Public Comments of [redacted]
[redacted] of Competition in Digital Entertainment
U.S. Department of Justice, Antitrust Division
Review of Consent Decrees in United States v. Paramount Pictures, Inc.

[redacted] submits this comment on the Paramount Consent Decrees on behalf of Competition in Digital Entertainment (CDE), urging the Department of Justice (Department) to consider the underlying issues involving vertical restraints in the production and distribution of motion pictures. CDE hopes that the Department will use this review to consider how these anticompetitive practices manifest themselves in the digital age—particularly with Netflix's conditions with connected device manufacturers. Our comment shows that these abuses are very much alive, and the Department cannot dismiss the Decrees as a relic of over-enforcement.

CDE promotes fair and open competition in the digital entertainment industry. It supports a consistent antitrust and privacy regulatory framework on a level playing field for all actors in the industry.

[redacted], where he has taught classes on antitrust, privacy, and internet law. He previously served as an attorney advisor at the FCC's Common Carrier and Media Bureaus.

As the Department notes in its solicitation for comments, "the motion picture industry has undergone considerable change" since 1948 including new technologies that enable streaming services for "different distribution and viewing platforms that did not exist when the decrees were entered into."

CDE heartily agrees with this assessment. But, these developments do not alter, and perhaps make more pronounced, the concern motivating the Decrees—that "the vertical combination of producing, distributing, and exhibiting motion pictures" can threaten competition when distributors place coercive conditions on exhibitors.[1]

Because movie production and distribution are no longer confined to traditional studios, market power shifts towards dominant distributors. Online Video Distributors (OVDs) or Subscription Video on Demand (SVoD) services such as Amazon Prime and Netflix began as services which aggregated and distributed traditional movie content, and are increasingly becoming major producers of original studio content as well.

Indeed, Barry Diller, the former CEO of Paramount Pictures, recently warned of how there is "too much concentration" among internet platforms, so that Netflix and Amazon would "supersede" the movie studios.[2] Both Amazon and Netflix are considering expanding into movie theatres, which underscores how large tech platforms are expanding into traditional modes of media distribution.[3]

The case of Netflix powerfully illustrates the expansive control of the distribution networks. Netflix's coercive contracts with connected devices, including Smart TVs and Digital Media Players, present serious threats to consumers' welfare and privacy as well as competition.

In its comments, CDE hopes to give perspective to the Department on its questions

1. "Have changes to the motion picture industry since the 1940s, including but not limited to, digital production and distribution, Multiplex theatres, new distribution and movie viewing platforms render any of the Consent Decree provisions unnecessary?"

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[1] United States v. Paramount Pictures, Inc., 334 US 131, 141 (1948).
[2] Nick Turner, *Diller Says Hollywood Risks Getting Overtaken by Amazon, Netflix*, BLOOMBERG (Oct. 3, 2018) https://www.bloomberg.com/news/articles/2018-10-03/diller-says-hollywood-risks-getting-overtaken-by-amazon-netflix.
[3] Ryan Faughnder, *Netflix has considered buying theaters, including Mark Cuban's Landmark, to gain an Oscar edge*, sources say, LA TIMES (Apr. 18, 2018), http://www.latimes.com/business/hollywood/la-fi-ct-landmark-netflix-20180418-story.html; Ashley Rodriguez, *Amazon could be the next great disruptor in cinema*, QUARTZ (Aug. 16, 2018), https://qz.com/1360879/amazon-could-start-a-new-movie-theater-revolution-with-landmark-theatres/.

2. "Are existing antitrust laws, including, the precedent of *United States v. Paramount*, and its progeny, sufficient or insufficient to protect competition in the motion picture industry"

CDE will demonstrate how Netflix uses its market power in the OVD and SvOD market to impose anticompetitive conditions on connected devices by controlling the design of the user-interface to promote Netflix more prominently than its competitors, placing dedicated Netflix buttons on remote controls at the expense of its competitors, and even preventing consumers from voluntarily allowing the TVs to track their Netflix viewing history, which forecloses consumers from creating digital bookmarks to save their favorite shows, receiving recommendations of new shows or even providing this information on a voluntary, disclosed, and opt-in basis to third parties like service providers and market research firms.

Specifically, in response to the Department's questions, the CDE submits

1. While it takes no position on whether the Decrees are still necessary, CDE voices concerns that dominant OVDs present serious anticompetitive threats—concerns that would counsel limiting any revision to the Decrees to the particularities of the case and avoiding any disavowal of precedent concerning vertical integration. While technological advancements have increased competition, they have also created new challenges. No doubt streaming video has made distribution far cheaper, but it also has encouraged vertically integration across multiple layers of distribution and consolidation through dominant OVDs. While these integrations have consumer benefits, they also allow dominant OVDs to entrench their market power by imposing unfair conditions on Smart TVs.

2. Despite the scaling back of per se rules against vertical restraints, the Department and Federal Trade Commission (FTC) still have ample authority to stop anticompetitive vertical practices by Netflix and other OVDs, which entrench their own market power. CDE will further show how *Paramount*'s holdings are relevant to anticompetitive conduct in the digital entertainment market today.

While CDE takes no position on whether the changes to the movie market justify lifting the Paramount Decrees, it urges the Department to limit its decision to the technological and economic changes in motion picture market, rather than abandon legal holdings established in *Paramount* relating to the illegality of anticompetitive vertical restraints.

I. "Have changes to the motion picture industry since the 1940s, including but not limited to, digital production and distribution, Multiplex theatres, new distribution and movie viewing platforms render any of the Consent Decree provisions unnecessary?

The Paramount Decrees were instituted prior to the widespread adoption of television, much less online streaming video. As other commenters will likely note, new technologies have greatly reduced the cost of both producing and distributing content, leading to an exponential increase in both the total amount of content and its availability to consumers. While this cost reduction increases competition in many respects, it also leads to consolidation on select platforms, along with multiple levels of vertical integration. These dramatic technological changes, therefore, may justify reconsidering protection for movie theatres, but they reinforce the need for protection against vertical integration in distribution.

A. The structure of the online video market.

In 1949, the only layers of distribution were the studios and exhibitors. However, the market for online video has far more intermediaries between the studio and the consumer. Studios and content producers make contracts with online video distributors such as Netflix, HBONow, Hulu, and Amazon Prime to aggregate content. Consumers purchase videos through subscriptions or on an à la carte basis from the OVDs.

However, before consumers watch it, a video must be transferred through the internet service providers (ISPs). Then, the video must be displayed on a device—whether it be a tablet, computer, or digital media player (DMP), such as ROKU or AppleTV, or a Smart TV which has the DMP integrated within the TV. For example, Samsung Smart TV users can download a

Netflix, Amazon, Hulu or HBO Now app, which allows them to stream the services directly to their TV.

Some firms are integrated on multiples levels. For example, Google controls YouTube Originals, YouTube, Google Fiber, Chromecast and Android TV.

	Studio	OVD	ISP	Device
Netflix	Netflix	Netflix		Control of Smart TVs though vertical restraints.
Google	YouTube Originals	YouTube/ YouTube Premium	Google Fiber	ChromeCast /Android TV
AT&T/Time Warner	HBO Warner Bros.	HBO Now	AT&T/Dish	
Comcast	NBC Universal Universal Studios	Hulu (⅓)	Comcast/Xfinity	
Amazon	Amazon Studios	Amazon Video		Fire TV

Table 1. Vertical Integration in Online Video by Level and Firm.

B. OVDs are the key distributors and gatekeepers of content.

In an interview with ReCode, Assistant Attorney General Delrahim distinguished Netflix and Amazon from ISP-studio conglomerates because “they’re not vertically integrated in what we’re talking about.” He argued that “they still need to go through a cable pipe or a wireless network to be able to access, which again gets back to the network neutrality issue. They still need to get through them to get to us."[4]

He explained this difference led Netflix to "invest and create this new content area, as with Amazon, to go and produce and compete. They had to pay that producer that produces, whatever, 'House of Cards' for $5 million dollars an episode, and they had to compete with HBO and NBC in order to buy that and put it on their network. They paid more. That's all that means. But if they get throttled ... So the power is there to do so when you're somebody who is competing with them, and the incentive will be there. And so that isn't vertical integration"[5]

Respectfully, while he correctly described how joint ownership of media and distribution functions in the production of OVD content, it is vital to remember that OVDs are vertically integrated. Indeed, Netflix's production and distribution of the series, "House of Cards," has been described in the D.C. Circuit as a textbook case of vertical integration.[6]

While the most common nomenclature for entities such as Netflix and Amazon Prime is Subscription Video on Demand, these companies are often also classified as "Online Video

[4] Eric Johnson, *Full Q&A: Assistant Attorney General Makan Delrahim talks antitrust on Recode Decode*, RECODE (Sep. 1, 2018), https://www.recode.net/2018/9/1/17807096/makan-delrahim-antitrust-att-time-warner-donald-trump-kara-swisher-recode-decode.
[5] *Id.*
[6] Comcast Cable Communs., LLC v. FCC, 717 F.3d 982, 990 (2013) (Kavanaugh, J., concurring) (describing Netflix's ownership of "House of Cards" is a prototypical—if benign—example of vertical integration).

Distributors."[7] Netflix has described itself as an "Online Video Distributor" in FCC filings[8], and the Justice Department has described it as such in antitrust complaints.[9]

The phrase "Subscription Video on Demand" was not created because these services were not distributors, but to distinguish OVDs such as Netflix, Hulu, and Amazon from a la carte video-on demand (VOD) services like Vudu and Cinema Now, advertising supported video on demand (AVOD) like TubiTV and PopcornFlix, and social media streaming services such as YouTube, Twitch, and Periscope.[10]

Furthermore, FCC Chair Ajit Pai recently wrote that "tech giants serve[] as gatekeepers of online content," because "recent experience shows that so-called edge providers are in fact deciding what content [consumers] see."[11] With the exclusion of a few services such as HBO Go and FXX, the vast majority of online content goes through dominant OVDs such as Netflix and Amazon.[12]

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[7] See, e.g., Time Warner Cable Inc. v. FCC, 729 F.3d 137, 143, (2d Cir. 2013) (describing Netflix as an "online video distributor").

[8] See, e.g., COMMENTS OF NETFLIX, INC. IN THE MATTER OF ANNUAL ASSESSMENT OF THE STATUS OF COMPETITION IN THE MARKET FOR THE DELIVERY OF VIDEO PROGRAMMING, MB Docket No. 07-269 (June 8, 2011), available at https://ecfsapi.fcc.gov/file/7021686451.pdf.

[9] See , United States v. Charter Comm., Inc., at *2. case no. 1:16-cv-00759 (D.D.C., Apr. 25, 2016), available at https://www.justice.gov/opa/file/844796/download 2 (describing "early OVDs, such as Netflix").

[10] See Natalie Klym, *The Ambiguity of Disruption: Discovering the Future of Video Content* at i, M.I.T. COMM. FUTURES PROG. (Sep. 2015), available at http://cfp.mit.edu/Ambiguity%20of%20Disruption%20Klym%20Sept%202015.pdf ("While all OVDs are considered "entrants" we distinguish between two categories: 1) those that compete on quality by offering comparable content choices (e.g., Netflix, Amazon, Hulu) and 2) those that compete on innovation by offering entirely new forms and formats of visual media (e.g., YouTube, Snapchat, Periscope).").

[11] Ajit Pai, *What I Hope to Learn from the Tech Giants*, FCC (Sep. 4, 2018), https://www.fcc.gov/news-events/blog/2018/09/04/what-i-hope-learn-tech-giants.

[12] See *Klym* at ii (noting that "Netflix, Amazon, and Hulu: are frequently called the "'Big 3' OVDs")

C. Netflix's market penetration in the OVD Market gives it market power

Seventy-six percent of over-the-top (OTT) TV households have Netflix subscriptions, according to comScore.[13] Nielsen estimates Netflix is in 58% of all TV households.[14] This makes Netflix nearly three times larger than Comcast or DirecTV in household subscriber base.[15] Due to its non-exclusivity, it's hard to define what Netflix's market share, but by any definition it is far greater than any of the studios at issue in the 1940s.

Regardless of how you divide this market, Netflix has the ability to compel the device makers which integrate its service to accept anti-competitive terms which harm Netflix's competitors (demonstrated in subsection E), which is prima facie evidence of market power.

D. Netflix uses its market power in the OVD market to exclude competitors in the Connected Device Market, which entrenches its dominance in the OVD market and benefits itself in the studio market.

Vertical integration does not always present anti-competitive concerns. Scholars have pointed out many benefits in the joint ownership or agreements between studios and OVDs, such as

- Allowing OVDs to "negotiate lower prices in licensing deals which benefits consumers."[16]
- Helping OVDs "create strong connection between their content and their platform brand" which increases customer loyalty and allows for cross-promotion.[17]
- Integrating companies can use their OVD data to produce from more appealing original content.[18]

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[13] Mike Rich, OTT Breaks Out of Its Netflix Shell, comScore (Apr. 10, 2017), https://www.comscore.com/Insights/Blog/OTT-Breaks-Out-of-Its-Netflix-Shell.

[14] Brian Wieser, SVOD Services June Data - Hulu Accelerates Again, Pivotal Research Group (July 9, 2018).

[15] Daniel Frankel, The top 7 cable, satellite and telco pay TV operators in Q4 2017: Ranking Comcast, DirecTV, Charter and more, Fierce Video (Mar. 1, 2018), https://www.fiercevideo.com/cable/top-7-cable-satellite-and-telco-pay-tv-operators-q4-2018-ranking-comcast-directv-charter-and.

[16] Brent Skorup & Adam Thierer, Uncreative Destruction: *The Misguided War on Vertical Integration in the Information Economy*, 65 FED. COMM. L.J. 157, 172 (2013)

[17] MICHAEL D. SMITH &RAHUL TELANG, STREAMING, SHARING, STEALING: BIG DATA AND THE FUTURE OF ENTERTAINMENT, 179 (2016).

Yet these benefits do not mean that vertical integration cannot lead to abusive practices. In 2013, Netflix commissioned Danger Zone Consulting to assess "the state of the online entertainment streaming industry as well as its future direction, investigating both threats and opportunities."[19] Danger Zone advised that, "vertical integration" defined as "combining the content creation, aggregating and distribution aspects of media-entertainment business . . .may be the key to attracting more subscribers and grabbing more market share in the home entertainment industry." The consultants further explain that,

> Netflix has its core businesses in aggregation and distribution, but creating more original content has two advantages: Firstly, the current popularity of Netflix Originals legitimizes its position in the media content field, and makes it more visible and more established as a big player in the burgeoning online media entertainment industry. Secondly, creating more content would attract more subscribers, since Netflix Originals are only available through Netflix.[20]

Joint control over the production and distribution of video continues to be a major antitrust concern in the digital era. The potential for a cable company or ISP to promote its own content has been central to the net neutrality debate, as well as the Comcast-NBC and AT&T-Time Warner mergers. As the Justice Department argued in its AT&T-Time Warner appeal, "AT&T [might] use Time Warner's valuable programming to raise its rival distributors' costs for obtaining programming."

Netflix engages in this very behavior by using its market power as a distributor to prevent rivals from obtaining the data necessary to compete. Several suppliers of video content license their video to Netflix and have also launched their own direct-to-consumer steaming services, including A&E Networks, AMC, CBS, Disney, Warner Bros. However, as a condition to

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[18] *Id.* at. 5-6.
[19] Jonathen Lew, et. al., Netflix, Inc. Client Report at 3, Danger Zone Consulting (2014), https://studylib.net/doc/8182702/netflix--inc.-client-report.
[20] *Id.*

licensing this material, Netflix will suppress the availability of information the video market place requires to make equitable commercial agreements or develop alternative streaming services that benefit consumers.[21]

Furthermore Netflix has coerced device makers and other partners to block any form of data collection will better inform market participants.

E. Controlling Viewer Data Allows Netflix to shut out other OVDs and Studios

In order to adequately compete, a studio needs data on the popularity of the films they produce. This data is necessary for marketing, acquiring new customers, promoting new content, and deciding what shows and films to produce, purchase and distribute through Netflix or its alternatives (including the studio's own services).

In 1949, as with the present, studios could look to ticket receipts from the movie theatres to determine the popularity of a theatrical. However, in 1940s tracking radio and later television broadcasts was far less precise. In 1942, AC Nielsen began tracking a small sample of households' listening patterns using a device to record their broadcasting data. AC Nielsen expanded to television in 1950. AC Nielsen would sell this data to broadcasters and advertisers. Critically important for the market to function, all broadcasters, producers, and advertisers had access to the same data to make decisions on how much to pay for advertising, what shows to produce, how much to pay actors, and how to market and distribute their content.

Today, Connected Devices, OVDs, ISPs, and web browsers all have the technological capacity to track who uses and watches them—allowing integration of content production and viewing data collection. Vertically integrated platforms such as Netflix and Amazon can use their own data to help produce shows. Other studios that rely on third parties, such as Nielsen,

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[21] SMITH & TELANG, *supra* note 17 at 144 (2016).

Luth Research, Comscore, Samba TV, and Alphonso, record digital media usage but lack the best access to the most revealing data.

Control of consumer data is crucial for Netflix to maintain its dominance. The company famously revolutionized data analytics for content production with its signature show “House of Cards.” The company used data to "predict whether a TV show will be a hit with audiences before it is produced" by using "seventy thousand attributes of movies and TV shows, some of which it drew on for the decision whether to create it."[22] This data allows it to both budget shows and help avoid the cost of investing in failed pilots.

However, data is even more important for distributing content. Netflix CEO Reed Hastings stated that his company’s “secret” is “that the website adapts to the individual’s taste.”[23] As Michael D. Smith and Rahul Telang note in their book, *Streaming, Sharing, Stealing: Big Data and the Future of Entertainment*, “[b]y keeping proprietary control over their data on customers, the big platform companies are able to use their data to evaluate the potential market for original content, and use their direct connections with customers to do highly targeted, preference-based marketing—something that can’t be done with Nielsen estimates and focus-group data.”[24] They quote Netflix spokesman Jonathan Friedlan, “The real advantage we have is not in picking the perfect content, it is in marketing it more efficiently.”[25]

Netflix does everything in its power to prevent third parties from learning its viewing data. Theodore A. Sarandos, Netflix's Chief Content Officer responded to questions about whether Nielsen and other third party apps can access its data and said "it is very difficult to

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[22] Thomas H. Davenport and Jeanne G. Harris, *How Netflix Uses Analytics to Thrive*, HUFFINGTON POST (Dec. 8, 2017), https://www.huffingtonpost.com/entry/how-netflix-uses-analytics-to-thrive_us_5a297879e4b053b5525db82b.
[23] *Id.*
[24] SMITH & TELANG, *supra* note 17 at 145.
[25] *Id.*

sample Netflix."[26] He previously mocked Symphony Advanced Media as having "remarkably inaccurate" Netflix data, and they soon filed for bankruptcy, depriving the market of its insights.[27]

Netflix encrypts its data to prevent ISPs and web browsers from tracking the use, and it does not share any data with third parties, even the studios whose material it licenses and who naturally want information on its own show.

While Netflix has a right to its own data and hardly constitutes an "essential facility" with affirmative sharing obligations, Netflix goes a step too far by using its market power in the OVD market to require that connected devices not use available data.

Many connected devices have apps which allows them to determine what shows are watched based on the pixels—and can thus track any video format whether it's a DVD, Cable, Broadcast, or streaming video. Netflix will not allow these devices to use its app unless they agree to block these apps from tracking Netflix. The details of these contracts are not publicly known, but the *New York Tim*es reported on these apps, "Netflix said it had agreements with smart TV manufacturers that precluded third-party tracking."[28]

The Supreme Court defines market power as "the power 'to force a purchaser to do something that he would not do in a competitive market.'"[29] In a competitive market, Smart TV manufacturers would want to have the option to give their consumers the ability to do this.

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[26] SEEKING ALPHA, NETFLIX' (NFLX) MANAGEMENT PRESENTS AT 5TH ANNUAL MOFFETTNATHANSON MEDIA & COMMUNICATIONS SUMMIT CONFERENCe (Transcript) (May 14, 2018), https://seekingalpha.com/article/4173988-netflix-nflx-management-presents-5th-annual-moffettnathanson-media-and-communications-summit?part=single.
[27] Yohana Desta, *Company That Kept Trying to Guess Netflix's Ratings Finally Gives Up,* VANITY FAIR (Apr. 19, 2017), https://www.vanityfair.com/hollywood/2017/04/netflix-ratings-symphony.
[28] Sapna Maheshwari, How Smart TVs in Millions of U.S. Homes Track More Than What's On Tonight, NY Times (July 5, 2018), https://www.nytimes.com/2018/07/05/business/media/tv-viewer-tracking.html.
[29] Eastman Kodak Co. v. Image Technical Services, Inc., 504 US 451, 464 (1992) (Jefferson Parish Hospital Dist. No. 2 v. Hyde, 466 US 2, 14 (1984)

As discussed above, Netflix has made it explicitly clear that they do not want their competitors to have access to their consumer data because it gives them an "advantage" in both content creation and marketing.

Like all forms of behavioral tracking, the recognition of pixels on screen raise serious privacy concerns. The FTC filed a complaint against the Smart TV manufacturer Vizio for inadequately disclosing the tracking, which led to a $2.2 million consent decree.[30]

However, Netflix's refusal applies to all connected devices, regardless of how or whether they disclose their privacy practices. Indeed, in the wake of the Vizio decree, most manufacturers are far more transparent than consumers, requiring users to clearly opt-in. Samba TV, which prompted Netflix's comments to the *New York Times*, only tracks data once users affirmatively agree to a statement which notes the app will provide: "recommendations based on the content you love. Connect your devices for exclusive content and special offers. By cleverly recognizing onscreen content, Samba Interactive TV lets you engage with your TV in a whole new way."[31]

In contrast, when a user signs up for Netflix—without even clicking a box—they are forced to consent to its 3,429 word "Privacy Statement."[32] Netflix has used its official Twitter account to make light of specific users' viewing history, tweeting, "To the 53 people who've watched A Christmas Prince every day for the past 18 days: Who hurt you?"[33]

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[30] VIZIO to Pay $2.2 Million to FTC, State of New Jersey to Settle Charges It Collected Viewing Histories on 11 Million Smart Televisions without Users' Consent, FVIZIO to Pay $2.2 Million to FTC, State of New Jersey to Settle Charges It Collected Viewing Histories on 11 Million Smart Televisions without Users' Consent, FTC (Feb. 6, 2017), https://www.ftc.gov/news-events/press-releases/2017/02/vizio-pay-22-million-ftc-state-new-jersey-settle-charges-ithttps://www.ftc.gov/news-events/press-releases/2017/02/vizio-pay-22-million-ftc-state-new-jersey-settle-charges-it.

[31] Maheshwari, *supra* note 28.

[32] Set up your payment, Netflix, https://www.netflix.com/signup/payment.

[33] Chris Sims, *Netflix calls out 53 'Christmas Prince' viewers and Twitter claps bac*k, USA TODAY (Dec. 12, 2017) https://www.usatoday.com/story/news/nation-now/2017/12/12/netflix-calls-out-53-christmas-prince-viewers-and-twitter-claps-back/943536001/.

While Netflix does not give data to its competitors, it will give information to Third Parties, including:

> "Promotional offers: We may offer joint promotions or programs that, in order for your participation, will require us to share your information with third parties. In fulfilling these types of promotions, we may share your name and other information in connection with fulfilling the incentive. Please note that these third parties are responsible for their own privacy practices."[34]

The FTC should enforce strong and consistent privacy rules for Smart TVs, and Netflix has a legitimate interest in protecting its users' data. However, in light of its own policies, the company cannot justify a blanket ban on allowing their users to voluntarily, opt-in to share their data on privacy grounds.

Indeed, with the massive growth in number of on demand video choices and fragmentation in providers, consumers face increasing difficulty remembering which provider offers their favorite shows.[35] Netflix's dominance of the OVD market and control of third party devices stifles the utilities which benefit consumers. For example, Apple TV and Samsung's video discovery services could not include bookmarks or recommendations of Netflix videos because of Netflix's anti-competitive approach to licensing its application to manufacturers. While manufactures normally provide tools for OVDs in universal search and discovery utilities on the device, Netflix's dominance enables it to block discovery services and prevent these utilities from including Netflix videos.

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[34] Privacy Statement, NETFLIX (last updated May 11, 2018), https://help.netflix.com/legal/privacy.
[35] Trey Williams, Do viewers care what networks air their favorite TV show?, Marketwatch (Oct. 12, 2017), https://www.marketwatch.com/story/do-viewers-care-what-networks-air-their-favorite-tv-show-2017-10-12.

II. Are existing antitrust laws, including, the precedent of *United States v. Paramount*, and its progeny, sufficient or insufficient to protect competition in the motion picture industry?

As detailed above, the biggest threat to competition in the motion picture industry comes from companies using their market power across the multiple layers of production and distribution. While the relevant antitrust statutes affecting vertical restraints have not significantly changed since *Paramount*, courts and regulators have scaled back rules against vertical restraints, particularly those involving price discrimination, monopoly leveraging, and exclusive detailing.[36] At first glance, the legal basis for curbing this conduct appears weaker than it was in the 1940s. But, existing antitrust law gives the Justice Department and Federal Trade Commission ample authority to stop abusive vertical practices, especially those which entrench a dominant market actor against inter-brand competition. In short, modern antitrust jurisprudence on vertical restraints is consistent with important principles in *Paramount.*

Paramount's critics portray its ruling as based on economically ignorant and outdated reasoning, which only Antitrust "hipsters" would embrace. Law professor and former FTC Commissioner Joshua Wright and Judge Douglas Ginsburg argue that older consent decrees have been unfairly immune from "the shift in doctrine from rules of per se illegality governing restraints such as exclusive territories, tying, and resale price maintenance to a rule of reason approach based upon the expected welfare effects of the restraint at issue."[37] They credit this shift for "allowing efficient vertical contracts and forms of competition previously condemned

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[36] See generally J. Thomas Rosch, *Developments in the Law of Vertical Restraints: 2012* at 6, available at https://www.ftc.gov/sites/default/files/documents/public_statements/developments-law-vertical-restraints-2012/120507verticalrestraints.pdf ("Like the Supreme Court, the U.S. antitrust enforcement agencies have embraced the view that the rule of reason should be applied to business methods and practices involving the use of vertical maximum or minimum RPM.").

[37] Joshua D. Wright & Douglas H. Ginsburg, The Economic Analysis of Antitrust Consents, 46 Eur. J. L. & Econ. 245 (2018).

under the antitrust laws, was the direct result of courts adapting to changes in our economic understanding and empirical knowledge concerning the competitive consequences of vertical restraints."[38] Wright and Geoffrey Manne had previously elaborated that *Paramount* was grounded on the "problematic economic theory" of monopoly leveraging, which they argue can have procompetitive justifications.[39]

However, the consent decrees did not rely on vague opposition to bigness or any vertical restraint. Dissolving the joint ownership of studios and distributors was not based on the idea that vertical integration is inherently bad, but reflected a structural remedy to address specific anticompetitive practices that the studios and theatres engaged in.

The final decrees were made after the Supreme Court explicitly rejected the notion that "vertical integration of producing, distributing and exhibiting motion pictures is illegal *per se."*[40] The Court evaluated each restraint based on "(1) the purpose or intent with which it was conceived, or (2) the power it creates and the attendant purpose or intent to determine if they were "unreasonable restraints of trade within the meaning of the Sherman Act." In evaluating each restraint, it carefully considered numerous factors including:

- "if it was a calculated scheme to gain control over an appreciable segment of the market and to restrain or suppress competition, rather than an expansion to meet legitimate business needs."
- "the nature of the market to be served"
- "the leverage on the market which the particular vertical integration creates or makes possible."[41]

[38] *Id*.
[39] Geoffrey A. Manne, Joshua D. Wright, Innovation and the Limits of Antitrust, 6 J. Competition L. & Econ. 153 (2010).
[40] 334 U.S. at 173-74.
[41] *Id.* at 174 (internal citations omitted).

While more recent case law and agency practice has expanded and refined how to answer these questions, these are still the factors considered in vertical restraints. In *Continental T. V., Inc. v. GTE Sylvania Inc*., the seminal case against applying per se rules to non-price vertical restraints, the Court similarly considered "the restraint's history, nature, and effect" to determine whether the defendant engaged in an "unreasonable restraint on competition."[42] *Leegin Creative Leather Prods. v. PSKS, Inc*., which ended *per se* rules on retail price maintenance, similarly reasoned, "While vertical agreements setting minimum resale prices can have procompetitive justifications, they may have anticompetitive effects in other cases."[43]

Even under a Rule of Reason analysis, a restraint currently only survives if "it is reasonably necessary to achieve the legitimate objectives proffered by the defendant."[44] Nonprice vertical restraints are illegal if a plaintiff shows the conduct has "an *actual* adverse effect on competition as a whole in the relevant market" and the defendant cannot "establish the pro-competitive redeeming virtues of the action" *or if* "that the same pro-competitive effect could be achieved through an alternative means that is less restrictive of competition."[45]

Paramount explained that "the chief argument at the bar is phrased in terms of monopoly of exhibition." Some may question whether the decision defined markets such as "monopoly in the first-run phase of the exhibition business," or whether the conduct among horizontal competitors was a conspiracy. While the factual situation in the movie business has changed dramatically and while we can question whether the Court properly applied the facts to the principles it enumerated, *Paramount's* underlying concerns remain.

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[42] 504 US 451, 483 (1992).
[43] 551 U.S. 877, 892 (2007)
[44] United States v. Brown Univ. in Providence in State of R.I., 5 F.3d 658, 678–79 (3d Cir. 1993).
[45] *Clorox Co. v. Sterling Winthrop, Inc*., 117 F. 3d 50, 57 (2d Cir. 1997).

Further, monopoly leveraging is not necessary to find anticompetitive vertical discrimination in the 1940s or today. It is true that not all of the rules *Paramount* applied remain good law—and the Court partially relied upon rules against monopoly leveraging.[46] Some Supreme Court dicta has suggested that a claim for monopoly leveraging must include threats to monopolization in the secondary market.[47] Thus, *Paramount*'s finding that it was "unnecessary to decide whether the defendants had conspired among themselves to" discriminate against independent theatres would likely be unsustainable under current law.[48]

However, many discriminatory vertical practices had the ability to help entrench the studios against its horizontal competitors. For example provisions such as "excluding foreign pictures and those of independent producers" restricted competition at the upstream level, and thus would not need to rely on monopoly leveraging.[49] Similarly, in *Eastman Kodak Co. v. Image Tech. Servs*, the Court distinguished the intrabrand integration in *GTE Sylvania,* by noting that the Kodak could enhance its market power in the upstream market with restraints in the aftermarket.[50]

Thus the vertical discrimination which affected interbrand competition in *Paramount*, such as restricting theatres from showing independent movies, could still be found illegal under modern case law. Similarly, when Netflix leverages its OVD power to prevent consumers from

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[46] See 334 US at 174 (considering the "leverage on the market which the particular vertical integration creates or makes possible.").
[47] See Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 415 fn. 4 (2004) ("To the extent the Court of Appeals dispensed with a requirement that there be a 'dangerous probability of success' in monopolizing a second market, it erred."). Some dispute whether this necessarily requires monopolization at both levels. See e.g., *Monopoly leveraging*, Holmes & Mangiaracina, ANTITRUST LAW HANDBOOK § 3:1 (noting that "leveraging presupposes anticompetitive conduct' might be construed as conceding the possible existence of monopoly leveraging as a discrete offense under § 2, provided that the defendant's conduct poses a meaningful threat of higher prices, reduced output or other actual market injury in the second market indicative of the exploitation of monopoly power").
[48] 334 US at 159-60.
[49] *Id.* at 160.
[50] 504 U.S. 451, 501-02 (1992).

voluntarily sharing its data from Smart TVs, Netflix prevents other OVDs from competing against Netflix.

III. **Conclusion**

The basic anticompetitive concern that motivates the Paramount Decrees was "the vertical combination of producing, distributing, and exhibiting motion pictures." At the time, movie studios produced pictures, while theatres distributed and exhibited them. The Paramount Decrees affected vertical combinations beyond mergers. It prevented studios form using their discriminatory provisions.

This basic principle is still very much alive. The Justice Department recently applied it in its ongoing litigation over the AT&T Time Warner Merger, and should consider further applying it to anticompetitive conduct by dominant OVDs, of which Netflix is largest. A device in the living room, connected to the Internet and integrated with Netflix is the movie theater of the current era. Its also one that is heavily and unfairly designed and controlled by Netflix. Its contracts with Smart TV and other device makers employ the same type of discriminatory provisions found illegal in *Paramount.*

Thus, while the specific factual and industry predicates of *Paramount* may need revision, its basic concerns about vertical foreclosure and anticompetitive behavior remain very much alive. Whether the Department keeps, modifies, or abandons the Consent Decrees, it must maintain the tools necessary to protect consumers from anticompetitive vertical restraints in the motion picture industry.