

“No Thanks, I Don’t Not Want to Read this Article About Dark Patterns”

Q&A with:

- » FairPatterns Founder and CEO **Marie Potel-Saville**
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Whether you’re a consumer or a company in the e-commerce or retail industry, chances are you’re no stranger to “dark patterns.”

Broadly speaking, “dark patterns” are deceptive design practices used by e-commerce platforms to mislead or trick users into actions they did not intend. These practices take various forms, including subscription traps, obstruction techniques, “roach motels,” confirm shaming, trick language, hidden fees, and bait-and-switch tactics. These techniques aim to subvert consumer autonomy and prey on consumers’ cognitive biases, such as fear of missing out (FOMO), urgency, scarcity and trust deception, to prompt impulsive decisions and manipulate user behavior.

As dark patterns’ prevalence grows, the FTC and state regulators are intensifying efforts to combat these deceptive practices and protect consumers from exploitation.

Between the FTC’s Enforcement Policy Statement on Dark Patterns, existing legislation to combat misleading advertising, and new proposed federal rules, it can be challenging to design consumer flows that balance a business’ goal to convert and retain consumers with the need to maintain transparent and ethical practices that comply with the law.

Even more challenging is making the often-nuanced determination of “what is a ‘dark pattern?’” and “what is just advertising that’s designed to encourage a consumer to purchase a product?” After all, isn’t that what marketing is intended to do?

Enter the world of consumer research and actual perception studies – arming attorneys and advisors with the data points to make crucial determinations as to whether a given practice is really a “dark pattern.” FairPatterns Founder and CEO Marie Potel-Saville answers our questions about addressing dark patterns.

Shedding Light on

- How dark patterns differ from acceptable advertising and marketing tactics.
- The growing attention and enforcement actions from the FTC and state regulators against dark patterns.
- The long-term negative impact dark patterns have on business.

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Marie Potel-Saville
FOUNDER and CEO
Fairpatterns

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- Marie Potel-Saville



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Setting the Stage

Based on FairPatterns' extensive dark patterns research, how would you define a dark pattern?

One of the first things that amazed me when I began studying dark patterns in 2018 was the sheer volume of academic research dedicated to this complex topic. To date, there are no less than 16 distinct taxonomies, each with its own definition, one ontology and hundreds of unique names for dark patterns.

After years of in-depth research in FairPatterns Research and Development (R&D) Lab, we've come to believe that the best definition is the one that's easy for everyone to understand. Dr. Harry Brignull, who first introduced the term, describes dark patterns as *"tricks that make you do things you did not mean to."* Unfortunately, we can all recall instances when we've fallen for these tricks online: an enticing green *"I Agree"* button, a seemingly harmless *"free trial"* or a subscription we've tried and failed to cancel.

In your view, does a dark pattern have to be online?

Dark patterns aren't exclusive to the digital world. Consider airports, where you must wind your way through duty-free shops to reach your boarding gate post-security. But there's a key difference: these real-world tricks are easier to spot and avoid. Online, however, dark patterns are built into the interface itself, in the *"choice architecture,"* making them more difficult to identify and resist. Research shows that, even when we know we're being manipulated by dark patterns, they can still influence our behavior. The digital world makes it easier to tailor dark patterns to individual users, enhancing their effectiveness based on past purchases, likes, etc.

But let's be clear: there's a significant difference between persuasive techniques and dark patterns. The former involves influence while the latter is based on manipulation.

Performance & Metrics

How do dark patterns differ from other kinds of persuasive techniques (like follow-up reminders to consumers or traditional marketing pushes such as discount offers)?

Using advertising and marketing to promote products or services is entirely acceptable. But advertising and marketing are identifiable and must not be misleading.

Because users can identify these tactics, they maintain the autonomy to form their own judgment. Dark patterns, on the other hand, alter users' decision-making environment, disrupting their ability to form their own judgment and make independent choices.

Do you think there are particular industries or growth stages of companies where we are seeing dark patterns employed on a more pervasive scale? If so, why?

In our R&D Lab and with our clients, we've noticed that the presence of dark patterns is more about the business model than the industry or stage of growth. They're often found in freemium models, subscription models and double-sided markets in general. There are some sectors where the harm caused by dark patterns is especially severe, such as health, finance, dating and video games.

It's worth noting that platforms are seeking out help to rectify their dark patterns. This is due to a mix of factors. Regulatory measures and enforcement are increasing worldwide. More interestingly, though, these companies are starting to realize that dark patterns are no longer profitable. They result in churn, reduce the customer's lifetime value and ultimately damage the brand's value. The data these businesses have collected themselves demonstrates a need for change.

To change, brands must be motivated by data reassuring them they aren't going to lose customers. Are companies conducting user experience, A/B or other testing to evaluate various techniques' impact on consumer retention or to help scale growth?

It's no secret that A/B testing is a crucial part of the digital design process. Every one of your clients uses it, and for good reason: it's the only surefire way to determine whether pages are doing their job, especially when rolling out a new feature.

We know for a fact some companies have whole teams dedicated to A/B testing key pages to maximize profits. The issue arises when 1) the variations they're testing primarily involve deceptive tactics, or dark patterns, and 2) the goals are purely profit-focused with no regard for whether the user is adequately informed.

That's exactly why enforcement agencies are now requesting A/B testing results during their investigations, as this data has become a key piece of evidence in cases involving dark patterns.

Cultural Impact

Do you think some "dark patterns" are more effective than others? If so, which ones are most problematic or carry the greatest risk of consumer harm?

There are several scientific and academic studies on this issue. Take, for example, the work of Bongard-Blanchy and their team, which evidenced that deceptive techniques, like confirm shaming, have an impact even when users are aware of them.

The harms caused by these techniques are multilayered and extensive. On one hand, we have individual harms that can affect personal autonomy, privacy, and even financial and health status. On the other, we have structural harms, which lessen competition, reinforce dominant positions, and erode trust in brands, markets and the digital economy overall.



While it may be the job of economists to determine which harms are the most severe, it's worth noting that the European Commission has found that dark patterns can physically increase heart rates and induce anxiety. The Organization for Economic Cooperation and Development (OECD) has even suggested that these methods could undermine the belief that a market economy best serves consumers by providing lower prices, choice and innovation.

Does the harm caused by dark patterns vary by demographic?

It's clear that dark patterns hit vulnerable users the hardest. This includes children (who make up a third of the world's internet users), elderly individuals, low-income populations and people with neurodiverse conditions.

It's also important to recognize that in our attention-driven economy, anyone can become vulnerable. Whether we're hurriedly buying a book, anxiously booking a hotel for an idyllic vacation or aimlessly scrolling on our phones, we're all susceptible to these tactics.

Latest Developments

The FTC has issued some very specific guidance in its proposed updates to the Negative Option Rule – in particular, that companies should get consent from consumers before serving them any upsells when they try to cancel. In addition, if a consumer is trying to cancel via phone or chat and hangs up or disconnects, that should be treated as a cancellation. Is this proposed guidance too aggressive and/or unrealistic for the e-commerce industry?

The FTC is sending a loud and clear message: businesses can't claim the guidelines are vague. The severity of the action aligns with the harm caused by dark patterns in subscription traps. Consumers are overspending millions, often without awareness. Businesses cannot rely on trapping consumers in never-ending accounts.

The silver lining is that brands are starting to realize that this shift can have a positive business impact. Omitting dark patterns boosts brand loyalty, increases customer lifetime value and enhances the brand's overall value. Not to mention, it helps avoid legal costs. We still have a way to go, but the signs of change are promising.

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AI algorithms could be used to personalize dark patterns to consumers based on their browsing data. Also, AI can be used to propagate more sophisticated types of dark patterns outside of the user e-comm flow, such as by generating fake reviews, endorsements or testimonials. How are artificial intelligence and machine learning impacting “dark patterns” or making them even more effective?

First, we must talk about anthropomorphism, as it’s one of the most common dark patterns powered by AI. This is when AI is made to seem like it’s a person, even though it’s really just a bot. This can be quite deceptive and manipulative. That’s why the AI Act requires AI-generated content to be clearly labeled, a rule that applies to general-purpose AI systems such as bots.

Next, let’s consider how AI-powered dark patterns can be more “effective.” They can target specific types of users, users in an emotionally vulnerable state or even hyper-personalize content based on browser history or personal data. Imagine so-called “AI-companions” using the thousands of personal data points most of us share online.

Finally, consider dematerialized interfaces, such as connected glasses or a VR headset, with an AI-powered bot whispering in your ear. “You’d look great in this new outfit, and it perfectly matches those shoes you bought last month.”

How are regulators responding?

The new AI Act prohibits AI-powered dark patterns. It’s written in broad terms, designed to cover new forms that we haven’t yet imagined: “employing subliminal, manipulative, or deceptive techniques to distort behavior and impair informed decision-making, causing significant harm.” It also bans AI systems that exploit “vulnerabilities related to age, disability, or socio-economic circumstances to distort behavior, causing significant harm.”

What types of dark patterns or use cases of dark patterns do you think the FTC and other government regulators will continue to focus on?

In both the European Union and the United States, regulators and enforcement agencies are ramping up their efforts to detect and map out dark patterns within their jurisdictions. They’re closely following new research on theories of harm and behavioral insights. We’re also seeing an increase in inter-agency collaboration when it comes to tackling dark patterns. Data protection authorities are teaming up with competition authorities to combat deceptive design and harmful choice architecture.

This approach is logical considering that most dark patterns violate several laws simultaneously: consumer protection, data privacy and sometimes even unfair competition law. This doesn’t consider sector-specific regulations like the EU’s Digital Markets Act (DMA), the Direct Selling Association’s (DSA) consumer protection measures and the AI Act. While there are provisions in place to avoid double penalties (for example, the DSA would only apply to dark patterns if the Unfair Commercial Practices Directive or the GDPR does not), there’s a clear trend toward interdisciplinary collaboration and enforcement.

What can be done?

Moving forward, collaboration will be key to addressing dark patterns issues. This begins with speaking the same language, working together on design and jointly creating practical solutions. Behavioral sciences could help develop this common language: A shared understanding of human judgment, decision-making and the cognitive biases that affect us all.

Armed with insights from neuroscience, the potential for value creation at the intersection of law, design and technology is immense. It paves the way for behavioral-informed regulation and “design for autonomy.”

Additional Resources

About FairPatterns

FairPatterns is an innovation studio established in 2018 to address dark patterns that deceive or manipulate consumers into taking actions against their own interests. FairPatterns develops countermeasures to dark patterns called “fair patterns” - these are interfaces that empower users to make informed, free choices. Its multi-disciplinary team of neuroscience, UX design, plain language and legal advisors provide resources for businesses to assess dark patterns and implement fair patterns.

» Learn more: fairpatterns.com

About Davis+Gilbert

Our [e-commerce and subscription-based practice](#) is a natural outgrowth of the firm’s historic connections to the advertising and retail industries and to the laws surrounding both. Sophisticated marketers in all sectors rely on us to apply those laws to the arenas of digital marketing and social media. We work with subscription-based companies at all stages of growth, providing strategic legal advice to emerging companies as well as established ones, and conduct compliance audits of e-commerce user flows with a practical eye. We work with brands across industries to help them avoid being the regulators’ next target in the field of “dark patterns.”

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