SIIA Preliminary Comments On
“Bringing Dark Patterns to Light: An FTC Workshop”

The Software & Information Industry Association (SIIA) welcomes the opportunity to provide written comments on the FTC’s upcoming virtual workshop “Bringing Dark Patterns to Light.” SIIA is the leading organization representing financial information, education technology, specialized content, information and publishing, and health technology companies. Our diverse membership of more than 700 companies and associations represent the broad and diverse landscape of the digital age. They provide services that are vital to our economic and social wellbeing; including helping learners of all ages prepare to succeed in their futures, managing the global financial markets, developing software that solves today’s challenges, providing critical information that informs businesses large and small, and innovating for better health care and personal wellness outcomes.

SIIA looks forward to attending the FTC’s virtual workshop on dark patterns. It is part of an ongoing and important policy discussion about the importance of digital transparency, choice, and trust. We support the FTC’s proposed topics for the workshop, particularly the discussion points on whether existing regulatory frameworks or laws already apply and whether additional rules, standards, or enforcement efforts are needed to protect consumers. We encourage the FTC to address whether the agency needs additional resources to combat unlawful dark patterns, how to define injury, and how the FTC should prioritize enforcement actions to combat dark patterns. We also encourage the FTC to consider the scholarly works of Justin (Gus) Hurwitz and Lior Strahilevitz, which address the FTC’s substantial body of existing authority and enforcement actions that combat unlawful dark patterns. Lastly, we encourage the FTC to consider the constitutionality of additional regulations of “dark patterns,” which risk violating the First Amendment’s protections for commercial speech.

Like many other stakeholders, SIIA is skeptical that the United States requires new legislation or regulatory frameworks to address dark patterns, nor do we believe that “dark patterns” are a new threat to the consumer experience. When we use the term “dark patterns’ we are merely recoining “deception” and “unfairness,” the prohibition of which has been the foundation of the FTC’s consumer protection mission since the 1930s. When drawing the boundaries of legality with respect to digital transparency and choice, the FTC should be guided by these doctrines. If a disclosure or a choice option materially misrepresents or omits material information, then it is deceptive irrespective of whether we refer to it as a dark pattern or as a “failure to disclose” or a “lie.” Similarly, if it is likely to cause substantial injury that a consumer cannot reasonably avoid and that is not outweighed by other market benefits, then it is an unfair practice that is unlawful and actionable by the FTC.

Indeed, the FTC has deployed its deception and unfairness tools for decades to combat what we now refer to as “dark patterns” in both the offline and online context, from bait and switch tactics to deceptive enrollments in continuity programs. In the digital context, the FTC’s
enforcement action against Age of Learning, Inc. (ABCmouse) is instructive. Here, the FTC leveraged its foundational statutory authority, Section 5, and the Restore Online Shoppers Confidence Act (ROSCA) to charge and stop deceptive and unfair practices relating to a “subscription trap”, including shady billing practices and unnecessarily difficult cancellation procedures. In a separate statement to that case, Commissioner Chopra made it clear that these unlawful practices constitute “dark patterns” and called on the FTC to combat unlawful dark patterns with the “numerous tools [it has] to root out the kinds of tricks and traps we saw in this matter.” He specifically pointed to the FTC Act as a tool, stating that it “vests the Commission with authority to analyze emerging practices and define which practices are unlawful.” Notably, the statement neither identified any business practices the FTC cannot address with its existing arsenal, nor any harms that went unremedied in the case. Instead, it would appear the FTC is facing a question of enforcement discretion and prioritization rather than lack of authority. The workshop is a good place to discuss how the Commission should prioritize these issues, and whether it needs additional resources to appropriately combat identified bad practices in the market.

Recent research on dark patterns supports this. For instance, the researchers in “Dark Patterns at Scale: Findings from a Crawl of 11K Shopping Websites,” found instances of dark patterns in 11.15% of the websites evaluated, most of which involved deceptive tactics. As the authors noted, the deceptive practices “are unambiguously unlawful in the United States (under section 5 of the Federal Trade Commission Act and similar state laws).” For example, the researchers discuss the dark pattern of using “testimonials of uncertain origin,” in which websites deploy false or misleading testimonials to encourage consumers to purchase. The FTC has a long history of combatting this type of deceptive advertising claim. Similarly, deceptive urgency claims (such as misleading countdown timers) are actionable by the FTC, along with many of the other dark patterns identified in the paper.1

To further explore this, we encourage you to consider the works of:

- **Justin (Gus) Hurwitz**, Associate Professor of Law, Director of the Nebraska Governance and Technology Center, and Co-Director of the Space, Cyber, & Telecom Law Program at the University of Nebraska. Professor Hurwitz advocates for a cautious approach to dark patterns. He argues that existing consumer protection law addresses the most concerning uses of dark patterns without the need for new regulation. Beyond these serious issues, he also argues the marketplace can be an effective check given the complexity of design and the risk of ossification if specific designs are prescribed through regulation. His key work on this issue is *Designing a Pattern, Darkly*. 2

---

1 What the paper did not consider is the FTC’s equal ability to leverage its unfairness doctrine to combat harm, which we believe can account for any gap in the researchers’ assessments that the patterns involve deception.

2 Justin (Gus) Hurwitz, *Designing a Dark Pattern, Darkly*, 22 N.C. J.L. & Tech 57 (2020); see also, Hurwitz’s testimony before the House Committee on Energy and Commerce’s Subcommittee on...
• Lior Strahilevitz, Sidley Austin Professor of Law at the University of Chicago. Professor Strahilevitz argues that the Federal Trade Commission has a substantive body of precedent with which the agency could target dark patterns despite lacking the term “dark patterns.” His key work on this issue is *Shining a Light on Dark Patterns*.  

Lastly, if the workshop explores regulating “dark patterns” that are not already unlawful as “unfair or deceptive practices” then it should include a discussion on whether such regulations would infringe on First Amendment rights. More specifically, regulations that burden the transmission of accurate, lawfully acquired information receive heightened judicial scrutiny: they must advance a substantial interest in restricting the speech, and be appropriately tailored to meet that interest. And any such regulations that discriminated based on content or speakers could well face strict scrutiny, virtually guaranteeing their unconstitutionality.

We thank you again for this opportunity to provide our preliminary comments ahead of the virtual workshop. If you have questions, you can contact me at sdepaul@siia.net.

Dated: March 15, 2021

Respectfully submitted,

/s/ Sara C. DePaul

Sara DePaul  
Associate General Counsel & Senior Director, Technology Policy  
SIIA - The Software & Information Industry Association  
202-789-4471 Office / 614-439-4392 Mobile / @saracdepaul Twitter  
siia.net/policy

Consumer Protection at the hearing on “Americans At Risk: Manipulation and Deception in the Digital Age” (January 8, 2020) (116th Congress).