

\$100M Vonage Settlement Shows FTC's 'Dark Pattern' Focus

By **Stephen Newman, Allen Denson and Alice Kwak** (December 19, 2022)

Previously nothing more than an academic description of certain kinds of aggressive online marketing, so-called dark patterns are now giving the Federal Trade Commission cause to pursue militant consumer protection efforts. In November, the FTC announced a bombshell **settlement** with Vonage Holdings Corp. for \$100 million in the U.S. District Court for the District of New Jersey, based on this brand-new liability theory.



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Dark Patterns were largely unknown as such until September — just two months before the Vonage settlement — when the FTC issued "Bringing Dark Patterns to Light," a 48-page staff report on the topic.

The report compiles various marketing techniques — some old, some new for the online world — that collectively are said to impair consumers' ability to make fully informed purchase decisions. The report describes dark patterns mostly as website or mobile application design elements that tend to trick or manipulate users into making choices they would not otherwise have made.



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"Dark patterns often take advantage of consumers' cognitive biases to steer their conduct or delay access to information needed to make fully informed decisions," the report says.

It goes on to identify and provide examples of four main categories of dark patterns used in the marketplace: design elements that induce false beliefs; design elements that hide or delay disclosure of material information; design elements that lead to unauthorized charges; and design elements that obscure or subvert privacy choices.



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The report warns consumers to be wary of such sophisticated practices, all while warning companies of the FTC's increased enforcement against the use of dark patterns.

The term appears to have been coined in 2010 by a self-described cognitive scientist and design specialist Harry Brignull, who, among other things, appears to be seeking employment as an expert witness in false advertising cases.

Despite the term's shaky provenance — but catchy phrasing — with the issuance of the report, dark patterns analysis is now deeply embedded in the FTC's investigation and enforcement regime.

According to Brignull, dark patterns are "instances where designers use their knowledge of human behavior (e.g., psychology) and the desires of end users to implement deceptive functionality that is not in the user's best interest."

On his website dedicated to dark patterns, Brignull names 12 different types of dark patterns and calls out the companies that utilize them. Some types of dark patterns are self-explanatory, e.g., bait and switch, trick questions and misdirection, while others are

not.

For example, "privacy Zuckering," a nod to Meta Platforms Inc. founder Mark Zuckerberg, refers to bad privacy practices that trick users into providing more personal information than they intended to; "confirmshaming" works by shaming users into acting; and a "roach motel" describes a design that allows a user to do something easily, but makes it difficult to get out of, which is the dark pattern central to the Vonage lawsuit.

The FTC's complaint against Vonage, an Internet-based telephone service provider, alleges that Vonage used dark patterns to make it difficult for customers to cancel their services and charged unexpected early termination fees, a type of junk fee, in violation of the FTC Act and the Restore Online Shoppers' Confidence Act.

The complaint details Vonage's "tiresome cancellation procedures," which, unlike its easy online enrollment procedures, began with speaking to a live agent over the phone.

Cancelling was made further complicated through "obscured contact information, circuitous and redundant procedural requirements, long wait times, dropped or unanswered calls, lengthy and repeated sales pitches, and unexpected high-dollar early termination fees," according to the complaint.

Even after completing all convoluted requirements to cancel, often times Vonage continued to bill its customers for recurring service fees. According to the complaint, Vonage received hundreds of complaints about its customer service, including complaints regarding the cancellation process.

On Nov. 3, the FTC announced its \$100 million settlement with Vonage. Once the district court judge approves the stipulated order, Vonage will be required to, inter alia, stop charging unauthorized early termination fees; simplify its cancellation procedures by stopping use of dark patterns; provide transparency as to the terms of its subscription plans; and pay \$100 million, which will be used for consumer relief.

The Vonage settlement is significant because it demonstrates the FTC's willingness to use the dark patterns framework to pursue what otherwise might be ordinary false advertising or unfair trade practices cases.

The FTC also appears to be attempting to shame companies with the dark patterns moniker. A fundamental question remains, however: whether this is simply old wine in new bottles, or whether previously acceptable methods of advertising now will be targeted aggressively for enforcement.

The line between what is permissibly persuasive versus what is unfair remains unclear. Companies may perhaps gain some insight from Brignull himself, who told the FTC in a 2021 speech about the dangers of companies taking advantage of consumers' cognitive biases:

[I]f a website tells you that other people are currently looking at the same item as you, that's tapping into your social proof bias. If it tells you that the item is almost sold out, that taps into your scarcity bias. If it shows you a discount, that taps into something called anchoring. Of course, if those things are all true, that's perfectly honest marketing. In fact, it's actually useful for a shopper to know this information. But if any of those things are lies, then it's a dark pattern.

One would hope that truth remains a defense to an unfair trade practices charge, and that the FTC does not use dark patterns analysis to punish companies for encouraging what the agency considers to be unwise choices.

New theories of cognitive bias should not be used to substitute the social goals of government officials for the preferences of consumers in the marketplace, even if consumers' desires can be affected by advertising.

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