

6-15-2024

Box Office Knockout: The Future of Theaters in an Industry Racing to Outpace Them

Jakob Stokes

Follow this and additional works at: <https://digitalcommons.pepperdine.edu/jbel>



Part of the [Antitrust and Trade Regulation Commons](#), and the [Entertainment, Arts, and Sports Law Commons](#)

Recommended Citation

Jakob Stokes, *Box Office Knockout: The Future of Theaters in an Industry Racing to Outpace Them*, 17 J. Bus. Entrepreneurship & L. 255 (2024)

Available at: <https://digitalcommons.pepperdine.edu/jbel/vol17/iss1/8>

This Note is brought to you for free and open access by the Caruso School of Law at Pepperdine Digital Commons. It has been accepted for inclusion in The Journal of Business, Entrepreneurship & the Law by an authorized editor of Pepperdine Digital Commons. For more information, please contact bailey.berry@pepperdine.edu.

BOX OFFICE KNOCKOUT: THE FUTURE OF THEATERS IN AN INDUSTRY RACING TO OUTPACE THEM

Jakob Stokes¹

I.	OLIGOPOLIES AND THE DISSOLUTION OF THE PARAMOUNT DECREES.....	257
A.	<i>FILM ANTITRUST PRIOR TO UNITED STATES V. PARAMOUNT</i> ...	258
B.	<i>THE BIG FIVE AND LITTLE THREE</i>	259
C.	<i>THE PARAMOUNT DECREES</i>	261
D.	<i>THE NEW “BIG FIVE”</i>	267
II.	CLOSING THE CINEMATIC WINDOW OF EXCLUSIVITY.....	271
A.	<i>PREMIUM VIDEO ON DEMAND</i>	276
B.	<i>ULTRA-VIDEO ON DEMAND</i>	278
C.	<i>DISNEY PREMIER ACCESS</i>	279
D.	<i>ARGUMENTS AGAINST SHORTENED WINDOWS</i>	281
1.	Cannibalization and Competition Prevention	281
2.	Saturation/Crowding.....	282
3.	Discrepancies in Compensation.....	282
4.	Small and Independent Theater Dissatisfaction	283
5.	Piracy	284

¹ Jakob Stokes is a graduate of Pepperdine’s Caruso School of Law (JD ‘24) and Cornell’s School of Hotel Administration (BS ‘20, cum laude). He would like to thank his parents for affirming the social worth of movie theaters, the Cornell Cinema, Ithaca’s Cinemapolis, and the countless independent producers, filmmakers, theater-owners, and other film industry creators whose livelihoods faced an adverse impact owing to the lingering effects of the coronavirus pandemic. This article is for all of you!

E.	<i>ARGUMENTS FOR SHORTENED WINDOWS</i>	285
1.	Consumer Choice.....	285
2.	Film Loyalty	285
3.	Subscribers to Streaming Sources	286
F.	<i>RECENT LEGAL DISPUTES INVOLVING WINDOWING</i>	287
1.	Christopher Nolan and Tenet.....	287
2.	Scarlett Johansson Lawsuit.....	288
3.	Matrix Resurrections Lawsuit.....	290
III.	CULMINATION OF OLIGOPOLISTIC EFFECT ON CINEMA.....	292
A.	<i>THE NEED FOR A REVISIT OF THE PARAMOUNT DECREES</i>	293
B.	<i>PROPPING OPEN THE WINDOW OF EXCLUSIVITY</i>	296
IV.	CONCLUSION.....	300

I. OLIGOPOLIES AND THE DISSOLUTION OF THE PARAMOUNT DECREES

The film industry has long been hailed as a landmark example of judicial regulation to prevent oligopolistic behavior.² Antitrust lectures praise the Paramount Decrees (Decrees), a 1948 judicial order that separated the production (studios) and exhibition (theaters) arms of the film industry to prevent the former from encroaching vertically to squeeze out the latter.³ The reality is that the film industry is nearing a degree of oligopolistic influence that hasn't existed since the era preceding the Decrees: six studios account for 88.9% of the domestic box office, and these studios are divested horizontally to weather downturns in ways that exhibitors, who are considerably smaller in scope and influence, are not.⁴

To understand how the landscape has evolved to this degree, it's necessary to examine the landmark ruling in *United States v. Paramount Pictures, Inc.*, which followed a decade of significant efforts to reject encroaching studio monopolization.⁵ It promulgated the Decrees, which expressly forbade many studio tactics used to vertically integrate the film industry.⁶ For over seventy years, these Decrees constituted the bedrock of cinematic antitrust, until a 2019 decision enacted a two-year sunset provision to wind down their efficacy.⁷ The end of this sunset period coincided with the global Covid-19 pandemic, resulting in a duplicative

² See *This Day in History, U.S. Supreme Court Decides Paramount Antitrust Case*, HIST. (Nov. 13, 2009), <https://www.history.com/this-day-in-history/u-s-supreme-court-decides-paramount-antitrust-case>.

³ See *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948).

⁴ See *Market Share for Each Distributor in 2022*, THE NUMBERS, <https://www.the-numbers.com/market/2022/distributors> (last visited Nov. 1, 2023). Relevant distributor shares—Universal: 20.99%; Disney: 18.32%; Paramount: 17.62%; Warner Bros.: 12.67%; Sony: 11.66%. *Id.* Note that the seventh listed distributor accounts for 1.53% of the year's box office. *Id.*

⁵ *Paramount*, 334 U.S. at 134.

⁶ See *id.*

⁷ See *Federal Court Terminates Paramount Consent Decrees*, U.S. DEP'T. OF JUST., OFFICE OF PUB. AFFS. (Aug. 7, 2020), <https://www.justice.gov/opa/pr/federal-court-terminates-paramount-consent-decrees>.

expansion of major studio power relative to theaters, viewers, and potential competitors.⁸

A. *Film Antitrust prior to United States v. Paramount*

The film industry came into existence in the early twentieth century and for several decades after avoided the ire of federal antitrust efforts largely through its youth and uncertainty as to its continued longevity.⁹ As the silent movie era blossomed from the 1910s to the late 1920s, regulators took note of the medium's prevalence and began examining the major players of the industry for possible violations of the Sherman Antitrust Act of 1890.¹⁰

During the 1930s, the landscape of the film industry was considerably different than it appears today.¹¹ Rather than a project having a writer, producer, production company, distribution company, streaming partner, affiliated theaters, and many other interdependent but discrete

⁸ See generally Brad Adgate, *The Impact COVID-19 Had On The Entertainment Industry in 2020*, FORBES (Apr. 13, 2021), <https://www.forbes.com/sites/bradadgate/2021/04/13/the-impact-covid-19-had-on-the-entertainment-industry-in-2020/?sh=2cc39f13250f>. The film industry was nearly decimated in the less traditional definition of the term, with box office revenues shrinking from a four-year creep above \$11 billion to registering \$2.1B in 2020, \$4.48B in 2021, and \$7.37B in 2022. See *Box Office Revenue in the United States and Canada from 1980 to 2022*, STATISTA, <https://www.statista.com/statistics/187069/north-american-box-office-gross-revenue-since-1980/> (last visited Aug. 12, 2023). While the industry is slowly recovering, many standalone and independent theaters were unable to weather this downturn, and the few remaining theater franchises (AMC: 595 sites; Regal: 511 sites; Cinemark: 324 sites; Cineplex: 160 sites; no others above 100) have either struggled or made agreements for shorter windows on blockbusters to ensure short-term revenue consistency and studio partnership. For statistics, see *Giants of Exhibition 2022*, BOX OFFICE PRO (last visited Nov. 1, 2023), <https://www.boxofficepro.com/giants-of-exhibition-2022/> (last visited Aug. 12, 2023); for struggles, see Jordan Moreau, *Regal Cinemas to Shut Down 39 U.S. Theaters Amid Bankruptcy*, VARIETY (Jan. 19, 2023), <https://variety.com/2023/film/news/regal-cinemas-shut-down-theaters-bankruptcy-1235495319/>; for shortened windows, see *infra* Section II(A).

⁹ See *The Silent Years 1910–27*, BRITANNICA (last visited Nov. 1, 2023) <https://www.britannica.com/art/history-of-the-motion-picture/The-silent-years-1910-27>.

¹⁰ See J. A. Aberdeen, *Hollywood Renegades Archive, Introduction: The First “Paramount Case”*, SOC’Y OF INDEP. MOTION PICTURE PRODUCERS, http://www.cobbles.com/simpp_archive/ftc-case_into.htm (last visited Aug. 12, 2023).

¹¹ See generally *id.*

entities, which are each responsible in part for the eventual release of a film, a studio furnished nearly all the roles during the 1930s.¹² From the screenplay writing to theaters showing the finished product, a handful of diversified and vertically integrated studios controlled every aspect of film production, effectively maintaining an oligopoly on the entire industry.¹³ This allowed these studios to refuse to show competing or independent films, carve out geographic areas that would only be able to view their films, deny or restrict “first run” rights to theater franchises, and regularly seize a staggering portion of the domestic box office, split jointly between a few major studios.¹⁴

B. *The Big Five and Little Three*

The oligopolistic behavior of these major studios eventually provoked the U.S. Department of Justice, and in 1938, they sued eight major chains and a long list of additional independent chains.¹⁵ Those eight chains were the “Big Five”—Paramount (the largest and primary defendant), Loew’s Inc., Warner Brothers, 20th Century Fox, and RKO Pictures—and the “Little Three”—Universal Pictures, Columbia Pictures, and United Artists.¹⁶ The distinction is that the former had already begun integrating into exhibition markets, whereas the latter were named for their market share and ability to tailor individual decrees to each major distributor.¹⁷

The main markets at play within the film industry were the production, distribution, and exhibition markets, each of which was becoming increasingly controlled by the eight major chains above.¹⁸ By

¹² See generally *Paramount*, 334 U.S. at 131. The court largely ignored the question of monopoly of production, as it sought to “narrowly” examine the issue of monopoly of exhibition, but it bore some commentary in the analysis of the necessity for a remedy. *Id.* at 166.

¹³ *Id.* at 167.

¹⁴ *Id.* at 166–67. See also Market Share, *supra* note 4.

¹⁵ *United States v. Paramount Pictures*, 66 F. Supp. 323, 347 (S.D.N.Y. 1946) (injunction granted).

¹⁶ See *infra* Section I(C). Analysis and discussion of the case indicates that the Little Three were included in the litigation largely to avoid creating a situation where they would overtake the Big Five by implementing those practices and strategies the larger studios were barred from, leaving film antitrust with the same issue but different players. See Aberdeen, *supra* note 10.

¹⁷ See *id.*

¹⁸ See Aberdeen, *supra* note 10.

1945, these major studios owned 17% of domestic cinemas outright or in part and received nearly half of film-rental revenues.¹⁹

In 1940, a consent order settled the action that allowed the government to continue prosecuting the studios if they did not adhere to certain restrictions, including curtailing block-booking and blind-buying practices.²⁰ In 1942, the studios elected not to participate fully and sought an alternative called the Unity Plan, which would allow block-booking to large blocks of theaters through the newly instituted Allied Theatre Owners, affording individual theaters the option to reject films.²¹

In response to this proposal, the Society of Independent Motion Picture Producers was created and brought suit against Paramount, which resulted in a slew of additional lawsuits by downstream verticals against studios.²² The government elected to reject the Unity Plan and resume prosecution of the studios pursuant to the original consent order in 1943.²³ A district court ruled in favor of the studios, and the government appealed to the Supreme Court.²⁴

¹⁹ *Paramount*, 334 U.S. at 167.

²⁰ *Id.* at 141 n.3. “Block booking” refers to a longstanding pre-Decrees practice whereby studios would sell multiple films at a time to theatres, bundling films so that studios could distribute less desirable films by pairing them with feature films to maximize the profitability of all of their releases. *Id.* at 156–57. “Blind selling” was another practice whereby studios would sell their films without allowing the theater districts purchasing them to view the films first. *Id.* at 157 n.11. This gave theaters little leverage to reject poor-quality films, especially when blocked with desirable features. *Id.* The 1960 consent order allowed the Big Five to bundle features but not shorts, and wholly outlawed blind selling, replacing it with a requirement to allow representatives from theater districts to view features in advance. *Id.* at 176.

²¹ The Allied Theatre Owners were later named the National Association of Theater Owners (hereinafter “NATO”). See J. A. Aberdeen, *Independents Protest the United Motion Picture Industry*, Cobblestone Entertainment; Hollywood Renegades Archive (copyright 2005, accessed Aug. 12, 2023), http://www.cobbles.com/simpp_archive/simpp_1942umpi.htm.

²² *Id.*

²³ See *The Government Reactivates the Paramount Case*, HOLLYWOOD RENEGADES ARCHIVE (Aug. 7, 1944, accessed Aug. 12, 2023), http://www.cobbles.com/simpp_archive/paramountdoc_1944biddle.htm.

²⁴ *United States v. Paramount Pictures*, 66 F. Supp. 323 (S.D.N.Y. 1946), *aff’d in part, rev’d in part*, 334 U.S. 131 (1948).

C. *The Paramount Decrees*

In 1948, the Supreme Court ruled 7-1 in the government's favor to enforce restrictions to combat encroaching oligopolistic influence by studios.²⁵ The landmark antitrust ruling is commonly referred to as the Paramount Decrees (the Decrees), as it decreed several tailored provisions and restraints aimed at breaking up vertical integration in the industry.²⁶

Part of the success of the Decrees, which would eventually ensure their demise, was that they were crafted separately by each studio.²⁷ While the Decrees' larger provisions were aimed at curtailing the same offensive practices restricted in the original consent order, levying individual decrees enabled the court to order the separation of companies especially entrenched in production and exhibition.²⁸ This method effectively prevented any existing company from achieving a high level of vertical

²⁵ *Paramount*, 334 U.S. at 166. The resulting remedy created a discrete separation of movie and screen as follows: film production, handled by studios in conjunction with production companies, and film exhibition, handled by independent and franchise theaters, drive-ins, and others. *Id.* By way of this, the court ensured two twin pillars of cinema: the studio, a market with billion-dollar budgets and high barriers to entry, and the theater, a market attainable by applying for a reasonable small business loan, a franchise, or working in the same franchise. *See also* Culmination of Oligopolistic Effect on Cinema, *infra* Section III. While studios can now tap directly into mobile and at-home viewers to circumvent traditional exhibitions to a degree, the modern parallels warrant consideration. *Id.*

²⁶ *See The Hollywood Antitrust Case*, HOLLYWOOD RENEGADES ARCHIVE, http://www.cobbles.com/simpp_archive/1film_antitrust.htm (last visited Aug. 12, 2023) (presenting a comprehensive history).

²⁷ *See* discussion *infra* Section III about the new "Big Five" of film distribution; *see also* Market Share, *supra* note 4. Naming the original eight litigants enabled the court to distinguish between remedies for studios already integrating into exhibition (e.g., the "Big Five" then) and those merely noteworthy enough to merit a remedy. *See Paramount*, 66 F. Supp. at 328–30. The Court, however, was unable to distinguish remedies for a divestiture of assets that did not then exist. *See id.*

²⁸ *Paramount*, 66 F. Supp. at 330. Part of the Decrees was a prohibition that none of the Big Five would acquire more theaters after being divested unless they could establish that such acquisitions would not "unreasonably restrain trade." *See id.* From an antitrust perspective, the most closely scrutinized relationship in the film industry is that of production and exhibition because if a corporation could maintain effective control over both, they could solely show their films and do so at prices that would unduly disadvantage cinemagoers, among several other concerning practices that would restrict the cinematic market and hinder new entrants. *Id.*

integration that could threaten oligopolistic influence.²⁹ It did not, however, prevent the possibility of future companies from walking through the same doors that barred the established studio-litigants in the Decrees.³⁰

As mentioned above, the Decrees were levied primarily against the studios that were becoming vertically integrated into exhibition, and at that point, there were eight studios that had expanded to this degree.³¹ Notably, the original eight litigants have, almost without exception, been dissolved, merged, or purchased following the order:

²⁹ *See id.*

³⁰ *See* Kevin Kodama, *Why Overturning the Paramount Decree Ruined Hollywood*, MOVIE WEB (Oct. 4, 2023), <https://movieweb.com/paramount-decree-is-ruining-hollywood/> (“[n]ow, seventy years later, the rules have changed, and the names are different, but the story remains relatively the same”). It would be difficult to consider film players like Netflix, Apple, or Amazon at the time of the original Decrees. *Id.* Studios ultimately dictate the distribution of their films, but streamers have created a niche by contributing to the decline in cable syndication while also providing a destination for second and even first run films. *Id.* Consequently, streamers must be included in any conversation about antitrust in the modern film industry. *See generally* Arne Alsin, *The Future of Media: Disruptions, Revolutions and the Quest for Distribution*, FORBES (July 19, 2018), <https://www.forbes.com/sites/aalsin/2018/07/19/the-future-of-media-disruptions-revolutions-and-the-quest-for-distribution/?sh=2bb9e5f660b9>.

³¹ *See Paramount*, 66 F. Supp. at 328–30. These studios were the “Big Five” of Paramount, 20th Century Fox, Warner Brothers, Metro-Goldwyn-Mayer, and RKO, as well as the “Little Three” of Universal, Columbia, and United Artists. *Id.* The former five had more stringent efforts to dismantle existing inroads into exhibition, whereas the other three were included in deregulation efforts for their size and influence despite not taking concrete steps to encroach into exhibition. *Id.*; *see also* Ralph Cassady, Jr., *The Impact of the Paramount Decision on Motion Picture Distribution and Price Making*, 31 SO. CAL. L. REV. 150–81 (1958).

The Big Five

- **Paramount** was purchased by Gulf+Western and then sold to Viacom in 1994;³²
- **20th Century Fox** was bought by Newscorp in 1985, and then sold to Disney in 2018;³³

³² See Bernard F. Dick, *ENGULFED: THE DEATH OF PARAMOUNT PICTURES AND THE BIRTH OF CORPORATE HOLLYWOOD 103–07* (University Press of Kentucky 2001). In February of 1994, Viacom purchased a controlling interest in Paramount for \$9.75 billion. See Geraldine Fabrikant, *Executives Say That Viacom Has Won Paramount Battle*, N.Y. TIMES (Feb. 15, 1994), <https://www.nytimes.com/1994/02/15/business/executives-say-that-viacom-has-won-paramount-battle.html>. In 2006, CBS and Viacom split, and Paramount's Parks and cable network stayed with the former, while its films went with the latter. See Bloomberg News, *Viacom Completes Split into 2 Companies*, N.Y. TIMES (Jan. 2, 2006), <https://www.nytimes.com/2006/01/02/business/media/viacom-completes-split-into-2-companies.html>.

³³ See Michael Wolff, *THE MAN WHO OWNS THE NEWS: INSIDE THE SECRET WORLD OF RUPERT MURDOCH 167* (2010). In 1981, 20th Century Fox was sold to two new owners, one of whom fled the country three years later to evade federal prosecution for tax evasion. *Id.* The other owner, Marvin Davis, purchased the absconding owner's half-interest shortly thereafter and sold it to Rupert Murdoch's News Corporation, selling his own remaining half in 1985 to the same for a total of \$575 million. *Id.* In 2012, Murdoch separated Fox from News Corporation and renamed the spinoff 21st Century Fox. See Dominic Rushe, *Rupert Murdoch Splits Empire but Keeps Faith in Tomorrow's Newspapers*, THE GUARDIAN (June 18, 2013), <https://www.theguardian.com/media/2013/jun/18/rupert-murdoch-split-empire-news-corp>. In 2019, Disney finalized its purchase of 21st Century Fox. See Matthew Schwartz, *Disney Officially Owns 21st Century Fox*, NPR (Mar. 20, 2019), <https://www.npr.org/2019/03/20/705009029/disney-officially-owns-21st-century-fox>.

The Big Five (cont.)

- **Warner Brothers** was bought by AT&T, but eventually merged with Discovery in 2022;³⁴
- **Metro-Goldwyn-Mayer** was controlled by Loews Theatres at the time of the action, who was the named party, and has been since owned by Sony and most recently Amazon;³⁵

³⁴ See Brooks Barnes, *New Era Begins at Warner Bros., Tinged With Nostalgia*, N.Y. TIMES (Apr. 10, 2022),

<https://www.nytimes.com/2022/04/10/business/media/warner-bros-discovery.html>. Warner Brothers sold its theater arm during the '50s, and merged with RKO's theater holdings until RKO went bankrupt in 1959. See Graham Daseler, *The Fall of the House of Warner: The Warner Brothers*, BRIGHT LIGHTS FILM JOURNAL (Jan. 25, 2014), <https://brightlightsfilm.com/the-fall-of-the-house-of-warner-the-warner-brothers/>. In 1966, Warner Brothers was sold to Canadian investors, and in 1989, it was bought out by Time, Inc. See Floyd Norris, *Time Inc. and Warner to Merge, Creating Largest Media Company*, N.Y. TIMES (Mar. 5, 1989), <https://www.nytimes.com/1989/03/05/us/time-inc-and-warner-to-merge-creating-largest-media-company.html>. Time nearly evaded a buyout from Paramount, recently acquired by Viacom, to fulfill the merger. See Barnes.

³⁵ See Andrew Ross Sorkin, *Sony Agrees to Buy MGM for Nearly \$5 Billion*, N.Y. TIMES (Sept. 13, 2004), <https://www.nytimes.com/2004/09/13/business/media/sony-agrees-to-buy-mgm-for-nearly-5-billion.html>; MGM: The Dream Factory, *Metro Goldwyn Mayer in the Pre-Code Hollywood Era*, PRE-CODE.COM (accessed October 24, 2023), <http://pre-code.com/hollywood-studios-pre-code-era/metro-goldwyn-mayer/>. Metro-Goldwyn-Mayer was formed in 1924 when founder and theater proprietor, Marcus Loew, bought the three named studios and merged them with his Loews theater chain. See Dream Factory, *supra*. After an attempted takeover by Fox in 1929, Loews was mandated to give up control of MGM through the Decrees' settlement terms. *Id.* Kirk Kerkorian acquired control of MGM in 1969. See Michael A. Hiltzik, *Kirk Kerkorian: Friend or Foe?: His Presence in the MGM Deal Receives Mixed Reviews*, LOS ANGELES TIMES (Jul. 17, 1996), <https://www.latimes.com/archives/la-xpm-1996-07-17-fi-24921-story.html>. Subsequently, Sony bought the company before going bankrupt in 2009. See Andrew Clark, *MGM Film Studio Plunges into Bankruptcy*, THE GUARDIAN (Oct. 30, 2010), <https://www.theguardian.com/business/2010/oct/31/mgm-bankruptcy-spyglass>; see also Sorkin, *supra*. After a revival, it was sold to Amazon in 2010. See Jill Goldsmith, *Amazon and MGM Close \$8.5 Billion Merger*, DEADLINE (Mar. 17, 2022), <https://deadline.com/2022/03/amazon-mgm-merger-1234981037/>.

The Big Five (cont.)

- **RKO** went bankrupt in 1959.³⁶

The Little Three

- **Universal** was eventually purchased by Comcast and merged with NBC;³⁷
- **Columbia** was bought by Sony in 1989;³⁸

³⁶ See King Bros. Productions, Inc. v. RKO Teleradio Pictures, Inc., 208 F. Supp. 271 (S.D.N.Y. 1962). After releasing classics like *Citizen Kane*, RKO focused on B-roll films for the years leading up to the Decrees. See Roy Stafford, *RKO – A Studio with a Difficult History*, IN THE PICTURE (Dec. 12, 2020), <https://itpworld.online/2020/12/12/rko-a-studio-with-a-difficult-history/> (“[t]he other four majors had better production facilities and more experience of making ‘A’ features”). In 1948, tycoon Howard Hughes purchased a controlling interest in RKO and divided the company’s exhibition and production departments, electing to get a jump on the federal orders vertically separating studios pursuant to the settlement terms. *Id.* Hughes garnered a reputation for inserting himself into production efforts, and in 1955, after several years of low output and profits, he sold his interest to General Tire, who folded the studio three years later. See *id.*; see also Terry Gross, ‘Sex, Lies And Stardom’: *Exploitation In Howard Hughes’ Hollywood*, NATIONAL PUBLIC RADIO (Nov. 13, 2018), <https://www.npr.org/transcripts/667391184>.

³⁷ See Sam Gustin, *Comcast’s NBCUniversal Deal: As One Media Era Ends, Another Begins*, TIME (Feb. 14, 2013), <https://business.time.com/2013/02/14/comcasts-nbcuniversal-deal-as-one-media-era-ends-another-begins/> (sale to Comcast); Reuters Staff, *Comcast Completes NBC Universal Merger*, REUTERS (Jan. 29, 2011), <https://www.reuters.com/article/us-comcast-nbc/comcast-completes-nbc-universal-merger-idUSTRE70S2WZ20110129> (merger completed). Universal was sold many times, most recently to General Electric in 2003, who sold a controlling interest to Comcast in 2011 and then the remaining share in 2013. See Bill Carter, *G.E. Finishes Vivendi Deal, Expanding Its Media Assets*, N.Y. TIMES (Oct. 9, 2003), <https://www.nytimes.com/2003/10/09/business/ge-finishes-vivendi-deal-expanding-its-media-assets.html>; Gustin, *supra*.

³⁸ See Paul Richter, *Sony to Pay \$3.4 Billion for Columbia Pictures*, LOS ANGELES TIMES (Sep. 28, 1989), <https://www.latimes.com/archives/la-xpm-1989-09-28-mn-361-story.html>. Columbia was purchased by Coca-Cola in 1982 for \$750 million and was then sold to Sony in 1989 for \$3.4 billion. *Id.*; see Thomas C. Hayes, *Coke Expected to Acquire Columbia Pictures*, N.Y. TIMES (Jan. 19, 1982), <https://www.nytimes.com/1982/01/19/business/coke-expected-to-acquire-columbia-pictures.html>.

The Little Three (cont.)

- **United Artists** merged with MGM after the latter separated from Loews and is collectively the only major litigant remaining in a purely studio form.³⁹

Because the litigant studios were near universally subsumed by larger companies in the decades following the Decrees and could circumvent the Decrees' regulatory influence by maintaining diversified subsidiaries and partnerships in production and distribution without

³⁹ See Robert J. Cole, *M-G-M is Reported Purchasing United Artists for \$350 Million*, N.Y. TIMES (May 16, 1981), <https://www.nytimes.com/1981/05/16/world/m-g-m-is-reported-purchasing-united-artists-for-350-million.html>. Transamerica acquired United Artists in 1967 and sold it to Kirk Kerkorian in 1981. See *id.* Tracinda Corporation acquired MGM in 1969, and after acquiring United, Kerkorian merged the two into MGM/UA. See AP, *MGM/UA Plans Merger of Unit*, N.Y. TIMES (Dec. 15, 1984), <https://www.nytimes.com/1984/12/15/business/mgm-ua-plans-merger-of-unit.html>. Kerkorian's frequent attempts to sell the merged company in the '80s resulted in a prolonged gap in UA releases. See Hiltzik, *supra* note 35. Although he eventually sold the merged company, he later repurchased it and revived UA in 2006 by creating a shell LLC with Tom Cruise and his producing partner Paula Wagner to furnish production. See Laura M. Holson, *Mission: Rescue Operation*, N.Y. TIMES (Nov. 3, 2006), <https://www.nytimes.com/2006/11/03/business/media/03studio.html>. As head of UA, Wagner released two films before departing the company in 2008. See Jay A. Fernandez and Leslie Simmons, *Paula Wagner Departs United Artists Studio*, REUTERS (Aug. 13, 2008), <https://www.reuters.com/article/us-unitedartists-wagner/paula-wagner-departs-united-artists-studio-idINN1335976020080814>. Since her departure, UA has released only two films, both co-produced with MGM. See Simon Brew, *Tom Cruise and The Failed United Artists Experiment*, DEN OF GEEK (Dec. 14, 2017), <https://www.denofgeek.com/movies/tom-cruise-and-the-failed-united-artists-experiment/>.

ostensibly maintaining ownership over them, the holding provides little and lessening staying power to combat oligopolies in the film industry.⁴⁰

Today, entertainment conglomerates that have sprung into being via merger or corporate genesis maintain a dominance that borders on restriction of trade.⁴¹ The youthfulness of the entities involved—for which some measure “recent memory” as the 3D era—makes their power and diversification all the more threatening for the industry’s unrestricted production.⁴²

D. *The New “Big Five”*

While the landscape shifts, even as this paper is authored, five major distributors ended 2022 with shares of domestic box office gross profits collectively amounting to over 80% of the money received by theaters throughout the year.⁴³ These five distributors are:

- **Paramount and Warner Brothers**, both original litigants to the Decrees;⁴⁴

⁴⁰ See GHJ Insights, *Vertical Integration in the Entertainment Industry and its Impact on Profit Participations*, GLOBAL ADVISORY AND ACCOUNTING NETWORK (Feb. 23, 2017), <https://www.ghjadvisors.com/ghj-insights/vertical-integration-in-the-entertainment-industry-and-its-impact-on-profit-participations>. In the decades between the Decrees and their sunset order, the scope of studios within entertainment has evolved. See generally *id.* The Decrees’ purpose was to uphold the balance of distribution and exhibition by preventing the former from gaining a foothold in the latter to squeeze it out. See *Paramount*, 66 F. Supp. at 328. Since then, a veritable foothold in the form of streaming has been established, as has considerable diversification of studios among entertainment to leverage synergies in music, television, movies, merchandise, theme parks, and more as revenue streams in a zero-sum game of box office revenues. See GHJ, *supra*.

⁴¹ See Market Share, *supra* note 4 (nearly 90% of box office revenues come from five distributors).

⁴² See Alsin, *supra* note 30. Disruptors force a market to adapt, but when disruption is coercively influenced by disparate power dynamics, protectionist intervention should be justified as a means to remedy the course and prevent further consolidation.

⁴³ See Market Share, *supra* note 4.

⁴⁴ See *Paramount and Warner Bros.*, *supra* notes 32 and 34, respectively.

The New “Big Five” (cont.)

- **Disney**;⁴⁵

⁴⁵ See D23, *Disney History*, WALT DISNEY ARCHIVES (accessed Oct. 24, 2023), <https://d23.com/disney-history/>. Surrounded by studios who have near-exclusively grown through regular production of film and television, Disney presents a nontraditional study: an animation studio that diversified into film and then began constructing amusement parks. *Id.* The value of these parks and their regular high-margin income to the growth of Disney as a media giant in cinema is often understated. See Christian Sylt, *The Secrets Behind Disney’s \$2.2 Billion Theme Park Profits*, FORBES (Jul. 14, 2014), <https://www.forbes.com/sites/csylt/2014/07/14/the-secrets-behind-disneys-2-2-billion-theme-park-profits/?sh=575b814584fb>. Its first park—Disneyland in Anaheim, CA—was partially funded in 1955 by an investment from a television network, and its accompanying hotel was constructed by an entrepreneur and television producer Walt Disney met through entertainment industry contracts. See Mary Ann Galante, *Disney, IEP Buy Wrather in \$152.3-Million Deal*, LOS ANGELES TIMES (Jan. 22, 1988), <https://www.latimes.com/archives/la-xpm-1988-01-22-fi-25011-story.html>. Disney created several new parks in the following years: 1971 (Walt Disney World), 1982 (Epcot), 1983 (Disneyland Tokyo), 1992 (Disneyland Paris), 1998 (Animal Kingdom), 2001 (California Adventure), 2005 (Hong Kong Disney), and 2016 (Shanghai Disney Resort). See J.I. Baker, *Disney Theme Parks: The History and the Magic*, LIFE, <https://www.life.com/destinations/disney-theme-parks-the-history-and-the-magic/> (last visited Aug. 12, 2023); Dustin Fuhs, *Walt Disney World Construction Timeline*, STEPS TO MAGIC, <https://stepstomagic.com/walt-disney-world-construction-timeline/> (last visited Aug. 12, 2023). While the construction of each park cost between hundreds of millions and billions of dollars, investing in them—and in cruise ships, merchandise stores, and brand partnerships—provided Disney with a competitive edge in production: over time, these investments grew to provide regular profits that could be leveraged to fund riskier, more immediately lucrative film ventures without fearing that poor reception might unduly hinder finances. See Sylt, *supra*; see also Robert Niles, *Disney’s Theme Parks Report Big Financial Results*, THEME PARK INSIDER (Nov. 8, 2022), <https://www.themeparkinsider.com/flume/202211/9226> (Parks generated \$28.7 billion in 2022). This avenue of vertical integration allows Disney to garner brand loyalty through consumer exposure and leverage untraditional verticals, like combining film assets and characters with cruise activities and theme rides, making it a uniquely equipped player to weather downturns in the modern synergetic entertainment industry. See generally Sylt, *supra*. Disney also purchased 21st Century Fox in 2019, horizontally integrating the former Decrees litigant in a \$71 billion merger. Schwartz, *supra* note 33.

The New “Big Five” (cont.)

- **Universal**⁴⁶
- **Sony**.⁴⁷

That there are so few distributors is not entirely unexpected: the cost of producing a film has risen considerably over the last several decades.⁴⁸ While studios are often hesitant to release methodical accounting of their films, estimates suggest the average major studio blockbuster costs \$100 million to produce and market—a discrete and near-unavoidable barrier to entry into the blockbuster production market—with 60% of these films failing to recoup its production costs in

⁴⁶ See Market Share, *supra* note 4. Universal, to an extent, followed the Disney blueprint: per 2017 figures, it is the third-largest theme park operator by global attendance and has two of the ten most-visited parks in the world. See Judith Rubin, *TEA/AECOM 2017 Theme Index and Museum Index: The Global Attractions Attendance Report*, AECOM, <https://aecom.com/content/wp-content/uploads/2018/05/2017-Theme-Museum-Index.pdf> (last visited Aug. 12, 2023). Disney operates the other eight parks. *Id.* About a decade after Disneyland opened, Universal began its pursuit of theme parks in 1964 with Universal Studios Hollywood, and opened subsequent parks in 1990 (Orlando), 2001 (Osaka), 2011 (Singapore), and 2021 (Beijing). See *History*, UNIVERSAL DESTINATIONS & EXPERIENCES, <https://corporate.universalparks.com/history> (last visited Aug. 12, 2023). Also of note is that Universal merged with NBC in 2004 and in 2011, Comcast—America’s largest multinational telecommunications company—purchased NBCUniversal, affording the resultant conglomerate considerable horizontal integration. See *id.*; *The Big 6 Media Companies*, THE MOTLEY FOOL, <https://www.fool.com/investing/stock-market/market-sectors/communication/media-stocks/big-6/> (Apr. 21, 2023, 3:19 PM).

⁴⁷ See Market Share, *supra* note 4. Sony is the largest technology and media conglomerate in Japan; it began as a manufacturer of rice cookers and electric floorboards in the 1950s and grew to become the world’s largest video game publisher, console manufacturer; and music publisher, while also becoming the second-largest record label and the third largest film studio. See SEA-JIN CHANG, *SONY VS SAMSUNG: THE INSIDE STORY OF THE ELECTRONICS GIANTS’ BATTLE FOR GLOBAL SUPREMACY* 9–13 (John Wiley & Sons, Inc., 2008). In addition to these entertainment arms, Sony is a giant in electronic product manufacturing, semiconductors, and cameras. See *id.*

⁴⁸ See Annie Mueller, *Why Movies Cost So Much to Make*, INVESTOPEDIA, <https://www.investopedia.com/financial-edge/0611/why-movies-cost-so-much-to-make.aspx> (July 31, 2022).

its domestic run.⁴⁹ Therefore, it is no surprise that three of the five companies—Disney, Universal (Comcast), and Sony—will likely eclipse \$100 billion in market capitalization by the end of 2023; the only companies that can gamble on the production of \$100 million creative assets are those for whom such a production every year with zero profits would only start to hurt in five decades.⁵⁰ As such, it's difficult to construct arguments that might promote a true *diversification* of the production market, but there are other routes to dilute power in the market.⁵¹

⁴⁹ *Id.*; see also Stephen J. Dubner, *Your Movie Industry Questions Answered*, FREAKONOMICS (Sept. 9, 2008), <https://freakonomics.com/2008/09/your-movie-industry-questions-answered> (interviewing Dan Glickman, C.E.O. of the Motion Picture Association of America, on subtleties in film production and the movie industry holistically).

⁵⁰ See *infra* Section III (comparing relative scopes of verticals). For reference, fifty years of annual \$100 million blockbusters would amount to \$5 billion, which presently amounts to a little under 3% of Disney's market capitalization. See *infra* Section III; see also Market Share, *supra* note 4. The value of those 50 films would be double the present market capitalization of AMC, the largest domestic theater chain. See *infra* Section III.

⁵¹ Erik Deutsch, *Governor Newsom and California Film Commission Executive Director Colleen Bell Release Statements Regarding Extension of California's Film & TV Tax Credit Program*, CAL. FILM COMM'N (July 10, 2023) <https://film.ca.gov/governor-newsom-and-california-film-commission-executive-director-colleen-bell-release-statements-regarding-extension-of-californias-film-tv-tax-credit-program>. It should be noted that there are advocates of true diversification via broad expansion of tax and funding incentives to independent film producers, but few of these arguments gain traction from voices of authority. *But see id.*

II. CLOSING THE CINEMATIC WINDOW OF EXCLUSIVITY

When considering the monopolistic influence in cinema, it is important to consider industry change in the context of power disparities between production and exhibition, with each side either growing or shrinking.⁵² Advances in the manner and presentation of film, and changes to audience behaviors, can often result in micro and macro adjustives to the power balance between the two.⁵³ An excellent example of this is the global Covid-19 pandemic and its effect on the theatrical window.⁵⁴ During the beginning of the pandemic, cinemagoers were unable to frequent theaters, and revenues in the exhibition wing of film production slumped to a near standstill.⁵⁵ Many theaters were then closed pursuant to

⁵² See, e.g., Katie Campione, *Ted Sarandos “Thrilled With Every Aspect” of ‘Glass Onion’ Release, Says Theatrical Window Drove Demand to Netflix*, DEADLINE (Jan. 19, 2023), <https://deadline.com/2023/01/glass-onion-limited-theatrical-release-netflix-earnings-ted-sarandos-1235228219/>. Third party forces and the indirect action of a vertical can easily influence relative positions of power: consider Netflix’s encroachment upon exhibition or any given distributional merger affording it greater financial resources. See *id.*

⁵³ See, e.g., Sharon Waxman, *Studios Rush To Cash In On DVD Boom; Swelling Demand for Disks Alters Hollywood’s Arithmetic*, NY TIMES (Apr. 20, 2004), <https://www.nytimes.com/2004/04/20/movies/studios-rush-cash-dvd-boom-swelling-demand-for-disks-alters-hollywood-s.html>. Additionally, consider the impact of the advent of DVDs, the growth of the internet, and the rise of streaming upon the relative powers of exhibitors and distributors. See *id.* Almost uniformly, they contribute to a degradation in relative power for exhibition. See *id.*

⁵⁴ See Adgate, *supra* note 8. While both parties were impacted, the relatively higher diversification of distributional studios meant that they maintained some revenues, boosted after trial adoptions of day-and-date releases, which allowed them to make decisions about the future that theater-owners with no revenue could not. See Adgate, *supra* note 8.

⁵⁵ See *id.*

local and state mandates, and movie exhibitors went into freefall.⁵⁶ It was hypothesized early that these closures would be a long-term boon for independent exhibitors, as they could more practicably operate in compliance with restrictions, but the true victors of the pandemic closures were drive-in theaters and streaming companies.⁵⁷

One method whereby power shifted away from exhibitors as a result of the pandemic was through the genesis and qualified success of day-and-date releases.⁵⁸ Films receiving these types of releases are distributed for exhibition to both traditional theaters and content distributors (often streamers) at the same time,⁵⁹ trading the potential longevity and profit maximization of dual, contiguous revenue streams for

⁵⁶ See generally Anthony D'Alessandro, *Coronavirus Concern at the B.O.: After 'No Time To Die' Move, Could 'Black Widow' & 'F9' Be Next?*, DEADLINE (Mar. 4, 2020), <https://deadline.com/2020/03/black-widow-f9-no-time-to-die-coronavirus-impact-on-box-office-1202874214>. Box office figures tracking 2020 totals against 2019 figures from the same seasonal period showed an 86% drop in China (\$2.1 billion) and a 48% drop in South Korea. *Id.* On March 17th, the CDC promulgated regulations limiting gatherings to ten individuals, and many prominent domestic theater chains promptly announced closures. Max Evry, *AMC, Regal, Landmark, Cineplex & Alamo Drafthouse Theaters Close*, COMINGSOON.NET (Mar. 17, 2020), <https://www.comingsoon.net/movies/news/1127329-amc-regal-landmark-cineplex-alamo-drafthouse-theaters-close>.

⁵⁷ See Alicia Wallace, *Drive-In Theaters Fueled Hollywood's Box Office Last Year. They Could Be Here to Stay*, CNN BUS. (Aug. 13, 2021), <https://www.cnn.com/2021/08/13/business/drive-ins-here-to-stay-pandemic/index.html>.

⁵⁸ Shannon Long, *Day-and-Date Releases: A COVID-Era Fad or a New Industry Standard?*, BROOK. SPORTS & ENT. L. BLOG (Apr. 19, 2022), <https://sports-entertainment.brooklaw.edu/film-tv/day-and-date-releases-a-covid-era-fad-or-a-new-industry-standard/>. This success was qualified in that a victory cannot be obtained in a zero-sum game without the necessary loss of another: theaters, who would witness the baby steps of a potentially lethal competitor while themselves helpless and lacking any viable revenue streams. See generally *id.*

⁵⁹ See also Max Covill, *Why Are Limited Release Movies Still a Distribution Method in 2018?*, FILM SCH. REJECTS (Jan. 31, 2018), <https://filmschoolrejects.com/limited-release-movies-still-distribution-method-2018/>. Some day-and-date releases separate these distributions by a day or week, which both serves as a watered-down holdover from the days of a monolithic window of exclusivity and a mechanism for qualifying for certain awards circuits that require some period of exclusively theatrical exhibition. See *id.*

a higher initial peak with cheaper marketing and wider immediate accessibility.⁶⁰

Prior to the pandemic, day-and-date releases had been largely reserved for independent films and those with abnormal considerations necessitating non-traditional release methods, such as Steven Soderbergh's *Bubble*⁶¹ or *The Interview*.⁶² Traditional exhibition was maintained largely through faith that it maximized profits for all verticals involved, but the quarantine would challenge that faith.⁶³ The origin of the window is unclear, but it was birthed with the videocassette boom of the 1980s.⁶⁴ By the end of the decade, the average window of exclusivity between theatrical and home video releases was around six months,⁶⁵ whereas blockbusters—defined as those that grossed between \$75 million and \$100

⁶⁰ See, e.g., Anders Bylund, *First Simultaneous Release Movie Opening Tonight*, ARS TECHNICA (Jan. 12, 2006, 1:08 PM), <https://arstechnica.com/uncategorized/2006/01/5967-2>. The article notes that the director of the indie film *Bubble* was motivated to release day-and-date partially due to the lower marketing spend and also out of a feeling that consumer tastes were shifting towards wanting several different avenues of viewership. *Id.*

⁶¹ *Id.*

⁶² See Alex Altman & Alex Fitzpatrick, *Everything We Know About Sony, The Interview, and North Korea*, TIME (Dec. 17, 2014, 9:13 PM), <https://time.com/3639275/the-interview-sony-hack-north-korea>. Completed in early 2014, *The Interview* satirized North Korea and was set for widespread distribution by Sony Pictures when the North Korean government threatened action against the United States if the film were permitted to be released. *Id.* Sony's computer systems were then hacked by a North Korean cybercrime group, the Guardians of Peace, who threatened terrorist attacks against theaters screening the film. *Id.* Consequently, Sony opted to release the film for online digital rental and purchase, followed by a limited theatrical release the next day, making it one of the first films to tackle the longstanding cinematic window. See Victor Luckerson, *Sony Has Almost Made Its Money Back on The Interview*, TIME (Jan. 7, 2014, 1:44 PM), <https://time.com/3658133/the-interview-brought-in-31-million-in-digital-sales/>.

⁶³ Rebecca Rubin, *RIP to the 90-Day Theatrical Window*, VARIETY (May 14, 2021, 1:44 PM), <https://variety.com/2021/film/box-office/theatrical-window-dead-1234973333>. It is important to note that no legislative or statutory provisions on a federal level enforce or promote the window's longevity: it's the equivalent of a longstanding handshake agreement between studios and exhibitors. See *id.*

⁶⁴ *Id.*

⁶⁵ Dennis Hunt, *Are Home Video Releases Coming Too Soon for Theaters?*, L.A. TIMES (Oct. 20, 1989, 12:00 AM), <https://www.latimes.com/archives/la-xpm-1989-10-20-ca-308-story.html>.

million in adjusted totals—typically saw a window of exclusivity between nine and twelve months.⁶⁶ By the early 2010s, advances in technology, changes in audience taste, and the willingness of studios to challenge established norms caused the average window to drop two months to around 115 days.⁶⁷

The prior window lasted, in part, because of technological constraints on distribution.⁶⁸ The advent of DVD and later streaming made the reproduction of films cheaper, faster, and more compact, which meant that the primary incentive to retain a theatrical window was profit maximization.⁶⁹

Disruptors, including Mark Cuban's 2929 Entertainment, attempted to shorten the theatrical window; 2929 Entertainment leveraged vertical integration in production and distribution to test out a day-and-date release of its film *Bubble* in 2006.⁷⁰ Lionsgate tested the waters in 2011 with *Margin Call*, which Lionsgate released day-and-date on VOD; *Margin Call* grossed \$5.3 million domestically but earned nearly equal profits from VOD sales.⁷¹ A final pre-quarantine effort to get rid of the theatrical window arose in 2018 over a conflict between Netflix, which

⁶⁶ *Id.*

⁶⁷ Terrence August, Duy Dao & Hyoduk Shin, *Optimal Timing of Sequential Distribution: The Impact of Congestion Externalities and Day-and-Date Strategies*, 34 MKTG. SCI. 755, 755 (2015), https://www.jstor.org/stable/24544746#metadata_info_tab_contents; see Mitra Ahouraian, *The Effects of a Shrinking Window for Theatrical Release Exclusivity*, FORBES (Sept. 16, 2021, 7:30 AM), <https://www.forbes.com/sites/forbesbusinesscouncil/2021/09/16/the-effects-of-a-shrinking-window-for-theatrical-release-exclusivity/?sh=4ceb48a7c5b2> (noting that a six-month window during the VHS era led to a ninety-day turnaround by DVD, showing how distributional evolution helped erode the necessity of the window).

⁶⁸ August, *supra* note 67. This paper provides a fairly comprehensive analytical discussion of the benefits and drawbacks of direct-to-video, day-and-date, perfect segmentation, and delayed release tactics as of 2015. *Id.*

⁶⁹ See Ahouraian, *supra* note 67.

⁷⁰ See August, *supra* note 67; Bylund, *supra* note 60.

⁷¹ Daniel Miller, *Sundance 2012: The Day-And-Date Success Story of 'Margin Call'*, THE HOLLYWOOD REP. (Jan. 18, 2012, 3:24 PM), <https://www.hollywoodreporter.com/news/general-news/sundance-2012-margin-call-video-on-demand-zach-quinto-283033>. The author notes that “[t]he cast had taken small paydays in exchange for backend deals,” and that producers were appeased by “a simultaneous release in a guaranteed number of theaters.” *Id.* The VOD success also led to the talent’s bonuses being paid, showing that an integral component of success with VOD may be planning for it in advance and maintaining transparency. *Id.*

championed day-and-date releases, and the Cannes Film Festival, which adhered to a thirty-six-month windowing schedule under French law.⁷² While France shortened its windowing rules to fifteen months in response to the quarantine, Netflix has not participated at Cannes since the 2018 dispute.⁷³

Internationally, and particularly in France, the theatrical window centers a debate over whether film is culture or content.⁷⁴ France has sought to protect and promote the rights of cinemas over conflict with studios and distributors because it views the cinema-going experience as the ultimate demonstration of film's impact on society.⁷⁵

⁷² See Scott Roxborough, *Europe's Theatrical Window Standoff Gives Studios Pause over Strategy*, THE HOLLYWOOD REP. (June 23, 2022, 3:45 AM), <https://www.hollywoodreporter.com/business/business-news/european-theatrical-window-standoff-gives-studios-pause-over-strategy-1235170587>. French regulations enforce “a strict, four-month exclusive theatrical window,” but also require a six-month “pay-TV release ahead of the streaming window.” *Id.* France also has “a strict free-TV window, meaning studios have to remove new films from streaming platforms for a period, usually between 22 and 36 months following their theatrical release,” to allow exclusive television airing. *Id.*

⁷³ Elsa Keslassy, *Netflix's Cannes Comeback Won't Happen This Year (EXCLUSIVE)*, VARIETY (Feb. 23, 2022, 10:18 AM), <https://variety.com/2022/film/global/cannes-netflix-blonde-2022-1235188197>; Alissa Wilkinson, *Netflix vs. Cannes: Why They're Fighting, What it Means for Cinema, and Who Really Loses*, VOX (Apr. 13, 2018, 2:50 PM), <https://www.vox.com/culture/2018/4/13/17229476/netflix-versus-cannes-ted-sarandos-thierry-fremaux-okja-meyerowitz-orson-welles-streaming-theater>.

⁷⁴ Wilkinson, *supra* note 73. The United States appears to be on a long-run trajectory from revering cinema during the Golden Age as the height of culture to affirming accessibility over spectacle in pursuit of content. Erin Blakemore, *How TV Killed Hollywood's Golden Age*, HIST., <https://www.history.com/news/how-tv-killed-hollywoods-golden-age> (last updated June 1, 2023). Protectionism has preserved the cinematic traditions of France and other European neighbors, and it should be considered in further depth for domestic application. Celestine Bohlen, *Protecting European Cinema*, N.Y. TIMES (June 21, 2013), <https://www.nytimes.com/2013/06/22/world/europe/22iht-letter22.html>.

⁷⁵ See Wilkinson, *supra* note 73. France allows studios to invest in French cinema and receive preferentially shortened windowing but requires substantial annual investments and carry only a reduction to a fifteen-month window. See Roxborough, *supra* note 72.

The longstanding ninety-day domestic theatrical window of exclusivity persisted in a purgatorial gray area during at least the first year of the COVID-19 pandemic, as producers and distributors grappled with the feasibility of continuing such a practice amid anemic theater attendance.⁷⁶ Theatrical revenue “dropped from \$42.3 billion in 2019 to \$12 billion in 2020,” and fell from 43% of the total global entertainment revenue to 15% over the same period.⁷⁷ Simultaneously, digital entertainment revenue rose 31% in 2020, and online video subscribers climbed 26% to 1.1 billion.⁷⁸

A. *Premium Video on Demand (PVOD)*

The first blockbuster film to challenge the theatrical exclusivity practice did so barely a month into the pandemic.⁷⁹ Universal Pictures (Universal) chose to completely eschew a window of exclusivity in favor of a PVOD approach in its release of *Trolls World Tour* (*Trolls*) in April of 2020.⁸⁰ Universal estimated that five million people rented *Trolls* in its first few weeks, generating roughly \$100 million in sales.⁸¹

For studios, PVOD is more appealing than releasing films on their streaming sources because the typical \$20 pricing of a PVOD movie (roughly equivalent to two adult film tickets) mitigates the cannibalization of box office performance, while streaming enables consumers to view the

⁷⁶ See Adgate, *supra* note 8.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ See Dave McNary, *AMC Theatres Won't Play Universal Movies in Wake of 'Trolls World Tour' Dispute*, VARIETY (Apr. 28, 2020, 4:47 PM), <https://variety.com/2020/film/news/amc-theatres-trolls-world-tour-dispute-1234592445>. COVID-19 hit the United States in March 2020. See *Premium Video on Demand (PVOD)*, SYMPHONY MEDIA, <http://symphonymedia.com/glossary/pvod-premium-video-on-demand> (last visited Aug. 12, 2023). Universal's first release came on April 10, 2020. See McNary, *supra*.

⁸⁰ See McNary, *supra* note 79. Under this method, rather than maintaining an exclusive cinematic window or opting for a general streaming addition, titles are available exclusively to subscribers of a given platform in exchange for a premium surcharge, which helps to replace some of the per-customer lost revenues of box office ticket sales. See *Premium Video on Demand (PVOD)*, *supra* note 79.

⁸¹ Brent Lang & Rebecca Rubin, *Universal, AMC Theatres Forge Historic Deal Allowing Theatrical Releases to Debut on Premium VOD Early*, VARIETY (July 28, 2020, 1:30 PM), <https://variety.com/2020/film/news/universal-amc-theatres-historic-deal-windows-1234718737>.

relevant title for a single, lower monthly cost.⁸² AMC Theaters' Chairman-CEO, Adam Aron, released a strongly worded letter to Universal following the studio's decision to break the exclusivity window, announcing that AMC would no longer play Universal movies in its United States, European, or Middle Eastern theaters.⁸³ Analysts note, however, that boycotts from theater chains carry little leverage because the chains are unlikely to boycott the releases from multiple studios for fear of limiting their film offerings.⁸⁴

After the PVOD release of *Trolls*, several rival studios began experimenting with PVOD releases, including Warner Bros. (*Scoob*), Disney (*Artemis Fowl*), Paramount (*Lovebirds*), and STX (*My Spy*).⁸⁵ The National Association of Theatre Owners (NATO) weighed in on the *Trolls* release, asserting that its success on PVOD “reflected unique circumstances rather than a shift in consumer attitudes.”⁸⁶ NATO also criticized Universal for its claim that AMC and NATO coordinated the timing of their statements on the *Trolls* release, noting that “Universal has a destructive tendency . . . of making unfounded accusations without consulting with their [exhibitor] partners.”⁸⁷

⁸² *Id.*

⁸³ See McNary, *supra* note 79.

⁸⁴ Jill Goldsmith, “Unaffordable” 90-Day Theatrical Window Is History as Leverage Tilts Towards Studios Post-Pandemic – Analyst, DEADLINE (June 1, 2020, 8:29 AM), <https://deadline.com/2020/06/unaffordable-90-day-theatrical-window-is-history-as-leverage-tilts-towards-studios-post-pandemic-analyst-1202948071>.

⁸⁵ McNary, *supra* note 79.

⁸⁶ *Id.*

⁸⁷ *Id.*

B. *Ultra-Video on Demand (Ultra-VOD)*

Ultra-VOD refers to putting a film on-demand before a theatrical run, attempting to prioritize home sales prior to the traditional cinematic model.⁸⁸ Magnolia Pictures, distributor of *Bubble*, was a disruptor and a forerunner of Ultra-VOD.⁸⁹ Commentators point to the fact that Magnolia's parent company owns Landmark Theatres, one of the largest art house movie theater chains in the United States, allowing Magnolia Pictures to circumvent the traditional ninety-day window and profit through integration.⁹⁰

Ultra-VOD has seen little domestic studio adoption, as the incentives to the distributor-exhibitor relationship run largely in one

⁸⁸ Chris O'Falt, *The 3 Biggest Problems Indies Face With Day-and-Date Releasing*, THE HOLLYWOOD REP. (Dec. 19, 2013, 11:41 AM), <https://www.hollywoodreporter.com/movies/movie-news/3-biggest-problems-indies-face-666871>. Criticism indicates that the largest hindrance to Ultra-VOD's adoption is the prevalent notion that cinemagoers are less likely to view a film in theaters if they already had the opportunity to view it at home. See generally Thomas Paris, *New Approaches for Greater Diversity of Cinema in Europe?*, EUR. PARLIAMENT (May 12, 2014), p. 40, https://preparatoryaction.files.wordpress.com/2014/05/report_new-approaches-for-greater-diversity-of-cinema-in-europe_thomas-paris_may20142.pdf (trial run of various films, including "For Those in Peril" released on Ultra-VOD, demonstrating greater additional audience generated among digital purchases). Europe flirted with Ultra-VOD more extensively than the United States: Birds Eye View released the 2014 film *In Bloom* via an Ultra-VOD release with an inverse window of exclusivity of roughly a month (April 8th to May 2nd) provided to Curzon Home Cinema, its home video partner. See Wendy Mitchell, *BEV, Curzon Launch Ultra VOD for In Bloom*, SCREEN DAILY (Mar. 31, 2014), <https://www.screendaily.com/festivals/in-bloom-to-get-ultra-vod-uk-launch/5070201.article>. The film based its venture upon fellow UK distributor Metrodome's 2013 found footage horror film *The Borderlands*, which had adopted a similar approach with relative success. See *id.* *In Bloom* was less successful but was also filmed without a budget around Chicago. *Id.*

⁸⁹ O'Falt, *supra* note 88.

⁹⁰ *Id.*

direction.⁹¹ If a movie can be seen online for a period prior to its theatrical release, the film must be truly compelling to convince a repeat viewer to refrain from watching, and piracy tends to be a greater concern after the streaming release than during the window of exclusivity.⁹² Thus, it's unlikely that Ultra-VOD sees widespread adoption in America.⁹³

C. *Disney Premier Access*

A true death blow to the theatrical window practice came from Disney in May of 2021, when the company announced that Marvel's *Shang-Chi and the Legend of the Ten Rings* and the Ryan Reynolds comedy *Free Guy* would have windows of exclusivity of only forty-five days prior to inclusion on home entertainment sources.⁹⁴ This followed the

⁹¹ *But see* Paris, *supra* note 88. There appears to be a perception among distributors that cinemagoers may be inclined to view a movie on home video after watching it in theaters but are hesitant to view a movie in theaters after watching it at home. *See id.* (lower theatre admissions relative to films exhibited with different release formats in same trial). Thus, adherence to a traditional model would capture not only the sole audiences of a film's theatrical and home video runs but also an increased third pool of repeat viewers, an audience that distributors might not expect to retain under an Ultra-VOD distribution. *See generally* O'Falt and Mitchell, both *supra* note 88. *But see* Paris, *supra*, at 88 ("VOD sales reach a relative maximum (with respect to the number of theatrical admissions) when releases are simultaneous . . . [a] VOD release three weeks before or several weeks after the theatrical release, according to the traditional media chronology, leads to a much lower relative number of transactions."). With the extremely limited sample size and low budgets of existing Ultra-PVOD releases, this perception remains speculative. *But see* Paris, *supra* note 88.

⁹² *See* Richard Chess and Bloomberg, *Movie piracy is on the rise as studios bypass theatrical releases*, FORTUNE (Oct. 6, 2020, 8:00 AM), <https://fortune.com/2020/10/06/movie-piracy-digital-streaming-releases-2020-coronavirus-pandemic/> ("[Streaming] has made it easier for pirates to illegally copy and share new releases . . .").

⁹³ *See* O'Falt, *supra* note 88. The two examples listed *supra* note 88 were both low-budget British productions, one a found footage film and the other filmed while walking around public property in a metropolitan city. *See* Mitchell, *supra* note 88. It's unlikely any movie beyond one with a modest budget could negotiate a deal for post-VOD exhibition with a cinema, and negotiation could strain the relationship between that distributor and the exhibitors. *See generally* Paris, *supra* note 88.

⁹⁴ Sara Whitten, *Disney's 'Shang-Chi' and 'Free Guy' will have 45-Day theatrical run, CEO says*, CNBC (May 13, 2021, 4:50 PM), <https://www.cnbc.com/2021/05/13/disneys-shang-chi-and-free-guy-will-have-45-day-theatrical-run.html>.

company's institution of a PVOD-modeled service called "Premier Access" in July of 2020.⁹⁵ Disney released several films, including *Mulan*, *Raya and the Last Dragon*, *Cruella*, *Black Widow*, and *Jungle Cruise* on Premier Access.⁹⁶ Commentators noted that *Mulan*, the first title to debut on the platform, didn't receive nearly enough Premier Access purchases to render the movie profitable.⁹⁷

There was considerable international backlash to Disney's election to move *Mulan* to a day-and-date model, which included a critical statement from Germany's largest organization of cinema operators, HDF Kino,⁹⁸ and a viral video from France showcasing an independent cinema owner destroying a piece of *Mulan* promotional artwork.⁹⁹ While Disney continued to make efforts to bolster Premier Access, they largely abandoned the service after middling revenues from *Jungle Cruise*.¹⁰⁰ Allegedly, Premier Access also caused strife between Disney Animation and Pixar, as Disney+ elected to release titles created by Disney Animation, like *Raya and the Last Dragon* on Premier Access while sending Pixar titles like *Luca* or *Soul* directly to the free tier of the streaming service.¹⁰¹

Disney's decision has been hailed as a death blow because they had been the lone studio fully committed to the theatrical window prior to

⁹⁵ See Jason Gurwin, *What is Disney Plus Premier Access?*, THE STREAMABLE (Aug. 12, 2020), <https://thestreamable.com/news/what-is-disney-plus-premier-access>.

⁹⁶ Whitten, *supra* note 94.

⁹⁷ David Sims, *The Failure of Mulan Is More Bad News for Hollywood*, THE ATLANTIC (Sept. 22, 2020), <https://www.theatlantic.com/culture/archive/2020/09/mulan-box-office-pandemic/616433>.

⁹⁸ Tom Grater, *German Cinema Org Weighs In On 'Mulan' Controversy: "[Disney Is] Playing With Fire."* DEADLINE (Aug. 7, 2020, 5:06 AM), <https://deadline.com/2020/08/german-cinema-mulan-controversy-disney-playing-with-fire-1203007172>.

⁹⁹ Tom Grater, *French Cinema Owner Destroys 'Mulan' Pop-Up Art In Protest Against Disney's Decision To Skip Theaters*, DEADLINE (Aug. 6, 2020, 8:07 AM), <https://deadline.com/2020/08/french-cinema-owner-destroys-mulan-pop-up-art-protest-disneys-decision-skip-cinemas-1203005960>.

¹⁰⁰ See Rebecca Rubin, *Is 'Jungle Cruise' a Box Office Hit? During COVID, It's Hard to Know*, VARIETY (Aug. 2, 2021, 8:49 AM), <https://variety.com/2021/film/box-office/box-office-success-flop-covid-pandemic-1235032231>.

¹⁰¹ Alessia Dunn, *Pixar Employees Reportedly Demoralized With 'Luca' Skipping Theaters*, INSIDE THE MAGIC (Mar. 30, 2021), <https://insidethemagic.net/2021/03/pixar-employees-upset-ad1>.

the COVID-19 pandemic.¹⁰² While Disney's move to Premier Access may have finally demolished the monolithic adoption of the theatrical window, many rival studios had attempted to curtail it in the months leading up to the decision.¹⁰³ Universal and AMC signed a multi-year deal in July of 2020 to debut their films on PVID after only seventeen days in theaters, settling a bitter feud revolving around the *Trolls* PVID release that saw AMC announce that Universal films would not play at their theaters.¹⁰⁴ Paramount and Warner Bros. announced their movies would play in theaters for forty-five days.¹⁰⁵ Warner Bros. also released their 2021 slate concurrently on HBO's Max as a one-year concession to the pandemic.¹⁰⁶

D. Arguments Against Shortened Windows

1. Cannibalization and Competition Prevention

Several arguments against the day-and-date approach center around curtailing the profit cannibalization arising from releasing a project concurrently on different sources, as that cannibalization often results in the marginalization of exhibition when it opposes studio profit maximization.¹⁰⁷ Wall Street analysts and film financiers have asserted with increasing regularity that day-and-date releases dilute box office profits and diminish other ancillary revenues.¹⁰⁸

¹⁰² Goldsmith, *supra* note 84.

¹⁰³ See Rubin, *supra* note 63.

¹⁰⁴ Lang & Rubin, *supra* note 81.

¹⁰⁵ Rubin, *supra* note 63.

¹⁰⁶ *Id.*

¹⁰⁷ See Peter Pollack, *Theater Chain Head Discusses DVD Release Windows*, ARS TECHNICA (Mar. 30, 2006, 4:31 PM), <https://arstechnica.com/uncategorized/2006/03/6497-2/> (“[T]heater chains view this shrinking window as one of the primary reasons they are watching profits fall.”).

¹⁰⁸ Pamela McClintock, *Why Disney's 'Black Widow' Premium VOD Reveal Rattled Hollywood*, THE HOLLYWOOD REPORTER (July 16, 2021, 5:23 PM), <https://www.hollywoodreporter.com/business/business-news/black-widow-premium-vod-reveal-shocked-hollywood-1234983101>.

2. Saturation/Crowding

The initial rise of day-and-date approaches in the 2010s led to issues of saturation in theaters and film review outlets, especially following festivals like Toronto International Film Festival (TIFF).¹⁰⁹ This has been especially difficult for indie-released day-and-date films, which traditionally relied on profile pieces in major publications to build word of mouth.¹¹⁰

3. Discrepancies in Compensation

The cannibalization of theater profits also leads to discrepancies in contracts dependent on box office revenues, which have historically provided backend compensation as a function of gross or net revenue.¹¹¹ As studios have begun facilitating day-and-date releases, questions arise over how exactly to factor in revenue cannibalization and the increased revenues to studios releasing films on streaming under their own umbrellas, which provide greater revenue shares due to the economies of scale arising from vertical integration.¹¹²

To address this, some studios have considered the payment model popularized by Netflix, which brokers larger fixed payments to talent with no associated profit participation.¹¹³ Others have lowered thresholds to

¹⁰⁹ See O’Falt, *supra* note 88.

¹¹⁰ *Id.*

¹¹¹ See Derek Thompson, *How Hollywood Accounting Can Make a \$450 Million Movie ‘Unprofitable,’* THE ATLANTIC (Sept. 14, 2011), <https://www.theatlantic.com/business/archive/2011/09/how-hollywood-accounting-can-make-a-450-million-movie-unprofitable/245134/>. A history of film talent compensation could be its own article, but the industry has seen evolutions from individual roles for cash to studio talent retention to additional perks and finally backend compensation for top-line talent. The summary version is that many lead actors in blockbuster films stand to personally gain through the success of a film, either as a percentage based upon the total profits (gross) or the profits less all associated costs (net, which often involve so-called “Hollywood Accounting” to ensure that a successful film somehow renders a loss). See *Id.*

¹¹² See Long, *supra* note 58.

¹¹³ *Id.*; see also Joe Flint and Erich Schwartzel, *Scarlett Johansson Sues Disney Over ‘Black Widow’ Streaming Release*, WALL STREET JOURNAL (Jul. 29, 2021, 5:57 PM), https://www.wsj.com/articles/scarlett-johansson-sues-disney-over-black-widow-streaming-release-11627579278?mod=searchresults_pos13&page=1&mod=article_inline (detailing some drawbacks to this model evidenced by Johansson profit participation lawsuit).

trigger bonuses, given profit participants a percentage of the licensing fees charged between studios and their streaming arms, or bought actors out of deals consisting primarily of theatrical contingencies.¹¹⁴

An additional concern with compensation is that streaming platforms are considerably less transparent with streaming revenue than movie theatres are with box office revenue, meaning there is a disparity in information between streaming platforms and talent. With non-VOD releases, revenue is not tied directly to one film but instead comes from subscribers, who are able to watch multiple films, making calculation all the more difficult.¹¹⁵

4. Small and Independent Theater Dissatisfaction

As the entire business model of movie theaters hinges on the duration of theatrical windows of exclusivity, many theaters grapple with the post-pandemic shifts.¹¹⁶ Cinemark publicly criticized the AMC-Universal deal that saw the former agree to a seventeen-day window, and Regal has stated that they “will only show movies that respect the traditional theatrical window.”¹¹⁷ This element has been exacerbated by the permanent closure of at least 5% of local and independent theaters amid the pandemic, aggregating more power into the major chains which

¹¹⁴ See Long, *supra* note 58.

¹¹⁵ Catie Keck, *Scarlett Johansson’s Black Widow Lawsuit has Unearthed a Huge Problem with Streaming*, THE VERGE (Aug. 5, 2021, 11:10 AM), <https://www.theverge.com/22611516/scarlett-johansson-disney-lawsuit-streaming-services-transparency>; see Nathan McAlone, *How Netflix Measures Success*, BUS. INSIDER (Feb. 1, 2016, 4:01 PM), <https://www.businessinsider.com/netflixs-most-important-metric-2016-2>.

¹¹⁶ Richard Yao, *The Death & Rebirth of the Theatrical Window*, MEDIUM (Aug. 13, 2020), <https://medium.com/ipg-media-lab/the-death-rebirth-of-the-theatrical-window-4fe61d819ad6>. When large theater franchises like AMC readily sign agreements to curtail the window and weather their downturns, smaller cinemas and local chains are often caught flatfooted in a shift engineered and orchestrated by larger actors. *Id.*

¹¹⁷ *Id.*

are now under pressure to reevaluate windowing policies.¹¹⁸ It is also likely that the argument against window-shortening carries the most international impact, as many theater-owners and chains in Europe and beyond have expressed significant dissatisfaction with shifts away from the traditional window.¹¹⁹

5. Piracy

The streaming release of a movie is also associated with a higher risk of piracy, as the film is distributed for reproduction to all end-users ahead of the exclusive window, where only the studio and exhibitors have copies of the film.¹²⁰ “‘Doing a big blockbuster movie at the same time in a theater as on a streaming source was kind of a failed experiment,’ says Richard Gelfond, CEO of Imax. ‘A lot of it was cannibalized by piracy over the streaming source.’”¹²¹

At CinemaCon 2021, John Fithian, president and CEO of the National Association of Theatre Owners, gave an annual address indicating that simultaneous release as a serious business model is “dead” and that “piracy is what killed it.”¹²² Charles Rivkin, CEO of the Motion Picture Association, added a lengthy speech which clarified that “pre-release piracy can take away as much as 20% of box office revenue,” an

¹¹⁸ See Brett Lang & Rebecca Rubin, *How Movie Theaters Fought to Survive (Another) Year of Turbulence and Change*, VARIETY, <https://variety.com/2021/film/news/movie-theaters-box-office-2021-pandemic-omicron-1235142992> (last visited Nov. 1, 2023). Some dilution applies to figures of permanent closures, as some smaller theaters were purchased by larger chains after closing, aggregating more power to chains but lowering permanent closure figures. See Brooks Barnes, *Movie Theaters Had a Great Summer. But There’s a Plot Twist*, N.Y. TIMES (Sept. 4, 2022), <https://www.nytimes.com/2022/09/04/business/movie-theaters-closing-bankruptcy.html>.

¹¹⁹ See generally Sims, *supra* note 97; Grater, *German Cinema*, *supra* note 98; Grater, *French Cinema*, *supra* note 99.

¹²⁰ See Chess and Bloomberg, *supra* note 92.

¹²¹ Brian Eckhouse, *Despite Omicron, Film Studios Make a Risky Bet on Theaters*, BLOOMBERG (Jan. 13, 2022, 3:00 AM), <https://www.bloomberg.com/news/articles/2022-01-13/despite-omicron-hollywood-film-studios-are-betting-on-theaters>.

¹²² Sarah Whitten, *Same-Day Theatrical and Streaming Releases are Dead as a Business Model, Movie Theater Group CEO Says*, CNBC (APR. 26, 2022, 5:22 PM), <https://www.cnbc.com/2022/04/26/same-day-theatrical-and-streaming-releases-are-dead-says-natos-john-fithian.html>.

issue bolstered most drastically when movies are first available to watch in the home, regardless of format.¹²³

E. *Arguments for Shortened Windows*

1. Consumer Choice

Advocates for day-and-date releases often champion the notion that providing multiple means of viewership is in the best interest of the consumer, as it gives them their choice of format when a film is first released.¹²⁴ To quote Netflix COO Greg Peters: “It’s great to be in a room with a bunch of people and watch incredible content presented in a high quality way . . . [b]ut it’s a different experience, also, being able to watch it at home, and for different people in different moments in time, each of those is relevant.”¹²⁵

2. Film Loyalty

The argument has also been advanced that greater accessibility across distribution channels will garner more loyalty between viewers and the media because they can watch films at their pace, rewatch without a second payment, and minimize the risk of distraction in a theater setting.¹²⁶ In the eyes of WarnerMedia president of home entertainment and content licensing Jim Wuthrich and Universal’s home entertainment president Michael Bonner, offering customers a chance to immerse themselves in films more quickly on the front end of the release cycle will only make

¹²³ *Id.*

¹²⁴ Edward Jay Epstein, *Will Mark Cuban (Finally) Revolutionize Hollywood?*, SLATE (Oct. 24, 2005, 1:12 PM), <https://slate.com/culture/2005/10/mark-cuban-s-distribution-revolution.html>. To quote entertainment disruptor and celebrity entrepreneur Mark Cuban: “How they want it, when they want it, where they want it.” *Id.*

¹²⁵ Tim Baysinger, *Netflix ‘Enthusiastic’ About Shrinking Theatrical Windows: ‘It’s What Consumers Want’*, WRAP (Mar. 2, 2021, 11:34 AM), <https://www.thewrap.com/theatrical-windows-netflix-paramount-warner-bros/>.

¹²⁶ *See generally Advantages of Watching Movies at Home*, MENTAL ITCH (last visited Oct. 25, 2023), <https://mentality.com/advantages-of-watching-movies-at-home/> (to name a few nonexhaustive chief boons of home streaming).

them “more willing to spend in pursuit of their fandom.”¹²⁷ Bonner noted that “[c]onsumer engagement is much greater now than it’s ever been” but that the engagement is “earlier in films’ life cycle[s],” creating a trade-off.¹²⁸

3. Subscribers to Streaming Sources

The growth of Netflix and streaming sources was rapidly accelerated by the quarantine when studios truly began to embrace day-and-date releases, leading to a large incentive for studios to capture some lost box office profits by recouping new subscribers to their platforms, many of which were under the same corporate media umbrellas as the studios.¹²⁹ Likewise, analysts pointed out that blockbuster day-and-date releases on streaming instantly inflate the number of subscribers to those services, which itself is a key metric in increasing stock prices.¹³⁰ This is tied to concerns regarding compensation accuracy because different streaming sources tie streaming profits to viewership as a relation of total subscription profits but do so in varying and inconsistent approaches.¹³¹

¹²⁷ Dade Hayes, *Day-And-Date Streaming Is “Winning Strategy”, But Consumer Bond With Movies Is “Greater Now Than It’s Ever Been,” WarnerMedia & Universal Execs Say*, DEADLINE (Aug. 10, 2021, 4:21 PM), <https://deadline.com/2021/08/warnermedia-hbomax-nbcuniversal-peacock-streaming-box-office-home-entertainment-covid-1234812482>.

¹²⁸ *Id.*

¹²⁹ *See HBO Max’s Day and Date Release Strategy Lands More Subscribers than Expected*, MOVIEGUIDE (Jan. 5, 2022), <https://www.movieguide.org/news-articles/hbo-maxs-day-and-date-release-strategy-lands-more-subscribers-than-expected.html>. HBO and HBO Max totaled 73.8 million subscribers by the end of 2021. *Id.* By the end of Q2 2022, they had rose another 22% Y2Y to 92.1 million. Jennifer Maas, *Warner Bros. Discovery Nears 95 Million Streaming Subscribers in Q3, Moves Up Date for Merged HBO Max-Discovery+ Launch*, VARIETY (Nov. 3, 2022, 1:06 PM), <https://variety.com/2022/streaming/news/hbo-max-discovery-plus-subscribers-q3-1235422137/>. Netflix, for reference, stood at 223.1 million as of the end of September 2022. *Id.*

¹³⁰ *See* Geogg Edgers, *Christopher Nolan Objects to Warner Bros. Release Plan, but He’s Happy You Can Watch ‘Tenet’ at Home Now*, WASH. POST (Dec. 15, 2020, 7:00 AM), https://www.washingtonpost.com/entertainment/christopher-nolan-warner-bros-tenet/2020/12/14/3974ca82-3e07-11eb-9453-fc36ba051781_story.html.

¹³¹ *See infra* subsection F (Recent Legal Disputes Involving Windowing).

F. *Recent Legal Disputes Involving Windowing*

1. Christopher Nolan and *Tenet*

The Christopher Nolan film *Tenet* was one of the initial test cases for the Covid era in cinema when given a limited, exclusive theatrical release in the summer of 2020 in “parts of the world where it was safe to open the film.”¹³² After this initial run, Warner Bros. elected to move the movie—along with *Wonder Woman 1984* and its entire slate of 2021 films—to their streaming source Max.¹³³ Many speculated the move was in reaction to theater closures and the growing significance of streaming, yet it engendered significant commentary from the cinematic industry regarding the betrayal Nolan and other filmmakers felt by the unannounced election.¹³⁴ Eschewing a longstanding relationship with Warner Bros., largely due to their decision to forego a traditional theatrical window and do so without notifying creators, Nolan would move to Universal Pictures for his next film after *Tenet*, 2023’s *Oppenheimer*.¹³⁵

Commentators have argued that the Premier Access release of *Mulan* proved that Disney made the correct decision, as *Tenet* grossed \$36 million domestically and conservative estimates of *Mulan*’s performance suggest it made double that revenue online.¹³⁶ These arguments also indicate that Disney was able to keep all of the money from the film due to the exclusive streaming release, whereas Warner Bros. and others have

¹³² See Edgers, *supra* note 130.

¹³³ Rebecca Rubin and Matt Donnelly, *Warner Bros. to Debut Entire 2021 Film Slate, Including ‘Dune’ and ‘Matrix 4,’ Both on HBO Max and in Theaters*, VARIETY (Dec. 3, 2020, 10:30 AM), <https://variety.com/2020/film/news/warner-bros-hbo-max-theaters-dune-matrix-4-1234845342>.

¹³⁴ *Id.*; see also Edgers, *supra* note 130.

¹³⁵ David Sims, *Hollywood’s Tenet Experiment Failed*, ATLANTIC (Sept. 14, 2020), <https://www.theatlantic.com/culture/archive/2020/09/hollywoods-tenet-experiment-didnt-work/616345>. *Oppenheimer* (runtime: three hours) would open to a respectable \$82.4 million, the third largest of any biographical film in North American history. Pamela McClintock, *Box Office Stunner: ‘Barbie’ Opens to Staggering \$162M, ‘Oppenheimer’ Snags \$82.4M*, HOLLYWOOD REP. (July 24, 2023, 7:00 AM), <https://www.hollywoodreporter.com/movies/movie-news/barbie-box-office-oppenheimer-opening-1235541719/> (behind *American Sniper* at \$89.3 million and *the Passion of the Christ* at \$83.9 million).

¹³⁶ David Sims, *The Failure of Mulan Is More Bad News for Hollywood*, THE ATLANTIC (Sept. 22, 2020), <https://www.theatlantic.com/culture/archive/2020/09/mulan-box-office-pandemic/616433>.

to split their revenues with cinemas or other distributors.¹³⁷ Were it to have amounted to litigation, Nolan would be among the first complaints to address this two-pronged issue with streaming compensation: the ability of a distributor to capture the entirety of a film's profit without cutting in an exhibitor's share without tangible and reportable figures like ticket sales or specific VOD purchases to indicate a film's true revenues.¹³⁸

2. Scarlett Johansson Lawsuit

In July of 2021, actress Scarlett Johansson felt the personal effects of this two-pronged issue and filed a lawsuit against the Walt Disney Company over the simultaneous “day-and-date” release of the film *Black Widow* in theaters and on the Disney+ streaming service.¹³⁹ Her suit alleged that Marvel breached a promise for the film to be initially distributed in exclusive “wide theatrical release” for 90 to 120 days.¹⁴⁰ Johansson's compensation had many provisions for box office residuals, meaning her pay for the film was drastically lessened by Disney's election to release *Black Widow* in theaters and streaming concurrently.¹⁴¹ Analysts point to the performance of F9—released at a similar time but under a “more traditional distribution model”—which grossed about \$700 million worldwide, almost double *Black Widow*'s gross.¹⁴²

This lawsuit was particularly nuanced, as Johansson's contract was with Marvel, whereas parent company Disney was the one who elected to furnish the title on their streaming source, meaning that the official suit was technically for tortious interference, rather than breach of

¹³⁷ *Id.*

¹³⁸ See Brent Lang & Gene Maddaus, ‘*Black Widow*’ Legal Battle: Inside the Fallout After Scarlett Johansson Sues Disney, VARIETY (July 30, 2021), <https://variety.com/2021/film/news/black-widow-scarlett-johansson-disney-fallout-1235031315>.

¹³⁹ *See id.*

¹⁴⁰ *Id.*

¹⁴¹ *See id.*

¹⁴² Anthony D'Alessandro, *Imax Boss Says “Cannibalization” Hurt ‘Black Widow’, Thinks Disney Will Return To Theatrical Window Releases*, DEADLINE (July 27, 2021), <https://deadline.com/2021/07/black-widow-jungle-cruise-disney-controversy-theatrical-windows-imax-rich-gelfond-1234801015>.

contract.¹⁴³ Likewise, Johansson claims that the Disney executives responsible for the decision will personally benefit financially from the tortious misconduct.¹⁴⁴

Another interesting aspect of the Johansson suit was her election to forego mandatory arbitration to challenge her arbitration clause, potentially providing an inroads for future similar suits, as some industry members speculated it might cause a cascade effect.¹⁴⁵ While the parties settled the suit prior to trial, the debate likely would have hinged on the Disney-Marvel agency relationship, the definition of wide theatrical release, and the question of whether that language necessitated a traditional exclusive theatrical release.¹⁴⁶ At the end of the same month Johansson brought the action, Johansson and Disney announced that they

¹⁴³ See Stan Soocher, *How Disney's Motion to Compel Arbitration of Scarlett Johansson's Lawsuit Over 'Day-and-Date' Release of 'Black Widow' Movie Might Have Played Out*, LAW.COM (Oct. 4, 2021, 5:02 PM), <https://www.law.com/2021/10/04/how-disneys-motion-to-compel-arbitration-of-scarlett-johanssons-lawsuit-over-day-and-date-release-of-black-widow-movie-might-have-played-out/?srlreturn=20220927150038>. Many press releases following the suit would focus on breach of contract, but the agency relationship between Marvel and Disney played a significant part in the nascent commentary on Johansson's likelihood of prevailing on her claims, as she would have had a much easier claim to breach of contract had Marvel been the one to elect to screen the film day-and-date. See Lang & Maddaus, *supra* note 138.

¹⁴⁴ See Flint & Schwartzel, *supra* note 113. Among these executives is Bob Iger, CEO of Disney, who received a \$16.5 million payout for his "successful launch of Disney+" in 2021 and "unprecedented subscriber growth in the first year," driven largely by the Premier Access releases of *Mulan*, *Black Widow*, *Raya*, *Jungle Cruise*, and *Cruella*. The Walt Disney Co., Notice of 2021 Ann. Meeting of S'holders and Proxy Statement (Form 14A) (Jan. 19, 2021).

¹⁴⁵ See Lang & Maddaus, *supra* note 138. There have been few instances of actors challenging arbitration clauses in talent contracts, as their enforceability has largely been presumed. *Id.* For an abnormal example, consider that when Kevin Spacey was fired from *House of Cards* over breach of his contract due to pending sexual assault and misconduct charges, his appeal was carried through arbitration, where it was determined that he had breached. Joe Flint, *Kevin Spacey Loses Arbitration Case Against 'House of Cards' Production Company*, WALL ST. J. (Nov. 22, 2021), <https://www.wsj.com/articles/kevin-spacey-loses-arbitration-case-against-house-of-cards-production-company-11637602277>. It has been speculated that a notable example or two of prominent actors challenging their arbitration provisions might lead to a shift in opinion as to their enforceability along public policy grounds. See Lang & Maddaus, *supra* note 138.

¹⁴⁶ Lang & Maddaus, *supra* note 138; Soocher, *supra* note 143.

had reached a confidential settlement.¹⁴⁷ Even with the litigation settled, the recurrence of disputes in entertainment contracts centered on shortening theatrical windows serves as a guiding principle for future similar actions.¹⁴⁸ Future deals in the post-streaming landscape will also likely challenge the calculation of backend revenue incentives because studios have taken several approaches to address this issue.¹⁴⁹ Following the settlement of Johannsson’s action, Emma Stone briefly considered a similar lawsuit over the day-and-date release of her film *Cruella* on Disney+ in 2021, but ultimately elected not to pursue one.¹⁵⁰

3. Matrix Resurrections Lawsuit

Directors and actors are not the only parties disgruntled by the move to day-and-date.¹⁵¹ A lawsuit from Village Roadshow Entertainment Group, a financial partner and distributor, alleged that Warner Bros. breached its contract it had with the company when they released “*Matrix Resurrections* simultaneously on HBO’s Max and in theaters, causing the movie to underwhelm at the box office.”¹⁵² The suit noted that HBO’s Max subscriptions—boosted by the decision to undergo a day-and-date approach for the film—are a revenue stream Village Roadshow does not

¹⁴⁷ Soocher, *supra* note 143. Johannsson’s counsel stated that the settlement totaled over \$50 million, indicating the value of avoiding an adverse verdict for Disney and a litigative cascade effect. See Ahouraian, *supra* note 67.

¹⁴⁸ See Ahouraian, *supra* note 67.

¹⁴⁹ Lang & Maddaus, *supra* note 138; Flint & Schwartzel, *supra* note 113. Warner Bros., for example, assumes streaming cannibalization of 50% and doubles gross streaming revenues to account for that, whereas Disney agreed to add streaming rental and theatrical totals for certain stars to enable them to hit backend incentives. Lang & Maddaus, *supra* note 138.

¹⁵⁰ Robert Peterpaul, *Emma Stone Reportedly Considering Suing Disney Over Cruella Release*, SCREEN RANT (July 30, 2021), [https://screenrant.com/cruella-movie-emma-stone-disney-lawsuit-rumors-updates.](https://screenrant.com/cruella-movie-emma-stone-disney-lawsuit-rumors-updates/); Jan Stromsodd, *How Emma Stone Was Cast as Cruella and Why She Didn’t Sue*, YOUR NEXT SHOES (June 14, 2022), <https://www.yournextshoes.com/emma-stone-cruella>.

¹⁵¹ Ahouraian, *supra* note 67. Directors and actors represent the largest collectives of parties with backend stakes in a film’s box office net profits. See *id.* Most other financial partners receive gross stakes as compensation for helping finance the film, so electing to release a film day-and-date often has a lesser impact on their payout. *Id.* Distribution partners, however, often have contractual expectations of exclusivity and frequently litigate over perceived breaches. *Id.*

¹⁵² Winston Cho, *Warner Bros. Sued Over ‘Matrix Resurrections’ Day-and-Date HBO Max Release*, HOLLYWOOD REP. (Feb. 7, 2022, 11:29 AM), <https://www.hollywoodreporter.com/business/business-news/warner-bros-sued-over-matrix-resurrections-day-and-date-hbo-max-release-1235088221>.

share.¹⁵³ Village Roadshow also alleged that Warner Bros. rushed the timeline of the film from 2022 to an early release in December 2021 to boost subscriptions and end-of-year earnings.¹⁵⁴

Like the Johansson suit, Warner Bros. alleged that Village Roadshow's lawsuit was a transparent attempt to circumvent compelled arbitration, a route the studio attempted to recommence in February 2022.¹⁵⁵ Village Roadshow waived its right to a hearing to compel arbitration in May 2022, suggesting that the resolution of the dispute would proceed out of court.¹⁵⁶ Warner Bros. moved its entire 2021 slate of films to HBO's Max for day-and-date release, prompting speculation that other 2021 slate members might follow Village Roadshow's suit, depending on the outcome of the arbitration.¹⁵⁷ This speculation increased because Warner Bros. sold the slate to its own streaming platform without giving profit participants the opportunity to consider what distributors like Apple or Netflix might have paid.¹⁵⁸

¹⁵³ *Id.*

¹⁵⁴ Nicole Sperling, *Producer of 'The Matrix Resurrections' Sues Warner Bros. Over How the Film Was Released*, N.Y. TIMES (Feb. 7, 2022), <https://www.nytimes.com/2022/02/07/business/matrix-resurrections-lawsuit.html>.

¹⁵⁵ Dominic Patten & Dade Hayes, *Village Roadshow Agrees to Arbitration with Warner Bros. in 'Matrix' Streaming Strategy Lawsuit – Update*, DEADLINE (May 27, 2022, 9:56 AM), <https://deadline.com/2022/05/warner-bros-slapped-by-village-roadshow-suit-matrix-streaming-1234927842>.

¹⁵⁶ *Id.*

¹⁵⁷ Kim Masters, *Christopher Nolan Rips HBO Max as "Worst Streaming Service," Denounces Warner Bros.' Plan*, THE HOLLYWOOD REP. (Dec. 7, 2020, 4:36 PM), <https://www.hollywoodreporter.com/business/business-news/christopher-nolan-rips-hbo-max-as-worst-streaming-service-denounces-warner-bros-plan-4101408>.

¹⁵⁸ *Id.*

III. CULMINATION OF OLIGOPOLISTIC EFFECT ON CINEMA

The post-pandemic cinematic landscape is unusually opaque for an industry known for unpredictability, but it will see the culmination of trends that will impact both the bargaining power of its parties and upon the oligopolistic influence of the major distributors.¹⁵⁹ The survival of theaters and the short-term health of independent distributors will depend on legislative or judicial intervention preventing this culmination from

¹⁵⁹ *Tough Act to Follow: Covid-19's Implications for Media and Entertainment*, S&P GLOBAL (Nov. 23, 2020), <https://www.spglobal.com/en/research-insights/featured/markets-in-motion/landscape-on-media>. Some of these trends include the sunset order of the Paramount Decrees, emergence from the pandemic, growth among a market of established streamers, and a fragile window of exclusivity of approximately forty-five days—half that of the old standard that endured for decades; G. Vaughn Joy, *The Paramount Decrees and the Deregulation of Hollywood Studios*, CHICAGO BOOTH (Dec. 12, 2022), <https://www.promarket.org/2022/12/12/the-paramount-decrees-and-the-deregulation-of-hollywood-studios/>.

vesting complete power in the arms of a handful of divested entertainment conglomerates.¹⁶⁰

A. *The Need for a Revisit of the Paramount Decrees*

The Paramount Decrees have sunset in quiet and no longer provide any staying force for cinematic antitrust, whether against the few original litigants continuing to distribute films after seventy years of semi-

¹⁶⁰ Sarah Whitten, *Movie theaters aren't dying — they're evolving*, CNBC (Feb. 25, 2023, 9:00 AM), <https://www.cnbc.com/2023/02/25/movie-theaters-evolving-not-dying.html>. There are only three futures, and none entails a status quo: one with protected theaters, one with large-scale geographic theater franchises beholden to studios, and one with theaters as an afterthought, relegated to antiquity by subsumption into streaming or an analog thereof. *See generally* Joan E. Solsman, *Movie Theaters Didn't Die, but They'll Never Be the Same Again*, CNET (Jan. 19, 2023), <https://www.cnet.com/culture/entertainment/movie-theaters-didnt-die-but-theyll-never-be-the-same-again/>. As a resolution to the pandemic forces a tenuous ceasefire, the staggering disparity in bargaining power between theaters and studios demands redress: AMC, by far the largest domestic theater chain, had a market cap that decreased from \$2.7 billion to roughly \$2 billion between the writing and finalization of this paper in March and November of 2023. *See* Sarah Whitten, *AMC Shares Crater as Investors Brace for Stock Conversion*, CNBC (Aug. 22, 2023), <https://www.cnbc.com/2023/08/22/amc-shares-crater-as-investors-brace-for-stock-conversion.html>. The smallest of the “New Big Five” companies—Paramount—has a market cap of nearly \$7 billion. *Paramount Global*, CNBC, <https://www.cnbc.com/quotes/VIAC> (last visited Nov. 8, 2023). The largest three—Disney, Comcast and Sony—all exceed \$100 billion, with Comcast nearing \$170 billion. *Walt Disney Co.*, CNBC, <https://www.cnbc.com/quotes/DIS> (last visited Nov. 8, 2023); *Comcast Corp.*, CNBC, <https://www.cnbc.com/quotes/CMCSA> (last visited Nov. 8, 2023); *Sony Group Corp.*, CNBC, <https://www.cnbc.com/quotes/SONY> (last visited Nov. 8, 2023). Optimistically emphasizing that production is considerably more expensive than exhibition, that nearly 90% of box office revenues are split by five companies, *see* Market Watch, *supra* note 4, ranging from five to sixty times the scope in wealth and correlative influence of the largest domestic theater franchise, *supra* this note, is bleak and bleaker to consider that every other smaller exhibitor faces longer odds in bargaining: how can an independent theater owner reasonably negotiate with a \$170 billion mega conglomerate? *But see* Cynthia Littleton, Matt Donnelly & Kate Aurthur, *'We Caused Them Pain': The Inside Story of How the WGA and AMPTP Negotiated a 'Great Deal' to End the Writers Strike*, VARIETY (Sept. 27, 2023), <https://variety.com/2023/biz/news/wga-strike-writers-studios-reached-deal-explained-1235737090/>.

restriction or against the many new actors who have sprung onto the scene or innovated upon traditional distribution.¹⁶¹

In revisiting the Decrees, it is helpful to examine the era that ushered them in; the instant catalyst was studio ownership of theaters, but it ended early out of a concern that studio behavior was demonstrating a conspiratorial degree of control over film distribution.¹⁶² The *Paramount* court found that the studios had established a conspiracy for the purposes of: “(1) limiting the first run of their pictures, as much as possible, to the theaters that the Major Defendants owned and controlled; and (2) closing off first-run theaters to their competitors, independent motion picture distributors.”¹⁶³ The five studios cooperated to ensure first runs of their films geographically in the theaters the major studios held, restricting entry

¹⁶¹ *Federal Court Terminates Paramount Consent Decrees*, OFFICE OF PUBLIC AFFAIRS (Aug. 7, 2020), <https://www.justice.gov/opa/pr/federal-court-terminates-paramount-consent-decrees>. Notably, the order to sunset the Decrees was issued in 2019, coming off a high year for cinema when the vitality of exhibition and relative bargaining powers of film verticals were very different than after the macro-shift resulting from the pandemic. Sarah Whitten, *More movies, more variety, more money: The box office is catching up to pre-Covid levels*, CNBC (Apr. 5, 2023), <https://www.cnbc.com/2023/04/05/box-office-almost-back-to-pre-covid-levels.html>. The judge in question likely would not have done the same had they been able to envision what would transpire during the two-year wind down period, but such thinking is futile. *Id.*

¹⁶² *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 132 (1948).

¹⁶³ *Id.* at 167. The distinction of “first-run” theaters is archaic because the conversation about temporal primacy has quieted in favor of the conversation about duration of initial first run. *See supra* Sections II(E), II(D) (listing arguments for and against shortened windows). During the Decrees era, first-run theaters received the most lucrative shares of box office revenues, as most consumers saw movies immediately upon release, and this led to oligopolistic efforts to premiere blockbusters on studio-controlled first-run theater chains and then sell to exhibitors the rights for subsequent runs. *See id.* at 166. Now, this first run share may result in initial profit spikes to exhibitors, but it will reflect as less enviable of a bargain as studios shrink cinematic windows, revert control, and potentially keep titles included in streaming archives indefinitely or license out their use for others to do the same. *See generally* Joshua M. Patton, *The Disney+ Content Purge Is the Opposite of ‘the Disney Vault’*, CBR (May 17, 2023), <https://www.cbr.com/disney-content-purge-vault/>.

to other distributors, and ensuring profits for the exhibition arms of each of the major studios.¹⁶⁴

It is more difficult now to maintain a cartel over such a diverse industry as film, but many of the behaviors that are rationales for enforcing judicial divestiture for antitrust purposes are behaviors that current studios are practicing.¹⁶⁵ Illustrative and overt examples include the three theaters that recently reopened through partnerships with Netflix¹⁶⁶ or Disney's restoration of Pacific Theaters like the El Capitan.¹⁶⁷ Most of the major studios this article outlines have taken ownership of at least one or two

¹⁶⁴ F. Andrew Hanssen & Thomas W. Hazlett, *Internet Streaming Overcomes Paramount*, CATO INSTITUTE, <https://www.cato.org/regulation/winter-2021/2022/internet-streaming-overcomes-paramount> (last visited Nov. 5, 2023). The "exhibition arms" of modern studios are uniformly becoming their streaming platforms, which have provided an avenue for vertical integration unimaginable to the original Decrees' drafters. *Id.* Long-term viability of streaming platforms remains unclear, as many hemorrhage money to maintain enviable content libraries. See Peter Kafka and Rani Molla, *The Streaming Boom is Over*, VOX (Jan. 5, 2023, 7:10 AM), <https://www.vox.com/recode/2023/1/5/23539590/streaming-losses-netflix-hbo-peter-kafka-media-column> (arguing that the losses are due to the fundamental issue of streaming sources attempting to reinvent the cable television model while also each maintaining individually cutting-edge catalogs out of a potentially-mistaken perception that the future cable landscape will narrow to only a few actors).

¹⁶⁵ See *Paramount*, 334 U.S. at 132. Antitrust standing would require proof of a violation of the Sherman Act, and the violation found persuasive to the drafters of the original Decrees was that of vertical encroachment leading to price-fixing prohibited by provisions aimed at restricting exclusive dealings. *Id.* At the resolution of this paper, the author asks the reader to consider whether similarities might exist in the present landscape. See *infra* Section IV.

¹⁶⁶ Catie Keck, *Netflix is Reopening a Movie Theater in SoCal this Month*, THE VERGE (Oct. 18, 2021, 3:35 PM), <https://www.theverge.com/2021/10/18/22733232/netflix-movie-theater-bay-palisades-village>.

¹⁶⁷ See David J. Fox, *At Age 65, the El Capitan Gets a Major Face Lift: Disney and the Pacific Theaters Movie Chain Have Spent Two Years Restoring the Structure on Hollywood Boulevard, in Time for 'The Rocketeer.'*, LOS ANGELES TIMES (Jun. 19, 1991), <https://www.latimes.com/archives/la-xpm-1991-06-19-ca-925-story.html>. These overt ventures into exhibition are secondary to the emergence of streaming, but they are worth noting as examples of behavior previously forbidden to studio-litigants but now unrestricted for newer entrants. See *id.*

exhibitors, although many of these theaters have become insolvent or have been resold.¹⁶⁸

The notion of a first-run theater does not exist in the same capacity as it did before the Decrees, but the court's recognition that discrete revenue streams exist for exhibitors promoting a new release and those on subsequent runs mirrors the debate over the theatrical window's longevity as a barrier against blurred exhibition.¹⁶⁹ Theaters and other true exhibitors survive in an era of increased media accessibility due to the benevolence of distributors that never had the reach or means to circumvent them entirely, but this will likely not long remain the case.¹⁷⁰ Unless a legislative or judicial barrier preserves any degree of true exclusivity of exhibition, studios will continue to erode box office profits until they subsume the profitability of theaters entirely.¹⁷¹

B. *Propping Open the Window of Exclusivity*

The theatrical window is shrinking.¹⁷² For decades, exhibitors could count on ninety days during which the only access to a film in a given location was the select theaters that were showing it.¹⁷³ Changes to film reproduction technology and the mandated closures of cinemas during COVID-19 led to trial adoptions of new distribution methods that

¹⁶⁸ See J.A. Aberdeen, *The Movie Theater Chains of the Media Giants*, COBBLESTONE ENT.: HOLLYWOOD RENEGADES ARCHIVE (last visited Aug. 12, 2023), http://www.cobbles.com/simpp_archive/studio-theaters_today.htm. This authority is largely out-of-date but provides interesting examples of studio efforts to encroach around the Decrees into exhibition in the 1980s and 1990s. *Id.*

¹⁶⁹ See *Paramount*, 334 U.S. at 132. A modern reappraisal of the first run might term it “theatrical exclusive release.” See Lisa Laman, *Why Movies Need the Theatrical Window*, COLLIDER (Jan. 3, 2023), <https://collider.com/why-we-need-theatrical-window/>.

¹⁷⁰ See generally Ted Johnson, *MPA Report Shows Impact of Streaming with Growth in Subscriptions, Production; Theatrical Box Office Rises but Still Lags Pre-Covid Levels*, DEADLINE (Mar. 14, 2022), <https://deadline.com/2022/03/streaming-services-mpa-1234977814>; Tom Brueggemann, *Digital Entertainment Is More than Triple the Global Box Office, Says MPA's Annual Report*, INDIE WIRE (Mar. 14, 2022), <https://www.indiewire.com/2022/03/mpa-2021-theme-report-box-office-streaming-1234707572>.

¹⁷¹ See Johnson, *supra* note 170.

¹⁷² See Rubin, *supra* note 100.

¹⁷³ See Rubin, *supra* note 63.

benefited from entertainment-starved audiences.¹⁷⁴ The unfortunate result is that theaters, whose revenues depend more on box office exhibition, have few choices but to accede to offered terms.¹⁷⁵ Recent post-pandemic contracts shrank windows to forty-five days or fewer,¹⁷⁶ indicating that the pandemic had enabled a lasting erosion of the window's breadth that would persist beyond society's reemergence from seclusion.¹⁷⁷

¹⁷⁴ Adgate, *supra* note 8. It is difficult to draw a correlation between mandated theater closures and studio adoption of alternative screening methods rising to an injury-in-fact to justify an antitrust remedy from the government. *But see id.* Rather, any legislative or judicial protectionist intervention should note that such hesitancy disparately impacted an insular, non-protected class of theater owners incapable of bargaining on their behalf against more sophisticated parties capable of providing better and prolonged legal representation. *See generally* Laman, *supra* note 169.

¹⁷⁵ Rubin, *supra* note 100. The last pre-pandemic effort to shorten windows came in 2011 when Universal attempted to release its film *Tower Heist* to PVID after three weeks of exhibition. Chris Newbould, *A New Era for the Film Industry: Why Cutting Down Cinemas' Exclusivity Windows Isn't All Bad*, THE NAT'L NEWS (May 20, 2021), <https://www.thenationalnews.com/arts-culture/film/a-new-era-for-the-film-industry-why-cutting-down-cinemas-exclusivity-windows-isn-t-all-bad-1.1226377>. Faced with threats of boycotts from theaters, Universal elected to back down. *Id.* Now, with collective action from the select distributors with major negotiating power, threats of boycotts have little weight, and the only remaining option is to negotiate to keep the window as open as possible on the broadest terms attainable. Rubin, *supra* note 63.

¹⁷⁶ Rubin, *supra* note 100.

¹⁷⁷ Rubin, *supra* note 63. Exhibition is particularly disadvantaged due to its unconsolidated mix of large national chains, smaller regional chains, and scattered local and singular independent theaters. *See The Cinema Foundation, State of the Cinema Industry*, NAT'L ASS'N OF THEATRE OWNERS 19–22 (Mar. 2023), <https://www.natoonline.org/wp-content/uploads/2023/03/Cinema-Foundation-Report-March-2023.pdf>. Unions and organizations of independent theater owners can boycott, but exhibitions' lack of post-pandemic cash reserves to weather such a boycott fails to compete with studios that can negotiate with large chains and undergo a period of streaming releases to circumvent unionized boycotts. Newbould, *supra* note 175. A war of attrition fought against a diversified corporation that can focus entirely on streaming releases for two years and continue to generate ancillary revenue from non-film revenue streams is a war with no food against an enemy whose hunger will never truly be distracting. *See* Market Share, *supra* note 4.

As that window shrinks, ancillary power vests in studios.¹⁷⁸ They suffer lesser penalties for withdrawing initially unsuccessful films, affording them more control over distributional scheduling and allowing for more volatility in exhibition profit forecasting.¹⁷⁹ Their share of revenues rises, as the termination of exhibition typically coincides with a concurrent shift to streaming. This results in direct revenue from earlier titles on streaming and indirect revenue from subscriber growth, if applicable.¹⁸⁰ Lastly, the difficulties inherent in calculating streaming revenue and profit participation means fewer backend incentives to talent, allowing them to recoup additional profits.¹⁸¹

While it was never legislatively or judicially enacted, the theatrical window persisted for decades to the mutual benefit of distributors and exhibitors, until social change and power degradation revealed its more unilateral advantage.¹⁸² A complete resurrection of the Decrees to encompass current distributional juggernauts seems unlikely

¹⁷⁸ See Newbould, *supra* note 175.

¹⁷⁹ See Shaun Raviv, *Box Office Bomb: The Short Life of Popcorn Prediction Markets*, THE RINGER (Nov. 15, 2018), <https://www.theringer.com/movies/2018/11/15/18091620/box-office-futures-dodd-frank-mpaa-recession>. Volatility in profit forecasting is underaddressed in discussions of windowing. See Amit Joshi, *Movie Stars and the Volatility of Movie Revenues*, 28 J. OF MEDIA ECON. 246 (2015). If studios face lesser penalties for shortening windows, they can leverage the ability to dictate high and low-profit periods and gradually squeeze out theaters in time. See generally Raviv, *supra*.

¹⁸⁰ See also Tom Power, *As Max's subscriber woes continue, Barbie's official streaming debut can't come soon enough*, TECH RADAR (Nov. 8, 2023), <https://www.techradar.com/streaming/hbo-max/as-maxs-subscriber-woes-continue-barbies-official-streaming-debut-cant-come-soon-enough>. If a forty-five day window emerges as the bellwether of the general post-pandemic window instability, note that this would cut theater profits drastically while vesting additional profit streams to distributors. See historical windowing background, *supra* notes 63 through 67. The “first run” effect creates an initial spike in sales with a resultant tail of diminishing returns, and advocates for shortened windows emphasize this. See Arguments for Shortened Windows, *supra* section II(E). That said, reducing a foundational tenet upon which the vitality of an industry has historically rested risks neutering that industry as it struggles to regain its footing. See also Arguments against Shortened Windows, *supra* section II(D).

¹⁸¹ See Scarlett Johansson lawsuit, *supra* Section II(F)(b).

¹⁸² See Rubin, *supra* note 63. Perhaps distributors always understood this, but streaming—which carries a high initial investment but significantly greater and more regular returns to create films at a similar cost—paved an inroads for circumvention that was previously unimaginable or, more certainly, unsustainable. *Id.*

for a variety of reasons,¹⁸³ but enacting federal antitrust legislation to affirm a mandatory window of exclusivity—as many European nations have done¹⁸⁴—would be a far more feasible solution, and could go a long way toward stiling an industry that was near-exterminated by the pandemic and which continues to fight against shifts in consumer preference.¹⁸⁵ The fundamental question is simply whether traditional theatrical exhibition is a useful art worth promoting or a relic from a time when people could not instantly watch films on smartphones or car interfaces upon release.¹⁸⁶

¹⁸³ The benefit of such an approach is that it would enable regulators to tailor restrictions to consider, for example, the theme parks of Disney or Universal or the video game consoles and other appliances produced and sold by Sony. *See* background on the new “Big Five” *supra* notes 44–47. When assessing the need for protectionist antitrust action, the relative horizontal integration of involved verticals should bear upon a decision, even if they are not directly related to the need for intervention. *See* discussion of relative scope of verticals *supra* note 160. One threshold challenge is determining whether the naming and specific tailoring of the Decrees, which was effective for so long but ultimately rendered them unfit, would be most prudent or whether categorical restrictions imposed via statute would be better tailored as an immediate, injunctive solution to an evolving problem. *See Paramount*, 334 U.S. A secondary issue with naming parties is the propriety of including non-traditional distributors like Netflix, or whether independent distributors like A24 should engender different treatment due to the historic if unintentional marginalization of independent cinematic distribution. *See* Thomas Jacobs, *The Monopoly of Streaming Companies? | Warner Bros. Discovery, Netflix, Disney*, HOLLYWOOD INSIDER (Apr. 22, 2022), <https://www.hollywoodinsider.com/streaming-companies-monopoly/> (dubbing Netflix a “monopoly” in size relative to other streaming sources in that distributional niche).

¹⁸⁴ *See, e.g.*, Roxborough, *supra* note 72 (French laws regulating windowing).

¹⁸⁵ *See* Adgate, *supra* note 8.

¹⁸⁶ *See generally* PVOD, *supra* Section II(A).

IV. CONCLUSION

To ensure the prolonged vitality of theatrical exhibition, the industry as a whole must take steps to combat rising oligopolistic influence from divested studios whose disparate power and wealth could erode traditional exhibition into nonexistence.¹⁸⁷ While a full-scale, tailored judicial order naming the current largest five or six distributors in a Decrees succession might have the best effect upon long-term encroaching integration, federal antitrust legislation aimed at preserving some degree of theatrical exclusivity could also serve as a meaningful protectionist measure.¹⁸⁸ If we agreed to give movies their time on the big screen, it could give exhibitors just enough time to regain stability after emerging from a period that nearly closed the curtains on them entirely.¹⁸⁹

¹⁸⁷ See Matthew Jordan, *Movie Theatres are on Life Support – How Will the Film Industry Adapt?*, THE CONVERSATION (Aug. 12, 2020), <https://theconversation.com/movie-theaters-are-on-life-support-how-will-the-film-industry-adapt-143877>. As box office returns are often a zero-sum game, where one's gain is the other's direct and equivalent loss, any gain to distributors comes at the direct expense of exhibition. *But see* Ryan Faughnder, *Busting the Myths of the Box Office After 'Top Gun,' 'Thor' and #Gentleminions*, L.A. TIMES (Jul. 12, 2022), <https://www.latimes.com/entertainment-arts/business/newsletter/2022-07-12/wide-shot-box-office-myth-busters-the-wide-shot>. The cinematic window is another zero-sum game, and shortened windows—providing distributor headway—afford distributors money coming directly from the exhibitor's traditional share. *See generally* Laman, *supra* note 169. Over time, these gradual zero-sum encroachments lead to a breakeven where operating theaters nets no money, forcing exhibitors out of the marketplace or replacing them with large franchises beholden to distributors. *See* Rubin, *supra* note 100. This lends direct gains to those studios that operate streaming platforms as they would stand to gain from any situation without theaters where consumers would have no choice but to stream new releases. *See generally id.*

¹⁸⁸ *See* Rubin, *supra* note 63; *see also* Arguments against Shortened Windows, *supra* section II(D).

¹⁸⁹ *See* Adgate, *supra* note 8. Operating without revenue for months or years amid the pandemic led to the closure of significant portions of independent and non-franchise cinematic exhibition. *Id.* If enough independent theaters closed to the extent that it led to a significant share of franchises signing overly generous agreements with studios who knew they possessed all the bargaining power, we would be back to vertically integrated studio control over exhibition—similar to pre-Paramount but with no justification or justice for the intervening stasis meant to prevent a recurrence. *See generally* Rubin, *supra* note 63.