Seattle Journal of Technology, Environmental & Innovation Law

Volume 13 | Issue 1 Article 6

2023

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I. INTRODUCTION

Video games as a form of digital entertainment have been around for decades, dating back to the mid-1900s.[1] In recent years, advancements in internet capabilities along with improvements in computer processing have ushered in the "modern age of video games."[2] As it exists today, the gaming industry is a multibillion-dollar industry[3] and, due in part to the Covid-19 pandemic, is now larger than the movie and North American sports industries combined.[4] There are over 3 billion people across the globe who now play video games, with around 1.5 billion of this demographic using a personal computer (PC) to do so.[5] This industry has now progressed and become global with users from Asia to Latin and North America.[6]

With such a large number of people gaming on PCs it is not difficult to imagine that there may be issues within the industry. Though there are many digital distributors of games on the PC, none come close to Valve's Steam platform (Steam), which is responsible for an estimated 75% of all digital game sales.[7] While on its face this may not appear to be an issue, Valve's alleged use of a "most favored nation" (MFN) clause in its contracts with developers has led some to wonder whether there are monopoly or antitrust issues.[8] This has culminated in a lawsuit filed against Valve which alleges that their use of MFN clauses in conjunction with their dominant market share constitutes a monopoly and violates

[1] Riad Chikhani, *The History of Gaming: an Evolving Community*, TECHCRUNCH (Oct. 31, 2015), https://techcrunch.com/2015/10/31/the-history-of-gaming-an-evolving-community/ [https://perma.cc/9JQY-S628].
[2] *Id.*
[3] Victor Potrel, *What the Gaming Industry Can Teach Digital Publishers*, FORBES (Nov. 5, 2021), https://www.forbes.com/sites/forbescommunicationscouncil/2021/11/05/what-the-gaming-industry-can-teach-digital-publishers/?sh=2822cde556ee [https://perma.cc/3Y39-2HEB].
[4] Wallace Witkowski, *Videogames Are a Bigger Industry than Movies and North American Sports Combined, Thanks to the Pandemic*, MARKETWATCH (Jan. 2, 2021), https://www.marketwatch.com/story/videogames-are-a-bigger-industry-than-sports-and-movies-combined-thanks-to-the-pandemic-11608654990 [https://perma.cc/R7M8-QAXC].
[5] Adam Bankhurst, *Three Billion People Worldwide now play Videogames, New Report Shows*, IGN (Aug. 14, 2020), https://www.ign.com/articles/three-billion-people-worldwide-now-play-video-games-new-report-shows [https://perma.cc/2SSV-48X8].
[6] *Id.*
[7] Eriq Gardner, *Popular Gaming Platform Accused of Abusing Market Power Through Contracts*, THE HOLLYWOOD REPORTER (Jan. 28, 2021), https://www.hollywoodreporter.com/business/business-news/popular-gaming-platform-accused-of-abusing-market-power-through-contracts-4124057/ [https://perma.cc/DXZ6-R53J]; Matt Sayer & Tyler Wilde, *The 15-Year Evolution of Steam*, PC GAMER (Sept. 12, 2018), https://www.pcgamer.com/steam-versions/ [https://perma.cc/E8VG-NURK].
[8] Brittany Alva, *The Seriously Shady Reason Valve is Being Sued*, SVG (Jan. 29, 2021), https://www.svg.com/323319/the-seriously-shady-reason-valve-is-being-sued/ [https://perma.cc/5Q47-CKY6].

antitrust law.[9] Specifically, the complaint alleges that Valve violated Section 1 of the Sherman Antitrust Act through their unlawful restraint of trade that unreasonably restricts competition and Section 2 by forming and maintaining a monopoly.[10]

This lawsuit and the evolving PC gaming industry provide a lens through which the use and effects of MFNs universally can be evaluated and assessed. Broadly, the concern is that corporations with sufficient market share could feasibly abuse MFNs to contractually maintain their power while stifling both competition and innovation. Importantly, MFNs have been in use for decades and are not novel in their use within the PC gaming industry.[11] There are several areas like international trade and healthcare where MFNs are common and have withstood a court's scrutiny.[12] While there exists a number of industries and markets where MFNs or similar clauses are common, there is a clear grey area regarding their inherent legality.[13]

To clear the waters, a process must be put into place in which contracts containing a potentially anticompetitive MFN can be preemptively reviewed. Examples of possible implementation include Attorney General (AG) required approval for such contracts, a rating or recommendation by the (AG) regarding the contract, and simple notification of a completed or pending contract fitting outlined parameters.

The significance of analyzing and suggesting remedies to the current state of MFNs and their potential antitrust violations is relevant for various reasons. First, it is necessary to look at MFNs and their impact on prospective newcomers to a market, as they could very well be stifling innovation in the spaces they are present. An organization's use of an MFN in conjunction with their dominant market share raises the possibility that newcomers in established industries could not compete. This scenario exists due to the restricted pricing that stems from the use of an MFN, which hinders the newcomer's ability to sell products at a discounted rate. Second, the case filed against Valve in particular raises an interesting question revolving around the major developers mentioned in the complaint. The analysis and ultimate resolution of the case will shed light on the potential culpability of producers signing off on this type of contract. Last, regarding the *Colvin* lawsuit and video game distribution agreements, this is an area and market that continues to grow, and that trend is predicted to continue.[14] Video games have rocketed in popularity over the last decade or so, and the intricacies of the regulation of such markets should be free of ambiguities. This specific market and the lawsuit that arose serve as a microcosm through which the potentially broader MFN issue can be analyzed and examined.

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[9] Complaint at 1, Sean Colvin et al. v. Valve Corp. et al, No. 2:21-CV-00650 (W.D. Wash. May 13, 2021) [hereinafter Valve Complaint].
[10] *Id.*
[11] Johnathan B. Baker et al., *COMMENT: Antitrust Enforcement Against Platform MFNs*, 127 YALE L.J. 2176 (2018).
[12] Beth A. Wright, *How MFN Clauses used in the Health Care Industry Unreasonably Restrain Trade Under the Sherman Act*, 18 J.L. & HEALTH 29, 35 (2003).
[13] Baker, *supra* note 11.
[14] Witkowski, *supra* note 4.

II. BACKGROUND ON ANTITRUST LAW

To properly evaluate the issues and claims against Valve and others in the industry, it is beneficial to properly understand antitrust law. Antitrust laws have the basic objective "to protect the process of competition for the benefit of the consumers, making sure there are strong incentives for businesses to operate efficiently, keep prices down, and keep quality up."[15]

A. Sherman Antitrust Act

The Sherman Antitrust Act (Act) was passed in 1890 and it was the first Antitrust law passed by Congress.[16] It was passed as a "comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade."[17] As mentioned by the Federal Trade Commission (FTC): "the antitrust laws proscribe unlawful mergers and business practices in general terms, leaving courts to decide which ones are illegal based on the facts of each case."[18] The two main provisions of the Act, Sections 1 and 2, are enforceable by the U.S. Department of Justice (DOJ) through litigation in the federal courts.[19] Those found in violation of the Act "can be ordered dissolved by the courts, and injunctions to prohibit illegal practices can be issued."[20] Further, violations are punishable by fines and imprisonment, and private parties injured by violations "are permitted to sue for triple the amount of damages done to them."[21]

In a 1911 case, *Standard Oil Co. v. U.S.*, the United States Supreme Court (SCOTUS) implemented and established the "Rule of Reason" interpretation of the Act.[22] The Court specified that "not every contract or combination restraining trade is unlawful," and that only "unreasonable" restraint of trade constitutes a violation of the Act.[23] In the 1945 case involving the *Aluminum Company of America*, however, the Court partially reversed this stance, declaring that "the size and structure of a corporation were sufficient grounds for antitrust action."[24] Following that ruling, the prohibition against monopolies has been "periodically

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[15] FED. TRADE COMM'N, *The Antitrust Laws*, (last visited Nov. 11, 2022), https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws [https://perma.cc/AC27-6FEP].
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] Brian Duignan & Editors of Encyclopedia Britannica, *Sherman Antitrust Act*, BRITANNICA (last visited Nov. 21, 2021), https://www.britannica.com/event/Sherman-Antitrust-Act [https://perma.cc/854S-LEJU].
[20] *Id.*
[21] *Id.*
[22] Lee Loevinger, *The Rule of Reason in Antitrust Law*, DEPARTMENT OF JUSTICE (Aug. 7, 1961), https://www.justice.gov/atr/speech/file/1237731/download [https://perma.cc/WD5L-XVVN]; *see also Standard Oil Co. of New Jersey v. United States*, 221 U.S. 30, 62, 66 (1911).
[23] Duignan, *supra* note 19.
[24] *Id.*; *see also United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. 1945).

enforced, involving in some cases the dismemberment of the offending firm."[25]

While the Act is not the only US law on antitrust, most complaints alleging violations involving MFNs, discussed below, are brought under Sections 1 and 2 of the Act.[26] Further, such cases are then analyzed under the rule of reason as opposed to a per se violation.[27] Predictably, the *Colvin* case against Valve alleges violation of both sections of the Act.[28]

1. Section 1

The Act was codified into law and can be found in Title 15 of the United States Code (USC), with Sections 1 and 2 being crucial to understanding violations.[29] Section 1 of the Act outlaws "every contact, combination, or conspiracy in restraint of trade."[30] While the code itself is up to interpretation, courts have been helpful in defining and narrowing down what constitutes a violation of Section 1.[31] As noted in *United States v. Delta Dental*, "the Supreme Court has interpreted section 1 to render unlawful restraints of trade that unreasonably restrict competition."[32]

SCOTUS further elaborated upon what is necessary to withstand a motion to dismiss in a case based on Section 1.[33] There are three elements that must be alleged with "sufficient clarity" to withstand such motion: "(1) the existence of a contract, combination or conspiracy among two or more separate entities that (2) unreasonably restrains trade, and (3) affects interstate or foreign commerce."[34] To determine whether an agreement unreasonably restricts trade, as it pertains to the second element, it is usually analyzed under either the per se rule or the Rule of Reason standard of review.[35] The court decides which rule to implement on a case-by-case basis by applying the facts of the case to the relevant guiding precedent.[36]

If a court determines that per se review is appropriate, the court evaluates whether a "practice facially appears to be one that would always or almost always tend to restrict competition and decrease output, and in what portion of the market," rather than "one designed to increase economic efficiency and render markets more, rather than less, competitive."[37] If the court finds that the practice in question appears to restrict competition and decrease output, the practice is thus found to be "per se illegal."[38] This method of evaluation "disregards the defendant's market power, illicit purpose, and the anticompetitive effects of the

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[25] Duignan, *supra* note 19.
[26] Wright, *supra* note 12, at 31.
[27] *Id.*
[28] Valve Complaint, *supra* note 9.
[29] Sherman Antitrust Act, 15 U.S.C. § 1.
[30] *Id*.
[31] FED. TRADE COMM'N, *supra* note 15.
[32] *United States v. Delta Dental of R. I.*, 943 F. Supp. 172, 185 (D.R.I. 1996).
[33] *Id.*
[34] *Id.*
[35] Wright, *supra* note 12, at 32.
[36] *Id.*
[37] *Broad. Music, Inc. v. Columbia Broad. Sys., Inc*., 441 U.S. 1, 19-20 (1979).
[38] Wright, *supra* note 12, at 32.

agreement."[39] The per se standard of review is typically applied to claims that involve horizontal price fixing or market allocation agreements among competitors.[40] Horizontal price fixing or horizontal agreements are agreements made between entities that exist at the same level within the supply chain, however, vertical agreements are between entities in different levels of the supply chain such as manufacturers, wholesalers, and retailers.[41] All other Section 1 claims, including vertical price fixing, are generally reviewed under the "Rule of Reason."[42]

The Rule of Reason standard, as described above, places the burden on the plaintiff to establish that "the anticompetitive effects of the agreements outweigh their legitimate business justifications."[43] This inquiry is limited to determining the market impact of the restraint on competition.[44] While the Court in *Delta Dental* notes that it declines to produce a detailed analytical framework for determining whether a particular restraint of trade unreasonably restricts competition under Section 1, it clarifies that an agreement is not unreasonable merely due to its injuring of a competitor.[45] Rather, the court notes the unreasonable element is satisfied only when it "causes detriment to the competitive process."[46] The Court in *Delta Dental* states that:

"Courts undertaking a rule of reason inquiry consider such diverse factors as: the defendant's intent and purpose for adopting the practice; the structure and competitive circumstances within the relevant market; the relevant competitive strengths of the defendants; the existence of economic hurdles undermining a competitor's ability to counteract the challenges practice; and the legitimate economic justifications for the practice."

The Court goes on to say that no single factor predominates any other factor.[47] Thus, analysis under the Rule of Reason requires an in-depth assessment of varying economic factors which is beyond the scope of this article.

2. Section 2

Section 2 of the Act states that "every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations" shall be deemed to have

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[39] *United States v. Delta Dental of R. I.*, 943 F. Supp. 172, 185-86 (D.R.I. 1996).
[40] *Id.* at 186.
[41] Stephen R. Latham, *Price-Fixing*, BRITANNICA (last visited February 4, 2022, 2:44pm), https://www.britannica.com/topic/price-fixing [https://perma.cc/8B4G-3TTZ].
[42] Wright, *supra* note 12, at 32.
[43] *Delta Dental*, 943 F. Supp. at 186.
[44] *Id.*; *see also* Nat'l Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 691 (1978).
[45] *Delta Dental*, 943 F. Supp. at 186.
[46] *Id.*
[47] *Id.*; *see also* William C. Holmes, Antitrust Handbook, § 1.04(2), at 223-24 (1996 ed.).

violated the Act and be guilty of a felony.[48] Section 2 establishes three separate offenses "commonly termed 'monopolization,' 'attempted monopolization,' and conspiracy to monopolize.'"[49] Those convicted under Section 2 shall be punished by a fine "not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both," within the discretion of the court.[50]

The First Circuit in *Ocean State Physicians Health Plan, Inc. v. Blue Cross & Blue Shield* noted that a monopolization claim under Section 2 requires: "(1) the possession of monopoly power in the relevant market, and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historical accident."[51] Furthermore, the *Ocean State* court observed that Section 2 prohibits "exclusionary conduct by a monopoly, often defined as 'behavior that not only (1) tends to impair the opportunities of rivals, but also (2) either does not further competition on the merits or does so in an unnecessarily restrictive way.'"[52]

A final note on principles of Section 2 standards and enforcement, implementation is not always clear and easy.[53] The Antitrust Division of the Department of Justice (DOJ) notes that protections are designed to safeguard competition, not competitors, and that, in its purest form, competition produces injuries.[54] In addition, the DOJ notes that distinguishing competitive and exclusionary conduct is often difficult, with "courts and commentators having long recognized the difficulty of determining what means of acquiring and maintaining a monopoly power should be prohibited as improper."[55] The use and enforcement of MFNs in the gaming industry, as well as generally, serves to provide a clear example of the struggles that may arise in the above evaluation of Section 2 violations.

III. BACKGROUND ON MFN CLAUSES

MFNs are not a rare occurrence and are quite commonplace in many different industries.[56] MFNs are referred to by a variety of names including, but no limited to "prudent buyer clauses, price nondiscrimination clauses, usual fee-provisions, and most favored trade requirement," and are traditionally found in contracts between two parties

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[48] 15 U.S.C. § 2.
[49] ANTITRUST DIV., *Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act: Chapter 1*, U.S. DEP'T OF JUST. ARCHIVES (March 18, 2022), https://www.justice.gov/atr/competition-and-monopoly-single-firm-conduct-under-section-2-sherman-act-chapter-1 [https://perma.cc/NGA2-JNPT].
[50] 15 U.S.C. § 2.
[51] Ocean State Physicians Health Plan, Inc. v. Blue Cross & Blue Shield, 883 F.2d 1101, 1110 (1st Cir. 1989).
[52] *Id.*
[53] U.S. Antitrust, *supra* note 49.
[54] *Id.*
[55] *Id.*
[56] Michael Arin, *Most Favored or Too Favored? Suits Challenge MFN Clauses Used by Amazon and Valve*, ABA (Feb. 24, 2021), https://www.americanbar.org/groups/business_law/publications/blt/2021/03/mfn-clauses/ [https://perma.cc/T53Q-H2HG].

in which one is selling or trading a good to another.[57] An MFN within such an agreement requires that the supplier "will treat a particular customer no worse than all other customers, and sometimes treat that particular customer better."[58] When applied to a producer and distributor, the producer agrees not to offer any other distributor a better price than is being given to the distributor with the MFN. Also, agreements may contain what is commonly referred to as "most favored nation plus," which typically requires a supplier to charge the buyer's competitors more than the supplier charges the buyer.[59] Specifically, with regard to online platforms, "a platform MFN requires that providers refrain from offering their products or services at lower prices on other platforms."[60]

MFNs are utilized in many areas and industries including international trade and healthcare.[61] In the area of trade, many nations in "good standing" have "MFN status" with the United States.[62] A country may grant "MFN status by a legislature or administrative act, decree, a diplomatic exchange of notes, or treaty."[63] MFNs appeared as early as the fourteenth century and became more comprehensive in use after the seventeenth century.[64] In trade, "the principals of a MFN clause lie in nondiscrimination and improved multinational trade relations."[65] In the healthcare industry, an MFN is commonly used in "a contractual agreement that guarantees a health insurer the same price as their market competitors."[66] MFNs in healthcare, while common, have had their legality heavily debated.[67] In fact, one of the first cases that allowed the court to subject an MFN to judicial scrutiny as an unreasonable restraint of trade in violation of Section 1 of the Act was *Delta Dental*. *Delta Dental* involved a dental insurer utilizing a MFN clause in their contracts.[68]

When a case is brought to court involving MFN conduct, courts have traditionally taken one of two approaches.[69] The first approach involves the examination of the business justification for the MFN.[70] A case demonstrating this approach, *Ocean State Physicians Health Plan v. Blue Cross & Blue Shield*, involved Blue Cross establishing an MFN after "a new entrant into the health insurance market gained significant enrollment

[57] Wright, *supra* note 12, at 30.
[58] Arin, *supra* note 56.
[59] ABA, ANTITRUST LAW DEVELOPMENTS Vol. 1, Ch. 2(C)(2)(f) (2020).
[60] Baker & Morton, *supra* note 11, at 2178.
[61] Wright, *supra* note 12; Di Jiang-Schuerger, *The Most Favored Nation Trade Status and China: The Debate should stop here*, 31 J. MARSHALL L. REV. 1321, 1325-8 (1998).
[62] Jiang-Schuerger, *supra* note 61 at 1326.
[63] *Id.* at 1324-25
[64] *Id.* at 1325.
[65] *Id.*
[66] Wright, *supra* note 12, at 30.
[67] *Id.*
[68] *See* United States v. Delta Dental of R. I., 943 F. Supp. 172, 187 (D.R.I. 1996).
[69] ABA, *supra* note 59.
[70] *Id.*

through lower premiums."[71] During the case, Blue Cross admitted that it held monopoly power in the relevant market, leaving the issue of whether Blue Cross illegally maintained its monopoly through the MFN.[72] Here, the court found Blue Cross's MFN was "a bona fide policy to ensure that Blue Cross would not pay more than any competitor paid for the same services," and that this policy saved Blue Cross nearly two million dollars.[73] An important note in this case is that the court refused to analyze the effects, stating, "nothing turns on whether Blue Cross in fact lowered its rates, as achieving lower costs is a legitimate business justification."[74] The court concluded that "insisting on a supplier's lowest price. . . as a matter of law is not exclusionary," assuming the price is "not 'predatory.'"[75]

The other approach focuses on "the anticompetitive effects of the challenged MFN."[76] A case demonstrating this approach, *Reazin*, again involved the health care company Blue Cross and Blue Shield.[77] In this case the Tenth Circuit "affirmed a jury finding of monopolization," with the court considering the MFN as "evidence of, or as contributing to, Blue Cross's market or monopoly power."[78] Here, the court did not address whether the MFN itself could violate Section 2 of the Act. Instead, the court relied on testimony that Blue Cross's MFN "hindered the development" of competitors, and "thereby had the power to exclude competition" and give "Blue Cross power over price."[79] Ultimately, the Tenth Circuit found that "Blue Cross' total conduct established willful maintenance of its monopoly power."[80]

State courts have also been entrusted with assessing MFN claims.[81] In *Willamette Dental Group v. Oregon Dental Service Corp.,* an Oregon court evaluated a claim under an Oregon statute "similar to Act Section 2."[82] In the case, the defendant argued that MFNs are not anticompetitive as a matter of law; the court disagreed but nevertheless found the market to be competitive.[83] This case is useful in seeing a potential disconnect between state and federal courts, with the Oregon court having "chided federal courts" that examine MFNs from an efficiency rationale.[84]

A final note on MFNs is that states have the ability to address them independently through legislation.[85] An example of this is Michigan's

[71] *Id.*; *see also* Ocean State Physicians Health Plan, Inc. v. Blue Cross & Blue Shield, 883 F.2d 1101, 1110 (1st Cir. 1989).
[72] *Id.*
[73] *Id.*
[74] *Id.* at 1111 n.11.
[75] ABA, *supra* note 59; *see* also Ocean State Health Plan, *supra* note 5151, at 1110.
[76] ABA, *supra* note 59.
[77] *Id.*
[78] Reazin v. Blue Cross & Blue Shiel, Inc., 8999 F.2d 951, 970 (10th Cir. 1990).
[79] *Id.*
[80] ABA, *supra* note 59.
[81] *Id.*
[82] *Id.*
[83] *Id.*
[84] *Id.*
[85] *Id.*

amendment of its general insurance laws in 2013 to prohibit health care corporations from using MFNs in any provider contract.[86]

IV. BACKGROUND ON GAMING

Today, gaming is one of the most profitable entertainment industries in the world, but it has not always been that way.[87] To better understand the current gaming industry, it can be helpful to look back at how it got to where it is. "The first recognized example of a game machine was unveiled by Dr. Edward Uhler Condon at the New York World's Fair in 1940,"[88] where about 50,000 attendees played the game during its six months on display.[89] However, the first game system designed for commercial use was not produced until 1967, nearly three decades later.[90] Similarly, arcade machines did not become popular until the mid-1960s, beginning with Sega's "periscope and Crown Special Soccer in 1966 and 1967."[91] It was not until the 1973 release of Atari's "Pong" that electronic video games began popping up in places such as bars, shopping malls, and bowling alleys.[92]

Technological advancements—including Intel's 1971 launch of their 4004 processor[93]—began to open up the possibilities. This introduction of the microprocessor allowed for the creation of the first "human-to-human" multiplayer game in 1975[94] and Atari's 2600 console in 1977.[95] This was followed by the first instance of internet utilization demonstrated at the Consumer Electronics Show in 1982.[96] The early use of "groundbreaking modem-transfer technology"[97] would eventually lead to the mostly "always-online" state of videogames today.[98] Beginning with the release of the original PlayStation in 1994 and the original Xbox in 2001,[99] the "modern age of gaming" heavily relied on the internet and is enjoyed by billions of people.[100]

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[86] *Id.*
[87] Chikhani, *supra* note 1.
[88] *Id.*
[89] *Id.*
[90] *Id.*
[91] *Id.*
[92] *Id.*
[93] INTEL, *Intel's First Microprocessor*, (last visited Nov. 1, 2021), https://www.intel.com/content/www/us/en/history/museum-story-of-intel-4004.html [https://perma.cc/A38W-JCF6].
[94] Chikhani, *supra* note 1.
[95] *Id.*
[96] *Id.*
[97] *Id.*
[98] Fred Dutton, *The Future of Always-Online*, EUROGAMER (June, 28, 2012), https://www.eurogamer.net/articles/2012-06-08-error-37-the-future-of-always-online [https://perma.cc/BH3B-ZP6T].
[99] PRECEDEN, *History of Video Game Consoles*, (last visited Nov. 2, 2021), https://www.preceden.com/timelines/191578-history-of-video-game-consoles [https://perma.cc/5MEB-MH98].
[100] Dutton, *supra* note 98*;* Chikhani, *supra* note 1.

A. The Current Digital Marketplace

Today's consumer of video games has the choice between two main platforms through which consumers enjoy their games: video game consoles or computers. The primary difference between the two mediums is that, while computers can serve a variety of purposes, a video game console only serves to facilitate video games. While videogame consoles do not offer a choice of where to purchase your downloadable games, PC's do.[101] In the early days of downloadable games most were purchasable and downloadable through the game developer's own website or launcher.[102] As time went on, however, some of those platforms began to offer games from a variety of publishers and developers, and other storefronts established themselves as independent virtual shops.[103] With brick-and-mortar shops such as the popular GameStop slowly losing out to the convenience of at home downloads, this has become the predominant method by which people purchase their games.[104] This evolution from disks to downloads created the new digital marketplace where platforms can not only make a profit from selling their own games, but also from earning a commission selling other developer's games on their storefront.[105]

It is impossible to overlook Steam while looking at the transition and the growth of digital distributors. The Steam platform's growth was organic, beginning as a simple portal for Valve's popular game Counter-Strike in 2003.[106] From there, with the then-novel concept of digital sales being born in 2006, Steam went on to become the largest and most successful distributor of PC games, allowing just about any game to appear on the platform.[107] Among the platforms offered on PC, Valve's Steam is the clear favorite, with a dominant seventy five percent market share.[108] Another important and frequently controversial note is the commission that Valve collects from developers selling on its platform.[109] Valve currently collects thirty percent of revenue generated from game sales on the Steam platform as commission, an amount frequently criticized by developers and consumers alike.[110] In defense of its commission percentage Valve has pointed out that it "charged that same thirty percent

[101] Users of Xbox, PlayStation, and other consoles can only purchase downloadable games through the console's store. PC's have several platforms from which users can purchase and download games. Physical copies of games are available for purchase at a multitude of locations.
[102] Sayer & Wilde, *supra* note 7.
[103] *Id.*
[104] Joe Filsinger, *Gaming in the Digital era: How the Transition from Physical to Digital Affects Console Gamers and Developers*, DBLTAP (Nov. 12, 2020), https://www.dbltap.com/posts/gaming-in-the-digital-era-how-the-transition-from-physical-to-digital-affects-console-gamers-and-developers-01ejea1n9pgb [https://perma.cc/2K9S-RM8T].
[105] Sayer & Wilde, *supra* note 7.
[106] *Id.*
[107] *Id.*
[108] Gardner, *supra* note 7.
[109] Tyler Wilde, *Most Game Devs Don't Think Steam Earns its 30% Revenue Cut*, PCGAMER (Apr. 28, 2021), https://www.pcgamer.com/most-game-devs-dont-think-steam-earns-its-30-revenue-cut/ [https://perma.cc/BYH9-ZNKU].
[110] *Id.*

for nine years before becoming dominant, beginning when competition was 'vibrant' and when Valve had zero market share."[111]

An important note lies in why developers have continued to release their games on Steam despite these high commission rates. There are a couple of reasons why this is likely the case, with the primary reason being exposure. With it being the largest games distributor on PC, Valve offers developers unparalleled exposure to potential consumers.[112] This level of exhibition is comparable to free advertising in the sense that, if gamers are already going to be engaging with the Steam service due to their previous purchases, they will be more likely to see developers' new games being offered on the platform.[113]

B. Alternatives to Steam and their Outcomes

Th current distribution of market share amongst digital distribution platforms is not where it is due to a lack of effort.[114] Throughout the history of digital downloads there have been several platforms such as Epic Games and Microsoft that have sought to take a chunk of Valve's success in the space.[115] The Epic Games Store (EGS), launched in December of 2018, is currently the most well-known among the competition and has publicly made its mission to take on Steam clear.[116] The EGS uses a much lower commission rate of twelve percent to attract developers and consumers.[117] It has even advertised that purchases on its platform result in higher revenues for developers as opposed to "only 70% elsewhere."[118] Further, EGS has introduced a program that rewards users of the platform with free games that cycle every week.[119] Despite all this effort, EGS is still a long way from completing its goal, but it remains hopeful for the future.[120]

Another popular option in the PC gaming marketplace is Microsoft's digital store. Initially offering almost exclusively titles published by Microsoft, the platform has since branched out and now

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[111] Andy Brown, *Valve Defends Taking 30 Percent Cut of Steam Sales in Response to Lawsuit*, NME (July 30, 2021), https://www.nme.com/news/gaming-news/valve-defends-taking-30-per-cent-cut-of-steam-sales-in-response-to-lawsuit-3007255 [https://perma.cc/KJR7-JW4B].
[112] Gardner, *supra* note 7.
[113] *Id.*
[114] Kyle Orland, E*pic Thinks EGS Could Make up 35-50% of the PC Gaming Market by 2024*, ARS TECHNICA (May 4, 2021), https://arstechnica.com/gaming/2021/05/epic-thinks-egs-could-make-up-35-50-of-the-pc-gaming-market-by-2024/ [https://perma.cc/95S7-5GSM].
[115] Gardner, *supra* note 7.
[116] EPIC GAMES, *The Epic Games store is now live*, (Dec. 6, 2018), https://www.epicgames.com/store/en-US/news/the-epic-games-store-is-now-live [https://perma.cc/SVJ2-7UGL].
[117] *Id.*
[118] *Id.*
[119] EPIC GAMES, *Free Games*, (last visited Nov. 5, 2021), https://www.epicgames.com/store/en-US/free-games [https://perma.cc/EG8Q-NYJE].
[120] Orland, *supra* note 114.

offers games from several publishers.[121] Additionally, Microsoft has introduced the "Xbox Game Pass for PC," which is a subscription-based service that offers subscribers access to over one hundred games for a monthly fee.[122] Even more recently, Microsoft has partnered with other large publishers and bundled their subscriptions with the Game Pass for PC.[123] As with the Epic Games Store, the Microsoft Store is alive and well, boasting its own competitive commission rate of only 12%, which began in August of 2021.[124]

While EGS, Microsoft, and others—including developer and publisher stores—remain active, there have been many platforms and stores that have not stood the test of time.[125] One of the biggest examples of this is the Discord Store.[126] Discord is primarily a communication service catered to gamers for their use while playing video games with others.[127] However, in October of 2018, Discord launched its own store within the app,[128] with the hope of capitalizing on its 200 million users.[129] Discord differentiated itself from EGS and Microsoft by only taking a 10% commission, the lowest of the major platforms.[130] In the end, the store was unable to pull enough users away from their preferred platforms and was taken down only a year after its release.[131] The rise and fall of the Discord Store is a good example of how even a platform with hundreds of millions of pre-existing users can fail to compete with Steam.

V. THE CURRENT CASE (COLVIN)

With the above information it is now possible to examine the current case being brought against Valve. The complaint in *Colvin* was filed by five Steam users on behalf of themselves and "all others similarly situated."[132] The complaint names Valve Corporation and several other developers—including CD Projekt, Ubisoft, Rust, and Devolver Digital—

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[121] MICROSOFT, *All Games*, (last visited Nov. 4, 2021), https://www.microsoft.com/en-us/store/collections/pcgaVTaz?rtc=1 [https://perma.cc/VX2R-92Y3].

[122] MICROSOFT, *Xbox Game Pass for PC*, (last visited Nov. 5, 2021), https://www.xbox.com/en-US/xbox-game-pass/pc-games?&ef_id=Cj0KCQjwrJOMBhCZARIsAGEd4VFTp67slceXvSSHJXXkHKM9x6_5kr3kr16rzpg_9CtYbKw7jIFwQAMaAqrREALw_wcB:G:s&OCID=AID2200843_SEM_Cj0KCQjwrJOMBhCZARIsAGEd4VFTp67slceXvSSHJXXkHKM9x6_5kr3kr16rzpg_9CtYbKw7jIFwQAMaAqrREALw_wcB:G:s&gclid=Cj0KCQjwrJOMBhCZARIsAGEd4VFTp67slceXvSSHJXXkHKM9x6_5kr3kr16rzpg_9CtYbKw7jIFwQAMaAqrREALw_wcB [https://perma.cc/E3WB-R94E].

[123] Jay Peters, *EA Play Will be Available to Xbox Game Pass PC Subscribers on March 18th*, THE VERGE (Mar. 17, 2021), https://www.theverge.com/2021/3/17/22335968/ea-play-xbox-game-pass-pc-ultimate [https://perma.cc/N4V9-GX2R].

[124] Jay Peters, *Microsoft Will Let Devs Keep Every Penny Their Windows App Makes – unless it's a game*, THE VERGE (July 28, 2021), https://www.theverge.com/2021/6/24/22549222/microsoft-store-developers-windows-11-revenues-games [https://perma.cc/M62H-A5QV].

[125] Sweatshopking, *The Digital Game Store Wars: Who are the Players?*, THE TECH REPORT (Mar. 6, 2019), https://techreport.com/review/34505/the-digital-game-store-wars-who-are-the-players/ [https://perma.cc/GD4J-GA82] [hereinafter Digital Game Store Wars].

[126] Nelly, *What's Coming for Nitro*, DISCORD (Sept. 12, 2019), https://blog.discord.com/whats-coming-for-nitro-a732ddc4b5b1 [https://perma.cc/52VD-23X9].

[127] DISCORD, *Discord Homepage*, (last visited Nov. 5, 2021), https://discord.com/ [https://perma.cc/9ULU-99GB].

[128] Nelly, *supra* note 126.

[129] Digital Game Store Wars, *supra* note 125.

[130] *Id.*

[131] Nelly, *supra* note 126.

[132] Valve Complaint, *supra* note 9.

as defendants.[133] The final note on the filing of the complaint is that the plaintiffs are seeking damages and injunctive relief from Valve and the other defendants for violation of both Section 1 and Section 2 of the Act.

The complaint begins with an in-depth analysis of antitrust laws, the economics of MFNs, and relevant product and geographical markets.[134] Its central argument is that Steam's MFN precludes price competition among online video game distributors.[135] The complaint cites that there have been several other platforms that have attempted to compete with Steam through means of lower commissions, but that ultimately the prices remain the same across all platforms to support this claim.[136] Here the complaint notes the differing platforms and respective commission rates coupled with the prices at which the same games are sold on each platform.[137] This information hammers home that if it were not for Steam and the MFN in place within the contracts, the prices would be varied across different platforms that have different commission percentages.

A second allegation within the complaint is that the "Steam MFN hinders innovation."[138] The heart of this argument is that the Steam MFN creates an artificial barrier to entry for platforms seeking to enter the market.[139] They mention that the market is "highly concentrated" and a new entrant can benefit consumers by "undercutting the incumbent's prices."[140] Further, it is mentioned that this method of undercutting prices is one way a new entrant could gain market share, and if the Steam MFN did not exist, platforms competing with Steam would be able to "provide the same (or higher) margins to game developers while simultaneously providing lower prices to consumers."[141] The plaintiffs proceed to make the statement that Discord's failure in the market was at least due in part to the Steam MFN.[142] This point is not backed up by any facts or statements by members of Discord but is instead essentially a hypothesis that they argue is highly likely.[143]

The last allegation within the body of the complaint is that "the Steam MFN suppresses output."[144] At its core, this allegation argues that Steam's MFN clause prevents others from offering games at discounted prices when compared to those on Steam, and this prevention directly leads to less games being sold. Again, Discord is used as an example with

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[133] *Id.*
[134] Valve Complaint, *supra* note 9.
[135] *Id.*
[136] *Id.*
[137] *Id.*
[138] *Id.*
[139] *Id.*
[140] *Id.*
[141] *Id.*
[142] *Id.*
[143] *Id.*
[144] *Id.*

the argument being that without the Steam MFN, "Discord's competitive pricing would have enticed game developers to price PC games at a lower level than they did on the Steam platform, because game developers would have been able to preserve their margins while selling more games."[145] This section concludes with the statement that "in a world without the Steam MFN, game developers would sell more PC games at the same level of profit, consumers would spend less money per PC game, and consumers would purchase more PC games," and that "the Steam MFN thus harms consumers."[146]

A. Claims for Relief

The first count brought by the plaintiffs states that Valve has violated Section 2 of the Act.[147] There are several points made within this claim, beginning with "Valve, utilizing the Steam platform, has monopolized the relevant market and is using the Steam MFN to maintain its monopoly."[148] The following points include the allegations that Valve has monopoly power in the relevant market and that this market share in combination with the alleged MFN allows Valve to ultimately set the sale price to consumers in an anticompetitive manner.[149] Further, the argument is made that the competing platform's much lower commission rates show that Valve is a monopolist and that their commissions, and thus consumer prices, are substantially above the competitive level.[150] This count concludes with the statement that "every day the Steam MFN remains in effect, Valve will continue to violate Section 2 of the Act."[151]

The second count predictably states that Valve and the other game developer defendants are in violation of Section 1 of the Act.[152] The argument is that by entering into the contract containing the MFN clause with Valve, the developers are combining or conspiring with Valve to unlawfully restrict trade, a violation of Section 1.[153] Again, it is reiterated that the effect of such a contract, or partnership, which appears to be what is alleged, is that of higher consumer prices.[154] Similar to the first count, it ends with a statement that as long as the MFN is in effect, "Valve and the game developers will continue to violate Section 1 of the Act."[155]

B. A Look at the Complaint's Approach

The complaint filed against Valve and the game developers has both solid and questionable arguments. First, the plaintiffs claim that if it were not for the Steam platforms MFN, the price of PC games would fall almost across the board. More games being available on discount services

[145] *Id.*
[146] *Id.*
[147] *Id.*
[148] *Id.*
[149] *Id.*
[150] *Id.*
[151] *Id.*
[152] *Id.*
[153] *Id.*; 15 U.S.C. § 1.
[154] Valve Complaint, *supra* note 9.
[155] *Id.*

could certainly lead to an increase in the number of total games purchased, making this claim somewhat plausible. It is understandable that there is no evidence for this point as the Steam MFN has always been in practice, but there remains no evidence, anecdotal or otherwise, that can be seen to support this assumption. It has long been established within the gaming market that most mainstream videogames will release with a price tag of $60.[156] This amount has become familiar to consumers within this market, so the argument that developers, or publishers, would charge less due to a smaller cut being taken from a platform is questionable.[157]

Second, the plaintiffs claim that Discord's Store failure is due directly to the Steam MFN, suffers from this same lack of evidence.[158] The complaint does a decent job of outlining the many ways in which the Steam MFN likely impacted the Discord Store's success. The complaint argues that it was due to a developer's inability to alter prices and "take advantage of Discord's lower cost structure," and that Discord was "unable to gain critical mass among consumers."[159] However, the plaintiff's allegation that absent the Steam MFN, developers would have been "enticed" to make use of the Discord platform, thus saving it, is without any statement from developers or other evidence.[160]

The final issue within the complaint is the inclusion of the numerous developers as defendants with Valve.[161] This inclusion raises questions as the main argument against Valve is that they are essentially forcing game developers and publishers to agree to the MFN in their distribution contract through their massive market power. It is common knowledge that Steam is frequently referred to as the best place to purchase games due to its massive library and user-friendly features, making it easier to conclude that it is the best place to successfully sell games.[162] This argument paints those selling, or hoping to sell, on Valve's Steam platform as victims of Valve's practices. This conflict is further demonstrated by the *Wolfire* case filed by a developer against Valve.[163] Thus, the complaint's inclusion of these developers as defendants may have the effect of making their argument and the case a whole lot murkier than if they had been left out.

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[156] Michelle Y. Huang & Ben Gilbert, *Here's the Reason Most New Console Video Games Cost $60*, BUSINESS INSIDER (Oct. 29, 2018), https://www.businessinsider.com/why-video-games-always-cost-60-dollars-2018-10 [https://perma.cc/4ED7-JQGT].
[157] *Id.*
[158] Valve Complaint, *supra* note 9.
[159] *Id.*
[160] *Id.*
[161] *Id.*
[162] Jordan Minor, *The Best Places to Buy and rent PC Games Online in 2021*, PC MAG (Nov. 24, 2021), https://www.pcmag.com/picks/the-best-places-to-buy-and-rent-pc-games-online [https://perma.cc/PA7M-QDMV].
[163] Andy Chalk, *Valve Responds to Antitrust Lawsuit, Defends Steam's 30% Cut*, PC GAMER (July 29, 2021), https://www.pcgamer.com/valve-responds-to-antitrust-lawsuit-defends-steams-30-cut/ [https://perma.cc/Y9E7-BDKM].

VI. SUGGESTIONS FOR REFORM

With MFNs in other industries still under legal scrutiny and the digital marketplace of video games continuing to grow, it is important to remedy as much muddy regulation in the space as possible. A solution must not remove any party's ability to enter freely and quickly into a contract with another. It must assist, instead of hinder, the answering of all judicial questions surrounding MFNs in contracts. Such a remedy likely lies in a notification or approval-based system involving state Attorneys General (AGs). This form of remedy is not a complete solution and does not seek to either eliminate or solidify, as acceptable, any legal MFN clause. Instead, it focuses on adding clarity to the potential positive or negative judicial treatment of particular contracts. It establishes a standard for those drafting contracts containing MFN, or potential MFN, clauses.

The central premise of this system revolves around those seeking to enter into a contract with a potential MFN or MFN-like clause having to submit that contract for review to the relevant State's AG office. The first step in establishing this process is to identify that the AGs office can be given the power to review such contracts. State AGs are empowered to prosecute violations of state law and can be empowered through state legislation to take on other tasks.[164] This form of a solution would then require such an empowerment from the state legislature which would grant the states AG the power to require contracts meeting set requirements to be reviewed by their respective offices. The standards for the contracts and clauses to be evaluated under would similarly be outlined by such legislation enacted in each state.

A. How MFNs would be Analyzed

1. Criteria to be Evaluated

All factors must be considered when establishing the criteria for which contracts should be submitted to the AGs office. Writing for the *Journal of Law and Health*, Beth Wright presented a "four-quadrant matrix" to aid in analyzing and evaluating the merits of a Sherman Act violation.[165] A criterion such as this would serve to aid the AG office in their evaluation of contracts and clauses, and enable them to provide an informed recommendation regarding their potential future issues. The review process would consist of the AG's office evaluating each submitted contract under this four-factor test.

The analysis would look at and evaluate the contract and the MFN clause's four following factors: pro-competitive effects, anticompetitive effects, pro-competitive purposes, and anticompetitive purposes.[166] The purpose of evaluating a contract under all four separate analyses is to allow and ensure those reviewing to understand all possible effects that could

[164] OFFICE OF THE ATTORNEY GENERAL, *What the Attorney General's Office DOES Do*, (last visited Nov. 7, 2022), https://www.atg.wa.gov/roles-office#:~:text=Investigates%20and%20prosecutes%20persons%20accused,county%20prosecutors%20on%20legal%20issues. [https://perma.cc/YCQ7-6KLG].
[165] Wright, *supra* note 12, at 35.
[166] Wright, *supra* note 12.

arise. A system that exclusively looks at the effects, or purposes, has the potential to miss crucial issues that may arise in future litigation. Thus, the system must require that the reviewing process include all pro-competitive and anticompetitive effects and purposes, resulting in a complete view of the contract. Further, this four-factor analysis allows the reviewer to apply the tests courts have established for reviewing MFNs.

Following the reviewer's analysis of each effect, they would be able to view the contract as a whole and take the next step of returning an opinion. The AG office would not be issuing a verdict that results in the contract succeeding or dying but would instead be issuing an informed recommendation. Both parties to the contract would be notified as to the results of the review and informed on any and all issues that are found with the contract. The parties partaking in this system would not be precluded from exercising their right to enter into a contract that may have been deemed to have issues. Similarly, a review resulting in a positive rating would not preclude future legal challenges and litigation on the basis of the contract. The review system would simply serve as a way that parties would be informed of potential issues and future legal consequences. Further, because the AG office's review will not preclude parties from entering into contracts, the parties are free to enter into their agreements following submission of the contract for review. The system is designed to provide parties with information regarding their potential contract, but should the parties be content there is no prohibition of contract.

2. General Requirements

The proposed legislation and accompanying review process would not apply to all contracts. While it is within a state's powers to require all potential contracts containing MFN clauses to undergo review, this article calls for more tailored legislation. An overinclusive statute could overwhelm the AGs office and potentially lengthen the contract formation process. To avoid this, the prescribed legislation shall be tailored to include strictly digital distribution and digital platform contracts. Because this area will be much more specified, this will allow for similarly constructed contracts within the digital space to be subject to review. It is not to say that this system could not work for a larger category of contracts, but simply that tailoring the legislation to limit the scope will ensure proper and speedy review.

Further, the prescribed legislation shall outline requirements that detail the types of contracts to be subject to notification and review. The first element that must be satisfied is, predictably, that the contract involves a distribution agreement between two parties. Second, the contract contains an MFN clause, or a clause that serves an identical or similar purpose. The third requirement deals with the size of the corporations: it only requires larger organizations with dominant market

share that are more capable of taking advantage of MFN clauses to be subject to contract review. With respect to this third requirement, the party submitting the contract for review must demonstrate that the other party possesses a requisite market share to be eligible for review. These elements seek to further the goal described above of limiting the volume of contracts to be reviewed and allowing for a thorough and speedy review.

Lastly, it shall be noted that certain contracts fulfilling the above elements are to be exempt from requiring review. A corporation such as a digital distributor that issues identical, or near identical, contracts or distribution agreements to producers shall not have to repeatedly submit such contracts for review. An initial submission for review shall then exempt further identical contracts from having to be submitted and reviewed. This exemption shall be contingent on the party that formerly completed the process providing the new party with the AG's findings, ensuring all the involved parties are made aware of the potential issues of the particular contract. Additionally, prior opinions drafted by the AG's office shall be accessible to other outside entities seeking to draft or engage in a contract themselves. The availability of prior opinions is an effort to allow organizations to be proactive in their drafting of a strong contract. This provision has the goal of reducing unnecessary submissions that would likely result in a severe delay for corporations that enter into such agreements frequently.

B. Basis for this System and Notification

This form of state regulation, while somewhat novel to the realm of contracts containing MFNs, is not unprecedented. As discussed above, states can, and have, taken legislative action regarding MFN clauses.[167] For example, in 2013 Michigan amended its general insurance laws to prohibit health care corporations from using MFNs in any provider contract.[168] Though this amendment concerned MFNs used by healthcare corporations as opposed to MFNs used by online video game distributors, it shows that states can regulate the implementation of MFN clauses in specific industries.[169] Further, legislation permitting the state to review MFN clauses is far less extreme than legislation outright prohibiting parties from entering into contracts with MFN clauses.

Further, Washington State already has systems in place which utilize the AG's office as a regulatory intermediary. For example, under Washington State law, there are certain circumstances when those in the healthcare industry must notify the Attorney General if they wish to engage in certain actions.[170] These actions include material changes such as a merger, acquisition, or contracting affiliation between two or more entities.[171] Entities that make up those encapsulated in the statute and who must notify include hospitals, hospital systems, or provider

[167] ABA, *supra* note 59.
[168] *Id.*
[169] *Id.*
[170] WASH. REV. CODE § 19.390.030 (2019).
[171] *Id.*

organizations.[172] Further, the Washington statute outlines four individual aspects of the notification that are required.[173] Those four aspects include: (a) the names of the parties and their current business address; (b) identification of all locations where health care services are currently provided by each party; (c) a brief description of the nature and purpose of the proposed material change; and (d) the anticipated effective date of the proposed material change.[174] Additionally, the statute includes a penalty for noncompliance in the form of a fine for each day that required notification is withheld.[175]

C. Addressing Potential Complaint/ Issues

This prescribed solution being properly implemented is crucial to the preservation of both individuals' and corporations' freedom of contract – otherwise, these freedoms could be threatened in a variety of ways.[176] First, it is possible that this proposed process could impose an undue delay on those seeking to enter into a contract with one another. This concern is addressed, however, by the fact that individuals are still free to enter into the contract in question regardless of the outcome of the AG's review. Thus, delay could only happen in situations where one or more parties prefer to view the results of the review prior to entering into the contract. Delay may also occur more frequently in situations where contracts are consistently differing and thus require new submissions. The only plausible solution here would be for the parties to attempt to tailor their contract to be like those previously reviewed by the AG's office, negating the requirement that the new contract be submitted.

VII. CONCLUSION

As the size and scale of the digital distribution market continues to grow, and as MFN and similar clauses continue to be prevalent in the industry's contracts, it is important to evaluate MFNs and make clear their limitations, legality, and potentially negative impact on competition. Courts have previously dealt with MFN clauses in other industries and have established various tests to evaluate these clauses. With the 2021 case filed against Valve, the concern about MFNs in the now predominant digital market has been brought front and center. I have suggested a relatively unintrusive system for evaluating contracts that contain MFN clauses. This reform first involves state legislatures empowering their Attorney Generals with the ability to review contracts that meet a set list of attributes. These listed attributes are tailored to ensure that the legislation is not overly intrusive and interferes as little as possible with

[172] *Id.*
[173] WASH. REV. CODE § 19.390.040 (2019).
[174] *Id.*
[175] *Id.*
[176] U.S. CONST. art I., § 10, cl. 1.

the freedom of parties to contract. Agreements that meet the set-out elements shall be examined and reviewed by the AG's office under a set of four factors: pro-competitive effects, anticompetitive effects, pro-competitive purposes, and anticompetitive purposes. The AG's office, once review is complete, shall inform all parties to the potential contract about the results and findings. Parties are not forced to take action on the findings and are free to enter into the agreement as soon as the contract has been submitted for review. To further reduce any undue delay for parties attempting to enter into an agreement, the prescribed legislation further states that repeat contracts need not be reviewed, and that only each party must be made aware of the previous finding as it relates to the contract. The overarching goals of this type of policy are to (1) protect parties that may be entering into a contract with an MFN, (2) provide parties with the knowledge of any potential issues that may arise in future litigation regarding the contract, and (3) potentially reduce the legal ambiguity of MFNs as they exist in contracts in the digital distribution market.