

POSITION STATEMENT

User Rights in Digital Copyright

**Approved by the IEEE-USA
Board of Directors, (16 November 2018)**

IEEE-USA urges Congress to clarify the rights of digital information users under copyright law. Specifically, IEEE-USA:

- Supports the application of the first sale provision to all digital works;
- Supports an exemption for temporary copies made incidental to the lawful use of a work, under prescribed safe harbor rules, and not covering acts where the potential for abuse is high;
- Recommends that common and necessary activities, such as making backup copies of lawfully acquired software, in a manner such that restoring the backup copy yields functional software without external permissions (such as publisher consent), should be legal; and
- Believes that all user rights in digital works, as well as other user rights provided by intellectual property law, must not be alterable by shrink wrap, click wrap, or similar licenses.

When Congress enacted service provider safe harbor provisions, as part of the *Digital Millennium Copyright Act* (DMCA), it provided certainty against copyright infringement suits for the reproduction and distribution of copyrighted material, as long as the service provider's actions fell within the rules for at least one safe harbor. Congress did not provide similar safe harbors for user reproductions, even though such reproductions are necessary to use a digital work, or are commonplace and do not diminish the value of the work.

Congress did, however, ask the Register of Copyrights and the Assistant Secretary of Commerce for Communications and Information to prepare a report for Congress regarding first sale and intermediate and archival copies for digital information.ⁱ That report recommended no changes to the first sale provision (17 USC 109), because there was no way to transfer a digital work while assuring that all copies have been deleted. The report concluded that, "relying on voluntary deletion is an open invitation to virtually undetectable cheating, and there is no reason to believe there would be general compliance with such a requirement." Since publication of the

report certain advances in deployed technology have developed that can provide assurances that copies are deleted during the transfer of ownership. While these advances provide assurance (in only some cases) that copies have been deleted, IEEE-USA nevertheless believes that the first sale provision should apply to all digital works.

The report also recommended there be no blanket exemption for temporary copies made incidental to a lawful use of a work, but that exemptions should exist for temporary copies incidental to a digital performance--such as streaming audio or video. IEEE-USA supports an exemption for temporary copies made incidental to the lawful use of a work, under prescribed safe harbor rules, and not covering acts where the potential for abuse is high.

Finally, the report noted the mismatch between the archival provision for computer programs and the backup procedures for users and systems operators. While those backup procedures may be defensible as a fair use, IEEE-USA believes that it is better to avoid the uncertainties of fair use determination. Any unintended consequences of such a determination, by specifically exempting such common and necessary activities, including that making backup copies of lawfully acquired software, in a manner such that restoring the backup copy yields functional software without external permissions (such as publisher consent), are legal.

In line with its past positions regarding shrink-wrap licenses overriding user rights in the *Copyright Act*, IEEE-USA believes that all user rights in digital works, as well as other user rights, which intellectual property law provides for, must not be alterable by a shrink wrap, click wrap, or similar licenses.

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 nearly 180,000 engineering, computing 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.

ⁱ Report to Congress: *Study Examining 17 U.S.C. Sections 109 and 117 Pursuant to Section 104 of the Digital Millennium Copyright Act*, U.S. Department of Commerce, National Telecommunications and Information Administration, March 2001. (URL: <http://www.ntia.doc.gov/ntiahome/occ/dmca2001/cover.htm>)