The End of Ownership

Personal Property in the Digital Economy

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5 The "Buy Now" Lie

If you've read this far, you understand the potential disparity between the legal rights of purchasers of analog and digital goods. The owner of a hardcover book, for example, can lend, resell, or give away their purchase consistent with age-old principles of personal property. But according to digital retailers and publishers, an ebook owner can't do the same. Nonetheless, the market for digital goods continues to grow. What explains the apparent eagerness of consumers to sacrifice these economically and socially valuable rights?

Ordinarily, the free market sends strong signals about what consumers want. Those signals tell companies which products to make, how many to produce, and what they should cost. So we would expect the market demand for digital goods to accurately reflect changing preferences. If we are buying more digital goods, that suggests the convenience and other advantages of those products outweigh whatever value people assign to ownership.

But the signals the market sends are not always reliable. One foundational assumption of market economics is that consumers make choices based on accurate information. But if consumers are denied valuable information—about competing products or current prices, for example—their behavior in the marketplace is a less useful indicator of their preferences. Information is never perfect, but we have laws that are intended to guard against the most egregious sources of misinformation. Trademark law, for example, prevents the use of confusingly similar names, logos, and other indicators of the source of a product.[1] More directly, the law prohibits false and deceptive advertising.[2] A company can't claim that its bottled water cures cancer if it doesn't, or that its service is free if it isn't.

Some people—and we are occasionally among them—prefer digital goods despite a full understanding of the limited bundle of rights associated with them. But not everyone is so well informed. Only a tiny fraction

actually read the fine print that spells out the details of digital transactions. And even if they did, most would struggle to make sense of those terms. Equally troublingly, those terms appear to conflict with a common-sense understanding of other, more prominent messages used to market digital goods. Words like "buy" and "own" are casually and commonly employed by digital retailers. And to the unwary, those words could communicate a set of rights that corresponds to personal property in the analog world. If so, digital retailers are engaged in a pervasive false advertising campaign that could have wide-reaching consequences for our shared understanding of ownership.

Mixed Signals

The digital marketplace is rife with marketing language that makes promises about ownership that are inconsistent with the text of the licenses that retailers insist govern these transactions. A shopper browsing digital movies on the Apple iTunes Store, for example, is likely to run across an ad inviting them to "Own It in HD." Unsurprisingly, Apple's marketing materials do not define precisely what it means to own a movie purchased from its digital storefront; it leaves customers to fill in those blanks for themselves. People with a lifetime of experience owning tangible objects could be forgiven if they assumed that the same basic rules of personal property applied to iTunes purchases. But Apple's license, despite describing those transactions as "purchases" and noting that "all sales ... are final," insists that customers cannot "rent, lease, loan, sell, [or] distribute" the movies and music they acquire from iTunes.[3]

Or consider Amazon, which offers hundreds of millions of items for sale on its site, from books and CDs to treadmills and toupees. Amazon invites its customers to purchase each of these millions of items with the ubiquitous phrase "Buy Now," or if you've enabled single-click shopping, the somewhat awkward "Buy Now with 1-Click®." That's true whether the product is a physical object or digital file. A reader shopping for an ebook encounters the same invitation to "Buy Now" they would see if contemplating a hardcover. And they would complete that transaction by clicking the very same button.

Despite these similarities, Amazon offers fundamentally different products to buyers of digital and analog goods. Those who buy hardcover books own their purchases; those who "buy" ebooks have a different relationship with their books, one that is probably unfair to characterize as ownership. Amazon says that relationship is defined by its terms of service. And buried

within the thousands of words of that EULA is one consistent message: you don't own your ebooks; you merely license them. You have permission to use them in the ways Amazon permits, and that's all. As Amazon's terms explain, "[u]nless specifically indicated otherwise, you may not sell, rent, lease, [or] distribute ... any rights to the Kindle Content."[4] Amazon's MP3 store offers similar terms, albeit in a separate prolix document. Although Amazon customers "purchase" music, payment merely "grant[s] you a non-exclusive, non-transferable right to use. ... Music Content ... only for your personal, non-commercial purposes." And "you may not redistribute, ... sell, ... rent, share, lend, ... or otherwise transfer or use Purchased Music."[5]

Sometimes ownership is presented as an explicit selling point of digital content despite obvious limitations on the rights of buyers. When publisher Image Comics announced a digital storefront for comic books, it touted the fact that unlike competing digital comics services, customers actually owned their purchases. *Wired* published an article with the headline "For the First Time, You Can Actually Own the Digital Comics You Buy," reporting on the difference between the Image Comics site, which allows customers to download DRM-free comics to their hard drives, and competing services, which prohibited downloads.[6] As Image's Director of Business Development explained at the time, "There's something to be said for the ownership factor. If readers purchase a book on ComiXology, ... that could be revoked. And God forbid, if ComiXology goes under or their data center has an earthquake all their hard drives go away—then you've got nothing."[7]

Image, the third largest comic books publisher in the United States, should be applauded for allowing customers to store copies locally, but for all of the celebration of consumer ownership, its license terms aren't much different from those of other digital retailers. That license provides in part: "You shall not share, lend, lease, rent, sell, license, sublicense, transfer, network, reproduce, display, distribute, or otherwise make any Digital Comic available to any other person, to the extent that doing so requires making a copy of the Digital Comic (e.g., a copy on a hard drive, RAM, flash memory, a paper copy, etc.). A Digital Comic may be shared only by sharing the device containing the Digital Comic."[8]

So in Image's view, its customers "own" their digital comics, but are forbidden from doing most of the things we associate with ownership. They can't lend, give away, or resell a specific comic they "own" without also transferring their entire comic library and an expensive piece of hardware. That is an understanding of ownership many people wouldn't recognize.

The misuse of the language of ownership isn't limited to efforts to persuade the average consumer. HeinOnline hosts a massive database of legal publications, including law journals, judicial opinions, statutes, and treaties from around the world. Historically, it has offered these materials to libraries, law firms, and individuals on a subscription basis. Subscribers who sign into their HeinOnline accounts can access the wealth of information stored on its servers. In response to pressure from some subscribers, notably libraries, that value the comparative reliability, security, and privacy of local copies, HeinOnline launched its "Digital Ownership Program." Rather than signing up for a remote access subscription, by "purchasing digital ownership," users can "obtain ownership rights to PDF files" delivered on a hard drive.[9] HeinOnline does not provide a link to the terms of the Digital Ownership Program on its site. But after we asked for clarification, HeinOnline provided us with a copy. The relevant language is below:

> **V. PURCHASE TERMS**
> Customer may not: (i) sell, distribute, publicly display or in any other way exploit (commercially or otherwise) the Collection(s) or portions thereof, by any means, including, without limitation, sale, exchange, barter, transfer, assignment, or distribution, (ii) transfer, assign or sublicense any of the Customer's rights or obligations under this Agreement. ... Under the terms of this Agreement, Customer is authorized to make further copies of its original copy in perpetuity, as it may deem necessary, for purpose of preservation, refreshing, or migration, including migration to other formats so long as the purpose of such copying is solely for continued access to and/or archival retention of the Collection(s) in the manner permitted hereunder.

These terms make clear that HeinOnline's definition of "ownership" is an exceedingly narrow one. A library that purchases one of these hard drives couldn't lend it to another institution, for instance. In that sense, HeinOnline's understanding of ownership is even more cramped than the one offered by Image Comics.

Random House tried a similar ploy when its Vice President of Library and Academic Sales told *Library Journal*, "Random House's often repeated, and always consistent position is this: when libraries buy their RH, Inc. ebooks from authorized library wholesalers, it is our position that they own them."[10] We will address a range of issues facing libraries in the next chapter, but it is worth pausing for a moment to consider what it means for a library to own a digital copy. Most publishers refuse to deal directly with libraries when it comes to ebooks. Instead, they contract with vendors like OverDrive, who provide technology platforms that allow library patrons to access digital books. Given that baseline, it is easy to understand why

the library community was puzzled by Random House's claim. When Peter Brantley of the University of California Davis Library sought clarification, Random House explained that by "ownership," it meant that libraries could migrate their ebook catalogs from one vendor to another. As Brantley put it, "That's very nice. It's just not ownership. It's licensing, with benefits."[11]

Contrast these claims of ownership with those made by technical publisher O'Reilly Media. When customers buy ebooks from O'Reilly they can "freely loan, re-sell or donate them, read them without being tracked, or move them to a new device without re-purchasing all of them,"[12] as long as they don't keep any copies of their books after lending or reselling them.[13] That's a notion of ownership that looks familiar to most of us.

Publishers and retailers understand the visceral appeal of the language of ownership. And they have succeeded in using that appeal to peddle digital products. But it remains to be seen whether we are actually getting what we bargained for.

The False and Deceptive Advertising Frameworks

Two distinct but overlapping bodies of federal law regulate the accuracy of claims used to market consumer products.[14] The Lanham Act—primarily the source of federal trademark protection—also prohibits the use of "any ... false or misleading representation of fact ... in commercial advertising or promotion [that] misrepresents the nature, characteristics, qualities, or geographic origin" of goods or services.[15] In addition, the Federal Trade Commission (FTC) is empowered by Congress to prevent the use of "unfair or deceptive acts or practices in or affecting commerce."[16] Both of these sources of law could be used to address potential mismatches between license terms and advertising claims. As an FTC official explained in 2009, "A company's marketing materials must be consistent with the nature of the product being offered. It's not enough to disclose the information only in a fine print of a lengthy online user agreement. ... If your advertising giveth and your EULA taketh away don't be surprised if the FTC comes calling."[17]

The standards for false and deceptive advertising under the Lanham and FTC Acts track each other fairly closely. We will discuss them in greater detail shortly. But first, we should highlight one important difference between these two legal regimes that relates to what lawyers call standing—the right to pursue your claim in court.

The Lanham Act creates a civil cause of action. That means a party who believes it was injured by false advertising can bring a suit in federal court against the advertiser. On its face, the statute creates broad standing. It

allows "any person who believes that he or she is or is likely to be damaged by such act" to sue for damages.[18] Despite this inclusive language, courts have limited standing to competitors or others with a commercial interest implicated by the allegedly false statements.[19] Consumers, even though they are most directly harmed by false claims about the products they buy, are barred from challenging them under the Lanham Act.[20]

Courts—understandably concerned about opening the floodgates of litigation to every person upset that their toothpaste was not in fact "new and improved"—argue that competitors are in a better position to vindicate consumer interests than consumers themselves.[21] Competitors, these courts say, have greater resources and financial incentives to target false advertising. So we should expect them to vigorously pursue such claims.

Sometimes that is true, but not always. Companies make the expensive decision to litigate only if they think it will give them a competitive advantage. Suppose your competitor launches a highly successful, but arguably false, advertising campaign. You worry that you are losing sales because this competitor is overstating the benefits of their product. You could spend millions of dollars in legal fees in the hope that in a year or two a court will put a stop to the campaign and perhaps award you monetary damages. Or you could just adopt the same misleading tactic as your competitor. The incentive to adopt dubious advertising language grows as it becomes more widespread.

Of course, there are reasons to suspect individuals would be reluctant to challenge false advertising too. Aside from the most expensive purchases, the harm to a single person from a false ad is just too small to justify the time and expense of a court case. Class action lawsuits could solve that problem by bundling together the claims of similarly situated consumers in a single case. But without consumer standing, that option remains off the table as a matter of federal law. Consumers could sue under false and deceptive advertising statutes in various states. But those claims face their own set of hurdles. Because those laws vary in subtle but sometimes significant ways, class actions may be limited to consumers within a particular state. In addition, some retailers like Amazon include arbitration provisions in their terms that may well preclude litigation altogether.[22]

That's where the FTC's deception authority steps in. Section 5 of the FTC Act does not create a private right of action for consumers or competitors; it leaves enforcement entirely to the FTC.[23] Unlike competitors, the FTC is tasked with defending the public interest.[24] So we might expect it to serve as a more reliable proxy for consumer interests. But given its broad mandate and limited resources, the FTC has to carefully prioritize its enforcement

efforts. So while it can't—and shouldn't—take on every questionable ad, the FTC can use its discretion to target deception that causes significant harm to buyers.

Whether it's a false advertising claim brought by a competitor or a deceptive practice case brought by the FTC, the central questions remain the same. In order to establish that an ad is false or deceptive, you must prove that it is misleading—that it is likely to convey a message that is not true. You must also prove that the message conveyed is material—that consumers would have behaved differently had they not been misled. So for example, a product advertised to U.S. customers as "Made in Turkmenistan" would be misleading if the product was actually produced in Tajikistan. But unless shoppers prefer products from Turkmenistan, that claim would be immaterial.

Misleading claims are not limited to express statements like "Made in Turkmenistan." They can be implied as well. An ad that claims a supplement will "boost your immune system" may not expressly promise to prevent the common cold, but it implies as much. Even omissions can be misleading. A television commercial for mail-order furniture, for example, would be misleading if it failed to disclose that the sofa depicted was child-sized. While express claims are clear on their face and require no additional proof of falsity, the meaning of implied claims and omissions are more ambiguous. In those cases, courts and the FTC consider other sorts of evidence including consumer testimony and surveys to decide whether an ad is likely to mislead.

How many consumers have to come away with an incorrect impression before an ad is considered false or deceptive? There is no precise answer to that question. Some courts talk about a "statistically significant"[25] or "not insubstantial"[26] portion of the intended audience. Others ask whether a "significant minority of consumers"[27] was misled. It's difficult to pin down an exact percentage, but prior cases suggest that a small number like 3 percent or 7.5 percent is below the legal threshold.[28] But courts have held that slightly higher rates like 10 , 15 , or 20 percent are enough to establish a likelihood of deception.[29]

The willingness of courts to accept survey evidence that demonstrates an ad deceives only a relatively small minority acknowledges that advertisements are often susceptible to more than one reasonable interpretation.[30] But where one of those interpretations is misleading, the advertiser is liable. It also reflects the fact that false advertising law is not intended to protect only the savvy or the skeptical. Its protections extend broadly to the public,

"that vast multitude which includes the ignorant, the unthinking and the credulous."[31]

Once we know people are being misled, the question turns to whether or not those inaccuracies are material to their choices. Would they have behaved differently had they known the truth?[32] Perhaps they would have refused to buy the product, would have paid less for it, or would have preferred an alternative. Materiality can be presumed for express claims, implied claims intended by the seller, or claims that relate to the health and safety, central characteristics, purpose, performance, or cost of a product.[33] Of course people don't want products that are unsafe, don't perform as expected, or don't work for their intended purpose. For misleading claims that fall outside of these categories, courts and the FTC consider consumer testimony and surveys, among other evidence.

What "Buy Now" Means to Digital Consumers

Do the marketing efforts of digital retailers meet the definitions of false or deceptive advertising? To answer that question, Aaron Perzanowski and Chris Jay Hoofnagle conducted a first-of-its-kind study to gauge how consumers understand the phrase "Buy Now" as used by major digital retailers.[34]

This study surveyed nearly 1,300 likely buyers of digital books, music, and movies. The sample was representative of the U.S. population in terms of sex, age, and income.[35] Respondents were asked a series of questions about their media purchasing habits and, depending on their responses, were sorted into one of three groups: ebook shoppers, digital music shoppers, and digital movie shoppers. In order to better replicate real-world conditions, they were next presented with a number of popular media titles and asked to select the one that most appealed to them.

At this point respondents viewed mock webpages featuring the book, album, or movie they chose. An example is included in figure 5.1. MediaShop—the fictional online retail site respondents viewed—was created for the purposes of the study. Its design elements—the layout, buttons, product photos, and descriptions—would be familiar to any online shopper. Aside from its name, color scheme, and perhaps reduced visual clutter, MediaShop is indistinguishable from Amazon, iTunes, Target, or Walmart. Each respondent was presented one of four variations of the product page. One group saw the digital good they chose accompanied by a "Buy Now" button; a second group saw the digital good with a button that read "License Now"; a third group saw the digital good with a "short notice," to be described in

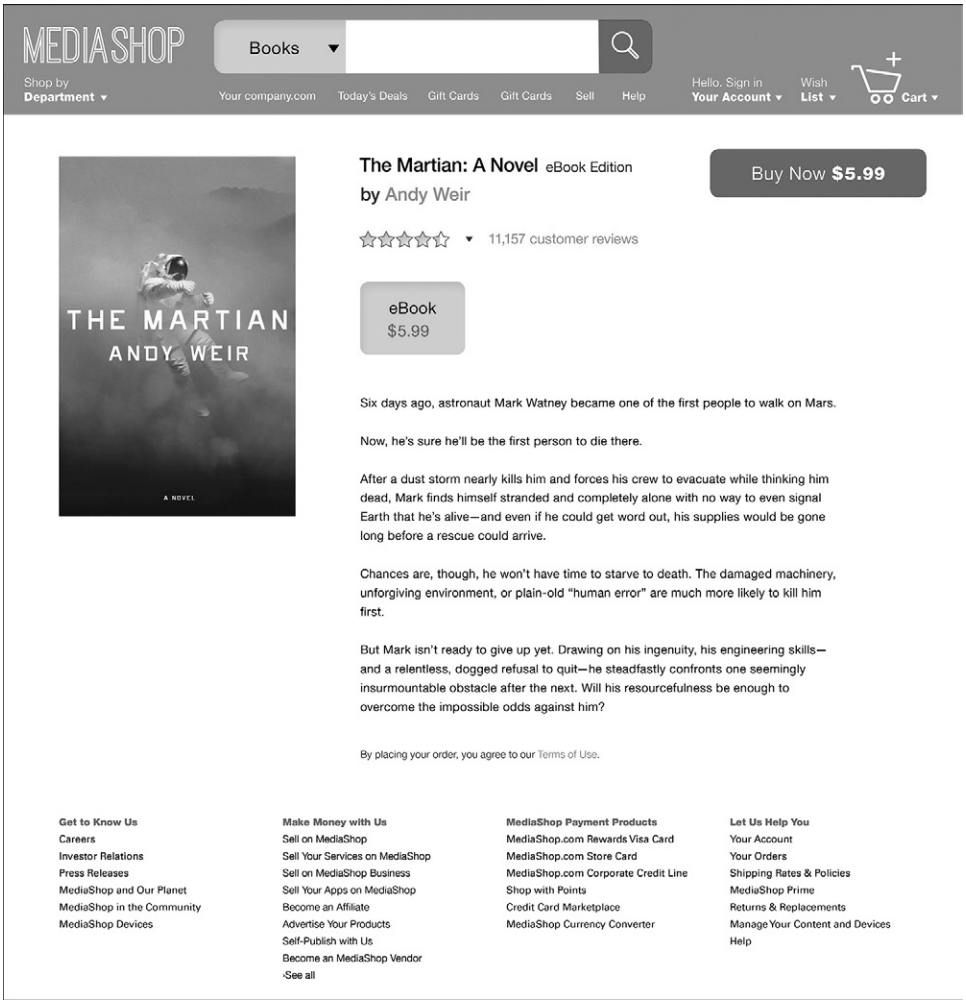

Figure 5.1
An example of a MediaShop product page

more detail; and the rest saw a physical good—a paperback, CD, or Blu-ray disc—with a "Buy Now" button.

Respondents were asked to review the MediaShop page as they normally would before making a purchase online. Notably, each digital product page included a link to MediaShop's Terms of Use.[36] Of the 956 respondents who viewed those pages, only 14 clicked the link to investigate the fine print. That figure—less than 1.5 percent—is consistent with other research that demonstrates how infrequently online consumers review terms.[37]

After completing their fictional transaction, respondents were presented a series of questions about what rights, if any, they obtained after paying for the product. As you can see in figure 5.2, lots of respondents believed that when they clicked "Buy Now" to acquire ebooks, MP3s, and digital movies, they were acquiring rights that we associate with ownership of physical goods. Survey respondents overwhelmingly believed that when they clicked "Buy Now" they owned the product that they purchased. Because ownership is a legal conclusion—one that is contested in the digital economy—it is hard to say with any certainty whether consumers are right or wrong when they express their beliefs about ownership. But on the whole, those beliefs seem to belie the claim often made by rights holders and retailers that people understand perfectly well that when they click "Buy Now" what they are buying is a license.[38] Putting aside the conceptual awkwardness of "buying a license," the survey data suggest that for a substantial number of consumers, the notion of buying entails a set of rights that are independent of any license terms.

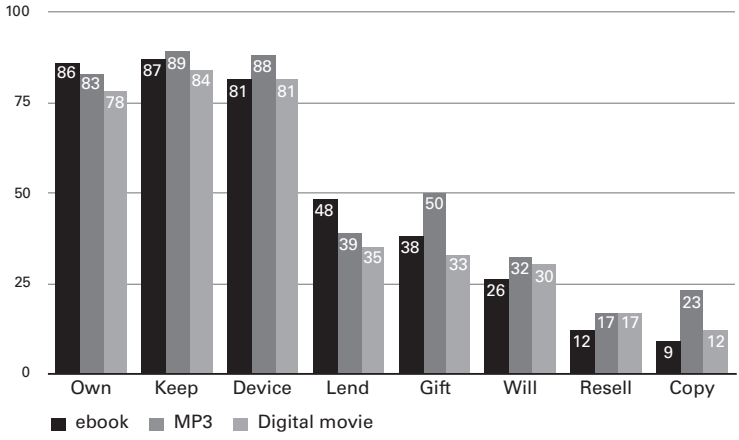

Figure 5.2
Percentage of respondents who believe the "Buy Now" button confers rights

For nearly nine out of ten respondents, "Buy Now" communicated that they were entitled to keep their digital purchase for as long as they wanted. That's typically the case with the physical media we buy. Once you pay for your hardcover book or your vinyl record, it is yours until you decide to part with it, barring theft or disaster. But as both a practical and legal matter, the same isn't true of the digital goods you buy. In chapter 1, we outlined some of the many ways buyers can be denied access to their digital purchases. Your retailer might go out of business or decide to shut down its servers as a cost-cutting measure. You might find your account wiped clean for violating the terms of service. You might wake up to find your device has been remotely deleted like the Amazon customers who thought they'd purchased *1984*. You might be denied access to ebooks you purchased months ago, like some Barnes and Noble customers, because your credit card recently expired.[39] Not only can your purchases be effectively repossessed after you pay for them, but risk-of-loss and termination provisions common in license agreements insulate retailers from any legal liability for denying you access to your purchases.[40]

An almost equally large majority of respondents believed that when they bought digital goods, they could enjoy them on the device of their choice, whether it be a laptop, smartphone, tablet, or dedicated reader or player. Assessing the accuracy of this belief is a challenge because of the variety of devices, formats, and business models in the marketplace. Some retailers have embraced the diversity of the digital ecosystem. Amazon, for example, supports a wide range of devices for digital media, from its own Kindle line to Apple iOS and Android devices, even including the latest Nook from competitor Barnes and Noble.[41] Amazon sees the ability to read ebooks on a buyer's device of choice as a selling point. Its choice to sell music in the de facto standard MP3 format paints a similar picture.

But other retailers have taken a decidedly more closed approach to device compatibility. Apple's iBooks can only be read on Apple devices. The same is true for iTunes music and movies. Through a combination of license terms, proprietary file formats, and DRM, Apple has inextricably tied the media it sells to its own hardware. In part, that's a reflection of Apple's longstanding obsession with carefully controlling end users' experience of its products. But it's also a function of the differing business philosophies of Apple and Amazon. Amazon works hard to keep prices low to attract an ever-larger customer base. It sells Kindle eReaders and tablets at break-even prices and may actually lose money on each sale.[42] But it hopes to profit in the long run by driving traffic to its site. Apple—despite selling billions of dollars' worth of apps, movies, and music—is in the hardware business.

And its profit margin on devices like the iPhone and iPad are as high as 69 percent, leading to quarterly profits of over $10 billion.[43] By ensuring that its customers can't play their media if they switch to a competing device, Apple keeps those profits coming.

Ultimately, whether buyers are correct in their belief about device compatibility depends on choices made by retailers, rather than their own legal rights. And in any case, that belief is often mistaken as a practical matter. In the MediaShop study, for example, the license limited respondents to the use of "Supported Devices." Only a handful knew that since the vast majority didn't read the license terms.

Lending is a widely recognized right of property owners. Book lending as a cultural practice predates the United States by several hundred years. And people have been lending music and movies as long as they have been available for sale. The same is true for gift giving. So it's hardly surprising that more than 40 percent of survey respondents believed they could lend and give away their digital purchases to friends and family. But it's standard practice for license terms to forbid such transfers. The Amazon Instant Video and MP3 stores, Apple iTunes, Google Play, Sony PlayStation Network, Microsoft Xbox Live, and countless smaller digital retailers explicitly bar consumers from lending, renting, giving away, or otherwise transferring their purchases.

Frustrated by the inability to make expected uses of their purchases, customers have pressured some retailers to liberalize their policies around lending and shared use. The Kindle and Nook stores both offer restricted lending programs. If publishers opt in, consumers can lend an ebook, one time only, for fourteen days. Of course, you can lend your hardcover books willy-nilly, whether the publisher likes it or not. Similarly, Apple's Family Sharing program allows digital media purchases to be shared among up to six accounts, provided they all share the same credit card information.[44] And while that might make it easier to ensure that the episode of *Peg + Cat* you bought on your laptop shows up on your kid's iPad, it's not the same as ownership.

Nearly 30 percent of respondents believed they could leave their ebooks, MP3s, and digital movies to loved ones in their wills. We've grown accustomed to inheriting physical media—a father's library or a grandmother's collection of LPs. And for many people, that tradition, or at least the expectation of it, survived the shift to digital copies. Locally stored copies can be transferred through a will easily enough: "I hereby leave my Kindle to my daughter." But tying a digital media collection to a single device is an

impractical and incomplete solution. What happens when that device breaks? Or when the movie collection and music library on a single device is left to two people? And what about the cloud-based purchases that aren't stored locally at all?

Some early efforts to address these sorts of complications show promise. First, we've seen providers of web services developing tools to ease the transfer of accounts after the death of a user. Google's Inactive Account Manager and Facebook's Legacy Contact both allow users to designate a digital heir to take over their account should they meet an untimely end.[45] So far, digital media stores haven't rolled out similar tools. But it isn't hard to imagine them doing so in the future.

Second, lawmakers have taken some tentative steps to deal with the pressing problem of aging baby boomers with active online lives. Delaware became the first state to enact the Fiduciary Access to Digital Assets Act, a model law developed by the Uniform Law Commission.[46] That law gives heirs and other beneficiaries of an estate the power to control digital accounts and assets—including text, audio, video, and software—and to request transfers or copies of those assets.[47] This act, which has been introduced in a number of states, provides the first legal foothold for those seeking to control the disposition of their digital media collections posthumously. But the act contains a crucial limitation. Control over digital assets is limited "to the extent permitted under ... any end user license agreement."[48] In other words, if a license forbids this sort of transfer, your digital purchases die with you. For the time being at least, people who believe that "Buy Now" allows them to control their digital assets after death are mistaken.

Finally, we turn to the question of resale. Used booksellers have operated in the United States for centuries. Benjamin Franklin and Thomas Jefferson built their personal libraries in part by buying used books. And resale markets for records, CDs, videotapes, and DVDs—though not always embraced by copyright holders—have been fixtures of online and offline shopping for decades. But at this point, you don't need us to tell you that resale is nearly uniformly barred by digital retailer license agreements.

Perhaps because of the inherently commercial nature of resale, fewer respondents believed that "Buy Now" gives them a right to resell later. Of the questions surveyed, resale was the only one that did not result in a rate of deception well above the legal threshold. Nonetheless, the number who thought they acquired resale rights—12 percent for books and 17 percent for music and movies—makes a more than plausible case that a "not

insubstantial" minority of consumers is likely to be misled.[49] Taken as a whole, this study suggests that when it comes to the rights we associate with ownership, the "Buy Now" button is a lie.

But it isn't enough to prove that the "Buy Now" button misleads consumers. The misinformation it communicates also has to be material to consumer purchasing decisions. If buyers wouldn't behave differently if they knew the truth, then they haven't been harmed by the deception. So the MediaShop study also gathered data on materiality. It did so in a few ways. First, it asked respondents to state their preferences when it came to the ability to lend, resell, and use their device of choice. Figure 5.3 illustrates the percentage of "Buy Now" respondents who strongly or somewhat preferred media purchases that allowed for those behaviors.[50]

There are two noteworthy findings here. First, a sizable portion of respondents—in many cases a majority—prefers to purchase goods that allow them to exercise rights we associate with ownership. Second, those preferences are remarkably stable across analog and digital goods. So consumer preferences for ebooks are very similar to their preferences for physical books. The same is true for MP3s and CDs, and for digital movies and Blu-ray discs. These rights remain just as important to buyers in the digital market as they have been in the physical one.

The survey also asked whether respondents would be willing to pay more for digital goods that they could lend, resell, or use on their device of

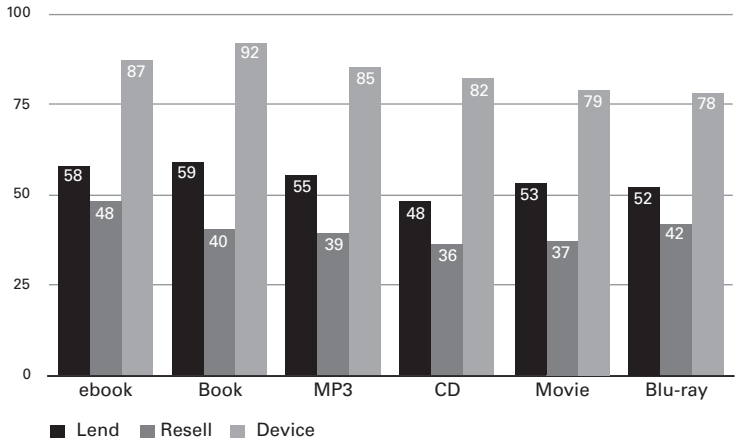

Figure 5.3
Percentage of respondents who express a strong or moderate preference for rights

choice. Most consumers were willing to pay more for at least one of those rights. The median price increase was $1, but the average was nearly $11 above the current Amazon prices. For the individual rights, respondents were willing to pay an average of $3.82 more for the right to lend, $3.24 for the right to resell, and $3.24 for the right to use media on their device of choice. Taken together, this evidence suggests that rights associated with personal property ownership influence the price of digital media goods. Roughly half of the respondents were willing to pay more for those rights. Since many respondents who expressed strong preferences for rights were unwilling to pay more for them, it is fair to conclude that some expect those rights to be part of the bargain under existing prices.[51] That information should interest retailers and rights holders.

Of equal interest, respondents were asked if they would be more likely to access digital books, music, and movies through subscription services—rather than purchasing them outright—if they couldn't lend, resell, or use their preferred device. Of the 94 percent of respondents who were familiar with subscription streaming services, more than half were more likely to stream if they could not lend their purchases. When it came to resale, 43 percent were more likely to stream. And 63 percent of respondents reported being more likely to stream if they couldn't use their purchases on their device of choice. For each of these rights, movie viewers were particularly susceptible to the draw of streaming services.

Fewer respondents—42 percent—had used or were familiar with the Pirate Bay and BitTorrent, two services associated with high volumes of infringing downloads. But among that group, 32 percent were more likely to download files without paying in the absence of a right to lend; 31 percent in the absence of a right to resell; and 40 percent in the absence of a right to use their device of choice. This suggests that the limited rights consumers acquire when they "Buy Now" contribute to the infringement of copyrighted works.

This survey evidence establishes that the "Buy Now" button misleads a considerable number of consumers about the legal rights they acquire when they spend money on digital goods. It also demonstrates that these misconceptions about their legal rights are material; people would behave differently if they knew that they didn't own their digital purchases. Applying the basic rules of false and deceptive advertising, the "Buy Now" button looks like an unlawful effort to exploit misinformation. The next question is: What can be done about it?

Coming Clean

The fact that a sizable number of consumers think they get a particular set of rights when they click the "Buy Now" button is not in itself an argument for granting them those rights. Consumer expectations are fickle things. They change over time and depending on context. They are manipulable. Rights—property, constitutional, or human—need a firmer foundation. In this chapter, we aren't arguing that the falsity of the "Buy Now" button helps us determine what rights people should have in digital purchases. Our goal here is more modest. It's to point out that the usual marketplace signals that tell us what consumers value have failed. They've failed because people incorrectly believe that they can do things with their digital goods that they can't. So the choice to embrace digital media does not prove, as some would conclude, that we've moved on as a society from the notions of ownership, lending, gifting, and reselling that have helped define our relationships with our property and each other for centuries.

No doubt, changes in the way we acquire, use, and share goods are underway. And they will have a profound effect on our culture. But those changes should take place in the open. Individuals should be fully aware so they can make thoughtful, deliberate choices. That only happens if they have accurate information. In some cases they do. Netflix and Spotify subscribers understand that once they stop paying their monthly fees, the movies in their queue and the music in their playlists go away. But we can't say the same for a la carte digital purchases.

That's where false and deceptive advertising law should come into play. There are two ways digital retailers could avoid deceiving their customers going forward. First, they could change the terms of their licenses to avoid misunderstandings that harm buyers. Instead of denying them economically valuable rights to lend, resell, and give away their purchases, licensors could grant them. Of course, retailers would need to negotiate with the copyright holders whose works they sell before making such a drastic change to their business models. Some retailers have taken tentative steps in this direction. We discuss licensed resale and lending solutions in greater detail in chapter 10, but for now we will just note that they strike us as both unlikely and problematic.

The other way to avoid deception is to change the way retailers talk about digital media transactions. If "Buy Now" fails to convey the limited set of rights defined by licenses, maybe we need a new button. Apple paid nearly $100 million to settle allegations made by the FTC that the company failed to adequately disclose that free apps targeted at children could be

used to make in-app purchases. In response, Apple eliminated the "Free" button for those apps in favor of the less misleading "Get."[52] In theory, the same could be done with "Buy Now."

The MediaShop survey tested two alternatives to see if either could reduce consumer misinformation. As described earlier, some respondents were shown product pages that used the phrase "License Now" instead of "Buy Now." In theory, the word "license" would put consumers on alert that something was different about this transaction. But under the "License Now" formulation, respondents failed to consistently reduce misperceptions of their rights.

A more promising approach relies on what are called short notices. The theory behind a short notice is that if retailers disclose the salient facts about a transaction in a clear, simple way, people are more likely to understand that information. So even though we don't read licenses, short notices can not only inform us, but also help us make better decisions. From online privacy policies to HIPAA disclosures and credit solicitations, layered notice has been encouraged or required as a way to increase consumer comprehension of complex agreements or legal regimes.[53]

Another group of respondents in the MediaShop survey saw a digital product page that, instead of the "Buy Now" button, included a short notice that described their rights in clear, simple terms and using intuitive iconography. Examples are included in figure 5.4. For an ebook, for example, respondents saw a thumbs-up symbol informing them that they had the right to: download the ebook to approved devices, read the ebook

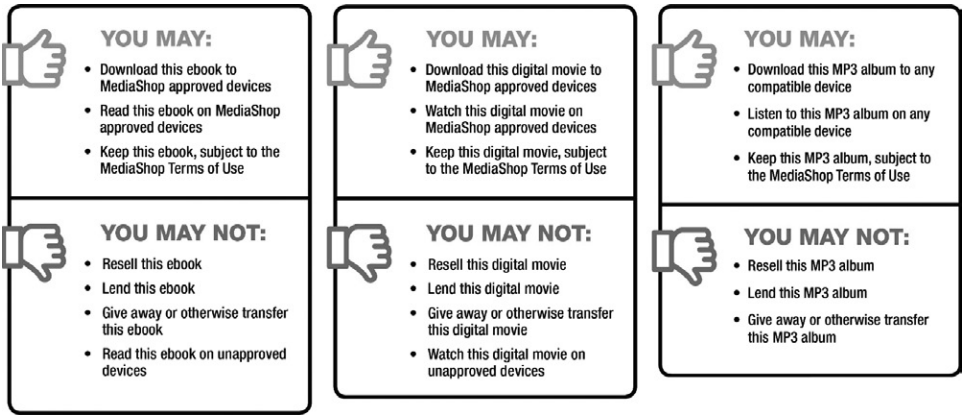

Figure 5.4
Examples of MediaShop short notices

on approved devices, and keep the ebook subject to the terms of use. A thumbs-down symbol was followed by text explaining that respondents did not have the rights to: resell the ebook, lend the ebook, give away or otherwise transfer the ebook, or read it on unapproved devices.

After viewing the short notice just one time, respondents were then asked the same questions about the rights they acquire after paying for a digital product. As figure 5.5 reveals, respondents demonstrated reduced rates of misconception under the short notice condition. Affirmative responses to the ownership question dropped significantly for all three media types. And yes answers to the lending and resale questions were cut by as much as half for ebooks and MP3s. When asked if they could leave their digital goods in their wills, ebook shoppers who saw the short notice were half as likely as their "Buy Now" counterparts to answer yes, a drop from 26 to 13 percent. Although outside of the range of statistical significance, MP3s saw an 11 percent drop. Likewise, when respondents were asked about the right to give away their digital media, there was a 10 percent drop for ebooks and a 14 percent decrease for MP3s.

The accuracy of respondents' beliefs was scored on a seven-point scale, with each correct response worth one point. Overall, the average score for all respondents was 3.1, with a median score of 3. Predictably, respondents who viewed physical media sold using the "Buy Now" button scored highest. Their mean score was 4.7 with a median of 5. Among respondents who shopped for digital goods, those who viewed the short notice performed

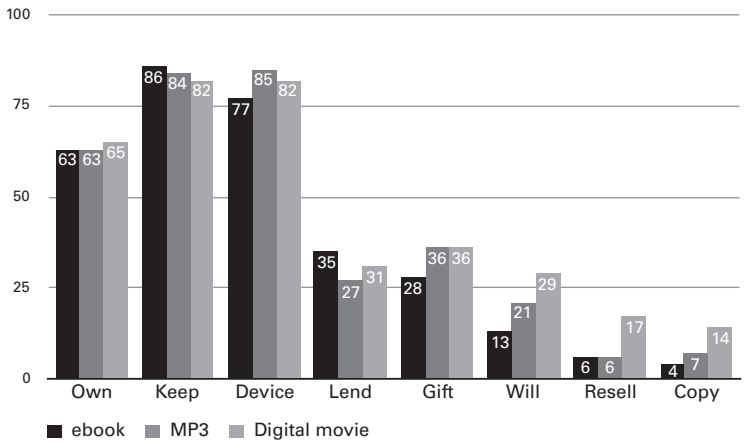

Figure 5.5
Percentage of respondents who believe the short notice confers rights

the best, with a mean of 3.0 and a median of 3. Those who viewed the "Buy Now" and "License Now" buttons scored considerably lower. The mean for "Buy Now" respondents was 2.45, with a median of 2. For "License Now" respondents, the mean was 2.27, with a median of 2. Compared to these two buttons, the short notice significantly improved how well respondents understood their rights after a single exposure.

Although the short notices were not perfectly or uniformly effective, they are a promising tool for preventing the kind of consumer deception that appears to be widespread in today's digital marketplace. Regulators should take a serious look at the efficacy of short notices and consider pressuring or requiring digital retailers to adopt them.

But more accurate disclosures are not a panacea. As valuable as accurate information about the nature of digital transactions may be, in chapter 6 we demonstrate that even highly sophisticated and informed digital media shoppers cannot avoid the constraints that law, licenses, and technology impose.