



POSITION STATEMENT

USER RIGHTS IN DIGITAL COPYRIGHT

*Adopted by the IEEE-USA
Board of Directors, 20 Nov. 2009*

IEEE-USA urges Congress to clarify the rights of users of digital information under copyright law. When Congress enacted service provider safe harbor provisions as part of the Digital Millennium Copyright Act (DMCA), it provided certainty against suit for copyright infringement for the reproduction and distribution of copyrighted material, as long as the act of the service provider fell within the rules for at least one of the safe harbors. Congress did not provide similar safe harbors for user reproductions, even though such reproductions are necessary to utilize 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.⁽¹⁾ That report recommends no changes to the first sale provision (17 USC 109) because there was and still is no way to transfer a digital work while assuring that all copies have been deleted. The report concludes 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." IEEE-USA believes that the first sale provision should be extended to digital works if there is assurance that there are no other usable copies retained by the transferor.

The report also recommended that there not be a 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 continues to disagree with the report, and 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 and any unintended consequences of such a determination by specifically exempting such common and necessary activities.

In line with its past positions regarding shrink-wrap licenses overriding user rights in the Copyright Act that are (the result of hard-fought compromises in Congress), IEEE-USA believes that all user rights in digital works, as well as other user rights provided by intellectual property law, must not be alterable by a shrink wrap, click wrap, or similar license.

This statement was developed by IEEE-USA's 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 more than 210,000 engineers, scientists and allied professionals who are U.S. members of IEEE. The positions taken by IEEE-USA do not necessarily reflect the views of IEEE or its other organizational units.

Notes

(1) 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>)