PHOENIX CENTER FOR ADVANCED LEGAL -
& ECONOMIC PUBLIC POLICY STUDIES -
5335 Wisconsin Avenue, NW, Suite 440 -
Washington, D.C. 20015 -
Tel: (+1) (202) 274-0235 • Fax: (+1) (202) 318-4909 -
www.phoenix-center.org

Lawrence J. Spiwak, President

17 August 2018

Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue, NW
Suite CC-5610 (Annex C)
Washington, D.C. 20580

RE: Competition and Consumer Protection in the 21st Century Hearings, Project Number P181201/Topic Number 8

To Whom it May Concern:

This June, the Federal Trade Commission announced that it plans to hold a series of hearings on "Consumer Protection and Competition in the 21st Century." In anticipation of these hearings, the Commission has asked the public to provide comment on eleven different topics. The purpose of these particular comments is to contribute to the discussion listed as Topic Number 8: *The Role of Intellectual Property and Competition Policy in Promoting Innovation*. As the attached scholarly research suggests, overbroad safe harbors contribute to many of the anticompetitive issues arising, in the FTC's words, at "the intersection of intellectual property and antitrust law" highlighted in the public notice.

The first piece is entitled *Fixing Safe Harbor: An Economic Analysis*.[1] As our Phoenix Center scholars explain, safe harbors such as Section 512 of the Copyright Act or Section 230 of the Communications Act largely shield intermediaries from "crippling liability" in return for cooperative action on infringing materials. As a consequence, illegal and abhorrent online content remains a significant problem.

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1 T.R. Beard, G.S. Ford and M. Stern, *Fixing Safe Harbor: An Economic Analysis*, PHOENIX CENTER POLICY PAPER NO. 52 (August 2017) (available at: http://www.phoenix-center.org/pcpp/PCPP52Final.pdf), *forthcoming* CARDOZO ARTS & ENTERTAINMENT LAW JOURNAL (2018).

To provide some insight into this issue, our scholars offer an economic model of safe harbor protection, demonstrating that *de minimis* liability for online platforms promotes infringing (or otherwise offensive) platforms to the detriment of responsible ones. Increasing the risk of liability for infringement results in a "separating equilibrium," with one platform offering only legitimate and high-value content and another offering a combination of illegitimate and low-value content. Accordingly, effective platform liability should ultimately change the structure of the platform industry, which we believe should improve the online environment and the enforcement of copyright law through mechanisms such as site blocking.

As it turns out, the abuse of these safe harbor provisions can be quantified. According to the music recording industry, YouTube, one of the largest purveyors of on-demand digital music, evades paying market rates for the use of copyrighted content by exploiting the Digital Millennium Copyright Act's "safe harbor" provisions. The source of the distortion in licensing negotiation appears to be that at any one time, there may be multiple unauthorized copies of a particular song available notwithstanding compliance with the safe harbors, suggesting that services may essentially be able to offer access to music without paying royalties and still claim safe harbor protection for infringement. The evidence appears to confirm the claim: market-based royalties for subscription-based services are about eight-times larger than that paid by YouTube. An interesting question, therefore, is how much revenue the recording industry loses from the distortions caused by the safe harbor provisions? In the attached paper entitled *Safe Harbors and the Evolution of Music Retailing*,[2] Phoenix Center scholars employ accepted economic modeling techniques to simulate revenue effects from royalty rate changes on YouTube's service. Using 2015 data, they find that that a plausible royalty rate increase could produce increased royalty revenues in the U.S. of $650 million to over one billion dollars a year. This is a sizeable effect and lends credence to the recording industry's complaints about YouTube's use of the safe harbor.

The final paper we are submitting is entitled *Free Markets, Monopolies, and Copyright*.[3] In this paper, Phoenix Center Chief Economist Dr. George S. Ford reviews the argument that current copyright law confers a "monopoly" to artists and, as such, is antithetical to laissez-faire capitalism. Dr. Ford reviews the writings of the three "giants" of laissez-faire capitalism: economists Ludwig von Mises (mentor of Friedrich Hayek) and Milton Friedman, and philosopher Ayn Rand, and concludes that any claim that copyright is inconsistent with laissez-faire capitalism and constitutes a "monopoly" is an exceedingly difficult position to defend. As Dr. Ford demonstrates, all three of these luminaries offer strong arguments for copyright in a free-market economy and reject the view that copyright is a monopoly in the modern use of the term. As Dr. Ford further demonstrates, in addition to the "giants" of free market capitalism, economists, antitrust

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[2] T.R. Beard, G.S. Ford and M. Stern, *Safe Harbors and the Evolution of Music Retailing*, PHOENIX CENTER POLICY BULLETIN NO. 41 (March 2017) (available at: http://www.phoenix-center.org/PolicyBulletin/PCPB41Final.pdf).

[3] G.S. Ford, *Free Markets, Monopolies, and Copyright*, PHOENIX CENTER POLICY PERSPECTIVE NO. 14-04 (June 25, 2014) (available at: http://www.phoenix-center.org/perspectives/Perspective14-04Final.pdf).

agencies and courts have concluded that a copyright conveys no more market power than does a deed to a house.

We hope you find the attached scholarly material helpful as you organize your upcoming hearings. If we can be of further assistance, please do not hesitate to contact us.

Sincerely,

Lawrence J. Spiwak