

COMMENTS OF THE NATIONAL ASSOCIATION OF THEATRE OWNERS
U.S. DEPARTMENT OF JUSTICE, ANTITRUST DIVISION
REVIEW OF ASCAP AND BMI CONSENT DECREES

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John Fithian, President and CEO
Jackie Brenneman, General Counsel
Esther Baruh, Director of Government Relations
National Association of Theatre Owners
1705 N Street, N.W.
Washington, D.C. 20036
(202) 962-0054

I. INTRODUCTION

The National Association of Theatre Owners ("NATO") respectfully submits the following comments in response to the U.S. Department of Justice Antitrust Division's (the "Department") announced intentions to review the ASCAP and BMI Consent Decrees (the "Decrees"). Individual motion picture theater companies may comment on various parts of the Decrees, but NATO's comment will focus on one seminal provision. Specifically, NATO urges the Department to maintain the "Movie Theater Exemption," as that provision continues to support pro-competitive practices.[1]

NATO is the largest motion picture exhibition trade organization in the world, representing more than 33,000 movie screens in all 50 states, and additional cinemas in 102 countries worldwide. Our membership includes the largest cinema chains in the world and hundreds of independent theater owners. NATO and its members have a significant interest in preserving a competitive marketplace in the North American film industry. North America remains the biggest film-going market in the world, in which 5% of the global population accounts for roughly 30% of global industry revenue.

NATO urges the Department to protect the Decrees, including and especially the Movie Theater Exemption. This critical provision benefits consumers and artists, and should not be subjected to the prolonged litigation and ensuing business uncertainty that would likely follow from termination or sunset of the decrees.

[1] The Movie Theater Exemption is embodied in Sections IV(E) and (G) of the ASCAP Consent Decree, and is underpinned by Sections IV(A)-(B) and VI of the ASCAP Decree, which require that ASCAP engage in non-exclusive licensing. Although this specific exemption is absent from BMI Consent Decree, the general provision in the BMI Consent Decree requiring BMI to engage in non-exclusive licensing, plus the industry practice that has built around source licensing of theatrical performance rights, have achieved the same result. *See e.g., Nat'l Cable TV Ass'n v. Broad. Music, Inc.*, 772 F. Supp. 614, 620 n.12 (D.C. 1991) (following the Decrees "neither ASCAP nor BMI licenses movie theaters for music in the pictures they exhibit").

As a result of the Movie Theater Exemption, performance rights for movie theater screenings are cleared at the most logical, efficient, and practical point in time: when the song is being selected for inclusion in the film by the film's producer, and at the same time as other necessary rights are being negotiated. If a copyright owner in a particular song is charging too much for those rights, the producer can select a different song or commission a new song. Movie theaters lack any ability to engage in such negotiations—receiving content well after those decisions are made—and would be subject to hold up by ASCAP, BMI, or other performing rights organizations ("PROs") and music publishers if movie producers did not clear public performance rights at the source. Thus, far from being an impediment to free market transactions, this aspect of the consent decree regime has fostered a highly dynamic, competitive, and free market. Since it was first implemented in 1950, the Movie Theater Exemption has incentivized songwriters and music publishers to license all of their rights in movies in a competitive marketplace.

The Movie Theater Exemption makes sense, as theaters have no choice in what music is included in a movie; have no ability to negotiate the rights for the music in a movie; and cannot avoid playing the music altogether, as the music is integrated into a movie's audio file, like the dialogue. Movie producers, on the other hand, necessarily make choices about what music to include in their movies, and can do so in a competitive negotiation before the music has been integrated into the movie's audio file.

The Decrees benefit consumers by helping to keep the moviegoing experience affordable, and ensuring that it retains the variety of programming consumers expect. Movie theaters already struggle to keep ticket prices low in the face of increased regulation and costs of doing business. Unchecked PRO license fees, combined with the licensing fees paid to movie distributors, would

come right off the theaters' bottom lines to the detriment of consumers, songwriters, and filmmakers.

II. BACKGROUND

In order to publicly exhibit a movie, movie theaters secure a single license from a movie's distributor that covers all of the various rights embedded within a single feature, and then compensate the movie's distributor for use. This is possible because the Movie Theater Exemption prohibits PROs from licensing or suing movie theaters for public performances of the music in movies. As a result, PROs' members negotiate licensing with the film's *producers*, not the film's *exhibitors*. This sensible practice means that movie theaters do not need to obtain additional licenses for the public performance rights in the music embedded in movies. Instead, film producers secure all of the rights necessary for theatrical exhibition of a musical work,[2] including public performance rights in musical compositions included in the film, at the point of a movie's production.

Without the protections offered by the Decrees, the competitive marketplace for public performance rights enjoyed by movie theaters would likely evaporate, and the impact of new, unregulated PRO fees could force movie theaters into downsizing or closure. Movie theaters are crucial cultural touchstones in the United States. From large chains to mid-size regional circuits to single-screen theaters, movie theaters are vital to American life. They are gathering places that not only entertain moviegoers, but also provide an important economic and social engine for

[2] Filmmakers must secure a number of potential licenses when selecting music for a film. For example, a synchronization license permits a filmmaker to synchronize a song with a visual image; a master use license refers to use of a specific recording of a song; and soundtrack usage covers yet an additional right. *See,* ASCAP, *How to Acquire Music For Films: What Licenses Must I Get To Use A Song In My Film?*, https://www.ascap.com/help/career-development/How-To-Acquire-Music-For-Films.

their communities.[3] Movie theaters can be particularly important for consumers in smaller markets, where a movie theater may be a key place to gather with members of their community. Many rural areas also lack strong broadband service, which means that a movie theater may be the only reliable viewing option in those communities.[4]

A. Background on the Movie Theater Exemption

ASCAP was founded in 1914 in order to ensure that songwriters were able to collect fees for public performances of their works. By pooling together their performance rights, songwriters were able to benefit from ASCAP's blanket licenses, which ASCAP offered to bars, restaurants, and other places that played a wide variety of live or prerecorded music. The blanket licenses allowed proprietors of these businesses the freedom to play music spontaneously and responsively to their guests, while also ensuring that songwriters and publishers would be paid in an amount proportionate to the popularity of their particular repertory of songs.

By the mid-1920s, movie theaters regularly purchased blanket licenses to cover the live music that accompanied silent films. However, once movies began to include sound, ASCAP no longer had a compelling claim for movie theater owners to obtain blanket licenses, since movie theaters no longer required the flexibility of live music in their auditoriums. Rather than abandon a lucrative licensing arrangement, ASCAP implemented a membership rule prohibiting its members from granting public performance rights to film producers at the same time the

[3] Daniel Cox & Ryan Streeter, *Having a Library or Café Down the Block Could Change Your Life*, THE ATLANTIC (May 20, 2019), https://www.theatlantic.com/ideas/archive/2019/05/america-needs-more-community-spaces/589729/ (Access to key public amenities including movie theaters, "brings a host of social benefits, such as increased trust, decreased loneliness, and a stronger sense of attachment to where we live.")

[4] "Fast, reliable internet service has become essential for everything from getting news to finding a job. But 24% of rural adults say access to high-speed Internet is a major problem in their local community . . . . An additional 34% of rural residents see this as a minor problem, meaning that roughly six-in-ten rural Americans (58%) believe access to high speed Internet is a problem in their area." Monica Anderson, *About a Quarter of Rural Americans Say Access to High-Speed Internet is a Major Problem*, FACT TANK (Sept. 10, 2018), http://www.pewresearch.org/facttank/2018/09/10/about-a-quarter-of-rural-americans-say-access-to-high-speed-internet-is-a-major-problem/

members granted synchronization rights for the music embedded in the film.[5] This illogical decoupling of performance and synchronization rights was a novel play by ASCAP to take advantage of the uncertainty present at the dawn of a new medium.[6]

The movie studios, in turn, were incentivized to adhere to this scheme because they shared in ASCAP's rate hikes as the "publishers" of the compositions in the films.[7] Movie theater owners now had no control over the music in a particular movie, no ability to alter or omit the songs, and no alternative licensing mechanisms. ASCAP took advantage of its market control to raise the exhibitors' rates for public performance licenses by as much as 1,500 percent.[8] At the same time, the five major studios used their market power to engage in other discriminatory distribution and pricing practices in relation to the films themselves.[9] These parallel pressures led to a series of corresponding lawsuits. The Department filed suit against the motion picture studios, leading to ten years of litigation culminating in a Supreme Court decision and a series of consent decrees (called the *Paramount* Consent Decrees) that restricted specific anticompetitive business practices that had been engaged in by movie studios. Separately, movie theater owners filed a massive private antitrust suit against ASCAP—*Alden-Rochelle, Inc. v.*

[5] *Alden - Rochelle, Inc. v. Am. Soc. of Composers*, ("Alden-Rochelle") 80 F. Supp. 888, 891-93 (S.D.N.Y. 1948).

[6] As will be described further in Section V(A) below, ASCAP has attempted this strategy repeatedly throughout the history of entertainment, and without the explicit protections of an exemption such as the one governing movie theater owners, it has been nearly impossible for other stakeholders to license fixed audiovisual works without a supplementary blanket license.

[7] *Alden-Rochelle*, 80 F. Supp. at 893 (The motion picture producers, through their ownership of a number of music publishing corporations who were members of ASCAP, shared in the funds collected by ASCAP from all sources, including the licensing of motion picture theatres. The producer publishers drew down 37% of the 50% of the net proceeds of ASCAP's licenses, allotted to publisher members by ASCAP.). This is still the case with two studio affiliates, SonyATV and Universal Music Publishing Group, alone controlling some 50% of the US publishing market. *In re Petition of Pandora Media, Inc.*, Civ. No. 12-8035 (DLC), 2014 WL 1088101 (S.D.N.Y. Mar. 18, 2014).

[8] *Alden-Rochelle*, 80 F. Supp. at 895.

[9] *See generally United States v. Paramount*, 334 U.S. 131 (1948).

ASCAP.[10] After trial, the district court concluded that "[a]lmost every part of the Ascap structure, almost all of Ascap's activities in licensing motion picture theaters, involve a violation of the anti-trust laws."[11] The court then entered a broad injunction that, among other things, prohibited ASCAP from licensing movie theaters.[12]

As a direct result of the *Alden-Rochelle* decision, ASCAP and the Department entered into negotiations to modify the existing ASCAP consent decree.[13] Those negotiations led to the adoption of the Movie Theater Exemption. Specifically, the 1950 amendment to the ASCAP Decree carried forward the *Alden-Rochelle* injunction, prohibiting ASCAP from charging performance license fees to movie theater owners for music synchronized with motion pictures. The 1950 amendment also prohibited ASCAP members from suing movie theater owners for copyright infringement of music in a motion picture.[14] Significantly, the comprehensive amendments to the ASCAP consent decree in 2001 carried forward these prohibitions once again.[15] In other words, fifty years after its initial incorporation, the express mandate of the Movie Theater Exemption remained vital enough for ongoing express inclusion in the Decree.

B. Source Licensing for Motion Pictures is Effective and Efficient

Music licensing for theatrical exhibition is simple: Since the time of the Decrees, movie theaters pay for all the rights associated with a film's license directly to the film's distributor as part of the box office percentage licensing fee. The movie's producers in turn negotiate for all

[10] *Alden-Rochelle*, 80 F. Supp. at 892.
[11] *Id.*at 893. A separate court, in rejecting a copyright infringement suit brought by music publishers against movie theaters, reached the same conclusion as in *Alden-Rochelle*. *See N. Witmark & Sons v. Jensen*, 80 F. Supp. 843, 849 (D. Minn. 1948).
[12] *See Alden-Rochelle, Inc. v. Am. Soc. of Composers ("Alden II")*, 80 F. Supp. 900, 901 (S.D.N.Y. 1948)
[13] *See* Mem. of Dep't of Justice in Support of the Joint Motion to Enter Second Amended Final Judgment, at 12, at https://www.justice.gov/atr/case-document/file/485996/download.
[14] *Amended Final Judgment in United States v. ASCAP*, No. 41-1395, 1950 U.S. Dist. LEXIS 1900 (S.D.N.Y. Mar. 14, 1950) ("AFJ")
[15] Second Amended Final Judgment in *United States v. ASCAP*, No. 41-1395, 2001 WL 1589999 (S.D.N.Y. June 11, 2001) ("AFJ2").

the necessary rights associated with the creation and theatrical exhibition of a film at the same time, including both the synchronization and performance licenses for songs. In this way, producers can seek the appropriate artistic contributors, including writers, actors, songwriters, and choreographers, among others, and negotiate the compensation arrangement for the entire package of rights associated with each copyright holder at one time. This overall cost is determined at the outset and producers are able to craft an appropriate business plan for each film. Exhibitors license a full film with all the required rights already cleared so there is no additional license needed to lawfully exhibit the licensed title. In short: producers are responsible for clearing all rights required for theatrical exhibition of a film; exhibitors are responsible for playing the title with no alterations in exchange for a share of the box office.

The Movie Theater Exemption helps place the negotiating responsibility where it belongs—with the party selecting the songs for each film. This is a common-sense, pro-competitive, and efficient process that works best for songwriters, exhibitors, and audiences.[16] Exhibitors still pay for all of the creative rights embedded within the films they license, but the payments are effectively incorporated into their negotiated rates with each distributor.[17] Distributors in turn are able to address varying competitive concerns when they are selecting music, and account for the corresponding payments during the negotiation process. This process allows songwriters to compete for the recognition that inclusion in a feature film affords, while

[16] *See CBS v. Am. Soc'y of Composers*, 400 F. Supp. 737, 760 (S.D.N.Y. 1975). In *CBS*, Albert Berman, managing director of the Harry Fox Agency, Inc. and Marion Mingle, the Fox employee who handled music rights, gave testimony describing the simple process they use to license both synchronization and performing rights for use in a theatrical motion picture—which can be completed roughly simultaneously most of the time. Mingle and her assistant were able to license "several hundred movies each year" this way. *See also Broad. Music, Inc. v. Columbia Broad. Sys., Inc.,* ("*BMI v. CBS*") 441 U.S. 1, 33 (1979) (Stevens, J. dissenting) (movie theater exemption "promptly" created a "competitive market").

[17] *See,* Lionel S. Sobel, *The Legal and Business Aspect of Motion Picture and Television Soundtrack Music*, 8 LOY. L.A. ENT. L. REV. 231, 244 (1988) ("[M]otion picture producers pass [the performance license] cost on to distributors, which in turn pass it along to theaters in the form of greater exhibition license fees.").

also ensuring that their specific creative contributions are appropriately compensated. It also places songwriters on the same footing as all the other artists—actors, writers, set designers, lighting specialists, prop masters, directors, and so on—who lend their creative talents to a film. This system ensures songwriters can get fair compensation for their songs, helps promote lesser-known songwriters, and allows established songwriters flexibility in negotiating their compensation.

For example, a studio with a small budget film may select titles from young songwriters with little previous exposure to incorporate into their film. They may offer a moderate rate, which the artist may accept for the career and other benefits that will come from being featured in a theatrical release. On the other end of the spectrum, a major producer may want to signal the prestige of a particular title by incorporating very well-known songs into the film and the corresponding marketing materials. For these purposes, the established songwriter may either ask for a significant upfront fee, or may wish to gamble on the future success of the project by negotiating for a piece of the profits in exchange for a lower initial fee. Indeed, the possibilities for these negotiations are limited only by law and imagination. Agents, managers, and creative guilds have created a wide range of compensation schemes for downstream rights for all the other copyright holders (writers, directors, choreographers, etc.) that lend their talents to a particular film. Further, by negotiating for all rights at the outset, the songwriter is also able to negotiate compensation for each downstream performance, rather than simply being paid based on an estimate out of the wide pool of rights in the blanket license.[18]

[18] Of course, musicians will still be compensated for all other appropriate uses of the blanket license structure, such as licenses for music played in lobbies or restaurants. The Decrees also provide protections against supra-competitive pricing of these licenses.

III. THE DECREES CONTINUE TO PROTECT COMPETITION

In 2018, the Department announced its intentions to review a number of "legacy" consent decrees, including the Paramount Decrees and the ASCAP and BMI Decrees. As described by the Department, this review is intended to target "outdated antitrust judgments" that "no longer protect competition."[19] Since that initial announcement, the Department has successfully achieved judgments to terminate nearly 500 decrees and filed additional motions to terminate such decrees in 63 district courts, often consolidating large numbers of decrees into a single motion.[20] No public comments were received regarding any of these decree reviews.[21]

The Department has stated that a decree may no longer be useful if: the "essential terms of the judgment have been satisfied, most defendants likely no longer exist, the judgment largely prohibits that which the antitrust laws already prohibit, [or] market conditions likely have changed."[22] Unlike many of the legacy consent decrees, the Decrees at issue here fail to satisfy any of the Department's four self-identified criteria for termination.

First, the "essential terms" of the Decrees have not been satisfied. As recently as 2016, the Department found that ASCAP was in violation of the prohibition on exclusive licenses with

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[19] Department of Justice, Office of Public Affairs, *Department of Justice Announces Initiative to Terminate "Legacy" Antitrust Judgments* (July 9, 2018), https://www.justice.gov/opa/pr/department-justice-announces-initiative-terminate-legacy-antitrust-judgments

[20] ND CA 37 in one motion, https://www.justice.gov/atr/page/file/1171631/download; DC 19 in one motion, https://www.justice.gov/atr/page/file/1079151/download; ED NY 14 in one motion, https://www.justice.gov/atr/page/file/1175216/download; MA 24 in one motion, https://www.justice.gov/atr/page/file/1164936/download;

[21] See e.g., California Central District: United States' Motion to Terminate Legacy Antitrust Judgments and Memorandum in Support Thereof, 8 (citing no comments received as a justification for moving to terminate 37 legacy judgments), *available at*, https://www.justice.gov/atr/page/file/1171631/download; District of Columbia: United States' Motion to Terminate Legacy Antitrust Judgments and Memorandum in Support Thereof, 3 (citing no comments received as a justification for moving to terminate 19 legacy judgments), *available at*, https://www.justice.gov/atr/page/file/1079151/download; Northern District of New York: United States' Motion to Terminate Legacy Antitrust Judgments and Memorandum in Support Thereof, 2 (citing no comments received as a justification for moving to terminate 5 legacy judgments), *available at,* https://www.justice.gov/atr/page/file/1156171/download.

[22] *See supra* note 19.

its members. The Department pursued a fine against ASCAP, and entered into a 10-year settlement agreement with fairly extensive oversight and reporting requirements.[23] That same year, the Department concluded a multi-year review of the Decrees and declined to modify them, holding instead that "the current system has well served music creators and music users for decades and should remain intact."[24]

Second, that the Defendants still exist is certainly unquestioned.

Third, the Decrees do far more than prohibit what the "antitrust laws already prohibit." Unlike other judgments that the Department has moved to terminate, the Decrees' prohibitions amount to much more than simply an "admonition that defendants must not violate the law."[25] In fact, the Supreme Court declined to hold that a blanket license was a *per se* violation of the Sherman Act, *because of the "unique" protections of the Decrees*, noting specifically:

> [I]t cannot be ignored that the Federal Executive and Judiciary have carefully scrutinized ASCAP and the challenged conduct, **have imposed restrictions on various of ASCAP's practices, and, by the terms of the decree, stand ready to provide further consideration, supervision, and perhaps invalidation of asserted anticompetitive practices**. **In these circumstances**, **we have a unique indicator that the challenged practice may have**

[23] Settlement Agreement and Order, *United States v. American Society of Composers, Authors and Publishers,* No. 41-1395 (DLC) (S.D.N.Y. 2016). https://www.justice.gov/atr/file/868186/download.
[24] Statement of the Department of Justice on the Closing of the Antitrust Division's Review of the ASCAP and BMI Consent Decrees, August 4, 2016, page 3, *available at*, https://www.justice.gov/atr/file/882101/download.
[25] *See, e.g.,* California Central District: United States' Motion to Terminate Legacy Antitrust Judgments and Memorandum in Support Thereof, (moving to terminate 37 legacy judgments, on the ground that their "core provisions" merely "prohibit acts that the antitrust laws already prohibit" such as price fixing, market allocation or group boycott), page 6, https://www.justice.gov/atr/page/file/1171631/download; Eastern District of New York: United States' Motion to Terminate Legacy Antitrust Judgments, (moving to terminate 14 legacy judgments, on the ground that their "core provisions" merely "prohibit acts that are illegal under the antitrust laws" such as market allocation, price fixing or customer allocation), page 8, https://www.justice.gov/atr/page/file/1175216/download; District of Columbia: United States' Motion to Terminate Legacy Antitrust Judgments and Memorandum in Support Thereof, (moving to terminate 19 legacy judgments, on the ground that their "core provisions" merely "prohibit acts that are illegal under the antitrust laws" such as customer allocation, price fixing or group boycott), page 9, https://www.justice.gov/atr/page/file/1079146/download.

> **redeeming competitive virtues** and that the search for those values is not almost sure to be in vain.[26]

Thus, the Decrees strike a critical balance by allowing the PROs to engage in behavior that represents "substantial deviations from the competitive norm"[27] but that nonetheless serves an important purpose, while also providing critical oversight and heightened enforcement mechanisms to prevent anticompetitive harms.

Fourth, and finally, the "market conditions" have not changed for theatrical exhibition or the PROs. Movie theaters still require licensed content that includes music that may not be altered or removed. This content still comes from studios, which are frequently themselves the "publishers" of musical compositions in films, and thus have the incentive to further ASCAP and BMI's anticompetitive actions. ASCAP and BMI in turn still exist to aggregate and license the copyright rights of now hundreds of thousands of otherwise competing rights holders.

The Decrees have shaped how entire industries interact and operate for decades and to remove them would introduce chaos in the marketplace, to the detriment of all participants, including consumers. Indeed, Congress was so concerned about any wide-scale changes to the Decrees that as recently as 2018, it added a provision to the Music Modernization Act asserting the fundamental role the Decrees play, and requiring additional notice and reporting by the Department during any review of the Decrees.[28] Unlike many other legacy decrees, which

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[26] *BMI v. CBS*, 441 U.S. at 25 (emphasis added).
[27] *Id*. at 32 (Stevens, J., dissenting).
[28] "[T]he ASCAP and BMI consent decrees have fundamentally shaped the marketplace for licensing public performance rights in musical works for nearly 80 years and entire industries have developed around them . . . There is serious concern that terminating the ASCAP and BMI decrees without a clear alternative framework in place would result in serious disruption in the marketplace, harming creators, copyright owners, licensees, and consumers. . . Given these ongoing concerns, section 105 of the legislation creates a formal role for Congress during any review by the Department of Justice of a consent decree with a performing rights society, such as ASCAP or BMI. During any review of such a decree, the Department of Justice shall provide upon request timely briefings to any Member of the Senate and House Judiciary Committees regarding the status of such review. The Department of Justice shall also

govern extinct industries and companies, the ASCAP and BMI Decrees are incredibly vital to this day. Their current relevance is evidenced by the wealth of comments submitted by significant segments of the U.S. economy—the radio and television industries; internet companies; the restaurant and bar industries; and these comments from the motion picture exhibitors' industry—in support of continuing or expanding the decrees during this and previous review periods.[29] This in stark contrast to the other decrees the Department has moved to vacate as a part of this review process, which have received little to no attention.[30]

The Decrees have led to a particularly efficient market structure for rights included in films for exhibition in movie theaters. This structure reduces transaction costs by placing the negotiating responsibility with the party selecting each song at the same time that they are negotiating for other necessary rights in the same compositions — i.e., synchronization rights. This system also ensures direct compensation for each copyright owner, rather than having royalties flow through the PROs for distribution as determined by surveys and reduced by overhead fees.[31]

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share with such Members detailed and timely information and pertinent documents related to the review . . ." Music Modernization Act, S. 2823, 115th Cong. § 105 (2018)

[29] https://www.justice.gov/atr/public-comments (2014 comments); https://www.justice.gov/atr/ASCAP-BMI-comments-2015 (2015 comments). See for instance, Fox News' 2014 comment in favor of the current rate-setting function performed by the rate court over a newly imposed mandatory arbitration system or Downtown Music Publishing's 2015 comment that "the best and fairest means to compensate songwriters for their hard work is to leave the present licensing mechanics intact" and that "any change…could have devastating consequences for thousands of songwriters and members of the publishing community."

[30] Although there were no public comments filed in relation to any of the consent decrees that the Department has moved to terminate, the *Paramount* consent decree review did receive a large number of public comments. https://www.justice.gov/atr/paramount-consent-decree-review-public-comments-2018. *See, e.g.,* Cinetopia LLC noting the importance of the *Paramount* consent decrees and their fostering of a competitive system in the movie industry. But the circumstances surrounding the *Paramount* consent decrees could not be more different and, tellingly the Department has not yet moved to vacate those decrees either.

[31] Payments to members are net of the PROs overhead and, in the case of SESAC and GMR, profits.

The benefits of this system are clear. Source licensing *lowers transaction costs* by ensuring that all rights are cleared in the same way as other music and creative rights, whereby artists negotiate myriad compensation options depending on their perceived value to the film. There is already a mechanism in place for negotiating synchronization rights to embed a song in a film, so the additional transaction costs (if any) are negligible.[32] Negotiating for the song within the context of its use and importance to the film and scene in which it appears also *ensures that the songwriter is compensated for the true value of the song*, rather than by subjecting it to a separate process where value is based simply on the fact that the song is played.

That this straightforward structure is only possible with several layers of enforcement mechanisms demonstrates the ongoing need for oversight. In essence, explicit precautions embodied by the Decrees, including the Movie Theater Exemption, are necessary to prevent anticompetitive abuse because the inherent structure of the PRO blanket license represents a "significant deviation from the competitive norm."[33] Even where a PRO blanket license provides substantial efficiency benefits, safeguards such as the rate court are necessary to mitigate the market power derived from collective licensing of large music catalogues.[34] Without the Decrees, PROs will continue to pool separate copyrights together, but without a rate court or other checks required by the Decrees, the likelihood of anticompetitive behavior is all but certain. While some anticompetitive acts may eventually be remedied—at great time, effort, and

[32] *See supra* note 15.
[33] Brief for the US as Amicus Curiae 16, *ABC v. ASCAP*, 620 F.2d 930 (2nd Cir. 1980) (No. 75-7600 (November 5, 1979).
[34] *ASCAP v. MobiTV, Inc*., 681 F.3d 76, 82 (2d Cir. 2012) ("[T]he rate-setting court must take into account the fact that ASCAP, as a monopolist, exercises market-distorting power in negotiations for the use of its music."); *United States v. BMI (In re Application of Music Choice)*, 426 F.3d 91, 96 (2d Cir. 2005) ("[R]ate-setting courts must take seriously the fact that they exist as a result of monopolists exercising disproportionate power over the market for music rights."); *ASCAP v. Showtime/The Movie Channel, Inc.*, 912 F.2d 563,570 (2d Cir. 1990) (rate court not simply a "placebo" intended to rubber stamp the "fees ASCAP has successfully obtained from other users.").

expense—through private antitrust litigation, there is no reason to assume that individual remedies in judgments or settlements will be coherent or consistent. Many businesses will not have the sophistication or financial ability to re-establish in costly private suits what the Decrees already provide to the public. Private litigation outcomes are too variable — and this industry is simply too active and too dependent on the Decrees — for a sunset to be in the public interest.

IV. THE MOVIE THEATER EXEMPTION PREVENTS THE ILLOGICAL AND ANTICOMPETITIVE OUTCOME OF REQUIRING SEPARATE PERFORMING RIGHTS PAYMENTS FOR MOVIES

The blanket license offered by the PROs is a creative solution to a specific problem: businesses from radio stations, to bars, restaurants and hotels, need the ability to spontaneously play a wide variety of music,[35] which would be impossible for songwriters to police for compensation. For such licensees, the sheer volume of music would make individual negotiations infeasible. As the Supreme Court described the problem: "those who performed copyrighted music for profit were so numerous and widespread, and most performances so fleeting, that as a practical matter it was impossible for the many individual copyright owners to negotiate with and license the users and to detect unauthorized uses."[36] By pooling their performance rights together in a PRO, those businesses with that specific kind of need are able to enter simple licensing transactions for entire libraries of songs, and songwriters are able to receive at least an estimated proportional share from the blanket licenses. This guaranteed compensation outweighs the administrative costs and lack of direct per-play payment in this particular scenario.

[35] https://mic-coalition.org/. Indeed, many movie theaters obtain blanket licenses for the music they play in their lobbies, bars and/or restaurants.
[36] *BMI v. CBS*, 441 U.S. at 4-5.

This logic does not extend to motion pictures, where there are already extensive source negotiations for the other associated rights in the relevant musical compositions (*e.g.*, the synchronization rights). In fact, decoupling the necessary related public performance rights from the synchronization rights creates an economically irrational structure that exists merely to increase the market power of the PROs. Simply put, a movie producer that creates a film with multiple integrated rights should not be able to license the film for exhibition without clearing all associated rights—including the right of public performance inherent in exhibition.

But in contexts outside of movie theaters, including in the broadcast television and streaming media industries, the public performance rights in musical compositions have been divorced from all the other rights in the movie. This is not because of some innovation or improvement in music licensing: it simply reflects the PROs' use of significant market power at a time when those industries were nascent. Indeed, in those contexts, licensing of performance rights is unquestionably *less* efficient and *less* competitive. By creating a regime where performance rights were decoupled from other necessary rights, the PROs created a market where end users were forced to pay a ransom to unlock the movie they already paid to license. Since the non-theatrical exhibitors had absolutely no control over the music and no way to use their licenses without the additional blanket license, these licensees were put in a take-it-or-leave-it bind since the license to exhibit a motion picture is worthless without the actual ability to exhibit the title.

In addition, if forced to pay additional blanket fees, exhibitors will be less likely to take chances on titles by smaller distributors, thereby penalizing new songwriters, distributors, and audiences, and causing harmful effects on the independent film industry. Unlike broadcasters, who must license a significant amount of titles on a daily basis, each movie theater location is

limited by the number of screens in each complex.[37] Further, license terms with distributors typically require that a particular film be the only title on a contracted screen, often for a period of weeks.[38] This limited screen inventory also means that exhibitors must carefully consider the individual merits of a particular title before entering into any license agreement with a distributor. Indeed, this decision involves a painstaking analysis of each theater location's demographics, audience history, and more. Margins in exhibition are famously tight, so the terms on each title must be justified by corresponding anticipated revenue.[39]

Without the protections of the Movie Theater Exemption, movie theaters would likely be forced to absorb the incremental costs of blanket license fees to cover all the songs included in every theatrical title. Currently, the terms with studios reflect the costs of making and marketing a particular title. Therefore, a big-budget title from a large studio will likely have significantly higher film rental than an independent film, with its correspondingly smaller costs.[40] In contrast, a blanket license comes with a fee that does not vary based on the amount or nature of a PRO's music performed by a licensee. So a studio that carefully chose a songwriter for the cost savings still costs the exhibitor the same amount as a studio film heavily featuring famous songs. This elimination of pricing competition would put smaller studios at a distinct disadvantage: despite lower film rentals, the exhibitors would be paying proportionally *more* in total licensing fees for

[37] Broadcasters also frequently license content of shorter duration than the average movie. For example, a broadcaster could license six different thirty-minute episodes of a show in the same three-hour period of one feature film.

[38] *See, e.g.,* Chris Taylor, *Disney has an Impressive List of Demands for Theaters who Want to Show 'The Last Jedi'*, MASHABLE (Nov. 1, 2017), https://mashable.com/2017/11/01/star-wars-last-jedi-theaters-disney/ (exhibitors forced to play *Star Wars: The Last Jedi* for four weeks or be forced to pay a penalty).

[39] *Why Does Popcorn at the Movies Cost So Much?*, MARKETPLACE (Aug. 4, 2014) https://www.marketplace.org/2014/08/04/why-does-popcorn-movies-cost-so-much/ ("profit margins for a whole theater average around 4.3 percent for the industry")

[40] Ashley Rodriguez, *Small Theater Chains Worry a Mid-Century Rule is all That Stands Between Them and Extinction*, QUARTZ (Dec. 16, 2018), https://qz.com/1479408/small-theater-chains-worry-a-mid-century-rule-is-all-that-stands-between-them-and-extinction/ (A bigger title by a major distributor may command upwards of 65% of ticket sales over the run of the film, compared to the 45%-50% charged by other studios or for smaller titles)

these titles than for the tentpole title with its soundtrack of hit songs.[41] In this system, the major studios would be able to subsidize their costs, at the expense of their competitors and the exhibitors. This is particularly rife for abuse where the studios as publishers also stand to benefit financially from PRO distributions for theatrical exhibition.

Further, despite the fact that the fees to cover the theatrical performance rights of the movie as a whole are *already included in the terms* between studios and exhibitors, it is unlikely that studios will pass along any cost savings stemming from no longer having to secure performance rights for musical works to exhibitors. As a result, exhibitors would be essentially paying more for no added value, which would in turn eat into exhibitors' already narrow margins. With these added costs, exhibitors would necessarily choose titles with more "guaranteed" revenue streams such as sequels, or titles with large marketing budgets and/or known characters/intellectual property. In doing so, this would significantly reduce the ability to

[41] Indeed, in *BMI v. CBS*, Justice Stevens in his dissent identified many of these factors as evidence of the unlawfulness of the blanket license as applied to broadcasters. While agreeing with the core holding of the majority, Stevens dissented because he determined there was ample evidence to find that the blanket license at issue was anticompetitive under the majority's rule of reason standard and therefore did not agree with the majority's decision to remand. Comparing the "competitive market" of the "motion picture industry" to the broadcasters' situation, he wrote:

> The record plainly establishes that there is no price competition between separate musical compositions. Under a blanket license, it is no more expensive for a network to play the most popular current hit in prime time than it is to use an unknown composition as background music in a soap opera. Because the cost to the user is unaffected by the amount used on any program or on all programs, the user has no incentive to economize by, for example, substituting what would otherwise be less expensive songs for established favorites or by reducing the quantity of music used on a program. . . . [T]he blanket license does not present a new songwriter with any opportunity to try to break into the market by offering his product for sale at an unusually low price. The absence of that opportunity, however unlikely it may be, is characteristic of a cartelized rather than a competitive market.

BMI v. CBS, 441 U.S. at 30-33.

program independent titles, or titles by smaller distributors, to the detriment of the songwriters, distributors, and audiences. This reduced output will harm consumer choice. And, without the key revenue from theatrical exhibition, many of these titles simply will not get made.[42]

V. REMOVAL OF THE MOVIE THEATER EXEMPTION WOULD LEAD TO CHAOS IN THE MOVIE THEATER INDUSTRY

For the movie theater industry, the Decrees have led to certainty regarding performing rights contracting and licensing. This free market solution has been supported by numerous stakeholders in the industry, including PROs.[43] The procedures and precedent outlined by the case law and ensuing Decrees offer clear guidelines for the industry that are generally accepted, and have led to little litigation between movie studios, theaters, and music publishers. Eliminating the Decrees, however, would lead to a tsunami of private litigation as industries try to re-implement some modicum of protection that the Decrees afford, and could threaten the health of the movie theater industry.

A. Removal of the Decrees Would Result in Widespread Litigation to Address Unresolved Legal Issues

The inevitable and immediate result of the removal of the Decrees will be private antitrust litigation against the PROs, music publishers, or both. Private antitrust litigation is

[42] *See* Comments Of The National Association Of Theatre Owners U.S. Department Of Justice, Antitrust Division Review Of Paramount Consent Decrees, Section II(C), *available at* https://www.natoonline.org/wp-content/uploads/2018/10/NATO-Comment-re-Paramount-Consent-Decree-Review.pdf (outlining critical role of exhibition in film greenlight/approval process and correlation between success in the movie theater and success in the ancillary markets).

[43] In advance of the 1950 ASCAP decree, government and BMI representatives agreed that the blanket license structure did not make sense for movies. *See* June 29, 1949 Department of Justice memorandum from Sigmund Timberg to Herbert A. Bergson (*Buffalo Broadcasting Co., Inc. v. ASCAP,* 546 F. Supp. 274, (S.D.N.Y. 1982) (Plaintiffs' Trial Exhibit 566)) ("Blanket licenses are not necessary in the motion picture industry."); A contemporaneous memorandum from BMI agreed "The synchronization and performance rights in all motion picture film, whether used for exhibition in theaters or for television broadcasting, should be treated as suggested herein." BMI memo to DOJ on proposed modifications of ASCAP consent decree submitted Oct. 25, 1949 cited in Frederick C. Boucher, *Blanket Music Licensing and Local Television: An Historical Accident in Need of Reform*, 44 WASH. & LEE L. REV. 1157, 1172-1173, fn 73, 74 (1987).

hugely expensive, and as a result only some industries will be able to even afford it. In addition, individual private litigants are not likely to seek the same set of remedies in their separate suits against the PROs. As a result, even successful private suits or suits brought on behalf of certain industries would at best result in a patchwork of regulation that does not protect all licensees and all consumers.[44] The sheer volume of rate-court litigation, even with the Decrees, shows that the performing rights licensing system is simply one that requires ongoing oversight. In contrast, the absence of litigation for movie theater rights proves that *the Movie Theater Exemption has resulted in significantly less oversight, and less ongoing federal intervention*.

The experience of TV broadcasters and other audiovisual licensees is instructive, and highlights the dangers of sunsetting the Decrees or otherwise eliminating the Movie Theater Exemption. At the time of the 1950 amendment to its Decree, ASCAP was able to limit the exemption to movie theaters, leaving television stations and other content licensees to purchase blanket licenses for music contained in their programming.[45] The rationale at the time was that television was still a new medium and mostly dependent upon live music, thereby requiring the flexibility of a blanket license. Moreover, ASCAP provided blanket licenses to broadcast stations free of charge at the time, given the nascent state of the medium.[46] This in turn made stations less inclined to fight for similar exemptions to the movie theaters.

In the decades following the creation of the Movie Theater Exemption, television changed significantly. Stations no longer heavily feature live content, relying instead on licensed

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[44] *See e.g., Alden Rochelle* and *Meredith Corp. v. SESAC*, 2011 U.S. Dist. LEXIS 24517 (S.D.N.Y. Mar. 8, 2011), (providing relief only to the litigating industries).

[45] *See, e.g.,* Boucher, *supra* n.43 at 1172-1173 (noting that the full benefits of the *Alden-Rochelle* decision did not extend to the television industry, leaving ASCAP the ability to license television broadcasters under the earlier blanket arrangements. *See also., CBS v. ASCAP: An Economic Analysis of a Political Problem*, FORDHAM LAW REVIEW: (Volume 47, 1978; Number 3; 277, 292) (stating that even after the 1950 amended judgment, ASCAP retained the ability to use the blanket license with respect to radio and television).

[46] *Id.* at 1170

content, including in part the same titles shown in movie theaters. However, without the Movie Theater Exemption, these stations generally required PRO license agreements to cover all possible uses of music in their programming, despite the inability to negotiate for individual songs. As their programming circumstances began to change, the TV broadcasters brought suit to obtain injunctive relief similar to that the movie theaters enjoy. However, in *BMI v. CBS*, the Supreme Court declined to hold that a blanket license was a *per se* violation of the Sherman Act, *because of the protections of the Decrees*.[47] As a result of this decision, subsequent cases have required lower courts to grapple with the individual facts of every challenge, often to the detriment of plaintiff broadcasters. Without the protection of the Movie Theater Exemption and the direct precedent of *Alden-Rochelle* and *Witmark*, these broadcast plaintiffs have a "long and unsuccessful" record of attempting to prove that the blanket licenses offered by ASCAP and BMI—as regulated by the Decrees—are illegal under the antitrust laws.[48] In multiple challenges, courts relied on various provisions in the Decrees, such as the availability of licenses on application, and the rate court, among others, to conclude that there were viable and practically available alternatives to the blanket license. [49]

Furthermore, many of these decisions were founded on the idea that because direct and source licensing were "fully available" it would naturally curb the PROs' anticompetitive

[47] *BMI v. CBS*, 441 U.S. at 25. *See also K-91, Inc. v. Gershwin Publishing Corp.*, 372 F.2d 1, 4 (9th Cir. 1967)("[A]s a potential combination in restraint of trade, ASCAP has been 'disinfected' by the [consent] decree.").

[48] *Meredith v. SESAC*, 2011 U.S. Dist. LEXIS at *39-40 (citing CBS Remand; *Buffalo Broadcasting Co., Inc. v. American Society of Composers, Authors and Publishers* ("Buffalo Broadcasting"), 744 F.2d 917 (2d Cir. 1984); *National Cable Television Ass'n, Inc. v. Broadcast Music, Inc*. ("NCTA"), 772 F.Supp. 614 (D.D.C. 1991).

[49] *Buffalo Broad. Co. v. ASCAP*, 744 F.2d 917, 932 (2d Cir. 1984) (source licensing possible for broadcasters because "grant of a performing rights license to ASCAP/BMI is on a non-exclusive basis" because of the Decrees). *Columbia Broadcasting Systems v. ASCAP*, 400 F. Supp. 737 (S.D.N.Y. 1975).

conduct.[50] However, those predictions — which themselves rely on the Decrees' requirement that ASCAP and BMI hold nonexclusive rights — have not proven true. Audiovisual licensees (other than movie theaters) have been embroiled in continual litigation against the PROs in the decades since.[51] The PROs have tried (unsuccessfully) to overcharge various audiovisual licensees over time, demonstrating the enduring importance of the Decrees to curb anticompetitive conduct.[52]

B. Removal of the Movie Theater Exemption Would Likely Lead to a Change in Custom that Would Harm the Industry and Consumers

There is no question that the Decrees changed the contracting practices of the studios, which continue to this day.[53] The Decrees put a stop to many of the earlier abuses and facilitated the growth of a competitive market, which allowed exhibitors more flexibility in programming. However, as described further in Section V(A) above, the PROs' efforts to leverage their market power with other licensees (such as broadcasters) of similar movie content that are not subject to

[50] ("CBS Remand")
[51] *See Id.*; Buffalo Broadcasting ("NCTA").
[52] *See, e.g., Am. Soc'y of Composers v. Showtime/The Movie Channel, Inc.*, 912 F.2d 563, 571 (2d Cir. 1990) (affirming rate court Magistrate's decision reducing ASCAP's rate for a blanket license from 25 cents per subscriber to 15 cents per subscriber based in part on the fact that the "market for licensing music rights is not freely competitive"); *Am. Soc'y of Composers v. MobiTV, Inc*., 681 F.3d 76 (2d Cir. 2012) (rejecting ASCAP's $15.8 million fee proposal for content aggregator, and instead setting fees at $405,000 - some 2.5% of the fee sought by ASCAP); *Broadcast Music, Inc v. DMX, Inc.*, 683 F.3d 32 (2d Cir. 2012) (setting fees based on actual competitive market data at 33% of those sought by ASCAP and 45% of those sought by BMI; *In re Petition of Pandora Media, Inc.*, Civ. No. 12-8035 (DLC), 2014 WL 1088101(S.D.N.Y. Mar. 18, 2014) (rejecting ASCAP's proposal of fee increases of more than 60% over a five year license term); *United States v. ASCAP (In Re Application of Buffalo Broad. Co.)*, No. 13-95 (WCC), 1993 WL 60687, at *16 (S.D.N.Y. Mar. 1, 1993) ("[T]he rate court must concern itself principally with defining a rate . . . that approximates the rates that would be set in a competitive market.").
[53] *Nat'l Cable TV Ass'n*, 772 F. Supp. at 629. The court referred to a number of synchronization licenses which all contained clauses "limiting the music performing rights to U.S. theatrical exhibition" and requiring additional licenses for any other exhibition of that particular title. The opinion specifically cites a Disney contract, which requires separate performing rights for television exhibitors. An "identical clause" was included in a Warner Bros. contract as well.

the Movie Theater Exemption reflects how such abusive business practices could easily re-emerge, absent sufficient protections as those afforded by the Decrees.

Movie theaters are in a particularly precarious position, as the Movie Theater Exemption helps protect them both from the PROs *and* the studios, groups that have historically acted unlawfully to the detriment of exhibitors. In fact, the current uniformity of pricing structure for other licensees suggests that *more* intervention may be needed to enforce the policy concerns of the *ASCAP* Court. Numerous courts have found that both the PROs and the studio publishers have engaged inappropriately in their dealings with exhibitors, further justifying the need for amplified protection mechanisms.[54] Should the Department remove the Movie Theater Exemption, music publishers would take advantage of the change in the status quo to withhold performance rights for theatrical exhibition from movie studios, leaving exhibitors suddenly responsible to negotiate and pay a separate fee to lawfully exhibit the content they already licensed—without any realistic ability to decline such a license or negotiate down the proposed rate. A challenge to these practices would lead to expensive and protracted litigation, clogging the federal courts. Although the laws may be able to restore competition through source licensing eventually, many small studios, exhibitors, and consumers would suffer from the ambiguities and expenses in the process.

[54] *Paramount*, 334 U.S. at 142 (determining by inference that a horizontal agreement existed between defendants based on the "pattern of price fixing disclosed in the record"); see also *United States v. Paramount Pictures, Inc*., 334 F. Supp. 323, 336 (S.D.N.Y. 1946) ("The whole system presupposed a fixing of prices by all parties concerned in all competitive areas"); Alexandra Gil, *Breaking the Studios: Antitrust and the Motion Picture Industry*, 3 J.L & LIBERTY 83–123, 111-112 (2008) ("The implication of this logic is that absent an agreement between all defendants to set a minimum admission price, one or more of the defendants would have lowered its admission price, thereby attracting more consumers and forcing price competition."). Courts have similarly found that the PROs were anticompetitive in their dealings with movie theaters. *See, e.g., M. Witmark & Sons v. Jensen*, 80 F. Supp. 843, 849 (D. Minn. 1948) ("As illustrative of the monopoly and control of Ascap, it appears that in August, 1947, it attempted by a notice to all theatre owners, to raise substantially and arbitrarily the license fees for performance rights of Ascap music in all motion picture theatres in the United States."); *Alden-Rochelle*, 80 F. Supp. At 893 ("Almost every part of the Ascap structure, almost all of Ascap's activities in licensing motion picture theatres, involve a violation of the anti-trust laws.").

In addition, many exhibitors would have to increase their ticket prices to account for the sudden rise in costs. Compared to other entertainment options like sporting events and theme parks, moviegoing is the most affordable option,[55] and families rely on these stable prices[56] when selecting their entertainment. An abrupt increase in prices, driven by suddenly increased licensing costs, would place many exhibitors in an untenable bind: raise prices and drive away loyal customers, or absorb the costs and go out of business. Movie theaters are the heart of many communities and losing theaters would mean the loss of these crucial cultural centers across America.

VI. CONCLUSION

Doing away with the Movie Theater Exemption could end an era of stability, and paradoxically, lead to *greater* reliance on the Decrees to offset the PROs' market power. Moreover, should the Decrees be terminated in their entirety, whether now or several years in the future, the licensing market would essentially reset back to the pre-Decree era of the 1940s. PROs could again use their monopoly power to demand supra-competitive public performance fees from movie theaters. ASCAP and BMI would be free to enter into exclusive licensing agreements with their members and affiliates that cut off the ability of movie producers to secure licenses covering public performance rights at the time they secure synchronization rights to the same compositions and often to identical rightsholders. And movie theaters would be compelled to take out blanket licenses from the PROs for theatrical performances of movies, because theaters would have no way to anticipate what music from which repertory will be used in films

[55] Motion Picture Association of America, THEATRICAL AND HOME ENTERTAINMENT MARKET ENVIRONMENT REPORT, 16 (2018) ("[A] movie . . . is still the most affordable [entertainment] option, costing under $36 for a family of four.").
[56] Beatrice Verhoeven, *Average Movie Ticket Price Drops 1.6% in First Quarter of 2019*, THE WRAP (April 26, 2019), https://www.thewrap.com/average-movie-ticket-price-drops-1-6-in-first-quarter-of-2019/ (when adjusted for inflation, the average ticket price is below the average ticket price in 1969).

they exhibit. There would be no rate courts to prevent those fees from being exorbitant, and yet there is no guarantee that movie distributors would reduce the licensing fees they charge to movie theaters to account for these increased burdens.

As the Department observed in 2001, in explaining the rationale underlying the *Alden-Rochelle* injunction, "because copyright holders [can] directly negotiate with movie producers to license performance rights at the same time that they negotiate[] with those producers to license synchronization rights, there was no efficiency justification for allowing ASCAP to collectively license movie producers or theaters."[57] The same remains true today: the main effect of the Movie Theater Exemption has been to create a competitive and efficient market for performance rights *at the source*, and there is no efficiency or competitive justification for returning to the pre-*Alden-Rochelle* world.

Accordingly, NATO urges the Department to maintain the protections provided by the Decrees, and specifically preserve the Movie Theater Exemption, as it continues to support pro-competitive practices.

[57] *See* Mem. of Dep't of Justice in Support of the Joint Motion to Enter Second Amended Final Judgment, at 12, at https://www.justice.gov/atr/case-document/file/485996/download.