

2008

Concealment of Information in Consumer Transactions in the United States, Sweden, and China: A Window to the Relationship between Individualism and Regulation

M. Neil Browne

Prof. Emeritus, Bowling Green State University

Justin Rex

Senior Res. Assoc., IMPACT Learning Community, Bowling Green State University

Curtis Bunner

Technology Analyst, Case Western University

Follow this and additional works at: <http://lawcommons.luc.edu/lclr>



Part of the [Consumer Protection Law Commons](#)

Recommended Citation

M. N. Browne , Justin Rex & Curtis Bunner *Concealment of Information in Consumer Transactions in the United States, Sweden, and China: A Window to the Relationship between Individualism and Regulation*, 20 Loy. Consumer L. Rev. 270 (2008).

Available at: <http://lawcommons.luc.edu/lclr/vol20/iss3/3>

This Feature Article is brought to you for free and open access by LAW eCommons. It has been accepted for inclusion in Loyola Consumer Law Review by an authorized administrator of LAW eCommons. For more information, please contact law-library@luc.edu.

Concealment of Information in Consumer Transactions in the United States, Sweden, and China: A Window to the Relationship Between Individualism and Regulation

By M. Neil Browne,^{*} Justin Rex^{**} & Curtis Bunner^{***}

I. Introduction

When buyers and sellers interact in the marketplace, each seeks advantage. A key element of any advantage is control over the flow of information about the terms of the trade. Specifically, among the relevant dimensions of the bargain are the health and safety associated with the good or service, the quality of the good or service, and the flow of future services to be expected from the seller should the function of the good or service be less than desirable. The more transparent these aspects of the prospective trade, the more likely the buyer will be able to make a sensible decision in terms of negotiating the trade-off between the flow of expected utility from the purchase and the price to be paid.

Courts and legislatures express their preferences for who is to win the allocative struggle between buyers and sellers by, *inter alia*, enabling or restricting the transparency desired by prospective buyers. This article examines the variation in that transparency in the United States, Sweden and China. This comparison suggests the fundamental role of individualism as a formative stimulus for the manner in which legislatures and courts respond to consumer needs. When consumers are viewed as responsible for their own protection, the idea of consumer protection in this realm seems discordant with

* Distinguished Teaching Professor, Emeritus and Senior Lecturer, Bowling Green State University.

** Senior Research Associate, IMPACT Learning Community, Bowling Green State University.

*** Technology Analyst, Case Western University.

dominant value preferences. On the other hand, conceptualizing the typical individual as vulnerable and lacking the time and knowledge to navigate particular market intricacies propels empathy and consequent legal assistance for consumers.

The struggle for fairness or for dominance in particular market exchanges is in large part a pushing and pulling over how much relevant information a seller is allowed to legally conceal. In other words, if a prospective seller can reveal the attractive components of the good or service in question, while protecting information that would sour the prospective buyer on the purchase, any resulting deal is premised on what must be called a misunderstanding. The buyer believed he or she was getting one thing, but instead received something else, a partial caricature of the image in the consumer's mind at the time the deal was consummated.

II. The United States

The first type of concealment recognized by American courts with regard to business transactions is concealment by actively engaging in behavior to hide a relevant characteristic of the good or service.¹ For example, Bob is trying to sell his house. However, there is a defect in the plumbing, resulting in a water-damaged ceiling in the living room on the first floor. Before showing his home, Bob paints over the water damage to hide the defect. Then, when asked by potential buyers about any leaks or defects, Bob denies any knowledge of any problems. Because Bob took an affirmative action to cover up the water damage, and then lied about the damage, Bob is guilty of this first type of concealment. Most states allowing

¹ See, N.J. Stat. Ann. § 56:8 spelling out the elements of a cause of action under the New Jersey Consumer Fraud Act. Included in the unlawful practices governed by the Act is the knowing concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise or real estate, or with the subsequent performance of such person as aforesaid, whether or not any person has in fact been misled, deceived or damaged thereby.

One of the reasons Wright's family lost was an insufficiency of evidence to prove their claims, including the fact that Wright's car was missing and therefore could not be examined. However, in 2003, Wright's family found out Mercedes-Benz's attorneys had purchased Wright's car after the accident and hid it from all parties involved in the initial litigation. The district court dismissed the charges, but the appellate court reversed the lower court's decision on grounds of fraudulent concealment. Due to the actions taken by Mercedes-Benz to hide material facts, the court found there was substantial evidence to find Mercedes-Benz liable.

concealment to constitute a fraudulent action require that concealment must be of an active variety.

The second type of business concealment recognized by U. S. courts is concealment by remaining silent on a point that could influence the buyer's decision.² This second type is much more specific, and subtle, than the first type. It includes actions such as selling your car, but not telling the buyer the radiator has been replaced five times in the last two years. Many consumers would not buy a car that has had to have an important part replaced so many times in a short period and, therefore, this information would affect the consumer's decision.³ Most states will acknowledge silence as

² See, e.g., *Berman v. Gurwicz*, 458 A.2d 1311 (N.J. Super. Ct. Ch. Div. 1981) (arguing a condominium seller's failure to disclose to buyers that the on-site recreational facilities were actually separate from the condominiums and were not included in the purchase price of the condominium constituted fraudulent concealment through silence. The court argued the buyers would not have agreed to the sale price had they known the recreational facilities were not included. Therefore, the seller withheld critical information that would have directly influenced the buyer's decision had the seller not kept the information a secret).

³ See DAVID C. COLANDER, *MICROECONOMICS* 38, 417-18 (5th ed. 2004). Situations where markets do not lead to desired outcomes are considered *market failures*. One specific type of market failure arises when parties have imperfect information. That is, when one party knows something the other party does not, or if both parties are missing significant information relevant to their transaction, a market failure occurs. Because the information concealed is the type of information that would influence the party's decision, concealment is a form of the market failure for imperfect information.

Accordingly, the legal problems arising when one party to a transaction improperly keeps material information from the other party to the transaction is not only a legal problem. The problem is also a market failure, and thus is a symptom of the potentially fallacious assumptions the dominant economic system makes about people. When states step in to attempt to curb the problem of imperfect information, although removing the problem from the market, the state is attempting to smooth market transactions such that Pareto optimality can be achieved, and the state can function smoothly as well.

Political scientist Charles Lindblom further addresses the interplay between political apparatus and market decisions when it comes to creating a functioning society. See CHARLES E. LINDBLOM, *POLITICS AND MARKETS: THE WORLD'S POLITICAL-ECONOMIC SYSTEMS* (1977). In his book, Lindblom examines various governmental and market structures to see the various ways in which humans can, and have, made decisions. He sees both government and the market as decision-making tools, as well as tools for keeping and exercising authority. Lindblom also argues governments and markets are intricately intertwined; thus, political decisions are market decisions, and market decisions are political decisions.

proof of fraudulent concealment, if there is a fiduciary duty to disclose information.⁴ Although the word “concealment” is a portion of what most, if not all, states consider fraud, not all states allow concealment, or all kinds of concealment, to constitute proof of fraud.⁵ It appears all states allow recovery for the first type of concealment.⁶ This article’s interest lies with the second type of

The shift from government to politics comes naturally, as politics is the business of running day-to-day affairs, and governments are typically the structure by which these decisions are made. However, markets also are omnipresent in every day affairs. Therefore, as Lindblom argues, much of politics is economics, and much of economics is politics.

Given the delicate interconnectedness of politics and markets, Lindblom ultimately concludes, whatever system is used for decision-making, it should be some blend of politics and markets: the only real question is what is the proper blend for a given geographic area existing at a specific moment in time. Lindblom’s conclusion helps lend support to those states that step in to attempt to curb some market failures, such as imperfect information. One method of correcting imperfect information in business transactions is to allow the court to impose liability upon parties who conceal relevant information to the detriment of the other party. This section of this article is primarily concerned with those states that do allow, or could allow, silence to constitute concealment in most if not all business transactions.

⁴ *Berman*, 458 A.2d at 1313.

⁵ Concealment is an ambiguous word that finds itself used with multiple meanings among the various states, and sometimes with multiple meanings within one given state. The question is less, does a given state allow concealment to prove fraud, but rather, what does a given state mean when it says concealment can prove fraud.

For example, some states acknowledge a distinction between active and constructive concealment, whereas others do not. *Compare* *Hughes v. Glaese*, 659 N.E.2d 516 (Ind. 1995) (stating that constructive concealment is when a party fails to disclose material information to the other party, but active concealment is when a party engages in affirmative action to hide material information from the other party), *with* *McGeechan v. Sherwood*, 760 A.2d 1068, 1081 (Me. 2000) (stating for a claim of concealment a party must prove, “(1) [a failure to] disclose; (2) the material fact that the well had been abandoned due to contamination; (3) with knowledge of the non-disclosure; [and] (4) for the purpose of inducing [the plaintiff] to purchase the farm.” Although containing specifics to the case, an examination of the criteria reveals the general criteria includes disclosure, with no separation made between silence and actions taken to hide information).

⁶ Based on a review of the case law in each state, it seems as if every state acknowledges the ability of a party to recover damages when the party is injured due to the active concealment of the other party. *See, e.g.*, *Shutter Shop, Inc. v. Amersham Corp.*, 114 F.Supp. 2d 1218 (M.D. Ala. 2000); *Laybourn v. Powell*, 55 P.3d 745 (Alaska 2002); *Am. Pepper Supply Co. v. Fed. Ins. Co.*, 93 P.3d 507

concealment, where a seller in a transaction conceals information by failing to disclose. Frequently the information not disclosed is information the buyer would not even know to ask.

United States courts are dominated by the perspective that those who enter any market are thoughtful, calculating agents.⁷ Hence, courts presume that consumers can generally discover or uncover the information they need to get the goods and services they seek. When something goes awry in the consuming process, such consumers have failed. They had an obligation to discover what they needed to know, and are now experiencing the logical outcome of their mistake.

While economics as a discipline, as well as the laws it sustains, assumes and explains that humans are rational, calculating machines, there is abundant social science data calling into doubt consumers' ability to form meaningful demand curves in terms of their own considered self-interest, let alone to make decisions that have positive community effects.⁸

(Ariz. 2004); *Davis v. Parham*, 208 S.W.3d 162 (Ark. 2005); *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005).

⁷ The law and economics perspective assumes humans are, ontological speaking, rational agents. The American legal system is premised upon humans' ability to rationally weigh costs and benefits, and act accordingly. Similarly, economics is premised upon humans' ability to weigh costs and benefits, and make all economic decision to further their own happiness based upon the cost-benefit analysis. See ROBERT E. LANE, *THE MARKET EXPERIENCE* 139 (1991). Lane compiles the evidence suggesting that as environmental complexity increases, cognitive complexity exhibits a curvilinear relationship. See also Kurt W. Fischer & Louise Silvern, *Stages and Individual Differences in Cognitive Development*, 36 ANN. REV. PSYCH, 613, 639 (1985).

See also ROBERT FRANK, *LUXURY FEVER* 72-74 (1999). Frank summarizes much of the scientific evidence suggesting that the correlation between income and happiness is extremely weak. He writes, "One of the central findings in the large scientific literature on subjective well-being is that once income levels surpass a minimal absolute threshold, average satisfaction levels within a given country tend to be highly stable over time, even in the face of significant economic growth."

⁸ See ROBERT LANE, *THE LOSS OF HAPPINESS IN MARKET DEMOCRACIES* (2000). In addition to presenting a theory of happiness inconsistent with the economists' assumption that happiness is achieved through consumption, Lane documents the difficulty consumers have in recalling the relevant dimensions of their previous consumption activities.

What such data means for the law is the ontological assumption about human nature underlying our market system may be flawed. Arguing through analogy, if consumers cannot rationally create demand curves that reflect their preferences, these same people cannot rationally evaluate every possible element of a business transaction, especially when the seller has major profit incentives to withhold particular bits of relevant information about the good or service.

In summary, concealment is treated in the United States as we would expect it to be treated. To use the law in any other fashion would be inconsistent with the individualism that serves as the moral core of commercial law in the U.S.

III. Sweden

The assumptions Swedish law makes about who consumers are creates radically different governmental policies, institutions and case law than we see in the U.S. with respect to concealment. Unlike their American counterparts, Swedes operate within the “paradigm of the weak consumer.”⁹ Below we first outline the history and assumptions that created this paradigm, the resulting consumer policy prescription, and finally the laws and institutions created in its mold.

⁹ J.K. Johansson, *The Theory and Practice of Swedish Consumer Policy* 10 J. CONSUMER AFF. 19, 20 (1976). America and Sweden (as well as their western European counterparts) also diverge in their fundamental values. America is characterized by an intense individualism. See EVERETT CARLL LADD, *THE AMERICAN IDEOLOGY: AN EXPLORATION OF THE ORIGINS, MEANING, AND ROLE OF AMERICAN POLITICAL IDEAS* (1994) (discussing the characteristic individualism of Americans).

Ladd defines individualism as "a view of the individual person which gives unprecedented weight to his or her choices, interests, and claims. Private property in the economic sphere; democracy and freedom from government control in the polity; advancement on one's merits, the absence of rank, and moral equality in the larger society: These are the essential, distinguishing American values. All reflect the pervasive underlying individualism."

See also ROBERT BELLAH ET AL., *HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE* (3d ed. 2008).

A. History¹⁰

In Sweden, as in many other Organization for Economic Co-Operation and Development (OECD) countries, consumer protection law began to develop rapidly in the 1970s. One cause for the change in Sweden was the recognition of changing historical trends in the economy. First was the observation that the number of products and services available to consumers was growing rapidly.¹¹ This growth was accompanied by a proliferation of advertising.¹² Thereafter, was the recognition of the increasing concentration of industry and a decreasing amount of competition¹³ in terms of price and quality of goods and services.¹⁴

¹⁰ For a more broad historical account of trends and values in Swedish law, see Rasmus Goksor, *Jurisprudence on Protection of Weaker Parties in European Contracts Law From a Swedish and Nordic Perspective*, 6 CHI.-KENT J. INT'L & COMP. L. 184 (2006).

Interestingly, at its outset, Swedish contract law had very similar assumptions to current American law, which is dominated by the value of individualism. Goksor notes that, in classical legal thought, it was assumed that "all contracting parties had equal social and economic power and, therefore, that parties could look after their own interests. The widespread use of the caveat emptor principle strengthened the presumption that contracting parties were informed and rational actors." Over time, however, these assumptions were replaced. In the early 20th century, Sweden gradually began to develop into a welfare state.

¹¹ Ulf Bernitz, *Consumer Protection: Aims, Methods, and Trends in Swedish Consumer Law*, 52 SCANDINAVIAN STUD. IN L. 13-36 (1976).

¹² *Id.* at 14.

¹³ The term "competition" is a technical one used by economists to denote a specific type of market structure. Several assumptions must be met for a market system to be beneficial to consumers. See COLANDER, *supra* note 3; M. Niel Browne, Carrie Williamson & Garrett Coyle, *The Shared Assumptions of the Jury System and the Market System* 50 ST. LOUIS U. L.J. 425 (2006). If the number of firms is large and there are no barriers to entry into a market, profit hungry firms will freely enter a market where existing firms are selling low quality products or charging high prices, sell a better product at a lower price, and drive out other firms, all to the benefit of consumers, who will buy better products cheaper.

See also JOHN KENNETH GALBRAITH, *AMERICA CAPITALISM: THE CONCEPT OF COUNTERVAILING POWER* (1952). The American heterodox economist documents the changes in the structure of the economy and its implications for competitive theory.

¹⁴ Bernitz, *supra* note 11, at 14.

B. Assumptions

These historical changes stimulated changes in how Swedes tend to view consumers and their power in the economy. Swedes see firms as having a disproportionate amount of power compared to consumers.¹⁵ Sweden's National Board for Consumer Policy states that, "the individual consumer occupies a weak position relative to producers, distributors, and marketers."¹⁶

The website of the Swedish Consumer Agency, the main government body working on behalf of consumers, discussed *infra*, expresses similar views: it acknowledges the "inherent imbalance between businessmen and consumers in the market-place" and the ability of businessmen to "use their superior bargaining power" to manipulate the consumer in an unfair way.¹⁷

This weakness stems largely from the historical trends just discussed. The Swedish assume consumers can be easily manipulated by increasingly sophisticated advertising^{18 19}, that the

¹⁵ Johansson, *supra* note 9, at 20.

¹⁶ *Id.*

¹⁷ The Swedish Consumer Agency, *Market Law in Sweden*, Sept. 9, 2007, <http://www.konsumentverket.se/mallar/en/artikel.asp?lngCategoryId=665>; see JOHN KENNETH GALBRAITH, *THE AFFLUENT SOCIETY* (1958). Economists assume that in a competitive market, consumers are sovereign. See Browne et al., *supra* note 13. That is that consumers have power and it is firms that are weak and need to bend to the will of consumer demand.

¹⁸ Galbraith writes that part of producer sovereignty is the ability of firms to manipulate consumer preferences. He is in the minority of economists. Economists assume that preferences are not shaped by firms or by society, but, rather that they are stable, given and brought to the market uninfluenced by external factors. See COLANDER, *supra* note 12, at 200; Gary Becker & George Stigler, *De Gustibus Non Est Disputandum*, 67 AM. ECON. REV. 76 (1977). They argue that "it is neither necessary nor useful to attribute to advertising the function of changing tastes" because consumers are sovereign (quoted in ROBERT KUTTNER, *EVERYTHING FOR SALE: THE VIRTUES AND LIMITS OF MARKETS* 44 (1996)). If this assumption is not correct, economic theory suffers a setback because demand curves no longer reflect true consumer desires and instead reflect artificial ones.

For a refutation of the assumption of stable preferences see the work in behavioral economics by Daniel Kahneman and Amos Tversky on the concepts of "loss aversion" and the "endowment effect." Research suggests that our desired price for a good changes when we are buying it as compared to when we are selling the same item after having owned it. Humans have an aversion to loss and after having been endowed a good, they will try to sell it for a higher price than if they were offering to buy the good having never owned it. If the research is valid,

growing number of products restricts the possibility of rational consumer choices because of a “scarcity of time, income, and generally limited resources,”²⁰ and that with decreasing competition and increasing market concentration consumers are at risk of injury from harmful products.²¹ An additional assumption is that “there exist large groups of consumers who, owing to low incomes, deficient education and knowledge of the market etc., are less well equipped than the average citizen for their role as consumers.”²²

consumer preferences are not stable and instead shift depending on our point of reference to a good. For a discussion of their work, see BARRY SCHWARTZ, *THE PARADOX OF CHOICE* (2004).

¹⁹ Sweden is particularly concerned with advertising's ability to influence children. See Gunilla Jarlbro, *Children and Television Advertising*, Jan., 2001, http://www.konsumentverket.se/mallar/en/lista_artiklar.asp?lngCategoryId=662; Erling Bjurström, *Children and Television Advertising*, Oct., 1994, http://www.konsumentverket.se/mallar/en/lista_artiklar.asp?lngCategoryId=662.

Sweden has an outright ban on any advertising aimed at children below the age of twelve and bans any advertising during the hours children are most likely to be watching television.

Evidence suggests that children are particularly susceptible to manipulation by advertising. See Janice H. Kang, *Barbie Banished from the Small Screen: The Proposed European Ban on Children's Television Advertising*, 21 NW. J. INT'L L. & BUS. 543 (2001). Kang cites studies that found that children are much more likely than adults to believe advertisements (children do not develop the capacity to begin doubting them until around age twelve) and found that children who are shown advertisements for a new product changed their established preferences.

²⁰ Johansson, *supra* note 9, at 20.

²¹ Bernitz, *supra* note 11, at 26.

²² *Id.* at 14.

Almost all economists would disagree with this depiction of the reasoning ability of consumers. They assume all humans behave according to rational self-interest. In a perfectly competitive market, consumers have perfect information about goods and services and rationally assess this information to develop a rank order of that which will give them the most marginal utility. So, consumers know the quality and price of a product as well as the amount of marginal pleasure it will provide (as well as this information for the next best alternative) and can therefore weigh alternatives according to expected utility and make rational choices, which will maximize their utility.

Much of the research in behavioral economics refutes that humans always behave rationally and make choices that maximize utility. For a compendium of much of the research done in this field, see RICHARD THALER, *THE WINNER'S CURSE: PARADOXES AND ANOMALIES OF ECONOMIC LIFE* (1992). For another useful trove of psychological evidence that humans are not always rational, see

Thus, unlike in the U.S., the Swedish legislature and courts see consumers as inevitably lacking some of the resources and skills necessary to exert power that would counterbalance that of producers.

C. General Policy Prescription

If consumers lack power and resources to protect their own interests in the marketplace, who shoulders responsibility for insuring that their interests are protected? In Sweden, as well as the other Scandinavian countries, responsibility for consumer protection is largely the duty of the state.²³ Sweden's Consumer Agency believes that the:

[C]onsumer should receive support and be given a strong position in the market. Mandatory legal rules and direct interventions form an important basis to support the consumer. The consumer legislation is, to a large extent, intended to prevent problems affecting the consumers as a group.²⁴

Together the state and consumer can balance the power exerted by businesses.²⁵

SCHWARTZ, *supra* note 18. Behavioral economics tests economists' predictions of how rational individuals will behave in given situations and the results often prove the predictions.

²³ Bernitz, *supra* note 11, at 26.

²⁴ *Market Law in Sweden*, *supra* note 17.

²⁵ For a detailed account of the governing bodies established in Sweden that work on behalf of the consumer, see The Swedish Consumer Agency,, <http://www.konsumentverket.se/>. See also Bernitz, *supra* note 11; J.J. Boddewyn, *The Swedish Consumer Ombudsman System and Advertising Self-Regulation*, 19 J. OF CONSUMER AFF. 140 (1985); Johansson, *supra* note 9. We provide a brief overview of the major institutions below.

The Consumer Agency, "Konsumentverket", and the Consumer Ombudsman, "Konsumentombudsmannen" (KO), function together as the main institution for consumer protection. The Consumer Agency is responsible for conducting talks with trade and industry associations as well as businesses to develop policy, settle disputes and push for industry self regulation. It has the authority to issue general guidelines and regulations concerning consumer policy.

D. Laws²⁶

Given the assumptions and view of the state's role in protecting consumers, what has Sweden actually done to protect consumers? The first major piece of legislation is the Marketing Act. It was passed in 1970 and updated in 1975 and 1996. As section one of the act states, "The object of this Act is to promote the interests of consumers and of trade and industry in connection with the marketing of products and to counteract marketing that is unfair to consumers and businessmen."²⁷ This act was created to insure fair marketing practices, which includes "advertisements and other measures taken in the course of business intended to promote sales and availability of products."²⁸ The act gives power to various government bodies to enforce these provisions through legal action and fines, discussed *infra*.²⁹

The act has requirements for what advertising must include, ordering that "[i]t shall also be clearly indicated who is responsible for the marketing."³⁰ But mainly the Act includes provisions for what businesses cannot include, as well as restrictions on the information included. For example, when marketing a product, a businessperson may not make claims or other statements that are misleading with respect to the businessman's own or another businessman's business operations.

This restriction applies especially to statements relating to the following:

1. nature, quantity, quality or other properties of the product;
2. origin, use and environmental and health effects of the product;

²⁶ The sources documenting these aspects in Sweden are many. *See generally* The Swedish Consumer Agency, <http://www.konsumentverket.se/>; Boddewyn, *supra* note 25; Bernitz, *supra* note 11; Johansson, *supra* note 9.

²⁷ Marknadsföringslagen (Svensk författningssamling [SFS]1995:450) (Swed.), *translated in* The Marketing Act (2004), *available at* <http://www.sweden.gov.se/content/1/c6/05/03/14/b02d0909.pdf>.

²⁸ § 3 Marknadsföringslagen (SFS 1995:450).

²⁹ *Id.* §§ 14-57.

³⁰ *Id.* § 5.

3. product's price, basis of pricing and conditions for payment;
4. businessman's own or another businessman's qualifications, market position, distinguishing marks and other rights; and
5. prices and awards given to the businessman.³¹

In addition, when marketing the good or service, a businessperson may not use packages that, because of their size or external design, generally are misleading as regards the quantity, size or form of the product.³² The businessperson may not use misleading imitations because they can easily be confused for another businessperson's known and characteristic products.³³ A businessperson may, in his advertisement, directly or indirectly, identify another businessman or businessmen's products under the following conditions:

1. only if the comparison is not misleading;
2. relates to products that correspond to the same need or are intended for the same purpose;
3. mentions in an objective manner substantially, relevant, verifiable and characteristic properties of the products;
4. does not involve confusion between the businessperson and another businessperson or between their products, trademarks, business names or other characteristic signs;
5. does not discredit nor is derogatory of another businessman's operations, circumstances, products, trademarks, business name or other characteristic signs;
6. does not take unfair advantage of the reputation of another businessman's trademark, business name or characteristic sign or the designation of origin of the goods; and

³¹ *Id.* § 6.

³² *Id.* § 7.

³³ § 8 Marknadsföringslagen (SFS 1995:450).

7. does not present a product as an imitation or copy of a product that has a protected trademark or business name.

The second major piece of consumer protection legislation is the Product Safety Act. Its objective is to “ensure that goods and services that are provided to consumers do not cause personal injury.”³⁴ The Act outlines criteria for what makes a product safe, but of particular importance here is the information the tradesman must supply to the consumer.

A manufacturer who supplies goods or a tradesman who provides a service shall provide such safety information as is necessary for a consumer to be able to assess the risks of the goods or service and protect himself against these risks. Any manufacturer who has supplied dangerous goods or tradesman who has provided a dangerous service shall without delay provide information about the risk of injury and how it can be avoided, if it is necessary to prevent the occurrence of an accident. The information shall be provided to the persons possessing the goods or for whom the service has been performed or who possess the property to which the service refers.

The information shall be provided in such a way that it may be assumed to come to the knowledge of the relevant persons, through direct notifications, advertisements or other presentations that the tradesman uses in his marketing. The information shall be provided to the extent that is reasonably necessary to prevent the occurrence of an accident. As with the Marketing Act, this Act also gives power to government agencies that can act on behalf of consumers to sanction businesses that do not follow its provisions³⁵

Sweden also has several other consumer protection laws regulating more narrow areas of possible concealment. The Consumer Credit Act “guarantee[s] that the consumer will be informed of the true cost of buying on credit, whether the credit is in the form of a bank loan, installment payments or credit on account. The consumer must be able to compare alternative forms of credit and compare credit to cash payment.”³⁶ The Price Information Act “stipulates that consumers must be provided with clear and correct price information for goods and services, including those in shop

³⁴ § 1 Produktsäkerhetslag (Svensk författningssamling [SFS] 2004:451) (Swed.), *translated in* Product Safety Act, (2004), *available at* <http://www.sweden.gov.se/sb/d/2016/a/33449>.

³⁵ §§ 24-45 Produktsäkerhetslag (SFS 2004:451).

³⁶ *Market Law in Sweden*, *supra* note 17.

windows.”³⁷ In addition, according to the Distant Sales and Door-to-Door Sales Act, “the seller must inform the consumer of this right when the goods are being marketed and when the sales agreement is made.”³⁸

Compared to the American reaction to concealment in market transactions, Sweden is aggressively committed to protecting consumers. By contrast, United States law assumes that consumers either can or should be able to protect themselves adequately in situations when the seller simply does not divulge relevant characteristics of the good or service. Either of these perspectives makes sense dependant on the assumptions citizens make about the intellectual and calculative power of one another. The key question, consequently, is “what is reasonable to assume that a buyer should be able to discover about a good or service prior to purchase?”

IV. China

The window to Chinese attitudes about the proper boundaries of concealment is their legal system’s response to claims made by advertisers. China, the world’s third largest advertising economy,³⁹ is expected to pass Japan to become the second largest advertising economy in the next seven to ten years.⁴⁰ Although a major economic power, China is relatively new to Western-style advertising, and Chinese advertising law has only a few decades of evolutionary history.⁴¹ Consequently, China is in a unique position of possessing a significant market for advertisers worldwide, but with little experience regulating advertisements.

The history of Chinese advertising law demonstrates the magnitude of change advertising law has undergone in China since

³⁷ *Market Law in Sweden*, *supra* note 17.

³⁸ *Id.*

³⁹ Geoffrey A. Fowler, *Agencies Find China Land of Opportunity and Unhappy Clients*, WALL ST. J., Mar. 17, 2006, at B1.

⁴⁰ Ad Note, WALL ST. J., Jan. 25, 2005, at B4.

⁴¹ The first modern law in China concerning advertising was the Provisional Regulations on the Administration of Advertising of 1982, followed by the Regulation on the Control over Advertisements, adopted by the State Council in 1987. This document was later replaced by the Advertisement Law of the People’s Republic of China, adopted by the Standing Committee of the Eighth National People’s Congress in 1994.

the first such law passed in 1982.⁴² The most recently enacted Chinese advertising law incorporates much of the content of the previous two laws, and expands the scope of the law to include issues of access to information regarding advertised products, the inclusion of data and statistical information in advertisements, competition, medical advertisements, and consumer protection.⁴³ This law provides the most direct avenue for making a comparison with U.S. and Swedish attitudes toward the proper boundaries of concealment in market exchanges.

Of particular interest are the striking ideological differences between American and Chinese advertising laws resulting from the heavy influence of Chinese culture and ideology. China's 1994 advertising law states as its purpose: "to protect the legitimate rights and interests of consumers, maintain the socioeconomic order, and enable advertisements to play a positive role in the socialist market economy."⁴⁴ Such a statement by itself tells us little about how such broad abstractions guide behavior in the marketplace.

The Chinese view consumer protection as a human right that would supersede any freedom of speech arguments. Freedom of speech as a right provides muscle for legitimizing the practice of advertising in the United States. The "maintenance of the socioeconomic order"⁴⁵ has no similar counterpart in American law,

⁴² Zhihong Gao, *The Evolution of Chinese Advertising Law: A Historical Review*, 8 ADVERTISING & SOC'Y REV.(2007), <http://muse.jhu.edu/journals/asr/v008/8.1gao.html>.

Gao claims that the development of Chinese advertising law "in the last two decades closely mirrors the contradictions embedded in the Chinese society in its transition from an underdeveloped socialist state to a market economy paired with authoritarian politics." Ideologically, according to Gao, China is influenced primarily by three systems of thought: Marxism-Leninism, liberalism, and Confucianism. "Confucianism has become "the residual," socialism "the selective tradition," and capitalism "the emergent," element of Chinese culture.

After the Mao regime's antagonism towards capitalism had faded, China began experimenting with market-oriented approaches in the 1970's. The country has since developed into (according to the official Chinese position) a "socialist market economy" that in actuality, according to Gao, is "essentially quasi-capitalist in nature."

⁴³ Advertisement Law (promulgated by the Standing Comm. Nat'l People's Cong., Oct. 27, 1994, effective Feb. 1, 1995) (P.R.C), *translation available at* http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383782.htm.

⁴⁴ *Id.*

⁴⁵ *Id.*

and is indicative of the roots of Chinese advertising law. Chinese law contains the mandate for advertising “to play a positive role in the socialist market economy.”⁴⁶ In the U.S. context such a statement of expectations, minus the rhetoric about socialism, would refer to the maximization of individual rights in market transactions. But in China, the same phrases represent recognition that the community is an organism apart from the aggregation of individual desires.

The Advertisement Law is comprehensive, incorporating all aspects of Chinese advertising law, but lacks any clause pertaining to Internet advertising regulation⁴⁷, an omission with increasingly significant ramifications.⁴⁸ The law defines ‘advertisements’ in a manner⁴⁹ that would, *prima facie*, seem to include Internet-related advertisements, but has yet to be implemented as such.⁵⁰

The Advertisement Law contains powerful standards with regard to the truthfulness of advertising claims, significantly more so

⁴⁶ *Id.*

⁴⁷ Xiaohu Ma, *China's Regulation of the Internet and Related Legal Issues*, (2000), <http://www.mofo.com/news/updates/files/update244.html>.

Ma and Deng note that the Advertisement Law of China was promulgated before the introduction (or at least mainstream adoption) of the Internet in China. Advertisers are required under the law to obtain an advertising license and issue invoices to advertising clients (which can only be issued by licensed advertisers). Internet Content Providers (e.g. YouTube) should theoretically be licensed and issue invoices to clients, but a majority of domestic Internet Content Providers are currently not required to do so. Ma and Deng reference the prediction by “Chinese legal experts” that a new set of internet advertising regulations will be introduced soon, but this remains unclear.

⁴⁸ Will Knight, *Google Mirror Beats Great Firewall of China*, NEW SCIENTIST ONLINE, Sept.6 2002, <http://www.newscientist.com/article/dn2768-google-mirror-beats-great-firewall-of-china.html>.

Google has been blocked inside China since the 1st of September 2002, along with several other websites, including the BBC website and other search engines. Although no legislation exists in China regarding the blocking of internet websites, the national government has made it a policy to restrict internet access to certain websites from other countries as well as domestically-hosted websites.

⁴⁹ Advertisement Law (P.R.C.), art. 2.

“The “advertisements” as used in this Law refer to commercial advertisements, for which a commodity producer or dealer or service provider pays, and by which the same, through certain media or forms, directly or indirectly introduces his commodities to be sold or services to be provided.”

⁵⁰ Ma & Deng, *supra* note 47.

than American standards.⁵¹ Of particular note is the requirement of an advertisement to comply "with the requirements for socialist cultural and ideological development." Americans might take for granted the individualistic theme of advertising in the U.S., but in China the themes, expressions, and possible interpretations from within the Chinese cultural context are quite different.

In another example of the differences between Chinese and American advertising norms, Article 7 reasserts the importance of consumer protection, social stability, and State interests.⁵² A more comprehensive explication of consumer protection can be found in the revised Product Quality Law.⁵³

⁵¹ Advertisement Law (P.R.C.), art. 3.

"Article 3: An advertisement shall be factually true, lawful and in compliance with the requirements for socialist cultural and ideological development. Article 4: An advertisement shall not contain any false information, and shall not cheat or mislead consumers. Article 5: ... and adhere to the principles of fairness, honesty, and credibility."

⁵² *Id.* art. 7.

"Article 7: The contents of an advertisement shall be conducive to the physical and mental health of the people, shall promote the quality of commodities and services, protect the legitimate rights and interests of consumers, be in compliance with social morality and professional ethics, and safeguard the dignity and interests of the State."

⁵³ Product Quality Law (promulgated by the Standing Comm. Nat'l People's Cong., Feb. 22, 1994, effective Sep. 1, 1993) (P.R.C.), *translation available at* http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383813.htm.

An official purpose of the Product Quality Law is "protecting the legitimate rights and interests of consumers and safeguarding the socio-economic order." This has no analog in American law, and as such provides a unique insight into the structure of the Chinese advertising system. "Consumers have the right to make inquiries to producers and sellers about the product quality; and to make complaints to the supervisory departments for product quality, the administrative departments for industry and commerce and relevant departments. The departments which accept the complaints shall be responsible for handling."

The Chinese have taken a proactive approach to consumer protection with the Product Quality Law. Rather than requiring that individual consumers take action against corporations individually or through class action suits, China has designed a governmental system to handle product quality assurance and consumer rights. The legal system of the U.S. assumes the consumer to have access to perfect (or near perfect) access to information, to be rational, and be able to leverage the necessary legal force to obtain compensation for faulty/harmful products from the producer.

China does not share this assumption of the rational, perfectly informed consumer.

Perhaps one of the more surprising aspects of advertising in China for foreign companies is the extent to which Chinese traditional custom and communitarian values shape the Chinese public's acceptance/rejection of advertisements. The role of the national government in regulating advertisements is quite often augmented by public outcry at foreign advertisements that fail to correctly compensate for Chinese culture norms. Many foreign companies have been forced to pull advertisements and even their products from Chinese markets as a result of insensitive advertising.⁵⁴

However, even when foreign companies take extra precautions to attempt to adapt their commercials to the Chinese culture by naming products after Chinese icons or incorporating aspects of Chinese tradition into advertisements, bridging the cultural gap remains insurmountable.⁵⁵

Instead, Chinese law is structured to provide protection of its citizens based on the very different assumptions that people are not rational all the time, have limited access to product quality information, and rarely possess the financial assets necessary to fund a lawsuit against a major corporation.

⁵⁴ Brian Walsh, *Mixed Messages*, TIME MAGAZINE, Asia ed., Nov. 4, 2002, available at http://www.time.com/time/asia/features/china_cul_rev/advertising.html.

Pizza Hut tried to run a TV commercial in China, adapting a U.S. advertisement for Chinese audiences by using Chinese actors. The commercial featured a classroom of children reporting on the activities of their weekends, with the last student getting so excited recounting his trip to Pizza Hut that he climbed on top of his desk. While such an advertisement would face no cultural or legal obstacles in the U.S., the commercial was prevented from airing by the Chinese Advertising Association (CAA) – the government agency that determines what commercials are allowed to air – because the censors “thought the end was impolite.” Pizza Hut ran the ad with modifications: sans delinquent behavior.

Yahoo was able to sidestep the cultural taboo of overt individualism in a TV commercial, which aired on Chinese TV. The commercial featured a mailman performing his regular duties while doing a ‘funky dance.’ He is arrested for his behavior, but is saved from being locked up in a Beijing mental ward by the ad’s ending that reveals that the mailman is a part of a funky dancing team. “It’s about being kooky, but being kooky in a group.”

⁵⁵ Fengru Li & Nader H. Shooshtari, *Multinational Corporations’ Controversial Ad Campaigns in China*, 8 ADVERTISING & SOC’Y REV. (2007), http://muse.jhu.edu/journals/asr/v008/8.1li_shooshtari.html.

Toyota ran a TV advertisement in China for their new 2004 SUV, “Prado.” Two Chinese characters, 霸道, (pronounced as *ba dao*) were chosen because of their masculine sounding phonetic appeal. The literal translation of *ba dao* is “taking the road in one’s own hand.” The contextual meaning, can be “the mighty

The Advertisement Law itself provides a somewhat mixed set of restrictions regarding what kinds of claims can and cannot be made in advertisements. U.S. advertising laws are silent on many of the issues covered by provisions of the Chinese Advertisement Law on the grounds that such issues are matters for negotiations between buyers and sellers.⁵⁶ Even the inclusion of prominent government officials in an advertisement can be grounds for banning an advertisement.⁵⁷ The combination of sometimes-vague advertising

rule,” “rule by force,” “tyranny,” and “overbearing.” The advertisement showed two Chinese stone lions bowing and saluting to the Toyota SUV with the headline of 霸道,你不得不尊敬, translated into “*ba dao* [The rule by force], you cannot but respect.” The contextual translation of the headline can be interpreted in three ways:

“You can't help but be ruled by Prado's power,”

“The Prado's power will take you over,” or

“You have to admire and respect Prado's supreme quality.”

The *faux pas* did not only carry with it the problem of an arrogant-sounding translation, but also the historical baggage of Chinese-Japanese relations. The Chinese lions (symbols of power and Chinese national pride) bowing and saluting to a conquering Japanese manufactured vehicle elicited ugly reminders of the Second Sino-Japanese War and the Nanking Massacre.

Nike ran an advertisement that was banned due to public outcry, despite the numerous cultural motifs and inclusions of Chinese icons. The spot featured American NBA player LeBron James defeating an elderly Chinese martial arts master, a pair of dragons, and two legendary Chinese goddesses in a simulated videogame. Nike aired the commercial through the China Central Television (CCTV) of Beijing, which immediately resulted in debates on Chinese Internet sites. On December 3, 2004, China's State Administration for Radio, Film and Television banned Nike's commercial stating that the commercial “violates regulations that mandate that all advertisements in China should uphold national dignity and interest and respect the motherland's culture.”

⁵⁶ Advertisement Law, art. 7.

“An advertisement shall not employ or do any of the following things:

1. Use the National Flag, the National Emblem or the National Anthem of the People's Republic of China;
2. Use terms such as "State level," the "highest grade" or "the best";
3. Hinder public order or violate sound social morals;
4. Contain information suggesting pornography, superstition, terror, violence or hideousness;
5. Hinder the protection of environment or natural resources”

⁵⁷ *Advertisers Warned Against Using Chinese Officials to Promote Products*, People's Daily, Sep. 8, 2006, <http://english.peopledaily.com.cn/200609/07/>

restrictions with a strong central Chinese authority creates an advertising environment of heavy restriction and censorship. However, such a system also provides for a great deal more consumer protection than the more liberal American advertising environment, exemplifying the drastic difference in cultural and legal value systems.

Another aspect of China's Advertisement Law that differs significantly from its American counterparts is the requirement for advertisers to provide consumers with all relevant information regarding a product.⁵⁸ This approach to informing prospective buyers is quite different from that found in the U.S. Rather than the default of limited access to information (save individual inquiries from consumers or lawsuits for further information) as is found in American advertisements, Chinese law specifically outlines the legal requirement for advertisers to include all relevant information. Advertisers are also required to cite their sources for statistical data,⁵⁹ a requirement notoriously absent from American advertising laws. This requirement marks a significant departure from American policy because it bars unsupported claims in advertising, even excluding "studies show" as inappropriate.

In yet another striking difference from the American competitive advertising system, direct competition in advertising is forbidden.⁶⁰ However, it is unclear from the text of the Chinese

eng20060907_300595.html.

"It is illegal, as per the Advertisement Law to use representations of the words and images of government leaders being used for commercial promotions. ... The inspection will focus on shopping malls, franchise houses and restaurants that may display words and photos of government officials to underline the credibility of their products and possibly mislead their customers. ... Illegal representations would result in prosecution, said the official."

⁵⁸ Advertisement Law, art. 9.

"Article 9: Where there are statements in an advertisement concerning the performance, place of origin, use, quality, price, producer or manufacturer, term of validity and promise of a commodity, or concerning the items, forms, quality, price and promise of a service, they shall be clear and explicit."

⁵⁹ Advertisement Law, art. 10.

"Article 10: Data, statistical information, results of an investigation or survey, digests and quotations used in an advertisement shall be true to the facts and accurate, and their sources shall be indicated."

⁶⁰ Advertisement Law, art. 12.

Advertisement Law to what extent this restriction on competition through advertising applies. The vague nature of this no-competition clause leaves much unanswered in terms of the allowable types of comparisons among similar products.

Where Chinese advertising law might lack clarity in no-competition regulations compared to U.S. laws, it is aggressively protective of consumer interests with respect to medical advertisements.⁶¹ While American medical ads are fraught with unsupported claims, ambiguous references to "a recent study," and "9 out of 10 doctors recommend," Chinese advertising law requires that advertisements include detailed, accurate, and scientifically sound information regarding medical products. Chinese laws additionally require that no rates of measured efficacy of medicines are included that might mislead consumers of the possibility of a cure.

Of particular note is the restriction that no images of medical research institutions, academic organizations, experts, doctors, or patients can be used in advertisements. It would be rare indeed to find a single American medical advertisement that would meet such a requirement, as personal testimony and authority figures of doctors and medical researchers constitute much of the credibility of American medical advertisements. Chinese advertisers who violate this provision face license revocations.⁶²

"Article 12: An advertisement shall not belittle the commodities of other producers and dealers or the services of other providers."

⁶¹ Advertisement Law, art. 14.

"Article 14: An advertisement for pharmaceuticals and medical equipment and instruments shall not include the following:

1. Unscientific affirmations or guarantees of efficacy;
2. Indications of rates of cure or efficacy;
3. A comparison of efficacy and safety with those of other pharmaceuticals or medical equipment and instruments;
4. Using the name or image of a medical research institution, academic organization, medical institution or of an expert, a doctor or a patient as proof;"

⁶² *China to Ban Products of Firms Posting "Illegal" Medical ads*, China Daily Online, Sept. 4, 2007, http://www.chinadaily.com.cn/bizchina/2007-04/15/content_850743.htm.

The (Chinese) State Food and Drug Administration (SDFA) asked its local administrators to ban the products of medical companies found to post illegal advertisements.

Serious offenders will also be stripped of their advertisement licenses for one

Illustrative of the Chinese antagonism to concealment in advertising is their strong stand against tobacco consumption.⁶³ China's position with respect to tobacco is counter-intuitive from a private profit perspective. China is the world's largest producer of tobacco. Yet, the law's insistence that advertising claims be complete and true is a practical application of its identification of consumer protection as a foundational step toward social welfare.

Yet another example of China's commitment to stymieing efforts by sellers to conceal relevant product information is the legal restriction on advertisements for breast milk substitutes.⁶⁴ This concern for public safety trumps the kinds of freedom of expression arguments that often hold sway in American discourse about regulation of advertising. Consequently, restrictions against

year, said an official with the SFDA. "Some medical manufacturers and retailers violate China's advertising law by providing false information or exaggerating the benefits of their products," the SFDA official said. Some also misled customers with endorsements by self-appointed experts, he said. In March, the SFDA blacklisted seven particularly egregious offenders who continue to post illegal advertisements despite being punished last year. A survey by the SFDA of 466 newspapers and 55 local TV stations from January to November last year uncovered 48,990 illegal advertisements for drug products. *China to Ban Products of Firms Posting "Illegal" Medical Ads*, China Court, Apr. 19, 2007, <http://en.chinacourt.org/public/detail.php?id=4174>.

⁶³ Press Release, World Health Organization, China joins the global war on smoking (2005), available at http://www.wpro.who.int/media_centre/press_releases/pr_20050830.htm.

"China, the world's largest consumer and producer of tobacco, has ratified an international treaty aimed at curbing tobacco-related diseases and deaths. The World Health Organization Framework Convention on Tobacco Control (WHO FCTC) was ratified on Sunday by the Standing Committee of the National People's Congress, Chinese state media reported."

⁶⁴ Vivien Cui, *Curbs Urged on Baby Formula Advertising*, SOUTH CHINA MORNING POST, JUL. 24, 2004, News at 6.

"The mainland should step up enforcement of a ban on advertising and marketing of breast milk substitutes, a Ministry of Health official has said. Commercials using sophisticated advertising techniques were often aired on television to promote breast milk substitutes. The regulations ban the advertising of formula milk for babies younger than six months of age - a period during which the World Health Organization considers a child should only be fed on breast milk. But one Health Ministry official said yesterday manufacturers, especially foreign firms, were still targeting their marketing at parents of younger infants, without explicitly breaking the rules."

concealment in advertising for medical products are increasingly protective of consumers.⁶⁵ When American advertisers attempt in China to use the same persuasive techniques that they use in American advertisements, they often learn the hard way about the relatively strong stance the Chinese take against concealment.⁶⁶

V. Conclusion

When we think of the typical buyer, whom do we envision? Is the consumer the rational actor who understands his or her consistent preferences and can make the calculations about the merits and demerits of alternative purchases on a regular basis? Alternatively, is the consumer often unable to make such decisions on his own behalf because the information needed to make those calculations is incomplete or misleading? Is the consumer an icon of personal responsibility in action or a vulnerable seeker requiring legal assistance if he or she is to register accurate preferences among goods and services?

The answers to these questions are doubtlessly shaped by cultural norms, introspection and observations reflecting almost certainly a very poor sample of the population of consumers. Concealment in the United States is often shielded from regulation by arguments tied to the free speech of the seller and the prescriptive

⁶⁵ *China Proposes New Advertising Regulations to Bad Adverts for Fake Products*, China Economic Net, Mar. 22, 2006, http://en.ce.cn/Industries/Consumen-Industries/200603/22/t20060322_6455441.shtml.

"Medical advertisements about hospitals and medicines are flooding the Chinese media. A government figure says that about 2.5 million Chinese took the wrong medication because of misleading advertising. Luo Yifeng, a leader figure in Beijing Chemical Industry Group Corporation, proposed to set up the Advertising Law on Public Interest to secure enough time for more useful adverts to be shown on TV. "The public service ads could effectively influence the audience, especially at a time when the country is looking to build a harmonious society," said Luo.

⁶⁶ *P&G (China) Again Faces False Advertising Claims*, China Daily, June 29, 2005, available at http://news.xinhuanet.com/english/2005-06/29/content_3150261.htm.

Four Proctor & Gamble (P&G) advertisements were challenged by the Commercial Bureau over exaggerated advertising claims, including the advertisement indicating that "Pantene V shampoo makes hair ten times more resilient than normal" and the SK-II de-wrinkle cream advertisement claiming to be able to "make one 12 years younger."

expectation that consumers should work to unveil the information they need.⁶⁷ Swedish and Chinese law, on the other hand, focuses on the vulnerability of buyers to faulty decisions in market transactions. In the interest of public health and safety, as well as a desire for market transactions to transpire in an atmosphere of abundant, accurate product information, Sweden and China inhibit concealment to a degree almost inconceivable in the United States.

⁶⁷ Dan Dobbs, *THE LAW OF TORTS*, at 348 (West 2001).