

**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS**

FEDERAL TRADE COMMISSION,
600 Pennsylvania Ave., N.W., Washington, DC 20580, Plaintiff,

v.

TOYSMART.COM, LLC,
170 High Street, Waltham, MA, 02453, a Delaware corporation, and
TOYSMART.COM, INC.,
170 High Street, Waltham, MA, 02453, a Delaware corporation, Defendants.

CIVIL ACTION NO. 00-11341-RGS

**FIRST AMENDED COMPLAINT FOR PERMANENT INJUNCTION AND OTHER
EQUITABLE RELIEF**

Plaintiff, the Federal Trade Commission ("FTC" or "Commission"), by its undersigned attorneys, alleges:

JURISDICTION AND VENUE

1. This Court has subject matter jurisdiction over the FTC's claims pursuant to 15 U.S.C. §§ 45(a) and 53(b) and 28 U.S.C. §§ 1331, 1337(a) and 1345.
2. Venue in this District is proper under 15 U.S.C. § 53(b) and 28 U.S.C. § 1391(b) and (c).

THE PARTIES

3. Plaintiff, the FTC, is an independent agency of the United States government created by statute. 15 U.S.C. §§ 41 *et seq.* The Commission enforces Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), which prohibits unfair or deceptive acts or practices in or affecting commerce. The Commission may initiate federal district court proceedings to enjoin violations of the FTC Act and to secure such equitable relief as is appropriate in each case. 15 U.S.C. § 53(b). The Commission also enforces the Children's Online Privacy Protection Act of 1998 (COPPA), 15 U.S.C. § 6501 *et seq.*
4. Defendants Toysmart.com, Inc. and Toysmart.com, LLC (collectively "Toysmart" or "defendant") are Delaware corporations. Toysmart.com, Inc. was incorporated on November 23, 1998, and qualified by the Secretary of State of Massachusetts on December 15, 1998; Toysmart.com, LLC was incorporated on August 8, 1999. Toysmart's principal place of business is located at 170 High Street, Waltham, MA 02453. Toysmart is the operator of a Web site on the Internet, located at www.toysmart.com, that is a retail toystore. Toysmart transacts or has transacted business in this district.

COMMERCE

5. At all times material to this complaint, defendant's course of business, including the acts and practices alleged herein, has been and is in or affecting commerce, as "commerce" is defined in Section 4 of the FTC Act, 15 U.S.C. § 44.

DEFENDANTS' BUSINESS PRACTICES

6. Since at least January 1999, Toysmart has advertised, promoted, and sold toys on the Internet, located at www.toysmart.com. Toysmart markets its products and services throughout the United States and the world via the Internet.
7. In connection with its Web site, Toysmart collects personal customer information including, but not limited to, consumers' names, addresses, billing information, shopping preferences, and family profile information ("Customer Lists").
8. In September 1999, Toysmart became a licensee of TRUSTe, an organization that certifies the privacy policies of online businesses and allows such businesses to display a TRUSTe trustmark or seal.
9. From September 1999 to the present, the privacy policy posted on the Toysmart.com Web site has stated, *inter alia*, (1) "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;" and (2) "When you register with toysmart.com, you can rest assured that your information will never be shared with a third party." A true and correct copy of the Toysmart privacy policy is attached hereto as Exhibit 1.
10. On May 22, 2000, Toysmart announced that, as of midnight on May 19, 2000, it had officially ceased operations. Toysmart also announced that it had retained the services of a Boston-based management consultant, The Recovery Group, to locate parties interested in acquiring Toysmart.com's business and assets.
11. On May 22, 2000, Toysmart began soliciting bids for the purchase of its assets. Bids have been sought for the purchase of all of the company's assets or for individual assets. Among the individual assets offered for sale by Toysmart.com are its Customer Lists (on either an exclusive or non-exclusive basis). Other assets available include inventory; warehouse fixtures and equipment; intangible assets including domain name, product databases, and Web site source code; and a B2B business plan. Bids were due to Toysmart by 6:00 p.m. EST on June 19, 2000.
12. On June 9, 2000, Toysmart's creditors filed a petition for involuntary bankruptcy. *See In Re: Toysmart.com, LLC, No. 00-13995-CJK (Bankr. D. Mass).*
13. On June 19, 2000, bidding for Toysmart's assets concluded. Toysmart informed the Federal Trade Commission that its Customer Lists will not be transferred to a third party absent bankruptcy court approval.
14. Beginning May 1, 2000, Toysmart collected personal information from children on its Web site through a dinosaur trivia contest. This information included name, email address, and age.
15. The trivia contest was directed to children. The trivia contest included no mechanism for parental notification or consent prior to the collection of information from children under the age of 13.

VIOLATIONS OF SECTION 5 OF THE FTC ACT

COUNT I

16. Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), prohibits "unfair or deceptive acts or practices in or affecting commerce."

17. From at least September 1999 to the present, defendant Toysmart, directly or through its employees and agents, in connection with its collection of personal consumer information, expressly and/or by implication, represented that it would "never" disclose, sell, or offer for sale customers' or registered members' personal information to third parties.

18. In truth and in fact, Toysmart has disclosed, sold, or offered for sale its customer lists and profiles. Therefore, the representation set forth in Paragraph 17 was, and is, a deceptive practice.

VIOLATIONS OF THE CHILDREN'S ONLINE PRIVACY PROTECTION ACT

COUNT II

19. Since at least May 1, 2000, through its dinosaur trivia contest, which was directed to children, Toysmart collected personal information from children that, in addition, it actually knew to be under the age of 13, without providing notice to parents or obtaining verifiable parental consent prior to the collection of such personal information. The information collected included name, email address, and age.

20. The practice set forth in Paragraph 19 did not fall within the exception to prior parental consent of 16 C.F.R. § 312.5(c)(2) and therefore was, and is, a violation of the Children's Online Privacy Protection Act, 15 U.S.C. § 6503 and 16 C.F.R. §§ 312.3-312.5.

CONSUMER INJURY

21. Toysmart's conduct, as set forth in Paragraphs 6-21 will injure consumers throughout the United States by invading their privacy.

22. Absent injunctive relief by this Court, the defendant is likely to injure consumers and harm the public interest.

THIS COURT'S POWER TO GRANT RELIEF

23. This Court is empowered by Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), to grant injunctive and other ancillary relief, to prevent and remedy any violations of any provision of law enforced by the Commission.

PRAYER FOR RELIEF

WHEREFORE plaintiff Federal Trade Commission pursuant to Section 13(b) of the FTC Act, 15 U.S.C. § 53(b) and the Court's own equitable powers, requests that this Court:

1. Permanently and preliminarily enjoin defendant from violating the FTC Act, as alleged herein;
2. Declare Toysmart's transfer of the Customer Lists to any third party to be a violation of the FTC Act;
3. Permanently and preliminarily enjoin defendant from violating the COPPA;
4. Require Toysmart to delete or destroy information collected in violation of COPPA;

5. Award such other relief as the Court finds necessary to redress injury to consumers resulting from defendant's violations of the FTC Act and COPPA.

Respectfully submitted,

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