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FTC v. Amazon Is 'Dark Patterns' Case To Watch

Targeting Amazon Prime for alleged "dark practices," the US FTC seeks to establish "an entirely new theory of legal liability," Amazon says.

by [Ryan Nelson](#)

Amazon's motion to dismiss is pending in Washington State's Western District in litigation concerning Prime subscriptions and alleged "dark patterns" used to trick consumers into enrolling and hinder cancellations, according to the US Federal Trade Commission. The case could be instructive for any and all digital marketers at a time of legal uncertainty surrounding the topic.

Amazon.com, Inc. maintains its Prime enrollment and cancellation processes comply with current laws, with key terms such as price and automatic renewal prominently and repeatedly disclosed on its website to ensure users are informed before signing up.

"Those [Prime] flows do not contain – and the FTC does not allege they contain – a single false statement or material omission. To the contrary ... when consumers sign up for Prime, they are presented with the material terms of enrollment in clear and conspicuous language, they provide their informed consent to being charged for the membership, and they are given multiple simple mechanisms to cancel," Amazon says.

For those reasons, the US Federal Trade Commission's lawsuit against Amazon in the US District Court for the Western District of Washington, regarding Amazon's alleged use of "dark patterns" to hoodwink consumers, is misplaced, the e-commerce giant says in its 18 October 2023 [motion to dismiss](#).

According to the defendant, the FTC "seeks to establish an entirely new theory of legal liability based on misleading and subjective characterizations of unremarkable marketing techniques."

This dark patterns theory “relies on vague and undefined concepts such as ‘visual imbalances’ and ‘manipulative design elements.’ In a case supposedly about clarity, the FTC’s purported standards are unconstitutionally opaque,” it adds.

“What amount of persuasive messaging does the FTC consider lawful marketing and what amount does the FTC deem unlawful ‘manipulation’?” – Amazon

The FTC filed its initial complaint against Amazon in June 2023 and then [amended the complaint](#) in September 2023 to add Amazon executives as co-defendants. According to the agency, Amazon uses, or previously has used, manipulative user-interface designs that trick consumers into making decisions they would not otherwise have made – ie, dark patterns. (Also see "[Advertising Law In 2024: Attorneys Tuning In For ‘Clean Beauty,’ ‘Dark Patterns’ Developments](#)" - HBW Insight, 19 Jan, 2024.)

For example, in the Amazon shopping checkout process, consumers meet with a prominent, double-stacked button to enroll in Prime, with the promise of receiving free two-day shipping or similar benefits. Once that button is clicked, Amazon enrolls the consumer in a Prime free trial, even if the consumer later abandons the shopping cart and does not order the merchandise, the FTC says.

Alternatively, consumers can decline the Prime service by clicking a comparatively inconspicuous link, a deliberate design that prioritizes the enrollment option over the decline option and “creates a visual imbalance,” according to the complaint.

Further, the decline link in the past has read “No thanks, I do not want fast, FREE delivery” or variations thereof, trafficking in what the FTC calls “confirmshaming,” meaning “emotive wording around the disfavored option to guilt users into selecting the favored option.”

Additionally, the FTC alleges that the price of monthly auto-renewal in Prime is not conspicuously disclosed, among other disfavor to consumers.

According to its complaint, nonconsensual enrollment in Prime has been a well-known issue within Amazon. “The company’s internal documents are littered with references to ‘accidental’ signups,” the FTC says.

Further, the commission points to a 2019 survey by Amazon in which consumers said their reason for cancelling Prime was that they never intended to enroll in the first place.

Epic Cancellation Process

The Amazon Prime cancellation process is also problematic, the FTC says. It alleges that prior to April 2023 when Amazon changed its Prime cancellation process “under substantial pressure from the Commission,” there were only two ways to cancel a Prime subscription through Amazon. Consumers either had to contact customer service or navigate a “four-page, six-click, fifteen-option” cancellation process.

Fittingly, the FTC says, Amazon named that labyrinthine cancellation process internally “Iliad,’ which refers to Homer’s epic about the long, arduous Trojan War,” and the Amazon leaders named as co-defendants – Neil Lindsay, Russell Grandinetti, and Jamil Ghani – “slowed or rejected user experience changes that would have made Iliad simpler for consumers because those changes adversely affected Amazon’s bottom line,” according to the complaint.

Again, the FTC attributes the complexity of the Iliad flow to use of dark patterns.

Sue First And Create Rules Later?

Amazon rejects such arguments in its motion to dismiss, casting the FTC’s claims as novel theories unsupported by statutory or case law.

“What font size and colors are required to comply with the FTC’s view of ‘balance’?” the defendant asks. “How many clicks on a website is too many for the FTC? What amount of persuasive messaging does the FTC consider lawful marketing and what amount does the FTC deem unlawful ‘manipulation’? The FTC does not even endeavor to answer such questions.”

Amazon adds, “Even worse, outside this litigation, the FTC admits that current law ‘does not provide clarity’ about how to avoid liability and fails to ‘address the deceptive use of so-called dark patterns.’”

Those “admissions” were made in the FTC’s [April 2023 proposal](#) to amend its Negative Option Rule, changes the agency believes would better address use of dark patterns to deceive consumers. (Also see "[Still Can’t Cancel That Gym Membership? FTC Proposes One Negative Option Rule To Rule Them All](#)" - HBW Insight, 1 Apr, 2023.)

Previously, the FTC addressed dark patterns in an [enforcement policy statement](#) on negative option marketing in October 2021 and then with a [staff report](#) in September 2022 examining tactics such as “disguising ads to look like independent content, making it difficult for consumers to cancel subscriptions or charges, burying key terms or junk fees, and tricking consumers into sharing their data.” (Also see "[FTC ‘Dark Patterns’ Enforcement Policy Darkens](#)")

[Public Input On Rule, Commissioner Wilson Argues](#)" - HBW Insight, 1 Nov, 2021.)

The FTC's complaint against Amazon cites violations of Section 5 (among others) of the FTC Act and the Restore Online Shoppers' Confidence Act of 2010 (ROSCA).

Amazon argues that its Prime flows are compliant with ROSCA, which underlies each of the FTC's causes of action, while questioning the 2010 law's applicability to the FTC's claims. "ROSCA was passed to prohibit conduct entirely different from that alleged in the Complaint: the then-common practice of 'third-party upsells of products or services made during check-out for an initial purchase.' ... [N]o types of marketing other than third-party upsells are even referenced in the congressional findings," the defendant says.

According to Amazon, the FTC and the courts historically have treated ROSCA as limited. "The statute was rarely invoked, was cited in only a handful of opinions, and resulted in no significant judgments against legitimate businesses," it says.

Notably, ROSCA provides for civil penalties, which explains the FTC's increased reliance on ROSCA after losing the authority to collect civil penalties under Section 13(b) of the FTC Act as a result of *AMG Capital Management, LLC v. FTC* in April 2021. (Also see "[FTC Will Ask Congress To Sharpen Monetary Relief Authority Dulled By Supreme Court Ruling](#)" - HBW Insight, 22 Apr, 2021.)

Generally, Amazon contends that its due process rights are in violation as the FTC seeks to impose requirements on Amazon that the FTC itself has acknowledged must be clarified and codified via rulemaking.

"Instead of promulgating such rules, the FTC has adopted an improper sue-first-and-create-rules-later tactic," Amazon says. "This 'we know it when we see it' approach should be rejected, and the Complaint should be dismissed. Nor can the FTC shoehorn its remarkable new theory into the decidedly unremarkable and plainly written statute at issue: the Restore Online Shopper Confidence Act."