Comments of Bow Tie Cinemas In Response to the United States Department of Justice Antitrust Division's Review of the ASCAP and BMI Consent Decrees

Bow Tie Cinemas ("Bow Tie") respectfully submits these comments in response to the United States Department of Justice Antitrust Division's ("DOJ" or the "Division") announced intentions to review the American Society of Composers, Authors and Publishers ("ASCAP") and Broadcast Music, Inc. ("BMI," and together with ASCAP, "PROs") Consent Decrees (the "Decrees").[1] Bow Tie's comment will focus on one of the most critical provisions of the Decrees: the "Movie Theater Exemption." For the reasons set forth below, Bow Tie urges the Division to maintain the status quo as to the Decrees, including the Movie Theater Exemption, as the Exemption continues to ensure pro-competitive practices, and any change to the exemption risks irreparable harm to consumers.[2]

I. INTRODUCTION

Bow Tie is an American movie theater chain, with approximately thirty-eight (38) locations in Colorado, Connecticut, Maryland, New Jersey, New York, and Virginia. It is the oldest movie theater chain in the United States, having been founded in 1900. As of 2019, Bow Tie is the eighth-largest movie theater chain in the country, but it has remained a family-owned business for generations. Having been in operation both prior and subsequent to the

[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 (last updated Jun. 19, 2019).

[2] The Movie Theater Exemption is contained in Sections IV(E) and (G) of the ASCAP Consent Decree, and is supported by Sections IV(A)-(B) and VI of the ASCAP Consent 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, in addition to the industry practice that has evolved as to source licensing of theatrical performance rights, have achieved the same result. *See e.g., National Cable Television Ass'n, Inc. v. BMI*, 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").

implementation of the Decrees, Bow Tie stands in a unique position to opine on the necessity of the Movie Theater Exemption to maintain a competitive marketplace in the movie industry. At its core, the Movie Theater Exemption prevents PRO's from exploiting their unequal bargaining when negotiating licensing fees with movie theatres, conduct the PROS engaged in prior to the enactment of the Decrees. The Movie Theatre Exemption has historically and continues to benefit all market participants, including consumers and artists. Any modification of the exemption or sunsetting of the Decrees is likely to result in prolonged litigation and business uncertainty to fill the gap in regulation of these complex and interrelated markets.

As a result of the Movie Theater Exemption, performance rights for movie theater performances are cleared at exactly the time they should be cleared: when a song is 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 of a particular song is charging too much for those rights, the producer can negotiate a lower licensing fee, select a different song or commission a new song. Movie theaters lack the ability to engage in such negotiations, and therefore, without the Movie Theater Exemption, they would be forced to obtain individual licenses from PROs and music publishers for music if movie producers did not clear public performance rights at the source. Thus, far from being an impediment to free market transactions, since its implementation in 1950, the Movie Theatre Exemption has fostered a highly dynamic, competitive, and free market, as evidenced by songwriters and music publishers licensing all of their rights related to movies through negotiations with producers.

The Movie Theater Exemption also makes logical sense. Theaters have no choice as to what music is included in a movie, have no capability to negotiate the licensing rights for the music in a movie, and cannot avoid playing the music altogether, given that the music, like the

dialogue of a movie, is integrated into a movie's audio file. Movie producers, on the other hand, routinely make choices as to the music to include in their movies and can engage in a competitive negotiation before the music is ultimately integrated into the movie.

The Exemption further benefits consumers by helping to keep the movie-going experience affordable, and ensuring that it retains the variety of programming consumers expect. Movie theaters already struggle to keep ticket prices low due to the increased costs of doing business.[3] Unchecked PRO license fees, combined with the licensing fees paid to movie distributors, would ultimately be passed onto consumers, as would the other costs incurred by movie theatres to litigate or operate in these newly unregulated markets.

II. THE ORIGIN AND HISTORY OF THE MOVIE THEATER EXEMPTION

ASCAP was founded in 1914 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 variety of live or pre-recorded 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 an amount proportionate to the popularity of their songs.

By the mid-1920s movie theaters regularly purchased blanket licenses to cover the live music that accompanied silent films. At this stage in the evolution of the motion picture industry, films were exhibited without soundtracks, and were typically accompanied by a live

[3] Why has going to the movies gotten so expensive?, POLICYGENIUS (Jun. 20, 2019), https://www.policygenius.com/blog/why-has-going-to-the-movies-gotten-so-expensive/ (when adjusted for inflation, "the average price of a movie ticket in the U.S. actually holds . . . steady.")

piano player or orchestra hired by the theater owner.[4] The licenses, covering ASCAP's entire catalog, predicated fees upon a theatre's seating capacity.[5] However, once movies began to include sound, a blanket ASCAP license was no longer necessary because movie theaters no longer required live music in their auditoriums. ASCAP responded by implementing a membership rule prohibiting its members from granting public performance rights to film producers at the same time the members granted synchronization rights for the music embedded in the film.[6] In other words, ASCAP's members would grant producers the right to record their musical works as part of the soundtrack of the films, but specifically withheld from the producer the license to perform publicly the music in conjunction with the exhibition of the films.[7] This illogical decoupling of performance and synchronization rights was a novel approach by ASCAP to take advantage of movie theatres during the uncertainty present at the dawn of this new medium. The specific understanding between ASCAP's members and the film producers was that these public performance rights would be licensed, instead, through arrangements between ASCAP and the theatre exhibitors. The movie studios were incentivized to adhere to this scheme because they shared in ASCAP's rate hikes as the "publishers" of the compositions in the films.[8]

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[4] *Alden-Rochelle, Inc. v. ASCAP*, 80 F. Supp. 888, 895 (S.D.N.Y. 1948).

[5] *Id.* at 891-92.

[6] *Id.* at 888 (findings of fact and conclusions of law 36, 78).

[7] *See Alden-Rochelle*, 80 F. Supp. at 888 (findings of fact and conclusions of law 36, 78).

[8] *Id.* 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."); *In re Petition of Pandora Media, Inc.*, Civ. No. 12-8035 (DLC), 2014 WL 1088101 (S.D.N.Y. Mar. 18, 2014) (finding two studio affiliates, Sony/ATV and Universal Music Publishing Group, alone controlling some 50% of the United States publishing market).

This left movie theater owners in a precarious position where they had 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 dominance to raise the exhibitors' rates for public performance licenses by as much as 1500 percent.[9] 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.[10] These parallel pressures led to a series of related lawsuits. On February 5, 1941, the Division filed an information against ASCAP and its board, alleging criminal violations of the Sherman Act. A civil complaint was also filed that contained the same allegations from the criminal matter.[11] In or around March 1941, the parties reached a settlement of both the civil and criminal actions. Thereafter, the court entered a consent decree, which was the initial ASCAP Consent Decree, resolving the civil case. The most significant provisions of the initial ASCAP Consent Decree prohibited ASCAP from obtaining exclusive rights to license its members' compositions, and required ASCAP to offer licenses other than a blanket license.[12] Separately, in 1942, movie theater owners filed a private antitrust suit against ASCAP — *Alden-Rochelle, Inc. v. ASCAP*.[13] After trial, the district court concluded that "[a]lmost every part of the Ascap structure, almost all of Ascap's activities in licensing motion

[9] *Id.* at 895.

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

[11] *See United States v. ASCAP*, 1941 Tr. Cas. (CCH) ¶ 56,104 (S.D.N.Y. 1941).

[12] *See* Mem. of United States in Supp. of the Joint Mot. to Enter Second Am. Final J., at 10, *United States v. Am. Soc'y of Composers, Authors, and Publishers*, No. Civ.A. 41-1395 (WCC), https://www.justice.gov/atr/case-document/file/485996/download.

[13] *Alden-Rochelle*, 80 F. Supp. at 892.

picture theaters, involve a violation of the anti-trust laws."[14] The court then entered a broad injunction that, among other things, prohibited ASCAP from entering into licenses with movie theaters.[15] As a direct result of the *Alden-Rochelle* decision, ASCAP and the Division entered into negotiations to modify the existing ASCAP Consent Decree.[16] Those negotiations led to the adoption of the Movie Theater Exemption. Specifically, the 1950 amendment to the ASCAP Consent Decree carried forward the *Alden-Rochelle* injunction, prohibiting ASCAP from charging performance license fees to movie theater owners for music synchronized with motion pictures. As a result of this prohibition, ASCAP members cannot sue movie theater owners – such as Bow Tie – for copyright infringement of music in a motion picture. The comprehensive amendments to the ASCAP Consent Decree in 2001 carried forward these prohibitions once again.[17] As a result, fifty years after its initial incorporation, the purpose of the Movie Theater Exemption remained important enough for it to be continually included in the Decree.

III. SOURCE LICENSING FOR MOTION PICTURES IS FAIR AND EFFECTIVE

The Decrees have resulted in music licensing becoming a simple and effective process: movie theaters pay for all of the rights associated with a film's license directly to the film's

[14] *Id.* at 893 (S.D.N.Y. 1948). 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) (See (holding that an industry practice of splitting sync and performance rights was copyright misuse and an antitrust violation because the copyright holders "obtained a potential economic advantage which far exceeds that enjoyed by one copyright owner.").

[15] *Alden-Rochelle*, 80 F. Supp. 900 at 902-03.

[16] *See* Mem. of United States in Supp. of the Joint Mot. to Enter Second Am. Final J., at 12, *United States v. Am. Soc'y of Composers, Authors, and Publishers*, No. Civ.A. 41-1395 (WCC), https://www.justice.gov/atr/case-document/file/485996/download.

[17] *See* Mem. Of The United States In Response To Public Comments On The Joint Mot. To Enter Second Am. Final J.,*United States v. Am. Soc'y of Composers, Authors, and Publishers*, No. Civ.A. 41-1395 (WCC), https://www.justice.gov/atr/case-document/memorandum-united-states-response-public-comments-jointmotion-enter-second-amended.

distributor as part of the box office percentage licensing fee. The movie's producers in turn negotiate for all 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 the current system, 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 complete 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 and exhibitors play the film with no alterations in exchange for a share of the box office.

The Movie Theater Exemption places 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.[18] It would be illogical – and unfair – to require that exhibitors negotiate with PROs for licenses to songs in films that they did not choose to include. In the current market, 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.[19] Distributors in turn are able to address various competitive concerns when they are selecting music, and account for the

[18] *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 33 (1979) (Stevens, J. Dissenting) (movie theater exemption "promptly" created a "competitive market").

[19] *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.").

corresponding payments during the negotiation process. This process allows songwriters to compete for the recognition that inclusion in a feature film affords, while 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 receive fair compensation for their songs, helps promote lesser-known songwriters, and allows established songwriters flexibility in negotiating their compensation.[20] As such, any argument that the Movie Theatre Exemption negatively impacts composers of musical works in motion pictures is not credible.

IV. THE DECREES CONTINUE TO BE VITAL TO THE OPERATION AND SURVIVAL OF THE MOVIE INDUSTRY

In 2018, the Division announced its intentions to review a number of "legacy" consent decrees, including the Paramount decrees and the ASCAP and BMI Decrees.[21] The Division described this review as intended to target "outdated antitrust judgments" that "no longer protect competition."[22] The Division 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

[20] Indeed, songwriters have testified that they would happily include performance rights in their contracts in order to have their work included into motion pictures or television shows. *CBS v. Am. Soc'y of Composers*, 620 F.2d 930, 938 (2d Cir. 1980) ("if CBS were to seek direct licensing, 'copyright proprietors would wait at CBS' door'" to take advantage of the license (internal citations omitted)).

[21] *See* U.S. DEP'T OF JUSTICE, OFFICE OF PUB. AFFAIRS, *Department of Justice Announces Initiative to Terminate "Legacy" Antitrust Judgments*, https://www.justice.gov/opa/pr/department-justice-announces-initiative-terminate-legacy-antitrust-judgments (Apr. 25, 2018).

[22] *Id.*

changed."[23] Unlike many of the legacy consent decrees, the Decrees at issue here fail to satisfy any of the Division's criteria for termination.

First, the "essential terms" of the Decrees have not been satisfied. As recently as 2016, the Division filed a Petition to Show Cause alleging that ASCAP violated the ASCAP Decree by entering into exclusive licenses with its members.[24] Eventually, the parties entered into a 10-year settlement agreement, with extensive oversight and reporting requirements.[25] That same year, the Division concluded a multi-year review of the Decrees and declined to modify the Decrees, finding that "the current system has well served music creators and music users for decades and should remain intact."[26] In the three years since the Division's decision to maintain the status quo, there has been no significant change in the movie industry to suggest a different result.

Second, the Defendants subject to the Decrees unquestionably exist.

Third, the Decrees do far more than prohibit what the "antitrust laws already prohibit."[27] Unlike other judgments that the Division has sought to terminate, the Decrees' prohibitions fill in the gaps in the antitrust laws with respect to the operation and regulation of these markets, thereby amounting to much more than simply an "admonition that defendants must not violate

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[23] *See* U.S. DEP'T OF JUSTICE, OFFICE OF PUB. AFFAIRS, *Department of Justice Seeks to Terminate "Legacy" Antitrust Judgments in Federal District Court in Washington, D.C.*, https://www.justice.gov/opa/pr/department-justice-seeks-terminate-legacy-antitrust-judgments-federal-district-court (Jul. 9, 2018).

[24] Settlement Agreement and Order, *United States v. Am. Soc'y of Composers, Authors, and Publishers*, No. Civ.A. 41-1395 (WCC), https://www.justice.gov/atr/file/868186/download.

[25] *Id.*

[26] *See* U.S. DEP'T OF JUSTICE, Statement of the Department of Justice on the Closing of the Antitrust Division's Review of the ASCAP and BMI Consent Decrees, at 3, https://www.justice.gov/atr/file/882101/download (Aug. 4, 2016).

[27] U.S. DEP'T OF JUSTICE, *supra* note 23.

the law."[28] In fact, the Supreme Court declined to hold that a blanket license was a *per se* violation of the Sherman Act, *because of the protections provided by the Decrees*:

> [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 redeeming competitive virtues** and that the search for those values is not almost sure to be in vain.[29]

The Decrees strike a critical balance by allowing the PROs to engage in behavior that represents "substantial deviations from the competitive norm"[30] but that nonetheless serves an important purpose, while also providing critical oversight and heightened enforcement mechanisms to prevent anticompetitive harm.

Finally, the "market conditions" have not changed for theatrical exhibition or the PROs. Movie theaters still require licensed content that includes music that cannot be altered or removed. This content still comes from studios, who are frequently themselves the "publishers" of musical compositions in films. BMI and ASCAP also continue to exist to aggregate and license the copyright rights of now hundreds of thousands of otherwise competing rights holder, and if the Exemption were to be modified, studios could collude with ASCAP and BMI to the

[28] *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.

[29] *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 25 (1979) (emphasis added).

[30] *Id*. at 32 (Stevens, J., dissenting).

detriment of movie theatres just like they did prior to the implementation of the Movie Theater Exemption.[31]

The Decrees have shaped how the various participants in the music and film industries interact and operate for decades, and to modify or terminate them will cause chaos and uncertainty in the marketplace, to the detriment of all parties, including consumers. Indeed, Congress was so concerned with potential changes to the Decrees that as recently as 2018, it added a provision to the Music Modernization Act recognizing the fundamental role the Decrees play, and requiring additional notice and reporting by the Division in connection with any review of the Decrees.[32] Unlike other legacy decrees, which govern extinct industries and companies, the Decrees remain vibrant and relevant to this day. Their continued importance is evidenced by the wealth of comments submitted by significant segments of the U.S. economy, including the radio and television industries, internet companies, the restaurant and bar industries, and the motion picture exhibitors' industry—all in support of continuing or expanding the Decrees

[31] *See In re Petition of Pandora Media, Inc.*, 2014 WL 1088101 (finding two studio affiliates, Sony/ATV and Universal Music Publishing Group, alone controlling some 50% of the United States publishing market.)

[32] "[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 share with such Members detailed and timely information and pertinent documents related to the review . . ." S. Rep. No. 115-339 (2018), https://www.govinfo.gov/content/pkg/CRPT-115srpt339/html/CRPT-115srpt339.htm.

during this and previous review periods.[33] This is in stark contrast to the other decrees the Division has sought to vacate as a part of this review process, which have received little to no attention.[34]

The Decrees have created an efficient market for rights included in films for exhibition in movie theaters by reducing transaction costs through the placement of 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[35] and reduced by overhead fees.[36]

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 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 are negligible. Negotiating for the full exploitation of a particular song also ensures that the songwriter is compensated for the true value of the song, rather than by

[33] *See* U.S. DEP'T OF JUSTICE, *ASCAP And BMI Consent Decree Review Public Comments 2014*, https://www.justice.gov/atr/public-comments (last updated Sept. 22, 2018); U.S. DEPT' OF JUSTICE, ASCAP And BMI Consent Decree Review Public Comments 2015, https://www.justice.gov/atr/ASCAP-BMI-comments-2015 (last updated Sept. 23, 2018).

[34] 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. *See* U.S. DEP'T OF JUSTICE, *Paramount Consent Decree Review Public Comments 2018*, https://www.justice.gov/atr/paramount-consent-decree-review-public-comments-2018 (last updated Dec. 20, 2018).

[35] ASCAP employs a survey system which enables it to track music on various mediums so it can determine which music has been performed and pay the appropriate writers and publishers.

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

subjecting him/her to a separate process where value is based simply on the fact that the song is played.

This market structure and its operation in a competitive manner is only possible with several layers of enforcement and ongoing oversight. The Decrees, including the Movie Theater Exemption, are necessary to prevent anticompetitive abuses because the inherent structure of a PRO blanket license represents a "significant deviation from the competitive norm."[37] Even when a PRO blanket license provides efficiency related benefits, safeguards such as the rate court are necessary to mitigate the market power derived from the collective licensing of large music catalogs. Without the Decrees, PROs will continue to pool separate copyrights together, but without a rate court or the other counter-balances required by the Decrees, the likelihood of anticompetitive behavior is all but certain. In sum, the movie industry today is as dependent on the Decrees as it ever has been, such that a sunset of the Decrees is not in the public interest.

V. CONCLUSION

If the Decrees are terminated, it is reasonable to assume that the licensing market would resemble the pre-Decree era of the 1940s. PROs would again use their market power to demand exorbitant public performance fees from movie theaters. ASCAP and BMI would be free to enter into exclusive licensing agreements with their members and affiliates, cutting 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 from identical right holders. Furthermore, movie theaters would be compelled to secure blanket licenses from the PROs, because theaters would have no way to anticipate what music will be used in the films they exhibit. There would be no rate courts to prevent those license fees from being exorbitant, and

[37] Brief for the United States as Amicus Curiae, *ABC v. ASCAP*, 620 F.2d 930 (2nd Cir. 1980) (No. 75-7600 at 16 (November 5, 1979)).

no guarantee that movie distributors would reduce the licensing fees they currently charge to movie theaters to account for these increased burdens. Movie theatres – such as Bow Tie – would be left at the mercy of PROs, and history has proven that PROs will use this leverage to demand supracompetitive fees from exhibitors.

As the Division observed when explaining the rationale underlying the *Alden-Rochelle* injunction in 2001, "because copyright holders could directly negotiate with movie producers to license performance rights at the same time that they negotiated with those producers to license synchronization rights, there was no efficiency justification for allowing ASCAP to collectively license movie producers or theaters."[38] The same remains true today: the Movie Theater Exemption has created a competitive and efficient market for performance rights *at the source,* and there is no efficiency enhancing justification for returning to the pre-*Alden-Rochelle* world.

Accordingly, Bow Tie urges the Division to maintain the protections provided by the Decrees, and specifically preserve the Movie Theater Exemption, as it continues to ensure pro-competitive practices in the music and film industries, and to reject any change to the current licensing system that could result in irreparable harm to all market participants, including consumers.

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