

The end-user licence: do you accept all of the conditions?

Executive summary
June 2010

Modern technologies are omnipresent in the daily activities of consumers; in this regard, a new form of agreement has become widespread, and consumers are usually ignorant of its scope. Today's consumers have to accept an ever-growing number of end-user licence agreements (hereafter EULAs). These agreements radically modify, and without consumers' knowledge, the rights that they think they have when they purchase a product. Before being able to fully use certain products (software, CDs, DVDs) and online services, consumers have to accept a EULA, without which they will be unable to use the product they legitimately purchased. Obviously, the problem is compounded by the fact that consumers are not made aware of these EULAs in a timely fashion, and that they do not read or understand them properly on account of the way they are presented or written.

This report examines the various questions raised by EULAs. How are these EULAs or "terms of use" legally characterized? What methods have been implemented to ensure that consumers are aware of the existence of the licence agreement they will be obliged to accept in order to use their purchase, along with the conditions or restrictions that agreement will impose? What influence will the time of consent to those conditions have on the consent given to the initial contract for acquiring a good or service? As presented, do these agreements allow consumers to become reasonably aware of their content? Do EULAs and their clauses observe legal obligations and restrictions regarding consumer protection and privacy? Do copyright holders abuse their rights under the Copyright Act?

The study provides an in-depth analysis of the legal characterization of EULAs and their interaction with various other (sales or service) contracts. In our field research, we examined the means taken to timely inform consumers of the existence and content of EULAs. An analysis of various clauses commonly used in EULAs assesses the validity of those clauses in the light of civil law, consumer protection laws, the Copyright Act and privacy laws.

Our study leads us to identify certain EULA-related issues as they pertain to each of the aspects examined.

We conclude, notably, that the term *licence agreement* is somewhat misleading at the outset when applied to mere "terms of use" that copyright holders try to foist on other contracts that may be entered into by consumers, by requiring their post-purchase

La force d'un réseau

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consent to terms that can restrict the use of the good or service acquired, or even refuse it totally if all the conditions are not fully agreed to.

Infractions to contract formation rules and to numerous legal consumer protection provisions are identified, with regard to the initial contract for which the EULA is intended, and to the EULA clauses themselves: information and readability problems, abusive clauses and even clauses prohibited by consumer protection laws, etc. In addition, EULAs often attempt to contractually limit the rights conferred to users by the Copyright Act or by civil law, and often ignore the obligations of merchants under privacy laws.

Other than a few recommendations addressed to merchants to induce them to improve their practices, Union des consommateurs recommends legislative amendments that could resolve many of the problems identified.

French version available on our website.

The present document summarizes a research report published by Union des consommateurs in June 2010 as part of a research project funded by Industry Canada's Office of Consumer Affairs. This report is available in French and in English on our website.