



POSITION STATEMENT

NON-NEGOTIABLE TERMS AND CONDITIONS IN THE SALE OR TRANSFER OF COMPUTER SOFTWARE AND OTHER DIGITAL WORKS

**(Approved by the IEEE-USA
Board of Directors, 14 Nov. 2008)**

IEEE-USA recognizes the need to impose some terms and conditions on the sale or other transfer of computer software and other digital works. These conditions generally come about through "shrink-wrap" or "click-on licenses." However, it is important that consumers understand such provisions, that the provisions not be overreaching, and that there be nationwide uniformity in the law governing such non-negotiable terms and conditions.

To achieve those goals, IEEE-USA recommends that:

- Congress exercise its authority to regulate national commerce to bring about uniformity for non-negotiable terms and conditions that accompany the sale or transfer of computer software and other digital works, much as it has established national rules for consumer warranties and for the protection of intellectual property by patents and copyrights.
- The terms and conditions for a particular transaction should be available before the transaction occurs and must be available at any time after the transaction.
- Before their actual use of computer programs or digital works, if purchasers or users are dissatisfied with the terms and conditions, they may return the computer software or digital works at the vendor's expense.
- Only standardized terms and conditions should be permitted, to help consumers understand the limitations being imposed on them.

IEEE-USA is not saying it believes there should be only a single set of terms and conditions. A number of alternative provisions should be available, so that vendors can compete by providing better terms to consumers, or so that alternatives such as open source software, which depend on special license provisions, can exist.

Congress should establish a mechanism for reviewing suggested provisions to assure that they are not against public policy and are fully explained to the public, perhaps through administrative review with public comment by an agency, such as the Federal Trade Commission. The burden should not be on an individual consumer to show that a provision is unconscionable, but on those proposing a provision to show that it is fair and reasonable.

IEEE-USA further believes that some non-negotiable terms and conditions should never be permitted, including provisions that:

- Prevent the study and understanding of a computer program by legitimate means, including reverse engineering
- Prohibit commenting on a product, including the publication of benchmarks comparing the product to its competition
- Convert what would otherwise be a sale into a license and thereby affect established user rights in copyright
- Forbid the transfer of the computer software or digital work to somebody willing to abide with the original restrictions on the work
- Permit "self help" that purports to authorize the accessing of a user's computer to enforce the terms of a license, particularly when it is accompanied with a disclaimer of liability for any damage caused
- Require that a consumer bring any legal action in a forum inconvenient to that consumer

IEEE-USA believes that vendors of computer software or other digital works subject to non-negotiable terms and conditions should not be permitted to disclaim all warranties, except when the works are distributed at no cost to the recipient. In all other cases, vendors must at least warrant that the digital information may be read on any device appropriate for the media, except to the extent clearly stated to the contrary. Unless the computer software or other digital works are being provided for no more than the media duplication and shipping and handling costs, vendors must also warrant that a product substantially conforms to its documentation, and any other representations made by its developers and distributors. Remedies for these warranties must include, but may be limited to, the return of the product for a complete refund within a reasonable period of time. Incidental and consequential damages may be disclaimed only to the extent permitted by state law.

This statement was developed by the IEEE-USA Intellectual Property Committee and represents the considered judgment of a group of U.S. IEEE members with expertise in the subject field. IEEE-USA advances the public good and promotes the careers and public policy interests of the 215,000 engineers, scientists and allied professionals who are U.S. members of the IEEE. The positions taken by IEEE-USA do not necessarily reflect the views of IEEE or its other organizational units.

Background

Since shrink-wrap licenses containing non-negotiable terms and conditions were first included in packaged computer software, the validity of such licenses has been uncertain. IEEE-USA recognizes the need to impose some terms and conditions on the sale or other transfer of computer software and other digital works, particularly to limit warranties, so that unreasonable liability is not imposed upon software developers. However, some court decisions uphold terms imposed by a shrink-wrap license, while others refuse to enforce them or even strike down laws supporting such licenses.

IEEE-USA has strongly opposed the Uniform Computer Information Transactions Act (UCITA) effort to legitimize shrink- and click-wrap ("mass-market") licenses. UCITA itself is extremely difficult to understand, and its attempts to legitimize any contract term, unless it "violates fundamental public policy," or is "unconscionable," despite the take-it-or-leave-it nature of a mass-market license. The law allows vendors to disclaim warranties for problems they hide from consumers at the time of a sale, and by attempting to transform a sale into a license, UCITA attempts to eliminate the important user rights that Congress and the courts provide under U.S. copyright laws.

Despite its existence, UCITA has not produced the desired uniformity in the rules for mass-market licenses, or even made their validity clear. The laws of the two states which adopted UCITA language are different, and on the other hand, some states have adopted laws protecting their citizens from UCITA. The American Bar Association, the Federal Trade Commission, and a majority of the state attorneys general have strongly criticized UCITA. By any objective measure, UCITA is a failure that does not deliver on its promise of uniform rules regarding shrink-wrap licenses across the country. Continuing the UCITA effort ill-serves the ability of developers of computer software, and other digital works with legitimate needs, to have reasonable terms and conditions accompany their transactions.

IEEE-USA believes that Congress should exercise its authority to regulate national commerce to bring about uniformity for the provisions accompanying the mass-market sale or transfer of computer software and other digital works, much as it has established national rules for consumer warranties and the protection of intellectual property.

For example, most terms and conditions contain a disclaimer of warranty, but each vendor uses its own language. A consumer should not need to read and understand each disclaimer of warranty to see if the language is different from another product. By having standardized provisions, it is possible to educate consumers about the meaning of terms, allowing them to make informed decisions. If special provisions are necessary for a particular transaction, those terms should result from a negotiated and signed agreement.

Establishing standardized provisions in mass market agreements provides many benefits to society, national commerce, and the U.S. economy. Removing the uncertainties caused by varying shrink-wrap licenses benefits U.S. businesses by:

- Making it easier and less costly to engage in interstate and e-commerce
- Reducing the potential liability of using provisions found to be against public policy
- Reducing violations, because consumers are more likely to honor such agreements, due to the consistency between such agreements
- Reducing the cost to educate consumers about the provisions of mass market agreements

Benefits to U.S. consumers include:

- Reduced consumer confusion and more understandable license language
- Federal laws that guarantee consumer rights and protections
- The ability to make more informed decisions

While IEEE-USA does not want to see the federal government dictate the terms and conditions for the sale of computer software, we believe a number of provisions should never be imposed, unless they are part of a truly negotiated agreement between the parties.

IEEE-USA has strongly stressed the importance of reverse engineering through our position statements and friend-of-the-court briefs. Congress and the courts have recognized the importance of reverse engineering and have endorsed its legitimate use. We have strongly opposed UCITA efforts to permit a shrink-wrap license to trump the court decisions upholding legitimate reverse engineering, and do not believe such provisions should ever be included in the non-negotiable terms and conditions for a software transaction.

Similarly, we see no reason why a software developer should use non-negotiable provisions to stifle comments about a product, particularly those that compare it to similar products. Consumers are entitled to accurate information to decide which software product best meets their needs. While it may be reasonable to limit comments during a true beta test of computer software, the developer can achieve this with signed confidentiality agreements with the beta testers. Marketing ploys claiming to be beta tests, such as when the program is provided to tens-of-thousands of users, should not be exempt from a rule against provisions prohibiting commentary about the program.

Just because the terms and conditions state that something is a license should not make it so. In most cases where users acquire mass-marketed computer programs, they reasonably believe that they are purchasing the computer program, much like they purchased the computer hardware. (Consumers do not usually tell a sales clerk, *"I'd like to license this software."*) This is vital, because important user rights in copyright law, such as first sale and the right to archive and make intermediate copies as necessary to use a computer program, may be available only to the owners of copies of works, not licensees.

While IEEE-USA understands that the ability to restrict later sales or transfers may be necessary when preferential pricing for software or database use is given to students or others, we strongly believe that, at the very minimum, the rightful possessor of a work should be able to transfer it to

anybody willing to abide with the original restrictions on the work, and limitations to the contrary should not be allowed. Ideally, the transfer of ownership for a computer program or other digital work should not be restricted at all, if there is assurance that there are no other usable copies retained by the transferor.

IEEE-USA is very concerned that any provision permitting a software developer to access a user's computer to attempt to enforce terms and conditions under the guise of "self-help," conflicts with the need for better security in computer software. Internet viruses already cause great harm and software with undisclosed backdoors is no way to solve the problem. No access or changes to a user's computer should be permitted without the express permission of that user.

All the consumer safeguards we believe necessary are for naught, if a consumer can only enforce their rights in a forum not readily accessible to the consumer. Any developer of software or other digital works selling its products in a consumer's state should be subject to suit in that state, as well as any consumer protection laws. We should not permit a "race to the bottom" by allowing sellers to select the laws of a state because it provides the least protection for a consumer.

While some companies may try to disclaim all warranties, some warranties should never be possible to disclaim. If computer software or other digital works are distributed on a medium such as compact disc, a warranty must be included that the compact disc is readable, and will be replaced if it can't be read. For example, if a music CD uses a copy-protection scheme that prevents it from being played on a personal computer and it is not clearly marked with an appropriate warning, the purchaser must be allowed to return the CD for a full refund after she discovers that it will not play on her computer. There should also be a warranty that allows customers to return computer software or other digital information that does not substantially comply with the representations made about it by its developers and distributors, but this warranty can be limited to a reasonable time, such as 30 days.

However, a software publisher can limit its liability to the return of the software at the publisher's expense for a full refund, and disclaim any liability for consequential damages to the extent possible by current law. Some states do not permit limitations on certain damages, and it is not our intention that a new federal law preempts those consumer protections.

It is important that anyone distributing computer software or other digital works at no charge should be able to disclaim all warranties. It is also important to state that a complete disclaimer is possible in such an instance, so that it is not interpreted as a failure of a required refund remedy because there is no money to refund. Those distributing works for cost-only should be able to disclaim all warranties, except for the readability of the media.

IEEE-USA is not saying it is concerned only about the non-negotiable terms and conditions provisions discussed above. A law like UCITA, which permits a seller to include any term or condition that is not unlawful or violates fundamental public policy, is an open invitation for some sellers to attempt to impose unreasonable requirements on a user. For example, the end-user license agreement from a major software company for its web-building software forbids using the software in constructing any web site that "disparages" that company and its "products and services."

We believe that requiring the use of standardized terms and conditions, and the requirement that any proposed terms and conditions get a thorough airing through an agency, such as the Federal Trade Commission, will minimize attempts for companies to attempt to legitimize overreaching or unreasonable provisions, something that UCITA does nothing to prevent.

IEEE-USA believes that this proposed approach represents a fair balance between the legitimate needs of software developers, and other producers of digital works, to include non-negotiable terms and conditions as part of the sale or other transfer of their products, and the need for consumers to understand such terms and conditions and be protected from unreasonable or overreaching provisions. We urge both companies that develop computer software and other digital works, and consumer protection organizations, to join us in promoting federal legislation - so that the legal status of shrink-wrap licenses can be clarified ~~both~~ quickly and uniformly.