

Comments and Recommendations on the

Federal Trade Commission's Peer to Peer Filesharing Workshop

FTC File No. P03 4577

By Seth Johnson

(These are recommendations that were submitted along with my request to participate submitted November 15, 2004)

A. Distributed Search Applications Not Correctly Defined

A matter of some concern regarding the FTC's workshop on "P2P filesharing technology" arises from its usage of the term "P2P" or "peer to peer." Observing that Napster's centralized data servers were a legal target, some Internet users declared that the use of a central server was unnecessary, because the decentralized architecture of the Internet was inherently not subject to the legal theory behind the charges levied against Napster. As a result, downloadable applications like KaZaA, Grokster and Gnutella took on the label "P2P" to distinguish them from Napster, when in fact the ability for any computer to directly communicate with any other is built into the Internet infrastructure. In addition, the facts that these applications allowed users to open up access to their directories, and that they presented lists of files which users could select to initiate transfers, have often obscured the fact that the applications themselves do not transfer the files, and that the ability to give other users access to local directories is a feature built into ordinary operating systems.

This is why "P2P filesharing" is not an appropriate name to describe these applications. These applications simply provide the same function that Napster provided with a centralized server: the ability to find files on the Internet. They are decentralized search engines. They do not perform the file transfers and they do not themselves make peer to peer possible. They allow users to implement a search engine that is distributed across many machines, and the Internet itself does the rest.

The description of "P2P filesharing applications" presented in this workshop's call for participation offers nothing to distinguish KaZaA, Grokster or Gnutella from the basic functions of the Internet and ordinary, generally used operating systems. It also makes no mention of the core functionality that these

applications actually do provide: search and discovery of the locations of files. Sharing files among a group of users is a basic network capability that operating systems and networks already provide.

B. Address Nature of P2P; Include Designers and Developers

Among the goals presented by the FTC for this workshop are learning about P2P, including how it works, and discussing self-regulatory, regulatory, and technological responses to a set of risks which the workshop associates with these consumer-friendly decentralized search engines. I suggest that the testimony of those who designed the Internet and those who exercise its basic functions as a matter of their daily productive lives, will provide a stronger framework for understanding the real nature of these risks. One name that should be recommended is David Reed, one of the original architects of the underlying infrastructure of the Internet. He is well-prepared to comment on the relationship between the architecture of the Internet and the capacities for innovation for which it provides. Another name that might be considered is Bram Cohen, the author of BitTorrent.

A cursory survey of Sourceforge.net will show a great variety of projects whose authors can testify to their dependence on the peer to peer architecture of the Internet, and to the fact that accessing and distributing of files among peers is an unalterable component of their work. The participation of voices representing development projects such as these is a critical consideration for this workshop.

C. Conceptual Framework will Produce Limited Understanding

Discussion of consumers' private interests should not be confused with copyright issues. Even greater risks ensue when discussions of filters, privacy, security, adware, viruses, exposure to undesirable material and impairments of computer function are mixed with copyright issues. The result of addressing copyright concerns in the manner of protecting private consumer interests can only be that both copyright and innovation will suffer. Technological developments that affect the capacity of individuals to publish, use, and develop new uses for information will often signal new issues for copyright policy, issues which touch on areas that are necessarily out of the scope of the FTC's mandate for rulemaking or promulgating norms.

In particular, among the risks mentioned in the workshop's call for participation is that of exposure of end users to liability to charges of copyright infringement. Addressing this risk within the conceptual framework that the call for participation appears to exhibit, and in terms of the kinds of responses that it cites for consideration, can reasonably be expected to lead to a very limited

understanding and an encouragement of prescriptive responses that are not well-advised.

More fundamentally, addressing copyright issues within this conceptual framework will result in owners of computers and makers of applications losing their capacity to develop and make use of their computers and the communications infrastructure.

D. Modify the Structure of the Workshop

It may be that the structure that the workshop will eventually take is to some extent exhibited in the questions presented in the call for participation and the way it contemplates certain risks with regard to consumers' use and understanding of the features of decentralized search applications. Inasmuch as this is true, it would be advisable to adjust the structure of the workshop to more precisely reflect the nature of the subject matter. The scope of the questions should also be expanded and adapted to admit a proper examination of the relationship of the risks to the nature of the technology and the interests of flexibility and innovation; and I would urge the FTC to adapt the conceptual framework and format of the workshop to reflect this purpose more greatly.

Describe Internet Architecture and Include Developers

Opportunity should be provided to describe the architecture of the Internet and how it fosters innovation, and to more precisely define the nature of the applications that are the focus of the workshop. The set of questions on uses of "P2P filesharing" technology should be expanded to admit testimony of those who develop Internet applications.

Address Technology and Copyright Separately and Extensively

The questions listed in the set addressing the impact of "P2P filesharing" on copyright holders would in fact warrant an extensive process of public inquiry in themselves. Many of these questions address areas that do not pertain specifically or solely to the consideration of the impact of peer to peer technology on copyright holders. The FTC would be well advised to report on the areas alluded to by these questions separately and extensively.

Describe Nature of Risks Correctly; Decouple from Narrow Focus on Decentralized Search Applications

The sets of questions addressing identification and disclosure of risks to consumers should be adapted so that the nature and source of the risks are not misconstrued, and so that a more encompassing understanding of the sources of the risks and of prospective solutions can be developed. The questions as a

whole exhibit a narrow focus on a set of applications whose characteristics are not properly recognized and understood. The set of questions addressing technological solutions should be decoupled from a narrow focus on specific applications that provide decentralized search capabilities, and should be expanded to admit a broader analysis.

E. General Note

The solutions currently identified in the call for participation do not appear to provide for a well-designed response to the full scope of risks and implications elicited by this workshop's areas of consideration. One major source of these risks that some will mention is the undue influence on the market and on copyright policymaking of interests such as market dominant software manufacturers, publishers and the recording and motion picture industries. Monopoly interests in the operating system arena in particular interfere severely with consumers' access to, understanding of and choices with respect to software that can provide far more robust protections than they generally make use of presently.