

**Before the
U.S. DEPARTMENT OF JUSTICE,
ANTITRUST DIVISION
Washington, D.C.**

In re Antitrust Consent Decree Review: The Paramount Consent Decrees

COMMENTS OF WRITERS GUILD OF AMERICA, WEST, INC.

The Writers Guild of America, West, Inc. (WGAW) is pleased to offer these comments in response to the Department of Justice Antitrust Division (DOJ) review of the Paramount Consent Decrees. WGAW is a labor organization that represents more than 10,000 professional writers of film, television, online video programming, local news and documentaries. In initiating this review, the DOJ has asked for comment on whether changes to the motion picture industry since the 1940s have rendered any of the Consent Decree provisions unnecessary, and whether existing antitrust laws are able to sufficiently protect competition in the motion picture industry.

The Paramount Consent Decrees arose from concerns regarding the extreme power that a group of large and integrated entertainment companies wielded over the theatrical film business. Much has changed in the intervening decades, but the media and entertainment industry is, once again, dominated by a few firms who wield significant market power, and who can use that leverage to harm competitors. Any action that would grant the major entertainment conglomerates more tools or assets they could use to control exhibition of theatrical films would harm competitors in theatrical distribution and production, and ultimately harm creative labor and consumer choice. The Paramount Consent Decrees have ongoing validity despite changes to the industry, and the DOJ must apply strict oversight and enforcement in order to protect that industry and its participants.

Theatrical Markets Remain Separate and Major Firms Exhibit Significant Market Power

During the *United States v. Paramount* and related legal actions of the 1940s, the defendant studios and exhibitors exerted a significant level of control over theatrical distribution and, therefore, theatrical production. Through practices such as direct ownership of theaters, block booking, circuit dealing, broad clearances and fixed admission prices, a set of powerful studios and theaters who became the Paramount defendants – Paramount Pictures, Twentieth Century Fox, Warner Brothers Pictures, Columbia Pictures Corporation, Loew's Incorporated, Radio-Keith-Orpheum (RKO), Universal Corporation and United Artists Corporation – were able to control theatrical prices, ensure distribution for preferred theatrical products and curtail competition from both independent theaters and independent film producers. Though collectively, the defendants had interests in only 17.35% of the country's theaters in 1945,¹ they actually controlled 90% of the most significant theaters in the major markets around the

¹ *United States v. Paramount Pictures*, 66 F. Supp. 323, 353 (S.D.N.Y. 1946).

country.² As the court noted in another case involving substantially the same companies,³ “Defendants control the production and distribution of more than 80% of feature pictures in this country, and no exhibitor can successfully operate without access to defendants’ product.”⁴ This level of control over theatrical film distribution was used as well to prevent competition with independent producers, who were unable to access theatrical outlets.⁵

Many aspects of the entertainment industry as well as the technology and venues for video distribution have changed since the 1940s. However, relevant markets remain dominated by a few powerful companies. Theatrical viewing, in particular, remains a separate consumer market despite the technological developments that have created a plethora of options for consumers to access film content, such as subscription streaming services, MVPD on-demand and DVD/Blu-Ray. As the DOJ recently confirmed in the AMC-Carmike Cinemas merger, commercial theater viewing is differentiated from in-home viewing by factors such as ticket prices, screen size, audio sophistication and social experience. In addition, the available product at first-run theaters is generally not replicated by in-home services.⁶ Consumers pay a higher ticket price per film to go to the theater in order to access a unique, collective viewing experience of first-run film content. Theater owners negotiate with film studios to screen the studios’ products, while studios aim to earn as much revenue as possible in this first and most lucrative release window, which often establishes a film’s value as it progresses through downstream windows of television, online video licensing and home video sales.

Online feature-length programs from services like Netflix and Amazon, a development of recent years, are a separate consumer product market from theatrically-released films. Online feature films are more analogous to TV movies, requiring a lower level of engagement, and the online market for feature-length programs has similarly tended to act as a repository for second-tier content. Indeed, Netflix has acquired distribution rights for several films from major studios following reports that the studios were nervous about the films performing poorly at the box office.⁷ The creators of *Crazy Rich Asians* chose a theatrical release with Warner Brothers over a significantly higher initial monetary offer to distribute the film via Netflix, recognizing that the cultural and social experience of having the first all-Asian film from a major Hollywood studio since 1993 in theaters would not be replicated by having one available on Netflix.⁸ The recent nature of these developments – Netflix’s substantial expansion into feature-length projects

² Kraig G. Fox, “Paramount Revisited: The Resurgence of Vertical Integration in the Motion Picture Industry,” *Hofstra Law Review*, Vol.21 Iss. 6 (1992) at 513 (“*Paramount Revisited*”).

³ All of the Paramount defendants except Universal.

⁴ *Goldman Theatres, Inc., v. Loew’s Inc.*, 3 Cir., 150 F.2d 738, 744, 745 (3d Cir. 1945), cited in *United States v. Paramount Pictures*, 66 F. Supp. 323, 334 (S.D.N.Y. 1946).

⁵ *Paramount Revisited* at 509, citing Michael Conant, *Antitrust in the Motion Picture Industry* (1960) at 37.

⁶ Complaint, *United States v. AMC Entertainment Holdings, Inc. and Carmike Cinemas, Inc.*, No. 1:16-cv-02475, at 7-8 (Dec. 12, 2016).

⁷ Borys Kit and Pamela McClintock, *Sources: Netflix Paid Paramount More Than \$50 Million for ‘Cloverfield Paradox’*, *Variety* (Feb. 6, 2018), <https://www.hollywoodreporter.com/heat-vision/netflix-paid-paramount-more-50-million-cloverfield-paradox-1082305>; Kaitlyn Tiffany, *Netflix buys Extinction, another sci-fi thriller the original studio didn’t want*, *The Verge* (Feb. 8, 2018), <https://www.theverge.com/2018/2/8/16992306/netflix-extinction-michael-pena-universal-cloverfield-paradox>; Zack Sharf, *‘Annihilation’ on Netflix: Moviegoers Need to Take Responsibility for Paramount’s Controversial Deal*, *IndieWire* (Feb. 26, 2018), <http://www.indiewire.com/2018/02/annihilation-netflix-paramount-deal-streaming-1201932550/>.

⁸ Rebecca Sun and Rebecca Ford, *The Stakes Are High for ‘Crazy Rich Asians’ – And That’s the Point*, *The Hollywood Reporter* (Aug. 1, 2018), <https://www.hollywoodreporter.com/features/crazy-rich-asians-story-behind-rom-com-1130965>.

began in late 2015 – leaves significant uncertainty in SVOD’s long-term participation in this market. Online viewing of entertainment content has evolved into a heavily television-focused outlet as episodic series are better suited to encouraging consumers to keep coming back to the platform. The MPAA reported online television views increased 45% in 2017 to 160 billion, while online movie views decreased 11% and numbered 7 billion.⁹

In this context, the large theatrical distributors wield significant market power over theater owners. Although the major studios do not distribute as high a share of feature films as they did in the 1940s, they dominate the box office. The top four distributors – Disney, Fox, Warner Brothers and Universal – accounted for close to 70% of domestic box office¹⁰ in 2015, 2016 and 2017. Following the merger of Disney and Fox, just three firms are likely to account for more than two-thirds of annual box office receipts. Disney-Fox combined accounted for 50% of total box office in the first six months of 2018.¹¹

U.S. and Canada Theatrical Distribution Market Share – Top Firms¹²											
	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018 Q1-2¹³
Disney	11%	12%	14%	12%	14%	15%	15%	20%	26%	22%	36%
Fox	13%	16%	15%	11%	10%	10%	18%	12%	13%	13%	13%
Warner	20%	20%	19%	18%	18%	21%	19%	17%	17%	18%	11%
Universal	13%	10%	9%	12%	13%	13%	11%	22%	14%	15%	12%
Sony	14%	14%	13%	13%	17%	11%	12%	9%	8%	10%	7%
CBS-Viacom	17%	15%	16%	19%	8%	8%	10%	6%	8%	5%	6%
Top 4 → 3 Firms	57%	58%	57%	53%	55%	60%	63%	71%	70%	68%	73%

Distributors and studios bargain over their division of box office revenue, as well as factors such as how often or long a film plays on a theater’s largest screens. The relatively standard revenue split in the domestic box office – close to 50% – represents the studios’ bargaining leverage against theater owners, which has been increasing recently as declining theatrical attendance makes theater owners more dependent on “tentpole” films.¹⁴ Tentpoles are large-budget films with significant marketing campaigns intended to drive high turnout for a given film and are often part of a franchise of films. Disney’s Marvel Cinematic Universe and Star Wars franchises are quintessential examples. This strategy is also a reaction to the growing importance of the international film market – where action films are more easily translated – and the decline of the physical home video market.

In recent years Disney, in particular, has increased its share of the domestic box office by acquiring competitors and reducing output. In 2008, the studio distributed 21 films that

⁹ Motion Picture Association of America, *2017 THEME Report* at 32 (2017).

¹⁰ Defined as the United States and Canada.

¹¹ Box Office Mojo.

¹² Box Office Mojo.

¹³ Through June 30, 2018.

¹⁴ Moffett Nathanson Research, *U.S. Theaters: Cyclical vs. Secular and Studio Leverage?* (Jan. 30, 2018).

accounted for 11% of box office receipts. Disney then acquired Marvel Entertainment in 2009 and Lucasfilm in 2012. By 2017, Disney distributed only 8 films but captured 22% of box office.

Disney-Fox Theatrical Output: Films Released											
	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018 Q1- 2 ¹⁵
Disney	21	23	16	14	13	10	13	11	13	8	5
Fox	26	25	25	26	22	22	25	25	21	25	6
Warner	32	29	28	26	26	31	28	31	23	20	13
Universal	25	27	22	23	24	22	25	32	33	22	12
Sony	39	41	38	40	35	31	34	35	38	38	13
CBS-Viacom	23	16	20	18	20	15	17	13	15	15	5
Top 4 → 3 Firms	104	104	91	89	85	85	91	99	90	75	36

The ability to increase market share while reducing output is a function of anticompetitive market power over theater owners. There are already reported incidents of studios exercising their market power to demand concessions from theaters. Disney, for instance, has reportedly demanded contract terms such as retaining 65-70% of ticket sales, monopolizing each theater's largest venue¹⁶ and crowded out other features.¹⁷

For the screenwriters, the increased market power and reduced output from major studios has meant fewer jobs, lower compensation and less creativity. Screen employment overall has been stagnant in recent years, as decreasing theatrical attendance and the decline of the physical home video market has pressured some film studio margins. Many of the major studios have responded to this pressure by cutting development budgets for new films, or studio research and development. The focus on franchise films, which are a series of films from the same studio which take place in the same cinematic "universe," has enabled this trend, allowing studios to reduce innovative development and employ fewer writers. These broader market trends have increased the power of large studio employers as writers compete for fewer jobs, causing average screenwriter compensation to decline. Search friction enhances the monopsony power of large screen employers. As screenwriting employment occurs on a per project basis, significant effort is needed to find the next job and this pressure causes screenwriters to invest significant time and often unpaid labor in order to even compete to obtain employment.

To the extent that Netflix becomes a buyer for or commissions feature-length projects that have comparable budgets to major theatrical releases, the writing for these projects could be considered within the theatrical film writing submarket, but its competitive impact remains unclear. The writing work for Netflix's handful of major studio-level projects (such as *Bright* or

¹⁵ Through June 30, 2018.

¹⁶ Erich Schwartzel, *Disney Lays Down the Law for Theaters on 'Star Wars: The Last Jedi'*, The Wall Street Journal (Nov. 1, 2017), <https://www.wsj.com/articles/disney-lays-down-the-law-for-theaters-on-star-wars-the-last-jedi-1509528603>.

¹⁷ Anthony D'Alessandro and Anita Busch, *Quentin Tarantino Blasts Disney on Howard Stern Show As 'Force Awakens' Pushes 'The Hateful Eight' Out of Cinerama Dome*, Deadline (Dec. 16, 2015), <https://deadline.com/2015/12/the-hateful-eight-star-wars-force-awakens-arclight-theater-fight-1201668018/>.

War Machine)¹⁸ was contracted under theatrical film writing terms with third-party producers, with the expectation by the writer that the film would be released initially in theaters. Netflix's strategy of content exclusivity means these films will only produce revenue as part of its monthly subscription income, which will limit the number of big-budget films made for Netflix and ultimately the impact of Netflix on competition for writing services.

In addition, writing a feature-length program for Netflix or Amazon remains an inferior labor market substitute for theatrical film writing due to differences in the structure of compensation. Theatrical films are generally sold or licensed in multiple secondary markets, producing a series of revenue-based reuse payments for writers that form a significant base of their compensation. Even mid-budget films, such as 2014's *The Hundred-Foot Journey*¹⁹ may still generate several hundred thousand dollars of residual compensation for the writer in the first year alone. SVOD films, in contrast, are compensated for reuse in the same manner as TV movies, with smaller fixed payments for reuse in the initial distribution market. And, because of Netflix's strategy of exclusivity, these films are unlikely to generate any other residual compensation for the writer or other creative labor via licensing to secondary markets. For instance, a Netflix high-budget feature length program will generate just over \$38,000 in residual compensation to the writer for the first year of its exhibition on Netflix's global platform.

These developments in distribution of films have not eradicated the ability of dominant firms to exercise market power, leaving theatrical markets vulnerable to harms from anticompetitive conduct when those firms reduce output and squeeze competitors out of theaters. Such conduct leaves writers with fewer jobs and consumers with fewer choices for what to see at the theater, and the overall quality and diversity of theatrical product suffers.

Rolling Back the Paramount Consent Decrees Threatens Competition

The Paramount Consent Decrees do not apply to all of today's powerful market players. However, they signal to the market that the DOJ will apply heightened scrutiny to studio ownership of theaters, block booking, circuit dealing, broad clearances and resale price maintenance. This signal acts as a normative constraint upon all major studios and deters abuse for fear of inviting DOJ review. The DOJ now contemplates permitting the freer exercise of market power in theatrical distribution and exhibition. Incumbents will be emboldened to further consolidate an oligopolistic theatrical market structure on both the buy and sell sides, with independent producers and distributors pushed out of the market. Some may opt for the streaming video marketplace, but the niche audiences and limited financial backend will reduce the available return on investment and lead to lower overall output. Competition, consumers and workers will all be worse off.

In recent decades, running movie theaters has not been integral to the business model and profitability of major studios. However, incentives are changing. There are many more entertainment alternatives than in the 1940s, such as television, video games and streaming video. Meanwhile, major movie studios have consolidated into diversified media conglomerates that seek to monetize intellectual property (IP) across reuse and ancillary markets, i.e. reselling films in secondary markets and developing derivative products for television, stage, theme parks, merchandise, etc. The theatrical market plays a key role in establishing the value of IP due to its ability to generate massive cultural events, such as the release of *Black Panther* or

¹⁸ Kayla Cobb, *Netflix Is Spending A Ton Of Money on Original Movies*, Decider (Apr. 12, 2017), <https://decider.com/2017/04/12/netflix-film-spending-2017/>.

¹⁹ Reported \$22 million budget.

Crazy Rich Asians. The major studios have an incentive to exert greater control over exhibition in order to recoup their investments, prop up box office revenues and secure the value of their IP in ancillary markets.

Vertical integration would enable powerful media conglomerates to capture a greater share of box office revenues by harming upstream and downstream competition. Vertically integrated studios will advantage their own films by putting them on more screens for longer, thereby foreclosing movie-going customers to competing producers and narrowing consumer choice. Peak movie-going times such as the holidays are especially vulnerable to foreclosure as tentpole films are released during the most lucrative calendar windows. Vertically integrated studios will foreclose critical inputs to rival exhibitors by licensing their films to affiliated theaters and granting broad clearances to maximize their share of the local box office. And vertical integration provides studios with access to sensitive information about licensing deals and enhanced bargaining power vis-à-vis unaffiliated exhibitors. The combined information and leverage will be used to raise prices and extract favorable terms and conditions from unaffiliated exhibitors, as the DOJ recently contemplated in its challenge to the AT&T-Time Warner merger.

Short of vertical integration, the repeal of the Paramount Consent Decrees encourages practices that increase the power of major studios over independent producers and distributors. Block booking poses a particular threat to the market for independent films. Independent distributors lack the power to force large exhibitors to accept a block of films. As noted above, even with over 40,000 screens in the US, just four (now to become three) studios control nearly 70% of the box office. Block booking will allow the major studios to increase their share of the box office by extending their control over art house and niche films. Without robust independent distribution, small and independent producers will have to strike a deal with the majors for inclusion as a secondary offering in a block of films, giving the majors more leverage over both distributors and producers. Films not included in a major studio's block would be forced to compete for a smaller number of leftover screens, reducing their visibility and revenue. The breakout success of low-budget films that do not fit the family-friendly or tentpole-focused major studios, such as 2016's award-winning *Moonlight*, would be even less likely.

Circuit dealing and broad clearances also threaten to freeze small and independent exhibitors out of the market for popular first-run films. License negotiations will take place at the level of the circuit where large exhibitors can guarantee broad exhibition of major studio films in exchange for clearances that effectively monopolize local exhibition markets. Small and independent theaters will be denied a chance to bid on popular first-run films in their local market. Since they rely on popular first run movies to attract customers and subsidize their art house and niche fare, exclusion from the first run market can irreparably harm smaller theaters, as demonstrated by the cases of *Cinemas Palme d'Or vs. Cinemark*²⁰ and *Viva Cinema Theaters vs. AMC*.²¹ Anticompetitive clearances are so damaging that small and independent theaters will not be able to stay in business long enough to prevail under a regime of circuit dealing and broad clearances. *Cinemas Palme d'Or* emphasized this point in a letter announcing its closure: "We could no longer stay solvent because of Cinemark's constant pressure on studios and distributors to shut us out of major titles. We have fought hard, but circuit-dealing has made it impossible to stay in business."²² The destruction of an important

²⁰ *Flagship Theatres of Palm Desert, LLC v. Century Theatres, Inc.*, 198 Cal.App.4th 1366 (2011).

²¹ *Viva Cinemas Theaters & Entertainment LLC v AMC Entertainment Holdings*, No. 4:15-CV-01015 (S.D.Tex 2018).

²² Anthony D'Alessandro, *Cinemas Palme d'Or Closes Over Losses From Circuit Dealing: Owner Bryan Cranston & Cinemark React – Update*, Deadline Hollywood (Apr. 26, 2016),

source of competition in local exhibition markets will reduce the variety of films on offer and limit consumers to the large multiplex viewing experience at the expense of the intimate or historic small theater viewing experience.

Resale price maintenance threatens to stifle innovation in theatrical pricing. New entrants and major exhibitors have been experimenting with theatrical subscription models. Mandating a minimum ticket price gives studios a tool to quash innovative ticketing models they see as threatening to their box office revenues. The major studios could force exhibitors to sell tickets at prices that make it difficult to include their films in subscription packages, thereby limiting the consumer appeal of such offerings.

The resurgence of these practices will allow major studios to make development and production decisions knowing that theatrical exhibition is all but guaranteed on favorable terms. Faced with declining competition, these studios will further narrow their film offerings and pare back development (R&D) budgets without risking box office revenue. Given the costs of producing and marketing films with the potential for monetization across reuse and ancillary markets, the major studios will concentrate development spending on fewer films based on existing properties instead of spreading risk across a larger and more varied slate. Reducing output also lowers the risk that films will cannibalize each other's revenues in head-to-head competition.

In a competitive theatrical market, small and mid-sized producers and distributors would respond to output reductions by the major studios by increasing production, investing in creative workers and competing for underutilized screens and unmet demand for different movies. However, tactics prohibited by the Consent Decrees, if allowed, would have significant anticompetitive effects in the current theatrical market. The major studios will be empowered to utilize a range of tools for denying rivals access to moviegoers on competitive terms in order to sustain output reductions. The squeeze on development budgets and output will harm writers by eliminating jobs, putting downward pressure on compensation and restricting creativity. Likewise, these actions harm consumers by stifling innovation and variety, leaving fewer choices for theatrical product.

Active Antitrust Enforcement Is Required to Protect Competition in Theatrical Markets

Theatrical markets have a history of anticompetitive conduct and concentration, and require active oversight in order to preserve competition. The DOJ's approval of the Disney-Fox acquisition creates a behemoth with over a third of the entire US box office and a demonstrated pattern of leveraging its market power into extraordinarily onerous exhibition terms and conditions. The top three studios are likely to control two-thirds of the box office, which increases the risk of abuse. Exhibitors have been consolidating as well, especially with the recent mergers of AMC-Carmike and Cineworld-Regal. In 1995, the top five chains owned 34.3% of the screens. By 2016, the top five chains owned 53% of the screens in the US.²³ And anticompetitive clearances have harmed numerous small and independent theaters.²⁴ This history suggests that the theatrical market warrants greater oversight, not less. The DOJ must

<https://deadline.com/2016/04/cinemas-palme-dor-closes-cinemark-circuit-dealing-bryan-cranston-1201744349/>.

²³ Michael Cieply, *AMC Is Set to Become the Biggest Movie Theater Company in the US*, The New York Times (Mar. 7, 2016), <https://www.nytimes.com/interactive/2016/03/07/business/media/amc-biggest-movie-theater-chain.html>.

²⁴ In addition to Cinemark vs. Cinemas Palme d'Or and AMC vs. Viva Cinemas, see also Landmark Cinemas vs. 2301 M Cinema, The Avalon Theater Project, Denver Film Society, and Cinema Detroit.

not send a signal to the marketplace that it no longer takes anticompetitive conduct and consolidation seriously.

Conclusion

The seventy years following the original Paramount Consent Decrees have seen many changes to the theatrical business, including the popularity of mediums such as television, home video and streaming. However, these changes have not eradicated the market power of major players, who retain significant control over what writers can get paid to write and what audiences can see in theaters. The DOJ should continue to use all of the tools at its disposal to prevent or fight against anticompetitive practices in this market.

Respectfully submitted:

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