

Comment of the Open Markets Institute on the Paramount Decrees

The Open Markets Institute is a non-profit organization dedicated to promoting fair and competitive markets. It does not accept any funding or donations from for-profit corporations. Its mission is to safeguard our political economy from concentrations of private power that undermine competition and threaten liberty, democracy, and prosperity. The Open Markets Institute regularly provides expertise on antitrust law and competition policy to Congress, journalists, and other members of the public. Vigorous enforcement of the antitrust laws against mergers and monopolies and strong antitrust remedies are essential to protecting the U.S. economy and democracy from concentrated private power. The Paramount decrees maintain separation between the production and distribution of films and promote open competition in both markets.

We write to oppose substantial modification to the Paramount decrees. Since 2017, the most significant action taken by the Department of Justice Antitrust Division is the DOJ's challenge to the AT&T-Time Warner merger. We agree with the general concern that the combined entity could use its power over both content creation and content distribution to exploit consumers, as well as rival distributors and content creators. Consistency would require the Department of Justice to not only keep the Paramount decrees in place, but to work towards separation of content and distribution in the increasingly vertically integrated existing movie business.

The Paramount decrees were implemented to address a similar concentration of power. They were a response to the market position of the Big Five studios (Paramount, MGM, Warner Bros., 20th Century Fox, and RKO Pictures), and their control over the postwar movie industry. From the writers and directors that created the films to the theaters that showed them, the Big Five controlled each step of the process. To break this oligopoly and establish a more open and competitive market for films, the DOJ sued the major studios for a variety of illegal trade practices, including discriminating against independent theaters and forcing theaters to purchase a group (or "block") of movies from studios, regardless of their quality. The settlement forbids studios from owning movie theaters and prohibits anticompetitive practices such as block-booking. What followed was the end of the so-called "studio system" and immense growth in the number of independent filmmakers and studios.

A DOJ decision to end the Paramount decrees would allow major studios to buy up theater chains and reimpose the anticompetitive practices on filmmakers and consumers, which have been barred for the past 70 years. This would come at a time of increased concentration in the studio, movie theater, and online distribution markets. Disney's recent purchase of 20th Century Fox means that four corporations now control 75 percent of the movie production business. In theaters, three firms now control 60 percent of the domestic market. Online, two companies [dominate](#) the streaming market, where 30 percent of consumers report using Amazon Prime Video and 50 percent report using Netflix as of 2017.

A few days after the announcement that the Department of Justice was reviewing the Paramount decrees, Amazon announced interest in purchasing Landmark Theatres. Landmark only has

around 50 theaters in 27 markets, making it a tiny player in the overall cinema business. So at first glance, an Amazon play for Landmark may look like a minor event. But three factors make the deal of potential concern to both filmmakers and film viewers. First, Landmark has long specialized in showing the sorts of independent and foreign films that mass-market chains like AMC and Loews tend to ignore. Second, in many specific cities, such as Washington, D.C., Landmark entirely dominates the showing of independent and foreign films. On October 1, according to the Hollywood Reporter, a federal judge in the District of Columbia allowed a lawsuit to continue alleging that Landmark Theatres uses its market power “to coerce film studios into exclusive licenses for specialty films.”

Third, Amazon is moving fast to grow its business of producing its own films, including such hits as “Manchester by the Sea” and “The Big Sick.” Many Hollywood observers believe Amazon’s main goal in targeting Landmark is to be able to promote its own films over those of independent filmmakers and rival studios. As one former studio executive put it, Amazon’s move is just “about having a theater chain that will take their movies.”

Amazon’s strategy here appears similar to the one it used to dominate the book market. In that instance, the corporation leveraged its leading position in online sales to build a dominant position in book sales; Amazon sells more than half of all physical books and 90 percent of e-books in the U.S. That, in turn, gave Amazon the ability to largely dictate terms to publishers, which rely on the corporation to get to market. It also allowed Amazon to integrate into publishing (both its own imprints and so-called “self-published” books of independent authors). And it allowed Amazon to integrate into physical retail, with a rapidly growing list of outlets across America, including many in former locations of Barnes & Nobles and Borders.

This interlocking, vertically integrated system of control over both book authors and publishers and book retailing creates numerous conflicts of interest that prevent Amazon from serving as a neutral seller of books. Given Amazon’s immense and growing power over the production and retail of films, the same is likely in store for filmmakers and film viewers.

In announcing the plan to review the Paramount consent decrees, Assistant Attorney General for Antitrust Makan Delrahim said that “much has changed in the motion picture industry since” the Paramount decrees. That’s true. In many key respects, the film industry is more concentrated now than it was in 1948.

The review of the Paramount decision is a key test of the Justice Department’s stated principles in the case the division brought to block AT&T’s takeover of Time Warner. The DOJ has repeatedly claimed that it sued to stop AT&T’s acquisition of Time Warner because the vertical integration of AT&T’s distribution platforms and Time Warner’s news and entertainment content would give AT&T both the power and incentive to manipulate these markets in ways that would harm the interest of viewers and rival distributors and content owners.

Under a consistent application of vertical separation principles, the DOJ should keep the Paramount decrees in place. The principles embodied in the Paramount decrees have served the



moviegoing public, theaters, and filmmakers well for 70 years. Instead of terminating or scaling back these decrees, the DOJ should strengthen their provisions and bring merger and non-merger enforcement actions to stem rising concentration in the production and distribution of films.