



Patent and Trademark Office
National Telecommunications and Information Administration
Docket No. PTO-P-2017-0003

**COMMENTS OF THE ENTERTAINMENT MERCHANTS ASSOCIATION ON
CONSUMER MESSAGING IN CONNECTION WITH ONLINE TRANSACTIONS INVOLVING
COPYRIGHTED WORKS**

The Entertainment Merchants Association (EMA) is the national trade association dedicated to advancing the interests of the \$43 billion home entertainment industry. Membership comprises the full spectrum of physical and digital retailers and distributors, the home video divisions of major and independent motion picture studios, video game publishers, and other related businesses that constitute and support the home entertainment industry. EMA member companies sell and/or rent DVDs, computer and console video games, and offer digitally distributed versions of these products over the Internet. In the Over the Top (OTT) market, our members engage in electronic sell-through (EST), transaction video on demand (TVOD), and subscription video on demand (SVOD).

EMA welcomes the opportunity to comment on consumer messaging in connection with online transactions involving copyrighted works.

The Digital Marketplace

The \$10.32 billion that consumers spent on digital video home entertainment in 2016 represents 51% of the year's total video spending. EST, TVOD, and SVOD all experienced growth.

EST grew 5.4% in 2016 and reached \$2 billion in sales. To aid that growth, content providers have developed several incentives for consumers to buy digital content. Strategies include giving titles an early exclusive EST window a few weeks ahead of disc and TVOD availability, providing exclusive digital bonus material and interactivity options for certain titles, and making it easier for consumers to store content in a digital locker (such as Ultraviolet participants and Disney Movies Anywhere) and access it from anywhere and play it across many different players and platforms.

TVOD revenue in 2016 was \$2.1 billion, a 6% increase over 2015. This was especially good news because VOD revenue had fallen almost 3% in 2015.

When consumers pay for a title on TVOD, they usually have 30 days in which to watch it. Once they start watching, they have between 24 and 48 hours to view the movie or TV show. Some retailers offer 7-day rentals on select titles.

SVOD has been experiencing double-digit growth for several years, and 2016 was no exception. SVOD captured more than \$6.2 billion in spending – an increase of 22.6% over 2015. From a survey conducted in the summer of 2016, Magid Associates reported that 72% of broadband households subscribe to an SVOD service. A substantial number of retailers and content producers are offering SVOD. The major players are Amazon, Hulu, and Netflix. Significant others include CBS All Access, HBO Now, and SHOWTIME. And there are a number of genre-specific services, such as Shudder for horror aficionados and Crunchyroll for fans of Asian programming and Japanese anime.

Total video game software spending in 2016 was \$24.5 billion up from \$23.2 billion the previous year. Software includes physical packaged goods, mobile games, downloadable content, subscriptions, and other revenue streams. Reliable data on particular segments is difficult to obtain (an issue that EMA is currently attempting to address), but EMA believes the majority of video game software revenue is generated through digital sales.

“Buy” Is Not a Deceptive Term

According to Merriam-Webster, the definition of “buy” is: “to acquire possession, ownership, or rights to the use or services of by payment especially of money.” The plain meaning of “buy” makes it the appropriate term to use across content formats. Consumers “buy” computer software even though it is a license, they “buy” VOD even though it is a rental, they “buy” movie tickets even though it is an admission to a public exhibition.

Consumers have been buying digital media content online for more than 16 years. They are accustomed to digital rights and appreciate the benefits digital content provides. The rise of digital storefronts has also played an important role in the cultural shift from piracy to lawfully accessed content and has created new revenue streams for content providers.

Customers understand that buying content in one format versus another can provide unique benefits and limitations. For instance, the owner of a DVD of a motion picture can resell it when he or she no longer wants to keep it, but the owner of a digital copy of the same movie cannot. And the owner of a digital copy stored on a cloud-based service like UltraViolet can access that content remotely, but the owner of a DVD must have the DVD with him or her in order to view it.

Notably, “What We Buy When We Buy Now” by Professors Perzanowski and Hoofnagle,¹ which has been cited by PTO and NTIA for the proposition that the buy button is confusing and/or deceptive, finds that there is no statistical difference in the percentage of respondents who gave affirmative responses to various rights-related inquiries when presented with either “Buy Now” or a short notice of rights in conjunction with a hypothetical digital movie purchase

¹ Perzanowski, A. & Hoofnagle, C.J., “What We Buy When We Buy Now,” 165 University of Pennsylvania Law Review 315 (2017).

(Figure 12). This demonstrates that consumers are neither confused nor deceived by “Buy Now” for digital movies.²

Thus, “buy” is an acceptable term and is not confusing or deceptive.

Retailers Need Flexibility in Communication with Consumers

It is important to keep in mind that the majority of terms that limit consumers’ ownership, usage, and transfer privileges are established by content providers, and these rights are only offered by content providers on a “license” basis (versus ownership). Due to the sheer number of rights holders and varying licensing requirements (as well as technological differences between retailer services), there is no uniformity in industry licensing terms, even within a single content provider.

Retailers assist customers by providing information about the conveyed rights by including information in their terms of service as well as help centers and other locations where they feel there is user confusion. Retailers need to be free to choose which specific information is provided to customers, both to align with their unique agreements with content providers and to tailor the messaging to address consumer experiences with their services (particularly as services grow and add new and different features).

In addition, retailers should have the flexibility to develop the buying experience and presentation. Consumers know they are engaging in a transaction for a digital good – regardless of whether a retailer presents the digital good transaction as buy, purchase, get, \$.00, etc. It also is particularly important for terminology to permit retailers to differentiate between EST and VOD, as most online video retailers offer both options.

Particularly given the differences between services, standardized disclosures do not allow appropriate flexibility for retailers to address actual customer needs, likely creating confusion.

For the reasons stated, EMA does not believe that establishing best practices for consumer messaging in connection with online transactions involving copyrighted works is either necessary or desirable.

² Furthermore, the widespread misperceptions reported by respondents regarding their rights to physical copies of movies (Blu-ray Discs) – such as 52% believe they cannot resell those discs or are unsure, 37% believe they cannot lend or are unsure, and 27% believe they cannot gift or are unsure (Figure 13) – strongly suggests a fundamental flaw in the survey methodology. Reselling, lending, and gifting Blu-ray Discs are common and well-established practices.