

# Consumer Finance Monitor (Season 6, Episode 31): The Challenges of Using the Current Law to Address Dark Patterns, A Conversation with Special Guest Gregory Dickinson, Assistant Professor, St. Thomas University, Benjamin L. Crump College of Law

Speakers: Alan Kaplinsky and Greg Dickinson

Alan Kaplinsky:

Welcome to the award-winning Consumer Finance Monitor podcast, where we explore important new developments in the world of consumer finance and what they mean for your business, your customers, and the industry. This is a weekly podcast show brought to you by the Consumer Financial Services Group at the Ballard Spahr Law Firm. I'm your host, Alan Kaplinsky. I'm the former practice group leader for 25 years, and now Senior Council of the Consumer Financial Services Group at Ballard Spahr. And I'm pleased to be moderating today's program.

For those of you who want even more information, either about the topic that we're going to be talking about today or anything else in the world of consumer finance law. Don't forget about our blog, which also goes by the name of Consumer Finance Monitor. We've hosted our blog since 2011 when the CFPB became operational, and there's a lot of industry content there. We also regularly host webinars on subjects of interest to those in the industry. So to subscribe to our blog or to get on the list for our webinars, please visit us at [ballardspahr.com](http://ballardspahr.com). And if you like our podcast, please let us know about it. Please leave us a review on whatever podcast platform you may use, be it Apple, Google, Spotify, et cetera. Also, please let us know if you have any ideas for other topics that we should consider covering or speakers that we should consider inviting as guests on our show. So today I am joined by Professor Gregory M. Dickinson. And I'm going to from now on call you Greg.

Greg Dickinson:

Please do.

Alan Kaplinsky:

So Greg Dickinson is a Assistant Professor of Law at St. Thomas University, Benjamin L. Crump College of Law, located in Miami Gardens Florida. Prior to joining that college of law, Greg was a fellow at the Stanford Law School Program in Law, Science and Technology. Greg's research centers on two key challenges facing law and technology. The first is developing a legal framework to govern the internet, big data and other emerging technologies. The second is deploying some of those same technologies, in particular data mining and machine learning, or sometimes we call it AI or artificial intelligence, to improve our understanding of how the American legal system operates in practice. Greg's work explores the strain that new technologies are playing on historical legal frameworks and proposes reforms to reshape existing regulatory frameworks to govern these new technologies. Through computational analysis of large bodies of case law, his work seeks to provide a more systematic view of our legal system and the doctrines, and to guide legal reforms and policy decisions. His work has appeared in law journals including the Brigham Young University Law Review, George Washington Law Review, Stanford Law & Policy Review, and the Administrative Law Review.

I first became familiar with Greg's work by reading a law review article that hasn't yet been published, but will soon be published in the Georgia Law Review. And the title of the article is called Privately Policing Dark Patterns. I became very interested in the subject of dark patterns about a year ago when I had, as my guest on our podcast show, Malini Mithal. Malini is the associate director of the Federal Trade Commission Division of Financial Practices. And on our program that got

released on May 5th of last year, she talked in great detail about how the FTC is investigating online companies that are using dark patterns to the detriment of consumers.

I then had as my guest on April 6th of this year, not so long ago, Andrew Nigrinis, not a lawyer, but he has his PhD and he is the Managing Principal of Edgeworth Economics. And most importantly, for purposes of the podcast, I recorded with him; he's a former CFPB enforcement economist, and he explained how deeply involved he was in rooting out dark patterns being used by companies to trick consumers, and how he supported the enforcement attorneys at the CFPB in conducting investigations and then ultimately bringing either lawsuits or entering into consent orders with companies that were targeted by the CFPB for using dark patterns.

So this is now the third time we have explored this topic in less than a year. If we cover a topic once, it's important, if we do it twice, it's very important. And if we do it three times, you know that at least I believe it's extraordinarily important. So first of all, Greg, a very warm welcome to our show. We're very happy to have you as our guest today.

Greg Dickinson:

Thanks so much, Alan. It's great to be here and I'm glad to hear that you think dark patterns are important. It's something I love talking about, and so I look forward to chatting about it now with you.

Alan Kaplinsky:

Well, anytime when clients start calling about something, either they're being investigated by the FTC or the CFPB and they'll start describing to me, they usually don't know the term dark patterns, but they're describing to me what the case investigation is all about. The first thing I tell them is it's dark patterns again, rearing its ugly head. The more and more frequently this is becoming an issue. So for the benefit of our listeners who were unable to listen to our other podcast shows, which by the way are available on our archive, you can get them on our website. We've archived all of our podcast shows going back four and a half years. So they are there. But let's build the foundation for everybody. And would you describe to our listeners what is a dark pattern?

Greg Dickinson:

Of course. So just like you, I saw this term a few years back and I remember thinking, what in the world is a dark pattern? It sounds so scary, whatever it is. And when you dig into it a little bit, it turns out that a dark pattern is just a fancy name for old-fashioned business trickery, at least when it's employed online. And so just some examples are really the best way to describe it. You sign up for an app or you sign up with an account on a website and you notice a pre-checked box that says, yes, I'd love to receive hourly emails from you advertising for your products. And you think, why in the world was that the default option? Why in the world was that pre-selected? And that's the rough idea of a dark pattern. Counterintuitive or maybe deceptive app and website designs that get the website operator what they want, and not necessarily what's in the best interest of the consumer or what the consumer would want. The scholars debate exactly how it should be defined, but that really gives you the rough idea.

Alan Kaplinsky:

Yeah. And actually when I started looking into the subject a little more deeply, I found out that that term dark patterns, it actually, it's been in use for a long time. It's not that new. I mean, I thought this was a new concept when I first heard about it from Malini Mithal at the Federal Trade Commission, but I can't remember now the history, but it goes back quite a ways, and I can't remember who the inventor of that phrase was.

Greg Dickinson:

Yeah. You can't open a newspaper now without running into it in the last year or so. But it goes back a little bit, the dark patterns description was invented by a, if I'm recalling correctly, a user interface design researcher who was trying to describe these sorts of aggressive interfaces that are trying to get users to do what they want. The term pattern, actually, strangely enough, it comes from architecture. It was a scholar of architecture who was trying to categorize architectural techniques that

you could then put together like Legos to develop well-designed buildings. It was adopted by computer engineers for things like click boxes and option boxes and good user design practices. And then of course, a bad user interface design practice, well, that's called a *dark* pattern. And so that's where the term originated.

Alan Kaplinsky:

Right. So you gave one example already of a dark pattern, something with a pre-selected box. And it is funny, that reminded me of a case that I handled many years ago for a very large consumer finance company. Well before the internet got created by, I think it was Al Gore, although I can't remember exactly. And they had a practice, nobody was doing business online with them, it was bricks and mortar. People would come in their office and they'd apply for a loan and then the papers would get printed out. And the papers would include all kinds of credit insurance and a disability insurance and accident health insurance. It would all be factored in even though there hadn't been no discussion with the consumer as to whether he or she wanted to elect what was supposed to be voluntary credit insurance. And sometimes the consumer would see it and sometimes they wouldn't see it because they're anxious to get their money. And when they would see it and object, the company would say, "Well, we can take all that out, but we won't be able to have the papers ready for you today. You'll have to come back tomorrow for us to reprint it without." So that, that's, I think the, not online of course, but that kind of practice certainly has had its genesis in certain bricks and mortar practices that companies were engaging in a while ago.

Greg Dickinson:

Absolutely. So not a new strategy. Businesses and consumers have always been in battle. So this is really just the most recent manifestation.

Alan Kaplinsky:

You told us about the pre-selection option, and I elaborated a little bit about how it was used in a bricks and mortar context, but can you give us some ideas of other examples of a dark pattern?

Greg Dickinson:

Of course. So you see these every day it feels like, every time you download a new app or go to a new website. And one thing scholars have been doing in this field is just to try to categorize them to get a handle on the various techniques companies are using. And one common framework for that divides them up into five or six categories, one of which is nagging, which you'll see if you go to a website, often, it'll ask you to allow it to check your location, to share your location data, and you can say no. And then the next time you go, it'll ask you again. And I get this with YouTube Music. I'm not a paying subscriber, but every time I visit the website, they ask me if I'd like to start paying and I say no, but there's no way to say no and don't ask me again. It is just going to ask me every single time. And that's a dark pattern. It's called nagging. One, this might be the one that you just described with the paperwork that's not ready in time. There's one called sneaking, where you aren't given relevant information until fairly late in the process. And so maybe you start signing up for what seems like a good deal with some sort of subscription or vacation package or something.

Alan Kaplinsky:

You might even think it's free, right?

Greg Dickinson:

Yeah, it could look even be advertised as free.

Alan Kaplinsky:

Because very often there'll be some kind of a free option where if you select that you don't get a hell of a lot.

Greg Dickinson:

Yeah. And then at the last minute it'll tell you, if it's a product, it'll tell you there's a 500% shipping and handling fee or something like that, or that the rate doubles after six months. And so you're given all of the information, but not until so late in the process that you've already invested a lot and now your calculations are going to change. One called sneaking.

The one that I mentioned about pre-selected check boxes, that's something called interface interference or you have confusing or otherwise deceptive user interfaces. Another way you see this is confusing wording or maybe emotionally manipulative wording. If you want to opt out of something, it'll say, "No thanks, I don't like saving money," will be the phrasing of the option for choosing against something. These sorts of things. One that my mother used to drive me nuts with, it's called forced action where if you want to accomplish something in an app or website, it makes you do something or it either literally forces you to do something or forces you to take an action in the real world rather than in the game.

And so she used to play a lot of Candy Crush Saga. And somehow, I never did investigate this, but she could only proceed in the game if she sent her friends invitations. And so I was always getting these invitations to join the game because she was forced to send them in order to proceed somehow. So that's called forced action. And then a general one is called obstruction, which is just the idea of making something harder than necessary for a user to accomplish. And the example I like to give for this is Amazon Prime. I told my students that I canceled my Amazon Prime and subscription and they all gasped. They were thinking, how in the world do you buy anything without Amazon Prime? But just going through the exercise of canceling it was part of what drove me to write this paper.

If you try to cancel your Amazon Prime account, first of all, it's hard to find where you would even do it. It's not in an easy location in the interface. You have to go to your account and then dig around through some menus. But once you finally initiate the process, it's not just click a button and it happens, like you might think would be the easy way to design it. Instead, you start the process and then you're presented with three options. So you've clicked on cancel my account, and then you're presented with the option to remind me later, keep my membership or cancel my membership. And you might think, well, I just clicked to cancel my membership. Obviously that's what I want to do, not remind me later or keep my membership, but they give you that screen and if you proceed, say, cancel my membership again, well then you get yet another screen that presents you with the same three options.

It says, remind me later, keep my membership or cancel your membership. But this time you are given a list of all of the TV shows you've been watching recently that you might lose access to, all of the good deals you've gotten in the last few months. And so it tries to remind you that you shouldn't really be doing what you're doing. And if you click it again, if you say again, cancel my membership, it still doesn't happen. You're presented with another screen that again presents you the same three options. Remind me later, keep my membership or cancel my membership. And this time it presents a fourth option, pause your prime membership. I don't know exactly what the difference is between pausing and canceling, but I assume it, or I'm guessing it really is a guess, that it has something to do with keeping your credit card information on file so that it's very easy to resume rather than requiring a new transaction.

And so you're three times presented with these same options and if you finally for the third time, click cancel my membership, well, then it really happens and you're again presented with a screen that looks very much like the one you've seen three times, but this time if you click continue instead of meaning continue to cancel your membership, the continue actually means continue my prime membership, meaning resume it. And so it would be easy to go through all of the screens to cancel your membership and then accidentally click continue one more time. And you've started it up again despite the fact that you went on this long journey to cancel it. And so this is something that's not uncommon. This is Amazon has maybe an especially well-designed obstruction dark pattern, but it's not unusual at all or atypical.

Alan Kaplinsky:

So do you think, Greg, that the big tech companies hire specialists in how to create dark patterns or how to create, I guess you got to be careful here. You need somebody that can create something that's not going to draw the ire of the FTC in the CFPB, but yet walk close to that line, that compliance line.

Greg Dickinson:

For somebody like Amazon, almost certainly. The value to them of having five more percent or even 0.1% of people act differently in response to an interface. The value to them is just so high that I can't imagine that they wouldn't pay multiple people to work on this.

The way they typically do it, if you work in software interface design, is through what's called A/B testing. And so you'll have one group of users will be presented with one interface, another group of users will be presented with another interface, and you see which one is more effective. And effective could mean they're able to quickly and accurately navigate the interface. That's kind of a traditional way of testing interfaces. But if you're trying to get users not to cancel their prime subscription, you might do A/B testing on one interface versus another for continuing versus canceling subscriptions. And that can produce very powerful interface designs that really discourage whatever particular action the designer doesn't want. And for somebody like Amazon, almost certain they do it. For smaller companies, they aren't going to have the resources to do something like that necessarily, but they're in the business of making money, and so they're going to at least pay attention to how this looks to the user.

Alan Kaplinsky:

As you were describing this whole thing, I started thinking about another topic that I know you're very interested in and that we've been covering on our podcast show, namely generative artificial intelligence. And I'm wondering, it just seemed to me that AI could end up replacing human beings in creating dark patterns or hopefully not dark patterns, but easy ways for consumers to navigate the internet site. Is that something that you see as well as coming in the future?

Greg Dickinson:

Yeah. The technology to do that would exist now. It wouldn't have to be human designed interfaces that are being tested through an A/B testing process. It could be that they're being optimized or adjusted in some way through computational techniques. You could very much automate the process through machine learning techniques, which would produce potentially even more attractive designs. It would need some human oversight. If you just set a computer off to find the user interface that minimizes cancellations, well, it's just going to lie. It's going to call the button that cancels continue or something like that. And so you do have to have some human oversight or you'll get ridiculous results, but certainly that that's going to speed things up and expand the number of possibilities you can try if you have computers rather than humans doing it.

Alan Kaplinsky:

Yeah. So I think you may have answered the question I'm going to ask you now, but I'm going to ask it to you again. What was it that got you very focused on this topic of dark patterns? What was the difficulty you had in actually canceling Amazon Prime or was it some something else?

Greg Dickinson:

Yeah, so annoyance was it. I can't remember what the first dark pattern that annoyed me enough to make me to decide to write on it was. But really if you have a lot of frustration, that powers writing. Academic writing can get boring at times because you have the fun idea and then you've got to power through. But if you have something that makes you angry now and again, that helps drive you. The other thing is this is an area where I have maybe a unique value add in a past life before I entered the law, I was a computer programmer, and so I have a bit of sympathy for how difficult it is to get these app designs right. It's not an easy task to create a streamlined and clear user interface. And so I have sympathy on both sides. And so it's an area where I feel like I can add something important to the discussion.

Alan Kaplinsky:

Yeah. Yeah. So let's talk about, and this question too, I think we may have already gone over, but other than the fact that a dark pattern is something that exists in an online environment, how does it differ from old-fashioned business trickery or a scam or just plain old garden variety fraud?

Greg Dickinson:

Yeah. In one sense, it's not. This all sounds familiar. Like you said, the world has seen this before and forever, essentially. If you look back at the old English cases, I remember reading one where a merchant selling wool had a cartload full of wool, and at the top he had very fine quality and he was selling by weight. And at the very bottom of the cart load, he had poor quality wool. And then there was a suit about this. And so this is not new stuff in a certain sense.

But the way that the world is changing or the way that things have changed is new research in behavioral economics and cognitive psychology have really expanded our understanding of consumers' susceptibility to irrational decision making, at the same time that this A/B testing on user interfaces really allows companies to maximize the effectiveness of exploitation of these biases.

And then one other difference is how easy it is to manipulate and change digital interfaces versus physical storefronts. If you wanted to create a dark pattern in the physical world, you could, casinos are famous for this with their layouts encouraging you to stick around forever at all hours of the day, but it's harder to do that, whereas with a digital interface, a few keystrokes might change it instead of just changing the architecture of a whole building. And so really it's the same stuff, but easier and maybe more powerful now than it used to be.

Alan Kaplinsky:

Yeah. Yeah. Let's turn to the law that applies to this activity. And tell us what laws govern dark patterns.

Greg Dickinson:

So again, right now at least, it's the same old stuff. And so if you're a plaintiff, if you're trying to sue somebody who's tricked you, you have all the common law claims, you could bring a fraud claim, you could bring some sort of a contract claim to undermine formation on the basis that you were tricked. Or as most states now have, there's going to be some sort of an unfair business practice statute you might be able to bring a claim under. And so that's available to consumers. But the real big player here, as you alluded to earlier, is the FTC, which has been taking the lead nationwide, trying to crack down on this stuff. Warning companies through guidance documents about practices that the FTC deems unfair or deceptive. And so they're really the big player in this area, even though theoretically, the consumers could take action directly through old common law actions.

Alan Kaplinsky:

Yeah. So the FTC, you're referring to Section 5 of the Federal Trade Commission Act that prescribes unfair and deceptive acts and practices, been on the book since, I don't know, maybe the 30s, I mean a long period of time that. That's the main statute that the FTC uses to police what it considers to be unlawful conduct by companies in the consumer finance space, or for that matter, in any kind of engagement with consumers. And the CFPB, Consumer Financial Protection Bureau, which got created by the Dodd-Frank Act in 2010 became operational in 2011, that's got a provision that prescribes unfair, deceptive and abusive acts and practices. Do you consider this dark pattern problem as fitting within the deceptive prong, or does it fit within each of these prongs, unfair, deceptive, and abusive?

Greg Dickinson:

Well, to the FTC, the FTCs position is that dark patterns could fall into either. They could be both unfair and they could be deceptive. Personally, and this is really my own take. Personally, I'd prefer to see the FTC pursue these claims through the deceptive prong of their authority. Just because the unfairness prong is so vague, so hard to understand how broad that authority is; you worry that you might start to have enforcement actions against practices that could be self-regulating, that consumers could regulate themselves. And so really I'd prefer to see the FTC rely on its deceptiveness authority, but what it has actually done in practice is say both are valid grounds for pursuing these.

Alan Kaplinsky:

Right. Right. And of course, at the state level, you mentioned these, I called them, use the acronym UDAP statutes, which are sometimes also called mini-FTC laws. They can be utilized by state attorneys general in bringing enforcement actions. And very often the state UDAP laws, unlike the UDAP provision in the Federal Trade Commission Act or in the Dodd-Frank Act, which can only be utilized by the government, at the state level, it can lead to private causes of action.

One of the problems, I think with, and I'm going to get to private litigation in just a little bit, but it occurs to me that sometimes while you might be able to bring an individual action to go after a company who may have deceived you through use of a dark pattern, it becomes a lot more difficult to get a class certified because of the need to show commonality. And if you can't show commonality, then you can't get a class certified under Federal Rule 23 or under its analog, under a state procedure, but individual actions are certainly available.

So we've talked about the old laws that have been there for a while, that are on the books and that have been applied in a wide variety of instances, well before the use of the internet created additional ways for consumers to be scammed or to be misled. But are lawmakers looking at special statutes that deal with dark patterns and that prohibit dark patterns and defined them with specificity? Has that happened yet?

Greg Dickinson:

So lawmakers are getting a lot of pressure to do this, and in some states they have. The furthest advances that have been made at the federal level is something called the DETOUR Act, which wasn't passed. I want to make that clear. It hasn't been enacted into law, but that would've attacked dark patterns directly and said, these are unlawful as a matter of federal law. And then that act does attempt to define them in some level of detail. And then actually in California and Colorado, both of those states as part of statewide consumer privacy laws that they have, they have also enacted bars on dark patterns in connection with compliance with those privacy laws. And so if you're going to get consent to use of data or you're going to get somebody to sign up again after having declined to participate in your program, those state laws bar acquiring consent via dark patterns and then go on to define what a dark pattern is; they use the term in the statute and then also define it.

Alan Kaplinsky:

But it's only in the context of privacy restrictions, I take it. Laws at the state level, and there've been a lot of state laws. They seem to be proliferating right now dealing with privacy. But nothing beyond privacy, I take it.

Greg Dickinson:

No, not a freestanding bar on dark patterns or anything like that.

Alan Kaplinsky:

Do you think there's a need for that, or do you think that the existing laws are sufficient? I mean what occurs to me, as soon as you try to get specific, then fraudsters will try to figure out a way around what you have prescribed, and they'll claim that what they did was lawful. If you've got a general UDAP statute, you can shoehorn just about anything into that.

Greg Dickinson:

Yeah, I agree with you entirely on that. The pressure here is coming. It's the do something pressure. We have a problem. The consumers are feeling the effects of these things, and so they want the legislature to do something. And I think that's where the pressure comes from. But what people aren't realizing is that this is more an enforcement problem than it is a law problem. It's not as if the law doesn't prohibit this stuff. It's just that the enforcement resources of the FTC and state analogs are pretty limited. And so without a substantial increase in the budgets and in enforcement actions, you're not going to have a complete elimination of these things. They're still going to be out there.

And as you say, if I were a fraudster, I'd like nothing more than a preemptive law that says, here's what a dark pattern is, and you're okay as long as you don't do this. That would be great. Who knows what you could come up with -- all sorts of great tricks.

Alan Kaplinsky:

Right. Right. So you mentioned in your law review article challenges to law making in this area. Can you talk a little bit about that?

Greg Dickinson:

Yeah. It relates to actually the point we were just discussing, which is, how are you ever going to define what a dark pattern is, at any level of detail, completely. There's endless variations in what dark patterns can look like. User interfaces change over time. In the next decades, or I don't know, maybe even quicker than that, we're going to see augmented reality and virtual reality interfaces, and they'll have all new ways to trick you into doing stuff you didn't mean to do. And if you try to draw a very firm line and say, this is what a dark pattern is, you're just not going to be able to do it. And so really the better approach is through broad laws that are then honed through decisional law of the courts. And so that's a key point that I make in the paper is even though there may be some changes in this area (because it really is affecting consumers) a detailed law purporting to set out exactly what a dark pattern is, is unlikely to be successful.

Alan Kaplinsky:

Yeah. So in your article, *Privately Policing Dark Patterns*, you see a greater role for private enforcement in the area. We touched upon that a little bit earlier in our podcast, but do you see a big role for private litigation as opposed to government enforcement?

Greg Dickinson:

I think there can be a role. I wouldn't do away with government enforcement. I think it's very important they're the big player here, but they're resource constrained. The FTC can only bring so many actions, can only send out so many letters, can only investigate so many companies. And there's a lot more going on. Essentially every company or nearly every company that's doing anything these days has a website. And it's very likely to be a confusing one or at least it could be. And so you need a lot of enforcement. And one way that you can get that is by creating private rights of action that allow the people who are duped, the people have maybe something at stake, to bring actions themselves rather than relying on the FTC to do that. But there are a few barriers to that, and, frankly, I'm still working through how to overcome those, things like, well, if you only lost some minutes of your time rather than actually getting tricked out of money, or if you maybe didn't lose very much money at all, why would you bring a lawsuit? You aren't going to pay a lawyer for that.

Alan Kaplinsky:

Well, and legally would you have standing to bring a lawsuit under the Supreme Court's *Spokeo* decision and other cases where it's becoming increasingly difficult to establish that you have legal standing and that there is a case or controversy.

Greg Dickinson:

Without that traditional loss, even a statute purporting to authorize a private right of action, maybe you wouldn't have constitutional standing in federal courts. And so there's a lot of nuances to work through. And I'm actually working on another paper that I plan to dig into those issues in more detail.

Alan Kaplinsky:

Let me give you something else to worry about, Greg. Very often, as you probably have noted, companies that sign up for something on the internet, bind themselves to an arbitration provision, which says, if a dispute develops between the two of us, you've got to go to... binding individual arbitration. It prohibits the use of class actions. It includes in the arbitration of



provision, a class action waiver, which is an area that I pioneered about 15 years ago when I had companies coming to me that were just being over -- there was literally an avalanche of class action litigation in the consumer finance area. My clients wanted to know if there was something, any idea I had as to something that might curb that. And that's when I took a great interest in arbitration, did a lot of research under the Federal Arbitration Act, and looked into whether a class action waiver would be valid. We litigated that issue for almost 10 years. And then finally, the US Supreme Court in a case called *AT&T v. Concepcion*, upheld the validity of class action waivers in arbitration provisions and said that that would preempt or override any state law, to the contrary, any state law that would make it unlawful. So I hope I didn't ruin your day, but that's another problem with private litigation.

Greg Dickinson:

Yeah. Of course, if you're talking about private litigants, they have the right to waive the right to the court system, and so they can enter into these arbitration agreements. There's still, I think, a role for a private right of action here. Of course, some companies won't use arbitration agreements, and even if they do, an arbitration dispute or an arbitrated dispute does leave some decisional law. It's not binding in the same way on future arbitrators, but it does often, especially in a big case, lead to a record of the dispute that might act something like common law does.

Alan Kaplinsky:

Let me change the subject as we are getting close to the end of our program, because I always like to include in our program practical advice for our listeners, particularly those who might be in-house counsel at a company that sells consumer goods or services online that offers consumer credit. And I take it that -- at least as the advice that I've been giving to clients is -- you really need to take a very close look at the software interface design that you're using on your website or websites. It is work that not only, I mean, think you need more than a lawyer, you need somebody who is an expert in that area to take a fresh look at what you've done, and then to work with your lawyer, either in-house counsel or outside council, to make sure you're on the compliance line and you haven't gone over that line into a dark pattern. And I'd like to get your thoughts on, from a practical standpoint, what are the takeaways here on what a company ought to be doing?

Greg Dickinson:

Yeah, I think those are all good points, Alan. I guess I would look at this in a similar way to how companies look at their advertising. And so if they're developing new advertising copy, they're going to have the marketers work on it first and figure out what they'd like to put in there. And then they're going to have the lawyers look at it and say, is this tricky enough that we're going to get in trouble for it, that somebody's going to get the wrong idea, or a substantial number of people are going to get the wrong idea? And so they kind of act as a check at the backend.

And I would do the same thing with user interfaces. Maybe you have the programmers and the people in charge of the product marketing or whatever they're doing, they design what they'd like, but then somebody else has got to come and give it a test drive and see if it's really confusing, if they're having trouble accomplishing what they want. So you want to separate out those processes so you don't talk yourself into doing something that's really tricky enough that you're going to make a bunch of people angry. And so lawyers are going to play a role. I think you're right, too. This might be an area where for bigger companies at least, they want somebody that's specialized in user interface design -- who knows not only does this feel tricky, but what are the alternatives. Is there a reasonable alternative here or not? And so I could see specialization being helpful.

Alan Kaplinsky:

Right. Right. So for people who can't wait to read your article and don't want to wait until the Georgia Law Review publishes it, I take it they can access it now, right?

Greg Dickinson:

The article's up on SSRN, Social Science Research Network. It's pre-publication, but it's getting close to final format. And so it's worth taking a look at now, I'd say. And just a Google search for *Privately Policing Dark Patterns* would pull it up.

Alan Kaplinsky:

All right. Right. Well, Greg, really want to thank you for taking the time today to be a guest on our show and for doing an excellent job in explaining what dark patterns are all about and what companies need to be doing to make sure that they don't get on the wrong side of the law here with the FTC or the CFPB. So thank you again for being our guest.

Greg Dickinson:

Absolutely. My pleasure and always happy to talk about this. Again, driven by frustration and so always happy to chat.

Alan Kaplinsky:

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