

Dark Patterns: A New Legal Standard or Just a Catchy Name? (Part Two)

Paul L. Singer

February 2, 2022



In [Part One](#) of this discussion, we provided background on the concept of dark patterns and analyzed some recent examples from State AG enforcement. We concluded that, in alleging dark patterns, State AGs are building primarily on existing precedent governing deception and unfairness but also are trying to push the envelope. Whereas earlier precedent mostly focused on false and hidden information, some of the State’s current allegations lean more towards coercion and the impairment of voluntary action.

In this post (Part Two), we examine the FTC’s approach to this issue, now and in the past. Here, we conclude that, despite the new terminology, the practices that comprise today’s dark patterns have been core elements of FTC law and policy for years. So far – and we emphasize *so far* – dark patterns is a catchy (and catch-all) name for a variety of longstanding and well-known practices that trick people into making choices that they would not otherwise make.

Dark Patterns Today

During the last year, the main actions the FTC has taken on dark patterns were to (1) hold a [workshop](#) on the topic (2) issue a [policy statement](#) on their use in negative option marketing, and (3) announce that the FTC’s planned [rulemaking](#) on “surveillance-based business models” will address dark patterns.

The workshop identified a range of conduct classified as dark patterns, some of which is classic deception (e.g., not disclosing up-front fees) and some of which would be more of a stretch under existing law (e.g., language denigrating a particular choice, like “no thanks, I don’t want to save money.”) As of this writing, the FTC hasn’t issued a report on the workshop and hasn’t announced any cases challenging practices in the “stretch” category.

Meanwhile, the policy statement on negative option marketing (described in the FTC’s press release as part of a “ramp up” on dark patterns) is largely a summary of prior cases based on the FTC Act, the Restore Online Confidence Act, the Telemarketing Sales Rule, and other laws and rules. The extensive precedent it cites – which includes dozens of cases addressing misleading or hidden disclosures, as well as burdensome cancellation and refund procedures – demonstrates the FTC’s long track record of addressing dark patterns, by whatever name.

Finally, the rulemaking to address “surveillance” and dark patterns has not yet been initiated.

Dark Patterns of Yesteryear

A trip down memory lane reveals an abundance of other FTC actions (beyond negative option marketing) to address the tricks and obfuscation now known as “dark patterns.” Here are just some of them:

- **Bait and Switch Guides.** First promulgated in 1967, these guides interpret how Section 5 applies to advertising that “baits” consumers with an “an alluring but insincere offer” in order to sell something else, typically at a higher price or on less favorable terms for the consumer. The guides identify as illegal a range of practices that steer consumers to the less desirable option – including disparagement of the advertised product, the refusal to take orders for it, and difficulties and delays in providing refunds for it.
- **CAN-SPAM Act/Rule:** This Act and Rule from the early 2000s prohibit deceptive email header information, which tricks consumers into opening the email, and requires senders to provide recipients with a simple way to opt out of future emails.
- **“Clear and Conspicuous” Requirement:** This requirement, which has appeared (in some form) in FTC rules and orders for decades, is designed to ensure that important disclosures (including mechanisms for obtaining consumer consent) aren’t hidden or drowned out by more prominent advertising claims or confusing text. It requires, among other things, that such disclosures, “by size, contrast, location, [and] length of time it appears” stand out from accompanying text so they are “easily noticed, read, and understood.” Also, the disclosures can’t be contradicted by anything else in the communication.
- **Ticketmaster case:** In this 2010 case against a leading ticket seller, the FTC alleged that the company used bait and switch ads, combined with a deceptive website interface, to cause buyers to click on a link taking them to an affiliated ticket reseller that charged higher prices.
- **In app purchase cases:** In a series of cases against Apple, Google, and Amazon in 2014, the FTC alleged that the app stores (1) offered “free” games to kids that included incentives for them to make in-app purchases, but (2) failed to disclose to parents that by entering a password, they were authorizing unlimited purchases for a certain time window.
- **Payments MD case:** In this 2015 case against a payment portal, the FTC charged that the portal used a confusing interface and registration system to trick consumers into signing up for a separate service that harvested their private medical information.

Of course, the fact that “dark patterns” aren’t new at the FTC doesn’t mean they’re not important. To the contrary, it means that the FTC’s renewed interest in this area rests on solid precedent and deserves attention. Just as we stated with respect to State efforts here, companies should take extra care in designing their disclosures, purchases flows, cancellation methods, and other communications to steer clear of marketing techniques that cross the line into dark patterns.

We will continue to monitor this issue on both the state and federal fronts and post updates as they occur.

AD LAW ACCESS

Kelley
Drye