



## DARK PATTERNS THREAT TO FREEDOM OF CHOICE

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### ABSTRACT

*This article aims to explore the phenomenon of dark patterns, addressing how deceptive design manipulates the decisions of users by exporting psychological triggers. It begins with introducing the concept of dark patterns and lists 12 types of dark patterns defined by Harry Briguall. The discussion then examines the impact on users, leading to financial losses, privacy breaches, and diminished trust among consumers. While businesses getting short-term gains at the risk of long-term reputational harm and regulatory challenges. Further, reviews of controversies and lawsuits. Then, discussed legislative measures in India, the United States, and the European Union. In addition, articles discuss emerging trends, including the integration of AI, alongside a growing movement toward ethical, transparent design standards. At last, the conclusion, emphasizes the crucial need for robust regulatory frameworks and ethical guidelines to safeguard consumer rights in the digital age.*

### INTRODUCTION

About this topic of dark patterns, I know a lot of people would not be aware of this. However, I am pretty sure that you have witnessed it or been the culprit. Thanks to the widespread use of the internet, dark patterns are all over the internet, whether you are browsing on a search engine or buying a product online on sale. They are also present in our beloved social media apps to stick you to your screen as long as possible. A small amount of credit goes to us also as we share our personal information out there. However, huge credit goes to data processing units and algorithms based on AIs to provide the most psychologically touching dark pattern that will influence your choice. I know this is new and tech-savvy, but we, as lawyers or students, have to be both dynamic and adaptable. This article aims to present information about dark

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patterns, their impact, and various legislation and solutions to tackle the hindrance against free choice.

## WHAT ARE DARK PATTERNS?

Dark Patterns are an activity that has been done by business organizations, mostly e-commerce websites, to manipulate the user's choice. It includes using design techniques in such a way as to deceive the customers and induce them into buying more. Harry Brignull defined dark patterns as something that tricks users into performing tasks that they were not willing to do or discourages behaviour that's bad for the company. These dark patterns can be different for each individual according to their online activity and buying decisions made while they were on the internet, as websites and businesses monitor and collect our activity in the form of cookies. This sinister work is done by various designers, UX/UI professionals, neuroscientists, and tech people. Who is working to nudge us towards a choice that they are willing to offer rather than what the consumer wants? It has been seen as the ultimate marketing technique used by online retailers. However, even during the offline retail era, they used to provide personalized discounts and combos. It represents that what they are doing is not new. However, the way and intensity of doing it has increased to a level that is causing legal problems. It shows that information is the most important thing to have currently, the company that has the accumulation of most information is king now. For example- Meta provides us with free services, but they collect our data and use it in different manners.

### Brignull has defined 12 Dark Patterns:<sup>1</sup>

- **Bait and Switch:** Wanted to do something, but a not willing thing happens instead.
- **Confirm Shaming:** Making the users guilty for not opting in the direction of something.
- **Disguised Ads:** Hidden ads, disguised so that the user clicks on them.
- **Forced Continuity:** Renewing the service either after a free trial or the end of the service without providing appropriate notification.
- **Friend Spam:** Spams all user's contacts after asking the user permission on the pretext that it would be used for appropriate reasons.
- **Hidden Costs:** Get to know that there were hidden costs in the check-out process.

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<sup>1</sup> 'Types of deceptive pattern' <<https://www.deceptive.design/types>>accessed 3 February 2025

- **Misdirection:** The attention of the user is distracted to make him more focused on other things.
- **Price Comparison Prevention:** Making comparisons between retailers difficult so that informed decisions cannot be made.
- **Privacy Zuckering:** Inducing the users to share more information about themselves than what is needed.
- **Roach Model:** Made the sign-in process easy but the sign-out process complicated.
- **Sneak into Basket:** Sneaking an additional product, even though the customer did not opt out of it.
- **Trick Question:** Forming questions in ways that have uncertainty in their meaning.

## HISTORY

As everything does, Dark Patterns have also evolved through a long process. It is a combination of various studies, including behaviour science and marketing. Behaviour science plays an important role, as it is the study of human behaviour through the use of systematic experimentation and observation. The term “dark patterns” was first introduced by Harry Brignull, a user experience expert, in 2010. A few scholars, such as Cass Sunstein and Richard Thaler, authors of the book *Nudge*<sup>2</sup>, made an argument to form a policy to tackle the issue. The field of behavioural science was seen as a way for the betterment of the users. However, what we see is, that things didn’t go as they were meant to be, as businesses are using these techniques of behavioural science to maximize the profit from their existing users, there is a saying that it is far easier to retain existing users than attract new customers. The earliest instances of such manipulative design can be traced back to Hotmail’s launch in 1996, as they used to send a promotional message to every outgoing email, encouraging recipients to sign up.<sup>3</sup>

## IMPACT OF USING DARK PATTERNS

### User/ Customer -

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<sup>2</sup> Cass R Thaler, Richard H and Sunstein, *Nudge : Improving Decisions About Health* (1<sup>st</sup> edn, Penguin Books 2009)

<sup>3</sup> Arvind Narayanan, Arunesh Mathur, Marshini Chetty, and Mihir Kshirsagarm, ‘Dark Patterns: Past, Present, and Future’ (Communications of the ACM, 1 Sep 2020) <<https://cacm.acm.org/practice/dark-patterns/?utm> > accessed 3 February 2025

- **Financial Loss:** When hidden charges, forced subscriptions, and deceptive checkout flows cause consumers to unknowingly spend more money.
- **Loss of Privacy & Data Exploitation:** Purposely complicated consent forms lead to sharing personal data unknowingly. Reading and comprehending those could be a cumbersome task.
- **Manipulating Consumers:** They are not making purchases through free will of choice. But based on the interface and misleading advertisements.
- **Reduced Trust in Digital Services:** Users face problems that reduce their trust in online businesses. This makes them constrained to few businesses, which reduces opportunities for small businesses and start-ups to gain public trust.

#### **Businesses -**

- **Short-Term Profit:** By using it, they can earn great profit by using users. Especially during the festival season, as consumers are on a buying spree.
- **Long-Term Damage:** Users would get fed up with misleading practices. If the practices are affecting the users in significant ways, they would even replace the provider.
- **Reputation and Brand Damage:** Companies using dark patterns often face public backlash and loss of credibility. It can lead to a decrease in profits and loss of customers.
- **Legal and Regulatory Fines:** Businesses are penalized for using dark patterns.

#### **MAJOR CONTROVERSIES REGARDING THE DARK PATTERNS**

**Cancellation Difficult in Amazon Prime:** They have made the canceling process of subscriptions a multi-step confusing process. Made it difficult to cancel a subscription. Federal Trade Commission (FTC) filed a lawsuit. Allegedly, the company used “dark patterns” to enroll consumers into subscriptions without their explicit consent and made the cancellation process intentionally difficult.<sup>4</sup> As of 11 Feb 2024, the decision is still pending.

**Google’s Location Tracking Deception:** Google, to settle the allegations from 40 U.S. States, agreed to pay \$391.5 million. They mislead the users into believing they had disabled location

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<sup>4</sup>Federal Trade Commission, 'FTC Takes Action Against Amazon for Enrolling Consumers in Amazon Prime Without Consent, Sabotaging Their Attempts to Cancel' (Federal Trade Commission, 27 June 2023) [https://www.ftc.gov/news-events/news/press-releases/2023/06/ftc-takes-action-against-amazon-enrolling-consumers-amazon-prime-without-consent-sabotaging-their?utm\\_](https://www.ftc.gov/news-events/news/press-releases/2023/06/ftc-takes-action-against-amazon-enrolling-consumers-amazon-prime-without-consent-sabotaging-their?utm_) accessed 5 February 2025

tracking, even though collecting and using their location data through settings like “Web & App Activity.”<sup>5</sup>

**TikTok Manipulation:** The Dutch Data Protection Authority (DPA) fined TikTok €750,000 for violation of the GDPR Rule by providing its privacy policy solely in English to Dutch Users, many of whom were children under 16. The practice was deemed a dark pattern.<sup>6</sup> In U.S. 14 states filed a lawsuit, alleging that TikTok’s addictive features have led to increased instances of anxiety, depression, etc.<sup>7</sup> As of 11 Feb 2024, the decision is still pending.

**Windows 10 Forced Upgrade Prompts:** When Windows 10 launched, Microsoft pursued tactics, making it difficult to avoid users upgrading. It even started automatically downloading without their permission. In July 2016, A Californian woman got compensation from Microsoft of \$10000 after the company withdrew its appeal because the automatic update failed and left an unresponsive computer.<sup>8</sup>

## LEGAL AND REGULATORY FRAMEWORKS

Above are listed some of the most prominent issues. However, reading those made crystal-clear that legislation and statutes are required to curb the problem of dark patterns:

**India:** “Guidelines for Prevention and Regulation of Dark Patterns, 2023” under Section 18 of the Consumer Protection Act, 2019<sup>9</sup>. These guidelines define dark patterns as deceptive practices. The guidelines identify a range of manipulative practices. A few listed manipulative practices in a press release:

- **Drip pricing:** Make a product appear less expensive initially, then disclose additional charges afterwards.

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<sup>5</sup> Bobby Allyn, 'Google settlement location tracking data privacy' (NPR, 14 November 2022) <[https://www.npr.org/2022/11/14/1136521305/google-settlement-location-tracking-data-privacy?utm\\_](https://www.npr.org/2022/11/14/1136521305/google-settlement-location-tracking-data-privacy?utm_)> accessed 5 February 2025

<sup>6</sup> Autoriteit Persoonsgegevens, 'TikTok fined for violating children’s privacy' (Autoriteit Persoonsgegevens, 22 July 2021) <<https://www.autoriteitpersoonsgegevens.nl/en/current/tiktok-fined-for-violating-childrens-privacy>> accessed 6 February 2025

<sup>7</sup> Peter Senzamici, 'TikTok sued as NY AG Tish James says algorithm is poisoning kids’ minds — and inspiring dangerous viral challenges' (New York Post, 8 October 2024) <<https://nypost.com/2024/10/08/business/tiktok-sued-by-13-states-including-ny-over-harmful-addictive-features/>> accessed 7 February 2025

<sup>8</sup> Samuel Gibbs, 'Microsoft pays out \$10,000 for automatic Windows 10 installation' (The Guardian, 27 June 2016) <<https://www.theguardian.com/technology/2016/jun/27/microsoft-automatic-windows-10-installation>> accessed 7 February 2025

<sup>9</sup> Consumer Protection Act 2019, s 18

- **Disguised advertising:** A technique that makes it difficult for users to distinguish between ads and other content.
- **Bait and switch:** first offering an appealing offer to attract consumers and then substituting the offer with a less favourable one.
- **False Sense of Urgency:** Misleading the users by creating a situation of scarcity or panic to induce consumers into buying or making immediate decisions<sup>10</sup>.

### United States:

The Federal Trade Commission (FTC) is playing an important role in addressing the problem of dark patterns in the USA. Defined them as “design practices that manipulate users into making decisions they would not otherwise have made and that may cause harm.” In September 2022, "Bringing Dark Patterns to Light,<sup>11</sup>" A comprehensive report was released that highlighted the increasing sophistication of design practices. The report details various tactics which may violate the FTC Act (Federal Trade Commission Act, 1914)<sup>12</sup>. A U.S. federal law that established the FTC to regulate deceptive or unfair business practices.

### European Union:

Although unified legislation is still missing, it addresses the issues through various regulations:

**Digital Service Act (DSA):** This act outlawed dark patterns, termed as practices to prevent users from making autonomous and informed choices or decisions that tend to distort or impair the user’s freedom of choice. Which aims to ensure online platforms operate transparently and fairly, safeguarding users from misleading designs.<sup>13</sup>

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<sup>10</sup> PIB Delhi, 'Central Consumer Protection Authority issues 'Guidelines for Prevention and Regulation of Dark Patterns, 2023' for prevention and regulation of dark patterns listing 13 specified dark patterns' (Press Information Bureau, 8 December 2023) <<https://pib.gov.in/PressReleaseIframePage.aspx?PRID=1983994>> accessed 8 February 2025

<sup>11</sup> Federal Trade Commission, 'Bringing Dark Patterns to Light' (Federal Trade Commission, September 2022) <[https://www.ftc.gov/system/files/ftc\\_gov/pdf/P214800%20Dark%20Patterns%20Report%209.14.2022%20-%20FINAL.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/P214800%20Dark%20Patterns%20Report%209.14.2022%20-%20FINAL.pdf)> accessed 9 February 2025

<sup>12</sup> Federal Trade Commission Act 15 U.S.C. §§ 41–58 (1914)

<sup>13</sup> Aarushi Jain and Pooja Kapadia, 'Dark Side of Advertising: Decoding Dark Patterns for Platforms and Endorsers' (Cyril Amarchand Blogs, 9 January 2024) <<https://corporate.cyrilamarchandblogs.com/2024/01/dark-side-of-advertising-decoding-dark-patterns-for-platforms-and-endorsers/>> accessed 8 February 2025

**General Data Protection Regulation (GDPR):** This act is more focused on addressing the issue of data processing and user consent of users. However, misleading the users using dark patterns to share personal data without informed consent can be non-compliant.<sup>14</sup>

**Unfair Commercial Practices Directive (UCPD):** It was a directive issued by the European Union in 2005. That set-out goals that EU member states must achieve by implementing those goals through their national laws. It prohibits unfair, misleading, or aggressive commercial practices, including certain types of dark patterns.<sup>15</sup>

## FUTURE TRENDS AND INNOVATIONS IN UX DESIGN

As The Greek philosopher Heraclitus said, "The only constant in life is change." It is true at the pace technology is changing, which brings both advantages and disadvantages. Dark patterns are no different, the more technology is advanced, the more sophisticated they will become.

**AI-driven personalization and Dark Patterns:** AI can analyze user behaviour information in real-time, the result of which highly personalized interfaces could be created. Making tactics more effective and less noticeable. It can form prompts as per the user's browsing history or current mood, which would increase the likelihood of a desired response.<sup>16</sup>

**Emergence of Augmented and Virtual Reality:** Another layer of complexity would be added with the integration of augmented reality (AR) and virtual reality (VR). Distinguishing between genuine and manipulative content is more challenging.

**Advancements in Psychological Manipulation Techniques:** Behavioural psychology plays an important role in innovations in UX design. By understanding cognitive biases and the decision-making process, designers can develop interfaces in such a way that subtly influences

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<sup>14</sup> Thomas Akhurst, Laura Zurdo, Riccardo Rapparini and Christoph Mautner Markhof, 'How should the European Union regulate dark patterns?' (Sciences Po, April 2023) <<https://www.sciencespo.fr/public/chaire-numerique/wp-content/uploads/2023/09/Dark-Patterns.pdf?utm>> accessed 8 February 2025

<sup>15</sup> C. Rosca, 'Destination "Dark Patterns": EU Digital Legislative Train and Line Drawing' (Maastricht University, 13 April 2023) <<https://www.maastrichtuniversity.nl/blog/2023/04/destination-%E2%80%99dark-patterns%E2%80%99-eu-digital-legislative-train-and-line-drawing>> accessed 9 February 2025

<sup>16</sup> Federico Guerrini, 'AI-Driven Dark Patterns: How Artificial Intelligence is Supercharging Digital Manipulation' (Forbes, 17 November 2024) <<https://www.forbes.com/sites/federicoguerrini/2024/11/17/ai-driven-dark-patterns-how-artificial-intelligence-is-supercharging-digital-manipulation/>> accessed 9 February 2025

user behaviour. It can enhance usability. However, it raises ethical concerns as it can be used for making choices against their best interest.

## **TREAD TOWARD ETHICAL UX DESIGN**

To tackle these challenges, there is a growing movement in the UX community to inculcate ethical design practices.

**Transparency:** Designers have to communicate how user data is collected, used, and stored. Also, the way they are creating interfaces should be honest and straightforward, avoiding deceptive elements that could mislead users.

**Digital Well-Being:** The purpose should be to give a meaningful experience to the users rather than using addictive design elements like endless scrolling or engagement tactics.

**Respecting User Privacy:** The balance between personalization and intrusion. Apps should collect information that is essential for their functionality and should not breach privacy boundaries.

**Autonomy and Control of User:** Granting control to users over the interface. It emphasizes providing users with freedom to choose, customize, and navigate based on their preferences.<sup>17</sup>

**Industry Standards:** Global and Nationwide uniform standards should be formed, with enforcement to avoid using dark patterns.

## **CONCLUSION**

Through this article, I tried to educate you about the concept of dark patterns in a simplified language. While researching for the article, I went through sources and also during the writing process. I felt that it is an issue that affects us in everyday activities, even though little has been written and discussed by renowned authors. It is a topic that is underrepresented in the academic field. Researching was a hindrance as I didn't find many research papers, so unfortunately, I had to rely on articles and blogs. I would greatly encourage students and academicians to contribute their knowledge towards addressing this issue.

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<sup>17</sup> 'Ethical Considerations in UX Design' (Designlab Blog, 8 February 2024)  
<<https://designlab.com/blog/ethical-considerations-in-ux-design?>> accessed 10 February 2025



Solutions are straightforward, and collaboration between various stakeholders is a prerequisite for the proper regulation and implementation. A few ways to tackle this are:

- UX designers have to be ethical and act responsibly when working under companies whose primary objective is profit maximization. A regulatory body should be formed with enforceable powers to check and moderate the interfaces. This will ensure that designers work under established regulations, as they can face penalties for misconduct.
- Educating the users, explaining to them that they have to be extra careful while browsing through the internet. As sites and apps are tailored in such a way as to predetermine their response. They should analyze the made choice a few times, whether they are making that as per their understanding or a response that has nothing to do with their choice.
- The government should impose stricter laws, and those laws should be technologically relevant to the issue. To maintain deterrence, strong penalties for violations should be present. Audits and investigations should be conducted by independent auditors in business to see whether they are engaged in deceptive UX practices.
- Recognizing the efforts of the company that follows fair UX practices. Through the publishing of reports that rank businesses based on transparency and UX fairness. Those who prioritize user trust over deceptive revenue tactics.