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# A very expensive box- Exactly what do you get when buying computer software "off-the-shelf"?

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# A Very Expensive Box – Exactly what do you get when Buying Computer Software "Off-the-Shelf"?

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## Introduction

Imagine that you go to one of the major electronics stores, or perhaps a department store. You find a computer game that you like, take it to the checkout, pay for it and bring it home. When you get home, you eagerly rip open the package and insert the CD-ROM in the CD drive of your computer. Having spent 5-10 minutes waiting for the game to get installed onto your hard drive, you are asked to click "I agree" to a lengthy License Agreement. Do you read the agreement? Perhaps you should.

More likely than not, you are amongst the 90%1 of people who never read the whole agreement. But what if you did? What is it you are agreeing to when clicking "I agree"? And, what happens if you do not agree? Are you entitled to return the computer software to the seller?

## The Two Contracts

When you take the computer software to the checkout you are, in a legal sense, making an offer to buy the software for the price stated on the price tag. When the person in the checkout accepts your money, he/she *accepts your offer* on behalf of his/her employer and a contract is formed between you (the "buyer") and the store (the "seller"). This is the first relevant contract (hereinafter referred to as the Contract of Sale).

A second contract is formed if you click on "I agree" when presented with the License Agreement. In contrast to the first contract, this contract is formed between you (the "buyer") and the company that manufactured the software and wrote the terms and conditions of the License Agreement (the "manufacturer").

In summary, the buyer ordinarily enters into two contract before he/she can use the computer software; one contract with the seller and one with the manufacturer.

## What is normally included in a licence agreement?

While the terms and conditions found in the License Agreements vary from manufacturer to manufacturer, certain types of terms are fairly standardised. Normally, the License Agreement gives the buyer the right to install and use the computer software. This right is often limited to one computer, or a small number of computers, only. Further restrictions are often placed on how the buyer is allowed to transfer the software to a third person (i.e. a person other than the buyer and manufacturer). It is, of course, uncontroversial that the License Agreement may highlight the fact that the software is copyright protected. However, the buyer is often also prevented from reselling the software. This sort of provision appears to be very rare outside the computer industry. Imagine if you, when buying a car, for example, were told that you were not allowed to sell that car unless the manufacturer gave you specific permission to do so!

It is also common for License Agreements to include provisions against so-called reverse engineering, and liability limitations by which the manufacture seeks to limit the buyer's right to take legal action against it.

Finally, it is common practice for the manufacturer to include so-called *choice of forum clauses* and *choice of law clauses*. A choice of forum clause determines where a potential dispute between the parties to the contract should be settled, and a choice of law clause determines which country's law should be applied in the case of a dispute.


## The relation between the two contracts

Let us now return to the hypothetical example introduced in the introduction of this article. Imagine that when you have installed your new computer game and are asked to read the License Agreement, you discover that one of the clauses stipulates that you are only allowed to play the game on Wednesdays, and another clause states that if there is a dispute between you and the manufacturer, that dispute must be decided by a court in the State of Washington (in the US) applying the laws of the State of Washington. Disappointed with these conditions you uninstall the game, put it back in the box and take it back to the store.

In certain situations, there would be such a close connec-

tion between the manufacturer and the seller that the two contracts (i.e. the Contract of Sale and the License Agreement) are dependent on each other. That would, for example, arguably be the case where the seller is the manufacturer's agent. Under such circumstances, the buyer should be allowed to return the software for a refund. However, such situations would seem rare.

While some stores have rather generous returns policies (e.g. allow you to return software within seven days without any questions asked), other stores are stricter. For example, some store's returns policy states that, as far as computer software, is concerned, only if "the product is returned unopened or unused" will they offer a refund. This would seem to indicate that, as you have had to open (i.e. break open the packaging) and use (i.e. insert the CD-ROM into your computer) the product, you would not be given a refund even if you find that you cannot agree to the terms of the License Agreement. Indeed, from a certain perspective, Kmart's position is only logical – why should they care whether or not you agree to the terms of a contract entered into between you and the manufacturer of the game? However, for that line of reasoning to work, we must conclude that there is no connection between the Contract of Sale and the License Agreement. As the License Agreement works as a barrier to the use of the software, effectively, that means that the only thing you actually buy when buying computer software off-the-shelf is a box containing a CD-ROM and possibly a manual, and the Contract of Sale does not give you the right to use the CD-ROM! But this sounds ridiculous – who would possibly pay $80 for a box, a CD-ROM and a manual if you were not allowed to use the software? A slightly more realistic interpretation is that, in addition to the physical box with its content, you also buy the option of entering into a License Agreement allowing you to use the software. A similar interpretation would be that when buying software off-the-shelf you buy, not only the box and its content, but also the right to use the software, but that right is conditioned on you agreeing to the License Agreement. If we accept any of these interpretations, we must question whether the Contract of Sale can be binding even if the License Agreement contains a totally absurd clause such as that you only were allowed to play the game on Wednesdays? The answer is possibly that such absurd contractual terms can be disregarded as non-binding based on the fact that the buyer had no reasonable expectation of them forming part of the License Agreement. However, the choice of forum and choice of law clauses mentioned above may be harder to dismiss.

Since both parties to the Contract of Sale (i.e. both the buyer and seller) are aware that the use of the computer software is subject to agreement being reached between the buyer and the manufacturer through the License Agreement, the better view is that, the Contract of Sale is conditioned on the buyer reaching an agreement with the manufacturer. It is submitted that the Contract of Sale includes an implied condition2 that the Contract of Sale is only binding if a subsequent agreement is reached between the buyer and the manufacturer. Further, it is implied that if the buyer does not return the software within a reasonable time (a week seems like a sensible time-frame), the buyer is taken to have forfeited his/her right to return the software.

Unfortunately the law does not give any clear and definitive answers as to whether the buyer has a general right to return the software and get his/her money back in the event the buyer do not wish to agree to the terms of the Licence Agreement.

## Misleading and Deceptive Conduct

Section 52(1) of the *Trade Practices Act* 1974 (Cth) states that "[a] corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive." If it is accepted that there is a connection between the Contract of Sale and the Licence Agreement, and a buyer not willing to agree to the latter within a reasonable time is not bound by the Contract of Sale, then retailers taking the approach exemplified by some store's returns policy are arguably misleading and/or deceiving consumers. However, as was highlighted above, it is not clear at this stage whether such a connection between the Contract of Sale and the Licence Agreement can be said to exist.

But not all situations depend on the connection between the Contract of Sale and the Licence Agreement. Virtually all Microsoft software sold in Australia has the following text printed on the box: "You must accept the enclosed License Agreement before you can use this product. If you do not accept the terms of the License Agreement, you should promptly return the product for a refund." It would seem beyond intelligent dispute that, regardless of the general connection between the Contract of Sale and the Licence Agreement, the text on the Microsoft products creates a right for consumers to return those products for a refund even where the product is opened and used. Presumably, the contract between Microsoft and the seller contains a clause obligating the seller to accept returned software. This right to return for a refund is a welcomed initiative, but is unfortunately not reflected in the stores' returns policies. Thus, retailers taking the approach that does not permit of a return of the software after the package is opened could be engaging in misleading or deceptive conduct, or alternatively conduct that is likely to mislead or deceive, at the very least in relation to Microsoft products.

In addition, it seems at least arguable that a License Agreement containing burdensome clauses such as restrictions on the right of use, or indeed, unfavourable choice of forum clauses or choice of law clauses, makes the software *unfit for its purpose* or of *unmerchantable quality*.3 If so, the buyer has a statutory right to return the product for a full refund.4

So far, the Australian Competition and Consumer Commission has, however, not taken any action.

## Conclusion

It seems possible that a person buying computer software off-the-shelf does not buy an unconditional right to use the computer software, and unless the terms of the License Agreement are absurd to such a degree that they can be disregarded, the buyer is forced to agree to the terms of the License Agreement in order to get any use of the computer software. In other words, unless you agree to the terms and conditions of the License Agreement you have potentially bought a very expensive and completely useless box! This is highly unsatisfactory, but it means that due to the uncertain position of the law, if you take the License Agreement seriously (and you should), and seek to return the software, you might find yourself in conflict with the seller. To avoid such a conflict, you should familiarise yourself with the stores'

returns policies, and you may wish to only buy software from stores that allow you to return the software within a reasonable time.

1 Adam Gatt, *The Enforceability of Click-wrap agreements*, Computer Law & Security Report Vol. 18 No. 6, at 408.
2 I.e. a condition that is not expressly mentioned in the contract, but both parties have knowledge of it and agree to it being a condition of the contract.
3 This line of reasoning is partly dependent on whether or not computer software can be classed as "goods", but that discussion goes beyond the scope of this article.
4 *Trade Practices Act* 1974 (Cth) s. 71(1) and s. 71(2), as complemented by s. 75A.