

# DARK PATTERNS: A PROGRESS REPORT

---

WILL RINEHART

CENTER FOR GROWTH AND OPPORTUNITY AT UTAH STATE UNIVERSITY

@WILLRINEHART

# STRUCTURE

---

- A bit of the history of the term and of the FTC
- Is there an Amazon case brewing?
- CGO research
- Concluding thoughts

# DEFINITIONS

---

- The term "dark pattern" was initially coined by London-based designer Harry Brignull in 2010 to bring attention to deceptive user design (UX) techniques.
- Mathur et al. (2019) define dark patterns as UX designs that are “coercing, steering, or deceiving.”
- Philip Hausner and Michael Gertz (2021) fix their understanding of dark patterns to "interface designs that nudge users towards behavior that is against their best interests."
- Luguri and Strahilevitz (2021) claim dark patterns are “user interfaces whose designers knowingly confuse users, make it difficult for users to express their actual preferences, or manipulate users into taking certain actions.”

# THE FTC AND DARK PATTERNS

---

- In April 2021, the FTC held a workshop on dark patterns to explore “which user interfaces can have the effect, intentionally or unintentionally, of obscuring, subverting, or impairing consumer autonomy, decision-making, or choice.”
- In October 2021, the agency released the “Enforcement Policy Statement Regarding Negative Option Marketing.”
- Negative option offers “each contains a term or condition under which the seller may interpret a consumer’s silence or failure to take affirmative action to reject a good or service or to cancel the agreement as acceptance or continuing acceptance of the offer.”

Center for Growth and Opportunity at Utah State University  
**Public Interest Comment on the “Bringing Dark Patterns to  
Light” FTC Workshop**

**Authors:**

William Rinehart<sup>a</sup>  
Caden Rosenbaum<sup>b</sup>  
Amanda Ortega<sup>c</sup>

**Docket ID: FTC-2021-0019**

Submitted: May 28, 2021

The Center for Growth and Opportunity at Utah State University is a research center dedicated to producing ideas that transform lives. We explore the interactions between key institutions — business, government, and civil society — to improve opportunity, broad-based economic growth, and individual well-being. The Center occasionally conducts independent analyses addressing government rulemakings and proposals. This comment is designed to



# THE FTC AND DARK PATTERNS

---

- In April 2021, the FTC held a workshop on dark patterns to explore “which user interfaces can have the effect, intentionally or unintentionally, of obscuring, subverting, or impairing consumer autonomy, decision-making, or choice.”
- In October 2021, the agency released the “Enforcement Policy Statement Regarding Negative Option Marketing.”
- Negative option offers “each contains a term or condition under which the seller may interpret a consumer’s silence or failure to take affirmative action to reject a good or service or to cancel the agreement as acceptance or continuing acceptance of the offer.”

# FTC AUTHORITY

---

- Section 5 of the FTC Act (15 U.S.C. § 45(a))
- The Restore Online Shoppers' Confidence Act ("ROSCA") (15 U.S.C. §§ 8401-8405)
- The Telemarketing Sales Rule (16 C.F.R. Part 310)

# FTC ENFORCEMENT STATEMENT

---

- The statement offers guidance in three spaces: disclosures, consent, and cancellation.
- Marketers must clearly and conspicuously disclose the material terms of the transaction, according to ROSCA and Section 5.
- Express informed consent must be granted prior to charging.
- Finally, negative option sellers to provide a simple, reasonable means for consumers to cancel their contracts.



# FTC ENFORCEMENT STATEMENT

---

- Cancellation is where most of the development has happened.
- ROSCA requires negative option sellers to provide a simple, reasonable means for consumers to cancel their contracts.
  - “To ensure compliance with this simple cancellation mechanism requirement, negative option sellers should not subject consumers to new offers or similar attempts to save the negative option arrangement that impose unreasonable delays on consumers’ cancellation efforts.”
  - “Negative option sellers should provide their cancellation mechanisms at least through the same medium (such as website or mobile application) the consumer used to consent to the negative option feature.”

# AMAZON

---



US MARKETS CLOSED  
In the news

▼ Dow Jones +0.97%

▼ Nasdaq +1.88%

▼ S&P 500 +1.42%

▼ TSLA +5.79%

▲ META -1.01%

HOME > RETAIL

## Amazon used a sneaky tactic to make it harder to quit Prime and cancellations dropped 14%, according to leaked data

Hannah Towey and Eugene Kim Mar 15, 2022, 3:16 PM



# LEGISLATION

---

- The California Privacy Rights Act (CPRA), which amended CCPA, defines dark patterns as: "a user interface designed or manipulated with the substantial effect of subverting or impairing user autonomy, decisionmaking, or choice, as further defined by regulation." It takes effect in 2023.
- The Deceptive Experiences To Online Users Reduction Act (DETOUR Act), if passed, would give the FTC authority to regulate specific classes of dark patterns used to subvert user autonomy and informed consent. Sens. Mark R. Warner (D-VA), Deb Fischer (R-NE), Amy Klobuchar (D-MN), and John Thune (R-SD) are the primary sponsors.

# CGO RESEARCH

---





# *CAPTOTOLOGY – COMPUTERS AS PERSUASIVE TOOLS*

---

- Dark patterns (UX)
- Advertising effects (adfx)
- BlackBoard and other online learning platforms
- Algorithms for pretrial risk assessment
- AI decision making systems

# CGO RESEARCH

---

- Working with a fellow to understand the data of Mathur et al. (2019).
  - Automated collection scheme of shopping sites
  - Started with a big list of ~300k top sites from Alexa
  - Narrowed that down to ~11k shopping sites.
  - “We discovered 1,818 instances of dark patterns from 1,254 (~11.1%) websites in our data set of 11K shopping websites.”
  - Deceptive dark patterns only occur 208 times in 180 websites. (1.6%)
  - When you consider total activity, it is less than 0.7%.

## How much data about dark patterns we've got

Shopping sites as a percent of all the web sites that are tracked by Alexa (n=361,101). We've got 2-3 percent at most.

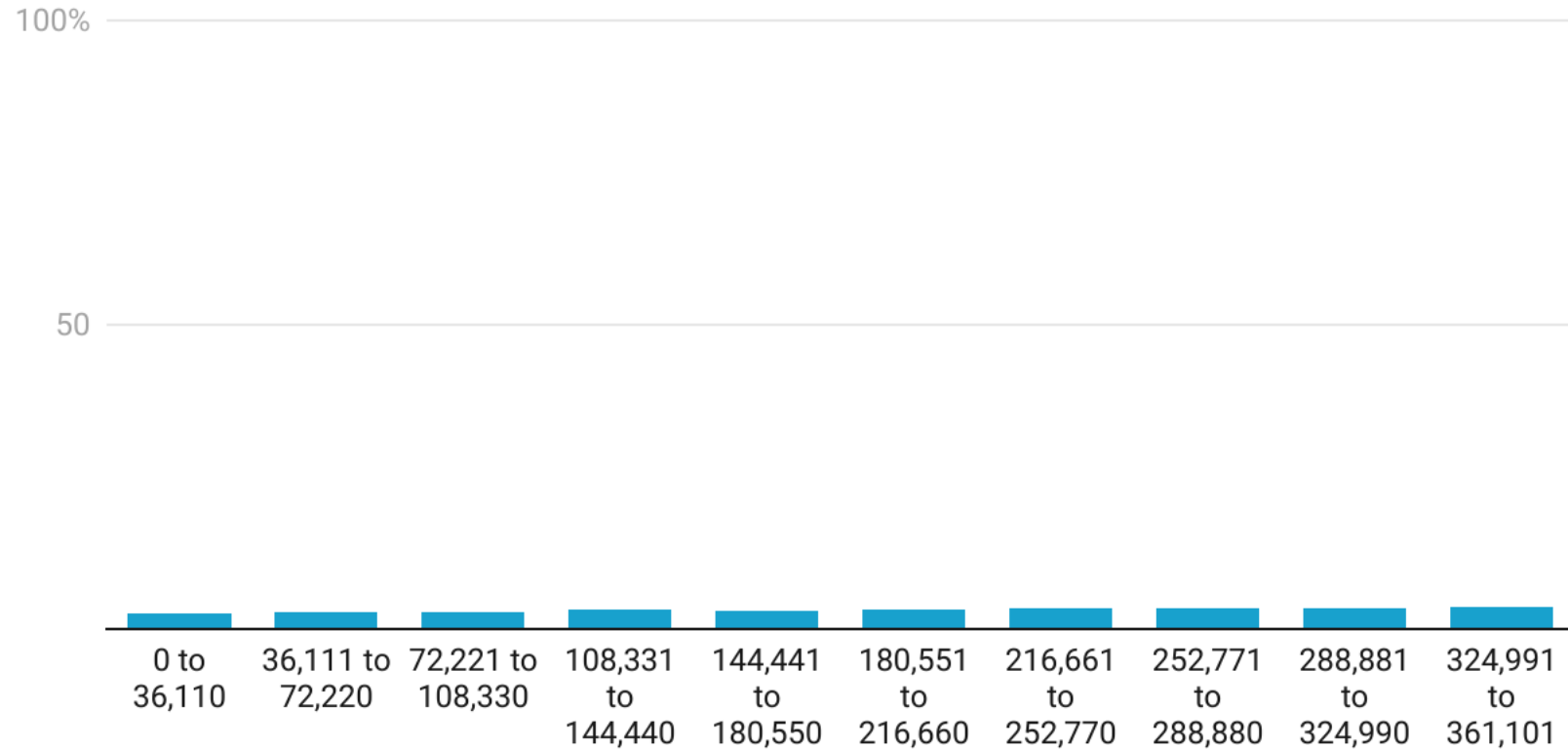


Chart: Will Rinehart • Created with Datawrapper

# CGO RESEARCH

---

- Working with a fellow to understand the data of Mathur et al. (2019).
  - Automated collection scheme of shopping sites
  - Started with a big list of ~300k top sites from Alexa
  - Narrowed that down to ~11k shopping sites.
  - “We discovered 1,818 instances of dark patterns from 1,254 (~11.1%) websites in our data set of 11K shopping websites.”
  - Deceptive dark patterns only occur 208 times in 180 websites. (1.6%)
  - When you consider total activity, it is less than 0.7%.

# FINAL COMMENTS

---

- Unclear that more authority is needed, given Section 5 + ROSCA
- Will the FTC lead the charge?
- We need a better understanding of the impacts, which might happen as a result of Amazon case.