
ARTICLE

WHAT WE BUY WHEN WE BUY NOW

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“[W]hen someone buys a book, they are also buying the right to resell that book, to loan it out, or to even give it away if they want. Everyone understands this.”

— *Jeff Bezos, CEO of Amazon.com*¹

INTRODUCTION

Imagine you purchase a new book from Amazon. You visit Amazon.com, find a book that looks promising, click the familiar *Buy Now* button, wait a mere two days for Amazon Prime delivery, and promptly place that new volume on your bookshelf, waiting for the perfect rainy day to crack it open. The next morning, you wake up to find a book-sized gap on your shelf. Your book has disappeared. Just then, you receive an email from Amazon customer service explaining that—at the copyright holder’s request—the book has been recalled.

Amazon informs you that it dispatched a drone to your home to silently and carefully retrieve the book while you slept in order to avoid any inconvenience. But not to worry, Amazon reassures you, your account has already been credited with a refund.

Most consumers would be outraged at such an intrusion, not only because of the physical violation it entails, but also because it contravenes some basic assumptions about the nature of personal property rights. When we buy a book, we own it; it is our property. And one right traditionally associated with personal property is the ability to keep the things you own for as long as you

¹ Tim O’Reilly, *Jeff Bezos’ Open Letter on Used Book Sales*, O’REILLY COMMUNITY (Apr. 15, 2002, 11:17 AM), <http://archive.oreilly.com/pub/wlg/1291> [https://perma.cc/WL58-MGDJ]. Bezos offered this defense of the rights of book buyers in response to criticism by the Author’s Guild of America regarding Amazon’s prominent marketing of used books on its site. See David D. Kirkpatrick, *Online Sales of Used Books Draw Protest*, N.Y. TIMES (Apr. 10, 2002), <http://www.nytimes.com/2002/04/10/business/online-sales-of-used-books-draw-protest.html> [https://perma.cc/78FG-XB32] (reporting on the Authors Guild’s email to its members encouraging them to not “be complicit” in “Amazon’s ‘notorious used-book service’”).

choose.² They cannot be taken from you without your consent, certainly not by private actors for their own benefit.³

As unthinkable as this scenario may be, it is almost exactly what happened to Amazon Kindle users in 2009.⁴ In response to disputes with publishers, Amazon remotely deleted the locally stored copies of a number of books from the devices of consumers.⁵ The deleted books ranged from those by Ayn Rand to *Harry Potter*.⁶ But perhaps most tellingly, they included George Orwell's *Nineteen Eighty-Four*.⁷ In that dystopian classic, the Ministry of Truth, the novel's fictional government, destroyed documents by tossing them into the memory hole, a network of tubes leading to an incinerator.⁸ Kindle users—perhaps struck by the irony—went to bed one night thinking they owned a copy of Orwell's cautionary tale only to wake up the next morning to find that their books had vanished down a different series of tubes.⁹

More prosaically, media companies—even large, reputable ones—have sometimes shut down or otherwise deprived consumers access to paid digital media. Google, Major League Baseball, MSN Music, Sony, Virgin Digital, Walmart, and Yahoo have all shuttered digital media services, or at least

² See, e.g., A. M. Honoré, *Ownership*, in OXFORD ESSAYS IN JURISPRUDENCE 107, 112-15 (A.G. Guest ed., 1961) (identifying the right of possession as one of eleven incidents of ownership).

³ Even the state's considerable power of eminent domain is constrained to takings that serve some public purpose. See *Kelo v. City of New London*, 545 U.S. 469, 477 (2005) (explaining that “the sovereign may not take the property of *A* for the sole purpose of transferring it to another private party *B*”); *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 245 (1984) (“A purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void.”).

⁴ See Brad Stone, *Amazon Erases Orwell Books from Kindle*, N.Y. TIMES (July 17, 2009), <http://www.nytimes.com/2009/07/18/technology/companies/18amazon.html> [https://perma.cc/RZV5-8HDP] (reporting on Amazon's forced deletion of George Orwell's novels from certain Kindle owners' devices). This power to remotely remove or disable purchases is not limited to eReaders like the Amazon Kindle. See, e.g., Matt Buchanan, *Apple Can Remotely Disable Apps Installed on Your iPhone*, GIZMODO (Aug. 6, 2008, 6:15 PM), <http://gizmodo.com/5034007/apple-can-remotely-disable-apps-install-ed-on-your-phone> [https://perma.cc/JW58-DDWV] (reporting on Apple's ability to remotely disable iPhone applications, regardless of user consent); Gregg Keizer, *Microsoft: We Can Remotely Delete Windows 8 Apps*, COMPUTERWORLD (Dec. 8, 2011, 1:57 PM), <http://www.computerworld.com/article/2500036/desktop-apps/microsoft—we-can-remotely-delete-windows-8-apps.html> [https://perma.cc/QCX7-9XTD] (describing Microsoft's ability to disable or eliminate applications from users' Windows 8 devices).

⁵ See Stone, *supra* note 4 (reporting on Amazon's remote deletion of e-books off of users' Kindles).

⁶ *Id.*

⁷ *Id.*

⁸ See GEORGE ORWELL, *NINETEEN EIGHTY-FOUR* (1949).

⁹ Senator Ted Stevens was mocked for describing the Internet as a “series of tubes” in 2006, but this analogy is not far off the mark. See Michael J. Socolow, *Ted Stevens Wins: The Internet's Tubes Will Be Unclogged*, SLATE (Jan. 15, 2014, 10:48 AM), http://www.slate.com/blogs/future_tense/2014/01/15/net_neutrality_struck_down_in_a_victory_for_the_late_sen_ted_stevens.html [https://perma.cc/FLN8-LTMK] (noting that the late Senator Ted Stevens's “‘tubes’ speech remains infamous”). But see ANDREW BLUM, *TUBES: A JOURNEY TO THE CENTER OF THE INTERNET* 5 (2012) (describing the interconnectedness of the Internet as “a series of tubes”).

threatened to do so.¹⁰ Recently, NOOK announced the shutdown of its service in the UK, while assuring purchasers that they should “have continued access to the *vast majority* of [their] purchased NOOK Books at no new cost.”¹¹ As we explain more fully below, the switch to a digital platform offers convenience, but it also makes consumer access more contingent. Unlike a purchase at a bookstore, a digital media transaction is continuous, linking buyer and seller, and giving the seller post-transaction power that would be impossible in physical markets.

Permanent possession is not the only right traditionally associated with ownership that is at stake in the digital environment. In 2012, reports spread across the Internet that movie star Bruce Willis planned to file a lawsuit against Apple over restrictions in the iTunes Terms of Service that prevented him from leaving his digital music collection to his daughters in the event of his death.¹² Although the story turned out to be a hoax,¹³ the worries about what happens to our digital libraries when we die are decidedly real.

The terms of use and end user license agreements (EULAs) associated with digital media goods typically restrict not only bequeathing those goods by will, but all manner of transfers. According to those provisions, purchasers cannot lend media goods; they cannot give them away as gifts; and they certainly cannot resell them.¹⁴ For tangible goods like books, records, and movies,

¹⁰ See Matt Buchanan, *Five Stores That Hosed Customers with DRM*, GIZMODO (Apr. 28, 2008, 12:15 PM), <http://gizmodo.com/384741/five-stores-that-hosed-customers-with-drm> [<https://perma.cc/RLX8-LKJ2>] (reporting on the cessation of digital media services by Major League Baseball, Google, Sony, Virgin Digital, and Microsoft); Antone Gonsalves, *Wal-Mart Reverses Decision to Shutdown Digital Music DRM Servers*, INFORMATIONWEEK (Oct. 10, 2008, 5:41 PM), <http://www.informationweek.com/wal-mart-reverses-decision-to-shutdown-digital-music-drm-servers-/d/d-id/1072848> [<https://perma.cc/N4U6-UFUT>] (describing Wal-Mart's reversal of its decision to shut down its digital music servers due to negative customer feedback); Jon Healey, *Yahoo Pulls an MSN Music (Only Faster)*, L.A. TIMES: BIT PLAYER (July 23, 2008), <http://opinion.latimes.com/bitplayer/2008/07/yahoo-pull-and.html> [<https://perma.cc/8zQJ-UBKN>] (describing how customers were unable to access their online music after Yahoo shut down its digital media service); see also Julie Jacobson, *Perils of DRM: What Happens to Your Digital Content if the Provider Goes Out of Business?*, CE PRO (June 5, 2009), http://www.cepro.com/article/print/what_happens_to_your_digital_content_if_the_provider_goes_out_of_business/ [<https://perma.cc/6W3E-RDNN>] (reporting on issues that companies and consumers have had using digital rights management (DRM) protection).

¹¹ Notice, The NOOK Team, Important Changes to the NOOK Service, <http://www.nook.com/gb/notice> [<https://perma.cc/ZM3W-MSLT>] (emphasis added).

¹² E.g., John Harlow & Robin Henry, *It's iHard as Willis Fights Apple*, SUNDAY TIMES (Sept. 2, 2012), http://www.thesundaytimes.co.uk/sto/news/uk_news/Tech/article1117103.ece [<https://perma.cc/FJ87-QH7A>] (reporting on Bruce Willis's desire to establish a trust in order to leave his digital music collection to his daughters).

¹³ See Charles Arthur, *No, Bruce Willis Isn't Suing Apple over iTunes Rights*, GUARDIAN: APPLE TECH. BLOG (Sept. 3, 2012, 5:29 PM), <http://www.theguardian.com/technology/blog/2012/sep/03/no-apple-bruce-willis> [<https://perma.cc/J7ET-DFPR>] (refuting the claim that Bruce Willis planned to sue Apple over ownership of his music collection).

¹⁴ For example, Amazon's terms for Kindle ebooks include the following provision, “Unless specifically indicated otherwise, you may not sell, rent, lease, distribute, broadcast, sublicense, or otherwise assign any rights to the Kindle Content . . .” *Kindle Store Terms of Use*, AMAZON, <http://>

copyright law's first sale doctrine guarantees owners the right to transfer them as they see fit.¹⁵ But copyright holders and digital retailers argue that digital goods are different for two reasons. First, transfer of a digital file typically requires the creation of a new copy.¹⁶ Second, rights holders and retailers maintain that digital media goods are not sold to purchasers; they are merely licensed.¹⁷

www.amazon.com/gp/help/customer/display.html?nodeId=201014950 [https://perma.cc/FA55-C7T4] (last updated Mar. 15, 2016). Similarly, Amazon's MP3 store terms state that "you may not redistribute, transmit, assign, sell, broadcast, rent, share, lend, modify, adapt, edit, license or otherwise transfer or use Purchased Music." *Amazon Music Terms of Use*, AMAZON, <http://www.amazon.com/gp/help/customer/display.html?nodeId=201380010> [https://perma.cc/HW7P-KFEH] (last updated Apr. 12, 2016). Apple's App Store terms provide, "You may not transfer, redistribute or sublicense the Licensed Application and, if you sell your Apple Device to a third party, you must remove the Licensed Application from the Apple Device before doing so You agree not to modify, rent, loan, sell, or distribute the Services or Content in any manner, and you shall not exploit the Services in any manner not expressly authorized." *Apple Media Services Terms and Conditions*, APPLE, <http://www.apple.com/legal/internet-services/itunes/us/terms.html> [https://perma.cc/66BZ-42L3] (last updated Sept. 13, 2016).

15 See 17 U.S.C. § 109 (2012) ("[T]he owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord."); see also *Kirtsaeng v. John Wiley & Sons, Inc.*, 133 S. Ct. 1351, 1363 (2013) (describing the first sale rule as "a common-law doctrine with an impeccable historic pedigree"). The statutory first sale rule imposes some restrictions on the commercial rental, leasing, and lending of copies of sound recordings and computer programs. See *id.* § 109(b) (describing the circumstances in which the renting, leasing, and lending of certain media are restricted, such as for the purpose of direct or indirect commercial advantage).

16 See Aaron Perzanowski & Jason Schultz, *Digital Exhaustion*, 58 UCLA L. REV. 889, 901 (2011) (noting how "the benefits of first sale have traditionally depended on a single trigger: ownership of a copy of a work").

17 See, e.g., *Kindle Store Terms of Use*, *supra* note 14 ("Kindle Content is licensed, not sold, to you by the Content Provider."); *Terms of Service and User Agreement*, SONY PLAYSTATION NETWORK, <https://www.playstation.com/en-us/network/legal/terms-of-service/> [https://perma.cc/PDV9-DYVV] ("[A]ll content and software . . . are licensed non-exclusively and revocably to you . . . solely for Your personal, private, non-transferable, non-commercial, limited use on a limited number of Authorized Devices in the country in which your account is registered You may not sell, rent, lease, loan, sublicense, modify, adapt, arrange, translate, reverse engineer, decompile, or disassemble any portion of the Property."). Apple is somewhat less clear in how it characterizes iTunes transactions. After informing consumers that its "[s]tandard EULA will govern any content . . . purchased" and noting that "[a]ll [t]ransactions are final," Apple insists that consumers agree not to "modify, rent, loan, sell, or distribute" their purchases. *Apple Media Services Terms and Conditions*, *supra* note 14; see also *Amazon Music Terms of Use*, *supra* note 14 ("[A]ll sales are final and risk of loss transfers upon sale."). The choice to avoid the "licensed, not sold" language in the music context is presumably a function of recording contracts that entitle artists to significantly higher royalty rates for licenses in comparison to royalties on sales. See *F.B.T. Prods., LLC v. Aftermath Records*, 621 F.3d 958, 964-65 (9th Cir. 2010) (noting that "the differences between [a license and a sale] play an important role in the overall structure and policies that govern artistic rights"); Eriq Gardner, *Universal Music Settling Big Class Action Lawsuit over Digital Royalties (Exclusive)*, HOLLYWOOD REP. (Mar. 19, 2015, 1:51 PM), <http://www.hollywoodreporter.com/thr-esq/universal-music-settling-big-class-783096> [https://perma.cc/64MB-XAAF] (reporting that artists receive fifteen percent of download income based on "sales" versus fifty percent for "licenses").

While lawyers might comprehend the difference between a license and a traditional sale, there are good reasons to doubt that the average consumer appreciates this distinction. The overwhelming majority of online shoppers ignore license terms.¹⁸ It is not hard to understand why. Licenses are notoriously long and complex. Although Apple has recently trimmed them down, the iTunes Terms and Conditions were once over 19,000 words—longer than Shakespeare's *Macbeth*.¹⁹ And these licenses are overflowing with defined terms, technical jargon, legalese, and complex sentence structures.²⁰ Given their complexity and ubiquity, it is only a slight exaggeration to claim that if consumers were to read every license agreement they encountered, the economy would grind to a halt.²¹ So it is no surprise that most people—including the Chief Justice of the Supreme Court²²—choose to ignore licenses, particularly when making a ninety-nine cent purchase from iTunes or Amazon.²³

18 See Florencia Marotta-Wurgler, *Will Increased Disclosure Help? Evaluating the Recommendations of the ALI's "Principles of the Law of Software Contracts,"* 78 U. CHI. L. REV. 165, 179-81 (2011) (reporting empirical data supporting the conclusion that license terms "are almost always ignored"); see also Yannis Bakos et al., *Does Anyone Read the Fine Print? Consumer Attention to Standard Form Contracts* 22 (N.Y. Univ. Law & Econ. Working Papers, Paper No. 195, 2013), http://lsr.nellco.org/cgi/viewcontent.cgi?article=1199&context=nyu_lewp [<https://perma.cc/DDP2-R6UZ>] (finding that license agreements for software retailers were accessed by users only 0.05% of the time). Our own results show a slightly higher rate of 1.4%. See *infra* text accompanying note 75. The common distinction between licenses and sales ignores the fact that a license to make use of a work may be accompanied by a sale, lease, or other transfer of a copy of that work. See Lothar Determann & Aaron Xavier Fellmet, *Don't Judge a Sale by Its License: Software Transfers Under the First Sale Doctrine in the United States and the European Community*, 36 U. S.F. L. REV. 1, 11 (2001) (discussing "critical" distinctions between "carrier media and protected intellectual property" as well as "the intellectual property itself . . . and the right to use or copy" that material).

19 Tom Gardner, *To Read, or Not to Read . . . the Terms and Conditions*, DAILY MAIL (Mar. 22, 2012, 11:00 AM), <http://www.dailymail.co.uk/news/article-2118688/PayPal-agreement-longer-Hamlet-iTunes-beats-Macbeth.html> [<https://perma.cc/FV5F-RZ83>].

20 Indeed, many licenses require a postgraduate education to fully understand. See DOUGLAS E. PHILLIPS, *THE SOFTWARE LICENSE UNVEILED: HOW LEGISLATION BY LICENSE CONTROLS SOFTWARE ACCESS* 77 (2009) (using the Flesch-Kincaid readability formula to analyze an Adobe licensing agreement and finding that a reader would likely need at least 19.3 years of formal education in order to decipher it).

21 To take a single example, Adobe Flash is a software platform that is downloaded approximately eight million times each day. See Bob Dormon, *Adobe Demands 7,000 Years a Day from Humankind*, REGISTER (Dec. 4, 2012, 8:00 AM), http://www.theregister.co.uk/2012/12/04/feature_tech_licences_are_daft [<https://perma.cc/PKJ2-C9DS>] (noting the software company's reported daily downloads). Assuming the average user can read the software's 3500-word license in ten minutes, if everyone who installed Flash in a single day read the license, it would require collectively over 1500 years of human attention per day. *Id.*

22 See Debra Cassens Weiss, *Chief Justice Roberts Admits He Doesn't Read the Computer Fine Print*, A.B.A. J. (Oct. 20, 2010, 12:17 AM), http://www.abajournal.com/news/article/chief_justice_roberts_admits_he_doesnt_read_the_computer_fine_print/ [<https://perma.cc/WKL4-2KR4>] ("Answering a student question, Roberts admitted he doesn't usually read the computer jargon that is a condition of accessing websites . . .").

23 Because licenses create idiosyncratic bundles of rights, a consumer would have to investigate the details of *each* transaction in order to be informed of the material differences between them. As a result, licenses impose significant information costs on consumers. Cf. Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110

If they do not read the terms, how well do consumers understand the choices they are making when they choose ebooks over hardcovers, MP3s over CDs and vinyl, or movie downloads over Blu-ray discs? Perhaps consumers think that the terms do not contain important limits, or that the convenience of immediate gratification outweighs any limits imposed. Most consumers are operating on the basis of incomplete information. Moreover, they may wrongly assume that the unread, and thus, unknown terms in license agreements are more favorable than they are in fact. Recent work by Ian Ayres and Alan Schwartz suggests that many consumers suffer from “term optimism”—the tendency to “expect a contract to contain more favorable terms than it actually provides.”²⁴ For example, consumers might anticipate that unread terms allow them to lend their ebooks to friends and family. Beyond this baseline optimism bias, the likelihood that consumers will act on the basis of the mistaken belief that license terms grant them greater rights than they actually do might be exacerbated by marketing language that sends a signal inconsistent with the fine print.

Some commentators have expressed concern that consumers might be misled by the apparent disconnect between the message communicated by the *Buy Now* button and the limited set of rights contemplated by EULAs and terms of service.²⁵ If so, the apparent embrace of digital goods may not accurately reflect consumer preferences. But industry representatives have been more sanguine, insisting that consumers have a more nuanced and sophisticated understanding of these transactions.²⁶

YALE L.J. 1, 3 (2000) (“[T]here is a potentially infinite range of promises that the law will honor.”); see also Christina Mulligan, *A Numerus Clausus Principle for Intellectual Property*, 80 TENN. L. REV. 235, 248 (2013) (discussing how “[e]very in rem right imposes information costs on a large and indefinite class of people”).

²⁴ See Ian Ayres & Alan Schwartz, *The No-Reading Problem in Consumer Contract Law*, 66 STAN. L. REV. 545, 551 (2014).

²⁵ See DEP’T OF COMMERCE INTERNET POLICY TASK FORCE, WHITE PAPER ON REMIXES, FIRST SALE, AND STATUTORY DAMAGES 56-57 (2016) [hereinafter WHITE PAPER ON REMIXES], <http://www.uspto.gov/sites/default/files/documents/copyrightwhitepaper.pdf> [<https://perma.cc/KV9Y-W6JQ>] (noting commentators’ concern that “consumers expect that when they click on the [*Buy Now*] button, they will ‘own’ the copy”); Aaron Perzanowski & Jason Schultz, *Reconciling Intellectual and Personal Property*, 90 NOTRE DAME L. REV. 1211, 1257 (2015) (noting the potential for consumer misunderstanding as a result of the *Buy Now* button).

²⁶ See WHITE PAPER ON REMIXES, *supra* note 25, at 56 n.352 (quoting Ben Sheffner of the Motion Picture Association of America as stating, “If you ask people when you go to a site to buy a movie or a book or a song, I think they pretty much understand that you’re not actually buying the copyright. What you are doing is you’re purchasing or buying a license which permits you to do certain things” and K. Christopher Branch of KC Branch Firm as stating, “I’m not sure that the consumers have the expectation that when they hit the buy button for some music that they’re thinking about how they’re going to resell it . . .”); see also DEP’T OF COMMERCE INTERNET POLICY TASK FORCE, GREEN PAPER ROUNDTABLE ON COPYRIGHT POLICY, CREATIVITY, AND INNOVATION IN THE DIGITAL ECONOMY 156 (2014), https://www.uspto.gov/sites/default/files/ip/global/copyrights/la_transcript.pdf [<https://perma.cc/EG9A-H7BE>] (quoting Catherine Bridge of Disney as stating, “I haven’t done a survey[.] I can’t speak scientifically about this, but . . . I would just say that I don’t think use of the buy

In its recent *White Paper on Remixes, First Sale, and Statutory Damages*, the Department of Commerce noted that the “the record before [it] [wa]s devoid of any actual evidence as to what consumers understand when they click on the ‘buy’ button.”²⁷ Nonetheless, it expressed concern over consumers’ understanding of their ownership rights in the online context:

It does not appear that consumers have a clear understanding whether they own or license the products and services they purchase online due in part to the length and opacity of most EULAs, the labelling of the “buy” button, and the lack of clear and conspicuous information regarding ownership status on websites.²⁸

Why might consumers be misled? Consumers operate in the marketplace based on their prior experience.²⁹ We suggest that consumers’ “default” behavior is based on the experience of buying physical media and that the assumptions from that context have carried over into the digital domain. As the above quote from Jeff Bezos reminds us, “[e]veryone understands” that when they buy a book, record, or movie, they can resell it, lend it, or give it away.³⁰ And the familiar *Buy Now* button leverages that common understanding.

This Article presents the results of the first study of the impact of marketing language like the *Buy Now* button on the beliefs and behavior of digital media consumers. Our data demonstrate that a sizable percentage of consumers is misled with respect to the rights they acquire when they “buy” digital media goods. They mistakenly believe they can keep those goods permanently, lend them to friends and family, give them as gifts, leave them in their wills, resell them, and use them on their devices of choice.

Not only are consumers misled, they are misled about ownership rights that are important to them. A sizable percentage of consumers express a desire for those rights and many say they are willing to pay more to preserve them. Importantly for retailers and copyright holders, respondents in our study indicated that they would turn to streaming services and BitTorrent if they were unable to engage in the uses typically associated with personal property ownership.

Part I of this Article describes the current digital media marketplace. Part II describes the methods of our study. Part III details the results and offers a number of hypotheses to explain them. Part IV considers these results through the lens of

button is a deception, and I think . . . that people are consuming content are understanding that it’s not a physical ownership model.”).

²⁷ WHITE PAPER ON REMIXES, *supra* note 25, at 68.

²⁸ *Id.*

²⁹ See Manoj Hastak & Michael Mazis, *Deception by Implication: A Typology of Truthful but Misleading Advertising and Labeling Claims*, J. PUB. POL’Y & MARKETING, Fall 2011, at 157, 158-59 (discussing “schema” theory).

³⁰ O’Reilly, *supra* note 1.

false and deceptive advertising law. The Article concludes by considering the implications of the study on other segments of the digital economy.

I. THE DIGITAL MEDIA MARKETPLACE

The market for media goods has undergone rapid and significant changes in recent years. For decades, if not centuries, copyright holders monetized their works primarily through the sale of tangible copies—hardcover books, CDs, records, sheet music, Blu-ray movies, DVDs, and, before that, VHS tapes. But the emergence of the Internet, coupled with mobile computing technology, led to a rethinking of media distribution. Pressing plants, delivery trucks, and shelf space have largely been replaced by servers, data plans, and disk space. This shift has dramatically affected the relationship between consumers and the media goods they acquire. At the same time, it has introduced considerable ambiguity about the nature of the transactions that make up the digital marketplace.

A. From Physical to Digital

In the wake of *Napster*,³¹ the music industry felt pressure to establish some means for lawful access to digital music. After a couple of failed attempts by the industry,³² Apple launched the iTunes Music Store in 2003.³³ Within a decade, iTunes boasted a library of forty-three million tracks that had been downloaded thirty-five billion times, making Apple the largest music retailer in the world—no doubt in part because of Apple’s dominance in the media player hardware market.³⁴ Soon paid music downloads surpassed physical media sales. A similar trend played itself out in the world of books, with a dominant hardware-

31 See *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1011 (9th Cir. 2001) (“Through a process commonly called ‘peer-to-peer’ file sharing, Napster allows its users to: (1) make MP3 music files stored on individual computer hard drives available for copying by other Napster users; (2) search for MP3 music files stored on other users’ computers; and (3) transfer exact copies of the contents of other users’ MP3 files from one computer to another via the Internet.”).

32 See WILLIAM PATRY, *MORAL PANICS AND THE COPYRIGHT WARS* 8-10 (2009) (describing the failure of the major label-backed Pressplay and MusicNet services).

33 See Nathan Ingraham, *iTunes Store at 10: How Apple Built a Digital Media Juggernaut*, VERGE (Apr. 26, 2013, 11:56 AM), <http://www.theverge.com/2013/4/26/4265172/itunes-store-at-10-how-apple-built-a-digital-media-juggernaut> [<https://perma.cc/3MS4-7PPV>] (reporting on the tenth anniversary of the launch of the iTunes Music Store).

34 See ITUNES, <http://www.apple.com/itunes/music> [<https://perma.cc/9C26-3TZF>] (advertising that the iTunes store has forty-three million songs for sale); Jordan Kahn, *Eddy Cue: Apple Passed 35 Billions Songs Sold on iTunes Last Week, 40 Million iTunes Radio Listeners*, 9TO5MAC (May 28, 2014), <http://9to5mac.com/2014/05/28/eddy-cue-apple-passed-35-billions-songs-sold-on-itunes-last-week-40-million-itunes-radio-listeners> [<https://perma.cc/U573-MN8X>] (noting that Apple has sold more than thirty-five billion songs); see also Press Release, Apple, iTunes Store Top Music Retailer in the US (Apr. 3, 2008), <https://www.apple.com/pr/library/2008/04/03iTunes-Store-Top-Music-Retailer-in-the-US.html> [<https://perma.cc/FH7U-LCMH>] (announcing that iTunes “became the largest music retailer in the US based on the amount of music sold during January and February 2008”).

maker driving explosive growth in the sale of digital media. After Amazon released the Kindle, annual ebook sales increased from ten million in 2008 to 510 million in 2014, rivaling sales of physical books.³⁵ Likewise, paid software and video game downloads have come to rival or even surpass physical sales.³⁶

Initially, consumers downloaded their digital purchases and stored copies locally. But as smartphones replaced dedicated media playback devices like the iPod, and as high speed mobile data networks matured, sellers encouraged consumers to store media on the provider's cloud network.³⁷ Since those files may not be stored permanently on a user's device, continued possession and access is less certain.³⁸ The lack of physical possession means that consumers' access to their purchases is contingent on the cloud service provider. Apple, for example, has removed purchased albums from consumers' iTunes cloud accounts at the request of copyright holders.³⁹ If the consumer did not save a

35 See Marisa Bluestone, *U.S. Publishing Industry's Annual Survey Reveals \$28 Billion in Revenue in 2014*, ASS'N AM. PUB. (June 10, 2015), <http://publishers.org/news/us-publishing-industry's-annual-survey-reveals-28-billion-revenue-201> [<https://perma.cc/4F2W-MQVT>] (noting that ebook sales reached 510 million in 2014); Jim Milliot, *BEA 2013: The E-book Boom Years*, PUBLISHER'S WKLY. (May 29, 2013), <http://www.publishersweekly.com/pw/by-topic/industry-news/bea/article/57390-bea-2013-the-e-book-boom-years.html> [<https://perma.cc/99H2-DSVM>] (indicating that ebook sales totaled only ten million in 2008, the year the Kindle was released). Although sales of ebooks surpassed hardcovers in 2012, digital sales decreased for the first time ever in 2015, in part because of publisher-driven price increases. See Alexandra Alter, *The Plot Twist: E-Book Sales Slip, and Print Is Far From Dead*, N.Y. TIMES, (Sept. 22, 2015), <http://www.nytimes.com/2015/09/23/business/media/the-plot-twist-e-book-sales-slip-and-print-is-far-from-dead.html> [<https://perma.cc/TN8B-PBHZ>] (noting that the Association of American Publishers reported reduced sales of ebooks and suggesting that physical books are uniquely attractive to consumers). But see Matthew Ingram, *No, E-book Sales Are Not Falling, Despite What Publishers Say*, FORTUNE (Sept. 24, 2015, 1:40 PM), <http://fortune.com/2015/09/24/ebook-sales/> [<https://perma.cc/P35U-J87H>] (challenging the conclusion that overall ebooks sales declined, citing the impact of higher prices on sales).

36 See Jacqui Cheng, *Forget the Box: Downloads Dominate Online Software Purchases*, ARS TECHNICA (May 28, 2010, 4:26 PM), <http://arstechnica.com/software/news/2010/05/forget-the-box-downloads-dominate-online-software-purchases.ars> [<https://perma.cc/LB7H-J6UR>] (indicating that "nearly two-thirds of online software purchases . . . were digital downloads"); Lance Whitney, *Digital Game Downloads Beat Retail Store Sales*, CNET (Sept. 20, 2010, 9:05 AM), http://news.cnet.com/8301-10797_3-20016943-235.html [<https://perma.cc/4UST-MJVF>] (noting that digital PC game sales surpassed retail game sales in 2010).

37 The "cloud" refers to remote storage, processing, and other computing resources available to Internet users. Although marketed as a groundbreaking technology, the cloud has its roots in much older, pre-digital networks. See generally TUNG-HUI HU, *A PREHISTORY OF THE CLOUD* (2015) (tracing the history of the cloud to industrial networks such as railroad and sanitation systems).

38 Even when consumers store copies locally, their ability to use them as they choose can be constrained by DRM technologies.

39 For example, if a copyright holder removes an album from the iTunes Store or replaces it with a new version of the same album, purchasers are prevented from accessing or downloading the removed album. See Geoffrey Goetz, *Apple's iCloud Is No Safe Haven for Some iTunes Purchases*, GIGAOM (Sept. 25, 2013, 4:10 PM), <https://gigaom.com/2013/09/25/apples-icloud-is-no-safe-haven-for-some-itunes-purchases/> [<https://perma.cc/T8W5-CKRH>] (recounting how numerous albums purchased by the author "disappeared from [his] iTunes Match music library").

local copy, her purchased music simply vanished. Apple's terms explicitly contemplate this scenario: "Apple further reserves the right to modify, suspend, or discontinue the Services (or any part or Content thereof) at any time with or without notice to you, and Apple will not be liable to you or to any third party should it exercise such rights."⁴⁰

In recent years, subscription streaming services have exploded in popularity. Netflix and Hulu launched online video services in 2007.⁴¹ Today, Netflix is one of the most popular content providers on the Internet. The service has more than seventy-five million subscribers and accounts for a third of all Internet traffic in North America.⁴² In 2015, its revenue exceeded \$6.7 billion.⁴³ Music streaming services have seen similar growth. Spotify has seventy-five million active users, about twenty million of whom are paying subscribers.⁴⁴ In 2014, the use of streaming services grew by a staggering fifty-four percent.⁴⁵ Not surprisingly, the streaming subscription model is being applied to books, video games, and other media as well.⁴⁶

The eagerness of consumers to embrace streaming services makes sense. Streaming services are inexpensive, typically costing around ten dollars per month. They have massive content libraries,⁴⁷ while still being convenient,

⁴⁰ *Apple Media Services Terms and Conditions*, *supra* note 14.

⁴¹ See Ken Auletta, *Outside the Box: Netflix and the Future of Television*, NEW YORKER: ANNALS COMMUN. (Feb. 3, 2014), <http://www.newyorker.com/magazine/2014/02/03/outside-the-box-2> [https://perma.cc/U59H-PYU6] (noting that Netflix began streaming movies and TV in 2007, the same year that NBC and Fox launched Hulu).

⁴² See Victor Luckerson, *Netflix Accounts for More Than a Third of All Internet Traffic*, TIME (May 29, 2015), <http://time.com/3901378/netflix-internet-traffic> [https://perma.cc/UGU5-X7D2] ("[N]etflix now accounts more almost [sic] 37% of downstream Internet traffic in North America during peak evening hours . . ."); Ben Popper, *Netflix Whizzes Past 75 Million Subscribers Thanks to Record International Growth*, VERGE (Jan. 19, 2016, 4:17 PM), <http://www.theverge.com/2016/1/19/10790282/netflix-q4-2015-earnings> [https://perma.cc/D25P-WJHT] (reporting on the rapid growth in Netflix subscribership).

⁴³ See *Netflix Inc.*, MARKETWATCH, <http://www.marketwatch.com/investing/stock/nflx/financials> [https://perma.cc/M6W7-EX2V] (reporting data on Netflix's sales, including \$6.78 billion in 2015).

⁴⁴ See *20 Million Reasons To Say Thanks*, SPOTIFY NEWS (June 10, 2015), <https://news.spotify.com/us/2015/06/10/20-million-reasons-to-say-thanks/> [https://perma.cc/L8S4-8Z8E] (announcing these milestones in Spotify subscribership).

⁴⁵ Ethan Smith, *Music Downloads Plummet in U.S., but Sales of Vinyl Records and Streaming Surge*, WALL ST. J. (Jan. 1, 2015), <http://www.wsj.com/articles/music-downloads-plummet-in-u-s-but-sales-of-vinyl-records-and-streaming-surge-1420092579> [https://perma.cc/WT4U-GJJM].

⁴⁶ In 2014, Amazon launched Kindle Unlimited, which gives subscribers access to a growing ebook library for a fixed monthly price. See Hayley Tsukayama, *Is Kindle Unlimited Worth It?*, WASH. POST (July 18, 2014), <https://www.washingtonpost.com/news/the-switch/wp/2014/07/18/is-kindle-unlimited-worth-it/> [https://perma.cc/T77A-K56Y] (reporting on the launch of the Kindle Unlimited service). Services like EA Access offer subscriptions to online video game libraries. See Erik Kain, *Sony Was Right To Turn Down EA's Video Game Subscription Plan [Update]*, FORBES (July 30, 2014, 2:28 PM), <http://www.forbes.com/sites/erikkain/2014/07/30/sony-was-right-to-turn-down-eas-video-game-subscription-plan/> [https://perma.cc/2RC9-ZZ2Z] (describing the emergence of gaming subscription services, including EA Access).

⁴⁷ See Madi Alexander & Ben Sisario, *Apple Music, Spotify and a Guide to Music Streaming Services*, N.Y. TIMES (Apr. 5, 2016), <http://www.nytimes.com/interactive/2015/06/30/business/media/>

offering portability and compatibility with a range of devices. From the perspective of copyright holders, there are upsides as well. By moving from physical to digital distribution, content owners can limit the impact of secondary markets. They can also bundle old, low-value content with new, high-value titles.⁴⁸ Subscription streaming services are also viewed as a strategy for reducing copyright infringement.⁴⁹ Given their low price point, services like Netflix and Spotify can attract consumers who might otherwise get their movies and music from The Pirate Bay.⁵⁰

But individual creators have been less than enthusiastic about offering their content on subscription services. A parade of songwriters and recording artists have complained about what they say are parsimonious royalty rates.⁵¹ Compared to the good old days of record-breaking CD sales, musicians are seeing checks that are missing several zeroes. In large part, that is because consumers are not willing to pay as much for temporary access to music as they are to own copies. The other explanation is that the bulk of the more than two billion dollars that Spotify has paid in copyright licenses—a figure representing seventy percent of its revenue—went to record labels.⁵² Under

music-streaming-guide.html [https://perma.cc/SM95-XHTK] (noting that the Spotify, Google Play, Tidal, and Apple Music libraries each include more than thirty million tracks); Piotr Kowalczyk, *Kindle Unlimited Ebook Subscription — 9 Things to Know*, EBOOK FRIENDLY, <http://ebookfriendly.com/kindle-unlimited-ebook-subscription/> [https://perma.cc/D5MZ-6GV3] (last updated Oct. 27, 2015) (noting that the Kindle Unlimited library includes over a million books); Michael Liedtke, *Gaps in Netflix's Online Library Likely to Persist*, YAHOO! NEWS (Apr. 9, 2012), <http://news.yahoo.com/gaps-netflixs-online-library-likely-persist-200620994.html> [https://perma.cc/X4HQ-2GB7] (noting that the Netflix streaming library includes over 60,000 movie and television titles).

⁴⁸ See Tim Carmody, *Netflix-Warner Bros. Deal Bundles Old and New Niche Dramas*, VERGE (Jan. 7, 2013, 11:42 AM), <http://www.theverge.com/2013/1/7/3846246/netflix-warner-bros-revolution-west-wing> [https://perma.cc/K8QX-YPF9] (reporting on a Netflix deal with Warner Bros., a continuation of Netflix's strategy of "[b]undling hot and not-so-hot series" in one deal to lower costs).

⁴⁹ See James Titcomb, *Internet Piracy Falls to Record Lows Amid Ride of Spotify and Netflix*, TELEGRAPH (July 5, 2016, 12:01 AM), <http://www.telegraph.co.uk/technology/2016/07/04/internet-piracy-falls-to-record-lows-amid-rise-of-spotify-and-net/> [https://perma.cc/X9EY-T7WE] (noting the "strong link between the rise of [subscription] services and falling piracy" suggested by a report commissioned by the United Kingdom's Intellectual Property Office).

⁵⁰ See Luis Aguiar & Joel Waldfogel, *Streaming Reaches Flood Stage: Does Spotify Stimulate or Depress Music Sales?* 20 (European Comm'n Joint Research Ctr., Inst. for Prospective Tech. Studies Dig. Econ. Working Paper No. 2015/05, 2015), <https://ec.europa.eu/jrc/sites/default/files/JRC96951.pdf> [https://perma.cc/PCN4-EJ3G] (analyzing data on "total weekly unpaid consumption on the top-50 weekly Spotify streaming index" to show that usage of Spotify displaces music piracy).

⁵¹ See Zach Schonfeld, *What Do Indie Musicians Really Think About Music Streaming?*, NEWSWEEK (July 23, 2015, 8:49 AM), <http://www.newsweek.com/ten-indie-musicians-weigh-music-streaming-debate-355298> [https://perma.cc/Y9UV-3NMD] (identifying a number of artists including Taylor Swift, Thom Yorke, and Prince, who have criticized Spotify and other streaming services, while noting considerable differences of opinions among independent recording artists).

⁵² See *Spotify Explained: How We Pay Royalties: An Overview*, SPOTIFY: ARTISTS (2013), <https://www.spotifyartists.com/spotify-explained/#how-we-pay-royalties-overview> [https://perma.cc/2WQF-GLXX] ("We pay out nearly 70% of our total revenue to rights holders.").

the recording contracts that labels have with artists, very little of that revenue made its way to recording artists.⁵³

Perhaps surprisingly, as adoption of streaming services has skyrocketed, demand for vinyl records, a decidedly analog format, has surged as well. In 2014, vinyl sales increased more than fifty percent over the prior year.⁵⁴ The same held true in 2015.⁵⁵ Vinyl is generally the most expensive way to get new music, but it offers arguably higher fidelity and better packaging. Importantly, it also confers to buyers the full range of property interests traditionally associated with a purchase.

B. Mixed Messages for Consumers

The concurrent rise in popularity of these two means of acquiring music—subscription streaming and vinyl records—highlights the importance of consumer choice. Some consumers prefer low-cost temporary access, and others prefer high-cost permanent access. For any particular consumer, those preferences can vary over time, across media types, and between particular artists or titles. When it comes to the stark choice between streaming and vinyl, it is easy for consumers to gather the information necessary to formulate and exercise those preferences. Significant price differences, the requirement of ongoing payment for subscriptions, and the presence or absence of a physical artifact are all salient features of a transaction that help consumers distinguish between these two models. But in other parts of the digital economy, the lines are much less clear.

Elsewhere, consumers are confronted with marketing language that appears to be in tension with the text of the licenses associated with those transactions. A consumer browsing digital movies on the Apple iTunes store, for example, might see an ad inviting them to “Own It in HD.”⁵⁶ But what does it mean to Apple and to consumers to “own” a digital movie? If Apple’s terminology draws

⁵³ See Tim Ingham, *Major Labels Keep 73% of Spotify Premium Payouts – Report*, MUSIC BUS. WORLDWIDE (Feb. 3, 2015), <http://www.musicbusinessworldwide.com/artists-get-7-of-streaming-cash-labels-take-46/> [<https://perma.cc/3XBQ-4ZSV>] (citing an Ernst & Young study that revealed that record labels kept 73% of payments from streaming services, while songwriters and recording artists collected just 16% and 11% of those payments, respectively).

⁵⁴ See Keith Caulfield, *Vinyl Album Sales Hit Historic High in 2014, Again*, BILLBOARD (Dec. 31, 2014), <http://www.billboard.com/articles/columns/chart-beat/6422442/vinyl-album-sales-hit-historic-high-2014> [<https://perma.cc/C2GZ-P8BU>] (“Sales of [vinyl albums] grew by 52 percent in 2014 to 9.2 million copies (up from 6.1 million in 2013).”). In absolute terms, the number was 9.2 million units, the largest vinyl tally in decades. *Id.*

⁵⁵ See JOSHUA P. FRIEDLANDER, RECORDING INDUS. ASS’N OF AM., NEWS AND NOTES ON 2015 MID-YEAR RIAA SHIPMENT AND REVENUE STATISTICS (2015), http://www.riaa.com/wp-content/uploads/2015/09/2015_RIAAMidYear_ShipmentData.pdf [<https://perma.cc/E8GX-CPUP>] (“Vinyl was up 52% by value for the first half of the year.”).

⁵⁶ See *Movies*, iTUNES (offering consumers the option to “Own It in HD”).

on a frame of reference established by consumers' experience with physical products, Apple's message is inconsistent with the terms for its digital products. The license maintains that consumers may not "modify, rent, loan, sell, or distribute" the movies and music they acquire from iTunes.⁵⁷ Likewise, Amazon urges its customers to *Buy Now* for both physical objects and digital files.⁵⁸ But Amazon's terms for digital goods reveal similar restrictions for digital goods that do not encumber their physical counterparts.⁵⁹

In some instances, ownership is touted as an explicit selling point of digital content. When publisher Image Comics announced a digital storefront for comic books, it distinguished itself from competitors by claiming that its customers actually owned their downloads.⁶⁰ As Image's Director of Business Development explained at the time, "There's something to be said for the ownership factor. If readers purchase a book on [a competitor's service], . . . that could be revoked. And God forbid, if [the competitor] goes under or their data center has an earthquake all their hard drives go away—then you've got nothing."⁶¹ However, despite making promises of ownership, Image Comics's terms were in line with other digital retailers that offer a license instead of ownership:

You shall not share, lend, lease, rent, sell, license, sublicense, transfer, network, reproduce, display, distribute, or otherwise make any Digital Comic available to any other person, to the extent that doing so requires making a copy of the Digital Comic (e.g., a copy on a hard drive, RAM, flash memory, a paper copy, etc.). A Digital Comic may be shared only by sharing the device containing the Digital Comic.⁶²

⁵⁷ *Apple Media Services Terms and Conditions*, *supra* note 14.

⁵⁸ See *Guardians of the Galaxy (Theatrical)*, AMAZON, https://www.amazon.com/Guardians-Galaxy-Theatrical-Chris-Pratt/dp/BooQROHoQK/ref=sr_1_1?ie=UTF8&qid=1481933738&sr=8-1&keywords=guardians+of+the+galaxy [<https://perma.cc/487M-PB2W>] (offering consumers the option to "Rent Movie HD" or "Buy Movie HD").

⁵⁹ For example, Amazon provides that "[u]nless specifically indicated otherwise, [customers] may not sell, rent, lease, [or] distribute . . . any rights to the Kindle Content." *Kindle Store Terms of Use*, *supra* note 14. Amazon's MP3 store offers similar terms. Although Amazon customers "purchase" music, payment merely "grant[s] [customers] a non-exclusive, non-transferable right to use Purchased Music . . . only for [customers'] personal, non-commercial purposes [Further, customers] may not redistribute, . . . sell, . . . rent, share, lend, . . . or otherwise transfer or use Purchased Music" *Amazon Music Terms of Use*, *supra* note 14.

⁶⁰ See Laura Hudson, *For the First Time, You Can Actually Own the Digital Comics You Buy*, WIRED: CULTURE (July 2, 2013, 2:52 PM), <http://www.wired.com/2013/07/drm-free-comics-download-image/> [<https://perma.cc/3GNV-JR5K>] (reporting that Image Comics would be the "first major U.S. publisher" to allow consumers to download DRM-free comics to their hard drives).

⁶¹ *Id.*

⁶² *Terms and Conditions*, IMAGE COMICS, <https://imagecomics.com/about/terms-and-conditions> [<https://perma.cc/TFL3-XJGZ>].

These conflicts between advertising and legal terms are not limited to the mass market. HeinOnline offers a massive database of legal publications, including law journals, judicial opinions, statutes, and treaties from around the world on a subscription basis. In recent years, HeinOnline introduced Digital Ownership Program, a new way to access its content. As HeinOnline explains the program, by “purchasing digital ownership,” users can “obtain ownership rights to PDF files” delivered on a hard drive.⁶³ However, the terms of service for the Digital Ownership Program, which are not available for review on the HeinOnline website, prohibit “owners” of those files from transferring them.⁶⁴ So a library would not be allowed, for example, to loan or give its hard drive to another institution.⁶⁵

Sophisticated institutional consumers like libraries will often be capable of reconciling marketing terms like “buy” and “own” with the more complex picture revealed by license terms.⁶⁶ But it remains to be seen, however, whether and to what extent the average consumer is getting what she bargained for.

⁶³ *Digital Ownership*, HEINONLINE: SERVICES, <http://home.heinonline.org/services/ownership/> [<https://perma.cc/DK62-558M>].

⁶⁴ Those terms provide in relevant part that “[c]ustomer[s] may not: (i) sell, distribute, publicly display or in any other way exploit (commercially or otherwise) the Collection(s) or portions thereof, by any means, including, without limitation, sale, exchange, barter, transfer, assignment, or distribution, (ii) transfer, assign or sublicense any of the Customer’s rights or obligations under this Agreement.” Email from HeinOnline to Aaron Perzanowski, Professor of Law, Case Western Reserve Univ. Sch. of Law (Jan. 13, 2015, 4:18 PM) (on file with author).

⁶⁵ Random House used similar language when its Vice President of Library and Academic Marketing and Sales told Library Journal, “Random House’s often repeated, and always consistent position is this: when libraries buy their RH, Inc. ebooks from authorized library wholesalers, it is our position that they own them.” Michael Kelley, *Random House Says Libraries Own Their Ebooks*, LIBR. J.: LJ INSIDER (Oct. 18, 2012, 2:36 PM), <http://lj.libraryjournal.com/2012/10/opinion/random-house-says-libraries-own-their-ebooks-lj-insider> [<https://perma.cc/DP58-T93P>]. Random House later clarified that by “owning,” it meant that libraries could move the books they license between competing DRM-protected ebook vendors like Overdrive. See Mike Masnick, *Turns Out When Random House Said Libraries ‘Own’ Their Ebooks, It Meant, ‘No, They Don’t Own Them,’* TECHDIRT (Oct. 24, 2012, 12:44 PM), <https://www.techdirt.com/articles/20121023/23465120806/turns-out-when-random-house-said-libraries-own-their-ebooks-it-meant-no-they-dont-own-them.shtml> [<https://perma.cc/AW8P-R7RG>] (“In fact, at best, when they say ‘own’ they mean ‘if you fit into this limited category, you have the right to move your ebooks from one approved platform to another approved platform.’”).

⁶⁶ We do not mean to concede here that licenses necessarily dictate the rights of consumers. Some courts have recognized that purported license terms do not necessarily preclude sales. See, e.g., *UMG Recordings, Inc. v. Augusto*, 628 F.3d 1175, 1182 (9th Cir. 2011) (holding that “there [was] no evidence to support a conclusion that licenses were established under the terms of the promotional statement” because the record was “devoid of any indication that the recipients agreed to a license”); *Krause v. Titleserv, Inc.*, 402 F.3d 119, 121, 123-24 (2d Cir. 2005) (concluding that the language of Section 117(a), which “allows the owner of a copy of a computer program to copy or modify the program for limited purposes without incurring liability for infringement,” suggests that the protection extends beyond those possessing formal title).

II. METHODS: THE MEDIASHOP STUDY

In order to assess consumer understanding of rights in different kinds of media, we conducted a web-based survey of a sample of internet users (N=1299) in 2016.⁶⁷ The sample was representative of the United States population with respect to sex, age, and income as measured by 2010 census data.⁶⁸ In addition, we collected demographic information on race,⁶⁹ geographic region,⁷⁰ and education level.⁷¹ Our panel of respondents was drawn from an initial pool of 7150 Internet users who were invited to participate in our survey. From that initial solicitation, 2325 participants began the survey. Out of that group, 1299 successfully completed the survey instrument.⁷²

⁶⁷ The survey was administered using the internet survey platform Qualtrics. We are aware of the methodological limitations involved in using web-based surveys and that telephone-based surveys remain the “gold standard.” However, for this study, a web-delivery mechanism was more appropriate because it allowed us to present the respondent with realistic simulations of the online shopping experience and because only Internet users can buy media from digital platforms like those studied here.

⁶⁸ Our sample was 51% female and 49% male. We limited respondents to this binary choice to mirror the 2010 census. In terms of age, 11.3% of our sample was between the ages of 18–24, 35% was between 25–44, 35% was between 45–64, and 18% of respondents were 65 or older. This closely matches the U.S. population as of 2010. *See* LINDSAY M. HOWDEN & JULIE A. MEYER, U.S. CENSUS BUREAU, U.S. DEP’T OF COMMERCE, 2010 CENSUS BRIEFS NO. C2010BR-03, AGE AND SEX COMPOSITION: 2010, at 2 tbl.1 (2011), <https://www.census.gov/prod/cen2010/briefs/c2010br-03.pdf> [<https://perma.cc/Z792-HQVW>] (showing the age and sex breakdown of the U.S. population).

⁶⁹ Our sample was also roughly representative of the U.S. population with respect to race. Whites were slightly overrepresented, comprising 80% of our sample. Black and Latino respondents were underrepresented at 9% and 6% of our sample, respectively. Asian and Native American respondents made up 4.2% and 0.6% of our sample, respectively, figures roughly in line with national figures. *See* KAREN R. HUMES ET AL., U.S. CENSUS BUREAU, U.S. DEP’T OF COMMERCE, 2010 CENSUS BRIEFS NO. C2010BR-02, OVERVIEW OF RACE AND HISPANIC ORIGIN: 2010, at 7 tbl.3 (2011), <http://www.census.gov/prod/cen2010/briefs/c2010br-02.pdf> [<https://perma.cc/99EH-MAY2>] (showing the racial breakdown of the U.S. population). However, we saw no significant relationship between race and survey responses.

⁷⁰ Regionally, our sample included a representative number of Southerners and Midwesterners. But Northeasterners were overrepresented—roughly 27% in our sample versus 18% in the population—while Westerners were somewhat underrepresented, comprising 15% of our sample versus 23% of the population. *See* PAUL MACKUN & STEVEN WILSON, U.S. CENSUS BUREAU, U.S. DEP’T OF COMMERCE, 2010 CENSUS BRIEFS NO. C2010BR-01, POPULATION DISTRIBUTION AND CHANGE: 2000 TO 2010, at 2 tbl.1 (2011), <https://www.census.gov/prod/cen2010/briefs/c2010br-01.pdf> [<https://perma.cc/3NZT-4QT4>] (showing the geographic breakdown of the U.S. population). However, we saw no significant correlation between region and survey responses.

⁷¹ We asked respondents to report the highest level of education they had completed. They responded as follows: Less than High School, 2%; High School/GED, 22%; Some College, 28%; 2-year College Degree, 11%; 4-year College Degree, 25%; Masters Degree, 10%; Doctoral Degree, 1%; Professional Degree (e.g., JD, MD), 1%. These results roughly match 2009 U.S. Census data. *See* CAMILLE L. RYAN & JULIE SIEBENS, U.S. CENSUS BUREAU, U.S. DEP’T OF COMMERCE, POPULATION CHARACTERISTICS NO. P20-566, EDUCATIONAL ATTAINMENT IN THE UNITED STATES: 2009, at 6 tbl.1 (2012), <https://www.census.gov/prod/2012pubs/p20-566.pdf> [<https://perma.cc/Y4NX-MH59>] (reporting educational attainment data for Americans over the age of twenty-five).

⁷² Most of the other 1026 responses were excluded for failing to meet our demographic criteria; incomplete responses were also excluded.

In addition to demographic questions, we asked a series of screening questions to limit respondents to those who were in the market for digital books, music, or movies.⁷³ We posed three questions to respondents:

1. Have you paid for digital music in the past 12 months, or do you plan to do so in the next 12 months?
2. Have you paid for an ebook in the past 12 months, or do you plan to do so in the next 12 months?
3. Have you paid for digital movies in the past 12 months, or do you plan to do so in the next 12 months?

The order of these questions was randomized for each participant. As soon as a respondent answered “Yes” to one of the questions, the participant was placed in the corresponding group: music, books, or movies. Respondents who answered “No” to all three questions were disqualified from the survey. The size of each media group was capped to yield equally-sized groups of 433 respondents for each of books, music, and movies.

Next, we prompted respondents to select a particular media title. Most surveys test products chosen by the researcher. Instead, we showed respondents within each media category a number of specific titles and asked them to choose the one that interested them most. We selected these titles from Amazon’s then-current list of best sellers and attempted to offer a diverse cross-section of genres.⁷⁴ This process allowed us to more closely replicate marketplace conditions and increase respondent engagement.

A. The MediaShop Site

To test how respondents react to a *Buy Now* button, we created a fictional online commerce site called MediaShop. The MediaShop site features design elements familiar to Internet shoppers—a header with a search bar, navigation elements, a shopping cart, a product image, a product description, user ratings, the price of the good, and some mechanism for completing the transaction. In arranging these various elements, as seen in Figure 1 below, we modeled MediaShop on existing online retail sites like Amazon, Target, and Walmart.

⁷³ Our study focused on digital music, books, and videos, but similar tensions surrounding user rights arise in software products such as games and apps as well. For more information, see Lothar Determann and David Nimmer, *Software Copyright’s Oracle from the Cloud*, 30 BERKELEY TECH. L.J. 161 (2015), which discusses copyright law in the software context.

⁷⁴ For books, respondents were given a choice between: *Bum Rap* by Paul Levine, *The Girl on the Train* by Paula Hawkins, *The Martian* by Andy Weir, and *All the Light We Cannot See* by Anthony Doerr. For music, the choices were: *1989* by Taylor Swift, *Before This World* by James Taylor, *American Beauty/American Psycho* by Fall Out Boy, and *To Pimp a Butterfly* by Kendrick Lamar. And for movies, choices included: *Kingsman: The Secret Service*, *The Imitation Game*, *Pitch Perfect*, and *Guardians of the Galaxy*.

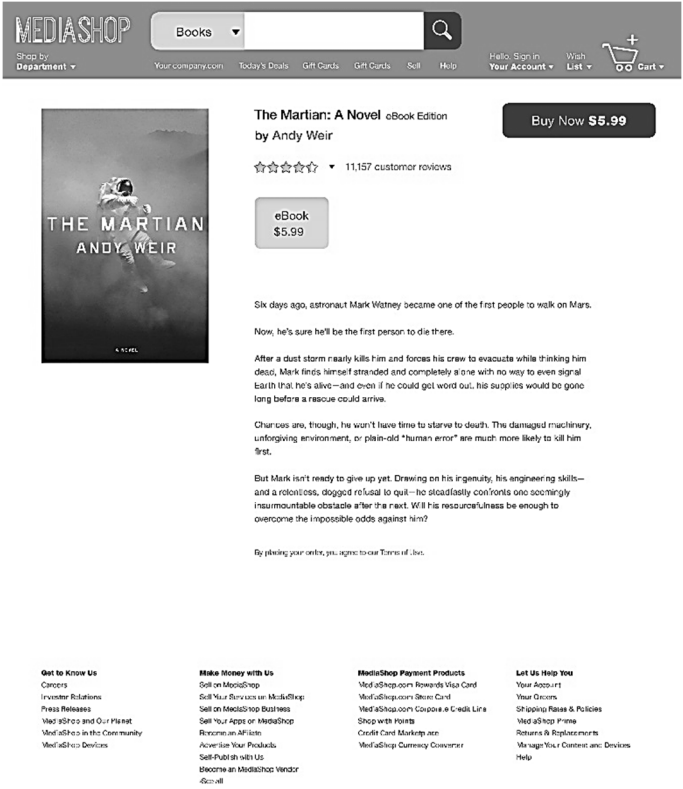
After selecting a particular title, each respondent was then shown one of four product page variations. Those variations differed with regard to both the type of product displayed and the button used to complete the transaction. For three of the four variations, respondents saw digital goods—ebooks, MP3s, or movie downloads—with three different transaction labels ($n=970$).

Some respondents saw digital goods with the *Buy Now* button (Figure 2, $n=333$); others saw a *License Now* button (Figure 3, $n=310$); and a third group saw a short notice that enumerated the uses that respondents could and could not make of the digital media good if purchased (Figure 4, $n=327$). For the fourth variation, respondents saw a physical good—paperbacks, CDs, or Blu-ray discs—and the standard *Buy Now* button (Figure 13, $n=329$). Roughly equal numbers of respondents were presented with each of these four product page variations.

Next, respondents were instructed to review that page as they normally would when acquiring media goods online. Notably, each digital good product page included a link to the MediaShop Terms of Use, which fully described the restrictions on the good's use and transfer. Of the 970 respondents who viewed the product pages, only fourteen clicked on the Terms of Use link, a rate of 1.4%.⁷⁵

⁷⁵ The language of the MediaShop Terms of Use was based on Amazon's Kindle Store terms. See *Kindle Store Terms of Use*, *supra* note 14.

Figure 1



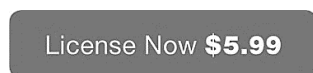
Respondents were presented with a range of products to choose from. This image depicts an ebook paired with the *Buy Now* button.

Figure 2



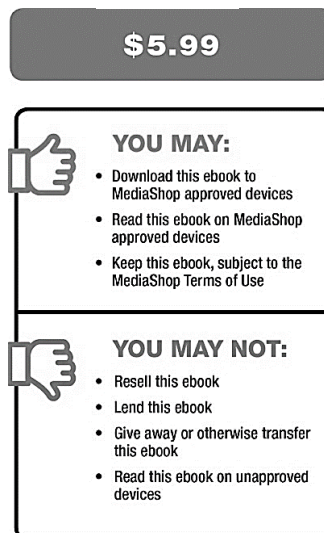
A quarter of respondents were presented with a *Buy Now* button paired with a digital good. Another quarter were presented with a *Buy Now* button paired with a tangible good.

Figure 3



A quarter of respondents were presented with a *License Now* button paired with a digital good.

Figure 4



A quarter of respondents were presented with this short notice concerning rights in digital goods.

B. Assessing Consumer Understanding of Rights

After respondents viewed the product page, we asked them a series of questions concerning their understanding of the *Buy Now*, *License Now*, or short notice conditions, as well as their beliefs about the rights they had acquired by paying for the media good. We began with open-ended questions such as, “When you see the phrase *Buy Now*, what, if anything, does it mean to you?” Next, we posed a set of more specific closed-ended questions. We asked respondents who viewed a book, for example, whether—after clicking the appropriate button—they owned the book, could lend it to a friend, could resell it, could read it on the device of their choice, could leave it to a friend or family member in their will, could keep it for as long as they wanted, could give it as a gift, or could make copies of it for others. We posed slightly modified versions of each of these questions for each media type. Respondents could choose “Yes,” “No,” or “I don’t know.”⁷⁶ Most of these questions were designed

⁷⁶ We included the following instruction: “If you aren’t certain, make the best selection based on the information you have. If you cannot make an informed choice, select ‘I don’t know.’” In part, we included this instruction to reduce the risk of “satisficing,” a strategy of choosing the answer that most reduces the burden of responding. See Jon A. Krosnick et al., *Satisficing in Surveys: Initial Evidence*, NEW DIRECTIONS FOR EVALUATION, Summer 1996, at 29, 30-31 (suggesting that fatigue and work avoidance behaviors in survey respondents can impact results and data quality).

to gauge the degree to which respondents believed they were entitled to engage in particular behaviors. However, we asked whether respondents “own” the media good as a measure of their overall impression of the transaction.

C. *Assessing Whether Rights Matter to Consumers*

For three particular behaviors—lending, reselling, and using the device of the consumer’s choice—we posed a set of follow-up questions designed to measure the degree to which respondents valued those rights and the degree to which their presence or absence influences purchasing decisions.⁷⁷ We began by asking respondents to state their preference for media goods on the basis of these behaviors on a five-point scale. Next, we asked respondents how much more, if anything, they would be willing to spend for a media good that could be used in the manner described—lent, resold, or used on the device of the respondent’s choice. These questions were intended to determine the extent to which respondents’ stated preferences would translate into behavior in the marketplace.

Finally, we gathered data intended to reveal the impact of the ability to engage in these three behaviors on the means by which respondents would acquire or access copyrighted material. We began by asking whether respondents were familiar with subscription streaming sites like Netflix and Spotify. We then asked those who were familiar a set of follow-up questions that inquired whether or not the respondents would be more likely to access a media title through such a service if they could not acquire a copy that could be lent, resold, or used on their device of choice. We then asked a similar set of questions about unauthorized downloading of works to those who reported being familiar with BitTorrent or The Pirate Bay.

III. RESULTS

The MediaShop survey reveals a number of insights about how consumers understand—or misunderstand—digital transactions. A surprisingly high percentage of consumers believe that when they *Buy Now*, they acquire the same sort of rights to use and transfer digital media goods that they acquire when they purchase physical goods. The data also strongly suggest that these rights matter to consumers. They are willing to pay more for those rights, and they are more likely to acquire media through other means, both lawful and unlawful, in the absence of those rights. Finally, our study suggests that a

⁷⁷ Asking these follow-up questions for each behavior would have significantly increased the time necessary to complete the survey, likely reducing both complete responses and the reliability of those responses. See Andy Peytchev, *Survey Breakoff*, PUB. OPINION Q., Spring 2009, at 74, 85 fig.2 (noting the impact of survey length on participation and completion). The median time of completion in the MediaShop survey was 607 seconds, that is, just over ten minutes.

relatively simple and inexpensive intervention—adding a short notice to a digital product page that outlines consumer rights in straightforward language—is an effective means of significantly reducing consumer misperceptions.

A. *How Consumers Understand Their Rights*

Across the four notice conditions, we observed significant variations in the frequency with which respondents believed that they had obtained rights to engage in particular behaviors after completing a transaction. On the whole, respondents who saw the *Buy Now* button for a physical good understood their rights most accurately.⁷⁸ Those who saw the same *Buy Now* button on a digital good apparently carried over assumptions from physical goods, and reported the least accurate beliefs about their rights. Our two interventions for digital goods—the *License Now* button and the short notice—both reduced mistaken beliefs among respondents, but the short notice was considerably more effective.⁷⁹

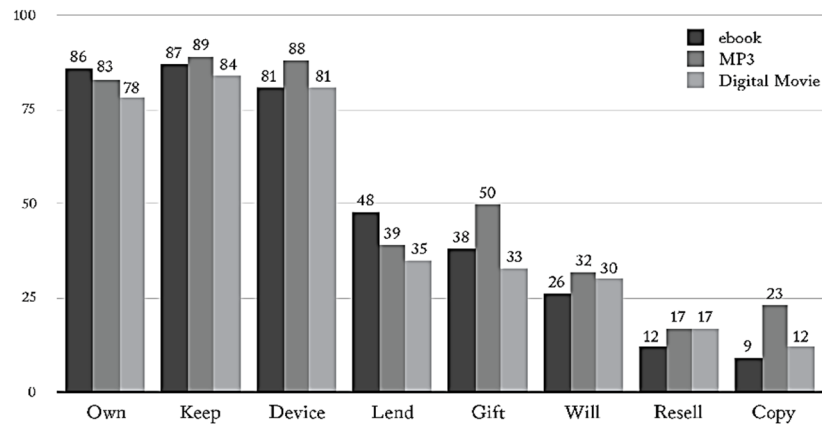
1. *Buy Now* for Digital Goods

Roughly one quarter of our respondents viewed a digital product page that included the familiar *Buy Now* button. Their responses to a series of questions about what rights, if any, they acquired after completing that transaction are summarized in Figure 5 below.

⁷⁸ Respondents' perceptions of their rights varied between groups with certain demographic and behavioral characteristics. Men were significantly more likely than women to believe that they could resell, give away, leave in a will, and make copies of the good for others. In terms of age, respondents between the ages of 25 and 34 were considerably more likely—and respondents over the age of 65 considerably less likely—to believe they had the right to lend, resell, give away, or leave a media good in their wills. We also asked respondents how frequently they acquired media online, lend their physical media, and resell their physical media. The more frequently respondents engaged in those behaviors, the more likely they were to answer "Yes" when asked about their rights.

⁷⁹ These general conclusions are also supported by our open-ended questions. Respondents who viewed the *Buy Now* button were far more likely than those who viewed either the short notice or *License Now* conditions to express the view that they were purchasing a media good. In fact, 577 *Buy Now* respondents (n=662), split nearly equally between digital and analog shoppers, said that *Buy Now* meant they were making a purchase. In comparison, only 87 *License Now* respondents (n=310) expressed that belief. For the short notice, that number dropped to 29 (n=327). Conversely, respondents were significantly less likely to express the view that *Buy Now* implied any limits on their use and enjoyment of the media good. No analog shopper identified such limits, and only one *Buy Now* digital shopper did. That number increased moderately, to 14, for those who saw the *License Now* button. But 141 of those who viewed the short notice responded that it imposed some rule or limitation on their use. 72 short notice users indicated specifically that they were not allowed to share or sell the media. Likewise, the number of respondents who said a copyright license was being proposed depended on which notice condition they saw. Again, no physical shoppers made that claim, and one *Buy Now* digital shopper indicated the transaction gave the user a license. Not surprisingly, that number shot up to 77 under the *License Now* condition. More interestingly, 32 respondents said the short notice communicated that a license was in the offering.

Figure 5: Percentage of Respondents Who Believe “Buy Now” Confers Rights in Digital Goods (n=333)



A sizable majority of respondents—just over 83%—believed that after clicking the *Buy Now* button, they owned the digital good in question. Ownership is both a complex legal conclusion and an intuitive claim about an individual’s relationship to a product. It is also a concept the precise contours of which are contested in the digital economy.⁸⁰ In that sense, a claim about ownership is not falsifiable; it is more like a gauge of a consumer’s overall impression of a transaction.⁸¹ Nonetheless, the high affirmative response rate to this question seems to belie the claims made by some rights holders and retailers that consumers understand perfectly well that when they click *Buy Now* they are simply acquiring a license.⁸²

More than 86% of respondents who saw the *Buy Now* button believed that they were entitled to keep their digital purchase for as long as they wanted.⁸³ That is typically the case with physical media. You can keep your hardcover books or vinyl records forever, barring theft, fire, or some other disaster.

⁸⁰ See generally AARON PERZANOWSKI & JASON SCHULTZ, *THE END OF OWNERSHIP: PERSONAL PROPERTY IN THE DIGITAL ECONOMY* (2016) (discussing competing notions of ownership in the context of the digital marketplace).

⁸¹ We were able to identify the substantive rights respondents most closely associated with ownership. The right to keep the good forever was most predictive of a respondent’s claim of ownership, followed closely by the rights to leave the good in one’s will, to give it away, and to resell it.

⁸² See *supra* note 26.

⁸³ Honoré referred to this entitlement as both “the right of possession” and “the absence of term.” Honoré, *supra* note 2, at 113–15, 121–23.

For digital goods, the same is not true. Access to one's media in the digital world is more contingent, as digital-good sellers have the ability to affect consumers after the initial transaction. Transactions for such digital goods are continuous and subject to both business failures and petty meddling from service providers. Contract law affords digital platforms protection against suit, while the technological affordances of the platform shape users' rights in surprising, non-negotiable ways.⁸⁴ For instance, digital retailers might go out of business or decide to shut down their media servers.⁸⁵ They might shift to a subscription model, converting purchases to rentals.⁸⁶ They might wipe clean customer accounts or devices for violating their terms of service.⁸⁷ They might deny consumers access to purchases made in one country when they move to another.⁸⁸ They might remotely delete purchases, as Amazon and Apple have done.⁸⁹ Or they might decide, as Barnes and Noble recently did, to deny customers access to their purchased ebooks when their credit cards expire.⁹⁰

⁸⁴ Cf. Shoshana Zuboff, *Big Other: Surveillance Capitalism and the Prospects of an Information Civilization*, 30 J. INFO. TECH. 75, 81 (2015) (describing how technology allows companies to monitor and enforce agreements in previously unknown ways).

⁸⁵ See *supra* text accompanying note 10 (discussing the difficulty customers have accessing digital purchases when companies file for bankruptcy or shut down).

⁸⁶ See Nate Hoffelder, *Scholastic to Close Storia eBookstore; Customers Could Lose Access to Their eBook Purchases*, DIGITAL READER (July 27, 2014), http://the-digital-reader.com/2014/07/27/scholastic-close-storia-ebookstore-customers-will-lose-access-ebook-purchases/#.U_ffdvSE-a5 [<https://perma.cc/7GLH-SDAR>] (describing academic publisher Scholastic's shutdown of its educational ebook store in favor of a subscription service and its message to consumers that "[t]he switch to streaming means that eBooks you've previously purchased may soon no longer be accessible").

⁸⁷ Linn Nygaard, a Norwegian Kindle customer, lost dozens of ebooks she bought from Amazon. They vanished without notice when Amazon erased her Kindle, citing unspecified "abuse of [its] policies." Mark King, *Amazon Wipes Customer's Kindle and Deletes Account with No Explanation*, GUARDIAN (Oct. 22, 2012, 10:25 AM), <http://www.theguardian.com/money/2012/oct/22/amazon-wipes-customers-kindle-deletes-account> [<https://perma.cc/3JGA-5LJK>]. Nygaard's account, which was later reinstated, likely violated Amazon's terms because the Kindle Store had not yet launched in Norway. See Michelle Jaworski, *Amazon Restores Kindle User's Mysteriously-Deleted Account, Still No Explanation*, DAILY DOT (Oct. 23, 2012, 5:54 PM), <http://www.dailydot.com/news/amazon-linn-nygaard-deleted-account-restored/> [<https://perma.cc/UXA5-ASU4>] (noting that Nygaard's problems seemed to stem from the fact that "because she lived in Norway, where Amazon has no offices, she [was told that she] would have to provide a U.K. address to get the replacement" when her Kindle broke while she was traveling).

⁸⁸ Purchases from the Apple iTunes store are linked to the user's home country address, and Apple warns users that if they switch countries in their iTunes account, "You won't see the items that you purchased from the previous country's store in your Purchased section." *Change Your iTunes Store Country or Region*, APPLE, https://support.apple.com/en-us/HT201389?cid=tw_sr [<https://perma.cc/FQ8F-KHNM>] (last updated Sept. 22, 2016).

⁸⁹ See *supra* text accompanying notes 5 and 39.

⁹⁰ See Tim Cushing, *Barnes & Noble Decides that Purchased Ebooks Are Only Yours Until Your Credit Card Expires*, TECHDIRT (Nov. 27, 2012, 11:42 AM), <https://www.techdirt.com/articles/20121126/18084721154/barnes-noble-decides-that-purchased-ebooks-are-only-yours-until-your-credit-card-expires.shtml> [<https://perma.cc/AD6V-TK6W>] (describing how customers could no longer access purchases when their credit cards expired).

Moreover, risk-of-loss and termination provisions that are common in license agreements insulate retailers from any legal liability for these behaviors.⁹¹

An almost equally large majority of respondents believed that when they clicked *Buy Now*, they could use the digital media on the device of their choice. For consumers with various makes and models of laptops, smartphones, tablets, ereaders and media players, the appeal of that freedom is easy to understand. In some cases, consumers are correct in their belief. But in others, they are mistaken. Unfortunately, the factors that determine whether consumers are right or wrong are not easy to assess. Some retailers have embraced the diversity of the digital ecosystem. Amazon, for example, supports a wide range of devices for digital media, from its own Kindle line to Apple iOS and Android devices, including even the latest NOOK ereader from its competitor Barnes and Noble. Amazon sees the ability to read ebooks on a buyer's device of choice as a selling point. Its choice to sell music in the standard MP3 format paints a similar picture.

But other retailers have taken a more closed approach to device compatibility. Apple's iBooks can only be read on Apple devices. The same is true for iTunes music and movies. Through a combination of license terms, proprietary file formats, and DRM, Apple has tethered the media it sells to its own hardware. That choice reveals the differing business philosophies of Apple and Amazon. Amazon works hard to keep prices low to attract an ever-larger customer base.⁹² It sells Kindle ereaders and tablets at break-even prices and may actually lose money on each sale,⁹³ but it hopes to profit in the long run by increasing sales of its content.⁹⁴ Apple—despite selling billions of dollars' worth of apps, movies, and music—is in the hardware business. And its profit margin on devices like the iPhone 6 has been estimated to be as high as sixty-nine percent, leading to quarterly profits of

⁹¹ Consider the following language:

Risk of Loss. Risk of loss for Kindle Content transfers when you download or access the Kindle Content

Termination. Your rights under this Agreement will automatically terminate if you fail to comply with any term of this Agreement. In case of such termination, you must cease all use of the Service, and Amazon may immediately revoke your access to the Service without refund of any fees. Amazon's failure to insist upon or enforce your strict compliance with this Agreement will not constitute a waiver of any of its rights.

Kindle Store Terms of Use, *supra* note 14.

⁹² See Kelly Clay, *Amazon Confirms It Makes No Profit on Kindles*, FORBES (Oct. 12, 2012, 1:10 AM), <http://www.forbes.com/sites/kellyclay/2012/10/12/amazon-confirms-it-makes-no-profit-on-kindles/> [<https://perma.cc/AY58-4A87>] (reporting that Amazon derives its profits from sales of content, not Kindles); Steve Kovach, *Amazon Will Lose Millions Selling the Kindle Fire, But That's the Point*, BUS. INSIDER (Sept. 30, 2011, 2:32 PM), <http://www.businessinsider.com/kindle-fire-profit-margins-2011-9> [<https://perma.cc/AT98-AQAF>] (noting that Amazon was selling Kindle Fire at a loss to "gain rapid adoption").

⁹³ *Id.*

⁹⁴ *Id.*

over ten billion dollars.⁹⁵ Apple has every incentive to keep its customers, and their media purchases, within its ecosystem.

Ultimately, whether buyers are correct in their belief about device compatibility depends on choices made by retailers, rather than their own legal rights. In the MediaShop study, for example, the license limited respondents to the use of “Supported Devices.” Of course, only a handful knew that, since the vast majority did not read the license terms.

Lending is a widely recognized right of property owners.⁹⁶ Book lending is a centuries-old American cultural practice,⁹⁷ and people have been lending music and movies for as long as they have been available for sale. The same is true for gift-giving. More than 40% of survey respondents believed that lending and gift-giving rights persist when they “Buy Now” in the digital marketplace.⁹⁸ However, nearly every license for digital goods forbids lending and gifts. The Amazon Instant Video and MP3 stores, Apple iTunes, Google Play, Sony Playstation Network, Microsoft Xbox Live, and countless smaller digital retailers explicitly bar consumers from lending, renting, giving away, or otherwise transferring their purchases.⁹⁹

⁹⁵ See Oscar Williams-Grut, *Apple's iPhone: The Most Profitable Product in History*, INDEPENDENT (Jan. 28, 2015), <http://www.independent.co.uk/news/business/analysis-and-features/apples-iphone-the-most-profitable-product-in-history-10009741.html> [<https://perma.cc/3ZTU-KYW8>] (reporting Apple's quarterly profits and industry estimates that the profit margin on the iPhone 6 could reach sixty-nine percent); see also Daisuke Wakabayashi, *Apple's Market Cap Loses \$60 Billion After iPhone Sales Disappoint*, WALL ST. J. (July 22, 2015, 10:02 AM), <http://www.wsj.com/articles/apple-earnings-boosted-by-iphone-sales-1437510647> [<https://perma.cc/W6L7-PP2F>] (noting that “[t]he iPhone now overshadows the rest of Apple's businesses”).

⁹⁶ See Honoré, *supra* note 2, at 118 (noting that “the right to the capital” includes “the power to alienate the thing”); O'Reilly, *supra* note 1.

⁹⁷ Benjamin Franklin, for example, founded the Library Company of Philadelphia in 1731. See LIBRARY CO. OF PHILA., “AT THE INSTANCE OF BENJAMIN FRANKLIN”: A BRIEF HISTORY OF THE LIBRARY COMPANY OF PHILADELPHIA 5 (2015), <http://www.librarycompany.org/about/Instance.pdf> [<https://perma.cc/FK67-XW2B>] (describing how Benjamin Franklin and his friends pooled their money so they could afford to import books).

⁹⁸ In theory, respondents could have misunderstood this question as one asking whether they could lend their physical device—a Kindle or an iPad—containing a digital media title rather than asking, as we intended, whether they could lend that particular digital media purchase. We carefully designed the wording of our questions to avoid this possibility by asking whether respondents could lend the particular “ebook,” “MP3 album,” or “movie” for which they paid.

Since the questions were phrased identically, the responses we received to questions concerning gifts and resale also bolster our confidence that respondents did not misinterpret our questions. Although a substantial number of respondents reported believing that they could engage in these activities, we would have expected those numbers to be considerably higher if they read the questions to be inquiring into their ability to resell, give away, or lend their Kindle or iPad. See *infra* subsection III.A.4 (discussing participants' responses to questions addressing the *Buy Now* button for physical goods). In analyzing our open-ended questions, only five of the 333 consumers presented with the *Buy Now* button signaled that it could mean an ability to lend the device to others.

⁹⁹ See *Amazon Music Terms of Use*, *supra* note 14 (“[Y]ou may not . . . assign, . . . rent, share, lend, . . . license or otherwise transfer or use Purchased Music”); *Amazon Video Terms of Use*,

In response to consumer demand, some retailers have introduced programs that mimic certain aspects of traditional lending. The Kindle and NOOK stores both offer restricted lending for some books.¹⁰⁰ If publishers opt in, consumers can lend an ebook—one time only—for fourteen days. Apple's Family Sharing program allows digital media purchases to be shared with up to six accounts, provided the accounts all share the same credit card information.¹⁰¹ But these programs do not include all works, and they are limited in fundamental respects that render them poor substitutes for a true right to alienate.

Consumers are accustomed to inheriting physical media. In our study, nearly thirty percent of respondents believed they could bequest their ebooks, MP3s, and digital movies in their wills.¹⁰² Thus, it appears that for many, the expectations established in the tangible era have survived the shift to digital copies. Although the owner of a computer or hard drive could leave that tangible object in her will, that is at best an incomplete solution for transferring ownership of digital content. To start, many media libraries are stored on the cloud rather than a local device. And when a media library is stored locally, it is likely intermingled with other files. A hard drive or laptop might include digital music, movies, and books, not to mention emails, financial records, and personal photos. If those files cannot be copied to other storage media, efforts to effectuate wills could be frustrated. Both public and private efforts

AMAZON, <https://www.amazon.com/gp/help/customer/display.html?nodeId=201422760> [<https://perma.cc/M4C6-CR66>] (last updated Jan. 25, 2016) (“[Y]ou may not . . . rent, lease, [or] distribute . . . any right to the Digital Content to any third party . . .”); *Apple Media Services Terms and Conditions*, *supra* note 14 (“You agree not to modify, rent, loan, sell, or distribute the Services or Content in any manner, and you shall not exploit the Services in any manner not expressly authorized.”); *Google Play Terms of Service*, GOOGLE, <https://play.google.com/about/play-terms.html> [<https://perma.cc/MX4H-T5G4>] (last updated July 27, 2016) (“You may not . . . rent, lease, redistribute . . . or transfer or assign any Content or your rights to Content to any third party without authorization, including with regard to any downloads of Content that you may obtain through Google Play.”); *Microsoft Services Agreement*, MICROSOFT: XBOX (Aug. 2015), <http://www.xbox.com/en-US/Legal/LiveTOU> [<https://perma.cc/4QCJ-LMYK>] (“You may not . . . rent, lease or lend the application; or transfer the application or this agreement to any third party.”); *Terms of Service and User Agreement*, *supra* note 17 (“You may not . . . rent, lease, [or] loan . . . any portion of the Property.”).

¹⁰⁰ See Jeff Bercovici, *A Pretty Good Solution to The Problem of E-Book Lending (Or At Least I Think So)*, FORBES (Aug. 22, 2012, 12:30 PM), <http://www.forbes.com/sites/jeffbercovici/2012/08/22/a-pretty-good-solution-to-the-e-book-lending-wars-or-at-least-i-think-so> [<https://perma.cc/QW8W-4AEJ>] (describing how lending is currently restricted to “short-term, one-time loans of some but not all titles”).

¹⁰¹ See *Family Sharing*, APPLE, <http://www.apple.com/icloud/family-sharing/> [<https://perma.cc/E7V5-GQME>] (“To get started, one adult in your household — the organizer — invites up to five additional family members and agrees to pay for any iTunes, iBooks, and App Store purchases they initiate while part of the family group.”).

¹⁰² A full 50% of respondents who saw the *Buy Now* button for digital goods chose “I don’t know” when asked this question.

to address these sorts of concerns are underway, but they have yet to directly confront license restrictions applied to digital media.¹⁰³

Likewise, 16% of respondents believed that clicking the *Buy Now* button gives them the right to resell their digital goods. Used booksellers have operated in the United States for centuries. Benjamin Franklin and Thomas Jefferson built their personal libraries in part by buying used books.¹⁰⁴ Used record stores have been around for decades, and online resale markets like eBay enable the sale of all manner of used media goods. But like lending and gift-giving, resale is uniformly barred by license terms applied to digital goods.¹⁰⁵

Finally, 14% of respondents believed that they were entitled to make copies of the digital good for other people. Although some exceptions apply, copyright law generally prohibits this behavior.¹⁰⁶ Tellingly, fewer respondents answered yes to this question than any other. Nonetheless, a considerable percentage of respondents—and particularly those shopping for digital music—believed clicking *Buy Now* gave them this right. This result suggests that there is a subset of consumers who tend to overestimate their rights. It is also indicative of a potential mismatch between the expectations of consumers and the dictates of copyright law.

103 Delaware became the first state to enact the Fiduciary Access to Digital Assets Act, a model law developed by the Uniform Law Commission. That law gives heirs and other beneficiaries of an estate the power to control digital accounts and assets—including text, audio, video, and software—and to request transfers or copies of those assets. But the Act contains a crucial limitation: control over digital assets is limited “to the extent permitted under . . . any end user license agreement.” Fiduciary Access to Digital Assets and Digital Accounts Act, DEL. CODE ANN. tit. 12, § 5004 (2015); see generally UNIF. FIDUCIARY ACCESS TO DIG. ASSETS ACT (NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS 2014), http://www.uniformlaws.org/shared/docs/Fiduciary%20Access%20to%20Digital%20Assets/2014_UFADAA_Final.pdf [<https://perma.cc/3V7U-R2AL>] (“The purpose of this act is to vest fiduciaries with the authority to access, control, or copy digital assets and accounts.”). California enacted a fiduciary access to digital assets law in September 2016. Revised Uniform Fiduciary Access to Digital Assets Act, CAL. PROB. CODE § 820 (2016). In terms of private action, Google’s Inactive Account Manager and Facebook’s Legacy Contact are tools to facilitate account transfer after the death of a user. See Geoffrey A. Fowler, *Facebook Heir? Time to Choose Who Manages Your Account When You Die*, WALL ST. J. (Feb. 12, 2015, 6:00 AM), <http://www.wsj.com/articles/facebook-heir-time-to-choose-who-manages-your-account-when-you-die-1423738802> [<https://perma.cc/5NH6-SMFB>] (noting that Facebook allows users to designate an individual to manage parts of their accounts posthumously).

104 See *Kirtsaeng v. John Wiley & Sons, Inc.*, 133 S. Ct. 1351, 1364–65 (2013) (“Used-book dealers tell us that, from the time when Benjamin Franklin and Thomas Jefferson built commercial and personal libraries of foreign books, American readers have bought used books published and printed abroad.”).

105 See, e.g., *Apple Media Services Terms and Conditions*, *supra* note 14 (“You agree not to . . . sell . . . the Services or Content in any manner”); *Kindle Store Terms of Use*, *supra* note 14 (“Unless specifically indicated otherwise, you may not sell . . . any rights to the Kindle Content”).

106 See 17 U.S.C. § 106 (2012) (providing that “the owner of copyright under this title has the exclusive rights . . . to reproduce the copyrighted work in copies or phonorecords” (emphasis added)). This right is not absolute. See *id.* §§ 107–08 (carving out exceptions to copyright owner’s exclusive right to reproduction for libraries and archives, among others). But as a general rule, unauthorized reproduction is prohibited.

When consumers are presented with digital media goods and the *Buy Now* button, we observe considerable misunderstanding about the rights they obtain through those transactions. If the *Buy Now* button sends a false signal to consumers, perhaps another button that better describes the nature of these digital transactions would communicate a more accurate set of expectations.

2. *License Now* for Digital Goods

Since the overwhelming majority of retailers and rights holders characterize these deals as licenses, we replaced *Buy Now* with *License Now* on the MediaShop products pages to see what impact, if any, it would have on consumers' perceptions of their rights. The results of this intervention are represented for each media type in Figures 6–8.

The most apparent shift was a reduction in the number of respondents who believed they “owned” the digital goods under the *License Now* scenario. For both ebooks and MP3s, we observed a statistically significant decrease—from 86% to 50%, and from 83% to 62%, respectively.¹⁰⁷ The decline for digital movies was notable—78% to 69%—but not statistically significant.

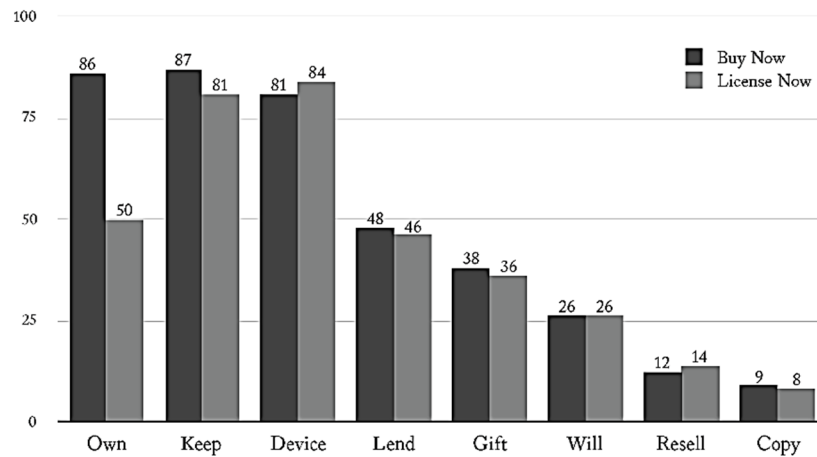
We also saw significant shifts in respondents' beliefs regarding other rights. While the number of respondents who believed they were entitled to lend their digital movies actually increased slightly, the number of respondents who selected “I don't know” increased markedly, from 23% under the *Buy Now* condition to 35% for *License Now*. This suggests respondents were less certain about their rights when presented with the option to *License Now*.

A similar effect was visible when it came to the question of whether respondents believed they were entitled to keep their digital purchases. For ebooks, “I don't know” responses increased from 7% to 19%, while “No” responses decreased from 6% to 0%. For digital movies, the number of respondents who believed they were entitled to keep the movie indefinitely decreased by 9%, while “I don't know” responses increased by 13%.

Finally, for digital movies we saw an increase in the percentage of consumers who believed they were entitled to resell their digital goods. Although this increase—from 17% to 23%—fell just short of significance, it was accompanied by a 15% drop in “No” responses and a 10% increase in “I don't know” responses.

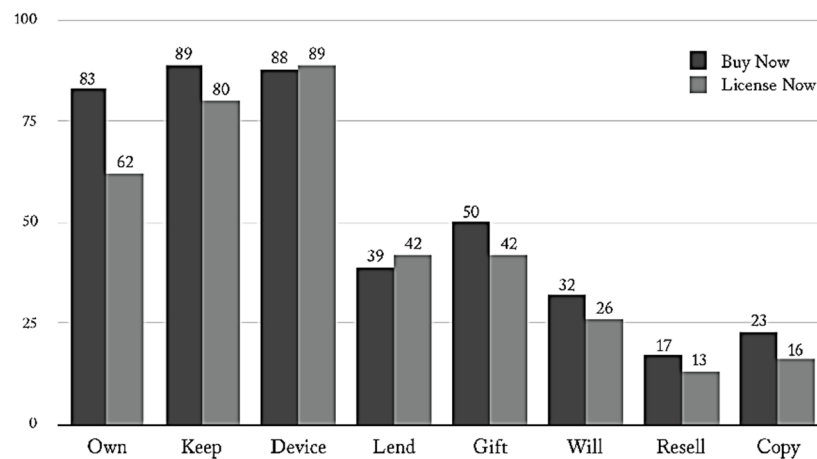
¹⁰⁷ We define statistical significance as $p < 0.05$ using Pearson's chi-squared test.

Figures 6: Percentage of Respondents Who Believe “Buy Now” and “License Now” Confer Rights for ebooks



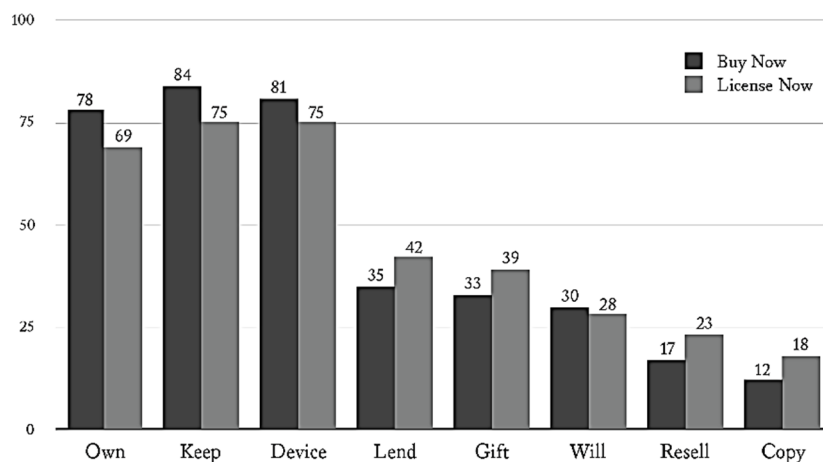
The *License Now* button reduced the number of affirmative responses to the ownership question but had little other effect.

Figure 7: Percentage of Respondents Who Believe “Buy Now” and “License Now” Confer Rights for MP3s



The *License Now* button reduced the number of affirmative responses to the ownership question but had little other effect.

Figure 8: Percentage of Respondents Who Believe “Buy Now” and “License Now” Confer Rights for Digital Movies



For digital movies, exposure to the *License Now* button had a mixed effect on respondents.

Overall, the *License Now* intervention suggests that the language used to characterize a transaction does have an impact on what rights consumers believe they acquire. But the term “license” conveys an unclear message to online shoppers. Given the range of terms a license may contain and the fact that most consumers have never read those terms, we are not surprised to find that the *License Now* button conveys inconsistent messages to consumers.

3. Short Notice of Rights for Digital Goods

In addition to the *License Now* button, we tested a second intervention that informed consumers about the specific rights they obtained in their digital goods. This intervention operated from the premise that a single word like “buy” or “license” is unlikely to capture the complex and perhaps counterintuitive set of rights that retailers and rights holders envision in the digital marketplace. Instead, we supplemented the existing license terms with a short, prominent, easily readable, bullet-point list of the behaviors consumers could engage in and those that they could not. This approach builds on prior experience with layered notice schemes that employ a simple, short notice to alert individuals of the most salient terms contained in a longer, less-accessible

document.¹⁰⁸ From online privacy policies,¹⁰⁹ HIPAA disclosures,¹¹⁰ and credit solicitations,¹¹¹ layered notices have been encouraged or required as a way to increase consumer comprehension of complex agreements or legal regimes.

Yet notice remains a controversial approach in consumer protection. In their 2013 book, Omri Ben-Shahar and Carl E. Schneider summarized a wealth of research on disclosure rules and argued that mandated disclosure simply does not work.¹¹² The notice model, they argued, makes assumptions about human behavior and thinking that simply are not true in practice.¹¹³ The duo also argued that notice leads to lazy policymaking that avoids tough questions by simply putting more and more notices before consumers that go unread.¹¹⁴

Further research has explored how consumers respond to notice in the privacy context. In one study, Ben-Shahar and Adam Chilton illustrated how different privacy notices of varying quality fail to change consumer behavior or their knowledge of privacy practices.¹¹⁵ In addition, Aleecia M. McDonald et al. tested several alternatives of privacy policies, but found that layered notices, standard policies, and a process that presented practices as bullet points all

108 See Nathaniel Good, Jens Grossklags, David Thaw, Aaron Perzanowski, Deirdre Mulligan, & Joseph Konstan, *User Choices and Regret: Understanding Users' Decision Process About Consensually Acquired Spyware*, 2 I/S: J.L. & POL'Y FOR INFO. SOC'Y 283, 294 (2006) (describing multi-layered notices, which include a short, condensed notice "layered" on top of the complete, detailed notice in order to improve consumer notification efficiency while still complying with legal notice requirements).

109 See Lorrie Faith Cranor, *Necessary but Not Sufficient: Standardized Mechanisms for Privacy Notice and Choice*, 10 J. TELECOMM. & HIGH TECH. L. 273, 293 (2012) (describing the use of privacy icons as a means of short-form notice for privacy policies); Joel R. Reidenberg et al., *Disagreeable Privacy Policies: Mismatches Between Meaning and Users' Understanding*, 30 BERKELEY TECH. L.J. 39, 48 (2015) (describing how layered notices are used to "present a website's privacy policy").

110 See Marie C. Pollio, *The Inadequacy of HIPAA's Privacy Rule: The Plain Language Notice of Privacy Practices and Patient Understanding*, 60 N.Y.U. ANN. SURV. AM. L. 579, 615 (2004) (describing how the United States Department of Health and Human Services "permits the notice [to patients] to be provided in 'layered' format").

111 See Prescreen Opt-Out Notice, 16 C.F.R. § 642.3 (2015) (requiring that consumers be provided with both "short" and "long" notices); see also Katy K. Liu, *Fair and Accurate Credit Transactions Act Regulations: Disclosure, Opt-Out Rights, Medical Information Usage, and Consumer Information Disposal*, 2 I/S: J.L. & POL'Y FOR INFO. SOC'Y 715, 720 (2006) (explaining that the Federal Trade Commission "requires a 'layered notice' because the FTC believes that [the notice] effectively carries out the requirements of the" Fair and Accurate Credit Transactions Act of 2003).

112 See generally OMRI BEN-SHAHAR & CARL E. SCHNEIDER, *MORE THAN YOU WANTED TO KNOW: THE FAILURE OF MANDATED DISCLOSURE* (2014); see also MARGARET JANE RADIN, *BOILERPLATE* 218-21 (2013) (examining the U.S.'s preference for requiring more disclosure as a means to protect consumers).

113 See BEN-SHAHAR & SCHNEIDER, *supra* note 112, at 47 ("[M]any disclosures fail because disclosees lack the literacy, intelligence, and sophistication to understand them.").

114 See *id.* at 139 ("Legislatures pass disclosure laws overwhelmingly, partly because they please the whole political spectrum.").

115 See generally Omri Ben-Shahar & Adam S. Chilton, *Simplification of Privacy Disclosures: An Experimental Test* (Univ. Chi. Coase-Sandor Inst. Law & Econ., Research Paper No. 737, 2016), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2711474 [<https://perma.cc/D82Y-F5D4>].

performed similarly.¹¹⁶ In the privacy context, there is good reason to believe that clearer notices do not improve consumer comprehension of practices. This is because consumers see the term “privacy policy” as a seal and assume that its presence is a guarantee of protection.¹¹⁷ Yet some researchers have been optimistic that notices based on nutrition labels—standardized, prominent, and clearly written—could inform consumers of company practice.¹¹⁸ Others have called for a “warning label” approach.¹¹⁹ Such an approach was tested by Ben-Shahar and Chilton, and it resulted in an improvement in consumer comprehension of privacy practices.¹²⁰ As Richard Craswell has observed, Ben-Shahar’s argument overstates the case against consumer notice and is not in conversation with the well-developed literature that recognizes the varied purposes and applications of notice regimes.¹²¹ Ben-Shahar and Schneider’s critique is universalist in approach, yet notices in different contexts do serve a useful purpose—consider, for example, the important policy and practice contributions that have flowed from security breach notification.¹²²

To test notice as an approach to digital rights understanding, we designed short notices for each of our three media types. As Figure 9 illustrates, the chief substantive difference between them is that ebooks and digital movies

¹¹⁶ See Aleecia M. McDonald et al., *A Comparative Study of Online Privacy Policies and Formats*, PRIVACY ENHANCING TECHS. 37, 49-50 (2009) (reporting that all of the tested formats “were unsatisfactory”).

¹¹⁷ See Chris Jay Hoofnagle & Jennifer M. Urban, *Alan Westin’s Privacy Homo Economicus*, 49 WAKE FOREST L. REV. 261, 282 (2014) (“[I]nternet users falsely believe that privacy policies convey specific, legally enforceable rights to users.”). The FTC spent years studying how banks could best disclose information-sharing. One of the agency’s conclusions was that such disclosures should not be labeled “privacy policies” because consumers interpreted this statement more expansively than what legal protections actually provide for financial data. See *Symposium Conference on Behavioral Economics and Consumer Policy* (2007) (statement of Joel Winston, Associate Director, Div. of Identify Prot., Bureau of Consumer Prot., Fed. Trade Comm’n) (explaining that consumers specifically believed privacy policies meant the institution never shared the consumers’ information, which was usually not the case in practice).

¹¹⁸ See Patrick Gage Kelley et al., *Standardizing Privacy Notices: An Online Study of the Nutrition Label Approach*, ACM-CHI (2010) (evaluating users’ understanding of privacy policies by “[c]ompar[ing] two variants of [the ‘nutrition label’] approach with a standardized-text format [and] two formats currently in use”).

¹¹⁹ See generally Ayres & Schwartz, *supra* note 24, at 553 (outlining how the authors’ proposed “warning box” would function).

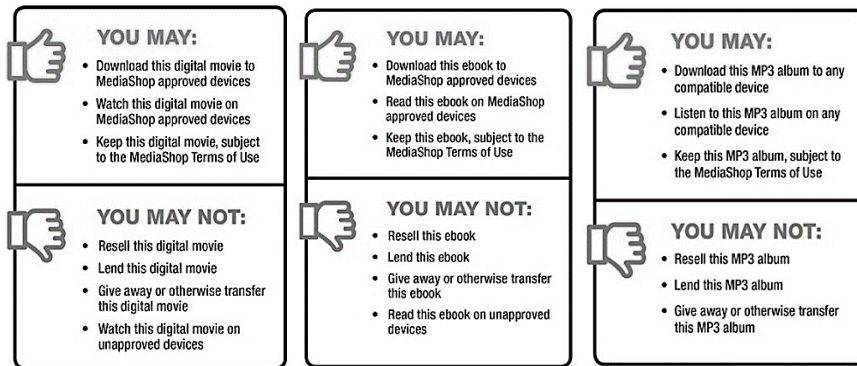
¹²⁰ See Ben-Shahar & Chilton, *supra* note 115, at 25 (finding “a highly statistically significant” increase in respondent comprehension after viewing a short warning label of surprising terms). Puzzlingly, Ben-Shahar and Chilton concluded that their results suggest “that the simplification of disclosures did not change people’s understanding of them.” *Id.* at 28.

¹²¹ See, e.g., Richard Craswell, *Static Versus Dynamic Disclosures, and How Not to Judge Their Success or Failure*, 88 WASH. L. REV. 333, 337-40 (2013) (discussing the broad range of purposes and goals that disclosures attempt to serve).

¹²² See CHRIS JAY HOOFNAGLE, FEDERAL TRADE COMMISSION PRIVACY LAW AND POLICY 227 (2016) (“[S]ecurity breach notification laws create strong incentives to collect less trigger information, to encrypt it, or to segment it technologically so that name was separate from other trigger information.”).

could be used on “approved devices,” while that limitation was omitted from the short notice for MP3 albums. We are not trained designers and do not hold this particular notice out as the perfect design solution. We are confident that experts, given time and resources, could improve on our efforts.¹²³ Nonetheless, even this proof-of-concept design was effective at improving consumers’ understanding of their digital rights.¹²⁴

Figure 9: The MediaShop Short Notices



Figures 10–12 compare the affirmative answers to questions about consumer rights under the *Buy Now* and short notice conditions. Overall, the short notice was considerably more effective in reducing consumer misperceptions of their rights than the *License Now* condition. It is worth noting, however, that in both instances respondents encountered the *License Now* button and the short notice provision for the first time during the MediaShop survey. Additionally, each respondent viewed those notices only once, likely for no more than several seconds. The *Buy Now* button, in contrast, is a staple of online shopping. With repeated consumer interaction with these new notice provisions, we expect the effects described below to be even more pronounced.¹²⁵

¹²³ For example, some respondents complained that the text was too small to be easily read.

¹²⁴ One might object that design elements of short notices, and, in particular, the thumbs-up and thumbs-down icons, express a normative viewpoint about various rights and restrictions. We do not dispute that there is a normative component to our notice design, but we believe it is one that reflects the pre-existing preferences of consumers as described in more detail below. *See infra* Section III.B.

¹²⁵ There is some chance that respondents paid greater attention to the short notice because it departed from their expectations. One might worry that, over time, it would become less effective rather than more. If, in fact, novelty increases consumer attention and decreases deception, that fact should inform retailers’ obligations in the design of their advertising.

Under the short notice condition, affirmative responses to the ownership question dropped significantly for each of the three media types—23% for ebooks, 20% for MP3s, and 13% for movies. For lending, we observed significant decreases for ebooks and MP3s—13% and 12%, respectively. For digital movies, there was no statistically significant change. Likewise, respondents who saw the short notice were less likely to believe they were entitled to resell digital goods; affirmative responses to that question were cut in half from 12% to 6% for ebooks. The results for MP3s were even more dramatic; they dropped from 17% to 6%. But again, the results were unchanged for digital movies.¹²⁶

When asked if they could leave their digital goods in their wills, ebook shoppers who saw the short notice were half as likely as their *Buy Now* counterparts to answer “Yes,” a drop from 26% to 13%. Although they fell outside our standard for significance, the results for MP3s and digital movies are worth noting. Affirmative responses for MP3s dropped by 11%. For digital movies, affirmative responses held steady, but we observed a 14% shift from “I don’t know” to “No” when compared to the *Buy Now* responses, suggesting an increase in respondent certainty about their rights.

Respondents acted similarly when asked about the right to give digital media away as a gift. We saw a 10% drop in affirmative responses for ebooks and a 14% decrease for MP3s, although neither result was statistically significant. And for digital movies, the affirmative response rate was essentially unchanged, but we observed a significant increase in “No” responses, up 12%, and a corresponding decrease in “I don’t know” responses of 15%.¹²⁷

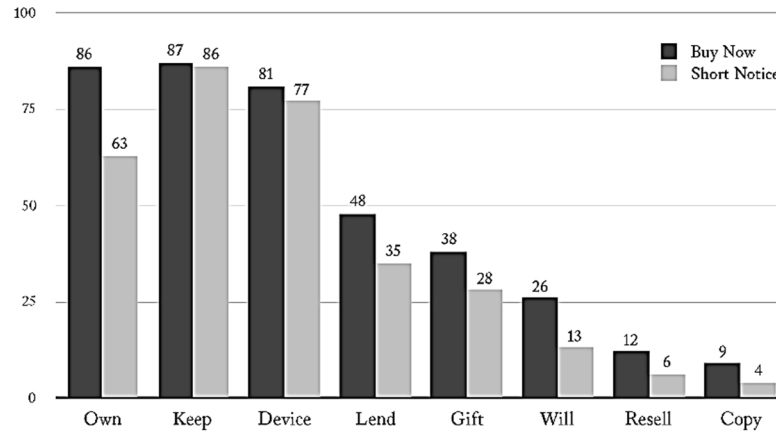
Although our short notice could undoubtedly be improved through testing alternative designs, placements, and interactions, it is nonetheless a remarkably low-cost intervention. And where false consumer perceptions can be avoided at little cost, we might be especially inclined to impose a legal obligation to do so.¹²⁸

¹²⁶ Respondents who indicated an interest in movies were less likely to be over the age of 65 and less likely to be female. Both of those demographics tended to answer “Yes” to these questions less frequently. This self-selection bias may be a cause of the misalignment in our results. *Cf. infra* subsection III.B.1.

¹²⁷ Comparing the *Buy Now* and short notice conditions, respondents were just as likely to answer “Yes” when asked about their rights to keep their digital media and use them on their device of choice.

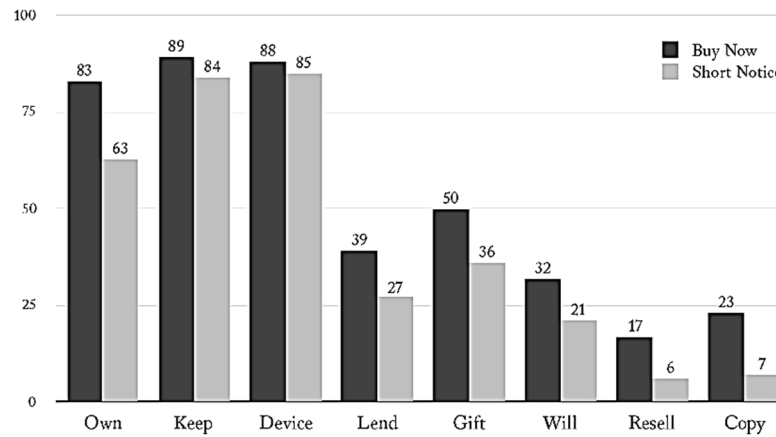
¹²⁸ See generally Richard Craswell, *Interpreting Deceptive Advertising*, 65 B.U. L. REV. 657 (1985) (arguing in favor of a cost-benefit approach to false advertising claims).

Figure 10: Percentage of Respondents Who Believe “Buy Now” and Short Notice Confer Rights for ebooks



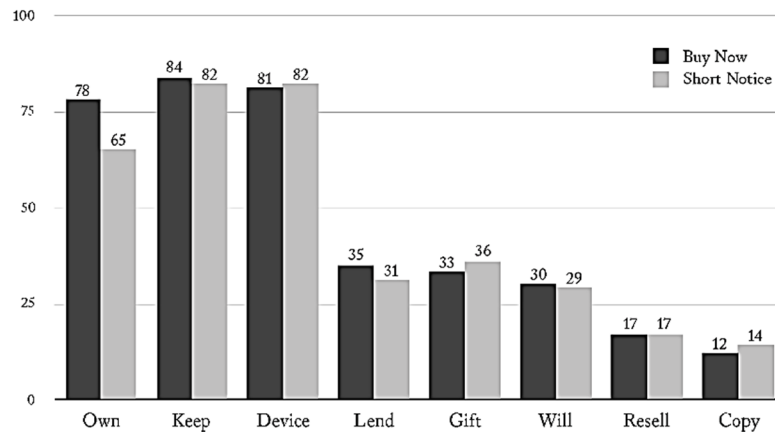
Ebook buyers who see the short notice have a more accurate view of their rights.

Figure 11: Percentage of Respondents Who Believe “Buy Now” and Short Notice Confer Rights for MP3s



MP3 buyers who see the short notice have a more accurate view of their rights.

Figure 12: Percentage of Respondents Who Believe “Buy Now” and Short Notice Confer Rights for Digital Movies



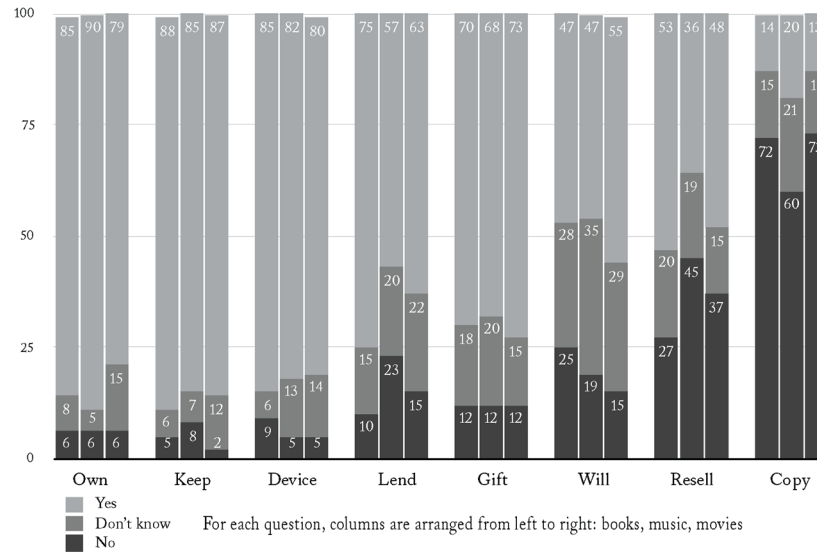
The short notice intervention was less successful at informing digital movie buyers of their rights.

4. *Buy Now* for Tangible Goods

Respondents who saw the *Buy Now* button for tangible goods—paperback books, CDs, and Blu-ray discs—demonstrated a considerably more accurate understanding of their rights than those who saw the button for digital goods. Nonetheless, a surprising number underestimated their ability to transfer the products they buy.

Figure 13 illustrates the responses for those who viewed tangible copy product pages with the standard *Buy Now* button. In contrast to digital media, the correct answer to most of these questions was “Yes”—the key exception being the right to make copies for others. When it came to ownership, retaining possession, using the device of the consumer’s choice, and giving away the copy, the results are unsurprising; respondents understood their rights, and very few chose “No.” But for three rights—lending, bequeathing, and reselling—we observed a higher degree of misperception. For lending, 23% and 15% of respondents expressed the belief that they could not lend their CDs and Blu-ray discs, respectively. And across all three media types, 19% of respondents believed they could not bequest their tangible media in their wills, and a remarkable 36% believed that they could not resell their physical purchases.

Figure 13: Percentage Who Believe “Buy Now” Confers Rights for Hard Copies



The overwhelming majority of respondents had an accurate view of their rights in physical media. However, some believed that they did not have the right to lend, gift, will, or resell these materials.

How might we explain these misperceptions? And what, if anything, do they tell us about deception in the market for digital goods? Given the low incidence of “No” responses for several rights, consumers do not appear generally confused about their rights in tangible media. So perhaps there is something about reselling, bequeathing, and lending that explains these misperceptions. Consumers may assume, for example, that because resale involves the exchange of money, it crosses some line separating lawful and unlawful behavior. Perhaps they are generally unfamiliar with the law of wills. And in an era of easy reproduction, they may be less accustomed to the simple act of sharing a physical copy. There is no shortage of plausible explanations, but on the basis of our data, we cannot endorse any in particular.

In terms of their implications, these misperceptions about rights in tangible media do not detract from our findings for digital goods. A skeptic may counter that since consumers are confused about lending and resale when it comes to tangible copies, their confusion in the digital space is not cause for alarm. But that argument overlooks two key points. First, an ebook and a paperback are different products with different attributes. It is no defense to a deceptive advertising claim to point out that consumers are also misled about

other distinct, but related, products. Second, when it comes to tangible goods, consumers underestimate their rights. That is, they think they have fewer rights than they acquire in fact. Since consumers buy the product despite their misperceptions, that may mean either that those rights are not material or that there has been no injury. For digital goods, our data establish just the opposite. Consumers overestimate their rights and incorrectly think they are entitled to lend, resell, and otherwise transfer their goods when licenses insist they cannot.

To the extent consumers rely on their experience with tangible media as a template for understanding their digital media rights, the misperceptions of tangible media respondents may actually reinforce our findings. One way to interpret the notable level of confusion among tangible goods consumers is that some subset of those consumers is pessimistic about certain rights, specifically, lending, reselling, and bequeathing. That subset tends to assume the absence of those rights, despite the fact that they have long been clearly established by the law. If so, that general pessimism might account for some of the respondents who answered “No” to those questions when they encountered digital goods. In other words, the confusion we observed for tangible goods may be the result of a general pessimism about those rights which—if shared by digital media consumers—tamp down the degree of misperception we reported for digital goods.

5. The Rights Score Metric

In addition to measuring respondents’ beliefs about individual rights, we also assessed the accuracy of those beliefs in the aggregate. We scored each respondent’s answers according to the criteria in Figure 14. Each correct response was worth one point, and each respondent received a score on a scale from 0 to 7.

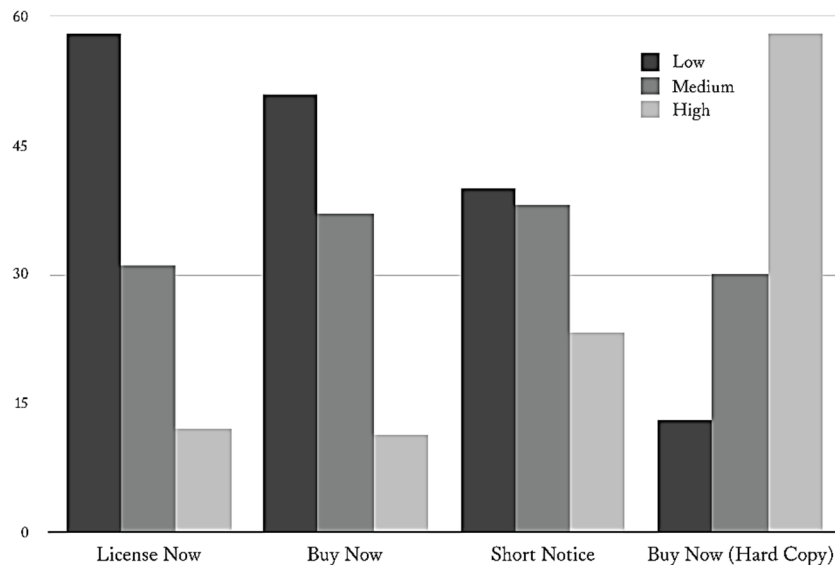
Figure 14: Rights Scores Correct Responses

	Keep	Device	Lend	Gift	Will	Resell	Copy
Digital Books and Movies	No	No	No	No	No	No	No
Digital Music	No	Yes	No	No	No	No	No
Physical Media	Yes	Yes	Yes	Yes	Yes	Yes	No

The table shows the legally correct answers to the rights-based questions used to calculate the Rights Score.

We categorized “Rights Scores” into three groups: Low (0-2 points, representing the 25th percentile of respondents), Medium (3-4 points; the median score was 3, and the mean was 3.1), and High (5-7 points, representing the 75th percentile of respondents). As Figure 15 depicts, nearly 60% of respondents who viewed the *Buy Now* button for tangible copies received High scores, and just 13% received Low scores. Compared to the tangible goods Rights Scores, the performance of respondents who viewed the *Buy Now* and *License Now* buttons for digital goods was practically a mirror image. The majority received Low scores: 51% for *Buy Now* and 58% for *License Now*. Only 11% of *Buy Now* and 12% of *License Now* respondents got High scores. But the short notice condition yielded considerable improvement for digital goods Rights Scores: Low scores dropped to 40%, and High scores doubled to 23%.

Figure 15: Percentage Distribution of Rights Scores by Notice Condition

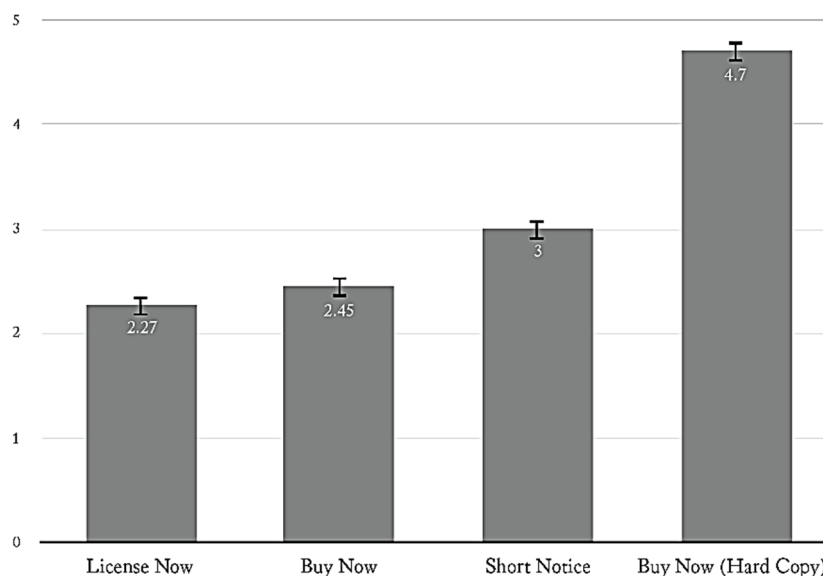


Respondents who purchased physical media had a high level of knowledge of rights, but digital media shoppers had a poorer understanding.

As Figure 16 illustrates, respondents who viewed physical media scored highest on average. Their mean score was 4.7 with a median of 5. Among respondents who shopped for digital goods, those who viewed the short notice performed the best, with a mean of 3 and a median of 3. Those who viewed the *Buy Now* and *License Now* buttons scored considerably lower. The mean for *Buy Now* respondents was 2.45 with a median of 2. For *License Now* respondents, the mean was 2.27 with a median of 2. With the exception of the insignificant difference between *Buy Now* and *License Now* for digital goods, changes in

notice condition were highly significant with respect to Rights Scores. Our short notice was responsible for a significant improvement in respondents' understanding of their rights after a single exposure.

Figure 16: Mean Rights Score by Notice Condition



On average, physical media shoppers scored highest, followed by digital media shoppers who viewed the short notice, *Buy Now*, and *License Now* conditions.

Ayres and Schwartz have proposed a warning box that “transparently and succinctly alert[s] the reader to the unexpected” contract terms as a means of improving consumer knowledge and combatting optimism bias in the context of online agreements.¹²⁹ Although our short notice implementation differs in some important respects from the government warning box they suggest, the significant increase in Rights Scores that we observed for respondents who viewed the short notice offers some confirmation of Ayres and Schwartz’s prediction.¹³⁰

We observed a significant relationship between Rights Scores and offline behavior with respect to physical media. Respondents who reported lending

¹²⁹ Ayres & Schwartz, *supra* note 24, at 580, 584.

¹³⁰ For example, the notice Ayres and Schwartz propose would feature a “government-provided, standardized” design, would only include terms that were “less favorable than consumers expect,” which “must be placed in order of decreasing likelihood that optimistic [consumer] mistakes . . . might influence purchase behavior” and would require separate assent to this notice. *Id.* at 583-84.

and reselling physical media infrequently or not at all were significantly less likely to receive Low Rights Scores. This was particularly true for respondents who viewed digital books and movies during the MediaShop study. It would seem that frequent lending and reselling of physical media creates an expectation that those rights extend to digital goods as well.

We should not expect the market to engage in some sort of spontaneous self-correction. Despite a decade of digital media transactions, these misperceptions remain widespread. Moreover, there is good reason to doubt that a subset of informed consumers can effectively discipline the market in a way that protects the interests of misled consumers.¹³¹

Although some degree of misperception is likely unavoidable, the language used to market goods has a demonstrable impact. *Buy Now* communicated a set of rights to most consumers. If those rights are not part of the bargained-for transaction, retailers can minimize consumer misperceptions through prominent use of language that clearly communicates the terms of the deal. But even if consumers are mistaken about the bundle of rights that they are getting for their money, that fact does not establish that their misperceptions are material to their purchasing decisions.

B. Materiality

A claim is material to consumers if it influences their decisions in the marketplace.¹³² We measured materiality in three ways. First, we asked respondents to state their preferences with respect to three of the rights surveyed above: the rights to lend, to resell, and to use media on their device of choice. Second, we asked how much more, if anything, respondents would be willing to pay for media goods that conferred those rights. Finally, we asked whether the absence of those rights would make respondents more likely to acquire digital media through other avenues. In order to ensure that respondents were engaged and that we were closely replicating a real-world shopping experience, we first gave them a choice between several popular media titles.

¹³¹ See R. Ted Cruz & Jeffrey J. Hinck, *Not My Brother's Keeper: The Inability of an Informed Minority to Correct for Imperfect Information*, 47 HASTINGS L.J. 635, 664 (1996) (explaining that informed minorities are rare and that, where they do exist, they fail to solve imperfect information problems in the market).

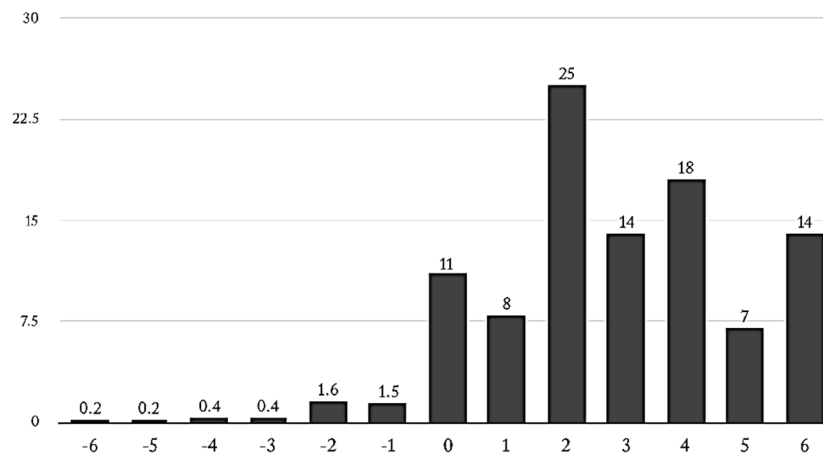
¹³² Letter from James C. Miller III, Chairman, Fed. Trade Comm'n, to John D. Dingell, Chairman, Comm. on Energy & Commerce, U.S. House of Representatives (Oct. 14, 1983) [hereinafter FTC Policy Statement on Deception] ("A 'material' misrepresentation or practice is one which is likely to affect a consumer's choice of or conduct regarding a product."), reprinted in *In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110 app. at 182 (1984).

1. Consumer Preferences for Rights

On the whole, respondents expressed a preference for lending, reselling, and using media on their device of choice. Across media types and notice conditions, 55% reported a moderate or strong preference for media they can lend, 39% preferred media they can resell, and 85% preferred media compatible with their device of choice. A number of respondents used the open-ended questions to express these preferences without being prompted. When asked what the short notice meant to them, they offered comments like the following: “It means I need to leave this site and go somewhere else that doesn’t try to restrict me from doing what I want with something I pay for.” “It means that I can read the book but I cannot resell or lend it. This is information I like to have, and I was glad to see it so prominently displayed.” “I probably won’t buy. If I don’t own it when I buy it, I may as well buy the CD.”

We measured each respondent’s overall preference by combining these three questions into a single variable, the Preference Thermometer. We calculated that variable by assigning a value of +2 for each strong preference, +1 for each moderate preference, 0 for no preference, -1 for each moderate dispreference, and -2 for each strong dispreference. Respondents who strongly preferred media goods they could not lend, resell, or use on their device of choice scored -6; ones who strongly preferred each of those rights scored 6. The distribution of the Preference Thermometer is represented below in Figure 17. The median score was 3, and the mean was 2.8.

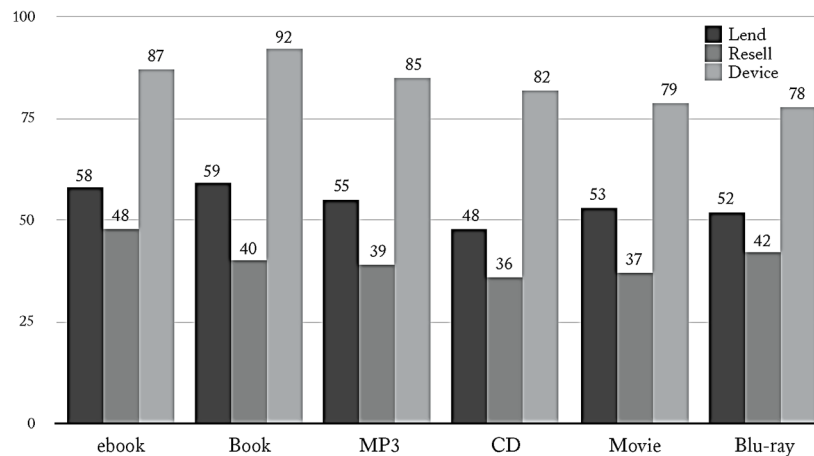
Figure 17: Percentage Distribution of Preference Thermometer



The overwhelming majority of respondents expressed some preference for the rights to lend, resell, or use on their device of choice. Nearly 40% expressed a strong preference.

When we compared respondents who viewed digital and tangible goods, we observed a remarkable consistency in their preferences. As Figure 18 illustrates, the rate at which respondents preferred lending, reselling, and using their device of choice was stable across media types, regardless of whether the media was tangible or digital. These patterns repeated for both the *License Now* and short notice conditions.¹³³

Figure 18: Percentage of “Buy Now” Respondents Who Prefer Rights



Respondents expressed consistent preferences for lending, reselling, and using their device of choice across media types.

Respondent preferences were strongly correlated with the frequency of online shopping for media and the lending and reselling of physical media. Respondents who regularly engaged in these activities were more likely to score highly on the Preference Thermometer. We also saw a difference between men and women, with men being considerably more likely to have strong preferences for greater rights.

¹³³ *License Now* respondents expressed the following preferences: lending, 54%; reselling, 34%; and device of choice, 85%. For the short notice, preferences were slightly higher: lending, 58%; reselling, 41%; and device of choice, 88%. These preferences did not vary significantly between media type in either case.

Our open-ended questions offer additional support for this observation. When asked, “If you own the [media good] you paid for, what sort of uses can you make of it?”, the number of respondents who said they could engage in a range of activities—including lending, giving away, reselling, consuming, and making personal uses—was consistent across notice conditions and media types.

2. Willingness to Pay for Rights

Next we asked respondents to assign a dollar value to their preferences. Since respondents were not spending actual money to acquire these rights, we were deliberately conservative in our design of these questions. First, we presented respondents with the current price of the good on Amazon and asked how much more they would pay for the product if it came with a particular right. In doing so, we allowed for the possibility that some respondents may value rights but be unwilling to pay anything extra for them on the grounds that traditional ownership rights should already be reflected in the current price. And, in fact, many respondents who expressed strong preferences for rights were unwilling to pay more for them.¹³⁴ Second, by asking how much more respondents would pay for these rights as opposed to how much less they would pay if the good came without them, we hoped to avoid the influence of the endowment effect—the well-established tendency to overvalue objects or rights that we own.¹³⁵ Finally, to discourage outliers, we capped responses to these questions at \$20.

Most digital consumers, 54%, were willing to pay more for at least one of these three rights.¹³⁶ The median overall price increase was \$1, but the average was \$9.60 above the current Amazon prices. For the individual rights, respondents were willing to pay an average of \$3.54 more for the right to lend, \$3.06 for the right to resell, and \$2.99 for the right to use media on their device of choice. Taken together, this evidence suggests that rights associated with personal property ownership influence the price of digital media goods. More than half of our respondents were willing to pay more for those rights. Among those who were unwilling to pay more, it is fair to conclude that many expect those rights to be part of the bargain under existing prices.

3. Likelihood of Switching to Subscriptions and File Sharing

Finally, we were curious if the rights to lend, resell, and use the device of choice influenced consumer decisionmaking about where and how to acquire media. Recent years have seen declining physical and digital sales and a

¹³⁴ For lending, 46% of respondents who expressed a strong preference for that right were unwilling to pay more. For resale, that number was 45%, and for device of choice it was 60%.

¹³⁵ See, e.g., Daniel Kahneman et al., *Experimental Tests of the Endowment Effect and the Coase Theorem*, 98 J. POL. ECON. 1325, 1342 (1990) (discussing how everyday objects increase in value as soon as they become one's possessions); Carey K. Morewedge et al., *Bad Riddance or Good Rubbish? Ownership and Not Loss Aversion Causes the Endowment Effect*, 45 J. EXPERIMENTAL SOC. PSYCHOL. 947, 949 (2009) (reporting that brokers who owned mugs themselves "bought and sold mugs for their clients at a higher price than did brokers who did not own a mug").

¹³⁶ Fifty-three percent of respondents gave a greater-than-zero answer to at least one of the three questions.

corresponding increase in subscription streaming in the music and movie industries.¹³⁷ Since sales are typically more profitable for rights holders and creators than streaming services, if the absence of property rights steers consumers towards streaming, copyright holders may be inclined to rethink their licensing terms. That should hold doubly true for infringing downloads. If the absence of meaningful rights in digital purchases encourages would-be paying customers to get their content from The Pirate Bay rather than Apple or Amazon, rights holders should take a hard look at their digital “sales” strategy.

We asked respondents if they had used or were familiar with subscription streaming services. An overwhelming majority, 94%, answered yes. Of that group, we asked if they would be more likely to watch a movie, listen to a record, or read a book through a subscription service like Netflix, Spotify, or Kindle Unlimited if they could not acquire a version of the good that allowed lending, rental, or the use of their preferred device. Overall, 52% were more likely to stream if they could not lend.¹³⁸

That rate held steady across the four notice conditions, but was consistently higher for movies. For resale, 43% of respondents were more likely to stream. Again, that number held steady across notice conditions, but saw a spike for movies.¹³⁹ The ability to use the consumer’s device of choice elicited the highest response rate, with 63% stating an increased likelihood of using a streaming service overall; that figure jumped to 74% among movie shoppers.¹⁴⁰

We asked a similar set of questions to the 42% of respondents who indicated familiarity with BitTorrent, a protocol for distributed file sharing,¹⁴¹ and The Pirate Bay, a popular index of copyrighted material available online at no charge.¹⁴² Although BitTorrent is frequently used for non-infringing purposes, and even some users of The Pirate Bay are engaged in non-infringing uses, much of the traffic associated with these two services constitutes infringement. Based on our survey data, consumers are more likely to opt out of lawful markets for copyrighted works and download illegally if there is no

¹³⁷ See Derek Thompson, *The Death of Music Sales*, ATLANTIC (Jan. 25, 2015), <http://www.theatlantic.com/business/archive/2015/01/buying-music-is-so-over/384790/> [<http://perma.cc/D8QZ-34ED>] (describing the decline in sales of CDs and digital music); Andrew Wallenstein, *Why 2015 Home Entertainment Figures Should Worry Studios*, VARIETY (Jan. 6, 2016, 10:58 AM), <http://variety.com/2016/digital/news/home-entertainment-spending-2015-studios-1201673329/> [<http://perma.cc/xw8Z-H898>] (noting that “subscription streaming increased by a whopping 25%” in both 2014 and 2015).

¹³⁸ For books, 48% were more likely to stream; for music, 47%; and for movies, 61%.

¹³⁹ For movies, 54% were more likely to stream; for books, 40%; and for music, 36%.

¹⁴⁰ For both books and music, 57% reported an increased likelihood of streaming.

¹⁴¹ See *About BitTorrent*, BITTORRENT, <http://www.bittorrent.com/company/about> [<https://perma.cc/XXF5-LTYM>] (explaining that BitTorrent’s protocols “keep creators and consumers in control of their content and data” and “move as much as 40% of the world’s Internet traffic on a daily basis”).

¹⁴² See *About*, PIRATE BAY, <https://thepiratebay.org/about> [<https://perma.cc/CE36-KCHS>] (describing the website as “the worlds [sic] largest bittorrent indexer,” which is available for use “free of charge”).

lawful way to obtain the rights to lend, resell, and use those copies on their device of choice. Thirty-two percent of respondents were more likely to download files without paying in the absence of a right to lend; 31% were more likely to do so in the absence of a right to resell; and 40% in the absence of a right to use their device of choice.¹⁴³

Not surprisingly, we observed a correlation between the strength of respondents' preferences for these rights and the likelihood that they would subscribe to a streaming service or download illegally in the absence of those rights. Perhaps more troublingly for rights holders and retailers, we also observed a strong correlation between the frequency of online media acquisition and both of these alternative avenues. Those who shop online for media either frequently or very frequently were considerably more likely to switch to subscription streaming or illegal downloads.

The MediaShop study establishes that a sizable number of digital media consumers misunderstand the rights they acquire when they *Buy Now*. Those misperceptions are in large part a function of the ubiquitous use of language borrowed from familiar transactions involving tangible goods, but our study strongly suggests that those misperceptions can be corrected through clear and conspicuous short notices. Finally, the study supports the conclusion that the rights to lend, resell, and use media goods on a consumer's device of choice are important to consumers' purchasing decisions. In the next Section, we consider the legal implications of these empirical findings.

IV. FALSE AND DECEPTIVE ADVERTISING

For the market to function efficiently, the public needs to be able to rely on the claims of manufacturers and retailers about the products and services they offer. Putting the burden on consumers to independently investigate every claim

¹⁴³ In recent months, we have seen some indirect evidence of this phenomenon. When Kanye West released his latest album, *The Life of Pablo*, as an exclusive on Tidal, a streaming service, he announced, "My album will never never never be on Apple. And it will never be for sale . . . You can only get it on Tidal." Kanye West (@kanyewest), TWITTER (Feb. 15, 2016, 6:34 PM), <https://twitter.com/kanyewest/status/699376240709402624> [<https://perma.cc/4GW5-LGJE>]. A day later, the album passed half a million downloads by BitTorrent users alone. Nathan McAlone, *Kanye West's New Album Has Already Gone Pirate 'Gold' with 500,000 Illegal Downloads in a Single Day*, BUS. INSIDER: TECH INSIDER (Feb. 16, 2016, 12:38 PM), <http://www.businessinsider.com/kanye-west-s-album-went-gold-with-500000-downloads-in-just-24-hours-if-were-talking-about-illegal-2016-2> [<https://perma.cc/2G8R-72PU>]. West soon retreated from his emphatic position, but the album still has yet to see a physical release. See Peter Helman, *Kanye West's Updated The Life of Pablo Is Now on Apple Music and Spotify*, STEREOGUM (Mar. 30, 2016, 10:06 PM), <http://www.stereogum.com/1868554/kanye-west-s-updated-the-life-of-pablo-will-reportedly-be-on-apple-music-and-spotify-this-friday/news> [<https://perma.cc/L4N9-6F5M>] (announcing that two of the album's tracks were available on streaming services other than Tidal and that the rest of the album was expected to follow that week).

about price, quality, performance, and other central characteristics introduces massive information costs. It also leaves consumers vulnerable to abuse.

Although precise information about the digital revenues of retailers like Apple and Amazon is hard to come by, publicly available data suggest that deception in this space costs consumers billions of dollars a year. Apple's revenue in fiscal year 2015 totaled more than \$233 billion.¹⁴⁴ Of that amount, 8.8%, or \$18.7 billion, was attributable to its services division, which includes the iTunes Store, the App Store, the Mac App Store, the iBooks Store, AppleCare, Apple Pay, and other services.¹⁴⁵ Amazon brought in \$107 billion in revenue in 2015,¹⁴⁶ an estimated \$7.9 billion of which can be traced to digital content.¹⁴⁷ Estimating conservatively, if the deceptive *Buy Now* button is responsible for just 10% of the price of digital goods, consumer deception results in as much as \$2.5 billion in overpayments to these two retailers alone every year. And that figure ignores any indirect revenue the illusion of ownership contributes to sales of related hardware, like iPhones and Kindles.

Putting the magnitude of damages aside, marketing language that misleads consumers about the nature of goods or services can trigger liability under both state and federal law. In this Section, we outline those legal theories, their application to the *Buy Now* button, and their limitations.¹⁴⁸ Ultimately, we conclude that although private causes of action offer consumers a promising

¹⁴⁴ See *Apple's Global Revenue from 1st Quarter 2005 to 3rd Quarter 2016 (In Billion U.S. Dollars)*, STATISTA, <http://www.statista.com/statistics/263426/apples-global-revenue-since-1st-quarter-2005> [https://perma.cc/AG46-MJ9A] (tracking Apple's quarterly revenues from 2005 to 2016).

¹⁴⁵ See *Share of Apple's Revenue by Product Category from the First Quarter of 2012 to the Second Quarter of 2016*, STATISTA, <http://www.statista.com/statistics/382260/segments-share-revenue-of-apple> [https://perma.cc/4MQH-39GC] (reporting the share of Apple's quarterly revenues in 2015 coming from its "Services" as 6.43%, 8.61%, 10.14%, and 9.88%, for an average of 8.8%).

¹⁴⁶ See Press Release, Amazon.com, Amazon.com Announces Fourth Quarter Sales Up 22% to \$35.7 Billion (Jan. 28, 2016), <http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9NjA3OTEifENoaWxkSUQ9MzIxMDI4fFR5cGU9MQ==&t=1> [https://perma.cc/N6D6-Z6QE] (reporting that "[n]et sales increased 20% to \$107.0 billion" in 2015).

¹⁴⁷ See Mark Hoelzel & Emily Adler, *The Kindle Fire Is Giving a Big Boost to Amazon's Revenues from Digital Media*, BUS. INSIDER (Feb. 26, 2014, 12:15 PM), <http://www.businessinsider.com/a-look-at-amazons-kindle-ecosystem-4-2014-2> [https://perma.cc/DRT6-B7KN] (showing graphically the revenue that the Amazon Kindle brought in from digital media).

¹⁴⁸ We limit our discussion to applicable United States law. However, European consumer protection law may very well provide a parallel avenue for enforcement. Although no cases sounding in false or deceptive advertising have been brought yet, cases in Germany and France have challenged restrictions on consumers' ability to resell digital video games on contract grounds. See Jon Fingas, *Lawsuit Demands the Right to Resell Steam Games*, ENGADGET (Dec. 21, 2015), <http://www.engadget.com/2015/12/21/lawsuit-demands-steam-resales> [https://perma.cc/NV65-PDVM] (announcing that a French consumer group was suing a company for the right to resell its downloadable games); Jeffrey Matulef, *Court Favours Valve in Not Allowing Digital Content Resells*, EUROGAMER.NET (July 2, 2014), <http://www.eurogamer.net/articles/2014-02-07-court-favours-valve-in-not-allowing-digital-content-resells> [https://perma.cc/2U9Y-S23S] (reporting that "[t]he Regional Court of Berlin decision ha[d] dismissed" a consumer group's lawsuit contesting a company's EULA that forbade reselling digital content).

avenue for increasing the quality of information about digital goods, public regulatory enforcement by the Federal Trade Commission is likely necessary to fully address the concerns that our study reveals.

A. State Claims

All states have their own Unfair and Deceptive Acts and Practices (UDAP) statutes, sometimes referred to as “little FTC acts.”¹⁴⁹ In addition, many states have both common law and statutory protections in place against false advertising. The result is a web of overlapping regimes to address unfair and deceptive business practices. In California, for example, the Unfair Competition Law bans “any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising.”¹⁵⁰ In addition, the state’s False Advertising Law prohibits the publication in advertising of “any statement . . . which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading.”¹⁵¹ And its Consumer Legal Remedies Act identifies a list of twenty-seven “unfair methods of competition and unfair or deceptive acts or practices,” including “[r]epresenting that a transaction confers or involves rights, remedies, or obligations which it does not have or involve.”¹⁵²

Although the precise formulation of these prohibitions differs between states, they are generally satisfied by proof of a false or misleading statement about a product that is material to consumers. The results of the MediaShop study offer strong empirical support that *Buy Now* buttons are both misleading and material to consumers. Nonetheless, there are a number of legal and practical hurdles facing private plaintiffs alleging false or deceptive advertising.

First, many online retailers include arbitration provisions in their terms of use that purport to deny consumers the ability to seek redress in court. While not all major retailers rely on arbitration clauses,¹⁵³ many powerhouse online retailers do. For example, Amazon includes the following language in its terms of use:

¹⁴⁹ For a high-level summary of these laws, see generally CAROLYN L. CARTER, NAT’L CONSUMER LAW CTR., A 50-STATE REPORT ON UNFAIR AND DECEPTIVE ACTS AND PRACTICES STATUTES (2009), https://www.nclc.org/images/pdf/car_sales/UDAP_Report_Feb09.pdf [<https://perma.cc/9WP3-2N6H>], which evaluates the effectiveness of various state UDAP statutes in providing protection for consumers.

¹⁵⁰ CAL. BUS. & PROF. CODE § 17200 (West 2016).

¹⁵¹ *Id.* § 17500.

¹⁵² CAL. CIV. CODE § 1770 (West 2016).

¹⁵³ Notably, Apple does not include such terms in its iTunes agreement. See *Apple Media Services Terms and Conditions*, *supra* note 14 (preserving the ability of consumers to file suit given its lack of a binding arbitration clause).

Any dispute or claim relating in any way to your use of any Amazon Service, or to any products or services sold or distributed by Amazon or through Amazon.com will be resolved by binding arbitration, rather than in court, except that you may assert claims in small claims court if your claims qualify

We each agree that any dispute resolution proceedings will be conducted only on an individual basis and not in a class, consolidated, or representative action¹⁵⁴

California courts have pushed back against sweeping arbitration clauses in consumer contracts by deeming them unconscionable.¹⁵⁵ However, the Supreme Court held that such an application of state contract law stands as an obstacle to the policies Congress meant to implement in the Federal Arbitration Act.¹⁵⁶ And just last year, the Court held that lower courts cannot invalidate class arbitration clauses on the basis of costs that exceed plaintiffs' likely recovery.¹⁵⁷ Those five-justice majority opinions—both authored by Justice Scalia—prompted vigorous dissents and may well be revisited in a future term.¹⁵⁸

As the law stands, arbitration clauses can still be invalidated “upon such grounds as exist at law or in equity for the revocation of any contract.”¹⁵⁹ So arguments rooted in fraud, duress, or unconscionability unrelated to arbitration provisions are still available to consumer plaintiffs seeking to bypass arbitration. But one recent false advertising claim brought against Amazon was removed from federal court by virtue of the Amazon arbitration provision.¹⁶⁰

¹⁵⁴ *Conditions of Use*, AMAZON, <https://www.amazon.com/gp/help/customer/display.html/?nodeId=508088> [<https://perma.cc/PK9Y-7AS5>] (last updated June 21, 2016).

¹⁵⁵ See *Discover Bank v. Superior Court*, 113 P.3d 1100, 1110 (Cal. 2005) (holding that class action waivers are unconscionable when “found in a consumer contract of adhesion . . . involv[ing] small amounts of damages, and when it is alleged that the party with the superior bargaining power has . . . deliberately cheat[ed] large numbers of consumers . . . to the extent the obligation is governed by California law.”); see also *Shroyer v. New Cingular Wireless Servs., Inc.*, 498 F.3d 976, 983-84 (9th Cir. 2007) (finding the defendant’s “class arbitration clause . . . both procedurally and substantively unconscionable” and thus unenforceable).

¹⁵⁶ See *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 343 (2011) (“A federal statute’s saving clause ‘cannot in reason be construed as [allowing] a common law right, the continued existence of which would be absolutely inconsistent with the provisions of the act . . . [T]he act cannot be held to destroy itself.’” (alteration in original)).

¹⁵⁷ See *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309 (2013) (rejecting respondents’ argument that individual litigation of their claims would violate antitrust policy, holding that “the antitrust laws do not guarantee an affordable procedural path to the vindication of every claim”).

¹⁵⁸ See generally *Italian Colors*, 133 S. Ct. at 2313 (Kagan, J., dissenting); *Concepcion*, 563 U.S. at 357 (Breyer, J., dissenting).

¹⁵⁹ 9 U.S.C. § 2 (2012).

¹⁶⁰ See *Fagerstrom v. Amazon.com, Inc.*, 141 F.Supp. 3d 1051, 1073-74 (S.D. Cal. 2015) (submitting plaintiffs’ claims to arbitration on the grounds that Amazon’s arbitration clause was neither illusory nor unconscionable).

More promisingly, arbitration clauses are ineffective when no agreement has been formed. Two recent cases—one from the California Court of Appeal¹⁶¹ and another from the Seventh Circuit¹⁶²—illustrate the growing sensitivity of courts to the implications of automatic contract formation coupled with arbitration clauses that deny consumers effective legal redress. In both cases, the courts held that where an arbitration clause is “buried”¹⁶³ in terms of service that are linked to or referenced on a page the consumer visits, but not directly presented in a manner that “get[s] the message through” that the consumer is agreeing to an arbitration agreement,¹⁶⁴ those terms “are not sufficiently conspicuous”¹⁶⁵ to form the basis of an enforceable agreement.

More recently, the Second Circuit questioned the enforceability of Amazon’s own arbitration clause after the plaintiff in a putative class action alleging violations of the Consumer Product Safety Act argued that notice of the terms was insufficient.¹⁶⁶ As the court explained, Amazon customers were “not required to click an ‘I agree’ box after being presented with a list of terms and conditions”; instead they were “asked to click on a ‘Place your order’ button after being told elsewhere on the page that ‘By placing your order, you agree to Amazon.com’s privacy notice and conditions of use,’ with the latter phrase hyperlinked to the [Amazon] Conditions of Use.”¹⁶⁷ If courts follow this line of reasoning, arbitration provisions buried in hyperlinked terms of service may function more like speed bumps rather than true barriers to individual and class action lawsuits.

Even if consumers can avoid arbitration, because of the small recovery due to any individual plaintiff, *Buy Now* false advertising cases are probably viable only to the extent they can leverage the class action mechanism.¹⁶⁸ For a class to be certified, a court must be convinced that the suit satisfies a number of requirements. The class must be “so numerous that joinder of all members is impracticable.”¹⁶⁹ With millions of potential class members, this requirement is

¹⁶¹ See *Long v. Provide Commerce, Inc.*, 200 Cal. Rptr. 3d 117, 123-27 (Cal. Ct. App. 2016) (holding that users did not assent to the terms contained in hyperlinked terms of use agreement because the hyperlink failed to put “a reasonably prudent user on inquiry notice of the terms of the contract”).

¹⁶² See *Sgouros v. TransUnion Corp.*, 817 F.3d 1029, 1034-35 (7th Cir. 2016) (acknowledging that contracts formed on the Internet require a fact-intensive inquiry into “whether the circumstances support the assumption that the purchaser receives reasonable notice of [the terms and conditions of the agreement]”).

¹⁶³ *Id.* at 1033.

¹⁶⁴ *Id.* at 1036.

¹⁶⁵ *Long*, 200 Cal. Rptr. 3d at 123.

¹⁶⁶ See *Nicosia v. Amazon.com, Inc.*, No. 15-423-CV, 2016 WL 4473225, at *8 (2d Cir. Aug. 25, 2016) (holding that the district court erred in dismissing plaintiff’s claim on the basis of Amazon’s arbitration clause).

¹⁶⁷ *Id.* at *9.

¹⁶⁸ See Fed. R. Civ. P. 23.

¹⁶⁹ *Id.* 23(a)(1).

easily satisfied. Next, there must be “questions of law or fact common to the class.”¹⁷⁰ Typically, this requires only a single common significant question of fact or law.¹⁷¹ Since the impact of the same *Buy Now* button—language all consumers encountered—is at issue for each class member, the commonality requirement can be satisfied.¹⁷² Potentially more problematic, however, is the requirement of predominance—that the questions common among class members predominate over questions that affect individual class members. Given the substantive differences between state laws, it may be difficult to certify a national class in a *Buy Now* case.¹⁷³ Some state statutes include scienter requirements;¹⁷⁴ others do not.¹⁷⁵ Some states require a showing of reliance;¹⁷⁶ others do not.¹⁷⁷ Available remedies also vary between states.¹⁷⁸

Although there are considerable hurdles facing private plaintiffs, there is good reason to suspect that state-wide class actions could succeed, particularly in the absence of an arbitration clause. But even if individual plaintiffs could recover, a more uniform solution may be preferable given the national and indeed international scope of markets for digital goods.

B. Federal Claims

There are two available avenues for federal claims concerning the *Buy Now* button: the Lanham Act and the Federal Trade Commission Act. Neither provides remedies for individual consumers, but the FTC Act may nonetheless provide policy tools to address misleading advertising in digital sales.

1. The Lanham Act

The Lanham Act is best known as the source of federal trademark protection. But it also prohibits the use of “any . . . false or misleading description of fact . . . in

¹⁷⁰ *Id.* 23(a)(2).

¹⁷¹ See *Mazza v. Am. Honda Motor Co., Inc.*, 666 F.3d 581, 589 (9th Cir. 2012) (finding that the question of whether a car manufacturer had a duty to disclose certain facts was common to the whole class of consumers even though different customers had viewed different advertisements).

¹⁷² See *Cabral v. Supple LLC*, 608 F. App'x. 482, 483 (9th Cir. 2015) (vacating a class certification on the grounds that not all class members saw the same allegedly false advertisement).

¹⁷³ See *Mazza*, 666 F.3d at 594 (refusing to certify a national false advertising class because “each class member’s . . . claim should be governed by the . . . laws of the jurisdiction in which the transaction [in question] took place”).

¹⁷⁴ See *CARTER*, *supra* note 149, at 17 (explaining that while “[m]ost states do not require the state agency to prove the business’s intent or knowledge,” Colorado, Indiana, Nevada, North Dakota, and Wyoming do under certain circumstances).

¹⁷⁵ *Id.*

¹⁷⁶ See *id.* at 20 (“Some states require the consumer to show . . . that the consumer specifically relied on the [unfair or deceptive] practice.”).

¹⁷⁷ *Id.*

¹⁷⁸ See *id.* at 7-10 (offering a comparison of the remedies available to consumers in all fifty states).

commercial advertising or promotion [that] misrepresents the nature, characteristics, qualities, or geographic origin” of goods or services.¹⁷⁹ On its face, the statute creates broad standing for private claims challenging false advertising. It allows “any person who believes that he or she is or is likely to be damaged by such act” to sue for damages.¹⁸⁰ While this language would suggest that the Lanham Act is a viable vehicle for consumer claims, courts have limited standing to competitors or others with a commercial interest implicated by the allegedly false statements.¹⁸¹ Consumers, even though they are most directly harmed by false claims about the products they buy, are barred from challenging them under the Lanham Act.¹⁸²

Concerned about “a veritable flood of claims brought in already overtaxed federal district courts,”¹⁸³ courts argue that competitors are in a better position to vindicate consumer interests than consumers themselves.¹⁸⁴ Competitors, these courts reason, have greater resources and financial incentives to target false advertising, so we should expect them to vigorously pursue such claims.

¹⁷⁹ 15 U.S.C. § 1125(a) (2012). Courts interpreted section 43(a) as creating a claim for false advertising. See Rebecca Tushnet, *Running the Gamut from A to B: Federal Trademark and False Advertising Law*, 159 U. PA. L. REV. 1305, 1309-13 (2011) (offering a brief discussion of early false advertising cases under the Lanham Act). Although not all courts were quick to reach that conclusion, they eventually reached something approaching a consensus. With the Trademark Law Revision Act of 1988, Congress codified the prevailing judicial reading, dividing section 43(a) into two subsections. The first establishes liability for the infringement of unregistered marks and trade dress. The second creates claims for false advertising and product disparagement. See Trademark Law Revision Act of 1988, Pub. L. No. 100-667, § 132, 102 Stat. 3935, 3946 (1988) (current version at 15 U.S.C. § 1125(a) (2012)).

¹⁸⁰ 15 U.S.C. § 1125(a).

¹⁸¹ See *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1391-93 (2014) (considering the approaches of various circuit courts and concluding that “a plaintiff suing under § 1125(a) ordinarily must show economic or reputational injury flowing directly from the deception wrought by the defendant’s advertising; and that that occurs when deception of consumers causes them to withhold trade from the plaintiff. That showing is generally not made when the deception produces injuries to a fellow commercial actor that in turn affect the plaintiff”).

¹⁸² See *id.* at 1390 (explaining that “[a] consumer who is hoodwinked into purchasing a disappointing product may well have an injury-in-fact cognizable under Article III, but he cannot invoke the protection of the Lanham Act—a conclusion reached by every Circuit to consider the question”).

¹⁸³ *Colligan v. Activities Club of N.Y., Ltd.*, 442 F.2d 686, 693 (2d Cir. 1971). Courts have expressed similar concerns for well over a century. See, e.g., *N.Y. & R. Cement Co. v. Coplay Cement Co.*, 44 F. 277, 278 (C.C.E.D. Pa. 1890) (warning against “open[ing] a Pandora’s box of vexatious litigation”).

¹⁸⁴ See *Coca-Cola Co. v. Procter & Gamble Co.*, 822 F.2d 28, 31 (6th Cir. 1987) (“[C]ompetitors have the greatest interest in stopping misleading advertising, and . . . section 43(a) allows those parties with the greatest interest in enforcement, and in many situations with the greatest resources to devote to a lawsuit, to enforce the statute rigorously.”); *Alpo Petfoods, Inc. v. Ralston Purina Co.*, 720 F. Supp. 194, 212 (D.D.C. 1989) (“While the Act is not directly available to consumers, it is nevertheless designed to protect consumers, by giving the cause of action to competitors who are prepared to vindicate the injury caused to consumers.” (citation omitted)), *aff’d in part, rev’d in part*, 913 F.2d 958 (D.C. Cir. 1990).

Sometimes that is true, but not always. Companies make the expensive decision to litigate only if they think it will give them a competitive advantage. If the *Buy Now* button leads to increased revenue compared to alternatives, competitors—even if they know the language is misleading—face strong incentives to use it. If consumers remain unaware of the deception, there is little competitive upside to pioneering new marketing language. For retailers who already use the standard language, a challenge could open them up to potential legal liability or public criticism for their past use of it. Also, new entrants into the concentrated digital media market may question how much their bottom lines will benefit from even a successful suit.

Of course, there are reasons to suspect individuals would be reluctant to challenge false advertising too. Aside from the most expensive purchases, the harm to a single person caused by a false ad is just too small to justify the time and expense of a lawsuit. Class actions could solve that problem by bundling together the claims of similarly situated consumers in a single case, but without standing, that option remains off the table as a matter of federal false advertising law.

2. The Federal Trade Commission Act

The Federal Trade Commission (FTC) is empowered by Congress through the Federal Trade Commission Act (FTCA) to prevent the use of “unfair or deceptive acts or practices in or affecting commerce.”¹⁸⁵ Unfairness and deception are separate legal theories under which plaintiffs can allege a violation of the FTCA. Given the vagueness of Congress’s statutory mandate, the FTC released two policy statements in the 1980s to define the contours of deception and unfairness: the FTC Policy Statement on Deception¹⁸⁶ and the FTC Policy Statement on Unfairness.¹⁸⁷ The Policy Statement on Deception sets forth three key elements of a deception case: there must be (1) “a representation, omission, or practice that is likely to mislead a consumer”; (2) the interpretation of that act or practice is examined based on the perspective of a reasonable consumer; and (3) “the representation, omission, or practice must be ‘material.’”¹⁸⁸

¹⁸⁵ 15 U.S.C. § 45(a)(1).

¹⁸⁶ See FTC Policy Statement on Deception, *supra* note 132, at app. at 174-84 (outlining the FTC’s “enforcement policy against deceptive acts or practices”).

¹⁸⁷ See Letter from Michael Pertschuk, Chairman, Fed. Trade Comm’n et al., to Wendell H. Ford, Chairman, Consumer Subcomm., Comm. on Commerce, Sci., & Transp. & John C. Danforth, Ranking Minority Member, Consumer Subcomm., Comm. on Commerce, Sci., & Transp. (Dec. 17, 1980), *reprinted in* Int’l Harvester Co., 104 F.T.C. 949 app. at 1070-76 (1984) [hereinafter FTC Policy Statement on Unfairness] (outlining the FTC’s approach to “the concept of consumer unfairness”).

¹⁸⁸ See FTC Policy Statement on Deception, *supra* note 132, at app. at 175.

Under the FTC's policy and case law, the *Buy Now* button and alternatives we tested would qualify as representations to the consumer.¹⁸⁹ Our study speaks to the more nuanced problems of the representation's propensity to mislead a "reasonable" consumer and the representation's materiality. A 1983 FTC policy statement imposes a "reasonable consumer" standard, and, over time, the agency has established criteria for evaluating whether a representation is misleading to the "reasonable" consumer.¹⁹⁰ The FTC weighs the clarity of the representation, whether there is conspicuous information that qualifies the representation, and whether the representation has omitted important information.¹⁹¹ As one FTC official explained,

A company's marketing materials must be consistent with the nature of the product being offered. It's not enough to disclose the information only in a fine print of a lengthy online user agreement . . . [I]f your advertising giveth and your EULA [license agreement] taketh away don't be surprised if the FTC comes calling.¹⁹²

In a series of investigations and enforcement actions over the past decade, the FTC has indicated that when retailers deprive consumers of the right to make reasonably expected use of digital media, those retailers may be engaged in deceptive behavior. In 2006, the FTC investigated Sony BMG for selling CDs that surreptitiously installed malicious software onto consumers' computers.¹⁹³ Among the many ways this software harmed consumers, it prevented consumers from making copies of their CDs and only permitted them to transfer the data on their CDs to devices that used particular file formats—namely, secure Windows Media or Sony ATRAC files.¹⁹⁴ Consumers who refused to install

¹⁸⁹ The FTC recently confirmed that a button characterizing a transaction constitutes a factual representation to consumers about the nature of that transaction. *See* Decision and Order at 3, Apple Inc., No. C-4444 (F.T.C. Mar. 25, 2014) (describing the FTC's settlement with Apple over the latter's failure to disclose that a user's approval of a single in-app purchase automatically authorized all other purchases made in the fifteen minutes following the initial authorization); *see also* Redacted Order Granting Amazon's Motion for Partial Summary Judgment and Granting the FTC's Motion for Summary Judgment at 18, *FTC v. Amazon.com, Inc.*, No. C14-1038-JCC (W.D. Wash. Apr. 26, 2016) (concluding that Amazon's use of buttons labeled "Free," which automatically authorized future in-app purchases, was deceptive).

¹⁹⁰ *See* FTC Policy Statement on Deception, *supra* note 132, at app. at 178; *see also* HOOFNAGLE, *supra* note 122, at 125-28 (describing the FTC's attempt "to ground the Commission's analysis in reasonable interpretations of a practice").

¹⁹¹ *See* FTC Policy Statement on Deception, *supra* note 132, at app. at 175 n.4.

¹⁹² Bruce Schneier, *Do You Know Where Your Data Are?*, WALL ST. J. (Apr. 28, 2009, 11:59 PM), <http://www.wsj.com/articles/SB123997522418329223> [[https://perma.cc/\(8\)8-KM58](https://perma.cc/(8)8-KM58)].

¹⁹³ *See* Deirdre K. Mulligan & Aaron K. Perzanowski, *The Magnificence of the Disaster: Reconstructing the Sony BMG Rootkit Incident*, 22 BERKELEY TECH. L.J. 1157, 1211 (2007) (describing the FTC's "response to the flawed notice and consent provisions of Sony BMG's DRM").

¹⁹⁴ *See id.* at 1166-77 (discussing how the software created several security vulnerabilities and improperly collected data).

the software could not play the CDs on their computers altogether. In its order, the Commission required Sony BMG to provide clear and prominent pre-purchase notice to consumers of these unexpected restrictions.¹⁹⁵

After the Sony BMG incident, the FTC opened three section five investigations in response to threats by other digital media retailers to deactivate the servers necessary for consumers to authorize playback devices. If those servers had been deactivated, consumers would have been unable to transfer and play their digital media purchases on a new computer or device. But the three retailers that were investigated—Microsoft,¹⁹⁶ Walmart,¹⁹⁷ and Major League Baseball¹⁹⁸—all backed down from their publicly announced plans in the face of FTC scrutiny.¹⁹⁹ As the Commission explained, it has a duty to ensure,

In the context of sales of digital products, that consumers are provided sufficient information prior to purchase so that they understand any inherent

¹⁹⁵ See Decision and Order at 3-5, Sony BMG Music Entertainment, No. C-4195 (F.T.C. June 28, 2007) (laying out the various disclosures Sony was required to make).

¹⁹⁶ See Letter from Mary Koelbel Engle, Assoc. Dir., Fed. Trade Comm'n, to Charles E. Buffon, Covington & Burling LLP (Sept. 30, 2008), https://www.ftc.gov/sites/default/files/documents/closing_letters/microsoft-corporation-msn-music/080930msnmusicclosingletter.pdf [<https://perma.cc/ZA3Y-7P45>] [hereinafter FTC Opinion Letter to Microsoft] (closing the FTC investigations into Microsoft's threatened actions).

¹⁹⁷ See Letter from Mary Koelbel Engle, Assoc. Dir., Fed. Trade Comm'n, to M. Sean Royall, Gibson, Dunn & Crutcher LLP (June 23, 2010), https://www.ftc.gov/sites/default/files/documents/closing_letters/wal-mart-stores-inc./100623walmartletter.pdf [<https://perma.cc/6ZCB-6Q47>] [hereinafter FTC Opinion Letter to Walmart] (explaining that the FTC would not be recommending enforcement action).

¹⁹⁸ See Letter from Mary Koelbel Engle, Assoc. Dir., Fed. Trade Comm'n, to Randal M. Shaheen, Arnold & Porter LLP (Oct. 9, 2008), https://www.ftc.gov/sites/default/files/documents/closing_letters/mlb-advanced-media-l.p./081009mlbamclosingletter.pdf [<https://perma.cc/B69Y-K9Q7>] [hereinafter FTC Opinion Letter to MLB] (declining to recommend enforcement action).

¹⁹⁹ See FTC Opinion Letter to Microsoft, *supra* note 196, at 2 (noting that “[i]n June 2008, . . . Microsoft announced that it had reversed its decision”); FTC Opinion Letter to MLB, *supra* note 198, at 3 (discussing the “MLBAM’s discontinuation of [certain] advertising” and the “accommodations that MLBAM [was] making to its customers” who were affected by DRM limits); FTC Opinion Letter to Walmart, *supra* note 197, at 2 (noting that Walmart “had reversed its decision to shut down the DRM servers”). The tension between consumer expectations of ownership and actual technological capabilities extends beyond digital media to a range of so-called “smart” devices. In 2016, the FTC launched an investigation into Nest’s decision to remotely disable the Revolv, a \$300 home automation hub sold to consumers. The Commission “was concerned that reasonable consumers would not expect the Revolv hubs to become unusable due to Revolv Inc.’s actions, and that unilaterally rendering the devices inoperable would cause unjustified, substantial consumer injury that consumers themselves could not reasonably avoid.” Letter from Mary Koelbel Engle, Assoc. Dir., Fed. Trade Comm’n, to Richard J. Lutton, Head of Legal & Regulatory Affairs, Nest Labs, Inc. 2 (July 7, 2016), https://www.ftc.gov/system/files/documents/closing_letters/nid/160707nestrevolveletter.pdf [<https://perma.cc/5TXV-BGFH>] [hereinafter FTC Opinion Letter to Nest Labs]. After Nest committed to providing consumers full refunds, the FTC closed its investigation. See *id.* (explaining that, due in part to “Nest’s practice of providing full refunds,” the FTC had concluded that “no further action [was] warranted”).

limitations on the use of the product they buy Boilerplate disclosures in lengthy Terms & Conditions or End User License Agreements may be insufficient to apprise consumers of important limitations on their purchases, particularly if the limitations may lead to an inability to view or listen to content in the future.²⁰⁰

In its investigation into Major League Baseball's public threat to disable its servers, the Commission appeared particularly concerned by MLB's prior representations "that consumers would 'own' the Downloads."²⁰¹ MLB marketing materials stressed that consumers would "OWN complete game downloads from this year or yesteryear" and encouraged consumers to "[o]wn today's games and yesterday's classics."²⁰² The FTC argued that such claims could "cause reasonable consumers to believe that they had the ability to play the content on a potentially unlimited number of compatible devices, or could otherwise use and dispose of the copy consistent with how consumers can use and dispose of other copies of copyrighted works that they own."²⁰³

Although we share the FTC's worry, we note that the Commission did not appear to use survey data to determine what inferences a reasonable consumer might draw from claims of ownership. In contrast, the FTC has relied on survey evidence to assess misleadingness, accepting varying levels of proof to establish deception.²⁰⁴ Today, if the FTC finds that a practice misleads a "significant minority"—ten or fifteen percent—of customers,²⁰⁵ the practice is deceptive.²⁰⁶ The willingness of courts to find deception in light of this relatively low incidence of misleadingness implicitly acknowledges that advertisements are

²⁰⁰ See FTC Opinion Letter to MLB, *supra* note 198, at 2-3 (internal quotations omitted).

²⁰¹ *Id.* at 2.

²⁰² *Id.*

²⁰³ *Id.* at 3.

²⁰⁴ While historically the FTC found deception even when less than ten percent of consumers were misled, over time the Commission began to look for higher percentages of deceived consumers. See Ivan L. Preston & Jef I. Richards, *Consumer Miscomprehension as a Challenge to FTC Prosecutions of Deceptive Advertising*, 19 J. MARSHALL L. REV. 605, 610-13 (1986) (noting that after some "early cases . . . the percentage supporting findings of violations became typically higher").

²⁰⁵ See *POM Wonderful, LLC v. FTC*, 777 F.3d 478, 490 (D.C. Cir. 2015) ("The Commission 'examines the overall net impression' left by an ad, and considers whether 'at least a significant minority of reasonable consumers' would 'likely' interpret the ad to assert the claim." (internal citations omitted)); see also *Telebrands Corp. v. FTC*, 457 F.3d 354, 359 (4th Cir. 2006) (holding that a company seriously and deliberately misled consumers with its "expensive, nationwide . . . [and] highly successful" advertising campaign).

²⁰⁶ See *Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck Consumer Pharms. Co.*, 290 F.3d 578, 594 (3d Cir. 2002) ("[W]e believe that survey evidence demonstrating that 15% of the respondents were misled . . . is sufficient to establish . . . [a] claim for false or misleading advertising . . ."); *Firestone Tire & Rubber Co. v. FTC*, 481 F.2d 246, 249 (6th Cir. 1973) (affirming the FTC's finding of deception when an ad "misled 15% (or 10%) of the buying public"); *Telebrands Corp. v. Media Grp., Inc.*, 45 U.S.P.Q.2d (BNA) 1342, 1348 (S.D.N.Y. 1997) (holding that a survey showing that 20% of consumers were misled was sufficient evidence to show deception).

often susceptible to more than one reasonable interpretation—and where one of those interpretations is misleading, the advertiser is liable. This judicial tendency also reflects the fact that false advertising law is not intended to protect only the savvy or the skeptical, but also “that vast multitude which includes the ignorant, the unthinking and the credulous.”²⁰⁷

Once we know consumers are being misled, the question turns to whether or not those inaccuracies are material to their choices. Would they have behaved differently had they known the truth? Perhaps they would have refused to buy the product, would have only purchased it for a lower price, or would have preferred an alternative.²⁰⁸ Materiality can be presumed for claims the seller expressly states or intentionally conveys, as well as for claims relating to a product’s cost, central characteristics, purpose, performance, or health and safety. A strong argument can be made that the rights suggested by the *Buy Now* button are just as material: an ebook that you can keep forever is a very different product than one that can disappear without notice.

Even if those rights are not presumptively material, the FTC determines the importance of claims by analyzing surveys, credible testimony of consumers, and whether the claim involves a feature that alters the price of the product. Here, our survey points to materiality in two respects—an expressed preference for the ability to use digital media in ways similar to physical books, music, and movies, and an expressed willingness to pay more for these features.

The FTC does not require evidence that the consumers who are deceived are the same as the consumers to whom false or misleading claims are material. Yet, in most cases where deception and materiality are established, it is safe to assume that a substantial number of consumers are misled about claims that are material to them. Our data demonstrate that with respect to the *Buy Now* button, this assumption is well-founded. Many respondents who expressed misperceptions about their rights valued their rights highly. For example, of the 519 respondents with Rights Scores of 2 or less, more than 40% expressed a strong preference for ownership rights.

Having shown their propensity to mislead reasonable consumers in material respects, it is clear that the FTCA’s deception theory could be employed against the practices described in this Article. We now briefly turn to the FTC’s other main theory of liability: unfairness. Unfairness is a more controversial legal theory that has been pruned back by Congress after the Commission used it to police a series of powerful economic actors—companies

²⁰⁷ *Charles of the Ritz Distrib. Corp. v. FTC*, 143 F.2d 676, 679 (2d Cir. 1944); see *id.* (upholding an FTC decision that a “rejuvenating” face cream was deceptively marketed, despite the manufacturer’s claim that “no straight-thinking person could believe that its cream would actually rejuvenate”); see also *Giant Food, Inc. v. FTC*, 322 F.2d 977, 982 (D.C. Cir. 1963) (“The Act was not intended to protect ‘sophisticates.’”).

²⁰⁸ See FTC Policy Statement on Deception, *supra* note 132.

that advertised to kids, funeral parlor directors, and used car salesmen.²⁰⁹ Today, the FTC uses a three-prong test to establish unfairness. For a consumer injury to be unfair, it must be (1) substantial; (2) not outweighed by countervailing benefits to competition or consumers produced by the practice; and (3) reasonably unavoidable.²¹⁰

Substantial injuries to consumers usually—but not always—involve monetary harm, coercion into the purchase of unwanted goods or services, and health or safety risks.²¹¹ Substantial injury may also occur where a business practice causes a small harm to a large number of people. Our data suggest that an unfairness theory would be based on this last factor: the idea that a large number of consumers suffer a financial detriment based upon receiving a different product—and one that came with significantly fewer rights—than they thought they would.

If the FTC finds an injury to consumers, the unfairness test suggests that the FTC should weigh the injury against its potential benefits and also determine whether the consumer could have avoided the injury by shopping elsewhere. Here, a digital goods company could argue that communicating more nuanced information to consumers imposes significant costs that are avoided by simple disclosures such as *Buy Now*. But the low cost of implementing a short notice provision undercuts that assertion. Retailers might also argue that consumers could avoid the harm done to them by reverting to analog copies and avoiding the pitfalls of digital products altogether. But pointing to related products that do not leverage unfair practices is an unconvincing response to ongoing consumer harm, particularly since consumers are often unaware of the differences between digital and analog goods.

The FTC could reasonably rely on either its deception or unfairness authority to pursue the use of *Buy Now* buttons. Between the two, deception appears to be the more natural fit, particularly because the unfairness theory raises potentially fact-intensive questions about the substantiality of the injury to consumers and the efficiency benefits of simple disclosures. Since unfairness offers no additional remedies, in all likelihood, if the FTC were to police these practices, it would proceed on a deception theory only.

209 Cf. HOOFNAGLE, *supra* note 122, at 133 (discussing how “the FTC found that” practices of certain used car salesmen “violated clearly established public policy”).

210 See FTC Policy Statement on Unfairness, *supra* note 187, app. at 1073 (describing the “three tests” that a practice must satisfy to be found unfair).

211 See *id.* (describing the types of injuries the Commission typically considers substantial).

3. The FTC Policy Approach to *Buy Now*

Like the Lanham Act, the FTCA lacks a private right of action.²¹² Nonetheless, the FTC may be the best policy option for addressing the deficits between consumer perceptions and the realities of digital goods. Whereas competitors have incentives not to sue under the Lanham Act,²¹³ the FTC has long intervened when entire markets engage in some deceptive practice. The FTC is empowered to sue, both to prevent this kind of widespread market deception²¹⁴ and also to selectively enforce the law against a single company, even where competitors engage in the same practices.²¹⁵

Not only does the FTC have the power to address these activities, it has fact-finding and investigative authority that could further elucidate the problems in digital goods marketing.²¹⁶ Companies, especially online ones, extensively test their websites and marketing representations to increase sales.²¹⁷ The FTC's broad investigative authorities could be used to obtain surveys or other internal-facing research performed by companies on consumers' perceptions of *Buy Now*.

Finally, the FTC's processes could guide policy through two different mechanisms. First, the FTC's enforcement actions are similar to a common law process. In the privacy realm, Daniel J. Solove and Woodrow Hartzog have praised the FTC's approach as an incrementalist, case-by-case approach to difficult consumer protection problems.²¹⁸ The FTC, unburdened by the hurdles that face private plaintiffs and some of the pathologies of civil

²¹² See, e.g., *Carlson v. Coca-Cola Co.*, 483 F.2d 279, 280 (9th Cir. 1973) ("The protection against unfair trade practices afforded by the [FTCA] vests initial remedial power solely in the Federal Trade Commission.").

²¹³ See Aaron Perzanowski, *Unbranding, Confusion, and Deception*, 24 HARV. J.L. & TECH. 1, 35-36 (2010) (highlighting that when multiple competitors in an industry make a false claim, no company has an incentive to sue another and put a stop to the practice).

²¹⁴ See *FTC v. Winsted Hosiery Co.*, 258 US 483, 493 (1922) ("The fact that misrepresentation and misdescription have become so common in [the market] . . . does not prevent their use being an unfair method of competition.").

²¹⁵ See *Johnson Prods. Co. v. FTC*, 549 F.2d 35, 41 (7th Cir. 1977) (affirming the FTC's authority to target a single firm based on an industry-wide practice); *Ger-Ro-Mar, Inc. v. FTC*, 518 F.2d 33, 35 (2d Cir. 1975) ("[W]hile petitioners may be unfortunate in being the first target of the Commission with respect to the selling practices in question, the Commission is under no obligation to start simultaneous suits against all alleged offenders and it did not abuse its discretion in any sense . . .").

²¹⁶ See *A Brief Overview of the Federal Trade Commission's Investigative and Law Enforcement Authority*, FED. TRADE COMM'N (July 2008), <https://www.ftc.gov/about-ftc/what-we-do/enforcement-authority> [<https://perma.cc/XJ5K-5LSV>] (explaining the FTC's enforcement powers).

²¹⁷ See e.g., Jeff Oxford, *6 Things Online Retailers Can Learn from Amazon*, FORBES (Sept. 24, 2013, 9:00 AM), <http://www.forbes.com/sites/groupthink/2013/09/24/6-things-online-retailers-can-learn-from-amazon/#3ae599553b85> [<https://perma.cc/P8HG-HRKV>] (noting that Amazon conducts tests on various facets of its website in order to increase sales).

²¹⁸ See Daniel J. Solove & Woodrow Hartzog, *The FTC and the New Common Law of Privacy*, 144 COLUM. L. REV. 583, 648-49 (2014) (discussing patterns of development in FTC privacy enforcement).

litigation, can set norms through carefully selected cases.²¹⁹ These cases are, in turn, relied upon by corporate counsel to define the boundaries between responsible and irresponsible conduct.²²⁰

Second, the FTC can shape policy through public workshops, a quasi-legislative process which would provide the Commission with a way to police the sale of digital goods without resorting to litigation. Because the dominant firms are mainstream and reputable actors, the FTC could use such workshops to establish norms for the sale of digital goods while incorporating the views of the industry, consumers, and academic experts in marketing and economics. These perspectives could help the FTC fill the legislative gaps in many consumer protection issues that escape the attention of Congress.

For these reasons, we think the FTC offers an attractive remedy to bridge the gulf between the realities of the digital marketplace and consumers' perceptions. The FTC could bring the most relevant actors to the table to develop a more effective set of disclosures and rules. The FTC could then use its enforcement powers to police the digital media companies that continue to use misleading marketing methods.

CONCLUSION

In a recent article, Professor Lauren Willis argued that firms should be required to periodically demonstrate, through third-party testing, that their customers understand the material terms of transactions.²²¹ Willis's approach recognizes that consumer understanding changes over time and is sensitive to context. In that spirit, our study has revealed the degree to which consumers are misled by the use of marketing language like the *Buy Now* button that relies on expectations developed in the tangible goods economy, but which are incompatible with the restrictive license terms that are attached to most digital media transactions. We have argued that use of the *Buy Now* button in this context constitutes false and deceptive advertising. But we have

²¹⁹ See HOOFNAGLE, *supra* note 122, at 333-35 (noting that "the FTC now enforces on a case-by-case basis" and elects to pursue enforcements "that are likely to have structural effect").

²²⁰ Among large, reputable firms like those that dominate the market for digital media goods, compliance with FTC norms is likely. See KENNETH A. BAMBERGER & DEIRDRE K. MULLIGAN, *PRIVACY ON THE GROUND: DRIVING CORPORATE BEHAVIOR IN THE UNITED STATES AND EUROPE* 68-71 (2015) (describing the incentives created by the FTC's enforcement authority, which encourage large companies to self-comply with FTC norms). However, among smaller firms, because of the extremely low risk of detection, the other priorities of startups, a lack of sophistication, and the fewer resources available for compliance, there is a greater risk of noncompliance. See Chris Jay Hoofnagle, *US Regulatory Values and Privacy Consequences, Implications for the European Citizen*, 2(2) EUR. DATA PROTECTION L. REV. 169 (2016).

²²¹ Lauren Willis, *Performance-Based Consumer Law*, 82 U. CHI. L. REV. 1309, 1371-72 (2015).

also outlined an effective alternative: a short notice that significantly improved respondents' comprehension of their rights in digital goods.

Those additional disclosures, which convey information to consumers that is currently buried in unread and unreadable license terms, could result in at least two positive developments.²²² In the short term, we are confident a short notice like the one we designed would lead to consumers making more informed decisions about existing products and services in the marketplace. Once consumers know digital goods come with substantial restrictions, they may decide physical copies are worth the occasional inconvenience they impose. Or consumers may see subscription streaming services as a more attractive alternative. We might also see a shift in price reflecting those newly informed consumer preferences.

In the long term, disclosure could spur competition between competing retailers over the bundles of rights they convey to consumers.²²³ Today, competition in the digital media market revolves around the most obvious and salient characteristic—namely, price. But by lowering the information costs associated with understanding the rights consumers acquire, short notices might create incentives to offer more attractive bundles of rights. Given the concentration of digital media markets and the ongoing control copyright holders exert over retailers, there is no guarantee that the market will respond to pressure from consumers for meaningful property rights in their digital purchases. But unless consumers have accurate information about those products, their preferences will remain a byproduct of deception.

222 See Craswell, *Static Versus Dynamic Disclosures*, *supra* note 121, at 339 (describing the positive externalities associated with required disclosures, including helping people make better decisions and inducing enterprises to be more efficient).

223 See Howard Beales et al., *Information Remedies for Consumer Protection*, 71 AM. ECON. REV. 410, 410 (1981) ("Additional information induces sellers to compete for the patronage of informed consumers by offering better values.").

APPENDIX

Table 1: Basic Demographics of Survey Respondents

Characteristic	Category	Percentage
Sex	Male	49%
	Female	51%
Age	18–24	11%
	25–34	18%
	35–44	17%
	45–54	19%
	55–64	16%
	65+	18%
Income	<\$15,000	13%
	\$15–\$25,000	12%
	\$25–\$50,000	24%
	\$50–\$75,000	17%
	\$75–\$100,000	12%
	\$100–\$150,000	12%
	>\$150,000	9%
Race	White/Caucasian	80%
	African American	9%
	Hispanic	6%
	Asian	4%
	Other	1%
Education Level	< High School	2%
	High School/GED	22%
	Some College	28%
	2-Year Degree	11%
	4-Year Degree	25%
	Masters Degree	10%
	Doctoral Degree	1%
	Professional Degree (e.g., JD/MD)	1%

Table 2: Size of Test Groups

Condition	Books	Music	Movies	Total
Buy Digital	113	109	111	333
License Now	101	107	102	310
Buy Physical	110	107	112	329
Short Notice	109	110	108	327
Total	433	433	433	1,299

Table 3: Percentage of Consumers Who Thought a Given Product Format and Notice Conveyed Rights

Format	Condition	Own	Keep	Device	Lend	Gift	Will	Resell	Copy
Digital Movie	<i>Buy Now</i>	78	84	81	35	33	30	17	12
Digital Movie	<i>License Now</i>	69	75	75	42	39	28	23	18
Digital Movie	Short Notice	65	82	82	31	36	29	17	14
Ebook	<i>Buy Now</i>	86	87	81	48	38	26	12	9
Ebook	<i>License Now</i>	50	81	84	46	36	26	14	8
Ebook	Short Notice	63	86	77	35	28	13	6	4
MP3	<i>Buy Now</i>	83	89	88	39	50	32	17	23
MP3	<i>License Now</i>	62	80	89	42	42	26	13	16
MP3	Short Notice	63	84	85	27	36	21	6	7
Blu-ray	<i>Buy Now</i>	79	87	80	63	73	55	48	13
Paperback	<i>Buy Now</i>	85	88	85	75	70	47	53	14
CD	<i>Buy Now</i>	90	85	82	57	68	47	36	20