Published on *The National Law Review* https://natlawreview.com

DOJ Seeking to End Movie Studio and Theater Antitrust Decrees amidst Streaming Competition – A New Opportunity in Theatrical Distribution?

Article By:

Kevin P. Milewski

For the film and media distribution industries, this year has been action-packed. Production budgets are skyrocketing and new digital services have been announced or are launching with each passing month. The streaming wars are upon us. Moreover, the FCC recently voted to treat streaming services as "effective competition" to traditional cable providers (or MVPDs), thereby triggering basic cable rate de-regulation in parts of Hawaii and Massachusetts.

The distribution landscape took yet another unexpected legal twist this week. On November 18, Assistant Attorney General Makan Delrahim announced that the Antitrust Division of the Department of Justice would ask a federal court to terminate the "Paramount Consent Decrees" (the "Decrees"), which have prohibited movie studios from engaging in certain distribution practices with movie theaters since the 1940s. The DOJ filed a motion to terminate the Decrees in federal court in the Southern District of New York on November 22, 2019. Notably, the DOJ cites streaming services and new technology as a few of the many reasons that the Decrees may no longer be necessary in what the DOJ official sees as today's highly competitive, consumer-driven content market. Given the volatility of the content licensing space, film licensors and licensees will have to carefully consider how the DOJ's actions will affect their content rights and options going forward.

By way of background, the Decrees emerged out of the landmark 1948 Supreme Court antitrust case, *United States v. Paramount Pictures, Inc*. Prior to the case, top Hollywood studios frequently owned movie theaters (thus, owning both the means of production and distribution). This vertical integration led to lower distribution costs for the studios and gave them pricing power and the ability to discriminate about which theaters distributed their films. Not surprisingly, smaller, independent theaters struggled to survive. The problem was exacerbated by studios engaging in practices such as "block-booking" (requiring theaters to distribute all or none of the studio's slate of films) and overbroad "clearances" (restrictions on the time which must elapse between particular runs of a film), as well as alleged horizontal conspiracies between the studios and theaters on matters like minimum ticket pricing. As part of the Decrees, the defendant studios were restricted or prohibited from engaging in these practices and were required to divest certain interests in their theaters.

The DOJ's November 22nd motion may not come as a surprise, as the DOJ first announced that the Decrees were under review in August 2018, after which several industry players, including the

National Association of Theatre Owners (NATO), submitted comments. In particular, NATO argued, despite how streaming and technology might increase competition, that block-billing would still adversely impact independent or local chains that exhibit fewer films and may not be able to afford larger blocks of films.

Delrahim summed up the DOJ's position, stating, "the [D]ecrees, as they are, no longer serve the public interest, because the horizontal conspiracy – the original violation animating the decrees – has been stopped. […] Changes over the course of more than half a century also have made it unlikely that the remaining defendants can reinstate their cartel." In particular, the DOJ argued that the competitive concerns of the 1940s no longer exist because the movie marketplace has changed so drastically, citing how film distributors have become less reliant on theatrical distribution with the advent of streaming. According to the DOJ, colluding to limit theatrical film distribution in today's market "would make no economic sense." In addition to streaming services, Delrahim also cited new theatrical release business models (such as flat-fee multi-ticket pricing) as increasing competition and innovation in film distribution.

The DOJ acknowledged NATO's concerns in part and asked the court to implement a two-year sunset on block-booking and circuit dealing (licensing to all theaters under common ownership, as opposed to on a theater-by-theater basis). Whether terminating the Decrees would decrease innovation, neither the motion papers nor Delrahim venture to guess. Delrahim noted that antitrust enforcers need not predict the future but need only recognize that changes are occurring. He added that practices covered by the Decrees would not become per se lawful, but would rather be subject to review under the rule of reason standard.

Commentators are split on whether termination of the Decrees that have shaped Hollywood for decades will lead to any significant change for the movie business. One thing that is important to note is that the Decrees did not outright prohibit vertical integration of studios and theaters – the defendant studios could (and did) acquire theaters after proving that such acquisitions would not unreasonably restrain trade. Further, only those studios party to the Decrees remain subject to their restrictions, meaning many of today's top studios (that now typically own a vast portfolio of traditional and digital entertainment properties) were non-existent or much smaller in the 1940s and have not been subject to the Decrees.

While it remains to be seen how this development will play out, it is noteworthy for digital providers because it may breathe extra life back into the theatrical release window. With mammoth streaming deals inked every week, the value of the theatrical release window was seemingly diminishing for some films. But now that many studios are forgoing third-party licensing fees and instead retaining their content for their own streaming platforms, studios may begin to ask whether added revenues from ownership of a theater chain could be a potential new source of revenue and a way to gain additional control of the theatrical window. Meanwhile, the effect of lifting the Decrees may not necessarily lead to a flurry of acquisitions, as other studios involved in direct-to-consumer streaming campaigns may not have the capital or desire to exploit the termination of the Decrees. Major theater chains will likely seek to strengthen relationships with studios, while independent theaters will look for ways to succeed despite potentially rising costs.

With all of these developments, studios and media platforms will also need to carefully consider how to protect their interests when handling their licensing arrangements, given the volatility in this space and keeping in mind the two-year sunset (assuming the DOJ succeeds) on block-booking and circuit dealing. While some distributors may be looking for long-term, exclusive content deals as they roll-out their streaming services, studios and content providers may seek flexibility as their distribution

options are changing day-to-day.

National Law Review, Volume IX, Number 329