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Movies to Fall Asleep to: The Antitrust Implications of Terminating the Paramount Consent Decrees

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MOVIES TO FALL ASLEEP TO: THE ANTITRUST IMPLICATIONS OF TERMINATING THE PARAMOUNT CONSENT DECREES

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I. INTRODUCTION

U.S. antitrust law promotes competition and prevents monopolies in various industries in order to foster economic growth.[1] Antitrust law in the

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media and motion picture industries became more of a controversial issue after *United States v. Paramount*[2] in 1948, a landmark case in the entertainment industry.[3] The studios subsequently signed the Paramount Consent Decrees (the "Paramount Decrees"), which would go on to govern anticompetitive practices jointly with the Sherman and Clayton Acts in the motion picture industry for the next six decades.[4] The resulting Paramount Decrees serve to restrict the original defendant studios from collusive and anticompetitive behavior, divest the major conglomerates, and set a new regulatory standard in conjunction with the Sherman Act.[5]

In 2018, the Department of Justice ("DOJ") reviewed legacy judgments to terminate any obsolete antitrust decisions that may not have any relevance or effect today.[6] Among those decisions was the Paramount Decrees, for which the DOJ filed a motion to terminate in 2020.[7] The Paramount Decrees were subsequently terminated by the United States District Court for the Southern District of New York.[8] The court cited many reasons, including new technology and changes in the law and market conditions.[9]

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1. *See* Sherman Act, 15 U.S.C. §§ 1–2.

2. 334 U.S. 131 (1948).

3. *See* Jonathan A. Schwartz*, Bringing Balance to the Antitrust Force: Revising the Paramount Decrees for the Modern Motion Picture Market,* 27 UCLA ENT. L. REV. 45, 49 (2020) (reasoning that "the '*Paramount* Decrees' encapsulated over ten years of antitrust actions by the Department of Justice against the nation's largest film production, distribution, and exhibition companies").

4. *See id.*

5. *Id.* at 51–52 (discussing the invasive nature of the major movie studios' divestiture resulting from the Decrees).

6. Press Release, U.S. Dep't of Just., Department of Justice Announces Initiative to Terminate "Legacy" Antitrust Judgments (Apr. 25, 2018), https://www.justice.gov/opa/pr/department-justice-announces-initiative-terminate-legacy-antitrust-judgments (announcing that all "open" legacy judgments would be reviewed to facilitate the termination of those that "no longer serve to protect competition").

7. Press Release, U.S. Dep't of Just., Federal Court Terminates Paramount Consent Decrees (Nov. 19, 2020), https://www.justice.gov/opa/pr/federal-court-terminates-paramount-consent-decrees [hereinafter DOJ Press Release].

8. United States v. Paramount Pictures, Inc., 19 Misc. 544 (AT), 2020 U.S. Dist. LEXIS 141427 (S.D.N.Y. Aug. 7, 2020).

9. *Id.* at *12 (reasoning that "seventy years of technological innovation, new competitors and business models, and shifting consumer demand have fundamentally

This Comment will argue that, while the Consent Decrees seem obsolete in the 21st century when studios own significant numbers of theaters, movies are no longer released one theater at a time like they were in 1948, which implicates relevant antitrust standards. With the prevalence of streaming, termination of the Paramount Decrees would allow streaming giants such as Disney+ and Netflix to monopolize the movie release market through the hybrid release model, impacting future case law and litigation. Part II of this Comment will examine the *Paramount* case, the consent decrees that resulted from it, and the judicial and congressional history of antitrust in the movie industry. Part III will apply those antitrust standards, case law, and the Sherman Act to the hybrid streaming model. Finally, Part IV will recommend that the Paramount Decrees be reworked in order to accommodate for the hybrid streaming model and stay in line with the Sherman Act and antitrust precedent as well as to preserve artistic integrity in the motion picture industry.

II. THE JUDICIAL HISTORY OF ANTITRUST IN THE MOVIE AND BROADCASTING INDUSTRY AND THE PARAMOUNT CONSENT DECREES

A. The Sherman Act and Monopoly Power

Congress enacted the Sherman Act in 1890 to promote competition, economic liberty, and prevent growth of monopolies. The Sherman Act is enforced by the Federal Trade Commission ("FTC") and the DOJ.[10] Companies are evaluated under antitrust actions based on their anticompetitive conduct, barriers to entry into the industry, and attempts to monopolize.[11] Sections 1 and 2 of the Sherman Act are especially significant as they govern anticompetitive conduct.[12] Section 1 prohibits "every contract, combination, or conspiracy in restraint of trade," and is more geared toward coordinated anticompetitive conduct.[13] Section 2 prohibits "monopolization, attempted monopolization, or conspiracy or combination

changed the industry").

10. *The Enforcers*, FED. TRADE COMM'N, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/enforcers (last visited Apr. 27, 2022).

11. *See Monopolization Defined*, FED. TRADE COMM'N, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/single-firm-conduct/monopolization-defined (last visited Mar. 20, 2022); *see also* Eliot G. Disner, *Barrier Analysis in Antitrust Law,* 58 CORNELL L. REV. 862, 863–64 (1973) ("Advertising intensity and the size of existing firms have also been regarded as separate barriers to entry.").

12. *See* Sherman Act, 15 U.S.C. §§ 1–2.

13. *Id.* § 1; *see also Parallel Conduct and Section 1 of the Sherman Act,* EPSTEIN BECKER GREEN, https://www.ebglaw.com/insights/parallel-conduct-and-section-1-of-the-sherman-act/ (last visited Jun. 26, 2022).

to monopolize."[14] This section in particular serves to promote "the process of competition that spurs firms to succeed" by outlawing business methods which are incompatible with the competitive process.[15] Congress's intent in passing the Sherman Act was to promote a fair, open, and competitive marketplace, as "excessive market concentration threatens basic economic liberties, democratic accountability, and the welfare of workers, farmers, small businesses, startups, and consumers."[16] The Sherman Act also serves to preserve competition that "spurs companies to reduce costs, improve the quality of their products, invent new products, educate consumers, and engage in a wide range of other activity that benefits consumer welfare."[17]

Courts assess monopoly power based on several factors, the primary ones being market share, exclusionary conduct, and business justification, as well as strength of competition, nature of anticompetitive conduct, and elasticity of consumer demand.[18] Market share alone is not enough to sustain a claim under the Sherman Act, but monopoly power can be proven without this as well.[19] The factors for monopoly power must be assessed on a case-by-case basis and weighed accordingly.

B. United States v. Paramount and the Resulting Consent Decrees

In 1948, the DOJ filed a lawsuit against eight major movie studios claiming several antitrust violations such as horizontal and vertical price

14. 15 U.S.C. § 2; *see also Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act: Chapter 1*, U.S. DEP'T OF JUST., https://www.justice.gov/atr/competition-and-monopoly-single-firm-conduct-under-section-2-sherman-act-chapter-1 (last visited Mar. 18, 2022) (describing how specific intent to monopolize entails a "specific intent to destroy competition or build monopoly").

15. U.S. DEP'T OF JUST., *supra* note 14.

16. Exec. Order No. 14,036, 86 Fed. Reg. 36,987 (July 9, 2021). *Compare* Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7, 8 (1966) (asserting that "Congress intended the courts to implement . . . only that value we would today call consumer welfare"), *with* Barak Orbach, *How Antitrust Lost Its Goal*, 81 FORDHAM L. REV. 2253, 2255–57 (2013) (stating that "consumer welfare" is an ambiguous term and that the Sherman Act's legislative history does not support the claims leading to the adoption of the consumer welfare standard).

17. U.S. DEP'T OF JUST., *supra* note 14.

18. *See* FED. TRADE COMM'N, *supra* note 11.

19. *See id*; *see also* William E. Kovacic, et al., *Plus Factors and Agreement in Antitrust Law,* 110 MICH. L. REV. 393, 397, 405 (listing the "chief plus factors," including actions contrary to each defendant's self-interest unless pursued as part of a collective plan, phenomena that can be explained rationally only as the result of concerted action, evidence that the defendants created the opportunity for regular communication, industry performance data that suggests successful coordination, and the absence of a plausible, le4gitiate business rationale for suspicious conduct).

fixing and other behaviors that prevented smaller studios from engaging in reasonable competition within the industry.[20] This lawsuit produced the Paramount Decrees that governed the actions of movie studios for decades.[21] Horizontal price fixing is "any arrangement among competitors that interferes with" the influence of free market forces on setting prices organically.[22] Horizontal price fixing does not have to be explicit in writing but can also be indirect or inferred from its detrimental effects.[23] Vertical price fixing on the other hand refers to agreements between entities in a supply or distribution chain, either controlling prices or more implicitly in terms of customer or territorial restrictions.[24]

For years, the Paramount Decrees successfully prevented price-fixing actions that violated the Sherman Act.[25] Until 1948, Paramount, Loew's, Warner, RKO, and Fox (five of the "major defendants") owned large movie theater circuits, including "over seventy percent of the best and largest 'first-run' theaters in the ninety-two largest cities in the United States."[26] This structure led to collusion because the defendants limited the first run of their pictures to the theaters that the major defendants owned and controlled.[27] In addition, they closed off first-run theaters to their competitors, who were independent motion picture distributors.[28] In the initial *Paramount* lawsuit, the district court found monopoly power in the distribution market for the first-run movies and found a conspiracy in the licensing practices, which limited local theaters by admission price-fixing, run categories, and clearances.[29]

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

21. *See id*.

22. 1 JULIAN O. VON KALINOWSKI ET AL., ANTITRUST LAWS AND TRADE REGULATION: DESK EDITION § 2.03 (2d ed. 2021).

23. *See id.* ("An agreement need not literally fix prices to be condemned as illegal horizontal price fixing, nor does it matter whether the price fixing agreement is direct or indirect.").

24. *See id.* § 2.04; *see also Dealings in the Supply Chain*, FED. TRADE COMM'N, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/dealings-supply-chain (last visited Apr. 27, 2022) (providing that vertical relationships in the supply chain are tested for reasonableness because they may violate antitrust laws if they reduce competition between companies at the same level or prevent new ones from entering the market).

25. *See Paramount Pictures, Inc*., 334 U.S. at 172; *see also* Schwartz, *supra* note 3, at 68–70 (tracing the Consent Decrees' history and the *Paramount* decision's legacy).

26. United States v. Paramount Pictures, Inc., No. 19 Misc. 544 (AT), 2020 U.S. Dist. LEXIS 141427, at *3 (S.D.N.Y. Aug. 7, 2020) (citing *Paramount Pictures, Inc.*, 334 U.S. at 167).

27. *See id.*

28. *See id.*

29. *See id.* at *4.

The DOJ imposed consent decrees with several conditions. The decrees limited block booking, which is the practice of licensing films in groups by conditioning one film license on many others.[30] Additionally, the decrees prohibited the buying of films without viewing and replaced this practice with special screenings at which representatives of all theater districts in the country could see films before booking any.[31] The decrees also barred the defendants from setting minimum movie ticket prices, granting exclusive film licenses for overly-broad geographic areas, and licensing a film to all theaters under common ownership instead of by individual theater.[32] The imposition of the decrees proved to be especially influential as it fully uncovered the vertical agreements that unreasonably restrained trade and established that even without an explicit horizontal agreement to fix prices, courts can infer collusion from the facts and the effects of such restraints of trade.[33] The Supreme Court in this case inferred a horizontal agreement between the major defendants from examining the similar price structures, which served as important evidence of collusion, barriers to entry, and anticompetitive conduct.[34] Following *Paramount*, the DOJ created the Society of Independent Motion Picture Producers to regulate and impose these requirements.[35] Additionally, the DOJ ordered Paramount to divest between film distribution and exhibition and sell their theaters to new independent companies in order to foster competition, eliminate barriers to entry, and allow more independent distributors and studios to enter the market.[36]

C. Notable Cases After United States v. Paramount

Cases following *Paramount* have largely built upon the structure and

30. *See id.* at *5–6; *see also* 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, 230 (2020) (describing the practice of "block booking" as bundling multiple films under one license, which the Paramount Decrees outlawed).

31. *See Paramount Pictures, Inc.*, 334 U.S. at 146 n.11.

32. *Paramount Pictures, Inc.*, 2020 U.S. Dist. LEXIS 141427, at *6.

33. *See* Alexandra Gil, *Breaking the Studios: Antitrust and the Motion Picture Industry*, 3 NYU J.L. & LIBERTY 83, 110–12 (2008) (noting how the court found inferred collusion without an explicit horizontal agreement to fix prices).

34. *See id.* at 111-12 (explaining that the court inferred price fixing from the uniformity of ticket prices absent a horizontal agreement to set a minimum price).

35. *See The Formation of the Society (1941 & 1942)*, HOLLYWOOD RENEGADES ARCHIVE, https://www.cobbles.com/simpp_archive/simpp_1941formation.htm (last visited Apr. 28, 2022).

36. U.S. Dep't of Just., *supra* note 7; *see also The Paramount Decrees*, U.S. DEP'T OF JUST., https://www.justice.gov/atr/paramount-decree-review (last visited Jun. 26, 2022).

standards that were laid out in the Paramount Decrees.[37] *United States v. Loew's*,[38] decided in 1962, concerned the violation of Section 1 of the Sherman Act regarding block booking, even though there was no evidence of an elaborate monopolization scheme in addition to the tying agreements.[39] The government brought suits against six major motion picture distributors alleging that each one engaged in block booking in violation of Section 1 of the Sherman Act to show their programs on television.[40] The Supreme Court held that block booking was illegal according to the standards set forth in *Paramount* and the Sherman Act, even though it was applied to a television program rather than a motion picture.[41] The defendants conditioned the licensing of one copyright on another's acceptance, so block booking occurred when the defendants "conditioned the license or sale of one or more feature films upon the acceptance . . . of a package or block containing . . . inferior films."[42] Often, agreements that tie distributors together to suppress competition or fix prices may force consumers into giving up their autonomy in purchasing a product as they are forced to purchase the tied products.[43] Tying agreements may also have other unintended consequences, such as jeopardizing the access of competing suppliers in a free market.[44] Another issue with block booking is that, due to the conditional nature of the copyright license, movies are equalized in terms of quality, target audience appeal, themes, and performances.[45] This occurs especially when the requirement that all be taken if one is desired increases the market for those that may not be as well-made or in demand; "each stands not on its own

37. *See* Jefferson Par. Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 16 (1984) (stating how conditioning a patented item on the purchase of other products from the patentee is prohibited and equating this practice to block booking); Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 28 (1979) (asserting that "[t]he rules which prohibit a patentee from enlarging his statutory monopoly by . . . refusing to grant a license under one patent unless the licensee also takes a license under another, are equally applicable to copyrights").

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

39. *See id.* at 49, 51–52 (discussing that "the thrust of the antitrust laws cannot be avoided merely by claiming that the otherwise illegal conduct is compelled by contractual obligations").

40. *See id.* at 40.

41. *See id.* at 48–49.

42. *Id.* at 40.

43. *See id.* at 45 (noting the Court's recognition that "tying agreements serve hardly any purpose beyond the suppression of competition").

44. *See id.* at 45 (listing cutting off completing suppliers' access as one of two undesirable effects of tying agreements).

45. *See id.* at 47–49 (referring to "equalizing" as the copyright law practice in which a film of inferior quality borrows quality from a high-quality film, thus "strengthen[ing] its monopoly by drawing on the other").

footing but in whole or in part on the appeal which another film may have."[46]

Another notable case in this realm is *Sony Corp. of America v. Universal City Studios, Inc.*,[47] in which the Supreme Court held that Sony could not be held liable for copyright infringement for broadcasting Universal's copyrighted works on their Betamax devices to consumers.[48] The Court reasoned that "although every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright, noncommercial uses are a different matter" because they require proof that the use is harmful or that it would "adversely affect the potential market for the copyrighted work."[49] Time-shifting in this case, with viewing the copyrighted material at different times from the broadcast, was not an infringement on the monopoly rights of a copyright holder for the original work.[50]

Around the same time in 1984, the Supreme Court decided *National Collegiate Athletic Ass'n v. Board of Regents*,[51] determining that the National Collegiate Athletic Association ("NCAA") unreasonably restrained trade in televising football games through a system that had appearance requirements and limitations on how often a member institution could appear on television.[52] The district court found multiple restraints on competition due to the streaming plan, including instances of price-fixing for particular telecasts, exclusive network contracts and sanctions, and an artificial limit on the football broadcasts.[53] The Supreme Court ruled that the NCAA's practices were restraints on trade because they limited their members' "freedom to negotiate and enter into their own television contracts," and that the ceiling on the number of games permitted to be televised was an artificial limit.[54]

Lastly, in *United States v. International Business Machines Corp.*,[55]

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46. *See id.* at 47.

47. 464 U.S. 417 (1984).

48. *Id.* at 421.

49. *Id.* at 451.

50. *See id.* at 454–55 (finding that the time-shifting practice was unlikely to "impair the commercial value of their copyrights or . . . create any likelihood of future harm").

51. 468 U.S. 85 (1984).

52. *See id.* at 91–94 ("[The television plan] limits the total amount of televised intercollegiate football and the number of games that any one team may televise. No member is permitted to make any sale of television rights except in accordance with the basic plan.").

53. *See id.* at 96.

54. *See id.* at 98–99 (explaining that horizontal agreements that limit output and price fixing are unreasonable restraints of trade).

55. 163 F.3d 737 (2d Cir. 1998).

International Business Machines ("IBM") moved to terminate the remaining provisions of a longstanding antitrust consent decree.[56] The government filed a civil antitrust complaint filed against IBM in 1952 that alleged that "IBM had used its monopolistic market power in the electronic tabulation machine industry to force customers to lease, rather than purchase, its machines," restraining trade.[57] In 1956, the government and IBM entered into a consent decree that constrained IBM's ability to exercise its market power, with the intention of encouraging competition.[58] It required IBM to sell its machines in addition to leasing them, as well as sell parts and provide training to outside firms that could compete with IBM for supplies and services for IBM machines.[59] It also prohibited IBM from reacquiring its machines.[60] Most of the decree provisions were terminated in 1995, as tabulating machines became obsolete, and some other provisions were automatically terminated.[61] The government proceeded to investigate the impact of terminating the decree provisions with respect to two specific computers: the S/390 and AS/400 lines.[62] The court terminated the decree provisions, finding that the phasing out presented no material threat of violating Sections 1 and 2 of the Sherman Act, as there was now an active market for computer repair services and the market would likely remain competitive if the decree was terminated because IBM would continue to sell spare parts to independent repair providers.[63] The court also found that IBM faced some competition in the computer market, deterring monopolistic tactics.[64]

D. The Hybrid Streaming Model

The emergence of streaming in today's day and age has numerous legal implications in terms of licensing and competition in the motion picture

56. *Id.* at 739.

57. *Id.* at 738 (providing that the civil complaint filed alleged that "IBM monopolized, attempted to monopolize, and restrained trade" under Sections 1 and 2 of the Sherman Act).

58. *Id.* (noting that IBM chose to enter into a consent decree with the government rather than proceed to trial).

59. *Id*. at 738–39.

60. *Id.* at 738.

61. *Id*. at 739 (stating that, in 1995, the government agreed to terminate all of the consent decree's provisions except as they applied to two specific product lines).

62. *Id*.

63. *Id*. at 740.

64. *Id*. (including "monopolistic tactics designed to shut off the supply of parts to independent repair companies").

industry.[65] Most notably, the new phenomenon of the hybrid streaming model raises many questions about how antitrust should be handled today when it comes to movies.[66] The hybrid streaming model is the simultaneous release of a movie both in theaters and on a streaming platform, such as Netflix or Disney+.[67] Robust competitors such as Netflix dominate the motion picture industry while avoiding many of the strict regulations which are imposed on the major movie studios.[68] In December of 2021, Legendary Entertainment, the production company behind *Dune* and *Godzilla vs. Kong*, was largely unaware that Warner Bros. planned to send seventeen films to HBO Max and any open theaters at the same time.[69] As a result, Legendary's executives considered suing Warner Bros., and *Dune*'s director, Denis Villeneuve, spoke to *Variety* in an op-ed in December of 2020 to condemn the HBO Max deal.[70] In 2021, Warner Bros. announced during the pandemic that all its 2021 movies would be released on both HBO Max and in theaters.[71] Bloomberg reported in January of 2021 that Warner Bros. may enact a multiplier that would lower the threshold of box office revenue needed to trigger a payout.[72] This multiplier would guarantee payment

65. *See* Dawson Oler, Note, *Netflix, Disney+, & a Decision of Paramount Importance*, 2020 U. ILL. J.L. TECH. & POL'Y 481, 491 (2020) (noting that "the [Paramount] Decrees [are] not binding upon streaming services like Netflix and Amazon").

66. *See id.*

67. *See id.* at 491–92 (describing the hybrid streaming model as one that uses both a theatrical release and streaming platforms to showcase films).

68. *See id.* at 491 (pointing out that the Department of Justice originally emphasized that streaming services, such as Netflix, were not bound by the Paramount Decrees).

69. Rebecca Rubin & Brent Lang, *'Dune' Producer Legendary Entertainment May Sue Warner Bros. Over HBO Max Deal*, VARIETY (Dec. 7, 2020, 9:50 AM), https://variety.com/2020/film/news/legendary-entertainment-warner-bros-hbo-max-deal-dune-godzilla-1234847605/; *see also* Rebecca Rubin, *Film Critics Say 'Dune' Should Be Seen on the Big Screen. Here's Why Warner Bros. Still Plans to Debut the Movie Simultaneously on HBO Max*, VARIETY (Sept. 13, 2021, 1:35 PM), https://variety.com/2021/film/box-office/dune-hbo-max-release-1235062312/; Owen Gleiberman, *'Dune' Is Opening in Movie Theaters . . . and Your Living Room. Here's Why That's a Mistake (Column)*, VARIETY (Sept. 26, 2021, 11:16 AM), https://variety.com/2021/film/columns/dune-hybrid-release-warner-bros-hbo-max-1235074489/.

70. Rubin, *supra* note 70; *see also* Denis Villeneuve, *'Dune' Director Denis Villeneuve Blasts HBO Max Deal (EXCLUSIVE)*, VARIETY (Dec. 10, 2020, 5:00 PM).

71. *See* Rubin & Lang, *supra* note 69; *see also* Rubin, *supra* note 70; Gleiberman, *supra* note 70.

72. Lucas Shaw & Kelly Gliblom, *Warner Bros. Guarantees Filmmakers a Payday for HBO Max Movies*, BLOOMBERG (Jan. 9, 2021, 5:36 PM), https://www.bloomberg.com/news/articles/2021-01-09/warner-bros-guarantees-filmmakers-a-payday-for-hbo-max-movies (noting that the stipulation that "if more theaters close down, the threshold will fall further" is known as the "Covid-19

regardless of box-office sales or theaters being closed.[73] With an absence of regulations in the motion picture industry regarding the hybrid release model, movie studios and production companies are crafting their own arrangements.[74] Some studios have struck deals with theaters to shorten the theatrical window, after which they can release the movie to streaming platforms.[75]

E. The Termination of the Paramount Decrees

In 2018, the Antitrust Division of the DOJ reviewed the Paramount Decrees with the intention to "terminate or modify 'legacy antitrust judgments that no longer protect competition' because of 'changes in industry conditions, changes in economics, changes in law, or for other reasons.' "[76] Since the establishment of the Paramount Decrees, the major defendants had to "separate their distribution and theater operations; today, none of them own an appreciable percentage of the nation's movie theaters."[77] Major films are now released to thousands of theaters at one time, and film distributors are no longer as reliant on theatrical distribution due to the advent and proliferation of streaming services.[78] Many of the original defendants from the *Paramount* case are no longer in business or distribute far fewer films, and new motion picture distributors have entered

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multiplier").

73. *See id.* (providing that "anyone entitled to a bonus will receive one at half the box-office revenue that would normally be needed to trigger a payout").

74. *See* Travis Clark, *Why Movie-theater Owners are Still Troubled by Hybrid Release Strategies, Even as Some Studios Commit to an Exclusive Theatrical Window*, BUS. INSIDER (Aug. 26, 2021, 3:27 PM) (highlighting that "Universal has struck deals with the major theater chains to shorten the theatrical window to as little as 17 days, at which point it can release its movies to digital-rental platforms," Warner Bros. intends to grant a forty-five-day exclusive theatrical window starting next year, and Paramount plans to release some of its movies to Paramount+ after forty-five days); *see also* Scott Mendelson, *First 'Matrix 4' Poster Hints At a Preference in Streaming Vs. Theaters Debate*, FORBES (Sept. 8, 2021, 1:35 PM), https://www.forbes.com/sites/scottmendelson/2021/09/08/movies-matrix-resurrections-poster-keanu-reeves-wachowski-hbo-max-warner-bros/?sh=4c13623d7ef5.

75. *See* Clark, *supra* note 74 (discussing major film studios' release plans).

76. United States v. Paramount Pictures, Inc., No. 19 Misc. 544 (AT), 2020 U.S. Dist. LEXIS 141427, at *6–7 (S.D.N.Y. Aug. 7, 2020) (quoting U.S. Dep't of Just., *supra* note 6).

77. *Id.* at *12; *see also* José Gabriel Navarro, *Movie Studios in the U.S. - Statistics & Facts*, STATISTA (Nov. 30, 2021), https://www.statista.com/topics/4394/movie-studios/#dossierKeyfigures (noting that Disney, Paramount, Sony, Universal, and Warner Bros. held about 81 percent of the movie market in the U.S. and Canada as of September 2021).

78. *Paramount Pictures, Inc.*, 2020 U.S. Dist. LEXIS 141427, at *13–14.

the market who are not part of the Paramount Decrees.[79]

III. ANALYZING THE TERMINATION OF THE PARAMOUNT CONSENT DECREES WITH THE CURRENT STREAMING LANDSCAPE

With the emergence of streaming in today's motion picture industry, the lack of regulatory authority and oversight is more relevant than ever. Hybrid streaming, a newer phenomenon, implicates many of the antitrust factors that courts look at to determine monopoly power and circumvents the regulations that the Paramount Decrees once enforced.[80]

A. The Relevance of the Paramount Decrees to the Hybrid Streaming Model

The hybrid release model may be contractually sound, but, in effect, stifles competition and minimizes a competitor's revenue (a competitor in this case being a traditional movie studio such as Loew's or Regal).[81] The Paramount Decrees are integral to the functioning of the motion picture industry, even today as streaming services proliferate and have changed the landscape of the movie industry fundamentally.[82]

The Paramount Decrees not only outlawed block booking, blind screening, and other anticompetitive practices in Hollywood at the time, but also changed what kind of evidence a party can present to allege an antitrust violation in the media industry.[83] The Court's reasoning in *Paramount* relied on effects, rather than express agreements and verbatim language, to prove conspiracy and monopolization.[84]

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79. *Id.* at *14–15 (providing as examples that the RKO film distribution company is no longer in business, that MGM currently distributes far fewer films than it did in the 1930s and 1940s, and that Disney has become a leading movie distributor).

80. *See, e.g.*, Complaint at 5, Periwinkle Ent., Inc., f/s/o Scarlett Johansson v. Walt Disney Co., No. 21STCV27831 (Cal. Super. Ct. July 29, 2021) [hereinafter *Periwinkle* Complaint] (describing how the hybrid release of *Black Widow* would "bolster Disney's market valuation").

81. *See* Oler, *supra* note 65, 491–92 (explaining how COVID-19 in the United States led major studios to use streaming platforms to showcase their movies over the exclusive theatrical experience).

82. *See* United States v. Paramount Pictures, Inc., 334 U.S. 131, 140–41 (1948) (describing the complaint giving rise to the Paramount Decrees as charging the defendants with restraining trade in the distribution and exhibition of films).

83. *See Paramount Pictures, Inc.*, 2020 U.S. Dist. LEXIS 141427, at *7; *see also* U.S. Dep't of Just., *supra* note 6.

84. *See Paramount Pictures, Inc.*, 334 U.S. at 142 ("It is not necessary to find an express agreement in order to find a conspiracy. It is enough that a concert of action is contemplated and that the defendants conformed to the arrangement."); *see also* U.S. DEP'T OF JUST., *supra* note 14 (explaining how Section 2 of the Sherman Act "achieves this end by prohibiting conduct that results in the acquisition or maintenance of

However, movies are no longer only shown in theaters under the hybrid model, which was the original framework for the decrees.[85]

B. Application of Court Factors to the Hybrid Release Model

The effects of the hybrid model work to stifle competition in terms of licensing and revenue streams and are thus problematic under antitrust law.[86] A court looks at many factors to assess monopoly power, including market share, strength of competition, probable development of industry, barriers to entry, nature of anticompetitive conduct, and elasticity of consumer demand.[87] The anticompetitive conduct in this case refers to the competition between traditional theater chains and streaming services.[88] With streaming services releasing a movie at the same time as a theater, anticompetitive conduct is evident in that the theaters and production studios lose out on revenue they would have otherwise had if it was not released simultaneously.[89] In this instance, the elasticity of consumer demand is not

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monopoly power, thereby preserving a competitive environment that gives firms incentives to spur economic growth").

85. *See Paramount Pictures, Inc.*, 334 U.S. at 140–41 (describing how the complaint giving rise to the Paramount Decrees charged the defendants with restraining trade in the distribution and exhibition of films).

86. *See, e.g.*, *Periwinkle* Complaint, *supra* note 80, at 12–13 (arguing Disney moved films slated for theatrical release to its streaming platform to hurt theatres while bolstering the bottom line for the new subscription service); Eriq Gardner, *Indie Cinema Alliance Warns Amazon May Buy Movie Theaters, Abuse Power if DOJ Gets Its Way*, HOLLYWOOD REPORTER (Jan. 17, 2020, 11:47 AM), https://www.hollywoodreporter.com/business/business-news/indie-cinema-alliance-warns-amazon-may-buy-movie-theaters-abuse-power-doj-gets-way-1270696/ [hereinafter Gardner, *Indie Cinema*] (suggesting that owners of streaming services may purchase physical theatres to push their own film releases); Eriq Gardner, *The Real Impact of Getting Rid of the Paramount Consent Decrees,* HOLLYWOOD REPORTER (Aug. 16, 2018, 6:55 AM), https://www.hollywoodreporter.com/business/business-news/real-impact-getting-rid-paramount-consent-decrees-1134938/ [hereinafter Gardner, *Real Impact*] ("[O]nce-restricted practices that might have been perceived as an illegal restraint of trade in one era may be given a fresh look as pro-competitive in a different era. If Disney wished to tempt scrutiny by conditioning the license of the latest Avengers film on a theater accepting its other movies, Disney would probably point to how indie producers have access to Netflix and other alternative distribution markets.").

87. *See* Sherman Act, 15 U.S.C. § 1; *see also* Thomas G. Krattenmaker et al., *Monopoly Power and Market Power in Antitrust Law*, 76 GEO. L.J. 241, 254–55 (1987).

88. *See generally* Gardner, *Real Impact*, *supra* note 87 (explaining how streaming services may foray into purchasing traditional theaters, and the market power of studios has diminished since the Paramount Consent decrees were established).

89. *See* Schwartz*, supra* note 3, at 89–90; *see also* 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, 350–51 (2019).

as transient.[90] Consumer demand for movies is steady with the supply of movies that are released, but also fluctuates depending on where it is released and economic factors.[91] Most recently, the COVID-19 pandemic severely affected the demand for movie theaters.[92] During the pandemic, consumers were more likely to watch movies on streaming platforms than theatres due to personal safety and a majority being closed for months.[93] Consequently, streaming services took advantage of people staying home to watch movies rather than in theaters, which is inherently anticompetitive.[94] Additionally, barriers to entry remain prevalent today.[95] The industry currently makes it almost impossible for smaller studios to enter and succeed in the market without a streaming service alternative or the means to do so.[96] Without

90. *See* Olivia Pakula, *The Streaming Wars+: An Analysis of Anticompetitive Business Practices in Streaming Business*, 28 UCLA ENT. L. REV. 147, 149, 159 (2021) (explaining that streaming video on demand revenues generated $50 billion in revenue in 2019, and that many streaming services have now been creating their own original content in order to further take advantage of consumer demand); *see also* Elaine Schwartz, *2 Reasons We Don't Go to the Movies,* ECONLIFE (Mar. 29, 2014), https://econlife.com/2014/03/price-elasticity-and-substitutes-diminish-movie-goers/ ("Elasticity involves how much a change in price affects the amount we buy. When a relatively large drop in price generates much higher sales and more revenue, the cause is elastic demand. If however, price and revenue both go up, then the quantity we demand is relatively inelastic.").

91. *See* Schwartz, *supra* note 3, at 91–92 (examining how "consumers hav[e] more options than ever before to access, buy, rent and stream content, . . . "); *see also* Pakula, *supra* note 91, at 170 (describing that "a streaming service's ability to maintain users while eroding user privacy could be 'considered equivalent to a monopolist's decision to increase prices or reduce product quality.'").

92. *See* Shashank Srivastava, *After COVID-19, Will Movie Fans Return to the Theater—or Keep Watching at Home?*, DELOITTE INSIGHTS (July 31, 2020), https://www2.deloitte.com/us/en/insights/industry/technology/pvod-upend-content-covid.html.

93. *See id.*

94. *See* Pakula, *supra* note 91, at 160–62 (reasoning that the major streaming platforms in the motion picture industry today operate as an oligopoly, dominating the market); *see also* Dave Simpson, *Disney Settles Scarlett Johansson's 'Black Widow' Pay Suit*, LAW360 (Sept. 30, 2021, 10:58 PM), https://www.law360.com/articles/1427178/disney-settles-scarlett-johansson-s-black-widow-pay-suit (noting that "[w]ith 'millions' of fans staying home to view *Black Widow* and also not buying multiple tickets if they wanted to see it more than once, [the film's] box-office receipts were harmed . . . ").

95. *See* Gil, *supra* note 33, at 122 (indicating how "[t]he barriers to entry for film production have continued to drop with the introduction of new technology that allows filmmakers to produce high quality films at lower prices, but the barriers to entry for film distribution and exhibition remain unchanged"); *see also* Pakula, *supra* note 91, at 149.

96. *See* Gil *supra* note 33, at 122–23 (highlighting the disadvantages of being a smaller studio when lacking the assistance of a distribution streaming service or ties to large media conglomerates).

connections to a streaming service, finding a distributor for an independent producer is even more difficult.[97] Streaming services are continuing to flourish as a result, increasing in value as they gain more users and increasing barriers to entry.[98]

C. Application of Case Law and Sherman Act to the Hybrid Release Model

Relevant antitrust precedent sheds light on how a court may handle a case regarding the hybrid release model.[99] *United States v. Loew's* emphasizes that a concert of action that is anticompetitive and a restraint of trade can still be adjudicated even if there is no direct evidence of a monopolization scheme under Section 1 of the Sherman Act.[100] Similar to agreements that tie distributors together to suppress competition, agreements between movie studios and streaming platforms that condition the release of a movie on a streaming platform first can be predatory and suppress the competition of a traditional exclusive theatrical release.[101] Conditional agreements may also be an unfair exercise of monopoly power, as in *Sony Corp. of America.*[102] Just as Sony exploited the copyrighted material to condition other releases on one copyright, the hybrid release model takes advantage of one movie release in theaters to bolster the stock price and revenue on the streaming platform on which it is released at the same time.[103] The hybrid release model also affects the potential market for the theatrical release adversely because it cuts into a studio's revenue from box office sales and can negatively impact compensation for actors whose earnings are tied to box office performance of the film.[104]

Although many of the Paramount Decrees may be obsolete in the sense that there are now multiple movie theaters in one metropolitan area and streaming did not exist in 1948, the basic precepts of the decrees and the

97. *See* Pakula, *supra* note 91, at 160 (discussing how "a few dominant companies can prevent the entry of competitors, which reduces innovation and creativity through a lack of competition").

98. *See id.*

99. *See* Oler, *supra* note 65, at 492 ("[C]ourts have noted that the Paramount Decrees do not apply to home videos, national theater chains, and television . . . .").

100. *See* 371 U.S. 38, 51–52 (1962) (explaining that, under Section 1 of the Sherman Act, lacking evidence of a monopolization ploy does not necessarily prevent the issue from being litigated).

101. *See id.*

102. 464 U.S. 417, 476 (1984) ("There are situations, nevertheless, in which strict enforcement of this monopoly would inhibit the very 'Progress of Science and useful Arts' that copyright is intended to promote.").

103. *See id.* at 421.

104. *See* Simpson, *supra* note 95.

underlying reasoning are necessary to keep competition in the movie industry under the Sherman Act.[105] Sections 1 and 2 of the Sherman Act work together to ban anticompetitive conduct.[106] Section 1 of the Sherman Act allows for a showing of evidence to support barriers to competition even if there is parallel conduct or an attempted monopoly in terms of exhibition.[107] Additionally, Section 2 of the Sherman Act enumerates that even if monopoly power is unexercised, "the power to exclude competition combined with the intent to exercise that power violates the Act."[108] Terminating the Paramount Decrees with no replacement regulations would allow streaming giants to monopolize revenue by aggressively marketing for consumers to watch movies on their platforms rather than on screen.[109] This practice demonstrates anticompetitive intent and would shift market power in the industry.[110] Additionally, Congress's intent when enacting the Sherman Act would be sullied.[111] Terminating the Paramount Decrees would cause a vacuum in the streaming industry and threaten consumer welfare, as well as competition.[112] Although the strength of the competition

105. *See* DOJ Press Release, *supra* note 7 (detailing how the Paramount Decrees "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)").

106. *See* Sherman Act, 15 U.S.C. §§ 1–2.

107. *See id.* § 1; *see also* Pakula, *supra* note 91, at 152 (explaining how "Section 1 of the Sherman Act bans unreasonable restraints of trade or commerce, and section 2 bans any monopolization of trade or commerce.").

108. *See* 15 U.S.C. § 2; Pakula, *supra* note 91, at 152.

109. *See Periwinkle* Complaint, *supra* note 80, at 3–4 ("In order to convince consumers that Disney+ was worth the $7 (now $8) monthly access fee – and to convince investors that the service would be profitable – Disney announced that the offerings on Disney+ would include Disney's entire library of films, a number of library television series, original content, and – crucially – that Disney+ would eventually be the go-to source to stream the MCU."); *see also* Simpson, *supra* note 95.

110. *See* Riemenschneider, *supra* note 90, at 369 (explaining how if the Paramount Decrees are eliminated, streaming services such as Amazon Prime would be able to fully control production, distribution, and exhibition through vertical integration, maximizing its competitive advantage).

111. *See* Bork, *supra* note 16, at 10–11 (stating Congress's predominant goal in enacting the Sherman Act was consumer welfare, and that the statute intended to strike at cartel agreements, monopolistic mergers, and predatory business tactics).

112. *See* Orbach, *supra* note 16, at 2262 (describing how in 1890 "anti-trust legislation" was interpreted to mean a variety of things that would be beneficial to the American economy, including a general state of competition, "freedom from restraints of trade, low prices, better conditions of supply, and prosperity opportunities"); *see also* Maureen Lenker, *Why the End of the Paramount Decrees is Bad for Movies and Movie Theaters: Opinion,* ENT. WEEKLY (Aug. 7, 2020, 2:35 PM),

between streaming services is fierce, it is far from perfectly competitive and is skewed in many ways.[113] With large content libraries, the ability to have an international platform, and content being exclusive to one platform at a time, barriers to entry are even more profound and indicative of anticompetitive practices.[114] Due to the entrance of more streaming services into the industry and the subsequent issues with licensing the platforms also work to stifle market power and competition as consumers develop "subscription fatigue" and are "becoming overloaded with choices and the inconvenience of subscribing to multiple platforms."[115] Streaming platforms have also further consolidated market power to restrict competition through "mergers, a first-mover advantage, or leveraging other businesses."[116]

Additionally, price-fixing and limitations on appearances like in *National Collegiate Athletic Association* can restrain trade and are anticompetitive under the Sherman Act.[117] The district court's determination of trade restraints in that case is rather similar to how the hybrid release model restrains trade with forcing production studios to comply with the simultaneous streaming release at the same time it is released in theaters by the same distribution house.[118] Hybrid streaming is also a limitation on trade as the hybrid release model restricts a production studio's freedom to negotiate, constituting a barrier to entry.[119] In order to distribute the movie through a particular distribution house, the production studio must accept the

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https://ew.com/movies/judge-ends-paramount-decrees/.

113. *See* Pakula, *supra* note 91, at 161 (examining how the assumption that strong competition from new entrants in streaming keeps subscription prices low is not accurate because streaming services can raise prices in response to new entrants due to its large audience without sharing content across platforms).

114. *See id.* at 161–62.

115. *Id.* at 162.

116. *Id.* at 179; *see also* Nicholas Jasinski, *What a Combined WarnerMedia and Discovery Means for the Streaming Wars,* BARRON'S (May 17, 2021, 4:03 PM), https://www.barrons.com/articles/what-a-combined-warnermedia-and-discovery-means-for-the-streaming-wars-51621281798; Alex Sherman, *Here Are the Next Media Mergers that Make the Most Sense,* CNBC (May 29, 2021, 9:31 AM), https://www.cnbc.com/2021/05/29/media-mergers-whos-next-.html.

117. *See* Nat'l Collegiate Athletic Ass'n v. Bd. of Regents, 468 U.S. 85, 96 (1984) (quoting Bd. of Regents v. Nat'l Collegiate Athletic Ass'n, 546 F. Supp. 1276, 1319–23 (W.D. Okla. 1982) (discussing how appearance limitations and price fixing operate as a "classic cartel" with "an almost absolute control over the supply of college football which is made available to the networks, to television advertisers, and ultimately to the viewing public . . . . The NCAA cartel imposes production limits on its members and maintains mechanisms for punishing cartel members who seek to stray away from these production quotas.").

118. *See id.* at 96, 98–99.

119. *See id.* (providing that the NCAA's practices restrained trade because they "limit[ed] members' freedom to negotiate and enter into their own television contracts").

simultaneous streaming release, undercutting profits from the crucial first week at the box office.[120]

Unlike *United States v. IBM Corp.*, terminating the Paramount Decrees altogether without any regulations to replace them would be detrimental to the motion picture industry.[121] The phasing out of the decrees would not be as much of a deterrent to streaming platforms engaging in monopolistic tactics, unlike IBM.[122] In this case, terminating the Paramount Decrees completely would only allow companies such as Netflix and Amazon to purchase their own theaters, engage in more vertical agreements to control the motion picture supply chain, and to monopolize the industry.[123] Additionally, the technology itself is not heading towards becoming obsolete like the tabulating machines in *United States v. IBM*—streaming is very much proliferating and is one of the main ways people now consume content and media online.[124] Even with the active market for streaming, it is dominated by a few major players, and the hybrid model only makes their market power more profound.[125]

Other antitrust factors are also prevalent in the streaming landscape today.[126] The nature of the anticompetitive conduct in the motion picture

120. Stephen Colbert, *How 2021 Box Office was Impacted by Simultaneous Streaming Releases,* SCREEN RANT (Dec. 8, 2021), https://screenrant.com/streaming-box-office-impact-2021-covid-theaters/.

121. *See* 163 F.3d 737, 740 (2d Cir. 1998) (citing United States v. Int'l Bus. Machs. Corp., No. 52 Civ. 72-344 (TPG), 1997 U.S. Dist. LEXIS 5829 (S.D.N.Y. May 1, 1997)).

122. *See id.* (quoting *IBM Corp.*, 1997 U.S. Dist. LEXIS 5289, at *6, *9) ("[T]he [district] court found that the phasing-out of the remaining Decree provisions 'presents no material threat of violation of §§ 1 and 2 of the Sherman Act' . . . and noted that there was now an active market in computer repair services.").

123. *See id.*; *see also* Riemenschneider, *supra* note 90, at 367–68 ("If the Decrees are eliminated (thus removing the scrutiny of production studios owning theaters), Amazon and Netflix would have an easier route to purchase their own theater chains (an idea both companies have already begun exploring).").

124. *See generally* Mendelson, *supra* note 74 (examining recent blockbuster hits, including *In the Heights*, *Reminiscence*, *Those Who Wish Me Dead*, and *The Little Things*, which still received wide viewership on subscription-based services even though they flopped in theaters); *see also* Oler, *supra* note 65, at 492 (discussing Disney's recent release of *Mulan* on Disney+ and charging subscribers an additional $29.99 to view the film).

125. *See IBM Corp.*, 163 F.3d at 739-40 (citing *IBM Corp.*, 1997 U.S. Dist. LEXIS 5289, at *6) (explaining the active market for computer repair services that led to the termination of the decree); *see also* Pakula *supra* note 91, at 159 (listing the major companies in the streaming industry today: "Amazon Prime Video, Google's YouTube Red, Facebook Watch, Apple TV+, Paramount Plus, Disney+, Peacock, HBO Max, Netflix, Showtime, and Starz"); *see also* Emilio Calvano & Michele Polo, *Market Power, Competition and Innovation in Digital Markets: A Survey*, 54 INFO. ECON. AND POL'Y 1, 3 (2020).

126. *See* FED. TRADE COMM'N, *supra* note 11; *see also* Pakula, *supra* note 91, at 161,

industry by streaming platforms is one that is characterized not only by vertical mergers and subscription-based streaming, but also by aggressive marketing.[127] For example, Disney+ capitalized on its Marvel cinematic universe, tying together well-known characters and stories, even if they are not all sequels.[128] Additionally, every Marvel film features a short clip at the end of the movie to tease a continuing story for the next one, which "is used as a sort of in-film marketing, building hype for the next Marvel film before the audience has even left the theater, and tying seemingly-unrelated storylines together."[129] Disney has also targeted younger audiences who are more likely to buy into television advertising and buy movie merchandise, as well as to ensure that these audiences will come back for subsequent movies within the Marvel universe.[130] These strategies serve to bolster Disney's stock price and its market power, and in conjunction with the hybrid release model, are effectively stifling competition by other studios and taking advantage of consumers who are fully invested into the franchise.[131] Marvel now "boasts three of the top ten highest grossing domestic films (*Black Panther*, *Avengers: Infinity War*, and *The Avengers*)."[132] Streaming services now own production, distribution, and exhibition under one roof, stifling competition further in conjunction with vertical mergers.[133] Indeed, "[i]n many ways, the streamers have been rebuilding Hollywood's old studio system" by using vertical integration

178 (describing aggressive marketing practices, consolidation of market power, bundling, and barriers to entry in streaming services).

127. *See* Riemenschneider, *supra* note 90, at 352–53 (examining the Disney+ business model and the marketing success of the Marvel franchise).

128. *Id.* at 352.

129. *Id.* at 353.

130. *See id.* at 353–54 (stating that younger audiences have more free time to watch television and go to the theater).

131. *See id.* at 352–55; *see also Periwinkle* Complaint, *supra* note 80 (explaining how when Disney+ launched, the market was already saturated with subscription video-on-demand services such as Netflix, Amazon, Hulu, HBO Now, and Apple TV+.); *see also* Simpson, *supra* note 95 (explaining how Disney reached a settlement with Scarlett Johansson in September 2021); *see also* U.S. DEP'T OF JUST., *supra* note 14 ("When a competitor achieves or maintains monopoly power through conduct that serves no purpose other than to exclude competition, such conduct is clearly improper.").

132. Riemenschneider, *supra* note 90, at 353.

133. *Id.* at 367; *see also* R.T. Watson, *In a Netflix World, Movie Studios Make More Movies Than Ever. Is That a Good Thing?*, WALL STREET J. (June 16, 2021, 1:33 PM), https://www.wsj.com/articles/in-a-netflix-world-movie-studios-make-more-movies-than-ever-is-that-a-good-thing-11623864782#comments_sector (contending that with the increase of vertical mergers and a shift of focus on streaming services creating their own content, the general quality of movies have gone down).

similarly as it was used during the 1920s to 1950s with a modern twist.[134]

IV. PROPOSED REGULATIONS TO ACCOMMODATE FOR THE HYBRID RELEASE MODEL AND PRESERVE THE EXCLUSIVE THEATRICAL RELEASE

The motion picture industry of today needs a new set of regulations to govern the recent advent of streaming platforms and how they will interact with theaters and studios moving forward.[135] The complete termination of the Paramount Decrees with no other regulations to replace them would create a vacuum, giving streaming giants free reign over the revenue streams that keep Hollywood alive today.[136] The hybrid release model has caused considerable backlash in Hollywood, including most recently with Scarlett Johansson's lawsuit against Disney+.[137] Although a breach of contract case in its essence, it alleged that Disney knowingly and intentionally breached their promise to Johansson regarding a traditional exclusive theatrical release, and simultaneously released *Black Widow* on Disney+ to bolster their own revenue and stock price.[138] Similarly, the producers of *Dune*, Legendary Entertainment, intended to sue Warner Bros.[139] Legendary was largely unaware that Warner Bros. planned to release several of their films on HBO Max, and this would have cut into their box office revenue considerably from an exclusive theatrical release.[140] Both of these news items demonstrate that the hybrid release model requires regulation to make sure studios and talent are given their rightful share of box office sales, without the interference of streaming platforms.[141]

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134. Kristin Hunt, *Are You Still Watching?: The Work of Cinema in the Age of Streaming Services*, JSTOR DAILY (Nov. 24, 2021), https://daily.jstor.org/are-you-still-watching/.

135. *See generally* Eriq Gardner, *Judge Agrees to End Paramount Consent Decrees*, HOLLYWOOD REPORTER (Aug. 7, 2020, 7:50 AM), https://www.hollywoodreporter.com/business/business-news/judge-agrees-end-paramount-consent-decrees-1306387/; *see also* Gardner, *Indie Cinema*, *supra*, note 87; Gardner, *Real Impact*, *supra* note 87.

136. *See* Pakula, *supra* note 91, at 160–62 (characterizing the current streaming landscape as an oligopoly with only a few, interdependent companies dominating the market and with costly barriers to entry).

137. *See Periwinkle* Complaint, *supra* note 80; *see also* Simpson, *supra* note 95 (quoting Johansson, who criticized Disney's release plan as "cynically orchestrated . . . so that it could keep the film's revenues for itself, grow [its] subscriber base . . . and boost [its] stock price, which jumped 4% in the days following the release . . . .").

138. *See* Simpson, *supra* note 95 (alleging that Disney had conspired to release *Black Widow* at the same time as in theaters to undercut Johansson's earnings from the film).

139. Rubin & Lang, *supra* note 69.

140. *Id.*

141. *See* Eriq Gardner, *Will New Media Revive Old Labor Concerns Amid Streaming-Era Issues?*, HOLLYWOOD REP. (May 28, 2021, 6:30 AM),

The Paramount Decrees should be replaced with regulations that will govern the hybrid release model so as to not violate the Sherman Act.[142] Additionally, this would address fairness for actors, studios, and talent in Hollywood.[143] One possible avenue to approach this would be to treat movie streaming as music streaming is treated.[144] For streaming of a motion picture, licensing could be obtained through a copy license and then performance rights for the streaming component, just like music streaming.[145] This would allow for movies to be licensed separately for the silver screen and then require streaming platforms to purchase the "performance rights" in order to have it available for viewing on their respective subscriptions.[146] This would preserve the exclusive theatrical release model as production houses could decide to grant performance rights to streaming services after the initial theatrical release is complete, without any conditional agreements or surprise releases. Additionally, this would reintroduce much needed competition into the industry and would also prevent revenue streams from being monopolized.

Another possible way to combat this issue would be to change the definition of what it means to be a "traditional movie studio" and include the major streaming platforms in addition to theaters.[147] This could bar

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https://www.hollywoodreporter.com/business/business-news/new-media-old-labor-concerns-1234958989/; *see also* Brooks Barnes, *'Star Wars,' 'Pinocchio' and More as Disney Leans Sharply Into Streaming*, NEW YORK TIMES (Dec. 10, 2020), https://www.nytimes.com/2020/12/10/business/media/disney-star-wars.html.

142. *See* Lenker, *supra* note 113("The decision seems to make a huge assumption that all studios will now continue to act in good faith, using a hope for best practices as a justification for ending these anti-trust laws.").

143. *See id.* ("The order further emphasizes that many movie studios were already technically not subject to these decrees and that existing federal and state antitrust laws should work to protect against future abuses.").

144. *See* Loren Shokes, *Financing Music Labels in the Digital Era of Music: Live Concerts and Streaming Platforms*, 7 HARV. J. OF SPORTS & ENT. L. 133, 142–46 (2016) (explaining the copyright implications behind music streaming and the loss of monopoly over music distribution that record labels had to face after the advent of iTunes and Spotify).

145. *See id.*; *see also* Emily Tribulski, *Look What You Made Her Do: How Swift, Streaming, and Social Media Can Increase Artists' Bargaining Power*, 19 DUKE L. & TECH. REV. 91, 95 (2021) (examining how Taylor Swift's recent dispute with Scooter Braun shed light on the issue of ownership and rights of artists in the media).

146. *See* James H. Richardson, *The Spotify Paradox: How the Creation of a Compulsory License Scheme for Streaming On-Demand Music Platforms Can Save the Music Industry*, 22 UCLA ENT. L. REV. 45, 59 (2014) (analyzing how Netflix must negotiate with content owners to establish rights to stream movies and television shows with little law governing these negotiations).

147. *See* Oler, *supra* note 65, at 492–93 (asserting that Netflix could be considered a movie studio since it produces and distributes films all within its company).

streaming giants specifically from allowing simultaneous theater and streaming releases rather than having blanket regulations to govern streaming and licensing separately. Now that "[b]oth Netflix and Amazon have shown an interest in obtaining theatrical releases for their original films," streaming services are looking toward purchasing theaters to further the hybrid release model on their own terms.[148] This would only make the monopoly power of streaming platforms even more profound, allowing them to vertically integrate to the point of controlling not only production, but also distribution and exhibition, leading to a greater stifling of competition.[149]

A lack of regulation of streaming services could have adverse effects on movie studios, cutting into revenue, as well as adverse effects on actors and talent, including artistic and financial ramifications.[150] Hollywood may be producing more films, but the shift to favoring quantity over quality is palpable to both film critics and consumers.[151] Consumers are losing interest in Netflix films compared to those produced by major studios for example, even when some have included Oscar contenders.[152] A lack of legislation to replace the Paramount Decrees would also require theatrical releases to compete with streaming releases at the same time.[153] Removing them completely would harm theater chains as well as smaller independent studios which are fulfilling demands for niche films from consumers who may be tired of watching movies all from the same few franchises.[154] This would also allow horizontal and vertical price fixing to proliferate, and violate the antitrust factors and the Sherman Act.

148. *See* Riemenschneider, *supra* note 90, at 367.

149. *See id.* at 369.

150. *See, e.g.*, *Periwinkle* Complaint, *supra* note 80; Schwartz, *supra* note 3, at 80 (explaining how major film distributors and streaming services have already aggressively expanded their power in the market through horizontal and vertical mergers, undercutting traditional studios); Simpson, *supra* note 95.

151. *See* Watson, *supra* note 134 (explaining how the general quality of each individual film is lowered "both from a company and a consumer standpoint" when streaming services "lure subscribers with a steady flow of films and series to keep them satisfied enough to continue paying their subscription fee—which costs roughly the same as one theater ticket—month after month").

152. *See id.* (describing how "cinema as art is being devalued as movies are lumped together with television series and unscripted shows and offered as 'content' on streaming platforms").

153. *See* Schwartz, *supra* note 3, at 89–90 (examining how many film distributors have decided to create their own streaming services and end their distribution deals with third-party streaming services).

154. *See* Riemenschneider, *supra* note 90, at 347 (asserting that, after the Paramount Decrees were issued, theater owners had the autonomy to choose which films they showed, and "major studios had newfound competition from smaller studios and independent filmmakers for screen time in theaters").

V. CONCLUSION

Terminating the Paramount Consent Decrees without any other standing regulations would give free reign to streaming services and allow the hybrid release model to continue, redirecting revenue to a growing monopoly power in the motion picture industry. Allowing the hybrid model to continue will only lead to streaming platforms monopolizing the market to a greater degree, resulting in more vertical mergers, acquisitions of smaller studios, and greater barriers of entry and anticompetitive behavior. The Sherman Act alone is not enough to combat these issues that threaten the economy and the motion picture industry. The Paramount Consent Decrees must be replaced with updated regulations to accommodate for the new phenomenon of the hybrid release model and the rise of streaming giants such as Netflix and Disney+. The antitrust implications of such a phenomenon must be considered carefully and the framework to evaluate it should be updated accordingly to ensure that competition is not stifled, and the Sherman Act is complied with.