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After 70+ Years, Hollywood's Major Studios Are Allowed to Leave "Hotel California": Why the District Court Was Correct in Terminating the Paramount Consent Decrees

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AFTER 70+ YEARS, HOLLYWOOD'S MAJOR STUDIOS ARE ALLOWED TO LEAVE "HOTEL CALIFORNIA": WHY THE DISTRICT COURT WAS CORRECT IN TERMINATING THE PARAMOUNT CONSENT DECREES

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I. INTRODUCTION

The year is 1948—Jackie Robinson made his Major League Baseball debut the year before,[1] television sets were only beginning to enter the homes of Americans,[2] Disneyland was still a figment of Walt Disney's imagination,[3] and Audrey Hepburn had not yet risen to fame.[4] Hollywood studios and the "silver screen" dominated the entertainment industry.[5] And, in this same year, the Supreme Court handed down an antitrust decision that would completely change the structure of the motion picture industry.[6]

The first half of the twentieth century saw the birth of Hollywood's Golden Age, where Hollywood and its major studios thrived as one of the biggest businesses in America.[7] By the 1930s, the eight major studios—Columbia Pictures Corporation ("Columbia Pictures"), Universal Corporation ("Universal"), and United Artists Corporation ("United Artists")—practically controlled all three phases of the movie industry: production, distribution, and exhibition.[8] The major studios effectively used this control to exclude their competitors from the market.[9] However, this came to an end in 1948 when the U.S. Department of Justice (DOJ) won its antitrust action against the major studios.[10] The Supreme Court held that the studios violated the

1. Nick Anapolis, *Robinson Debuts Five Days After Signing with Dodgers*, NAT'L BASEBALL HALL OF FAME, https://baseballhall.org/discover/inside-pitch/robinson-signs-first-big-league-contract [https://perma.cc/3LY9-SK4L].

2. PAULA LANDRY & STEPHEN R. GREENWALD, THE BUSINESS OF FILM: A PRACTICAL INTRODUCTION 11–12 (2d ed. 2018).

3. Construction of Disneyland began in 1954 and its doors opened in 1955. *See Disneyland Opens*, HISTORY, https://www.history.com/this-day-in-history/disneyland-opens [https://perma.cc/YR8E-E7MH].

4. Audrey Hepburn did not receive her first starring role in *Roman Holiday*—for which she won both an Academy Award and a Golden Globe Award—until 1953. Susan King, *Audrey Hepburn's 1953 'Roman Holiday' an Enchanting Fairy Tale*, LA TIMES (Dec. 12, 2013, 5:00 AM), https://www.latimes.com/entertainment/envelope/la-xpm-2013-dec-12-la-et-mn-oscar-archives-audrey-hepburn-roman-holiday-20131212-story.html [https://perma.cc/PU65-JV72].

5. *See* THOMAS SCHATZ, THE GENIUS OF THE SYSTEM: HOLLYWOOD FILMMAKING IN THE STUDIO ERA 412 (2010).

6. *See U.S. Supreme Court Decides Paramount Antitrust Case*, HISTORY, https://www.history.com/this-day-in-history/u-s-supreme-court-decides-paramount-antitrust-case [https://perma.cc/E452-8D9K].

7. *See* Tom Schatz, *The Studio System and Conglomerate Hollywood*, *in* THE CONTEMPORARY HOLLYWOOD FILM INDUSTRY 13, 15 (Paul McDonald & Janet Wasko eds., 2008).

8. Michael Conant, *The Paramount Decrees Reconsidered*, 44 L. & CONTEMP. PROBS. 79, 80 (1981).

9. *See id.*

10. *U.S. Supreme Court Decides Paramount Antitrust Case*, *supra* note 6.

Sherman Antitrust Act of 1890 ("Sherman Act") and ordered their illegal scheme dismantled.[11] As a result, the studios each signed consent decrees, collectively known as the Paramount Consent Decrees ("Paramount Decrees").[12]

> [The Paramount] Decrees required the movie studios to separate their distribution operations from their exhibition businesses . . . [and] banned various motion picture distribution practices, including block booking (bundling multiple films into one theatre license), circuit dealing (entering into one license that covered all theatres in a theatre circuit), resale price maintenance (setting minimum prices on movie tickets), and granting overbroad clearances (exclusive film licenses for specific geographic areas).[13]

The Sherman Act[14] prohibits illegal restraints of trade by two or more actors (section 1), or unilaterally by a monopolist (section 2).[15] In the early days of antitrust, most violations under section 1 were per se, meaning the conduct was illegal on its face. When alleging a per se violation, "plaintiffs are not required to define the relevant product markets or show that the defendant has market power in a relevant market."[16] However, most modern jurisprudence relies on the rule of reason approach, in which the court defines the relevant market and balances the procompetitive justifications against the anticompetitive

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11. *Id.*

12. United States v. Paramount Pictures Inc., [1948–1949 Trade Cas.] Trade Regul. Rep. (CCH) ¶ 62,335 (S.D.N.Y. Nov. 8, 1948) [hereinafter RKO Decree]; United States v. Paramount Pictures Inc., [1948–1949 Trade Cas.] Trade Regul. Rep. (CCH) ¶ 62,337 (S.D.N.Y. Mar. 3, 1949) [hereinafter Paramount Decree]; United States v. Loew's Inc., [1950–1951 Trade Cas.] Trade Regul. Rep. (CCH) ¶ 62,765 (S.D.N.Y. June 7, 1951) [hereinafter Warner Bros. Decree]; United States v. Loew's Inc., [1950–1951 Trade Cas.] Trade Regul. Rep. (CCH) ¶ 62,861 (S.D.N.Y. June 7, 1951) [hereinafter Twentieth Century-Fox Decree]; United States v. Loew's Inc., [1952–1953 Trade Cas.] Trade Regul. Rep. (CCH) ¶ 67,228 (S.D.N.Y. Feb. 7, 1952) [hereinafter Loew's Decree]; United States v. Loew's Inc., [1950–1951 Trade Cas.] Trade Regul. Rep. (CCH) ¶ 62,573 (S.D.N.Y. Feb. 8, 1950) [hereinafter Columbia/Universal/United Artists Decrees]. Electronic copies of the Paramount Decrees are available at https://www.justice.gov/atr/paramount-decree-review [https://perma.cc/DTT9-T5XS].

13. Press Release, Off. of Pub. Affs., U.S. Dep't of Just., Federal Court Terminates Paramount Consent Decrees (Aug. 7, 2020), https://www.justice.gov/opa/pr/federal-court-terminates-paramount-consent-decrees [https://perma.cc/KP79-59C3].

14. 15 U.S.C. §§ 1–7 (2018).

15. *Id.* §§ 1–2.

16. U.S. DEP'T OF JUST. & FED. TRADE COMM'N, ANTITRUST ENFORCEMENT AND INTELLECTUAL PROPERTY RIGHTS: PROMOTING INNOVATION AND COMPETITION 106 (2007), https://www.justice.gov/atr/chapter-5-antitrust-issues-tying-and-bundling-intellectual-property-rights [https://perma.cc/B3DB-SJUM].

effects of the conduct that restrains trade in the defined market.[17] If the procompetitive justifications outweigh any anticompetitive effects, the conduct is found to be a reasonable restraint of trade; if the opposite is true, the conduct is found to violate the Sherman Act.[18]

After a civil antitrust suit has been filed by the government, the parties may opt to enter into a consent decree, which essentially equates to a settlement agreement between the prosecuting government agency and the defendant(s).[19] At any point in the litigation, the government can instead choose to enter into a settlement with the defendant(s), where the government "terminates its suit in exchange for the defendant's willing acceptance of 'specific limitations on his future conduct.'"[20] Consent decrees have been "an important feature of the civil antitrust litigation conducted by the Department of Justice."[21] The court reviews the consent decree and may approve it only if the court determines that it is in the "public interest."[22] The court retains "equitable power over its decrees," so parties who are subject to the

17. Herbert Hovenkamp, *The Rule of Reason*, 70 FLA. L. REV. 81, 83 (2018) ("Courts evaluate most antitrust claims under a 'rule of reason,' which requires the plaintiff to plead and prove that defendants with market power have engaged in anticompetitive conduct. To conclude that a practice is 'reasonable' means that it survives antitrust scrutiny. This is in contrast to antitrust's 'per se' rule, in which power generally need not be proven and anticompetitive effects are largely inferred from the conduct itself."); Michael A. Carrier, *The Four-Step Rule of Reason*, 33 ANTITRUST 50, 51 (2019), https://www.antitrustinstitute.org/wp-content/uploads/2019/04/ANTITRUST-4-step-RoR.pdf [https://perma.cc/4YXR-VSJ6] ("Courts confront a challenging task when assessing a restraint's anticompetitive and procompetitive effects. They typically are required to define markets, quantify competitive effects, and balance different types of competitive harm and procompetitive synergies.").

18. Bd. of Trade of Chi. v. United States, 246 U.S. 231, 238 (1918).

19. *See* Jonathan A. Schwartz, Note, *Bringing Balance to the Antitrust Force: Revising the* Paramount *Consent Decrees for the Modern Motion Picture Market*, 27 UCLA ENT. L. REV. 45, 54 (2019).

20. *Id.* (quoting Note, *Flexibility and Finality in Antitrust Consent Decrees*, 80 HARV. L. REV. 1303, 1303 (1967)); 15 U.S.C. § 16(b).

21. Michael E. DeBow, *Judicial Regulation of Industry: An Analysis of Antitrust Consent Decrees*, 1987 U. CHI. LEGAL F. 353, 353. In fact, consent decrees are used in a majority of modern civil antitrust cases brought by the government. DOUGLAS H. GINSBURG & JOSHUA D. WRIGHT, ANTITRUST SETTLEMENTS: THE CULTURE OF CONSENT 178 (Nicolas Charbit et al. eds., 2013) ("The Antitrust Division[] first entered into a consent decree in a case in *United States v. Otis Elevator Company* in 1906. . . . By the 1980s, 97 percent of civil cases filed by the Division resulted in a consent decree, and that percentage remained relatively constant at 93 percent in the 1990s. This trend has continued, with the Division resolving nearly its entire antitrust civil enforcement docket by consent decree from 2004 to present. The Federal Trade Commission has experienced a similar increase in the use of consent decrees as a proportion of enforcement activity. . . . Since 1995, the FTC has settled 93 percent of its competition cases." (footnotes omitted)).

22. 15 U.S.C. § 16(e)(1); *see* DeBow, *supra* note 21, at 355.

decree may return to the court to file motions seeking modification or termination.[23]

Modern decrees are not perpetual and usually include a sunset provision of ten years, but many earlier antitrust consent decrees had no sunset provisions or termination dates.[24] In 2018, the DOJ decided to look into these "legacy" consent decrees to determine whether they should be terminated or modified.[25] The DOJ began this initiative because the "judgments are perpetual, regardless of whether there have been subsequent industry or technological changes that might make those judgments either ineffective in protecting competition or even anticompetitive themselves."[26] Therefore, the DOJ would unilaterally move to terminate "legacy" decrees "that no longer serve their original purpose of protecting competition."[27] Assistant Attorney General Markan Delrahim encapsulated the negative impact of these legacy decrees in a simple statement: "The perpetual consent decrees call to mind the famous line from the Eagles song, 'Hotel California': 'You can check out any time you like, but you can never leave.'"[28]

At the time the DOJ initiated its review, there were 1,300 of these "legacy" judgments, and included in this number were the Paramount Decrees.[29] Following a period of public comment—and pushback from members of the entertainment industry, such as the National Association of Theater Owners,[30] the Writers Guild of America,[31] and

23. Schwartz, *supra* note 19, at 55; 15 U.S.C. § 21(c) (2018).

24. In the late 1970s, the DOJ "adopted the general practice of including sunset provisions that automatically terminate judgments, usually 10 years from entry." Press Release, Off. of Pub. Affs., U.S. Dep't of Just., Department of Justice Announces Initiative to Terminate "Legacy" Antitrust Documents (Apr. 25, 2018), https://www.justice.gov/opa/pr/department-justice-announces-initiative-terminate-legacy-antitrust-judgments [https://perma.cc/6HBA-66LM].

25. *Id.*

26. Press Release, Off. of Pub. Affs., U.S. Dep't of Just., Department of Justice Opens Review of Paramount Consent Decrees (Aug. 2, 2018), https://www.justice.gov/opa/pr/department-justice-opens-review-paramount-consent-decrees [https://perma.cc/JT8U-ZQ96].

27. *Judgment Termination Initiative*, U.S. DEP'T OF JUST. (Jan. 21, 2022), https://www.justice.gov/atr/JudgmentTermination [https://perma.cc/4QSY-NNK5].

28. Makan Delrahim, Assistant Attorney General, U.S. Dep't of Just., Remarks at the Antitrust Division's Second Roundtable on Competition and Deregulation (Apr. 26, 2018), https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-antitrust-divisions-second [https://perma.cc/YJQ8-7HW3].

29. Press Release, U.S. Dep't of Just., *supra* note 26.

30. Nat'l Ass'n of Theatre Owners, Comments on the Department of Justice, Antitrust Division's Review of the Paramount Consent Decrees (Oct. 1, 2018), https://www.justice.gov/atr/page/file/1102536/download [https://perma.cc/CL3J-VNEA].

31. Writers Guild of Am., West, Inc., Comments on the Paramount Consent Decree Review (Oct. 4, 2018), https://www.justice.gov/atr/page/file/1102781/download [https://perma.cc/E3UT-4NXS].

the Independent Cinema Alliance[32] (among others), who worried about reversion to the conduct prohibited by the Paramount Decrees—the DOJ decided to file a motion with the court asking that the Paramount Decrees be repealed.[33] The DOJ determined that, among other things, the industry's structure no longer invited the anticompetitive conduct that necessitated the Paramount Decrees in the late 1940s.[34]

In 2020, the district court granted the DOJ's motion to terminate the Paramount Decrees,[35] leading to the question of whether the court was correct in repealing the decrees or whether the major studios will return to the actions that warranted antitrust scrutiny years ago. The question also arises as to why the DOJ decided to push for termination of these decrees *now*. The DOJ believed the Paramount Decrees were unnecessary back in the 1980s but was unwilling to expend its own resources to file a motion seeking termination.[36]

The simplest answer lies in the changing landscape of the entertainment industry, with the rising prominence of streaming platforms and other competitors, such as Disney, who are not bound by the strict requirements of the Paramount Decrees. But, more recently (and likely just as important), the COVID-19 pandemic[37] drastically altered the traditional structure of the movie industry, as theaters either remained closed to the public or open at limited capacity, and the importance of streaming services has continued to grow rapidly. Termination of the Paramount Decrees allows the signatory studios an opportunity to evolve with the altered entertainment landscape without having to jump through any additional hurdles, leveling the playing field in this brand new game.

With this perspective in mind, this Comment argues that the District Court was correct in its ruling because of the post-*Paramount*

32. Indep. Cinema All., Comments on the Department of Justice, Antitrust Division's Review of the Paramount Consent Decrees (Oct. 4, 2018), https://www.justice.gov/atr/page/file/1102561/download [https://perma.cc/J68U-72NP].

33. Memorandum in Support of Motion of the United States for an Order Terminating Antitrust Judgments, United States v. Paramount Pictures, Inc., No. 19-mc-00544 (S.D.N.Y. Nov. 22, 2019) [hereinafter DOJ Memorandum].

34. *Id.* at 3.

35. *See infra* Section III.D.

36. DeBow, *supra* note 21, at 363.

37. The COVID-19 pandemic began in March 2020 and resulted in mandatory quarantines, lockdowns, closure of businesses to the public (such as gyms, movie theaters, dining at restaurants, etc.), and limited contact with other people, including social distancing (remaining a certain distance apart from others) and wearing masks. Kathy Katella, *Our Pandemic Year—A COVID-19 Timeline*, YALE MED. (Mar. 9, 2021), https://www.yalemedicine.org/news/covid-timeline [https://perma.cc/EPS3-F2SZ].

changes in both the movie industry and antitrust law itself. In Part II, this Comment discusses the relationship between antitrust and the entertainment industry before *Paramount*, placing the industry into its historical context. Part III of this Comment will look at the 1948 *United States v. Paramount Pictures, Inc.*[38] decision and the consent decrees that followed. In Part IV, this Comment will look at the evolution of specific antitrust law doctrines as well as changes within the movie industry since the Paramount Decrees. And, in Part V, this Comment will analyze why the DOJ sought termination *now* as well as the concerns of Paramount Decree advocates and argue that the changes in the structure of the movie industry, the impact of the COVID-19 pandemic, and the modern approach to antitrust law support termination of the Paramount Decrees.

II. THE COMMINGLED DEVELOPMENT OF ANTITRUST LAW AND THE MOVIE INDUSTRY

From its inception, the motion picture industry has been intertwined with antitrust law because "[t]he history of the motion picture industry is one of almost continuous innovations and a succession of combinations to control markets."[39] The beginnings of Hollywood "coincided with the introduction of antitrust law, leading to many interactions between the fledgling industry and the nascent body of law."[40] This part will introduce major players in the early era of the movie industry and its "studio system,"[41] as well as the impact of antitrust law on their operation. The actions of these players serve as a precursor to the illegal actions of the defendants in *United States v. Paramount Pictures*.

38. 334 U.S. 131 (1948).

39. MICHAEL CONANT, ANTITRUST IN THE MOTION PICTURE INDUSTRY 16 (1960).

40. Alexandra Gil, Note, *Breaking the Studios: Antitrust and the Motion Picture Industry*, 3 N.Y.U. J.L. & LIBERTY 83, 89 (2008).

41. The term "studio system" refers

> both to the factory-based mode of film production and also, crucially, to the vertical integration of production, distribution, and exhibition. The studio system coalesced in the 1910s and early 1920s via expansion, merger and acquisition, and by the 1930s the film industry had evolved into what economists term a "mature oligopoly"—that is, an industry effectively controlled by a cartel of companies.

Schatz, *supra* note 7, at 14–15.

A. Beginning of the Movie Industry: Thomas Edison and the Motion Picture Patents Company

The origins of the American motion picture industry are said to coincide with Thomas Edison's invention of, and grant of a patent for, his motion picture camera (the Kinetograph) in the late 1880s.[42] Edison's Kinetograph "utilized the principles of still photography, but took pictures at such a rapid speed that, when played on Edison's Kinetoscope, the images appeared to be moving."[43]

Following the law of supply and demand, more competitors attempted to enter the field as the demand for motion pictures increased.[44] These companies created equipment that violated Edison's patent rights, for which Edison brought patent infringement suits, but these suits failed to deter the entry of new competitors.[45] Alternatively, these companies imported cameras from Europe to produce their films.[46]

By 1908, the leading players in the motion picture industry came together to form the Motion Picture Patents Company, pooling the power of their patents together to fend off the increasing number of smaller firms while simultaneously minimizing the patent disputes among themselves.[47] Through their "collective patent rights, the [Motion Picture Patents Company] was able to control nearly all motion picture technology,"[48] and became so powerful that "it was able to force Eastman Kodak to withhold raw film stock from producers who weren't licensed by [it]."[49]

Within one year of its existence, the Motion Picture Patents Company brought a number of patent infringement suits against its competitors.[50] However, the courts refused to accept an antitrust defense against the claims of patent infringement,[51] stating that "the charge, if established, that the [Motion Picture Patents Company] is itself, or is a member of, a combination in violation of the federal anti-trust

42. Gil, *supra* note 40, at 89–90; CONANT, *supra* note 39, at 16.
43. Gil, *supra* note 40, at 90.
44. CONANT, *supra* note 39, at 17.
45. *Id.*
46. *Id.*
47. *Id.* at 18.
48. Gil, *supra* note 40, at 92.
49. LANDRY & GREENWALD, *supra* note 2, at 9.
50. Gil, *supra* note 40, at 92.
51. Motion Picture Pats. Co. v. Laemmle, 178 F. 104, 105 (S.D.N.Y. 1910); Motion Picture Pats. Co. v. Ullman, 186 F. 174, 175 (S.D.N.Y. 1910); Gil, *supra* note 40, at 92.

statute, is not a defense available in an action for the infringement of a patent."[52] But independent producers continued to infringe the Motion Picture Patent Company's patents because "fines from patent violations were less than profits from filmmaking."[53]

Although the Motion Picture Patents Company successfully deterred most producer entry into the exhibition market, some competitors were still able to be part of the industry despite its power.[54] As a result, the Motion Picture Patents Company turned to vertical integration in its effort to "tighten[] its control . . . [and] block the entry of independent producers into the distribution market."[55] Specifically, "[i]n 1910 it organized a distribution subsidiary . . . [which] forced the sale to it of 57 of the 58 principal exchanges and drove the minor exchanges out of business by refusing films to them."[56]

In 1912, the DOJ filed an antitrust action against the Motion Picture Patents Company and its subsidiary.[57] The district court found that the defendants engaged in an unreasonable restraint of trade and formed a monopoly in violation of the Sherman Act.[58] Concurrent with this antitrust ruling, the Motion Picture Patents Company also lost key patent cases, one of which reversed the court's prior position on the use of an antitrust defense to claims of patent infringement.[59] By 1915, the Motion Picture Patents Company was losing its grip of

52. *Laemmle*, 178 F. at 105.

53. Janet Staiger, *Combination and Litigation: Structures of U.S. Film Distribution, 1891–1917*, 23 CINEMA J. 41, 55 (1984).

54. CONANT, *supra* note 39, at 19 ("Many licensed distribution exchanges secretly marketed films of nonlicensed producers. A few independent exchanges also induced licensed exhibitors to rent their nonlicensed films.").

55. *Id.*

56. *Id.*

57. *Id.* at 20.

58. United States v. Motion Picture Pats. Co., 225 F. 800, 810–11 (E.D. Pa. 1915) ("We are constrained, however, to find that there was no such relation, but that the end, directly proposed, was the imposition upon the trade of an undue and unreasonable restraint, in order that, as the immediate and direct effect and result of the combination, the defendants might monopolize the trade in all the accessories of the motion picture art so far as they are articles of commerce. . . . [D]efendants did, in furtherance of the scheme of the combination so to do, directly impose upon the trade undue and unreasonable restraint, and that such restraint was the end proposed to be directly reached, and was not merely incidental to efforts to protect the rights granted by the patents, but went far beyond the fair and normal possible scope of any efforts to protect such rights, and that as a direct and intended result of such undue and unreasonable restrictions the defendants have monopolized a large part of the interstate trade and commerce in films, cameras, projecting machines, and other articles of commerce accessory to the motion picture business.").

59. Motion Picture Pats. Co. v. Universal Film Mfg. Co., 235 F. 398, 400 (2d Cir. 1916) *aff'd*, 243 U.S. 502 (1917); Motion Picture Pats. Co. v. Calehuff Supply Co., 248 F. 724 (E.D. Pa. 1918) (holding the Latham Loop Patent, which had given the Motion Picture Patent Company a near monopoly on movie cameras, invalid); CONANT, *supra* note 39, at 20–21.

power over the industry, as the "success of the government's antitrust action encouraged new entry and spurred dissatisfied members to leave the combine."[60]

Despite its short-lived reign of power, the Motion Picture Patents Company left its footprints throughout the motion picture industry. For example, Hollywood's role as the mecca of movies was a direct result of the Motion Picture Patents Company's power in New York. Producers moved to Los Angeles, "where they could make pictures with machines that infringed the combine's patents and still be close enough to the Mexican border to flee in case prosecution was imminent. Output expanded there, and Hollywood became the center of motion picture production."[61]

B. Famous Players—Lasky

As the Motion Picture Patents Company was losing its power, another player was quickly gaining it. In 1916, the Famous Players Film Company (controlled by Adolph Zukor)[62] and the Jesse L. Lasky Feature Play Company merged to form the Famous Players-Lasky Corporation.[63] As cases against the Motion Picture Patents Company were being litigated and decided, Famous Players-Lasky was "well on the way toward domination of the industry."[64]

Famous Players-Lasky was a key producer and distributor known for its development and use of the "block booking" system (which is "the practice of licensing films in groups by specifically conditioning the licensing of one film on the acceptance to show one or more other films"[65]), vertical integration (owning theaters in addition to being a producer and distributor), and minimum admission price standards.[66]

60. CONANT, *supra* note 39, at 21.

61. *Id.*

62. Adolph Zukor is known as a "key figure in the development of the motion picture industry." *Adolph Zukor Biography*, TCM, https://www.tcm.com/tcmdb/person/23046%7C7612/Adolph-Zukor/#biography [https://perma.cc/GMJ3-6DCC].

63. Ralph Cassady, Jr., *Impact of the Paramount Decision on Motion Picture Distribution and Price Making*, 31 S. CAL. L. REV. 150, 154 n.33 (1958).

64. *Id.* at 153–54.

65. 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, 229 (2020).

66. CONANT, *supra* note 39, at 23 ("Famous Players-Lasky instituted block booking."); Marciszewski, *supra* note 65, at 245 ("Block Booking has been credited to 'Adolph Zukor, the studio pioneer who transformed Paramount into Hollywood's first ever vertically-integrated movie company.'"). Famous Players-Lasky, run by Zukor, was the predecessor to Paramount Pictures. Cassady, *supra* note 63, at 154.

In 1921, the Federal Trade Commission (FTC)[67] brought an antitrust case against Famous Players-Lasky, alleging a conspiracy to restrain trade and create a monopoly in the production and distribution of motion pictures.[68] The "key distribution practice attacked was block booking,"[69] and Famous Players-Lasky was ordered to cease its anticompetitive block booking practice.[70] The court of appeals refused to enforce the block booking prohibition because Famous Players-Lasky's share of domestic releases and rentals had dropped, decreasing its market power, which led the court to find a "state of free competition in the industry" and thus no violation of the Sherman Act.[71] Famous Players-Lasky's antitrust troubles were not over, however. In 1916 it merged with Paramount Picture Corporation and would eventually become known as Paramount Pictures, Inc., one of the eight defendants in *United States v. Paramount Pictures*.[72]

III. *UNITED STATES V. PARAMOUNT PICTURES* AND THE PARAMOUNT CONSENT DECREES

Keeping in mind the storied relationship between the movie industry and antitrust law noted above, the focus now turns to the antitrust case that arguably had the biggest impact on the development and direction of the movie industry.

A. Introduction to the Paramount *Defendants and Case History*

Just as the leading companies came together to form the Motion Picture Patents Company years before, the "new industry leaders sought to protect their business interests as well."[73] The studios turned to vertical integration, which involves a company "acquir[ing] outlets

67. For a description of the FTC enforcement process, see *The Enforcers*, FED. TRADE COMM'N, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/enforcers [https://perma.cc/UP3T-9YUS].

68. *In re Famous Players-Lasky*, 11 F.T.C. 187 (1927).

69. CONANT, *supra* note 39, at 27; *In re Famous Players-Lasky*, 11 F.T.C. at 206–07.

70. *In re Famous Players-Lasky*, 11 F.T.C. at 211–12.

71. Fed. Trade Comm'n v. Paramount Famous-Lasky Corp., 57 F.2d 152, 155–56 (2d Cir. 1932).

72. Cassady, *supra* note 63, at 154 n.33 ("Famous Players-Lasky Corporation was organized in 1916 by a merger of Famous Players Film Company (controlled by Adolph Zukor) and the Jesse L. Lasky Feature Play Company. In 1914, the Paramount Pictures Corporation had been formed to distribute the Zukor product. In 1917, production and distribution were integrated through the acquisition of Paramount. In April, 1927, the corporation name was changed to Paramount Famous Lasky Corporation, and in 1935 it became known as Paramount Pictures, Inc.").

73. Charles H. Grant, *Anti-Competitive Practices in the Motion Picture Industry and Judicial Support of Anti-Blind Bidding Statures*, 13 COLUM.-VLA J.L. & ARTS 349, 354 (1989).

above and below it on a production line. The result is that a company controls all phases of manufacturing [(production)], wholesaling [(distribution)], and retailing [(exhibition)]."[74]

The *Paramount* defendants fell into two main groups: (1) the five majors and (2) the three minors. The five major defendants ("Five Majors") were those that produced, distributed, and exhibited films: Paramount, Loew's, RKO, Warner Brothers, and Fox. The three minor defendants ("Three Minors") were further divided into two categories: Columbia Pictures and Universal, which only produced and distributed films, and United Artists, which only distributed films.[75]

1. Production

Seven of the *Paramount* defendants (all except United Artists) produced their own films.[76] In the five film seasons from 1934–1939, the seven producer-defendants made 62.2 percent of all movies.[77] This number is a somewhat misleading description of power, however, as the producer-defendants and the independents affiliated with United Artists accounted for almost all of the class-A (i.e., best quality) movies.[78] However, by 1945, there were approximately forty "independent producers of feature films in Hollywood."[79] In addition to the rise of independent studios, by the time of the *Paramount* litigation, it was found that although the *Paramount* defendants owned a majority of total studio space, "a number of them rented the space to other independents."[80]

2. Distribution

Distribution of films essentially deals with the "wholesaling sector of the industry," and all eight of the *Paramount* defendants engaged in this portion of the film market.[81] During the period of the *Paramount* litigation, the *Paramount* defendants were the largest

74. *Id.*
75. CONANT, *supra* note 39, at 34.
76. United Artists did not produce their own films; however, they would work with independent producers. *See* Cari Beauchamp, *United Artists Marks 100 Years of Independent Filmmaking*, VARIETY (Oct. 4, 2019, 6:00 AM), https://variety.com/2019/film/spotlight/chaplin-pickford-united-artists-marks-100-years-of-independent-filmmaking-1203358514/ [https://perma.cc/8MS6-8URW].
77. CONANT, *supra* note 39, at 36.
78. *Id.* at 36–37.
79. *Id.* at 37.
80. *Id.* at 38.
81. *Id.* at 43.

distributors of films: of the eleven firms that had nationwide distribution systems, eight of them were the *Paramount* defendants.[82] The defendants released 71 percent of domestic films during 1936–1946; however, "almost all of the class A [films]—the only type shown in leading theaters—were distributed by the eight defendants."[83] Furthermore, the eight defendants received 95 percent of domestic film rentals from 1935–1940 and 94 percent of total film rentals for the 1943–1944 season.[84]

All of the *Paramount* defendants, except United Artists, licensed their films in "blocks or indivisible groups before the pictures had actually been produced."[85] This practice almost exclusively impacted the independent exhibitors (exhibitors that were not affiliated with any of the *Paramount* defendants) because the *Paramount* defendants could not "impose block booking on the affiliated theaters of the other . . . majors without suffering retaliatory action of the same type."[86] With the limited number of available screens (since, unlike today, all theaters only had one screen), block booking prevented the independents from having their movies played in the exhibitors' theaters. The "effect of block booking as a long-run market policy, when followed by seven distributors in combination, was to preempt independent exhibitors' playing time and thus foreclose entry into the market to independent distributors."[87]

3. Exhibition

Only the Five Majors owned theaters and, in 1945, their theater circuits accounted for 17.35 percent of all movie theaters in the United States, and approximately 25 percent of total seating capacity.[88] The defendants' theaters, for the most part, were in different geographic locations and, in locations where two or more of the Five Majors owned theaters, they would create pooling agreements or joint ownership arrangements[89] to share in the profits: "[T]here is no doubt that

82. *Id.* at 34, 43.
83. *Id.* at 44.
84. *Id.* at 44–45.
85. *Id.* at 77.
86. *Id.* at 78–79.
87. *Id.* at 79.
88. *Id.* at 48–49.
89. Pooling refers to theaters where two or more exhibitor-defendants, or an exhibitor-defendant and an independent exhibitor, who are "normally competitive, . . . operate[] as a unit, or [are] managed by a joint committee or by one of the exhibitors, the profits being shared according to prearranged percentages." United States v. Paramount Pictures, Inc., 334 U.S. 131, 149 (1948).

Paramount, Warner [Brothers], Fox, and RKO owned or operated theatres either in largely separate market areas or in pools, without more than trifling competition among themselves or with Loew's."[90] First-run theaters were those that were awarded the first exhibition of a film in a given area[91] and, collectively, the Five Majors "controlled more than 70 per cent of the first-run theaters in the 92 largest cities."[92] The *Paramount* defendants relied on one another to obtain pictures "for use in their various theatres . . . [and] to obtain theatre outlets for their own pictures, for the best customers of any defendant were ordinarily one or more of the other defendants."[93]

4. Case History

In 1938, the DOJ filed its initial complaint against the eight *Paramount* defendants in the United States District Court for the Southern District of New York.[94] Before trial, in 1940, the DOJ and the Five Majors entered into a consent decree.[95] The Three Minors did not consent to the decree and were therefore not bound by its terms.[96] The 1940 decree was to last for three years and merely "put minor restrictions on trade practices but left undisturbed the major circuits' first-run theater monopolies in a majority of major American cities."[97] The substance of the 1940 decree included a prohibition on blind selling[98] and unreasonable clearances, agreement by the Five Majors that they would not expand theater holdings for three years, and limitation of block booking to five movies.[99]

In 1944, after the three-year window of the 1940 decree, the DOJ reactivated the case and moved for trial against all of the *Paramount* defendants.[100] The DOJ's complaint accused the defendants of

90. United States v. Paramount Pictures, Inc., 85 F. Supp. 881, 889 (S.D.N.Y. 1949)

91. *Paramount Pictures*, 334 U.S. at 144 n.6.

92. CONANT, *supra* note 39, at 50. "Largest Cities" refers to cities with over 100,000 population. *Id.*

93. *Paramount Pictures*, 85 F. Supp. at 893.

94. CONANT, *supra* note 39, at 94–95.

95. The 1940 decree "contained no admission of violation of law and adjudicated no issue of fact or law, except that the complaint stated a cause of action." *Paramount Pictures*, 334 U.S. at 141 n.3.

96. CONANT, *supra* note 39, at 95.

97. *Id.* at 95, 106.

98. Blind selling is a practice where "a distributor licenses a feature before the exhibitor is afforded an opportunity to view it." *Paramount Pictures*, 334 U.S. at 157 n.11.

99. United States v. Paramount Pictures, Inc., 66 F. Supp 323, 331–33 (S.D.N.Y. 1946); CONANT, *supra* note 39, at 95–97.

100. CONANT, *supra* note 39, at 97.

"combining and conspiring unreasonably to restrain trade and commerce in the production, distribution, and exhibition of motion pictures and to monopolize such trade and commerce in violation of the Sherman Act."[101] The ultimate goal of the DOJ in bringing this suit was to "undermine the entire studio system, which relied on a stable and consistent market for its standardized products, which in turn generated the cash flow that enabled the studios to pay their operating (overhead) costs and maintain their contract personnel" and create "an industry in which movies were produced and sold on a picture-by-picture and theater-by-theater basis."[102]

B. Holdings

The district court found that the defendants "through illegal horizontal collusion and a cartel had (1) monopoly power in the distribution market for first-run motion pictures; and (2) engaged in a conspiracy to fix licensing practices, including admission prices, run categories, and clearances for substantially all theaters located in the United States."[103] The district court disagreed with the allegations in the DOJ's complaint regarding production and held that the defendants had not monopolized the production market.[104]

Specific illegal conduct noted by the district court included: price fixing arrangements, unreasonable clearances, pooling agreements, joint ownership, formula deals, master agreements, franchises, block booking, and discrimination.[105] The district court's chosen remedy

101. *Paramount Pictures*, 66 F. Supp at 330.

102. SCHATZ, *supra* note 5, at 411–12.

103. DOJ Memorandum, *supra* note 33, at 10.

104. United States v. Paramount Pictures, Inc., 334 U.S. 131, 140 (1948). "Effective combination for direct control of production output was not possible in the motion picture industry. Heterogeneous inputs (in the form of stories and actors) and highly differentiated, continuously changing film product were factors promoting innovation and the entry of independent producers." CONANT, *supra* note 39, at 37.

105. The following is a more detailed description of the various anticompetitive and illegal actions the district court, and ultimately the Supreme Court, found the *Paramount* defendants engaged in:

1. *Horizontal Price Fixing*: A minimum price fixing conspiracy was inferred between all the defendants because the minimum prices were nearly uniform across all licenses. *Paramount Pictures*, 334 U.S. at 141–42.

2. *Vertical Price Fixing*: A minimum price fixing conspiracy existed between each distributor-defendant and its licensees based on express agreements. *Id.* at 142.

3. *Clearances*: A clearance is:

> [T]he period of time, usually stipulated in license contracts, which must elapse between runs of the same feature within a particular area or in specified theatres. Runs are

was to institute a process of competitive bidding, where "films [were] . . . offered to all exhibitors in [a] competitive area. The license for the desired run [was] to be granted to the highest responsible bidder . . . [and] all licenses [were] to be offered and taken theatre by theatre, picture by picture."[106]

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successive exhibitions of a feature in a given area, first-run being the first exhibition in that area, second-run being the next subsequent and so on.

Id. at 144 n.6. "Clearances are designed to protect a particular run of a film against a subsequent run." *Id.* at 144. The Court found that the defendants' clearances were unreasonable because they "had no relation to the competitive factors which alone could justify them." *Id.* at 146.

4. *Pooling Agreements*: Theaters where two or more exhibitor-defendants, or an exhibitor-defendant and an independent exhibitor, who are "normally competitive, . . . operate[] as a unit, or [are] managed by a joint committee or by one of the exhibitors, the profits being shared according to prearranged percentages." *Id.* at 149. These agreements would "eliminate competition *pro tanto* both in exhibition and in distribution of features, since the parties would naturally direct the films to the theatres in whose earnings they were interested." *Id.*

5. *Joint Ownership*:

> Many theatres are owned jointly by two or more exhibitor-defendants or by an exhibitor-defendant and an independent. The result is . . . that the theaters are operated "collectively, rather than competitively." . . . Joint ownership between exhibitor-defendants then becomes a device for strengthening their competitive position as exhibitors by forming an alliance as distributors.

Id. at 150–51.

6. *Formula Deals*:

> [A] licensing agreement with a circuit of theatres in which the license fee of a given feature is measured, for the theatres covered by the agreement, by a specified percentage of the feature's national gross . . . The inclusion of theatres of a circuit into a single agreement gives no opportunity for other theatre owners to bid for the feature in their respective areas and . . . is therefore an unreasonable restraint of trade.

Id. at 153.

7. *Master Agreements*: A master agreement is "a licensing agreement or 'blanket deal' covering the exhibition of features in a number of theatres, usually comprising a circuit." *Id.* at 142 n.4. These were found to be illegal restraints of trade because they "eliminate[d] the possibility of bidding for films theatre by theatre . . . [and] diverting the cream of the business to the large operators." *Id.* at 154. It was also found to be a misuse of monopoly power. *Id.* at 154–55.

8. *Franchises*: A franchise is "a licensing agreement, or series of licensing agreements, entered into as part of the same transaction, in effect for more than one motion picture season and covering the exhibition of features released by one distributor during the entire period of the agreement." *Id.* at 142 n.4. The district court found that these were restraints of trade because "a period of more than one season was too long and the inclusion of all features was disadvantageous to competitors." *Id.* at 155.

9. *Block Booking*: The Court held that this practice "prevents competitors from bidding for single features on their individual merits . . .[and] 'adds to the monopoly of a single copyrighted picture that of another copyrighted picture which must be taken and exhibited in order to secure the first.'" *Id.* at 156–57.

10. *Discrimination:* "The District Court found that defendants had discriminated against small independent exhibitors and in favor of large affiliated and unaffiliated circuits through various kinds of contract provisions." *Id.* at 159. These provisions were only granted to the larger circuits and gave "competitive advantages . . . so great that their inclusion [in the circuit contracts]" constituted unreasonable discrimination against small independents. *Id.* at 160.

106. *Id.* at 161.

On appeal, the Supreme Court affirmed the district court's finding that the defendants violated the Sherman Act.[107] However, the Supreme Court disagreed with the district court's remedy of competitive bidding and instead instructed the district court to fashion a remedy that would "uproot all parts of an illegal scheme—the valid as well as the invalid—in order to rid the trade or commerce of all taint of the conspiracy" and "undo[] what the conspiracy achieved."[108]

C. On Remand: Paramount Consent Decrees Signed

Before a decision was reached on remand, RKO and Paramount entered into consent decrees divesting their theater holdings.[109] With regard to the other six defendants, the district court, following the Supreme Court's instruction, issued its final decree ordering "a divorcement or separation of the business of the defendants as exhibitors of films from their business as producers and distributors."[110] The decrees for the remaining Five Major defendants (Warner Brothers, Fox, and Loew's) prohibited each "distributor from reentering exhibition . . . unless [it] showed to the court that such entry would not unreasonably restrain competition."[111] The district court held that this was the "only adequate means of terminating the conspiracy and preventing any resurgence of monopoly power on the part of the remaining defendants."[112] Because Paramount and RKO consented to decrees prior to the district court's opinion, they avoided "any requirement to seek court approval to reenter exhibition in the future."[113]

In addition to requiring the defendants to divest their theater holdings, the Paramount Decrees "restricted the ways in which all the Defendants could license and distribute movies to theatres."[114] Namely, the Paramount Decrees barred the defendants from "[r]esale price maintenance—setting minimum movie ticket prices; . . . [u]nreasonable clearances—granting exclusive film licenses for overly broad geographic areas; . . . [conditional] block booking—bundling multiple films in one theatrical license; . . . [and] circuit dealing—licensing a

107. *Id.* at 141–61, 178; *see supra* note 105.
108. *Paramount Pictures*, 334 U.S. at 148, 171.
109. Schwartz, *supra* note 19, at 79.
110. United States v. Paramount Pictures, Inc., 85 F. Supp. 881, 895 (S.D.N.Y. 1949).
111. CONANT, *supra* note 39, at 105.
112. *Paramount Pictures*, 85 F. Supp. at 896.
113. Schwartz, *supra* note 19, at 78–79.
114. DOJ Memorandum, *supra* note 33, at 12.

film to all theaters under common ownership or control instead of theatre by theatre."[115]

D. Fast Forward 70+ Years: The Paramount Decrees Are Terminated

On August 7, 2020, the United States District Court for the Southern District of New York terminated the Paramount Decrees, "effective immediately, except for a two-year sunset period on the . . . provisions banning block booking and circuit dealing."[116] The court held that termination of the Paramount Decrees was in the "public interest"[117] because (1) the Paramount Decrees accomplished their goal of resetting the market to competitive conditions; (2) changes in the industry make it unlikely that the Paramount defendants would "once again limit their film distribution to a select group of theaters"; (3) "[c]hanges in antitrust law . . . suggest that the potential for future violation is low" and the "legal framework used to evaluate the [Paramount] Decrees' film licensing practices . . . has also changed"; and (4) current antitrust laws are "an effective deterrence."[118]

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115. *Id*.

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

117. When the government seeks to terminate a consent decree, the court must determine whether such termination would be in the "public interest." *Id*. at *3.

> The Tunney Act [(statutory procedures governing the DOJ's antitrust consent decrees)] lays out two sets of factors for the court to consider. First, the court assesses the decree's competitive impact, including the duration of relief sought, the anticipated effects of alternative remedies actually considered by the DOJ, and "any other considerations bearing upon the adequacy" of the decree. Second, the court should examine the impact of the consent decree "upon the public generally and individuals alleging specific injury" from the violations stated in the complaint. . . . Courts have generally deferred to the DOJ and approved decrees with little fanfare.

Joseph G. Krauss et al., *The Tunney Act: A House Still Standing*, ANTITRUST SOURCE 2 (2007), https://www.hoganlovells.com/~/media/hogan-lovells/pdf/publication/tunneyact_pdf [https://perma.cc/Q9CF-H7QD]. Although the language in the Tunney Act applies to approving an antitrust consent decree, the Second Circuit has held "that termination also requires judicial supervision—and 'consider[ation of] the public interest'—as a corollary to the Tunney Act." United States v. Int'l Bus. Machs. Corp., 163 F.3d 737, 740 (2d Cir. 1998) (quoting United States v. Am. Cyanamid Co., 719 F.2d 558, 565 (2d Cir. 1983)). "[T]he Court, in making its public interest finding [for termination of a decree], should . . . carefully consider the explanations of the government . . . and its responses to comments in order to determine whether those explanations are reasonable under the circumstances." *Paramount Pictures*, 2020 WL 4573069, at *3.

118. *Paramount Pictures*, 2020 WL 4573069, at *3–8.

IV. CHANGES IN LAW AND INDUSTRY POST-*PARAMOUNT*

Since the *Paramount* decision came down and the Paramount Decrees were entered into in the late 1940s and early 1950s, there have been evolutions in both the interpretation of antitrust law as well as the in the overall structure of the movie industry. As described in more detail below, this Comment agrees with the district court's assessment that these changes support termination of the Paramount Decrees.

A. State of Antitrust Jurisprudence Post-Paramount

The Sherman Act, which governs antitrust law and which has been called the "Magna Carta of free enterprise" by the Supreme Court,[119] condemns anticompetitive conduct that results unilaterally from a monopoly,[120] or from two or more actors agreeing to restrain trade.[121] Section 1 analysis under the Sherman Act is further divided by whether the suspected anticompetitive agreement is horizontal or vertical. Horizontal agreements occur when direct competitors conspire to restrict trade. Vertical agreements, in contrast, are the result of a conspiracy to restrain trade by companies at different levels of the distribution chain.

Although the Sherman Act states that "every" anticompetitive "contract [and] combination"[122] is illegal, the Supreme Court has held that only "unreasonable restraints" of trade are unlawful.[123] Certain agreements and types of activity are presumed to be anticompetitive on their face and are therefore per se violations. These agreements are ones that "would always or almost always tend to restrict competition and decrease output."[124] If an agreement does not fall under a category deemed per se unlawful, it is analyzed under the rule of reason to determine its anticompetitive effect.[125] Under the rule of reason, the trier of fact balances the anticompetitive effects against the procompetitive benefits arising from the agreement.[126] If the anticompetitive effects

119. United States v. Topco Assocs., Inc., 405 U.S. 596, 610 (1972).

120. 15 U.S.C. § 2 (2018).

121. *Id.* § 1.

122. *Id.*

123. *See* Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 63–67 (1911).

124. Leegin Creative Leather Prods. v. PSKS, Inc., 551 U.S. 877, 886 (2007) (quoting Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 723 (1988)).

125. See *infra* note 130 and accompanying text for examples of per se categories under section 1 of the Sherman Act.

126. *See, e.g.*, O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049, 1070 (9th Cir. 2015).

outweigh the procompetitive justifications, the agreement is found unlawful.[127] However, if the opposite is true, the agreement is not found to violate the Sherman Act despite some anticompetitive effect on the market (i.e., the agreement is treated as a reasonable restraint of trade).[128] Today the default analysis under section 1 of the Sherman Act is the rule of reason,[129] except for a limited number of specific categories deemed per se unlawful, such as horizontal price fixing and market divisions.[130]

Congress drafted the Sherman Act as a "common law statute" and the courts are expected to provide an evolving interpretation as economic thinking progresses.[131] So, interpretation of the Sherman Act should (and usually does) change as economic thinking evolves.[132] At a broad level, modern antitrust jurisprudence has "distanced itself from the more enthusiastic interventionism characterizing the first sixty years of the Sherman Act's existence."[133] In looking at the current state of antitrust law, this Comment will focus on the evolution of certain antitrust doctrines surrounding vertical agreements, tying arrangements, clearances and circuit dealing (which was the conduct that was the focus of the *Paramount* defendants' antitrust violations), and the impact of such evolution on the logic behind the Paramount Decrees.

127. *See Leegin*, 551 U.S. at 885–86.

128. *See id.*

129. *Id.* at 885 ("The rule of reason is the accepted standard for testing whether a practice restrains trade in violation of § 1.").

130. *See, e.g.*, United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940) (holding horizontal price fixing per se illegal); Palmer v. BRG of Ga., Inc., 498 U.S. 46 (1990) (holding horizontal market divisions per se illegal).

131. State Oil Co. v. Kahn, 522 U.S. 3, 20–21 (1997) ("Thus, the general presumption that legislative changes should be left to Congress has less force with respect to the Sherman Act in light of the accepted view that Congress 'expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition.'"); *Leegin*, 551 U.S. at 899–900 ("From the beginning the Court has treated the Sherman Act as a common-law statute. . . . Just as the common law adapts to modern understanding and greater experience, so too does the Sherman Act's prohibition on 'restraint[s] of trade' evolve to meet the dynamics of present economic conditions. The case-by-case adjudication contemplated by the rule of reason has implemented this common-law approach. Likewise, the boundaries of the doctrine of per se illegality should not be immovable. For '[i]t would make no sense to create out of the single term "restraint of trade" a chronologically schizoid statute, in which a "rule of reason" evolves with new circumstances and new wisdom, but a line of per se illegality remains forever fixed where it was.'" (citations omitted)).

132. *Leegin*, 551 U.S. at 899–900.

133. Schwartz, *supra* note 19, at 55.

1. Vertical Agreements

In the early days of antitrust enforcement, vertical agreements were categorically illegal as per se violations. In the landmark decision of *Dr. Miles Medical Co. v. John D. Park & Sons Co.*,[134] the Supreme Court held:

> [A]greements or combinations between dealers, having for their sole purpose the destruction of competition and the fixing of prices, are injurious to the public interest and void. They are not saved by the advantages which the participants expect to derive from the enhanced price to the consumer.[135]

Dr. Miles remained the Supreme Court's precedent (for vertical minimum price agreements) for over 100 years.[136]

The modern Court, in a trilogy of major cases, challenged the older Court's per se approach to vertical agreements.[137] In *Continental Television, Inc. v. GTE Sylvania Inc.*,[138] the Supreme Court held that vertical non-price agreements—vertical divisions of territory or customer restrictions—should be analyzed under the rule of reason.[139] In doing so, the Court noted that per se is only applicable when the agreement is always or almost always anticompetitive, and the Court felt that was not the case with vertical non-price agreements.[140] Similarly, the Court held in *State Oil Co. v. Kahn*[141] that an agreement between a buyer and a seller to resell a product at a maximum price falls under the rule of reason.[142] Finally, in *Leegin Creative Leather Products v. PSKS, Inc.*,[143] the Court overruled *Dr. Miles* and held that vertical agreements to set a minimum price are subject to the rule of reason.[144] These "vertical restraints, once thought to reduce competition and foster illegal monopolistic structures, were now often thought to aid

134. 220 U.S. 373 (1911).
135. *Id.* at 408.
136. *See Leegin*, 551 U.S. at 907.
137. For an in-depth discussion of the developments in vertical restraints, see J. THOMAS ROSCH, DEVELOPMENTS IN THE LAW OF VERTICAL RESTRAINTS: 2012 1–50 (2012), https://www.ftc.gov/sites/default/files/documents/public_statements/developments-law-vertical-restraints-2012/120507verticalrestraints.pdf [https://perma.cc/UA8H-67T9].
138. 433 U.S. 36 (1977).
139. *Id.* at 37.
140. *Id.* at 49–50, 57.
141. 522 U.S. 3 (1997).
142. *Id.* at 22.
143. 551 U.S. 877 (2007).
144. *Id.* at 907.

competition and help the economic environment,"[145] reflecting the evolution of economic thinking and the resulting impact on antitrust law.

The Court in *Paramount*, aligned with the law stated in *Dr. Miles*, held that vertical minimum price fixing arrangements were per se violations of the Sherman Act.[146] The Paramount Decrees *permanently* enjoined the signatory studios "from granting any license in which minimum prices for admission to a theatre are fixed by the parties."[147] Therefore, the change in the Court's jurisprudence regarding vertical minimum price fixing is not applicable to the studios bound by the Paramount Decrees**,** while all other competitors, such as Disney, can engage in such activity so long as it does not violate the rule of reason. Furthermore, although *Leegin*, in overturning *Dr. Miles*, dealt with "resale price restrictions on [physical] goods sold by retailers, the [governmental] Agencies [(i.e., the DOJ and FTC)] apply the *Leegin* analysis to pricing restrictions in [intellectual property] licensing agreements. Accordingly, the Agencies analyze vertical price restrictions in licensing agreements under the rule of reason."[148] Therefore, terminating the Paramount Decrees allows the signatory studios to be on equal footing with their competitors regarding the legality of vertical minimum price fixing arrangements.

2. Tying Arrangements

Tying arrangements occur when a seller, as a condition of purchasing one product (Product A), requires a buyer to also purchase another product (Product B).[149] Product A is the tying product, and

145. Kraig G. Fox, Note, *Paramount Revisited: The Resurgence of Vertical Integration in the Motion Picture Industry*, 21 HOFSTRA L. REV. 505, 520 (1992).

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

147. Paramount Decree, *supra* note 12. Each of the Paramount Decrees "enjoins [this] conduct." Gerald F. Phillips, *The Recent Acquisition of Theatre Circuits by Major Distributors*, 5 ENT. & SPORTS L. 1, 14 (1987).

148. Directorate for Fin. & Enter. Affs. Competition Comm., *Licensing of IP Rights and Competition Law—Note by the United States*, ORG. FOR ECON. COOP. & DEV. 10 (June 6, 2019), https://www.justice.gov/atr/page/file/1313541/download [https://perma.cc/LMQ6-L4TS]; *see also* U.S. DEP'T OF JUST. & FED. TRADE COMM'N, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY § 5.2 (Jan. 12, 2017), https://www.justice.gov/atr/IPguidelines/download [https://perma.cc/2FJ7-9REG] ("As with [Minimum Resale Price Maintenance] agreements that apply to outright sales of goods, the Agencies will apply a rule of reason analysis to price maintenance in intellectual property licensing agreements. The Agencies will analyze vertical price restrictions in licensing agreements on a case-by-case basis, evaluating the competitive benefits and harms from such agreements. Agreements constituting a horizontal cartel will be considered per se illegal.").

149. N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958).

Product B is the tied product. Before and during the era of the 1948 *Paramount* case, the Court viewed tying as a per se violation, where the requirement to purchase two products together was viewed by the Court as unlawful and anticompetitive on its face.[150] The Court believed that "[t]ying agreements serve hardly any purpose beyond the suppression of competition."[151]

Since then, however, the Supreme Court has modified its assessment of tying arrangements. Now, these arrangements "are recognized as having significant procompetitive benefits and are therefore subject to a form of per se legality."[152] In *Jefferson Parish Hospital District No. 2 v. Hyde*,[153] the Supreme Court articulated a "quasi per se" rule where a tying arrangement is per se unlawful if: (1) the seller is selling two separate products or services;[154] (2) the seller has market power in the tying market;[155] and (3) the tying arrangement forecloses "a substantial volume of commerce" in the tied market.[156]

When looking at the rule set forth by the Supreme Court in *Jefferson Parish*, it becomes evident that tying is not really a per se category because "any inquiry into the validity of a tying arrangement must focus on the market or markets in which the two products are sold, for that is where the anticompetitive forcing has its impact."[157] In her concurrence, Justice O'Connor argued for a rule of reason approach because the "per se" tying doctrine adopted by the majority "incurs the costs of a rule-of-reason approach without achieving its benefits: the doctrine calls for the extensive and time-consuming economic analysis characteristic of the rule of reason, but then may be interpreted to prohibit arrangements that economic analysis would show to be beneficial."[158] In the years since *Jefferson Parish* was decided, the quasi per se approach "is increasingly interpreted as tracing O'Connor's rule of reason approach, 'allow[ing] defendants to prove

150. *See* Int'l Salt Co. v. United States, 332 U.S. 392, 395–96 (1947), *abrogated by* Ill. Tool Works Inc. v. Indep. Ink, Inc., 547 U.S. 28 (2006); *N. Pac. Ry. Co.*, 356 U.S. at 5.

151. Standard Oil Co. v. United States, 337 U.S. 293, 305–06 (1949).

152. Schwartz, *supra* note 19, at 95.

153. 466 U.S. 2 (1984).

154. *Id.* at 21 ("[A] tying arrangement cannot exist unless two separate product markets have been linked.").

155. *Id.* at 13–18.

156. *Id.* at 16.

157. *Id.* at 18.

158. *Id.* at 34–35 (O'Connor, J., concurring).

procompetitive justifications that would indicate that a given tie produced a net increase in consumer welfare.'"[159]

a. Evolution of Tying Arrangements Within the Entertainment Industry

The *Paramount* Court agreed with the jurisprudence of its time and viewed the tying arrangement engaged in by the *Paramount* defendants, block booking, as a per se violation of antitrust.[160] Block booking is "the practice of licensing, or offering for license, one feature or group of features on condition that the exhibitor will also license another feature or group of features released by the distributors during a given period."[161] The Court reiterated this view in its 1962 decision in *United States v. Loew's, Inc.*,[162] where it was tasked with evaluating whether the block-booking limitations established by *Paramount* would apply to the sale of pre-1948 films to television networks.[163] Here, the Court again found that the tying arrangements were per se violations following the reasoning it had set forth in the *Paramount* decision.[164] The Court contended that "[a]ppellants cannot escape the applicability of *Paramount Pictures*. A copyrighted feature film does not lose its legal uniqueness because it is shown on a television rather than a movie screen."[165] Both the *Paramount* and *Loew's* decisions illustrate "antitrust law's hostility to tying agreements at the time."[166]

More recently, the Ninth Circuit was asked to address a modern form of block booking in *Brantley v. NBC Universal, Inc.*[167] In that case, the plaintiffs (retail cable and satellite television subscribers) argued that two tying arrangements existed in violation of the Sherman Act.[168] First, programmers (companies such as NBC Universal who own television programs and channels) tied their cable channels together, utilizing their market power to condition the sale of "high-

159. Schwartz, *supra* note 19, at 96 (quoting Einer Elhauge, *Rehabilitating* Jefferson Parish*: Why Ties Without a Substantial Foreclosure Share Should Not Be Per Se Legal*, 80 ANTITRUST L.J. 463, 494 (2015)).

160. United States v. Paramount Pictures, Inc., 334 U.S. 131, 157–59 (1948).

161. *Id.* at 156.

162. 371 U.S. 38 (1962).

163. *Id.* at 39–40.

164. *See id.* at 55.

165. *Id.* at 48.

166. Schwartz, *supra* note 19, at 98.

167. 675 F.3d 1192 (9th Cir. 2012), *cert. denied*, 568 U.S. 998 (2012).

168. *Id.* at 1195.

demand" cable channels on the purchase of all of the programmers' "low-demand" channels.[169] Second, when distributors (companies such as Time Warner and EchoStar) sold channels to consumers, the consumers were "required to purchase each Programmer's low-demand channels . . . in order to gain access to that Programmer's high-demand channels, which [the consumers] do not want."[170] The plaintiffs sought to "compel [the] programmers and distributors . . . to sell each cable channel separately, thereby permitting plaintiffs to purchase only those channels that they wish[ed] to purchase."[171]

Applying the *rule of reason* to these tying arrangements,[172] the court ultimately held that the plaintiffs did not sufficiently allege that the arrangements caused an injury to competition.[173] In so holding, the Ninth Circuit noted that

> courts distinguish between tying arrangements in which a company exploits its market power by attempting "to impose restraints on competition in the market for a tied product" (which may threaten an injury to competition), and arrangements that let a company exploit its market power "by merely enhancing the price of the tying product" (which does not).[174]

Further, the court reasoned that "market conditions may be such that a specific tying arrangement does not have anticompetitive effects."[175] The *Brantley* court's "logic appears directly adverse to the principles articulated in *Paramount* and extended by *Loew's*" which viewed tying arrangements as per se violations.[176] Instead, the Ninth Circuit seems to follow the logic set forth in

169. *Id*. at 1200–01.

170. *Id.* at 1201.

171. *Id.* at 1195.

172. *Id.* at 1197. The court noted that the "per se" rule only applies to tying arrangements in "some circumstances," and the parties here agreed that the tying arrangements were not per se violations. *Id.* at 1197 n.7 ("A tying arrangement will constitute a per se violation of the Sherman Act if the plaintiff proves '(1) that the defendant tied together the sale of two distinct products or services; (2) that the defendant possesses enough economic power in the tying product market to coerce its customers into purchasing the tied product; and (3) that the tying arrangement affects a not insubstantial volume of commerce in the tied product market.'" (quoting Cascade Health Sols. v. PeaceHealth, 515 F.3d 883, 913 (9th Cir. 2008))).

173. *Id.* at 1204.

174. *Id.* at 1199 (quoting Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 14 (1984)).

175. *Id.* ("As the Supreme Court has noted, 'when a purchaser is "forced" to buy a product he would not have otherwise bought even from another seller in the tied product market, there can be no adverse impact on competition because no portion of the market which would otherwise have been available to other sellers has been foreclosed.'" (quoting *Jefferson Parish Hosp. Dist. No. 2*, 466 U.S. at 16)).

176. Schwartz, *supra* note 19, at 101.

Justice O'Connor's *Jefferson Parish* concurrence, applying the rule of reason to the alleged tying arrangement.[177] The Supreme Court denied review of the Ninth Circuit's opinion.[178]

b. Impact on Paramount *Defendants*

While the *Paramount* defendants were permanently enjoined from engaging in conditional block booking no matter the circumstance,[179] the modern trend seems to indicate the opposite is true for their competitors. The *Brantley* court opted to apply the rule of reason to a modern block booking arrangement, and the Supreme Court's "quasi per se" rule requires analysis into the market, with the current trend of analysis bearing a closer resemblance to rule of reason analysis.[180]

Furthermore, even the DOJ and FTC undergo a rule of reason analysis when internally evaluating cases to decide whether they should exercise "their prosecutorial discretion."[181] The DOJ and FTC would be "likely to challenge a tying arrangement if: (1) the seller has market power in the tying product, (2) the arrangement has an adverse

177. *See id.* at 102–03.

178. Brantley v. NBC Universal, Inc., 675 F.3d 1192 (9th Cir. 2012), *cert. denied*, 568 U.S. 998 (2012). While *Brantley* reflects the modern trend of antitrust jurisprudence in which the court is unwilling to support expansive antitrust enforcement, there are still some decisions that go against the general trend. *See, e.g.*, Cablevision Sys. Corp. v. Viacom Int'l Inc., No. 13 Civ. 1278, 2014 WL 2805256, at *1–2 (S.D.N.Y. June 20, 2014) (holding, on facts similar to *Brantley*, that the plaintiff pleaded sufficient facts to allege a blockbooking tying claim under *Jefferson Parish's* "per se" rule to survive a motion to dismiss).

179. *See, e.g.*, Warner Bros. Decree, *supra* note 12, at 2.

180. Elhauge, *supra* note 159, at 493–94 (2015) ("Even if one accepted the critics' mistaken claim that ties with tying market power usually have positive effects on consumer welfare and total welfare, their analysis would not support their position that ties without a substantial foreclosure share should be per se legal. . . . Instead, what their conclusion would justify is a rule of reason approach. But that is precisely what the current quasi-per se rule provides. It requires evidence of tying market power to prove that anticompetitive effects on consumer welfare are possible, but allows defendants to prove procompetitive justifications that would indicate that a given tie produced a net increase in consumer welfare."); *see, e.g.*, Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 104 n.26 (1984) ("[W]hile the Court has spoken of a 'per se' rule against tying arrangements, it has also recognized that tying may have procompetitive justifications that make it inappropriate to condemn without considerable market analysis."); PSI Repair Servs., Inc. v. Honeywell, Inc., 104 F.3d 811, 815 n.2 (6th Cir. 1997) ("[U]nder tying's per se rule, the seller must possess substantial market power in the tying product market. In addition, tying's per se rule provides for an inquiry into whether the defendant's conduct has procompetitive effects. Such an extensive factual inquiry is hardly the stuff of per se analysis. Under rule-of-reason analysis, the antitrust plaintiff must show, inter alia, an adverse effect on competition."); *see also* Christian Ahlborn et al., *The Antitrust Economics of Tying: A Farewell to Per Se Illegality*, 49 ANTITRUST BULL. 287, 289 (2004) ("[M]odern economic thinking supports a rule of reason approach toward tying.").

181. U.S. DEP'T OF JUST. & FED. TRADE COMM'N, *supra* note 148, § 5.3 n.70.

effect on competition in the relevant market for the tying product or the tied product, and (3) efficiency justifications for the arrangement do not outweigh the anticompetitive effects."[182] This test is different from the "quasi per se" rule articulated by the Court in its 1984 *Jefferson Parish* holding because it guides the prosecutorial agencies to not only look into the relevant market, but to also balance the procompetitive justifications against the anticompetitive effects—which is the traditional rule of reason analysis. Therefore, the trend in analyzing tying arrangements under the rule of reason approach supports termination of the Paramount Decrees because its prohibitions hold only a handful of industry members to the more antiquated per se rule.[183]

3. Clearances and Circuit Dealing

Clearances are "the period of time, usually stipulated in license contracts, which must elapse between runs of the same feature within a particular area or in specified theatres."[184] In *Paramount*, the DOJ argued that clearances were per se illegal.[185] However, the district court, and ultimately the Supreme Court, refused to view clearances as per se violations because they may be reasonable restraints of trade.[186] The district court outlined factors for consideration in determining whether a clearance is an unreasonable restraint of trade, which were reiterated by the Supreme Court in its holding.[187]

Since *Paramount*, there have not been cases that analyze the reasonableness of clearances imposed by vertically integrated

182. *Id.* at § 5.3; *see also* Directorate for Fin. & Enter. Affs. Competition Comm., *supra* note 148, at 10 ("Because tying arrangements (including package licensing) can result in procompetitive benefits and significant efficiencies, the Agencies apply a rule of reason analysis to tying arrangements.").

183. Though the big picture trend is pushing toward rule of reason tying analysis and limiting robust antitrust enforcement, the Court's approach has not been entirely linear as there have been decisions that still apply the traditional *Jefferson Parish* quasi-per se tying analysis. *See, e.g.*, Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 461–79 (1992) (allowing the plaintiff to survive a motion for summary judgement for a tying claim under the *Jefferson Parish* standard, and stating: "We need not decide whether Kodak's behavior has any procompetitive effects and, if so, whether they outweigh the anticompetitive effects. . . . In this case, when we weigh the risk of deterring procompetitive behavior by proceeding to trial against the risk that illegal behavior will go unpunished, the balance tips against summary judgment.").

184. United States v. Paramount Pictures, Inc., 334 U.S. 131, 144 n.6 (1948).

185. *Id.* at 145.

186. *Id.*

187. *Id.* at 145–46. The Supreme Court held that the clearances imposed by the *Paramount* defendants were unreasonable because they "had no relation to the competitive factors which alone could justify them." *Id.* at 146.

distributors,[188] but modern cases involving theater clearances are decided under a similar line of reasoning as *Paramount*.[189] These clearances are viewed under the rule of reason because "they can and often do generate a net benefit to consumers by increasing the selection of films that theaters offer and stimulating competition on bases other than film selection."[190] The reasonableness of a clearance "depends on the competitive stance of the theaters involved and the clearance's effect on competition, especially the interbrand competition which, as the Supreme Court has instructed, is [the court's] primary concern in an antitrust action."[191] A clearance "may violate antitrust laws if it is shown to cause actual harm to competition that outweighs any procompetitive benefits of the clearance."[192] Because the law analyzing clearances has not changed since the Paramount Decrees were entered into, the Paramount Decrees' "clearance provisions are not necessary to protect competition."[193]

Circuit dealing occurs when "a dominant movie theater chain [(a circuit)] . . . uses its market power to obtain preferential agreements, particularly clearances, from distributors for the licensing of films . . . in multiple geographic markets."[194] The *Paramount* Court found circuit dealing to be a per se violation of the Sherman Act and the Supreme Court has not revisited the issue of circuit dealing since.[195] In modern circuit dealing cases, some lower courts have not strayed from the *Paramount* Court's holding when deciding on motions to dismiss.[196]

188. Flagship Theatres of Palm Desert, LLC v. Century Theatres, Inc., 269 Cal. Rptr. 3d 446, 464 (Ct. App. 2020).

189. *See*, *e.g*., Theee Movies of Tarzana v. Pac. Theatres, Inc., 828 F.2d 1395, 1398 (9th Cir. 1987).

190. *Flagship Theatres of Palm Desert*, 269 Cal. Rptr. 3d at 455.

191. Orson, Inc. v. Miramax Film Corp., 79 F.3d 1358, 1372 (3d Cir. 1996). "Interbrand competition is the competition among the manufacturers of the same generic product . . . and is the primary concern of antitrust law. The extreme example of a deficiency of interbrand competition is monopoly." Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 52 n.19 (1977). Intrabrand competition, on the other hand, is "the competition between the distributors—wholesale or retail—of the product of a particular manufacturer." *Id.*

192. *Flagship Theaters of Palm Desert*, 269 Cal. Rptr. 3d at 454–55.

193. DOJ Memorandum, *supra* note 33, at 37.

194. 2301 M Cinema LLC v. Silver Cinemas Acquisition Co., 342 F. Supp. 3d 126, 130 (D.D.C. 2018). Circuit dealing can occur when an exhibitor "pools the purchasing power of an entire circuit to 'eliminate the possibility of bidding for films [on a] theatre by theatre [basis]'" or by "unlawful monopoly leveraging." *Id.* at 132–33 (alterations in original) (citations omitted).

195. *Flagship Theaters of Palm Desert*, 269 Cal. Rptr. 3d at 464.

196. *2301 M Cinema*, 342 F. Supp. 3d at 132; Cobb Theaters III, LLC v. AMC Ent. Holdings, Inc., 101 F. Supp. 3d 1319, 1343 (N.D. Ga. 2015); Cinetopia, LLC v. AMC Ent. Holdings, Inc., No. 18-2222, 2018 WL 6804776, at *3–4 (D. Kan. Dec. 27, 2018).

The California Court of Appeal, however, found that the Supreme Court's holding in *Paramount* regarding circuit dealing was not dispositive because *Paramount* "addresses circuit dealing in the context of a unique and distinguishable set of market conditions: vertically integrated film distributors who employed a broad range of anticompetitive practices, including horizontal coordination, to maintain their monopoly power over an entire industry [and n]o such broad network of restrictions, nor any horizontal coordination, was alleged" in the case before it.[197] Instead, in *Flagship Theaters of Palm Desert v. Century Theaters*,[198] the California Court of Appeal analyzed the circuit dealing arrangement before it as a form of vertical restraint under the rule of reason, consistent with the modern treatment of vertical restraints under the Sherman Act as described in Section IV.A.1 above.[199] In doing so, the California Court of Appeal cited federal case law applying the rule of reason to circuit dealing arrangements.[200] However, despite this shift, the Paramount Decrees continue to prohibit circuit dealing as per se violations for the *Paramount* defendants.[201]

B. Post-Paramount *Changes to the Motion Picture Industry*

1. Changes in the Structure of the Motion Picture Industry

a. Paramount Decrees Disrupted the Studio's Business Model

Pre-*Paramount*, the production of movies in Hollywood "[had] been characterized as a factory system akin to that used by a Ford plant, and Hollywood often praised its own work structure for its

197. *Flagship Theaters of Palm Desert*, 269 Cal. Rptr. 3d at 464.

198. 269 Cal. Rptr. 3d 446 (Ct. App. 2020).

199. *Id.* at 469–71; *see supra* Section IV.A.1.

200. *Flagship Theaters of Palm Desert*, 269 Cal. Rptr. 3d at 470–71 (citing Cinema Vill. Cinemart, Inc. v. Regal Ent. Grp., No. 15-05488, 2016 WL 5719790 (S.D.N.Y. Sept. 29, 2016), *aff'd*, 708 Fed. App'x 29 (2d Cir. 2017)); Six W. Retail Acquisition, Inc. v. Sony Theatre Mgmt. Corp., No. 97 Civ. 5499, 2004 WL 691680, at *8 (S.D.N.Y. Mar. 31, 2004), *aff'd*, 124 Fed. Appx. 73 (2d Cir. 2005).

201. Paramount Decree, *supra* note 12, § II(A)(8) (prohibiting defendant from "licensing any feature for exhibition upon any run in any theater in any other manner than that each license shall be offered and taken theater by theater, solely upon the merits and without discrimination in favor of affiliated theatres, circuit theatres or others"); DOJ Memorandum, *supra* note 33, at 12 ("[T]he Decrees barred each Defendant from engaging in the following practices: . . . Circuit dealing—licensing a film to all theatres under common ownership or control instead of theatre by theatre.").

efficient mass production of entertaining films."[202] Movie stars, directors, and other talent were contracted to the studio, allowing for the creation of many films at low cost.[203] And, since the studios also owned theaters, there was a guaranteed arena to exhibit all of these films.[204] The studio system glamorized these movie stars and used "them to sell . . . movies to the public," making "the actors . . . the draw, more than the films" themselves.[205] Gene Kelly's character in *Singin' in the Rain,* Don Lockwood, perfectly illustrates this notion.

However, as a result of the Paramount Decrees, the signatory studios were required to divest of their theater holdings. Not only were the Five Majors required to "divorce themselves of their theater circuits," but the court "also ordered the divorced circuits to divest themselves of approximately one-half of the 3,137 theaters they owned in 1945."[206] The divestment of theaters from the studio's production and distribution arms "removed the studios' safety net . . . [and] '[w]ith no guarantee of exhibition, fewer movies could be made. . . . The 1950s was a time of bust[,] of caution."[207] Since then, the total movie production by the *Paramount* defendants has continued to decline.[208] For example, MGM (formerly Loew's), which "distributed 52 movies in 1939, including *Gone with the Wind*, *The Wizard of Oz*, and *It's a Wonderful Life* . . . distributed just three movies in 2018. . . . United Artists . . . distributed 30 movies in 1939 . . . [and] did not distribute a single movie in 2018."[209]

The studios have shifted their focus to "big" blockbuster movies, and while the "studios finance and release feature films, production relies on mobilizing largely outsourced creative resources (producers, artists, and technicians) on a film-by-film basis."[210] Studios "now rel[y] on independent producers to supply 'packaged' projects that the studios would 'green light' for production, putting up some portion of

202. DAVID BORDWELL ET AL., THE CLASSICAL HOLLYWOOD CINEMA: FILM STYLE & MODE OF PRODUCTION TO 1960, at 90 (1985).
203. Schatz, *supra* note 7, at 15.
204. *See* Gil, *supra* note 40, at 120.
205. LANDRY & GREENWALD, *supra* note 2, at 9.
206. CONANT, *supra* note 39, at 106.
207. Gil, *supra* note 40, at 120.
208. *Id*. at 119.
209. DOJ Memorandum, *supra* note 33, at 21.
210. Allègre L. Hadida et al., *Hollywood Studio Filmmaking in the Age of Netflix: A Tale of Two Institutional Logics*, 45 J. CULTURAL ECON. 213, 217 (2021).

the budget in exchange for the distribution rights, and often leasing out their production facilities as well."[211]

However, because studios could no longer rely on the name of a movie star or studio alone to generate audiences, "'audience creation' [became] just as important a creative product as the film itself."[212] Some studios "commit up to $50 million in prerelease advertising on a single movie."[213] To minimize the cost of this marketing campaign, the studios often focus on franchises, sequels, and remakes, which already have a guaranteed audience.[214] For example, Paramount rejected a "project that had attached stars, an approved script, and a bankable director by telling the producer: 'It's a terrific idea, too bad it has not been made into a movie already or we could have done the remake.' This response . . . is not untypical."[215] The decline in major studio production left a gap between film product and theater demand. The independent producers and smaller studios stepped in to provide product to fill that gap, "hoping to bring back the movies . . . that the major studios have largely abandoned."[216]

Additionally, after the collapse of the studio system, movie stars were able to "auction[] off their services to the highest bidder from film to film."[217] Some stars have used this freedom to work "for near scale[[218]] in … indie films [which] allows indie producers to take

211. Schatz, *supra* note 7, at 16.

212. EDWARD JAY EPSTEIN, THE HOLLYWOOD ECONOMIST: THE HIDDEN FINANCIAL REALITY BEHIND THE MOVIES 150 (2012).

213. *Id.* at 151.

214. *Id.* at 76, 149, 152 ("Studios today, as a former executive explained, tend to green-light four types of movies for wide openings: remakes (such as *King Kong*), sequels (such as *Star Wars: Episode III*), television spin-offs (such as *Mission: Impossible*), or video game extensions (such as *Lara Croft: Tomb Raider*).").

215. *Id.* at 149.

216. Nat'l Ass'n of Theatre Owners, *supra* note 30, at 5 ("Exhibitors are eager for these studios and their content to be available on their screens."); Anne Thompson, *Fear of Netflix, Disney's Dominance, the Secret Success of MoviePass, and 5 More Things We Learned at CinemaCon*, INDIEWIRE (May 1, 2018, 10:19 AM), https://www.indiewire.com/2018/05/10-things-cinemacon-hollywood-future-1201958718/ [https://perma.cc/X2DJ-KHRB] ("Theaters are begging for more movies in the $50 million-$100 million range to fill their screens, but the studios are increasingly disinterested. As the studios look for growth outside North America, they increasingly target movies overseas like domestic disappointments 'Pacific Rim Uprising' and 'Tomb Raider.' Finally, theaters look to the indies to fill that hole, among them Annapurna-MGM, STX, Global Road, A24, Entertainment Studios, and Neon.").

217. EPSTEIN, *supra* note 212, at 55; *see also* SCHATZ, *supra* note 5, at 482 ("For top industry talent, particularly the leading producers, directors, and stars, declining studio control meant unprecedented freedom and opportunity.").

218. "When an actor is paid scale, it means they're making the minimum pay rate allowed by the production company's agreement with SAG[-]AFTRA. Sometimes you'll hear of an 'A list' movie actor working for 'scale' as a favor on a low-budget project when they would usually get

advantage of [the] star's cachet to finance the movies."[219] With the availability of a market and name actors, the independent movie market has only continued to grow: "While studio-produced blockbusters are the prime movers in the global movie marketplace, the domestic US market since the early 1990s has become increasingly split between these major studio releases on the one hand, and low-budget 'indie' films on the other."[220]

In sum, the studios "responded—and ultimately survived—by fundamentally changing the way they made movies and did business."[221] And, the changes made by the studios spurred the growth and increased the role of independent movies in the industry.

b. Film Exhibition: Shift from Single Screens to Multiplexes

From the early days of the movie industry until the 1960s, theaters only had one screen and could therefore only play one picture at a time—think of the famous El Capitan Theatre in Hollywood, California, which has been fully restored and currently still operates as a single-screen theater.[222] However, with the growth of city suburbs and rise of shopping centers, theaters began opening multiplexes (theaters with multiple screens).[223] The first multiplex—a double-screened theater—was opened in 1963 by AMC theaters in Missouri.[224] By 1969, AMC had also opened four-screen and six-screen theaters.[225] Soon thereafter, "single-screen theaters nationwide were being converted into multiplexes . . . caus[ing] many single-screen theaters that were not renovated to go out of business."[226] And, by the 1990s, "the multiplex was the dominant retail model, sparking an enormous increase

paid hundreds of thousands or millions of dollars for their projects." Erin Pearson, *The Complete Guide to SAG-AFTRA Paid Scale*, TOPSHEET (Jan. 28, 2020), https://topsheet.io/blog/sag-aftra-paid-scale [https://perma.cc/66FW-WAFA].

219. EPSTEIN, *supra* note 212, at 55.

220. Schatz, *supra* note 7, at 29.

221. *Id.* at 16.

222. *About the Theatre*, EL CAPITAN THEATRE HOLLYWOOD, https://elcapitantheatre.com/about-us/ [https://perma.cc/Y2ER-SVPF]; *see El Capitan Theatre*, FANDANGO, https://www.fandango.com/el-capitan-theatre-aacon/theater-page [https://perma.cc/99E4-JKBK] (showing that only one movie plays at the El Capitan at a time).

223. LANDRY & GREENWALD, *supra* note 2, at 21.

224. *Id.*

225. *Id.*

226. Erin McDowell, *The Rise and Fall of Movie Theaters—And How the Coronavirus Pandemic Might Change Them*, BUS. INSIDER (May 26, 2020, 9:02 AM), https://www.businessinsider.com/photos-that-show-the-rise-and-fall-of-movie-theaters-2020-5 [https://perma.cc/CN38-TKHZ].

in the number of available screens."[227] The shift to multiplexes, paired with the decrease in film production by the major studios, resulted in more available screens for the independent producers, who "support[ed] the growth of th[is] sector."[228]

Because of the restrictions in the Paramount Decrees, however, the corporations that "had acquired the theater chains of the five major Paramount defendants met th[is] dynamic change[] in exhibition under the disadvantages of the severe restrictions of the decrees."[229] These successor corporations could not easily sell their downtown single screen theaters and acquire new multiplexes in suburban shopping centers because

> [t]he court treated this in the same way as a net addition to the circuit and required proof that it would not unduly restrain competition. It was not until 1974 that the district court agreed to an exception to this rule for theaters newly constructed by one of the five circuits. [However,] . . . this exception did not apply to theaters constructed by others, such as developers of shopping centers, and then leased or sold to one of the circuits.[230]

As a result, the strict requirements of the Paramount Decrees hindered the ability of these theater circuits to evolve with the changes to movie exhibition.[231]

2. Rise of New Competitors and Impact

a. Television

The first major challenge to the studios following the Paramount Decrees was the advent and growth of television. This was the first time movies "faced a new competitor for consumers' 'eyeballs.'"[232] The introduction of television negatively impacted theater attendance. For example, 1958 movie attendance was "less than half of the size of

227. LANDRY & GREENWALD, *supra* note 2, at 22.

228. *Id.*

229. Conant, *supra* note 8, at 100.

230. *Id.*

231. "The series of decisions by the district court on petitions of the divorced circuits to acquire theaters show no clear standards. . . . The cases demonstrate that a costly litigation process was added to any plans of the five divorced circuits to follow the demographic trend and expand into the suburban shopping centers. The result was that the five circuits declined as the major central cities where most of their theaters were located decayed. By 1979 only one of the five former circuits was still operated by its original successor corporation." *Id.* at 100–01.

232. LANDRY & GREENWALD, *supra* note 2, at 12.

the 1948 audience."[233] To get people out of their homes and back into the theaters, "movie-going [turned] into an 'entertainment experience' worthy of the price of a ticket and a babysitter."[234] It was no longer enough "to advertise a famous star [the audience] knows. If you want to get the crowds to come around you've got to have glorious Technicolor, breathtaking Cinemascope, and stereophonic sounds."[235]

At first, the studios pushed back against television, refusing to license their films to television networks because they feared that television would be "the end of the theatrical movie business."[236] However, soon thereafter, the studios realized that licensing their films to television "establish[ed] lucrative new streams of revenue for the industry."[237] Television would receive the film after it had completed its theatrical run. The revenue from television showings allowed the studios to survive despite declining theater attendance.[238]

b. In-Home Entertainment

i. VHS and DVD

After the advent of television, the "introduction of the home video player in the 1970s marked the next major transition for the film business."[239] Just as with television, the movie industry's initial "reaction to home video in the 1970s was one of panic . . . fear[ing] that if consumers could watch a movie at home they would no longer patronize theaters."[240] However, "[b]y the 1980s, the studios realized that home video would be immensely profitable" as it provided another avenue to further capitalize on the blockbuster films that had completed their theatrical runs.[241] Within a short period of time, "home-video licensing and sales had become the largest source of revenue for the film

233. EPSTEIN, *supra* note 212, at 216.
234. LANDRY & GREENWALD, *supra* note 2, at 13.
235. Gil, *supra* note 40, at 120 (quoting SILK STOCKINGS (MGM 1957)).
236. LANDRY & GREENWALD, *supra* note 2, at 12.
237. *Id.*
238. *Id.* at 13 ("By 2000, the major film companies' income from theatrical exhibition accounted for approximately 20 percent of total revenue, while income from television represented about 40 percent of revenue. Studios increasingly rely on television revenue (as well as content licensing and video games) to offset the riskiness of [sic] inherent on the film side.").
239. *Id.* at 15.
240. *Id.* at 187.
241. *Id.* at 188–89 ("The home-viewing market, whether rental or sell-through, has always been dominated by films that have been theatrically released. The advertising and marketing that supports a theatrical release powers the visibility of a movie for the home-viewing market.").

industry."[242] DVD emerged in 1995, and "[p]rior to the invention of cell phones, the DVD player was the fastest-selling electronic consumer product in history, and its rapid penetration of the market fueled significant revenue growth for the film industry from 1999 to 2004."[243] By 2004, "DVDs were bringing into the studios' coffers more than twice as much money as the theatrical release of movies."[244]

ii. Online Streaming

Perhaps the biggest challenge to the movie industry came with the rise and dominance of online streaming platforms, such as Netflix.[245] At first, the studios saw "online streaming as an additional release window, not fundamentally different from pay-per-view or television, which they could exploit to compensate for the decline in DVD revenue in the early 2000s."[246] Once streaming services began releasing original content (for example, Amazon plans to release at least thirty movies per year and Netflix fifty-five movies per year), the streaming services were no longer just mediums of licensing films, but competition.[247] Streaming services provide convenience to consumers, allowing them to watch unlimited content from the comfort of their homes or on the go, while also recommending titles to limit a consumer's search time—all for a low monthly fee.[248] There are approximately 271 streaming services in the United States alone.[249] With "the rise of this technology and widespread popularity, new players in the movie business[] Netflix, Amazon, and Apple are positioned to threaten the established Hollywood studios."[250]

The movie industry tried to match the streaming model, developing MoviePass in 2017, which "offered customers the option to see one movie [in theaters] per day for $9.99 a month."[251] But, by 2020, MoviePass failed and "filed for bankruptcy after running out of

242. *Id*. at 16.
243. *Id.* at 189.
244. EPSTEIN, *supra* note 212, at 137.
245. *See* Hadida, *supra* note 210, at 218.
246. *Id.* at 221.
247. *Id.* at 221–22.
248. *Id.* at 220–22.
249. *Id.* at 221.
250. LANDRY & GREENWALD, *supra* note 2, at 24–25.
251. Rebecca Rubin, *MoviePass Teases Mysterious Relaunch, but It's Unclear Who's in Charge*, VARIETY (Mar. 16, 2021, 2:58 PM), https://variety.com/2021/film/news/moviepass-countdown-clock-relaunch-1234932183/ [https://perma.cc/A78J-TMR2].

cash."[252] The studios had to adapt, and "[o]nce film distributors recognized the potential of streaming services, many decided to create their own and pull their films from the existing third-party streaming services."[253] In light of the events surrounding the COVID-19 pandemic, the role of streaming in the movie industry has only continued to increase to the detriment of theatrical exhibition.[254] However, the silver lining for theaters is that they will never be irrelevant so long as industry award eligibility—Oscars and Golden Globes—requires a period of theatrical exhibition.[255]

c. Media Conglomerates

When the Paramount Decrees were signed, Disney was not a major player in the movie industry.[256] By the 1980s, Disney "enjoyed the industry's leading market share,"[257] a position it still possesses. For example, Disney "accounted for 50% of the total box office in the first six months of 2018,"[258] and in 2019, Disney "represented 38% of the U.S. movie industry's" market.[259] To state it simply, Disney is "the largest media powerhouse on the planet."[260] And Disney, who was not

252. *Id.*

253. Marciszewski, *supra* note 65, at 279.

254. *See infra* Sections IV.B.3 and V.B.1.

255. *Awards Rules and Campaign Regulations Approved for 93rd Oscars*, OSCARS (Apr. 28, 2020, 12:15 AM), https://www.oscars.org/news/awards-rules-and-campaign-regulations-approved-93rd-oscarsr [https://perma.cc/L43C-TKAL]; Hollywood Foreign Press Ass'n, *Golden Globe Award Consideration Rules*, GOLDEN GLOBES 1, 5 (May 31, 2021), https://www.goldenglobes.com/sites/default/files/2021-07/golden-globe-awards-eligibility-descriptions-2021-revisions-approved-5-25-21.pdf [https://perma.cc/7TJQ-ZXZL] (explaining that eligibility requires the film to be "both released [(made available for exhibition in theaters or on a recognized pay-per-view channel or service)] and screened for the . . . [voting Golden Globes] members[] in the greater Los Angeles area during the qualifying year (January 1 through December 31)."). Even Amazon and Netflix "intend to offer limited theatrical release to those films most likely to get high-profile nominations and awards." Hadida, *supra* note 210, at 222.

256. *See supra* note 12; *Disney Company*, BRITANNICA, https://www.britannica.com/topic/Disney-Company [https://perma.cc/2JR8-NLNP]. At the height of the *Paramount* defendants' market power, Disney was just entering the industry and would not begin to flourish until the 1950s and 1960s. *Id.*

257. Schatz, *supra* note 7, at 23.

258. This value represents Disney's total box office share after its acquisition of Fox. Writers Guild of Am., *supra* note 31, at 3. Disney "has increased its share of domestic box office by acquiring competitors and reducing output." *Id.*

259. Sarah Whitten, *Disney Accounted for Nearly 40% of the 2019 US Box Office*, CNBC (Dec. 29, 2019, 3:04 PM), https://www.cnbc.com/2019/12/29/disney-accounted-for-nearly-40percent-of-the-2019-us-box-office-data-shows.html [https://perma.cc/8BNT-H9N4].

260. Andrew Beattie, *Walt Disney: How Entertainment Became an Empire*, INVESTOPEDIA (July 26, 2020), https://www.investopedia.com/articles/financial-theory/11/walt-disney-entertainment-to-empire.asp [https://perma.cc/5KQQ-NJLG].

a party to the *Paramount* case, has never been bound by the prohibitions of the Paramount Decrees.

Meanwhile, "teetering on the brink of collapse," the *Paramount* defendants "fell victim"[261] to corporate consolidation, operating as "divisions of huge media conglomerates" where the "film divisions are [now] relatively small contributors to the overall revenue and profit of the[] media groups:"[262]

> Paramount Pictures was purchased by industrial conglomerate Gulf + Western Industries Corporation before being sold to multimedia company Viacom (today, ViacomCBS) in 1994. Twentieth Century-Fox would survive under semi-independence until 1985 when Rupert Murdoch's NewsCorp purchased the studio; it would then be sold in 2018 to the Walt Disney Company. RKO was sold to General Tire and Rubber Company in 1955, but would be dissolved soon afterward: it has since been revived as a small, independent production company. Warner Bros. would eventually merge with publishing company Time, Inc., forming Time Warner, which would itself be purchased by AT&T in 2018. MGM and United Artists would both be bought, reorganized, and sold by several corporate parents—with MGM ultimately taking control of United Artists' label and library. MGM would emerge from a bankruptcy in 2011 by signing co-financing and codistribution deals with other studios. [And, in 2021, it was announced that MGM would be acquired by Amazon.[263]] Universal would be purchased by talent agency Music Corporation of America and lean heavily into television production before going through a series of sales to Matsushita Electronic (now Panasonic), drink distributor Seagram, General Electric and ultimately cable company Comcast, where it would be combined with television network NBC to form NBCUniversal. Columbia Pictures would be purchased by Sony in 1989.[264]

261. Schwartz, *supra* note 19, at 83.

262. LANDRY & GREENWALD, *supra* note 2, at 17.

263. Brent Lang & Todd Spangler, *Amazon Buys MGM, Studio Behind James Bond, for $8.45 Billion*, VARIETY (May 26, 2021, 5:37 AM), https://variety.com/2021/digital/news/amazon-buys-mgm-studio-behind-james-bond-for-8-45-billion-1234980526/ [https://perma.cc/M62J-JTEL].

264. Schwartz, *supra* note 19, at 83–84.

Thus, although the studios survived, they were mere shells of their former selves, existing "as production plants, as distribution companies, [and] as familiar trademarks."[265] These "are scarcely the studio power brokers of old . . . [i]n fact, the power of today's conglomerated moguls dwarfs that of their Golden Age predecessors."[266]

3. Impact of COVID-19 on the Movie Industry

The COVID-19 pandemic, and the forced lockdowns that resulted, impacted many industries. For the movie industry in particular, the pandemic not only halted production for a period of time, but closed theaters to the public.[267] This left the industry scattering, as scheduled theatrical releases for films could not occur as planned. As a result, some film releases were pushed to future years, while other studios decided to release films straight to online platforms.[268]

With theaters closed and individuals required to stay in their homes, streaming services dominated the entertainment landscape. With nowhere to go and not much to do, society binged the movies and shows available on these streaming platforms. In fact, many of the "most-watched titles in Netflix history" were released to the platform during the pandemic.[269] Trying to capitalize on this shift, studios also developed, acquired, or invested in their own streaming platforms.[270] As the pandemic continued, studios were allowed to engage in production again, albeit with new pandemic protocols and variables that could greatly increase the cost and time associated with producing a picture. Some theaters opened to the public at limited capacity, but many theaters were on the brink of bankruptcy because of the lack of revenue.[271] And, some theater chains, such as ArcLight Cinemas and

265. SCHATZ, *supra* note 5, at 481.

266. *Id.* at xi.

267. Madeline Berg, *Hollywood Studios Halt Film and TV Production Amid Coronavirus*, FORBES (Mar. 13, 2020, 4:22 PM), https://www.forbes.com/sites/maddieberg/2020/03/13/hollywood-studios-disney-netflix-halt-film-and-tv-production-amid-coronavirus/ [https://perma.cc/XZJ7-ALNZ]; Jake Coyle & Associated Press, *Movie Theaters Across the U.S. Start Shutting Down in Response to Coronavirus Pandemic*, FORTUNE (Mar. 16, 2020, 8:36 AM), https://fortune.com/2020/03/16/amc-theaters-audience-limits-coronavirus/ [https://perma.cc/34VJ-52PN].

268. *See infra* text accompanying notes 311–315.

269. Kasey Moore, *Every Viewing Statistic Netflix Has Released So Far (October 2021)*, WHAT'S ON NETFLIX (Oct. 25, 2021, 4:46 PM), https://www.whats-on-netflix.com/news/every-viewing-statistic-netflix-has-released-so-far-october-2021/ [https://perma.cc/2U8C-78VZ].

270. *See infra* text accompanying note 318.

271. Brent Lang, *5 Burning Questions for the Movie Business After the Stunning Warner Bros.-HBO Max News*, VARIETY (Dec. 3, 2020, 1:27 PM), https://variety.com/2020/film/news/w

Pacific Theaters, permanently closed their locations because of the devastating effects of the pandemic.[272]

The gradual importance of streaming created tension between theaters and studios. Some studios, like Universal, promised to "open titles on [digital] and in theaters at the same time."[273] In response, AMC announced that it would "'no longer play any of the [Universal] films' . . . cit[ing] the breaking of the 90-day window between the theatrical release and at-home distribution release as 'unacceptable' and has pledged not to show any Universal film in its theaters . . . until Universal abandons this practice."[274] Additionally, Warner Brothers announced that all of its 2021 theatrical releases would also be concurrently released on its streaming service, HBO Max.[275] Theaters, which thrived on the exclusivity of the theatrical run, became upset, with AMC "slamming WarnerMedia and its intent to 'sacrifice a considerable portion of the profitability of its movie studio division.'"[276] AMC and Warner Brothers reached an agreement for the 2022 season, where Warner Brothers agreed to show its 2022 films "on the big screen for an exclusive 45-day window."[277] This compromise cut the traditional exclusive theatrical window[278] in half (from 90 days to 45

arner-bros-hbo-max-announcement-movie-business-1234845580/ [https://perma.cc/B7CH-E5LD] ("AMC, Cineworld and other chains are laden with debt and face the prospect of bankruptcy.").

272. Pamela McClintock, *ArcLight Cinemas and Pacific Theatres to Close*, HOLLYWOOD REP. (Apr. 12, 2021, 5:12 PM), https://www.hollywoodreporter.com/movies/movie-news/arclight-cinemas-and-pacific-theatres-to-close-4165158/ [https://perma.cc/899X-JSTZ].

273. Dave McNary, *AMC Theaters Won't Play Universal Movies in Wake of 'Trolls World Tour' Dispute*, VARIETY (Apr. 28, 2020, 4:47 PM), https://variety.com/2020/film/news/amc-theatres-trolls-world-tour-dispute-1234592445/ [https://perma.cc/BZQ5-VYA2].

274. Marciszewski, *supra* note 65, at 263.

275. Lang, *supra* note 271.

276. Hoai-Tran Bui, *AMC Is Not Happy with Warner Bros. 2021 HBO Max Release Plans, Other Major Exhibitors React*, SLASHFILM (Dec. 4, 2020, 7:30 AM), https://www.slashfilm.com/578153/amc-responds-to-warner-bros-2021-plans/ [https://perma.cc/FU7A-TXQG]; Mia Galuppo, *AMC Theatres Says Warner Bros.' Streaming Plan Will "Sacrifice" Studio Profits*, HOLLYWOOD REP. (Dec. 3, 2020, 3:21 PM), https://www.hollywoodreporter.com/movies/movie-news/amc-theatres-says-warner-bros-streaming-plan-will-sacrifice-studio-profits-4100058/ [https://perma.cc/78QU-AZYU] ("'Clearly, Warner Media intends to sacrifice a considerable portion of the profitability of its movie studio division, and that of its production partners and filmmakers, to subsidize its HBO Max startup,' said Adam Aron, CEO and president of AMC Entertainment, in a statement to The Hollywood Reporter. 'As for AMC, we will do all in our power to ensure that Warner does not do so at our expense. We will aggressively pursue economic terms that preserve our business.'").

277. Rebecca Rubin & Brent Lang, *AMC Theaters and Warner Bros. Agree to Shorten Theatrical Window*, VARIETY (Aug. 9, 2021, 2:54 PM), https://variety.com/2021/film/news/amc-theatres-theatrical-window-bitcoin-1235037677/ [https://perma.cc/U88Y-ADD4].

278. For a description of the typical theatrical release process, see Melanie D. Miller, *Attention, Filmmakers: Here's Everything You Need to Know About Release Windows*, INDIEWIRE (Jan. 14, 2015, 1:04 PM), https://www.indiewire.com/2015/01/attention-filmmakers-heres-everything-you-need-to-know-about-release-windows-66295/ [https://perma.cc/XGC4-HKEH].

days) and other deals—such as the AMC-Universal deal—cut the theatrical window to only 17 days,[279] pointing to a change in the movie industry's focus away from theaters and towards the rising dominance of streaming platforms.

V. REVISITING THE PARAMOUNT DECREES

A. Why Now?

Termination of the Paramount Decrees was not a rash decision of the DOJ. In fact, the view within the DOJ since the early 1980s was that the Paramount Decrees had become irrelevant in light of changed circumstances, and the district court has now agreed.

1. DOJ's Revisit in the 1980s

In the early 1980s, the DOJ underwent an initiative to review "almost all antitrust consent decrees that were over ten years old," including the Paramount Decrees, to determine whether they were "either out of date, anticompetitive, or based on theories out of favor with the Reagan Administration."[280] In 1981, the DOJ concluded that the Paramount Decrees had "outlived their usefulness", and the "safeguards that had been instigated at the suggestion of the Supreme Court were no longer needed."[281] However, it was not "advisable [for the DOJ] to expend its [limited] resources in seeking on its own to terminate the decrees."[282] The DOJ signaled to the signatory studios that it would support their private actions against the Paramount Decrees, but "the studios were not interested enough to push for changes in court on their own."[283] Pursuing termination or modification of consent decrees was "very complex and expensive,"[284] and the studios instead "focused on maintaining the upward trajectory of home entertainment revenue which rose rapidly in the 1980s."[285]

279. Richard Yao, *The Death & Rebirth of the Theatrical Window*, IPG MEDIA LAB (Aug. 13, 2020), https://medium.com/ipg-media-lab/the-death-rebirth-of-the-theatrical-window-4fe61d819ad6 [https://perma.cc/K7MD-VWVH].

280. Fox, *supra* note 145, at 526.

281. *Id.*

282. DeBow *supra* note 21, at 363; Al Delugach, *Justice Won't Oppose Theater Ban on Studios: Antitrust Chief Says Industry Isn't Interested in Seeking Change in Court*, L.A. TIMES (Feb. 7, 1985, 12:00 AM), https://www.latimes.com/archives/la-xpm-1985-02-07-fi-5402-story.html [https://perma.cc/2483-X3N7].

283. Delugach, *supra* note 282.

284. *Id.*

285. Schwartz, *supra* note 19, at 86–87.

2. Loew's Decree Terminated in 1992

In 1992, Loew's, with the support of the DOJ, successfully moved for the termination of its consent decree.[286] In affirming the motion for termination, the district court noted "that in the intervening four decades since the Loew's Judgment was entered the motion picture exhibition business has undergone great changes, with the result that Loews is one of only two of the many large exhibition circuits that remain subject to the Paramount Decrees."[287] And, in light of "the changed environment in which the . . . Loews Judgment now operates, [the court held] there [was] no persuasive reason for maintaining the Judgment and subjecting Loews to restrictions that do not bind other exhibition circuits."[288]

3. DOJ Seeks Termination in 2019

In 2018, the DOJ announced its initiative to review 1,300 "legacy" decrees, those entered into with no sunset provisions or termination dates.[289] This initiative sparked review of the Paramount Decrees to determine whether they "no longer serve to protect competition."[290] Similar to the findings in the 1980s and 1990s, the DOJ concluded that "these decrees have served their purpose, and their continued existence may actually harm American consumers by standing in the way of innovative business models for the exhibition of America's great creative films."[291] The movie industry that existed at the time of the Paramount Decrees is now gone, as "none of the Paramount defendants own a significant number of theaters," major cities "have more than one theater," theaters have more than one screen, and new technology has created alternate methods of viewing content.[292] New competitors, such as Disney and Netflix, have come to dominate the industry, and are not subject to the prohibitions of the Paramount Decrees.[293] In light of this, and the changes in modern antitrust law, the DOJ concluded that removing the restrictions of the Paramount

286. United States v. Loew's Inc., 783 F. Supp. 211, 211 (S.D.N.Y. 1992).
287. *Id.* at 213–14.
288. *Id.* at 215.
289. Press Release, U.S. Dep't of Just., *supra* note 24.
290. Press Release, U.S. Dep't of Just., *supra* note 26.
291. Press Release, U.S. Dep't of Just., Department of Justice Files Motion to Terminate Paramount Consent Decrees (Nov. 22, 2019), https://www.justice.gov/opa/pr/department-justice-files-motion-terminate-paramount-consent-decrees [https://perma.cc/FTE9-Y932].
292. Press Release, U.S. Dep't of Just., *supra* note 26.
293. *See supra* Sections IV.B.2.b.ii and IV.B.2.c

Decrees for the signatory studios "can . . . lead to business practices and innovations that benefit consumers."[294]

The DOJ filed a motion to terminate the Paramount Decrees with the Southern District Court of New York in November 2019, and, in August 2020, the district court agreed that the changes in law and industry provide "'a reasonable and persuasive explanation' as to why the termination of the Decrees would 'serve the public interest in free and unfettered competition,'" and granted the DOJ's motion to terminate.[295]

B. Concerns of Paramount Decree Advocates

1. Studios Will Start Buying Theaters

One major concern of Paramount Decree advocates is that without the Paramount Decrees in place, both the signatory studios and non-signatory studios will quickly begin to buy up theater circuits and resume anticompetitive practices.[296] There are two main problems with this purported concern: (1) the Paramount Decrees never actually prohibited anyone from buying theaters; and (2) there is no indication that studios currently want to buy theater circuits. Each of these problems will be addressed in turn.

First and foremost, the Paramount Decrees and the prohibitions therein are not applicable to non-signatory studios. Therefore, even if the Paramount Decrees remained in place, studios like Disney, Netflix, Amazon, or Lionsgate would not be bound by any of the terms, including vertical integration.[297] These studios have purchased theaters; for example, Disney owns the El Capitan Theater and Netflix owns the Egyptian Theater in Hollywood and the Paris Theater in New York.[298]

294. DOJ Memorandum, *supra* note 33, at 22.

295. United States v. Paramount Pictures, Inc., 2020 WL 4573069, at *3–9 (S.D.N.Y. Aug. 7, 2020).

296. *See, e.g.*, Tyler Riemenschneider, '*Don't Run up the Stairs!': Why Removing the Paramount Decrees Would Be Bad for Hollywood*, 13 OHIO ST. BUS. L.J. 334, 366–70 (2019).

297. *See* Brent Lang, *Why Eliminating the Paramount Antitrust Decrees Won't Shake Up the Movie Business*, VARIETY (Nov. 19, 2019, 3:07 PM), https://variety.com/2019/film/news/paramount-antitrust-consent-decrees-movie-business-analysis-1203409589/ [https://perma.cc/D68L-PFMN].

298. Austin Goslin, *Major Antitrust Ruling Clears the Way for Movie Studios to Own Theaters*, POLYGON (Aug. 7, 2020, 12:04 PM), https://www.polygon.com/2020/8/7/21358637/movie-theater-antitrust-laws-paramount-consent-decrees-movie-studios-theater-chains-netflix-disney [https://perma.cc/ET7N-9V2M]; Eriq Gardner, *Judge Agrees to End Paramount Consent Decrees*,

Additionally, it is a common misconception that the *Paramount* ruling held vertical "integration of the business of distribution with exhibition illegal."[299] Although the Paramount defendants' vertical integration was an "active aid[] to the conspiracy and [was thus] rendered … illegal" on those facts, vertical integration may be legal in other situations.[300] This is supported by the Court's refusal to find vertical integration of production, distribution, and exhibition of films per se illegal.[301] And, though the Paramount Decrees did require that the Five Majors divest of their theater holdings, it did not strictly prohibit any defendant from acquiring theaters thereafter.[302] Fox, Loew's (now MGM), and Warner Brothers were required to gain the court's approval before purchasing theaters, while Paramount, Universal, Columbia, and United Artists had no restrictions and have "always been free to acquire theaters."[303] In fact, the signatory studios controlled theaters years before the Paramount Decrees were terminated.[304] However, despite being able to purchase theaters, "modern film studios [are

HOLLYWOOD REP. (Aug. 7, 2020, 7:50 AM), https://www.hollywoodreporter.com/business/business-news/judge-agrees-end-paramount-consent-decrees-1306387/ [https://perma.cc/XT8D-5QFX].

299. Phillips, *supra* note 147, at 11.

300. United States v. Paramount Pictures, Inc., 85 F. Supp. 881, 893 (S.D.N.Y. 1949); Phillips, *supra* note 147, at 11.

301. United States v. Paramount Pictures, Inc., 334 U.S. 131, 173–74 (1948) ("Exploration of these phases of the cases would not be necessary if, as the Department of Justice argues, vertical integration of producing, distributing and exhibiting motion pictures is illegal per se. But the majority of the Court does not take that view. In the opinion of the majority the legality of vertical integration under the Sherman Act turns on (1) the purpose or intent with which it was conceived, or (2) the power it creates and the attendant purpose or intent."); *see also Paramount*, 85 F. Supp. at 893 ("While vertical integration would not per se violate the Sherman Act . . . . We do not suggest that every vertically integrated company which engages in restraints of trade or conspiracies will thereby render its vertical integration illegal.").

302. DOJ Memorandum, *supra* note 33, at 11, 31.

303. *Id.* at 31.

304. By 1987, approximately 40 years after the Paramount Decrees, "Gulf Western (Paramount) own[ed] Mann Theaters (360 screens), Trans-Lux (24 screens), and Festival Enterprises (101 screens). It also own[ed] Famous Players Ltd. (469 screens), a leading Canadian circuit. Columbia Pictures (Columbia) own[ed] approximately 35 percent of Tri-Star Pictures which own[ed] Loew's Theaters (300 screens) and Music Makers Theaters (65 screens). Columbia own[ed] Walter Reade Organization (11 screens). MCA, the parent corporation of Universal Pictures (Universal), own[ed] 50 percent of Cineplex Odeon Corp. (Cineplex), which reportedly ha[d] 1,550 screens in the United states and Canada. Cineplex own[ed] Plitt Theaters (692 screens), Septum Theaters (48 screens), Essaness Theaters (41 screens), Sterling Recreation Organizations (100 screens, and in addition, licenses pictures for 30 other screens) and Neighborhood Theaters (76 screens). Through a separate subsidiary, it also own[ed] the RKO Century Warner chain, which include[d] the prestigious Cinema Five division (97 screens)." Phillips, *supra* note 147, at 20–21 n.1; *see also* Conant, *supra* note 8, at 80–105.

not] vertically integrated in any way with the theaters that exhibit their films to the public."[305]

Nonetheless, some critics of Paramount Decree termination are worried that without the Paramount Decrees, major studios will target purchases of national theater circuits, such as AMC, Cinemark, or Regal, and engage in anticompetitive conduct.[306] Furthermore, there was concern that the COVID-19 pandemic would set the stage for such an acquisition as theaters were struggling financially.[307] There is little evidence that such a concern will come to fruition. When asked whether studios would be interested in buying major theater circuits that were on the "brink of bankruptcy" due to the COVID-19 pandemic shutdowns, executives from Universal and Warner Brothers stated the studios had no intention of doing so.[308] There have been rumored talks of Amazon acquiring AMC Theaters but, as it turned out, it was nothing more than rumors.[309] Since the initial announcement in May of 2020, no news of continued talks between Amazon and AMC have emerged. However, even if Amazon were to purchase AMC, the acquisition would have no bearing on whether the Paramount Decrees should be terminated because Amazon is not bound by the decrees.[310]

In fact, the trend arising from the COVID-19 pandemic suggests that studios might turn away from theaters and theatrical releases to focus on streaming services. Warner Brothers decided to simultaneously release all of its 2021 films onto HBO Max.[311] Paramount sold "a half-dozen titles to streamers like Netflix and Amazon, taking hard

305. Flagship Theaters of Palm Desert, LLC v. Century Theaters, Inc., 269 Cal. Rptr. 3d 446, 464 (Ct. App. 2020).

306. DOJ Memorandum, *supra* note 33, at 30.

307. Maureen Lee Lenker, Opinion, *Why the End of the Paramount Decrees Is Bad for Movies and Movie Theaters*, ENT. WKLY. (Aug. 7, 2020, 2:35 PM), https://ew.com/movies/judge-ends-paramount-decrees/ [https://perma.cc/B26J-FBXX].

308. Dade Hayes, *Warner Bros & Universal Bosses Say No Movie Theater Buyouts in the Works, but "We're Rooting for Them,"* DEADLINE (Oct. 15, 2021, 1:55 PM), https://deadline.com/2020/10/warner-bros-universal-bosses-movie-theater-buyouts-covid-19-1234598176/ [https://perma.cc/Z5EK-U4J7].

309. Rachel Labonte, *Movie Theatres May Be Acquired by Amazon*, SCREEN RANT (May 11, 2020), https://screenrant.com/amazon-buying-movie-theaters-amc/ [https://perma.cc/WM4N-EPYA].

310. DOJ Memorandum, *supra* note 33, at 21.

311. Steve Kovach, *Your Movie Theater Experience Is Going Extinct*, CNBC (Dec. 7, 2020, 3:31 PM), https://www.cnbc.com/2020/12/04/warner-bros-to-release-movies-on-hbo-max-threatening-theatrical-windows.html [https://perma.cc/3EXH-ZKSE]; Anthony D'Alessandro, *Warner Bros Sets Entire 2021 Movie Slate to Debut on HBO Max Along with Cinemas in Seismic Windows Model Shakeup*, DEADLINE (Dec. 3, 2020, 10:30 AM), https://deadline.com/2020/12/warner-bros-2021-movie-slate-hbo-max-matrix-4-dune-in-the-heights-1234649760/ [https://perma.cc/RL3J-N92M].

cash over an ambiguous [financial] future."[312] Universal began to experiment with video on demand,[313] and Disney utilized its streaming service, Disney+, to release some movies concurrently with theaters.[314] Disney also utilized Disney+ to launch franchises, such as *The Mandalorian*, and to cut the theatrical window of exclusivity for some releases in half, releasing the films on Disney+ 45 days after their theatrical release.[315] Even independents are beginning to enter the streaming space with their own streaming service.[316]

Ironically, against the fears of Paramount Decree advocates, theaters may need integration with studios to serve as a lifeboat from bankruptcy.[317] However, the studios have indicated no interest in buying theater circuits and have instead focused their efforts on developing, acquiring (or being acquired by), and working with streaming services: Disney, with Disney+ and Hulu; Paramount, with Paramount+; Universal, with Peacock; Warner Brothers, with HBO Max; MGM

312. Tom Brueggemann, *Why Would Studios Suggest Abandoning Theaters? Some Logic Behind the Strategy*, INDIEWIRE (Oct. 14, 2020, 8:30 AM), https://www.indiewire.com/2020/10/why-studios-suggest-abandoning-theaters-disney-strategy-1234591873/ [https://perma.cc/PWU5-NJWB].

313. *Id.*

314. Brian Truitt, *Disney+ Will Keep Streaming Big Movies in 2021 as 'Free Guy' and 'Shang-Chi' Adjust Strategy*, USA TODAY (May 13, 2021, 6:42 PM), https://www.usatoday.com/story/entertainment/movies/2021/05/13/disney-streaming-movies-2021-free-guy-shang-chi-theaters-chapek/5081434001/ [https://perma.cc/AA24-9NLJ].

315. *Id.* Pixar has also released several movies straight to Disney+, skipping theaters altogether. Jordan Moreau, *Pixar's 'Turning Red' Skips Theaters, Will Debut on Disney Plus in March*, VARIETY (Jan. 7, 2022, 12:39 PM), https://variety.com/2022/film/news/turning-red-disney-plus-pixar-skip-theaters-1235149234/ [https://perma.cc/3AGH-K58V] ("Pixar's upcoming film 'Turning Red' is skipping theaters and will debut exclusively on Disney Plus on March 11, . . . follow[ing] 'Soul' and 'Luca' as fellow Pixar releases that went straight to the streaming platform during the COVID-19 pandemic.").

316. Valerie Complex, *Slamdance Launches Streaming Platform The Slamdance Channel*, DEADLINE (Jan. 11, 2022, 9:00 AM), https://deadline.com/2022/01/slamdance-channel-streaming-site-launches-1234907785/ [https://perma.cc/QXJ2-3R66] ("Slamdance will debut a new streaming platform for independent films, . . . providing creators with maximum opportunities to reach movie audiences.").

317. "Domestic box office is on pace to plummet more than 80% in the U.S., as theaters in New York and LA remain shuttered more than seven months after the pandemic started sweeping across the U.S. As exhibitors have launched a promotional campaign about their safety measures and enlisted top filmmakers for a plea to Congress, a bailout plan—even from private equity firms buying up other 20th century assets like newspapers and radio stations—has not emerged." Hayes, *supra* note 308; *see also* Hoai-Tran Bui, *Major Hollywood Studios Won't Be Buying Out Movie Theaters Any Time Soon*, SLASHFILM (Oct. 16, 2021, 11:20 AM), https://www.slashfilm.com/577253/movie-theater-buyouts-hollywood-studios/ [https://perma.cc/9FUX-X774] ("For theaters to truly survive, the movie industry may need to go back to the Classic Hollywood model of studios owning stakes in exhibitors.").

(formerly Loew's), with Amazon Prime; as well as Netflix and Amazon forming studios to develop their own content.[318]

The concern that termination of the Paramount Decrees will lead to the vertical integration that resulted in the illegal restraints of trade in 1948 is unfounded. As explained above, nothing in the Paramount Decrees actually barred signatory studios and non-signatory studios from owning theaters, and even when presented with an opportunity to do so, the signatory studios have shown no interest in purchasing major theater circuits.

2. The Practice of Block Booking Will Resume Without the Paramount Decrees

Another major concern of the Paramount Decree advocates is that after the two-year sunset provision (from the court's termination order in 2020), the practice of block booking will resume in full force, harming small theaters and independent producers.[319] It is first important to note that the only block booking prohibited by the Court and Paramount Decrees was *conditional* block booking, where exhibitors were forced to buy additional movies to get the one they wanted.[320] The Court explicitly stated that it was "not suggest[ing] that films may not be sold in blocks or groups, when there is no requirement, express or implied, for the purchase of more than one film."[321] And, in fact, unconditional block booking has been used following *Paramount*.[322]

It has since been suggested that the nature of the *Paramount* defendants' block booking was not to force the purchase of an entire slate of films, but rather to "cheaply provide in quantity a product needed in quantity."[323] The blocks were beneficial because they reduced the

318. Marciszewski, *supra* note 65, at 279–80; Joshua Glick, *Studio Branding in the Streaming Wars*, L.A. REV. BOOKS (June 24, 2021), https://lareviewofbooks.org/article/studio-branding-in-the-streaming-wars/ [https://perma.cc/YA9W-FSMP]; Cynthia Littleton, *Paramount Plus to Launch March 4 in U.S. and Latin America*, VARIETY (Jan. 19, 2021, 6:00 AM), https://variety.com/2021/tv/festivals/paramount-plus-streaming-debut-march-4-viacomcbs-1234887452/ [https://perma.cc/49B4-M42A].

319. *See, e.g.*, Nat'l Ass'n of Theatre Owners, *supra* note 30, at 6–8; Marciszewski, *supra* note 65, at 256–57.

320. United States v. Paramount Pictures, Inc., 334 U.S. 131, 159 (1948); Paramount Decree, *supra* note 12, § II(A)(7).

321. *Paramount*, 334 U.S. at 159.

322. F. Andrew Hanssen, *The Block Booking of Films Reexamined*, 43 J.L. & ECON. 395, 419–20, 422 (2000); *see also id.* at 420 n.91 ("For example, in 1950, 3,700 theaters chose to book Paramount pictures in blocks with a right to cancel 20 percent.").

323. *Id.* at 397.

costs and time commitment associated with licensing films.[324] The evidence found in licensing contracts and practices between the *Paramount* defendants and exhibitors supports this position: the major studios did not require the purchase of entire blocks and the number of films, as well as the duration of runs, was flexible.[325] This was a direct result of the profit-sharing licensing scheme used and the importance of maintaining good relationships with the exhibitors (and vice versa).[326] Additionally, the licensing contracts contained cancellation clauses that allowed exhibitors to cancel a license if the cost for the film was too high, and the right to refuse (usually) 10 percent of contracted-for films.[327] Although the exhibitors were allowed to do so, the cancellation clauses were rarely used to their fullest.[328] The licensing contracts also allowed exhibitors to roll over unshown films to the following season, and even "exchange [them] for agreements to show newer films."[329]

Nonetheless, the conditional block booking feared by Paramount Decree advocates is entirely speculative, and evidence points to the conclusion that such practice will not be revived with termination of the Paramount Decrees. First, the major studios are producing a much smaller number of movies than in the pre-*Paramount* era, [330] supporting the conclusion that conditional block booking is not as big a threat

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324. *Id.* at 400 ("An exhibitor trade association noted in 1938, 'The exhibitor is in the position of buying a sufficient quantity of quality product for his theater to insure a continuous supply of merchantable pictures. To quit block booking would be to greatly increase the price of pictures;'" when Famous-Players Lasky experimented with individual selling of films in the early 1920s, it "estimated that its sales force would have to be quadrupled, sales and overhead costs doubled, and the price per picture raised by 40 percent."); CONANT, *supra* note 39, at 145 ("Many exhibitors . . . found negotiating for each picture individually too time consuming and preferred to buy films in groups.").

325. Hanssen, *supra* note 322, at 409–11, 415.

326. *See id.* at 396.

327. *Id.* at 412–13 ("Film exhibitors could use the cancellation clause to adjust, at the margin, the number of films they actually accepted and thus vary play dates in line with demand without worrying that they might not be able to show all the films they contracted for. The cancellation clause was a standard feature of block-booked contracts, and 10 percent was the standard minimum.").

328. *Id.* at 415.

329. *Id.* at 414 ("'[E]very member of the sales organization knew that a large proportion of all cancellations consisted of adjustments made to exhibitors to further the sales of the new season's pictures.' Such cancellations were a loss for accounting purposes only; . . . '[t]hey knew that the exhibitor had only so many days in the year to show pictures and that if all the time was taken up, the mere substitution of new pictures for old pictures was not a real loss of business.'" (quoting *FBO Productions, Inc.: Decrease of Number of Cancellations in Contracts*, 8 HARV. BUS. REPS.: CASES ON MOTION PICTURE INDUS. 391, 395, 396 (1930))).

330. LANDRY & GREENWALD, *supra* note 2, at 12, 16.

as it was in the *Paramount* era. Unlike the old days, the studios no longer have a guaranteed forum of exhibition or contracted talent to easily produce films. And, with the decline of the star system, the major studios must put money into not only producing but also marketing these films to the decreasing movie-going public. Pre-*Paramount*, "more than 65% of the population went to the movies weekly" in the United States,[331] and the "major studios made virtually all of the movies that people saw."[332] Since the 1960s, an average of a little below 10 percent attend the movies weekly,[333] and the studios now only make a small fraction of the total theatrically released movies.[334] Therefore, because of the *Paramount* defendants' focus on producing blockbuster titles (as noted in Section IV.B.1.a), there are fewer available movies for the *Paramount* defendants to tie, even if they wanted to do so.

Additionally, the rise in multiplexes alters the theatrical landscape: exhibitors are no longer limited to one screen. Therefore, even if the studios engaged in some form of conditional block booking, it would not result in the exclusion of other producers from theaters since exhibitors have many more screens available at any given time. And,

331. Caterina Cowden, *Movie Attendance Has Been on a Dismal Decline Since the 1940s*, BUS. INSIDER (Jan. 6, 2015, 4:35 AM), https://www.businessinsider.com/movie-attendance-over-the-years-2015-1 [https://perma.cc/HQ8E-AJH4].

332. EPSTEIN, *supra* note 212, at 23.

333. Cowden, *supra* note 331. In light of the COVID-19 pandemic, the number of potential moviegoers has continued to decrease. Andrew Ross Sorkin et al., *Must the Shows Go On?*, N.Y. TIMES: DEALBOOK (Jan. 10, 2022), https://www.nytimes.com/2022/01/10/business/dealbook/hollywood-pandemic-box-office.html [https://perma.cc/SP9B-TR86] ("According to a recent study, 49 percent of prepandemic moviegoers are no longer buying tickets. Eight percent say they will never return.").

334. In 2019, "over 900 films [were] shown in theaters." Marciszewski, *supra* note 65, at 267-68. In 2019, Paramount released 11 movies, MGM released 2 movies, 20th Century Fox released 13 movies, Sony (which owns Columbia Pictures) released 24 movies, Warner Brothers released 43 movies, Universal released 26 movies, and United Artists released 6 movies. *Box Office History for Paramount Pictures*, THE NUMBERS, https://www.the-numbers.com/market/distributor/Paramount-Pictures [https://perma.cc/A97T-S249]; *Box Office History for MGM*, THE NUMBERS, https://www.the-numbers.com/market/distributor/MGM [https://perma.cc/WXZ7-ZX7P]; *Box Office History for 20th Century Fox*, THE NUMBERS, https://www.the-numbers.com/market/distributor/20th-Century-Fox [https://perma.cc/3DAE-UYLQ]; *Box Office History for Sony Pictures*, THE NUMBERS, https://www.the-numbers.com/market/distributor/Sony-Pictures [https://perma.cc/3DAE-UYLQ]; *Box Office History for Warner Bros.*, THE NUMBERS, https://www.the-numbers.com/market/distributor/Warner-Bros [https://perma.cc/E8MY-U3HS]; *Box Office History for Universal*, THE NUMBERS, https://www.the-numbers.com/market/distributor/Universal [https://perma.cc/RLW7-5BDM]; *Box Office History for United Artists*, THE NUMBERS, https://www.the-numbers.com/market/distributor/United-Artists [https://perma.cc/Z7XJ-MY2D]. In total, the *Paramount* defendants released 125 of at least 900 movies in 2019, or at most 13.89 percent, as opposed to the 316/508, or 62.2 percent, of movies released in the 1934–1939 seasons. *See* CONANT, *supra* note 39, at 36.

lastly, the rise of streaming platforms not only provides independent producers another method to release their films, but also gives studios an avenue to release their lower-tiered movies without having to use conditional block booking. As noted above, the signatory studios each have developed, purchased, or invested in a streaming platform, and these platforms can be used as an alternative method to release these lower-quality, non-blockbuster movies.

Some have argued that lifting the prohibition on conditional block booking will inevitably result in the foreclosure of independent movies from theaters that desire this content.[335] However, many of these independent and small theaters do not focus on playing content from Hollywood studios, rather, "[m]any [of them] primarily play films from independent studios and distributors [and] foreign films."[336] These theaters "cater to niche audiences and aren't wholly reliant, if at all, on the Hollywood machine."[337] Furthermore, courts have even recognized this independent market as distinct from Hollywood movies, referring to these theaters as "specialty theaters": theaters that show "specialty films," including "independent films, art films, foreign films, and documentaries . . . [which] unlike mainstream commercial films . . . are not intended to appeal to a broad audience."[338] Therefore, the argument that the Paramount Decrees, if terminated, will disallow independent theaters from showing independent films is unconvincing.

Lastly, the fact that none of the signatory studios aided or supported the DOJ's push for termination of the Paramount Decrees[339] indicates that these studios have no desire to revert to the practices prohibited by the Paramount Decrees, including block booking. Had

335. *See, e.g.*, Writers Guild of Am., *supra* note 31, at 6; Amicus Curiae Independent Cinema Alliance's Memorandum in Opposition to the Department of Justice's Motion to Terminate the Paramount Consent Decrees at 2, 2 n.2, United States v. Paramount Pictures, Inc., No. 19-mc-00544 (S.D.N.Y. Nov. 17, 2020) [hereinafter ICA Amicus].

336. Dawson Oler, Note, *Netflix, Disney+, & A Decision of Paramount Importance*, 2020 U. ILL. J.L. TECH. & POL'Y 481, 499.

337. Cara Buckley, *How New York's Small Cinemas Are Hanging On*, N.Y. TIMES (Oct. 27, 2020), https://www.nytimes.com/2020/10/27/movies/nyc-indie-movie-theaters.html [https://perma.cc/9ZRN-MNNN].

338. 2301 M Cinema LLC v. Silver Cinemas Acquisition Co., 342 F. Supp. 3d 126, 129 (D.D.C. 2018).

339. *See Paramount Consent Decree Review Public Comments 2018*, U.S. DEP'T OF JUST., https://www.justice.gov/atr/paramount-consent-decree-review-public-comments-2018 [https://perma.cc/6JWF-K9M4] (listing all of the public comments submitted to the DOJ to assist in its determination of whether the Paramount Decrees were still necessary to protect competition, and no comments were submitted by any of the signatory studios).

the signatory studios desired to do so, logically one would have seen them be more involved in the process, working with the DOJ to repeal the Paramount Decrees. Or, alternatively, one would have expected the see the studios move for termination on their own volition (with the DOJ's support) before the DOJ initiated its review of the legacy decrees. Instead, however, the DOJ sought to terminate the Paramount Decrees unilaterally.

3. The Paramount Decrees Are Necessary to Protect Small and Independent Competitors

In its brief opposing termination of the Paramount Decrees, the Independent Cinema Alliance (ICA), which represents 236 independent cinema companies, "urge[d] preserving the Paramount . . . Decrees, which foremost seek to protect independent cinemas."[340] ICA argued that for independent competitors, the Paramount "Decrees constitute a continuing lifeline, a way to remain competitive in an industry still inclined to anticompetitive abuse."[341]

Citing the language of the Supreme Court in *Paramount*, ICA characterized the purpose of the *Paramount* litigation as protecting independent and small competitors:

> The trade victims of this conspiracy have in large measure been the small independent operators. They are the ones that have felt most keenly the discriminatory practices and predatory activities in which defendants have freely indulged. They have been the victims of the massed purchasing power of the larger units in the industry. It is largely out of the ruins of the small operators that the large empires of exhibitors have been built.[342]

There is no argument against this characterization of the case; the Court *was* trying to protect smaller competitors. The Court's view in *Paramount* was in line with similar cases of its time, expressing a willingness to use antitrust to protect small, independent businesses.

For example, in *Klor's, Inc. v. Broadway-Hale Stores, Inc.*,[343] a small independently operated store alleged that Broadway-Hale, a chain of department stores, and ten other national manufactures

340. ICA Amicus, *supra* note 335, at 1.
341. *Id.* at 3.
342. *Id.* at 1 (quoting *Paramount Pictures II*, 334 U.S. 131, 162 (1948)).
343. 359 U.S. 207 (1959).

"conspired to restrain and monopolize commerce."[344] The lower courts granted summary judgment for the defendants, stating that this was a "purely private quarrel" that did not "amount to a '*public wrong proscribed by the Sherman Act*.'"[345] The Supreme Court, reversing the lower courts, held that defendant's actions "interfere[] with the natural flow of interstate commerce. It clearly has, by its 'nature' and 'character,' a 'monopolistic tendency.' As such it is not to be tolerated merely because the victim is just *one merchant whose business is so small* that his destruction makes little difference to the economy."[346] Similarly, in *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*,[347] a manufacturer brought suit against an association and its members, alleging a combination and conspiracy to restrain interstate commerce.[348] The lower courts again granted a motion for summary judgment because there was no harm to the public.[349] The Supreme Court reversed and followed its decision in *Klor's* stating that the size of the company does not matter—rather, "to state a claim upon which relief can be granted under that section, allegations adequate to show a violation and, in a private treble damage action, that plaintiff was damaged thereby are all the law requires."[350]

However, the Court's views have since shifted away from this approach. This shift was "doctrinal. The Court concentrated on sharpening the element of proper enforcement within antitrust, namely ensuring that antitrust law focused on the integrity of the competitive process and not the viability of individual competitors."[351] As early as 1962, two years after the *Radiant Burners* decision, the Court indicated as much, stating that antitrust laws were passed for "the protection of *competition,* not *competitors*."[352] By the 1990s, the Court shifted away from protecting small business and diffusing economic power as the goal of antitrust, holding instead that in circumstances similar to the allegations in *Klor's* and *Radiant Burners*, "the plaintiff . . . must allege and prove harm, *not just to a single competitor, but to*

344. *Id.* at 208.
345. *Id.* at 210 (emphasis added).
346. *Id.* at 213 (emphasis added).
347. 364 U.S. 656 (1961).
348. *Id.* at 657.
349. *Id*. at 658–59.
350. *Id*. at 659–60.
351. Daniel M. Tracer, *Stare Decisis in Antitrust: Continuity, Economics, and the Common Law Statute*, 12 DEPAUL BUS. & COM. L.J. 1, 20–21 (2013).
352. Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962).

the competitive process, i.e., to competition itself."[353] For, "the purpose of the [Sherman] Act is not to protect businesses from the working of the market; it is to protect the public from the failure of the market."[354]

Therefore, ICA's argument that the Paramount Decrees should remain intact to protect small competitors is not convincing. ICA would need to show that without the Paramount Decrees, there would be harm to *competition itself*, not independent competitors.[355] Instead, ICA attempts to use antitrust in a manner directly against the Supreme Court's description of its purpose noted above—ICA wants to maintain the Paramount Decrees in an attempt to protect independent theaters from the workings of the market: "Independents already dwell in a kind of perpetual existential angst, and the economic challenges of running a cinema continue to mount. . . . Independents need to see a steadfast commitment to the principles of fairness so succinctly embodied in the Paramount . . . Decrees . . . ."[356]

C. Changes in Antitrust Law Make It Unfair to Hold Different Competitors to Different Standards

As noted in Section IV.A above, the Court has modified its approach to various business practices banned by the Paramount Decrees. Consequently, all that is lost by termination of the Paramount Decrees is "a vague sense of special treatment that came from circumstances long gone, with little practical application."[357] Vertical restraints are now analyzed under the rule of reason, making it unfair that only a handful of studios are still bound the Paramount Decrees' per se ruling. The DOJ stated that "[c]onsistent with modern antitrust law, the Division will review the vertical practices initially prohibited by the Paramount decrees using the rule of reason. . . . If credible

353. NYNEX Corp. v. Discon, Inc., 525 U.S. 128, 135 (1998) (emphasis added).

354. Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 458 (1993).

355. This argument is based on the current standing of antitrust law. As mentioned *infra* in Section V.C, there is a robust debate happening at this moment among Congress and academics regarding antitrust law, including whether there needs to be a return to using antitrust to protect independent competitors.

356. ICA Amicus, *supra* note 335, at 20.

357. Tom Brueggemann, *Theaters Have Many Problems, but the Consent Decrees Weren't One*, INDIEWIRE (Aug. 7, 2020, 6:29 PM), https://www.indiewire.com/2020/08/theaters-many-problems-but-the-consent-decrees-werent-one-1234578739/ [https://perma.cc/83XE-HL2D].

evidence shows a practice harms consumer welfare, antitrust enforcers remain ready to act."[358]

Additionally, the modern trend for tying arrangements, such as block booking, is pushing toward rule of reason analysis. And, the Court has backed away from its willingness to use antitrust to protect individual competitors. To keep the Paramount Decrees intact would go against the goals of modern antitrust case law and result in harming competition, as competitors in today's movie industry landscape are held to different standards.

Moreover, the movie industry market definition has changed since the days of *Paramount*. Market definition is an often heavily litigated portion of antitrust cases, as the power of the defendant is measured by their control of the defined market. During the era of *Paramount*, the movie industry market was, at its broadest, theaters in general and, at its narrowest, the type of theater (first-run, second-run, third-run theaters, etc.). Now, however, at its broadest, the movie industry market includes not only theaters, but in-home entertainment (television, DVDs, and streaming platforms). And, at its narrowest, it is theaters (which as noted in Section IV.B above, are very different from the single-screen theaters of old). The Court in *Paramount* defined the market as first-run theaters (taking the narrow definition).[359] Even if the same approach is used in a modern action following termination of the Paramount Decrees, the market definition would, at its narrowest, be theaters since specific run theaters no longer really exist.[360] Therefore, the broadening of the market definition from the time of *Paramount* is important when noting the post-*Paramount* changes in antitrust analysis.

Furthermore, even if the signatory studios do resort to the feared anticompetitive behavior outlawed by the Paramount Decrees, they are not exempt from antitrust scrutiny. The National Theater Organization agreed, stating: "We agree with the Court that anti-competitive behavior remains anti-competitive under existing antitrust law. This

358. Dana Harris-Bridson, *No, Studios Won't Buy Theaters, but Small Exhibitors Fear Destruction While DOJ Touts Innovation*, INDIEWIRE (Nov. 20, 2019, 1:07 PM), https://www.indiewire.com/2019/11/paramount-consent-decrees-studios-wont-buy-theaters-1202190582/ [https://perma.cc/4M6R-53H4].

359. United States v. Paramount Pictures, Inc., 85 F. Supp. 881, 894 (S.D.N.Y. 1949); *see also* United States v. Paramount Pictures, Inc., 334 U.S. 131, 167 (1948).

360. "[M]ajor films are released broadly to thousands of multi-screen theaters at the same time in a single theatrical run." United States v. Paramount Pictures, Inc., No. 19 MISC. 544, 2020 WL 4573069, at *4 (S.D.N.Y. Aug. 7, 2020).

decision simply shifts the mechanism for enforcement into regular, existing channels."[361] And, repealing the Paramount Decrees does not invalidate the law surrounding the *Paramount* defendants' illegal business practices that have remained unaltered since the Supreme Court's *Paramount* holding.[362]

Additionally, since the Paramount Decrees were signed, the Hart-Scott-Rodino Act,[363] implemented in 1976, provides antitrust authorities with the opportunity to review and challenge most "mergers and acquisitions that are likely to reduce competition and lead to higher prices, lower quality goods or services, or less innovation."[364] Therefore, if any major studio tried to buy a major theater chain, as feared by Paramount Decree advocates,[365] there are now processes in place to block such mergers if they would lead to anticompetitive practices, including those used by the vertically integrated studios prior to the *Paramount* litigation.

With the rise of antitrust in the spotlight of current events (specifically with its role in addressing concerns raised by big tech), there is debate about whether antitrust law, as it stands, is sufficient to prohibit and enforce anticompetitive behavior or if the Sherman Act should be updated.[366] Whether antitrust law must be amended is another question, outside the scope of this Comment. Assuming arguendo that current antitrust law is inadequate, does that mean that the regulations of the Paramount Decrees should stay intact for only a few competitors in the motion picture industry? The answer is no, as removing restrictions will promote competition and innovation in the market. The termination of the Paramount Decrees allows the *Paramount* defendants to better compete with rising powerhouses such as Disney, Netflix, and Amazon.

361. Brueggemann, *supra* note 357.

362. *See* Schwartz, *supra* note 19, at 106.

363. 15 U.S.C. § 18(a) (2018).

364. *Merger Review*, FED. TRADE COMM'N, https://www.ftc.gov/enforcement/merger-review [https://perma.cc/2REC-67YA].

365. *See supra* Section V.B.1.

366. *See, e.g.*, A. Douglas Melamed, *Antitrust Law and Its Critics*, 83 ANTITRUST L.J. 269, 269 (2020); Andrew Ross Sorkin et al., *Why Apple Didn't Lose in the Epic Games Ruling*, N.Y. TIMES: DEALBOOK (Oct. 8, 2021), https://www.nytimes.com/2021/09/13/business/dealbook/apple-epic-fortnite-lawsuit.html [https://perma.cc/W4C3-KCLT] ("'The ruling shows the gap between the popular perception of what is a monopoly and what the law says'. . . . And that, in turn, 'gives those pushing to change the laws in Congress pretty good ammunition.'").

VI. CONCLUSION

The Paramount Decrees were necessary when originally entered into due to the then-existing status of antitrust jurisprudence and the structure of the movie industry. However, post-*Paramount* changes to the movie industry, including the rise of new competitors, new avenues for entertainment, multiplexes, and, most recently, the impact of the COVID-19 pandemic have created an industry in which the conduct prohibited by the Paramount Decrees is unlikely to occur again. Additionally, the Supreme Court has relaxed its views on several antitrust doctrines, which the Paramount Decrees strictly held to be per se violations. Terminating the Paramount Decrees allows the signatory studios to compete with non-signatory studios on a level playing field. The concerns of Paramount Decree advocates are unsupported by law and fact and, therefore, the district court was right to terminate the Paramount Decrees.