What Does "Buy Now" Really Mean?

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Aaron Perzanowski & Chris Jay Hoofnagle, *What We Buy When We Buy Now*, 165 **U. Pa. L. Rev.** (forthcoming 2017), available at SSRN.

In their forthcoming article, *What We Buy When We Buy Now*, Aaron Perzanowski and Chris Jay Hoofnagle richly capture today's digital media marketplace and rightly raise concerns about consumers' understanding of their legal rights upon licensing a book, movie, or song. They focus upon vendors' use of the language "buy now" on their websites and test consumer comprehension of this language empirically. The results, showing, for example, that 83 percent of respondents believed they "owned" their media, certainly raise alarms. The article proposes a sensible and inexpensive solution, supported by the authors' empirical evidence, that would help clear up the "buy now" confusion, namely "adding a short notice to a digital product page that outlines consumer rights." I enthusiastically recommend this article for anyone interested in twenty-first century digital commerce.

As with any excellent article, perplexing issues remain. For example, is "buy now" less misleading than the article suggests? As mentioned, 83 percent of respondents believed they "owned" their media, but as the authors concede, the concept of ownership is inherently ambiguous, and perhaps doesn't preclude in consumers' minds the limitations that licensing entails. In addition, although more than 80 percent of respondents believed they could use their digital media on any of their devices, the reality is not so starkly different according to the authors, with some vendors allowing such usage and others not. Fewer than 50 percent of respondents thought incorrectly that they held the right in turn to lend, gift, resell, or copy their product, or leave their product in a will. In fact, fewer than 25 percent thought mistakenly that they had the right to resell or copy their media. On the other hand, 86 percent of respondents thought they could keep their digital product indefinitely, and Perzanowski and Hoofnagle set forth several counterexamples demonstrating that this misperception may be a real problem. In addition, the authors note that the FTC labels an advertising practice as deceptive even if only 10 or 15 percent of people are misled by the practice.

Another issue concerns the so-called duty to read. After all, the licensing agreement makes the rights of the licensee clearer, if not clear, if the consumer bothered to read the form. And "buy now" is not the most precise guarantee of consumer rights. Of course, for good reason, consumers give digital licenses (as well as paper ones) short shrift (if any "shrift" at all!). And my coauthor and I have shown that vendors of software on the Internet make important quality claims on their websites only to withdraw them through warranty disclaimers on their digital standard forms. (Robert A. Hillman & Ibrahim Barakat, *Warranties and Disclaimers in the Electronic Age*, 11 **Yale J.L. & Tech.** 1 (2009).) We therefore concluded that in the digital age, bait-and-switch is a real problem in the area of software product warranties. So I am the last to say that the duty-to-read idea should trump any concern in the licensing-of-media context. But, playing devil's advocate for the moment, perhaps the arguably ambiguous meaning of "buy now" combined with the elaboration of rights in the digital standard form, if clear, should give pause as to whether consumers need additional protection.

To the extent that there is a serious problem, the authors' solution, a box on the digital product page explaining rights, "You may not resell this ebook," etc., is a good solution as far as it goes. However, what about consumers' confusion over the extent of warranty coverage, access to courts, the right of the vendor to modify the terms, etc.? In short, if consumers are to be protected and the license itself cannot do the job, the box may itself grow too large and unwieldy to do much good. Further, the task of determining what rights are sufficiently important to require box treatment will challenge the lawmaker.

In the end, I believe much can be said for an alternative, albeit modest, solution suggested by the American Law Institute's Principles of the Law of Software Contracts. Despite some rather farfetched claims in the literature about the failure of disclosure as a general remedy for consumer (and others') ignorance, the software project took the position that early disclosure of terms on the Internet, even before a consumer took the leap and decided to "buy," in conjunction with adequate judicial policing of "dangerous terms," was likely the only realistic contribution to greater consumer protection. The expectation was not that consumers would likely increase reading their standard forms and shop around for better terms, but that watchdog groups would access the openly available forms, and spread the word about their meaning and ramifications. This would create the incentive on the part of vendors to write reasonable terms. An example of the success of such a strategy was the furor over Facebook's privacy terms that caused it to reverse its approach.

I hope it is clear from this brief discussion that I believe *What We Buy When We Buy Now* is an important contribution to the literature on digital contracts and that the authors deserve kudos for bringing the "buy now" problem to our attention.

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