



January 18, 2005

Electronically and By Hand

Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Re: P2P File-Sharing Workshop – Comment, P034517

Dear Commissioners Majoras, Swindle, Leary, Harbour, and Liebowitz:

P2P United, based in Washington, DC, is the nation's trade association of the peer to peer file-sharing and file-searching industries. Its member companies develop and provide to the public the decentralized, peer to peer software popularly known as BearShare, Blubster, eDonkey, Grokster and Morpheus.¹ P2P United was formed in July of 2003 to proactively participate in the public policy process. P2P United wishes to commend the Commission and its staff for the rigor and professionalism that the agency has brought to the legitimate policy questions pertaining to peer to peer ("P2P") technology and its lawful distribution. We also applaud the Commission's coequal emphasis in its Workshop proceeding on both consumer protection and competition issues, and address both in some detail below.

In its Workshop presentation on December 15, 2004, P2P United was necessarily blunt in substance and tone. Our central message was and remains that, for the past several years, policy makers, regulators, law enforcement officials, and the public have been the targets of multi-million dollar misinformation campaigns about the alleged magnitude of P2P technology's "risks," as well as the falsely claimed "illegitimacy" of P2P software and its developers.

While disappointed to do so, we were not at all surprised to again hear at the Workshop yet more flatly false, deceptive and misleading statements by and on behalf of powerful copyright-based industries concerning, among other things: the degree to which P2P United's members allegedly have failed to help consumers understand and mitigate such risks as may be associated with P2P software; our supposed "refusal" to "filter" undesirable content from P2P "networks"; and the fictively claimed "anti-competitive" nature of our members' business models.

¹ P2P United's member companies develop and provide to the public the decentralized, peer to peer programs popularly known as BearShare, Blubster, eDonkey, Grokster and Morpheus. Three of P2P United's member companies are incorporated in the United States and maintain business offices in as many major cities. The remaining two have made themselves equally and fully available to policy makers through P2P United and have freely submitted to the jurisdiction of American courts. Our membership has never, and will at no point, include the producers of KaZaA, EarthStation5 or any other justifiably notorious peer to peer or "malware" software developer.

The following Comments address these distortions and untruths in detail. In brief, however, the verifiable and actual facts are these:²

- Consumer Safety: P2P United and its member companies have from the organization's earliest days acknowledged and striven *on an ongoing and evolving basis* (and in active collaboration with state and federal regulators) to meet their obligations to educate consumers honestly and fully about: the nature of P2P software, its relationship to other products often downloaded with it (upon user consent), and how to mitigate risks of many kinds. Most recently, as detailed at the Workshop, P2P United devised and unveiled an expansive new consumer education and advisory effort designed over a period of months with extensive guidance from senior FTC staff;³
- Precision v. Propaganda: A pressing need for precision and clarity in the evaluation of technical claims regarding P2P software exists, particularly with regard to allegations – as false as they are frequent – that the developers of decentralized P2P software possess, but “refuse” to exercise, the ability to “filter” unwanted or illegal content from transfers between individual P2P software users. P2P United asks the Commission in the strongest possible terms to foster neutral analysis and resolution of these critical threshold matters before seriously entertaining arguments by copyright interests for formal action against P2P software distributors under the FTC Act.⁴
- Competition: Significant evidence exists, but has not yet been systematically investigated, that:
 - a) recording industry claims of harm due to the allegedly anti-competitive conduct of P2P software developers are baseless or radically inflated;
 - b) P2P software developers appear to have been “*blacklisted*” by multiple record labels from contracting with third party companies to foster the licensed online distribution of music using P2P software; and
 - c) in sharp contrast to P2P United's members, a host of truly rogue and consumer-unfriendly peer to peer software distributors shamelessly promote their products online with brazenly false and deceptive claims that virtually *all* copyrighted songs and movies

² P2P United is not only willing to be held accountable for the accuracy of these statements, but expressly asks that the Commission systematically and, as appropriate, scientifically evaluate each of them and make its findings widely known to Congress and the media.

³ **N.B.** – P2P United recognizes and emphasizes for the record that the Commission itself has made no formal review of, or yet taken any public position on, this program.

⁴ Multiple expert sources of germane information have yet to be tapped by either the Commission or Congress. These include, but need not be limited to, the National Academy of Sciences and National Science Foundation. Moreover, contrary to commentary at the Workshop by representatives of the major music labels (RIAA) and movie studios (MPAA), essential objective studies of technical issues need and should not take excessively long periods either to commission or complete. As the success of the Commission's own excellent efforts last month demonstrate, no more than two or three partial days of hearings featuring solely technical witnesses should suffice to build the comprehensive and objective record still substantially and inexplicably lacking in the P2P policy making process.

are *lawfully* available from them for free. They also otherwise fraudulently trade on the brand names and reputations of legitimate P2P software companies and sell inferior (and sometimes hazardous) software to consumers under the names of P2P United member companies.⁵ P2P United and its members join with consumer protection advocates and copyright holders in calling upon the Commission to shutter these truly anti-competitive and lawless entities.

Before immersing itself in details, however, we respectfully ask that the Commission pause at “30,000 feet” to broadly consider the nature of its role in what, prior to its involvement, has been a largely unproductive and too often knowingly disingenuous debate. P2P United submits that the Commission now has before it both an opportunity *and a profound responsibility* to help Congress chart an informed course to consumer safety and genuine competition through what thus far has been an ocean of entertainment industry propaganda about P2P technology, its developers, and consumers’ experiences with it.

The Commission’s December Workshop made an excellent beginning to that journey and P2P United is proud and pleased to have contributed to both its planning and panels. The truly hard work, however, starts now. P2P United and its members are committed to *continuing* to work fully and transparently with the Commission and its talented staff throughout that process in pursuit of *fact-based*, balanced and innovation-friendly peer to peer technology policy. We implore the Commission to conduct the kind of unbiased, empirical and intellectually honest inquiry – sorely lacking to date -- that the public interest demands.⁶ In furtherance of that effort, P2P United offers the following Comments:

I. At Every Stage of Its Brief Existence P2P United has Demonstrated a Strong Commitment to Consumer Protection Through Self-Regulation

A) 2003: Early and Expansive Voluntary Efforts

P2P United was incorporated as a non-profit trade association in late July of 2003. Within weeks of its formation, the association engaged an Executive Director. It then rapidly crafted a Mission Statement and designed and launched a website, both of which substantially retain their original forms today. Then and now, P2P United’s Mission Statement (*Exhibit A*) includes commitments to:

- developing and promulgating industry standards, best practices and codes of ethics for P2P companies and those who do business with them;
- promoting fair and balanced copyright and competition law, and respect for such statutes;
- seeking fair methods of compensation for all copyright holders whose material is made commercially available by means of P2P technology; and

⁵ Specifically, these true consumer predators often pass themselves off as one or more of the legitimate members of P2P United and collect one-time or ongoing fees for products otherwise available for free directly from a genuine P2P United member. At other times, these imposters offer consumers virus and spyware-ridden software that they knowingly misrepresent to have been produced by one or more members of P2P United.

⁶ P2P United has made, and here reiterates, an equally strong request of Congress.

- ✦ educating P2P technology users regarding related legal and legislative issues. . . .

Our web homepage, a current “screen capture” of which is attached (*Exhibit B*), centrally features a large icon depicting the “circled C” symbol for copyright. It is conspicuously labeled “Copyright & P2P” and, at single click, has consistently presented users with the following clear warning:

“IMPORTANT NOTICE --- P2P United and it’s member companies remind all peer-to-peer software users that – while P2P technology makes it possible to share all kinds of information – some of that information may both be protected by copyright and require the copyright owner’s advance permission to make available to other P2P users. This will often be the case with popular music and other forms of entertainment, including game or other software.

Title 17 of the U.S. Code includes stiff penalties for copyright infringement, including significant fines and – in severe cases – even jail sentences. All P2P users are urged to respect copyright laws and to learn more about them. The links below can help, but represent just a fraction of the material available on this important issue. Please contact us at P2P United with your suggestions for other links that may make this page more useful.” (Note: Boldface text appears here as on screen.)

P2P United’s Copyright Page also provides links to many other sources of online information about copyright, including the U.S. Copyright Office and the Recording Industry Association of America’s own “anti-piracy” page. All members of P2P United provide a conspicuous and contextualized link directly to this information on their respective online home and/or software download pages.

By late September of 2003, we unveiled the P2P United Member Code of Conduct (*Exhibit C*) at the National Press Club, explaining that full compliance with the Code was and is a requirement of charter or subsequent membership in the organization. All members of P2P United are in full compliance with the Code, which directly addresses (among other consumer issues): copyright compliance and education, user data security, preventing pornography exposure, facilitating child protection, and respecting and guarding user privacy and security.

Two weeks later, and just five weeks after publicly committing to do so, P2P United announced that we also had designed and put into service a web-based “Parent to Parent Resource Center” to help parents control their children’s exposure to online pornography and to facilitate the “one click” report of suspected child pornography to federal law enforcement authorities. The Resource Center, with the advice and assistance of national child welfare advocates and law enforcement, will undergo a significant expansion and redesign early in 2005.⁷

⁷ To that end, P2P United’s Director spoke with representatives of the National Center for Missing and Exploited Children and of WiredSafety.org in furtherance of that collaboration at the FTC’s Conference Center during the December P2P Workshop. Cooperative efforts will continue to be pursued actively by P2P United early in 2005, and continuously thereafter.

B) January to June 2004: Aggressive Outreach and Active Engagement

P2P United and its members were no less proactively pro-consumer and engaged with federal and state policy-makers on consumer issues in the first half of 2004. As verbally outlined at the Commission's workshop, virtually all of the issues now before the Commission were raised by a group of six Senators led by Sen. Lindsey Graham of South Carolina late in 2003. P2P United replied in detail and presented its heavily annotated written responses to the Senators (*Exhibit D*) in a personal meeting with Sen. Graham in January of 2004.⁸

As reported in the *Washington Post* in May of 2004 (*Exhibit E*), P2P United also had been engaged for many weeks by that time in active discussion with the FBI as to how best to use the power of P2P technology to assist the public to help the Bureau apprehend suspected child pornographers. These discussions have not yet borne fruit and, despite P2P United's best efforts, appear to have stalled. As stated at the Workshop, P2P United would welcome the Commission's and Department of Justice's assistance in reengaging the Bureau on these matters. We remain committed to the project and are hopeful that it will help put child pornographers and those who exploit and enjoy child pornography behind bars as swiftly as possible.

Shortly after publication of the *Post's* article, P2P United also proactively engaged the National Association of Attorneys General upon learning informally of that group's interest in essentially the same consumer-oriented issue set identified by the Commission. P2P United's March 2004 letter to NAAG's then-President, Attorney General Bill Lockyer of California, resulted in invitations for the undersigned to address senior staff by teleconference, and later the nation's Attorneys General themselves at the group's June 2004 meeting. Subsequently, the nation's Attorneys General wrote to P2P United in August expressing a series of specific concerns similar to those raised by Sen. Graham and his colleagues and now before the FTC. As discussed below, dialogue with designated senior staff to the letter's signators has been ongoing.⁹

Also in June of 2004, P2P United actively and successfully sought to appear before Sen. Gordon Smith's Subcommittee on Competition, Foreign Commerce & Infrastructure of the Senate Commerce Committee.¹⁰ Mr. Michael Weiss, CEO of StreamCast Networks -- developer of the popular Morpheus P2P software -- submitted a detailed prepared statement for the record of that proceeding which, at the Subcommittee's request addressed virtually all of the issues highlighted by the Commission's December Workshop, particularly allegations that P2P software company's disclosures regarding potential risks to the public of using their products were actionably "false and misleading" (*Exhibit F*).¹¹

⁸ The Senator's office has expressed no further concerns to P2P United, nor to our knowledge has he made related public statements bearing on the issues discussed, since our meeting.

⁹ P2P United met with senior staff to the Attorney Generals of California, Texas and Florida in mid-December of 2004 to discuss our latest consumer protection efforts detailed in the next section of these Comments. Our dealings, at the request of staff to the California Attorney General remain informal. Written response to the August 2004 letter has been discouraged to date in favor of informal conversation and, we hope, collaboration. P2P United and staff to Attorney General Lockyer last spoke and corresponded in early January 2005.

¹⁰ As the Commission knows, Senator Smith had expressed his concerns regarding the issues addressed by the Workshop in a May 4, 2004 letter to the Commissioners also signed by Senators Hatch, Leahy, Stevens and Boxer.

¹¹ Sadly, due to the press of other business, witness presentations were limited to less than five minutes and the entire hearing, attended only by Chairman Smith and Senator Boxer, lasted well under an hour.

P2P United was pleased to appear before Senator Smith's subcommittee with Mr. Howard Beales, then Director of the FTC's Bureau of Consumer Protection, who testified on behalf of the Commission specifically with respect to the FTC staff's investigation into the specific disclosure practices of the ten most popular P2P software programs, including Morpheus.¹² Three important Commission observations to which Mr. Beales testified bear emphasis in the record of this proceeding:

1) because decentralized P2P software it is not "an inherently dangerous product," there appeared to be no principled basis under the FTC Act "for distinguishing P2P from other neutral consumer technologies," such as e-mail programs or internet web search engines;¹³

2) having reviewed consumer risk disclosures and representations of the ten subject P2P software providers, the FTC's staff found that, such distributors "use a variety of means to convey risk information to consumers," including providing consumers with "a hyperlink to risk information at www.p2punitied.org." Staff further concluded that, "None of these representations appear on their face to be false or misleading;"¹⁴ HOWEVER . . .

3) the Commission ultimately stated that, "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. Because risk information may be useful to consumers, the Commission believes that it would be beneficial for distributors to make this information more accessible."¹⁵

Mr. Beales also informed the Subcommittee that the Commission would provide P2P software distributors with appropriate FTC advertising guidelines and would work with industry representatives to enhance consumer disclosures voluntarily.

C) July 2004 to January 2005: Active FTC Coordination and New Advisories

Just 8 days after Chairman Smith adjourned his June 23, 2004 hearing, P2P United met with FTC staff to begin work on an extensive program to better inform the public about P2P software and how to use it safely. Several months in productive and consultative development, that program was finalized in September of 2004 and submitted to the Commission's Bureau of Consumer Protection for its consideration. Publicly unveiled on December 8, 2004, the program was outlined in detail by P2P United in its FTC Workshop presentation a week hence¹⁶ and is

¹² Mr. Beales made clear, however, that Commission rulings as to the legality or illegality of specific conduct can only come on the basis of a complete record amassed after public notice and the opportunity of affected parties to comment. Accordingly, P2P United does not here state or imply that the Commission has made any such official finding as to "the legality of the acts and practices discussed" in Mr. Beales written submission to the subcommittee.

¹³ See Beales Testimony of June 23, 2004 at pp. 6-7 available online at: www.ftc.gov/os/2004/06/040623p2ptest.pdf

¹⁴ Beales Testimony at pp. 7-8.

¹⁵ Beales Testimony at p. 8.

¹⁶ The plan's details also were discussed at length on December 10, 2004 with senior staff to the Attorneys General of California, Texas and Florida serving as liaison to the larger group of such officials who had previously written to

projected to be fully implemented by all members of P2P United well within the first quarter of this year (most likely in matter of weeks).

As P2P United noted in its December announcement of this “cyber-safety” initiative,¹⁷ its “new advisories will be built variously into every part of the user's peer to peer experience, including: individual member companies' websites, software installation screens, and the “interface” screens first viewed by consumers each time that a program already installed is opened by the consumer.” This initiative is comprised of five distinct elements:

1) Conspicuous Notice

Whenever a consumer accesses the website of any member of P2P United to assess its software for possible download, the following advisory will appear prominently:

Click Here for Important Information
about Using P2P Software Safely

Moreover, after a consumer downloads a P2P United member’s software, the same advisory also will also be prominently displayed *every time* that software is activated (whether manually or automatically) on the consumer’s computer.

2) Clear Cautions

When the consumer does accept the conspicuous invitation to “Click Here,” that hyperlink will take the consumer directly to a set of simple, direct, and comprehensive warnings pertaining to “copyright infringement liability,” “data security,” “unwanted exposure to pornography,” “spyware,” and “viruses” the full text of which are attached as *Exhibit G* to these Comments. In all instances, these brief and clear paragraphs (crafted in consultation with FTC staff) provide links to additional information and to specific features of individual P2P software programs designed to enable consumers to protect themselves and their families, such as program password protection and key word screening functions.

Through links to P2P United’s website, member companies also make substantial additional information about avoiding copyright infringement and pornographic material online available to consumers, including non-endorsed links to third party products, such as Net Nanny and “Blockster,” whose authors appeared at the Workshop. Prominent links to the FTC’s own relevant documents, such as its advisories concerning P2P software and identity theft, also are provided in P2P United’s new advisories.

3) Calling Special Attention to Copyright Concerns

For the record, every member of P2P United now (and has since the organization’s formation) cautions potential and existing users of its products that peer to peer software ought

P2P United on these matters. As noted above, P2P United’s efforts to coordinate with the nation’s Attorneys General are active, ongoing and cordial.

¹⁷ The full text of the announcement is available online at:
www.p2punited.org/modules.php?op=modload&name=Sections&file=index&req=viewarticle&artid=15&page=1

not be used for unlawful purposes, particularly the infringement of copyright in general and with respect to popular songs, movies and games. Realizing the importance of this issue, in addition to such measures already in place, *and the new warning text described above*,¹⁸ every member of P2P United as part of our newest initiative also conspicuously will provide the following caution before a prospective new user of its product is permitted to install that company's software: *"The use of this software for illegal activities, including infringement of intellectual property laws, is strictly forbidden and may subject the user to civil and/or criminal penalties."*

4) Voluntary Online Advertising to Educate Consumers

P2P United's responsiveness to concerns raised by lawmakers, public officials and the media with regard to consumer education and protection issues did not have to be compelled. In fact, as detailed in the organization's history above and its newest initiative make clear, our members consistently have been visible, accessible and proactive in these matters.

In that spirit, although not asked to do so by any outside party, the members of P2P United also have committed voluntarily to call our new "cyber-safety" initiative to the public's attention through online public service advertising commissioned to reach no fewer than 15 million individual Americans over a 90 day period to commence shortly. We have previously called publicly upon the nation's entertainment industries to devote some of their substantially greater resources to promoting P2P United's new initiative in their own interest, but have as yet received no formal or informal response. We here reiterate our request.

5) Rapid Response to Newly Articulated Concerns

As noted above, the new consumer advisories crafted by P2P United with the guidance of Commission staff addressed: "copyright infringement liability," "data security," "unwanted exposure to pornography," "spyware," and "viruses." Several days prior to the Commission's Workshop, however, Ms. Parry Aftab of WiredSafety.org -- a respected online consumer advocate on whose panel at the Workshop P2P United also presented -- contacted P2P United with two additional concerns. That:

¹⁸ "Copyright Infringement Liability" is the first of the advisories presented to the consumer when he or she activates the "Click Here" link in the boxed notice discussed above. That advisory makes it unmistakably plain that this warning certainly applies to "popular music, movies, games, and software," and that copyright owners have sued individual consumers to protect their rights. The advisory reads in full (emphasis in original):

"Copyright Infringement Liability - P2P technology makes it possible to share all kinds of information. Some information is protected by copyright, which means that you generally need the copyright owner's permission before you make it available to other P2P users. **Popular music, movies, games, and software are often protected by copyright.**

Copyright infringement can result in significant monetary damages, fines and even criminal penalties. Some copyright owners have filed civil lawsuits against individuals that they believe unlawfully distributed large numbers of copyrighted songs. You can learn more about copyright laws at www.p2punited.org/copyright.php.

[Click here](#) for information about how to use this P2P software application to minimize or avoid copyright infringement."

a) some consumers, presented with the opportunity to purchase “ad free” versions of P2P software were not advised at the point of sale that purchase of the software itself did and does not convey any license or other entitlement to use the software to up or download copyrighted material; and

b) factually accurate references to the “legality” of P2P software programs (based upon multiple federal court rulings now before the Supreme Court) were nonetheless inadvertently confusing or misleading to some consumers who, once again, might misinterpret that term to refer to the “legality” of up or downloading copyrighted content.

As Ms. Aftab herself explained at the Workshop, P2P United responded immediately, inviting her to meet with us on December 14th, crafting language that day to address the first issue described above, making substantial progress on the second, and committing in good faith to collaborate on finalizing appropriate member website changes to fully resolve the second issue.¹⁹ The two P2P United members directly affected by these discussions have not waited, however, to make significant interim changes to their sites in the public interest. Both eDonkey’s and Morpheus’ homepage and software sales pages have been clarified to address Ms. Aftab’s reasonable and well-articulated concerns.²⁰

P2P United appreciates Ms. Aftab’s outreach and looks forward to an ongoing relationship in the public interest with WiredSafety.org. We also invite other responsible and established consumer advocates to contact P2P United with equally thoughtful concerns so that they too may be collaboratively and professionally addressed.

II. Unsupported Claims Concerning P2P Software and its Legitimate Developers Must Finally be Subjected to, and Cannot Withstand, Rigorous Analysis

As detailed above, P2P United’s members understand the need -- and from the organization’s inception took significant voluntary steps -- to educate the public about how best to safely use P2P software. Those efforts clearly continue. To date, however, studies of risks associated with P2P software use too often have been predicated upon essentially “loaded” questions: ones seemingly designed to deprive policy makers of a full view of the environment in which P2P software is used by and promoted to consumers.²¹

¹⁹ P2P United and Ms. Aftab have spoken on several occasions since the Workshop and full resolution of the concerns she brought to us is anticipated. To be clear, however, her “endorsement” has yet to be provided. In the interim, however, both eDonkey and Morpheus have removed all references to the “legality” of their software from the point of sale pages for their respective paid, ad free products. In addition, Morpheus has clearly and conspicuously annotated its general home page (www.morpheus.com) to make clear that purchase of its paid product, Morpheus Ultra, “is not a license to share copyrighted material.” Morpheus also has removed the “bulleted” reference to the legality of its software on that page from a list of other attributes of its product. MorpheusUltra’s sales page (www.MorpheusUltra.com) did and does not now include any such reference.

²⁰ For the record, while references to the “legality” of P2P software no longer appear on any P2P United member’s website, we look forward to working with the Commission and Ms. Aftab to craft language for possible future use that accurately conveys in context both what federal courts have ruled concerning the legality of *developing* and *marketing* P2P software AND that the *use* of such software to infringe copyright or violate any other statute is not lawful.

²¹ For example, asking the GAO whether significant exposure to pornography by P2P users is probable not surprisingly produced an affirmative answer. It is not until reaching page 11 of the resulting report, however, that the reader finds that such exposure is an inherent quality of internet use in general and that it is far more significant

Notwithstanding P2P United's consistent record of commitment to consumer education and safety (and active and ongoing collaboration with federal and state regulators, and consumer advocates, to that end) described above, critics of our member businesses and their software products continue to doggedly and slanderously describe them as "irresponsible," "illegal," and "illegitimate." These broadsides are dependent upon extrapolation, assumption and – at times – outright fabrication concerning important empirical questions. P2P United submits that objectively resolving these questions must be a critical prerequisite to making rational policy and regulatory enforcement determinations concerning P2P technology, and thus a priority of the agency.

P2P United and its members have never, and clearly are not now, suggesting that they have no responsibility to assist the public in minimizing unwanted exposure to offensive and sometimes illegal material *insofar as the limits of decentralized P2P technology structurally permit them to do so*. Quite the opposite is true. However, we urge the Commission and members of Congress to frame questions broadly and in a manner intended to elicit maximally useful and fully contextualized data, not ammunition for any particular party to the debate.

We urge the Commission in the strongest possible terms to identify -- and then undertake or commission -- such unbiased technical, economic and other analyses as may be necessary to make informed policy in this arena. At the end of that process, we are confident that the following characterizations of "myth" and fact will prove accurate with respect to the principal consumer protection issues now before us:

A) Copyright Infringement

Myth: P2P developers have intentionally designed their illegal software to evade liability, are "aiding and abetting" copyright infringement, and refuse to exercise their ability to control or filter out illegally shared copyrighted material from their "services" or "networks."

FACT: No member of P2P United is *unwilling* to prevent the misuse of our products by individuals to infringe copyright or commit crimes. Rather, as two federal courts and the General Accounting Office have affirmed, they are technologically *unable* to do so for the very reasons that make true, open and public decentralized P2P software the powerful, content-neutral distribution tool that it is. Without fundamentally redesigning and crippling the inherently decentralized nature of our software in a manner that will make it radically less useful (indeed to make it like the original Napster outlawed by the courts), P2P United's members have *no* technical ability to centrally "filter" copyrighted, offensive or indeed any file content whatsoever.²²

through other online channels, such as general web surfing. "Push polling"-style questions may play a legitimate role in the rough and tumble of electoral politics. P2P United respectfully submits, however, that they ought not serve as the basis for taxpayer funded studies ordered up to support a predetermined and parochial policy outcome.

²² What Hollywood's and the recording industry's representatives mean by "filter" is, in reality, a requirement that the efficiencies of decentralized P2P systems be scrapped in favor of a new design that would require all P2P-based communications to, in effect, be rerouted and approved in advance by copyrighted content owners. We respectfully submit that our refusal to make radical and retrograde changes to the fundamental architecture of our software for the parochial benefit of copyright holders is no evidence at all of disregard for the public interest – in fact, quite the opposite. Moreover, the proposal is "ostrich-like" in that it fails to acknowledge the cold reality that P2P software programs are ubiquitous and very easy to design. Indeed, during the FTC's Workshop, news of the world's newest and shortest, open source P2P program – nicknamed "TinyP2P" – was released. Developed by Princeton professor

The same is true, not incidentally, of BitTorrent, the most efficient open source P2P software yet designed. While Hollywood has met its emergence with alarm, Macworld Magazine just honored BitTorrent and its developer with a 2004 “Editor’s Choice Award.”²³

Moreover, P2P software developers and marketers operate no “networks,” “systems” or “services,” words consistently used by critics of our members to deliberately create the false impression that our members are physically capable of influencing – or even *knowing* -- how users of our software communicate with each other and what they communicate. Our critics’ claims in this regard are simply and verifiably false and, in the case of the Motion Picture Association of America’s written comments in this proceeding, are either “misinformed” to a degree that strains credulity or deliberately intended to mislead both the public and regulators. Indeed, in the MPAA’s five-page submission, its Vice President and Director of Legal Affairs refer to P2P “systems” and “services” three times each and invoke “networks” four times.²⁴ The document refers only once each to P2P “software” or “programs,” words far better suited to describe the reality of P2P usage and architecture.

There is method and motive to this misinformation, however. Entertainment industry interests appear to be at pains to use verbiage and constructs from cases in which *centralized* P2P providers (such as Napster and Aimster) were held secondarily liable for copyright infringement to implicitly tar wholly *decentralized* software products like Grokster and Morpheus, and their developers. In so doing, they clearly seek to generate liability in Congress and before the Commission for neutral information sharing technology where federal courts have refused to find it.

The facts are, as found in Federal District Court and affirmed in the Ninth Circuit, that “[w]hile the parties dispute what Defendants feasibly could do to alter their software, here, unlike in *Napster*, there is no admissible evidence before the Court indicating that Defendants have the ability to supervise and control the infringing conduct (all of which occurs after the product has passed to end-users). The doctrine of vicarious infringement does not contemplate liability based upon the fact that a product could be made such that it is less susceptible to unlawful use, where no control over the user of the product exists.” *MGM v. Grokster, supra*, 259 F.Supp.2d 1029 *1045, 1046.

Edward Felten and graduate student Alex Halderman, it is available for download at: www.freedom-to-tinker.com/tinyp2p.html The entire program is just 15 lines long!

Such a redesign requirement, even if forced by law upon responsible P2P software companies like P2P United’s members, would be rendered moot in a matter of weeks if not days by the wholesale migration of P2P software users to new platforms designed by anonymous individuals who cannot and will not be found, and who have neither respect for copyright, nor a proactive and accessible Washington-based trade association. As has been observed in mainstream media, the baseless demonization and consequent overregulation of responsible P2P companies will simply produce such an ungovernable and wholly lawless “darknet.” For a definition of the “darknet,” see, e.g., www.wordspy.com/words/darknet.asp and, for analysis, a seminal paper by Microsoft researchers to which it links entitled, “The Darknet and the Future of Content Distribution” online at: <http://crypto.stanford.edu/DRM2002/darknet5.doc>. See also, “No respite from the forces of darknet” by Richard Waters, Financial Times (London), July 29, 2003.

²³ See “In Praise of Bit Torrent” by Jason Snell, MacWorld Magazine Editor’s Notes Weblog, January 6, 2005 online at: www.macworld.com/weblogs/editors/2005/01/bittorrent/index.php

²⁴ See November 18, 2004 Comments of the Motion Picture Association of America by Mr. Dean Garfield.

As the Commission is aware, the Supreme Court will hear argument in this case in ten weeks time and is likely to issue a ruling by July of this year. In addition, Congress is likely to conduct further hearings on these matters in connection with legislation that Sen. Hatch and others have publicly promised to reintroduce to alter the scope of secondary copyright infringement liability.²⁵ Now is the time for the Commission to elicit, analyze and report on these matters objectively and dispassionately. For the same reasons, it is manifestly not the time (or legally supportable) to bring a formal complaint against any member of P2P United based upon the entertainment industries' disingenuous and baseless claims.

B) Data Security

Myth: "Thousands" of people's personal data – such as health, tax, and other financial material – has been and is inadvertently made available through P2P software programs, which make such breaches of personal security easy and whose developers don't seem to care.

FACT: As P2P United testified before Sen. Smith last June, these allegations are among the most egregiously false claims about P2P United's members' software. They appear, however, to have the inexplicable staying power of "an urban myth, no more accurate – though easily as persistent – as reports of alligators in New York's storm drains."²⁶

In fact, users of our members' software must affirmatively create and populate "shared" document folders and are subject to multiple cautions about the importance of not affirmatively placing sensitive material in them. Moreover, only files downloaded with our members' programs are "routed" to such shared folders, and can easily be removed from such shared folders. No existing information on a users' hard drive can "migrate" to those shared folders on its own.

Lastly, this issue was important enough to P2P United's members that they elected to make safeguarding consumer's data, and educating the consumer about this issue, an ongoing qualification for membership in P2P United under our September 2003 Code of Conduct. It remains critical to us today, as evidenced by the new consumer advisory addressing this issue described above and here attached.²⁷

C) Pornography

Myth: P2P software developers have the ability, but have nonetheless failed, to provide parents with adequate means– including effective "filters" -- to safeguard children from exposure

²⁵ Known originally as the "INDUCE Act," Sen. Hatch's bill was identified in the 108th Congress as S. 2560. It received a single hearing in the Senate Judiciary Committee, which did not vote on the bill. Multi-party discussions under the auspices of the Committee also failed to achieve any consensus on the broad expansion of secondary liability at the bill's core. Significant technology industries and venture capital concerns were, and remain, concerned that such an expansion could well chill the development of future neutral communications and other devices and software, such as the iPod, TiVO, satellite radio, DVD burners, broadband internet access, and P2P programs.

²⁶ See June 23, 2004 Prepared Testimony of Mr. Michael Weiss, *Exhibit F* to these Comments, at p. 11.

²⁷ See *Exhibit G*, second paragraph.

to child pornography and other pornographic material transmitted by means of P2P software, particularly through mislabeled files that actually contain offensive or criminal material.

FACT: P2P United's members have worked hard through P2P United's Parent to Parent Resource Center and their own program advisories to call attention to the need for parental oversight of children's use of the internet and P2P software in particular. Our latest advisories are yet another example of our efforts. They also have built such tools into their software, like password protection and word-based screening mechanisms, as the wholly decentralized nature of modern P2P software allows. They also have collaborated privately with law enforcement when called upon to help track, apprehend and convict individuals suspected of child pornography and other crimes. P2P United also is committed, of course, to continued public and policy maker education on this subject and to assisting law enforcement efforts as it lawfully may. Our members also are committed to assuring that third-party products, such as Blockster, may be used by parents and other adults as effectively as they are designed to be.

The unfortunate fact is, however, that – for the same reasons that they cannot centrally “filter” copyrighted content – P2P United's members literally have no means of identifying, intercepting, or otherwise routing pornographic communications between individuals facilitated by their software. Unlike the phone company, for example, P2P software does not run on a “network” owned or controlled by a software developer as if our members were AT&T. Indeed, the role of our members is analogous to that of the companies that make the microwave towers and antennas that passively facilitate billions of user-initiated contacts every day.

Many of P2P United's member companies are run by people with children and grandchildren of their own – people who have just as much fear of and anger toward those who would prey on our children as any Member of Congress, state Attorney General, FTC Commissioner, prosecutor, or policy maker at any level of government. We respectfully submit, however, that such fear and anger are poor bases for policy in the face of verifiable technical facts regarding what P2P software developers can – and cannot – *legitimately* be expected to do to help fight this scourge. We will do everything that we and others can think of to do what is within our power, but sadly we cannot solve this problem alone and should not be expected to do so.

D) Spyware, Viruses & “Malware”

Myth: P2P software programs, upon download by consumers, surreptitiously install all manner of other programs – some impossible to remove – that report on the consumer's surfing habits or private data (sometimes including passwords and bank account numbers) to third parties without the consumer's knowledge or permission, and often infect user's computers with viruses, worms, Trojan horses and other “malware.”

FACT: All of the above is undoubtedly true of some, perhaps many, of the hundreds of P2P software programs available to consumers, BUT it is utterly and entirely false with regard to the software developed and marketed by the members of P2P United.

As our Code of Conduct makes clear, and our newest consumer advisories attest to, the members of P2P United never bundle or distribute actual “spyware” of the kind that logs individual consumer behavior or reports it, including keystrokes, to third parties – period. Moreover, when our members bundle “adware” software with their programs, as most do in order to make their P2P software applications available for free (just as television programs with commercials

are available for free), that fact is disclosed to the consumer, who is given a choice as to whether to permit those programs to be installed. Once installed, they are easily removed by following clear and accessible instructions for doing so provided to the consumer. Lastly, every major commercially available anti-virus and spyware program available to consumers is fully compatible with the software produced by the members of P2P United.

All of the foregoing claims are easily and empirically verifiable by the Commission. P2P United urgently here requests that such an inquiry be undertaken so that the groundless fear-mongering cynically conducted around these issues, particularly on behalf of copyright-based industries, finally may be brought to an end.

P2P United looks forward to the rapid collection and objective review of all of the data described and requested above. We are confident that such inquiry will document that:

- ✦ P2P industry self-regulation has and will continue to adequately warn the public of any risks associated with P2P software use (please see the balance of our Comments, below);
- ✦ such risks are not out of proportion to those experienced by consumers who engage in other online activity;
- ✦ the level of risk attributable to the behavior of P2P software programs and developers (rather than to individual lawbreakers) has been substantially overstated; and
- ✦ both consumer sophistication,²⁸ and the prevalence of third-party tools to mitigate risks created by cyber-criminals and enforce copyright owners' rights,²⁹ are rapidly growing and may be expected to grow even more quickly for the foreseeable future.

²⁸ The Commission took note of these factors in Mr. Beales' statement before Sen. Smith's subcommittee last June, noting: "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. Thus, many consumers likely are aware that they also could be liable for copyright infringement if they engage in similar conduct. 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." Beales Testimony at p. 5 (notes omitted).

²⁹ Such tool designers appear to be able to keep pace with even the latest and most powerful forms of neutral, open source P2P software. See "Firm Traces BitTorrent Seeders," ITVibe News, January 15, 2005 presently online at: <http://itvibe.com/news/3206/> (*Exhibit I*)

III. SERIOUSLY ANTI-COMPETITIVE CONDUCT IN AND RELATED TO THE P2P INDUSTRY WORTHY OF FTC AND DOJ INQUIRY IS ONGOING, BUT HAS NOT BEEN PERPETRATED BY MEMBERS OF P2P UNITED

A) The “Business Model” of P2P United’s Members is Entirely Lawful

1) Checking Actual Market-Based Facts

Entertainment industry representatives repeatedly have alleged before the Commission and Congress that P2P United’s members and other P2P software developers, in effect, are unfairly competing with them by virtue of making their software available to the public. They further claim that peer to peer software distribution has had or will have a significant adverse impact upon their profits.³⁰ To date, these claims largely have been accepted at face value and adverse impact unscientifically has been presumed.

As the “economists’ panel” at the Commission’s Workshop documented and has been widely reported,³¹ however, particularly the music industry’s claims of a causal link between alleged sales declines and P2P software usage in recent years are internally inconsistent, fail to take the many additional downward pressures on CD sales over the past 5 years into account (such as vast new competition for “entertainment dollars” from DVDs, cell phones and on-demand cable TV) and have not been adequately studied independently. Moreover, little if any evidence of adverse box office impact not attributable to product quality or larger economic circumstances has been presented in any forum by the motion picture industry. Indeed, MPAA’s written comments in this proceeding make no *specific* claims of present or imminent economic harm whatsoever.

Without pre-judging the result, whether a significant or unexplainable decline in music sales (rather than shipments within the industry’s control) occurred at all clearly appears to be at least a legitimate subject of unbiased inquiry, as does the movie industry’s conjectural prognostication of adverse peer to peer impact. P2P United here formally reiterates its many past public calls for independent analysis of the music industry’s sales data and extrapolations from it so that

³⁰ Even assuming, *arguendo*, that the profits of recording companies attributable to control of the music distribution chain might diminish in the future, such companies now (and will continue to) perform other profitable functions, such as finding and producing talent, marketing and promotion. Moreover, the increased use of P2P technology by artists and labels alike to “push” new music to a global audience at minimal incremental cost is likely to change the economics of the industry in favorable ways not yet, in P2P United’s view, adequately acknowledged or studied. P2P United respectfully reminds the Commission and other P2P policy makers that revolutionary technologies historically have proven to be both necessarily “disruptive” and of enormous aggregate social benefit. Had the livery industry been permitted to throttle marketing of the automobile or the recording industry radio in those technologies’ infancy – as both tried unsuccessfully to do – the world certainly would be a poorer place.

³¹ See, e.g. “US Music Sales Continue to Rise Despite Piracy,” Associated Press, April 29, 2004; “Album Sales in US Reported Ahead of 2003,” Reuters, July 3, 2004; “Analysts Question MPAA’s Findings on Film Piracy,” by Jay Lyman, TechNewsWorld, July 9, 2004; “US Sees Growth in CD Sales Market,” BBC News, January 6, 2005 [reporting a 2.3% increase for 2004, the first annual increase in 4 years]; and “Country Music Sales Up 12% in 2004,” Associated Press, January 6, 2005. Systematic study will unearth literally hundreds of similar reports and multiple analyses of a complex market dynamic that the entertainment industries would have policy makers believe is as simple as correlating the rise of P2P software use with an *allegedly* significant decline in CD sales.

policy may be made on the basis of reality rather than hyperbole.³² Absent the presentation of credible data suggesting present harm to Hollywood, we do not presently ask that the Commission undertake a comparable study at taxpayer expense of that industry.

2) “Checking” Defamatory Political Rhetoric

For the past two years, at the Commission’s Workshop, and in their written comments in this and many other formal proceedings, representatives of powerful copyright interests adept at “messaging” have sought to color the debate over whether to regulate the design and marketing of decentralized P2P software with both false claims and inflammatory rhetoric. Among the many, no claim is either more false or more inflammatory than the oft-repeated allegation that the “business model” of P2P United’s members is “illegitimate” and that their product is “illegal.”

P2P United is confident that its members’ efforts to assist consumers in using P2P software safely will withstand the scrutiny that we ourselves have asked for repeatedly in these Comments and many times publicly in the past. We also now ask that the Commission determine whether any portion of the FTC Act, or any policy that has evolved in its interpretation, is contravened by the otherwise lawful development and responsible marketing of what the Commission has already described in Congressional testimony as a “neutral” communications tool.

In the event that no violation of law is found, as we are confident will be the case, P2P United urges the Commission to then determine whether the knowingly false and repeated characterization of the P2P software produced by P2P United’s members as “illegal,” and the distribution of such software as “illegitimate,” *itself* constitutes actionable anti-competitive conduct by the entertainment industry. P2P United would be pleased to formally brief this issue upon the Commission’s request.

B) Credible Evidence of a Recording Industry “Blacklist” of P2P Companies Exists and Deserves Thorough FTC Investigation

Shortly after testifying on this issue before Sen. Smith last June, P2P United met with Commission counsel to discuss evidence entered into the record of that hearing by P2P United that the developers of Morpheus and other popular P2P software companies had been “black-listed” by multiple record labels from engaging in business deals *with third parties* to promote the expanded and licensed online distribution of popular music.

Specifically, Michael Weiss, CEO of Morpheus’ StreamCast Networks, Inc., testified that his company was poised to enter into just such an arrangement with Real Networks, which holds licenses by all major recording companies for the licensed online redistribution of their music through the Rhapsody subscription service. Literally on the eve of concluding that deal, however, Mr. Weiss’ executive in charge was left a voice mail message (lawfully recorded, retained and transcribed by Morpheus) by her counterpart with RealNetworks, who said:

³² Sam Yagan, President of P2P United member eDonkey, reiterated this request most recently on the second day of the December Workshop calling upon Mr. Sherman of the recording industry, a fellow panelist, to join him in calling for objective, expert fact-finding. Mr. Sherman appeared to decline Mr. Yagan’s invitation.

“Unfortunately, the licenses for the ability to stream to Rhapsody come from the labels, as you are aware. And the labels have blacklisted you guys. So that is the problem we've got. Basically, what they're saying is you've got to denounce P2P and/or resolve the lawsuit -- is what you have to do. And so, until they resolve the lawsuit they're going to keep you on the blacklist, which means I'm probably not going to get much latitude to do anything as far as Rhapsody goes”(emphasis added).³³

It thus would appear from this message that, while the entertainment industries publicly castigate P2P software distributors for the uncontrollable infringing actions of individual P2P users, the labels privately – and perhaps illegally – are working in secret to prevent P2P industry leaders from being able to demonstrate to policy makers that P2P technology and popular software could foster the sale and distribution of vastly more licensed downloadable music than has been possible to date.

P2P United notes that the entertainment industries have a powerful incentive to block any such demonstration by P2P companies. Such positive uses of P2P programs as the kind Morpheus and RealNetworks were poised to make clearly would qualify as the kind of “substantial non-infringing use” that would destroy the industries’ contention that Morpheus and similarly situated companies should be held liable as secondary copyright infringers. The Ninth Circuit, of course, rejected that clam in any event and the matter is now before the Supreme Court – all the more reason that the blacklist doubtless remains in full force and effect.

P2P United appreciates the receptivity to evaluating these issues that Commission staff has shown to date and respectfully requests that the Commissioners themselves make this matter a priority.

C) The Commission Should Take Prompt Action Against Real Anti-Competitive Conduct by Truly Rogue P2P Companies

Despite profound differences with the entertainment industries over the many issues discussed above, P2P United joins them in calling upon the Commission to take prompt and formal action against the truly rogue and consumer- unfriendly peer to peer software distributors who shamelessly promote their products online with brazenly false and deceptive claims that virtually *all* copyrighted songs and movies are *lawfully* available from them for free.

These unscrupulous entities often seek to pass themselves off as legitimate members of P2P United and either charge consumers for products that are free from legitimate P2P United members and/or offer inferior and malware-laden programs as if it were the genuine product of a P2P United company. These claims often appear as prominent “sponsored links” on Google, Yahoo!, and other popular search engines alongside those for legitimate P2P companies, and industry-sponsored music and movie download services.

³³ The full transcript of this message is attached as *Exhibit H*. The actual voice recording also was submitted to Sen. Smith’s subcommittee in digital form and will be provided to Commission counsel shortly.

These entities and their practices stand in sharp, and we hope useful, contrast to those of P2P United and its members and we echo the copyright industries' call upon the Commission to shutter and fine these truly anti-competitive and lawless entities.³⁴

CONCLUSION

As the substantial record amassed at the Commission's December Workshop makes clear, there is no shortage of important issues deserving of the Commission's attention raised by the rapid evolution and public embrace of peer to peer technology. P2P United and its members have addressed all of these issues in multiple fora in the past and appreciate the opportunity afforded by this proceeding to do so again in these Comments and their appendices.

P2P United recognizes that the software its members make available to the public is a revolutionary and inherently "disruptive" technology that threatens, as have all such technologies, powerful entrenched interests. Accordingly, rational peer to peer policy making in the broad public interest demands of us all a renewed commitment to truth, scientific accuracy and intellectual rigor in cautiously evaluating potential regulatory approaches to this powerful new information tool yet in its technical and commercial infancy.³⁵

We stand ready to further assist the Commission's efforts to that necessary end.

Respectfully submitted,

/ s /

Adam M. Eisgrau
Executive Director
P2P United

³⁴ Note 58 to the 1984 Federal Trade Commission Policy Statement on Deception, cited by Mr. Beales in his June testimony before Sen. Smith's subcommittee, makes clear that such action is permissible and justified under the FTC Act. It reads in relevant part: "The prohibitions of Section 5 are intended to prevent injury to competitors as well as to consumers. The Commission regards injury to competitors as identical to injury to consumers. Advertising and legitimate marketing techniques are intended to "lure" competitors by directing business to the advertiser. In fact, vigorous competitive advertising can actually benefit consumers by lowering prices, encouraging product innovation, and increasing the specificity and amount of information available to consumers. Deceptive practices injure both competitors and consumers because consumers who preferred the competitor's product are wrongly diverted." The Commission's Policy Statement is appended to *Cliffdale Associates*, 101 F.T.C. 110 (1984).

³⁵ P2P United calls the Commission's attention to a very recent and thorough analysis of potential alternative marketplace scenarios in which "public" P2P software may play an integral and constructive role for society and the economy as a whole. The study, published on January 7, 2005 by the Digital Media Project at the Berkman Center for Internet and Society at Harvard Law School, is entitled: "'Content and Control: Assessing the Impact of Policy Choices on Potential Online Business Models in the Music and Film Industries.'" It is available online and free of charge at: http://cyber.law.harvard.edu/media/files/content_control.pdf P2P United endorses the study's fundamental conclusion as summarized by the Berkman Center: "'[G]overnment intervention [in the P2P marketplace] is currently premature because it is unlikely to strike an appropriate balance between achieving industry goals while supporting other social values, such as consumer rights, the diversity of available content, and technological innovation.'" We also request that the full text of the study be considered to have been incorporated in the record of the FTC's P2P Workshop by virtue of P2P United's reference to it in these Comments.