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AMERICAN MULTI-CINEMA, INC.'S ("AMC'S") COMMENTS TO THE U.S. DEPARTMENT OF JUSTICE ANTITRUST DIVISION REGARDING THE ASCAP AND BMI CONSENT DECREES AND THE MOVIE THEATER EXEMPTION

I. INTRODUCTION

American Multi-Cinema, Inc. ("AMC") respectfully submits the following comments in response to the U.S. Department of Justice Antitrust Division's ("DOJ's") invitation for public input regarding the consent decrees entered into between DOJ and the American Society of Composers, Authors and Publishers ("ASCAP") and Broadcast Music, Inc. ("BMI") (collectively, the "Decrees").[1] AMC urges DOJ to protect the ASCAP and BMI Decrees, and, in particular, to preserve the Movie Theater Exemption provision.[2]

AMC, founded by Edward Durwood in 1920, is a leading movie exhibition company in the U.S., and is headquartered in Leawood, Kansas. AMC introduced Multiplex theaters in the 1960s and the North American stadium seated Megaplex theater format in the 1990s. AMC owns, operates, or has interests in approximately 1,004 theaters and 11,036 screens in 15 countries. In

[1] *See* U.S. Dep't of Justice, Antitrust Consent Decree Review - ASCAP and BMI 2019, https://www.justice.gov/atr/antitrust-consent-decree-review-ascap-and-bmi-2019.

[2] The Movie Theater Exemption is embodied in Sections IV(E) and (G) of the ASCAP 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 the BMI 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 Television Ass'n, Inc. v. BMI*, 772 F. Supp. 614, 620 n.12 (D.D.C. 1991) (following the Decrees "neither ASCAP nor BMI licenses movie theaters for music in the pictures they exhibit").

the U.S., it has approximately 670 theater locations with a total of 8,114 screens, and serves more than 250 million moviegoers each year. It offers innovative features and amenities to enhance its guests' experience, including power recliners, AMC Dine-In Theatres, and premium presentation formats such as Dolby Cinema at AMC and IMAX. At its core—and consistent with its founding almost a century ago—AMC prides itself on providing a gathering place to entertain moviegoers, acting as a cultural hub and spurring economic growth in various communities.

In response to DOJ's review of the Decrees and the primary issue it is examining— whether the Decrees continue to serve a useful purpose—AMC believes that the Decrees, and in particular the Movie Theater Exemption contained therein, are just as vital today (and will continue to be in the future) as they previously have been to check the market power of ASCAP and BMI (collectively, the performing rights organizations, or "PROs"). The Decrees and the Movie Theater Exemption provide durable guardrails that facilitate the efficiencies of collective licensing, while protecting those at risk from harms posed by the PROs' market power, namely monopolistic pricing and other anticompetitive effects. By preserving the Decrees and the Movie Theater Exemption, the process for licensing public performance rights remains efficient and procompetitive, thereby ensuring that consumers, theatrical exhibitors, and artists are not negatively impacted, and they continue to benefit from a stable and functioning system. Any wholesale or piecemeal changes to the current foundation of the performance rights licensing ecosystem will create marketplace disruption and uncertainty, alongside the resulting protracted, widespread, and costly private litigation. Rather than leading to a more robust and competitive free market, the termination of the Decrees and the Movie Theater Exemption will have anticompetitive consequences, and upend a highly interdependent, vibrant, and complex industry that relies on the forward-thinking foundation laid by DOJ.

II. THE MOVIE THEATER EXEMPTION IS EFFICIENT AND RESULTS IN PROCOMPETITIVE BENEFITS TO CONSUMERS AND ARTISTS

A. The Movie Theater Exemption is Innovative, Yet Practical and Efficient.

The Decrees and Movie Theater Exemption contained therein are an elegant solution to clearing public performance rights, and to constraining the market power and resulting leverage of ASCAP and BMI—two of the largest PROs in the U.S.[3] While much has been written about the emerging marketplace for music in the U.S. and the resulting Decrees, it is worth underscoring that the Decrees and the Movie Theater Exemption were borne out of a series of marketplace failures in a competitive market, including predatory licensing and contracting practices by ASCAP, BMI, and the studios against movie theaters and others seeking to license or contract for public performance rights.[4] The Movie Theater Exemption was ahead of its time in that its

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[3] ASCAP has more than 715,000 members representing more than 11.5 million copyrighted works, and is the "worldwide leader" in performance royalties. *See ASCAP Annual Revenue and Distributions Continue to Break Records* (May 1, 2019), https://www.ascap.com/press/2019/05/05-01-financials-release. BMI is comprised of more than 900,000 members with more than 14 million musical works. *See* https://www.bmi.com/join. The market power and leverage resulting from the blanket licensing activities of ASCAP and BMI are beyond dispute. *See, e.g.,* Memorandum in Aid of Construction of the Final Judgment, *U.S. v. BMI*, No. 64-cv-3787, at 3-4 (S.D.N.Y filed June 4, 1999) ("The PROs' pooling and blanket licensing of copyrights creates antitrust concerns. Because both ASCAP and BMI have so many compositions in their repertories, most music users cannot avoid the need to take a license from each PRO. . . . As a result, the PROs have market power in setting fees for licenses"); Brief for the United States as Amicus Curiae, *In Re Application of THP Capstar Acquisition Corp.*, 756 F. Supp. 2d 516, at 1 (2d Cir. filed May 6, 2011) ("The PROs aggregate rights from copyright holders, license them on a non-exclusive basis to music users, and distribute royalties to their members. These and other functions provide some efficiencies, but also give the PROs significant market power.").

[4] When DOJ brought civil and criminal proceedings against ASCAP in 1940 for antitrust violations, it concluded that while coordination among composers was necessary to achieve the efficiencies sought by collective licensing, the resulting market power and harm to consumers was not acceptable. Thus, the foundation for the Decrees was laid. The ensuing litigation against ASCAP, and the court's decision in *Alden-Rochelle* resulted in a broad injunction that, among other things, prohibited ASCAP from imposing separate licensing requirements on movie theaters. *See Alden-Rochelle v. ASCAP*, 80 F. Supp. 888 (S.D.N.Y. 1948) (concluding 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"). 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 Consent Decree also prohibited ASCAP members from suing movie theater owners

procompetitive benefits were almost immediately realized, and because it continues to ensure a streamlined performance rights licensing and contracting process that benefits theatrical exhibitors, songwriters, and audiences, even in the face of a dynamic and evolving movie industry.[5]

The guardrails set forth in the Decrees and Movie Theater Exemption place the responsibility for negotiating all necessary performance rights on the producers (including public performance rights in musical compositions included in a movie) at the point of production. Movie theater companies like AMC negotiate with and pay film distributors for all rights associated with a single license and agree to play the film with no alterations, in exchange for a share of the box office receipts. PROs, per the terms of the Decrees and the Movie Theater Exemption, can only provide a blanket license, and are prohibited from licensing to or suing movie theaters for public performances of the music in movies.

The Movie Theater Exemption makes it possible for performance rights associated with movies to be cleared at the most logical, efficient, and practical point in time—when the song is being selected for inclusion in the film by its producer. If the copyright owner (such as a large studio that might also be a publisher) of a particular song is charging too much for those rights,

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for copyright infringement of music in a motion picture. Significantly, the comprehensive amendments to the ASCAP Consent Decree in 2001 carried forward these prohibitions once again. 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.

[5] *Broadcast Music, Inc. v. Columbia Broadcast Sys., Inc.*, 441 U.S. 1, 33 (1979) (Stevens, J. Dissenting) (Movie Theater Exemption "promptly" created a "competitive market".). The Decrees' continuing procompetitive benefits were again highlighted by DOJ upon the conclusion of its most recent review of the Decrees in 2016 when it stated that the Decrees "seek to prevent the anticompetitive exercise of market power while preserving the transformative benefits of blanket licensing," and "industry participants have benefited from the … access to the vast repertories of songs that each PRO." *See* U.S. Dep't of Justice, *Statement of the Dep't of Justice on the Closing of the Antitrust Division's Review of the ASCAP and BMI Consent Decrees*, at p. 3 (Aug. 4, 2016), https://www.justice.gov/atr/file/882101/download.

the producer can select a different song or commission a new song. It may also offer competing songwriters an opportunity to place a song in a particular movie, while ensuring their contributions are appropriately compensated. The overall cost of the package of rights (including those of writers, directors, choreographers, synchronization rights, and others)[6] is determined at the outset, and producers are able to engage in a competitive negotiation for such rights.

AMC (and, ultimately, AMC's moviegoers) benefit as well—when AMC negotiates to license a complete film with all of the required rights already cleared, it does not need to engage in any other negotiations for additional licenses with respect to the movie. This streamlined process means that AMC does not (and cannot) engage in any negotiations for performance rights, as it receives the content well after these decisions are made. Because movie producers own the rights to the intellectual property, and theater exhibitors (like AMC) do not know the music embedded in a movie until it is trade screened, this leaves exhibitors with no opportunity to negotiate performance rights prior to a movie's release date.

If the Movie Theater Exemption is dissolved or terminated (and producers are no longer required to purchase public performance rights at the source), AMC and other exhibitors will be subject to inefficient and costly negotiations with PROs exercising their market power and by large studios who are music publishers as well. This will result in increased PRO fees, thereby forcing movie theaters to divert money away from providing an enhanced and more innovative customer experience, and potentially may result in downsizing or closure of certain theaters.

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[6] Filmmakers are securing 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 How to Acquire Music for Films*, www.ascap.com.

B. Termination of the Movie Theater Exemption Will Result in Higher Costs and Other Anticompetitive Effects that will Impact Movie Theaters, Consumers, and Artists.

In addition to providing an efficient and less costly licensing process, the Decrees and the Movie Theater Exemption benefit consumers by helping to keep the moviegoing experience affordable, and by ensuring that AMC can provide a variety of movie choices that consumers have come to expect. AMC aims to maintain reasonably priced tickets in the face of increasing costs of innovation and regulation in order to stay competitive while providing a superior experience for its guests. If what's past is prologue, the termination of the Decrees and the Movie Theater Exemption means that PROs will revert to anticompetitive contracting practices that will result in protracted negotiations with PROs, escalated PRO license fees, and increased costs to AMC to the detriment of consumers and artists.

AMC and other movie theaters across the country are particularly at risk, as the Movie Theater Exemption currently helps protect them from the anticompetitive contracting practices of PROs and the studios. It is clear that the Decrees help deter anticompetitive contracting practices of the studios as they relate to movie theaters; and they facilitate the growth of a competitive market that allows AMC and others more flexibility in programming, and inspires more innovation and cultivates a best-in-class moviegoing experience. The PROs' efforts to leverage their market power against other licensees (such as broadcasters) with respect to similar movie content that is not subject to the Movie Theater Exemption shows how readily anticompetitive practices will flourish in the absence of the Decrees.[7] Numerous courts have found that both the PROs and the

[7] These anticompetitive practices continue to this day with respect to broadcasters. In *Nat'l Cable Television Ass'n, Inc. v. BMI*, 772 F. Supp. 614, 629 (D.D.C. 1991), 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

studio publishers historically have engaged inappropriately in their dealings with exhibitors, further justifying the need for amplified protection mechanisms.[8]

The current omnipresence of the blanket license suggests that the PROs have been able to achieve the same result (*i.e.*, mandatory blanket licenses) indirectly as had previously been sought through direct demands.[9] With many of the studios sharing in the publishing profits, and with the difficulty in changing longstanding business practices, there has been no will to negotiate with songwriters directly and to pass the costs downstream. Despite the efficiency of source licensing, and the direct revenues for the songwriters, the combined power of the PROs and the publishers is simply too strong for fair negotiations. For movie theater exhibitors in particular, these multiple threats require enhanced protection and oversight.

Should DOJ dissolve the Movie Theater Exemption, music publishers will take advantage of the change in the status quo to withhold performance rights for theatrical exhibition from movie studios, leaving exhibitors suddenly responsible for paying a supplemental fee to lawfully exhibit the content they previously licensed. A challenge to these practices will lead to expensive and time-consuming litigation, clogging the federal courts. Although the laws may be able to restore

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opinion specifically cites a Disney contract that requires separate performing rights for television exhibitors. An "identical clause" was included in a Warner Bros. contract as well.

[8] In *Paramount*, for example, the Court found that the studio's actions on their own were facially lawful, but nonetheless held that the facts of the industry and the uniformity of pricing implied that the studios were working in concert. *See United States v. Paramount*, 334 U.S. 131, 142 (1948) (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"); *see also Alden-Rochelle*, 80 F. Supp. 888 (concluding 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").

[9] *Broadcast Music, Inc.,* 441 U.S. at 33 (Stevens, J. Dissenting).

competition through source licensing eventually, many small studios, exhibitors, and consumers will suffer from the ambiguities and expense in the process.

In addition, many movie theaters will 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, a trip to a movie theater is still an affordable option for a family or group of friends.[10] A sudden increase in ticket prices, driven by a rapid increase in licensing costs, means that movie theaters will face a Hobson's choice—raise prices and drive away loyal customers, absorb the costs (and end up with less resources to innovate and provide a superior moviegoing experience), or end up downsizing or going out of business.

III. THE DECREES ARE APPROPRIATE, ESSENTIAL TO PROMOTING COMPETITION, AND THEIR TERMINATION WILL UPEND THE INDUSTRY

A. The Decrees are an Appropriate and Balanced Check on the PROs' Exercise of Market Power.

ASCAP and BMI were borne out of a need to correct certain market failures that undermined rights granted by Congress to incentivize music creation, and to decrease the prohibitively high costs of deterring copyright infringement. The PROs were formed so that composers and music publishers did not have to negotiate individually for public performance rights.[11] The PROs offer blanket licenses that convey the right of public performance for thousands of musical works at a single price. The resulting PRO paradox remains today—a private solution

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[10] *See, e.g.*, MPAA, *Theatrical Market Statistics*, at 16 (2018), https://www.mpaa.org/wp-content/uploads/2019/03/MPAA-THEME-Report-2018.pdf ("[A] movie is still the most affordable [entainment] option, costing a little over $36 for a family of four.").

[11] *See* Richard Epstein, *Antitrust Consent Decrees in Theory and Practice: Why Less is More*, at 30-31 (2007), *available at* https://www.aei.org/wp-content/uploads/2014/07/-antitrust-consent-decrees_112236997186.pdf.

to market failures created an environment where the PROs' market power led to anticompetitive conduct that went unchecked and diminished the efficiency-enhancing benefits of joint licensing.[12]

By the time DOJ commenced civil and criminal proceedings against ASCAP in 1940, it concluded that this was not an industry for which the free market, by itself, was an acceptable option.[13] Although coordination among music creators was necessary to achieve the efficiencies of ASCAP and BMI, the PROs' resulting market power and ability to set monopolistic prices left DOJ with an enforcement quandary—how to maintain the efficiency-enhancing aspects of the PROs, yet guard against their anticompetitive effects. The answer is found in the Decrees—first negotiated with ASCAP in 1941, modified in 1950, and again in 2001.[14] DOJ's logic in developing the Decrees is that appropriate restrictions on the behavior of PROs allow them to engage in collective licensing while mitigating the anticompetitive harms that will otherwise result.[15]

The Decrees are based on a set of underlying tenets, including: (1) preservation of the efficiencies associated with joint licensing through permissible (but not required) blanket licensing; (2) requiring non-exclusivity and allowing the option of individual licensing, thereby impeding the PROs' exercise of market power; (3) mandating that ASCAP and BMI offer genuine alternatives to the blanket license, and allow licensees to adjust their blanket license fees to reflect

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[12] *See id.*

[13] *See, supra,* note 4; *see also* Memorandum of the United States in Support of the Joint Motion to Enter a Second Amended Final Judgment, *United States v. ASCAP*, No. 41-1395, at 10 (S.D.N.Y. 2000).

[14] DOJ most recently undertook a lengthy and in-depth review of the Decrees starting in 2014, and concluded in 2016 that no modifications were needed. *See* U.S. Dep't of Justice, *Statement of the Dep't of Justice on the Closing of the Antitrust Division's Review of the ASCAP and BMI Consent Decrees*, at 3 (Aug. 4, 2016), *available at* https://www.justice.gov/atr/file/882101/download.

[15] Comment of Netflix, Inc. to U.S. Dep't of Justice, Attachment A (Comments of Dr. Adam B. Jaffe), at 3-4 (Aug. 6, 2014), https://www.justice.gov/sites/default/files/atr/legacy/2014/08/20/307908.pdf.

works for which they have secured performance rights directly from the rightsholders; and (4) providing a uniform dispute resolution process when direct negotiations fail, including the Rate Court process through which royalties are determined by a neutral party.[16]

While ASCAP and BMI assert that these safeguards are no longer necessary and they should be terminated or relaxed in various ways, it is widely recognized that the Decrees continue to help alleviate the most egregious effects of the PROs' market power and do not result in undue or burdensome regulation.[17] Even with the Decrees in place, the PROs still find ways to flex their market power, including by their inability to provide transparency regarding their catalogue of licensed works—for example, ASCAP is unable to provide a list of all songs that are covered by its blanket license, and it purportedly states that licenses must be obtained from all of the PROs in order to ensure that a licensee is protected.

B. The Decrees Continue to Promote Competition and are Useful.

AMC believes that DOJ's review will again establish that the Decrees have not outlived their usefulness—in fact, as discussed above, the Decrees continue to be the fulcrum to promoting competition and providing benefits to consumers and artists, and have not stood in the way of innovation or a free market. The factors that determine whether the Decrees continue to be useful as a matter of sound competition policy include whether the "essential terms of the judgment have been satisfied, most of the defendants likely no longer exist, the judgment largely prohibits that

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[16] *See id.*

[17] *See, e.g.,* Daniel A. Crane, *Bargaining in the Shadow of Rate-Setting Courts*, 76 ANTITRUST L.J. 307, 311 (2009) (finding that reliance on the rate courts is a rare exception); Gus Hurwitz, *Delrahim: Don't Stop Believing in the Music Decrees*, CPI JOURNAL (Aug. 9, 2018), https://www.competitionpolicyinternational.com/delrahim-dont-stop-believing-in-the-music-decrees/ (stating that a well-functioning music industry should not be disrupted by removing a significant framework upon which it is built); *see also, supra*, note 14.

which antitrust laws already prohibit, [or] market conditions likely have changed."[18] In contrast to the typical consent decree implemented by DOJ, the ASCAP and BMI Decrees were not intended to create a functioning market in the typical manner (by eliminating anticompetitive conduct and restoring competition)—instead, the Decrees permitted the blanket license, yet created an environment in which competition was feasible. As applied to the facts, it is evident the goals of the Decrees have yet to be achieved: (1) their essential terms have not been satisfied; (2) the defendants still exist; (3) the Decrees aim to do more than simply prohibit what antitrust laws prohibit; and (4) market conditions have not changed with respect to movie theater exhibition practices or the PROs such that the Decrees' protections are still of value.

With respect to the first element, the essential terms of the Decrees have not been satisfied. As recently as 2016, DOJ found that ASCAP violated the prohibition on exclusive licenses with its members. DOJ pursued a fine against ASCAP, and entered into a 10-year settlement agreement with fairly extensive oversight and reporting requirements.[19] That same year, DOJ concluded a multi-year review of the Decrees and declined to modify them, finding instead that "the current system has well served music creators and music users for decades and should remain intact."[20]

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[18] *See U.S. v. United Shoe Machinery Corp.*, 391 U.S. 244, 248 (1968); *see also New York v. Microsoft Corp.*, 531 F. Supp. 2d 141, 172-73 (D.D.C. 2008) (in support of its decision to extend the consent decree against Microsoft, the court set forth the collective standards that had been relied upon in considering termination of a consent decree); *see* U.S. Dep't of Justice Press Release, *Dep't of Justice Seeks to Terminate "Legacy" Antitrust Judgements in Federal District Court in Washington, D.C.* (July 9, 2018), *available at* https://www.justice.gov/opa/pr/department-justice-seeks-terminate-legacy-antitrust-judgments-federal-district-court.

[19] *See U.S. v. ASCAP*, No. 1:16-cv-03565 (S.D.N.Y. settlement agreement and order filed June 17, 2016), *available at* https://www.justice.gov/atr/file/868186/download.

[20] *See*, *supra*, note 14.

The second element is not in question—the defendants ASCAP and BMI are still in existence.

Regarding the third element, the Decrees are more than a mere reprimand to the defendants that they "must not violate the law."[21] In the *BMI* case, the Supreme Court declined to hold that a blanket license was a *per se* violation of Section 1 of the Sherman Act because the Decrees contained certain restrictions, including 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."[22] The Court emphasized that "substantial restraints placed on ASCAP and its members by the consent decree must not be ignored,"—chief among these are that members may grant ASCAP only nonexclusive rights to license their works for public performance.[23] The Decrees thus allow PROs to engage in blanket licensing—behavior that is otherwise unlawful—yet also provide for non-exclusive licensing rights and serve as important enforcement mechanisms and oversight to prevent anticompetitive effects.

As to the final element, market conditions have not changed for movie theater exhibitors or PROs. AMC still needs licensed content that includes music that may not be altered or removed. This content continues to be generated primarily by large studios, which may also be the publishers of musical scores and soundtracks in movies; thus, they are incentivized to further the anticompetitive practices of ASCAP and BMI. BMI and ASCAP still exist to aggregate and

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[21] *See, e.g.,* United States' Motion to Terminate Legacy Antitrust Judgments and Memorandum in Support Thereof, *In Re Termination of Legacy Antitrust Judgments*, CV 19-80-147, at 6 (N.D. Cal. filed June 5, 2019) (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), *available at* https://www.justice.gov/atr/page/file/1171631/download.

[22] *Broadcast Music, Inc.*, 441 U.S. at 24-25.

[23] *See id.* at 11.

license the performance rights of competing rights holders. The Decrees continue to enable the efficient and well-functioning market for public performance rights among a complex and interdependent ecosystem of groups and stakeholders, and, as discussed below, their removal will be replaced by great uncertainty and upend the industry. Unless market conditions radically change (and no such showing has been made by any stakeholder, including the PROs), the Decrees can only effectuate their goals by continuing to remain a critical and effective check on the PROs.

C. Termination of the Decrees Will Result in Protracted Litigation and Upend the Industry.

The Decrees have resulted in an efficient and certain process surrounding the licensing of and contracting for performance rights in the movie exhibition industry. Supported by numerous stakeholders in the industry, including PROs,[24] the case law and Decrees offer clear guidelines for the industry that are generally accepted by movie studios, theaters, and music publishers. Dissolving the Decrees will upend the industry, lead to uncertainty, and result in lengthy litigation as various stakeholders attempt to reinstitute the protections afforded by the current Decrees.

Private antitrust litigation can be a prohibitive drain on time and money, and, as a result, only some industry participants will be able to shoulder this burden. In addition, individual private litigants are not likely to seek the same set of remedies in their separate suits against the PROs.

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[24] As early as March 1949, in an internal DOJ memorandum, Sigmund Timberg (the principal negotiator for DOJ) noted that ASCAP had already agreed to a provision requiring, for motion pictures, that the licensing of performance rights occur solely through movie producers, and a few months later, ASCAP agreed to this approach. *See* U.S. Dep't of Justice, Memorandum from Sigmund Timberg to Herbert A. Bergson, at 2 (Mar. 8, 1949); *see also* U.S. Dep't of Justice, Memorandum from Sigmund Timberg to Harold Lasser and Beatrice Rosenberg, at 2 (May 2, 1949). A contemporaneous memorandum from BMI agreed "[t]he 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." *See* BMI Memorandum to U.S. Dep't of Justice on Proposed Modifications of ASCAP Consent Decree, at 72-73 (Oct. 25, 1949).

Consequently, even successful private claims or claims brought on behalf of certain industries will (at best) result in a patchwork of regulation that does not protect all licensees and consumers.[25]

Given the length of time that the Decrees have been in place, and how movie theaters and other stakeholders have evolved and interacted with them during this time, the removal of the Decrees will upend the industry and negatively impact those who benefit from them most—consumers and artists. The Decrees continue to govern relevant and current stakeholders, unlike many of the other legacy decrees that DOJ is reviewing, and many of the stakeholders impacted by the Decrees are weighing in with supportive comments during this DOJ review period.[26]

IV. CONCLUSION

There is simply no evidence that the Decrees or the Movie Theater Exemption have outlived their intended purpose—quite to the contrary, since the implementation of the Decrees in 1941 (and the amendment in 1950 that added the Movie Theater Exemption) and through the present, they have not been static but have evolved to continue promoting a competitive, functioning, and free market that ultimately benefits consumers and artists. AMC urges DOJ to leave the Decrees in place and to preserve the Movie Theater Exemption. Any wholesale dissolution or piecemeal changes will favor the interests of a small number of stakeholders as opposed to the needs of the whole music licensing ecosystem, including consumers who benefit from the facilitation of easy access to public performance rights, the availability of a wide range of music, and affordability. Maintaining the Decrees in their current state will result in continued predictability and consistency in a complex and interdependent licensing process that is fairly and

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[25] *See Alden-Rochelle*, 80 F. Supp. at 888 (providing injunctive relief only to the litigating industries).

[26] For example, AMC understands that the National Association of Theatre Owners is submitting comments to DOJ, among many others.

efficiently administered, will achieve appropriate compensation for performance rights, and will ensure that AMC is able to continue providing an innovative and best-in-class moviegoing experience to consumers.

AMC appreciates the opportunity to submit comments, and thanks DOJ for its consideration of AMC's comments.

Sincerely,

American Multi-Cinema, Inc.
Kevin Connor, General Counsel & Senior Vice President

Dated: August 8, 2019