

Statement of Commissioner Mozelle W. Thompson
Toysmart.com, File No. x000075

This case is important because it directly considers the obligation of an online business to its customers and the responsibility of the business for its customers' personal information. This case is also very timely in light of predictions that pressures for internet profitability may lead many dot coms to sell data. *See, e.g., The Internet Privacy Migraine*, May 16, 2000, Forrester Research.

Toysmart.com ("Toysmart"), an online toy retailer, developed a valuable database of children's personal information based, among other things, on the express representation that it would never disclose such information to third parties. Unfortunately, Toysmart's performance in the marketplace resulted in bankruptcy, prompting Toysmart to sell its principal remaining asset - - its customer information database. In building this asset, however, Toysmart made a covenant with its customers; the company's lack of success does not extinguish this important obligation which forms the very basis for the existence of the asset.

I have voted to approve the settlement in this matter resolving the Commission's charges that Toysmart violated Section 5 of the Federal Trade Commission Act because I believe the terms of the settlement are consistent with Toysmart's privacy policy.⁽¹⁾ More specifically, the settlement permits Toysmart to sell its information only to a "qualified buyer," defined as an entity engaged in the family commerce market who expressly agrees to be Toysmart's successor-in-interest as to that information. Accordingly, Toysmart may transfer its data only to someone who specifically "stands" in the shoes of Toysmart.

Despite the consistency between the settlement and Toysmart's privacy policy, my decision to approve the settlement is not without reservation. Like my colleagues Commissioner Anthony and Commissioner Swindle, I think that consumers would benefit from notice and choice before a company transfers their information to a corporate successor. Indeed, many of the consumers who disclosed their families' personal information to Toysmart might not have been willing to turn over the same information to the particular corporate entity that ultimately succeeds Toysmart. This is true even where Toysmart's corporate successor must pursue the same line of business as its predecessor.

I urge any successor to provide Toysmart customers with notice and an opportunity to "opt out" as a matter of good will and good business practice. In this case I believe that the specific terms of the settlement provide Toysmart's customers with the rights to which they agreed when they disclosed their information. I do, however, reserve the right to revisit this question should anyone, including the Bankruptcy Court, seek to alter these important settlement provisions.

1. Toysmart also violated the Children's Online Privacy Protection Act ("COPPA") by collecting personal information directly from children under the age of 13 without providing parental notice or obtaining verifiable parental consent. The settlement effectively resolves this charge by requiring Toysmart to delete all the information it collected in violation of the COPPA.

Statement of Commissioner Sheila F. Anthony
Toysmart.com, Inc. File No. X00 0075

The proposed settlements⁽¹⁾ in this matter involve competing consumer privacy and business interests. At issue is a customer list rich with personal and financial data as well as information about children. Consumers provided the detailed information pursuant to Toysmart's privacy policy that expressly stated such information would "never be shared with a third party." Toysmart, a dotcom company whose major asset appears to be this customer list, is a debtor-in-possession in a Chapter 11 bankruptcy case and is attempting to sell the list.

The settlements attempt to satisfy both the privacy interests of consumers and the business needs of a failing firm by establishing the conditions on the sale of Toysmart's customer list. Specifically, the order proposed to be filed with the bankruptcy court limits to whom Toysmart may sell its customer list. Toysmart may only sell the customer list in connection with its goodwill, not as a stand-alone asset, and only to a qualified buyer. A qualified buyer is defined as one that is in the "family commerce market" and one that expressly agrees to be Toysmart's successor-in-interest as to its customer list. Further, the qualified buyer must abide by the terms of the privacy statement and may make material changes to the privacy statement only with the opt-in consent of consumers.

To accept the bankruptcy settlement would place business concerns ahead of consumer privacy. Although the proposed settlement's definition of a qualified buyer attempts to ensure that only an entity "similar" to Toysmart is eligible to purchase the list, I do not believe that this limitation is an adequate proxy for consumer privacy interests. In my view, consumer privacy would be better protected by requiring that consumers themselves be given notice and choice before their detailed personal information is shared with or used by another corporate entity -- especially where, as here, consumers provided that information pursuant to a promise not to transfer it.

1. There are two proposed settlements before the Commission; one to be filed with the bankruptcy court and the other to be filed in district court. The proposed district court settlement will be filed only if the bankruptcy court approves the conditions limiting the sale of the customer list. The district court settlement specifically addresses the allegations of the complaint and accordingly, prohibits Toysmart from making false or misleading statements about the disclosure of customer information to third parties and from selling or disclosing customer information to any third party except as expressly provided in the bankruptcy order.

Dissenting Statement of Commissioner Orson Swindle
in *Toysmart.com, Inc.*, File No. X000075

Defendant Toysmart.com, Inc. ("Toysmart") represented that it would never disclose, sell, or offer to sell the personal information of its customers to a third party. ¶ 17 of the First Amended Complaint for Permanent Injunction and Other Equitable Relief. When faced with severe financial difficulties, however, Toysmart solicited bids for its customer lists, which include or reflect the personal information of its customers. *Id.* at ¶ 11. During the bidding process, Toysmart's creditors filed a petition for involuntary bankruptcy. *Id.* at ¶ 12. Toysmart has completed the bidding process but not yet sold its customer lists. *Id.* at ¶ 13.

The Commission filed a Section 13(b) complaint alleging that Toysmart's representation that it would never disclose, sell, or offer to sell the personal information of its customers was false because it had solicited bids for its customer lists. *Id.* at ¶¶ 17-18. The Commission sought an injunction against the sale of the customer lists and a declaration that "Toysmart's transfer of [its customer lists] to any third party [would] be a violation of the FTC Act." *Id.*

To resolve the allegations in the complaint, the Commission has agreed to allow Toysmart's customer lists to be sold to a third party, essentially so long as the buyer is in a similar line of business and agrees to abide by Toysmart's privacy policies. ¶¶ 2 and 3 of the Stipulation and Order Establishing Conditions on Sale of Customer Information ("Bankruptcy Order").

I agree that a sale to a third party under the terms of the Bankruptcy Order would be a substantial improvement over the sale that likely would have occurred without Commission action. Nevertheless, I do not think that the Commission should allow the sale. If we really believe that consumers attach great value to the privacy of their personal information and that consumers should be able to limit access to such information through private agreements with businesses, we should compel businesses to honor the promises they make to consumers to gain access to this information. Toysmart promised its customers that their personal information would *never* be sold to a third party, but the Bankruptcy Order in fact would allow a sale to a third party. In my view, such a sale should not be permitted because "never" really means never.⁽¹⁾

I dissent.

1. If Toysmart had obtained the consent of its customers to a sale of the customer lists to a buyer that met the specific conditions spelled out in the Bankruptcy Order, I would have had no objection to the sale.