



POSITION

NON-NEGOTIABLE TERMS AND CONDITIONS IN THE SALE OR TRANSFER OF COMPUTER SOFTWARE, AND OTHER DIGITAL WORKS, INCLUDING THOSE EMBEDDED IN TANGIBLE GOODS

*Approved by the IEEE-USA
Board of Directors, 11 November 2017*

IEEE-USA recognizes that in distribution to multiple, undifferentiated end-users of computer software and other digital works, including those embedded in “tangible” goods, marketplace realities require the use of standard terms and conditions in a “take-it-or-leave-it” offer (often by “shrink-wrap” or “click-wrap”) of an integrated transaction (sometimes called “terms-as-the-product”) with no objective possibility of negotiation of the constituent terms and conditions. Transactions so characterized are called “mass-market” herein.

IEEE-USA maintains that to avoid uncertainty and the defeat of reasonable end-user expectations consuming resources that otherwise may be devoted to innovation and productivity – “mass-market” transactions that appear to be sales, notwithstanding “licensing of software” language -- should meet minimum, reasonable end-user expectations of the right to use and dispose of the product purchased in such transactions.

Although intellectual property doctrines such as “fair use,” “first sale,” and “exhaustion” generally support the positions taken here, gray areas exist. Many end-users may not be able to afford counsel to apply these doctrines, much less litigate them. IEEE-USA believes establishing baseline expectations for both embedded and “stand alone” digital products (copies) transferred in sale-like mass-market transactions on which the public may rely, is needed.

IEEE-USA recommends that Congress and state legislatures extend or clarify the law. Federal and state courts and agencies must construe statutes to ensure that non-negotiable terms and conditions accompanying mass-market “sale” (including transfer under paid-up, or fee-included “license”) of copies of computer software and other digital works and tangible goods in which they are embedded, do not deprive end-users of the value they reasonably expect of the products they purchase.

IEEE-USA recommends legislation that renders unenforceable in mass-market sale, such non-negotiable terms and conditions that would waive or abridge constitutional, statutory, or other basic end-user rights, including terms relative to the product sold.

Such laws would ban or render unenforceable terms and conditions that:

- Prevent the study by legitimate means, including reverse engineering (and temporary copying therefor) of the copy of the product by or for the purchaser
- Prohibit commenting on the product, including publishing benchmarks comparing the product to its competition
- Convert what a purchaser would ordinarily consider a sale (e.g., for a single or installment payment(s)) into a “license” that restricts further sale or, for tangible products incorporating digital information components, further distribution (including rental)
- Otherwise limit the sale or transfer of the product to another end-user willing to abide by enforceable use restrictions clearly notified to, and assented to, by the end-user upon the first sale of the product.

Additionally, IEEE-USA supports legislation that would render unenforceable non-negotiable terms in mass-market transactions that are unexpected or overreaching, including terms that:

- Permit "self-help" (for example, to limit use) by remote access to an end-user's computer (including a limited-purpose processor embedded in a tangible product) without the end-user's specific consent
- Disclaim liability for any damage caused by seller's remote access to, or automatic limitation of, an end-user's computer without the end-user's specific consent
- Require that an end-user seek remedy exclusively in a forum resort, costing the end-user unreasonably relative to the remedy sought
- Prevent an end-user from obtaining a refund or avoiding payment obligations, by returning or rendering inaccessible a stand-alone digital information product, before realizing value from its use or passage of reasonable time for testing
- Disclaim all warranties at the time first sold to an end-user

At the same time, unless the computer software or digital work is provided at no cost, legislation should require in mass-market transactions that:

- The terms and conditions for a particular transaction be available before the transaction occurs, and for a reasonable time after the transaction
- Vendors warrant that the digital information may be read on any device appropriate for the media, except to the extent clearly stated to the contrary
- Vendors warrant, at the time first sold to an end-user, that a product substantially conforms to its documentation and to any other affirmations made in marketing that the developer, manufacturer, or publisher has approved

IEEE-USA does not maintain that there 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 depends on special license provisions, can exist. Nonetheless, Congress and/or state legislatures coordinated, for example, by the Uniform Law Commission, should establish national minimum standards for mass-market transactions in digital information products, so pervasive in our economy and our lives, and that may have outsized effects on public welfare if minimum standards are not maintained.

In the absence of legislation, IEEE-USA believes that courts and agencies should construe statutes, and apply doctrines such as misuse, preemption and unconscionability, to achieve the limitations on non-negotiable end-user terms and conditions outlined above. Moreover, the Federal Trade Commission and state counterparts should become more proactive in evaluating whether imposing certain non-negotiable, end-user terms and conditions constitute unfair or deceptive trade practices.

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 200,000 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.