

Targeted Advertising: A ‘Free’ Choice Phenomenon Marred by Covert Manipulation

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Abstract

Statistics show that India has become a lucrative ground for digital marketing. This includes social media, online shopping giants and publishing platforms. Everything is a fair ground for data miners and brokers. Personal information is collected, harnessed, utilised and repurposed in opaque ways with vague or no clarifications. One manifestation occurs in the form of targeted advertisement. This article delves into the process of manipulation of individual faculties leading to violation of civil liberties and fair market practices. It first builds ground for discussion establishing targeted advertising as a manipulative practice. Second, it delves into various legal ramifications resulting from the said targeting. Third, it delinks manipulation from persuasion drawing from fair market principles and intentional mismatch of the data controller and provider. Lastly, it highlights regulatory practices of the EU as guiding principles to begin identification and regulation of this covertly designed practice aimed at exploiting one party to bestow illegitimate gains on another. The phrase “knowledge is power” holds even stronger apprehensions in the digital economy and this article deeply explores the perils when it comes at the cost of “ignorance” of another.

Keywords: data protection, targeted advertising, free choice, consumer protection

Introduction

India is at yet another precipice of digital legal history with the enactment of Digital Data Protection Act, 2023. With over 378 million¹ facebook and 362 million² instagram users along with capturing about 5 percent of Amazon's market share,³ India now accounts for one of the highest populations on these digital platforms. This makes it extremely lucrative for big tech and data fiduciaries to mine and sell digital information to be utilised in myriad of different forms one of which includes targeted advertising. However, the conundrum around targeted advertising lies in its seemingly harmless operation without any legal ramifications. In fact, it is believed to be a convenience rather than a threat of any legal or psychological kind in a market economy. The author tries to break this myth through establishing manipulative patterns cobwebbed in the opaque process around data mining, storing and processing to bring out real threat to consumers and their liberties. This reflects in denial of independent decision making to the author who is targeted. The author reflects on the European model to provide guiding light to deal with this covert threat and employ urgently needed techniques to prevent manipulation and exploitation of consumers without them knowing about it.

Targeted Advertising: The What and How?

To analyse the consumer law framework around targeted advertising and its analysis, it is crucial to understand its meaning and functionality. Targeted advertising is a marketing

¹ Available at <<https://www.statista.com/statistics/268136/top-15-countries-based-on-number-of-facebook-users/>>

² Available at <<https://www.statista.com/statistics/578364/countries-with-most-instagram-users/>>

³ Available at <<https://worldpopulationreview.com/country-rankings/amazon-users-by-country/>>

practice aimed at a specific group or audience or even an individual relying on data extracted from the same target audience or data publishing platform.⁴ Targeted advertising is neither a novel evolution following the internet and AI nor is it restricted to digital space.

Broadly, targeting in advertising can either be contextual⁵ (relies on the core essence/theme of the published data); or personalised⁶ (relies on data about the individual consumer being targeted). Personalised targeting is based on data that the individual may voluntarily provide or data that may have been tracked involuntarily through the consumer's digital footprint and includes any kind of resultant inferences. Such tracking is what is commonly known as "psychological profiling".⁷ This provides companies with necessary information about the "psychographic traits" (behavioral affinity/ interests/ values/ financial bracket etc.) to identify the most lucrative consumer base to advertise their product. This is what is called "behavioral advertising" which is used for "personalised ranking"(altering search results rankings to emphasise products) and "personalised pricing"(differential pricing for like products).⁸ However, the focus of this paper is limited to personalized advertising and consequent relation with abovementioned subjects.

Online personalised targeted advertising occurs on the same platform that perhaps the consumer visited on their own volition in the first instance. The same platform space is sold to the advertisers- large, medium or even sole proprietorships.

Targeted Advertising or Targeted Manipulation? The Slippery Slope

When a user visits or navigates any web page or application for any reason, many data points are created including their geography, browsing history, language, shopping patterns, interests etc.⁹ Unknown to the user, web navigation of any kind is observed, information is gathered, data is created and stored to be used and repurposed to any end to any number of parties in the future.¹⁰ Generally, such information is sold to potential advertisers who use this data to identify potential consumers and psychoanalyse their purchasing interests and power.¹¹ The efficacy of these practices is notched up with increase in technological prowess with tailor made advertisements based on succinct and nuanced pictures of the target. For instance, depression of a consumer can be gauged who can then be nudged towards gambling habits

⁴ European. Commission, Consumer Market Study on Online Market Segmentation Through Personalised Pricing/Offers In the European Union 31, 41 (2018).

⁵ EU Directorate-General for Internal Policies, Pol'y Dep't for Citizens' Rights Const. Affs., Regulating Targeted and Behavioural Advertising in Digital Services: How to Ensure Users' Informed Consent, PE 694.680, at 26 n. 20 (2021).

⁶ *Supra* note 1.

⁷ *Id.*

⁸ Aniko Hannak, Gary Soeller, David Lazer, Alan Mislove & Christo Wilson, *Measuring Price Discrimination and Steering on E-commerce Web Sites*, in IMC '14.

⁹ Steve Melendez & Alex Pasternack, *Here are the databrokers quietly buying and selling your personal information*, FAST Co. Available at <<https://www.fastcompany.com/90310803/here-are-the-data-brokers-quietly-buying-and-selling-your-personal-information>>

¹⁰ Paul Ohm, *Sensitive Information*, 88 S. CAL. L. REV. 1125, 1128 (2015) (citing Julia Angwin, *The Web's New Gold Mine: Your Secrets*, WALL ST. J.:WHAT THEY KNOW SERIES (July 30, 2010), Available at <<http://online.wsj.com/news/articles/SB10001424052748703940904575395073512989404>>.

¹¹ Kirsten Martin & Helen Nissenbaum, *PrivacyInterests in PublicRecords:An EmpiricalInvestigation*, 31 HARV. J.L. TECH. 111 (2017)

through their advertisers.¹² One cogent example is when Meta shared information on “psychologically vulnerable” adolescents.¹³ Any marketing attempt by “data traffickers”¹⁴ with pre-existing knowledge psychographic information (which aids in prediction of wants and needs) about the potential consumers is leveraged to nudge or create an interest in the seller’s product or service clouding any initial disinterest.¹⁵

The person may not know about a product, may not know about the company but suddenly they are bombarded with extremely persuasive product advertisements which may come on their radar. Would it mean that the person completely loses sense of whether they should purchase it? Does this mean that the company is in any way directly forcing them to purchase this product. No.

However, targeted manipulation in advertising covers standard coercive and persuasive practices.¹⁶ A more nuanced way to understand this manipulation is to acknowledge the psychological maneuvers to create a nudge or persuasion to alter consumer choice.¹⁷ To this end, the author draws on Eric A. Posner’s idea of manipulation in *The Law, Economics and Psychology of Manipulation* to define targeted manipulation as a covert exploitative tactic targeting specific individual’s psyche and vulnerability to take over decision making faculties to serve the manipulator.¹⁸ Such manipulation is against the spirit of law in market economy as it goes against the basic market principle of meaningful consumer choice which reflects informed consent to business activity.¹⁹

However, a critical consideration is when the manipulation is believed to be regarding something that is truly necessary and appropriate. For instance, a consumer at times may truly like something and targeted advertisement may help the consumer reach a desired goal which may align with the advertiser. This circumstance according to Noggle is not a manipulative act.²⁰ According to him, manipulation to dictate targeted advertising must induce in a way which is unacceptable to the dictator themselves.²¹

A Tussle between Free and Manipulated Choice

a. Vulnerability of the Consumer:

The question of free choice is quintessential in market oriented discussions as it provides autonomy to transaction parties and legitimacy to the said transaction.²² Therefore, it is presumed that when a consumer clicks on a purchase link it is always by free choice. However,

¹² Ryan Calo, *DigitalMarket Manipulation*, 82 GEO. WASH. L. REV. 995, 996 (2014). See generally TAL Z. ZARSKY, *Online Privacy, Tailoring, and Persuasion*, in PRIVACY & TECHNOLOGIES OF IDENTITY 209 (2006).

¹³ Nitasha Tiku, *GetReadyfor theNext BigPrivacyBacklashAgainstFacebook*, WIRED (May 21, 2017, 7:00 AM), Available at <<https://www.wired.com/2017/05/welcome-next-phase-facebook-backlash/>>.

¹⁴ Lauren Henry Scholz, *PrivacyRemedies*, 94 IND. L. J. 653, 664-67 (2019).

¹⁵ *Supra* note 9.

¹⁶ Cass R. Sunstein, *Fifty ShadesofManipulation*, 1J. MKTG. BEHAV. 213, 213 (2016).

¹⁷ Becher & Yuval Feldman, *Manipulating, Fastand Slow: The Law ofNon-Verbal Market Manipulations*, 38 CARDOZO L. REV. 459, 459 (2016).

¹⁸ Eric A. Posner, *The Law, Economics, andPsychology of Manipulation*, 1 J. MKTG. BEHAV. 267, 267 (2016). See also, JOSEPH RAZ, *THE MORALITY OF FREEDOM* 378 (1988).

¹⁹ R. H. Coase, *The Problem of Social Cost*, 3 J.L. ECON. 1, 42-44 (1960).

²⁰ Robert Noggle, *ManipulativeActions: A ConceptualandMoralAnalysis*, 33 AM. PHIL. Q. 43,45 (1996).

²¹ *Id* at 50.

²² *Id*.

targeted advertising is practiced with the intent to undermine this free choice by clouding judgement. The advertiser uses data backed knowledge about the consumer's vulnerable state of mind to expose them to any purchase they may be susceptible to endorse in that moment of weakness. Following a thorough psychological profiling of the consumer, the advertiser cogent inferences about plausible behavioral outcomes of the consumer. Professor Ryan Calo identified this phenomenon where "surface data" is used to create tangible inferences about emotional and financial distress of the consumer.²³ For instance, an individual's fight with depression could be observed through social media history, reading patterns or even products and services purchase history. With the current level of nuanced technology in big data and AI, it is not difficult to establish patterns and design plausible future courses. These manifest in bombardment of accessible and seemingly efficient purchase options used to divert attention from problem solving to making a purchase. Any purchase. Therefore, it would be wrong to presume manipulative tactics in advertising per se wrong rather it is the after effect of such manipulation, which prevents targets from owning their own decisions, undermining informed and free choice, and there resides the wrongness of manipulated advertisement.

b. Opaqueness: The Differentiating Scale of Persuasion and Manipulation

It would be as inadequate to discern ultimate responsibility of targeted manipulation on the advertiser as it would be to say that the ultimate choice and by extension, the ultimate liability to make a purchase resides with the consumer alone. Data fiduciaries,²⁴ who command substantial control over user activity and storage of said activity play a key role. They store, process and when need arises sell the said information/data to the highest bidder which attracts a handsome amount from ever more increasing number of data brokers in the economy. The concern lies in concealing this entire process of storing, sharing and processing at the whims of the usurper. The user is kept out of the process which uses their own personal information, information that they may not know has been shared and sold to the highest bidder, or worse, they may have 'consented' to share or used as the data broker deems fit. The final nail in the coffin is that the consumer may have, knowingly or unknowingly, 'consented' to be manipulated because the data being used to manipulate them is in fact taken, if not stolen, from themselves. The opaqueness of this entire process warrants a dominant position for a data controller which is used to target a vulnerable group or individuals, temporary or permanent.²⁵ A buyer intending to buy the same product that the seller intends to sell is the basic market principle causing no harm to anyone. The opaque process of targeted manipulation does not hold ground unless it is substantiated with a clear intentional mismatch between the buyer and the seller. A data controller may not always have the same or best interest of the consumer.²⁶ In fact some authors have argued that there is a perpetual mismatch of interests between the data fiduciaries and consumers.²⁷

²³ *Supra* note 9 at 1009.

²⁴ *Id.*

²⁵ Lina M. Khan & David E. Pozen, *A Skeptical View of Information Fiduciaries*, 133 HARV. L. REV. 497, 497 (2019).

²⁶ *Id.*

²⁷ R. Edward Freeman et al., *Stakeholder Theory and "The Corporate Objective Revisited,"* 15 ORG. SCI. 364, 364 (2004).

The reason for targeted manipulation to take root in any market transaction is the buyer's lack of intention to make a purchase. And such manipulation works because the buyer is unaware that when they see an advertisement of gym membership they were not intending to buy or vitamins that they were not deficient in, and hence did not require to purchase on a sale did not appear randomly on their screens. It followed an extremely nuanced process of data collection, distribution and processing on or through one or multiple platforms. Data that was part of the personal digital footprint of the individual, not intended for anyone but the user. Data that was stored, sold, repurposed and then sold again to multiple bidders, without knowledge or consent. This extremely crucial piece of information is hidden to ensure that the buyer remains unaware of the fact that the random advertisements on their search results are not a convenience rather a covert tactic of manipulating them into buying something they may not want or need.

Actively hiding this background set of elaborate personal data processing is what separates Targeted advertisements from simple persuasion of other forms of advertisements. Persuasion is not hidden, it is known, and open to be debated or denied. Targeted manipulation on the other hand has no way of being countered as for all practical purposes it does not exist. Therefore, persuasion causes no real harm, (at least in strict legal sense) whereas, targeted manipulation is specifically designed to seduce consumers to act towards a goal that may not be freely chosen by them falling into a trap unbeknownst to them, thereby causing legal violations.²⁸ As rightly said by professor Calo, the strength of manipulation lies in its covertness.²⁹

Opaqueness in operations also allows stakeholders to evade liability rendering the practice almost impossible to govern.

Denying Choice or Foregoing Consent: A Question of Autonomy

Market transactions function on a basic presumption of free and voluntary bargaining capacities of all actors involved.³⁰ Alain Marciano asserts that “By choosing, individuals demonstrate that they explicitly give consent to the conditions under which a choice is made.” Choice as consent ensures that consumers can choose autonomously because they are the best judge of what suits them best.³¹ The author goes on to argue that the outcome is immaterial when the means to reach that outcome are coercive, particularly in a market economy with dominant actors at play.

Raz draws similarities between coercion/fraud and manipulation so far as both induce the free will of a person and render it subservient to another.³² For him coercion denies physical options and is known whereas manipulation perverts individual's decision making while hidden or unknown.³³ The distortion of reality in manipulation makes the consumer believe in the sanctity of his decision making. This can be seen as a direct attack on the liberty of individuals and thereby undermining the basic tenets of our constitution imbibed in liberty and equality.³⁴ This

²⁸ *Supra* note 8.

²⁹ Ido Kilovaty, *Legally Cognizable Manipulation*, 34 BERKELEY TECH. L.J. 449, 464 (2019).

³⁰ Gordon R. Foxall, *The Behavior Analysis of Consumer Choice: An Introduction to the Special Issue*, J. ECON. PSYCH. 581-82 (2003).

³¹ *Id.*

³² Joseph Raz, *The Morality Of Freedom* 378 (1988).

³³ *Id.*

³⁴ Preamble, The Indian Constitution, 1950.

not only results in direct harm to the consumer but eventually undermines the legitimacy and integrity of the entire economy by inefficiently allocating resources.³⁵

Indian laws regulate many deceptive and fraudulent practices through Indian Contract Act, 1872; Competition Act, 2002; The Consumer Protection Act, 2019; Digital Data Protection Act, 2023 and many more. However, none of the abovementioned enactments deal with the problem of manipulated targeting because it is simply not seen as such. The author argues that there is a need for cogent policy and regulatory measures to prevent this vehemently prevalent and ever increasing practice.

Regulation is the Key: Alternate Regulatory Measure

Regulating manipulated targeting needs to place accountability where it is due – The manipulator. This could be the person who owns the data, data fiduciaries, distributors, advertisers, big tech, data processing companies etc. Data aggregators and ad networks hold a key position and hence explicit laws must either be enacted or amended to place liability on them. Secondly, Consumer facing firms must hold accountability of their shared data. Both these options will reduce opaqueness and prevent exploitation of vulnerable consumers by aligning the interests of all stakeholders. We do not deny that the personalised nature of targeting renders it extremely difficult to track. Therefore, data protection and robust regulatory framework around it is the key. Accountability needs to be defined in terms of objective end goals for data controllers. That objectivity can be provided through privacy and data protection of consumers. The EU has been a pioneer in the data protection regime and offers objective insights into regulations.

a. The Rights Based Approach of EU Model

The emergence of digital markets propelled enactment of GDPR in the EU. Behavioral and targeted advertising forms a major part of creation of personal data markets. Regulation of targeted advertising however requires a more sophisticated and specified body of law, one capable of addressing consumer grievances where data is collected and used for seemingly legal purposes. The general principle that the EU follows for consumer protection is “high level” which is basically a social right and their enforceability is not as efficient as that of fundamental rights.³⁶ Because consumers hold a lesser bargaining power in any commercial transitions the EU has enacted many legislations to balance the scales by informational transparency and regulating unfair practices.³⁷

The transparency requirement of Digital Services Act, 2022 permeates all consumer law protection enactments with the assumption that information is key to exercising autonomous

³⁵ Cass R. Sunstein, *Legal Interference with Private Preferences*, 53 U. CH. L. REV. 1129, 1129 (1986).

³⁶ Article 38, Charter of Fundamental Rights of the European Union, 2000.

³⁷ Directive 2005/29/EC, of the European Parliament and of the Council of 11 May 2005 Concerning Unfair Business-to-Consumer Commercial Practices in the Internal Market and Amending Council Directive 84/450/EEC; Directive 2011/83/EU, of the European Parliament and of the Council of 25 October 2011 on Consumer Rights, Amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and Repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, 2011 O.J. (L 304); Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts, 1993 O.J. (L 95); Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on Certain Aspects Concerning Contracts for the Supply of Digital Content and Digital Services, 2019 O.J.; Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and Amending Directive 2000/31/EC (Digital Services Act), 2022 O.J. (L 277).

choices from a “reasonably well informed and observant consumer.”³⁸ However, contractual terms are not always read in entirety to make an informed choice and UCTD governs the unfairness of terms in standard form contracts. If there is no clarity the terms are read according to the maxim *dubio contra stipulatorem* i.e. in favor of the consumer.³⁹ Another major legislation is Article 5(2) of Unfair Commercial Practices Directive which states that “it materially distorts **or is** likely to materially distort the **economic** behavior with regard to the product of the average consumer whom it reaches or to whom it is addressed, or of the average member of the group when a commercial practice is directed to a particular group of consumers.”⁴⁰ Article 6 and 7 of UCPD also prohibit “misleading” and “aggressive” practices.⁴¹

Both the abovementioned rules apply to targeted practices at contractual as well as advertising stage.⁴² The simple rule is that whenever the personal data is processed or repurposed without a contractual necessity or legal requirement, the processing attracts consumer protection rules.⁴³ Along with transparency requirements the UCPD clearly states that any platform cannot display misleading or inaccurate pricing.⁴⁴ For instance, when Meta displayed “Facebook is free and will always be free,”⁴⁵ Italian courts held that it is not free as consumers provide data for personalised and targeted advertising and Meta had to clarify its monetizing process.⁴⁶ This is again reflected in another case involving Meta whereby “legitimate interest” and “necessity” conditions have been elaborated upon.⁴⁷ This paved the way for a blanket ban on targeted and behavioral advertising by the Norwegian Data Protection Authority.

Norway banned Meta from running behavioural advertising on Facebook and Instagram in Norway unless it obtains users’ consent for such processing. As a result, Meta has now launched its first ad-free option for Facebook and Instagram in the EU. Users who are 18 years old or above have been given an option to decide if they want to use Meta’s services for free and be subject to targeted ads based on their personal data or pay 10 pounds a month for ad-free access.⁴⁸

Conclusion

³⁸ Articles 15, 24, 27, 39 and 42, Digital Services Act, 2022.

³⁹ Article 5, Unfair Contracts Terms Directive, 1993.

⁴⁰ *Id.*, Article 5(2).

⁴¹ *Id.*, Article 6 and 7.

⁴² Caterina Gardiner, Unfair Contract Terms in Digital Age 105-7 (2022).

⁴³ *Id.*

⁴⁴ *Supra* note 36, article 4(2).

⁴⁵ *Id.*

⁴⁶ L’Autorita Graante Della Concorrenza e Del Mercato [AGCM] [Consumer Market Authority] Nov. 29, 2018, Provvedimento n.27432 (It.), Available at <<https://perma.cc/DWX6-ULQ9>>; See also Marta Bianchi, T.A.R., Facebook Case: Personal Data as Contractual Consideration: Antitrust Procedure Initiated [Tar Lazio 10 January 2020, N.RI 260 and 261], DIRITTO DI INTERNET (Feb. 13, 2020), Available at <<https://bit.ly/3oLOSub>>.

⁴⁷ Meta Platforms Inc. and others v. Bundeskartellamt, C-252/21.

⁴⁸ Available at <<https://www.cnn.com/2023/10/30/facebook-and-instagram-get-ad-free-subscription-service-in-europe.html>>

Indian Digital Data Protection Act, 2023 does not bar targeted advertising for adults. It provides some relief to children and bars tracking, monitoring and behavioral targeting of children.⁴⁹ However, even this guideline can be overcome provided the companies show that the said tracking and monitoring occurs in a reasonably safe manner.⁵⁰ Merely complying with consent specific guidelines is not sufficient when it comes to data profiling misdemeanours. This is particularly worrisome when the problem resides in circumnavigation of informed consent of the consumers. This is done by using information overload, click wrap and standard form of agreements which run into thousands of pages and overwhelm consumers into buying into the terms and conditions without realising the cost. Sometimes even awareness is not sufficient to curb the said practices and consent remains a frivolous if not obsolete instrument to be played at the tune of the dominant player. Law needs to be corroborated with simpler policy frameworks of marked advertisement linked to a transparent detailed page of how and why the user has been targeted with this particular advertisement. Additionally, the government needs to take proactive measures in raising awareness by running parallel ads about the monitoring that goes behind the doors for any advertisement that induces a purchase. It is not merely a legal phenomenon and legal measures may not suffice. Any hope of curbing the ill impacts of targeting begin with psychological awareness to be attained through equal if not more efficiently pervasive advertising of the perils.

⁴⁹ Section 9(3), Digital Personal Data Protection Act, 2023.

⁵⁰ *Id.*