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Amazon: The Prime Target in FTC Crackdown

Minding Your Business on **November 7, 2023**

On October 18, 2023, Amazon filed a motion to dismiss the Federal Trade Commission's lawsuit alleging that the company deceived millions of consumers into nonconsensual Prime membership enrollment and thwarted members' attempts to cancel their Prime subscriptions. In a heavily redacted complaint filed on June 21, 2023 in the Western District of Washington, the FTC charges Amazon with using "manipulative, coercive, or deceptive user-interface designs known as 'dark patterns' to trick consumers into enrolling in automatically-renewing Prime subscriptions," in violation of the FTC Act and the Restore Online Shoppers' Confidence Act ("ROSCA"). The FTC describes the Amazon platform as bombarding customers with options to sign up for Prime and obscuring options to shop without Prime, making non-Prime alternatives difficult for consumers to locate. In some cases, the FTC alleges, the button to complete a transaction did not clearly state the shopper was also agreeing to enroll in a recurring Prime subscription.

According to the FTC, Amazon trapped customers into recurring subscriptions by knowingly complicating the cancellation process for those seeking to end their membership. Per the complaint, Amazon internally named the Prime cancellation process "Iliad"—the title of Homer's epic on the decade-long Trojan War—because it designed the cancellation process to be "labyrinthine." The FTC accuses Amazon leadership of "slow[ing] or reject[ing] user experience changes that would have made Iliad simpler for consumers because those changes adversely affected Amazon's bottom line."

On September 20, 2023, the FTC filed an amended complaint, adding the names of three senior Amazon executives who purportedly played key roles in the enrollment scheme. According to the amended complaint, which includes content from internal company emails and messages, Amazon executives acknowledged that the enrollment flow lacked transparency. The internal communications illustrate the extent to which the company and its management team were aware of the misconduct, contends the FTC.

In its motion to dismiss, Amazon asked a Seattle federal judge to dismiss the FTC's lawsuit, submitting the Commission is improperly attempting to change consumer protection law through litigation. "The FTC has repeatedly admitted that [ROSCA] does not provide necessary guidance on the 'dark patterns' theory that the FTC is aggressively prosecuting here," states the motion. According to Amazon, the current laws are "problematically unclear," and the FTC must promulgate new rules to define the concepts it's trying to prosecute. The motion continues, "the FTC seeks to retroactively impose its interpretation of as-yet unpromulgated rules on Amazon in clear violation of Amazon's due process rights." Amazon insists that its Prime enrollment and cancellation processes are compliant with the law, and the FTC's suit represents a "premature attempt to legislate through litigation," depriving the company of fair notice.

The present case is but one in a string of cases that form part of the FTC's crackdown on the use of dark patterns. In late 2021, the FTC issued a warning that it planned to scrutinize patterns that "trick or trap" consumers into subscription services, noting the Commission's past enforcement actions against subscription services had not gone far enough. In September of 2022, the FTC issued a 48-page dark patterns report, titled "Bringing Dark Patterns to Light." Two months later, in November of 2022, the FTC reached a $100 million settlement with Vonage over the company's auto-renewing phone plan and "junk" termination fees. The following month, in December of 2022, the FTC obtained a $520 million dark patterns settlement with Epic Games over violations of child privacy laws and for deceiving players into making unintentional in-game purchases. Months later, in a June 2023 press release commenting on the instant suit against Amazon, the FTC vowed it "will continue to vigorously protect Americans from 'dark patterns' and other unfair or deceptive practices in digital markets." In its present motion to dismiss, Amazon emphasizes that litigation is not a permissible way for an agency to enact new standards, and the FTC ought to propose a rule that would address the "deceptive use of so-called 'dark patterns'" rather than using ROSCA to "upend longstanding marketing practices." If Amazon's challenge is successful, the FTC will be required to provide clear guidance on dark patterns and regulation in this space before pursuing businesses they perceive to be violating ROSCA.

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