



**Comments from Marcus Theatres to
Department of Justice Antitrust Division (“DOJ”)
With Respect to Paramount Decrees**

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INTRODUCTION

Marcus Theatres Corporation (“Marcus”) is a regional movie theater circuit headquartered in Milwaukee, Wisconsin. Marcus submits these comments in response to DOJ’s request for comments, as described in its News Release dated August 2, 2018, regarding the potential termination or modification of consent decrees with leading movie industry companies Paramount Pictures, Inc., Twentieth Century-Fox Corporation, Columbia Pictures Corporation (Sony), Universal Pictures, United Artists, Warner Brothers Pictures., and Loew’s (MGM) (the “Decrees”). Marcus submits these comments as a supplement to comments separately submitted by the National Association of Theatre Owners (NATO). Marcus further endorses comments submitted on this topic by Harkins Theatres, headquartered in Scottsdale, Arizona.

The Decrees have applied to prevent certain anticompetitive practices successfully challenged by DOJ in the seminal movie industry antitrust litigation cases, primarily in the 1940s and 1950s. The key legal principles on which the Decrees are based arise from Supreme Court case law¹ that has been cited and relied upon extensively in private movie industry antitrust litigation since that time. Litigation relating to these Supreme Court cases ultimately led to the issuance of the Decrees, which established a federal court supervised process enforcing standards designed to prevent anticompetitive conduct in the business of licensing movies to play in theaters. The Decrees of course do not overrule, replace, or modify the related Supreme Court case law.

The issue now being explored by DOJ, and the related questions being asked, essentially involve the overriding issue of whether the Decrees any longer serve a useful purpose in a movie industry that has gone through extensive change over the 70 years the Decrees have been in

¹ See, e.g., *United States v. Paramount*, 334 U.S. 131(1948); *Schine v. United States*, 334 U.S. 110 (1948); *United States v. Griffith*, 334 U.S. 100 (1948).

place. Marcus submits that the answer to this question is “yes.” In fact, the Decrees may be more important now than at any point in recent memory, as they address certain anticompetitive practices in the licensing of first-run films for theatrical distribution² that have become more pervasive as a result of increasing concentration at the major studio distributor level of the business. This problem of market concentration at the distributor level is exacerbated by the market power held by the three dominant theater circuits, AMC, Regal and Cinemark, and the close relationships between these theater circuits and the major distributors.

The discussion below is not intended to provide comprehensive comments on issues related to potential termination or modification of the Decrees. Instead, the primary focus is on anticompetitive effects of distributor and exhibitor concentration as these effects would almost certainly increase as a consequence of termination of the Decrees.

Conclusions from the discussion below can be summarized as follows:

- The anticompetitive problems in the movie industry resulting from vertical integration, i.e., joint ownership and control of distribution and exhibition that were addressed by the Decrees and by the body of law created by the related Supreme Court decisions, continue to exist, and are becoming more serious despite—and in many instances because of—changes in the movie industry.
- These problems have become increasingly serious as the businesses of theatrical distribution and exhibition of first-run movies both have steadily become more concentrated and in key respects less competitive.
- Termination of the Decrees has the potential to make the anticompetitive problems in the movie industry worse. Leaving the Decrees in place would send the correct message that the DOJ still recognizes the need for continued (or increased),

² The theatrical window—that is, the period beginning when a movie is first released in theatres and ending when it becomes available through other mediums—remains a crucial period in the lifecycle of a movie. This window has remained relevant in spite of the advent of television, cable television, VHS tapes, DVDs and, most recently, video on demand and streaming. The shortening of the window over time is directly attributable to technological developments (a movie can be made available through a digital platform quicker than a VHS tape or DVD can be produced and distributed) and is not indicative of a trend towards eliminating the theatrical window. Rather, the theatrical window is crucial to the economic success of a movie as it moves through the various viewing platforms after its initial theatrical release. In this regard, the movie exhibition industry is very much the same as it was when *Paramount* was decided and the Decrees were first issued. In fact, with distributors receiving less revenue from streaming platforms than from DVD sales, theatrical box office has increased in importance in recent years.

enforcement of the general principles fostering competitive conduct that the Decrees established.

- If DOJ takes steps to either terminate or modify the Decrees, it is important that DOJ make clear that any such actions are not intended to express reservations regarding the law as stated in the Supreme Court cases and their progeny.

DISCUSSION

Marcus Theatres

Marcus is a division of The Marcus Corporation, which was founded by Ben Marcus in 1935 with the opening of a single movie theatre in Ripon, Wisconsin. Marcus has grown in size since that time and now operates 68 theatres in eight Midwest states - - Illinois, Iowa, Minnesota, Missouri, Nebraska, North Dakota, Ohio, and Wisconsin. Greg Marcus, Ben Marcus's grandson, is the company's current President and Chief Executive Officer, having taken over those roles from his father, Steve Marcus, who himself is Chairman of the Board of The Marcus Corporation.

Throughout its more than eight decades in the movie industry, Marcus has encountered various forms of anticompetitive conduct in the licensing of first-run movies from distributors. Based on its experience, this conduct has ramped-up since the early 2000s, paralleling increased consolidation of studios and a higher concentration of film product coming from the seven major distributors (Disney, Fox, Lionsgate, Paramount, Sony, Universal, and Warner Bros.) (the "Major Distributors").

The consolidation of the movie industry is not only occurring amongst distributors, it is also taking place at the exhibition level. While Marcus is the fourth largest movie theater circuit

in the United States, it operates a small fraction of the screens operated by the three dominant circuits (AMC, Regal and Cinemark) (the “Dominant Circuits”).³

Ultimately, the market power created by the ongoing concentration in the movie industry—at both the distribution and exhibition levels—serves to heighten the anticompetitive impact which the Decrees were designed to prevent.

Increased Concentration in the Movie Industry

In 2000 approximately 71% of the film exhibition value of first run commercial films, as measured by domestic gross ticket sales, was generated by films from the Major Distributors. In 2017 this figure increased to 88%.⁴ This concentration of control at the film distribution level will become even greater with Disney acquiring Fox’s theatrical distribution business—reportedly raising the domestic gross share of the combined Disney/Fox enterprise to 50%, and reducing the Major Distributors to six. So, in other words, nearly 90% of the film exhibition value will be coming from just six distributors.⁵

Effects of this concentration at the distributor level are felt by Marcus and by other independent and regional exhibitors, i.e., exhibitors other than the Dominant Circuits. These effects include increased pressure by distributors to exercise control over movie ticket prices, and discrimination against regional and independent exhibitors in film rental terms as compared to film rental terms available to the Dominant Circuits. In order to counter this, regional and independent exhibitors need to utilize any leverage they have in negotiations, including decisions regarding film product. In this respect, the ban in the Decrees against block booking is vital.

³ (1) AMC Theatres 8,218 screens; (2) Regal Entertainment Group 7,379 screens; (3) Cinemark USA, Inc. 4,544 screens; (4) Marcus Theatres Corporation 889 screens.

⁴ Source: *boxofficemojo.com*

<https://www.boxofficemojo.com/studio/?view=company&view2=yearly&yr=2000&p=.htm>;

<https://www.boxofficemojo.com/studio/?view=company&view2=yearly&yr=2017&p=.htm>

⁵ Year-to-date, approximately 86% of domestic gross ticket sales were derived from the Major Distributors.

<https://www.boxofficemojo.com/studio/?view=company&view2=yearly&yr=2018&p=.htm>

Consequence of Increased Concentration: Ticket Prices

Despite the Decrees, distributors routinely use indirect methods to influence ticket prices. Eliminating the ban on resale price maintenance in the Decrees would lead to even greater price control by distributors, to the detriment of both exhibitors and movie-going consumers.

The primary method currently used by distributors to control ticket prices is per-capita requirements in license agreements, or so-called “per-caps.” Essentially, per caps require that an exhibitor pay to the distributor a scaled percentage⁶ of each movie ticket sold, with the price per ticket effectively established in the license agreement based on the exhibitor’s posted rates, **irrespective of what the exhibitor actually charges**. Consequently, while the exhibitor is ostensibly free to set its own ticket prices, in reality this is largely influenced by its negotiations with the studio and the terms of the license agreement.

In essence, distributors are indirectly setting a minimum ticket price through per caps, which can have a profound impact on an exhibitor’s bottom-line when a significant portion of ticket sales are attributable to discounted tickets. For instance, Marcus Theatres offers a number of promotions, including \$5 Tuesdays, Student Discount Thursdays and Young at Heart® matinees for seniors on Fridays. These promotions are very successful in driving attendance (hence, ticket sales and box office revenue) to the benefit of both distributors and exhibitors, yet distributors nevertheless maintain the right to demand reimbursement based on the ticket price and the percentage scale established in the license agreement.

In Marcus’s experience, increased concentration in the market has caused Major Distributors to become increasingly aggressive in per-cap audits. This is potentially due to a lack of DOJ intervention in this area, and a complete elimination of the resale price maintenance ban in the Decrees would very likely embolden the studios in establishing and enforcing per-cap

⁶ The percentage to be paid to the distributor typically increases as total box office increases.

minimums, and potentially attempting to control ticket prices through other, even more direct, methods. This will have a greater impact on independent and regional exhibitors than the Dominant Circuits, and will ultimately result in less competition in the market.

Consequence of Increased Concentration: Film Costs

Overall, Marcus has seen average film costs charged by the Major Distributors rise steadily. For instance, from 2007 through 2017, film costs, measured as a percentage of gross box office revenue, rose over 2.4 percentage points.⁷ This increase is significant to any exhibitor's bottom-line, and is unrelated to inflationary adjustments. In fact, it is largely, if not entirely, attributable to increased negotiation leverage of the Major Distributors resulting from consolidation in the industry. This increase over the course of the last decade occurred despite an increase in overall ticket prices which have been made possible by Marcus's significant capital investment to improve amenities in Marcus Theatres—DreamLoungers™ (luxury recliner seating), food and beverage outlets, and premium large screen formats and sound systems, to name a few.

Consequence of Increased Concentration: Circuit Dealing

While Marcus does not intend in these comments to include a detailed discussion of anticompetitive issues relating to *circuit dealing*, it is worthwhile to point out that the concentration of market power at the distributor level of the theatrical, first-run movie business is related to effects at the exhibitor level, as is discussed in detail in the seminal Supreme Court movie industry antitrust cases.

Termination of the Decrees would be argued by defendants in private circuit dealing antitrust cases as strong precedent for the proposition that the legal principles from the Decrees

⁷ Disney/Buena Vista represented the largest increase, rising over 8.6 percentage points over the same ten year period.

and the key Supreme Court cases are no longer relevant to the theatrical movie business. In fact, in *Flagship v. Century Theatres*, 198 Cal. App. 4th 1366 (2011), a version of this argument was made by Century Theatres (Cinemark) in support of an unsuccessful defense motion to overturn a jury verdict in favor of Flagship, an independent movie theatre, in a circuit dealing case—even though no action to terminate the Decrees has yet taken place.⁸ Put another way, termination of the Decrees would seriously undermine private litigation efforts to challenge circuit dealing and other anticompetitive practices in the movie industry, and to oppose continued consolidation of the movie distribution business.

Block Booking⁹

In 1948 the United States Supreme Court in *Paramount* held that **block booking** is a discriminatory practice prohibited by the Sherman Act. The Court reasoned that a copyright granted in a film in essence grants the owner a monopolistic right, but the public purpose associated with that monopoly is not served “where a high quality film greatly desired is licensed only if an inferior one is taken” (*Paramount*, 334 U.S. 131, 158). Quite simply, nothing has changed since the Supreme Court issued its decision which resulted in the Decrees. In fact, as explained above, consolidation in the movie industry has arguably increased the importance of the ban against block booking.

⁸ See also, *Cobb Theatres v. AMC III, LLC v. AMC Entertainment Holdings, Inc.* 101 F. Supp.3d 1319 (2015) (motion to dismiss by defendants denied and case settled after completion of extensive discovery and before ruling on then pending summary judgment motion); *Regal Entertainment Group v iPic-Gold Class Entertainment, LLC*, Court of Appeals, First District of Texas, # 01-16-00102-CV (2016) (upholding temporary injunction against defendant Regal; case subsequently settled as against defendant Regal; summary judgment granted for defendant AMC); *Viva Cinemas & Entertainment, LLC v. American Multi-Cinema, Inc. (S.D. Tex., 2015) v. AMC* (summary judgment and Daubert motions denied in 2018; case settled on confidential basis on the eve of jury trial).

⁹ NATO, in its submission, details at-length the anticompetitive consequences of lifting the restriction against block booking in the Decrees. While Marcus does not intend by this submission to reiterate all of the points set forth by NATO, suffice it to say that Marcus strongly agrees with NATO’s submission. The importance of having screens available for films from smaller studios, which would be significantly affected by block booking, cannot be overstated. In fact, distributor demands for longer blockbuster runs already has an impact on screens available for exhibitors to satisfy consumer’s demand for movie variety.

Regional and independent exhibitors, including Marcus, must have access to a meaningful variety of films, must be able to choose the film product which they show in their theaters, and must have a sufficient number of screens available (i.e., screens not monopolized by Major Distributors, either by demanding longer runs and more screens for blockbusters, or by block-booking tactics). Likewise, exhibitors know their markets and how to maximize ticket sales, and should be free to do so without subsidizing the distributor's cost of blockbuster movies by agreeing to play inferior product. Allowing distributors to demand block booking would only further tilt the balance in favor of the Major Distributors which, as explained above, has increased over time due to consolidation in the movie industry, and already has a significant impact on film costs and ticket prices.

MARCUS RESPONSE TO DOJ QUESTIONS

The following are Marcus's responses to the specific questions posed by DOJ.

Q: Do the Paramount Decrees continue to serve important competitive purposes today?

A: Yes. Provisions of the Decrees as discussed above continue to support standards important to regional and independent theaters today.

Q: Individually, or collectively, are the decree provisions relating to: (1) movie distributors owning movie theatres; (2) block booking; (3) circuit dealing; (4) resale price maintenance; and (5) overbroad clearances necessary to protect competition? Are any of these provisions ineffective in protecting competition or inefficient? Do any of these provisions inhibit competition or cause anticompetitive effects?

A: As discussed above, the Decree provisions are not sufficient alone to prevent the anticompetitive effects listed. However, they are one significant element that together with private litigation supports the legal principles stated in the key Supreme Court decisions on these topics. Continued existence of the Decrees, along with DOJ and private enforcement of the

principles stated both in the Decrees and in the key Supreme Court decisions is important to address negative effects of increased consolidation and conduct violations.

Q: What if any modifications to the Paramount Decrees would enhance competition and efficiency?

A: While Marcus does not believe that any modification should be made, please see Marcus's discussion above regarding particular concerns about anticompetitive consequences of the elimination of specific provisions in the Decrees.

Q: What effect, if any, would the termination of the Paramount Decrees have on the distribution and exhibition of motion pictures?

A: The reality for independent and regional theatres generally has been increased anticompetitive pressures of the sort declared unlawful by the seminal Supreme Court decisions. Termination of the Decrees would undoubtedly increase these pressures to the detriment of exhibitors and movie-goers.

Q: Have changes to the motion picture industry since the 1940s, including but not limited to, digital production and distribution, multiplex theatres, new distribution and movie viewing platforms render any of the Consent Decree provisions unnecessary?

A: No. Theatrical exhibition of first run movies remains a valid antitrust market that continues to present anticompetitive practices that are being challenged almost solely through private antitrust litigation. The proliferation of at-home platforms has increased, not decreased, the importance of the theatrical window and the need to ensure competition in the theatre industry. Violation of the principles established in the key Supreme Court cases and in the Decrees are critical to mitigate persistent attacks on, and damages to, competition in film licensing and exhibition markets.

Q: Are existing antitrust laws, including the precedent of *United States v. Paramount* and its progeny, sufficient or insufficient to protect competition in the motion picture industry?

A: Only if robustly enforced through **both** Government and private actions. While there have been some recent successes in private antitrust cases challenging circuit dealing, the imbalance between industry forces attacking regional and independent exhibitors and their ability to address such attacks in private actions is great. Termination of the Decrees, or substantially weakening them, would add to that imbalance thereby damaging efforts to combat the anticompetitive forces.

CONCLUSION

Marcus respectfully submits these comments and is available to answer questions and provide additional materials in support of these comments if that would be helpful to the DOJ in this review process.