

**Prepared Statement of
The Federal Trade Commission**

**Before the
Subcommittee on Competition, Infrastructure, and Foreign Commerce
of the Committee on Commerce, Science, and Transportation**

**United States Senate
Hearing on P2P File-Sharing Technology**

Washington, D.C.

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I. Introduction

Mr. Chairman and members of the Committee, I am Howard Beales, Director of the Bureau of Consumer Protection, Federal Trade Commission (“Commission” or “FTC”).¹ I appreciate this opportunity to provide the Commission’s views on peer-to-peer (“P2P”) file-sharing and protecting consumers online.²

The Federal Trade Commission is the federal government’s principal consumer protection agency. Congress has directed the Commission, under the FTC Act, to take law enforcement action against “unfair or deceptive acts or practices” in almost all sectors of the economy and to promote vigorous competition in the marketplace.³ With the exception of certain industries and activities, the FTC Act provides the Commission with broad investigative and enforcement authority over entities engaged in, or whose business affects, commerce.⁴ The FTC Act also authorizes the Commission to conduct studies and collect information, and, in the public interest, to publish reports on the information it obtains.⁵

¹The written statement presents the views of the Federal Trade Commission. Oral statements and responses to questions reflect my views and not necessarily those of the Commission or any individual Commissioner.

²The views contained in this testimony are expressed to assist you in your review of peer-to-peer file sharing technology. Official Commission determinations of the legality of practices under the Federal Trade Commission Act are ordinarily made based on a complete record, after notice and the opportunity to fully brief the issues being considered. Thus this letter testimony should not be viewed as a final Commission resolution of the legality of the acts and practices discussed herein.

³15 U.S.C. § 45.

⁴In addition to the FTC Act, the Commission also has responsibility under 46 additional statutes governing specific industries and practices.

⁵15 U.S.C. §§ 46(b) and (f). Section 46(f) of the FTC Act provides that “the Commission shall also have the power . . . to make public from time to time such portions of the information

II. P2P File-Sharing Technology

P2P file-sharing services make available for downloading computer programs that enable users to share computer files with other users of that file-sharing program. These files may be music, video, or data files. The files do not reside in a central location, but rather are stored on the hard drives of the individual users of the file-sharing software. File-sharing applications work by making selected files on a user's computer available for upload, which in turn gives the user access to selected files on the computers of other users on the same P2P file-sharing network (hence the name, peer-to-peer).⁶ Each user on a particular P2P file-sharing network places files in a shared folder on his or her own hard drive and can label or designate these files in any manner he or she chooses.

P2P file-sharing programs eliminate the need for a central storage point for files, and, therefore can increase the speed of file transfers and conserve bandwidth.⁷ This technology is significantly faster than traditional file transfer downloads and significantly cheaper because it

obtained by it hereunder as are in the public interest; and to make annual and special reports to Congress”

⁶See “P2P Fear and Loathing: Operational Hazards of File Trading Networks,” John Hale, Nicholas Davis, James Arrowood, and Gavin Manes, Center for Information Security, University of Tulsa, September 2002, at 2. See also “File-Sharing Programs: Peer-to-Peer Networks Provide Ready Access to Child Pornography,” General Accounting Office Report to the Chairman and Ranking Minority Member, Committee on Government Reform, U.S. House of Representatives, Feb. 2003, at 21; Letter from Linda D. Koontz, Director, Information Management Issues, General Accounting Office, to The Honorable Orrin G. Hatch, dated Nov. 14, 2003.

⁷An example is the P2P file-sharing system used by Lindows, the developer and vendor of Linux-based operating systems, to distribute its Linux operating system software. Lindows uses a P2P file-sharing technology called BitTorrent, which breaks a typical 500MB Lindows Operating System file into about 1,000 pieces, which are then transported independently for reassembly at the customer's computer.

requires less bandwidth.

Downloading and using P2P file-sharing programs, however, sometimes also creates significant risks for consumers. When consumers download P2P file-sharing software programs, they may download other, unwanted, software, including spyware.⁸ The Commission recently held a public workshop on spyware.⁹ Later this year, the FTC will issue a comprehensive report addressing spyware, including the relationship between P2P file-sharing software and spyware. The Commission is also conducting non-public investigations concerning potential unfair or deceptive practices in connection with the dissemination of spyware. The Commission also is conducting non-public investigations concerning potential unfair or deceptive practices in connection with the dissemination of spyware.

When consumers use P2P file-sharing software programs, they face additional risks. Consumers may inadvertently place files with sensitive personal information in their directory of files to be shared.¹⁰ Consumers may receive files with viruses and other programs that could impair the operation of their personal computers.¹¹ Consumers may receive or redistribute files

⁸See “P2P Fear and Loathing: Operational Hazards of File Trading Networks,” *supra* note 6, at 2.

⁹69 Fed. Reg. 8538 (Feb. 24, 2004), at www.ftc.gov/os/2004/02/040217spywareworkshopfrn.pdf.

¹⁰See, e.g., “Usability and Privacy: A Study of Kazaa P2P File-Sharing,” by Nathaniel S. Good (HP Laboratories) & Aaron Krekelberg (University of Minnesota), June 2002; see also “Kazaa Users Often Expose Personal Files,” by Steven Musil, Cnetnews.com, June 6, 2002. This risk of inadvertently sharing personal files appears to have decreased because the default settings of most of the popular P2P file-sharing programs currently only share files in a special “shared” folder created by the program or in other folders that the user specifically selects.

¹¹See “P2P Fear and Loathing: Operational Hazards of File Trading Networks,” *supra* note 6, at 2.

that may subject them to civil or criminal liability under laws governing copyright infringement and pornography.¹² Because of the way the files are labeled, individuals, including children, may be exposed to unwanted and disturbing images.¹³ The Commission is concerned with the exposure of individuals, especially children, to unwanted pornographic materials through deceptive practices.¹⁴

¹²See 17 U.S.C. §§ 502-505, 506, and 509 (civil and criminal liability for copyright infringement); 18 U.S.C. § 2252 (criminal liability for possession or distribution of child pornography). Distributing pornography to children is a criminal violation under the laws of most, if not all, states. We are not aware, however, of any criminal prosecutions for the unintentional redistribution of pornography via P2P file-sharing.

¹³In connection with its oversight of the marketing of violent entertainment to children, the Commission staff recently examined four popular P2P file-sharing services (Kazaa, Morpheus, LimeWire, and Overnet) to assess what online disclosures, if any, were made regarding the content of individual files shared by users of these services. Each of the P2P file-sharing programs offered some type of filter to exclude unwanted content. All of these filters, however, operate by examining language found in the title or descriptor of the file, rather than the content of the file. Thus, these filters may not be effective when users label files inaccurately, which can result in the transfer of files with pornographic or other unwanted content. This is particularly a problem because P2P technology necessarily involves sharing information with other users rather than with a centralized source.

¹⁴For example, the Commission sued John Zuccarini who, in a ploy designed to capture teenaged and younger Internet users, registered 15 variations of the popular children's cartoon site, www.cartoonnetwork.com, (e.g., "cartoon netwok" instead of "cartoon network") and 41 variations on the name of teen pop star, Britney Spears. *FTC v. John Zuccarini*, No. 01-CV-4854 (E.D. Pa. 2002). The Commission alleged in its complaint that surfers who looked for a site, but misspelled its Web address, were taken to the defendant's sites. Once consumers arrived, Zuccarini's Web sites were programmed to take control of their Internet browsers and force the consumers to view explicit advertisements for pornographic Web sites. The Commission obtained a permanent injunction and a \$1.8 million judgment. The United States Attorney's Office for the Southern District of New York also indicted Mr. Zuccarini with violations of the Truth in Domain Names Act and possession of child pornography. He was sentenced to 30 months in prison.

More recently, pursuant to the CAN-SPAM Act (the Controlling the Assault of Non-Solicited Pornography and Marketing Act), the Commission adopted a final rule requiring that

There is reason to believe that many consumers already are aware of some of these risks. For example, with respect to the concern that consumers may use P2P software illegally to download copyrighted material, the recording industry has brought nearly 2000 copyright infringement actions since July 2003 against consumers who used P2P file-sharing programs to download music.¹⁵ Thus, many consumers likely are aware that they also could be liable for copyright infringement if they engage in similar conduct.¹⁶ Similarly, most consumers likely are aware that it may be a crime to possess or distribute child pornography. Given that many consumers know that one can receive a virus from a file attached to an e-mail, many of them may correctly infer that one can also receive a virus from a file received through the use of a P2P file-sharing program. Nevertheless, there may be some consumers who are unaware of some of these P2P file sharing risks.

The FTC has engaged in educational efforts to inform consumers who may not know of these risks, so that they can protect themselves and their children from the risks of harm from P2P file-sharing technology. In July 2003, the FTC issued a consumer alert entitled, “File-

the phrase “SEXUALLY-EXPLICIT: “ be included in the subject line of spam that contains sexually oriented material in order to inform recipients that a spam message contains such material and to make it easier to filter out messages that recipients do not wish to receive. *See* 69 Fed. Reg. 21,024 (Apr. 19, 2004), at <http://www.ftc.gov/os/2004/04/040413adultemailfinalrule.pdf>. When opening such an email, the recipient must see the electronic equivalent of a “brown paper wrapper” in the body of the message. The first portion of the message must include the phrase “SEXUALLY-EXPLICIT” and certain other specified information but no other information or images.

¹⁵ *See* Recording Industry Association of America Press Release, “RIAA Brings New Round of Cases Against Illegal File Sharers” (Mar. 23, 2004).

¹⁶ For instance, a recent Harris Interactive Internet poll conducted for the Business Software Alliance found that 86% of children ages 8 to 18 know that the files they download may be copyrighted. Harris Interactive Poll, *Tweens’ and Teens’ Internet Behavior and Attitudes About Copyrighted Materials* (Apr. 2004).

Sharing: A Fair Share? Maybe Not.”¹⁷ In this alert, the Commission warned consumers about the various possible risks from downloading and using P2P file-sharing software.¹⁸

III. Potential FTC Act Violations

An important question for the Commission is whether P2P file-sharing software distributors are violating Section 5 of the FTC Act by not adequately disclosing the risks of downloading and using their software.¹⁹ The issue of whether the distributor of a technology has a legal obligation under Section 5 of the FTC Act to disclose risks that depend on individual use is not limited to the P2P file-sharing program context; it also implicates many other consumer technologies. For example, consumers can use e-mail to send or receive copyrighted materials, pornography, viruses, and spyware. Similarly, search engine technology may expose consumers inadvertently to child pornography, viruses, and spyware. Videotape recorders and compact disc

¹⁷See “File-Sharing: A Fair Share? Maybe Not,” at www.ftc.gov/bcp/online/pubs/alerts/shareart.htm.

¹⁸In April 2004, the Commission likewise alerted businesses to the potential security risks of P2P file-sharing programs. The Council of Better Business Bureaus, with the cooperation of the Commission and the National Cyber Security Alliance, produced and widely distributed a brochure that provides a checklist of recommendations to help large and small businesses improve their computer security, and specifically alerts businesses to the possible risks associated with file-sharing programs.

¹⁹ Section 5 of the FTC Act prohibits unfair acts and practices, which may include the omission of information. An act or practice is unfair if it causes or is likely to cause injury to consumers that is (1) substantial; (2) not outweighed by countervailing benefits to consumers or to competition; and (3) not reasonably avoidable by consumers themselves. Section 5(n) of the FTC Act, 15 U.S.C. § 45(n). When the Commission has required disclosures based on unfairness, the cases usually have involved a risk of serious physical injury, *see, e.g., International Harvester Co.*, 104 F.T.C. 949 (1984)(failing to disclose risk of fuel geysering from tractors), or the disclosure of a standardized metric to allow consumers to make comparisons across competing products, *see, e.g., Labeling and Advertising of Home Insulation*, 16 C.F.R. Part 460 (rule governing disclosure of the heat-resisting ability of home insulation products).

recorders may be used in violation of copyright laws by individuals who are unaware that they are doing so. Many risks associated with P2P file-sharing seem to result largely from the actions of individual users, rather than from the operation of the P2P file-sharing software itself.

Although the Commission has required warnings with respect to inherently dangerous products in appropriate cases,²⁰ we are not aware of any basis under the FTC Act for distinguishing P2P from other neutral consumer technologies.

Distributors of P2P file-sharing programs could also violate Section 5 of the FTC Act if they made deceptive claims about such risks.²¹ The FTC staff reviewed the disclosures on the Web sites of the ten most popular P2P file-sharing software program distributors.²² Consumers have downloaded these ten file-sharing programs more than 640 million times. The purpose of this review was to determine whether these distributors misrepresent the risks associated with their P2P file-sharing programs.

The FTC staff's review revealed that distributors of P2P file-sharing programs use a variety of means to convey risk information to consumers. Distributors disclose risk information on their own Web sites²³ or in their licensing agreements with consumers. Some distributors also

²⁰ See, e.g., *Swisher Int'l, Inc.*, <http://www.ftc.gov/opa/2001/02/cigarlabel.htm> (requiring a cigar manufacturer to warn of the significant adverse health effects associated with cigar use).

²¹ See *Federal Trade Commission Policy Statement on Deception, appended to Cliffdale Assocs.*, 103 F.T.C. 110, 174-83 (1984).

²² The FTC staff examined the information found on the Web sites of Kazaa Media Desktop, Morpheus, iMesh, Audiogalaxy Satellite, Limewire, BearShare, Grokster, WinMX, Blubster, and Ares Galaxy. <http://download.com/sort/3150-2166-0-1-4.html?> Commission staff estimates that these ten distributors represent well over 90% of P2P file-sharing software downloads.

²³ This information is usually presented on the Web site through the posted privacy policy or the frequently asked questions section.

provide consumers with a hyperlink to risk information at www.P2PUnited.org, one of the P2P file-sharing software industry's trade associations. In addition, one of the main portals for downloading such programs, www.Download.com, discloses some risk information on its site.

FTC staff reviewed and analyzed the representations made by these distributors about the risks associated with downloading and using their programs. None of these representations appear on their face to be false or misleading.

Distributors of P2P file-sharing programs do not appear to be providing as much risk information about their products as they could or providing risk information as clearly and conspicuously as they might.²⁴ Because risk information may be useful to consumers, the Commission believes that it would be beneficial for distributors to make this information more accessible.

The Commission staff therefore is providing the ten largest distributors of P2P file-sharing programs with a copy of the FTC's guidance document addressing how to disclose information in an online context.²⁵ The staff will also inform distributors that they may incorporate in their Web sites a prominent link sending consumers to the FTC's online brochure for more information about the risks associated with file-sharing software.²⁶

²⁴Seven of the eight P2P file-sharing software programs that bundled software (usually adware) with their programs disclose this fact to consumers. Eight of the ten P2P file-sharing software program Web sites disclose that there are risks of liability associated with sharing copyrighted materials; four disclose that users may be subject to criminal prosecution for sharing or possessing files that contain pornography.

²⁵ See Federal Trade Commission, *Dot Com Disclosures: Information about Online Advertising* (May 2000), <http://www.ftc.gov/bcp/online/pubs/buspubs/dotcom/index.html>.

²⁶ See Federal Trade Commission, Consumer Alert: "File-Sharing: A Fair Share? Maybe Not" (July 2003), available at www.ftc.gov/bcp/online/pubs/alerts/shareart.html.

A P2P file-sharing software industry trade association recently wrote to the Commission to report that its member companies have a “desire . . . to act responsibly, to improve their products and to offer consumers a high-quality experience.”²⁷ We will encourage industry members to make good on this offer by improving their disclosures of risk information to consumers. Working with industry, through outreach, hosting roundtables, and holding public workshops, has proven beneficial in other areas, particularly those involving technology. Therefore, as an initial matter, the Commission staff will meet with P2P file-sharing software industry trade associations regarding improving disclosures. The Commission staff will also re-examine the Web sites of P2P file-sharing software programs to reassess the information that distributors are providing to consumers.

Conclusion

The FTC thanks the Committee for this opportunity to describe how the Commission has used its authority under of Section 5 of the FTC Act to address issues raised by P2P file-sharing technology.

²⁷ Letter dated May 20, 2004, from Martin C. Lafferty, CEO, Distributed Computing Industry Association, to Federal Trade Commission, at 4.