



ELECTRONIC FRONTIER FOUNDATION

Protecting Rights and Promoting Freedom on the Electronic Frontier

January 7, 2014

VIA OVERNIGHT DELIVERY

Glenn T. Graham
Deputy Attorney General
Consumer Fraud Prosecution Section
124 Halsey Street, 5th Floor
Newark, New Jersey 07102

RE: In re: Jeremy Rubin, individually and d/b/a/ Tidbit

Dear Mr. Graham,

The Electronic Frontier Foundation (“EFF”) represents Mr. Rubin and Tidbit in connection with the December 4, 2013 *subpoena duces tecum* and interrogatories you issued requesting information about Tidbit. Thank you for extending the time for Tidbit to produce the requested records. While we are hopeful we can resolve this matter, there is an initial concern we’d like to bring to your attention.

As you know, the Dormant Commerce Clause prohibits New Jersey from using state law to regulate interstate commercial activity, regardless of whether the state legislature intended the extraterritorial reach. *Healy v. Beer Institute, Inc.*, 491 U.S. 324, 336 (1989). Indeed, numerous courts have struck down state laws that purport to restrict Internet activity occurring in other states. *See, e.g., PSINet, Inc. v. Chapman*, 362 F.3d 227, 240-41 (4th Cir. 2004); *American Booksellers Foundation v. Dean*, 342 F.3d 96, 104 (2d Cir. 2003); *ACLU v. Johnson*, 194 F.3d 1149, 1161-63 (10th Cir. 1999).

Tidbit and its developers have no connection to New Jersey at all. All of Tidbit’s developers, including Mr. Rubin, are MIT students who reside in Massachusetts. Tidbit’s servers are not physically located in New Jersey. Tidbit is aware of recent settlements your office has reached with out-of-state Internet companies E-Sports Entertainment and PulsePoint for conduct impacting New Jersey residents. But unlike E-Sports, Tidbit did not take control of over 140,000 computers in New Jersey to mine for bitcoins.¹ And unlike PulsePoint, Tidbit did not place 215 million targeted ads on web browsers used by New Jersey consumers.²

That’s because Tidbit’s code has never been functional and is incapable of mining for bitcoins.

¹ *Acting Attorney General Announces \$1 Million Settlement Resolving Consumer Fraud, Unlawful Access Claims Against Online Gaming Company*, November 19, 2013, <http://nj.gov/oag/newsreleases13/pr20131119a.html>.

² *New Jersey Division of Consumer Affairs Obtains Million-Dollar Settlement With Online Advertising Company Accused of Overriding Consumers’ Privacy Settings Without Consent*, July 25, 2013, <http://nj.gov/oag/newsreleases13/pr20130725a.html>.

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Page 2 of 2

Tidbit was developed for the 2013 Node Knockout hackathon. At its core, Tidbit allows users to mine for bitcoins using the computing power of a client's computer. It was envisioned as a replacement for advertising.

But Tidbit was presented as a proof of concept, with its developers clearly stating on the Node Knockout website that "Tidbit isn't fully ready for production use, but 98% of the infrastructure is in place. We believe this is a very strong proof of concept for the idea."³ The lack of functionality was not an accident; Tidbit wanted time to not only refine the code but also come up with terms of service. This would be important because even Mr. Rubin himself understood that in order for Tidbit to be used online, there would need to be a mechanism for users to opt-in to the service.⁴

Since the code was never functional, it cannot and has not been used to mine for bitcoins. Tidbit has already publicly explained that "[w]e have left out the final interaction with P2Pool while we put together a Terms and Conditions, so we currently do not receive any Bitcoins."⁵

Tidbit certainly appreciates New Jersey's concern that citizens in the Garden State would, without their knowledge or control, have their computers compromised. But Tidbit has not engaged in any illicit behavior comparable to E-Sports or PulsePoint. And in any event, Tidbit's code is not functional and unable to mine for bitcoins at all.

In sum, while Tidbit doubts New Jersey's ability to use state law to regulate interstate online commercial activity, even if it could regulate Tidbit, since its code is not functional and no bitcoins have been mined, it appears there is no need to respond to the subpoena or the interrogatories. We believe that this letter resolves the matter.

Should you have any questions or concerns, please don't hesitate to call, email or write.

Sincerely,



Hanni M. Fakhoury, Esq.
Staff Attorney

Nathan D. Cardozo, Esq.
Staff Attorney

³ <http://nodeknockout.com/teams/shoop-team>.

⁴ <https://news.ycombinator.com/item?id=6714396>.

⁵ <http://nodeknockout.com/teams/shoop-team>.