



UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION  
WASHINGTON, D.C. 20580

Office of the Director  
Bureau of Consumer Protection

July 1, 2010

Peter Larson  
Martin E. Shmagin  
c/o Bonnie L. Pollack, Esq.  
Cullen and Dykman LLP  
100 Quentin Roosevelt Boulevard  
Garden City, New York 11530

Dear Messrs. Larson and Shmagin:

The Bureau of Consumer Protection of the Federal Trade Commission (“FTC”) is sending you this letter based on our understanding that you are negotiating with a bankruptcy Trustee to obtain possession and ownership of sensitive personal information.<sup>1</sup> It is our understanding that this information (hereafter “XY PI”) was collected for about 11 years from subscribers of various publications and services operated under the XY brand name (collectively “XY”).

### **XY.Com, XY Magazine, and Their Privacy Practices**

XY Magazine was a gay male youth-oriented magazine published in the United States between 1996 and 2007. The magazine contained political and cultural articles, pictures, and submissions by readers that included advice to youth on suicide and drug abuse prevention, parent-child relations, university applications, and other concerns of underage gay people. According to the publisher of this magazine, the average age of XY readers was 18 as of 2001. XY also operated the website XY.Com, which featured magazine content as well as an online dating service for young gay men.<sup>2</sup> The final issue of the magazine was published in December 2007. The associated website closed in 2009.

The magazine and website collected a substantial amount of personal information from its subscribers and members during the time it was in operation, including names and street

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<sup>1</sup> This information is listed as part of a debtor’s Chapter 7 estate in a case pending before the U.S. Bankruptcy Court in New Jersey. *In re Peter Ian Cummings*, Case No. 10-14433 (Bankr. D. N.J.). We also understand that you have asserted before the bankruptcy court pre-existing ownership rights to this information. We take no position on the validity of such claims. The purpose of this letter is to put you on notice regarding practices that may be problematic with respect to the use of this information. Please note that the views expressed herein do not necessarily reflect the views of the Commission or any individual Commissioner.

<sup>2</sup> Beginning in 2003, XY also published a bimonthly companion magazine entitled “XYFoto.”

addresses of about 100,000 subscribers of XY Magazine; photographs and articles submitted by about 3,000 former XY Magazine readers; names, street addresses, email addresses, personal photos, and online personal profiles of between 500,000 and 1,000,000 former subscribers of XY.Com; and bank card account information for XY subscribers.<sup>3</sup>

It is our understanding that since its inception the XY.Com's "Signup Confirmation Page" told potential members/subscribers: "Please note our amazing privacy policy. We never give your info to anybody."<sup>4</sup> Similarly, the XY Magazine subscription form stated: "Amazing Privacy Policy: XY never sells its list to anybody!"<sup>5</sup> Another similar statement, which appeared on the website and was directed to magazine subscribers, stated: "[O]ur privacy policy is simple: we never share your information with anybody." Those submitting online profile information were told that such information "will not be published. [W]e keep it secret." Those submitting articles for possible publication were told that they would be contacted before such articles were used.

XY also made representations regarding the anonymity of its magazine subscriber base in connection with the distribution of the magazine. According to the publisher, the sexual orientation of many of the magazine and website members/subscribers was not public, including that of some minors living at home with their parents. Indeed, to alleviate concerns about the possible social stigma associated with a subscription, the XY.Com website published the following FAQ: "[Q:] Will my mom figure out what I'm getting in the mail? [A:] Subscription copies of XY are mailed in plain, shrink-wrapped black plastic, with no mention of XY on the mailing label." For young adults who moved out of their parents' residence during the course of their subscription, XY maintained a change of address webpage that allowed them to immediately update such moves.

### **Potentially Unlawful Transfers and Uses of XY PI**

We understand that you are attempting to establish ownership and obtain possession of XY PI through a bankruptcy proceeding. You may be seeking to obtain this information to sell or otherwise transfer it or to use it to restart the XY magazine or website. As explained below, we believe that these activities would contradict the privacy statements made to original subscribers, in possible violation of the Federal Trade Commission Act's ("FTC Act") prohibition against "unfair or deceptive acts or practices."<sup>6</sup>

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3 See Motion to Avoid Impairment of Debtor's Schedules as to Ownership and Exemption of Customer Lists and Other Property Protected by Federal & State Privacy Rights, filed March 19, 2010, *In re Cummings* (hereafter "Motion"), at 4.

4 Motion, Exhibit A.

5 *Id.*

6 15 U.S.C. § 45(a).

***Potential Sale or Transfer of XY PI***

The Commission has brought several cases alleging that the failure to adhere to promises about information privacy constitute a deceptive practice under the FTC Act.<sup>7</sup> These cases include *FTC v. Toysmart*<sup>8</sup> in which the Commission sued an online toy retailer which had filed for bankruptcy and sought to auction the personal information it collected from its customers. The Commission alleged that the offer for sale constituted a deceptive practice because the company had represented in its privacy policy that such information would never be shared with third parties.

In this case, the XY privacy policy is simple, explicit, and clear. Subscribers and members were told that their personal information would not be sold, shared, or given away to “anybody.” This includes the names, addresses, profile information, and credit card information submitted by subscribers. It also includes unpublished articles that were submitted, for which permission to publish had not yet been secured. Therefore, any sale or transfer of the data to a new company, new owner, or other third party would directly contravene the privacy representations and could constitute a deceptive practice by the original company or its principals. Such practice also could be unfair.<sup>9</sup> In addition, the receipt of such data by a third party, knowing that such receipt violated the privacy policy, could be unfair.<sup>10</sup>

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<sup>7</sup> See, e.g., *FTC v. ControlScan, Inc.* (N.D. Ga.) (Stipulated Final Judgment and Order for Permanent Injunction and Other Equitable Relief), available at <http://www.ftc.gov/os/caselist/0723165/index.shtm>; *In the Matter of CVS Caremark Corporation*, File No. 072 3119, available at <http://www.ftc.gov/os/caselist/0723119/index.shtm>; *In the Matter of Genica Corporation*, File No. 082 3113, available at <http://www.ftc.gov/os/caselist/0823113/index.shtm>; *In the Matter of Life is good, Inc.*, File No. 072 3046, available at <http://www.ftc.gov/os/caselist/0723046/index.shtm>; *In the Matter of The National Research Center for College and University Admissions, Inc.*, File No. 022 3005, available at <http://www.ftc.gov/os/caselist/0223005/index.shtm>; and *In the Matter of Microsoft Corporation*, File No. 012 3240, available at <http://www.ftc.gov/os/caselist/0123240/0123240.shtm>.

<sup>8</sup> First Amended Complaint for Permanent Injunction and Other Equitable Relief, Case No. 00-11341-RGS (D. Mass. July 21, 2000), available at <http://www.ftc.gov/os/2000/07/toysmartcomplaint.htm>.

<sup>9</sup> See *In the Matter of Philips Electronics North America Corporation*, File No. 022 3095, available at <http://www.ftc.gov/os/caselist/0223095.shtm>.

<sup>10</sup> Cf. *In the Matter of Vision I Properties, LLC, doing business as CartManager International*, File No. 042 3068, available at <http://www.ftc.gov/os/caselist/0423068/0423068.shtm> (collection and rental of personal information by service provider in contravention of merchant privacy policies without merchants' knowledge alleged to be an unfair practice).

***Potential Use of XY PI by the Present Owner***

We understand that you have represented to the bankruptcy court that you want possession of the XY PI for purposes of resuming operation of XY Magazine and/or the XY.Com website.<sup>11</sup> In the *Toysmart* case, mentioned above, the agency suggested that the transfer of personal information to a new owner of the business, the use of which was strictly encumbered by the original owner's privacy policy, might be permissible under certain limited circumstances that were consistent with the original purpose for which the data was provided. Specifically, in that case, the Commission entered a settlement allowing transfers where the line of business of the new owner would be substantially similar to that of the old owner, the new owner would abide by the terms of the original owner's privacy policy, and the new owner would obtain affirmative consent from consumers for any material changes to that policy.<sup>12</sup>

In this situation, however, the continued use of the XY PI, even by the existing owner, would not necessarily be consistent with the original purpose for which the data was provided. Indeed, due to the nature of the information, the passage of time, and the closure of the magazine and website in 2007 and 2009, respectively, the continued use of the data may pose privacy risks not reasonably contemplated by subscribers when they provided the data, and not consistent with their course of dealing with the company.

With regard to the street addresses collected by XY, many of these were provided by minors living with their parents or others who may have been unaware of their sexual orientation. With the passage of time since the magazine and website's demise, many of these minors may have moved. At the time the website and magazine were operational, minors who moved, especially those concerned about the confidentiality of their subscriptions, were able to go online to update promptly any change of address. Former subscriber expectations, however, have likely changed over the past several years. They do not expect to receive any future communications from XY. The magazine has ceased publication and has been dormant for three years. The website no longer functions, making it impossible to update any changes of address, even if there were an expectation that future communications might occur. Accordingly, any effort to contact former subscribers via mail now carries the risk of unintentionally revealing their sexual orientation to individuals residing at the former subscribers' addresses.

The continued use of old email accounts creates similar risks. During the passage of time between cessation of operation and the present, undoubtedly some email accounts held by former subscribers have been abandoned. Abandoned email addresses are often reassigned. Emails that contain any information disclosing the identity of a former subscriber sent to others would

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<sup>11</sup> See Affirmation in Opposition to Debtor's Motion to Avoid Impairment of Debtor's Schedules, et al., filed April 7, 2010, *In re Cummings*, at 6.

<sup>12</sup> Stipulated Consent Agreement and Final Order, Case No. 00-11341-RGS (D. Mass. July 21, 2000), available at <http://www.ftc.gov/os/2000/07/toysmartconsent.htm>.

clearly contradict the XY privacy policy and therefore possibly violate the FTC Act.

### **Conclusion**

As described above, based on the information currently available to us, we believe that any sale, transfer, or use of the XY PI raises serious privacy issues and could violate the FTC Act. Further, to avoid the possibility that this highly sensitive data could fall into the wrong hands, we ask that it be destroyed (along with any credit card data still being retained) as soon as possible. If you believe that there is a compelling justification for maintaining or using the XY PI, we urge you to provide such information to us immediately.

Sincerely,

A handwritten signature in black ink, appearing to read 'D. Vladeck', written over the word 'Sincerely,'.

David C. Vladeck

cc: John Michael McDonnell  
Shoshana Schiff