

In the Matter of:

**Consumer Messaging in Connection with Online
Transactions Involving Copyrighted Works**

*April 18, 2017
Public Meeting*

Condensed Transcript with Word Index



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5 DEPARTMENT OF COMMERCE

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7 CONSUMER MESSAGING IN CONNECTION

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9 WITH ONLINE TRANSACTIONS INVOLVING COPYRIGHTED WORKS

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11 PUBLIC MEETING

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13 TUESDAY, APRIL 18, 2017

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16 U.S. PATENT AND TRADEMARK OFFICE

17 600 DULANY STREET

18 ALEXANDRIA, VIRGINIA 22313-1450

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1 WELCOME REMARKS

2 MS. ALLEN: Good afternoon. We're ready to get

3 started if everyone could please have a seat.

4 MS. PERLMUTTER: Good afternoon, everyone. For

5 those who don't know me, I'm Shira Perlmutter, the Chief

6 Policy Officer and Director for International Affairs

7 here at the USPTO. And I wanted to begin by welcoming

8 all of you here, both those of you who are here

9 physically and those watching online.

10 Today's meeting is the latest installment of

11 the work of the Department of Commerce's Internet Policy

12 Task Force. For those of you who aren't familiar with

13 the Task Force, it was formed all the way back in 2010 to

14 look at the policy and operational issues impacting the

15 private sector's ability to realize the potential for

16 economic growth and job creation through the internet.

17 The USPTO and NTIA have together led the Task

18 Force's work on copyright issues, and we've produced two

19 papers now: a green paper back in 2013 on copyright

20 policy, creativity, and innovation in the digital economy

21 and a white paper at the beginning of last year that made

22 a number of policy recommendations looking at issues that

23 had been raised in the green paper.

24 Many of you know, because you participated,

25 that we held extensive public consultations leading up to

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1 I N D E X

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1 both of those papers, including on the issue of whether

2 the first sale doctrine of copyright law should be

3 extended to cover the distribution of works by means of

4 digital transmissions.

5 Now, during the course of all those public

6 consultations, we heard a number of concerns expressed

7 about the level of consumers' understanding of what they

8 have purchased when they pay for copies of works

9 delivered online. The Task Force, therefore, concluded

10 that consumers would benefit from more information on the

11 nature of these transactions, including whether they're

12 paying for temporary access to content or for the

13 ownership of a copy with the long-term goal of instilling

14 greater confidence in the online marketplace and

15 enhancing participation.

16 So we're here today to discuss that specific

17 issue and to determine together whether there is a good

18 way forward to make progress, perhaps through a multi-

19 stakeholder process as we suggested in the white paper,

20 although we're open to hearing all options.

21 We'll begin by hearing a number of academic

22 presentations on different aspects of consumer messaging

23 in the online marketplace and have the opportunity for

24 panel discussions of those presentations, as well as of

25 specific questions relating to what terms are useful or

5

1 important to communicate to consumers and how this can
2 best be done.

3 We will also hear from the U.S. Copyright
4 Office, which recently conducted a study on embedded
5 software in consumer devices and, in doing so, looked at
6 the possibility of establishing best practices for end-
7 user license agreements in that specific context.

8 And, then, finally, we'll conclude with a
9 discussion of what, if any, next steps could be fruitful.
10 We very much look forward to your input, and I will now
11 turn the floor over to David Carson, who is Senior
12 Copyright Counsel here at the PTO.

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1 PRESENTATION: OVERVIEW OF COPYRIGHT IN DIGITAL
2 TRANSACTIONS AND THE ONLINE MARKETPLACE

3 MR. CARSON: Thank you, Shira. We just need to
4 switch to a different presentation.

5 (Brief pause.)

6 MR. CARSON: Well, thanks very much. As
7 Shira's mentioned, this meeting follows up on the
8 Department of Commerce's white paper on remixes, first
9 sale, and statutory damages. That's the -- you can see
10 that on the right on the screen -- and in particular, the
11 discussion of the first sale doctrine, which we spent
12 quite a bit of time on over a period of about two years
13 leading up to the white paper.

14 We had a number of public meetings in 2013 and
15 2014 that discussed copyright law and policy issues
16 relating to the first sale doctrine, as well as other
17 issues. And we stated our conclusions and
18 recommendations in the white paper, which was issued a
19 little over a year ago. Our discussion today, however,
20 is about consumer messaging, that is, about improving
21 consumers' understanding of license terms and
22 restrictions in connection with online transactions
23 involving copyrighted works.

24 But to set the context for that discussion,
25 it's useful to spend a few minutes explaining what we

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1 concluded and what we analyzed when we addressed the
2 first sale doctrine in the white paper process. So let's
3 start by explaining what the first sale doctrine is. And
4 before I do that, let me again just say -- this is by way
5 of background -- this conference isn't about the first
6 sale doctrine, but it certainly gives you the context.

7 We are not here to debate the role of the first
8 sale doctrine or what it should be in the digital network
9 environment -- again, why we spent an incredible amount
10 of time leading up to and in preparing and releasing the
11 white paper doing just that. Today's goal is to address
12 how to help consumers better understand what they may and
13 may not do with the copies of creative works that they
14 obtain online and to understand that the rules that
15 govern what I may do with a paperback book don't
16 necessarily apply to what I may do with an e-book.

17 In fact, there are some things I may do with
18 the hard copy book that I may not do with the e-book; and
19 there are also some things I may do with the e-book that
20 I may not do with the hard copy. And those differences
21 are, in part, due to copyright law and, in part, due to
22 different business models and licensing terms and
23 conditions.

24 Copyright law provides the copyright owner with
25 a number of exclusive rights, and you see the statutory

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1 text right up here. The first sale doctrine is an
2 important limitation on one of the most important of
3 those rights -- the exclusive right to distribute copies
4 to the public by sale or other transfer of ownership or
5 by rental, lease, or lending. That's Section 106(3) of
6 the Copyright Act.

7 Only the author of a work or the entity to whom
8 the author has assigned the copyright or the distribution
9 right, such as a publisher or a record company or a movie
10 studio, has the right to distribute copies of the
11 author's work to the public. But the first sale
12 doctrine, which is codified in Section 109 of the
13 Copyright Act, provides that the owner of a particular
14 copy, lawfully made under this title, is entitled without
15 the authority of the copyright owner to sell or otherwise
16 dispose of the possession of that copy. So if I go into
17 a bookstore and buy a book, I'm free to sell it to you
18 afterwards or to give it to you free of charge or to lend
19 it to you.

20 The copyright owner cannot prevent me from
21 doing that and isn't entitled to any compensation when I
22 do that. The copyright owner of the exclusive
23 distribution right, however, is limited to the first sale
24 of a particular copy. That's how we get the name "first
25 sale doctrine." Once that copy has been sold or

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1 otherwise distributed, the copyright owner's distribution
2 right, with respect to that particular copy, disappears.
3 That's a well established principle of copyright law.
4 But in the last quarter-century, more and more
5 works of authorship have been distributed not only in the
6 form of hard copies, such as books, CDs, DVDs, and so on,
7 but they've also been distributed by means of digital
8 transmissions, for example, by downloading a book from
9 Amazon.com, downloading music from iTunes, or downloading
10 apps from Google Play. Those digital works are also
11 eligible for copyright protection, and the copyright
12 owner has the same exclusive rights that the copyright
13 owner has with respect to hard copies.
14 But certain rules that applied in the pre-
15 digital world don't necessarily apply in the online
16 environment. Notably for our purposes today, the first
17 sale doctrine does not permit the resale or
18 redistribution of a copy that was obtained by means of a
19 digital transmission.
20 There are a number of reasons for this, but the
21 most obvious one is that when you download a copy, you're
22 implicating more than the distribution right. When you
23 transmit a copy of a work online, you're implicating
24 another of the copyright owner's exclusive rights.
25 That's Section 106(1), the right to reproduce the

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1 copyrighted work in copyrights [sic] or phonorecords.
2 What we call -- while we call a transmission
3 over the internet a distribution, it's actually much more
4 than that. After all, the actual copy that's sitting on
5 the server doesn't move from the server to the
6 recipient's device. Instead, a transmission is made that
7 results in reproduction of the bits and bytes that
8 together make up a copy of the work. And the first sale
9 doctrine does not apply to the reproduction right.
10 I can't take the time to go into all of our
11 analysis on the issue, and there's really not reason --
12 that's not what we're here to talk about for the most
13 part, but let me take a minute or two to give you a sense
14 of some of the other reasons that led to our conclusions.
15 When I go into a bookstore to buy a book, I
16 take the book off the shelf, I pay for it, and I walk out
17 of the store with it. At the beginning of the
18 transaction, there was only one book; and at the end of
19 the transaction, there's still only one book. The
20 particular copy of the book has just been removed from
21 the bookshelf in the bookstore, and it ends up on my
22 bookshelf.
23 But when I download an e-book, the copy that is
24 sitting on the server at Amazon or Barnes & Noble doesn't
25 go anywhere. It's there at the beginning of the

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1 transaction, and it's still there at the end of the
2 transaction. But a second copy of the book is now
3 residing on my iPad or my Kindle, or perhaps both. It's
4 the transmission of that second digital copy that creates
5 complicated questions that we don't have with the single
6 particular copy of, say, a paperback book.
7 Those complications, again, are not what we're
8 here to talk about, but for background information, it's
9 important to understand why copyright laws that apply to
10 digital distribution do so in a way that's different in
11 some respects to the way they apply to the traditional
12 distribution of physical goods.
13 Let's talk about licensing, because that's
14 really what governs many of the terms and conditions of
15 what one can do when one obtains a copy by means of
16 digital transmissions, at least in the commercial world.
17 Digital distribution models differ from traditional
18 brick-and-mortar models for other reasons. Because of
19 the different nature of an e-book or a song or video
20 file, we access them differently than we do in hard copy.
21 When I want to get a book or a movie online,
22 it's not the same kind of transaction as a transaction I
23 enter into at a bookstore or a video store. Not only
24 that, but making works available online opens up all
25 sorts of new options that allow consumers to experience

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1 works of authorship without owning and sometimes without
2 even possessing copies.
3 Some of those experiences may feel very similar
4 to the experiences we have with hard copies like books,
5 DVDs, and CDs. You pay money; you get a copy; and you
6 can read or watch or listen to it whenever you want. But
7 when you obtain that copy by means of an online
8 transmission, almost inevitably the transaction is going
9 to be accompanied by a license called an end-user license
10 agreement, or EULA. You'll have to -- you'll have an
11 opportunity to read that agreement typically. You
12 usually will have to click on a link to read it, and you
13 will have to do something to indicate your consent, most
14 likely.
15 But as we looked at the issue while we were
16 working on the white paper, the consensus seemed to be
17 that it's very rare that anyone actually reads the EULA
18 or even looks at it. I don't think anyone came forward
19 with any evidence as to how frequently customers read
20 them, but I also don't think anyone actually disputed
21 that proposition.
22 That's not surprising. EULAs are frequently
23 very lengthy; they're detailed; and they're not
24 necessarily easy to read. But it's the EULA that will
25 tell you whether you actually own the copy, how many

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1 copies you can make, and on how many and what kinds of
2 devices you can put them; whether you can give your copy
3 to somebody else, whether you can provide access to
4 somebody else, and so on.
5 Of course, this isn't an issue only with
6 respect to issues that relate to copyright. There are
7 all sorts of terms and conditions in EULAs that have
8 nothing to do with copyright. And I would imagine that
9 consumers are just as knowledgeable or unknowledgeable
10 about those terms and conditions as they are about the
11 terms that relate to copyright.
12 They can vary also from vendor to vendor and
13 perhaps also from copyright owner to copyright owner.
14 Different services may offer different terms and
15 conditions based on their understanding of what it is
16 that consumers want or on what they believe makes
17 economic sense, and all also based on the contract they
18 have with the copyright owner.
19 We'll have representatives of online platforms
20 and copyright owners on our first panel, and perhaps we
21 can learn some more from them about this. Now, the white
22 paper described an online marketplace that's evolving
23 from services involving the distribution of copies to
24 those in which consumers are offered different levels of
25 access at a choice of price points and an exchange for

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1 benefits that may not be available or necessary in the
2 physical world. For example, software patches and
3 upgrades.
4 Indeed, the RIAA recently announced that in
5 2016, for the first time ever, streaming music platforms
6 generated the majority of the U.S. music industry's
7 revenues. But it's not just about making more money for
8 copyright owners. The marketplace, in fact, is
9 responding to consumer demands and taking advantage of
10 new opportunities and flexibilities that digital
11 technology offers. The music business is probably the
12 furthest along this path toward access-based models, and
13 the motion picture industry is probably close behind. In
14 other industries, such as book publishing, the prevailing
15 model is still based on giving the consumer a copy of the
16 work, whether it's in hard copy form or a digital copy.
17 Access-based models also come in a number of
18 different kinds of offerings. There are subscription
19 services that give you access to a large number of works
20 for as long as you have the subscription. Think of
21 Spotify, for example, or Netflix. There are 24-hour or
22 48-hour rentals in which we're given access to a work for
23 a relatively short period of time. Such arrangements are
24 popular, for example, with motion pictures.
25 In these access models, the question of

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1 ownership or of the ability to resell or give away copies
2 just doesn't come up, because you never actually have a
3 copy. But other questions do come up depending upon the
4 business model. For example, on how many devices or what
5 kinds of devices may I access the work? Can I give
6 access to my family or friends?
7 We also heard assertions that some of the terms
8 and conditions set forth in EULAs, such as provisions
9 barring redistribution of copies by consumers, are at
10 odds with the ordinary expectations of consumers,
11 especially when the consumer consummates the transaction
12 by clicking on a button that says "buy." Others
13 disagreed, expressing the view that the particular
14 contexts in which those transactions take place,
15 consumers are likely to understand that they're paying
16 for something that falls short of ownership. That's
17 something we'll be exploring a little later today.
18 But nobody came forward with hard evidence as
19 to what consumers actually understand they're getting
20 when they obtain copies of works online. Many
21 participants on all sides agreed that consumers are
22 entitled to clarity and that more should be done to
23 communicate what rights they are or are not getting when
24 they enter into a transaction involving digital
25 transmissions of copies.

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1 Based on what we heard, we reached the
2 following conclusion in the white paper. We concluded
3 that there's a need to provide consumers with more
4 clarity about the nature of the transactions they enter
5 into when they download copies of works. And the purpose
6 of this meeting is to explore whether there's a need for
7 further action and, if so, what kind of action would be
8 appropriate.
9 So that's what the meeting's about, and that
10 brings us today to the rest of the program, in which
11 we've brought together various stakeholders to explore
12 the issues and to share their views surrounding consumer
13 messaging relating to online transactions involving
14 copyrighted works. The question is whether we need to do
15 more to let consumers know what they may or may not do
16 with the copies they obtain online and helping them
17 understand the rules of the road when they engage in
18 digital transactions for copyrighted works.
19 We don't have a particular process or a
20 particular outcome in mind, but we want to, at the very
21 least, start a conversation on the topic. We heard from
22 some stakeholders that renting and not owning will become
23 the primary way that people consume content in the
24 future. I've already alluded to that when I talk about
25 online subscription services, for example.

17

1 As the digital marketplace continues to evolve
 2 to include a wide variety of license-based business
 3 models, clear communication of relevant terms to
 4 consumers can help facilitate commerce and establish
 5 trust in the online marketplace.
 6 Copyrighted works form a substantial portion of
 7 online commercial transactions, and they contribute
 8 significantly to U.S. commerce, but the issues we're
 9 discussing today are not unique to the United States.
 10 They're being explored by governments around the world.
 11 For example, Europe has come up with suggested guidelines
 12 for a way to communicate with consumers. What you see
 13 are some suggested guidelines that the European
 14 Commission has come up with.
 15 When looking at solutions, we need to be
 16 forward-looking because what may be cutting edge to
 17 today's consumers may be commonplace tomorrow, and the
 18 day after tomorrow, they may be absolutely old-fashioned.
 19 Solutions also need to make sense. If a virtual
 20 assistant like Alexa or Google Home has to read out
 21 lengthy EULAs before playing music or streaming
 22 television, consumers' enthusiasm for using those
 23 assistants could decrease substantially, to put it
 24 mildly. So there's a real problem between mediating
 25 between the need to give information to consumers and

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1 giving consumers the ability to get to what they're
 2 really looking for, which isn't necessarily that
 3 information.
 4 But, thankfully, we don't have to reinvent the
 5 wheel. In addition to representatives from online
 6 platforms and copyright industry associations and public
 7 interest organizations, we have with us today people with
 8 significant experience in consumer messaging and in other
 9 fields such as privacy disclosures and computer science.
 10 And they, hopefully, can help us provide some insight
 11 into relevant considerations as we explore consumer
 12 messaging.
 13 Finally, we want to make sure that everyone
 14 understands this meeting is not about what terms and
 15 conditions should be imposed on consumers any more than
 16 it's about what the rules of copyright law should be. We
 17 understand that reasonable minds can differ on those
 18 topics, and I'm sure there's a variety of views on those
 19 topics in this room. But for the purposes of this
 20 exercise, we're taking for granted that the terms are
 21 what they are. The question isn't what they ought to be
 22 but rather how do we best communicate to consumers what
 23 those terms are.
 24 And with that, let me introduce our next
 25 presenter, Aaron Perzanowski. Professor Perzanowski is a

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1 professor of law at Case Western Reserve University of
 2 Law. He was an active participant at one of our white
 3 paper roundtables, and he's written extensively on the
 4 first sale doctrine. But what he has to talk -- what
 5 he's here to talk about today is not the first sale
 6 doctrine.
 7 Instead, he's here to address another
 8 conclusion in the white paper, the one I've just been
 9 talking about, which is the conclusion that there's a
 10 need to provide consumers with more clarity about the
 11 nature of the transactions they enter into when they
 12 download copies of works.
 13 Professor Perzanowski is the coauthor of an
 14 article published in January in the University of
 15 Pennsylvania Law Review, entitled "What we Buy when we
 16 Buy Now." It's the only study we're aware of that looks
 17 into what consumers believe they acquire when they buy
 18 digital media goods. The article suggests that adding a
 19 short notice to digital product pages, a notice that
 20 explains what consumers may and may not do with the
 21 copies they obtain, would improve their understanding of
 22 what they're buying.
 23 Following Professor Perzanowski's presentation,
 24 we'll have a panel of four commenters who will react to
 25 what he has to say, and I think it's fair to say we'll

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1 hear a variety of viewpoints. But whether you would
 2 disagree or agree with Professor Perzanowski, his article
 3 should be the basis for a very lively discussion.
 4 So with that, I hand it over to Professor
 5 Perzanowski. And hopefully someone with more skill than
 6 I can find his PowerPoint.
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1 RESEARCH PRESENTATION: WHAT WE BUY WHEN WE BUY NOW
 2 MR. PERZANOWSKI: Bear with me for just a
 3 moment here.
 4 So thanks so much for giving me the opportunity
 5 to talk about this project today, thanks to all the folks
 6 at the PTO and at NTIA and everyone involved in
 7 organizing this event. So this paper, as David just
 8 mentioned, is one that I cowrote with Chris Hoofnagle.
 9 It was recently published in the University of
 10 Pennsylvania Law Review. And my comments today are
 11 really going to be focused on kind of explaining the
 12 design of this study and outlining the conclusions that
 13 we drew from this data.
 14 So as a starting point -- I have two machines
 15 to keep track of here. As a starting point, I imagine a
 16 lot of you remember this incident from a few years ago
 17 where Amazon remotely deleted all of the copies of George
 18 Orwell's 1984 from the devices of consumers who had
 19 purchased that book. This is, I think, a really stark
 20 example of the ways in which consumers' relationships
 21 between -- or consumers' relationships with digital
 22 products differs from their relationship when it comes to
 23 physical books. It just isn't a thing that could happen
 24 when it comes to physical books.
 25 And it is one of a number of incidents that I

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1 think illustrate this point. The removal of purchased
 2 Xbox fitness videos in the last year or so is probably
 3 the most recent example.
 4 So some have argued that consumers understand
 5 that when they click that "buy now" button on the Amazon
 6 webpage that what they're really purchasing isn't a copy
 7 of a book but a license to access content. And I've
 8 always suspected that that is a rather optimistic
 9 assessment of how well consumers understand these sorts
 10 of transactions. So what Chris and I set out to do was
 11 to test exactly what consumers are taking away from these
 12 advertising messages.
 13 And I think that question is important for a
 14 couple of reasons. First, from a purely consumer
 15 protection point of view, we want to make sure that
 16 consumers have accurate information when they're making
 17 choices in the marketplace. We don't want them to be
 18 making a purchase, expecting one set of rights and then
 19 acquiring a lesser and in some ways inferior set of
 20 rights. But more broadly, if we value the marketplace as
 21 a source of information about consumer preferences, then
 22 we need to make sure that the decisions that consumers
 23 are making are actually an accurate reflection of what
 24 they want, right?
 25 So you can't point to all of those diesel

23

1 Volkswagens that were sold over the past decade or so and
 2 claim that that's evidence that consumers really love
 3 pollution, right? And I think in the same way it's not
 4 clear that we can point to this shift away from
 5 ownership-based models of media acquisition to more
 6 temporary, more conditional forms of access and claim
 7 that that is a reflection of consumer preferences, unless
 8 consumers have accurate information.
 9 So what did we do in this study? We created
 10 this sort of fictitious marketplace called Media Shop and
 11 surveyed just under 1,300 consumers about their
 12 understanding of this "buy now" language. We created a
 13 set of screening questions to make sure that all of our
 14 survey respondents were online shoppers, in the market
 15 for either digital books, music, or movies. And the
 16 sample that we came up with was designed to be
 17 representative and was representative in terms of sex, in
 18 terms of age, and in terms of income. It was also
 19 roughly representative when it came to race, region of
 20 the country, and education, as well.
 21 So on the basis of those screening questions,
 22 we sorted consumers into three different categories, and
 23 within each one of those categories, we focus on a
 24 different media type, right? So we had books, music, and
 25 movies here. Here we have an example of an e-book.

24

1 We also gave consumers a choice between a
 2 number of different media titles. We wanted to sort of
 3 ensure that they were engaged. We also wanted to ensure
 4 that our measures of materiality in some way reflected
 5 something that approximated the actual marketplace,
 6 right? So if I put a book in front of you that you'd
 7 never consider reading, that makes it a lot harder to
 8 measure things like materiality.
 9 So someone who was sorted into the e-book
 10 tranche here and selected The Martian would have seen one
 11 of four different variations on this page. They may have
 12 seen a digital book sold with a "buy now" button. They
 13 may have seen a digital book offered with a "license now"
 14 button. They may have seen -- it's a subtle shift there
 15 -- "buy now, license now." Some people also saw a
 16 paperback version of the book with the "buy now"
 17 language. We'll come back to that in a bit. There's the
 18 "license now" variation. And here we have our fourth
 19 condition, a short notice, rather than the "buy now" or
 20 "license now" button.
 21 The price that was reflected on these pages was
 22 taken from the current Amazon price for these products,
 23 so there were differences between the digital and
 24 physical versions of the book. Sometimes the digital
 25 versions were cheaper, but not always, right? So we

25

1 wanted to replicate market prices as closely as we could.
2 If you notice, down there at the bottom, there
3 is a link to the license terms that govern these
4 transactions. And we tracked how many people actually
5 clicked on that link. We did pretty well in terms of a
6 response rate on clicking this link -- 1.4 percent of our
7 survey respondents clicked on this link, which, if you've
8 read the literature on that question, is higher than
9 usual.
10 So our short notice was designed, and I'll come
11 back to the details here in a bit, to provide sort of
12 clear and conspicuous language that told consumers what
13 rights they were acquiring and which they were not.
14 So a few of our kind of key findings here.
15 Three, I think, key takeaway points. One, the data
16 support the notion that the "buy now" button misleads a
17 substantial portion of consumers about the particular
18 rights they acquire in digital media transactions.
19 Second, those misperceptions are material to their
20 purchasing decision. Consumers would behave differently
21 if they had full and accurate information. And, finally,
22 we saw a significant improvement in consumers'
23 understanding of their rights when we replaced the "buy
24 now" button with this short notice.
25 So how did the survey itself operate? So after

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1 the respondents were given an opportunity to view and
2 interact with those product pages I just showed you, they
3 were asked a series of questions about what rights they
4 believe they acquired in these transactions, right? So,
5 here, the question is, "After clicking 'buy now' and
6 paying for the e-book, can you lend it to a friend?" So
7 can you lend it, can you resell it, can you leave it in
8 your will, can you give it away as a gift, can you read
9 it on the device of your choice?
10 And I want to briefly summarize the results,
11 starting with what we found for the consumers who saw the
12 "buy now" button for digital goods. So what we see here
13 is that it turns out a very high percentage of consumers
14 believe that they are getting rights that are expressly
15 denied to them under these license terms. People think
16 they're getting the right to lend their digital
17 purchases, to give them away, and even, for a not
18 insubstantial number of consumers, to resell those goods.
19 We see really high affirmative response rates
20 here for the ability to keep these purchases for as long
21 as you would like the ability to use them on your device
22 of choice. And more than 40 percent of our respondents
23 believe they had the right to lend those digital
24 purchases and to give them away. A smaller percentage
25 responded yes to leaving them in their will and to

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1 resale.
2 But if we're thinking about this, and this is
3 kind of the lens that we use in the paper to analyze the
4 results here, if we think about this through the lens of
5 false advertising law, you know, there's not a hard-and-
6 fast percentage when it comes to a false advertising
7 case, but a typical rate of -- typically a rate of above
8 15 percent or so is good evidence of deception. And,
9 frankly, resale here is the only close call.
10 We also asked people if they had the right to
11 make copies for other people, something they're clearly
12 not entitled to do under copyright law, as a sort of
13 sanity check on our results. And, in fact, with the
14 possible exception of MP3s, we saw the lowest affirmative
15 response rates to that question.
16 So what happens when we switch from "buy now"
17 to "license now"? Something interesting happens. The
18 first question we ask, "Do you own the thing that you
19 have just paid for?" we see a massive decrease, right?
20 So we're comparing here in the -- on the left the "buy
21 now" results with the "license now" results. For e-
22 books, we see a huge drop in the number of people who say
23 they own this thing, but, of course, ownership is a sort
24 of complex legal conclusion, right? It's not really a
25 falsifiable result, but we do think it gives us a sense

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1 of kind of overall consumer perception of the
2 transaction.
3 Beyond that, though, very little changes,
4 right? There are no substantial statistically
5 significant shifts that happen when we shift from "buy
6 now" to "license now." That's true here for e-books. I
7 could show you the slides for MP3s and movies. It's
8 pretty much the same thing.
9 What about our short notice intervention here,
10 right? One thing to say about the short notice, first of
11 all, is neither Chris nor I are professional designers.
12 We are not trained in user interface design. I, frankly,
13 spent about 15 to 20 minutes putting this little thumbs-
14 up, thumbs-down thing together. And we thought we'd see
15 how it works, right? And there are obvious ways to
16 improve it.
17 In our open-ended questions in the survey, we
18 had a number of people who said, Uh, you know, that
19 notice was good, but the typeface was too small, it was
20 too hard to read, right? So maybe it needs to be, like,
21 you know, 11-point instead of 9-point or something along
22 those lines.
23 So we think there are ways to improve upon the
24 results that we found, but the results were significant.
25 So this is what happens when we compare the "buy now" and

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1 short-notice conditions for e-books. We see that similar
2 drop in the people who think they own the digital good,
3 but we also see significant drops in affirmative
4 responses for lending, gifting, willing, and reselling.
5 And this is after only a single exposure to this short
6 notice for no more than, you know, 30 seconds at most.
7 We made a mistake, frankly, and didn't track
8 how long people were on that particular page, which we
9 should have done, but the average response time for the
10 entire survey, which had lots of steps in it, was ten
11 minutes, right? So people were not spending a great deal
12 of time looking at that product page. We think that with
13 repeated exposures we might see more pronounced results.
14 So those are the results there for e-books.
15 A similar story plays out for MP3s. We see
16 drops in much of the same places. Interestingly, though,
17 we saw very little effect when it came to movies.
18 Consumers did not respond in quite the same way. And, to
19 be honest, we're not entirely sure why that's the case.
20 It might be something unique about movies. My best guess
21 is the demographics of the people who self-selected into
22 the movie purchaser category were different than the
23 other two categories. There were fewer people over the
24 age of 65 in the movie category, and there were fewer
25 women in the movie category. And people over the age of

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1 65 and women tended to understand their rights more
2 accurately than younger men. Conclude from that what you
3 will.
4 So we also wanted to sort of quantify
5 respondents' performance on these questions, right? Not
6 only descriptively what did they believe, but were they
7 right or wrong? And so we scaled each respondent --
8 there were seven questions. We scaled them on this zero
9 through seven scale based on essentially what is our
10 little grading chart here. And here is what we found,
11 right? Here's how people performed.
12 So the lowest scores on average were the people
13 who encountered the "license now" condition, right? That
14 just introduced in some ways additional confusion. One
15 thing that was interesting about "license now" -- and in
16 some ways I saw this as a success -- more people answered
17 "I don't know" to the "Do you have the right to do this
18 or not." And in some ways, I don't know, like, that's
19 the most correct answer. It's the most honest answer, in
20 a sense. So "license now" kind of shook people's
21 confidence, but in terms of correct answers, we saw a
22 lower rate.
23 Marginally better, although not statistically
24 significant, was the result for "buy now." That
25 difference was not significant.

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1 The short notice performs markedly better than
2 the "buy now" button, right? This was a quite
3 significant result but still far short of the pretty
4 accurate, although not wholly accurate, but the largely
5 accurate average score when it came to people who saw the
6 "buy now" button as attached to a hard copy, right?
7 So this has so far just been kind of
8 summarizing the accuracy of these beliefs that consumers
9 expressed. We were also interested in the question of
10 materiality, right? Do these potential misperceptions
11 about their rights actually matter to consumers? Would
12 they behave differently if they knew the truth?
13 And we tried to do that in a few ways, right?
14 We tried to measure when it came to three of the
15 particular rights. We didn't have time in the survey to
16 ask about all of them because it adds significantly to
17 the time, lowers your completion rate, lowers the
18 attentiveness of the respondents, so we focused on three
19 of them: lending, reselling, and using on the device of
20 your choice.
21 So the first way we tried to measure
22 materiality was to ask people about their preferences.
23 Would you strongly prefer an e-book that you can lend to
24 a friend, or would you, you know, somewhat prefer one
25 that you can't lend to a friend, right? So here's what

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1 we found. And what I think is interesting about this is
2 not only did the vast majority express a mild or strong
3 preference for more than one of these three rights, the
4 format didn't seem to make much difference.
5 Those preferences were just as strong when you
6 were talking to someone who was shopping for a physical
7 book as when you were talking to someone who was shopping
8 for a digital book. Same for music and movies, as well.
9 And, in some cases, counterintuitively, the preference
10 was stronger for the digital good, right?
11 You can see that for the ability to lend music,
12 55 percent say they have a preference for lending an MP3
13 as opposed to 48 percent for a compact disk. This is
14 just another sort of metric for capturing that same data.
15 We scored everyone on a negative 6 to positive 6 scale,
16 so positive 6 would be someone who expressed a strong
17 preference for all three rights; negative 6 would be
18 someone who expressed a strong preference against the
19 right in each of the three instances.
20 And you see the distribution there. The
21 majority of people express these preferences for
22 additional rights. So that's well and good, but how does
23 this relate to consumer behavior in the marketplace? Are
24 they going to make purchasing decisions differently on
25 the basis of these preferences? And it turns out when

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1 you ask people about their willingness to pay, to put a
2 dollar value on these preferences, this is what we found.
3 Most of our respondents were willing to pay
4 more, and we asked this question in the most conservative
5 way possible, right? We didn't ask how much less would
6 you pay for something where these rights are taken away
7 from you. We asked how much more would you pay to get
8 this right that you're not currently entitled to. And
9 most respondents were willing to pay something. The
10 median increase in price was a dollar; the average price
11 increases were significantly more, right?
12 Now, we weren't asking people to spend real
13 money, right? If you said you'd spend \$5 more, we didn't
14 take \$5 away from you, right? So I don't know that this
15 is a perfect simulation of what consumers would do in the
16 marketplace, but it gives us some sense that they attach
17 a dollar value to these rights.
18 One last slide here, and then I will wrap
19 things up. We tried to measure materiality in one more
20 way. We tried to ask people if these rights are not
21 available to you, might you consider -- would you be more
22 likely to acquire media through some other means. And we
23 asked about two of them. We asked people whether they'd
24 be more likely to get their music from a streaming
25 service, for example, if they did not -- if they could

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1 not in the marketplace acquire the right to lend digital
2 copies.
3 And here are the results that we saw for books,
4 music, and movies. So likelihood of streaming is on the
5 right. A considerable percentage of consumers see
6 streaming as a more attractive, more viable option in the
7 absence of these rights that we associate with ownership.
8 And I think, more disturbingly, about a third of our
9 respondents said if I can't get the rights that I think
10 are valuable, I am more likely to download that material
11 illegally.
12 So I think there is a measurable desire for
13 additional rights on the parts of consumers, and I'm
14 hopeful that our conversation today can move us forward
15 in a way to kind of figure out how to reconcile these
16 perceptions that consumers have about what's happening in
17 the digital marketplace with the reality. Thanks.
18 MR. CARSON: Thank you, Aaron.
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1 DISCUSSION: REACTIONS TO RESEARCH PRESENTATION
2 MR. CARSON: Can we have our panelists come up?
3 We have a hard stop on this panel at 2:20, so I'd like to
4 get started.
5 Thank you very much, Professor Perzanowski.
6 We're going to have you come up here in a few minutes to
7 join the panel, but first we're going to ask essentially
8 for people to react to what they've heard Professor
9 Perzanowski say, and following that, with a little bit of
10 discussion, we'll open it up to questions from the
11 audience. At that point, we'll ask Professor Perzanowski
12 to come up, because, of course, he hasn't had a chance to
13 answer any questions yet. We might also have him
14 interact with the rest of the members of the panel as
15 well. As I said, we have to move on because we do have a
16 hard stop at 2:20.
17 So what I'm going to do is just introduce
18 everyone by name and title and then just have each of
19 them tell us a little bit about who they represent and
20 give us an overview of their reaction and what we just
21 heard from Professor Perzanowski.
22 So we'll start with John Bergmayer, who is with
23 Public Knowledge and go to Greg Barnes with the Digital
24 Media Association; Mark Fisher from the Entertainment
25 Merchants Association; and Ben Sheffner from the Motion

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1 Picture Association of America.
2 So let's just go down the line. Again, let us
3 know who you represent, who your organization represents,
4 and give us an overview of your reaction to what we
5 heard.
6 MR. BERGMAYER: Sure. Hello? So I'm with
7 Public Knowledge. We're a Washington, DC-based consumer
8 digital rights advocacy group. Just so you know where
9 I'm coming from policy-wise, you know, I'm a big
10 supporter of digital first sale, but obviously, like we
11 said, we're not here to discuss the fundamental policy of
12 first sale and things like that.
13 You know, I think getting to my preferred
14 policy would take a lot of work and rethinking how
15 copyright law works, in particular, you know, formulating
16 some new concept of a digital copy that you own that is
17 somehow distinct from the sort of physical media it's
18 embedded in because as I'm sure everyone here knows, you
19 know, there's intellectual property rights and then you
20 own a copy, which is defined as a physical item, and when
21 we're talking about digital media, people always talk
22 about this concept of, oh, I got a copy, I downloaded a
23 copy, which is not really how the term "copy" works in
24 copyright law. So getting to my preferred outcome would
25 be really difficult.

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1 So in the meantime, I'm totally in favor of
2 things that I think pragmatically help consumers. And
3 one of the key things, as Aaron discussed, is, you know,
4 consumer education and disclosure to people about what it
5 is they're buying, what it is they can do so we can see
6 if maybe in the marketplace if there is the ability to
7 offer people more rights than they currently have, if
8 they prefer to spend money on those things, and maybe we
9 could have more of a marketplace reaction.

10 You know, there are a couple of other policy
11 ideas, which I think would be great, like if a company is
12 claiming that it is going to provide access to a work to
13 consumers, then that obligation on the part of the
14 company is ongoing. So we've had instances before where
15 companies say, you know, you're just buying rights to
16 this and, you know, you can access it on these devices,
17 and then the company goes out of business. Then people
18 either lose the ability to authorize new devices or
19 things like that.

20 Meanwhile, we've seen with the case of Pebble,
21 which is a smart watch company, they got bought; their
22 business wasn't looking so great; they issued one final
23 software update to their hardware product, which says,
24 okay, we've made it so you can continue to use this, even
25 after all of our servers shut down.

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1 I think things like that would be great, where
2 if you are buying something from a company and it's just
3 access and then the company, for whatever reason, changes
4 its business model, the consumer ought to still be able
5 to have access if you transfer it to another company, if
6 you give them a DRM-free version of that thing that they
7 had bought access to so there's no longer a need for
8 ongoing support, things like that I would support too.

9 And also I'll just point out from a policy
10 perspective there's this fun legal concept called
11 numerous clauses where you have a defined set of rights
12 that are recognized by the law, and if you had, like,
13 more of just a menu of the kinds of rights that companies
14 sell to consumers, it's easier to disclose.

15 So getting into the sort of consumer
16 understanding perspective, I think if -- you know, if
17 every different digital media company doesn't reinvent
18 the wheel and come up with new kinds of rights with
19 little exceptions here and there where it varies pretty
20 significantly from company to company and what you've
21 learned about how Apple works is not the same about how
22 Amazon works, but instead you had just a simplified menu
23 of the kinds of rights that consumers can have, I think
24 then it would be very much easier to have consumer
25 education and, you know, that, for example, the same kind

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1 of notice could be used across different media platforms.
2 And it would mean the same thing, more or less, legally.

3 Now, you know, one of my issues with this is
4 there's a big graphic design component, as Aaron pointed
5 out, and maybe having lawyers decide how to describe what
6 is important to disclose to consumers and how to present
7 it is not always the best idea, because you ask a lawyer,
8 what are the important components of this EULA that ought
9 to be explained to consumers, it's, like, all of them.
10 That's why we wrote it in the EULA, the important parts
11 are the things we wrote down.

12 And you need to have some kind of flexibility
13 to have someone with a nonlegal perspective with just a
14 more pragmatic simplified perspective, you know, try to
15 communicate to consumers how to understand things, while
16 at the same time there is a legal question. You need to
17 make sure that it's a safe harbor where if people
18 misunderstand, if the EULA is accurate but the disclosure
19 isn't and it's a disclosure that people thought was good
20 enough but it turned out it wasn't in this one Edge case,
21 you know, we don't also want to hold people responsible
22 where we're telling them to provide simplified
23 information to consumers and then all of a sudden because
24 that simplified information didn't have all the same
25 information as the EULA you're holding them liable for

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1 somehow deceiving consumers. So I think there's a little
2 bit of a balance there.

3 And this is my final point, and I'm happy that
4 the Copyright Office is here today to discuss the
5 consumer -- the embedded software issue, because I think
6 a lot of the same legal doctrines, first sale and
7 copyright, apply to the consumer products that have
8 software embedded. They have EULAs; you have the same
9 disclosure issues; you have the same consumer
10 understanding issues as applies to digital media.

11 And, in fact, I think that a lot of the
12 instincts that consumers have with regard to what did I
13 buy the right to do are even stronger in the case of
14 physical goods that used to not have software or no
15 significant software and now are associated with this
16 EULA where consumers expect if I buy a good I can pass it
17 along in my will, I can sell it to a friend, I can lend
18 it out, I can repair it. I can repair from an
19 unauthorized repair shop. I can make small modifications
20 to it.

21 And all of those legal doctrines that we're
22 talking about with respect to just things like music
23 downloads I think will also -- could end up having
24 effects on those areas too. So I think, you know, that's
25 just an emerging area, I think, that people need to be

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1 aware of. Thank you.
 2 MR. CARSON: Thanks, John. I think you've
 3 raised enough issues to keep us busy for the rest of the
 4 afternoon.
 5 Greg, want to raise some more?
 6 MR. BARNES: I've taken a lot of notes. So as
 7 David pointed out, my name is Greg Barnes. I'm General
 8 Counsel for the Digital Media Association. DiMA
 9 represents several of the major online distributors of
 10 digital content, including movies, music, and books. We
 11 see ourselves as playing a key role in the online
 12 ecosystem connecting fans with those individuals who
 13 actually create the copyrighted works.
 14 I guess I had a lot of thoughts, and I tried to
 15 jot down a couple of notes when John was speaking. Let
 16 me try to kind of summarize because I know we're in
 17 limited time. I think the study is interesting, but I
 18 think it's too limited to really draw meaningful
 19 conclusions. For example, the research fails to account
 20 for clear contradictions. The main argument of the study
 21 appears to be that the use of the "buy now" button lends
 22 itself to consumer confusion in that online purchases of
 23 digital content lead individuals to believe that they
 24 bargained for greater rights than they actually obtained.
 25 However, if you look at the study, the research

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1 actually undermines that very argument when the authors
 2 examine purchasers who made the physical content. In
 3 those instances, the authors note that consumers often
 4 underestimate benefits they will receive as a result of
 5 transactions involving the "buy now" button.
 6 So same button, two contradictory outcomes.
 7 "Buy now" button associated with physical purchases,
 8 sometimes the rights are underestimated. Use of the "buy
 9 now" button in certain instances with digital content,
 10 the rights are overestimated. Now, that can lead some to
 11 ask the question, How can that be? Well, the authors
 12 attempt to explain the latter occurrence by pointing to
 13 external factors that contribute to the misperceptions.
 14 But they fail to make similar concessions with respect to
 15 purchases of digital content.
 16 And from our perspective, this oversight is
 17 important and something that's worth studying because if
 18 lack of awareness or appreciation of relevant law can
 19 explain why consumers underestimate their rights with
 20 respect to physical purchases, it could equally be true
 21 that they overestimate because lack of awareness of law
 22 lends to overestimation.
 23 So I think this is a point that if we're going
 24 to look at this study and we're going to make policy
 25 recommendations or conclusions based upon the study, we

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1 should be giving that some thought.
 2 A second problem with the study is that it
 3 fails to adequately consider consumer motivations. Our
 4 research -- speaking for companies that I work with and
 5 talk to on a regular basis -- our research indicates that
 6 when consumers purchase, let's just say, the latest
 7 Taylor Swift song, for example, they aren't buying that
 8 song with the thought of maybe 40 years down the line I
 9 can actually gift that to a relative.
 10 They are actually making that purchase for one
 11 of five reasons. Reason one is instant gratification.
 12 They want to be able to immediately consume and enjoy
 13 that content that they just purchased. Convenience. For
 14 those who used to buy physical products, you would have
 15 to make a trip to your local store, drive, depending upon
 16 where you live, 5, 10, 20 minutes, fork through the
 17 aisles to actually purchase content. Now you can do all
 18 of that online.
 19 Access to massive libraries. For those who
 20 actually went to their record store or went to their
 21 local Walmart to purchase a CD or a DVD, they often had
 22 the experience where they might be out of stock. Well,
 23 the online digital storefronts have changed all that
 24 because now we have access to massive libraries, and we
 25 actually sell in the context of music about 50 percent of

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1 what we call catalog, meaning we actually sell old music
 2 just as much as we sell newer music. That didn't exist
 3 when you actually bought music off the shelf, so that's
 4 the important thing that motivates consumers.
 5 Affordability is a big issue. Digital content
 6 is often priced cheaper than physical products. And the
 7 last thing that motivates consumers deals with
 8 portability. For those who actually purchase music
 9 videos, books, if you purchased them in the physical
 10 world, you actually have to take them with you, carry
 11 them. In this new environment, as long as you have the
 12 device, you always have access to those purchased works.
 13 And, so, those are five important factors that
 14 tend to influence consumer purchases. And the last thing
 15 I would suggest on that issue is if, in fact, consumers
 16 were being misled or deceived, as often is suggested, we
 17 wouldn't see the same level of repeat customers that the
 18 digital storefronts experience. Not only are we actually
 19 -- not only do we actually have a loyal fan base, we
 20 actually are growing the number of consumers.
 21 And we think if this weren't the case, people
 22 would actually probably have complained. And as Aaron
 23 pointed out, they probably would actually go and pursue
 24 alternative means of actually accessing content, but we
 25 don't see that happening. We actually see the legitimate

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1 online marketplace growing right now.
2 The final point I'll make, and it's probably
3 the most important, is I think not only is the short
4 notice unwarranted, I think it could easily lead to
5 additional problems. And I've kind of cataloged three
6 problems. First off is fueling increasing consumer
7 confusion. The authors tend to suggest that this short
8 notice would be short and simple, and I don't think
9 either is true.
10 It wouldn't be simple in that this licensing
11 environment is very complex, and it differs depending
12 upon the actual platform and the copyright holder that
13 we're negotiating with. There's an entirely different
14 agreement that develops between independent music and
15 actually major record labels. Those agreements look very
16 different than the types of agreements that we enter into
17 with the major motion picture studios. And those
18 agreements look different than the agreements with book
19 publishers.
20 And, so, when you try to -- and I think John
21 touched upon this kind of briefly, when you're trying to
22 create a simple notice, it actually wouldn't be simple,
23 nor would it be short. David talked, I think, in his
24 introductory a few minutes ago about EULAs, you know,
25 people not liking EULAs. John chimed in and said, yeah,

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1 but they actually are long because they include important
2 information, and that's true.
3 And when you try to move into this short notice
4 environment, any -- any attorney worth his salt is going
5 to actually tell you, you better be careful. You better
6 include all of the important data because anything you
7 leave out can actually expose you to a Section 5
8 proceeding. So we think that's something to be mindful
9 of.
10 A second problem with the short notice, and I
11 struggle with how to put it nicely, but I think it's a
12 proposal that's probably five or ten years behind it's
13 time. Again, turning to David's introductory remarks, he
14 talked a little bit about voice-activated assistance.
15 Right now, all major technology -- not all. Several
16 major technology companies are experimenting: Alexa,
17 Bixby, Cortana, Siri, Hello Google.
18 It's not clear in the next decade if we'll
19 actually even have screens where people can actually view
20 these notices that we're discussing. And as I think
21 David mentioned, would you want to have some kind of
22 voice-activated system reading back a EULA to you? I
23 don't think you'd want that, and I don't think you'd want
24 it reading back this short notice that we're talking
25 about right now.

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1 Finally, I'll touch upon a point that Aaron did
2 point out, is this short notice, it could actually move
3 people away from legitimate online marketplace. It could
4 actually decrease sales and increase piracy. And I think
5 those are two things that we don't want.
6 Speaking again for the online platforms, we've
7 done tremendous work and dedicated a lot of time to build
8 a legitimate online marketplace. Everybody can think
9 back, who follows this industry, to the days of Napster
10 where consumers were convinced content should be free.
11 We've actually changed that dynamic and convinced them
12 now that it should be purchased. And we would hate to
13 see anything disrupt that status quo.
14 So I think I'll wrap up there. I'll say the
15 research is a good starting point, but it definitely
16 warrants further research and more discussion.
17 MR. CARSON: Thank you, Greg.
18 Mark, what do you have say?
19 MR. FISHER: I am -- there we go. Good
20 afternoon. I am Mark Fisher, the President and CEO of the
21 Entertainment Merchants Association. Personally, I've
22 spent 35 years in the home entertainment business, both
23 as a retailer -- a retail executive and currently as a
24 trade association executive.
25 The Entertainment Merchants Association is the

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1 trade association supporting the retailing of home video
2 and video games. Our numbers run the spectrum from
3 digital retailers to physical retailers, brick-and-mortar
4 retailers, online retailers, the home entertainment
5 divisions of all the major studios and movie studios and
6 many industry dealers as well, video game publishers and
7 all of those associated service technology companies that
8 support our industry.
9 Our members that are engaged in the digital
10 space are involved in electronic sell-through business or
11 the sale of digital content, TVOD, transactional VOD, the
12 rental of video content, as well as SVOD, which is
13 subscription video on demand, and AVOD, advertising video
14 on demand.
15 The digital marketplace as the home
16 entertainment digital marketplace, home video
17 marketplace, is over a \$10 billion business, or was in
18 2016, and for the first time in 2016 surpassed the
19 physical home video marketplace. Of that, more than --
20 more than half of it is subscription video-on-demand
21 business and the remainder splits down the middle between
22 electronic sell-through and transactional video on
23 demand. All three of those -- of those -- of those
24 business practices have actually grown over the past
25 year, 2016 versus 2015, albeit that that subscription

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1 video-on-demand business has grown significantly more and
2 has experienced double-digit growth over the past several
3 years.
4 To address the buy-button issue, according to
5 the Merriam-Webster dictionary, I'll read it, the
6 definition of "buy" is to acquire possession, ownership,
7 or rights to the use of -- to the use or services of by
8 payment, especially of money. So the plain meaning of
9 "buy" is really an appropriate term across all content
10 formats. Consumers buy consumer software, even though
11 they're licensing it. They buy video on demand, even
12 though they know that they're renting a movie. And they
13 buy movie tickets, even though they're simply buying an
14 admission to a public performance.
15 Consumers have been buying digital media --
16 digital video -- since the beginning of this century.
17 Movielink and CinemaNow started in -- I think it was
18 1999. Consumers today are accustomed to digital rights.
19 This isn't a -- this isn't a new business. And
20 consumers, they appreciate the fact that with the digital
21 content they have -- as Greg said, they have portability
22 and they have immediate access to content. They don't
23 have to leave their house and go to a store to access the
24 content. They appreciate those benefits of digital
25 content.

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1 Consumers understand, as David was saying in
2 his opening, that buying content in one format versus
3 another offers different benefits and different
4 limitations. And if somebody buys a DVD of a movie, they
5 know that they can resell it when they no longer want to
6 keep it, but the owner of a digital copy of that same
7 movie, I think they know that they can't resell it.
8 The owner of a digital copy of a movie that's
9 stored in the -- that's stored in the cloud, on the
10 Amazon cloud or Ultra -- a service like UltraViolet,
11 knows that they can access that content wherever they
12 might be remotely, but the owner of the DVD knows that
13 they have to have the DVD with them when they -- when
14 they view the content.
15 In the study that we just saw presented by
16 Professor Perzanowski, the -- it cited the buy button is
17 confusing and the buy button is deceptive, but when the -
18 - when the respondents were presented with the -- with
19 the short notice of rights for video content
20 specifically, there really wasn't statistical -- a
21 statistically significant difference in what they
22 perceived their rights to be.
23 So I believe that this demonstrates that
24 consumers really aren't confused and deceived by the "buy
25 now" button for digital movies. It's an acceptable term,

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1 and it's not confusing, not deceptive.
2 It's important to keep in mind that the
3 majority of the terms that limits the consumer's
4 ownership or usage and the transfer privileges are
5 established back by the content providers, and those
6 rights are only offered by content providers on a license
7 basis, and they're -- due to the sheer number of content
8 providers that occasional retailer is working with. The
9 licensing requirements are -- they vary. And they vary
10 too much to be able to be covered in a -- in one simple -
11 - one simple message to the consumer to be covered
12 properly.
13 Retailers do a really good job of communicating
14 to their consumers what their consumers need to know.
15 Retailers don't exist because they're attempting to
16 deceive the consumer. Retailers exist and develop great
17 relationships with a consumer when the consumer keeps
18 coming back.
19 In order to do that, the retailer has to have a
20 really good idea of what their message -- to their
21 consumer, what they're offering, and the content that
22 they're -- that they're carrying on their sites. And we
23 believe that they need the flexibility to be able to do
24 that and to do that as best they can, as they can best, I
25 should say.

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1 So for the reasons stated, the EMA believes
2 that there -- that there is not need to establish best
3 practices for consumer messaging in connection with
4 online transactions involving copyrighted works. We
5 don't believe that's necessary. We don't believe it's
6 desirable. And we believe it will confuse the market.
7 MR. CARSON: Thanks, Mark.
8 And, finally, Ben, let's get the perspective of
9 the motion picture industry.
10 MR. SHEFFNER: Thank you, David, and thank you
11 to the PTO and NTIA for hosting us today. So, so far,
12 we've heard, in addition to John, we've heard from two
13 sets of retailers: from DiMA and from EMA. I represent
14 the motion picture studios, the major motion -- the six
15 major motion picture studios. Generally speaking, they
16 are not in the retail business; instead, they are in the
17 wholesale business, meaning they don't have the direct
18 relationship with customers.
19 I should have a -- I should state a caveat that
20 there are some experiments going on with -- on a
21 relatively small scale at the moment -- of direct
22 relationships via websites operated directly by the
23 studios, but speaking generally, the way that our members
24 make their works available to the public is through these
25 online platforms that Mark's and Greg's associations

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1 represent -- Amazon, Apple, Walmart/VUDU, et cetera. So
2 it is not the movie studios that have the direct
3 relationship with the consumer who visits these websites
4 or these platforms to obtain access to the materials.
5 It's also important to note that the motion
6 pictures and television shows that eventually end up on
7 iTunes and Amazon, et cetera, are the result of hundreds,
8 perhaps thousands, of individually negotiated agreements.
9 So one of my -- one of our studios, for example, Fox,
10 they will have separate negotiations with Apple, with
11 Amazon, with Walmart. So will Disney; so will Warner
12 Brothers, et cetera.
13 So we're talking -- and each of those
14 agreements may not cover their entire catalog. There may
15 be different negotiations covering different catalogs.
16 So, again, it's hard to talk uniformly about everything.
17 I obviously haven't seen all these hundreds or perhaps
18 thousands of agreements. So what I'm going to be talking
19 about here is the general rule, although it won't shock
20 me if somebody can find a particular exception out there.
21 One thing I've learned in researching and
22 preparing for this event is, you know, I want to know,
23 well, how exactly does this page on Amazon.com or on
24 Apple get to be that way. Is it because Amazon or Apple
25 -- or is it because the particular copyright owner whose

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1 works are being offered -- designed that particular page?
2 And it probably won't surprise people in this room to
3 learn that Amazon designs its own webpages; Apple designs
4 its own webpages. That is not the subject of agreements
5 between the copyright owner and the platform.
6 As I understand it, it's generally not the
7 subject of any negotiation or discussion. Apple can --
8 and Amazon, they consider it that -- their real estate.
9 They don't want others -- they don't want others
10 designing it, both in terms of the graphics and in terms
11 of the particular words that are used to describe the
12 transaction.
13 So let me just take a minute to sort of
14 describe the current state of the marketplace because I
15 think it bears on whether consumers are being confused by
16 what they're presented with. As others have alluded to,
17 consumers obviously have a choice between obtaining or
18 obtaining access to copyrighted works, online or through
19 traditional hard goods like DVDs or Blu-ray disks in our
20 industry.
21 In 2015 -- the end of 2015 -- which is the
22 latest figures that I have available at the moment, there
23 were 121 legal services over the internet that people
24 could access movies and television shows, compared to
25 only 80 in 2012, and of course zero going back to 1988 --

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1 '98 or '99.
2 In 2015, they used -- consumers used those
3 services to access 76.1 billion -- with a B -- television
4 episodes online, compared to 48.8 billion three years
5 earlier; and lawfully accessed 8.4 billion -- with a B --
6 movies compared to 4.4 billion in 2012.
7 I think what this says is that consumers are,
8 overall, satisfied with the current state of affairs.
9 Those numbers are going up. Now, Professor Perzanowski
10 had a -- sort of a prebuttal to the argument that he
11 probably suspected I was going to make and said, well,
12 you know, Volkswagen sold these millions of cars and they
13 lied about the emissions that were going to be coming out
14 of them. That doesn't mean that all those -- those
15 millions of Volkswagen buyers are satisfied with those
16 transactions. And that's true, but there's a big
17 difference.
18 I suspect that most of those Volkswagen
19 purchasers will be one-time purchasers.
20 PROF. PERZANOWSKI: (Off-microphone comment.)
21 MR. SHEFFNER: And I suspect you and probably
22 most of those others will be -- will be one-time VW
23 purchasers. As others have alluded to, the people who
24 are buying or obtaining access to -- let's use that term
25 for the moment -- all of these billions of movies and

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1 television shows, they're obviously repeat customers.
2 There's simply -- there are not enough people in the
3 world for it to be one-off purchases.
4 So they are hitting the buy button or the rent
5 button or whatever it happens to say on their particular
6 platform, they are paying a few dollars, and they are
7 watching or obtaining more permanently the movie, and
8 they are coming back. And they are doing it again and
9 again and again. And I suspect they would not be coming
10 back again and again and again if they felt that they
11 were being tricked or deceived or weren't getting what
12 they thought they were getting when they -- when they hit
13 that button.
14 I know we're short on time. Let me just take
15 one or two minutes to talk for a second about the buy
16 button and what I think is going on here. I'm a defender
17 of the buy button. I'm not here to tell the online
18 platforms that they should not be using the buy button,
19 but I think we -- I think I want to just put a little
20 perspective how I think we should think about the word
21 "buy."
22 I started thinking about this. You know,
23 there's a lot of instances on the internet where we use
24 terms that are borrowed from very familiar terms from the
25 offline world. Just a few examples. We use email.

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1 Obviously, everyone's familiar with old-fashioned mail
2 that you get in your mailbox, and we have this newfangled
3 thing where you get messages, and it's kind of, sort of
4 similar to old-fashioned mail, so we call it email.

5 When we open up our computer and we are looking
6 for stuff that we have saved, we talk about folders and
7 files sitting on the desktop. Now, obviously, those are
8 -- those are kind of metaphors for very familiar things
9 that we're familiar with from the physical world, from
10 our officers.

11 Amazon has this thing called a shopping cart.
12 We're all familiar with shopping carts. It's where you
13 sort of tentatively decide you're going to buy something,
14 and you put it in your cart, and then you check out at
15 the end. Obviously, on -- when you go to Amazon.com,
16 there's not a physical thing that you wheel around, but
17 it's this metaphor that approximates what you are -- you
18 know, what you've experienced in the offline world.

19 That is, I think, how we should think about the
20 buy button. You know, it's a colloquial word, as
21 Professor Perzanowski, I think, accurately said at one
22 point, both in his paper and in his presentation a few
23 minutes ago. Ownership is both a complex legal
24 conclusion and an intuitive claim about an individual's
25 relationship to a product. I think that's another way of

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1 saying it's a colloquial word that we use to say, okay, I
2 pay for something and I get something, whether it's a
3 physical object or access to something.

4 And, you know, I just -- again, an example from
5 personal experience, but I think obviously we should
6 extrapolate widely from, you know, in casual
7 conversation, I'll often say, I just bought an album on
8 iTunes. What it meant is that I paid about ten bucks,
9 and all of a sudden, a bunch of songs showed up on my
10 iPhone or my -- on my iPhone and my computer and my Apple
11 TV at home so I can listen to it on my home stereo. And
12 I'm talking like -- and I'm thinking like and talking
13 like a normal human being who talks about, you know, I
14 paid some money and I got this thing.

15 If I were to step away from my sort of normal
16 human-beingness and think about it as a lawyer, I'm sure
17 I could write a 10 or 20-page memo analyzing, well, I
18 paid for something, what exactly did I get? Did I get
19 physical ownership of a copy? Did I license something?
20 Did I -- did I buy the copyright? I think we'd all
21 probably agree, no, I didn't buy the copyright. It would
22 probably cost millions of dollars to buy any of the
23 actual copyrights that we're talking about.

24 And there's sort of no problem. I mean, it's
25 when we say, wow, "buy," you know, that carries specific

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1 legal meaning that means, you know, can you do X or Y or
2 Z that we sort of -- and, you know, that we're sort of
3 inventing a problem that doesn't really exist.

4 I mean, I know I'm probably running long, but
5 just one final thought in closing. You know, in -- it's
6 one thing to run an experiment and then sort of grill
7 people, well, did you think you were getting this; do you
8 think you were getting that; how much would you have paid
9 for, you know, something else versus the experience in
10 the real world.

11 I mean, I gave you a bunch of statistics about
12 sort of how many billions of these transactions are going
13 on. You know, in preparing for this event, I spoke a
14 little bit with Mark and with Greg, and we kind of
15 compared notes. And, you know, this question that we had
16 for each other is, well, you know, are your members
17 getting complaints from the public about these
18 transactions? Did they say, oh, you know what, I hit
19 buy, but then I found out, well, you know what, maybe I
20 wasn't getting the same exact rights that I would have
21 gotten if I had bought a physical book or a DVD or a CD.

22 And the answer that I think all of us share is
23 no. And I think it was -- you know, Greg mentioned to
24 me, hopefully I won't misquote him, you know, online --
25 online purchasers are very quick to complain and make

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1 their views known if they are unhappy. They do not
2 hesitate to go on, whether it's the review pages on
3 Amazon or message boards or whatever. And if they don't
4 like the way they are being treated, they are not shy
5 about complaining. And I'm sure they've complained about
6 other things, but they simply do not complain about this
7 issue.

8 And we're -- the members at the MPAA are a step
9 removed from these transactions, but I can report that it
10 is the same from our perspective. People are not saying,
11 you know what, I hit the buy button but I didn't get what
12 I thought when I was doing it. So with that, I think
13 I'll close and happy to respond to any questions later.

14 MR. CARSON: Well, somebody is obviously
15 speeding up the clock, and we're going to look into this,
16 but, Aaron, I can give you 60 seconds and literally not a
17 second more, and I'm really sorry, but we've run out of
18 time.

19 PROF. PERZANOWSKI: That's fine, I can talk
20 fast. So this idea that "buy" -- the term "buy" kind of
21 functions as a metaphor, I think that gets back to a
22 point that we heard earlier about this idea of the
23 numerous clauses principle. We simply don't have a word
24 to succinctly describe these kinds of transactions to
25 consumers. I don't know what the word "buy" means.

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1 That's why I went out and asked people what they believe
2 that it means, right?
3 It leverages a set of expectations that have
4 been developed in the physical world where people have
5 been buying things for a long time. And I think there is
6 a set of assumptions built into that terminology. If we
7 want to construct a different kind of transaction that
8 has a different nature, we need to communicate that. And
9 maybe in time we'll develop another word for it and we
10 can use a single word shorthand. I don't think we're
11 there yet, and I think the data that we uncovered sort of
12 bears that out.
13 I have so many other things that I could say.
14 MR. CARSON: We're going to stop here. I'm
15 really sorry.
16 MR. PERZANOWSKI: That's all right.
17 MR. CARSON: We just have a hard stop right
18 here.
19 MR. PERZANOWSKI: Sure.
20 MR. CARSON: Thanks very much. We could have
21 gone on much longer, clearly, but we can't.
22 Next panel, please.
23
24
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1 SERIES OF PRESENTATIONS: INFORMATIVE PERSPECTIVES
2 MR. ZAMBRANO: Hi, everyone. My name is Luis
3 Zambrano. I'm a Policy Analyst at NTIA. Thank you for
4 coming here. When we were planning this meeting, many
5 pointed to work that has been done in other areas that
6 involved consumer messaging, for example, privacy and
7 food and nutrition.
8 We also realized that there were many
9 perspectives in these areas of expertise that fed into
10 this discussion, and we have asked our next presenters to
11 provide us with a bit of information about consumer
12 disclosures from different perspectives, including how to
13 design and evaluate disclosures in a digital world,
14 communication research trends, and to speak a little bit
15 about the legal framework for disclosures.
16 And with that, I would like to introduce to you
17 one of our -- our first speaker today. Lorrie Cranor is
18 a professor of computer science and of engineering and
19 public policy at Carnegie-Mellon, where she is a director
20 of the CyLab Usable Privacy and Security Laboratory and
21 co-director of the MSIT Privacy Engineering Masters
22 Program.
23 In 2016, she served as a Chief Technologist at
24 the U.S. Federal Trade Commission. So Lorrie is actually
25 in very much of high demand today and she has to leave

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1 for another commitment after her presentation, so we
2 would like to thank Lorrie in advance for making the time
3 to be with us today.
4 DESIGNING AND EVALUATING DISCLOSURES IN A DIGITAL WORLD
5 PROF. CRANOR: Thank you. All right. So most
6 of the work that I've done with disclosures is in the
7 privacy space. You may recognize some of these privacy-
8 related disclosures and symbols, and these are all
9 examples of disclosures that myself or my students in my
10 lab have been involved in doing some evaluation, to see
11 how effective are they. And that's what I'm mostly going
12 to talk about today.
13 If you want to know whether disclosures are
14 effective, you need to put some thought into actually how
15 to do the evaluation. And we've done that. We've looked
16 at some of the cognitive models that have been put
17 forward about how people process disclosures in their
18 brain.
19 And this is a simplified version of one that
20 was put forth by Michael Wogalter. I've simplified it
21 here, but if you imagine that an individual is presented
22 with a disclosure in some way, and the first question is
23 whether they actually even noticed that the disclosure is
24 there. And if so, do they fix their attention on it. If
25 it's visual, do they read it? Or if it's audio, do they

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1 listen to it?
2 If they have actually looked at it, then do
3 they understand what it means? Do they understand the
4 words? Do they understand the symbols? Then, if they
5 understand it, do they believe it? Do they think it's
6 important? Do they trust it? Do they think it's
7 relevant to them? Do they think they personally should
8 pay attention to it, or is it somebody else's
9 responsibility to do that?
10 And then are they motivated to do something
11 with the information that they have just learned from
12 this disclosure? And, then, finally, do they actually do
13 it? Do they make decisions based on the information
14 they've just gained? Do they change their behavior in
15 some way, or do they choose not to change their behavior,
16 but from an informed perspective?
17 So that's the cognitive path that we expect
18 people go through when encountering a disclosure, and
19 there are three points here that I'm going to focus on,
20 and that is looking at whether people notice the
21 disclosure, they comprehend it, and do they act on it.
22 And, so, I have three very quick studies to share with
23 you.
24 So on the question of noticing a disclosure,
25 one of my students did this study looking at the privacy

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1 notices in an Android app. And she posited that whether
2 or not people notice the notice might depend on when they
3 actually see the notice. And, so, she developed an app
4 with a little quiz game, and she developed different
5 versions of it where the privacy notice, which is what
6 you see in the middle, appeared at different points. In
7 some, it appeared in the app store; in some, it appeared
8 right after you download the app; in some it appeared --
9 it interrupted you in the middle of playing the game; in
10 some, it appeared at the end of the game.

11 She had a bunch of different versions,
12 including one that had no privacy notice. She had people
13 download the app, play the game. She gave them a survey,
14 which they thought was about how much they liked the
15 game, but somewhere in there she had some questions about
16 the privacy notice. And that's what she was really after
17 was to find out whether they could correctly answer those
18 questions.

19 And, basically, what she found is that the
20 people who saw the privacy notice in the app store did no
21 better than the people who did not see it at all.
22 However, any of the other places that she put it, people
23 were more likely to be able to correctly answer
24 questions. So that shows that the exact same notice,
25 whether people notice it and pay attention to it, depends

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1 on the timing of when they actually encounter it.

2 All right, the next study focused on
3 comprehension. We looked at this blue triangle icon.
4 It's known as the AdChoices icon, and you can see it's
5 positioned in the corner of these ads. And you'll see it
6 in the corner of many of the ads that you see on the
7 internet. Well, we noticed in our research that most
8 people seemed to be unfamiliar with it and didn't know
9 that it was even there, let alone what it meant.

10 So we did a study where we recruited about
11 1,500 people online, and each one of them was exposed to
12 one version of this icon and an associated tag line. We
13 showed them a picture of The New York Times front page,
14 and you can see there are several ads, and each ad has
15 the icon and tag line there. And then we asked them some
16 questions about the icon and tag line. And you can see,
17 here's a list of the different versions of the tag line
18 that we tested. Some are versions that are actually used
19 on ads; some are versions that we made up for the study.

20 And the questions we asked were things like,
21 well, what do you think would happen if you clicked on
22 the icon, and we gave them some examples of things that
23 might happen, and we asked them if they agreed or
24 disagreed that those would happen. So, when we gave this
25 icon and the AdChoices tag line, 56 percent of people

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1 said they thought more ads would pop up if you clicked.
2 That's wrong.

3 Forty-five percent thought that it was a Your-
4 Ads-Here sort of thing, that they could buy ads on the
5 website. That's also wrong. Only 27 percent of people
6 had the correct answer, which is it will take you to a
7 page where you can opt out of tailored ads.

8 Now, when we tested other tag lines, we got
9 different results. So if we changed the tag line to
10 "configure ad preferences," you can see now we go from 27
11 percent of people have the correct answer to 50 percent
12 of people having the correct answer. Now, 50 percent is
13 still not very good, but it's about twice as good as what
14 we were doing before. So this shows you that what words
15 you put next to the icon actually make a big difference
16 in how people comprehend the meaning of this icon.

17 Okay, the last study that I want to share with
18 you is looking at whether these disclosures actually
19 change people's behavior. So this is back to Android
20 apps, and one of my students developed this privacy facts
21 notice that was designed to be put on -- in the Android
22 app store. And it gives you a quick summary of some of
23 the privacy information related to apps.

24 So the way he decided to do this test is he
25 developed a mock-up of the Android app store; he

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1 populated it with a bunch of apps; and he invited
2 participants into our lab. And he told them to imagine
3 that they had a friend who had just bought their first
4 Android phone and was asking for assistance in selecting
5 apps. And the friend wanted an app for dieting, an app
6 for travel, a bunch of different types of apps.

7 And there were exactly two of each of these
8 apps in the app store. Now, half of the participants
9 visited an app store that had privacy facts, and half the
10 participants visited an identical app store without
11 privacy facts. And we looked to see which apps did they
12 select and what was their reason.

13 Now, what we found was that the people who saw
14 the privacy facts were more likely to select the more
15 privacy-protected apps than those who did not have that
16 privacy information. And that was in most cases.
17 However, we did some exceptions. We specifically
18 designed these pairs of apps in ways to test different
19 hypotheses, and in one case, we would pair a privacy-
20 protective but completely unknown brand against a known
21 brand that did not have such good privacy. And what we
22 found is the well-known brand often was more popular,
23 despite their privacy rating. So we can see that there
24 are different factors at play here that actually impact
25 people's behavior.

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1 So when I was at the FTC last year, this was
2 also a topic of interest to the FTC, but not just about
3 privacy disclosures, but all types of disclosures. And
4 we had a meeting where we invited people who do work on
5 nutrition labels and drug fact labels and mortgage labels
6 and all sorts of different types of disclosures.

7 And you can read a report of that workshop,
8 which is on the FTC website, but two key takeaways I want
9 to share. One was that our experts, regardless of what
10 domain they were in, said it's really important to test
11 disclosures before you put them out there to see if
12 they're effective. And even if you have a low budget,
13 some testing is better than no testing at all.

14 And then the other key takeaway is that when
15 you test them, it's not just enough to test, do people
16 understand these words, but you actually have to run a
17 test where you can test comprehension in the context that
18 makes sense for this particular disclosure.

19 The last thing I want to say before I wrap up
20 is I wanted to put out the idea of computer-readable
21 disclosures. Some of our speakers earlier today
22 mentioned the problem of do you really want Alexa reading
23 a disclosure to you, and, of course, we don't really want
24 to listen to these long disclosures. However, if you
25 make these disclosures computer-readable so that Alexa

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1 and all of your other digital assistants can read them
2 electronically to themselves, not out loud to you, you
3 can do all sorts of useful things now.

4 So your personal assistants can read them.
5 They can use this information to discover whether there's
6 something unusual in this disclosure, or is this the same
7 disclosure you've already seen a zillion times before.
8 You might set your personal preferences to say, alert me
9 only if there's something unusual in this disclosure; or
10 alert me the first time I've seen this disclosure; after
11 that, just say it's the same one you've seen before.

12 You can also use this for searching. You know,
13 I would like this hot new song, but I want it from the
14 company that will give me these particular rights. And
15 you could have your personal privacy assistant find the
16 vendor that will offer it to you with those rights. Lots
17 of really useful things you can do once you put these
18 disclosures in an electronic and computer-readable form.
19 And I'll end there. Thank you.

20 MR. ZAMBRANO: Thank you, Lorrie.

21 Our next presenter is Florencia Marotta-
22 Wurgler. She's a professor of law at New York University
23 School of Law and the director of the NYU Law School
24 Study Abroad Program in Buenos Aires. Her teaching and
25 research interests are contracts, consumer privacy,

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1 electronic commerce, and law and economics. Her
2 published research has addressed various problems
3 associated with standard form contract online such as the
4 effectiveness of disclosure regimes, delayed presentation
5 of terms, and whether people read the fine print.

6 She's currently working on a large empirical
7 project on consumer privacy policies online and on the
8 effectiveness of current consumer privacy protections.

9 Florencia?

10 CONSUMER PERCEPTION: COMMUNICATIONS RESEARCH TOOLS

11 PROF. MAROTTA-WURGLER: Thank you.

12 Hi, thank you very much. Let me just access my
13 slides.

14 Okay, so, I'll talk a bit about some work I've
15 done on -- I've been focusing on fine print for over a
16 decade now, specifically on software -- end-user software
17 license agreements. I thought I'd focus on the contract
18 that is the most dense and less likely to be read
19 because, you know, academics have a lot of free time.

20 So I'll talk a bit about that and about some of
21 the findings that I've -- some of the evidence that I
22 found -- I do empirical work -- and then some of the
23 takeaway points from my work and other people's work. So
24 the first one is that very few people read standard
25 terms. You know, the motivation of the talk at the

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1 beginning was that nobody really focused on whether
2 people actually read fine print, and I thought I'd
3 address that a little bit. So very few people read fine
4 print.

5 Increasing disclosure barely changes the rate
6 of readership. And I'll put a caveat on that. There's
7 certain types of disclosure. The traditional forms of
8 disclosure don't really work at all. I'll present some
9 evidence as to that as well. But even requiring assent,
10 presenting the terms in a box and making you click on "I
11 agree," doesn't really work so much.

12 But there's some lessons learned. So
13 shortening, simplifying, framing effects and the just in
14 time, the timing of disclosures, as Lorrie just said,
15 seem to help tremendously in making disclosures more
16 effective, and I'll focus on what effectiveness means in
17 a second.

18 So, first, I'll focus on the studies -- the
19 findings of a first study, worked together with two
20 coauthors. We look to the extent to which people read
21 fine print, not in a lab setting, not in a survey, but in
22 a real market. What -- we look for something that in law
23 and economics we call an informed minority, which is a
24 critical number of people that is sufficiently large to
25 affect a market, to affect sellers into offering terms

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1 that buyers want.
2 So -- and we focused on the market for shopping
3 for software online. EULAs are rich, quintessential type
4 of standard form contract, and for the purposes of this
5 audience and this talk, they include most of the terms
6 related to intellectual property rights, in addition to
7 many others. The average EULA is 2,700 pages long, and
8 they have grown an average of 30 percent over the last
9 decade. So clearly a highly dense contract and which is
10 constantly evolving.
11 So what we do is we measure all the visits by
12 40,091 households to 66 software companies across a
13 number of different markets, including games, word
14 processing, antivirus, from large to very small -- from
15 highly competitive to more concentrated markets, and see
16 the extent to which the shoppers click on the URLs that
17 correspond to EULA. So we use click-stream data for this
18 that basically captures all of the URLs of all of these
19 visitors during their visits to these companies so we can
20 track very carefully how -- where they visit and how long
21 they spend on each particular page.
22 And we say -- and we have very detailed
23 demographic information for each particular user, and we
24 track all of the URLs that correspond to EULAs and
25 measure the extent to which they click on these contracts

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1 and how long they spend on this. And we say that a
2 reader is somebody who spends at least one second in
3 these contracts. So that's -- that's as much as you need
4 to be a reader. It's highly beneficial.
5 And, here, you can see a bit of how this -- how
6 this looks like. So, here, we have for retail and
7 freeware sites we thought, well, maybe if somebody's
8 getting something for free they're more likely to know
9 that there might be strings attached, so you can see that
10 for retail firms we have the 40,697 visits. And then we
11 have some of the characteristics about the particular
12 visit, but the most interesting findings are on the right
13 side of the panel, and particularly the one that's framed
14 in red.
15 And we can see that out of the 40,697 visits,
16 only 49 click on the EULA. These are shoppers. These
17 are people who are actively searching to shop. And those
18 who click on the EULA spend a median time of 29 seconds
19 on a contract that is twenty -- over 2,700 words long.
20 So clearly this is a very small number, about
21 one in 1,000, and with some very generous parameters,
22 maybe .17 percent. So one in 1,000 bothers to access the
23 terms, but they're barely, barely read.
24 So I thought I'd ask, well, how about, you
25 know, maybe these software license agreements, all of

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1 these findings basically lump in different kinds of
2 disclosures. Sometimes it's at the bottom of the page;
3 sometimes it takes fewer clicks to access. What if the
4 disclosure is more salient? Maybe with increased
5 disclosure we see more likely to see readership.
6 And this is what I evaluated in a subsequent
7 study, where I say, well, maybe when contracts are more
8 likely to be read -- meaning that they take fewer clicks
9 to access -- then we're going to see more readership.
10 And what this -- so we do the same, the same thing, and
11 this is one way of measuring access. So one is whether,
12 you know, you have to click times in a page, but
13 sometimes there is -- there is -- basically you have to
14 acknowledge that you agree to a license.
15 What if we require assent, meaning that you
16 can't escape the contract no matter where -- where you
17 go. So there's this one form of requiring assent.
18 Basically you have to click on "I agree" at the end of
19 the -- of entering all the terms. So, what -- you know,
20 do you really want to bother about figuring out what it
21 is that you've just agreed to. And the other times, it's
22 right there for you, right? All you need to do is just
23 basically scroll down and see what happens.
24 So maybe what if readership is increased when
25 we basically require consumers to agree to particular

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1 terms? And, here again, we have EULAs and company visits
2 as a function of how many clicks it takes to access the
3 contract. So clicking as a function of disclosure. And,
4 ideally, as the number of clicks goes down, you might
5 want to have readership go up. That's the goal of
6 increased disclosure.
7 And, indeed, you do find this, right, when you
8 have -- when the EULA is six clicks away, nobody accesses
9 them, but when it's one click away, it's true, EULAs are
10 more likely to be read, but the number is basically not
11 distinguishable from zero, right? It's .32 percent.
12 And, again, the median time spent is extremely low,
13 right? So one out of 200 shoppers even glances at the
14 EULA, let alone understands it, reads it, or reacts to
15 it.
16 So we look at whether readers actually react to
17 what they read, and I find no such indication. And,
18 well, how about requiring readership? How about those
19 clickwraps? So it turns out that those aren't that
20 helpful either. So .23 percent click on hyperlinks on
21 EULAs that they're forced to acknowledge exist. You have
22 to click on "I agree," but nobody bothers to click on the
23 hyperlink next to it.
24 And when you have a EULA in a checkout page,
25 nobody spends that much -- enough time to actually scroll

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1 down and read through the terms. It's about 94 seconds,
2 but consider that that time includes entering personal
3 information with phone -- I'm sorry, name, address, and
4 credit card information. So the bottom line is that even
5 with required assent, almost nobody reads the fine print,
6 and this is true in other contexts as well.

7 But it turns out that, so, these traditional
8 disclosures are not so helpful, but there's some
9 evidence, and Lorrie has talked about some, that when
10 disclosure might work. So EULAs, not so likely to be
11 read, but what happens if we shorten simplified
12 disclosures that are made at the right time tend to be
13 more likely to work.

14 And then there's very interesting research that
15 finds that the framing effect, depending on how you frame
16 the terms, is it more in a moral sense or in a colloquial
17 sense or in a highly legal sense affects not only the
18 likelihood to be read but also the perceptions about what
19 the nature of the obligation is.

20 So there's some very interesting and
21 encouraging evidence from the restaurant grade card
22 experiments that seems to have found restaurant hygiene
23 cards actually reduce the number of emergency room
24 admittances for food poisoning, and this has been in L.A.
25 in 1997. And also a recent study in New York seems to

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1 have the same-- the same types of -- types of things.

2 There are other initiatives that this --
3 conversations in this area I could learn from. So the
4 FTC's dot-com disclosure seems to -- seemed to borrow or
5 adopt these types of lessons learned. The CFPB has been
6 testing and experimenting with this. Smart disclosures
7 in the U.K. nudge units, they're all in different
8 settings, and the disclosures vary tremendously, but what
9 they have in common is that they all test their
10 disclosures, not only in a room, but also they do field
11 studies.

12 The Nudge Unit in the U.K. actually does field
13 studies with small samples of the population to test the
14 extent to which different types of disclosures work in
15 effectively communicating information to consumers and
16 affecting their behavior -- ultimately affecting their
17 behavior. So testing is a key component, no matter where
18 these particular disclosures are made.

19 And, finally, there's a very interesting study
20 on framing effects. So, for example, when a contractual
21 obligation is framed in moral rather than legal terms,
22 consumers are more likely to be drawn to them, and
23 they're more likely to read them, but also to comply with
24 the terms that are being presented, to comply with a
25 particular contractual term in this particular example.

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1 Similarly, when terms are likely to be read,
2 they're also more likely to be complied with, which is
3 sometimes -- you know, not shocking, but shorter
4 disclosures are also more likely to be read, especially
5 if they're framed in not a very legalistic manner. That
6 being said, legalistic information, just when you
7 structure something in a legalistic way, consumers seem
8 to be more committed to a particular deal. So context
9 and the framing -- framing effects matter a lot, not only
10 in comprehension but also in understanding what the role
11 of the consumer is in fulfilling a particular contractual
12 duty.

13 So to conclude, the traditional disclosures are
14 not very effective, right? So hardly any -- anybody
15 reads these long contracts. Increased disclosure, the
16 traditional way, the legally enforceable way, some of
17 these clicking "I agree's" are the gold standard in terms
18 of what courts will enforce. And what's costly really is
19 the reading and comprehension, not access, and the
20 disclosure effectiveness could be improved by shortening,
21 simplifying, framing the just in -- the timing, and
22 finally and most importantly, empirically testing these
23 particular initiatives.

24 Thank you.

25 MR. ZAMBRANO: Thank you, Florencia.

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1 Our next speaker is Deborah Lodge. Deborah is
2 a partner at Squire Patton Boggs and specializes in
3 intellectual property, privacy, and internet law. Among
4 her diverse clients are financial institutions,
5 communications and media companies, retailers, and
6 technology pioneers. With her broad legal experience and
7 practical business perspective, Deborah helps clients
8 achieve their strategic goals while complying with the
9 legal regulations that govern privacy, e-commerce, and
10 advertising.

11 CONSUMER DISCLOSURE: AN OVERVIEW

12 MS. LODGE: Hello, and I'm delighted to be here
13 on this -- on part of this discussion, and I guess when I
14 was asked to be on this, I said, oh, okay, now there
15 should be the law because there may be some usefulness in
16 reviewing some of the basics. There's been allusion to
17 the Federal Trade Commission and other laws that govern
18 this space, and actually, I'm delighted to be here
19 because my practice melds all of these interests, and
20 it's fascinating because, as technology changes, so the
21 disclosures and the law affecting them has to change too.

22 So, now, how do I go next? We'll figure this
23 technology -- here we go. So here we are. So the
24 Federal Trade Commission, of course, is the primary
25 enforcer of truthfulness in advertising and disclosures.

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1 And there, the basic law is Section 5 of the FTC Act,
2 which prohibits unfair or deceptive acts or practices in
3 or affecting commerce.
4 And that language is extremely flexible and has
5 been, you know, interpreted in different ways to address
6 various technologies. An act or practice generally is
7 deemed unfair if, A, it is likely to cause substantial
8 consumer injury, which a consumer could not reasonably
9 avoid, and it is not outweighed by the benefit to
10 consumers. And an example of that is in the recent
11 privacy area of the Wyndham decision where the Federal
12 Trade Commission said it was unfair of the hotel company
13 not to take greater precaution to protect privacy
14 interests of its hotel guests.
15 On the deceptive side, an act or practice is
16 considered deceptive if it misleads consumers who are
17 acting reasonably under the circumstances and is material
18 to the purchase or use decision. And that definition
19 comes out of the FTC's policy statement on deception,
20 which is still used as a guide. Obviously, it's filled
21 with many issues there because what is acting reasonably
22 and what is material to the purchase or use decision.
23 In reviewing messaging, the FTC evaluates the
24 message or offer by looking at all the elements of the
25 promotional offering material. And as we've heard today,

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1 net impression is critical. What is the disclosure, and
2 what is the consumer's understanding of what the
3 disclosure means?
4 Notably, if there's a deceptive net impression,
5 the FTC will find the ad to be misleading, even if
6 specific individual claims or presentations are not
7 misleading. And that's the critical issue here,
8 obviously, in terms of buy now. What does it mean? And,
9 you know, are there various misleading statements or
10 impressions that are associated with that?
11 In the FTC land, actual injury is not a
12 prerequisite because something can be deemed to be
13 misleading and harmful to consumers, even if there is no
14 actual injury shown. The key issue is what are
15 consumers' perceptions and expectations.
16 If a claim would not be -- if a claim would be
17 deceptive unless information is provided in addition to
18 the basic claim, then under the FTC's view, disclosures
19 must be provided, and there was already reference to the
20 FTC's dot-com disclosures. I have them here because
21 they're incredibly helpful and, you know, the FTC has
22 tried to deal with the issue of the transfer of much of
23 our shopping and consumer experiences to the internet,
24 and online deception is obviously one of the issues that
25 we're all trying to deal with in different contexts.

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1 But from the FTC's perspective, the medium does
2 not matter because print, online, broadcast media, social
3 media as well, the basic principles of Section 5 apply to
4 all of the different platforms and media on which these
5 disclosures are made. And as I referenced, the dot-com
6 disclosures, which were updated in March 2013, really
7 give further guidance to all us practitioners in terms of
8 how to make effective disclosures online.
9 One of the issues that we were dealing with
10 today and Professor Perzanowski's study addressed is, you
11 know, what is material, what is likely to influence a
12 purchasing decision. That clearly depends on the nature
13 of the product or service that is being advertised and
14 offered, and the basic questions are are disclosures
15 needed in order to address consumer expectations, what
16 are the consumer's expectations? Obviously, they're
17 going to differ very much from whether there's a physical
18 object involved or probably whether there is something
19 that is just online or communicated via, you know, audio
20 or other kinds of messaging.
21 And what is the consumer's perception of the
22 advertisement on the offer? That really is very critical
23 to an FTC assessment. And, also, you know, what are the
24 total costs to receive or use the products or services?
25 Does the consumer understand what the pricing is and what

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1 goes along with those pricing points?
2 Sales terms, including return or refund
3 policies, or in the digital context, certainly, you know,
4 whether or not something is going to be available for a
5 short term, forever, whatever. And the omission of
6 critical information that relates to these points can, in
7 the FTC's view, be deemed material or deceptive.
8 The FTC's dot-com disclosure guidelines really
9 focus on clear and conspicuous disclosures and the import
10 of making them so that they do draw consumers' attention.
11 And I thought that the prior statements and presentations
12 were critical on this because that is what I think, you
13 know, we're all looking for in terms of the utility of
14 any disclosures.
15 The FTC has adopted what are called the four Ps
16 for online effective disclosures where they need to be
17 prominent, large enough for a consumer to notice and read
18 -- hopefully they'll read; presentation, you know, what
19 wording and format, is it easy to understand; placement,
20 the information or the link should be easy to find; and
21 proximity, it should be close to the claim that the
22 disclosure qualifies.
23 Audio and visual disclosures, particularly in
24 advertising contexts, have related issues that are in
25 addition to those because a listener needs to be able to

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1 hear and comprehend the disclosure. And on-screen
2 disclosures, I mean, I see many sort of flip across the
3 screen, and, you know, the question is whether they are
4 really noticeable and whether they're legible and whether
5 they're comprehensible. You know, those are all very
6 critical issues. And in the FTC's parlance, you know,
7 the disclosures should be repeated in the advertising if
8 they are necessary to the comprehension.

9 I also put together a few examples of FTC
10 actions in this area. And, p.s., there aren't a lot.
11 You know, the FTC's recent actions have been more in
12 disclosures in native advertising or in endorsements and
13 testimonials, but there have been a few cases in the
14 digital rights area. And one was in 2007, where the FTC
15 brought an action against Sony BMG Music for the practice
16 of selling CDs without telling consumers that they
17 contained content-protective software that limited the
18 number of devices and the number of times that the
19 particular music could be downloaded and played or
20 shared. And, p.s., this is 2007, already obviously the
21 marketplace has changed. This was not streaming; this
22 related to, you know, the CDs that one had to put into
23 some kind of device in order to access the music.

24 And the FTC found that the failure to disclose
25 -- or the complaint alleged -- that the failure to

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1 disclose the fact that the consumer downloaded the
2 content-protective devices and software when the CD was
3 loaded on to the device was a material omission of a
4 critical fact and that the consumers might not have
5 purchased the music or the rights or whatever it was had
6 they known that it would come with software that, A,
7 restricted their ability to use it and, p.s., also
8 downloaded certain facts that were relating to the
9 consumer's actual use of the music.

10 So there was a consent order in which Sony BMG
11 agreed to clearly and prominently disclose the
12 limitations, either on the front of the product's
13 packaging and also with further directions on the back of
14 the product packaging and agreed not to install content-
15 protective software without the consumer's affirmative
16 consent.

17 Another one -- and this was a closing letter,
18 actually, that was issued against Major League Baseball's
19 Advanced Media, LP, MLB Advanced Media, in which the FTC
20 closed an investigation of digital download sales of MLB
21 games that were subject to a digital rights management
22 system. The advertising had said, "Don't just watch the
23 game, own it."

24 And the license, the digital rights management
25 software, downloaded on a computer when the material was

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1 downloaded the first time, but the closing letter noted
2 that the MLB Advanced Media company had, you know, made
3 significant changes in terms of disclosing the fact of
4 the digital rights management and what the consumer was
5 getting prior to purchase, so they were satisfied and
6 there was -- you know, everyone was pleased with that.

7 But it's interesting because there was also
8 part of that -- in the closing letter, the FTC noted that
9 the Commission has the challenge of ensuring in the
10 context of sales of digital products that consumers are
11 provided sufficient information prior to purchase so they
12 understand any inherent limitations on the use of the
13 products they buy. And that obviously is what we're
14 discussing today.

15 But one issue is that the boilerplate terms and
16 conditions or EULA licenses, according to the FTC's view,
17 may not be sufficient disclosure if the consumer does not
18 have the understanding of what they're getting.

19 Going back a couple of years before that, there
20 were a few other cases where Hewlett-Packard and
21 Microsoft, for instance, were selling personal digital
22 assistants that actually at that time were competitors
23 to the Palm, but the products came with access -- built
24 in -- the advertisements, you know, proclaimed you could
25 get your email, you could get all of your access to the

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1 internet, but there was no clear disclosure that a
2 consumer needed to purchase separately a modem and
3 utilize the modem in conjunction with the advertised
4 device. And the Federal Trade Commission received a
5 consent order from the company saying, no, you know, we
6 will make that more prominent because obviously in order
7 to utilize what the consumers had bought, they needed to
8 have this other device.

9 And the Gateway Corporation similarly, there
10 was another consent order where the FTC had challenged as
11 deceptive ads for "free internet" when there was
12 disclosure in very fine print that consumers would have
13 to incur additional telephone charges, even if they were
14 calling to the toll-free number. And, you know, in the
15 FTC's view, that was not a clear or conspicuous enough
16 disclosure to avoid any deception.

17 So from the FTC's dot-com disclosure guidance,
18 I think there are certain, you know, things that the
19 FTC's views are reflected in by their saying that they
20 will continue to enforce the consumer protection laws to
21 ensure that even in the new media the products and
22 services are described accurately and truthfully online
23 and the consumers understand what they're paying for.

24 And I think that that is exactly the crux of
25 what we're talking about now, what is consumer

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1 perception. It may be that it's significant and more
2 shall be disclosed, I'm sure, because the -- all of this
3 enforcement, in the FTC's view, also ensures competition
4 in the market and the dissemination of additional, you
5 know, products and services and different media to
6 consumers, which obviously, you know, is for the
7 betterment of all the consumer interests.

8 So that's it, and I know that this is sort of
9 the underlying kind of issue of what is the law on the
10 consumer protection side, and in addition to the FTC, I
11 just wanted to mention that there are, of course, state
12 little FTC laws as well as sector-specific. And, you
13 know, with the proliferation of class actions and other
14 groups, you know, asserting false advertising rights, you
15 know, this is clearly an area that, you know, all sectors
16 have important stakes in.

17 So I'm pleased to be here. Thank you very
18 much, and this is great.

19 MR. ZAMBRANO: Thank you, Deborah. And thank
20 you again, Lorrie, and Florencia, for your presentations.
21 I think now we're going to take a ten-minute break and
22 reconvene at 3:14. So thank you.

23 (Brief recess.)
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1 DISCUSSION: COMMUNICATING COPYRIGHT TERMS IN DIGITAL
2 TRANSACTIONS TO CONSUMERS

3 MS. ALLEN: Okay, we're ready to begin the next
4 panel. So good afternoon. We've just had a lively
5 discussion followed by presentations about different
6 aspects about how consumer disclosures and perceptions
7 can be evaluated based on the experience in other fields.

8 We turn now to a panel discussion, followed by
9 participation from the audience, both in-person and
10 online, to cover first how to determine what copyright-
11 related terms and conditions are important to communicate
12 to consumers in the online environment, and then we'll
13 talk about -- and then we'll discuss how best to ensure
14 that license terms related to copyright are clearly and
15 effectively communicated.

16 Our panelists will share a variety of different
17 perspectives from industry and academia. I invite them
18 each to introduce themselves quickly, and then let them
19 give any initial thoughts about how to determine what
20 terms are important to consumers. And then we'll go
21 ahead and talk a little bit about ensuring copyright-
22 related license terms are communicated clearly and
23 effectively.

24 So I'll start with Florencia.

25 PROF. MAROTTA-WURGLER: Hi. So I just

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1 talked about disclosure, so I work on disclosures and
2 consumer -- and not only on what's in standard form
3 contracts but also how consumers behave to them in the
4 next area that I'm interested in is understanding, well,
5 now that we know that disclosing a huge amount of
6 information doesn't really -- that doesn't really work.
7 The question is, well, what is it that we disclose. And
8 I think that the research, at least in legal academia and
9 also in some finance departments when we have to deal
10 with financial disclosures, is to elicit or try to get a
11 sense of what is it that needs to be disclosed.

12 And there are several formulas, but the
13 approach is about the same. So one is given that not
14 everything needs -- can be disclosed, one of the most
15 important things of all, maybe we can disclose what
16 consumers find most important. But this might vary by
17 context. So one way of doing that, and this is work that
18 Zev Eigen and I have been working on, is we did it in
19 terms of the preferences regarding terms of use for
20 social networks, is maybe to survey consumers online and
21 get a sense of what types of terms they consider to be
22 the most important, have them rank them in particular
23 order.

24 And, so, the terms that are the highest ranks
25 might be the ones that are more likely to be disclosed,

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1 but the highest rank terms maybe are terms that are
2 unknown to consumers. So there is -- there's another
3 philosophy, which is, well, maybe what we need to
4 disclose is not those terms that are the ones that are
5 most important to consumers but those that -- but those
6 that consumers are most confused about.

7 And in a recent paper at The Stanford Law
8 Review, Professors Alan Schwartz and Ian Ayres from Yale
9 Law School did exactly that, also in terms of the -- in
10 regards to the terms of use of Facebook. So they tried
11 to elicit information regarding the terms to which
12 consumers were most confused about, meaning that they had
13 wrong perceptions about what was in those terms. So, for
14 example, related to Aaron's really interesting paper.

15 So, for example, to what extent do consumers
16 understand what "buy now" means? Maybe more in a sense
17 of a binary choice or other types of terms and then
18 disclose in a bit of a warning box type thing only those
19 terms, up to three or five, to which consumers are not
20 only confused about it but also terms that have less --
21 less rights that they understand.

22 So terms that are actually -- if consumers
23 think that the contract in question is more restrictive,
24 then they think -- they think that the market would
25 correct itself. So it would be when the consumers have

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1 too optimistic a perception, those are the terms that
 2 need to be disclosed.
 3 So there's different types of going about it,
 4 but in -- but in terms of implementing things -- and I'm
 5 happy to elaborate more on this later -- it has to be
 6 done in terms of an experiment or some field studies, as
 7 has been done in several areas.
 8 MS. ALLEN: Thank you.
 9 B.J.?
 10 MR. ARD: So, good afternoon, everyone. I'm
 11 B.J. Ard, and I'm a Ph.D. candidate at Yale Law School
 12 and a resident fellow at the Yale Information Society
 13 Project. And there are three interrelated points that I
 14 want to put out there. And the first is that it's
 15 important to think about the different types of
 16 enforcement mechanisms we're dealing with as we look at
 17 copyright licenses. It may be that sometimes we're
 18 specifying sort of the limits of the license itself so
 19 that if the user is exceeding those boundaries, they're
 20 in the terrain of infringing activity, and we bring to
 21 bear copyright statutory damages and other remedial
 22 mechanisms.
 23 It may be that we're dealing with sort of
 24 standard boilerplate contractual terms, the sorts of
 25 things that we see all throughout e-commerce, but that if

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1 we're in -- if we're looking at breach, then we're
 2 talking about something like, you know, a breach of
 3 contract suit or termination of their services, a
 4 different set of usually lesser remedies than what we'd
 5 be looking at in copyright.
 6 And then we just have things that are going to
 7 be enforced mechanically by the service. If there's a
 8 technological protection measure or a DRM of some sort
 9 that doesn't allow for certain sorts of copying or
 10 sharing, the users may be disappointed once they come to
 11 realize that, but it's a sort of automatic enforcement.
 12 What they're losing out on is limited to some degree by
 13 what it is that they paid for this good or service. And
 14 it's going to become actually rather salient at the time
 15 that this comes up.
 16 The second point that I want to make is that as
 17 we're trying to figure out which terms to disclose, a lot
 18 hinges on what the baselines of understanding are for the
 19 consumers. So we might think, well, okay, to the extent
 20 that we're talking about infringing activities, what are
 21 the limits of sort of fair use or how many copies I can
 22 make or so forth. Maybe consumers understand the
 23 baselines of copyright law, but we could put an asterisk
 24 there because oftentimes it seems they don't.
 25 But then to the extent that things have been

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1 portrayed as a sale or some sort of implied license, who
 2 knows what it is that consumers think that they're
 3 getting when they get into one of these agreements, which
 4 gets to the third point of just underscoring the
 5 importance of actually testing things.
 6 As the last panel got into in some detail and
 7 as this recurring theme we've gotten to today, it's one
 8 thing to think about sort of what do we think that this
 9 term means, what can we extrapolate from our own
 10 experiences versus what is the average consumer actually
 11 thinking when they interact with one of these retailers,
 12 one of these platforms, download some of these works.
 13 And if they think they're getting a certain set of
 14 rights, that they're actually not, then that becomes a
 15 concern.
 16 And as we're trying to devise disclosures that
 17 inform them of what they are or aren't getting, again,
 18 testing needs to be done to understand, okay, so we've
 19 finally distilled it down to this set of terms, that
 20 maybe these are the ones that they're overly optimistic
 21 about and they didn't, were buried in the boilerplate of
 22 the license, but now that we've disclosed them, has that
 23 made a difference, do they actually understand what's
 24 changed.
 25 And this is the sort of thing that if we're

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1 going to move outside of the sort of formalism of, okay,
 2 it's in this thing that you had to click or you had to
 3 scroll through to the actual question of what did people
 4 understand, I think we'll get closer to the actual
 5 realities of what's going on in the marketplace and what
 6 consumers understand they're getting.
 7 MR. GOMULKIEWICZ: Yeah, Bob Gomulkiewicz from
 8 the University of Washington School of Law, and I really,
 9 in my scholarship, draw not only on being on academic for
 10 15 years but also before being an academic I was a
 11 practicing lawyer for 15 years. So in my writing, I try
 12 to pull together insights from both of those worlds. And
 13 I've been writing about software licenses, I think for a
 14 couple of decades now, and probably I'm best known for
 15 coining the phrase "the license is the product," which is
 16 what I hear a lot of you saying in this -- in these
 17 conversations today.
 18 And I'm really pleased to be part of this
 19 conversation so that people understand what the product
 20 is that they're getting. So I think this is a timely
 21 topic and it's one I know that the software industry has
 22 been dealing with for a long time. And it's, I think,
 23 very instructional for me to see that all copyright
 24 industries are wrestling with that now.
 25 So I just want to make a few opening

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1 observations about this idea of trying to get information
2 to consumers about what the product is, what the license
3 is. And my first plea is actually to lawyers, and that's
4 not to give up on drafting simpler licenses. I think in
5 some ways the tone today and the tone I hear among
6 practitioners and also among academics is that lawyers
7 have to draft licenses that are hard to read in law.

8 And I don't think that's the case. I think
9 that we actually can draft licenses that are more user-
10 friendly. And one project that I did several years ago
11 was to take the most venerable open-source license, the
12 good, new general public license which is a lengthy,
13 complex, difficult license to read. And I wrote it into
14 a simple form, a one-page license.

15 So it can be done. We actually as lawyers have
16 to dedicate ourselves to actually doing it. And I think
17 as Florencia pointed out in her presentation, if we frame
18 licenses the right way, then at least some people will
19 read them, and those that choose to read them will get
20 more out of it.

21 I think the other thing about simple licensing
22 to point out is actually something that John Bergmayer
23 mentioned, is that in some ways we don't take simple
24 licenses that seriously. I think Florencia actually
25 pointed that out in her presentation. People think that

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1 if it sounds legalistic then it has more sticking -- or
2 just more gravitas to it. And the other concern is that
3 if you write something that's simple that somehow it
4 won't be enforceable or you'll be held liable if there's
5 a corner case, as John pointed out.

6 So I think we have a ways to go culturally, and
7 maybe courts have a ways to go in actually enforcing
8 simple licensing for those lawyers that actually can do
9 it. Courts should be able to follow up on that and make
10 sure that that approach is actually enforceable.

11 And then the second thing I'll say about that
12 is it's not just about the lawyers. We need to be
13 engaging the businesspeople, if we are serious about
14 making licenses more user-friendly. My experience with
15 working with businesspeople in the software industry is a
16 lot of them do have a passion for presenting terms in a
17 simple way.

18 And, so, it's not just about the lawyers. In
19 fact, it's kind of sad that we're mainly in a group of
20 lawyers and lobbyists here. Right, we should be engaging
21 with businesspeople, and a lot of them have the tools to
22 do this well. People in corporate communication, they
23 know how to make things interesting and entertaining.
24 Let's access those resources.

25 When I was at Microsoft, I was there for over a

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1 decade, I proposed a EULA that would be performed by
2 Steve Ballmer. Now, that would get some interest, or a
3 EULA performed by Bill Gates. Now that would be -- that
4 would be interesting. But we have -- we actually have
5 the tools. Businesspeople have the tools to do
6 communication more effectively. They do it all the time.
7 That's their job. And, so, why are we giving end-user
8 licenses a pass on that? I don't think that we
9 necessarily should.

10 Some people have mentioned usability testing.
11 That's another thing that's well known in most industries
12 as a way to improve readability. And then just the
13 second thing I'll say in my -- before we get to the panel
14 discussion, I think the way that you get people who don't
15 read the licenses to understand more about them is you
16 create a conversation about the licenses to energize
17 people to talk about the terms. Not all of us read every
18 single book, but a lot of us read book reviews. We rely
19 on other commentators to unearth the terms that are
20 important.

21 So journalists should be commenting on
22 licensing as much as they're commenting on software.
23 Scholars, we're particularly bad at this. Scholars are
24 always writing about new cases, but why aren't scholars
25 writing about critiquing licenses and license approaches?

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1 Why aren't there nongovernment organizations that are
2 dedicated to really making sure that licenses are
3 friendly and explaining that getting that information out
4 there to consumers so it doesn't just have to be the
5 consumer reading. Other people can make that information
6 available and provide that commentary, and thanks to the
7 internet, that information will be available.

8 MS. ALLEN: Thank you, Bob.

9 And, Brian, if you could introduce yourself and
10 tell us a little bit about your thoughts on how to
11 determine what terms are important to consumers.

12 MR. SCARPELLI: Thank you. Hi, everyone.
13 Great to be here. My name is Brian Scarpelli, and I'm
14 the -- I'm Senior Policy Counsel at ACT, the App
15 Association. We are a trade association based here in
16 Washington representing about 5,000 small and medium-
17 sized software development companies and app developers.

18 If this were just a week later, I could hold it
19 up, but we have an economic report that we issue every
20 year about the status of the industry, so I thought I'd
21 include a few stats from that report that, you know,
22 basically, you know, we're -- this is -- it's going
23 somewhere, but this is an industry, our app industry,
24 that's powering \$143 billion ecosystem that's created
25 over 100,000 jobs over just the last couple of years.

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1 And it's -- you know, there's that exponential growth
2 that's creating jobs and good for -- good for all of us
3 here.

4 The licensing regime, the way that licenses are
5 purchased, is a foundation of that growth. And it's
6 something that our members rely upon to grow their
7 businesses and create more jobs. And, so, I just -- you
8 know, we should -- I want to make sure we don't get too
9 far ahead of ourselves, and this is similarly themed to
10 some of the panelists from earlier in the event. We're
11 looking to ensure that we're really responding to a
12 demonstrated consumer harm before we take any sort of
13 government action at all because we don't want to mess up
14 this great growth that our industry is experiencing.

15 And as you can tell, I'm not -- we are not
16 convinced that the case has been made for that. We're
17 not like -- again, like the panelists earlier mentioned,
18 we're just not -- universally, we are not hearing about
19 massive outrage from consumers and damage being caused
20 based on misunderstanding of the copyright terms. These
21 are pretty -- in our view, you know, I'm not trying to
22 even be glib but just stating clearly that is
23 copyrighted, that it is a license and not a purchase,
24 those sorts of straightforward terms. And I would second
25 that the simpler the better is advisable, exist in many

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1 license -- in licenses today.

2 And, so, you know, I don't want to -- I don't
3 want to have us -- I don't think it's -- I don't think
4 it's constructive to be in the situation of proving a
5 negative. So what is broken here? And let's define that
6 and have a real problem statement that there's consensus
7 around before undertaking something like a multi-
8 stakeholder approach or some other more serious action
9 from the government.

10 I guess I don't want to be completely negative
11 either, though. I think that there is -- there is a
12 great amount -- there's merit to examining these -- what
13 terms are most effective and ideally that will -- that
14 will translate into even greater understanding of
15 copyright licenses and terms by consumers, and education
16 is a big component of that. So I would argue that that's
17 -- that's a -- that's a pretty critical role, including
18 from the U.S. Government to consumers.

19 Just for our own part, I realize it's targeted
20 at our members, so developers, but not consumers. We've
21 come up with -- we've tried to play our part in causing -
22 - causing or helping our members put more clear copyright
23 and terms forward and how to -- and protecting their
24 copyrights, same with trademarks. And so we've developed
25 a guide for our members that is a voluntary best-

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1 practices guide. And, so we try to promote that with our
2 members and continue to work on voluntary approaches such
3 as that, but, you know, dialogues such as these I think
4 are valuable, and continued study, and partnering on
5 education would probably be the path forward that I think
6 we'd recommend.

7 Thanks.

8 MS. ALLEN: Thank you, Brian.

9 Allan?

10 MR. ADLER: I'm Allan Adler. I'm General
11 Counsel and Vice President for Government Relations with
12 the Association of American Publishers, which represents
13 our nation's book publishers. As Susan knows, I'm here
14 to take a little bit more of a hard line towards this
15 exercise here.

16 There were two words I would have expected to
17 have heard by now, and I guess since I haven't, I may as
18 well say them myself. Caveat emptor, let the buyer
19 beware. That has been a general rule in the marketplace
20 for centuries, throughout the history of commerce, that
21 has always bumped up against the question of what is an
22 appropriate role for government to play in restricting
23 behavior in the marketplace.

24 We favor competitive marketplaces, and what
25 we're talking about now, which are conditions in which

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1 products are being offered online, are competitive terms,
2 every bit as much as pricing of the goods themselves is a
3 competitive term. I find it extraordinary that we
4 basically move quickly past the notion that these people
5 who are offering their goods online have spoken to
6 consumers, albeit they've done so in EULAs, they've done
7 so in terms of service, and we've moved past that to
8 essentially excuse people for not bothering to read that
9 and saying it's okay, we need to do something more
10 affirmative for them.

11 And I think that that's a real problem. It
12 bumps up against something that we all know is true with
13 respect to works that are involved with copyright rights.
14 And that is that licensing has always been the means of
15 exercising one's rights of copyright, but there's always
16 been this tension and this unresolved, ultimately for
17 some folks, issue of the extent to which a license
18 agreement for a copyrighted work, for use of a
19 copyrighted work, must strictly reflect consistency with
20 the terms of statutory copyright law.

21 And we know the courts have basically said that
22 freedom to contract generally, as long as contracts are
23 not contracts of adhesion, if they don't shock
24 conscionability, basically you are allowed to vary terms
25 in contract agreements that underlie your licensing of

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1 your works, so long as the usual elements of contractual
 2 agreement are present, so long as there's mutual assent,
 3 people understand the terms that are involved. And I'm
 4 afraid that this exercise is one that's going to bump up
 5 against that question because ultimately what's at issue
 6 here is not the public's lack of understanding of the
 7 licenses; it's the public's lack of understanding of
 8 copyright.

9 And there's no surprise about that given the
 10 recent debates about copyright and the different
 11 perspectives that have been taken by various stakeholder
 12 communities about what certain key aspects and key terms
 13 of copyright law mean. I found it rather extraordinary,
 14 though, that, you know, in this willingness to sort of
 15 let the consumer off the hook, he has an explanation from
 16 the vendor about the terms and conditions under which the
 17 product is being offered, but it's okay. Too complicated
 18 to read, so we're not going to focus on that.

19 I remember working on the statute that was
 20 enacted by Congress to enhance the authority of the
 21 Consumer Product Safety Commission with respect to safety
 22 notices required for children's products. And one
 23 interesting part of the proposed regulation would have
 24 had to have had a notice requirement placed on each and
 25 every children's product. And people began to wonder, as

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1 a practical matter, how do you do that? How would you
 2 fit that on there in a way that would be practical, that
 3 would be readable, that would be comprehensible and still
 4 comply with the law?

5 And, ultimately, ironically, in this context,
 6 the response from the Consumer Product Safety Commission
 7 was to agree to a proposal from most of the affected
 8 stakeholders that said, well, what if we just put the
 9 notices on the vendor's website, isn't that giving
 10 sufficient notice to consumers? Isn't that better than
 11 trying to actually place the notice on each and every
 12 product that falls into the consumer's hands? And it
 13 seemed to be a reasonable way of working at that issue.

14 For the industry that I represent, we have some
 15 of the same issues that Ben Sheffner told you about, the
 16 motion picture industry, only we have them in a little
 17 bit more complicated version. Publishers of trade books,
 18 works of best-selling fiction and nonfiction, do not sell
 19 generally directly to the public. And, therefore, they
 20 don't have a transactional relationship with the public.

21 They are wholesalers who typically have their
 22 books marketed to the public through a series of
 23 distributors. And there are various questions as to the
 24 relationships that different publishers have with their
 25 distributors regarding who actually sets terms and

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1 conditions, other than pricing, with respect to how those
 2 books are offered, particularly in digital formats for
 3 online downloading or access.

4 And we have a more complicated problem, as I
 5 mentioned, because I think the people in Ben's industry,
 6 although they're in fierce competition with each other,
 7 they tend to be fairly homogenous in the sense they're
 8 producing the same kind of works and they're competing to
 9 the audience to see which works will be more popular with
 10 the audience.

11 I represent publishers who are in a sectoral
 12 nature all in very distinct businesses. Trade publishing
 13 is as different from educational publishing as
 14 educational publishing is from professional and scholarly
 15 publishing. And each one of them would have very
 16 different concerns about the kind of terms and conditions
 17 they want to be certain that their customers are aware if
 18 they're going to be accessing and using those works in
 19 digital format, and especially if they're going to be
 20 accessing them and downloading them from online.

21 These problems also reflect the fact that what
 22 we're talking about here are competitive market terms.
 23 This is exactly the area in which, as some of you may
 24 know, some major publishers got into trouble with the
 25 U.S. Justice Department's Antitrust Division several

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1 years ago because they were working with distributors,
 2 essentially taking the same approach to the way in which
 3 distributors would work with them in pricing the goods
 4 and services for the marketplace. And the government
 5 found that approach to violate antitrust restrictions,
 6 basically because they ended up having the same kinds of
 7 policies, despite the fact that they didn't actually
 8 negotiate them together.

9 This is an issue that I think points out the
 10 fact that there are other areas of law here that raise
 11 great complexity for this, much more complex than we've
 12 heard people sort of acknowledge so far.

13 The other aspect of these type of notices is
 14 that they constitute commercial speech, which is
 15 protected by the First Amendment. And vendors in the
 16 marketplace typically get to be able to decide on what
 17 kind of commercial speech they want to offer in
 18 connection with the goods and services they offer to
 19 convince consumers to become customers.

20 Now, of course, that doesn't mean they could
 21 lie about their products. It doesn't mean that they
 22 could engage in deceptive practices when they market
 23 their goods, but it does mean that the issue can be very
 24 much more complicated than people think it is.

25 I just want to mention this quickly. There was

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1 a Supreme Court decision last month some of you may have
2 been familiar with. It's called Expressions Hair Design
3 vs. Schneider. And what the case was about was a statute
4 enacted in New York that basically distinguished what was
5 called differential pricing practices in the sense of
6 merchants who preferred that their customers purchase
7 their goods with cash rather than with credit cards,
8 because then the merchant would have to provide fees to
9 the credit card service provider. And, so, in doing
10 that, typically what merchants would do is offer a
11 discount to the customer if they pay in cash rather than
12 purchasing with a credit card.

13 Well, unfortunately, this New York statute
14 prohibited the language that a merchant could use if they
15 said we want to reimpose a surcharge for credit card
16 purchases that is not imposed for cash purchases. The
17 New York statute was construed by the Second Circuit
18 Court of Appeals as basically outlawing one version of
19 describing a particular practice that could be allowed
20 under another description of that practice, but the
21 practice itself was exactly the same. The difference
22 between whether or not you offered a discount for cash
23 purchases and you charge more to the customer for the
24 credit card purchase.

25 Here's what Chief Justice Roberts said about

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1 that. "The Court of Appeals concluded that Section 518
2 posed no First Amendment problem because the law
3 regulated conduct, not speech. In reaching this
4 conclusion, the Court of Appeals began with the premise
5 that price controls regulate conduct alone. And,
6 therefore, a law regulating the relationship between two
7 prices regulates speech no more than a law regulating a
8 single price. And, therefore, that particular statute
9 was simply a conduct regulation rather than a speech
10 regulation."

11 Well, a unanimous Supreme Court, with the
12 opinion written by the Chief Justice, said, "But Section
13 518 is not a typical price regulation. Such a regulation
14 would simply regulate the amount that a store could
15 collect. This law tells merchants nothing about the
16 amount they are allowed to collect from a cash or credit
17 card. What the law does is regulate how sellers may
18 communicate their prices. Accordingly, we cannot accept
19 the conclusion that this statute is nothing more than a
20 mine-run price regulation. In regulating the
21 communication of prices rather than the prices
22 themselves, this law regulates speech."

23 And that's the same proposition, I would
24 propose to you, about the kinds of things we're
25 discussing today.

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1 MS. ALLEN: Thank you, Allan. We appreciate
2 your statements. I think our question now, we can turn
3 to the panel. In the interest of time to just see if
4 anyone anecdotally, by way of observation, has any
5 thoughts about how to determine what terms might matter
6 to consumers. And then we'll go again to the discussion
7 on how to ensure that such terms are clearly
8 communicated.

9 PROF. MAROTTA-WURGLER: I will say something
10 briefly because unfortunately I have to leave at 4:00.
11 So in terms of what observationally I think might matter
12 to consumers, I'd like to resist a temptation because my
13 message, I think, I think has been several times, which
14 is we don't really know yet. We need to ascertain that.
15 And that would address both Brian's and Allan's issues.

16 So Brian rightfully said, well, what's broken,
17 right? Before we decide to regulate something -- the
18 same question is, well, disclosure has been designed to
19 solve all sorts of information asymmetries, and the goal
20 is -- I guess the purpose is to correct through
21 information some type of misperception, and the harm is
22 that that misperception might be leading consumers to
23 overconsume something. So we need to -- in trying to
24 ascertain whether there's a harm, we -- in trying to
25 ascertain what must be disclosed, if anything, we will

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1 address the question of whether there is a harm at all.

2 So if there is a misperception about a term
3 that would cause consumers to overestimate the utility of
4 a product, maybe because they wish they could put it in
5 their will and now they can, and that means a lot to
6 them, but this is something that we can ascertain through
7 research. There's -- this has been done in other
8 contexts, and there's roadmaps. A disclosure regulation
9 has been studied -- has been going on since the '70s but
10 has been studied empirically for a while now, so we know
11 something about that.

12 So I would urge instead of us trying to
13 brainstorm about whether -- what should be disclosed, we
14 need to test the particular related set of terms that
15 might -- that might be candidates for disclosure. And
16 that will lead us to understand what is broken.

17 And, second, related to Allan's point, it might
18 lead us also to understand the extent to which that
19 particular term is competitive or not. So a term is
20 competitive -- subject to competition if it affects -- if
21 consumers are acting on it. So price tends to be salient
22 in the sense that consumers usually understand price and
23 they will shop based on price.

24 There's some -- there are some terms in fine
25 print that are salient, and there are some terms that are

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1 nonsalient, either because they're not read or sometimes
2 they're not understood. Consumers tend to be over-
3 optimistic about particular sets of terms. Nonsalient
4 terms are not subject to market competition. If they're
5 not subject to market competition, they're not going to
6 reflect this ideal bargain between what sellers want to
7 offer and consumers want to receive, or they might not
8 even reflect a willingness to pay.

9 Again, we need to understand whether a
10 particular product is -- or term is salient or not. And,
11 again, we can -- we can test and measure the extent to
12 which a term is subject to market competition or not by
13 measuring the extent to which consumers understand that.

14 So, three things can be answered by doing more
15 work in this area if we want a roadmap about what to
16 disclose. One is to understand what it is to be -- what
17 we need to disclose, we need to understand those terms
18 that are subject to -- lead to consumer overconsumption.
19 This defines the harm, and it also tends to reveal that
20 that term is not subject to market competition. So
21 that's basically -- and the answer is just because it's
22 in a contract doesn't mean that it causes harm or that
23 it's subject to competition. We need to find that out.
24 Thanks.

25 MS. ALLEN: Does anyone else have anything to

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1 say briefly?

2 MR. ARD: So one thing that I appreciate about
3 Allan's comments bringing out is this tension between the
4 confusion over what's in the contract or is the confusion
5 over copyright law, haven't we disposed of these things
6 by licenses for the past hundred years or more?

7 And part of the reason that this has become
8 more complicated and perhaps confusing is that when the
9 Copyright Act of '76 was laid out, when we did most
10 copyright-related or IP-related deals early in the
11 history of intellectual property, we were talking about
12 deals between relatively sophisticated parties, between
13 publishers and retailers and so forth.

14 By the time something was in the theater or hit
15 the shelves, consumers were buying the ticket or buying
16 their personal copy. Once we hit digital copies, things
17 changed because now consumers were creating copies, have
18 the ability, even in the process of using the work
19 oftentimes, and had the capability to create copies
20 intentionally or not. And it fell onto them to
21 understand, okay, what are my rights and
22 responsibilities, some of which may be laid out in the
23 statute, which is not necessarily user-friendly, some of
24 which may be laid out in these licenses.

25 And while it's tempting sometimes to say the

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1 user should simply read the license and it's on them to
2 understand it, it's not clear that users would
3 necessarily understand the nuances of what's conveyed in
4 there, and it's not clear that that's always going to be
5 a great use of time. One thing that I wish Lorrie Cranor
6 were here to discuss is some research she had done on
7 privacy policies at one point.

8 And this was some years ago, where she added up
9 the amount of time it would take for people using
10 reasonable estimates to read all of the privacy policies
11 they encountered in a year. And when she converted that
12 into a measure of labor hours, her estimate in that paper
13 was that it would be something approaching the gross
14 product of Florida's economy for a year, the number of
15 labor hours involved in reading this.

16 And, so, we get to this question of, okay, in
17 lieu -- given the lack of technical or legal
18 understanding that consumers have and given the sheer
19 mass of words that they have to confront if we expected
20 them to read this, how are we to convey the relevant and
21 salient information without forcing people to engage in
22 wasteful or potentially fruitless sorts of exercises.

23 MR. GOMULKIEWICZ: Yeah, so, just a couple
24 comments. One, that's why I am relentless in saying that
25 let's not just accept the fact that these licenses have

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1 to be so long so that you have to spend your entire life
2 reading them. But, secondly, I think more important is
3 to energize people to shine lights on those terms --
4 journalists, scholars, NGOs -- because you're right,
5 people really -- it's unrealistic to expect people to
6 read all the terms.

7 So we need people to shine the spotlight on the
8 terms so that, yes, then let the market decide. We don't
9 have to sit in this room and decide what consumers want.
10 Let's see what -- first, the consumers have to know about
11 it. I agree with Florencia, but then we'll see, what do
12 people in the market care about.

13 But the second thing, I want to link this to
14 comments that several people have made about endorsement.
15 So I do think that consumers care about what the license
16 says, but they also care about whether they're going to
17 be sued if they breach those terms. That they care a lot
18 about.

19 And, so, I think there it's interesting to look
20 at some work that Mark Lemley did a few years ago. He
21 wrote an article in the Minnesota Law Review called
22 "Terms of Use." And one of Mark's insights was that when
23 people were wringing their hands about software end-user
24 licenses, people thought that the big source of
25 litigation was going to be business-to-consumer

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1 litigation, and that didn't turn out to be the case.
2 Most end-user license cases are B2B, or business-to-
3 business, cases.
4 And the reason for that is -- has already been
5 pointed out here, is that if some -- if a business makes
6 a decision to sue a consumer, especially in this age of
7 internet shaming, then that's -- you have to make a big,
8 tough decision about whether it's worth the PR risk to
9 sue a consumer over a term.
10 And, of course, consumers know this. So that's
11 not -- that's not to say that we shouldn't push for terms
12 to be easier to read and fair, but on the other hand,
13 there aren't -- there aren't a lot of cases because
14 businesses do have to think long and hard about whether
15 they're going to pick on a consumer or lending a copy or
16 giving away a copy in a will. Is somebody really going
17 to sue if somebody lends or gives something away in a
18 will.
19 And then the final thing I want to say is that
20 I think one important thing I learned from Aaron's work
21 is that consumers can start to learn about the way things
22 work in the real world. If you would have asked
23 consumers two decades ago, when I started writing about
24 end-user licenses, about whether you can copy, they would
25 have all said, yes, you can copy. And now I think

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1 Aaron's work shows that people now understand that just
2 because you have something in electronic form doesn't
3 mean that you can copy it. So that's been two decades'
4 worth of work of trying to educate people on the way this
5 works. So I do have some confidence that consumers can
6 learn.
7 MS. ALLEN: So I'm mindful of the time, and I
8 want to give time for everyone in the audience to ask
9 questions or have a discussion as well. Florencia, I
10 know you have to go. Does anyone specifically have any
11 questions for Florencia quickly?
12 (No response.)
13 MS. ALLEN: Okay. Thank you so much for your
14 participation.
15 MS. MAROTTA-WURGLER: Thank you.
16 MS. ALLEN: We greatly appreciate it.
17 Does anyone in the audience have questions?
18 Jonathan?
19 MR. BAND: So it seems to me that context makes
20 a big difference, and thinking back to Ben's comments
21 earlier when he talked about how, you know, buying is a
22 metaphor --
23 MS. ALLEN: And could you introduce yourself,
24 too, as well?
25 MR. BAND: Okay. So I'm Jonathan Band, and I

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1 was saying that context makes a big difference, and when
2 Ben before was talking about how the word "buy" is a
3 metaphor, I think it to some extent depends on the
4 context in which the word "buy" uses. So you can imagine
5 at least two different situations. Sometimes you have --
6 you have a product advertised, let's say, an e-book on
7 Amazon, for example, and then the only choice is buy,
8 right? It's buy or not buy. And, so, conceivably, "buy"
9 in that context means one thing.
10 But if you go to iTunes and you are looking at
11 movies, you usually have the option of buying or renting.
12 And then what's interesting there is that you scroll
13 down, they explain very clearly exactly what renting
14 means, right? I mean, they say renting means, you know,
15 you have to, you know, access it within 30 days, and once
16 you access it, you have to finish watching it in 24
17 hours. Very clear exactly what renting means.
18 But they don't tell you anywhere what buying
19 means. And, you know, so I think in terms of how we look
20 at this, it is kind of interesting that they thought that
21 there was a need to clarify what rent means but not what
22 buy means. And especially one could certainly imagine,
23 you know, when you're -- you have a -- one option is
24 renting, and the other option is buying. Renting, I
25 think everyone sort of understands -- everyone

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1 understands means short-term.
2 Buying you assume is permanent, right? That's
3 the -- isn't that right, that's the difference between
4 buying a car and renting a car, right? When you rent the
5 car, you obviously have to return it or, you know, you're
6 going to be paying more every day, whereas if you're
7 buying the car, you pay for it and, you know, you get to
8 drive it until, you know, it stops driving and you can
9 sell it.
10 So the point is that of these -- the context
11 makes a huge difference in terms of these -- how we
12 understand these terms, and it could be that, you know,
13 that's an added layer of complexity that we need to be
14 aware of.
15 MS. ALLEN: Thank you very much.
16 Does anyone else either, in the audience or
17 online as well, if you want to chat in a question.
18 MR. FISHER: Could I just react to that, to
19 that comment? And some of -- some of the response to
20 that -- some of the reason for that may go to who sets
21 the rules in that situation, whether those rules are set
22 by the -- by the content provider or set by the retailer.
23 If rules are set by the retailer, it's much easier for
24 them to enumerate those rules on their site, and they're
25 more consistent.

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1 MR. MITCHELL: That provides a nice -- Mark's
2 comment provides a nice segue to, I guess, my comment.
3 MS. ALLEN: John, could I interrupt you? I'm
4 sorry.
5 MR. MITCHELL: Oh, I'm John Mitchell. And I
6 was reminded of some of the more prominent disclosures
7 that were very clear, very conspicuous, impossible to
8 escape, and were simply wrong, which I think provides
9 perhaps more harm to the consumer than not saying
10 anything about it at all. The very first EULA to reach
11 the Supreme Court was, of course, in the Bobbs-Merrill
12 case that said you may not sell this book for less than a
13 dollar, and if you do, it's infringement. And the
14 Supreme Court said to hell with that.
15 And yet people probably, you know, would have
16 been reluctant to do that, and somebody with Mazey's
17 power there bucked that system. Foreign-made copies of
18 textbooks that had stamped on there "not for sale in the
19 United States." You couldn't escape it. And the Supreme
20 Court, a couple of years back, said, hey, of course you
21 can; the Copyright Act says you can.
22 Forget the EULA; Copyright Act trumps the EULA.
23 Not for rental on DVDs. I didn't see many of them, but I
24 did get samples of retailers saying I -- I'm a rental
25 store, and this DVD says not for rental. You can ignore

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1 that. It's -- it purports to be a licensing term. Some
2 -- most of my litigation right now involves B2B
3 relationship where the copyright owner is trying to
4 impose, as a matter of right under copyright, something
5 that the Copyright Act actually denies them.
6 But coming to Mark's point -- Mark Fisher --
7 the -- I think the real key is whether that language is
8 coming from the copyright owner or from someone other
9 than the copyright owner. So a video store could tell
10 their customer, no, not for rental, or, yes, as long as
11 you get it back to me in seven days, you can rent it.
12 They have that power if they're the owner of the DVD to
13 authorize their renters to sub-rent or not.
14 The copyright owner has no such power if
15 they're not the owners of that copy. So from a consumer
16 perspective, the prohibition or the license may look the
17 same, but coming back to -- I think Bob made the point
18 of, you know, who is going to sue me. It may make a
19 really big difference if I as a consumer breach a term
20 that says I cannot rent it and the damages are going to
21 be the cost of a rental versus statutory damages under
22 the Copyright Act, which will bankrupt me.
23 So just making that little...
24 MS. ALLEN: Thank you.
25 Ben?

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1 MR. SHEFFNER: Ben Sheffner with the Motion
2 Picture Association. And something Jonathan Band just
3 said actually reminded me of a point that I didn't have
4 time to make when I was on the panel a little while ago.
5 It's true, as Jonathan said, that I said, and I believe
6 this, that "buy" is in some sense a metaphor that use to
7 describe these transactions that we're used to describing
8 from the real world. But it's also true -- I want to
9 sort of try to disabuse everybody of the notion that
10 "buy" necessarily means the obtaining of a physical
11 object.
12 Even in the old-fashioned world, we still use
13 "buy" all the time to refer to something that -- to sort
14 of obtaining a service or obtaining access to something.
15 I -- you know, I hit the "buy" button on an airline's
16 website all the time. Obviously, I'm not obtaining an
17 actual physical seat; I'm essentially buying a license
18 that entitled -- that entitles me to sit on the airplane
19 from point A to point B.
20 And lest you think that this is simply a point
21 that, you know, big copyright owners are making, I want
22 to quote from something that I read last night while I
23 was preparing for this event. This is from the Internet
24 Policy Task Force white paper, where they're actually
25 quoting a submission by the Center for Democracy --

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1 Center for Democracy and Technology, which is often at
2 odds with copyright owners like those that we represent.
3 And here's what they say in quote: "Consumers
4 often buy access to large libraries of content via
5 subscriptions or buy cloud-based services in which they
6 have an ongoing relationship with the provider, rather
7 than conducting a one-time transaction that feels like a
8 'single' purchase." And I completely agree with that. I
9 mean, again, people in common parlance use the term "buy"
10 not just to obtaining a physical object but to buying a
11 license or buying the right to do certain things.
12 MS. ALLEN: Thank you very much. We appreciate
13 all of your comments. Do we have anyone on the internet?
14 No.
15 Okay, I'll give the panelists one last
16 opportunity for a quick last thought before we turn it
17 over to our next presentation. Do you have any final
18 thoughts?
19 MR. ADLER: Yeah. Just to give you an example
20 of the complexity of this, a lot of what we heard from
21 some of the previous panelists was connected to consumer
22 expectations in the marketplace. And I think that
23 particularly in the case of the Federal Trade Commission,
24 one of the abiding concerns is an understanding of what
25 the supposedly reasonable consumer -- if such a person

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1 actually exists -- expects in a particular marketplace
2 transaction.
3 The case of books is particularly interesting
4 with respect to that. The term "book," by the way, does
5 not appear in the Copyright Act to describe a
6 copyrightable work because a book is simply the vessel,
7 the container, the format. It is the embodied literary
8 work that is, in fact, protected by copyright law and
9 generates the rights.
10 So when e-books came along, we found ourselves
11 with a different kind of vessel or format or container
12 for that embodied literary work. And we also discovered
13 that e-books would give the reader capacities with
14 respect to the use of that literary work that didn't
15 exist when that literary work -- the exact same literary
16 work -- was embodied in a hard copy print book. And
17 that's what these discussions really are all about.
18 The curious thing, however, is is that there's
19 two different flows of ideas with respect to how these
20 types of disclosures would work. There are some people
21 who are very determined to see that e-books should give
22 them exactly the same abilities that they have with
23 respect to that embodied literary work as the hard copy
24 print does, right? They want to be able to alienate the
25 particular copy of the work. They want to be able to own

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1 it, and owning it means they have complete dispositional
2 authority over subsequent treatment of that particular
3 book.
4 But at the same time, we're also hearing from
5 people that they want acknowledgment of the additional
6 capacities that an e-book has beyond those of a print
7 book, that it can be moved from one platform to another,
8 that it can be used remotely and even simultaneously by
9 multiple readers. These are all very interesting facts
10 that create different kinds of consumer expectations.
11 The library community, in some respects, would like to
12 see e-books treated like print books in terms of the way
13 they can lend those books to library constituents.
14 We understand that and we think it makes sense,
15 but from the publisher's perspective, e-books are a very
16 different kind of creature when you're talking about
17 lending it to individuals as compared to the situation
18 you'd have when you're lending a hard copy of the same
19 exact work.
20 So all of these things go into shaping consumer
21 expectations, and I'm not sure that it's very easy to
22 come up with any kind of consensus mapping in any
23 particular context, let alone across different types of
24 copyrighted works, different industries, different
25 sectors within industries about what consumer

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1 expectations are with respect to what they actually get
2 when they engage in an online transaction that is
3 designed to give them access and use of a particular
4 copyrighted work.
5 MS. ALLEN: Thank you, Allan. I'm afraid we
6 really do have to go, but thank you all for your
7 participation today.
8 And next up is Catie Rowland from the U.S.
9 Copyright Office with a presentation on the recent
10 report.
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1 PRESENTATION: SOFTWARE ENABLED CONSUMER PRODUCTS STUDY
2 MS. ROWLAND: Hello. I'd like to thank the
3 Internet Policy Task Force for inviting us here to talk
4 about our software enabled consumer product study that
5 the Copyright Office conducted over the past year and a
6 half or two years, about. It's a little bit different
7 than what we've been talking about thus far in this
8 conference. So, thus far, we've been talking about all
9 sorts of software and access to copyrightable works.
10 Software-enabled consumer products are a whole different
11 ball game, where perhaps unlike what was discussed
12 before, the license might not be the product, but the
13 product might be the product with a license.
14 So the background of this is all about the
15 Copyright Act, and this is my representation of kind of
16 the movement of the Copyright Act throughout the years.
17 At first, it was just maps, charts, and books; went to
18 photographs, sound recordings, and audiovisual works; and
19 as technology changed, so did the protection for
20 copyrighted works.
21 And for software, it's been protected since the
22 '60s or so, originally as books. And in kind of a
23 strange way to fit it in is under the rule of doubt, back
24 in the '60s. And originally it was reviewed as the
25 standalone application, so things like Microsoft Word or

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1 something like that or an operating system -- something
2 that's pretty easy for everyone to understand what
3 software is being used for.
4 Then as the years passed, we've gone to a whole
5 different range of software uses, where now it's nearly
6 ubiquitous. So, now, you find it in your smartphone and
7 your appliances and your medical devices, and this has
8 caused a lot of discussion in the copyright arena.
9 This actually has been the subject of the
10 Copyright Office's review for many years now. As an
11 aside, the Copyright Office does something called the
12 triennial 1201 rulemaking process, which is not the
13 subject of this study, but this is where a lot of our
14 issues popped up. So this is something that you're all,
15 I'm sure, fully familiar with where you have TPMs that
16 protect certain copyrighted content.
17 In the past, we have noticed at the Copyright
18 Office that these TPMs are going far beyond what was
19 originally contemplated. So originally when we had the
20 DMCA 1201 process, it was much more limited. And in
21 recent years, it's gone all the way to tractors, which
22 everyone's probably heard about, to smartphones and
23 jailbreaking, and to things like pacemakers and your car.
24 And, so, in light of this, the Senate took
25 note, and they asked us at the Copyright Office to do a

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1 study. And in October of 2015, we got a letter from
2 Senators Grassley and Leahy, asking us to look into this
3 kind of amorphous category of everyday products. And
4 they noticed that there -- that copyright has impacted so
5 many things that perhaps the everyday consumer does not
6 realize.
7 So your tractor, your smartphone, your
8 refrigerator, you might not know that there's copyrighted
9 software in there doing things that perhaps before might
10 have been purely mechanical. And these are things that
11 can be protected by a copyright's exclusive rights and
12 limitations and exceptions, and it's a whole different
13 world of the law that a lot of people who are dealing
14 with the stuff are probably not familiar with.
15 I think as Allan was mentioning earlier, there
16 are -- there's a lot of copyright stuff that would be
17 good for the consumers to understand so that they know
18 what is going on with what -- the products they're using,
19 as well as just things like books and motion pictures,
20 which everyone has traditionally understood come along
21 with copyright issues.
22 So the Senate asked us to study this in an
23 effort to better understand and evaluate how our
24 copyright laws enable creative expression, foster
25 innovative business models, and allow legitimate uses in

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1 the software enabled environment. They asked us to give
2 recommendations to see if possibly there should be
3 legislative efforts and to see if copyright should be
4 treated different -- or copyright should treat software
5 enabled products differently than it should be treated
6 with generally software.
7 Now, here's a caveat. We did not study
8 software generally. That was not our mandate. We did
9 not try to figure out kind of broad software copyright
10 issues. We were limited very specifically to this
11 category of everyday products, which if you were involved
12 in our study, you realize is a little bit difficult to
13 define. It's hard to figure out what is an everyday
14 product. And our study actually determined that there
15 was no specific definition that we could use for this
16 group of software, that there is no legislative
17 definition that we could recommend.
18 Instead, we looked at kind of the commonalities
19 of things that people looked at when they thought of
20 something as an everyday product. So we looked at things
21 like is the software something that comes with the
22 product; are you buying the product really for the
23 software, or is it really more of a mechanical thing that
24 might have been used before that is now kind of
25 integrated with software; and the price point, what are

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1 you really paying for.
2 So we had a bunch of different kind of
3 guideposts to look at. And we did that because not only
4 did the Senate ask us to do it but also because we --
5 once we did the study, we realized that copyright law is
6 actually uniquely situated to help protect both the
7 owners and the consumers in the genre of everyday
8 products because you have all sorts of exceptions and
9 limitations as well, like mergers, scenes a faire, the
10 idea/expression dichotomy, and those are all things that
11 are actually pretty uniquely pretty well used with
12 everyday products.
13 As a side note, and which is probably of
14 interest to you with the licensing issues, is that
15 licensing really kind of almost took over our study, even
16 though we were not trying to go over software generally
17 or licensing generally, we did realize that licensing was
18 a very, very important part of the software enabled
19 products.
20 So we heard all about how it's a common
21 practice for price differentiation and management and
22 flexible distribution methods, so it was very important
23 for the copyright owners. But then we heard like you all
24 were hearing about the consumer concerns, about the
25 confusion. They didn't know what they were buying, they

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1 didn't know if they were licensing it, what their
2 restrictions were, so there was that concern as well.
3 And then we got into a whole other can of worms
4 about state contract law because while copyright law is
5 very important, there's state contract law, which is kind
6 of layered over it. And we had a lot of discussion about
7 preemption, which we heard a little bit about today;
8 breach of contract, conditions versus covenants, consent
9 on clickwrap and shrinkwrap and fair use.
10 And the state contract law issues were very,
11 very interesting and, for better or worse, also entwined
12 with software generally. So it was very difficult for us
13 to separate, you know, state contract should apply just
14 to everyday products or should only apply for software
15 generally or how that worked. So that was actually quite
16 difficult for us, so we were unable to really kind of
17 parse that issue, although we were able to kind of look
18 at it with the copyright context.
19 Just to give you a little bit of a flavor of
20 some of the things we talked about, which I think some of
21 the people in the room are familiar with, we had a pretty
22 spirited debate about if you had a contract term that
23 limited fair use, so you buy or you license a product and
24 it has -- you cannot make something that would otherwise
25 be considered a fair use, would that run afoul of the

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1 Copyright Act, or would it be just a breach of contract.
2 We did not actually come to resolution of that in our
3 study because it goes beyond the scope of everyday
4 products, but it is a very interesting area and was
5 something that the Copyright Office had not really spent
6 a whole lot of time thinking about before it coming up.
7 So it's actually a fascinating, interesting part of the
8 copyright law, if you're interested in that.
9 So we had a report. It came out last December.
10 And although we didn't hear a lot about the concern about
11 reselling and disposition, so I should we say we kind of
12 lumped all of our findings into certain categories, so we
13 heard about reselling, repair, tinkering, security,
14 research, interoperability. So those were kind of the
15 main categories that we heard about of concern.
16 So the first one we heard about was from
17 resell, and can you -- if you have your car and it has
18 some sort of software embedded in it, can you resell your
19 car, does it come with the software, how does that work.
20 And there are two kind of lines of cases that are of
21 interest here. There's one called Vernor and one Krause,
22 and they all deal with whether or not you license -- a
23 license is going to work or not, if a license is a
24 license or if a license is kind of an ownership
25 situation.

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1 And what we saw in the study is that there was
2 concern about the reselling, but we actually didn't see a
3 whole lot of examples of licenses for the software that
4 was embedded in everyday products. There was some with
5 B2B and a kind of institutional/industrial licenses, but
6 not really a whole lot there for the consumer products,
7 which was what we were focused on.
8 And from what we saw, and we kind of looked at
9 Vernor and we kind of looked at Krause, which were those
10 two kind of different ways to look at licensing, and we
11 tried to see how it could apply to this resale of your
12 everyday product. And looking at our guideposts, which I
13 mentioned earlier, you know, why are you buying this
14 product? Is it for the software? Is it that kind of
15 incidental? Does the software come at the same time
16 you're buying the product? What kind of control do you
17 have over the product? Does the -- you know, in the
18 Krause case, they talked about did the owner of the
19 copyright maintain control of that software and did they
20 really -- were they able to kind of come and get it
21 whenever.
22 So based on that, we looked at the first sale
23 doctrine and determined that we think that it should
24 protect consumers in many cases with this embedded
25 software. So that was one thing that we felt like the

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1 law did not need to be changed if you looked at the law
2 in the way we looked at the law, and the first sale,
3 Section 109 in the Copyright Act should be okay.
4 The next issue was about repair, security,
5 research, and interoperability. So, again, you have all
6 these issues that are kind of -- some of them are the
7 ownership issue, so like Section 117 has some ownership
8 issues and only applies to owners in certain cases. And
9 then you have more broad limitation and exceptions
10 issues. So for the idea expression of dichotomy, fair
11 use, mergers, scenes a faire, those to us really seemed
12 very well situated to handle a lot of these issues.
13 So, for example, if you have interoperability,
14 so you're trying to create something that works, you
15 know, with another product, there is case law that says
16 that reverse engineering can be a fair use. And in that
17 case, we felt like the law was pretty well aligned and
18 would be well aligned with having the interoperability
19 issues with these kind of products.
20 Same with repair and security research,
21 although security research is not that -- there's not a
22 whole lot of law on it. We really do believe that that
23 is something that would fall within the purview of these
24 existing exemptions and limitations, and we didn't really
25 feel there was a need to have any legislative

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1 recommendations. Also, the problem being is how you
2 define "everyday products." So happily for us we were
3 able to find a solution to that.
4 And then again the licensing was implicated
5 throughout everything, and we realized how important the
6 licensing paradigm is to the content owners and how they
7 distribute all of their works. And it was an interesting
8 study because unlike having your normal Copyright Office
9 stakeholders come in, we had kind of a different cast of
10 characters.
11 We had some people who we see a lot, but we
12 also saw a lot of kind of repair people, people who may
13 be more in our 1201 context versus more of our other kind
14 of study. So it was something in which a lot of the
15 discussion was based on what can you do with something
16 you think you own. So it does tie back to a lot of
17 issues that were discussed in kind of the "buy now"
18 issues where what do you own? You think you buy the car,
19 but do you really buy -- do you own the car, do you own
20 your software in the car, what is happening there?
21 And at the Copyright Office, we felt
22 comfortable that at this point in time there was no need
23 for any sort of legislative fix to this and that -- the
24 way we construe it, which we believe is properly, that
25 you would have some pretty good exemptions and

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1 limitations that would help you out with using the
2 products that you buy on an everyday basis.
3 Now, this is limited to this category of
4 everyday products. And we didn't really extrapolate to
5 software generally, but it is something that is happening
6 more and more. And as you all know, there is now
7 software basically everywhere, and it's kind of a dynamic
8 situation where we have decided that, you know, because
9 there was not a lot of evidence of current licenses in
10 these kind of products that it was something that we
11 didn't really need to go any further on.
12 I believe the Internet Policy Task Force also
13 found similar -- had similar findings, and so we were
14 comfortable with that. And until there's a change in the
15 market, we don't feel like we need to do any more study
16 on this area. But that was our study in a nutshell. And
17 thank you.
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1 DISCUSSION: WHAT ARE THE NEXT STEPS?
2 MR. MORRIS: Thanks very much to Catherine.
3 I'm John Morris with NTIA, and my job is to bring some
4 coherence and conclusion -- I'm not sure consensus -- but
5 at least some coherence to the day. You know, we were
6 very pleased that the Copyright -- that Catherine and the
7 Copyright Office could join us because although, as she
8 said, what they were looking at is a little bit
9 different, I really do think it illustrates that many of
10 the same issues that we were talking about arise in other
11 contexts, that it's not just the context that we've been
12 focused on.
13 You know, this section is discussion, what are
14 the next steps. You know, before getting into kind of my
15 thinking, our thinking on next steps, let me just
16 generally say that if folks were unable to get their
17 comments in earlier because we ran a fairly fast
18 schedule, the next kind of half-hour discussion is a time
19 when, you know, we'll welcome, you know, folks to weigh
20 in and kind of say points that you hadn't been able to
21 say before.
22 I do have, you know, a number of questions that
23 I'd like to kind of lay out and get reactions to. The
24 point of this always has been to figure out what, if
25 anything, the government could do to contribute and to

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1 help in this area and to kind of improve the situation.
2 You know, we never -- we've never been, you know, looking
3 to impose or propose government regulation to solve a
4 problem here. We've really been trying to, you know, ask
5 stakeholders, is there work that you can do that perhaps
6 we can facilitate or convene, but is there work that you
7 can do to help address some of the concerns here.
8 And, I mean, let me go back in history. I know
9 that at least a few of you were with Shira and me as we
10 traveled from Nashville to Los Angeles, I think up to the
11 Bay Area a couple of years ago in some of the workshops
12 that we had that led to the white paper recommendation
13 and discussion of first sale. And as we said, you know,
14 in those meetings, there was actually more consensus in
15 those meetings as we traveled around the country than
16 there is today, even though it's those meetings that
17 really led to this meeting.
18 But, you know, we heard a fair bit of
19 consensus, which we summarized as saying, you know, it
20 does not appear that consumers have a clear understanding
21 whether they own or license the products and services
22 they purchase online, due in part to the length and
23 opacity of most EULAs, the labeling of the buy button,
24 and the lack of clear and conspicuous information
25 regarding ownership status on websites.

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1 So to kind of answer, I suppose, I think maybe
2 Brian in the last panel had really raised, well, you
3 know, what's broken, what's the problem we're trying to
4 solve. Well, that is actually the problem that we heard,
5 and there was a fair bit of consensus. And, so, that's
6 the problem that we're kind of asking, is there something
7 we should do.
8 Now, I do appreciate -- we certainly appreciate
9 -- that, you know, this was, gosh, two whole years ago,
10 and a lot's changed in two years. We do work on internet
11 time, and the marketplace really, in fact, has evolved.
12 Streaming services are much more dominant than they were
13 even two years ago. And, so, you know, we fully
14 appreciate that it may be that something that was more of
15 a concern two years ago maybe is less of a concern today.
16 So, I mean, it's not that we heard something and are
17 doggedly going to say we have to solve the problem of two
18 years.
19 But, I mean, one thing I'd like to kind of
20 tease out, and let me kind of throw out a perhaps almost
21 provocative question, perhaps mainly to the content
22 folks, to Allan, Ben, others, but really to the room,
23 because it's striking to me that two years ago, when we
24 were discussing the first sale doctrine and discussing
25 consumer understanding of what rights they had when they

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1 downloaded an MP3, there were two very prominent
2 different reasons to be concerned about consumer
3 understanding.
4 And we've talked a great deal about the first
5 one, and we've talked very little about the second one.
6 And I just want to kind of put the second one on the
7 table and get your reaction. The first reason that we
8 heard that consumer understanding was important was what
9 we've talked a lot about today: consumer expectations,
10 is there, you know, something unfair, is -- you know, are
11 consumers, you know, fully understanding what they're
12 acquiring, do we need to make sure that they understand
13 what they're getting before they -- before they purchase.
14 And I think, you know, I continue to think that's still a
15 very important issue, and we can talk a little bit more.
16 But the other issue that we hear in our road
17 trips in 2015 was that consumer understanding was
18 important to help continue to address the broad question
19 of piracy, that consumers perhaps would download an MP3
20 and would not necessarily understand, well, what can I do
21 with this MP3, what are my rights with this MP3, can I
22 give it away.
23 And, so, I mean, I think that there is and
24 certainly has been years -- I think there is still a kind
25 of a strong consensus that improving consumer education,

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1 consumer understanding of copyright issues is a positive
2 thing in terms of addressing priority, certainly USPTO
3 and NTIA support efforts to have more digital literacy
4 taught in high schools, taught, you know, in the
5 educational system to try to help consumers understand,
6 well, what are the limits of what they can do.
7 But today, we heard, you know, very little
8 about -- a little bit -- but very little about and even
9 some resistance to the idea that at the point of sale
10 might be an opportunity to increase consumer
11 understanding of copyright terms from a piracy
12 perspective. So kind of my one question I'd like to just
13 toss out, if anyone's willing to just offer a reaction
14 is, you know, is that kind of still a concern, or has the
15 market so moved to streaming that we really don't need to
16 worry about kind of piracy of downloaded goods and things
17 like that.
18 So, I mean, does anyone -- anyone willing to
19 take my -- go for it, and introduce yourself, please.
20 MR. MITCHELL: Okay, John Mitchell again. I
21 don't want to get more than my fair share, but I sort of
22 cut my teeth on copyright dealing with piracy, but we
23 worked at it both in music and then eventually in VHS
24 tapes. And then when it came to DVD, one of the
25 remarkable things that happened is that when DVDs were

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1 priced so low at wholesale that you end up with Redbox
2 renting them for a dollar, it put the pirates out of
3 business, that is, who's going to pay five bucks, which
4 was I think the going street price for a VHS -- pirated
5 copy of a VHS, when you could watch the movie from
6 Redbox. And that was thanks to the first sale doctrine.
7 I think as we get into the digital delivery of
8 goods and we end up with an inaccessible copy, not
9 because of any legal restraint but because it's on my
10 hard drive and not yours, and I want you to see it, and
11 the only way I can technologically do it now is to make a
12 copy because I don't want to give you my laptop, I think
13 that really does create some barriers.
14 And I think if consumers believe they have less
15 rights on alienation than they actually do, there will be
16 even greater reluctance to engage in commerce where their
17 inability to send things downstream is affected. But
18 flipping that and looking at the copyright -- the
19 constitutional purpose of copyright to increase broad
20 dissemination, the danger is when we go to pure access,
21 that's always priced as a brand new hard copy book in a
22 sense, to borrow that non-copyright-term book. And I
23 should parenthetically indicate software is in the same
24 thing. You can license software, you can buy software,
25 just like you can license its -- they're both literary

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1 works.
2 The people who depend on secondary markets for
3 used clothing, used shoes, used cars, are seeing a
4 dwindling of that secondary market for works that are
5 more and more accessible only to people who are willing
6 to pay that top dollar. And I think we as a society need
7 to be mindful of that and encouraging ways for people to
8 be able to gain access.
9 The reason that e-books are different is not a
10 legal one. It's a problem of physics and electronics.
11 It's perfectly legal for me to lend, sell, or give away
12 my e-book, as long as I get rid of the physical device
13 that it's on. I'm the owner of a lawfully made copy if I
14 downloaded that copy. As I impolitely mentioned to
15 MaryBeth Peters eons ago, if you get hit in the head with
16 a hard drive, it hurts a lot more than a CD. And I think
17 the same is true for e-books, the hard drive will hurt
18 more than a hard copy book. But we need to not squelch
19 that opportunity.
20 And I'll confess that with my group OmniCube,
21 we're trying to work on breaking that physics and
22 electronics barrier so that you can, in fact, do the
23 equivalent of taking a slice of your hard drive that has
24 -- that is that copy and moving it to someone else in a
25 way that's faithful to the Copyright Act, but we do risk

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1 shutting off a huge -- millions of people who can't buy
2 new and giving them basically little choice but the
3 piracy, as the only market in which they can affordably
4 acquire the goods.
5 MR. MORRIS: Great. Thank, John.
6 Does anyone else want to weigh in?
7 MR. ADLER: I'm sure you didn't mean this,
8 John, but the thing that's somewhat disturbing about the
9 way in which you proposed the second interest is that it
10 involves a kind of a rationalization of piracy. The
11 unhappy consumer is somewhat justified in violating the
12 rights of individuals and violating law because they
13 believe that the marketplace is not fair to them, that
14 the marketplace isn't meeting their expectations.
15 And I know you don't -- you can't carry that
16 argument too far, but on the other hand, I am concerned
17 about -- that what it presents overall in the larger
18 context of the way in which copyright rights are
19 exercised by those who have them ultimately, you know, we
20 have not been able to figure out how to improve the
21 ability to enforce rights in a meaningful way in an
22 environment that increasingly made it more difficult to
23 enforce them using the means that Congress had already
24 provided. And I think that part of that is this notion
25 that somehow or another there are at least segments of

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1 the population that feel that it is an appropriate
2 position to take that their actions are justified because
3 they're unhappy with what the marketplace offers.
4 MR. MORRIS: So --
5 MR. ADLER: So we'd just like to make sure
6 that, you know, we're ultimately considering that aspect
7 of this as well and we don't end up being in a position
8 where consumer expectations and consumers' perspectives
9 on the way in which people vend their goods and services
10 in the marketplace somehow justify them in engaging in
11 extra-legal activity with respect to them.
12 MR. MORRIS: So certainly let me make super
13 crystal clear that I personally individually and I think
14 the IPTF Department of Commerce doesn't at all think that
15 kind of the situation I identified of lack of consumer
16 understanding is a justification, but, I mean, honestly,
17 we have worked -- NTIA and PTO -- over the years to, you
18 know, to further efforts to try to reduce piracy because,
19 in fact, we both -- both of our agencies and the
20 Department of Commerce -- very strongly believe that
21 piracy should not happen.
22 And, I mean, I think, you know, Aaron's
23 research that started out this morning, you know, there
24 are certainly critiques of it, and I don't mean to -- and
25 I suspect Aaron wouldn't say that it's the last word on

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1 anything, but I think one thing that Aaron's critiques
2 suggest and Lorrie Cranor's critiques in other areas, not
3 copyright areas, you know, Florencia's research, I think
4 also, do suggest that -- that consumers can learn,
5 consumers can gather information.
6 Now, as to whether it actually makes a
7 difference in behavior, as to whether it makes a
8 difference in long-term piracy, you know, I think a lot
9 of people have said, you know, there needs to be more
10 work. But, I mean, I just want to kind of push to say
11 not that we or certainly I, you know, do not believe that
12 it's -- it is any way a legitimate excuse for piracy.
13 It's really just, I think -- the question I was
14 really more raising is is it a missed opportunity for
15 improving consumer understanding. And that's really all
16 I was, you know, trying to raise, because, honestly, you
17 know, I do think some in the content community in the
18 2015 roundtables kind of expressed that view. And that's
19 one of the reasons we kind of came into this
20 conversation.
21 But, you know, so I certainly didn't want to
22 suggest what you suggested.
23 MR. ADLER: I appreciate that. For anyone
24 who's interested in seeing sort of a real-world example
25 of this kind of debate and the yin and yang, you should

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1 read articles about Sci-Hub, a situation where people
2 undoubtedly, unquestionably in the eyes of federal court,
3 violated the law and violated the rights of copyright
4 owners in scientific journal articles but nevertheless
5 have met with the rationalization on some campuses and
6 some libraries and elsewhere in the scientific community
7 about the importance of universal access to those
8 materials, sort of being capable of justifying the
9 situation.

10 MR. MORRIS: So let me shift a little bit, but
11 I think I'm going to toss out another slightly
12 provocative idea because really to some extent my goal is
13 to -- is to urge you guys to keep talking to each other
14 and ultimately, not necessarily in the next 14 minutes,
15 but ultimately in the next few months to invite you to
16 continue to let us know if there's any role that we as
17 the Department of Commerce can play.

18 But let me again be a little bit provocative
19 and say that in listening to presentations up here I did
20 hear just a little bit of finger pointing of saying, oh,
21 it's not my problem, it's those people's problem. And I
22 heard it in two directions. You know, we heard from some
23 of the platforms that, well, gosh, it's those content
24 people over there who have all these complicated
25 licenses, and we can't really possibly understand them

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1 and I certainly couldn't explain them to consumers.

2 And I heard the, you know, content people say,
3 well, gosh, it's those platform people that control the
4 page, which both -- all of that's true. And, so, I don't
5 challenge the truth of anyone's statements, but there is
6 a little bit of, you know, again, is there a missed
7 opportunity to improve consumer understanding that if the
8 platforms and the content community were interested,
9 totally on their own, or with government, you know,
10 support to talk about that issue, to see is there
11 something.

12 I mean, certainly, none of us want to go and go
13 down what I know is an unwinnable battle of trying to
14 force people who make user interfaces to make their user
15 interfaces the way some government lawyer wants it to be.
16 I realize that that's not what we're talking about, and
17 that's not what the content companies, I think, would say
18 to the industry, to the platforms.

19 But the other side is that -- is that, I mean,
20 I do think that there is some evidence, and I'll raise a
21 question about whether more research needs to happen in a
22 minute, but, I mean, there is some evidence that
23 consumers don't have as robust an understanding as they
24 could, and is there an opportunity for platforms and
25 content owners to talk more. And I appreciate that's a

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1 totally private license negotiation, and the government's
2 not trying to stick our nose into it, but if there's
3 anything that we can do to facilitate a conversation
4 about how to improve consumer understanding, we'd be
5 interested in helping.

6 But -- so that's a slightly provocative point.
7 Anyone want to, you know, throw tomatoes or eggs at me,
8 or comment otherwise?

9 Go ahead Aaron. And introduce yourself.

10 PROF. PERZANOWSKI: I'm Aaron Perzanowski,
11 Professor of Law at Case Western University. I had sort
12 of a point of information and hopefully clarification
13 that relates to this particular point. We heard -- and
14 I'm sorry if I'm unable to attribute this in the blur of
15 wonderful people that we've heard from today -- but I
16 heard some conversation earlier today pointing out that
17 there are hundreds, if not thousands, of different
18 licenses that have been negotiated between copyright
19 holders, content owners, and retailers and platforms.
20 And I think that's an important bit of complexity to
21 raise.

22 I don't quite understand how that relates to
23 the consumer-facing licenses that we're worried about
24 here today. I've spent a fair amount of time looking at
25 the iTunes license, for example, all 20,000 words of it.

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1 And within the United States, there's one agreement,
2 right? There's one license.

3 Amazon, similarly, does not have a different
4 license depending on the content holder, right? Each --
5 their MP3 store has a license; their Kindle bookstore has
6 a license. So I'm not quite seeing how that -- what I'm
7 sure is a very real problem of complexity in the licenses
8 negotiated between copyright holders and the platforms
9 relates to the consumer-facing licenses that at least I'm
10 concerned with trying to explain in simpler and shorter
11 terms.

12 So if anybody can kind of fill me in there, it
13 would be really helpful.

14 MR. MORRIS: Anyone else want to jump in?

15 Okay, seeing none, fair warning, I'm going to
16 raise another kind of general topic for questions, but
17 then that will only take a moment and then open it if
18 anyone has been wanting to say something or respond to
19 something that was said two hours ago, your chance will
20 be in a moment.

21 But -- so the other -- one other thing that
22 we've heard a number of times from folks today, you know,
23 both some of the academics, I think, you know, Greg
24 Barnes suggested that Aaron's study was too limited. So
25 the question, you know, do we need to do more research.

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1 And the "we" is not we, the government, necessarily one
2 way or another but we as a community, you know, and what
3 kind of more research, you know, would be worth doing,
4 and, you know, would any of your companies or any of your
5 associations, if you represent associations or companies,
6 you know, be interested in participating. So, I mean,
7 just to kind of -- let me toss out that question as much
8 a question to ask for an answer now but also a question
9 for, you know, folks to think about after today, to see
10 if there's anything that they'd like to do.

11 But, I mean, certainly, if there are any
12 academics or anyone else who wants to jump in on research
13 that would be worthwhile doing.

14 Matt.

15 MR. SCHRUEERS: Hi, Matt Schruers with CCIA. I
16 -- you know, there is a lot of research that I wish I had
17 a budget to commission from the association but I don't.
18 But I would like to observe that I feel like the
19 conversation today identified lots of critical unanswered
20 questions, just sort of standard, I think, research
21 questions that any -- in any area we would do research,
22 like are the results of Aaron's study reproduceable, do
23 they vary in different contexts.

24 We had some interesting conversation during the
25 break about contexts where we probably know results are

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1 different. You know, I pointed out, for example, that
2 most of us know we can't resell a plane ticket, but it's
3 not because we read the terms of use on Travelocity or --
4 and where does that understanding come from? I feel like
5 there are a lot of areas like this where we probably want
6 to start figuring out why consumers have better
7 understandings in some contexts than others.

8 And I don't know where to start there, but I
9 feel like those are the kinds of questions that we want
10 to start answering, perhaps before necessarily
11 prescribing anything here, because there are a lot of
12 unknown unknowns that probably need consideration before
13 we chart a policy course, or at least that would be my
14 suggestion.

15 MR. MORRIS: Certainly responding individually,
16 I couldn't agree more. I think there is an awful lot
17 that we don't know, and my perception is that, I mean,
18 the online marketplace, which isn't clearly going to
19 be -- you know, it's clearly continuing to overtake the
20 physical marketplace in terms of distribution of content
21 is likely to get more complex, not less complex, in terms
22 of new options, new possibilities and things like that.

23 And, so, I mean, although Aaron's study, you
24 know, I think was more focused on the idea of downloading
25 a piece of content, you know, my guess is that if you did

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1 studies on other forms of distribution, streaming and
2 all, there might still be, you know, even in that area
3 some kind of lack of understanding of what your consumer
4 options are. So, I mean, I do certainly think that -- I
5 mean, certainly, we appreciate that there's an awful lot
6 we don't know, but -- John, were you trying to jump in
7 earlier? And then Jonathan.

8 MR. BERGMAYER: Hello. Okay, John Bergmayer
9 from Public Knowledge. I guess one piece of research
10 that I think would be interesting, and I know that some
11 has been done and, you know, maybe people can point me to
12 it, is just about the economic value of the rights that
13 people are not buying. So, for instance, you know,
14 publishers often point out that the cost of production of
15 a book is more the production of the actual work and not
16 the paper and the trucks. So, therefore, you shouldn't
17 expect a huge discount, but if people, when they're
18 buying an e-book or acquiring fewer rights, you know, you
19 would expect them to pay less.

20 And, you know, if I'm buying fewer legal
21 entitlements when I'm buying something, I should pay
22 less. And to what extent, like, that is actually
23 reflected in actual marketplace prices and, you know, the
24 actual economic value that people place on these things.

25 MR. MORRIS: Yeah, I mean, certainly to me it

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1 does, and I think one of the most interesting little data
2 points from Aaron's study is the last slide or two where
3 he suggested that perhaps, again in a non-real-world
4 setting, people might pay more to get a larger bundle of
5 rights.

6 Anyone else want to jump in on -- oh, yes, I'm
7 sorry, Jonathan Band.

8 MR. BAND: Yes, I'm still Jonathan Band.
9 The -- just to echo what others have said about the
10 importance of research, I think it's even all the more
11 critical to really understand this issue of, you know,
12 consumer expectations and notice and because part of --
13 it really resonates, especially given what Catherine was
14 saying in the software enabled consumer products area. I
15 mean, so right now, you know, when you buy your
16 refrigerator and you buy your car, you don't receive a
17 license typically for the software. Right now, you're
18 buying the whole product.

19 But, you know, I'm sure within ten years that's
20 not going to be the case. And, so, we need to really get
21 ahead of the curve, you know, because -- you know,
22 because, you know, it's sort of -- in a sense, you could
23 say, well, it's bad enough now, but we're only talking
24 about, you know, the \$10 e-book purchase on Amazon or the
25 \$2 rental on iTunes, right? I mean, we're talking about

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1 relatively small things now, small dollar value.
2 But when we're talking about the -- you know,
3 the \$20,000 Nissan or the, you know, \$100,00 Tesla, it's
4 going to make a much bigger difference, and it's going to
5 be much more controversial, and so we should -- I really
6 think it's necessary to try to get ahead of the curve and
7 really understand what's going on and how to handle --
8 you know, try to wrap our hands around this issue now
9 when it's relatively simple, rather than in ten years
10 when it's going to be much, much more complicated.
11 MR. MORRIS: Agreed.
12 Aaron?
13 MR. PERZANOWSKI: Yeah, Aaron Perzanowski
14 again. I just wanted to kind of echo that point. I
15 mean, one of the things that I think is really important
16 in terms of ongoing research is thinking about how some
17 of these same issues play out when it comes to internet
18 of things, devices, other kinds of software enabled
19 products because they are the indicators to consumers
20 that they should expect the same sort of suite of legal
21 rights, I think is even stronger than what I presented
22 earlier today, and we're already seeing examples
23 undermining those expectations.
24 So I'm not implying causation here by any
25 means, but just a couple weeks after the Copyright Office

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1 study was published that we just heard about, John Deere
2 put out a license for their tractors, right, and that
3 license is very clear about who owns the software that
4 makes that machine operate. So I think we're already
5 moving in a direction where we're getting kind of
6 explicit claims about ownership that are inconsistent
7 with reasonable consumer expectations.
8 In terms of other work that I think needs to be
9 done here, longitudinal data, I think, would be really
10 valuable. I suspect that the survey that I showed you
11 all today would have looked really different five years
12 ago, and depending on what happens next in this process
13 or other processes, it's going to look real different
14 five years from now.
15 I think it would play out -- you know, I'm
16 always careful to try to focus my comments here on kind
17 of verifiable, empirical claims because fundamentally
18 that's where this conversation needs to be. It's not
19 about our presumptions, our assumptions, what we think
20 consumers know, or what we suppose consumers believe. If
21 you want to make a claim about that, you need to go ask
22 them. So it's sort of a put up or shut up time when it
23 comes to data in this conversation.
24 I think it's really important, though, to point
25 out that I don't anticipate that the answers that I

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1 showed you all today play out the same in every context.
2 I'm going to violate the rule that I just sort of put on
3 the table and say, you know, like, in the video game
4 industry, for example, what I suspect is that consumers,
5 in part because of price point and in part because of the
6 role that resale plays in that market, are much more
7 sophisticated in their understanding of what rights they
8 acquire when they buy digital goods.
9 I would imagine tentatively that that's true in
10 the app space as well, but I don't know, I could be
11 wrong, you know, what do I know? I need to go out and
12 figure out the answers to those questions, and I would
13 encourage those with better access to data than I have,
14 right -- I'm operating on a shoestring law professor here
15 trying to do empirical research that is not free, might
16 not even be cheap -- other people have access to this
17 data.
18 There are companies that I think are much
19 better positioned to do this sort of work. You know, it
20 would be really great if they would publish what they
21 know on this question as well. And that's probably
22 asking for too much, but I think it would really help
23 move the conversation forward.
24 I don't think that I have, you know, done sort
25 of the definitive study here. I hope what I've done is

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1 the first, and that's really all I can hope for.
2 MR. MORRIS: Allan?
3 MR. ADLER: I was just going to mention, I
4 didn't want to let this go past without mentioning this,
5 because as I was reading some things in anticipation of
6 this panel, I was surprised to see what is being
7 characterized now as an arms race among social media
8 platforms to adopt buy buttons and the reasons that were
9 offered for that. Several articles that I read talked
10 about the extent to which Facebook, Pinterest, Instagram,
11 Twitter, and platforms like that are now looking at what
12 they're calling social buy buttons.
13 And the interesting reason that they seem to be
14 doing it is because given their existing capabilities to
15 tailor and target customized advertising towards their
16 constituents, they're eager to promote what they're
17 calling impulse-purchase moments. That seems to me to
18 present these issues in a much higher relief with respect
19 to the welfare of consumers than some of the issues that
20 we've been discussing where there already seems to be a
21 fair amount of experience and some degree of settled
22 practice.
23 They also point out that they're looking to
24 reduce the high rate of what they're calling cart
25 abandonment on mobile devices, where although consumers

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1 would be happy to use buy buttons on these social
2 platforms that they're always on anyway, they become
3 impatient with the checkout process.
4 So I would suggest to people like Professor
5 Perzanowski that as that checkout process is addressed, I
6 think this issue of the use of buy buttons in the social
7 media platform context where it's not limited only to the
8 focus on copyrighted works but the behavior of consumers
9 and the platforms and vendors of goods in a much broader
10 context is going to be a very rich area to mine.
11 MR. MORRIS: Thanks, Allan.
12 So I'm going to reserve the last word for me,
13 but anyone want to get a last word in before I give a
14 last word? Quickly.
15 MR. MITCHELL: Yes, I'll do this quickly. I
16 was thinking that we've I think identified maybe -- not
17 all identified, the distinction between disclosing EULA
18 terms but as a license agreement and full disclosure of
19 functionality. A couple of decades ago, I warned of
20 automated agreements and restraint of trade. This was
21 coming from an antitrust standpoint, that once your bots
22 are talking to each other, you could be held liable if
23 they're agreeing to an antitrust violation.
24 As we automate more and more and our devices
25 know what we want and anticipate our needs and do certain

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1 things, consumers may be more and more out of the
2 equation of clicking on a "I agree" button. They don't
3 need disclosure of the licensing terms; they need
4 disclosure of the functionality -- is this going to work
5 the way I intend it to? -- because the technology itself
6 may be enforcing this whether they agree or not. Just
7 that last comment.
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1 CLOSING REMARKS, WRAP-UP
2 MR. MORRIS: Well, I mean, one last comment
3 I'll make really is a riff off of that, and in part,
4 that's to reassure folks in this room that the IPTF is
5 not picking on you, that, in fact, we are looking at
6 consumer understanding in a number of contexts, including
7 the cyber security context. We have an ongoing multi-
8 stakeholder process specifically trying to figure out
9 ways to try to improve consumer understanding of the
10 cyber security implications of internet of things
11 devices.
12 So, I mean, I think the point you just made
13 that, I mean, we really -- all of us, I think, will be
14 better off in the ecosystem if we try to keep and try to
15 -- trying to keep consumer understanding in mind.
16 Shira, before I say thank you's, anything you
17 want to add?
18 MS. PERLMUTTER: I guess I would only say I
19 want to absolutely make sure we're crystal clear on a few
20 points that I think we've mentioned a few times. And one
21 is that we're really through this conversation not trying
22 in any way to address the freedom to set terms of
23 licenses but just looking at how those terms are
24 communicated, and, again, with the point being that there
25 could be benefits from greater clarity, first of all for

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1 consumers, in understanding what they can and can't do,
2 but also potentially to copyright owners because, as John
3 was suggesting, there could be fewer acts of infringement
4 if people understand what is not permitted in a clearer
5 way.
6 And overall, what we're looking at is there
7 a nonregulatory way to improve this situation, but I
8 think the thing that's been most clear to me from the
9 whole conversation is how difficult it is even to
10 approach that question, first of all without adequate
11 data, but also at a time when this is such a moving
12 target with such fast-changing circumstances. So I think
13 both John and I were struck by how different the context
14 is today than when we first started hearing about this
15 issue just two years -- two or three years ago.
16 MR. MORRIS: Great. Thank you. Bear with me
17 for 30 more seconds, because I'd like to just first say
18 thank you to the very critical staff of the Global
19 Intellectual Property Academy, the folks who actually run
20 this specific facility. So, Nadine Herbert, Jamie Day,
21 and Capris Barnes have been instrumental in a lot of the
22 behind-the-scenes work.
23 And then let me thank Shira's team at PTO,
24 Shira and David Carson and Susan Allen and Linda Quigley,
25 and my folks within NTIA, Luis Zambrano, Charlie Franz,

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1 Steven Yushko and others. And, in particular, to Susan
2 and Linda and Luis who really were instrumental in
3 crafting this panel and in contacting all the speakers.
4 So thank you very much to all of you for participating,
5 and, you know, we look forward to the conversation that
6 follows. And if you have more ideas about how we might
7 contribute, we'd be happy to hear about it, but thanks
8 very much.

9 (Applause.)

10 (Whereupon, the meeting was adjourned at 5:07
11 p.m.)

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