THE TROUBLE WITH MERGERS IS . . .

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Abstract

This Article delves into the legal intricacies of the recently proposed merger of Disney with 21st Century Fox. This deal is the latest in a wave of mergers and acquisitions in the entertainment and media industries, which are adapting to the rapid rise of subscription video-on-demand services. Such a merger raises many antitrust questions regarding market power and concentration, as well as intellectual property issues. This Article looks into the proposed merger's probability of success by examining, among other things, the *Horizontal Merger Guidelines*. In addition, this Article assesses the competition issues Disney and Fox are currently facing in the European Union, as well as current European efforts to modernize copyright and consumer access to the digital market. The entertainment landscape is at a fascinating crossroads, and this Article attempts to identify and analyze the legal considerations at play.

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Introduction

"Look, Simba. Everything the light touches is our kingdom." In *The Lion King*, this exchange between father and son, respectively the sovereign and heir to the throne, foreshadows the responsibilities and challenges the young cub will have to face to protect the land that has been bestowed upon him. This oft-quoted movie has entered the cultural zeitgeist, as Disney films

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often do, and this quote specifically could well be an aphorism for the entertainment company's mindset in today's rapidly evolving media market. In December 2017, the Walt Disney Company announced that it would be acquiring $52.4 billion of 21st Century Fox's assets—a move with which the company is attempting to both protect and expand the kingdom.[1] Disney's current content wheelhouse is impressive as it boasts, just to name a few, ABC, ESPN, Lucasfilm, Pixar, and Marvel.[2] The entertainment behemoth's merger bid—while it may appear bold considering the stricter scrutiny applied by the Justice Department to horizontal mergers—is not surprising.[3]

Disney is employing offensive tactics to compete with the rise of subscription video-on-demand services (SVOD). The shift towards over-the-top (OTT) video—that is, the delivery of content via the internet—is growing. The number of SVOD services has increased to over 200. And, according to research from Leichtman Research Group, Inc., 64 percent of U.S. households subscribe to one of the current top three such services: Amazon, Netflix, or Hulu.[4] With this in mind, Disney is looking to this merger with Fox to increase both its national and international presence.[5] The kingdom is now up for grabs, and "everything the light touches" is virtual and global.

This Article attempts to shed light on the legal intricacies of such a merger and its potential hurdles—not only in the United States, but also in Europe where both Disney and Fox are facing European competition law challenges. First, however, it is important to set the scene as this announcement is just the latest in a slew of mergers and acquisitions in the media industry.

I. The Race for Quality Content

It has become commonplace to hear that we are living in the golden age of television.[6] Series such as *Mad Men*, *Breaking Bad*, *Game of Thrones*,

1 Disney CEO Bob Iger has stated that the deal will give Disney a "much larger international footprint." Dawn Chmielewski, Mike Fleming Jr. & Nellie Andreeva, *Disney Set To Acquire Most Of Fox, A Game-Changing Deal That Will Redraw Hollywood Landscape*, DEADLINE (Dec. 14, 2017), http://deadline.com/2017/12/disney-fox-merger-deal-done-hollywood-media-1202219012 [perma.cc/WLY2-UCZS].

2 Madeleine Johnson, *Your Complete Guide To All Things Owned by Disney*, NASDAQ (Apr. 21, 2017), https://www.nasdaq.com/article/your-complete-guide-to-all-the-things-owned-by-disney-cm777262 [https://perma.cc/D4KF-B35P].

3 Ashley Cullins, *Experts Weigh Disney-Fox Antitrust Concerns*, THE HOLLYWOOD REPORTER (Dec. 16, 2017), https://www.hollywoodreporter.com/thr-esq/experts-weigh-disney-fox-antitrust-concerns-1068175 [perma.cc/R6A4-DVPL].

4 The Leitchtman Research Group, *64% of U.S. Households have an SVOD Service*, Leichtman Research Group (July 24, 2017), http://www.leichtmanresearch.com/press/072417release.html, [http://perma.cc/LY26-6VFZ].

5 Chmielewski, *supra* note 1.

6 Ian Leslie, *Watch it While it Lasts: Our Golden Age of Television*, THE FINANCIAL TIMES (Apr. 13, 2017), https://www.ft.com/content/68309b3a-1f02-11e7-a454-ab04428977f9 [http://perma.cc/Z5BG-2TM4].

Stranger Things, and *The Americans* have all secured their place on the auteurship mantle, having achieved cult status in the United States and abroad. Premium cable and satellite networks such as HBO and Showtime and SVOD services like Netflix are leading the pack in delivering quality content to consumers, and an increase in subscriptions has led traditional broadcasting and cable companies to reposition their pawns on the game board.[7]

In 2011, Comcast bought NBCUniversal (NBCU) as a means to control content and its distribution.[8] At the time of the merger, *The New York Times* reported, "The success of Netflix in changing consumer behavior has raised fears that the heart of Comcast's business—selling cable subscriptions—could be in jeopardy."[9] At the time, Netflix was nascent competition, and the Department of Justice took on the formidable task of applying antitrust rules and regulations to the nebulous market of online video services. As mentioned above, SVOD services and OTT video have managed to flip the script on traditional viewership in a relatively short time frame: subscriptions are projected to reach 546 million consumers by 2022.[10] Following in Comcast's footsteps, AT&T/DirecTV made a bid for Time Warner, which owns HBO, CNN, TNT, and TBS.[11] And on the other side of the Atlantic, 21st Century Fox, which already owns 39 percent of Sky in Britain, has made an offer to purchase the remaining 61 percent.[12] Meanwhile, Orange, the French telecom operator, is showing interest in purchasing the pay-television channel Canal+.[13]

The above examples, however, differ from the proposed Disney-Fox merger due to their vertical nature. Content creation and distribution are complementary, but not traditionally competing industries. Horizontal mergers, whereby competitors in the same industry combine forces, are viewed critically by the relevant national competent authorities (NCAs) for fear of monopolization of that industry, and are therefore investigated with a much finer comb.

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7 Alexis Kleinman, *Netflix Continues to Crush Cable TV*, THE HUFFINGTON POST (Nov. 13, 2015), https://www.huffingtonpost.com/2015/03/11/netflix-cable-tv_n_6846942.html [http://perma.cc/C88J-YQLK].

8 Tim Arango & Brian Stelter, *Comcast Receives Approval For NBC Universal Merger*, N.Y. TIMES (Jan. 19, 2011), http://www.nytimes.com/2011/01/19/business/media/19comcast.html [http://perma.cc/W6AD-LD8B].

9 *Id.*

10 *Global SVOD Forecasts*, Research and Markets (Oct. 2017), https://www.researchandmarkets.com/research/tmvlvl/global_svod [perma.cc/KBD2-NFN9].

11 Dep't of Justice Off. of Pub. Aff., *Justice Department Challenges AT&T/DirecTV's Acquisition of Time Warner*, U.S. Dep't of Justice (Nov. 20, 2017), https://www.justice.gov/opa/pr/justice-department-challenges-attdirectv-s-acquisition-time-warner [https://perma.cc/YH6U-W4VA].

12 Henry Chu, *Disney-21st Century Fox Negotiations Add Uncertainty to Fox's Sky Takeover Bid*, VARIETY (Dec. 5, 2017), http://variety.com/2017/biz/news/disney-fox-adds-uncertainty-fox-sky-takeover-bid-1202631195 [https://perma.cc/9JMX-EHSR].

13 Reuters, *Sky's Not The Limit For European Media Mergers,* FORTUNE (Dec. 16, 2016), http://fortune.com/2016/12/16/european-media-mergers [https://perma.cc/EFL6-S9DP].

The next Part analyzes these legal structures and assesses Disney's chances of succeeding with the proposed merger. In addition, it explores the effects such a merger could have, with a focus on copyright law concerns.

II. To Market, To Market

The Federal Trade Commission (FTC) and the Department of Justice are the gatekeepers to mergers and acquisitions in the United States.[14] Under the Hart-Scott-Rodino Act,[15] these two agencies share jurisdiction over merger review, tasked with scrutinizing proposed transactions that they believe would substantially lessen U.S. commercial competition.[16] It should be noted that the very nature of a merger review is predictive. Specialists, crouching over market shares and concentrations in relevant markets, carry out hypothetical experiments, but nothing is ever certain. As explained in the latest *Horizontal Merger Guidelines* (*Guidelines*) released by the Department of Justice and FTC, "Given this inherent need for prediction, these Guidelines reflect the congressional intent that merger enforcement should interdict competitive problems in their incipiency and that certainty about anticompetitive effect is seldom possible and not required for a merger to be illegal."[17] In the end, the objective is to prevent the creation, enhancement, or entrenchment of market power, defined as "the power profitably to maintain prices above competitive levels, or to reduce output, product quality, service or innovation."[18] In order to assess market power, the *Guidelines* look closely at, *inter alia*, market share and concentration.[19]

In the case of Disney's acquisition of 20th Century Fox's film studio, there is fear amongst cinema operators and distributors that, by joining Disney's *Star Wars* and Fox's *X-Men* and *Avatar*, Disney would gain significant bargaining power over theater chains.[20] In fact, if Disney were to own these

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14 U.S. Dep't of Justice & Fed. Trade Comm'n, *Horizontal Merger Guidelines*, U.S. Dept. of Justice (Aug. 19, 2010), https://www.justice.gov/atr/horizontal-merger-guidelines-08192010#1 [https://perma.cc/HL3T-F6AJ].

15 15 U.S.C. § 18(a) (1996).

16 Fed. Trade Comm'n, *Premerger Notification Program*, Fed. Trade Comm'n, https://www.ftc.gov/enforcement/premerger-notification-program [https://perma.cc/F3YP-MAWK].

17 U.S. Dep't of Justice, *supra* note 14.

18 Makan Delrahim, *Antitrust Enforcement in the Entertainment and Media Industries*, U.S. Dep't of Justice (Dec. 18, 2003), https://www.justice.gov/atr/speech/antitrust-enforcement-entertainment-and-media-industries [https://perma.cc/54AR-WCMH].

19 U.S. Dep't of Justice, *supra* note 14. *Definition of 'Market Concentration,'* ECON. TIMES, https://economictimes.indiatimes.com/definition/market-concentration [https://perma.cc/5E2C-K89M]. Market share is the percentage of total sales that a particular company in a specific industry will make in a defined period. Concentration is the degree to which a small number of firms make up for the total production in the market.

20 Gerry Smith, *Movie Theaters Were Already In Trouble. With Disney's Fox Deal, It's Double*. BLOOMBERG BUSINESSWEEK (Dec. 21, 2017), https://www.bloomberg.com/news/articles/2017-12-21/movie-theaters-were-already-in-trouble-with-disney-s-fox-deal-it-s-double

franchises, the company would yield major leverage to exact financial demands over theaters. Specifically, Disney is looking to capitalize on the acquisition of the *X-Men* and the *Fantastic Four* universes (both Marvel comics), which would create a whole new palette of possibilities for mutant and superhero stories with Marvel Entertainment (e.g., *The Avengers*), which Disney presently owns.[21] At the end of 2017, Disney's film studio accounted for 21.8 percent of the world-wide box-office market, putting it in first place (mostly thanks to *Star Wars*), whereas 20th Century Fox was in fourth position with 12 percent.[22] In 2016, Disney and Fox accounted for 40 percent of ticket sales in the United States and Canada. According to the *Guidelines*, "Mergers that cause a significant increase in concentration and result in highly concentrated markets are presumed to be likely to enhance market power."[23] Disney has already demonstrated a propensity for using its intellectual property to pressure the downstream exhibitor market. Thanks to its acquisition of Lucasfilm, Disney has leveraged *Star Wars* to receive a higher share of box-office sales from theaters—upwards of 60 percent—when traditionally exhibitors and studios split the revenue equally.[24] There is a justifiable concern that, were Disney to acquire Fox, it could exert that same power in connection with future *Avatar* films (four are currently in the works), the first of which is the highest-grossing film of all time.[25] *Star Wars: The Force Awakens* is in third place.[26]

That said, if one were to look at the top box-office studios of the past decade, Disney, Universal, Warner Brothers, Sony, Paramount, and 20th Century Fox fluctuate among the top five spots.[27] Back in 1995, the Competition Committee of the Organisation for Economic Co-operation and Development (OECD) debated competition policy in film distribution, noting that the industry "has remained moderately concentrated, with eight to ten large distributors existing at any given time. Individual market shares are not stable, however. In one year a distributor may have a highly successful blockbuster film; in another

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[https://perma.cc/C8FX-NGLZ].

21 Josef Adalian and Chris Lee, *6 Things We Know (and Don't Know) About the Disney-Fox Merger.* VULTURE (Dec. 14, 2017), http://www.vulture.com/2017/12/disney-fox-merger-what-we-know-and-dont-know.html [https://perma.cc/6BDK-RTUS].

22 Warner Brothers accounted for 18.4 percent and Universal 13.8 percent of the market. Information obtained from Box Office Mojo, http://www.boxofficemojo.com/studio. For specific information on *Star Wars*: http://www.boxofficemojo.com/studio/chart/?yr=2017&view=company&studio=buenavista.htm [https://perma.cc/KBT2-MGSS].

23 U.S. Dep't of Justice, *supra* note 14.

24 Smith, *supra* note 20.

25 Newsday.com Staff, *The Biggest Box Office Hits Of All Time*, NEWSDAY (Jan. 9, 2018), https://www.newsday.com/entertainment/movies/the-biggest-box-office-hits-of-all-time-1.5369007 [https://perma.cc/ZZ9X-6NUB].

26 *Id*.

27 Box Office Mojo, *Studio Market Share*, Box Office Mojo, http://www.boxofficemojo.com/studio [https://perma.cc/M6V2-SBFU].

it may have several failures."[28] For example, in 2012, a year in which it did not release a blockbuster hit such as *X-Men* or *Avatar*, Fox fell to sixth position with 9.2 percent of that year's market share.[29] Nonetheless, a Disney-Fox merger, which would result in an intellectual property portfolio of characters (Marvel characters and the X-Men) that are currently sure-fire successes for these companies, could warrant an investigation by the Justice Department.[30]

The Justice Department calculates market concentration using the Herfindahl-Hirschman Index (HHI).[31] According to Sanford C. Bernstein analyst Todd Juenger, "Just running a simple HHI calculation, using domestic box office, a combination of Fox and Disney theatrical output scores a potentially troubling HHI."[32] According to the *Guidelines*, a high HHI potentially raises "significant competitive concerns and often warrants scrutiny."[33] Nevertheless, contrary to Juenger's warning, it should be noted that theatrical revenues account only for $11 billion as compared to $140 billion in revenue in 2017 from consumer spending in the premium video market (i.e., streaming services, pay TV, DVD, etc.), and as stated above, the theatrical market is volatile; and if one year Disney and Fox may dominate the market based due to box-office hits, this may not be true for another release year.[34] Universal Pictures (*Jurassic World*, *The Fast and the Furious*) and Warner Brothers (*Wonder Woman*, *Harry Potter*), two studios who heavily rely on the theatrical box office, will still be able to compete against Disney, since consumers enjoy effects-heavy blockbusters on large 3D screens.[35] Furthermore, consumer behaviors are changing as a result of SVOD and home viewership, and smaller studios are turning their attention to deals with these platforms.[36] Theatrical blockbusters by large stu-

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28 OECD Policy Roundtables, *Competition Policy And Film Distribution 1995*, OECD (1996), http://www.oecd.org/regreform/sectors/1920038.pdf [https://perma.cc/53Z7-PWFZ].

29 Box Office Mojo, *supra* 27.

30 Brent Lang, *Fantastic Four, X-Men Can Team with Avengers Thanks to Fox, Disney Deal*, VARIETY (Dec. 14, 2017), http://variety.com/2017/film/news/fantastic-four-xmen-marvel-disney-fox-1202640697 [https://perma.cc/M7XW-YE55].

31 The HHI is calculated by summing the squares of the individual firms' market shares.

32 Pamela McClintock, Michael O'Connell & Borys Kit, *Disney-Fox Deal Marks Seismic Shift For Hollywood's Studio System*, HOLLYWOOD REP. (Dec. 14, 2017), https://www.hollywoodreporter.com/news/disney-fox-deal-marks-seismic-shift-hollywoods-studio-system-1067517 [https://perma.cc/6QW4-HJUS].

33 U.S. Dep't of Justice, *supra* note 14.

34 McClintock, *supra* note 32.

35 Motion Picture Ass'n of Am., *Theatrical Market Statistics 2016*, Motion Picture Association of America (2016), https://www.mpaa.org/wp-content/uploads/2017/03/MPAA-Theatrical-Market-Statistics-2016_Final-1.pdf [https://perma.cc/GX7N-ZABQ].

36 Mike Sinder, *Theaters Taking Hits from Movie Viewing at Home, Weak Box Office*, USA TODAY (Aug. 2, 2017), https://www.usatoday.com/story/money/business/2017/08/02/movie-theaters-getting-pinched-sluggish-box-office-movies-viewing-home/532256001 [https://perma.cc/ADV9-S8A5].

dios are not responsible for hurting small studios at the box office as much as Netflix and Amazon are, as the latter continue to revolutionize our relationship with entertainment. Consequently, Disney and Fox's market shares of the blockbuster box office would not necessarily reflect concentration of the wider consumer film market.

Regardless of the format of viewership, whether at home or on the big screen, there is concern as to what concentrated ownership of the most bankable characters in theatrical history will mean. In the latest *Antitrust Guidelines for the Licensing of Intellectual Property Rights* (Intellectual Property Guidelines), the Department of Justice's Antitrust Division and the Federal Communications Commission have stated that "[they] will not presume that patent, copyright, or trade secret necessarily confers market power upon its owner. Although the intellectual property right confers the power to exclude with respect to the specific product, there will often be sufficient actual or potential close substitutes for such product to prevent the exercise of market power."[37] In antitrust law, a substitute refers to a product that can be purchased instead of another.[38] Substitution is affected by price, brand recognition, personal preference, and geographical location, among other factors. In short, "a product need not duplicate another for users to consider it a suitable substitute. It need only resemble the product enough that consumers would purchase it in place of another product."[39] Substitutable products are considered within a same relevant market. For example, oranges from Spain and from Morocco are considered substitutable products in the produce market. Pay TV and free TV are not the same market, nor are live theater and going to the movies. However, HBO and Showtime compete in the same market, premium cable television, as do Netflix and Hulu, subscription video-on-demand. And now that HBO and Showtime have launched their own SVOD services, they are also players in the latter market. Therefore, in order to make an accurate antitrust analysis and prediction, it would be wise to differentiate each one of these markets, especially now that studios and companies are branching out into multiple markets.

The foregoing examples focus on delivery models but not content. Pursuant to the Intellectual Property Guidelines, content could also be substitutable. Case in point: Netflix. The company has capitalized on the substitution model.[40]

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37 U.S. Dep't of Justice & Fed. Trade Comm'n, *Antitrust Guidelines For The Licensing Of Intellectual Property*, Dep't of Justice & Fed. Trade Comm'n (Jan. 12, 2017), https://www.ftc.gov/system/files/documents/ public_statements/1049793/ip_guidelines_2017.pdf [https://perma.cc/H7RL-PL5B].

38 Julian McAuley, Rahul Pandey & Jure Leskovec, *Inferring Networks of Substitutable and Complementary Products*, ACM (2015), http://www-cs.stanford.edu/~jure/pubs/prodgraph-kdd15.pdf [https://perma.cc/Q6NB-QNSG].

39 Roman L. Weil, Daniel G. Lentz & David P. Hoffman, Litigation Services Handbook: The Role Of The Financial Expert (5th ed. 2012).

40 Willy Shih and Stephen Kaufman, *Netflix in 2011*, Harvard Business School Case

When it launched, Netflix quickly realized that licensing recent blockbusters would become too onerous to sustain and, as a result, rethought its business model.[41] The result was a recommendation system that would identify user preferences and suggest films or programs resembling the one any given user was searching for in the first place.[42] Disney, as proprietor of many of these blockbuster films, is looking to capitalize on its acquisition of 20th Century Fox to create its own streaming service for launch in 2019.[43] With Disney's decision not to extend its licensing agreement with Netflix, the Mouse is pushing to fill its SVOD club with content the company believes consumers will run to eagerly, just as they flock to theaters for the latest *Star Wars* or *Avatar* film.

Furthermore, the success of an enterprise does not appear to be an issue under the Intellectual Property Guidelines: "As with any other asset that enables its owner to obtain significant supra-competitive profits, market power (or even a monopoly) that is solely a consequence of a superior product, business acumen, or historic accident does not violate the antitrust laws."[44] However, the Intellectual Property Guidelines do warn that antitrust concerns "may arise when a licensing agreement harms competition among entities that would have been actual or potential competitors in a relevant market in the absence of a license (a horizontal relationship)."[45] Although this particular excerpt of the Intellectual Property Guidelines is referring to technologies, it is appropriately extended to content creation. There is legitimate concern that a marriage between Disney and Fox could give the companies, through licensing or direct co-ownership, collective ownership of characters whose commercial value is important regardless of viewing format. This could lead to market division and price fixing, which was of concern at the time of the Comcast and NBCU merger.

III. The Comcast and NBCU Merger

In 2011, the Antitrust Division filed a lawsuit to prevent the merger of Comcast with General Electric's subsidiary NBCU. The latter wholly owned the NBC network and Telemundo and partially owned A&E Television Networks (Lifetime, Biography, and History), as well as several film studios (Universal Pictures, Focus Films, and Universal Studios).[46] The merger in ques-

615-007 6 (Aug. 19, 2014).

41 *Id*.

42 *Id*.

43 Greg Kumparak, *Disney is ditching Netflix in 2019 to launch its own Streaming Service*, TECH CRUNCH (Aug. 8, 2017), https://techcrunch.com/2017/08/08/disney-is-ditching-netflix-in-2019-to-launch-its-own-streaming-service [https://perma.cc/3XYP-25QU].

44 U.S. Dep't of Justice, *supra* note 37.

45 *Id*.

46 OECD Global Forum on Competition, *Competition Issues In Television And Broadcasting 2013*, OECD, (Oct. 28, 2013), http://www.oecd.org/daf/competition/TV-and-broadcasting2013.pdf [https://perma.cc/NF38-GRV5].

tion was to be a traditional vertical merger: Comcast, a distribution service, sought to control, via NBCU, the content it delivers. The investigation was spearheaded by two agencies: the Antitrust Division, which was responsible for reviewing the merger pursuant to Section 7 of the Clayton Act to determine whether the merger would result in a substantial lessening of competition in the relevant market; and the FCC, which oversaw issues of public interest, convenience, and necessity.[47] Echoing the horizontal relationship concerns described in the Intellectual Property Guidelines, the Antitrust Division contended that Comcast's traditional and online rivals (i.e., Netflix) needed to be able to access NBCU's catalogue of programming in order to compete against Comcast.[48] Netflix was then only a fledgling competitor and the division feared that the absence of a license would "substantially lessen competition for video programming distribution . . . and that the market would experience lower levels of investment, less experimentation with new models of delivering content, and less diversity in the types and range of product offerings."[49] As a result, the merger would only be approved if Comcast agreed to the following concessions—which it did[50]:

> Comcast may not retaliate against any broadcast network or cable programmer, or production studio or content licensee for licensing content to a competing cable, satellite, or telephone company or online video distributor.[51]
>
> Comcast must relinquish its management rights in Hulu. Comcast must continue to make available to Hulu NBC content that is comparable to or better than the programming content Hulu obtains from its other media owners, Disney and News Corp.
>
> Comcast may not, with some narrowly defined exceptions, require programmers or video distributors to agree to licensing terms that seek to limit online distributors' access to content.

Though the Comcast-NBCU merger was vertical in essence, it did involve some horizontal concerns since Comcast-NBCU would be competing with online video distributors in the same relevant market (i.e., Netflix and Hulu). If the merger had gone through without scrutiny from the Antitrust Division

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47 Section 7 of the Clayton Act (15 U.S.C. § 18) prohibits the acquisitions of "stock" and "assets" where "the effect of such acquisition may be substantially to lessen competition, or tend to create a monopoly." Assets include tangible, as well as intangible assets (i.e., copyrights). The "public interest, convenience, and necessity" provision, 47 U.S.C. § 310(d), has been the subject of a number of judicial debates since its inception in 1927. In simple, non-controversial terms, these requirements refer to a legal and moral imperative to serve the public interest by authorizing broadcast licenses, promoting diversity and public issues, freedom of speech, etc. For more information, *see generally*, http://www.museum.tv/eotv/publicintere.htm.

48 *Id.*

49 *Id.* at 328.

50 *Id.* at 329.

51 *Id.*

and the FCC, Comcast would have been able to limit competition by withholding content from online video services or stifle their businesses by leveraging the content for higher prices.

Nonetheless, a similar analysis today, weighing the competition potential of online video distributors, could be of limited efficacy in an antitrust investigation. At the time the Comcast-NBCU merger was proposed, platforms like Netflix and Hulu were infant industries. *United States v. Microsoft*, a seminal antitrust case, raises this "nascent competitor" concern.[52] In that case, the Department of Justice filed a lawsuit against Microsoft for bundling its web browser Internet Explorer with its Microsoft Windows operating system.[53] Ultimately, a settlement was reached whereby Microsoft was required to share its application-programming interface with third-party companies. The court stated that "it would be inimical to the purpose of the Sherman Antitrust Act to allow monopolists free reign to squash nascent, albeit unproven, competitors at will—particularly in industries marked by rapid technological advance and frequent paradigm shifts."[54] In today's entertainment-media market, SVOD distributors are the undisputed winners of this most recent paradigm shift. The threat has switched sides: Netflix is no longer the underdog, but the prized horse. However, the Antitrust Division does not appear to agree. In its latest press release regarding the AT&T/DirecTV and Time Warner deal, the agency warned that "the combined company would . . . use its increased power to slow the industry's transition to new and exciting video distribution models that provide greater choice for consumers."[55] The Division posits that the transition is still underway, but considering the proposed mergers discussed in this Article's previous Part, it is arguable that this development has reached its next phase: ascendency. Quality content distributed by online services is the new normal, and to ensure that the Disney-Fox deal passes muster with antitrust officials and that Disney enters this lucrative market successfully, the company has decided it would not acquire Fox Broadcasting Company (Fox Broadcasting) or Fox's sports programming, since Disney already owns ABC and ESPN.[56] Instead, Disney is focused on acquiring Fox TV Studios (including FXX, a player in quality content television, thanks to *The Americans* and *American Horror Story*) and Fox's film studios.[57]

Makan Delrahim, the United States Assistant Attorney General for the Antitrust Division, is responsible for overseeing the AT&T/DirecTV and Time Warner merger. Because AT&T refused to relinquish control over Time Warner's Turner division, the Justice Department filed suit for prospective antitrust

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52 U.S. v. Microsoft Corp., 253 F.3d. 34 (D.C. Cir. 2001).
53 *Id.*
54 *Id.*
55 U.S. Dep't of Justice, *supra* note 11.
56 Cullins, *supra* note 3.
57 Adalian, *supra* note 21.

violations.[58] As an olive branch of sorts, Disney is already offering to leave Fox Broadcasting alone, but will that be enough to allay Justice Department concerns? The most likely outcome would closely resemble the settlement reached by the Justice Department and Comcast. Disney would have to continue for a period of time to license "comparable" content to SVOD platforms, that is, comparable to what other media companies offer, even once Disney has its own video distribution platform. As for Hulu, Disney would become majority shareholder if the merger succeeds.[59] At this time, it is difficult to predict whether Disney would sell or buy Comcast's ownership interest in Hulu, but this development is unlikely to worry the Justice Department, who may just ask Disney to relinquish its managing rights for a limited period of time.[60] Overall, the Justice Department has made its position very clear: online content distributors must be protected and promoted.[61]

IV. Beyond the Shores

This Article's introduction noted Disney's goals for international expansion. If the merger goes ahead as planned, Disney would be the new owner of Fox's 39 percent interest in European satellite broadcaster Sky.[62] Importantly, Fox is currently tied up by U.K. regulators in its bid to purchase the remaining 61 percent of Sky shares, yet Disney has expressed that its merger with Fox is not contingent on Fox's securing the Sky deal.[63] This Article will not expound on the Fox-Sky deal, which in itself is a fascinating study on media ownership in the European Union; however, it will focus on a substantive element of European Union competition law that the Fox-Sky case has brought up: media plurality.

Pursuant to Article 21(1) and (2) of Council Regulation (EC) No 139/2004 (Merger Regulation), the Commission has exclusive jurisdiction to

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58 U.S. Dep't of Justice, *supra* note 11.

59 Fox, Disney, and Comcast/NBC currently each have 30 percent stakes. Edmund Lee, *Disney's Fox Acquisition Means the End of Hulu As We Know It*, RECODE (Dec. 14, 2017), https://www.recode.net/2017/12/14/16771712/hulu-disney-acquisition-fox-means-dis-foxa-21cf [https://perma.cc/86YF-STSS].

60 OECD, *supra* note 46.

61 U.S. Dep't of Justice, *supra* note 11. "If permitted to merge, AT&T/DirecTV/Time Warner would have the incentive and ability to charge more for Time Warner's popular networks and take other actions to discourage future competitors from entering the market place altogether. A senior Time Warner executive has stated that they have leverage over an online video distributor, whose offering would be [expletive] without Turner." Though one has to wonder how the agency would react to a proposed acquisition of Netflix by Amazon Studios.

62 Chu, *supra* note 12.

63 Georg Szalai, *What the Disney Deal Means For Sky's Bid*, HOLLYWOOD REP. (Dec. 14, 2017), https://www.hollywoodreporter.com/news/what-disney-deal-means-foxs-sky-bid-1066687 [https://perma.cc/TWA5-XK6V].

review EU mergers.[64] The Merger Regulation goes so far as to state, in Article 21(3), that Member States may not apply their national laws on competition to concentrations with a Community dimension.[65] However, in an effort to respect the European Union's founding principles of subsidiarity and proportionality, Article 21(4) of the Merger Regulation states that "Member States may take appropriate measures to protect legitimate interests. . . . Plurality of the media . . . shall be regarded as legitimate interests."[66] A media plurality review may be initiated by an interested Member State; such a review "reflects the crucial role media plays in a democracy, and looks at a wider concern about whether the number, range, and variety of persons with control of media enterprises will be sufficient."[67] Therefore, EU mergers are subjected to two parallel investigations, one by the Commission, scrutinizing the proposed merger's anti-competitive effects, and a second by the relevant Member States, looking into a potential anti-democratic concentration of the media.[68] In the case of Fox and Sky, although the Commission has green-lit the merger, the U.K. is still very much reviewing the deal.[69] The EU's media plurality standard, which promotes the diversity of news sources, transparency, and the protection of the press, resembles the FCC's "public interest" review, which aims to ensure that there is a diversity of information sources and services to the public.[70] As Disney does not plan on acquiring Fox Broadcasting, there does not appear at first blush that there will be much threat of concentration under the EU media plurality assessment.

Finally, back in 2014, the European Commission launched an investigation into anti-competitive pay-television clauses in contracts between Sky and Hollywood studios.[71] The Commission identified clauses in licensing agreements between Sky and six studios (including Disney and 21st Century Fox) that require Sky to block access to, or geo-block, films through its services to

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64 The Commission is the European Union's executive institution. Art. 21(1). Council Regulation No 139/2004 on the Control of Concentrations between Undertakings (the EC Merger Regulation), 2004 O.J. L. 24.

65 *Id.* at Art. 21(3).

66 *Id.* at Art. 21(4).

67 Fox/Sky, Case M. 8354, Commission Decision [2017], O.J. C 73.

68 European Commission Press Release, *Mergers: Commission Clears 21st Century Fox's Proposed Acquisition of Sky under EU Merger Rules*, European Commission (Apr. 7, 2017), http://europa.eu/rapid/press-release_IP-17-902_en.htm [https://perma.cc/FA8Y-WKYZ].

69 *Id.* If anything, a Disney-Fox merger would be welcomed by U.K. regulators, who are wary of Rupert Murdoch's control over the press in Britain. Unlike the Murdoch family, Disney has never been known to be a political purveyor.

70 47 U.S.C. § 521(4); *see also* 47 U.S.C. § 532(a).

71 European Commission, *Antitrust: Commission Sends Statement Of Objections On Cross-Border Provisions Of Pay-TV Services Available In UK And Ireland*, European Commission Press Release Database (July 23, 2015), http://europa.eu/rapid/press-release_IP-15-5432_en.htm [https://perma.cc/28XJ-JL5T].

consumers outside Sky's licensed territory (United Kingdom and Ireland).[72] According to the Commission's statement of objectives, "these clauses grant 'absolute territorial exclusivity' to Sky UK. . . . They eliminate cross-border competition between pay-TV broadcasters and partition the internal market along national borders."[73] Currently, only Paramount has agreed to settle with the Commission to allow customers to access, through passive sales, pay-television content that had been restricted to the United Kingdom and Ireland.[74]

The EU is also moving full speed ahead with its Digital Single Market (DSM) strategy.[75] The aim of DSM is straightforward: to update the European Union's Single Market rules for the digital era, ensuring that the principle of free movement and access is available online to everyone in the European Union, regardless of nationality or place of residence.[76] In other words, the strategy is designed to end unjustified geo-blocking and allow cross-border access on a temporary basis.[77] Although audiovisual services are not included in the latest geo-blocking regulation, the plan has not been abandoned by its proponents in the European Union.[78] Entertainment and media companies, such as Disney, geo-block as a "windowing" mechanism, allowing them to distribute content in different formats and channels in strategic timeframes and varying price ranges.[79] While this may be inconvenient for viewers who would prefer immediate worldwide and discounted access, "windowing" is an effective business strategy for distributors and content creators who benefit from the control and price discrimination this mechanism offers.[80] And the latter mechanism could not be enforceable without national copyright laws protecting territorial rights. Under copyright law in the EU, the exclusive rights holder (licensee)—in this case, Sky UK—is entitled to rely on its license to prevent another source from distributing the licensed film or television show

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72 *Id.*

73 *Id.*

74 *Id.* Passive sales are unsolicited requests to pay-TV services from consumers located abroad, i.e., a Member State where Sky UK is not actively promoting or advertising its services.

75 European Commission, *Shaping the Digital Single Market*, https://ec.europa.eu/digital-single-market/en/policies/shaping-digital-single-market [https://perma.cc/WXB7-ZASC].

76 *Id.*

77 European Commission, *Geoblocking Policy*, https://ec.europa.eu/digital-single-market/en/geo-blocking-digital-single-market [https://perma.cc/GDR3-WUE5].

78 *See* Member of European Parliament, Julia Reda: https://juliareda.eu/2018/02/eu-did-not-end-geoblocking.

79 Joseph V. Kennedy, *Why Geoblocking Can Increase Consumer Welfare and Improve Income Equality*, The Information Technology and Innovation Foundation (May 2014), http://www2.itif.org/2014-geoblocking-increase-consumer-welfare.pdf [https://perma.cc/R8SD-5ZHJ].

80 *Id.*

in its territory.[81] However, according to the Commission, Sky cannot prevent a consumer abroad, i.e., outside the licensed territory, from enjoying this content.[82] As a result of the Commission's investigation, Disney is compelled to navigate the uncharted waters of the current European debate on modernizing copyright law and ending unjustified geo-blocking.[83] Since Disney has not yet responded to the Commission's requests to conform its pay-television clauses with EU competition regulation, Disney's potential ownership of Sky could be viewed by the EU institutions as a way to directly control more programming in the EU, and this would give the company more decision-making leverage with EU regulators.[84]

Speculation, however, is tenuous at this juncture considering that Sky UK, a British media company, will soon be out of the Commission's purview as a result of Brexit. Currently, under EU law, the U.K. benefits from single market legislation, which aims to open and facilitate media transmission within the European Union.[85] What this means for co-productions, cross border operations, and licensing agreements is anyone's guess, but Disney and Fox should pay close attention to Brexit negotiations, as well as to the evolution of copyright and territoriality in the European Union. These political decisions will be just as important as the ascendency of the online video distribution model, especially if Disney and Comcast have global intentions for Hulu.

Conclusion

In the introduction, this Article posed this question: "Who will own the kingdom?" In reality, the issue is this: "What will the kingdom look like?" If the European Commission has its way, audiovisual services will one day be borderless and open to all. If the Justice Department has its way, audiovisuals will be varied and affordable to industry professionals and consumers alike. In sum, competition should reinforce the idea of choice. Digital streaming is in

81 Francisco Javier Cabrera Blàzquez, Maja Cappello, Christian Grece & Sophie Valais, *Territoriality And Its Impact On The Financing Of Audiovisual Works*, European Audiovisual Observatory (Council of Europe) (2015), https://rm.coe.int/168078347f [https://perma.cc/4N6E-TPYP].

82 *Id.*

83 Natasha Lomas, *At last an end to Geoblocking in Europe? Nope, not by a long chalk . . .*, TECH CRUNCH (Feb. 5, 2018), https://techcrunch.com/2018/02/06/at-last-an-end-to-geoblocking-in-europe-nope-not-by-a-long-chalk [https://perma.cc/6YKD-Y9MG].

84 21st Century Fox owns 39 percent of Sky Italia and Sky German. Mark Sweney, *Why US Media Giants are Eyeing Sky—and What Any Deal Might Mean*, Guardian, Mar. 3, 2018, https://www.theguardian.com/business/2018/mar/03/why-us-media-giants-are-eyeing-sky-and-what-any-deal-might-mean [https://perma.cc/25BE-PCKZ].

85 The Conversation, *What a Brexit Would Mean for Europe's Television Channels*, The Conversation (June 3, 2016), https://theconversation.com/what-a-brexit-would-mean-for-europes-television-channels-60388 [https://perma.cc/F3A6-ZCDG]. For example, the Television Without Borders Directive, which was enacted in 1989, enabled channels to broadcast to other member states without being subject to local licensing rules.

its golden age, just like television, and every media and communications company is going back to the drawing board to see how it can get in on the action. In fact, Facebook and Apple both recently launched their own streaming services. If Disney were to remove all of its content from Netflix and Hulu to deliver the content on its own SVOD platform, consumers would then have to sign up for an extra subscription service. The fear is that, in the end, consumers will be paying as much for SVOD as they are paying for Comcast or DirecTV. The FTC and Justice Department will be reviewing all of these concerns. It remains to be seen how consumers will react if subscription video on demand services hike their prices and start canceling programs.[86] If this recent surge in mergers and acquisitions in the entertainment industry has taught consumers anything, it is that choice comes at a price.

86 Netflix has already raised its subscription fees. Peter Kafka, *Netflix is raising its prices and Wall Street is raising Netflix's stock price*, Recode, Oct. 5, 2017, https://www.recode.net/2017/10/5/16430206/netflix-price-hike-november-current-subscribers-october-new-subscribers [https://perma.cc/3RN8-4VPD].