
From: Griffin, Kodzina on behalf of Miller, Jim
Sent: Monday, November 08, 2004 3:38 PM
To: 'filesharingworkshop@ftc.gov'
Subject: P2P File-Sharing Workshop - Request to Participate, P034517

Dear Sir or Madam --

Please consider this e-mail my comment to the Federal Trade Commission's (FTC's) Notice Concerning Peer-to-Peer File-Sharing Technology and my written request to participate as a panelist in the FTC's public workshop, "Peer-to-Peer File-Sharing Technology: Consumer Protection and Competition Issues," scheduled for December 15 and 16, 2004. I would appreciate an opportunity to comment on the issues raised in Section D of the Notice.

As you may know, I have spent considerable time analyzing the risks posed to consumers from using Peer-to-Peer ("P2P") file sharing software, and whether the current major providers of this software adequately disclose these risks in a clear and conspicuous manner as required by the Federal Trade Commission Act. To this end, during the past year I have submitted (i) the attached letter to Commission Harbour, and (ii) comments to the FTC's Spyware workshop held on April 19 (these comments are incorporated herein by reference). As detailed in this letter and these comments, there is strong evidence suggesting that the notice and disclosure practices of the current major P2P software providers violate the FTC Act and other applicable laws.



As the FTC has recognized, the current providers of P2P file sharing software do not appear to be providing consumers with as much information concerning the risks of using their software as they could, or give the information they do provide in a clear and conspicuous manner. Moreover, as detailed in the attached letter and incorporated comments, the major P2P distributors provide virtually *no* disclosure of the multiple, substantial risks arising from using their software to trade files of P2P networks. These risks include the unknowing installation of spyware/adware on users' computers; the high risk of acquiring a computer virus on a P2P network; the high risk of violating copyright laws through file sharing; and the risk of acquiring and unwittingly distributing pornography, including illegal pornography. The major P2P providers either fail to disclose these risks to consumers or bury disclosures deep within the fine-print of lengthy end user license agreements. Either way, these companies fail to disclose the existence of these risks in a clear and conspicuous manner as required by Section 5 of the FTC Act and detailed in FTC publications such as *Dot Com Disclosures*. As a result, consumers are harmed by downloading P2P software and engaging in an activity without full knowledge of the substantial risks involved.

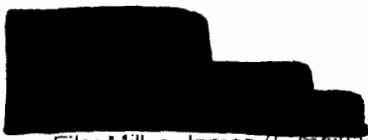
I believe FTC investigation and potential enforcement, possibly in cooperation with other law enforcement agencies such as the U.S. Department of Justice and the State Attorneys General, is appropriate. History suggests strongly that the major P2P providers will not change their current business practices unless compelled to do so. Enforcement action therefore is needed and is in the public interest.

In sum, my expertise is particularly relevant to topics such as the identification of the risks to consumers of P2P file sharing and the disclosure of these risks by the P2P file sharing software providers -- both of which are suggested in the Notice. Accordingly, I would welcome an opportunity to contribute to the Commission's greater understanding of these important issues.

My curriculum vitae also is attached. Please contact me if you have any questions. Thank you for your consideration.

James C. Miller III


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Chairman
The CapAnalysis Group, LLC




<< File: Miller, James (E-mail).vcf >>



Miller Letter re P2P
Consumer ...



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Letter.pdf

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September 27, 2004

The Honorable Pamela Jones Harbour
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Dear Commissioner Harbour:

Thank you very much for the opportunity to meet with you to discuss consumer protection concerns relating to Peer-to-Peer ("P2P") file sharing networks. Distribution of music over the Internet offers virtually limitless possibilities to both the music industry and consumers. For record companies and artists, digital technology brings music to a wider audience, offers greater exposure to niche and new artists, and makes our vast musical heritage more widely available. For consumers, digital technology puts virtually the entire catalog of old and new music at their fingertips, offering the ability to purchase songs at affordable prices from the convenience of a personal computer.

As we discussed in our meeting, and as detailed in the whitepaper we submitted to the Commission on behalf of the Recording Industry Association of America ("RIAA"), the current business practices of the major P2P networks are undermining the development of a healthy marketplace for electronic music distribution.¹ We argued in our whitepaper that these business practices constitute at least potential violations of the FTC Act and other laws, and thus warrant investigation and possible enforcement action by the Commission.

This having been said, there is nothing inherently wrong with P2P technology. In fact, as the Commission noted in its Congressional testimony on this issue, for some

¹ As detailed in our whitepaper, *Peer-to-Peer Software Providers' Liability Under Section 5 of the FTC Act* (April 29, 2004) (Hereafter, "RIAA Whitepaper"), the major P2P networks foster an environment where unauthorized file sharing is widespread and the danger of exposure to unwanted content is high. These and other risks associated with the current P2P networks impose substantial costs, both on consumers and the music industry. While the current major P2P software providers may tout the potential to "share" content for "free," in the end, because of the undisclosed risks and costs detailed in our whitepaper, both consumers and legitimate producers pay a high price.

applications "P2P file-sharing programs eliminate the need for a central storage point for files, and, therefore can increase the speed of file transfers and conserve bandwidth."²

In our meeting, you asked us to consider whether it is possible to capture the benefits of P2P technologies while reducing or eliminating the costs current systems impose on consumers and producers of music and other content. You also asked us to suggest specific steps that can be taken to facilitate the emergence of "legitimate" P2P services. I think these are exactly the right questions, and this letter constitutes an initial response.

We believe that P2P technologies can play an important role in the legitimate distribution of music and other electronic content. For them to do so, however, current P2P services need to implement some basic steps to truly inform consumers of the risks associated with using their software and to limit the use of their services for unauthorized file sharing and uncontrolled distribution of pornography. Once this happens, there will be an opportunity for new business models to emerge that will capture the technological benefits of P2P technologies for the legitimate distribution of copyrighted material.

I. STEPS EXISTING P2P SERVICES SHOULD TAKE TODAY

The first step is for current P2P services to reform their business practices – either voluntarily or, if necessary, as the result of enforcement actions by the Commission.³ To this end, existing P2P services can and should take at least three steps.

A. Incorporate Effective Content Filters

Filtering is a process by which files containing protected or unauthorized works are identified, thereby allowing the host of the P2P network either to prevent their dissemination or to attach a price tag to them. This technology is being developed or is currently available from companies such as Snocap (founded largely by the same team

² Prepared Statement of the Federal Trade Commission Before the Subcommittee on Competition, Infrastructure, and Foreign Commerce of the Committee on Commerce, Science, and Transportation, United States Senate, Hearing on P2P File-Sharing Technology, June 23, 2004 (hereafter "P2P Testimony").

³ Members of the U.S. Senate have strongly urged P2P software providers voluntarily to adopt many of these measures. See November 12, 2003 Letter from Senators Lindsey Graham, Dianne Feinstein, Richard Durbin and Gordon Smith to Daniel Rung, Owner, Grokster; Vincent Falco, President, BearShare; Wayne Rosso, President, Blubster; Sam Yagan, President, eDonkey 2000; Greg Bildson, President, Lime Wire; and Michael Weiss, President, Streamcast Networks.

that originally created Napster) and Audible Magic. Filtering technology allows for the real-time, passive monitoring of traffic on P2P networks. It has the ability to block selectively the sharing of particular files, such as copyrighted music or pornography, while allowing other files to pass unimpeded. It does so by examining the characteristics of a file (in the case of music, by examining a small portion of its acoustic properties) and then comparing these characteristics – a so-called “fingerprint” – to fingerprints stored in a pre-compiled database. If the fingerprint of a music file, for example, matches that of a copyrighted work contained in the database, the transfer of that file can be blocked or, alternatively, permitted so long as the acquiring user pays an appropriate fee.⁴

B. Change the “Sharing” Default Setting

It is a potential violation of U.S. copyright laws to distribute a copyrighted work without the owner’s permission. Yet, by default, most P2P software is designed so that every time a user downloads a file, that file automatically is available for distribution to everyone else on the network. The only way for a consumer to avoid being a forced distributor, and thereby avoid being potentially subject to liability for “sharing,” is to change the default settings that come with the software. Although users currently can change these settings on an individual basis, the vast majority of users either are unaware they can do so or are unaware of the legal risks they face unless they take this action.

C. Provide Clear, Conspicuous, and Meaningful Disclosures to Users About the Risks of Using P2P Software

As we discussed in our whitepaper, there is strong evidence suggesting that the notice and disclosure practices of P2P software providers violate the FTC Act and other applicable laws. At a very minimum, as the FTC said in its Senate testimony, “[d]istributors 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.”⁵

P2P software providers should inform consumers about the risks of sharing files on P2P networks by providing a clear, conspicuous, and meaningful warning to users *before* they download the file-sharing software. Consistent with the FTC’s guidance

⁴ See Bill Rosenblatt, *Napster Founder Seeks to Unite P2P and Copyright Owners*, DRM Watch (Jan. 29, 2004) (describing Snocap) and http://www.audiblemagic.com/copysense_appliance.html (describing Audible Magic).

⁵ P2P Testimony at 8-9.

provided in *Dot Com Disclosures*, these disclosures should be clear and conspicuous and not contained in hyperlinks or buried deep within the fine print of End User License Agreements ("EULAs").

Currently, the major P2P software providers give no clear and conspicuous disclosures of the danger of contracting computer viruses on P2P networks, despite the substantial risk of obtaining viruses through P2P file sharing, as noted by the Commission.⁶ These providers also fail to disclose in a clear and conspicuous manner that the software they provide comes bundled with spyware, which can cause substantial harms such as transmitting personally identifiable user information to third parties, taking up a computer's bandwidth and processing capacity, and remaining active on a computer even after the user deletes the P2P software.

As noted earlier, P2P services also do not disclose adequately the potential legal risks users may incur by using their software. Specifically, they do not provide clear and conspicuous disclosures that using the software to "share" music may be illegal, and that doing so may subject them to lawsuits such as the ones recently filed by the RIAA.⁷

Clear and conspicuous disclosures concerning pornography distributed over P2P networks also are essential. The FTC has recognized parents' interests in limiting their childrens' access to indecent, lewd, and/or violent material. Legitimate content providers have worked hard to adopt practices that empower parents to make informed decisions about their childrens' exposure to such materials, and the RIAA has indicated its commitment to continue working with the FTC to achieve further improvement.⁸ P2P services, however, lack even rudimentary protections. P2P services not only fail to provide appropriate labeling, they make no significant effort to notify parents of the types of materials their children will find when they start "sharing" files with anonymous fellow P2P subscribers of all ages and tastes.

⁶ See P2P Testimony at 4 (through file sharing on P2P networks "[c]onsumers may receive files with viruses and other programs that could impair the operation of their personal computers."); FTC Consumer Alert, *File Sharing: A Fair Share? Maybe Not* (July 2003) ("Files you download could be mislabeled, hiding a virus or other unwanted content.").

⁷ Since July 2003 the RIAA has filed over 4,000 lawsuits against individual users on P2P networks. These enforcement efforts continue. In August 2004 the RIAA brought nearly 744 new lawsuits in Georgia, Missouri, California, New York, Texas, Kentucky, Colorado, New Jersey and Wisconsin. See RIAA Press Release, *RIAA Steps Up Efforts Against Illegal File Sharers, eDonkey Users Among Those Sued* (August 25, 2004).

⁸ See FTC, Report to Congress, *Marketing Violent Entertainment to Children: A Fourth Follow-up Review of Industry Practices in the Motion Picture, Music Recording & Electronic Game Industries* (July 2004).

Another issue that raises the need for clear and conspicuous warning disclosures is the distribution of illegal pornography shared over the P2P networks. As noted above, most file-sharing software configures itself so that any file that a user downloads becomes available for redistribution from that user's computer to anyone else using the P2P network, thus potentially turning file sharers into unwitting distributors of such content. This can result in exposing children to pornography and adults to criminal liability for illegal pornography distribution.

To the extent disclosures of these risks are provided, they are buried deep within the fine print of lengthy EULAs. Such disclosures clearly are inadequate because they (i) are unlikely to be noticed by a vast majority of consumers downloading the software;⁹ (ii) even if noticed, they most often fail to provide sufficient information for consumers to determine the risks and costs associated with P2P file sharing; and (iii) they most often are contradicted by clear and prominent representations made by P2P software providers that use of their software is safe.¹⁰

As the FTC stated in its testimony, many of these risks appear to stem largely from the actions of individual users and potentially implicate other consumer technologies.¹¹ The risks associated with using P2P software, however, are substantially greater than those associated with other digital technologies such as e-mail and use of the Internet. For example, as stated in our whitepaper, a recent University of Washington study found that P2P file sharers were *22 times* more likely to be infected with spyware than Internet users in general.¹² If consumers recognize the risks inherent in using a product but decide to use it anyway, Commission action may not be appropriate. However, because the major P2P software providers fail to give consumers clear and conspicuous warnings of the greatly increased risks inherent in using their products, the harms and costs their customers suffer simply are not the result of *fully informed* consumer choice. The failure to warn consumers of these risks raises at least two questions under Section 5: whether the lack of disclosure is a deceptive act or practice, and whether subjecting consumers to substantially increased risks they cannot reasonably avoid is an unfair act or practice.

⁹ See *Dot Com Disclosures* at 5 ("In reviewing their online ads, advertisers should . . . assume that consumers don't read an entire Web site Making the disclosure available somewhere in the ad so that consumers who are looking for the information *might* find it doesn't meet the clear and conspicuous standard.").

¹⁰ See, e.g., RIAA Whitepaper at 11-12 and Attachment One (examples of P2P software providers making prominent claims that their software is spyware-free).

¹¹ See P2P Testimony at 7.

¹² See RIAA Whitepaper at 10.

These three steps – use of filters, changing the default setting, and provision of adequate notice – would go a long way towards limiting the harm P2P services are currently inflicting on consumers and on the owners and legitimate distributors of music and other content. This progress will facilitate the development of a healthy marketplace for digital online content in general, and the legitimate use of P2P technologies in particular.

II. THE COMMISSION HAS THE AUTHORITY TO TAKE ACTION

We believe the Commission has a direct role to play in ensuring that these practices are adopted. Indeed, we respectfully disagree with the Commission's apparent conclusion, as expressed in its testimony, that the Commission's only role is to educate P2P software providers and encourage voluntary compliance.¹³ The recent actions of the P2P software providers indicate that requesting them to change their business model voluntarily in the interest of their users simply will not work. Neither the RIAA's litigation efforts to date against the providers themselves, or against thousands of their customers, have persuaded the P2P services to act responsibly. Indeed, the primary response thus far of the P2P software providers has not been to educate and inform consumers, but to make their systems harder to detect and to further insulate themselves from risk.¹⁴ Given this track record, it is not surprising that major providers such as KaZaA, LimeWire, and iMesh have thus far failed to accept voluntarily the FTC's invitation to provide a prominent link on their web pages to the FTC's on-line brochure describing the risks of file sharing. These providers simply will not change their current practices unless forced to do so.

The Commission has the power to investigate this matter, and enforcement under Section 5, if warranted, would continue the Commission's long-standing role as the chief guardian of consumers' interests in the digital marketplace. Action against

¹³ We were pleased, however, to note in the Commission's recent letter to Congressman Waxman that it intends to hold a workshop on the impact of P2P technology on consumers and competition in order to gather further information. See Letter from Donald S. Clark to Honorable Henry Waxman, September 13, 2004, at 9..

¹⁴ See RIAA Whitepaper at 20 (describing P2P provider Blubster's efforts to hide the identity of its users while itself disclaiming all legal liability for unauthorized file sharing). See also Pew Internet & American Life Project, *Music Downloading, File-Sharing and Copyright* (June 2003) (within months of Napster's demise "a myriad of decentralized file-sharing services emerged and millions of Internet users simply migrated to new systems."); Donald S. Passman, ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS at 384 (2000) ("The practicality of suing [P2P software providers] isn't always so simple. In contrast to the expense and time it takes to go after [current providers], it's cheap and easy for new sites to pop up like mushrooms as soon as others get squashed.").

P2P software providers is consistent with past Commission enforcement actions such as those against Microsoft, Guess, and Eli Lilly, in which the FTC required these operators to provide clear and conspicuous disclosures on the Internet, or otherwise protect the confidentiality of consumers' personally identifiable information within the digital marketplace.¹⁵

Commission action also would be consistent with the concerns recently raised by 45 state attorneys general ("AGs") in a letter to P2P software providers and their trade groups, which expressed concern over the lack of adequate disclosures to consumers and threatened enforcement action if the providers did not take "concrete and meaningful" steps to address the current problems.¹⁶ In their letter, the AGs conclude that P2P networks have become the medium of choice for the dissemination of illegal pornography and for unauthorized file sharing. Because of these risks, "more needs to be done . . . to warn P2P users as to the specific legal and personal risks they face when they use P2P technology."¹⁷ Moreover, the AGs express concern that the current P2P software providers are moving in the wrong, not right, direction by intentionally adding encryption features to their services, thus making "it more difficult, if not impossible, for law enforcement to police users of P2P technology in order to prosecute crimes such as child pornography[.]"¹⁸

III. THE LEGITIMATE MARKET ONLINE CONTENT AND THE POTENTIAL FOR LEGITIMATE USE OF P2P TECHNOLOGY

The adoption of responsible business practices by current P2P services – whether it happens voluntarily, as the Commission hopes, or as the result of state or Federal enforcement actions, as we believe is more likely – is a prerequisite for the emergence of a healthy, legitimate market for online content, including services that rely

¹⁵ As explained in our whitepaper, the current acts and practices of the P2P software providers appear to go beyond those that were the subject of these prior enforcement actions. Unlike past situations where a company fails to provide all of the promised benefits from its product (as in *Microsoft*) or consumer information was disseminated through the acts of a negligent employee or third-party hacker (as in *Eli Lilly* and *Guess*), the current P2P software providers intentionally condone the dissemination of personally identifiable information through their partnerships with spyware providers, and use of P2P networks substantially increases the risks these consumers face. See RIAA Whitepaper at 24-25.

¹⁶ Alexei Alexis, *State AGs Ask Peer-to-Peer Platforms to Address Piracy, Pornography Concerns*, BNA (Aug. 6, 2004). The Attorneys General of the District of Columbia and the U.S. Virgin Islands also signed the letter.

¹⁷ *Id.*

¹⁸ *Id.*

on P2P technology. Such services are not likely ever to compete successfully, and certainly will not achieve their full potential, so long as illegitimate services are able deceptively to market the promise of a digital "free lunch."

A. Legitimate Online Distribution Services Are Now Available

A legitimate digital music marketplace is emerging through providers such as Apple's iTunes, Buy.com's BuyMusic, and Microsoft's MSN Entertainment.¹⁹ The growth of these and other providers show that consumer demand exists for the legitimate on-line distribution of music. Their full potential as platforms for music distribution, however, will be impeded as long as the current P2P networks continue to thrive.

Because legitimate providers respect copyright laws and actually disclose to consumers the true price of the music they provide, they face hurdles that illegitimate providers currently can ignore. One such hurdle is building a music catalog. Legitimate providers do so by negotiating licenses with both the major music companies and independent record labels. Illegitimate providers, of course, choose to forgo this legally required process. Another hurdle is price. Legitimate providers have varying pricing structures such as subscription fees or per song download fees that they disclose to consumers prior to purchase. While these prices tend to be low (for example, iTunes charges a flat download fee of \$0.99 per song), many consumers still perceive them as more expensive than the allegedly "free" music available on P2P networks. Therefore, many consumers still opt for file sharing, unaware of the substantial, undisclosed costs they most likely will pay eventually.

Due to these unfair "advantages" legitimate providers, despite their success thus far, still are dwarfed by the illegitimate P2P networks. For example, while iTunes has sold over 125 million music downloads in the sixteen months since it's founding in April 2003, the RIAA estimates that 2.6 billion files (the majority of which are music files) are shared *every month* on P2P networks. Clearly, legitimate digital music providers cannot reach their full potential while the current practices of the P2P networks continue.

B. P2P Technologies Can Be Used for Legitimate Distribution

Exciting new technologies are being developed that will fully capture the efficiencies of the P2P concept while protecting the rights of content owners. For example, in 2003 a group of leading technology- and content-related companies (including Macrovision, Microsoft, Nippon Telegraph and Telephone, Universal Music

¹⁹ Other licensed services include Connect (Sony), ebay (Passalong/TennPac), Musicmatch, MusicNet@AOL, MusicNow, Napster (Roxio), Rhapsody (Real Networks), and WalMart (Liquid Audio).

Group, and VeriSign) established the Content Reference Forum ("CRF"). The primary goal of the CRF is to "create a dynamic marketplace where participants can promote, sell and legitimately share content; consumers can get the right content for their location, platform and preferences; and the underlying commercial agreements and rights surrounding the content are respected."²⁰ Central to CRF's proposed technological architecture are "Content References," files that users can trade and that contain information about the desired content (for example, a particular song, movie, or video game) and the ownership and availability of the content. When the receiving user clicks on a Content Reference, information about the desired content is sent to a central service, which automatically sends the recipient information about the content's local availability through various media and sources the user can go to acquire it either electronically or in person.²¹ Through this system, consumers can enjoy and redistribute content on commercial terms that benefit content owners, distributors, technology suppliers, and ultimately, the consumers themselves.

A company called LX Systems is developing another potentially promising technology called grid computing, in which individual users that are authorized to participate in the grid can trade files, but the content of the files traded is monitored by a central source. If a requested file fails validation (e.g., if it contains potentially illegal or unauthorized content), it is not transferred, and a valid alternative file is found within the grid. The goal of this system is to create virtual communities that provide a safe, secure, centrally controlled distribution system that benefits both users and content providers.²²

Whether these new business models will succeed or fail in the marketplace is impossible to predict. On the one hand, the Commission obviously should be careful not to discourage the development of new technologies by over-regulating. By the same token, however, the Commission will not advance the cause of technological progress by overlooking illegitimate business practices simply because the market is "innovative" or the business model relies on "new technologies." To the contrary, the Commission can best promote technological progress by creating a market environment in which consumers are well-informed and property rights are well-respected. In the case of P2P networks, these are goals the Commission is well positioned to pursue.

²⁰ www.cfforum.org.

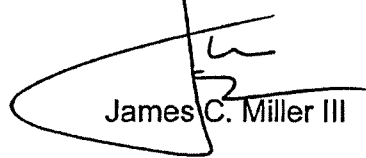
²¹ See generally *Content Reference Forum Whitepaper* at 8-11 (March 17, 2003), available at www.cfforum.org.

²² See www.lxsystems.com.

Commissioner Pamela Jones Harbour
September 27, 2004
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In closing, I want to thank you personally, and on behalf of RIAA, for your interest in this critical issue. If we can provide you with any additional information, we will be pleased to do so.

Sincerely yours,



James C. Miller III

cc: Jeff Eisenach
Lisa Jose Fales
Mitch Glazier



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JIM MILLER leads the CapAnalysis practice and participates in its various research programs. He is the author or co-author of several CapAnalysis studies and has served as an expert witness in several cases. Jim's government service included being Director of the Office of Management and Budget and Chairman of the Federal Trade Commission.

Jim is John M. Olin Distinguished Fellow at both the Center for Study of Public Choice and the Mercatus Center at George Mason University. He is also a Senior Fellow (by courtesy) of the Hoover Institution at Stanford University, a member of the board of Americans for Prosperity, and an Emeritus Member of the Boards of Citizens for a Sound Economy Foundation, the Tax Foundation, and the Progress and Freedom Foundation.

Jim is also a Member of the Boards of Independence Air (formerly Atlantic Coast Airlines) where he serves on the audit committee, Recipco Corporation, Washington Mutual Investors Fund where he serves as chairman of the audit committee, the Tax-Exempt Fund of Maryland and the Tax-Exempt Fund of Virginia where he serves on the audit committees, and the JPMorgan Value Opportunities Fund. Also, Jim serves on the Board of Governors of the U.S. Postal Service, where serves on the audit committee, having been appointed by President George W. Bush in 2002. In addition, he is a consultant to Freddie Mac.

Jim is frequently called on to comment on public issues. He has appeared on the Today Show, CBS Morning News, Good Morning America, Meet the Press, Face the Nation, This Week, Inside Edition, MacNeil-Lehrer NewsHour, Crossfire, Inside Politics, Late Edition, Kudlow-Cramer, and Wall Street Week. His opinion pieces have appeared in the Wall Street Journal, New York Times, Washington Post, Washington Times, USA Today, Investors Business Daily, and other major newspapers. He has also been an occasional commentator for Marketplace Radio.

In 1994, Jim was a candidate for the Republican nomination to the U.S. Senate from Virginia, losing a close race to Ollie North. In 1996, he was once again a candidate for the Republican nomination to the U.S. Senate, losing to incumbent John Warner in the June primary.

Jim is the author of over 100 articles in professional journals and is also the author, co-author, or editor of nine books, the most recent of which is *Monopoly Politics*, published in 1999 by the Hoover Press at Stanford University.

EDUCATION

University of Virginia, Ph.D., Economic, 1969

University of Georgia, B.B.A., Economics, 1964

TESTIMONY

PRESENTATIONS PRESENTED BEFORE OR PREPARED FOR COURTS:

Testified in *Maritrans v. United States*, #96-483-C, and *America Pelagic Fishing Company v. United States*, #99-119C, both in the U.S. Court of Federal Claims. Wrote expert reports and was deposed in *Tyson Foods, Inc. v. Conagra Foods, Inc.*, #03-5015 in U.S. District Court for the Western District of Arkansas.

PRESENTATIONS BEFORE REGULATORY AGENCIES:

U.S. Departments of Agriculture, Commerce, Health, Education and Welfare, Housing and Urban Development, Interior, and Transportation; the Civil Aeronautics Board, the Coast Guard, the Consumer Product Safety Commission, the Environmental Protection Agency, the Federal Aviation Administration, the Federal Deposit Insurance Corporation, the Federal Energy Administration, the Federal Power Commission, the Federal Reserve Board, the Federal Trade Commission, the Food and Drug Administration, the International Trade Commission, the Interstate Commerce Commission, the National Highway Traffic Safety Commission, the Occupational Safety and Health Administration, the Postal Rate Commission, and the Securities and Exchange Commission; the Department of Energy, the Civil Aeronautics Board, the Interstate Commerce Commission, the Postal Rate Commission, the National Commission for the Review of Antitrust Laws and Procedures, and the California and Pennsylvania public utilities commissions

PRESENTATIONS BEFORE COMMITTEES OF THE U.S. HOUSE OF REPRESENTATIVES:

U.S. House of Representatives Committee on Appropriations; U.S. House of Representatives Committee on the Budget; U.S. House of Representatives

Committee on the Judiciary; U.S. House of Representatives Committee on Public Works and Transportation; U.S. House of Representatives Republican Study Committee; U.S. House of Representatives Rules Committee; U.S. House of Representatives

Subcommittee on Administrative Law & Governmental Relations, Committee on the Judiciary; U.S. House of Representatives Subcommittee on Aviation, Committee on Public Works and Transportation; U.S. House of Representatives Subcommittee on Commerce, Consumer and Monetary Affairs, Committee on Government Operations; U.S. House of Representatives Subcommittee on Commerce, Justice, State, the Judiciary and Related Agencies, Committee on Appropriations; U.S. House of Representatives Subcommittee on Commerce, Transportation and Tourism, Committee on Energy & Commerce; U.S. House of Representatives Subcommittee on Consumer Protection and Finance, Committee on Oversight and Investigations; U.S. House of Representatives Subcommittee on Economic Stabilization, Committee on Banking, Finance and Urban Affairs; U.S. House of Representatives Subcommittee on Legislation and National Security, Committee on Government Operations; U.S. House of Representatives Subcommittee on Monopolies & Commercial Law, Committee on Judiciary; U.S. House of Representatives Subcommittee on Oversight and Investigations, Committee on Energy and Commerce; U.S. House of Representatives Subcommittee on Science, Research and Technology, Committee on Science and Technology; U.S. House of Representatives Subcommittee on Small Business Problems, Committee on Small Business; U.S. House of Representatives Subcommittee on Transportation and Commerce, Committee on Interstate and Foreign Commerce; and U.S. House of Representatives Subcommittee on Treasury, Postal Service and General Government Appropriations

PRESENTATIONS BEFORE COMMITTEES OF THE U.S. SENATE

U.S. Senate Committee on Appropriations; U.S. Senate Committee on the Budget; U.S. Senate Committee on Commerce, Science, and Transportation; U.S. Senate Subcommittee on the Constitution, Committee on the Judiciary; U.S. Senate Committee on Governmental Affairs; U.S. Senate Committee on the Judiciary; U.S. Senate Committee on Small Business; U.S. Senate Subcommittee on Administrative Practice and Procedure, Committee on the Judiciary; U.S. Senate Subcommittee on Antitrust and Monopoly, Committee on the Judiciary; U.S. Senate Subcommittee on Alcoholism and Drug Abuse, Committee on Labor and Human Resources; U.S. Senate Subcommittee on

Aviation, Committee on Commerce, Science and Transportation; U.S. Senate Subcommittee on Commerce, Justice, State and Judiciary, Committee on Appropriations; U.S. Senate Subcommittee on Consumer, Committee on Commerce, Science and Transportation; U.S. Senate Subcommittee on Federal Expenditures, Research and Rules, Committee on Government Affairs; U.S. Senate Subcommittee on Intergovernmental Relations, Committee on Governmental Affairs; U.S. Senate Subcommittee on Productivity and Competition, Committee on Small Business; U.S. Senate Subcommittee on Regulatory Reform, Committee on the Judiciary; U.S. Senate Subcommittee on Treasury, Postal Service, and General Government Appropriations; and U.S. Senate Special Committee on Aging

PRESENTATIONS BEFORE JOINT CONGRESSIONAL COMMITTEES:

U.S. Joint Economic Committee Subcommittee on Economic Goals and Intergovernmental Policy, U.S. Joint Economic Committee; Subcommittee on Trade, Productivity and Economic Growth, U.S. Joint Economic Committee; Congressional Grace Caucus; and Motor Carrier Ratemaking Study Commission

PROFESSIONAL ASSOCIATIONS

- ABA Committee on Government Ethics, Member in early 1990's. (Committee produced report in 1993 entitled: "Keeping Faith: Government Ethics and Government Ethics Regulation")
- Southern Economic Association, Vice President, 1990 to 1991
- ABA Committee on Antitrust, Member of Executive Committee, 1981 to 1985
- Southern Economic Association, Member of the Executive Committee, 1980 to 1982
- American Economic Association, Member
- Public Choice Society, Member
- ABA, Associate Member

PUBLICATIONS AND SPEECHES

ARTICLES

- Miller, III, James C. "Reagan's economic policy legacy" (with Jeffrey A. Eisenach), *The Washington Times*, (August 8, 2004).

- Miller, III, James C. "Preserving the Reagan legacy," *The Washington Times*, (February 3, 2004).
- Miller, III, James C. "Warner, Chichester Tax Packages: Both Plans Would Undercut Economy," *Richmond Times-Dispatch*, (January 19, 2004).
- Miller, III, James C. "In the Wake of a Failed Cancun," *The Washington Times*, (September 19, 2003).
- Miller, III, James C. "Principles of Tax Reform," *The Washington Times*, (June 10, 2003).
- Miller, III, James C. "Campaign Reforms Weighed in Court," *The Washington Times*, (January 16, 2003).
- Miller, III, James C. "Restraining the Competition," *The Washington Times*, (January 15, 2003).
- Miller, III, James C. and Doug Ose. "Regulation Could Stand More Oversight," *The Washington Times*, (July 24, 2002).
- Miller, III, James C. and J.D. Foster. "The Tyranny of Budget Forecasts," *Journal of Economic Perspectives*, (Summer, 2000).
- Miller, III, James C. "Incumbents' Advantage," *George Mason University, Working Papers in Economics*, (December, 1997).
- Miller, III, James C. "Suggestions for a Leaner, Meaner Budget," *Jobs & Capital*, (Spring, 1995).
- Miller, III, James C. and Mark Crain. "Budget Process and Spending Growth," *William and Mary Law Review*, (Spring, 1990).
- Miller, III, James C. "Independent Agencies -- Independent from Whom?," *Administrative Law Review*, (Fall, 1989).
- Miller, III, James C. "It's Time to Free the Mails," *Cato Journal*, (Spring, 1988).
- Miller, III, James C. "A Reflection on the Independence of Independent Agencies," *Duke Law Journal*, (1988).
- Miller, III, James C. and Introduction by Robert D. Tollison. "Spending and Deficits," (1988). G. Warren Nutter Lecture in Political Economy, The American Enterprise Institute for Public Policy Research, 1987.
- Miller, III, James C. "Comments on Baumol and Ordovery," *Journal of Law and Economics*, (May, 1985).

- Miller, III, James C. and Paul Paulter. "Predation: The Changing View in Economics and the Law," *Journal of Law and Economics*, (May, 1985).
- Miller, III, James C. "The Case Against Industrial Policy," *Cato Journal*, (Fall, 1984).
- Miller, III, James C. and William F. Shugart, III and Robert D. Tollison. "A Note on Centralized Regulatory Review," *Public Choice*, (January, 1984).
- Miller, III, James C. and Thomas F. Walton, William E. Kavcic, and Jeremy A. Rabkin. "Industrial Policy: Reindustrialization through Competition or Coordinated Action?," *Yale Journal on Regulation*, (1984).
- Miller, III, James C. "Is Organized Labor Rational in Supporting OSHA?," *Southern Economic Journal*, (January, 1984).
- Miller, III, James C. "Reindustrialization Policy: Atari Mercantilism?," *Plant Closings: Public or Private Choice?*, (1984). in Richard B. McKenzie (ed.) (revised edition, CATO Institute).
- Miller, III, James C. "Resale Price Maintenance: Analytical Framework," *Regulation*, (January, 1984).
- Miller, III, James C. "Comparative Data on Life-Threatening Risks," *Toxic Substances Journal*, (Summer, 1983).
- Miller, III, James C. "Report from Official Washington," *Antitrust Law Journal*, (1983).
- Miller, III, James C. "Regulatory Relief under President Reagan," *Jurimetric Journal*, (Summer, 1982).
- Miller, III, James C. "The (Nader-) Green-Waitzman Report," *Toxic Substances Journal*, (Winter, 1981).
- Miller, III, James C. "Collective Ratemaking Reconsidered: A Rebuttal," *Transportation Law Journal*, (1980).
- Miller, III, James C. and Roger Sherman. "Has the 1970 Act Been Fair to Mailers," *Perspectives on Postal Services Issues*, *American Enterprise Institute*, (1980). in Roger Sherman (ed.).
- Miller, III, James C. "Airline Market Shares vs. Capacity Shares and the Possibility of Short-Run Loss Equilibria," *Research in Law and Economics*, (1979).

- Miller, III, James C. "Regulation and the Prospect of Reform," *Regulation, Competition and Deregulation -- an Economic Grab Bag*, (1979). in Charles F. Phillips (ed.).
- Miller, III, James C. "An Economic Analysis of Airline Fare Deregulation: The Civil Aeronautics Board's Proposal," *Transportation Law Journal*, (1978).
- Miller, III, James C. "Regulators and Experts: A Modest Proposal," *Regulation*, (November, 1977).
- Miller, III, James C. "Regulatory Reform: Some Problems and Approaches," *American Enterprise Institute Reprint No. 72*, (August, 1977).
- Miller, III, James C. and William Lilley, III. "The New 'Social Regulation'," *Public Interest*, (Spring, 1977). reprinted extensively.
- Miller, III, James C. "Lessons of the Economic Impact Statement Program," *Regulation*, (January, 1977).
- Miller, III, James C. "Effects of the Administration's Proposed Aviation Act of 1975 on Air Carrier Finances," *Transportation Journal*, (Spring, 1976). reprinted in Paul W. MacAvoy and John W. Snow (eds.), *Regulation of Passenger Fares and Competition Among the Airlines*, American Enterprise Institute, (1977).
- Miller, III, James C. and Robert L. Greene. "Environmental Protection: The Need to Consider Costs and Benefits," *Highway Users Quarterly*, (1976).
- Miller, III, James C. "A Perspective on Airline Regulatory Reform," *Journal of Air Law and Commerce*, (Fall, 1975).
- Miller, III, James C. and Robert D. Tollison. "Rates of Publication Per Faculty Member in Forty-five Rated Economics Departments," *Economic Inquiry*, (March, 1975).
- Miller, III, James C. "Government Regulation," *Economic Report of the President, 1975*, (1975). Chapter 5.
- Miller, III, James C. and George W. Douglas. "Quality Competition, Industry Equilibrium, and Efficiency in the Price-Constrained Airline Market," *American Economic Review*, (September, 1974).
- Miller, III, James C. and George W. Douglas. "The CAB's Domestic Passenger Fair Investigation," *Bell Journal of Economics and Management Science*, (Spring, 1974). reprinted by The Brookings Institution (Technical Series Reprint T-008).

- Miller, III, James C. "The Optimal Pricing of Freight in Combination Aircraft," *Journal of Transport Economics and Policy*, (September, 1973).
- Miller, III, James C. "A Time of Day Model for Aircraft Scheduling," *Transportation Science*, (August, 1972).
- Miller, III, James C. and Richard A. Bilas and Fred A. Massey. "Marginal Revenue and Pigouvian Second Degree Price Discrimination," *Metroeconomica*, (August, 1971).
- Miller, III, James C. and Robert D. Tollison. "The Implicit Tax on Reluctant Military Recruits," *Social Science Quarterly*, (March, 1971).
- Miller, III, James C. "A Note on Profits, Entry, and Scale of Plant in the Purely Competitive Model," *Revista Internazionale de Scienze Economiche e Commerciali*, (February, 1971).

BOOKS

- Miller, III, James C. *Monopoly Politics*, Stanford: Hoover Institution Press, 1999.
- Miller, III, James C. *Fix the U.S. Budget!: Urgings of an Abominable No-Man*, Stanford: Hoover Institution Press, 1994.
- Miller, III, James C. *The Economist as Reformer: Revamping the FTC, 1981-1995*, Washington: American Enterprise Institute, 1989.
- Miller, III, James C. and Robert J. Mackay and Bruce Yandle. *The Federal Trade Commission: The Political Economy of Regulation*, Stanford: Hoover Institution Press, 1987.
- Miller, III, James C. and Timothy B. Clark and Marvin H. Kusters. *Reforming Regulation*, Washington: American Enterprise Institute, 1980.
- Miller, III, James C. and Bruce Yandle. *Benefit-Cost Analyses of Social Regulation: Case Studies from the Council on Wage and Price Stability*, Washington: American Enterprise Institute, 1979.
- Miller, III, James C. *Perspectives on Federal Transportation Policy*, Washington: American Enterprise Institute, 1975.
- Miller, III, James C. and George W. Douglas. *Economic Regulation of Domestic Air Transport: Theory and Policy*, Washington: The Brookings Institution, 1974.

- Miller, III, James C. *Why the Draft?: The Case for a Volunteer Army*, Baltimore: Penguin Books, 1968.

SPEECHES AND PRESENTATIONS RELATED TO COMPETITION AND CONSUMER PROTECTION ISSUES

- Luncheon and Keynote Address Speaker, "A Former Chairman's Perspective on the Role of Economic Analysis," FTC Bureau of Economics Roundtable Celebrating 100th Anniversary of its Predecessor Agency – the Bureau of Corporations, Washington, DC, September 4, 2003.
- "Regulatory Policy Toward Mergers and Acquisitions: Past, Present, and Future," William G. Karnes Symposium on Mergers and Acquisitions Sponsored by the University of Illinois at Urbana-Champaign, Chicago, IL, May 10, 1985.
- "Real Economics: A Return to Fundamentals," Association of Private Enterprise Education, Chicago, IL, April 21, 1985.
- "Real Economics," Conference Jointly Sponsored by the Center for Education and Research in Free Enterprise of Texas A&M University and the Heritage Foundation, Dallas, TX, April 2, 1985.
- "Structural Change in the U.S. Economy: Implications for Antitrust," Annual Spring Meeting of the American Bar Association Section of Antitrust Law, Washington, DC, March 22, 1985.
- "Revamping the FTC," National Press Club, Washington, DC, November 27, 1984.
- "Policymaking in Washington: Some Personal Observations," Distinguished Guest Lecture - Southern Economic Association Annual Conference, Atlanta, GA, November 14, 1984.
- "Oil Industry Mergers," Society of Independent Gasoline Marketers of America, New Orleans, LA, November 12, 1984.
- "A Perspective on the Future of the Airline Industry," American Bar Association Transportation Committee Section of Administrative Law, Washington, DC, October 25, 1984.
- "Reagan Administration Antitrust Reforms in Historical Perspective," Undergraduate Economics and Business Administration Association, Vanderbilt University, October 16, 1984.

- "Maximizing the Benefits of Self-Regulation," White House Conference on Association Self-Regulation, Washington, DC, October 3, 1984.
- "Predation: The Changing View in Economics and the Law," Antitrust and Economic Efficiency Conference, Hoover Institution, August 30, 1984.
- "Research Joint Ventures, Antitrust, and Industrial Innovation," Berlin Cartel Conference 1984, Berlin, Germany, July 2, 1984.
- "The Empirical Approach to Advertising Issues," American Advertising Federation, Denver, CO, June 4, 1984.
- "Production Joint Ventures and the U.S. Antitrust Laws," Jetro-Joea U.S. Legal Seminar, Tokyo, Japan, May 23, 1984.
- "Why is There No 'Industrial Policy' in America?," Kansai Federation of Economic Organizations, Osaka, Japan, May 21, 1984.
- "The Evolution of U.S. Antitrust Policy," Japan Federation of Economic Organizations, Tokyo, Japan, May 18, 1984.
- "The Case Against 'Industrial Policy'," Cato Institute Policy Conference, Washington, DC, April 27, 1984.
- "Research Joint Ventures and Industrial Innovation," Conference on Cooperative Research Ventures, New York, NY, April 5, 1984.
- FTC's Ad Substantiation Program, Washington, DC, March 23, 1984.
- "The Intellectual Debate Over Antitrust and the Future of FTC Enforcement," Spring Meeting of American Bar Association Section of Antitrust Law, March 23, 1984.
- "Reindustrialization Through the Free Market," American Bar Association Section of Antitrust Law, Washington, DC, March 22, 1984.
- "Structural Change in the U.S. Economy: Implications for Antitrust," American Bar Association Section of Antitrust Law Annual Spring Meeting, Washington, DC, March 22, 1984.
- "Reagan Regulatory Reform and the Issue of Fairness," John F. Kennedy School of Government Harvard University, Cambridge, MA, February 28, 1984.
- Consumer Federation of America - Consumer Assembly '84, Washington, DC, February 16, 1984.

- The Calvin Coolidge High School Student Body, Washington, DC, February 9, 1984.
- "The FTC and Small Business in the 1980s," Small Business Legislative Council Issues and Policy Conference, Washington, DC, January 10, 1984.
- Society of Consumer Affairs Professionals in Business International Consumer Affairs Exchange, New York, NY, October 5, 1983.
- San Francisco Advertising Club, San Francisco, CA, September 30, 1983.
- "Industrial Policy: Panacea or Pandora's Box?," Commonwealth Club of California, San Francisco, CA, September 30, 1983.
- World Affairs Council, San Francisco, CA, September 29, 1983.
- "The Reagan Philosophy at the FTC," Independent Insurance Agents of America, San Francisco, CA, September 26, 1983.
- American Bar Association House of Delegates, Atlanta, GA, August 2, 1983.
- "Who (Should) Control(s) the FTC?," American Bar Association Section of Administrative Law, Atlanta, GA, August 1, 1983.
- "Commencement Address," Georgia State University, June 18, 1983.
- American Advertising Federation, Washington, DC, June 13, 1983.
- International Consumer Credit Association, June 10, 1983.
- Atlanta Chapters of the American Marketing Association and the Better Business Bureau, Atlanta, GA, June 8, 1983.
- "Reindustrialization Policy: Atari Mercantilism?," The Economic Club of Detroit, April 18, 1983.
- National Legislative Issues Conference of the American Dental Association, Washington, DC, March 26, 1983.
- Annual Spring Meeting of the American Bar Association Section of Antitrust Law, March 25, 1983.
- Faculty and Students of Arizona State University, Arizona, February 18, 1983.
- National Association of Homebuilders, Houston, TX, January 23, 1983.
- International Franchise Association, New Orleans, LA, January 18, 1983.
- "Regulation Advertising - Myths and Realities," National Advertising Review Board, New York, NY, December 14, 1982.

- Brookings Institution Colloquium, Washington, DC, October 26, 1982.
- Oral and Maxillofacial Surgery Political, Atlanta, Ga, October 24, 1982.
- Federal Trade Commission on Advertising Substantiation, October 20, 1982.
- Council on Employee Benefits, Detroit, MI, October 14, 1982.
- National Retail Merchants Association, Crystal City, VA, October 11, 1982.
- Philadelphia Chamber of Commerce, September 8, 1982.
- Kansai Federation of Economic Organizations, Osaka, Japan, August 26, 1982.
- Japan Federation of Economic Organizations, Tokyo, Japan, August 23, 1982.
- Annual Meeting of the National Association of Attorneys General, Mackinac Island, MI, July 17, 1982.
- Washington Business Group on Health, Washington, DC, June 23, 1982.
- Virginia Bar Association, Virginia Beach, VA, June 19, 1982.
- Association for a Better New York, June 17, 1982.
- The Milwaukee Forum, Milwaukee, WI, May 3, 1982.
- American Bar Association Antitrust Section, Washington, DC, April 2, 1982.
- American Chamber of Commerce, Sydney, Australia, March 26, 1982.
- "False and Deceptive Advertising: Asking the Right Questions," American Advertising Federation, Washington, DC, December 8, 1981.
- Association of National Advertisers, San Francisco, CA, November 10, 1981.

EXPERIENCE**CORPORATE**

The J.P. Morgan Value Opportunities Fund, Member, Board of Directors (2001 to present).

Recipco Corporation, Member, Board of Directors (2000 to present).

The Tax Exempt Fund of Maryland, Member, Board of Directors (2000 to present).

The Tax Exempt Fund of Virginia, Member, Board of Directors (2000 to present).

Independence Air (formerly Atlantic Coast Airlines), Member, Board of Directors (1995 to present).

Washington Mutual Investors Fund, Member, Board of Directors (Member of Advisory Board, November 1989 - October 1992) (1992 to present).

GOVERNMENT

Administrative Conference of the United States, Vice Chairman (Member of Council, November 1981 - December 1987) (1987 to 1988).

President Reagan's Cabinet and National Security Council, Member (1985 to 1988).

U.S. Office of Management and Budget, Director (1985 to 1988).

U.S. Federal Trade Commission, Chairman (1981 to 1985).

U.S. Office of Management and Budget, Administrator for Information and Regulatory Affairs (1981).

National Science Foundation, Consultant (1977 to 1981).

U.S. Council on Wage and Price Stability, Assistant Director (1975 to 1977).

U.S. Council of Economic Advisors, Senior Staff Economist (1974 to 1975).

U.S. Department of Transportation, Consultant (1972 to 1974).

U.S. Department of Transportation, Senior Staff Economist (1969 to 1972).

FACULTY AND FOUNDATION APPOINTMENTS

Americans for Prosperity, Member, Board of Directors (2004 to present).

George Mason University, Member, Board of Visitors (1998 to 2002).

Hoover Institution (Stanford University), Senior Fellow (by courtesy) (1998 to present).

Progress & Freedom Foundation, Member (or Emeritus Member), Board of Directors (1994 to present).

Consumer Alert, Member, Board of Advisors (1991 to present).

Tax Foundation, Member (or Emeritus Member), Board of Directors (1989 to present).

Citizens for a Sound Economy, Member (or Emeritus Member), Board of Directors (1988 to present).

George Mason University, Center for Study of Public Choice, Distinguished Fellow (1988 to present).

George Mason University, Mercatus Center, Distinguished Fellow (1996 to present).

U.S. Air Force Academy, Member, Board of Visitors (1988 to 1992).

George Washington University, Lecturer, Economics (1978 to 1980).

The American Enterprise Institute for Public Policy Research, Adjunct Scholar (1975 to 1977).

Texas A&M University, Associate Professor, Economics (1972 to 1974).

The Brookings Institution, Associate Staff (1972 to 1974).

The American Enterprise Institute for Public Policy Research, Research Associate (1972).

Georgia State University, Assistant Professor, Economics (1968 to 1969).