



Stop Before You Click.

12 PRINCIPLES FOR FAIR COMMERCE IN SOFTWARE AND OTHER DIGITAL PRODUCTS

Americans for Fair Electronic Commerce Transactions (AFFECT) has long favored a competitive and fair marketplace. We are now undertaking an outreach campaign called **STOP BEFORE YOU CLICK** to help sellers, users of digital products and policymakers work together to develop better and more fair laws to govern purchases of off-the-shelf software and digital products. The cornerstone of AFFECT's efforts is the creation of *12 Principles for Fair Commerce in Software and Other Digital Products*.

STOP

before you click

Insist on fair  digital product terms

When you buy an off-the-shelf product for yourself or your business, you expect the law to provide you with some basic rights. For example, your car will work as advertised. Or you will be allowed to legally sell the television set when you upgrade to a new one and you wouldn't expect something as simple as lending a book to a friend to create any problems for you.

It might surprise you to learn, then, that the rights you are accustomed to when you buy traditional goods and services may not apply when you purchase digital products.

When you buy software or other digital information—and even when you buy another type of product that comes packaged with a CD-ROM or DVD, for example—the seller, including the creator, supplier and distributor, often presents terms that could deprive you of these rights. Frequently these terms of the deal are called a “license.”

The problem is it can be hard to find out what your rights are when buying digital products in the mass market. Often the seller will not make the terms of the “license” available until after you have opened the sealed package.

Then it's too late. At that point, you cannot negotiate more favorable terms. Nor do you have much, if any, recourse if you reject them. This anti-customer approach is used by many digital product sellers. What's worse, it could soon be used in transactions for “smart” goods that incorporate software into their design, such as for autos, fax machines and microwave ovens.

It's time to put a stop to unfair digital product terms.

And it's not just off-the-shelf products. When you purchase or “license” a digital product via the Internet, you are asked to click “I agree” to terms that, if enforced, may prohibit you from criticizing the product, giving it to someone else or using it to create new products. Some terms even claim to allow the seller to invade your privacy by collecting your personal data, monitoring your Internet activity and using the data in any way they wish. Even though courts might refuse to enforce such unfair digital product terms, people who read the license might avoid violating the terms for fear of being sued. Sellers might also build features into their software that prevent you from breaking a term of the agreement. Thus they give themselves protection even if a court might later rule their terms unfair.

The unfair digital product terms that many sellers embed in these agreements for off-the-shelf products, as well as the product features used to enforce them, often take away your basic rights as a customer. They could increase your computer security risks and jeopardize your privacy. They could also chill competition.

A competitive marketplace depends on a balance of power between sellers and customers. Rather than focusing on making secure, bug-free products, many sellers make the terms of agreement hard to locate and try to get you to sign away your rights after you purchase a product. At the same time, they deny all warranties. Consequently, consumers and businesses must continually struggle to maintain their computers' reliability and security and prevent invasion of their privacy.

It's time to put a stop to unfair digital product terms.

12 Principles for Fair Commerce in Software and Other Digital Products

1. CUSTOMERS ARE ENTITLED TO readily find, review and understand proposed terms when they shop.

In a healthy digital marketplace, it should be easy for you to find and read a product's proposed terms of agreement before making a decision to buy it. This is particularly important so that you can compare one product with another. You should be informed in plain and conspicuous language of all aspects of the proposed deal that might influence your purchase decision.

2. CUSTOMERS ARE ENTITLED TO actively accept proposed terms before they make the deal.

Real acceptance requires you to take an active step to indicate agreement to the terms that become part of the deal. You should not be bound by terms just because you visit a website, open a box containing a product or install a product that you already bought. Even if the terms are available somewhere on the website, inside the box, or on some file in the software, you should be bound by those terms only if you actively and unambiguously indicate your acceptance of them. Of course, any terms that are unfair, including but not limited to those discussed in Principles 5–12 below, should not become part of the deal.

3. CUSTOMERS ARE ENTITLED TO information about all known nontrivial defects in a product before committing to the deal.

You should have easy access to information in plain language about any known nontrivial defects in a digital product. An example of a nontrivial defect would be a flaw that prevents a spreadsheet from correctly calculating a certain type of formula or inclusion of spyware or security vulnerabilities. Improving your awareness of the quality differences between competing products will help you choose the best products for your particular needs.

4. CUSTOMERS ARE ENTITLED TO a refund when the product is not of reasonable quality.

You are entitled to assume a product will meet or surpass reasonable customer expectations and the seller's claims. If a product is not of reasonable quality or does not measure up to the product's stated purpose, you should be entitled to return the product for a refund. That refund should be easily available from the point of purchase or by a reasonably convenient refund procedure.

5. CUSTOMERS ARE ENTITLED TO have their disputes settled in a local, convenient venue.

If you have a dispute with the seller of a digital product, you should not be forced to go to an out-of-state court to resolve the dispute. Nor should you be forced to give up remedies and legal protections guaranteed by the laws of the state in which you live.

6. CUSTOMERS ARE ENTITLED TO control their own computer systems.

A seller or third-party should not be able to control or disable your system or a digital product installed on it. Terms permitting such acts are unfair unless a digital product is clearly labeled as a product that will only operate for a fixed period of time. Sellers who implement electronic “self-help” or “repossession” by remotely disabling a digital product threaten disproportionate damage. In addition, sellers must take reasonable steps to ensure that a product is free of viruses, spyware, and other malicious code or security problems that will compromise your computer systems.

7. CUSTOMERS ARE ENTITLED TO control their own data.

Since in the course of using a digital product you may enter personal or mission-critical business data, store private information or create documents for future use, you must be able to control the dissemination of that data. A seller should clearly inform you before payment or installation about a product’s principal and significant functions, including whether the seller will copy or distribute your data. In addition, you are entitled to be able to access data you have created even if you can no longer use the digital product used to create it, and you must be able to convert it to a format that other programs can read. Fair terms do not limit *your* rights to control *your* own data.

8. CUSTOMERS ARE ENTITLED TO fair use, including library or classroom use, of digital products to the extent permitted by federal copyright law.

Consumers, businesses, libraries and educational institutions rely on “off-the-shelf” digital products. For 200 years, federal copyright law has carefully developed balanced rules for the use of copyrighted information. Terms in agreements for mass-market digital products should not attempt to prohibit activities otherwise permitted under federal copyright law. For example, journalists and scholars should be able to quote language in mass-market digital content products, and libraries should be able to lend this type of material. To avoid inhibiting important fair uses, terms claiming to restrict them should not be used.

This set of principles was not formulated to apply to agreements for customized digital products, “Open Source” or “Free” software.

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9. CUSTOMERS ARE ENTITLED TO study how a product works.

Intellectual property law protects software vendors from theft of their work. We support the aggressive enforcement of those laws. However, it may be necessary for you to study a product so that you can adapt it to work with your own system or other systems, understand its security features, or repair it. This type of study is permitted under intellectual property law for traditional products available to the public and should be no different for digital products marketed to the general public.

10. CUSTOMERS ARE ENTITLED TO express opinions about products and report their experiences with them.

Healthy competition depends on information about competing products in the marketplace. You must be able to compare product terms and the products themselves, both qualitatively and quantitatively. You must also be able to recommend and criticize products, legally reprint images and quote text to explain product limitations and help other purchasers make informed decisions.

11. CUSTOMERS ARE ENTITLED TO the free use of public domain information.

Public domain information is free for anyone to use, either because the information inherently does not fall under copyright protection, because the copyright term has expired or because the copyright holder has allowed the information to fall into the public domain. Sellers, therefore, should not be able to take facts, ideas and other unprotected works from the public domain and claim property rights to them by limiting your use of these facts or ideas through an agreement. Such terms are unfair and should be unenforceable.

12. CUSTOMERS ARE ENTITLED TO transfer products as long as they do not retain access to them.

You should have the right to transfer a mass-market digital product in the same way that you might legally sell your old television or lend your favorite book to a friend as long as you do not retain access to it and the new recipient agrees to observe the fair terms of the deal. Any terms that claim to take away this right are unfair and should not be enforced.

A more detailed version of the *12 Principles*, designed for legislators, policymakers, and others interested in promoting a truly competitive digital marketplace, is available at www.fairterms.org.

“AFFECT has done a tremendous public service by developing a set of clear, accessible, balanced principles that reflects the best of modern contract law, as applied in this new area. Those who try to draft contract forms in this area to take advantage of others, or to get a better ‘bargain’ than the law (or sound policy) would permit, will be disappointed with these principles because they give to customers important rights that many vendors might believe they can take away.”

William J. Woodward, Jr.,
Temple University
Beasley School of Law



AMERICANS for FAIR ELECTRONIC
COMMERCE TRANSACTIONS

AFFECT is a national coalition of consumers, retail and manufacturing businesses, financial institutions, technology professionals and librarians committed to the growth of fair and competitive U.S. markets in software and other digital products.

Since 2000, AFFECT has successfully prevented the passage of UCITA (Uniform Computer Information Transactions Act), dangerous, anti-competitive, anti-business, anti-consumer legislation. UCITA would have a negative impact on the U.S. economy and the development of electronic commerce and new technologies. AFFECT continues to promote enactment of anti-UCITA “bomb-shelter” legislation in state legislatures to protect both individual consumers and businesses from the long-arm reach of UCITA.

www.ucita.com outlines AFFECT’s continuing legislative and policy efforts and links to www.fairterms.org, the new site for the **STOP BEFORE YOU CLICK** campaign based on AFFECT’s *12 Principles for Fair Commerce in Software and Other Digital Products*. **STOP BEFORE YOU CLICK** seeks to promote fair business practices and to guide sellers, users of digital products and policymakers in developing balanced law to govern purchases of off-the-shelf software and digital products.

Contact us to get involved or to learn more.

Americans For Fair Electronic Commerce Transactions

1301 Pennsylvania Ave. NW
Suite 403
Washington, D. C. 20004
affect@alawash.org
v 202-628-8410 / 1-800-941-8478
f 202-628-8419

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