

Subcommittee on Antitrust, Commercial and Administrative Law
Hearing on “Online Platforms and Market Power, Part 4: Perspectives of the
Antitrust Agencies”

Questions for the Record

Questions submitted by Ranking Member Jim Sensenbrenner:

Questions for Assistant Attorney General Delrahim:

1. Three years ago, the Division concluded a review of the ASCAP and BMI consent decrees, ultimately concluding that the decrees should not be modified. That multi-year review consisted of various rounds of public comments focused on very specific proposals. In June, the Division launched its current review by soliciting comment on a number of very high-level questions with regard to the decrees rather than any specific proposals. Yet, in August, it was reported that the Division might take action on the decrees before the end of this year.
 - a. Why does the Division feel that it needs to take action on the decrees at this time? What prompted the Division’s review, and subsequent announcement, and what does the Division hope to achieve with this review?
 - b. If the Division were to decide to make changes to the current decrees will you commit to ensuring the public, as well as the relevant Committees of Congress, have ample opportunity to review and respond to any specific proposed changes before moving forward?
2. Last year, Congress unanimously passed the Music Modernization Act, which was the product of years of legislative discussion between my colleagues in both chambers and stakeholders on all sides of the music industry. A key part of the MMA that led to consensus support was a provision that establishes an enhanced oversight role for Congress in any DOJ review of the ASCAP and BMI consent decrees. The inclusion of this provision reflected an understanding that terminating the ASCAP and BMI consent decrees, even over a long time period, creates significant risk of causing the exact kind of market chaos the MMA solves. I understand that the Department recently solicited comments relating to the decrees and you have made public comments suggesting that you intend to take additional steps to seek changes. If – at some point - the Division intends to sunset these decrees, close consultation with Congress is necessary to ensure that such chaos can be avoided through the implementation of an alternative framework before DOJ takes any action toward sunsetting them, and certainly before terminating them.
 - a. Should you take such action, can you detail how you would anticipate complying with those requirements, and additionally how you would anticipate working with

Congress to develop an alternative music licensing framework in advance of any action?

- b. Any termination, sunset or controversial modification of the decrees prior to implementation of an alternative framework will undoubtedly result in significantly increased litigation against ASCAP and BMI. To what extent is the Division factoring in this increased litigation risk in determining how to proceed on these decrees?
 - c. How does the amount of resources devoted within the past five years to non-mandated reviews of the decrees – the first finding that the decrees remain necessary and should not be altered at all – compare to the resources expended by the Division in the actual administration of the decrees over the same period of time?
3. For several decades, as you know, ASCAP and BMI have operated under consent decrees administered by the Department of Justice. Within the Antitrust Division Manual, the Department of Justice indicates that consent decrees should not be presumptively terminated “when there is a pattern of noncompliance with the decree or there is longstanding reliance by industry participants on the decree.” The Antitrust Division Manual also suggests that consent decrees that fall into this category do not qualify for expedited review. U.S. Dep’t of Justice, Antitrust Division, Antitrust Division Manual III-147–48 (5th ed. 2018).
- a. Do you believe there has been “longstanding reliance by industry participants” on the consent decrees governing ASCAP and BMI? If so, wouldn’t it be more appropriate to review the consent decrees under the Division’s traditional approach, instead of an expedited review process?

Question submitted by Rep. Buck:

Both Witnesses:

1. In recent months, several issues concerning Apple have raised attention. These include Apple's practices involving its App Store, as discussed in a July 2019 Wall Street Journal article.¹ Other issues include Apple's practices involving the online provision of news, Apple's expansion into audiovisual services, and European authorities' increased focus on and criticism of Apple's payment system. Finally, there may be questions concerning Apple's use of data. Will you consider these issues as you examine whether large online platforms are engaging in practices to consolidate dominant market power?

¹ See Tripp Mickle, *Apple Dominates App Store Search Results, Thwarting Competitors* (July 23, 2019) (available at <https://www.wsj.com/articles/apple-dominates-app-store-search-results-thwarting-competitors-11563897221>).