

“AND THE OSCAR GOES TO . . .”: WHY THE ACADEMY
AWARDS MAY CREATE ANTITRUST DRAMA WITH
PROPOSED ELIGIBILITY RULE CHANGES

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INTRODUCTION

At the ninety-first Academy Awards in February 2019, streaming service Netflix earned its first Best Picture nomination for its film *Roma*.¹ Though *Roma* ultimately failed to win, the fact that a streaming service was nominated for one of Hollywood's biggest awards worried filmmakers who believed that films should only be viewed in a movie theater.² As a result, the Academy of Motion Picture Arts and Sciences (the Academy), the organization that gives out the Academy Awards, or the "Oscars," met in April 2019 to discuss potential changes to its eligibility rules to address this worry.³ Currently, films must be shown in a theater in Los Angeles County for one week to be eligible for an Academy Award.⁴ Proposed rule changes included lengthening this requirement from one week to as long as four weeks.⁵

While the Academy's Board of Governors was considering potential changes to eligibility rules, the Department of Justice (DOJ) became aware of the issue.⁶ In response, the DOJ sent an advisory letter to the Academy outlining concerns that eligibility changes shutting out certain studios and streaming services may violate antitrust laws under the Sherman Act:

In the event that the Academy—an association that includes multiple competitors in its membership—establishes certain eligibility

¹ Constance Grady, *Roma Just Scored Netflix Its First Best Picture Oscar Nomination*, VOX (Jan. 25, 2019, 9:00 AM), <https://www.vox.com/culture/2019/1/22/18187333/roma-oscar-nomination-best-picture-alfonso-cuaron> [https://perma.cc/JLK6-H4TE].

² See JP Mangalindan, *Why Hollywood Should Be Worried About Netflix and Its Oscar Nod*, YAHOO FIN. (Feb. 24, 2019), <https://finance.yahoo.com/news/netflix-oscar-roma-113215458.html> [https://perma.cc/CY3S-4RHV] (“[I]f a streamed film like ‘Roma’ wins Best Picture on Sunday, the line between movies and TV will continue to blur, imperiling movie theaters and box office receipts.”).

³ Dominic Patten, *Netflix Wins as Academy Leaves Oscar Eligibility Rule Unchanged*, DEADLINE (Apr. 23, 2019, 9:48 PM), <https://deadline.com/2019/04/oscar-eligibility-vote-ampas-netflix-board-of-governors-1202600968> [https://perma.cc/JWC5-LE3H].

⁴ See *infra* Section I.E.

⁵ David Sims, *Steven Spielberg vs. Netflix*, ATLANTIC (Mar. 11, 2019), <https://www.theatlantic.com/entertainment/archive/2019/03/spielberg-vs-netflix/584530> [https://perma.cc/8JYH-QMC3].

⁶ See David Reid, *Banning Netflix from Oscars Could Break Law, DoJ Warns*, CNBC (Apr. 3, 2019, 6:26 AM), <https://www.cnbc.com/2019/04/03/banning-netflix-from-oscar-may-break-law-says-department-of-justice.html> [https://perma.cc/2ZGG-BET2].

requirements for the Oscars that eliminate competition without procompetitive justification, such conduct may raise antitrust concerns. Section 1 of the Sherman Act, 15 U.S.C. § 1, prohibits anticompetitive agreements among competitors. Accordingly, agreements among competitors to exclude new competitors can violate the antitrust laws when their purpose or effect is to impede competition by goods or services that consumers purchase and enjoy but which threaten the profits of incumbent firms.⁷

The letter describes that a major point of contention is the fact that restricting studios from consideration for the Oscars could potentially result in fewer sales for those films. “If the Academy adopts a new rule to exclude certain types of films, such as films distributed via online streaming services, from eligibility for the Oscars, and that exclusion *tends to diminish the excluded films’ sales*, that rule could therefore violate Section 1 [of the Sherman Act].”⁸

With this warning, the DOJ appears to take the position that the Academy Awards play a unique role in the entertainment industry and can harm competition among film studios. Amidst fears of large technology firms such as Facebook, Google, and Amazon becoming too large and powerful, the DOJ seems to be taking the side of another corporate giant: Netflix.⁹ With continued mergers and acquisitions—including Disney’s \$71.3 billion acquisition of Fox’s entertainment assets and the merger of CBS and Viacom—the entertainment industry will be controlled by fewer organizations going forward.¹⁰ The Oscars issue seems to be representative of this larger problem. Potential rule changes would not only affect Netflix, but would also impact smaller studios

⁷ Letter from the Dep’t of Justice to Dawn Hudson, CEO, Acad. of Motion Picture Arts and Scis. (Mar. 21, 2019), <https://www.documentcloud.org/documents/5792523-DOJ-Academy-Letter.html> [<https://perma.cc/VJV6-ADLD>] [hereinafter Letter].

⁸ *Id.* (emphasis added).

⁹ See Max Gorynski, *Is the American Public Still in Love with Big Tech?*, MEDIUM (Apr. 17, 2019), <https://medium.com/wonk-bridge/is-the-american-public-still-in-love-with-big-tech-b2e09564ae6d> [<https://perma.cc/5YWL-XKH4>].

¹⁰ David Folkenflik, *Viacom and CBS Agree to Merge in \$30B Deal*, NPR (Aug. 13, 2019, 4:50 PM), <https://www.npr.org/2019/08/13/750896132/viacom-and-cbs-agree-to-merge-in-30-billion-deal> [<https://perma.cc/68UR-7R4D>]; Matthew S. Schwartz, *Disney Officially Owns 21st Century Fox*, NPR (Mar. 20, 2019, 6:17 AM), <https://www.npr.org/2019/03/20/705009029/disney-officially-owns-21st-century-fox> [<https://perma.cc/8H7W-HD2W>].

seeking award recognition.¹¹ Amidst power grabs by some of America's largest media organizations, it is imperative to recognize the impact eligibility rule changes for the Oscars may have on the wider landscape of competition within the entertainment industry.

This Note argues that the Academy would violate antitrust laws under the Sherman Act if it were to expand its exclusive theatrical window for films to be eligible for awards consideration. The Academy, an association representing all film professionals, would effectively be prioritizing studios with the financial ability to showcase their works in traditional theaters over those studios with the inability to do so.¹² It would also be shutting out those studios whose business models do not depend on showing films exclusively in theaters.¹³ Not only will this change ultimately hurt such companies' bottom lines and restrict competition, but it will also harm public trust and confidence in the Academy's ability to name the best in film every year.

Part I of this Note documents *Roma's* path to the Academy Awards,¹⁴ including Netflix's history with prestige filmmaking¹⁵ and the Academy's response to Netflix almost winning a Best Picture Oscar.¹⁶ Part I also documents the history of the Academy Awards,¹⁷ the current eligibility rules for films,¹⁸ and the evidence showing that the Oscars result in a tangible "box office bump" for nominated and winning films.¹⁹ Part II will provide a general background of antitrust law²⁰ and then detail how the Academy Awards' rule changes would constitute antitrust violations under the Sherman Act as a group boycott²¹ and an illegal price fixing scheme.²² Part III will discuss Netflix's theatrical release strategy

¹¹ Anne Thompson, *The Spielberg vs. Netflix Battle Could Mean Collateral Damage for Indies at the Oscars*, INDIEWIRE (Feb. 28, 2019, 8:12 PM), <https://www.indiewire.com/2019/02/steven-spielberg-vs-netflix-oscar-academy-wars-1202047846> [<https://perma.cc/UY7D-22VN>].

¹² See discussion *infra* Section II.C.

¹³ See discussion *infra* Section II.B.

¹⁴ See *infra* Section I.A.

¹⁵ See *infra* Section I.B.

¹⁶ See *infra* Section I.C.

¹⁷ See *infra* Section I.D.

¹⁸ See *infra* Section I.E.

¹⁹ See *infra* Section I.F.

²⁰ See *infra* Section II.A.

²¹ See *infra* Section II.B.

²² See *infra* Section II.C.

for the most recent Academy Awards ceremony,²³ its response to potential rule changes,²⁴ and the effect *Roma* potentially had on the Academy and the film industry.²⁵

I. BACKGROUND

A. *Roma Falls Short at the Oscars*

At the ninety-first Academy Awards in February 2019, history was set to be made. For more than nine decades, only nine non-English-language films had been nominated for what is considered Hollywood's greatest honor—the Oscar for Best Picture—and none had won.²⁶ *Roma*, however, was something different. Considered to be Academy Award-winning director Alfonso Cuarón's magnum opus, *Roma* is a semi-autobiographical film entirely told in Spanish.²⁷ It tells the story of an indigenous Mexican housekeeper and the family that employed her in 1970s Mexico City.²⁸ Filmed in black and white by Cuarón himself,²⁹ *Roma* entered the Oscars conversation after winning the Venice Film Festival's Golden Lion Prize.³⁰ Enrapturing critics³¹ and coming from one

²³ See *infra* Part III.

²⁴ See *infra* Part III.

²⁵ See *infra* Part III.

²⁶ Ashley Rodriguez, "Roma" Is Trying to Do Something No Foreign-Language Film Has Ever Achieved in Hollywood, QUARTZ (Feb. 23, 2019), <https://qz.com/quartz/1556291/oscars-2019-roma-could-make-history-with-best-picture-win> [<https://perma.cc/FA6D-GSMA>].

²⁷ Emma Dibdin, *Everything You Need to Know About Roma Before It Sweeps the 2019 Oscars*, HARPER'S BAZAAR (Feb. 24, 2019, 5:33 PM), <https://www.harpersbazaar.com/culture/film-tv/a26470576/what-is-roma-about-movie-meaning-oscars-2019> [<https://perma.cc/T6YP-JYAR>].

²⁸ *Id.*

²⁹ Anne Thompson, *Cuarón Tells Lubezki How He Filmed 'Roma'—Even One Quiet Shot Needed 45 Camera Positions*, INDIEWIRE (Dec. 14, 2018, 6:29 PM), <https://www.indiewire.com/2018/12/roma-emmanuel-lubezki-alfonso-cuaron-cinematography-1202028167> [<https://perma.cc/4RWA-LTAA>] (describing how Cuarón composed his shots after his original cinematographer stepped down due to scheduling conflicts).

³⁰ Ariston Anderson, *Venice: Alfonso Cuarón Wins Golden Lion for 'Roma'*, HOLLYWOOD REP. (Sept. 8, 2018, 10:15 AM), <https://www.hollywoodreporter.com/news/venice-film-festival-alfonso-cuaron-wins-golden-lion-roma-1141199> [<https://perma.cc/8F7P-V2W5>].

³¹ As of January 2020, *Roma* sat at ninety-six percent approval from *Rotten Tomatoes*, a service that aggregates critical reviews to capture general consensus about the film. *Roma*, ROTTEN TOMATOES, https://www.rottentomatoes.com/m/roma_2018 [<https://perma.cc/7PEC->

of Hollywood's most endearing figures, Cuarón's masterpiece had long been seen as the Best Picture frontrunner.³² The film ultimately secured ten nominations, tied for the highest number of nominations for a single film at the ceremony.³³ Going into the final stretch of the Oscars telecast, it seemed inevitable that *Roma* would triumph at the end of the night.³⁴ It had already won two awards for Cuarón—Best Director and Best Cinematography—and earned Mexico its first award for Best Foreign-Language Film.³⁵

Even with its early momentum, *Roma* failed to triumph over *Green Book*, which was named the Best Picture of 2018.³⁶ Entertainment journalists and industry personnel had many theories about why *Green Book* ultimately won out over *Roma*: an older audience's resistance to a foreign-language film, *Green Book*'s easy-to-digest message about racism

PQTY] (“*Roma* finds writer-director Alfonso Cuarón in complete, enthralling command of his visual craft—and telling the most powerfully personal story of his career.”).

³² Scott Feinberg of *The Hollywood Reporter*, a leading awards season prognosticator, believed that *Roma* would win on Oscars night: “Ultimately, though, I suspect that the Academy, which has never had more members from outside the U.S., is ready to make history and give its top prize to a subtitled film.” Scott Feinberg & Todd McCarthy, *Oscars: Who Will Win, Who Should Win*, HOLLYWOOD REP. (Feb. 19, 2019, 5:00 PM), <https://www.hollywoodreporter.com/lists/oscars-2019-who-will-win-who-should-win-1187572/item/oscars-will-win-should-win-19-best-picture-1187570> [https://perma.cc/TKB7-BGZ6].

³³ Brooks Barnes, *Oscar Nominations 2019: ‘Roma,’ ‘The Favourite’ and ‘Black Panther’ Break Ground*, N.Y. TIMES (Jan. 22, 2019), <https://www.nytimes.com/2019/01/22/movies/oscar-nominations-academy-awards.html> [https://perma.cc/M9MC-RD82].

³⁴ See K. Austin Collins, *What Green Book’s Best-Picture Oscar Does (and Does Not) Mean*, VANITY FAIR (Feb. 25, 2019), <https://www.vanityfair.com/hollywood/2019/02/what-green-books-best-picture-oscar-does-and-does-not-mean> [https://perma.cc/XKS2-GKWP] (discussing how historic wins for diverse films such as *Black Panther*, *If Beale Street Could Talk*, and *Spider-Man: Into the Spider-Verse* seemed to lay the groundwork for an ultimate *Roma* win).

³⁵ Georg Szalai, *Oscars: Alfonso Cuarón’s ‘Roma’ Wins Mexico Its First Foreign-Language Honor*, HOLLYWOOD REP. (Feb. 24, 2019, 6:08 PM), <https://www.hollywoodreporter.com/news/oscars-2019-cuarons-roma-wins-mexico-first-foreign-language-honor-1187807> [https://perma.cc/6Q5J-XED5].

³⁶ Patrick Hipes, *‘Green Book’ Caps Wild Oscar Year with Best Picture Win*, DEADLINE (Feb. 24, 2019, 9:00 PM), <https://deadline.com/2019/02/green-book-wins-oscar-best-picture-1202563744> [https://perma.cc/GWJ4-5R34].

and inequality,³⁷ a preferential ballot system that favors “typical” films,³⁸ and a perception that *Roma* was simply boring.³⁹ While all of these theories likely have merit, the fact that streaming service Netflix distributed *Roma* was surely one of the factors in the Academy’s ultimate decision.⁴⁰ In an anonymous submission, one Academy member described *Roma* as an “expensive home movie,” and discussed how the experience of watching a film at home “greatly diminished” the experience.⁴¹ While Netflix had become a household name for its commercial and award-winning television series, it was new to the film

³⁷ See Emily Todd VanDerWerff, *Green Book’s Frustrating Best Picture Win, Explained*, VOX (Feb. 25, 2019, 1:16 AM), <https://www.vox.com/culture/2019/2/25/18239309/oscars-2019-green-book-best-picture> [https://perma.cc/8NH9-GRM5] (arguing that elite Hollywood liberals embraced *Green Book*’s controversial take on racism and inequality in an attempt to make themselves feel good).

³⁸ Best Picture is the only Oscars category to not award the film with the highest number of votes. Instead, the category utilizes a preferential ballot where voters rank their choices with the idea of awarding the film with the highest general acceptance among Academy members. See Scott Feinberg, *Oscars: Anonymous Voter Thinks He Knows How ‘Green Book’ Beat ‘Roma’*, HOLLYWOOD REP. (Feb. 27, 2019, 7:00 AM), <https://www.hollywoodreporter.com/news/oscars-anonymous-voter-thinks-he-knows-how-green-book-beat-roma-1190882> [https://perma.cc/JA76-2ADJ] (“How did *Green Book* win? I have to assume the preferential balloting [which in a close race can elevate films ranked second or lower by many voters] helped because people clearly had a lot of regard for *Roma*, based on Alfonso Cuarón’s directing win.”).

³⁹ See Emily Yoshida, *Was Roma Ever Really an Oscars Front-Runner?*, VULTURE (Feb. 25, 2019), <https://www.vulture.com/2019/02/oscars-2019-roma-best-picture-alfonso-cuaron.html> [https://perma.cc/HT3X-A57V] (“[B]ut the line, at least from the segment of the voting body that gave Best Picture to *Green Book* apparently out of spite, is that *Roma* was respectable but boring, and that everyone is just pretending to like it, and you have to go along if you don’t want to look racist.”).

⁴⁰ See Scott Feinberg, *Brutally Honest Oscar Ballot #1: ‘Roma’ Just an “Expensive Home Movie,” “About F—ing Time” for Spike Lee*, HOLLYWOOD REP. (Feb. 20, 2019, 7:00 AM), <https://www.hollywoodreporter.com/lists/brutally-honest-oscar-ballot-roma-just-an-expensive-home-movie-1187668/item/best-picture-brutally-honest-oscars-ballot-19-1187666> [https://perma.cc/QVR3-KVV4] [hereinafter *Brutally Honest Oscar Ballot*].

⁴¹ This Academy member’s full quote stated:

After that is *Roma*. It’s beautifully crafted and looks fantastic, but ultimately, I was wondering where the entertainment or even intellectual value is in this movie. To me, it’s a very slow and rather indulgent film—the most expensive home movie ever made. As far as the Netflix thing, what is our job as Academy members? We are trying to promote great films for audiences to see. When we gave our award to *The Hurt Locker* or *Moonlight*, we were getting people to go to theaters to see them; *Roma* is this brilliant work, visually speaking, on a big screen, but it becomes greatly diminished when you watch it on television, which is what 95 percent of the people that want to watch it have to do. I’ve spoken to several of my peers who watched it at home, and they were out after 20 minutes.

Id.

world.⁴² It was the nontraditional actor shaking up the movie business by making the types of movies other studios would not, like teen comedy-dramas and romantic comedies.⁴³ Many in the industry felt that Netflix was incapable of making such high-brow fare as *Roma*.⁴⁴ Even with *Roma*'s track record of critical acclaim, many thought the film should be considered a television movie because most people would be watching it at home.⁴⁵

B. *Netflix Enters the Prestige Filmmaking Business*

1. Netflix's First Foray into the Film Festival Scene

Before getting into the "prestige film" business, Netflix had a contentious relationship with power players in the film industry. Netflix's first major foray into the film festival circuit was Bong Joon-ho's *Okja* and Noah Baumbach's *The Meyerowitz Stories*, which both premiered at the 2017 Cannes International Film Festival in France.⁴⁶ Both films came from well-respected veteran directors.⁴⁷ While both films opened to positive reviews, organizers and board members of the festival were immediately opposed to rewarding the streaming service because Netflix did not release the films in French theaters.⁴⁸ According to the National Federation of French Cinemas, releasing *Okja* and *The Meyerowitz Stories*

⁴² See Joe Flint, *Emmys 2013: With 14 Nominations, Netflix Gains Credibility*, L.A. TIMES (July 18, 2013, 12:00 AM), <https://www.latimes.com/entertainment/envelope/la-xpm-2013-jul-18-la-et-ct-netflix-emmy-20130718-story.html> [https://perma.cc/TND8-H6A5] (describing Netflix as a "legitimate platform" after it received prestigious Emmy nominations).

⁴³ See Christopher Rosa, *Netflix Is Making the Rom Com Cool Again*, GLAMOUR (July 10, 2018), <https://www.glamour.com/story/netflix-new-romantic-comedies> [https://perma.cc/NQH6-AVE7].

⁴⁴ See Matt Singer, *Netflix Is Creating a Future of Film That Looks a Lot like Television's Past*, SCREENCRUSH (March 26, 2018), <https://screencrush.com/netflix-movies-are-like-1950s-television> [https://perma.cc/RD2Z-783F] (discussing how the nearly seven hundred original films produced and/or distributed by Netflix before 2018 are usually not critically acclaimed, with a few exceptions).

⁴⁵ See *Brutally Honest Oscar Ballot*, *supra* note 40.

⁴⁶ Kaitlyn Tiffany, *Netflix's First Two Films at Cannes Could Be Its Last*, VERGE (May 10, 2017, 9:43 AM), <https://www.theverge.com/2017/5/10/15608978/netflix-cannes-film-festival-new-rule-theater-release-france> [https://perma.cc/3JGR-6M3L].

⁴⁷ *Id.*

⁴⁸ *Id.*

on streaming services before or at the same time as their theatrical distribution would “call into question their nature as a cinematographic work.”⁴⁹

While festival organizers did not remove these two films from competition at the 2017 festival, the organizers almost immediately changed the rules to require theatrical releases in France for all films in competition at the 2018 festival.⁵⁰ As a result, Netflix pulled its plans to premiere films at the 2018 festival, which would have included *Roma*.⁵¹ Instead, the film premiered at the Venice Film Festival, which imposed no such rule.⁵² Netflix’s Chief Content Officer, Ted Sarandos, said that the reason Netflix pulled the films from competition was France’s strict law for theatrical release windows.⁵³ The law requires that films cannot be placed on online streaming services for the first three years after their theatrical release in France.⁵⁴ The rivalry between Netflix and Cannes would begin to mirror Netflix’s uphill battle toward gaining respect within the American film industry.

2. Netflix Enters the Academy Awards Conversation

Netflix received its first major Oscar nominations in 2018 for *Mudbound*.⁵⁵ As a result, highly-esteemed director and producer Steven

⁴⁹ *Id.*

⁵⁰ Elsa Keslassy, *Cannes Keeps Netflix Movies in Competition but Says Future Films Must Have Theatrical Release*, VARIETY (May 10, 2017, 4:37 AM), <https://variety.com/2017/film/global/cannes-film-festival-maintains-netflixs-movies-in-competition-sets-new-rule-amid-turmoil-1202420874> [<https://perma.cc/HE4Q-R267>].

⁵¹ Benjamin Lee, *Netflix Pulls Out of Cannes Film Festival After Rule Change*, GUARDIAN (Apr. 11, 2018, 2:28 PM), <https://www.theguardian.com/film/2018/apr/11/netflix-pulls-out-cannes-film-festival> [<https://perma.cc/PZ2H-VMKE>].

⁵² See Nancy Tartaglione, ‘ROMA’: Alfonso Cuarón Shares First Look at Venice-Bound Personal Drama, DEADLINE (July 25, 2018, 8:31 AM), <https://deadline.com/2018/07/alfonso-cuaron-roma-teaser-venice-film-festival-netfli-1202433161> [<https://perma.cc/Y77Y-KYPB>].

⁵³ Ramin Setoodeh, *Netflix Pulls Out of Cannes Following Rule Change (EXCLUSIVE)*, VARIETY (Apr. 11, 2018, 10:34 AM), <https://variety.com/2018/film/news/netflix-cannes-rule-change-ted-sarandos-interview-exclusive-1202750473> [<https://perma.cc/U5TN-86KE>].

⁵⁴ *Id.*

⁵⁵ Netflix’s *Mudbound* received three Oscar nominations in 2018 for supporting actress, original song, and cinematography while its documentary *Icarus* won the Best Documentary

Spielberg appeared prepared to go to war with Netflix's film release and Oscar campaign strategy.⁵⁶ Spielberg, who serves as a governor on the Academy's Board of Governors, believes that movies that hit streaming services before an extended run in theaters are "a clear and present danger to filmgoers."⁵⁷ He went on to say: "Once you commit to a television format, you're a TV movie. You certainly—if it's a good show, deserve an Emmy. But not an Oscar."⁵⁸ Spielberg made these remarks long before *Roma* hit the festival circuit and ultimately overtook the Oscars conversation.⁵⁹ Ultimately, however, the Academy fully embraced *Roma* as a cinematic achievement, giving it ten nominations across a wide swath of categories.⁶⁰

Feature Oscar. Yohana Desta, *Steven Spielberg Doesn't Think Netflix Movies Should Qualify for Oscars*, VANITY FAIR (Mar. 23, 2018) <https://www.vanityfair.com/hollywood/2018/03/steven-spielberg-netflix-oscars> [<https://perma.cc/5EHM-C4LK>]; Swapna Krishna, *Netflix's 'Mudbound' Receives Four Oscar Nominations*, ENGADGET (Jan. 23, 2018), <https://www.engadget.com/2018-01-23-netflix-mudbound-oscar-nominations.html> [<https://perma.cc/HR9E-J8KS>]; see Ramin Setoodeh, *Can Netflix Crash the Oscars With Dee Rees' 'Mudbound'?*, VARIETY (Sept. 5, 2017, 6:00 AM), <https://variety.com/2017/film/features/mudbound-dee-rees-netflix-oscars-1202545540> [<https://perma.cc/JX5D-HBLD>].

⁵⁶ Desta, *supra* note 55.

⁵⁷ *Id.*

⁵⁸ Libby Hill, *Oscars or Emmys? How a Feature Film Could Earn Nominations from Both Academies*, INDIEWIRE (Mar. 15, 2019, 10:55 AM), <https://www.indiewire.com/2019/03/steven-spielberg-roma-emmy-eligible-1202050815> [<https://perma.cc/FBP7-7TQF>].

⁵⁹ *Id.*

⁶⁰ Oscar nominations other than Best Picture and Best Foreign-Language Film are determined by the various branches, who select the five nominees in each category. For example, the Best Editing nominations are determined by members of the Academy's Editing Branch. Winners are ultimately determined by the entire Academy voting body. See Adam Chitwood, *How Are Oscar Nominees Chosen?*, COLLIDER (Jan. 9, 2018), <https://collider.com/how-are-oscar-nominees-chosen> [<https://perma.cc/8BB5-XWV8>]. *Roma* ultimately secured ten nominations, including Best Picture, along with nominations for director, actress, supporting actress, original screenplay, sound mixing, sound editing, production design, cinematography, and foreign-language film. These nominations imply that a wide variety of filmmakers appreciated *Roma* as an actual film worthy of recognition. See Variety Staff, *Oscar Nominations 2019: The Complete List*, VARIETY (Jan. 22, 2019, 4:56 AM), <https://variety.com/2019/film/news/oscar-nominations-2019-list-1203112405> [<https://perma.cc/Y48K-ZX7C>].

C. *Steven Spielberg and the Academy Respond to Roma's Almost-Win*

Though *Roma* ultimately came up short in the Best Picture race, Spielberg wanted to make sure that Netflix, other streaming services, and all production companies complied with what Spielberg and other traditional film proponents saw as a pure theatrical experience.⁶¹ As a governor on the Academy's chief rule-making body, the Board of Governors, Spielberg holds considerable clout to affect changes in Academy initiatives and the Oscars.⁶² In March 2019, Spielberg was prepared to discuss with the Board of Governors what role streaming services should play in the awards conversation.⁶³ Spielberg did not attend the March meeting, however, as he was tied up with production of his 2020 release, a remake of *West Side Story*.⁶⁴ As a result, and without much fanfare, the Board of Governors took no affirmative action to change the eligibility rules, maintaining the current rules for the 2020 Academy Awards.⁶⁵ While the particular rules that Spielberg would have proposed were kept under wraps, they would have potentially required films to be shown exclusively in theaters for a longer period of time before hitting streaming; restricted the amount of money any studio could spend

⁶¹ See Hill, *supra* note 58. To add to the drama, Steven Spielberg was a vocal proponent for a *Green Book* Best Picture win, with *Green Book* director Peter Farrelly stating that Spielberg thought the film was "his favorite buddy movie" in recent memory. See Jacob Stolworthy, *Steven Spielberg Thinks Green Book is 'Best Buddy Comedy' Since Butch Cassidy and the Sundance Kid*, INDEPENDENT (Feb. 15, 2019, 10:22 AM), <https://www.independent.co.uk/arts-entertainment/films/news/steven-spielberg-green-book-butch-cassidy-sundance-kid-buddy-movie-oscars-2019-a8780511.html> [<https://perma.cc/A22K-W2R6>].

⁶² See Brent Lang, *Steven Spielberg vs. Netflix: How Oscars Voters Are Reacting*, VARIETY (Mar. 5, 2019, 4:17 PM), <https://variety.com/2019/film/awards/steven-spielberg-oscars-netflix-1203155528> [<https://perma.cc/ZA4V-FNUC>].

⁶³ See Thompson, *supra* note 11.

⁶⁴ Brooks Barnes, *Blockbuster Battle Between Steven Spielberg and Netflix Fizzles*, N.Y. TIMES (Apr. 23, 2019), <https://www.nytimes.com/2019/04/23/business/media/steven-spielberg-netflix-academy-awards.html> [<https://perma.cc/NNA7-F7LE>].

⁶⁵ *Id.* In fact, Spielberg's team maintains that his animosity toward Netflix may be somewhat overstated, but that he is also very critical of Netflix's theatrical release strategy and hopes for changes in Oscar rules in the future. *Id.*

on an Oscars campaign; and/or required production companies to report box office numbers.⁶⁶

D. History of the Academy and the Academy Awards

The Academy of Motion Picture Arts and Sciences was founded in 1927 by Louis B. Mayer of MGM and other studio executives.⁶⁷ Initially, its main purpose was to prevent filmmakers from unionizing so that studios could retain nearly all of the profits from distributing their films.⁶⁸ The Academy's initial goal, however, became moot as Hollywood employees, including writers, actors, and directors, unionized to protect their interests.⁶⁹ Today, the Academy is most well-known for its annual award ceremony, colloquially known as the Oscars. In the Academy's first ceremony in 1928, the organization gave out "awards of merit" in twelve categories.⁷⁰ Throughout the Academy's nearly 100-year history, it has expanded its mission to include documenting film history, archiving and preserving films, and educating up-and-coming filmmakers.⁷¹ Because of its expansive programming, the Academy plays an important role in the film industry as a bellwether of film excellence and a promoter of the filmmaking medium as an artform.⁷²

⁶⁶ See Thompson, *supra* note 11 (summarizing the complaints studios had about *Roma*'s almost win, including "Netflix spent too much [on its Oscar campaign]," "*Roma*' only spent three weeks as a theatrical exclusive," and "Netflix doesn't report box office").

⁶⁷ David Thomson, *The House That Mr. Mayer Built: Inside the Union-Busting Birth of the Academy Awards*, VANITY FAIR (Feb. 21, 2014), <https://www.vanityfair.com/hollywood/2014/02/secret-oscar-history> [<https://perma.cc/W8B7-Y8ZJ>].

⁶⁸ *Id.*

⁶⁹ See W. Harry Fortuna, *The Gig Economy Is a Disaster for Workers. Hollywood's Unions Can Help Them Learn to Fight Back*, QUARTZ (Sept. 1, 2017), <https://qz.com/1052310/hollywood-unions-offer-the-perfect-model-for-the-beaten-down-workers-of-todays-gig-economy> [<https://perma.cc/X869-HN4P>]. Today, nearly all workers in the film and television industry, with the exception of those who work on reality programs, are union members. David Ng, *Hollywood Guilds Flex Their Muscle as Union Influence Declines Nationwide*, L.A. TIMES (May 9, 2017, 3:00 AM), <https://www.latimes.com/business/hollywood/la-fi-ct-hollywood-unions-20170509-story.html> [<https://perma.cc/Q87E-PSXF>].

⁷⁰ See *Academy Story*, ACAD. MOTION PICTURE ARTS & SCIS., <https://www.oscars.org/academy-story> [<https://perma.cc/AN4B-7M2N>].

⁷¹ *Id.*

⁷² See *id.*

The Academy consists of approximately 9,000 individual members from a wide array of filmmaking disciplines.⁷³ Academy members must be professionals working in the production of theatrically released motion pictures and be sponsored by two current Academy members in the branch in which they are seeking membership.⁷⁴ These members ultimately make up the body that selects the nominees and the eventual winners at the Academy Awards.⁷⁵

⁷³ See Erik Hayden, *Academy Invites 842 New Members*, HOLLYWOOD REP. (July 1, 2019, 11:04 AM), <https://www.hollywoodreporter.com/news/new-academy-members-2019-revealed-full-list-1221972> [<https://perma.cc/2NUG-8W7Y>] (estimating membership at 9,226 members prior to the addition of the members invited to join in 2018). The Academy is organized into seventeen branches, which include Actors, Casting Directors, Cinematographers, Costume Designers, Designers, Directors, Documentary, Executives, Film Editors, Makeup Artists and Hairstylists, Music, Producers, Public Relations, Short Films and Feature Animation, Sound, Visual Effects, and Writers. There are also two “categories,” Members-at-Large and Associates, for those who do not fit neatly into one of the branches. See *Branch Requirements*, ACAD. MOTION PICTURE ARTS & SCIS., <https://www.oscars.org/about/becoming-new-member/branch-requirements> [<https://perma.cc/TNP7-GUXM>].

⁷⁴ *Academy Membership*, ACAD. MOTION PICTURE ARTS & SCIS., <https://www.oscars.org/about/join-academy> [<https://perma.cc/UQW9-NYTM>]. Academy Award nominees are automatically considered for membership and do not require sponsorship. *Id.* The #OscarsSoWhite controversy, in which all acting nominees at the 2015 and 2016 Oscar ceremonies were white, resulted in the Academy pushing to drastically increase Academy membership to include more women, international filmmakers, and people of color. Hayden, *supra* note 73. The Academy invited 819 new members in 2020, 842 in 2019, 928 in 2018, 774 in 2017, and 683 in 2016. *Id.*; Anne Thompson, *The Academy Invites 819 Members, Including Awkwafina, Cynthia Erivo, Ari Aster, and More*, INDIEWIRE (June 30, 2020, 5:00 PM), <https://www.indiewire.com/2020/06/the-academy-oscars-2020-new-members-1234570634> [<https://perma.cc/6EJ2-3LEQ>]. As the Academy dramatically increases its membership, it will presumably become a more powerful organization in Hollywood as it provides a better representative sample of those working in the entertainment industry. See, e.g., Press Release, Academy of Motion Picture Arts and Sciences, *Academy Establishes Representation and Inclusion Standards for Oscars Eligibility* (Sept. 8, 2020), <https://www.oscars.org/news/academy-establishes-representation-and-inclusion-standards-oscarsr-eligibility> [<https://perma.cc/7RME-D9BX>].

⁷⁵ Tim Gray, *How Does Oscar Voting Work?*, VARIETY (Feb. 5, 2020, 12:34 PM), <https://variety.com/feature/who-votes-on-oscars-academy-awards-how-voting-works-1203490944> [<https://perma.cc/2A7V-QTGS>].

E. *The Oscars and Theatrical Exclusivity*

The Academy currently gives out twenty-three Oscars at its annual ceremony.⁷⁶ To be eligible for an Academy Award, a film must satisfy six requirements, including: (1) being more than forty minutes long; (2) being publicly exhibited within certain technical parameters; (3) being shown for “paid admission in a commercial motion picture theater in Los Angeles County;” (4) meeting a theatrical qualifying run of at least seven consecutive days during which screenings must occur at least three times daily, with at least one screening beginning between 6 p.m. and 10 p.m. daily; (5) being advertised and exploited during its Los Angeles County theatrical qualifying run in a “manner normal and customary to theatrical feature distribution practices;” and (6) being released between January 1 and December 31 of the eligibility year.⁷⁷

Additionally, the Academy’s rules specifically state that films that receive their first public exhibition in a manner other than a theatrical release will not be eligible for an award.⁷⁸ Such manners of distribution include television, video-on-demand, DVDs, and internet

⁷⁶ See Pete Hammond, *Oscars Keeping Show Date but Make Big News as Academy Lightens Eligibility Rules, Combines Sound Categories, Ends DVD Screeners and More*, DEADLINE (Apr. 28, 2020, 1:46 PM), <https://deadline.com/2020/04/oscars-major-changes-academy-awards-coronavirus-1202919950> [<https://perma.cc/HFP6-Q9XC>].

⁷⁷ *92nd Academy Awards of Merit Rules*, ACAD. MOTION PICTURE ARTS & SCIENCES, 2–3, https://www.oscars.org/sites/oscars/files/92aa_rules.pdf [<https://perma.cc/YN6B-82AQ>] (Rule Two—Eligibility). While these rules are generally applicable to most categories, special rules are also in place for the International Feature, Documentary Feature, and Short Film awards. *Id.* at 4. Films competing in the International Feature Film category must be (1) selected by their country’s film organization, jury, or committee as the country’s sole submission; (2) be shown publicly in that country; and (3) have a predominantly non-English dialogue track. *Id.* at 16–17 (Rule Thirteen—Special Rules for the International Feature Film Award). Documentaries competing in the Documentary Feature category have three options to be eligible: (1) being theatrically released in *both* Los Angeles County and New York City, (2) winning a qualifying award at a competitive film festival, or (3) being submitted in the International Feature Film category as its country’s official selection. *Id.* at 11 (Rule Eleven—Special Rules for the Documentary Award). Documentaries are also eligible for Best Picture but must follow all other applicable rules for narrative films. *Id.* Animated and Live Action Short Films have three options to be eligible: (1) being theatrically released in *either* Los Angeles County or New York City, (2) winning a qualifying award at a competitive film festival, or (3) winning a medal at the Academy’s Student Academy Awards. *Id.* at 27 (Rule Nineteen—Special Rules for the Short Film Awards). Documentary Shorts have the same requirements as Animated and Live Action Shorts. *Id.* at 13–14 (Rule Eleven).

⁷⁸ *Id.* at 3 (Rule Two).

transmission.⁷⁹ However, the Academy has built in a caveat for films released in theaters and available at home on the same day.⁸⁰ Films released through nontheatrical means “on or after the first day of their Los Angeles County theatrical qualifying run remain eligible.”⁸¹ Therefore, Netflix can qualify its films for Academy Awards if it exhibits in a single theater in Los Angeles County for seven consecutive days before or on the same day the film begins streaming on its service.

This exception built into the Academy’s rules is one of the many sticking points that “theater purists” feel allows Netflix to devalue the filmgoing experience. Allies of Steven Spielberg appear to have provided two main ways to address the problem.⁸² First, the Academy could get rid of the rule allowing streaming services to release a film on its service the same day it begins its seven-day theatrical run.⁸³ Second, and likely more controversial, is expanding the theatrical window from one week to as long as four weeks.⁸⁴

To evaluate the consequences of such a rule change, it is important to first understand the traditional model of theatrical exhibition. When a film is completed and ready to be distributed for viewing in theaters, the studio’s distribution arm, or a distinct distribution entity, will work with movie theater chains on a distribution agreement.⁸⁵ Traditionally, the theater will pay a fee to the studio to show the studio’s films.⁸⁶ The agreement will stipulate the division of proceeds from ticket sales between the studio and the theater chain.⁸⁷ Generally, the movie studio will receive the majority of the box office proceeds while the theater will

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² See Thompson, *supra* note 11.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ See Schuyler Moore, *The 9 Types of Film Distribution Agreements*, FORBES (July 19, 2019, 8:07 PM), <https://www.forbes.com/sites/schuylermoore/2019/07/19/types-of-film-distribution-agreements/#4ab18f086253> [<https://perma.cc/6Q4U-97NV>].

⁸⁶ See Ashley Rodriguez, *Small Theater Chains Worry a Mid-Century Rule is All That Stands Between Them and Extinction*, QUARTZ (Dec. 16, 2018), <https://qz.com/1479408/small-theater-chains-worry-a-mid-century-rule-is-all-that-stands-between-them-and-extinction> [<https://perma.cc/JWA8-V74P>].

⁸⁷ Moore, *supra* note 85.

retain only a minority of the proceeds.⁸⁸ To capitalize on profits available from showing movies in theaters, major exhibitors typically require a seventy-two-day period of exclusivity before distributing in other forms, such as Blu-ray or streaming.⁸⁹

When Netflix distributes its films in theaters, however, it does not follow the traditional revenue-splitting agreements that traditional studios do.⁹⁰ Netflix uses the unique method of “four-walling” screens, which involves renting the screen at a flat fee and taking all the revenue raised from ticket purchases.⁹¹ With four-walling, Netflix is not obligated to report box office revenue, unlike those studios which release their films through traditional means.⁹² Many industry professionals and theater owners take issue with this four-walling practice, with only small independent chains such as Landmark Theaters and iPic allowing Netflix to exhibit its films.⁹³

Netflix has the size, money, and bargaining power to be able to release its films through such a nontraditional method.⁹⁴ Nearly all other studios, however, choose or have no other option but to show their films through the traditional exclusive window and revenue-splitting method. The Academy’s proposal to expand the theatrical exhibition period required for awards consideration would require Netflix to spend more

⁸⁸ Clancy Morgan, *17 Sneaky Ways Movie Theaters Get You to Spend More Money*, BUS. INSIDER (Aug. 2, 2019, 4:30 PM), <https://www.businessinsider.com/movie-theaters-sneaky-ways-spend-more-money-amc-regal-2019-8> [<https://perma.cc/5ZWV-MNCL>]. AMC, the largest movie theater chain in the United States and the one with the most bargaining power, only retains around fifty percent of revenue from ticket sales while keeping over eighty percent of revenue from concession sales after accounting for costs. *Id.*

⁸⁹ Nicole Sperling, *Inside the Debate Between Netflix and Big Theater Chains Over ‘The Irishman’*, N.Y. TIMES (Nov. 1, 2019), <https://www.nytimes.com/2019/11/01/business/irishman-netflix-theaters.html> [<https://perma.cc/GAS9-JEHK>].

⁹⁰ See Rebecca Keegan, *How the Oscar Race Became a Referendum on Netflix*, HOLLYWOOD REP. (Nov. 14, 2018, 6:30 AM), <https://www.hollywoodreporter.com/news/how-oscar-race-became-a-referendum-netflix-1160629> [<https://perma.cc/CYR4-FE6V>].

⁹¹ *Id.*

⁹² *Id.*

⁹³ Pamela McClintock & Borys Kit, *As Netflix Blinks on Theatrical Runs, Which Directors Will Get A-List Treatment?*, HOLLYWOOD REP. (Nov. 7, 2018, 6:30 AM), <https://www.hollywoodreporter.com/news/as-netflix-blinks-theatrical-runs-directors-will-get-a-list-treatment-1158771> [<https://perma.cc/VCH6-JULY>].

⁹⁴ In May 2018, Netflix’s market capitalization was \$151.43 billion, passing that of Disney. Jacob Sonenshine, *Netflix Hits a Record High, Passes Disney in Size (NFLX)*, MKTS. INSIDER (May 24, 2018, 5:00 PM), <https://markets.businessinsider.com/news/stocks/netflix-stock-price-hits-record-high-2018-5-1025212394> [<https://perma.cc/82PL-WNB8>].

money to exhibit its films for a longer amount of time.⁹⁵ On the other hand, however, smaller independent studios would likely have a hard time complying with such a rule. Theaters would be unwilling to pay for the opportunity to screen those films that do not attract a large enough audience.

F. The “Oscar Bump” at the Box Office

The 2019 domestic box office raked in approximately \$11.4 billion.⁹⁶ While that number may seem large, it is a four percent drop from 2018’s \$11.88 billion.⁹⁷ Additionally, a few studios dominated the box office, including Disney, which accounted for thirty-three percent of all ticket sales.⁹⁸ Amidst a box office which brought all-time records for films such as *Avengers: Endgame*, *The Lion King*, and *Spider-Man: Far From Home*, independent film studios struggled to bring in revenue.⁹⁹ Critical indie darlings such as *Booksmart*, *Late Night*, and *Blinded by the Light* failed to meet box office expectations, and only a few independent films made a significant profit.¹⁰⁰ This trend is not new, but independent movies have

⁹⁵ See *infra* Section I.E.

⁹⁶ Paula Bernstein, *2019 Box Office: Here’s What Worked and What Didn’t*, FORTUNE (Dec. 30, 2019, 2:36 PM), <https://fortune.com/2019/12/30/2019-box-office-hits-bombs-avengers-endgame-star-wars-cats-terminator> [<https://perma.cc/23EK-AHQ9>].

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Avengers: Endgame* became the highest-grossing film of all time with a \$2.8 billion worldwide gross. Sarah Whitten, ‘Avengers: Endgame’ to Be the Highest-Grossing Film of All Time, CNBC (July 20, 2019, 8:39 PM), <https://www.cnbc.com/2019/07/20/avengers-endgame-to-be-the-highest-grossing-film-of-all-time.html> [<https://perma.cc/P5PG-MRB8>]. The 2019 reimagining of *The Lion King* is now the highest-grossing animated film ever, while *Spider-Man: Far from Home* is the highest grossing release from Sony Pictures. Chaim Gartenberg, *The Lion King Remake Is the Biggest Animated Earner Ever, but Disney Claims It Isn’t*, VERGE (Aug. 12, 2019, 5:42 PM), <https://www.theverge.com/2019/8/12/20802717/lion-king-live-action-animated-remake-biggest-film-of-all-time-disney-debate> [<https://perma.cc/TE46-BVJG>]; Nancy Tartaglione, ‘Spider-Man: Far From Home’ to Become Sony’s Highest-Grossing Film Ever as WW Box Office Swings Past ‘Skyfall’ On Sunday, DEADLINE (Aug. 17, 2019, 7:45 AM), <https://deadline.com/2019/08/spider-man-far-from-home-becomes-sonys-highest-grossing-film-ever-worldwide-box-office-skyfall-1202670412> [<https://perma.cc/LUA3-FMJ2>].

¹⁰⁰ Rebecca Rubin, *Summer Box Office Wrap: Five Things We Learned from a Lackluster Popcorn Season*, VARIETY (Sept. 4, 2019, 6:45 AM), <https://variety.com/2019/film/news/summer-2019-box-office-wrap-disney-1203321443> [<https://perma.cc/SRB3-L5B2>]. Examples of independent films which performed well include *The Farewell*, *Parasite*, and *Hustlers*. *Id.*; see also Kate Erbland, *The 20 Highest Grossing Indies of 2019 (A Running List)*, INDIEWIRE (Feb. 5, 2019,

traditionally filled a niche for those audiences seeking original, drama-driven works.¹⁰¹ Additionally, one thing that independent distributors could practically guarantee was that, with the proper amount of attention and critical acclaim, they could campaign for Oscars. Being nominated for or winning Oscars would translate into higher revenues from streaming or home release.¹⁰² Therefore, while Netflix would be the target of an Academy rule change, independent studios would likely feel the brunt of a rule change's effects.¹⁰³

There is evidence to suggest that an Oscar nomination or a subsequent win provides an "Oscar bump" to box office numbers for those nominated films. Among the eight films nominated for Best Picture at the ninety-first Academy Awards in 2019, six experienced a box office bump.¹⁰⁴ While some were fairly small, *Green Book*, the eventual Best Picture winner, made an additional \$24.5 million after winning.¹⁰⁵ This number is quite large considering the film had been in theaters for nearly two months prior to the Oscar nomination announcement.¹⁰⁶ *The Shape of Water*, the 2018 Best Picture winner, earned an additional \$33 million

5:52 PM), <https://www.indiewire.com/2019/02/highest-grossing-indie-films-2019-1202031574> [https://perma.cc/SZ74-S4K9].

¹⁰¹ BEN FRITZ, *THE BIG PICTURE: THE FIGHT FOR THE FUTURE OF MOVIES* (2018).

¹⁰² See Sarah Whitten, *The Post-Oscar Sales Bump Likely Won't Be Huge for This Year's Best Picture Winner*, CNBC (Feb. 23, 2019, 10:36 AM), <https://www.cnbc.com/2019/02/23/post-oscar-sales-bump-unlikely-to-be-huge-for-the-best-picture-winner.html> [https://perma.cc/2SGU-R87R].

¹⁰³ Amazon Studios typically honors the theatrical exclusivity window before placing its films on its Prime Video streaming service. However, even multi-billion-dollar company Amazon is curtailing its theatrical release strategy after several high-profile bombs at the box office. Rebecca Keegan, *Amazon Heads to Fall Festivals with a New Film Strategy and Something to Prove*, HOLLYWOOD REP. (Sept. 5, 2019, 9:00 AM), <https://www.hollywoodreporter.com/news/amazon-risks-alienating-filmmakers-shorter-release-windows-1236197> [https://perma.cc/Y8A5-AU9H].

¹⁰⁴ See Whitten, *supra* note 102. *Roma*, as a Netflix release through four-walling, had no box office revenues to report. *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Green Book* opened in wide release on November 21, 2018. Pamela McClintock, 'Green Book' to Get Limited-Edition Run in Theaters Before Opening Nationwide, HOLLYWOOD REP. (Oct. 31, 2018, 11:02 AM), <https://www.hollywoodreporter.com/news/green-book-get-limited-edition-run-theaters-before-opening-nationwide-1156772> [https://perma.cc/Z2KQ-NUQ9]. The subsequent Oscar nominations announcement took place on January 22, 2019. See Variety Staff, *Oscar Nominations 2019: The Complete List*, VARIETY (Jan. 22, 2019, 4:56 AM), <https://variety.com/2019/film/news/oscar-nominations-2019-list-1203112405> [https://perma.cc/Y48K-ZX7C].

after its initial nomination.¹⁰⁷ Other examples of large box office bumps after Best Picture wins include \$34.5 million for *Million Dollar Baby* in 2005, \$43 million for *Slumdog Millionaire* in 2009, \$24.6 million for *The King's Speech* in 2011, and \$12.9 million for *The Artist* in 2012.¹⁰⁸ An even more stark example is the 2017 winner, *Moonlight*.¹⁰⁹ In the time between being nominated and the Oscars ceremony, *Moonlight* gained an additional \$3.2 million, and the film ultimately earned another \$2.5 million after winning Best Picture.¹¹⁰ The post-nomination bump represents nearly 400 percent of the initial production budget of \$1.5 million.¹¹¹ These numbers illustrate that the Oscars can play an important role in boosting profitability for small independent movies.

Though the evidence is clear that independent studios and other traditionally released films benefit from Oscar nominations, Netflix films do not receive such box office bumps. The DOJ stresses that Academy rule changes may be antitrust violations if they “tend[] to diminish the excluded films’ sales.”¹¹² If Netflix’s main business model does not depend on releasing films in theaters, how could an Academy rule change result in a reduction in the films’ “sales”? First of all, Netflix has a “conquer everything” strategy, which it finds necessary to eventually become the dominant force in Hollywood.¹¹³ To actually “conquer everything,” Netflix needs to obtain Hollywood’s highest honor, the Best Picture Oscar.¹¹⁴ Netflix needs a wide variety of content on its service to steadily increase its subscriber base.¹¹⁵ Presumably, Netflix can attract

¹⁰⁷ Whitten, *supra* note 102.

¹⁰⁸ *Id.*

¹⁰⁹ Yohana Desta, *Moonlight's Box-Office Oscar Bump Was Mightier than Usual*, VANITY FAIR (Mar. 6, 2017), <https://www.vanityfair.com/hollywood/2017/03/moonlight-box-office-oscar-bump> [<https://perma.cc/7PRA-UBPE>].

¹¹⁰ *Id.*; Whitten, *supra* note 102. It should be noted, however, that *Moonlight* likely also benefitted from a dramatic win after actress Faye Dunaway mistakenly announced *La La Land* as the Best Picture winner. See Sandra Gonzalez, *It Was 'Moonlight,' Not 'La La Land': A Timeline of a Historic Oscars Blunder*, CNN (Feb. 28, 2017, 3:52 PM), <https://www.cnn.com/2017/02/27/entertainment/academy-awards-mistake-what-happened/index.html> [<https://perma.cc/84VZ-PKFB>].

¹¹¹ Desta, *supra* note 109.

¹¹² Letter, *supra* note 7.

¹¹³ ‘The Big Picture’ | *Why Does Netflix Want an Oscar?*, RINGER (Feb. 19, 2019), <https://www.facebook.com/ringer/videos/305957376775073> [<https://perma.cc/VG9Y-Y73B>].

¹¹⁴ *Id.*

¹¹⁵ Netflix increased its subscribers by 6.8 million internationally in the third quarter of 2019, beating market expectations. Daniel Strauss, *Netflix Spikes 11% After Global Subscriber Growth*

more subscribers by diversifying its arthouse, prestige films available for viewing, and the Oscars serve as the bellwether for these types of films every year. Because of the prestige the Oscars offer, while Netflix would not lose “sales” in the traditional box office, it could lose subscribers if it is unable to compete for Oscars and attract consumers who care about these awards.

Additionally, there are other potential harms, apart from a loss of subscriptions, that could result from not receiving awards recognition. First, because these films would not receive the historical marker that an Oscar can provide, Netflix would be unable to capitalize on its Oscar-level fare. For example, there would be limited marketing and merchandising opportunities to sell toys, develop sequels, or release Oscar-branded home content.¹¹⁶ Second, Netflix would also be less inclined to re-release its movies in theaters for historic milestones. *The Wizard of Oz* and *Titanic*, both Oscar-winning films, are frequently re-released to mark important anniversaries, and Netflix would essentially be barred from this practice.¹¹⁷

II. ANALYSIS

A. Background of Antitrust Law

The Sherman Act prohibits agreements in restraint of trade, and the plain language of the statute does not treat different business entities

Blows Away Forecasts (NFLX), MKTS. INSIDER (Oct. 16, 2019, 10:42 PM), <https://markets.businessinsider.com/news/stocks/netflix-stock-price-reaction-3q-earnings-international-subscriber-growth-beat-2019-10-1028605398> [<https://perma.cc/U34A-52UK>].

¹¹⁶ Following the wide critical acclaim and Oscar support for *Roma*, the film will now be included in the Criterion Collection and available on DVD and Blu-ray. Ryan Lattanzio, *Netflix Joins the Criterion Collection with Home Video Debut of 'Roma'*, INDIEWIRE (Nov. 15, 2019, 3:12 PM), <https://www.indiewire.com/2019/11/roma-criterion-collection-1202189937> [<https://perma.cc/Z46G-CAPZ>].

¹¹⁷ Simon Thompson, *'The Wizard of Oz' Returning to Theaters for Its 80th Anniversary*, FORBES (Jan. 12, 2019, 2:06 PM), <https://www.forbes.com/sites/simonthompson/2019/01/12/the-wizard-of-oz-returning-to-theaters-for-its-80th-anniversary/#3ee751397d84> [<https://perma.cc/3WJF-V7UQ>]; Dave McNary, *'Titanic' to Be Re-Released in Theaters for 20th Anniversary*, VARIETY (Nov. 15, 2017, 3:33 PM), <https://variety.com/2017/film/news/titanic-20th-anniversary-re-release-1202616007> [<https://perma.cc/3VG7-QG8G>].

differently.¹¹⁸ The Supreme Court has further elaborated by saying that only those agreements with “unreasonable” restraints of trade are illegal, so courts will analyze restraints under the “rule of reason.”¹¹⁹ Additionally, some forms of restraints are considered per se unreasonable because the Court can “predict with confidence that the rule of reason will condemn [them].”¹²⁰ Examples of such per se unreasonable restraints in violation of the Sherman Act include group boycotts and some price-fixing schemes.¹²¹

This Note will examine whether the potential expansion of the theatrical window for consideration at the Academy Awards would constitute an “unreasonable” restraint of trade. The case law establishes two main arguments that the expansion of the theatrical window is an unreasonable restraint of trade. First, the rule changes should be considered a group boycott—also known as a “concerted refusal to deal”—in reference to Netflix and other streaming services, which would be per se illegal under the Sherman Act.¹²² Second, the rule changes may

¹¹⁸ Sherman Act, 15 U.S.C. § 1 (2004) (“Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.”). The Academy is organized as a corporation under California law and files federal tax returns as a tax-exempt organization under Internal Revenue Code § 501(c)(6). See 2017 Form 990 for the Acad. of Motion Picture Arts & Scis., Return of Organization Exempt from Income Tax (Form 990) (May 11, 2018), <https://projects.propublica.org/nonprofits/organizations/950473280/201831349349302878/full> [<https://perma.cc/ZKF4-54XG>]. Section 501(c)(6) organizations include business leagues which are created among “persons having some common business interest, the purpose of which is to promote such common interest and not to engage in a regular business of a kind ordinarily carried on for profit.” Treas. Reg. § 1.501(c)(6)-1 (2020). Here, the Academy is promoting the film industry as a whole without itself aiming for a profit. It is important to note that the Academy is not a trade association. Trade associations are membership organizations intended to “promote *and* improve business conditions” in their members’ line of business. 11 C.F.R. § 114.8(a) (2005) (emphasis added). While the Academy promotes the art of filmmaking and honors culturally significant films, it does not lobby lawmakers to improve the business conditions of film studios and individual filmmakers. A similar, though unrelated, organization that performs such activities is the Motion Picture Association of America. See Pamela McClintock, *Netflix Becomes First Streamer to Join the Motion Picture Association of America*, HOLLYWOOD REP. (Jan. 22, 2019, 8:38 AM), <https://www.hollywoodreporter.com/news/netflix-advanced-talks-join-mpaa-1177926> [<https://perma.cc/2C8H-QNUA>].

¹¹⁹ See generally *Arizona v. Maricopa Cty. Med. Soc’y*, 457 U.S. 332, 342–43 (1982).

¹²⁰ *Id.* at 344.

¹²¹ See *Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284 (1985) (establishing that group boycotts are per se unreasonable restraints); *Arizona*, 457 U.S. at 342 (determining that price fixing is a per se unreasonable restraint of trade).

¹²² See discussion *infra* Section II.B.

constitute per se illegal price fixing, as they would result in higher barriers to entry for all studios seeking to access the awards market, including small independent studios.¹²³

B. *The Academy's Changes Effectuate a Group Boycott*

The DOJ letter sent to the Academy stated that “agreements among competitors to exclude new competitors can violate the antitrust laws when their purpose or effect is to impede competition by goods or services that consumers purchase and enjoy but which threaten the profits of incumbent firms.”¹²⁴ The DOJ cited the case of *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.* to support its claim.¹²⁵

In *Northwest Wholesale*, the Supreme Court held that the expulsion of an office supply retailer from a cooperative buying agency could potentially constitute a violation of antitrust laws as an example of a group boycott—also known as a concerted refusal to deal.¹²⁶ In the case, the membership of the Northwest Wholesale cooperative voted to expel Pacific Stationery from its membership without any explanation and without giving Pacific any notice or providing the opportunity for a hearing.¹²⁷ Pacific subsequently brought suit for violation of section 1 of the Sherman Act.¹²⁸

The Court first determined what types of activities would constitute a group boycott.¹²⁹ The most common example of a group boycott is when firms jointly “disadvantage competitors by ‘either directly denying or persuading or coercing suppliers or customers to deny relationships the competitors need in the competitive struggle.’”¹³⁰ In general, a group boycott which “cut[s] off access to a supply, facility, or market necessary to enable the boycotted firm to compete” will be held to be a per se

¹²³ See discussion *infra* Section II.C.

¹²⁴ See Letter, *supra* note 7.

¹²⁵ *Id.*

¹²⁶ *Nw. Wholesale Stationers*, 472 U.S. at 298 (remanding because the Court of Appeals incorrectly applied the per se violation analysis).

¹²⁷ *Id.* at 287.

¹²⁸ *Id.* at 288.

¹²⁹ *Id.* at 294.

¹³⁰ *Id.* (citing L. SULLIVAN, LAW OF ANTITRUST 261–62 (1977)).

antitrust violation, and, frequently, the boycotting firms possess a dominant position in the relevant market.¹³¹ Additionally, certain group boycotts are “so likely to restrict competition without any offsetting efficiency gains that they should be condemned as [a] *per se* violation[.]” of the Sherman Act.¹³² Ultimately, however, group boycotts need not involve the denial of supplies, a dominant market leader, or the decision to cut off the firm from a necessary market.¹³³ To merit *per se* treatment of a restraint of trade, the challenged action only needs to present “the likelihood of predominantly anticompetitive consequences.”¹³⁴

In deciding the case, the Court rejected the plaintiff’s argument that the lack of procedural protections afforded in the expulsion proceedings was a basis for finding an antitrust violation.¹³⁵ The Court determined that the expulsion of Pacific from the cooperative’s membership did not merit *per se* invalidation under the Sherman Act because it did not “imply anticompetitive animus.”¹³⁶ The expulsion of a member from the cooperative would only constitute a *per se* illegal group boycott if the cooperative “possesse[d] market power or exclusive access to an element essential to effective competition.”¹³⁷ Since the *per se* analysis was inappropriate, the case was remanded to the lower court to assess the potential for anticompetitive effects.¹³⁸

In *Fashion Originators’ Guild of America, Inc. v. FTC*, the Supreme Court found that an action was a *per se* illegal group boycott under the Sherman Act.¹³⁹ Important fashion houses in New York founded the Fashion Originators’ Guild of America (Guild) in 1932 with the stated goal to protect “originators of fashions and styles against copying and

¹³¹ *Id.* (citing *Silver v. N.Y. Stock Exch.*, 373 U.S. 341, 348 (1963)).

¹³² *Id.* at 290.

¹³³ *Id.* at 295 (“Although a concerted refusal to deal need not necessarily possess all of these traits to merit *per se* treatment, not every cooperative activity involving a restraint or exclusion will share with the *per se* forbidden boycotts the likelihood of predominantly anticompetitive consequences.”).

¹³⁴ *See id.*

¹³⁵ *Id.* at 293.

¹³⁶ *Id.* at 296–97.

¹³⁷ *Id.* at 296. “Market power” is defined as “a seller’s ability to exercise some control over the price it charges.” DEP’T OF JUST., COMPETITION AND MONOPOLY: SINGLE-FIRM CONDUCT UNDER SECTION 2 OF THE SHERMAN ACT 19 (2008) [hereinafter COMPETITION AND MONOPOLY].

¹³⁸ *Nw. Wholesale Stationers*, 472 U.S. at 298.

¹³⁹ *Fashion Originators’ Guild of Am., Inc. v. FTC*, 312 U.S. 457, 466 (1941).

piracy.”¹⁴⁰ The Guild attempted to protect original fashion designs in the absence of copyright laws by devising a scheme among its members.¹⁴¹ The Guild members agreed to boycott certain manufacturers who sold garments copied from non-Guild manufacturers.¹⁴² The agreement also prohibited member organizations from participating in retail advertising, regulated discounts that retailers could provide, and determined when sales could be held.¹⁴³ Nearly 12,000 retailers throughout the country agreed to cooperate with the Guild’s boycott program.¹⁴⁴ Approximately half of these retailers, however, agreed only because Guild members threatened not to sell to them.¹⁴⁵

The Federal Trade Commission asserted that the Guild’s agreement “substantially lessened, hindered and suppressed” competition and effectively created a monopoly.¹⁴⁶ The U.S. Supreme Court agreed. The Court held that such an agreement among competitors ran contrary to the policy established by the Sherman Act to prevent the formation of a monopoly.¹⁴⁷ The agreement, while not necessarily creating an actual monopoly, sufficiently “deprive[d] the public of the advantages which flow from free competition.”¹⁴⁸ The *Fashion Originators’* case is often taught in fashion law courses to illustrate that attempts to protect fashion designs outside established intellectual property laws will likely fail in the United States.¹⁴⁹ It also stands for the proposition, however, that a self-regulatory scheme among competitors to shut out others will likely fail on antitrust grounds.¹⁵⁰

¹⁴⁰ C. Scott Hemphill & Jeannie Suk, *The Fashion Originators’ Guild of America: Self-help at the Edge of IP and Antitrust*, in *INTELLECTUAL PROPERTY AT THE EDGE: THE CONTESTED CONTOURS OF IP* 159, 162 (Rochelle Cooper Dreyfuss & Jane C. Ginsburg eds., 2014).

¹⁴¹ *Fashion Originators’ Guild*, 312 U.S. at 461.

¹⁴² *Id.*

¹⁴³ *Id.* at 463.

¹⁴⁴ *Id.* at 461.

¹⁴⁵ *Id.* at 461–62.

¹⁴⁶ *Id.* at 464.

¹⁴⁷ *Id.* at 467–68 (“The purpose and object of this combination, its potential power, its tendency to monopoly, the coercion it could and did practice upon a rival method of competition, all brought it within the policy of the prohibition declared by the Sherman and Clayton Acts.”).

¹⁴⁸ *Id.* at 466 (quoting *United States v. E.C. Knight Co.*, 156 U.S. 1, 16 (1895)).

¹⁴⁹ See GUILLERMO JIMINEZ & BARBARA KOLSUN, *FASHION LAW: CASES AND MATERIALS* 36 (2016).

¹⁵⁰ See *id.* at 33.

These cases support a finding that an agreement among Academy members to shut out Netflix and other streaming services would unduly burden competition and should be considered a group boycott, a per se violation of section 1 of the Sherman Act. Unlike the cooperative in *Northwest Wholesale*, which was not found to have exclusive control of the office supply market, the Academy controls the exclusive access to the market for an Academy Award, and the Academy possesses market power.¹⁵¹ Members of the Academy, including Steven Spielberg, have expressed their animus to Netflix being a peer in the awards community.¹⁵² By cutting off companies from award recognition, the Academy would be “cut[ting] off access to a . . . market necessary” for firms to compete.¹⁵³ Additionally, because the Academy has nearly all the market power in the award-giving space, it will have a strong impact on those studios seeking award recognition. The market power which the Academy possesses is the ability to exercise control over the means by which films become eligible for awards consideration. These means effectively correlate with the “price” the Academy charges for eligibility, or the cost of putting films in theaters for a specified period of time. Because studios would be cut off from the awards market and because the Academy has market power, the Academy’s eligibility rule changes would constitute a group boycott specifically targeted at Netflix and would thus be per se illegal under the Sherman Act.

Additionally, the Academy’s rule changes shutting out Netflix are effectively the same as the Fashion Originators’ Guild’s attempts to control its members, which was found to be a per se illegal group boycott under the Sherman Act. First, the Fashion Originators’ Guild and the Academy are starkly similar organizations. In the same way the Guild sought to include only the most high-value fashion houses, the Academy seeks to only include those film professionals who have risen to a certain level of fame and success within the industry.¹⁵⁴ Both organizations exert an air of exclusivity in their membership selection processes. Though the Academy is made of individuals and not distinct business entities like the

¹⁵¹ See COMPETITION AND MONOPOLY, *supra* note 137. For the purposes of this analysis, the practice of giving out film awards will be treated as a single market. See discussion *infra* Section II.C.

¹⁵² See *Desta*, *supra* note 5556.

¹⁵³ *Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284, 294 (1985).

¹⁵⁴ See discussion *supra* Section I.D.

Guild, the Academy as an entity exerts enough influence within the entertainment industry to be able to coerce members like the Guild did.

Second, both the Guild's boycott program and the Academy's potential eligibility changes effectively force industry members to conform to industry norms. For fashion, the norm was to refrain from copying other companies' designs.¹⁵⁵ For film, the norm is to exhibit films in a traditional movie theater for a certain standard amount of time before allowing viewers to experience the film at home.¹⁵⁶ The effect of not conforming with such rules is different for these two organizations, however. For the fashion retailers, not following rules set by the Guild cuts off a major source of inventory to be sold to customers.¹⁵⁷ On the other hand, film studios would be free to disregard the eligibility requirements for the Academy Awards and would still be able to sell and market their products to consumers. Only one particularly strong marketing channel—the ability to market their movies as “award-winners” or “award nominees”—would be restricted. This advertising mechanism can be essential, however, for non-blockbuster films.¹⁵⁸

The Academy may argue that the scheme employed by the Fashion Originators' Guild is different from changing eligibility rules because the Academy would not be cutting off a market *necessary* to compete in the overall film industry. The Academy could argue that success in the film industry does not depend on awards recognition. Plenty of examples exist, including Disney's films in the Marvel Cinematic Universe.¹⁵⁹ Regardless of whether awards recognition is necessary to compete in the industry, however, Netflix could show the rule changes would have strong

¹⁵⁵ *Fashion Originators' Guild of Am., Inc. v. FTC*, 312 U.S. 457, 461 (1941).

¹⁵⁶ See discussion *supra* Section I.E.

¹⁵⁷ *Fashion Originators' Guild*, 312 U.S. at 463.

¹⁵⁸ See discussion *supra* Section I.F.

¹⁵⁹ *Black Panther* remains the only Marvel film to win any Oscars, as *Avengers: Endgame* failed to beat *1917* in the Best Visual Effects category at the 92nd Oscars. Michael Ordoña, *World War I Adventure '1917' Wins Visual Effects Oscar*, L.A. TIMES (Feb. 9, 2020, 7:22 PM), <https://www.latimes.com/entertainment-arts/movies/story/2020-02-09/visual-effects-oscar-winner-2020> [<https://perma.cc/FAK5-Y986>]; Angela Watercutter, *Black Panther's Oscar Wins Made History*, WIRED (Feb. 25, 2019, 10:47 AM), <https://www.wired.com/story/black-panthers-oscar-wins-made-history> [<https://perma.cc/HB97-GQLZ>]. The Marvel Cinematic Universe has still managed to gross more than \$18 billion worldwide. Sarah Whitten, *Disney Bought Marvel for \$4 Billion in 2009, A Decade Later It's Made More Than \$18 Billion at the Global Box Office*, CNBC (July 21, 2019, 2:00 PM), <https://www.cnbc.com/2019/07/21/disney-has-made-more-than-18-billion-from-marvel-films-since-2012.html> [<https://perma.cc/XP96-DU87>].

anticompetitive effects. Netflix would be unable to capitalize on wins to draw viewers to its services or films. Ultimately, it would potentially “lose sales” in its inability to grow its subscriber base from competing for Oscars.¹⁶⁰ Netflix would be treated differently than studios that follow traditional theatrical exhibitions. It would also not be able to brand its content as “award-winning” or capitalize on historic milestones going forward like traditional studios.¹⁶¹

C. *The Academy’s Rule Changes Result in Illegal Price Fixing*

Price fixing involves competitors agreeing to “raise, fix, or otherwise maintain the price at which their goods or services are sold.”¹⁶² Price fixing, however, does not require that competitors literally “fix” the price.¹⁶³ Multiple competitors may literally “price fix”—establish a single price for a category of goods or services—and still comply with the requirements of the Sherman Act.¹⁶⁴ The price-fixing scheme must still be one that is “plainly anticompetitive” and without “redeeming virtue.”¹⁶⁵ Additionally, organizations may still be price fixing when they restrict the output of a certain good or service, having the ultimate effect of altering prices in the marketplace.¹⁶⁶

In *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, the Supreme Court refused to apply a *per se* rule on violation of the Sherman Act for the issuance of blanket licenses for musical works.¹⁶⁷ The television network CBS sued two performing rights organizations, which operate as clearinghouses for the issuance of public performance licenses

¹⁶⁰ See discussion *supra* Section I.F.

¹⁶¹ See *supra* Section I.F.

¹⁶² DEP’T OF JUST., PRICE FIXING, BID RIGGING, AND MARKET ALLOCATION SCHEMES: WHAT THEY ARE AND WHAT TO LOOK FOR 2 (2007).

¹⁶³ *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 9 (1979) (“As generally used in the antitrust field, ‘price fixing’ is a shorthand way of describing certain categories of business behavior to which the *per se* rule has been held applicable.”).

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ See *Nat’l Collegiate Athletic Ass’n v. Bd. of Regents*, 468 U.S. 85, 99 (1984) (“By restraining the quantity of television rights available for sale, the challenged practices create a limitation on output; our cases have held that such limitations are unreasonable restraints of trade.”).

¹⁶⁷ *Broad. Music*, 441 U.S. at 10 (“[T]hough there has been rather intensive antitrust scrutiny of ASCAP [one of the defendants in this case] and its blanket licenses, that experience hardly counsels that we should outlaw the blanket license as a *per se* restraint of trade.”).

for musical works.¹⁶⁸ These performing rights organizations are nonprofit corporations composed of members of the broadcast industry, representing the vast majority of the authors and composers of musical works.¹⁶⁹ To publicly perform works held by performing rights organizations, television networks and other distributors obtain a blanket license, which gives the licensees the right to perform any and all of the compositions owned by the organization as often as the licensee wants for a specified term.¹⁷⁰ CBS alleged that such blanket licenses are examples of price fixing and are thus per se illegal under the Sherman Act.¹⁷¹ CBS's argument alleged that the performing rights organizations had negotiated among themselves for a single rate at which the blanket licenses would be issued, and, therefore, CBS had no power to bargain for a different price.¹⁷²

The Supreme Court ultimately refused to determine that these blanket licenses were a form of illegal price fixing under section 1 of the Sherman Act because there were many procompetitive reasons for the existence of the blanket license.¹⁷³ With the unwieldy copyright laws related to musical compositions and sound recordings, organizations wishing to perform certain works would lack the ability to effectively negotiate prices for individual works with individual music publishers and record labels.¹⁷⁴ Therefore, the blanket license provides a better opportunity for organizations with little bargaining power to gain affordable access to musical works.¹⁷⁵ Even for large businesses like CBS, having a blanket license provides a simpler and more cost-efficient

¹⁶⁸ *Id.* at 4–5.

¹⁶⁹ *Id.* at 5.

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 6.

¹⁷² *Id.* at 5–6.

¹⁷³ *Id.* at 20 (“The blanket license, as we see it, is not a ‘naked restrain[t] of trade with no purpose except stifling of competition,’ but rather accompanies the integration of sales, monitoring, and enforcement against unauthorized copyright use.”) (citation omitted).

¹⁷⁴ *Id.* (“Individual sales transactions in this industry are quite expensive, as would be individual monitoring and enforcement, especially in light of the resources of single composers. Indeed, as both the Court of Appeals and CBS recognize, the costs are prohibitive for licenses with individual radio stations, nightclubs, and restaurants, and it was in that milieu that the blanket license arose.”) (citation omitted).

¹⁷⁵ *Id.*

method for securing the performance rights for compositions than individually negotiating for the rights to each work.¹⁷⁶

This case illustrates how courts will analyze claims of per se violation of the Sherman Act.¹⁷⁷ To determine if an action is anticompetitive, it must be shown that the “practice facially appears to be one that would always or almost always tend to restrict competition and decrease output.”¹⁷⁸ Otherwise, the action may be one “designed to ‘increase economic efficiency and render markets more, rather than less, competitive.’”¹⁷⁹ The blanket license scheme is a clear example of something that makes the market for performing rights more efficient and competitive.¹⁸⁰

Contrary to the blanket licensing case, the Supreme Court held that the National Collegiate Athletic Association’s (NCAA) scheme to restrict the output of football games available in the broadcast market constituted horizontal price fixing.¹⁸¹ The NCAA creates and promulgates rules for twenty-four different sports, determines academic eligibility for student-athletes, and regulates the sizes of teams and coaching staffs.¹⁸² In the 1980s, the NCAA was struggling to fill college football stadiums because of the ease with which fans could watch games at home on their televisions.¹⁸³ As a result, the NCAA developed a plan to encourage physical attendance by manipulating the number of games that could be aired on television.¹⁸⁴ Under the plan, NCAA member schools were allowed to contract directly with television networks for the right to

¹⁷⁶ The Court stated:

But even for television network licenses, ASCAP reduces costs absolutely by creating a blanket license that is sold only a few, instead of thousands, of times, and that obviates the need for closely monitoring the networks to see that they do not use more than they pay for. ASCAP also provides the necessary resources for blanket sales and enforcement, resources unavailable to the vast majority of composers and publishing houses. Moreover, a bulk license of some type is a necessary consequence of the integration necessary to achieve these efficiencies, and a necessary consequence of an aggregate license is that its price must be established.

Id. at 21.

¹⁷⁷ *See generally id.*

¹⁷⁸ *Id.* at 19–20.

¹⁷⁹ *Id.* at 20 (quoting *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 441 n.16 (1979)).

¹⁸⁰ *Id.* at 21.

¹⁸¹ *Nat’l Collegiate Athletic Ass’n v. Bd. of Regents*, 468 U.S. 85, 100 (1984).

¹⁸² *Id.* at 88.

¹⁸³ *Id.* at 91.

¹⁸⁴ *Id.* at 91–92.

televise their games.¹⁸⁵ No NCAA member institution, however, was allowed to appear on television more than six times overall and four times nationally.¹⁸⁶ Additionally, the institutions were required to split their appearances between the NCAA's two carrying network partners, ABC and CBS.¹⁸⁷ By limiting the number of times each team could appear on television, people would presumably be more motivated to attend live games to support their favorite teams.¹⁸⁸

The television plan sparked controversy because major football programs wanted more influence in determining football television policy than they had as members of the NCAA.¹⁸⁹ Five major conferences and major football-playing independent institutions organized the College Football Association prior to the development of the television plan at issue.¹⁹⁰ This organization, designed to promote major football-playing schools within the NCAA structure, obtained an independent contract to air its teams' games on a competing network, NBC.¹⁹¹ As a result, the NCAA threatened disciplinary action against those institutions that complied with the NBC contract.¹⁹² Subsequently, the institutions sued the NCAA for antitrust violations under the Sherman Act.¹⁹³

The District Court held in favor of the plaintiffs, and the Court of Appeals affirmed, finding the scheme to be a *per se* violation of antitrust law.¹⁹⁴ The Supreme Court affirmed, holding that the NCAA's practices in its television plan were unreasonable restraints on trade.¹⁹⁵ However, the Supreme Court refused to apply a *per se* analysis because some horizontal restraints on competition are necessary to develop a market for collegiate football games.¹⁹⁶ Even so, the NCAA created an

¹⁸⁵ *Id.* at 93.

¹⁸⁶ *Id.* at 94.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 91.

¹⁸⁹ *Id.* at 94-95.

¹⁹⁰ *Id.* at 89.

¹⁹¹ *Id.* at 94-95.

¹⁹² *Id.* at 95.

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 88; *see Bd. of Regents v. Nat'l Collegiate Athletic Ass'n*, 707 F.2d 1147 (10th Cir. 1983).

¹⁹⁵ *Id.* at 99.

¹⁹⁶ *Id.* at 101 ("[W]hat is critical is that this case involves an industry in which horizontal restraints on competition are essential if the product is to be available at all.").

unreasonable horizontal restraint that was plainly anticompetitive.¹⁹⁷ The Court reasoned that the television plan placed an “artificial limit on the quantity of televised football games . . . available to broadcasters and consumers.”¹⁹⁸ Therefore, by limiting the output available in the marketplace, the NCAA was effectively price fixing.¹⁹⁹ Additionally, the television plan eliminated a significant number of competitors from the broadcast market because only those broadcasters able to bid on television rights for the entire NCAA could compete.²⁰⁰

The NCAA argued, however, that its television plan could not have significant anticompetitive effects because the record failed to show the plan had market power.²⁰¹ The NCAA believed that its plan lacked the ability to affect supply and demand for televised football games in the market.²⁰² The Court rejected this argument on both legal and factual grounds.²⁰³ Legally, proving that an action is anticompetitive does not require showing market power when there is a naked restriction on price or output.²⁰⁴ Factually, the Court found the NCAA clearly possessed market power in the market at issue—football broadcasts.²⁰⁵ The Court reasoned that the availability of other sports to be televised was not sufficient to refute an antitrust violation because the product—football games in particular—is unique.²⁰⁶ As a result, college football broadcasts can be defined as a separate market from other sports broadcasts.²⁰⁷

The Academy’s proposed eligibility rule changes more closely align with the NCAA’s restriction of football broadcasts than with the

¹⁹⁷ *Id.* at 106–07 (“The anticompetitive consequences of this arrangement are apparent. Individual competitors lose their freedom to compete. Price is higher and output lower than they would otherwise be, and both are unresponsive to consumer preference.”).

¹⁹⁸ *Id.* at 99.

¹⁹⁹ *Id.* at 99–100.

²⁰⁰ *Id.* at 108.

²⁰¹ *Id.* at 109.

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.* at 109–10 (“[W]hen there is an agreement not to compete in terms of price or output, ‘no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement.’” (quoting *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 692 (1978))).

²⁰⁵ *Id.* at 111.

²⁰⁶ *Id.* at 111–12 (also discussing how championship boxing events constitute a market separate from the market for non-championship events).

²⁰⁷ *Id.* at 112 (“When a product is controlled by one interest, without substitutes available in the market, there is monopoly power.” (quoting *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 394 (1956))).

performing rights organizations' issuance of blanket licenses. The blanket license scheme is different from the Academy's potential theatrical exhibition rule change. A blanket license provides two major benefits: (1) opening up access to copyrighted musical works to organizations with little bargaining power, and (2) providing a cost-saving mechanism for purchasing the right to perform the musical compositions.²⁰⁸ These benefits motivated the Court to find that the blanket license could actually be procompetitive.²⁰⁹

In contrast to the issuance of blanket licenses, extending the required theatrical exhibition window for awards consideration would not provide the same benefits. While a blanket license is beneficial for smaller users of the musical compositions,²¹⁰ the extension of a theatrical window would restrict small independent studios from bargaining with theaters.²¹¹ Because larger studios would contract with theaters to showcase their films for longer periods of time to be eligible, less opportunity will exist for smaller independent fare to compete in the theatrical marketplace. In fact, such a rule would counteract the Academy's reported purpose for its rule changes to encourage exhibition in movie theaters.²¹² Also, while the blanket license provides for lower costs for those seeking to perform musical compositions, a longer theatrical window would increase costs for studios showing in movie theaters.²¹³ Therefore, a court is unlikely to find that the Academy's potential rule change is procompetitive, and, thus, should be considered a *per se* unreasonable restraint of trade.

Alternatively, the Academy could argue that horizontal restraints are necessary for the existence of an awards-giving community in order to define what works could be considered "film," much like such restraints are necessary for the existence of a college football broadcast market.²¹⁴ If the Academy is successful in proving this argument, a court may be prone to not find the eligibility rule changes to be a *per se* violation of the Sherman Act. Even so, a court will likely find that the rules

²⁰⁸ See *supra* notes 173–76 and accompanying text.

²⁰⁹ See *supra* notes 173–76 and accompanying text.

²¹⁰ See *supra* notes 175–76 and accompanying text.

²¹¹ See discussion *supra* Section I.E.

²¹² See discussion *supra* Section I.E.

²¹³ See discussion *supra* Section I.E.

²¹⁴ See *supra* note 196 and accompanying text.

are so anti-competitive as to constitute an antitrust violation, especially regarding small independent studios with little bargaining power.

The Academy could also argue that it is inappropriate to define its awards ceremony as a single market capable of being anticompetitive. The *NCAA* case supports a finding, however, that the practice of awarding films can be considered a single market for an antitrust analysis. The Court was “convinced” that football broadcasts should be defined as a single market, and, therefore, it is reasonable to find that courts should treat the Academy Awards as a single market because there are no sufficient substitutes.²¹⁵ While other award bodies exist, none of them match the size and prestige of the Academy.²¹⁶ While other awards are important, the Oscar stands out as the most prestigious award that a film professional can win.²¹⁷ Earning an Oscar implies that the recipient is

²¹⁵ Nat'l Collegiate Athletic Ass'n v. Board of Regents, 468 U.S. 85, 112 (1984) (“It inexorably follows that if college football broadcasts be defined as a separate market—and we are convinced they are—then the NCAA’s complete control over those broadcasts provides a solid basis for the District Court’s conclusion that the NCAA possesses market power with respect to those broadcasts.”).

²¹⁶ Other bodies which give away film awards include the Hollywood Foreign Press Association, the Broadcast Film Critics’ Choice Association, and guilds of the various filmmaking crafts, including the Directors Guild of America, Writers Guild of America, and Screen Actors Guild, among others. The Hollywood Foreign Press Association gives out the Golden Globe Awards, often considered the first step to receiving an Academy Award, but its organization only includes around ninety international journalists. Caity Weaver, *Wait—Who Runs the Hollywood Foreign Press Association?*, N.Y. TIMES (Jan. 10, 2019), <https://www.nytimes.com/2019/01/10/style/hfpa-golden-globes.html> [<https://perma.cc/VT6N-Z8YN>]. The Broadcast Film Critics Association is made up of more than 300 film critics in the United States and Canada, but members need only “regularly provide a[n] . . . audience with subjective assessments of the quality of motion pictures,” and do not have to work on productions within the film industry. See *BFCA, CRITICS CHOICE ASS’N*, <http://www.criticschoice.com/bfca> [<https://perma.cc/SQV5-B5KQ>]. The guilds are made up of members of their various crafts, the largest of which is the Screen Actors Guild at around 160,000 members. See *About, SAG-AFTRA*, <https://www.sagaftra.org/about> [<https://perma.cc/B2NF-FGXW>]; Elena Nicolaou, *Who Votes for the SAG Awards?*, REFINERY29 (Jan. 23, 2019, 6:50 PM), <https://www.refinery29.com/en-us/2019/01/222436/who-votes-sag-awards-aftra-screen-actors-guild-2019> [<https://perma.cc/2U3F-U3GM>].

²¹⁷ Mark Cuban, known for his role as an investor on the television show *Shark Tank*, said, “That’s what makes the Oscars so special. It introduces the world to amazing talents and helps propel them to even greater heights.” THR Staff, *19 Hollywood A-Listers on Why the Oscars Still Matter (and One Who Says They Don’t)*, HOLLYWOOD REP. (Feb. 22, 2017, 6:00 AM), <https://www.hollywoodreporter.com/lists/19-hollywood-a-listers-why-oscars-still-matter-1-who-says-they-dont-978119/item/isabelle-huppert-why-oscars-still-matter-978118> [<https://perma.cc/72QP-PEZ9>]. Producer Jeffrey Katzenberg said, “[O]ur industry may be obsessed with billion-dollar blockbusters, but the Oscars still remind me of what matters most.

someone at the top of their craft being honored by their fellow filmmakers. Even though Steven Spielberg seems to imply that Emmys for television are just as prestigious as the Oscars for film, the Oscars occupy a much more important space in the entertainment world.²¹⁸ Therefore, because no other entertainment or film award is as important as the Academy Award, for the purposes of an antitrust analysis, giving out and broadcasting the Academy Awards should be treated as a single market. Even so, the Academy could argue that it has no market power in the industry, but market power is not a prerequisite to finding an antitrust violation.²¹⁹ However, even if market power were required to find an antitrust violation, the Academy does possess market power in the awards-giving community.²²⁰

While increasing the necessary theatrical window for competing for an Academy Award is not directly restricting output like the NCAA's television plan, the eligibility rule changes may have the unintended consequence of altering the available number of theater screens available in the marketplace. If a successful streaming service like Netflix or Amazon is required to book a screen for up to four weeks in a movie theater, that would shut out other production companies and smaller independent studios from being able to bargain with movie theater chains for screening space.²²¹ Even without competition from these large studios, small indies would have a hard time putting their movies in a

Which is why, given the choice in 1974 or in 2017 between a pot of gold or that golden statue, it would be Oscar every time." *Id.*

²¹⁸ Evidence of the Oscars' importance includes the fact that only twenty-three awards are given out every year, compared to dozens of Primetime Emmy awards. See Nomination Press Release, Television Acad., 2019 Primetime Emmy Awards, <https://www.emmys.com/sites/default/files/Downloads/71st-nominations-list-v6.pdf> [<https://perma.cc/T7LA-SV4T>] (listing the nominees at the 2019 ceremony, which include numerous awards in each craft field). Additionally, because there are so few Oscar categories, people may find it easier to seek out Oscar-nominated films each year than the dozens of television shows nominated at the Emmys. The viewership for the Oscars each year is also considerably higher than that of the Emmys. In 2019, Oscar viewership was at just under thirty million viewers while the Emmys only attracted seven million. Joe Otterson, *Oscars 2019 Ratings Rise from Last Year to 29.6 Million Viewers*, VARIETY (Feb. 25, 2019, 7:04 AM), <https://variety.com/2019/tv/news/oscar-ratings-2019-1203144417> [<https://perma.cc/MQS7-BLQK>]; Josef Adalian, *The 2019 Emmys Were a Ratings Disaster*, VULTURE (Sept. 23, 2019), <https://www.vulture.com/2019/09/2019-emmys-ratings.html> [<https://perma.cc/H6PN-3PEL>].

²¹⁹ See *supra* note 204 and accompanying text.

²²⁰ See *supra* note 151.

²²¹ See discussion *supra* Section I.E.

theater for an extended time.²²² Alternatively, changing such a rule would place studios in a position of losing money by exhibiting a film for an amount of time that does not meet public demand. Therefore, the restriction on output of theater exhibitions available to studios as a whole is much like restricting the number of television broadcasts available for football games. Such a restraint of trade will likely be found to be unreasonable.

III. RECENT DEVELOPMENTS

Aside from playing at film festivals, *Roma* was only in theaters for approximately three weeks prior to its home release on the streaming website.²²³ Other more unlikely Oscar hopefuls in 2018, including *The Ballad of Buster Scruggs* and *Bird Box*, only received a one-week exclusive theatrical run.²²⁴ While *Roma*'s limited theatrical release was not a barrier to it receiving a significant number of nominations, the release strategy may have ultimately prevented the film from winning the biggest prize of the night. As a result, Netflix expanded its theatrical release strategy for its Oscar hopefuls for the ninety-second Academy Awards in 2020.²²⁵ Initially, Netflix attempted to contract with large cinema chains like AMC and Cineplex.²²⁶ Talks fizzled, however, after Netflix refused to honor an exclusivity window of sixty days in theaters, which is lower than the typical seventy-two days.²²⁷ Netflix refused to go above forty-five days.²²⁸

²²² A study in 2015 found that twenty percent of all wide-release movies run for only two weeks. Mark Fahey, *Why Movies Are Sometimes Here and Gone in Theaters*, CNBC (Nov. 17, 2015, 12:24 PM), <https://www.cnbc.com/2015/11/17/why-movies-are-sometimes-here-and-gone-in-theaters.html> [<https://perma.cc/YYP3-QDCB>]. Indie films in particular may only play for one week. *Id.*

²²³ Brent Lang, *Netflix's 'Roma,' 'Ballad of Buster Scruggs,' 'Bird Box' Get Exclusive Theatrical Releases*, VARIETY (Oct. 31, 2018, 4:30 PM), <https://variety.com/2018/film/awards/roma-netflix-theaters-alfonso-cuaron-1203016333> [<https://perma.cc/A9LP-Z96D>].

²²⁴ *Id.*

²²⁵ Dami Lee, *Netflix Will Release Ten Fall Films in Theaters, Well Ahead of Their Streaming Debuts*, VERGE (Aug. 27, 2019, 5:49 PM), <https://www.theverge.com/2019/8/27/20835697/netflix-fall-movie-lineup-theatrical-release-steven-soderbergh-laundromat-martin-scorsese-irishman> [<https://perma.cc/268Z-KT9G>].

²²⁶ Sperling, *supra* note 89.

²²⁷ *Id.*

²²⁸ *Id.*

As a result, Netflix had to slightly alter its strategy by showing in smaller independent theaters.²²⁹

Martin Scorsese's *The Irishman*, a three-and-a-half-hour-long gangster epic, starring Robert De Niro, Al Pacino, and Joe Pesci, received almost four weeks in theaters.²³⁰ *Marriage Story*, from previous Netflix collaborator Noah Baumbach, showed for a full month.²³¹ Additionally, movies such as *Dolemite Is My Name* and *The King*, received more than three weeks, even though neither were expected to break through in major categories.²³² The two main players for awards, *The Irishman* and *Marriage Story*, played on an estimated 2,000 and 1,000 screens, respectively.²³³ *The Irishman* even received a splashy four-week release at Broadway's Belasco Theater in New York, with Netflix footing the bill to provide the appropriate equipment to screen the film.²³⁴

Aside from increasing its theatrical footprint for its Oscar fare, Netflix has gotten into the business of purchasing movie theaters to screen its own films.²³⁵ Netflix is currently finalizing a multimillion-dollar deal to purchase Hollywood's historic Egyptian Theater from current owner American Cinematheque.²³⁶ The streaming service also saved New York City's last single-screen venue, the Paris Theatre, from closing down by leasing the property for at least ten years.²³⁷ Netflix primarily used the

²²⁹ *Id.*

²³⁰ Lee, *supra* note 225.

²³¹ *Id.*

²³² *Id.*; see also Will Mavity, *Dolemite Is My Name*, NEXT BEST PICTURE (Oct. 4, 2019), <https://www.nextbestpicture.com/dolemite-is-my-name.html> [<https://perma.cc/8KTQ-UNW4>]; Matt Neglia, *The King*, NEXT BEST PICTURE (Oct. 9, 2019), <https://www.nextbestpicture.com/the-king.html> [<https://perma.cc/8NXJ-PM8N>].

²³³ See Anousha Sakoui, *AMC and Regal Won't Screen Netflix's 2020 Oscar Nominations*, L.A. TIMES (Jan. 13, 2020, 8:45 AM), <https://www.latimes.com/entertainment-arts/business/story/2020-01-13/oscar-nominations-2020-amc-regal-theaters-boycott-netflix> [<https://perma.cc/KHG6-3HXD>].

²³⁴ Nancy Coleman, *'The Irishman' on Broadway: Phone Booths, Broadsheets and Jimmy Hoffa Stickers*, N.Y. TIMES (Nov. 4, 2019), <https://www.nytimes.com/2019/11/04/movies/irishman-belasco-netflix.html> [<https://perma.cc/2S4X-4FBU>].

²³⁵ Pamela McClintock, *Will Netflix's Ownership of L.A.'s Egyptian Theatre Spark Backlash?*, HOLLYWOOD REP. (Aug. 9, 2019, 7:00 AM), <https://www.hollywoodreporter.com/news/will-netflixs-ownership-las-egyptian-theatre-spark-backlash-1229765> [<https://perma.cc/7EVX-69V6>].

²³⁶ *Id.*

²³⁷ Mike Fleming Jr., *We'll Always Have Paris: Netflix Seals Long Term Deal to Keep Gotham's Last Single-Screen Picture Palace Alive*, DEADLINE (Nov. 25, 2019, 10:00 AM),

Paris Theater to show *Marriage Story* as part of its awards campaign.²³⁸ While these purchases allow Netflix to increase the number of its revenue streams, Netflix seems to be preparing to shield itself from a potential Academy rule change.

Netflix's awards strategy seems to have worked. For the 2020 Academy Awards, Netflix was the studio with the highest number of nominations at twenty-four, a first for a streaming service.²³⁹ Both *The Irishman* and *Marriage Story* received Best Picture nominations while *The Two Popes* also received major nominations.²⁴⁰ While *Joker* led the nominations with eleven, *The Irishman* was close behind with ten (in a three-way tie with *1917* and *Once Upon a Time in Hollywood*).²⁴¹

Though leading all studios with the most nominations at the ninety-second Academy Awards, Netflix walked away from the night with only two wins.²⁴² Netflix had a tough time besting two cinematic juggernauts

<https://deadline.com/2019/11/paris-theatre-longerm-lease-netflix-marriage-story-the-irishman-robert-solow-1202794519> [<https://perma.cc/Q3XB-833M>].

²³⁸ *Id.*

²³⁹ Pamela McClintock, *Oscars: Netflix Leads All Hollywood Studios with Twenty-Four Nominations*, HOLLYWOOD REP. (Jan. 13, 2020, 6:53 AM), <https://www.hollywoodreporter.com/news/oscar-netflix-leads-all-hollywood-studios-24-nominations-1268945> [<https://perma.cc/3XNM-PRJ6>].

²⁴⁰ Netflix's nominees included *The Irishman* (ten nominations), *Marriage Story* (six), and *The Two Popes* (three). Netflix also received two nominations for Best Documentary Feature (*American Factory* and *The Edge of Democracy*), two nominations for Best Animated Feature (*Klaus* and *I Lost My Body*), and one nomination for Best Documentary Short (*Life Overtakes Me*). Violet Kim, *For the First Time, the Oscar Nominations Were Led by a Streaming Service*, SLATE (Jan. 13, 2020, 12:27 PM), <https://slate.com/culture/2020/01/oscar-nominations-2020-by-studio-and-movie-netflix.html> [<https://perma.cc/DE96-75KC>].

²⁴¹ Variety Staff, *Oscar Nominations 2020: The Complete List*, VARIETY (Feb. 9, 2020, 2:59 PM), <https://variety.com/2020/film/news/2020-oscar-nominations-list-academy-awards-nominees-1203461985> [<https://perma.cc/M6WE-MVMX>].

²⁴² Piya Sinha-Roy, *Netflix Wins Two Oscars, 'The Irishman' Leaves Empty-Handed*, HOLLYWOOD REP. (Feb. 9, 2020, 8:42 PM), <https://www.hollywoodreporter.com/news/netflix-wins-two-oscar-irishman-leaves-empty-handed-1277795> [<https://perma.cc/4G2B-55KY>]. Netflix's two awards included Best Supporting Actress for Laura Dern in *Marriage Story* and Best Documentary Feature for *American Factory*. *Id.* Netflix was surely disappointed, as it reportedly spent \$159 million on *The Irishman*. Richard Trenholm, *The Irishman: De-Aging De Niro Was a Waste of Money*, CNET (Dec. 1, 2019, 10:36 PM), <https://www.cnet.com/news/the-irishman-de-aging-robert-de-niro-was-a-waste-of-money> [<https://perma.cc/ZY7V-8DBF>] (discussing the reported \$159 million production budget for *The Irishman*).

in Best Picture frontrunners *Parasite* and *1917*.²⁴³ *Parasite*, a South Korean film directed by previous Netflix collaborator Bong Joon-ho, became the first non-English film to win Best Picture.²⁴⁴ This achievement followed just one year after *Roma*'s loss.²⁴⁵

The COVID-19 pandemic has drastically altered the landscape for the 2021 awards season and the ninety-third Academy Awards.²⁴⁶ For the first time ever, films that premiere on streaming services or video on-demand will be eligible for the Oscars.²⁴⁷ Studios, however, must prove that they were planning to release these films in theaters.²⁴⁸ Though this new rule may signify a major development for Netflix's Oscar chances,²⁴⁹

²⁴³ See *The Best Picture Race is Parasite vs. 1917 . . . For a Few Days, at Least*, VANITY FAIR (Jan. 23, 2020), <https://www.vanityfair.com/hollywood/2020/01/little-gold-men-podcast-sag-awards-ellen-lewis-interview> [<https://perma.cc/87VE-WMCS>].

²⁴⁴ Adam Nayman, *What Does the 'Parasite' Best Picture Win Mean for the Future of Foreign Language Film at the Oscars?*, RINGER (Feb. 10, 2020, 12:15 PM), <https://www.theringer.com/oscars/2020/2/10/21131530/parasite-best-picture-oscars-academy-awards-future> [<https://perma.cc/67YE-2JZ9>]; see also Tiffany, *supra* note 46.

²⁴⁵ Alex Zaragoza, *'Parasite' Winning Best Picture Feels Like Justice for 'Roma'*, VICE (Feb. 10, 2020, 7:24 AM), https://www.vice.com/en_us/article/88459k/parasite-winning-best-picture-feels-like-justice-for-roma [<https://perma.cc/4V29-YJMH>]. Though both *Roma* and *Parasite* were foreign-language films, *Parasite* was shown in theaters exclusively before being available for home viewing. See Tom Brueggemann, *How 'Parasite' Changed What Foreign-Language Films Can Do at the Box Office*, INDIEWIRE (Jan. 17, 2020, 1:00 PM), <https://www.indiewire.com/2020/01/parasite-neon-foreign-language-films-box-office-1202203641> [<https://perma.cc/3Z7F-354P>].

²⁴⁶ The 2021 Oscars have been postponed to April 25, 2021, nearly two months after the original date, and the eligibility window has been extended two months to include films through February 2021. Pete Hammond, *2021 Oscars Postponed to April 25, Latest Date Ever; Films Eligible Through February 28; Academy Museum Opening Delayed to April 30*, DEADLINE (June 15, 2020, 11:29 AM), <https://deadline.com/2020/06/2021-oscars-postponed-academy-museum-opening-delayed-1202959447> [<https://perma.cc/9M3B-2AZU>].

²⁴⁷ Erich Schwartzel, *Streaming Movies Are Eligible for Oscars, Academy Says*, WALL ST. J. (Apr. 28, 2020, 6:07 PM), <https://www.wsj.com/articles/streaming-movies-are-eligible-for-the-oscars-academy-says-11588110996> [<https://perma.cc/MY2U-25UG>].

²⁴⁸ *Id.*

²⁴⁹ As of February 2021, several awards prognosticators for the ninety-third awards ceremony predict that Netflix will receive three or four Best Picture nominations while Amazon's competing streaming service will receive one or two nominations. Clayton Davis, *Oscar Predictions: Best Picture—Is 'Nomadland' Still the Academy Frontrunner or Is Netflix Closing In?*, VARIETY (Feb. 18, 2021, 12:24 AM), <https://variety.com/feature/2021-oscars-best-picture-predictions-1234768047> [<https://perma.cc/AXS2-SURD>]; Scott Feinberg, *Feinberg Forecast: First Oscar Projections for All Twenty-Three Categories*, HOLLYWOOD REP. (Feb. 15, 2021, 1:57 PM), <https://www.hollywoodreporter.com/race/feinberg-forecast-first-oscar-projections-for-all-23-categories> [<https://perma.cc/Y92M-VPR4>]; The Oscar Expert, *2021 Oscar Nomination Predictions | February 2021*, YOUTUBE (Feb. 15, 2021), <https://www.youtube.com/>

the Academy has made it clear that this rule is only temporary until movie theaters are able to reopen.²⁵⁰ In a press release describing the rule change, the Academy professed that “[its] commitment to [the theatrical experience] is unchanged and unwavering.”²⁵¹ Such a strong sentiment further proves a strong animus toward Netflix and other streaming services. Therefore, even though Netflix may temporarily benefit from a rule change for the 2021 ceremony, the fight between Netflix and the Academy is still far from over, and potential antitrust violations should continue to worry the Academy.

CONCLUSION

Netflix has considerably increased its ability to create a number of Oscar-quality films. Though Netflix has acquired the ability to shield itself from being shut out of the Oscars race through its purchase of movie theaters, smaller independent studios and low-budget films do not possess the same power as the streaming giant and would feel the brunt of an eligibility rule change. A potential Academy rule change would effectively be a group boycott and an illegal price-fixing scheme.²⁵² Expanding the theatrical window would cut off not only Netflix and other streamers, but also these smaller studios, from accessing the awards-giving market.

The Academy’s mission is to “recognize and uphold excellence in the motion picture arts and sciences, inspire imagination, and connect the world through the medium of motion pictures.”²⁵³ The way consumers interact with film, the way production companies make film, and the way the world sees film will inevitably be different going forward. By shutting out Netflix and other studios, the Academy would be failing to recognize the benefits of these changes. Since its inception, the Academy has honored risk takers and new players in the film industry,

watch?v=naLbJ3ojZqQ [https://perma.cc/6V8C-7R66]. Therefore, streaming services may make up half of the Best Picture nominees.

²⁵⁰ *Id.* (“For the first—and, the Academy said, only—time, a movie that was available just for streaming will be able to contend for best picture and other prizes.”).

²⁵¹ *Id.*

²⁵² *See supra* Part II.

²⁵³ *About*, ACAD. OF MOTION PICTURE ARTS & SCIS., <https://www.oscars.org/about> [https://perma.cc/P3AQ-BG8G].

whether it was *Moonlight*, *Parasite*, or Walt Disney—the most honored filmmaker in the history of the Academy Awards with twenty-six competitive awards.²⁵⁴ The Academy should heed Disney’s advice: “In this volatile business of ours, we can ill afford to rest on our laurels, even to pause in retrospect. Times and conditions change so rapidly that we must keep our aim constantly focused on the future.”²⁵⁵ Failing to allow Netflix, streaming services, and all studios of all sizes to compete in a fair marketplace for awards recognition would mean the Academy would not be focusing on the future, but rather on the past. That failure would not only pose antitrust concerns, but it would diminish the public’s respect for the Academy as the bellwether of the best in film.

²⁵⁴ Mahita Gajanan, *Here’s Who Has Won the Most Oscars Ever*, TIME (Feb. 14, 2019, 11:28 AM), <https://time.com/5148660/who-has-won-the-most-oscars> [<https://perma.cc/FNJ6-FGCN>]; see discussion *supra* Section I.F. and Part III.

²⁵⁵ *Walt Disney Quote Archive*, D23, <https://d23.com/walt-disney-quote> [<https://perma.cc/W2XC-R8KA>].