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Attack on Antitrust: Preventing a Grim Future for Anime Streaming

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INTRODUCTION

August of 2021 was a month of celebration for anime fans. Loyal viewers rejoiced at the news that Sony, owner of Funimation Global Group (Funimation), had reached a deal to acquire Crunchyroll from AT&T for a staggering $1.175 billion.[1] This meant that Funimation exclusive titles would be merged into Crunchyroll's already impressive catalogue of shows. Classics like *Yu Yu Hakusho*, *Cowboy Bebop*, and *Akira*, as well as new age hits like *Horimiya*, *Kaguya-sama: Love Is War?*, and a potpourri of isekai shows have already made the transition. Equally important is Funimation's substantial collection of English dubs.

Sony's billion-dollar acquisition represents three things. First, "big anime" is truly here.[2] The largest players in entertainment are ready and willing to sink billions of dollars into Japanese animation, a content medium that has skyrocketed in popularity in the U.S. since the 90s. This is evidenced by the investment of major streaming generalists like Netflix, Amazon, and

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1. *See* Press Release, Sony's Funimation Global Group Completes Acquisition of Crunchyroll from AT&T (Aug. 9, 2021), https://www.sonypictures.com/corp/press_releases/2021/0809/sonysfunimationglobalgroupcompletesacquisitionofcrunchyrollfromatt#:~:text=FOR%20IMMEDIATE%20RELEASE-,Sony's%20Funimation%20Global%20Group%20Completes%20Acquisition%20of%20Crunchyroll%20from%20AT%26T,through%20Funimation%20Global%20Group%2C%20LLC.

2. Cecilia D'Anastasio, *Welcome to the Era of Big Anime*, WIRED (Aug. 31, 2021), https://www.wired.com/story/funimation-crunchyroll-big-anime-era-is-here/

Disney into anime streaming. Second, it united what has long been regarded as the two giants of dedicated anime streaming platforms in the United States. Now, viewers can log into one platform, pay one fee, and access more content than ever. Third, it may signal the start of a concerning trend of consolidation in the anime streaming industry. This should trigger alarm bells for antitrust authorities. Past lessons suggest that we should be extremely cautious where conglomerate corporations lead the charge in industry consolidation.[3]

This short essay serves as a warning for antitrust authorities: merger challenges must not be neglected in the anime streaming industry. The following will discuss the dangers of Sony's acquisition of Crunchyroll for the anime streaming market (I), explain why the prevailing model of antitrust laws is insufficient to stop these harms from occurring (II), and posit that the antitrust laws give agencies like the FTC sufficient leeway to abandon the deficient approach of the old guard and take necessary, preemptive action to protect anime streaming as a unique product market (III).

I. THE ALL FOR ONE OF ANIME STREAMING: CRUNCHYROLL-FUNIMATION

Sony and Funimation's acquisition of Crunchyroll looks like the start of a dangerous trend of consolidation in anime streaming. Traditional market principles suggest that the dispersion of power is good—more competitors create a greater incentive to lower prices to a competitive level or provide better products through innovation. Both are good for consumers. For instance, if one large competitor offered a product for above what consumers are rationally willing to pay, there is ample room for an existing competitor, or a new entrant, to offer lower prices. Consumers benefit from healthy *competition*.

Naturally then, we should worry about industry concentration, which can signal a lack of competition. Concentrated industries are often accompanied by higher prices and reduced innovation.[4] Paradoxically, however, our markets are arranged to promote concentration. Scholar and economist John Kwoka has noted the dangerous trend of concentration in the U.S. economy allowed by our antitrust laws:

> [T]he number of major US airlines has gone from 7 to 4. The number of accounting companies has fallen from 8 to 4. . . . There are now only two pharmacy chains, two sizeable mattress manufacturers, two large brewers. . . . Microsoft has now been joined by four additional dominant

3. *See*, *e.g.*, Michael L. Cederblom, *The Antitrust Alternative: Promoting Public Health Through Competition*, J.L. & SOC. EQUAL. (forthcoming 2023) (describing how concentration in the food industry has increased food prices and negatively affected public health as a result).

4. John Kwoka, *Squaring the Deal*, MILKEN INST. REV. (Oct. 20, 2017), https://www.milkenreview.org/articles/squaring-the-deal; Lina M. Khan, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710, 721 (2017) (describing how increased market power of firms is often followed by "diminished innovation").

> companies, in search, social media, and e-commerce. And these five have collectively acquired more than 600 companies over the past twenty years.[5]

Kwoka has also criticized the poor enforcement efforts of federal antitrust agencies, linking this to the concentration epidemic. Federal challenges are generally confined to mergers leading to extreme concentration (two to three competitors), ones bordering on true monopoly.[6] Despite the lack of federal challenges, however, mergers reducing the market to five to eight competitors are largely anticompetitive still.[7]

There are two important lessons that can be gleaned from Kwoka's findings. First, concentration is harming consumers. Airlines, for instance, are offering fewer and lower quality flights.[8] Workers' wages are stagnating across the board.[9] It has even been pointed out how concentration contributes to increasing food prices.[10] With fewer competitors and lax agency enforcement, large conglomerate corporations have been able to siphon greater profits at the expense of the consumer.[11] Second, Kwoka's data details a troubling trend: emboldened by weak antitrust principles, companies have been able to purchase their way out of competition just until the point where the FTC or DOJ might step in and challenge them—a monopoly creep of sorts. The FTC and DOJ's categorization of startup acquisitions as procompetitive (or not anti-competitive), as seen in Kwoka's review of big tech companies like Microsoft and Amazon, precludes an outcome where a nascent competitor can arise. But these still pose "no threat" to competition under prevailing principles since startups will not bequeath upon the purchaser sufficient market power to trigger monopolistic concerns in existing markets, and the short-term focus of existing review precludes a finding of anticompetitive capabilities in future markets.

Enter the Crunchyroll-Funimation merger. Sony's acquisition of Crunchyroll was designed to combat the rising market shares of competitors like Netflix and Amazon Prime Video.[12] The immediate result was a decreased incentive to innovate. For example, Funimation's website has long

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5. *Does America Have a Monopoly Problem? Examining Concentration and Competition in the U.S. Economy: Hearing Before the Subcomm. On Antitrust, Competition Pol'y & Consumer Rts., S. Comm. On the Judiciary*, 116th Cong. 1 (Mar. 5, 2019) (prepared statement of John E. Kwoka, Jr., Neal F. Finnegan Distinguished Professor of Economics, Northeastern University), https://www.judiciary.senate.gov/imo/media/doc/Kwoka%20Testimony.pdf.

6. *Id.* at 6.

7. *Id.*

8. *See* Frank Pasquale & Michael L. Cederblom, *The New Antitrust: Realizing the Promise of Law & Political Economy* (working paper) (on file with author).

9. *Id.* at 51.

10. *See* Cederblom, *supra* note 3.

11. *Id.* (discussing Tyson's behavior during the pandemic, raising prices to counter the supposed costs of the pandemic and supply chain shortages, while also recording increased profits).

12. Josh Sisco & Jessica Toonkel, *Sony's Hopes of Countering Netflix in Anime Market Delayed by Antitrust Probe*, INFO. (Mar. 24, 2021), https://www.theinformation.com/articles/sonys-hopes-of-countering-netflix-in-anime-market-delayed-by-antitrust-probe.

received strong criticism for its lack of functionality compared to the simpler design of Crunchyroll. But now, Funimation no longer needs to fix or improve their website; they can just use the new one they bought from Crunchyroll.

Prior to the merger, concentration was already having its effect. For thirteen years, Crunchyroll maintained their original pricing model of $6.95 for a premium subscription. After their acquisition by AT&T, Crunchyroll raised their prices for the first time ever to $7.99, a 15% increase.[13] Perhaps they were emboldened by a market mainly consisting of only seven streaming services (Crunchyroll, Funimation, Netflix, Amazon Prime Video, HBO Max, Hulu, and HiDive). What is more concerning is what the merger allows Crunchyroll-Funimation to do going forward.

Consider now Crunchyroll's free subscription model. Previously, viewers were able to choose between the $6.95 per month fee and a free ad-supported membership model. These members were able to watch all existing and new shows as they aired (called "simulcast" in the industry—where anime debuting in Japan is simultaneously broadcasted to American audiences on a regular basis instead of all episodes being released as a complete season) for free. The only tradeoffs were free viewers received ads, and simulcast shows were released one week later for free members than premium members (who had access to simulcast shows the day after the Japan release date).[14] After their acquisition by Sony, Crunchyroll-Funimation changed this policy and removed the free, ad-supported model for new shows. Now, anyone who wants to watch the newest shows as they air must pay the increased price of $7.99 per month—note the loss of incentive to offer the ad-supported free model. Previously, viewers likely chose between Funimation and Crunchyroll (or one of many piracy sites) to watch the newest simulcast shows. Crunchyroll enticed viewers to their platform through their free membership built on ad revenue. Without Funimation as a competitor, however, Crunchyroll-Funimation just lost their incentive to maintain their ad-free model.

Also highly concerning is the potential for greater labor exploitation. Partly to blame is Sony's successful efforts at vertical integration.[15] Look at

13. Anthony Ha, *Crunchyroll Raises its Monthly Subscription Price to $7.99*, TECH CRUNCH (Mar. 22, 2019), https://techcrunch.com/2019/03/22/crunchyroll-raises-its-monthly-subscription-price-to-7-99/#:~:text=Prices%20for%20its%20premium%20subscription,or%20%C2%A364.99%20per%20year.

14. Emma Roth, *Crunchyroll Ends Free Streaming for New and Continuing Series*, VERGE (Mar. 27, 2022), https://www.theverge.com/2022/3/27/22998591/crunchyroll-ends-free-ad-supported-streaming-new-releases-simulcasts-anime#:~:text=Crunchyroll%20will%20no%20longer%20offer,which%20start%20at%20%247.99%20%2F%20month.

15. Vertical integration has long been lauded by Establishment antitrust scholars as procompetitive, unlike its horizontal counterpart. However, modern scholars point out the anticompetitive tendencies of such coordination that is relied upon and currently being challenged by the Big Tech industry. *See* Marshall Steinbaum (@Econ_Marshall), TWITTER (Sept. 6, 2022, 8:18 AM), https://twitter.com/Econ_Marshall/status/1567125127338524673. Vertical restraints, according to Steinbaum, have been embraced by the law: "And his aim has been achieved in the de facto legalization

the anime *Fate/Grand Order*: the show was produced by Aniplex (owned by Sony), animated by Clover Works (owned by Aniplex), dubbed by Funimation (Sony), and the music was largely produced by Sony Music.[16] Later, Funimation acquired a 30-day exclusivity period internationally and a 1-year exclusivity period for the English dub.[17] By inserting themselves at each step, Sony leverages their influence to gain even more streaming and exclusive licenses. This is the type of foreclosure that Lina Khan warned about in 2017 that has been largely ignored since it falls outside the purview of the "Consumer Welfare" standard's concern of price and output.[18]

There are two consequences of this: (1) lower wages for Japanese animators, and (2) lower wages for U.S. English dub voice actors. Animators in Japan are notoriously underpaid, earning roughly $2 an hour for their hand drawn work.[19] A concentrated streaming industry will ensure fewer distribution outlets, forcing animation companies to accept lower prices, reducing pay. Coupled with the rising demand overseas, Japanese actors will be overworked and underpaid. English voice actors are also frighteningly underpaid. Often working for Funimation or Crunchyroll, actors risk the integrity of their vocal cords while earning as little as $35 an hour without

of vertical restraints, most recently in *Ohio v. American Express*."). Marshall Steinbaum, *When It Comes to the History of Economics, Don't Think Like an Economist*, L. POL. ECON. PROJECT (Sept. 6, 2022), https://lpeproject.org/blog/when-it-comes-to-the-history-of-economics-dont-think-like-an-economist/. One consequence of this vertical integration is unprecedented control of workers and a near complete avoidance of the consequences of labor law. *See, e.g.*, Marshall Steinbaum, *Antitrust, The Gig Economy, and Labor Market Power*, 82 L. & CONTEMP. PROBS. 45, 53 (2019) ("More recently… is the advent of the so-called gig economy: the deployment of independent contractor status for workers, not just for the independent businesses who employ them. This makes each individual worker an independent business, and thus denuded of any protections under labor law. However, they can simultaneously be controlled entirely by employer/customers without the protections and stability of the employment relationship enshrined in statute during the New Deal. This is the business model that online labor platforms like Uber, Lyft, Handy, and Care.com have perfected…"). Despite the present-day acceptance of vertical restraints, they were once illegal under the Sherman Act. Premised on political concern over bigness, enforcers were highly concerned with the potential for "leverage and foreclosure" of these vertical giants. *See* Lina M. Khan, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710, 731-32 (2017). This is the type of danger that Sony's vertical integration poses in the anime streaming market. Sony's influence at all stages of the stream of production for anime streaming requires competitors like HiDive to compete not only for licenses, but for music, production, and more. *Id.* at 732 ("Foreclosure, meanwhile, occurs when a firm uses one line of business to disadvantage rivals in another line. A flourmill that also owned a bakery could hike prices or degrade quality when selling to rival bakers—or refuse to do business with them entirely. In this view, even if an integrated firm did not directly resort to exclusionary tactics, the arrangement would still increase barriers to entry by requiring would-be entrants compete at two levels.").

16. D.M. Moore, *Anime is One of the Biggest Fronts in the Streaming Wars*, VERGE (Dec. 23, 2019), https://www.theverge.com/2019/12/23/21003549/anime-streaming-wars-netflix-amazon-att-sony-crunchyroll-funimation.

17. *Id.*

18. Khan, *supra* note 16, at 732.

19. Eric Margolis, *The Dark Side of Japan's Anime Industry*, VOX (July 2, 2019), https://www.vox.com/culture/2019/7/2/20677237/anime-industry-japan-artists-pay-labor-abuse-neon-genesis-evangelion-netflix.

session minimums.[20] Earning $35 an hour may seem like a great rate, but it rarely results in a substantial paycheck. The voice actors for *Jujutsu Kaisen 0*, one of the biggest anime movie hits of 2022, are estimated to have earned only $150-600 for the *entire* movie.[21]

This is just the beginning and prompt action is needed. In industries like big tech, the harms flowing from overly concentrated markets are difficult to unwind. It is significantly easier to prevent the harm of concentration by targeting mergers initially. For instance, it would be easier to stop Facebook's acquisition of Instagram than to untangle the two after nearly 10 years of integration. Fortunately, the FTC is beginning to prioritize blocking incipient concentration in new and emerging markets.[22] For Chair Lina Khan, the FTC must turn its attention forward to the "next-generation" of big tech. For instance, the FTC recently filed a challenge against Meta's acquisition of Within (a "reality fitness start-up") to protect the viability of the future market.[23]

The next generation of entertainment is already here. Anime is a rapidly growing industry that demands forward thinking enforcement.[24] The same approach the FTC is applying to big tech should be used in the anime streaming market, for proactive, not reactive, policies will keep a market competitive. Instead of shelving acquisitions by large conglomerates in the anime streaming industry as procompetitive or simply not anticompetitive, like the FTC has historically done with Big Tech and startups, the federal agencies should give great weight to the implications that such mergers will have on future competitive markets. Viewing such acquisitions by vertically integrated companies like Sony with a more critical eye, focusing on the potential for leveraging and foreclosure, will better protect markets down the road from terminal consolidation. After all, the history of antitrust enforcement under the prevailing Establishment principles has endorsed concentration and, as will be discussed, is incapable of preventing it, even under the leadership of a reformist like Khan.

II. ESTABLISHMENT ANTITRUST'S MYOPIA

Khan's forward-looking enforcement is necessary for young and growing markets because the principles of the prevailing Establishment

20. Borealis Capps, *Crunchyroll's Low Pay Sparks Controversy Among Voice Actors*, GAMERANT (Mar. 4, 2022), https://gamerant.com/crunchyrolls-low-pay-sparks-controversy-among-voice-actors/.

21. Evan Minto, *The Battle for Union Anime Dubs*, ANIMENEWSNETWORK (Mar. 28, 2022), https://www.animenewsnetwork.com/feature/2022-03-28/the-battle-for-union-anime-dubs/.183842.

22. *See* Cecilia Kang, *F.T.C. Chair Upends Antitrust Standards with Meta Lawsuit*, N.Y. TIMES (July 28, 2022), https://www.nytimes.com/2022/07/28/technology/ftc-lina-khan-meta.html?searchResultPosition=2.

23. *Id.*

24. *See, e.g.*, Sara Fischer & Kerry Flynn, *Demand for Anime Content Soars*, AXIOS (Jan. 11, 2022), https://www.axios.com/2022/01/11/anime-demand-soars-content-straming.

Antitrust[25] prevent meaningful intervention. In fact, their methods have directly resulted in the current concentration epidemic. There are two reasons for this. First, the deficient Consumer Welfare (CW) standard endorses concentration based on its narrow economic output focus. Second, Establishment principles tend to rely on broad product market definitions, ones favorable to would-be-monopolizers that preclude successful enforcement under the CW standard.

The antitrust laws were designed to protect *competition*, not some notion of neutral empiricism. From their founding, and for much of the history of their enforcement, the antitrust laws promoted populist political values (small business and democracy).[26] However, Robert Bork's highly influential book, *The Antitrust Paradox*, rerouted the entirety of antitrust. Bork posited that antitrust enforcement had lost control, and the true purpose of the antitrust laws was quite simple: promoting lower prices and increased output. Bork's "Consumer Welfare standard"[27] quickly gripped the federal agencies and courts, establishing itself as the prevailing school of thought. Now, neither bigness nor concentration is seen as an issue in the analysis. For Bork and his following, they lacked sufficient empiricism. Instead, so long as short-term price does not increase, or output decrease, there is no violation of the antitrust laws.[28] If lower prices can be achieved by the work of a single dominant firm, the CW standard would welcome it. Even if prices increase, if there is some tangible procompetitive justification, the behavior may be excused under the assumption that there is a net positive result.

In the anime streaming market, we should expect nothing different. Based on these myopic output concerns, there is nothing conceivably wrong with mergers like Crunchyroll-Funimation's. Nothing in the short-term suggests the streaming giant will raise prices or decrease output. Even the changes to the free membership model can be excused by a procompetitive justification such as the additional shows added to the library—the price increase is warranted. The issue here is that such a model ignores the increased power and ability of the giant to raise prices in the future when the market is sufficiently concentrated.

Broad market definitions also lend to favorable review under the CW standard. In a broad market, we can seemingly find more competitors and a lower percentage of market share, lowering the perceived risk of a proposed merger. Part of the reason for this preference is an unwillingness to use narrower market definitions for fear of stifling innovation. This fear is not completely unfounded, since market definitions are often outcome

25. "Establishment Antitrust" is a term coined by Frank Pasquale and I describing the modern lineage of the Chicago School antitrust scholars. *See* Pasquale & Cederblom, *supra* note 8.

26. *See*, Cederblom, *supra* note 4, at 14.

27. Thomas A. Piraino Jr., *Reconciling the Harvard and Chicago Schools: A New Antitrust Approach for the 21st Century*, 82 IND. L.J. 345, 350 (2007).

28. *See, e.g.*, Rebel Oil Co. v. Atl. Richfield Co., 51 F.3d 1421, 1433 (9th Cir. 1995) ("[R]eduction of competition does not invoke the Sherman Act until it harms consumer welfare.").

determinative.[29] On this view, authorities have come to the conclusion that product market definitions are being too narrowly defined such that important economic efficiencies are being excluded from the analysis.[30] While narrow market definitions are ostensibly pro-plaintiff, broad ones are notably pro-defendant. Even if markets are being more narrowly defined today than 20 or 30 years ago,[31] this does not necessarily lead to the conclusion that markets are too narrowly defined—perhaps we are just closing in on what is a more accurate product market definition. However, this fear of stifling innovation through overenforcement in emerging markets precludes meaningful review.[32]

This is the approach that AT&T and Sony took for the Crunchyroll-Funimation merger. Arguing that the "anime market" is not a distinct market, they sought to broaden the scope of the analysis to include other animated shows like *The Simpsons* and *Family Guy*, creating an appearance of heightened competition in the now broader market. A continuation of these policies would ensure that industry-narrowing mergers like this will continue. Sony, Amazon, and Netflix are poised to continue to buy competitors like HiDive without repercussion under the guise that other competitors in the expanded market provide viable competition. The result will be concentration and consumer harm, like we have seen time and time again.

III. TOWARDS FAIR COMPETITION

Khan's leadership foreshadows a New Antitrust agenda that accounts for the deficiencies of the Establishment Antitrust.[33] Fortunately, the flexibility of the antitrust laws as written provides ample space for this shift. The CW standard was not written into the antitrust statutes, rather it is the product of generalist courts coopting the rightful role of agency experts and imposing particular normative values.[34] As Sanjukta Paul has pointed out, we are free to reconstruct these guiding principles of antitrust under different normative values.[35] And we should. The emphasis should be on promoting

29. Christine S. Wilson, *The Unintended Consequences of Narrower Product Markets and the Overly Leveraged Nature of Philadelphia National Bank*, FED. TRADE COMM'N (June 30, 2019), https://www.ftc.gov/system/files/documents/public_statements/1532894/wilson_-_remarks_at_oxford_antitrust_enforcement_symposium_6-30-19_0.pdf.

30. *Id.*

31. Christine S. Wilson & Keith Klovers, *Same Rule, Different Result: How the Narrowing of Product Markets Has Altered Substantive Antitrust Rules*, 84 ANTITRUST L.J. 55, 59 (2021).

32. *See, e.g.*, Andrew C. Hruska, *A Broad Market Approach to Antitrust Product Market Definition in Innovative Industries*, 102 YALE L.J. 305, 305 (1992).

33. For a discussion on the "New Antitrust" movement, *see* Pasquale & Cederblom, *supra* note 8.

34. *Id.* at 30-39; Ganesh Sitaraman, *Taking Antitrust Away from the Courts*, THE GREAT DEMOCRACY INITIATIVE, 1, 6-7 (2018).

35. Sanjukta Paul, *Recovering the Moral Economy Foundations of the Sherman Act*, 131 YALE L.J. 176, 179 (2021).

fair competition—a fitting job for the FTC which is explicitly empowered to implement "morality embedded in Sherman Act case law."[36]

Part of the restructuring should emphasize narrow market definitions that more accurately capture the relevant market. Thus, anime streaming should be viewed as a distinct market, separate from entertainment and other types of animation. Anime has created a unique (formerly niche) audience. Naturally, *The Simpsons* is not an adequate replacement when one finishes *Bleach* or *Tokyo Ghoul*.[37] The presence of these shows on a general streaming platform does not negate this, and the presence of anime-only streaming platforms actually supports the idea of anime as a distinct market. Conflating anime and anime streaming with animation generally or even with the entirety of the entertainment market may include some market efficiencies as desired by the Establishment antitrust, but it also works to mask anticompetitive tendencies and mergers that cancel out and overpower any proposed efficiency.

Antitrust also structures markets. Instead of promoting maximum-efficiency giants, we can promote fair competition. What constitutes "fair competition" is perhaps not exactly clear cut, but what we know is that it is broader than the type of conduct proscribed by the Sherman and Clayton Acts.[38] For instance, Sandeep Vaheesan has called for the FTC to define "market dominance" at 30% or more control of a market,[39] a much more generous (and realistic) interpretation of where a corporation can engage in anticompetitive practices. To Vaheesan, such a rule would promote fair competition by "strik[ing] at monopolies in their 'incipiency,'"[40] instead of trying to remedy preventable harms. The FTC's goal should be to flush out the concept of fair competition, likely by looking to the failures of the policies of the last 40 years.

Imperative to assuring fair competition for future markets is proactive enforcement to protect young, growing markets from early domination. Khan has set the new status quo (by returning to the original goals of the antitrust laws) with its Within merger challenge.[41] Applying this to the anime

36. Sandeep Vaheesan, *The Morality of Monopolization Law*, 63 WILLIAM & MARY L. REV. ONLINE 119, 123 (2022).

37. One reason for this difference is the larger range of mature themes found in anime. Cartoons are colloquially thought of as shows for kids. While adult humor and content is often strewn throughout (such as the White Bronco reference in Shrek 2), the primary audience is still children, and the content is appropriate. Anime, on the other hand, purposefully makes shows for adults. One would not mistake the brutality of *Berserk*, *Parasyte*, or *Re:Zero*, for instance, to be suitable for young children like *The Simpsons* or *SpongeBob* would. There appears to be a more fundamental difference between the two categories as well, revealed by AI and neural networks. *See* Chai Jia Xun, Haritha Ramesh, & Justin Yeo, *Are Anime Cartoons?*, http://cs229.stanford.edu/proj2016/report/ChaiRameshYeo-AreAnimeCartoons-report.pdf ("This tells us that there are significant differentiating features between anime and cartoon – features that can even be detected by a machine.").

38. Vaheesan, *supra* note 36, at 134.

39. *Id.* at 136-37.

40. *Id.*

41. Khan, *supra* note 19.

streaming market would require the FTC and DOJ to challenge similar mergers in the future that threaten to consolidate the industry. This is the goal of antitrust, after all, to arrange the economy and markets in such a way to assure fair competition for both viewers and labor—this requires (as originally intended) the promotion of small business and the reigning in of large corporations that seek to corner the market by reducing the number of competitors.[42] While the courts have bought in to the Establishment economic narrative, agencies like the FTC were not designed to be subservient to the generalist judicial system. Armed with expertise and industry specific knowledge, agencies should take control of antitrust review back from the generalist courts with the power specifically delegated to them by Congress.[43] Sandeep Vaheesan has argued that this legislative power is quite broad:

> Under progressive leadership, one federal agency, the FTC, could resurrect antitrust law as "a comprehensive charter of economic liberty." Modern administrative law and Congressional delegation of policymaking authority grant the FTC expansive power to interpret the antitrust provision of Section 5 of the FTC Act. In enacting this statute, Congress articulated a grand progressive-populist vision of antitrust. It wanted the FTC to police "unfair methods of competition" that injure consumers, prevent rivals from competing on the merits, and allow large corporations to dominate our political system. Congress intended the FTC's antitrust authority to encompass more than the prohibitions in the Sherman and Clayton Acts and to nip anticompetitive problems in the embryonic state before corporations gained undue power over consumers, small suppliers, competitors, and the American political system.[44]

Building on Vaheesan's work, in *The Antitrust Alternative*, I argued that §5 gives the FTC the power to define unfair acts in ways that protects the food market from unfair mergers that harm competition.[45] The same approach to protecting markets should be taken here: under §5 of the Federal Trade Commission Act, the FTC can use its administrative rulemaking power to provide merger review parameters that includes scrutiny of the future leveraging and foreclosure capabilities a merger may confer on an entity (instead of focusing merely on short term price and output), with the

42. Letter from FARM ACTION, *Re: Request for Information on Merger Enforcement* (Apr. 21, 2022), https://farmaction.us/wp-content/uploads/2022/04/Farm-Action-Merger-Guidelines-Comment-4.21.22.pdf.

43. *See* Cederblom, *supra* note 4, at 23.

44. Sandeep Vaheesan, *Resurrecting "A Comprehensive Charter of Economic Liberty": The Latent Power of the Federal Trade Commission*, 19 U. PENN. J. BUS. L. 645, 650 (2017). Discussing the concern of big businesses crossing market boundaries, using their monopolies to enter and become top competitors in new markets (through conglomerate mergers), Peter C. Carstensen and Nina H. Questal advocated for the FTC to use §5 to create a rule defining certain conglomerate mergers as "unfair" under the FTCA, perhaps based on size. *See* Peter C. Carstensen & Nina H. Questal, *Use of Section 5 of the Federal Trade Commission Act to Attack Large Conglomerate Mergers*, 63 CORNELL L. REV. 841, 866-68 (1978).

45. *Id.* at 23-24.

goal of protecting future markets from "unfair acts."[46] Taking advantage of the rightful deference that should be afforded to such expert agencies, the FTC can redefine the structures of competition law to promote fair competition in present and future markets.

CONCLUSION

As the anime streaming industry rushes towards its bright future, antitrust authorities must be vigilant. Fortunately, we are in a unique position compared to other concentrated markets—anime streaming is still young in the U.S., and it is possible to act before it is too late. The New Antitrust reformists of the Biden administration are grappling with the difficult problem of unwinding decades of concentration in big tech. The same mistake cannot be made here; antitrust agencies and lawmakers must not ignore this rapidly growing arena. It is imperative that federal agencies redraw their approach to align with the normative foundations of antitrust: the protection of fair competition and the dispersal of power. Narrowly defining the anime streaming market and proactive enforcement will prevent underenforcement-led monopoly creep through terminal consolidation of the industry, and allow anime streaming to flourish in the coming years.

46. *Id.*

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