated, with large circuits merging to create a two-tier market of commercial theaters and specialty independents.[308]

IV. Reconsideration of the Decrees

Given the history and development of the *Paramount* Decrees and the industry they regulate, it seems unclear whether any purpose remains for retaining them at all. The studios have already had the option to return to the exhibition market—reversing the most consequential result of the original *Paramount* case—and have seemingly rejected the opportunity. Nonetheless, until a court grants the DOJ's motion to terminate them, the Decrees create actual limitations on the original defendants and an existential threat against similar actions by nondefendant firms.

5:00 AM), https://variety.com/2010/film/features/do-studios-want-back-into-the-theater-1118020549 [https://perma.cc/L28N-47BR].

303. *Id.*

304. *Id.*

305. *See* 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/#3fe2e2e26219 [https://perma.cc/4M8W-VAP2]; James Emanuel Shapiro, *Disney, Warner, Universal, Et Al to Own Theaters Again?*, Birth. Movies. Death. (Aug. 3, 2018), https://birthmoviesdeath.com/2018/08/03/disney-warner-universal-et-al-to-own-theaters-again [https://perma.cc/GU2W-TJUP].

306. *See* Wu, *supra* note 1, at 227–32.

307. Jess Bravin, *New Owner Hopes to Revitalize Famous Mann Theater Chain*, Wall Street J. (July 8, 1998, 12:01 AM), https://www.wsj.com/articles/SB899833780894197000 [https://perma.cc/7RC9-VVEP].

308. Ashley Rodriguez, *Small Theater Chains Worry a Mid-Century Rule Is All That Stands Between Them and Extinction*, Quartz (Dec. 16, 2018), https://qz.com/1479408/small-theater-chains-worry-a-mid-century-rule-is-all-that-stands-between-them-and-extinction [https://perma.cc/84MS-S3K6]; *see also 2018 THEME Report*, Motion Picture Assoc. of Am. (2018), https://www.mpaa.org/wp-content/uploads/2019/03/MPAA-THEME-Report-2018.pdf [https://perma.cc/VQ6U-YXK7].

Based on its August 2, 2018, announcement to review "nearly 1,300 legacy antitrust judgments," including the *Paramount* Decrees,[309] the DOJ's articulated standard would be "whether they still serve the American public and are still effective in protecting competition in the motion picture industry."[310] Hinting at an eye for modifying the decrees in some fashion, the DOJ noted the "considerable change" that the film industry has undergone: the rise of multiplex theaters, increased competition in the largest markets, and, of course, the lack of distributor control over the exhibition market—specifying the rise of "cable and broadcast television, DVDs, and . . . streaming services."[311] Industry commentators were quick to join the DOJ in opining on the reduced market power of the studios and the extent to which "horizontal arrangements between competitors or vertical arrangements between companies and their partners are more likely to be upheld today."[312] Few claimed, however, that the move would be particularly procompetitive.

Public comments, on the other hand, explicitly condemned the move. The majority of responses came from independent theater chains, who stated that independent theaters would lose the ability "to manage [their] showings, prices, and runs independently and without undue influence by studios and distributers."[313] Exhibition industry trade organizations, such as the United Drive-In Theatre Owners Association (UDITOA) and the National Association of Theatre Owners (NATO), echoed such sentiments, concluding that independent theaters have "the best understanding of what the local demographic can sustain" and would be willing to pay to see.[314] Notably, the NATO comment focused almost exclusively on block booking, claiming restrictions on the tying arrangement "are *more necessary* than ever."[315] The Writers Guild of America, West, an entity actively seeking antitrust enforcement in various sectors of the

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309. *See* Press Release, Dep't of Justice, Department of Justice Opens Review of Paramount Consent Decrees (Aug. 2, 2018), https://www.justice.gov/opa/pr/department-justice-opens-review-paramount-consent-decrees [https://perma.cc/4MFL-KTVB].

310. *Id.*

311. *Id.*

312. Gardner, *supra* note 24.

313. Letter to Bow Tie Cinemas (Oct. 3, 2018) (discussing the Paramount Consent Decrees), https://www.justice.gov/atr/page/file/1102346/download [https://perma.cc/27P6-Z3UR].

314. United Drive-In Theatre Owners Assoc., Comment to *Letter on Review of the Paramount Consent Decrees* (Oct. 3, 2018), https://www.justice.gov/atr/page/file/1102766/download [https://perma.cc/Y556-ABBL].

315. Nat'l Assoc. of Theatre Owners, Comment to *Letter on Review of the Paramount Consent Decrees* (Oct. 1, 2018), https://www.justice.gov/atr/page/file/1102536/download [https://perma.cc/ZE34-R4G4]. The comment discusses how a "shift to global blockbusters incentivizes major studios to make fewer movies while demanding longer runs on more screens;" how "the modern multiplex requires ensured variety of content;" and how block booking would allow the large distributors to "leav[e] little room for the independent and smaller distributors," as well as "stifle exhibitors' nascent attempts to offer innovative pricing incentives." *Id.* at 3, 6, 19.

entertainment industry, commented that "[market] changes have not eradicated the market power of major players, who retain significant control over what writers can get paid to write and what audiences can see in theaters."[316]

In 1985, under a similarly deregulatory environment, the DOJ encouraged studios to pursue changes to the Decrees and the studios essentially declined.[317] Likewise, outcries from independent exhibitors during that reconsideration period focused on vertical integration and how "loss of the decrees could jeopardize their continued existence," while also "hurt[ing] movie-goers."[318] What they claimed, in some ways, came to pass, yet not at the hands of the surviving *Paramount* defendants. Instead, the modern exhibition market is characterized by "market domination by the circuits,"[319] while, even with the Decrees in place, "the distribution arm of the film industry has become increasingly concentrated in several major companies."[320]

The market has since shifted. Of the surviving studios, only Twentieth-Century Fox, Warner Bros., and the MGM/United Artists consortium are still restricted from owning theaters, while Paramount Pictures, Universal Studios, and Columbia Pictures are otherwise required to follow the Decrees' picture-by-picture licensing procedures. All of the defendants remain subject to the limitations on contracting outlined by the Supreme Court and codified in the Decrees. But theatrical exhibition is no longer the focal point of distribution, and crossover of internet-based streaming companies with brick-and-mortar cinemas[321] amplifies the fact that the distribution market of today is investing in an exhibition market of tomorrow.[322] While first-movers and

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316. Writers Guild of Am., West, Comment to *Letter on Review of the Paramount Consent Decrees* (Oct. 4, 2018), https://www.justice.gov/atr/page/file/1102781/download [https://perma.cc/5AXV-FUS8].
317. Leslie Maitland Werner, *U.S. to Rule on Lifting Movie Antitrust Decrees*, N.Y. TIMES (Feb. 4, 1985), https://www.nytimes.com/1985/02/04/business/us-to-rule-on-lifting-movie-antitrust-decrees.html [https://perma.cc/5EHF-JQXD]; *see also infra* Subpart III.C.
318. *Id.*
319. Fox, *supra* note 103, at 529.
320. Mary Elizabeth Kilgannon, Note, *Motion Picture Licensing Acts: An Analysis of the Constitutionality of Their Provisions*, 51 FORDHAM L. REV. 293, 293 (1982).
321. Chris Lee, *Wait, Why Does Netflix Want to Buy a Movie Theater?*, VULTURE (April 9, 2019), https://www.vulture.com/2019/04/why-does-netflix-want-to-buy-a-movie-theater.html [https://perma.cc/SWH3-4BMN].
322. Lisa Richwine, *Cinema Vs. Streaming: The Battle over When and Where You Can See Movies*, REUTERS (April 10, 2019, 3:05 AM), https://www.reuters.com/article/us-film-theaters/cinema-vs-streaming-the-battle-over-when-and-where-you-can-see-movies-idUSKCN1RM13V [https://perma.cc/R53P-FTAM]; Ashley Rodriguez, *The Internet Is Finally Going to Be Bigger Than TV Worldwide*, QUARTZ (June 12, 2018), https://qz.com/1303375/internet-usage-will-finally-surpass-tv-in-2019-zenith-predicts [https://perma.cc/869Q-P84N]; James K. Wilcox, *Guide to Streaming Video Services*, CONSUMER REPS. (Mar. 9, 2020), https://www.consumerreports.org/streaming-media-devices/guide-to-subscription-streaming-video-services [https://perma.cc/436E-GJAN].

technology conglomerates dominate the streaming platform space,[323] new competitors from across the traditional media spectrum have announced their own streaming services, ranging from CBS television network's CBS All Access to IFC Films Unlimited from the specialty film distributor IFC.[324]

In the coming years, physical and digital exhibition will increasingly amalgamate into fungible alternatives for consumers.[325] Even traditional theatrical exhibitors, the purported beneficiaries of the Decrees, are taking steps to enter digital exhibition through online rentals of recent releases.[326] Thus, as the playing field shifts, the analytical question remains the same: "whether a District Court judge should regulate an industry through very old consent decrees, or whether an industry should be regulated by antitrust law."[327] To properly evaluate this, the DOJ and the District Court would do well to review the fundamental concerns supporting the Decrees, the drastic evolution of the market definitions underlying the Supreme Court's findings in *Paramount*, and the foundational reconsideration of interbrand competition fostered by antitrust jurisprudence following the Decrees' enactment.

A. *Revisiting the* Paramount *Concerns*

The *Paramount* Court condemned discrete contracting terms, but its overarching concern was how such "interdependent" terms achieved "the aim

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323. Manish Singh, *Global Video Streaming Market Is Largely Controlled by the Usual Suspects*, VentureBeat (Mar. 30, 2019, 6:56 PM), https://venturebeat.com/2019/03/30/global-video-streaming-market-is-largely-controlled-by-the-usual-suspects [https://perma.cc/GX7D-LVGJ]; *see also* Vince Tabora, *The Golden Age of Streaming TV*, Medium (Feb. 2, 2019), https://medium.com/datadriveninvestor/the-golden-age-of-streaming-tv-612a4bbd23b8 [https://perma.cc/37WV-VUQK].

324. Michael Nordine, *IFC Films Announces New Streaming Service IFC Films Unlimited*, IndieWire (May 16, 2019, 4:35 PM), https://www.indiewire.com/2019/05/ifc-films-unlimited-streaming-service-cannes-1202142085 [https://perma.cc/UA95-ZRKG].

325. While streaming is eating into cable and network television audiences, *see, e.g.*, Laura Nichols, *Young Cord-Cutters Concerned About Costs but Willing to Pay for Streaming*, Morning Consult (Aug. 21, 2017, 5:22 PM), https://morningconsult.com/2017/08/21/young-cord-cutters-cost-concerns-still-willing-pay-streaming [https://perma.cc/TAH2-LFBG], theaters have generally been successful at differentiating themselves from the home-viewing experience and content options; *see also* Andrew Arnold, *Convenience Vs. Experience: Millennials Love Streaming but Aren't Ready to Dump Cinema Just Yet*, Forbes (Oct. 26, 2017, 4:17 AM), https://www.forbes.com/sites/andrewarnold/2017/10/26/millennials-love-streaming-but-arent-ready-to-dump-cinema-just-yet/#622c2fb36311 [https://perma.cc/UN7H-HN7K] (noting that this should not distract from the reality that even the studios themselves are investing heavily in streaming options).

326. Chris Lindahl, *AMC Theaters Now Offers VOD Rentals Once Movies Leave its Screens, Plus Free Popcorn*, Indiewire (Oct. 15, 2019, 8:45 PM), https://www.indiewire.com/2019/10/amc-rental-purchase-movies-platform-on-demand-1202181880 [https://perma.cc/GJR9-XNXA].

327. Werner, *supra* note 317.

of the conspiracy . . . to strengthen [the studios'] hold on the exhibition field."[328] The "vertically integrated structure of the industry, with the complexity, scope and diversity of its practices," was viewed as a product of a "conspiracy to monopolize the industry" as a whole.[329] The Court would go on to apply a type of precursor to modern joint monopoly theory,[330] finding the parallel conduct of the studios and theater circuits provided sufficient evidence of an agreement or, seeing as "they fell short of monopoly,"[331] an attempted monopoly.[332]

Whether the Decrees should be rescinded or revised depends upon whether such changes are "likely unreasonably to restrain competition in either the motion picture distribution or exhibition industries."[333] As such, it is necessary to evaluate whether there remains a risk of monopolization restrained by the Decrees. Monopolization requires both a market power element and an anticompetitive conduct element.[334] Below, this Article evaluates the now-expanded definition of the market that makes the narrow interpretation of the at-risk market in *Paramount* irrelevant today, and the changing lens of antitrust law when considering the riskiest conduct dispelled by the Decrees: tying agreements known as "block booking."

B. *Market Definition Expansion*

Shortly after *Paramount* was decided, television burst onto the competitive landscape and quickly usurped movie theaters as consumers' preferred method of consuming entertainment product.[335] The later advent of home video made the notion of separate theatrical runs obsolete[336] and modern streaming platforms similarly swallowed the home video market, allowing distributors to profit directly off their back-catalogues of intellectual property through licensing models and over-the-top purchases without the added costs of remarketing a full-fledged theatrical run. Production of original content has

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328. United States v. Paramount Pictures, Inc., 334 U.S. 131, 170–71 (1948).
329. De Vany, *supra* note 21, at 143.
330. *See, e.g.*, United States v. American Airlines, Inc., 743 F.2d 1114, 1117–18 (5th Cir. 1984) (discussing "joint monopolization").
331. *Paramount*, 334 U.S. at 171.
332. *See* Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456 (1993) (discussing "attempted monopolization").
333. U.S. v. Loew's Inc., 882 F.2d 29, 33 (1989).
334. United States v. Grinnell Corp., 384 U.S. 563, 570–71 (1966) (noting that monopolization "has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.").
335. "By 1950, American consumers had spent more than one billion dollars on television sets. That figure more than doubled in 1951 . . . hook[ing] enough people to keep move attendance in its postwar decline." Berg, *supra* note 267, at 460.
336. *See* Ulin, *supra* note 23, at 163–64; *see generally* Suzanne M. Donahue, American Film Distribution: The Changing Marketplace (1987).

boomed in an "arms race" for audience share.[337] With consumers having more options than ever before to access, buy, rent, and stream content, it is difficult to imagine today a submarket similar to the *Paramount* Court's first-run theatrical market that could justify a finding of monopoly power by any single producer or distributor.

Underlying the Decrees, the *Paramount* Court relied solely on the concentrated power of the Big Eight in the first-run feature film market to find antitrust violations.[338] Using this narrow market definition, the Court successfully found substantial market power, which it then used to graft anticompetitive intent onto the industry as a whole and give the DOJ license to aggressively realign privately-developed industry mechanisms. When viewed in the context of today's competing production content, distribution methods and exhibition platforms, market power—that is, the ability to raise or control prices and eliminate or control competition[339]—is much harder to plausibly achieve. Increased consumption options, both in volume of product formats (e.g. theatrical feature films, short films, half-hour television shows, hour-long television shows, streaming service feature and midlength films, YouTube and other shortform or amateur productions) and methods of consumption (e.g. theatrical viewing, laptop viewing, smartphone viewing), indicate that holding all else equal, cross-elasticity of product demand from the studios and similarly-situated firms will only increase over time.[340] In particular, with the market now providing entirely free alternatives via web-based video streaming platforms like YouTube, excessive costs in feature film production and distribution have sharply diminishing returns. Subscription models substitute single-ticket feature films for single-fee portfolios of entertainment products. The per-product cost, then, has dropped precipitously, leaving both consumers and competitors to the surviving *Paramount* defendants in their strongest position since the early days of the film industry.

With the successful conglomeratization of the original *Paramount* defendants, market power ostensibly appears even more concentrated than when

337. Michael Grothaus, *Netflix Has Started an "Arms Race" for Original Content*, Fast Company (Mar. 3, 2016), https://www.fastcompany.com/3057425/netflix-has-started-an-arms-race-for-original-content [https://perma.cc/W8PR-73P3].

338. United States v. Paramount Pictures, Inc., 334 U.S. 131, 167–68 (1948).

339. Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 481 (1992) (citing United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 391 (1956)).

340. Determining whether a firm has market power to reach a potential Sherman Act violation depends on whether, in the relevant market, there is "availability of alternative commodities for buyers: i.e., whether there is a cross-elasticity of demand between" the product market at issue and appropriate alternatives, as determined through "the purchase of competing products for similar uses considering the price, characteristics and adaptability of the competing commodities." *Du Pont*, 351 U.S. at 380–81. This is a fact-centric evaluation that can be undertaken by the DOJ (or District Court), akin to defining the market and subsequent market power in any traditional merger analysis.

the Big Eight ruled the industry in the 1940s. Public comments accompanying the DOJ's announcement referenced the Walt Disney Company's theatrical feature film production and distribution operations numerous times as the looming existential threat held back by the existence of the Decrees.[341] The popularity of Disney's films[342] reportedly grants the studio substantial leverage in negotiations with theatrical exhibitors, allowing the studio to demand a 15 percent to 20 percent premium from ticket sales and to impose additional contractual limitations that dissuade smaller theaters from carrying Disney features at all.[343] With its recent acquisition of former *Paramount* defendant Twentieth-Century Fox, Disney is likely to both substantially increase its leverage in negotiations with theatrical exhibitors and seek future relief from Fox's restrictions tied to the *Paramount* Decrees.[344] Even more recently, Disney's launch of its own streaming service, Disney+, seems aimed at leveraging its vice grip on franchised content into a similarly dominant position in the broader digital exhibition market.[345]

Despite this apparent handwringing, "[a]lthough market share is a key indicator of market power, market share alone will not necessarily dictate the legality of a vertical restraint."[346] Instead, under modern antitrust analyses, "[s]trong price competition in a market tends to show that market share and vertical restraints may not have an adverse impact on interbrand competition,"

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341. Rodriguez, *supra* note 308 (noting that some public comments described ways in which Disney, among other major studios, functionally control ticket prices, in spite of the existence of the Decrees). That the Walt Disney Company is not a signatory to the Decrees appears less important than the omnipresence of industry norms and practices embodied by the Decrees.

342. Ticket sales for Disney films in 2019 are more than double the next-highest studio, making it the clear and dominant market leader. As of May 23, 2019, Disney's Buena Vista held a 34.2 percent market share over Warner Bros.'s 15.8 percent share, and three of top six-performing feature films. *Box Office by Studio: Studio Market Share*, Box Office Mojo (last visited May 24, 2019), https://www.boxofficemojo.com/studio [https://perma.cc/NH3-9CGR]; *Yearly Box Office: 2019 Domestic Grosses*, Box Office Mojo (last visited May 24, 2019), https://www.boxofficemojo.com/yearly/chart/?yr=2019&p=.htm [https://perma.cc/PAV9-2GT9].

343. *See* Erich Schwartzel, *Disney Lays Down the Law for Theaters on 'Star Wars: The Last Jedi'*, Wall Street J. (Nov. 1, 2017), https://www.wsj.com/articles/disney-lays-down-the-law-for-theaters-on-star-wars-the-last-jedi-1509528603 [https://perma.cc/4GWW-7JKZ]. Larger circuits purportedly receive favorable treatment. *See* Rodriguez, *supra* note 308.

344. Brooks Barnes, *Disney Moves from Behemoth to Colossus with Closing of Fox Deal*, N.Y. Times (Mar. 20, 2019), https://www.nytimes.com/2019/03/20/business/media/walt-disney-21st-century-fox-deal.html [https://perma.cc/Q6UM-KVGV].

345. Chris Gates & Rick Marshall, *Disney+: Everything You Need to Know About Disney's Streaming Service*, Digital Trends (Feb. 5, 2020), https://www.digitaltrends.com/business/disney-plus-streaming-service-news [https://perma.cc/ZC35-362D].

346. Theodore L. Banks, Distribution Law: Antitrust Principles and Practice 4–71 (2d ed. 1995).

and studios integrated through the distribution and exhibition markets can nonetheless provide procompetitive efficiency benefits that ultimately increase consumer welfare through price competition with other such studios.[347]

Even before attempting to dissect these efficiencies, however, the exhibition market definition of today is starkly different—and substantially broader—than the exceedingly narrow approach taken by the *Paramount* Court. While theaters are still relevant to studios' release schedules, they no longer hold the same central role in profitability as they once did.[348] Furthermore, the DOJ has not yet seen fit to treat nontheatrical exhibition platforms as falling under the *Paramount* Decrees' limitations. As such, it is difficult to interpret *Paramount*, with its narrow market definition, as sufficiently accurate to successfully benefit consumer welfare going forward and convincingly manage the pro- and anticompetitive balancing necessary when undertaking antitrust scrutiny.

C. *Tying Agreements and Interbrand Competition*

While the *Paramount* Court expressed concerns that the studios were using vertical integration to stamp out interbrand competition from outside of the "Big Eight" consortium, the remedial focus was actually to force intrabrand competition and thereby decouple the studios' purported horizontal conspiracy. Although all of the condemned provisions contributed to this purported cooperation, none was more reviled, or overt, than the tying agreements known as block booking.[349] "Each studio-owned theater implicitly block booked its studio's entire production," since the very reason studios owned theaters "was to ensure they would book all of its films season after season."[350] Indeed, "[v]ertical integration was the ultimate form of block booking."[351] By seeking an open bidding system[352] and eventually a complete divorcement of the exhibition market from the vertically integrated studios, the judiciary sought "[a] release pattern that permitted more theaters to show a feature simultaneously."[353] Because feature films, at the time, "faced contemporaneous competition from other features in a given run and intertemporal competition from itself between phases of its first and later runs," the courts believed

347. *Id.* Interbrand competition has been defined as "competition among manufacturers selling different brands of the same type of product." Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 890 (2007).

348. Brent Lang, *The Reckoning: Why the Movie Business Is in Big Trouble*, VARIETY (Mar. 27, 2017, 8:00 AM), https://variety.com/2017/film/features/movie-business-changing-consumer-demand-studios-exhibitors-1202016699 [https://perma.cc/5DG2-CXWW].

349. *See infra* Subpart III.A.1.e.

350. DE VANY, *supra* note 21, at 163.

351. *Id.*

352. *See* United States v. Paramount Pictures, Inc., 66 F. Supp. 323, 353 (S.D.N.Y. 1946), *supra* note 232. *See also infra* Subpart III.A.1.f.

353. DE VANY, *supra* note 21, at 169.

any remedy had to "increase contemporaneous competition among exhibitors of the same feature," while reducing "contemporaneous competition among different features."[354] Put another way, the courts injected intrabrand competition into the exhibition market in order to achieve its ultimate goal of introducing interbrand competition in the distribution market and breaking up the oligopoly.

This view was further reinforced by the Supreme Court's evaluation of what made vertical integration contravene the Sherman Act. Its two-alternative test, "the purpose or intent with which [the vertical integration] was conceived," or "the power [the vertical integration] creates and the attendant purpose or intent," is a much more rigid version of the "plus factors" approach taken to evaluating oligopolistic practices today.[355] The *Paramount* Court flagged the size of the firm as an "earmark of monopoly power," as well as past violations, market structure and market leverage—each contributing to the studios' purpose or intent.[356]

The "plus factor" harms articulated by the *Paramount* Court are similarly reflected in vertical tying agreements. While tying agreements can provide for quality control, efficiencies of scale, efficiencies of scope, and value-added benefits of complementary goods, they also serve to evade price controls, deter entry, and leverage monopolies into greater strengths in other unrelated markets.[357] Though the block booking evaluation was only one aspect of the Court's opinion, the Court clearly believed that suspension of tying agreements would be necessary (though not sufficient) to end the anticompetitive conduct foreclosing market share to competitors.

It has become clear in recent decades, however, that the Court's priorities on antitrust doctrines have changed, and tying agreements similar to those utilized in block booking are no longer considered outright anticompetitive. For example, while resale price maintenance was treated as evidence of conspiracy to monopolize in *Paramount*, it is considered today a reasonable tool of commerce.[358] Similarly, tying agreements are recognized as having significant procompetitive benefits and are therefore subject to a form of per se legality.[359]

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354. *Id.*

355. *See* United States v. Paramount Pictures, Inc., 334 U.S. 131, 174 (1948) (citing United States v. Reading Co., 253 U.S. 26, 57 (1920)); Richard A. Posner, *Oligopoly and the Antitrust Laws: A Suggested Approach*, 21 Stan. L. Rev. 1562, 1579–86 (1986).

356. Interestingly, modern antitrust analysis appears to reject "leverage" arguments as standalone theories of harm. *See* Four Corners Nephrology Assocs., P.C. v. Mercy Med. Ctr. of Durango, 582 F.3d 1216, 1222 (10th Cir. 2009).

357. *See, e.g.*, United States v. Griffith, 334 U.S. 100, 105 (1948). *See also* Scott Makar, *In Defense of Franchisors: The Law and Economics of Franchise Quality Assurance Mechanisms*, 33 Vill. L. Rev. 721, 745 (1988).

358. Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 889–90 (2007).

359. Einer Elhauge, *Rehabilitating Jefferson Parish: Why Ties Without a Sustainable Foreclosure Share Should Not Be Per Se Legal*, 80 Antitrust L.J. 463, 463 (2016).

Under the "quasi per se" rule articulated in *Jefferson Parish Hospital v. Hyde*, tying agreements today are evaluated under a form of rule of reason analysis: to fall outside of per se legality, the seller must be selling separate products,[360] have market power in the "tying" market,[361] and preclude a substantial volume of sales commerce in the "tied" market.[362] These elements attempt to confine the scope of government intervention to the root concerns of tying agreement doctrine: "extraction and price discrimination effects that significantly harm consumer welfare."[363] In practical terms, the majority sought to curtail a seller's ability to "force" a buyer into an unnecessary secondary purchase, thus suffocating actual market competition for the secondary good.[364]

While the *Jefferson Parish* majority stated in dicta that procompetitive justifications—such as functional links between the products, service improvement, or goodwill—were not relevant to the legality of the tying agreement, Justice Sandra Day O'Connor's concurrence argued in favor of full rule of reason treatment for each of these elements.[365] Indeed, the quasi per se rule is increasingly interpreted as tracing O'Connor's rule of reason approach, "allow[ing] defendants to prove procompetitive justifications that would indicate that a given tie produced a net increase in consumer welfare."[366]

In a modern competitive environment of per se vertical agreement legality, "the quasi-per se rule on tying is the one rule on vertical agreements that the Supreme Court reaffirmed during the modern age of antitrust economics."[367] It is possible, then, to reframe the *Paramount* Court's holding against the studios as embodying a strict application of the majority in *Jefferson Parish*: the studios' market power in the tying market (exhibition) forced buyers in the tied market (distribution) to purchase studio products it may not have otherwise wanted to buy.

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360. Separability is based on an independent demand test—a consumer-centric, factual analysis, reflecting on the traits of the market. Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 21–22 (1984).
361. *See id.* at 16 (identifying the tying market power as a "force" element driving sales in the tied market).
362. *Id.* at 17; *see also*, Elhauge, *supra* note 359, at 502.
363. Elhauge, *supra* note 359, at 514.
364. Justice Stevens expressed his concern over the coerciveness of a tying agreement clearly and convincingly:

> Our cases have concluded that the essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms. When such "forcing" is present, competition on the merits in the market for the tied item is restrained and the Sherman Act is violated.

Jefferson Parish, 466 U.S. at 12.
365. *Id.* at 33 (O'Connor, J., concurring in the judgment).
366. Elhauge, *supra* note 359, at 494.
367. *Id.* at 464.

But other developments in the Court's antitrust jurisprudence indicate that this holding is fundamentally inconsistent with the modern view of tying agreements in the evolving entertainment distribution and exhibition markets. When viewed in the present context, the *Paramount* Decrees appear to be relics of a retired analytical framework, and their existence, instead of serving the interests of consumers, undercuts the *Paramount* defendants' abilities to compete with modern entertainment entities and ultimately harms competition.

1. *Loew's*, *Illinois Tool Works* and *Bentley*

In 1962, the Supreme Court was forced to take its first steps towards reconciling the *Paramount* Decrees with the changing media landscape. While *Paramount*'s exhibition market consisted solely of physical theaters with individual screens showing individual feature films, the subsequent proliferation of television created new revenue streams for the *Paramount* defendants who could sell films in their back catalogs to television networks.[368] In *United States v. Loew's*, *Inc.*,[369] six separate antitrust suits filed in the Southern District of New York were consolidated to evaluate whether block booking limitations would apply to sales of pre-1948 feature films to television networks and, impliedly, whether these limitations would apply to nonsignatories.[370]

Echoing the *Paramount* Court, the *Loew's* Court reiterated that tying allows the tied, lower-quality films to "borrow[] quality from the [tying film] and strengthen[] its monopoly by drawing on the other."[371] The Court explicitly rejected the defendants' claim that the *Paramount* restrictions do not apply to the sale of "feature films to exhibitors in a new medium—television."[372] The Court held that "[a] copyrighted feature film does not lose its legal or economic uniqueness because it is shown on a television rather than a movie screen," and as the District Court noted, each film "varied in theme, in artistic performance, in stars, in audience appeal, etc., and [is] not fungible."[373] Thus, "mere presence of competing substitutes for the tying product" in the form of "other programming material" was "insufficient to destroy the legal, and indeed economic, distinctiveness of the copyrighted product," or alleviate the

368. *See infra* Subpart III.B.2.
369. United States v. Loew's, Inc., 371 U.S. 38, 40 (1962).
370. *Id.* The Court explicitly recognized that "there was keen competition between the defendant distributors," focusing the case solely "on the individual behavior of each in engaging in block booking." *Id.* at 41.
371. *Id.* at 47.
372. *Id.* at 47–48. The defendants claimed that, in the television medium, the feature films at the heart of *Paramount* accounted for less than 8 percent of television programming and were "'reasonably interchangeable' with other types of programming material." *Id.* at 47.
373. *Id.* at 48 (internal citations omitted). This implied, in the Court's view, a lack of cross-elasticity of demand between different entertainment products. *See also* Grothaus, *supra* note 337.

suppression of competition caused by denying purchasing television stations "access to films marketed by other distributors who, in turn, were foreclosed from selling to the stations."[374]

The Court explained that *Paramount* was a "*particularized application of the general doctrine*" of tying agreements involving copyrighted products, and proclaimed that "[e]nforced block booking of films is a vice in both the motion picture and television industries,"[375] regardless of the overall economic value at issue. The Court went on to overtly modify the Decrees, requiring that distributors provide individual prices for block sales upon request, limit price differentials between the packaged and individual features, and prohibit temporary refusals to deal outside of competitive circumstances.[376] *Paramount*'s intrabrand focus would remain the law of the entertainment landscape.

Key to the *Loew's* holding was antitrust law's hostility to tying agreements at the time. The Court had held that "[t]ying agreements serve hardly any purpose beyond the suppression of competition,"[377] by "forc[ing] buyers into giving up the purchase of substitutes for the tied product"[378] and "destroy[ing] the free access of competing suppliers of the tied product to the consuming market."[379] Citing *Paramount*, the Court stated that such market dominance "is *presumed* when the tying product is patented or copyrighted."[380]

This presumption has since been explicitly upended. In *Illinois Tool Works, Inc. v. Independent Ink, Inc.*,[381] the Court held that "the mere fact that a tying product is patented does not support" a "presumption of market power" in that product,[382] since Congress had amended the Patent Act to eliminate such market power presumption in patent misuse doctrine.[383] Furthermore, the Court explicitly crowned the quasirule of reason developed in *Jefferson Parish* as the proper evaluative tool for tying agreements,[384] noting that historically anticompetitive behaviors including price discrimination may "also occur[] in fully competitive markets."[385]

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374. *Loew's*, 371 U.S. at 49.
375. *Id.* at 50 (emphasis added).
376. *Id.* at 53–56. Limiting price differentials encroaches on price discrimination, another element of antitrust concern outside the scope of this Article.
377. *Id.* at 44 (citing Standard Oil Co. of Cal. v. United States, 337 U.S. 293, 305–06 (1949)).
378. *Id.* at 45 (citing Times-Picayune Pub. Co. v. United States, 345 U.S. 594, 605 (1953)). Such language previewed Justice Stevens's articulated concern over the "forced" purchasing undermining competition in *Jefferson Parish*. *See also supra* note 361 and accompanying text *infra* Subpart IV.C.
379. *Loew's*, 371 U.S. at 45 (citing Int'l Salt Co. v. United States, 332 U.S. 392, 396 (1947)).
380. *Id.* (citing United States v. Paramount Pictures, Inc., 334 U.S. 131, 131 (1948)) (emphasis added).
381. Ill. Tool Works, Inc. v. Indep. Ink, Inc., 547 U.S. 28 (2006).
382. *Id.* at 31.
383. 35 U.S.C. § 271(d).
384. *Ill. Tool*, 547 U.S. at 42.
385. *Id.* at 44–45.

The *Illinois Tool Works* Court distinguished *Paramount*, however, and necessarily so, as the *Paramount* Court relied heavily on less stringent proof of market power to make its heavy-handed determination. *Paramount*, it noted, still withstood this new level of scrutiny because it dealt with "unlawful" arrangements that were "the product of a true monopoly or a marketwide conspiracy."[386] Without such a presentation, a finding of unlawful tying arrangements "must be supported by proof of power in the relevant market rather than by a mere presumption thereof."[387]

However, it is difficult to discern the *Illinois Tool Works* Court's holding from *Paramount* based solely on its ethereally determined, factually unsupported distinction. According to the *Paramount* Court, the tying agreements at issue were the most blatant of the contractual practices that allowed the Court to determine that, on the whole, a conspiracy to monopolize the distribution and exhibition markets existed. Furthermore, the *Paramount* Court's monopolization description aligns neatly with the concerns of the majority in *Jefferson Parish*, explicating how the studios' market power in exhibition had led to the preclusion of competition that extended beyond exhibition and into the distribution market. By contrast, *Illinois Tool Works* (and its abrogation of the *Lowe's* Court's assumptions) suggests that tying agreements need to be reviewed under a rule of reason analysis, as articulated in Justice O'Connor's *Jefferson Parish* concurrence. Such an approach, however, would undermine the *Paramount* Court's use of this network-of-contracts structure to imply a monopolization conspiracy, making the *Illinois Tool Works* Court's characterization of *Paramount* circular: a tying agreement that invokes a conspiracy to monopolize cannot only be illegal in the context of such a conspiracy. The lasting impact of *Paramount*, then, is to serve as little more than a presumptive admonition of vertical integration, separate and apart from modern antitrust doctrine's treatment of tying agreements, and a precedential advocate of intrabrand competition.

This disparity between *Paramount* and modern tying agreement precedent is best illustrated by the Ninth Circuit's holding in *Brantley v. NBC Universal, Inc.*[388] In what reads as a modern version of block booking, the *Brantley* plaintiffs "s[ought] to compel programmers and distributors of television programming to sell each cable channel separately, thereby permitting plaintiffs to purchase only those channels that they wish to purchase, rather than paying for multi-channel

386. *Id.* at 42–43. Instinctively, the Court's logic reads somewhat inconsistently here; if a conspiracy is derived from the combined assortment of multiple anticompetitive actions, it seems difficult to require a conspiracy in order to make such actions individually anticompetitive.

387. *Id.* In reaching this holding, the Court relied heavily on "the vast majority of academic literature on the subject." *Id.* at 43 n.4.

388. Brantley v. NBC Universal, Inc., 675 F.3d 1192 (9th Cir. 2012), *cert. denied*, 568 U.S. 998 (2012).

packages."[389] Unlike the three-market film industry structure detailed in *Paramount*, the *Brantley* court describes the television market as consisting solely of an upstream "programmer" market and a downstream distribution market, which involves cable providers, satellite providers, and telephone companies selling directly to consumers.[390] The programmer market involves both the production and acquisition of television shows, which are then sold wholesale to the distributors.[391] The distributors, by selling directly to consumers through their own content delivery methods, functionally inhabit a parallel exhibition market—effectively collapsing *Paramount*'s "distribution" and "exhibition" markets into a single market definition. The programmers have full or partial ownership "of multiple important cable channels" and "a broadcast channel," providing it with substantial market power, whose bundling "impair[s] competition among Distributors for consumer business," leading to programmer and distributor violations of Section 1 of the Sherman Act.[392]

In an opinion denied certiorari by the Supreme Court, the Ninth Circuit held that the practice of forced bundling of television channels by programmers and distributors for consumer purchase did not amount to an antitrust injury, a necessary element of a Section 1 complaint.[393] More specifically, the court explained that the plaintiffs failed to "allege facts that if taken as true would allow them to recover for 'an injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful.'"[394] The plaintiffs needed to "plead an injury to competition beyond the impact on the plaintiffs themselves," first by identifying a "contract, combination or conspiracy that has an anticompetitive effect."[395]

Unlike horizontal agreements, the court explained, "agreements between firms operating at different levels of a given product market (referred to as 'vertical agreements')"—even those that "foreclose competitors from entering or competing in a market"—may not sufficiently threaten an injury to competition and, as such are, "in varying forms, . . . widely used in our free market economy" with "substantial scholarly and judicial authority supporting their economic utility."[396] In some cases, however, vertical agreements can injure competition, either by sufficiently foreclosing competitors or by facilitating

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389. *Id.* at 1195.
390. *Id.* at 1195 n.3.
391. *Id.* at 1195.
392. *Id.* at 1195–96.
393. *Id.* at 1204. The pleading standard for the elements of an antitrust claim must either "state a claim to relief that is plausible on its face," or "raise a reasonable expectation that discovery will reveal evidence" of the injury to competition. *See* Bell Atl. Corp. v. Twombly, 550 U.S. 554, 556, 570 (2007).
394. *Brantley*, 675 F.3d at 1200 (quoting Atl. Richfield Co, v. USA Petroleum Co., 495 U.S. 328, 334 (1990)).
395. *Id.* at 1198.
396. *Id.* (citing Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 54–57 (1977)).

horizontal collusion.[397] The overarching approach to vertical restraints were that, "[w]hile such restraints limit intrabrand competition, they may increase interbrand competition, such as by 'induc[ing] retailers to engage in promotional activities or to provide service[s] that 'might not be provided by retailers in a purely competitive situation.'"[398] Regarding tying agreements, the court distinguished between those that are generally impermissible—that "attempt[] 'to impose restraint on competition in the market for a tied product' (which may threaten an injury to competition)"—and those that are generally permissible, which "'merely enhanc[e] the price of the tying product' (which does not [threaten an injury to competition])."[399] The Ninth Circuit listed four circumstances in which an injury to competition "flow[s] from tying arrangements:" when selling of the high-demand tying product with the low-demand tied product "excludes other sellers of low-demand [tied products] from the market;" when the practice "raises barriers to entry in the programming market" creating foreclosure of competitors; when the arrangement "causes consumers to forego the purchase of substitutes for the tied product;" and when the arrangement "facilitate[s] horizontal collusion."[400] Notably, however, "market conditions may be such that a specific tying arrangement does not have anticompetitive effects."[401] Limiting distribution market competition, reducing consumer choice, and increasing prices are were considered insufficient to "allege an injury to competition for purposes of stating a Section 1 claim."[402]

The *Brantley* court's logic appears directly adverse to the principles articulated in *Paramount* and extended by *Loew's*. The injury described in *Paramount* was based on an amalgamation of contractual provisions allowing the defendants to exclude competitors from the market by raising various barriers to entry—most explicitly, limiting access to screens through tactics like block booking.[403] Furthermore, as the *Loew's* Court explained, forcing television buyers to take unwanted films functionally "denied [the buyers] access to films marketed by other distributors," creating a foreclosure of competition proportional

397. *Id.* (citing Leegin Leather Prods., Inc., v. PSKS, Inc., 551 U.S. 887, 893 (2007)).
398. *Id.* at 1200 (citing *Continental*, 433 U.S. at 55).
399. *Id.* at 1199 (citing Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 14 (1984)).
400. *Id.* at 1201.
401. *Id.* at 1199. For example, "[w]here there is no competition in the tied market, there can be no antitrust violation." Blough v. Holland Realty, Inc., 574 F.3d 1084, 1090 (9th Cir. 2009) (citing *Jefferson Parish*, 466 U.S. at 16). Similarly, the Fifth Circuit held that the Dallas Cowboys, having a lawful monopoly in the market for preseason tickets, did not adversely affect competition by selling those tickets in a tying arrangement. Driskill v. Dallas Cowboys Football Club, Inc., 498 F.2d 321, 323 (5th Cir. 1974).
402. *Brantley*, 675 F.3d at 1201. "[R]educing consumers' choices or increasing prices to consumers does not sufficiently allege an injury to competition. Both effects are fully consistent with a free, competitive market," and are not "unlawful absent a showing of actual anticompetitive effect." *Id.* at 1202 (citing *Leegin*, 551 U.S. at 895–97; *Continental*, 433 U.S. at 55).
403. *See* United States v. Paramount Pictures, Inc., 334 U.S. 131, 166–67 (1948).

to the forced purchase.[404] That the activities took place in the television exhibition market as opposed to the film exhibition market was irrelevant—the actions and their impact were sufficient to require antitrust enforcement.[405]

The *Brantley* court, however, held that the plaintiffs had not sufficiently alleged a sufficiently similar injury; the consumers at issue were not required to "*forego* the purchase of other low-demand channels,"[406] as had occurred in *Loew's*. Furthermore, an arrangement "[*c*]*ompelling* the purchase of unwanted products," without more, was deemed "not itself an injury to competition."[407] Unlike the *Loew's* Court, which viewed a compelled purchase as the functional equivalent of preclusion of alternative purchasing options, the *Brantley* Court embraced modern economic practices and rejected the broad reach of *Paramount*.

Finally, in a claim reminiscent of the *Paramount* Court's conspiracy holding and its statement that "acquiescence in an illegal scheme is as much a violation of the Sherman Act as the creation and promotion of one,"[408] the *Brantley* plaintiffs claimed that "because most or all Programmers and Distributors engage in the challenged practice, [the Ninth Circuit] should hold that in the aggregate, the practice constitutes an injury to competition."[409] Despite the *Paramount* Court's emphasis that collective activity provided sufficient grounds for a conspiracy and, ultimately, monopolization charge, the *Brantley* court determined that the failure to allege a specific satisfactory harm to competition prevented the court from considering how "a widely applied practice" can "harm[] consumers"[410] sufficiently to mark an antitrust injury. This conclusion arose despite not only *Paramount*'s use of collective evidence to discern an industry-wide conspiracy,[411] but also in spite of *Illinois Tool Works*'s *Paramount* recharacterization that, with sufficient evidence of an illicit marketwide practice, individual activities can be deemed anticompetitive without detailed evidentiary support.[412]

The *Brantley* Court did not necessarily misapply the quasi-per se rule by which tying agreements are evaluated. While it clearly stepped back from the *Jefferson Parish* majority's "force" concerns, it simply followed the rule of

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404. United States v. Loew's, Inc., 371 U.S. 38, 49 (1962).

405. "Enforced block booking of films is a vice in both the motion picture and the television industries, and that the sin is more serious (in dollar amount) in one more than the other does not expiate the guilt for either." *Id.* at 50.

406. *Brantley*, 675 F.3d at 1203 (emphasis added).

407. *Id.* (emphasis added).

408. *Paramount*, 334 U.S. at 161; *see* Paramount Brief, *supra* note 15, at 25–26.

409. *Brantley*, 675 F.3d at 1203.

410. *Id.* Appropriate allegations would have included, for example, bundling inhibiting programmers' production of competitor channels, diminishing of distributors' cost or quality competition, or preclusion of competitors offering their channels individually. *Id.*

411. *But see* De Vany, *supra* note 21, at 139–41 (describing how "[t]he organization of the industry and the nature of its controversial licensing arrangements . . . are competitive solutions to the information and incentive problems that plague the industry.").

412. Ill. Tool Works, Inc. v. Indep. Ink, Inc., 547 U.S. 28, 42–43 (2006).

reason trend endorsed by Justice O'Connor's *Jefferson Parish* concurrence and embraced in *Illinois Tool Works*. The court simply concluded that the plaintiffs failed to allege the proper foreclosure element, resulting in per se legality.[413]

Nonetheless, the case's treatment of *Loew's* and *Paramount* leaves a gap in legal logic that ultimately undercuts any present or future reliance on the *Paramount* Court's holding. It is no longer clear, from either a doctrinal or practical perspective, how *Paramount* remains good law and yet fails to apply evenly to reasonably identical activities in different media. The departure from *Paramount* seems predicated on courts' evolving understanding of interbrand and intrabrand competition. While *Brantley* insists that vertical arrangements, "even when their 'intent and competitive impact' is to 'limit[] the freedom of the retailer to dispose of the purchased products as he desire[s]' are often pro-competitive,"[414] it simultaneously ignores *Loew's* explication that "block book[ing] contracts are covered by the flat holding in *Paramount Pictures* that 'a refusal to license one or more copyrights unless another copyright is accepted' is 'illegal.'"[415] It further dismisses *Illinois Tool Works*'s reclamation of *Paramount* as an illustration of a "marketwide conspiracy" sufficient to overcome needed poof of market power.[416] It thus fails to reach the key question lurking behind the disparate treatment of traditionally distributed feature films and those distributed through television, cable, or alternative means:[417] whether antitrust for new media simply plays by different rules and, if so, whether such an approach is truly procompetitive.

2. The Contested Status of the *Paramount* Holding

Given the foregoing doctrinal evolution since *Paramount*, it would appear that traditional feature film producers and distributors are at a severe disadvantage in their struggle to respond to new media competitors. While *Paramount* remains in existence to prevent traditional film studios from engaging in vertical integration into exhibition in the name of encouraging intrabrand competition, the rest of antitrust law—including those doctrines applying to those film studios' competitors in television, cable, and streaming—allows, or even encourages, vertical integration in the name of interbrand competition.

Based on this dichotomy, it would seem that *Paramount* rests on shaky ground. The case that controls vertical integration of traditional film production,

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413. *See* Elhauge, *supra* note 359, at 509.

414. *Brantley*, 675 F.3d at 1200 (quoting Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 54–55 (1977)).

415. United States v. Loew's, 371 U.S. 38, 50 (1962) (quoting United States v. Paramount Pictures, Inc., 334 U.S. 131, 159 (1948)).

416. *Ill. Tool*, 547 U.S. at 42–43.

417. Notably, there does not seem to be grounds to reconsider whether the Court's statement that "[a] copyrighted feature film does not lose its legal or economic uniqueness because it is shown on a television rather than a movie screen," *Loew's*, 371 U.S. at 48, was overturned as a result of *Illinois Tool Works*'s market power holding.

distribution, and exhibition markets has been progressively downgraded from a clear condemnation of specific anticompetitive behaviors to a special circumstance in which the same behaviors may be found anticompetitive based on broader, idiosyncratic market circumstances.[418] If the tying agreements themselves are no longer considered presumptively anticompetitive and the narrow market definition that had applied at the time would no longer apply, it should follow that today's dynamic entertainment media marketplace no longer needs the Decrees to push intrabrand remedies at the expense of encouraging proper interbrand competition. Instead, the DOJ must admit that these Decrees no longer appear to protect the kind of competition antitrust doctrine seeks to further and should therefore be terminated or appropriately modified. Accordingly, the DOJ seems to have agreed.[419]

V. The Future of the *Paramount* Decrees

With a dynamically transformed market definition and market practices increasingly giving the benefit of the procompetitive doubt, the sinister and collusive market condemned by *Paramount* appears to be a shadow of entertainment's distant past. Whereas the first-run theatrical exhibition market had once been the "cream" of the feature film industry, it is now one of many alternatives for exhibition firms to reach consumers. Upstream firms have evolved in response, with the distribution market expanding and contracting with independent firms and streaming companies, and lower-cost technology maintaining diversity and entry in the production market. Further upstream, creative input markets are dominated by increasingly diversified talent agencies and powerful unions, whose own activities stretch throughout the three traditional film industry markets.

The world inhabited by the *Paramount* Decrees is over. In order to both modernize the industry's regulatory regime and liberalize the studios to compete with increasingly powerful technology firms, the *Paramount* Decrees must be modified to embrace procompetitive principles and focus more specifically on anticompetitive realities.

A. *Rescinding or Modifying the Decrees*

To modify or rescind an antitrust consent decree, the party subject to the decree "with consent of all concerned" can petition the court with "a clear showing of grievous wrong evoked by new and unforeseen conditions."[420] Alternatively, "it may *not* be changed in the interests of the defendants if the purposes of the litigation as incorporated in the decree (the elimination of monopoly and

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418. *Compare id.* at 50, *with Ill. Tool*, 547 U.S. at 42–43.
419. *See* Press Release, Dep't of Justice, Department of Justice Files Motion to Terminate Paramount Consent Decrees (Nov. 22, 2019), https://www.justice.gov/opa/pr/department-justice-files-motion-terminate-paramount-consent-decrees [https://perma.cc/2GC3-VZYU].
420. United States v. Swift & Co., 286 U.S. 106, 119 (1932).

restrictive practices) have not been fully achieved."[421] For the *Paramount* defendants, however, this purpose is closely tied to the "standard set forth in Part VI(B) of the consent decree and in Section 7 of the Clayton Act," which requires a showing that the alteration or exception "is likely unreasonably to restrain competition in either the motion picture distribution or exhibition industries."[422]

More recently, however, the standard for modification of antitrust consent decrees has been lowered in the Second Circuit. While, "[i]n most cases, the antitrust defendant should be prepared to demonstrate that the basic purposes of the consent decrees—the elimination of monopoly and unduly restrictive practices—have been achieved,"[423] circumstances may arise wherein "modification or termination of a consent decree is appropriate even though the purpose has not been achieved," such as when there are "significant changes in the factual or legal climate."[424]

Based on the analysis above,[425] it appears that this standard has been met. Factual and legal circumstances have evolved extensively, resulting in a set of Decrees whose purpose—the prevention of anticompetitive foreclosure in the distribution and theatrical exhibition industries—has been seemingly satisfied by the natural progression of supply and demand.[426] Rescission, then, would seem the simplest and most straightforward answer to the perplexing persistence of the Decrees and appears to be the path the DOJ is pursuing.[427]

However, even if expulsion from the exhibition market is no longer a particular concern for film studios, risks remain over the contractual provisions outlawed by the Decrees that threaten to undercut independent exhibitors.[428]

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421. United States v. United Shoe Mach. Corp., 391 U.S. 244, 248 (1968).

422. United States v. Loew's Inc., 882 F.2d 29, 33 (2d Cir. 1989). The Court draws this conclusion on top of "the court's power to relax the provisions of its decrees in light of changing circumstances," and specifies that the concern is whether any chance "is [likely] to increase barriers to entry into the exhibition business or reduce competition by (1) foreclosing competing exhibitors from access to features; (2) foreclosing [the requesting defendant's] competitors from access to theatres; or (3) limiting entry and presence in the distribution and exhibition markets to integrated concerns." *Id.*

423. United States v. Eastman Kodak, Co., 63 F.3d 95, 101 (1995) (citing *United Shoe*, 391 U.S. at 248).

424. *Id.* at 102 (citing Rufo v. Inmates of Suffolk Cty. Jail, 502 U.S. 367, 383 (1992)). The standard in *Rufo* specifies that "[m]odification of a consent decree may be warranted when changed factual conditions make compliance with the decree substantially more onerous . . . when a decree proves unworkable because of unforeseen obstacles . . . or when enforcement of the decree without modification would be detrimental to the public interest." *Rufo*, 502 U.S. at 384–85 (internal citations omitted).

425. *See infra* Subparts B–C.

426. *See* Frank H. Easterbrook, *The Limits of Antitrust*, 63 Tex. L. Rev. 1, 39–40 (1984).

427. *See* Ted Johnson, *The Justice Department Files Motion to Terminate Paramount Consent Decrees*, Deadline (Nov. 22, 2019, 2:24 PM), https://deadline.com/2019/11/justice-department-paramount-consent-decrees-2-1202793402 [https://perma.cc/EP86-NUTQ].

428. *See* NATO, Comment to *Letter on Review of the Paramount Consent Decrees*, *supra* note 315.

There may be no need to preserve the Decrees solely for these purposes; "even if the Justice Department decides to rip up the Paramount Consent Decrees, it can't overrule the Supreme Court. Block-booking, overbroad clearances, and other banned practices like setting minimum prices on movie tickets might invite lawsuits."[429] Furthermore, "as times change, once-restricted practices that might have been perceived as an illegal restraint of trade in one era may be given a fresh look as pro-competitive in a different era."[430] Such could be concluded today, wherein the content portfolios that make up cable bundling and streaming services are permitted to reach consumers under tying agreements, without charges of anticompetitive block booking.

Rather than rescind or reinterpret the Decrees,[431] the courts should pursue judicial modification to reflect competitive realities while staying true to both the purpose of *Paramount* and the judicial purview over antitrust remedies.[432] In its most recent description of *Paramount*, the Supreme Court described the case as an instance in which market consolidation and coercive tactics resulted from "a true monopoly or a marketwide conspiracy."[433] Thus, the vitality of the Court's holdings and the reflective Decrees should be reviewed in light of the understanding that *Paramount*'s policies are meant to undermine broad, overarching attempts to "restrain competition" in the distribution and exhibition industries.

1. The Ban on Exhibition Entry Should Be Lifted

First, the ban on film studio entry into the exhibition market should be rescinded in its entirety. When the District Court enacted the divestiture of the studios' exhibition assets, it noted that, based on the extent of the defendants' conspiracy, there was a high risk that the "monopoly power might be built up again" if they retained market power in exhibition, because "the temptation to continue such practices [would]be strong, and [it could not] regard an injunction as a sufficient preventive."[434] Since then, developments in the industry have continued to erode the studios' market power. The domestic box office share among the six major film studios from 1995 to 2018 shows non-*Paramount* defendant Walt Disney Studios, combined with its newly acquired Fox assets, holding an unchecked 27.79 percent, followed by Warner Bros. with

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429. Gardner, *supra* note 24.
430. *Id.*
431. Reinterpretation occurs when administrative agencies are permitted to have their own evolving understanding and interpretation of the decree accepted by courts, without changing its terms. *See, e.g.*, Phillip G. Oldham, *Regulatory Consent Decrees: An Argument for Deference to Agency Interpretation*, 62 U. Chi. L. Rev. 393, 418–19.
432. "[T]he power of a court to modify or terminate a consent decree is, at bottom, guided by equitable considerations." United States v. Eastman Kodak, Co., 63 F.3d 95, 101 (1995) (explaining that Fed. R. Civ. P. 60(b)(5), Relief for a Judgement or Order, "makes no exception for antitrust decrees").
433. Ill. Tool Works, Inc. v. Indep. Ink, Inc., 547 U.S. 28, 42–43 (2006).
434. United States v. Paramount Pictures, 85 F. Supp. 881, 896 (S.D.N.Y. 1949).

15.12 percent, Sony/Columbia Pictures with 12.10 percent, Universal Pictures with 11.45 percent, and Paramount Pictures with 10.69 percent.[435] However, while the domestic box office grossed approximately $11.3 billion in 2019,[436] streaming platforms brought in approximately $24.248 billion.[437] There, market demand for original content presents a different picture: in 2018, Netflix lead with a dominant 68 percent market share, followed by Amazon Prime Video at 10 percent, Hulu with 9 percent, CBS All Access with 5 percent, DC Universe with 1 percent and "others" with 7 percent.[438] With the DOJ encouraging these markets to compete more directly,[439] it must recognize that the new paradigm of exhibition embraces a broader market definition than the *Paramount* Court's brick-and-mortar theaters and, concomitantly, new potential risks.[440]

Together, traditional and new media exhibition platforms dilute any interpretable market power of the studios and suggests that, beyond the distinctly

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435. Felix Richter, *Disney-Fox Deal to Shake Up the Movie Industry*, STATISTA (July 4, 2018), https://www.statista.com/chart/12307/market-share-of-major-film-studios [https://perma.cc/9XAU-5PXH].

436. *Domestic Yearly Box Office*, BOX OFFICE MOJO, https://www.boxofficemojo.com/year/ytd/?interval=cumulative_december [https://perma.cc/MVM4-PTYA].

437. *Video Streaming (SVoD)*, STATISTA, https://www.statista.com/outlook/206/100/video-streaming-svod-/worldwide [https://perma.cc/CN5P-REXW].

438. Parrot Analytics, *The Global Television Demand Report 2018* 1, 15 (2019), https://www.rbr.com/wp-content/uploads/Parrot-Analytics-The-Global-TV-Demand-Report-2018.pdf [https://perma.cc/C8MK-UTFA]. Market shares will shift with the continuing entry of new competitors, but the overall distinction will likely remain the same for some time given firstmover advantages.

439. In March 2019, the Department of Justice notified the Academy of Motion Picture Arts and Sciences that any decision to refuse Netflix consideration for the prestigious, and economically favorable, Academy Awards would be pursued as a violation of Section 1 of the Sherman Act. Scott Feinberg & Eriq Gardner, *Justice Department Backs Netflix in Oscars Feud—But Is There Really an Antitrust Issue?*, HOLLYWOOD REP. (Apr. 2, 2019, 3:11 PM) https://www.hollywoodreporter.com/thr-esq/justice-department-backs-netflix-oscars-feud-but-is-an-antitrust-issue-1199000 [https://perma.cc/U2Y6-VL8Y].

440. *See* United States v. Loew's Inc., 882 F.2d 29, 33–34 (2d Cir. 1989).

> [T]he changed nature of the motion picture exhibition industry has made [market] foreclosure highly improbable. The growth of the motion picture aftermarkets of videocassettes, network, syndicated and cable television, and the development of national television advertising, have changed the business realities of the industry so that movie producers and distributors have every incentive to disseminate their products as quickly, and as widely, as possible. Many more exhibitors exhibit on many more screens than was the case when the consent judgments were entered into . . . . The uncontroverted evidence . . . is that Warner's motive . . . is to enable it to compete with distributors not subject to the decretal restrictions, a legitimate business purpose that offends neither the Warner Consent Judgment nor Section 7.

Id.

different factual and legal scenarios of modern competitors,[441] the goals of theater divorcement and divestiture have been achieved.[442]

2. Block Booking Should be Reasonably Permitted

Based on the recent decision in *Brantley* and its seeming parallel to streaming platforms—which sell immediate access to their entire bundle of programs for a single subscription fee—it would seem that the tying agreements of studios' competitors are treated more leniently than those of the studios themselves. While sales to theatrical exhibitors is arguably a unique paradigm from sales to alternative cable or streaming platforms (for example, employing large numbers of individuals or providing a unique service to consumers), it is not clear how that differentiation is relevant in light of modern treatment of an activity once deemed "a sin" in "both the motion picture and television industries," regardless whether one appears "more serious (in dollar amount)" than the other.[443] Holding the same activity illegal in some exhibition platforms but not others, without a procompetitive justification consistent with the Court's recent emphasis on interbrand competition, would seem to "make compliance with the decree substantially more onerous," inconsistent and "unworkable because of unforeseen obstacles," and ultimately "detrimental to the public interest."[444]

Alternatively, the court should reconsider the legality of practices like bundling, sanctioned in *Brantley*. What amounts to block booking in an alternative medium, these bundling "agreements" exhibit the elements necessary to be deemed anticompetitive under the quasi-per se rule.[445] Netflix, for example, may offer consumers its high-quality dramatic television series or original comedy feature films, but such products may only be purchased alongside the vast array of other, less-desirable streaming programming. The *Brantley* court's finding that no antitrust harm ensued is based on a narrower conception of trying agreements that would seemingly have excluded the original *Paramount* defendants: the tie did not exclude other sellers from the market or cause consumers to forego alternatives any more than bundling prevents modern consumers from affording alternatives.[446] The case for disparate treatment can be made based on the degree to which barriers were raised and the degree to which horizontal collusion was furthered; however, such concerns would still

441. United States v. Eastman Kodak, Co., 63 F.3d 95, 102 (1995) (citing Rufo v. Inmates of Suffolk Cty. Jail, 502 U.S. 367, 383 (1992)).
442. United States v. United Shoe Mach. Corp., 391 U.S. 244, 248 (1968).
443. United States v. Loew's, 371 U.S. 38, 50 (1962).
444. *Rufo*, 502 U.S. at 384–85 (internal citations omitted).
445. *See* Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 15–18 (1984) (establishing a "quasi per se" rule for anticompetitive tying agreements—a single seller of two separate products based on an independent demand test, with market power in the tying market and preclusion of a substantial volume of sales in the tied market).
446. Brantley v. NBC Universal, Inc., 675 F.3d 1192, 1201 (9th Cir. 2012), *cert. denied*, 568 U.S. 998 (2012).

be couched in concerns over intrabrand competition, whereas permitting such vertical arrangements would likely prove procompetitive by facilitating interbrand competition between the studios and streamers themselves.[447]

To maintain the block booking provisions in the *Paramount* Decrees would require a recognition of special conditions in preserving the theatrical exhibition markets. As expressed by the National Association of Theatre Owners in their comment, the preservation of an independent theatrical market may be key in creating consumer welfare by increasing consumer choice from theaters to home entertainment.[448] However, interbrand competition can actually be stimulated by reducing intrabrand competition.[449] The positive benefits proclaimed of independent theaters—including localized marketing or supplementary benefits or conveniences—may be furthered as theaters are forced to compete on service and quality, rather than reliance on selective programming.[450] Thus, permitting such contracting to some extent would not only benefit competition among the studios, but would also bring greater parity between the competing exhibition platforms.

3. The Residual Contractual Limitations Should Remain in Place

Outside of the block booking provisions, it is unclear how rescinding the remaining contracting limitations would benefit competition and would require additional scrutiny. Pooling agreements, joint ownership, formula deals, master agreements, franchises, and the remaining discriminatory provisions are each "likely unreasonably to restrain competition in either the motion picture distribution or exhibition industries,"[451] whether utilized in traditional theatrical markets or newer digital markets. Clearances, for example, are still ripe for abuse; where there are shades of grey, the doctrinal lucidity of the Decrees provides clarity to the extent courts treat various exhibition platforms similarly.[452] Whether such treatment continues in parity remains to be seen.

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447. *Id.* at 1201.

448. NATO, Comment to *Letter on Review of the Paramount Consent Decrees, supra* note 315, at 5–6.

449. *See* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 890 (2007).

450. *Id.* (noting that vertical price restraints can "encourage[] retailers to invest in tangible or intangible services or promotional efforts" and "give consumers more options").

451. United States v. Loew's Inc., 882 F.2d 29, 33 (2d Cir. 1989). The Court draws this conclusion on top of "the court's power to relax the provisions of its decrees in light of changing circumstances," and specifies that the concern is whether any chance "is [likely] to increase barriers to entry into the exhibition business or reduce competition by (1) foreclosing competing exhibitors from access to features; (2) foreclosing [the requesting defendant's] competitors from access to theatres; or (3) limiting entry and presence in the distribution and exhibition markets to integrated concerns." *Id.*

452. *Compare* Cinetopia v. AMC Entm't Holdings, Inc., 2018–2 Trade Cas. (CCH) ¶ 80,626 (D. Kan. Dec. 27, 2018) (illustrating the continuing risks of overbroad clearances) *with* Viva Cinemas Theaters v. AMC Entm't Holdings, Inc., No. 4:15-cv-1015, 2016 WL 6916242, at *1 (S.D. Tex. Aug. 16, 2016) (illustrating uncertainty over whether "submarkets" as

Conclusion

The *Paramount* Decrees are out of date and inconsistent with both modern market definitions and modern treatment of vertical agreements. While industry history preceding the *Paramount* decision explains the necessary role played by antitrust law and the Decrees in opening up the entertainment industry, post-*Paramount* developments reveal that their impact was swift, effective, and conclusive. Substantially modifying the Decrees so as to decrease the regulatory burden on studios and theatrical distributors today would create greater "[p]arity of treatment" among entertainment firms.[453] Despite calls for greater oversight of media companies, the inconsistent treatment of the studios based on seventy-year-old precedent can hardly be considered procompetitive.

Critics of media consolidation have reason to be hesitant, however. Media concentration is accelerating. The fact that nearly all of the original *Paramount* defendants have survived as active content engines this long despite the Decrees should, on its face, give antitrust regulators pause before suggesting the Decrees are entirely relics of the past. Nonetheless, it is difficult to ignore that the media landscape, particularly the exhibition market, has shifted. Whereas physical theaters provided the only means to view feature films in the midtwentieth century, today's consumer has ubiquitous access to content and content platforms. If the courts and antitrust advocates are truly concerned about overcompensating the studios in the name of promoting interbrand competition, perhaps the best response to calls for rescinding the *Paramount* Decrees—and other similarly outdated legacy judgments[454]—is to enforce the holding of the Supreme Court as articulated in the *Paramount* opinion consistently and evenhandedly across media formats, as it nonetheless remains at this time good, procompetitive law.[455]

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addressed in *Paramount* are as viable in today's film market).

453. United States v. Paramount Pictures, Inc., 334 U.S. 131, 172 (1948).

454. Matthew Perlman, *Here We Go Again: DOJ's Latest Music Licensing Review*, Law360 (June 11, 2019, 8:02 PM), https://www.law360.com/articles/1167707/here-we-go-again-doj-s-latest-music-licensing-review [https://perma.cc/8YDD-9UQL].

455. "Times change, but even if the Justice Department decides to rip up the Paramount Consent Decrees, it can't overrule the Supreme Court. Block-booking, overbroad clearances, and other banned practices like setting minimum prices on movie tickets might invite lawsuits." Gardner, *supra* note 24. *See also* FTC v. Motion Picture Advert. Serv. Co., 344 U.S. 392, 394 (1953) ("The 'Unfair methods of competition', which are condemned by . . . the [Sherman] Act, are not confined to those that were illegal at common law or that were condemned by the Sherman Act. Congress advisedly left the concept flexible to be defined with particularity by the myriad of cases from the field of business.") (internal citations omitted). Otherwise, perhaps courts should heed calls for more fundamental changes to interpretation of antitrust law. *See* Lina M. Khan, *Amazon's Antitrust Paradox*, 126 Yale L.J. 710, 737–46 (2017) (advocating an alternative "structural" baseline for evaluating effective anticompetition policies).