

Tracking Developments with Regard to Dark Patterns
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The Federal Trade Commission (FTC) and, to a lesser degree, the Consumer Financial Protection Bureau (CFPB) and the state of California, have increasingly warned advertisers against the use of so-called dark patterns. But where did the term come from, what does it mean and what are the FTC's enforcement intentions with respect to dark patterns?

IN THE BEGINNING

The term dark patterns was conceived in 2010 by an Englishman, Harry Brignull, who received a Ph.D. in cognitive science and is an independent user experience consultant. He currently runs the website darkpatterns.org. Brignull was also a panelist in the dark patterns workshop hosted by the FTC (discussed below). And in perhaps the clearest indication that a dark pattern legal storm is about to break upon consumer marketing, he also advertises his work as an expert witness for "dark patterns and deceptive user experiences in digital products." In 2016, the New York Times published an article about dark patterns called "When Websites Won't Take No for an Answer." Finally, in 2019, Purdue University created a website to discuss dark patterns, an article titled "When Manipulation Is the Digital Business Model" appeared in the Financial Times, and in a study first posted in 2019 and later published in 2021, University of Chicago Professors Luguri and Strahilevitz authored a paper titled "Shining a Light on Dark Patterns."

WHAT IS A DARK PATTERN?

Darkpatterns.org defines dark patterns broadly (and sinisterly) as "tricks used in websites and apps that make you do things that you didn't mean to, like buying or signing up for something." What does this mean in practical terms for advertisers? Several of the practices defined by darkpatterns.org as dark patterns are ones that have long been viewed as unlawful. Dark patterns such as bait and switch, disguised ads, trick questions, and sneak into basket likely describe practices that have always been viewed as violations of Section 5. Other dark patterns seem to describe more traditional marketing techniques, raising the question of whether they too may violate Section 5. Confirmshaming, for example, is defined as the "the act of guiltting the user into opting into something. The option to decline is worded in such a way as to shame the user into compliance." Hidden costs, which are unexpected charges that appear at the last step of the checkout process, are also defined as a dark pattern. There is currently litigation over whether the inclusion of certain costs, such as resort fees, at the end of the checkout process is unlawful, though no regulator to date has suggested that other costs such as "taxes" cannot be disclosed at checkout.

The FTC, to date, has provided similar broadly worded definitions. In a separate statement issued in connection with a proposed settlement of a 2020 Section 5 case, then-Commissioner Chopra defined dark patterns as "design features used to deceive, steer or manipulate users into behavior that is profitable for an online service, but often harmful to users or contrary to their intent" and as digital tricks and traps that "involve an online sleight of hand using visual misdirection, confusing language, hidden alternatives or fake urgency to steer people toward or away from

certain choices.” The following year, while opening the FTC’s Workshop on Dark Patterns, then-acting Chairwoman Slaughter defined dark patterns as “user interface designs that manipulate consumers into taking unintended actions that may not be in their interest.”

The difficulty with such broad definitions is that traditional marketing relies upon manipulation to at least some degree. An advertiser might appeal to our sense of patriotism, to our love of cute puppies or heartwarming, tender moments, or to our preference for one color over another, all with an eye toward persuading us to purchase a product or service. Retailers also might put commonly purchased, discounted items such as diapers at the back of the store, forcing a consumer to walk past a gauntlet of other products in the hope that the consumer will purchase something else they hadn’t otherwise intended to buy. Where is the line between lawful effective marketing and unlawful consumer manipulation? The FTC and other regulators have begun to flesh this out, though much more work remains to be done.

UNLAWFUL DARK PATTERN OR EFFECTIVE MARKETING

The FTC’s 2022 report issued as a follow-up to its April 2021 dark patterns workshop provides at least some insight into what types of dark patterns might attract unwelcome regulatory scrutiny. The report identifies four common categories of dark patterns that the agency believes to be unlawful.

First are **design elements that induce false beliefs**. The agency cites as examples aspects of native advertising, where ads are deceptively formatted to resemble independent editorial content and comparison-shopping sites that appear neutral but are actually pay to play. Also included are false claims of scarcity or countdown timers that are not actually time limited.

The second category is **design elements that hide or delay disclosure of material information**. The commission’s focus here is on hidden fees, drip pricing and related issues. The report states that “companies should include any unavoidable and mandatory fees in the upfront, advertised price, and failure to do so has the potential to deceive consumers.” Companies also should not make people think fees are mandatory when they are not. The report also emphasizes that companies should use caution if they are targeting specific audiences, for example older adults, who could have more difficulty seeing information placed at the periphery of the screen or in a light color, or children, who can also be uniquely affected by dark patterns.

The third category is **design elements that lead to unauthorized charges**. This category focuses on the payment for goods or services that consumers did not want or do not “intend to buy.” Examples here include kid gaming apps, where a green button is the standard button to proceed to the next level but suddenly becomes a “Buy” button. The report suggests that kids who have likely been absent-mindedly pressing that next-level button will be misled into clicking that same button and making an unwanted purchase. Other examples include free trials with inadequately disclosed recurring subscription charges and subscription services that make cancellation challenging. The report emphasizes the need to have express informed consent before charging consumers, and it reminds companies to “not hide key terms of a purchase in a general terms and conditions document or behind hyperlinks, pop-ups, or drop-down menus.”

Finally, the fourth category focuses on privacy – **design elements that obscure or subvert privacy choices**. The report warns businesses to “become good stewards of consumer personal information” and practice data minimization measures. Concerns are raised about default settings that collect, use or share information in a way consumers did not expect. The report also notes that companies should “collect information only when the business has a justified need for collecting the data,” but it cites no precedent for why such a practice is unlawful as long as it is clearly disclosed. The report also emphasizes making choices easy to access and avoiding the need to navigate multiple screens to find or change privacy settings. Finally, concerns are raised about excessive sharing prompts and interfaces that let consumers accept practices with a bold active button but make them “reject” with a muted button.

Perhaps, though, the most concrete way to understand, at least for now, what dark patterns the FTC and other regulators consider unlawful is to look at what practices they have specifically singled out, either through enforcement actions or regulations. The first FTC enforcement action where conduct was deemed a dark pattern was the agency’s 2020 \$10 million settlement with ABCmouse, a children’s online subscription-based learning site. According to the complaint, the company allegedly failed to adequately disclose that its 12-month and 30-day free trial memberships would automatically renew unless cancelled. The complaint also alleged that cancellation was not easy as promised or required. Consumers who tried to cancel through email, phone or customer support were instead directed to the company’s online cancellation mechanism, which the FTC alleged was difficult to find and not clearly marked. Further, consumers trying to cancel had to first navigate six to nine screens, many with links that would take consumers out of the cancellation path, and many of which also offered consumers inadequate information regarding how to continue the cancellation process. In a separate statement accompanying the settlement, then-FTC Commissioner Chopra labeled these practices dark patterns and likened the company’s practices to the “roach motel” dark pattern, where it is easy to get in but almost impossible to escape.

In 2021, California adopted a new regulation for the California Consumer Privacy Protection Act (CCPA) that prohibits the use of certain dark patterns. (Although the regulation does not specifically mention dark patterns, the California attorney general, in a press release, noted that the regulation bans “so-called ‘dark patterns’ that delay or obscure the process for opting out”) The regulation prohibits businesses from using an opt-out method “that is designed with the purpose or has the substantial effect of subverting or impairing a consumer’s choice to opt-out.” The regulation then provides the following illustrative examples:

- (1) The business’s process for submitting a request to opt out shall not require more steps than that business’s process for a consumer to opt in to the sale of personal information after having previously opted out. The number of steps for submitting a request to opt out is measured from when the consumer clicks on the “Do Not Sell My Personal Information” link to completion of the request. The number of steps for submitting a request to opt in to the sale of personal information is measured from the first indication by the consumer to the business of their interest to opt in to completion of the request.
- (2) A business shall not use confusing language, such as double negatives (e.g., “Don’t Not Sell My Personal Information”), when providing consumers the choice to opt out.

- (3) Except as permitted by these regulations, a business shall not require consumers to click through or listen to reasons why they should not submit a request to opt out before confirming their request.
- (4) The business's process for submitting a request to opt out shall not require the consumer to provide personal information that is not necessary to implement the request.
- (5) Upon clicking the "Do Not Sell My Personal Information" link, the business shall not require the consumer to search or scroll through the text of a privacy policy or similar document or webpage to locate the mechanism for submitting a request to opt out.

Additional draft provisions released in 2022 by the California Privacy Protection Agency specifically mention dark patterns and create additional restrictions regarding dark patterns, which are defined as a web or digital interface that "has the effect of substantially subverting or impairing user autonomy, decision-making, or choice, regardless of the business's intent." Under the proposed regulations methods for submitting CCPA requests and obtaining consumer consent must incorporate the following five principles:

- (1) Methods shall use language that is easy for consumers to read and understand.
- (2) Methods shall provide symmetry in choice. In other words, "the path for a consumer to exercise a more privacy-protective option shall not be longer than the path to exercise a less privacy-protective option."
- (3) Avoid the use of language or interactive elements that are confusing, such as double negatives.
- (4) Avoid manipulative language or choice architecture; for example, do not guilt or shame a consumer into making a particular choice or bundle consents so as to subvert a consumer's choice.
- (5) Choices should be easy to execute without unnecessary burdens or friction.

Finally, several more regulatory actions followed in 2022. First, the CFPB brought an enforcement action against a credit score company, alleging the use of an array of dark patterns to trick people into recurring payments and to make it harder to cancel such payments. These allegedly included the use of deceptive buttons that gave the impression that a consumer was accessing free content when in fact clicking the button signed the consumer up for a recurring monthly charge. In addition, disclosure of the recurring charge was inside a hard-to-find disclosure that took up to 30 seconds longer to load than the rest of the information on the page. Finally, the CFPB said that cancellation was made difficult through "clever uses of font and color," i.e., by using a large font in a bright-yellow box to take the consumer out of the cancellation process and using a small font in light blue to continue the cancellation process.

The FTC subsequently brought an enforcement action against Credit Karma, alleging that the company had used dark patterns that misrepresented that consumers were preapproved for credit

card offers. The FTC noted that the company's A/B testing had confirmed that consumers were more likely to click on offers stating that they were preapproved and that the subsequent use of such language tricked consumers into taking actions that benefitted the company but harmed consumers.

Finally, toward the end of 2022, the CFPB filed an additional dark pattern enforcement action. The case involved an online event registration company and allegations that it utilized dark patterns to trick consumers into inadvertently signing up for a paid membership club. According to the complaint, the company presented consumers with an "Accept" button, which many thought indicated their acceptance of the fee to register and participate in the event when, in actuality, they were consenting to enrollment in the membership club.

Look for additional regulatory actions and guidance in the coming months to further flesh out what type of marketing techniques constitute unlawful dark patterns.