

# Ensuring Fair Competition in the Midst of the Streaming Wars

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## I. INTRODUCTION

In December 2020, Warner Bros. shocked the country with its unprecedented announcement that it would be releasing all of its new 2021 movies on its streaming service, HBO Max, on the same dates as the theater premieres of the films.<sup>1</sup> While many speculate that this is a temporary solution in response to changes in consumer habits due to the pandemic,<sup>2</sup> those in the film industry know that this pivot was inevitable and could be here to stay.<sup>3</sup> Indeed, movie production studios have been shifting their business models in force in recent years to embrace the future of digital exhibition platforms.<sup>4</sup> Only months earlier, the Walt Disney Company announced a reorganization of its company to enable it to invest more money into its popular streaming service Disney+, which has gained one hundred million subscribers in its first sixteen months and is proving to be an incredible source of profit for the movie production giant.<sup>5</sup> This move will allow Disney to produce more content for its

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<sup>1</sup> Ann Hornaday, *Did Warner Bros. Just Kill Movie Theaters? Not by a Long Shot*, WASH. POST (Dec. 4, 2020), [https://www.washingtonpost.com/entertainment/warner-bros-movie-releases-on-hbo-max/2020/12/03/bdac5d68-359e-11eb-a997-1f4c53d2a747\\_story.html](https://www.washingtonpost.com/entertainment/warner-bros-movie-releases-on-hbo-max/2020/12/03/bdac5d68-359e-11eb-a997-1f4c53d2a747_story.html) [<https://perma.cc/TY66-MGTH>].

<sup>2</sup> *See id.*

<sup>3</sup> *See* Kyle Buchanan, *How Will the Movies (as We Know Them) Survive the Next 10 Years?*, N.Y. TIMES (June 20, 2019), <https://www.nytimes.com/interactive/2019/06/20/movies/movie-industry-future.html> [<https://perma.cc/8Y3Z-QWLF>]. *But see* Joe Flint & Erich Schwartzel, *Scarlett Johansson Sues Disney over 'Black Widow' Streaming Release*, WALL ST. J. (July 29, 2021), <https://www.wsj.com/articles/scarlett-johansson-sues-disney-over-black-widow-streaming-release-11627579278> [<https://perma.cc/9J3W-XMV7>] (detailing the lawsuit filed by *Black Widow* star, Scarlett Johansson, in which she contends that Disney breached their contract by releasing *Black Widow* on Disney+ on the same day as the theater premiere—a move that allegedly deprived the star of the box office revenue, estimated at over \$50 million that was contractually promised to her); *All of Disney's 2021 Movies to Debut Exclusively in Cinemas*, BBC NEWS (Sept. 11, 2021), <https://www.bbc.com/news/world-us-canada-58524893> [<https://perma.cc/S86J-YG54>] (noting how other production companies are “closely watching” Disney’s decision to release the remainder of their 2021 movies exclusively in theaters following the lawsuit filed against Disney by Scarlett Johansson).

<sup>4</sup> Amol Sharma & Joe Flint, *The Great Streaming Battle Is Here. No One Is Safe.*, WALL ST. J. (Nov. 9, 2019), <https://www.wsj.com/articles/the-great-streaming-battle-is-here-no-one-is-safe-11573272000> [<https://perma.cc/GR6D-6H4R>].

<sup>5</sup> Frank Pallotta, *Disney+ Reaches a Major Milestone*, CNN (Mar. 10, 2021), <https://www.cnn.com/2021/03/09/media/disney-streaming-100-million-subscribers-disney/index.html> [<https://perma.cc/9D9N-LBB7>]; Frank Pallotta, *Disney to Overhaul Its Entertainment Business with Focus on Streaming*, CNN (Oct. 12, 2020), <https://www.cnn.com/2020/10/12/media/disney-reorganization-streaming/index.html> [<https://perma.cc/6V7M-3XR5>].

streaming site,<sup>6</sup> which, in turn, will enable the movie mogul to maintain and strengthen the loyalty of its ever-growing subscriber base.<sup>7</sup>

Disney and Warner Bros.'s successful transition into the streaming industry is part of a widespread trend among movie production studios to provide "direct-to-consumer" services as demand for such movie-watching platforms continues to skyrocket.<sup>8</sup> Within the last year alone, companies like Apple, NBC Universal, and Paramount have joined Disney and Warner Bros. in the so-called "streaming wars" by pushing themselves into a market that has made Netflix, Hulu, and Amazon Prime household entertainment basics.<sup>9</sup>

This Note explores how, despite this widespread growth by movie production companies, no government regulation currently exists that could keep the expansion of these companies in check and prevent anticompetitive behaviors.<sup>10</sup> This absence of governmental oversight is especially concerning in an age where streaming companies are luring consumers away from movie theaters and cable subscriptions and companies behind those traditional media services are struggling to remain desirable, competitive options.<sup>11</sup> Moreover, for

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<sup>6</sup> This Note uses the term "content" to describe both movies and television shows.

<sup>7</sup> See Chris Lee, *What Exactly Does Disney's 'Reorganization' Mean for the Movie Industry?*, VULTURE (Oct. 14, 2020), <https://www.vulture.com/2020/10/what-exactly-does-disneys-reorganization-mean-for-movies.html> (on file with the *Ohio State Law Journal*).

<sup>8</sup> Sharma & Flint, *supra* note 4 (discussing the rising demand of media companies to form their own streaming services and the percentages of people likely to subscribe and noting that customers are willing to pay up to forty dollars a month in streaming service fees); Joe Flint, Benjamin Mullin & Lillian Rizzo, *With America at Home, the Streaming War Is Hollywood's Ultimate Test*, WALL ST. J. (Apr. 11, 2020), <https://www.wsj.com/articles/with-america-at-home-the-streaming-war-is-hollywoods-ultimate-test-11586577609> [<https://perma.cc/9LUU-H86A>] (stating that the average monthly fee of consumers has increased from thirty to thirty-seven dollars since the pandemic began).

<sup>9</sup> Sharma & Flint, *supra* note 4; Jessica Bursztynsky, *ViacomCBS to Launch Streaming Service Paramount+ on March 4, to Compete with Disney+, HBO Max*, CNBC (Jan. 19, 2021), <https://www.cnbc.com/2021/01/19/viacomcbs-paramount-streaming-service-launches-march-4.html> [<https://perma.cc/8GNW-JDQR>]; Jill Disis, *Disney Is Taking Full Control of Hulu*, CNN BUS. (May 14, 2019), <https://www.cnn.com/2019/05/14/media/disney-buys-comcast-hulu-ownership/index.html> [<https://perma.cc/4VZL-LNX8>] (reporting that Disney now has full operational control of Hulu).

<sup>10</sup> Steven Zeitchik, *Streaming Explosion Sparks Calls for New Government Regulations*, WASH. POST (Nov. 22, 2019), <https://www.washingtonpost.com/business/2019/11/22/streaming-explosion-sparks-calls-new-government-regulations/> [<https://perma.cc/9HAG-RJCV>] (arguing that in an age where net neutrality no longer exists, it could become dangerous if companies like Comcast have a large share of the streaming service market). Attesting to the timeliness of this topic, after this Note was completed, another comment was published making a similar argument. See generally Olivia Pakula, Comment, *The Streaming Wars+: An Analysis of Anticompetitive Business Practices in Streaming Business*, 28 UCLA ENT. L. REV. 147 (2021).

<sup>11</sup> Michael Schneider & Kate Aurthur, *R.I.P. Cable TV: Why Hollywood Is Slowly Killing Its Biggest Moneymaker*, VARIETY (July 21, 2020), <https://variety.com/2020/tv/news/cable-tv-decline-streaming-cord-cutting-1234710007/> (on file with the *Ohio State Law Journal*); Brent Lang & Matt Donnelly, *Inside Indie Movie Theaters' Battle to Survive*,

the first time in decades, streaming and governmental indifference have allowed production studios to have control over exhibition platforms, which traditionally have been independently owned.<sup>12</sup> This Note argues that without regulation and with few alternative methods to view or display a movie, smaller companies and consumers will turn to the streaming companies, who with little competition or oversight can promote—and charge—whatever and however they please. This scenario could seriously threaten not only the availability of movies as an economic, accessible choice of entertainment but also the diversity of films to which consumers currently have access.

Part II of this Note examines how governmental oversight within the movie industry used to be prevalent and effective at preventing anticompetitive behavior. In *United States v. Paramount Pictures, Inc.*, a 1948 antitrust case against eight major movie studios, the Supreme Court ruled that the studios breached the Sherman Antitrust Act.<sup>13</sup> The violating acts centered around unfair exhibition practices by the studios, including the studios owning their own movie theaters and forcing smaller theaters to play one studio's films exclusively ("block-booking").<sup>14</sup> Such acts prevented small, independent movie studios from being able to exhibit their films in major movie theaters, thus blocking them out from the market.<sup>15</sup> The court's ruling in *Paramount* resulted in the emergence of the Paramount Decrees.<sup>16</sup> Under these consent decrees, movie production studios were prohibited from owning their own movie theaters or having any control over how movie theaters exhibited films.<sup>17</sup> This allowed true competition, which ensured that movie theaters could control what movies they exhibited and thus allowed independent films a fair chance to reach consumers.<sup>18</sup>

Even though the Paramount Decrees technically only applied to eight movie production studios that were named in the above antitrust suit, they nevertheless set boundaries for every studio and served as a model of acceptable behavior for the entire industry.<sup>19</sup> In the years of the consent decrees, companies—including

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VARIETY (Mar. 26, 2019), <https://variety.com/2019/film/features/small-theaters-exhibitors-movie-business-1203170700/> (on file with the *Ohio State Law Journal*); Buchanan, *supra* note 3 (detailing how rapidly the movie industry is changing and discussing whether streaming services will completely revolutionize the movie-watching experience in ten years).

<sup>12</sup> See *infra* Part II.D; Tyler Riemenschneider, Note, "Don't Run up the Stairs!": Why Removing the Paramount Decrees Would Be Bad for Hollywood, 13 OHIO ST. BUS. L.J. 334, 344–45 (2019).

<sup>13</sup> *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 178 (1948).

<sup>14</sup> *Id.* at 156–59.

<sup>15</sup> Riemenschneider, *supra* note 12, at 338, 347.

<sup>16</sup> *Id.* at 344–46.

<sup>17</sup> *Id.* at 347.

<sup>18</sup> See *id.*

<sup>19</sup> *Id.* at 350–54; *The Paramount Decrees*, U.S. DEP'T JUSTICE, <https://www.justice.gov/atr/paramount-decree-review> [<https://perma.cc/D98M-NSSN>]. See generally *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948).

those not bound to them, such as Netflix and Disney—never crossed the line marked by this monumental case.<sup>20</sup>

In November 2019, however, the Department of Justice (DOJ) moved to terminate the Paramount Decrees, arguing that they were antiquated and were no longer relevant in the age of streaming, physical media, and cable.<sup>21</sup> Indeed, it has long been advocated by experts in the field and the studios bound by the decrees that without such restraint, the movie studios would be better able to compete with emerging streaming services.<sup>22</sup> On August 7, 2020, a judge granted the DOJ's motion to terminate the Paramount Decrees, agreeing with the DOJ's rationale that the decrees were outdated and did not apply to newer movie studios, making the consent decrees somewhat arbitrary.<sup>23</sup> The court added that it believed that “evolved” antitrust law is enough to ensure that the movie monopoly of the 1930s and 1940s will not happen again.<sup>24</sup>

Part III discusses the context surrounding and driving this decision, and how the new digital exhibition platforms, or streaming services, are changing the movie industry. Streaming not only allows movie production companies to control the production and exhibition of their content—more control than they have had in decades—but it also enables companies to engage in data collection practices.<sup>25</sup> Part III further explores how these actions already serve as barriers to prevent other movie production companies from entering the market successfully.

Part IV.A argues that, given these changes within the movie industry, the district court's reasoning for reversing the regulation was a failure to truly understand the underlying problems within the movie industry. For example, one such antitrust law referenced in the district court's opinion is the Hart-Scott-Rodino Improvements Act of 1976 (HSR Act). Under this act, companies must notify the Federal Trade Commission (FTC) and DOJ before going forward with

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<sup>20</sup> This is evidenced by the fact that neither company owns a theater chain. *But see* Lizzie Plaugic, *Netflix Has Reportedly Considered Buying Theaters to Screen Its Movies*, VERGE (Apr. 19, 2018), <https://www.theverge.com/2018/4/19/17258114/netflix-theaters-landmark-mark-cuban-buying-screenings-oscars-cannes> [<https://perma.cc/2XB8-NYLZ>] (noting an instance where Netflix attempted to buy Landmark Theaters, a move that companies bound by the decrees were prohibited from making); Dawson Oler, *Netflix, Disney+, & a Decision of Paramount Importance*, 2020 U. ILL. J.L. TECH. & POL'Y 481, 499–500 (discussing Disney's practice of forcing movie theaters to show its films on the theater's largest screen for four consecutive weeks, comparing the practice to block-booking, and noting the harm of such practice on smaller theaters who risk losing profit by agreeing to such terms).

<sup>21</sup> *The Paramount Decrees*, *supra* note 19.

<sup>22</sup> *See generally* Jonathan A. Schwartz, Note, *Bringing Balance to the Antitrust Force: Revising the Paramount Decrees for the Modern Motion Picture Market*, 27 UCLA ENT. L. REV. 45 (2020) (advocating for the reversal of the Paramount Decrees and arguing that newer decrees need to replace them that better account for today's movie market).

<sup>23</sup> *United States v. Paramount Pictures, Inc.*, No. 1:19-mc-00544-AT, 2020 WL 4573069, at \*3 (S.D.N.Y. Aug. 7, 2020).

<sup>24</sup> *Id.* at \*7–9.

<sup>25</sup> *See infra* notes 77–97 and accompanying text.

a large merger or acquisition.<sup>26</sup> In theory, this prevents big companies from engaging in large mergers that result in a monopolization of market share.<sup>27</sup> Despite this supposed antitrust roadblock, however, recent mergers such as that of Disney-Fox, which allowed Disney to amass thirty-eight percent of the movie market,<sup>28</sup> and AT&T-Time Warner, which gave an internet provider control over a content producer,<sup>29</sup> were allowed to move forward.<sup>30</sup> These mergers are noteworthy because, when viewed in juxtaposition to the end of the Paramount Decrees, they suggest that the government is unwilling to stand in the way of these big movie production companies amassing significant market power, even if it comes at the expense of small businesses, workers, and consumers.

Part IV.B discusses how the reversal of the Paramount Decrees reveals a worrying long-term trend in the movie and entertainment business.<sup>31</sup> To curb this concerning growth, this Note proposes antitrust regulation mirroring Senator Elizabeth Warren's proposal to break up large tech companies.<sup>32</sup>

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<sup>26</sup> *Hart-Scott-Rodino Antitrust Improvements Act of 1976*, FTC, <https://www.ftc.gov/enforcement/statutes/hart-scott-rodino-antitrust-improvements-act-1976> [<https://perma.cc/EP48-H6GM>]; *Effective February 27, 2020: New Higher Thresholds Under Hart-Scott Rodino Antitrust Improvements Act of 1976*, BUCHANAN INGERSOLL & ROONEY PC (Jan. 29, 2020), <https://www.bipc.com/effective-february-27-2020-new-higher-thresholds-under-hart-scott-rodino-antitrust-improvements-act-of-1976> [<https://perma.cc/4APP-MWBR>] (describing how in February 2020, the threshold amount increased to \$94 million for which an acquisition would need the approval of the FTC and DOJ).

<sup>27</sup> See Kelly Signs, *Milestones in FTC History: HSR Act Launches Effective Premerger Review*, FTC (Mar. 16, 2015), <https://www.ftc.gov/news-events/blogs/competition-matters/2015/03/milestones-ftc-history-hsr-act-launches-effective> [<https://perma.cc/R935-YSEC>].

<sup>28</sup> Sarah Whitten, *Disney Accounted for Nearly 40% of the 2019 US Box Office*, CNBC (Dec. 29, 2019), <https://www.cnbc.com/2019/12/29/disney-accounted-for-nearly-40percent-of-the-2019-us-box-office-data-shows.html> [<https://perma.cc/F2DY-BY94>]. This percentage reflects the profits amassed by Disney in box office sales in relation to the box office sales within the entire movie industry. Although this number, by excluding profits made via Disney's streaming platforms, does not perfectly correlate to the exact amount of content produced, it nevertheless provides a likely estimate of Disney's capacity to produce content compared to other companies within the industry. It is for this reason that this Note equates this percentage to Disney's market share of the industry. See *id.* Forbes estimates that Disney's share could be larger, at forty to forty-five percent. Jim Amos, *Hollywood Cliffhanger: What the Termination of the Paramount Consent Decrees Means for Movie Theater Owners*, FORBES (Nov. 19, 2019), <https://www.forbes.com/sites/jamos/2019/11/19/hollywood-cliffhanger-what-the-termination-of-the-paramount-consent-decrees-means-for-movie-theater-owners/?sh=1c9f23df7069> (on file with the *Ohio State Law Journal*).

<sup>29</sup> See *infra* notes 117–25 and accompanying text.

<sup>30</sup> Alex Sherman, *The Decade in Media: Content Was King, Then Distributors Went Shopping*, CNBC (Dec. 17, 2019), <https://www.cnbc.com/2019/12/17/netflix-att-verizon-and-comcast-were-the-decades-media-kingmakers.html> [<https://perma.cc/3V5R-BBCC>] (detailing the merger between AT&T and Time Warner).

<sup>31</sup> Riemenschneider, *supra* note 12, at 361–70.

<sup>32</sup> See Team Warren, *Here's How We Can Break Up Big Tech*, MEDIUM (Mar. 8, 2019), <https://medium.com/@teamwarren/heres-how-we-can-break-up-big-tech-9ad9e0da324c> [<https://perma.cc/65DJ-5XZX>].

Alternatively, Congress could implement antitrust legislation that resembles the Paramount Decrees by separating the production and exhibition sides of companies. Such protections would be industry-specific and encompass potential future evolution of the film industry to guarantee that the regulation remains effective at preventing anticompetitive practices for generations to come. Finally, any regulation within the industry would protect and encourage independent exhibition companies, ensuring that content is presented to consumers on equal footing. With such protections in place, the government can ensure that all content, regardless of who made it, remains within a consumer's reach.

## II. THE RISE AND FALL OF THE PARAMOUNT DECREES

For decades, consent decrees within the movie industry served as an artificial line that companies could not cross when expanding, for fear that the government would intervene. Under the Paramount Decrees, movie production studios were prohibited from owning movie theaters because the Supreme Court deemed the control of both the production and exhibition of movies a form of vertical integration that harmed both small companies and consumers.<sup>33</sup> On its surface, the recent reversal of these consent decrees allows movie companies to own their own movie theaters.<sup>34</sup> Nevertheless, this reversal also marked the end of any industry-specific regulation on movie production companies' growth.

### A. Governmental Indifference Enabled the First Movie Oligopoly

Film as a source of entertainment was always intended to be accessible to individuals of all classes.<sup>35</sup> The movie industry emerged because its inexpensive, engrossing offerings were able to attract mass audiences across various socioeconomic classes,<sup>36</sup> with working-class individuals making up as much as seventy-eight percent of early film audiences.<sup>37</sup>

The ability of motion pictures to attract large and diverse audiences offered a huge money-making opportunity for production studios, which were quick to jump at the opportunity. In the early twentieth century, eight major movie production studios (the "Big Eight") dominated Hollywood, commanding

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<sup>33</sup> *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 159–60, 170–72 (1948).

<sup>34</sup> See, e.g., Eric J. Savitz, *A Movie Studio Could Buy AMC, Even if Amazon Isn't Interested*, BARRON'S (May 11, 2020), <https://www.barrons.com/articles/a-movie-studio-paramount-decrees--amc-amazon-merger-51589226278> [<https://perma.cc/96ZF-N58T>] (speculating how a movie studio could buy AMC theaters, a company that in recent years has been the sights of many as a potential acquisition).

<sup>35</sup> Emily Scarbrough, "Fine Dignity, Picturesque Beauty, and Serious Purpose": The Reorientation of Suffrage Media in the Twentieth Century 25–26 (Aug. 4, 2015) (Masters Thesis, Eastern Illinois University), <https://thekeep.eiu.edu/cgi/viewcontent.cgi?article=3032&context=theses&httpsredir=1&referer=> [<https://perma.cc/H52A-3SBV>].

<sup>36</sup> See *id.*

<sup>37</sup> *Id.*

ninety-five percent of the movie business.<sup>38</sup> Such companies owed their success to the “studio system,” a business organization that allowed the companies to control their films at most, if not all, levels.<sup>39</sup> Five companies in the Big Eight maintained power over the production, distribution, and exhibition of their movies,<sup>40</sup> with two others controlling the production and distribution,<sup>41</sup> and one controlling only distribution.<sup>42</sup>

During the Great Depression, movie-going audiences barely slowed.<sup>43</sup> The government was thus readily open to allowing the monopolization of companies within the industry because of the industry’s position to boost the American economy.<sup>44</sup> Under the 1933 National Industrial Recovery Act (NIRA), the government enabled movie moguls to join together to decide acceptable, though

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<sup>38</sup> David A. Cook & Robert Sklar, *The Hollywood Studio System*, BRITANNICA, <https://www.britannica.com/art/history-of-the-motion-picture/The-Hollywood-studio-system> [<https://perma.cc/4CGS-NG6Z>].

<sup>39</sup> Schwartz, *supra* note 22, at 59.

<sup>40</sup> These companies were Paramount Pictures, Loew’s (later MGM), RKO, Warner Bros., and Twentieth Century Fox. *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 140 (1948); *see also* Cook & Sklar, *supra* note 38 (noting that the exhibition of films accounted for ninety-four percent of the studios’ profits); Riemenschneider, *supra* note 12, at 336 (noting that because of the studio system, “[s]tudios produced films in-house with factory-like efficiency”).

<sup>41</sup> The two companies were Columbia Pictures and Universal. *Paramount Pictures, Inc.*, 334 U.S. at 140.

<sup>42</sup> This company was United Artists. *Id.* The main role of distributors is to get films an audience. *See* Schuyler Moore, *The 9 Types of Film Distribution Agreements*, FORBES (July 19, 2019), <https://www.forbes.com/sites/schuylermoore/2019/07/19/types-of-film-distribution-agreements/?sh=d44059f6253e> [<https://perma.cc/W7NY-26VP>]. Independent production companies usually have to make deals with major production studios, as a distributor, to get the independent films dispersed in a meaningful way. *See id.* These deals usually entail the maker of the film granting the distributor significant rights over the film and the film’s eventual profits. *Id.*; *see, e.g.*, Brent Lang, *Steven Spielberg’s Amblin Partners, Netflix Forge Film Deal in Sign of Changing Hollywood*, VARIETY (June 21, 2021), <https://variety.com/2021/film/news/steven-spielberg-netflix-amblin-deal-1235001513/> [<https://perma.cc/K98S-HTUS>] (detailing an example of this kind of deal). While distribution is an incredibly important part of the film industry, for the sake of simplicity, this Note largely ignores the independent role of distribution today. It is important to note, however, that companies like Netflix and Disney have both production and distribution elements built into their businesses, which only amplifies the amount of control such companies have within the industry. *See The Walt Disney Company Announces Strategic Reorganization of Its Media and Entertainment Businesses*, WALT DISNEY CO. (Oct. 12, 2020), <https://thewaltdisneycompany.com/the-walt-disney-company-announces-strategic-reorganization-of-its-media-and-entertainment-businesses/> [<https://perma.cc/L6LS-YQRG>]. Consequently, this Note assumes that the referenced “movie production studios” have a stake in both the production and the distribution of their content.

<sup>43</sup> *See* Caterina Cowden, *Movie Attendance Has Been on a Dismal Decline Since the 1940s*, BUS. INSIDER (Jan. 6, 2015), <https://www.businessinsider.com/movie-attendance-over-the-years-2015-1> [<https://perma.cc/P536-MC22>] (displaying a graph showing that movie-goers reached an all-time high for the era at the beginning of the Depression).

<sup>44</sup> *See* Schwartz, *supra* note 22, at 65.



anticompetitive, practices within the industry that ultimately lasted long after the NIRA itself was declared void.<sup>45</sup> These practices included block booking, where the companies would give a theater its blockbuster film on the condition that the theater agreed to take the studio's less popular films;<sup>46</sup> price-fixing; and clearances, where a studio only allowed its films to play in select theaters within a particular region for a set duration.<sup>47</sup> For the production studios that did not own theaters, such practices were enormously profitable, as it forced exhibition sites to play movies that otherwise would be flops or to charge higher admission prices than they otherwise would have.<sup>48</sup> Nevertheless, for independent exhibition sites, who often had no choice in film selection for their small theaters, and consumers, who often had to travel to see a movie of their choice at the only regional theater permitted to show said film,<sup>49</sup> these practices were harmful and inconvenient.<sup>50</sup>

### *B. Government Intervention Quickly Became Necessary in the Early Twentieth Century to Promote Fair Practices Within the Movie Industry*

Eventually, the DOJ took notice of the studios' practices. In 1938, the DOJ brought suit against the Big Eight for violations of the Sherman Antitrust Act, mostly because of their exhibition ownership and block-booking activities.<sup>51</sup> This initial action resulted in consent decrees, under which the studios agreed to limit block-booking activities and otherwise cut back on practices that were harming independent theaters.<sup>52</sup> These consent decrees did not prove particularly effective, however, as the studios' profits continued to soar and

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<sup>45</sup> See *id.* at 66.

<sup>46</sup> Riemenschneider, *supra* note 12, at 342–43 (listing other anticompetitive behaviors including pooling agreements, where the theaters and studios agreed upon a set percentage share of profits beforehand).

<sup>47</sup> *Id.* at 341–42.

<sup>48</sup> See Schwartz, *supra* note 22, at 70 (noting that the studios were conspiring together to set minimum prices for admission tickets).

<sup>49</sup> See David Sims, *Trump's Justice Department Wants to Change the Movie Industry*, ATLANTIC (Nov. 20, 2019), <https://www.theatlantic.com/entertainment/archive/2019/11/justice-department-movie-industry-paramount-ruling/602311/> [<https://perma.cc/6M4L-MULX>]; Alexandra Gil, *Breaking the Studios: Antitrust and the Motion Picture Industry*, 3 N.Y.U. J.L. & LIBERTY 83, 118 (2008) (noting how studios divided control of movie theaters along regional lines).

<sup>50</sup> See Schwartz, *supra* note 22, at 76.

<sup>51</sup> *Id.* at 67; Riemenschneider, *supra* note 12, at 340. The Sherman Antitrust Act prohibits unreasonable restraints of trade that clearly harm competition within a market. *The Antitrust Laws*, FTC, <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws> [<https://perma.cc/SR5X-W3JP>]; see also *infra* notes 101–03 and accompanying text.

<sup>52</sup> Riemenschneider, *supra* note 12, at 334.

independent theaters continued struggling to stay afloat.<sup>53</sup> Moreover, the studios that did not own exhibition sites, and thus depended on block-booking to remain competitive, and those that did not engage in the practice of block-booking at all refused to agree to these initial decrees.<sup>54</sup> Consequently, the decrees lost effect in 1942.<sup>55</sup>

With the anticompetitive activities continuing with no slow in sight, independent movie producers, including Walt Disney and Charlie Chaplin, joined together to form the Society of Independent Motion Pictures Producers (SIMPP) in 1942.<sup>56</sup> SIMPP voiced the concern of many independent producers and artists that the studios were overtaking the industry and making it impossible for anyone outside the studio system to compete.<sup>57</sup> Under this mounting pressure to eliminate the anticompetitive behavior, the DOJ once again sued the Big Eight for violating the Sherman Antitrust Act, charging the studios with monopolization and restraint of interstate trade within the movie industry.<sup>58</sup>

In 1948, the Supreme Court sided with the DOJ and ruled that the Big Eight had engaged in anticompetitive behavior in *United States v. Paramount Pictures, Inc.*<sup>59</sup> The Court found that the studios' acts of engaging in block-booking,<sup>60</sup> clearances, pooling agreements, and price-fixing all contributed to

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<sup>53</sup> Schwartz, *supra* note 22, at 68 (“From 1931 to 1940, the studios’ combined profits totaled \$128.2 million . . . and soared to \$398.8 million during the period from 1941 and 1946.”).

<sup>54</sup> Riemenschneider, *supra* note 12, at 340.

<sup>55</sup> *Id.*

<sup>56</sup> *Film Producers Form Independent Society; Chaplin, Disney, Goldwyn, Welles in New Coast Organization*, N.Y. TIMES (Jan. 29, 1942), <https://www.nytimes.com/1942/01/29/archives/film-producers-form-independent-society-chaplin-disney-goldwyn.html> [<https://perma.cc/26V8-SCHM>].

<sup>57</sup> See generally J.A. ABERDEEN, HOLLYWOOD RENEGADES: THE SOCIETY OF INDEPENDENT MOTION PICTURE PRODUCERS (2000); *U.S. Supreme Court Decides Paramount Antitrust Case*, HISTORY (Apr. 30, 2020), <https://www.history.com/this-day-in-history/u-s-supreme-court-decides-paramount-antitrust-case> [<https://perma.cc/SDQ4-KRS8>].

<sup>58</sup> *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 140–41 (1948).

<sup>59</sup> *Id.* at 178; Karen Hoffman Lent & Kenneth B. Schwartz, *The DOJ Moves to Terminate the Paramount Consent Decrees*, N.Y.L.J. (Dec. 10, 2019), <https://www.law.com/newyorklawjournal/2019/12/09/the-doj-moves-to-terminate-the-paramount-consent-decrees-is-this-the-end-of-the-movie-industry-as-we-know-it/> (on file with the *Ohio State Law Journal*) (noting that the court was specifically targeting the vertical integration among companies with theaters and the “horizontal conspiracy to fix prices [and] divide markets” that resulted from such activities).

<sup>60</sup> With regard to block-booking, the Court found it to be a violation of copyright law, which only allows an author to benefit from a copyright because of the merits of that specific copyrighted work. *Paramount Pictures, Inc.*, 334 U.S. at 156–58. With block-booking, “[e]ven where all the films included in the package are of equal quality, the requirement that all be taken if one is desired increases the market for some.” *Id.* at 158. Such practice “add[s] to the monopoly of the copyright.” *Id.* In other words, the studios were making some of their films more valuable by forcing association with their more popular films—an advantage smaller production studios did not possess. See *id.* This practice seems to have remarkable

the studios' antitrust violations.<sup>61</sup> In addition to declaring the above acts anticompetitive, the Supreme Court remanded back to the district court the issue of whether theater ownership by the studios violated the Sherman Antitrust Act.<sup>62</sup> On remand, the district court ruled that when examined in the context of the studios' other anticompetitive actions such as price-fixing and clearances, the ownership of the theaters appeared to be for the purpose of stifling competition.<sup>63</sup> The court specifically relied on geographical statistics that showed that in certain areas with smaller populations, one studio generally had a greater holding than others in the exhibition market.<sup>64</sup> As a result of this holding, studio ownership of theaters was no longer allowed, and the court ordered a divestiture of the studios' theater holdings.<sup>65</sup>

*C. The Aftermath of the Court's Decision Allowed Temporary Solutions to Emerge that Failed to Completely Eliminate Monopolistic Behavior in the Industry*

In the immediate aftermath of the courts' rulings, the Big Eight all signed the consent decrees that became known as the Paramount Decrees.<sup>66</sup> By signing, the studios were agreeing to give up ownership of movie theaters and stop anticompetitive practices such as block-booking and price-fixing.<sup>67</sup> The direct result of the decrees was that smaller production companies and theaters were better able to find an independent place in the market.<sup>68</sup>

Nevertheless, while the Paramount Decrees offered a solution to the antitrust problems that arose because of the studio system, it was quickly apparent that the decrees were not completely effective at preventing monopolistic behavior in the movie industry.<sup>69</sup> Companies found new ways to

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similarity to what Netflix now does with the overwhelming promotion of its own content (over the content of others) on its streaming site. See Schwartz, *supra* note 22, at 108–09 (comparing Netflix's "bundling" practices to block-booking and proposing that reforms to the decrees should account for this evolution in continuing to prohibit block booking).

<sup>61</sup> *Paramount Pictures, Inc.*, 334 U.S. at 140–41, 178.

<sup>62</sup> *Id.* at 175.

<sup>63</sup> Riemenschneider, *supra* note 12, at 344.

<sup>64</sup> *Id.* at 345 (citing *United States v. Paramount Pictures, Inc.*, 85 F. Supp. 881, 892–93 (S.D.N.Y. 1949)).

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 346. "A consent decree is a settlement between a private party and the government," in which the private party agrees to a set of terms in exchange for the court dropping the case. Lent & Schwartz, *supra* note 59 (noting that the decrees had no expiration date).

<sup>67</sup> Riemenschneider, *supra* note 12, at 347.

<sup>68</sup> *Id.* at 347–50 (noting, too, that without the ability to block-book, the studios suddenly cared more about the quality of their films and, as a result, production costs rose, and the number of films being produced declined).

<sup>69</sup> See *id.* at 352–54.

promote their new movies using the popularity of their previous films.<sup>70</sup> Additionally, through the emergence of groups such as the National Research Group, an independent entity that records what demographics will be responsive to each upcoming movie and then reports the information to the big studios, the major production companies still indirectly work together to ensure their blockbusters will not have conflicting release dates with the other studios' films that target the same audience.<sup>71</sup> Moreover, the Paramount Decrees did not apply to companies besides the Big Eight, and thus notably excluded Disney, a company that quickly rose in power in the years after the decrees.<sup>72</sup>

While the above-mentioned practices do not violate antitrust laws, the reality is that the movie industry is not particularly friendly to newer, smaller businesses because large companies are always looking for ways to gain more power, and the government has never meaningfully interfered with their quest. Nonetheless, while the Paramount Decrees' true effect dwindled as it aged and the industry evolved, the consent decrees still gained a symbolic significance. It was proof that government intervention could be a reality if companies went too far.

#### *D. With the Rise of New Movie-Watching Habits, the Government Took Notice that the Consent Decrees Were Dated*

Fear of government intervention of antitrust behavior recently evaporated when, in November 2019, the DOJ moved to terminate the Paramount Decrees. This move came as part of a larger plan by the DOJ to review and terminate any old antitrust judgment that no longer serves its initial purpose and instead “clog[s] court dockets, create[s] unnecessary uncertainty for businesses or, in some cases, may actually elicit anticompetitive market conditions.”<sup>73</sup> The DOJ found that the Paramount Decrees were one such judgment, arguing that the decrees were dated and ineffective in an age where theaters have multiple

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<sup>70</sup> *Id.* at 352 (quoting one source that said that Disney, by making movies with the Star Wars or Marvel name, is in the “brands business” rather than the movie business).

<sup>71</sup> *Id.* at 354–55 (“This system has avoided antitrust scrutiny because there is no direct communication between the studios . . .”). This is valuable information for production studios, who are likely to get more attention and profits if their film is a success in the first weekend of its theater release. *See generally* Luís Cabral & Gabriel Natividad, *Box Office Demand: The Importance of Being #1*, 64 J. INDUS. ECON. 277 (2016).

<sup>72</sup> *See* Brent Lang, *Why Eliminating the Paramount Antitrust Decrees Won't Shake Up the Movie Business*, VARIETY (Nov. 19, 2019), <https://variety.com/2019/film/news/paramount-antitrust-consent-decrees-movie-business-analysis-1203409589/> [<https://perma.cc/L28T-D4EQ>].

<sup>73</sup> Press Release, Dep't of Just., Dep't of Just. Announces Initiative to Terminate “Legacy” Antitrust Judgments (Apr. 25, 2018), [https://www.justice.gov/opa/pr/department-justice-announces-initiative-terminate-legacy-antitrust-judgments?utm\\_medium=email&utm\\_source=govdelivery](https://www.justice.gov/opa/pr/department-justice-announces-initiative-terminate-legacy-antitrust-judgments?utm_medium=email&utm_source=govdelivery) [<https://perma.cc/8AUT-Y6VN>] (internal quotation marks omitted).

screens and consumers have access to DVD/Blu-rays, cable, and internet.<sup>74</sup> A New York district judge agreed with the DOJ's assessment in August 2020, thereby officially ending the decrees.<sup>75</sup> As one of her reasons, the judge held that the antitrust laws that have been passed since 1948 would prevent another "horizontal conspiracy" among production companies from happening again.<sup>76</sup>

Despite the judge's insistence that the function of the Paramount Decrees is obsolete in today's world, the anticompetitive action that sparked the consent decrees' existence has not been eliminated. Instead of movie production studios expanding through the accumulation of theater control, today's companies are expanding by gaining a presence on online "direct-to-consumer" services.

### III. THE DIGITAL SHIFT IN THE MOVIE-WATCHING EXPERIENCE

Online streaming as a form of movie exhibition began in 2007, when Netflix, then a direct competitor to Blockbuster as a company that sent DVD rentals to consumers by mail, decided to make movies available online in electronic format for a low monthly subscription.<sup>77</sup> At the time, Netflix executives believed that offering such content online was the future of the movie exhibition business and began investing more into its online downloading service.<sup>78</sup> Indeed, Netflix's decision not only led to enormous profits and popularity for the company,<sup>79</sup> but it also forever changed the movie industry.<sup>80</sup> In 2011, Amazon took notice of Netflix's success and launched its own

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<sup>74</sup> Press Release, Dep't of Just., Dep't of Just. Files Motion to Terminate Paramount Consent Decrees (Nov. 22, 2019), <https://www.justice.gov/opa/pr/department-justice-files-motion-terminate-paramount-consent-decrees> [<https://perma.cc/73TV-KENM>].

<sup>75</sup> See *United States v. Paramount Pictures, Inc.*, No. 1:19-mc-00544-AT, 2020 WL 4573069, at \*1 (S.D.N.Y. Aug. 7, 2020).

<sup>76</sup> *Id.* at \*11–13.

<sup>77</sup> Michelle Castillo, *Reed Hastings' Story About the Founding of Netflix Has Changed Several Times*, CNBC (May 23, 2017), <https://www.cnbc.com/2017/05/23/netflix-ceo-reed-hastings-on-how-the-company-was-born.html> [<https://perma.cc/G5UZ-R3AS>]. Although the act of streaming movies was novel in 2007, the concept of putting videos online was not, as YouTube launched its video sharing site two years earlier in 2005. See Paife Leskin, *YouTube Is 15 Years Old. Here's a Timeline of How YouTube Was Founded, Its Rise to Video Behemoth, and Its Biggest Controversies Along the Way*, BUS. INSIDER (May 30, 2020), <https://www.businessinsider.com/history-of-youtube-in-photos-2015-10> [<https://perma.cc/UQX8-QTF5>].

<sup>78</sup> Castillo, *supra* note 77.

<sup>79</sup> *Netflix One Question: Is It Losing Money or Making Money?*, FORBES (May 1, 2020), <https://www.forbes.com/sites/greatspeculations/2020/05/01/netflix-one-question-is-it-losing-money-or-making-money/?sh=3c4faf2929a6> (on file with the *Ohio State Law Journal*) (stating that Netflix's net profits in 2019 were \$1.9 billion).

<sup>80</sup> *The History of Video Streaming Services*, SKIMM (Dec. 22, 2019), <https://www.theskimm.com/world/video-streaming-services-history-3fDiXiz45r1eyqQhBNUQo2> [<https://perma.cc/4KZE-CYTH>].

subscription-based streaming service, Amazon Prime Instant Videos (“Amazon”) to reap some of the profits of this new exhibition method.<sup>81</sup>

Then, looking for ways to evolve in a market with new competition, Netflix decided to produce its own content for exclusive streaming on its site in 2013 with the premiere of *House of Cards*.<sup>82</sup> This move by Netflix was groundbreaking, mostly because of how the idea for the show was born.<sup>83</sup> In the immediate aftermath of launching the streaming service, Netflix suddenly had unprecedented access to data on consumer movie-watching habits.<sup>84</sup> This included what shows were the most popular on its site; clusters of shows certain people were more inclined to watch together; and what scenes in a movie people were likely to skip over, pause on, or rewind.<sup>85</sup>

The concept for *House of Cards*, an adaptation of the BBC drama from the 1990s, emerged from this data.<sup>86</sup> Both Netflix and Amazon were able to know that political dramas were then extremely popular.<sup>87</sup> Amazon stopped there, using that information to produce its own political drama, *Alpha House*.<sup>88</sup> Netflix went further, however, figuring out that viewers were more engaged in dramas with one protagonist and that the audiences who liked political dramas, including the original *House of Cards* series, also watched Kevin Spacey movies (the star of *House of Cards*) and movies directed by David Fincher (the director of the *House of Cards* pilot episode).<sup>89</sup> It thus was not that big of a surprise to Netflix when *House of Cards* was an immediate success with its subscribers.

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<sup>81</sup> Mike Boas, *The Forgotten History of Amazon Video*, MEDIUM (Mar. 14, 2018), <https://medium.com/@mikeboas/the-forgotten-history-of-amazon-video-c030cba8cf29> [<https://perma.cc/H23X-S4RY>] (noting that Amazon changed the name to Prime Video in 2018). This new industry also directly killed an entire movie rental industry, with companies like Blockbuster declaring bankruptcy in 2010. Frank Olito, *The Rise and Fall of Blockbuster*, BUS. INSIDER (Aug. 20, 2020), <https://www.businessinsider.com/rise-and-fall-of-blockbuster> [<https://perma.cc/85K5-BPYV>].

<sup>82</sup> Kristin Westcott Grant, *Netflix’s Data-Driven Strategy Strengthens Claim for ‘Best Original Content’ in 2018*, FORBES (May 28, 2018), <https://www.forbes.com/sites/kristinwestcottgrant/2018/05/28/netflixs-data-driven-strategy-strengthens-lead-for-best-original-content-in-2018/?sh=3434f28d3a94> [<https://perma.cc/NU9T-NH4M>].

<sup>83</sup> Comment on the United States Department of Justice Antitrust Division Review of the Paramount Decrees, *Competition in Digital Entertainment: Review of Consent Decrees in United States v. Paramount Pictures, Inc.* 11 (Oct. 4, 2018), <https://www.justice.gov/atr/page/file/1102391/download> [<https://perma.cc/SP9F-TTQ4>] [hereinafter Comment on the Paramount Decrees].

<sup>84</sup> See Andrew Leonard, *How Netflix Is Turning Viewers into Puppets*, SALON (Feb. 1, 2013), [https://www.salon.com/2013/02/01/how\\_netflix\\_is\\_turning\\_viewers\\_into\\_puppets/?123](https://www.salon.com/2013/02/01/how_netflix_is_turning_viewers_into_puppets/?123) [<https://perma.cc/Z4EU-HBYQ>].

<sup>85</sup> *Id.*

<sup>86</sup> Westcott Grant, *supra* note 82.

<sup>87</sup> See *id.* (describing how Amazon and Netflix, after analyzing data on consumer preferences, both concluded on investing in political dramas).

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*; Leonard, *supra* note 84.

Moreover, the success of *House of Cards* enabled Netflix to learn more about viewers, including that they especially liked the thirteen-episode format of the series because it enabled them to “binge” the entire series in one or two days.<sup>90</sup> Consequently, with each new show Netflix produced thereafter, it used the data collected on previous shows to make its new series and movies better than the last.<sup>91</sup> In this way, *House of Cards* marked the beginning of streaming services using data collection to eliminate a risk that had always been inherent in movie production: the uncertainty of whether consumers will be receptive to the content.

The data collection capabilities of the streaming services thus pose an incredible competitive advantage for the production studios that have such services.<sup>92</sup> Netflix and Amazon, as companies looking out for their own interests, do not release any of the data that they collect from their services.<sup>93</sup> Consequently, unless a company has a streaming service of its own, production companies are unable to have the advantage of knowing exactly what movies and shows will be successful.<sup>94</sup> In this context, it makes sense that companies like Disney, Warner Bros., and NBC Universal are all fighting to get into the industry as quickly as possible.

Although it takes a different form and appears in a different medium, this advantage has remarkable similarity to the advantage production studios had in the 1930s and 1940s because of their ownership or control over movie theaters. The studio system was problematic because while the Big Eight had no worries that their movies would find an audience, smaller companies with no stakes in movie theaters constantly had that fear looming over their existence.<sup>95</sup> Similarly, a company without access to a data collection service is still working in a world where there is a risk that audiences will not like their content, while companies with streaming services have practically eliminated this fear.<sup>96</sup> The result of this competitive advantage is that audiences are more likely to

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<sup>90</sup> Westcott Grant, *supra* note 82.

<sup>91</sup> See Leonard, *supra* note 84.

<sup>92</sup> The DOJ itself notes that a monopoly can be shown by evidence of (1) a large market share of the industry in question and (2) the creation of obstacles to entry for others in the industry. U.S. DEP’T OF JUSTICE, COMPETITION AND MONOPOLY: SINGLE-FIRM CONDUCT UNDER SECTION 2 OF THE SHERMAN ACT 21 (2022), [https://www.justice.gov/sites/default/files/atr/legacy/2008/09/12/236681\\_chapter2.pdf](https://www.justice.gov/sites/default/files/atr/legacy/2008/09/12/236681_chapter2.pdf) [<https://perma.cc/L8RV-6QLB>]. Data collection by the streaming services may be enough to meet the second prong of this test.

<sup>93</sup> Comment on the Paramount Decrees, *supra* note 83, at 9 (maintaining, as support to its argument that the Paramount Decrees should not be reversed, that anticompetitive behaviors already exist in the streaming industry because of Netflix’s data collection practices).

<sup>94</sup> *Id.* at 10–11.

<sup>95</sup> See, e.g., Cook & Sklar, *supra* note 38 (discussing the sustainability of the Big Eight due to their vertical integration between production, distribution, and exhibition).

<sup>96</sup> Leonard, *supra* note 84 (describing the scale, scope, and capability of Netflix’ data gathering capabilities and its effect on their ability to develop streaming content they know will be popular before its even released).

subscribe to a company's service where the content is literally designed for them than they are to go to the theaters and watch a movie they may not enjoy.<sup>97</sup>

This competitive advantage exists because companies like Netflix and Amazon were allowed to vertically integrate by forming their own production studios to complement their exhibition services, just like the studios in the early twentieth century. Just because movie-watching formats have changed does not mean that the problem that *Paramount* tried to solve has disappeared. In a way, the invention of online streaming was the loophole in the *Paramount* antitrust decision because the 1948 court could not have predicted the evolution of the movie industry.

#### IV. REGULATING THE ANTICOMPETITIVE BEHAVIORS IN THE STREAMING AGE

The eradication of the Paramount Decrees is not in and of itself problematic. The Paramount Decrees were extremely dated and were so narrow in scope that they were not effectively preventing anticompetitive behaviors in the industry as they were originally designed to do.<sup>98</sup> In many ways and as advocated by many scholars, the reversal of the Paramount Decrees can offer movie theaters and production companies a short-term opportunity for new life and innovation in an age where streaming companies are pilfering consumers away from traditional movie-watching mediums.<sup>99</sup>

Nevertheless, the reversal of the consent decrees, as the only real regulation limiting the power of movie production companies, indicates the concerning permissive attitude of the government and courts toward current oligopolistic behaviors by movie production companies. Whatever the reasons for this attitude, with movie studios currently accumulating power at an alarming rate through their streaming services, it may soon become apparent to all why regulation will be needed to curb movie production studios' growth.

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<sup>97</sup>For more of a discussion about how "data-driven creativity" is influencing the entertainment industry, see Kal Raustiala & Christopher Jon Sprigman, *The Second Digital Disruption: Streaming and the Dawn of Data-Driven Creativity*, 94 N.Y.U. L. REV. 1555, 1558 (2019) ("The deeper understanding of consumer preferences that streaming data permits leads not only to a new competitive landscape – some firms have access to huge volumes of data, others do not – but also, more significantly, to new ways of creating content.").

<sup>98</sup>Schwartz, *supra* note 22, at 45–46 (advocating for the reversal of the Paramount Decrees and arguing that newer decrees need to replace them that better account for today's movie market).

<sup>99</sup>See Riemenschneider, *supra* note 12, at 358–60 (providing an in-depth discussion of why some experts have advocated for the decrees' reversal given the digital shift of the movie industry); Brooks Barnes, *Netflix Was Only the Start: Disney Streaming Service Shakes an Industry*, N.Y. TIMES (July 20, 2019), <https://www.nytimes.com/2019/11/10/business/media/Disney-Plus-streaming.html> [<https://perma.cc/3PNY-P24G>] (displaying a graph showing the increasingly high number of Americans ending their cable subscriptions).



*A. Contrary to the District Court Judge’s Opinion, Current Antitrust Laws and Enforcement Patterns May Not Be Enough to Stop Large Streaming Services from Anticompetitive Behavior*

In 1948, the DOJ interfered in the studio system because of their violations of the Sherman Antitrust Act (Sherman Act).<sup>100</sup> The Sherman Act was enacted in 1890 as the first antitrust law.<sup>101</sup> Today, the Sherman Act prevents any monopoly that creates an unreasonable restraint of trade.<sup>102</sup> Together with the Federal Trade Commission Act, an act that outlaws “unfair methods of competition” and is enforced by the FTC, and the Clayton Act, which forbids mergers that could stifle competition or create a monopoly, the Sherman Act serves as a limit to American business growth.<sup>103</sup>

While these acts gave the government the power to divest massive companies in the mid-twentieth century, they fell short of preventing large mergers from happening in the first place.<sup>104</sup> Consequently, President Ford signed the HSR Act into law in 1976.<sup>105</sup> Under the HSR Act, companies must notify the DOJ and FTC of any planned mergers before those mergers go into effect, theoretically making it harder for monopolistic mergers to occur.<sup>106</sup>

Even with the HSR Act in place, however, very few mergers raise actionable concerns in the DOJ each year, regardless of the administration in power.<sup>107</sup> In many ways, this has been a trend since the Reagan administration.<sup>108</sup> In the 1980s, the U.S. government began taking an antitrust approach that reflected a more favorable view of unregulated competition.<sup>109</sup> Believing that large companies should be left alone to allow competition to be guided and regulated by the economy and market, the U.S. government did little, if anything, to break

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<sup>100</sup> *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 140 (1948).

<sup>101</sup> *The Antitrust Laws*, *supra* note 51; Sherman Anti-Trust Act, 15 U.S.C. §§ 1–7.

<sup>102</sup> *The Antitrust Laws*, *supra* note 51.

<sup>103</sup> *Id.*; Federal Trade Commission Act, 15 U.S.C. §§ 41–58; Clayton Act, 15 U.S.C. §§ 12–27.

<sup>104</sup> *See Signs*, *supra* note 27.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> Daniel A. Crane, *Has the Obama Justice Department Reinvigorated Antitrust Enforcement?*, 65 STAN. L. REV. 13, 13–15 (2012) (arguing that despite Obama’s criticism of the Bush administration’s lack of antitrust enforcement suits, the Obama administration brought a similar number of suits each year while in office, perhaps suggesting that antitrust enforcement is not entirely affected by politics).

<sup>108</sup> *See* Louis Galambos, *When Antitrust Helped, and Why It Doesn’t Now*, WASH. POST (June 13, 1999), <https://www.washingtonpost.com/archive/opinions/1999/06/13/when-antitrust-helped-and-why-it-doesnt-now/68ea1edd-bd6b-484f-82b4-88243ef818a7/> [<https://perma.cc/5NET-K724>] (arguing that the Reagan deregulation of antitrust extended up until 1998 and was done to enable American businesses to compete on an international scale).

<sup>109</sup> Maurice E. Stucke & Ariel Ezrachi, *The Rise, Fall, and Rebirth of the U.S. Antitrust Movement*, HARV. BUS. REV. (Dec. 15, 2017), <https://hbr.org/2017/12/the-rise-fall-and-rebirth-of-the-u-s-antitrust-movement> [<https://perma.cc/2WQ3-MKF6>].

up and prevent large accumulations of market power by a single company.<sup>110</sup> This mentality continued long after the Reagan administration through the Obama administration.<sup>111</sup> As some scholars note, it was not until the DOJ's recent challenge to the AT&T-Time Warner merger that the government again began to care about companies' vertical accumulation of market power.<sup>112</sup>

This hands-off approach of the U.S. government toward antitrust policy has made an impact in recent years and has prevented the implementation of any antitrust regulation that will protect the movie industry from anticompetitive behavior. This is evidenced by the recent mergers within the industry, specifically that of Disney and Twentieth Century Fox ("Fox") in 2019.<sup>113</sup> In 2018, the DOJ allowed Disney to acquire Fox for \$71.3 billion.<sup>114</sup> The one condition the DOJ set for the movie mogul was that Disney sell twenty-two regional sports networks to "ensure that sports programming competition is preserved in the local markets."<sup>115</sup> Despite the concern for competition in sports broadcasting, however, the merger allowed Disney to acquire a thirty-eight percent control of movie content.<sup>116</sup>

Perhaps more significantly, that same year, the U.S. District Court for the District of Columbia allowed the merger between AT&T, a telecom company that controls consumers' access to the internet, and Time Warner, a huge media organization that owns HBO and Warner Bros., among other content

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<sup>110</sup> *Id.*

<sup>111</sup> *Id.* Maurice E. Stucke and Ariel Ezrachi note that the lack of antitrust enforcement has led to large concentrations of power by single companies in various industries, which has affected the number of small businesses in those industries. *Id.*

<sup>112</sup> *Id.* ("When the United States recently challenged AT&T's acquisition of Time Warner, some cried foul. The government rarely challenged vertical mergers during the past policy cycle, under the belief that they were highly unlikely to lessen competition or create monopolies.")

<sup>113</sup> Matthew S. Schwartz, *Disney Officially Owns 21st Century Fox*, NPR (Mar. 20, 2019), <https://www.npr.org/2019/03/20/705009029/disney-officially-owns-21st-century-fox> [<https://perma.cc/U4NN-HFV8>]; see also Alex Sherman, *Trump's Crackdown on AT&T-Time Warner Is Infuriating Big Media – To the Benefit of Amazon, Netflix and Others*, CNBC (Feb. 5, 2018), <https://www.cnbc.com/2018/02/05/trump-delay-att-time-warner-approval-stalled-big-media-helps-netflix-amazon.html> [<https://perma.cc/AAF8-G647>] (noting that Rupert Murdoch decided to sell Fox in large part because of the looming pressure to compete with the digital streaming platforms).

<sup>114</sup> Eric Deggans, *Justice Department: Disney Can Buy 21st Century Fox, but with One Caveat*, NPR (June 27, 2018), <https://www.npr.org/2018/06/27/624075667/justice-department-disney-can-buy-21st-century-fox-but-with-one-caveat> [<https://perma.cc/GM4B-QLKN>].

<sup>115</sup> Press Release, Dep't of Just., *The Walt Disney Company Required to Divest Twenty-Two Regional Sports Networks in Order to Complete Acquisition of Certain Assets from Twenty-First Century Fox* (June 27, 2018), <https://www.justice.gov/opa/pr/walt-disney-company-required-divest-twenty-two-regional-sports-networks-order-complete> [<https://perma.cc/5Q9U-TNW9>]. The concern with sports programming was that there were specific areas where Fox and Disney were the only competitors. *Id.* People in those areas feared that if Disney had control of both, it would be able to charge consumers in that area inflated prices for its services. *Id.*

<sup>116</sup> Whitten, *supra* note 28.

producers.<sup>117</sup> The move allowed true vertical integration to become possible within the streaming world. Now, a movie production studio can have access to production, exhibition, and distribution through the control of consumer's internet access.<sup>118</sup>

The AT&T-Time Warner merger occurred despite the DOJ's objection to such a merger.<sup>119</sup> One of the DOJ's main objections was that the new company could raise prices for its telecom rivals to exhibit the company's content.<sup>120</sup> This, in turn, would harm the rivals' customers who would be paying higher prices than if they used the giant company's internet and cable services instead.<sup>121</sup> As there are already limited options for cable and internet services in many geographic areas, the DOJ feared that such behavior has the potential to give the new giant company a monopoly throughout the country.<sup>122</sup> Moreover,

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<sup>117</sup> Nilay Patel, *The Court's Decision to Let AT&T and Time Warner Merge Is Ridiculously Bad*, VERGE (June 15, 2018), <https://www.theverge.com/2018/6/15/17468612/att-time-warner-acquisition-court-decision> [<https://perma.cc/KG72-MSKD>] (reporting that "the resulting company will have unparalleled market power over both content and distribution," and arguing that the judge failed to understand that by allowing the merger, he was not enabling the companies to compete with Netflix but rather was allowing the companies to experiment with ways to get ahead of the company). It is important to note that this was not the first time a merger on this scale occurred in the media industry, and thus the AT&T-Time Warner merger was not without precedent. In 2011, the government gave Comcast, a cable company, permission to acquire NBC Universal, a broadcast company. Tim Arango & Brian Stelter, *Comcast Receives Approval for NBC Universal Merger*, N.Y. TIMES (Jan. 19, 2011), <https://www.nytimes.com/2011/01/19/business/media/19comcast.html> [<https://perma.cc/PHW4-65YF>] (predicting in 2011 that the Comcast-NBC Universal merger could raise antitrust concerns in the future).

<sup>118</sup> Patel, *supra* note 117. *But see infra* note 125.

<sup>119</sup> Complaint at 2, *United States v. AT&T, Inc.*, No. 1:17-cv-02511, 2017 WL 5564815 (D.D.C. Nov. 20, 2017). The DOJ argued that such a merger could harm rivals and consumers. *Id.* at 3. Deciding an appeal of the lower court's decision to allow the merger, the judge rejected AT&T's claims that the DOJ's objection to the merger was politically motivated and at the request of President Trump because of his dislike of CNN, an affiliate of Time Warner. Edmund Lee & Cecilia Kang, *U.S. Loses Appeal Seeking to Block AT&T-Time Warner Merger*, N.Y. TIMES (Feb. 26, 2019), <https://www.nytimes.com/2019/02/26/business/media/att-time-warner-appeal.html> (on file with the *Ohio State Law Journal*); Brent Kendall, *Judge Denies AT&T Access to Government Discussions on Time Warner*, WALL ST. J. (Feb. 20, 2018), <https://www.wsj.com/articles/judge-denies-at-t-bid-for-information-on-internal-government-discussions-about-time-warner-deal-1519156444> [<https://perma.cc/8C74-ZVL2>]; *see also* Edmund Lee, *Here's What You Need to Know About the U.S. Lawsuit Against the AT&T-Time Warner Merger*, VOX (Mar. 16, 2018), <https://www.vox.com/2018/3/16/17110870/doj-lawsuit-att-time-warner-merger-explained-trump-cnn> [<https://perma.cc/VV4L-X3DL>] (discussing one unproven theory that the Disney-Fox merger was approved by the DOJ because Fox was owned by Rupert Murdoch, who is also the owner of Trump-friendly Fox News).

<sup>120</sup> Complaint, *supra* note 119, at 3.

<sup>121</sup> *Id.* at 14–16.

<sup>122</sup> *Id.* at 15.

if one views this merger in light of recent decisions on net neutrality,<sup>123</sup> this allowance of power becomes more problematic, especially in the streaming age where media companies are dependent on their customers having reliable internet speed.<sup>124</sup> With control of their films at every level, including the speed at which consumers are able to stream movies, a company could hypothetically promote its own movie streaming platforms at the expense of others.<sup>125</sup>

One of the main justifications cited by courts for allowing such mergers (and which was also cited by the New York district court when ruling to reverse the Paramount Decrees) was that such moves would allow companies without a digital or content production branch to compete with companies like Netflix, which has both elements built into its business model.<sup>126</sup> This reasoning is flawed, however, because it assumes that Netflix's position in the market is acceptable.<sup>127</sup> Moreover, the fact that it takes deregulation and the allowance of massive mergers to create a competitive industry is extremely problematic and exacerbates the underlying problem: existing streaming companies have too much control of the market.<sup>128</sup>

### B. *New Regulation Can Stop the Current Anticompetitive Practices*

Streaming services are expanding rapidly and continually figuring out ways to attract and engross subscribers in the form of data collection and mass-production of content, putting start-up production companies with fewer

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<sup>123</sup> See *What Is Net Neutrality?*, ACLU, <https://www.aclu.org/issues/free-speech/internet-speech/what-net-neutrality> [<https://perma.cc/B5NX-M7VE>] (discussing how telecommunications companies are currently free to adjust consumers' internet speeds as they please in order to charge consumers more money for basic internet services); Heather Morton, *Net Neutrality 2020 Legislation*, NAT'L CONF. STATE LEGISLATURES (Jan. 19, 2021), <https://www.ncsl.org/research/telecommunications-and-information-technology/net-neutrality-2020-legislation.aspx> [<https://perma.cc/Z2XX-W49N>].

<sup>124</sup> See Patel, *supra* note 117.

<sup>125</sup> In May 2021, AT&T sold WarnerMedia, the production company of Time Warner, to Discovery in a \$43 billion deal. Steve Kovach & Sam Meredith, *AT&T Announces \$43 Billion Deal to Merge WarnerMedia with Discovery*, CNBC (May 17, 2021), <https://www.cnbc.com/2021/05/17/att-to-combine-warnermedia-and-discovery-assets-to-create-a-new-standalone-company.html> [<https://perma.cc/BD83-L2WZ>] (noting that AT&T shareholders will maintain a 71% stake in the new company). While on its surface this move seems to make the above-mentioned scenario unlikely, in reality, the threat has only been delayed. AT&T's decision to divest was solely motivated by its own financial interests; had the company found that it could maximize its profits by keeping the production company, it would have, and the government would not have stopped it. See *id.* Although it might not be AT&T that changes the competitive landscape of the film industry, government inaction continues to leave that role open for another ambitious entity.

<sup>126</sup> See Raustiala & Sprigman, *supra* note 97, at 1559–60.

<sup>127</sup> See Oler, *supra* note 20, at 495.

<sup>128</sup> See Barnes, *supra* note 99.

resources to compete at risk of losing easy access to the market.<sup>129</sup> Without freedom to compete, consumers will be the true victims, paying exaggerated fees to access content that was once readily available and inexpensive. The reversal of the Paramount Decrees not only threatens the future of small theaters but, by deregulating an already antitrust regulation-deficient industry, it also functions as a sort of green light for big streaming services like Netflix, HBO Max/Discovery, or Disney+ to expand without limits. While some may disagree that there is actionable anticompetitive behavior now,<sup>130</sup> based on current trends, letting these companies go unchecked could pose serious antitrust problems in the future. For this reason, industry-specific regulation is needed sooner rather than later.<sup>131</sup>

### 1. *Why a World with No Regulation Is Problematic for Small Companies and Consumers*

In the movie business, content is the key to success.<sup>132</sup> For companies like Disney, which recently acquired Fox and Hulu, having the content necessary to attract subscribers is not a concern.<sup>133</sup> Its decision to produce more content

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<sup>129</sup> See, e.g., Benjamin Mullin & Lillian Rizzo, *Quibi Was Supposed to Revolutionize Hollywood. Here's Why It Failed.*, WALL. ST. J. (Nov. 2, 2020), <https://www.wsj.com/articles/quibi-was-supposed-to-revolutionize-hollywood-heres-why-it-failed-11604343850> [<https://perma.cc/VT4E-GBQP>]. Even Quibi, a streaming company with nearly \$1 billion of initial investment, was unsuccessful entering this market. *Id.* (“To compete, new players can’t afford to have a flawed idea or shaky execution, especially when their rivals . . . have brand recognition and deep libraries of programming.”).

<sup>130</sup> Many may argue that there currently exist enough companies within the industry to give consumers options, to maintain competitive prices, and to keep each other in check. See, e.g., Steve Kovach, *Netflix Finally Admitted Two Things We Already Knew About the Streaming Wars*, CNBC (Oct. 17, 2019), <https://www.cnn.com/2019/10/17/netflix-says-competition-pricing-could-slow-subscriber-growth.html> [<https://perma.cc/77P6-BVWB>] (discussing Netflix’s growing need to find creative ways to keep subscribers as new competitive streaming services continue to emerge).

<sup>131</sup> See generally Angela Chen, *How to Regulate Big Tech Without Breaking It Up*, MIT TECH. REV. (June 7, 2019), <https://www.technologyreview.com/2019/06/07/135034/big-tech-monopoly-breakup-amazon-apple-facebook-google-regulation-policy/> [<https://perma.cc/S4ER-3ZNF>].

<sup>132</sup> See Frank Pallotta, *Paramount+ Is Banking on Iconic TV Characters from ‘Frasier’ to ‘SpongeBob,’* CNN BUS. (Mar. 4, 2021), <https://www.cnn.com/2021/03/04/media/paramount-launch-streaming/index.html> [<https://perma.cc/SXD6-8TRL>] (highlighting that Paramount is the latest movie studio to join the streaming world with the launch of its streaming service, Paramount+, on March 11, 2021); Steven Dudash, *The Streaming Wars Are Entering Their Final Season*, FORBES (May 28, 2021), <https://www.forbes.com/sites/greatspeculations/2021/05/28/the-streaming-wars-are-entering-their-final-season/?sh=128773ae5dbd> [<https://perma.cc/AV6D-F4FP>].

<sup>133</sup> Matt Zoller Seitz, *Disney Is Quietly Placing Classic Fox Movies into Its Vault, and That’s Worrying*, VULTURE (Oct. 24, 2019), <https://www.vulture.com/2019/10/disney-is-quietly-placing-classic-fox-movies-into-its-vault.html> (on file with the *Ohio State Law Journal*); Emily VanDerWerff, *Here’s What Disney Owns After the Massive Disney/Fox*

stems more from a profit-seeking motive than from a competitive necessity to stay in the market.<sup>134</sup> In fact, these major movie production studios are flourishing in the age of streaming because it has allowed them to gain more control over the exhibition of their content, a luxury that was not as easily available to them in the past.<sup>135</sup> As production studios no longer need to make deals with theaters, cable networks, or other streaming sites, they are able to make even more profits from their own content.<sup>136</sup>

This newfound freedom of the production studios, however, comes at a price for other businesses in the industry. Small production companies with little content, or third-party exhibition sites with no original content (like Netflix pre-2013), will have a difficult time finding a sustainable, independent place in the streaming market.<sup>137</sup> The expansion of the already big production companies may therefore correlate with the fall of independent movie studios.

To make matters worse, with so many streaming services available to consumers, and consumers thus paying a lot of money in monthly fees, it is unlikely that all the companies currently in existence will be able to maintain their businesses in current form as consumers begin to pick and choose among the companies.<sup>138</sup> The result could then be that the industry will shrink and only a few giants will dominate subscriber bases and movie content.<sup>139</sup> This oligopolistic behavior within the industry could then obliterate the tiny chance that remained for smaller production companies to enter the market without making a deal with one of these major companies.<sup>140</sup> Such outcome not only

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*Merger*, VOX (Mar. 20, 2019), <https://www.vox.com/culture/2019/3/20/18273477/disney-fox-merger-deal-details-marvel-x-men> (on file with the *Ohio State Law Journal*) (listing the extent of Disney's content monopoly).

<sup>134</sup> See Barnes, *supra* note 99.

<sup>135</sup> See Whitten, *supra* note 28.

<sup>136</sup> See Jonah Weiner, *The Great Race to Rule Streaming TV*, N.Y. TIMES (July 10, 2019), <https://www.nytimes.com/2019/07/10/magazine/streaming-race-netflix-hbo-hulu-amazon.html> [<https://perma.cc/ZKE3-CQL4>] (describing how streaming services are constantly trying to come up with new content to either attract new consumers or retain existing ones).

<sup>137</sup> See David Trainer, *Netflix's Original Content Strategy Is Failing*, FORBES (July 19, 2019), <https://www.forbes.com/sites/greatspeculations/2019/07/19/netflixs-original-content-strategy-is-failing/#16183e783607> (on file with the *Ohio State Law Journal*); *supra* notes 82–90 and accompanying text.

<sup>138</sup> Dana Feldman, *Study: Six New Streaming Services Exceed Consumer Demand*, FORBES (Oct. 29, 2019), <https://www.forbes.com/sites/danafeldman/2019/10/29/tv-time-uta-streaming-wars-study-6-new-services-exceeds-consumer-demand/#50d51c151fb0> (on file with the *Ohio State Law Journal*) (cautioning that the goal of many of these new streaming services to encourage customers to pay an additional monthly fee in addition to their current streaming subscriptions may not be feasible if customers have too many options from which to choose).

<sup>139</sup> See generally Raustiala & Sprigman, *supra* note 97.

<sup>140</sup> See Daniel M. Isaacson & Samantha P. Koppel, *Let Them Eat Cable: Potential Sherman Act Liability when Media Giants Collaborate in Direct-to-Consumer Offerings*, 8 BERKELEY J. ENT. & SPORTS L. 27, 43–44 (2019) (proposing joint ventures as a solution to promote competition among streaming services). It is important to note that currently, small

would result in thousands of jobs lost within the industry,<sup>141</sup> but is also a dangerous outcome for consumers who could wind up paying more than they otherwise would have for access to a company's content.

## 2. *Breaking Up: When It Is Time to Forfeit Market Control*

The core problem the Supreme Court intended to solve in *United States v. Paramount Inc.* was that movie production studios should not be allowed to vertically integrate. Just because movie-watching experiences and forums have changed does not mean that this problem has ceased to exist.<sup>142</sup> In just over a decade, Disney has acquired Marvel Studios, Lucasfilm, and Fox,<sup>143</sup> and there are no regulations in place to suggest that its acquisition activity with other production studios will stop.<sup>144</sup> Nevertheless, Disney's current control of thirty-eight percent of movie content and ownership of two major streaming services, Disney+ and Hulu, is already concerning.<sup>145</sup> Going forward, imposing stricter regulation in the form of limits to a company's market share and content control would prevent another merger on the scale of Disney-Fox from happening again.

The government should set a ceiling on the acceptable level of market share one company can possess. In many ways, such a solution would draw parallels to a plan Senator Elizabeth Warren proposed during her 2020 presidential

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businesses are few within the entertainment industry, and the ones that do exist are already dependent on big production studios to help get their movies distributed. Nevertheless, with the rise of unregulated streaming, it may become impossible for these companies to exist in any independent form.

<sup>141</sup> Brent Lang, Cynthia Littleton & Joe Otterson, *How Fox Employees Are Bracing for Life Under Disney*, VARIETY (Mar. 5, 2019), <https://variety.com/2019/film/news/fox-disney-merger-transition-employees-1203154866/> [<https://perma.cc/5XRB-M95T>] (reporting that up to 4,000 jobs were estimated to have been cut as a result of the Disney-Fox merger).

<sup>142</sup> See generally Comment on the Paramount Decrees, *supra* note 83, at 17 (arguing that the problem remains).

<sup>143</sup> Matthew Johnston, *7 Companies Owned by Disney*, INVESTOPEDIA (July 15, 2021), <https://www.investopedia.com/articles/markets/102915/top-5-companies-owned-disney.asp> [<https://perma.cc/BZ9W-LNMS>]; see also Schwartz, *supra* note 113 (noting that when Disney acquired Fox, it got Fox's thirty percent share in Hulu, which in addition to Disney's preexisting thirty percent share in the streaming service, gave Disney control over the streaming company). Disney is not the only company acquiring production companies. See Annie Palmer, *Amazon to Buy MGM Studios for \$8.45 Billion*, CNBC (May 26, 2021), <https://www.cnbc.com/2021/05/26/amazon-to-buy-mgm-studios-for-8point45-billion.html> [<https://perma.cc/A9GF-L5X3>].

<sup>144</sup> With Disney's history of acquiring content and streaming companies and the government's allowance of media and telecom companies, it is plausible that Disney could eventually set its eyes on a telecom industry of its own. Although Disney is probably a big enough company to set off immediate warning bells for the DOJ and judges if it takes such an action, there is no precedent or law that would guarantee such a result. The absence of such regulation is truly concerning.

<sup>145</sup> See Disis, *supra* note 9; see also Whitten, *supra* note 28.

campaign to break up Big Tech companies.<sup>146</sup> Warren’s solution comes after companies like Amazon and Google have been expanding into a new internet market with little to no government oversight.<sup>147</sup> While these companies have seen immense success from their innovation in the form of a societal shift in consumer usage of the internet, according to Warren, these companies have also created a market in which it is virtually impossible for smaller businesses to emerge and compete.<sup>148</sup>

To stop the anticompetitive nature of the tech industry, Warren suggested marking all companies with an annual revenue of or exceeding \$25 billion.<sup>149</sup> These companies would then be subject to certain restrictions, including being “prohibited from owning both the platform utility and any participants on that platform.”<sup>150</sup> In this way, Warren’s plan would stop these large companies from the current vertical integration that has been cutting small businesses out of various fields of the tech industry and has resulted in monopolies.<sup>151</sup> Warren’s plan would mainly target recent mergers of the Big Tech companies, which she believes to be particularly problematic trend-setters.<sup>152</sup>

Warren’s plan is very similar to the plan suggested here, with slight variations. Given the underlying differences of the tech and movie industries, any regulation of movie production studios should focus on overall content control rather than annual revenue of companies. A market share ceiling that directly correlates with the percentage of content controlled by one company

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<sup>146</sup> See Team Warren, *supra* note 32.

<sup>147</sup> Sheelah Kolhatkar, *How Elizabeth Warren Came Up with a Plan to Break Up Big Tech*, NEW YORKER (Aug. 20, 2019), <https://www.newyorker.com/business/currency/how-elizabeth-warren-came-up-with-a-plan-to-break-up-big-tech> [<https://perma.cc/HNW4-DMU7>] (noting that underlying Warren’s idea is that while it may seem like the Big Tech are helping consumers by making shopping and access to online information easier, the reality is that the monopolies of these companies has resulted in a decrease in available jobs in America).

<sup>148</sup> *Id.*

<sup>149</sup> Team Warren, *supra* note 32.

<sup>150</sup> *Id.* One of the main anticompetitive problems among the Big Tech companies to which Warren is responding is the fact that a company like Amazon is both a store selling its own products and a platform through which third parties can buy and sell products. Issie Lapowsky, *Elizabeth Warren Fires a Warning Shot at Big Tech*, WIRED (Mar. 8, 2019), <https://www.wired.com/story/elizabeth-warren-break-up-amazon-facebook-google/> [<https://perma.cc/KBL9-D8PN>]. *But see* Makena Kelly, *Most Democrats Refuse to Back Elizabeth Warren’s Big Tech Break Up Plan on the Debate Stage*, VERGE (Oct. 15, 2019), <https://www.theverge.com/2019/10/15/20916729/democratic-debate-elizabeth-warren-big-tech-break-up-facebook-google-amazon-twitter> (on file with the *Ohio State Law Journal*) (implying that Warren’s plan to actually break up the companies was more extreme than solutions suggested by other 2020 Democratic presidential candidates); Rory Van Loo, *In Defense of Breakups: Administering a “Radical” Remedy*, 105 CORNELL L. REV. 1955, 1955–57 (2020) (noting that breaking up companies as a solution to large consolidations of power has traditionally been seen as too “radical” a move, but ultimately arguing that breakups would be beneficial in an antitrust context).

<sup>151</sup> See Team Warren, *supra* note 32.

<sup>152</sup> Kolhatkar, *supra* note 147.



would target the true danger of allowing one movie production studio to expand without limits: it can dominate all popular content such that it becomes the only platform to which consumers will wish to subscribe, thus preventing any real competition from smaller companies.<sup>153</sup>

After companies with a large market share are recognized based on content control, regulation would then force existing media companies with too large of a market share to forfeit some of their share by breaking up into smaller production companies or lose the exhibition portion of their business.<sup>154</sup> This would not only create jobs within the industry but would also promote competition—the best scenario for consumer protection.<sup>155</sup>

Similar to Warren’s plan, the implementation of this kind of regulation would target recent mergers, but the cap on total content would primarily be a concern before allowing a merger to occur. This is because there may be serious concerns about how to consistently regulate the percent market share of a company by its overall content, especially as the amount of content owned by a particular company is ever-increasing in fair and natural ways as an inherent characteristic of its business.<sup>156</sup> The only conceivable way that a company could get in trouble for content control without having engaged in a merger with another production company would be if it expands in its exhibition practices such that the company begins to use its control of content as a competitive weapon to keep smaller companies out of the industry.

For example, imagine a company creates its own streaming site with only its own content, relying on its brand to attract consumers.<sup>157</sup> A smaller company with a small amount of content does not have the brand recognition, content, or money to have its own streaming service and therefore is no longer able to compete with the large company because it does not have the same consumer access to its content.<sup>158</sup> It is under these circumstances that regulation would be needed to step in to break up the company with the large content control, such that the company has two options: it could either forfeit its exhibition site and keep control of a large content share or it could forfeit ownership of some of its content, such that it would be forced to allow the content of other production studios on its exhibition site and market that content on equal footing as its own content.

Arguably, had this type of regulation been in place at the time Disney was seeking to acquire Fox, such a merger would have been viewed through a

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<sup>153</sup> See generally Amos, *supra* note 28.

<sup>154</sup> See, e.g., Press Release, *supra* note 115.

<sup>155</sup> See Van Loo, *supra* note 150, at 2021.

<sup>156</sup> Gavin Bridge, *Netflix Released More Originals in 2019 than the Entire TV Industry Did in 2015*, VARIETY (Dec. 17, 2019), <https://variety.com/2019/tv/news/netflix-more-2019-originals-than-entire-tv-industry-in-2005-1203441709/> [<https://perma.cc/LJ63-U7XP>] (reporting that in 2019, Netflix released 371 new movies and tv shows).

<sup>157</sup> Disney+ may come to mind. See Riemenschneider, *supra* note 12, at 351–52 (discussing Disney’s reliance on brand recognition as a marketing strategy).

<sup>158</sup> See Isaacson & Koppel, *supra* note 140, at 28.

skeptical lens that may have stopped the merger dead in its tracks. A merger that allows one company to have a near forty percent control of a market is frowned upon by most industries' standards.<sup>159</sup> While any specific cap could be debated as an arbitrary line to draw, it is reasonable to think such a cap should remain at or around thirty percent of the total market.<sup>160</sup>

Such a solution is also not without precedent. On the contrary, this would be similar to what the government did with the Paramount Decrees by forcing companies to release their command of the market by giving up the exhibition sides of their companies.<sup>161</sup>

### 3. Congressional Intervention May Be Able to Promote Competition

The government's failure to recognize the danger to consumers when it allowed Disney to acquire Fox reveals that change is needed on a deeper level with the government's attitude toward giant mergers, even those outside the media industry. Politicians and government officials need to be more concerned about the immense market control businesses are gaining from being able to reach consumers easily through the internet.<sup>162</sup> If present, such concern would manifest in the form of new, much needed legislation as an alternative to the above regulation. While this legislation at first may appear more drastic, it would nevertheless attack the heart of the anticompetitive problems in the movie industry.<sup>163</sup>

When the DOJ announced its evaluation of the Paramount Decrees, many argued that the decrees just needed to be updated rather than completely repealed.<sup>164</sup> While the New York district court's repeal of the consent decrees closed the door to the consent decrees being reformed, it is still possible for Congress to pass legislation that mirrors the core of the Paramount Decrees. If

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<sup>159</sup> See, e.g., *Monopoly by the Numbers*, OPEN MARKETS, <https://www.openmarketsinstitute.org/learn/monopoly-by-the-numbers> (last visited Mar. 19, 2021) [<https://perma.cc/R8RY-7E54>] (listing industries believed to have monopolies, including the television advertising and railroad industries which both contain one company with just over forty percent control of its respective industry).

<sup>160</sup> While one company having control of one third of an industry is a lot, it nevertheless still allows other companies to have a fair chance at accessing the majority of the industry's market.

<sup>161</sup> Schwartz, *supra* note 22, at 62–68.

<sup>162</sup> Admittedly, most politicians are educated and probably do not look favorably on government regulation of businesses for policy reasons. Paul Constant, *How Did Unfettered Business Become a Bipartisan Issue? Professor Luigi Zingales Explains Why Democrats and Republicans Are Both Pro-Business Parties, at the Expense of Everyone Else.*, BUS. INSIDER (Nov. 19, 2019), <https://www.businessinsider.com/luigi-zingales-professor-finance-democrats-republicans-pro-business-2019-11> [<https://perma.cc/F4K6-VKBZ>].

<sup>163</sup> This solution is also much less feasible given that politicians generally look favorably on mergers. *See id.*

<sup>164</sup> See Schwartz, *supra* note 22, at 110; Comment on the Paramount Decrees, *supra* note 83, at 19.

new protections similar to the Paramount Decrees were to emerge, however, all media companies (including Disney, Netflix, and Amazon) would have to be prohibited from owning both exhibition platforms and production companies.<sup>165</sup> Such legislation would have to be broad enough to include any possible company that may emerge and any new movie-watching habits that may arise in the future.<sup>166</sup> Otherwise, there is a real risk that there will no longer be independent movie exhibition businesses as they struggle to find content to exhibit in a world where people are beginning to go to theaters less and less and production studios have significantly more bargaining power.<sup>167</sup>

Any new legislation attempting to mirror the old consent decrees would also have to account for how new technology has changed the movie-making business. For example, it is essential that streaming companies be forced to share consumer data, thus allowing all studios to know popular trends before investing money in a film.<sup>168</sup> As it currently stands, companies like Netflix and Disney have an incredible competitive advantage over other studios, who still have to gamble when choosing what projects to pursue.<sup>169</sup> Arguably, it was thanks to Disney's acquisition of the well-established streaming sites, Hulu and BAMTech, a streaming service known for streaming Major League Baseball,<sup>170</sup> that Disney was able to launch Disney+ as successfully as it did. Other streaming sites without such insider advantage have had a much harder time learning the ropes in this new industry.<sup>171</sup>

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<sup>165</sup> Even though the above-mentioned companies have never owned their own theaters, Netflix once tried unsuccessfully to acquire Landmark Theaters, proving that compliance with the Paramount Decrees by companies not bound to them was merely a polite rule. Plaugic, *supra* note 20.

<sup>166</sup> See generally Schwartz, *supra* note 22; Comment on the Paramount Decrees, *supra* note 83.

<sup>167</sup> See Mark Marciszewski, *The Paramount Decrees and Block Booking: Why Block Booking Would Still Be a Threat to Competition in the Modern Film Industry*, 45 VT. L. REV. 227, 285 (2020) (arguing that with the Paramount Decrees, block booking will become a big threat to fair competition in the theater industry).

<sup>168</sup> See Chen, *supra* note 131 (offering data sharing as a solution for regulating Big Tech companies).

<sup>169</sup> The solution to this Note assumes that companies like Amazon and Netflix are classified with other movie studios when being regulated for movie production, distribution, and exhibition purposes. It is possible, however, that such companies would argue that they are technology companies for the sake of avoiding the type of regulation that this Note suggests. See Oler, *supra* note 20, at 492–95 (suggesting that this argument is not very strong and recommending that any new legislation should explicitly classify streaming companies as movie studios to avoid any strategic evasion of regulations).

<sup>170</sup> Ben Popper, *Disney Bought Baseball's Tech Team to Take on Netflix*, VERGE (Aug. 9, 2017), <https://www.theverge.com/2017/8/9/16118694/disney-bamtech-espn-streaming-netflix> [<https://perma.cc/7DG8-684N>].

<sup>171</sup> Mullin & Rizzo, *supra* note 129 (noting the failure of Quibi, a streaming service that offered short duration content, to find a successful place in the market and is shutting down after only six months in operation).

Furthermore, while it will be noteworthy to watch how the government responds to recent pushes to regulate Big Tech companies (e.g., Google, Apple, Facebook, and Amazon),<sup>172</sup> streaming companies should not be mixed in with this group. Given the ever-evolving nature of the movie industry and the underlying product such industry offers,<sup>173</sup> movie studios need regulation that is tailored to their unique role in society.<sup>174</sup> Specifically, any regulation that is implemented should create more protection of companies that focus on exhibition forums besides streaming, specifically movie theaters and cable companies. This would ensure that consumers have options on how to access content and that streaming services have other companies that they must watch and with which to compete in order to keep prices consumer friendly.

#### 4. *Reliance on Mergers and Content Sharing as a Solution Is Unrealistic and Ignores the Underlying Issue*

It is possible that some may argue that less drastic measures to breaking up companies and regulating their acquisition behavior can be used to keep the movie production and exhibition companies in check. Practices like content sharing (where one company allows another company to stream its content in addition to having that same content streaming on its own platform) or a company opening its streaming site to the content of movie production studios without a streaming site (as Netflix has always done) are a few such alternatives.<sup>175</sup> Nevertheless, those solutions are not feasible in the long run and do nothing to solve the anticompetitive problems plaguing the industry now.

In the current competitive world of streaming where the quality and exclusivity of one's content is the key to success, content sharing is extremely undesirable and unfeasible. This is evidenced by what recently happened with the NBC series *Parks and Recreation*. For years, consumers had a choice of

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<sup>172</sup> Glenn Jeffers & Mark McCareins, *Why Antitrust Regulators Don't Scare Big Tech*, KELLOGG INSIGHT (Aug. 19, 2019), <https://insight.kellogg.northwestern.edu/article/why-antitrust-regulators-dont-scare-big-tech> [<https://perma.cc/98GL-UH79>].

<sup>173</sup> Unlike the Big Tech companies, the movie industry still encompasses movie production companies and movie theaters that have no digital side to their businesses. Additionally, regulation of movie studios should acknowledge that movie studios are producing a product that is solely for entertainment purposes. The movie industry is thus unique from the Big Tech companies in that there are not quite the same cultural policy considerations to balance when discussing regulation of the industry.

<sup>174</sup> See Oler, *supra* note 20, at 502 n.202. Making industry-specific regulations would combat criticism that Warren's breakup plan was too broad and needed to be better tailored toward the companies she was targeting. Kevin Roose, *A Better Way to Break Up Big Tech*, N.Y. TIMES (Mar. 13, 2019), <https://www.nytimes.com/2019/03/13/technology/elizabeth-warren-tech-companies.html> [<https://perma.cc/5VD2-FCES>].

<sup>175</sup> See Isaacson & Koppel, *supra* note 140, at 43–44 (proposing joint ventures as a solution to anticompetitive concerns among streaming companies).

watching this popular series on Netflix, Amazon, or Hulu.<sup>176</sup> With the launch of NBC's own streaming service, Peacock, however, viewers can now only view *Parks and Recreation* on NBC's exhibition platform.<sup>177</sup> From NBC's perspective, this move makes perfect sense; making one's content exclusive to one's site is the only real way to gain a significant number of subscribers and therefore make a profit. Consequently, any regulation that would attempt to limit exclusivity of content would not only undermine the business strategy of all movie production companies and violate basic copyright law,<sup>178</sup> but it would also completely overlook the real anticompetitive problem: production studios being able to own exhibition platforms.

Additionally, even if independent production studios were to make a deal with a larger production studio for streaming rights, the big studio could not be trusted to promote the small company's content on an equal footing as their own or pay the small studio the compensation it deserves.<sup>179</sup> If movie studios are allowed to continue on their current trajectory, the content of large production companies will soon dominate both theaters and streaming, making it hard for independent production studios to reach wide audiences and giving consumers less options.

## V. CONCLUSION

The simultaneous boost of streaming services and hit taken by the movie theaters during the pandemic could speed up the domination of the media giants in the next decade. Regulation is thus needed sooner rather than later. For most consumers who are now reaping the benefits of a seemingly endless supply of at-home movies for low monthly fees, it may not yet be apparent why letting the streaming war rage unchecked is problematic. Nevertheless, in light of recent mergers and the government's seeming indifference to large accumulations of power by movie production companies, competition within the industry may slowly fade away if the industry continues at its current rate. Without that competition, consumers will suffer in the form of ever-increasing prices for fewer and poorer quality content.

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<sup>176</sup> Kayla Cobb, '*Parks and Recreation*' Is Leaving Netflix, Hulu and Amazon in October, DECIDER (Sept. 2, 2020), <https://decider.com/2020/09/02/parks-and-recreation-leaving-netflix/> [<https://perma.cc/476P-7T7X>].

<sup>177</sup> *Id.* This example also underscores how unfriendly the movie industry already is to consumers. Where it was once possible to choose between an Amazon Prime and a Netflix subscription (because they both had overlapping content), one now needs subscriptions to multiple platforms if one wants to view a diversity of content. In this way, the industry is shifting such that there are no true independent exhibition sites because production companies have gained control of the middleman's industry. The consumer, who is now paying much more in monthly subscriptions, is thus the victim.

<sup>178</sup> See 17 U.S.C. § 106.

<sup>179</sup> One only has to log on to Netflix and be overwhelmed with promotion of Netflix original content to see how a streaming service with its own production studio can be biased.

For an industry that is fueled by consumer enjoyment, consumers should ultimately be the victors of this feud. Regulation can thus be the secret weapon that ensures that the movie production and streaming companies always keep consumers' best interests front and center while protecting film's place in society as an accessible, fun source of entertainment and culture.