

ESSAY #2

## **PRIVACY POLICIES: THE PROBLEM OF MUTABLE TERMS**

Others have written at length about the privacy debate surrounding the increasingly common business practice of linking on-line data gathered on the basis of the terms in a Web site's privacy policy to personal information for commercial use; creating and selling individual profiles according to such characteristics as age, occupation, salary, marital status, medical conditions, political affiliations or even as to what kind of toilet paper one prefers to use.<sup>1</sup>

Of course, this brings the inevitable question of "so what?" to the forefront of the debate—like the example my e-commerce law professor would ask all of us—"So what if people know what kind of toilet paper I use—they can put it up on a billboard a top of the Lincoln Tunnel." Notwithstanding, this paper assumes as its starting point that privacy does matter to consumers.

With the presumption that privacy matters to consumers, this paper examines the problem involving the actual capture and use of personal information in transaction-generated situations by Web sites, which frequently occurs on the basis of obliging, non-binding and ambiguous privacy policies due to what I will call "mutable terms." Mutable terms are express statements within a Web site's privacy policy that reserve the right for a Web site to change their privacy policy at any time. Such statements as "we reserve the right to change this privacy policy at our discretion" essentially allows a Web site to change the terms of its privacy policy after consumers have already consented, rendering meaningless any consent given by the consumer on

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<sup>1</sup> Galil, Yair Y., *No Child's Play: Treatment of Contractually Protected Private Information in Bankruptcy Proceedings*, 2002 Colum. Bus. L. Rev. 823

the basis of the previously agreed upon terms.<sup>2</sup>

Privacy policies are, in effect, displayed to “reassure consumers that their privacy is respected,”<sup>3</sup> informing them about what happens to the personal information they provide by disclosing a Web site’s collection and use practices.<sup>4</sup> Though, with that said, the mere posting of a privacy policy does not ensure adequate privacy protection for consumers because often Web sites either violate their own policies or simply don’t follow them because of mutable terms,<sup>5</sup> coupled with the lack of effective monitoring and enforcement—which I will discuss later.

However, Web sites that do not explicitly assert the mutability of its privacy policy, i.e. that “the rules may change,” regarding their collection and use of information practices, but then later change its terms and apply it retroactively must, in fact, comply with the representations made at the time the personal information was collected or they run the risk of being prosecuted by the FTC due to violating their own privacy policies under Section 5 of the Federal Trade Commission Act (FTCA) for deceptive online information practices.<sup>6</sup>

For example, one particular case prosecuted under Section 5 of the FTCA involved the virtual toy store Toysmart, which sold toys via a website <http://www.toysmart.com>.<sup>7</sup> Toysmart

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<sup>2</sup> Colloquium on Privacy & Security, Gary M. Schober-Moderator, Shubha Ghosh-Organizer, Ann Bartow, Chris Hoofnagle, Phyllis Borzi-Panelists, Spring / Summer, 2002, 50 Buffalo L. Rev. 703

<sup>3</sup> Larry E. Ribstein, *Law v. Trust*, 81 B.U. L. Rev. 553, 558 (2001)

<sup>4</sup> See Ribstein, *supra* note 553

<sup>5</sup> Paige Norian, *The Struggle to Keep Personal Data Personal: Attempts to Reform Online Privacy and How Congress should Respond*, 52 Cath. U.L. Rev. 803

<sup>6</sup> See Norian, *supra* 803

<sup>7</sup> Daniel Bronski, Conway Chen, Matthew Rosenthal and Robert Pluscec, *eCOMMERCE: FTC vs. Toysmart*, 2001 Duke L. & Tech. Rev. 10

collected personal information from its customers including names, addresses, credit card numbers, shopping preferences and family profile data<sup>8</sup> under the following privacy policy:

"Personal information voluntarily submitted by visitors to our site, such as name, address, billing information and shopping preferences, is never shared with a third party. All information obtained by toysmart.com is used only to personalize your experience online. When you register with toysmart.com, you can rest assured that your information will never be shared with a third party."<sup>9</sup>

In addition to its privacy policy, Toysmart exhibited a TRUSTe seal on its Web site, certifying that the personal information customers provided to Toysmart would never be shared with, or sold to, third parties.<sup>10</sup> However, when Toysmart went bankrupt, all those promises inevitably went out the window and the toy company tried to sell its most valuable asset—the consumer personal information.<sup>11</sup>

The FTC sued Toysmart to halt the sale of its customer database, but only after TRUSTe showed it was incapable of preventing Toysmart from selling its customer database on its own.<sup>12</sup> The FTC alleged that Toysmart violated the consumer protection laws and privacy rights of its customers under Section 5 of the FTCA for deceptive online information practices.<sup>13</sup>

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<sup>8</sup> See Bronski, supra 10

<sup>9</sup> See Bronski, supra 10

<sup>10</sup> See Bronski, supra 10

<sup>11</sup> See Bronski, supra 10

<sup>12</sup> See Bronski, supra 10

<sup>13</sup> See Bronski, supra 10