

THE STREAMING WARS+:

An Analysis of Anticompetitive Business Practices in Streaming Business

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ABSTRACT

The recent rise of streaming platforms currently benefits consumers with quality content offerings at free or at relatively low cost. However, as these companies' market power expands through vertical integration, current antitrust laws may be insufficient to protect consumers from potential longterm harms, such as increased prices, lower quality and variety of content, or erosion of data privacy. It is paramount to determining whether streaming services engage in anticompetitive business practices to protect both competition and consumers.

Though streaming companies do not violate existing antitrust laws because consumers are not presently harmed, this Comment thus explores whether streaming companies are engaging in aggressive business practices with the potential to harm consumers. The oligopolistic streaming industry is combined with enormous barriers to entry, practices of predatory pricing, imperfect price discrimination, bundling, disfavoring of competitors on their platforms, huge talent buyouts, and nontransparent use of consumer data, which may be reason for concern. This Comment will examine the history of the entertainment industry and antitrust laws to discern where the current business practices of the streaming companies fit into the antitrust analysis. This Comment then considers potential solutions to antitrust concerns such as increasing enforcement, reforming the consumer welfare standard, public utility regulation, prophylactic bans on vertical integration, divestiture, and fines.

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INTRODUCTION

In the streaming wars, companies offer “plus” programming. But what’s the plus? This Article examines the growth of the streaming industry and the business practices of streaming companies¹ under the current framework of U.S. antitrust laws.² Consumers currently benefit from receiving peak TV programming;³ this quality content is offered for free or at relatively low prices.

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1. This Comment uses “streaming” to encompass a variety of different streaming models, including the over-the-top (OTT) services like subscription-based video on demand (SVOD), advertisement-based video on demand (AVOD), traditional-based video on demand (TVOD), as well as mixed-models of these services. For a further discussion of the differences in these terms, see *Difference Between VOD and OTT and the Terms SVOD, AVOD, TVOD, VODLIX*, <https://vodlix.com/difference-between-vod-and-ott-and-the-terms-svod-avod-tvod> [<https://perma.cc/SFM4-KST7>].
 2. See generally *Antitrust Laws and You*, U.S. DEP’T JUST. (Jan. 5, 2017), <https://www.justice.gov/atr/antitrust-laws-and-you> [<https://perma.cc/F4TM-KHE7>] (“The Federal Government enforces three major Federal antitrust laws, and most states also have their own. Essentially, these laws prohibit business practices that unreasonably deprive consumers of the benefits of competition, resulting in higher prices for products and services.”).
 3. See Alan Sepinwall, *The 2010s Brought Us Peak TV—and the Next Decade Promises*

As these companies' market power expands, are current laws enough to protect consumers from potential longterm harms, such as increased prices, lower quality and variety of content, or erosion of data privacy? Determining whether streaming services such as Netflix, Amazon, Hulu, and others engage in anticompetitive business practices is crucial to protect both competition and consumers. The global streaming industry is estimated to reach \$100 billion in revenue by 2025, according to the latest report from Digital TV Research.⁴ This estimate, if accurate, is equivalent to double the value from the \$50 billion that streaming video on demand (SVOD) revenues generated in 2019.⁵ The streaming industry is projected to grow by 529 million subscribers globally between 2019 and 2025, bringing total global subscribers to 1.17 billion.⁶ Presently, a greater percentage of households subscribe to a streaming service than to traditional pay television.⁷ This growth is impressive, considering that Netflix offered the first streaming-only subscription plan in 2010.⁸ The rapid development in this industry highlights the importance of exploring the industry's business practices under an antitrust framework.

This Comment explores whether streaming companies, which do not violate existing competition laws since consumers presently are not harmed, are nevertheless engaging in aggressive business practices with the potential to harm consumers. The streaming industry is an oligopoly, with each company having tremendous market power.⁹ This market power—combined with enormous barriers to entry, practices of predatory pricing, imperfect price discrimination, bundling, disfavoring of competitors on their platforms, huge talent buyouts, and nontransparent use of consumer data—may be reason for concern. There is a need to address these potential threats to consumers, small businesses, and competition due to the individual and combined effects of these practices. Part I of this Comment will examine the history of the entertainment industry and the rise in vertical integration within entertainment

Much, Much More of It, ROLLING STONE (Dec. 4, 2019, 1:13 PM), <https://www.rollingstone.com/tv/tv-features/decade-of-peak-tv-2010s-essay-sepinwall-911531> [<https://perma.cc/G27Z-7RUJ>].

4. Michael Balderston, *Streaming Industry to Cross \$100B in Revenue by 2025*, TV TECH (Sept. 28, 2020), <https://www.tvtechnology.com/news/streaming-industry-to-cross-dollar100b-in-revenue-by-2025-report> [<https://perma.cc/GV9Z-5QET>].
5. *Id.*
6. *Id.*
7. Ethan Wham, *Competition in Streaming Services Is Heating Up*, DISRUPTIVE COMPETITION PROJECT (May 31, 2019), <https://www.project-disco.org/competition/053019-competition-in-streaming-services-is-heating-up> [<https://perma.cc/9C6P-GX2D>].
8. William L. Hosch, *Netflix*, ENCYC. BRITANNICA, <https://www.britannica.com/topic/Netflix-Inc> [<https://perma.cc/W92Y-7ER9>].
9. *Cf.* Prateek Agarwal, *Oligopoly Market Structure*, INTELLIGENT ECONOMIST (Mar. 2, 2020), <https://www.intelligenteconomist.com/category/cost-theory> (follow the “Oligopoly Market Structure” link) [<https://perma.cc/4T3W-NPEH>] (defining oligopoly market structure as “just a few interdependent firms that collectively dominate the market”).

companies across various subsets of the industry. This vertical integration had previously led to the *Paramount Decrees* which regulated the film industry, financial syndication laws regulating broadcast television, and net neutrality laws regulating the internet. Part II explores today's major players in streaming and dissects their business models. Part III investigates the history and philosophy of antitrust laws, including the Sherman, Clayton, and Federal Trade Commission Acts, and comparisons to the *Microsoft*, *Apple*, and *Paramount* antitrust cases to discern where the business practices of the streaming companies fit into the antitrust analysis. Part IV looks to potential solutions to antitrust concerns such as increasing enforcement, reforming the consumer welfare standard, public utility regulation, prophylactic bans on vertical integration, divestiture, and fines.

I. THE HISTORY OF ENTERTAINMENT COMPANIES AND THE RISE OF VERTICAL INTEGRATION

The entertainment industry has historically engaged in certain business practices that have resulted in antitrust scrutiny.¹⁰ This is because the entertainment industry is “uniquely vulnerable to [the] economic pressures that encourage concentration” and vertical integration.¹¹ This Part analyzes the rise of the studio system and vertical integration, the *Paramount Decrees*, the post-*Paramount Decrees* rise in profit participation, financial syndication laws, and net neutrality laws. Additionally, this Part highlights the cyclical history of vertical integration followed by regulation, which finally results in new business models. The focus is on the concentration of market power and the potential for consumer harm from vertical integration.

A. *Studio System and Vertical Integration*

From the early twentieth century until the 1950s, the studio system governed the motion picture industry.¹² The studio system refers to the business

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10. See Tyler Riemenschneider, Note, ‘Don’t Run Up the Stairs!’: Why Removing the Paramount Decrees Would Be Bad for Hollywood, 13 OHIO ST. BUS. L.J. 334 (2019); Jonathan A. Schwartz, *Bringing Balance to the Antitrust Force: Revising the Paramount Decrees for the Modern Motion Picture Market*, 27 UCLA ENT. L. REV. 45 (2020); cf. Russell Bandom, *The Monopoly-Busting Case Against Google, Amazon, Uber, and Facebook*, VERGE (Sept. 5, 2018, 8:14 AM), <https://www.theverge.com/2018/9/5/17805162/monopoly-antitrust-regulation-google-amazon-uber-facebook> [<https://perma.cc/T935-8SQY>] (discussing the possible antitrust cases against each of the big technology companies).
 11. Schwartz, *supra* note 10, at 47.
 12. See generally BILL DANIELS, DAVID LEEDY, & STEVEN D. SILLS, *MOVIE MONEY: UNDERSTANDING HOLLYWOOD’S (CREATIVE) ACCOUNTING PRACTICES* (2d ed. 2006). The studio system “is a method of filmmaking wherein the production and distribution of films is dominated by a small number of large movie studios [in Hollywood].” *Studio System*, WIKIPEDIA, https://en.wikipedia.org/wiki/Studio_system [<https://perma.cc/E7DF-VZKB>]. The term refers to the practice of large motion picture studios between the

practices of the “Big Eight” major studios who influenced the industry through a “consolidation of corporate power.”¹³ Each studio was vertically integrated across all three phases of the industry: they controlled the production, distribution, and exhibition of their films.¹⁴ These practices allowed for economies of scale and reduced costs.¹⁵ Since the entire process was controlled within this studio system, the studio retained all profits.¹⁶ The studios guaranteed their profits through the practice of block booking: selling their movies together in “blocks.”¹⁷ Popular actors and actresses that drew in crowds were controlled through exclusive contracts¹⁸ that typically provided for a “fixed weekly or per-picture salary.”¹⁹ The studios thus controlled their productions through “factory-like” operations intended to produce movies as inexpensively as possible.²⁰

The studios’ calculated efforts to insulate profits through anticompetitive business practices triggered federal antitrust intervention.²¹ The combination of market power, vertical integration, and strategic business practices was viewed as a threat to competition and consumer welfare.

B. Paramount *Decrees*

The *Paramount Decrees* (the *Decrees*) were “a series of consent decrees and court opinions in the 1940s and 1950s which used antitrust law to break up the studios’ control and allowed others to gain a foothold in the industry.”²² *United States v. Paramount Pictures, Inc.* was an injunction suit by the U.S. government under the Sherman Act to eliminate or modify certain business practices in the motion picture industry.²³ The government was concerned with practices such as fixed minimum admissions pricing by distributors, unrea-

1920s and 1960s of (1) “produc[ing] films primarily on their own filmmaking lots with creative personnel under often long-term contract,” and (2) “dominat[ing] exhibition through vertical integration, i.e., the ownership or effective control of distributors and exhibition, guaranteeing additional sales of films through manipulative booking techniques such as block booking.” *Id.*

13. Schwartz, *supra* note 10, at 59 (quoting THOMAS SCHATZ, *THE GENIUS OF THE SYSTEM: HOLLYWOOD FILMMAKING IN THE STUDIO ERA* 69–70 (1988)).
14. Riemenschneider, *supra* note 10, at 336; *see also* Schwartz, *supra* note 10, at 60 (noting that the studios maintained their power by controlling a “financing and distribution machine[] that bankroll[ed] production, and then dominate[d] the distribution channels to market and release the films [it] finance[d]” (alteration in original) (quoting JEFFREY C. ULIN, *THE BUSINESS OF MEDIA DISTRIBUTION* 4 (3d ed. 2019))).
15. *See* Riemenschneider, *supra* note 10, at 336–37.
16. *See id.* at 338.
17. *Id.* at 343.
18. *Id.* at 337.
19. DANIELS ET AL., *supra* note 12, at 190.
20. Riemenschneider, *supra* note 10, at 336.
21. *See United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948).
22. Riemenschneider, *supra* note 10, at 334.
23. *Paramount*, 334 U.S. 131.

sonable provisions for clearances, joint ownership of theaters by distributors and exhibitors, theater pooling agreements, formula deals, master agreements and franchises, block booking, and terms that discriminated between exhibitors.²⁴ The Supreme Court held that “‘the defendants had violated § 1 and § 2 of the Sherman Act,’ through conspiracy to monopolize and actual monopolization of the distribution and exhibition markets.”²⁵ Section 1 of the Sherman Act bans unreasonable restraints of trade or commerce, and section 2 bans any monopoly of trade or commerce.²⁶

The Court, however, rejected the argument that vertical integration of the three markets—production, distribution, and exhibition—was illegal per se.²⁷ The Court determined that vertical integration may violate the Sherman Act if it was either a “calculated scheme to gain control over an appreciable segment of the market and to restrain or suppress competition, rather than an expansion to meet legitimate business needs,” or if the company’s vertical integration, “though unexercised,” provides a “power to exclude competition . . . coupled with a purpose or intent to do so.”²⁸ Thus, the legality of vertical integration under the Sherman Act section 1 “turns on (1) the purpose or intent with which it was conceived, or (2) the power it creates and the attendant purpose or intent.”²⁹ The Court stressed that size itself is demonstrative of monopoly power since size leads to opportunity for abuse.³⁰ It is also highly relevant whether the company used its power in the past to prevent competition.³¹

Under section 1 of the Sherman Act, combination to fix prices is illegal per se.³² “It is not necessary to find an express agreement in order to find a conspiracy.”³³ The studios’ “parallel conduct . . . provided sufficient evidence of an agreement” or “an attempted monopoly” in terms of exhibition.³⁴ Under section 2 of the Sherman Act, monopoly power, even if unexercised, may be illegal; the power to exclude competition combined with the intent to exercise that power violates the Act.³⁵ The Court found that the business practices of the major studio defendants were unlawful under both section 1 and section 2 of the Sherman Act.³⁶

24. *See id.*

25. Schwartz, *supra* note 10, at 69 (quoting *Paramount*, 334 U.S. at 140).

26. *Paramount*, 334 U.S. at 173.

27. *Id.* at 173–74.

28. *Id.* at 174.

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.* at 143.

33. *Id.* at 142.

34. Schwartz, *supra* note 10, at 91.

35. *Paramount*, 334 U.S. at 173–74.

36. *See id.* at 144, 160.

Since the feature films produced were copyrighted, the Court also analyzed copyright law and its intersection with antitrust law.³⁷ Under copyright law, the financial reward to the owner of a copyright is a secondary consideration.³⁸ This limited monopoly grant is designed to encourage artists to create works to be released into the public and benefit society.³⁹ However, the Court found that the studios' practices of "tying"⁴⁰ defeated the aims of copyright law.⁴¹ The Court explained: "Where a high quality film greatly desired is licensed only if an inferior one is taken, the latter borrows quality from the former and strengthens its monopoly by drawing on the other."⁴² In this case, copyright owners of the motion pictures surpassed their limited monopoly rights under the Copyright Act and were within the scrutiny of the Federal Antitrust Act.⁴³ Copyright law may not be used to diminish competition, which is exactly what the practice of tying accomplished.⁴⁴ Similarly, the defendants licensed the exhibition of pictures conditioned on minimum admission prices, which limited the exhibitor's ability to compete on prices.⁴⁵ These combined practices were found to be anticompetitive in violation of the Sherman Act.⁴⁶

In the end, the individual defendants entered into the Decrees, agreeing to restrictions on "the vertical integration of the production, distribution and exhibition of motion pictures."⁴⁷ These Decrees recognized that there should

37. *See id.* at 141–44, 156–59. Almost all the content produced by these companies is copyrighted. For a discussion of the copyright misuse doctrine that prevents a copyright holder from engaging in anticompetitive behavior, see *Video Pipeline, Inc. v. Buena Vista Home Ent., Inc.*, 342 F.3d 191 (3d Cir. 2003); *see also* *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1 (1979).

38. *Paramount*, 334 U.S. at 158.

39. *Id.*

40. The FTC explains tying as follows:

For competitive purposes, a monopolist may use forced buying, or "tie-in" sales, to gain sales in other markets where it is not dominant and to make it more difficult for rivals in those markets to obtain sales. This may limit consumer choice for buyers wanting to purchase one ("tying") product by forcing them to also buy a second ("tied") product as well. Typically, the "tied" product may be a less desirable one that the buyer might not purchase unless required to do so, or may prefer to get from a different seller. If the seller offering the tied products has sufficient market power in the "tying" product, these arrangements can violate the antitrust laws.

See Tying the Sale of Two Products, FED. TRADE COMM'N, <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/single-firm-conduct/tying-sale-two-products> [<https://perma.cc/UVW4-VADR>].

41. *See Paramount*, 334 U.S. at 158.

42. *Id.*

43. *See id.* at 144, 159.

44. *See id.* at 144.

45. *Id.*

46. *Id.*

47. Schwartz, *supra* note 10, at 69 (quoting *United States v. Loew's Inc.*, 882 F.2d 29, 30 (2d Cir. 1989)).

be a separation between the creators of content and the means of distributing the content to audiences.⁴⁸ The result was a temporary limitation on the major studios' ability to exercise their oligopoly power by "restricting how they sold their films and effectively barring" them from controlling the production, distribution, and exhibition of their films.⁴⁹ Studios who were not defendants, like Disney, were not bound by the Decrees.⁵⁰

It is important to note that the Decrees were enacted before television and online streaming video, and therefore were tailored to the film industry's business practices.⁵¹ On August 7, 2020, a federal judge agreed to end the Decrees, seven decades after the initial decision.⁵² The Court analyzed the changes in the industry and changes in business models and found it "unlikely that the remaining Defendants would collude to once again limit their film distribution to a select group of theaters in the absence of the Decrees and . . . that termination [was] in the public interest."⁵³ While it is true that the industry has changed, this statement may minimize the profound and lasting impact that the Decrees have had on Hollywood and encourage a return to anticompetitive behaviors through new business practices.

C. *Post-Paramount: The Rise of Independent Studios and Profit Participation*

The Decrees prevented vertical integration and combined control over production, distribution, and exhibition.⁵⁴ Since the studios lost dominance over the entire market for their films, their profits were no longer assured.⁵⁵ The Decrees led to a massive increase in the production costs of movies since studios were unable to produce movies with the factory-like efficiency of vertical integration.⁵⁶ The studios became concerned about their investments in this newly competitive market. The Decrees removed some of the barriers to entry for new competitors such as small studios and independent filmmakers.⁵⁷ The number of independent producers rose "from virtually none in the

48. Paris Marx, *Break Up the Media Giants*, MEDIUM: ONEZERO (Oct. 17, 2019), <https://onezero.medium.com/break-up-the-media-giants-61bf9b5ae8c2> [<https://perma.cc/A6BA-Y9TJ>].

49. *Id.*

50. Schwartz, *supra* note 10, at 58.

51. See COMPETITION IN DIGIT. ENT., PUBLIC COMMENT ON REVIEW OF CONSENT DECREES IN UNITED STATES V. PARAMOUNT PICTURES, INC. 4 (2018), <https://www.justice.gov/atr/page/file/1102391/download> [<https://perma.cc/5EYG-DFQX>].

52. Eriq Gardner, *Judge Agrees to End Paramount Consent Decrees*, HOLLYWOOD REP. (Aug. 7, 2020, 7:50 AM), <https://www.hollywoodreporter.com/thr-esq/judge-agrees-end-paramount-consent-decrees-1306387> [<https://perma.cc/FJZ4-62KT>].

53. *Id.*

54. See Marx, *supra* note 48; see also Schwartz, *supra* note 10, at 59.

55. See Riemenschneider, *supra* note 10, at 336–38.

56. *Id.* at 349–50.

57. *Id.* at 347–48.

pre-Paramount Decrees era to 100 in 1947.”⁵⁸ The increase in independent producers forced the studios to compete for the best talent once again.⁵⁹

In order for the studios to compete for the best talent, they offered generous compensation packages.⁶⁰ However, these enormous upfront costs presented a risk to the studios if a film was not profitable.⁶¹ Universal devised a creative solution to this problem.⁶² Jimmy Stewart, whom Universal could not afford to pay upfront, was hired on the agreement that he would receive 50 percent of the film’s net profits.⁶³ This led to the creation of what is now known as profit participation; the talent had the opportunity to participate in the profits of a successful movie, and later in a television series.⁶⁴ These deals lowered the studios’ financial risk by reducing their immediate costs of production.⁶⁵ As studios began to rise in power once again, they began insisting on more favorable terms.⁶⁶ The studios structured their deals and the definition of their costs so that the amount of revenue required to break even was increased in the computation of net profits.⁶⁷ Further, cross-collateralization allowed studios to transfer the costs of financial losses on unprofitable films to profitable films so that the profitable films would also show losses.⁶⁸ These modifications of deal terms almost always ensured the studios would account to a loss, and they would not have to pay a share of the profits to the participants.⁶⁹ For these reasons, the rise of profit participation in deals was not without its own problems.⁷⁰

Simultaneously, the studios would retain talent through overall deals and first-look deals.⁷¹ In an overall deal, the studio “obtains the fully exclusive

58. *Id.*

59. DANIELS ET AL., *supra* note 12, at 192.

60. *See id.*

61. *Id.* at 190.

62. *Id.*

63. *Id.*

64. *See generally* KEN BASIN, *THE BUSINESS OF TELEVISION* 162–76 (2019) (discussing profit participation in television).

65. DANIELS ET AL., *supra* note 12, at 190.

66. *Id.* at 191.

67. *Id.*

68. *See* BASIN, *supra* note 64, at 182 (“[C]ross-collateralization under the deal—that is, the extent to which the guarantees paid and fees recouped in separate years of the deal are aggregated with one another for purposes of determining the vig and the availability of fresh cash.”).

69. *See id.*

70. *See, e.g.*, *Buchwald v. Paramount Pictures, Corp.*, No. C 706083, 1990 Cal. App. LEXIS 634 (Cal. Ct. App. Jan. 31, 1990); Cynthia Littleton, *Lawyers Square Off in Court Over ‘The Walking Dead’ Profit Participation Lawsuit*, VARIETY (Feb. 28, 2018, 12:35 PM), <https://variety.com/2018/tv/news/the-walking-dead-profit-participation-frank-darabont-lawsuit-1202713342> [<https://perma.cc/XYX2-DSLF>]; *Wark Ent., Inc. v. Twentieth Century Fox Film Corp.*, No. BC 602287, 2019 Cal. Super. LEXIS 3179 (Cal. Super. Ct. June 3, 2019).

71. *See* BASIN, *supra* note 64, at 177.

services of an individual for the term of the agreement.”⁷² The studio retains discretion as to whether or not to proceed with a given project.⁷³ Even if the studio declines to proceed with the project, the talent may not sell the project to a third party during the term of the agreement.⁷⁴ In a first-look deal, the studio has the first opportunity to buy any project that the talent has created.⁷⁵ In both overall and first-look deals, the studios gain control over highly desirable writers, producers, and directors in exchange for a guaranteed compensation.⁷⁶

The *Paramount Decrees* eliminated vertical integration, which allowed for new competition based on the talent and quality of the content produced. However, this competition may have been shortlived, as studios found ways to gain competitive advantages through the structure of their talent deals in both feature films and television. Similar valiant but failed efforts to battle vertical integration arose in the context of television.

D. *Financial Syndication Laws*

Television evolved to become vertically integrated in a similar manner to the film industry.⁷⁷ In order to maximize profits, television networks began to increase control of production and own their programming.⁷⁸ The Financial Syndication and Interest Rules (the fin-syn rules) were established in 1970 because “networks’ control over distribution allowed them to demand punitive terms from production companies.”⁷⁹ Similar to the *Paramount Decrees*, the fin-syn rules “prohibited networks from entering production and syndication markets.”⁸⁰ The big three networks, ABC, CBS, and NBC, were subject to regulations regarding what content could be aired.⁸¹ The fin-syn rules prevented these networks from airing programming they “owned in prime time or syndicated programming they had a financial stake in.”⁸² These networks were forced to rely on independent production companies for content.⁸³ However, the fin-syn rules were weakened through the 1980s and finally repealed during the mid-1990s.⁸⁴ After the repeal, networks returned to vertical integration

72. *Id.* at 178.

73. *Id.*

74. *Id.*

75. *Id.* at 185–86.

76. *See id.*

77. *See Marx, supra* note 48.

78. *Id.*

79. *Id.*

80. STAFF OF SUBCOMM. ON ANTITRUST, COM. & ADMIN. L. OF THE H. COMM. ON THE JUDICIARY, 116TH CONG., INVESTIGATION OF COMPETITION IN DIGITAL MARKETS 379 (2020) [hereinafter SUBCOMM. ON ANTITRUST], <https://assets.documentcloud.org/documents/7222836/Investigation-of-Competition-in-Digital-Markets.pdf> [https://perma.cc/BM5F-DZB4].

81. Marx, *supra* note 48.

82. *Id.*

83. *See id.*

84. *Id.*

due to the economic incentives of content ownership as opposed to licensing.⁸⁵ This led to many independent content providers going out of business.⁸⁶ The efforts of the fin-syn rules to eliminate the problematic business practices associated with vertical integration had failed.

The deregulation of vertical integration within the broadcast television industry is relevant to the effect that streaming companies' business practices have on the economy.⁸⁷ The entertainment industry has come full circle: its history is one of replacing an oligopoly in one industry with an oligopoly in another as technology develops and creates new means of distributing content to consumers.⁸⁸ The overall trend has been toward higher production costs and the consolidation and vertical integration of media companies, all of which has further raised the barriers to entry and increased the market power of dominant players. These behaviors risk potential anticompetitive practices which may not be easily reversed.⁸⁹

E. *Net Neutrality*

The rise of the internet provided similar concerns about potential anticompetitive behavior. Net neutrality is the theory that internet service providers (ISPs) "should provide all online content equally without favoring or blocking specific products, websites or types of content."⁹⁰ Essentially, all traffic on the internet should be treated equally and be equally accessible.⁹¹ As media and technology companies become more consolidated, there is a risk that these powerful companies will promote specific content and block others.⁹²

Net neutrality laws seek to regulate the blocking of lawful content on the internet, paid prioritization (providers prioritizing companies or consumers who pay a premium), and throttling (the practice of slowing internet connections based on specific internet activities).⁹³ The Federal Communications Commission (FCC) passed sweeping net neutrality laws in 2015.⁹⁴ Under these regulations, internet providers were regulated as common carriers, and in

85. BASIN, *supra* note 64, at 248.

86. *Id.*

87. *See* Marx, *supra* note 48.

88. *See id.*

89. *Id.*; *see also* Lina Khan & Sandeep Vaheesan, *Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents*, 11 HARV. L. & POL'Y REV. 235, 235–36 (2017) (arguing that modern antitrust enforcement has allowed too much consolidation, which in turn contributes to market power which exacerbates economic inequality).

90. Taylor Gadsden, *What Is Net Neutrality, and What Does It Mean for You?*, ALLCONNECT (Mar. 10, 2021), <https://www.allconnect.com/blog/net-neutrality-explained> [<https://perma.cc/22WD-C6ZV>].

91. *Id.*

92. *See* COMPETITION IN DIGIT. ENT., *supra* note 51, at 7, 9.

93. Gadsden, *supra* note 90.

94. Klint Finley, *The WIRED Guide to Net Neutrality*, WIRED (May 5, 2020, 7:00 AM), <https://www.wired.com/story/guide-net-neutrality> [<https://perma.cc/A548-PD3N>].

exchange for serving the entire population, were rewarded with specific legal benefits.⁹⁵ However, in 2017 the FCC repealed these regulations and the new rules removed the common carrier status for broadband providers.⁹⁶

In the wake of the deregulation of net neutrality, there are concerns that ISPs may operate solely in their best interests and not in the interest of the user.⁹⁷ A 2010 FCC proposal had net neutrality proponents worried that it would allow internet “fast lanes” and give special treatment to those who can pay for it.⁹⁸ The ethos of the internet was that it was created to be open and free. It is argued that net neutrality is necessary to foster innovation and promote free expression.⁹⁹ When a handful of large telecommunications companies hold the power of the internet, there is the potential to “suppress particular views or limit online speech to those who can pay the most.”¹⁰⁰

Additionally, with a limited number of internet providers, there are concerns of anticompetitive behavior. For example, after Charter Communications acquired Time Warner Cable and BrightHouse Networks, the company increased prices,¹⁰¹ even though the increase in subscribers should have decreased costs or at least increased revenue to the company. There is thus a legitimate concern that companies may leverage their power in one area to gain power or revenue in another. Comcast currently offers their streaming service, Peacock, free to Comcast subscribers while charging those who do not subscribe to Comcast.¹⁰² Similarly, some providers allow only their own content to not count towards data limits.¹⁰³

The concerns of net neutrality are relevant to streaming companies’ business practices. The history of regulation in the areas of broadcast television and net neutrality laws has influenced the business practices of today’s streaming platforms. Though the technology and business models may have changed, it seems that many of the perverse incentives and concerns of abuse of power remain.

II. TODAY’S BIG PLAYERS AND THEIR BUSINESS MODELS

This Part of the Comment analyzes the current state of the streaming industry. Subpart A describes the major streaming platforms. Subpart B

95. *Id.*

96. *Id.*

97. *See id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. Gadsden, *supra* note 90.

102. *Id.* Similarly, Comcast could make Peacock free for subscribers, but add a fee for streaming Netflix. *Id.*

103. Finley, *supra* note 94 (“AT&T lets you watch its DirectTV Now video service without having it count against your data plan, but watching Netflix or Hulu still chews through your limit.”).

explains the rising production costs and increasing talent buyouts. Subpart C analyzes how these companies engage in various practices that may harm competition in the long run. Lastly, Subpart D explains how data use may reinforce other business practices to create a winner-take-all economy. Taken together, this Part demonstrates how technology and business models have evolved, leading to the conclusion that new laws may be needed to effectively promote competition.

A. *The Major Streaming Platforms*

The streaming wars describes the recent entry of multiple technology and media companies into the area of streaming digital content, such as television and movies, directly to consumers.¹⁰⁴ The streaming industry has showcased the vertical integration and leveraging of other business components.¹⁰⁵ Although the major technology companies already dominate in their original field, many have started creating their own content to make their streaming services more receptive to consumer demand.¹⁰⁶ Though it seems like a new streaming service is added or an existing platform is going out of business daily, as of this writing the current major companies offering some form of streaming are: Amazon Prime Video, Google's YouTube Red, Facebook Watch, Apple TV+, Paramount Plus, Disney+, Peacock, HBO Max, Netflix, Showtime, and Starz.¹⁰⁷ Technology companies like Amazon, Apple, Facebook, and Google have been able to subsidize their streaming platforms with profits from their other businesses.¹⁰⁸ Netflix, on the other hand, has a first-mover advantage¹⁰⁹ and has built a reputation for high-quality content and an easy-to-use interface. Seventy-six percent of over-the-top TV households have Netflix subscriptions, and Netflix is in fifty-eight percent of TV households.¹¹⁰ Netflix and the other technology companies have an advantage over traditional cable and broadcast television companies in terms of capital and access to fundraising.¹¹¹ Due to recent media mergers, each company wields considerable market power.¹¹² The trend in the industry is toward greater consolidation and escalating budgets.¹¹³

104. Elyse Dorsey, *Anything You Can Do, I Can Do Better—Except in Big Tech?: Antitrust's New Inhospitality Tradition*, 68 KAN. L. REV. 975, 1008 (2020).

105. *See id.*

106. Marx, *supra* note 48.

107. For a full list of streaming services including live television and more niche services, see generally Alex Burns, *Complete List of All Video Streaming Services 2020*, SODA (June 26, 2020), <https://www.soda.com/video/complete-list-of-streaming-services> [<https://perma.cc/FQJ6-U2DZ>]. Of these mentioned, Disney owns Hulu, and ViacomCBS owns Showtime.

108. Marx, *supra* note 48.

109. BASIN, *supra* note 64, at 251.

110. COMPETITION IN DIGIT. ENT., *supra* note 51, at 8.

111. *See Marx, supra* note 48.

112. *See id.*

113. For example, Netflix, competing "with HBO to create 'prestige' television, has already

The streaming industry, like many other facets of the entertainment industry, can be characterized as an oligopoly for a variety of reasons.¹¹⁴ A market is characterized as an oligopoly structure when there are only a few companies that dominate the market.¹¹⁵ These companies are interdependent because they adjust their prices in response to their competitors.¹¹⁶ Streaming services are platforms that tend to increase in value as they gain more users, and there are costly barriers to entry. For example, the capital expenditure required to create streaming platforms and produce or acquire content is astronomical.¹¹⁷ Additionally, a few dominant companies can prevent the entry of competitors, which reduces innovation and creativity through a lack of competition.¹¹⁸

While it may appear that in the streaming wars, there are constantly new entrants, many companies have been unsuccessful.¹¹⁹ Platforms have come and gone in recent years.¹²⁰ For example, Quibi, after having raised \$1.75 billion, failed to gain enough subscribers to become profitable and went out of business in October 2020.¹²¹ This illustrates how launching a streaming service requires a “huge investment in content, infrastructure, and marketing,” but even a large capital investment may not be enough to succeed.¹²² The few companies who have been successful and now dominate the market either had a “first-mover advantage (Netflix), industry affiliate subsidization (Hulu, via its ownership structure), or massive deployable resources and complementary lines of business (Amazon and Apple).”¹²³

significantly bid up production budgets to between \$5 million and \$7 million per hour of programming.” *Id.* Similarly, Apple paid more for *The Morning Show* than HBO did for the final season of *Game of Thrones*, “which cost \$15 million per episode.” *Id.* These budgets represent vast increases from previous years, and the budgets are still increasing. *Id.*

114. See Agarwal, *supra* note 9 (listing cable TV, entertainment, and mass media as examples of oligopolies). The mass media industry is considered a very significant example of an oligopoly, since 90 percent of media outlets in the United States are owned by only five corporations: NBCUniversal, ViacomCBS, New Corporation, Time Warner, and Disney. *See id.* It is relevant that these companies have also entered into the streaming industry.

115. *Id.*

116. *Id.*

117. *Id.*; see also BASIN, *supra* note 64, at 162–216 (explaining the investment in content, infrastructure, and marketing required in creating a streaming platform).

118. See Agarwal, *supra* note 9.

119. See BASIN, *supra* note 64, at 251. Examples of recently failed platforms include NBC’s Seeso, Comcast’s Watchable, Fullscreen’s streaming service, and Verizon’s Go90. *Id.*

120. *Id.*

121. Ryan Faughnder, Wendy Lee, Stacy Perman et al., *High-Profile Streamer Quibi Is Shutting Down After Subscriber Struggles*, L.A. TIMES (Oct. 21, 2020, 4:08 PM), <https://www.latimes.com/entertainment-arts/business/story/2020-10-21/quibi-shutting-down-after-subscriber-struggles> [<https://perma.cc/H5A4-ETS3>].

122. BASIN, *supra* note 64, at 251.

123. *Id.*

Oligopolies can be problematic since prices for consumers are higher than they would be in a market characterized by perfect competition where prices are determined by supply and demand.¹²⁴ Furthermore, the streaming industry is full of imperfect knowledge since much of the data regarding the number of viewers, costs, and revenues is obscured.¹²⁵ Customers may not be able to determine whether a price is fair. Currently, many streaming services are either free and subsidized through ads or offer some sort of tiered pricing.¹²⁶ One would assume that with all the alleged competition from new entrants in streaming that this would keep prices low. However, Netflix recently raised prices even after HBO Max and Peacock entered the streaming market.¹²⁷ The ability to raise prices demonstrates that the streaming market may not be as competitive as the streaming wars may suggest. With its sizeable market share, analysts explain that Netflix can raise prices due to its large content library, consumer value proposition, and international presence.¹²⁸ The market is also not perfectly competitive because the content is not shared across platforms, with a specific show or movie available to stream on only one platform at a time.¹²⁹

The term streaming wars demonstrates the popular perception that the video streaming market is cutthroat and filled with new companies entering the market.¹³⁰ Investors and the press paint a picture of “new entrants utilizing their vast libraries of content, lower prices (sometimes even free with ads) and cross-marketing scale leveraging their other portfolio assets to take share from streaming incumbents.”¹³¹ However, the data tells a more oligopolistic story. In terms of time spent on various streaming services, a recent report found that only five streaming services (Netflix, YouTube, Prime Video, Hulu, and Disney)

124. Agarwal, *supra* note 9.

125. *Id.* (noting that imperfect knowledge is one of the key characteristics of an oligopoly); see COMPETITION IN DIGIT. ENT., *supra* note 51, at 11 (“Netflix does everything in its power to prevent third parties from learning its viewing data.”).

126. See Alison DeNisco Rayome, *Best Streaming Service of 2021*, CNET (Mar. 26, 2021, 5:00 AM), <https://www.cnet.com/news/best-streaming-service> [<https://perma.cc/BSC4-VR37>].

127. Julia Alexander, *Netflix Is Raising the Price of Its Most Popular Plan to \$14 Today, Premium Tier Increasing to \$18*, VERGE (Oct. 29, 2020, 3:00 PM), <https://www.theverge.com/2020/10/29/21540346/netflix-price-increase-united-states-standard-premium-content-product-features> [<https://perma.cc/N2UM-2A8S>].

128. See Daniel Frankel, *Netflix Price Hike ‘Probable in the Near- to Mid-term,’ Analyst Says*, NEXT TV (Sept. 28, 2020), <https://www.nexttv.com/news/netflix-price-hike-probable-in-the-near-to-mid-term-analyst-says> [<https://perma.cc/V3QH-GRN8>].

129. Wham, *supra* note 7.

130. Daniel Frankel, *What Streaming Wars? Five Services Control 83% of Connected TV Viewing*, NEXT TV (Sept. 30, 2020), <https://www.nexttv.com/news/what-streaming-wars-five-services-control-83-of-connected-tv-viewing> [<https://perma.cc/TUT4-M795>] (emphasis omitted).

131. *Id.*

control 83 percent of U.S. connected TV usage.¹³² Market dominance is only expected to become increasingly concentrated. It is projected that by 2025, three streaming platforms will likely control half the world's subscriptions: Netflix, Disney+, and Amazon Prime Video.¹³³ The recent entrance of HBO Max and Peacock illustrates some of the barriers to entry in the streaming industry.¹³⁴ Each entered the market promising new high-quality programming but subsequently experienced issues licensing their platforms, which raised the question of whether people were willing to subscribe to yet another platform.¹³⁵ With subscription fatigue, consumers are becoming overloaded with choices and the inconvenience of subscribing to multiple platforms, which will likely decrease the quality of competition in the market.¹³⁶ Viewers do not want watching TV to become complicated. Requiring viewers to conduct a detailed analysis to figure out what shows are on what platforms overcomplicates the experience.¹³⁷ Netflix itself does not view the market as competitive: according to Netflix CEO Reed Hastings, the only real competition in the streaming market is sleep.¹³⁸

Though consumers are currently benefiting from free content, it is questionable if this value outweighs the potential harm. The nature of oligopolies makes the streaming industry uniquely susceptible to above market pricing and potential abuses of market share.

B. *Increased Talent Buyouts and Production Costs*

The business practices of the dominant streaming platforms are likely to make competition from new entrants difficult, given the need to produce high-quality programming with significant production costs. Today, as in the past, the platforms that can outspend their competition on product development tend to become market leaders. For example, Netflix was estimated to

132. *Id.* This data was from equity research company LightShed Partners using Comscore data from July 2020. *Id.* Overall, measured in share of Comscore OTT viewing hours: Netflix, 26 percent; YouTube, 21 percent; Prime Video, 17 percent; Hulu, 14 percent; Disney+, 5 percent; and other, 17 percent. *Id.* Netflix, YouTube, and Amazon Prime Video combine to control 64 percent. *Id.*

133. Balderston, *supra* note 4 (“Netflix is projected to lead the way in subscribers with 263 million, up 91 million from 2019, but Disney+ is forecasted to have the biggest growth, with an estimated 142 million subscribers signing up for the streaming platform, bringing its total to 172 million subscribers.”).

134. See Dieter Bohn, *The Streaming Wars Have Barely Started and They're Already Exhausting*, VERGE (Jan. 17, 2020, 7:00 AM), <https://www.theverge.com/2020/1/17/21069703/streaming-wars-peacock-subscription-fatigue-exhaustion-apple-hbo-hulu-netflix-qui-bi-disney-augh> [https://perma.cc/3XRX-7VSM].

135. *See id.*

136. *See id.*

137. *See id.*

138. *Id.*

have spent \$17.8 billion on content in 2020.¹³⁹ It is virtually impossible for a small independent company to compete with this type of spending. Instead of focusing on delivering profits, Netflix is investing in content in an attempt to eliminate competition.¹⁴⁰ This fierce business strategy has gained praise from Wall Street investors.¹⁴¹

Streaming platforms often produce international content, and for these companies, the exclusivity of content is essential.¹⁴² When streaming companies like Netflix or Amazon buy content from a third party, they pay license fees in excess of 100 percent of production costs to their studio partners for the international rights to exclusively stream the content.¹⁴³ These “cost-plus deals” are a stark departure from the profit participation models of the film and television industry discussed in Subpart I.C.¹⁴⁴ The former profit participation deals no longer make sense because it is difficult to determine the profit derived from one series on a subscription-based platform. The streaming companies do not want to reveal the number of views on each series or how highly they value a specific series.¹⁴⁵ These high license fees, a substantial percentage above the cost of production, have driven companies like Netflix and Amazon to invest in developing and producing their own shows.¹⁴⁶ It makes more sense to pay the cost of producing the series themselves than paying cost-plus to an outside studio.¹⁴⁷

The streaming companies have been looking for new ways to structure their deals with outside producers.¹⁴⁸ There is an industry-wide trend of moving beyond profit participation to new creative deals that allegedly benefit all parties, but considering the market power of the streaming companies, it will likely

139. Todd Spangler, *Netflix Spent \$12 Billion on Content in 2018. Analysts Expect that to Grow to \$15 Billion This Year*, VARIETY (Jan. 18, 2019, 2:56 PM), <https://variety.com/2019/digital/news/netflix-content-spending-2019-15-billion-1203112090> [https://perma.cc/AL3F-9P5N]. Netflix spent \$12.04 billion in cash on content in 2018, an increase of 35 percent from the \$8.9 billion it spent in 2017. *Id.*

140. *Id.* (noting that Netflix is “focusing on building out a wider moat instead of delivering profits”); *see also* COMPETITION IN DIGIT. ENT., *supra* note 51, at 8–14 (discussing Netflix’s anticompetitive practices).

141. Spangler, *supra* note 139.

142. *See* BASIN, *supra* note 64, at 167–69.

143. *Id.* at 167 n.9.

144. *See id.* at 194.

145. COMPETITION IN DIGIT. ENT., *supra* note 51, at 13 (“Netflix has made it explicitly clear that they do not want their competitors to have access to their consumer data because it gives them an ‘advantage’ in both content creation and marketing.”).

146. BASIN, *supra* note 64, at 194–95.

147. *Id.*

148. *See* Nellie Andreeva, *Disney TV Studios Eyes New Profit Participation Model as Industry Continues to Pull Away from Traditional Backend Deals*, DEADLINE (July 8, 2019, 2:23 PM), <https://deadline.com/2019/07/hollywood-profit-participation-tv-deals-change-disney-streaming-services-1202641423> [https://perma.cc/TJQ9-9N5J].

be more beneficial to streaming services.¹⁴⁹ Rather than paying talent a percentage of a show's profits, these companies prefer to pay large fixed amounts of cash to not have to account to profit participants.¹⁵⁰ For example, Disney is replacing its current profit participation model with a per-point model in order to have flexibility in distributing content across its ecosystem of networks and digital platforms.¹⁵¹ The per-point model has a uniform value across a portfolio of programming where the value of the show increases based on the length of the series run and the show's performance and awards.¹⁵² This allows the studio to exhibit the show on any platform without having to make a separate deal for profit participants.¹⁵³ As discussed, Netflix's cost-plus model bypasses profit participation altogether and takes all worldwide rights by "buying out" the amount of compensation likely to be earned through a profit participation deal (typically by paying a full license fee and premium of around 130 percent of the production cost).¹⁵⁴ These new deal models allow the studios to benefit by making profits from day one instead of incurring a loss for years under the traditional broadcast and cable models.¹⁵⁵ However, this also caps any profit windfall from a massively successful show, potentially decreasing the long-run profits they would have made under the old profit participation model.¹⁵⁶ Without access to Netflix and other streaming companies' data, it is difficult to assess whether the studios are getting a fair deal with these new deal structures.

It is currently a race to outspend competition and acquire the exclusive rights to the best content and the top talent. The increased production costs and talent buyouts are examples of how market power can potentially prevent competition. However, from the consumer's perspective, the increased costs seem to benefit consumers through higher quality content for free or a low cost.

C. *Business Practices: Leveraging, Predatory Pricing/Loss Leading, Tying, Price Discriminating, and Self-Favoring*

In isolation, leveraging, predatory pricing/loss leading, tying, price discriminating, and self-favoring may be good business practices with procompetitive justifications. Together, these practices potentially threaten competition and consumer welfare. The large size, vertical integration, and financial resources of streaming companies creates a threat of abusing this market power through potentially anticompetitive business practices. Companies like Amazon and

149. *See id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

Apple can use their strength in one area (online shopping for Amazon and consumer electronics for Apple) to affect their online streaming business.

Currently, Amazon Prime Video membership is included with an Amazon Prime subscription.¹⁵⁷ Similarly, Apple TV+ is free to those who have recently purchased an Apple product or only \$4.99 per month compared with Netflix's cheapest plan, which is currently \$8.99 per month.¹⁵⁸ In terms of economics, these companies may use their streaming platforms as loss leaders.¹⁵⁹ Loss leading is a pricing strategy where one product is sold at a price below its market cost in order to draw in customers and stimulate sales of more profitable products.¹⁶⁰ However, it is unlikely that someone would purchase a \$700 iPhone to save \$60 on a yearly subscription to Apple TV. The more likely rationale is that these companies are engaging in predatory pricing. Predatory pricing occurs when large companies with cash reserves and lines of credit sell their products at a loss in order to drive out competition.¹⁶¹ Competitors who cannot afford to operate at a loss are either bought by the dominant company or driven out of business completely. Though the low prices may seem to benefit consumers, once competitors are driven out of business, the dominant company can raise prices above the competitive price in order to recoup its loss.¹⁶² It may seem irrational for a company to purposefully operate at a loss when it could compete through quality or cutting costs, but "[p]redatory pricing is a particular risk in digital markets, where winner-take-all dynamics incentivize the pursuit of growth over profits, and where the dominant digital platforms can cross-subsidize between lines of business."¹⁶³ Since streaming companies are secretive with their data,¹⁶⁴ it can often be hard to ascertain whether they engage in predatory pricing. This problem is only compounded by vertical integration and revenues generated from other businesses.

The streaming industry is distinct in that the platform's subscription model ties all the content together, which inhibits competition by not allowing the individual content to compete on quality or price.¹⁶⁵ Consumers cannot purchase just the content they wish to watch. This practice is very similar to the practice of block booking that concerned the *Paramount* court.¹⁶⁶ Low-quality

157. Marx, *supra* note 48.

158. *Id.*; Frankel, *supra* note 128.

159. *Cf.* Lina M. Khan, Note, *Amazon's Antitrust Paradox*, 126 *YALE L.J.* 710, 756–57 (2017) (discussing Amazon's strategy of selling ebooks below cost).

160. *See id.* at 756–63.

161. Ben Bloodstein, Note, *Amazon and Platform Antitrust*, 88 *FORDHAM L. REV.* 187, 205 (2019).

162. *Id.*

163. SUBCOMM. ON ANTITRUST, *supra* note 80, at 396.

164. BASIN, *supra* note 64, at 25.

165. *See* Riemenschneider, *supra* note 10, at 358–59.

166. *See* *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 156–59 (1948).

content is tied to higher quality content.¹⁶⁷ The value of each show or movie on the streaming service is not equal. Amazon Prime also ties Prime Video access to its Amazon Prime membership. This tying obscures the value of the service and makes it more difficult for consumers to judge whether they are charged a fair price. Though this may not directly be anticompetitive, it further complicates the analysis when coupled with other business practices.

Many streaming services offer different tiers of their subscriptions.¹⁶⁸ Some may be free and supported by ads, some may offer fewer ads in exchange for higher prices, and others may charge different prices in order to be accessed by an increased number of screens.¹⁶⁹ Hulu and Amazon, for example, also offer student discounts.¹⁷⁰ By offering different prices for their services, these companies can price discriminate.¹⁷¹ In theory, the company could charge each consumer the exact price they are willing to pay. Though this may seem beneficial in terms of consumer welfare, this practice has the potential to be abused since these prices would likely be above their market price in a perfectly competitive market.

Since the platforms contain content that is produced by the companies themselves and by third parties, there is the potential for these companies to favor their own content, which would harm consumers through decreased competition. As the companies are more and more vertically integrated, this threat grows. Currently, the streaming services are not only acting as studios and distributors, but many are also ISPs. Some even control the manufacture of smart TVs and other electronic devices capable of displaying streaming applications.¹⁷² This favoring could manifest through suggesting that a service-owned show be watched next, automatically playing that show, or prominently displaying it on the homepage. The ability to favor their own content and disfavor third party content threatens fair competition in the marketplace. Similarly, Netflix was accused of entering into coercive contracts with connected smart TV and digital media player device manufacturers.¹⁷³ Netflix allegedly entered into coercive contracts to “promote Netflix more prominently than its

167. Schwartz, *supra* note 10, at 108.

168. See Rayome, *supra* note 126.

169. See Sahil Patel, *Streaming TV Is Surging, But the Ads Remain on Repeat*, WALL ST. J. (Sept. 23, 2020, 5:30 AM), <https://www.wsj.com/articles/streaming-tv-is-surging-but-the-ads-remain-on-repeat-11600853400> [<https://perma.cc/WCG3-MU49>].

170. Sage Anderson, *The Best Student Discounts on Music and Movie Streaming Services*, ROLLING STONE (Feb. 25, 2021, 8:06 PM), <https://www.rollingstone.com/product-recommendations/lifestyle/best-streaming-deals-discounts-students-1118708> [<https://perma.cc/6QYA-4NWN>].

171. See generally Patrick F. Todd, *Digital Platforms and the Leverage Problem*, 98 NEB. L. REV. 486 (2019) (discussing price discrimination in the context of competition issues in digital platform markets).

172. COMPETITION IN DIGIT. ENT., *supra* note 51, at 14.

173. *Id.* at 2.

competitors,” such as by placing Netflix buttons on remote controls.¹⁷⁴ The potential for using market power to favor these platforms goes further. AT&T/Time Warner is an ISP that owns HBO Max and has the potential to favor their content on their internet.¹⁷⁵ Amazon’s Fire TV could also prioritize its Amazon Prime content at the expense of rivals.¹⁷⁶ The concerns of the *Paramount* Decrees and net neutrality have likely multiplied and intensified through the practices of streaming companies.

These tactics provide large technology companies with an unfair advantage in the adjacent streaming industry. The threat of these business practices is multiplied due to the aggregation of data collected by these services.

D. *Use of Consumer Data*

The use of “big data” in entertainment and the streaming industry is novel and potentially creates an incentive to engage in anticompetitive behaviors.¹⁷⁷ Streaming platforms have aggregated mass amounts of detailed data about their customers’ viewing habits, more than was ever possible for traditional networks.¹⁷⁸ Beyond data about viewing habits, companies such as Amazon and Apple have information about their customers’ purchase history of other products.¹⁷⁹ Though it is not clear how this data is used, this data likely allows the streaming company to make targeted decisions about which projects to develop and produce, what talent to hire, and how much to spend on each project.¹⁸⁰ This data “allows companies to target advertising with scalpel-like precision, improve services and products through a better understanding of user engagement and preferences, and more quickly identify and exploit new business opportunities.”¹⁸¹ Moreover, “data-rich accumulation is self-reinforc-

174. *Id.* at 3.

175. *See id.* at 5 tbl.1.

176. *See id.*; *see also* Rob Frieden, Krishna Jayakar, & Eun-A Park, *There’s Probably a Blackout in Your Television Future: Tracking New Carriage Negotiation Strategies Between Video Content Programmers and Distributors*, 43 *COLUM. J.L. & ARTS* 487, 487 (2020) (“[W]hen [video] programmers and distributors fail to reach closure on new terms and conditions before the end date of an existing agreement, service interruptions (‘black-outs’) occur. Video consumers resent having to pay sizable monthly subscriptions for content they temporarily cannot view, and both programmers and distributors risk financial injury.”).

177. *See* BASIN, *supra* note 64, at 25.

178. *Id.* (“The volume and nuance of data collected by services like Netflix and Amazon dwarfs the information historically gleaned from traditional data companies like Nielsen.”).

179. *See* Marshall Steinbaum & Maurice E. Stucke, *The Effective Competition Standard: A New Standard for Antitrust*, 86 *U. CHI. L. REV.* 595 (2019); *see also* Brandom, *supra* note 10.

180. BASIN, *supra* note 64, at 25.

181. SUBCOMM. ON ANTITRUST, *supra* note 80, at 42.

ing”: as companies exploit the user’s data, they use the products more, and more data is collected.¹⁸²

“Netflix and Amazon tend to be extremely proprietary with their data,” and refuse to disclose what data they have collected, how it is used, and what metrics they rely on in their decisions.¹⁸³ The impact of this is tremendous:

[B]y keeping proprietary control over their data on customers, the big platform companies are able to use their data to evaluate the potential market for original content, and use their direct connections with customers to do highly targeted, preference-based marketing—something that can’t be done with Nielsen estimates and focus-group data.¹⁸⁴

This data accumulation creates an information asymmetry where platforms have access to significant data that is unavailable to outside parties.¹⁸⁵ In the past, studios could rely on box office receipts and Nielsen ratings to determine the popularity of their content.¹⁸⁶ All broadcasters, producers, advertisers, and other relevant parties had access to the same information.¹⁸⁷ Today, the vertically integrated companies, including connected devices, online video distributors, ISPs, and web browsers, “all have the technological capacity to track who uses and watches them—allowing integration of content production and viewing data collection.”¹⁸⁸ Netflix encrypts its data to prevent ISPs and web browsers from tracking their uses, and *The New York Times* has reported that Netflix has agreements with smart TV manufacturers that preclude third-party tracking.¹⁸⁹ In a competitive market, smart TV manufacturers, ISPs, web browsers, and the studios who license their content to Netflix would have the ability to track viewership, or at least have access to the data and metrics collected.¹⁹⁰

Arguably, the collection of data benefits consumers by improving their viewing experience and the user interface. However, there is no ability to import data from one streaming platform to another.¹⁹¹ For example, Apple TV or Amazon Prime could not include bookmarks or recommendations to Netflix’s content.¹⁹² “Netflix has made it explicitly clear that they do not want their competitors to have access to their consumer data because it gives them

182. *Id.*

183. BASIN, *supra* note 64, at 25.

184. COMPETITION IN DIGIT. ENT., *supra* note 51, at 11 (quoting MICHAEL D. SMITH & RAHUL TELANG, *STREAMING, SHARING, STEALING: BIG DATA AND THE FUTURE OF ENTERTAINMENT* 145 (2016)).

185. Bloodstein, *supra* note 161, at 196.

186. BASIN, *supra* note 64, at 25; COMPETITION IN DIGIT. ENT., *supra* note 51, at 10.

187. COMPETITION IN DIGIT. ENT., *supra* note 51, at 10.

188. *Id.*

189. *Id.* at 12.

190. *See id.* at 11–12.

191. *See* SUBCOMM. ON ANTITRUST, *supra* note 80, at 41–42.

192. COMPETITION IN DIGIT. ENT., *supra* note 51, at 14.

an ‘advantage’ in both content creation and marketing.”¹⁹³ Eighty-five percent of Americans are concerned about the amount of data online platforms store about them, and “[t]he persistent collection and misuse of consumer data is an indicator of market power online.”¹⁹⁴ Streaming platforms, such as YouTube or Peacock, appear free but are monetized through advertising or sale of user data.¹⁹⁵ As these technology companies have grown in market power, they have also influenced the policymaking process.¹⁹⁶

Streaming, as with other online platform markets, is a winner-take-all industry due to network effects and control over data, both of which mean that early advantages become self-reinforcing.¹⁹⁷ “Network effects arise when a user’s utility from a product increases as others use the product. Since popularity compounds and is reinforcing, markets with network effects often tip towards oligopoly or monopoly.”¹⁹⁸ The value of streaming platforms increases as others use the product. Everyone wants to watch the most popular series and discuss the content with their peers.

Unlike prior monopolies in other industries, technology companies have successfully used data accumulated in one area of business to gain advantages when they expand into related businesses.¹⁹⁹ For example, Amazon uses sales data from outside merchants to make purchasing decisions in order to undercut them on price and give its own items “featured placement under a given search.”²⁰⁰ Amazon uses the third-party data about which products were selling well and then creates a version of that product under its own label.²⁰¹ Amazon and other prominent streaming platforms can utilize their vertical integration

193. *Id.* at 13.

194. SUBCOMM. ON ANTITRUST, *supra* note 80, at 12, 51.

195. *See id.* at 51.

196. *Id.* at 75.

197. *Id.* at 37.

198. Khan, *supra* note 159, at 785.

199. Brian Fung, *Congress’ Big Tech Investigation Finds Companies Wield ‘Monopoly Power,’* CNN (Oct. 6, 2020, 9:12 PM), <https://www.cnn.com/2020/10/06/tech/congress-big-tech-antitrust-report/index.html> [<https://perma.cc/Z4TV-UDNR>].

200. Khan, *supra* note 159, at 781 (quoting Greg Bensinger, *Competing with Amazon on Amazon*, WALL ST. J. (June 27, 2012, 6:15 PM), <http://www.wsj.com/SB10001424052702304441404577482902055882264> [<http://perma.cc/5XL9-NTCQ>]). There is a famous example of Pillow Pets, “stuffed-animal pillows modeled after NFL mascots” that a third-party merchant sold on Amazon. *Id.* (quoting Bensinger, *supra*).

For several months, the merchant sold up to one hundred pillows per day. According to one account, “just ahead of the holiday season, [the merchant] noticed Amazon had itself beg[un] offering the same Pillow Pets for the same price while giving [its own] products featured placement on the site.” The merchant’s own sales dropped to twenty per day. *Id.* (alteration in original) (footnotes omitted) (quoting Bensinger, *supra*).

201. *See* Todd, *supra* note 171, at 501.

by using their dominance in one market as leverage in negotiations in an unrelated line of business.²⁰²

Technology companies maintain market power due to high switching costs since it is not easy for users to switch away from the dominant platform.²⁰³ Even if there is a cheaper or better alternative, users will avoid switching due to the inconvenience.²⁰⁴ The vertical integration of the platforms “tie[s] products and services in ways that can lock in users and insulate the platform from competition.”²⁰⁵ Over time, this may “reduce competition, deter market entry, and may even worsen data privacy” since dominant companies have no incentive to compete over data privacy.²⁰⁶ The traditional definition of market power as “the ability to raise prices without a loss to demand, such as fewer sales or customers” no longer fits in the digital economy since many products and services are free.²⁰⁷ However, a streaming service’s ability to maintain users while eroding user privacy could be “considered equivalent to a monopolist’s decision to increase prices or reduce product quality.”²⁰⁸ Oftentimes, the value of the data gathered may exceed the economic value to consumers.²⁰⁹

Competition has been the center of the American economy because it drives “innovation, business dynamism, entrepreneurship, and the ‘launching of new industries.’”²¹⁰ Recently, rates of entrepreneurship and job creation have declined, suggesting that “the dominance of online platforms has materially weakened innovation and entrepreneurship in the U.S. economy.”²¹¹ The network effects, switching costs, self-reinforcing advantages of data, and increasing returns to scale make streaming platforms a part of a winner-take-all economy, in which the few competing companies are incentivized to eliminate competitors by any means necessary. Users may be more burdened than benefited by the free and easy-to-use services than the streaming wars suggest.

III. ANTICOMPETITIVE AND DECEPTIVE PRACTICES

Part III analyzes the business practices of streaming companies under U.S. antitrust laws. Subpart A explores the history and philosophy of antitrust law. Subpart B explains the current state of antitrust law and the emphasis on consumer harm. Subpart C determines how the business practices of streaming companies would be viewed under the framework of modern antitrust laws.

202. See SUBCOMM. ON ANTITRUST, *supra* note 80, at 379.

203. See Bloodstein, *supra* note 161, at 202.

204. SUBCOMM. ON ANTITRUST, *supra* note 80, at 41–42.

205. *Id.* at 378.

206. *Id.* at 42.

207. See *id.* at 51.

208. *Id.* at 52.

209. *Id.* at 46.

210. *Id.*

211. *Id.* at 47.

This Part explores whether the same antitrust standards should be applied in the new digital economy with unique business models and practices.

A. *The History and Philosophy of Antitrust Law*

Antitrust laws date back to ancient Rome, where laws prohibited buying and hoarding scarce everyday goods.²¹² Early U.S. antitrust laws sought two goals: to protect the interests of consumers and to protect entrepreneurs to ensure fair competition.²¹³ Different theories and economic frameworks offer unique views about the purpose of antitrust laws and whether and when government intervention into a market is necessary.

The main antitrust laws in the United States are the Sherman Act of 1890, the Clayton Act of 1914, and the Federal Trade Commission Act of 1914.²¹⁴ Section 1 of the Sherman Act “prohibits price-fixing and the operation of cartels,” as well as “other collusive practices that unreasonably restrain trade,” while section 2 prohibits the abuse of monopoly power.²¹⁵ Section 7 of the Clayton Act restricts mergers and acquisitions of organizations that would likely substantially lessen competition.²¹⁶ Lastly, the Federal Trade Commission Act of 1914 outlaws unfair methods, acts, or practices that affect commerce.²¹⁷ Examples of anticompetitive behavior found to violate antitrust law include “exclusive dealing, price discrimination, refusing to supply an essential facility, product tying and predatory pricing.”²¹⁸ Judicial remedies for antitrust violations can range from breaking up large organizations, forcing companies to follow certain obligations, or the imposition of massive penalties.²¹⁹

The proper judicial remedy depends on which economic theory explaining market forces is used to interpret the antitrust laws. Under the theory of laissez-faire, antitrust is seen as unnecessary since it is assumed that the market is perfectly competitive, and each company would compete for market dominance in the longterm.²²⁰ A company may gain dominance due to superior quality, innovation, pricing, or other factors.²²¹ The belief is that the government should not intervene, however, because the market will correct itself by

212. *Competition Law*, WIKIPEDIA, https://en.wikipedia.org/wiki/Competition_law [<https://perma.cc/M4YF-7D3G>].

213. See Todd, *supra* note 171.

214. SUBCOMM. ON ANTITRUST, *supra* note 80, at 390.

215. *United States Antitrust Law*, WIKIPEDIA, https://en.wikipedia.org/wiki/United_States_antitrust_law [<https://perma.cc/6Z3J-WL5H>].

216. *Id.*

217. *Federal Trade Commission Act of 1914*, WIKIPEDIA, https://en.wikipedia.org/wiki/Federal_Trade_Commission_Act_of_1914 [<https://perma.cc/5PHN-4W3C>].

218. *United States Antitrust Law*, *supra* note 215.

219. *Id.*

220. See *Competition Law*, *supra* note 212.

221. See Todd, *supra* note 171, at 508.

having the other companies compete on these metrics.²²² From the classical perspective, “certain agreements and business practice[s] could be an unreasonable restraint” on individuals’ liberties to earn their livelihoods.²²³ Adam Smith, a famous British economist, believed that monopolists harm society by keeping supply below demand in order to sell their goods at prices above the natural price.²²⁴ The neoclassical model of free markets believes that competitive free markets maximize social welfare.²²⁵ This model assumes no barriers to entry so that goods will be efficiently allocated to those who are willing to pay for them.²²⁶ Neo-Brandeisians (named after Justice Louis Brandeis) view any adjacent market entry by dominant companies as inherently suspicious because these companies are likely to leverage their market power to exclude competitors in these adjacent markets.²²⁷ Though the various economic theories have different assumptions regarding competition, it is agreed that the existence of a monopoly would lead to increased prices, decreased production, and lower consumer welfare.²²⁸

The original goal of antitrust laws was not only to protect consumers but also to prohibit the use of power to control the marketplace.²²⁹ With this objective, antitrust laws were “overwhelmingly opposed to both vertical integration and leveraging conduct.”²³⁰ For example, the *Paramount* court used antitrust laws to oppose the vertical integration and leveraging of the studio defendants on the grounds that this harmed consumers, independent producers, and theater owners.²³¹ In 1965, Robert Bork explained that “[f]rom its inception with the passage of the Sherman Act in 1890, antitrust has vacillated between the policy of preserving competition and the policy of preserving competitors from their more energetic and efficient rivals.”²³² In the early 1900s, monopolies were viewed as “indefensible and intolerable” since they were believed to “appropriat[e] the fruits of industry to the benefit of the few at the expense of the many.”²³³ The courts followed the Brandeis view that “[t]he government . . . had the right to regulate the ‘concentration of wealth and power’ if

222. See *Competition Law*, *supra* note 212.

223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.*

227. Todd, *supra* note 171, at 490.

228. Bloodstein, *supra* note 161, at 205.

229. See *Competition Law*, *supra* note 212.

230. Todd, *supra* note 171, at 504.

231. See *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 142–44 (1948).

232. Todd, *supra* note 171, at 540 (alteration in original) (quoting Robert H. Bork & Ward S. Bowman, *The Crisis in Antitrust*, 65 COLUM. L. REV. 363 (1965)).

233. Matt Stoller, *The Return of Monopoly*, NEW REPUBLIC (July 13, 2017), <https://newrepublic.com/article/143595/return-monopoly-amazon-rise-business-tycoon-white-house-democrats-return-party-trust-busting-roots> [<https://perma.cc/U284-NG6M>].

it threatened the public welfare.”²³⁴ Protecting free competition was important to protect consumers, businesses, and democracy. As Justice Douglass wrote in his dissent in *United States v. Columbia Steel Co.*, power should be decentralized so that “the fortunes of the people will not be dependent on the whim or caprice, the political prejudice, the emotional stability of a few self-appointed men.”²³⁵ This view influenced early antitrust cases but was criticized by some economists.

Robert Bork argued in *The Antitrust Paradox* that “both the original intention of antitrust laws and economic efficiency was the pursuit only of consumer welfare, the protection of competition rather than competitors.”²³⁶ Bork was part of the Chicago School, an emerging group of conservative economists at the University of Chicago, including Milton Friedman and George Stigler.²³⁷ This group believed in less government intervention in the marketplace in order to benefit the economy.²³⁸ They criticized the Supreme Court’s antitrust case law and believed that certain conduct that was viewed as anti-competitive should actually be legal.²³⁹ Under the Chicago School, some actions originally considered anticompetitive could, in fact, promote competition.²⁴⁰ In their view, market dominance was due to superior skill, and from an efficiency view of economics, this should be rewarded through market power and not deterred by government intervention.²⁴¹ The Chicago School believed that vertical integration is pro-competitive since it results in economies of scale and other efficiencies that lead to lower prices.²⁴² The focus was solely on benefits to consumers with no other considerations.

In the 1970s and 1980s, influenced by the Chicago School, antitrust law shifted to view competition within the framework of the short-term interests of consumers.²⁴³ The impact on producers and the competitiveness of the market as a whole is no longer a consideration and low prices are used as evidence of competition.²⁴⁴ This standard of emphasizing price as a measure of consumer harm impacted the development of modern consumer-centric antitrust analysis.

234. *Id.*

235. Khan, *supra* note 159, at 742 (quoting *United States v. Columbia Steel Co.*, 334 U.S. 495, 536 (1948) (Douglas, J., dissenting)).

236. *Competition Law*, *supra* note 212 (emphasis omitted).

237. Stoller, *supra* note 233.

238. *See id.*

239. Todd, *supra* note 171, at 507.

240. *Id.*

241. *Id.*

242. *Id.* at 516.

243. Khan, *supra* note 159, at 716.

244. *Id.*

B. *Modern Examples of Antitrust Analysis*

Under modern antitrust jurisprudence, “courts have shown a growing tendency to defer to independent business judgment as a reasonable basis for adopting ostensibly anticompetitive activities and agreements.”²⁴⁵ The focus of antitrust laws is on the protection of competition and not the protection of competitors. Actual harm in the form of reduced consumer welfare, either through lowered quality or increased prices, must be proven.²⁴⁶ Antitrust enforcement has declined under the consumer welfare standard.²⁴⁷ Between 1970 and 1972, the government brought thirty-nine civil and three criminal cases against monopolies and oligopolies.²⁴⁸ However, “over the past twenty years, the Department of Justice (DOJ) has brought only one major monopolization case under Section 2 of the Sherman Act, against Microsoft.”²⁴⁹ Two recent antitrust cases, *United States v. Microsoft Corp.* and *United States v. Apple, Inc.*, illustrate the emphasis on consumer harm as the test for anticompetitive behavior. The cases highlight how antitrust law has struggled to keep up with new technologies and business practices.

In *Microsoft*, the D.C. Circuit considered whether contractual and technological bundling of Microsoft’s Internet Explorer web browser with its Windows operating system constituted a per se unlawful tying arrangement in violation of antitrust laws.²⁵⁰ Microsoft sought to exercise its market power to eliminate competition from Netscape’s Navigator web browser. In addition to bundling its web browser with the operating system, Microsoft also took steps to deter users from downloading Netscape, such as prohibiting equipment manufacturers from pre-loading Netscape onto any Windows computer.²⁵¹ The D.C. Circuit applied a rule of reason to Microsoft’s conduct, meaning that if Microsoft could offer “a nonpretextual claim that its conduct is indeed a form of competition on the merits because it involves, for example, greater efficiency or enhanced consumer appeal” then that behavior would be tolerated.²⁵²

The *Microsoft* court acknowledged the implications of a new digital economy characterized by network effects.²⁵³ The case was complicated because developing a product that is incompatible with a rival’s product is not itself a violation of antitrust laws.²⁵⁴ In order to violate the antitrust laws, there must be “an anticompetitive effect that outweighs any . . . justification for

245. Schwartz, *supra* note 10, at 56.

246. See COMPETITION IN DIGIT. ENT., *supra* note 51, at 17.

247. Steinbaum & Stucke, *supra* note 179, at 599.

248. *Id.*

249. *Id.*

250. *United States v. Microsoft Corp.*, 253 F.3d 34, 84 (D.C. Cir. 2001).

251. *Id.* at 59–61.

252. *Id.* at 59.

253. *Id.* at 83–84.

254. *Id.* at 65.

the design.”²⁵⁵ The District Court found that Microsoft had greater than a 95 percent market share, which was protected by substantial barriers to entry.²⁵⁶ Furthermore, Microsoft used its market power in one area (operating systems) in order to leverage its power into an adjacent business (web browsers).²⁵⁷ The District Court determined that Microsoft’s business practices were in contravention of the Sherman Act since it had “maintained monopoly in the market for . . . PC operating systems in violation of § 2; attempted to gain a monopoly in the market for internet browsers in violation of § 2; and illegally tied two purportedly separate products, Windows and Internet Explorer . . . in violation of § 1.”²⁵⁸ The D.C. Circuit required that Microsoft be divested,²⁵⁹ the company was split into an operating systems business and an applications business.

In *Microsoft*, even though the government prevailed on some of its charges, the appellate court weakened some aspects of the law by raising procedural burdens on plaintiffs in future antitrust cases.²⁶⁰ Notably, had Microsoft sought to exploit its monopoly power by acquiring Netscape rather than by excluding it, it is unlikely that there would have been an antitrust claim. This acquisition would have the same result as the monopolistic conduct but would escape enforcement.²⁶¹ This illustrates a problem in the entertainment industry, which has seen a series of mergers and acquisitions in recent years but avoided antitrust scrutiny.

Another notable antitrust case against a large technology company was *Apple*.²⁶² In 2007, Amazon introduced the Kindle.²⁶³ Soon after, Amazon had a 90 percent market share of the market for digital books called ebooks.²⁶⁴ Amazon had priced bestselling books below cost, at \$9.99, which was significantly below the \$12 to \$30 price of a new hardback book.²⁶⁵ The book publishing market was a small industry with six major players.²⁶⁶ In 2009, Apple had plans to sell ebooks on its newly released iPad.²⁶⁷ In order to compete with Amazon, Apple entered into most-favored nation agreements with the publishers that required the publishers to offer their ebooks through Apple for no more than the same book was offered elsewhere, such as from Amazon.²⁶⁸

255. *Id.* at 75.

256. Todd, *supra* note 171, at 533.

257. *See Microsoft Corp.*, 253 F.3d at 45.

258. *Id.*

259. *See id.* at 105–07.

260. Steinbaum & Stucke, *supra* note 179, at 599.

261. *See* SUBCOMM. ON ANTITRUST, *supra* note 80, at 44.

262. *United States v. Apple, Inc.*, 791 F.3d 290 (2d Cir. 2015).

263. *Id.* at 296.

264. *Id.* at 301.

265. Khan, *supra* note 159, at 757.

266. *See Apple, Inc.*, 791 F.3d at 298.

267. *Id.* at 301.

268. *Id.* at 304–05.

The result of this agreement was that the average prices for hardcovers, new releases, and other ebooks increased over the following two-year period.²⁶⁹

The Second Circuit found that Apple orchestrated a conspiracy among publishers to raise ebook prices, which unreasonably restrained trade in violation of section 1 of the Sherman Act.²⁷⁰ The Court explained that competition is not served by allowing a market entrant to “eliminate price competition” in order to enter the market.²⁷¹ In theory, the market for ebooks would have been made more competitive by a new market entrant. However, barriers to entry and network effects of the ebook industry show the incentive to conspire. Apple and the publishers resorted to collusion in order to extract the prices that they could not win through competition.²⁷² In this case, the market was not perfectly competitive, and the pressures of a digital economy forced a large technology company to act in a manner found to be anticompetitive.

As illustrated by *Microsoft* and *Apple*, the consumer welfare standard has been criticized by modern economists for not accurately capturing the realities of the digital economy. As of this Comment’s writing, there has not been an antitrust case brought against the streaming companies. However, the *Microsoft* and *Apple* decisions suggest it is likely their business practices would not be found anticompetitive under modern antitrust law.

C. *How Streaming Companies Fit in the Modern Antitrust Analysis*

The entertainment industry substantially rewards first-mover advantages.²⁷³ In the context of the streaming industry, innovators like Netflix and HBO invented new business models and gained market power while the rest of the industry failed to fully understand the value of these services.²⁷⁴ The first-mover advantage, combined with high barriers to entry, has allowed companies like Netflix and HBO to maintain their dominant market positions and prevent challenges from newcomers.²⁷⁵ Similarly, technology companies like Amazon and Apple can potentially utilize their market power in other industries to subsidize their streaming services through predatory pricing.²⁷⁶ Others—like Disney+ and Hulu, both owned by Disney—can be seen as industry affiliate subsidization by utilizing their vast content libraries and increasing revenue streams through flexibility regarding where to distribute their content.²⁷⁷

Recent mergers and acquisitions in the past two years, such as Disney/Fox, AT&T/Time Warner, and CBS/Viacom, threaten the remaining independent

269. *Id.* at 310.

270. *Id.* at 297.

271. *Id.* at 298 (emphasis omitted).

272. *Id.* at 327.

273. BASIN, *supra* note 64, at 251.

274. *See id.*

275. *Id.*

276. *See id.*

277. *See id.*

companies in entertainment.²⁷⁸ The size of these entertainment and technology companies, combined with their data accumulation, potential future mergers, and the winner-take-all tendency of digital economies poses a threat to consumers, small companies, employees, and governments alike. The history of the entertainment industry has shown that it is uniquely vulnerable to concentration and consolidation, with the potential to turn into collusive and monolithic empires.²⁷⁹ Recent antitrust case law demonstrates that only the most egregious behavior will be found to violate antitrust laws under the current consumer welfare standard.²⁸⁰ However, the *Paramount* court noted that “[t]hose who have shown such a marked proclivity for unlawful conduct are in no position to complain that they carry the burden of showing that their future clearances come within the law.”²⁸¹ The concerns underlying the *Paramount* Decrees remain, and the technology and entertainment companies will only find new ways to engage in behavior designed to eliminate competition in the long-run.²⁸²

Streaming services are bundling and tying content and other services together similar to the block booking that was found anticompetitive in *Paramount*.²⁸³ In this new medium, Netflix offers its high-quality content alongside its less desirable programs.²⁸⁴ Through producing, distributing, and exhibiting original content, the streaming services have vertically integrated and can use their market power across various industries. The *Paramount* Decrees were criticized as grounded on the “problematic economic theory” of leveraging, which was believed to have pro-competitive justifications.²⁸⁵ However, *Microsoft* and *Apple* show that leveraging in digital economies can harm competition. The issues of vertical integration and leveraging are not just an opposition to market power, but a concern about the anticompetitive practices associated with abuse of market power that is encouraged by the characteristics of the digital economy, such as network effects, barriers to entry, switching costs, and data accumulation.²⁸⁶

278. See Gavin Bridge, *Top 19 Media Trends of 2019: Mega Mergers*, VARIETY (Dec. 12, 2019, 3:19 PM), <https://variety.com/2019/biz/opinion/top-19-media-trends-of-2019-mega-mergers-1203434577> [perma.cc/54DJ-P4GB].

279. See Schwartz, *supra* note 10, at 45.

280. See Steinbaum & Stucke, *supra* note 179, at 597–601.

281. *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 148 (1948).

282. See COMPETITION IN DIGIT. ENT., *supra* note 51, at 1 (arguing that the abuses that brought about the *Paramount* decrees “are very much alive”).

283. See Riemenschneider, *supra* note 10, at 343.

284. Schwartz, *supra* note 10, at 108.

285. COMPETITION IN DIGIT. ENT., *supra* note 51, at 15 (quoting Geoffrey A. Manne & Joshua D. Wright, *Innovation and the Limits of Antitrust*, 6 J. COMPETITION L. & ECON. 153 (2010)).

286. See *id.*

The current practices of streaming companies reflect a high-stakes race to capture the entire market.²⁸⁷ Just as internet search “is dominated by Google, e-commerce by Amazon, online auctions by eBay, payments by PayPal, ride hailing by Uber and Lyft, [and] social media by Facebook,”²⁸⁸ it is only a matter of time before the victor of the streaming wars emerges. The basic concern of the *Paramount* Decrees—the “vertical combination of producing, distributing, and exhibiting motion pictures”—clearly remains today, and technology has only made it more relevant.²⁸⁹

Microsoft explained that monopoly power might be “inferred from a [company’s] possession of a dominant share of a relevant market that is protected by entry barriers.”²⁹⁰ This is true of the streaming industry, in which a few players dominate and there are substantial barriers to entry. Under the Sherman Act, the potential to exercise monopoly power is illegal.²⁹¹ However, due to the emphasis on consumer harm as the standard for antitrust violations, it is unlikely that the business practices of streaming companies would meet this standard. Since it is assumed that lower prices improve consumer welfare, *Apple* explained that pricing below cost is unlawful only if “there is a ‘dangerous probability’ that the [company] engaging in it will later recoup its losses by raising prices to monopoly levels after driving its rivals out of the market.”²⁹² This standard is almost impossible to meet, given the difficulty in determining the fair market value of a streaming service, especially in an economy where some services are free through advertisement and data subsidization.²⁹³

The current antitrust framework needs to be revised to reflect the structure of the specific industry. In addition to consumer harm, there should be consideration of “whether a company’s structure creates certain anticompetitive conflicts of interest; whether it can cross-leverage market advantages across distinct lines of business; and whether the structure of the market incentivizes and permits predatory conduct.”²⁹⁴ Waiting until after monopoly or oligopoly power is abused before intervening is a mistake.²⁹⁵ It is easier and more efficient to promote competition when there is a significant risk that market power will be abused rather than trying to correct an anticompetitive industry after the abuse has occurred.²⁹⁶

287. See SUBCOMM. ON ANTITRUST, *supra* note 80, at 11.

288. Marx, *supra* note 48.

289. COMPETITION IN DIGIT. ENT., *supra* note 51, at 19.

290. *United States v. Microsoft Corp.*, 253 F.3d 34, 51 (D.C. Cir. 2001).

291. See *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 173 (1948).

292. *United States v. Apple, Inc.*, 791 F.3d 290 (2d Cir. 2015) (quoting *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 224 (1993)).

293. See SUBCOMM. ON ANTITRUST, *supra* note 80, at 18–19.

294. Khan, *supra* note 159, at 717.

295. See Stoller, *supra* note 233.

296. See *id.*

The threat of concentration of market power goes beyond just economic concerns. Consolidation reflects wealth and political power, which may undermine democratic values.²⁹⁷ Prior to the Sherman Act, price levels in the United States were slowly decreasing, which indicates that price increases were not the sole concern of antitrust laws.²⁹⁸ Congress could have individually regulated any industry that it believed to be problematic.²⁹⁹ It is evident that in addition to price controls, Congress' goals included "the preservation of open markets, the protection of producers and consumers from monopoly abuse, and the dispersion of political and economic control" in order to ensure that consumers were protected and that the economy fostered innovation and free entry of new businesses.³⁰⁰ As companies grow both in size and into vertical industries, the consumer welfare standard cannot fully capture this harm.³⁰¹ For example, Amazon has prioritized growth, expanded into multiple lines of business, and engaged in predatory pricing while avoiding antitrust scrutiny.³⁰² Amazon simultaneously operates as "a retailer, . . . a marketing platform, a delivery and logistics network, a payment service, a credit lender, an auction house, a major book publisher, a producer of television and films, a fashion designer, a hardware manufacturer, and a leading provider of cloud server space and computing power."³⁰³ The conflicts of interest and potential for abuse are evident but remain unchecked.³⁰⁴

Streaming companies have accumulated market power through mergers, a first-mover advantage, or leveraging other businesses. This market power, combined with predatory pricing, barriers to entry, imperfect price discrimination, bundling, and network effects, has the potential to harm consumers in the longterm. However, since the services are free, or at a price currently viewed as fair, consumers are not presently harmed under the current consumer welfare standards. Advocates of free competition call for immediate regulation of these behemoth companies, but their proposals vary.

IV. POTENTIAL SOLUTIONS TO ANTITRUST CONCERNS

Modern antitrust law is insufficient to address the current reality of the digital economy.³⁰⁵ The standard of consumer harm that focuses on price is no longer adequate in a digital economy where many products are free or priced at different tiers. There have been calls to break up big technology companies,

297. SUBCOMM. ON ANTITRUST, *supra* note 80, at 76–77.

298. Khan, *supra* note 159, at 741.

299. *Id.*

300. *Id.* at 743 (footnote omitted).

301. *Id.*

302. See Brandom, *supra* note 10.

303. Khan, *supra* note 159, at 754.

304. See *id.*

305. *Id.* at 710.

and Part IV explores the possibilities of increasing enforcement, reforming the consumer welfare standard, public utility regulation, prophylactic bans on vertical integration, divestiture, and the imposition of fines.

A. *Increasing Enforcement*

The House Judiciary Committee's Antitrust Subcommittee recently released the findings of its more than sixteen-month-long investigation into the state of competition in the digital economy, focusing specifically on the challenges presented by the dominance and business practices of Apple, Amazon, Google, and Facebook.³⁰⁶ Although the technology companies' behavior is not identical to that of the streaming industry, many of the same players are at issue, and thus many of the concerns and solutions are applicable to both industries. The report found that these companies "have too much power, and that power must be reined in and subject to appropriate oversight and enforcement Our economy and democracy are at stake."³⁰⁷ The report recommended "changes to antitrust laws to reinvigorate a perceived lack of strong enforcement."³⁰⁸ Amazon, Apple, Facebook, and Google collectively have purchased more than five hundred companies since 1998, and not a single one of these acquisitions was prevented.³⁰⁹ The report concludes courts should combat monopoly or oligopoly power at its inception by using antitrust authority to prevent certain mergers.³¹⁰ The House Subcommittee also recommended "[i]mprovements to the Clayton Act, the Sherman Act, and the Federal Trade Commission Act, to bring these laws into line with the challenges of the digital economy; [e]liminating anticompetitive forced arbitration clauses; [s]trengthening the [FTC] and the Antitrust Division of the Department of Justice; [a]nd promoting greater transparency and democratization of the antitrust agencies."³¹¹ Overall, the lack of antitrust enforcement has allowed consolidation and vertical integration that potentially threatens consumers and free competition.

306. Jill Goldsmith, *Facebook, Amazon, Apple, Google Are Monopolists, House Antitrust Subcommittee Finds, Seeks Changes*, DEADLINE (Oct. 6, 2020, 3:42 PM), <https://deadline.com/2020/10/house-antitrust-report-facebook-amazon-apple-google-monopolists-1234592573> [<https://perma.cc/MS8T-R9PW>].

307. Ryan Tracy, *House Panel Says Big Tech Wields Monopoly Power*, WALL ST. J. (Oct. 6, 2020, 8:07 PM), https://www.wsj.com/articles/house-panel-calls-for-congress-to-break-up-tech-giants-11602016985?mod=mw_quote_news [<https://perma.cc/73T7-HJM9>].

308. *Id.* But see Phil Gramm & Jerry Ellig, Opinion, *The Misguided Antitrust Attack on Big Tech*, WALL ST. J. (Sept. 14, 2020, 7:13 PM), <https://www.wsj.com/articles/the-misguided-antitrust-attack-on-big-tech-11600125182> [<https://perma.cc/7F2M-K7SJ>].

309. SUBMCOMM. ON ANTITRUST, *supra* note 80, at 391.

310. See Stoller, *supra* note 233.

311. Press Release, House Comm. on the Judiciary, Judiciary Antitrust Subcommittee Investigation Reveals Digital Economy Highly Concentrated, Impacted By Monopoly Power (Oct. 6, 2020), <https://judiciary.house.gov/news/documentsingle.aspx?DocumentID=3429> [<https://perma.cc/45KJ-B99L>].

B. *Reforming the Consumer Welfare Standard*

As discussed, the shift from a standard that recognized harm to consumers and competitors to a standard that focuses solely on short-term harm to consumer welfare has weakened antitrust law.³¹² The consumer welfare standard has led to “less competition, higher markups, greater concentration, and widening wealth and income inequality.”³¹³ Under the current consumer welfare standard, courts would often find justifications for anticompetitive conduct that harmed consumers, such as arguing the benefits of longterm economic growth.³¹⁴ While the foundation of our government seeks to achieve democracy through shared power and free competition, the consumer welfare standard has the opposite effect.³¹⁵

Scholars argue that since antitrust laws were designed to “promote[] multiple economic, political, and social objectives,” there needs to be a standard that recognizes these multiple objectives.³¹⁶ The Sherman Act, the Clayton Act, and the Federal Trade Commission Act were all enacted due to the threat that monopolies posed to the economy and society more broadly.³¹⁷ However, the courts may have erred by focusing on price and output rather than the competitive process and market structure as a whole.³¹⁸ A standard that focuses instead on effective competition would assess multiple factors of the current market’s economic realities, rather than just considering whether prices have increased.³¹⁹

Specific changes to the framework of modern antitrust law may better fit the digital economy and acknowledge the perverse incentives that arise due to size and vertical integration. Courts should shift away from the rule of reason approach, which allows companies to justify their anticompetitive behavior, and adopt clearer presumptions in favor of antitrust plaintiffs.³²⁰ Courts should presume that vertical integration is harmful and that predatory pricing occurs when products are priced lower than competitors or are free, even if they are bundled with other goods.³²¹ Overall, the approach agencies and courts take should focus on ensuring “competitive market structures that protect individuals, purchasers, consumers, and producers; preserve opportunities

312. *See supra* Part III.

313. Steinbaum & Stucke, *supra* note 179, at 595.

314. *Id.* at 595–96.

315. SUBMCOMM. ON ANTITRUST, *supra* note 80, at 391.

316. Steinbaum & Stucke, *supra* note 179, at 619.

317. Khan, *supra* note 159, at 731–32.

318. *See id.* at 744–46.

319. *See generally* Steinbaum & Stucke, *supra* note 179 (arguing for such an “effective competition” standard).

320. *Id.* at 620.

321. Dorsey, *supra* note 104, at 993.

for competitors; promote individual autonomy and well-being; and disperse private power.”³²²

It is ironic that in the long-run, a standard that is designed to maintain consumers’ welfare may ultimately harm them.³²³ Streaming companies’ conduct may be more likely to be found anticompetitive under a framework that considers multiple factors rather than just consumer harm through increased prices.

C. *Public Utility Regulation*

The application of regulatory schemes addressing public utilities in the early 1900s may serve as a fruitful comparison point in reworking modern antitrust law. Public utility regulations were popular during the early 1900s to oversee the new technologies of the time.³²⁴ The rationale was that by accepting these technologies as natural monopolies, they should be made universally available to the public at reasonable rates.³²⁵ Previous industries regulated as utilities include water, electricity, gas, railroads, and telephones.³²⁶ There has been much discussion about including some internet companies, such as Google and Amazon, as public utilities, so it is not farfetched that this classification could be extended to streaming platforms susceptible to similar economic pressures to engage in anticompetitive behavior.

Public utility regulation operates by limiting how the monopolist can use, hence not abuse, its power while retaining any benefits that arise from economies of scale.³²⁷ One common public utility policy is requiring nondiscrimination in price and service.³²⁸ This policy would ensure that Netflix or Amazon could not prioritize its own content at the expense of a competitor. Streaming platforms would also be prevented from discriminating against consumers and likely would not be able to price discriminate. As a public utility, the streaming service would have all data regulated to ensure fair access to other businesses.³²⁹ These self-preferencing rules would be similar to the early net neutrality laws. Additionally, the regulations could go farther by requiring that platforms make their services compatible with competitors and allow for data portability between services.³³⁰ Ideally, by restricting power, consumers will benefit from universal access to a highly valued service in society at a reasonable price.

322. Steinbaum & Stucke, *supra* note 179, at 602.

323. *See id.* at 601.

324. Khan, *supra* note 159, at 797.

325. *Id.*

326. *Id.*

327. *See id.* at 803.

328. *Id.* at 798.

329. *See* SUBMCOMM. ON ANTITRUST, *supra* note 80, at 381.

330. *See id.*

D. *Eliminating Vertical Integration through Prophylactic Bans and Divestiture*

Senator Elizabeth Warren made headlines by announcing that “big tech companies have too much power” and “have hurt small businesses and stifled innovation.”³³¹ Warren and others have suggested breaking up big tech.³³² This goal could be achieved by putting a ban on vertical integration, preventing acquisitions, or even by forcing large companies to split up their businesses as happened in *Microsoft*.³³³

In the streaming context, restrictions on vertical integration would stop these companies from producing, distributing, and exhibiting their own content, which would encourage the use of independent studios and production companies.³³⁴ This was the goal of the *Paramount Decrees*.³³⁵ A prophylactic ban on vertical integration would prevent the industry structures and perverse incentives that arise through the concentration of power.³³⁶ Though this may seem radical, a similar law was enacted in the banking industry.³³⁷ The Bank Holding Company Act of 1956 banned U.S. banks from engaging in other businesses.³³⁸ Antitrust scholar Lina Khan argues that due to the unique economics of the digital economy, a prophylactic ban on vertical integration “may prove more effective than policing these conflicts.”³³⁹

Although there are some arguments that consumers have benefited from the scale and slight reduction in costs that result from vertical integration, venture capitalists have now been reluctant to invest in new startups, which has weakened innovation.³⁴⁰ Venture capitalists fear that startups are not worthwhile investments because it is too easy for the big technology companies to acquire smaller companies or drive them out of business.³⁴¹ One famous example of how this phenomenon has played out is Amazon’s acquisition of

331. Elizabeth Warren, *Here’s How We Can Break Up Big Tech*, MEDIUM: TEAM WARREN (Mar. 8, 2019), <https://medium.com/@teamwarren/heres-how-we-can-break-up-big-tech-9ad9e0da324c> [<https://perma.cc/Q4KC-V9S7>].

332. *Id.*

333. See Khan, *supra* note 159, at 793.

334. Marx, *supra* note 48.

335. See generally *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948).

336. Khan, *supra* note 159, at 793.

337. *Id.* at 794.

338. *Id.* (“The main justifications for preserving the separation between banking and commerce have ‘included the needs to preserve the safety and soundness of insured depository institutions, to ensure a fair and efficient flow of credit to productive [businesses], and to prevent excessive concentration of financial and economic power in the financial sector.’” (alteration in original) (quoting Saule T. Omarova, *The Merchants of Wall Street: Banking, Commerce, and Commodities*, 98 MINN. L. REV. 265, 275 (2013))). These justifications likely fit the streaming industry as well.

339. *Id.* at 793.

340. Warren, *supra* note 331.

341. *Id.*

Diapers.com in 2010.³⁴² Amazon dropped diaper prices by 30 percent until the smaller company agreed to be acquired, and other retailers have accused Amazon of engaging in similar price targeting.³⁴³ Due to the massive amounts of data Amazon and other technology companies have access to, they are able to dominate the market before other companies have entered, assuring there is no possibility of fair competition since they are already dominating the market before other companies have entered.³⁴⁴ These tactics have not gone unnoticed, as Senator Elizabeth Warren declared: “You can be the umpire in the baseball game, or you can be a player, you can have . . . a team in the game But you don’t get to be the umpire and have a team in the game.”³⁴⁵

Preventing large technology companies from engaging in acquisitions may help mitigate this problem.³⁴⁶ The companies would have to compete with their own resources rather than buying out any company that threatens to compete with them through innovation or a superior product.³⁴⁷ For example, Google has acquired more than 200 companies since it was started, including companies that have become essential to their brand like YouTube, Android, DoubleClick, Nest, and DeepMind.³⁴⁸ One proposal from Minnesota Senator Amy Klobuchar would block acquisitions by any company with a market cap over \$100 billion, which is true for most technology companies.³⁴⁹ Others propose that regulations go farther. Stacy Mitchell, the co-director at the Institute for Local Self-Reliance, believes that a “Microsoft-style antitrust suit,” which would divide Amazon into distinct business segments and regulate each part individually, would be more successful.³⁵⁰ In either case, it appears that consumers, politicians, and others are concerned with the market size and aggressive business practices of the dominant technology companies.

E. *Fines*

A fine for violating antitrust laws could theoretically discourage companies from engaging in anticompetitive behavior. However, in 2017 Google was fined 2.4 billion euros by the European Commission for “leverag[ing] its

342. *Id.*

343. Will Oremus, *The Time Jeff Bezos Went Thermonuclear on Diapers.com*, SLATE (Oct. 10, 2013, 12:37 PM), <https://slate.com/technology/2013/10/amazon-book-how-jeff-bezos-went-thermonuclear-on-diapers-com.html> [<https://perma.cc/ZPG4-T4TR>].

344. See Alexander C. Kaufman, *Elizabeth Warren on Breaking up Amazon: ‘You Don’t Get to Be the Umpire and Have a Team.’* HUFFINGTON POST (Apr. 23, 2019), https://www.huffpost.com/entry/elizabeth-warren-tech-amazon_n_5cbe6120e4b00b3e70ce32b8 [<https://perma.cc/T9S6-98CW>].

345. *Id.* (first alteration in original).

346. See generally SUBMCOMM. ON ANTITRUST, *supra* note 80.

347. See Brandom, *supra* note 10.

348. *Id.*

349. *Id.*

350. *Id.*

market dominance in general internet search into a separate market, comparison shopping.”³⁵¹ This fine did not seem to have the desired impact, since one year later Google was fined another 4.34 billion euros for bundling its mobile applications through Google’s Android operating system.³⁵² It is also possible that any fines imposed could be passed off to consumers in the form of higher prices. Ultimately, fines alone may not go far enough to stop the alleged anti-competitive behavior when companies are willing to pay up now in order to find new ways to engage in anticompetitive behavior in the future.

CONCLUSION

The current business practices of streaming companies such as Netflix, Amazon, and Hulu have the potential to decrease competition within the industry. The consumer welfare standard of current U.S. antitrust laws is insufficient to capture this potential harm because the services are essentially free, consumers’ immediate welfare is not harmed, and antitrust law does not reach these practices. As these companies’ market shares rise, it is apparent that current laws are not sufficient to protect consumers from potential longterm harms, such as increased prices, lack of quality, decreased variety of content, or erosion of data privacy.

The streaming industry is dominated by a few companies with sizable market power and has enormous barriers to entry, practices of predatory pricing, imperfect price discrimination, bundling, disfavoring of competitors on these platforms, huge talent buyouts, and nontransparent use of consumer data. Taken together, there is clearly a need to address these threats to consumers, small businesses, and new market entrants. Although the entertainment and technology industries have a history of engaging in anticompetitive business practices, there are many proposed solutions to address antitrust concerns, ranging from fines to divestiture. While there is no silver bullet among them, each presents a step in the right direction. Once the streaming wars have ended, the ideal victor would be both consumers and competition.

351. Todd, *supra* note 171, at 487 (quoting European Commission Press Release IP/17/1785, Antitrust: Commission Fines Google €2.4 Billion for Abusing Dominance as Search Engine by Giving Illegal Advantage to Own Comparison Shopping Service (June 27, 2017)).

352. *Id.* at 488.