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Privacy and Failing Dot. Coms: A Case study of Toysmart.com

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Failing dot-coms: the subject seems to dominate the evening news of late. The airwaves are full of stories explaining their impact on the stock market and the economy. However, the greatest risk may be to Internet users' privacy rights. As dot-coms race to raise monies to pay their creditors, a significant risk to consumers is being realized. Do the privacy rights of the dot-com customers exist beyond the existence of the business? In the case of failed toy retailer, ToySmart.com, the answer is maybe.

ToySmart.com was an online toy store. It had obtained a Trust-e seal of approval. The seal of approval is awarded only to sites that adhere to Trust-e 's established privacy standards of disclosure, choice, access and security. By displaying the TRUSTe Privacy Seal, web sites agree to abide by the program's principles, which are based on the fair information practices as interpreted by the U.S. government in its discussion paper "Elements of Self Regulation for Protection of Privacy." [1] TRUSTe's standards include[2]:

- Disclosure – Web sites displaying the TRUSTe seal must post clear notice of what personally identifiable information is gathered and with whom it is shared. This disclosure must be easy to read and accessible by one mouse click from the home page.
- Choice – Users must have the ability, through opt-in or opt-out functions, to choose whether to allow secondary uses of that personal information. In effect, users must be able to prevent the Web site from selling, sharing, renting or disseminating their personally identifiable information.
- Access – Users must have reasonable access to information maintained about them by a Web site to correct any inaccuracies in the data collected.
- Security – The Web site must provide reasonable security to protect the data that is collected.

In May 2000, Toysmart filed for bankruptcy protection and ceased to do business. To satisfy creditor's demands, the business began selling off its assets. Some of its most valuable assets were its customer list and databases. The databases contained personal identifiable data on Toysmart's customer base. The information included in the database was the names, addresses, shopping preferences and credit card numbers. Customers relied upon the published policy statement on Toysmart's web site in making the decision to allow the site to collect personal data on their purchases. The privacy policy clearly stated that the personal identifiable data collected by Toysmart would never be disclosed to third parties.[3]

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[1] The Department of Commerce staff discussion paper, "Elements of Effective Self Regulation for the Protection of Privacy," enumerated certain principles of fair information practices that are essential for a strong self-regulatory approach to addressing privacy. See http://www.ecommerce.gov. These elements form the core of the TRUSTe program.

[2] "Building Trust Online: TRUSTe, Privacy and Self Governance". TRUSTe White Paper. URL: http://www.truste.com/about/about_whitepaper.html

[3] Toysmart.com Privacy Policy. URL: http://www.ftc.gov/os/2000/07/toyexh1.pdf

The published privacy statement in essence represented a contract between Toysmart and its users to never allow anyone to access their data. Contract law in the United States requires three elements to be present when two parties enter into a contract. These three elements must be present in any contracts. They are agreement, consideration and intentions. In addition a party to a contract must have the legal ability to fulfill the services contracted for. In the case of Toysmart, all of these requirements were satisfied.

Agreement is defined as an offer and acceptance of that offer. In the case of Toysmart, its users accepted the company's offer to protect their privacy forever. Allowing the site to collect their data evidenced the users' acceptance. At any point, users had the right to opt out of the site's privacy practices by sending an email to customer service or not using the site. Once they opted into the site's privacy policy, Toysmart agreed to protect their personal data. Toysmart.com provided reasonable efforts of securing this data, by not providing the data to third party companies and by instituting reasonable controls to protect its customers' data. These measures included the technical controls used for authentication and access control. These practices satisfied the requirement for acceptance in basic contract law.

The next requirement for a contract to exist is consideration. Contract law defines consideration as an exchange of some benefit or some value. Toysmart.com users paid for the products purchased on the site with their credit cards. This benefited the user by providing convenience and in some cases, discounted prices. Toysmart.com benefited monetarily from this practice and it allowed them to track their users shopping preferences. This allowed the company to target its advertising budget based on their members' spending patterns.

Finally, both parties had the necessary legal intentions to enter into a legally binding contract. Basically legal intentions are an agreement between the two parties to enter into a contract for a legal activity. At this time, buying and selling goods over the Internet is legal. It is also legal for companies to maintain personal data on its customers. Currently e-Commerce privacy policies for United States have very few regulations. Self-governance reigns for protecting user privacy. This makes organizational standards like TRUSTe very important to ensure users minimal privacy protections. One of the legislative measures passed to protect consumer's Internet privacy is the Children's Online Privacy Protection Act of 1998. This act is sometimes referred to as COPPA. The other is the provision in the Federal Trade Commission (FTC) act[4]. This provision allows the FTC to investigate and prohibit unfair or deceptive business practices[5]. Acting upon complaints from privacy advocates, the FTC used this sixty-two year-old provision to investigate the sell of Toysmart's member database.

In a Massachusetts bankruptcy court, the FTC argued that Toysmart.com would break its promise to never release the data to third parties by selling its customer lists and

[4] Act of Sept. 26, 1914, ch. 311, § 5, 38 Stat. 717, 719 (codified as amended at 15 U.S.C. § § 41-58 (1994)).
[5] Act of March 21, 1938, ch. 49, § 3, 52 Stat. 111 (codified at 15 U.S.C. § 45(a)(1) (1994)).

databases. In addition, the FTC charged Toysmart.com with violating the Children's Online Privacy Protection Act of 1998. Toysmart.com became the first company to be charged for this offense under the statute. After several rounds of negotiation and court rulings, the FTC and Toysmart.com agreed that Toysmart.com could only sell its member databases to companies involved in a similar industry. The FTC agreed with Toysmart.com that its members had agreed for their toy purchases to be tracked by a toy retailer and therefore in substance privacy pollicies for toy retailers are much the same from site to site. With a lack of privacy statements for e-Commerce sites and a policy of self-governance, it appears that the FTC simply rolled over to the financial demands of Toysmart.com creditors at the expense of the privacy of the site's members. Toysmart's members contract was with Toysmart and not the toy store industry to protect their privacy. The FTC had a chance to establish a precedent of holding defunct dot-coms to the same privacy standards that they used while in business.

In conclusion, I believe that as dot-com companies begin to fail, Internet users will begin to see an erosion in their privacy rights. The fact that the bankruptcy court's interest is in satisfying the creditor's economic demands and not consumer privacy will lead to more loopholes in failed sites privacy polices. When a site promises to never release member data, it should be made to never release that data. Dot-coms should not be given the opportunity to abandon privacy assurances in return for cash This puts consumers in the position of investigating the stability of dot-com companies before giving the companies access to their personal data. In this world of mega-mergers and operating agreements, an Internet consumer can never be sure who is a third party of a site. Or who has access to their personably identified data. Recently Scott McNealy, CEO of Sun MicroSystems Inc., stated, "Privacy is dead, deal with it."[6] It may not be dead but a user's right to privacy dies when the dot-com fails.

[6] Meeks, Brock N. "Analysis: Is privacy dead?" ZDNet News. 7 December 2000. URL: http://www.zdnet.com/zdnn/stories/news/0,4586,2662465,00.html

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