

VICTORIA COULDN'T KEEP A SECRET

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So many privacy issues. So little time.

The Internet has forced lawmakers to spend a lot of time on privacy over the past few years. And the chosen approach has been to slow down and tackle one industry at a time. It seems that lawmakers asked themselves "What do Americans really want to be kept private?", and answered that question by drafting legislation seeking to protect information about our health - what drugs we take, what types of doctors we are seeing, what sort of diseases we have - and our money - how much we have, where we keep it, what we do with it. In other words, Congress' response has been to enact big legislation to deal with big problems. But in tackling these types of privacy issues (principally in the form of two legislative behemoths - HIPAA and Gramm-Leach-Bliley), smaller privacy issues have been left unattended.

For example, Congress has not enacted any new legislation to deal with the personal information provided to online retailers by purchasers of goods over the Internet. As a result, online retailers have been left to fend for themselves, with no clear direction other than self-regulation. It appears, however, that this landscape may now be changing. And what better place to start than the privacy connected to the purchase of women's underwear?

Web Site Vulnerability

In November of 2002, a customer visiting Victoria's Secret's web site discovered a vulnerability which allowed him to view certain personal information about other Victoria's Secret customers. The Privacy Statement on the web site specifically promised Victoria's Secret's customers that their information would be "maintained in private files" and that the web site provided "stringent and effective security measures."

But this customer found he could access the names of other Victoria's Secret customers, as well as their billing addresses and items ordered during the prior eight months, without authorization. Its Privacy Statement notwithstanding, it appears that Victoria couldn't keep a secret. And while Victoria's Secret promptly disabled the flawed area of the web site (though only after it received a phone call from an MSNBC.com reporter), the damage had already been done - the personal information of at least three customers had been accessed without authorization and at least 559 customer files had been left vulnerable to unauthorized access. The New York State Attorney General's Office was notified and conducted an inquiry.

Victoria's Secret ultimately entered into an Assurance of Discontinuance with the New York State Attorney General. It agreed to pay a \$50,000 fine and improve its online security practices. In addition, money was refunded to those customers whose information actually had been accessed, and those customers whose personal information had been left vulnerable were to be provided with notice. New York residents got gift certificates.

While the New York State Attorney General's resolve in addressing this privacy violation was impressive, and the penalties imposed on Victoria's Secret were, to say the least, creative, perhaps the most interesting part of this cautionary tale was the basis on which the inquiry was conducted. The Attorney General asserted that by failing to fulfill the pledge contained in its Privacy Statement, Victoria's Secret had violated sections 349 and 350 of the New York General Business Law. These provisions prohibit deceptive business practices and false advertising.

Deceptive Practices, False Advertising?

To prove its case under section 349, the New York State Attorney General would have to show that Victoria's Secret deceived consumers in misrepresenting the efficacy of its safeguards to protect consumer privacy. This may have been a tall order, indeed. Victoria's Secret's Privacy Statement contained vague assurances that it would maintain information "responsibly" and that it would "provide stringent and effective security measures" on the web site. It seems a bit of a reach to conclude that its failure to comply with these vague assurances would rise to the level of deception.

Even more of a reach is the claim that these assurances constitute a false advertisement. While the Privacy Statement may have provided an inducement to some consumers to shop online, it certainly was not an advertisement in the traditional sense. Indeed, the application of a false advertising statute to an online privacy policy would have been a first.

Arguments Untested

Unfortunately, the effectiveness of these arguments will remain untested. Victoria's Secret did not challenge the application of these statutes, instead opting to enter into the Assurance of Discontinuance without admitting to any of the Attorney General's findings. But the New York State Attorney General's reliance on the New York General Business Law demonstrates that, while federal lawmakers slowly work to enact new and uniform legislation to deal with online privacy issues, the States are willing to rely on their own individual laws, enacted years before the advent of the Internet, to address these same issues.