

ALERT

July 2023

FTC Targets Amazon In Crackdown On ‘Dark Patterns’ Marketing Tactics

By: Terese L. Arenth

The Federal Trade Commission (FTC) alleged that Amazon used digital marketing tactics known as “dark patterns” to trick millions of customers into unknowingly enrolling in Amazon Prime auto-renewing subscriptions, while knowingly making it difficult for customers to cancel those subscriptions, according to a lawsuit filed recently in federal court. Not so, responded Amazon in a statement to media following the FTC filing, contending that the agency’s claims were “false on the facts and the law.”

Whatever the outcome, this high-profile case demonstrates the FTC’s resolve in shining a regulatory spotlight on allegedly manipulative design practices in online marketing and advertising content.

While the case could have specific implications for subscription-based services, its impact will likely be broader given other actions underway and more that are likely to come. Less than a week after the Amazon filing, the FTC announced that Publishers Clearing House had agreed to a proposed court order requiring it to pay \$18.5 million to consumers as a result of dark patterns used in its sweepstakes program. We will discuss that case in a future alert.

Defining ‘Dark Patterns’

In April 2021, the FTC sent a clear message that regulators were stepping up enforcement in this area by holding a workshop on the topic. The agency issued a report based on the workshop, [Bringing Dark Patterns to Light](#), in September 2022.

The report defined dark patterns as design practices that trick or manipulate users into making choices they would not otherwise have made and that may cause harm. Among the many examples cited were:

- pre-checked boxes, instead of having consumers purposely check desired boxes;
- disclosures that are hard to find or difficult to read;
- confusing cancellation policies;
- ads formatted to look like independent news stories, or biased comparisons designed to look like unbiased reviews;

ALERT

- website buttons labeled “next” that do not move customers to the next screen when clicked, as expected, but instead automatically process the transaction; and
- “drip pricing” that shows only part of a product’s total price up front, with other charges mentioned later.

Dark patterns can significantly influence consumer behavior, especially when more than one tactic is used, the report said. In one study referenced, the percentage of people opting for an identity theft protection service doubled when the content contained dark patterns designs.

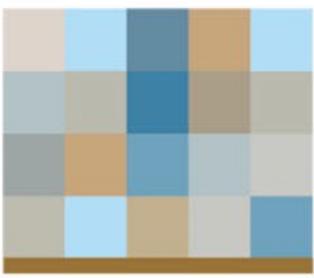
The FTC concluded the report by putting companies on notice that dark patterns are on their radar. Where the practices violate the FTC Act, the Restore Online Shoppers’ Confidence Act (ROSCA) or other statutes and regulations enforced by the agency, the FTC will continue to take action.

True to its word, the FTC has since taken action against several companies for their dark pattern practices. In November 2022, the FTC reached a [\\$100 million settlement with Vonage](#) for using dark patterns to make it difficult for consumers to cancel service on automatic phone plan renewals, and for imposing unauthorized charges. In December 2022, the regulators announced a [\\$245 million settlement with Epic Games](#), the maker of the Fortnite video game, after alleging that the company used dark patterns to trick players (many of them children) into making unintended in-game purchases.

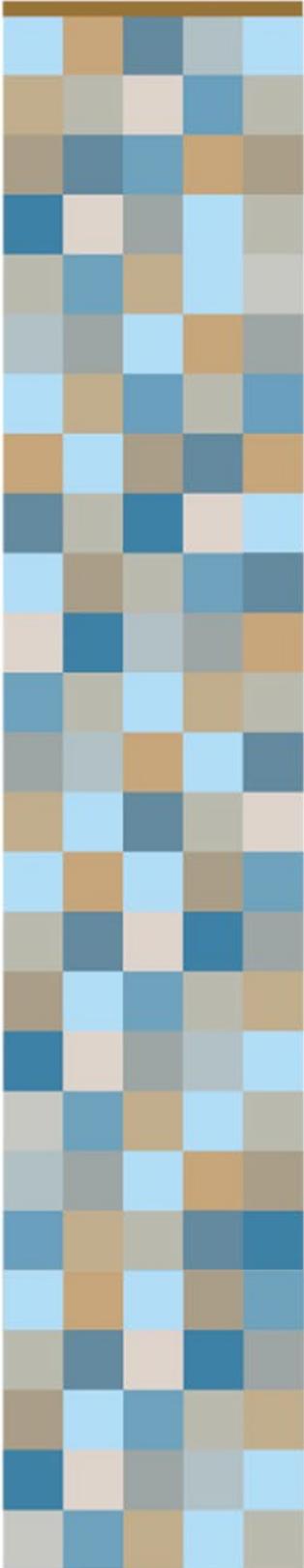
FTC Allegations Against Amazon

On June 21, 2023, the FTC filed a [complaint against Amazon](#) in the United States District Court Western District of Washington alleging the company used dark patterns to manipulate customers into enrolling in Prime without their consent in violation of the FTC Act and ROSCA. During the online checkout process for buying products, Amazon presented customers with Prime subscription enrollment options multiple times and, according to the complaint, “(i)n many cases, the option to purchase items on Amazon without subscribing to Prime was more difficult for consumers to locate. In some cases, the button presented to consumers to complete their transaction did not clearly state that in choosing that option they were also agreeing to join Prime for a recurring subscription.”

The lawsuit also accused Amazon of purposely creating a complicated process for cancelling Prime subscriptions. The FTC alleges customers could not easily find the right pathway to cancel their subscriptions, and once they did, they had to click through multiple pages asking whether they wanted to continue the subscription at a discounted price, or turn off the auto-renew feature, or had decided not to cancel, before they could finally cancel the service.



ALERT



The FTC's complaint is heavily redacted so we should learn more about the FTC allegations and Amazon's defense as the case progresses.

If you have any questions regarding the matter raised in this Alert, please feel free to contact Terese Arenth at tarenth@moritthock.com.

Moritt Hock & Hamroff LLP is a broad-based commercial law firm with more than 85 lawyers and a staff of paralegals. The firm's practice areas include: closely-held/family business practice; commercial foreclosure; commercial lending & finance; construction; copyrights, trademarks & licensing; corporate, mergers and acquisitions, & securities; COVID litigation; creditors' rights, restructuring & bankruptcy; privacy, cybersecurity & technology; dispute resolution; employment; healthcare; landlord & tenant; litigation; marketing, advertising & promotions; not-for-profit; real estate; secured lending, equipment & transportation finance; sports law; tax; and trusts & estates.



This Alert is published solely for the interests of friends and clients of Moritt Hock & Hamroff LLP for informational purposes only and should in no way be relied upon or construed as legal advice.

©2023 Moritt Hock & Hamroff LLP