August 9, 2019

Department of Justice
Via email: atr.mep.information@usdoj.gov

Dear Mr. Delrahim,

I am the Executive Vice President-General Counsel for Cinemark Holdings, Inc. ("***Cinemark***"), a publicly traded motion picture theatre company that operates approximately 340 theatres in the United States.

I understand that the Department of Justice (the "***Department***") is considering potentially taking steps to modify and/or terminate aspects of the ASCAP and BMI Consent Decrees (collectively, the "***Decrees***"). I write to provide you with Cinemark's perspective on how such actions might affect our industry, our business, and our valued customers.

Cinemark urges the Department to maintain the "Movie Theatre Exemption," which has long prevented ASCAP and other Performing Rights Organizations ("***PROs***") from using their monopoly power to harm competition and consumers within the theatrical exhibition market. For nearly seventy years, the Movie Theatre Exemption has accomplished this goal by prohibiting the PROs from (i) attempting to require exhibitors to acquire public performance licenses for musical works embedded within motion picture soundtracks, and (ii) suing exhibitors for copyright infringement based upon their exhibition of such films. As discussed below, these core protections remain just as vital in today's modern industrial context as they were when the Decrees were first entered. We encourage the Department to keep them in place.

I very much appreciate your consideration of Cinemark's perspective. Should you wish to discuss any of these issues further, we would be more than happy to set up a time to talk.

A. The PROs' Aggregation of Millions of Copyrights Endows Them With Immense Monopoly Power.

Copyright law gives music creators a state-sanctioned monopoly over their own works. As a result, when operating independently, a copyright owner has the right to charge whatever he or she chooses for the rights to reproduce or publicly perform the products of his or her musical prowess. We embrace this principle because we believe that it encourages those with musical talent to produce new works for the enjoyment of the general public.

Yet the vast majority of music creators have elected not to operate independently; they have chosen instead to combine under the banner of various PROs. ASCAP and BMI are, of course, the two largest PROs in the United States. With hundreds of thousands of members, each has the ability to license tens of millions of discrete copyrighted works via "blanket" licenses that allow music users access to their entire libraries.

It is beyond dispute that the PROs' aggregation of millions of copyrights endows them with extraordinary monopoly power in the market for the licensure of music rights. *See, e.g.,* Memorandum in Aid of Construction of the Final Judgment, *United States v. BMI*, dated June 4, 1999 (S.D.N.Y.), at 3-4 ("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.*, dated May 6, 2011 (2d. Cir.), at 1 ("[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."); *Alden-Rochelle, Inc. v. Am. Soc. Of Composers*, 80 F. Supp. 888, 893 (S.D.N.Y. 1948) ("That Ascap is a monopoly, within the language of Sec. 2 of the anti-trust laws, was clearly established at the trial."); *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.").

B. The Movie Theatre Exemption Was Designed To Prevent PROs from Using Their Monopoly Power To Harm Exhibitors and Their Customers.

The purpose of the Decrees, in general, is to prevent the PROs from abusing their well-established monopoly power. *See* Brief for the United States as Amicus Curiae dated May 6, 2001 (2d Cir.) at 1-2, *In Re Application of THP Capstar Acquisition Corp.* (stating that the Decrees are designed "to cabin the exercise of [the PROs' market] power"); Memorandum of the United States In Support of the Joint Motion to Enter Second Amended Final Judgment, *United States v. ASCAP*, dated Sept. 4, 2000 (S.D.N.Y.), at 15-16 ("the [ASCAP Consent Decree] contains a number of provisions intended to provide music users with some protection from ASCAP's market power.").

Whereas the Decrees protect some music users from potential abuses through vehicles like the rate-setting court, it has long been recognized that the particular interrelated dynamics of the music and film industries require that movie theatres be afforded additional protection. Indeed, as the Southern District of New York first recognized in 1948: "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." *See Alden-Rochelle,* 80 F. Supp. At 893.

In light of these systemic concerns (which are detailed further below), the Movie Theatre Exemption was created to protect theatres and their customers from potential violations of the antitrust laws by the PROs. The Movie Theatre Exemption does so by restraining the PROs from the following:

- "[g]ranting to, enforcing against, collecting any monies from, or negotiating with any motion picture theater exhibitor concerning the right of public performance for music synchronized with motion pictures"; and

- "[i]nstituting, threatening to institute, maintaining, continuing, sponsoring, funding or providing any legal services for any suit or proceeding against any motion picture theater exhibitor for copyright infringement relating to the nondramatic public performance of any work contained in a motion picture . . . ."

See Second Amended Final Judgment, *United States v. ASCAP*, dated June 11, 2002, at Sections IV(E), (G).[1]

C. The Movie Theatre Exemption Remains Essential Today.

Without the Movie Theatre Exemption, the PROs' ability to harm and distort pricing in the exhibition market would be just as pronounced today as it was when *Alden-Rochelle* was adjudicated—primarily because exhibitors today have no more ability to bargain for which musical works will be included in any particular film's soundtrack than did the exhibitors of the 1950s. This dynamic is due, in part, to the way in which the industry developed following the issuance of the separate 1949 Paramount Consent Decrees. Prior to the Paramount Decrees, the major film distribution companies (e.g., Paramount, Fox, etc.) owned many of the most important theatres in America. The Paramount Decrees changed that structure by effectively barring distributor ownership of theatres. This prohibition created a divide between movie studios/distributors (which make and license movies) and movie theatres (which show movies in theatres for the enjoyment of the public).

[1] The ASCAP Decree is the only Decree that contains an express statement of the Movie Theatre Exemption. The BMI Decree does not. Yet the fact that the Department and courts so clearly condemned ASCAP's historical negotiating tactics with movie theatres caused the industry to adopt the Movie Theatre Exemption as the norm, with other PROs following the ASCAP Decree without the need for separate consent decrees.

This divide still exists today.[2] Cinemark owns and operates theatres. It does not make movies. As a result, Cinemark has no input whatsoever into which musical works will be included in any particular film it exhibits on its screens. To the contrary, choices regarding which musical works will be included are made by the film's producer long before the film is ever licensed downstream to Cinemark for exhibition. And that makes sense—because it is at that time, when the movie is being made, that the film's producer has the ability to choose which musical works to use in the film. In that sense, the producer can compare the relative qualities, attributes, licensing costs, etc., of an array of different musical choices. If a particular selection of songs is too expensive, it can substitute in cheaper ones, or choose to employ fewer works in its soundtrack. This opportunity for choice creates at least some potential for competition among musical works at this early stage in the film's lifecycle.

Once the film is finished, however, the music is "in the can," and movie theatre operators like Cinemark have no ability to alter the film or its soundtrack. In fact, Cinemark's film licensing contracts with motion picture distributors (e.g., Disney, Sony, etc.) expressly prohibit Cinemark from making any alternations to the film. Accordingly, unlike the film's producer, exhibitors have no ability to choose which musical works will play in the soundtrack of any particular film that is licensed from a studio/distributor. That absence of choice means that there is no opportunity for competition among musical works at the theatre level of the film's lifecycle. Exhibitors are simply shackled with the choices that were made by the film's producer.

Because exhibitors have no choice regarding which musical works are included in any particular film's soundtrack, any hypothetical negotiations between the PROs and exhibitors for public performance licenses would play out in a completely non-competitive environment. For example, if a film's soundtrack included ASCAP works and ASCAP demanded an unreasonable licensing fee, there would be no opportunity for the exhibitor to seek to replace the ASCAP work with a work created by a BMI artist or an unaffiliated artist (because the film is already complete and unalterable). With no such options, the exhibitor would instead be put to the horns of an unenviable dilemma: either pay whatever ASCAP asks in order to secure a public performance license for the music included within the film it wants to play, or be forced to decline the license and pass on the film altogether.

In reality, almost every major commercial film includes multiple copyrighted musical works, often from an array of artists associated with multiple PROs. Because there is no pragmatic way for a movie theatre company to track down and negotiate with each individual artist who appears on the soundtrack to obtain the public performance rights for that particular work, exhibitors would be forced to take blanket licenses from each of the PROs in order to exhibit most major commercial releases on their screens. Their only other options would be to shut down completely or show the film without taking a public performance license and, thereby, subject themselves to costly and time consuming copyright litigation.[3]

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[2] Notably, even if the Department elects to sunset the Paramount Decrees, this action will not change—in any immediate way—the two-tiered industry structure that developed in their wake.

[3] In any such litigation, the exhibitor would likely also be forced to assert counterclaims against the PROs for violation of the Sherman Act. Ironically, the equitable relief the exhibitor would be seeking would be effectively the same as that already currently being provided by the Movie Theatre Exemption.

Although our industry has undergone many changes in the decades since the Decrees were first entered—e.g., the movie palace has given way to the multiplex; film canisters have been replaced by digital prints—nothing about the fundamental structure of the PROs or the two-tiered nature of the film/theatre industry has changed at all:

- The PROs continue to be organizations that combine the copyrighted works of numerous artists; in this respect, the PROs have only grown more powerful over the years, as their membership ranks have swelled and their catalogues have expanded;
- Movies are still produced by film studios that have the sole ability to select the musical works that will be included in any particular film;
- Film studios (and their associated distribution arms) continue to license films for exhibition in theatres under licensing agreements that prohibit the exhibitor from altering any aspect of the film, including the soundtrack; and
- Exhibitors continue to have no ability to choose which musical works will be incorporated into the films licensed from the film studios/distributors.

Accordingly, absent the Movie Theatre Exemption's protections, exhibitors would still be at the mercy of the PROs when it comes to their ability to obtain the public performance rights for musical works included in films. In Cinemark's view, this overwhelmingly militates in favor of maintaining the Movie Theatre Exemption, rather than removing a protection that has effectively restrained monopolistic abuses for decades.

D. Terminating the Movie Theatre Exemption Likely Would Cause Chaos and Harm Consumers.

As noted above, the protections of the Movie Theatre Exemption are engrained into the structure and norms of the industry—so much so that it is, frankly, difficult to predict all of the myriad ways its elimination might affect the industry:

- Will the PROs once again attempt to separate the synchronization and public performance rights when negotiating with the film studios over which musical works will be included in soundtracks?
- Will film studios reduce investment and output if they perceive a risk that their films might not be exhibited on screens at movie theatres as a result of conflicts between PROs and exhibitors over public performance rights?
- Will the PROs once again attempt to extort exorbitant licensing fees from theatre companies in light of the fact that exhibitors have no option but to pay the ransom or pass the films-at-issue due to an inability to exhibit them without fear of copyright litigation from the PROs?[4]

[4] The threat of exorbitant fees is no mere hypothetical. Shortly prior to the Decrees, ASCAP did, in fact, attempt to increase the licensing fees it charged to theatres by as much as 1500% over historical levels. *See Alden Rochelle*, 80 F. Supp. at 895.

- Will the PROs attempt to pursue copyright infringement litigation against theatres who stay in business and decline to take public performance licenses?

- Will exhibitors be forced to pursue antitrust litigation against PROs who attempt to use the power derived from their collection of copyrights to extract public performance licenses from theatres?

- Will courts evaluating antitrust claims brought by exhibitors against PROs enter injunctions that effectively reinstate the Movie Theatre Exemption?

The fact is that no one knows the answers to these questions. What we do know is that there is no valid reason for the industry, or any particular exhibitor, to spend its limited resources attempting to sort them all out. The far more efficient and pro-competitive course of action would be for the Department to maintain the Movie Theatre Exemption, which has long ensured that public performance rights are negotiated in the only forum where the possibility for competition among musical works exists—i.e., between the PRO and the film's producer, prior to the completion of the film.

This is particularly true given that consumers would likely also suffer while the industry deals with the seismic consequences associated with eliminating the Movie Theatre Exemption. As we have learned from experience in a few of our international markets,[5] forcing exhibitors to take and pay for public performance licenses from PROs results in increased costs for the theatres—primarily because it takes the negotiations for music licenses out of the space where competition is possible (i.e., when the music is being chosen for the film) and places it into a space where no competition is possible (i.e., when the film has already been made and is ready for exhibition). Were that to occur domestically, exhibitors would undoubtedly be forced to pass at least some portion of the increased operating costs through to consumers due to the high fixed cost nature of the exhibition business. Moreover, in the worst case scenario for consumers, an inability to reach agreement on public performance rights going forward would result in decreased output of first-run films at theatres around the United States, as many theatres simply will not have the resources to stay afloat while protracted copyright and antitrust battles play out in court.

[5] The development of the domestic industry differs from the development of many international markets. As noted above, the existence of the Movie Theatre Exemption in the United States has long ensured that negotiations over public performance rights take place at the only level where any modicum of competition is possible: between the film's producer and the copyright holder for musical works to be included in the film. Under this paradigm, the film's producer/distributor passes the cost of the musical licenses on to theatres in the form of relatively higher film rental. In some international markets with less developed antitrust laws, Cinemark (and presumably other theatres) have been forced to take and pay for direct licenses from PROs or embark on costly litigation against such PROs. This, in turn, has resulted in Cinemark paying less in film rental to the studios/distributors, as those dollars must, instead, be paid to the PROs in order to avoid copyright infringement claims. Under this paradigm, the economic consequences of Cinemark's competitive negotiations with the film studios/distributors are replaced by those associated with non-competitive "negotiations" between Cinemark and the international PROs. Not surprisingly, the results are an increase in the cost of doing business and higher prices for consumers.

None of this is good for consumers. None of it is good for exhibitors. None of it is good for film makers or music artists. The bottom line is that the Movie Theatre Exemption has worked well for decades. We implore the Department not to invite chaos, litigation, and consumer harm when relative peace already exists.

E. Conclusion

Again, thank you for your consideration of Cinemark's perspective. I stand ready to talk about these issues should you ever so desire.

Sincerely,

Michael Cavalier
Executive Vice President-General Counsel