DARK PATTERNS

The new threat to consumer protection- Discussion Document

November 2022

ASCI | The Advertising Standards Council of India

ABOUT THE ADVERTISING STANDARDS COUNCIL OF INDIA

Established in 1985, The Advertising Standards Council of India (ASCI) is the self-regulatory body of the Indian advertising industry. ASCI resolves issues around
- Dishonest or misleading ads
- Indecent or offensive ads
- Harmful ads
- Ads that are unfair in competition.

ASCI looks at advertisements across all media types and formats such as TV, print, digital, outdoor, radio, point of sale, claims made on packaging and so on.

ASCI works closely with different stakeholders in the matter of consumer protection. ASCI's code is part of The Advertising Code enshrined within the Cable TV Networks (Regulation) Act, 1994, providing it with a legal backstop.

Complaints management

ASCI's speedy, independent and low-cost complaint management approach ensures that both consumers and industry have the opportunity for a fair resolution. All stakeholders can register their complaints at no cost via WhatsApp at 77100-12345 or at www.ascionline.in

ASCI's independent jury (The Consumer Complaints Council or CCC) comprises 40 eminent professionals, both from the industry as well as from civil society, who review complaints on a weekly basis and provide their recommendations

Four retired high court judges hear appeals from complainants or advertisers who may wish to contest a CCC recommendation

Eminent technical experts from over 20 fields support the CCC and the Review Panel

Training and Advisory Services

With a view to supporting the industry get it right, ASCI has several initiatives such as the ASCI Masterclass, as well as services like the 'ADVERTISING ADVICE' (AA). ASCI has long-established expertise in the area of advertising depictions, claims and representations, through its extensive panel of advertising and technical experts. ASCI's AA panel comprises of advertising experts, as well as technical experts who are well-qualified and experienced specialists from several disciplines such as Ayurveda, Formulations, Microbiology, Electronics, Market Research, Nutrition, Financial services and so on. Many organisations voluntarily submit their ads at a pre-production stage to ASCI to receive non-binding advice on whether the ad potentially may violate any ASCI code. Small changes at the production stage can save a lot of hassle later.
The advisory services provided by ASCI are not binding on the advertiser or its independent jury - the CCC.

ASCI also offers an Endorser Due Diligence service to help endorsers meet their obligations to ensure that ads they feature in do not make misleading claims and potentially violate the law.

ABOUT DARK PATTERNS

Think of this - you are happily browsing a food ordering platform, looking forward to a yummy meal. You choose an option that costs Rs. 100. When you check out, you are presented with a bill for Rs. 250. There are taxes, delivery charges, tips etc. all added in. When you made the purchase decision, you made it in the face of incomplete information about an important aspect, i.e. price. What if there was initially an option for a similar meal at Rs. 150, that you did not choose, because it was 50% more expensive than your choice. But had you picked that, you might have been presented only with a bill of Rs. 200 in the end.

Did the app use a design feature to steer or manipulate you to choices that are profitable for the platform but not in your best interest?

Here's another scenario- you are booking an airline ticket and you are informed "Only 2 seats left at this price". This creates a sense of urgency to make an immediate decision, and in some cases, this may not be a true reflection of seat availability.
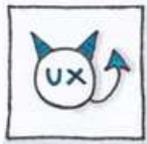
So many of us have been presented with a pop-up banner asking us for our data, that we don't want to click on, but we struggle to find the "reject" tab. The option to exit or reject is so obscurely placed that it makes it difficult for consumers to refuse the collection of their personal data if they wish to proceed.

These and several more are examples of dark patterns.

A dark pattern is a user interface that has been crafted to trick or manipulate users into making choices that are detrimental to their interest - such as buying a more expensive product, paying more than what was initially disclosed, sharing data or making choices based on false or paid-for reviews, and so on. E-commerce companies spend millions of dollars in designing user interfaces and navigation paths that eventually lead to more business. Every day, technology offers new ways of engaging with consumers. However, when these are done in a way that steers the consumer to choices that are prejudicial to their interest, a line is crossed. User experience designer Harry Brignull coined the term "Dark Patterns" in 2010 to describe such practices.

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KINDS OF DARK PATTERNS

Several kinds of dark patterns exist in the online space, and many have been identified as causing some consumer harm. Here are some examples of commonly seen dark patterns.

IMAGE CREDIT: KRISZTINA SZEROVAY

HOW REGULATORS ARE RESPONDING

The issue of dark patterns is now an increasing concern for those working in the area of consumer protection. Dark patterns mainly pertain to advertising or unfair practices. The European Data Protection Board (EDPB) for instance, has issued guidelines on dark patterns on social media platform interfaces. Some problem areas have been identified - such as overwhelming consumers with requests to share more data, designing the interface in a way that users fail to consider data protection aspects of a decision, or hiding information or privacy controls.

The proposed Digital Services Act includes (non-exhaustive) the following examples of specific practices that are of particular concern.

- Giving more prominence to certain choices when asking the recipient of the service for a decision;
- Repeatedly requesting a recipient of the service to make a choice where such a choice has already been made, especially by presenting a pop-up that interferes with user experience; and
- Making the procedure of terminating a service more difficult than subscribing to it.

A recent report by the Federal Trade Commission (FTC) shows a rise in sophisticated dark patterns designed to trick and trap consumers. As per a press release issued by the FTC, dark pattern tactics detailed in the report include disguising ads to look like independent content, making it difficult for consumers to cancel subscriptions or charges, burying key terms or junk fees, and tricking consumers into sharing their data. The report highlighted the FTC's efforts to combat the use of dark patterns in the marketplace and reiterated the agency's commitment to taking action against tactics designed to trick and trap consumers.

As more commerce has moved online, dark patterns have grown in scale and sophistication, allowing companies to develop complex analytical techniques, collect more personal data, and experiment with dark patterns to exploit the most effective ones. The staff report, which stems from a workshop the FTC held in April 2021, examined how dark patterns can obscure, subvert, or impair consumer choice and decision-making.

"Our report shows how more and more companies are using digital dark patterns to trick people into buying products and giving away their personal information. This report—and our cases—send a clear message that these traps will not be tolerated." -
Samuel Levine, Director of the FTC's Bureau of Consumer Protection.
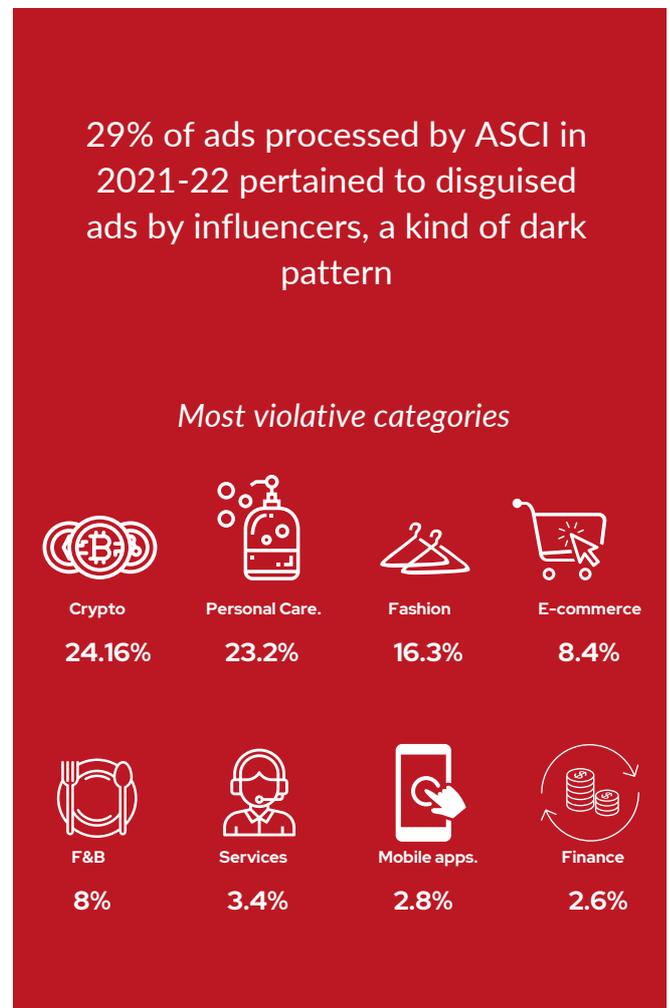
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CLOSER HOME..

The Indian consumer is not immune to dark patterns, and as online commerce grows, this is an increasing area of consumer vulnerability. A few steps have already been taken in this regard in the recent months.

Recently, the Department of Consumer Affairs summoned cab and two-wheeler aggregators to come clean on their charges and algorithms, as consumer angst and frustration with these services rose to alarming levels. The Department also formed a consultation group to address the issue of fake online reviews.

A press release by the Department of Consumer Affairs states "*Given that e-commerce involves a virtual shopping experience without any opportunity to physically view or examine the product, consumers heavily rely on reviews posted on e-commerce platforms to see the opinion and experience of user who have already purchased the goods or service. As a result, due to fake and misleading reviews, the right to be informed, which is a consumer right under the Consumer Protection Act, 2019 is violated.*"

Although the term "Dark patterns" has only recently made its way into common usage, The Advertising Standards Council of India (ASCI), has been addressing such issues through its existing code on misleading ads. The ASCI code applies across media, including online advertising (including companies' own websites, pages and handles).

In 2021, ASCI asked social media influencers to disclose promotions, in order to address the issue of disguised ads. As lines between content and ads blur, the ability of consumer to make an informed decision comes under question.

29% of ads processed by ASCI in 2021-22 pertained to disguised ads by influencers, a kind of dark pattern

Most violative categories

Crypto	Personal Care.	Fashion	E-commerce
24.16%	23.2%	16.3%	8.4%

| F&B	Services	Mobile apps.	Finance
8%	3.4%	2.8%	2.6%

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Both the Consumer Protection Act 2019 and the ASCI code require ads not to mislead consumers. And indeed, many dark patterns end up doing so and violate ASCI's code on misleading ads which states, inter alia, that "Advertisements shall not be so framed as to abuse the trust of consumers, or exploit their lack of experience or knowledge".

FORMATION OF A TASK FORCE

To better understand the issue of dark patterns and how ASCI might safeguard consumers against them, a task force was put together comprising different stakeholders.
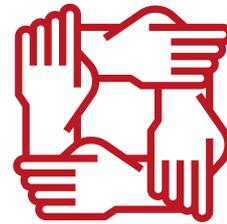
The task force examined various dark patterns and arrived at those that were believed to be prevalent in advertising, as well as those that were unfair practices not directly linked to advertising content.
The team at Phoenix Legal helped the task force to better understand the global regulations and approaches.

Based on the discussions of the task force, The ASCI code is proposed to be extended to reflect the following advertising-related concerns around dark patterns. ASCI would invite the views of the public, and other stakeholders before extending the code to these areas. The last date for such feedback is 31ST DECEMBER 2022.
You may send your feedback to contact@ascionline.in

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# PROPOSED AREAS OF EXTENSION TO THE ASCI CODE ON MISLEADING ADS

Dark Pattern	Details
Drip Pricing	Only a part of a product's price is disclosed to potential buyers including elements that have to be borne by almost all customers, for example tax. Accordingly, the total price is only revealed at the very end of the buying process, thereby creating ambiguity around the final price as well as preventing easy price comparisons. Hence these sort of representations may be said to be misleading. Quoted prices must include non-optional taxes, duties, fees and charges that apply to all or most buyers.
Bait and Switch	When an ad directly or indirectly implies one outcome based on the consumer's action, but instead serves an alternative outcome, the same would be considered misleading Examples: 1. A consumer may select a product offered at a certain price but is thereafter only able to access products at a higher price. 2. Another example is offering an attractive product and later revealing that it is out of stock, offering an alternative product. 3. Changing the meaning of key symbols to mean the opposite. For example an X on the top right corner, instead of closing an app, may open up the app, or the action that the user was trying to avoid. The X has always meant "close". But in the interaction, the X means "accept/ proceed".
False Urgency	Stating or implying that quantities of a particular product are more limited than they actually are.
Disguised Advertising	An advertisement that is of a similar format as editorial or organic content must clearly disclose that it is an ad. Examples could be influencer posts, paid reviews, and ads placed in a manner to appear like content.

OTHER DARK PATTERNS OUTSIDE THE REMIT OF ADVERTISING CONTENT

Dark Pattern	Details
Privacy	Interfaces that trick users into sharing more information than they intended to. Users may give up this information unknowingly or through practices that obscure or delay the option to opt out of sharing their private information.
Confirm-shaming	Confirm-shaming uses shame to drive users to act. For example, when websites use words that induce shame or guilt to describe the options that consumers wish to exercise, such as declining to sign up for newsletters, or make a donation etc.
Checkbox Treachery	Obfuscatory checkboxes are probably the most famous and most common examples of dark patterns. These are usually in the form of opt-in or opt-out checkboxes that businesses use to give customers notional control over how their contact data is used.
Nagging	Repeatedly asking users for the same thing. There is often no option to make it stop, with the hope of eventually breaking users and getting them to agree to sharing data or agreeing to unfair terms. This is commonly seen when websites asking you to download their app, or platforms ask you to give them your phone number or sign up to their services.
Sneak-in Basket	When consumers purchase something, additional products are added into the basket of the consumer, without their knowledge. For example, buying insurance with airline tickets, or making a donation to a charitable cause while checking out of an e-commerce site.

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LET THERE BE LIGHT

UX expert Michael Craig lists the following suggestion for UX designers and brands as alternatives to dark patterns (https://www.toptal.com/designers/ux/dark-patterns)
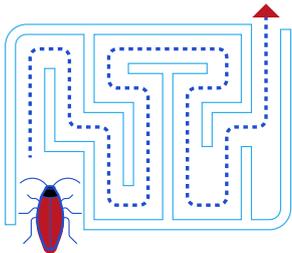
Roach Motel

A roach motel is a service that is easy to sign up for but difficult to cancel. An example is an online subscription that can only be canceled by phone.
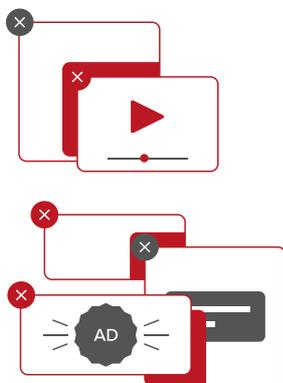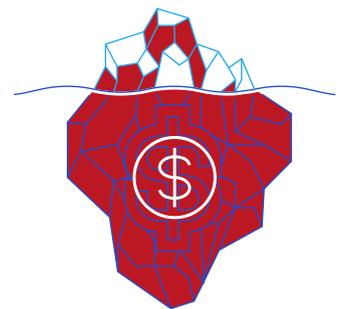
Instead

Make it easy for customers to unsubscribe from their account pages. Consider offering a retention package to persuade them to stay before they make their final decision.

Hidden Costs

Hidden costs aren't disclosed until a purchase is nearly complete. These might include shipping, service fees, or poorly defined "convenience fees."

Instead

Show the total cost in the shopping cart at all times. Most customers are perfectly willing to accept these fees when disclosed upfront but dislike the secrecy.

Nagging

Nagging occurs when a site repeatedly interrupts customers with an ad or a call to action. Examples include pop-ups, auto-playing audio or video, or anything else that distracts users from what they came to the site to do.

Instead

Delay pop-ups until customers have been on the site for at least a few minutes. Even better, show the pop-up on the bottom right or left corner of the screen so the customer can continue whatever they're doing without distraction.

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Disguised Ads

Disguised ads are advertisements designed to blend in with the rest of an interface in order to trick customers into clicking on them. For example, making an advertisement button look exactly like the host website's call-to-action button.

Instead

Distinguish ads clearly so that customers will recognize them for what they are. Tricking customers into clicking ads will only frustrate them.
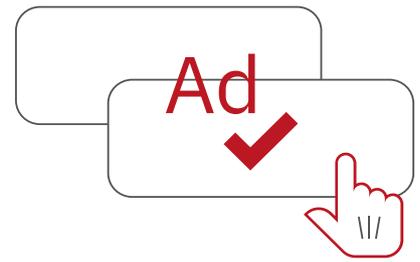
Interface Interference

Interface interference is designing an interface to prioritize or pre-select certain actions. An example of this is pre-selecting an option to be contacted by the company, which requires customers to recognize that they need to deselect it. Sometimes these preselections are hidden in a drop-down menu.

Instead

Show all options and allow customers to make their own decisions and selections.

Forced Action

Forced action is similar to interface interference, except customers don't get a choice in the matter. For example, making a customer submit an email address in order to use a website.

Instead

Let customers decide whether or not they want to give away personal information in exchange for a service.
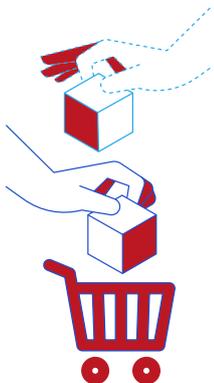

Basket Sneaking

Basket sneaking is the practice of adding items to a shopper's cart that they didn't select themselves. For example, a customer might be shopping for cosmetic items, only to find out that extra sample products were added for $5 each.

Instead

Present additional items as suggestions on the shopping cart page and allow them to be easily added to the order before final checkout.

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Privacy Deception

Privacy deception involves tricking people into sharing more information than they intend to. For example, a company may request personal information under the guise of improving the customer experience—while neglecting to disclose all the ways that information will be used.
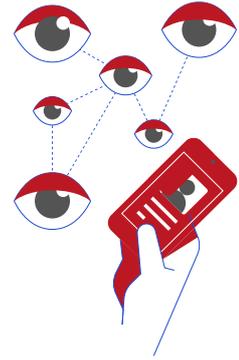
Instead

Be transparent about what information you need or want from customers.
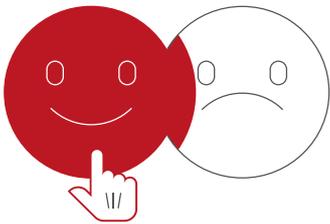
Confirm Shaming

Confirm shaming attempts to use guilt as a way to make customers comply. For example, phrasing the option to unsubscribe from a discounts mailing list as "No, I REALLY hate saving money."

Instead

While the goal of this type of copy is to be funny and snarky, it can seem condescending and offend some customers. Matter-of-fact language, such as "You have been unsubscribed," will suffice.

Price Comparison Prevention

This is the act of preventing customers from being able to compare prices, making it diffcult for them to make informed decisions. For example, forcing a customer to add an item to their shopping cart to see the cost, leaving them vulnerable to accidentally purchasing it later if they forget to remove it.

Instead

Show the benefits of plans and services, and make pricing transparent. Hiding prices will inevitably make customers unhappy.
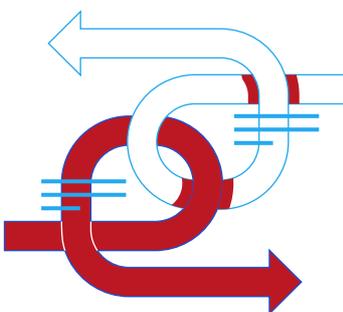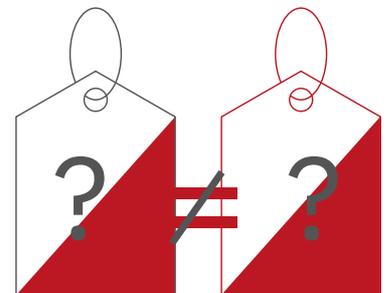
Trick Questions and Ambiguity

Deceptive website copy is worded in a way to confuse customers into making decisions they don't want to make. For example, loading a sentence with double and triple negatives to obscure whether the right answer is yes or no.

Instead

Write copy in plain, straightforward language.

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Bait-and-switch

Bait-and-switch is when a company presents one option to entice customers and then replaces it with something else of lower value or higher cost. An example is an advertisement depicting a discounted fully loaded smartphone that leads to a product page for a more basic option that costs extra to upgrade because the advertised model is "no longer available."
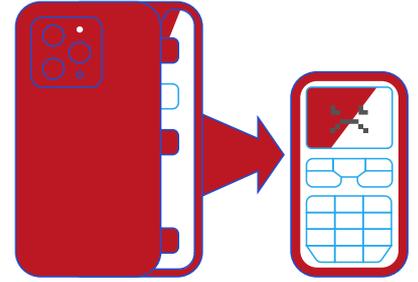
Instead

Make interactions and offers lead to outcomes that customers expect. Be honest about product or service availability and features.

Forced Continuity

Forced continuity is a common headache: Customers sign up for a free trial and are automatically charged once the trial ends, often without notice. This is often used in combination with the roach motel.

Instead

Notify customers that their trials have expired and let them choose whether to continue subscribing. Don't renew the service until customers confirm their choice to continue.

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TO CONCLUDE

The online world is a space that we all increasingly inhabit for our needs - be it for entertainment, education, or shopping. And we all succumb to the illusion of control in some way. Whilst in theory the choices to exit, see certain options using filters, creating one's preferences, and ability to compare, all exist; in practice, we are subject to the force of algorithms that push us in a certain direction. Ordinary consumers are up against billions of dollars of investments that are manipulating their choices in ways unknown to them.

Dark patterns are a complex issue that need close cooperation between different stakeholders. A key challenge is that it is often difficult to differentiate between persuasive tactics usually deployed by advertising and manipulative tactics that form dark patterns.

Dark patterns harm both consumers and honest brands. It is precisely for this reason that honest advertisers and platforms must step up to improve their transparency and ensure that consumers are well informed – but not overwhelmed – to make their decisions. Most importantly, internal company policies around UX design must ensure that stakeholder value is not built by compromising consumer value.

Dark patterns eventually undermine how consumers view advertising. The increasing presence of dark patterns force consumers to be on guard and suspicious of the online space. In the long run, such tactics ruin customer experience, lower brand image and loyalty and increase abandonments.

While it is important to increase consumer awareness around dark patterns, the rapidly evolving nature of such patterns is unlikely sufficiently protect consumers. Voluntary disclosure and transparency measures can provide strong support to regulation to keep consumers safe.

Regulators and self-regulators across the globe are stepping up their monitoring game with investments in artificial intelligence that can detect dark patterns and manipulative practices. While legislation and rules in this area will continue to evolve, a culture of consumer respect and meaningful engagement is what is most needed from organizations to keep the online experience kosher.

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READ ASCI'S OTHER REPORTS

2022

Misleading Ads and Trademarks: A Registration Conundrum

Annual Complaints Sector Report Card 2021-22

Annual Complaints Insights Report 2021-22

GenderGains: A business case for progressive gender depictions

Influencer Report: Report on Influencer Advertising Guidelines

What India Takes Offence to: A Study on Complaints received at ASCI

2021

GenderNext: An actionable insight study on the representation of women in advertising

2020

Trust in Advertising Report: Mapping Consumer Trust in Advertising

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The last date for comments on this discussion paper is 31ST DECEMBER 2022.
You may send your feedback to contact@ascionline.in