COMMENTS OF CINÉPOLIS USA[1]
U.S. DEPARTMENT OF JUSTICE
ANTITRUST CONSENT DECREE REVIEW - ASCAP AND BMI 2019

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[1] These comments were adapted from the comments submitted by the National Association of Theatre Owners on July 24, 2019.

I. INTRODUCTION

Cinépolis USA 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"). Cinépolis USA urges the Department to maintain the "Movie Theater Exemption," as that provision continues to support pro-competitive practices.[2]

Cinépolis USA, including its affiliates outside the U.S., is the second largest exhibitor in the world, representing more than 250 movie screens in 7 states, and additional cinemas in 17 countries worldwide. Cinépolis USA has 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.

Cinépolis USA urges the Department to protect the ASCAP and BMI (the "PROs") consent 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 modification or sunset of the decrees.

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 the song is being selected for inclusion in the film by the film's producer, and at the same time as other necessary

[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 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., National Cable Television Association, 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").

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, and would be subject to hold up by the 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, such as Cinépolis USA, 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 film producers are able to

secure all of the rights necessary for theatrical exhibition, including public performance rights in musical compositions included in the film, at the point of a movie's production. The film producers' ability to clear public performance rights associated with theatrical exhibition was made possible by the Movie Theater Exemption, which prohibits PROs from licensing or suing movie theaters for public performances of the music in movies. As a result, PROs' members individually handle licensing of the public performance rights of their songs for theatrical exhibition, by including those rights in the same transaction in which they negotiate the license for synchronization rights that allow for the incorporation of those songs into a particular movie. 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.

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 (without mentioning the fact that such unregulated and unilateral fees may be subject of lawsuits and litigations). Movie theaters are crucial cultural touchstones in the United States. and are vital to hometowns. They are gathering places that not only entertain moviegoers, but also provide an important economic and social engine for 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 of these more rural areas also lack strong broadband service, which means that a movie theater may be the only reliable viewing option in those communities.[4]

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[3] 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

A. Background of 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 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]

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/

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

[6] As will be described further in Section III, 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.

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 1500 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. 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]

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[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.); *Buffalo Broadcasting*, 546 F. Supp. at 283 n. 21. 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).
[10] *Alden-Rochelle*, 80 F. Supp. at 892.
[11] *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).
[12] *See Alden-Rochelle*, 80 F. Supp. 900 at 902-03.

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 Consent Decree 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 with the film's 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 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

[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] CITE
[15] https://www.justice.gov/atr/case-document/memorandum-united-states-response-public-comments-jointmotion-enter-second-amended

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 such as Cinépolis USA, still pay for all of the creative rights embedded within the films they license, but the payments are effectively incorporated into our 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 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.[18]

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[16] *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".)

[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.").

[18] 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); *see also ESPN v BMI rate court* (ESPN able

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.[19]

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

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to directly negotiate with songwriters for rights to play some music/ publishers have been happily including performance rights in the deals – if they weren't willing to do so, their music wouldn't make it into movies that show in theatres. The rate petition in the ESPN case from 2016 sets forth how ESPN is able to clear most of the performance rights it needs in direct deals.

[19] 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 supracompetitive pricing of these licenses.

competition."[20] 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.[21] No public comments were received regarding any of these decree reviews.[22]

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."[23] 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 its members, and was able to pursue a fine against ASCAP, and entered into a 10-year settlement agreement, with fairly extensive oversight and reporting requirements.[24] That same year, the Department concluded a multi-year review of the Decrees and declined to modify the Decrees, holding instead that "the current system has well served music creators and music users for decades and should remain intact."[25]

Second, that the Defendants still exist is certainly unquestioned.

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[20]https://www.justice.gov/opa/pr/department-justice-announces-initiative-terminate-legacy-antitrust-judgments

[21] ND CA 37 in one motion; https://www.justice.gov/atr/JudgmentTermination

[22] See e.g., California Central District: United States' Motion to Terminate Legacy Antitrust Judgments and Memorandum in Support Thereof, (citing no comments received as a justification for moving to terminate 37 legacy judgments), page 8, https://www.justice.gov/atr/page/file/1171631/download.

[23] https://www.justice.gov/opa/pr/department-justice-seeks-terminate-legacy-antitrust-judgments-federal-district-court

[24] https://www.justice.gov/atr/file/868186/download

[25] 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

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."[26] 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 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 redeeming competitive virtues** and that the search for those values is not almost sure to be in vain.[27]

Thus, the Decrees strike a critical balance by allowing the PROs to engage in behavior that represents "substantial deviations from the competitive norm"[28] 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

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[26] *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.
[27] *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 25, 99 S. Ct. 1551, 1565 (1979) (emphasis added).
[28] *Id*. at 32 (Stevens, J., dissenting).

BMI's anticompetitive actions. BMI and ASCAP 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 parties, 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.[29] Unlike many other legacy decrees, which govern extinct industries and companies, the ASCAP and BMI decrees are incredibly vital to this day, as 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.[30] 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.[31]

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[29] "[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 . . ." https://www.govinfo.gov/content/pkg/CRPT-115srpt339/html/CRPT-115srpt339.htm

[30] https://www.justice.gov/atr/public-comments (2014 comments); https://www.justice.gov/atr/ASCAP-BMI-comments-2015 (2015 comments).

[31] 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.

The Decrees have led to an 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.[32]

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 rights and other 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 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 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 consent decree, including 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 catalogs. Without the Decrees,

[32] Payments to members are net of the PROs overhead and, in the case of SESAC and GMR, profits.
[33] Brief for the US as Amicus Curiae, *ABC v. ASCAP*, 620 F.2d 930 (2nd Cir. 1980) (No. 75-7600 (November 5, 1979) at 16).

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 acts may eventually be remediable—at great time, effort, and expense—through private antitrust litigation, there is no reason to assume that the remedies that each antitrust plaintiff is able to secure (in judgments or settlements) will be coherent or consistent, and many businesses will close before they could hope 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,[34] 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."[35] 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

[34] https://mic-coalition.org/. Indeed, many movie theaters obtain blanket licenses for the music they play in their lobbies, bars and/or restaurants.
[35] Broadcast Music, Inc. v. Columbia Broadcasting System, Inc. & CBS, 441 U.S. 1, 4-5 (1979).

share from the blanket licenses. This guaranteed compensation outweighs the administrative costs and lack of direct per-play payment in this particular scenario.

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.

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.

A. With Additional Blanket Fees, Exhibitors Will be Less Likely to Take a Chance on Titles by Smaller Distributors, Thereby Penalizing New Songwriters, Distributors and Audiences

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.[36] 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.[37] This limited screen inventory also means that exhibitors must carefully consider the individual merits of a particular title before entering into any license agreement. 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.[38]

Without the protections of the 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.[39] In contrast, a blanket license comes with a fee that does not vary based 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

[36] 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.

[37] *See, e.g.,* 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).

[38] 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")

[39] 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)

competition would put smaller studios at a distinct disadvantage: despite lower film rentals, the exhibitors would be paying proportionally *more* in licensing films for these titles than for the tentpole title with its soundtrack of hit songs.[40] 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 are *already included in the terms* between studios and exhibitors, it is unlikely that the cost savings of no longer having to secure performance rights would be passed on to exhibitors, leaving the exhibitors to essentially pay more for no added value. This in turn would 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

[40] Indeed, Justice Stevens 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. In his dissent he compared the "competitive market" of the "motion picture industry" to the broadcasters' situation:

> 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.

Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 30-33 (1979).

characters/intellectual property. In doing so, this would significantly reduce the ability to 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.[41]

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

For Cinépolis USA, 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.[42] 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, will lead to a tsunami of private litigation, as industries try to re-implement some modicum of protection that the consent 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

Private antitrust litigation is 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

[41] *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).

[42] 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 DOJ memorandum from Sigmund Timberg to Herbert A. Bergson (Buffalo Broadcasting 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 pp 72-73. Fn 74

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.[43] 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 ongoing federal intervention*.

The experience of TV broadcasters and other audiovisual licensees is instructive, and highlights the dangers of sunsetting the consent decrees or otherwise eliminating the movie theater exemption. At the time of the 1950 amendment to the 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.[44] 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.[45] 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 has changed significantly. Stations no longer heavily feature live content, relying instead on licensed content, including the same titles shown in movie theaters. However, without the Movie Theater Exemption, these stations generally have 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

[43] (See Alden Rochelle and the SESAC cases, which provided relief only to the litigating industries.)
[44] *See, e.g.,* Frederick C. Boucher, Blanket Music Licensing and Local Television: An Historical Accident in Need of Reform, Washington and Lee Law Review: (Volume 44; Fall 1987; Number 4; 1157, 1170)
[45] *Id.*

relief similar to that the movie theaters enjoy. However, in *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc*.,[46] 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"[48] record of attempting prove that the blanket licenses offered by ASCAP and BMI are illegal under the antitrust laws. 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 conduct.[50] However, those predictions — which themselves rely on the Decrees' requirement that

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[46] 441 U.S. 1, 25, 99 S. Ct. 1551, 1565 (1979)

[47] *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 25, 99 S. Ct. 1551, 1565 (1979). See Section II above for more detailed discussion of this case. *See also K-91, Inc. v. Gershwin Publishing Corp.*, 372 F.2d 1, 4 (9th Cir. 1967), cert. denied, 389 U.S. 1045, 88 S. Ct. 761, 19 L. Ed. 2d 838 (1968) ("[A]s a potential combination in restraint of trade, ASCAP has been 'disinfected' by the [consent] decree.").

[48] Meredith Corp. v. SESAC, LLC, 2011 U.S. Dist. LEXIS 24517, at *39-40 (S.D.N.Y. Mar. 8, 2011)

[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). *But see Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 26, 99 S. Ct. 1551, 1566 (1979). In his dissent, Justice Stevens agreed with the core holding of the Court, but dissented on grounds that the challenged blanket licenses should be addressed by the Court and indeed that they should be held as unlawful price fixing under a rule of reason analysis. Based on the record before the Court, Justice Stevens found sufficient evidence to affirm the decision of the Court of Appeals and find that the blanket licenses "have a significant adverse impact on competition." The dissent includes a clear admonition of the blanket licensing system, which despite some facial protections against per se violations, fails to create a true competitive market.

[50] *CBS v. Am. Soc'y of Composers*, 620 F.2d 930, 935-36 (2d Cir. 1980)

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 of similar movie content that are not subject to 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, such as Cinépolis USA are in a particularly precarious position, as the exemption helps protect us both from the PROs *and* the studios, groups that have historically acted unlawfully to the detriment of exhibitors.[54] In fact, the current uniformity of pricing structure for

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[51] *See Columbia Broadcasting System, Inc. v. American Society of Composers, Authors and Publishers* ("CBS Remand"), 620 F.2d 930 (2d Cir. 1980); *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).

[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").

[53] *Nat'l Cable TV Ass'n v. Broad. Music, Inc.*, 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 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.

[54] Paramount etc.

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.[55]

The current ubiquity of the blanket license suggests that the PROs have been able to achieve the same result (mandatory blanket licenses) indirectly as they had previously sought through direct demands.[56] With the studios sharing in the publishing profits, and the difficulty in changing longstanding business practices, there has been no appetite to negotiate with songwriters directly and simply pass along 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 exhibitors in particular, these twin threats require enhanced protection and oversight.

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 for paying a supplemental fee (which unilateral imposition may require additional judicial oversight and, eventually may be subject to additional lawsuits) to lawfully exhibit the content they already licensed. A challenge to

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[55] 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. 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."). PROs—INCLUDE CITES FROM ALDEN ETC.

[56] Stevens' dissent etc.

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.

In addition, many exhibitors, including Cinépolis USA, would be forced 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,[57] and families rely on these stable prices[58] 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. Should the Decrees be terminated the licensing market would essentially reset back to the pre-Decree era of the 1940s. PROs could again use their monopoly power to again demand supracompetitive 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

[57] https://www.mpaa.org/wp-content/uploads/2018/03/MPAA-Theatrical-Market-Statistics-2016_Final-1.pdf page 12 ("A movie still provides the most affordable entertainment option, costing under $35 for a family of four.")

[58] 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-of2019/ (when adjusted for inflation, the average ticket price is below the average ticket price in 1969).

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, because theaters would have no way to anticipate what music from which repertory will be used in films 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 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."[59] 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, Cinépolis USA 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.

[59] *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.