

# Software Licence Agreements: Just what are you agreeing to when you press the “Accept” button?

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## Abstract

Software users merrily click away at the 'Accept' buttons as they install new software and are presented with the terms of the Software Licence Agreement, but few understand why they do it or what they are agreeing to in these legally binding agreements. This paper reviews the current situation and the pitfalls that exist both for the software users and the software authors.

## Keywords

EULA; software license agreements; warranty; copyright infringement

## 1. How have we arrived at the current situation?

Most software is intended for a mass market, so the publisher retains the legal rights in it and gives each user permission to use it; in legal jargon, the publisher licenses it to each user. That permission comes as part of something bigger - the End User Licence Agreement (EULA).

Microsoft XP<sup>1</sup>: *Reservation Of Rights And Ownership. Microsoft reserves all rights not expressly granted to you in this licence agreement... The Software is licensed, not sold.*

But the same reasoning could be applied to books, and yet no one visits a bookshop to license a book. Book tokens and till receipts do not come with licence agreements printed on the back. The customer simply buys his book like a packet of cornflakes. (We are referring here to traditional books printed on paper, not e-books, which are more like software.) So why are software users presented with licence agreements?

The difference flows from an intersection of copyright law and technology. It is an infringement of the copyright in any copyright work, whether a book or a piece of software, to make a copy of it without the copyright owner's permission. But while a book can be read without making a copy of it (ignoring any copy that may be made in the reader's brain), software cannot be put to any practical use without making at least one copy of it on the user's computer. So while a book publisher cannot control who reads a legitimate copy of a book, a software publisher can control who may use a legitimate copy of a program after it has been sold, and how they may use it.

<sup>1</sup> The terms quoted from licence agreements as illustrations may not be the current version.

Some argue that this difference is purely fortuitous for software publishers, and that such post-sale control is not legitimate, but the position is now long established and it is far too late for such debates. This paper discusses today's reality rather than any Utopia.

## 2. Copyright infringement – Is it anything to worry about?

Copyright infringement is a serious matter. Firstly, it is a criminal offence on a par with theft. Prosecutions may be brought by the authorities or by the publisher. An individual can be prosecuted as well as the company he works for.

Secondly, the publisher is entitled to compensation. The starting point when assessing this compensation is the licence fees he ought to have paid. This may be calculated on the basis of the full individual licence fee, as the sizeable reductions which may be available when buying multiple copies of a program often only apply to licences which are bought before the software is used. This figure may then be increased to punish the user.

Finally, the user will have to pay the publisher's legal costs of taking him to court, which in many cases will equal or exceed the compensation.

Unlicensed users face a significant risk of being caught, especially when the software itself tips off the publisher, as and when that computer is connected to the internet. The major software companies fund organisations like the Business Software Alliance, whose purpose in life is to identify infringers, bring prosecutions and obtain money.

Criminal prosecutions are relatively rare in practice, but this may be because the prospect of a prosecution often encourages an infringer to settle the publisher's financial claim on generous terms.

## 3. So what's wrong with licence agreements?

As the core purpose of a licence agreement is to give the user permission to use what he has paid for, it is worth examining what publishers actually put in their licence agreements.

Firstly, software publishers seldom give a simple permission. Instead, they permit use of the software in very specific ways, leaving any other use an infringement of copyright. Then they attach all manner of conditions which have little to do with the core licence but which the user had better observe as any failure to do so almost invariably brings the licence to an end, leaving the user with an empty wallet and software he cannot use.

So what sort of restrictions and conditions can be found in licence agreements, and are they reasonable?

Let us return for a moment to the analogy of buying a book, and the everyday transaction of a man who buys a business related book in London, where he works. He plans to start reading it at home and to finish it on a forthcoming business trip to America. Upon his return he will give it to his colleague to read before either putting it in the company library, handing it in at an Oxfam shop, or selling it to a second-hand book shop.

Now imagine that after he has paid for the book at the till, he is presented with a very long receipt. On the back, under the heading 'licence agreement', it says that:

1. He will be bound by all this small print if he merely opens the book.

2. The book's content may not match the description on the cover, the print might be unreadable and some pages may be missing, but he cannot do anything about it even though he could not reasonably be expected to have discovered any of these things until after he had opened the book.
3. He must pay extra if he wants to read the book while wearing reading glasses, as these boost the performance of his eyes.
4. He must pay extra when he takes the book abroad.
5. He is not allowed to lend it to his colleague or to sell it or give it away when he has finished with it, and he will have to pay for a second copy if someone else reads it.
6. He must keep a written record of where it is at all times.
7. If he subsequently buys a second edition, after the publisher has corrected the errors and typos in the first, he must burn the first.
8. The publisher is entitled to enter his office and home to see if he has complied with all this.
9. Until the publisher has corrected the errors, and removed any bits which have been plagiarised following complaints from other publishers, it is entitled to tear pages out of his book.
10. All this applies to any other books from that publisher which he might read – even if it is someone else's book in someone else's house.
11. The publisher can change these terms whenever it wishes, without even telling him.
12. The publisher's decision is always final.
13. The law of California applies.

This is so ludicrous as to be almost unimaginable, yet this is just what happens when people buy software and click those 'Accept' buttons to agree to the licence agreement.

#### 4. The word “Grant” appears in many licence agreement....

This sounds formal, almost official. It sounds as if the user is being given something special and valuable which he did not have before. In practice, it usually conceals the fact that he is being deprived of something which he probably thought he had paid for.

For example, the licence is often limited to specific individuals (e.g. the purchaser) or specific equipment, which prevents the user sharing the software with a colleague:

**Autodesk:** *Autodesk grants You a non-sublicensable, non-exclusive, non-transferable, limited license to use copies of the Software ...*

**Skype:** *Subject to the terms of this Agreement, Skype hereby grants You a limited, personal, non-commercial, non-exclusive, non-sublicensable, non-assignable, free of charge license to download, install and use the Skype Software on Your computer, phone or PDA.*

**Microsoft XP:** *You may not rent, lease, lend or provide commercial hosting services with the Software.*

The user may only be allowed to use the software where he bought it:

**Autodesk:** *Autodesk grants You a non-sublicensable, non-exclusive, non-transferable, limited license to use copies of the Software in the jurisdiction in which you acquire the Software ...*

So he cannot use the software while in America on business if he buys it in England.

Buying an upgrade may prevent the user from using the software he already has, even if it is not satisfactory:

**Microsoft XP:** *After upgrading, you may no longer use the software that formed the basis for your upgrade eligibility.*

Although the licence might not be as extensive as the user might wish in many ways, in others it may be more extensive than the user realises. In particular, it might cover more software than the user thought he was buying. In one well known instance, the product licence agreement covered code which monitored the user's web browsing activity.

In this example:

**Skype:** *This End User License Agreement constitutes a valid and binding agreement between Skype Software S.a.r.l and You, as a user, for the use of the Skype Software ... You hereby agree and acknowledge that this Agreement covers all Your use of Skype Software, whether it be from this installation or from any other terminals where Skype Software has been installed, by You or by third parties.*

The user agrees that he is subject to all the conditions, restrictions and obligations in the licence agreement not just in connection with his own Skype terminal but also when he uses someone else's. This is equivalent to saying that the small print on the back of a till receipt for a book apply to any of the publisher's books which the customer might read, even those he borrows from a friend.

Many licence agreements include reverse licences - i.e. the customer gives the publisher permission to do things without warning him:

- Permission to automatically update the software

**Microsoft XP:** *The Software contains components that enable and facilitate the use of certain Internet-based services. You acknowledge and agree that Microsoft may automatically check the version of the Software and/or its components that you are utilizing and may provide upgrades or fixes to the Software that will be automatically downloaded to your Workstation Computer.*

- Permission to extract information from the customer's computer

**Microsoft XP:** *You agree that Microsoft and its affiliates may collect and use technical information gathered as part of the product support services ... Microsoft may use this information solely to improve our products or to provide customized services or technologies to you and will not disclose this information in a form that personally identifies you.*

This allows Microsoft and others to gather information about the user and to distribute that information to other unnamed persons. It does not say that either Microsoft or its affiliates

will not collect information in a form that personally identifies the user, or that they will not use it in that form. It does not even say that Microsoft's affiliates will not pass on information in a form that personally identifies the user.

- Permission to enter the customer's premises:

**Macromedia:** *You agree that Macromedia may audit your use of the Software for compliance with these terms at any time, upon reasonable notice. In the event that such audit reveals any use of the Software by you other than in full compliance with the terms of this Agreement, you shall reimburse Macromedia for all reasonable expenses related to such audit in addition to any other liabilities you may incur as a result of such non-compliance.*

**Autodesk:** *To ensure compliance with this Agreement, You agree that upon reasonable notice, Autodesk or Autodesk's authorized representative shall have the right in inspect and audit Your Installation, Access and use of the Software. Any such inspection or audit shall be conducted during regular business hours at Your facilities or electronically.*

This should be paid to home workers working in their pyjamas!

## 5. Just what does the word "Warranty" mean?

Anyone who buys anything from anyone usually expects certain assurances; that the seller has the right to sell it, that the user will be able to use it, that the item supplied is as the seller described, and that it does what the seller claimed and does it reasonably well. Lawyers call these assurances 'warranties', and the courts will order the seller to compensate the buyer for any breaches of warranty. These particular warranties sound reasonable; so much so that Parliament passed laws which add them to many contracts if they have not been spelt out. But they are obviously too much for some publishers:

**Skype:** *No warranties. The Skype software is provided "as is", with no warranties whatsoever; skype does not, either expressed, implied or statutory, make any warranties, claims or representations with respect to the skype software, including, without limitation, warranties of quality, performance, non-infringement, merchantability, or fitness for use or a particular purpose.*

**Remedy.** *Your only right or remedy with respect to any problems or dissatisfaction with the skype software is to deinstall and cease use of such skype software.*

If this applied to a book, the content may not match the cover, the print may be unreadable, some pages may be missing, and what is there and readable might be an illegal copy of another publisher's book, but all the customer can do is stop reading it and throw it away. He should not expect an exchange or a refund.

**Autodesk:** *Limited Warranty. Autodesk warrants that, as of the date on which the Software is delivered by Autodesk and for ninety (90) days thereafter, the Software will provide the features and functions generally described in the User Documentation and that the media on which the*

*Software is furnished, if any, will be free from defects in materials and workmanship.*

Most people would expect a book to last for many years without the story changing or the print fading away or falling off the page, but software users should have lower expectations.

As well as giving very limited warranties, or even none at all, some licence agreements include reverse warranties. In other words, the user becomes obliged to compensate the publisher.

## 6. Special Conditions may apply.....

These may go beyond preventing the user from abusing the publisher's rights. In the well known instance mentioned above, where the product licence agreement allowed the publisher to include code which monitored the user's web browsing activity, a condition prohibited the user from using anti-spyware software to remove this code.

Publishers enforce these conditions by giving themselves the right to terminate the user's licence if he breaches a condition:

**Microsoft XP:** *Without prejudice to any other rights, Microsoft may terminate this agreement if you fail to comply with the terms and conditions of this agreement. In such event, you must destroy all copies of the Software and all of its component parts.*

The publisher's decision may be final:

**Skype:** *...You acknowledge and agree that Skype, in its sole discretion, may modify or discontinue or suspend Your ability to use any version of the Skype Software, and/or disable any Skype Software You may already have accessed or installed without any notice to You ... where You, at Skype's discretion, are in breach of this Agreement ....*

Some rather extreme licence agreements turn all use of the software after a breach of the licence agreement into a criminal offence – even if the breach is trivial and inadvertent, and even if the user is unaware of it:

**Autodesk:** *Autodesk's license grant is conditioned on Your continuous compliance with all license limitations and restrictions described in this Agreement. If You violate any of these limitations or restrictions, the license grant will automatically and immediately expire.*

**Mozilla Firefox:** *If you breach this Agreement your right to use the Product will terminate immediately and without notice, but all provisions of this Agreement except the License Grant (Paragraph 1) will survive termination and continue in effect. Upon termination, you must destroy all copies of the Product.*

## 7. Just which licence agreement are you signing up for?

As if grappling with the complexities of one licence agreement were not enough, a user may be faced with several:

**Redhat Linux:** *Red Hat Enterprise Linux is a modular operating system consisting of hundreds of software components. The end user license agreement for each component is located in the component's source code.*

Some publishers have included an evolutionary term in their licence agreement, so that the entire licence agreement is automatically superseded by any new version of it which the publisher displays on its website at any time in the future, whether or not the user has ever seen the new licence agreement or is even aware of its existence.

**Skype:** *Furthermore, by installing and continuing to use the Skype Software You agree to be bound by the terms of this Agreement and any new versions hereof... Skype reserves the right to modify this Agreement at any time ... by publishing the revised Agreement on the Skype Website. The revised Agreement shall become effective within thirty (30) days of such publishing ...*

So the publisher can change the rules whenever it chooses.

The courts would undoubtedly find this practice objectionable, but it is not clear that they would refuse to allow the publisher to rely on the new licence agreement terms.

## 8. Can publishers always rely on their own licence agreements?

A licence agreement's terms do not have any legal effect unless they form part of a legal agreement between the publisher and the user. At the risk of stating the obvious, this raises the question of which law applies:

**Macromedia:** *This licence agreement shall be governed by the internal laws of the State of California, without giving effect to principles of conflict of laws. You hereby consent to the exclusive jurisdiction and venue of the state courts sitting in San Francisco County, California or the federal courts in the Northern District of California to resolve any disputes arising under this licence agreement. In each case this licence agreement shall be construed and enforced without regard to the United Nations Convention on the International Sale of Goods.*

This is equivalent to a customer buying a selection of business books from a high street bookshop only to find that his right to read each book is subject to the law of a different country. For simplicity, this paper assumes that English law applies.

Most publishers use a software installation process which requires the user to see the licence agreement and to click an 'accept' button before the software will install or activate, but some go further:

**Microsoft XP:** *You agree to be bound by the terms of this licence agreement by installing, copying, or otherwise using the software.*

The bookshop equivalent is being given a till receipt bearing small print which says that the purchaser is bound by that small print if he opens the book.

The problem for the bookseller would be how to ensure that anyone else coming into possession of the book would also be bound by the small print on the till receipt. Software publishers – or rather their clever lawyers – have the answer:

**Microsoft XP:** *The initial user of the Software may make a one-time permanent transfer of this licence agreement and Software to another end user, provided the initial user retains no copies of the Software ... Prior to the transfer, the end user receiving the Software must agree to all the licence agreement terms.*

This is to ensure that the licence agreement goes wherever the software goes, even if the new owner of the computer has not had to click the 'Accept' button. If he tries denying that he is bound by the licence agreement – which he probably could under contract law – then his licence evaporates and his further use of the software is an infringement of copyright. That should stop him taking the point.

A licence agreement is usually introduced after the software has been supplied and paid for, and under the normal principles of contract law this is too late for any part of the licence agreement to have any legal effect. But the position is complicated by the copyright point; a purchaser may be free to keep the copy he has bought unaffected by anything in the licence agreement, but he needs a licence from the publisher before he can use it and that licence, which is in the licence agreement, is subject to all the licence agreement's other terms:

**Microsoft XP: GRANT OF LICENSE.** *Microsoft grants you the following rights provided that you comply with all terms and conditions of this licence agreement.*

So the user would be unwise to say the licence agreement is of no effect at all. But a court which disliked some of the licence agreement's more onerous terms could give effect to this as meaning all those terms which form part of the legal agreement, rather than all those printed in the licence agreement. This then raises the question, 'Which of the licence agreement's terms form part of the legal agreement?'

If a user physically signs a printed licence agreement, almost any term in it will then be part of the agreement. In the more usual situation, where the user clicks an 'Accept' button, whether any particular term forms part of the agreement will depend on various factors, including the nature of the particular term and whether the publisher has taken sufficient steps to alert the user to the term. A draconian term hidden away at the end of six pages of small print will almost certainly not be part of the agreement. It is not clear whether the increasingly frequent practice of requiring the user to complete his name before clicking the 'Accept' button constitutes a signature for these purposes.

Even if a particular term in a licence agreement is part of the user's legal agreement with the publisher, it does not automatically follow that the publisher can enforce it: legislation like the Unfair Contract Terms Act 1977 and the Unfair Terms in Consumer Contracts Regulations 1999 may prevent it from doing so. Terms which may be affected include those which allow the publisher to supply something different to what the user reasonably expected; restrict certain statutory warranties; restrict the publisher's liability to compensate the user; oblige the user to compensate the publisher.

Consumers receive special protection, but even Microsoft receives protection against other publishers' licence agreements. For commercial users, the reasonableness of the term is often the key issue: was it reasonable for the publisher to include that term in that particular agreement with that particular user.

The concept of reasonableness is very wide, and the court is specifically required to take account of all the relevant circumstances. Nevertheless, the courts have developed a reasonably consistent approach to this issue when it comes before them and some factors have begun to emerge as especially important. For example, it is very unlikely that a publisher would be able to rely on a complete exclusion of its liability to compensate a user when it is a substantial organisation or it could obtain insurance to cover its liabilities.

It is up to a publisher to ensure that it stays within the bounds of reasonableness: a court will not substitute a more reasonable term for an unreasonable one. So a sensible publisher should voluntarily accept a higher level of liability which it is more likely to be able to rely on rather than impose too low a level which it cannot rely on. This is an important point which many publishers do not appear to appreciate, but it is not easy to achieve the right balance and, perhaps more than anything else in software licensing, this is an issue on which specialist legal advice is essential.

## 9. Conclusion

The very existence of licence agreements is the result of the odd interaction between computer technology and copyright law. They developed when computers were generally seen as something new and special, which might explain why users allowed publishers to include the terms we see today. There were very few specialist lawyers then, so licence agreements tended to evolve without a great deal of legal analysis and negotiation by users. By the time all this changed, and disputes started to come before the courts, many of the terms in today's licence agreements had become commonplace. In itself this meant that they were more likely to survive the courts' assessment of their reasonableness, but more recently the courts have shown themselves willing to strike terms down as unreasonable, and intelligent publishers should react to this by revising their licence agreements.

Users who find themselves in dispute with a publisher may be able to avoid some of the worse excesses of licence agreements, but this may be an expensive exercise with no guarantee of the right outcome. A user should certainly not see this as an alternative to reviewing licence agreements before accepting them. Admittedly there is probably very little scope for negotiating changes to the licence agreement for most off-the-shelf software, but it is possible with more expensive packages. As for the rest, there are always two options in the 'take-it-or-leave-it' situation, and users should seriously consider exercising the second option on occasions.

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