DEPARTMENT OF JUSTICE

"As Time Goes By"*: Protecting the Future of Innovation Through Effective Antitrust Enforcement

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Good afternoon, it is a pleasure to join you again this year at the ABA Antitrust Fall Forum, my third as Assistant Attorney General. I am particularly thankful to Maureen Ohlhausen and Svetlana Gans for the hard work they put in organizing this event.

I have been proud to call myself a member of the ABA Antitrust Section for years. I am grateful for the opportunities that it has provided me and my colleagues, as well as young and emerging leaders in the antitrust bar. Regardless of background or political affiliation, the Antitrust Section welcomes members, leaders, and future leaders of our profession with open arms.

Unfortunately, actions in the past and more recently by some acting on behalf of the broader American Bar Association have undermined the important work of the Antitrust Section and sections devoted to other practice areas. I am referring to the ABA system for rating judicial nominees and the recent controversy surrounding the ABA's rating of Ninth Circuit nominee and DOJ colleague Lawrence VanDyke. If reports are true that the ABA judicial nominee rating committee broke its own rules, it paints a disturbing picture of abuse that all of us as lawyers should take seriously and work to address. When it comes to advancing the legal profession on fair and nonpartisan terms, it is my hope that ABA leadership could learn something from the Antitrust Section.

I commend the Section for dedicating this Fall Forum to one of the defining antitrust issues of our era: the role of competition law in policing anticompetitive conduct and transactions in technology sectors and digital markets. It was a great honor to hear today from Deputy Attorney General Jeffrey Rosen, whom I have the pleasure of working alongside, regarding the Department's review of leading digital platforms.

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* DOOLEY WILSON, *As Time Goes By*, in CASABLANCA: ORIGINAL MOTION PICTURE SOUNDTRACK (Rhino Records, 1997).

At the Antitrust Division, our goal in this review is to ensure that digital markets live up to their promise of unlocking incredible value for consumers, including making it easier for consumers to compare, choose, and use products and services through platforms. We do so by protecting against conduct or transactions that harm competition, including competition that takes place on those platforms.

Over the past several years, we have overcome the mindset that somehow digital markets could not or should not be policed by antitrust law. Many cautioned against antitrust enforcement by arguing that monopoly rents in high-tech markets are fleeting, because the markets move so quickly and because barriers to entry are almost always low.

In recent years, the conversation among antitrust practitioners has evolved, in line with the growing public perception that digital platforms that enjoy durable network effects may be acting anticompetitively.

I would like to focus today on the role of innovation within the antitrust framework, and specifically the role of innovation effects in how we analyze potentially anticompetitive conduct.

Put simply, consumers benefit when companies or individuals innovate—whether by increasing internal business efficiency, by improving previous versions of products and services, or by developing new and exciting products that render old ones obsolete. Where anticompetitive conduct or mergers reduce innovation, consumers will fail to reap these welfare gains as the benefits of innovation are delayed.

When enforcers consider bringing an antitrust lawsuit, they often weigh two dueling concerns: overenforcement or "false positives," and underenforcement or "false negatives." Yet it is easy to overlook the fact that false positives and false negatives are not all created equal.

The stakes vary depending on the dimension of competition, or the competitive effect, in question.

Consider price effects. If the government brings suit and enjoins a company practice that is, in fact, *pro*competitive, then that company may be deterred from competing as vigorously and lowering prices in the future. Conversely, if the government fails to act against a monopolist engaging in *anti*competitive conduct, then consumers also may incur higher prices. As economists often note, however, these harmful price effects may be fleeting—especially in high-tech markets—due to monopoly's natural tendency to incentivize greater entry. Absent insurmountable barriers to entry, the thinking goes, consumers will suffer only a short-term deadweight loss due to higher prices, and the market will correct itself.

When it comes to *innovation* effects, however, the cost of under- and over-enforcement may be much more pronounced. That is because innovation is cumulative; one new innovation can unlock an entire array of new innovations. Thus, if antitrust enforcers get an enforcement decision wrong and stifle or delay innovation, consumers not only will miss out on that particular product improvement, they also could lose the opportunity to enjoy dozens of additional new products or services.

To put it more concretely, suppose in the early 2000s a monopolist gained a stranglehold on mobile devices and took unlawful actions to exclude a competitor who had a disruptive touchscreen innovation ready to roll out to the market. Suppose further that no antitrust enforcer intervened and, as a result, there was less innovation, such that smartphones with touchscreen-apps hit the market five years later—in 2012 rather than 2007. How much economic value, including entire business models, would have been delayed during those five years? The amount likely would run into the hundreds of billions of dollars, if not higher.

The same could be true of overzealous antitrust enforcement against business conduct that is not, in fact, anticompetitive. In particular, the Antitrust Division has cautioned against the application of antitrust law to patent disputes where a patent holder is merely attempting to monetize his or her investment in research and development, consistent with the statutory construct under the patent laws. Devaluing patent rights through the threat of antitrust lawsuits and treble damages against unilateral conduct can reduce incentives for the next generation of innovation, depriving consumers of the benefits the U.S. patent system creates.

In high-tech markets undergoing rapid transformation, the byproduct of robust competition is innovation that can benefit American consumers and fuel the next generation of business opportunities and new products. The stakes of getting it wrong are high.

Similarly, it is important for antitrust enforcers to recognize the risks of misapplying antitrust law in *creative* fields that experience significant change. I hope you all were in attendance this morning to hear Deputy Attorney General Rosen's remarks on this very subject. He highlighted how the forces of creative destruction have shaped and reshaped industries: sometimes causing opportunities for new competition, and sometimes enabling entrenched players to exclude competition. He focused in particular on the film industry.

As DAG Rosen observed, the film industry has undergone much transformation over the past few decades. As a Los Angeles native and movie fan, I have always viewed film as a form of art to "inform or delight,"[1] to share culture and to broaden minds, to lift us up to, and to highlight areas for, correction. To know the hopes and disappointments of the past century of human history requires only a look at our great movies. They tell stories central to our existence: stories of family, love, war and… of course, antitrust enforcement. I'm sure we (and probably

[1] HORACE, ARS POETICA (18 or 19 BCE).

only us antitrust lawyers) fondly remember waiting on the edge of our seats for the release of *The Informant* starring Matt Damon, which tells the story of the lysine price-fixing conspiracy.

The movie industry itself features in the Antitrust Division's history of enforcement. As many of you may know, the Division filed an antitrust lawsuit in 1938 alleging several major motion picture companies had engaged in a conspiracy to control the motion picture industry through their ownership of film distribution and exhibition.

After several years of litigation leading to a Supreme Court decision,[2] in 1948, the Justice Department and the defendants agreed to a series of consent decrees, collectively called the "*Paramount* decrees." The five defendants that owned movie theaters were required to divest their distribution operations from their exhibition business. They also were prohibited from both distributing films and owning theaters in the future without court approval. To this day, no major movie distributor owns a significant number of movie theatres.

The *Paramount* decrees also outlawed certain distribution practices. These enduring regulations by decree included: setting minimum prices for movie tickets; bundling multiple films into a single theatre license – known as "block booking"; entering into a single license to cover all theatres in a theatre circuit, known as "circuit dealing"; and granting unreasonable "clearances" – granting exclusive rights to movies for specific geographic areas.

The *Paramount* consent decrees had no termination date and continue to govern how the film industry conducts itself to this day. Since the decrees were entered, however, the movie industry has undergone significant change. Back in the 1930s and 40s, metropolitan areas generally had a single movie theatre with one screen that showed a single movie at a time. Today, not only do our metropolitan areas have many multiplex cinemas showing films from

[2] United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948).

different distributors, but much of our movie-watching is not in theatres at all. Technological advancements, most recently subscription streaming services, have permitted more American consumers to watch movies anywhere they want at any time. Competitive pressures have emerged from unexpected sources. For example, some of you might remember the now-defunct Moviepass, which charged consumers one flat price to see an unlimited number of movies in theaters. This business model was flawed, and this led to effective prices so low that some described it as a "great socialist scheme accidentally implemented by very confused capitalists."[3] Moviepass ultimately exited the market, but nevertheless has affected how some movie theaters are looking at innovation; AMC launched its own monthly flat-free program last year.

These changes illustrate that markets can evolve, and no one can predict with certainty from where and in what form innovation will appear. Once innovation has occurred, however, it would be a mistake for antitrust enforcers to limit the potential for consumer-enhancing innovation. We cannot pretend that the business of film distribution and exhibition remains the same as it was eighty years ago.

Fortunately, to update the *Paramount* consent decrees in light of industry change does not require predicting the future of a dynamic field; antitrust enforcers simply must recognize the changes that have already occurred, as well as business models already deployed in other markets. As Henry Ford once famously remarked, "if I had asked people what they wanted, they would have said faster horses." In this case, antitrust enforcers can see the cars; it thus makes little sense to enforce the law as if we rode horses.

[3] Zach Schonfeld (Sr. Writer, Newsweek), TWITTER (July 30, 2018), https://twitter.com/zzzzaaaaccccchhh/status/1024076554941460481

In response to these changes, the Antitrust Division opened a review of the *Paramount* consent decrees last year as part of our broader initiative to review all legacy antitrust decrees.[4] We invited public comment on whether specific prohibitions of the *Paramount* decrees ought to be updated or eliminated – or whether the decrees should be terminated as a whole. Our inquiry has been to determine whether the decrees remain useful to prevent the original horizontal conspiracy or its recurrence.

We have determined that the decrees, as they are, no longer serve the public interest, because the horizontal conspiracy – the original violation animating the decrees – has been stopped. Along with the passage of time, the *Paramount* decrees have already remedied the effects of the violation, ridding the industry of "all taint" of the horizontal conspiracy and undoing what the conspiracy had achieved.[5] Changes over the course of more than half a century also have made it unlikely that the remaining defendants can reinstate their cartel. Evolution in antitrust law has further made blanket prohibitions of certain vertical restraints inappropriate. Accordingly, the Division finds the consent decrees no longer meet consumer interests.

Today, I am announcing that the Antitrust Division will be asking the court to terminate the *Paramount* consent decrees, except for a two-year sunset period on the bans on block booking and circuit dealing. The sunset period will allow the Defendants and movie theatres a period of transition to adjust to any licensing proposals that seek to change the theatre-by-theatre and film-by-film licensing structure currently mandated by the decrees.

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[4] The Antitrust Division changed its policy in 1979 to include an automatic sunset provision – typically ten years – so that no decree outlives its relevance. Many consent decrees entered prior to 1979 still remain effective, however, so the Division embarked on an initiative last year to review legacy consent decrees still officially on the books.

[5] *Paramount*, 334 U.S. at 148.

To be clear, terminating the *Paramount* decrees does not mean that the practices addressed in them are now considered per se lawful under the antitrust laws. They are not insulated from antitrust scrutiny. Rather, consistent with modern antitrust law, the Division will review the vertical practices initially prohibited by the *Paramount* decrees using the rule of reason. If credible evidence shows a practice harms consumer welfare, antitrust enforcers remain ready to act.

This is a more appropriate role for the Antitrust Division. As filmmaker Martin Scorsese says, "Cinema is a matter of what's in the frame and what's out." Antitrust enforcers, however, were not cast to decide in perpetuity what's in and what's out with respect to innovation in an industry. Our role is instead to weigh evidence-based arguments to *enforce* the antitrust laws – not to act as directors in the marketplace.

As the movie industry goes through more changes with technological innovation, with new streaming businesses and new business models, it is our hope that the termination of the *Paramount* decrees clears the way for consumer-friendly innovation.

Thank you.