

Guidelines for Prevention and Regulation of Dark Patterns, 2023

Authority - U/powers conferred by section 18 of the Consumer Protection Act, 2019, the Central Consumer Protection Authority (CCPA) issued the following guidelines.

Definitions -

- “Dark patterns” shall mean any practices or deceptive design pattern using user interface or user experience interactions on any platform that is designed to mislead or trick users to do something they originally did not intend or want to do, by subverting or impairing the consumer autonomy, decision making or choice, amounting to misleading advertisement or unfair trade practice or violation of consumer rights.
- “Platform” under these guidelines shall have the same meaning as defined under Consumer Protection (E-Commerce) Rules, 2020. [E-Commerce Rules - (i) “platform” means an online interface in the form of any software including a website or a part thereof and applications including mobile applications]

Application - Section 3 - These guidelines shall apply to -

- (i) all platforms, systematically offering goods or services in India;
- (ii) advertisers;
- (iii) sellers.

Prohibition/bar - Section 4 - Prohibitions against engaging in dark patterns - No person, including any platform, shall engage in any dark pattern practice.

Section 5 - Any person, including any platform, shall be considered to be engaging in a dark pattern practice if it engages in any practice specified in Annexure 1 of the guidelines.

- A joint reading of sections 4 and 5 appears to suggest that: what constitutes violation of the prohibition under section 4 is exhausted by the Guidelines. Put in other words, section 5 delineates what amounts to “any dark pattern practice”. As such no practice not specified under Annexure 1 could be considered a dark pattern practice under the Guidelines.
- Or maybe not, as Guidelines are not meant to be exhaustive.
- The Guidelines seem to apply to offline platforms too as the definition of “advertiser” under the Guidelines for Prevention of Misleading

Advertisements and Endorsements for Misleading Advertisements, 2022 include :

2 (b) ... a person who designs, produces and publishes advertisements either by his own effort or by entrusting it to others in order to promote the sale of his goods, products or services and includes a manufacturer and service provider of such goods, products or services

Specified Dark Patterns under the Annexure

1. “False Urgency” means falsely stating or implying the sense of urgency or scarcity so as to mislead a user into making an immediate purchase or taking an immediate action, which may lead to a purchase, including - (i) showing false popularity of a product or service to manipulate user decision; (ii) stating that quantities of a particular product or service are more limited than they actually are.
2. “Basket sneaking” means inclusion of additional items such as products, services, payments to charity or donation at the time of checkout from a platform, without the consent of the user, such that the total amount payable by the user is more than the amount payable for the product or service chosen by the user: Provided that the addition of free samples or providing complimentary services or addition of necessary fees disclosed at the time of purchase, shall not be considered as basket sneaking. [Explanation- The term “necessary fees” means, the fees which is necessary to fulfill the completion of the order such as delivery charges, gift wrapping, additional taxes on the product charged by the government or any other charges which are explicitly disclosed to the consumer at the time of purchase.]
3. “Confirm shaming” means using a phrase, video, audio or any other means to create a sense of fear or shame or ridicule or guilt in the mind of the user so as to nudge the user to act in a certain way that results in the user purchasing a product or service from the platform or continuing a subscription of a service, primarily for the purpose of making commercial gains by subverting consumer choice.
 - Using a phrase meant to create a sense of fear or shame etc. in respect of a product or service which is not offered by the platform may not technically qualify as “confirm shaming”.

4. “Forced action” means forcing a user into taking an action that would require the user to buy any additional goods or subscribe or sign up for an unrelated service or share personal information in order to buy or subscribe to the product or service originally intended by the user.
5. “Subscription trap” means the process of- (i) making cancellation of a paid subscription impossible or a complex and lengthy process; or (ii) hiding the cancellation option for a subscription; or (iii) forcing a user to provide payment details or authorization for auto debits for availing a free subscription; or (iv) making the instructions related to cancellation of subscription ambiguous, latent, confusing, cumbersome.
 - The DPDP Act also casts a similar obligation on the Data Fiduciary by stipulating under section 6(4) that the Data Principal shall have the right to withdraw her consent at any time, with the ease of doing so being comparable to the ease with which such consent was given.
6. “Interface interference” means a design element that manipulates the user interface in ways that (a) highlights certain specific information; and (b) obscures other relevant information relative to the other information; to misdirect a user from taking an action as desired.
7. “Bait and switch” means the practice of advertising a particular outcome based on the user’s action but deceptively serving an alternative outcome.
8. “Drip pricing” means a practice whereby- (i) elements of prices are not revealed upfront or are revealed surreptitiously within the user experience; or (ii) revealing the price post-confirmation of purchase, i.e. charging an amount higher than the amount disclosed at the time of checkout; or (iii) a product or service is advertised as free without appropriate disclosure of the fact that the continuation of use requires in-app purchase; or (iv) a user is prevented from availing a service which is already paid for unless something additional is purchased. Explanation-: A marketplace e-commerce entity shall not be liable for price fluctuations to the extent attributable to price changes by third party sellers or due to other factors beyond their control.
 - However, 8 (ii) may not arise in India due to MRP Law. Or perhaps, its limited application may be in the Purchase Now, Pay Later industry.

- Re 8 (iii): If some services are free and some require in-app purchase - the user can continue using the product or service as a whole. As such, this shall not not attract this provision.
9. “Disguised advertisement” means a practice of posing, masking advertisements as other types of content such as user generated content or new articles or false advertisements, which are designed to blend in with the rest of an interface in order to trick customers into clicking on them. Explanation- (a) for the purposes of this paragraph, the expression “disguised advertisement” shall also include misleading advertisement as defined in clause 2(28) of the Act and the “Guidelines for Prevention of Misleading Advertisements and Endorsements for Misleading Advertisements, 2022” shall also be applicable to it; (b) in relation to content posted by a seller or an advertiser on a platform, the responsibility of making the disclosure that such content is an advertisement shall be on such seller or advertiser.
- Political advertisements on TV news channels and newspapers often come in this form. It would be interesting to see if these will attract this provision.
10. “Nagging” means a dark pattern practice due to which a user is disrupted and annoyed by repeated and persistent interactions, in the form of requests, information, options, or interruptions, to effectuate a transaction and make some commercial gains, unless specifically permitted by the user.
- Why should nagging be outlawed at all? Nagging is similar to nudging. However, it is sludging, as opposed to nudging, which disturbs information symmetry, by making a process more difficult such that the buyer arrives at an outcome that is not in his best interest. Unlike nudging, sludging is not aligned with market actors’ preferences for maximizing utility, and is inefficient. Nudging does not necessarily lead to inefficient outcomes.
11. “Trick Question” means the deliberate use of confusing or vague language like confusing wording, double negatives, or other similar tricks, in order to misguide or misdirect a user from taking desired action or leading consumers to take a specific response or action.

12. “Saas billing” refers to the process of generating and collecting payments from consumers on a recurring basis in a software as a service (SaaS) business model by exploiting positive acquisition loops in recurring subscriptions to get money from users as surreptitiously as possible.
 13. “Rogue Malwares” means using ransomware or scareware to mislead or trick users into believing there is a virus on their computer and aims to convince them to pay for a fake malware removal tool that actually installs malware on their computer.
- Malwares are anyway covered by IT Act and IPC. Thus, the need to insert this in the Guidelines is not clear.

Penalty for violating the Guidelines

Section 89, CPA: Any manufacturer or service provider who causes a false or misleading advertisement to be made which is prejudicial to the interest of consumers shall be punished with imprisonment for a term which may extend to two years and with fine which may extend to ten lakh rupees; and for every subsequent offence, be punished with imprisonment for a term which may extend to five years and with fine which may extend to fifty lakh rupees.

20. Where the Central Authority is satisfied on the basis of investigation that there is sufficient evidence to show violation of consumer rights or unfair trade practice by a person, it may pass such order as may be necessary, including—

- (a) recalling of goods or withdrawal of services which are dangerous, hazardous or unsafe;
- (b) reimbursement of the prices of goods or services so recalled to purchasers of such goods or services; and
- (c) discontinuation of practices which are unfair and prejudicial to consumers' interest.

US Law

Courts in the United States have not been proactively using the term ‘dark patterns’ when issuing decisions policing manipulative user interfaces. Instead, they have usually relied on existing doctrines dealing with manipulative contractual designs in contract law and the Children’s Online Privacy Protection Act (COPPA).

Pre 2010 case law

Specht v. Netscape Communications Corp. - users reported that when they downloaded one of Netscape's programs, a second plug-in program was also inadvertently installed. This program had its own license terms, which were placed at the bottom of the website, after the "download" button (where users rarely scrolled) and did not request an "I agree" check. Justice Sotomayor ruled that downloading the second plug-in did not constitute acceptance of its terms and stated that contractual terms that are not called to the attention of the recipient which are on a "submerged screen", are not sufficient to notify consumers of those terms. Thus, the Court was still able to decide on a manipulative website design as an issue of assent under classic U.S contract law.

Post 2010

Nguyen v. Barnes & Noble Inc. - Barnes & Noble launched a fire sale of Touchpads, and the plaintiff purchased two units on their website. The following day, Barnes & Noble informed the plaintiff that they could not complete the order due to unexpected high demand and canceled the purchase. The plaintiff sued in federal court, and Barnes & Noble moved to stay court proceedings based on an arbitration clause included in the Terms of Use of its website (available via a hyperlink located in the bottom left-hand corner of the website). The Court denied the enforceability of the arbitration clause included in the Terms of Use stating that (ii) Nguyen had insufficient notice of the same and that the clause was made available through a "conspicuous hyperlink" that does not prompt users to take any affirmative action to demonstrate assent.

McDonald v. Killoo A/S8 - a group of parents initiated a class action against the developers of the app Subway Surfers and a group of software development kits (SDKs). The game developers and the SDKs received the transmission of personal data from users of the game (children) while they were playing it online. SDKs collected personal identifiable information directly from the mobile device where the child was playing and also detected the child's activity across multiple apps, platforms, and devices. Afterwards, they used this data to facilitate targeted behavioral advertising. Plaintiffs argued a violation of the federal Children's Online Privacy Protection Act (COPPA), a common law tort claim of intrusion, and a consumer protection claim under New York General Business Law § 349(a). The case was settled.

Statutory law

- The California Privacy Rights Act (CPRA), which came into full force and effect in January 2023, and which amended the California Consumer Privacy Act (CCPA), defines a dark pattern as: “[a] user interface designed or manipulated with the substantial effect of subverting or impairing user autonomy, decision-making, or choice, as further defined by regulation.”
- California Privacy Protection Agency as the body in charge of enforcing the CPRA.
- However, the CPRA seems to refer to the use of dark patterns for the collection of personal data. This excludes other types of dark patterns that do not trigger personal data obligations, but are manipulative and deceptive.
- California Age-Appropriate Design Code Act - This Code will be effective July 1, 2024. It defines dark patterns and states that businesses that provide an online service, product, or feature likely to be accessed by children shall not “use dark patterns to lead or encourage children to provide personal information beyond what is reasonably expected to provide that online service, product, or feature to forego privacy protections, or to take any action that the business knows, or has reason to know, is materially detrimental to the child’s physical health, mental health, or well-being.”
- Under the Federal Trade Commission Act, the Federal Trade Commission (FTC) combats the use of unfair or deceptive practices that affect commerce in interstate trade. In this role, the FTC has filed actions against several companies for the use of dark patterns, even if some cases do not specifically use this term. [see: 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.”]
- It appears that the U.S. law has clearly identified the loss or impairment of personal data as the market failure which is sought to be corrected by the law. By contrast, the Indian law fails to identify a specific market failure which the Guidelines seek to correct. It may be argued that the Guidelines seek to address informational asymmetry, but “nagging” or “confirm shaming” do not cause informational asymmetry, but are still outlawed.

Economics

- Law and economics, which is the application of economic theory, especially microeconomic theory, to the analysis and practice of law, provides valid tools to understand and investigate dark patterns as a legal phenomenon in online contracting.
- Increased comprehension (by addressing information asymmetry) could decrease contracting related transaction costs, such as time, various scarce resources, and the likelihood of disagreements and disputes, while also increasing positive views, such as trust, and contractual commitment.
- Comprehensibility decreases the need for re-negotiation and reduces unintentional and intentional contract breaches.
- Sludge (behavioral economics)- It makes a process more difficult in order to arrive at an outcome that is not in the best interest of the sludged. Unlike nudging, sludging is not aligned with market actors' preferences for maximizing utility. Sludge causes information asymmetry, one of the four market failures in economic theory.
- Market failure is described as a situation where there is a room for Pareto-improvements, but it cannot be realized through market mechanisms. Therefore, state intervention may be required.
- The exploitation of biases will affect the functioning of the market, making it sub optimal, as these manipulative designs will make the market actors behave against their preferences. How? Consumers buy things that they do not really want. They give up their scarce resources (i.e., money) for things that do not necessarily increase their utility; Consumers buy more products. The utility function works suboptimally; the company captures the consumer welfare - since consumers now buy products without any effective change in product prices.