

Dark Patterns: Trends and Developments

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An Article highlighting the increased regulatory scrutiny of the use of dark patterns as a deceptive, abusive, and unfair trade practice in online transactions and marketing. This Article discusses the definition of dark patterns and developments in enforcement activities against dark patterns.

When does a clever digital design become deception? In response to hypercompetitive online markets, businesses have developed savvy ways of presenting offers to customers, in an effort to increase the desirability of products and reduce, as much as possible, any friction or impediments to completing a sale. These strategies take many familiar forms, including but by no means limited to:

- Targeted ads.
- Suggested add-ons based on shopping history.
- Free trial periods automatically converting to paid subscriptions, automatic billing absent cancellation, and other similar negative option programs.

These techniques are not inherently illegal, provided customers have the information needed to make an informed choice and the option to refuse. However, online user experiences that result in or rely on consumer deception to benefit a business are coming under increased legal scrutiny based on the concept of dark patterns.

Businesses need to learn how to identify dark patterns and refrain from using them in their digital spaces to avoid liability for deceptive, abusive, and unfair trade practices.

Defining Dark Patterns

Origins

Harry Brignull, a PhD in Cognitive Science and expert on dark patterns, first coined the term “dark patterns” in 2010. Dr. Brignull describes dark patterns 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.” ([Dark Patterns: What are Dark Patterns?.](#))

According to Dr. Brignull, dark patterns include tactics like:

- Trick questions.
- Adding items to a cart through an “opt-out” function.
- Deceiving consumers into giving personal information.
- Misdirection.
- Shaming consumers into consent.

([Dark Patterns: Types of Dark Patterns.](#))

Federal Trade Commission

The Federal Trade Commission (FTC) recently commented on dark patterns in an enforcement action and held a workshop focusing on the effects of dark patterns on consumers.

When the FTC announced its settlement with Age of Learning in September 2020, then-FTC Commissioner Rohit Chopra issued a separate statement specifically to address illegal dark patterns. Relying heavily on Dr. Brignull’s work, the statement defines 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.” Further calling out dark patterns as “digital tricks and traps,” Chopra’s statement gives common examples of:

- Dark pattern tricks, including “using buttons with the same style but different language, a checkbox with double negative language, disguised ads, or time pressure designed to dupe users into clicking, subscribing, consenting, or buying.”
- Dark pattern traps, including, “forced continuity programs that make it difficult to cancel charges, trick



questions to frustrate user choice, or through free trials that automatically convert into paid memberships.”

(See [FTC: Statement of Commissioner Chopra, Regarding Dark Patterns in the Matter of Age of Learning, Inc., Commission File Number 1723186 \(September 2, 2020\)](#).)

For more on the Age of Learning enforcement action, see [Age of Learning \(ABCmouse\)](#).

The FTC subsequently hosted a workshop on dark patterns in 2021, “Bringing Dark Patterns to Light” (Dark Patterns Workshop). At the Dark Patterns Workshop, Dr. Arunesh Mathur, a post-doctoral research fellow at the Center for Information Technology Policy at Princeton University, discussed six main taxonomies of dark patterns and gave examples, many of which are familiar to online consumers:

- **Deceptive.** For example, a countdown timer on a website that falsely implies that customers have a limited time to receive an offer.
- **Information Hiding.** For example, charging a fee that is not adequately disclosed to consumers or waiting to disclose a fee until a consumer is far into the transaction process.
- **Asymmetric.** For example, a consent dialogue box that pops up and is readily available while the deny button is hidden.
- **Covert.** For example, a pop-up offering a discount that requires consumers to enter their email address but then asks for a telephone number as well, leading consumers to believe entering a telephone number is required.
- **Differential Treatment.** For example, a “free” game that requires users to make purchases to progress, thereby treating paying players differently than those who do not make purchases.
- **Restrictive.** For example, requiring consumers to agree to receive marketing emails when accepting the terms and conditions of a website to access the website.

For more information, see [FTC: Presentation of Arunesh Mathur, Bringing Dark Patterns to Light: An FTC Workshop \(April 29, 2021\)](#).

Enforcement Based on Dark Patterns

Although the term dark patterns is relatively novel in legal actions, legal theories of enforcement or litigation based on dark patterns are most likely to center around well-tread themes like:

- Lack of consent.
- Inadequate disclosure.
- Lack of opportunity to avoid a charge.
- Overly burdensome methods of cancelling recurring charges.

For example, one of the defining characteristics of a dark pattern is that it tricks users into doing something they did not want to do, like agreeing to pay a recurring fee or providing unnecessary personal information. The logical extension of this phenomenon is that a consumer has not consented to a transaction, has instead been deceived, and the transaction is therefore unauthorized.

Federal Enforcement

Age of Learning (ABCMouse)

In 2020, the FTC settled with Age of Learning (d/b/a ABCmouse) alleging that it operated a deceptive negative option program between 2015 and 2018. Although neither the complaint nor the FTC’s press release regarding the settlement referred to ABCmouse’s practices as dark patterns, Chopra’s separate statement made clear that this complaint was motivated by what the FTC considered to be illegal dark patterns.

The FTC alleged that ABCmouse’s actions violated both the FTC Act and the Restore Online Shoppers’ Confidence Act (ROSCA) by:

- Failing to adequately disclose that its 12-month memberships would automatically renew indefinitely.
- Failing to disclose that extensions on 30-day free trial memberships at reduced rates would automatically renew indefinitely.
- Advertising “easy cancellation,” but creating a myriad of procedural hurdles to prevent cancellation.
- Embedding pitfalls in the cancellation process to mislead customers into extending their memberships, as opposed to cancelling them.

Chopra described these practices as a “roach motel,” a term Dr. Brignull also uses, where it was easy for consumers to subscribe but virtually impossible to cancel. Chopra stated that ABCmouse’s use of illegal dark patterns constituted “tricks to lure families into signing up for its service, and traps to prevent them from cancelling.” (See [FTC: Statement of Commissioner Chopra, Regarding Dark Patterns in the Matter of Age of Learning, Inc., Commission File Number 1723186 \(September 2, 2020\)](#).)

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In addition to imposing a \$10 million judgment against ABCmouse, the consent order requires ABCmouse to:

- Disclose important information to consumers when it offers negative option plans clearly, conspicuously, and immediately adjacent to any representation that a negative option feature is being offered on a free, trial, no obligation, or similar basis, including:
 - what affirmative steps a consumer must take to avoid additional charges;
 - the total charges or frequency of charges unless a customer takes affirmative action; and
 - the deadline by which the action must be taken.
- Disclose anywhere it attempts to obtain billing information a simple cancellation mechanism to stop recurring charges and any fees associated with cancellation.
- Immediately send a written confirmation of any online order by email repeating all the required disclosures, or send the same by mail within two days of telephone or mail-in orders.
- Put in place specific informed consent procedures for any negative option offers, including for:
 - all written offers, obtaining consent through a check box, signature, or similar method, which requires a consumer to expressly accept any negative option feature; and
 - oral offers, disclosures must be made before obtaining billing information, consumers must verbally affirm their understanding of the negative option feature, and ABCmouse must maintain unedited voice recordings of the entire transaction for three years.

FTC Enforcement Policy Statement on Negative Option Marketing

The FTC recently announced a new enforcement policy intended to address dark patterns in negative option programs (Enforcement Policy Statement) (see [FTC: Enforcement Policy Statement Regarding Negative Option Marketing](#)). In its announcement of the Enforcement Policy Statement, the FTC stated that dark patterns are deceptive or unfair trade practices and those related to the marketing and operation of negative option programs in particular are already subject to enforcement authority provided under:

- Section 5 of the FTC Act (15 U.S.C. § 45(a)).
- ROSCA (15 U.S.C. §§ 8401 to 8405).

- The Telemarketing Sales Rule (16 C.F.R. §§ 310.1 to 310.9).
- The Rule on the Use of Prenotification Negative Option Plans (16 C.F.R. § 425.1).
- The Electronic Fund Transfer Act (15 U.S.C. §§ 1693 to 1693r).
- The Postal Reorganization Act (39 U.S.C. § 3009).

For more information, see [FTC: Press Release: FTC to Ramp up Enforcement against Illegal Dark Patterns that Trick or Trap Consumers into Subscriptions \(October 28, 2021\)](#) and [FTC: Enforcement Policy Statement Regarding Negative Option Marketing](#).

Several of these enforcement authorities may be also used generally against online dark patterns. See [FTC: Statement of Commissioner Chopra, Regarding Dark Patterns in the Matter of Age of Learning, Inc., Commission File Number 1723186 \(September 2, 2020\)](#).

In addition, given newly confirmed Consumer Financial Protection Bureau (CFPB) Director Rohit Chopra's previous statements while at the FTC, it is likely the CFPB will take a similar stance against dark patterns including using the agency's "abusiveness" tool.

The Enforcement Policy Statement focuses on addressing the tricks and traps of dark patterns, advising businesses to:

- **Make clear and conspicuous disclosures.** Businesses must provide all material terms of the offer clearly and conspicuously, including displaying the terms upfront when consumers first see the offer and as prominently as the offer.
- **Obtain informed consumer consent.** Businesses must obtain consumers' express informed consent before charging them, including:
 - obtaining consumer acceptance of the negative option feature separately from other parts of the entire transaction; and
 - refraining from practices that interfere with or undermine consumers' ability to provide informed consent.
- **Provide easy cancellation methods.** Businesses must provide an easy way for consumers to cancel a negative option program.

(See [FTC: Enforcement Policy Statement Regarding Negative Option Marketing](#).)

State Enforcement and Private Actions

State attorneys general have also begun to scrutinize dark patterns under state consumer protection laws. For example, the District of Columbia Attorney General has sued Instacart for charging consumers deceptive service fees (see [District of Columbia Office of the Attorney General: Press Release: AG Racine Sues Instacart for Charging District Consumers Millions in Deceptive Service Fees, Not Paying Sales Tax \(August 27, 2020\)](#)).

In 2021, the California Attorney General announced modified regulations under the California Consumer Privacy Act (CCPA) that ban the use of dark patterns to subvert or impair the right of consumers to opt out of the sale of their personal information (see [California Office of the Attorney General: Press Release: Attorney General Becerra Announces Approval of Additional Regulations That Empower Data Privacy Under the California Consumer Privacy Act \(March 15, 2021\)](#)). The regulation gives specific examples of the dark patterns it bans regarding the consumer right to opt out of the sale of their personal information, including:

- Requiring a consumer to complete more steps in the opt-out request process than the number of steps needed for a consumer to opt back into the sale of personal information after previously opting out.
- Using confusing language (for example, using double-negatives like “Don’t Not Sell My Personal Information”).
- Requiring consumers to click through or listen to reasons why they should not submit a request to opt-out before confirming their request.
- Requiring consumers to provide personal information that is unnecessary to implement an opt-out request.
- After clicking the “Do Not Sell My Personal Information” link, requiring consumers to search or scroll through a privacy policy or similar text to locate the mechanism for submitting the opt-out request.

(Cal. Code Regs. tit. 11, § 999.315(h).) For more information on the CCPA, see [Practice Note, Understanding the California Consumer Privacy Act \(CCPA\) and the California Privacy Rights Act \(CPRA\)](#).

In addition, private consumer class actions have already begun accusing businesses of employing dark patterns to deceive consumers or invoking dark patterns to claim consumers have not consented to arbitration agreements. For more information, see:

- Complaint, *Rattner v. Tribe App, Inc.*, 2017 WL 6764354 (S.D. Fla. April 10, 2017).

- Complaint, *Farmer v. Airbnb, Inc.*, 2020 WL 6591432 (N.D. Cal. Nov. 5, 2020).
- Complaint, *Nichols v. Noom, Inc.*, 2021 WL 621079 (S.D.N.Y. Jan. 29, 2021).
- Opinion, *Oberstein v. Live Nation Ent.*, 2021 WL 4772885 (C.D. Cal. Sept. 20, 2021).

National Advertising Division

In November 2021, the National Advertising Division (NAD) responded to the FTC’s increased scrutiny of dark patterns by providing an even faster lane for disclosure issues under its Fast-Track SWIFT challenge submission process. NAD designed this expedited lane specifically to address the prominence and sufficiency of disclosures related to dark patterns as well as consumer reviews and influencer marketing. The NAD hopes the streamlined and less expensive process encourages challenges in this area with the goal of “restor[ing] consumer trust in the online marketplace.” (See [BBBNP: Press Release, BBB National Programs National Advertising Division Launches Expedited Fast-Track SWIFT Lane Designed to Address Misleading Advertising Disclosures \(November 9, 2021\)](#).)

Businesses should therefore expect to see an increase in NAD challenges related to dark patterns. For more information on the NAD and the Fast-Track SWIFT process, see [Practice Note, Advertising Self-Regulation in the US: Overview: NAD](#).

Next Steps for Businesses

The Dark Patterns Workshop and the Enforcement Policy Statement have sent out a clear signal that the FTC intends to focus its enforcement activities on dark patterns. As a result, businesses should keep apprised of any FTC guidance and enforcement activities involving dark patterns, as well as guidance from (and enforcement activities by) state consumer protection agencies. Finally, NAD challenges focusing on dark patterns will also be a resource for identifying trends and potential vulnerabilities.

Businesses should evaluate their own online advertising practices and user experiences, making changes as necessary to address potential dark patterns and avoiding practices that are already recognized as dark patterns.

Three main areas for review are:

- **User Interface and Experience.** Businesses should ensure that their websites are easy-to-use and customer friendly, including clear and conspicuous disclosures.

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All navigation elements, disclosures, and purchase information, including subscription enrollments and fees, should be prominently and clearly displayed, in readable print and without unnecessary distractions or obstacles. Finding information, such as how to cancel an order, should be easy, and links should be described accurately. Businesses should avoid pre-clicked options for subscriptions and upgrades. Further, purchasing screens should contain all important and relevant information in a single screen so that customers can see all the terms of their purchase before buying.

- **Personal Information Practices.** When collecting personal information, businesses should clearly disclose what information is being collected from the customer, whether providing the information is required or optional, what benefit the customer will receive, and what will be done with that information.
- **Identifying Advertising.** Businesses should clearly disclose or indicate what content on their websites or

in their emails is advertising. Endorsements, including those from customers, should include all necessary disclosures clearly and conspicuously to avoid being deceptive.

Businesses should consult the FTC's guidance for help in avoiding these and other issues, such as its [.com Disclosures: How to Make Effective Disclosures in Digital Advertising](#).

Although the increased attention from regulators means that enforcement actions based on allegations of deceptive dark patterns are more likely, it remains to be seen whether previously legal practices will become illegal. While the law develops, businesses designing innovative ways to connect with online consumers should illuminate their customers' experience with clear disclosures, easily accessible information, and strong consent mechanisms.

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