

Statement of James C. Miller III
on behalf of
The Recording Industry Association of America (RIAA)
before
The Conference on P2P File-Sharing
sponsored by
The Federal Trade Commission
on
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in
Washington, DC

In its website warning consumers about the dangers of using current P2P software, the Federal Trade Commission (FTC) admonishes, "consider the trade-offs."¹ That is not only good advice to give; it is good advice to take. If the FTC takes to heart its own advice to consumers, it will act promptly to change the practices of major P2P software companies.

¹ [File-Sharing: A Fair Share? Maybe Not, FTC Consumer Alert \(July 2003\).](#)

There is ample evidence that the major P2P software companies are violating Section 5 of the FTC Act.² The tradeoff for the FTC is whether to intervene. As I shall summarize briefly below, the benefits of doing so clearly outweigh the costs.

The major P2P companies are blatantly violating the Commission's policy on deception, defined as a material representation or omission likely to mislead a reasonable consumer.³ Some examples suffice. As shown in the attachment, Kazaa prominently displays a commitment to consumers that its software contains no bundled spyware. Yet, consumers who download the "free" version of Kazaa (the vast majority), also download spyware distributed by Cydoor and the GAIN Network.⁴ Following on the heels of recent litigation, the P2P software companies have trumpeted the message that their software is altogether legal. Examples of such claims include: "Kazaa is 100% legal" and "Morpheus is the only American P2P File Sharing software ruled legal by the US Federal Courts."⁵ Such messages communicate to consumers acting reasonably under the circumstances that the most frequent use to which such P2P software is put – downloading copyrighted materials – is not a violation of law. But, as we know, the court decisions say no such thing: they find that copyright holders cannot hold current P2P services liable for contributory infringement.⁶ But individual use remains both

² See below and also Lisa Jose Fales, Charles Webb, Jeffrey A. Eisenach, and James C. Miller III, Peer-to-Peer Software Providers' Liability Under Section 5 of the FTC Act (April 27, 2004).

³ See letter from James C. Miller III, Chairman of the FTC, to the Honorable John D. Dingell, Chairman of the Committee on Energy and Commerce of the U.S. House of Representatives (October 14, 1983).

⁴ (Deceptive) material representations about the (alleged) absence of spyware are also made by LimeWire, Morpheus, and eDonkey among others. (See Attachment.)

⁵ See Attachment for actual Kazaa and Morpheus web pages making these claims.

⁶ See *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 259 F. Supp.2d 1029, 1034-45 (C.D. Cal. 2003), *aff'd*, 380 F.3d 1154 (9th Cir. 2004), *cert. granted*, 2004 U.S. LEXIS 8173 (Dec. 10, 2004).

illegal and fully actionable. Presumably, what the P2P providers intend consumers to believe is something else: that it is “100 percent legal” to use P2P networks to “share” copyrighted music – which, of course, is blatantly false. In my view, the “100 percent legal” claim and equivalents are facially deceptive and material under a traditional interpretation of Section 5 of the Act.

The major P2P companies’ material omissions are equally violative of FTC law. The major P2P software providers fail to warn consumers of the substantial risks of engaging in P2P file sharing, such as those arising from the spread of computer viruses; the dissemination of personal, confidential information; the receipt and potential distribution of pornography, including illegal child pornography; and downloading copyrighted materials – despite the knowledge that the latter two (pornography and copyrighted materials) constitute the vast majority of files shared with their software. While some of the major P2P software companies do provide a limited description of just what the consumer is downloading, this information most often is buried in boilerplate language contained in lengthy end user license agreements (EULAs) that no reasonable consumer (especially the major users of P2P software – teenagers and children) would be expected to wade through. For example, to understand the implications of downloading the GAIN Network spyware that comes bundled with Kazaa, the consumer must scroll through hundreds of lines of text on Kazaa’s web pages and comprehend thousands of words of obtuse legal language.⁷

So, clearly, the FTC can act. Should it do so? What are the tradeoffs?

⁷ Such a display clearly does not meet the requirements spelled out in the FTC’s [Dot-Com Disclosures](#) (May 2000).

As described below, for relatively little expenditure of resources the FTC can change the practices of the major P2P software companies and eliminate the vast majority of the attendant costs. What are those costs? I make no effort to quantify them, but the magnitudes are striking.

First, there is the theft of copyrighted material. Sure, we all know that once intellectual property has been produced the (marginal) cost of utilizing it is zero. But to price it as such ignores the role of property rights in assuring a flow of intellectual property. This is what the patent and copyright laws are all about: a recognition of the importance of assigning rights to producers of intellectual property and enforcing those rights. Music is no exception. If people are allowed to steal music, much of the incentive to produce new music disappears. So, as the Founding Fathers concluded centuries ago, assigning and defending rights to intellectual property produces more benefits than costs.

Second, there are the personal security risks. As noted above, consumers generally are not aware that bundled with P2P software is spyware that communicates personal information about the user that presumably they would rather not have distributed. The consequences range from the disclosure of intensely personal information to fraudulent use of financial information and even theft of identity.

Third, while P2P software, used properly, can enhance efficiency, because of the pattern of deception by the major P2P software providers the bandwidth resources consumed are huge and largely undetected by the consumer.⁸ Keep in mind that P2P software “takes hold” of one’s computer and uses it to search for and distribute files. A

⁸ See Attachment.

consumer observing that her computer is running more slowly than might be expected is unlikely to blame the new P2P software any more than a driver getting less-than-expected mileage from her automobile would think that someone was systematically siphoning off gasoline from the car's tank.

Fourth, there is evidence that a substantial portion of the files downloaded through P2P software contain viruses or other malware. There is also evidence that, contrary to express claims otherwise, current P2P software is woefully inadequate in dealing with this problem.⁹

Fifth, while not strictly within the ambit of the FTC's legal authority, there are social issues that should prompt the Commission to utilize its legal authority in this matter. As noted earlier, the major P2P software providers deceive some consumers into thinking that it is lawful to download copyrighted materials. For the rest, P2P providers facilitate lawlessness on the part of consumers, especially the young.

One of the greatest uses of P2P file-sharing is pornography. For adults, that should be a matter of personal preference. But there are two extremely important issues here. The first is that children should not be exposed to such information. While P2P providers represent that their software incorporates efficient filters of "adult" content, such filters are woefully inadequate. Using relatively innocuous terms to search a P2P network will produce a variety of pornography since, in part, the source is the one labeling the file and pornographers are clever in labeling their work to induce wide access. Also, the major P2P providers have conveniently configured their websites to make it very easy to disable the adult filter. The second serious concern is

⁹ See RIAA submission to this conference: [Peer-to-Peer File-Sharing Technology: Consumer Protection and Competition Issues](#) (November 2004).

that the distribution of child pornography is a felony, and that is exactly what a consumer engages in whenever, even without his knowledge, his computer is taken over by the P2P software and a file containing child pornography is shared with others.

What can and should the FTC do to eliminate these costs? I have five suggestions. First, the FTC should continue its consumer education programs – its various alerts and communications with the press.

Second, the FTC should seek voluntary cooperation among P2P providers to address the problems just described. The FTC should demand strict limits on P2P practices and specify certain requirements to which they must adhere. For example, P2P providers should end the deceptive practices described above and in the Attachment. They should be required to disclose in very plain language that, by default, consumers will be downloading spyware, that their computers will be used as devices to distribute files to others directly and to facilitate the distribution of files among third parties, that downloading copyrighted material such as recorded music is stealing and is punishable by fines and/or imprisonment; and that the P2P software will enable the consumer's computer to distribute child pornography and that this is a felony.

The P2P providers should also be required to incorporate certain features into their software. To police the unlawful downloading of music, their software should incorporate filters that can detect when a file is copyrighted and then block its downloading. To reduce the abuse of pornography by children, the adult filter's default should be "on" (not "off"), and should be made more difficult to disable. The providers should also explore means for making adult content filters more effective – especially to prevent the distribution of child pornography.

The FTC should encourage the major P2P providers to adopt the menu of changes just described, plus others that might be warranted. But to accomplish this, the FTC must be much more aggressive with these P2P software providers than it has been in the past. A glaring feature of the major P2P providers' performance to date is their ignoring of FTC law, FTC guidelines, and even their own promises to change their practices.

Third, the FTC should back up its demand that the P2P providers change their practices by initiating a formal Trade Regulation Rule (TRR) designed to accomplish the reforms just described plus any other reforms that might be warranted.

Fourth, the Commission should initiate targeted litigation against offenders. I would suggest the FTC begin with the claim that P2P filesharing is "100 percent legal."

The major objective of both the TRR and litigation would be to force quick, voluntary action on the part of P2P providers, as this route tends to be more timely and effective than either formal rulemaking or extended litigation.

Finally, even with a voluntary agreement the FTC needs to be vigilant in making sure P2P providers adhere to FTC law and interpretations. This is an industry that is prone to deception. The product is very complicated, and consumers find it difficult to observe and evaluate defects. Most consumers are teenagers and children, and parents or guardians are not likely to understand what the product does or perhaps even be aware that it is being used. Consumers who knowingly engage in illegal activity are unlikely to complain.

Furthermore, P2P providers have strong incentives to promote cheating by users -- in order to drive up their revenues. The industry is characterized by low costs of entry

and exit, and there is little in the way of reputational capital at risk. Also, as we have seen, the major P2P providers are sophisticated avoiders of legal liability (at least thus far). Policing this industry will entail the FTC's constant searching of websites and utilization of P2P software to determine whether its requirements are actually being met.

As with many emerging technologies, P2P holds great promise for improving efficiency and increasing consumer welfare. But P2P can realize its potential only if certain practices are ended and consumers are adequately warned about the dangers of P2P abuse. The FTC is arguably the only entity capable of guaranteeing this result.