



**COMMENTS OF HARKINS THEATRES  
U.S. DEPARTMENT OF JUSTICE, ANTITRUST DIVISION  
REVIEW OF ASCAP AND BMI CONSENT DECREES**

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Harkins Theatres (“Harkins”) respectfully submits these comments to assist the U.S. Department of Justice Antitrust Division’s (“Department”) inquiry into whether its Consent Decrees with the American Society of Composers, Authors and Publishers (“ASCAP”) and Broadcast Music, Inc. (“BMI”)<sup>1</sup> continue to protect competition.<sup>2</sup> Harkins echoes the comments of the National Association of Theatre Owners (“NATO”) and writes separately only to emphasize the ongoing importance of the so-called “movie theatre exemption” in protecting film exhibitors, and ultimately consumers, from the costs of imposing excessive and anticompetitive music licensing fees on exhibitors.

Since its founding in 1933, Harkins has grown into North America’s fifth largest theatre chain (and largest privately-owned theatre chain), currently operating five hundred fifteen screens at thirty-four locations in five states. Over the years Harkins has experienced first-hand the crucial role anti-trust regulation plays in protecting competition. In fact, given that Harkins has survived and thrived in large part due to its participation in anti-trust litigation,<sup>3</sup> it is fair to say that Harkins would not be what it is today without the United States’ anti-trust laws.

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<sup>1</sup> *United States v. ASCAP*, Civ. Action No. 41-1395 (WCC), 2001 U.S. Dist. LEXIS 23707 (S.D.N.Y. June 11, 2001) (“ASCAP Decree”); *United States v. Broad. Music, Inc.*, Civil No. 64 Civ. 3787., 1966 U.S. Dist. LEXIS 10449 (S.D.N.Y. Dec. 29, 1966) (“BMI Decree”).

<sup>2</sup> *Department of Justice Opens Review of ASCAP and BMI Consent Decrees*, U.S. DEP’T OF JUSTICE (June 5, 2019), available at <https://www.justice.gov/atr/antitrust-consent-decree-review-ascap-and-bmi-2019>.

<sup>3</sup> *See Harkins Amusement Enterprises, Inc. v. General Cinemas Corp., et al.*, 850 F.2d 477 (9th Cir. 1988) (reversing dismissals and remanding claims including bid rigging and market splitting). The Ninth Circuit’s decision allowed Harkins to reach successful settlements with all defendants, ensuring the company’s growth and prosperity.

At issue in this proceeding is an important competitive protection provided to film exhibitors in the ASCAP Decree. The protection, often called the “movie theatre exemption,” prohibits ASCAP from “[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[.]”<sup>4</sup> The exemption exists to shield exhibitors from the excessive licensing fees that invariably result from one-sided “negotiations” between performing rights organizations (“PROs”) and exhibitors over the performance rights to a film’s music, which exhibitors have no hand in selecting and for which exhibitors cannot realistically refuse to purchase rights. This is no hypothetical problem: The exemption arose directly out of ASCAP’s attempts to use its lopsided leverage to demand from exhibitors “unfair and exorbitant [sic] license fees.”<sup>5</sup>

Unreasonable demands like ASCAP’s force exhibitors to “choose” between paying outrageous licensing fees or not showing a particular film (which could be a blockbuster on which their businesses rely). In practice this presents no choice at all: Exhibitors will pay the exorbitant fees. However, they cannot always pass on such fees to their customers in light of competition from other theatres, streaming services, and other entertainment choices. Some smaller theatres

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<sup>4</sup> ASCAP Decree Section IV(E); *see also* ASCAP Decree Section IV(G) (protecting exhibitors from copyright infringement claims related to the public performance of music in films). Other performing rights organizations, including BMI, have adhered to the exemption in the ASCAP Decree.

<sup>5</sup> *Alden-Rochelle, Inc. v. Am. Soc. of Composers*, 80 F. Supp. 888, 895 (S.D.N.Y. 1948) (“The conduct of Ascaph in notifying the theatre exhibitors in August 1947 that the rates for an Ascaph license would be increased to such an extent that some theatres would be required to pay 15 times as much as the license fees under which they had been operating since 1934, is an indication of the power that Ascaph has unlawfully acquired by its own arrangements with its members and by their arrangements with the motion picture producers.”).

and chains will be forced out of business by these higher costs that they cannot bear. Other theatres will be forced to pay the higher fees and will pass them on to their customers, to the detriment of the moviegoing public.

The exemption's ongoing importance is best illustrated by way of example. Take the 2017 crime drama 'Baby Driver,' which features a critically acclaimed soundtrack with an eclectic mix of music from multiple decades, including tracks by famous artists such as The Beach Boys and Queen.<sup>6</sup> The film's writer and director, Edgar Wright, cleverly synchronized the film's action sequences to its soundtrack by writing scenes to match particular songs.<sup>7</sup> Wright accomplished this in part by licensing each song before filming.<sup>8</sup> He otherwise risked being unable to secure rights to a particular song (at least without paying a pretty penny) after he had already filmed a scene tailored to that song. As the film's supervising sound editor put it, securing the rights in advance provided "the luxury of knowing" that the film's production would not be "screwed" by "some licensing issue."<sup>9</sup>

To borrow the editor's words, without the movie theatre exemption exhibitors and the viewing public could, and most likely would, be "screwed" by "some licensing issue." PROs would approach an exhibitor only after a studio had selected the music for a particular film. With the music already incorporated, the exhibitor would be unable to respond to unreasonable fee

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<sup>6</sup> *Baby Driver (2017): Soundtracks*, INTERNET MOVIE DATABASE (last visited July 30, 2019), available at <https://www.imdb.com/title/tt3890160/soundtrack>.

<sup>7</sup> Rick Marshall, 'Baby Driver' was an entire film built around music. Here's how they did it, DIGITAL TRENDS (Dec. 22, 2017), available at <https://www.digitaltrends.com/movies/baby-driver-music-sound-effects/>.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

demands the way a studio typically would: by simply selecting different music. An exhibitor would have no similar “luxury.” Without the exemption, the exhibitor would be left only with the illusory “choice” between paying unreasonable fees or not playing a film.

Persons outside the movie industry may imagine that the movie theatre exemption is unnecessary because, if synchronization rights and performance rights are “unbundled” such that studios pay for the former and exhibitors the latter, studios would pass on to exhibitors the savings they derive from no longer paying for both sets of rights. But any such suggestion relies on two unwarranted leaps of faith. First, it assumes that PROs would reduce the licensing fees charged to studios by an amount that mirrors the amount they would charge exhibitors for performance rights. But PROs would be neither obligated nor incited to maintain the same total fees once they begin negotiating separately with studios and exhibitors. And even if PROs began by negotiating in good faith, they would always possess an ability to abuse their unequal negotiating power, a temptation to which they will eventually succumb, as ASCAP has demonstrated amply in the past:

That Ascap was moderate in its demands in 1934 and considerate in the prices it fixed after negotiation with the exhibitors, does not detract from the fact that as a monopoly Ascap had the power to increase those prices to an unreasonable figure by demanding higher license fees, to the financial gain of its members. Ascap showed to what extent that power could be exercised when in August 1947 it attempted to increase the license fees as much as 200% to 1500%.<sup>10</sup>

Exhibitors can find little comfort in the promise of good behavior made by the fox guarding the henhouse (or, in this case, a monopolist with a history of abusive pricing).

Second, even assuming PROs reduce the total fees charged to studios by any amount, whether or not commensurate with the amount they charge to exhibitors for performance rights, Harkins has no expectation that studios would pass on those savings. Like PROs, studios would

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<sup>10</sup> *Alden-Rochelle, Inc.*, 80 F. Supp. at 895.

be neither obligated nor incented to share any savings they enjoy as a result of “unbundled” licensing fees. And even if studios initially reduced film rental in response to unbundling, it is unlikely that the reduction would persist over the long term given that film rental percentage charges have a long and unfortunately reliable history of only going up, and never down, regardless of the variables affecting film production costs.

Fundamentally, the movie theatre exemption continues to protect film exhibitors from the natural consequences of negotiating for performance rights with little to no leverage. Absent any obligations on PROs and studios to ensure that unbundled licensing fees would not disproportionately affect exhibitors and American moviegoers, history provides no reason to believe they would act in good faith with exhibitors. The exemption therefore continues to play a critical role in protecting and promoting competition in the film industry and should be kept in place.