WELCOME REMARKS

MS. ALLEN: Good afternoon. We’re ready to get
started if everyone could please have a seat.

MS. PERLMUTTER: Good afternoon, everyone. For
those who don’t know me, I’m Shira Perlmutter, the Chief
Policy Officer and Director for International Affairs
here at the USPTO. And I wanted to begin by welcoming
all of you here, both those of you who are here
physically and those watching online.

Today’s meeting is the latest installment of
the work of the Department of Commerce’s Internet Policy
Task Force. For those of you who aren’t familiar with
the Task Force, it was formed all the way back in 2010 to
look at the policy and operational issues impacting the
private sector’s ability to realize the potential for
economic growth and job creation through the internet.

The USPTO and NTIA have together led the Task
Force’s work on copyright issues, and we’ve produced two
documents now: a green paper back in 2013 on copyright
policy, creativity, and innovation in the digital economy
and a white paper at the beginning of last year that made
a number of policy recommendations looking at issues that
had been raised in the green paper.

Many of you know, because you participated,
that we held extensive public consultations leading up to
both of those papers, including on the issue of whether
the first sale doctrine of copyright law should be
extended to cover the distribution of works by means of
digital transmissions.

Now, during the course of all those public
consultations, we heard a number of concerns expressed
about the level of consumers’ understanding of what they
have purchased when they pay for copies of works
delivered online. The Task Force, therefore, concluded
that consumers would benefit from more information on the
nature of these transactions, including whether they’re
paying for temporary access to content or for the
ownership of a copy with the long-term goal of instilling
greater confidence in the online marketplace and
enhancing participation.

So we’re here today to discuss that specific
issue and to determine together whether there is a good
way forward to make progress, perhaps through a multi-
stakeholder process as we suggested in the white paper,
although we’re open to hearing all options.

We’ll begin by hearing a number of academic
presentations on different aspects of consumer messaging
in the online marketplace and have the opportunity for
panel discussions of those presentations, as well as of
specific questions relating to what terms are useful or
important to communicate to consumers and how this can best be done.

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

And, then, finally, we’ll conclude with a discussion of what, if any, next steps could be fruitful.

We very much look forward to your input, and I will now turn the floor over to David Carson, who is Senior Copyright Counsel here at the PTO.

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

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

(Brief pause.)

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

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

But to set the context for that discussion, it’s useful to spend a few minutes explaining what we concluded and what we analyzed when we addressed the first sale doctrine in the white paper process. So let’s start by explaining what the first sale doctrine is. And before I do that, let me again just say -- this is by way of background -- this conference isn’t about the first sale doctrine, but it certainly gives you the context.

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

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

Copyright law provides the copyright owner with a number of exclusive rights, and you see the statutory text right up here. The first sale doctrine is an important limitation on one of the most important of those rights -- the exclusive right to distribute copies to the public by sale or other transfer of ownership or by rental, lease, or lending. That’s Section 106(3) of the Copyright Act.

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

The copyright owner cannot prevent me from doing that and isn’t entitled to any compensation when I do that. The copyright owner of the exclusive distribution right, however, is limited to the first sale of a particular copy. That’s how we get the name “first sale doctrine.” Once that copy has been sold or
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24 another of the copyright owner’s exclusive rights.
23 transmit a copy of a work online, you’re implicating
22 implicating more than the distribution right. When you
21 most obvious one is that when you download a copy, you’re
20           There are a number of reasons for this, but the
18 redistribution of a copy that was obtained by means of a
17 sale doctrine does not permit the resale or
16 environment. Notably for our purposes today, the first
15 digital world don’t necessarily apply in the online
14 part, but let me take a minute or two to give you a sense
13 that’s not what we’re here to talk about for the most
12 analysis on the issue, and there’s really not reason --
11 opportunity to read that agreement typically. You
10 agreement, or EULA. You’ll have to -- you’ll have an
9 doctrine does not apply to the reproduction right.
8 transmission, almost inevitably the transaction is going
7 when you obtain that copy by means of an online
6 can read or watch or listen to it whenever you want. But
5 DVDs, and CDs. You pay money; you get a copy; and you
4 to the experiences we have with hard copies like books,
3           Some of those experiences may feel very similar
2 even possessing copies.
1 copyrighted work in copyrights [sic] or phonorecords.

What we call -- while we call a transmission
over the internet a distribution, it’s actually much more
than that. After all, the actual copy that’s sitting on
the server doesn’t move from the server to the
recipient’s device. Instead, a transmission is made that
results in reproduction of the bits and bytes that
together make up a copy of the work. And the first sale
doctrine does not apply to the reproduction right.

I can’t take the time to go into all of our
analysis on the issue, and there’s really not reason --
that’s not what we’re here to talk about for the most
part, but let me take a minute or two to give you a sense
of some of the other reasons that led to our conclusions.

When I go into a bookstore to buy a book, I
take the book off the shelf, I pay for it, and I walk out
of the store with it. At the beginning of the
transaction, there was only one book; and at the end of
the transaction, there’s still only one book. The
particular copy of the book has just been removed from
the bookshelf in the bookstore, and it ends up on my
bookshelf.

But when I download an e-book, the copy that is
sitting on the server at Amazon or Barnes & Noble doesn’t
go anywhere. It’s there at the beginning of the
transaction, and it’s still there at the end of the
transaction. But a second copy of the book is now
residing on my iPad or my Kindle, or perhaps both. It’s
the transmission of that second digital copy that creates
complicated questions that we don’t have with the single
particular copy of, say, a paperback book.

Those complications, again, are not what we’re
here to talk about, but for background information, it’s
important to understand why copyright laws that apply to
digital distribution do so in a way that’s different in
some respects to the way they apply to the traditional
distribution of physical goods.

Let’s talk about licensing, because that’s
really what governs many of the terms and conditions of
what one can do when one obtains a copy by means of
digital transmissions, at least in the commercial world.
Digital distribution models differ from traditional
brick-and-mortar models for other reasons. Because of
the different nature of an e-book or a song or video
file, we access them differently than we do in hard copy.
When I want to get a book or a movie online,
it’s not the same kind of transaction as a transaction I
enter into at a bookstore or a video store. Not only
that, but making works available online opens up all
sorts of new options that allow consumers to experience
works of authorship without owning and sometimes without
even possessing copies.

Some of those experiences may feel very similar
to the experiences we have with hard copies like books,
DVDs, and CDs. You pay money; you get a copy; and you
can read or watch or listen to it whenever you want. But
when you obtain that copy by means of an online
transmission, almost inevitably the transaction is going
to be accompanied by a license called an end-user license
agreement, or EULA. You’ll have to -- you’ll have an
opportunity to read that agreement typically. You
usually will have to click on a link to read it, and you
will have to do something to indicate your consent, most
likely.

But as we looked at the issue while we were
working on the white paper, the consensus seemed to be
that it’s very rare that anyone actually reads the EULA
or even looks at it. I don’t think anyone came forward
with any evidence as to how frequently customers read
them, but I also don’t think anyone actually disputed
that proposition.

That’s not surprising. EULAs are frequently
very lengthy; they’re detailed; and they’re not
necessarily easy to read. But it’s the EULA that will
tell you whether you actually own the copy, how many

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copies you can make, and on how many and what kinds of devices you can put them; whether you can give your copy to somebody else, whether you can provide access to somebody else, and so on.

Of course, this isn’t an issue only with respect to issues that relate to copyright. There are all sorts of terms and conditions in EULAs that have nothing to do with copyright. And I would imagine that consumers are just as knowledgeable or unknowledgeable about those terms and conditions as they are about the terms that relate to copyright.

They can vary also from vendor to vendor and perhaps also from copyright owner to copyright owner. Different services may offer different terms and conditions based on their understanding of what it is that consumers want or on what they believe makes economic sense, and all also based on the contract they have with the copyright owner.

We’ll have representatives of online platforms and copyright owners on our first panel, and perhaps we can learn some more from them about this. Now, the white paper described an online marketplace that’s evolving from services involving the distribution of copies to those in which consumers are offered different levels of access at a choice of price points and an exchange for ownership or of the ability to resell or give away copies just doesn’t come up, because you never actually have a copy. But other questions do come up depending upon the business model. For example, on how many devices or what kinds of devices may I access the work? Can I give access to my family or friends?

We also heard assertions that some of the terms and conditions set forth in EULAs, such as provisions barring redistribution of copies by consumers, are at odds with the ordinary expectations of consumers, especially when the consumer consummates the transaction by clicking on a button that says “buy.” Others disagreed, expressing the view that the particular contexts in which those transactions take place, consumers are likely to understand that they’re paying for something that falls short of ownership. That’s something we’ll be exploring a little later today.

But nobody came forward with hard evidence as to what consumers actually understand they’re getting when they obtain copies of works online. Many participants on all sides agreed that consumers are entitled to clarity and that more should be done to communicate what rights they are or are not getting when they enter into a transaction involving digital transmissions of copies.

benefits that may not be available or necessary in the physical world. For example, software patches and upgrades.

Indeed, the RIAA recently announced that in 2016, for the first time ever, streaming music platforms generated the majority of the U.S. music industry’s revenues. But it’s not just about making more money for copyright owners. The marketplace, in fact, is responding to consumer demands and taking advantage of new opportunities and flexibilities that digital technology offers. The music business is probably the furthest along this path toward access-based models, and the motion picture industry is probably close behind. In other industries, such as book publishing, the prevailing model is still based on giving the consumer a copy of the work, whether it’s in hard copy form or a digital copy.

Access-based models also come in a number of different kinds of offerings. There are subscription services that give you access to a large number of works for as long as you have the subscription. Think of Spotify, for example, or Netflix. There are 24-hour or 48-hour rentals in which we’re given access to a work for a relatively short period of time. Such arrangements are popular, for example, with motion pictures.

In these access models, the question of...
As the digital marketplace continues to evolve to include a wide variety of license-based business models, clear communication of relevant terms to consumers can help facilitate commerce and establish trust in the online marketplace. Copyrighted works form a substantial portion of online commercial transactions, and they contribute significantly to U.S. commerce, but the issues we’re discussing today are not unique to the United States. They’re being explored by governments around the world. For example, Europe has come up with suggested guidelines for a way to communicate with consumers. What you see are some suggested guidelines that the European Commission has come up with.

When looking at solutions, we need to be forward-looking because what may be cutting edge to today’s consumers may be commonplace tomorrow, and the day after tomorrow, they may be absolutely old-fashioned. Solutions also need to make sense. If a virtual assistant like Alexa or Google Home has to read out lengthy EULAs before playing music or streaming television, consumers’ enthusiasm for using those assistants could decrease substantially, to put it mildly. So there’s a real problem between mediating between the need to give information to consumers and giving consumers the ability to get to what they’re really looking for, which isn’t necessarily that information.

But, thankfully, we don’t have to reinvent the wheel. In addition to representatives from online platforms and copyright industry associations and public interest organizations, we have with us today people with significant experience in consumer messaging and in other fields such as privacy disclosures and computer science. And they, hopefully, can help us provide some insight into relevant considerations as we explore consumer messaging.

Finally, we want to make sure that everyone understands this meeting is not about what terms and conditions should be imposed on consumers any more than it’s about what the rules of copyright law should be. We understand that reasonable minds can differ on those topics, and I’m sure there’s a variety of views on those topics in this room. But for the purposes of this exercise, we’re taking for granted that the terms are what they are. The question isn’t what they ought to be but rather how do we best communicate to consumers what those terms are.

And with that, let me introduce our next presenter, Aaron Perzanowski. Professor Perzanowski is a professor of law at Case Western Reserve University of Law. He was an active participant at one of our white paper roundtables, and he’s written extensively on the first sale doctrine. But what he has to talk about today is not the first sale doctrine. Instead, he’s here to address another conclusion in the white paper, the one I’ve just been talking about, which is the conclusion that there’s a need to provide consumers with more clarity about the nature of the transactions they enter into when they download copies of works.

Professor Perzanowski is the coauthor of an article published in January in the University of Pennsylvania Law Review, entitled “What we Buy when we Buy Now.” It’s the only study we’re aware of that looks into what consumers believe they acquire when they buy digital media goods. The article suggests that adding a short notice to digital product pages, a notice that explains what consumers may and may not do with the copies they obtain, would improve their understanding of what they’re buying.

Following Professor Perzanowski’s presentation, we’ll have a panel of four commenters who will react to what he has to say, and I think it’s fair to say we’ll hear a variety of viewpoints. But whether you would disagree or agree with Professor Perzanowski, his article should be the basis for a very lively discussion.

So with that, I hand it over to Professor Perzanowski. And hopefully someone with more skill than I can find his PowerPoint.
And it is one of a number of incidents that I
when it comes to physical books. It just isn't a thing that could happen
products differs from their relationship when it comes to
example of the ways in which consumers' relationships
purchased that book. This is, I think, a really stark
Orwell's 1984 from the devices of consumers who had
where Amazon remotely deleted all of the copies of George
Orwell’s 1984 from the devices of consumers who had
we drew from this data.
So as a starting point -- I have two machines
to keep track of here. As a starting point, I imagine a
lot of you remember this incident from a few years ago
where Amazon remotely deleted all of the copies of George
purchased that book. This is, I think, a really stark
example of the ways in which consumers’ relationships
between -- or consumers’ relationships with digital
products differs from their relationship when it comes to
physical books. It just isn’t a thing that could happen
when it comes to physical books.
And it is one of a number of incidents that I
think illustrate this point. The removal of purchased
Xbox fitness videos in the last year or so is probably
the most recent example.
So some have argued that consumers understand
that when they click that “buy now” button on the Amazon
webpage that what they’re really purchasing isn’t a copy
of a book but a license to access content. And I’ve
always suspected that that is a rather optimistic
assessment of how well consumers understand these sorts
of transactions. So what Chris and I set out to do was
to test exactly what consumers are taking away from these
advertising messages.
And I think that question is important for a
couple of reasons. First, from a purely consumer
protection point of view, we want to make sure that
consumers have accurate information when they’re making
choices in the marketplace. We don’t want them to be
making a purchase, expecting one set of rights and then
acquiring a lesser and in some ways inferior set of
rights. But more broadly, if we value the marketplace as
a source of information about consumer preferences, then
we need to make sure that the decisions that consumers
are making are actually an accurate reflection of what
they want, right?
So you can’t point to all of those diesel
Volkswagens that were sold over the past decade or so and
claim that that’s evidence that consumers really love
pollution, right? And I think in the same way it’s not
clear that we can point to this shift away from
ownership-based models of media acquisition to more
temporary, more conditional forms of access and claim
that that is a reflection of consumer preferences, unless
consumers have accurate information.
So what did we do in this study? We created
this sort of fictitious marketplace called Media Shop and
surveyed just under 1,300 consumers about their
understanding of this “buy now” language. We created a
set of screening questions to make sure that all of our
survey respondents were online shoppers, in the market
for either digital books, music, or movies. And the
sample that we came up with was designed to be
representative and was representative in terms of sex, in
terms of age, and in terms of income. It was also
roughly representative when it came to race, region of
the country, and education, as well.
So on the basis of those screening questions,
we sorted consumers into three different categories, and
within each one of those categories, we focus on a
different media type, right? So we had books, music, and
movies here. Here we have an example of an e-book.
We also gave consumers a choice between a
number of different media titles. We wanted to sort of
ensure that they were engaged. We also wanted to ensure
that our measures of materiality in some way reflected
something that approximated the actual marketplace,
right? So if I put a book in front of you that you’d
never consider reading, that makes it a lot harder to
measure things like materiality.
So someone who was sorted into the e-book
tranche here and selected The Martian would have seen one
of four different variations on this page. They may have
seen a digital book sold with a “buy now” button. They
may have seen a digital book offered with a “license now”
button. They may have seen -- it’s a subtle shift there
-- “buy now, license now.” Some people also saw a
paperback version of the book with the “buy now”
language. We’ll come back to that in a bit. There’s the
“license now” variation. And here we have our fourth
condition, a short notice, rather than the “buy now” or
“license now” button.
The price that was reflected on these pages was
taken from the current Amazon price for these products,
so there were differences between the digital and
physical versions of the book. Sometimes the digital
versions were cheaper, but not always, right? So we
the respondents were given an opportunity to view and interact with those product pages I just showed you, they were asked a series of questions about what rights they believed they acquired in these transactions, right? So, here, the question is, “After clicking ‘buy now’ and paying for the e-book, can you lend it to a friend?” So can you lend it, can you resell it, can you leave it in your will, can you give it away as a gift, can you read it on the device of your choice?

And I want to briefly summarize the results, starting with what we found for the consumers who saw the “buy now” button for digital goods. So what we see here is that it turns out a very high percentage of consumers believe that they are getting rights that are expressly denied to them under these license terms. People think they’re getting the right to lend their digital purchases, to give them away, and even, for a not insubstantial number of consumers, to resell those goods.

We see really high affirmative response rates here for the ability to keep these purchases for as long as you would like the ability to use them on your device of choice. And more than 40 percent of our respondents believe they had the right to lend those digital purchases and to give them away. A smaller percentage responded yes to leaving them in their will and to resale.

But if we’re thinking about this, and this is kind of the lens that we use in the paper to analyze the results here, if we think about this through the lens of false advertising law, you know, there’s not a hard-and-fast percentage when it comes to a false advertising case, but a typical rate of -- typically a rate of above 15 percent or so is good evidence of deception. And, frankly, resale here is the only close call.

We also asked people if they had the right to make copies for other people, something they’re clearly not entitled to do under copyright law, as a sort of sanity check on our results. And, in fact, with the possible exception of MP3s, we saw the lowest affirmative response rates to that question.

So what happens when we switch from “buy now” to “license now”? Something interesting happens. The first question we ask, “Do you own the thing that you have just paid for?”, we see a massive decrease, right? So we’re comparing here in the -- on the left the “buy now” results with the “license now” results. For e-books, we see a huge drop in the number of people who say they own this thing, but, of course, ownership is a sort of complex legal conclusion, right? It’s not really a falsifiable result, but we do think it gives us a sense of kind of overall consumer perception of the transaction.

Beyond that, though, very little changes, right? There are no substantial statistically significant shifts that happen when we shift from “buy now” to “license now.” That’s true here for e-books. I could show you the slides for MP3s and movies. It’s pretty much the same thing.

What about our short notice intervention here, right? One thing to say about the short notice, first of all, is neither Chris nor I are professional designers. We are not trained in user interface design. I, frankly, spent about 15 to 20 minutes putting this little thumbs-up, thumbs-down thing together. And we thought we’d see how it works, right? And there are obvious ways to improve it.

In our open-ended questions in the survey, we had a number of people who said, Uh, you know, that notice was good, but the typeface was too small, it was too hard to read, right? So maybe it needs to be, like, you know, 11-point instead of 9-point or something along those lines.

So we think there are ways to improve upon the results that we found, but the results were significant. So this is what happens when we compare the “buy now” and
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<td>short-notice conditions for e-books. We see that similar</td>
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<td>drop in the people who think they own the digital good,</td>
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<td>but we also see significant drops in affirmative</td>
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<td>responses for lending, gifting, willing, and reselling.</td>
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<td>And this is after only a single exposure to this short</td>
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<td>notice for no more than, you know, 30 seconds at most.</td>
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<td>how long people were on that particular page, which we</td>
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<td>should have done, but the average response time for the</td>
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<td>entire survey, which had lots of steps in it, was ten</td>
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<td>of time looking at that product page. We think that with</td>
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<td>repeated exposures we might see more pronounced results.</td>
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<td>drops in much of the same places. Interestingly, though,</td>
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<td>we saw very little effect when it came to movies.</td>
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<td>Consumers did not respond in quite the same way. And, to</td>
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<td>be honest, we’re not entirely sure why that’s the case.</td>
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<td>the movie purchaser category were different than the</td>
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<td>65 and women tended to understand their rights more</td>
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<td>accurately than younger men. Conclude from that what you</td>
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<td>only descriptively what did they believe, but were they</td>
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<td>right or wrong? And so we scaled each respondent --</td>
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<td>there were seven questions. We scaled them on this zero</td>
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<td>through seven scale based on essentially what is our</td>
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<td>little grading chart here. And here is what we found,</td>
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<td>right? Here’s how people performed.</td>
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<td>who encountered the “license now” condition, right? That</td>
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<td>just introduced in some ways additional confusion. One</td>
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<td>thing that was interesting about “license now” -- and in</td>
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<td>some ways I saw this as a success -- more people answered</td>
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<td>“I don’t know” to the “Do you have the right to do this</td>
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<td>the most correct answer. It’s the most honest answer, in</td>
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<td>a sense. So “license now” kind of shook people’s</td>
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<td>confidence, but in terms of correct answers, we saw a</td>
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<td>lower rate.</td>
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<td></td>
<td>Marginally better, although not statistically</td>
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<td>significant, was the result for “buy now.” That</td>
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<td></td>
<td>difference was not significant.</td>
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<tr>
<td>31</td>
<td>The short notice performs markedly better than</td>
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<td>the “buy now” button, right? This was a quite</td>
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<td>significant result but still far short of the pretty</td>
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<td></td>
<td>accurate, although not wholly accurate, but the largely</td>
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<td></td>
<td>accurate average score when it came to people who saw the</td>
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<td></td>
<td>“buy now” button as attached to a hard copy, right?</td>
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<td></td>
<td>So this has so far just been kind of</td>
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<td>summarizing the accuracy of these beliefs that consumers</td>
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<td>expressed. We were also interested in the question of</td>
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<td>materiality, right? Do these potential misperceptions</td>
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<td></td>
<td>about their rights actually matter to consumers? Would</td>
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<td>they behave differently if they knew the truth?</td>
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<td>And we tried to do that in a few ways, right?</td>
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<td>We tried to measure when it came to three of the</td>
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<td>particular rights. We didn’t have time in the survey to</td>
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<td>ask about all of them because it adds significantly to</td>
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<td>the time, lowers your completion rate, lowers the</td>
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<td>attentiveness of the respondents, so we focused on three</td>
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<td></td>
<td>of them: lending, reselling, and using on the device of</td>
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<td>your choice.</td>
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<td>So the first way we tried to measure</td>
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<td>materiality was to ask people about their preferences.</td>
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<td>Would you strongly prefer an e-book that you can lend to</td>
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<td>a friend, or would you, you know, somewhat prefer one</td>
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<td>that you can’t lend to a friend, right? So here’s what</td>
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<td>we found. And what I think is interesting about this is</td>
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<td>not only did the vast majority express a mild or strong</td>
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<td>preference for more than one of these three rights, the</td>
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<td>format didn’t seem to make much difference.</td>
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<td>Those preferences were just as strong when you</td>
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<td>were talking to someone who was shopping for a physical</td>
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<td></td>
<td>book as when you were talking to someone who was shopping</td>
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<td></td>
<td>for a digital book. Same for music and movies, as well.</td>
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<td></td>
<td>And, in some cases, counterintuitively, the preference</td>
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<td>was stronger for the digital good, right?</td>
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<td></td>
<td>You can see that for the ability to lend music,</td>
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<td>55 percent say they have a preference for lending an MP3</td>
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<td>as opposed to 48 percent for a compact disk. This is</td>
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<td>just another sort of metric for capturing that same data.</td>
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<td>We scored everyone on a negative 6 to positive 6 scale,</td>
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<td>so positive 6 would be someone who expressed a strong</td>
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<td></td>
<td>preference for all three rights; negative 6 would be</td>
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<td>someone who expressed a strong preference against the</td>
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<td>right in each of the three instances.</td>
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<td>And you see the distribution there. The</td>
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<td>majority of people express these preferences for</td>
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<td>additional rights. So that’s well and good, but how does</td>
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<td>this relate to consumer behavior in the marketplace? Are</td>
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<td>they going to make purchasing decisions differently on</td>
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|      | the basis of these preferences? And it turns out when
you ask people about their willingness to pay, to put a dollar value on these preferences, this is what we found. Most of our respondents were willing to pay more, and we asked this question in the most conservative way possible, right? We didn’t ask how much less would you pay for something where these rights are taken away from you. We asked how much more would you pay to get this right that you’re not currently entitled to. And most respondents were willing to pay something. The median increase in price was a dollar; the average price increases were significantly more, right? Now, we weren’t asking people to spend real money, right? If you said you’d spend $5 more, we didn’t take $5 away from you, right? So I don’t know that this is a perfect simulation of what consumers would do in the marketplace, but it gives us some sense that they attach a dollar value to these rights. One last slide here, and then I will wrap things up. We tried to measure materiality in one more way. We tried to ask people if these rights are not available to you, might you consider -- would you be more likely to acquire media through some other means. And we asked about two of them. We asked people whether they’d be more likely to get their music from a streaming service, for example, if they did not -- if they could not in the marketplace acquire the right to lend digital copies. And here are the results that we saw for books, music, and movies. So likelihood of streaming is on the right. A considerable percentage of consumers see streaming as a more attractive, more viable option in the absence of these rights that we associate with ownership. And I think, more disturbingly, about a third of our respondents said if I can’t get the rights that I think are valuable, I am more likely to download that material illegally. So I think there is a measurable desire for additional rights on the parts of consumers, and I’m hopeful that our conversation today can move us forward in a way to kind of figure out how to reconcile these perceptions that consumers have about what’s happening in the digital marketplace with the reality. Thanks. MR. CARSON: Thank you, Aaron.

DISCUSSION: REACTIONS TO RESEARCH PRESENTATION

MR. CARSON: Can we have our panelists come up?

We have a hard stop on this panel at 2:20, so I’d like to get started.

Thank you very much, Professor Perzanowski.

We’re going to have you come up here in a few minutes to join the panel, but first we’re going to ask essentially for people to react to what they’ve heard Professor Perzanowski say, and following that, with a little bit of discussion, we’ll open it up to questions from the audience. At that point, we’ll ask Professor Perzanowski to come up, because, of course, he hasn’t had a chance to answer any questions yet. We might also have him interact with the rest of the members of the panel as well. As I said, we have to move on because we do have a hard stop at 2:20.

So what I’m going to do is just introduce everyone by name and title and then just have each of them tell us a little bit about who they represent and give us an overview of their reaction and what we just heard from Professor Perzanowski.

So we’ll start with John Bergmayer, who is with Public Knowledge and go to Greg Barnes with the Digital Merchants Association; and Ben Sheffner from the Motion Picture Association of America.

So let’s just go down the line. Again, let us know who you represent, who your organization represents, and give us an overview of your reaction to what we heard.

MR. BERGMAYER: Sure. Hello? So I’m with Public Knowledge. We’re a Washington, DC-based consumer digital rights advocacy group. Just so you know where I’m coming from policy-wise, you know, I’m a big supporter of digital first sale, but obviously, like we said, we’re not here to discuss the fundamental policy of first sale and things like that.

You know, I think getting to my preferred policy would take a lot of work and rethinking how copyright law works, in particular, you know, formulating some new concept of a digital copy that you own that is somehow distinct from the sort of physical media it’s embedded in because as I’m sure everyone here knows, you know, there’s intellectual property rights and then you own a copy, which is defined as a physical item, and when we’re talking about digital media, people always talk about this concept of, oh, I got a copy, I downloaded a copy, which is not really how the term “copy” works in copyright law. So getting to my preferred outcome would be really difficult.
So in the meantime, I’m totally in favor of things that I think pragmatically help consumers. And one of the key things, as Aaron discussed, is, you know, consumer education and disclosure to people about what it is they’re buying, what it is they can do so we can see if maybe in the marketplace if there is the ability to offer more rights than they currently have, if they prefer to spend money on those things, and maybe we could have more of a marketplace reaction.

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

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

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

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

So getting into the sort of consumer understanding perspective, I think if -- you know, if every different digital media company doesn’t reinvent the wheel and come up with new kinds of rights with little exceptions here and there where it varies pretty significantly from company to company and what you’ve learned about how Apple works is not the same about how Amazon works, but instead you had just a simplified menu of the kinds of rights that consumers can have, I think then it would be very much easier to have consumer education and, you know, that, for example, the same kind of notice could be used across different media platforms.

And it would mean the same thing, more or less, legally.

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

And you need to have some kind of flexibility to have someone with a nonlegal perspective with just a more pragmatic simplified perspective, you know, try to communicate to consumers how to understand things, while at the same time there is a legal question. You need to make sure that it’s a safe harbor where if people misunderstand, if the EULA is accurate but the disclosure isn’t and it’s a disclosure that people thought was good enough but it turned out it wasn’t in this one Edge case, you know, we don’t also want to hold people responsible where we’re telling them to provide simplified information to consumers and then all of a sudden because that simplified information didn’t have all the same information as the EULA you’re holding them liable for somehow deceiving consumers. So I think there’s a little bit of a balance there.

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

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

And all of those legal doctrines that we’re talking about with respect to just things like music downloads I think will also -- could end up having effects on those areas too. So I think, you know, that’s just an emerging area, I think, that people need to be
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So I think this is a point that if we’re going to look at this study and we’re going to make policy recommendations or conclusions based upon the study, we should be giving that some thought.

A second problem with the study is that it fails to adequately consider consumer motivations. Our research -- speaking for companies that I work with and talk to on a regular basis -- our research indicates that when consumers purchase, let’s just say, the latest Taylor Swift song, for example, they aren’t buying that song with the thought of maybe 40 years down the line I can actually gift that to a relative.

They are actually making that purchase for one of five reasons. Reason one is instant gratification.

They want to be able to immediately consume and enjoy that content that they just purchased. Convenience. For those who used to buy physical products, you would have to make a trip to your local store, drive, depending upon where you live, 5, 10, 20 minutes, fork through the aisles to actually purchase content. Now you can do all of that online.

Access to massive libraries. For those who actually went to their record store or went to their local Walmart to purchase a CD or a DVD, they often had the experience where they might be out of stock. Well, the online digital storefronts have changed all that because now we have access to massive libraries, and we actually sell in the context of music about 50 percent of what we call catalog, meaning we actually sell old music just as much as we sell newer music. That didn’t exist when you actually bought music off the shelf, so that’s the important thing that motivates consumers.

Affordability is a big issue. Digital content is often priced cheaper than physical products. And the last thing that motivates consumers deals with portability. For those who actually purchase music videos, books, if you purchased them in the physical world, you actually have to take them with you, carry them. In this new environment, as long as you have the device, you always have access to those purchased works.

And, so, those are five important factors that tend to influence consumer purchases. And the last thing I would suggest on that issue is if, in fact, consumers were being misled or deceived, as often is suggested, we wouldn’t see the same level of repeat customers that the digital storefronts experience. Not only are we actually -- not only do we actually have a loyal fan base, we actually are growing the number of consumers.

And we think if this weren’t the case, people would actually probably have complained. And as Aaron pointed out, they probably would actually go and pursue alternative means of actually accessing content, but we don’t see that happening. We actually see the legitimate
Finally, I’ll touch upon a point that Aaron did point out, is this short notice, it could actually move people away from legitimate online marketplace. It could actually decrease sales and increase piracy. And I think those are two things that we don’t want.

Speaking again for the online platforms, we’ve done tremendous work and dedicated a lot of time to build a legitimate online marketplace. Everybody can think back, who follows this industry, to the days of Napster where consumers were convinced content should be free. We’ve actually changed that dynamic and convinced them now that it should be purchased. And we would hate to see anything disrupt that status quo.

So I think I’ll wrap up there. I’ll say the research is a good starting point, but it definitely warrants further research and more discussion.

MR. CARSON: Thank you, Greg.

Mark, what do you have say?

MR. FISHER: I am -- there we go. Good afternoon. I am Mark Fisher, the President and CEO of the Entertainment Merchants Association. Personally, I’ve spent 35 years in the home entertainment business, both as a retailer – a retail executive and currently as a trade association executive.

The Entertainment Merchants Association is the trade association supporting the retailing of home video and video games. Our numbers run the spectrum from digital retailers to physical retailers, brick-and-mortar retailers, online retailers, the home entertainment divisions of all the major studios and movie studios and many industry dealers as well, video game publishers and all of those associated service technology companies that support our industry.

Our members that are engaged in the digital space are involved in electronic sell-through business or the sale of digital content, TVOD, transactional VOD, the rental of video content, as well as SVOD, which is subscription video on demand, and AVOD, advertising video on demand.

The digital marketplace as the home entertainment digital marketplace, home video marketplace, is over a $10 billion business, or was in 2016, and for the first time in 2016 surpassed the physical home video marketplace. Of that, more than -- more than half of it is subscription video-on-demand business and the remainder splits down the middle between electronic sell-through and transactional video on demand. All three of those -- of those business practices have actually grown over the past year, 2016 versus 2015, albeit that that subscription...
video-on-demand business has grown significantly more and has experienced double-digit growth over the past several years.

To address the buy-button issue, according to the Merriam-Webster dictionary, I’ll read it, the definition of “buy” is to acquire possession, ownership, or rights to the use of, to the use or services of by payment, especially of money. So the plain meaning of “buy” is really an appropriate term across all content formats. Consumers buy consumer software, even though they’re licensing it. They buy video on demand, even though they know that they’re renting a movie. And they buy movie tickets, even though they’re simply buying an admission to a public performance.

Consumers have been buying digital media -- digital video -- since the beginning of this century. Movielink and CinemaNow started in -- I think it was 1999. Consumers today are accustomed to digital rights. This isn’t a -- this isn’t a new business. And consumers, they appreciate the fact that with the digital content they have -- as Greg said, they have portability and they have immediate access to content. They don’t have to leave their house and go to a store to access the content. They appreciate those benefits of digital content.

Consumers understand, as David was saying in his opening, that buying content in one format versus another offers different benefits and different limitations. And if somebody buys a DVD of a movie, they know that they can resell it when they no longer want to keep it, but the owner of a digital copy of that same movie, I think they know that they can’t resell it.

The owner of a digital copy of a movie that’s stored in the -- that’s stored in the cloud, on the Amazon cloud or Ultra -- a service like UltraViolet, knows that they can access that content wherever they might be remotely, but the owner of the DVD knows that they have to have the DVD with them when they -- when they view the content.

In the study that we just saw presented by Professor Perzanowski, the -- it cited the buy button is confusing and the buy button is deceptive, but when the - - when the respondents were presented with the -- with the short notice of rights for video content specifically, there really wasn’t statistical -- a statistically significant difference in what they perceived their rights to be.

So I believe that this demonstrates that consumers really aren’t confused and deceived by the “buy now” button for digital movies. It’s an acceptable term, and it’s not confusing, not deceptive.

It’s important to keep in mind that the majority of the terms that limits the consumer’s ownership or usage and the transfer privileges are established back by the content providers, and those rights are only offered by content providers on a license basis, and they’re -- due to the sheer number of content providers that occasional retailer is working with. The licensing requirements are -- they vary. And they vary too much to be able to be covered in a -- in one simple - - one simple message to the consumer to be covered properly.

Retailers do a really good job of communicating to their consumers what their consumers need to know. Retailers don’t exist because they’re attempting to deceive the consumer. Retailers exist and develop great relationships with a consumer when the consumer keeps coming back.

In order to do that, the retailer has to have a really good idea of what their message -- to their consumer, what they’re offering, and the content that they’re -- that they’re carrying on their sites. And we believe that they need the flexibility to be able to do that and to do that as best they can, as they can best, I should say.

So for the reasons stated, the EMA believes that there -- that there is not need to establish best practices for consumer messaging in connection with online transactions involving copyrighted works. We don’t believe that’s necessary. We don’t believe it’s desirable. And we believe it will confuse the market.

MR. CARSON: Thanks, Mark.

And, finally, Ben, let’s get the perspective of the motion picture industry.

MR. SHEFFNER: Thank you, David, and thank you to the PTO and NTIA for hosting us today. So, so far, we’ve heard, in addition to John, we’ve heard from two sets of retailers: from DiMA and from EMA. I represent the motion picture studios, the major motion -- the six major motion picture studios. Generally speaking, they are not in the retail business; instead, they are in the wholesale business, meaning they don’t have the direct relationship with customers.

I should have a -- I should state a caveat that there are some experiments going on with -- on a relatively small scale at the moment -- of direct relationships via websites operated directly by the studios, but speaking generally, the way that our members make their works available to the public is through these online platforms that Mark’s and Greg’s associations
Consumer Messaging in Connection with Online Transactions Involving Copyrighted Works

25 only 80 in 2012, and of course zero going back to 1988 --

24 could access movies and television shows, compared to

23 were 121 legal services over the internet that people

22 latest figures that I have available at the moment, there

21           In 2015 -- the end of 2015 -- which is the

20 industry.

19 traditional hard goods like DVDs or Blu-ray disks in our

18 obtaining access to copyrighted works, online or through

17 consumers obviously have a choice between obtaining or

16 what they're presented with.  As others have alluded to,

15 think it bears on whether consumers are being confused by

14 describe the current state of the marketplace because I

13           So let me just take a minute to sort of

12 transaction.

11 of the particular words that are used to describe the

10 designing it, both in terms of the graphics and in terms

09 they will have separate negotiations with Apple, with

08 Amazon, with Walmart.  So will Disney; so will Warner

07 Brothers, et cetera.

06 So we’re talking -- and each of those

05 agreements may not cover their entire catalog.  There may

04 be different negotiations covering different catalogs.

03 So, again, it’s hard to talk uniformly about everything.

02 I obviously haven’t seen all these hundreds or perhaps

01 thousands of agreements.  So what I’m going to be talking

00 about here is the general rule, although it won’t shock

04 prepare for this event is, you know, I want to know, well, how exactly does this page on Amazon.com or on

03 Apple get to be that way.  Is it because Amazon or Apple

02 -- or is it because the particular copyright owner whose

01 works are being offered -- designed that particular page?

00 And it probably won’t surprise people in this room to

00 learn that Amazon designs its own webpages; Apple designs

00 its own webpages.  That is not the subject of agreements

00 between the copyright owner and the platform.

00 As I understand it, it’s generally not the

00 subject of any negotiation or discussion.  Apple can --

00 and Amazon, they consider it that -- their real estate.

00 They don’t want others -- they don’t want others

00 designing it, both in terms of the graphics and in terms

00 of the particular words that are used to describe the

00 transaction.

00 So let me just take a minute to sort of

00 describe the current state of the marketplace because I

00 think it bears on whether consumers are being confused by

00 what they’re presented with.  As others have alluded to,

00 consumers obviously have a choice between obtaining or

00 obtaining access to copyrighted works, online or through

00 traditional hard goods like DVDs or Blu-ray disks in our

00 industry.

00 In 2015 -- the end of 2015 -- which is the

00 latest figures that I have available at the moment, there

00 were 121 legal services over the internet that people

00 could access movies and television shows, compared to

00 only 80 in 2012, and of course zero going back to 1988 --

00 ‘98 or ‘99.

00 In 2015, they used -- consumers used those

00 services to access 76.1 billion -- with a B -- television

00 episodes online, compared to 48.8 billion three years

00 earlier; and lawfully accessed 8.4 billion -- with a B --

00 movies compared to 4.4 billion in 2012.

00 I think what this says is that consumers are,

00 overall, satisfied with the current state of affairs.

00 Those numbers are going up.  Now, Professor Perzanowski

00 had a -- sort of a prebuttal to the argument that he

00 probably suspected I was going to make and said, well, 

00 you know, Volkswagen sold these millions of cars and they

00 lied about the emissions that were going to be coming out

00 of them.  That doesn’t mean that all those -- those

00 millions of Volkswagen buyers are satisfied with those

00 transactions.  And that’s true, but there’s a big

00 difference.

00 I suspect that most of those Volkswagen

00 purchasers will be one-time purchasers.

00 PROF. PERZANOWSKI:  (Off-microphone comment.)

00 MR. SHEFFNER:  And I suspect you and probably

00 most of those others will be -- will be one-time VW

00 purchasers.  As others have alluded to, the people who

00 are buying or obtaining access to -- let’s use that term

00 for the moment -- all of these billions of movies and

00 television shows, they’re obviously repeat customers.

00 There’s simply -- there are not enough people in the

00 world for it to be one-off purchases.

00 So they are hitting the buy button or the rent

00 button or whatever it happens to say on their particular

00 platform, they are paying a few dollars, and they are

00 watching or obtaining more permanently the movie, and

00 they are coming back.  And they are doing it again and

00 again and again.  And I suspect they would not be coming

00 back again and again and again if they felt that they

00 were being tricked or deceived or weren’t getting what

00 they thought they were getting when they -- when they hit

00 that button.

00 I know we’re short on time.  Let me just take

00 one or two minutes to talk for a second about the buy

00 button and what I think is going on here.  I’m a defender

00 of the buy button.  I’m not here to tell the online

00 platforms that they should not be using the buy button, 

00 but I think we -- I think I want to just put a little

00 perspective how I think we should think about the word

00 “buy.”

00 I started thinking about this.  You know, there’s a lot of instances on the internet where we use

00 terms that are borrowed from very familiar terms from the

00 offline world.  Just a few examples.  We use email.
Obviously, everyone’s familiar with old-fashioned mail that you get in your mailbox, and we have this newfangled thing where you get messages, and it’s kind of, sort of similar to old-fashioned mail, so we call it email.

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

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

That is, I think, how we should think about the buy button. You know, it’s a colloquial word, as Professor Perzanowski, I think, accurately said at one point, both in his paper and in his presentation a few minutes ago. Ownership is both a complex legal conclusion and an intuitive claim about an individual’s relationship to a product. I think that’s another way of saying it’s a colloquial word that we use to say, okay, I pay for something and I get something, whether it’s a physical object or access to something.

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

If I were to step away from my sort of normal human-beingness and think about it as a lawyer, I’m sure I could write a 10 or 20-page memo analyzing, well, I paid for something, what exactly did I get? Did I get physical ownership of a copy? Did I license something?

Did I -- did I buy the copyright? I think we’d all probably agree, no, I didn’t buy the copyright. It would probably cost millions of dollars to buy any of the actual copyrights that we’re talking about. And there’s sort of no problem. I mean, it’s when we say, wow, “buy,” you know, that carries specific legal meaning that means, you know, can you do X or Y or Z that we sort of -- and, you know, that we’re sort of inventing a problem that doesn’t really exist.

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

I mean, I gave you a bunch of statistics about sort of how many billions of these transactions are going on. You know, in preparing for this event, I spoke a little bit with Mark and with Greg, and we kind of compared notes. And, you know, this question that we had for each other is, well, you know, are your members getting complaints from the public about these transactions? Did they say, oh, you know what, I hit buy, but then I found out, well, you know what, maybe I wasn’t getting the same exact rights that I would have gotten if I had bought a physical book or a DVD or a CD. And the answer that I think all of us share is no. And I think it was -- you know, Greg mentioned to me, hopefully I won’t misquote him, you know, online -- online purchasers are very quick to complain and make
That’s why I went out and asked people what they believe it means, right?

It leverages a physical world where people have been buying things for a long time. And I think there is a set of assumptions built into that terminology. If we want to construct a different kind of transaction that has a different nature, we need to communicate that. And maybe in time we’ll develop another word for it and we can use a single word shorthand. I don’t think we’re there yet, and I think the data that we uncovered sort of bears that out.

I have so many other things that I could say.

MR. CARSON: We’re going to stop here. I’m really sorry.

MR. PERZANOWSKI: That’s all right.

MR. CARSON: We just have a hard stop right here.

MR. PERZANOWSKI: Sure.

MR. CARSON: Thanks very much. We could have gone on much longer, clearly, but we can’t.

Next panel, please.

SERIES OF PRESENTATIONS: INFORMATIVE PERSPECTIVES

MR. ZAMBRANO: Hi, everyone. My name is Luis Zambrano. I’m a Policy Analyst at NTIA. Thank you for coming here. When we were planning this meeting, many pointed to work that has been done in other areas that involved consumer messaging, for example, privacy and food and nutrition.

We also realized that there were many perspectives in these areas of expertise that fed into this discussion, and we have asked our next presenters to provide us with a bit of information about consumer disclosures from different perspectives, including how to design and evaluate disclosures in a digital world, communication research trends, and to speak a little bit about the legal framework for disclosures.

And with that, I would like to introduce to you one of our — our first speaker today. Lorrie Cranor is a professor of computer science and of engineering and public policy at Carnegie-Mellon, where she is a director of the CyLab Usable Privacy and Security Laboratory and co-director of the MSIT Privacy Engineering Masters Program.

In 2016, she served as a Chief Technologist at the U.S. Federal Trade Commission. So Lorrie is actually in very much of high demand today and she has to leave for another commitment after her presentation, so we would like to thank Lorrie in advance for making the time to be with us today.

DESIGNING AND EVALUATING DISCLOSURES IN A DIGITAL WORLD

PROF. CRANOR: Thank you. All right. So most of the work that I’ve done with disclosures is in the privacy space. You may recognize some of these privacy-related disclosures and symbols, and these are all examples of disclosures that myself or my students in my lab have been involved in doing some evaluation, to see how effective are they. And that’s what I’m mostly going to talk about today.

If you want to know whether disclosures are effective, you need to put some thought into actually how to do the evaluation. And we’ve done that. We’ve looked at some of the cognitive models that have been put forward about how people process disclosures in their brain.

And this is a simplified version of one that was put forth by Michael Wogalter. I’ve simplified it here, but if you imagine that an individual is presented with a disclosure in some way, and the first question is whether they actually even noticed that the disclosure is there. And if so, do they fix their attention on it. If it’s visual, do they read it? Or if it’s audio, do they listen to it?

If they have actually looked at it, then do they understand what it means? Do they understand the words? Do they understand the symbols? Then, if they understand it, do they believe it? Do they think it’s important? Do they trust it? Do they think it’s relevant to them? Do they think they personally should pay attention to it, or is it somebody else’s responsibility to do that?

And then are they motivated to do something with the information that they have just learned from this disclosure? And, then, finally, do they actually do it? Do they make decisions based on the information they’ve just gained? Do they change their behavior in some way, or do they choose not to change their behavior, but from an informed perspective?

So that’s the cognitive path that we expect people go through when encountering a disclosure, and there are three points here that I’m going to focus on, and that is looking at whether people notice the disclosure, they comprehend it, and do they act on it. And, so, I have three very quick studies to share with you.

So on the question of noticing a disclosure, one of my students did this study looking at the privacy
notices in an Android app. And she posited that whether
or not people notice the notice might depend on when they
actually see the notice. And, so, she developed an app
with a quiz game, and she developed different
versions of it where the privacy notice, which is what
you see in the middle, appeared at different points. In
some, it appeared in the app store; in some, it appeared
right after you download the app; in some it appeared --
it interrupted you in the middle of playing the game; in
some, it appeared at the end of the game.

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

And, basically, what she found is that the
people who saw the privacy notice in the app store did no
better than the people who did not see it at all.
However, any of the other places that she put it, people
were more likely to be able to correctly answer
questions. So that shows that the exact same notice,
whether people notice it and pay attention to it, depends
on the timing of when they actually encounter it.

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

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

And the questions we asked were things like,
well, what do you think would happen if you clicked on
the icon, and we gave them some examples of things that
might happen, and we asked them if they agreed or
disagreed that those would happen. So, when we gave this
icon and the AdChoices tag line, 56 percent of people
said they thought more ads would pop up if you clicked.
That’s wrong.

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

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

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

So the way he decided to do this test is he
populated it with a bunch of apps; and he invited
participants into our lab. And he told them to imagine
that they had a friend who had just bought their first
Android phone and was asking for assistance in selecting
apps. And the friend wanted an app for dieting, an app
for travel, a bunch of different types of apps.

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

Now, what we found was that the people who saw
the privacy facts were more likely to select the more
privacy-protected apps than those who did not have that
privacy information. And that was in most cases.
However, we did some exceptions. We specifically
designed these pairs of apps in ways to test different
hypotheses, and in one case, we would pair a privacy-
protective but completely unknown brand against a known
brand that did not have such good privacy. And what we
found is the well-known brand often was more popular,
despite their privacy rating. So we can see that there
are different factors at play here that actually impact
people’s behavior.
So when I was at the FTC last year, this was also a topic of interest to the FTC, but not just about privacy disclosures, but all types of disclosures. And we had a meeting where we invited people who do work on nutrition labels and drug fact labels and mortgage labels and all sorts of different types of disclosures.

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

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

The last thing I want to say before I wrap up is I wanted to put out the idea of computer-readable disclosures. Some of our speakers earlier today mentioned the problem of do you really want Alexa reading a disclosure to you, and, of course, we don’t really want to listen to these long disclosures. However, if you make these disclosures computer-readable so that Alexa and all of your other digital assistants can read them electronically to themselves, not out loud to you, you can do all sorts of useful things now.

So your personal assistants can read them. They can use this information to discover whether there’s something unusual in this disclosure, or is this the same disclosure you’ve already seen a zillion times before.

You might set your personal preferences to say, alert me only if there’s something unusual in this disclosure; or alert me the first time I’ve seen this disclosure; after that, just say it’s the same one you’ve seen before.

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

MR. ZAMBRANO: Thank you, Lorrie.

Our next presenter is Florencia Marotta-Wurgler. She’s a professor of law at New York University School of Law and the director of the NYU Law School Study Abroad Program in Buenos Aires. Her teaching and research interests are contracts, consumer privacy, electronic commerce, and law and economics. Her published research has addressed various problems associated with standard form contract online such as the effectiveness of disclosure regimes, delayed presentation of terms, and whether people read the fine print.

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

Florencia?

CONSUMER PERCEPTION: COMMUNICATIONS RESEARCH TOOLS

PROF. MAROTTA-WURGLER: Thank you.

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

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

So I’ll talk a bit about that and about some of the findings that I’ve -- some of the evidence that I found -- I do empirical work -- and then some of the takeaway points from my work and other people’s work. So the first one is that very few people read standard terms. You know, the motivation of the talk at the beginning was that nobody really focused on whether people actually read fine print, and I thought I’d address that a little bit. So very few people read fine print.

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

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

So, first, I’ll focus on the studies -- the findings of a first study, worked together with two coauthors. We look to the extent to which people read fine print, not in a lab setting, not in a survey, but in a real market. What -- we look for something that in law and economics we call an informed minority, which is a critical number of people that is sufficiently large to affect a market, to affect sellers into offering terms
that buyers want.
So -- and we focused on the market for shopping
for software online. EULAs are rich, quintessential type
of standard form contract, and for the purposes of this
audience and this talk, they include most of the terms
related to intellectual property rights, in addition to
many others. The average EULA is 2,700 pages long, and
they have grown an average of 30 percent over the last
decade. So clearly a highly dense contract and which is
constantly evolving.
So what we do is we measure all the visits by
40,091 households to 66 software companies across a
number of different markets, including games, word
processing, antivirus, from large to very small -- from
highly competitive to more concentrated markets, and see
the extent to which the shoppers click on the URLs that
correspond to EULA. So we use click-stream data for this
that basically captures all of the URLs of all of these
visitors during their visits to these companies so we can
track very carefully how -- where they visit and how long
they spend on each particular page.
And we say -- and we have very detailed
demographic information for each particular user, and we
track all of the URLs that correspond to EULAs and
measure the extent to which they click on these contracts

and how long they spend on this. And we say that a
reader is somebody who spends at least one second in
these contracts. So that’s -- that’s as much as you need
to be a reader. It’s highly beneficial.
And, here, you can see a bit of how this -- how
this looks like. So, here, we have for retail and
freeware sites we thought, well, maybe if somebody’s
getting something for free they’re more likely to know
that there might be strings attached, so you can see that
for retail firms we have the 40,697 visits. And then we
have some of the characteristics about the particular
visit, but the most interesting findings are on the right
side of the panel, and particularly the one that’s framed
in red.
And we can see that out of the 40,697 visits,
only 49 click on the EULA. These are shoppers. These
are people who are actively searching to shop. And those
who click on the EULA spend a median time of 29 seconds
on a contract that is twenty -- over 2,700 words long.
So clearly this is a very small number, about
one in 1,000, and with some very generous parameters,
maybe .17 percent. So one in 1,000 bothers to access the
terms, but they’re barely, barely read.
So I thought I’d ask, well, how about, you
know, maybe these software license agreements, all of
terms? And, here again, we have EULAs and company visits
as a function of how many clicks it takes to access the
contract. So clicking as a function of disclosure. And, ide-ally, as the number of clicks goes down, you might
want to have readership go up. That’s the goal of
increased disclosure.
And, indeed, you do find this, right, when you
have -- when the EULA is six clicks away, nobody accesses
them, but when it’s one click away, it’s true, EULAs are
more likely to be read, but the number is basically not
distinguishable from zero, right? It’s .32 percent.
And, again, the median time spent is extremely low,
right? So one out of 200 shoppers even glances at the
EULA, let alone understands it, reads it, or reacts to
it.
So we look at whether readers actually react to
what they read, and I find no such indication. And,
well, how about requiring readership? How about those
clickwraps? So it turns out that those aren’t that
helpful either. So .23 percent click on hyperlinks on
EULAs that they’re forced to acknowledge exist. You have
to click on “I agree,” but nobody bothers to click on the
hyperlink next to it.
And when you have a EULA in a checkout page,
obody spends that much -- enough time to actually scroll
down and read through the terms. It’s about 94 seconds, but consider that that time includes entering personal information with phone -- I’m sorry, name, address, and credit card information. So the bottom line is that even with required assent, almost nobody reads the fine print, and this is true in other contexts as well. But it turns out that, so, these traditional disclosures are not so helpful, but there’s some evidence, and Lorrie has talked about some, that when disclosure might work. So EULAs, not so likely to be read, but what happens if we shorten simplified disclosures that are made at the right time tend to be more likely to work. And then there’s very interesting research that finds that the framing effect, depending on how you frame the terms, is it more in a moral sense or in a colloquial sense or in a highly legal sense affects not only the likelihood to be read but also the perceptions about what the nature of the obligation is. So there’s some very interesting and encouraging evidence from the restaurant grade card experiments that seems to have found restaurant hygiene cards actually reduce the number of emergency room admittances for food poisoning, and this has been in L.A. in 1997. And also a recent study in New York seems to have the same -- the same types of -- types of things.

There are other initiatives that this -- conversations in this area I could learn from. So the FTC’s dot-com disclosure seems to -- seemed to borrow or adopt these types of lessons learned. The CFPB has been testing and experimenting with this. Smart disclosures in the U.K. nudge units, they’re all in different settings, and the disclosures vary tremendously, but what they have in common is that they all test their disclosures, not only in a room, but also they do field studies. The Nudge Unit in the U.K. actually does field studies with small samples of the population to test the extent to which different types of disclosures work in effectively communicating information to consumers and affecting their behavior -- ultimately affecting their behavior. So testing is a key component, no matter where these particular disclosures are made. And, finally, there’s a very interesting study on framing effects. So, for example, when a contractual obligation is framed in moral rather than legal terms, consumers are more likely to be drawn to them, and they’re more likely to read them, but also to comply with the terms that are being presented, to comply with a particular contractual term in this particular example. Similarly, when terms are likely to be read, they’re also more likely to be complied with, which is sometimes -- you know, not shocking, but shorter disclosures are also more likely to be read, especially if they’re framed in not a very legalistic manner. That being said, legalisting information, just when you structure something in a legalistic way, consumers seem to be more committed to a particular deal. So context and the framing -- framing effects matter a lot, not only in comprehension but also in understanding what the role of the consumer is in fulfilling a particular contractual duty.

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

Thank you.

MR. ZAMBRANO: Thank you, Florencia. Our next speaker is Deborah Lodge. Deborah is a partner at Squire Patton Boggs and specializes in intellectual property, privacy, and internet law. Among her diverse clients are financial institutions, communications and media companies, retailers, and technology pioneers. With her broad legal experience and practical business perspective, Deborah helps clients achieve their strategic goals while complying with the legal regulations that govern privacy, e-commerce, and advertising.

CONSUMER DISCLOSURE: AN OVERVIEW

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

So, now, how do I go next? We’ll figure this technology -- here we go. So here we are. So the Federal Trade Commission, of course, is the primary enforcer of truthfulness in advertising and disclosures.
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<td>And there, the basic law is Section 5 of the FTC Act, which prohibits unfair or deceptive acts or practices in or affecting commerce. And that language is extremely flexible and has been, you know, interpreted in different ways to address various technologies. An act or practice generally is deemed unfair if, A, it is likely to cause substantial consumer injury, which a consumer could not reasonably avoid, and it is not outweighed by the benefit to consumers. And an example of that is in the recent FTC's dot-com disclosures. I have them here because must be provided, and there was already reference to the basic claim, then under the FTC's view, disclosures to the purchase or use decision. And that definition comes out of the FTC's policy statement on deception, which is still used as a guide. Obviously, it's filled with many issues there because what is acting reasonably and what is material to the purchase or use decision. In reviewing messaging, the FTC evaluates the message or offer by looking at all the elements of the promotional offering material. And as we’ve heard today, net impression is critical. What is the disclosure, and what is the consumer’s understanding of what the disclosure means? Notably, if there’s a deceptive net impression, the FTC will find the ad to be misleading, even if specific individual claims or presentations are not misleading. And that’s the critical issue here, obviously, in terms of buy now. What does it mean? And, you know, are there various misleading statements or impressions that are associated with that? In the FTC land, actual injury is not a prerequisite because something can be deemed to be misleading and harmful to consumers, even if there is no actual injury shown. The key issue is what are consumers’ perceptions and expectations. If a claim would not be -- if a claim would be deceptive unless information is provided in addition to the basic claim, then under the FTC’s view, disclosures must be provided, and there was already reference to the FTC’s dot-com disclosures. I have them here because they’re incredibly helpful and, you know, the FTC has tried to deal with the issue of the transfer of much of our shopping and consumer experiences to the internet, and online deception is obviously one of the issues that we’re all trying to deal with in different contexts.</td>
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<td>But from the FTC’s perspective, the medium does not matter because print, online, broadcast media, social media as well, the basic principles of Section 5 apply to all of the different platforms and media on which these disclosures are made. And as I referenced, the dot-com disclosures, which were updated in March 2013, really give further guidance to all us practitioners in terms of how to make effective disclosures online. One of the issues that we were dealing with today and Professor Perzanowski’s study addressed is, you know, what is material, what is likely to influence a purchasing decision. That clearly depends on the nature of the product or service that is being advertised and offered, and the basic questions are are disclosures needed in order to address consumer expectations, what are the consumer’s expectations? Obviously, they’re going to differ very much from whether there’s a physical object involved or probably whether there is something that is just online or communicated via, you know, audio or other kinds of messaging. And what is the consumer’s perception of the advertisement on the offer? That really is very critical to an FTC assessment. And, also, you know, what are the total costs to receive or use the products or services? Does the consumer understand what the pricing is and what goes along with those pricing points? Sales terms, including return or refund policies, or in the digital context, certainly, you know, whether or not something is going to be available for a short term, forever, whatever. And the omission of critical information that relates to these points can, in the FTC’s view, be deemed material or deceptive. The FTC’s dot-com disclosure guidelines really focus on clear and conspicuous disclosures and the import of making them so that they do draw consumers’ attention. And I thought that the prior statements and presentations were critical on this because that is what I think, you know, we’re all looking for in terms of the utility of any disclosures. The FTC has adopted what are called the four Ps for online effective disclosures where they need to be prominent, large enough for a consumer to notice and read -- hopefully they’ll read; presentation, you know, what wording and format, is it easy to understand; placement, the information or the link should be easy to find; and proximity, it should be close to the claim that the disclosure qualifies. Audio and visual disclosures, particularly in advertising contexts, have related issues that are in addition to those because a listener needs to be able to</td>
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downloaded the first time, but the closing letter noted that the MLB Advanced Media company had, you know, made significant changes in terms of disclosing the fact of the digital rights management and what the consumer was getting prior to purchase, so they were satisfied and there was -- you know, everyone was pleased with that.

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

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

Going back a couple of years before that, there were a few other cases where Hewlett-Packard and Microsoft, for instance, were selling personal digital assistants that actually at that time were competitors to the Palm, but the products came with access -- built in -- the advertisements, you know, proclaimed you could get your email, you could get all of your access to the internet, but there was no clear disclosure that a consumer needed to purchase separately a modem and utilize the modem in conjunction with the advertised device. And the Federal Trade Commission received a consent order from the company saying, no, you know, we will make that more prominent because obviously in order to utilize what the consumers had bought, they needed to have this other device.

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

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

And I think that that is exactly the crux of what we’re talking about now, what is consumer
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18 each to introduce themselves quickly, and then let them
17 perspectives from industry and academia. I invite them
16            Our panelists will share a variety of different
15 effectively communicated.
14 that license terms related to copyright are clearly and
13 talk about -- and then we'll discuss how best to ensure
12 disclose in a bit of a warning box type thing only those
11 of a binary choice or other types of terms and then
10 terms, up to three or five, to which consumers are not
9 such as brand names and logos, are important to communicate
8 the underlying kind of issue of what is the law on the
7 betterment of all the consumer interests.
6 aspects about how consumer disclosures and perceptions
5 can be evaluated based on the experience in other fields.
4 disclose is not those terms that are the ones that are
3 philosophy, which is, well, maybe what we need to
2 consumer -- and not only on what's in standard form
1 perception. It may be that it's significant and more

10 online, to cover first how to determine what copyright-
9 participation from the audience, both in-person and
8 I think that the research, at least in legal academia and
7 The question is, well, what is it that we disclose. And
6 consumers, which obviously, you know, is for the
5 know, with the proliferation of class actions and other
4 groups, you know, asserting false advertising rights, you
3 know, this is clearly an area that, you know, all sectors
2 social networks, is maybe to survey consumers online and
1 shall be disclosed, I'm sure, because the -- all of this

25 correct itself. So it would be when the consumers have
24 then they think -- they think that the market would
23 think that the contract in question is more restrictive,
22           So terms that are actually -- if consumers
21 less rights that they understand.
20 only confused about it but also terms that have less --
19 disclose in a bit of a warning box type thing only those
18 Zev Eigen and I have been working on, is we did it in
17 context. So one way of doing that, and this is work that
16 with the proliferation of class actions and other
15 groups, you know, asserting false advertising rights, you
14 example, related to Aaron's really interesting paper.
13 wrong perceptions about what was in those terms. So, for
12 disclose what
11 to elicit information regarding the terms to which
10 regards to the terms of use of Facebook. So they tried
9 the underlying kind of issue of what is the law on the
8 So that's it, and I know that this is sort of
7 betterment of all the consumer interests.
6 aspects about how consumer disclosures and perceptions
5 can be evaluated based on the experience in other fields.
4 disclose is not those terms that are the ones that are
3 philosophy, which is, well, maybe what we need to
2 consumer -- and not only on what's in standard form
1 perception. It may be that it's significant and more

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DIscussion: Communicating Copyright Terms in Digital Transactions to Consumers

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

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

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

So I'll start with Florencia.

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

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

And, so, the terms that are the highest ranks might be the ones that are more likely to be disclosed,
too optimistic a perception, those are the terms that need to be disclosed.

So there’s different types of going about it, but in -- but in terms of implementing things -- and I’m happy to elaborate more on this later -- it has to be done in terms of an experiment or some field studies, as has been done in several areas.

MS. ALLEN: Thank you.

B.J.?

MR. ARD: So, good afternoon, everyone. I’m B.J. Ard, and I’m a Ph.D. candidate at Yale Law School and a resident fellow at the Yale Information Society Project. And there are three interrelated points that I want to put out there. And the first is that it’s important to think about the different types of enforcement mechanisms we’re dealing with as we look at copyright licenses. It may be that sometimes we’re specifying sort of the limits of the license itself so that the user is exceeding those boundaries, they’re in the terrain of infringing activity, and we bring to bear copyright statutory damages and other remedial mechanisms.

It may be that we’re dealing with sort of standard boilerplate contractual terms, the sorts of things that we see all throughout e-commerce, but that if we’re in -- if we’re looking at breach, then we’re talking about something like, you know, a breach of contract suit or termination of their services, a different set of usually lesser remedies than what we’d be looking at in copyright.

And then we just have things that are going to be enforced mechanically by the service. If there’s a technological protection measure or a DRM of some sort that doesn’t allow for certain sorts of copying or sharing, the users may be disappointed once they come to realize that, but it’s a sort of automatic enforcement. What they’re losing out on is limited to some degree by what it is that they paid for this good or service. And it’s going to become actually rather salient at the time that this comes up.

The second point that I want to make is that as we’re trying to figure out which terms to disclose, a lot hinges on what the baselines of understanding are for the consumers. So we might think, well, okay, to the extent that we’re talking about infringing activities, what are the limits of sort of fair use or how many copies I can make or so forth. Maybe consumers understand the baselines of copyright law, but we could put an asterisk there because oftentimes it seems they don’t.

But then to the extent that things have been portrayed as a sale or some sort of implied license, who knows what it is that consumers think that they’re getting when they get into one of these agreements, which gets to the third point of just underscoring the importance of actually testing things.

As the last panel got into in some detail and as this recurring theme we’ve gotten to today, it’s one thing to think about sort of what do we think that this term means, what can we extrapolate from our own experiences versus what is the average consumer actually thinking when they interact with one of these retailers, one of these platforms, download some of these works. And if they think they’re getting a certain set of rights, that they’re actually not, then that becomes a concern.

And as we’re trying to devise disclosures that inform them of what they are or aren’t getting, again, testing needs to be done to understand, okay, so we’ve finally distilled it down to this set of terms, that maybe these are the ones that they’re overly optimistic about and they didn’t, were buried in the boilerplate of the license, but now that we’ve disclosed them, has that made a difference, do they actually understand what’s changed.

And this is the sort of thing that if we’re going to move outside of the sort of formalism of, okay, it’s in this thing that you had to click or you had to scroll through to the actual question of what did people understand, I think we’ll get closer to the actual realities of what’s going on in the marketplace and what consumers understand they’re getting.

MR. GOMULKIEWICZ: Yeah, Bob Gomulkiewicz from the University of Washington School of Law, and I really, in my scholarship, draw not only on being on academic for 15 years but also before being an academic I was a practicing lawyer for 15 years. So in my writing, I try to pull together insights from both of those worlds. And I’ve been writing about software licenses, I think for a couple of decades now, and probably I’m best known for coining the phrase “the license is the product,” which is what I hear a lot of you saying in this -- in these conversations today.

And I’m really pleased to be part of this conversation so that people understand what the product is that they’re getting. So I think this is a timely topic and it’s one I know that the software industry has been dealing with for a long time. And it’s, I think, very instructional for me to see that all copyright industries are wrestling with that now.

So I just want to make a few opening
observations about this idea of trying to get information
to consumers about what the product is, what the license
is.  And my first plea is actually to lawyers, and that’s
not to give up on drafting simpler licenses.  I think in
some ways the tone today and the tone I hear among
practitioners and also among academics is that lawyers
have to draft licenses that are hard to read in law.
And I don’t think that’s the case.  I think
that we actually can draft licenses that are more user-
friendly.  And one project that I did several years ago
was to take the most venerable open-source license, the
good, new general public license which is a lengthy,
complex, difficult license to read.  And I wrote it into
a simple form, a one-page license.
So it can be done.  We actually as lawyers have
to dedicate ourselves to actually doing it.  And I think
as Florencia pointed out in her presentation, if we frame
licenses the right way, then at least some people will
read them, and those that choose to read them will get
more out of it.
I think the other thing about simple licensing
to point out is actually something that John Bergmayer
mentioned, is that in some ways we don’t take simple
licenses that seriously.  I think Florencia actually
pointed that out in her presentation.  People think that
if it sounds legalistic then it has more sticking -- or
just more gravitas to it.  And the other concern is that
if you write something that’s simple that somehow it
won’t be enforceable or you’ll be held liable if there’s
a corner case, as John pointed out.
So I think we have a ways to go culturally, and
maybe courts have a ways to go in actually enforcing
simple licensing for those lawyers that actually can do
it.  Courts should be able to follow up on that and make
sure that that approach is actually enforceable.
And then the second thing I’ll say about that
is it’s not just about the lawyers.  We need to be
engaging the businesspeople, if we are serious about
making licenses more user-friendly.  My experience with
working with businesspeople in the software industry is a
lot of them do have a passion for presenting terms in a
simple way.
And, so, it’s not just about the lawyers.  In
fact, it’s kind of sad that we’re mainly in a group of
lawyers and lobbyists here.  Right, we should be engaging
with businesspeople, and a lot of them have the tools to
do this well.  People in corporate communication, they
know how to make things interesting and entertaining.
Let’s access those resources.
When I was at Microsoft, I was there for over a
decade, I proposed a EULA that would be performed by
Steve Ballmer.  Now, that would get some interest, or a
EULA performed by Bill Gates.  Now that would be -- that
would be interesting.  But we have -- we actually have
the tools.  Businesspeople have the tools to do
communication more effectively.  They do it all the time.
That’s their job.  And, so, why are we giving end-user
licenses a pass on that?  I don’t think that we
necessarily should.
Some people have mentioned usability testing.
That’s another thing that’s well known in most industries
as a way to improve readability.  And then just the
second thing I’ll say in my -- before we get to the panel
discussion, I think the way that you get people who don’t
read the licenses to understand more about them is you
create a conversation about the licenses to energize
people to talk about the terms.  Not all of us read every
single book, but a lot of us read book reviews.  We rely
on other commentators to unearth the terms that are
important.
So journalists should be commenting on
licensing as much as they’re commenting on software.
Scholars, we’re particularly bad at this.  Scholars are
always writing about new cases, but why aren’t scholars
writing about critiquing licenses and license approaches?

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

MS. ALLEN:  Thank you, Bob.
And, Brian, if you could introduce yourself and
tell us a little bit about your thoughts on how to
determine what terms are important to consumers.

MR. SCARPELLI:  Thank you.  Hi, everyone.
Great to be here.  My name is Brian Scarpelli, and I’m the
-- I’m Senior Policy Counsel at ACT, the App
Association.  We are a trade association based here in
Washington representing about 5,000 small and medium-
sized software development companies and app developers.
If this were just a week later, I could hold it
up, but we have an economic report that we issue every
year about the status of the industry, so I thought I’d
include a few stats from that report that, you know,
basically, you know, we’re -- this is -- it’s going
somewhere, but this is an industry, our app industry,
that’s powering $143 billion ecosystem that’s created
over 100,000 jobs over just the last couple of years.
practices guide. And, so we try to promote that with our
members and continue to work on voluntary approaches such
as that, but, you know, dialogues such as these I think
are valuable, and continued study, and partnering on
education would probably be the path forward that I think
we’d recommend.

Thanks.

MS. ALLEN: Thank you, Brian.

Allan?

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

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

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

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

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

And we know the courts have basically said that
freedom to contract generally, as long as contracts are
not contracts of adhesion, if they don’t shock
conscionability, basically you are allowed to vary terms
in contract agreements that underlie your licensing of
your works, so long as the usual elements of contractual agreement are present, so long as there’s mutual assent, people understand the terms that are involved. And I’m afraid that this exercise is one that’s going to bump up against that question because ultimately what’s at issue here is not the public’s lack of understanding of the licenses; it’s the public’s lack of understanding of copyright.

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

I remember working on the statute that was enacted by Congress to enhance the authority of the Consumer Product Safety Commission with respect to safety notices required for children’s products. And one interesting part of the proposed regulation would have had to have had a notice requirement placed on each and every children’s product. And people began to wonder, as a practical matter, how do you do that? How would you fit that on there in a way that would be practical, that would be readable, that would be comprehensible and still comply with the law?

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

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

They are wholesalers who typically have their books marketed to the public through a series of distributors. And there are various questions as to the relationships that different publishers have with their distributors regarding who actually sets terms and conditions, other than pricing, with respect to how those books are offered, particularly in digital formats for online downloading or access.

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

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

These problems also reflect the fact that what we’re talking about here are competitive market terms. This is exactly the area in which, as some of you may know, some major publishers got into trouble with the U.S. Justice Department’s Antitrust Division several years ago because they were working with distributors, essentially taking the same approach to the way in which distributors would work with them in pricing the goods and services for the marketplace. And the government found that approach to violate antitrust restrictions, basically because they ended up having the same kinds of policies, despite the fact that they didn’t actually negotiate them together.

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

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

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

I just want to mention this quickly. There was
a Supreme Court decision last month some of you may have been familiar with. It’s called Expressions Hair Design vs. Schneider. And what the case was about was a statute enacted in New York that basically distinguished what was called differential pricing practices in the sense of merchants who preferred that their customers purchase their goods with cash rather than with credit cards, because then the merchant would have to provide fees to the credit card service provider. And, so, in doing that, typically what merchants would do is offer a discount to the customer if they pay in cash rather than purchasing with a credit card.

Well, unfortunately, this New York statute prohibited the language that a merchant could use if they said we want to reimpose a surcharge for credit card purchases that is not imposed for cash purchases. The New York statute was construed by the Second Circuit Court of Appeals as basically outlawing one version of describing a particular practice that could be allowed under another description of that practice, but the practice itself was exactly the same. The difference between whether or not you offered a discount for cash purchases and you charge more to the customer for the credit card service provider. And, so, in doing that, typically what merchants would do is offer a discount to the customer if they pay in cash rather than purchasing with a credit card.

Here’s what Chief Justice Roberts said about

that. “The Court of Appeals concluded that Section 518 posed no First Amendment problem because the law regulated conduct, not speech. In reaching this conclusion, the Court of Appeals began with the premise that price controls regulate conduct alone. And, therefore, a law regulating the relationship between two prices regulates speech no more than a law regulating a single price. And, therefore, that particular statute was simply a conduct regulation rather than a speech regulation.”

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

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

address the question of whether there is a harm at all. So if there is a misperception about a term that would cause consumers to overestimate the utility of a product, maybe because they wish they could put it in their will and now they can, and that means a lot to them, but this is something that we can ascertain through research. There’s -- this has been done in other contexts, and there’s roadmaps. A disclosure regulation has been studied -- has been going on since the ’70s but has been studied empirically for a while now, so we know something about that.

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

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

There’s some -- there are some terms in fine print that are salient, and there are some terms that are
consumer messaging in connection with online transactions involving copyrighted works

And while it's tempting sometimes to say the responsibility, some of which may be laid out in the licenses, which may be laid out in these licenses.

understand, okay, what are my rights and often times, and had the capability to create copies, have the ability, even in the process of using the work.

offer and consumers want to receive, or they might not even reflect a willingness to pay.

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

So, three things can be answered by doing more work in this area if we want a roadmap about what to disclose. One is to understand what it is to be -- what we need to disclose, we need to understand those terms that are subject to -- lead to consumer overconsumption.

This defines the harm, and it also tends to reveal that term is not subject to market competition. So that’s basically -- and the answer is just because it’s in a contract doesn’t mean that it causes harm or that it’s subject to competition. We need to find that out.

Thanks. MS. ALLEN: Does anyone else have anything to say briefly?

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

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

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

And while it’s tempting sometimes to say the

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

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

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

MR. GOMULKIEWICZ: Yeah, so, just a couple comments. One, that’s why I am relentless in saying that let’s not just accept the fact that these licenses have to be so long so that you have to spend your entire life reading them. But, secondly, I think more important is to energize people to shine lights on those terms -- journalists, scholars, NGOs -- because you’re right, people really -- it’s unrealistic to expect people to read all the terms.

So we need people to shine the spotlight on the terms so that, yes, then let the market decide. We don’t have to sit in this room and decide what consumers want.

Let’s see what -- first, the consumers have to know about it. I agree with Florencia, but then we’ll see, what do people in the market care about.

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

And, so, I think there it’s interesting to look at some work that Mark Lemley did a few years ago. He wrote an article in the Minnesota Law Review called “Terms of Use.” And one of Mark’s insights was that when people were wringing their hands about software end-user licenses, people thought that the big source of litigation was going to be business-to-consumer
litigation, and that didn’t turn out to be the case.

Most end-user license cases are B2B, or business-to-business, cases.

And the reason for that is -- has already been pointed out here, is that if some -- if a business makes a decision to sue a consumer, especially in this age of internet shaming, then that’s -- you have to make a big, tough decision about whether it’s worth the PR risk to sue a consumer over a term.

And, of course, consumers know this. So that’s not -- that’s not to say that we shouldn’t push for terms to be easier to read and fair, but on the other hand, there aren’t -- there aren’t a lot of cases because businesses do have to think long and hard about whether they’re going to pick on a consumer or lending a copy or giving away a copy in a will. Is somebody really going to sue if somebody lends or gives something away in a will.

And then the final thing I want to say is that I think one important thing I learned from Aaron’s work is that consumers can start to learn about the way things work in the real world. If you would have asked consumers two decades ago, when I started writing about end-user licenses, about whether you can copy, they would have all said, yes, you can copy. And now I think

Aaron’s work shows that people now understand that just because you have something in electronic form doesn’t mean that you can copy it. So that’s been two decades’ worth of work of trying to educate people on the way this works. So I do have some confidence that consumers can learn.

MS. ALLEN: So I’m mindful of the time, and I want to give time for everyone in the audience to ask questions or have a discussion as well. Florencia, I know you have to go. Does anyone specifically have any questions for Florencia quickly?

(No response.)

MS. ALLEN: Okay. Thank you so much for your participation.

MS. MAROTTA-WURGLER: Thank you.

MS. ALLEN: We greatly appreciate it.

Does anyone in the audience have questions?

Jonathan?

MR. BAND: So it seems to me that context makes a big difference, and thinking back to Ben’s comments earlier when he talked about how, you know, buying is a metaphor --

MS. ALLEN: And could you introduce yourself, too, as well?

MR. BAND: Okay. So I’m Jonathan Band, and I was saying that context makes a big difference, and when Ben before was talking about how the word “buy” is a metaphor, I think it to some extent depends on the context in which the word “buy” uses. So you can imagine at least two different situations. Sometimes you have -- you have a product advertised, let’s say, an e-book on Amazon, for example, and then the only choice is buy, right? It’s buy or not buy. And, so, conceivably, “buy” in that context means one thing.

But if you go to iTunes and you are looking at movies, you usually have the option of buying or renting.

And then what’s interesting there is that you scroll down, they explain very clearly exactly what renting means, right? I mean, they say renting means, you know, you have to, you know, access it within 30 days, and once you access it, you have to finish watching it in 24 hours. Very clear exactly what renting means.

But they don’t tell you anywhere what buying means. And, you know, so I think in terms of how we look at this, it is kind of interesting that they thought that there was a need to clarify what rent means but not what buy means. And especially one could certainly imagine, you know, when you’re -- you have a -- one option is renting, and the other option is buying. Renting, I think everyone sort of understands -- everyone understands means short-term.

Buying you assume is permanent, right? That’s the -- isn’t that right, that’s the difference between buying a car and renting a car, right? When you rent the car, you obviously have to return it or, you know, you’re going to be paying more every day, whereas if you’re buying the car, you pay for it and, you know, you get to drive it until, you know, it stops driving and you can sell it.

So the point is that of these -- the context makes a huge difference in terms of these -- how we understand these terms, and it could be that, you know, that’s an added layer of complexity that we need to be aware of.

MS. ALLEN: Thank you very much.

Does anyone else either, in the audience or online as well, if you want to chat in a question.

MR. FISHER: Could I just react to that, to that comment? And some of -- some of the response to that -- some of the reason for that may go to who sets the rules in that situation, whether those rules are set by the -- by the content provider or set by the retailer. If rules are set by the retailer, it’s much easier for them to enumerate those rules on their site, and they’re more consistent.
MR. MITCHELL: That provides a nice -- Mark's comment provides a nice segue, I guess, my comment.

MS. ALLEN: John, could I interrupt you? I'm sorry.

MR. MITCHELL: Oh, I'm John Mitchell. And I was reminded of some of the more prominent disclosures that were very clear, very conspicuous, impossible to escape, and were simply wrong, which I think provides perhaps more harm to the consumer than not saying anything about it at all. The very first EULA to reach the Supreme Court was, of course, in the Bobbs-Merrill case that said you may not sell this book for less than a dollar, and if you do, it's infringement. And the Supreme Court said to hell with that.

And yet people probably, you know, would have been reluctant to do that, and somebody with Mazey's power there bucked that system. Foreign-made copies of textbooks that had stamped on there "not for sale in the United States." You couldn't escape it. And the Supreme Court, a couple of years back, said, hey, of course you can; the Copyright Act says you can.

Forget the EULA; Copyright Act trumps the EULA. Not for rental on DVDs. I didn't see many of them, but I did get samples of retailers saying I -- I'm a rental store, and this DVD says not for rental. You can ignore that. It's -- it purports to be a licensing term. Some relationship where the copyright owner is trying to impose, as a matter of right under copyright, something that the Copyright Act actually denies them.

But coming to Mark's point -- Mark Fisher -- the -- I think the real key is whether that language is coming from the copyright owner or from someone other than the copyright owner. So a video store could tell their customer, no, not for rental, or, yes, as long as you get it back to me in seven days, you can rent it. They have that power if they're the owner of the DVD to authorize their renters to sub-rent or not.

The copyright owner has no such power if they're not the owners of that copy. So from a consumer perspective, the prohibition or the license may look the same, but coming back to -- I think Bob made the point of, you know, who is going to sue me. It may make a really big difference if I as a consumer breach a term that says I cannot rent it and the damages are going to be the cost of a rental versus statutory damages under the Copyright Act, which will bankrupt me.

So just making that little...

MS. ALLEN: Thank you. Ben?
The case of books is particularly interesting with respect to that. The term “book,” by the way, does not appear in the Copyright Act to describe a copyrightable work because a book is simply the vessel, the container, the format. It is the embodied literary work that is, in fact, protected by copyright law and generates the rights.

So when e-books came along, we found ourselves with a different kind of vessel or format or container for that embodied literary work. And we also discovered that e-books would give the reader capacities with respect to the use of that literary work that didn’t exist when that literary work -- the exact same literary work -- was embodied in a hard copy print book. And that’s what these discussions really are all about.

The curious thing, however, is that there’s two different flows of ideas with respect to how these types of disclosures would work. There are some people who are very determined to see that e-books should give them exactly the same abilities that they have with respect to that embodied literary work as the hard copy print does, right? They want to be able to alienate the particular copy of the work. They want to be able to own it, and owning it means they have complete dispositional authority over subsequent treatment of that particular book.

But at the same time, we’re also hearing from people that they want acknowledgment of the additional capacities that an e-book has beyond those of a print book, that it can be moved from one platform to another, that it can be used remotely and even simultaneously by multiple readers. These are all very interesting facts that create different kinds of consumer expectations. The library community, in some respects, would like to see e-books treated like print books in terms of the way they can lend those books to library constituents.

We understand that and we think it makes sense, but from the publisher’s perspective, e-books are a very different kind of creature when you’re talking about lending it to individuals as compared to the situation you’d have when you’re lending a hard copy of the same exact work.

So all of these things go into shaping consumer expectations, and I’m not sure that it’s very easy to come up with any kind of consensus mapping in any particular context, let alone across different types of copyrighted works, different industries, different sectors within industries about what consumer expectations are with respect to what they actually get when they engage in an online transaction that is designed to give them access and use of a particular copyrighted work.

MS. ALLEN: Thank you, Allan. I’m afraid we really do have to go, but thank you all for your participation today.

And next up is Catie Rowland from the U.S. Copyright Office with a presentation on the recent report.
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<td>something like that or an operating system -- something that’s pretty easy for everyone to understand what software is being used for. Then as the years passed, we’ve gone to a whole different range of software uses, where now it’s nearly ubiquitous. So, now, you find it in your smartphone and your appliances and your medical devices, and this has caused a lot of discussion in the copyright arena. This actually has been the subject of the Copyright Office’s review for many years now. As an aside, the Copyright Office does something called the triennial 1201 rulemaking process, which is not the subject of this study, but this is where a lot of our issues popped up. So this is something that you’re all, I’m sure, fully familiar with where you have TPMs that protect certain copyrighted content. In the past, we have noticed at the Copyright Office that these TPMs are going far beyond what was originally contemplated. So originally when we had the DMCA 1201 process, it was much more limited. And in recent years, it’s gone all the way to tractors, which everyone’s probably heard about, to smartphones and jailbreaking, and to things like pacemakers and your car. And, so, in light of this, the Senate took note, and they asked us at the Copyright Office to do a study. And in October of 2015, we got a letter from Senators Grassley and Leahy, asking us to look into this kind of amorphous category of everyday products. And they noticed that there -- that copyright has impacted so many things that perhaps the everyday consumer does not realize. So your tractor, your smartphone, your refrigerator, you might not know that there’s copyrighted software in there doing things that perhaps before might have been purely mechanical. And these are things that can be protected by a copyright’s exclusive rights and limitations and exceptions, and it’s a whole different world of the law that a lot of people who are dealing with the stuff are probably not familiar with. I think as Allan was mentioning earlier, there are -- there’s a lot of copyright stuff that would be good for the consumers to understand so that they know what is going on with what -- the products they’re using, as well as just things like books and motion pictures, which everyone has traditionally understood come along with copyright issues. So the Senate asked us to study this in an effort to better understand and evaluate how our copyright laws enable creative expression, foster innovative business models, and allow legitimate uses in the software enabled environment. They asked us to give recommendations to see if possibly there should be legislative efforts and to see if copyright should be treated different -- or copyright should treat software enabled products differently than it should be treated with generally software. Now, here’s a caveat. We did not study software generally. That was not our mandate. We did not try to figure out kind of broad software copyright issues. We were limited very specifically to this category of everyday products, which if you were involved in our study, you realize is a little bit difficult to define. It’s hard to figure out what is an everyday product. And our study actually determined that there was no specific definition that we could use for this group of software, that there is no legislative definition that we could recommend. Instead, we looked at kind of the commonalities of things that people looked at when they thought of something as an everyday product. So we looked at things like is the software something that comes with the product; are you buying the product really for the software, or is it really more of a mechanical thing that might have been used before that is now kind of integrated with software; and the price point, what are you really paying for. So we had a bunch of different kind of guideposts to look at. And we did that because not only did the Senate ask us to do it but also because we -- once we did the study, we realized that copyright law is actually uniquely situated to help protect both the owners and the consumers in the genre of everyday products because you have all sorts of exceptions and limitations as well, like mergers, scenes a faire, the idea/expression dichotomy, and those are all things that are actually pretty uniquely pretty well used with everyday products. As a side note, and which is probably of interest to you with the licensing issues, is that licensing really kind of almost took over our study, even though we were not trying to go over software generally or licensing generally, we did realize that licensing was a very, very important part of the software enabled products. So we heard all about how it’s a common practice for price differentiation and management and flexible distribution methods, so it was very important for the copyright owners. But then we heard like you all were hearing about the consumer concerns, about the confusion. They didn’t know what they were buying, they...</td>
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24 license or if a license is kind of an ownership and they all deal with whether or not you license -- a interest here. There's one called Vernor and one Krause, And there are two kind of cases that are of car, does it come with the software, how does that work. So the first one we heard about was from main categories that we heard about of concern. And although we didn't hear a lot about the concern about the reselling, but we actually didn’t see a whole lot of examples of licenses for the software that was embedded in everyday products. There was some with B2B and a kind of institutional/industrial licenses, but not really a whole lot there for the consumer products, which was what we were focused on.

And from what we saw, and we kind of looked at Vernor and we kind of looked at Krause, which were those two kind of different ways to look at licensing, and we tried to see how it could apply to this resale of your everyday product. And looking at our guideposts, which I mentioned earlier, you know, why are you buying this product? Is it for the software? Is it that kind of incidental? Does the software come at the same time you're buying the product? What kind of control do you have over the product? Does the -- you know, in the Krause case, they talked about did the owner of the copyright maintain control of that software and did they really -- were they able to kind of come and get it whenever.

So based on that, we looked at the first sale doctrine and determined that we think that it should protect consumers in many cases with this embedded software. So that was one thing that we felt like the
recommendations. Also, the problem being is how you define “everyday products.” So happily for us we were able to find a solution to that. And then again the licensing was implicated throughout everything, and we realized how important the licensing paradigm is to the content owners and how they distribute all of their works. And it was an interesting study because unlike having your normal Copyright Office stakeholders come in, we had kind of a different cast of characters.

We had some people who we see a lot, but we also saw a lot of kind of repair people, people who may be more in our 1201 context versus more of our other kind of study. So it was something in which a lot of the discussion was based on what can you do with something you think you own. So it does tie back to a lot of issues that were discussed in kind of the “buy now” issues where what do you own? You think you buy the car, but do you really buy -- do you own the car, do you own your software in the car, what is happening there? And at the Copyright Office, we felt comfortable that at this point in time there was no need for any sort of legislative fix to this and that -- the way we construe it, which we believe is properly, that you would have some pretty good exemptions and limitations that would help you out with using the products that you buy on an everyday basis.

Now, this is limited to this category of everyday products. And we didn’t really extrapolate to software generally, but it is something that is happening more and more. And as you all know, there is now software basically everywhere, and it’s kind of a dynamic situation where we have decided that, you know, because there was not a lot of evidence of current licenses in these kinds of products that it was something that we didn’t really need to go any further on.

I believe the Internet Policy Task Force also found similar -- had similar findings, and so we were comfortable with that. And until there’s a change in the market, we don’t feel like we need to do any more study on this area. But that was our study in a nutshell. And thank you.

help in this area and to kind of improve the situation.

You know, we never -- we’ve never been, you know, looking to impose or propose government regulation to solve a problem here. We’ve really been trying to, you know, ask stakeholders, is there work that you can do that perhaps we can facilitate or convene, but is there work that you can do to help address some of the concerns here.

And, I mean, let me go back in history. I know that at least a few of you were with Shira and me as we traveled from Nashville to Los Angeles, I think up to the Bay Area a couple of years ago in some of the workshops that we had that led to the white paper recommendation and discussion of first sale. And as we said, you know, in those meetings, there was actually more consensus in those meetings as we traveled around the country than there is today, even though it’s those meetings that really led to this meeting.

But, you know, we heard a fair bit of consensus, which we summarized as saying, you know, it does not appear that consumers have a clear understanding whether they own or license the products and services they purchase online, due in part to the length and opacity of most EULAs, the labeling of the buy button, and the lack of clear and conspicuous information regarding ownership status on websites.
So to kind of answer, I suppose, I think maybe Brian in the last panel had really raised, well, you know, what’s broken, what’s the problem we’re trying to solve. Well, that is actually the problem that we heard, and there was a fair bit of consensus. And, so, that’s the problem that we’re kind of asking, is there something we should do.

Now, I do appreciate -- we certainly appreciate -- that, you know, this was, gosh, two whole years ago, and a lot’s changed in two years. We do work on internet time, and the marketplace really, in fact, has evolved. Streaming services are much more dominant than they were even two years ago. And, so, you know, we fully appreciate that it may be that something that was more of a concern two years ago maybe is less of a concern today.

So, I mean, it’s not that we heard something and are doggedly going to say we have to solve the problem of two years.

But, I mean, one thing I’d like to kind of tease out, and let me kind of throw out a perhaps almost provocative question, perhaps mainly to the content folks, to Allan, Ben, others, but really to the room, because it’s striking to me that two years ago, when we were discussing the first sale doctrine and discussing consumer understanding of what rights they had when they downloaded an MP3, there were two very prominent different reasons to be concerned about consumer understanding.

And we’ve talked a great deal about the first one, and we’ve talked very little about the second one. And I just want to kind of put the second one on the table and get your reaction. The first reason that we heard that consumer understanding was important was what we’ve talked a lot about today: consumer expectations, is there, you know, something unfair, is -- you know, are consumers, you know, fully understanding what they’re acquiring, do we need to make sure that they understand what they’re getting before they -- before they purchase.

And I think, you know, I continue to think that that’s still a very important issue, and we can talk a little bit more. But the other issue that we hear in our road trips in 2015 was that consumer understanding was important to help continue to address the broad question of piracy, that consumers perhaps would download an MP3 and would not necessarily understand, well, what can I do with this MP3, what are my rights with this MP3, can I give it away.

And, so, I mean, I think that there is and certainly has been years -- I think there is still a kind of a strong consensus that improving consumer education, consumer understanding of copyright issues is a positive thing in terms of addressing priority, certainly USPTO and NTIA support efforts to have more digital literacy taught in high schools, taught, you know, in the educational system to try to help consumers understand, well, what are the limits of what they can do.

But today, we heard, you know, very little about -- a little bit -- but very little about and even some resistance to the idea that at the point of sale might be an opportunity to increase consumer understanding of copyright terms from a piracy perspective. So kind of my one question I’d like to just toss out, if anyone’s willing to just offer a reaction is, you know, is that kind of still a concern, or has the market so moved to streaming that we really don’t need to worry about kind of piracy of downloaded goods and things like that.

So, I mean, does anyone -- anyone willing to take my -- go for it, and introduce yourself, please.

MR. MITCHELL: Okay, John Mitchell again. I don’t want to get more than my fair share, but I sort of cut my teeth on copyright dealing with piracy, but we worked at it both in music and then eventually in VHS tapes. And then when it came to DVD, one of the remarkable things that happened is that when DVDs were priced so low at wholesale that you end up with Redbox renting them for a dollar, it put the pirates out of business, that is, who’s going to pay five bucks, which was I think the going street price for a VHS -- pirated copy of a VHS, when you could watch the movie from Redbox. And that was thanks to the first sale doctrine. I think as we get into the digital delivery of goods and we end up with an inaccessible copy, not because of any legal restraint but because it’s on my hard drive and not yours, and I want you to see it, and the only way I can technologically do it now is to make a copy because I don’t want to give you my laptop, I think that really does create some barriers.

And I think if consumers believe they have less rights on alienation than they actually do, there will be even greater reluctance to engage in commerce where their inability to send things downstream is affected. But flipping that and looking at the copyright -- the constitutional purpose of copyright to increase broad dissemination, the danger is when we go to pure access, that’s always priced as a brand new hard copy book in a sense, to borrow that non-copyright-term book. And I should parenthetically indicate software is in the same thing. You can license software, you can buy software, just like you can license its -- they’re both literary.
works.

The people who depend on secondary markets for used clothing, used shoes, used cars, are seeing a dwindling of that secondary market for works that are more and more accessible only to people who are willing to pay that top dollar. And I think we as a society need to be mindful of that and encouraging ways for people to be able to gain access.

The reason that e-books are different is not a legal one. It’s a problem of physics and electronics. It’s perfectly legal for me to lend, sell, or give away my e-book, as long as I get rid of the physical device that it’s on. I’m the owner of a lawfully made copy if I downloaded that copy. As I impolitely mentioned to MaryBeth Peters eons ago, if you get hit in the head with a hard drive, it hurts a lot more than a CD. And I think the same is true for e-books, the hard drive will hurt more than a hard copy book. But we need to not squelch that opportunity.

And I’ll confess that with my group OmniCube, we’re trying to work on breaking that physics and electronics barrier so that you can, in fact, do the equivalent of taking a slice of your hard drive that has -- that is that copy and moving it to someone else in a way that’s faithful to the Copyright Act, but we do risk shutting off a huge -- millions of people who can’t buy new and giving them basically little choice but the piracy, as the only market in which they can affordably acquire the goods.

MR. MORRIS: Great. Thank, John.

Does anyone else want to weigh in?

MR. ADLER: I’m sure you didn’t mean this, John, but the thing that’s somewhat disturbing about the way in which you proposed the second interest is that it involves a kind of a rationalization of piracy. The unhappy consumer is somewhat justified in violating the rights of individuals and violating law because they believe that the marketplace is not fair to them, that the marketplace isn’t meeting their expectations.

And I know you don’t -- you can’t carry that argument too far, but on the other hand, I am concerned about -- that what it presents overall in the larger context of the way in which copyright rights are exercised by those who have them ultimately, you know, we have not been able to figure out how to improve the ability to enforce rights in a meaningful way in an environment that increasingly made it more difficult to enforce them using the means that Congress had already provided. And I think that part of that is this notion that somehow or another there are at least segments of the population that feel that it is an appropriate position to take that their actions are justified because they’re unhappy with what the marketplace offers.

MR. MORRIS: So --

MR. ADLER: So we’d just like to make sure that, you know, we’re ultimately considering that aspect of this as well and we don’t end up being in a position where consumer expectations and consumers’ perspectives on the way in which people vend their goods and services in the marketplace somehow justify them in engaging in extra-legal activity with respect to them.

MR. MORRIS: So certainly let me make super crystal clear that I personally individually and I think the IPTF Department of Commerce doesn’t at all think that kind of the situation I identified of lack of consumer understanding is a justification, but, I mean, honestly, we have worked -- NTIA and PTO -- over the years to, you know, to further efforts to try to reduce piracy because, in fact, we both -- both of our agencies and the Department of Commerce -- very strongly believe that piracy should not happen.

And, I mean, I think, you know, Aaron’s research that started out this morning, you know, there are certainly critiques of it, and I don’t mean to -- and I suspect Aaron wouldn’t say that it’s the last word on anything, but I think one thing that Aaron’s critiques suggest and Lorrie Cranor’s critiques in other areas, not copyright areas, you know, Florencia’s research, I think also, do suggest that -- that consumers can learn, consumers can gather information.

Now, as to whether it actually makes a difference in behavior, as to whether it makes a difference in long-term piracy, you know, I think a lot of people have said, you know, there needs to be more work. But, I mean, I just want to kind of push to say not that we or certainly I, you know, do not believe that it’s -- it is any way a legitimate excuse for piracy. It’s really just, I think -- the question I was really more raising is is it a missed opportunity for improving consumer understanding. And that’s really all I was, you know, trying to raise, because, honestly, you know, I do think some in the content community in the 2015 roundtables kind of expressed that view. And that’s one of the reasons we kind of came into this conversation.

But, you know, so I certainly didn’t want to suggest what you suggested.

MR. ADLER: I appreciate that. For anyone who’s interested in seeing sort of a real-world example of this kind of debate and the yen and yang, you should
read articles about Sci-Hub, a situation where people undoubtedly, unquestionably in the eyes of federal court, violated the law and violated the rights of copyright owners in scientific journal articles but nevertheless have met with the rationalization on some campuses and some libraries and elsewhere in the scientific community about the importance of universal access to those materials, sort of being capable of justifying the situation.

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

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

And I certainly couldn’t explain them to consumers. And I heard the, you know, content people say, well, gosh, it’s those platform people that control the page, which both -- all of that’s true. And, so, I don’t challenge the truth of anyone’s statements, but there is a little bit of, you know, again, is there a missed opportunity to improve consumer understanding that if the platforms and the content community were interested, totally on their own, or with government, you know, support to talk about that issue, to see is there something.

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

But the other side is that -- is that, I mean, I do think that there is some evidence, and I’ll raise a question about whether more research needs to happen in a minute, but, I mean, there is some evidence that consumers don’t have as robust an understanding as they could, and is there an opportunity for platforms and content owners to talk more. And I appreciate that’s a totally private license negotiation, and the government’s not trying to stick our nose into it, but if there’s anything that we can do to facilitate a conversation about how to improve consumer understanding, we’d be interested in helping.

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

Go ahead Aaron. And introduce yourself.

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

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

And within the United States, there’s one agreement, right? There’s one license.

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

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

MR. MORRIS: Anyone else want to jump in?

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

But -- so the other -- one other thing that we’ve heard a number of times from folks today, you know, both some of the academics, I think, you know, Greg Barnes suggested that Aaron’s study was too limited. So the question, you know, do we need to do more research.
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<td>And the “we” is not we, the government, necessarily one way or another but we as a community, you know, and what kind of more research, you know, would be worth doing, and, you know, would any of your companies or any of your associations, if you represent associations or companies, you know, be interested in participating. So, I mean, just to kind of -- let me toss out that question as much a question to ask for an answer now but also a question for, you know, folks to think about after today, to see if there’s anything that they’d like to do. But, I mean, certainly, if there are any academics or anyone else who wants to jump in on research that would be worthwhile doing.</td>
<td>studies on other forms of distribution, streaming and all, there might still be, you know, even in that area some kind of lack of understanding of what your consumer options are. So, I mean, I do certainly think that -- I mean, certainly, we appreciate that there’s an awful lot we don’t know, but -- John, were you trying to jump in earlier? And then Jonathan.</td>
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<td>MR. MORRIS: Certainly responding individually, for you know, there is a lot of research that I wish I had a budget to commission from the association but I don’t. But I would like to observe that I feel like the conversation today identified lots of critical unanswered questions, just sort of standard, I think, research questions that any -- in any area we would do research, like are the results of Aaron’s study reproducible, do they vary in different contexts. We had some interesting conversation during the break about contexts where we probably know results are different. You know, I pointed out, for example, that most of us know we can’t resell a plane ticket, but it’s not because we read the terms of use on Travelocity or -- and where does that understanding come from? I feel like there are a lot of areas like this where we probably want to start figuring out why consumers have better understandings in some contexts than others. And I don’t know where to start there, but I feel like those are the kinds of questions that we want to start answering, perhaps before necessarily prescribing anything here, because there are a lot of unknown unknowns that probably need consideration before we chart a policy course, or at least that would be my suggestion.</td>
<td>MR. BAND: Yes, I’m still Jonathan Band. The -- just to echo what others have said about the importance of research, I think it’s even all the more critical to really understand this issue of, you know, consumer expectations and notice and because part of -- it really resonates, especially given what Catherine was saying in the software enabled consumer products area. I mean, so right now, you know, when you buy your refrigerator and you buy your car, you don’t receive a license typically for the software. Right now, you’re buying the whole product. But, you know, I’m sure within ten years that’s not going to be the case. And, so, we need to really get ahead of the curve, you know, because -- you know, because, you know, it’s sort of -- in a sense, you could say, well, it’s bad enough now, but we’re only talking about, you know, the $10 e-book purchase on Amazon or the $2 rental on iTunes, right? I mean, we’re talking about</td>
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<td>MR. SCHRUERS: Hi, Matt Schruers with CCIA. I -- you know, there is a lot of research that I wish I had a budget to commission from the association but I don’t. But I would like to observe that I feel like the conversation today identified lots of critical unanswered questions, just sort of standard, I think, research questions that any -- in any area we would do research, like are the results of Aaron’s study reproducible, do they vary in different contexts.</td>
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showed you all today play out the same in every context. I'm going to violate the rule that I just sort of put on the table and say, you know, like, in the video game industry, for example, what I suspect is that consumers, in part because of price point and in part because of the role that resale plays in that market, are much more sophisticated in their understanding of what rights they acquire when they buy digital goods.

I would imagine tentatively that that's true in the app space as well, but I don't know, I could be wrong, you know, what do I know? I need to go out and figure out the answers to those questions, and I would encourage those with better access to data than I have, right -- I'm operating on a shoestring law professor here trying to do empirical research that is not free, might not even be cheap -- other people have access to this data.

There are companies that I think are much better positioned to do this sort of work. You know, it would be really great if they would publish what they know on this question as well. And that's probably asking for too much, but I think it would really help move the conversation forward.

I don't think that I have, you know, done sort of the definitive study here. I hope what I've done is the first, and that's really all I can hope for.

study was published that we just heard about, John Deere put out a license for their tractors, right, and that license is very clear about who owns the software that makes that machine operate. So I think we're already moving in a direction where we're getting kind of explicit claims about ownership that are inconsistent with reasonable consumer expectations.

In terms of other work that I think needs to be done here, longitudinal data, I think, would be really valuable. I suspect that the survey that I showed you all today would have looked really different five years ago, and depending on what happens next in this process or other processes, it's going to look real different five years from now.

I think it would play out -- you know, I'm always careful to try to focus my comments here on kind of verifiable, empirical claims because fundamentally that's where this conversation needs to be. It's not about our presumptions, our assumptions, what we think consumers know, or what we suppose consumers believe. If you want to make a claim about that, you need to go ask them. So it's sort of a put up or shut up time when it comes to data in this conversation.

I think it's really important, though, to point out that I don't anticipate that the answers that I
would be happy to use buy buttons on these social platforms that they’re always on anyway, they become impatient with the checkout process.

So I would suggest to people like Professor Perzanowski that as that checkout process is addressed, I think this issue of the use of buy buttons in the social media platform context where it’s not limited only to the focus on copyrighted works but the behavior of consumers and the platforms and vendors of goods in a much broader context is going to be a very rich area to mine.

MR. MORRIS: Thanks, Allan.

So I’m going to reserve the last word for me, but anyone want to get a last word in before I give a last word? Quickly.

MR. MITCHELL: Yes, I’ll do this quickly. I was thinking that we’ve identified, the distinction between disclosing EULA terms but as a license agreement and full disclosure of functionality. A couple of decades ago, I warned of automated agreements and restraint of trade. This was coming from an antitrust standpoint, that once your bots are talking to each other, you could be held liable if they’re agreeing to an antitrust violation.

As we automate more and more and our devices know what we want and anticipate our needs and do certain things, consumers may be more and more out of the equation of clicking on a “I agree” button. They don’t need disclosure of the licensing terms; they need disclosure of the functionality -- is this going to work the way I intend it to? -- because the technology itself may be enforcing this whether they agree or not. Just that last comment.

CLOSING REMARKS, WRAP-UP

MR. MORRIS: Well, I mean, one last comment I’ll make really is a riff off of that, and in part, that’s to reassure folks in this room that the IPTF is not picking on you, that, in fact, we are looking at consumer understanding in a number of contexts, including the cyber security context. We have an ongoing multi-stakeholder process specifically trying to figure out ways to try to improve consumer understanding of the cyber security implications of internet of things devices.

So, I mean, I think the point you just made that, I mean, we really -- all of us, I think, will be better off in the ecosystem if we try to keep and try to -- trying to keep consumer understanding in mind.

Shira, before I say thank you’s, anything you want to add?

MS. PERLMUTTER: I guess I would only say I want to absolutely make sure we’re crystal clear on a few points that I think we’ve mentioned a few times. And one is that we’re really through this conversation not trying to absolutely make sure we’re crystal clear on a few points that I think we’ve mentioned a few times. And one is that we’re really through this conversation not trying to address the freedom to set terms of licenses but just looking at how those terms are communicated, and, again, with the point being that there could be benefits from greater clarity, first of all for consumers, in understanding what they can and can’t do, but also potentially to copyright owners because, as John was suggesting, there could be fewer acts of infringement if people understand what is not permitted in a clearer way.

And overall, what we’re looking at is there a nonregulatory way to improve this situation, but I think the thing that’s been most clear to me from the whole conversation is how difficult it is even to approach that question, first of all without adequate data, but also at a time when this is such a moving target with such fast-changing circumstances. So I think both John and I were struck by how different the context is today than when we first started hearing about this issue just two years -- two or three years ago.

MR. MORRIS: Great. Thank you. Bear with me for 30 more seconds, because I’d like to just first say thank you to the very critical staff of the Global Intellectual Property Academy, the folks who actually run this specific facility. So, Nadine Herbert, Jamie Day, and Capris Barnes have been instrumental in a lot of the behind-the-scenes work.

And then let me thank Shira’s team at PTO, Shira and David Carson and Susan Allen and Linda Quigley, and my folks within NTIA, Luis Zambrano, Charlie Franz,
Steven Yushko and others. And, in particular, to Susan
and Linda and Luis who really were instrumental in
crafting this panel and in contacting all the speakers.
So thank you very much to all of you for participating,
and, you know, we look forward to the conversation that
follows. And if you have more ideas about how we might
contribute, we’d be happy to hear about it, but thanks
very much.

(Applause.)

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