

September 11, 2000

Mr. Donald A. Clark  
Secretary, Federal Trade Commission  
Room H-159  
600 Pennsylvania Ave., N.W.  
Washington, D.C. 20580

Re: High-Tech Warranty Project – Comment, P994413

Dear Mr. Clark:

The following comments represent the position of the American Electronic Association (“AEA”) regarding the issues that have been raised by the Federal Trade Commission (“FTC” or “Commission”) in the above referenced proceeding. We appreciate the opportunity to address the Commission on these matters of great concern to the software and electronics industry and would urge the FTC to forbear from any additional regulatory action in the area of software and computer information licenses.

AEA is the largest high-technology trade association in the country, representing over 3,000 companies involved in the manufacture and distribution of software and electronic components. Indeed, software has become omnipresent in our everyday lives, as it is used in everything from databases to hand-held computers. Furthermore, given the advent of the Internet and new technological delivery systems, our member companies have a distinct interest in ensuring that they are able to run their business with minimum regulatory burdens.

Specifically, we would like to direct our comments to the success that the software licensing model has brought to consumers, American workers, and our economy. Indeed, the existing licensing model for software goods and services has not only resulted in the tremendous growth of the high-tech industry that is fueling our country’s sustained economic growth, but has concomitantly permitted broad dissemination of these goods and services. The model has been nothing short of an unmitigated success for the millions of Americans employed by the high-tech industry, and the customers that they serve worldwide.

#### I. Consumer Expectations

Given the highly successful growth of the software industry and the number of jobs it has created for our economy, the Commission should take extreme care in evaluating consumer expectations before it embarks on any efforts to reformulate or regulate the licensing model. Currently, we are unaware of any widespread consumer dissatisfaction with the distribution methods used by the software and electronics industry, or consumer confusion with respect to rights and responsibilities regarding the purchase of software.

In fact, a recent survey of computer users conducted by Hart-Riehle-Hartwig Research for the Business Software Alliance indicates that about half of all computer users understand that only the buyer may use the software on one machine, and that the software may not be copied onto other machines. Furthermore, the survey also shows that about half of all computer users are aware that when purchasing

software in the retail setting, they will not know the terms of the license or agreement until after they pay for the product.

## II. Consumer Benefits

Of course, consumers receive several benefits from the post-payment terms model. As a threshold issue, this method of contracting facilitates a mass market that might not otherwise exist, by saving the consumer the transaction costs of face-to-face bargaining. Consumers need not worry about having to review and assent to every term in a shrinkwrap license via a pre-printed copy of the license presented at the cash register, before purchasing the software. Nor do they have to speak with a representative of the software developer over the phone and affirmatively assent to the terms of the license before they are able to download the software from the Internet. Instead, under current proposals such as the Uniform Computer Information Transaction Act (“UCITA”), consumers are able to purchase the software, take it home and review the license at their leisure, or as they install the software. If they are unhappy with the product, for any reason, UCITA gives them an absolute right of return and refund and requires the provider to pay for the costs of return.<sup>1</sup>

The many different interests at stake in various software transactions makes a compelling argument for the enforceability of shrinkwrap licenses. Such licensing is ideally suited to enforcing various contractual rights (e.g., use versus reproduction), distinguishing between different classes of users (e.g., consumers versus commercial users or prospective competitors), and permitting different levels, time periods, or use. These options make it possible for a person to pay for exactly the rights that they want and need, rather than for rights that only someone else might wish to exploit. Furthermore, the licensing model permits high quality software services to be delivered to schools, libraries and non-profits at a reasonable rate. At the same time, they permit a software provider to recoup its investment while providing these products to consumers and others whose need and level of expected use is relatively limited. Insisting on “one size fits all” license terms, or abandoning the open market licensing model, would harm everyone in the market, but especially those of lesser means.

## III. Growth in the Software and Computer Industry as a Result of the Licensing Model

The licensing model and the current set of legal rules governing consumer transactions have unleashed unprecedented economic growth and job creation within the software and high technology sectors of our economy. As previously stated, this is due to the widespread distribution of affordable software products that is permitted by the licensing model. As evidenced in AEA’s latest edition of “Cyberstates: A State-by-State Overview of the High-Technology Industry,” the high-tech industry has experienced explosive growth, adding 1.2 million jobs to the U.S. economy between 1993 and 1999. High-tech job growth also continues across the nation, as all 50 states, the District of Columbia and Puerto Rico added new high-tech jobs between 1997 and 1998. In addition to employment statistics, “Cyberstates” provides details on the most recent national wage data, data on venture capital investment and research and development expenditures, and high-tech employment projections through 2008.

The report focuses on three major categories –high-tech manufacturing, communications services, and software and computer-related services—which we believe comprise the core components of today’s high-technology industry and represent a solid, yet conservative, definition of our industry. “Software and Computer-Related Services” are grouped into three categories: 1) Software Services including computer programming services, prepackaged software, and computer integrated systems design; 2) Data Processing and Information Services, including computer processing and data preparation, information retrieval services and computer facilities management services, and; 3) Rental, Maintenance, and Other

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<sup>1</sup> UNIFORM COMPUTER INFORMATION TRANSACTION ACT § 209 (Proposed Official Draft, February 2000).

Computer-Related Services, including computer rental and leasing, computer maintenance and repair and other computer-related services.

#### IV. U.S. High-Tech Employment

What is most striking about the data is its illustration of the paramount role that software and computer related companies are playing in the growth of our economy. As the report indicates, U.S. high-tech employment grew from 3.8 million to 5 million from 1993 to 1999. Employment in the software industry and computer related-services industry reached 1.8 million in 1999, doubling from more than 890,000 jobs in 1993. This represents the largest increase in job creation among the three major high-tech industry categories.

The statistics for software services are equally impressive. From 1993 to 1999, the total number of jobs attributable to the prepackaged software industry more than doubled from 143,000 to 289,000. In other words, more than 146,000 new jobs were created for Americans due to the success of the mass market software industry.

#### V. U.S. High-Tech Average Wage

According to statistics from the U.S. Bureau of Labor Statistics, from 1993 to 1999 the total high-tech average wage increased from \$48,000 to \$57,800. During that time, the average wage for workers in the software and computer industry surpassed that of the electronics manufacturing and communications services industries. While the average wage for those workers increased 17 percent (\$47,500 to \$55,300) and 10 percent (\$47,200 to \$51,800) respectively, the average wage for workers in the software industry increased 28 percent (\$51,100 to \$65,200). Clearly, the industry continues to provide a high quality of life for its workers and their families.

Many of these workers are earning even higher salaries. When the wages are analyzed by segment, they show that as of 1998, there were nearly 800,000 employees in the software services industry earning an average annual wage of \$72,000. This represents an increase of nearly 29 percent in this specific sector from 1993 to 1998. Finally, the best paid high-technology industry workers in 1998 were prepackaged software services employees who earn an average of \$95,000 per year.

The FTC cannot ignore the wage and employment statistics for the software industry in general and the prepackaged software sector in particular. Software providers and developers are not only creating the greatest number of high-tech jobs, but are also creating the highest paying high-tech jobs. The FTC should carefully ask itself why it should regulate the most successful member of the high-tech industry, by micromanaging the shrinkwrap and mass market licensing model.

#### VI. Venture Capital/R&D

The software industry also led the other industry categories in venture capital investments and research and development expenditures from 1997 to 1999. Venture capital investments are key to the growth of today's most innovative and cutting-edge businesses. Research and development is equally important for the high-tech industry in order to innovate, develop new products, maximize the use of technology in the work force, and keep America globally competitive.

Venture capital investments in the United States totaled \$35.6 billion in 1999, more than triple the \$11.5 billion invested in 1997. The leading high-tech industry sector for venture capital investment is software, with \$6.6 billion in venture capital investment in 1999. This represents a 175 percent increase from 1997, when \$2.4 billion was invested in the software industry.

Therefore, it is not only consumers who are “voting with their dollars” to make the software industry the most successful in the nation. Investors also see the software industry as leading the high-tech revolution, and are investing accordingly.

#### VII. U.S. High-Tech Industry Employment Projections

According to employment and occupation projections by the U.S. Bureau of Labor Statistics, software and computer related services are expected to post the fastest growth by employment of all sectors in the United States. As noted in the “Cyberstates” report, while employment in the high-tech industry will jump from 5 million in 1999 to more than 7 million in 2008, software and computer-related services employment is projected to nearly double from 1.8 million to 3.5 million between 1999 and 2008. This represents nearly half of all new jobs created in the high-tech industry. Furthermore, occupational employment is expected to more than double for the nation’s computer scientists, computer engineers and computer support specialists in the next 10 years.

#### VIII. Conclusion

The software and computer-related services industries are at the forefront of the growth in the high-tech sector of our marketplace. Furthermore, the software and computer services industry is expected to post the fastest growth by employment of all sectors in the United States, with jobs nearly doubling from 1.8 million in 1999 to 3.5 million in 2008.

The success of this industry, and the opportunities that are being provided to all Americans, is due in large part to the existing business and licensing model that permits widespread distribution of software and computer products to millions of consumers at affordable costs. Given these benefits, and in the absence of any compelling evidence of consumer dissatisfaction and market failure, the Commission should forbear from any action that would regulate existing licensing models for software.

As the Commission begins its initial public forum on this issue, AEA believes that the interest of the high-technology community should be represented. Furthermore, we believe that the Commission should consider the various benefits that are afforded consumers through shrinkwrap licenses and require that opponents of this model present evidence of market failure or detriment to the economy as a whole, before weakening the open market rules that have brought us to this point of energy and development.

Very truly yours,

William T. Archey, President  
American Electronics Association

Enclosures: “Cyberstates 4.0”  
Hart-Riehle-Hartwig Research