

[REDACTED]

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October 4, 2018

VIA EMAIL (atr.mep.information@usdoj.gov)

United States Department of Justice, Antitrust Division
450 Fifth Street, NW
Washington, DC 20530

Re: [REDACTED] **Comments in Response to the U.S. Department
of Justice, Antitrust Division's Review of the Paramount Consent Decrees**

Dear Sir/Madam:

[REDACTED]¹ respectfully submits the following comments in response to the U.S. Department of Justice, Antitrust Division's (the "Department") announced intentions to review the Paramount Consent Decrees (the "Decrees"). We believe that eliminating or modifying the Decrees would likely reduce competition in the theatrical exhibition of motion pictures and would encourage the growth of the anti-competitive conditions similar to those that existed prior to and during the era of U.S. v. Paramount Pictures, 334 U.S. 131 (1948) and that necessitated the entry of the Decrees in the first place.

The theatrical motion picture industry has been plagued by the consolidation of power in the hands of a few large distributors and exhibitors. This is somewhat expected given that copyright allows owners of motion picture content to control how, when and under what conditions a license to show that content can be granted. Accordingly, a delicate balance has to take place between and among the restrictions imposed by the antitrust laws, the protections afforded by copyright and the principles underlying the First Amendment. That balance was achieved by the entry of the Decrees and has been a fairly effective deterrent against anti-competitive abuse for more than 65 years. Indeed, the legal parameters set by the Decrees established a strong precedent for those studios, distributors and even exhibitors who are not bound by the Decrees. As exhibitors, we all recognize the mantra that film licensing must take place "picture-by-picture and theatre-by-theatre."

[REDACTED] acknowledges that on a very broad scale, much has changed in the world of filmed entertainment since U.S. v. Paramount Pictures, 334 U.S. 131 (1948) was decided. We have gone way beyond, video, DVD and cable. The public is now consuming entertainment on handheld devices; content is streamed over the internet from sources such as YouTube and

¹ [REDACTED] owns and operates 26 movie theatres with a total of 392 screens across the United States. [REDACTED] also owns and operates theatres in Brazil, Argentina and the United Kingdom.

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Instagram that were never envisioned during the time of U.S. v. Paramount Pictures, and changes are taking place in companies such as Facebook, Amazon and Netflix that are of great concern to traditional movie studios and exhibitors.

However, notwithstanding this profound evolution, the theatrical motion picture business is quite similar to what it was during the time that the Decrees were entered. Producers/distributors of movie content still license their product to motion picture exhibitors who display that product in their movie theatres to the public. And of course, at this level, exhibitors have realized that in order to compete against these alternative forms of entertainment, they need to adapt and innovate, which they have done. Over the last decade, exhibitors have installed digital projection systems, enabled 3D and 4D capabilities, reseeded their theatres with luxurious, fully reclining seats, provided a wide array of food alternatives and tried to customize their offerings to the consuming public. This has all been done, and is currently being done, at a very large cost, which may not have been expended had exhibitors, particularly smaller exhibitors, not been operating under the protections of the Decrees.

However, there have been other types of responses to these challenges as well. Over the last decade, there has been increasing concentration at the production/distribution level. In 2011, Comcast merged with NBC/Universal. More recently, AT&T acquired Time Warner. And now Walt Disney, the most powerful distribution company in the industry, is scheduled to close on its purchase of Twenty-First Century Fox in early 2019. With Disney's acquisition of Fox, four corporations will exercise control over 75 percent of the movie production business.

In addition to distributor concentration, there has been considerable consolidation among exhibitors. In 2012, Chinese conglomerate, Dalian Wanda Group, acquired the U.S. movie theatre chain AMC Entertainment Holdings ("AMC"). Between 2015 and 2017, AMC purchased two U.S. chains, Starplex Cinemas and Carmike Cinemas, as well as two leading movie theatre operators in Europe, UCI & Odeon Cinema Group and the Nordice Cinema Group. In 2017, Cineworld Group, a European movie theatre, acquired the U.S. firm Regal Entertainment. Combined, these two companies operate more than 15,568 screens in the United States, which constitutes 38% of the total screens in the country. The top five leading cinema circuits operate more than half of the total screens in the United States. This increased concentration in distribution, production and exhibition, even though not vertically integrated, nevertheless is fertile ground for anti-competitive abuse, particularly if the protections afforded by the Decrees are eliminated.

Circuit Dealing

Without the protection of the Decrees, larger, dominant movie theatre circuits may try to leverage their circuit power by pressuring distributors to obtain licenses and film terms

applicable to more than one of their complexes in a sort of tying arrangement.² Depending upon the facts, this arrangement could be extremely detrimental to smaller and/or independent exhibitors, particularly those operating in the same geographic area and in competition with the larger circuit. As the larger circuits have become more powerful nationally and internationally, and as their presence has spread throughout the geographic markets in the United States, the risk of this type of behavior has increased, not decreased.

Unreasonable Clearances

Clearances that are “unduly extended as to area or duration,” or granted over theatres “not in substantial competition,” may be unreasonable under the Sherman Act. There have been a large number of “clearance” cases litigated since the entry of the Decrees particularly since the determination of what constitutes an “unreasonable” clearance is a factual determination that needs to be made market-by-market. But these cases are extremely costly to bring and invariably, those with the larger resources (i.e., large circuits and large film companies) are better positioned to expend the funds necessary to prevail in or deter this litigation. Without the prohibition on overbroad clearances in the Decrees, this type of abuse, which is extremely prejudicial to smaller exhibitors, as well as to the film-going public, would be likely to increase.

Resale Price Maintenance

The goal of the Decrees’ prohibition on price fixing in licensing agreements was “to open the market to independent purchasers and distributors, to allow exhibitors to select which movies they would show, and to remove artificial constraints on ticket pricing.” Allowing the content owner to dictate the price, which the exhibitor needs to charge at the box office, removes from the exhibitor the ability to compete based on ticket price to the public.³ And this in turn, could easily distort competition in the local markets where small independents compete against large, well-funded circuits, again to the detriment of the consuming public.⁴

Block Booking

The practice of block booking prevents exhibitors from licensing single features on their individual merits. Although distributors may license films in blocks or groups under the Decrees,

² The Supreme Court held that tying agreements were illegal in U.S. v. Griffith, 334 U.S. 100, 106-09 (1948). However, such arrangements in the motion picture exhibition industry are extremely difficult to prove because they may not be evident or obvious or even appear to be causally related.

³ This is particularly problematic under the current circumstances where 75% of the most popular film product is coming from only four distributors.

⁴ In General Cinema Corp. v. Buena Vista Distribution Co., 681 F.2d 594 (9th Cir. 1982) the Court held that per capita clauses for the purpose of determining film rental were permissible. The Court struck a balance which gave the content creator/owner some protection while not tying the exhibitors’ hands in determining price to the consumer.

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distributors cannot condition the offer on an exhibitor's license of another feature or group of features during a given period. The National Association of Theatre Owners ("NATO") filed a comment on the Department's review of the Decrees, which focused solely on the importance of maintaining the prohibition on block booking. [REDACTED] supports NATO's analysis and concurs that the abandonment of its proscription would diminish exhibitors' ability to provide customers with the high quality and varied content they demand. This, in turn, would harm smaller exhibitors because they will be less able to obtain product and to compete with larger exhibitors, again, jeopardizing their continued viability and existence.

CONCLUSION

The prohibitions contained in the Decrees are interrelated and were carefully crafted to govern a unique industry with a unique product. Beneath the prohibitions of the Decrees is an undercurrent of strong and vital First Amendment concerns that need protection. Is it important to preserve the smaller independent theatres as venues for content, or is it sufficient to have large operators showing commercial product at fixed prices at the risk of forgoing theatrical exhibition of less commercially oriented films? Granted, the recent technological revolution has made many other outlets available for protected expression to take place. However, the fact remains that the experience of a motion picture viewed in a movie theatre is distinct from any other form of exhibition and it is truly a powerful medium that should be preserved.

The question that should be asked is not whether the Decrees should be eliminated due to advances in technology and evolution of the medium, but rather what would elimination of the Decrees under existing conditions of market concentration do to movie theatres at a local level and how much would this impact the public consumer who is interested in and benefits from a wide variety of choice and pricing options. [REDACTED] believes that the answer is clear. Competition would suffer, smaller theatres would slowly shut their doors, prices would increase, product choice would homogenize and the public would suffer. The Decrees should be maintained in place.

Very truly yours,

[REDACTED]