



THE CHAIRMAN

FEDERAL TRADE COMMISSION  
WASHINGTON, D.C. 20580

November 13, 2007

The Honorable Henry Waxman  
Chairman  
Committee on Oversight and Government Reform  
United States House of Representatives  
2157 Rayburn House Office Building  
Washington, D.C. 20515

Re: Inadvertent File Sharing Over Peer-to-Peer Networks

Dear Chairman Waxman:

Thank you for your October 17, 2007 letter requesting certain information from the Federal Trade Commission regarding inadvertent file sharing over peer-to-peer (P2P) networks and for the opportunity to assist with the Committee's ongoing investigation into this issue. We take seriously the concerns raised, and the staff has paid close attention to the issue of inadvertent file sharing in recent months. As you know, the Commission is committed to protecting consumers from identity theft, as well as some other online and offline threats. To this end, I submit the following information in response to your questions.

- I. Does the FTC still consider the risks posed by P2P file sharing to be similar to "other Internet-related activities such as surfing web sites, using search engines, downloading software and using e-mail or instant messaging?"**
  - a. If so, please explain how these risks are similar.**
  - b. If not, please explain how the agency plans to protect consumers from the enhanced risks of utilizing P2P file-sharing programs.**

There are similarities between the risks associated with P2P file sharing and the risks associated with other Internet-related activities, such as inadvertent exposure to pornography, viruses, and spyware. The PTO report issued earlier this year, however, raises concerns that go beyond these known risks. The PTO report suggests that the design of certain P2P file-sharing programs itself is causing users to share files. This includes files with sensitive information that consumers have not chosen to share. If that is the case, then the use of those specific P2P file-sharing programs does pose new risks to consumers.

Accordingly, it is crucial for industry to take steps to minimize the likelihood of inadvertent sharing by improving the user interface and incorporating enhanced safeguards into

their programs. If consumers attempt to override those safeguards, the programs should warn them with an intensity commensurate with the risk, and require them to take multiple affirmative steps to complete the override. Following this Committee's hearing in July, the FTC staff began a dialogue with the industry to explore ways to do just that. The staff will continue to examine the major U.S. P2P file-sharing programs and work with their distributors on enhancing safeguards and warnings. The staff also will work with industry to better educate consumers about the risks of inadvertent file sharing. In addition, the staff is reviewing the possibility of law enforcement action under Section 5.<sup>1</sup>

**2. Has the FTC reviewed the report issued by the PTO earlier this year? If so, please indicate if the agency is conducting additional tests to determine whether its assessment of the risks posed by P2P need to be reevaluated.**

The FTC staff has reviewed the PTO's report on inadvertent file sharing and examined recent versions of the P2P programs discussed in that report<sup>2</sup> for the following:

- What risk disclosures -- including the risk of inadvertent sharing -- are presented to consumers prior to download;
- Whether the programs prompt consumers and use preselected default settings to enable sharing of files already present on consumers' computers;
- What files and folders the programs share when initially installed;
- Whether the programs indicate which folders and files are designated as "shared," how clearly those indications are being given, and how easy those designations are to change; and
- Whether the programs warn consumers if they try to designate root directories or "My Documents" folders as shared folders.

Based on this review, we have determined that the industry can take additional steps to minimize the risk of inadvertent file sharing. The FTC staff is working with industry to develop better safeguards and stronger warnings. This will require that the staff periodically test how various

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<sup>1</sup> See *infra* pp. 4-6.

<sup>2</sup> The PTO report discusses the programs eDonkey, Bearshare, KaZaA, LimeWire, and Morpheus. The eDonkey2000 program is no longer being distributed. The Bearshare program examined by the FTC staff appears to share only music and video files.

P2P file-sharing programs operate and assess whether they can be improved to minimize the risk of inadvertent file sharing.

**3. Has the agency followed up with remaining P2P distributors since December 2004 to determine whether they have adhered to the *Code of Conduct*? If so, please provide details about these inquiries and their results.**

Since the announcement of the self-regulation measures in December 2004, the FTC staff has periodically reviewed P2P file-sharing programs to monitor the industry's implementation of its risk-disclosure promises. In addition, in 2005, the FTC staff sent letters to P2P file-sharing distributors reminding them of their commitments to comply with the industry's self-regulatory program. The FTC staff's reviews have confirmed that the major P2P file-sharing programs steadily improved their risk disclosures. As of March 2006, all of the major U.S.-based program distributors were making the promised risk disclosures.<sup>3</sup>

As noted above, following the issuance of the PTO report, the FTC staff conducted additional reviews of those P2P file-sharing programs that were being distributed at that time, and found that the distributors were disclosing the risks of inadvertently sharing sensitive, personal files where applicable. Although the staff has not attempted to police the distributors' compliance with all aspects of the *Code of Conduct*, it has concluded in its various reviews that the distributors were complying with their commitments to install their programs only with users' informed consent. Notwithstanding the previously adopted *Code of Conduct*, however, we believe that P2P file-sharing program distributors should strive to exceed the standards in the *Code of Conduct*, given evolving risks. To that end, the FTC staff has met with the Distributed Computing Industry Association (DCIA), whose members include the most popular U.S. P2P file-sharing application providers, to discuss strategies to mitigate the specific risks of inadvertent file sharing. The staff intends to work with the DCIA and its individual members to define concrete steps that the industry can take to address the problem, and to monitor its progress as these strategies are implemented.

**4. In its efforts to combat identity theft, has the FTC considered the impact of P2P file sharing?**

**a. Was P2P file sharing considered as a potential risk by the President's Identity Theft Task Force?**

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<sup>3</sup> In March 2006, I sent interested members of Congress an update on the staff's most recent review of P2P program web sites. *See, e.g.*, Letter from Deborah Platt Majoras, Chairman, Federal Trade Commission, to Henry Waxman, Member of the U.S. House of Representatives (Mar. 6, 2006). Only one major operating P2P program distributor, Blubster, failed to make the promised risk disclosures. Blubster is located in Spain, and the FTC staff referred its findings to the appropriate Spanish authorities.

**b. Will recent DOJ activity in this area lead to more explicit linkage between identity theft and file sharing?**

The Commission's Identity Theft Program has developed resources for consumers to use to guard against the unauthorized acquisition of their personally identifiable information. In particular, our *OnGuard OnLine* resources provide detailed information on peer-to-peer file sharing,<sup>4</sup> and caution consumers about the potential risks associated with P2P. The site alerts consumers to the need to install anti-spyware software, provides advice about the proper loading of the P2P file-sharing software and other protections, and advises consumers to ensure that all members of the family know about the potential risks associated with use of P2P file-sharing programs. Without taking these steps, consumers risk intrusions into their computers and the data they store on their hard drives. Theft of this data could very well lead to identity theft.

The President's Identity Theft Task Force recognized that identity thieves will try to steal consumer data wherever it resides – whether in trash bins, wallets, databases, or home PCs. The Task Force therefore recommended various legislative changes that would better equip the Department of Justice to charge and prosecute those who steal data through electronic means, including, presumably, through unauthorized P2P access. As you point out in your letter, the Department of Justice successfully indicted a defendant who used data acquired through a P2P network to commit identity theft.<sup>5</sup> The Task Force recommended changes to existing laws that would broaden the category of cases that could be brought, and would enhance sentences under certain circumstances.<sup>6</sup> Indeed, Senators Leahy and Specter recently introduced legislation that captures many of these recommendations.<sup>7</sup>

The FTC and the Department of Justice work very closely on issues pertaining to data theft, security, and identity theft. As co-chairs of the Identity Theft Task Force, the agencies have strengthened their ties, and are developing even more ways to ensure that consumers are secure in their home computing, and that criminals who commit high-tech burglary can be charged and prosecuted. In addition, the FTC has updated its educational materials concerning identity theft to help make consumers more aware of the potential risk of identity theft via

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<sup>4</sup> See [www.onguardonline.gov/p2p.html](http://www.onguardonline.gov/p2p.html).

<sup>5</sup> The man charged in that case pleaded guilty on November 5, 2007. Press Release, U.S. Attorney's Office, W.D. Wash., Seattle Man Pleads Guilty in Connection with Id Theft Using Computer File Sharing Programs (Nov. 5, 2007), available at <http://www.usdoj.gov/usao/waw/press/2007/nov/kopiloff.html>.

<sup>6</sup> See [www.idtheft.gov/reports/StrategicPlan.pdf](http://www.idtheft.gov/reports/StrategicPlan.pdf), p. 68 and App. G.

<sup>7</sup> See [www.leahy.senate.gov/press/200710/101607b.html](http://www.leahy.senate.gov/press/200710/101607b.html).

information unwittingly shared via P2P file-sharing networks. We are considering additional steps.

**5. Does the FTC have sufficient enforcement authority to address problems associated with inadvertent file sharing or does it need additional authority?**

The Commission has authority to take action against unfair or deceptive acts or practices under Section 5 of the FTC Act. However, the Commission, which has exclusively civil jurisdiction, does not have authority to prosecute criminal activities relating to P2P programs. Possible applications of the Commission's legal authority are discussed below.

A. *Deception*

An act or practice is deceptive under Section 5 of the FTC Act if: (1) there is a representation or omission of information that is likely to mislead consumers acting reasonably under the circumstances; and (2) that representation or omission is material to consumers. FTC Policy Statement on Deception ("Deception Policy Statement"), *appended to Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 175 (1984); *see, e.g., FTC v. Tashman*, 318 F.3d 1273, 1277 (11<sup>th</sup> Cir. 2003); *FTC v. Gill*, 265 F.3d 944, 950 (9<sup>th</sup> Cir. 2001); *FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020, 1029 (7<sup>th</sup> Cir. 1988). A representation or omission is material if it is "likely to affect [consumers'] choice of, or conduct regarding a product." *Kraft, Inc. v. FTC*, 970 F.2d 311, 322 (7<sup>th</sup> Cir. 1992) (quoting *Cliffdale Assocs.*, 103 F.T.C. at 165). Misrepresentations relating to consumers' use of a product after purchasing can be deceptive under Section 5. Deception Policy Statement, 103 F.T.C. at 182 n.45 ("Material information may affect conduct other than the decision to purchase a product.").

As noted in the Commission's June 2004 letter to Senator Hatch, P2P file-sharing program providers could violate Section 5 if they made deceptive claims about the risks related to their programs.<sup>8</sup> A review of the top ten programs at the time showed no such claims being made, nor has subsequent review.<sup>9</sup> Similarly, if a P2P program indicates falsely that a consumer's files are not being shared when, in fact, they are being shared, that representation would violate Section 5. In July, the FTC staff began reviewing the programs discussed in the PTO report that were still being distributed to evaluate whether deceptive representations were being made about the programs' risks or, within the course of operating the programs, about the files the programs would be sharing. That review continues.

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<sup>8</sup> Letter from Donald Clark, Secretary, Federal Trade Commission, to Orrin Hatch, Member of the United States Senate (June 21, 2004).

<sup>9</sup> *Id.* at 7; *see* Letter from Deborah Platt Majoras, Chairman, Federal Trade Commission, to Henry Waxman, Member of the U.S. House of Representatives (Mar. 6, 2006).

The FTC previously has used its deception authority to bring two successful law enforcement actions based on deceptive claims made about P2P file-sharing programs. In *FTC v. Cashier Myricks Jr.*,<sup>10</sup> the Commission filed suit against the operator of the web site MP3DownloadCity.com for making allegedly deceptive claims that it was “100% LEGAL” for consumers to use the file-sharing programs he promoted to download and share music, movies, and computer games. The defendant entered into a settlement agreement with the FTC that barred misrepresentations about P2P file-sharing products or services, required the operator to disclose the civil and criminal liability risks of downloading copyrighted material without the owner’s permission, and required the operator to refund more than \$15,000 to the customers he allegedly duped into buying memberships to the web site.

In *FTC v. Odysseus Marketing, Inc.*,<sup>11</sup> the FTC filed suit against the operator of the web site Kazanon.com. According to the FTC’s complaint, the defendants encouraged consumers to download free software that they falsely claimed would allow consumers to engage in anonymous P2P file-sharing. The FTC also alleged that the defendants deceptively failed to disclose that their free software installed spyware and adware on consumers’ computers. The defendants entered into a settlement agreement with the FTC that prohibits secret downloads in the future, prohibits the operators from exploiting security vulnerabilities to download software, and bars future misrepresentations. In addition, the defendants agreed to disgorge their alleged ill-gotten gains.

#### B. *Unfairness*

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. 15 U.S.C. § 45(n); *see also International Harvester Co.*, 104 F.T.C. 949, 1061 (1984); FTC Policy Statement on Unfairness (“Unfairness Policy Statement”), *appended to International Harvester*, 104 F.T.C. at 1073. The concept of reasonable avoidance helps to ensure that when the Commission brings an unfairness case, it is “not to second-guess the wisdom of particular consumer decisions, but rather to halt some form of seller behavior that unreasonably creates or takes advantage of an obstacle to the free exercise of consumer decisionmaking.” Unfairness Policy Statement, 104 F.T.C. at 1074.

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<sup>10</sup> Civ. No. CV05-7013-CAS (FMOx) (C.D. Cal., filed Sept. 27, 2005).

<sup>11</sup> Civ. No. 05-330 (D.N.H., filed Sept. 21, 2005).

The unwanted disclosure of consumers' sensitive, personal files to potential identity thieves would constitute substantial injury.<sup>12</sup> Proving that consumers cannot reasonably avoid that injury when using any particular P2P file-sharing program would require extensive analysis and testing of that program to determine if it unreasonably creates obstacles to consumer choice about which files the user will share.<sup>13</sup> The FTC is examining these issues. The Commission would also need to show that the injury to consumers is not outweighed by any offsetting consumer or competitive benefits produced by distributing programs that create such obstacles to consumer choice. *See* Unfairness Policy Statement, 104 F.T.C. at 1073-74.

We are evaluating whether there is evidence of a law violation. However, even if the operation of any given program is not unfair within the meaning of Section 5, the program may well be improved to reduce the risk that consumers will inadvertently share sensitive, personal files. As noted in our response to question 1 above, the FTC staff will work with the major, U.S.-based P2P file-sharing application distributors to improve their interfaces and minimize the risk to consumers, particularly those who are novice users of their software. The FTC staff will also continue its own efforts, and work with application distributors to enhance their efforts, to educate consumers about the risks of inadvertent file sharing, how to avoid them, and how to correct any inadvertent sharing that may have resulted from the use of earlier versions of those distributors' programs.<sup>14</sup>

## **Conclusion**

I hope that the foregoing information is helpful. I am committed to exploring ways to reduce the inadvertent sharing of personal information via P2P file-sharing networks. If you or

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<sup>12</sup> *See, e.g., BJ's Wholesale Club, Inc.*, 140 F.T.C. 465 (Sept. 20, 2005) (consent order) (complaint alleges that company's failure to adopt reasonable and appropriate security measures to protect consumers' personal financial information stored on its computers, which resulted in millions of dollars of purchases on compromised credit and debit card accounts, was an unfair practice). Even absent identity theft, consumers may be harmed by the inadvertent disclosure of sensitive financial or health information. *See, e.g., Eli Lilly & Co.*, 133 F.T.C. 763 (May 8, 2002).

<sup>13</sup> The PTO report highlights several characteristics of P2P file-sharing programs that the PTO asserts could lead to inadvertent file sharing. Such characteristics are instructive but not necessarily determinative as to whether the risk of inadvertent file sharing is reasonably avoidable by consumers.

<sup>14</sup> The FTC staff is also attempting to gain information regarding the number of consumers inadvertently sharing personal information relative to the millions of likely users of popular file-sharing programs to better understand the scope of the problem.

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your staff have any additional questions or comments or wish to provide additional information, please contact me or have your staff call Jeanne Bumpus, the Director of our Office of Congressional Relations, at (202) 326-2946.

Very truly yours,

A handwritten signature in cursive script that reads "Deborah P. Majoras".

Deborah Platt Majoras  
Chairman