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Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue N.W., Suite CC-5610 (Annex A)
Washington, DC 20580

RE: Bringing Dark Patterns to Light

Common Sense, a nonpartisan, nonprofit organization dedicated to helping kids and families thrive in a world of media and technology, respectfully submits these comments in response to the Federal Trade Commission's request for comment after its recent workshop, "Bringing Dark Patterns to Light." We are excited to see the Commission examine the implications of dark patterns on consumers.

Dark patterns exist across the online ecosystem, and Common Sense was pleased to see attention paid to how dark patterns impact children and teens. As highlighted at the workshop and in the halls of Congress, there is broad-based bipartisan concern about how technology is impacting children. There are a wide variety of dark patterns that can nudge young people into unhealthy choices and subvert their decisionmaking and autonomy. One particularly problematic category of dark pattern are those designed to extend engagement, which can make it difficult for young people to find balance and time away from devices. Indeed, almost half of teens report feeling "addicted" to their phones.¹ Social media platforms offer immediate and variable rewards, just like casino games, and these can lead to compulsion.² Infinite scrolls do not offer any visual cues or reminders to young people to stop. "Awards" for repeat use or actions, like Snapchat's "Snapstreaks" for daily communication with friends, encourage unnecessary and excessive engagement. Autoplay videos keep kids glued to the screen even after a show is over.

I. The Challenge of Defining Dark Patterns

While "dark patterns" have entered the lexicon of policymakers, the FTC has highlighted the challenge of defining this term within the context of its consumer protection mission. We believe a proper framing is to view dark patterns as manipulative design.³ Though all design is inherently manipulative, the FTC can be guided by its existing understanding of unfairness and deception to evaluate designs that knowingly confuse individuals and encourage them into taking certain

¹ Rideout, V., & Robb, M. B. (2018). Social media, social life: Teens reveal their experiences.

² Shoshana Zuboff, *The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power*, p. 448 (2019).

³ Tweet from Stephanie Lucas, @eyesondesign00 (May 1, 2021), <https://twitter.com/eyesondesign00/status/1388528962356146178>.

action by exploiting cognitive biases.⁴ Unlawful manipulative design is that that seeks to undermine individual autonomy.⁵

Concerns about user autonomy and choice have animated the FTC's consumer protection mission,⁶ and this focus on autonomy has appeared in legislative efforts to address manipulative design. The California Privacy Rights, Act, for instance, prohibits obtaining consent through "dark patterns," which are defined as "a user interface designed or manipulated with the substantial effect of subverting or impairing user autonomy, decision-making, or choice."⁷ This echoes similar language in the bipartisan DETOUR Act, which would make it unlawful for large online companies "to design, modify, or manipulate a user interface with the purpose or substantial effect of obscuring, subverting, or impairing user autonomy, decision-making, or choice to obtain consent or use data."⁸

There have been several efforts both to catalog and create a taxonomy of these types of design.⁹ As Luguri and Strahilevitz note, much problematic design is clearly covered by the FTC's existing understanding of and precedences against deception, but other techniques -- including nagging and toying with individual's emotions -- are fundamentally questions of unfairness under Section 5.¹⁰ Dark patterns seem to work against the consumer sovereignty principles inherent in the unfairness policy statement;¹¹ manipulative design that targets vulnerable communities and children require critically reassessing what unavoidable injuries are and how it is fair to ask people to suffer those harms to the benefit of tech companies and unscrupulous advertisers.

II. Autoplay Is Often Problematic and Can Be Unfair

Autoplay functionality is a good example of a potential unfair manipulative design. Autoplay can keep a user engaged with content, and is hard enough for adults to resist. But children are especially susceptible to autoplay, and research shows they get upset when screen time limits are put in place.¹² One family physician and youth development expert has likened autoplays video to posting a graphic billboard in public and then telling parents if they don't want their kids to see it, not to let their children go outside: "TV is vetted by someone. A producer makes the decision to put something on TV. But the Internet is more reactive. Often people just post without vetting.

⁴ Luguri, Jamie and Strahilevitz, Lior, *Shining a Light on Dark Patterns*, 13 *Journal of Legal Analysis* 43 (2021), <http://dx.doi.org/10.2139/ssrn.3431205>.

⁵ Arunesh Mathur, Jonathan Mayer, and Mihir Kshirsagar, *What Makes a Dark Pattern... Dark?: Design Attributes, Normative Considerations, and Measurement Methods*, in CHI Conference on Human Factors in Computing Systems (CHI '21) (2021), <https://doi.org/10.1145/3411764.3445610>.

⁶ See Luke Herrine, *The Folklore of Unfairness*, 96 *N.Y.U. L. Rev.* 431 (2021).

⁷ Sec. 1798.140(l).

⁸ S.1084 - DETOUR Act, 116th Congress (2019-2020).

⁹ E.g., *Dark Patterns*, <https://www.darkpatterns.org/>.

¹⁰ Luguri & Strahilevitz, *supra* note 4, at 90.

¹¹ See Herrine, *supra* note 6.

¹² Jenny Radesky, *Kids' TV Has Rules. It's the Internet's Turn.*, *Common Sense* (Mar. 4, 2020), <https://www.common sense media.org/kids-action/blog/kids-tv-has-rules-its-the-internets-turn>.

Autoplay videos of violence push parents to hover over their children more than they should. In reality, we should be giving our children more autonomy.”¹³

The reality is that in many instances, autoplay functionality undermines children’s autonomy while providing big benefits to tech companies. Video streaming and social media sites can argue that autoplay is a user convenience,¹⁴ but autoplay has material benefits that accrue largely to companies at consumer’s expense. There is a reason that YouTube (and YouTube Kids) have defaulted to turning on autoplay: a huge portion of traffic is driven by ensuring that videos are played endlessly and continuously. Of course, there are different types of autoplays -- for instance, websites and platforms have made it so that video media plays automatically upon page loads. This shift toward having videos play as much as possible is driven entirely by commercial interests: video ads alone generate 20 to 50 times more revenue than traditional display ads.¹⁵ Autoplay necessarily encourages additional advertising -- and content -- consumption.

Only belatedly have companies offered any control over autoplay, nevermind ensuring individuals can opt into its use. Netflix, for example, only provided an option to turn off auto-playing previews in February 2020.¹⁶ YouTube Kids is even more problematic. As a child-directed service, it provides no control over autoplay. It took significant public backlash and movement by lawmakers for YouTube to finally agree to introduce autoplay controls at some point in the future.¹⁷

This hesitancy is by design. Studies have shown that you can effectively trick people into eating soup by giving them a bottomless bowl that automatically refills as they eat.¹⁸ As a result, people eat 73% more calories and significantly underestimate how many calories they have consumed. Autoplay is a bottomless bowl.

There is bipartisan interest among lawmakers at the state and federal level to address the impacts of autoplay on kids.¹⁹ The DETOUR Act explicitly singles out autoplay by prohibiting function

¹³ Lyz Lenz, *Why parents should challenge autoplay video*, Mashable (Aug. 28, 2015), <https://mashable.com/2015/08/28/autoplay-videos-kids/>.

¹⁴ Tashina Alavi, *Gray Patterns in UX: where do we draw the line between helpful vs. harmful design?*, UX Collective (Sept. 25, 2020), <https://uxdesign.cc/gray-patterns-in-ux-where-do-we-draw-the-line-between-helpful-vs-harmful-design-ce-d7fbaa8ad5>.

¹⁵ Brian X. Chen, *Autoplay Videos Are Not Going Away. Here’s How to Fight Them.*, N.Y. Times (Aug. 1, 2018), <https://www.nytimes.com/2018/08/01/technology/personaltech/autoplay-video-fight-them.html>.

¹⁶ Chris Welch, *How to stop Netflix autoplay*, Verge (Feb. 6, 2020), <https://www.theverge.com/2020/2/6/21126930/netflix-autoplay-turn-off-stop-disable-block-trailers-how-to>.

¹⁷ Rebecca Heilweil, *YouTube’s kids app has a rabbit hole problem*, Vox Record (May 12, 2021), <https://www.vox.com/recode/22412232/youtube-kids-autoplay>.

¹⁸ Tristan Harris, *How Technology is Hijacking Your Mind – from a Magician and Google Design Ethicist* (May 18, 2016), <https://medium.com/thrive-global/how-technology-hijacks-peoples-minds-from-a-magician-and-google-s-design-ethicist-56d62ef5edf3>.

¹⁹ At a hearing this spring on California AB 1545, which proposed a number of design changes for children’s tech products, all members spoke out about concerns with autoplay.

“directed to an individual under the age of 13, with the purpose or substantial effect of cultivating compulsive usage, including video auto-play functions initiated without the consent of a user.”²⁰ However, we would argue that manipulative design that encourages compulsive usage to a company’s benefits and child’s detriment -- particularly if such design cannot be avoided -- should be unfair under Section 5 of the FTC Act.

The FTC evaluates whether an act or practice is unfair under a three-prong test: the activity must (1) cause substantial injury to consumers, (2) not be reasonably avoidable, and (3) not be outweighed by countervailing benefits to consumers or competitions. The harm that autoplay presents to kids is obvious: it encourages unnecessary screen time and, in the case of algorithmically amplified feeds, streams kids a steady diet of commercial content, misinformation, and extremist material. Autoplay subjects kids to inappropriately violent and sexualized material and it sends them down rabbit holes from which extricating themselves can prove challenging.²¹

The second prong asks whether consumers can reasonably avoid the harm. Suggesting that individuals simply turn “off” autoplay functionality ignores that platforms make these options difficult to find and that defaults are sticky. While there may be some way to create a reasonable avoidance opt-out option, we have yet to see it. And, even if the FTC expects rational consumers to effectively self-regulate their screen time, this expectation is not fair to put on kids. The reality is that, in general, autoplay functionality is not in the best interests of children and undermines kids’ needs for safe and healthy online environments.²²

The benefits to autoplay also nearly exclusively accrue to businesses in the form of additional advertising revenue and engagement metrics. Default autoplay functionality does not benefit consumers, and whatever competitive benefits it provides to companies seems tenuous. It is functionality that exists solely to support business models that are designed to engage and extract kids’ attention and offer immediacy endlessly.

Autoplay that children cannot avoid is only one of the most pernicious forms of manipulative design that the FTC should begin to regulate and enforce against.

Joseph Jerome
Director, Platform Accountability

²⁰ S. 1084, Sec. 3(c).

²¹ STATEMENT OF JOAN DONOVAN, PHD RESEARCH DIRECTOR AT HARVARD KENNEDY SCHOOL’S SHORENSTEIN CENTER ON MEDIA, POLITICS AND PUBLIC POLICY HEARING ON “ALGORITHMS AND AMPLIFICATION: HOW SOCIAL MEDIA PLATFORMS’ DESIGN CHOICES SHAPE OUR DISCOURSE AND OUR MINDS” BEFORE THE SENATE COMMITTEE ON THE JUDICIARY SUBCOMMITTEE ON PRIVACY, TECHNOLOGY, AND THE LAW (Apr. 27, 2021), [https://www.judiciary.senate.gov/imo/media/doc/Donovan%20Testimony%20\(updated\).pdf](https://www.judiciary.senate.gov/imo/media/doc/Donovan%20Testimony%20(updated).pdf).

²² See UK Info. Commissioner’s Office, Age Appropriate Design: A Code of Privacy for Online Services, Detrimental Use of Data (2020), <https://ico.org.uk/for-organisations/guide-to-data-protection/key-data-protection-themes/age-appropriate-design-a-code-of-practice-for-online-services/5-detrimental-use-of-data/>.