

DMH Stallard guide

Consumer protection for digital content

The Consumer Rights Act 2015 came into force today, 1 October 2015, and aims to consolidate and reform a large part of consumer law in the UK.

Why was reform necessary?

The Consumer Rights Act 2015 seeks to rectify previous inconsistencies and gaps within consumer laws. In particular, it introduces for the first time statutory rights and remedies in relation to consumer contracts for the supply of digital content (found in Part 1 of the Act).

What is the definition of digital content?

The Act defines digital content as “data which are produced and supplied in digital form”. This definition appears to capture most media (including computer games, films and mobile phone apps) and highlights that the media does not have to be supplied on a disc or CD for the definition to apply.

To whom will the changes regarding digital content contracts apply?

The Act will cover consumer contracts between a ‘trader’ and ‘consumer’ in relation to digital content as a separate category of content, distinct from goods and services, with its own statutory rights and remedies.

The Act defines ‘a consumer’ as *“an individual acting for purposes that are wholly or mainly outside that individual’s trade, business, craft or profession”*. This definition of consumer is wider than existing definitions found in UK and EU law as it includes individuals who enter into contracts for a mixture of business and personal reasons.

The Act defines a ‘trader’ as *“a person acting for purposes relating to that person’s trade, business, craft or profession, whether acting personally or through another person acting in the trader’s name or on the trader’s behalf”*.

This definition includes government departments and public sector authorities.

In which circumstances will the supply of digital content be regulated?

The Act regulates the supply of digital content when:

- it is supplied for a price;
- it is supplied free with goods and services which the consumer has paid for, and would not be generally available to consumers otherwise; or
- it is supplied for payment by way of a “facility” for which money was paid (for example, payment by way of a gift voucher).

Compulsory terms to be included in a contract to supply digital content and statutory rights of consumers

1. Digital content must be of satisfactory quality;
2. Digital content must be fit for a particular purpose (if this is made known to the trader);
3. Digital content must be as described;
4. Conformity with other pre-contractual information on digital content (required under the Consumer Contracts Regulations);
5. The trader has the right to supply the digital content to the consumer; and
6. Right to remedy for damage to device or to other digital content.

A term of a contract to supply digital content is not binding on the consumer to the extent it would exclude or restrict the trader’s liability in relation to 1-5 above.

Digital content is non-conforming if it does not meet the requirements stated at 1 to 3 above.

What remedies are available?

The remedies that are available to the consumers differ depending on the consumer's statutory rights:

In relation to 1,2 and 3 above:

- the right to repair (not limited to one repair) or a replacement of the digital content at the trader's costs within a reasonable time and without significant inconvenience to the consumer (unless repair or replacement is impossible or one is disproportionate compared to the other).
- the right to a price reduction on the digital content if repair or replacement is not possible (note that a refund can only be obtained on that part of the digital content that was faulty).

In relation to 4 above:

- the right to recover costs incurred as a result of the breach, up to full price.

In relation to 5 above:

- the right to a refund.

In relation to 6 above:

- the trader must repair the damage (within a reasonable time and without significant inconvenience to the consumer and incur all costs in repairing the damage) or compensate the consumer for the damage with an appropriate payment.

In addition to, or instead of, the statutory remedies above the consumer may also claim damages and specific performance (but no double recovery).

Mixed Contracts

The Act confirms that where a 'mixed contract' occurs, i.e. a disc (goods) containing music (digital content), then the remedies available for the supply of goods, as opposed to the supply of digital content, will apply.

Impact of the Act

Unlike with faulty goods, the consumer does not have the right to reject digital content and claim a full refund. Arguably, the inclusion of such a right would encourage suppliers to ensure digital content is fault free.

In relation to 6 above, unless suppliers of digital content know what devices are being used by their customers it will be difficult for them to assess the possible financial exposure they may face.

Whilst the Act provides clarification on consumer rights relating to the supply of digital content, there has been no similar legislative clarification with the supply of digital content to businesses.

Key contacts



Sarah Cook

Associate

01293 605077

sarah.cook@dmhstallard.com



Tim Ashdown

Head of DR TMT

0207 822 1570

tim.ashdown@dmhstallard.com



Rob Ganpatsingh

Associate

01293 605093

robert.ganpatsingh@dmhstallard.com

London | Gatwick | Guildford | Farnham | Brighton

