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# **Game Over? How Video Game Console Makers are Speeding Toward an Antitrust Violation**

*Clayton Alexander\**

## ABSTRACT

There has been a recent trend in the video game industry that console makers (Sony, Microsoft, and Nintendo) have been acquiring video game developers to make games solely for their console. With a surge of acquisitions, these three console makers have rapidly increased their market share of the console video game industry. But in doing so, have they started to run afoul of antitrust law? Do these three console makers now have enough market power to exert control over the video game industry like a monopoly? This article seeks to answer these questions, while also suggesting several steps that console makers can take now to avoid the headache that is an antitrust violation in the future.

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## I. INTRODUCTION

On August 19, 2019, Japanese entertainment conglomerate Sony announced that they had acquired video game developer Insomniac Games.<sup>1</sup> The company became the 14th video game studio bought by Sony to exclusively produce games for their PlayStation video game console since their creation in 1994.<sup>2</sup> Just one month prior, Microsoft—software giant and maker of the PlayStation’s main competitor, the Xbox—announced the acquisition of Double Fine Productions.<sup>3</sup> The acquisition was the 15th studio brought on to exclusively produce games for the Xbox.<sup>4</sup> These acquisitions represent a new trend in the video game industry: console makers are focused on acquiring video game studios to exclusively produce titles for their respective consoles (also called first-party developers or studios).<sup>5</sup> In fact, Sony recently stated it is currently on the hunt to acquire more video game studios.<sup>6</sup>

There are several possible explanations for this new trend. Console makers may have vertically integrated as a way to compete with one another as differences between console hardware (historically where competition focused) have become increasingly marginal.<sup>7</sup> Having select video game franchises produce games solely for one console, or in other words, creating console exclusive video games, is one way to do so.<sup>8</sup> As it currently stands, Microsoft fans cannot experience the Uncharted or God of War series on the Xbox, and Sony fans do not have the opportunity to play through the Halo or Gears of War series on the PlayStation. While these actions may effectively fall within guise of “anti-competitive” activity (having a negative impact on the competitive market), is it flagrant enough to be an antitrust violation?

What about other video game publishers and developers that must meet Sony, Microsoft, and Nintendo standards in order for their games to be allowed on consoles? As of 2018, the number of console gamers is estimated to be about 86.5 million.<sup>9</sup> Some games, such as the famous Kingdom Hearts series, appear only on consoles.<sup>10</sup> If small producers could not meet their target console’s standards, then all the time and resources poured into developing and marketing the games would be

1. Samit Sarkar, *Sony to acquire Insomniac Games*, POLYGON (Aug. 19, 2019), <https://www.polygon.com/2019/8/19/20812654/sony-buys-insomniac-games>.

2. Press Release, Sony Interactive Entm’t, Sony Interactive Entertainment to Acquire Insomniac Games (Aug. 20, 2019), <https://www.sie.com/en/corporate/release/2019/190820.html>.

3. Ben Kuchera, *Microsoft acquires Double Fine Productions*, POLYGON (June 9, 2019), <https://www.polygon.com/e3/2019/6/9/18658708/microsoft-acquires-double-fine-studios-e3-2019-first-party>.

4. Matt Booty, *Double Fine Productions Joins Xbox Game Studios*, XBOX.COM (June 9, 2019), <https://news.xbox.com/en-us/2019/06/09/double-fine-productions-joins-xbox-game-studios/>.

5. The Faceless Rebel, *What Is the Difference between 1st, 2nd and 3rd party Developers*, ARSTECHNICA (Jun. 13 2007, 1:42 AM), <https://arstechnica.com/civis/viewtopic.php?t=206689>.

6. Matt Purslow, *Sony is Considering Studio Acquisitions Ahead of PS5*, IGN (July 1, 2019), <https://www.ign.com/articles/2019/07/01/sony-is-considering-studio-acquisitions-ahead-of-ps5>.

7. Felicia Miranda, *The best video game consoles of 2020*, DIG. TRENDS (Mar. 27, 2020), <https://www.digitaltrends.com/gaming/best-gaming-consoles/>.

8. One of the biggest factors that consumers consider when purchasing a console is the scope of the console game library/exclusive content. See Matt Peckham, *The Surprising Reasons People Buy the PlayStation 4, Xbox One or Wii U*, TIME (Feb. 26, 2015), <https://time.com/3723953/console-buyers/>.

9. Dustin Bailey, *35% of Americans are PC gamers*, PC GAMES N (Sept. 11, 2018), <https://www.pcgamesn.com/pc-gamers-vs-console-gamers-numbers>.

10. See, e.g., *Square Enix Games*, SQUARE ENIX, [https://square-enix-games.com/en\\_US/games](https://square-enix-games.com/en_US/games) (last visited Jan. 14, 2020) (listing Kingdom Hearts III as available only on the Xbox One and PS4 consoles).

for naught; for a AAA game series like Kingdom Hearts,<sup>11</sup> this amount would be at least \$60 million.<sup>12</sup> Does this preferential treatment for acquired studios like Insomniac and Double Fine run afoul of antitrust law? So far, that answer is no, but these console makers are inching ever closer toward crossing the line into violating the laws on vertical mergers.

This article will examine whether the most popular major console makers—Sony, Microsoft, and Nintendo—have violated, or come dangerously close to violating, antitrust laws on vertical mergers due to these acquisitions. Part II will briefly discuss the layout and some basic terminology of the video game industry. Part III will provide an overview of relevant antitrust law and its implementation. Part IV will examine whether there is a violation of antitrust laws on vertical mergers by these console makers. Lastly, Part V will go over preventive measures that console makers can take to avoid antitrust scrutiny.

## II. A BRIEF OVERVIEW OF THE VIDEO GAME MARKET

The console video game market is made up of two main components: consoles and video games. The three major console makers, Nintendo (makers of the Switch, Wii U, and 3DS),<sup>13</sup> Microsoft (makers of the Xbox One and Xbox One S),<sup>14</sup> and Sony (makers of the PlayStation 4 and PlayStation 4 Pro)<sup>15</sup>—hereafter referred to as the “Big Three”—make up more than 90% of worldwide video game console sales.<sup>16</sup> Video games are made by video game developers (“studios”), of which there are two types: first-party and third-party.<sup>17</sup> First-party video game developers are studios that are owned by one of the Big Three console makers and exclusively make games for that console.<sup>18</sup> This includes reputable studios such as Naughty Dog (makers of the Uncharted series and The Last of Us),<sup>19</sup> 343 Studios (makers of the Halo franchise),<sup>20</sup> and Nintendo (creators of Mario, Zelda, and Metroid).<sup>21</sup> Third-party studios, on the other hand, are not owned by a console maker, but instead produce games for any number of consoles.<sup>22</sup> Notable third-party studios

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11. Traditionally, AAA games were defined as games that were released by “mega-sized publishers,” with Square Enix being one of those publishers. Rhys Pugatschew, *Triple A Games: Defining What AAA Games Actually Are*, NERDMUCH? (May 17, 2019), <https://www.nerdmuch.com/games/170501/triple-a-games/>.

12. Superannuation, *How Much Does It Cost To Make A Big Video Game?*, KOTAKU (Jan. 15, 2014), <https://kotaku.com/how-much-does-it-cost-to-make-a-big-video-game-1501413649>.

13. *Nintendo*, NINTENDO, <https://www.nintendo.com/> (last visited Nov. 10, 2019).

14. *Welcome to Xbox Game Studios*, XBOX.COM (Sept. 8, 2019), <https://www.xbox.com/en-US/xbox-game-studios>

15. *SIE Worldwide Studios*, PLAYSTATION.COM (Sept. 8, 2019), <https://www.playstation.com/en-gb/footer/about-us/world-wide-studios/>

16. *USA Yearly Chart: The year's top-selling games at retail ranked by unit sales*, VG CHARTZ, <http://www.vgchartz.com/yearly/2019/USA/> (last visited Nov. 10, 2019).

17. The Faceless Rebel, *supra* note 5.

18. *Id.*

19. *About*, NAUGHTY DOG, <https://www.naughtydog.com/company> (last visited Mar. 31, 2020).

20. *Welcome to Xbox Game Studios*, XBOX.COM, <https://www.xbox.com/en-US/xbox-game-studios> (last visited Sept. 8, 2019).

21. *Game Store*, NINTENDO, <https://www.nintendo.com/games/game-guide/> (last visited Mar. 15, 2020).

22. The Faceless Rebel, *supra* note 5.

include Rockstar (makers of the Grand Theft Auto series),<sup>23</sup> CD Project Red (makers of the Witcher series),<sup>24</sup> Dice (makers of the Battlefield series),<sup>25</sup> and Infinity Ward (makers of Call of Duty: Modern Warfare).<sup>26</sup>

In addition to video game developers, there are also video game publishers—entities that own several video game studios and focus on financing, marketing, and distributing video games.<sup>27</sup> Notable video game publishers include Take Two Interactive (owners of Rockstar),<sup>28</sup> Electronic Arts (“EA”) (owners of Dice and various sport games),<sup>29</sup> and Activision (owners of Infinity Ward).<sup>30</sup> While a video game developer can choose to self-publish,<sup>31</sup> most studios go through a publisher.<sup>32</sup> First-party studios do not worry about publishers since the console makers also function as a video game publisher.<sup>33</sup>

### III. AN OVERVIEW OF ANTITRUST LAW

Antitrust law covers a wide array of different anticompetitive acts. These range from things such as restrictions on trade, price gouging, to mergers and acquisitions. With a plethora of different acts covered by the antitrust law, it is important to focus on what specifically is at issue when it is in relation to video game studio acquisition.

#### A. Relevant Governing Statutes

At the federal level, there are two primary antitrust statutes: the Sherman Act and the Clayton Act.<sup>34</sup> In general, § 7 of the Clayton Act prohibits the acquisition of another company if that acquisition would lead to a decrease in competition.<sup>35</sup> More specifically, the statute states that

[n]o person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital . . . , where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such

23. ROCKSTAR, <https://www.rockstargames.com/games> (last visited Mar. 15, 2020).

24. CD PROJECT RED, <https://en.cdprojektred.com/> (last visited Mar 15, 2020).

25. *Our Games*, DICE, <https://www.dice.se/games/> (last visited Mar. 15, 2020).

26. *Our Games*, INFINITY WARD, <https://www.infinityward.com/games> (last visited Mar. 15, 2020).

27. Paul Trowe, *The Difference Between a Video Game Developer and Publisher*, THE MEDIUM (Jun. 16, 2018), <https://medium.com/@PaulTrowe/the-difference-between-a-video-game-developer-and-publisher-c6038324ee56>.

28. TAKE TWO INTERACTIVE, <https://www.take2games.com/> (last visited Mar. 15, 2020).

29. *Worldwide Studios*, ELECTRONIC ARTS, <https://www.ea.com/studios> (last visited Mar. 15, 2020).

30. *Studios & Locations: Infinity Ward*, ACTIVISION, <https://www.activision.com/company/locations/infinity-ward> (last visited Mar. 15, 2020).

31. CD PROJECT RED, *supra* note 24; Dan Pearson, *CD Projekt RED: “Independence is a crucial part of our strategy,”* GAMEINDUSTRY.BIZ (Mar. 7, 2013), <https://www.gamesindustry.biz/articles/2013-03-07-cd-projekt-independence-is-a-crucial-part-of-a-our-strategy>.

32. Trowe, *supra* note 27.

33. *Id.*

34. *The Antitrust Laws*, FTC, <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws> (last visited Mar. 15, 2020); Sherman Antitrust Act, 15 U.S.C. §§ 1–7 (2018); Clayton Act, 15 U.S.C. §§ 12–27 (2018).

35. 15 U.S.C. § 18 (2018).

acquisition may be substantially to lessen competition, or to tend to create a monopoly.<sup>36</sup>

Here, console makers are buying up video game studios to exclusively develop games for their consoles.<sup>37</sup> This affects commerce in that consumers cannot enjoy certain video games without also having to purchase the adjoining console. This also leads to concerns of anti-competitive behavior: if a console maker is able to gain enough market share in the video game industry, it can eventually compel competing video game developers to yield to its demands, which is likely to result in anti-competitive results.

## B. TYPE OF MERGERS

The next issue that needs to be determined is the type of merger created by console makers buying up first-party studios. The federal antitrust enforcers—Department of Justice (“DOJ”), and the Federal Trade Commission (“FTC”)—has two established merger types: horizontal and non-horizontal.<sup>38</sup> Horizontal mergers occur when two or more parties that compete in the same production market combine into one entity.<sup>39</sup> An example of this is when J.D. Rockefeller used tactics to acquire all the surrounding oil fields, making him the sole supplier of oil.<sup>40</sup> Non-horizontal mergers, on the other hand, have previously referred to two separate types of mergers: vertical mergers and conglomerates.<sup>41</sup> Both are mergers of two parties from distinct fields that combine to create a single entity.<sup>42</sup> For example, during the late 1800s, Scottish-American steel magnate Andrew Carnegie bought all the required infrastructure necessary to make steel, spanning from mining rights, to railroads, to the factories that actually produced the steel, all of which were combined into the Carnegie Steel Company.<sup>43</sup> Non-horizontal mergers have historically been challenged far less by the DOJ compared to their horizontal counterparts.<sup>44</sup> There are several reasons why,<sup>45</sup> but the most prominent is that the DOJ has found that “non-horizontal mergers are less likely than horizontal mergers to create competitive problems.”<sup>46</sup>

36. *Id.*

37. Richard Wakeling, *Xbox's New Studios Will Be Focused On Making Exclusive Games*, GAMESPOT (Aug. 21, 2019), <https://www.gamespot.com/articles/xboxs-new-studios-will-be-focused-on-making-exclus/1100-6469279/>; Robin Burks, *Sony First-Party Games Might Not All Be Playstation Exclusives*, SCREENRANT (Aug. 20, 2019), <https://screenrant.com/sony-first-party-exclusive-platforms-pc/>.

38. See *Horizontal Merger Guidelines*, DEP'T OF JUST. (Aug. 19, 2010), <https://www.justice.gov/sites/default/files/atr/legacy/2010/08/19/hmg-2010.pdf>; *Non-Horizontal Merger Guidelines*, DEP'T OF JUST. 1, <https://www.justice.gov/atr/page/file/1175141/download?mkwid=c> (last visited Mar. 15, 2020).

39. HERBERT HOVENKAMP, *FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE* §12.1 (4th ed. 2011).

40. *BRIA 16 2 b Rockefeller and the Standard Oil Monopoly*, CONST. RTS. FOUND. (Jan. 14, 2020), <https://www.crf-usa.org/bill-of-rights-in-action/bria-16-2-b-rockefeller-and-the-standard-oil-monopoly.html>.

41. HOVENKAMP, *supra* note 39, at § 12.1.

42. *Id.*

43. *United States Steel Corporation*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/United-States-Steel-Corporation> (last visited Mar. 15, 2020).

44. HOVENKAMP, *supra* note 39.

45. *Id.* at §9.5.

46. *Non-Horizontal Merger Guidelines*, *supra* note 38.

The acquisition of studios by console makers are vertical mergers. As mentioned previously, console markets and video game development markets are distinct from one another. If the issue was that a single video game studio was buying fellow studios, that would likely create a horizontal merger issue, because the entities at issue would share the same market. Further, the type of merger here is not likely to represent a conglomerate merger because even though such mergers occur between two firms in distinctly different markets, conglomerate mergers require that those distinct markets are not related in any capacity to one another.<sup>47</sup> Put differently, in a conglomerate merger, the products of one firm are not strategically related to the products of another firm. For example, if a console maker bought a company that made office chairs, this would likely be a conglomerate merger; while people may use office chairs to play video games on consoles, the chairs are not a necessary component to enjoying a video game console, and conversely, it is not necessary to own a video game console to use an office chair. That leaves the game studio acquisitions to be judged under vertical merger guidelines. Since video games and consoles are part of the same supply chain – video games serve as an input to video game consoles – the acquisition of those who make video games by the console makers are becoming more vertically integrated. This all supports the likelihood that console makers acquiring video game studios would be analyzed as a vertical merger.

### C. *Who Could Bring Suit?*

Once indicators reveal that an antitrust law issue, the next question is who could raise a concern over a violation. In general, most antitrust suits are brought by private plaintiffs,<sup>48</sup> though the federal government is the only entity able to bring criminal charges.<sup>49</sup> The federal government usually will not bring suit unless it is in violation of one of the merger guidelines.<sup>50</sup> On the other hand, private plaintiffs bring antitrust suits at a much greater rate,<sup>51</sup> but they run into two general problems:<sup>52</sup> first, in order to bring an antitrust suit, plaintiffs must first satisfy the direct purchaser rule;<sup>53</sup> second, the plaintiff must show an antitrust harm.

The direct purchaser rule requires that the plaintiff be within one degree of separation from the antitrust harm.<sup>54</sup> This generally serves as a prohibition against “pass-on,” which is when intermediaries shift the burden of an antitrust harm down the line of commerce.<sup>55</sup> Potential plaintiffs within one degree of separation of harm include video game publishers who are now foreclosed from the opportunity to acquire the studio themselves. For reasons discussed later, the size of the video game developer market is vast enough that the acquisition of a single studio is likely

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47. See HOVENKAMP, *supra* note 39.

48. *The Enforcers*, FTC, <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/enforcers> (last visited Apr. 9, 2020).

49. *Id.*

50. *See id.*

51. *See id.*

52. E. THOMAS SULLIVAN & HERBERT HOVENKAMP, *ANTITRUST LAW, POLICY, AND PROCEDURE: CASES, MATERIALS, PROBLEMS* (7th ed. 2013). Chapter 4, I, A.

53. *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).

54. *Id.*

55. *Id.* at 736.

insufficient to justify a foreclosure harm.<sup>56</sup> The other potential plaintiff could be your average video game end consumer; the harm in this case would be that the end consumer is excluded from playing certain games without purchasing the requisite console (a concept called “tying”).<sup>57</sup> While it was once debatable if ordinary end consumers are within a degree of separation should they buy the physical copy of the game (due to the presence of brick-and-mortar retailers), a recent court decision has firmly placed them within the degree of separation.<sup>58</sup> In *Apple v. Pepper*, the Court found that those who purchased apps from the Apple App Store were within the necessary degree of separation.<sup>59</sup> Since each console maker also operates a digital market place, similar to that of an app store, end consumers should have no problem satisfying the direct purchaser rule.<sup>60</sup>

The second problem in bringing antitrust suits by private plaintiffs is establishing an antitrust harm. This is especially the case in a § 7 claim since the harm alleged is more likely to be subtle.<sup>61</sup> Typically, the alleged harms include firms who are charged a monopoly price due to a merger, a firm that struggles to maintain the efficiencies of a merged firm, or an independent distributor who lost a supplier.<sup>62</sup> In the video game industry, the harm being suffered is either the loss of a supplier or the inability to compete with the merged firm’s efficiency. The loss of a supplier comes from the fact that there is a decrease in the number of studios that produce games for all consoles. The inability to compete with efficiency comes from video game publishers who cannot produce games at the same quality or price as the console makers, though this harm will probably suffer for being too speculative.

#### *D. Determining Market Power*

One of the most difficult things to do in antitrust litigation is determining a firm’s market power.<sup>63</sup> However, as the Supreme Court noted in *duPont*, “[d]etermination of the relevant market is a necessary predicate to a finding of a violation of the Clayton Act because the threatened monopoly must be one which will substantially lessen competition ‘within the area of effective competition.’”<sup>64</sup> To do this, courts generally participate in a three step process: (1) determining a relevant product market, (2) determining a relevant geographic market, and (3) computing the percentage output.<sup>65</sup>

##### *i. Determining the Relevant Product Market*

In determining the relevant product market, the goal is to find the smallest possible market that would be affected by a “small but significant nontransitory

56. See *infra* Part IV.

57. SULLIVAN & HOVENKAMP, *supra* note 52.

58. *Apple Inc. v. Pepper*, 139 U.S. 1514 (2019).

59. *Id.*

60. *Id.*

61. SULLIVAN & HOVENKAMP, *supra* note 52.

62. *Id.*

63. See HOVENKAMP, *supra* note 39, at §3.1.

64. *United States v. E. I. du Pont de Nemours & Co.*, 353 U.S. 586, 593 (1957) (*citing* *Standard Oil Co. of California v. United States*, 337 U.S. 293, 299 n. 5 (1949)).

65. HOVENKAMP, *supra* note 39, at § 3.8; See also *Heerwagen v. Clear Channel Communications*, 435 F.3d 219, 227 (2d Cir. 2006).



increase in price” (“SSNIP”).<sup>66</sup> For example, if Kellogg’s, the makers of the cereal Froot Loops, decides to increase the price of its cereal by 5%, what would consumers do? More than likely, they will just buy the discount knock offs of Froot Loops, such as Tootie Fruities.<sup>67</sup> The strong similarity of the substitutes makes this market too small to be the relevant product market.<sup>68</sup> If we expand the seller’s power to increase the price on all fruit related cereals by 5%, consumers might just switch cereals to something like Cheerios or Frosted Flakes. Again, the relative similarity of the substitute products makes the market too small to deem relevant.

But what if the price of *all* cereals increased by 5%? Consumers would likely be stuck paying the extra 5% because the alternatives—like waffles or fruit—are so different from the base market that consumers would rather pay the extra fee.<sup>69</sup> It is at this point that a relevant product market is therefore determined.<sup>70</sup>

In the case of video game console makers, there is at least an arguable case that there is a relevant product market. If the console makers were to increase the price of a certain *franchise* of games,<sup>71</sup> such as Call of Duty, consumers would probably move on to another first-person shooter franchise,<sup>72</sup> such as Battlefield. If console makers instead raised the price on an entire *genre* of games, such as first-person shooters, there would certainly be grumblings, but ultimately consumers would likely switch to other comparable genres, such as third-person shooters.<sup>73</sup>

Now if console makers were to raise the price of *all video games* on their consoles, there are likely two viable outcomes: either consumers begrudgingly pay the higher price due to the perceived lack of alternatives, or they switch to playing video games in other ways, such as on their phone or personal computer (“PC”).<sup>74</sup> The former would establish that the console video game market is the relevant product market; the latter would not. The issue with the latter is determining how reasonable it would be to switch to a different video game platform.

At the moment, smartphones are not as powerful as current generation video game consoles (due to the relative lack of internal hardware capability), but that gap is closing.<sup>75</sup> While PCs can possess similar (and in most cases, greater) internal

66. HOVENKAMP, *supra* note 39, at § 3.8a.

67. Mike Hughlett, *Bagged Knockoff Cereals Taking Bites out of Name Brands’ Revenue*, LA TIMES (June 24, 2012), <https://www.latimes.com/business/la-xpm-2012-jun-24-la-fi-cereal-20120625-story.html>.

68. HOVENKAMP, *supra* note 39, at § 3.2.

69. *Id.*

70. *Id.*

71. This is under the assumption that if the console makers were to raise the price of using their console to the various other publishers and developers, that those publishers and developers would pass-on the price increase to consumers. The issue of who would have standing to sue console makers will be addressed later on.

72. A first-person shooter is “a type of video game in which the player view the action through the eyes of a character and has to attack enemies.” *First-person shooter*, OXFORD LEARNER’S DICTIONARIES, <https://www.oxfordlearnersdictionaries.com/us/definition/english/first-person-shooter?q=first+person+shooter> (last visited Mar. 31, 2020).

73. A third-person shooter is “a game focused on shooting where, instead of seeing through the main character’s eyes, you see the main character from an external perspective.” *Know you Genres: Third-Person Shooters*, XBOX WIRE (Oct. 9, 2015), <https://news.xbox.com/en-us/2015/10/09/games-know-your-genres-third-person-shooters/>.

74. Keith Stuart, *How Do I Start Playing Video Games? A beginner’s guide*, THE GUARDIAN (Feb. 18, 2015), <https://www.theguardian.com/technology/2015/feb/18/how-do-i-start-playing-video-games-a-beginners-guide>.

75. *Smartphones Will Soon Be More Powerful Than Game Consoles*, STUFF (Feb. 22, 2016), <https://www.stuff.co.nz/entertainment/games/77134952/>.

hardware capability compared to consoles,<sup>76</sup> it is currently unreasonable to find a PC with comparable internal specifications at a similar price that can perform at a comparable level to consoles.<sup>77</sup> This would render the alternatives to game consoles wholly unreasonable, and therefore not part of a reasonable product market.

Another factor to consider in determining relevant product market is the ability of other sellers to enter into the market.<sup>78</sup> If there is a rush of sellers that want to enter the market, the implication is that the market is controlled by a monopoly, and that the invading sellers want to take advantage of that opportunity.<sup>79</sup> Conversely, if there is not a flux of new sellers joining the market, the implication is that either the market is perfectly competitive (meaning that there is not market to exploit) or that the barriers to entry are too high.<sup>80</sup>

In the present case, there is steady stream of new video game developers into the market. This is made evident by the rise of “indie gaming,” which refers to an influx of small, upstart game studios.<sup>81</sup> In terms of the console market, there has been a relative dearth of new competition to the Big Three with one notable exception: in late 2019, Google released Stadia, a gaming experience meant to rival game consoles by streaming all their games rather than providing a piece of hardware.<sup>82</sup> Since Google Stadia is new to the market, it is hard to tell how it will affect the console market and the race for exclusives.

## ii. Determining Geographic Market

Geographic market is the area in which a firm can fully exercise its market power.<sup>83</sup> To determine a firm’s geographic market, courts generally see if a price increase in the potential area will either (1) encourage consumers to find a substitute outside the area, or (2) encourage producers to flood the market with substitute goods.<sup>84</sup> In the current situation, the geographic market is likely the least contentious aspect, since video games are carried and sold in stores nationwide. The geographic market for video games is analogous to the situation in *United States v. Alcoa*.<sup>85</sup> In *Alcoa*, a producer of aluminum shipped and sold its product all across

76. “In short, then, today’s PCs will stomp all over the Xbox One (and PS4) in terms of raw computation power.” Sebastian Anthony, *PlayStation 4 vs. Xbox One vs. PC: In depth specs comparison*, IT PRO PORTAL (June 11, 2013), <https://www.itproportal.com/2013/06/11/playstation-4-vs-xbox-one-vs-pc-how-the-hardware-specs-stack-up/>.

77. Brandon Hart, *Good \$500 Gaming PC Build vs. Xbox One X and PS4 Pro 2019*, LEVEL SKIP (Jan. 23, 2019), <https://levelskip.com/consoles/400-gaming-pc-vs-console>; See also Sebastian Anthony, *Can You Build A Gaming PC Better Than the PS4 for \$400?*, EXTREME TECH (Nov. 18, 2013), <https://www.extremetech.com/gaming/171158-can-you-build-a-gaming-pc-better-than-the-ps4-for-400> (PC build could rival consoles in quality and price, but the optimization of consoles makes any raises concerns of comparability).

78. HOVENKAMP, *supra* note 39, at § 3.3.

79. *Id.*

80. *Id.*

81. Tracey Lien, *How Indie Games Went Mainstream*, POLYGON (Oct. 4, 2013), <https://www.polygon.com/2013/10/4/4768148/the-next-generation-of-indies>.

82. Chris Morris, *Google Stadia Goes Live in November*, FORTUNE (June 6, 2019), <https://fortune.com/2019/06/06/google-stadia-video-game-publishers/>.

83. HOVENKAMP, *supra* note 39, at § 3.6.

84. *Id.*; See also *Baxley-DeLamar v. American Cemetery Ass’n*, 938 F.2d 846, 850 (8th Cir. 1991) (Geographic area is “the geographic area in which the defendant faces competition and to which consumers can practically turn for alternative sources of the product).

85. *U.S. v. Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. 1945).

the nation, leading the court to determine that the relevant geographic market for the product was nationwide.<sup>86</sup> Similarly, since video games are sold and distributed across the nation, the relevant geographic market is nationwide.

### *iii. Computing Market Share*

Conceptually, computing market share is straightforward—you simply take an individual firm’s output (in this case, console maker’s first-party developer games) and divide that by market output (all other games on consoles) over a set period of time.<sup>87</sup> The tricky part comes with what inputs are used to determine a firm’s and market’s output. For example, to determine an individual firm’s output, do you use the number of units sold, or revenue? This comes down to the variability of price per unit between the firm and the market as a whole, and whether one of the two entities prove to be an outlier.<sup>88</sup> A firm could sell a mere fraction of units that an average competitor would sell, but if the firm priced their units substantially higher than their competition, they could conceivably have a majority market share *despite having actually sold less units than their competitors*. The inverse is also possible: a firm can sell a disproportionately higher number of units compared to the average competitor, but if they undercharge for their product, they can have the majority market share in output without the market share in revenue.

Another issue is whether to use output or capacity to determine market output. Output is simply what the market actually produced, while capacity refers to the maximum amount that the market could theoretically produce.<sup>89</sup> While using actual output seems intuitive, there are shortcomings that arise out of using output that does not happen when using capacity. If most firms in the market are producing output at an inefficient level, and the firm in question is producing output efficiently, then the efficient firm is penalized by being treated as a monopoly, despite the likelihood that they would be viewed as a normal firm in a competitive, efficient market.<sup>90</sup>

One of the key economic goals of antitrust legislation is to punish inefficient market behavior by firms,<sup>91</sup> and using only market output as a measurement penalizes desired behavior.<sup>92</sup> Instead, if market capacity was used as the measurement, then the calculations involving the inefficient firms would be corrected, ultimately not penalizing competitively efficient firms.<sup>93</sup> Using market capacity has its own drawbacks, with one of the biggest being that it is a poor measurement in light of real-world circumstances. There could be extenuating circumstances that make typically efficient output producing firms become inefficient, such as changes in a law that require new measures for compliance, natural disasters, etc.<sup>94</sup> Both situations are incredibly rare though, and as long as they are accounted for when computing market share, it should not be an issue.<sup>95</sup>

86. *Id.*

87. HOVENKAMP, *supra* note 39, at § 3.7.

88. *Id.*

89. *Id.*

90. *Id.* at § 3.7a.

91. *Id.*

92. *Id.*

93. *Id.* at § 3.7b.

94. *Id.*

95. *Id.*

According to DOJ guidelines, there is a preference to using revenue as the measurement for the numerator since “they reflect the real-world ability of firms to surmount all of the obstacles necessary to offer products on terms and conditions that are attractive to customers.”<sup>96</sup> In regards to capacity versus output, DOJ has indicated that “capacities or reserves may better reflect the future competitive significance of suppliers than revenues, and the Agencies may calculate market shares using those measures.”<sup>97</sup>

In the present case, first-party developers have constituted 30.86% of all video game sales over the past five years.<sup>98</sup> Additionally, their total unit output and market share percentage has increased every year since 2015, with the most recent year showing a 40.26% market share.<sup>99</sup>

#### IV. DETERMINING AN ANTITRUST VIOLATION

With both the type of merger defined (vertical) and the market share established, we are prepared to examine whether any of the Big Three have violated antitrust law. In general, for vertical mergers, courts look at four factors: (1) whether competitors of the supplier or the buyer will be foreclosed from the market, (2) whether there is a trend towards vertical integration in the market, (3) whether there is an intent to foreclose competition, and (4) whether barriers to entry are erected foreclosing equal access to markets.<sup>100</sup> Courts do not always adhere strictly to the four-factor test, and sometimes, courts also use a more holistic analysis that compares the pro-competitive benefits of a merger against the anti-competitive concerns.<sup>101</sup> When applying this holistic approach, courts complete their analysis through the perspective of an end consumer; in other words, the analysis of the effects on competition is not directly concerned with the well-being of competitors, but rather that of the *consumers*.<sup>102</sup> Either way, the process is an intensive fact-based determination.<sup>103</sup>

##### *A. Anti-Competitive Concerns*

There are several anti-competitive concerns that arise when there is a tentative vertical merger. These concerns fall into three main categories: (1) strategic control of inputs, (2) price discrimination, and (3) foreclosure to entry barriers.

##### *i. Strategic Control of Inputs*

When a company begins a vertical merger, they start to gain greater market pressure. By controlling the inputs of an industry, a firm can keep their competitors from acquiring the same inputs that they need to be able to operate.<sup>104</sup> For the case

96. *Horizontal Merger Guidelines*, *supra* note 38.

97. *Id.*

98. *USA Yearly Chart*, *supra* note 16.

99. *Id.*

100. BRENT A. OLSON, SECTION 7 OF THE CLAYTON ACT—VERTICAL MERGERS § 22:67 (2019).

101. *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 486 (1992).

102. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 485 (1977).

103. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

104. HOVENKAMP, *supra* note 39, at § 9.3b.

at hand, if a console maker starts acquiring game studios in bulk, then that will prevent other game publishers and even other console makers from acquiring video games from that studio. That would be a deprivation of that input in the video game market. This is noticeable today by the quality of the inputs becoming exclusive. Games that critically renowned, such as the recent God of War, are exclusive to one console, and are thereby depriving others from being able to sell the game on their console.<sup>105</sup> There is also the issue of how strategically controlling the inputs can affect the downstream market. By controlling more intermediate steps of the selling process, the merging business can begin to flex power not just as a single business entity, but as an entire commerce chain.<sup>106</sup> For example, Sony would be able to tell game publisher EA that they will not list an EA game on their online store unless EA produced games solely for Sony consoles. This might pressure physical retailers to either hide the game or remove it from their shelves all together.

## ii. Price Discrimination

Another anti-competitive tool that the ‘Big Three’ could use is outright price discrimination. Price discrimination occurs when a company charges different customers different prices for the same product.<sup>107</sup> This is a concern with vertical mergers due to the fact that companies, merely by selling their products to different industries, can price discriminate in multiple markets.<sup>108</sup> For example, a firm that makes video games can charge the manufacturer suggested retail price (“MSRP”) at brick and mortar stores, but then proceed to sell the same video games for a steep discount on their own digital stores. The concern about price fixing is that it produces highly inefficient results that seem patently unfair.<sup>109</sup> By charging different prices, it raises two key problems that promote inefficiency: the motivated buyer problem and promoting the use of arbitrage.

The first problem is that discriminatory pricing does not always permit the most motivated buyer to actually obtain the product.<sup>110</sup> For example, if a customer wants to buy a game from a brick and mortar store, where the average price tends to be \$60, but the customer only has the ability to pay \$54, then the customer will not be able to obtain the product. In contrast, if the same game is available online on the digital store of one of the ‘Big Three’ at \$40, and the customer was willing to pay up to \$45 to obtain the game, that customer is still able to acquire the game. In this example, even though the first customer valued the product more, they were unable to obtain the game, while the second customer, who valued the same product for less, was able to obtain it. This leads to an inefficient (and facially unfair) result, in that the person who values the product less was able to obtain the product over the person who valued it more.

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105. Based on its high Metacritic score, which is a reviewer conglomerate score, God of War is one of the highest rated games of the past decade. See *God of War*, METACRITIC, <https://www.metacritic.com/game/playstation-4/god-of-war> (last visited Apr. 9, 2020).

106. Michael Salinger, *Vertical Mergers and Market Foreclosure*, 103 Q.J. ECON. 345, 354–55 (1988).

107. Matthew A. Edwards, *Price and Prejudice: The Case Against Consumer Equality in the Information Age*, 10 LEWIS & CLARK L. REV. 559, 560 (2006).

108. HOVENKAMP, *supra* note 39, at § 9.3b.

109. Edwards, *supra* note 107, at 583–84.

110. *Id.* at 559.

The second problem with price discrimination is that it promotes the use of arbitrage.<sup>111</sup> Arbitrage occurs when a retailer buys up a product at a discounted rate, then proceeds to sell that product at a slightly lower price than their competitor, in order to gain sales.<sup>112</sup> This concept is best illustrated through an example. Say that an individual buys a video game on from a digital store for \$40, receiving a digital download code. The individual then takes the digital code, writes it down, and opens a stall next to the brick and mortar store selling the download code to these games. The individual chooses to sell these codes at a price of \$55, which is less the brick mortar store using the MSRP of \$60. By offering a discount for the same product as the brick and mortar store, the individual profits \$15 per sale while depriving the brick and mortar store a sale. While the net decrease in price might seem like a benefit to the consumer since they are getting the product they want at a cheaper price, they have contributed to the creation of a new issue: a rise in this informal, unregulated market. The potential for arbitrage also coincides with a rise in unregulated startups that focus solely on a quick profit turnaround.<sup>113</sup> These businesses present opportunities for unsavory companies to take advantage of consumers due to the lack of regulation and oversight.<sup>114</sup>

### ***iii. Foreclosure and Entry Barriers***

By increasing the amount of inputs necessary to operate a business in a market, the entry barriers to that market are increased.<sup>115</sup> Some markets naturally have higher barriers of entry compared to others.<sup>116</sup> For example, the barriers to entry for video game console makers are likely significant due to the costs of setting up factories to assemble the consoles, research and development of components to make the console, marketing the console, and the most recent requirement of having some type of exclusive game for your console.<sup>117</sup> By contrast, the barriers to entry into the video game market are likely low due to the fact that games can be created with open source software that is free to the public.<sup>118</sup> The concern with vertical mergers is that for future video game developers to be profitable, they likely either have to sell exclusively to one console maker or create their own console. By having a tight grip over the console market, and expanding into video games creation, console makers have the leverage to force game developers into exclusive arrangements,<sup>119</sup> which hurt consumers in the end.<sup>120</sup> This is because customers are either deprived of the ability to experience a game, due to lacking a given console, or incurring steep expenses in obtaining multiple consoles to play all of these exclusive games.

111. Frank Partnoy, *The Law of Two Prices: Regulatory Arbitrage, Revisited*, 107 GEO. L.J. 1017, 1019 (2019).

112. *Id.*

113. *See id.* (“So long as the relevant regulation is in place and some market participants continue to trade the regulated good, a price difference between a regulated and unregulated good is likely to persist.”).

114. *Id.* at 1027.

115. HOVENKAMP, *supra* note 39, at §9.4.

116. *Id.*

117. *Id.*

118. Salinger, *supra* note 106, at 346.

119. *Id.*; Kyle Orland, *The rise and fall (and rise and fall) of gaming’s third-party exclusives*, ARSTECHNICA (Aug. 13, 2014, 1:30 PM), <https://arstechnica.com/gaming/2014/08/the-rise-and-fall-and-rise-and-fall-of-gamings-third-party-exclusives/>.

120. HOVENKAMP, *supra* note 39, at §9.2b.

### B. Pro-Competitive Benefits

In stark contrast to fears of vertical mergers decreasing competition, they also have the capacity to benefit the consumer market. In general, there are two major pro-competitive benefits of a vertical merger: reducing transaction costs and eliminating double marginalization.

A merged business needs less coordination with outside companies, and can instead rely on its own resources.<sup>121</sup> The ability of a company to dictate its own delivery times, shipping quotas, and quality standards helps improve a company's efficiency and quality.<sup>122</sup> This leads to a reduction of transaction costs, which could potentially lead to lower prices.<sup>123</sup>

The other pro-competitive benefit is that a vertical merger eliminates double marginalization, which is the "exercise of market power at successive vertical layers in a supply chain."<sup>124</sup> For example, assume that a consumer wants to buy a printer with some ink. The printer and the ink are made by two separate companies. The consumer is willing to spend up to \$300 to get a printer with some ink. The cost of the printer is \$250 while the ink costs \$30. In a perfectly competitive market, when both the printer and ink manufacturer do not have market power, that is the end of the story; the consumer makes their respective purchases and walks away with \$20 surplus value. However, if one of the two entities has market power, the analysis does not stop at the consumer receiving that surplus value. Assume that the printer manufacturer has market power, but the ink manufacturer does not. In this case, the printer manufacturer will increase its price to capture that \$20 surplus, raising the printer price to \$270, making the whole package \$300. This is a single marginalization, which is still a fair result, since the consumer is walking away with the product at their maximum value of the product. If, however, both the printer and ink manufacturer have market power, then we run into double marginalization. In this case, both the ink and printer manufacturer will increase their price to capture that \$20 surplus, and without coordination, will each raise the price of their product by \$20. That would make the entire package cost \$320, exceeding the customer's maximum price and leading to a lost sale. In this scenario, everyone loses: the consumer does not get their desired product, and both manufacturers lose out on a sale.

This last scenario could have been avoided with coordination, thus illustrating why vertical integration is important.<sup>125</sup> Vertical integration would have allowed the ink and printer manufacturer to coordinate their prices to capture the most amount of surplus while still getting the sale.<sup>126</sup> Vertical integration ensures that the consumer gets their desired product and also incentivizes businesses to create more products that consumers want.<sup>127</sup> If businesses know that they can capture all the consumer surplus through vertical integration, then they will continue to produce products that will incur repeat customers.<sup>128</sup>

121. *Id.*

122. *Id.*

123. *Id.*

124. Career Anna, *Double Marginalization: Supply Chain Management Concept*, CAREER ANNA (July 4, 2015), <https://www.careeranna.com/articles/double-marginalization/>.

125. *Id.*

126. *Id.*

127. Thomas A. Lambert, *Appropriate Liability Rules for Tying and Bundled Discounting*, 72 OHIO ST. L.J. 909, 955 (2011).

128. *Id.*

### C. *Four Factor Analysis*

In addition to the analysis on the competitive effects of a merger, there are four general factors that courts look at to determine whether a merger is in fact an anti-trust violation.<sup>129</sup> Courts look at whether the merger will result in (1) future foreclosure from a market, (2) a trend toward integration, (3) intent to foreclose others from the market, and (4) creating greater entry barriers that lead to foreclosure.<sup>130</sup>

#### i. *Foreclosure from the Market*

Foreclosure from the market is intuitive: it considers whether a console maker buying video game studios forecloses competitors from entering the video game market. The competitors in this case would be various video game publishers and independent studios. Strictly speaking, console makers buying video game studios does not preclude other studios from developing games on consoles. Video game publishers and independent studios frequently produce games for multiple consoles; in fact, some of the best-selling games owe their popularity to being available on all consoles, and not being tied down with exclusive deals.<sup>131</sup> Therefore, the facts in this analysis tend to show that there is a lack of an anti-competitive effect.

#### ii. *Trend Toward Vertical Integration*

For the second factor, courts look at the behavior of the firms in question to determine whether they have showed a pattern of actions that amount to increasing vertical integration.<sup>132</sup> Examining recent actions taken by console makers, it seems clear that there is an increasing trend toward vertical integration.<sup>133</sup> Two of the largest console makers, Sony and Microsoft, acquired reputable third-party studios in 2019.<sup>134</sup> By doing so, the two console makers now have more first-party studios than ever before.<sup>135</sup> With each acquisition, console makers increase their market share in the video game market, thereby also increasing the degree of vertical integration. For example, Sony's recent acquisition of Insomniac Games increased their market share in 2019 by 5%.<sup>136</sup> The amount of acquisitions does not seem to be stopping anytime soon. Microsoft's desire to create more profitable exclusive games,<sup>137</sup> and Sony's expressed desire to acquire more first-party studios,<sup>138</sup> indicate that the trend will continue for the foreseeable future. Taking this into account,

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129. OLSON, *supra* note 100, § 22:67.

130. *Id.*

131. This can be seen in that the majority of the top ten selling each year are sold across multiple consoles. *USA Yearly Chart*, *supra* note 16.

132. See HOVENKAMP, *supra* note 39.

133. *See id.*

134. Kuchera, *supra* note 3; Samit Sarkar, *Sony to acquire Insomniac Games*, POLYGON (Aug. 19, 2019), <https://www.polygon.com/2019/8/19/20812654/sony-buys-insomniac-games>.

135. *Welcome to Xbox Game Studios*, XBOX.COM (Sept. 8, 2019), <https://www.xbox.com/en-US/xbox-game-studios>; *SIE Worldwide Studios*, PLAYSTATION.COM (Sept. 8, 2019), <https://www.playstation.com/en-gb/footer/about-us/world-wide-studios/>

136. This is due to the impact of the game that Insomniac released that year, *Spiderman*. *USA Yearly Chart*, *supra* note 16.

137. Kuchera, *supra* note 3.

138. Purslow, *supra* note 6.



it is likely that a court would view the actions by console makers as trending toward vertical integration.

### *iii. Intent to Foreclose Competition*

The third factor, intent to foreclose competition, is likely the trickiest factor to evaluate. The purpose of this factor is to determine whether a firm intends to restrict competition to their benefit.<sup>139</sup> Courts have also determined that intent can be inferred from actions without any overt type of agreement.<sup>140</sup> At the moment, none of the ‘Big Three’ have come out to explicitly say that they intend to either force out or acquire various video game publishers and independent studios. However, finding evidence of a blatant agreement that physically exists is incredibly rare.<sup>141</sup> In other words, it is unlikely that businesses are foolish enough to put an illegal agreement in writing and preserve it.<sup>142</sup> Therefore, most analyses done for intent are conducted by examining a firm’s actions.<sup>143</sup>

In the past, the ‘Big Three’ have repeatedly stated that third-party support is crucial for the survival of their consoles.<sup>144</sup> It is no surprise that the most recent console that struggled to remain viable, the Nintendo Wii U, had the weakest third-party support of a console in over a decade.<sup>145</sup> This seems to indicate a lack of intent to vertically integrate due to importance of third-party support.

Recent trends, however, cast some doubt as to whether console makers believe in the necessity of independent third-party studios. One of the newest trends in the video game industry is the use of exclusive deals, wherein video game publishers will offer some type of benefit to purchase a game on a certain console.<sup>146</sup> These benefits range from trivial things such as some type of exclusive in-game cosmetic item, to more concerning benefits such as additional in-game story content.<sup>147</sup> While these exclusive deals are not in perpetuity, the increasing trend of using them should raise concerns of future integration. For lack of a better phrase, exclusive deals are a gateway to vertical integration. So, while the increasing amount of exclusive deals may be cause for concern, there is likely still a gap between exclusive deal agreements and complete vertical integration.

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139. HOVENKAMP, *supra* note 39, at §9.4.

140. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977).

141. SULLIVAN & HOVENKAMP, *supra* note 52.

142. *Id.*

143. *Id.*

144. *Third-party games will drive Nintendo’s Switch in 2018: Analyst*, CNBC (Apr. 26, 2018), <https://www.cnbc.com/video/2018/04/26/third-party-games-will-drive-nintendos-switch-in-2018-analyst.html>; Ollie Barder, *Nintendo Is Well Aware Of The Importance Of Third-Party Support For The Switch*, FORBES (Jan. 19, 2017), <https://www.forbes.com/sites/olliebarder/2017/01/19/nintendo-is-well-aware-of-the-importance-of-third-party-support-for-the-switch/#49aa8ca6220b>; Paolo Sirio, *Sony: Third Party Deals For PlayStation 4 Games Is Important To Us, It Will Continue In 2016*, GAMEPUR (Nov. 6, 2015), <https://www.gamepur.com/news/21075-sony-third-party-deals-playstation-4-games-important-us-it-will-continue.html>; Matthew Handrahan, *Third-party sales boosted Microsoft Gaming revenue in Q3*, GAMES INDUSTRY (Apr. 27, 2018), <https://www.gamesindustry.biz/articles/2018-04-27-third-party-sales-boosted-microsoft-gaming-revenue-in-q3>.

145. Barder, *supra* note 144.

146. Kirk Hamilton, *What A Video Game ‘Exclusive’ Means In 2017*, KOTAKU (June 6, 2017), <https://kotaku.com/what-a-video-game-exclusive-means-in-2017-1796024566>

147. For a recent example, the famous Call of Duty series announced an exclusive online game-mode exclusive for players on PlayStation for a year. *Id.*

#### ***iv. Erection of Barriers to Entry that Foreclose from Market***

For the final factor, courts will look at whether a proposed merger creates additional barriers to entry that foreclose the market.<sup>148</sup> Barriers of entry are components that are necessary to operate in a given market.<sup>149</sup> For example, consider the oil industry: you cannot operate in the oil industry without an oil well, so having the capital necessary to either purchase or build an oil well is necessary to enter the oil industry. In our analysis, the question becomes whether the console makers acquisition of first-party studios has led to an increase of entry barriers in the video game industry.

At the moment, the answer is likely that there has not been an increase in entry barriers. There is no evidence that entry barriers have raised in video game development due to acquisitions of first-party studios. While there is not a current issue, it is not hard to foresee an increase in barriers in the future. For example, if console makers add more requirements to have games be playable on their console or make the current requirements more difficult to comply with, while also giving support or an outright pass on compliance with these new requirements to their first-party studios, this may represent a barrier to entry.

#### ***D. Evaluation***

The most pertinent part of the conversation now becomes whether the ‘Big Three’ are in violation of antitrust laws by using vertical mergers to inflict anti-competitive effects on consumers. One of the first things to consider is their ability to effectively enforce any anti-competitive effect through their market power. With only 30.86% market share in the video game market,<sup>150</sup> it is arguable that since the ‘Big Three’ do not control a third of the market, they could not effectively use their market power to implement anti-competitive effects. However, the Supreme Court has held differently.<sup>151</sup> In *Brown Shoe Co. v. United States*, the Court found that the defendant company had instituted anti-competitive effects on consumers with only 5% market share.<sup>152</sup>

While the ‘Big Three’ theoretically have the market share necessary to institute an anti-competitive effect, the next concern is whether they can practically implement it. They have mostly avoided anti-competitive scrutiny due to the presence of competing video game publishers to keep them in check. Video game publishers make up roughly 40% of the market share for video game console sales.<sup>153</sup> It is the strength of these publishers, especially since they reliably create a third of the top ten selling games each year,<sup>154</sup> that keep a check on the console makers ability to institute anti-competitive effects. By maintaining a significant market share, these publishers can easily battle back against any strategic limitation of inputs

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148. OLSON, *supra* note 100, § 22:67.

149. HOVENKAMP, *supra* note 39, at §9.4b.

150. *USA Yearly Chart*, *supra* note 16.

151. *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962).

152. *Id.*

153. *USA Yearly Chart*, *supra* note 16.

154. *Id.*

established by video game developers. In addition, any attempt to implement price discrimination would be met with the threat of removing publishers' games from those platforms, which would be economically disastrous to the console developers.<sup>155</sup> Lastly, the entry barriers are likely to remain stable, due again to threats by publishers to withhold games from the consoles. Thanks to the presence of strong video game publishers, console makers are disincentivized from implementing anti-competitive effects through their increasing video game developer acquisitions.

## V. PREVENTATIVE MEASURES TO AVOID ANTITRUST SCRUTINY

How long can the video game publishers maintain the status quo in holding back the anti-competitive effects of video game console makers? First-party studios have been steadily increasing their market share since 2015.<sup>156</sup> In addition, the stated intention of the 'Big Three' to acquire more first-party studios will only hasten the increase of market share by these console makers.<sup>157</sup> If the console makers are able to reach a point where they can economically survive on the sales of their first-party studio games and those that have exclusive dealings with that studio, then the Big Three can leverage the various video game publishers to acquiesce to their anti-competitive demands, and ultimately harm the consumer. At that point, it is undoubtable that either the federal government, or possibly a brave publisher, will bring an antitrust suit against the 'Big Three.' What can they do, either now or before the potential suit, to satisfy the concerns of anti-competitive practices?

The key to avoiding most antitrust suits is ensuring that all actions benefit consumers at the end of the day.<sup>158</sup> The biggest pro-consumer measure that the 'Big Three' can implement is allowing their first-party studios to develop games that are available on all platforms. This would allow consumers to choose a console without the concern about the availability of games, forcing console makers to compete based on the quality of their consoles, and not about the list of exclusive video game studios. Including a time period of sole exclusivity to first-party studio games may make this more feasible to the console makers and cause them to soften their stance on this issue. This provides some incentive to pick a certain console over another,<sup>159</sup> but because consumers know that it will eventually reach all consoles, they now have the choice of whether they either patiently wait for the game to release or make another console purchase.

Another possible solution is to divest control over the various digital video game marketplaces.<sup>160</sup> Since the 'Big Three' also control the digital marketplaces on their various consoles,<sup>161</sup> they can easily skew the market showings to favor their proprietary games over those of various video game publishers, even if those games end up being derivative, overpriced, and of a lower quality than the publisher's games. The ability to effectively suppress the games of competing video game

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155. Handrahan, *supra* note 144.

156. *USA Yearly Chart*, *supra* note 16.

157. *Id.*

158. Spencer Weber Waller, *The Past, Present, and Future of Monopolization Remedies*, 76 *Antitrust L.J.* 11 (2009).

159. *NPD: PS3 sales spike on MGS4*, GAMESPOT (July 17, 2008), <https://www.gamespot.com/articles/npd-ps3-sales-spike-on-mgs4/1100-6194691/>.

160. Waller, *supra* note 158, at 12.

161. *Id.* at 24.

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publishers is arguably too great and could eventually need to be curtailed. By divesting ownership of the digital marketplace to outside companies, the 'Big Three' would be forced to compete on a more even playing field to reach the featured section on a third-party marketplace.

## VI. CONCLUSION

While the video game console makers are likely not in violation of antitrust laws at the moment due to acquiring more first-party studios, the trend of these first-party studios gaining more market share could eventually put them in the crosshairs of antitrust regulators, and they will need a plan to avoid their ire.