

October 1, 2021

"Dark Patterns": The Privacy Hot Topic of 2021

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What is a Dark Pattern?

- "Dark Patterns are tricks used in websites and apps that make you do things you didn't mean to do, like buying or signing up for something." - H. Brignull
- "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." - R. Chopra, FTC.
- "Dark patterns are user interfaces that benefit an online service by leading users into making decisions they might not otherwise make." – A. Narayanan
- "Dark pattern tricks 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." – R. Chopra, FTC.

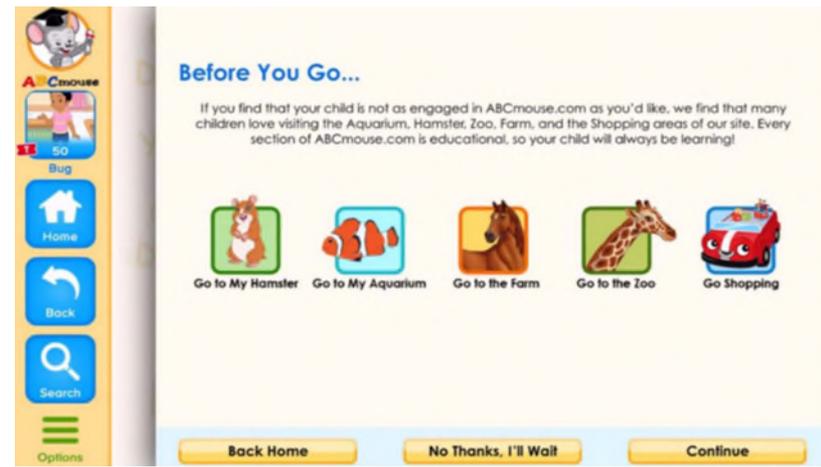
Existing Legal Frameworks

- Section 5 of FTC Act
- State Unfair and Deceptive Practices Acts
- Restore Online Shoppers' Confidence Act ("ROSCA")
- Enforcement
 - ***FTC v. Age of Learning*** (ABC Mouse) (2020) - \$10M settlement for failure to clearly disclose automatic renewal subscriptions, failure to offer a simple cancellation method, user design that confused and attempted to thwart attempts to cancel subscription.
 - ***FTC v. Match.com*** (*pending* 2021) – Match.com sent misleading advertisements to consumers that appeared to be communications from potential love interests that were in fact potentially fraudulent users of Match.com; confusing cancellation process.

What is a Dark Pattern?

Examples

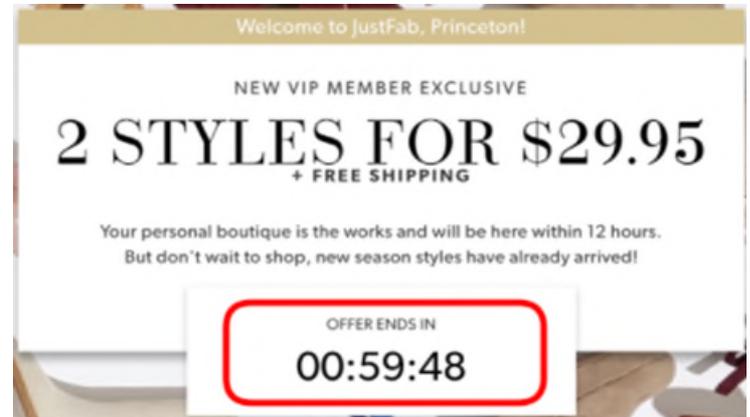
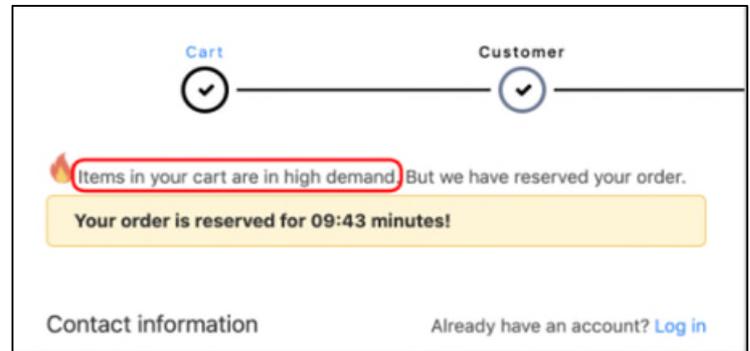
- **Hidden Subscription (i.e., Roach Motel):** You can enter into the agreement easily but it very difficult to cancel.
- **Obstructing Flow of Task:** Making it challenging to cancel or opt-out by concealing or complicating the process (e.g., multiple screens).



On ABC Mouse, users who clicked on any of the links, or the "back home," or "no thanks, I'll wait," links would be removed from the cancellation path.

Examples

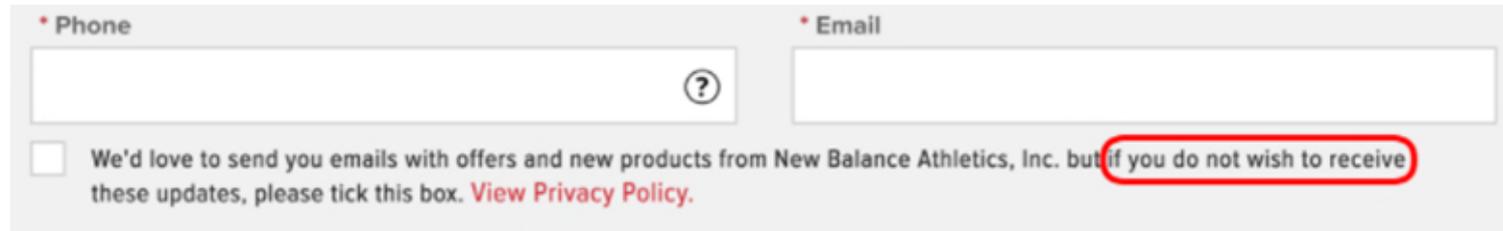
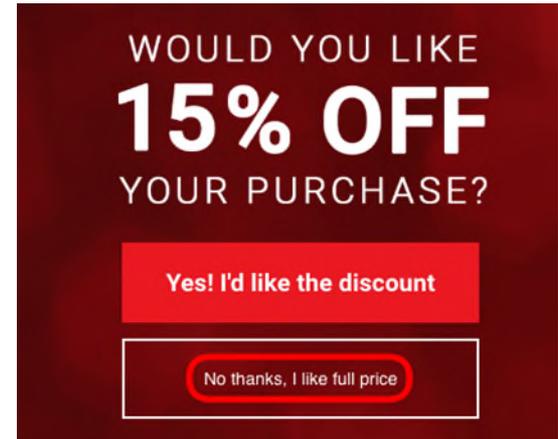
- **Scarcity Bias:** Signaling a product is likely to become unavailable, thereby increasing its desirability
- **Urgency / Countdown Timers:** Countdown timers or other statements about availability of products that are not actually based on availability of the product.



Source: Dark Patterns at Scale, Princeton University

Examples

- **Confirm Shaming:** Guilting a user into opting in. The question is worded to shame the user and to force them to make a statement that causes internal conflict. E.g., “I do not want to save 20% on my order today.
- **Trick questions / Double Negatives:** Confusing language steers customers into making certain choices



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Examples

- **Nudging:** “Nudging” a user’s decision by making one option more prominently displayed or easier to access.
- **Misdirection:** Design purposefully focuses attention on one thing in order to distract from another thing

CONTACT PREFERENCES

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**2021: Dark Patterns
become a "hot topic"**

New State Laws highlight *dark patterns* in context of *consent*

- **California Privacy Rights Act (CPRA)**
 - "***Dark pattern*** means a user interface designed or manipulated with the substantial effect of subverting or impairing user autonomy, decisionmaking, or choice..." Proposition 24, Cal. Civ. Code § 1798.140(l).
 - Agreement obtained through use of dark patterns does not constitute consent. *Id.* at § 1798.140(h).
- **Colorado Privacy Rights Act (CPA)**
 - "***Dark pattern*** means a user interface designed or manipulated with the substantial effect of subverting or impairing user autonomy, decisionmaking, or choice..." Colo. Rev. Stat. § 6-1-1303(9)
 - Agreement obtained through use of dark patterns does not constitute consent. *Id.* § 6-1-1303(5)(c)
- **Washington Privacy Act (*proposed*)**
 - Same.

Regarding requests to opt-out of "sale" of personal data:

*"A business shall not use a method designed with **the purpose or has the substantial effect of subverting or impairing a consumer's decision to opt-out.**" § 999.315(h). Specifically:*

- The process to submit request to opt-out shall not require more steps than the process to opt-in
- Shall not use confusing language, such as double-negatives
- Shall not require consumer to click through or listen to reasons why they should not opt-out
- Shall not require consumer to provide more PI than necessary to implement the opt-out request
- Shall not require the business to search or scroll through text to locate the mechanism to submit a request to opt-out

Bringing Dark Patterns to Light, FTC Virtual Workshop (April 2021).

- FTC sought public comments and brought together researchers, experts and industry stakeholders to discuss key topics, including:
 - how dark patterns differ from sales tactics employed by brick-and-mortar stores;
 - how they affect consumer behavior, including potential harms;
 - whether some groups of consumers are unfairly targeted or are especially vulnerable;
 - what laws, rules, and norms regulate the use of dark patterns; and
 - whether additional rules, standards, or enforcement efforts are needed to protect consumers



Vox

How dark patterns in web design trick you into saying yes

Dark patterns, the tricks websites use to make you say yes, explained. How design can manipulate and coerce you into doing what websites want.

Apr 1, 2021



Reuters

Dark patterns — a new frontier in privacy regulation

Earlier this year, California became the first state to pass consumer privacy legislation banning the use of dark patterns. Last month, Colorado...

Jul 29, 2021



NPR

Dark Patterns User Interface Lure In Online Customers ...

Dark patterns are manipulative, often deceptive strategies that retailers and marketers use. Like you know when you think you're signing up for...

Apr 28, 2021



Digiday

WTF are dark patterns?

WTF are dark patterns? ... A method of manipulating people online is in the midst of a crackdown. Dark patterns pop up all over the digital...

Mar 25, 2021



California bans 'dark patterns' that trick users into giving away their personal data

Strengthening the state's landmark digital privacy legislation

By James Vincent | Mar 16, 2021, 6:28am EDT



Built In

Sadly, Confirmshaming Works. Resist It Anyway.

In the decade-plus since Brignull first identified the issue, dark patterns have grown like an invasive vine — rampant and problematic...

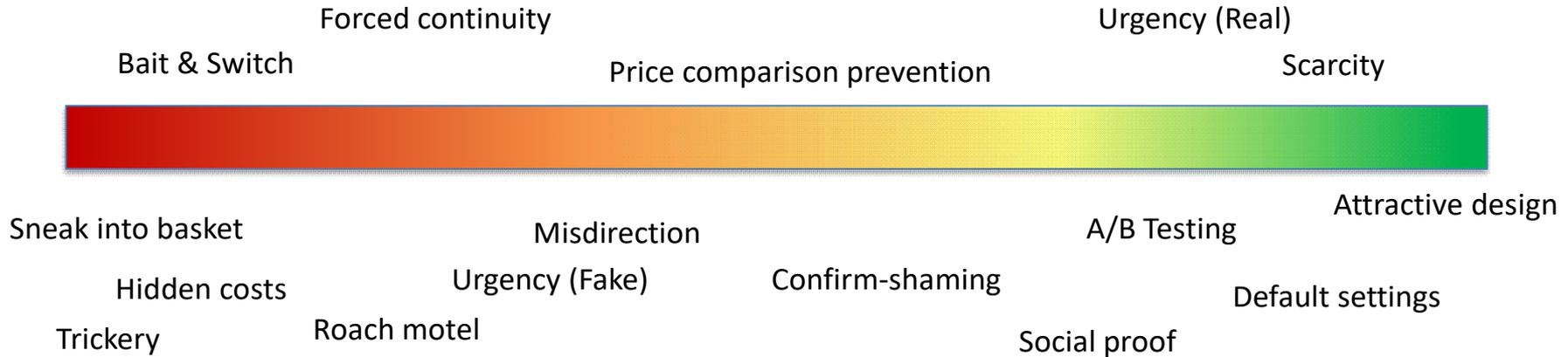
5 days ago



Harms of Dark Patterns

From Deception to Persuasion

- **Dark Patterns cross the spectrum from outright fraud and deception to persuasion and nudging**



- **At what point does persuasion become manipulative? When do standard marketing techniques become deceptive?**

Dark Patterns: Do Not Sell

- **Stanford University Comments re: Do Not Sell Dark Patterns (October 2020)**
 - DNS link sent users to privacy policy rather than DNS form
 - Users had to select a button or toggle without instructions (making it unclear it triggered the DNS form)
 - DNS forms offered only in English
 - Manipulative language/double negatives/confirm-shaming
 - Copious text
- **CCPA Regulations**
 - **October 2020:** 999.315 Requests to Opt-Out clarified to prohibit methods that are "designed with the purpose or has the substantial effect of subverting or impairing" choice to opt-out
 - **December 2020:** Reintroduction of "Opt-Out" Icon

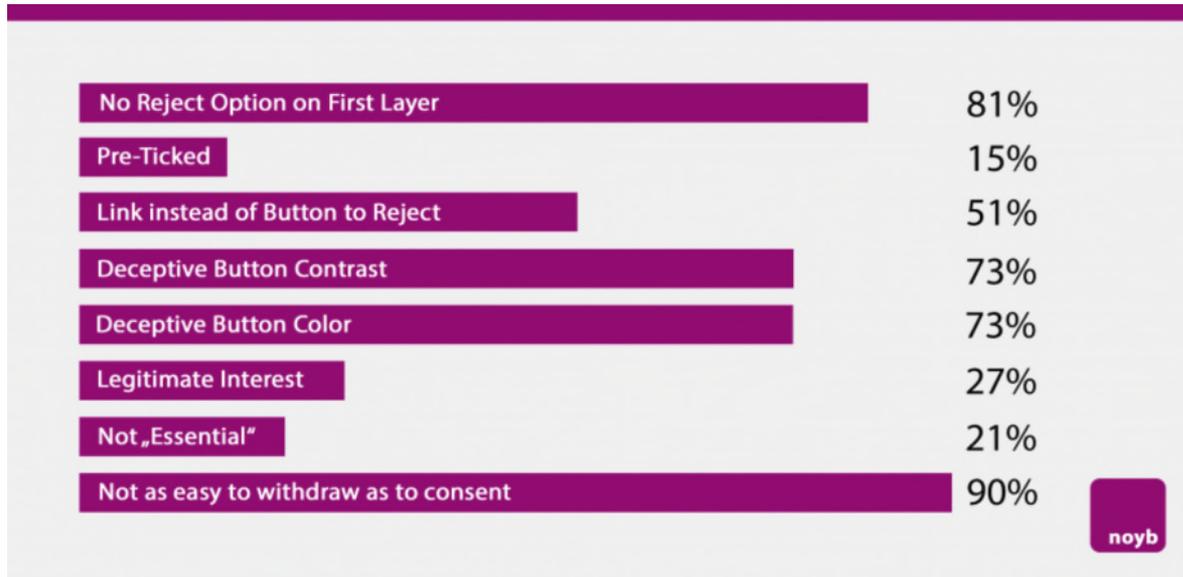


Source: CCPA Regulations

Dark Patterns: Consent

CONSENT

- CPRA/CPA/WPA-like bills
- GDPR: "freely given, specific, informed, unambiguous"
- Cookie banners (ePrivacy)



Source: noyb, noyb aims to end "cookie banner terror" and issues more than 500 GDPR Complaints

Dark Patterns: Nudging

- **Are some nudges beneficial/desirable to consumers?**
 - UK ICO Age Appropriate Design Code
 - encourages the use of “pro-privacy nudges” and nudges “to promote health and wellbeing” (e.g., towards supportive resources or tools such as pause and save buttons) for children.
 - "Pro-social nudges"
- **Is it possible to present options in a neutral way? Or does everything constitute a nudge in one direction?**
 - If so, do businesses need to present options in a way that benefits the consumer (e.g., more protective of privacy)?
- **Could "nudges" evolve to employ personalized "persuasion-profiling"?**

Dark Patterns: Children

DETOUR Act (2019) / SAFE DATA Act (2020)

- Would have made it unlawful for large online operators to, among other things:
 - design, modify, or manipulate a user interface
 - on a website or online service, or portion thereof, **that is directed to an individual under the age of 13, with the purpose or substantial effect of cultivating compulsive usage**, including video auto-play functions initiated without the consent of a user.

Stronger protections for kids?



"We urge the adoption of a broad definition of dark patterns that includes all "nudges" ... that encourage children's continued engagement or purchases."

- Advocacy groups call for FTC to ban dark patterns used on children.
- Specifically, the following tactics:
 - ***Fear of missing out*** – countdown timers, add-on inventory that changes frequently; contributes to impression of exclusivity or luxury.
 - ***Endless treadmill*** – never-ending stream of content available for consumption, convincing kids there is always more to do in a game.
 - ***Microtransactions and in-game currency*** – designed to obfuscate the value of money spent
 - ***A/B testing*** – design testing to optimize algorithms collects additional PI from kids in form of preferences and behaviors
 - **Expose kids to persistent advertising** – carrot and stick tactics (pay to skip ads); native ads and brand integrations (e.g. cross-promote characters)

- Comments of Campaign for a Commercial Free Childhood and the Center for Digital Democracy, May 2021

Guardrails and Best Practices

Clear guardrails:

- ✓ Clear and conspicuous disclosures and consent mechanisms that align with existing laws for subscription autorenewals, free trials, continuity plans
- ✓ Avoid all dark patterns in design of consent frameworks, particularly CCPA/CRPA/CPA consumer rights and opt-outs
- ✓ Avoid clearly deceptive, fraudulent and unfair conduct (bait & switch)

Guidelines for Good Practices

- Consider audience in making design choices – higher scrutiny for child users and decisions that could cause financial harm
- Evaluate the success of designs holistically, emphasizing respect for individuals over short-term metrics
- Consider balance of consumer-to-business benefits. Minimize nudging for choices/activities that have little benefit to consumers
- When in doubt, nudge towards privacy protective option
- Avoid manipulative emotionality (confirm shaming) or things that feel "icky"
- Use A/B testing for good: test to understand how well consumers are making choices, availing themselves of opt-out options, adjusting controls
- Monitor customer service complaints to identify design-based confusion, inadvertent deception or unusual number of complaints

Questions + Contact



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