

# Digital Consumer and User Rights

T-86.5300 Information and  
Communication Technology Enabled  
Commerce (ICTEC)

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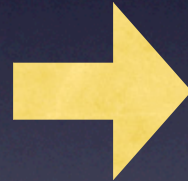


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# Problem

- consumer protection has developed in the world of physical goods
- the consumer surplus is in transition:

mechanical devices  
(tangible/physical  
goods)



software and other  
digital content  
(intangible goods, i.e.  
services)



# Dualistic Consumer Protection Scheme

- high level of consumer protection for physical goods
- almost non-existent protection for software and other digital content



# Outline

1. Consumer protection for physical goods, services and embedded systems
2. Revision of the Consumer Acquis (Green Paper on the Review of Consumer Acquis)
  - political debate going on the idea of extending the scope of Consumer Sales Directive to digital services



3. Open source and consumer rights
4. The interface between user rights and copyright protection
5. Consumer empowerment in digital environment



# Giving examples

- Physical goods (Citroen 2 cv)
- Embedded systems (mobile phones, navigation devices, microwave ovens)
- Services (software, ring tones, music)



# Consumer Protection for Physical Goods

- manufacturers, and in some cases sellers and importers, are liable for damage caused by the goods they sell
- products have to be able to function as advertised and also as reasonably expected by consumers
- products have to be in conformity with the contract of sale
- consumer rights are mostly put in place by **mandatory regulations**
  - it is not possible to use agreements to force consumers to give up their rights



# Consumer Protection for Embedded Systems

- i.e. mobile phones, navigation devices
- include both software and physical goods

→ **are included** in normal consumer protection legislation

- if an embedded system doesn't work because of a problem with its software, consumers have full legal recourse against the manufacturer





# The line between software and physical goods is getting foggier

- technical development
  - it is possible to update or add features to a product very easily
    - especially if there's also a way to connect it to the Net.



# The increasing use of consumables as a platform for services

- A mobile phone into which a consumer has loaded 2,000 songs from the service provider
- A GPS navigation device filled with detailed geographical maps of Finland



# Consumer Protection for Services

- Consumer Sales Directive does not apply
- a consumer good is defined as a 'tangible moveable item'

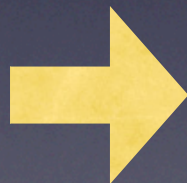


no protection in case of defective performance



# Case: Software

- the manufacturer is allowed to use license agreements to limit its liability to the minimum
- manufacturers typically deny having any responsibility for the proper functioning of delivered software in a user's computer
- the software is sold effectively "as-is" and consumers are left to solve any problems by themselves



protection for consumers is almost non-existent





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From the News Desk

### Adobe joins list of companies not reading own EULAs

By [David Chartier](#) | Published: March 29, 2008 - 11:49AM CT

Adobe [released Photoshop Express](#) this week, its first SaaS (Software as a Service) offering in the form of a free Web-based photo editing, organizing, and sharing service. The early reaction to this (naturally) beta program has been positive, but a few aggressive terms in its EULA have caused some to put down their color adjustment palettes. While Adobe has already stated that it is rewriting the terms in question, it has still joined the growing list of major software shops who aren't paying attention to their own EULAs.

Specifically, the Photoshop Express terms that got people's exposure sliders in a twist are on page two of the service's [terms disclosure](#) (unavailable as of this writing):

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[Windows Vista SP1 is now available in 31 languages in addition to the original English, Spanish, German, French, and Japanese versions. The "All](#)



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## Computer software terms 'unfair'

**Some of the world's biggest computer firms have been accused of imposing unfair contracts on customers who buy their software.**



Microsoft is one of the firms the NCC wants to see investigated

The National Consumer Council (NCC) has accused 17 firms, including Microsoft, Adobe and Symantec, of using unfair "end user licence agreements" (EULAs).

The NCC has asked the Office of Fair Trading to launch an investigation.

The NCC said the firms' EULAs were misleading customers into "signing away legal rights".

"Software rights-holders are shifting the legal burden on to consumers who buy computer programmes, leaving them with less protection than when they buy a cheap Biro," said Carl Belgrove of the NCC.

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# Main findings in the NCC Study ‘Whose licence is it anyway?’:

- complex wording and widespread use of legal jargon
- legal uncertainty, with frequent references to legislation in other countries
- immediate contract termination rights for the provider



- the right for the provider to remove services without notice
- ambiguous references to 'statutory rights'
- restrictions on the transfer of the users' rights to a third party
- excessive exclusion of liability





# Microsoft XP EULA

”Microsoft warrants that the Product will perform substantially in accordance with the accompanying materials for a period of ninety days from the date of receipt.”



# The Green Paper

- The Directorate General for Consumer Affairs has lately shown an interest in protection of consumers' rights in digital information services
- The green paper asks:
  - Should the scope of the Consumer Sales Directive be extended to services?
- the loophole in legislation is considered a 'potential consumer protection lacuna'





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## Consumer guarantee law may extend to software under EU plans

OUT-LAW News, 10/09/2007

**Buying software or other digital goods as a consumer does not entitle an individual to the same rights under EU law that he or she enjoys when buying tangible products. But that could change following a Resolution of the European Parliament on Thursday.**

Software trade bodies gave a cautious welcome to the proposals and one legal expert has said that the changes, if made, could force UK lawmakers to reconsider whether software should be classed as goods or services.

The European Parliament has not passed a new law. Instead, it passed a Resolution that endorsed a [Green Paper on EU consumer laws](#) (34-page / 126KB PDF).

The Green Paper was published by the European Commission in February. It examined various consumer laws, among them the [Consumer Sales Directive](#) (5-page / 121KB PDF). That Directive gives certain rights to consumers. It says that goods sold to consumers must conform to the contract; it provides remedies where they do not; and it says that where goods come with a guarantee, that guarantee should be legally enforceable.

The Consumer Sales Directive applies only to consumer goods – and it defines a consumer good as a "tangible moveable item".

The Green Paper stops short of saying that the definition should be extended; but it asks the question: should the Directive's scope be extended, "to include intangible goods, such as software and data"?

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# The Green Paper:

Question H1 “Should the rules on consumer sales cover additional types of contracts under which goods are supplied or digital content services are provided to consumers?”

## Actions proposed by the Commission in the Green Paper

*Option 1:* Status quo: i.e. the scope of application would be limited to sales of consumer goods, with the only exception of goods which are still to be produced.

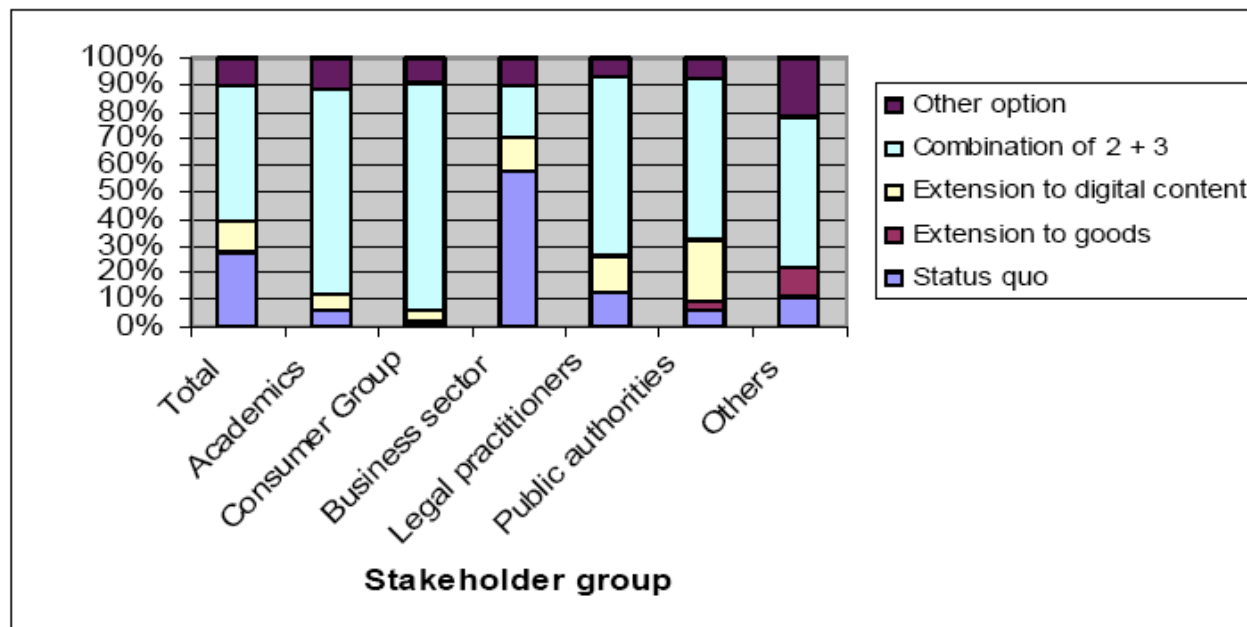
*Option 2:* The scope would be extended to additional types of contracts under which goods are supplied to consumers (e.g. car rental).

*Option 3:* The scope would be extended to additional types of contracts under which digital content services are provided to consumers (e.g. on-line music)

*Option 4:* Combination of Option 2 and 3



**Graph 5.16: Contributions on types of contract to be covered by rules on consumer sales per stakeholder group**



A combination of options 2 (extension to additional types of contracts under which goods are supplied to consumers) and 3 (extension to additional types of contracts under which digital content services are provided to consumers) was preferred by half of the contributors (50%).

[http://ec.europa.eu/consumers/rights/  
detailed\\_analysis\\_en.pdf](http://ec.europa.eu/consumers/rights/detailed_analysis_en.pdf)



# Business Sector:

- The digital service is licensed.
- It very much depends on the way the consumer installs the software on his computer, and whether he/she was aware or not at the beginning of the compatibility of the service with his/her own material.
- There are many different parts that interact with each other but are not necessarily always compatible according to the quality of the product, the “age” of the computer or the other software/hardware installed. Contributors indicated that if there is a malfunctioning of the digital product supplied, it would be extremely difficult to determine which one of the elements caused the damage.

[http://ec.europa.eu/consumers/rights/  
detailed\\_analysis\\_en.pdf](http://ec.europa.eu/consumers/rights/detailed_analysis_en.pdf)



- The first caveat is not very convincing.
- The second and third caveats are more severe.



Is the defects liability problem mainly a problem of compatibility?

- In fact, it is questionable if the extension of Consumer Sales Directive is the best solution. Maybe not?



# An Alternative Solution?

- a cooling-off period also for digital services
- mandatory requirement to offer trial versions for digital services





# Reasonably expected

- According to the Consumer Sales Directive products must be able to function as reasonably expected by the consumers
- If the scope of Consumer Sales Directive will be extended to services:
  - What is reasonably expected with respect to software and other digital content?



# What is reasonable expected by consumers?

- Ring tones?
- Navigation services?
- Software?
- Music?
- Cardiac pacemaker?



# What about open source and consumer rights?

- Stephen Walli:
- “FOSS projects are not products – they are interesting buckets of technology”
- “A project is an interesting bucket of technology with users and contributors, i.e. the project’s community”



- Stephen Walli:
- “A product is packaged, installable, tested, documented, supported, and maintained for customers
- Companies build products as part of their value proposition to their customer; another way to say this is customers buy products (solutions), not software”



- In addition, it is noteworthy that Consumer Sales Directive does not apply in a situation where a product is offered for free!
- Therefore, the extension of Consumer Sales Directive wouldn't be a problem



# The interface between user rights and copyright protection

- both software and content are typically protected with copyright
- copyright regulation has direct relevance for consumer protection
- none of the European copyright directives even mention the word "consumer"



# Digitalization has changed the standing of the user of copyrighted content

- In the analogue world
  - consumers had a wide range of rights to use works they had acquired
  - albeit with practical limitations pertaining to physical limitations



# In the digital environment

- users' rights and possibilities of making private copies are strictly limited

by **legal** and

**technical** means

(i.e., digital rights management)





# Conclusion

- just as with consumer rights, user rights are relatively weak in the digital environment
- consumers do not have any digital rights unless given by the right holder
- the situation of the consumer has worsened in many different ways



# Norwegian Consumer Council argues

consumers should have the following rights to all digital works:

- Make backup copies
- Watch and/or listen to content when you want to
- Move content between players
- Convert content to an appropriate format
- Adapt equipment
- Use digital content without being monitored
- Make use of public and private services
- Make use of necessary technology and assistance to exercise your digital rights



# Pay-per-use

- What about a consumer who just wants to watch movies in her Windows Vista or listen to songs in her iPod?
- Wouldn't she end up paying more for content than necessary because the content provider cannot offer different prices for different consumer groups (i.e., price discriminate)?



# Bringing it all together

- The value of the service can often be ten or even a hundred times the value of the device itself
- High level of consumer protection in physical goods
- The situation changes considerably with services (intangible goods)
- There is currently political debate going on the idea of extending the Consumer Sales Directive to Digital Goods



- However, it isn't so straightforward!
- Digitalization strengthens at the same time the consumer empowerment



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Date of Last Revision: November 15, 2007.

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# Consumer empowerment

The screenshot shows a Facebook interface with a group titled "Facebook owns your photos". The group information includes:

- Name:** Facebook owns your photos
- Type:** Common Interest – Beliefs & Causes
- Description:** They're NOT your photos... they're Facebook's!

The group description contains a link to <http://www.facebook.com/terms.php> and a quote: "By posting User Content to any part of the Site, you automatically grant... an irrevocable, perpetual, non-exclusive, transferable, fully paid, worldwide license... to use, copy, publicly perform, publicly display ... such User Content for any purpose..."

Below the quote, it says: "Compare this nonsense above with the equivalent from Google's free Gmail service:"

Another quote follows: "Google does NOT claim ANY ownership in any of the content, including any text, data, information, images, photographs, music, sound, video, or other material, that you upload, transmit or store in your Gmail account. We will NOT use ANY of your content for any purpose except to provide you with the Service."

The group also has a "Share" button and a "Group Type" section stating "This is an open group. Anyone".

On the left sidebar, there is a search bar and a list of applications: Photos, Groups, Events, Marketplace, Hug Me, Lentohaku, and Dogbook. Below that is a post titled "Rusketu turvallisesti" with a photo of a woman and the text: "Hanki kaunis rusketus ilman vaarallisia UV-säteitä. Kokeile 30 päivää ilmaiseksi!"





## Press release

09/04/2008

### **The Consumer Agency demands that Sampo Bank submit a report on the mess caused by the updating of its systems – Complaint form made to assist customers**

The Consumer Agency has requested that Sampo Bank submit a report on what measures the Bank will take to rectify the problems caused by the updating of its IT system. Customers have been unable to, among other things, use the online bank or their debit and credit cards. There were also delays in payment transfers: customers did not receive their salaries and benefits, and the direct debiting service did not work.

The Consumer Agency emphasises that IT systems are an integral part of the service purchased by a customer. This is why companies are responsible for ensuring that they work. Where banks are concerned this responsibility is especially important, as they are handling their customers' finances.

According to the Consumer Agency, companies should be better prepared to deal with major changes, such as the restructuring of an organisation or IT system. In addition to Sampo Bank, Elisa, Hobby Hall and Vattenfall stumbled with the restructuring of their respective systems. None of these companies had back-up plans in place for any problems encountered.

In problem situations a minimum requirement is that the company have enough staff on hand to respond to customer queries. This ensures that the customer can contact the company easily and with reasonable speed. In addition, there should be a direct line to customer service representatives.

Customer must be kept abreast of the situation as it develops. For example, all information on the company's website should always be up-to-date. Customers also need clear guidelines on what actions to take. For example, they must be provided with information on where to lodge complaints. Overoptimistic promises concerning the correction of a problem should always be avoided.

Sampo Bank must submit its report to the Consumer Agency by 16 April. After this, the Agency will negotiate with the bank regarding the corrective actions it must take.

Because the problem situations encountered by customers are very complex, they have also resulted in a wide range of damages. Customers demanding compensation must file a complaint with Sampo Bank itemising the

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Thank you!

(I would like to thank Juha Laine and Ville Oksanen for  
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