

# New interest in regulating dark patterns highlights evolving debate over online consent

Article

The Federal Trade Commission (FTC) last week held a **workshop** where researchers, academics, consumer advocates, and lawmakers discussed the deceptive design practices

known as **dark patterns** and explored regulatory strategies for protecting consumers from them. Speakers warned some of these practices may violate consumer protection laws, and Sen. Mark Warner, who has **cosponsored** dark pattern legislation, said he **believed** the FTC possessed authority to prohibit certain types of dark patterns.

**Dark patterns are click behaviors, choice architectures, and design cues intended to manipulate users into making choices that benefit platforms.** These can **present** themselves in the form of intentionally obscure unsubscribe buttons, countdown checkout timers that manufacture false urgency, unwanted products appearing unsolicitedly in user's shopping carts, and pop-ups that use subtle **coercion** to pressure users from leaving the platform.

**The use of dark patterns is fairly common online, posing a problem that states are trying to address in the absence of federal law.** In 2019, Princeton researchers **scanned** 11,000 shopping websites and found instances of at least 15 different types of dark patterns on 11% of the scanned sites. In March, new regulations were **clarified** under the California Consumer Privacy Act (CCPA) that prohibit developers from using dark patterns to influence users. Legislation addressing dark patterns was also **included** in Washington state's failed privacy bill. Without a federal privacy standard, FTC regulations could act as check on dark patterns above the state level.

**The FTC's interest in dark patterns suggests regulators may soon confront broader questions about the meaning of informed consent.** Dark patterns are inseparable from the issue of **informed consent**—a user's ability to agree to terms of services based on transparent, easily understandable explanations. While the definition and standard for determining consent are hotly **contested**, consent was a key component of both the **GDPR** and the **CCPA**. In practice, however, consent requirements have had mixed results. During the FTC workshop, Jennifer King, a privacy and data fellow at Stanford, aptly characterized the current mechanisms for acquiring consent online as a “complete failure.”

**If Congress follows the FTC's lead and addresses dark patterns as part of a possible federal data privacy standard, that decision will be met with industry opposition.** At least one ad network, the Network Advertising Initiative, is reportedly already gearing up to fight off any legislative attempts to address dark patterns the practice, **per** Digiday. Similar to data privacy laws more generally, a state-level patchwork approach to dark pattern regulation may be more **susceptible** to industry lobbying than federal efforts.