



# The Blurry Lines between Manipulative Design and Marketing Strategy in Nigeria's Digital Space

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# Introduction

Have you ever contemplated the possibility that the world is being manipulated and rejected it as a conspiracy theory? Well, here is one that is definitely not a conspiracy theory, Dark patterns. Dark patterns are user interface and design techniques used on websites, mobile applications (Apps) or any other digital medium to manipulate users to do something they did not intend to do in order to benefit the website or App owner.<sup>1</sup> For example, purchasing something or signing up for a service.

Dark patterns can range from subtle omissions to explicit lies, but they all serve to undermine users' objectives and waste time or money they did not intend to spend. More often than not, users' access to privacy and control over their psychological and behavioural autonomy is jeopardised by the exploitation of dark patterns by digital service providers, undercutting the concept of freedom of choice. Dark patterns exploit human psychology for the sole purpose of encouraging people to act against their best interests. They often take the shape of misleadingly worded buttons, difficult-to-undo choices, and graphical features like colour and shading that draw users' attention to or away from specific options. The use of dark patterns is obvious in numerous digital services and products.





# Dark Patterns or a Marketing Strategy?

More often than not, the use of dark patterns is often justified as a marketing strategy to bring in more sales or increase the client base of the product. A marketing strategy refers to a business's overall game plan for reaching prospective consumers and turning them into customers of their products or services.<sup>2</sup>

Email marketing and point of purchase marketing are major marketing techniques employed by organisations to increase their client base. Email marketing is a computer-assisted procedure for reaching out to targeted prospects and consumers in order to influence their purchasing decisions. Email marketing successes are measured by open rates and click-through rates particularly when it is used as a component of a larger internet marketing initiative.<sup>3</sup> Interestingly, the average expected email marketing ROI is \$42 for every \$1 spent<sup>4</sup> accounting for the reason behind a lot of unsolicited advertising and marketing emails especially without consent. In addition to this, there is also the act of contact spamming. Not only are you forced to receive marketing emails with no “opt-out” options, these organisations also contact-spam your contacts which they may have pretentiously gained access to via a trick question or contacts on social media websites. The NDPR provides that all data subjects have certain rights that protect them and limits the ability of data controllers to send repeated and random unsolicited marketing emails without their consent<sup>5</sup>, such as the the right to understand how and why that data is being used;<sup>6</sup> as well as the right to object to processing.<sup>7</sup>

Another technique used is the point-of-purchase marketing (or POP marketing) which is used to sell to shoppers/clients already in-store and already at the point of purchase. It is frequently utilised to advertise items, pique consumers' interest, and persuade customers to buy. It could typically include product displays at false prices, creating a false scarcity bias for products, creating a false impression that a product is going on sale or generally just sneaking items into a person's shopping cart online. POP marketing often sway buying decisions at the shelf by making an offer simply too good and too visible to pass up.<sup>8</sup> It is often targeted at impulse buyers with statistics showing that annual impulse purchases in the U.S total a whopping \$17.78 billion.<sup>9</sup>

1 Manyame, Amanda and Oloyede, Ridwan. Dark Design: The Art of Deception by Design <https://techhiveadvisory.org.ng/wp-content/uploads/2021/11/th-DARK-DESIGN.pdf> Accessed 10 Feb. 2022.

2 “What Is a Marketing Strategy?” Investopedia, <https://www.investopedia.com/terms/m/marketing-strategy.asp>. Accessed 16 Feb. 2022.

3 Woschnick, Vicki. Top 10 Most Effective Marketing Strategies for B2B and B2C. <https://www.weidert.com/blog/top-10-most-effective-marketing-strategies>. Accessed 16 Feb. 2022.

4 10 Email Marketing Statistics You Need to Know in 2022. 11 Dec. 2021, <https://www.oberlo.com/blog/email-marketing-statistics>.

5 Section 2.3.2 of the Nigerian Data Protection Regulation

6 Section 3.1.1 of the Nigerian Data Protection Regulation

7 Section 2.8(a) of the Nigerian Data Protection Regulation

8 Woschnick, Vicki. Top 10 Most Effective Marketing Strategies for B2B and B2C. <https://www.weidert.com/blog/top-10-most-effective-marketing-strategies>. Accessed 16 Feb. 2022.

9 “Retail Therapy and the Power of the Impulse Buy.” DAC, 26 Feb. 2019, <https://www.dacgroup.com/blog/retail-therapy-and-the-power-of-the-impulse-buy/>.



Making profit and increasing revenue is an essential and crucial aspect of business however when this is juxtaposed with the free will and choice of users, it is important to ascertain which is ethical and more important. Does a high conversion rate necessarily translate into the best user experience? Although some of these dark patterns are not unlawful they are very unethical and erode the users trust, take advantage of them and eventually may result in the users abandoning the product once they realise they've been tricked. Thus although dark patterns may result in an initial high conversion rate, it does not deliver the best user experience and in the long run creates a bad impression of the product and brand in the mind of the users.

Distinguishing dark patterns from other marketing techniques which can also often involve an element of persuasion can be quite tricky. that plays on human psychological frailties. However, it is important to note that once the technique used modifies the consumer choice architecture, through a range of possible design attributes that either modify the decision space (i.e. the choices available to the consumer) or manipulate information flows to the consumer, in order to make it especially hard for consumers to make independent and informed decisions, it is a dark pattern. In addition to this, if the technique results in the detriment of the customer and may likely involve loss e.g. financial loss, breach of privacy, undermining the customers freewill, forced decisions and choices, reduced competition or loss of trust in online businesses it crosses the lines of marketing.



# Dark Patterns in e-Business

Have you tried shopping on an e-commerce website and you notice certain costs in the purchase are hidden, you only notice when you get to the check-out point? Have you realised that you suddenly have extra items you didn't select in your online shopping cart? Have you ever experienced difficulty logging out of a business website except you follow a certain procedure that forces you to give your personal details or generally finding it difficult to opt out of a service? Have you been forced to share your personal details without being told why?

Electronic business (e-business) refers to the use of the Web, Internet, intranets, extranets or some combination thereof to conduct business<sup>10</sup>. A major aspect of e-business is e-commerce, however e-business goes beyond the simple buying and selling of products and services online.

Consider yourself as a shopper at a high-end online clothing store on a budget. The first thing that comes up on the page is that the item you are looking for is currently unavailable. The website then takes you to the most expensive clothing on the site, which is far above your financial budget. Then you get to the checkout page and discover items that you did not put in your cart because rather than add to cart, you have to remove all the items you didn't want in order to save the item you do want to your cart. Finally, you remove the unwanted goods from your shopping cart and attempt to pay with your credit card. Just to pay, you are required to provide a great deal of information about yourself.

Dark patterns in subscriptions are another common example of these kinds of design choices, given the ubiquity of online subscriptions and free trials for all kinds of products and services.<sup>11</sup> This kind of dark pattern might make it difficult for a user to unsubscribe, or it might automatically convert a free trial into a paid subscription. When you open a particular news item on some news website, the first thing that pops up is information about subscribing to their one year plan. There is no option of closing the pop up, the only option is in small fonts which is to go back to the homepage. This leaves you unable to read the news that brought you to the website and possibly forces you to subscribe to gain access to that particular news item. Some of these news websites also use a form of dark design called roadblock. You open a news item and you gain access to a few paragraphs after which you are required to subscribe or sign in before you can continue reading the news item.<sup>12</sup>

Another form of dark pattern in subscriptions is forced continuity. We have all subscribed for a free trial at one point or the other where we are mandated to include our credit card details before we can gain access to the trial period.<sup>13</sup> Before the trial period ends you notice you have been charged for continuity or you suddenly find it difficult to opt out of the subscription and have to contact their customer support line to assist you in opting out.

10 "What Is Electronic Business (E-Business)? - Definition from Techopedia." Techopedia.Com, <http://www.techopedia.com/definition/1493/electronic-business-e-business>. Accessed 17 Feb. 2022.

11 "What Are Dark Patterns? An Online Media Expert Explains." UF College of Journalism and Communications, <https://www.jou.ufl.edu/insights/what-are-dark-patterns-an-online-media-expert-explains/>. Accessed 24 Feb. 2022.

12 "Dark Patterns: What Are They and How to Avoid Falling for Them." CyberGhost Privacy Hub. 2021, <https://privacyhub.cyberghostvpn.com/privacyhub/what-are-dark-patterns/>. Accessed 18 Feb. 2022.

13 "Dark Patterns: 12 Tricks You Should Never Use in Your Products." Shopify, <https://www.shopify.com.ng/partners/blog/dark-patterns>. Accessed 24 Feb. 2022.

Some e-commerce websites in Nigeria make use of countdown timers on products on sale. This type of dark pattern forces the consumer to make an instant purchase so as not to miss the sales period. Unfortunately, these sale timers are frequently inaccurate, and their sole purpose is to drive you into making an instant purchase. Aside from using the countdown timer, pop ups indicating the number of items left is also used to create a form of scarcity to encourage the consumer to make the purchase right there in addition to forcing customers to create a customer account at the point of checkout without which payments cannot be made as opposed to simply requesting delivery details which can be erased or deleted. Majority of e-businesses that mandate you to create accounts with them to use a service have no processes for deleting those accounts.<sup>14</sup>

The use of fake reviews and testimonials are also popular on e-commerce websites. This form of dark patterns is used to promote products and to present them as credible and trustworthy. A lot of times, after purchasing these products you discover that the reviews are phony because the product did not work as the reviews said it would.<sup>15</sup> When we are presented with good reviews about a product we are encouraged to purchase that particular product with the hope that it will perform beyond our expectations. The people that give these reviews might not even exist, they might just be bots employed by the e-commerce business to sell their products.<sup>16</sup>

Hundreds of dark designs are currently used by e-businesses. Even the most basic website feature can be used to persuade a buyer to make a purchase they don't want to make. Some of the major dark patterns used by e-commerce websites include: confirm shaming, F.O.M.O (fear of missing out), fake testimonials, bait and switch, misdirection, social proof or obstruction in order to adversely influence consumer decision making.

## Dark Patterns in e-Business

E-transaction entails a business process where money is transferred electronically from one place into another. It could be through internet banking, ATM, from stock exchange trades or just an invoice completion for some service/goods.<sup>17</sup> By entering a pin or swiping a card across a system, we can now make payments for goods and services online from anywhere in the world. The continuous digitization of payment systems and solutions has brought about multiple methods and systems for payments of goods and services from credit loans and facilities to gift cards across a wide range of fintech outfits and platforms. It is also common practice for providers to offer products and services at zero monetary prices. Even when consumers do not pay a monetary price for the services they consume, it is well established that consumers compensate digital providers with their personal data.<sup>18</sup>

<sup>14</sup> Luguri J, Lior Jacob Strahilevitz LJ, Shining a Light on Dark Patterns (2021) <https://academic.oup.com/jla/article/13/1/43/6180579>. Accessed 24 Feb. 2022.

<sup>15</sup> "Is Social Proof a Dark Pattern?" Convertize, 5 Aug. 2021, <https://www.convertize.com/social-proof-dark-patterns/>. Accessed 22 February 2022.

<sup>16</sup> Luguri J and Strahilevitz LJ, 'Shining a Light on Dark Patterns' (2021) 13 Journal of Legal Analysis 43 <https://academic.oup.com/jla/article/13/1/43/6180579>. Accessed 24 February 2022.

<sup>17</sup> "What Is an E-Transaction?" EMA, 9 June 2016, <http://eumerchantaccount.com/what-is-an-e-transaction/>.

<sup>18</sup> Quality Considerations in the Zero-Price Economy - OECD. <https://www.oecd.org/competition/quality-considerations-in-the-zero-price-economy.htm>. Accessed 21 Feb. 2022.

Dark patterns in e-transactions seek to influence the user into paying for a product or service by misrepresenting terms and conditions of using the service or fraudulently making the terms and conditions difficult to understand or read, adding hidden costs to the burden of the users, or forcing users to give away more personal information than they would prefer without even knowing it or seeking the consent for the processing of such data

An example of this is the misleading interest rates or additional costs to users who need to borrow money from digital lenders, automatically renewing loan agreements which ought to be closed or forcing users to fill in weird details about themselves like your health status and work address in order to make payment online.

More often than not users find themselves stuck in contracts they would have avoided if they had full knowledge of the terms and conditions. Some users have to pay extra fees they had no idea about and cannot afford in addition to the possibility of having their privacy rights breached.

## Dark Patterns in Social Media

Dark patterns in the use of social media often take the form of tracking and targeting for the purpose of marketing and advertising.<sup>19</sup> They trick users into granting consent to being tracked or having their data used in ways they didn't expect and didn't want. Have you ever realised a quick search for some social media apps could result in weeks of advertising of that product and similar products or similar brands and vendors?

Fake notification is a dark pattern used by social networking sites, using the power of notification for the purpose of making the users check their notifications more often than they ordinarily would.<sup>20</sup> It exploits the curiosity and exploitations of users in order to gain traction for the platforms and force users to expend more time and data than they ordinarily would surfing the platform to see who liked their profile or read the full message sent to them.

During the process of creating accounts on social media platforms, users are often mandatorily required to provide personal information that can include their name, birth date, geographic location, and personal interests. Data is often collected on user behaviours: when, where, and how users interact with their platform. All of this data is stored and leveraged by social media platforms to better target advertising to their users. Sometimes, companies share users' data with third-party entities, often without users' knowledge or consent. Larger issues around the interconnection of some of these platforms is another issue. How can a user ascertain that a single post made is not part of a larger conversation on another interconnected platform or that a user's data is not shared across multiple interconnected platforms?<sup>21</sup>

<sup>19</sup> Morrison, Sara. "Dark Patterns, the Tricks Websites Use to Make You Say Yes, Explained." Vox, 1 Apr. 2021, <https://www.vox.com/recode/22351108/dark-patterns-ui-web-design-privacy>. Accessed 21 Feb. 2022.

<sup>20</sup> Are Notifications A Dark Pattern? <https://designlab.com/blog/are-notifications-a-dark-pattern-ux-ui/>. Accessed 24 Feb. 2022.

<sup>21</sup> Brooks, Caroline, and Michigan State University. The Dark Secrets of Social Media Dark Patterns. <https://phys.org/news/2018-04-dark-secrets-social-media-patterns.html>. Accessed 24 Feb. 2022.





# The Role of App-developers and Product Designers in Eliminating Dark Patterns in User Experience Design

The role of app developers and product designers is crucial in providing users with a great user experience. User experience (UX) design is the process design teams use to create products that provide meaningful and relevant experiences to users. This involves the design of the entire process of acquiring and integrating the product, including aspects of branding, design, usability and function.<sup>22</sup> These decisions have a great impact on users and thus it should not be left entirely at the hands of designers and developers.

In 2021, Google made an attempt at regulating app designs with its app safety section.<sup>23</sup> The section mandates developers to submit information about who, what, why and how they process data, as well as the security and data protection measures available on their apps otherwise, risk their apps being rejected by Google play. The section also mandates apps to be secure by default, have privacy by design, give users control over data, display a privacy notice irrespective of the data collected by the app and declare accurate information on data usage by third parties through the app.

In eliminating dark patterns, user experience designers need to think beyond providing aesthetics and usability to users and rather focus on personal and professional ethics as well as protection of the rights of users.

<sup>22</sup> "What Is User Experience (UX) Design?" The Interaction Design Foundation, <https://www.interaction-design.org/literature/topics/ux-design> . Accessed 22 Feb. 2022.

<sup>23</sup> "Preparing for Google Play's New Safety Section." Android Developers Blog, <https://android-developers.googleblog.com/2021/07/new-google-play-safety-section.html>. Accessed 20 Feb. 2022.



# Existing Legal Framework for Dark Patterns in Nigeria

Currently, there is no legal document that holistically addresses the use of dark patterns, nor is there a law that speaks directly and intentionally to its use. However, certain provisions of different laws can be used to curb and curtail some dark pattern practices.

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## The Federal Competition and Consumer Protection Act, 2018

Section 114 of the FCCPA provides that any notice, document or visual representation must be provided or displayed in plain language and reasonable enough to be understood by consumers with average literacy skills and minimal experience.<sup>24</sup> This provision of the FCCPA is designed to ensure that all consumers, regardless of their educational level, can easily understand any notice, document, or visual depiction. It also aims to eliminate ambiguity and the use of legal jargons in notices and documents to better enable users to understand them.

Section 115 states that an organisation cannot display any goods or services for sale without adequately displaying to the consumer the price of those goods or services. Section 115(3) of the FCCPA<sup>25</sup> states that consumers shall not pay a price for goods or services different from the price that was displayed. The section is particularly important in preventing the type of dark pattern known as hidden costs. Organisations are required to disclose all necessary pricing information for the goods and services it provides. It also protects customers from paying for goods and services without having complete and full disclosure of the pricing information.

Section 123 (1) of FCCPA<sup>26</sup>, a producer, importer, distributor, retailer, trader or service provider shall not make any false representation to a consumer in a manner that is likely to imply any false or incorrect, erroneous, deceptive or reasonably misleading representation concerning goods and services. The FCCPA guarantees that organizations offer full details as well as accurate descriptions about the goods and services they provide in order to safeguard consumers against deception or manipulation.

<sup>24</sup> Section 114 of the Federal Competition and Consumer Protection Act (FCCPA), 2018

<sup>25</sup> Section 115 of the Federal Competition and Consumer Protection Act (FCCPA), 2018

<sup>26</sup> Section 123 of the Federal Competition and Consumer Protection Act (FCCPA), 2018

# Nigeria Data Protection Regulation, 2019

Article 2.2 (a)<sup>27</sup> of the NDPR allows a data subject to give their consent to the processing of their personal data, however, article 2.3 (2)<sup>28</sup> provides that the data controller is under obligation to ensure that consent of a data subject has been obtained without fraud, coercion or undue influence. Therefore this means that consent obtained through the use of dark patterns is voidable.

Article 3.1(1)<sup>29</sup> provides that the data controller shall take appropriate measures to provide any information relating to processing to the data subject in a concise, transparent, intelligible and easily accessible form, using clear and plain language, and for any information relating to a child. The information shall be provided in writing, or by other means, including, where appropriate, by electronic means. When requested by the data subject, the information may be provided orally, provided that the identity of the data subject is proven by other means. This provision puts an obligation on data controllers to deal with the personal data in such a way that does not constitute a breach to the rights of the data subject.

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## CBN's Consumer Protection Regulation 2016

Section 4.1 of the CBN Consumer Protection Regulation<sup>30</sup> provides that institutions must ensure that documents provided or made available to consumers shall be written in clear, legible and simple English language and provided in a durable form for future reference. With this provision, the CBN Consumer Protection Framework intends to ensure consumer protection. Documents should not be unclear or excessively difficult to comprehend for consumers.

Section 4.2 of the Central Bank of Nigeria's Consumer Protection Regulation<sup>31</sup> also provides that advertisements shall be factual and unambiguous, expressed in clear and simple language and shall not be offensive, misleading, deceptive, injurious, or exaggerate the benefits of the products or services being advertised. This provision reinforces the duty to fulfill the condition that goods and services delivered shall correspond with the description and representation in its advertisement.

<sup>27</sup> Section 2.2(a) of the Nigerian Data Protection Regulation

<sup>28</sup> Section 2.3.2 of the Nigerian Data Protection Regulation

<sup>29</sup> Section 3.1.1 of the Nigerian Data Protection Regulation

<sup>30</sup> Section 4.2 of the Central Bank of Nigeria's Consumer Protection Regulation

<sup>31</sup> Section 4.2 of the Central Bank of Nigeria's Consumer Protection Regulation

# What can the Regulators do?

Appointing a relevant regulator to oversee dark patterns is not straightforward. Dark patterns cut across several regulators' jurisdictions simultaneously including but not limited to: a data protection authority, a consumer protection authority and the sectoral regulators that have jurisdiction over the provider using dark patterns. However these are some recommendations that may possibly eliminate dark patterns:

- **Legislating against Dark Patterns:**

It's hard to know what's an actionable deceptive act or manipulative practice when there's no privacy law in the first place. This could either take the form of reviewing various sectoral legislations to include provisions that protect against dark patterns or use a holistic bill that addresses dark patterns similar to America's Deceptive Experiences to Online Users Reduction ("DETOUR") Act. This Bill aims to curb the use of dark patterns by banning interface features that intentionally diminish consumers' autonomy, ability to make decisions and choices.<sup>32</sup>

- **Auditing of Design Processes of Organizations**

Regulators can periodically audit digital interfaces to gauge the effect of the interfaces on users' decision-making capacity and agency. Audits could look for manipulative designs that foster deception or nudge users to share excessive personal information. An impact assessment test could be mandated for new products and existing products to check for manipulative designs in order to correct them.

- **Creating Interface Design Models**

Regulators may also collaboratively lay out models that must be followed in designing interfaces or products for consumers. Digital markets are evolving rapidly, however, consumer protection legislation enforcement must be more aggressive and responsive. Rather than reactive, enforcement must be proactive by laying out models that design interfaces must follow before they are even available to consumers.

- **Creating Dark Pattern Standards**

Creating and drawing the line between accepted persuasive models and dark patterns may also be helpful in helping designers, marketing practitioners, as well as consumers, detect and draw the line between what exactly amounts to dark patterns. In doing this regulators would be setting boundaries for technological design thereby removing ambiguity around what is permissible and what is not.

32 "Lawmakers Reintroduce Bipartisan Bicameral Legislation to Ban Manipulative 'Dark Patterns.'" Mark R. Warner, <https://www.warner.senate.gov/public/index.cfm/2021/12/lawmakers-reintroduce-bipartisan-bicameral-legislation-to-ban-manipulative-dark-patterns> Accessed 21 Feb. 2022.



## Conclusion

It's almost always appropriate to persuade someone to do something, but it's almost never ethical to coerce them. Organizations must bridge the perception gap between what is offered and what users believe they are getting, rather than deceiving users. If organisations abandon the usage of dark patterns, they will be establishing the framework for brand loyalty and organic and sustained growth, rather than seizing short-term profits for an unsustainable high rate of conversion.

The opportunity for design interfaces to manipulate consumers has continued to grow exponentially and if it continues to go unregulated users may actually become subject to behavioural surveillance. Given the risks associated with dark patterns and the demands for the need to safeguard users in the digital space, the call to action for regulators and stakeholders cannot be more important.



# TECH HIVE

## ADVISORY

### AUTHORS

Oyindamola Banjoko

Ridwan Oloyede

Adedolapo Evelyn Adegoroye