

# 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<sup>1</sup>

## INTRODUCTION

Imagine you purchase a new book from Amazon. You visit [amazon.com](http://amazon.com), find a book that looks promising, click the familiar *Buy Now* button, wait a mere two days for 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.

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<sup>1</sup> Tim O’Reilly, *Jeff Bezos’ Open Letter on Used Book Sales*, O’REILLY NETWORK, April 15, 2002, <http://archive.oreilly.com/lpt/wlg/1291>. Bezos offered this defense of the rights of book buyers in response to criticism by the Author’s Guild of America of Amazon’s prominent placement of used books on its site.

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 choose.<sup>4</sup> They can't be taken from you without your consent, certainly not by private actors for their own benefit.<sup>5</sup>

As unthinkable as this scenario may be when it comes to tangible property, it is almost exactly what happened to Amazon Kindle users in 2009.<sup>6</sup> In response to disputes with publishers, Amazon remotely deleted the locally-stored copies of a number of books from the devices of consumers who had clicked the *Buy Now* button to purchase them. The deleted books ranged from Ayn Rand to *Harry Potter*. But perhaps most tellingly, they included George Orwell's *Nineteen Eighty-Four*.<sup>7</sup> In that dystopian classic, the Ministry of Truth destroyed documents by tossing them into the memory hole, a network of tubes leading to an incinerator. Kindle users—perhaps struck by the irony—went to bed one night thinking they owned a copy of Orwell's cautionary tale and woke up the next morning to find that their books had vanished down a different series of tubes.<sup>8</sup>

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<sup>4</sup> See, e.g., A.M. Honoré, *Ownership*, in OXFORD ESSAYS IN JURISPRUDENCE 107, 112–28 (A.G. Guest ed., 1961) (identifying the right of possession as one of eleven incidents of ownership).

<sup>5</sup> Even the state's considerable power of eminent domain is constrained to takings that serve some public purpose. *Kelo v. City of New London, Conn.*, 545 U.S. 469, 477, 125 S. Ct. 2655, 2661, 162 L. Ed. 2d 439 (2005) (explaining that “the sovereign may not take the property of A for the sole purpose of transferring it to another private party B”); *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 245 (1984) (noting that “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”).

<sup>6</sup> 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>.

<sup>7</sup> GEORGE ORWELL, *NINETEEN EIGHTY-FOUR* (1949).

<sup>8</sup> 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 ANDREW BLUM, *TUBES: A JOURNEY TO THE CENTER OF THE INTERNET 2* (2012).

More prosaically, media companies—even large, reputable ones—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 threatened to do so.<sup>9</sup> Recently, Nook announced the shutdown of its service in the UK, assuring purchasers that they should “have continued access to the vast majority of [their] purchased NOOK Books at no new cost.”<sup>10</sup> As we explain more fully below, the switch to a digital platform offers convenience but also makes consumer access more contingent. Unlike a purchase at a book store, a digital media transaction is continuous, linking buyer and seller and giving the seller post-transaction power 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 daughter in the event of his death.<sup>11</sup> Although the story turned out to be a hoax, the worries about what happens to our digital libraries when we die are decidedly real.<sup>12</sup>

The Terms of Use and End User License Agreements associated with digital media goods typically restrict not only bequeathing those goods by will, but all

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<sup>9</sup> See Matt Buchanan, *Five Stores That Hosed Customers with DRM*, GIZMODO, April 28, 2008, <http://gizmodo.com/384741/five-stores-that-hosed-customers-with-drm>; Jon Healey, *Yahoo Pull An MSN Music (Only Faster)*, BIT PLAYER, Los Angeles Times, July 23, 2008, <http://opinion.latimes.com/bitplayer/2008/07/yahoo-pull-and.html>; Antone Gonsalves, *Wal-Mart Reverses Decision to Shutdown Digital Music DRM Servers*, INFORMATIONWEEK, October 10, 2008, <http://www.informationweek.com/wal-mart-reverses-decision-to-shutdown-digital-music-drm-servers-/d/d-id/1072848>; Julie Jacobson, *Perils of DRM: What Happens to Your Digital Content if the Provider Goes Out of Business?* CEPRO, June 5, 2009, [http://www.cepro.com/article/print/what\\_happens\\_to\\_your\\_digital\\_content\\_if\\_the\\_provider\\_goes\\_out\\_of\\_business/](http://www.cepro.com/article/print/what_happens_to_your_digital_content_if_the_provider_goes_out_of_business/).

<sup>10</sup> *Important Changes to the NOOK Service*, <http://www.nook.com/gb/notice> (emphasis added).

<sup>11</sup> John Harlow and 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](http://www.thesundaytimes.co.uk/sto/news/uk_news/Tech/article1117103.ece).

<sup>12</sup> Charles Arthur, *No, Bruce Willis Isn't Suing Apple over iTunes Rights*, GUARDIAN, Sept. 3, 2012, <http://www.theguardian.com/technology/blog/2012/sep/03/no-apple-bruce-willis>.

manner of transfers. According to those provisions, purchasers can't lend media goods; they can't give them away as gifts; and they certainly can't resell them.<sup>13</sup> For tangible goods, copyright law's first sale doctrine guarantees owners of books, records, and movies the right to transfer them as they see fit.<sup>14</sup> But copyright holders and retailers argue that digital goods are different for two reasons. First, transfer of a digital file typically requires the creation of a new copy.<sup>15</sup> Second, rights holders and retailers maintain that digital media goods are not sold to purchasers, they are merely licensed.<sup>16</sup>

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<sup>13</sup> 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*,

<http://www.amazon.com/gp/help/customer/display.html?nodeId=201014950>.

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*, <http://www.amazon.com/gp/help/customer/display.html?nodeId=201380010>.

Apple's App Store terms provide: "You may not rent, lease, lend, sell, 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." *Terms and Conditions*, <http://www.apple.com/legal/internet-services/itunes/us/terms.html>.

<sup>14</sup> See 17 U.S.C. § 109 ("the 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"); *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. 17 U.S.C. § 109(b).

<sup>15</sup> See Aaron Perzanowski & Jason Schultz, *Digital Exhaustion*, 58 UCLA L. REV. 889, 901-07 (2011).

<sup>16</sup> See, e.g., *Kindle Store Terms of Use*, <http://www.amazon.com/gp/help/customer/display.html?nodeId=201014950> ("Kindle Content is licensed, not sold, to you by the Content Provider."); *Sony Entertainment Network Terms of Service*, <http://www.playstationnetwork.com/en-gb/terms-of-service/> ("All Software is licensed, not sold, which means you acquire rights to use the Software ... but you do not acquire ownership of the Software."); *Terms and Conditions*, <http://www.apple.com/legal/internet-services/itunes/us/terms.html> ("the software products made available through the

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.<sup>17</sup> It is not hard to understand why. Licenses are notoriously long and complex. The iTunes Terms & Conditions are over 19,000 words or fifty-six pages of fine print.<sup>18</sup> That's longer than Shakespeare's *MacBeth*.<sup>19</sup> And these licenses are overflowing with defined terms, technical jargon, legalese, and complex sentence structures.<sup>20</sup> Given their complexity and ubiquity, it is only a slight exaggeration to

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App Store ... are licensed, not sold, to you.”). Apple is somewhat less clear in how it characterizes iTunes transactions. After describing those transactions as “purchases” and noting that “[a]ll sales . . . are final,” Apple insists that consumers agree not to “rent, lease, loan, sell, [or] distribute” their purchases.” *Id.*; see also *Amazon Music Terms of Use*, <http://www.amazon.com/gp/help/customer/display.html?nodeId=201380010>. (“all 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. v. Aftermath Records*, 621 F.3d 958 (9th Cir. 2010); Eriq Gardner, “Universal Music Settling Big Class Action Lawsuit over Digital Royalties,” *Hollywood Reporter*, March 19, 2015, <http://www.hollywoodreporter.com/thr-esq/universal-music-settling-big-class-783096>.

<sup>17</sup> 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); see also Yannis Bakos, Florencia Marotta-Wurgler, and David R. Trossen, *Does Anyone Read the Fine Print? Consumer Attention to Standard Form Contracts*, New York University Law and Economics Working Papers, Paper 195, New York University School of Law, New York, NY, 2014, 22, [http://lsr.nellco.org/cgi/viewcontent.cgi?article=1199&context=nyu\\_lewp](http://lsr.nellco.org/cgi/viewcontent.cgi?article=1199&context=nyu_lewp) (finding that “only one or two out of every thousand retail software shoppers chooses to access the license agreement, and those few that do spend too little time, on average, to have read more than a small portion of the license text.”). Our own results show a slightly higher rate of 1.4%. See *infra* note 77.

<sup>18</sup> *Terms and Conditions*, <https://www.apple.com/legal/internet-services/itunes/us/terms.html>

<sup>19</sup> Tom Gardner, *To Read, Or Not to Read... the Terms and Conditions*, DAILY MAIL, March 22, 2012, <http://www.dailymail.co.uk/news/article-2118688/PayPal-agreement-longer-Hamlet-iTunes-beats-Macbeth.html>.

<sup>20</sup> Many licenses require a postgraduate education to fully understand. DOUGLAS E. PHILLIPS, *THE SOFTWARE LICENSE UNVEILED: HOW LEGISLATION BY LICENSE*

claim that if consumers read every license agreement they encountered, the economy would grind to a halt.<sup>21</sup> So it is no surprise that most people—including the Chief Justice of the Supreme Court<sup>22</sup>—choose to ignore licenses, particularly when making a 99-cent purchase from iTunes or Amazon.<sup>23</sup>

If they don't read the terms, how well do consumers understand the choices they are making when they choose ebooks over hardcovers, mp3s over CDs or 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 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.”<sup>24</sup> So all things being equal, consumers might anticipate that unread terms allow them to lend their ebooks to friends and family, for example. 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.

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CONTROLS SOFTWARE ACCESS 79 (2009).

<sup>21</sup> To take a single example, Adobe Flash is a software platform installed on millions of computers each day. Assuming the average user can read the 3,500 word Flash license in 10 minutes, if everyone who installed Flash in a single day read the license, it would require collectively over 1,500 years of human attention per day. Bob Dorman, *Adobe Demands 7,000 Years a Day from Humankind*, REGISTER, December 4, 2012, [http://www.theregister.co.uk/2012/12/04/feature\\_tech\\_licences\\_are\\_daft](http://www.theregister.co.uk/2012/12/04/feature_tech_licences_are_daft).

<sup>22</sup> Mike Masnick, *Supreme Court Chief Justice Admits He Doesn't Read Online EULAs or Other 'Fine Print'*, TECHDIRT, October 22, 2010, <https://www.techdirt.com/articles/20101021/02145811519.shtml>.

<sup>23</sup> Because licenses create idiosyncratic bundles of rights, consumers must investigate the details of each transaction in order to be informed of material differences between them. As a result, licenses impose significant information costs on consumers. See generally Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1, 3 (2000); see Christina Mulligan, *A Numerus Clausus Principle for Intellectual Property*, 80 TENN. L. REV. 235 (2013).

<sup>24</sup> See Ian Ayres and Alan Schwartz, *The No-Reading Problem in Consumer Contract Law*, 66 STAN. L. REV. 545 (2014).

Some commentators, for example, 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.<sup>25</sup> 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.<sup>26</sup>

In its recent *White Paper on Remixes, First Sale, and Statutory Damages*, the Department of Commerce noted that the “the record before [it] is devoid of any actual evidence as to what consumers understand when they click on the ‘buy’ button.”<sup>27</sup> Nonetheless, it expressed concern that “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.”<sup>28</sup>

Why might consumers be misled? Consumers operate in the marketplace based on their prior experience.<sup>29</sup> We suggest that consumers’ “default” behavior is based on the experiences of buying physical media, and the assumptions from that context have carried over into the digital domain. As the above quote from Jeff Bezos reminds us, “everyone knows” that when they buy a book, record, or movie,

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<sup>25</sup> Aaron Perzanowski & Jason Schultz, *Reconciling Intellectual & Personal Property*, 90 NOTRE DAME L. REV. 1211, 1257 (noting potential for consumer misunderstanding as a result of the *Buy Now* button); Department of Commerce Internet Policy Task Force, WHITE PAPER ON REMIXES, FIRST SALE, AND STATUTORY DAMAGES 56-57 (2016), <http://www.uspto.gov/sites/default/files/documents/copyrightwhitepaper.pdf> (noting commentators expressing concern about the *Buy Now* button).

<sup>26</sup> *Id.* at n.352 (quoting Ben Sheffner of the Motion Picture Association of America 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 Catherine Bridge of Disney 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.”)

<sup>27</sup> *Id.* at 68-69.

<sup>28</sup> *Id.*

<sup>29</sup> See discussion of “schema theory” in Manoj Hastak & Michael Mazis, *Deception by Implication: A Typology of Truthful but Misleading Advertising and Labeling Claims*, 30 J. PUB. POL’Y & MARKETING 157 (2011).

they can resell it, lend it, or give it away.<sup>30</sup> 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 device of choice.

Not only are consumers misled, but the rights they are confused about are important. A sizable percentage 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 describes the current digital media marketplace. In Part II, we describe 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 false and deceptive advertising law. We conclude 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, and sheet music, and 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,<sup>31</sup> the music industry felt pressure to establish some means for lawful access to digital music. After a couple of failed attempts by the

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<sup>30</sup> See O'Reilly, *supra* note 1.

<sup>31</sup> *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1011 (9th Cir. 2001)

industry,<sup>32</sup> Apple launched the iTunes Music Store in 2003.<sup>33</sup> Within a decade, iTunes boasted a library of 43 million tracks that had been downloaded 35 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.<sup>34</sup> Soon paid music downloads surpassed physical media sales. A similar trend played itself out in the world of books, with a dominant hardware maker leading a shift to digital media. Once Amazon released the Kindle, annual ebook sales increased from 10

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(“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.”).

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

<sup>33</sup> Nathan Ingraham, *iTunes Store at 10: How Apple Built a Digital Media Juggernaut*, THE VERGE, April 26, 2013, <http://www.theverge.com/2013/4/26/4265172/itunes-store-at-10-how-apple-built-a-digital-media-juggernaut>.

<sup>34</sup> *iTunes*, <http://www.apple.com/itunes/music> (noting a library of 43 million songs); Jordan Kahn, *Eddy Cue: Apple passed 35 billions songs sold on iTunes last week, 40 million iTunes Radio listeners*, 9 TO 5 MAC, 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>; *iTunes Store Top Music Retailer in the US*, April 3, 2008, <https://www.apple.com/pr/library/2008/04/03iTunes-Store-Top-Music-Retailer-in-the-US.html> (noting that iTunes “became the largest music retailer in the US based on the amount of music sold during January and February 2008.”).

million in 2008 to 510 million in 2014, rivaling sales of physical books.<sup>35</sup> Likewise, paid software and video game downloads soon rivaled or surpassed physical sales.<sup>36</sup>

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.<sup>37</sup> Since those files may not be stored permanently on a user's device, continued possession and access is less certain.<sup>38</sup> 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 the iTunes cloud accounts of consumers at the request of copyright holders.<sup>39</sup> If the consumer did not save a local copy, her

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<sup>35</sup> Jim Milliot, *BEA 2013: The E-book Boom Years*, PUBLISHER'S WEEKLY, May 29, 2013, <http://www.publishersweekly.com/pw/by-topic/industry-news/bea/article/57390-bea-2013-the-e-book-boom-years.html>; Marisa Bluestone, *U.S. Publishing Industry's Annual Survey Reveals \$28 Billion in Revenue in 2014*, PUBLISHERS.ORG, June 10, 2015, <http://publishers.org/news/us-publishing-industry's-annual-survey-reveals-28-billion-revenue-2014>. Although ebooks surpassed hardcovers in 2012, digital sales decreased for the first time ever in 2015, in part because of publisher-driven price increases. 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> (noting reduced sales reported by the Association of American Publishers); *but see* Matthew Ingram, *No, E-book Sales are Not Falling, Despite What Publishers Say*, FORTUNE, Sept. 24, 2015 <http://fortune.com/2015/09/24/ebook-sales/> (challenging the conclusion that overall ebooks sales declined and noting the impact of higher prices on sales).

<sup>36</sup> Jacqui Cheng, *Forget the Box: Downloads Dominate Online Software Purchases*, ARS TECHNICA, May 28, 2010, <http://arstechnica.com/software/news/2010/05/forget-the-box-downloads-dominate-online-software-purchases.ars>; Lance Whitney, *Digital Game Downloads Beat Retail Store Sales*, CNET NEWS, Sept. 20, 2010, [http://news.cnet.com/8301-10797\\_3-20016943-235.html](http://news.cnet.com/8301-10797_3-20016943-235.html).

<sup>37</sup> 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).

<sup>38</sup> Even when consumers store copies locally, their ability to use them as they choose can be constrained by digital rights management (DRM) technologies.

<sup>39</sup> 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

purchased music simply vanished. Apple's terms explicitly contemplate this scenario:

Apple and its licensors reserve the right to change, suspend, remove, or disable access to any iTunes Products, content, or other materials comprising a part of the iTunes Service at any time without notice. In no event will Apple be liable for making these changes.<sup>40</sup>

In recent years, subscription streaming services have exploded in popularity. Netflix and Hulu launched online video services in 2007.<sup>41</sup> Today, Netflix is one of the most popular content providers on the internet, with more than 75 million subscribers and accounting for a third of all internet traffic.<sup>42</sup> In 2015, its revenue exceeded \$6.7 billion<sup>43</sup> Music streaming services have seen similar growth. Spotify has 75 million active users, about 20 million of whom are paying subscribers, and its revenues are over a billion dollars per year.<sup>44</sup> In 2014, streaming services grew by a staggering 54%.<sup>45</sup> Not surprisingly, the streaming subscription model is being applied to books, video games, and other media as well.<sup>46</sup>

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accessing or downloading that album. See Geoffrey Goetz, *Apple's iCloud is No Safe Haven for Some iTunes Purchases*, GIGAOM, Sept. 25, 2013, <https://gigaom.com/2013/09/25/apples-icloud-is-no-safe-haven-for-some-itunes-purchases/>

<sup>40</sup> *Term and Conditions*, <http://www.apple.com/legal/internet-services/itunes/us/terms.html>.

<sup>41</sup> Ken Auletta, *Outside the Box*, THE NEW YORKER, Feb. 3, 2014, <http://www.newyorker.com/magazine/2014/02/03/outside-the-box-2>.

<sup>42</sup> Ben Popper, *Netflix Whizzes Past 75 Million Subscribers Thanks to Record International Growth*, The Verge, Jan. 20, 2016, <http://www.theverge.com/2016/1/19/10790282/netflix-q4-2015-earnings>; Victor Luckerson, *Netflix Accounts for More Than a Third of ll Internet Traffic*, TIME, May 29, 2015, <http://time.com/3901378/netflix-internet-traffic>.

<sup>43</sup> *Netflix Inc.*, MARKETWATCH, <http://www.marketwatch.com/investing/stock/nflx/financials>.

<sup>44</sup> *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/>.

<sup>45</sup> Ethan Smith, *Music Downloads Plummet in U.S., but Sales of Vinyl Records and Streaming Surge*, WALL STREET JOURNAL, January 1, 2015, <http://www.wsj.com/articles/music-downloads-plummet-in-u-s-but-sales-of-vinyl-records-and-streaming-surge-1420092579>.

<sup>46</sup> In 2014, Amazon launched Kindle Unlimited, which gives subscribers access to a growing ebook library. Hayley Tsukiyama, *Is Kindle Unlimited Worth It?*,

The eagerness of consumers to embrace streaming services makes sense. Those services are inexpensive—typically around \$10 per month. They have massive content libraries.<sup>47</sup> And they are convenient, 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, they can limit the impact of secondary markets. And they can bundle old, low-value content with new, high-value titles. Subscription streaming services are also viewed as a strategy for reducing copyright infringement. 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.<sup>48</sup>

But individual creators have been less than enthusiastic. A parade of songwriters and recording artists have complained about what they say are parsimonious royalty rates.<sup>49</sup> Compared the good old days of record-breaking CD

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WASHINGTON POST, July 18, 2014, <https://www.washingtonpost.com/news/the-switch/wp/2014/07/18/is-kindle-unlimited-worth-it/>. Services like PlayStation Now and EA Access offer subscriptions for online video game libraries. Erik Kain, *Sony Was Right To Turn Down EA's Video Game*, FORBES, July 30, 2014, <http://www.forbes.com/sites/erikkain/2014/07/30/sony-was-right-to-turn-down-eas-video-game-subscription-plan/>.

<sup>47</sup> Madi Alexander, *Apple Music, Spotify and a Guide to Music Streaming Services*, N.Y. TIMES, Jan. 8, 2016, <http://www.nytimes.com/interactive/2015/06/30/business/media/music-streaming-guide.html> (noting that the Spotify and Apple Music libraries includes 30 million tracks); Michael Liedtke, *Gaps in Netflix's Online Library Likely to Persist*, YAHOO NEWS, April 9, 2012, <http://news.yahoo.com/gaps-netflixs-online-library-likely-persist-200620994.html> (noting that the Netflix streaming library includes over 60,000 movie and television titles); Piotr Kowalczyk, *Kindle Unlimited ebook Subscription — 9 Things to Know*, EBOOK FRIENDLY, last modified October 27, 2015, accessed November 18, 2015, <http://ebookfriendly.com/kindle-unlimited-ebook-subscription/> (noting that the Kindle Unlimited collection includes over a million books).

<sup>48</sup> Luis Aguiar and Joel Waldfoegel, *Streaming Reaches Flood Stage: Does Spotify Stimulate or Depress Music Sales?*, EUROPEAN COMMISSION JOINT RESEARCH CENTRE, <https://ec.europa.eu/jrc/sites/default/files/JRC96951.pdf>.

<sup>49</sup> See, e.g., Zach Schonfeld, *What Do Indie Musicians Really Think about Streaming Music?*, NEWSWEEK, July 23, 2015 <http://www.newsweek.com/ten-indie-musicians-weigh-music-streaming-debate-355298> (identifying a number of artists including Talyor Swift, Thom Yorke, and Prince who have criticized Spotify and other streaming services, but noting considerable differences of opinions among independent recording artists).

sales, musicians are seeing checks that are missing several zeroes. In large part, that's 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 \$2 billion Spotify has paid in copyright licenses—70% of its revenue—went to record labels.<sup>50</sup> Under their recording contracts, very little made its way to recording artists.<sup>51</sup>

Perhaps surprisingly, at the same time 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.<sup>52</sup> The same held true in 2015.<sup>53</sup> 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 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, this preference 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

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<sup>50</sup> *Spotify Explained: How Does Spotify Make Money?*, <http://www.spotifyartists.com/spotify-explained/#how-does-spotify-make-money>.

<sup>51</sup> See Tim Ingham, *Major Labels Keep 73% of Spotify Premium Payouts – Report*, MUSIC BUSINESS WORLDWIDE, Feb. 3, 2015, <http://www.musicbusinessworldwide.com/artists-get-7-of-streaming-cash-labels-take-46/> (citing Ernst & Young study that revealed labels kept 73% of payments made by streaming services while songwriters and recording artists collected just 16% and 11% of those payments respectively).

<sup>52</sup> Keith Caufield, *Vinyl Album Sales Hit Historic High in 2014, Again*, BILLBOARD, December 31, 2014, <http://www.billboard.com/articles/columns/chart-beat/6422442/vinyl-album-sales-hit-historic-high-2014>. In absolute terms, the number was 9.2 million units, the largest vinyl tally in decades.

<sup>53</sup> JOSHUA P. FRIEDLANDER, NEWS AND NOTES ON 2015 MID-YEAR RIAA SHIPMENT AND REVENUE STATISTICS (2015), <http://riaa.com/media/238E8AC7-3810-A95C-44DC-B6DEB46A3C6E.pdf>.

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.” What does it mean to Apple and to consumers to “own” a digital movie? If Apple’s terminology draws on a frame established by physical products, that message is inconsistent with the terms for Apple’s digital products. The license maintains that consumers may not “rent, lease, loan, sell, [or] distribute” the movies and music they acquire from iTunes.<sup>54</sup> Likewise, Amazon urges its customers to *Buy Now* for both physical objects and digital files. But Amazon’s terms for digital goods reveal similar restrictions for digital goods that do not encumber their physical counterparts.<sup>55</sup>

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.<sup>56</sup> 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 [competing service] ComiXology, . . . that could be revoked. And God forbid, if ComiXology goes under or their data center has an earthquake all their hard drives go away—then you’ve got nothing.”<sup>57</sup> Despite making promises of ownership, Image Comic’s terms were in line with other digital retailers that offer a license instead of ownership:

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<sup>54</sup> *Term and Conditions*, <http://www.apple.com/legal/internet-services/itunes/us/terms.html>.

<sup>55</sup> For books “[u]nless specifically indicated otherwise, you may not sell, rent, lease, [or] distribute . . . any rights to the Kindle Content.” *Kindle Store Terms of Use*, <http://www.amazon.com/gp/help/customer/display.html?nodeId=201014950>. Amazon’s MP3 store offers similar terms. Although Amazon customers “purchase” music, payment merely “grant[s] you a non-exclusive, non-transferable right to use . . . Music Content . . . only for your personal, non-commercial purposes.” And “you may not redistribute, . . . sell, . . . rent, share, lend, . . . or otherwise transfer or use Purchased Music.” *Amazon Music Terms of Use*, <http://www.amazon.com/gp/help/customer/display.html?nodeId=201380010>.

<sup>56</sup> Laura Hudson, *For the First Time, You Can Actually Own the Digital Comics You Buy*, WIRED, July 2, 2013, <http://www.wired.com/2013/07/drm-free-comics-download-image/> (reporting on the difference between the Image Comics site, which allows consumers to download DRM-free comics to their hard drives, and competing services, which prohibited downloads).

<sup>57</sup> *Id.*

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.

These conflicts between advertising and legal terms aren't 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 a new way to access its content, the Digital Ownership Program. As HeinOnline explains the program, by “purchasing digital ownership,” users can “obtain ownership rights to PDF files” delivered on a hard drive.<sup>58</sup> 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.<sup>59</sup> So a library would not be allowed, for example, to loan or give its hard drive to another institution.<sup>60</sup>

Sophisticated institutional consumers like libraries will often be capable of reconciling marketing terms like “buy” and “own” with the more complex picture

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<sup>58</sup> *Terms and Conditions*, <https://imagecomics.com/about/terms-and-conditions>.

<sup>59</sup> Those terms provide in relevant part: “Customer 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 (Jan. 13, 2015, 4:18PM EST) (on file with author).

<sup>60</sup> Random House used similar language when its Vice President of Library and Academic 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*, LIBRARY JOURNAL INSIDER, October 18, 2012, <http://lj.libraryjournal.com/2012/10/opinion/random-house-says-libraries-own-their-ebooks-lj-insider>. 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. Peter Brantley, *Random House Did Not Mean Own, Exactly*, PUBLISHER’S WEEKLY PWXYZ, October 23, 2012, <http://blogs.publishersweekly.com/blogs/PWxyz/2012/10/23/just-another-word/>.

revealed by license terms.<sup>61</sup> But it remains to be seen whether and to what extent the average consumer is getting what she bargained for.

## 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 (N=1299) of internet users in 2016.<sup>62</sup> The sample was representative of the United States population with respect to sex, age, and income as measured by 2010 census data.<sup>63</sup> In addition, we collected demographic information including race,<sup>64</sup> geographic region,<sup>65</sup> and education

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<sup>61</sup> 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 (9th Cir. 2011); Krause v. Titleserv, Inc., 402 F.3d 119, 123 (2d Cir. 2005).

<sup>62</sup> The survey was administered by Qualtrics. We are aware of the issues 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 these platforms.

<sup>63</sup> Our sample was 51% female and 49% male. We limited respondents to this binary choice to mirror the 2010 census. In terms of age, our panel was 11.3% between the ages of 18-24, 35% from 25-44, 35% from 45-64, and 18% who were 65 or older. This closely models the U.S. Population in 2010. *See* LYNDSEY M. HOWDEN AND JULIE A. MEYER, AGE AND SEX COMPOSITION: 2010, (2011), <https://www.census.gov/prod/cen2010/briefs/c2010br-03.pdf>

<sup>64</sup> In terms of race, our sample was roughly representative of the U.S. population. Whites were slightly overrepresented at 80% of our sample. Black and Latino respondents were underrepresented at 9% and 6% of our sample, respectively. Asian and Native American respondents were 4.2% and 0.6% of our sample, roughly in line with national figures. *See* KAREN R. HUMES, NICHOLAS A. JONES, AND ROBERTO R. RAMIREZ, OVERVIEW OF RACE AND HISPANIC ORIGIN: 2010 (2011), <http://www.census.gov/prod/cen2010/briefs/c2010br-02.pdf>. However, we saw no significant correlation between race and survey responses.

<sup>65</sup> Regionally, our sample included a representative number of Southerners and Midwesterners. But New Englanders were overrepresented—roughly 27% in our sample and 18% nationally—while Westerners were somewhat underrepresented—15% in our sample and 23% nationally. *See* PAUL MACKUN AND STEVEN WILSON, POPULATION DISTRIBUTION AND CHANGE: 2000 TO 2010 (2011), <https://www.census.gov/prod/cen2010/briefs/c2010br-01.pdf>. However, we saw no

level.<sup>66</sup> 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.<sup>67</sup>

In addition to demographic quotas, we asked a series of screening questions to limit respondents to those who were in the market for digital books, music, or movies. Respondents were randomly asked whether they had paid for each form of digital media in the past 12 months or whether they planned to shop for them in the next 12 months. An affirmative response to any of those three questions placed the respondent in one of three corresponding media groups: books, music, or movies. Respondents who answered in the negative to all three questions were disqualified from the survey. The size of each of those media groups was capped to yield equally sized groups of 433 respondents for 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 current best sellers and attempted to offer a diverse cross section of genres.<sup>68</sup> This process allowed us to more closely replicate marketplace conditions and increase respondent engagement.

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significant correlation between region and survey responses.

<sup>66</sup> We asked respondents 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 (JD, MD), 1%. Those results are roughly in line with 2009 data. See Camille L. Ryan and Julie Siebens, Educational Attainment in the United States: 2009 (2012), <https://www.census.gov/prod/2012pubs/p20-566.pdf> (reporting educational attainment data for adults over the age of 25).

<sup>67</sup> Most of 1026 incomplete responses were excluded for failing to meet our demographic criteria.

<sup>68</sup> 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, they included: *Kingsman: The Secret Service*, *The Imitation Game*, *Pitch Perfect*, and *Guardians of the Galaxy*.

## A. The MediaShop Site

To test how respondents react to the *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, and a shopping cart, a product image, a product description, user ratings, price, 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.

**MEDIA SHOP** Books

Shop by Department [Your company.com](#) [Today's Deals](#) [Gift Cards](#) [Gift Cards](#) [Sell](#) [Help](#) Hello, Sign in [Your Account](#) [Wish List](#)

**THE MARTIAN**  
ANDY WEIR

A NOVEL

**The Martian: A Novel** eBook Edition  
by **Andy Weir**

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\$5.99

Six days ago, astronaut Mark Watney became one of the first people to walk on Mars. Now, he's sure he'll be the first person to die there.

After a dust storm nearly kills him and forces his crew to evacuate while thinking him dead, Mark finds himself stranded and completely alone with no way to even signal Earth that he's alive—and even if he could get word out, his supplies would be gone long before a rescue could arrive.

Chances are, though, he won't have time to starve to death. The damaged machinery, unforgiving environment, or plain-old "human error" are much more likely to kill him first.

But Mark isn't ready to give up yet. Drawing on his ingenuity, his engineering skills—and a relentless, dogged refusal to quit—he steadfastly confronts one seemingly insurmountable obstacle after the next. Will his resourcefulness be enough to overcome the impossible odds against him?

By placing your order, you agree to our [Terms of Use](#).

<p><b>Get to Know Us</b></p> <ul style="list-style-type: none"> <li>Careers</li> <li>Investor Relations</li> <li>Press Releases</li> <li>MediaShop and Our Planet</li> <li>MediaShop in the Community</li> <li>MediaShop Devices</li> </ul>	<p><b>Make Money with Us</b></p> <ul style="list-style-type: none"> <li>Sell on MediaShop</li> <li>Sell Your Services on MediaShop</li> <li>Sell on MediaShop Business</li> <li>Sell Your Apps on MediaShop</li> <li>Become an Affiliate</li> <li>Advertise Your Products</li> <li>Self-Publish with Us</li> <li>Become an MediaShop Vendor</li> <li><a href="#">See all</a></li> </ul>	<p><b>MediaShop Payment Products</b></p> <ul style="list-style-type: none"> <li>MediaShop.com Rewards Visa Card</li> <li>MediaShop.com Store Card</li> <li>MediaShop.com Corporate Credit Line</li> <li>Shop with Points</li> <li>Credit Card Marketplace</li> <li>MediaShop Currency Converter</li> </ul>	<p><b>Let Us Help You</b></p> <ul style="list-style-type: none"> <li>Your Account</li> <li>Your Orders</li> <li>Shipping Rates &amp; Policies</li> <li>MediaShop Prime</li> <li>Returns &amp; Replacements</li> <li>Manage Your Content and Devices</li> <li>Help</li> </ul>
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Figure 1: Respondents were presented with a range of products to choose from. This image depicts an ebook paired with the Buy Now button.

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 uses they could and could not make of the digital media good (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 (n=329). A roughly equal number of respondents was presented with each of these four product page variations.

**Buy Now \$5.99**

*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.*

**License Now \$5.99**

*Figure 3: A quarter of respondents were presented with a License Now button paired with a digital good.*

**\$5.99**



**YOU MAY:**

- Download this ebook to MediaShop approved devices
- Read this ebook on MediaShop approved devices
- Keep this ebook, subject to the MediaShop Terms of Use

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**YOU MAY NOT:**

- Resell this ebook
- Lend this ebook
- Give away or otherwise transfer this ebook
- Read this ebook on unapproved devices

*Figure 4: A quarter of respondents were presented with this short notice concerning rights in digital goods.*

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 their use and transfer. Of the 970 respondents who viewed those product pages, a total of 14 clicked on the Terms of Use link, a rate of 1.4%.<sup>69</sup>

## B. Assessing Consumer Understanding of Rights

After they viewed the product page, we asked respondents a series of questions concerning their beliefs about the rights they acquired after paying for the media good. 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; and 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.”<sup>70</sup> Most of these questions were designed 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.<sup>71</sup> We began by asking respondents to state their preference for media goods on the basis of these behaviors

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<sup>69</sup> The language of the MediaShop Terms of Use was based on Amazon’s Kindle Store terms.

<sup>70</sup> 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, Sowmya Narayan, and Wendy R. Smith, *Satisficing in Surveys: Initial Evidence*, in *ADVANCES IN SURVEY RESEARCH* 29 (M.T. BRAVERMAN & J.K. SLATER EDS. 1996).

<sup>71</sup> 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 Tobias Gummer and Joss Roßmann, *Explaining Interview Duration in Web Surveys: A Multilevel Approach*, 33 *SOC. SCI. COMP. REV.* 217 (2015) (noting the impact of survey length on participation and completion). The median time of completion in the MediaShop survey was just over 10 minutes.

on a five-point scale. Next, we asked respondents how much more, if at all, 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 a set of follow up questions that inquired whether or not the respondent 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 downloading the work using 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 in physical goods. The survey also strongly suggests 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 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 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.<sup>72</sup> Those who saw the same *Buy Now* button on a digital good apparently

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<sup>72</sup> Respondents’ perceptions of their rights were partly explained by certain demographic and behavioral characteristics. For some rights—to resell, to give away, to leave in a will, and to make copies for others—men were significantly more likely to answer in the affirmative than women. In terms of age, respondents

carried over the assumptions from physical-world 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.

### 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.

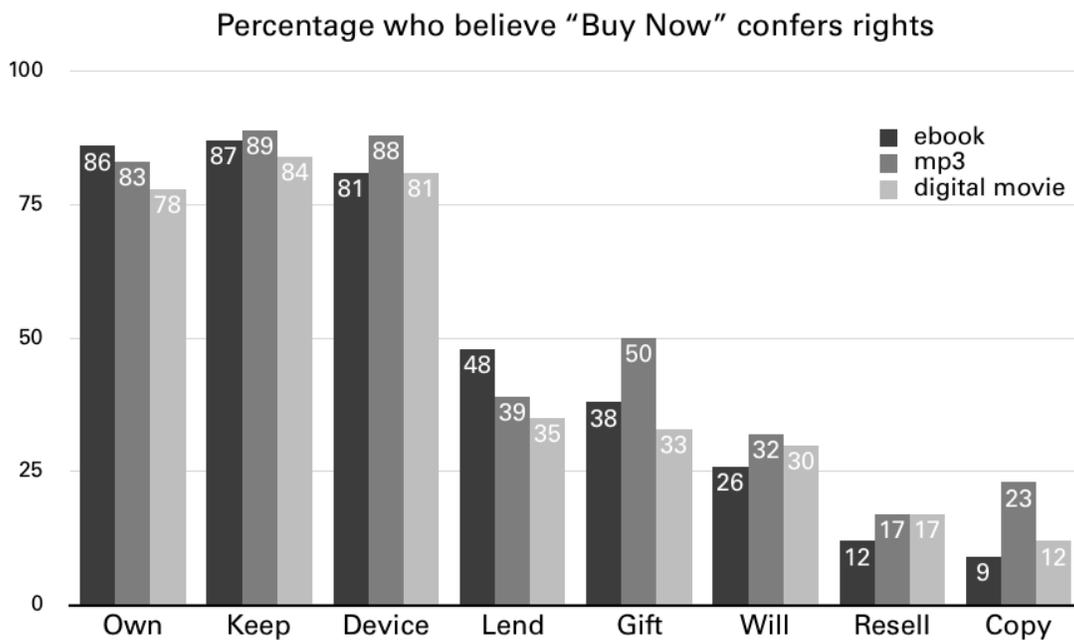


Figure 5: Percentage of respondents who believe that “buy now” confers rights in digital goods ( $n=333$ ).

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

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between 25-34 were considerably more likely—and respondents over the age of 65 considerably less likely—to believe they had the right to lend, resell, give way, 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.

contested in the digital economy. In that sense, a claim about ownership is not falsifiable; it more like a gauge of a consumer's overall impression of a transaction.<sup>73</sup> 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.<sup>74</sup>

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.<sup>75</sup> That's typically the case with physical media. You can keep your hardcover books or vinyl records forever, barring theft, fire, or some other disaster.

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.<sup>76</sup> For instance, digital retailers might go out of business or decide to shut down their media servers.<sup>77</sup> They might shift to a subscription model, converting purchases to rentals.<sup>78</sup> They might wipe clean customer accounts or devices for violating their terms of service.<sup>79</sup> Or they might remotely delete

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<sup>73</sup> 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.

<sup>74</sup> See *supra* note 26.

<sup>75</sup> Honoré referred to both "the right of possession" and "the absence of term." See *supra* note 4.

<sup>76</sup> Shoshana Zuboff, *Big Other: Surveillance Capitalism and the Prospects of an Information Civilization*, 30 J. INFO TECH. 75 (2015).

<sup>77</sup> See *supra* note 9.

<sup>78</sup> Nate Hoffelder, *Scholastic to Close Storia eBookstore; Customers Could Lose Access to Their eBook Purchases*, THE 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](http://the-digital-reader.com/2014/07/27/scholastic-close-storia-ebookstore-customers-will-lose-access-ebook-purchases/#.U_ffdvSE-a5) (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").

<sup>79</sup> 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 (UK), October 22,

purchases as Amazon and Apple have done.<sup>80</sup> Or they might decide, as Barnes and Noble recently did, to deny customers access to their purchased ebooks when their credit cards expire.<sup>81</sup> Moreover, risk-of-loss and termination provisions common in license agreements insulate retailers from any legal liability for these behaviors.<sup>82</sup>

An almost equally large majority of respondents believed that when they clicked *Buy Now*, they could use the digital media on their 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, even including the latest Nook from 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 *de facto* standard mp3 format paints a similar picture.

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2012, <http://www.theguardian.com/money/2012/oct/22/amazon-wipes-customers-kindle-deletes-account>. Nygaard's account, which was later reinstated, likely violated Amazon's terms because the Kindle Store had not yet launched in Norway.

<sup>80</sup> See *supra* notes 6 and 39.

<sup>81</sup> Tim Cushing, *Barnes & Noble Decides That Purchased Ebooks Are Only Yours Until Your Credit Card Expires*, TECHDIRT, November 27, 2012, <https://www.techdirt.com/articles/20121126/18084721154/barnes-noble-decides-that-purchased-ebooks-are-only-yours-until-your-credit-card-expires.shtml>.

<sup>82</sup> 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 Kindle Store and the Kindle Content, and Amazon may immediately revoke your access to the Kindle Store and the Kindle Content 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*,  
<http://www.amazon.com/gp/help/customer/display.html?nodeId=201014950>.

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. It sells Kindle e-readers and tablets at break-even prices and may actually lose money on each sale.<sup>83</sup> But it hopes to profit in the long run by driving traffic to its site. 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 and iPad are as high as 69%, leading to quarterly profits of over \$10 billion.<sup>84</sup> 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 didn’t read the license terms.

Lending is a widely recognized right of property owners.<sup>85</sup> Book lending is a centuries-old American cultural practice.<sup>86</sup> And people have been lending music and movies as long as they have been available for sale. The same is true for gift-giving. More than 40% of survey respondents believed that those rights persisted when they *Buy Now* in the digital marketplace. However, nearly every license for

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<sup>83</sup> Kelly Clay, “Amazon Confirms it Makes No Profit on Kindles,” *Forbes*, October 12, 2012, <http://www.forbes.com/sites/kellyclay/2012/10/12/amazon-confirms-it-makes-no-profit-on-kindles/>; Steve Kovach, “Amazon Will Lose Millions Selling the Kindle Fire, But That’s the Point,” *Business Insider*, September 30, 2011, <http://www.businessinsider.com/kindle-fire-profit-margins-2011-9>.

<sup>84</sup> Oscar Williams-Grut, “Apple’s iPhone: The Most Profitable Product in History,” *Independent (UK)*, January 29, 2015, <http://www.independent.co.uk/news/business/analysis-and-features/apples-iphone-the-most-profitable-product-in-history-10009741.html>; Daisuke Wakabayashi, “Apple’s Market Cap Loses \$60 Billion After iPhone Sales Disappoint,” *Wall Street Journal*, July 22, 2015, <http://www.wsj.com/articles/apple-earnings-boosted-by-iphone-sales-1437510647>.

<sup>85</sup> See O’Reilly, *supra* note 1; Honoré, *supra* note 4 (noting that “the right to the capital” includes “the power to alienate the thing”).

<sup>86</sup> Benjamin Franklin, for example, founded the Library Company of Philadelphia in 1731. See EDWIN WOLF, *AT THE INSTANCE OF BENJAMIN FRANKLIN: A BRIEF HISTORY OF THE LIBRARY COMPANY OF PHILADELPHIA* (1976), <http://www.librarycompany.org/about/Instance.pdf>.

digital goods forbid 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.

Some retailers have introduced programs that mimic certain aspects of traditional lending in response to consumer demand. The Kindle and Nook stores both offer restricted lending for some books.<sup>87</sup> If publishers opt in, consumers can lend an ebook, one time only, for 14 days. Apple’s Family Sharing program allows digital media purchases to be shared among up to six accounts, provided they all share the same credit card information.<sup>88</sup> 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.

Nearly 30% of respondents believed they could bequest their ebooks, mp3s, and digital movies in their wills.<sup>89</sup> Consumers are accustomed to inheriting physical media. 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. 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, movie, and books, not to mention email, financial records, and personal photos. Without the ability to copy those files to other storage media, efforts to effectuate wills could be frustrated. Both public and private efforts to address these sorts of concerns are underway, but have yet to directly confront license restrictions applied to digital media.<sup>90</sup>

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<sup>87</sup> Jeff Bercovici, *A Pretty Good Solution To The Problem Of E-Book Lending (Or At Least I Think So)*, FORBES, Aug. 20, 2012, <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>.

<sup>88</sup> See *Family Sharing*, <http://www.apple.com/icloud/family-sharing>.

<sup>89</sup> A full 50% of respondents who saw the *Buy Now* button for digital goods chose “I don’t know” when asked this question.

<sup>90</sup> 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, 79 Del. Laws 416 §§ 5004-05 (2014), [http://www.legis.delaware.gov/LIS/lis147.nsf/vwLegislation/HB%20345/\\$file/legis](http://www.legis.delaware.gov/LIS/lis147.nsf/vwLegislation/HB%20345/$file/legis).

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.<sup>91</sup> Used record stores have been around for decades, and online resale markets like eBay enables 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.

Finally, 14 % of respondents believed that they were entitled to make copies of the digital good for other people. Although some exceptions apply, this is behavior that copyright law generally prohibits.<sup>92</sup> Tellingly, fewer respondents answered yes to this question than any other. Nonetheless, a considerable percentage of respondents, 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.

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.

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html); Nat'l Conf. of Comm'rs on Unif. State Laws, Uniform Fiduciary Access to Digital Assets Act (2014), [http://www.uniformlaws.org/shared/docs/Fiduciary%20Access%20to%20Digital%20Assets/2014\\_UFADAA\\_Final.pdf](http://www.uniformlaws.org/shared/docs/Fiduciary%20Access%20to%20Digital%20Assets/2014_UFADAA_Final.pdf)). 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. Geoffrey A. Fowler, *Facebook Heir? Time to Choose Who Manages Your Account When You Die*, WALL STREET JOURNAL, February 12, 2015, <http://www.wsj.com/articles/facebook-heir-time-to-choose-who-manages-your-account-when-you-die-1423738802>.

<sup>91</sup> 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.”).

<sup>92</sup> See 17 U.S.C. § 106 (providing that “the owner of copyright under this title has the exclusive rights ... to reproduce the copyrighted work in copies or phonorecords” among others). This right is not absolute. See *id.* §§107-122. But as a general rule unauthorized reproduction is prohibited.

## 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 is the reduction in the number of respondents who believed they “owned” digital goods under the License Now scenario. For both ebooks and mp3s, we observed a significant decrease—from 86% to 50%, and from 83% to 62%, respectively.<sup>93</sup> The decline for digital movies was notable—78% to 69%—but not statistically significant.

We also saw significant shifts for 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.

A similar effect was visible when it came to the question of keeping 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 media good indefinitely decreased by 9%, while “I don’t know” responses increased by 13%.

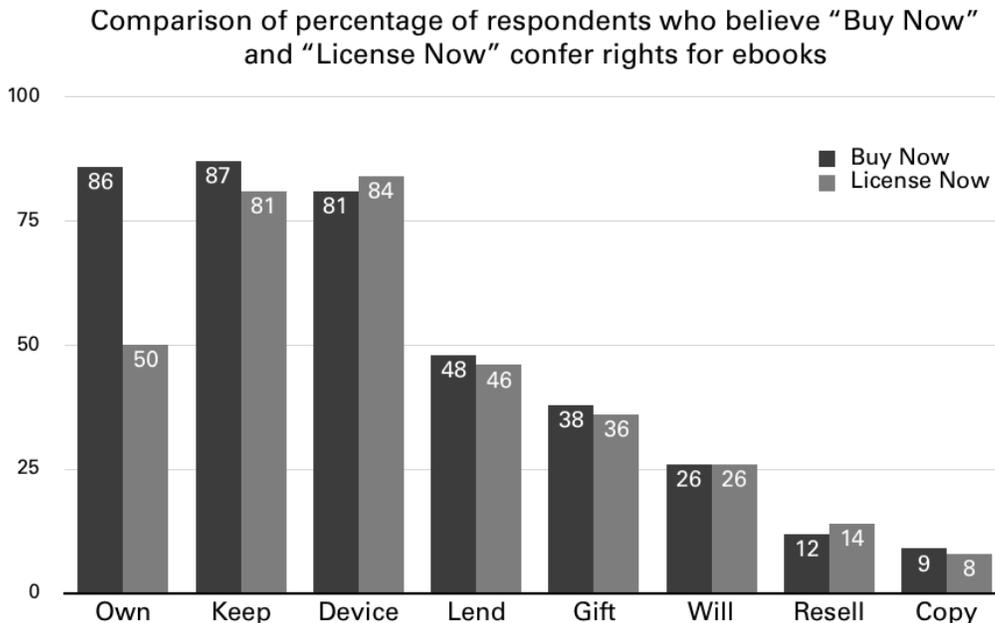


Figure 6: The License Now button reduced the number of affirmative responses to the ownership question, but had little other effect.

<sup>93</sup> We define significance as  $p < 0.05$  using Pearson’s chi-squared test.

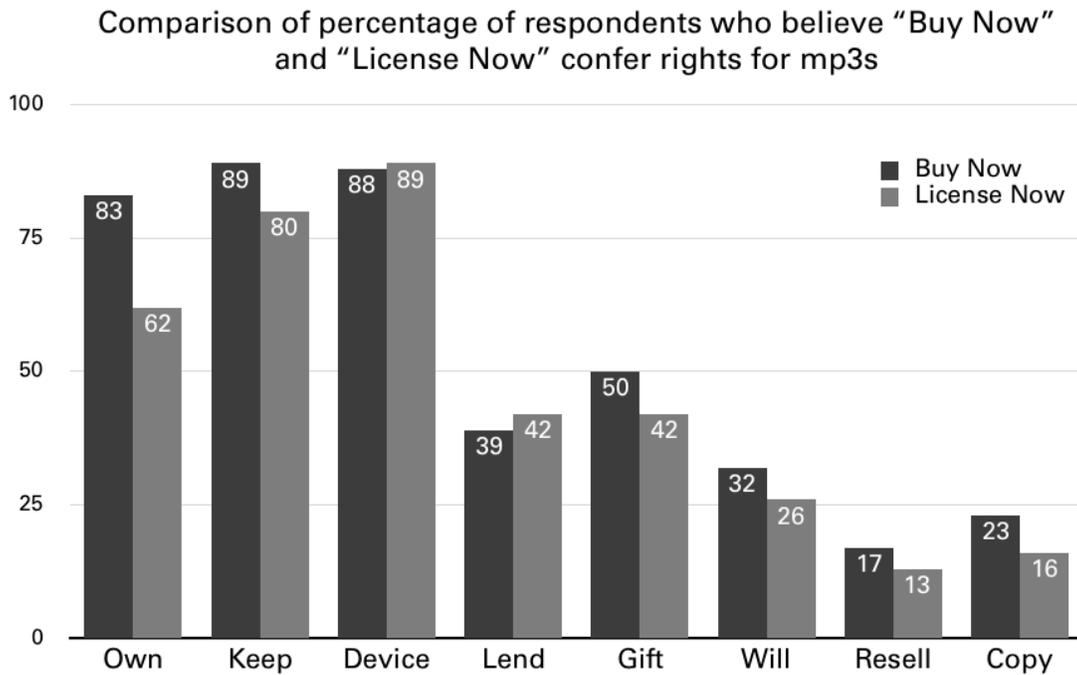


Figure 7: The License Now button reduced the number of affirmative responses to the ownership question, but had little other effect.

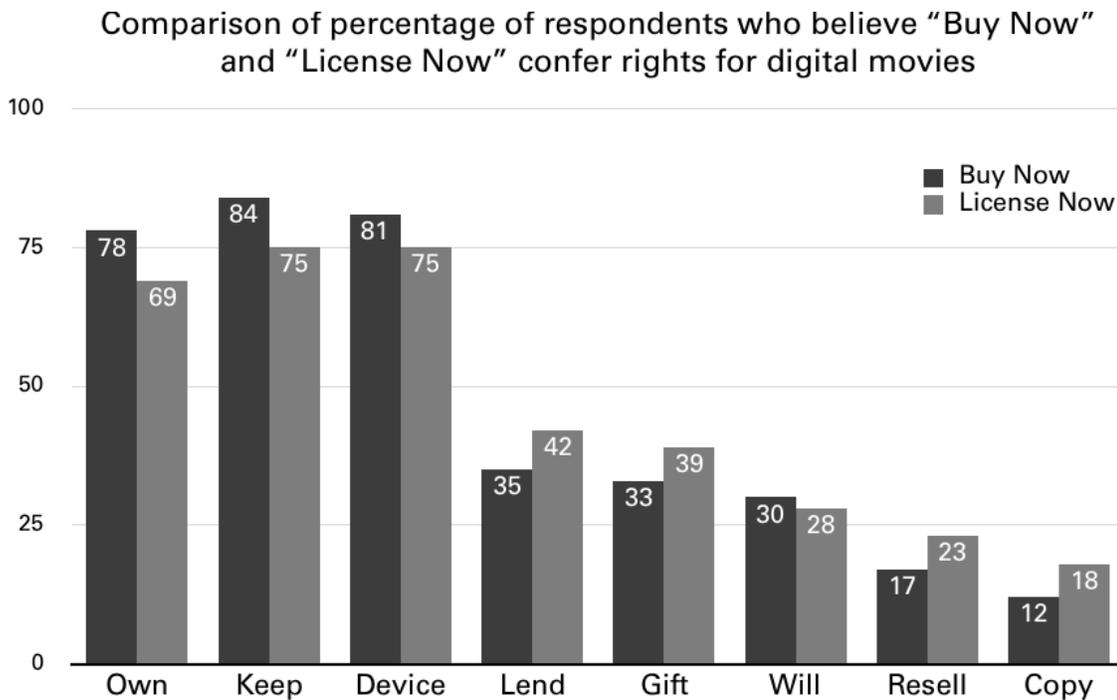


Figure 8: For digital movies, exposure to the License Now buttons had a mixed effect on respondents.

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 15% drop in “No” responses and a 10% increase in “I don’t know” responses.

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 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-pointed list of the behaviors consumers can engage in and those they cannot. 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.<sup>94</sup> From online privacy policies,<sup>95</sup> HIPAA disclosures,<sup>96</sup> and credit solicitations,<sup>97</sup> layered notice has been encouraged

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<sup>94</sup> See Nathaniel Good, Jens Grossklags, David Thaw, Aaron Perzanowski, Deirdre Mulligan, and 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).

<sup>95</sup> See Joel R. Reidenberg, Travis Breaux, Lorrie Faith Cranor, Brian French, Amanda et. al., *Disagreeable Privacy Policies: Mismatches Between Meaning and Users' Understanding*, 30 BERKELEY TECH. L.J. 39, 48 (2015); Lorrie Faith Cranor, *Necessary but Not Sufficient: Standardized Mechanisms for Privacy Notice and Choice*, 10 J. TELECOMM. & HIGH TECH. L. 273, 293 (2012).

<sup>96</sup> 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).

<sup>97</sup> Prescreen Opt-Out Disclosure, 70 FR 5022-01; see 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

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.<sup>98</sup> The notice model, they argue, makes assumptions about human behavior and thinking that simply are not true in practice. The duo also argued that notice leads to lazy policymaking that avoids tough questions by putting more and more notices before consumers that go unread.<sup>99</sup>

In a draft article, Ben-Shahar and Adam Chilton illustrate how different privacy notices of varying quality fail to change consumer behavior or knowledge of privacy practices.<sup>100</sup> In addition, 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 performed similarly.<sup>101</sup> 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.<sup>102</sup> Yet some researchers have been optimistic that notices based on nutrition labels—standardized, prominent, and clearly written—could inform

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INFO. SOC'Y 715, 720 (2006).

<sup>98</sup> OMRI BEN-SHAHAR & CARL E. SCHNEIDER, *MORE THAN YOU WANTED TO KNOW: THE FAILURE OF MANDATED DISCLOSURE* (2014); See also Margaret Jane Radin, *Boilerplate* (2013).

<sup>99</sup> *Id.*

<sup>100</sup> Omri Ben-Shahar & Adam S. Chilton, '*Best Practices' in the Design of Privacy Disclosures: An Experimental Test* (October 5, 2015), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2670115](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2670115).

<sup>101</sup> Aleecia M. McDonald, Robert W. Reeder, Patrick Gage Kelley, Lorrie Faith Cranor, A Comparative Study of Online Privacy Policies and Formats, *in* PRIVACY ENHANCING TECHNOLOGIES, proceedings of the 9th International Symposium, PETS 2009, Seattle, WA, USA, August 5-7, 2009.

<sup>102</sup> Chris Jay Hoofnagle and Jennifer M. Urban, *Alan Westin's Privacy Homo Economicus*, 49 WAKE FOREST L. REV. 261 (2014). 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 legal protections provide for financial data. Conference on Behavioral Economics and Consumer Policy, April 20, 2007 (Comments of Joel Winston).

consumers of company practice.<sup>103</sup> Others have called for a “warning label” approach.<sup>104</sup> Such an approach was tested by Ben-Shahar and Chilton, and it resulted in an improvement in consumer comprehension of privacy practices.<sup>105</sup> As Richard Craswell has observed, Ben-Shahar’s argument overstates the case against consumer notice and is not in conversation with a well-developed literature that recognizes the variegated purposes and applications of notice regimes.<sup>106</sup> Ben-Shahar and Schneider’s critique is universalist in approach, yet notices in different contexts do serve a useful purpose—consider the important policy and practice contributions that have flowed from security breach notification.<sup>107</sup>

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 can be used “on approved devices,” that limitation is omitted from the short notice for mp3 albums.

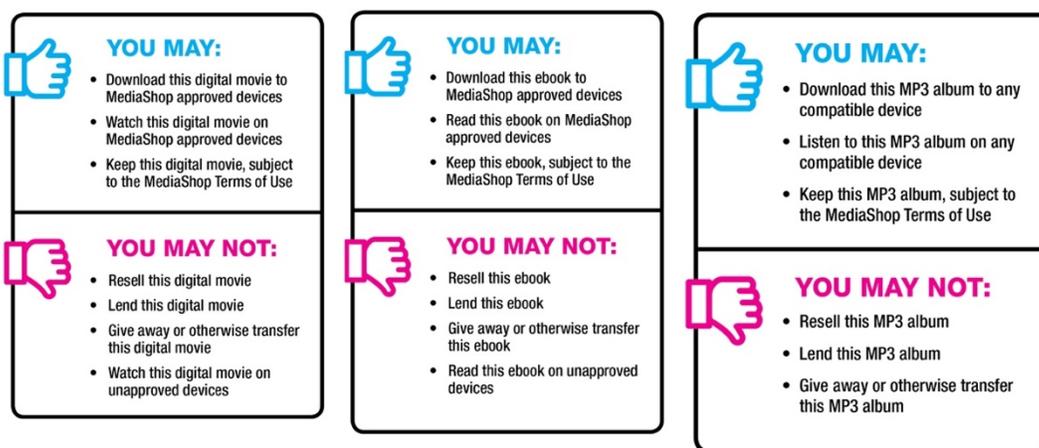


Figure 9: The MediaShop short notice

<sup>103</sup> P.G. Kelley, L.J. Cesca, J. Bresee, and L.F. Cranor, *Standardizing Privacy Notices: An Online Study of the Nutrition Label Approach*, in the proceedings of ACM-CHI CHI 2010.

<sup>104</sup> Ayres & Schwartz, *supra* note 24.

<sup>105</sup> Ben-Shahar & Chilton, *supra* note 100 at 24 (finding a “highly statistically significant” increase in respondent comprehension after viewing a short warning label of surprising terms). Puzzlingly, Ben-Shahar and Chilton conclude that their “results suggest that the simplification of disclosures did not change people’s understanding of them.” *Id.* at 27.

<sup>106</sup> Richard Craswell, *Static Versus Dynamic Disclosures, and How Not to Judge Their Success or Failure*, 88 WASH. L. REV. 333 (June 2013)

<sup>107</sup> See CHRIS JAY HOOFNAGLE, *FEDERAL TRADE COMMISSION PRIVACY LAW AND POLICY* (Cambridge Univ. Press 2016).

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. In both instances, however, it is worth noting that respondents encountered the *License Now* button and the short notice provision for the first time during the MediaShop survey. And 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 interactions, we expect the effects described below to be even more pronounced.

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 statistical 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.<sup>108</sup>

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 just outside of 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% swing from “I don’t know” to “No” compared to the *Buy Now* responses, suggesting an increase in respondent certainty about their rights.

A similar story played out for the right to give digital media away as a gift. We saw a 10% drop in affirmative responses for ebooks and 14% decrease for mp3s, although both results were outside the range of statistical significance. And for digital movies, the affirmative response rate was essentially unchanged, but we observed a significant increase in “No” responses of 12% and a corresponding decrease in “I don’t know” responses of 15%.<sup>109</sup>

Although our short notice could undoubtedly be improved through testing alternative designs, placements, and interactions, it is a remarkably low-cost

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<sup>108</sup> 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, as described in more detail below, tended to answer “Yes” to these questions less frequently.

<sup>109</sup> 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.

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.<sup>110</sup>

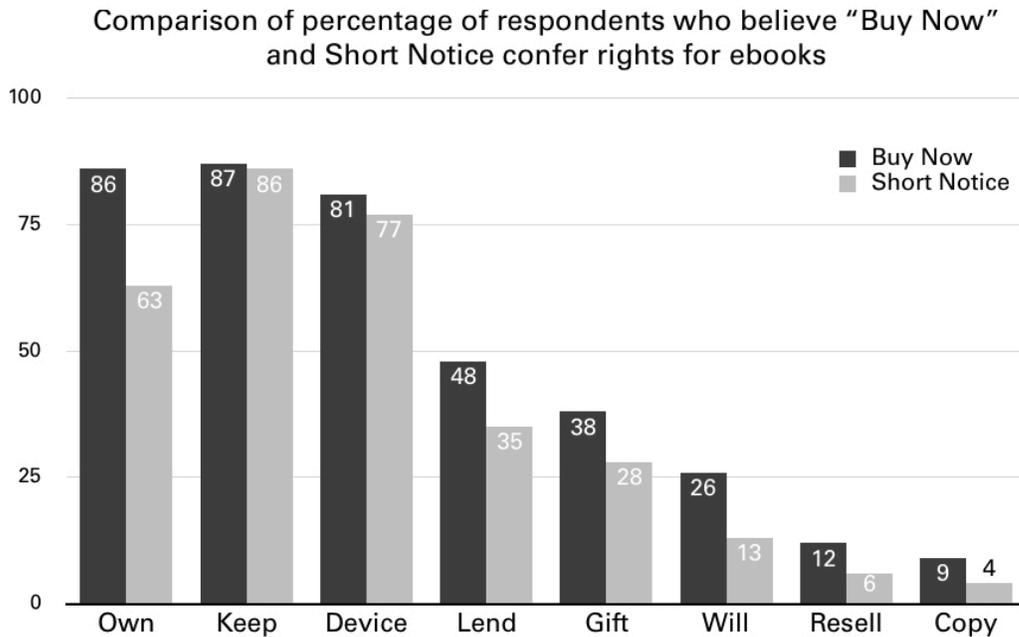


Figure 10: Ebook buyers who see the short notice have a more accurate view of their rights.

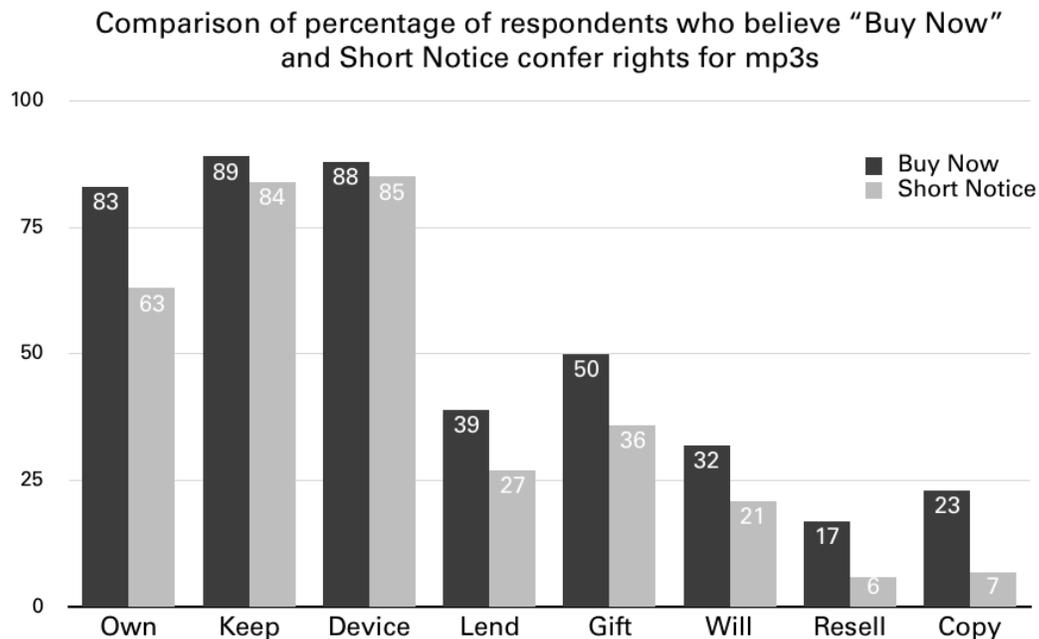


Figure 11: Mp3 buyers who see the short notice have a more accurate view of their rights.

<sup>110</sup> See Richard Craswell, *Interpreting Deceptive Advertising*, 65 B.U.L. REV. 657 (1985) (arguing in favor of a cost-benefit approach to false advertising claims).

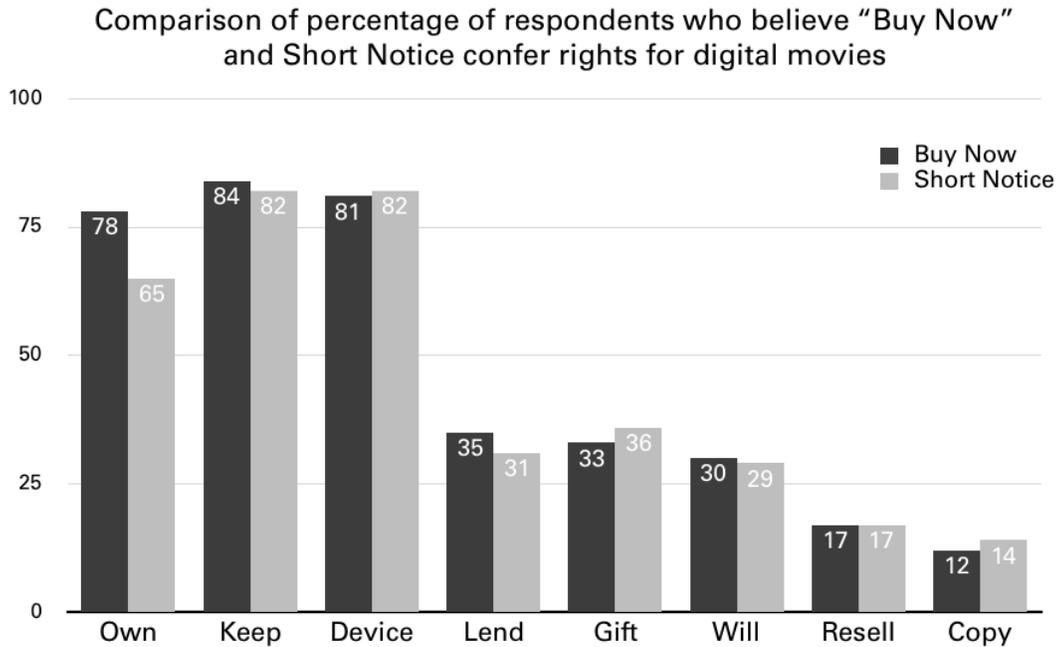


Figure 12: The short notice intervention was less successful in disabusing buyers of digital movies.

#### 4. Buy Now for Tangible Goods

Respondents who saw the *Buy Now* button for a tangible goods—paperback books, CDs, and Blu-ray discs—demonstrated a considerably more accurate understanding of their rights. 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 bequeath their tangible media in their wills, and a remarkable 36% believed that they could not resell their physical purchases.

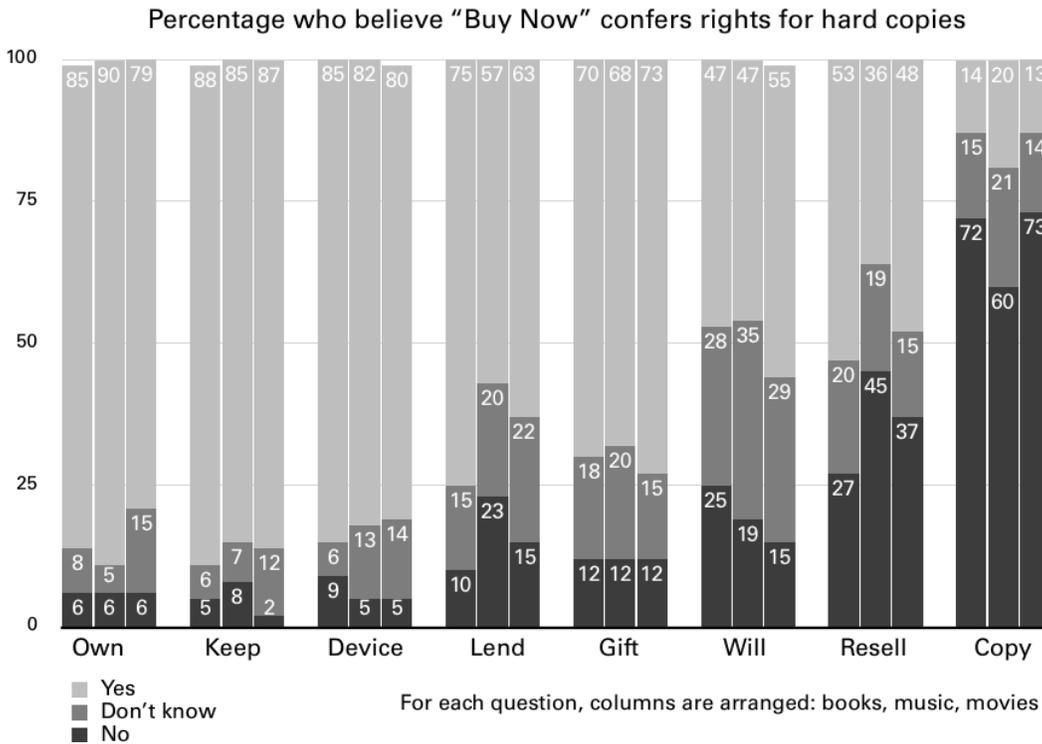


Figure 13: The overwhelming majority of respondents had an accurate view of their rights in physical media. However, some believed that they did not have the right to lend, gift, will, and resell these materials.

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 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 acquire in fact. Since consumers buy the product despite their misperceptions, that may mean 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, incorrectly thinking they are entitled to lend, resell, and otherwise transfer when licenses insist they can't.

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 is pessimistic about certain rights—lending, reselling, and bequeathing. That subset tends to assume they lack those rights, despite the fact that 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.

Rights Score 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

Figure 14: The 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 25<sup>th</sup> percentile of respondents), Medium (3-4, the median score was 3 and mean 3.1), and High (5-7, representing the 75<sup>th</sup> 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 Score; Low scores dropped to 40% and High scores doubled to 23%.

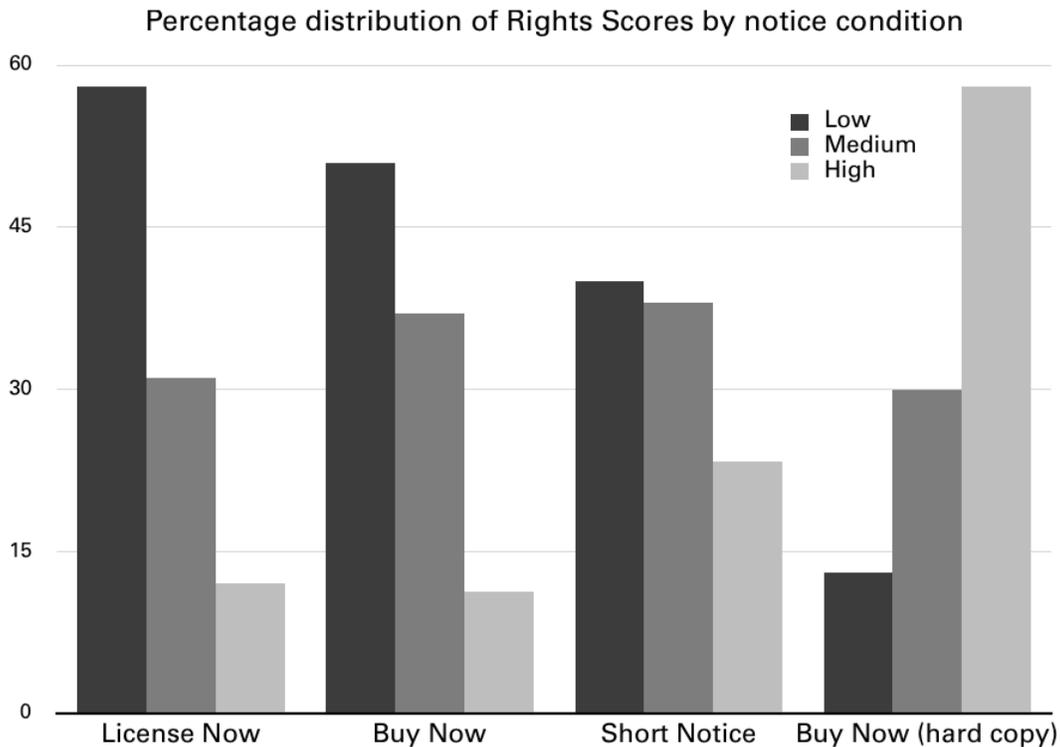


Figure 15: Respondents who purchased physical media had a high level of knowledge of rights, but digital media shoppers had a poorer understanding.

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 3.0 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.

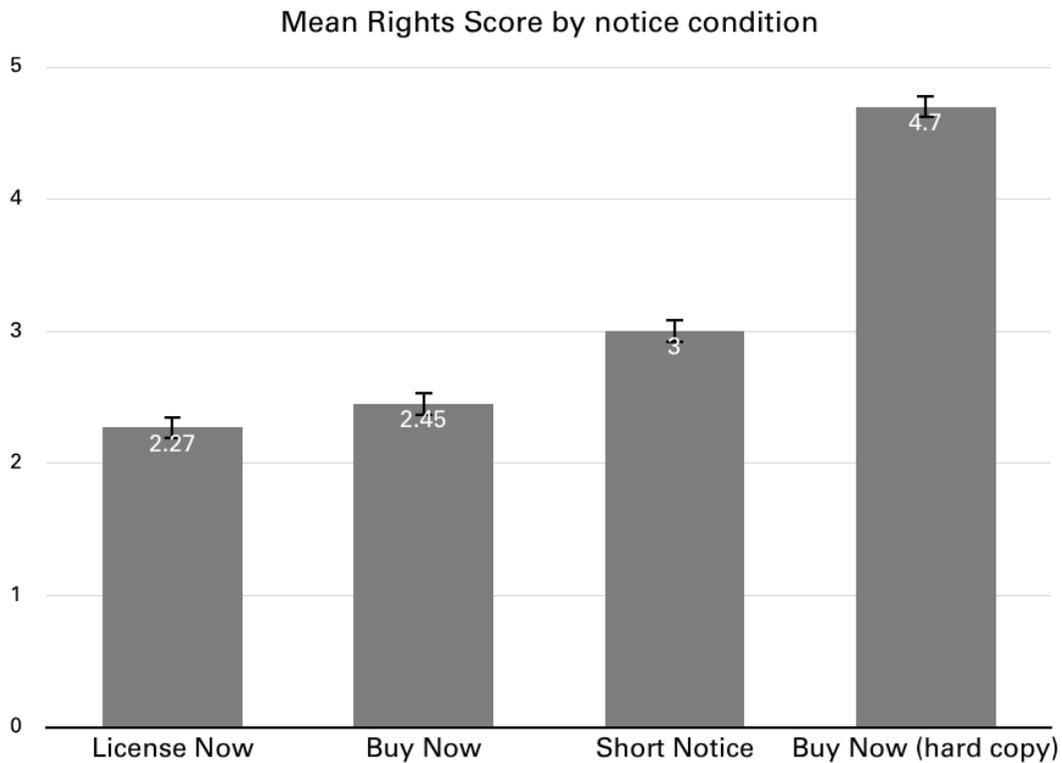


Figure 16: On average, physical media shoppers scored highest, followed by digital media shoppers who viewed the short notice, Buy Now, and License Now conditions.

Ayres & Schwartz have proposed a warning box that “transparently and succinctly alert[s] the reader” of unexpected contract terms as a means of improving consumer knowledge and combatting optimism bias in the context of online agreements.<sup>111</sup> 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 & Schwartz’s prediction.<sup>112</sup>

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

<sup>111</sup> Ayres & Schwartz, *supra* note 24 at 584.

<sup>112</sup> For example, the notice Ayres & Schwartz propose would feature a “government-provided, standardized” design; that notice may include only unexpected terms; those terms “must be placed in order of decreasing likelihood” of optimistic mistakes; and Ayres & Schwartz require separate assent to this notice. *Id.* at 583-84.

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 interest of misled consumers.<sup>113</sup>

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 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.<sup>114</sup> 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.

### 1. Consumer Preferences for Rights

On the whole, respondents expressed a preference for lending, reselling, and using media on their devices of choice. Across media types and notice conditions, 55% reported a moderate or strong preference for media they can lend; 39%

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<sup>113</sup> 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 (1996) (explaining why an informed minority cannot typically correct for imperfect information).

<sup>114</sup> FTC Policy Statement on Deception, James C. Miller to John D. Dingell, 14 October 1983 (“A ‘material’ misrepresentation or practice is one which is likely to affect a consumer’s choice of or conduct regarding a product”).

preferred media they can resell; and 85% preferred media compatible with their device of choice.

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. A respondent who strongly preferred media goods they could not lend, resell or use on their device of choice scored -6; one 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.

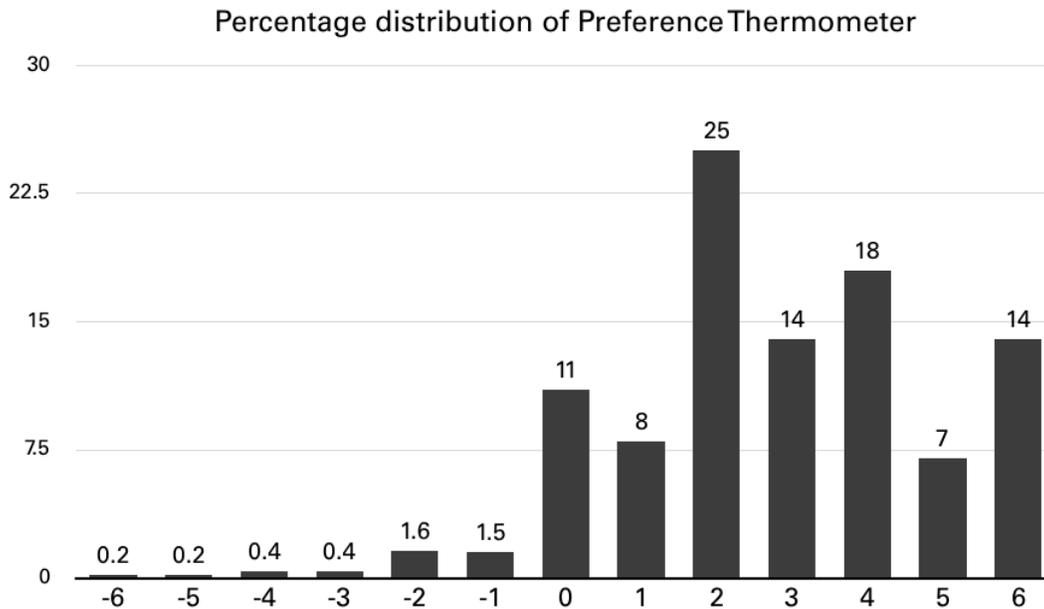


Figure 17: The overwhelming majority of respondents expressed some preference for the rights to lend, resell, or use on their device of choice. Nearly 40% expressed a strong preference.

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 devices 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.<sup>115</sup>

<sup>115</sup> 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.

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.

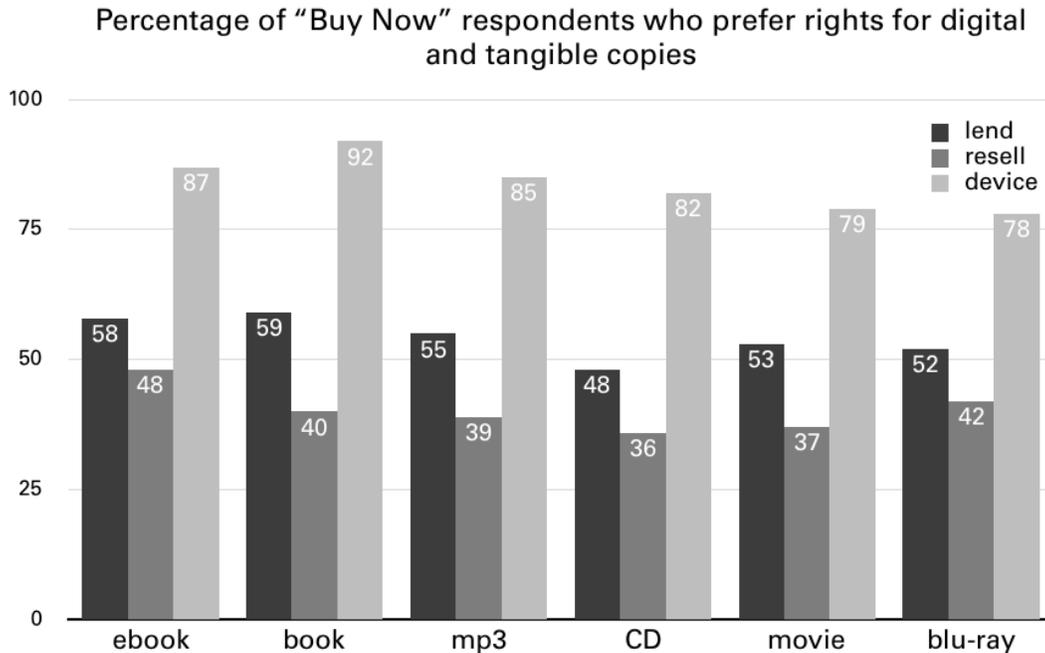


Figure 18: Respondents expressed consistent preferences for lending, reselling, and using their device of choice across media types.

## 2. Willingness to Pay for Rights

Next we asked respondents to assign a dollar value to their preferences. Since respondents were not actually spending money to acquire these rights, we were deliberately conservative in our design of these questions. First, we started with the current prices from Amazon.com and asked how much more respondents would pay for a product that came with a particular right. In doing so, we allowed for the possibility that some respondents may value those rights, but be unwilling to pay anything extra for them on the grounds that those 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.<sup>116</sup> Second, by asking how much more respondents would pay for these rights as opposed to how much

<sup>116</sup> For lending, 48% of those who expressed a strong preference were unwilling to pay more. For resale, that number was 49%, and for device of choice it was 60%.

less they would pay without them, we hoped to avoid the influence of the endowment effect, the well-established tendency to overvalue objects or rights that we own.<sup>117</sup> Finally, to discourage outliers, we capped responses to these questions at \$20.

Most consumers were willing to pay more for at least one of these three rights.<sup>118</sup> The median overall price increase was \$1, but the average was nearly \$11 above the current Amazon prices. For the individual rights, respondents were willing to pay an average of \$3.82 more for the right to lend, \$3.24 for the right to resell, and \$3.24 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. Roughly 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 & File Sharing*

Finally, we were curious if the rights to lend, resell, and use the device of choice influenced consumer decision making about where and how to acquire media. Recent years have seen declining physical and digital sales and a corresponding increase in subscription streaming in the music and movie industries. 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

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<sup>117</sup> See Daniel Kahneman, Jack L. Knetsch, and Richard H. Thaler, *Experimental Tests of the Endowment Effect and the Coase Theorem*, 98 J. POL. ECON. 1325 (1990); Carey K. Morewedge et al., *Bad Riddance or Good Rubbish? Ownership and Not Loss Aversion Causes the Endowment Effect*, 45 J. EXPER. PSYCH. 947 (2009).

<sup>118</sup> 53% of respondents gave a greater-than-zero answer to at least one of the three questions.

could not acquire a copy that allowed lending, rental, or the use of their preferred device. Overall, 52% were more likely to stream if they could not lend.<sup>119</sup>

That rate held steady across the four notice conditions, but was consistently higher for movies. For resale, 43% were more likely to stream. Again, that number held steady across notice conditions, but saw a spike for movies.<sup>120</sup> The ability to use the consumer's device of choice elicited the highest response rate, with 63% stating an increased likelihood of suing a streaming service overall, and 74% of movie shoppers.<sup>121</sup>

We asked a similar set of questions to the 42% of respondents who indicated familiarity with BitTorrent, a protocol for distributed file sharing, and the Pirate Bay, a popular index of copyrighted material available online at no charge. 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 lawful way to obtain the rights to lend, resell, and use those copies on their device of choice. 32% of respondents were more likely to download files without paying in the absence of a right to lend; 31% in the absence of a right to resell; and 40% in the absence of a right to use their device of choice.<sup>122</sup>

Not surprisingly, we observed a correlation between the strength of respondents' preferences for these rights and the likelihood that they would

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<sup>119</sup> For books, 48% were more likely to stream; for music, 47%; and for movies, 61%.

<sup>120</sup> For movies, 54% indicated they were more likely to stream, compared to 40% for books and 36% for music.

<sup>121</sup> For both books and music, 57% reported an increased likelihood of streaming.

<sup>122</sup> In recent months, we've seen some indirect evidence of the phenomenon. When Kanye West released his latest album, *The Life of Pablo*, as an exclusive on the Tidal 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, Twitter, Feb. 15, 2016, <https://twitter.com/kanyewest/status/699376240709402624>. A day later, the album passed half a million downloads by BitTorrent users alone. Nathan Malone, *Kanye West's New Album has Already Gone Pirate 'Gold' with 500,000 Illegal Downloads in a Single Day*, BUSINESS INSIDER, Feb. 16, 2016, <http://www.businessinsider.com/kanye-west-s-album-went-gold-with-500000-downloads-in-just-24-hours-if-were-talking-about-illegal-2016-2>. West soon retreated from his emphatic position, but the album has yet to see a physical release. Peter Helman, *Kanye West's Updated The Life of Pablo Is Now on Apple Music and Spotify*, STEREOGUM, March 30, 2016, <http://www.stereogum.com/1868554/kanye-west-s-updated-the-life-of-pablo-will-reportedly-be-on-apple-music-and-spotify-this-friday/news>.

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 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 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 their purchasing decisions. In the next Part, 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 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 deception in this space costs consumers billions of dollars a year. Apple's revenue in fiscal year 2015 totaled more than \$233 billion.<sup>123</sup> 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.<sup>124</sup> Amazon brought in \$ 107 billion in revenue in 2015,<sup>125</sup> an estimated \$7.9 billion of

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<sup>123</sup> *Apple's Global Revenue From 1st Quarter 2005 to 2nd Quarter 2016 (In Billion U.S. Dollars)*, STATISTA, <http://www.statista.com/statistics/263426/apples-global-revenue-since-1st-quarter-2005>.

<sup>124</sup> *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>.

<sup>125</sup> Amazon.com Announces Fourth Quarter Sales Up 22% to \$35.7 Billion, Jan. 28, 2016, <http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9NjA3OTE1fENoaWxkSUQ9MzIxMDI4fFR5cGU9MQ==&t=1>.

which can be traced to digital content.<sup>126</sup> 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 Part, we outline those legal theories, their application to the *Buy Now* button, and their limitations.<sup>127</sup> Ultimately, we conclude that although private causes of action offer consumers a promising 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 the MediaShop 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.”<sup>128</sup> In addition, many states have both common law and statutory protections against false advertising. The result is a web 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

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<sup>126</sup> Mark Hoelzel & Emily Adler, *The Kindle Fire Is Giving A Big Boost To Amazon's Revenues From Digital Media*, Business Insider, Feb. 26, 2014, <http://www.businessinsider.com/a-look-at-amazons-kindle-ecosystem-4-2014-2>.

<sup>127</sup> 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 yet been brought cases in Germany and France have challenged restrictions on consumers’ ability to resell digital video games on contract grounds. See Jeffrey Maulef, *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>; 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>.

<sup>128</sup> For a high-level summary of these laws, see CAROLYN L. CARTER, NATIONAL CONSUMER LAW CENTER, A 50-STATE REPORT ON UNFAIR AND DECEPTIVE ACTS AND PRACTICES STATUTES (February 2009), [https://www.nclc.org/images/pdf/car\\_sales/UDAP\\_Report\\_Feb09.pdf](https://www.nclc.org/images/pdf/car_sales/UDAP_Report_Feb09.pdf).

or misleading advertising.”<sup>129</sup> 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.”<sup>130</sup> And its Consumer Legal Remedies Act identifies a list of twenty-seven “unfair methods of competition and unfair or deceptive acts or practices” including “representing that a transaction confers or involves rights, remedies, or obligations which it does not have or involve.”<sup>131</sup>

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 for both of those conclusions. 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. Not all major retailers rely on arbitration clauses. Notably, Apple does not include such terms in its iTunes agreement.<sup>132</sup> Amazon, on the other hand, includes the following language in its terms:

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 action....<sup>133</sup>

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<sup>129</sup> Cal. Bus. & Prof. Code § 17200.

<sup>130</sup> Cal. Bus. & Prof. Code § 17500.

<sup>131</sup> Cal. Civ. Code § 1770.

<sup>132</sup> That's true in the United States. In other parts of the world, like Egypt, it does. See *Terms and Conditions*, <http://www.apple.com/legal/internet-services/itunes/eg/terms-en.html> (providing that “any dispute ... shall be finally resolved by binding arbitration pursuant to the rules and under the auspices of the International Chamber of Commerce...”).

<sup>133</sup> *Conditions of Use*, <https://www.amazon.com/gp/help/customer/display.html/?nodeId=508088>.

California courts pushed back against sweeping arbitration clauses in consumer contracts by deeming them unconscionable.<sup>134</sup> But 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.<sup>135</sup> And just last year, the Court held that lower courts cannot invalidate a class arbitration on the basis of costs that exceed the plaintiff's likely recovery.<sup>136</sup> Those five-justice majority opinions—both authored by Justice Scalia—prompted vigorous dissents and may well be revisited in a future term.

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.”<sup>137</sup> So arguments rooted in fraud, duress, or unconscionability unrelated to the arbitration provision are still viable routes for consumer plaintiffs to bypass arbitration. But one recent false advertising claim brought against Amazon was removed from federal court by virtue of the Amazon arbitration provision.<sup>138</sup> Perhaps more promisingly, arbitration clauses are ineffective when no agreement has been formed. Two recent cases—one from the California Court of Appeal<sup>139</sup> and another from the Seventh Circuit<sup>140</sup>—illustrate the growing sensitivity of courts to the implications of automatic contact formation coupled with arbitration clauses that deny consumers effective legal redress. In both cases, the courts held that where an arbitration clause is “buried”<sup>141</sup> 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”<sup>142</sup> that the consumer is agreeing to an arbitration agreement, those terms are “not sufficiently conspicuous”<sup>143</sup> to form the basis of an enforceable agreement.

Even if consumers can avoid arbitration, because of the small recovery for any individual plaintiff, *Buy Now* false advertising cases are probably viable only to

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<sup>134</sup> See *Discover Bank v. Superior Court*, 36 Cal.4th 148 (Cal. 2005).

<sup>135</sup> *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 343, 131 S. Ct. 1740, 1748, 179 L. Ed. 2d 742 (2011).

<sup>136</sup> *Am. Exp. Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309, 186 L. Ed. 2d 417 (2013).

<sup>137</sup> 9 U.S.C. § 2.

<sup>138</sup> *Fagerstrom v. Amazon.com, Inc.*, No. 15-CV-96-BAS-DHB, 2015 WL 6393948 (S.D. Cal. Oct. 21, 2015).

<sup>139</sup> *Long v. Provide Commerce, Inc.*, 245 Cal. App. 4th 855 (2016).

<sup>140</sup> *Sgouros v. TransUnion Corp.*, No. 15-1371, 2016 WL 1169411 (7th Cir. Mar. 25, 2016).

<sup>141</sup> *Id.* at \*2.

<sup>142</sup> *Id.* at \*5.

<sup>143</sup> 245 Cal. App. 4th at 863.

the extent they can leverage the class action mechanism.<sup>144</sup> For a class to be certified, a court must be convinced that a number requirements have been met. The class must be “so numerous that joinder of all members is impracticable.”<sup>145</sup> With millions of potential class members, this requirement is easily satisfied. Next, there must be “questions of law or fact common to the class.”<sup>146</sup> Typically, this requires only a single common significant question of fact or law. Since the impact of the same *Buy Now* button—language all consumers encountered—is at issue for each class member, the commonality requirement will be satisfied.<sup>147</sup> More problematic potentially 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 states, it may be difficult to certify a national class in a *Buy Now* case.<sup>148</sup> Some state statutes include scienter requirements; others do not. Some states evaluate materiality from the perspective of a reasonable consumer; others require individual determinations. Some states require a showing of reliance; others do not. Available remedies also vary between states.

Although there are considerable hurdles facing private plaintiffs, there is good reason to suspect state-wide class actions could succeed, particularly in the absence of an arbitration clause. But even if plaintiffs do 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 and Federal Trade Commission Acts. Neither provides remedies for individual consumers, but the FTC Act may nonetheless provide policy tools to address misleading in digital sales.

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<sup>144</sup> See Fed. R. Civ. P. 23.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> See *Cabral v. Supple LLC*, 608 Fed.Appx. 482 (9th Cir. 2015) (vacating class certification on the grounds that not all class members saw the allegedly false advertisement).

<sup>148</sup> See *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 591 (9th Cir. 2012) (refusing to certify national false advertising class).

### 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 representation of fact ... in commercial advertising or promotion [that] misrepresents the nature, characteristics, qualities, or geographic origin” of goods or services.<sup>149</sup> 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.<sup>150</sup> 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. 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.<sup>151</sup>

Courts—concerned about “a veritable flood of claims brought in already overtaxed federal district courts”<sup>152</sup>—argue that competitors are in a better position to vindicate consumer interests than consumers themselves.<sup>153</sup> Competitors, these

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<sup>149</sup> Lanham Act § 43(a), 15 U.S.C. § 1125(a). Courts interpreted section 43(a) as creating a sui generis tort of false advertising. Although not all courts were quick to reach that conclusion, they eventually reached something approaching 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) (2013)).

<sup>150</sup> 15 U.S.C. § 1125(a).

<sup>151</sup> *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1390, 188 L. Ed. 2d 392 (2014) (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.”).

<sup>152</sup> *Colligan v. Activities Club of New York, Ltd.*, 442 F.2d 686, 693 (2d Cir. 1971). Courts have expressed similar concerns for well over a century. *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”).

<sup>153</sup> 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,

courts say, have greater resources and financial incentives to target false advertising. So we should expect them to vigorously pursue such claims.

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 the alternatives, competitors—even if they know the language is misleading—face strong incentives to adopt or retain the same language. 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 liability or public criticism for their past use of it. And 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 from a false ad is just too small to justify the time and expense of a court case. Class action lawsuits could solve that problem by bundling together the claims of similarly situated consumers in a single case. But without consumer 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.”<sup>154</sup> Unfairness and deception are separate legal theories and because of the vagueness of Congress’ mandate, the FTC released two policy statements in the 1980s to define their contours: the FTC Policy Statement on Deception<sup>155</sup> and the FTC Policy Statement on Unfairness.<sup>156</sup> The Deception Statement sets forth three key elements of a deception case: There

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212 (D.D.C. 1989), *aff’d in part, rev’d in part*, 913 F.2d 958 (D.C. Cir. 1990) (“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.”).

<sup>154</sup> Federal Trade Commission Act § 5(a)(1), 15 U.S.C. § 45(a)(1) (2013).

<sup>155</sup> Letter from James C. Miller III, FTC Chairman, to John D. Dingell, Chairman, House Comm. on Energy and Commerce 5–6 (October 14, 1984). The Policy Statement is appended to *Cliffdale Associates, Inc.*, 103 F.T.C. 110, 174 (1984).

<sup>156</sup> Letter from Michael Pertschuk, FTC Chairman, and Paul Rand Dixon, FTC Commissioner, to Wendell H. Ford, Chairman, House Commerce Subcommittee on Commerce, Science, and Transportation (December 17, 1980).

must be (1) a representation, omission, or practice that is likely to mislead a consumer; (2) the interpretation of that act or practice is considered from the perspective of a reasonable consumer; and (3) the representation must be material.<sup>157</sup>

Under the FTC’s policy and case law, the *Buy Now* button and alternatives we tested would qualify as representations to the consumer.<sup>158</sup> Our study speaks to the more nuanced problems of a “reasonable” interpretation of the representation, and the representation’s materiality. On its face, the Policy Statement seems to imply a “reasonable consumer” standard, but in practice, the FTC has used its judgment to evaluate misleadingness and survey evidence. The FTC weighs the clarity of the representation, whether there is conspicuous information that qualifies the representation, and whether omitted information is important. As an FTC official explained in 2009 conference concerning DRM, “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.... If your advertising giveth and your EULA taketh away don't be surprised if the FTC comes calling.”<sup>159</sup>

In a series of investigations and enforcement efforts over the past decade, the FTC has strongly suggested 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 its surreptitious installation of its rootkit DRM. Among the many harms this technology imposed on consumers,<sup>160</sup> it prevented them from making copies of their CDs and limited transfer to devices that used particular file formats, namely secure Windows Media or Sony ATRAC files. Consumers who refused to install the software were denied the ability to access the music via their computers altogether. In its order, the

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<sup>157</sup> See *supra* note 155.

<sup>158</sup> The FTC’s settlement with Apple and its litigation against Amazon over the use of “Free” buttons on their respective app store for applications that enabled in-app purchases were both premised on the notion that a button that characterizes a transaction represents factual information to consumers about the nature of that transaction. See Decision and Order, In the Matter of Apple Inc., Docket No. C-4444 (March 25, 2014); FTC v. Amazon.com, Inc., Case No. C14-1038-JCC (W.D. Wa., April 26, 2016), <https://www.ftc.gov/system/files/documents/cases/160427amazonorder.pdf>

<sup>159</sup> Bruce Schneier, *Do You Know Where Your Data Are?*, WALL STREET JOURNAL, April 28, 2009, <http://www.wsj.com/articles/SB123997522418329223>.

<sup>160</sup> See generally Deirdre Mulligan & Aaron Perzanowski, *The Magnificence of the Disaster: Reconstructing the Sony BMG Rootkit Incident*, 22 BERKELEY TECH. L.J. (2007) 1157.

Commission required Sony BMG to provide clear and prominent pre-purchase notice to consumers of these unexpected restrictions.<sup>161</sup>

After the Sony BMG incident, the FTC investigated three Section 5 violations in as many years in response to threats by digital media retailers to pull the plug on DRM servers necessary to for consumers to authorize playback devices. If those servers had been deactivated, consumers would have been unable to transfer and play their purchases on a new computer or device. But Microsoft,<sup>162</sup> Walmart,<sup>163</sup> and Major League Baseball<sup>164</sup> all backed down from their publicly announced plans in the face of FTC scrutiny. As the Commission explained, it has a duty to ensure that:

in the context of sales of digital products, that consumers are provided sufficient information prior to purchase so that they understand any inherent 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.<sup>165</sup>

The Commission appeared particularly concerned by Major League Baseball's repeated representations in its marketing materials that "consumers would 'own' the Downloads."<sup>166</sup> MLB stressed that consumers would "OWN complete game downloads from this year or yesteryear" and encouraged consumers to "Own today's games and yesterday's classics."<sup>167</sup> 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

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<sup>161</sup> Decision and Order, In the Matter of Sony BMG Music Entertainment, Docket No. C-4195.

<sup>162</sup> Letter from Mary Koelbel Engle to Charles E. Buffon, Re: Microsoft Coproration, FTC File No. 082-3189, Sept. 30, 2008.

<sup>163</sup> Letter from Mary Koelbel Engle to M. Sean Royall, Re: Wal-Mart Stores, Inc., FTC File No. 092-3003, June 23, 20010.

<sup>164</sup> Letter from Mary Koelbel Engle to Randal M. Shaheen, Re: MLB Advanced Media, L.P., FTC File No. 082-3043, Oct. 9, 2008.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

otherwise use and dispose of the copy consistent with how consumers can use and dispose of other copies of copyrighted works that they own.”<sup>168</sup>

Although we share the FTC’s worries, we note that the Commission did not appear to have the benefit of survey data supporting its conclusions about the inferences a reasonable consumer might draw from claims of consumer ownership. Over the decades, the FTC has relied on survey evidence to assess misleadingness and has accepted varying levels of proof as establishing deception.<sup>169</sup> Today, if the FTC finds that a practice misleads a “significant minority”<sup>170</sup>—10 or 15 percent—of customers, that practice is deceptive.<sup>171</sup> The willingness of courts to accept survey evidence that demonstrates an ad deceives only a relatively small minority acknowledges that advertisements are often susceptible to more than one reasonable interpretation. But where one of those interpretations is misleading, the advertiser is liable. It also reflects the fact that false advertising law is not intended to protect only the savvy or the skeptical. Its protections extend broadly to the public, “that vast multitude which includes the ignorant, the unthinking and the credulous.”<sup>172</sup>

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<sup>168</sup> *Id.*

<sup>169</sup> Early cases supported single-digit percentage findings to support a Commission finding, but in later cases the Commission’s cases had higher percentages of deceived consumers. See Ivan L. Preston & Jef I. Richards, *Consumer Miscomprehension as a Challenge to FTC Prosecutions of Deceptive Advertising*, 19 JOHN MARSHALL L. REV. 605 (1985–1986).

<sup>170</sup> *POM Wonderful, LLC v. FTC*, 777 F.3d 478 (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.”); *Telebrands Corp. v. FTC*, 457 F.3d 354 (4th Cir. 2006).

<sup>171</sup> *Firestone Tire & Rubber Co. v. FTC*, 481 F.2d 246, 249 (6th Cir. 1973) (finding “it hard to overturn the deception findings of the Commission if the ad thus misled 15% (or 10%) of the buying public”); *Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck Consumer Pharms. Co.*, 290 F.3d 578, 594 (3d Cir. 2002) (survey showing 15% of respondents were misled is sufficient to prove a likelihood of deception among a “substantial portion” of the intended audience); *Telebrands Corp. v. Media Grp., Inc.*, 45 U.S.P.Q.2d (BNA) 1342, 1348, 1997 WL 790576, \*21-22 (S.D.N.Y. Dec. 23, 1997) (survey showing that 20% of the viewers took away the false message is sufficient).

<sup>172</sup> *Charles of the Ritz Distributors Corp. v. FTC*, 143 F.2d 676 (2d Cir. 1944)(upholding FTC determination that a “rejuvenating” face cream was deceptively marketed, despite claim that “no spright-thinking person could believe that its cream would actually rejuvenate”); see also *Giant Food, Inc. v. FTC*, 322 F.2d 977 (D.C. Cir. 1963), cert. dismissed, 376 U.S. 967 (1964). (“The Act was not

Once we know people 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 paid less for it, or would have preferred an alternative.<sup>173</sup> For express claims, implied claims intended by the seller, or claims relating to the health and safety, central characteristics, purpose, performance, or cost of a product, materiality can be presumed. Of course people don't want products that are unsafe, don't perform as expected, or don't work for their intended purpose. A strong argument can be made that the rights suggested by the Buy Now button are central to their value to consumers. 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 credible testimony of consumers, surveys, or whether it involves a feature that alters the price of the product. Here, our survey points to materiality in two respects—expressed preferences for the ability to use digital media in ways similar to physical books, music, and movies, and in 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. 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, that 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 rights.

In sum, the FTCA's deception theory could be employed against practices described in this article. We now briefly turn to the FTC's other main theory, 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 that advertised to kids, funeral parlor directors, and used car salesmen.<sup>174</sup> The FTC today considers a three-prong test when pondering unfairness. For a consumer injury to be unfair, it must be substantial, the injury must not be outweighed by countervailing benefits to competition or consumers

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intended to protect 'sophisticates.'")

<sup>173</sup> James C. Miller to John D. Dingell, 14 October 1983: "A 'material' misrepresentation or practice is one which is likely to affect a consumer's choice of or conduct regarding a product".

<sup>174</sup> See Hoofnagle, *supra* note 107.

produced by the practice, and it must be an injury that could not have been reasonably avoided.<sup>175</sup>

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. Substantial injury may also occur where a business practice causes a small harm to a large number of people. Our data would suggest that an unfairness theory would be based on this last factor: the idea that a large number of consumers suffered financial detriment for getting a different product that they thought they would.

If the FTC finds injury, the unfairness test suggests that it should weigh this injury against potential benefits, and determine whether the consumer could have avoided the injury by shopping elsewhere. Here a digital goods company could argue that producing more information and having consumers digest it is a real cost avoided by simple disclosures such as *Buy Now*. But the effectiveness and low cost of implementing a short notice provision would seem to undercut that assertion. Retailers might also argue that consumers could revert to analog copies and avoid the pitfalls of digital products altogether. But pointing to related markets and products that do not leverage unfair practices is an unconvincing response to ongoing consumer harm, particularly when consumers are often unaware of the differences between digital and analog goods.

In sum, the unfairness authority is harder to ply against the practices discussed in this article. As a theory, it offers no additional remedies. In all likelihood, if the FTC were to police these practices, it would proceed on a deception theory only.

### 3. *The FTC Policy Approach to Buy Now*

Like the Lanham Act, the FTCA lacks a private right of action.<sup>176</sup> 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, the FTC has long intervened when all companies involved in a market participate in some common deception. The FTC is empowered to both sue to prevent practices even where they are commonplace in the market<sup>177</sup> and to selectively enforce the law against a single company where competitors engage in the same practices.<sup>178</sup>

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<sup>175</sup> See *supra* note 156.

<sup>176</sup> *Carlson v. Coca-Cola Co.*, 483 F.2d 279 (9th Cir. 1973).

<sup>177</sup> *FTC v. Standard Educ. Soc.*, 86 F.2d 692, 695 (2d Cir. 1936) modified on other grounds, 302 US 112 (1937); *FTC v. Winsted Hosiery Co.*, 258 US 483 (1922).

<sup>178</sup> *Johnson Products Co. v. FTC*, 549 F.2d 35 (7th Cir. 1977); *Ger-Ro-Mar, Inc. v. FTC*, 518 F.2d 33 (2d Cir. 1975)

Not only does the FTC have the power to address these activities, it has fact-finding and investigative authorities that could further elucidate the problems in digital goods marketing. Companies, especially online ones, extensively test their websites and marketing representations to increase sales. The FTC's broad investigative authorities could be used to obtain surveys or other internal-facing research performed by companies on consumers' perception 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.<sup>179</sup> The FTC, unburdened by the hurdles that face private plaintiffs and some of the pathologies of civil litigation, can set norms through carefully-selected cases.<sup>180</sup> These cases in turn are examined by corporate counsel and understood to define responsible and irresponsible conduct.

Second, the FTC need not always use the stick of litigation to police the sale of digital goods. Because the dominant firms are mainstream and reputable firms, the FTC could establish norms for the sale of digital goods through public workshops. These workshops have elements of legislative process that incorporate the views of industry, consumers, and academic experts in marketing and economics. They fill in the gaps on many consumer protection issues that escape the attention of Congress.

For these reasons, we think the FTC offers an attractive remedy for the gulf between the realities of the digital marketplace and consumers perceptions of it. The FTC could bring the most relevant actors to the table to develop a set of more effective disclosures and rules. The FTC could then use its enforcement powers to police those who continue to use misleading frames for the marketing of such goods.

## CONCLUSION

In a recent article, Professor Lauren Willis proposed that disclosures be tested for consumer comprehension.<sup>181</sup> 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 trades on expectations developed in the tangible goods economy that are incompatible with the restrictive license terms attached to most

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<sup>179</sup> Daniel J. Solove & Woodrow Hartzog, *The FTC and the New Common Law of Privacy*, 144 COLUM. L. REV. 583 (2014).

<sup>180</sup> Hoofnagle, *supra* note 107.

<sup>181</sup> Lauren Willis, *Performance-Based Consumer Law*, 82 THE U. OF CHI. L. REV. 1309 (2015).

digital media transactions. We've argued that use of the *Buy Now* button in this context constitutes false and deceptive advertising. But we've 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 two positive developments.<sup>182</sup> 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 they know digital goods come with substantial restrictions, consumers may decide physical copies are worth the occasional inconvenience they impose. Or they 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 longer term, disclosure could spur competition between competing retailers over the bundles of rights they convey to consumers.<sup>183</sup> Today competition in the digital media market revolves around the most obvious and salient characteristics, 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.

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<sup>182</sup> See Craswell, *supra* note 106.

<sup>183</sup> See Richard Craswell, *Information Remedies for Consumer Protection*, 71 Am. Econ. Rev. 410 (1981)

## APPENDIX

Table 1: Basic demographics of the survey respondents.

<b>Basic Demographics</b>	
<b>Sex</b>	
Male	49%
Female	51%
<b>Age</b>	
18–24	11%
25–34	18%
35–44	17%
45–54	19%
55–64	16%
65+	18%
<b>Income</b>	
<\$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%
<b>Race</b>	
White/Caucasian	80%
African American	9%
Hispanic	6%
Asian	4%
Other	1%
<b>Education</b>	
< High School	2%
High School/GED	22%
Some College	28%
2-Year Degree	11%
4-Year Degree	25%
Masters Degree	10%
Doctoral Degree	1%
JD/MD	1%

Table 2: Our total N was 1,299. This table displays the sizes of the test groups.

<b>Condition</b>	<b>Media Type</b>			<b>Total</b>
	<b>Book</b>	<b>Music</b>	<b>Movie</b>	
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: Percent of consumers who thought a given product format and notice conveyed rights.

<b>Format</b>	<b>Condition</b>	<b>Own</b>	<b>Keep</b>	<b>Device</b>	<b>Lend</b>	<b>Gift</b>	<b>Will</b>	<b>Resell</b>	<b>Copy</b>
digital movie	buy now	78	84	81	35	33	30	17	12
digital movie	license now	69	75	75	42	39	28	23	18
digital movie	short notice	65	82	82	31	36	29	17	14
ebook	buy now	86	87	81	48	38	26	12	9
ebook	license now	50	81	84	46	36	26	14	8
ebook	short notice	63	86	77	35	28	13	6	4
mp3	buy now	83	89	88	39	50	32	17	23
mp3	license now	62	80	89	42	42	26	13	16
mp3	short notice	63	84	85	27	36	21	6	7
Blu-ray	buy now	79	87	80	63	73	55	48	13
paperback	buy now	85	88	85	75	70	47	53	14
CD	buy now	90	85	82	57	68	47	36	20