

NETFLIX, DISNEY+, & A DECISION OF PARAMOUNT IMPORTANCE

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I. INTRODUCTION

Movies: They sure don’t make them how they used to.

In an excellent scene from the 2019 Quentin Tarantino film, *Once Upon a Time... in Hollywood*, the character Cliff Booth (played by Brad Pitt) drives on the famous Sunset Boulevard in the Hollywood neighborhood of Los Angeles,

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California.¹ The camera follows Booth for several minutes as he makes his drive home through traffic, inviting the viewer to marvel at the glitz and glamour of old Hollywood.² The film, a period piece set in 1969 following a fictional actor and his stuntman (who doubles as his best and only friend), required painstaking attention to detail and a large sum of money dedicated to recapturing the glitz and glamour of Hollywood's iconic strip.³ But what stands out the most from this scene is how much has changed on the street; gone are the small, iconic theaters, often replaced by large theater chains.⁴ The scene certainly comes across as an ode to a time of great love for cinema.

These days, Sunset Boulevard is populated by nearly 20 massive billboards promoting the content of one of Hollywood's newest (and richest) players: Netflix.⁵ The deal cost an estimated "tens of millions of dollars," as the advertising along Sunset Boulevard is some of the most expensive advertising space in the country.⁶ But for Netflix, a company that earned \$15.8 billion in revenue in 2018,⁷ the money is less consequential than the message it sends: that this is a company ready to take Hollywood by storm by changing the way the country watches movies. No longer should the entire model be based around the theater experience, but rather an experience which utilizes technology and what movie lovers want most—major motion pictures, enjoyed from the comfort of their home.

Netflix's infiltration of Hollywood encompasses more than merely purchasing billboards. The L.A. Times reported that Netflix was pursuing a deal to acquire Landmark Theaters,⁸ a theater chain with over 50 locations,⁹ causing many to wonder if Netflix was even able to buy a theater chain under the "Paramount Decrees," a landmark antitrust suit.¹⁰ There would be a number of questions raised if Netflix proceeded with the purchase of a theater chain. Is the future of Netflix in owning theaters in every town in America to show its films? If so, will other companies in the movie industry follow suit? Does this create a

1. ONCE UPON A TIME... IN HOLLYWOOD (Columbia Pictures 2019).

2. *Id.*

3. Zoe Hewitt, *How 'Once Upon a Time ... in Hollywood' Turned the Clock Back for Its Shoot*, VARIETY (July 12, 2019, 9:45 AM), <https://variety.com/2019/artisans/production/once-upon-a-time-in-hollywood-quentin-tarantino-1203263909/>.

4. Nate Nickolai & Pat Saperstein, *'Once Upon a Time in Hollywood': A Guide to the Los Angeles Area Landmarks*, VARIETY (July 30, 2019, 12:56 PM), <https://variety.com/2019/film/news/once-upon-a-time-in-hollywood-locations-guide-musso-and-frank-1203284555/>.

5. David Ng, *Netflix's Latest Conquest? Billboard Advertising Along the Sunset Strip*, L.A. TIMES (Oct. 16, 2018, 5:00 AM), <https://www.latimes.com/business/hollywood/la-fi-ct-netflix-sunset-strip-20181016-story.html>.

6. *Id.*

7. Amy Watson, *Revenue Generated by Netflix from 1st Quarter 2011 to 2nd Quarter 2020*, STATISTA (last updated July 17, 2020), <https://www.statista.com/statistics/273883/netflixs-quarterly-revenue>.

8. Ryan Faughnder, *Netflix has Considered Buying Theaters, Including Mark Cuban's Landmark, to Gain an Oscar Edge, Sources Say*, L.A. TIMES (Apr. 18, 2018, 1:50 PM), <https://www.latimes.com/business/hollywood/la-fi-ct-landmark-netflix-20180418-story.html>.

9. Alex Fang, *A Trade Between Billionaires: Mark Cuban Sells Landmark Theatres Chain to Film Buff Charles Cohen*, FORBES (Dec. 5, 2018, 4:47 PM), <https://www.forbes.com/sites/alexfang/2018/12/05/billionaires-mark-cuban-sell-landmark-theatres-charles-cohen/#470632276219>.

10. Brent Lang & Ramin Setoodeh, *Netflix and Byron Allen Could Be Getting into the Movie Theater Business*, VARIETY (Apr. 19, 2018, 12:41 PM), <https://variety.com/2018/film/news/netflix-byron-allen-movie-theater-1202761265>.

monopoly, where one can only view movies from a handful of studios, who only show their films in their own theaters? Will the current Sunset Boulevard eventually be viewed as the Sunset Boulevard in *Once Upon a Time... In Hollywood*: a relic of a completely different movie industry? This Note will address these questions and attempt to analyze the current antitrust issues facing Hollywood, specifically through the lens of the would-be tech disruptor, Netflix.

Part II of this Note will summarize the history and consequences of the famous Paramount Decrees (alternatively, the “Decrees”), and why the Federal Trade Commission decided to target major motion picture studios for anticompetitive practices. Part II will also detail the rise of Netflix and the subsequent murkiness of what qualifies as a film studio, as well as an update on the legal issue following the landmark announcement by the United States Justice Department to repeal the Paramount Decrees.

Part III of this Note will analyze whether Netflix can be classified as a film studio under the jurisdiction of the Paramount Decrees. It will also offer analysis on what the recent repealing of the Paramount Decrees means for the future of the tech giant, and how its actions will influence an entire industry backpedaling at this announcement, as well as its impact on consumers.

Finally, Part IV of this Note will provide a recommendation to the Justice Department on how it should proceed following the Paramount Decrees repeal, including a call for a more thorough factual investigation and measures to protect the heart of the Paramount Decrees.

II. BACKGROUND

A. *The “Golden Age” and the Fall of Hollywood’s Studio System*

As motion picture technology blossomed, so too did an industry which captured the imaginations of thousands in the turn-of-the-century United States. With the release of Alan Crosland’s *The Jazz Singer* in 1927,¹¹ the small motion picture studio Warner Bros. became a massive distributor, and other film studios soon followed.¹² Soon, a “Big Five” was established of the five largest, fully-integrated studios operating in Hollywood: MGM, Warner Bros., 20th Century Fox, Paramount, and RKO.¹³ These studios were not only solely responsible for the production and distribution of their own films, but they also owned their own theater chains to show their films.¹⁴ This era of the studio system is commonly referred to as Hollywood’s “Golden Era.”¹⁵

11. THE JAZZ SINGER (Warner Brothers 1927).

12. Lee Pfeiffer, *The Jazz Singer*, BRITANNICA, <https://www.britannica.com/topic/The-Jazz-Singer-film-1927> (last visited Oct. 21, 2020).

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

14. *Id.*

15. *Hollywood*, HISTORY, <https://www.history.com/topics/roaring-twenties/hollywood> (last visited Oct. 21, 2020).

However, this Golden Era soon came to an end. Paramount Pictures had already been targeted for antitrust issues in 1921 in the *Famous-Players* case.¹⁶ The Federal Trade Commission (“FTC”) accused Paramount Pictures of illegally restraining trade, most notably because they had moved from simply producing films to distributing and exhibiting those films.¹⁷ Specifically, the issue was “block-booking.”¹⁸ Block-booking was an industry practice where movie studios would only allow theaters to show their films if the theaters also showed the studios’ other films, typically smaller films with inferior production to their major counterparts.¹⁹ The FTC viewed this process, coupled with the fact that Paramount Pictures showed its movies in its own theaters, as stifling competition and “tend[ing] to create a monopoly in the motion picture industry.”²⁰ With the decision from the FTC in the *Famous-Players* case, Paramount was ordered to stop the practice of block-booking.²¹

In addition to block-booking, movie studios were releasing their movies in “runs” in coordination with other competitors to avoid overlapping first runs, so that their movies faced minimal competition.²² The theaters also coordinated to set the prices higher in these opening weekends so each studio could maximize profits for their films during their opening runs.²³ After their first runs, the studios would sell the rights to their movies at a discount to independent theaters for later runs.²⁴ Because most moviegoers would only see a movie during its opening run, this practice hurt independent theaters who had no opportunities to show movies during their opening runs.²⁵

Not too long after the *Famous-Players* case, the Great Depression brought a major slump to the movie industry.²⁶ With a rise in independent theaters, the Big-Five studios resumed their engagement in block-booking theaters, and the United States Justice Department seemed to look the other way in enforcing antitrust laws against these studios due to the hard financial times the studios were experiencing because of the Depression.²⁷ However, the independent studios persisted in raising antitrust issues against the major studios,²⁸ and the FTC took a renewed interest in Hollywood practices again in 1938.²⁹ This

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

17. *Id.*

18. *Id.*

19. Alexandra Gil, *Breaking the Studios: Antitrust and the Motion Picture Industry*, 3 N.Y.U. J.L. & LIBERTY 83, 84 (2008).

20. *In re Famous Players-Lasky Corp.*, 11 F.T.C. at 207.

21. *Id.*

22. U.S. DEPT. OF JUSTICE, MEMORANDUM IN SUPPORT OF MOTION OF THE UNITED STATES FOR AN ORDER TERMINATING ANTITRUST JUDGMENTS (2019), <https://www.justice.gov/opa/press-release/file/1219831/download>.

23. *Id.*

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

25. *Id.*

26. Gil, *supra* note 19.

27. *Id.*

28. Alexandra Gil, *The Motion Picture Industry and the Anti-Trust Laws*, 36 COLUM. L. REV. 635, 643 n.48 (1936).

29. Gil, *supra* note 19.

further examination by the FTC would eventually lead to the landmark decision that would come to be known as the Paramount Decrees.³⁰

United States v. Paramount Pictures (otherwise known as the “Paramount Decrees”) was decided by the Supreme Court in 1948.³¹ The issue first arose in the Southern District of New York, where although the court found no monopoly in the movie industry, it issued a decree comprising five orders for studios to follow, among them to immediately end the practice of block-booking.³² However, the district court stopped short of ordering the movie studios to immediately divest their interest in the movie theaters, instead opting for a “competitive bidding” process where theaters could bid on which films they would show.³³ This order never reached widespread practice, though, because the Supreme Court, on appeal, overruled the district court’s holding and ordered for the immediate divestment of the studios’ ownership of theaters.³⁴ Following the Paramount Decrees, film studios were no longer allowed to engage in block-booking, and a few of the movie studios³⁵ could not own their own theater chains to show their movies.³⁶ In essence, film studios could produce and distribute their movies, but they could no longer participate in the exhibition of their movies. This was a move by the Court to “protect independent first-run theaters by providing them with equal access to all new movies.”³⁷

B. Post-Paramount Film Industry

This decision was a major blow to the Big Five studios, as these practices (along with the other practices outlawed by the Paramount Decrees such as resale price management) majorly contributed to the profitability of movie studios.³⁸ Although the Court determined practices such as block-booking and vertical integration were anticompetitive in nature, the policies “had clearly served to reduce distribution costs.”³⁹ RKO Pictures (one of the Big Five) soon dissolved.⁴⁰ Studios lost their safety net of guaranteed box office revenues from their own theaters.⁴¹ As one film writer put it at the time, “With no guarantee of exhibition, fewer movies could be made. . . . The 1950s was a time of bust: of

30. *United States v. Paramount Pictures Inc.*, 334 U.S. 131, 132 (1948).

31. *Id.*

32. *United States v. Paramount Pictures*, 66 F. Supp. 323, 328 (S.D.N.Y. 1946), *aff’d* in part, *rev’d* in part, 334 U.S. 131 (1948).

33. *Id.*

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

35. See *U.S. v. Paramount Pictures, Inc.*, 19 MISC. 544 (AT), 2020 WL 4573069, at *3 (S.D.N.Y. Aug. 7, 2020) (quoting *Loew’s Inc.*, 783 F. Supp. at 214) (holding that the Government can terminate a decree if there is evidence offered that serves the interest of the public).

36. *Id.*

37. Stanley I. Ornstein, *Motion Picture Distribution, Film Splitting, and Antitrust Policy*, 17 HASTINGS COMM. & ENT. L.J. 415, 436–37 (1994).

38. Gil, *supra* note 19.

39. *U.S. v. Paramount Pictures*, 2020 WL 4573069 at *3.

40. Part 6: *The Supreme Court Verdict That Brought an End to the Hollywood Studio System, 1948*, THE SIMPP RESEARCH DATABASE: COBBLESTONE ENTERTAINMENT, http://www.cobbles.com/simpp_archive/paramountcase_6supreme1948.htm (last visited Oct. 21, 2020).

41. Gil, *supra* note 19.

caution.”⁴² In addition to advances in technology and the invention of home televisions leading to a decrease in movie attendance, Hollywood seemed to be in dire financial straits after the Paramount Decrees.⁴³

Though there were initial losses suffered by the studios in Hollywood immediately following the Paramount Decrees,⁴⁴ the movie industry was able to reach new financial heights again in the 1970s with new, mass-appeal films like Francis Ford Coppola’s *The Godfather*, Steven Spielberg’s *Jaws*, and William Friedkin’s *The Exorcist* earning so much money they spawned a new term: the blockbuster.⁴⁵ Then, home videos came along, and eventually the invention of DVDs created growth for Hollywood due to the profit margin from selling DVDs.⁴⁶ However, movie studios still focused on what they thought to be the most lucrative generator of all: box office.⁴⁷

Eventually, two businessmen in Silicon Valley, California identified a keen trait about movie lovers: not all of them were interested in seeing movies at the theater.⁴⁸ These two men launched the first online DVD rental store in 1998, calling it Netflix.⁴⁹

C. A New Player

Netflix began as a traditional DVD rental service, but not long after its inception, it changed to a subscription model for DVD rentals.⁵⁰ In 2007, Netflix announced it would begin a service to “deliver movies and television shows directly to users’ PCs,” a service that would quickly come to be commonly known as “streaming video.”⁵¹ While Netflix did not own or produce the movies and television programs they showed, they obtained licenses to show the content from providers, similar to the way home video rental stores obtained movies for rental.⁵²

Netflix soon would soon change its model again. In 2014, Netflix released *House of Cards*, its first original television series completely produced by the

42. Ethan Mordden, *THE HOLLYWOOD STUDIOS: HOUSE STYLE IN THE GOLDEN AGE OF THE MOVIES* 368 (1988).

43. Gil, *supra* note 19.

44. *Id.*

45. *THE GODFATHER* (Paramount Pictures 1972); *JAWS* (Universal Pictures 1975); *THE EXORCIST* (Warner Bros. Pictures 1973).

46. BEN FRITZ, *THE BIG PICTURE: THE FIGHT FOR THE FUTURE OF MOVIES* 20 (2018).

47. Adam Davidson, *How Does the Film Industry Actually Make Money?* N.Y. TIMES MAG. (June 26, 2012), <https://www.nytimes.com/2012/07/01/magazine/how-does-the-film-industry-actually-make-money.html>.

48. Michelle Castillo, *Reed Hastings’ Story About the Founding of Netflix has Changed Several Times*, CNBC (May 23, 2017), <https://www.cnbc.com/2017/05/23/netflix-ceo-reed-hastings-on-how-the-company-was-born.html>.

49. *Id.*

50. Meira Gebel, *Yes, Netflix Still Mails DVDs—Here’s How to Sign up for Netflix’s DVD Plan, and Rent Movies with No Late Fees*, BUS. INSIDER (Mar. 20, 2020), <https://www.businessinsider.com/does-netflix-still-mail-dvds>.

51. Miguel Helft, *Netflix to Deliver Movies to the PC*, N.Y. TIMES (Jan. 16, 2007), <https://www.nytimes.com/2007/01/16/technology/16netflix.html>.

52. *How Does Netflix License TV Shows and Movies?*, NETFLIX, <https://help.netflix.com/en/node/4976> (last visited Oct. 21, 2020).

company.⁵³ This series was one of the most expensive television series ever produced.⁵⁴ Netflix Chief Executive Officer, Reed Hastings, wrote to shareholders at the time that the release of *House of Cards* would be “a defining moment in the history of Internet TV.”⁵⁵ Netflix followed this series with four other in-house produced television series to be shown exclusively through its service.⁵⁶ The message was clear: Netflix intended to be a major player in Hollywood.

In addition to original television programming, Netflix soon introduced original films to its catalogue with the release of *Beasts of No Nation* in 2015.⁵⁷ Though the film was not a major success, Netflix continued to pursue prestige in the movie space, as they began pursuing deals with successful, well-known filmmakers like Martin Scorsese, Alfonso Cuarón, and the Coen Brothers.⁵⁸ In 2019, Netflix finally saw the fruits of its labor in the movie space, as it received a total of fifteen nominations for the Academy Awards, including ten for Alfonso Cuarón’s *Roma*.⁵⁹ Netflix went on to win three awards for *Roma*,⁶⁰ showing that it was a force to be reckoned with in the movie industry with its ability to produce, distribute, and exhibit award-winning films, all through their own service.⁶¹

Despite placing such an emphasis on creating prestige films and partnering with widely acclaimed filmmakers, Netflix has still been viewed as an outsider in Hollywood circles.⁶² Steven Spielberg, so beloved that he may be one of the most influential people in Hollywood,⁶³ publicly supported changes to the

53. Brian Stelter, *A Drama’s Streaming Premiere*, N.Y. TIMES (Jan. 18, 2013), <https://www.nytimes.com/2013/01/20/arts/television/house-of-cards-arrives-as-a-netflix-series.html>.

54. *Id.*

55. Tim Carmody, *Netflix CEO Reed Hastings Thinks He Can Win the Video Subscription War*, VERGE (Jan. 23, 2013, 8:53 PM), <https://www.theverge.com/2013/1/23/3908374/subscribers-netflix-ceo-reed-hastings-steps-TV>.

56. *Id.*

57. Pamela McClintock, *Why Netflix Isn’t Worried That ‘Beasts of No Nation’ Flopped in Theaters*, HOLLYWOOD REP. (Oct. 18, 2015, 12:25 PM), <https://www.hollywoodreporter.com/news/why-netflix-isnt-worried-beasts-832136>.

58. Anita Bush & Liz Cavilro, *Martin Scorsese’s Robert De Niro Pic ‘The Irishman’ Heading to Netflix?*, DEADLINE (Feb. 21, 2017), <https://deadline.com/2017/02/martin-scorsese-the-irishman-acquired-netflix-robert-de-niro-1201931848>; Rebecca Keegan & Nicole Sperling, *Netflix Threatens to Pull Five Films from Cannes*, VANITY FAIR (Apr. 6, 2018), <https://www.vanityfair.com/hollywood/2018/04/netflix-threatens-to-pull-five-films-from-cannes-film-festival>; Press Release, Netflix, *The Coen Brothers come to Netflix in the new Western Anthology THE BALLAD OF BUSTER SCRUGGS* (Aug. 9, 2017), <https://media.netflix.com/en/press-releases/the-coen-brothers-come-to-netflix-in-the-new-western-anthology-the-ballad-of-buster-scruggs>.

59. Anthony D’Alessandro, *Netflix Soars with 15 Oscar Nominations, Led by 10 For ‘Roma’, Off Unique Theatrical & Streaming Release Model*, DEADLINE (Jan. 22, 2019, 8:09 AM), <https://deadline.com/2019/01/netflix-roma-oscar-nomination-records-1202538273>.

60. Anthony Ha, *Netflix’s ‘Roma’ Wins Three Oscars, Including Best Director (But Not Best Picture)*, TECH CRUNCH (Feb. 24, 2019, 10:23 PM), <https://techcrunch.com/2019/02/24/netflix-roma-oscars>.

61. Alex Sherman, *Netflix’s ‘Roma’ Could be the Turning Point for the Movie Industry to Shift Away from Theaters*, CNBC (Feb. 24, 2019, 12:10 PM), <https://www.cnbc.com/2019/02/24/netflix-roma-oscar-win-could-shift-movie-industry-away-from-theaters.html>.

62. Anne Thompson, *The Academy Prepares for the Netflix-Spielberg Showdown, and a \$10,000 Streaming App*, INDIEWIRE (Apr. 19, 2019, 8:11 PM), <https://www.indiewire.com/2019/04/the-academy-prepares-for-the-netflix-spielberg-showdown-and-a-10000-streaming-app-1202060453>.

63. David Sims, *Steven Spielberg vs. Netflix*, ATLANTIC (Mar. 11, 2019), <https://www.theatlantic.com/entertainment/archive/2019/03/spielberg-vs-netflix/584530>.

Academy Awards which would make Netflix films ineligible if they debuted on the streaming platform.⁶⁴ Though some outright dismissed Spielberg's opinions,⁶⁵ others have agreed with him, and fighting against the Academy appears not to be in Netflix's best interest.⁶⁶

Perhaps as a way to appease its critics, Netflix soon began making moves that signaled a shift in its approach to distribution. In April 2019, it was reported that Netflix had begun to explore the idea of buying movie theater chains, specifically Landmark Theaters.⁶⁷ Although the deal fell apart (likely due to price), the report showed that Netflix's was open to a new way of doing business in the movie industry.⁶⁸

After passing on the purchase of Landmark Theaters, it was reported Netflix was in negotiations to purchase the Egyptian Theater in Los Angeles, California.⁶⁹ The iconic theater, home to the premiers of many classic American films, was owned by a nonprofit organization, American Cinematheque.⁷⁰ Netflix's intention for the space was to premiere new movies from its collection, and to appease filmmakers who believed in the traditional manner of debuting films—in a theater with a live audience.⁷¹ Netflix's plan is markedly different, however, from the plan of purchasing a chain of movie theaters. This plan would involve only one theater, with only one screen for the debut of its movies.⁷²

Netflix was finally successful in its venture to own its own theater, this time with a theater in New York City. In November 2019, Netflix announced it was purchasing The Paris, a famous single-screen theater in New York City, New York.⁷³ The Paris, located in a desirable area in the borough of Manhattan, had closed in August 2019 with no explanation from its owner.⁷⁴ Fans of the theater were understandably disappointed by the sudden closing of such an iconic theater.⁷⁵ However, Netflix's announcement was met with praise from cinema lovers in the city,⁷⁶ leading some to speculate that Netflix would be able

64. *Id.*

65. Alex Cranz, *Steven Spielberg Got Old*, GIZMODO (Mar. 26, 2018, 6:27 PM), https://gizmodo.com/steven-spielberg-got-old-1824092623?rev=1522103330454&utm_campaign=socialflow_gizmodo_twitter&utm_source=gizmodo_twitter&utm_medium=socialflow.

66. *How Does Netflix License TV Shows and Movies?*, *supra* note 52.

67. Ryan Faughnder, *Netflix has Considered Buying Theaters, Including Mark Cuban's Landmark, to Gain an Oscar Edge, Sources Say*, L.A. TIMES (Apr. 18, 2018, 1:50 PM), <https://www.latimes.com/business/hollywood/la-fi-ct-landmark-netflix-20180418-story.html>.

68. *Id.*

69. Ryan Faughnder, *Netflix in Talks to Buy Egyptian Theater in Hollywood*, L.A. TIMES (Apr. 9, 2019, 12:45 PM), <https://www.latimes.com/business/hollywood/la-fi-ct-netflix-egyptian-theatre-hollywood-20190409-story.html>.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Netflix to Reopen Famed Paris Theatre in Manhattan*, CBS: N.Y. (Nov. 25, 2019, 6:00 PM), <https://newyork.cbslocal.com/2019/11/25/netflix-to-reopen-famed-paris-theatre-in-manhattan>.

74. Hunter Harris, *The Paris Theatre—One of Midtown's Best!—Has Closed*, VULTURE (Aug. 29, 2019), <https://www.vulture.com/2019/08/paris-theatre-closing-new-york.html>.

75. Jeremiah Moss, *Paris and Beekman*, JEREMIAH'S VANISHING N.Y. (Aug. 29, 2019), <http://vanishingnewyork.blogspot.com/2019/08/paris-and-beekman.html>.

76. Stefanie Waldek, *Netflix Saves New York's Iconic Paris Theater*, ARCHITECTURAL DIG. (Nov. 27, 2019), <https://www.architecturaldigest.com/story/netflix-saves-new-yorks-iconic-paris-theater>.

to curry favor with influential filmmakers in the future due to this decision.⁷⁷ The theater would be exclusively playing films produced or distributed by Netflix.⁷⁸ Following the announcement, Netflix Chief Content Officer, Ted Sarandos, stated Netflix was “proud to preserve” the iconic theater and hoped it could “continue to be a cinematic home for film lovers.”⁷⁹

Despite the interest Netflix has shown in acquiring theaters, it should be noted that these theaters are primarily for film premieres, as opposed to a traditionally operating theater with multiple screenings each day.⁸⁰ However, it still raises the question: could Netflix show its films in these theaters on a day-to-day basis, just like how traditional movie theaters operate? Is Netflix barred from owning and operating theater chains in the same way that the major film studios are under the Paramount Decrees?

D. *Paramount Decrees Repealed*

The debate around the Paramount Decrees began to change when the Justice Department announced it had opened a review of the Decrees to determine if they required modification or if they should be terminated altogether.⁸¹ The Justice Department noted that the movie industry landscape had changed significantly in the seventy years since the *Paramount* decision.⁸² For instance, none of the *Paramount* defendants (Paramount Pictures, Disney Studios, and WarnerMedia) owned “a significant number of movie theatres.”⁸³ In addition, most large cities in the country now had more than one movie theater, which was not the case as when the Paramount Decrees were ordered.⁸⁴ The Justice Department also implicitly recognized the rise of Netflix, as it pointed out that consumers are “no longer limited to watching motion pictures in theatres.”⁸⁵

The initial reaction to the Justice Department’s announcement was mixed.⁸⁶ Some legal scholars called for the Justice Department to keep the Paramount Decrees intact, arguing that this change would bolster technology companies such as Amazon and Netflix while effectively putting independent theaters out of business, which goes against what the Paramount Decrees originally were designed to accomplish.⁸⁷

77. Anthony Ha, *Netflix Leases New York’s Paris Theatre*, TECHCRUNCH (Nov. 26, 2019, 5:24 PM), <https://techcrunch.com/2019/11/26/netflix-paris-theatre>.

78. *Id.*

79. *Id.*

80. Faughnder, *supra* note 69, at 1.

81. *Department of Justice Opens Review of Paramount Consent Decrees*, U.S. DEP’T JUST., <https://www.justice.gov/opa/pr/department-justice-opens-review-paramount-consent-decrees> (last visited Oct. 21, 2020).

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. 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 (2019) (exploring arguments in favor of and opposing removing the decrees).

87. *Id.* at 336.

At the conclusion of the 60-day period, the Justice Department filed a motion which would be bombshell news for Hollywood executives: the Paramount Decrees had fulfilled their remedial purpose, and the Justice Department was asking for them to be terminated.⁸⁸ Assistant Attorney General Makan Delrahim argued the continued existence of the Paramount Decrees “may actually harm American consumers by standing in the way of innovative business models for the exhibition of America’s great creative films.”⁸⁹ In its official announcement, the Justice Department again emphasized the differences in the industry since the Paramount Decrees, including the prevalence of multiplexes showing multiple films a day and the advancements in technology allowing consumers to enjoy films outside of the theater.⁹⁰ The Southern District of New York officially accepted the Justice Department’s argument and ordered the Decrees terminated on August 7, 2020.⁹¹

The Justice Department also proposed a two year “sunset period” before studios would be allowed to engage in block-booking and circuit dealing.⁹² This would allow theaters “a transitional time period to adjust their business models and strategies to any proposals to change the film-by-film, theatre-by-theatre licensing regime.”⁹³ The Justice Department’s hope, it seems, would be for the sunset period to “foster new and innovative distribution and licensing agreements that are legal, efficient, and beneficial to industry participants, as well as movie goers.”⁹⁴

The move by the Justice Department to terminate the Paramount Decrees was met with skepticism from those within Hollywood.⁹⁵ The Directors Guild of America (a union composed of prominent American film directors) wrote in a statement that the move was “a step in the wrong direction.”⁹⁶ Its reasoning included the argument that smaller, independent theaters would suffer from the likely changes if the Decrees were terminated.⁹⁷ This comes during a time when many brick-and-mortar theaters are already failing: attendance in movie theaters dropped 11% between 2009 and 2019.⁹⁸ Additionally, there has been increased

88. *Department of Justice Files Motion to Terminate Paramount Consent Decrees*, U.S. DEP’T JUST. (Nov. 22, 2019), <https://www.justice.gov/opa/pr/department-justice-files-motion-terminate-paramount-consent-decrees> [hereinafter “DOJ”].

89. *Id.*

90. *Id.*

91. *United States v. Paramount Pictures, Inc.*, 19 Misc. 544 (AT) 1, 8 (S.D.N.Y. Aug. 7, 2020).

92. *Id.*

93. U.S. DEP’T JUST., *supra* note 22, at 28.

94. *Id.* at 38.

95. Ted Johnson, *DGA Opposes Justice Department Effort to End Paramount Consent Decrees*, DEADLINE (Dec. 2, 2019, 12:16 PM), <https://deadline.com/2019/12/dga-paramount-consent-decrees-justice-department-1202798575>.

96. *Id.*

97. *Id.*

98. Jim Amos, *No, Cinema Isn’t Dying: 7 Reasons to be Optimistic (Yes, Optimistic!) About Hollywood in 2020*, FORBES (Feb. 5, 2020, 12:47 PM), <https://www.forbes.com/sites/jamos/2020/02/05/no-cinema-isnt-dying-7-reasons-to-be-optimistic-yes-optimistic-about-hollywood-in-2020>.

consolidation in the theater industry, suggesting that many of the smaller theaters are struggling to survive on their own.⁹⁹

However, the reaction to the repeal of the Paramount Decrees was not all critical.¹⁰⁰ Some commentators pointed out how the Justice Department emphasized that the Decrees were not binding upon streaming services like Netflix and Amazon.¹⁰¹ Thus, a flourishing competitor was allowed to come into the marketplace without the strict regulations imposed on the major movie studios (whose market power was already declining thanks to Big Tech),¹⁰² which commentators found to be “absurd.”¹⁰³ Thus, the regulations would have the exact effect the Justice Department was arguing for: repealing the Paramount Decrees would create a more level playing field between streamers and traditional studios and would promote competition.¹⁰⁴

E. *Covid-19 Infects Hollywood*

Amidst the uncertainty following the repeal of the Paramount Decrees, the movie industry suddenly faced a new issue: the spread of COVID-19, otherwise known as the coronavirus.¹⁰⁵ Measures to slow COVID-19 also led to the delay of several highly-anticipated films, such as the James Bond franchise film *No Time to Die*¹⁰⁶ and *Fast and Furious 9*.¹⁰⁷ However, when the theaters made this announcement, there were movies still showing in the theaters, along with movies set to be released the upcoming weekend.¹⁰⁸ In an unprecedented move, Universal Pictures made the decision to release its top theatrical titles directly to audiences for purchase at home, thus completely bypassing the theatrical window.¹⁰⁹ Some of these films were already available in theaters; another (*Trolls World Tour*) would be released to streaming the same day it was

99. Rich Duprey, *Movie Theater Consolidation Continues as Hollywood Box Office Falls*, MOTLEY FOOL (Dec. 22, 2019, 6:44 PM), <https://www.fool.com/investing/2019/12/22/movie-theater-consolidation-as-box-office-falls.aspx>.

100. Adam Candeub, *Keep the BMI-ASCAP Consent Decrees: Despite New Technology, Their Licensing Duopoly Endures*, FORBES (Jan. 13, 2020, 5:39 PM), <https://www.forbes.com/sites/washingtonbytes/2020/01/13/keep-the-bmi-ascap-consent-decrees-despite-new-technology-their-licensing-duopoly-endures>.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. Madeline Berg, *Hollywood Studios Halt Film and TV Production Amid Coronavirus*, FORBES (Mar. 13, 2020, 3:22 PM), <https://www.forbes.com/sites/maddieberg/2020/03/13/hollywood-studios-disney-netflix-halt-film-and-tv-production-amid-coronavirus/#3d2470bf5d28>.

106. Travis Clark, *The James Bond Movie ‘No Time to Die’ Will be Delayed 7 Months Because of Coronavirus Concerns*, BUS. INSIDER (Mar. 4, 2020, 11:44 AM), <https://www.businessinsider.com/james-bond-no-time-to-die-release-date-delayed-coronavirus-2020-3>.

107. Travis Clark, *‘Fast and Furious 9’ Will be Delayed Until 2021 Because of the Coronavirus Pandemic*, BUS. INSIDER (Mar. 12, 2020, 12:59 PM), <https://www.businessinsider.com/fast-and-furious-9-release-date-delayed-a-year-coronavirus-2020-3>.

108. Eliana Docketerman, *Can Movie Theaters Survive COVID-19?*, TIME (Mar. 12, 2020, 12:59 PM), <https://time.com/5806060/coronavirus-movie-theaters-streaming>.

109. Ryan Lattanzio, *Universal Breaking Theatrical Windows to Stream ‘Invisible Man,’ ‘The Hunt,’ and ‘Emma,’* INDIEWIRE (Mar. 16, 2020, 2:56 PM), <https://www.indiewire.com/2020/03/invisible-man-the-hunt-emma-streaming-universal-coronavirus-1202218172>.

originally scheduled to arrive in theaters.¹¹⁰ The films would be available to purchase and view within 48 hours for the price of \$19.99.¹¹¹ In addition to new films going straight to streaming, Disney sent *Onward* straight to Disney+, bypassing the usual three-month theatrical window from the time a film is released in theaters to the time it is available for home video.¹¹² They followed this practice later in the year by releasing *Mulan*, one of the most anticipated films of the year, straight to Disney+, but with a catch: subscribers had to pay an additional \$29.99 to access the film.¹¹³ This film was set to be released in Chinese theaters, though it is not anticipated to earn much in theater revenue.¹¹⁴

Another remarkable moment in the COVID-19 era for the movie industry was the release of Warner Bros.' *Tenet*. After several delays, the film was finally released in 2,800 theaters in America on September 4, 2020.¹¹⁵ Despite nearly 2/3 of theaters closed nationwide¹¹⁶ (and the ones opened operating at a reduced capacity), the film was still able to earn a modest \$20.3 million in box office revenue, signaling to some in Hollywood that audiences may be ready to flock to theaters again.¹¹⁷

Though not even the savviest Hollywood executive could have foreseen the spread of coronavirus, the reactions to the spread continue a trend of movie studios using streaming platforms to showcase their properties over the traditional theatrical experience.

III. ANALYSIS

A. *Is Netflix a Movie Studio?*

Netflix may be able to exhibit its movies in its own theaters with no regulation if the Paramount Decrees do not apply to it whatsoever. Though courts have noted that the Paramount Decrees do not apply to home videos, national theater chains, and television, Netflix could still easily be considered a movie studio due to the mere fact that it produces and distributes films all within its company.¹¹⁸ However, there are a few ways Netflix could position itself as an entity completely separate from the studio systems the Paramount Decrees apply to, thus allowing it to purchase theater chains as a way to exhibit its films to live audiences. First, Netflix could argue that it is a technology company first

110. *Id.*

111. *Id.*

112. Zoe Haylock, *Onward Jumps to Disney+ Two Weeks after Hitting Theaters*, VULTURE (Mar. 20, 2020), <https://www.vulture.com/2020/03/onward-streaming-disney-plus-coronavirus.html>.

113. Frank Pallotta, *Why Disney is Releasing 'Mulan' on Disney+ for \$30*, CNN (Aug. 30, 2020, 11:16 AM), <https://www.cnn.com/2020/08/30/media/mulan-disney-price/index.html>.

114. Elaine Yau, *Disney's Mulan Likely to Bomb in China. Hit by Coronavirus, Boycotts and Controversy, Liu Yifei Film Fails to Inspire Audiences*, S. CHINA MORNING POST (Aug. 30, 2020, 11:16 AM), <https://www.scmp.com/lifestyle/entertainment/article/3100799/disneys-mulan-likely-bomb-china-hit-coronavirus-boycotts>.

115. Chris Lee, *Tenet Could Be Chasing Profit at the Movie Theatre for Months to Come*, VULTURE (Sept. 8, 2020), <https://www.vulture.com/2020/09/tenet-could-chase-profits-at-the-movie-theater-for-months.html>.

116. *Id.*

117. *Id.*

118. *United States v. Paramount Pictures, 1980-2 Trade Cas. (CCH) P63, 553. (S.D.N.Y. 1980).*

and foremost, and because of its beginnings in the technology industry, Netflix as a whole should not be recognized as a movie studio. Second, Netflix can show that it does not behave as traditional movie studios have behaved, and that due to its outsider status, it should not be subject to the same rules and regulations as other movie studios have been. These arguments, and the likelihood of success, will be assessed below.

The way a technology company positions itself may seem like mere semantics, but in some instances, it has created significant legal issues for courts to sort out. Another technology company, Uber, has placed itself at the center of legal battles over how to be categorized as a company, and thus, how it should be regulated. The results of Uber's legal battles have shown that some technology companies have been able to skirt regulation by portraying itself as a technology company first, as opposed to a transportation company (or, in Netflix's case, a movie studio).

Uber is a ridesharing app that has been hailed as a revolutionary innovator to mobility.¹¹⁹ Although Uber offers a service in which it matches riders with drivers who can transport them to their selected locations, there have been varying approaches to whether it should be classified as a taxi service or as a technological intermediary, connecting passengers and independent drivers.¹²⁰ Uber denied in a recent lawsuit that it "offer[s] a taxi service."¹²¹ Although the issue is still undecided in the United States, courts in Europe have begun to hear the issue of whether Uber is a transportation company or a "technology company" that can avoid regulations which only apply to traditional taxi companies.¹²² In holding that Uber was indeed a transportation service, and not merely a technology service, the European Court of Justice noted that Uber's entire business (transportation) is inextricably linked to the technology it provides.¹²³ Thus, companies whose technology and service are not independent of one another are less likely to be able to argue that it should be viewed as a technology company first.¹²⁴

Applying this to Netflix, it seems unlikely that Netflix will be able to successfully argue that it should be classified as a technology company as opposed to a movie studio. Netflix was founded in Silicon Valley, which has long been considered the hub for burgeoning technology companies.¹²⁵ In addition, Netflix invests heavily in new technology to enhance the production side of its business, which is behavior typical of technology companies and less so of movie studios.¹²⁶ However, Netflix invests in technology, which is largely designed to improve the user experience, meaning that the technology and the

119. Dawson Oler, *Ridesharing & Regulation: How Ridesharing Apps Are Regulated and How They Should Be Regulated*, 24 ILL. BUS. L.J. 45, 46 (2018).

120. *Id.*

121. Nat'l Fed'n. of the Blind of Cal. v. Uber Techs., Inc., 103 F. Supp. 3d 1073, 1082 (N.D. Cal. 2015).

122. Case C-434/15, Asociación Profesional Elite Taxi v. Uber Systems Spain, SL, ECLI:EU:C:2017:981.

123. *Id.*

124. *Id.*

125. Castillo, *supra* note 48.

126. Janko Roettger, *How Netflix Wants to Take on Its Competition in 2019 and Beyond*, VARIETY (Mar. 21, 2019), <https://variety.com/2019/digital/news/netflix-look-behind-curtain-1203169528/>.

service provided depend upon one another.¹²⁷ This resembles the “Uber Systems Spain” case, where the court held that Uber was a transportation company because its technology almost entirely served to supplement the transportation aspect of its service.¹²⁸ Though this case’s jurisdiction is not binding, it casts doubt on whether Netflix will be able to use the fact that it focuses so much of its business on technology to separate itself from being classified as a movie studio.¹²⁹

In arguing for a classification separate from a movie studio, Netflix may also argue how its business does not resemble the business of a traditional movie studio. For example, movie studios’ primary mode of distribution is to send reels of film to movie theaters throughout the nation for the purpose of bringing patrons to the theater to view the film.¹³⁰ Netflix’s entire mode of operations involves creating content, uploading it to its servers, and its paying subscribers being able to access the content on the go, wherever they want.¹³¹ Netflix began, primarily, as a company that made streaming television. How, then, would it be classified as a movie studio?

However, this argument holds less weight as traditional movie studios begin to wade into the streaming market.¹³² In November 2018, Disney CEO Bob Iger announced Disney would be launching a streaming service called Disney+, primarily streaming content from the Disney catalogue.¹³³ Disney+ launched in November 2019, and a reported 10 million users subscribed in its first day.¹³⁴ Shortly after Iger announced Disney+, the CEO of WarnerMedia (which owns Warner Bros. Studios) announced a streaming service to debut in 2020.¹³⁵ By having their own accompanying streaming service, studios have found another way to bypass the theater system and reap the entirety of the profits.¹³⁶ On the launch day of Disney+, Disney debuted *The Mandalorian*, a television program based in the Star Wars universe that would have undoubtedly

127. *Id.*

128. *Uber Systems Spain*, ECLI:EU:C:2017:981, at ¶50.

129. *Id.*

130. Diana Wolf, *How Movie Theaters Work*, MENTALFLOSS (July 24, 2008), <https://www.mentalfloss.com/article/19152/how-movie-theaters-work>.

131. Roettger, *supra* note 126.

132. Cynthia Littleton, *Bob Iger Talks Disney+, Hulu Plans and His Vision for Enlarged TV Studio*, VARIETY (Nov. 8, 2018, 1:54 PM), <https://variety.com/2018/digital/news/disney-disney-streaming-service-launch-2019-1203023789>; *see also* Larry Light, *An Unhappy Ending for Movie Theatre Chains AMC and Cineworld*, FORBES (May 5, 2020), <https://www.forbes.com/sites/larrylight/2020/05/05/an-unhappy-ending-for-movie-theater-chains-amc-and-cineworld/#34211e92d934> (discussing attempts by movie studios to move more releases directly to streaming platforms).

133. Light, *supra* note 132.

134. Todd Spangler, *Disney Says Disney Plus Has Over 10 Million Sign-Ups After Launch Day*, VARIETY (Nov. 13, 2019, 9:07 AM), <https://variety.com/2019/digital/news/disney-says-disney-plus-has-over-10-million-signups-1203403515/>.

135. Ryan Faughnder & Wendy Lee, *WarnerMedia Announces New Streaming Service to Compete with Netflix and Disney*, L.A. TIMES (Oct. 10, 2018, 2:05 PM), <https://www.latimes.com/business/hollywood/la-fi-ct-att-streaming-service-20181010-story.html>.

136. Aparna Narayanan, *Disney Earnings Beat, Revenue Misses; Disney+ Subscribers Strong but Losses to Deepen*, INV. BUS. DAILY (Feb. 5, 2020, 8:35 AM), <https://www.investors.com/news/disney-earnings-q1-2020-disney-plus-subscribers-disney-stock/>.

been a major box office draw had it been released in theaters.¹³⁷ Unsurprisingly, Disney saw a rise in revenue in the quarter immediately following the launch of Disney+.¹³⁸ This shows that, as movie studios are beginning to compete in the streaming marketplace, Netflix's service is no longer unique. This fact alone will not help Netflix's argument that it does not behave like a movie studio (and should therefore not be regulated like a movie studio).

B. Paramount Decrees Repealed, and the Justice Department's Reasoning

Before analyzing the potential benefits and consequences from the Justice Department's decision, another question needs to be asked and answered: Does the Justice Department have strong enough reasons for this decision? As outlined above, the Paramount Decrees' purpose was to create competition in the movie industry. To do so, it mandated that major studios were prohibited from licensing their movies to theaters they own. This provided a way for studios and theaters to coexist and compete within the marketplace.

The Justice Department's exclusive reliance on *United States v. International Business Machines Corp.* ("*IBM*") undermines their position rather than bolstering it.¹³⁹ *IBM* requires that for an antitrust decree to be terminated, the court must find termination is in the public interest.¹⁴⁰ The *IBM* standard of review is forward-looking; it is necessarily "focused on the likelihood of a potential future violation, rather than the mere possibility of a violation."¹⁴¹

The Justice Department argues that termination of the Paramount Decrees serves a public interest.¹⁴² Their reasoning mainly hinges on two arguments: first, that changes in the movie industry make the concerns which led to the Decrees virtually irrelevant; and second, that antitrust laws have evolved to the point where they undermine the regulatory provisions of the Decrees.¹⁴³

The Justice Department points to several changes in the movie industry which suggest it is unlikely for movie studios to collude in the same way as when the Decrees were given.¹⁴⁴ One change is that none of the major studios own a theater chain.¹⁴⁵ However, the most major change the Justice Department highlights is one in which this Note has outlined: The rise of streaming services has led to film distributors being less reliant on theatrical releases.¹⁴⁶ These

137. Andrew Liptak, *Jon Favreau's Live-Action Star Wars Show Will Be Called The Mandalorian*, VERGE (Oct. 4, 2018, 6:52 PM), <https://www.theverge.com/2018/10/3/17934746/star-wars-jon-favreau-live-action-disney-show-the-mandalorian>.

138. Narayanan, *supra* note 136.

139. Brief for the Conference of Independent Exhibitors' Associations as Amicus Curiae at 5, *United States v. Paramount Pictures*, 334 U.S. 131 (1948) [hereinafter "*ICA*"].

140. *United States v. Int'l. Bus. Machs. Corp.* [hereinafter "*IBM*"], 163 F.3d 737, 738 (2d Cir. 1998).

141. *Id.* at 741–42.

142. *United States v. Paramount Pictures, Inc.*, No. 19 Misc 544 (AT), 2020 WL 4573069, at *4–9 (S.D.N.Y. Aug. 7, 2020).

143. *Id.*

144. *Id.* at *4–6.

145. *Id.*

146. Brooks Barnes, *The Streaming Era Has Finally Arrived. Everything Is About to Change*, N.Y. TIMES (Nov. 18, 2019), <https://www.nytimes.com/2019/11/18/business/media/streaming-hollywood-revolution.html>.

changes, the Southern District of New York found, make it unlikely that studios will engage in the same anticompetitive behavior “in the absence of the decrees.”¹⁴⁷

The Justice Department has also argued that changes in antitrust law support terminating the Decrees.¹⁴⁸ Several standards in antitrust law have changed in the seventy years since the Decrees were handed down. For example, both vertical integration and statutory mergers were major concerns leading to the Decrees; each of these forms of conduct are reviewed by completely different standards today.¹⁴⁹ At the time of the Decrees, “companies could merge without any notification to antitrust authorities.”¹⁵⁰ Now, a significant merger (like a movie studio merging or acquiring a theater chain) would be subject to substantial oversight.¹⁵¹ The Justice Department argues these new standards “diminish[] the importance of the Decrees’ restrictions.”¹⁵²

However, the circumstances in *IBM* are far different than those underlying the Paramount Decrees. The court in *IBM* agreed to terminate, in part, because most provisions of the decree had already been terminated, and the others were “obsolete.”¹⁵³ It was not a full termination of the consent decree.¹⁵⁴ Further, the Second Circuit was comfortable proceeding because the Justice Department had undertaken a detailed, thorough investigation of the anticipated impact of the termination of the decrees.¹⁵⁵ Their investigation “included the review of more than 100,000 pages of IBM documents, including its strategic business plans, and interviews with IBM’s customers, competitors, and executives.”¹⁵⁶ In the Paramount Decrees case, the Justice Department launched no such investigation. Instead, the Justice Department merely reasoned through various changes in the industry.¹⁵⁷ While some of these points may be valid, they do not come close to the standard of factual investigation set by *IBM*.

Additionally, in *United States v. American Cyanamid Co.*, the Second Circuit reversed the District Court’s termination of part of a consent decree because it relied only on the Justice Department’s understanding of “contemporary economic theory,” and not on the rigid framework as outlined by the Supreme Court.¹⁵⁸ Applying these facts here, the Justice Department is merely restating their interpretation of economic theory, as opposed to researching the factual issue thoroughly.

Further, the Justice Department’s reasoning completely ignores “the heart”¹⁵⁹ of the Paramount Decrees: the mandate that licenses to show films

147. *United States v. Paramount Pictures, Inc.*, 2020 WL 4573069 at *6.

148. *Id.* at *6–7.

149. *Id.*

150. *Id.* at *6.

151. *Id.*

152. *Id.* at *13.

153. *IBM*, 163 F.3d at 739.

154. *Id.*

155. *Id.*

156. *Id.*

157. DOJ, *supra* note 88, at 18–21.

158. *United States v. Am. Cyanamid Co.*, 719 F.2d 558, 567–68 (2nd Cir. 1983).

159. *United States v. Loew’s Inc.*, 705 F. Supp. 878, 881 (S.D.N.Y. 1988).

should be offered “theatre by theatre, solely upon the merits and without discrimination in favor of affiliated theatres, circuit theatres or others.”¹⁶⁰ This is a monumental aspect of the Paramount Decrees, the portion which caused the biggest change in the film industry when announced.¹⁶¹ All told, if the Department of Justice preserved this portion, then practices outlined in this note such as block-booking could be completely nonexistent, because there would (and could) be no theater preference for distributors.¹⁶² This practice could even be considered as pervasive authority, because even certain studios who were not a part of the Paramount Decrees have followed the practice.¹⁶³ However, the Department of Justice neglected to even *mention* the theater-by-theater mandate in their initial request for comment. This suggests one of two things: Either the Department of Justice is willfully ignoring the Paramount Decrees key components, or they are hoping to sidestep it by painting with a wide brush in the name of eliminating old antitrust decrees.¹⁶⁴ Either way, by eliminating the Paramount Decrees, it could potentially “unravel decades of industrial stability and innovation.”¹⁶⁵

Finally, the Justice Department’s argument severely misunderstands which party has the burden of proof to overturn a consent decree reached after extensive litigation.¹⁶⁶ The Justice Department argues that they are justified in overturning the Paramount Decrees due to an absence of public comments raising grounds that, absent the decrees: “Defendants would collude to reimpose uniform distribution and licensing schemes on movie theatres.”¹⁶⁷ However, in *U.S. v. Swift & Co.*, the Supreme Court held that overturning an antitrust consent decree requires “[n]othing less than a clear showing of grievous wrong evoked by new and unforeseen conditions.”¹⁶⁸ The Court emphasizes that these decrees were reached after “years of litigation,” and included the consent of all parties included.¹⁶⁹ Based on *Swift & Co.*, the Justice Department has the burden to demonstrate the “grievous wrong evoked by new and unforeseen conditions” in the current movie industry compared to when the Paramount Decrees were reached.¹⁷⁰ Instead, the Justice Department is attempting to avoid its burden of proof by simply demonstrating that the Defendants *would not* collude.¹⁷¹

160. Warner Brothers Pictures, Inc., CCH Trade Cas. ¶ 62,765, at 64,266 (1950–51).

161. ICA, *supra* note 139.

162. *Id.* at 9–10.

163. *See id.* (highlighting that Disney follows the “theater by theater” mantra, even though they did not exist at the time of the Paramount Decrees).

164. *Id.* at 10.

165. *Id.*

166. DOJ, *supra* note 88, at 5.

167. *Id.*

168. *U.S. v. Swift & Co.*, 286 U.S. 106, 119 (1932).

169. *Id.*

170. *Id.*

171. ICA, *supra* note 139.

C. Consequences

1. Block-Booking

A potential issue that arises from this decision is the renewed practice of block-booking. As noted in Part I, block-booking is an industry practice which required studios to show a package of movies, as opposed to the theaters selecting which movies they wanted to show based on profitability and the needs of their specific market. This practice presents immediate problems for smaller theaters.

Say, a four-screen movie theater (hereinafter “Small Theater”) that specializes in screening independent, small-budget and niche arthouse films is interested in showing the film *Jojo Rabbit*, a film owned and distributed by Disney’s subsidiary, Searchlight.¹⁷² In theory, Disney could allow Small Theater to show *Jojo Rabbit*, but only if they show *Frozen II* and *Star Wars: The Rise of Skywalker* on their other screens.¹⁷³ Now, Small Theater only has one other screen to show their specialty film, while they are showing two films that may not serve their established clientele. For Small Theater’s biggest competitor in the market, a thirteen-screen theater (hereinafter “Big Theater”), this is not much of a problem. Big Theater can go on playing all the Disney films, and will not lose any business by losing out on a dedicated clientele. But for theaters like Small Theater, it is an entirely new way of doing business.

On first glance, this example does not actually seem like much of a problem for Small Theater. Small Theater is being forced to show *Frozen II* and a *Star Wars* movie, each of which was a top-ten box office earner in 2019 and earned over a billion dollars worldwide.¹⁷⁴ Surely it is not a problem if smaller movie theaters are making *too much* money. But what about the films that Disney releases which are not major blockbusters? For instance, if Small Theater was interested in using one of its screens to show Disney’s *The Lion King*, a highly anticipated film which went on to be the second highest earning film in 2019, for two straight months.¹⁷⁵ Disney could then allow Small Theater to show *The Lion King*, but also force Small Theater to show other, perhaps less desirable films, like Disney’s 2020 release *Underwater* (which went on to gross only \$37.5 million against a reported \$65 million budget).¹⁷⁶ While Small Theater got what they wanted by obtaining the license to show *The Lion King*, and thus can earn a cut of its box office sales along with all revenue from concessions, there will also be several empty theaters now showing *Underwater* for the entire time they have a license to show *The Lion King*. If Small Theater is turned off

172. JOJO RABBIT (Searchlight Pictures 2019).

173. FROZEN 2 (Walt Disney Pictures 2019); STAR WARS: THE RISE OF SKYWALKER (Walt Disney Studios Motion Pictures 2019).

174. *Domestic Box Office for 2019*, BOX OFFICE MOJO, <https://www.boxofficemojo.com/year/2019/> (last visited Oct. 21, 2020); *Worldwide Box Office for 2019*, BOX OFFICE MOJO, <https://www.boxofficemojo.com/year/world/2019> (last visited Oct. 21, 2020).

175. THE LION KING (Walt Disney Studios Motion Pictures 2019).

176. UNDERWATER (20th Century Fox 2020); *Underwater*, BOX OFFICE MOJO <https://www.boxofficemojo.com/release/r1302548481/> (last visited Oct. 21, 2020).

by the idea of showing an unpopular film like *Underwater* for two months, then Disney could simply pull *The Lion King* from Small Theater, and now Small Theater is unable to keep up with Major Theater, who can afford to take a hit by showing empty screenings of *Underwater*. This imbalance is precisely the reason the Paramount Decrees prohibited the practice of block-booking.

In fairness, small movie theaters play only a small role in the overall film market.¹⁷⁷ Many of these theaters primarily play films from independent studios and distributors, foreign films, and second-run films.¹⁷⁸ Their primary audience would not be interested in most films distributed by a major studio like Disney or Universal. Thus, their harm appears to be minimal. However, many small theater owners fear the Decrees are the only thing standing between them and extinction.¹⁷⁹ Not all small theaters play independent films; many are chains who play a hybrid of major films and independent films.¹⁸⁰ These theaters have the most to lose from the practice of block booking.

It is not only the theaters who are hurt by block-booking. Smaller film studios and distributors will lose out on opportunities to screen their films as well under block-booking. Continuing with the scenario above, if the theater is being forced to show less-desirable films from other studios in exchange for the movies they want to screen, there will be less room in theaters to show films from the smaller studios, as well as independent studios.

Disney, which was not listed in *U.S. v. Paramount* and is thus not bound by the Decrees, has already been engaging in a practice similar to block booking. With the repeal of the Paramount Decrees, it may only worsen for theaters.¹⁸¹ In the lead-up to the release of *Star Wars: The Last Jedi*,¹⁸² Disney imposed new restrictions on theaters hoping to play the film.¹⁸³ Before the theaters could play the film, they were forced to commit to play the film in their largest auditorium for at least four consecutive weeks.¹⁸⁴ Disney also took a reported 65% of the film's box office revenue—an all-time high for a Hollywood studio¹⁸⁵ (studios normally contract for between 43–49% of their film's ticket sales).¹⁸⁶ If the

177. See generally Matt Donnelly & Brett Lang, *Inside Indie Movie Theaters' Battle to Survive*, VARIETY (Mar. 26, 2019, 6:00 AM), <https://variety.com/2019/film/features/small-theaters-exhibitors-movie-business-1203170700> (discussing the issues small movie theaters face with the increase in streaming services and chain theaters).

178. *Id.*

179. Ashley Rodriguez, *Small Theater Chains Worry a Mid-Century Rule is All That Stands Between Them and Extinction*, QUARTZ (Dec. 16, 2018), <https://qz.com/1479408/small-theater-chains-worry-a-mid-century-rule-is-all-that-stands-between-them-and-extinction>.

180. See Donnelly & Lang, *supra* note 177 (“[Small theaters] exhibit all kinds of films. Some play obscure foreign language movies; other showcase the latest superhero adventure. Regardless of their size or what movies they’re presenting, independent theaters have no choice but to out-hustle the bigger circuits if they want to survive.”).

181. Erich Schwartzel, *Disney Lays Down the Law for Theaters on ‘Star Wars: The Last Jedi’*, WALL ST. J. (Nov. 1, 2017, 12:28 PM), <https://www.wsj.com/articles/disney-lays-down-the-law-for-theaters-on-star-wars-the-last-jedi-1509528603>.

182. STAR WARS: THE LAST JEDI (Walt Disney Motion Pictures Studios 2017).

183. Schwartzel, *supra* note 181.

184. *Id.*

185. *Id.*

186. Stephen Follows, *How is a Cinema’s Box Office Income Distributed?*, STEPHEN FOLLOWS FILM & DATA EDUC. (Feb. 20, 2017), <https://stephenfollows.com/how-a-cinemas-box-office-income-is-distributed>.

theater refused to honor these conditions, Disney would not allow them to play the film (whose projected box off revenue exceeded \$500 million); if the theater violated the terms, Disney would take an additional 5% of the box office sales.¹⁸⁷ Many theaters could not afford not to show a *Star Wars* film, but Disney's terms were difficult for theaters to meet.¹⁸⁸ A small-town Iowa theater owner, who could realistically service all his town's moviegoers in a couple of weeks, reported that if he were to accept Disney's terms, he would be showing the movie in empty theaters by the end of the four-week term.¹⁸⁹ This could cause substantial loss for the theaters, as other, non-Disney properties (which would normally occupy a theater's largest auditorium on opening night) were to be released in the coming weeks.¹⁹⁰

It should be noted that this practice was not blocked by the Paramount Decrees (as Disney was not bound by the Decrees), nor was it necessarily illegal. Movie studios will always have leverage over theaters for their largest properties. However, this particular example suggests that movie studios are prepared to hold as much of that leverage over smaller theaters as possible. By permitting block-booking, studios are only given even more leverage, and theaters will have no choice but to bow to movie studios increasingly high demands.

While these studios are already competing against bigger studios, the practice of block-booking makes the gaps between these two competitors even wider.

2. *Resale Price Maintenance*

There is another party who loses under the practice of block-booking: consumers. This is due to the forbidden practice of resale price maintenance. Resale price management is "Agreements or concerted Practices between a supplier and a dealer with the object of directly or indirectly establishing a fixed or minimum price or price level to be observed by the dealer when reselling a product/service to his customers."¹⁹¹ This practice goes against the standard principle of supply-and-demand; when consumers make a purchase or requests a service, they do so under the belief that the price was set organically, based on fair-market practices.¹⁹² This economic process is completely upended when resale price management occurs, and that is why it is almost always illegal.

With the merger of 20th Century Fox with Disney occurring mere months before the Justice Department's repeal of the Paramount Decrees, the timing

187. *Id.*

188. *Id.*

189. *Id.*

190. *See id.* (noting that a highly anticipated film *Jumanji: Welcome to the Jungle* would be released only a few weeks after *Star Wars: The Last Jedi*—distributed by perhaps Disney's largest rival, Sony Pictures).

191. *Resale Price Maintenance (RPM)*, CONCURRENCES GLOSSARY OF COMPETITION TERMS, <https://www.concurrences.com/en/glossary/resale-price-maintenance-rpm> (last visited Oct. 21, 2020).

192. *Id.*

could not be better for Disney.¹⁹³ With even more market control in the movie industry, there is now no official legal bar preventing Disney from engaging in block-booking, or cutting the middle-man out completely and opening its own theaters which would exclusively play Disney content.¹⁹⁴ Disney could also charge a minimum price for their films. They are already comfortable with this, charging Disney+ customers an extra \$29.99 in order to view *Mulan* (rather than releasing it in theaters).¹⁹⁵ Either way, consumers stand to lose. Under block-booking (which will mostly hurt movie theaters, especially those that are independently-owned), consumers are harmed because they would not have a diverse selection of films dictated by the market. Instead, they would only have choices dictated by a select few major film studios. In an alternative scenario, if a major studio decided to open its own theater, consumers would lose because prices would inevitably go up.¹⁹⁶ It is a well-established principle in antitrust cases that “[w]henver there is concentration in any availability of any service or product, prices have a tendency to go up.”¹⁹⁷ If Disney were to open its own theater, nothing would stop it from setting the prices higher than the other theaters in the area which no longer have access to Disney’s films. Since Disney now controls such a high percentage of the box office (and the highest valued individual franchises, including the *Marvel Comic Universe* and *Star Wars* franchises), consumers may have to pay the cost of such exclusivity.¹⁹⁸

Therefore, block-booking and resale price management exists only to make major film studios even bigger, while moviegoers, independent theaters, and smaller movie studios and distributors all stand to lose based on the practice.

3. *Harm to Independent Distributors*

Since the Paramount Decrees were announced, major studios have had to compete more and more with new, independent distributors.¹⁹⁹ However, several of these independent studios have had to merge with the major studios, or choose to shut their doors for good.²⁰⁰ However, in recent years, truly independent distributors such as Annapurna Pictures, Neon Films, A24 Films, and Blumhouse Productions have found a foothold in the industry as

193. Emily VanDerWerff, *Here’s what Disney Owns After the Massive Disney/Fox Merger*, VOX (Mar 20, 2019, 1:10 PM), <https://www.vox.com/culture/2019/3/20/18273477/disney-fox-merger-deal-details-marvel-x-men>.

194. Rodriguez, *supra* note 179.

195. Kirsten Acuna, *If You Pay \$29.99 to Watch ‘Mulan’ on Disney Plus, it Won’t Be a One-time Rental*, INSIDER (Aug. 5, 2020, 6:54 PM), <https://www.insider.com/mulan-purchase-on-disney-wont-be-one-time-rental-2020-8>.

196. John Eggerton, *Ending Decrees Could Be of ‘Paramount’ Importance*, MULTICHANNEL (Dec. 2, 2019), <https://www.multichannel.com/news/ending-decrees-could-be-of-paramount-importance>.

197. *Id.*

198. *Id.*

199. MICHAEL CONANT, ANTITRUST IN THE FILM INDUSTRY 111, 112–13 (1960).

200. Sean Fennessey, *The End of Independent Film as We Know It*, RINGER (Apr. 10, 2017, 10:49 AM), <https://www.theringer.com/2017/4/10/16044256/netflix-amazon-studios-independent-film-sundance-5def390a69ef> (“In recent years, many of the indie-boutique shingles that the major studios once supported—Paramount Vantage, Warner Independent Pictures—have closed up shop. They’ve become victims of an increasingly corporatized, IP-centric major studio strategy. Those that remain, including Fox Searchlight, Miramax, and Focus Features, have been weakened.”).

independent films have risen in popularity.²⁰¹ If theaters are allowed to engage in block-booking, or if studios are able to open their own theaters to exclusively show their own films, these independent distributors will suddenly find they cannot showcase their movies in theaters.²⁰² This would likely force many of these distributors and studios to either close or choose to merge with major studios, just as independent studios in the 1990's were forced to do.²⁰³ Unlike their predecessors, however, this change would not be an organic feature of the marketplace, but would instead be directly tied to legal action from the Justice Department, which has unreasonably decided to support major studios. Thus, independent studios and distributors would be severely affected by the repeal of the Paramount Decrees.

Next, these independent distributors would need to find somewhere to showcase what films they are still financially able to produce and distribute. Many independent distributors have already been partnering with streaming giants such as Amazon and Netflix.²⁰⁴ These two companies are arriving in the industry fully integrated, and have already found ways to disrupt the film industry with their innovation in the streaming world.²⁰⁵ However, if the only way for independent distributors to be able to flourish involves partnerships with one of only a few major streaming networks, competition will further be stifled because the only competitors in the marketplace will be major studios and major technology companies.²⁰⁶ This keeps with the theme of the Justice Department's decision that business will become easier for major corporations, and more difficult for the smaller, independent businesses attempting to gain a foothold in the industry. Though there will be innovation, there is not much of an advantage for the consumer, who will see their choices limited because of the harm to independent studios and distributors.

Hollywood's reaction to the coronavirus is indicative of the general trend toward streaming, potentially spelling disaster for independent theaters. So far, only one major movie has been announced to go straight to streaming.²⁰⁷ The rest have been viewed as generally mid-tier Hollywood productions, including one film from Focus Features, a distributor of independent movies which is a subsidiary of the major studio Universal Pictures.²⁰⁸ It is entirely possible that these strategies of home video release wind up being a one-time reaction to an

201. Eric Kohn, *Beyond A24: How Hip New Distributors Are Targeting Millennial Tastemakers with Bold Films*, INDIEWIRE (Mar. 8, 2017, 12:06 PM), <https://www.indiewire.com/2017/03/a24-neon-blumhouse-moonlight-get-out-colossal-distribution-1201791026/2>.

202. Admittedly, this is a complicated issue because of the unique role independent studios play in the larger movie industry. Many independent films do not generate much revenue from theatrical release but become profitable by being sold to streaming services. They also earn profit by acquiring foreign films and documentaries. The likelihood that a film from an independent studio records a profit is much lower than a film from a major studio. See Stephen Follows, *What Percentage of Independent Films are Profitable?*, STEPHEN FOLLOWS FILM DATA & EDUC. (Oct. 7, 2019), <https://stephenfollows.com/what-percentage-of-independent-films-are-profitable/> (explaining the difficulty in funding compared to the profitability of independent films).

203. Fennessey, *supra* note 200.

204. *Id.*

205. Riemenschneider, *supra* note 86.

206. *Id.*

207. Candeub, *supra* note 100.

208. Duprey, *supra* note 99.

unprecedented global pandemic. However, if these otherwise inconsequential films see a major boost due to being available at home, what would stop a movie studio from doing this again? And if more studios have their own streaming services, what is to stop the studios from doing what Disney did with *Onward* and sending it directly to the streaming service as soon as it seems to be losing steam in the movie theater? These strategies will only be answered in time once theaters are able to open again,²⁰⁹ but it is yet another data point in a trend of movie studios preferring their movies streaming than being seen in a theater. In addition, this spells trouble for independent cinemas, whose entire business model obviously relies on new releases to be shown in their theaters.²¹⁰

One independent theater in Chicago, Illinois, created its own distribution company and streaming service in order to keep up with the trend towards streaming.²¹¹ Perhaps more independent theaters will follow this trend with the repeal of the Paramount Decrees. However, this streaming service is extremely limited in its catalogue, and does not come close to the selection of titles available on other streaming services like Amazon and Netflix. It will always be an uphill climb for independent theaters such as Music Box, but with the repeal of the Paramount Decrees and the subsequent bolstering of the major studios and technology companies with streaming services, it seems the climb will become impossible.

IV. RECOMMENDATION

The Southern District of New York found the Justice Department “offered a reasonable and persuasive explanation” for why the termination of the Decrees would “serve the public interest in free and unfettered competition.”²¹² While the Author agrees many of the Justice Department’s arguments are persuasive, the Court and Justice Department each overlook the troubling consequences of block-booking and tying. Although the Justice Department offered a two-year sunset period to “provide a transitional time period to adjust their business models and strategies to any proposals to change the film-by-film, theater-by-theater licensing regime,” this is not sufficient, especially considering how COVID-19 continues to impact the film industry.²¹³ In light of the uncertainty surround how movie theaters will recover following the disastrous effects of COVID-19 on the industry, the Justice Department should consider offering a

209. At time of this drafting, movie theaters remain closed due to COVID-19, and the United States Center for Disease Control strongly recommends avoiding gatherings of more than 10 individuals. *See generally Center for Disease Control and Prevention*, <https://www.cdc.gov/coronavirus/2019-ncov/cdcresponse/index.html> (last visited Oct. 21, 2020) (describing the CDC’s response to COVID-19).

210. Rebecca Rubin, *In the Age of Coronavirus, Even Movie Theaters Learn to Love Streaming*, VARIETY (Apr. 2, 2020, 2:07 PM), <https://variety.com/2020/film/news/movie-theaters-closed-coronavirus-virtual-cinemas-1203550005>.

211. Music Box Films, *Introducing Music Box Direct*, YOUTUBE (Apr. 8, 2019), <https://www.youtube.com/watch?v=cH-p9xgFO9w>.

212. *United States v. Paramount Pictures, Inc., No., 19 Misc. 544 (AT) (S. D. N. Y. 2020)* (quoting *Loew’s Inc.*, 783 F. Supp. at 214).

213. *Id.* at 4.

longer sunset period to give theaters even more time adjust their business models.²¹⁴

Not only is the reasoning behind their decision flawed and not based on empirical evidence, but the timing is not right for the decision. Independent theaters are struggling in large part because the Paramount Decrees have not been enforced properly. Instead of completely nixing the Decrees, the Justice Department should instead launch a factual inquiry and thorough investigation to produce statistical evidence to defend its statement that “the industry is changing.”²¹⁵

Admittedly, the majority of this recommendation is based on the impact the Justice Department’s decision will have on independent theaters, studios, and distributors. However, by keeping independent cinema alive, it continues competition within the movie industry and ensures better options for consumers. First, this recommendation would give consumers an alternative to the traditional options typically offered by major studios, while maintaining competition between the traditional theater experience and streaming services. Second, it will help foster diversity within the movie industry and guarantee more opportunity for artists representing minorities. Third, and finally, it will reduce issues of anti-competitiveness within the industry, which is “the heart” of the Paramount Decrees.

First, continuing the Paramount Decrees gives consumers an alternative choice to the types of films offered by major studios. Many consumers are willing to pay to see films from independent studios and distributors in the movie theater, and often will see them in independent movie theaters themselves.²¹⁶ Independent cinema has seen great success in recent years: in 2016, the movie *Moonlight* (produced and distributed independently) won Best Picture at the 89th Academy Awards.²¹⁷ Not long after, the film *Parasite*, another independent, arthouse film, won the same award at the 92nd Academy Awards.²¹⁸ In addition, independent theaters are more likely to show documentary films, which have also seen a rise in popularity; documentary films set an all-time record at the box office in 2018, largely due to being featured in independent movie theaters.²¹⁹ At the same time, streaming services like Netflix and Amazon have both been making waves with popular films of their own in

214. *Film Marketing Execs on Reopening Theaters, Distributing Movies During COVID-19*, VARIETY (Aug. 31, 2020, 1:37 PM), <https://variety.com/2020/film/news/film-marketing-covid-19-kenote-marketing-roundtable-1234749848> (discussing the changes to film distribution in the age of coronavirus).

215. DOJ, *supra* note 88.

216. Donnelly & Lang, *supra* note 177.

217. Sandra Gonzalez, *‘Moonlight’ Wins Best Picture Oscar After Baffling On-Stage Flub*, CNN (Feb. 28, 2017, 12:03 AM), <https://www.cnn.com/2017/02/27/entertainment/moonlight-wins-best-picture-oscar-flub/index.html>; MOONLIGHT (A24 Films 2016).

218. Julia Alexander, *Parasite Wins Best Picture, Making Oscar History*, VERGE (Feb. 9, 2020), <https://www.theverge.com/2020/2/9/21130625/oscars-parasite-best-picture-win-bong-joon-ho-historic-academy-awards-2020>; PARASITE (CJ Entertainment 2019).

219. David Sims, *Documentaries Are Thriving at the Summer Box Office. Why?*, ATLANTIC (July 11, 2018), <https://www.theatlantic.com/entertainment/archive/2018/07/whats-driving-documentaries-to-box-office-success/564875/>.

recent years, including titles such as *The Irishman* and *Honey Boy*.²²⁰ Moviegoers were even willing to see movies which would premiere on Netflix or Amazon within merely weeks at independent theaters, suggesting there is interest in viewing these films in the traditional theater setting as opposed to streaming at home.²²¹ This is a healthy balance to movies produced by major studios, which are still far and away the most popular at the box office. By repealing the Paramount Decrees, the Justice Department may as well be forcing all movies shown in independent theaters to be seen on the small screen rather than theaters. This helps technology companies like Netflix or Amazon, but it hurts consumers who opt to see these films in theaters, who have suddenly seen their choices limited. Therefore, the Justice Department should extend the sunset period, and open up a much larger, thorough factual inquiry into the current trends of the industry.

Second, the Justice Department should consider this recommendation in order to ensure more diversity within the film industry. Independent films are more likely to feature filmmakers, actors, and crew from various minorities than films from major studios.²²² In addition, most filmmakers representing minorities who find work on major studio films first begin working on independent films.²²³ As outlined above, the Justice Department's repealing of the Paramount Decrees puts the independent film industry at stake. Thus, to preserve the improving diversity in filmmaking at the independent level, the Justice Department should consider this recommendation.

Third, the Paramount Decrees have continued to do their job, which is to create competition within the film industry, and should be kept intact to continue to create competition and inspire innovation. The Department of Justice is somewhat correct—the state of the industry *is* in a state of change, but as has been outlined in this Note, the change has been moving towards “greater concentration and consolidation.”²²⁴ The only thing keeping the marketplace for all players is the Paramount Decrees, which have been in force for decades without challenge.²²⁵ The Justice Department should reconsider its decision, and continue extending this lifeline to independent cinemas and distributors, “a way to remain competitive in an industry still inclined to anticompetitive abuse.”²²⁶

Finally, a two-year sunset period beginning in August 2020 is not enough time to allow theaters and studios to adjust their business models. Theaters and studios are each reeling in the wake of COVID-19, and there remains a

220. *THE IRISHMAN* (Netflix 2019); *HONEY BOY* (Amazon Studios 2019).

221. Tom Brueggmann, *Here's Why Netflix and Amazon Don't Report Box Office, and Probably Never Will*, INDIEWIRE (Nov. 23, 2019, 10:00 AM), <https://www.indiewire.com/2019/11/streamers-netflix-amazon-gross-reporting-1202191357>.

222. Katherine M. Pieper et al., *Race & Ethnicity in Independent Films: Prevalence of Underrepresented Directors and the Barriers They Face 2–5* (Annenberg School for Communication & Journalism University of Southern California Working Paper).

223. *Id.*

224. ICA, *supra* note 139, at 4.

225. *Id.*

226. *Id.*

tremendous amount of uncertainty in how the industry will look once the pandemic has subsided and the public at large can return to theaters.²²⁷ The sunset period's entire purpose is to give theaters a window to adjust business plans and make proposals in order to prepare for the repeal of the Decrees.²²⁸ However, these theaters have more pressing matters facing them right now—they are simply trying to stay in business during an unprecedented global pandemic. Extending the sunset period will give these theaters and studios more time to make the adjustments the Department of Justice sees as necessary before completely repealing the Paramount Decrees.

Though it seems like this recommendation would be resisting innovation, it still allows for would-be “disruptors” such as Netflix or Amazon to participate fully in the industry. For instance, these streamers have offered alternatives to outdated theatrical practices, such as the theatrical window. Additionally, it remains a possibility that because of more advanced demographic data at their disposal, companies such as Netflix can actually offer filmmakers who normally do not have a voice an opportunity to work because of the diversity of their subscriber base. Thus, this proposed recommendation still supports opportunities for innovation, but calls for the Justice Department to undergo a much more thorough factual investigation before they take such a drastic step.

In addition, for future antitrust disputes surrounding movie studios, streaming companies like Netflix or Amazon should be treated as movie studios. As explained in Part III(A), these companies are movie studios first, technology company second. Though the Decrees are repealed, it will certainly not be the end of antitrust litigation surrounding anticompetitive practices in the movie industry. When those issues arise, the Department of Justice and courts should hold streaming companies to the same standard as they do movie studios.

V. CONCLUSION

Hollywood has already begun moving to a marketplace which emphasizes streaming services; they do not need any help from the Justice Department. Under the Paramount Decrees, Hollywood studios, distributors, theaters, and now streaming services have all blossomed into a competitive industry. Instead of intervening and risking a critical upset of the careful balance already in place, the Justice Department should reconsider their move to repeal the Paramount Decrees.

227. Tom Tapp, *Los Angeles County Coronavirus Update: L.A. Will Not Reopen Movie Theaters or Indoor Retail in Near Term, Even If New State Rules Allow It, Says County Health Department*, DEADLINE (Aug. 28, 2020, 3:18 PM), <https://deadline.com/2020/08/los-angeles-county-coronavirus-l-a-will-not-reopen-in-near-term-even-if-new-state-rules-allow-it-says-county-health-director-1203026311>.

228. Eggerton, *supra* note 196.