ENTERTAINMENT CONSOLIDATION, CONTENT MONOPOLIES, AND THE FUTURE OF INFORMATION♦

INTRODUCTION

The Walt Disney Company's 2019 acquisition of certain assets of 21st Century Fox[1] has resulted in an avalanche of antitrust and media monopoly concerns. Many of these concerns are not unprecedented: entertainment, media, and information consolidation are concepts that have existed since the onset of communication companies. Although this was a horizontal merger, vertical communication mergers and subsequent

[1] *Disney's Acquisition of 21st Century Fox Will Bring an Unprecedented Collection of Content and Talent to Consumers Around the World*, WALT DISNEY CO. (Mar. 19, 2019), https://thewaltdisneycompany.com/disneys-acquisition-of-21st-century-fox-will-bring-an-unprecedented-collection-of-content-and-talent-to-consumers-around-the-world/ [https://perma.cc/Q3BF-TX4T].

enjoinments constitute most of the history surrounding information and media monopolies in the United States.[2]

The Walt Disney Company (Disney) is now dipping its toes in streaming, and therefore, competing in a different kind of distribution market.[3] Although Disney settled with the Department of Justice (DOJ) in its acquisition of 21st Century Fox and the merger was finalized,[4] the future and fate of other competing media companies and distributors is uncertain. Disney's recent merger with Fox is a horizontal merger, meaning it has acquired rights from a competitor in the same exact industry in which it competes and at the same level of the supply chain.[5] If current trends persist, Disney's market share will continue to increase and dominate the entertainment industry. The horizontal merger raises many questions about content monopolies, the future of streaming, and entertainment consolidation, specifically the anticompetitive atmosphere that is created when large entertainment companies begin to be housed under one behemoth.

The DOJ's antitrust standards for horizontal and vertical integrations are fairly distinct: the guidelines interpret two different sections of the Sherman Act,[6] which rarely address both concerns raised by these mergers. Current antitrust treatment of horizontal mergers fails to recognize the resounding anticompetitive vertical effects. Because the Act separates these standards, each section on its own will not be able to address the issues of large market share in conjunction with vertically integrated systems and supply chains. Additionally, current U.S. antitrust law, derived from the problems posed by quintessential monopolistic companies from the nineteenth and twentieth centuries (such as railroads, oil companies, and telephone services), rarely takes into account the nuances and complexities of our globalized and modernized world. Technology is everchanging and innovating daily. However, changes in antitrust law are slow to implement and are likely not to occur at all.

With the influx of new technology, the implications of media mergers, consolidation, and monopolization are looming, especially as

[2] *See generally* Christopher S. Yoo, *Vertical Integration and Media Regulation in the New Economy*, 19 YALE J. ON REG. 171, 293 (2002).
[3] *Disney's Acquisition of 21st Century Fox Will Bring an Unprecedented Collection of Content and Talent to Consumers Around the World*, *supra* note 1.
[4] Press Release, U.S. Dep't of Just., Off. of Pub. Affs., The Walt Disney Company Required to Divest Twenty-Two Regional Sports Networks in Order to Complete Acquisition of Certain Assets from Twenty-First Century Fox (June 27, 2018), https://www.justice.gov/opa/pr/walt-disney-company-required-divest-twenty-two-regional-sports-networks-order-complete [https://perma.cc/44TU-D6TJ].
[5] Mitchell Grant, *Horizontal Merger*, INVESTOPEDIA, https://www.investopedia.com/terms/h/horizontalmerger.asp [https://perma.cc/DG2B-G6QK] (last updated May 31, 2021).
[6] *See generally Merger Enforcement*, U.S. DEP'T OF JUST. (June 30, 2020), https://www.justice.gov/atr/merger-enforcement [https://perma.cc/N8W2-7RSF].

streaming and other technologies have come to the forefront of American media. The Disney-21st Century Fox merger is a key example of why the current antitrust law framework is suboptimal in addressing anticompetitive practices. Despite being considered a horizontal merger, the merger will produce lasting vertical effects.

Both the Federal Trade Commission (FTC) and the DOJ enforce federal antitrust laws.[7] The reviewing agency (here, the DOJ), when addressing antitrust issues, fails to consider the totality of the effects of a proposed horizontal merger. Rather, it focuses on the dichotomy of horizontal versus vertical mergers, which is an antiquated concept given the current technological climate. Because large corporations, especially those in the market for mass communications, are integrated both vertically and horizontally, the FTC or DOJ should consider how horizontal mergers will have vertical effects (and vice-versa) when allowing proposed mergers to pass.

This Note proposes a change in law to the current merger guidelines. Reviewing and enforcement agencies should not solely focus on short-term effects in the consumer welfare framework but also consider how the mergers can stifle the competitive process and market structure in the long-term. In our Internet- and media-driven world, innovation is ever-important. Yet, as antitrust law remains hands-off to these schemes and entertainment consolidation pervades the industry, the law must change to consider these nuances.

I. BACKGROUND

A. *Antitrust Law of the United States of America*

The Sherman Antitrust Act of 1890 is a chief part of U.S. antitrust law.[8] It was passed in 1890 in response to monopolistic behavior, such as price-fixing cartels, in the face of American capitalism.[9] Ultimately, it sought to preserve "free and unfettered competition as the rule of trade."[10] The Act enables the DOJ to enjoin anticompetitive conduct that violates the Act and prohibits any unreasonable restraint on trade.[11] Subsequent legislation expanded the scope of the Act and antitrust law. In 1914,

[7] *The Enforcers*, FED. TRADE COMM'N, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/enforcers [https://perma.cc/7R5C-X4GQ] (last visited Aug. 11, 2021).
[8] Act of July 2, 1890 (Sherman Act), ch. 647, 26 Stat. 209 (current version at 15 U.S.C. §§ 1–7 (2018)).
[9] ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 17 (1978).
[10] N. Pac. R.R. v. United States, 356 U.S. 1, 4 (1958).
[11] *The Antitrust Laws*, FED. TRADE COMM'N, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws [perma.cc/LHF7-YMQV] (last visited Mar. 10, 2021) ("For instance, in some sense, an agreement between two individuals to form a partnership restrains trade, but may not do so unreasonably, and thus may be lawful under the antitrust laws.").

Congress passed the Federal Trade Commission Act (FTCA) and the Clayton Act.[12] These Acts further bolstered antitrust law and were necessary to begin to address the omnipresent threats of anticompetitive practices that permeated American society.

The FTCA, which created the FTC, bans "unfair methods of competition."[13] The Act is broad in what it considers to constitute unfair competition. For example, cases can be brought for false advertising or deceptive pricing.[14] Along with promoting the initial objective of free competition, the FTCA also seeks to protect consumers from unfair practices.[15] Only the FTC can bring cases under the FTCA. The FTC was given extensive powers: it could fill gaps remaining in antitrust law or even prevent business practices not invented at the time of the Clayton Act's enactment but were contrary to public policy.[16] However, certain anticompetitive activities, such as mergers and interlocking directorates, did not fall within the scope of the FTCA and the Sherman Antitrust Act. Since courts were frustrated with certain activities not falling within the scope of the Sherman Antitrust Act and the FTCA, Congress passed the third core federal antitrust act, the Clayton Act,[17] broadening the scope of impermissible activities under antitrust law.[18]

The Clayton Act seeks to prevent anticompetitive practices in their incipiency, rather than after monopolistic tendencies have formed.[19] It addresses multiple types of anticompetitive activities, and it was amended twice in the twentieth century to address new concerns. In 1936, the Robinson-Patman Act amended the Clayton Act and was passed to prevent price differentiation and discrimination between purchasers of commodities of comparable quality.[20] An example would be changing the selling price of a commodity from buyer to buyer for arbitrary reasons other than differences in the cost of manufacture, sale, or delivery in order to lessen competition or create a monopoly in any line of commerce.[21]

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[12] *Id.*; Act of Sept. 26, 1914 (Federal Trade Commission Act), ch. 311, 38 Stat. 717 (current version at 15 U.S.C. §§ 41–58 (2018)); Act of Oct. 15, 1914 (Clayton Act), ch. 323, 38 Stat. 730 (current version at 15 U.S.C. §§ 12–27 (2018)).
[13] 15 U.S.C. §§ 45(a)(1) (2018).
[14] *See* Guides Against Deceptive Pricing, 16 C.F.R. § 233 (2020).
[15] *The Antitrust Laws*, *supra* note 11.
[16] *Antitrust*, CORNELL L. SCH.: LEGAL INFO. INST., https://www.law.cornell.edu/wex/antitrust [https://perma.cc/5ZEC-SK73] (last updated May 2020).
[17] Act of Oct. 15, 1914 (Clayton Act), ch. 323, 38 Stat. 730 (current version at 15 U.S.C. §§ 12–27 (2018)).
[18] *The Antitrust Laws*, *supra* note 11.
[19] *See, e.g.*, Standard Oil Co. v. FTC, 282 F. 81, 86 (3d Cir. 1922) ("[T]he Clayton Act, which is a part of the scheme of laws against unlawful restraints and monopolies, does not want for its operation until monopolies have been created and restraints of trade established, but seeks to reach them in their incipiency and stop their growth.").
[20] Robinson-Patman Act of 1936, ch. 592, 49 Stat. 1526 (codified at 15 U.S.C. § 13 (2018)).
[21] *Id.*

The Clayton Act also sought to prevent fixed sales that substantially lessen competition.[22] These sales are often conditioned on the buyer agreeing not to engage in commerce with the competitors of the seller.[23] Most notably, and relevant to the discussion at hand, Section 7 of the Act addresses mergers and acquisitions where the effect "may be substantially to lessen competition, or to tend to create a monopoly."[24]

After this Amendment and throughout the bulk of the mid-twentieth century, there were few changes to federal antitrust law. However, as various industries and competitive practices continued to develop, antitrust law had to advance in order to address the latest concerns. After the DOJ's settlement of telephone mergers during the Nixon Administration, Congress was primarily concerned with lack of public transparency and impropriety in antitrust consent decrees.[25] Therefore, in 1974, the Tunney Act, or the Antitrust Procedures and Penalties Act, was passed in order to increase public transparency of current antitrust actions by publishing documents associated with violations.[26]

The following procedures were created pursuant to the Tunney Act. The DOJ prepares and files a complaint and competitive impact statement with a proposed consent decree expressing the antitrust violation allegations and its proposed remedy.[27] The DOJ then publishes the documents in the *Federal Register* for public comment and files such comments publicly with the relevant court in which the antitrust suit has been filed.[28] The federal court subsequently analyzes these documents for review of the proposed merger or acquisition.[29]

The goals of transparency and prevention of restraints on trade in their incipiency, before reaching full-scale Sherman Act violations, continued to be integrated into the law. In 1976, the Clayton Act was further amended by the Hart-Scott-Rodino Antitrust Improvements Act.[30] This amendment requires companies to notify the government about certain large mergers or acquisitions it wishes to complete.[31] The deals must generally be of a certain caliber (notably, of minimum value and the

22 Clayton Act § 3 (current version at 15 U.S.C. § 14 (2018)).
23 *Id.*
24 *The Antitrust Laws*, *supra* note 11.
25 *See* 119 CONG. REC. 24,598 (1973) (statement of Sen. John Tunney).
26 Antitrust Procedures and Penalties (Tunney) Act, Pub. L. No. 93-528, 88 Stat. 1706 (1974) (codified at 15 U.S.C. § 16 (2018)).
27 *Id.*
28 *Id.*
29 *Id.*
30 Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, 90 Stat. 1383 (current version at 15 U.S.C. § 18a (2018)).
31 *Id.*; *see also Premerger Notification and the Merger Review Process*, FED. TRADE COMM'N, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/mergers/premerger-notification-merger-review [https://perma.cc/5N55-G9K2] (last visited Mar. 7, 2021).

parties must be of minimum size), which is why not all mergers or acquisitions require a premerger filing.[32] However, entertainment and technology companies with the stature of the ones mentioned in this Note meet the threshold requirements.

The parties cannot complete the merger, acquisition, or transfers of securities or assets until they submit a detailed filing with the FTC and DOJ, providing data about the industry and their own businesses.[33] Upon filing, staff from the FTC and DOJ will meet and the matter will be "cleared" for one of the agencies to take over the review process of the proposed merger.[34] The agency will then begin the review process and will be given access to private information from the parties and other participants in the given industry.[35] Finally, through investigation, the federal agency will determine if the proposed transactions will adversely affect commerce.

At this stage, the potential outcomes are for the agency to (1) stop the investigation and let the deal pass; (2) negotiate and enter into a consent agreement with the companies, often incorporating provisions or protocols to ensure and restore competition; or (3) file a preliminary injunction in federal court pending an administrative trial on the merits, seeking to prevent the entire deal from going forward.[36] The FTC acknowledges that "[m]any merger challenges are resolved with a consent agreement between the agency and the merging parties."[37] As further explained later in this Note, Disney settled with the DOJ's Antitrust Division and had to follow consent decree procedures and divestures in relation to only its regional sports networks.[38]

B. *Vertical and Horizontal Mergers*

In antitrust law, mergers are deemed either vertical or horizontal.[39] Vertical mergers are typically defined as those between two or more companies producing a different kind of a good or service, operating at different levels in a vertical supply chain, merging operations to operate

[32] These different thresholds of minimum value and size are updated each year. For the annual filing thresholds, see *Current Thresholds*, FED. TRADE COMM'N, https://www.ftc.gov/enforcement/premerger-notification-program/current-thresholds [https://perma.cc/5EHY-7NKE] (last visited Mar. 12, 2021).
[33] *See Premerger Notification and the Merger Review Process*, *supra* note 31.
[34] *Id*.
[35] *Id*.
[36] *Id*.
[37] *Id*.
[38] *See infra* Section II.A.
[39] *Competitive Effects*, FED. TRADE COMM'N, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/mergers/competitive-effects [https://perma.cc/2KZ2-FNCJ] (last visited Mar. 8, 2021).

efficiently.[40] This is advantageous because a company effectively creates a pipeline that guarantees a steady stream of business at multiple stages of production or service.[41]

On the other hand, a horizontal merger occurs when two or more companies, often as competitors of the same good or service within the same industry (i.e., television and film studios), merge to have higher gains in a particular market share.[42] This is advantageous from a business perspective because the models and operations of the companies are often very similar, which allows for a more seamless transition and reduced costs.[43]

C. *History of Communication Monopolies in the United States*

1. Communication Giant: AT&T

Monopoly power is defined as the "ability to control prices in the relevant market *or* to exclude competitors from that market."[44] AT&T is often regarded as one of the first and long-lasting information monopolies.[45] In the early twentieth century, AT&T began to acquire a series of small competitors, raising antitrust concerns to regulators.[46] AT&T's president, Theodore Vail, settled with the U.S. government in a deal known as the Kingsbury Commitment.[47] Ultimately, AT&T agreed to divest itself of Western Union, cease acquiring competing independent companies without the approval of the Interstate Commerce Commission, and interconnect its long-distance networks with local independent competitors.[48] It had to divest Western Union and cease the latter activities because the companies had established a monopoly in the manufacture, distribution, and sale of telephone equipment.[49] This vertically integrated system meant that AT&T had almost total control and monopolistic power over communication technology in the country, which is one of the prime concerns of antitrust law.[50]

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40 *5 Types of Company Mergers*, MINORITY BUS. DEV. AGENCY, DEPT. OF COM., https://www.mbda.gov/news/blog/2012/04/5-types-company-mergers [https://perma.cc/DV8F-G2EH] (last visited Mar. 8, 2021).
41 *Id.*
42 *Id.*
43 *Id.*
44 2 JULIAN O. VON KALINOWSKI, PETER SULLIVAN & MAUREEN MCGUIRL, ANTITRUST LAWS AND TRADE REGULATION § 25.03, LexisNexis (2d ed., database updated through Apr. 2021).
45 *Id.*
46 ALAN STONE, PUBLIC SERVICE LIBERALISM: TELECOMMUNICATIONS AND TRANSITIONS IN PUBLIC POLICY 192 (2014).
47 *Id.*
48 *Id.*
49 *Id.*
50 *Id.* at 192–93.

For the majority of the twentieth century, AT&T retained its monopoly status as a long-distance telephone service provider.[51] However, in the 1970s, the Federal Communications Commission raised suspicions of an anticompetitive, vertically integrated structure.[52] In turn, the federal government charged AT&T with the monopolization of "a broad variety of telecommunications services and equipment in violation of section 2 of the Sherman Act."[53] Among other claims, the company was charged with using its vertically integrated relationship with Western Electric, one of AT&T's subsidiaries that produced telephone equipment, to stifle competition in telecommunications equipment.[54] The court summed up the allegations:

> AT&T has allegedly used its control of this local monopoly to disadvantage these competitors in two principal ways. First, it has attempted to prevent competing long distance carriers and competing equipment manufacturers from gaining access to the local network, or to delay that access, thus placing them in an inferior position vis-à-vis AT&T's own services. Second, it has supposedly used profits earned from the monopoly local telephone operations to subsidize its long distance and equipment businesses in which it was competing with others.[55]

AT&T was given the option to refute these allegations. Instead, it sought to settle with the government by breaking up the company and dividing it into several different units.[56] The court approved AT&T's proposed settlement plan with modifications pursuant to the Tunney Act.[57] The modifications required court approval of the reorganization plan and confirmation of the court's authority to carry out enforcement proceedings sua sponte.[58]

2. Communication Monopolies in the Film Industry

Antitrust issues surrounding both horizontal and vertical integration in the entertainment industry were further explored in *United States v. Paramount*.[59] The United States sued Paramount Pictures pursuant to violations of Sections 1 and 2 of the Sherman Act by (1) five corporations which produce films and their respective subsidiaries which distribute

[51] *Id.* at 193.
[52] United States v. Am. Tel. & Tel. Co., 552 F. Supp. 131, 161–62 (D.D.C. 1982).
[53] *Id.* at 139.
[54] *Id.* at 178.
[55] *Id.* at 223.
[56] *Id.*
[57] *Id.*
[58] *Id.* at 217.
[59] United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948).

and show films and own or control theaters; (2) two corporations which produce films and their subsidiaries which distribute films; and (3) one corporation engaged only in the distribution of films.[60] Essentially, many of the film corporations owned the theaters in which their films were shown, and in turn, only showed the films of the corporations that owned each respective theater.[61] Because the corporations had too much control over the movie theaters, which are at a different level of distribution on the supply chain, this structure violated antitrust law.[62] This type of vertical integration was lucrative but illegal, because the studios had a near-monopoly on the film and distribution business.[63] Therefore, there was no room for other studios, especially independent producers of films, to effectively compete against the studio giants.

The U.S. Supreme Court affirmed the district court's ruling that the companies violated antitrust law.[64] The studios were required to divest themselves of their particularly owned theater chains.[65] Additionally, the studios were required to sign consent decrees terminating the practice of block booking, the system by which theaters often had to buy several of the major studios' films in order to get one of their desirable films by requiring that all films be sold individually.[66] These consent decrees are called the "Paramount Decrees."[67] The growth of the television industry is often attributed to the decision in *United States v. Paramount*,[68] forming due to the freedom of the market and lack of vertically integrated media systems.[69]

The Paramount Decrees and the final decision in *United States v. Paramount* are critical when discussing media monopolies in the film industry, which is why they are often discussed in the context of entertainment consolidation. One example of such consolidation is the Disney-21st Century Fox merger. In 2018, the DOJ began to review the Paramount Decrees and whether or not they still continued to serve important competitive purposes seventy years after their implementation.[70] The DOJ sought to review the Decrees because the

60 *Id.* at 140.
61 *Id.* at 141–42.
62 *Id.* at 140–41.
63 Scott Bomboy, *The Day the Supreme Court Killed Hollywood's Studio System*, NAT'L CONST. CTR. (May 4, 2021), https://constitutioncenter.org/blog/the-day-the-supreme-court-killed-hollywoods-studio-system [https://perma.cc/Y6GZ-ETV7].
64 *Paramount*, 334 U.S. at 178.
65 *Id.* at 175.
66 *Id.* at 178.
67 *The Paramount Decrees*, U.S. DEP'T OF JUST., https://www.justice.gov/atr/paramount-decree-review [https://perma.cc/QL6B-ZRJQ] (last updated Oct. 30, 2018).
68 Bomboy, *supra* note 63.
69 *The Paramount Decrees*, *supra* note 67.
70 *Id.*

modern motion picture industry is very different from the industry in the 1930s and 1940s.[71] Furthermore, some commentators argue that the Decrees are antiquated and useless today.[72] Metropolitan cities often have numerous movie theaters playing multiple films per day on multiple screens.[73] Consumers have a variety of different distribution platforms to consume films.[74] Therefore, consumers are no longer limited to going to theaters.[75] Those in favor of abolishing the Decrees think that these modern distinctions demonstrate that the antitrust issues that existed in the time of *United States v. Paramount* are no longer a true threat to our communications industry because there is more consumer choice and means of competition.[76]

The Paramount Decrees continue to be an important consideration in current antitrust law and specifically, in entertainment consolidation. When the DOJ approved the Disney-Fox merger, the issues presented by eliminating the Paramount Decrees and the long-term effects that can occur from allowing these mergers should have been considered. Many expressed these concerns in the review process; seventy-seven public comments were submitted and published by various independent theaters, trade groups, and private individuals.[77] Many small studios, including many drive-in theaters and family-owned small cinema chains, expressed their support for the Decrees, specifically their concern that big studios like Disney will charge higher prices to play their films if the Decrees were terminated.[78] Theoretically, if the Decrees were abolished, Disney

[71] *Id.*

[72] *See, e.g.*, Steven Madoff, *The End of the Paramount Antitrust Consent Decrees: A Brief Look at Movie History and the Future*, ANTITRUST ATT'Y BLOG (Aug. 7, 2020), https://www.theantitrustattorney.com/the-end-of-the-paramount-antitrust-consent-decrees-a-brief-look-at-movie-history-and-the-future/ [https://perma.cc/ED3M-3EGF].

[73] *The Paramount Decrees*, *supra* note 67.

[74] *Id.*

[75] *Id.*

[76] *Id.*

[77] *See Paramount Consent Decree Review Public Comments 2018*, U.S. DEP'T OF JUST., https://www.justice.gov/atr/paramount-consent-decree-review-public-comments-2018 [https://perma.cc/LK84-8R8T] (last updated Dec. 20, 2018).

[78] *Id.* For example, Bow Tie Cinemas expressed support by stating that it "is a family-owned company that has been owned and managed by the Moss family for four generations and over one hundred years." It submitted a comment that

> focuses on the deleterious effect that modification or termination of the Decrees would have on smaller chain theatres such as Bow Tie and the consumers they service. Put simply, Bow Tie believes that any reduction or termination of the existing decrees will reduce consumer choice, increase consumer cost, and significantly harm smaller regional chains that have limited negotiating power against large studios and distributors.

Bow Tie Cinemas, LLC, Comment Letter for the *Paramount* Consent Decree Review (Oct. 3, 2018), https://www.justice.gov/atr/page/file/1102346/download [https://perma.cc/4BYJ-XZNX]. Others, like Aut-O-Rama Drive-In, a small business that operates a drive-in theatre in North Ridgeville, Ohio, simply expressed their support by endorsing other submitted comments. *See* Aut-O-Rama Drive-In Theatre, Comment Letter for the *Paramount* Consent Decree Review (Oct. 4, 2018), https://www.justice.gov/atr/page/file/1102721/download [https://perma.cc/A2FP-2JFK]

and other media giants could buy movie theaters and use them in unforeseen ways to distribute their films.[79] This would add to "current concerns surrounding competition and market share in the industry."[80] If media giants have control and power over a remarkable amount of distribution means (movie theaters), competition will be stifled because studio-owned theaters would not play any of its competitors' films.[81] Therefore, competitors would have to adapt or, most likely, go out of business.

Although the film industry has changed, many of the sentiments concerning unequal bargaining power of media conglomerates exist today—smaller studios have much less bargaining power than large theater chains to negotiate with studios.[82] Regardless of the review, the Decrees are still being enforced today.[83]

D. *Consumer Welfare*

When assessing whether to bring antitrust actions against a large company, agencies use the consumer welfare standard.[84] Under this standard, "business conduct and mergers are evaluated to determine whether they harm consumers in any relevant market."[85] To administer this principle, an agency would consider whether the challenged practice creates a "sufficient inference of lower market-wide output and higher prices," and if so, it is unlawful.[86] The consumer welfare standard has recently been criticized for failing to take into account more considerations than just how consumers are affected by antitrust.[87] Although the consumer welfare standard is an effective standard in assessing antitrust analysis, many critics propose a total welfare standard as an alternative for antitrust enforcement.[88] This standard considers both producers and consumers in a given market, rather than just consumers.[89]

(stating that is "fully supports" the comments submitted by the United Drive-In Theatre Owners Association, National Association of Theatre Owners, and the Independent Cinema Alliance).

[79] Peter Labuza, *4 Ways a New Justice Department Repeal May Radically Reshape Moviegoing*, POLYGON (Nov. 20, 2019, 3:02 PM), https://www.polygon.com/2019/11/20/20974364/justice-department-paramount-decree-disney-netflix-monopoly [https://perma.cc/N7E5-BHY5].

[80] *Id.*

[81] *Id.*

[82] *Id.*

[83] *Id.*

[84] Christine S. Wilson, *Welfare Standards Underlying Antitrust Enforcement: What You Measure Is What You Get*, FED. TRADE COMM'N 1 (Feb. 15, 2019), https://www.ftc.gov/system/files/documents/public_statements/1455663/welfare_standard_speech_-_cmr-wilson.pdf [https://perma.cc/AK2N-PAVL].

[85] *Id.*

[86] *Id.* at 5.

[87] *Id.* at 1–2, 5–8.

[88] *Id.* at 4.

[89] *Id.*

Despite these considerations, the FTC used the consumer welfare standard in its antitrust analysis of the proposed Disney-Fox merger.

II. ANALYSIS

A. United States v. The Walt Disney Company

In December of 2017, Disney agreed to acquire certain assets and businesses from Fox for approximately $71.3 billion.[90] Such interests included "Fox's ownership of or interests in its RSNs [Regional Sports Networks], FX cable networks, National Geographic cable networks, television studio, Hulu, film studio, and international television businesses."[91] The United States filed a civil antitrust complaint on June 27, 2018.[92] The complaint alleged that Disney's acquisition of certain proposed assets of Fox's would likely substantially lessen competition in the licensing of cable sports programming to distributors in Designated Market Areas (DMAs) in violation of Section 7 of the Clayton Act.[93] Complying with the requirements of the Tunney Act, the United States filed a proposed Final Judgment and Hold Separate Stipulation and Order (an order that requires divesture assets to be operated separately from Disney's business to preserve the assets and maintain interim competition)[94] consenting to entry of the Final Judgment.[95] The United States filed a proposed Final Judgment on August 7, 2018, requiring Disney to divest twenty-two RSNs in order to ameliorate the anticompetitive effects of the proposed acquisition.[96]

Despite the divesture of certain RSNs, Disney eventually acquired the majority of 21st Century Fox's entertainment assets, most notably Twenty-First Century Fox Film Corporation and Twenty-First Century Fox Television.[97] As a result, Disney is now the owner of a large number

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90 Press Release, Walt Disney Co., The Walt Disney Company Signs Amended Acquisition Agreement to Acquire Twenty-First Century Fox, Inc., for $71.3 Billion in Cash and Stock (June 20, 2018), https://www.thewaltdisneycompany.com/the-walt-disney-company-signs-amended-acquisition-agreement-to-acquire-twenty-first-century-fox-inc-for-71-3-billion-in-cash-and-stock/ [https://perma.cc/Y5ZF-5KQH].

91 Complaint at 1–2, United States v. Walt Disney Co., No. 1:18-cv-05800, 2019 WL 5386807 (S.D.N.Y. Sept. 23, 2019).

92 *Id.*

93 *Id.*

94 *Frequently Asked Questions About Merger Consent Order Provisions*, FED. TRADE COMM'N, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/mergers/merger-faq [https://perma.cc/BLY4-DYL3] (last visited Mar. 3, 2021).

95 United States v. Walt Disney Co., No. 1:18-cv-05800, 2019 WL 5386807 (S.D.N.Y. Sept. 23, 2019).

96 Plaintiff United States' Motion and Memorandum in Support of Lifting the Stay and Entering the Final Judgment, United States v. Walt Disney Co., No. 1:18-cv-05800, 2019 WL 5386807 (S.D.N.Y. Sept. 23, 2019).

97 Erich Schwartzel & Joe Flint, *Disney Closes $71.3 Billion Deal for 21st Century Fox Assets*, WALL ST. J. (Mar. 20, 2019, 5:30 AM), https://www.wsj.com/articles/disney-completes-buy-of-

of franchises and characters.[98] For example, Disney acquired the Marvel character rights from the *X-Men* and the *Fantastic Four* franchises, creating increased opportunities for Marvel Studios, a Disney subsidiary, to produce films with these rights.[99] This is not Disney's first acquisition of world-renowned entertainment assets: Lucasfilm (the studio known for producing the *Star Wars* and the *Indiana Jones* franchises) has been a subsidiary of Disney since 2012.[100] Additionally, in 2006, Disney acquired the company Pixar, the computer animation company which owns Pixar Animation Studios, the CGI film production company known for producing films like *Monsters, Inc.*, *Toy Story*, and *Cars*.[101]

In June 2019, Marvel Studios' *Avengers: Endgame* became the highest-grossing film of all time, surpassing the long-held record by *Avatar*.[102] *Avatar*, prior to the Disney merger, was owned by 21st Century Fox.[103] Multiple *Avatar* sequels are rumored to be released in the next decade.[104] *Avatar* was directed by James Cameron, a well-regarded director whose films have made more than $6 billion.[105] James Cameron is also the famous director of *Titanic*. The five highest-grossing movies of all time, as of November 2019, in descending order, are *Avengers: Endgame*, *Avatar*, *Titanic*, *Star Wars: The Force Awakens*, and *Avengers: Infinity War*.[106] Therefore, The Walt Disney Company now has ownership rights in all five of the top-grossing films of all time.[107]

Given the current trend of Marvel's success and *Avatar* sequels on the horizon, Disney's two highest-grossing franchises (*Marvel Cinematic Universe* and *Avatar*) could eventually be competing against one another for the highest box office profits. As Disney continues to create high-grossing movies, it will obtain more capital.[108] Consequently, it effectively increases its market share in the film industry. If the highest-grossing movies are all owned by Disney, there is a possibility of

foxs-entertainment-assets-11553074200 (last visited Mar. 3, 2021).
98 *Id.*
99 *Id.*
100 Press Release, Walt Disney Co., Disney to Acquire Lucasfilm Ltd. (Jan. 24, 2006), https://www.thewaltdisneycompany.com/disney-to-acquire-lucasfilm-ltd/ [https://perma.cc/NDX6-JE24].
101 Press Release, Walt Disney Co., Disney to Acquire Pixar (Oct. 30, 2012), https://thewaltdisneycompany.com/disney-to-acquire-pixar/ [https://perma.cc/2J58-57E2].
102 Sarah Whitten, *'Avengers: Endgame' to Be the Highest-Grossing Film of All Time*, CNBC (July 20, 2019, 8:39 PM), https://www.cnbc.com/2019/07/20/avengers-endgame-to-be-the-highest-grossing-film-of-all-time.html [https://perma.cc/J77H-XWB5].
103 Sarah Whitten, *'Avatar' Sequels Are a Huge Risk for Disney, but You Can't Doubt James Cameron*, CNBC (July 26, 2019, 11:56 AM), https://www.cnbc.com/2019/07/26/james-camerons-avatar-sequels-are-a-huge-risk-for-disney.html [https://perma.cc/5NMB-8VXM].
104 *Id.*
105 *Id.*
106 *Id.*
107 *Id.*
108 *Id.*

anticompetitive effects. In years to come, there will be a risk that other major entertainment studios will not be able to compete for blockbuster hits, especially given the current market share. This could lead to fewer jobs and options for creatives not working at Disney, and additionally, unfair leverage with theater owners.

B. *Disney's Studio Market Share and Intellectual Property*

In recent years, Disney has made fewer films than it traditionally has.[109] Rather, it has put more money into the budget of a film to ensure large audiences and high gross revenue.[110] Some commentators argue that Disney has been concentrating on profitability, rather than the quality of its products.[111] These commentators find that Disney knows it can cash in on valuable remakes, such as the live-action *The Lion King*, or sequels of sagas, such as *Avengers: Endgame*.[112] Excessive amounts of remakes can make consumers feel like there is a lack of innovation and creativity in the film system. However, remakes and reboots are an easy way to generate revenue because consumers often have sentimental feelings toward the original version of the film and are interested in how the company will "revamp'" and "innovate" the traditional story with new technology and ideas.[113] Disney is able to capture many different types of audiences with its remakes—although many films are stories for children, teenagers and adults are drawn to the story that they know and love, or a famous voice cast, such was the case for *The Lion King*.[114]

Is there more to this than simply knowing your audience, paying for top-of-the-range franchises, and then, commercializing your IP to customers? Arguably, having strong market power can lead to studio complacency, which effectively lowers the quality of the products. This means that innovation is often stifled because a company knows it has strategic power over the industry and does not have to try as hard to have a competitive edge.[115] Despite these notions, consumers are attracted to Disney as a well-respected entertainment giant, and even if it becomes "complacent" in its origination of films, it is still producing the highest-grossing films because of its "cult-like" intellectual property.[116] Cult-like intellectual property ranges from the aforementioned remakes to the

[109] Brett Heinz, *It's Time to Break Up Disney*, AM. PROSPECT (Oct. 1, 2019), https://prospect.org/power/time-to-break-up-disney-monopoly/ [https://perma.cc/8382-KG36].
[110] *Id.*
[111] *Id.*
[112] *Id.*
[113] *Id.*
[114] *Id.*
[115] *Id.*
[116] *Id.*

consumer-obsessed Marvel and *Star Wars* franchises. Additionally, Disney has an ability to make blockbuster films one after another, with many arguing that these films are created at the expense of "quality" filmmaking. For example, *The Lion King* remake, which was released in Summer 2019, amassed a lot of critical reviews.[117] Despite the star-studded cast and beautiful visuals, some critics felt that the quality of storytelling was low (it closely followed the original animated film, without any nuances).[118] Many see Disney movies for its cult-like status, massive budgets, and superstar casts. Disney capitalizes on this public conception.

This complicated and seemingly vicious anticompetitive cycle is driven by Disney's market share. Even prior to the merger, Disney's market share was extremely large: in 2018, Disney's earnings of $7.3 billion represented 26% of the U.S. market share and 14.2% of the international market share.[119] By the end of 2019, Disney and 21st Century Fox's studio market share was already higher than 33%.[120] Put simply, around a third of the top-grossing movies of 2019 were produced and owned by Disney. The larger the market share becomes, the more antitrust implications continue to arise. Although Disney's merger with Fox was settled, the monopolistic problems presented by the merger are seemingly reflected in Disney's yearly earnings.

The DOJ has stated that market power cannot be a threshold inquiry, meaning that the antitrust analysis must integrate more than just the sole inquiry into the percentage of market share in the given industry.[121] Scholars have noted that a company cannot be considered a monopoly simply because it has amassed a high percentage of market share:

> [A] market share of ninety percent "is enough to constitute a monopoly; it is doubtful whether sixty . . . percent would be enough; and certainly thirty-three percent is not." Use of market share as a proxy for market power has rightfully been criticized for ignoring other important market information such as the ability of competing firms to expand or of new competitors to enter. At the extreme, the theory of contestability shows that even a firm with a 100% market

117 *See, e.g.*, Matt Zoller Seitz, *The Lion King*, ROGER EBERT (July 19, 2019), https://www.rogerebert.com/reviews/the-lion-king-2019 (last visited Aug. 11, 2021).
118 *Id.*
119 Juan Diego Bogotá, *Disney Buys 21st Century Fox: A Monopoly on Entertainment?*, LATINAMERICAN POST (Mar. 29, 2019), https://latinamericanpost.com/27217-disney-buys-21st-century-fox-a-monopoly-on-entertainment [https://perma.cc/SH5Z-ZFKF].
120 Julia Stoll, *North American Box Office Market Share of Disney/Buena Vista from 2000 to 2020*, STATISTA (Jan. 20, 2021), https://www.statista.com/statistics/187300/box-office-market-share-of-disney-in-north-america-since-2000 [https://perma.cc/J2FT-3QP5].
121 Thomas G. Krattenmaker, Robert H. Lande & Steven C. Salop, *Monopoly Power and Market Power in Antitrust Law*, 76 GEO. L.J. 241, 255 (1987).

> share may have no ability to raise price or collect monopoly profits under certain, albeit highly restrictive, circumstances.[122]

Market share should be one of the many factors to consider, but not the sole focus of the antitrust analysis.[123]

C. *The Streaming Wars*

When Disney acquired Fox, it also acquired 60% of Hulu, resulting in a majority interest in one of the largest video streaming services.[124] Although Hulu has been losing around $1.7 billion per year, it still has hundreds of millions of subscribers across the United States.[125] With its resources, Disney will most likely seek to expand Hulu and its reach across various platforms. In August 2019, Disney predictably announced its own streaming service, Disney+.[126] In addition to its own streaming service, Disney announced a $12.99 bundle for a combination of Disney+, Hulu, and ESPN+, giving access to brands and classic Disney content for consumers of all ages and genders.[127] These rates are competitive and leave many unanswered questions for the future of streaming.

An increasing number of competitors and studios are announcing their own streaming services, such as NBC's Peacock, CBS's All Access, and WarnerMedia's HBO MAX.[128] Many have labeled the current era as the beginning of a "streaming war."[129] Right now, there appears to be much competition in the streaming distribution market as these new services come to fruition. The future of streaming is starting to look like a reflection of the past of cable networks and TV channels: numerous different platforms will show exclusive and original content, with the occasional crossover.[130] The amount of new and different streaming services would seem to undercut the anticompetitive effect: the big media companies will have to fight for new and interesting content, or

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122 *Id.* at 259 (footnotes omitted) (ellipses in original) (quoting Judge Learned Hand in United States v. Aluminum Co. of Am., 148 F. 2d 416, 424 (2d Cir. 1945)).
123 *Id.* at 260.
124 Bogotá, *supra* note 119.
125 Patrick Seitz, *Hulu Under Disney Likely to Remain Also-Ran Against Netflix*, INVESTOR'S BUS. DAILY (Oct. 5, 2018), https://www.investors.com/news/technology/click/hulu-disney-fox-netflix/ [https://perma.cc/LB2D-5BLQ].
126 Press Release, Walt Disney Co., New Global Launch Dates Confirmed for Disney+ (Aug. 19, 2019), https://www.thewaltdisneycompany.com/new-global-launch-dates-confirmed-for-disney/ [https://perma.cc/FEJ5-FWBE].
127 *Id.*
128 Stephen Zetichik, *Everything You Need to Know About Upcoming Streaming Services, in One Handy Rundown*, WASH. POST (Sept. 20, 2019), https://www.washingtonpost.com/business/2019/09/20/everything-you-need-know-about-upcoming-streaming-services-one-handy-rundown/ [https://perma.cc/G6W3-MWVX].
129 *Id.*
130 *Id.*

consumers will unsubscribe. However, each of these big companies is a media conglomerate. So, while there is no one monopolistic behemoth dominating this industry, there are only a few large media companies competing in the market (all of whom own and have acquired many other media and distribution companies along the way).[131] Although Disney's power as an entertainment company is seemingly daunting, with the advent of numerous companies taking on streaming and other technologies, the concerns may be unfounded. All these companies seem to be successfully competing in the market with Disney.[132]

However, Netflix is one platform whose ability to successfully compete in the market with Disney after the merger with Fox was in doubt. At the time, the future of Netflix's services remained very uncertain.[133] With the influx of different streaming services, a great deal of popular content was pulled from Netflix.[134] For example, *The Office* (NBC), *Friends* (WarnerMedia), and all of Disney's original content has been removed from Netflix.[135] In case other media companies pull their content, and knowing that the future of streaming is in original programming, Netflix spent $12 billion developing original shows in 2018.[136] However, by the end of 2019, over 60% of its viewing hours were from licensed shows.[137] Additionally, in order to fund show

131 AT&T owns Time Warner Inc., Turner Broadcasting, and HBO (including TNT, TBS, CNN, Cartoon Network, and associated websites like CNN.com). *See* Shobhit Seth, *The World's Top Media Companies*, INVESTOPEDIA, https://www.investopedia.com/stock-analysis/021815/worlds-top-ten-media-companies-dis-cmcsa-fox.aspx [https://perma.cc/4V2H-RLDF] (last updated Oct. 7, 2020). CBS owns various subsidiaries such as CBS Sports Network, CBS Television Distribution, Simon & Schuster, and The CW. *See* VIACOMCBS ANNUAL REPORT 2020 FORM 10-K (NASDAQ:VIACA) (Feb. 20, 2020), https://annualreport.stocklight.com/NASDAQ/VIACA/20636513.pdf [https://perma.cc/M88V-H4CE]. Viacom owns MTV, Nickelodeon, Comedy Central, VH1, CMT, Paramount Network, BET, and Showtime. *See Brands*, VIACOM, https://www.viacom.com/brands [https://perma.cc/KVH6-9DDZ] (last visited Mar. 12, 2021). However, in early December 2019, Viacom and CBS merged. Cynthia Littleton, *CBS and Viacom Complete Merger: 'It's Been a Long and Winding Road to Get Here,'* VARIETY (Dec. 4, 2019), https://variety.com/2019/biz/news/cbs-viacom-merger-complete-redstone-bob-bakish-1203424316/ [https://perma.cc/52FV-AMSY]. The merger makes ViacomCBS another massive mass media conglomerate. Finally, NBCUniversal is a subsidiary of Comcast (itself a conglomerate) and it owns NBCUniversal Filmed Entertainment, Broadcast Television, Cable Networks, Sports, and News (MSNBC, CNBC, E!), and Universal Parks & Resorts. *See* Nathan Reiff, *Top 5 Companies Owned by Comcast*, INVESTOPEDIA, https://www.investopedia.com/articles/markets/101215/top-4-companies-owned-comcast.asp [https://perma.cc/9C2Y-2VZ3] (last updated Oct. 16, 2019).

132 Alex Sherman, *How to Tell Who's Winning—and Who's Losing—the Streaming Wars*, CNBC (Feb. 18, 2021), https://www.cnbc.com/2021/02/18/streaming-wars-how-to-tell-whos-winning-and-whos-losing.html [https://perma.cc/AY59-VAH5].

133 Stephen McBride, *Netflix Has 175 Days Left to Pull Off a Miracle. . . Or It's All Over*, FORBES (May 21, 2019, 8:54 AM), https://www.forbes.com/sites/stephenmcbride1/2019/05/21/netflix-has-175-days-left-to-pull-off-a-miracle-or-its-all-over/ [https://perma.cc/YS9R-5RNF].

134 *Id.*

135 *Id.*

136 *Id.*

137 David Trainer, *Netflix's Original Content Strategy Is Failing*, FORBES (July 19, 2019), https://www.forbes.com/sites/greatspeculations/2019/07/19/netflixs-original-content-strategy-is-failing/ [https://perma.cc/N5DK-AYPC].

development and advertising, the company has borrowed huge sums of money from creditors.[138] The Netflix stock had fallen and entered into negative territory in 2019.[139] For the first time in ten years, Netflix's subscriptions fell.

The negative trend was predicted to continue into 2020 as a result of the "streaming wars,"[140] but it was not fully realized. Fall of 2019 proved fruitful for Netflix with the release of *Marriage Story*, *The Irishman*, and *The King*, which were released in a limited run in theaters before they became available for streaming.[141] There is no available box office data that has been released by Netflix for the films,[142] but they received wide acclaim and numerous award nominations and accolades.[143] This suggests that Netflix's plan to focus on original programming might prove profitable despite the competition.

In fall of 2019, there were rumors surrounding a potential Netflix acquisition by Apple, which could raise vertical merger antitrust concerns in and of itself.[144] However, Apple, started its own streaming service in November 2019, Apple TV+, and it primarily has to focus on its entrance into the streaming market.[145] Days after Disney launched Disney+, Netflix announced a multiyear partnership with Nickelodeon.[146] This strategic decision came about right after Disney+ took away a lot of Netflix's kid-friendly content.[147] According to Netflix's vice president of original animation, Melissa Cobb, the goal was to "find fresh voices and

138 McBride, *supra* note 133.
139 Keris Lahiff, *Netflix Stock Turns Negative for 2019, but Trader Sees Another Big Drop Ahead*, CNBC (Sept. 25, 2019), https://www.cnbc.com/2019/09/25/netflix-stock-turns-negative-for-2019-but-trader-foresees-bigger-drop.html [https://perma.cc/LUJ6-2FHQ].
140 *Id.*
141 Mahita Gajanan, *These Are the Most Popular Netflix Shows and Movies—According to Netflix*, TIME (Dec. 10, 2019), https://time.com/5697802/most-popular-shows-movies-netflix/ [https://perma.cc/26X6-7VE7].
142 *Id.*
143 Matt Donnelly, *Netflix Leads Oscar Nominations for the First Time Behind 'Irishman,' 'Marriage Story,'* VARIETY (Jan. 13, 2020), https://variety.com/2020/film/news/netflix-oscar-nominations-2020-the-irishman-marriage-story-1203463792/ [https://perma.cc/LG4K-5UJR].
144 Michael Sheetz, *Apple Should Buy Netflix but It Would Likely Cost at Least $189 Billion, JP Morgan Says*, CNBC (Feb. 4, 2019, 7:55 AM), https://www.cnbc.com/2019/02/04/jp-morgan-apple-should-buy-netflix.html [https://perma.cc/SP7V-K9GX].
145 Michael Teddler, *Apple's Streaming Service Launches Soon. Here's How Apple TV+ Compares to Netflix and Hulu*, MONEY (Sept. 23, 2019) http://money.com/money/5655965/apple-tv-streaming-service-price-shows-start-date/ [https://perma.cc/JTM7-AV37]; Press Release, Apple, Apple TV+ Launches November 1, Featuring Originals from the World's Greatest Storytellers (Sept. 10, 2019), https://www.apple.com/newsroom/2019/09/apple-tv-launches-november-1-featuring-originals-from-the-worlds-greatest-storytellers/ [https://perma.cc/H24H-ZWCX].
146 Sarah Brookbank, *Netflix and Nickelodeon Announce Multiyear Partnership in Wake of Disney+ Launch*, USA TODAY (Nov. 14, 2019, 10:17 AM), https://www.usatoday.com/story/tech/2019/11/14/netflix-nickelodeon-partnership-new-shows-movies-disney/4189837002/ [https://perma.cc/C35H-9VZC].
147 *Id.*

bring bold stories to our global audience on Netflix."[148] This is a key example of Netflix having to stay novel in order to keep up with Disney and other large entertainment streaming companies, if it wants to keep its subscribers.

2020 was a year that completely changed the profitability of streaming services like Netflix. Through the COVID-19 pandemic, Netflix and other streaming services have become star performers.[149] The company added millions of subscribers and increased its stock price and net profits dramatically.[150] As stated, Netflix borrowed billions of dollars to invest in original content, however, through the COVID-19 pandemic, it was able to generate profits and made enough revenue to pay back loans while maintaining its content budget.[151] In fact, in early 2021, Netflix announced that it no longer needed to borrow money in order to cover its entertainment productions after a decade of doing so.[152] The combination of the pandemic, which enabled many people to stay home and watch more content than ever before, and successful original programming like *The Queen's Gambit* allowed Netflix to continue to be a viable contender in the streaming service war.[153] From March to April of 2020, Netflix saw a huge spike in viewership with docuseries like *Tiger King*, *Love Is Blind*, and *Too Hot to Handle*.[154] Whether the original programming investment, the COVID-19 pandemic, or a combination of both is the root of such success, Netflix's seemingly bleak future was reversed in 2020.[155]

The reality is that now there are a few major players in the streaming world—all successful on their own merits, especially in the wake of COVID-19. This begs the question of whether the average American

148 *Id.*

149 Trefis Team, *Netflix One Question: Is It Losing Money or Making Money?*, FORBES (May 1, 2020), https://www.forbes.com/sites/greatspeculations/2020/05/01/netflix-one-question-is-it-losing-money-or-making-money/ [https://perma.cc/2KKE-LDPR].

150 *Id.* (reporting that in the first months of 2020, Netflix's stock price rose by around 25%, its net profits tripled, and it added 16 million subscribers).

151 Edmund Lee, *Netflix Will No Longer Borrow, Ending Its Run of Debt*, N.Y. TIMES (Jan. 19, 2021), https://www.nytimes.com/2021/01/19/business/netflix-earnings-debt.html [https://perma.cc/9STQ-NQPJ].

152 *Id.*

153 Travis Bean, *These Were the 25 Most Popular Shows on Netflix in 2020*, FORBES (Dec. 19, 2020, 5:00 PM), https://www.forbes.com/sites/travisbean/2020/12/19/the-25-most-popular-shows-on-netflix-in-2020/ [https://perma.cc/4AGF-3U2U].

154 Erin Carson, *Netflix's 2020 Trends: Tiger King, Love Is Blind and Other Series that Helped Us Escape a Pandemic*, C|NET (Dec. 10, 2020, 9:28 AM), https://www.cnet.com/news/netflixs-2020-trends-tiger-king-love-is-blind-and-other-series-that-helped-us-escape-a-pandemic/ [https://perma.cc/4WX6-249N].

155 Jon D. Markman, *Best Stocks of the Year: Netflix Is Number 5*, THESTREET (Dec. 14, 2020), https://www.thestreet.com/investing/best-stocks-of-2020-netflix-number-five [https://perma.cc/7AU3-K9X9] ("In the first three quarters of 2020, Netflix added 28.1 million new subscribers, more than in all of 2019. At the end of Q3, the company had 195 million paid subscribers. . . . During the most recent quarter, Netflix reported $1.3 billion in net cash from operations versus a loss of $502 million a year ago. The company now has $8.4 billion of cash on hand.").

household even can afford to subscribe to all available streaming options, including Netflix, Disney+, and Amazon Video.[156] Assuming that the average American household cannot or would not choose to subscribe to all,[157] there is no market analysis to suggest that if people had to choose, they would choose Disney+, and it will likely take years to understand the full market effects of the streaming wars. But if Disney keeps its prices low and content desired, it could potentially push out competitors in the streaming industry. Therefore, if competitors are pushed out and there are less choices in the streaming market, Disney can charge more for its services.

The streaming wars and media consolidation continue to heat up. In May 2021, AT&T announced its deal to combine its content unit WarnerMedia with Discovery.[158] This would create a new business that is separate from AT&T and be valued at as much as $150 billion.[159] Overall, this merger allows AT&T to undo its media acquisition of Time Warner, reversing its plan to combine content and distribution in a vertically integrated company.[160] Instead, this move comes as Netflix and Disney have emerged as dominant players in the direct-to-consumer streaming market, and will put AT&T in a better position to compete in the "wars."[161]

Regardless, antitrust law is ill-equipped to scrutinize these technological nuances at the premerger stage. Current entertainment conglomerates transcend multiple markets. Entertainment and technology companies are massively vertically and horizontally integrated. Despite this, these concepts are not considered by antitrust enforcement and regulatory agencies because these agencies seem to focus only on direct or indirect market effects when assessing proposed mergers and acquisitions.

156 *See* Joe Supan, *Americans Already Subscribe to Three Streaming Services on Average. Is There Room for More?*, ALLCONNECT (June 20, 2020), https://www.allconnect.com/blog/average-american-spend-on-streaming [https://perma.cc/H278-HX8N].
157 *Id*.
158 Steve Kovach & Sam Meredith, *AT&T Announces $43 Billion Deal to Merge WarnerMedia with Discovery*, CNBC (May 17, 2021), https://www.cnbc.com/2021/05/17/att-to-combine-warnermedia-and-discovery-assets-to-create-a-new-standalone-company.html [https://perma.cc/9PT2-MS5H].
159 *Id.*
160 *Id.*
161 Jason Abbruzzese & Dylan Byers, *Discovery and WarnerMedia Merge, Creating One of the Largest U.S. Media Companies*, NBC NEWS (May 17, 2021), https://www.nbcnews.com/media/discovery-warnermedia-merge-creating-one-largest-us-media-companies-rcna940 [https://perma.cc/QEU4-CL5B].

D. *Brand Partnerships in the Consolidation Context*

Unsurprisingly, consumers are extremely attracted to the Disney+ streaming service, especially given the robust amount of intellectual property on the service. In less than two weeks of the app's launch, it was downloaded over 15.5 million times and generated over $5 million through in-app purchases.[162] On its first day, Disney+ recruited over 10 million subscribers.[163] Many of these subscribers downloaded the app due to the deals Disney made ahead of the service's launch, such as its partnership with Verizon to give free Disney+ for one year for Fios and unlimited wireless customers.[164]

Many consumers are drawn to these new streaming services because of partnerships with different service providers—and even competitors—that offer free or discounted services. In the beginning of 2019, Disney issued an edict to its staffers stating that it refuses to accept advertisements from rival streaming services on any of its properties (including ABC and Freeform).[165] However, Disney found a compromise with every other competitor company besides Netflix.[166] It determined that the other competitors, such as Apple and Amazon, presented mutually beneficial business or advertising opportunities for Disney; however, Netflix did not.[167] This represents a shift in the television industry: "[B]roadcasters have generally allowed streaming services such as Netflix and Amazon Prime Video to advertise, even when it became clear they were luring away viewers."[168] Allowing competitors to advertise on services promotes free competition. Therefore, preventing Netflix from accessing marketing channels will adversely affect its ability to attract new subscribers to the service.[169] Possibly because Netflix was the pioneer of streaming services, it is put at a disadvantage that other competitor streaming services will not face. However, by refusing to enter into any sort of partnership, even for marketing purposes, Disney has deemed Netflix unworthy of a mutually beneficial relationship.[170]

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162 Jacob Siegal, *Data Shows that Disney+ Is Adding a Million New Subscribers Every Day*, BGR (Nov. 26, 2019, 6:05 PM), https://bgr.com/2019/11/26/disney-plus-price-downloads-subscription-numbers/ [https://perma.cc/7V3H-6B4S].

163 *Id.*

164 *Id.*

165 Alexander Bruell & Suzanne Vranica, *Disney Bans Netflix Ads as Streaming Marketing Wars Intensify*, WALL ST. J. (Oct. 4, 2019, 4:58 PM), https://www.wsj.com/articles/disney-bans-netflix-ads-as-streamings-marketing-wars-intensify-11570199291 (last visited Mar. 5, 2021).

166 *Id.*

167 *Id.*

168 *Id.*

169 *Id.*

170 *Id.*

Similar tensions are reflected in Disney's relationship with other technology giants. Disney and Amazon have struggled to agree to terms for a Disney app on Amazon's Fire TV streaming-media player.[171] As of present date, Disney+ is now available on Fire TV.[172] There is an influx of technology companies, like Apple and Amazon, who have entered the content-production market.[173] As technology companies expand, they will continue to dip their toes into the world of television content production—Amazon and Apple already offer their own streaming services, Amazon Prime Video and Apple TV+, respectively. It is not inconceivable for entertainment companies to enter the television devices and players market to compete with Amazon Fire TV and Apple TV players. Although it might be unnecessary, given that Disney+ is available to stream on Roku, Apple TV, and Amazon Fire TV, it is not out of the question for Disney to create its own digital media players and attempt to control the market on that front. How is the integration of entertainment conglomerates, content distribution, streaming services, and digital media players any different from past vertical and horizontal integration issues in antitrust law?

With these major entertainment and technology conglomerates competing in the same markets, the issue is whether Disney, or any of these companies, have a duty to deal with their competitors. In general, any business can choose its business partners.[174] The duty to deal is considered an unexplored and undeveloped area of antitrust law, according to the FTC.[175] However, under certain circumstances, courts have found antitrust liability when a particular company with market power refuses to deal and do business with its competitor.[176] For example, in *Lorain Journal Co. v. United States*, the Supreme Court found that a newspaper violated Section 1 of the Sherman Act and attempted to monopolize commerce in violation of Section 2 of the Act.[177] The newspaper enjoyed a substantial monopoly in mass dissemination of news and advertising in Lorain, Ohio. It refused to accept advertisements in its publication from any advertiser who advertised on the radio station

171 *Id.*
172 Michael Polin, *Disney+ Now Available on Fire TV*, FIRE TV (Nov. 12, 2019), https://amazonfiretv.blog/disney-now-available-on-fire-tv-2627b30ffbe5 [https://perma.cc/S9JH-KURK].
173 Peter Csathy, *Streaming Wars 2021 Mid-Year Scorecard: How Netflix, Amazon Prime Video, Disney+, Apple TV+, and HBO Max Stack Up*, CONSEQUENCE TV (May 10, 2021), https://consequence.net/2021/05/streaming-wars-2021-mid-year-scorecard/ [https://perma.cc/6PYV-8KSM].
174 *Refusal to Deal*, FED. TRADE COMM'N, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/single-firm-conduct/refusal-deal [https://perma.cc/FLG8-XA4Y] (last visited Mar. 5, 2021).
175 *Id.*
176 *Id.*
177 Lorain J. Co. v. United States, 342 U.S. 143 (1951).

eight miles away from Lorain.[178] Its anticompetitive goals were effective: numerous merchants abandoned their plans to advertise over the radio station.[179] The Court held that "a single newspaper, already enjoying a substantial monopoly in its area, violates the 'attempt to monopolize' clause of § 2 when it uses its monopoly to destroy threatened competition."[180]

Ultimately, the newspaper's refusal to deal with advertisers using the radio station strengthened its dominant advertising market position and threatened to terminate competition with the radio station.[181] Courts do not usually require a company to deal with its competitors because, ironically, it could have anticompetitive effects.[182] Although it is rare to require this duty, the refusal of broadcast advertising and app integration into the major technology players, like Apple TV, looks eerily similar to the anticompetitive and monopolistic arguments in *Lorain Journal Co*.

E. *Horizontal Merger: Vertical Effects*

This Note has thus far explored Disney's studio market share and its resounding dominance over the film and television industry. However, another reason why current antitrust law is not equipped to tackle entertainment and technology company consolidation has to do with the other industries in which these large companies compete. Disney is not simply a film company—it is an enormous media conglomerate.[183] The horizontal merger will likely affect more than just the film industry. Disney also owns cruises, hotels, theme parks, radio stations, and local news stations.[184] Having power in many different markets gives Disney the ability to beat competitors, offer products at a lower price, squeeze profits from other markets, and influence legislation and public policy.[185]

With the amount of coveted intellectual property obtained, including James Cameron's revolutionary works, Disney will continue to be a powerhouse not only in the film industry but also in its profitability from consumer products and merchandise (for example, toys and apparel), theme parks, and hotels.[186] At Disney's 2019 D23 expo, a bi-

178 *Id.* at 148.
179 *Id.* at 145–46.
180 *Id.* at 154.
181 *Refusal to Deal*, *supra* note 174.
182 *Id.*
183 Heinz, *supra* note 109 ("Disney now owns or holds a share in a small kingdom of companies: 20th Century Fox, ABC, A&E, Endemol Shine (producers of everything from *Deal or No Deal* to *Black Mirror*), ESPN, Fox Sports Network, FX, GoPro, History Channel, Hollywood Records, Hulu, Lifetime, Lucasfilm, National Geographic, Marvel, Photobucket, Pixar, Touchstone Pictures, and Vice Media.").
184 *Id.*
185 *Id.*
186 *Id.*

annual convention to celebrate Disney's achievements and announce new projects, Bob Chapek, chairman of Disney Parks, Experiences, and Products, announced that an *Avengers* Campus will open at Disney California Adventure in summer 2020.[187] When the COVID-19 pandemic occurred, Disney pushed back the opening of the *Avengers* Campus to June 2021.[188] The park would have opened one year after Disney officially opened *Star Wars*: Galaxy's Edge at Disneyland (Anaheim, California) and Disney's Hollywood Studios (Orlando, Florida).[189] The *Star Wars*-themed land reportedly cost $1 billion to conceive and build and was arguably the most highly anticipated theme park expansion of all time.[190] Reservations at Disneyland were required between May 31 and June 23, and often sold out each day within minutes.[191]

According to the 2018 Global Attractions Attendance Report published by the Themed Entertainment Association and the Economics practice at AECOM, Walt Disney Attractions had the highest attendance rate of 2017 (150,014,000 visitors).[192] Merlin Entertainments Group had the second-highest attendance rate, which was 2.3 times lower than Disney's, and Universal Parks and Resorts had the third-highest attendance rate, which was 3 times lower than Disney's.[193] Despite Disney's acquisition of Fox and *The Simpsons* IP, Universal can continue to license the characters in its Florida park for *The Simpsons* ride until 2028, unless Fox feels that Universal has violated the terms of their agreement early.[194] The Walt Disney Company reported in its 2019 fourth quarter financial reports that its Parks, Experiences and Products revenue

187 Thomas Smith, *Disney Parks, Experiences and Products Shares First of Many Exciting Announcements to Be Unveiled at D23 Expo 2019*, DISNEY PARKS BLOG (Aug. 22, 2019), https://disneyparks.disney.go.com/blog/2019/08/disney-parks-experiences-and-products-shares-first-of-many-exciting-announcements-to-be-unveiled-at-d23-expo-2019/ [https://perma.cc/B4X4-U8MA].

188 Sarah Whitten, *Avengers Campus Is Now Open at Disneyland Resort—Take a Look Inside*, CNBC (June 4, 2021), https://www.cnbc.com/2021/06/04/avengers-campus-is-now-open-at-disneyland-resort-take-a-look-inside.html [https://perma.cc/CJ4P-AJNU].

189 *Star Wars: Galaxy's Edge Is Now Open at Walt Disney World Resort!*, STAR WARS (Aug. 29, 2019), https://www.starwars.com/news/star-wars-galaxys-edge-now-open-at-walt-disney-world-resort [https://perma.cc/5ZFT-CPEB].

190 Brad Tuttle, *Star Wars Land Opens at Disneyland This Week. Here's Everything to Know About Reservations, Rides, and Ticket Prices*, MONEY (May 28, 2019), http://money.com/money/5645650/disneyland-star-wars-land-reservations-galaxys-edge/ [https://perma.cc/7GTF-8PFM].

191 *Id.*

192 Themed Entertainment Association (TEA), *TEA/AECOM 2017 Theme Index and Museum Index: The Global Attractions Attendance Report* 9 (2018), http://www.teaconnect.org/images/files/TEA_268_653730_180517.pdf [https://perma.cc/6TAN-6RUW].

193 Merlin Entertainments Group had a 66,000,000 attendance rate and Universal Parks and Reports had a 49,458,000 attendance rate. *Id.*

194 Brian Glenn, *Let's Talk About the Simpsons Rights at Universal Parks*, INSIDE UNIVERSAL (Mar. 25, 2019), https://www.insideuniversal.net/2019/03/lets-talk-about-the-simpsons-rights-at-universal-parks/ [https://perma.cc/7WNP-GT7L].

increased 8% to a total of $6.7 billion.[195] As its earnings continue to go up quarter after quarter, Disney continues to charge higher prices for its theme park tickets.[196] Additionally, guests are spending more money in the parks on ticket sales and purchases such as food and merchandise.[197]

The same story repeats: Disney looks toward trends and consumer attractions, and it inevitably acquires dynamic entertainment assets. Disney does not solely produce films with its newly acquired intellectual property—it infiltrates various consumer markets and eventually becomes an extremely profitable company in each respective industry it competes in. In 2018, the company reported that non-studio activities make up over 83% of its almost $60 billion total revenue.[198] Disney leverages its compelling intellectual property and breaks technology and innovation boundaries no matter which market it is competing in. This is the true crux of Disney's power.

Modern antitrust law barely scratches the surface when considering the resounding effects of media and technology giants. When media companies merge, the tremendous amount of IP and resources gained put that company at a competitive advantage in multiple different industries, while simultaneously competing against fewer companies because it has merged with or acquired its competitors. With almost 200,0000 employees operating in 45 countries, Disney has a diverse and strategic workforce that is constantly thinking of next-generation experiences throughout all of its platforms.[199] On the one hand, it is awe-inspiring to see a company strategically acquire profitable IP and create branded experiences for its dedicated consumers. Arguably, it is a testament to shrewd business strategies and innovative thinking. However, on the other hand, can too much power and innovation cause other competitors to fall to the wayside? If so, is Disney in violation of antitrust laws?

Many of the anticompetitive distribution concerns that pervaded the *Paramount* decision permeate today.[200] In 2017, Disney negotiated the rights to show *Star Wars: The Last Jedi* to movie theaters throughout the

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195 Press Release, Walt Disney Co., The Walt Disney Company Reports Fourth Quarter and Full Year Earnings for Fiscal 2019, BUS. WIRE (Nov. 7, 2019), https://www.businesswire.com/news/home/20191107006062/en/Walt-Disney-Company-Reports-Fourth-Quarter-Full [https://perma.cc/6WDB-R3NF].

196 *Id.*

197 *Id.*

198 Andrew Pulver, *Fairytale Rise: Disney Climbs to New High of Hollywood Dominance*, THE GUARDIAN (July 12, 2019, 10:22 AM), https://www.theguardian.com/film/2019/jul/12/disney-studios-hollywood-dominance-box-office-market-share [https://perma.cc/C6RZ-NZAG].

199 Press Release, Walt Disney Co., Disney Among LinkedIn's Top Companies for 2017 (May 18, 2017), https://www.thewaltdisneycompany.com/disney-among-linkedins-top-companies-2017/ [https://perma.cc/4E7N-B74F].

200 *See* discussion *supra* Section I.C.2.

United States.[201] Theaters were obligated to give Disney "65% of ticket revenue from the film, a new high for a Hollywood studio."[202] Additionally, the theaters were required to show the film in their biggest auditorium for at least a month.[203] If a theater violated these conditions, Disney had the right to take away 5% of the box office revenue from the theater, one example of squeezing profits from other markets.[204] Disney can legally use these powerful tactics; however, they can be extremely detrimental to smaller theaters that lack bargaining power.[205] With that in mind, the horizontal merger with Fox continues to feed into Disney's "monopoly" status. The potential to use similar tactics to show *Avatar* sequels or other Fox intellectual property in theaters will continue to be normalized, having vertical effects in the supply chain of movie distribution.

Moreover, so long as Disney maintains its formidable market power, it has tremendous ability to permeate the policymaking process, shift current political thought, and influence legislation. For example, in 1992, Congress amended the Copyright Act of 1976 with the Copyright Term Extension Act, also known as the Sonny Bono Copyright Term Extension Act.[206] The Act was amended, in part, due to Disney's heavy lobbying for an extension of the copyright term because the likeness of Mickey Mouse was soon to be released to the public domain.[207] In a nod to Disney's successful lobbying, the Act was nicknamed the Mickey Mouse Protection Act.[208]

Large companies like Disney often participate in similar political lobbying.[209] This is particularly prevalent with the major tech giants—Amazon, Apple, Facebook, and Google—who are facing their own antitrust investigations.[210] These tech giants track increasing public and political discontent with their "size, power, [and] handling of user data and role in elections."[211] In turn, they intensify efforts to work with lobbyists associated with the White House, regulatory agencies (such as

[201] Erich Schwartzel, *Disney Lays Down the Law for Theaters on 'Star Wars: The Last Jedi,'* WALL ST. J. (Nov. 1, 2017, 12:28 PM), https://www.wsj.com/articles/disney-lays-down-the-law-for-theaters-on-star-wars-the-last-jedi-1509528603 [https://perma.cc/7M3H-P392].
[202] *Id.*
[203] *Id.*
[204] *Id.*
[205] *See id.*
[206] Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2927 (1998).
[207] Heinz, *supra* note 109.
[208] *Id.*
[209] Cecillia Kang & Kenneth P. Vogel, *Tech Giants Amass a Lobbying Army for an Epic Washington Battle*, N.Y. TIMES (June 5, 2019), https://www.nytimes.com/2019/06/05/us/politics/amazon-apple-facebook-google-lobbying.html [https://perma.cc/K6R5-9A6X].
[210] *Id.*
[211] *Id.*

those that analyze antitrust issues), and Congress.[212] Although these tech conglomerates are different from media corporations such as Disney, Disney spends several million dollars per year on federal lobbying.[213] Although lobbying is a typical function of a large corporation of its caliber, having "friends in high places" is advantageous for any such company when issues, such as the potential loss of IP, arise.[214]

F. *Mixed Horizontal-Vertical Restraint*

Antitrust law has long thought of mergers in a linear fashion. However, certain cases have tried to address the mixing of horizontal and vertical restraints. In *Leegin Creative Leather Products v. PSKS, Inc.*, a manufacturer of leather goods instituted a policy of refusing to sell to retailers that discounted its goods below its suggested prices.[215] When Leegin learned that one of the retailers selling its goods, Kay's Kloset, had been selling some of its line for less than twenty percent of the suggested price, Leegin ceased its sales to the store.[216] This had a considerable negative impact on the store's revenue.[217] The Supreme Court decided to overrule the per se rule that it is illegal under the Sherman Act for a manufacturer to agree with its distributor to set the minimum price a distributor can charge for the manufacturer's goods.[218] Instead, vertical price restraints were to be judged according to the "rule of reason."[219] Under the rule of reason, the "factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition. Appropriate factors to take into account include specific information about the relevant business and the restraint's history, nature, and effect."[220] The rule's purpose is to distinguish between restraints that are in consumer's best interest and restraints with anticompetitive effect that are harmful to the consumer.[221]

The *Leegin* decision set the standard that horizontal price restraints were still to be judged under the per se rule, whereas vertical price restraints were to be judged under the rule of reason.[222] Vertical conduct

212 *Id.*
213 Pat Miguel Tomaino, *Disney Should Be More Transparent About Its Lobbying*, DENV. POST (Mar. 7, 2017, 11:52 AM), https://www.denverpost.com/2017/03/07/disney-should-be-more-transparent-about-its-lobbying [https://perma.cc/3E57-MHTB].
214 Heinz, *supra* note 109.
215 Leegin Creative Leather Prods. Inc. v. PSKS, Inc., 551 U.S. 877 (2007).
216 *Id.* at 884.
217 *Id.*
218 *Id.* at 907.
219 *Id.*
220 *Id.* at 885.
221 *Id.* at 886.
222 Todd R. Seelman, *United States:* US Department of Justice v. Apple Inc., MONDAQ (Dec. 12,

can be judged independently under the rule in the presence of both horizontal and vertical parties.[223] The *Leegin* Court stated, "A horizontal cartel among competing manufacturers or competing retailers that decreases output or reduces competition in order to increase price is, and ought to be, *per se* unlawful."[224] *Leegin* is part of a trend of shifting antitrust enforcement away from protections of consumer interests toward protection of business interests loosening restrictions on vertical integrations.[225] This demonstrates how "current law underappreciates the risk of predatory pricing and how integration across distinct business lines may prove anticompetitive."[226] Vertical pricing conduct demands a higher form of scrutiny from the DOJ during horizontal mergers too.

The decision in *Leegin* put the application of the per se doctrine to vertical pricing conduct to rest until the decision of *United States v. Apple Inc*.[227] In *Apple*, the DOJ filed antitrust suits alleging that Apple and five book publishing companies conspired to fix the retail price for e-books in violation of Section 1 of the Sherman Antitrust Act.[228] Amazon's Kindle bookstore was the dominant e-retailer for books. Apple entered the e-book market through iBooks, offered with the launch of the iPad in 2010.[229] As a new entrant, Apple intended to change the e-books market through product innovations, technological software advances, color viewing, and expanding the e-book market through Apple's already extensive distribution network.[230] Apple decided to pursue an agency model with a thirty percent commission for Apple and no retail price competition.[231]

At the district court level, the court treated Apple as a horizontal actor in its attempts to conspire with publishers in order to eliminate price competition and raise the price of e-books.[232] Therefore, it considered Apple's actions per se illegal and did not allow Apple to have the opportunity to set forth all of the evidence that would be relevant and admissible under the rule of reason approach.[233] As a result, "vertical relationships may be subject to more stringent antitrust treatment than

2014), http://www.mondaq.com/unitedstates/x/359994/Antitrust+Competition/US+Department+Of+Justice+v+Apple+Inc [https://perma.cc/E3L3-RGZU].
223 *Id.*
224 *Leegin*, 551 U.S. at 892.
225 Edward D. Cavanagh, *Vertical Price Restraints After* Leegin, 21 LOY. CONSUMER L. REV. 1, 2 (2008).
226 Lina M. Khan, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710, 803 (2017).
227 United States v. Apple Inc., 952 F. Supp. 2d 638 (S.D.N.Y. 2013).
228 *Id.* at 645.
229 *Id.* at 707.
230 Seelman, *supra* note 222.
231 *Apple*, 952 F. Supp. 2d at 661.
232 *Id.* at 707.
233 *Id.*

had been considered after *Leegin*."[234] The *Apple* case represents an important example of how current antitrust law often focuses on the categorical labels of vertical or horizontal, rather than focusing on the overall anticompetitive effects. This has been the case for the last decade or so; however, given the new technological infrastructure and developments in the past couple of years, the dichotomous approach may fall flat of fully addressing consumer choice, monopolies, and price schemes. Judicial economy is the reason for distinguishing between the two types of restraints: horizontal restraints are per se illegal because they are more likely to reduce competition in an undesired way, whereas vertical restraints can serve legitimate business purposes.[235]

This dichotomous approach is particularly problematic when a manufacturer engages in dual distribution. Dual distribution exists when a manufacturer sells to independent dealers while also simultaneously supplying consumers directly at the distribution level.[236] Unlike typical horizontal competition, by supplying a dealer, the dual distributor creates competition with itself.[237] The hybrid of and interplay between both horizontal and vertical layers confuses courts and law authorities because it is difficult to categorize whether an agreement is horizontal or vertical.[238] Usually, dual distribution does not increase a manufacturer's power in a given market. Herbert Hovenkamp observes:

> A manufacturer who has no market power cannot use dual distribution to create it. Furthermore, even a monopoly manufacturer generally cannot increase its market power by insulating its wholly-owned retail outlets, even if the effect is to injure competing, independent retailers. If the manufacturer has market power, any monopoly profits earned at the retailer level could also be earned at the manufacturer level.[239]

Therefore, in the case of Disney, it could be adopting this dual distribution model to sell its services directly to households if it continues to sell its TV programming through cable TV operators.[240] For example, in early 2021, it was announced that *Modern Family* would be available for streaming on both Hulu and NBCUniversal's Peacock, marking an

234 Seelman, *supra* note 222.
235 Ioannis Lianos, *The Vertical/Horizontal Dichotomy in Competition Law: Some Reflections with Regard to Dual Distribution and Private Labels*, *in* PRIVATE LABELS, BRANDED GOODS AND COMPETITION POLICY: THE CHANGING LANDSCAPE OF RETAIL COMPETITION 161, 165 (Ariel Ezrachi & Ulf Bernitz eds., 2009).
236 *Id.* at 172.
237 *Id.*
238 *Id.*
239 HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY, THE LAW OF COMPETITION AND ITS PRACTICE §11.6e (6th ed. 2020).
240 *Id.*

unusual dual distribution deal that could soon become the norm.[241] This also includes releasing films in theatres and on Disney+ at the same time.

G. *Financial Interest and Syndication Rules*

The FCC implemented the financial interest and syndication rules (fin-syn rules) in the 1970s in order to limit the market control of three main broadcast television networks.[242] These rules prevented the networks from owning any of the programming that they aired during prime time television, syndicating "in-house" programs, and securing financial interests in programs produced by other producers that the network broadcast.[243] The FCC was concerned about networks obtaining greater dominance and monopoly power over producers, and also over the content that Americans could watch, effectively "limiting the number and variety of programs available to the public, thereby limiting program diversity, contrary to the FCC's much sought after goal."[244] The fin-syn rules were structured in order to promote source diversity, outlet diversity, and program diversity.[245] The term "source" referred to the different producers involved in providing the TV programs; "outlet" referred to the amount of different ways that communications are available to the public, such as network television, cable, and VCRs; and "program" referred to the variety of programs offered to consumers.[246] Due to new studies in the 1980s, the rules were continually relaxed.[247]

In 1990, the FOX network, then a new entrant into the industry, petitioned the FCC for a waiver of the fin-syn rules, arguing that the rules were counterproductive and discouraged emerging networks to program at full capacity while giving the traditional three networks greater concentration of power.[248] By 1995, the fin-syn rules were repealed and no longer in effect based on the difference in industry standards compared to twenty years prior.[249] The termination of the rules was the catalyst for the media merger trend.[250] Two of the three major networks that were the

241 Christine Zosche, *Modern Family Heads to Hulu and Peacock in Unusual Dual Distribution Deal*, ADWEEK (Jan. 27, 2021), https://www.adweek.com/blognetwork/modern-family-heads-to-hulu-and-peacock-in-unusual-dual-distribution-deal/84171 [https://perma.cc/EU3U-XWLK].
242 Tamber Christian, *The Financial Interest and Syndication Rules—Take Two*, 3 COMMLAW CONSPECTUS 107 (1995).
243 *Id.*
244 *Id.* at 108.
245 *Id.*
246 *Id.*
247 *Id.*
248 *Id.* at 109.
249 *Id.*
250 William T. Bielby & Denise D. Bielby, *Controlling Prime-Time Organizational Concentration and Network Television Programming Strategies*, 47 J. BROAD. & ELEC. MEDIA 573, 576 (2003).

cause of the rules were absorbed into vertically-integrated entertainment companies (ABC by Disney and CBS by Viacom).[251]

Until the recent "streaming wars," these trends of open network programming have permeated modern television broadcasting. It is difficult to see how any sort of media regulations, such as those that transpired decades ago, would operate in the current landscape. However, these rules demonstrate that there has been a constant struggle between separating content creation and distribution means. With the advent of streaming platform conglomerates, regulators may look back toward the fin-syn rules, or at least the theories behind these regulations. If regulators are serious about antitrust concerns or consolidation issues, they must look backwards at previous regulations but think much broader in the context of a complex and different media landscape.

CONCLUSION

Given the current technological and innovative climate, large companies can easily permeate multiple different industries, all while vertically and horizontally integrating. Antitrust law has not been amended in any significant way since the prevalence of the Internet. Antitrust law developed to regulate the typical industries that threatened competitive practices in the nineteenth and early-twentieth centuries, which bear little resemblance to the large media conglomerates today.

Current treatment of antitrust law is suboptimal to address today's media mergers. The agencies involved in the review process at all stages—from premerger to full-blown integration, merger, and acquisition—must assess the harms to producers (competitors) and consumers with more nuance and forethought about projected consequences. The Walt Disney Company's acquisition of 21st Century Fox is just one example of how antitrust enforcement agencies have ignored the vertical anticompetitive effects of horizontal mergers (and vice-versa). This issue will continue to be at the forefront of antitrust law as technology giants, such as Amazon, dominate every market in which they compete.

The future of the entertainment industry is unknown, given the streaming wars and emerging unprecedented technology. Entertainment conglomerates are able to develop original content, distribute it, and knock smaller entertainment companies and distributors out of the market. However, antitrust law cannot address any of these issues if its focus is simply on the linear approach. If vertical and horizontal effects

[251] *Id.*

were considered in their totality, it is likely that many past entertainment mergers would not have passed review by the federal agencies.

Agencies involved in reviewing antitrust concerns do not acknowledge any need to change or update the current treatment of antitrust law. Agencies approach these issues too unilaterally, often focusing solely on either vertical or horizontal effects, rather than both. Along these lines, they emphasize old issues in antitrust law, while ignoring new lessons. This Note proposes that reviewing and enforcement agencies should implement different reviewing procedures and undergo a cost-benefit analysis of a proposed merger while thinking long-term rather than just short-term. Additionally, these agencies must consider the impact not just on the market that is at issue—especially in the context of a horizontal merger—but also on adjacent markets, because corporations of the caliber mentioned in this Note merge and acquire in a web-like pattern rather than a vertical or horizontally linear pattern. If the agencies do not take this web-like pattern into consideration, few companies will effectively compete in any given market.

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