



## **The Consumer Rights Act 2015: New rules for digital content**

**By Lucy McCormick**

The **Consumer Rights Act 2015** comes into force on 1 October 2015. In anticipation, Henderson Chambers is publishing a series of **Alerters** reviewing the key provisions. The series began on 3 September 2015 with an **overview** by **Noel Dilworth**. In this second article, **Lucy McCormick** focuses in on the new consumer rights and remedies in respect of digital content. Later this month, **George Mallet** will write on the reforms to unfair terms. Finally, **Rachel Tandy** will consider the extent to which the new provisions will apply alongside various industry-specific regulations.

### **INTRODUCTION**

1. The bulk of existing consumer rights legislation was enacted before the rise of the internet. Accordingly, it is hardly surprising that it is silent in relation to defective digital products. As the law stands, the legal status of digital content, particularly whether it can amount to "goods" within the meaning of the Sale of Goods Act 1979, is unclear. With the advent of the Consumer Rights Act 2015 this will all change – the Act introduces a new category of sales contract, namely contracts between a trader and consumer in relation to 'digital content' (as distinct from goods or services). The rights and remedies for digital content are found in Part 3 of the Act.

### What is 'digital content'?

2. The Act defines 'digital content' as '*data which are produced and supplied in digital form*'. This encompasses an enormous range of products, including:
  - a. Software
  - b. E-books
  - c. Films
  - d. Computer games
  - e. Mobile phone apps
  - f. 'Virtual items', such as in-game purchases within Farmville or World of Warcraft.
3. At risk of stating the obvious, it follows that goods sold via a website do not automatically become 'digital content' simply because they were purchased online. Nor does a trader supply 'digital content' purely because the trader supplies a service by which digital content reaches the consumer – a mobile phone network or broadband supplier would not, in itself, be caught by these provisions. Conversely, digital services where the consumer does not acquire anything (such as cloud storage) would also not fall within the scope of the new rules.
4. The Act recognises that in reality traders often supply a mixture of goods, services and digital content. For example, a retailer may supply a computer (goods) and anti-virus software (digital content) and install the software on the computer for the client (service). Under the Act, generally in such contracts the 'service' element of the contract attracts 'service' rights and remedies, the 'goods' elements attract 'goods' rights and remedies and the 'digital content' elements attract the 'digital content' rights and remedies. However, where goods 'are an item that includes digital content', the

goods do not comply with contract if the digital content does not conform. In effect, the standards for the digital content conforming to the contract are those for digital content but if the trader is in breach, the remedies will be those for goods.

### **What if the ‘digital content’ is free?**

5. Generally, the Act only applies to paid-for digital content, and not where it is provided for free.
6. Interestingly, the Act acknowledges that ‘payment’ can be a rather fluid concept online. The Act still covers the consumer even if he has not paid directly with money, but instead “*using, by way of payment, any facility for which money has been paid*” – so the use of in-game currency or tokens would be caught. The Act also protects the consumer where digital content is (i) supplied free with goods or services or other digital content for which the consumer pays a price, and (ii) not generally available to consumers unless they have paid a price for it or for goods or services or other digital content.

### **What is the consumer entitled to expect from ‘digital content’?**

7. Under the Consumer Rights Act 2015 certain standards apply to every transaction for the supply of digital content. The digital content must be:
  - a. of satisfactory quality
  - b. fit for a particular purpose
  - c. as described
8. The Act defines quality as satisfactory if it “*meets the standard that a reasonable person would consider satisfactory*”, taking account of (i) any

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description (ii) the price (iii) all other relevant circumstances. Safety, durability, fitness for purpose and freedom from minor defects are all specifically identified as potentially “*aspects of the quality of digital content*”.

9. Of course, for the purposes of the Act quality is objective, rather than subjective. It will not be possible for a consumer to return a DVD simply because he did not like the film. In addition, most software, computer games and apps have minor defects which are corrected over time, so content need not be flawless for a ‘reasonable person’ to consider it ‘satisfactory’.
10. The provision that the goods must be ‘as described’ poses unique challenges when it comes to digital content. If the digital product is of a type which is upgraded over time – such as software or a mobile phone app – then the content must continue to match the original description. Moreover, where the consumer examines a trial version before the contract is made, it is not sufficient that the digital content matches (or is better than) the trial version if the digital content does not also match any description of it given by the trader to the consumer.
11. The provisions in the Act dovetail with the recent Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 – so that much of the information which must be provided under the Regulations automatically becomes incorporated into the contract for digital content. In addition, The Act also imposes an implied term that the trader has the ‘right to supply’ the relevant digital content.

### **What are the remedies for breach?**

12. If the digital content does not conform to the contract, the consumer's primary remedy under the Act is repair or replacement. In limited circumstances, he is entitled to a price reduction instead.
13. If the consumer requires the trader to repair or replace the digital content, the trader must (i) do so within a reasonable time and without significant inconvenience to the consumer and (ii) bear any necessary costs incurred in doing so (including in particular the cost of any labour, materials or postage). However, the consumer cannot require the trader to repair or replace the digital content if that remedy is impossible or disproportionate compared to other remedies. Thus, for example, if a consumer asked a trader to 'repair' a corrupted mp3 music file, the trader would likely be entitled instead to offer the customer the download of a replacement copy.
14. The secondary remedy of a price reduction is only triggered if either:
  - a. the remedies of repair and replacement are not possible; or
  - b. the remedy for either repair or replacement has been requested but this has not been carried out within a reasonable time and without significant inconvenience to the consumer.
15. The amount of the reduction may, where appropriate, be the full amount of the price.
16. Provided there is no 'double recovery', the consumer may still pursue alternative remedies outside the Act.

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