



Legal aspects of mass-marketed software

Matěj Myška

Tento projekt je spolufinancován Evropským sociálním fondem a státním rozpočtem České republiky.



INVESTICE DO ROZVOJE VZDĚLÁVÁNÍ

2 | Matěj Myška



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3 | Cyberspace



- > Last Fri+Sat in November (25. – 26. 11.)
- > Volunteers still needed
- > Write to: libor.kyncl@law.muni.cz

4 | Aim of the lecture



- > Get the idea of the term „License“
- > Understand the basic distribution forms of SW
- > Gain insight into the types of specific types of SW contract formations
- > Grasp the basics of EULA
- > Peek in to the issue of „second hand software“

- > 1998
- > Robert Gomulkiewicz, senior corporate attorney at Microsoft
- > *"For most software products, the license is the product; the computer program provides functionality to the user, but the license delivers the use rights."*



BASICS

- > Exclusive rights of the author
- > Art. 4 – Software Directivee
- > right to do or to authorise: *„any form of distribution to the public, including the rental, of the original computer program or of copies thereof.“*
- > Sec. 14 of CCA



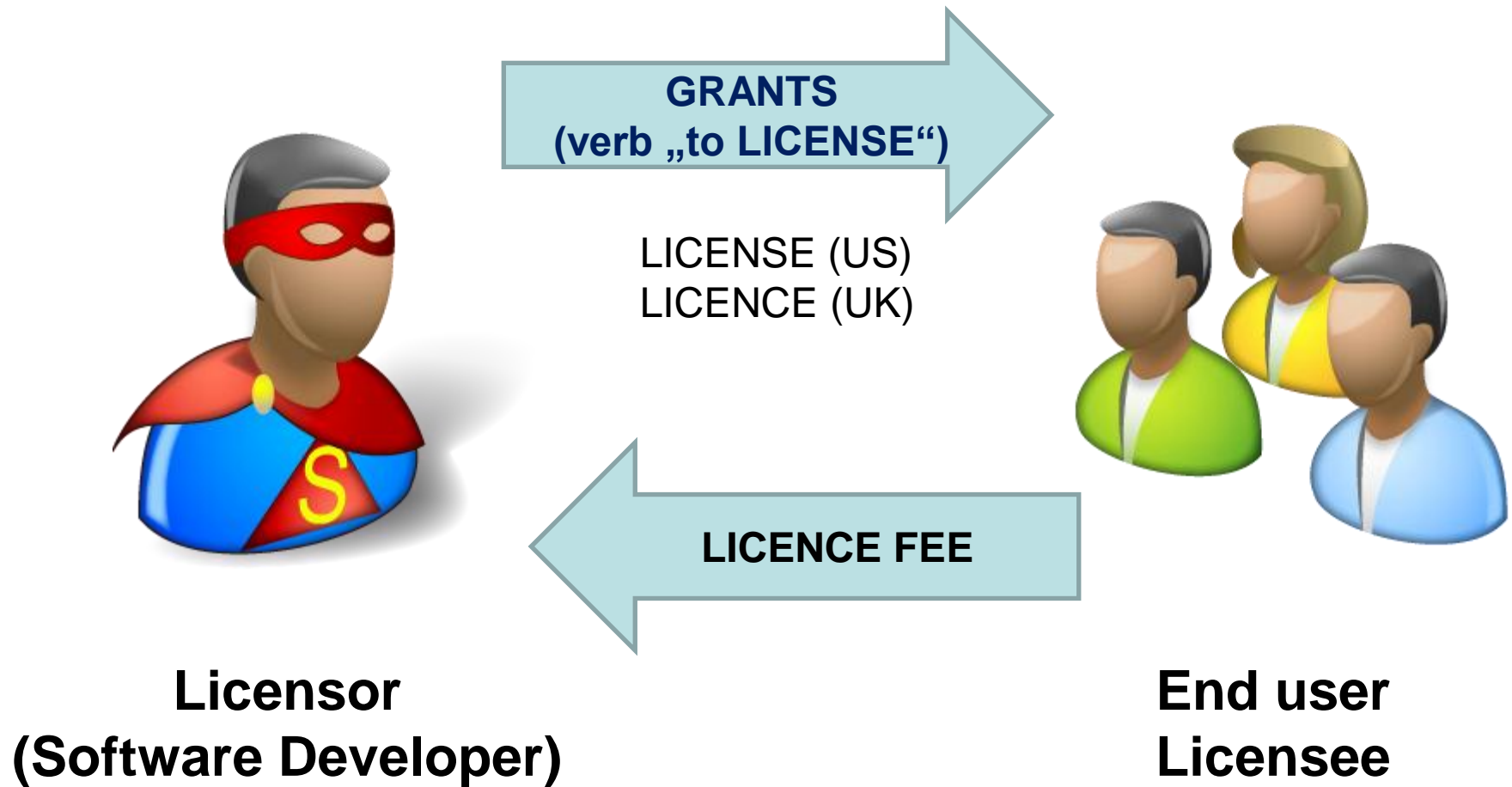
- > **Section 106(3) of the Copyright Act**
- > **exclusive right to distribute copies of its copyrighted work**

9 | License



- > Permission to use?
- > License

10 | Terminology



In the US

- > License – a promise
- > Contract – requires consideration

In the EU

- > License is a contract under law
(consideration not required)
- > Licencse agreement ≠ License

- > **Content of the licence (CZ LAW!)**
 - Specification of the software
 - Scope of the licence – exclusive/non-exclusive
 - Amount
 - Time
 - Region
 - Fee/Free
 - Other (optional) - sublicence

- > **Accordingly > Special „types of software“**

- > <http://www.youtube.com/watch?v=oHsFpWlgwQs>

- > **End User License Agreement**
 - Distant Contract of adhesion
 - Unfair terms directive (Consumer protection) / e.g. exclusion of liability for death
 - Terms invalid if one of the party grossly disadvantaged



THE CHURCH OF EULA

- > AMEN or leave the church
- > D. E. Phillips, *The software license unveiled: how legislation by license controls software access*. Oxford University Press, 2009.

- > Mass-market license agreement
- > Conduct X Signature
- > standard form license agreements that are accepted by conduct
- > most "retail" software is governed by non-negotiable licences

> Commercial Off-the-shelf

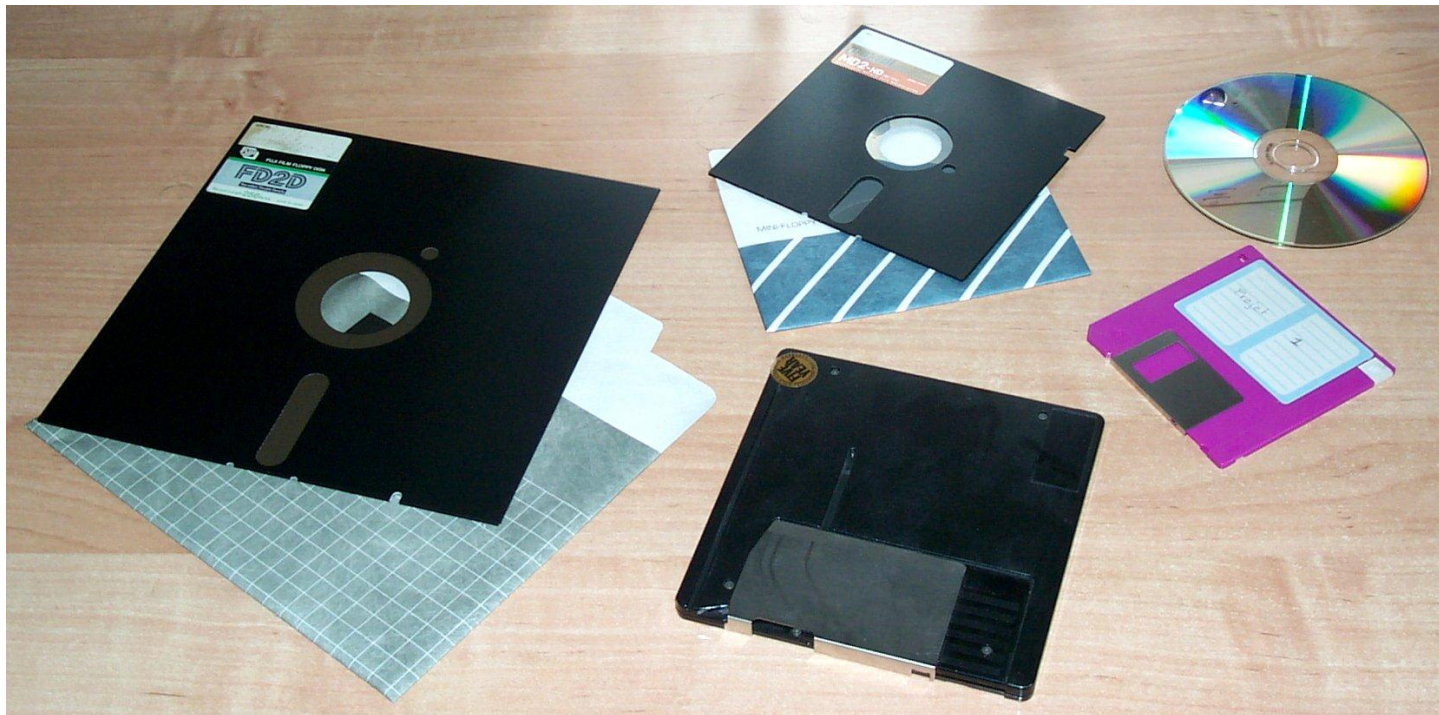
- Brick-and-mortar shops
- Box-software
- Medium + copy of the programme + documentation (user manual)

X

- > Bespoke software
- > (tailored)



> Offline media: Floppy disks, CDs, DVDs



<http://upload.wikimedia.org/wikipedia/commons/b/b1/Disquettes.jpg>

19 | Distribution channels



- > NOWADAYS?
- > ONLINE
- > no tangible copy is transferred



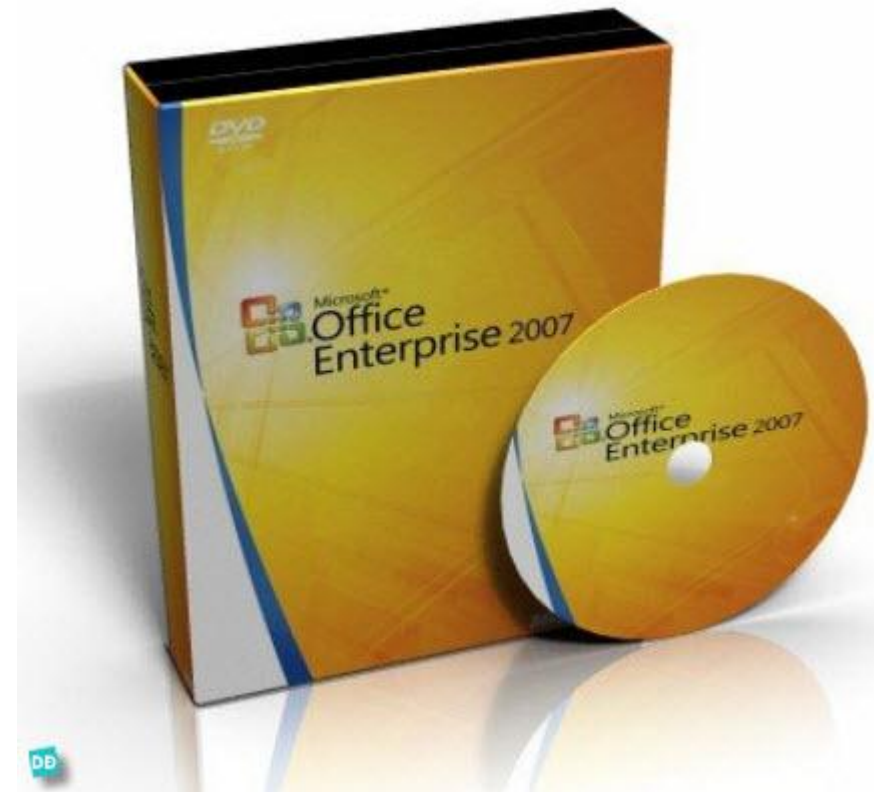
- > Freeware
- > OEM
- > Adware
- > Nagware
- > Demo
- > Shareware

21 | PROPRIETARY SOFTWARE



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- > “Traditional”
- > Non-free
- > Closed source code
- > Mass/volume licensing



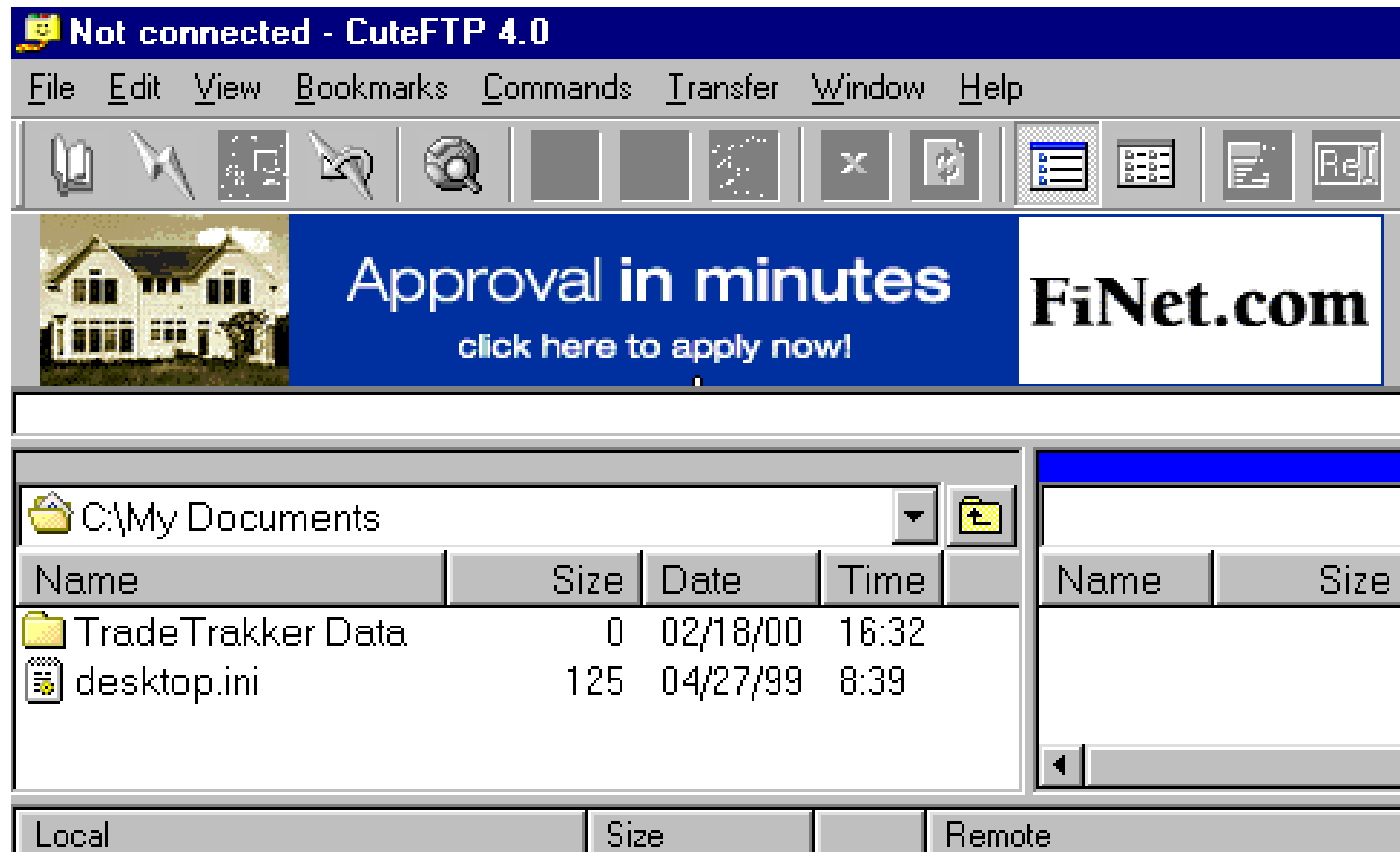
- > Still proprietary
- > At no cost (or optional)
- > Postcardware
- > Careware



- > Free/Open Source Software
- > Non-proprietary
- > 4 freedoms
- > to run the program, for any purpose
- > to study how the program works, and change it so it does your computing as you wish
- > to redistribute copies so you can help your neighbor
- > to distribute copies of your modified versions to others



> Ad-supported



- > Proprietary software
- > Business model
- > Trialware, crippleware, demoware
- > Registration (payment): added functionality
- > Nagware

Wolfenstein 3D



AN **ID** SOFTWARE INC.
PRODUCTION

Which episode to play?



Episode 1

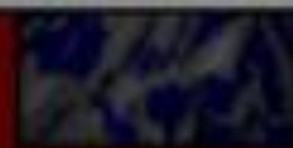
Escape from Wolfenstein



Episode 2

Operation: Eisenfaust

Please select "Read This!"
from the Options menu to
find out how to order this
episode from Apogee.



Episode 3

Trail of the Madman



Episode 6

Confrontation

28 | A very special type of licence



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<sam@hocevar.net>

Everyone is permitted to copy and distribute verbatim or modified copies of this license document, and changing it is allowed as long as the name is changed.

DO WHAT THE FUCK YOU WANT TO PUBLIC LICENSE TERMS AND CONDITIONS FOR COPYING, DISTRIBUTION AND MODIFICATION

o. You just DO WHAT THE FUCK YOU WANT TO.



ENTERING INTO CONTRACT...

30 | Contract formation



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- > **Special types of will expression in software licences contracting**
 - **Shrink-wrap**
 - **Click-wrap**
 - **Browse-wrap**

> No signature – concludent conduct



33 | ProCD, Inc. v. Zeidenberg



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http://museumofintellectualproperty.org/i/pro_cd_%20fv_6573_o.png

ProCD, Inc. v. Zeidenberg, 86 F.3d 1447
(7th Cir., 1996)



> Facts of the case

- Plaintiff > ProCD, Inc.
- Defendandt > Matt Zeidenberg



- > **Disctrict court > unenforceable** – user had no opportunity to review the terms until after the purchase was consummated

- > *"A vendor, as master of the offer, may invite acceptance by conduct, and may propose limitations on the kind of conduct that constitutes acceptance. A buyer may accept by performing the acts the vendor proposes to treat as acceptance. And that is what happened. ProCD proposed a contract that a buyer would accept by using the software after having an opportunity to read the license at leisure. This Zeidenberg did. He had no choice, because the software splashed the license on the screen and would not let him proceed without indicating acceptance."*

- > Step-Saver Data Sys., Inc. v. Wyse Technology, 939 F.2d 91 (3d Cir. 1991) ([full-text](#)).
- > Shrinkwrap license – disclaimers&warranties
- > Unenforceable – no actual knowledge of the licensee of the previously completed contract



> Hill v. Gateway 200, Inc.

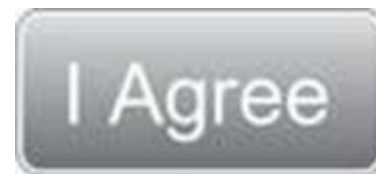
- 30-day return clause constituted an “approve-or-return” offer

- > Entering into contract by visiting the page and downloading
- > *Specht v. Netscape Communications Corp.*, 150 F.Supp.2d 585 (S.D.N.Y. 2001) ([full-text](#)), *aff'd*, 306 F.3d 17 (2d Cir. 2002) ([full-text](#))
- > “Please review and agree to the terms of the license before downloading and using the software.” [hypertext link to the license itself]
- > *“Reasonably conspicuous notice of the existence of contract terms and unambiguous manifestation of assent to those terms by consumers are essential if electronic bargaining is to have integrity and credibility”*



- > *"primary purpose of downloading is to obtain a product, not to assent to an agreement."*

- > **Caspi v. The Microsoft Network, 323 N.J. Super. 118, 732 A.2d 528 (1999) ([full-text](#)).**



41 | Caspi v. Microsoft



Review Subscription Agreement



Review the MSN 8 Subscription Agreement and the Passport Terms of Use below.

use MSN.

1.2 MSN includes various Web sites, Web pages, software and services operated by the Microsoft Corporation, One Microsoft Way, Redmond, Washington 98052 or its affiliates. As used in this Subscription Agreement, "you" or "your" means you, anyone who has access to use your MSN account, and any person utilizing an Associated Account, as defined below in Section 9. You must be at least eighteen (18) years of age to subscribe to MSN.

1.3 Your use of a particular Web site or service within MSN may be under additional terms, codes of conduct or guidelines, including without limitation, particular features or offers such as sweepstakes or chat areas (the "Additional Terms"). Your acceptance of this Subscription Agreement constitutes your acceptance of any Additional Terms applicable to any Web site or service within MSN. In the event that anything in this Subscription Agreement conflicts with the Additional Terms then this Subscription Agreement shall control.

2. PRIVACY AND PROTECTION OF PERSONAL INFORMATION

2.1 MSN adheres to the MSN Statement of Privacy for the collection and use of your personal information. You can review the MSN Statement of Privacy

[MSN Privacy Statement](#) | [Terms of Use](#) | [Passport Privacy Statement](#)

* Details of Standard MSN Internet access Plan: For users of Windows® 98 or later operating system only. You must additionally subscribe to MSN Internet access in accordance with its Member Agreement to access the service. A major credit card is required. The current price for the MSN Standard Unlimited access Plan will be automatically charged to your credit card until you cancel your account or select an alternative plan. MSN is available only for personal non-commercial use. Additional

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** Details of MSN Internet access Limited Hour Plan: You first 20 hours of use are included in the \$9.95 monthly fee, all access time in excess of 20 hours will be charged to you at the rate of \$1.50 per hour. For users of Windows® 98 or later operating systems only. Includes MSN Internet access client software only. You must additionally subscribe to MSN Internet access in accordance with its Member Agreement to access the service. MSN Internet access is only available to residents of the 50 United States, the District of Columbia and Puerto Rico. A major credit card is required. The current price for the Limited Hour Plan will be automatically charged to your credit card until you cancel your account or select an alternative plan. MSN is available only for personal non-commercial use. Additional telephone and/or long distance toll charges may apply. It is the customer's responsibility to check with their phone company to determine if additional phone charges may apply. Local market network activity and capacity may affect access availability.

By typing my name in the box below I am attaching my electronic signature to and agreeing to the MSN 8 Subscription Agreement, Passport Terms of Use, MSN Statement of Privacy, .NET Passport Privacy Statement and the plan terms outlined above (the "Agreements") and **I consent to receive all information from MSN in electronic form only**. I understand that if I do not agree to all the Agreements in their entirety without modification, then I should discontinue this process and close my browser to discontinue my registration.

Type your first and last name (gddf afg):

[Back](#)

[Continue](#)

- > **Concludent formation of the contract:**
 - Licences generally enforceable, as soon as:
 - The user is aware of the fact that he is entering into a contract
 - The user is able to clearly demonstrate his will
- > **Directive 97/7/EC on the protection of consumers in respect of distance contracts**
- > **Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market**

- > **Coss Holland v. TM Data Nederland**
- > *"the single act of opening a package does not constitute acceptance to the license. In order for it to be considered consent to the license, the user will have to be in the knowledge that by opening the package, he or she consents to the license. Furthermore, the user has to have knowledge of the conditions of the license prior to opening the package. Failing any of these conditions implies a **lack of consent.**"*

> As translated in Peeters, Joris. General Public License in Court - Analyses of the case law in EU countries. *jura falconis*, jg 44, 2007-2008, nr 4, p. 631-656

- > Contract – always 2 identified parties !
- > EULA???



problem?

<http://s3.amazonaws.com/kym-assets/photos/images/original/000/096/044/trollface.jpg?1296494117>

- > (5) An offer to enter into an agreement is involved even in the cases where the declaration of will is addressed to an **indeterminate circle of persons**.
- > (6) With respect to the content of the proposal or to the practice introduced between the parties, or with respect to the generally established practice, the person to whom the offer to enter into an agreement is addressed may express his consent with the offer by carrying out an act without notifying it to the offering party, such an act being based on the offered agreement including, but not limited to the provision or acceptance of a discharge. If such is the case, the **acceptance** of the offer shall become **effective at the moment of carrying out such an act**.

- > EULA/terms - visible prior to concluding the contract
- +
- > Explicit acceptance
- > (i.e. courts will favor click-wraps over shrink-wraps and browse-wraps)

Advanced Query Tool Version 4

Copyright © 1999 Cardett Associates Ltd. All right reserved

By clicking on the ACCEPT button, you agree to be bound by the terms of this agreement.

If you do not agree to all the terms, click the DO NOT ACCEPT button to terminate the program.

END USER LICENSE AGREEMENT

You are granted a non-exclusive license to use this version of Advanced Query Tool (the Software) for evaluation and trial purposes only. You may evaluate the Software for a period of up to 30 days from the date of installation. After this period, you must register the software or remove it from your computer.

REGISTERED USAGE

Each
multi
user.
Softw
Softw
insta
acce
licen

Speed Reader

Wow you read that fast!! You must be a speed reader!
It took you just 2.2 seconds to read over 350 words!
That is 169 words per second which is just about a world record!

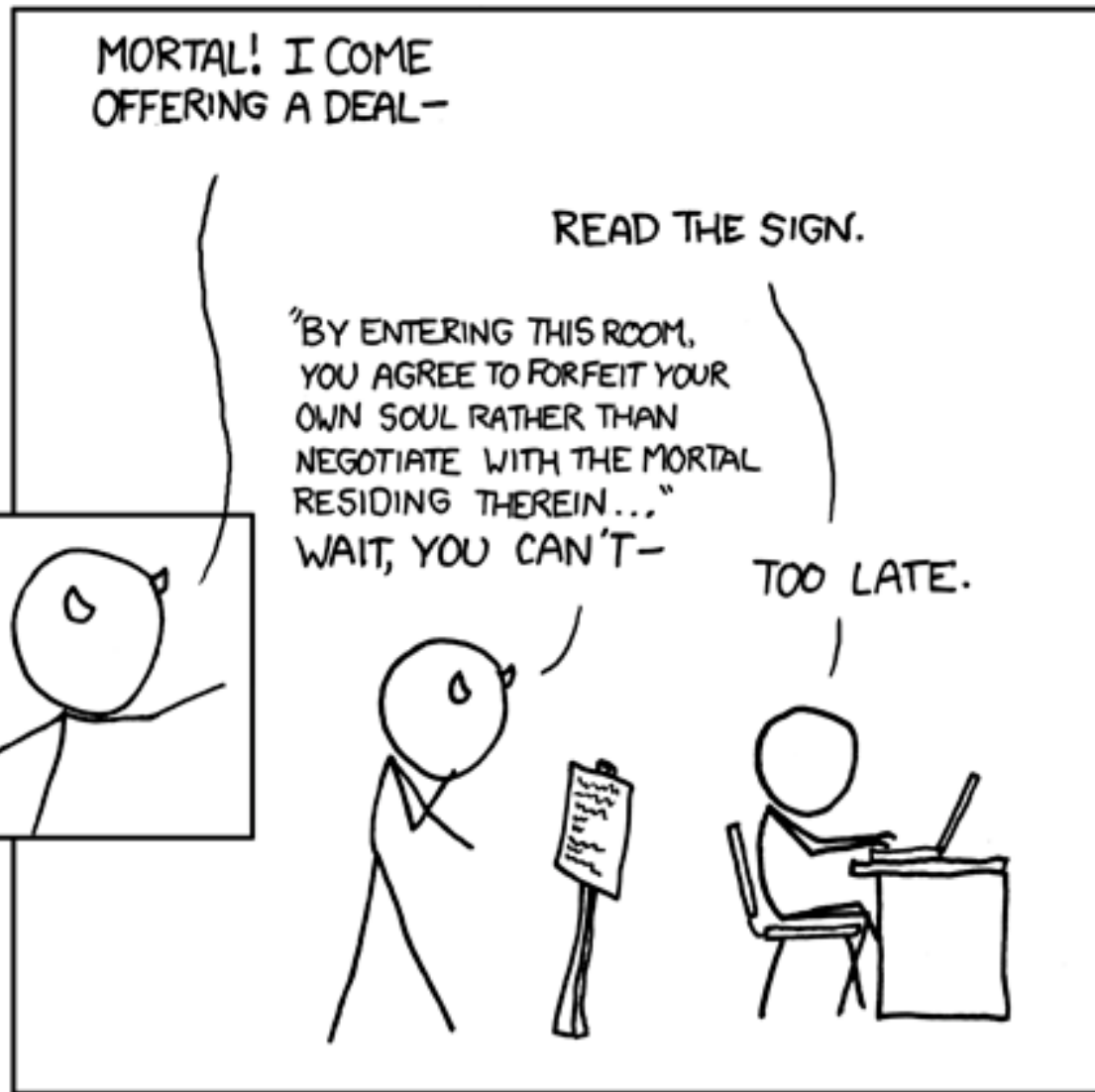
OK

Accept

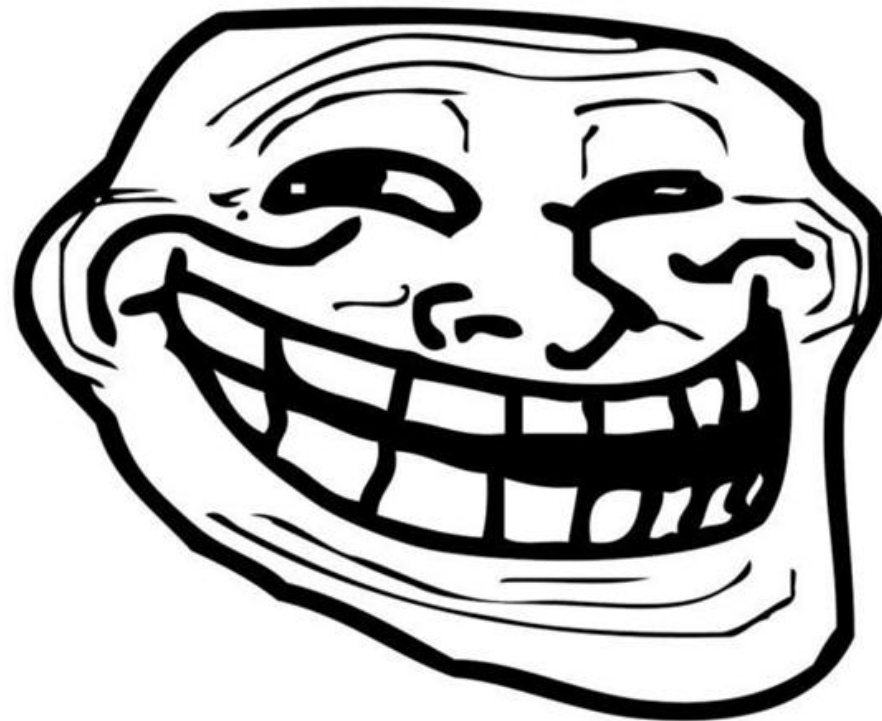
Do Not Accept

> http://d24w6bsrhbehgd.cloudfront.net/photo/346109_700b.jpg

- > (6) If the agreement was concluded by means of distant communication devices, the consumer may withdraw from the agreement within 14 days after the performance was taken over...
- > (7) Apart from cases when the withdrawal right was explicitly agreed, the consumer **can not withdraw** according to paragraph 6 from the following agreements:
 - d) agreements on supply of audio and video records and **computer programs** if the consumer impaired their original wrapping



MEPHISTOPHELES ENCOUNTERS THE E.U.L.A.



problem?

SOFTWARE RESALE & USED SOFTWARE (?)



US

FIRST SALE



- > sec. 109(a) of the U.S. Copyright Act
- > *"any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy..."*
- > i.e. not any other copies (like e.g. copies of this copy)

- > **Microsoft v. Harmony Computers**
 - 1994
 - Not sale, but license
 - First sale rule not applicable = © infringement
- > **SoftMan Products Co. v. Adobe Systems, Inc., 171 F. Supp. 2d 1075 (C.D. Cal. 2001)**
([full-text](#)).
 - sale – no assent to EULA (never installed software) – First sale rule applicable





EU

EXHAUSTION

- > Only the rights to the one *particular* embodiment of the work
- > Art. 4 (2) SW Directive: „*The first sale in the Community of a copy of a program by the rightholder or with his consent shall exhaust the distribution right within the Community of that copy, with the exception of the right to control further rental of the program or a copy thereof.*“

> UsedSoft

- Used software reseller
- Not copies, merely licences (OEM, multi)
- 2 families of cases
 - „Microsoft“
 - „Oracle“

- > **Master CD**
- > **Q:** Are the strict contractual terms enforceable against later resellers/users?
- > German Federal Supreme Court of 6 July 2000 I ZR 244/97 **OEM = original equipment manufacturer**
 - **Bundling with hardware (cheaper price)**
- > exhaustion prevailed – unbundling possible
- > Conclusion: terms forbidding further reselling are null and void

- > Transfer via Download
- > *Oracle v usedSoft* BGH (Urteil vom 06.07.2000, I ZR 244/97)
- > Unclear
- > Referred to CJEU
- > C-128/11

- > Is the person who can rely on exhaustion of the right to distribute a copy of a computer program a 'lawful acquirer' within the meaning of Article 5(1) of Directive 2009/24/EC?
- > If the reply to the first question is in the affirmative: is the right to distribute a copy of a computer program exhausted in accordance with the first half-sentence of Article 4(2) of Directive 2009/24/EC when the acquirer has made the copy with the rightholder's consent by downloading the program from the internet onto a data carrier?

- > If the reply to the second question is also in the affirmative: can a person who has acquired a 'used' software licence for generating a program copy as 'lawful acquirer' under Article 5(1) and the first half-sentence of Article 4(2) of Directive 2009/24 also rely on exhaustion of the right to distribute the copy of the computer program made by the first acquirer with the rightholder's consent by downloading the program from the internet onto a data carrier if the first acquirer has erased his program copy or no longer uses it?

> „License“

- Basic tool how to grant someone the usage rights to SW
- Software is not sold > licensed

> Understand the basic distribution forms of SW distribution models

- online/offline
- F/OSS, freeware, adware, trialware, shareware

- > **EULA – End User Licence Agreement**
 - Consumer protection applies
- > **Specific**
 - Shrink-wrap
 - Click-wrap
 - Browse-wrap
- > **„Second hand software“**
 - First sale, exhaustion doctrine
 - The big issue – waiting for the CJEU



Thank you for your attention!

See you next week...

Matěj Myška

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