University of Miami Business Law Review

Volume 31 | Issue 1 Article 7

January 2023

Now Streaming: How Streaming Services Are Following in the Antitrust Footsteps of Hollywood's Golden Age

Megan Elizabeth Norris
University of Miami School of Law

Now Streaming: How Streaming Services Are Following in the Antitrust Footsteps of Hollywood's Golden Age

Megan Elizabeth Norris[a1]

The entertainment industry is undergoing quite the transformation following the recent termination of the Paramount Consent Decrees, which effectively regulated the industry to prevent monopolization and promote competition for almost a century. The industry now faces a drastic surge in the utilization of streaming services and a new wave of antitrust issues.

"With great power comes great responsibility;" however, the dominant streaming companies in the industry have raised suspicion about emerging anticompetitive concerns. While long overdue, the termination of the Paramount Consent Decrees leaves a gaping hole in antitrust policy regarding the nuanced business practice of streaming platforms. Existing antitrust laws may be insufficient to protect consumers from potential harms as streaming services gain prominent traction in the film and television arenas. Expansion through vertical integration and related business practices echoes antitrust violations from over 70 years ago, when the Paramount Consent Decrees were first implemented. Thus, anticompetitive consideration is "paramount" to prevent history from repeating itself. This Note seeks to compare past violations with present actions, address one of the most dominant legal challenges in the entertainment media industry, and discuss possible solutions to counter this growing concern.

[a1] Juris Doctor Candidate at the University of Miami School of Law, Class of 2023; Editor-in-Chief of the *University of Miami Business Law Review*, Vol. 31. All errors are her own. Special thanks to Professor Christie Anne Daniels for her support in creating this Note.

INTRODUCTION

"Can't repeat the past? Why of course you can!" – The Great Gatsby

While the infamous fictional character, Jay Gatsby, was incorrect about a great many things, he certainly understood the cyclical fate of history. Around 1915, America's entertainment industry[1] commenced an iconic transformation into what is permanently enshrined as the "Golden

[1] This Note will look at the entertainment industry through three distinct lenses: film, television, and streaming.

Age of Hollywood."[2] The industry exploded from an influx of innovative filmmaking with exceptional talent and revolutionary advancement in cinematic technology.[3] Over several decades, a few entertainment studios rose to power and monopolized the industry.[4]

This, along with other anticompetitive business practices, ultimately forced Assistant Attorney General Thurman Arnold and the Department of Justice ("DOJ") to sue them for violating antitrust law.[5] In 1948, the United States Supreme Court reached a decision in the case that led to the implementation of the *Paramount Consent Decrees* ("*Decrees*")[6] The *Decrees* effectively regulated the film industry for 70 years and, coupled with the rise of television, brought an end to the golden years of film.[7] However, those who do not learn from history are bound to repeat it, and despite the history lesson within the film industry, television suffered a similar fate in the 1970's. When major players gained prominence as television entities, the Financial Syndication and Interest ("fin-syn") Rules were briefly implemented to prevent further monopolization.[8]

Although minimal antitrust regulation has since been applied to the entertainment industry, a new era of anticompetitive conduct is on the horizon – *the streaming wars*.[9] This Note examines the growing tension between antitrust regulators and the streaming industry, which has been exacerbated by the COVID-19 Pandemic. It will apply the current framework of U.S. antitrust laws to the business practices of streaming services by comparing previous regulation on earlier eras of the entertainment industry. Like the film and television markets, streaming services have evolved into an oligopoly.[10] This market structure and other troubling business practices pose substantial threats to competition and consumers in the industry.[11] As is evidenced by past monopolies of the entertainment industry, there is an impending need for antitrust regulators to address the growing dominance and anticompetitive actions of major players in the streaming market. Part I of this Note will provide a brief

---

2 *See generally* Audrey W., *The Rise and Fall of Hollywood's Golden Age*, https://www.arcadiapublishing.com/Navigation/Community/Arcadia-and-THP-Blog/June-2019/The-Rise-and-Fall-of-Hollywood%E2%80%99s-Golden-Age.

3 *See id.*

4 *See id.*

5 *See id.*

6 *See* United States v. Paramount Pictures, Inc., 334 U.S. 131, 143 (1948).

7 *See* W., *supra* note 2.

8 *See* Marx, *infra* note 75.

9 This Note utilizes and expands upon the analysis made by Olivia Pakula in *THE STREAMING WARS+: An Analysis of Anticompetitive Business Practices in Streaming Business. See* Pakula, *infra* note 60.

10 *See* Agarwal, *infra* note 78.

11 *See id.*

background of relevant antitrust law and its regulators. Part II will delve into the historically tumultuous relationship between the entertainment industry and antitrust law, citing relevant case law, regulations, and outcomes. Part III will introduce today's dominant streaming market and analyze the developing anticompetitive conduct, both old and new. Finally, Part IV will discuss imperative solutions to address the growing antitrust concerns.

I. BRIEF BACKGROUND OF ANTITRUST LAW

In 1890, Congress passed 15 U.S.C.A.,[12] also known as the Sherman Antitrust Act (the "Sherman Act"), to protect competition for the benefit of consumers and to regulate major companies from monopolizing the market by curbing concentrations of power that reduce economic competition.[13] The Sherman Act is a federal statute prohibiting "business entities from entering into contracts, combinations, or conspiracies that restrain interstate . . . trade."[14] Section 1 of the Sherman Act states that "[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce . . . is declared to be illegal."[15] Section 2 continues, "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce . . . shall be deemed guilty . . . "[16] The purpose of this regulation is to preserve "free and unfettered competition" in a specific market.[17] In addition to the Sherman Act, Congress passed the Federal Trade Commission Act ("FTCA"), which created the Federal Trade

---

12 *See generally* 15 U.S.C.A. (West 2004)*; see also The Antitrust Laws*, FEDERAL TRADE COMMISSION https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws.

13 *See Sherman Antitrust Act,* BRITANNICA, https://www.britannica.com/event/Sherman-Antitrust-Act.

14 *Sherman Antitrust Act (Sherman Act), Practical Law Glossary Item 8-383-6475*, https://1.next.westlaw.com/Document/Ibb0a126eef0511e28578f7ccc38dcbee/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62af00000017d166a1b9d0d4bb558%3Fppcid%3Dce5712d0c7c6409a9f51a147ba42cc8a%26Nav%3DKNOWHOW%26fragmentIdentifier%3DIbb0a126eef0511e28578f7ccc38dcbee%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=79af28c22da8e274fd8506e2e0334ca1&list=KNOWHOW&rank=2&sessionScopeId=93aa1bcde41cec94a3945385f4a4729cd5c6aa037cd7c1c22fc9408800e6ba36&ppcid=ce5712d0c7c6409a9f51a147ba42cc8a&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29.

15 15 U.S.C.A. § 1 (West 2004).

16 15 U.S.C.A. § 2 (West 2004).

17 FEDERAL TRADE COMMISSION, *supra* note 12.

Commission ("FTC"), and the Clayton Act of 1914.[18] These three predominant antitrust laws collectively address unlawful business practices, leaving courts to determine their legality based on the facts of each case.[19]

Both the FTC and the DOJ enforce federal antitrust laws.[20] At times, "the two authorities overlap, however for the most part, their practices complement one another" to determine whether a company's action is in violation of federal antitrust laws.[21] For example, they may monitor *potential conduct that unreasonably restrains* trade or commerce in violation of Section 1 of the Sherman Act or *potential monopolization* of trade or commerce in violation of Section 2 "on their own initiative and at their own discretion."[22] Illegal action includes price fixing, unlawful vertical integration, concerted use of monopoly power, and other unlawful business conduct that might result in anticompetitive effects.[23]

Each form of anticompetitive action is judged differently based on antitrust law. For example, under Section 1 of the Sherman Act, price fixing – adjusting prices at the harm of the consumer – is automatically illegal *per se*,[24] while vertical integration – the accumulation of multiple tiers of a market – is not. However, the latter may become anticompetitive if it substantially reduces competition and harms the consumer by deterring other entrants into the market.[25] For example, vertical integration becomes illegal in the entertainment industry through excessive dominant exhibition, which results from ownership of production, distribution, and exhibition to manipulate sales.[26] The legality of vertical integration under

---

18 The FTCA prohibits "unfair methods of competition" and "unfair or deceptive acts or practices." 15 U.S.C.A. § 45(a)(1) (West 2006). Moreover, the Supreme Court has said that all violations of the Sherman Act also violate the FTCA. *See generally id.* The Clayton Act addresses specific practices that the Sherman Act does not clearly prohibit, such as mergers and acquisitions, unlawful tying contracts, and interlocking directorates. 15 U.S.C.A §§ 12-27 (West 2002).

19 *See* FEDERAL TRADE COMMISSION, *supra* note 12.

20 *See The Enforcers*, FEDERAL TRADE COMMISSION, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/enforcers.

21 *See id.*

22 Robert Houck, et al., *Restraints of Trade and Dominance in the United States: Overview,* Clifford Chance (Feb. 1, 2022).

23 *See Violations of Antitrust Laws*, WE ARE IMPACT LAW, https://www.impactlaw.com/criminal-law/white-collar/antitrust.

24 *Paramount*, 334 U.S. at 143 (citing United States v. Soconoy-Vacuum Oil Co., 310 U.S. 150 (1940)).

25 *See* The Investopedia Team, *What are the legal barriers to vertical integration?,* INVESTOPEDIA, https://www.investopedia.com/ask/answers/012615/what-are-legal-barriers-vertical-integration.asp.

26 In the film industry, an example of illegal vertical integration is "guaranteeing additional sales of films through manipulative booking techniques such as block booking."

the Sherman Act looks at (1) the purpose or intent at conception, and (2) the successive power and the attendant purpose or intent.[27] The size of an operation is demonstrative of monopoly power because it increases the potential for abuse of power.[28] Any combination of excessive market power, vertical integration, and other questionable business conduct may call a company's impact on the relevant market into question under federal antitrust law.[29]

II. RELEVANT HISTORY: ANTITRUST IN THE ENTERTAINMENT INDUSTRY

Media industries have historically clashed with government regulators in the realm of antitrust law.[30] They have a reputation for vulnerability to relevant economic pressures, ranging consumer demands, technological evolutions, and "collusive or monolithic empires."[31] Over time, media empires have risen, fallen, and been replaced due to the high volatility of the relevant market.[32] One example is the sweeping rise of the entertainment industry in the mid-twentieth century when the advancement of film production and motion pictures, literally, stole the spotlight.

A. Paramount Consent Decrees

At the height of America's most glamorous era in entertainment history – Hollywood's Golden Age – the DOJ sought to address the growing economic injustice of the monopolization of the motion picture industry.[33] Hollywood's Golden Age was the era of some of the best moviemaking of all time.[34] It was a time inundated with immense profit, dazzling stars, and brilliant filmmakers.[35] For decades, the major film

---

Bill Daniles, David Leedy, & Steven D. Sills, *Movie Money: Understanding Hollywood's (Creative) Accounting Practices* (2d ed. 2006).

27 *See Paramount*, 334 U.S. at 174.

28 *See id.*

29 *See generally* Daniles, *supra* note 26.

30 *See* Jonathan A. Schwartz, *Bringing Balance to the Antitrust Force: Revising the* Paramount *Decrees for the Modern Motion Picture Market,* 27 UCLA ENT. L. REV. 45, 47 (2020).

31 *Id.*

32 *See id.*

33 *See generally Paramount*, 334 U.S. 131.

34 *See* Erin Blakemore, *How TV Killed Hollywood's Golden Age,* HISTORY (Jan 3, 2018), https://www.history.com/news/how-tv-killed-hollywoods-golden-age#:~:text=Though%20historians%20can't%20agree,popular%20stars%20and%20brilliant%20filmmakers (last updated Sep. 1, 2018).

35 *See id.*

companies, known as "the Big Five and the Little Three"[36] (collectively, the "Big Eight"), successfully monopolized the industry by purchasing swaths of movie theaters across the country, in which they began to exclusively exhibit either their own media output or the productions of other major studios.[37] Ultimately, the Big Eight accumulated control of the three relevant vertical markets – production, distribution, and exhibition – to the detriment of competition and consumer welfare.[38] From an antitrust perspective, this action, when deemed unlawful, demonstrates vertical integration – a major antitrust violation.[39]

Thus, in 1948, the DOJ brought legal action against the Big Eight for anticompetitive behavior in violation of the Sherman Act.[40] In *United States v. Paramount Pictures, Inc.*, the DOJ alleged that the Big Eight "conspired to control the motion picture industry through their ownership of film distribution and exhibition."[41] Specifically, the government was concerned with the business practices of fixed minimum admissions pricing by distributors, unreasonable provisions for clearances, joint theater ownership by distributors and exhibitors, pooling agreements, formula deals, master agreements, block booking, and discrimination between exhibitors.[42]

At trial, the District Court of the United States for the Southern District of New York confirmed that the Big Eight had engaged in "wide-spread conspiracy" for illegally fixing the prices of motion picture films and

---

36 From the early 1920s to the late 1950s, the major film studios that dominated cinema were Paramount Pictures, Inc., Loew's Incorporated (also known as Metro-Goldwyn-Mayer, or "MGM"), Radio-Keith-Orpheum ("RKO"), Twentieth Century-Fox Corporation, and Warner Brothers Pictures (also known as the "Big Five"), as well as United Artists Corporation, Universal Corporation, and Columbia Pictures Corporation (the "Little Three"). Bethany Lee, *The Big Five and The Little Three: The Golden Age of Hollywood (1930-1960)* (Nov. 19, 2018), https://filmstudiesleeb.wordpress.com/2018/11/19/the-big-five-and-the-little-three-the-golden-age-of-hollywood-1930-1960/#:~:text=2018%20by%20filmstudiesleeb-,The%20Big%20Five%20and%20The%20Little%20Three%3A%20The%20Golden,of%20Hollywood%20(1930%2D1960)&text=From%20the%201920s%20%E2%80%93%20early%201950s,century%20Fox%20and%20Warner%20Bros.

37 *See* W., *supra* note 2*; see also* U.S. Dep't of Just. Antitrust Div., *The Paramount Decrees*, https://www.justice.gov/atr/paramount-decree-review; *see also* Schwartz, *supra* note 31, at 64.

38 *See* Schwartz, *supra* note 30, at 67.

39 *See generally Paramount,* 334 U.S. 131. The legality of vertical integration of producing, distributing and exhibiting motion pictures turns on "the purpose of intent with which it was conceived" or "the power it creates and the attendant purpose or intent." *Id.* at 174.

40 *See* Lee, *supra* note 36.

41 U.S. Dep't of Just. Antitrust Div., *supra* note 37.

42 *See generally Paramount,* 334 U.S. 131.

monopolizing the film distribution and movie theater markets.[43] The court acknowledged that, while it found "no monopoly on any phase of the cases," it recognized a clear attempt to monopolize with price-fixing, granting unreasonable clearances, block booking, and other unlawful restraints of trade.[44] The district court refused to grant the DOJ's request for total divestiture by the Big Five on their theater holdings, finding that such action would prove injurious to both the companies and the public.[45] Nevertheless, it enjoined the Big Five from expanding their present theater holdings in any way, along with other prohibitive action.[46]

On appeal, the Supreme Court affirmed the district court's decision, referring to the monopolizing companies as "the formulation of a regime."[47] The Court held that the companies were in violation of both Sections 1 and 2 of the Sherman Act with "conspiracy to monopolize and actual monopolization of the distribution and exhibition markets."[48] The Court ruled, however, that the vertical integration of the three markets – production, distribution, and exhibition – was not illegal *per se*.[49] Vertical integration violates the Sherman Act only if it was a "calculated scheme" for control over an "appreciable segment of the market" that seeks to restrain or suppress competition instead of mere expansion for the purpose of legitimate business needs, or if, "though unexercised . . . provide[s] a power to exclude competition . . . coupled with a purpose or intent to do so."[50] As such, the Court, through a thoroughly reasoned approach, found at least some business practices to be unlawful under both sections of the Sherman Act.[51]

This antitrust ruling on the Big Eight drastically changed the structure of the motion picture industry from that point forward.[52] In support of the *Decrees* mandated by the district court the Supreme Court ordered a separation between film distribution and exhibition by requiring the Big Five to divest either their distribution operations or their theaters.[53] Consequently, motion picture companies were prohibited from both distributing movies and owning theaters without first obtaining court

---

43 U.S. Dep't of Just. Antitrust Div., *supra* note 37.
44 *Paramount,* 334 U.S. at 169.
45 *Id.* at 170.
46 *Id.*
47 *Id.* at 179. *See also* U.S. Dep't of Just. Antitrust Div., *supra* note 37.
48 Schwartz, *supra* note 30, at 69 (referencing the Supreme Court's ruling in *Paramount*). *See Paramount,* 334 U.S. at 178.
49 *See Paramount,* 334 U.S. at 156.
50 *Id.* at 174 (emphasizing that size may reasonably demonstrate monopoly power, since increased size may present an opportunity for abuse of power).
51 *See id.* at 152, 156.
52 *See* U.S. Dep't of Just. Antitrust Div., *supra* note 38.
53 *Id.*

consent.[54] The Supreme Court's *Decrees* also outlawed various motion picture distribution practices, such as block booking, circuit dealing, resale price maintenance, and overboard clearance grants.[55] Each motion picture company signed the *Decrees*, agreeing to: (1) release their exclusionary hold on theaters that only showed their films; (2) terminate the pre-sale of films exclusively; (3) prohibit film companies from showing more than five of their productions in theaters at once; and (4) establish a board to oversee and enforce the *Decrees*.[56]

B. Post-Paramount Consent Decrees

The outcome of *Paramount*, coupled with the growing popularity of television, brought an end to Hollywood's glorious Golden Age and its motion picture empire.[57] The Court's decision effectively ended the classic Hollywood studio system of the 1940's and 1950's, forcing the Big Eight to divest from combined control of production, distribution, and exhibition.[58] In response, the industry wholly revised its infrastructure, which drove several of the Big Eight to lose power, notoriety, and revenue.[59] Moreover, the *Decrees* forced a drastic increase in the production costs of movies, and investing became a widespread issue for the newly competitive market.[60] On a positive note, the *Decrees* removed entry barriers for new competitors, which led to a rise in independent filmmakers and small-scale studios.[61] As a result, the number of independent producers in the industry increased "from virtually none . . . to 100 in 1947."[62]

---

54 *Id.*

55 Block booking is the practice of bundling multiple films into one theater license; circuit dealing refers to one license that covers all theaters in a theater circuit; resale price maintenance is the act of setting minimum prices on movie tickets (like price-fixing); granting overbroad clearances are exclusive film licenses for specific geographic locations. *See id.*

56 *See generally* Lee, *supra* note 36.

57 *See id.*

58 *See* Marueen Lee Lenker, *Why the end of the Paramount decrees is bad for movies and the movie theaters: Opinion*, https://ew.com/movies/judge-ends-paramount-decrees/.

59 *See* Lee, *supra* note 36*; see also* Mike Reyes, *3 Really Important Takeaways From The Paramount Consent Decrees Ruling And How It Could Affect Theaters* (Aug. 7, 2020), https://www.cinemablend.com/news/2552063/3-really-important-takeaways-from-the-paramount-consent-decrees-ruling-and-how-it-could-affect-theaters (stating that the decrees prevented the major studios from performing vertical integration, or holding a significant ownership stake in major theatrical chains).

60 Olivia Pakula, *The Streaming Wars+: An Analysis of Anticompetitive Business Practices in Streaming Business*, 28 UCLA ENT. L. REV. 147, 154 (2021).

61 *Id.*

62 Tyler Riemenschneider, *'Don't Run Up the Stairs!': Why Removing the Paramount Decrees Would be Bad for Hollywood*, 13 OHIO STATE BUS. L. J. 334, 347-48 (2019).

For the past 70 years, courts have applied the *Decrees* to the entertainment industry. During this time, the industry itself has undergone significant change, from economic rectification to technological innovation.[63] New powerhouse names have emerged; others have joined forces with the "big tech" companies that entered the traditional film studios' market shares; and viewing methods have drastically evolved.[64] Just as the invention of the television impacted Hollywood's theatrical distribution of films,[65] nuanced streaming platforms have taken over consumer viewership in an evolutionary cycle of technological metamorphosis. From Video Home System ("VHS") tapes to Digital Versatile Discs ("DVD's"), the modality of viewership has changed substantially since the implementation of the *Decrees*.[66] The latest technological wave of innovation – the emergence of streaming services – has captivated households, particularly during a time of mandatory quarantine and isolation with the COVID-19 Pandemic.[67]

In 2019, the DOJ reviewed the *Decrees* to determine its continued relevancy in consideration of the entertainment industry's transformation through the years.[68] On November 22, 2019, the Antitrust Division of the DOJ filed a motion to terminate the *Decrees*, claiming that they "no longer serve their original remedial purposes and no longer serve to promote or protect competition and innovation."[69] Although 70 years ago the *Decrees* successfully ended the horizontal conspiracy among movie companies and limited vertical integration, they no longer regulate the entertainment industry to the same effect.[70] The *Decrees* continue to govern how film companies conduct business despite the major changes that have occurred since their inception decades ago.[71] In fact, the Division went so far to say

---

63 *See generally* Schwartz, *supra* note 30.

64 *See id.* at 48.

65 *See generally* Lee, *supra* note 36.

66 *See* U.S. Dep't of Just. Antitrust Div., *supra* note 37.

67 *See* Brooks Barnes, *The Streaming Era Has Finally Arrived. Everything Is About to Change*, https://www.nytimes.com/2019/11/18/business/media/streaming-hollywood-revolution.html. While streaming services have challenged Hollywood's status quo for years – i.e., the birth of Netflix in 2007 – the "long-promised streaming revolution" has begun to reach full force with the increased involvement from major companies, such as Apple, NBCUniversal, WarnerMedia, and Disney. *Id.*

68 *See* U.S. Dep't. of Just. Antitrust Div., *Department of Justice Files Motion to Terminate Paramount Consent Decrees*, https://www.justice.gov/opa/pr/department-justice-files-motion-terminate-paramount-consent-decrees.

69 *Id.*

70 *See id.*

71 *See id.* Changes in the film industry include "technological innovations, new movie platforms, new competitors and business models, and shifting consumer demand." *Id.* Moreover, the conspiracy and practices that were in place at the time of the *Decrees* no longer exist. *See* U.S. Dep't. of Just. Antitrust Div., *Federal Court Terminates Paramount*

that the *Decrees'* continued existence might inadvertently harm consumers by preventing innovative business models from reaching their fullest potential for the exhibition of America's film industry.[72]

As such, on August 7, 2020, a federal court for the Southern District of New York terminated the *Decrees* – effective immediately, except for a slow, two-year removal period on the provisions banning block booking and circuit dealing.[73] Now, without the limitations enforced by the *Decrees*, the entertainment industry is free to explore novel business models that might best benefit consumers.[74]

C. From Film to Television: Evolving Oligopolies

In conjunction with the divestiture of Hollywood's monopolized film industry, the fascination with television quickly gained prominence across the country. However, the television industry ultimately evolved toward vertical integration in an almost identical manner to the film industry.[75] Television networks began to increase their control over production and programming to maximize profits.[76] Thomas Streeter, a renowned professor of media, technology, and law, wittily characterized the hope-turned-deceit that cable services would prevent television oligopoly but instead "merely provided an arena for the formation of a new oligopoly" as the "cable fable."[77]

An oligopoly is an anticompetitive environment where a few interdependent firms collectively dominate the market, and while all are individually powerful, none can prevent other competing firms from holding sway over the market.[78] In an oligopoly, several participating companies collaborate to gain additional market returns by placing restrictions on output or by fixing prices.[79] Although technically competitors in an industry, they might collude to increase collective profits by forcing consumers to pay more.[80] Factors that might contribute to an

Consent Decrees, https://www.justice.gov/opa/pr/federal-court-terminates-paramount-consent-decrees.

72 *See id.*

73 *See id*.

74 *See id.*

75 *See* Paris Marx, *Break Up the Media Giants*, One Zero (Oct. 17, 2019), https://onezero.medium.com/break-up-the-media-giants-61bf9b5ae8c2.

76 *See id.*

77 Thomas Streeter, *Blue Skies and Strange Bedfellows: The Discourse of Cable Television*, https://www.uvm.edu/~tstreete/newfable.htm; *see also id.*

78 *See* Prateek Agarwal, *Oligopoly Market Structure* (last updated Feb. 2, 2022), https://www.intelligenteconomist.com/oligopoly/ (classifying both "Mass Media" and "Entertainment" as industries that frequently exhibit characteristics of an oligopoly).

79 *See id.*

80 *See id.*

oligopoly include special legal privileges, platforms that increase in value with an increase in users, and costly barriers to entry.[81] While not always obvious at first, oligopolies have several downsides, many of which negatively impact consumers.[82] For example, oligopolies, which are effectively states of limited competition, reduce consumer choice and often lead to price fixing.[83] They can also prevent new companies from entering the industry, which inadvertently limits innovation and creativity.[84] Prices often increase as a result of increased competition, supply, and demand.[85] If this sounds familiar, it is because the Golden Age of Hollywood – the Pre-*Paramount* era – was an oligopoly.[86] Hollywood's studio system became vertically integrated when the Big Eight established dominance, which amounted to an oligopolist industry by 1930.[87]

In response to the eerily familiar antitrust developments among the television networks, the "fin-syn rules" were established in 1970 to limit the networks' control over distribution that allowed them "to demand punitive terms from production companies."[88] These rules "prohibited networks from entering production and syndication markets"[89] – a limitation closely resembling those of the *Decrees*. The big three television networks at the time – ABC, NBC, and CBS – were subject to regulations regarding content that they "owned in prime time or syndicated programming they had a financial stake in."[90] This regulation forced them to rely strictly on independent production companies.[91]

Ultimately, the fin-syn rules were repealed in the 1990's, and television networks returned to methods of vertical integration due to the economic incentives of owning their own content.[92] As a result, many independent providers and production companies went out of business and the antitrust efforts of the fin-syn rules to control vertical integration

---

81 *See id.*
82 *See id.*
83 *See* Brandon Miller, *10 Pros and Cons of Oligopoly*, GREEN GARAGE BLOG (Dec. 6, 2017), https://greengarageblog.org/10-pros-and-cons-of-oligopoly.
84 *See* Agarwal, *supra* note 78.
85 *See id.* (adding that with an increase in prices comes an increase in profit margins for the firms involved).
86 *See Oligopoly,* Jukola Art Community (last updated Aug. 24, 2022), https://www.jukolart.us/film-technology/oligopoly.html.
87 *See id.*
88 Marx, *supra* note 75.
89 Jerold Nadler & David N. Ciciline, *Investigation of Competition on Digital Market*, 379 (2020), https://s3.documentcloud.org/documents/7222836/Investigation-of-Competition-in-Digital-Markets.pdf.
90 Marx, *supra* note 75.
91 *See id.*
92 *See id.*

within the television industry failed.[93] Importantly, however, the deregulation of vertical integration for television networks has paved the way for streaming services, which are largely a product of these pioneer networks, to impact the economy from an antitrust perspective.[94] Streaming programs offer broadcast networks the opportunity to remove the cable company from the equation and go straight to the consumer.[95]

In its evolution against antitrust law, the entertainment industry's business practices have consistently replaced one oligopoly with another as technology develops and provides new means for content distribution.[96] Such anticompetitive conduct tends to lead to higher production costs, the consolidation and vertical integration of companies, an increase in entry barriers, and most notoriously, the increase in market power of the major companies.[97]

III. *"I'VE SEEN THIS MOVIE BEFORE:"* ANALYZING ANTICOMPETITIVE CONDUCT TODAY

Just as its predecessors once generated enough anticompetitive attention to be closely ridiculed and ultimately regulated, the streaming industry has begun to receive similar scrutiny. While the industry has not yet produced enough concern to trigger regulation, it has created wary apprehension for similar conduct to that of the incumbent film and television industries. Opportunities for industries to engage in anticompetitive conduct continue today, and unless subject to regulation, may exist in full force if not otherwise challenged. This conduct includes, but is not limited to, oligopolistic industry formation, vertical integration, horizontal mergers and acquisitions, barriers to entry, predatory pricing, tying, and price discrimination. Moreover, the streaming industry has called into question conduct that was not previously considered anticompetitive, such as nontransparent use of consumer data, award eligibility, and third-party contracts with cinematic professionals.

93 *See* Pakula, *supra* note 60, at 157.
94 *See id.*
95 *See* Marx, *supra* note 75.
96 *See* Pakula, *supra* note 60 at, 157.
97 *See id.*

A. Streaming Wars Episode I: The Rise of Streaming Platforms

1. Background of Streaming

The world met its first streaming product in 1992 named *StarWorks*, an on-demand server software that permitted the random access of videos on corporate Ethernet networks.[98] Three decades later, the capabilities of streaming platforms have exponentially progressed, with Netflix, Hulu, Disney+, HBO, and several other service providers accumulating millions of subscribers.[99] This revolutionary method of media viewership has captivated the world's attention and exploded with popularity in recent years. In fact, the global streaming industry is expected to reach $100 billion in revenue by 2025.[100] This increase demonstrates a doubling of value that revenues generated in 2019.[101] The streaming industry is expected to grow by 529 million subscribers between 2019 and 2025, bringing total global subscribers to 1.17 billion.[102] Netflix is projected[103] to lead in number of subscribers with up to 263 million – an increase of 91 million from 2019 – while Disney+ is forecasted to have the largest growth, with an estimated number of 142 million subscriptions, bringing its total to an approximate 172 million subscribers.[104] Although trends indicated increased use of at-home entertainment prior to 2020, the

---

98 *See Streaming Media*, ULTIMATE POP CULTURE WIKI, https://ultimatepopculture.fandom.com/wiki/Streaming_media.

99 *See* Julia Alexander, *The world is streaming more than ever – and it's straining the internet*, THE VERGE (March 27, 2020), https://www.theverge.com/2020/3/27/21195358/streaming-netflix-disney-hbo-now-youtube-twitch-amazon-prime-video-coronavirus-broadband-network.

100 *See* Michael Balderston, *Streaming Industry to Cross $100B in Revenue by 2025 (Report)*, TV TECH (Sept. 28, 2020), https://www.tvtechnology.com/news/streaming-industry-to-cross-dollar100b-in-revenue-by-2025-report.

101 *See id.*

102 *See id.*

103 Netflix has reached over 223 million subscribers as of Q3 of 2022. Unlike the 2021 predictions that it would add 2.5 million subscribers in Q1 of 2022, the platform instead lost approximately 1,170 subscribers in the first two quarters of 2022. However, the Q3 numbers have helped Netflix recover and it remains on a similar projection. *See* Daniel Ruby, *Netflix Subscribers 2022 – How many Subscribers does Netflix Have,* DemandSage (Oct. 20, 2022), https://www.demandsage.com/netflix-subscribers/.

104 *See id.* As of August 2022, Disney has officially surpassed Netflix in total subscriptions with a total number of 221.1 million subscribers, compared to Netflix's 220.67 million. Jill Goldsmith, *Disney's Streaming Services Passed Netflix in Total Subscriptions – Update,* DEADLINE (Aug. 10, 2022), https://deadline.com/2022/08/disney-just-passed-netflix-in-total-streaming-subscribers-1235089361/.

COVID-19 pandemic and mandated lock-downs undoubtedly exacerbated home viewership.[105]

From not leaving the house for a movie premier to having immediate access to thousands of TV show options, consumers have found several benefits to the use of streaming services. For example, during the early months of the COVID-19 lock-down many consumers utilized the convenience and cost-efficiency of streaming films and TV shows from the comfort of their couches.[106] Streaming platforms are the avantgarde way to watch videos, shows, and movies at home, but now, one does not need to wait until the movie first premiers in theaters. As of late, many services have premiered productions directly on streaming platforms. For a moderate monthly fee, usually between five and twenty dollars, users have relatively unfettered access to their favorite films and shows with high quality video and audio, instant viewing, no download time, no use of memory space, and freedom to rewatch anything on the platform at any time.[107] The services are limited to the content that the providers have access to, and unless pre-downloaded, use of the platforms require an active internet connection with reasonable bandwidth speed.[108] However, these minor inconveniences are easily addressed, particularly when the majority of viewers are watching at home or on a mobile device in a Wi-Fi or data-connected area. As for content limitations, viewers may resort to purchasing multiple subscriptions at once and/or may choose to pay an additional fee for specific content; but for the most part, each platform provides a plethora of entertainment options in its vast electronic library.

2. Concerns of Streaming

Streaming service business models do not presently violate existing competition laws and technically were not subject to the *Decrees* in their existence.[109] The purpose of antitrust regulation is to protect the welfare of the consumer and the interests of competition. Consumers are not currently harmed by streaming platforms[110] – in fact, some might argue that consumers greatly benefit from this revolutionary method of entertainment viewership. For example, the days of having to sprint to the

---

105 *See generally* Tia Richards, *Predicting the future of the entertainment industry after COVID,* USC NEWS (Mar. 30, 2021), https://news.usc.edu/183870/future-of-entertainment-after-covid-movies-tv-streaming-usc-experts/.

106 *See id.*

107 *See* Dave Johnson, *The beginner's guide to streaming, including how it works, the pros and cons, and more*, BUSINESS INSIDER (Jan. 11, 2021), https://www.businessinsider.com/what-is-streaming.

108 *See id.*

109 *See* Pakula, *supra* note 60, at 147.

110 *See id.*

bathroom during commercials are gone. However, the streaming industry has not risen in popularity without pushback.

> It's disingenuous to say we need to get rid of the consent decree because people now watch streaming . . . what is streaming if not the ultimate form of block-booking – making consumers take the good with the bad? You can get rid of the consent decree, but you'll still have the same issues from the 1930s that made them necessary.[111]

Several academics, experts, and advocates for antitrust regulation on the entertainment industry have expressed similar concern about streaming platforms' current and potential business practices. With the repeal of the *Decrees*, major streaming companies can now conquer new territory, such as the movie theater industry, or take over entire genres of films and shows, by increasing actors' pay.[112] This will likely lead to an increase in vertically integrated companies and a decrease in creative agency.[113] In contrast, some argue that major streaming players will not pursue the theater market for exhibition, and instead seek alternative methods to further dominate the entertainment industry.[114] Regardless, it is anticipated that the structure of the current market will revert to the "kind of abusive behavior that the *Decrees* were designed to prevent."[115]

The *Decrees* were implemented first and foremost to place safeguards against the anticompetitive tendencies of dominant actors.[116] Without such regulation, the Big Eight would likely have grown exponentially, eventually wiping out all competition until only one triumphant name remained. With streaming services trending in a similar direction, how is this outcome expected to be any different? The outlook is not exactly optimistic, especially considering the vast amount of power that dominant streaming services presently wield over consumers. As such, it is important to recognize the alarms that supporters of regulation on streaming services raise because, although antitrust law has not been

---

111 Steven Zetchik, *Streaming explosion sparks calls for new government regulations*, THE WASHINGTON POST (Nov. 22, 2019), https://www.washingtonpost.com/business/2019/11/22/streaming-explosion-sparks-calls-new-government-regulations/.

112 *See* Peter Labuza, *4 ways a new Justice Department repeal may radically reshape moviegoing,* POLYGON (Aug. 7, 2020), https://www.polygon.com/2019/11/20/20974364/justice-department-paramount-decree-disney-netflix-monopoly.

113 *See id.*

114 *See* Zetchik, *supra* note 111.

115 Brandon Katz, *The Implications of the Biggest Legal Decision to Hit Hollywood in Decades,* OBSERVER (Aug. 14, 2020), https://observer.com/2020/08/paramount-consent-decrees-implications-future/.

116 *See* Zetchik, *supra* note 111.

explicitly violated by present action, there is increasing potential for the industry to trend in that direction.

B. Streaming Wars Episode II: The Phantom Oligopoly Menace

From an antitrust perspective, the streaming industry may be characterized as an oligopoly.[117] Several sectors within the entertainment industry – TV services, film, and mass media – frequently exhibit the characteristics of an oligopoly.[118] Although the number of companies involved in streaming has increased in recent years, the significant players are Netflix, Amazon Prime Video, Apple TV+, Hulu, Paramount+, Disney+, HBO Max, and Peacock.[119] These paid online streaming platforms provide near-identical services that require similarly priced subscriptions to access licensed and original content.[120] The companies are competitively interdependent because they adjust their prices in response to each other.[121]

To analyze the structure of the streaming industry, antitrust regulators must identify the four distinguishing characteristics of an oligopoly: (1) few sellers; (2) barriers to entry; (3) interdependence; (4) prevalent advertising.[122] As stated above, the number of dominant players in the industry remains low, however recent entrants to the industry, such as Paramount+,[123] have proven to be adequate competition. The barriers to enter the streaming market have drastically heightened because the streaming giants are increasing pricing and production, while

---

[117] *See* Pakula, *supra* note 60, at 160.

[118] Mass media is considered an oligopoly because 90% of media outlets in the United States are owned by one of the five major corporations: NBCUniversal, ViacomCBS, New Corporation, Time Warner, and Disney. These companies have also all entered the streaming industry. *See* Agarwal, *supra* note 78.

[119] Moreover, while it appears that the industry is rapidly growing with new entrants, many companies have been unsuccessful. *See* Josef Adalian, *Which Streaming Service Do You Actually Want? Helping you navigate the many, many, many, many, many, many, many options out there.,* VULTURE (Nov. 2, 2021), https://www.vulture.com/article/best-streaming-services-guide.html.

[120] *See* Lee Jun Jui, *Market Structure*, TAYLOR'S UNIVERSITY, https://sites.google.com/site/netflixraisesprice/content/market-structure (last visited Jan. 7, 2022).

[121] *See* Agarwal, *supra* note 78; *see also* Pakula, *supra* note 60, at 160.

[122] *See* John Bouman, *Unit 8, Section 3: Characteristics of an Oligopoly Industry*, INFLATE YOUR MIND, https://inflateyourmind.com/microeconomics/unit-8-microeconomics/section-3-characteristics-of-an-oligopoly-industry/.

[123] *See* Movieguide Staff, *Paramount Plus to Replace CBS All Access and Enter Streaming War*, Movie Guide (2021), https://www.movieguide.org/news-articles/paramount-plus-to-replace-cbs-all-access-and-enter-streaming-war.html.

simultaneously improving technology and content.[124] Although the platforms are all competing for the same consumers, they are highly interdependent because they must constantly adjust their prices in response to one another.[125] Finally, the leading streaming platforms heavily invest in advertising. These big names, such as Netflix, Hulu, Disney+ among others, market their products through sponsorships, campaigns, and advertisements. For example, Netflix sponsors events[126] and collaborates with other media companies[127], while Disney heavily relies on Facebook and desktop video to promote Disney+.[128] Thus, streaming platforms appear to demonstrate an oligopolistic structure on the surface. While a more in-depth look into the industry is required to officially consider it an oligopoly, analysis of the initial layers begin to expose its form.

Abraham Ravid, a professor of finance at Yale University, points to the parallels between Hollywood's film oligopoly in the 1940's and the present-day oligopoly forming among streaming services.[129] Until the *Decrees* were established, studios vertically integrated and made the extent of their profits from the productions, the success of the films, and the exhibition of the films in theaters.[130] In the Post-*Paramount* era, studios can once again seek control over production and exhibition, however theaters are no longer the only means of exhibition.[131] In recent years, streaming services have become the leading form of exhibition,

---

124 *See generally* Nicholas Rossolillo, *Will Streaming Subscriptions to Cable Networks and Other Competitors Hurt Netflix?,* THE MOTLEY FOOL (Feb. 17, 2016), https://www.fool.com/investing/general/2016/02/17/will-streaming-subscriptions-to-cable-networks-and.aspx.

125 *See* Pakula, *supra* note 60 at 160. *See also Microeconomic Analysis of Netflix*, UK ESSAYS (Aug. 10, 2021), https://www.ukessays.com/essays/economics/netflix-micro economic-analysis-9322.php (clarifying that if one of the companies drops its prices, the others must also drop prices in order to stay competitive).

126 *See Netflix to Sponsor Catalyst Event,* THE ALUMNI SOCIETY (Sept. 8, 2015), https://thealumnisociety.com/netflixannounce/ (stating that Netflix sponsored the Alumni Society's Catalyst Event in 2015).

127 *See* Gizem Tas, *Key Takeaways from Netflix's Digital Marketing Strategy*, DIGITAL AGENCY NETWORK (Jun. 24, 2020), https://digitalagencynetwork.com/key-takeaways-from-netflix-digital-marketing-strategy/.

128 *See* William Merchan, *Disney+ Marketing in 2020: Behind Disney Plus's $525M Digital Advertising Strategy*, PATHMATICS (Feb. 19, 2021), https://www.pathmatics.com/blog/disney-marketing-in-2020-behind-disney-plus-525m-digital-advertising-strategy.

129 *See* Sabri Ben-Achour & Daniel Shin, *How the "vertical integration" of streaming studios today evokes old Hollywood's power,* MARKETPLACE (Aug. 13, 2021), https://www.marketplace.org/2021/08/13/how-the-vertical-integration-of-streaming-studios-today-evokes-old-hollywoods-power/.

130 *See id.*

131 *See id.*

which are predominantly owned by the production companies.[132] Almost all studios own a streaming service and increasingly limit content to promote their own productions.[133] While competition between the services remains strong for now, consumer choice will likely lessen as the age of streaming matures.[134] Platform markets, such as the streaming industry, are typically "winner-takes-all" markets that are controlled by a few "super-platforms."[135] The emergence of these "super-platforms"[136] will inevitably limit competition, followed by innovation in the industry and consumer freedom. As such, this oligopolistic structure will likely parallel that of the 1940's film market and the subsequent 1970's television market.

C. Streaming Wars Episode III: Return of the Anticompetitive Conduct

The growing oligopolistic environment of streaming services reflects that of Hollywood's Pre-*Paramount* era in more ways than one: vertical integration, barriers to entry, and the anticompetitive business practices of predatory pricing, tying, and price discrimination.

1. Vertical Integration

First, the primary streaming competitors have vertically integrated by taking control over production, distribution, and exhibition. In addition to licensing external content, companies such as Disney+, Netflix, HBO Max, and Apple TV+ have begun producing, distributing, and exhibiting original content directly through their streaming platforms.[137] The early days of the COVID-19 pandemic exacerbated this trend with the temporary closure of studios and cinemas.[138] Turning from big screens in local cinemas to flat-screens in the comfort of their own homes, audiences signed up for streaming services and binged away hours of the early days of lock-down.[139] Studios began to take advantage of this cinematic shift by either streaming new releases through licensing agreements with

---

132 *See id.*
133 *See id.*
134 *See* Marx, *supra* note 75.
135 *Id.*
136 *Id.*
137 *See* Ben-Achour, *supra* note 129.
138 *See* Cardiff Univ. Sch. Of Journalism, Media and Cultural Stud., *Vertical Integration Heats up Streaming Wars as Movies Move Online*, CREATIVE CONVERSATION (May 11, 2020), https://thecreativeconversation.wordpress.com/2020/05/11/vertical-integration-heats-up-streaming-wars-as-movies-move-online/.
139 *See id.*

already existing streaming platforms or developing their own.[140] Cinemas threatened to boycott, but the shift in box-office power was already in place.[141] Large studios, such as Disney and Paramount, were able to "lure" subscribers with their content without having to split the profits with cinemas.[142] This action is important to monitor because it lays the foundation for anticompetitive conduct in the realm of exhibition. In effect, the studios isolate their content through their own platforms, which results in a growing reliance of consumers on the services of those studios. As each studio does this, consumers are forced to expand the number of services on which they rely for the content they wish to view, which includes increased spending and sharing of personal data.

Moreover, vertical ownership of exhibition through streaming closely resembles vertical ownership of exhibition through theaters. While vertical integration is not illegal *per se*,[143] such action is deemed illegal under antitrust law when the "(1) purpose or intent with which it was conceived, or (2) power it creates" proves to be anticompetitive.[144] Under the Sherman Act, vertical integration of producing, distributing, and exhibiting motion pictures is illegal if it was 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."[145] Streaming platforms have been trending in the anticompetitive direction of vertical integration by producing their own content, minimizing collaboration with independent production companies and cinemas, and suppressing competition by growing internally.[146]

2. Horizontal Mergers and Acquisitions

In a similar fashion to vertical integration, the streaming market is experiencing a rise in horizontal mergers and acquisitions that resembles those that occurred during Hollywood's Golden Age. By means of vertical integrations, several of the Big Eight mercilessly acquired theater chains, which resulted in domination of the exhibition market.[147] For example, Warner Brothers vertically and horizontally acquired the Stanley theater circuit, which controlled the majority of theaters in the mid-Atlantic states,

---

140 *See id.*
141 *See id.*
142 *Id.*
143 *See Paramount Pictures, Inc.,* supra note 6, at 156.
144 *Id.* at 174.
145 *Id.*
146 *See* Marx, *supra* note 75.
147 *See The Hollywood studio system,* Britannica, https://www.britannica.com/art/history-of-the-motion-picture/Germany.

and First National's production and distribution facilities.[148] By the 1930's, the other members of the Big Eight, such as Fox and Paramount, accomplished similar substantial transactions in their quest for monopolization of the entertainment industry.[149]

Presently, the streaming leaders are mirroring similar tendencies in this regard. Warner Brothers, now under Warner Media,[150] has once again found itself atop the industry, but in a different light. In 2022, Warner Media, the parent company to HBO, merged with Discovery.[151] The newly re-branded Warner Bros. Discovery will combine HBO Max and Discovery+ into one all-encompassing media behemoth.[152] This merger poses considerable antitrust concerns for the future of streaming services and the entertainment industry as a whole. Congress has warned that the "resulting competition vacuum" produced by the newly combined company might ultimately result in consumer harm if it ignores what subscribers want.[153] This concern stems from the recent controversy surrounding the cancelation of HBO Max's highly anticipated *Batgirl* film, which allegedly does not "live up to Warner's new standards for theatrical releases and has no place in its streaming plans."[154]

When the newly consummated Warner Bros. Discovery service officially launches in 2023, regulators will carefully monitor how much consumers are charged for the combined service.[155] An unreasonable price increase would signal anticompetitive conduct and indicate that Warner Media "is running afoul of the merger guidelines."[156] Antitrust law dictates that an acquisition's impact on price is the "heaviest factor in weighing a merger."[157] In this instance, HBO Max already resides among the most expensive streaming platforms at $14.99 per month. It remains unclear at this time whether consumers will appreciate a "price hike" to add the

---

148 *See id.*

149 *See generally id.*

150 *See generally Our Brands*, Warner Media, https://www.warnermedia.com/us/brands.

151 *See* Elise Hu, et al., *How HBO transformed television*, NPR (Sep. 20, 2022), https://www.npr.org/2022/09/16/1123513375/how-hbo-transformed-television#:~:text=to%20a%20close%3F-,Earlier%20this%20year%2C%20HBO's%20parent%20company%2C%20Warner%20Media%2C%20merged,yet%20unnamed%20umbrella%20streaming%20service.

152 *See id.*

153 Winston Cho, *Why Warner Bros. Discovery's Issues Are Beyond 'Batgirl',* THE HOLLYWOOD REPORTER (Aug. 17, 2022), https://www.hollywoodreporter.com/business/business-news/warner-bros-discovery-batgirl-antitrust-1235197626/.

154 *Id.* (noting that critics believe "it seems like self-harm").

155 *See id.*

156 *Id.*

157 *Id.*

content from Discovery+, as there is not much overlap between the two services.[158]

Meanwhile, Disney took a different approach than Warner Media. In addition to Disney's recent horizontal merger with Fox,[159] Disney currently owns a whopping 66% of Hulu, while Comcast owns the remaining 33%.[160] However, Disney intends to acquire the remainder from Comcast by 2024.[161] The two media conglomerates have a signed agreement in place for this acquisition,[162] which would give Disney full ownership and control over three major streaming services: Disney+, ESPN+, and now Hulu.[163] Several opinions have surfaced about how Disney should implement its complete ownership of Hulu, whether ESPN+ ought to be spun-off or sold, transferring certain content from ESPN+ and Hulu to Disney+, or perhaps combining all three into one consolidated streaming platform.[164] Presently, Disney offers a price bundling deal, where subscribers can have a three-for-one package with total access to Disney+, Hulu, and ESPN+ for $13.99 per month[165] – one dollar cheaper than HBO Max on its own. Control over such a substantial segment of the streaming world gives Disney significant future pricing power, potential to stifle competition among content producers and distributors, and other concerning antitrust woes. Until the transaction is completed in 2024, it remains unclear exactly how Disney will reorganize its content, if at all, but it is evident streaming has become the focal strategy for the company.

---

158 *Id.*

159 The recent horizontal merger between Disney and Fox has reduced the number of companies that control the U.S. audiovisual market from six to "a potential 'Big Five.'" *See* Annika Stöhr, et al., *Happily ever after? Vertical and horizontal mergers in the U.S. media industry*, Ilmenau Economics Discussion Papers, No. 126, Technische Universität Ilmenau, Institut für Volkswirtschaftslehre, Ilmenau 1, 7 (2019), https://www.econstor.eu/bitstream/10419/197995/1/1666818194.pdf.

160 *See* Todd Spangler, *Comcast Would Be Interested in Buying Hulu From Disney 'If It Was Up for Sale,' CEO Brian Roberts Says,* The Variety (Sep. 14, 2022), https://variety.com/2022/digital/news/comcast-interested-buying-hulu-disney-ceo-brian-roberts-1235372543/.

161 *See* Tony Maglio*, Disney Would 'Love' to Have Fully Ownership of Hulu Before 2024*, Indie Wire (Sep. 14, 2022), https://www.indiewire.com/2022/09/disney-own-hulu-2024-1234762843/.

162 *See* Alex Sherman, *Comcast executives expect Disney to stick to its agreement to acquire the remaining stake in Hulu*, CNBC (Sep. 2, 2022), https://www.cnbc.com/2022/09/02/comcast-executives-expect-disney-to-buy-remaining-stake-in-hulu.html.

163 *See* Brian Steinberg, *Dan Loeb's Third Point Calls for Disney to Divest ESPN, Take Control of Hulu*, The Variety (Aug. 15, 2022), https://variety.com/2022/tv/news/disney-espn-dan-loeb-third-point-1235341464/.

164 *See id.*

165 *See Bundle & Save*, Hulu, https://www.hulu.com/hulu-disney-espn-bundle-offer (noting "Get the best movies, shows, and sports for $13.99/month**").

Both Warner Media and Disney exemplify the seemingly harmless, yet potentially anticompetitive conduct that mergers and acquisitions can produce if left unchecked. These recent decisions echo similar behavior of the ghosts of entertainment's past, and should be closely monitored to avoid repeating history.

3. Barriers to Entry

Additionally, the immense popularity of the relevant market – streaming – has created high barriers to entry because a large amount of capital and Information Technology ("IT") is necessary to monitor and grow the database.[166] Launching a streaming service requires a "huge investment in content, infrastructure, and marketing," but even so, a large capital investment may not be sufficient enough to prevail competitively.[167] As in the past, platforms able to "outspend their competition" on product development have the upper hand in becoming market leaders.[168] Netflix, for example, is estimated to spend a total of $18 billion on content creation alone by the end of 2022,[169] a price that would be next-to-impossible for small, independent production companies. The highly volatile market of streaming services has illustrated the challenges platforms face as they attempt to enter the industry.[170] Moreover, entry into the streaming market is difficult due to the economies of scale and scope, which means that "as [a platform's] subscriber base grows, it benefits from lower unit costs, due to its large fixed cost base."[171] Large-scale companies, such as Netflix, that operate for a long time can produce at a lower cost.[172] This competitive advantage of a price difference allows existing players to get ahead of and force out new, weaker competitors.[173] Similar to the Big Eight forcing out smaller competitors in the 1940's, the major streaming players are also able to do so with the help of high entry barriers.

---

166 *See* Balderston*, supra* note 100.

167 *See generally* Ken Basin, *The Business of Television*, 162-216 (2019).

168 Pakula, *supra* note 60 at 162.

169 *See* Julia Stoll, *Content spend of Netflix 2016-2022,* Statista (Oct. 18, 2022), https://www.statista.com/statistics/964789/netflix-content-spend-worldwide/.

170 *See* Basin, *supra* note 167.

171 Phoebe Jin, *Streaming wars and the Netflix business model,* SPACESHIP (Aug. 26, 2019), https://www.spaceship.com.au/learn/netflix-investment-analysis/.

172 "The more paying subscribers [Netflix] can attract, the more profitable the company can be." Phoebe Jin, *Streaming wars and the Netflix business model,* SPACESHIP (Aug. 26, 2019) (last visited on Feb. 22, 2022), https://www.spaceship.com.au/learn/netflix-investment-analysis/. *Id.*

173 *See id.*

4. Predatory Pricing, Tying, & Price Discrimination (oh my!)

Finally, streaming platforms have suggested various anticompetitive business practices, such as predatory pricing, tying, and price discrimination. Alone, such practices might offer pro-competitive justifications; however, combined, they have the potential to threaten competition and harm the consumer.[174] Predatory pricing and price discrimination, when coupled with other concerted action – such as vertical integration, vast growth within the industry and self-favoring – creates the threat of market power abuse through anticompetitive conduct.[175] For example, Amazon and Apple, which both have multi-faceted business practices, can utilize their strengths in one arena to influence their streaming platforms.[176] Access to Amazon's streaming service, Amazon Prime Video, is tied with an Amazon Prime subscription.[177] Similarly, Apple's service, Apple TV+, is free to users who have recently purchased an Apple product or only $4.99, as opposed to competitors' higher monthly fees.[178] Both pricing techniques are strategies that lead to predatory pricing.[179] While, at first, the low prices appear to benefit consumers, the dominant company can ultimately raise prices above the competitive market price to recoup its losses from lowering prices to drive competitors out of business.[180] The practice eventually harms the consumers because they have no other choice but to pay higher fees if they wish to use the services of the dominant player. In a parallel to the *Paramount* court's determination, predatory pricing was deemed anticompetitive when coupled with the other alleged business conspiracies of the Big Eight.[181] Based on this comparison, it is important to recognize that, with other anticompetitive business practices, predatory pricing will likely be considered an antitrust violation for streaming platforms.

---

174 *See* Pakula, *supra* note 60 at 164.
175 *See id.*
176 *See id.* at 165.
177 *See* Marx, *supra* note 75.
178 *See id.*
179 Predatory pricing involves a two-step strategy to secure monopoly profits. First, a company charges a price below its costs to drive out competitors by forcing them to also sell at lower costs. Second, the company recoups its profits as the sole provider in the market by charging a higher price for future profit. *See* Christpher R. Leslie, *Predatory Pricing and Recoupment,* 113 COLUM. L. REV. 1695, 1695 (Nov. 2013).
180 *See* Ben Bloodstein, *Amazon and Platform Antitrust*, 88 FORDHAM L. REV. 187, 205 (2019).
181 *See Paramount,* 334 U.S. at 162 (1948).

In addition to predatory pricing, the streaming industry has raised concern with the practice of tying.[182] Streaming services are unique in that their subscription model ties all content together – content that the consumer wants and content that the consumer does not want.[183] This practice closely resembles the technique of block booking that the Big Eight used Pre-*Paramount*.[184] The value of each film or show is not necessarily equal in the eyes of the consumer. In the case of Amazon, Amazon Prime Video is also tied to Amazon Prime's services. This form of tying makes it difficult for the consumer to adequately assess whether the value of the service equates the cost of it.[185] While not illegal *per se*, this method of tying complicates an accurate analysis of anticompetitive conduct, particularly when coupled with other questionable business practices.[186] Like the practice of predatory pricing, tying may be deemed anticompetitive for streaming services when grouped with other conduct.

The third questionable business practice – price discrimination – has raised suspicion of anticompetitive conduct among streaming platforms with the "tiers" of subscriptions.[187] For example, Hulu offers a lower price subscription of $8 a month with advertisements, as well as the option to upgrade to an ad-free plan for $15 a month or the option to add live TV streaming for $70 a month to fully replace cable.[188] Additionally, both Hulu and Amazon offer student discounts.[189] By offering various forms of pricing and tying products to meter consumption, the dominant platforms can price discriminate.[190] Price discrimination is a selling strategy that charges customers various prices for the same product or service based on

---

182 Tying refers to the sale of one product on the condition of the purchase of another. Typically, one is in relatively high demand while the other is not – the sale of the popular product (the "tying" product) is conditional on the purchase of the less-popular product (the "tied" product). *See* Einer Elhauge, *Tying and the Single Monopoly Profit Theory*, 123 HARV. L. REV. 397 (2009).

183 Here, low-quality content is tied to high-quality content. *See* Pakula, *supra* note 60 at 165-166.

184 *See id.* at 165. *Block booking*, MERRIAM WEBSTER, https://www.merriam-webster.com/dictionary/block%20booking (last visted Sept. 6, 2022) ("[T]he licensing for exhibition of motion-picture films in a block or group, the licensee being compelled to take an entire group of films or none . . .").

185 *See* Pakula, *supra* note 60. at 166.

186 *See id.*

187 *See* Alison DeNisco Rayome, et al., *Best streaming service of 2022: Netflix, Disney Plus, HBO Max, Prime Video, Hulu, ESPN Plus and more*, CNET (Aug. 11, 2022), https://www.cnet.com/tech/services-and-software/best-streaming-service-of-2022/.

188 *See id.*

189 *See* Sage Anderson, *RS Recommends: The Best Student Discounts on Music and Movie Streaming Services*, ROLLING STONE (Aug. 23, 2022), https://www.rollingstone.com/product-recommendations/lifestyle/best-streaming-deals-discounts-students-1118708/.

190 *See* Patrick F. Todd, *Digital Platforms and the Leverage Problem,* 98 NEB. L. REV. 486, 507 (2019).

what the seller expects the customer to be willing to pay.[191] By producing original content, streaming companies have the potential to favor and overvalue their own content over third party production companies, which could ultimately harm the consumer through a decrease in competition.[192] Vertical integration within the streaming industry will probably worsen this and likely qualify as an antitrust violation if not addressed by the industry.

The compilation of these business tactics is likely to result in decreased competition, increased monopolization, and ultimately, harm to the consumer. Much like the *Paramount* outcome, streaming services will likely require some form of antitrust regulation to prevent history from repeating itself once more.

D. *Streaming Wars Episode IV: A New Antitrust Concern*

To complicate matters further, the new streaming era has provoked contemporary antitrust concerns: nontransparent use of consumer data, award eligibility, and dealings with third party cinematic professionals.

1. Nontransparent Use of Consumer Data

The entertainment and streaming industry's nuanced use of "big data" is revolutionary and opens the doors to engage in previously non-existent anticompetitive behavior.[193] By means of subscriptions, streaming platforms have accumulated exorbitant amounts of data extending beyond consumers' viewing habits – more than previously feasible through traditional networks.[194] For example, the major tech companies that have joined the entertainment industry through streaming, such as Amazon and Apple, have aggregate amounts of data that extend beyond viewing habits.[195] While it is largely unknown how this data is used, it likely allows companies to make intentional decisions with production and to "target advertising with scalpel-like precision."[196] This form of data accumulation is "self-reinforcing"[197] because companies exploit consumer data, which leads to consumers using the products more and results in accumulating

---

191 *See* Alexandra Twin, *What is Price Discrimination?*, INVESTOPEDIA (June 13, 2022), https://www.investopedia.com/terms/p/price_discrimination.asp.

192 *See* Pakula, *supra* note 60 at 166.

193 *See* Basin, *supra* note 167 at 25.

194 *See id.*

195 *See* Marshall Steinbaum & Maurice E. Stucke, T*he Effective Competition Standard: A New Standard for Antitrust*, 86 U. CHI. L. REV. 595, 622 (2019).

196 *See* Nadler, *supra* note 89 at 42; Netflix and Amazon are notorious for refusing to disclose what data they have collected, how they utilize it, and what metrics they incorporate to make decisions. *See* Basin, *supra* note 146 at 25.

197 *See* Pakula, *supra* note 60 at 167.

even more data.[198] Today, vertically integrated streaming services "all have the technological capacity to track who uses and watches them – allowing integration of content production and viewing data collection."[199] On one hand, the aggregation of data could benefit consumers because it improves their viewing experience. On the other hand, the lack of transparency as to how the data is used and where it goes is potentially harmful. Moreover, for consumers who switch between a variety of streaming platforms, there is no way to transfer their data from one platform to the other.[200] For example, Netflix's information is not transferrable to Amazon Prime Video or Apple TV+, and vice versa.[201] This multiplies the amount of information online about any multi-platform user and increases the risk of a security breach with their information.[202]

Consumers have increasingly expressed concern about the amount of data that platforms have on them.[203] Moreover, this collection and misuse of consumer data is becoming an indicator of the growing market power controlled by major streaming platforms.[204] Antitrust enforcers should consider several factors in determining the danger of the accumulation of big data through streaming platforms: (1) any substantial increase in the scale of the collected data; (2) the type of data collected; (3) the implications of collecting usage data; (4) the inevitable combination of data across the internet that are used to improve the platforms and affect consumer choice.[205] From an antitrust perspective, this form of deception reeks of anticompetitive behavior that should be addressed through regulation.

2. Award Eligibility

Streaming services have also caught the attention of antitrust regulators by means of their eligibility for awards – in particular, the

---

198 *See* Nadler, *supra* note 89 at 42.

199 *See Competition in Digital Entertainment, Review of Consent Decrees in United States v. Paramount Pictures, Inc.*, DEPARTMENT OF JUSTICE, 10 (2018), https://www.justice.gov/atr/page/file/1102391/download.

200 *See* Nadler, *supra* note 89 at 12.

201 Netflix has been explicit with refusing to provide their competitors with access to their consumer data because it gives them an "'advantage' in both content creation and marketing." *See* DEPARTMENT OF JUSTICE, *supra* note 199 at 4, 13.

202 *See* Nadler, *supra* note 89 at 12.

203 *See id*.

204 *See id*. at 17-18.

205 *See* Eriq Gardner, *Big Data Comes to Hollywood: The Brewing Antitrust Battle of the Streaming Era,* THE HOLLYWOOD REPORTER (Jan. 3, 2020), https://www.hollywoodreporter.com/business/business-news/big-data-hollywood-brewing-antitrust-battle-streaming-era-1265520/.

Academy Awards.[206] Traditionally, only films that had been theatrically released prior to becoming available through other means were eligible for an Academy Award, or "Oscar."[207] Consideration of streaming service productions for an Oscar began in February 2019 when Netflix earned its first Best Picture nomination for *Roma*.[208] To remain eligible for nomination, Netflix premiered the movie in cinemas a few weeks prior to releasing through its platform.[209] In response to Netflix's nomination in 2019, the DOJ sent an advisory letter to the Academy of Motion Picture Arts and Sciences ("AMPAS") outlining concerns that changing Oscar eligibility could violate antitrust laws under the Sherman Act.[210] The DOJ's letter outlines a growing concern that restricting studios from consideration for the Oscars could potentially result in a decrease in competition through fewer sales for those films.[211]

A year later, qualifying requirements for Oscar consideration were directly impacted by COVID-19, and streaming services became more eligible than ever once the theatrical release barrier was dropped.[212] While the pandemic persisted for its first two years, AMPAS permitted films to skip theatrical release entirely and still be eligible for an award as a direct result of the COVID-19 pandemic.[213] Simultaneously, streaming services

---

206 *See generally* Armando Marin III, *And the Oscar Goes To . . . ": Why the Academy Awards May Create Antitrust Drama with Proposed Eligibility Rule Changes*, CARDOZO L. REV. 645 (2021).

207 In 2019, Oscar rules demanded that a film be theatrically released in Los Angeles for at least one week to be eligible for an Academy Award. *See* David Sims, *Steven Spielberg vs. Netflix,* THE ATLANTIC (Mar. 11, 2019), https://www.theatlantic.com/entertainment/archive/2019/03/spielberg-vs-netflix/584530/.

208 *See* Constance Grady, *Roma Just Scored Netflix Its First Best Picture Oscar Nomination*, VOX (Jan. 25, 2019), https://www.vox.com/culture/2019/1/22/18187333/roma-oscars-nomination-best-picture-alfonso-cuaron.

209 *See* Jasmine Garsd, *With an Eye on Oscars, Netflix Sent 'Roma' To Theaters First*, NPR (Dec. 7, 2018), https://www.npr.org/2018/12/07/673661569/with-an-eye-on-oscars-netflix-sent-roma-to-theaters-first.

210 Letter from the Dep't of Just. to Dawn Hudson, CEO, Acad. of Motion Picture Arts and Scis. (Mar. 21, 2019), https://www.documentcloud.org/documents/5792523-DOJ-AcademyLetter.html (citing Section 1 of the Sherman Act, which prohibits anticompetitive agreements among competitors to exclude new competitors when the purpose is to impede competition)*; see generally* 15 U.S.C.A., *supra* note 12.

211 "If the Academy adopts a new rule to exclude certain types of films, such as films distributed via online streaming services, from eligibility for the Oscars, and that exclusion tends to diminish the excluded films' sales, that rule could therefore violate Section 1." *Id.*

212 *See* Barnes, *supra* note 188 (confirming that the eligibility rule for streaming services to theatrically release films was dropped in April 2020 as the "pandemic surged").

213 *See* Brooks Barnes, *Movies can go right to streaming and still be eligible for Oscars*, THE NEW YORK TIMES (May 27, 2021), https://www.nytimes.com/2021/05/27/business/oscars-streaming-theaters.html ("Easing the rules a second year in a row, the Academy of Motion Picture Arts and Sciences said the movie industry was 'still impacted by the pandemic.'"); This is subject to change, however, for the 2023 Academy Awards covering

increasingly received notoriety and nominations for Oscars,[214] which only added more fuel to the growing fire outside AMPAS' door.

Finally, after two years of "pandemic-related adjustments" and much deliberation, AMPAS announced that the Oscars will hopefully return to normal for the 95th Academy Awards in 2023.[215] AMPAS intends to reinstate the original eligibility requirements with some nuanced adjustments to better incorporate streaming platforms.[216] Eligible films may "premiere 'day and date' in movie theaters *and* on streaming service, but their theatrical run must go for a minimum of seven consecutive days with at least one showing a day in one of six approved major metropolitan areas," including Lost Angeles, New York, Chicago, Miami, Atlanta, and San Francisco.[217]

This adjustment triggers larger antitrust issue – rule changes by AMPAS not only affect the major players in the streaming market, but also the smaller studios in pursuit of an award.[218] Similar to other anticompetitive behavior, this action stands to greatly benefit the major actors in the industry, such as Netflix, but severely harm the smaller competitors with fewer resources and finances.[219] Eventually, the smaller "indie" studios will be driven out of the competition, while the larger "successful" companies collect the mass of viewers, awards, and earnings. Eligibility rules for the Academy Awards affect all competitors in the industry, regardless of size, resources, and platform. As such, it is essential to examine the unique role of the Academy Awards, how it might be affected by the rise of streaming services, and how its response to this nuanced platform will impact the entire industry.

---

feature films released during 2022. Scott Feinberg, *Oscars: Academy Restores Theatrical Qualifying Requirement, Sets other Rule Changes,* THE HOLLYWOOD REPORTER (May 18, 2022), https://www.hollywoodreporter.com/movies/movie-news/oscars-2023-theatrical-release-other-rule-changes-1235149530/.

214 Brooks Barnes & Nicole Sperling, *Streaming Took Over Hollywood, Will It Take Best Picture, Too?,* THE NEW YORK TIMES (Mar. 26, 2022), https://www.nytimes.com/2022/03/26/business/media/academy-awards-streaming-services.html.

215 Associated Press, *No More Streaming-Only Debuts for Oscar Hopefuls*, U.S. News (May 18, 2022), https://www.usnews.com/news/entertainment/articles/2022-05-18/no-more-streaming-only-debuts-for-oscar-hopefuls#:~:text=Qualifying%20films%20are%20allowed%20to%20premiere%20%E2%80%9Cday%20and%20date%E2%80%9D%20in,six%20approved%20major%20metropolitan%20areas.

216 *See generally id.*

217 *Id.* (emphasis added).

218 *See* Anne Thompson, *The Spielberg vs. Netflix Battle Could Mean Collateral Damage for Indies at the Oscars*, INDIEWIRE (Feb. 28, 2019), https://www.indiewire.com/2019/02/steven-spielberg-vs-netflix-oscar-academy-wars-1202047846/.

219 "At its peak, 'Roma' played in 125 prime indie theaters; Netflix could do that again for its films, even going to several hundred screens, without [help]." *Id.*

3. Third Party Contracts with Cinematic Professionals

The third growing issue concerns the streaming industry's impact on consumers and third-party cinematic professionals. The rise of streaming has shifted the balance of power antitrust law seeks to maintain between studios and entertainment professionals more toward the studio.[220] In the 1940's, studios were vertically integrated, and many artists committed to long-term contracts that tied them to one specific studio.[221] As a result, actors' paychecks were directly controlled by that one studio. [222]

The new age of the entertainment industry has facilitated a multi-dimensional relationship with both consumers and third parties contracted to work with them, such as filmmakers and actors.[223] These individuals are separate from the major companies yet still a fundamental part of the entertainment industry. While actors have played a significant role in the industry since its inception, their role has been negatively affected by rising issues that services have unearthed.[224] Each contract between an actor and the relevant company may vary – actors generally receive an upfront payment, but some may receive an additional percentage from box office earnings.[225] This additional form of payment has never previously generated conflict because box office sales have historically occurred in conjunction with movie premiers.[226] The age of at-home entertainment via streaming services has disrupted this. Now, companies can premier films in the movie theater, at home on a streaming application, or both simultaneously.[227] This has inadvertently impacted box office sales figures, particularly during the early months of the COVID-19 Pandemic.[228] By producing less content for the theater, box office sales

---

220 *See* Ben-Achour, *supra* note 129.

221 *See id.*

222 *See id.*

223 *See generally* Tom Ward, *How Has the Unstoppable Rise of Streaming Platforms Impacted Film? We Asked Experts*, ESQUIRE (Sept. 6, 2021), https://www.esquire.com/uk/culture/tv/a36842312/streaming-platforms/.

224 *See e.g.,* Matt Morrison, *Scarlett Johansson Isn't The Only Actor To Lose Out On A Streaming Shift*, SCREENRANT (Aug. 2, 2021), https://screenrant.com/scarlett-johansson-disney-controversy-other-actors/.

225 *See How much do actors make off of movies?*, FAQ-HQ (Aug. 16, 2021), https://faq-qa.com/en/Q%26A/page=6a05280d81c4f21952eabddd96d7fc6a.

226 *See* Gabriel Snyder, *How Movie Stars Get Paid*, GAWKER (Apr. 2, 2009), https://www.gawker.com/5196154/how-movie-stars-get-paid.

227 *See generally* Julia Alexander, *Warner Bros. will release all of its new 2021 movies simultaneously on HBO Max*, THE VERGE (Dec. 3, 2020), https://www.theverge.com/2020/12/3/22150605/hbo-max-warner-bros-movies-2021-simultaneous-release-matrix-godzilla-suicide-squad-space-jam.

228 *See* Stephen M. Colbert, *How 2021 Box Office Was Impacted by Simultaneous Streaming Releases*, SCREENRANT (Dec. 8, 2021), https://screenrant.com/streaming-box-office-impact-2021-covid-theaters/.

decreased, which in turn affected the pay for actors who, by contract, expected a percentage cut from those earnings.[229] Thus, when a film is released simultaneously in movie theaters and on a streaming service, it eats into the potential earnings for the actor whose contract is based on box office performance, instead of digital sales.[230]

This issue came to a head when Scarlett Johansson, the star of Marvel Studio's *Black Widow*, sued Disney over the film's simultaneous release on Disney+ and in theaters on July 9, 2021.[231] The film set a box office record for a movie release during the COVID-19 pandemic in its first weekend, grossing $218 million, but immediately thereafter faced a sharp drop in box office receipts.[232] Johansson claimed that, by simultaneously premiering the movie in theaters and on Disney's streaming platform, Disney breached its contract by depriving her contractual share of potential box office sales,[233] which were estimated to have amounted to a loss of $50 million.[234] The contract stated that *Black Widow* would be a "theatrical release," which Johansson understood to provide a window of time in theaters before releasing on Disney+.[235] This "window" has traditionally lasted for 90 days.[236]

The two parties have since settled on the matter,[237] however Johansson was not alone in voicing concerns over this pre-COVID contractual issue.[238] In fact, many actors have been "short-changed" by contracts written prior to the COVID-19 pandemic, which were based on the presumption that film releases would premier in theaters before streaming services.[239] Moreover, the Actors' Equity Association, representing stage actors and film professionals, and SAG-AFTRA, representing screen actors and film professionals, recently settled a dispute over which organization should oversee theatrical productions produced for a live audience but also distributed digitally during the COVID-19 pandemic.[240] Some studios attempted to rectify this contractual dilemma over simultaneous theatrical and streaming releases.[241] For example, Gal Gadot

---

229 *See* Morrison, *supra* note 224.
230 *See id.*
231 *See* BBC News*, Black Widow: Disney and Scarlett Johansson settle lawsuit*, BBC (Oct. 1, 2021), https://www.bbc.com/news/business-58757748.
232 *See id.*
233 *See id.*
234 *See* Morrison*, supra* note 224.
235 *See* BBC News, *supra* note 231.
236 *See id.*
237 *See id.*
238 *See* Morrison*, supra* note 224.
239 *See id.*
240 *See id.*
241 *See id.*

was given an additional $10 million by Warner Bros. to compensate for potential losses during the simultaneous premier of *Wonder Woman 1984* in theaters and on HBO Max.[242]

While an additional flat fee appears to be an effective short-term solution to this contractual dispute, it is not feasible for the entire industry long term. Top-notch actors such as Johansson and Gadot have access to lawyers and provisions to protect them, but the lesser-known artists with substantially smaller bank accounts and networks might not.[243] Moreover, it will be important to watch how studios evolve in response to a more standardized practice of premiering "at home" and develop contracts for third parties moving forward. In particular, it will be crucial for antitrust regulators to monitor how streaming services become more involved in the studio role.[244] Amidst the new streaming era, regulation that limits studios' contracts with third parties regarding compensation might be necessary to ensure fair payment. The growing debate over this complex issue is far from over, and legal action is likely necessary to address contracts between cinematic professionals and major streaming companies moving forward – particularly if this is determined to be a relevant antitrust concern for third parties.

IV. SOLUTIONS: A MODERN TAKE ON THE CLASSICS

Even with the creative innovation and technological improvement that streaming services bring to the entertainment industry, "[t]he same problems . . . happen in new guises."[245] However, several potential approaches exist to mitigate the growing anticompetitive conduct of the streaming industry. Much like the regulation enacted upon the film and television industries of the past, the courts could enforce a *Decrees*-esque approach to the conduct at issue. Alternatively, to avoid litigation, the DOJ and other antitrust regulators could re-evaluate existing standards to better incorporate the relevancy of the conduct of streaming services. Finally, the DOJ could seek to address the antitrust violations through negotiation. If that avenue fails, the DOJ could turn to the courts to enforce fines.

---

242 *See id.*

243 *See* Ben-Achour, *supra* note 129.

244 For example, Netflix has been striking huge deals with major actors, including Dwayne Johnson and Adam Sandler, that rival those of traditional movie studios. Dwayne Johnson earned $23.5 million alone for starring in and producing Netflix's *Red Notice.* Travis Clark, *The Rock is No.1 on the highest paid actors list from Forbes again this year – with help from Netflix*, Insider (Aug. 12, 2020), https://www.businessinsider.com/the-rock-is-highest-paid-actor-netflix-deal-forbes-2020-8.

245 Zetchik, *supra* note 111.

A. Reshaping the Paramount Decrees

"Yes, the consent decree may be outdated, but the idea that there's danger in someone bulk-producing content and then controlling distribution is not outdated – it's very current."[246] Although the *Decrees* ultimately lost relevancy as society progressed, courts could integrate remnants of the once-successful precedent with the modern entertainment world as a solution to the streaming era's growing antitrust concerns. The abolition of the *Decrees* poses a unique opportunity for antitrust regulators to examine the rules that the present industry demands.[247]

One reason for reverting to a similar antitrust structure as implemented by the *Decrees* is economic.[248] At the tail-end of the *Paramount* era, more than 90% of the revenue generated in the film industry came from seven distribution companies, with five being major studios.[249] Coupled with major mergers and acquisitions in the industry, as well as other forms of consolidation, there was a growing fear that, with the removal of regulation, anticompetitive conduct and monopolization would return in a way that ultimately hurts the economy.[250] These concerns still exist after the *Decrees* have been lifted.[251] Moreover, they have only been exacerbated by the immense growth of the streaming industry within the last few years.[252] Thus, implementing improved regulation parallel to that of the *Decrees* could be a reasonable solution to prevent further economic damage. The *Decrees* effectively resolved the economic tension that resulted from the film industry's monopolization in the mid-1900's. It follows that similar regulation would likely produce a similar effect today.

Another reason addresses concern for the streaming industry's impact on competition.[253] The *Decrees* could be a model for the formation of new rules, in which "net neutrality is reinstituted to give independent producers the same advantages."[254] With streaming services driving smaller competitors out of business and stifling creative agency, it would be beneficial to address these concerns with regulation that efficiently did so before. The *Decrees* were undeniably successful at stimulating competition and innovation for the film industry. As such, antitrust

---

246 *Id.*
247 Advocates, academics, and industry players have increasingly criticized the government for not adequately recognizing the new dangers that the modern era of entertainment poses. *See id.*
248 *See* Gardner, *supra* note 205.
249 *See id.*
250 *See id.*
251 *See* Zetchik, *supra* note 111.
252 *See id*.
253 *See id.*
254 *Id.*

regulators could introduce parallel rules that directly address the actions of streaming services to boost small-scale producers and promote competition.

B. *Improving Antitrust Standards*

Antitrust enforcers must carefully compare the competitive benefits to harms when considering the reality of today's market. On one hand, the reintroduction of a modernized version of the *Decrees* could be the solution to fight the rise of streaming services. On the other hand, such action might be better served by developing entirely new standards that are tailored to address the growing concerns and anticompetitive challenges of the streaming industry.

For example, some advocates have argued for a "regulatory authority empowered specifically to monitor streaming."[255] In theory, this solution seems perfect, however it would likely face its fair share of challenges. For example, in early 2019, the U.S. Court of Appeals of the D.C. Circuit permitted the AT&T acquisition of WarnerMedia, thereby permitting the type of vertical integration that has raised red flags in the streaming industry.[256] For a streaming-specific authority to succeed, courts would need to be more apprehensive of individual instances of anticompetitive conduct.[257] For example, courts will need to take every potential antitrust concern into account and then analyze whether the compilation of concerns amounts to anticompetitive conduct in violation of the Sherman, Clayton, and FTCA. While there might not be precedent for streaming services, antitrust violations can still exist. Courts cannot discredit anticompetitive conduct in the streaming industry solely because they have nothing to compare it to within the industry's market.

Alternatively, instead of focusing on the issue of streaming services, regulators could turn to antitrust law and re-envision the consumer welfare standard. The standard that once focused on harm to consumers and competitors has evolved into a standard that strictly recognizes short-term harm to consumer welfare.[258] The consumer welfare standard has resulted in "less competition, higher markups, greater concentration, and widening wealth and income inequality."[259] Accordingly, courts have justified

---

255 *Id.*
256 *See* Zetchik, *supra* note 111.
257 *See id*.
258 *See* Pakula, *supra* note 60 at 181 (stating that such a shift has "weakened antitrust law").
259 Marshall Steinbaum & Maurice E. Stucke, *The Effective Competition Standard: A New Standard for Antitrust*, 86 U. CHI. L. REV. 595, 595 (2019).

anticompetitive conduct that can harm consumers on the presumption that such activity supports the benefits of long-term growth.[260]

This justification demonstrates the way that antitrust law has shifted its priorities in determining what actions are anticompetitive. Antitrust law was designed to "promote[] multiple economic, political, and social objectives," so the standards that it upholds must do so as well.[261] A standard that was designed to protect consumers in the short-term but might harm them in the long-term is contradictory. As such, it needs to be reassessed to wholly protect consumer welfare. In the context of streaming services, the platforms' conduct would more likely be considered anticompetitive under an all-encompassing antitrust microscope, as opposed to one that strictly looks at consumer welfare in terms of economic growth.

C. Alternative Deterrents: Negotiation and Fines

Finally, the DOJ could pursue justice against streaming services' anticompetitive conduct by deterring violators through negotiation, fines, and sentencing. As an initial effort, the DOJ could seek to negotiate with any company in violation of antitrust law by requesting that they cease their illegal action at the risk of facing litigation. Since streaming services are a revolutionized method of entertainment viewership, legal precedent does not yet exist beyond that of preceding markets.[262] If negotiations fail, the DOJ and other antitrust regulators could turn to two alternative options: fines or sentencing.

In theory, fines could discourage antitrust violators from engaging in anticompetitive behavior. Fines are most likely to impact companies that would be seriously harmed by the financial punishment, such as independent producers and new entrants into the market. They might not have quite the same effect on major corporations with a pocketbook that can afford it. For example, in 2017 the European Commission fined Google parent company Alphabet €2.4 billion t for leveraging its market dominance as a search engine into comparison shopping, an entirely separate market.[263] This fine did not seemingly have its intended effect because Alphabet was fined €4.34 billion a year later for similar conduct.[264] In the streaming industry, the largest companies will most

---

260 *See id.* at 595-96.
261 *Id*. at 619.
262 *See generally* Pakula, *supra* note 60.
263 *See* Patrick F. Todd, *Digital Platforms and the Leverage Problem*, 98 NEB. L. REV. 486, 487 (2019) (citing European Commission Press Release IP/17/1785, Antitrust: Commission Fines Google €2.4 Billion for Abusing Dominance as Search Engine by Giving Illegal Advantage to Own Comparison Shopping Service (June 27, 2017)).
264 *Id*. at 488.

likely treat fines in a similar manner. For example, Netflix, with a market cap of $121.55 billion,[265] and Disney, with a market cap of $164.18 billion,[266] could likely pay the fine without much consequence. Moreover, any company receiving a fine could simply pass it along to consumers by means of raising subscription costs.[267] Thus, fines may not be the most effective universal method of deterring companies from violating antitrust law when dealing with $100+ billion-dollar corporate behemoths.

CONCLUSION

The present business practices of streaming platforms in the entertainment industry ring antitrust alarms for anticompetitive behavior. Although consumers are not necessarily harmed by oligopolistic structure, vertical integration, horizontal mergers and acquisitions, predatory pricing, tying, price discrimination, consumer data aggregation, or contract challenges with third party cinematic professionals *alone*, they can be deeply abused by an *accumulation* of these practices. As the major streaming giants increase their market power and dominance over the industry, competition continues to decline, and consumers are growing concerned.

The entertainment industry has historically clashed with antitrust law, as is evidenced by the implementation of the *Decrees* and the fin-syn rules. Thus, it is no surprise that the latest trend in entertainment viewership is combating similar issues. Potential solutions available to address the streaming industry's growing anticompetitive behavior include re-instating similar regulation to that of the *Decrees*, re-evaluating antitrust standards, and implementing alternative deterrents. While none of these individual proposed solutions will completely and unequivocally address the challenging situation at hand, each would likely provide a step in the right direction. Ultimately, adhering to these measures may be critical to preventing anticompetitive history from repeating itself once more.

---

[265] The market capital of Netflix as of November 10, 2022, is $121.55 billion. *See* Netflix Inc (NFLX), YCHARTS, https://ycharts.com/companies/NFLX/market_cap.

[266] The market capital of Disney as of November 10, 2022, is $164.18 billion. *See* The Walt Disney Co (DIS), YCHARTS, https://ycharts.com/companies/DIS/market_cap.

[267] *See generally* Pakula, *supra* note 60.