

‘DON’T RUN UP THE STAIRS!’: WHY REMOVING THE PARAMOUNT DECREES WOULD BE BAD FOR HOLLYWOOD

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I. INTRODUCTION

Have you ever watched a really great scary movie? A tingle runs down your spine and you feel your muscles tense up as you watch the monster slowly close in on the film’s protagonists. You can feel a sense of dread building up within you; try as they might, the camp counselors, the newly-moved family, the babysitting high schooler, are all helpless. Sure, maybe they’ve made some dumbfounding mistakes (“Don’t run up the stairs!”), but do they deserve the fate they’re sure to meet?

In many ways, modern Hollywood feels like a scary movie. Long gone are the days where the major film studios used anticompetitive tactics to bend the rest of the industry to their will. That era was brought to an end via the Paramount Decrees, a series of consent decrees and court opinions in the 1940s and 1950s which used antitrust law to break up the studios’ control and allowed other groups to gain a foothold in the industry.¹ Instead, the studios are playing the roles of horror-movie victims, desperately trying to escape the clutches of the Silicon Valley boogeyman. Not only are streaming services like Netflix and Amazon providing consumers with a cheaper, more

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¹ “The Department filed an antitrust lawsuit alleging that eight major motion picture companies had conspired to control the motion picture industry through their ownership of film distribution and exhibition. The eight original defendants were Paramount Pictures, Inc., Twentieth Century-Fox Corporation, Loew’s Incorporated (now Metro-Goldwyn-Mayer (“MGM”)), Radio-Keith-Orpheum (dissolved in 1959), Warner Brothers Pictures, Columbia Pictures Corporation, Universal Corporation, and United Artists Corporation. After a trial, the district court found that the defendants had engaged in a wide-spread conspiracy to illegally fix motion picture prices and monopolize both the film distribution and movie theatre markets. On appeal, the Supreme Court sustained those findings. See *United States v. Paramount*, 334 U.S. 131 (1948). Subsequently, each of the defendants entered into a consent decree with the Department (collectively, “the Paramount Decrees”).” THE UNITED STATES DEPARTMENT OF JUSTICE, THE PARAMOUNT DECREES (2018), <https://www.justice.gov/atr/paramount-decree-review> [<https://perma.cc/4NPF-59PM>].

accessible way to watch movies at home, but they are also creeping closer and closer to a territory that has been the almost-exclusive domain of Hollywood since the dawn of film: the box office. Many believe that the tech companies entering the industry, like scary movie monsters, are unstoppable. No matter how studios tinker with their business model, they are supposedly helpless against their newfound competitors.

In light of this new competition, the Department of Justice announced that it will be reviewing the seventy-year-old Paramount Decrees (“the Decrees”) to determine if their constraints are still necessary for modern Hollywood.² Concerned with potentially outdated regulations, the Department of Justice seeks to determine whether the Decrees are still effective in their current form, if they should be modified to reflect the times, or if the Decrees should be removed in their entirety.³

This paper explores the potential effects of removing the Paramount Decrees. The first section provides a history of the Studio System that necessitated antitrust intervention last century. The next section will detail changes in Hollywood after the Paramount Decrees took effect. The third section explores the consequences that would come with removing the Decrees, first by covering arguments in favor of removal, and then explaining opposing arguments. Finally, the last section will argue that changes to the antitrust environment are not even needed and that there is some indication that Hollywood is adequately adapting to its new tech competitors.

Would removing the Decrees be good for the industry? At first glance, it is easy to say “yes.” Removing the Decrees would give studios more freedom in competing with Netflix and Amazon. Without the Decrees, studios may regain enough control over the industry to stay profitable and fend off their new competitors from Silicon Valley.

² THE UNITED STATES DEPARTMENT OF JUSTICE OFFICE OF PUBLIC AFFAIRS, DEPARTMENT OF JUSTICE OPENS REVIEW OF PARAMOUNT CONSENT DECREES (2018), <https://www.justice.gov/opa/pr/departement-justice-opens-review-paramount-consent-decrees> [<https://perma.cc/R75Q-3E8A>]; THE UNITED STATES DEPARTMENT OF JUSTICE, *supra* note 1; *E.g.*, Ryan Faughnder, *Justice Department to Review Decades-Old Rules for Movie Studios*, LOS ANGELES TIMES (Aug. 2, 2018, 4:45 PM), <http://www.latimes.com/business/hollywood/la-fi-ct-doj-paramount-decrees-20180802-story.html> [<https://perma.cc/6BKT-6AE6>]; Eriq Gardner, *Justice Dept. Reviewing Movie Licensing Restrictions on the Books for Decades*, THE HOLLYWOOD REPORTER (Aug. 02, 2018, 1:12 PM), <https://www.hollywoodreporter.com/thr-esq/justice-dept-reviewing-movie-licensing-restrictions-books-decades-1131827> [<https://perma.cc/2QMY-X44A>].

³See *supra* note 2 and accompanying text.

However, a closer look at the industry reveals several concerns. Removing the Decrees would negatively impact other players in the industry, including theater chains and independent producers. Removal of the Decrees could also antagonize consumers by way of higher prices, potentially driving viewers away from the silver screen and to the small screen.

Removing the Decrees could actually have the opposite of the intended effect, providing Netflix and Amazon a path to replace the studios as leaders of the industry. The same control the studios seek to gain from removing the Decrees could be just as easily taken advantage of by Amazon and Netflix. Thus, removing the Decrees could be a “don’t run up the stairs!” decision, serving to only speed up Silicon Valley’s takeover of the industry (the very thing that removal would be intending to prevent).

Every scary movie has its survivors: the would-be victims who refuse to go down. And while Netflix and Amazon might instill fear in the hearts of Hollywood’s power brokers, the necessity for antitrust deregulation has been overstated. Studios are beginning to adapt their business model to their new competitors, in some cases even using tech companies for their benefit. Despite well-founded concerns about the future of the industry, studios are still surviving.

II. THE STUDIO SYSTEM AND THE NEED FOR ANTITRUST

The Studio System, existing prior to 1948, was a model of operation in Hollywood that resulted in unprecedented studio control. Prior to the Paramount Decrees, the eight major studios (at the time, Paramount, Loew’s, RKO, Warner Bros., Twentieth Century-Fox, Columbia, Universal, and United Artists)⁴ were vertically integrated almost completely, controlling all three phases of the film industry (production, distribution, and exhibition).⁵ Studios produced films in-house with factory-like efficiency.⁶ Many studios had the capacity to produce movies entirely on their backlots.⁷ Studios maximized their capabilities by working around the clock to churn out these in-house movies: a feature film could be shot in less than a month, and B films

⁴ THE UNITED STATES DEPARTMENT OF JUSTICE, *supra* note 1.

⁵ Micah Long, *Should the Studios Be Broken Up?: How Hollywood Skirts Anti-Trust Law*, 2017 LIBERTY LAW. 18, 19 (2017).

⁶ EDWARD JAY EPSTEIN, *THE BIG PICTURE: MONEY AND POWER IN HOLLYWOOD* 7-8 (2005).

⁷ *Id.*

could be completed in a single week.⁸ Major studios could shoot up to six films at a time.⁹

This level of efficiency was possible because practically the entire industry was under the thumb of the major studios. In 1939, “about six producers...pass on about 90 percent of the script and edit about 90 percent of the pictures.”¹⁰ The major studios controlled theater chains, either by owning them directly or controlling them via block booking.¹¹ Block booking was the practice of licensing movies to theaters in groups of films called “blocks”¹² (usually ten films per block).¹³ A theater would have to choose between licensing and showing all of the films in the block or none at all.¹⁴ Thus, studios could force theaters to show lesser-quality films as a requirement for licensing more popular films.¹⁵

Along with theater chains, studios also controlled the big-name actors and actresses of the day.¹⁶ Movie stars were signed to exclusive contracts, often at a minimal cost, to a given studio.¹⁷ Actors and actresses were contractually required to star in every film and participate in every bit of publicity assigned to them.¹⁸ Rather than bid against each other for stars, the studios would “rent” their actors to each other, limiting competition for acting talent and thus keeping compensation for actors low.¹⁹

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* at 7.

¹¹ *Id.* at 6; Barak Y. Orbach, *Antitrust and Pricing in the Motion Picture Industry*, 21 YALE J. ON REG. 317, 338 (2004); Barak Y. Orbach & Liran Einav, *Uniform Prices for Differentiated Goods: The Case of the Movie-Theater Industry*, 27 INTERNATIONAL REV. OF LAW AND ECONOMICS 129, 139 (2007); Harrison J. Reynolds, *Introducing Price Competition at the Box Office*, 20 UCLA ENTMT'L REV. 1, 9 (2013).

¹² See *supra* note 11 and accompanying text.

¹³ EPSTEIN, *supra* note 6, at 6.

¹⁴ *Supra* notes 9-11; 1. “Block-booking was often combined with blind-selling, a practice whereby a distributor licenses a feature before the exhibitor has an opportunity to view it.” Orbach, *supra* note 11, at 338.

¹⁵ *Supra* notes 11-14 and accompanying text.

¹⁶ EPSTEIN, *supra* note 6, at 7-9.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* Studios began loaning stars to each other to uphold their agreement not to lure away each other's stars. The usual arrangement “was that the borrowing studio paid the loaning studio the star's contractual wages plus a garnish of 10%.” *Id.* at 95. “In theory, these loan-outs were also available to independent producers, but a Department of Justice analysis of loan-outs found that over 90 percent of them were to other major studios. By making it exceedingly difficult, if not impossible,

The studios' schemes weren't just about reducing costs: the practices were often aimed at eliminating competition as well. Censorship codes were often used to prevent foreign and independent producers from competing with them at the box office.²⁰ Thanks to Depression-era regulations (and a cozy relationship with the FDR administration)²¹, the studios incorporated their "Code of Fair Competition" (often referred to as the "Hays Code") into federal law.²² This Code was used to set up block booking, clearances, and minimum pricing schemes.²³ Any theater who refused to follow these practices could be punished since the Code carried the weight of federal law.²⁴

In 1945, the studios also set up the Motion Picture Export Association (MPEA) for overseas markets.²⁵ The MPEA allocated profits to member studios based on a pre-determined formula.²⁶ Profits were determined by each member's share of the domestic box office, rather than the amount of overseas profits a studio was actually responsible for.²⁷

The control the major studios enjoyed meant that they could make movies cheaply while insulating their profits from competition. As a result, almost all of the major studios' movies were profitable.²⁸ The average production cost in 1947 was \$732,000, with the average revenue being \$1.6 million.²⁹ The most successful movies could net as much as \$5 million in profits.³⁰

for independent and foreign producers to obtain stars, the moguls reinforced their grip" on the industry. *Id.*

²⁰ *Id.* at 93-95.

²¹ Many studio executives worked closely with the Roosevelt administration to promote the President's initiatives, to the point where Roosevelt's political opponents accused Hollywood of propagandizing. Larry Getlen, *How Hollywood became the 'Sixth Estate' of Government*, NEW YORK POST (Nov. 23, 2014, 4:30 AM), <https://nypost.com/2014/11/23/how-hollywood-became-the-sixth-estate-of-government/> [<https://perma.cc/EA9M-ZW4U>] (reviewing KATHRYN CRAMER BROWNELL, *SHOWBIZ POLITICS: HOLLYWOOD IN AMERICAN POLITICAL LIFE* (2014))

²² J. Douglas Gomery, *Hollywood, the National Recovery Administration, and the Question of Monopoly Power*, 31 NO. 2 J. OF THE UNIV. FILM ASSOC., 47, 49-50 (1979).

²³ EPSTEIN, *supra* note 6 at 93-95; . "The vast majority of the code guaranteed that the Hays group could continue monopolistic behavior." Gomery, *supra* note 22.

²⁴ *See supra* note 23.

²⁵ EPSTEIN, *supra* note 6 at 95-96 (The MPEA acted as a single distributor for all of the major studios in foreign markets.).

²⁶ *Id.* at 96.

²⁷ *Id.*

²⁸ *Id.* at 9.

²⁹ *Id.*

³⁰ *Id.*

A. *Leadup to Paramount*

As America pulled out of the Great Depression, the major studios knew they would no longer receive the protection from antitrust litigation that they had enjoyed.³¹ As they increased their production of A-list films, Hollywood was hoping that an increase in quality of motion pictures would help them escape scrutiny from the Department of Justice.³² This plan proved ineffective, as the major studios hit a particularly bad slump in 1938, just as a small independent studio led by Walt Disney broke through with *Snow White and the Seven Dwarfs*.³³ The studios' struggles, combined with the success of Disney, led many to believe that block booking and other tactics had led to a sense of complacency from the major studios.³⁴ The Department of Justice capitalized on this anti-studio sentiment, filing an antitrust suit against the eight major studios—Paramount, Loew's, RKO, Warner Bros., Twentieth Century-Fox, Columbia, Universal, and United Artists.³⁵ The Department's major contentions were that block booking and theater ownership constituted illegal restraints of trade.³⁶ Shortly after the case went to trial, the studios signed a consent

³¹ The Society of Independent Motion Picture Producers (SIMPP), *The Independent Producers and the Paramount Case, 1938-1949: Part 1: The Hollywood Slump of 1938*, HOLLYWOOD RENEGADES ARCHIVE (2005), http://www.cobbles.com/simpp_archive/paramountcase_1slump1938.htm [<https://perma.cc/U6MB-P6AC>].

³² *Id.*

³³ “By the end of the first quarter of 1938, the combined profits of the Big Eight had already dropped 47 percent from the previous year.” *Id.* Just how big of a splash did Disney make with *Snow White*? It quickly became the highest-grossing film of all time. Bill Higgins, *Hollywood Flashback: 80 Years Ago, Disney's 'Snow White' Set the Animation Standard*, THE HOLLYWOOD REPORTER (Feb. 1, 2018, 11:00 AM), <https://www.hollywoodreporter.com/news/hollywood-flashback-80-years-disneys-snow-white-set-animation-standard-1079926> [<https://perma.cc/QAJ2-SVQZ>] (*All Time Box Office (Domestic Grosses Adjusted for Ticket Price Inflation)*), BOX OFFICE MOJO (last visited November 8, 2018, 12:13 AM), <https://www.boxofficemojo.com/alltime/adjusted.htm> [<https://perma.cc/X5MZ-ZGWN>] (Adjusted for inflation, the film [Snow White} is still one of the ten highest-grossing films ever.).

³⁴ SIMPP, *supra* note 31; *E.g.*, U.S. v. Paramount Pictures, 334 U.S. 131, 140 (1948).

³⁵ SIMPP, *supra* note 31.

³⁶ SIMPP, *The Independent Producers and the Paramount Case, 1938-1949: Part 2: The Studios Prepare for the Antitrust Battle, 1939*, HOLLYWOOD RENEGADES ARCHIVE (2005), http://www.cobbles.com/simpp_archive/paramountcase_2studios1939.htm [<https://perma.cc/J8PG-M466>].

decree with the Department of Justice.³⁷ The Consent Decree of 1940 contained a compromise: the Department of Justice agreed to drop the suit (and allow studios to retain their theater holdings) if the studios limited block booking to only five films per block (as opposed to the customary ten films per block)³⁸ and made several other smaller concessions.³⁹ However, the Decree contained a provision allowing the Department of Justice to re-open the case if there were any dissenters to the Decree.⁴⁰ Universal and Columbia (two studios who did not own theaters but relied substantially on block booking) and United Artists (who neither owned theaters nor block booked) dissented to the Decree, causing it to expire in 1942.⁴¹ Consequently, the antitrust suit went back to trial in 1945.⁴²

B. *United States v. Paramount and the End of the Studio System*

With the expiration of the 1940 Decree, the Justice Department once again filed suit against the eight major studios, alleging violations of the Sherman Antitrust Act.⁴³ The complaint divided the eight studios into three groups: Paramount, Loew's, RKO, Warner Bros., and Twentieth Century-Fox (the "Big Five") were studios who, in addition to producing and distributing films, also owned and controlled theater chains.⁴⁴ The second group, consisting of Columbia and Universal, produced and distributed films but did not own any theater chains themselves.⁴⁵ The third group was comprised solely of United Artists, who only acted as a distributor.⁴⁶ The complaint alleged various violations of the Sherman Act, including illegal restraints of trade and monopolization.⁴⁷

³⁷ SIMPP, *The Independent Producers and the Paramount Case, 1938-1949: Part 3: The Consent Decree of 1940*, HOLLYWOOD RENEGADES ARCHIVE (2005), http://www.cobbles.com/simpp_archive/paramountcase_3consent1940.htm [<https://perma.cc/V55X-5AX5>].

³⁸ EPSTEIN, *supra* note 6, at 6.

³⁹ SIMPP, *supra* note 37.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² SIMPP, *The Independent Producers and the Paramount Case, 1938-1949: Part 4: The Studios in Federal Court, 1945*, HOLLYWOOD RENEGADES ARCHIVE (2005), http://www.cobbles.com/simpp_archive/paramountcase_4equity1945.htm.

⁴³ Paramount, *supra* note 34 at 140.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* at 140-141.

1. Paramount *Reaches the Supreme Court*

The case made its way to the Supreme Court in 1948.⁴⁸ In a lengthy opinion, the Court declared that the major studios had violated the Sherman Antitrust Act by engaging in illegal restraints of trade.⁴⁹ The Court then addressed several practices that the studios had engaged in while maintaining these illegal restraints of trade.

i. *Minimum Prices*

The Supreme Court found two illegal price-fixing schemes: one horizontal scheme between studios, and one vertical scheme between the studios and the theaters who licensed their films.⁵⁰ The studios implemented the price-fixing scheme by requiring a minimum admissions price when licensing their films to theaters.⁵¹ The Court compared both schemes to patent owners who require licensees to sell the patented invention at a specified price (which is illegal under U.S. patent law): “Certainly the rights of the copyright owner are no greater than those of the patentee.”⁵² The Court stated that the price-fixing combination was illegal *per se*,⁵³ noting “the total effect is that... a price structure is erected which regulates the licensees’ ability to compete against one another in admissions prices.”⁵⁴

ii. *Clearances*

Clearances were specified periods of time where only one theater in a certain geographic area could be showing a given movie for the duration of the period.⁵⁵ “A “run-clearance-zone” system was established: In any defined geographic location (“zone”), a given

⁴⁸ *See Id.* (citing to the case generally)

⁴⁹ *Id.*

⁵⁰ *Id.* at 142.

⁵¹ *Id.* at 142-144 (The District Court “found that substantially uniform minimum prices had been established in the licenses of all defendants.”).

⁵² *Id.* at 142-144.

⁵³ *Id.* at 143 (“We start, of course, from the premise that so far as the Sherman Act is concerned, a price-fixing combination is illegal *per se*.”).

⁵⁴ *Id.* at 143-144.

⁵⁵ Anthony D’Alessandro & Anita Busch, *Distribs & Exhibs Hold Line on Clearances Despite Fox’s Position Change*, DEADLINE (Mar. 31, 2016, 4:00 PM), <https://deadline.com/2016/03/20th-century-fox-exhibition-clearances-circuit-dealing-1201729061/> [<https://perma.cc/ZU92-WRBJ>]. Alexandra Gil, *Breaking the Studios: Antitrust and the Motion Picture Industry*, 3 N.Y.U. J. L. & LIBERTY 83, 84 (2008).

movie played at one theater (“run”), and another theater within the same zone could show the same movie only after a defined period lapsed (“clearance”).”⁵⁶ The Supreme Court agreed with the District Court that while clearances are not illegal per se, clearances were utilized by the defendants in a way that was unreasonable.⁵⁷ The Court found that the clearances used by the defendants “were made applicable to situations without regard to the special circumstances which are necessary to sustain them as reasonable restraints of trade.”⁵⁸ As such, the Court enjoined the studios from utilizing any unjustified clearances, placing the burden of proof on the studios to show that any future clearances are reasonable.⁵⁹

iii. *Pooling Agreements*

The Court found that pooling agreements—agreements both between the studios and between studios and theaters to split shared profits based on pre-determined percentages (similar to the arrangement set up by the MPEA to address overseas markets)⁶⁰—were illegal under antitrust law.⁶¹ The Court held that the purpose of the agreements was to eliminate competition by “nullifying competition between the allied theaters” as well as strengthening the position of the agreeing parties “against theaters not in the pool.”⁶²

⁵⁶ Orbach, *supra* note 11, at 336-337.

⁵⁷ *Paramount*, 334 U.S. at 145-148.

⁵⁸ *Id.* Factors to be assessed included “(1) The admission prices of the theatres involved, as set by the exhibitors; (2) The character and location of the theatres involved, including size, type of entertainment, appointments, transit facilities, etc.; (3) The policy of operation of the theatres involved, such as the showing of double features, gift nights, give-aways, premiums, cut-rate tickets, lotteries, etc.; (4) The rental terms and license fees paid by the theatres involved and the revenues derived by the distributor-defendant from such theatres; (5) The extent to which the theatres involved compete with each other for patronage; (6) The fact that a theatre involved is affiliated with a defendant-distributor or with an independent circuit of theatres should be disregarded; and (7) There should be no clearance between theatres not in substantial competition.” *Id.*

⁵⁹ *Id.*

⁶⁰ Text accompanying notes 25-27.

⁶¹ *Paramount*, 334 U.S. at 149.

⁶² *Id.* “Clearer restraints of trade are difficult to imagine.” *Id.* The Court also struck down joint ownership of theaters by two or more studios under similar reasoning. *Id.* at 150

iv. *Block booking*

As explained above, block booking was the practice of forcing theaters to license films in blocks, making the licensing of desirable films contingent on the licensing of lesser films.⁶³ The Court found that block booking constituted an illegal enlargement of the copyright monopoly.⁶⁴ The Court noted that such a practice had already been ruled illegal, comparing the conditioning of copyright licensing on the purchase of additional works to patent law's prohibitions on similar practices.⁶⁵ The Court reasoned that copyright protection (and all the benefits that come with it) incentivizes public release of the product, which is the result of the copyright owner's "genius."⁶⁶ "But the reward does not serve its public purpose if it is not related to the quality of the copyright."⁶⁷ When the licensing of a desired film is conditioned on the licensing of a mediocre film, "the latter borrows quality from the former and strengthens its monopoly by drawing on the other."⁶⁸ Thus, each film in a block "stands not on its own footing but in whole or in part on the appeal which another film may have."⁶⁹ Thus, the Court ruled that block booking was an illegal restraint on competition.⁷⁰

v. *Theater Ownership*

The Supreme Court ruled that the Big Five's theater holdings were not illegal per se, but remanded the issue to determine the connection between the studios' theater ownership and the antitrust violations.⁷¹ The Court stated that whether the Big Five's theater holdings were

⁶³ See text accompanying notes 9-13.

⁶⁴ *Paramount*, 334 U.S. at 156-158.

⁶⁵ *Id.* at 157.

⁶⁶ *Id.* at 158.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.* at 156-159. "We do not suggest that films may not be sold in blocks or groups, where there is no requirement, express or implied, for the purchase of more than one film. All we hold to be illegal is a refusal to license one or more copyrights unless another copyright is accepted." *Id.*

⁷¹ *Id.* at 171-172. "It is the relationship of the unreasonable restraints of trade to the position of the defendants in the exhibition field . . . that is of first importance on the divestiture of these cases." *Id.* The court "set aside the findings of divestiture" so that the legality of studio-owned theaters could be addressed on remand. *Id.* at 175.

illegal would depend on the purpose behind owning theater chains.⁷² If the studios' vertical integration was coupled with an intent to reduce competition, rather than a legitimate business interest, their theater holdings would be in violation of the Sherman Act.⁷³

2. *RKO and Paramount Sign Consent Decrees*

After the *Paramount* decision, RKO quickly announced that it would divest of its theater holding.⁷⁴ RKO signed a consent decree with the Justice Department on November 8, 1948, in what would prove to be the first domino to fall in divorcing the studios from their theaters.⁷⁵ Paramount quickly followed suit, preferring to sign on to voluntary divestiture rather than engage in another expensive legal battle.⁷⁶ Paramount signed its decree with the Justice Department in February of 1949.⁷⁷

3. *The District Court Orders Divestiture*

On remand, the District Court found that "theatre holdings of the [remaining] major defendants have played a vital part in effecting violations of the Sherman Anti-Trust Act."⁷⁸ The District Court noted how minimum pricing, clearances, and pooling agreements were used to protect the studios' theater holdings from competition.⁷⁹ The Court then turned to the geographical distribution of studio-owned theaters.⁸⁰ In cities with populations of fewer than 100,000, the Court found "no doubt that Paramount, Warner, Fox, and RKO owned or operated theatres... without more than trifling competition among

⁷² *Id.* at 174.

⁷³ *Id.*

⁷⁴ *The Independent Producers and the Paramount Case, 1938-1949: Part 6: The Supreme Court Verdict That Brought an End to the Hollywood Studio System, 1948*, HOLLYWOOD RENEGADES ARCHIVE (2005), http://www.cobbles.com/simpp_archive/paramountcase_6supreme1948.htm. The weakest of the five theater-owning studios, RKO was eager to see all five studios be subjected to divestiture, as a way to put the studios on equal footing. *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* Paramount Pictures, Inc., 1948-49 Trade Cas. (CCH) ¶62, 377 (S.D.N.Y. Mar. 3, 1949).

⁷⁸ *United States v. Paramount Pictures*, 85 F. Supp. 881, 887 (1949).

⁷⁹ *Id.* at 885.

⁸⁰ *Id.* at 889-895.

themselves.”⁸¹ In cities with populations greater than 100,000, “there was in general little competition among the defendants, although considerably more than in towns of under 100,000.”⁸² The Court found this evidence showed that the geographic distribution of the studios’ theater holdings substantially eliminated or limited competition among them.⁸³

We do hold that the geographical distribution became a part of the system in which competition was largely absent and the status of which was maintained by fixed runs, clearances and prices, by pooling agreements and joint ownerships among the major defendants, and by cross-licensing which made it necessary that they should work together. The argument of some of the defendants that they had no opportunity to change this geographical status not only seems inherently improbable but affirmatively contradicted by the making of pooling agreements and entering into joint ownerships with one another. Moreover, even in the relatively few areas where more than one of the major defendants had theatres, competition for first-run licensing privileges was generally absent because the defendants customarily adhered to a set method in the distribution and playing of their films.⁸⁴

After determining that the studios’ theater holdings were illegal restraints of trade, the District Court held that divestiture was the appropriate remedy.⁸⁵ Even in the wake of the RKO and Paramount consent decrees, the Court held that “the divorcement we have determined to order appears to be the only adequate means of terminating the conspiracy and preventing any resurgence of monopoly power.”⁸⁶

⁸¹ *Id.* at 889. “There appears to be little, if any competition among the five defendants . . . in 97% of the towns and in respect to 95% of the theatres in which they had interest.” *Id.* at 890.

⁸² *Id.* Only 27% of the studios’ theaters in these larger cities were in competition with each other. *Id.* at 892.

⁸³ *Id.* at 890-892.

⁸⁴ *Id.* at 892-893.

⁸⁵ *Id.* at 895 (explaining why a simple injunction would be inadequate).

⁸⁶ *Id.* at 896 (“[T]he monopoly power might be built up again if the illegal practices were not terminated by divorcement, irrespective of the fact that two of the conspirators have been eliminated from the controversy by the consent decrees.”).

4. *The Remaining Studios Sign Consent Decrees*

After the District Court's decision in 1949, the remaining three theater-owning studios signed consent decrees with the Justice Department (Twentieth Century-Fox and Warner Bros. signed their respective decrees in 1951, while Loew's held out on signing its decree until 1954).⁸⁷

III. THE LANDSCAPE OF HOLLYWOOD AFTER THE PARAMOUNT DECREES

The Paramount Decrees dramatically reduced the amount of control that the major studios enjoyed over the motion picture industry. Other players in the industry (most notably theaters and star-level actors) suddenly found themselves with leverage against the studios, and exercised it accordingly. As a result, the studio's business model changed to correspond with the new challenges they faced.

A. *Major Studios Come and Go*

Perhaps the biggest change from the Pre-Decrees era is the makeup of the major studios. While the eight defendants in *Paramount* included Paramount, Warner Bros., Twentieth Century-Fox, RKO, Loew's, Universal, Columbia, and United Artists, today only six major studios exist: Disney, Paramount, Warner Bros., Sony, Twentieth Century-Fox (currently in the process of being acquired by Disney)⁸⁸, and Universal.⁸⁹

⁸⁷ Twentieth Century-Fox Corp., 1950-51 Trade Cas. (CCH) ¶ 62, 861 (S.D.N.Y. June 7, 1951); Warner Bros. Pictures, 1950-51 Trade Cas. (CCH) ¶ 62, 765 (S.D.N.Y. Jan. 4, 1951); Loew's (MGM), 1952-53 Trade Cas. (CCH) ¶ 67, 228 (S.D.N.Y. Feb. 7, 1952). See Ricard Gil, *An Empirical Investigation of the Paramount Antitrust Case*, 42 APPLIED ECON., Jan. 2010, at 171; U.S. DEP'T OF JUST., *supra* note 2. By this time, Columbia, Universal, and United Artists had also signed consent decrees. Columbia Pictures Corp. (Sony), 1950-51 Trade Cas. (CCH) ¶ 62, 573 (S.D.N.Y. Feb. 8, 1950); Universal Pictures, 1950-51 Trade Cas. (CCH) ¶ 62, 573 (S.D.N.Y. Feb. 8, 1950); United Artists, 1950-51 Trade Cas. (CCH) ¶ 62, 573 (S.D.N.Y. Feb. 8, 1950).

⁸⁸ Edmund Lee and Brooks Barnes, *Disney and Fox Shareholders Approve Deal, Ending Corporate Duel*, THE NEW YORK TIMES (July 27, 2018), <https://www.nytimes.com/2018/07/27/business/media/disney-fox-merger-vote.html> [<https://perma.cc/GM2E-AQ59>].

⁸⁹ Anthony D'Alessandro, *As Domestic B.O. Hits All-Time \$11.37B Record, The Industry Wants A Revolution: 2016 Studio Market Share – Update*, DEADLINE (Jan. 3, 2017, 6:37 PM), <https://deadline.com/2017/01/highest-grossing-movie-studios-2016-us-box-office-1201876405/> [<https://perma.cc/L8VV-2HA7>]. Columbia has

B. Studios No Longer Wield Complete Control of the Industry

Due to divestiture from their theaters and the prohibition on block booking, studios lost the ability to dictate which films theaters were required to run.⁹⁰ Instead, the theater owners themselves are now able to choose what movies they want to show on their screens.⁹¹ Theater owners generally do not give preferences to certain studios, instead opting to license films that they think will perform the best at the box office.⁹² Once they divested from their theater holdings, studios also lost the ability to leverage censorship codes into blocking independent producers from showing their films in theaters.⁹³ Consequently, the major studios had newfound competition from smaller studios and independent filmmakers for screen time in theaters.⁹⁴ The amount of independent producers increased from virtually none in the pre-

since been purchased by Sony. EPSTEIN, *supra* note 6 at 14-15. After signing its Decree, Loew's split into a theater chain (Loew's, later acquired by AMC Theaters), Gabriel Snyder, *AMC, Loews Toast Merger Completion*, VARIETY (Jan. 26, 2006, 3:48 PM), <https://variety.com/2006/film/markets-festivals/amc-loews-toast-merger-completion-1117936927/> [<https://perma.cc/E9FF-K4VM>],) and a production studio (MGM, also later purchased by Sony, Andrew Ross Sorkin, *Sony Agrees to Buy MGM for Nearly \$5 Billion*, THE NEW YORK TIMES (Sept. 13, 2004), <https://www.nytimes.com/2004/09/13/business/media/sony-agrees-to-buy-mgm-for-nearly-5-billion.html> [<https://perma.cc/GCW2-M3D8>]). EPSTEIN, *supra* note 6 at 14-15. RKO was purchased by Viacom, who is also now the parent company of Paramount. EPSTEIN, *supra* note 6 at 14-15. United Artists underwent a series of purchases and relaunches, but is no longer a major player in the industry. *See* David Thomson, *Dream factory*, GUARDIAN: FILM (Feb. 22, 2008, 7:03 PM), <https://www.theguardian.com/film/2008/feb/23/film> . [<https://perma.cc/S8AD-RUN8>].

⁹⁰ "Paramount Pictures executives were angry at no longer having first rights to the Paramount Theatre screen regardless of the quality of the picture offered." MICHAEL CONANT, *ANTITRUST IN THE FILM INDUSTRY* 111 (1960).

⁹¹ EPSTEIN, *supra* note 6, at 17. CONANT, *supra* note 90 at 110-111.

⁹² *Id.* at 111. "Two legal barriers seemed to operate effectively to bar treatment of their former theaters. First, such preferences would violate the divorcement decrees and could lead to contempt action against both the distributor and the exhibitor circuit. Second, the shares of the four circuits which had completed divorcement were publicly held. The officers and directors of each theater firm had a fiduciary duty to their firm to maximize its profits by booking those films which they honestly thought would accomplish this end. Under this obligation they could not legally give continued preference to their former affiliated distributor regardless of picture quality. To do so would have subjected these officers and directors to a possible shareholders' representative suit in which the corporation might collect from them such profits as were lost through their deliberate mismanagement." *Id.*

⁹³ *Id.* at 113-114.

⁹⁴ *Id.* at 112-113. EPSTEIN, *supra* note 6, at 17.

Paramount Decrees era to 100 in 1947 and 165 in 1957.⁹⁵ More recently, the major studios produced less than half of the 473 films released in 2003,⁹⁶ a far cry from the domination these studios enjoyed prior to the Decrees.

Theaters and independent producers were not the only ones exercising their increased power in the industry: actors began dismantling the star system through a series of separate lawsuits against the major studios.⁹⁷ For example, actress Olivia de Havilland sued Warner Bros. in 1944.⁹⁸ The Court ruled that, under §2855 of the California Labor Code, personal service contracts could not be extended beyond seven calendar years, regardless of how many years of “actual service” had been performed.⁹⁹ The ensuing “De Havilland Law” led to the dismantling of the star system and helped usher in the free agency system for Hollywood.¹⁰⁰

Freed from the star system, actors and actresses negotiated deals as free agents with studios.¹⁰¹ In the late twentieth century, when a film’s box office could rise based on the cache of its star,¹⁰² studios were eager to build and maintain relationships with big-name actors

⁹⁵ CONANT, *supra* note 90, at 112-113.

⁹⁶ EPSTEIN, *supra* note 6, at 17.

⁹⁷ See *De Havilland v. Warner Bros. Pictures, Inc.*, 67 Cal. App. 2d 225 (1944) (challenging the ability of studio to extend contracts beyond seven years). See also *Parker v. Twentieth Century-Fox Film Corp.*, 3 Cal. 3d 176 (the famous “Bloomer Girl” law school case, in which Shirley MacLaine Parker sued Twentieth Century-Fox for swapping which film it wanted Parker to star in).

⁹⁸ *De Havilland*, 67 Cal. App. 2d.

⁹⁹ *De Havilland*, 67 Cal. App. 2d. “We cannot believe that the phrase ‘for a term not beyond a period of seven years’ carries a hidden meaning.” *Id.* at 232 (discussing the change in language of the amended statute from the original.) See Cal. Lab. Code. §2855 (Deering 2018).

¹⁰⁰ Jeffrey B. Same, Comment, *Breaking the Chokehold: An Analysis of Potential Defenses Against Coercive Contracts in Mixed Martial Arts*, 2012 MICH. ST. L. REV. 1057, 1077-1080 (2012). “It is commonly accepted that *De Havilland* and its interpretation of section 2855 (sometimes referred to as the ‘de Havilland law’) freed actors from the ‘old Hollywood studio system, which hampered or ruined many actors’ careers by holding them to long-term contracts’ and initiated an era of ‘free agency’ for actors. As a result, actors gained the ability to negotiate new contracts based on their fair market value.” Note, *California Labor Code Section 2855 and Recording Artists’ Contracts*, 116 HARV. L. REV. 2632, 2635 (2003).

¹⁰¹ BEN FRITZ, THE BIG PICTURE: THE FIGHT FOR THE FUTURE OF MOVIES 87 (2018).

¹⁰² At the time, recruiting A-list actors and actresses was shown to have a positive impact on box office performance. Sarah Jane Gilbert, *The Box Office Power of Stars*, HARVARD BUSINESS SCHOOL WORKING KNOWLEDGE (Oct. 3, 2005), <https://hbswk.hbs.edu/item/the-box-office-power-of-stars> [<https://perma.cc/5KEY-BMPG>].

and actresses. As a result, studios often convinced stars to set up their own production companies, and entered into “first-look” deals with these one-star companies.¹⁰³ First-look deals usually involved a studio agreeing to cover overhead for producing a film if they could have the right of first refusal for any film the star’s production company decided to greenlight.¹⁰⁴ When stars could still drive audiences to the box office, these deals often worked for both parties: actors could make (and star in) the movies they wished, and received financial backing from the studios to do so. On the other hand, studios were able to build strong connections with actors and ensured they continued to keep them in their movies.¹⁰⁵ However, these deals turned one-sided as stars lost their influence as box office drivers.¹⁰⁶

After the Decrees, major studios not only lost their influence to other players within the industries; they also faced new competition from outside of Hollywood. Television emerged as an alternative form of entertainment, and led to a decline in theater audiences.¹⁰⁷ Thus, distributors could no longer rely on large audiences for their films, and instead had to “create” audiences for each upcoming film.¹⁰⁸ In order to entice viewers to head to the box office, massive amounts were spent on marketing upcoming films.¹⁰⁹

C. Cost of Production Increases

The Paramount Decrees led to a skyrocketing of production costs for movies.¹¹⁰ The average production cost more than doubled in just

¹⁰³ FRITZ, *supra* note 101, at 87. These arrangements did not guarantee that a star would work exclusively with one studio, but first-look deals were integral in earning the loyalty of coveted actors and actresses. *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ “That’s why Clint Eastwood has made so many movies for Warner Bros., Leonardo DiCaprio for Paramount, and James Cameron for Fox. *Id.*

¹⁰⁶ *Id.* at 93-99. Household-name actors are no longer reliable in attracting audiences. EDWARD JAY EPSTEIN, *THE HOLLYWOOD ECONOMIST* 151 2d ed. (2012).

¹⁰⁷ Theater attendance declined from 60% in the 1940s to less than 10% in 1964. Caterina Cowden, *Movie Attendance Has Been On A Dismal Decline Since The 1940s*, *BUSINESS INSIDER* (Jan. 6, 2015, 7:35 AM), <https://www.businessinsider.com/movie-attendance-over-the-years-2015-1>. [<https://perma.cc/4URG-5TMM>].

¹⁰⁸ EPSTEIN, *supra* note 106, at 149-160 (describing the major-studio marketing strategies). *E.g.*, EPSTEIN, *supra* note 6 at 175-190 (detailing the various stages of “audience creation”).

¹⁰⁹ *Supra* note 108.

¹¹⁰ EPSTEIN, *supra* note 6, at 18.

three years, rising from \$732,000 in 1947¹¹¹ to \$1,800,000 in 1950.¹¹² And costs only continued to increase over time.¹¹³ Even after adjusting for inflation, “the cost of producing films had increased more than sixteen times since the collapse of the studio system.”¹¹⁴

As they lost the ability to force low-quality movies onto theaters, studios became unable to churn out movies with factory-style efficiency.¹¹⁵ Instead, film production now requires adequate attention to ensure the film would be appealing to theaters (and their audiences).¹¹⁶ Studios now make box office projections prior to a film being greenlit, and a film is judged based on whether they meet projections, not simply whether they are profitable.¹¹⁷

D. Using Blockbusters to Capitalize on Licensing and Home Entertainment

Due to the new competition and increased costs, the major studios adapted their business model, with studios placing less emphasis on the box office and more emphasis on opportunities for home entertainment and intellectual property licensing.¹¹⁸ Today, the actual box office is no longer a source of significant revenue for the major studios.¹¹⁹ In fact, most films’ box office revenue fails to cover their costs.¹²⁰

¹¹¹ *Id.* at 9.

¹¹² CONANT, *supra* note 90, at 116. Paramount Pictures was able to keep their costs slightly lower than its competitors, with an average production cost of \$1,144,000 for the 25 films it produced in 1950. *Id.*

¹¹³ The average production cost in 2003 was \$63.8 million. EPSTEIN, *supra* note 6, at 18.

¹¹⁴ *Id.*

¹¹⁵ *Supra* text accompanying notes 5-31.

¹¹⁶ See EPSTEIN, *supra* note 106, at 149-157.

¹¹⁷ FRITZ, *supra* note 101, at 31-32.

¹¹⁸ Adam Davidson, *How Does the Film Industry Actually Make Money?*, THE NEW YORK TIMES MAGAZINE (Jun. 26, 2012), <https://www.nytimes.com/2012/07/01/magazine/how-does-the-film-industry-actually-make-money.html>. [<https://perma.cc/9CUL-9RJT>]. EPSTEIN, *supra* note 6 at 225-228.

¹¹⁹ The percentage of studios’ revenue coming from the box office decline from 100% in 1948 to 53% in 1980 to just 18% in 2003. *Id.* at 20.

¹²⁰ *Id.* at 16. Determining the profitability of a film is not as simple as comparing box office receipts to the production budget; a studio often has to split the box office revenue with other entities, and the production budget does not account for the extraordinary expense of marketing a film in order to create audience awareness. For an in-depth look at the opaque accounting methods used in the film industry, see EPSTEIN, *supra* note 106.

With the box office diminishing as a revenue source, studios needed to find other ways to make a profit. Home entertainment and IP licensing became major sources of revenue, eventually becoming the focus of the business. Theater windows (the time a movie would run in theaters prior to being released in home entertainment format) shortened in order to capitalize on the home entertainment market.¹²¹

Studios also had to find a way to differentiate themselves from television programming in order to attract audiences to theaters. The solution was to turn movies into “events,” filled with special effects and action that could not be replicated by TV. This led to an increase of costs, on top of the expenses added as a result of the Paramount Decrees.¹²²

As the cost of producing a film increased, studios began making less films. The largest film distributors in the U.S. released 290 films in 1947.¹²³ By 1954 (the year the final *Paramount* defendant had signed its Consent Decree), however, the number of releases had declined to 269.¹²⁴ And the number of releases continues to decline to this day. The major studios accounted for just 93 movies releases in 2016, 79 releases in 2017, and 85 releases in 2018.¹²⁵ Disney, the current leader among studios, serves as a microcosm: the studio’s annual releases have declined from 30 in 2005 to 21 in 2007 to just 10 in 2013.

A decrease in the number of films meant that each film took on greater importance with respect to a studio’s bottom line, and, as a result, producing a film became a risky endeavor. Studios began looking for ways to reduce the risk involved in producing and distributing movies. They began leaning heavily on big-name actors, and more recently, recognizable intellectual property. Existing intellectual property reduced the costs of advertising a film (since audiences had existing awareness of the franchise) as well as making it easier to project a film’s success. “The main task of today’s studio is to collect fees for the use of the intellectual properties they control in one form or another and then to allocate those fees among the parties—including themselves—who create, develop, and finance the

¹²¹ EPSTEIN, *supra* note 6, at 214-215.

¹²² EPSTEIN, *supra* note 106, at 41-43.

¹²³ CONANT, *supra* note 90, at 120. The number of releases actually reached as many as 352 in 1951. *Id.*

¹²⁴ *Id.* “By 1954 most of the leading producer-distributors had adopted a policy of fewer, more expensive films.” *Id.*

¹²⁵ *Domestic Movie Theatrical Market Summary 1995 to 2018*, THE NUMBERS (last visited Nov. 26, 2018, 8:22 PM), <https://www.the-numbers.com/market/>.

[<https://perma.cc/FF3Z-QGKN>].

properties.”¹²⁶ 43 of the top 50 highest grossing movies from 2012-2016 were based on existing properties or franchises.¹²⁷

Disney has taken the franchise model to an extreme. The studio now only releases movies from the Marvel and Star Wars franchises, remakes and reboots of existing Disney properties, and a few original animated family films.¹²⁸ “Disney isn’t in the movie business...It’s in the Disney brands business. Movies are meant to serve those brands. Not the other way around.”¹²⁹

Whatever one thinks of the artistic merits of Disney’s strategy, it is difficult to say that it is anything other than a success financially. From 2013-2016, “Disney has ranked number one or number two at the box office every year, despite consistently releasing fewer movies than the other five major studios.”¹³⁰ During that time period, Disney is responsible for 18 of the 40 highest grossing films.¹³¹ From 2014-2016, Disney’s profit margin more than doubled those of other studios¹³² Disney’s 2017 profit margin was nearly 28%, compared to Warner Bros.’ 13%, Universal’s 17%, Fox’s 8%, Sony’s 4%, and Paramount’s -7%.¹³³

Nowhere is the success of Disney’s IP-heavy business model more apparent than with the Marvel franchise. Disney does not simply capitalize on existing well-known characters with the Marvel franchise, but has turned the brand into a “cinematic universe,” setting each film (and its characters) in the same fictional reality.¹³⁴ This connects each Marvel film to one another even when they are not linear sequels to each other. “Marvel Studios had the business insight, completely new at the time, that by linking movies with different characters, it could get the benefit of sequels without having to wait two or three years to reunite the same actors.”¹³⁵

¹²⁶ EPSTEIN, *supra* note 6, at 107.

¹²⁷ FRITZ, *supra* note 101 at xix.

¹²⁸ *Id.* at 144.

¹²⁹ *Id.* at 145-146.

¹³⁰ *Id.* at 144.

¹³¹ *Id.*

¹³² “Disney’s motion-picture profit margin reached 21 percent in fiscal 2014, 24 percent in 2015, and 29 percent in 2016.” *Id.* at 162. Other major studios were “maxing out” at a profit margin of 10% during the same time period. *Id.* at 144.

¹³³ See Paul Bond & Georg Szalai, *Studio-by-Studio Profit Report: Disney Reigns, Viacom Stems Losses*, THE HOLLYWOOD REPORTER (Feb. 23, 2018, 5:45 AM), <https://www.hollywoodreporter.com/news/studio-by-studio-profit-report-disney-reigns-viacom-stems-losses-1086505>. [<https://perma.cc/P7EQ-S4Z4>].

¹³⁴ FRITZ, *supra* note 101, at 66.

¹³⁵ *Id.* at 66.

Each Marvel film usually includes one or more post-film “stingers,” short clips featuring characters from upcoming films and alluding to future events within the cinematic universe.¹³⁶ These stingers are 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.¹³⁷ By keeping every movie connected within the universe, Disney has turned each Marvel movie into a “quasi-sequel,” which serves to make revenues and costs for future projects more predictable.¹³⁸

The Marvel universe has had unprecedented success unlike any other movie franchise. As of December 1, 2018, Marvel’s 20 releases have grossed more than \$6.8 billion domestically, with an average domestic box office of \$343 million.¹³⁹ Marvel also boasts three of the top ten highest grossing domestic films (*Black Panther*, *Avengers: Infinity War*, and *The Avengers*),¹⁴⁰ and all three films are in the top 35 even after adjusting for inflation.¹⁴¹ *Infinity War* also holds the record for opening weekend (both domestically and worldwide) as well as being the fastest film to gross \$150 million, \$200 million, and \$250 million domestically.¹⁴²

The increase in franchise films has coincided with another trend in the industry: after the Paramount Decrees, studios began targeting younger audiences more and more.¹⁴³ Not only does the younger

¹³⁶ Alex Suskind, *You’re Still Here?’: A Brief History of the Movie Post-Credits Sequence*, VULTURE: BRIEF HISTORIES (Apr. 8, 2014), <https://www.vulture.com/2014/04/brief-history-of-movie-post-credits-sequences.html>. [<https://perma.cc/2CGW-94TM>].

¹³⁷ *Id.*

¹³⁸ FRITZ, *supra* note 101, at 67.

¹³⁹ *Franchises: Marvel Cinematic Universe*, BOX OFFICE MOJO (last visited December 1, 2018, 6:55 PM), <https://www.boxofficemojo.com/franchises/chart/?id=avengers.htm>. [<https://perma.cc/SN9R-HT2Y>].

¹⁴⁰ *All Time Box Office: Domestic Grosses*, BOX OFFICE MOJO (last visited December 1, 2018, 6:55 PM), <https://www.boxofficemojo.com/alltime/domestic.htm>. [<https://perma.cc/A93G-S3KW>].

¹⁴¹ *All Time Box Office: Domestic Grosses Adjusted for Ticket Price Inflation*, BOX OFFICE MOJO (last visited December 1, 2018, 6:55 PM), <https://www.boxofficemojo.com/alltime/adjusted.htm>. [<https://perma.cc/NL3N-JTME>].

¹⁴² *All Time Box Office: All Time Records (By Record Holder)*, BOX OFFICE MOJO (last visited December 1, 2018, 6:55 PM), <https://www.boxofficemojo.com/alltime/?page=byrecord&p=.htm>. [<https://perma.cc/4CNX-H8ZU>].

¹⁴³ EPSTEIN, *supra* note 6, at 20. EPSTEIN, *supra* note 106, at 151-157.

demographic have more free time to go to the theaters, they also spend more time watching TV (and thus are more susceptible to TV advertising). It is also easier to market intellectual property-licensed products (such as toys, video games, and apparel) to children and teenagers than it is to adults.¹⁴⁴ Almost half of all box office revenue came from films rated PG-13 (targeted at the crucial teenage market).¹⁴⁵

E. Studios Find Other Ways to Reduce Risk

Besides a reliance on big-budget franchise blockbuster, studios have also used other methods to reduce their risk. The distribution portion of the business has taken on a greater importance since the Decrees, with studios acting as distributors even for films that they did not produce themselves.¹⁴⁶ Despite the Decrees' attempts at breaking up monopolization, major studios still dominate the distribution channels because theater chains believe that major studios are the only entities with the capability to handle large scale releases and generate the required audience awareness.¹⁴⁷ As a result, studios maintain a close relationship with theater chains and continue to have leverage in scheduling and booking the release calendar.¹⁴⁸ Acting as distributors allows the studios to retain control of royalty and fee calculations. Usually, complicated formulas are used to ensure studios retain as much of the profit for a given movie as possible, before allocating the other parties their share of the proceeds.¹⁴⁹

Movie studios are still engaging in activities that seem similar to the type of behavior prohibited by the Paramount Decrees. The theatrical release calendar is built around studios cooperating with each other to avoid head-to-head competition between similar movies.¹⁵⁰ This cooperation is dependent upon information provided

¹⁴⁴ *Id.*

¹⁴⁵ *Market Charts: MPAA Ratings*, THE NUMBERS (last visited Nov. 28, 2018, 10:51 PM), <https://www.the-numbers.com/market/mpaa-ratings>. [<https://perma.cc/Z7HS-J7RE>].

¹⁴⁶ "Each of the big six studios, Warner Bros., Disney, Fox, Sony, Paramount, and Universal, has a wholly owned distribution arm that distributes titles that it finances, titles that it co-finances with partners, and titles produced and financed by outside production companies and so-called studio-less studios." EPSTEIN, *supra* note 106 at 112.

¹⁴⁷ *Id.* at 112-113.

¹⁴⁸ *Id.*

¹⁴⁹ EPSTEIN, *supra* note 6, at 119-125.

¹⁵⁰ EPSTEIN, *supra* note 106, at 138-142.

by the National Research Group (NRG).¹⁵¹ NRG polls potential moviegoers to determine the demographic appeal of specific movies, and then compiles this information into a weekly “Competitive Positioning” report, which is then supplied to each of the major studios.¹⁵² If the report shows that two films marketed to the same demographic group are set to be released on the same weekend (and thus eating into each other’s potential profit), one of the studios will choose a different release date for their movie (often the movie showing lower levels of awareness in the report) in order to avoid the head-to-head conflict (and thus maximize each films’ profit).¹⁵³ This system has avoided antitrust scrutiny because there is no direct communication between the studios; NRG acts as an intermediary, providing a standard basis of information and helping orchestrate cooperation.¹⁵⁴

Another aspect of the industry that some consider to be anticompetitive is the system of uniform pricing for theatrical releases that has been in place since 1970.¹⁵⁵ With the exception of some variance that has nothing to do with perceived quality of the films, ticket prices for all movies are generally the same.¹⁵⁶ Even after initial release (when interest can be quantified), prices remain uniform, regardless of the positive or negative reception a film receives.¹⁵⁷ Some wonder whether this is really any different than the minimum pricing or block booking schemes utilized in the pre-Decrees era.¹⁵⁸

¹⁵¹ *Id.* NRG has exclusive contracts with each of the major studios, ensuring that it is the sole provider of demographic-appeal information for the studios’ movies. *Id.* “Because of this monopoly of information, the report provides the studios with a common basis on which to make their scheduling decisions.” *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ EPSTEIN, *supra* note 6, at 97.

¹⁵⁵ See Orbach, *supra* note 11, at 317-318.

¹⁵⁶ Reynolds, *supra* note 11, at 14-16.

¹⁵⁷ *Id.* at 36-37 (explaining the difficulties in attempting to adjust prices after initial release, particularly that lowering price post-release could cause potential viewers “to second-guess whether a film is worth their time.”).

¹⁵⁸ “By averaging ticket prices, exhibitors are economically tying one product to another, similar to block-booking.” *Id.* at 19. “Uniform pricing practices are thus in many ways a scheme unfriendly to moviegoers. Rather than set a reduced price for a film forecasted to be worth less to audiences, distributors (and thus exhibitors under their influence) hope that enough people will be duped into paying a uniform inflated price to make up for the lessened demand for the film and the underpricing of higher-value films.” *Id.*

IV. REMOVING THE DECREES

The Decrees have shaped the twists and turns Hollywood has taken since 1948; they may cease to do so in the very near future. The Department of Justice is currently reviewing the Paramount Decrees as part of a broader deregulation effort aimed at “outdated” antitrust provisions.¹⁵⁹ In explaining the need for review, the Department cited the dramatic changes in the film industry:

“The Paramount Decrees have been on the books with no sunset provisions since 1949,” the Justice Department’s antitrust chief Makan Delrahim said in a statement. “Much has changed in the motion picture industry since that time. It is high time that these and other legacy judgments are examined to determine whether they still serve to protect competition.”¹⁶⁰

The questions specifically posed by the Department of Justice include: whether the Decrees’ restrictions on various practices are still needed to protect competition; whether any of these restrictions ineffective or have anticompetitive effects; whether any modifications would enhance competition; what the effect of terminating the Decrees would be; whether changes in the industry have rendered the Decrees unnecessary; and whether existing antitrust law is sufficient to protect competition in Hollywood.¹⁶¹ The Department’s request for public input has not gone unnoticed. Numerous comments have been filed with the Department, mainly from independent theater chains espousing the necessity of the Decrees’ antitrust restrictions.¹⁶²

In any event, the actual effectiveness of any rollback of the Decrees would likely depend on judiciary action (to overturn *Paramount*).¹⁶³ However, studios could see any action by the Department of Justice as a signal to begin testing the courts’ tolerance for previously prohibited conduct.¹⁶⁴ The Supreme Court may decide that restrictions

¹⁵⁹ *Supra* note 2.

¹⁶⁰ Faughnder, *supra* note 2.

¹⁶¹ THE UNITED STATES DEPARTMENT OF JUSTICE, *supra* note 1.

¹⁶² THE UNITED STATES DEPARTMENT OF JUSTICE, PARAMOUNT CONSENT DECREE REVIEW PUBLIC COMMENTS 2018 (2018), <https://www.justice.gov/atr/paramount-consent-decree-review-public-comments-2018#comments>.

¹⁶³ *See* Gardner, *supra* note 2.

¹⁶⁴ “If we assume that the Consent Decrees restrained the industry from excessively unfair pacts, what will happen if they are struck down? Will the studios begin flexing their muscles and seeing what they can get away with under antitrust laws? It’s just a matter of time before we know.” *Reconsidering the Consent Decrees*,

on practices such as block booking and clearances are no longer appropriate in today's entertainment environment.¹⁶⁵

In fact, several recent lawsuits have alleged antitrust violations from large theater chains, alleging that these chains used their control of the market to obtain exclusive licenses with studios that prevent smaller theaters from screening popular films.¹⁶⁶ One ongoing case recently survived a motion to dismiss, with the D.C. District Court concluding that the plaintiffs (a group of small theaters) sufficiently alleged that the defendant (the national chain Landmark Theatres) committed antitrust violations.¹⁶⁷ While the major studios have not been named as parties in any of these cases, "those studios are said to have acquiesced" to major theater chains' demands for exclusive licenses.¹⁶⁸ Such a relationship between major studios and theater chains harkens back to the pre-*Paramount* era when studios enjoyed control over theaters to the detriment of the less influential players in Hollywood.

FILM JOURNAL INTERNATIONAL (Sept. 6, 2018), <http://www.filmjournal.com/columns/reconsidering-consent-decrees>.

¹⁶⁵ Eriq Gardner, *The Real Impact of Getting Rid of the Paramount Consent Decrees*, THE HOLLYWOOD REPORTER (Aug. 16, 2018, 6:55 AM), <https://www.hollywoodreporter.com/thr-esq/real-impact-getting-rid-paramount-consent-decrees-1134938>.

¹⁶⁶ Eriq Gardner, *Antitrust Lawsuit Accuses AMC Entertainment of Hurting Hispanic Community via Studios Pacts*, THE HOLLYWOOD REPORTER (Apr. 21, 2015, 9:15 AM), <https://www.hollywoodreporter.com/thr-esq/antitrust-lawsuit-accuses-amc-entertainment-790440>. Eriq Gardner, *Regal Said to Have Abused Movie Theater Monopoly in Nation's Capital*, THE HOLLYWOOD REPORTER (Jan. 27, 2016, 7:30 AM), <https://www.hollywoodreporter.com/thr-esq/regal-said-have-abused-movie-859747>. Lawsuits against AMC and Regal, respectively, have since been settled out of court. Ashley Cullins, *AMC Settles Lawsuit Over Alleged Conspiracy With Major Studios*, THE HOLLYWOOD REPORTER (Sept. 14, 2018, 6:59 PM), <https://www.hollywoodreporter.com/thr-esq/amc-settles-lawsuit-viva-cinemas-alleged-conspiracy-major-studios-1143574>. Eriq Gardner, *Regal Settles Monopoly Suit Led by Mark Cuban's Landmark Theatres*, THE HOLLYWOOD REPORTER (Aug. 4, 2016, 4:07 PM), <https://www.hollywoodreporter.com/thr-esq/regal-settles-monopoly-suit-led-922636>.

¹⁶⁷ 2301 M Cinema LLC v. Silver Cinemas Acquisition Co., 2018 U.S. Dist. LEXIS 167176, at *25 (D.D.C. 2018). Eriq Gardner, *Mark Cuban's Landmark Theatres Must Face Antitrust Lawsuit*, THE HOLLYWOOD REPORTER (Oct. 1, 2018 9:27 AM), <https://www.hollywoodreporter.com/thr-esq/mark-cubans-landmark-theatres-face-antitrust-lawsuit-1148226>.

¹⁶⁸ Gardner, *supra* note 166.

A. Removing the Decrees Could Provide the Freedom Necessary to Fend Off New Competition

One main concern in Hollywood is that tech giants like Amazon and Netflix are looming on the horizon,¹⁶⁹ and that studios need more freedom in order to compete. Streaming services have already eaten into studios' DVD sales, eroding an important revenue source for the studios.¹⁷⁰ Unlike the 1940s, consumers now have nearly-limitless content offered to them,¹⁷¹ most of it coming from somewhere other than Hollywood.¹⁷² This content is cheaper to create than a studio-produced movie,¹⁷³ and thus can be offered at lower prices to consumers.¹⁷⁴ Additionally, independent producers, once financed and

¹⁶⁹ "Major studios are feeling mounting pressure as Netflix gains a stronger foothold in the entertainment market. Netflix retains a \$152.29 billion market cap in comparison to Viacom's \$12.29 billion and 21st Century Fox's \$84.14 billion." Victoria Graham, *Big Movie Studios, Theater Chains Win if Antitrust Rules Lifted*, ANTITRUST ON BLOOMBERG LAW (Aug. 10, 2018), <https://www.bna.com/big-movie-studios-n73014481670/>.

¹⁷⁰ DVD sales fell 11% in 2014 and 12% in 2015. Benjamin Linell, *Dealing with Uncertainty in the Hollywood Movie Industry*, 5, <http://www.diva-portal.se/smash/get/diva2:1118990/FULLTEXT01.pdf>

¹⁷¹ Netflix had over 576 hours of original content on its streaming platform in 2016. Samantha Rullo, *Here's How Long It Would Take To Watch Every Single Netflix Original Series—INFOGRAPHIC*, BUSTLE (Feb. 3, 2017), <https://www.bustle.com/p/heres-how-long-it-would-take-to-watch-every-single-netflix-original-series-infographic-35403>. 487 original scripted TV programs were aired in 2017. John Koblin, *487 Original Programs Aired in 2017. Bet You Didn't Watch Them All.*, THE NEW YORK TIMES (Jan. 5, 2018), <https://www.nytimes.com/2018/01/05/business/media/487-original-programs-aired-in-2017.html>. TV is no longer the only outside competitor movie studios have to worry about: over 400 hours of content is uploaded to YouTube *per minute*, and the website's users are watching an eye-popping one billion hours of videos daily. Jack Nicas, *YouTube Tops 1 Billion Hours of Video a Day, on Pace to Eclipse TV*, THE WALL STREET JOURNAL (Feb. 27, 2017, 1:40 PM), <https://www.wsj.com/articles/youtube-tops-1-billion-hours-of-video-a-day-on-pace-to-eclipse-tv-1488220851>.

¹⁷² See note 169.

¹⁷³ For example, the production budget for Netflix's *Stranger Things 2* was \$8 million per episode for nine episodes (\$72 million total). Maureen Ryan and Cynthia Littleton, *TV Series Budgets Hit the Breaking Point as Costs Skyrocket in Peak TV Era*, VARIETY (Sept. 26, 2017, 8:44 AM), <https://variety.com/2017/tv/news/tv-series-budgets-costs-rising-peak-tv-1202570158/>. While this was considered a substantial investment relative to other TV shows, \$72 million for nearly nine hours of content would be a bargain by Hollywood standards. See *id.*

¹⁷⁴ For example, Netflix subscription plans (giving viewers access to the entire streaming platform) range from \$7.99 to \$13.99 per month. Lizzie Plaugic, *Netflix is raising its prices for US subscribers*, THE VERGE (Oct. 5, 2017, 10:02 AM),

distributed by the “indie” arms of the major studios,¹⁷⁵ are now looking to Netflix and Amazon for survival.¹⁷⁶ The streaming platforms, hungry for content, have been more than happy to oblige them.¹⁷⁷ In 2017, 41 of 119 feature films showed at the Sundance Film Festival were purchased.¹⁷⁸ Of these 41, 10 were purchased by Netflix, and Amazon picked up 5, the highest acquisition totals for both companies.¹⁷⁹ The freedom that streaming platforms can provide to independent filmmakers desperate for an opportunity is “often too much...to turn away from.”¹⁸⁰

What’s more, even theaters are starting to look elsewhere as studios lose their grip on the industry.¹⁸¹ IMAX has had discussions with Amazon, Hulu, and Netflix about releasing each company’s respective original content on their screens.¹⁸² Indeed, IMAX debuted the Netflix original *Crouching Tiger, Hidden Dragon: The Green*

<https://www.theverge.com/2017/10/5/16429126/netflix-price-raise-standard-premium-tiers>. This is compared to \$9.38, which was the average price for a single movie ticket in the second quarter of 2018. Pamela McClintock, *Average Movie Ticket Price Hits Record High of \$9.38 in Second Quarter*, THE HOLLYWOOD REPORTER (Jul. 18, 2018, 2:03 PM),

<https://www.hollywoodreporter.com/news/average-movie-ticket-price-hits-record-high-938-second-quarter-1128169>.

¹⁷⁵ “In recent years, many of the indie-boutique shingles that the major studios once supported—Paramount Vantage, Warner Independent Pictures—have closed up shop... Those that remain, including Fox Searchlight, Miramax, and Focus Features, have been weakened.” Sean Fennessey, *The End of Independent Film As We Know It*, THE RINGER (Apr. 10, 2017, 11:49 AM),

<https://www.theringer.com/2017/4/10/16044256/netflix-amazon-studios-independent-film-sundance-5def390a69ef>.

¹⁷⁶ FRITZ, *supra* note 101, at 187-200. *E.g.*, Fennessey, *supra* note 175. “[Amazon] put themselves in the place of Sony Pictures Classics. That’s not really a disruption as much as it is a replacement.” *Id.*

¹⁷⁷ FRITZ, *supra* note 101, at 187-200. *E.g.*, Fennessey, *supra* note 175. “Netflix’s insatiable appetite for library-building and content delivery” has led to a splurge of financing for original content, including feature films. *Id.* “Netflix unofficially began a new initiative: releasing one new original movie on its streaming service every Friday.” *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* “Every single filmmaker I’ve spoken with this year has testified to the astonishing freedom the companies provide. ‘If you disagree with a note from Netflix or Amazon, you can have a creative discussion about it,’ *Gilmore Girls* creator Amy Sherman-Palladino recently told *The Wall Street Journal*.” *Id.*

¹⁸¹ Andrew Liptak, *IMAX might soon be screening Netflix and Amazon originals*, THE VERGE (Sept. 16, 2018, 10:13 AM),

<https://www.theverge.com/2018/9/16/17866114/imax-streaming-services-netflix-hulu-amazon-theaters-original-films>.

¹⁸² *Id.*

Legend in its theaters in 2015, on the same day it was released on Netflix's streaming platform.¹⁸³

Freeing the studios from the restraints of the Paramount Decrees could allow them to keep pace with this new competition. Some experts think it is unlikely that studios would begin seeking theater ownership if the Decrees are removed.¹⁸⁴ But tactics like block booking and minimum pricing could give studios more leverage in negotiations with theaters, in turn giving them more control over the exhibition process.¹⁸⁵ Block booking small- and mid-budget productions with blockbusters could allow smaller movies to become a viable enterprise for studios once again.¹⁸⁶ Theaters would be required to show these smaller budget movies as a requisite to screen desired blockbusters.¹⁸⁷

Minimum pricing schemes would help ensure that a studio's percentage of box office receipts substantially covers their production, distribution, and advertising costs. This shift in the economics of the industry would allow studios to get back into the non-blockbuster business¹⁸⁸

Additionally, the leverage gained from these tactics would give studios the ability to demand a higher percentage of box office receipts from theaters.¹⁸⁹ Disney has already begun doing this (as explained below), but Disney also has an unrivaled market share as a source of leverage.¹⁹⁰

¹⁸³ Nathan Ingraham, *Netflix's first original movie will be a sequel to 'Crouching Tiger, Hidden Dragon'*, THE VERGE (Sept. 29, 2014, 9:36 PM), <https://www.theverge.com/2014/9/29/6870271/netflix-first-original-movie-will-be-a-sequel-to-crouching-tiger-hidden-dragon>.

¹⁸⁴ Graham, *supra* note 169.

¹⁸⁵ *See Id.*

¹⁸⁶ Studios "could shift their focus on producing more content instead of just a few blockbuster hits." *Id.*

¹⁸⁷ *Supra* notes 11-15, and accompanying text.

¹⁸⁸ Studios have stopped producing mid-budget movies because the expected profits are miniscule when compared to the expected return from big-budget blockbusters, with a higher risk of losing money on these smaller productions. FRITZ, *supra* note 101, at 112-116.

¹⁸⁹ Text accompanying notes 5-31.

¹⁹⁰ As of November 25, Disney has accounted for 27% of 2018's box office, almost double second-place Universal (15.3%). *Studio Market Share: 2018*, BOX OFFICE MOJO (last visited Nov. 29, 2018, 12:28 PM), <https://www.boxofficemojo.com/studio/?view=company&view2=yearly&yr=2018&p=.htm>. This market share is only expected to increase once Disney acquires Twentieth Century-Fox, who had 9.5% of the box office as of November 25. *Id.*

B. *Removing the Decrees is Likely to Create More Harm Than Good*

The initial thought that removing the Decrees would help the studios is tempting. After all, what company wouldn't benefit from more control over their industry? However, a closer look at the Decrees' removal show counterproductive effects. Freeing the studios from antitrust restraints would have a negative impact on independent producers as well as theater chains whom the studios currently rely on. Additionally, removing the Decrees would also eliminate any roadblocks preventing tech companies from entering Hollywood. Thus, while the studios might temporarily enjoy greater control over Hollywood without the Decrees, the likes of Amazon and Netflix would enjoy unfettered access as vertically-integrated production companies in short order.

1. *Eliminating the Decrees Would Have Negative Effects on Other Players in Hollywood*

Even assuming the studios would benefit by removing the Decrees, others in the industry would almost certainly be harmed by it. Block booking and other methods of control over theaters could threaten niche independent producers that are thriving in the current environment. For example, Blumhouse Productions, a small production studio headed by Jason Blum, has cornered the market on the modern horror genre, turning low-budget productions into enormous box office gains.¹⁹¹ With hits like the *Paranormal Activity* series, *Split*, the critically-acclaimed *Get Out*, and 2018's *Halloween*, Blumhouse regularly overperforms its size at the box office, with five of the studio's films grossing over \$100 million domestically,¹⁹² and thirteen more films grossing more than \$50 million¹⁹³ (all one shoestring budgets).¹⁹⁴ Rather than feeling constrained by its limited

¹⁹¹ Emily Canal, *How This Small Production Studio Is Turning Dirt-Cheap Budgets Into Millions at the Box Office*, INC., <https://www.inc.com/emily-canal/blumhouse-productions-get-out.html>.

¹⁹² As of November 2018. *Blumhouse Productions*, BOX OFFICE MOJO (last visited Nov. 4, 2018, 9:00 PM), <https://www.boxofficemojo.com/franchises/chart/?id=bhouse.htm>.

¹⁹³ *Id.*

¹⁹⁴ Blumhouse generally spends about \$5 million or less on an original and up to about \$10 million on a sequel. Canal, *supra* note 191. The production budget for each of these films are as follows: *Get Out*—\$4.5 million; *Halloween*—\$10 million; *Split*—\$9 million; *Paranormal Activity*—an astonishingly frugal \$15,000; *Paranormal Activity 3*—\$5 million; *Paranormal Activity 2*—\$3 million; *Insidious Chapter 2*—\$5 million; *The Purge: Election Year*—\$10 million; *The Purge:*

resources, Blumhouse actually attributes its success to being financially limited, explaining that its modest budgets require its directors to think outside the box.¹⁹⁵ The result are creative movies that explore new ideas and themes within the horror genre.¹⁹⁶

Anarchy—\$9 million; *The First Purge*—\$13 million; *Insidious: The Last Key*—\$10 million; *The Visit*—\$5 million; *The Purge*—\$3 million; *Happy Death Day*—\$4.8 million; *Insidious*—\$1.5 million; *Paranormal Activity 4*—\$5 million; *Insidious Chapter 3*—\$10 million; and *Ouija*—\$5 million. *Get Out*, BOX OFFICE MOJO, <https://www.boxofficemojo.com/movies/?id=blumhouse2.htm> (last visited Nov. 4, 2018, 9:00 PM); *Halloween*, BOX OFFICE MOJO, <https://www.boxofficemojo.com/movies/?id=halloween2018.htm> (last visited Nov. 4, 2018, 9:00 PM); *Split*, BOX OFFICE MOJO, <https://www.boxofficemojo.com/movies/?id=split2017.htm> (last visited Nov. 4, 2018, 9:00 PM); *Paranormal Activity*, BOX OFFICE MOJO, <https://www.boxofficemojo.com/movies/?id=paranormalactivity.htm> (last visited Nov. 4, 2018, 9:00 PM); *Paranormal Activity 3*, BOX OFFICE MOJO, <https://www.boxofficemojo.com/movies/?id=paranormalactivity3.htm> (last visited Nov. 4, 2018, 9:00 PM); *Paranormal Activity 2*, BOX OFFICE MOJO, <https://www.boxofficemojo.com/movies/?id=paranormalactivity2.htm> (last visited Nov. 4, 2018, 9:00 PM); *Insidious Chapter 2*, BOX OFFICE MOJO, <https://www.boxofficemojo.com/movies/?id=insidious2.htm> (last visited Nov. 4, 2018, 9:00 PM); *The Purge: Election Year*, BOX OFFICE MOJO, <https://www.boxofficemojo.com/movies/?id=purge3.htm> (last visited Nov. 4, 2018, 9:00 PM); *The Purge: Anarchy*, BOX OFFICE MOJO, <https://www.boxofficemojo.com/movies/?id=purge2.htm> (last visited Nov. 4, 2018, 9:00 PM); *The First Purge*, BOX OFFICE MOJO, <https://www.boxofficemojo.com/movies/?id=purge4.htm> (last visited Nov. 4, 2018, 9:00 PM); *Insidious: The Last Key*, BOX OFFICE MOJO, <https://www.boxofficemojo.com/movies/?id=insidious4.htm> (last visited Nov. 4, 2018, 9:00 PM); *The Visit*, BOX OFFICE MOJO, <https://www.boxofficemojo.com/movies/?id=blumhouse2015.htm> (last visited Nov. 4, 2018, 9:00 PM); *The Purge*, BOX OFFICE MOJO, <https://www.boxofficemojo.com/movies/?id=purge.htm> (last visited Nov. 4, 2018, 9:00 PM); *Happy Death Day*, BOX OFFICE MOJO, <https://www.boxofficemojo.com/movies/?id=blumhousehorror2018.htm> (last visited Nov. 4, 2018, 9:00 PM); *Insidious*, BOX OFFICE MOJO, <https://www.boxofficemojo.com/movies/?id=insidious.htm> (last visited Nov. 4, 2018, 9:00 PM); *Paranormal Activity 4*, BOX OFFICE MOJO, <https://www.boxofficemojo.com/movies/?id=paranormalactivity4.htm> (last visited Nov. 4, 2018, 9:00 PM); *Insidious Chapter 3*, BOX OFFICE MOJO, <https://www.boxofficemojo.com/movies/?id=insidiouschapter3.htm> (last visited Nov. 4, 2018, 9:00 PM); *Ouija*, BOX OFFICE MOJO, <https://www.boxofficemojo.com/movies/?id=ouija.htm> (last visited Nov. 4, 2018, 9:00 PM). In all, the eighteen films have cumulatively grossed over \$1.5 billion at the domestic box office, on a combined budget of \$109.8 million.

¹⁹⁵ Canal, *supra* note 191.

¹⁹⁶ "One of the things that has been great about the response to *Get Out*, it acknowledges that you can make interesting, challenging movies that happen to be horror thrillers," says Couper Samuelson, 37, the president of feature films for

Other independent studios have been started from scratch.¹⁹⁷ These newcomers mainly focus on the mid-budget films that have largely been abandoned by the major studios.¹⁹⁸ New independents have actually found it easier to start lean and build up rather than a studio who attempts to downsize.¹⁹⁹ Unlike major studios, which “were built for an age of abundant profits” and annual slates of 20-30 films, these new independents have been able to maintain low overhead costs, lowering the risk of financial disaster due to box office flops.²⁰⁰ Because of their low overhead costs, the economics of non-franchise films make sense for smaller studios.²⁰¹ For example, 2.0 Entertainment, headed by a former Sony executive, estimates that it needs just four or five box office hits out of its twenty-movie slate in order to be successful.²⁰²

Allowing the major studios to engage in block booking would prove catastrophic for small, independent studios like Blumhouse or 2.0 Entertainment. If major studios are once again allowed to make the licensing of their blockbusters contingent on theaters also agreeing to run their lower budget films, independent studios could be crowded out of theaters. If theater chains now have to devote their screens to, say, low-budget Disney films in order to license the next *Avengers* movie, then there are fewer screens available to show low-budget productions from studios like Blumhouse who are currently serving a need in the market (and reaping the benefits from it).²⁰³ The motion picture industry saw a huge increase in independent studios after the implementation of the Paramount Decrees²⁰⁴; it could be true that removing the Decrees leads to the opposite outcome, with independent studios being crowded back out of the market.

[Blumhouse Productions]. "It kind of emboldens us to make sure that there are galvanic and interesting ideas in our scary movies." *Id.* The success of Blumhouse's business model has not gone unnoticed: one box office analyst says that Blumhouse is “doing it right, perfectly, in fact in terms of Hollywood structure.” *Id.*

¹⁹⁷ FRITZ, *supra* note 101, at 221-230.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 228. The head of 2.0 Entertainment “planned to employ no more than a dozen people at his company, including a few creative executives to help him develop and makes the movies, along with business and legal staff.” *Id.*

²⁰¹ While middle-budget films provide little upside to the major studios, “the benefits...are actually meaningful” to these new smaller studios. *Id.* at 221-230.

²⁰² *Id.* at 228.

²⁰³ See notes 191-96 and accompanying text.

²⁰⁴ See notes 90-96 and accompanying text.

Removing the Decrees would also harm theater chains. While minimum pricing requirements would allow studios to ensure their share of the box office adequately covers their cost, this tactic poses a substantial risk for theaters. Price elasticity at the box office is notoriously difficult to gauge with any sort of certainty.²⁰⁵ If the public's demand for movies in theaters is relatively inelastic, increasing prices would provide an opportunity for the studios to increase their profits at the box office, since raising prices would not cause a drop in attendance.²⁰⁶ However, if the demand for movies in theaters is relatively elastic, higher prices could result in lower attendance (and thus lower box office receipts for the studios).²⁰⁷ Although it's unclear how audiences would react to uniformly higher prices, there is some evidence to suggest that it could lead to more and more viewers opting to stay home,²⁰⁸ especially with the rise of in-home entertainment options.²⁰⁹ Even if higher prices don't cause audiences to stay away from the box office, increased ticket prices could lead to decreased spending at the concession stand, where theater chains currently make most of their profit.²¹⁰

Another current concern of theater chains is the consolidation of studios, particularly the recently-approved Disney-Fox merger.²¹¹

²⁰⁵ Orbach & Einav, *supra* note 11, at 149.

²⁰⁶ See Reynolds, *supra* note 11, at 31.

²⁰⁷ See *Id.*

²⁰⁸ See Elain 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/>. Theater attendance decline from 1999-2011 as price increases outpaced inflation during that period. Michael Cieply, *Charging a Premium for Movies, at a Cost*, THE NEW YORK TIMES (July 31, 2011), https://www.nytimes.com/2011/08/01/business/media/as-ticket-prices-rise-theater-audiences-shrink.html?pagewanted=all&_r=0&mtref=undefined&gwh=D652A26DA25976DFA9BD380E208E4DC1&gwt=pay.

²⁰⁹ See Mike Snider, *Theaters taking hits from movie viewing at home, weak box office*, USA TODAY (Aug. 2, 2017, 8:05 PM), <https://www.usatoday.com/story/money/business/2017/08/02/movie-theaters-getting-pinched-sluggish-box-office-movies-viewing-home/532256001/>; but see Andrew Arnold, *Convenience Vs. Experience: Millennials Love Streaming But Aren't Ready To Dump Cinema Just Yet*, FORBES (Oct. 26, 2017, 4:17 AM), <https://www.forbes.com/sites/andrewarnold/2017/10/26/millennials-love-streaming-but-arent-ready-to-dump-cinema-just-yet/#509c8ae16311> (exploring millennials' interest in the theater-going experience).

²¹⁰ EPSTEIN, *supra* note 106, at 25-27. Ben Geier, *The sneaky way movie theaters are making up for falling ticket sales*, FORTUNE (Feb. 18, 2015), <http://fortune.com/2015/02/18/movie-theaters-concessions/>.

²¹¹ Dawn C. Chmielewski, *Congressional Democrats Call for Disney-Fox Hearings Amid Antitrust Concerns*, DEADLINE (Dec. 18, 2017, 3:32 PM),

Disney is positioning the merger as a defensive tactic against competition from the tech companies in the entertainment industry, but skeptics are worried it is another step in Disney's journey to becoming a monopoly.²¹² After the merger, Disney will account for 40% of the box office, plus a controlling stake in Hulu²¹³ (as well as its own streaming service Disney+, launching in 2019).²¹⁴

Will the merger give Disney too much leverage in negotiations with theaters? The studio has already begun asking for a higher percentage of box office receipts for its films, as it did with *Star Wars: The Last Jedi* in 2017.²¹⁵ If Disney applies the same tactic to upcoming movies (featuring the intellectual property from both Disney and Fox), many theaters will no longer retain a sufficient percentage of box office receipts to cover their costs.²¹⁶ Theaters would have to increase ticket and concession prices in order to survive.²¹⁷ In addition, this leverage could be similarly applied in the home entertainment sector.²¹⁸

If anything, critics argue, antitrust regulation (or deregulation) should be tilted more in favor of theaters.²¹⁹ Theater chains are already

<https://deadline.com/2017/12/disney-fox-antitrust-concerns-congressional-hearings-request-1202228114/> [<https://perma.cc/TU9X-UF5B>] (“Sen. Amy Klobuchar (D-MN), the ranking Democrat on the Senate subcommittee, requested a hearing on the proposed mega-deal, echoing concerns voiced by advocates who worry the \$66 billion deal would concentrate too much power in the hands of a single Hollywood studio, and result in consumers paying higher prices for entertainment.”).

²¹² *Id.*

²¹³ *Id.*

²¹⁴ Chaim Gartenberg, *Disney's long-awaited streaming service will be called Disney+*, THE VERGE (Nov. 8, 2018, 5:35 PM), <https://www.theverge.com/2018/11/8/18077014/disney-plus-streaming-service-marvel-star-wars-loki-tom-hiddleston> [<https://perma.cc/7JQS-2FFL>].

²¹⁵ Jason Guerrasio, *Disney's requirements for the new 'Star Wars' movie have angered some movie theaters*, BUSINESS INSIDER (Nov. 1, 2017, 4:02 PM), <https://www.businessinsider.com/disney-requirements-to-show-star-wars-the-last-jedi-in-theaters-2017-11> [<https://perma.cc/8WNR-BVCK>]; Disney required theaters to send 65% of ticket sale revenue to the studio in order to screen *The Last Jedi*, while most studios receive only 55%-60% of box office receipts from theaters. *Id.*

²¹⁶ Trevor Norkey, *How the Disney-Fox Merger Will Crush Rival Studios and Impact Exhibitors*, MOVIEWEB (July 28, 2018), <https://movieweb.com/disney-fox-deal-change-theaters-impact-movie-studios/> [<https://perma.cc/6RU2-CYXA>].

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ Ryan Faughnder, *supra* note 2 (“‘The relationship between studios and theaters is under pressure,’ said Jason E. Squire, a movie business professor at University of

being squeezed as Disney claims a higher percentage of box office receipts.²²⁰ Major theater chains can tolerate Disney's demands, "but for small independent theaters, this could cripple their business. So that some independently-owned theaters have decided not to play 'The Last Jedi.'"²²¹ Thus, the increased leverage (from removing the Decrees) that the studios would enjoy over the theaters would be accompanied by an increased burden on theater chains, making it even more difficult for them to stay profitable.²²² Unlike studios, who can find ways to maximize revenues from streaming and home entertainment, theaters have few options to supplement revenues as more and more viewers opt to watch films in-home rather than in the theater.²²³

2. Removing the Decrees Could Provide Fully-Integrated Tech Companies a Path to Control

It is far from clear that getting rid of the Decrees would help, rather than hurt, the studios. Proponents of eliminating the Decrees state that it would help the studios compete against Netflix and Amazon,²²⁴ who have been increasingly encroaching the motion picture production industry.²²⁵ But the studios' freedom from the antitrust restraints of the Decrees would also be enjoyed by their new Silicon Valley competitors. As a result, removing the Decrees could backfire on the studios, accelerating the very outcome they are seeking to prevent.

Southern California. 'If anything should change, it should be in favor of the exhibitor. I don't see how returning to block booking is going to help theaters.'").

²²⁰ Guerrasio, *supra* note 215.

²²¹ *Id.*

²²² See Ryan Faughnder, *supra* note 2.

²²³ Jason Guerrasio, *Hollywood is fighting billionaire Sean Parker's plan to let you rent movies still in theaters for \$50*, BUSINESS INSIDER (May 31, 2017, 8:00 AM), <https://www.businessinsider.com/sean-parker-screening-room-backlash-2017-5> [<https://perma.cc/LN7U-GY6G>]. Premium "day-and-date" in-home movie services have been rejected by theater chains over the concern that the loss of a theatrical window would leave theaters without the revenue sources necessary to stay afloat. *Id.*

²²⁴ Graham, *supra* note 169. E.g., Matt Pressberg, *DOJ to Review Consent Decrees Barring Studios From Owning Movie Theaters*, THE INFORMATION (Aug. 3, 2018), <https://www.theinformation.com/briefings/d99992>.

²²⁵ In 2015, Amazon announced it would begin producing movies for theatrical release. Chris Welch, *Amazon announces plans to make movies for theaters, Prime streaming*, THE VERGE (Jan. 19, 2015, 9:18 AM), <https://www.theverge.com/2015/1/19/7852513/amazon-studios-making-movies-for-theaters-prime-streaming>. Netflix also released their first original film in 2015. Ingraham, *supra* note 183, and accompanying text.

Both Netflix²²⁶ and Amazon²²⁷ have shown an interest in obtaining theatrical releases for their original films.²²⁸ One obstacle standing in their path has been theater chains' insistence on having a theatrical window before the films are released on Netflix's and Amazon's streaming platforms.²²⁹ Major theater chains refuse to exhibit films if the producer does not honor the theatrical window.²³⁰ Amazon and Netflix are looking at purchasing theaters to gain the ability to show films in theaters and on their streaming platforms on a "day-and-date"

²²⁶ Netflix was rumored to be negotiating an acquisition of Landmark Theaters. Lizzie Plaugic, *Netflix has reportedly considered buying theaters to screen its movies*, THE VERGE (Apr. 19, 2018 4:37 PM), <https://www.theverge.com/2018/4/19/17258114/netflix-theaters-landmark-mark-cuban-buying-screenings-oscar-cannes> [https://perma.cc/3DTQ-F78S]. Although the deal fell through, the negotiations signaled the company's interest in potentially owning a theater chain. *Id.*

²²⁷ Shortly after the rumors of Netflix's interest, news broke that Amazon was also looking at a potential deal for Landmark Theaters. Spencer Soper, Anaousha Sakoui & Nabila Ahmed, *Amazon reportedly in the running to acquire Landmark movie chain*, THE SEATTLE TIMES (Aug. 16, 5:29 PM), <https://www.seattletimes.com/business/amazon-reportedly-in-the-running-to-acquire-landmark-movie-chain/> [https://perma.cc/692V-VHHB].

²²⁸ See Graham, *supra* note 224. "'This is probably a move to get broader distribution of [Amazon's] film content,' said Leo Kulp, an analyst with RBC Capital Markets. 'Netflix had been discussed as a potential buyer of Landmark for a similar reason.'" Soper, *supra* note 227. Landmark currently has 50 theaters in 27 markets, "including high-profile locations in New York, Philadelphia, Chicago, Los Angeles, and San Francisco." *Id.*

²²⁹ See Jim Amos, *Amazon Reportedly Has Interest In Landmark Theatres, But Why Would It?*, FORBES (Aug. 16, 2018, 2:01 PM), <https://www.forbes.com/sites/jamos/2018/08/16/why-landmark-would-be-a-head-scratching-fit-for-amazon/#1870e9c965c7> [https://perma.cc/SN6J-U3Q5]. Netflix has thus far remained steadfast in refusing a theatrical release window. See Fennessey, *supra* note 175 ("Netflix goes direct to its service, with virtually no theatrical window."). However, the company has signaled a softening of this stance, with three upcoming films set to be released in theaters with a window before the films hit Netflix's streaming platform. Pamela McClintock, *Netflix to Give 3 Award Contenders Exclusive Runs in Select Theaters*, THE HOLLYWOOD REPORTER (Oct. 31, 2018, 4:30 PM), <https://www.hollywoodreporter.com/news/netflix-give-3-award-contenders-runs-select-theaters-1153081> [https://perma.cc/RQ8R-HL8K]. On the other hand, Amazon has (for the moment) largely ceded to theater chains' demand of a traditional window. FRITZ, *supra* note 101, at 196. Amazon found that theatrical windows actually have helped their business, stating "[C]ustomers wanted the awareness of the theatrical release to guide them on what to watch." *Id.* The two companies' strategies stand in stark contrast: "Amazon applies lessons learned from working within the Hollywood studio experience; Netflix defies them at will." Fennessey, *supra* note 175.

²³⁰ Amos, *supra* note 229.

basis (releasing a film in theaters and on the company's platform on the same day).²³¹ 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).²³² Once these tech companies own their own theaters, they can dictate their theatrical windows as they wish, removing a major barrier that has largely kept Silicon Valley away from Hollywood's box office.²³³

The threat from the studios' new competition would not stop there. Amazon has a substantial track record of success once it enters an industry²³⁴; it would be unlikely that the box office would be any different. Amazon has already been buying smaller films neglected by the major studios, as well as producing their own films.²³⁵ However, Amazon's business model is different from the typical movie studio. Rather than use movies as sources of revenue themselves²³⁶ (or to generate income from licensing), Amazon uses its film library as a way to incentivize Amazon Prime subscriptions (and thus increasing the

²³¹ *Id.*

²³² *See supra* notes 226-227.

²³³ *See supra* notes 225-231 and accompanying text. Amazon has had only nine theatrical releases (six original productions, as well as *Chi-Raq*, *Manchester By the Sea* and *The Big Sick* each of which Amazon purchased the rights to after production). *Amazon Studios*, BOX OFFICE MOJO (last visited Dec. 5, 2018, 2:15 PM),

<https://www.boxofficemojo.com/studio/chart/?yr=2018&view=company&studio=amazon.htm> [<https://perma.cc/49HW-NM8Z>]. As of November 5, 2018, the six original productions had grossed a cumulative \$9.8 million domestically, while the three purchased films grossed \$93.2 million. *Amazon Studios*, *supra* note 233; *Chi-Raq*, BOX OFFICE MOJO (last visited Nov. 5, 2018, 2:15 PM), <https://www.boxofficemojo.com/movies/?id=chiraq.htm>; *Manchester By the Sea*, BOX OFFICE MOJO (last visited November 5, 2018, 2:15 PM), <https://www.boxofficemojo.com/movies/?id=manchesterbythesea.htm>; *The Big Sick*, BOX OFFICE MOJO (last visited Nov. 5, 2018, 2:15 PM), <https://www.boxofficemojo.com/movies/?id=thebigsick.htm>.

²³⁴ *See* Shira Ovide, *How Amazon's Bottomless Appetite Became Corporate America's Nightmare*, BLOOMBERG (Mar. 14, 2018), <https://www.bloomberg.com/graphics/2018-amazon-industry-displacement/>; Jacob Sonenshine,

Amazon is notorious for disrupting industries — now it's eyeing entire countries (AMZN), BUSINESS INSIDER: MARKETS INSIDER (May 29, 2018, 4:03 PM), <https://markets.businessinsider.com/news/stocks/amazon-stock-price-notorious-disrupting-industries-now-eyeing-entire-countries-2018-5-1025753496>.

²³⁵ FRITZ, *supra* note 101, at 187-200.

²³⁶ "Amazon didn't make movies primarily to make money from movies. It used movies to draw attention, to increase engagement, and to dominate people's time and digital behavior so they would ultimately buy more stuff from the company." *Id.* at 200.

number of consumers purchasing items on the platform).²³⁷ Because the financial success of Amazon's production studio is not tied to the actual movies it creates, the company is less worried about the returns on each individual movie, instead focusing on how their content library impacts the company's larger Prime subscriber base.²³⁸ Amazon's ability to tolerate a movie's financial loss already gives it an advantage over the major studios, who are dependent on their blockbusters to turn a profit.²³⁹ Should the Paramount Decrees be eliminated, Amazon would have the freedom to fully vertically-integrate its motion picture business, controlling production, distribution, and exhibition. Amazon's strategy in the film industry appears to be similar to the one it utilized in dominating the book market.²⁴⁰ Allowing Amazon to flex its muscles in such a way would only serve to maximize its competitive advantage over already-vulnerable studios, who to this point haven't seen direct competition at the box office from streaming services.²⁴¹

²³⁷ "The e-commerce company already spends billions each year on movies and TV shows, saying it helps entice shoppers to join its Prime subscription plan and makes existing members more likely to renew." Soper, *supra* note 227. Amazon Studio's focus has been on "art-house" movies aimed at higher-income, well-educated online shoppers. "If the ultimate goal of Amazon's movie business was to attract, retain, and engage Prime subscribers, it only made sense to draw people who would buy the most computers, books, and Kindles online." FRITZ, *supra* note 101, at 197. ²³⁸ *Id.* at 199.

²³⁹ *Supra* notes 122-145 and accompanying text.

²⁴⁰ "In that instance, the corporation leveraged its leading position in online sales to build a dominant position in book sales; Amazon sells more than half of all physical books and 90 percent of e-books in the U.S. That, in turn, gave Amazon the ability to largely dictate terms to publishers, which rely on the corporation to get to market. It also allowed Amazon to integrate into publishing (both its own imprints and so-called 'self-published' books of independent authors). And it allowed Amazon to integrate into physical retail, with a rapidly growing list of outlets across America, including many in former locations of Barnes & Nobles and Borders." Open Markets, *The Corner Newsletter, August 23, 2018: Why the Paramount Consent Decrees Matter —Tech Giants Threaten Banking — An Overlooked Dissent at the FTC*, OPEN MARKETS INSTITUTE (Aug. 24, 2018), <https://openmarketsinstitute.org/newsletters/corner-newsletter-august-23-2018-paramount-consent-decrees-matter-tech-giants-threaten-banking-overlooked-dissent-ftc/>.

²⁴¹ It has been suggested that Amazon as a fully-integrated movie studio could seize on several untapped advantages. For starters, Amazon jumping into Hollywood with both feet would allow it to build and maintain strong relationships with filmmakers. Additionally, it's not difficult to imagine Amazon turning moviegoing into a more immersive experience, incorporating other perks of Prime membership into its theaters. David Bloom, *Five Reasons Amazon Might Want to Buy Landmark Theaters*, FORBES (Aug. 16, 2018, 2:15 PM), <https://www.forbes.com/sites/dbloom/2018/08/16/amazon-landmark-theaters-mark-cuban-movies/#43ea6d125617>.

Critics of Amazon worry that its domination of the book industry could be easily replicated in the film industry.²⁴²

V. ARE CHANGES TO THE ANTITRUST ENVIRONMENT EVEN NEEDED?

While many in the industry are debating the benefits and drawbacks that would come from removing the Paramount Decrees, a larger question should be answered first: are the studios even in trouble in the first place? A look at some recent developments show signs for optimism.

Hollywood just saw its best month of October ever, grossing a record \$820 million at the domestic box office (out-earning October 2017 by 47%).²⁴³ This comes after new box office records were already set in 2018 for February,²⁴⁴ April,²⁴⁵ and June²⁴⁶ (four monthly records were also broken in 2017, one of them being October).²⁴⁷ The three highest-grossing years were 2016, 2015, and 2017, with 2018 entering the top ten highest grossing years regardless of how Hollywood performs at the box office in November and December.²⁴⁸

That's not the only sign of progress: theater revenues are up 10% and attendance has increased by 7.7% year-over-year.²⁴⁹ Overall, 2018 is on pace to sell the most theater tickets and have the highest inflation-

²⁴² Open Markets, *supra* note 240.

²⁴³ Brad Brevet, *October Delivered a Record \$820 Million at the Domestic Box Office*, BOX OFFICE MOJO (Nov. 7, 2018), <https://www.boxofficemojo.com/news/?id=4454&p=.htm>.

²⁴⁴ *Monthly Box Office (Wide Releases): February*, BOX OFFICE MOJO, <https://www.boxofficemojo.com/monthly/?view=widedate&chart=bymonth&month=2&sort=sumgross&order=DESC&p=.htm> (last visited Nov. 7, 2018 9:54 PM).

²⁴⁵ *Monthly Box Office (Wide Releases): April*, BOX OFFICE MOJO, <https://www.boxofficemojo.com/monthly/?view=widedate&chart=bymonth&month=4&sort=sumgross&order=DESC&p=.htm> (last visited Nov. 7, 2018 9:54 PM).

²⁴⁶ *Monthly Box Office (Wide Releases): June*, BOX OFFICE MOJO, <https://www.boxofficemojo.com/monthly/?view=widedate&chart=bymonth&month=6&sort=sumgross&order=DESC&p=.htm> (last visited Nov. 7, 2018 9:54 PM).

²⁴⁷ Scott Mendelson, *Hollywood Broke Monthly U.S. Box Office Records Four Times In 2017*, FORBES (Jan. 12, 2018, 11:00 AM), <https://www.forbes.com/sites/scottmendelson/2018/01/12/hollywood-broke-monthly-u-s-box-office-records-four-times-in-2017/#45cafd6c64a7>.

²⁴⁸ *Yearly Box Office (Domestic)*, BOX OFFICE MOJO (last visited Nov. 7, 2018 9:54 PM), <https://www.boxofficemojo.com/yearly/?sort=totalgross&order=DESC&p=.htm>.

²⁴⁹ Rebecca Rubin, *Comeback Kid: Movie Theaters Rebound With a Vengeance*, VARIETY (Nov. 7, 2018, 9:45 AM), <https://variety.com/2018/biz/news/holiday-box-office-2018-1203020373/>.

adjusted box office since 2012.²⁵⁰ Even without a Star Wars or Marvel Cinematic Universe movie to bolster the end of the year, “industry analysts remain optimistic that the year will reach record territory even if the fourth quarter does fall flat.”²⁵¹

Additionally, studios have begun finding new opportunities abroad, most notably in China.²⁵² China has become not only an enormous source of box office revenue, but also a place where studios can find investors willing to finance their films.²⁵³

Even though tech companies have proven to be threats to the studios so far, it’s possible Hollywood finds a way to turn them into assets. One intriguing option presented itself to the studios--ironically in the form of a Silicon Valley start-up. Screening Room, backed by former Facebook president Sean Parker, was a proposed plan to give consumers in-home access to movies as they release to theaters.²⁵⁴ The plan would have charged \$50 per view, and given consumers 48 hours to watch a given film.²⁵⁵ To assuage theater chains, Screening Room was to include two free tickets to see the movie in theaters, as well as entitling exhibitors to \$20 of the \$50 per-view fee.²⁵⁶ Studios would have also received a percentage of the fee.²⁵⁷ Ultimately, the idea was nixed, but it is not hard to fathom a similar idea cropping up in the near future.²⁵⁸ Warner Bros. and Fox were rumored to be working on their

²⁵⁰ *Domestic Movie Theatrical Market Summary 1995 to 2018*, THE NUMBERS (last visited Nov. 7, 2018, 9:45 PM), <https://www.the-numbers.com/market> (based on annualized rates for 2018).

²⁵¹ Rubin, *supra* note 249.

²⁵² See FRITZ, *supra* note 101, at 201-219.

²⁵³ *Id.*

²⁵⁴ Brett Lang, *Studios, Exhibitors Consider Revolutionary Plan for Day-and-Date Movies at Home*, VARIETY (Mar. 9, 2016, 3:41 PM), <https://variety.com/2016/film/news/studios-exhibitors-consider-revolutionary-plan-for-day-and-date-movies-at-home-exclusive-1201725168>. Screening Room would have offered movies in-home on their theatrical release dates, protected by anti-piracy technology. *Id.*

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ Annlee Ellingson, *New movies will play at home, just not via Screening Room*, L.A. BIZ (May 31, 2017, 5:50 PM), <https://www.bizjournals.com/losangeles/news/2017/05/31/new-movies-will-not-play-via-screen-room.html>.

own versions of a “day and date” model,²⁵⁹ while many other believe Apple’s iTunes would provide a natural fit for such an idea.²⁶⁰

While day-and-date services are still just a concept, Hollywood has nevertheless found ways to utilize Silicon Valley as a tool. Paramount recently announced a multi-film agreement with Netflix.²⁶¹ The studio will likely use the agreement to make mid-budget movies that no longer justify full theatrical releases.²⁶²

Major studios are also beginning to adopt Amazon and Netflix’s own business models, with Disney and Warner Bros. both developing streaming services for their own content.²⁶³ Disney has already indicated that their streaming service, Disney+, will be the exclusive platform for their content, thus giving them a key competitive advantage over Netflix and Amazon: if viewers want to watch Disney movies, they have to pay for Disney+.²⁶⁴ Even if a studio chooses to license their films to other streaming companies, having their own streaming platform would give them leverage to negotiate a higher licensing fee. In this way, Silicon Valley isn’t threatening Hollywood as much as it is giving the studios a way to adapt to the new entertainment landscape.²⁶⁵

²⁵⁹ The models being developed by Warner Bros. and Fox would make films available 30 days after their release dates (as compared to the standard 90-day theatrical window), and would charge \$30 per viewing. *Id. E.g.*, Jason Guerrasio, *supra* note 223.

²⁶⁰ If studios and theaters allow a day-and-date model to launch, “they most likely would out their trust in a service they already work with, like iTunes.” *Id.*

²⁶¹ Rebecca Keegan, “A New Paradigm”: How Netflix and Apple Are Upending Hollywood Hierarchy With Studio Deals, *THE HOLLYWOOD REPORTER* (Nov. 27, 2018, 6:35 AM), <https://www.hollywoodreporter.com/news/apple-netflix-reshaping-studio-hierarchy-paramount-a24-deals-1163992>. Renowned independent studio A24 signed a similar deal with Apple. *Id.*

²⁶² *Id.*

²⁶³ Gartenberg, *supra* note 214; William Hughes, *Warner announces new three-tiered streaming service, because online media wasn’t complicated enough*, *AV/NEWS* (Nov. 29, 2018, 5:32 PM), <https://news.avclub.com/warner-announces-new-three-tiered-streaming-service-be-1830755192>.

²⁶⁴ Natalie Jarvey, *Disney’s Top Dealmaker Kevin Mayer Talks Fox Plans and that New Streaming Service*, *THE HOLLYWOOD REPORTER* (Dec. 18, 2018, 6:15 AM), <https://www.hollywoodreporter.com/news/kevin-mayer-disneys-fox-acquisition-new-streaming-service-1169862>; Samit Sarkar, *What Disney’s streaming service means for Netflix subscribers*, *POLYGON* (Feb. 7, 2018, 4:15 PM), <https://www.polygon.com/2018/2/7/16982030/disney-leaving-netflix-marvel-lucasfilm-pixar-streaming-rights>.

²⁶⁵ In fact, *The Hollywood Reporter’s* predictions for Hollywood in 2019 include Disney’s dual-threat of Hulu and Disney+ slowing the growth of Netflix’s subscriber base. THR Staff, *Hollywood Predictions 2019: Wheeling, Dealing and (for Some) Reeling*, *THE HOLLYWOOD REPORTER* (Jan. 7, 2019, 6:55 AM),

VI. CONCLUSION

Hollywood currently finds itself in a precarious position, facing competition from Silicon Valley that is unlike anything it has seen before. In light of this competition, it's understandable why one would think drastic measures need to be taken. In the heat of the moment, freeing the studios from the Paramount Decrees' requirements may seem like a wise decision. The move would give studios more control over the industry, and leveraging this control could tilt the economics of moviemaking back in their favor. However, this move could be akin to the babysitter in a scary movie running up the stairs to get away from the monster. While removal of the Decrees could yield some benefits, it would also allow the likes of Netflix and Amazon to enter the industry flexing their fully-integrated muscles, ensuring the studios' demise.

Moreover, there are trends within the industry that indicate the threat has been overstated. Studios are finding new ways to generate revenue, and are even exploring utilizing in-home technology to their own benefit. In all, it would be prudent to leave the Paramount Decrees in place, and let the studios live to fight another day.