

# Are You Still Watching? An Argument to Reconsider the Paramount Decrees and Include Streaming Video on Demand Companies Under Its Protections.

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*This Article explores the history of Hollywood and the regulations the industry and its executives were forced to follow. Such regulations, specifically those established through the Supreme Court’s decision in United States v. Paramount Pictures, Inc. (i.e., The Paramount Decrees), were rooted in Anti-Trust laws. The United States Department of Justice sought to end the near monopolistic reign of major film studios in Hollywood. Recently, the Decrees have been terminated. However, with streaming services gaining similar control over the industry, the decision to end the control of the Decrees should be reconsidered.*

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## I. INTRODUCTION

The film industry is a lucrative one, but all of the glitz and glam of red-carpet appearances, award-winning performances, and rubbing elbows with A-list celebrities does not come without painstaking economic planning and potentially risky decision-making on the part of studio executives.<sup>1</sup> Arguably, the most important of these decisions back in the early days of Hollywood film making was which theaters a studio would license its films to. Profits at the box office were generally split amongst the theater owners, the film's distributors, and the film's producers.<sup>2</sup> What is more, in the early days of Hollywood, the percentage of the profit that went to each party changed as the film remained in theaters, with the studios receiving most of the profits during the opening weekend while theater operators received a larger percentage as the film got older.<sup>3</sup> Because of arrangements like this, a film's first-run ticket sales have traditionally been extremely important for film studios.<sup>4</sup>

First-run ticket sales became even more important to studios trying to make a profit once the Paramount Decrees were established, forcing studios who once owned their own theaters to divest from such theaters.<sup>5</sup> Such divestment allowed for independent filmmakers to break into the industry and diversify the types of stories that were told through the lens.<sup>6</sup> The later rise of streaming services led to another avenue for studios to earn a profit off their older films, while it also opened yet another new avenue for independent film production.<sup>7</sup> Subsequently, the rise of streaming services has also been an avenue for film production to revert back to the monopolistic control that was rampant in the early days of filmmaking.<sup>8</sup>

This Article will explore the rise of streaming services, the fall of the Paramount Decrees, and the need now, more than ever, to revisit

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<sup>1</sup> Dina Zipin, *How Exactly Do Movies Make Money?*, INVESTOPEDIA (Oct. 18, 2021), <https://www.investopedia.com/articles/investing/093015/how-exactly-do-movies-make-money.asp> [<https://perma.cc/FU7K-K39G>].

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *See id.*

<sup>5</sup> *See* Dawson Oler, *Netflix, Disney+, & a Decision of Paramount Importance*, 2020 UNIV. ILL. J. L., TECH. & POL'Y 481, 485-86 (2020).

<sup>6</sup> Olivia Pakula, *The Streaming Wars+: An Analysis of Anticompetitive Business Practices in Streaming Business*, 28 UCLA ENT. L. REV. 147, 154 (2020).

<sup>7</sup> Craig Benzine & CrashCourse, *Home Video: Crash Course Film History #13*, YOUTUBE (July 13, 2017), <https://www.youtube.com/watch?v=VfJ-6nQAmk> [<https://perma.cc/2CXC-9HKM>].

<sup>8</sup> *See* Pakula, *supra* note 6, at 159.

the importance of the Paramount Decrees. Specifically, it will explore the need to update the Paramount Decrees so as to adequately control the production, distribution, and exhibition of films in the new age of streaming video on demand, and the Paramount Decrees' significant importance in controlling the distribution of films' first-run profits in a new age of film particularly susceptible to monopolistic control in that area.

## II. STUDIO SYSTEM AND HOLLYWOOD'S "GOLDEN AGE."

The Hollywood Studio System was the standard practice in the entertainment industry “[f]rom the early twentieth century until the 1950s.”<sup>9</sup> The “Studio System” typically refers to the time in the 1930s and 1940s when five major film studios were responsible for nearly everything produced by Hollywood.<sup>10</sup> The five major studios, Metro-Goldwyn-Mayer, Warner Brothers, Paramount Pictures, Twentieth-Century Fox, and RKO, were able to control so much of Hollywood’s production because these studios kept production, distribution, and exhibition of their film products in-house.<sup>11</sup>

This system allowed for reduced production costs and increased profits for the major film studios.<sup>12</sup> The system was extremely profitable, because, in addition to reducing production costs, practices like vertical integration,<sup>13</sup> block booking,<sup>14</sup> and price fixing prevented new players

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<sup>9</sup> *Id.* at 150.

<sup>10</sup> See Rafael Abreu, *What is the Studio System – Hollywood’s Studio Era Explained*, STUDIOBINDER (July 11, 2021), <https://www.studiobinder.com/blog/what-is-the-studio-system-in-hollywood/> [<https://perma.cc/Q4JN-GD94>].

<sup>11</sup> *Id.*

<sup>12</sup> Pakula, *supra* note 6, at 151; Oler, *supra* note 5, at 483.

<sup>13</sup> Ashley Pascual, *What is Vertical Integration in Film?*, BEVERLY BOY PROD. (Aug. 31, 2021), <https://beverlyboy.com/filmmaking/what-is-vertical-integration-in-film/> [<https://perma.cc/FB8N-ZE42>]. Vertical integration, generally, describes “businesses in which two or more stages of production usually operated by separate individually-owned companies are instead owned and operated by the same parent company to provide economies of scale.” *Id.* Specifically, in the film industry, vertical integration occurs when a film production company “owns two or more businesses that are responsible for production and distribution of a film.” *Id.* See also Pakula, *supra* note 6, at 151.

<sup>14</sup> J. A. Aberdeen, *Block Booking: “The Root of All Evil in the Motion Picture Industry,”* COBBLESTONE ENT., [https://www.cobbles.com/simpp\\_archive/blockbook\\_intro.htm](https://www.cobbles.com/simpp_archive/blockbook_intro.htm) (last visited Nov. 21, 2022) [<https://perma.cc/WT95-L4CG>]. Block booking describes the process by which film studios would “sell [their] films in packages on an all-or-nothing basis – usually requiring theaters to buy several mediocre pictures for every desirable one.” *Id.* The practice made it very difficult for independent film producers to distribute their films into theaters because the theaters were likely already blocked off with several films produced by major film studios, which the theater owners were all but forced to show. *Id.*

from entering the film industry.<sup>15</sup> With production costs low and profits high, studios were releasing more films per year in the 1920s and 1930s than during any other decade to date and the studios spared no expense when it came to set design, costumes, and hiring big name movie stars.<sup>16</sup>

Vertical integration occurred when a studio controlled each stage of the film making process – production, distribution, and exhibition.<sup>17</sup> When following this practice, in the production phase studios essentially “owned” writers, actors, and directors.<sup>18</sup> Studio executives determined which of their movies each individual worked on and prevented each individual from working for competing studios.<sup>19</sup> In the distribution and exhibition phases, studios often owned many of the theaters that they showed their films in, practiced block booking, and often set mandatory minimum pricing limits.<sup>20</sup> Thus, the few major film studios, with only each other as competitors, created the ability to essentially determine their own profits, and guaranteed ways to secure those profits. In the simplest of terms, these studios had created a monopoly of the film industry.<sup>21</sup>

Through this vertical integration scheme, the major film studios were able to capitalize on their films’ first-run profits.<sup>22</sup> The way studios finance their films has been largely the same since the Golden Age, with financiers in New York lending money to creatives in Los Angeles.<sup>23</sup> As not much in the way of financing has changed, the major studios remain at the top of the industry.<sup>24</sup> However, financing is only half of the equation.<sup>25</sup> The studios would not remain at the top without earning significant profits, which they have largely been able to do through first-run releases at theaters.<sup>26</sup> The first week of a film’s life in the theater is generally its most important for studios.<sup>27</sup> Studio executives generally understand that they have one

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<sup>15</sup> See Pakula, *supra* note 6, at 151. See also Oler, *supra* note 5, at 484.

<sup>16</sup> Craig Benzine & CrashCourse, *The Golden Age of Hollywood: Crash Course Film History #11*, YOUTUBE (June 30, 2017), <https://www.youtube.com/watch?v=6KfBNrHUSY> [<https://perma.cc/2DZB-SNHQ>].

<sup>17</sup> Pakula, *supra* note 6, at 151.

<sup>18</sup> See *id.* See also Abreu, *supra* note 10.

<sup>19</sup> See Pakula, *supra* note 6, at 151.

<sup>20</sup> Oler, *supra* note 5, at 484. Block booking was the process by which a studio bundled the films it sent to the theaters, forcing a theater to show both films if it wanted to show one. *Id.* This process would essentially guarantee the studio’s films a successful stint at the box office.

<sup>21</sup> See Pakula, *supra* note 6, at 151.

<sup>22</sup> *United States v. Paramount Pictures*, 2020 WL 4573069, \*1 (S.D.N.Y., Sept. 7, 2020).

<sup>23</sup> Adam Davidson, *How Does the Film Industry Actually Make Money?*, N.Y. TIMES (June 26, 2012), <https://www.nytimes.com/2012/07/01/magazine/how-does-the-film-industry-actually-make-money.html> [<https://perma.cc/WDS2-CRVR>].

<sup>24</sup> *Id.*

<sup>25</sup> See *id.*

<sup>26</sup> See *id.*

<sup>27</sup> See Stephen Follows, *How Important Is The Opening Week To A Movie’s Total Box*

week where they can really hold onto audiences before the next “big film” will be in theaters.<sup>28</sup> Profits can drop as much as fifty percent from week one to week two in a theater.<sup>29</sup> With this in mind, studios would generally contract for a larger percentage of the profits the films made in the first week (i.e., first-run profits), with theater owners getting larger and larger percentages as the film remained in theaters for longer periods.<sup>30</sup>

### III. THE PARAMOUNT DECREES.

In the late 1940s, the Department of Justice (“DOJ”) sued the major film studios alleging that the studios had attempted to, and did, monopolize the film industry by contracting with various exhibitors, which “unreasonably restrained trade.”<sup>31</sup> Specifically, the DOJ alleged that major film studios’ practice of vertical integration (i.e., owning both the production studios and the movie theaters) violated sections one and two of the Sherman Antitrust Act (“Act”).<sup>32</sup> Section one of the Act, in relevant part, makes it illegal to contract in “restraint of trade or commerce among the several states.”<sup>33</sup> Section two, in relevant part, makes it illegal for one to “monopolize, or attempt to monopolize . . . any part of the trade or commerce among the several states.”<sup>34</sup>

The District Court initially held that the defendant film studios did violate the two sections of the Act.<sup>35</sup> The District Court also found that the defendant film studios were restraining and monopolizing interstate trade in the distribution and exhibition of their films.<sup>36</sup> Specifically, the studios were practicing vertical integration and setting minimum prices for admission, as well as for licenses to show the films.<sup>37</sup> Such practices, the District Court determined, unreasonably restricted trade and violated provisions of the Act.<sup>38</sup>

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*Office?*, FILM DATA & EDUC. (June 11, 2018), <https://stephenfollows.com/how-important-is-the-opening-week-to-a-movies-total-box-office/>. [<https://perma.cc/3FKD-YF55>].

<sup>28</sup> *See id.*

<sup>29</sup> *Id.*

<sup>30</sup> *See id.*

<sup>31</sup> *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 140–41 (1948).

<sup>32</sup> *Id.* at 141.

<sup>33</sup> 15 U.S.C. § 1.

<sup>34</sup> 15 U.S.C. § 2.

<sup>35</sup> *Paramount*, 334 U.S. at 140.

<sup>36</sup> *Id.* at 141.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

The Supreme Court affirmed multiple findings of the District Court.<sup>39</sup> Namely, the Court held that studios were conspiring to operate two or more theaters, which would otherwise be competing, collectively.<sup>40</sup> Combining these theaters in such a way not only eliminated competition between independent theaters and those owned by the studios, but it also increased the studios' ability to profit from their films.<sup>41</sup> Additionally, the Court determined that the major studios were requiring exhibitors, as a condition on the license to show the studios' films, to set ticket prices at a predetermined minimum.<sup>42</sup> The Court determined that these practices raised concerns over who in the entertainment industry was being allowed access to highly profitable first-run business.<sup>43</sup> Specifically, studios would use minimum pricing to maximize profits during first-runs of their films because the first-run of a film was generally the most popular window for audiences to see the film in theaters.<sup>44</sup> Under these profit maximizing efforts by studios, first-run theaters (which were often those owned by the film studios themselves) were required to charge the highest ticket prices, followed by second-run theaters charging the next highest and so on until the film was no longer shown in theaters.<sup>45</sup> The defendants created a market strategy that essentially limited the first-runs of their pictures solely to theaters that they owned, closing off first-run showings in theaters owned by their competitors (i.e., independent film distributors).<sup>46</sup>

In light of these practices, the Court determined that major studios had too much control over limiting competitors' access to first-run profits, as it seemed that the studios' goals were to monopolize exhibition of their own films.<sup>47</sup> The Court suggested that the threat of monopoly due to vertical integration came from the exhibition level of the vertical integration scheme, and more specifically, from the first-run

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<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 149.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 141. Establishing a minimum price for which a studio's licensee may show the film eliminates the licensee's ability to compete with other area licensees in terms of admission prices. *See id.* at 144. This practice, combined with vertical integration, would allow a studio to set higher admissions prices at theaters that it owned than for theaters it was competing against, which in turn, would maximize profits for itself. *See id.*

<sup>43</sup> *Id.* at 167.

<sup>44</sup> *See id.*

<sup>45</sup> *Id.* at 170-71.

<sup>46</sup> *Id.* at 154-55.

<sup>47</sup> *Id.* at 170.

exhibition market.<sup>48</sup> The problem was not *what* audiences would see in films, which would be a production concern in the vertical integration scheme. Instead, the problem was *how* audiences would see films, which would be an exhibition concern in the vertical integration scheme.

The source of the studios' monopolies over the film industry prior to the Paramount Decrees' enforcement and prior to the practice of competitive bidding were deeply rooted in their total control over first-run showings and profits of their films.<sup>49</sup> The Court in *Paramount* even described the monopoly as one of power in the distribution market for first-run films.<sup>50</sup>

Reducing theaters' access to the first-run market created a monopoly over the exhibition of motion pictures.<sup>51</sup> In 1945, the five major film studios were affiliated with over seventy percent of the first-run theaters in the ninety-two cities in the United States with populations over 100,000.<sup>52</sup> The same five major film studios had interests in 577 out of a total of 978 first-run theaters in cities with populations between 25,000 and 100,000 people.<sup>53</sup> Finally, in some cities with populations under 25,000, the major film studios operated the only first-run theaters in town.<sup>54</sup> The first-run film market was dominated by theaters controlled by the very studios who produced the films, making it extremely difficult for independent theaters to compete in the film industry.<sup>55</sup>

Following the holding of the Court, the major studios consented to the Paramount Decrees ("Decrees").<sup>56</sup> The consequences that followed included the mandate that major studios separate their interest in distribution of their films and exhibition of their films.<sup>57</sup> Studios were required to either divest their distribution operations or their theaters, and subsequently, studios were no longer allowed to both distribute films and own theaters.<sup>58</sup> The Decrees also prohibited studios from practices like block booking and price fixing.<sup>59</sup> Essentially, the Decrees made it so that studios could

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<sup>48</sup> *Id.* at 166.

<sup>49</sup> Michael Conant, *The Paramount Decrees Reconsidered*, 44 L. & CONTEMP. PROBS. 79, 85 (1981).

<sup>50</sup> *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 170–71 (1948).

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 167.

<sup>53</sup> *Id.* at 168.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *The Paramount Decrees*, U.S. DEP'T OF JUST. (Aug. 7, 2020), <https://www.justice.gov/atr/paramount-decree-review> [<https://perma.cc/RKZ4-LS38>].

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

produce and distribute their films, but could no longer participate in the exhibition of said films, resulting in a protection for independent theaters to benefit from important and lucrative first-run profits of new films.<sup>60</sup>

#### IV. AFTER THE ENFORCEMENT OF THE DECREES – FALL OF THE STUDIO SYSTEM.

Following the establishment of the Decrees, the film industry began the practice of “competitive bidding,” so as to ensure some level of competition remained in the industry.<sup>61</sup> Competitive bidding was a process by which distributors with available motion pictures would send invitations to various exhibitors to bid on the films.<sup>62</sup> The highest bidder, presumably, would earn the rights to show the film, though the distributor reserved the right to deny all, including the highest, bids.<sup>63</sup> The new method saw higher rental prices for motion pictures, as well as longer running times.<sup>64</sup>

The Decrees succeeded in preventing the major film studios from monopolizing the industry.<sup>65</sup> These studios no longer profited as much from their films at the box office.<sup>66</sup> However, with less profit at the box office, production became more costly as studios could not guarantee that they would recoup their expenses.<sup>67</sup> As a result, the Decrees were less successful in their goal to allow independent film makers a chance to break into the industry.<sup>68</sup> Increased production costs and fewer box office profits meant independent films became difficult to finance.<sup>69</sup>

##### *A. Post-Decrees Hollywood.*

In the 1950s, with the Decrees in place, studios had to start competing with the emergence of television on top of already dwindling profits at the box office.<sup>70</sup> When studios saw this new medium as a potential way

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<sup>60</sup> Oler, *supra* note 5, at 485.

<sup>61</sup> *Twentieth Century Fox Film Corp. v. Goldwyn*, 328 F.2d 190, 206 (9th Cir. 1964).

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> Oler, *supra* note 5, at 485.

<sup>66</sup> *Id.*

<sup>67</sup> See Lucas Hilderbrand, *The Art of Distribution: Video on Demand*, 64 *FILM Q.* 24, 24 (2010).

<sup>68</sup> See *id.*

<sup>69</sup> See *id.*

<sup>70</sup> Erin Blakemore, *How TV Killed Hollywood's Golden Age*, *HISTORY* (Jan. 3, 2018), <https://www.history.com/news/how-tv-killed-hollywoods-golden-age> [<https://perma.cc/>



back to higher profits, the federal government passed laws allowing the government to deny TV licenses to any companies that had been convicted of engaging in monopolistic practices.<sup>71</sup> Studios were all but forced out of TV station ownership. As broadcast TV was free to anyone with a television set, it became difficult for studios to convince people to leave their homes to go to the theater.<sup>72</sup> Costs had to be cut somewhere, and studios started taking fewer creative risks, investing less in quality films, and ultimately started producing fewer feature films by the mid-1960s.<sup>73</sup> By the end of the 1960s, Hollywood had drifted away from the classical film formula and began releasing more unique stories, which turned out to be just as successful as the major blockbusters of the “Golden Age.”<sup>74</sup>

By the 1970s, the *Paramount* defendants remained the major players in the film making world, however, the executives of the “Golden Age” were beginning to retire,<sup>75</sup> and the studios began to focus their efforts more on distribution rather than production.<sup>76</sup> There were few new players at the distribution level of film making because the emergence of television led to fewer feature films being made.<sup>77</sup> However, more independent producers were able to begin working in the production phase with the help of financing from the new generation of studio executives.<sup>78</sup> These studio executives would lease their studio space to the independent producers in exchange for distribution rights to the films the producers created.<sup>79</sup> At the same time these independent films were breaking onto the scene, the production side of traditional Hollywood studios shifted into the “New Hollywood Cinema” era, where studios began working under larger budgets and putting greater pressure on their films to succeed.<sup>80</sup>

The “New Hollywood Cinema” era did not last long into the 1980s, because the pressure to succeed with such extravagant budgets was not sustainable.<sup>81</sup> If one large budget film did not do as well as it was

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<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> CrashCourse, *The Golden Age of Hollywood*, YOUTUBE (June 30, 2017), [https://www.youtube.com/watch?v=6KfBNrHU\\_SY](https://www.youtube.com/watch?v=6KfBNrHU_SY) [<https://perma.cc/VYK3-AQ7C>].

<sup>75</sup> *Id.*

<sup>76</sup> See Conant, *supra* note 49, at 89-90.

<sup>77</sup> *Id.* at 107.

<sup>78</sup> CrashCourse, *Independent Cinema*, YOUTUBE (July 6, 2017), <https://www.youtube.com/watch?v=opQC45irmN8> [<https://perma.cc/R5Y6-3FD5>].

<sup>79</sup> Conant, *supra* note 49, at 84.

<sup>80</sup> *Independent Cinema*, *supra* note 78.

<sup>81</sup> *Id.*

projected to do, the studio may have lost so much money that it would not survive.<sup>82</sup> Moving into the 1980s, the studios were being purchased by multinational corporations, which altered how they operated.<sup>83</sup> Altered operations included appeasing stock holders, and consulting marketing departments and risk assessment teams before deciding to green-light production on any film.<sup>84</sup> Thus, the major studios began producing blockbuster hits that appealed to the masses, leaving independent film makers once again searching elsewhere for funding.<sup>85</sup> The 1980s also saw the advent of the Video Home System (“VHS”), making 2-hour long films accessible to view at home.<sup>86</sup> Studios saw VHS as a new avenue for profits in the ever changing film making industry, and charged between eighty and ninety dollars per VHS of their blockbuster hits.<sup>87</sup>

Most avid movie watchers could not afford such steep prices for one VHS tape, allowing the rise of video rental giants like Blockbuster and Hollywood Video, which would buy the studios’ VHS tapes in bulk and rent them out to movie watchers for a few dollars (plus any late fees).<sup>88</sup> Such video rental giants continued this practice into the 1990s, and studios began formatting their old films for VHS and making profits on their old films again, as well as the new ones they were producing.<sup>89</sup> With the success of VHS, some independent film makers also saw an opportunity to bypass theatrical releases all together, and instead released their films directly to VHS (i.e., “direct to video” films), again creating a new avenue for independent film makers to break into the industry.<sup>90</sup>

In the early 1990s, studios began selling their films to consumers on VHS for less than ninety dollars per film, which turned out to be another big money-maker for the studios.<sup>91</sup> Shortly thereafter, in the mid-1990s, DVDs emerged into the film industry.<sup>92</sup> DVDs were a significant upgrade from VHS tapes, making them an even bigger money-maker

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<sup>82</sup> See *id.* The film “Cleopatra” was one of the most expensive films ever made at the time it was produced, costing upwards of \$31 million. *Id.* The film nearly bankrupted the studio (Twentieth Century Fox) that produced it. *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> CrashCourse, *Home Video*, YOUTUBE (July 13, 2017), <https://www.youtube.com/watch?v=VfJ-6nQAmTk> [<https://perma.cc/5KMP-YCBU>].

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> See *id.*

for studios.<sup>93</sup> DVDs were also capable of holding a lot of extra content, like deleted scenes, director commentaries, and trailers for new films yet to be released.<sup>94</sup> These added features gave studios yet another incentive to sell their old films in this new format, again making them more money.<sup>95</sup> Each of these new technologies allowed the studios to survive the impact of their decreased profits from traditional theatrical releases following the establishment of the Paramount Decrees.<sup>96</sup>

### *B. Streaming Video on Demand.*

In the 2000s, technology advanced to the point where “direct to video” became “direct to consumer” through the internet. Streaming Video on Demand (“SVOD”) services, like Netflix, soon after their success breaking into the film industry, began producing their own content.<sup>97</sup> This became yet another avenue for independent filmmakers to access the industry.<sup>98</sup> Present day SVOD services have a weak argument that they are distinct from traditional movie studios in that their business models do not follow those of the traditional studios’ models.<sup>99</sup> For example, traditional film studios’ mode of distribution was to send their film reels to theaters with the goal of attracting viewers to the theaters to see their pictures.<sup>100</sup> Netflix, on the other hand, operates with the sole objective of creating its product and uploading it directly to its own servers, with the goal of keeping its subscribers subscribed and attracting new subscribers to its platform.<sup>101</sup> In the end, SVOD services and traditional movie studios are about as distinct as sneakers are from tennis shoes. This has never been clearer than in recent years with traditional studios, like Disney and Paramount, creating their own SVOD counterparts.<sup>102</sup>

With the emergence of streaming services and the lack of first-run profit regulation of such services, the entertainment industry has seen a regression back toward the studio system.<sup>103</sup> Again, these “studios” are controlling all levels of the entertainment process (i.e., production, distribution, and exhibition).<sup>104</sup> As more and more “studios” enter the streaming market,

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<sup>93</sup> *See id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *See Oler, supra* note 5, at 493.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *See id.* at 495.

<sup>104</sup> Patrick Frater et al., *Damming the Stream: Global Governments Try to Set*

especially traditional studios like Disney (with Disney+) and Paramount Pictures (with Paramount+), the potential problems of this regression become much more evident. Specifically, the recurrence of the threat of monopoly following studios' substantial control over first-run profits is apparent.<sup>105</sup>

*C. Rewinding the Film – Slipping Back to the “Golden Age” through Streaming Video on Demand.*

SVOD platforms that release films directly through their platforms are able to exclusively control first-run profits of each film, creating the exact problem that the Decrees were implemented to prevent.<sup>106</sup> The potential profit maximizing that studios can accomplish through this process is illustrated through the recent lawsuit that Scarlett Johansson commenced against Walt Disney Studios.<sup>107</sup>

After ten years of playing Natasha Romanoff in supporting roles throughout various Marvel Cinematic Universe (“MCU”) films, becoming a fan favorite in the MCU, and helping to build the MCU into a multibillion-dollar franchise for Disney, Scarlett Johansson entered into a contract with Marvel in 2017 to star in a Romanoff-centered film titled *Black Widow*.<sup>108</sup> In the previous seven MCU films that Johansson starred in, millions, if not billions of dollars were seen at the global box office.<sup>109</sup> In reliance on such previous success, Johansson and Marvel agreed to defer some of Johansson's compensation for her work in *Black Widow*, making it contingent on box office receipts.<sup>110</sup> With this contingency in mind and to keep her financial interests secure, Johansson obtained a “valuable contractual promise” from Marvel that *Black Widow* would have a “wide theatrical release.”<sup>111</sup> Such a release, as understood by all contracting parties, guaranteed the film would be released *exclusively* in theaters and remain *exclusively* in theaters for between 90 and 120 days.<sup>112</sup> At the time of contracting, this was both the standard practice in the film industry and

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*Boundaries for Streaming Giants. Will they Work?*, VARIETY, <https://variety.com/2021/global/global/netflix-europe-avms-regulation-streamers-1235009148/> [<https://perma.cc/HGW6-TQZ2>] (last visited Nov. 23, 2022).

<sup>105</sup> See Oler, *supra* note 5, at 484.

<sup>106</sup> See Oler, *supra* note 5, at 485, 491.

<sup>107</sup> Complaint at 2, *Periwinkle Ent., Inc. v. Walt Disney Co.*, No. 21STCV27831 (Cal. Super. Ct. July 29, 2021).

<sup>108</sup> *Id.* at 3.

<sup>109</sup> See Travis Bean, *All 24 Marvel Cinematic Universe Films Ranked at the Box Office – Including Black Widow*, FORBES (Apr. 24, 2020), <https://www.forbes.com/sites/travisbean/2020/04/24/all-23-marvel-cinematic-universe-films-ranked-at-the-box-office-including-black-widow/?sh=4fe71d77494e> [<https://perma.cc/P6ZN-3LAC>].

<sup>110</sup> Complaint, *supra* note 107, at 1.

<sup>111</sup> *Id.* at 3.

<sup>112</sup> *Id.*

the practice for each of the previous MCU films in which Johansson starred.<sup>113</sup>

In early 2019, Disney announced that its new SVOD platform, Disney+, would launch on November 12, 2019.<sup>114</sup> Among other things, Disney+ would stream the collection of MCU films, and would be the “exclusive SVOD home for new releases from . . . Marvel, beginning with the 2019 theatrical slate.”<sup>115</sup> Following this announcement, representatives for Johansson sought assurance that Marvel intended to comply with the agreement to have a “wide theatrical release” of *Black Widow*.<sup>116</sup> Marvel acknowledged, in May 2019, that Johansson’s “*whole deal . . . [was] based on a series of (very large) box office bonuses*” and as such, any intention to proceed without a wide theatrical release would have to be discussed with Johansson first.<sup>117</sup>

Despite Marvel’s assurance to Johansson that *Black Widow* would see a wide theatrical release, Disney (presumably directing Marvel to ignore its agreement with Johansson) announced in March, 2021, that *Black Widow* would be released simultaneously in theaters and on Disney+ with Premier Access.<sup>118</sup> Johansson’s losses following this breach are illustrative of the potential monopolizing effect that Disney is creating by releasing feature films in such a hybrid format (or, alternatively, if the films are released exclusively on SVOD platforms).

First, Johansson lost millions of dollars in potential earnings at the box office.<sup>119</sup> Disney announced that in the first weekend alone *Black Widow* earned \$60 million on Disney+.<sup>120</sup> This number is perhaps misleading in illustrating just how many people were drawn away from the theaters due to the film’s concurrent release on Disney+.<sup>121</sup> The flat rate of \$30 for access to the film on Disney+ could cover an entire household viewing *Black Widow*.<sup>122</sup> Not only that, but multiple households may share a single Disney+ account or various subscribers

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<sup>113</sup> *Id.*

<sup>114</sup> Todd Spangler, *Disney+ to Launch in November, Priced at \$6.99 Monthly*, VARIETY (Apr. 19, 2019), <https://variety.com/2019/digital/news/disney-plus-streaming-launch-date-pricing-1203187007/> [<https://perma.cc/8R5Q-VY3H>].

<sup>115</sup> *Id.*

<sup>116</sup> Complaint, *supra* note 107, at 4.

<sup>117</sup> *Id.* (emphasis in the original).

<sup>118</sup> *See id.* (Premier Access would allow any Disney+ subscriber to view *Black Widow* the day it was released in theaters for a fee of \$30. The one-time fee gave the viewer unlimited access to view the film as many times as they liked).

<sup>119</sup> *Id.* at 6.

<sup>120</sup> *Id.* at 5.

<sup>121</sup> *See id.*

<sup>122</sup> Steven Cohen, *I’m a Big Marvel Fan and Got my Money’s Worth with ‘Black Widow’ on Disney Plus Premier Access, but Casual Viewers are Better Off Waiting*, BUS. INSIDER (July 12, 2021), <https://www.businessinsider.com/guides/streaming/black-widow-disney-plus-premier-access-review> [<https://perma.cc/KZ3P-DJLQ>].

could have hosted watch parties, allowing many more people to view *Black Widow* without any additional payment and without a trip to the theater. It is impossible to determine just how many people saw the film for “free.” Just as Johansson lost these profits that would have been earned at the box office, theaters also lost the business, ticket sales, and potential concession sales from these would-be theater goers.

Not only were box office profits lost as to individuals who share a Disney+ account, but such profits were also lost as to would-be repeat movie goers. Anyone with Premier Access could view the film an unlimited number of times after only a single purchase.<sup>123</sup> On its face this does not seem like too great a loss, however, the Guinness World Record for the most times viewing the same movie in theaters is 191 times.<sup>124</sup> What is more, the film that the record holder viewed that many times was an MCU film.<sup>125</sup> Additionally, there was an 85% increase in repeat movie goers from *Avengers: Infinity War* to the following movie in the MCU, *Avengers: Endgame* (two of the three MCU films that directly preceded *Black Widow*).<sup>126</sup> Johansson (and independent movie theaters) potentially lost thousands of dollars from a single person with Premier Access on Disney+, and who knows how many of those would-be repeat movie goers opted for a one-time payment for unlimited viewings instead of paying for each trip to the theater.

An additional source of box office loss from Disney’s hybrid release of *Black Widow* comes in the form of piracy.<sup>127</sup> Piracy is seeing a resurgence in the age of streaming services.<sup>128</sup> Obtaining a pirated version of *Black Widow* became much easier when Disney decided to release it on Disney+.<sup>129</sup> *Black Widow* was the number one pirated title the week it was released.<sup>130</sup> Even without obtaining the title illegally through piracy, there were likely Disney+ subscribers who waited for the title

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<sup>123</sup> *Id.*

<sup>124</sup> Charlie Zhang, *Florida Man Sets Guinness World Record for Watching ‘Avenger’s: Endgame’ 191 Times in Theaters*, HYPEBEAST (Apr. 2, 2021), <https://hypebeast.com/2021/4/guinness-world-record-avengers-endgame-movies-info> [https://perma.cc/9Q9N-3DEE].

<sup>125</sup> *Id.*

<sup>126</sup> Complaint, *supra* note 107, at 14.

<sup>127</sup> Rick Bentsen, *Disney Reportedly Lost Over \$600 Million on Black Widow to Piracy*, MOVIEWEB (Jan. 13, 2022), <https://movieweb.com/disney-black-widow-piracy#:~:text=Disney> [https://perma.cc/8QHW-8GGS].

<sup>128</sup> Michael Beausoleil, *The New Trend in Streaming: Piracy*, MEDIUM (Feb. 14, 2021), <https://medium.com/swlh/the-new-trend-in-streaming-piracy-9882165da769> [https://perma.cc/9VFP-4J4D].

<sup>129</sup> Bentsen, *supra* note 127.

<sup>130</sup> Complaint, *supra* note 107, at 14.

to be released on Disney+ without the additional Premier Access fee. These viewers were also able to see the film for “free,” only requiring a Disney+ subscription fee to view it (again, Disney would see these profits exclusively).<sup>131</sup> This was likely seen as an attractive option for many viewers as *Black Widow* was set to release on Disney+ for regular subscribers just ninety days after its initial theatrical release.<sup>132</sup> This is less time than the average MCU film is exclusively in theaters, which is 117 days.<sup>133</sup> Not only was this a shorter window to wait than for previous MCU films to be available outside the theater, but it was also a much shorter wait time for the film to be available for regular subscribers of a SVOD platform.<sup>134</sup> Generally, MCU films were not available on SVOD platforms like Disney+ for six to eight months after their initial releases.<sup>135</sup>

If this were not evidence enough of Disney’s complete grasp over the profits of *Black Widow*, the company’s stock price elevated 4% in the days following *Black Widow*’s release.<sup>136</sup> The film’s release on Disney+ allowed Disney to gain new subscribers, incentivize existing subscribers to continue paying their monthly fees, and justify any future monthly price hikes.<sup>137</sup> Several Disney executives also received bonuses, which were granted largely for their successful undertaking of launching Disney+ and providing for substantial subscriber growth in the platform’s first year.<sup>138</sup>

Finally, Disney’s intent becomes the clearest when one considers the substantial box office pulls from previous MCU films.<sup>139</sup> If Disney was willing to forego millions, potentially billions, in revenue at the box office, it very likely had ulterior motives. Although at the time the film was released Disney claimed that the theater market was weak,<sup>140</sup> Disney could have pushed its release date back. *Black Widow* had already seen

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<sup>131</sup> Cohen, *supra* note 122.

<sup>132</sup> Complaint, *supra* note 107, at 14.

<sup>133</sup> *Id.* at 8–9.

<sup>134</sup> Travis Clark, *How Major Hollywood Studios are Shifting Their Streaming Strategies as the Theater Industry Stages a Comeback*, BUS. INSIDER (May 11, 2022), <https://www.businessinsider.com/how-long-movies-play-in-theaters-before-streaming-2022-5#warner-bros-5> [<https://perma.cc/6E9W-Q5UC>].

<sup>135</sup> *Id.*

<sup>136</sup> Complaint, *supra* note 107, at 5.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 6.

<sup>139</sup> See Bean, *supra* note 109.

<sup>140</sup> Complaint, *supra* note 107, at 12. Many theaters were just beginning to open up after the COVID-19 pandemic. *Black Widow* would have been one of the first films to be released in theaters after more than a year. Many movie-goers were still reluctant to sit in a potentially crowded theater for over two-hours in the wake of the pandemic.

delayed release dates for over a year.<sup>141</sup> Disney knew that it could make substantial profits from the film's release on Disney+.<sup>142</sup> Such earnings would be kept exclusively for Disney itself, as it had no obligation to compensate Johansson based on Disney+ earnings,<sup>143</sup> nor was there any obligation to provide theaters with their cut of the film's earnings.<sup>144</sup>

Disney clearly saw the potential for exclusive profits from first-run showings of *Black Widow* on Disney+. It would not have foregone the guaranteed gross at the global box office had it not expected to reap the benefits of streaming the film on the SVOD platform. Clearly, the profits that *Black Widow* brought in through Disney+, plus the increase in the stock price for Disney+ in the days following the film's release, suggest that Disney's suspicions had merit. This profit scheme is illustrative of how SVOD platforms can capitalize and monopolize on first-run profits when their films are released on such platforms.

#### V. THE FUTURE FOR STREAMING VIDEO ON DEMAND TO AVOID MONOPOLISTIC PRACTICES.

A potential solution to the monopolistic problem may be gleaned from award show regulations, as well as from regulations implemented by foreign countries in an effort to keep SVOD giants at bay. To be eligible for an Academy Award (i.e., an Oscar), the Academy of Motion Picture Arts and Sciences ("AMPAS") requires, *inter alia*, a film to have a "theatrical qualifying run of at least seven consecutive days in the same commercial motion picture theater, during which period screenings must occur at least three times daily."<sup>145</sup> Netflix, one of the leading SVOD services of today, employs a limited theatrical release for its films which it believes can be Oscar contenders.<sup>146</sup> It does this to comply with Academy

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<sup>141</sup> Julia Alexander, *Black Widow Delayed to 2021, Pushing Back The Eternals and Other Marvel Movies*, THE VERGE (Sept. 23, 2020), <https://www.theverge.com/2020/9/23/21437889/black-widow-delayed-release-date-marvel-cinematic-universe-disney-streaming-mulan> [<https://perma.cc/7CK5-824G>].

<sup>142</sup> Christopher Palmeri, *Disney Touts \$125 Million in Online Revenue From 'Black Widow'*, BLOOMBERG NEWS (Aug. 22, 2021), <https://www.bnnbloomberg.ca/disney-touts-125-million-in-online-revenue-from-black-widow-1.1643050>. [<https://perma.cc/4Y6S-HPVH>].

<sup>143</sup> Complaint, *supra* note 107, at 12.

<sup>144</sup> *See id.*

<sup>145</sup> ACAD. OF MOTION PICTURES ARTS & SCIENCES, RULES & ELIGIBILITY: 95<sup>TH</sup> OSCARS (2022).

<sup>146</sup> Anthony D'Alessandro, *Netflix Soars with 15 Oscar Nominations, Led by 10 for 'Roma,' Off Unique Theatrical & Streaming Release Model*, DEADLINE (Jan. 22, 2019), <https://deadline.com/2019/01/netflix-roma-oscar-nomination-records-1202538273/>.



Award guidelines, but such practice can be seen as proof of Netflix's (and other SVOD platforms') ability to distribute its product outside of itself.

Even a mandatory theatrical release for a minimum period of time would reduce the monopolistic practice that SVOD platforms currently undertake. The Academy Awards require a minimum of seven consecutive days in theaters.<sup>147</sup> The first week of a major film studio's film's release is typically the week in which it grosses the most money compared to the rest of the film's theatrical life.<sup>148</sup> This first week release is a significant part of the first-run scheme for a film.<sup>149</sup> As such, if SVOD platforms were required to release all of their films for a minimum run of one week in theaters, other players in the entertainment industry would benefit immensely. This minimal requirement would arguably eliminate the same problems that the Paramount Decrees sought to eliminate when traditional film studios were undertaking similar practices in the early to mid-1900s.<sup>150</sup>

However, streaming giants like Netflix are currently not considered to be in the same category as studio giants like pre-Paramount Decrees "big five," despite the fact that they can control first-run profits under a starkly similar business model as the studios of old Hollywood.<sup>151</sup> As such, even if a minimal theatrical release were required for films, Netflix (and like platforms) would not be bound by the Decrees' requirement, so it could buy its own theaters in which to show its films.<sup>152</sup> Such practice would negate the purpose of the mandatory theatrical release to avoid monopolistic profit retention by the company. What is more, even if Netflix were to be considered in the category of a major film studio, the Paramount Decrees have recently been repealed, meaning studios are once again free to produce their films to be exhibited in theaters that they own.<sup>153</sup>

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[<https://perma.cc/CE3P-EHP2>].

<sup>147</sup> ACAD. OF MOTION PICTURES, *supra* note 145.

<sup>148</sup> Follows, *supra* note 27.

<sup>149</sup> Bambi Turner, *Why is a Movie's First Week Box Office so Important?*, HOWSTUFFWORKS, <https://entertainment.howstuffworks.com/why-is-movie-first-week-box-office-important.htm#:~:text=A%20stellar%20opening%20weekend%20lays,%5Bsource%3A%20PBS%20Frontline%5D>. [<https://perma.cc/F8AG-TWEY>] (last visited Dec. 1, 2022).

<sup>150</sup> For example, the Decrees required studios to sell the theaters they owned (i.e., separate the production, distribution, and exhibition phases of their business). *Paramount*, 334 U.S. at 149. If SVOD companies were required to release their films in independent theaters for a limited amount of time, the goal of separating production, distribution, and exhibition would similarly be accomplished.

<sup>151</sup> See Oler, *supra* note 5, at 485.

<sup>152</sup> See *U.S. v. Paramount Pictures*, 2020 U.S. Dist. LEXIS 141427 \*1, 13–14 (S.D.N.Y. 2020).

<sup>153</sup> See *Paramount Pictures*, 2020 U.S. Dist. LEXIS at \*1–2.

*A. Decision to Repeal the Decrees.*

In 2020, the Anti-Trust Division of the DOJ moved to terminate the Paramount Consent Decrees.<sup>154</sup> Unsurprisingly, the Independent Cinema Alliance (“ICA”), which is a trade organization committed to empowering independent theater owners in North America, and the National Association of Theatre Owners (“NATO”), which is a U.S. trade organization whose members are owners of movie theaters, objected to the potential termination of the Decrees.<sup>155</sup> However, such organizations were not the only ones to oppose the termination of the Decrees.<sup>156</sup> Prior to the DOJ’s motion to terminate the Decrees, it held a sixty day notice and public comment period, wherein it received over eighty comments.<sup>157</sup> Many of these comments were in opposition to the DOJ’s desire to terminate the Decrees.<sup>158</sup>

Nevertheless, the DOJ continued with its request to terminate the Decrees.<sup>159</sup> Because the DOJ consented to the termination of a government anti-trust action, the court needed only to determine if termination of the Decrees was in the public interest.<sup>160</sup> Still, in a government anti-trust action the DOJ has broad discretion, and while the court in such an action needs to consider what is in the public interest, it should “carefully consider the explanations of the government” when determining what is reasonable action under the circumstances.<sup>161</sup>

The Court cited four reasons the DOJ gave for requesting the Decrees be terminated.<sup>162</sup> The first reason was that the Decrees succeeded in their goal to disrupt the conspiracy of the defendants to monopolize the industry and to undo what aspects of the conspiracy that were achieved up to that point.<sup>163</sup> The second reason was that the changes that had occurred in the film industry since the establishment of the Decrees made it unlikely that the studios would have the ability to re-monopolize the film distribution and exhibition markets if the Decrees were no longer

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<sup>154</sup> *Id.* at 2.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* at 7.

<sup>158</sup> *Id.*

<sup>159</sup> Paramount Pictures, 2020 U.S. Dist. LEXIS at 7.

<sup>160</sup> *Id.* at 8.

<sup>161</sup> *Id.* at 9.

<sup>162</sup> *Id.* at 9–10.

<sup>163</sup> *Id.* The Decrees succeeded in forcing studios to separate their levels of film making (i.e., vertical integration was broken up). *Id.* at 24. Additionally, the practices of block booking and price fixing were effectively handled by the Decrees. *Id.*

regulating them.<sup>164</sup> Third, the DOJ cited that anti-trust case law has evolved over the last seventy years, making the regulation on such vertical integration models, like the ones prohibited by the Decrees, inappropriate.<sup>165</sup> Finally, the DOJ suggested that even without the Decrees in place the studios would be subject to liability under the general anti-trust laws, which would deter the studios from conspiring to create monopolies over the distribution and exhibition markets once again.<sup>166</sup>

From the DOJ's cited reasons for terminating the Decrees, the Court proceeded to determine if such reasons were "reasonable" and if subsequent termination was within the public interest.<sup>167</sup> The Court began by describing how the film industry has changed since the establishment of the Decrees and how such changes make it nearly impossible for the film studios to undertake the problematic practices that they used to undertake.<sup>168</sup> Specifically, the Court noted that single-screen and theater-only "distribution market[s that] provided Defendants with incentive and ability to limit the first-run distribution of their films to a select group of owned or controlled theaters in order to maximize their profits" no longer exists.<sup>169</sup> Today, filmmakers have the option to release their films in multiple screen theaters, on broadcast or cable television, directly to DVD format, or even on the internet through SVOD platforms.<sup>170</sup> Such diversity in options, the Court reasoned, minimizes a studio's ability to singlehandedly control first-run profits.<sup>171</sup> Furthermore, the Court indicated that as of the time of the action to terminate the Decrees, no film distributor owned a major movie theater,

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<sup>164</sup> *Id.*

<sup>165</sup> U.S. v. Paramount Pictures, 2020 U.S. Dist. LEXIS 141427 \*1, 10 (S.D.N.Y. 2020). Today, courts hear anti-trust cases under a different standard. *Id.* at 7. Whereas vertical integration was deemed *per se* illegal under the Decrees, today, the courts look at such practices as potentially beneficial under the "rule of reason" analysis. *Id.* at 10. This analysis mandates that the court "weigh the competitive harm or foreclosing competitors – either motion picture distributors from theaters, or movie theaters from movie distributors' films – against any procompetitive efficiencies to determine whether a transaction violates the antitrust laws." *Id.* at 17. Where a court finds that such practice is beneficial in lowering costs and encouraging innovation, it will be allowed. *See id.*

<sup>166</sup> U.S. v. Paramount Pictures, 2020 U.S. Dist. LEXIS 141427 \*1, 10 (S.D.N.Y. 2020).

<sup>167</sup> *Id.* at 6.

<sup>168</sup> *Id.* at 10.

<sup>169</sup> *Id.* at 13.

<sup>170</sup> *See* U.S. v. Paramount Pictures, 2020 U.S. Dist. LEXIS 141427 \*1, \*1 (S.D.N.Y. 2020).

<sup>171</sup> *Id.* at 12.

suggesting that that overarching problem was no longer present.<sup>172</sup>

The Court next cited the new competitors in the industry as justification for terminating the Decrees.<sup>173</sup> Specifically, the Court noted that the defendants in the original *Paramount* decision distributed far fewer films as of the writing of this current opinion compared to the number of films they distributed in the 1930s and 1940s.<sup>174</sup> Meanwhile, the studios and filmmakers that had broken into the industry since the Decrees, and thus, those filmmakers that are not subject to the conditions of the Decrees, dominated the market at the time of the writing of the current opinion.<sup>175</sup> The Court suggested that it was unfair to subject the original defendants to the restrictions of the Decrees when their new competitors were subject to no such restrictions.<sup>176</sup> The Court determined that because it was unlikely that the remaining defendants from *Paramount* would once again collude to acquire major movie theater chains, it was in the public interest to terminate the Decrees.<sup>177</sup>

The Court went on to say that even without the Decrees in place studios would be subject to general anti-trust laws.<sup>178</sup> Such restriction was enough for the Court to determine that the studios would be adequately deterred from reverting to monopolistic practices within the film industry.<sup>179</sup> Ultimately, the Court held that the DOJ “offered a reasonable and persuasive explanation for why the termination of the Decrees would serve the public interest in free and unfettered competition.”<sup>180</sup>

### *B. Lingering Concerns.*

The Court cited the evolution of the filmmaking industry as making monopolistic control over the industry unlikely today.<sup>181</sup> What the Court neglected to consider, however, was how these new avenues for film distribution and exhibition may be conducive to monopolistic control of a film’s first-run profits in and of themselves. Similarly, the Court cited the change in competition as a justification for terminating the Decrees.<sup>182</sup>

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<sup>172</sup> *Id.*

<sup>173</sup> *Id.* at 10.

<sup>174</sup> *Id.* at 12.

<sup>175</sup> *Id.*

<sup>176</sup> *U.S. v. Paramount Pictures*, 2020 U.S. Dist. LEXIS 141427 \*1, 13 (S.D.N.Y. 2020).

<sup>177</sup> *Id.* at 11.

<sup>178</sup> *Id.* at 10.

<sup>179</sup> *Id.*

<sup>180</sup> *Id.* at 20.

<sup>181</sup> *Id.* at 9.

<sup>182</sup> *U.S. v. Paramount Pictures*, 2020 U.S. Dist. LEXIS 141427 \*1, 10 (S.D.N.Y. 2020).

However, it neglected to consider that the new competitors entering the industry may be in a position to monopolize first-run profits just as the old competitors did.<sup>183</sup>

Looking back to the Complaint filed by Scarlett Johansson against Disney will illustrate the alleged harms that can be avoided by reinstating the Decrees and including SVOD companies under their protections.<sup>184</sup> If the Decrees were regulating Disney's film production, distribution, and exhibition practices, it would likely not have willfully breached its contract with Johansson. Disney released *Black Widow* concurrently in theaters and on its own streaming platform to maximize its profit from the film.<sup>185</sup> If Disney+ was held to the standards of the Decrees, Disney would have been barred from releasing the film on its own platform (at least during the film's lucrative first-run timeframe).<sup>186</sup> The profits that Disney sustained for itself would have been shared amongst Johansson and the theaters where *Black Widow* was shown.<sup>187</sup> Thus, reinstating the Decrees, and including SVOD companies under their protections, will allow for anti-monopolistic practice in the updated film industry.

## VI. CONCLUSION.

The Court in its decision to terminate the Paramount Consent Decrees correctly recognized that the same dangers that were apparent in the film industry in the early days of filmmaking are no longer present in the industry today.<sup>188</sup> It also correctly recognized that the new competitors in the industry, like Netflix, Disney, and Amazon, were not subject to the same restrictions as the original defendant film studios from Hollywood's "Golden Age."<sup>189</sup> However, it failed to recognize that these new players present their own dangers to the fair competition that filmmakers have enjoyed during the Decrees' era. It terminated the Decrees, opening the door for studios to revert back to monopolistic control in the filmmaking industry, with little oversight. Instead, the Court should have considered these new dangers that the industry is facing and updated the Decrees to include these new industry players under the Decrees' protections.

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<sup>183</sup> *See id.*

<sup>184</sup> Complaint, *supra* note 107.

<sup>185</sup> *Id.*

<sup>186</sup> U.S. v. Paramount Pictures, 2020 U.S. Dist. LEXIS 141427 \*1, 6 (S.D.N.Y. 2020).

<sup>187</sup> *Id.*

<sup>188</sup> *Id.* at 11.

<sup>189</sup> *Id.* at 10.