

My Dissent to the “Privacy Online: Fair Information Practices in the Electronic Marketplace” Report, Federal Trade Commission, May 2000

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Assignment 3

1) Identifies weaknesses in the ways in which the FTC collected evidence in their study and how those weaknesses may have skewed their conclusions.

Before any opinions are raised regarding the “Privacy Online: Fair Information Practices in the Electronic Marketplace” report by the FTC (Federal Trade Commission), it is essential that we examine the FTC’s survey methodology used to support this report. The FTC report claims that the “...2000 Survey went beyond the mere counting of disclosures; it analyzed the nature and substance of these privacy disclosures...”¹ The problem with this analysis is that many of the sites that the survey suspected did not have any security measures did in fact have security measures, but decided not to disclose the precise nature of their measures in the fear that hackers could use this information to break into their site. It also appears that this analysis of disclosures did not attempt to investigate if these sites actually provided ‘Access’ and ‘Security,’ but rather analyzed whether disclosures covered these issues.

The survey also does not seem to distinguish a site that collects small amounts of personal information (for example, a site that collects only a name and email address) from a site that collections large and/or more sensitive amounts of information (for example, full billing address, credit card information). This is an important distinction, given that consumers may be concerned with sites that collection sensitive information such as health or financial data, but far less concerned about sites that request less sensitive data such as their name and email address. Since the survey sample sites include “search engines, portals, and Internet service providers, as well as e-commerce sites offering consumer goods and services, including computer hardware and software; electronics; email services; books; music; clothing; news and entertainment; auction and contests; job listings; travel services; real estate listings; and medical information,” the survey should attempt to make

¹ Federal Trade Commission 2000 Report, “Privacy Online: Fair Information Practices in the Electronic Marketplace” (thereafter referred to as “FTC 2000 Report”) at 11.

this distinction.² Comparing Google’s privacy disclosure (whose site may only request an email address for a News Alert) to Amazon.com’s privacy disclosure (whose site may have very sensitive consumer behavior and financial data on individuals) without making this distinction is not “seek[ing] to represent consumer experience” accurately.³

Furthermore, the survey fails to accurately demonstrate lost online sales due to privacy concerns. “Indeed, survey data also shows that 57% of Internet users have decided not to use or purchase something from a retail Web site because they were not sure how the site would use their personal information.”⁴ This information is likely misleading due to the survey’s ‘positive response’ questioning and lack of further investigation. If the survey asked online consumers, for example, ‘Have you ever not bought something due to privacy concerns?’ these potential positive responses will exclude consumers who may have made their online purchases at another website, and consumers who may have been dissuaded from making their purchase then, but later, are undeterred from making their online purchases, regardless of privacy concerns.

2) Points out institutional limits of a federal agency that might also have affected their findings, when such limits are visible from a close reading [of] the report itself.

The purpose of the FTC is to “...ensure the nation’s markets are vigorous, efficient and free of restrictions that harm consumers.”⁵ It may be surprising then that the FTC seems to be suggesting to Congress that despite recent progress in self-regulation, the government should relinquish a free, self-regulatory approach in lieu of significant restrictions and FTC lawmaking-authority over all e-commerce (electronic commerce).⁶ The report also seems to be limited in declining to address other solutions to consumer privacy needs other than FTC-drafted legislation. These positions of the FTC favoring new legislation, however,

² FTC 2000 Report at 9

³ FTC 2000 Report at 8

⁴ FTC 2000 Report at 15

⁵ <http://www.ftc.gov/bcp/online/pubs/general/guidetofc.htm>

⁶ FTC 2000 Report at Appendix C, Table 2a

should not be surprising when you consider that in 2000, online sales doubled, and studies predicted total online sales would surpass total traditional sale vendors by 2005.⁷ It should be noted that in the year 2000, the FTC already could employ authority under Section 5 on misleading and dishonest e-commerce vendors.⁸ Yet, in an effort to maintain the FTC's importance and role in the United States government, the survey questions and the report hope to discredit self-regulatory efforts in favor of their imposed legislative restriction over e-commerce.

3) Presents your own opinion as to whether or not the proposed recommendations in Section IV are likely to solve the problems identified by the Commission in its Report and why.

I agree that a well-crafted strategy of e-commerce regulation will include some legislation regarding online privacy. I disagree, however, with the FTC's across-the-board and unjustified abrogation of its previous recommendation of self-regulation in lieu of its new recommendations of broad government regulation. Therefore, I believe some of the recommendations in Section IV will benefit the growth of e-commerce and provide adequate privacy protection, and some recommendations will severely weaken the thriving e-commerce industry.

The survey found that a large majority of sites provide 'Notice' of privacy policies.⁹ However, there seems to be a need for better, and most importantly, consistent and comparable privacy disclosures by e-commerce vendors. A required privacy disclosure will not impose much cost to the vendor, and will make the market more efficient by providing full and defined information for the consumer. By insisting that e-commerce vendors use clear and conspicuous terms with uniform meaning, consumers will be able to understand and compare vendors' disclosure policies, resulting in a better market outcome.

⁷ See EMarketer's eCommerce: B2C Report, http://cyberatlas.internet.com/markets/retailing/article/0,1323,6061_349891,00.html, April 27, 2000

⁸ See *FTC v. ReverseAuction.com, Inc.*, No. 00-0032 (D.D.C Jan. 6, 2000); *GeoCities*, FTC Docket No. C-3849 (Feb. 12, 1999).

⁹ FTC 2000 Report at 24

The recommendation of ‘Choice’ is more complicated than that of ‘Notice.’ This recommendation gives consumers a unbridled ability to use e-commerce sites, but also gives them complete control over the site’s internal and external uses of their information. By forcing sites to grant the same services to those who provide their personal information and those who do not provide any information, it would also give traditional offline vendors who record consumer information a competitive advantage over e-commerce vendors. For example, if I walk into a Safeway grocery store and buy groceries on sale, I have to use my “Safeway Club Card” to enjoy those saving (and in return, Safeway gets to track my purchases). If this ‘Choice’ recommendation is forced on online retailers, however, if I shopped for those same groceries online, say at Safeway.com, I could opt-out of any consumer tracking and still enjoy the same saving as those who provide Safeway.com with their consumer information.¹⁰ This will likely reduce the activity of e-commerce by forcing this competitive disadvantage, reduce the services of e-commerce vendors, and disincentivize traditional offline companies from forming an online presence, resulting in a loss of efficiency and overall market value.

The ‘Access’ recommendation would also impose a significant cost on e-commerce vendors, and possibly stifle many online businesses and again, e-commerce vendors would be at a competitive disadvantage compared to traditional offline vendors. This ‘Access’ recommendation would also force all e-commerce vendors to take a risk of liability in the event of identity theft or illicit hacking activity. This recommendation would also likely disincentivize current traditional offline vendors from building an online presence, further stifling online commerce, and contrary to one of the goals of the FTC. By imposing this recommendation on all e-commerce vendors, many online businesses will likely reduce

¹⁰ This free riding behavior by consumers withholding their information would likely be adjusted by online vendors by having higher prices on all online groceries or imposing flat fees for all online shoppers, increasing transaction costs and decreasing overall market efficiency.

their services or possibly leave their online presence altogether, particularly the small niche businesses which have provided such a popular online market.

The ‘Security’ recommendation of forcing security disclosures and services may increase consumer confidence. However, the recommendation is extremely broad, stating that e-commerce vendors need to take “reasonable steps to protect the security” of consumer’s information.¹¹ Security is always a favorable quality, but without knowing what the FTC means by “reasonable,” this recommendation should not be enforced. It may drive out the small online vendors who, for example, may not be able to afford the FTC’s “reasonable” security systems, but provide niche products to consumers who are less concerned about security. As mentioned before, many e-commerce vendors may provide a security system but do not disclose this particular information in an effort to preventing hacking or other illicit activities in their online stores.

4) Regardless of your ultimate conclusion in (3), make at least two recommendations to improve the Commission’s recommendations in Part IV.

It is disturbing that the FTC, one of the most important antitrust agencies of the U.S. government, did not consider the anticompetitive effects their broad recommendations would impose on the online marketplace. One of the problems the FTC was addressing (and hoping to decrease) was the loss of online sales income due to privacy concerns by consumers. I believe that by imposing the recommendations set forth in Section IV, without a consideration of the many costs this legislation would impose on the online companies, would greatly hinder online commerce. Although the survey results indicate a majority of e-commerce vendors have privacy disclosures, the ‘Notice’ recommendation in Section IV would require all sites to disclose soon, and encourage consistent, comparable descriptions of privacy policies, thus allowing consumers to vote with online wallets and

¹¹ FTC 2000 Report at 37

reward vendors with preferred privacy policies. I would further recommend that the FTC also increase its efforts to educate consumers on the risks of e-commerce and how to understand privacy disclosures, in an effort to give the consumer more confidence in the online marketplace.

I would also support an effort to apply certain restrictions respective to the particular online vendors, instead of the across-the-board standards approach the report recommends for all e-commerce vendors. For example, an online vendor who does not collect sensitive materials such as credit card information should not be required to provide the same “reasonable” security that consumers would want in an online vendor that does store sensitive information. Furthermore, I would recommend that the FTC applies similar privacy regulations to traditional offline companies. The e-commerce marketplace has “enhanced the ability” for online vendors to “store, transfer and analyze vast amounts of data,” but online privacy concerns are very similar to those in respect to offline vendors.¹² Advances in technology have allowed offline companies to collect and compile personal information similar to online companies.¹³ Clear and conspicuous privacy disclosures should be required from both online and offline vendors, establishing a level playing field for both marketplaces to flourish.

¹² FTC 2000 Report at 1

¹³ Abacus is a good example of an offline company using technology to collect and compile consumer information. See *In re Trans Union*, Docket No. 9255 (Feb. 10, 2000)