**SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION**
*"Nomination of Gigi Sohn, to be a Commissioner of the Federal Communications Commission"*

10:00 AM, February 9, 2022

**Questions for the Record from the Hon. Maria Cantwell to Ms. Gigi Sohn**

***Sports Fans Coalition.*** During the nomination hearing on February 9, 2022, you answered questions about the settlement amount paid by the defendant in *American Broadcasting Cos. Inc. et al v. David R. Goodfriend and Sports Fans Coalition NY, Inc.*

*Question 1:* You noted that the parties agreed to settlement terms to resolve *American Broadcasting Cos. Inc. et al v. David R. Goodfriend and Sports Fans Coalition NY, Inc.* on October 12, 2021, approximately two weeks before you were nominated to be a Commissioner of the Federal Communications Commission and the public filing of the Stipulated Consent Judgment and Permanent Injunction with the court. Based on your knowledge, please provide a timeline of the resolution of this matter and your understanding of why the parties wanted to settle this matter outside of court instead of continuing on with litigation.

*Answer:* On August 31, 2021, Judge Louis Stanton of the U.S. District Court for the Southern District of New York published an opinion that granted summary judgment to the plaintiffs on the question of whether Sports Fans Coalition NY (SFCNY) qualified as a nonprofit entitled to the statutory exemption to copyright law under 17 USC § 111(a)(5). The judge ruled that no such exemption applied. Importantly, the judge made no determination as to SFCNY's liability or as to damages. That was because, in a case narrowing agreement dated December 17, 2019, the parties agreed that the central issue to be decided in this case was whether Locast qualified for the statutory exemption to copyright law.

On September 1, 2021, Judge Stanton denied a motion for summary judgment by defendant Goodfriend that the federal Volunteer Protection Act provided him immunity from liability and should result in the dismissal of all claims against him. On that same day, the Plaintiffs moved for entry of a Permanent Injunction prohibiting SFCNY and Goodfriend from operating Locast.

On September 15, 2021, Judge Stanton granted plaintiffs' motion and issued a Permanent Injunction order that barred Defendants "along with their officers, agents, servants, employees, attorneys and other persons who are in active concert or participation with Defendants…," from operating Locast.

The issuance of the permanent injunction started the clock for an appeal of the Judge's September 15, 2021 order based on the Judge's decision that the exemption did not apply. The time for appeal was 30 days, or October 15, 2021.

At that juncture, the Board of SFCNY was tasked with deciding whether to appeal Judge Stanton's order or try to settle the matter with the Plaintiffs. My understanding was that the Plaintiffs were eager to settle because Judge Stanton's decision was favorable to them and, at just 8 pages and based on what SFCNY lawyers believed to be a weak argument, was vulnerable on appeal. Another factor was that there was likely to be at least another year of discovery before

the matter would be ripe for trial, at a cost of millions of dollars to the Plaintiffs as well as to SFCNY. That was money that SFCNY did not have, no matter how good the chances were on appeal.

Ultimately, the Board of SFCNY decided that because of the enormous differences in resources between the four largest broadcast networks and SFCNY and because of the cost of the remaining discovery, motion practice, trial and appeal, the better course was to settle the matter now.

The term sheet setting out the terms of the settlement were signed by the parties to the litigation (not me) on October 12, 2021, just 3 days prior to the expiration of the deadline for appeal. The term sheet, which was enforceable, set the amount of payment from SFCNY to Plaintiffs as the amount remaining in SFCNY's bank account after paying its landlords and vendors and giving Plaintiffs Locast's used equipment. To give SFCNY an incentive to bargain with the vendors and landlords for good deals, the Plaintiffs agreed that if there were $700,000 left in SFCNY's bank accounts, Plaintiffs would file a formal Satisfaction of Judgment announcing to the world that SFCNY's financial liability to the networks had been fully satisfied. The lawyers then drafted the confidential settlement agreement that incorporated the terms agreed to in the term sheet, which is explicitly referred to in the text of the settlement agreement. The settlement agreement, which was signed by 9 different individuals, including myself, was finalized on October 27, 2021, although several of the Plaintiffs' attorneys signed it on October 26.

On October 28, 2021, more than two weeks after the term sheet had been signed and a day after all of the parties had signed the confidential settlement agreement, the Parties filed and Judge Stanton approved a "Joint Motion for Entry of Consent Judgement and Permanent Injunction," which included a "Stipulated Consent Judgment and Permanent Injunction," which was drafted and agreed to by the parties. Among other things, the Stipulated Consent Judgment reiterated the permanent injunction against Goodfriend and SFCNY's officers, agents, employees and others from operating the Locast service and set out what could happen in the event that anyone violated the permanent injunction. The Stipulated Consent Judgment also stated that "Plaintiffs are awarded statutory damages under the Copyright Act, 17 U.S.C. § 101 et seq. against SFCNY in the amount of $32 million."

This statement was negotiated by Plaintiffs and SFCNY with the full understanding that SFCNY was never going to pay statutory damages unless they lost at both trial and appeal, costly and uncertain for all parties. It was language insisted upon by the Plaintiffs to deter anybody who might consider starting another service similar to Locast. The fact is that if, after paying its landlords and vendors, SFCNY only had $700,000 left in its bank account, Plaintiffs had agreed to accept that amount as the full settlement payment. The $700,000 was merely a condition for making the Plaintiffs provide the Satisfaction of Judgment.

*Question 2:* You were not a party to *American Broadcasting Cos. Inc. et al v. David R. Goodfriend and Sports Fans Coalition NY, Inc.*, and therefore never financially liable for the resolution of this ligation. However, you also noted during your testimony that there was no risk of anyone being financially responsible for the activities of Sports Fans Coalition or Locast. Please detail your understanding of how and why the parties limited their financial responsibility in this dispute.

*Answer:* On December 17, 2019, four months before I joined the SFCNY Board, the parties entered into a case narrowing agreement, in which, among other things, the Plaintiff broadcast networks agreed not to pursue in this litigation or in any other litigation, "monetary remedies of any kind" against any Sports Fans Coalition Board member or employee "arising from the operation of Locast service up through the date of final judgment of this litigation." In a separate provision in the case narrowing agreement, the Plaintiffs agreed to withdraw any claims of monetary damages against defendant Goodfriend.

The case narrowing agreement also protected the Plaintiffs from SFCNY's and Goodfriend's counterclaims and affirmative defenses, which Plaintiffs wanted dropped. As a result, the case narrowing agreement also provides that Defendant Goodfriend and SFCNY agree to withdraw their counterclaims and affirmative defenses. The parties clearly defined what the litigation was about: "the evidence introduced and the arguments asserted [will] focus adjudication on the availability of the Exemption [under 17 USC Sec. 111(a)(5)]."

Thus, from the very earliest days of the litigation, the parties agreed that the case was not about money, but instead a case of first impression about the scope of the copyright exemption. I cannot speak to the motivation behind the Plaintiffs limiting the Defendants' financial liability here, other than to guess that was most important to the networks was not money, but a determination that Locast was not entitled to the exemption so that the service could be shut down.

*Question 3:* At the time of your testimony, you noted that although the defendants in *American Broadcasting Cos. Inc. et al. v. David R. Goodfriend and Sports Fans Coalition NY, Inc.*, had fulfilled the terms of the settlement agreement to resolve this dispute, the plaintiffs had not filed the Satisfaction of Judgment with the court. When did the defendants in this case fulfill their obligations of the settlement agreement with the plaintiffs, *American Broadcasting Cos. Inc. et al*? Has the Satisfaction of Judgment been filed yet?

*Answer:* The Satisfaction of Judgment was filed on February 11, 2022, which resolved all matters relating to the litigation. SFCNY had 90 days from the execution of the settlement agreement (January 27, 2022) to complete all of its obligations under the settlement agreement, including giving its used equipment to the Plaintiffs and transferring to Plaintiffs any remaining funds in SFCNY's bank account. The final monetary payment was made to the networks on December 3, 2021 and the last piece of equipment was delivered on January 12, 2022. All of the obligations were completed by January 17, 2022. The Plaintiffs agreed on January 24, 2022 to file the Satisfaction of Judgment, but did not file the two-page document until February 11, 2022, approximately three weeks later.

*Question 4:* In your testimony, you explained that your January 27, 2022, voluntary recusal regarding issues on retransmission consent and copyright broadcast issues was narrow, and would have no impact on your ability to work on important issues facing the Federal Communications Commission. Can you please describe the proceedings you will be able to participate in as a Commissioner despite your voluntary recusal?

*Answer:* I will be able to participate in the major proceedings before the Commission. Here is a list of just some of the critical proceedings in which I will be able to participate, some of which are mandated by the Infrastructure Investment and Jobs Act (IIJA):

- Implementation and oversight of the $14.2 billion Affordable Connectivity Program authorized by the IIJA;
- Adoption of the report on the impact of the IIJA on the universal service fund and any proceedings stemming from the recommendations in that report, including any effort to reform universal service contributions;
- The current network resiliency proceeding;
- The digital discrimination proceeding required by the IIJA;
- The current proceeding seeking to strengthen the FCC's data breach rules;
- Any proceeding to restore the FCC's authority over broadband and/or adopt new network neutrality rules;
- Any proceeding addressing robocalls/call spoofing and enforcement of the Telephone Consumer Protection Act;
- The current proceeding re-evaluating the FCC's decision on 24 GHz emissions;
- Any proceeding examining broadcast ownership and media diversity, including the 2018 Quadrennial review (a Congressionally mandated proceeding every four years to see which media ownership rules are in the public interest);
- Oversight of mergers and transfers of control in every industry the FCC regulates;
- Any proceeding impacting the Video Relay Service (VRS);
- Any proceeding involving unlicensed and licensed spectrum;
- RDOF II or any proceeding to consider reallocating those funds;
- Any future mobility fund proceeding;
- Any proceeding to modernize Lifeline, E-Rate or the Rural Health Care Fund;
- The current proceeding to target and eliminate unlawful text messages;
- The current proceeding on whether delivering a message directly to a consumers' voicemail is in violation of the Telephone Consumer Protection Act of 1991.

*Question 5:* You explained in your testimony that the parties in *American Broadcasting Cos. Inc. et al v. David R. Goodfriend and Sports Fans Coalition NY, Inc*. settled this matter for approximately $700,000 plus the physical assets of Sports Fan Coalition, even though the text of the Stipulated Consent Judgment and Permanent Injunction states that "Plaintiffs are awarded statutory damages under the Copyright Act, 17 U.S.C. Section 101 et seq., against SFCNY in the amount of $32 million." Based on your understanding, why did the Stipulated Consent Judgment and Permanent Injunction reference $32 million despite the prior settlement agreement between the parties? Did the court ever order Sports Fans Coalition New York to make a monetary award to the plaintiffs in this case?

*Answer:* The court never ordered SFCNY to make a monetary award to the plaintiffs, and it never ruled on liability or damages. The reference to $32 million in the Stipulated Consent Judgment was an estimate of the maximum amount of statutory damages that Plaintiffs could seek if the case went to trial. SFCNY and Goodfriend vigorously contested that statutory damages were appropriate and argued that their service actually conferred a benefit on the networks by boosting their signals to people in the networks' intended audience. It was language insisted upon by the Plaintiffs to deter anybody who might consider starting another service similar to Locast. The Defendants agreed even though Defendants believed they could show that Plaintiffs were entitled to zero damages at trial. As you note, the parties had already agreed to settle the matter for what was left in SFCNY's bank account plus SFCNY's physical assets, so there was never any question about whether SFCNY was going to pay $32 million.

The parties believed, and at the time had reason to believe, that the confidential settlement agreement would remain confidential and that the much smaller payment from SFCNY to the Plaintiffs would not be public.

*Question 6*: Based on your knowledge of Sports Fans Coalition's financial situation, did the nonprofit organization have $32 million in assets from which it could satisfy a possible judgment for that amount in *American Broadcasting Cos. Inc. et al v. David R. Goodfriend and Sports Fans Coalition NY, Inc.*?

*Answer:* No, and it's important to note that Judge Stanton never ruled on liability or damages, because the case narrowing agreement only called for the court to decide the matter of whether Locast was eligible for the statutory exemption from copyright law under 17 U.S.C § 111(a)(5).

*Question 7*: Based on your knowledge of Sports Fans Coalition's financial situation, did Sports Fans Coalition's agreement to settle the lawsuit for around $700,000 in cash and the transfer of its equipment represent all or nearly all of the nonprofit organization's assets?

*Answer:* Yes, but it is important to note the SFCNY did not commit to pay $700,000 and Plaintiffs did not insist that SFCNY pay $700,000. The settlement was for whatever was left in SFCNY's bank account after it paid its vendors and landlords. If that amount was at least $700,000, then Plaintiffs would make a public filing that the monetary judgment had been satisfied. SFCNY did pay $700,000, and on February 11, 2022, Plaintiffs did file the Certification that the judgment had been satisfied.

*Question 8*: On October 21, 2021, the Federal Trade Commission (FTC) released a report that examined the privacy practices of Internet Service Providers. The report went into great detail on a number of concerning trends related to the collection and use of consumer data, which included ISPs amassing large databases of sensitive data that could be used to create detailed consumer profiles. The examination of these privacy practices led the FTC to conclude that ISP are collecting more data than ever before, without fully explaining why and how they use the data, and that such collection could lead to consumer harm.

These conclusions highlight that many of the ISPs' data collection and use practices may mirror problems identified in other industries and underscore the importance of restricting data collection and use. Do you believe that ISPs' data collection and use practices are dangerous for consumers? If so, how should the FCC and FTC consider reigning them in?

*Answer:* I am very concerned that ISP data collection and use practices may be violating consumers privacy, which can lead to social, financial, and sometimes even physical harm. As I discussed in my previous QFRs, the FTC's Section 5 authority to reign in these practices is limited to those that are "unfair or deceptive." The agency has interpreted that authority to apply only to those occasions where the ISP either promises to engage (or not engage) in a certain behavior but does it anyway, or whether it has failed to tell a consumer that it will engage in certain behavior. In other words, if an ISP reserves the right collect data, keep it indefinitely and sell it to or share it with whomever it would like, the FTC would likely find that it cannot regulate that behavior.

The FCC can do little to reign in ISPs privacy practices unless and until it reinstates its authority over broadband by reclassifying it as a telecommunications service under Title II of the Communications Act. If it does so, then it can either just use the plain language of Section 222 of the Communications Act to enforce pro-consumer privacy practices, or it can adopt new rules that require ISPs to protect their customers' privacy. The only constraint on those rules is that they cannot be "substantially similar" to the 2016 FCC broadband privacy rules that Congress repealed in 2017 pursuant to the Congressional Review Act. New rules can be different however, and can be stronger than those adopted in 2016.

***Recusal***. In your testimony, you mentioned that there was precedent for the voluntary recusal you entered into regarding retransmission consent and television broadcast copyright issues.

*Question 1*: Based on your knowledge, are you aware of other nominees that have voluntary recused themselves from certain matters or made other voluntary commitments outside of their ethics agreement? If so, please provide your understanding on the decisions of other nominees to voluntarily recuse themselves during the confirmation process.

*Answer*: I know of at least 5 nominees who have either voluntarily recused themselves from certain matters or have made other voluntary commitments outside of their ethics agreements. They include:

- Robert Califf, recently confirmed by the Senate, but then President Biden's nominee for FDA Commissioner, agreed to recuse himself from matters involving his former employers and clients for four years, two years longer than what is required in the Biden-Harris

administration's Ethics Pledge. Dr. Califf indicated he did not intend to seek a waiver from his recusals. He also agreed not to seek employment with or compensation from, including as a result of board service, any pharmaceutical or medical device company that he interacts with during his tenure as FDA Commissioner and for four years after completing his government service. He did so at the request of Senator Elizabeth Warren in order to win her vote.

- In 2014, Ronald Walter and Virginia Lodge, two nominees for the Tennessee Valley Authority (TVA) Board were confirmed by the Senate the day after they promised in a letter to TVA's ethics officer to recuse themselves from any board matters involving real-estate developer Franklin Haney. Their letter was in response to concerns raised by Sen. Corker about Mr. Haney's influence on the nominations process.

- As reported in the New York Times on February 9, 2022, Fed governor nominees Lisa D. Cook and Phillip N. Jefferson and nominee for Vice Chair for Supervision Sarah Bloom Raskin have all agreed not to seek employment in the financial services industry for four years after leaving office at the behest of Senator Warren. These commitments go beyond any required by law or the ethics rules.

*Question 2*: In your testimony, you described how FCC Chairman Bill Kennard's voluntary recusal provided precedent for your decision to recuse yourself as outlined in your January 27, 2022, letter. Please explain how Chairman Kennard's precedential decision to recuse himself is similar to this situation and your decision to voluntarily recuse yourself.

*Answer*: Chairman Kennard's voluntary recusal is almost identical to my own, other than his came when he was already the sitting Chair. In 1983, he was working as an intern for the National Association of Broadcasters when he personally signed a Petition for Rulemaking asking the FCC to repeal the Commission's Personal Attack and Political Editorial rules, which derived from the fairness doctrine. In 1987, the FCC repealed the underlying fairness doctrine, but left the Personal Attack and Political Editorial rules in place.

The question of whether the two remaining rules should be repealed came before the FCC again in 1998, after the Radio-Television News Directors asked the US Court of Appeals for the District of Columbia Circuit to force the agency to do so. The agency agreed to consider the matter. It was at that point that Chairman Kennard voluntarily recused himself from participating in the matter.

Like Chairman Kennard, I personally signed a Petition for Rulemaking seeking changes to a specific set of rules. Like Chairman Kennard, I voluntarily recused myself from the docket that emanated from that Petition, although I have gone even a little farther and voluntarily recused myself from other retransmission consent and broadcast copyright issues for the first three years of my term. Like Chairman Kennard's recusal, mine was not required by law or rules, but was undertaken "out of an abundance of caution" (Chairman Kennard's words) and "to avoid any appearance of impropriety" (my words).

**Questions for the Record from the Hon. Sinema to Ms. Gigi Sohn**

***Recusal***. In January 2021, you pledged to voluntarily recuse yourself on Federal Communications Commission matters pertaining to retransmission consent and television broadcast copyright for three years.

*Question 1*: Why do you feel this temporary recusal is appropriate and necessary?

*Answer*: After the December 1 hearing and reading through the QFRs from Committee members, and after conferring with Committee staff and my outside advisors, I decided that the best way forward was to craft a very limited and narrow recusal, based on precedent, in an effort to assuage concerns about my participation on the Sports Fans Coalition NY, Inc. (SFCNY) Board.

*Question 2*: Will this recusal negatively impact the Commission's ability to regulate in this industry?

*Answer*: I do not believe that the recusal will negatively impact the Commission's ability to regulate the broadcast industry. The Commission has taken no action in the 12-year-old docket from which I recused myself since 2014. Retransmission consent disputes only very rarely reach the full Commission, and in those rare instances when they do, they are decided unanimously. Since copyright is outside the FCC's jurisdiction, it is even more rare that television broadcast copyright is ever "material" to an FCC proceeding, and my recusal only affects those proceedings where television broadcast copyright is material.

*Question 3*: In light of this recusal, why do you feel additional recusals are not warranted for other industries?

*Answer:* The recusal, which was crafted to address one specific concern by a number of members of the Committee, is limited in scope only to those issues at the nexus of my involvement in Locast and my personal participation in a 12-year-old Petition for Rulemaking seeking changes to the retransmission consent regime.

I didn't have to recuse myself—ethics officials have looked at all of the SFCNY documents and found that I required no additional recusals beyond what is in my ethics agreement.

I relied upon precedent involving former Chairman Kennard, who voluntarily recused himself from a fairness doctrine related docket because he had signed a Petition for Rulemaking as an NAB intern many years before. I had signed a Petition for Rulemaking seeking changes to the retransmission consent regime, and the docket remains open, so I have voluntarily offered to recuse myself for a limited period from issues emanating from that petition.

There is no similar rationale for wide ranging recusals not tethered to anything and without precedent. Those who are seeking such recusals are effectively saying that I should be recused from everything and anything I've ever advocated for or against. Imagine the implications of that—anyone, whether they be in private practice, working for a corporation, an academic or a public interest advocate, would have to recuse themselves from any matter on which they've taken a public position on, whether or not they were representing specific clients. The result

would be an FCC populated by members with no background in communications law and policy. I don't believe that is a result that anybody wants.

**Questions for the Record from Senator Warnock to Ms. Gigi Sohn**

***Broadband Deployment.*** With the passage of the Bipartisan Infrastructure Law, the federal government is gearing up to make transformational investments in broadband deployment.

*Question:* Will you commit to working with me and my staff to connect every Georgian to accessible and affordable broadband services?

*Answer:* Yes.