QFR – Rep. Mary Gay Scanlon

11.13 ACAL Hearing
November 11, 2019

Proposed Question for AAG Makan Delrahim

In addition to the examining how antitrust agencies might take enforcement actions to curtail abusive market practices by the large tech companies, I am interested in looking at how these same companies may be taking advantage of prior enforcement actions to unfairly benefit themselves under the auspices of the antitrust laws.

In 1941, ASCAP and BMI, two performance rights organizations representing songwriters for licensing public performances of musical works, entered into consent decrees with the Antitrust Division. These legacy decrees were necessary to protect traditional licensees - restaurants, bars, venues and a fledgling broadcast industry from anticompetitive behavior by the PROs. These protections were deemed necessary because individual licensees lacked market power and needed licenses to virtually all musical works in order to avoid significant liability for statutory damages under copyright law. When they were negotiated there was no imagining the giant tech companies of today.

Each of the largest tech companies possess significant market power as compared to songwriters/publishers and as compared to smaller radio stations and hospitality venues. This is a complex economic ecosystem that needs nuanced and comprehensive action to evaluate and modernize the decrees for a new era.

AAG Delrahim, if there are any discussions about the future of the consent decrees, will any next actions be thoughtful and comprehensive, and take into account the relative negotiating market power of songwriters/publishers, independent hospitality venues like restaurants and wineries, and large tech companies that could not have been imagined in 1941. How can we bring performance rights to a free and fair market given technological developments, while maintaining the efficiency of traditional/general licensing through ASCAP and BMI?