WHAT DOES ANTITRUST'S REVIVAL MEAN FOR COPYRIGHT?

by CHRISTOPHER JON SPRIGMAN*

Let me say up front how grateful I am for the opportunity to give the fiftieth installment of the Donald C. Brace Memorial Lecture — a series of lectures on copyright law which has, over its history, featured talks by such luminaries as Melville Nimmer, Barbara Ringer, Pierre Leval, Paul Goldstein, Gerald Gunther, Jane Ginsburg, Jessica Litman, Pam Samuelson, and Richard Posner. In light of my predecessors' eminence, I hope that I will be equal to the task I've set for myself here, which is to offer a bit of analysis, and also, I will candidly admit, a bit of speculation, about what antitrust law's nascent and still uncertain revival might mean for copyright.

INTRODUCTION

I suspect many of you have seen news headlines about the recent federal and state antitrust actions against Google and Facebook. In fact, there are three separate government antitrust actions that have been filed against Google in the U.S., one against Facebook, and possibly more to come against both companies. First, on October 20, 2020, the United States Department of Justice and eleven states filed a lawsuit against Google,[1] alleging that the company used its monopoly in the market for internet searches to preserve its monopolies in both search and online advertising. Specifically, the DOJ Antitrust Division alleges that Google has entered into a series of exclusionary agreements that have the collective

*Murray and Kathleen Bring Professor of Law, New York University School of Law, and Co-Director, Engelberg Center on Innovation Law and Policy. I am grateful to Gloria Phares and Naomi Jane Gray for inviting me to give the Brace Lecture. I want also to thank the leadership and staff of the Copyright Society of the USA for their work to make this event possible, the Emily C. and John E. Hansen IP Institute at Fordham University Law School for sponsoring the event, the Copyright Society's Executive Director Kait Kubat for her help with logistics and technology, and Richard Reimer and Scott Hemphill for comments that helped improve the published version of the talk. Finally, I want to acknowledge my NYU colleagues and fellow Co-Directors of the Engelberg Center on Innovation Law and Policy, Barton Beebe, Rochelle Dreyfuss, Jeanne Fromer, Scott Hemphill, Jason Schultz and Kathy Strandburg, as well as Engelberg Center Executive Director Michael Weinberg, for all they do to make my academic life so rewarding.

[1] *See* Complaint, United States v. Google, Case 1:20-cv-03010 (D.D.C. Oct. 10, 2020), https://www.justice.gov/opa/press-release/file/1328941/download.

effect of locking up the primary avenues through which users access search engines, both by requiring that Google be the preset default search engine on billions of mobile devices and computers and, in many cases, prohibiting preinstallation of a competitor. On December 9, 2020, the Federal Trade Commission and forty-eight states filed suit against Facebook,[2] charging that its acquisitions of Instagram and WhatsApp and its imposition of a series of anticompetitive conditions on software developers in exchange for all-important access to Facebook's API (including conditions that allegedly barred third-party developers from deploying functionality that competes with Facebook), harmed competition and consumers and had the effect of maintaining Facebook's monopoly in social networking. On December 16, 2020, ten GOP-controlled states led by Texas Attorney General Ken Paxton filed an antitrust complaint[3] alleging that Google engaged in a variety of anti-competitive practices to gain and maintain a monopoly in the markets for digital advertisement technologies. The Texas-led lawsuit also alleges that Google and Facebook agreed not to compete with one another in these markets, and cooperated in manipulating online ad auctions. Then on December 17, 2020, a bi-partisan coalition of 35 states led by Colorado's Attorney General Phil Weiser[4] filed a complaint that built on and broadened the DOJ's allegations. The Colorado-led state lawsuit advances broader claims based on Google's alleged deals with competitors like Apple to maintain its position as a default search engine. The Colorado complaint focuses also on allegations that Google uses its dominant marketing tool for advertisements linked to consumers' search terms to thwart competitors in the online advertising markets and also to discriminate against rival search platforms that attempt to specialize in segments like travel or entertainment.

Four major antitrust lawsuits in less than three months is . . . unusual, even judged in the context of life in the United States in 2020. One might be tempted to think that this sudden upsurge in antitrust enforcement is an element of society's gathering push-back against the overweening power of two of America's largest tech companies. And of course, it is, in part. But it's not only that. As I aim to show here, these lawsuits are part of — and indeed likely would not have been possible without—some new think-

[2] *See* Complaint, Fed. Trade Comm'n v. Facebook, Inc., Case 1:20-cv-03590 (D.D.C. Jan. 13, 2021), 051_2021.01.21_revised_partially_redacted_complaint.pdf (ftc.gov).

[3] *See* Complaint, State of Texas v. Google (E.D. Tex. Dec. 16, 2020), https://www.texasattorneygeneral.gov/sites/default/files/images/admin/2020/Press/20201216%20COMPLAINT_REDACTED.pdf.

[4] *See* Complaint, State of Colorado v. Google (D.D.C. Dec. 17, 2020), https://coag.gov/app/uploads/2020/12/Colorado-et-al.-v.-Google-PUBLIC-REDACTED-Complaint.pdf. Plaintiffs in this action also include the District of Columbia, the Commonwealth of Puerto Rico and the Territory of Guam.

ing about antitrust's mission, and how best to pursue it. And, as I'll detail later in this talk, I believe this recent revival in antitrust thinking may, in the longer term, prove to have consequences not just for America's technology companies, but also for what copyright lawyers often refer to as the "content industries."

I. *SOME PERSONAL HISTORY AT THE INTERSECTION OF ANTITRUST AND COPYRIGHT*

I suspect that many copyright lawyers keep up with antitrust developments, perhaps because their work intersects with some of the copyright institutions that have been shaped by past antitrust interventions — for example, the two biggest performance rights organizations, ASCAP and BMI, which have been governed by antitrust consent decrees for the past half-century. For my own part, I follow antitrust because it's where I started: I began my career as an antitrust lawyer, first in private practice in New York City, then in Washington, DC at the U.S. Department of Justice Antitrust Division, and then again at another law firm in DC before moving into law teaching.

I started thinking seriously about copyright the week I arrived at the Antitrust Division. I had been hired, in part, to work on the Microsoft case[5] and lawyers at the Division were being asked to pitch in on various questions. I found the question that was assigned to me to be particularly interesting. The Division's principal monopolization claim against Microsoft was based, in part, on that firm's Windows software licenses with computer manufacturers, referred to as "OEMs."[6] These licenses contained a set of restrictions that, we alleged, were designed to discourage OEMs from installing Netscape or other internet browsers that were rivals to Microsoft's Internet Explorer.[7] So, for example, Microsoft forbade OEMs, as a condition of receiving a license for Windows, from removing the desktop icon for Internet Explorer.[8] We alleged that the Windows license restrictions prevented OEMs from reaching deals to exclusively distribute rival browsers, and also discouraged them from installing rival browsers at all.[9]

My bosses at DOJ were concerned, however, that Microsoft had an ace up its sleeve. As I'm sure most copyright lawyers know, Microsoft's Windows operating system was, and is, protected by copyrights. We ex-

---

[5] United States v. Microsoft Corp., 87 F. Supp. 2d 30 (D.D.C. 2000).

[6] *See* Complaint, United States v. Microsoft, ¶¶ 24-27, No. 98-1232 (D.D.C. May 18, 1998), https://www.justice.gov/atr/complaint-us-v-microsoft-corp [hereinafter "Microsoft Complaint").

[7] *Id.*

[8] United States v. Microsoft Corp., 84 F. Supp. 2d 9, 59 (¶ 203) (D.D.C. 1999).

[9] Microsoft Complaint, *supra* note 6, ¶¶ 24-27.

pected that at some point Microsoft would argue that its copyrights gave it, in effect, a lawful monopoly in the Windows code. And on that basis, we expected that Microsoft would eventually argue that the restrictions in its Windows licenses with OEMs were legally justified because, in imposing them, Microsoft is simply "exercising its rights as the holder of valid copyrights."[10]

Microsoft did in fact make that argument, and the courts rejected it, with the DC Circuit deriding it as "bordering upon the frivolous."[11] What Microsoft was claiming, as the DC Circuit's per curiam opinion framed it, was "an absolute and unfettered right to use its intellectual property as it wishes: '[I]f intellectual property rights have been lawfully acquired,' Microsoft argued, then 'their subsequent exercise cannot give rise to antitrust liability.'"[12] "That is no more correct," the DC Circuit responded, "than the proposition that use of one's personal property, such as a baseball bat, cannot give rise to tort liability. Intellectual property rights do not confer a privilege to violate the antitrust laws."[13]

Admittedly, I am not objective on this point, but the DC Circuit's baseball bat metaphor always struck me as violently correct. Ownership of IP, including copyrights, is not a license to violate the antitrust laws. That much should be uncontroversial. But the real questions about the relationship between antitrust and IP law, including copyright law, are always more subtle than that. One question is what stance antitrust takes toward the market power that ownership of IP, including ownership of copyrights, may convey. Another is what kind of conduct by IP owners is viewed as outside the scope of what the IP permits. And a third is the extent to which antitrust authorities are willing to intervene, either with respect to mergers or single-firm conduct, in areas of the economy where ownership of IP, including copyrights, might create market power. On all of these fronts, antitrust's disposition may be changing, in ways that augur more antitrust intervention in copyright markets, not less.

In the next part of this talk, I'm going to sketch out some history of antitrust, and, in particular, how antitrust's Chicago School consensus, dominant over the past four decades or more, has been challenged by a band of younger so-called "Neo-Brandeisians" who want to expand antitrust's role in our society. It's possible, although by no means at this point certain, that the reigning Chicago consensus may be beginning to break down. I'll get to all of that first.

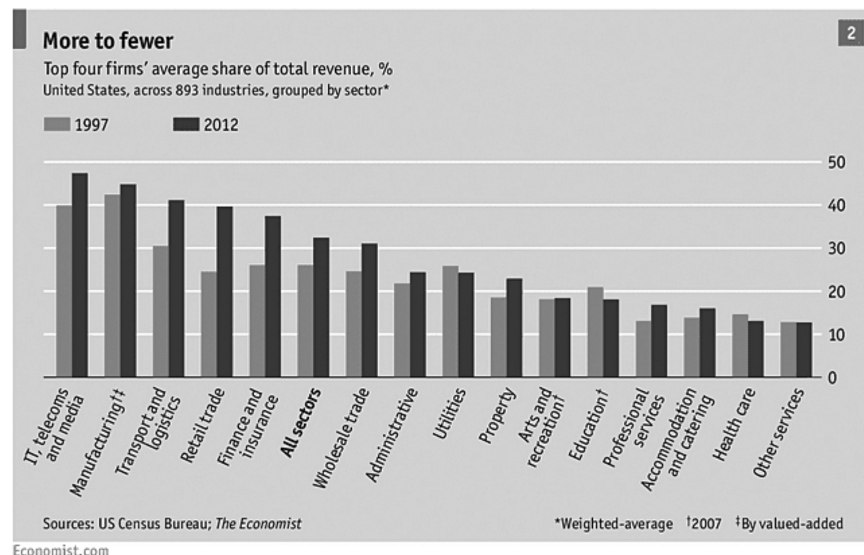
In the final part of the talk, I'll chance a bit of prediction about how antitrust's revival—assuming it happens — might affect copyright. Part of

---

[10] *See* United States v. Microsoft, 253 F.3d 34, 63 (D.C. Cir. 2001).
[11] *Id.*
[12] *Id.*
[13] *Id.*

that discussion will review antitrust's relationship with copyright over the years. Much of that history will be familiar to at least some of you. I want to emphasize that pretty much everything I say in this final part of the talk, aside from the historical part, is speculative, at least to some extent. Antitrust's revival is not a sure thing; we're in the middle of a struggle over whether it's going to happen at all. But for reasons I will explain, I think it's at least reasonably likely that antitrust enforcement is going to get more aggressive. Partly that's because new antitrust thinkers have pointed out ways in which traditional antitrust misses a lot of potentially anticompetitive business conduct by over-focusing on consumer prices, while downplaying the significance of market structure. But partly it's because it looks as if we might have a growing concentration problem in the American economy.

Figure 1



What you see here is a graphic from a 2016 issue of *The Economist*, showing, for a number of important sectors of the U.S. economy, the average share of total revenue collected by the top four firms in that sector.[14] What you see between 1997 (in light blue) and 2012 (in darker blue; note that 2012 is the most recent year of United States Economic Census data that was available in 2016), is a meaningful increase in concentration for many of the sectors shown. *The Economist's* summary of the graphic finds

[14] *See Too Much of a Good Thing*, ECONOMIST (Mar. 16, 2016), https://www.economist.com/briefing/2016/03/26/too-much-of-a-good-thing.

that "[t]he weighted average share of the top four firms in each sector has risen from 26% to 32%" (See the "All Sectors" bar in the chart).[15] For the approximately 900 market sectors that *The Economist* studied in total, two-thirds of them became more concentrated between 1997 and 2012.

Now, we need to keep in mind that none of the broad economic sectors that *The Economist* reviewed are "markets" as antitrust lawyers would define them — the sectors are much broader than that (indeed, the underlying industries that are lumped together as sectors usually don't themselves correspond to antitrust markets either). You'll notice also that none of the sectors in the graphic corresponds precisely to any particular *copyright* market. The "IT, telecoms and media" segment contains a lot of copyright-dependent businesses, but is not entirely comprised of them. The same is true of "arts and education."

For those reasons, the data illustrated in Figure 1 are suggestive of macro trends, rather than developments in any specific properly defined antitrust market for copyrighted content. That said, it's no secret that some very important copyright markets are fairly concentrated. Recent analyses of the U.S. recorded music market, for example, suggest that the top three firms in that market collectively hold a 65% share.[16] Along similar lines, recent analyses of the U.S. music publishing market suggest that the top four firms together maintain a 66% share of that market.[17] Note that in both of these markets, concentration is higher than in the sectors illustrated in *The Economist's* graphic. That isn't in itself necessarily noteworthy — even markets where the top firms control in excess of 60% share can be quite competitive — though, as we'll see, there are characteristics of these copyright markets and others that conceivably could, in light of those levels of concentration, attract antitrust scrutiny. I'll get back to that later.

But first, another data point on competitiveness in the modern U.S. economy. Take a look at Figure 2, which shows data from the Bureau of Economic Analysis, the arm of the U.S. Department of Commerce that provides the federal government's official macroeconomic and industry statistics.[18]

---

15 *Id.*

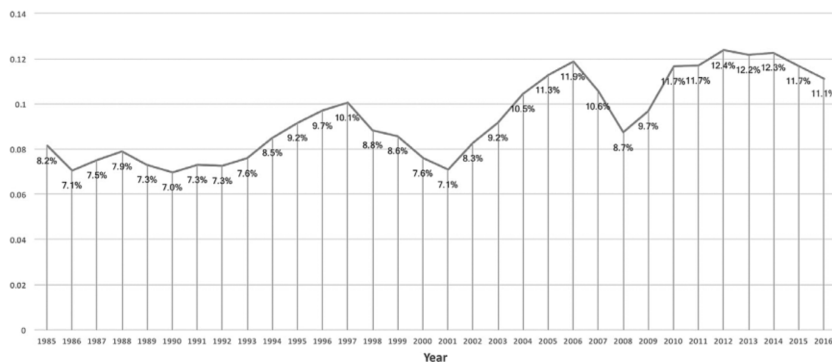
16 *Market Share of Record Companies in the United States from 2011-2019, by Label Ownership*, Statista, ttps://www.statista.com/statistics/317632/market-share-record-companies-label-ownership-usa (last visited Mar. 8, 2021).

17 *Market Share of Music Publishers in the United States from 4th Quarter 2017 to 1st Quarter 2019,* Statista, https://www.statista.com/statistics/983264/quarterly-market-share-of-music-publishers-us (last visited Mar. 8, 2021)

18 For this graph, see Carl Shapiro, *Antitrust in a Time of Populism*, 61 Int'l J. of Indus. Org. 714, 732 (2018).

Figure 2

Corporate Profits/GDP



The graph is tracking over more than three decades the aggregate profit of all U.S. corporations. I'm not offering the graph as a precise measurement of profits of the firms in any particular market, but rather as an illustration of a large trend, which is that over the period there has been an increase in U.S. corporate profits of roughly 50%, from 7-8% of GDP up to 11-12% of GDP.[19] What does that mean? It's not definitive, but the growth in corporate profits, and the fact that they have remained elevated for almost two decades now (with interruption by the Great Recession) suggests that competition, which tends to dissipate excess corporate profits, has softened. The new antitrust activists, those neo-Brandeisians I referred to earlier, note also that the upward trend in corporate profits began not long after the notable loosening of antitrust enforcement brought about under the dominance of Chicago School ideas. I'll turn to a bit of that history now.

II. THE RISE OF CHICAGO ANTITRUST

For the past several decades, U.S. antitrust law and policy has been dominated by ideas generated by lawyers and economists, including Robert Bork,[20] Aaron Director,[21] Edward Levi,[22] George Stigler,[23] Richard Posner,[24] and Frank Easterbrook,[25] associated with the University of Chi-

---

19 *Id.* at 733.

20 ROBERT H. BORK, THE ANTITRUST PARADOX (1978).

21 *See* Sam Peltzman, *Aaron Director's Influence on Antitrust Policy*, 48 J.L. & ECON. 313 (2005).

22 Edward H. Levi, *The Antitrust Laws and Monopoly*, 14 U. CHI. L. REV. 153 (1947).

23 George J. Stigler, *The Economic Effects of the Antitrust Laws*, 9 J.L. & ECON. 225 (1966).

24 RICHARD A. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE (1976).

cago law school and economics department — an approach to antitrust that has been shorthanded as "Chicago School".[26] The foundation of Chicago School antitrust is a faith in the efficiency and resiliency of markets; a commitment which counsels that antitrust intervention, outside of the core activity of cartel-busting, is appropriate only in narrow circumstances.[27] The Chicago School views merger enforcement, as well as civil non-merger enforcement, as advisable only where there is a clear harm, or a strong likelihood of harm, to competition and to consumers in a well-defined antitrust market. And, as we shall see, Chicagoans hold to a narrow understanding of what counts as evidence of competitive harm.

It's important to remember that Chicago antitrust was, at its core, a reaction to a pre-Chicago approach that the Chicagoans perceived as unscientific, lacking clear objectives, and too often based in impressionistic notions of fairness rather than economic efficiency or the welfare of consumers.[28] Chicagoans believed that merger enforcement in particular had been overly aggressive.[29] As proof, they pointed to the Antitrust Division's decision in 1960 to block a merger between two Los Angeles-area grocery chains that would have given the merged firm a 7.5% share of the grocery retailing business in L.A.[30] — a decision upheld in 1966 by the Supreme Court in *United States v. Vons Grocery Co*.[31] The Chicagoans also perceived pre-Chicago antitrust as unjustifiably hostile to vertical integration. In a recent paper, two well-respected Chicago-school antitrust thinkers detail the long federal antitrust campaign against the vertically integrated A&P supermarket chain.[32] A&P is widely credited with in-

[25] Frank H. Easterbrook, *The Limits of Antitrust*, 21 Occasional Papers L. Sch. U. Chi. 1 (1985).
[26] Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. Pa. L. Rev. 925 (1979).
[27] *See* Frank H. Easterbrook, Workable Antitrust Policy, 84 Mich. L. Rev. 1696, 1701 (1986) (The Chicago School "seems to favor little other than prosecuting plain vanilla cartels and mergers to monopoly. Its adherents are reasonably sure that these two things are harmful to consumers (though there are scattered doubters); these incurable skeptics doubt that other intervention is worth the costs.").
[28] *See* Timothy J. Muris & Jonathan E. Nuechterlein, *Chicago and Its Discontents*, 87 U. Chi. L. Rev. 495, 500 (2020) ("[S]cholars associated with the Chicago School challenged long-held but poorly tested assumptions supporting antitrust intervention in particular contexts. By the early 1970s, much of antitrust policy reflected the 'simple market concentration doctrine,' which held that even modest degrees of market concentration were inherently harmful, even in seemingly well-functioning markets.").
[29] *Id.* at 507.
[30] For a more recent example of the continuing criticism of *Von's Grocery*, see Joshua Wright, *Von's Grocery and the Concentration-Price Relationship in Grocery Retail*, 48 UCLA L. Rev. 743 (2001).
[31] 384 U.S. 270 (1966).
[32] Muris & Nuechterlein, *supra* 28, at 507-10.

venting the modern supermarket in the 1920s. With its low prices, wide range of products and penchant for innovation, the chain became the leading retailer of its era. It owned more than 70 factories that produced a wide range of grocery products and eliminated middlemen, which allowed it to keep costs down. At the height of its power, A&P had a 75% share of the U.S. market for groceries. Yet, as the Chicago-school antitrusters described, A&P's popularity triggered a backlash. The government pursued A&P on antitrust grounds for many years starting in the 1940s, egged on, in the Chicago-school view, by competitors that could not compete. After decades of decline, A&P shut its doors in 2015.[33]

As Chicago antitrust has matured, antitrust has come to see consumer harm as something close to a sine qua non for enforcement in all areas other than cartels. Mergers or business conduct that lower prices for consumers are unlikely to be considered anticompetitive. By 1979, the Supreme Court had absorbed the Chicago perspective, declaring in *Reiter v. Sonotone Corp.*[34] that "Congress designed the Sherman Act as a 'consumer welfare prescription,'"[35] citing Robert Bork's seminal Chicago School work *The Antitrust Paradox.*[36] That declaration is, as many have pointed out,[37] an incomplete picture of Sherman's Act's legislative history, which reveals a welter of different justifications, including consumer welfare, protection of small business and farmers, fairness, and concerns with the cultural and political implications of an economy dominated by large firms. It's fair to say that the Chicago School's attractive conceptual simplicity succeeded in spite of, or maybe because of, the normative complexity of antitrust's founding.

I should note that within the general frame of Chicago antitrust, the scope of antitrust enforcement has waxed and waned through various periods. The officials running the Clinton Administration Antitrust Division, for example, were heavily influenced by Chicago thinking but did not subscribe to the narrowest conception of the Chicago model. The case they brought against Microsoft was not about price but about Microsoft's attempt to squash innovations that might threaten their monopoly, and much of the proof in that case related to market structure and intent, as

---

[33] Hayley Fitzpatrick, *A&P Made One Mistake Which Undermined Its Business*, Business Insider (July 22, 2015), https://www.businessinsider.com/ap-made-one-mistake-that-undermined-its-business-2015-7#:~:text=A%26P%20just%20filed%20for%20Chapter%2011%20bankruptcy.&text=its%20parent%20company%2C%20The%20Great,to%20The%20Wall%20Street%20Journal.

[34] 442 U.S. 330 (1979).

[35] *Id.* at 343.

[36] *See supra* note 20.

[37] For a powerful critique, see Christopher Grandy, *Original Intent and the Sherman Antitrust Act: A Re-Examination of the Consumer Welfare Hypothesis*, 53 J. Econ. Hist. 359-76 (1993).

opposed to clearly demonstrated consumer harms. It is also true that recently some Chicagoans have joined with neo-Brandeisians in expressing a desire to strengthen antitrust enforcement.[38]

That said, on the whole and over time, Chicago thinking has substantially narrowed antitrust enforcement. Let me give a couple of examples. First, Chicago's attachment to the consumer welfare criterion makes it skeptical in general of predatory pricing claims,[39] although Richard Posner and others have outlined circumstances under which predatory pricing would in fact be a rational strategy.[40] Under the influence of Chicago thinking, antitrust doctrine has evolved to require proof that a scheme of predatory pricing includes not just below-cost pricing but also a reasonable prospect of recoupment — i.e., that the defendant will be able to acquire monopoly power and to charge a monopoly price for long enough to make the whole scheme profitable.[41] Chicago analysis generally considers recoupment unlikely, because, again, its abiding faith in the efficiency and resilience of markets leads it to expect that, absent special circumstances, the above-market pricing necessary to achieve recoupment will attract new market entrants, who will undercut the would-be predator and torpedo the recoupment effort. So in the Chicago framework, predatory pricing is rarely a rational strategy even for powerful firms, is therefore unlikely to be attempted, and any antitrust action against it more likely, on balance, to deprive consumers of low prices made possible by a firm's superior efficiency.[42]

---

[38] *See, e.g.*, the essays collected in *Unlocking Antitrust Enforcement*, 127 YALE L.J. 1916-2203 (2018), several of which are authored or co-authored by scholars, economists, and former antitrust enforcement officials identified with Chicago antitrust thinking.

[39] Kenneth G. Elzinga & David E. Mills, *Antitrust Predation and* The Antitrust Paradox, 57 J.L. & ECON. 181 (2014).

[40] Posner, *supra* note 26, at 939-40 ("Even without having a well-developed theory of strategic behavior, one can easily imagine circumstances in which predatory pricing, at least in the absence of legal prohibition, would be a plausible policy for a profit-maximizing seller to follow. Suppose that he sells in many markets, and his rivals sell in only one or a few markets each. If he sells below cost in one market, his losses there are an investment that will be recouped with interest in his other markets in the form of more timid competition from the rivals in those markets. Knowing that the multimarket seller can obtain substantial gains from a demonstrated willingness to sell below cost for an extended period of time in one market, the local victim may not think it worthwhile to try to outlast him.").

[41] *See* Christopher R. Leslie, *Predatory Pricing and Recoupment*, 113 COLUM. L. REV. 1695, 1700 (2013).

[42] Posner, *supra* note 26, at 927 ("Selling below cost in order to drive out a competitor is unprofitable even in the long run, except in the unlikely case in which the intended victim lacks equal access to capital to finance a price war. The predator loses money during the period of predation and, if he tries to recoup it later by

Second, Chicago antitrust is similarly skeptical of enforcement in vertical merger cases; i.e., in mergers that involve companies operating at different levels of a product or service supply chain — a recent example would be the merger of Comcast, which owns a cable network, with NBCUniversal, which makes a good bit of the programming that Comcast distributes. Chicago antitrust views vertical mergers are largely benign, posing little risk of foreclosing rivals and potentially unlocking efficiencies that benefit both competition and consumers.[43] So perhaps it was not surprising that Obama antitrust enforcers (who, like their GOP counterparts were heavily influenced by Chicago thinking) approved the Comcast/NBCU merger with conditions that even management at Comcast publicly admitted were not onerous.[44]

I will note that NBC executives were obliged, as a condition of antitrust approval of the merger, to give up their management role in Hulu, the online streaming service.[45] I'll say a bit more on streaming later, but first, let's turn to some of the new antitrust ideas that, unlike Chicago antitrust, got started on the political left, but which, like Chicago antitrust, may eventually prove to have appeal across the political spectrum.

III. THE NEO-BRANDEISIAN RESPONSE

If the current Chicago framework in antitrust is focused on consumer welfare, the neo-Brandeisian approach adopts a much wider perspective. Indeed, as was true for the movement's namesake Supreme Court Justice, Louis Brandeis, this new (or perhaps renewed) approach to antitrust is concerned with the economic and political effects of concentration even where it cannot be shown to lead to higher prices for consumers. Lina Khan, now an associate professor at Columbia Law School, captured the essence of the neo-Brandeisian critique in a 2017 article, written when she

raising his price, new entrants will be attracted, the price will be bid down to the competitive level, and the attempt at recoupment will fail.").

43 *Id.* ("[I]t makes no sense for a monopoly producer to take over distribution in order to earn monopoly profits at the distribution as well as the manufacturing level. The product and its distribution are complements, and an increase in the price of distribution will reduce the demand for the product. Assuming that the product and its distribution are sold in fixed proportions, and thus that the price discrimination analysis is inapplicable, the conclusion is reached that vertical integration must be motivated by a desire for efficiency rather than for monopoly.").

44 Tim Arango & Brian Stelter, *Comcast Receives Approval for NBC Universal Merger*, N.Y. TIMES (Jan. 19, 2011), https://www.nytimes.com/2011/01/19/business/media/19comcast.html (quoting David L. Cohen, executive vice president of Comcast, as stating that "I don't think any of the conditions [imposed in return for antitrust approval of the merger] are particularly restrictive.").

45 *Id.*

was a law student, titled *Amazon's Antitrust Paradox*.[46] Khan wrote that Chicago antitrust, and "specifically its pegging competition to 'consumer welfare,' defined as short-term price effects . . . is unequipped to capture the architecture of market power in the modern economy."[47]

Khan's article focused on Amazon's growing dominance in online retailing. She argued that Chicago antitrust, which measures competition primarily through price and output, cannot recognize the potential harms to competition posed by Amazon's dominance. Specifically, she argued that current doctrine underappreciates the risk of predatory pricing and how integration across distinct business lines may prove anticompetitive:

> [G]auging real competition in the twenty-first century marketplace—especially in the case of online platforms—requires analyzing the underlying structure and dynamics of markets. Rather than pegging competition to a narrow set of outcomes, this approach would examine the competitive process itself. Animating this framework is the idea that a company's power and the potential anticompetitive nature of that power cannot be fully understood without looking to the structure of a business and the structural role it plays in markets. Applying this idea involves, for example, assessing whether a company's structure creates certain anticompetitive conflicts of interest; whether it can cross-leverage market advantages across distinct lines of business; and whether the structure of the market incentivizes and permits predatory conduct.[48]

Khan's attempt to shift antitrust from a narrow focus on consumer welfare to a looser sort of economic structuralism rests on the idea that concentrated markets are likely to lead to anticompetitive forms of conduct — structure is, in a sense, destiny.

> That is because: (1) monopolistic and oligopolistic market structures enable dominant actors to coordinate with greater ease and subtlety, facilitating conduct like price-fixing, market division, and tacit collusion; (2) monopolistic and oligopolistic firms can use their existing dominance to block new entrants; and (3) monopolistic and oligopolistic firms have greater bargaining power against consumers, suppliers, and workers, which enables them to hike prices and degrade service and quality while maintaining profits.[49]

Crucially, in Khan's view, by the time that harms to competition manifest in the form of higher consumer prices — if they ever do — most of the damage to markets is done and will be difficult to reverse.

The bottom line is this: Chicago antitrust has long viewed markets as resilient and likely to self-correct with reasonable dispatch. This foundational belief leads to the view that concentration is not in itself an antitrust problem and not even necessarily a troubling signal. Concentration, in the

---

[46] 126 YALE L.J. 710 (2017).
[47] Id.
[48] *Id.* at 717.
[49] *Id.* at 718.

Chicago view, is likely in most cases to be evidence of the superior efficiency of the dominant firms. This set of priors — which, it should be emphasized, is based more in economic theory than in any broad corpus of empirical work[50] — also leads to comfort with higher levels of market concentration, both in merger policy and in analyzing the unilateral conduct of firms with substantial market power. The neo-Brandeisian reaction — which to be fair, is at this point also largely the product of intuition rather than empirical investigation — is based on a very different view of markets, one skeptical of self-correction, at least in the short- to medium-term. Perhaps most importantly, neo-Brandeisians are convinced that market structure is a powerful, indeed, almost irresistible force in shaping the behavior of firms. That is, that firms in concentrated markets are likely to behave anticompetitively.

I have to reiterate that, at this point, it's far from clear that neo-Brandeisian antitrust is destined to replace the Chicago School as antitrust's dominant paradigm. Chicago possesses the virtue of relative conceptual simplicity; it appeals to lawyers who wish to think of what they do as "scientific" rather than "political" and judges who are comfortable working within a framework that constrains (or at least purports to constrain) their discretion. And speaking for a moment about my own feelings, I'm conflicted about whether a neo-Brandeisian turn would be good for antitrust, for competition, or even for the broader political aims that the neo-Brandeisians seek to serve. On the one hand, I am worried about what looks like increasing levels of concentration in the U.S. economy. And I agree with Lina Khan and others about the limits of Chicago antitrust, and its tendency to ignore some forms of competitive harm that look to me like a real problem. But as someone who was raised in the Chicago tradition — I went to law school at the University of Chicago; I served in a DOJ Antitrust Division in which both Democratic and Republican appointees largely worked within the Chicago consensus — I am wary of antitrust trying to do too much, losing its focus, and becoming a political tool. A political tool, I'll add, that may be misused with grievous consequences.

---

[50] Clinton-era Chairman of the Federal Trade Commission Robert Pitofsky captured this point when he asserted that Chicago School antitrust exhibits "preferences for economic models over facts, the tendency to assume that the free market mechanisms will cure all market imperfections, the belief that only efficiency matters, outright mistakes in matters of doctrine, but most of all, lack of support for rigorous enforcement and willingness of enforcers to approve questionable transactions if there is even a whiff of a defense." *See* Robert Pitofsky, *Introduction*, *in* How the Chicago School Overshot the Mark: The Effect of Conservative Economic Analysis on US. Antitrust 5 (Robert Pitofsky ed., 2008).

We already see a few things that have me worried. First, the Trump Administration's decision in 2018 to sue to block the merger of AT&T and TimeWarner[51] had everyone scratching their heads trying to figure out what was going on behind the scenes. Had the Antitrust Division suddenly grown more attentive to the dangers of vertical mergers? Or, was the challenge a product of Donald Trump's hatred for CNN, which is owned by TimeWarner? I don't want to be misunderstood: I am not laying blame for the confusion around the Trump Administration's AT&T/TimeWarner challenge on the neo-Brandeisians. This trouble, like so many other bad things over the past four years,[52] is squarely the Trump's Administration's doing. My point is more about the problems that inevitably begin to crop up when antitrust takes on a more explicitly political agenda.

There's another thing that worries me: neo-Brandeisian antitrust has been largely focused so far on tech companies and has had comparatively little to say about the rest of the U.S. economy. You can see this in the lengthy antitrust report that the House Democrats released recently.[53] That report, which was prepared with the help of Lina Khan, who was counsel to the Democrats on the House Judiciary Subcommittee on Antitrust, Commercial and Administrative Law, focuses overwhelmingly on tech companies, finding that Apple, Amazon, Google and Facebook needed to be checked and recommending antitrust law reforms that seem aimed mostly at addressing the power of online platforms.

Why this initial focus on tech? Partly because those companies have risen so rapidly, and they exercise substantial market power. But also, I'm willing to bet, because of bipartisan anger at Facebook and (to a lesser extent) Google. Democrats are angry at the role these companies have played in spreading the misinformation that has so badly degraded our politics. Republicans, on the other hand, are angry about the companies' alleged role in suppressing conservative political speech (this view doesn't have any real factual support, but that doesn't mean conservatives are go-

---

[51] For a challenge rejected by the District of Columbia federal district court in June 2018, see United States v. AT&T, Inc., Civil Case No. 17-2511 (RJL) (D.D.C. Jun. 12, 2018), *rejected on appeal*, States v. AT&T, Inc., 916 F.3d 1029 (D.C. Cir., 2019).

[52] *See, e.g.*, Christopher Sprigman, *What's Missing in Current and Former Officials' Reponses to DOJ Antitrust Whistleblower*, Just Security (Jul. 16, 2020), https://www.justsecurity.org/71450/whats-missing-in-current-and-former-officials-responses-to-doj-antitrust-whistleblower/.

[53] *See* United States House of Representatives, Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary, Investigation of Competition in Digital Markets: Majority Staff Report and Recommendations (2020), https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf.

ing to drop it, and some may even believe it). Politicians in both parties must sense that antitrust enforcement directed against the companies would provide an opportunity for payback. But that's not a promising foundation on which to build an antitrust revolution, at least not a coherent and sustainable one.

Now, I want to move to talking about the potential impact of neo-Brandeisian antitrust on the copyright industries. Perhaps this is an odd segue, but I will note that some in the copyright industries have been observing the new antitrust scrutiny of big tech with a measure of barely-concealed joy. One one level, the schadenfreude is understandable: from the perspective of some in the copyright industries who have seen tech companies profit from infringement of copyrighted works, the idea that those companies' business practices may be disciplined by antitrust law is welcome. That said, my unsolicited advice to the copyright industries it to be careful what you wish for. The initial focus of neo-Brandeisian antitrust may be on tech companies, but nothing in the logic of this set of antitrust ideas suggests that an antitrust revival should stop there. The neo-Brandeisian movement is, at the moment, very much on the march. If that continues, we might expect neo-Brandeisian ideas to have some effect on the antitrust thinking of a Biden Antitrust Division and a Federal Trade Commission led by a Biden-appointed Chair. And I'd predict that sooner rather than later those ideas will be shaping antitrust thinking about the copyright industries, and about copyright law. So, let's think about what a renewed antitrust scrutiny of the copyright industries might look like.

IV. NEO-BRANDEISIAN ANTITRUST AND COPYRIGHT: PROS IN THE CROSSHAIRS?

I'll start with an old antitrust issue in the copyright industries that has been very much in the news lately: the antitrust consent decrees that govern the businesses of ASCAP and BMI.[54] These performance rights organizations, as you know, offer blanket public performance licenses to huge portfolios of copyrighted musical compositions. Or, at least many people thought they did. It turns out that the blankets that ASCAP and BMI offer have more than a few holes in them. Let me talk a bit about what that means, how we learned it, and how antitrusters looking at the situation through a neo-Brandeisian lens might react.

[54] For the ASCAP consent decree, see Second Amended Final Judgment, United States v. The Am. Soc'y of Composers, Authors & Publishers, No. 41-1395 (WCC) (S.D.N.Y. June 11, 2001), https://www.justice.gov/atr/case-document/second-amended-final-judgment. For the BMI consent decree, see Amended Final Judgment, United States v. Broad. Music, Inc., 64-Civ-3787 (S.D.N.Y. Dec. 29, 1956), https://www.justice.gov/atr/case-document/bmi-final-judgment.

First, what do I mean when I say that the ASCAP and BMI blankets have holes? Well, you'll remember that back in 2014, those firms asked the DOJ's Antitrust Division to review the antitrust consent decrees that they'd been operating under, with revisions, since 1941.[55] Those consent decrees settled antitrust litigation that the Antitrust Division brought against the PROs that same year.[56] The Division, quite correctly, understood the PROs to be ringmastering a price-fixing arrangement: i.e., the owners of musical compositions that would otherwise compete in licensing markets were getting together, under the auspices of the PROs, to fix the prices at and terms on which they would offer licenses. Price fixing is a per se offense under the Sherman Act;[57] it is one of antitrust's "prime evils" and is illegal without the need to show harm to competition.

So if in 1941 the Antitrust Division saw the PROs as price fixing entities, it also saw that they could have enormous value, if properly restrained. Just imagine the chaos if radio stations or concert venues were forced to license compositions piecemeal, especially in the 1940s. As a consequence, the Antitrust Division didn't seek to eliminate the PROs; it sought to tame them. The consent decrees, which contain provisions designed to harness ASCAP and BMI for pro-competitive ends, reflect this. The firms are required to offer their blanket licenses on a non-discriminatory basis. If the parties are unable to agree on an appropriate price for a license, the decrees provide for a "rate court" proceeding in front of a U.S. district judge.[58]

As you all likely know these decrees remain in effect to this day. Which brings me to 2014, when ASCAP and BMI petitioned the Antitrust Division seeking modification of the existing decrees to allow publishers to partially withdraw works from PROs. Authorizing partial withdrawal would mean that publishers could direct PROs not to license their compositions to digital music users such as Spotify or Apple Music. In place of the blanket license, publishers would license their catalogs directly to the

---

[55] *See* United States Department of Justice, Antitrust Division, Antitrust Consent Decree Review—ASCAP and BMI 2014, https://www.justice.gov/atr/ascap-bmi-decree-review.

[56] United States v. ASCAP, 41 Civ. 1395 (S.D.N.Y. 1941); United States v. BMI, 64 Civ. 3787 (S.D.N.Y. 1941).

[57] *See Guide to Antitrust Laws: The Antitrust Laws*, Federal Trade Commission, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws (last visited Mar. 8, 2021) ("[C]ertain acts are considered so harmful to competition that they are almost always illegal. These include plain arrangements among competing individuals or businesses to fix prices, divide markets, or rig bids. These acts are '*per se*' violations of the Sherman Act; in other words, no defense or justification is allowed.").

[58] *See* Second Amended Final Judgment (ASCAP), IV(C), VI, IX; Amended Final Judgment (BMI), VIII, XIV.

streaming services, but continue to use the PROs to license traditional venues. Note that the PROs did not themselves favor partial withdrawal—they understandably preferred, all else equal, to continue to serve as the publishers' licensing agent for as many uses as possible. But the publishers, feeling that they could get a better rate in direct negotiations with online users (but knowing that direct licensing of the countless traditional "brick and mortar" licensees was impractical), were exerting substantial pressure on ASCAP and BMI to permit withdrawal for certain online uses only. In seeking authorization for partial withdrawal, the PROs were bowing to these demands, however reluctantly.

The PROs' requests followed closely upon a defeat in federal court on the question of partial withdrawal. In that case, *Pandora Media, Inc. v. ASCAP,*[59] the Pandora streaming service petitioned the district court for the determination of a fee on an ASCAP blanket license. In an earlier (2013) opinion, Judge Cote had granted Pandora's motion for partial summary judgment on the issue of the permissibility of partial withdrawal.[60] That opinion held that the ASCAP consent decree prohibited ASCAP from withdrawing from Pandora the rights to perform any compositions over which ASCAP retained any licensing rights. In Judge Cote's later (2014) opinion in that case setting the ASCAP license rate, we learned more about the background facts that had informed the judge's earlier opinion barring partial withdrawal. In particular, we learned that, at least according to Judge Cote, the purpose of the partial withdrawal strategy was to obtain higher rates, and not just from streaming services, but from *all* licensees: "Sony and UMPG justified their withdrawal of new media rights from ASCAP," she wrote, "by promising to create higher benchmarks"[61] that could then be used to push the rates charged by the PROs higher. We also learned that in the negotiations undertaken to implement this strategy, executives from Sony/ATV and Universal made what Pandora interpreted as barely-veiled threats to shut Pandora down by withholding licenses if their higher price demands were not met.[62] At the same time, Judge Cote found, both the publishers and ASCAP refused to provide lists of their repertory in ways that would let Pandora remove those songs, exposing Pandora to potentially crippling copyright infringement liability if the negotiations failed.[63]

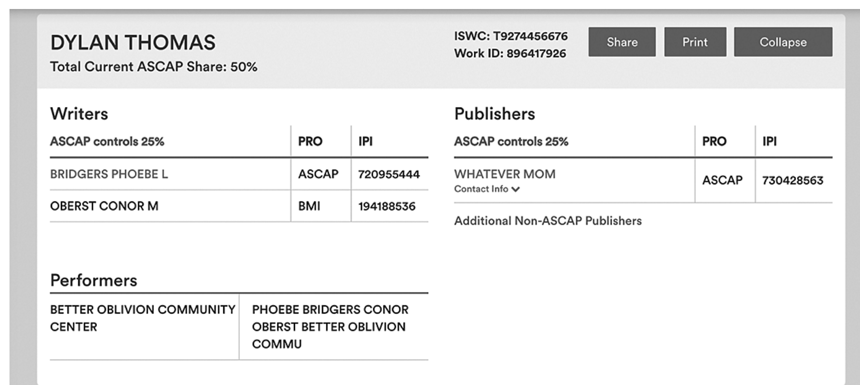
That court defeat, and the information that Judge Cote's opinion released into the marketplace, appears to have prompted the request to

[59] 6 F. Supp. 3d 317 (S.D.N.Y. 2014).
[60] *See In re* Pandora, 12 Civ. 8035 (DLC), 2013 WL 5211927 (S.D.N.Y. Sept. 17, 2013).
[61] *Id.* at 357.
[62] *Id.* at 343.
[63] *Id.* at 344.

DOJ to amend the consent decrees to permit partial withdrawal. But, at least initially, the PROs and the publishers fared no better in DOJ's review process than they had in litigation: indeed, the DOJ's inquiry soon veered off in a direction that neither the PROs nor their publisher clients likely anticipated. In the process of reviewing public comments, the Antitrust Division determined that it needed to better understand how the PROs treated licenses for musical compositions with more than one owner.[64] Specifically, the DOJ heard conflicting views about whether the consent decrees permitted PROs to offer "fractional" licenses. A fractional license grants licensees the right to play multi-owner works only if all the owners or artists are represented by the PRO, meaning licensees might need licenses from multiple PROs for some multi-owner works.

A real-world example may be helpful here. Figure 3 is a screenshot from a search I did on the ASCAP public website for *Dylan Thomas*, the title of a song which appears on the eponymous 2019 debut album by Better Oblivion Community Center, a joint project of singer-songwriters Phoebe Bridgers and Conor Oberst. I love the song, so let's see if I'd be able to publicly perform it if I were an ASCAP "blanket" licensee.

Figure 3

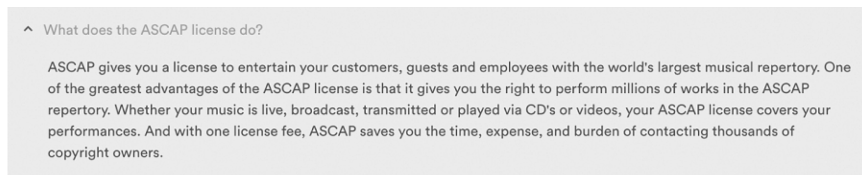


[64] *See* United States Department of Justice, Antitrust Division, ASCAP and BMI Consent Decree Review Request for Public Comments 2015, https://www.justice.gov/atr/ascap-and-bmi-consent-decree-review-request-public-comments-2015 ("In the course of [the DOJ's 2014 inquiry], industry stakeholders recommended additional modifications regarding ASCAP's and BMI's licensing practices related to jointly owned works. Such proposals also have implications for proposed Consent Decree modifications to provide for "partial withdrawal" or "partial grants of rights.". . . Accordingly, in 2015, the Antitrust Division invited interested persons, including songwriters and composers, publishers, licensees, and service providers, to provide the Division with information or comments relevant to the questions described below.").

Nope. Even if I took a blanket license from ASCAP, I don't have authorization to publicly perform *Dylan Thomas*. We've found one of the holes in the ASCAP blanket. A glance at Figure 3 will tell you why. A licensee could not publicly perform this composition without licenses to play the works of both of the co-writers of the band's songs: Phoebe Bridgers, who, as you can see above, is represented by ASCAP, and Conor Oberst, who is represented by BMI. The same is also true if I take a "blanket" license from BMI: such a license does not, standing alone, authorize my public performance of *Dylan Thomas*. To be in the clear, I have to take a license from *both* ASCAP and BMI.

This was a surprise to the DOJ — and not because Antitrust Division lawyers aren't sophisticated about music copyright. During their initial inquiry, DOJ heard from many music users who claimed that PROs always offered "full-work" (aka "100%") licenses to perform all works in their repertories. The PROs disagreed with that view, but maybe it isn't too surprising that many licensees thought that a PRO "blanket" covered them for every composition in the licensor's repertory. That was, in fact, how the PROs represented their services to the public. Take a look at Figure 4, which is a screenshot from a page that appeared on ASCAP's public-facing website as of December 3, 2020, the date of this Brace Lecture.[65]

Figure 4



^ What does the ASCAP license do?

ASCAP gives you a license to entertain your customers, guests and employees with the world's largest musical repertory. One of the greatest advantages of the ASCAP license is that it gives you the right to perform millions of works in the ASCAP repertory. Whether your music is live, broadcast, transmitted or played via CD's or videos, your ASCAP license covers your performances. And with one license fee, ASCAP saves you the time, expense, and burden of contacting thousands of copyright owners.

Take a moment and read it. ASCAP is telling venue owners that "one license fee" gives them "the right to perform millions of works in the ASCAP repertory." There is no mention of holes, or the need to license from other PROs to escape liability. Of course, as copyright lawyers we're at a disadvantage here — it's difficult for us to read this language as an ordinary venue owner would. But to my eye, what we have here is ASCAP suggesting to the public that the ASCAP blanket will do what "blankets" do — cover them. Comforting, but also misleading. And precisely the opposite of what ASCAP told the DOJ.

---

65 *ASCAP Licensing*, ASCAP, https://www.ascap.com/help/ascap-licensing (last visited Mar. 8, 2021).

Now take a look at these Figures 5 and 6, which are screenshots, also current as of December 3, 2020, taken from BMI's public-facing website.[66]

Figure 5

Q: What does a business really get with a BMI Music License?

A BMI License provides you with the legal authorization you need to use a very powerful product – music. This product is the music creator's property, so a licensing agreement protects your business or organization from the penalties involved in copyright infringement. Your payment of music licensing fees ensures the continued creation of music – for you and your organization.

Figure 6

Q: If a business has a license with another performing right organization, do they still need to license with BMI?

A music license with another performing right organization allows you to perform only copyrighted music represented by that organization. It does not cover public performances of the award-winning music licensed by BMI. This is because each songwriter or composer may belong to only one performing right organization at any given time, so each PRO licenses a unique repertoire of music.

As with the ASCAP statement, these statements by BMI suggest that a BMI license gives licensees "the legal authorization [they] need"—i.e., that BMI's blanket will cover you. The language in the screenshot in Figure 6 is actually a bit cheeky. It suggests that those who license from other PROs also need a BMI license, but doesn't suggest the same is true of BMI licensees. Also, the statement suggests that each PRO licenses a "unique repertoire of music." That would be true if the PROs offered full-work licenses, as DOJ believed. But it's not true in a world of fractional licensing. In that world, the PRO repertories *overlap*. Suggesting that PRO repertories are "unique" is actually misleading — that statement would suggest to a non-expert that rights to compositions in BMI's repertory are licensed only by BMI.

DOJ looked at all this and didn't like the position the PROs were taking. And so DOJ concluded that the consent decrees require ASCAP and BMI to offer full-work licenses, rather than fractional licenses. The

[66] *BMI Offers a Variety of Music Licenses for Business*, BMI, https://www.bmi.com/licensing/#licensetools (last visited Mar. 8, 2021).

DOJ interpreted the language of the consent decrees, under which the PROs were supposed to issue licenses that allow "immediate use" of compositions, to require full-work or "100%" licensing (two names for the same thing). Now, as most of you undoubtedly know, the DOJ's interpretation of the decrees was rejected by both the Southern District of New York[67] and the Second Circuit.[68] Those courts held that the decrees did not address fractional licensing one way or the other and that restrictions on the PROs' conduct that were not explicitly provided in those decrees would not be inferred.

I will say that whatever you think about fractional licensing as a practice, the Southern District and Second Circuit decisions strike me as correct interpretations of the existing consent decrees — they are, in a sense, contracts, and restrictions that aren't in them shouldn't lightly be read into them. But my real concern isn't with what's happened so far, but with what may happen next. As you all know, in 2019 the Antitrust Division opened yet another inquiry into the ASCAP and BMI consent decrees.[69] The Division is asking whether the decrees should be terminated, and it has received a flood of comments, most arguing that the decrees are still necessary to ensure competition in licensing musical compositions and should be maintained in effect.

And here I'll make a couple of predictions. Imagine that a few neo-Brandeisians are placed in key positions in the Biden Antitrust Division. What will they see when they look at the Division's recent experience in reviewing the ASCAP and BMI consent decrees? It's difficult to say definitively, but I doubt they will think it's a good idea to modify the consent decrees to permit partial withdrawal. In fact, following this lecture the Trump Antitrust Division, in its last major act, decided that they would leave the consent decrees in place without modification — so even an Antitrust Division dominated by Chicagoans proved to be skeptical of the PROs arguments for permitting partial withdrawal.[70] I doubt that the neo-Brandeisians will see things differently in the coming years. Some have suggested that, while the decrees should stay in place for physical venues and radio stations, they could be modified to exclude the major streaming services, which could rely on direct licensing. I am skeptical,

---

[67] United States v. Broad. Music, Inc., 207 F. Supp. 3d 374 (S.D.N.Y. 2016).

[68] United States v. Broad. Music, Inc., 720 Fed. App'x 14 (2d Cir. 2017).

[69] *See Antitrust Consent Decree Review—ASCAP and BMI 2019*, United States Department of Justice, https://www.justice.gov/atr/antitrust-consent-decree-review-ascap-and-bmi-2019.

[70] See Anousha Sakoui, *Justice Department Leaves Decades-Old Music Industry Decrees Unchanged*, L.A. Times (Jan. 15, 2021), https://www.latimes.com/entertainment-arts/business/story/2021-01-15/justice-dept-consent-decrees-music-industry-ascap.

and I will state candidly that my skepticism is based, at least in part, on insight I gained representing Spotify in a group of lawsuits alleging that the streaming service made mechanical reproductions of certain musical compositions without a license.[71] The music publishing industry is dominated by three major publishers, but there is a competitive fringe featuring a very large number of smaller publishers. Significantly, ownership of musical compositions is often fragmented among two or more authors, who may be represented by multiple publishers (representation which changes with some frequency as publishers are acquired, or pieces of a publisher's catalog are sold off), and the data that is available to licensees regarding who owns what is very poor. Now imagine that the streaming services, instead of licensing public performance of musical compositions from a few PROs (two of which are subject to non-discrimination requirements), must license directly from literally hundreds of music publishing companies. The opportunities for licensor collusion, holdout and strategic behavior would multiply. And the streaming services would almost inevitably face a wave of copyright infringement lawsuits claiming that the services' direct licenses do not cover all of the copyright ownership shares in some large number of compositions. Perhaps not surprisingly, the streaming services, well aware of the difficulties direct licensing would create for their businesses, expressed relief when the DOJ rebuffed the request to permit partial withdrawal.[72]

Nor would I bet that a Division guided by neo-Brandeisians will move in the coming years to terminate or sunset the consent decrees in favor of an unregulated licensing market.[73] It's more likely that neo-Brandeisians among the Division leadership would conclude that the PROs practice of fractional licensing suggests that the existing consent decrees *aren't strong enough*. And I think that it's possible that the neo-Brandeisians may go even further. They may conclude that the decrees should be dissolved and

---

[71] Those lawsuits have been settled.

[72] *See supra* note 68 (quoting head of trade association representing streaming services: "Successive administrations have now rejected calls to alter these essential pro-consumer protections.").

[73] In an informative 2005 article, Randy Picker details a 2001 addition to the ASCAP decree, the so-called "Genuine Choice" provision, which was designed to ensure that licensees would be able to reduce their payments to PROs if they reduced their use of music in a PRO's portfolio, thereby facilitating the growth of alternative licensing arrangements (either direct licensing or transactions with licensing collectives other than the then-existing PROs). *See* Randal C. Picker, *Unbundling Scope-of-Permission Goods: When Should We Invest in Reducing Entry Barriers?*, 72 U. Chi. L. Rev. 189, 195-96 (2005). In the years since these changes were introduced, there has been some growth in direct licensing as well as growth of smaller PROs such as SESAC and GMR, but it is also fair to say that the PRO-centered structure of the public performance licensing market is essentially unchanged.

new price fixing litigation instituted against the PROs; not just ASCAP and BMI, but the up-and-coming rival PROs SESAC[74] and Global Music Rights (GMR)[75] as well. After all, if ASCAP and BMI are price-fixing vehicles, then SESAC and GMR, which work according to the same basic structure, are too.

If I'm right, then the neo-Brandeisians' end-game might be to use the enormous leverage from the prospect of a new price-fixing lawsuit to negotiate new decrees that apply to all of the PROs. Decrees that strengthen the anti-discrimination provisions of the current decrees, that specifically bar partial withdrawal, that mandate 100% licensing. And that subject all of the PROs to rate court determinations.

If the neo-Brandeisians take this route, they might do it based on the logic of the consent decrees at their inception. Back in 1941, when the decrees were put into place, the licensing markets for musical compositions were very different. ASCAP and BMI were the two major players. ASCAP had far the bigger portfolio. But BMI was a comer — in fact, after ASCAP doubled its licensing fees to radio stations in 1940, radio stations organized a boycott and organized BMI in response. That boycott, which lasted a year, was largely successful — BMI's catalog was large enough for the stations to hold out and force ASCAP to back down from its licensing fee demands.[76] And so in the view of the DOJ at the time it sued ASCAP and BMI, those two firms were *competitors,* or at least they would be if watched carefully to prevent them from colluding. That is, in the DOJ's view at the time the consent decrees were negotiated, it was possible for radio stations or physical venues to license from either of ASCAP or BMI, and not both. As a consequence, competition between the ASCAP and BMI portfolios could help discipline prices and the terms of dealing for public performance license.

That market structure is gone, and has been for a while now. Think of today's music streaming services — they are completists; they need licenses to publicly perform *every* musical composition they can get. For them, there is no competition between ASCAP, BMI, or any of the other PROs. Rather, from the perspective of the streaming services, the PRO portfolios, in economic terms, are *complements.* But it's worse: even those smaller licensees who might not need a license from every PRO in a market built on "full work" licenses will need a license from multiple PROs in a world of fractional licensing. Because each PRO's blanket is full of

---

[74] SESAC, https://www.sesac.com/#! (last visited Mar. 8, 2021).

[75] Global Music Rights, https://globalmusicrights.com (last visited Mar. 10, 2021).

[76] *See* Gary Rosen, *Performing for Profit: 100 Years of Music Performing Rights*, Oxford Univ. Press Blog (Feb. 13, 2014), https://blog.oup.com/2014/02/music-performance-rights-ascap-100/.

holes, a license from one PRO is basically a guarantee that the licensee is, or soon will become, an infringer.

Given all that, here's how the current situation is likely to appear to the neo-Brandeisians: First, none of the PROs compete. Second, we have two PROs that are subject to judicial price-setting if negotiations fail. But then we have two other PROs who aren't constrained, in a market where the most important licensees *have no choice* but to license from all of the PROs. And that means that the PROs not subject to judicial rate-setting are free to fix prices that reflect their substantial market power. Actually it's worse: the PROs not subject to judicial rate-setting have *hold-out* power—they can push their rates higher by waiting until licensees have sunk costs in obtaining licenses from the rate-regulated PROs. The resulting updraft in license prices will eventually travel full circle to affect judicial rate-setting for the PROs that are bound by consent decrees. Consideration of rates for "comparable" licenses is, of course, an element of that process. But if those license fees are based on exercise of hold-out power, then judicial rate-setting won't reflect the functioning of a market, but rather the *malfunctioning* of a market.

None of that sounds like what the Division thought the consent decrees would do in 1941. And that might lead an Antitrust Division under the influence of neo-Brandeisians to conclude that we need a re-set. One that subjects all the PROs to substantially tighter restrictions on their conduct.

Or the impetus for reform might be even more far-reaching. Under the right political conditions one might imagine an effort, coordinated with congressional allies, to displace the PROs and replace them with a statutory licensing mechanism. I'm talking about a structure for public performance licensing similar to what the recently enacted Music Modernization Act[77] establishes for licensing mechanical reproduction of musical compositions. I'm not saying this is likely. But it's not unthinkable. On neo-Brandeisian terms, music publishing is a concentrated market. And Judge Cote's findings in the *Pandora* case show music publishers doing what the neo-Brandeisians expect firms in a concentrated industry to do — using their power to limit competition, in ways that are usually difficult for antitrust cops to detect, and difficult to repair once detected.

V. SOME FINAL THOUGHTS ABOUT COPYRIGHT INDUSTRY VERTICAL MERGERS

I want to leave time for questions, but let me say something briefly about neo-Brandeisian antitrust and vertical mergers in the copyright industries. Again, Chicago antitrust sees vertical mergers as largely benign.

[77] Pub. L. 115-264 (Oct. 11, 2018).

Neo-Brandeisian antitrust does not. It sees the possibility that vertical integration may foreclose rivals from access to the market. It also worries that vertical integration may diminish competition by forcing would-be rivals to enter the market at both levels at which the incumbent firms compete.

Let me give you a recent example. In 2010, the Obama Antitrust Division greenlighted a vertical merger of Ticketmaster, a dominant ticket vendor, and Live Nation, a dominant promoter of events. The merger was approved subject to a consent decree that imposed a weak set of restrictions designed to prevent Live Nation from retaliating against venue owners who defected to rival promoters.[78] As many predicted, the consent decree proved unequal to the task, and the Division was forced in 2019 to re-open its investigation of the merger. Ultimately the Division was able to reach agreement with Live Nation on a strengthened consent decree.[79] But from the neo-Brandeisian perspective, the revised consent decree is not a sign of success. By the time the Division caught up with it, Live Nation may well have already severely damaged its existing rivals and deterred potential entrants. And in any event the revised consent decree terminates in 2025,[80] which means that any competitive reprieve is going to be short-lived.

To the neo-Brandeisians, the lesson is clear: if you don't act to preserve a competitive market structure, then anticompetitive conduct ineluctably follows. If a Biden administration brings neo-Brandeisians in to the Antitrust Division and the FTC, we can expect a more skeptical approach to vertical integration generally, and in the copyright industries specifically.

I mention vertical integration because we are seeing a trend now in the market for streaming video that may lead to a market structure likely to catch the attention of neo-Brandeisian antitrusters. If you think back a decade, Netflix was in the business of renting out DVDs that it sent to you through the mail. That business model was actuated, of course, by copyright law's first sale doctrine.[81] Netflix owned the DVDs it sent through

---

78 *See* United States Department of Justice, Antitrust Division, *United States v. Ticketmaster Entertainment, Inc. and Live Nation Entertainment, Inc.*, United States' Motion and Supporting Memorandum to Enter Final Judgment (June 29, 2010), https://www.justice.gov/atr/case-document/united-states-motion-and-supporting-memorandum-enter-final-judgment-7.

79 United States v. Ticketmaster Ent., Inc. and Live Nation Ent., Inc., Amended Final Judgment, 1:10-cv-00139-RMC (D.D.C. Jan. 28, 2020), https://www.justice.gov/atr/case-document/file/1241016/download.

80 *See id.*, Sec. XV.

81 See 17 U.S.C. § 109(a) ("Notwithstanding the provisions of section 106(3) [i.e., the section of the Copyright Act establishing the copyright owner's exclusive right to distribute copies or phonorecords of the copyrighted work to the public], the

the mail; the first sale of those DVDs exhausted the copyright owner's distribution right, leaving Netflix free of licensing claims from the studios.

We know now that technological shifts meant that the Netflix version 1.0 business model was doomed; people want to stream movies, not wait for them by the mailbox (although I will admit that I enjoyed the DVD-by-mail service, not least b/c back in those first-sale days when Netflix could rely on the first sale doctrine and didn't need studio deals, they had a great selection). Thinking about Netflix back then, I suspected (and I'm sure I wasn't alone in this) that in shifting to streaming Netflix was essentially surrendering. That is, Netflix was allowing the studios to extract, through licensing deals, all of its profits, meaning that the service would end up as a cash-poor online distributor or perhaps as the property of a studio.

That turned out to be wrong. Netflix, as we now know, vertically integrated. They entered the programming market in a big way, and today they are one of the largest studios in Hollywood. The strategy has had some ups and downs, but so far it's largely a success. And what allowed Netflix to move up the chain and become a successful content producer? *Data*.

As Kal Raustiala and I argue in a recent article,[82] Netflix capitalized on its ability, as a streaming service where data flows in both directions, to collect and analyze truly massive amounts of data about their users' viewing preferences and habits. This allowed a programming newcomer to understand better what viewers want and to outsmart the traditional studios in designing new content . . . at least for a while. Because like most forms of competitive advantage, Netflix's data supremacy is not meant to last. Amazon has followed a similar path, though, as we explain in the article, it uses data somewhat differently. And now we see traditional studios mimicking Netflix's strategy. Disney, which owns ABC as well as Fox's television and motion picture assets, has started its own streaming service, Disney+. It also is a 67% owner of Hulu. NBC and CBS have followed suit, both launching streaming services featuring their content.

On the one hand, this is competition working. Netflix turned its streaming service into a data feedback loop that helped that firm compete in the programming market. And now its rivals are copying its successful formula. But viewed from a longer-term perspective, what we see in the market for streaming video should worry us — and it may worry antitrust

owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord.").

[82] Kal Raustiala & Christopher Jon Sprigman, *The Second Digital Disruption: Streaming and the Dawn of Data-Driven Creativity*, 94 N.Y.U. L. Rev. 1555 (2019).

enforcers, at least if they no longer view vertical integration through the rose-tinted Chicago lens. A market dominated by large incumbents who both produce programming and own captive streaming services is not likely to be friendly to independent program producers or new entrants. Smaller programmers, or new programmers, will face a tough go competing at two levels: that is, both as programmers and as streamers. Most consumers aren't going to pay for more than two or three streaming services, and the incumbents have more programming to offer, which makes it difficult for smaller firms and new entrants to break in. If programmers aren't going to compete at both the production and distribution levels, then they are going to be reliant on one of the vertically integrated incumbents for distribution. That's not a safe bet, because a vertically integrated incumbent has the incentive to limit the growth of rival programmers. They can do it by making distribution expensive, or through more subtle efforts, like using their recommendation algorithms to discriminate against programming rivals.

There's a way in which we've seen this all before. Remember that back in the 1940s the major motion picture studios were also sued by the Antitrust Division,[83] and, like ASCAP and BMI, the studios operated under a consent decree — the so-called Paramount Decrees — which were terminated just last August (2019).[84] One important element of those decrees was an injunction forbidding the studios from owning theaters. In other words, the focus of the Paramount Decrees was the same sort of concern with the vertical integration of motion picture production and distribution that we may see being replicated now in the case of streaming video. What is old in the interplay of antitrust and copyright is new again.

Now, we don't know yet how this is going to sort out, and I'm not suggesting that competition can't find a way. It's possible, for example, that the market might support a powerful "independent" streaming service — one which focuses not on producing its own programming, but on providing market access for independent programmers. It's possible a service like that will help maintain competition and incentives for new entry. It's also possible that in a concentrated market dominated by a few vertically integrated incumbents, we'll see predation and foreclosure strategies that prevent that sort of competition from getting a foothold.

All of this remains to be seen. But at the moment, I am at least reasonably confident that if the neo-Brandeisian antitrust revival continues to gather strength, then antitrust enforcers are going to be looking at these developments more closely, and with a more skeptical disposition, than

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

[84] See U.S. Department of Justice, Antitrust Division, *The Paramount Decrees* (Aug. 7, 2020), https://www.justice.gov/atr/paramount-decree-review.

they have in many years. Everything in our world seems upside down at the moment, and predictions are even more hazardous than they are in ordinary times. But I will nonetheless dare to predict that a lot of copyright lawyers are going to be reading up on antitrust law in the coming years.

Thank you.