



ELECTRONIC FRONTIER FOUNDATION

Protecting Rights and Promoting Freedom on the Electronic Frontier

Testimony to the House Economic Matters Committee
HB 131: Commercial Law—Non-disparagement Clauses in Consumer
Contracts—Prohibition
Position: Favorable

February 2, 2016

The Honorable Dereck E. Davis
Economic Matters Committee
Room 231, House Office Building
Annapolis, MD 21401
cc: Members, Economic Matters Committee

Honorable Chair Davis and Members of the Economic Matters Committee:

The Electronic Frontier Foundation applauds the Maryland House of Delegates for considering House Bill 131 and hopes to see it enacted.

HB 131 would forbid the sellers of consumer goods and services from using consumer contracts to limit the free speech of consumers. For example, under HB 131, the maker of a digital device couldn't use the fine print in the terms of service agreement to stop an unhappy customer from posting a negative review online.

HB 131 addresses one component of a larger issue that has troubled us for years: companies hiding terms in form contracts designed to rob customers of their rights. Whether it's a restrictive terms-of-service agreement waiving a customer's right to modify the software on her phone or a dentist's contract forbidding his patient from leaving a negative review, the principle is the same: contracts should not be used to waive consumers' rights. This is especially true when consumers don't have a meaningful opportunity to negotiate contract terms.

We've been following the disturbing trend of vendors burying clauses in their contracts that bar customers from leaving reviews of their products and

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services. When these cases have gone to trial, courts have reliably sided with the customer; unfortunately, that hasn't stopped the practice. For every high-profile story of a customer fighting back against this unfair business practice, there are many more stories we'll never hear: stories of customers who simply gave up under a company's pressure to pay a fine or delete a review. Because legal gray areas are fertile ground for legal bullying, the law should make it clear that customers have every right to speak their mind, even if a company's form contract says otherwise.

We've also been tracking a related trend: some vendors claim in form contracts to own intellectual property rights in a customer's future reviews. The companies may then attempt to remove a negative review by filing a takedown request under the Digital Millennium Copyright Act. We suggest that the House of Delegates consider amending HB 131 to address this practice as well, and we would be happy to offer suggestions on how such an amendment could be structured.

Finally, we question why it is necessary to limit the scope of HB 131 to "goods or services that are primarily for personal, household, or family purposes." Though we admire the drafters' commitment to protecting individual consumers first and foremost, we think that the same protections could be offered to customers in business-to-business transactions as well.

Once again, EFF is pleased to see the House considering HB 131 and eager to see it signed into law.

Sincerely,

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