

Criminalizing Fair Use

From my first subscription to Consumer Reports to my frequent visits to www.TomsHardware.com, I have depended upon unbiased reviews of products, hardware and software for both my personal use and my professional recommendations.

There is a lot to dislike about software licensing these days, but unreasonable restrictions on what we used to consider 'fair use' is the most disturbing.

Almost every software product we install displays an "End User Licensing Agreement" or EULA during installation, and requires that you agree to it before installation can continue. It is often a long and ponderous legal document that most of us don't bother reading.

Never mind that these 'contracts' are not available to read until after you have bought the product (even printed EULA's are packaged inside the shrink-wrap). Even if your attorney feels the contract is not enforceable, the legal costs of finding out through a court case against a software giant would prevent most of us from finding out.

One disturbing licensing trend growing in popularity is the restriction against publishing benchmark results without written approval. The software publishers claim it is an effort to make sure test beds are set up fairly - but the result is that it's impossible to get written approval for benchmarks - even when their product performs well!

Benchmarks serve a vital purpose in the market. Years ago, there was a software product that claimed to maximize your computers memory. The claims seemed amazing until benchmarks proved the software did absolutely nothing. The product soon disappeared from the shelves. What would happen to the user community if the software was sold today with restrictions on publishing benchmarks 'without prior written approval'?

More recently, I read of a Navy department assessment of various SQL Database products. Microsoft's SQL Server ranked very well in those assessments and turned out to be the preferred solution - and the Navy wanted to present a white paper on the results. They dutifully requested written approval, but no approvals were forthcoming.

You may think that since the clause in question is not on the printed EULA out of the box, it's not a problem. The reality is that the EULA you agree to during installation is usually very different from the printed version in the box. Even worse, every time you download a software update, you are again forced to agree to yet another EULA with new terms! Here is an excerpt from Microsoft's EULA presented when you install a Security Patch (A security patch which is completely unrelated to the .NET Framework, by the way):

"You may not disclose the results of any benchmark test of the .NET Framework component of the OS Components to any third party without Microsoft's prior written approval."

So, how could any of us expect to get unbiased benchmark results for the software we purchase?

Restricted benchmarks are not the only trend restricting fair use. By clicking that "I Agree" button you may be granting access to your computers to the software publishers. You have probably already granted them the right to install any additional software on your system without warning, and delete or disable files and applications as they see fit. Here's another excerpt from one of those Security Update Patch EULA's (a patch that is necessary because of a blatant security leak in Windows Media Player):

"You agree that in order to protect the integrity of content and software protected by digital rights management ('Secure Content'), Microsoft may provide security related updates to the OS Components that will be automatically downloaded onto your computer. These security related updates may disable your ability to copy and/or play Secure Content and use other software on your computer."

I guess you can choose to leave your system vulnerable to hackers by not installing the security patch, or install the patch and make it vulnerable to the software publisher.

A third restriction seems to be an affront to free speech. Here's a portion of the EULA from Microsoft FrontPage 2002:

"You may not use the software in connection with any site that disparages Microsoft, MSN, MSNBC, Expedia, or their products or services, infringe any intellectual property or other rights of these parties, violate any state federal or international law, or promote racism, hatred or pornography."

I'm no fan of racism, hatred or pornography, but I would apparently not be allowed to write this column at all if I were using Frontpage to write it (Microsoft is NOT the only company with such restrictions). (**Note to Microsoft:** I am not using a Microsoft editor to create this column).

Most CAD packages restrict rights as well. If you purchased 100 AutoCAD seats and later laid off half you staff, could you then sell 50 seats to another company? No. You're stuck with them. Reselling them is illegal, and AutoDesk has

actively watched the Internet for sales by people other than 'Authorized Resellers'. You didn't actually buy the software - only the right to use it for awhile. You can't sell something you don't own.

But what about the files you create with the software? Do you own your word processing files and cad files? Apparently not. After all, you've granted the publisher the right to scan and delete your files if they are in some way disparaging - right? Even if they don't delete the files, how are you going to read or print them when they've disabled or discontinued the software?

These trends in licensing are disturbing. They have become ubiquitous and threaten your ownership of your own data. Although I am against piracy and respect the software publishers rights to protect their intellectual property from pirates, I think recent trends threaten fair use and traditional definitions of ownership. Share important EULA's with your attorney to see what she thinks!