Antitrust Insights
Webinar Series

Antitrust in a Streaming World:
The Influence of Competition Law on Music, Film and the Entertainment Industry

Colin Kass, Partner
David Munkittrick, Senior Counsel
Kelly Landers Hawthorne, Associate
Nathaniel Miller, Associate
Nicollette Moser, Associate

January 27, 2021

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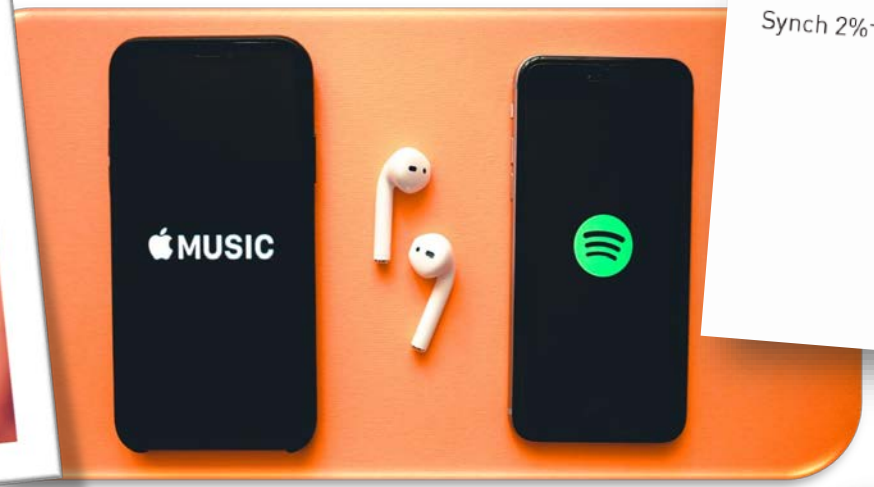
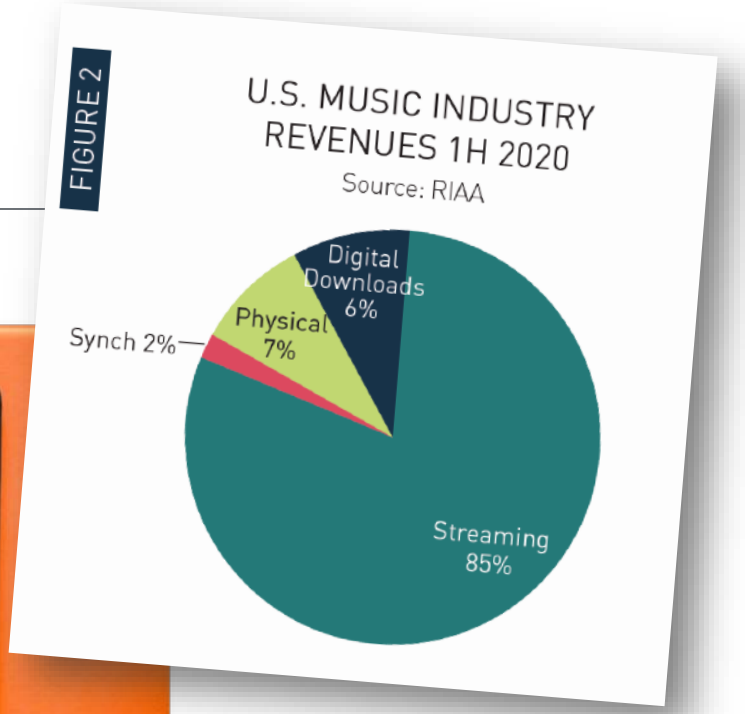
A Proskauer Webinar Series

Devastation in Live Music While the Streaming Boom Continues





Global music revenue: ⬇ 25%

Live music: ⬇ 75%

"Music streaming was down in the early days of the pandemic, but that turned around in a big hurry as quarantining went on — so much so that the year 2020 ended up setting a streaming record in America, ***increasing 17%*** for the year to end with an ***unprecedented 872.6 billion streams***."

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Makan Delrahim's Pet Project: Terminate "Legacy" Consent Decrees

AAG, Antitrust Division
Sept. 28, 2017 – Jan. 20, 2021

April 25, 2018

"We will pursue the termination of outdated judgments around the country that presently do little more than clog court dockets, create unnecessary uncertainty for businesses or, in some cases, may actually elicit anticompetitive market conditions."

Oct. 20, 2020

"I'm still a big believer that the consent decrees — an 80-year negotiation or regulation by the Justice Department and the two performance rights organizations, ASCAP and BMI, and two judges — [are] not the best way to regulate price control and negotiating music license rights, so I think changes are due."

Makan Delrahim's Pet Project: Terminate "Legacy" Consent Decrees

AAG, Antitrust Division
Sept. 28, 2017 –
Jan. 20, 2021

January 15, 2021

Terminating the decrees outright, given the level of reliance on the existing licensing mechanism, was not an option but "continued review and stakeholder input concerning the decrees remains necessary…."

Copyright Bootcamp

The Music Edition

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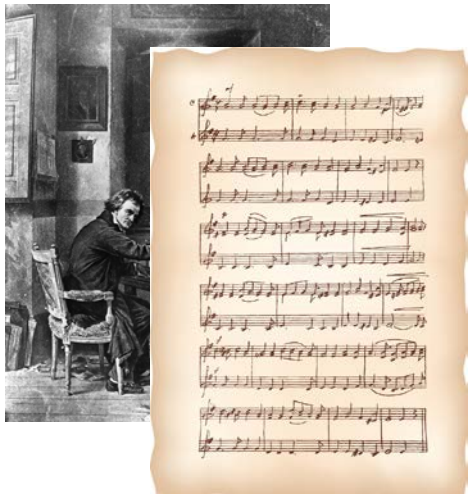
Two Separate Copyrights

Musical Composition

Sound Recording

Who Owns What? The Composition



Songwriters

Publisher

BMG MUSIC PUBLISHING

WARNER CHAPPELL MUSIC

SONY MUSIC

UNIVERSAL MUSIC PUBLISHING GROUP

Kobalt Music Publishing

The Rights in a Copyright

The owner of a copyright under 17 U.S.C. § 106 has the exclusive rights to do and to authorize any of the following:

Reproduce the copyrighted work

Prepare ***derivative works***

Distribute copies … to the public by sale or other transfer of ownership, or by rental, lease, or lending

Perform the copyrighted work publicly*

Display the copyrighted work publicly*

In the case of sound recordings, to perform the copyrighted work publicly by means of a ***digital audio transmission***

You Need To…

… play recorded music at an event open to the public.

In copyright terms, you are:

- Publicly performing the composition
- Publicly performing the recording

You need…

You Need a License From…

… a Performing Rights Organization

Performing Rights Organizations
- Offer blanket public performance licenses for compositions in their catalog

Public performances include:
- Broadcast (AM/FM, streaming, or satellite)
- Venue (live or recorded)
- Television programming / advertising

The ASCAP / BMI Consent Decrees

The Year is 1941

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The Year is 1941

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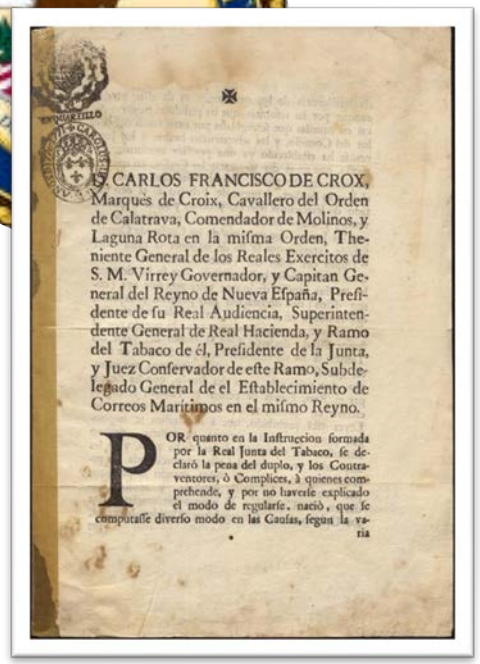
The Consent Decrees



D. CARLOS FRANCISCO DE CROX, Marqués de Croix, Cavallero del Orden de Calatrava, Comendador de Molinos, y Laguna Rota en la misma Orden, Theniente General de los Reales Exercitos de S. M. Virrey Governador, y Capitan General del Reyno de Nueva España, Presidente de su Real Audiencia, Superintendente General de Real Hacienda, y Ramo del Tabaco de él, Presidente de la Junta, y Juez Conservador de este Ramo, Subdelegado General de el Establecimiento de Correos Marítimos en el mismo Reyno.

POR quanto en la Instruccion formada por la Real Junta del Tabaco, se declaró la pena del duplo, y los Contraventores, ò Complices, à quienes comprehende, y por no haverle explicado el modo de regularse, nació, que se computasse diverso modo en las Causas, segun la varia

- No exclusive contracts
- No discrimination
- Establish rate-setting courts
- No long-term agreements
- No vertical integration or offering other rights

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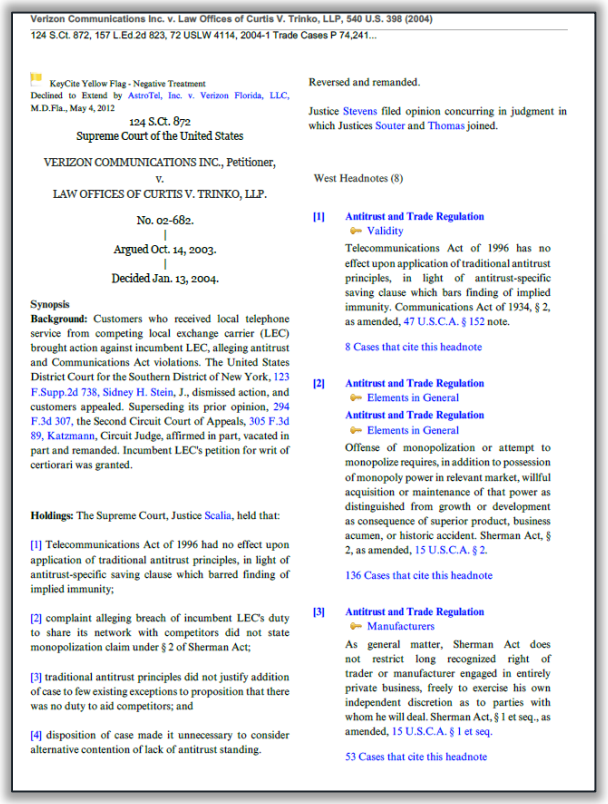
Modification Requires:



Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004)
124 S.Ct. 872, 157 L.Ed.2d 823, 72 USLW 4114, 2004-1 Trade Cases P 74,241...

KeyCite Yellow Flag - Negative Treatment
Declined to Extend by AstroTel, Inc. v. Verizon Florida, LLC, M.D.Fla., May 4, 2012

124 S.Ct. 872
Supreme Court of the United States

VERIZON COMMUNICATIONS INC., Petitioner,
v.
LAW OFFICES OF CURTIS V. TRINKO, LLP.

No. 02-682.
|
Argued Oct. 14, 2003.
|
Decided Jan. 13, 2004.

Synopsis
Background: Customers who received local telephone service from competing local exchange carrier (LEC) brought action against incumbent LEC, alleging antitrust and Communications Act violations. The United States District Court for the Southern District of New York, 123 F.Supp.2d 738, Sidney H. Stein, J., dismissed action, and customers appealed. Superseding its prior opinion, 294 F.3d 307, the Second Circuit Court of Appeals, 305 F.3d 89, Katzmann, Circuit Judge, affirmed in part, vacated in part and remanded. Incumbent LEC's petition for writ of certiorari was granted.

Holdings: The Supreme Court, Justice Scalia, held that:

[1] Telecommunications Act of 1996 had no effect upon application of traditional antitrust principles, in light of antitrust-specific saving clause which barred finding of implied immunity;

[2] complaint alleging breach of incumbent LEC's duty to share its network with competitors did not state monopolization claim under § 2 of Sherman Act;

[3] traditional antitrust principles did not justify addition of case to few existing exceptions to proposition that there was no duty to aid competitors; and

[4] disposition of case made it unnecessary to consider alternative contention of lack of antitrust standing.

Reversed and remanded.

Justice Stevens filed opinion concurring in judgment in which Justices Souter and Thomas joined.

West Headnotes (8)

[1] Antitrust and Trade Regulation
Validity
Telecommunications Act of 1996 has no effect upon application of traditional antitrust principles, in light of antitrust-specific saving clause which bars finding of implied immunity. Communications Act of 1934, § 2, as amended, 47 U.S.C.A. § 152 note.
8 Cases that cite this headnote

[2] Antitrust and Trade Regulation
Elements in General
Antitrust and Trade Regulation
Elements in General
Offense of monopolization or attempt to monopolize requires, in addition to possession of monopoly power in relevant market, willful acquisition or maintenance of that power as distinguished from growth or development as consequence of superior product, business acumen, or historic accident. Sherman Act, § 2, as amended, 15 U.S.C.A. § 2.
136 Cases that cite this headnote

[3] Antitrust and Trade Regulation
Manufacturers
As general matter, Sherman Act does not restrict long recognized right of trader or manufacturer engaged in entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal. Sherman Act, § 1 et seq., as amended, 15 U.S.C.A. § 1 et seq.
53 Cases that cite this headnote

1) "when the statutory or decisional law has changed to make legal what the decree was designed to prevent"

2) those changes "make compliance with the decree substantially more onerous"

3) the proposed modification is "suitably tailored" to the changed circumstances

Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367 (1992)

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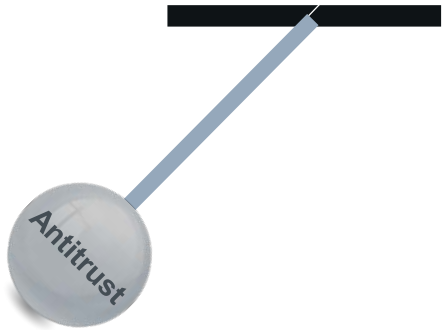
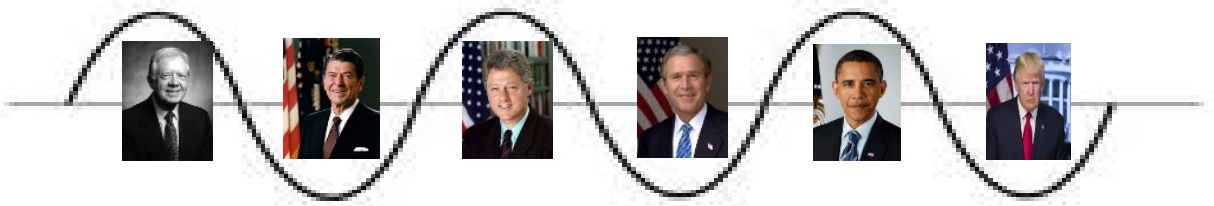
The Evolution Of Antitrust Enforcement

- Price Fixing
- Vertical Mergers
- Refusals to Deal
- Monopoly Leveraging
- Exclusive Dealing
- Predatory Pricing
- Price Discrimination
- Minimum Resale Price Maintenance
- Maximum Resale Price Maintenance
- Dealer Terminations
- Customer Restraints
- Territorial Restraints





1970's 1980's 1990's 2000's 2010's 2020's

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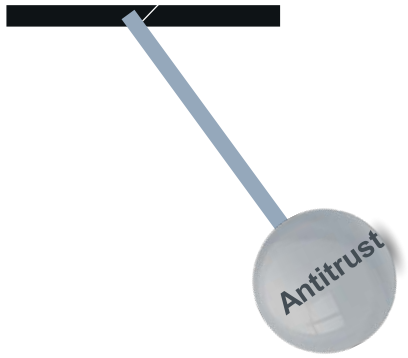
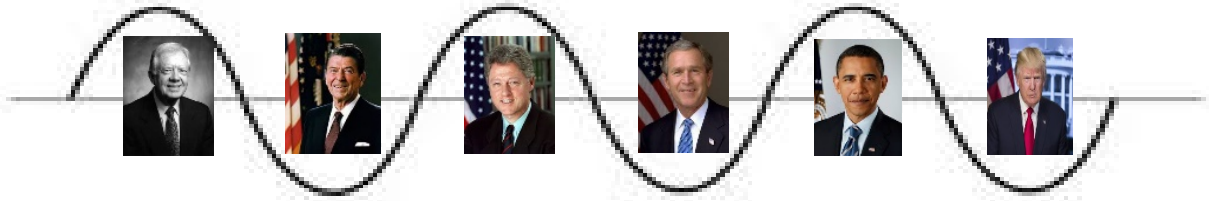
The Evolution Of Antitrust Enforcement

- Price Fixing



- Territorial Restraints
- Customer Restraints
- Dealer Terminations
- Maximum Resale Price Maintenance
- Minimum Resale Price Maintenance
- Price Discrimination
- Predatory Pricing
- Exclusive Dealing
- Monopoly Leveraging
- Refusals to Deal
- Vertical Mergers



1970's 1980's 1990's 2000's 2010's 2020's

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Evolution of the Music Industry

Evolution of the Music Industry

Evolution of the Music Industry

Evolution of the Music Industry

Evolution of the Music Industry

Those in Favor

"[B]roadcasters and other licensees do not have practical control over what music they play—an industry dynamic fostered by the Decrees themselves. … The Decrees help ***reduce transaction costs*** for music licensors and licensees…."

"Removal of the Decrees ***would result in chaos*** that would fundamentally challenge all of these constituencies to the profound detriment of Audiovisual Licensees and their viewing customers."

"While many small businesses will have no ability to fight back against ASCAP's and BMI's efforts to ***dramatically increase prices***, others will turn to the courts. Companies and industries with the wherewithal to fund litigation will file private antitrust suits against ASCAP and BMI, followed by years and years of ***protracted and expensive litigation***."

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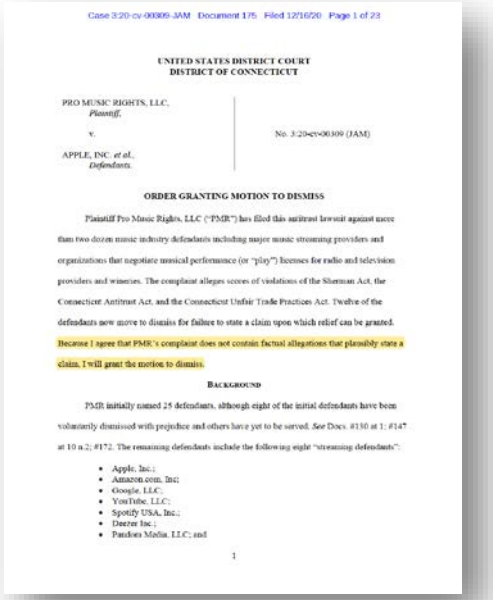
No Strangers to Litigation

PRO MUSIC RIGHTS



Case 3:20-cv-00309-JAM Document 175 Filed 12/16/20 Page 1 of 23

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

PRO MUSIC RIGHTS, LLC,
Plaintiff,
v.
APPLE, INC. *et al.*,
Defendants.

No. 3:20-cv-00309 (JAM)

ORDER GRANTING MOTION TO DISMISS

Plaintiff Pro Music Rights, LLC ("PMR") has filed this antitrust lawsuit against more than two dozen music industry defendants including major music streaming providers and organizations that negotiate musical performance (or "play") licenses for radio and television providers and wineries. The complaint alleges scores of violations of the Sherman Act, the Connecticut Antitrust Act, and the Connecticut Unfair Trade Practices Act. Twelve of the defendants now move to dismiss for failure to state a claim upon which relief can be granted. Because I agree that PMR's complaint does not contain factual allegations that plausibly state a claim, I will grant the motion to dismiss.

Background

PMR initially named 25 defendants, although eight of the initial defendants have been voluntarily dismissed with prejudice and others have yet to be served. *See* Docs. #130 at 1; #147 at 10 n.2; #172. The remaining defendants include the following eight "streaming defendants":

- Apple, Inc.;
- Amazon.com, Inc;
- Google, LLC;
- YouTube, LLC;
- Spotify USA, Inc.;
- Deezer Inc.;
- Pandora Media, LLC; and

1

"The consent decrees force a ***contrived and restrictive licensing system*** that produces ***below-market rates*** and imposes a court-administered rate-setting process in the rate court that is unresponsive to market forces and unable to consider all relevant data. To maintain this favorable status quo and 'two-stop shopping,' defendants have used a variety of aggressive tactics against PMR … including refusal to negotiate with them or acknowledge them as legitimate sellers, agreeing to boycott PMR…."

"But 'as a general matter, the Sherman Act does not restrict the long recognized right of a trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal.' *Verizon Commc'ns Inc. v. Law Offices of Curtis v. Trinko, LLP*, 540 U.S. 398, 408 (2004) (cleaned up). This means the fact that none of the defendants have chosen to do business with PMR does not show that this refusal to deal is because of any illicit understanding among the defendants. "

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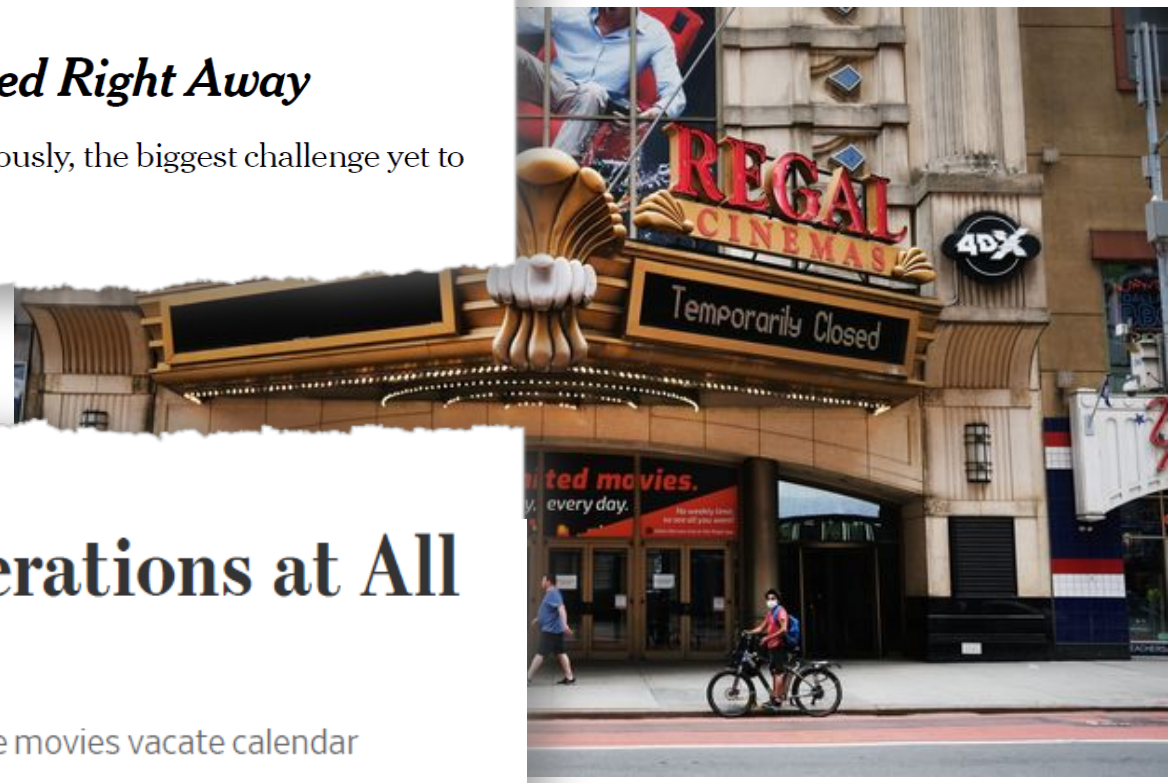
Paramount
A VIACOM COMPANY

U.S. Theaters are Experiencing Historical Levels of Financial Strain

The New York Times | https://nyti.ms/2VBtXcU

Warner Bros. Says All 2021 Films Will Be Streamed Right Away

Seventeen movies will each arrive in theaters and on HBO Max simultaneously, the biggest challenge yet to Hollywood's traditional way of doing business.



THE WALL STREET JOURNAL.

Regal Cinemas Suspending Operations at All U.S. Locations

Second-largest U.S. cinema chain is closing its doors again as high-profile movies vacate calendar

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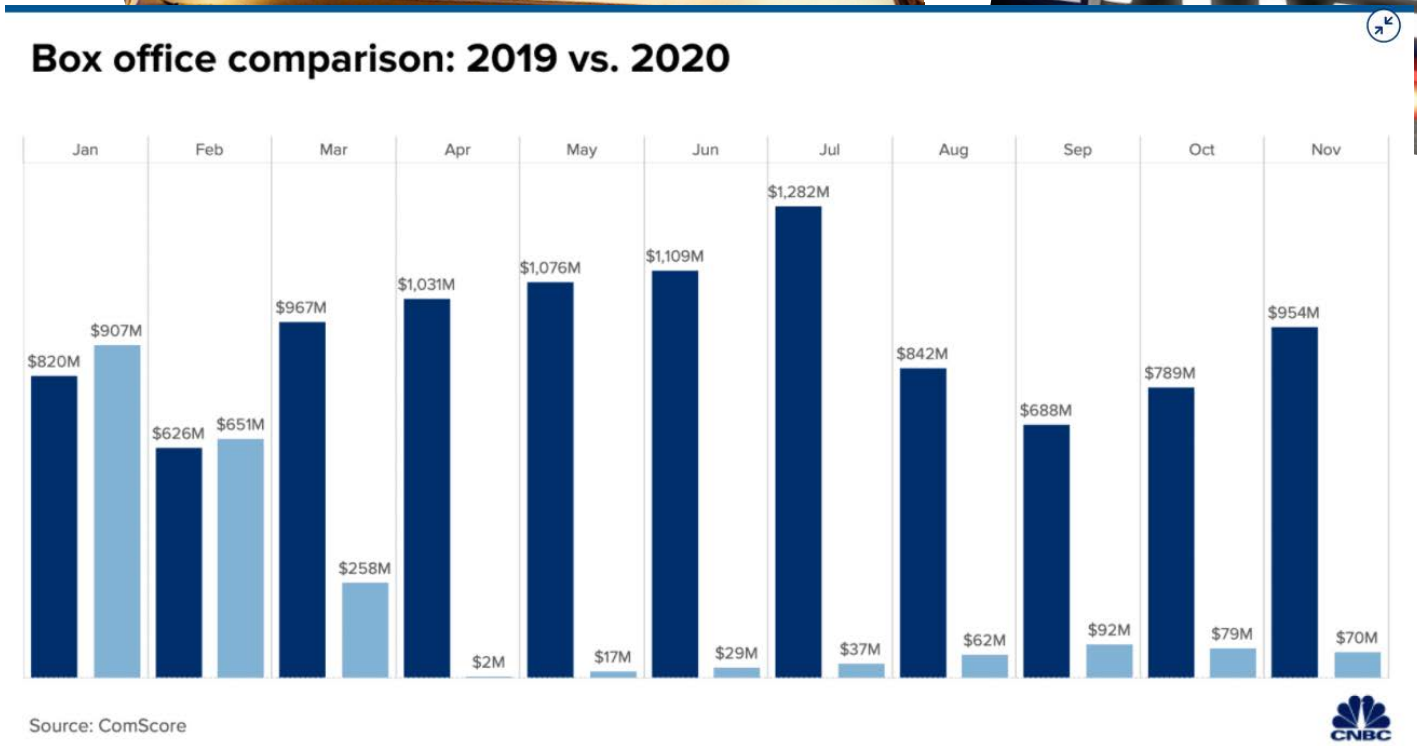
Domestic Box Office Figures are the Lowest in 40 Years



"Ticket sales crumpled 80% to $2.28 billion, a far cry from the second-best box office haul ever of $11.4 billion in 2019, according to data from Comscore."
- *CNBC*

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Potential Industry Consolidation

"If the status quo continues, 69% of small and midsize movie theater companies will be forced to file for bankruptcy or to close permanently" according to National Association of Theatre Owners. - *Wall Street Journal*

"…without a substantial slate of big movies, and with people still worried about the virus, our revenues have been decimated. We're losing money while operating. And we were shut down entirely for many, many months. It's life or death for many, many, many theater companies." - *John Fithian, National Association of Theatre Owners*

"Given the uncertainty regarding our ability to raise material amounts of additional liquidity and the uncertainty as to the time at which attendance levels normalize, substantial doubt exists about the Company's ability to continue as a going concern for a reasonable period of time." - *AMC SEC filing, December 2020*

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Will We See a Rise in the Failing Firm Defense?

"To be clear, we support vigorous competition and hope that firms that have been hard hit by the economic downturn recover quickly and remain viable competitors so that they can continue to serve their customers. We will accept solid evidence that a firm is failing, and step aside when justified by the full evidence. But we will not turn away from the challenges ahead by changing the rules that have served us well in the past, including during prior economic downturns. And we ask that counsel not make that job harder by seeking advantage from the suffering of some."
– *Ian Conner, director of the FTC's Bureau of Competition, May 2020*

"We may be more receptive to [the failing firm defense] from the standpoint when you say we're in dire financial straits because we've been closed for three months, we've seen drop-off in revenues.… What we think is different is that now we are looking even more diligently at [buyers' and sellers'] current financial state and their debt because of this crisis. Those are questions that we would have asked before. It's just now with Covid, there's concern with debt financing and viability that are directly resulting from the Covid crisis." – *Interview with Ian Conner, July 2020*

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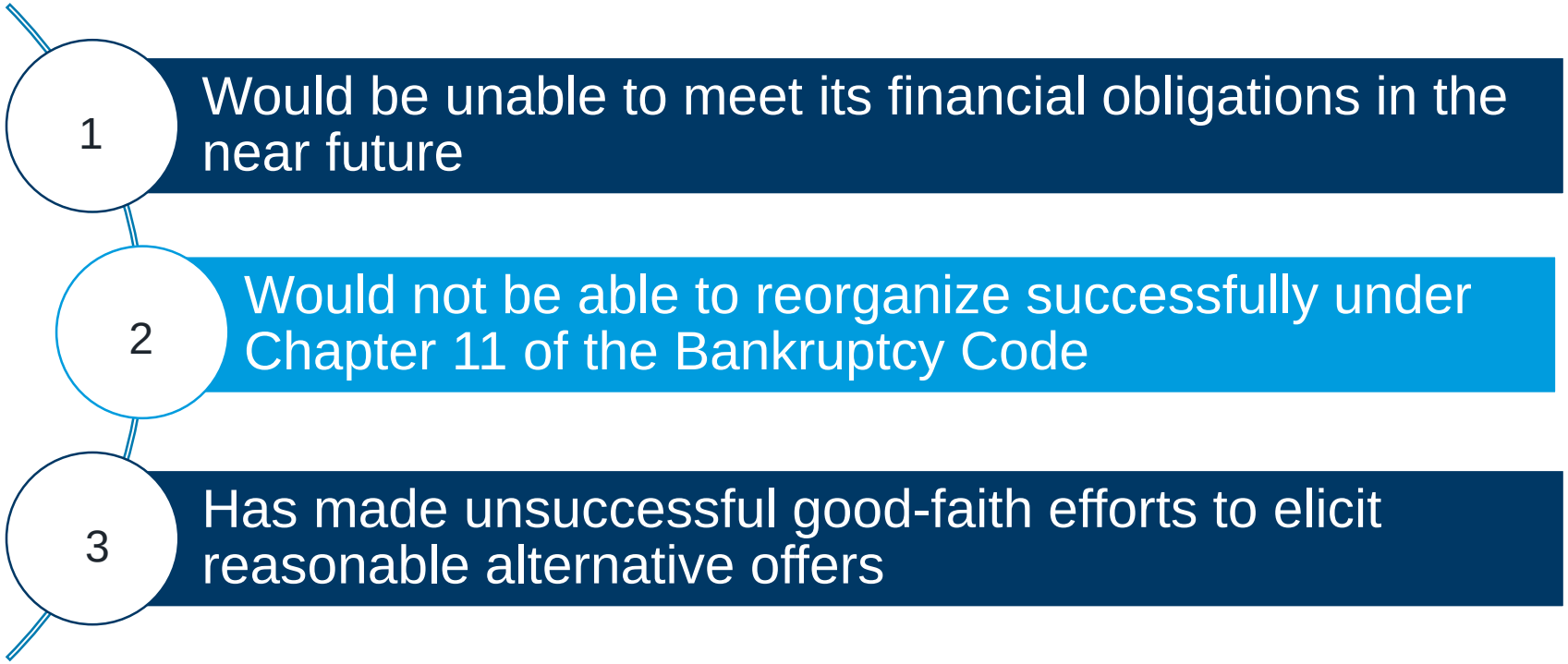
Failing Firm Defense is Still a High Burden

Very few transactions have been approved based on the failing firm defense by antitrust enforcers in the last few decades.

Under the Horizontal Merger Guidelines, the merging parties must show that the failing firm:



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The Paramount Consent Decrees

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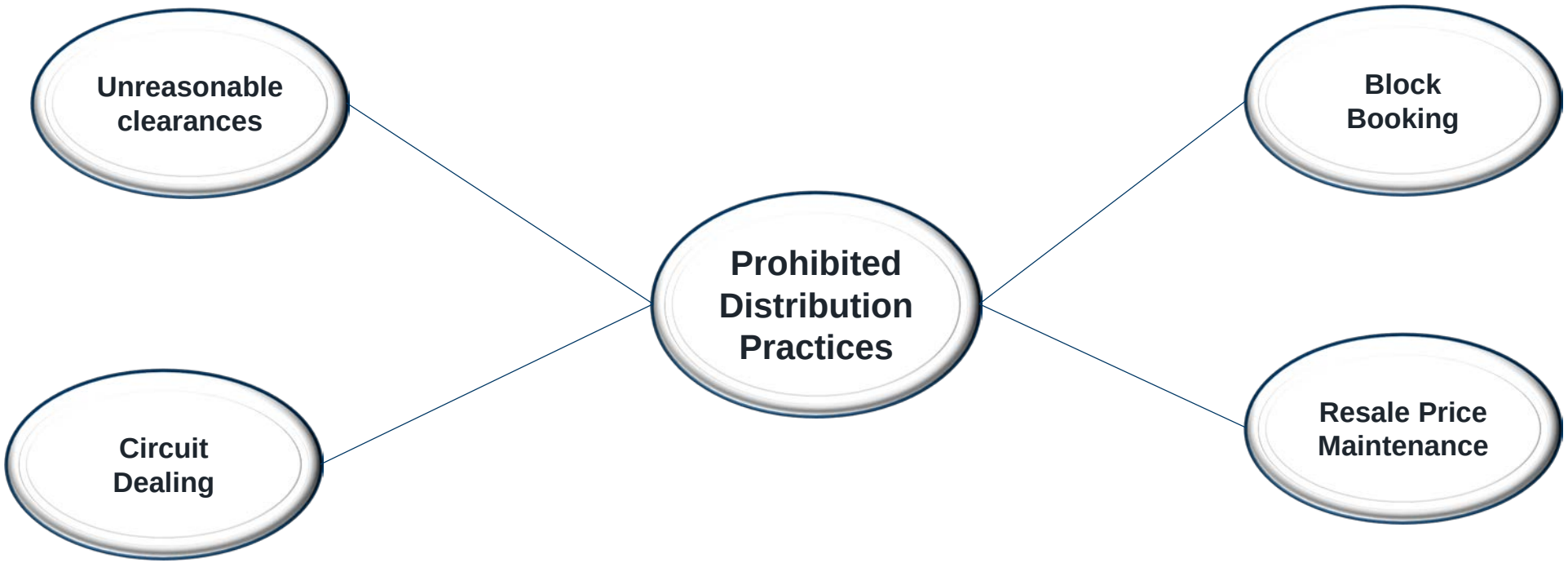
The Paramount Consent Decrees

- The DOJ has regulated how certain movie studios distribute films to movie theaters for over 70 years.
- In 1938, the DOJ filed an antitrust lawsuit alleging that eight major motion pictures, including Paramount Pictures, Twentieth Century-Fox, and Warner Brothers, conspired to control the motion picture industry through their ownership of film distribution and exhibition.
- The district court found that defendants had engaged in a widespread conspiracy to illegally fix motion picture prices and monopolize both the film distribution and movie theater markets.
- The Supreme Court upheld the decision in 1948.

> "The practices were bald efforts to substitute monopoly for competition and to strengthen the hold of the exhibitor-defendants on the industry by alignment of competitors on their side. Clearer restraints of trade are difficult to imagine." *United States v. Paramount*, 334 U.S. 131, 149 (1948).

The Effects of the Paramount Consent Decrees

- Changed the structure of the motion picture industry
- Created a separation between film distribution and exhibition
- Required the major defendants to sell their theaters to new independent companies



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The Antitrust Division's Review of the Decrees

The Division argued there were four reasons terminating the Decrees would be in the public interest

1. The Decrees achieved the Supreme Court's remedial mandate to this Court: they "uproot[ed]" and ended Defendants' illegal conspiracy and, along with the passage of time, "rid" the industry of "all taint of the conspiracy," "undoing what the conspiracy achieved."
2. Changes in the motion picture industry over the last seventy years have made it unlikely that the remaining Defendants could or would reinstate their cartel to monopolize the motion picture distribution and theater markets.
3. Antitrust case law has evolved to undermine the Decrees' ongoing regulatory provisions.
4. The Sherman Act will continue to provide effective deterrence against any industry-wide attempts to re-establish a cartel to monopolize the film distribution and exhibition markets.

The Court Terminates the Decrees

- Technological innovation, new competitors, and shifting customer demand have fundamentally changed the industry
- No movie distributor owns a major theater
- Films today are broadly released in single theatrical runs
- Competitors have changed
- Antitrust law has changed
  - Decrees treated certain conduct as per se illegal that today may be deemed legal and beneficial to competition and consumers
  - Statutory merger law has changed – HSR Act
- The Supreme Court's rulings in the *Paramount* litigation still exist to deter conduct

> "Termination simply implies that this Court, in performing a 'necessarily forward-looking and probabilistic' evaluation, determined that termination would be in the public interest because there is a low 'likelihood of a potential future violation, … given the changes in the market and the fact that motion picture distributors not subject to the Decrees have shown no propensity to acquire major movie theater circuits or engage in the type of collusive practices the Decrees targeted."

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State of the Video Game Industry: Pandemic Silver Lining

Older people are spending more on video games and playing more during the pandemic than ever before

Ben Gilbert Dec 2, 2020, 12:34 PM

Videogames are a bigger industry than movies and North American sports combined, thanks to the pandemic

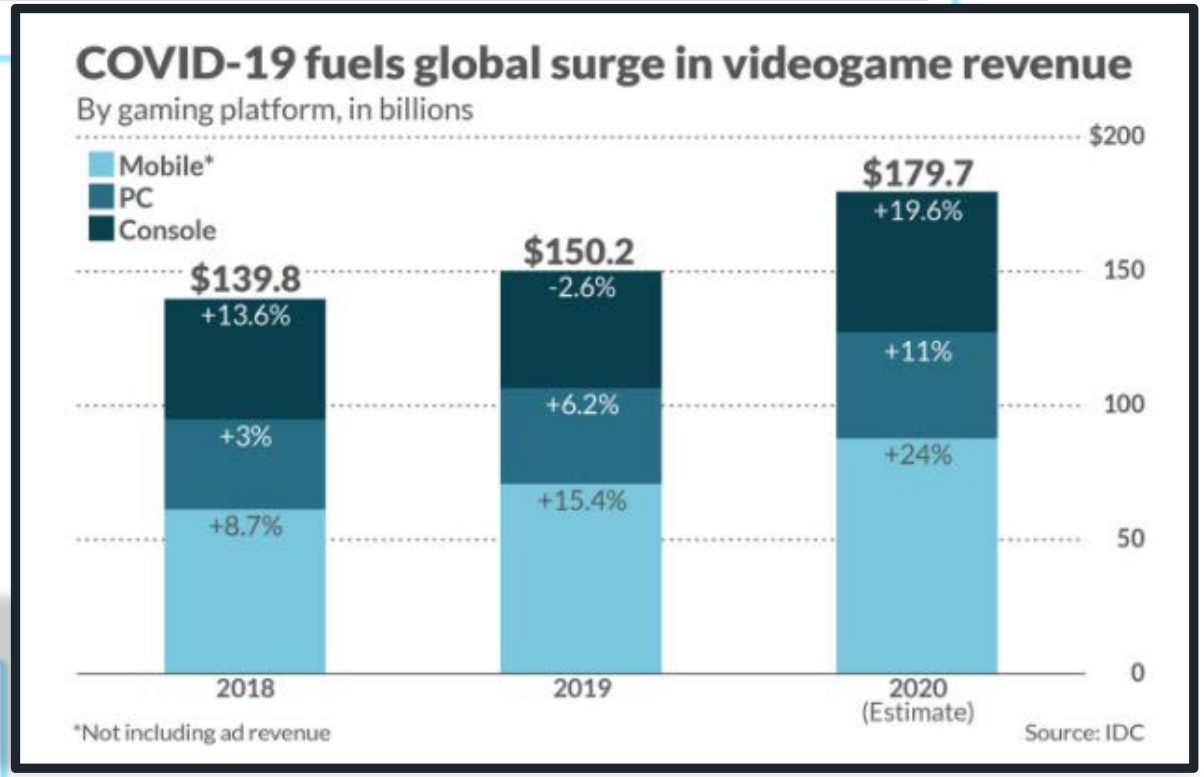
Last Updated: Jan. 2, 2021 at 10:27 a.m. ET MarketWatch

Video games can be a healthy social pastime during coronavirus pandemic

Mike Snider USA TODAY

Published 4:17 p.m. ET Mar. 28, 2020 | Updated 3:51 p.m. ET Mar. 29, 2020

Mergers Are Heating Up in the Videogame World. EA and Activision Have Lots of Spending Money. BARRON'S Max A. Cherney June 22, 2020 7:25 pm ET



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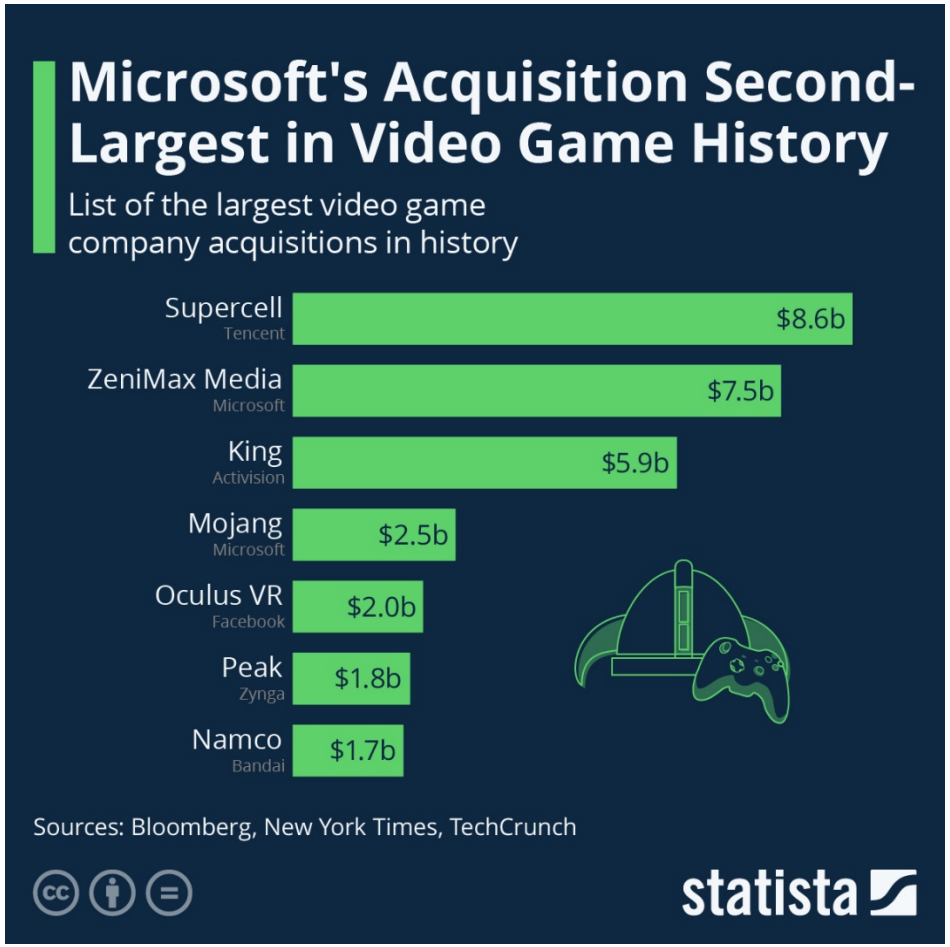
State of the Industry: Acquisitions



- Microsoft announced agreement to acquire Zenimax Media for **$7.5 billion**
  - Includes titles like
    - **Elder Scrolls,**
    - **Fallout,** and
    - **Doom**
- **No perceived antitrust issues with the deal**
  - Distributor acquiring content producer

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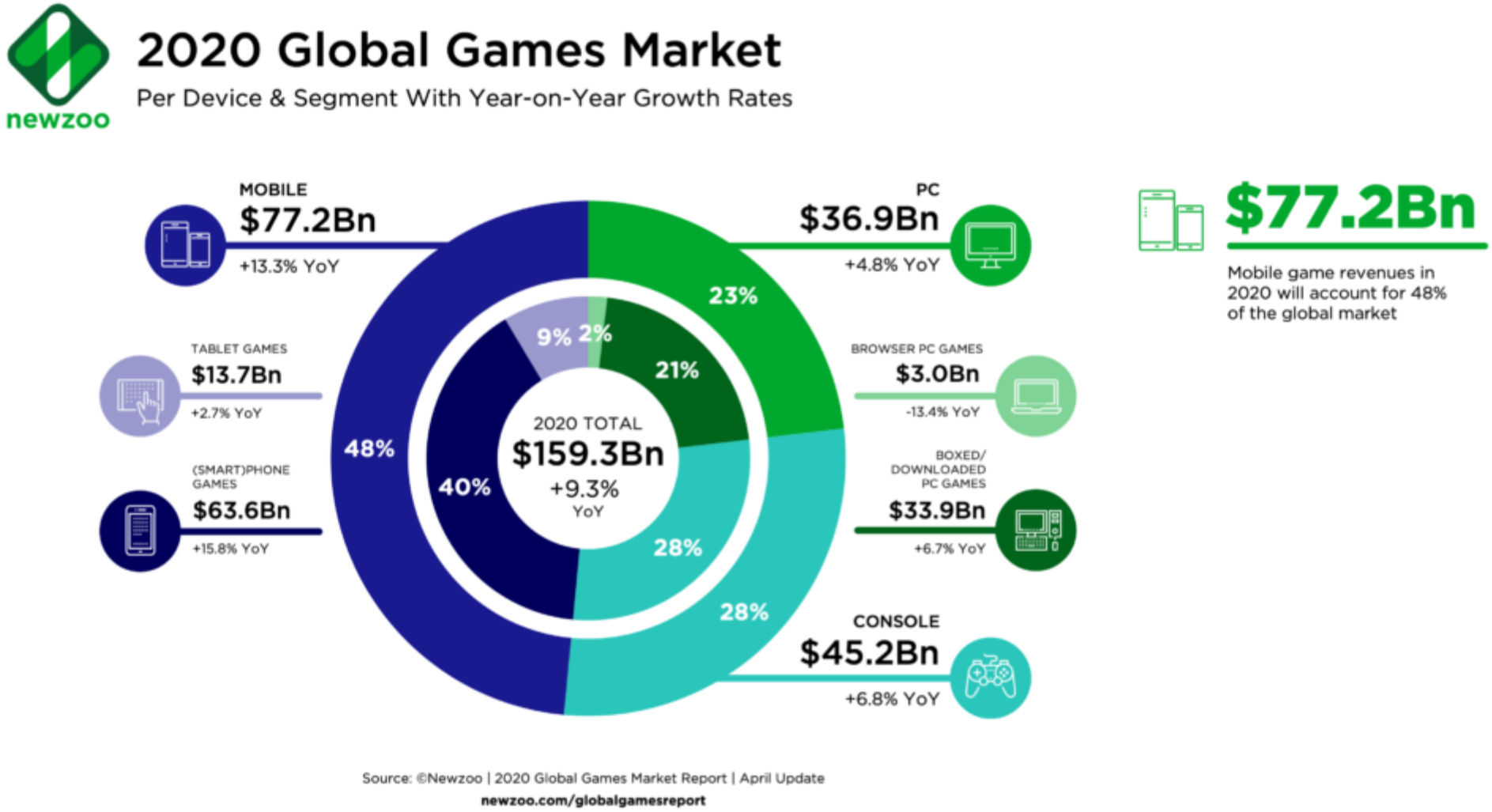
The Rise of Mobile Gaming



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Apple Lawsuits

- Apple has been battling litigation over its App Store for several years from proposed classes of app developers and consumers.

- *Apple v. Pepper* held that app users have standing to sue the company for alleged overcharges stemming from the commissions developers pay.

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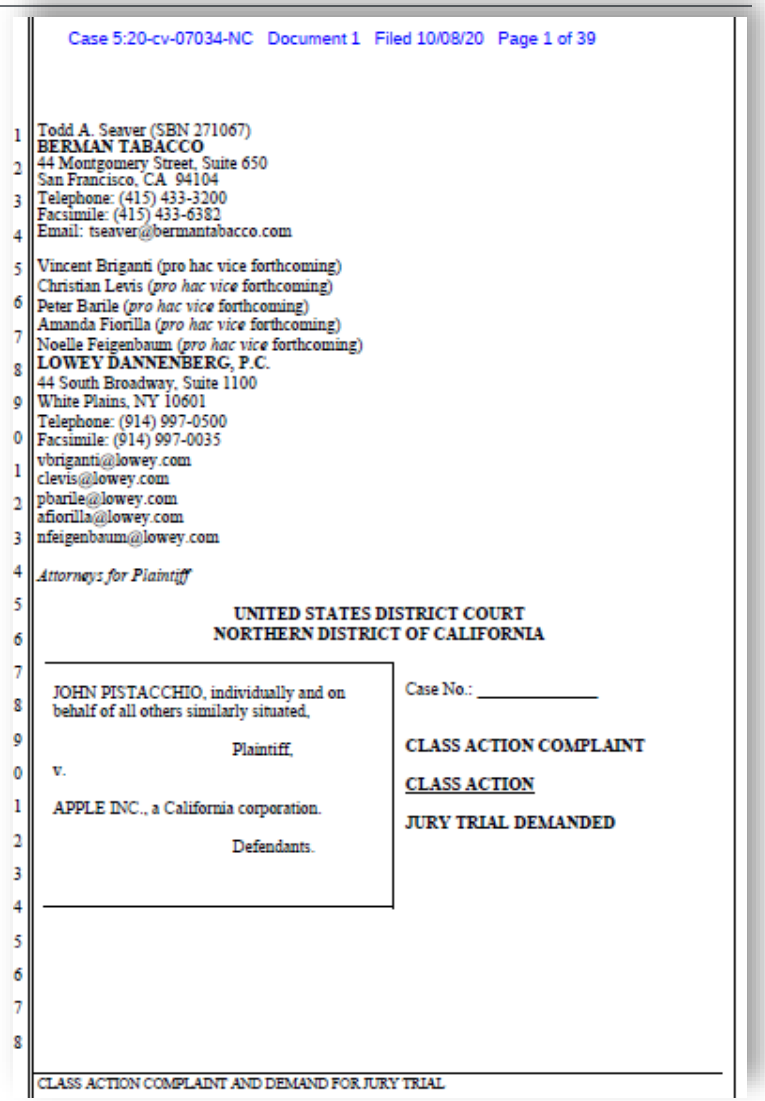
Apple v. Pepper Progeny

- Supreme Court decision opened the door for class action lawsuits from customers, since App Store customers were held to be direct purchasers from Apple.
- *Pistacchio v. Apple Inc.*
  - Consumer class action over Apple Arcade's $4.99 monthly fee.
  - Accuses Apple of monopolizing the mobile game market.
  - Result is higher prices and fewer choices for gamers.



Case 5:20-cv-07034-NC Document 1 Filed 10/08/20 Page 1 of 39

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Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JOHN PISTACCHIO, individually and on behalf of all others similarly situated,

Plaintiff,

v.

APPLE INC., a California corporation.

Defendants.

Case No.: _____

CLASS ACTION COMPLAINT

CLASS ACTION

JURY TRIAL DEMANDED

CLASS ACTION COMPLAINT AND DEMAND FOR JURY TRIAL

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Epic Litigations

- Antitrust lawsuits launched against Apple and Google.
- Both target restrictions that force developers to distribute apps through Apple's App Store and Google's Play Store.
  - Developers are charged a 30% commission on app purchases and on all in-app payments.
  - Epic claims this leads to monopolizing the markets for app distribution (*Apple* & *Google*), and alleges breach of the duty to deal (*Apple*).
- Goal: get courts to force the platform makers to accept the use of alternative in-app payment systems (e.g., PayPal).

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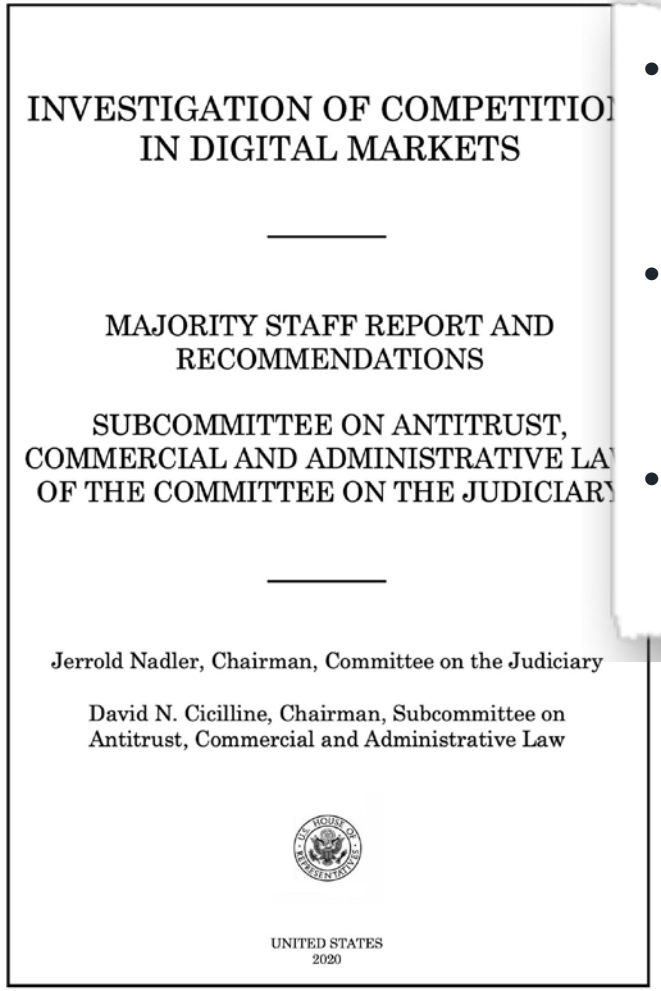
Epic Arguments & Possible Consequences

- Themes
  - **Epic**: Apple and Google collectively dominate mobile platforms. Yes, Epic breached its contracts, but only because the restrictions are illegal.
  - **Apple & Google**: They are private, entrepreneurial companies, not public utilities. Epic is merely seeking more money.
- What's at stake?
  - **Epic**: Pressure these companies to change their practices.
  - **Apple & Google:** Punish breaches.

Courts Have Yet to Indicate How the Relevant Market Will be Defined

- *Pistacchio* plaintiffs claim the relevant market = the "**iOS subscription-based mobile gaming services market**" (i.e., the Apple Arcade gaming service)
  - Pending motion to dismiss attacks this "gerrymandered" definition head on.
- Epic alleges the relevant market = **iOS application distribution market** (i.e., the App Store).
  - Apple responds that the relevant market is broader: all competing platforms that distribute Fortnite, e.g., Xbox, PlayStation, computers, tablets.

Democrats' October 2020 Report Eyed Possible Reforms



INVESTIGATION OF COMPETITIO
IN DIGITAL MARKETS

MAJORITY STAFF REPORT AND
RECOMMENDATIONS

SUBCOMMITTEE ON ANTITRUST,
COMMERCIAL AND ADMINISTRATIVE LA
OF THE COMMITTEE ON THE JUDICIARY

Jerrold Nadler, Chairman, Committee on the Judiciary

David N. Cicilline, Chairman, Subcommittee on
Antitrust, Commercial and Administrative Law

UNITED STATES
2020

- "**Overriding *Ohio v. American Express*** by clarifying that cases involving platforms do not require plaintiffs to establish harm to both sets of customers"
- "**Overriding *United States v. Sabre Corp*.,** [by] clarifying that platforms that are "two-sided," or serve multiple sets of customers, can compete with firms that are 'one-sided';"
- "Clarifying that **market definition is not required for proving an antitrust violation**, especially in the presence of direct evidence of market power … "

Proskauer

App Platforms Face Continued Scrutiny

The New York Times

Nov. 18, 2020

Apple Halves Its App Store Fee for the Smaller Companies

App makers bridled at the 30 percent commission, which has drawn scrutiny from regulators looking into antitrust claims.

"Developers that **brought in $1 million or less** from their apps in the previous year will pay a 15 percent commission on those app sales starting next year, down from 30 percent, the company said."

U.S. LEGAL NEWS JANUARY 15, 2021 / 12:50 PM / UPDATED 6 HOURS AGO

Google Play is unsportsmanlike, U.S. states likely to argue in potential lawsuit

REUTERS

By Diane Bartz, Paresh Dave

3 MIN READ

WASHINGTON (Reuters) - State attorneys general are planning a third lawsuit against Alphabet Inc's Google, this one focused on the search and advertising giant's Play Store for Android phones, according to two sources familiar with the matter.

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A LOT OF NEWS IS JUST ENTERTAINMENT MASQUERADING AS NEWS

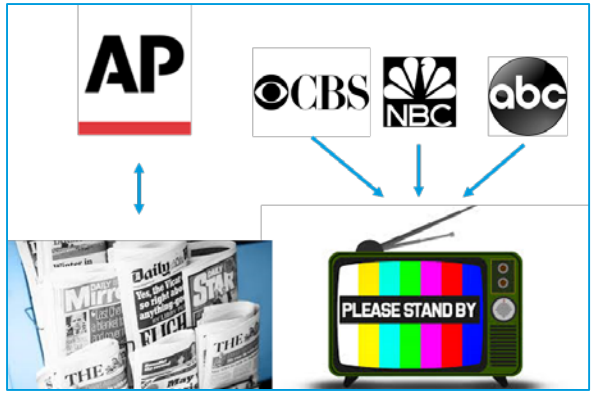
NATE SILVER

PICTUREQUOTES.com

PICTUREQUOTES

Proskauer

News is the Latest Entertainment Product to Face Antitrust Scrutiny



Then

v.

Now

- News dissemination has drastically changed in modern times.
- Content providers rely heavily on Big Tech platforms, both for “eye balls” and “infrastructure.”
- Powerful “network effects” gives platforms unparalleled market power.
- Big Tech platforms under tremendous pressure to use this power to police their ecosystem.

Proskauer

Concerns About Big Tech's Control of Information Is a Bipartisan Issue

Ahead of 2020 election, partisans expect made-up news to target their own party more than the other

% who say made-up news related to the presidential election will mostly be intended to hurt ...

	Their own party	The other party	Both equally
Dem/Lean Dem	51	4	36
Liberal	67	2	26
Cons/Mod	37	6	45
Rep/Lean Rep	62	4	29
Conserv	75	3	18
Mod/Lib	41	6	45

Source: Survey of U.S. adults conducted Oct. 29-Nov. 11, 2019.

PEW RESEARCH CENTER

Poll: Who do you think has the main responsibility for reducing the amount of misleading information that is made public?

PBS NEWS HOUR

- 39% The news media
- 18% Tech companies
- 15% The government
- 12% The public
- 12% None of these
- 4% Unsure

NPR/PBS NewsHour/Marist Poll National Adults. Interviews conducted January 7th through January 12th, 2020, n=1259 MOE +/- 3.5 percentage points.

Attorney General Paxton Leads 50 Attorneys General in Google Multi-state Bipartisan Antitrust Investigation

"Now, more than ever, ***information is power***, and the most important source of information in Americans' day-to-day lives is the internet.

Proskauer

The Dueling Approaches to Address Misinformation

Limit Platform Power


INVESTIGATION OF COMPETITION IN DIGITAL MARKETS

MAJORITY STAFF REPORT AND RECOMMENDATIONS

“ [T]hese giants can pick winners and losers throughout our economy.”

“[E]ach platform uses its gatekeeper position to maintain its market power.”

“They bought out, copied, or cut off their competitive threats.”

Through self-preferencing, predatory pricing, or exclusionary conduct, the dominant platforms have exploited their power to become even more dominant.

Require Platforms to Police


1813

I. Introduction: Big Tech Is Out to Get Conservatives.

REINING IN BIG TECH'S CENSORSHIP OF CONSERVATIVES

Rep. Jim Jordan, Ranking Member

“Rigorous enforcement is in order against any antitrust violation by Big Tech”

Congress must take more direct and powerful measures to address censorship in Big Tech.

One important option is ***reconfiguring liability protections*** that currently shield Big Tech from accountability for content-moderation decisions.

Proskauer

Associated Press: The “OG” of Platforms

1945

“The heart of the government's charge was … a system of By-Laws which prohibited all AP members from selling news to non-members, and which granted each member powers to block its non-member competitors from membership.”

Associated Press v. U.S., 326 U.S. 1 (1945)
65 S.Ct. 1416, 89 L.Ed. 2013, 1 Media L. Rep. 2269

KeyCite Yellow Flag - Negative Treatment
Declined to Extend by Bates v. Hadden, 8th Cir.(Iowa), Aug. 2014

65 S.Ct. 1416
Supreme Court of the United States

ASSOCIATED PRESS et al.
v.
UNITED STATES.
TRIBUNE CO. et al.
v.
SAME.
UNITED STATES
v.
ASSOCIATED PRESS et al.

Nos. 57, 58 and 59.
|
Argued Dec. 5, 6, 1944.
|
Decided June 18, 1945.
|
Rehearing Denied Oct. 8, 1945.

See 66 S.Ct. 6.

Synopsis
Bill for injunction by the United States against the Associated Press and others, charging violation of the Sherman Anti-Trust Act, ss 1—8, 15 U.S.C.A. ss 1—7, 15 note. The government's motion for summary judgment under Federal Rules of Civil Procedure, rule 56, 28 U.S.C.A. following 723c, was granted by a three-judge District Court, 52 F.Supp. 362, and from a judgment by which the government's prayer for relief was granted in part and denied in part, the Associated Press, Paul Bellamy, George Francis Booth, and others take one appeal, and the Tribune Company and another take a separate appeal, and the United States also appeals separately.

Affirmed.

Mr. Chief Justice STONE, Mr. Justice ROBERTS, and Mr. Justice MURPHY, dissenting in part.

agency, found to be the chief single source of news for the American Press, whose by-laws forbade members to furnish news to nonmembers and required a member's competitor seeking membership to pay a percentage of assessments received from members since 1900 and obtain a majority vote of members, a judgment enjoining enforcement of by-laws was affirmed. Sherman Anti-Trust Act, §§ 1–8, 15 U.S.C.A. §§ 1–7, 15 note.

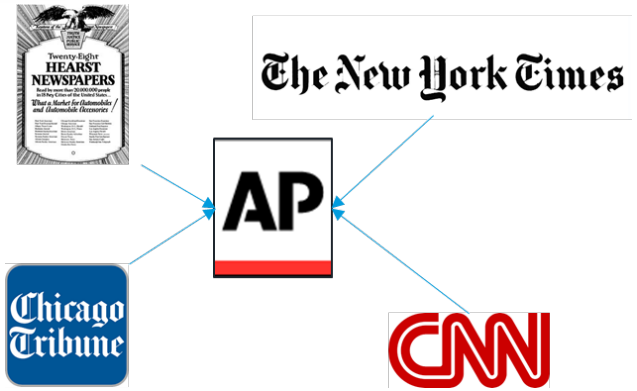
102 Cases that cite this headnote

[2] Antitrust and Trade Regulation Damages and Other Relief

A judgment enjoining enforcement of news agency's by-laws restricting membership, without prejudice to adoption of by-laws restricting admission, provided that on application therefor by a member's competitor, such member should not have power to impose conditions and that effect of admission on applicant's ability to compete with members should not be taken into consideration, was not vague or ambiguous, and meant that news was to be furnished to competitors of old members without discrimination.

81 Cases that cite this headnote

[3]



“The by-laws … operate … as a network of agreements among the members of the Associated Press whereby they mobilize the interest of all against the danger of competition to each by a present or future rival.”

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Nascent Competitor Acquisitions

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FEDERAL TRADE COMMISSIO
600 Pennsylvania Avenue, N.W.
Washington, DC 20580

Plaintiff,

v.

FACEBOOK, INC.
1601 Willow Road
Menlo Park, CA 94025

Defendant.

COMPLAINT FOR INJUNCTIVE AND OTHER EQUITABLE RELIEF

Plaintiff, the Federal Trade Con

Court pursuant to Section 13(b) of the

§ 53(b), for a permanent injunction an

("Facebook"), to undo and prevent its

in or affecting commerce in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

I. NATURE OF THE CASE

1. Facebook is the world's dominant online social network. More than 3 billion

people regularly use Facebook's servic

lives. But not content with attractin

Facebook has maintained its monopol

threats and by imposing restrictive po

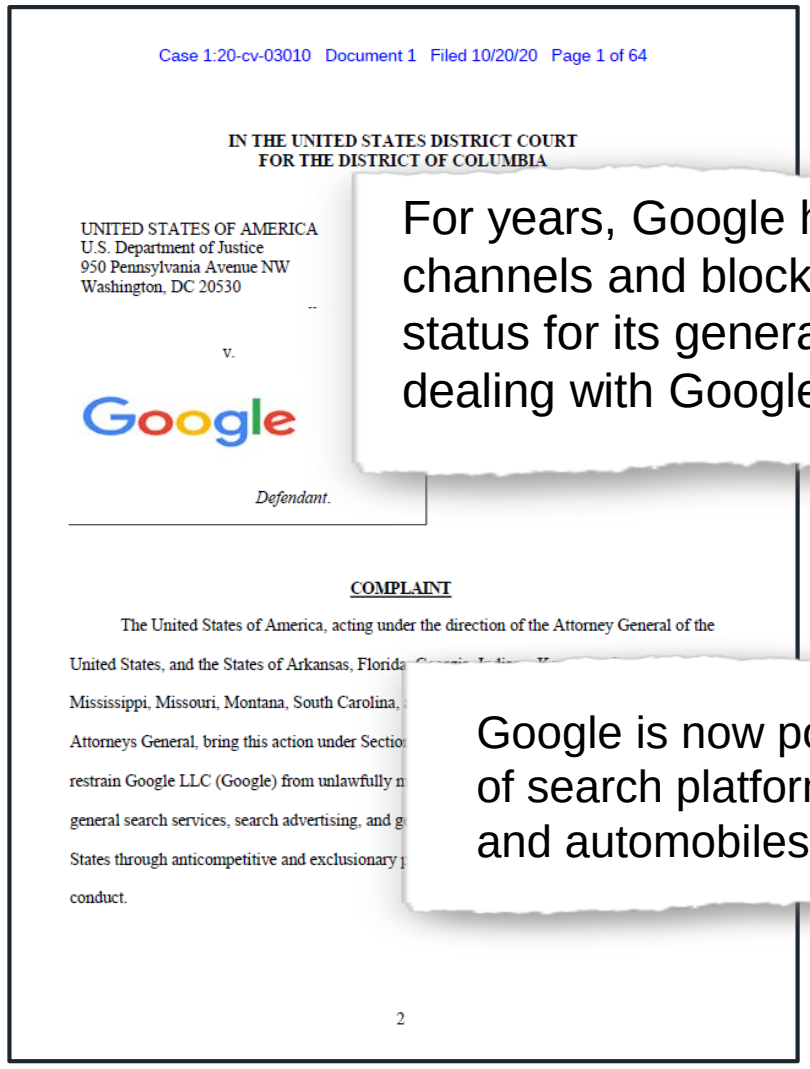
Facebook does not or cannot acquire.

"Facebook has maintained its monopoly position by buying up companies that present competitive threats and by imposing restrictive policies that unjustifiably hinder actual or potential rivals that Facebook does not or cannot acquire."

"*it is better to buy than compete.*"

"I remember your internal post about how Instagram was our threat and not Google+. You were basically right. ***One thing about startups though is you can often acquire them.***"

Traditional Exclusive Dealing



Case 1:20-cv-03010 Document 1 Filed 10/20/20 Page 1 of 64

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530

v.

Google

Defendant.

COMPLAINT

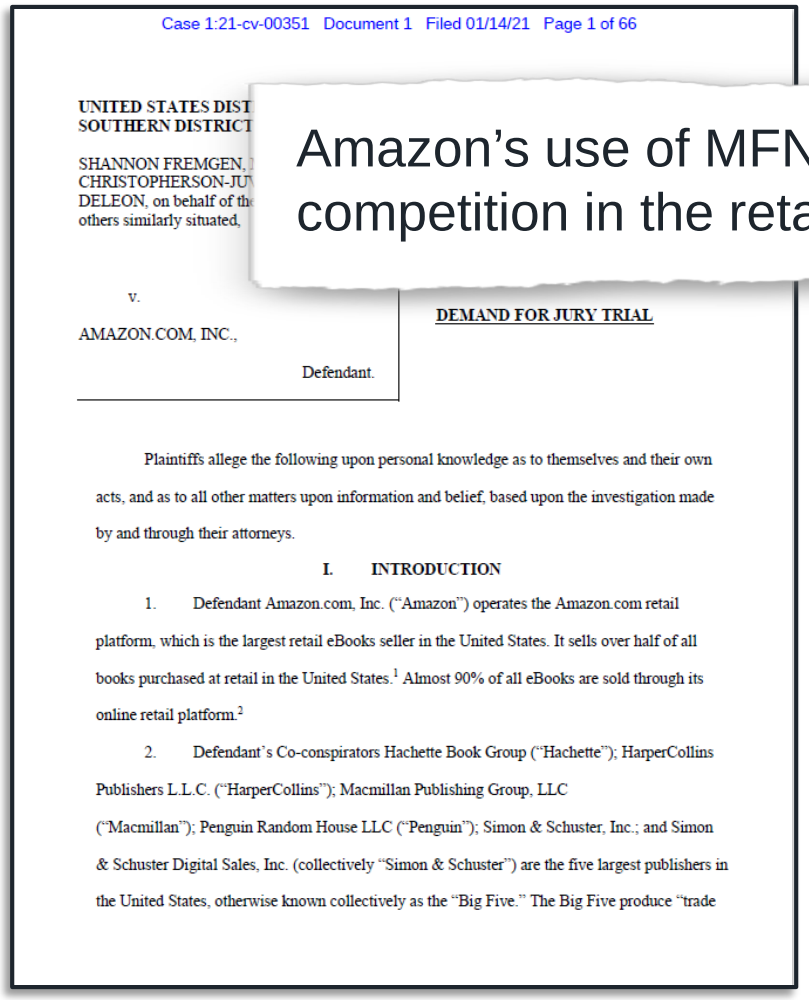
The United States of America, acting under the direction of the Attorney General of the United States, and the States of Arkansas, Florida, [illegible] Mississippi, Missouri, Montana, South Carolina, [illegible] Attorneys General, bring this action under Sectio[illegible] restrain Google LLC (Google) from unlawfully m[illegible] general search services, search advertising, and g[illegible] States through anticompetitive and exclusionary [illegible] conduct.

2

For years, Google has entered into exclusionary agreements … to lock up distribution channels and block rivals. Google pays *billions* of dollars each year … to secure default status for its general search engine [or] specifically prohibit Google's counterparties from dealing with Google's competitors.

Google is now positioning itself to dominate search access points on the next generation of search platforms: internet-enabled devices such as smart speakers, home appliances, and automobiles (so-called internet-of-things, or IoT, devices).

MFN Provisions



Case 1:21-cv-00351 Document 1 Filed 01/14/21 Page 1 of 66

UNITED STATES DIST
SOUTHERN DISTRICT

SHANNON FREMGEN,
CHRISTOPHERSON-JU
DELEON, on behalf of th
others similarly situated,

v.

AMAZON.COM, INC.,

Defendant.

DEMAND FOR JURY TRIAL

Plaintiffs allege the following upon personal knowledge as to themselves and their own acts, and as to all other matters upon information and belief, based upon the investigation made by and through their attorneys.

I. INTRODUCTION

1. Defendant Amazon.com, Inc. ("Amazon") operates the Amazon.com retail platform, which is the largest retail eBooks seller in the United States. It sells over half of all books purchased at retail in the United States.[1] Almost 90% of all eBooks are sold through its online retail platform.[2]

2. Defendant's Co-conspirators Hachette Book Group ("Hachette"); HarperCollins Publishers L.L.C. ("HarperCollins"); Macmillan Publishing Group, LLC ("Macmillan"); Penguin Random House LLC ("Penguin"); Simon & Schuster, Inc.; and Simon & Schuster Digital Sales, Inc. (collectively "Simon & Schuster") are the five largest publishers in the United States, otherwise known collectively as the "Big Five." The Big Five produce "trade

Amazon's use of MFN provisions in its agreements with book publishers harms competition in the retail book market, including the eBook market.

But Are the Antitrust Laws Really Up to the Task?

Antitrust Law Has its Limits

- Being a monopolist is ok
- No obligation to deal with rivals
- No non-discrimination obligations

LAW OFFICES OF CURTIS V. TRINKO, LLP.

No. 02-682.

Argued Oct. 14, 2003.

Decided Jan. 13, 2004.

Synopsis

Background: Customers who received local telephone service from competing local exchange carrier (LEC) brought action against incumbent LEC, alleging antitrust and Communications Act violations. The United States District Court for the Southern District of New York, 123 F.Supp.2d 738, Sidney H. Stein, J., dismissed action, and customers appealed. Superseding its prior opinion, 294 F.3d 307, the Second Circuit Court of Appeals, 305 F.3d 89, Katzmann, Circuit Judge, affirmed in part, vacated in part and remanded. Incumbent LEC's petition for writ of certiorari was granted.

Holdings: The Supreme Court, Justice Scalia, held that:

[1] Telecommunications Act of 1996 had no effect upon application of traditional antitrust principles, in light of antitrust-specific saving clause which barred finding of implied immunity;

[2] complaint alleging breach of incumbent LEC's duty to share its network with competitors did not state monopolization claim under § 2 of Sherman Act;

[3] traditional antitrust principles did not justify addition of case to few existing exceptions to proposition that there was no duty to aid competitors; and

[4] disposition of case made it unnecessary to consider alternative contention of lack of antitrust standing.

53 Cases that cite this headnote

"As a general matter, the Sherman Act ***does not restrict*** the long recognized right of a trader or manufacturer engaged in an entirely private business, ***freely to exercise his own independent discretion as to parties with whom he will deal***."

Verizon Comm's, Inc. v. Trinko, 540 U.S. 398 (2004)

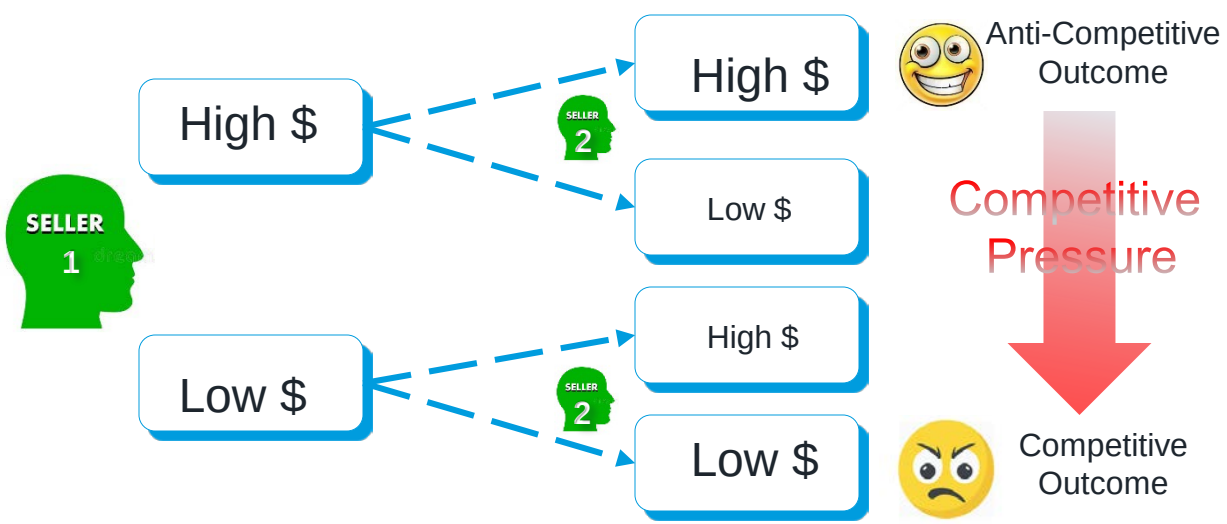
Weaker Tech Does Not Mean Better Information

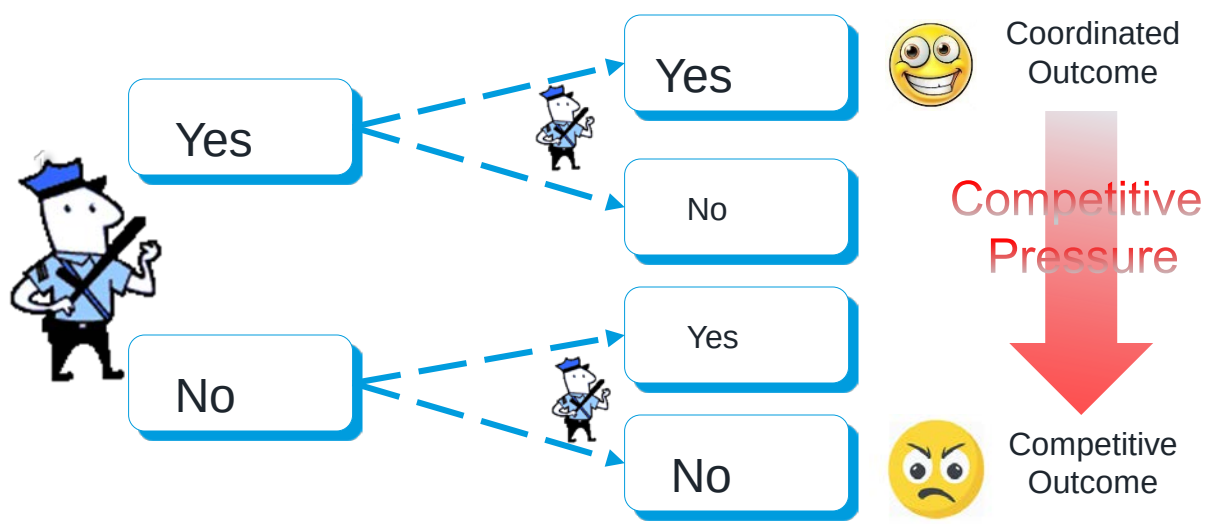
- Antitrust is concerned with too few voices; the problem with fake news is too many voices
- Fake news arises from a "market failure," known as the market for lemons; increased competition may make the problem worse

Proskauer

So What About Platforms Policing Content?

Pricing and Policing Have a Lot in Common: There is a "Race to the Bottom."





The Antitrust Laws May Prevent Coordinated Policing

Proskauer

Proving a Conspiracy:
Lockstep Decision May Not be Enough, But … “Plus Factors”

The New York Times | https://nyti.ms/3gzGhUC

‹ Walmart Outlines Vaccine Distribution Plans

Mastercard and Visa stop allowing their cards to be used on Pornhub.

Dec. 10, 2020
By Gillian Friedman

Mastercard and Visa said they had prohibited the use of their cards on the adult website Pornhub, after the New York Times columnist Nicholas Kristof reported that the platform included videos of child abuse and rape.

Both companies had started investigations this week into their financial ties with MindGeek, the parent company of Pornhub.

Mastercard said in a statement on Thursday that the investigation “confirmed violations of our standards prohibiting unlawful content on their site,” which prompted the company to terminate the acceptance of its cards on the site.

In a separate statement, Visa said, “We are instructing the financial institutions who serve MindGeek to suspend processing of payments through the Visa network,” pending the completion of its investigation.

Nearly seven million videos are posted on Pornhub each year, and although the vast majority of them probably depict consensual acts, many do not, Mr. Kristof wrote. He reported that videos of teenage girls who had been victims of assault and trafficking had been found on the website.

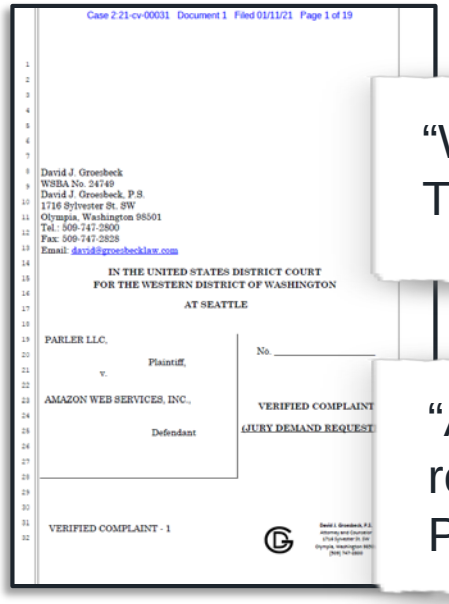
“In each case, offenders were arrested for the assaults, but Pornhub escaped responsibility for sharing the videos and profiting from them,” Mr. Kristof wrote.

Pornhub, which said on Tuesday that it had made changes to prevent the use of nonconsensual content, said on Thursday that Mastercard’s and Visa’s measures were “exceptionally disappointing.”

Mastercard said it would continue to investigate potential illegal content on other websites, and take action as necessary.

Proskauer

Proving a Conspiracy: An *Unrelated* Commercial Arrangement May Not Be Enough, But…


Case 2:21-cv-00031 Document 1 Filed 01/11/21 Page 1 of 19

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

PARLER LLC,
Plaintiff,
v.
AMAZON WEB SERVICES, INC.,
Defendant

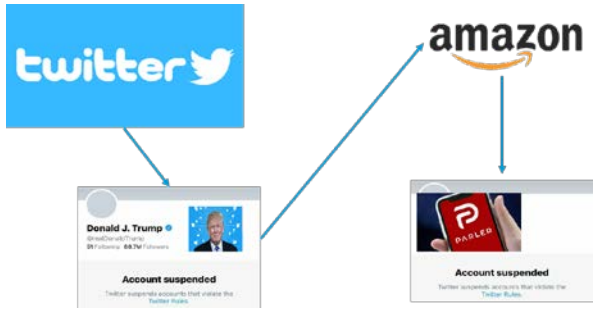
No. _____

VERIFIED COMPLAINT
(JURY DEMAND REQUEST

VERIFIED COMPLAINT - 1

"When Twitter announced two evenings ago that it was permanently banning President Trump from its platform, conservative users began to flee Twitter en masse for Parler."

"AWS's decision to effectively terminate Parler's account is apparently designed to reduce competition … to the benefit of Twitter… Less than a month ago, AWS and Parler's competitor, Twitter, entered into a multi-year deal."




UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

PARLER LLC,
Plaintiff,
v.
AMAZON WEB SERVICES, INC.,
Defendant

CASE NO. 2:21-cv-0031-BJR

INTRODUCTION

Injunction Denied

"Parler has submitted no evidence that AWS and Twitter acted together intentionally—or even at all—in restraint of trade."

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Antitrust Insights
Webinar Series

Thank You

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