



## **Balancing Marketing Strategies While Complying with GDPR and CCPA Regulations**

**Compliance and Ethics**

**Media and Publishing**

**Technology, Privacy, and eCommerce**



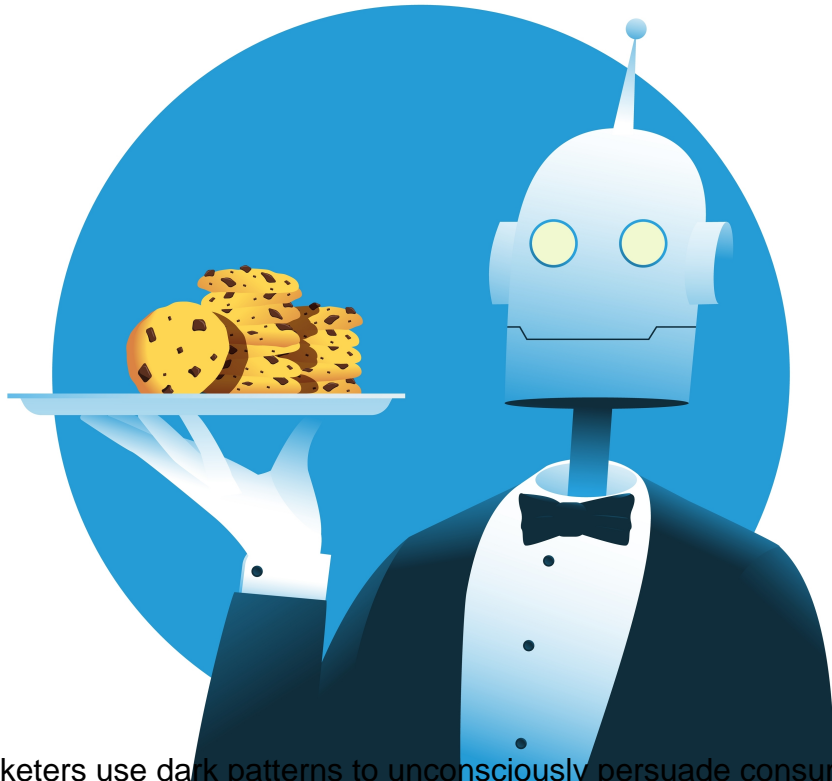
Banner artwork by fedrunovan / Shutterstock.com

## The use of dark patterns

Do you ever stop and think about the intentionality of your online purchases? Perhaps you don't even remember how you found a product. You may have fallen victim to a dark pattern, a tactic that may be used by marketers to increase product visibility and sales. The US Federal Trade Commission stated common dark patterns [“are often presented as giving consumers choices about privacy settings or sharing data but are designed to intentionally steer consumers toward the option that gives away the most personal information.”](#)

Imagine this: Company A is a retail company that receives 45 percent of its revenue from e-commerce sales. Now further imagine that a consumer is browsing the internet and stumbles across this retailer's website which gives consumers the opportunity to “Accept all Cookies” or “Decline” before browsing. The accept all button is on the left side of the screen, and the decline button is on the right side of the screen.

Without much thought, the consumer clicks the accept all button. Little did the consumer know that Company A's marketing team strategically placed the button on the left side because they understood — based on human psychology and case studies — 70 percent of online retail shoppers will unconsciously click the button on the left side of the screen.



Bots and human marketers use dark patterns to unconsciously persuade consumers to accept cookies on websites. Moor Studio / Shutterstock.com

The US Federal Trade Commission stated common dark patterns "are often presented as giving consumers choices about privacy settings or sharing data but are designed to intentionally steer consumers toward the option that gives away the most personal information."

There are many questions that arise when evaluating this scenario. Did the consumer unwillingly give their consent? Did Company A provide the consumer with the opportunity to opt-out? Could Company A's strategic placement of the "Accept all Cookies" button be considered a dark pattern? Is this a violation of the General Data Protection Regulation (GDPR) or California Consumer Privacy Act (CCPA)?

## **The importance of consent**

Understanding human behavior and preferences is a crucial skill in any marketing role. This is nothing new. Successful marketing should appeal to consumers' emotional and psychological needs. However, because of the use of dark patterns "[consumers may be unaware of the privacy choices they have online or what those choices might mean](#)," thereby hindering consumers from making informed choices.



Customers

may be unaware of the privacy choices they legally have. Golden Sikorka / Shutterstock.com

The collection of data and consent has become a hot button issue due to concerns about transparency and limited options for consent. Consent is a cornerstone in the GDPR; Recital 32 of the GDPR makes clear that consent must be informed, specific, unambiguous, and freely given.

In a similar manner, California's position on dark patterns and a consumer's ability to opt out is crystal clear: [business must not use manipulative user interfaces that undermine decision-making or choices](#). Under the CCPA — as amended by the California Privacy Right Act (CPRA) — dark patterns are defined as [“a user interface designed or manipulated with the substantial effect of subverting or impairing user autonomy, decision-making, or choice, as further defined by regulation.”](#) In effect, it is crucial for companies to align their practices with the CCPA and prioritize consent and the ability to opt-out.



Companies should utilize an opt-out function for users who do not consent to accepting cookies or sharing personal data. *ivector / Shutterstock.com*

However, because of the use of dark patterns "consumers may be unaware of the privacy choices they have online or what those choices might mean," thereby hindering consumers from making informed choices.

While successful marketing strategies may lead to increases in consumer engagement and revenues in the short term, it can ultimately result in costly penalties and damage a company's reputation if data privacy laws are not followed. If anything, the recent CPRA amendment serves as a reminder that companies — like Company A — must ensure consumers are provided the opportunity to make informed choices.



If data protection regulations are ignored, marketing strategies can result in hefty penalties. *Creativa Images / Shutterstock.com*

## Marketing vs. data protection

Lawyers advising companies must be mindful of the tension between marketing tactics and data protection regulations, such as GDPR and CCPA, in obtaining consumer consent. While marketing plays a crucial role in boosting revenue of such companies, the use of dark patterns and deceptive user interfaces to obtain consent can be a violation of the data protection regulations. As marketers continue to understand the patterns of human psychology to increase product sales, transparency and ethical practices must remain at the forefront to maintain consumer trust and avoid legal consequences.

[Join ACC](#)

---

[Johnathan Duffie](#)



Senior Legal Counsel

Capgemini

Johnathan Duffie is senior legal counsel at Capgemini, a leading strategic technology partner to companies around the world, headquartered in Paris, France. Prior to joining Capgemini, Duffie was an attorney for the United States Department of Education where he focused on interagency agreements, FOIA litigation,

---

employment law, and investigations. Duffie is an US Army veteran, including a tour in Iraq. He earned his bachelors from Loyola University Chicago and his juris doctor and master's degree from Case Western Reserve University.

[Elizabeth A. Hernandez](#)





Legal Counsel

Capgemini

Elizabeth A. Hernandez is legal counsel at Capgemini a leading strategic technology partner to companies around the world, headquartered in Paris, France. She focuses on technology transactions, including data privacy issues. Prior to joining Capgemini, Hernandez was legal counsel for Prospectiva en Tecnología and Tata Consultancy Services, where she focused on technology and corporate transactions, operating across Mexico, Uruguay, and Guatemala. She earned a Bachelor of Laws and a postgraduate degree in International Trade Law from Universidad Nacional Autónoma de México, UNAM and she is currently pursuing an MBA at Universidad Anáhuac.

