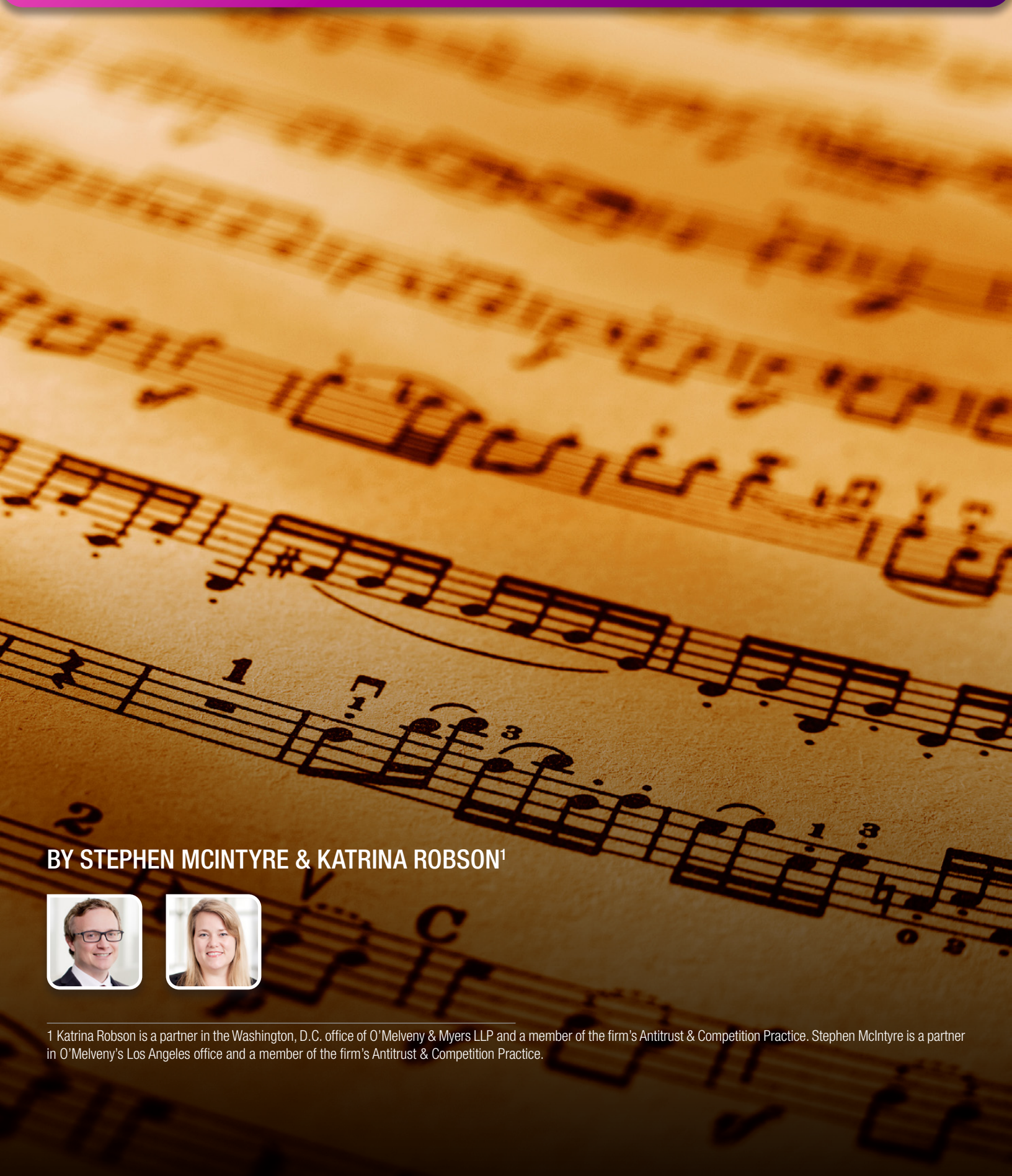
# WHAT'S YOURS IS MINE: WHAT A SEVENTY-YEAR-OLD RECORDING INDUSTRY CONSENT DECREE SAYS ABOUT MODERN ANTITRUST LAW



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# I. INTRODUCTION

Over 70 years ago, the Antitrust Division of the U.S. Department of Justice filed sued against Decca Records, a leading American record company. The lawsuit alleged that Decca and its British counterpart conspired with EMI, another major competitor, to carve up the world map into exclusive territories and to fix resale prices for records sold to American consumers, all in violation of the Sherman Act. After four years of litigation, but before the parties reached trial, the record companies settled with the Antitrust Division. They agreed to a consent decree that imposed a number of obligations on the record companies in perpetuity.

The Decca consent decree invalidated the record companies' agreements and forbade them from engaging in market allocation, price-fixing, and other anticompetitive conduct. But it did not stop there. It also required the defendants to lease out or license the rights to their master recordings (known as "matrices") in certain circumstances. The defendants were permitted to lease or license their matrices to one another for a limited period of time, but once those rights had expired (or if the rights had not been exercised), the defendants were required to entertain offers from third parties and give third parties a right of first refusal. Unless a defendant received a "substantial offer" from the prior lessee or licensee, the defendant *had to* accept any "reasonable offer" from a third party.

Forced sharing of a valuable asset — such as recording masters — may be anathema to many 21st century antitrust practitioners. Compulsory licensing has fallen into disfavor as an antitrust remedy, and the "essential facilities" doctrine has been brushed aside as an "epithet." As the Supreme Court emphasized in its most recent pronouncement on the subject, "the Sherman Act does not restrict the long recognized right of a trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal."[2] As a general matter, even monopolists do not have to share with rivals.

As the current presidential administration entered its final month, the Antitrust Division filed a motion to terminate the Decca consent decree. At least on its face, the filing had little if anything to do with the decree's arguably outmoded compulsory licensing provision; the Division instead focused on the fact that the U.S. Decca defendant no longer exists and that most of the decree's proscriptions are already covered by the Sherman Act.

One might be inclined to think that a seven-decade-old consent decree involving a relic of the recording industry has little to say about modern antitrust law. That is not the case. After years of neglect, we may be witnessing a revitalization of compulsory licensing (or forced sharing) as an antitrust remedy. Nowadays, the concern is not for record labels' control of master recordings for the era's top musical acts — rather, it is for tech companies' control and exploitation of data and information. In the past few months, as condemnations of "Big Tech" (emanating from both

2 *Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004).

the left and the right) reached a fever pitch, a Subcommittee of the U.S. House of Representatives issued a more than 400-page report critiquing competition in digital markets[3] and the U.S. Department of Justice Antitrust Division and the Federal Trade Commission filed parallel antitrust suits against Google and Facebook, respectively. The report and lawsuits alike assert that tech giants derive market power from the data they collect, and that they maintain that power by strategically denying would-be competitors access to data.

We take no stance on the report's findings or the merits of the government's lawsuits. Our interest, rather, is in what the legislators and agencies propose to do about tech companies' alleged use of data. Forced sharing may *currently* be disfavored in antitrust law, but as the Decca consent decree reminds us, yesterday's heresy may be tomorrow's orthodoxy — and vice-versa. Forced sharing was once a go-to remedy for antitrust violations, and it may yet be again. Whether that happens depends on a number of factors, perhaps the chief of which is what the incoming Biden administration has to say about it.

In the coming months and years, we will see whether 21st century antitrust enforcers intend to take a page from the mid-century playbook that led to the Decca consent decree.

## II. DECCA RECORDS' METEORIC RISE

Decca Records may not be a household name in 2021, but it was one of the most important record labels in the mid-20th century. Founded in England in 1929, the Decca Record Company quickly expanded into the United States.[4] After acquiring UK rights to the American Brunswick label — which included such major U.S. stars as Al Jolson, the Mills Brothers, the Boswell Sisters, and Bing Crosby — Decca founded an American label of its own in 1934.[5]

Decca's UK arm initially gained a foothold against competitors HMV and Columbia — which merged to form Electric and Musical Industries, or "EMI," in 1931 — through aggressive price competition.[6] Adopting the slogan "Leading artists — lower prices," Decca undercut EMI's prices while focusing on acquiring talent with wide appeal.[7] American Decca adopted a similar strategy, building a stable of popular recording artists — with the notable help of Jack Kapp, a former Brunswick executive who brought Bing Crosby and other Brunswick stars to the Decca label — while selling records at the low price of 35 cents apiece.[8]

With war on the horizon, Edward Lewis, who founded Decca in the UK, sold off his interest in American Decca in 1939, rendering the American venture independent.[9] By that point, both Decca companies had grown into industry leaders. EMI and Decca constituted a duopoly in the U.K. market,[10] and one out of every three records sold in the United States bore Decca's label.[11] This growth continued through World War II, with American Decca in particular "exit[ing] the war years as a hugely successful and established company."[12]

It was at the height of this success that Decca ran into trouble with the U.S. Department of Justice.

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3 U.S. House of Representatives Subcommittee on Antitrust, Commercial, and Administrative Law of the Committee on the Judiciary (the "Subcommittee"), Investigation of Competition in Digital Markets (Oct. 2020).

4 Decca Introduction, https://adp.library.ucsb.edu/index.php/resources/detail/407 (accessed Jan. 4, 2021).

5 *Id.*; Paul McGuinness, *Decca Records: A History of "The Supreme Record Company"*, uDiscoverMusic (Jan. 29, 2020), https://www.udiscovermusic.com/in-depth-features/decca-records-label-history.

6 McGuinness, *supra* note 5.

7 *Id.*

8 Dave Laing, *The Recording Industry in the Twentieth Century*, *in* The International Recording Industries 31, 36 (Lee Marshall ed., 2013).

9 McGuinness, *supra* note 5.

10 Laing, *supra* note 8, at 36.

11 McGuinness, supra note 5.

12 *Id.*

## III. THE ANTITRUST DIVISION'S CASE AGAINST DECCA AND THE RESULTING CONSENT DECREE

In 1948, the U.S. Department of Justice Antitrust Division filed an antitrust case against American Decca, UK Decca, and EMI in the Southern District of New York.[13] The suit claimed that the three defendants had conspired to control the world record market.[14] In particular, the Justice Department alleged that the Decca companies and EMI had violated Sections 1 and 3 of the Sherman Act[15] by allocating markets and agreeing upon resale prices to be charged for records in the United States.[16] The three defendants had allegedly agreed to give American Decca exclusive control over the U.S. market; EMI exclusive control over Australia, New Zealand, and the Far East; and UK Decca exclusive control over the rest of the world, which included Europe.[17]

Court records from the litigation are hard to come by, but it appears the defendants initially fought the lawsuit. The litigation did not come to a close until 1952, when the parties entered a stipulated consent decree.[18] The consent decree provided as follows:

- The Decca defendants were enjoined from entering into any agreement with each other, or with EMI, that had the purpose or effect of —
    - allocating or dividing territories or markets for the manufacture, distribution, or sale of records;
    - limiting, restricting, or preventing importation of records into, or exportation of records from, the United States;
    - determining, fixing, or maintaining prices, discounts, or other terms or conditions for the sale of records to third persons; or
    - transferring or exercising any right to sublicense or sublease any right in any "matrix" — that is, a master recording or any derivative thereof, other than a record — except for use in a country where the grantor or owner is unable to obtain payments in the currency of its own country.
- Any agreement between the Decca defendants or between a Decca defendant and EMI for the leasing or licensing of matrices could not exceed three years — and even then, the would-be "grantee" (i.e., the licensee or lessee ) had to exercise an option to lease or license the matrix rights within 120 days of their becoming available for use.
- Where a grantee's lease or license to a matrix had expired or a grantee had not exercised its option to lease or license a matrix, each defendant was required to entertain third-party negotiations; to give such third party a right of first refusal; and, where the grantee itself did not make a "substantial offer," to "accept any reasonable offer" to lease or license that matrix.
- Several specific agreements between defendants were invalidated as unlawful.[19]

13 *Decca Firm Sued By Anti-Trust Div.*, Broadcasting – Telecasting (Aug. 9, 1948), at 22, 22.

14 *Id.*

15 15 U.S.C. §§ 1, 3. Section 3 of the Sherman Act extends the prohibitions in Sections 1 and 2 to United States territories and the District of Columbia. See *id.* § 3.

16 *Decca Firm Sued By Anti-Trust Div.*, supra note 13, at 79.

17 III Russell Sanjek, American Popular Music And Its Business: The First Four Hundred Years 232–33 (1988).

18 See *Decree Ends Gov't EMI, Decca's Suit*, The Billboard (Dec. 20, 1952) at 19, 19.

19 *United States v. Decca Records, Inc.*, 1952-53 Trade Cas. (CCH) ¶ 67,402 (S.D.N.Y. 1952).

As one author has put it, the 1952 consent decree "dissolved the last vestige of EMI's cartel agreement in the United States and permitted Decca to make its masters available for sale or lease to any foreign distributor if EMI did not accept them within [120] days after release."[20] By the same token, the consent decree opened the door to EMI selling records and leasing or licensing out its matrices in the United States. With the labels' market allocation agreements dissolved and a procedure for the compulsory licensing of matrices in place, "within a year, EMI was doing business in the United States."[21]

The Decca consent decree remained in effect for nearly 70 years. On December 21, 2020, without much fanfare and in the waning days of an outgoing presidential administration, the Antitrust Division filed a motion to terminate the decree.[22] The Division argued that the consent decree "presumptively should be terminated because its age alone suggests it no longer protects competition," but also because American Decca no longer exists and many of the decree's terms "merely prohibit that which the antitrust laws already prohibit."[23] As of this writing, the district court has not yet ruled on the Division's motion.

## IV. THE DECCA CONSENT DECREE: A PRODUCT OF ITS TIME — OR A HARBINGER OF THINGS TO COME?

The Decca consent decree may seem like a product of a bygone era in antitrust law. The decree did not merely dissolve unlawful contracts and order the defendants to refrain from market allocation, price-fixing, and the like. The decree went a step further, requiring the defendants to lease out or license the rights to their "matrices" (master recordings) to third parties under certain circumstances. If a prior grantee's rights in a particular matrix had expired (or if the grantee had not timely exercised its option to lease or license the matrix), the defendant that owned the matrix had to entertain any third-party negotiations, give the third party a right of first refusal, and — if the prior grantee failed to make a "substantial offer" — "*accept any reasonable offer*" from the third party. The defendants could not sit on their matrices.

As Makan Delrahim stated in a 2004 speech, given during his first stint with the Justice Department, "compulsory licensing has a long but contradictory history" as an antitrust remedy.[24] In the mid-20th century, he noted, courts saw compulsory licensing as a "well-recognized remedy" and "consistently" favored antitrust over intellectual property rights.[25] In 1953, for example, a district court "broke up a light bulb cartel and required GE to issue 'free' licenses to its competitors, the effect being essentially to wipe out GE's light bulb patents."[26]

This same era also gave birth to what are likely the most well-known antitrust consent decrees in the music business: the ASCAP and BMI decrees. Originally entered in 1941,[27] the ASCAP and BMI consent decrees required the two dominant performing rights organizations to provide licenses to their repertories *upon request*, and even set up a "rate court" litigation process whereby licensees could ask a federal court to decide an appropriate license fee.[28] Against this backdrop, the Decca consent decree should not be considered anomalous.

But as Delrahim also observed in his 2004 speech, by the 1980s "the pendulum . . . again began to swing in the other direction."[29] Courts and enforcers came to disfavor compulsory licensing of intellectual property and other forms of forced sharing.[30] As famed antitrust scholar Phillip

20 Sanjek, *supra* note 17, at 243–44.

21 *Id.* at 244.

22 See Motion of the United States to Terminate a Legacy Antitrust Judgment, *United States v. Decca Records, Inc.*, No. 1:20-mc-778 (S.D.N.Y. Dec. 21, 2020), ECF No. 1.

23 United States' Memorandum of Law in Support of Its Motion to terminate a Legacy Antitrust Judgment 9, *United States v. Decca Records, Inc.*, No. 1:20-mc-778 (S.D.N.Y. Dec. 21, 2020), ECF No. 1-1; Declaration of T. Jakob Sebrow ¶ 6, *United States v. Decca Records, Inc.*, No. 1:20-mc-778 (S.D.N.Y. Dec. 21, 2020), ECF No. 1-4.

24 Makan Delrahim, Forcing Firms to Share the Sandbox: Compulsory Licensing of Intellectual Property Rights and Antitrust (May 10, 2004), https://www.justice.gov/atr/speech/forcing-firms-share-sandbox-compulsory-licensing-intellectual-property-rights-and.

25 *Id.* (quoting *United States v. Besser Mfg. Co.*, 343 U.S. 444, 447 (1952).

26 *Id.* (citing *United States v. Gen'l Elec. Co.*, 115 F. Supp. 835, 843-46 (D.N.J. 1953)).

27 See Antitrust Consent Decree Review — ASCAP and BMI 2019 (Sept. 11, 2019), https://www.justice.gov/atr/antitrust-consent-decree-review-ascap-and-bmi-2019.

28 See *United States v. ASCAP*, 1940-1943 Trade Cas. (CCH) ¶ 56,104 (S.D.N.Y. 1941); *United States v. BMI*, 1940-1943 Trade Cas. (CCH) ¶ 56,096 (S.D.N.Y. 1941).

29 Delrahim, *supra* note 24.

30 *Id.*; see also David A. Balto & Andrew W. Wolman, *Intellectual Property and Antitrust: General Principles*, 43 IDEA 395, 472 (2003) ("[I]n recent years both essential facilities claims and compulsory licensing have fallen out of favor.").

Areeda stated in an influential 1989 article, for instance, the "essential facilities" doctrine — which provides that a monopolist may, under limited circumstances, be held liable under the antitrust laws for denying competitors access to an asset deemed essential to competition — should be considered an "epithet."[31]

The modern view of forced sharing is perhaps best encapsulated in the Supreme Court's *Trinko* decision. There, the Supreme Court held that Verizon, as an incumbent local exchange carrier in New York State, did not have to share access to its network with rivals.[32] The Court cautioned that forced sharing "may lessen the incentive for the monopolist, the rival, or both to invest in . . . economically beneficial facilities," and "also requires antitrust courts to act as central planners, identifying the proper price, quantity, and other terms of dealing — a role for which they are ill suited."[33] The Court continued: "compelling negotiation between competitors may facilitate the supreme evil of antitrust: collusion."[34] Under *Trinko*, there is "no duty to aid competitors," except in very narrow circumstances.[35]

The antitrust agencies have formally embraced the logic of *Trinko*.In their 2017 update to the *Antitrust Guidelines for the Licensing of Intellectual Property*, for example, the Antitrust Division and the Federal Trade Commission emphasized that "[t]he antitrust laws generally do not impose liability upon a firm for a unilateral refusal to assist its competitors, in part because doing so may undermine incentives for investment and innovation."[36]

Given the decades-long trend against forced sharing as an antitrust remedy, the Antitrust Division's decision to terminate the Decca consent decree may not be surprising. But that is not to say the days of forced sharing, like that embodied in the Decca consent decree, are behind us. Just the opposite: the antitrust world may be on the verge of a resurgence in forced sharing.

## V. FORCED SHARING IN THE AGE OF BIG TECH

Antitrust is frequently in the news these days. The hottest topic, it seems, is what antitrust has to say (if anything) about "Big Tech." In recent months, federal and state antitrust authorities launched a series of high-profile lawsuits against Google and Facebook, and a House Subcommittee issued a lengthy report on competition in digital markets.

The antitrust enforcers' lawsuits raise a number of theories, but one of the common threads is the power that major tech companies derive from their control of data, and how access to that data allegedly can be leveraged to deter competition. Case in point: the Antitrust Division's lawsuit against Google quotes Google's former CEO as saying, "We just have so much scale in terms of the data we can bring to bear."[37] To effectively compete with Google, the Division alleges, a rival would need access to sufficient data — whether gathered from the rival's users or supplied by third parties — for algorithms "to deliver more relevant [search] results."[38] Without this "scale," says the Division, a search engine cannot "deliver a quality search experience."[39] Likewise, the Division asserts, "search advertising of any kind requires a search engine with sufficient scale to make advertising an efficient proposition for businesses."[40] The complaint directly takes on Google's supposed data-control practices, alleging that "Google unlawfully maintains its monopolies" by using onerous "distribution agreements to lock up scale for itself *and deny it to others*."[41]

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31 Phillip Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 Antitrust L.J. 841, 841 (1989).

32 *Trinko*, 540 U.S. at 407–11.

33 *Id.* at 407–08.

34 *Id.* at 408.

35 *Id.* at 411.

36 U.S. Department of Justice & Federal Trade Commission, Antitrust Guidelines for the Licensing of Intellectual Property § 2.1 (Jan. 12, 2017).

37 Complaint ¶ 8, *United States v. Google LLC*, No. 1:20-cv-03010 (D.D.C. Oct. 20, 2020), ECF No. 1 [*hereinafter* "Google Complaint"].

38 *Id.* ¶¶ 24, 35.

39 *Id.* ¶ 95.

40 *Id.* ¶ 110.

41 *Id.* ¶ 8 (emphasis added).

The FTC's complaint against Facebook also targets the social network's control and exploitation of user data. In its opening pages, the FTC alleges that "Facebook monetizes its personal social networking monopoly principally by selling advertising, which exploits a rich set of data about users' activities, interests, and affiliations to target advertisements to users."[42] Similar to the Antitrust Division's suit against Google, the FTC accuses Facebook of using access to its APIs — which "allow[] third-party apps to access Facebook user data" — to coerce app developers into not working with or otherwise assisting Facebook competitors.[43] Facebook is also alleged to have directly cut off nascent competitors' access to its APIs.[44]

Assuming the antitrust agencies can prove these theories against Google and Facebook — and to be clear, these authors express no view on the merits of the lawsuits — the question then becomes one of remedy. If the tech companies have unlawfully acquired or maintained a monopoly by denying rivals access to valuable data, as the agencies allege, what is to be done about it? Are we likely to see a return to the days of forced sharing?

Some have called for forced sharing, to be sure.[45] Notably, the Subcommittee's report on digital markets recommended that Congress consider "nondiscrimination rules" requiring dominant platforms to offer "equal terms" that would apply to "terms of access,"[46] pointing back to the Antitrust Division's 1982 consent decree with AT&T, which required AT&T to offer certain other carriers access to its network on equal terms of quality and price. As for the antitrust agencies, they are playing it closer to their vests. The Antitrust Division's complaint against Google requests unspecified "structural relief," "preliminary or permanent [injunctive] relief," and "any additional relief the Court finds just and proper," but does not expressly ask the Court to compel Google to share access to the data that feed its algorithms.[47] The FTC's complaint requests that Facebook be "permanently enjoined from imposing anticompetitive conditions on access to APIs and data," but that is a step removed from forced sharing.[48]

The question is really one for the incoming Biden administration to answer. There is no shortage of speculation about how a President Biden may treat Big Tech,[49] but little insight into whether Biden's (still-unknown) nominees to the Antitrust Division and FTC may see compulsory licensing or forced sharing as a legitimate antitrust remedy. And so, for the time being anyway, the jury is still out.

## VI. CONCLUSION

One might not think that an obscure order from an antitrust case filed over 70 years ago has much to say about Big Tech. But the Decca consent decree serves as a reminder that, when it comes to forced sharing as an antitrust remedy, the jurisprudential pendulum has swung before — and may be in the midst of swinging again. If Decca could be compelled to license its master recordings to third parties making a "reasonable offer," is there any reason an alleged tech monopolist cannot be ordered to make valuable user data available to upstart competitors in return for a reasonable fee? Perhaps more importantly, will President Biden nominate antitrust enforcers who believe the answer to that question is "no"?

We look forward to seeing those questions answered in the months ahead.

42 Complaint ¶ 4, *FTC v. Facebook, Inc.*, No. 1:20-cv-03590 (D.D.C. Dec. 9, 2020), ECF No. 3 [*hereinafter* "Facebook Complaint"].

43 *Id.* ¶¶ 130, 138–51.

44 *Id.* ¶¶ 152–60.

45 See e.g. Jacob Silverman, *We Need More Than Antitrust Law to Tackle Big Tech*, The New Republic (Dec. 4, 2020) (describing proposal for a "data commons").

46 Subcommittee, *supra* note 3, at 384.

47 Google Complaint ¶ 194.

48 Facebook Complaint at 51–52 (Prayer for Relief).

49 E.g. Eileen Guo, *What Biden Means For Big Tech—and Google in Particular*, MIT Tech. Rev. (Nov. 10, 2020), https://www.technologyreview.com/2020/11/10/1011902/biden-big-tech-plans-google; Bobby Allyn, *How Will Tech Policy Change in the Biden White House? Here's What You Need to Know*, NPR (Nov. 9, 2020), https://www.npr.org/2020/11/09/931039648/how-will-tech-policy-change-in-the-biden-white-house-heres-what-you-need-to-know; Matt Stoller, *Would Joe Biden Bust Up Big Tech?*, Inc. (Oct. 29, 2020), https://www.inc.com/matt-stoller/how-a-president-biden-would-approach-big-tech.html.

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