
Thou shalt not mislead thy customer! The pitfalls of labelling and transparency

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Abstract: The article explains why one should not mislead his customers. And the author is not even talking about rules of decency and fair play; she is talking about legal reasons, as recently confirmed by a court decision in France. The article also explains, however, why the issue of transparency is a tricky one, and under which conditions transparency could turn against the consumer.

Keywords: transparency, labelling, consumer expectation

Foreplay



Does this look familiar? What does this mean to you, average reader? One tip: it is about transparency (solution to the question at the end of the text).

The Part 1 –Transparency rules

Thou shalt not mislead thy customer! This at least was the conclusion of the Tribunal de Grande Instance de Nanterre (2003a). The court had to decide on the complaint by buyers of CDs from the music publisher EMI music, which would not play on computers or car radios. The consumers were represented by the French consumer organization CLCV. CLCV held that the consumers have been misled. True, on the CDs it was indicated that technological anti-copy protection measures were in place; but nowhere was it written that this means one cannot listen to the music. Surely, making it impossible to even listen to music would mean pushing copyright protection too far, or not? It does, so said the court, it does at least if consumers have not been warned beforehand.

Misleading – not a gentleman’s crime in France

According to French consumer protection law, anyone who deceives consumers about the nature of a product can be held liable (Article L213-1 of the French consumer law). The judge concluded that the nature of a CD is that it can be listened to, even on computers and car radios. If one cannot do so, the product is flawed (see Tribunal de Grande Instance de Nanterre 2003b). Not informing a consumer about the fact that a product is flawed constitutes misleading behaviour. And, at least in France, this can have consequences and be fined with up to 250,000 French Francs (38112.25 Euros) or two years imprisonment. Misleading consumers is clearly no gentleman’s crime in France. Interestingly, the court also found that sole reference to the fact that technical anti-copying measures are in place is not enough to avoid liability. Consumers cannot be expected to know that anti-copying can mean anti-listening. In response, it imposed on EMI Music France the obligation to label its CDs – in 2.5 mm characters: "Attention cannot be listened on all players or car radios".

...Nor in Europe - Unfair B2C Commercial Practice Directive

Consumer protection laws differ from state to state, and not each state might have rules comparable to the French law. Soon, however, no European Member State will be able to get around acknowledging a legitimate interest of consumers “to know”. The proposed Unfair

Commercial Practices Directive will harmonise the existing national general clauses in consumer protection laws in relation to unfair commercial practices between businesses and consumers (see Unfair Commercial Practices Directive 2003). It will establish precise criteria for determining when behaviour is unfair under the general clause (Unfair Commercial Practices Directive, Explanatory Memorandum, Recital 48). In addition, it addresses specific unfair practices which are to be banned in the Internal Market. One practice to be banned in the Internal Market is the misleading of consumers by omitting information the consumer should know. Article 7 (1) of the proposed Unfair Commercial Practices Directive stipulates that a commercial practice, which “[...] omits material information that the average consumer needs, according to the context, to take an informed transactional decision and thereby causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise” is regarded misleading according to Article 7(1)) and as such deemed unfair and is banned, Articles 5(3)(a) and 5(1) of the proposed Unfair Commercial Practices Directive.

Back to the main argument, translated into a language that the average consumer is able to understand this means that providers of music CDs, DVDs and downloadable music must provide the consumer with all the reasons and characteristics why the product he buys is possibly not what he thinks he is buying. The consumer should have the possibility to know what he is buying. Fair enough, one might want to add. In an increasingly sophisticated technical environment it cannot be expected of the consumer to know all the technical specifications by just looking at the product. CDs are more complicate than pears and books. Still, a consumer does have certain expectations of how CDs should function. For example, it should play in a CD player. If a product fails to live up to these expectations, this is information that the consumer should have. Consequently, if a producer sells CDs that cannot be played on different devices, he is obliged to inform the consumer about this.

Transparency and consumer expectations

Precondition is that the average consumer would not otherwise have bought the CD. This leads to some difficult questions, first and foremost what is it that a consumer expects from a CD, and what features of a CD are so essential that, if the consumer knows that they are absent, he will not buy that CD? So far, there was not much need to think about what we expect from a CD. It played. Thanks to DRM, however, CDs no longer simply play. The controller of DRM has increasingly sophisticated tools at hand to control if a CD plays in a car radio, if it can be ripped, sampled, fast forwarded, if it plays in different countries and continents, if it allows to skip the commercials, e-mail an electronic file of it to a friend. In order to know whether a label will prevent us from buying or not buying a product we must know what we actually expect from this product. And the industry must know what we expect so that they can warn us not to buy their products. And we must know what the industry thinks that we expect so that if we expect something different and nobody warns us we know what to expect. Listening to music used to be easier.

Transparency is good and important. Knowledge is power. The power of consumers is to decide to buy or not to buy a product. In order to be able to make an informed decision, consumers must, first of all, know what the characteristics of the product they buy are. The purpose of transparency obligations is to tell consumers what they must know before they can make an informed decision. The purpose of labels, of transparency is also to give consumers the chance to compare and to choose the products that offer the most attractive terms, conditions and quality. Transparency is inevitable in a functioning market place.

Part 2 – Transparency is not everything

But transparency is not – as some have heralded (see Beemsterboer 2005)¹ – the answer to everything. As beneficial as transparency can be from a competition and consumer welfare point of view, we should be aware that simply by informing the consumer about all the things that he

¹ See Helberger, Interview with Beemsterboer, INDICARE Monitor, Vol. 1, Number 6/7, 17 December 2004.

cannot do with the product, which he bought, the digital world is not necessarily a much better one – at least not for the consumer.

Headache

Transparency can cause a headache. Perhaps, in future we will buy music like medicines – accompanied by a long and fierce looking insert, which lists all the side effects and risks that listening to this piece of music involves. How much transparency is the average consumer able to digest?

Risks and side effects

Transparency can have its own risks and side effects. Transparency can turn against the consumer – if we read often enough on CDs that this product will not play in car radios, cannot be copied, cannot be sampled and ripped – do we actually still expect that CDs can do all these things? The notion of a transactional decision “that he would not have taken otherwise” presupposes that the consumer actually believes he has a choice. In the worst case, transparency could be abused by the entertainment industry to educate us, and tell us what we are supposed to expect from a product.

Abuse

And finally, transparency can also be used to manipulate the consumer, the market place. This could be, for example the effect of Microsoft’s newest “transparency” initiative – “Plays for sure” (Microsoft 2005). Microsoft has launched its labelling campaign “plays for sure”. The idea behind “plays for sure” is the introduction of a new logo that indicates which formats a portable music player can process.



In order to be able to play music “for sure” consumers would have to 1) download the Windows Media Player 10, 2) find a portable device that carries the “play for sure” logo, and 3) find an online music store that also carries the logo. In other words, with all the music stores and portable devices that are not part of Microsoft’s campaign, consumers cannot be sure at all that their player will play their music. It is worth mentioning that serious competitors of Microsoft’s own download service MSN music, such as iTunes and Rhapsody, are not amongst the online stores that the campaign supports. It is difficult not to have the impression that Microsoft’s motives for the campaign are not entirely altruistic. Selective transparency can be also a tool to tell consumers what to listen to, or even more importantly: whom not to listen to.

Bottom line

In conclusion, maybe, better than to warn consumers from not functioning products is to actually produce products in a way that consumers want to buy them – even if they know all about them. Knowledge is good. Quality is better.

After play

The solution to the question what the label means is: It is the IFPI Copy Control Symbol for CDs. IFPI has developed this label to indicate that a CD contains technical protection mechanisms. It recommends its members and non-members to apply the sign. Users of the label can provide consumers with further information about possible incompatibilities, how often a CD can be copied, etc. (see IFPI 2002).

Sources

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As an aside, Article 7 also provides that information requirements established in other Directives, notably the Distant Contract Directive, the E-Commerce Directive, and the Unfair Terms Directive will be regarded as "material" information under this Directive. This is to balance consumers' needs for information with the acknowledgement that an overload of information can be as much a problem to consumers as a lack of information (see Unfair Terms Directive, Explanatory Memorandum, Recital 65).