



Department
for Business
Innovation & Skills

**Consumer Rights Act:
Digital Content**

Guidance for Business

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Use of this Guidance

This guidance is not intended to cover every situation and you may need to carefully consider how the Act (and any other relevant legislation) apply in your specific circumstances. However, following this guidance should help you to understand how to comply with your obligations under the law.

A. What contracts does this part of the Consumer Rights Act cover?

A trader does not necessarily have to be based in the UK to be affected by the Consumer Rights Act. As a general rule, if the trader markets their digital content to consumers living in the UK then the provisions in the Digital Content Chapter of the Consumer Rights Act could apply to them.

The Consumer Rights Act applies to consumer contracts for the provision of digital content agreed after the Act comes into force on 1 October 2015.

The Consumer Rights Act does not contain all the law on the provision of digital content that you need to know about. There may be rules specific to your sector. There may also be relevant common law as well as other statutes. For help with this see:

<https://www.gov.uk/browse/business/setting-up>.

You should also have regard for the Unfair Terms regime set out in the Consumer Rights Act.¹

B. What is digital content?

1. What is meant by digital content

Digital content is data that are produced and supplied in digital form. Examples of digital content are software, games, apps, ringtones, e-books, online journals and digital media such as music, film and television. Digital content may be supplied in tangible form (for example on a disk), or in intangible form such as downloaded, streamed, or accessed on the web. (Note that for faulty digital content supplied in tangible form, the goods rights and remedies apply, see the associated Goods guidance on Business Companion.) The scope of the digital content category is broad and is not limited to particular means of content transmission or by the way in which digital content is packaged or paid for.

¹ Guidance is available at

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/398206/CMA37con_Unfair_contract_terms_guidance.pdf

As these rights are contractual rights, they apply to digital content that is supplied to a consumer under a contract either as a one-off supply, or as an ongoing contractual relationship such as a subscription package. You are liable for the digital content if you are the **trader** – that is if you supply (sell) the digital content to the consumer. Digital content is commonly supplied to a consumer under a license which gives the consumer rights to use the digital content under specific circumstances (which may be quite limited). Ownership of digital content is rarely the same as for goods. The Digital Content rights apply to digital content supplied under such license agreements as well as “sold” in a traditional sense.

Digital content is **not** online shopping. Online shopping is just one method by which digital content can be obtained, just as it is a method by which goods can be obtained – so a physical book bought online is not digital content, it is goods.

Digital content is **not** services delivered online, such as online banking or the website for online grocery shopping. In the same way as the use of a physical bank is not seen as the supply of goods, the use of an online bank is not the supply of digital content. The exception is where a consumer has separately paid for an online banking app – the app itself would be digital content.

Frequently Asked Questions:

When is digital content “supplied” to the consumer?”

- For the purposes of this Act, the digital content is “supplied” to the consumer at the point it reaches the consumer’s device or an independent trader such as an Internet Service Provider (ISP) or Mobile Network Operator (MNO), who the consumer has contracted with for a service to deliver the digital content to their device, whichever is sooner.
- If you are supplying the consumer with more than one item of digital content under your contract with them (e.g. if you offer a subscription service), each item of digital content is supplied at the point it reaches the consumer’s device or an independent trader within the contractual control of the consumer (e.g. their ISP) whichever is sooner.

Does this apply to digital content, such as software, provided on the cloud?

- The digital content provisions do not apply only to more “traditional” digital products such as apps, music, ringtones, downloaded or uploaded software etc but also extend to cloud computing to the extent that digital content is supplied to the consumer.
- Cloud computing is a type of computing that relies on sharing computing resources rather than having local servers.

- Cloud computing may be complex, where consumers can buy access to software, processors etc, or simple, where a consumer simply buys access to remote storage.
- When a consumer pays for digital content through complex arrangements such as accessing software on the cloud, although the processing may take place remotely, some digital content will generally be supplied to their device (for example, representing the interface with the software, or the result of the remote processing).
- The digital content rights will therefore apply to the digital content that is supplied to the consumer. Other aspects of cloud computing where digital content is not supplied to the consumer, may be considered as a service.
- When a consumer simply buys access to remote storage of their own digital content and the consumer retrieves that digital content, the contract will be one for a service if no new digital content is actually supplied to the consumer (see the associated Services guidance on Business Companion).

Does this apply to social networks such as facebook?

- The rights apply to any digital content supplied to a consumer under a contract within scope. A consumer may have a contract for the use of a social network site. However digital content which is not paid for with money may be out of scope. See below for further details.
- Where a social network site acts as a platform for games – providing games under a contract to their consumers (and for a price), the social network site is acting as a trader supplying digital content (the game) to a consumer, so the social network site will be responsible for ensuring the digital content meets the quality rights.

Is a contract with an Internet Service Provider or a Mobile Network Operator a contract to supply digital content?

- When a consumer contracts with an ISP or MNO they are contracting for a service (access to a network). The ISP or MNO is not therefore liable for content which is faulty, but they would be liable in relation to the general quality of the network service provided (see the associated Services Guidance on Business Companion).
- Where an ISP or MNO separately contracts for the provision of digital content, for example an app for a consumer to monitor their data consumption, this would be a contract to supply digital content.
- Where a consumer contracts for a package deal that includes access to an ISP network, phone, TV and streaming, the consumer has a mixed contract.

If I sell a code to download digital content, am I liable if the digital content is faulty? How does this differ from a gift voucher?

- With a product code, the consumer can only exchange the code for a specified item of digital content. So if you sell a code for some antivirus software, you have a contract with the consumer for the supply of digital content.
- The consumer has a contract with the trader who sold them the code, not the trader who provides the final product. This is the same as for other retail products: if the consumer buys a TV in a high street shop, they have rights against the high street shop not the TV manufacturer. So if you sell a download code to a consumer, the consumer has rights against you and not the manufacturer of the digital content.
- This is different to a gift voucher which can be exchanged for any item of digital content from a particular trader. If you sell this type of gift voucher, the consumer's rights for faulty digital content (or goods) are against the trader who ultimately supplies the digital content or goods (the trader with whom the gift voucher can be exchanged).

2. Free digital content

“Free digital content” is excluded from the statutory rights **except the remedy relating to compensation for damage to the consumer's other digital content or device** (for which liability can be limited, as long as the limitations are fair), **or rights relating to unfair terms**². Other legislation also applies to contracts for the supply of digital content, for example, the Consumer Contract Regulations and the Consumer Protection from Unfair Trading Regulations.

For all the digital content rights to apply, there needs to be a contract between you and the consumer. In England, Wales and Northern Ireland, for there to be a contract, the consumer has to give you something in return for the digital content (known as “consideration”). This is usually money, but could be something else of value such as personal information. In Scots law, there is no requirement for consideration but the parties' agreement must show an intention to be legally bound. The digital content statutory rights apply where the digital content has been paid for with money, or is associated with any paid for goods, digital content or services and not generally available to consumers for free, or is paid for with a facility previously paid for with money (for example a virtual currency). “Free digital content” is digital content that the consumer does not pay money for, which includes digital content supplied in exchange for personal data. If you get revenue from the supply of digital content through advertising or through other means such as the legal use of consumer's data, but the consumer does not pay money for it, the digital content is free to the consumer and so the quality rights **do not apply**.

² Guidance is available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/398206/CMA37con_Unfair_contract_terms_guidance.pdf

If the consumer does not pay for specific digital content, but you supply that digital content under the same contract as the one under which you supply the consumer with other, paid-for, digital content, goods or services, then the specific digital content is not free to the consumer and so the quality rights **do apply**. The exception is when the digital content is generally available elsewhere for free.

Example 1

“A consumer subscribes to a magazine, which comes weekly with a free DVD – at the end of the subscription, the consumer will have a “box set” of DVDs.”

Although the DVDs (the digital content) are labelled as a “free gift” the consumer is really paying to collect the DVDs as well as the magazines. Both are supplied under the same contract and a price is paid by the consumer, so the quality rights will apply to the digital content. For faulty digital content supplied in tangible form, the goods rights will apply.

Example 2

“A charity has a free computer game aimed at educating children about road safety. In order to play the game, the parent has to first register with the website which involves giving the charity some of their personal details”.

The game is supplied for free as no money is exchanged. The giving of personal data does not constitute payment for the purposes of the digital content rights in the Consumer Rights Act (although if there is a contract between the charity and the consumer, they will still have to comply with the Consumer Contract Regulations and Part 2 of the Act, Unfair Terms).

Example 3

“A consumer downloads a free game (for example, a virtual world) and builds up some virtual currency in the game through their normal game play. They then buy some additional virtual currency in order to make an in-app purchase (for example, an item for their world). The item is faulty and doesn’t appear in the consumer’s world.”

As the game is free, you do not have to provide a remedy to the consumer for any faults in the game. But once the consumer has paid a price for some content, then if the consumer can show that that content is faulty (that is, does not meet the quality rights), you will be liable for a remedy. You are only liable for faults affecting the chargeable elements of the game.

Frequently Asked Questions:

I supply a free game where in-app purchases are made with a virtual currency. The consumer can either earn the virtual currency through game play or they can buy extra virtual currency. Will I have to keep an audit trail of what in app-purchases are made with what portion of virtual currency?

- You are not required to keep an audit trail, although you could develop one if you think it would be helpful to you.
- If it is not transparent to the consumer which digital content is bought with the virtual currency that was paid for with money (as opposed to earned through gameplay), once the consumer has injected some money into the game (paying for some virtual currency) then the quality rights will apply to their in-app purchases. However the satisfactory quality right is flexible and takes into account (among other things) the price paid for the digital content.

3. Digital content in goods

If you supply digital content in tangible form e.g. on a disk or pre-loaded onto a device such as a phone or tablet, then you are still supplying digital content. The digital content quality rights will therefore apply to the digital content. However, since the digital content is part of the goods, then if it does not meet the quality rights, the goods remedies will apply (see the associated Goods guidance on Business Companion).

Example 1

“A consumer buys a CD in a shop. When they get the CD home, the disk appears not to be scratched or cracked, but the music jumps in a few places, and it is not of satisfactory quality.”

As the music was sold in tangible form (on a disk), the goods remedies apply. So the consumer would be entitled to return the disk within 30 days to get a full refund. The consumer would also be entitled to other goods remedies such as a limit of one repair or replacement and the final right to reject.

Frequently Asked Questions:

Does this mean that if I sell tangible digital content (e.g. on a disk) then I have to provide different remedies to a trader who sells the same digital content as a download?

- Yes. The quality of the digital content will be judged against the same quality rights. But if the digital content is faulty, then if it is supplied on a disk, the goods

will be faulty and so the goods remedies will apply. This includes the short term right to reject and strict limits on the number of repairs/replacements.

C. Requirements on the Trader

1. What information must I provide to the consumer before they agree to the contract?

The Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (SI2013/3134)³ require you to give or make available certain information to the consumer before a contract is made. The information is summarised below – the Regulations contain further details of how the information must be provided.

If you are a trader selling goods, services or digital content, these Regulations will apply to you – although certain trader-to-consumer contracts are excluded from the regulations or the information requirements. The Regulations set these out. Unlike the digital content rights in the Consumer Rights Act, these Regulations also apply to free digital content that is supplied under contract.

The information requirements for on-premises transactions (in a shop, for example) are less extensive than those for distance and off-premises (such as online or phone sales) transactions. The Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 and the accompanying implementing guidance⁴ set out the full definitions of distance and off-premises contracts. In the guidance, section D deals with the application of the regulations to distance sellers and section E deals with particular provisions for sellers of downloaded digital content.

The Regulations also require you to give confirmation to the consumer of off-premises and distance contracts on a durable medium (for off-premises contracts, the confirmation should be given on paper unless the consumer agrees to another durable medium, or a copy of the signed contract can be given). A durable medium allows the consumer to access information directed personally to them, in an unchangeable format for as long as they might reasonably need it.

³ The Regulations are available in PDF format at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/265898/consumer-contracts-information-cancellation-and-additional-payments-regulations-2013.pdf

The Implementing Guidance for the regulations is available in PDF format at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/310044/bis-13-1368-consumer-contracts-information-cancellation-and-additional-payments-regulations-guidance.pdf

⁴ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/310044/bis-13-1368-consumer-contracts-information-cancellation-and-additional-payments-regulations-guidance.pdf

a. On-premises

The pre-contractual information required for on-premises contracts is found in Schedule 1 to the Regulations. **This information is only required if it is not already apparent from the context** (e.g. there is no need to provide your address if the sale takes place in your shop). The information required is as follows:

- a. the main characteristics of the goods or services, to the extent appropriate to the medium of communication and to the goods or services;
- b. your identity (such as your trading name), the geographical address at which you are established and your telephone number;
- c. the total price of the goods or services inclusive of taxes, or where the nature of the digital content is such that the price cannot reasonably be calculated in advance, the manner in which the price is to be calculated;
- d. where applicable, all additional delivery charges or, where those charges cannot reasonably be calculated in advance, the fact that such additional charges may be payable;
- e. where applicable, the arrangements for payment, delivery, performance, and the time by which you undertake to deliver the goods or to perform the service;
- f. where applicable, your complaint handling policy;
- g. in the case of a sales contract, a reminder that you are under a legal duty to supply goods that are in conformity with the contract;
- h. where applicable, the existence and the conditions of after-sales services and commercial guarantees;
- i. the duration of the contract, where applicable, or, if the contract is of indeterminate duration or is to be extended automatically, the conditions for terminating the contract;
- j. the functionality, including applicable technical protection measures, of digital content;
- k. any relevant compatibility of digital content with hardware and software that you are aware of or can reasonably be expected to have been aware of.

b. Distance and Off-premises

The pre-contractual information required for off-premises and distance contracts is found in Schedule 2 to the Regulations. For off-premises contracts this information must be given to the consumer on paper or (if the consumer agrees) another durable medium. For distance contracts, the information must be given or made available to the consumer in a clear and comprehensible manner and in a way appropriate to the

type of distance communication used. For more detail on the way in which the information can be provided, see the (cross reference to CCR guidance). Where a right to cancel exists, you are also required to provide the cancellation form set out in Schedule 3 to the Regulations.

The required information is as follows:

- a. the main characteristics of the goods or services, to the extent appropriate to the medium of communication and to the goods or services;
- b. your identity (such as your trading name);
- c. the geographical address at which you are established and, where available, your telephone number, fax number and e-mail address, to enable the consumer to contact you quickly and communicate efficiently;
- d. where you are acting on behalf of another trader, the geographical address and identity of that other trader;
- e. if different from the address provided in accordance with paragraph (c), the geographical address of your place of business, and, where you act on behalf of another trader, the geographical address of the place of business of that other trader, where the consumer can address any complaints;
- f. the total price of the goods or services inclusive of taxes, or where the nature of the goods or services is such that the price cannot reasonably be calculated in advance, the manner in which the price is to be calculated,
- g. where applicable, all additional delivery charges and any other costs or, where those charges cannot reasonably be calculated in advance, the fact that such additional charges may be payable;
- h. in the case of a contract of indeterminate duration or a contract containing a subscription, the total costs per billing period or (where such contracts are charged at a fixed rate) the total monthly costs;
- i. the cost of using the means of distance communication for the conclusion of the contract where that cost is calculated other than at the basic rate;
- j. the arrangements for payment, delivery, performance, and the time by which you undertake to deliver the goods or to perform the services;
- k. where applicable, your complaint handling policy;
- l. where a right to cancel exists, the conditions, time limit and procedures for exercising that right;
- m. where applicable, that the consumer will have to bear the cost of returning any goods in case of cancellation and, for distance contracts, if the goods,

by their nature, cannot normally be returned by post, the cost of returning the goods;

- n. that, if the consumer exercises the right to cancel after having made a request, the consumer is to be liable to pay your reasonable costs;
- o. where there is no right to cancel or the right to cancel may be lost, the information that the consumer will not benefit from a right to cancel, or the circumstances under which the consumer loses the right to cancel;
- p. in the case of a sales contract, a reminder of the existence of a legal guarantee of conformity for goods;
- q. where applicable, the existence and the conditions of after-sale customer assistance, aftersales services and commercial guarantees;
- r. the existence of relevant codes of conduct, and how copies of them can be obtained, where applicable;
- s. the duration of the contract, where applicable, or, if the contract is of indeterminate duration or is to be extended automatically, the conditions for terminating the contract;
- t. where applicable, the minimum duration of the consumer's obligations under the contract;
- u. where applicable, the existence and the conditions of deposits or other financial guarantees to be paid or provided by the consumer at the request of the trader;
- v. the functionality, including applicable technical protection measures, of digital content;
- w. any relevant compatibility of digital content with hardware and software that you are aware of or can reasonably be expected to have been aware of;
- x. Where applicable, the possibility of having recourse to an out-of-court complaint and redress mechanism, to which you are subject, and the methods or having access to it.

c. Information about Alternative Dispute Resolution

Under the Alternative Dispute Resolution Directive, which is due to be implemented by July 2015, if you are obliged by law or through membership of a particular trade association to use a particular ADR provider, you must provide information about that certified ADR provider on your website and, if applicable, in the terms and conditions of the contract. In cases where there is no such obligation to use ADR, if a consumer raises a complaint with you and you are unable to resolve it with them

directly, you must provide information about who the relevant ADR provider(s) is and explain whether you are prepared to make use of the relevant provider.

Under the Online Dispute Resolution Regulations, if you sell digital content online, from January 2016 you must provide a link to the Online Dispute Resolution platform on your website. Further information must be provided about the ODR platform if your business is obliged or committed to using ADR. All websites which act as a platform for businesses to sell their goods, digital content and/or services must also provide a link to the ODR platform.

2. 14 day right to cancel for digital content bought at a distance or off-premises

If you sell digital content to a consumer at a distance (online, over the phone, etc.) or off-premises (see above for further information on what distance and off-premises contracts are) then the consumer has a 14 day period in which they may change their mind and cancel the contract. However, this right to cancel does not apply to sealed audio, video and software products once unsealed, once the digital content has begun to be streamed or downloaded, or the performance of the digital content has started. In this case the trader must notify the consumer that by commencing the streaming or downloading, they are waiving their right to withdraw, and the consumer must acknowledge this⁵.

Note that this right for the consumer to return digital content within 14 days is different and separate to their rights if the digital content is found to be faulty. The consumer may use this 14 day cooling off period to cancel without giving a reason.

Example 1

“A consumer pays to download a game from a website. When they start to play it, the game is clearly faulty”

When the consumer downloaded the game, they waived their right to withdraw from the sale, so the consumer cannot return the game for a refund. However, as the game is faulty, they can claim for a repair or replacement of the games under their right to the digital content being of satisfactory quality.

⁵ Guidance is available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/310044/bis-13-1368-consumer-contracts-information-cancellation-and-additional-payments-regulations-guidance.pdf

Example 2

“A consumer streams a movie. Halfway through they decide that the movie is boring and that they don’t want to watch the rest of it.”

When the consumer began streaming the movie, they waived their right to withdraw from the sale, so the consumer cannot return the movie for a refund. The quality rights do not cover subjective enjoyment of digital content so just as if the consumer watched the movie in a cinema but didn’t like it, the consumer is not entitled to a remedy.

Example 3

“A consumer pays to download a TV series from a website, but hasn’t begun the downloading. 3 days later a friend gives them the same TV series as a DVD box set.”

As the consumer bought the TV series at a distance (from a website) but had not begun the downloading, and they are within the 14 day withdrawal period, they are entitled to withdraw from the distance sale and have their money back.

Frequently Asked Questions:

If, under a subscription contract, each time digital content is delivered to the consumer, the Consumer Rights Act views that as a supply of digital content (cross reference), does the consumer have the opportunity to withdraw from the subscription following each supply of digital content?

- No. The cancellation right under the Consumer Contract Regulations ends at the end of 14 days after the day on which the contract is entered into, not by reference to when the digital content is supplied.

3. Digital content to be of satisfactory quality

The digital content that you supply to the consumer under the contract must be of satisfactory quality. The test of whether or not the quality of the digital content is satisfactory is determined by what a reasonable person would think is satisfactory, taking into consideration all relevant circumstances. These include, **but are not limited to**:

- any description of the digital content
- the price of the digital content and

- any public statements made about the specific characteristics of the digital content by the trader or producer or their representatives, (such as statements made in advertisements or in an online description) – see below for explanation of when public statements might not be relevant.

Example 1

“A consumer buys a 69p app-based “space-invader” type game. The game is as it was described, but the quality of the graphics is poor.”

“A consumer buys a £30 “space-invader” type computer game. The game is as it was described, but the quality of the graphics is poor.”

Price is relevant to the standard a reasonable person would consider satisfactory: the higher the price, the higher standard that would be considered satisfactory. A reasonable person may consider that the higher priced computer game would have higher quality graphics than a low-priced app-based game. However, it is unlikely that a reasonable person would consider even a 69p app satisfactory if it did not properly perform even its basic function.

The quality of the digital content will always include its state and condition. Other aspects of quality that may be relevant to determining whether the digital content is satisfactory include, but are not limited to:

- fitness for all the purposes for which the type of digital content in question is usually supplied
- freedom from minor defects
- safety (for example, how secure the digital content is)
- durability (for example, the lifespan of the digital content).

A reasonable person’s expectations as to quality are likely to vary according to the nature of the content and some of the aspects of quality may not be relevant in a particular case. The quality rights do not extend to subjective judgements of the quality of the digital content such as its artistic merit.

Example 2

“A consumer buys a computer game which contains a minor defect that does not affect gameplay but very occasionally causes the background to momentarily freeze.”

A reasonable consumer would expect there to be some minor defects in complex products such as games or software, so such a defect would not necessarily mean

that the game was faulty such that it breached the satisfactory quality right. However in the context of digital content consumer expectations are such that faults in digital content will often be repaired through an update, even though you may not be obliged to do so.

Example 3

“A consumer buys an MP3 file which contains a defect that causes the music to “jump” when it gets to a particular point.”

A reasonable consumer would expect some types of digital content, such as MP3 files, to be free from minor defects, so in contrast, this defect may mean that the MP3 file is faulty - that is, it would not be considered of satisfactory quality if the music jumps in this way.

a. Public Statements about Quality

Public statements are not relevant if you were not and could not have reasonably been aware of the statement or if the statement was publicly withdrawn or publicly corrected before the contract was made. The statement is also not relevant if the consumer’s decision to contract for the digital content could not have been influenced by it.

For example, if an online description that was only published in a foreign language made claims about the digital content, and you did not see and could not have known about this description, the consumer could not require a remedy for the digital content not meeting what was said in that advert. Alternatively, if you were aware of a public statement, but before the consumer bought the digital content the statement had been publicly withdrawn because the claims were false, again, the consumer could not claim that the digital content was in breach of this right relying on that public statement.

b. Defects Brought to the Consumer’s Attention

If there is an existing fault with the digital content and that fault is specifically brought to the attention of the consumer before they buy the content, the consumer cannot then claim the digital content is of unsatisfactory quality on the basis of that fault. This also applies if the consumer examines the digital content before they buy the content and the fault ought to be revealed by the examination. In addition, this applies if the digital content was sold on the basis of a trial version and a reasonable examination of the trial version would have shown the fault. However, general statements to the effect that the digital content will not be fault free would not count as drawing a specific defect to the consumer’s attention. Such terms would be subject to Part 2 of the Act (Unfair Terms).

If a **different** fault is found to the one specifically brought to the consumer's attention, this may mean the digital content is in breach of the satisfactory quality right, if the new fault means the digital content does not meet the standards that a reasonable person would consider as satisfactory.

Frequently Asked Questions:

Who is the 'reasonable person' who determines the standard of satisfactory quality?

- This is simply a way of saying that the digital content must meet the quality that a reasonable person in the buyer's position would think is satisfactory. It does not take account of unreasonable expectations.
- In the goods context, the reasonable person has been construed by the courts as one who is in the position of the buyer with his knowledge, rather than a reasonable third party observer not acquainted with the transaction and the background.

Does this mean that minor defects in digital content will mean that it is faulty?

- Not necessarily. It will depend on the circumstances, such as, the type of digital content, and the price paid for the digital content.
- Major defects that prevent the digital content from functioning in the way it is intended will mean that the digital content is unlikely to be considered of satisfactory quality and therefore will count as faulty. For complex digital content a major defect may significantly impair the functioning of a feature, or features, which the content is described as having.
- Minor defects will only count as a fault where a reasonable person would expect the digital content to be free of minor defects, such as MP3 and MP4 files.
- A reasonable person will expect minor defects in complex digital content such as software and games and therefore these are unlikely to breach the satisfactory quality standard at the time of purchase.
- Although you may not be obliged to provide a repair under the Act, as some forms of digital content are frequently updated, it may be considered good business practice to repair such minor defects through an update.

How can I be responsible for the quality of digital content that I didn't produce?

- In the same way that shopkeepers are liable for the quality of the goods sold in their shops, a supplier of digital content (such as an online retailer or a high street shop) is liable for the quality of the digital content even if they did not produce it.

- The consumer has the right to go back to the person who they paid for the digital content to get a remedy.
- If you have had to compensate the consumer for faulty digital content that you did not produce, you will have to go back to the supplier of that digital content for redress (if available).

Am I liable if my digital content contains some third party software that is later found to have an inherent security weakness?

- To be of satisfactory quality, digital content must meet the standards a reasonable person would consider satisfactory taking into account all relevant circumstances.
- The security of digital content is a relevant circumstance that could form part of the judgement of whether digital content is of satisfactory quality.
- If the security weakness had already been identified, the fact that you did not know about the security weakness when you supplied the digital content would not affect the question of whether the digital content is deemed to be of satisfactory quality. However if the security weakness had not been identified, it may not be a reasonable expectation that the digital content should be secure with respect to that weakness.
- The first tier remedy for faulty digital content would be a repair or a replacement, so once a consumer noted a vulnerability, you would be required to offer a repair (an update) or replacement that would fix the vulnerability.

Am I liable if a fault occurs because of an unforeseen incompatibility with something on the consumer's device?

- The Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 require that you should give the consumer information about interoperability (compatibility) of digital content with hardware and software that you are aware of or can reasonably be expected to be aware of prior to sale. This description of the digital content will be a relevant factor in assessing the quality of the digital content.
- You are not responsible for quality issues that are the fault of a trader under the control of the consumer, such as their ISP, mobile network operator or cable provider, or due to problems with the consumer's device.
- This may include factors such as the consumer not having the appropriate system requirements, or incompatibilities that you could not have foreseen.

4. Digital content to be fit for a particular purpose

If a consumer makes known to you – by saying so or implying - that they intend to use the digital content for a particular purpose before the contract is made, unless you can show that the consumer did not rely on your judgement, or it is unreasonable for them to rely on your judgement, then the digital content must function in that capacity. Consequently, you should let the consumer know that the content cannot be used for this purpose before the consumer enters into a contract. If you do not, the digital content should function in the way that the consumer intends.

If you have advised the consumer that the digital content sold is not fit for the purposes stated by the consumer, or if the consumer has emailed you the stated purpose for buying the digital content and then downloaded it without giving you the chance to reply, it is unlikely that it would be reasonable for the consumer in either context to claim that they had relied upon your judgement in these circumstances. In these scenarios, it is unlikely that you would be liable to provide a remedy to the consumer if the digital content did not function in the way that they intend.

Example 1

“A consumer wants to use a game aimed at teaching reading skills at Key Stage 1 (5-7 years), to help their pre-school child learn to read. This is not the usual purpose of this game and the game does not say that it is suitable for this purpose. The consumer goes into a shop and asks the shopkeeper if it is suitable for this purpose and the shopkeeper says that it will be. The game turns out to be too advanced for a pre-school child and the child is unable to play with it.”

The consumer has made the trader aware of their intentions for the use of the game, and the trader has advised them that it is suitable for this purpose, even though it is not. The right to fit for a particular purpose has been breached and the consumer is entitled to a remedy.

Example 2

“A consumer wants to use a game aimed at teaching reading skills at Key Stage 1 (5-7 years), to help their pre-school child learn to read. This is not the usual purpose of this game and the game does not say that it is suitable for this purpose. The consumer emails the trader to ask if it is suitable and then immediately downloads the game. The game turns out to be too advanced for a pre-school child and the child is unable to play with it.”

Although the consumer did email the trader with their intentions for the use of the game, the trader had no opportunity to respond. The trader may in these circumstances be able to show that the consumer did not rely on their judgement when they made the purchase or, if they did, it was unreasonable to do so. If the trader can show this, this right will not be breached.

How can digital content be fit for a particular purpose? Consumer digital content is very rarely tailored to a specific purpose.

- This is not only about bespoke digital content which is designed to fulfil a consumer's specific requirements.
- Fit for a particular purpose is when a consumer makes known to you that they want to use the digital content for a specific purpose, which may be an unusual purpose.
- In these cases, where you are made aware of the consumer's intentions, the consumer should be able to depend on this quality right unless you can show that they did not rely on, or it was not appropriate for them to rely on your skill and judgement.

Digital content transactions are often instantaneous transactions conducted online. Am I liable if the consumer sends me an email about their intended use of the digital content, and then downloads it without waiting for a reply?

- The consumer has to show that they made known their intended purpose to you
- If they do not wait for a reply, then it is open to you to show that the consumer did not rely on your skill and judgment or it is unreasonable for them to do so.
- In these circumstances, it may be that the consumer did not make known the purpose to you or it may be that you will be able to show that the consumer did not rely, or it was unreasonable for them to rely on your skill and judgement in selecting the digital content because you did not respond to their email.

5. Digital content to be as described

The digital content that you supply to the consumer must match the description that you give. Where there is a trial version of the digital content available and the consumer examines it before entering into a contract, it is not enough that the digital content matches or is better than the trial version, it must also match the description (if they differ).

This does not mean that the description has to list every single function of the digital content but where there is a function listed in the description, the digital content must include that function. That is, it must **at least** match the description. But if a term of the contract states that you will provide software updates to the consumer, this clause does not prevent you from adding or enhancing features through a software update, although such a term must still be fair, in accordance with Part 2 of the Act, and comply with other relevant legislation such as data protection legislation and the Consumer Protection from Unfair Trading Regulations (2008). In this way, digital content can improve and evolve over time.

Information about the main characteristics, functionality and compatibility of the digital content forms part of the contract. This is information that you are required to give to the consumer before the contract is concluded. (The obligation is set out in the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (SI2013/3134)⁶) Consequently, the digital content must match the information you have provided in terms of main characteristics, functionality and compatibility as well as any other description you may have given of it.

If you want to change the pre-contractual information provided about the digital content before entering into the contract or later, for example, so you can remove a feature of the digital content that consumers no longer use, you must get the express agreement of the consumer. If you do not, you will be in breach of this right unless the information itself reflects the fact that the particular potential changes envisaged may be made (or, in the case of information you provided voluntarily, you otherwise qualified the information the same occasion as providing it).

Example 1

“A consumer pays to download a TV series which is described as containing all 13 episodes. When they download it they find that the final episode is missing.”

The digital content is not as described. The consumer would be entitled to a repair or replacement of the digital content, to bring it in line with the description. In this instance, an appropriate remedy may be a download of the final episode.

Frequently Asked Questions:

Does this stop me from changing the digital content through updates?

- As long as you have stated in the contract that you will provide software updates, this right does not prevent you from doing so. But the digital content must continue to still at least match the description unless you have expressly agreed a change to the description with the consumer. You can, however, add new features or enhance existing features. See the section on updates for more details. You

⁶ The Regulations are available in PDF format at

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/265898/consumer-contracts-information-cancellation-and-additional-payments-regulations-2013.pdf

The Implementing Guidance for the regulations is available in PDF format at

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/310044/bis-13-1368-consumer-contracts-information-cancellation-and-additional-payments-regulations-guidance.pdf

should also look at the guidance on Part 2 of the Act (unfair terms), and the relevant CMA guidance⁷ which sets out which terms can be reviewed for unfairness. If terms are unfair, they are not binding on the consumer.

How do I get “consent” from a consumer to change the description of the digital content?

- You may get that permission up front from the consumer if the contract states what is likely to vary and how, as long as that contract term is judged as fair under Part 2 of the Act.
- You cannot agree a change which would deprive the consumer of the digital content rights.
- You can also get express consent to changes post contract if the change is not adequately covered in the contract. For example, in the form of a statement alongside an agreement to download the relevant update.
- See the section on changes to the digital content contract and the CMA guidance for further information⁸.

6. Digital content supplied across a network

Digital content sold in intangible form is almost always supplied across a network of some kind (the Internet, mobile network, cable network etc). The consumer will be able to claim a remedy from you if the digital content is faulty (that is, not of satisfactory quality, not fit for a particular purpose or not as described), even if the original digital content file was not faulty and the problem occurs during the transmission of the digital content across the network. However, if the problem is due to a fault with a service provided by another trader with whom the consumer has a contractual relationship (e.g. their ISP or mobile network operator), or the consumer’s device, and the digital content is not faulty, then you are not liable. The ISP or mobile network operator’s obligation to provide their service with reasonable care and skill is set out in the guidance on services.

Some types of digital content may be sold on a disk but then accessed in an online environment for their full functionality (e.g. a massively multi-user online game, or MMO). Other types of digital content are accessed entirely online such as an online newspaper subscription. In these cases you must provide the online aspect of the digital content for the time period stated in the contract, or if there is none, for a reasonable period of time. The digital content must also meet the quality standards (satisfactory quality, fit for a particular purpose, as described) for that period of time.

⁷ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284426/oft311.pdf

⁸ Ibid

Example 1

“A consumer pays to download a film on to their tablet computer. There is no problem with the consumer’s device or their broadband connection, but only half of the film plays properly.”

As the problem is not with the consumer’s device or broadband connection, you would be liable to provide a remedy (which could be a repeat download – as long as that download is successful), since the digital content is not of satisfactory quality, even though the file may have been complete (and of satisfactory quality) when it left your servers. If the fault occurred with a third party intermediary, you may have the option to seek compensation from them.

Example 2

“A consumer pays for a MMO game, but when they play it in the online mode, the server is completely unreliable and keeps crashing. As a result their experience of the game does not meet their expectations.”

As the problem is not with the consumer’s device or broadband connection, the consumer would be entitled to a remedy from you. If another trader is responsible for the servers on which the game is played, you may have the option to seek compensation from them if your contract with them says you can. If the consumer has another contract with the trader who provides the server, perhaps through a monthly subscription, they would also have the option of claiming a remedy from that trader under the services provisions, for example if the service is not provided with reasonable care and skill, although they could not recover twice for the same loss.

Example 3

“A consumer pays to download a game to their PC. They do not have sufficient memory on their PC for the game and the download fails.”

As long as the game was properly described so that the consumer could see the memory requirements of the game, the problem is with the consumer’s device, so you would not be liable to provide a remedy. You may, however, choose to do so as a matter of goodwill to the consumer, for example, help them clear some memory space.

Example 4

“A consumer pays to stream some TV content to their PC. They do not have sufficient bandwidth for the streaming, and the streaming fails.”

As long as the bandwidth requirements for the streaming were properly described, the problem is with the consumer’s bandwidth, so you would not be liable to provide a remedy (although you may choose to do so). The consumer may be entitled to some compensation from their broadband provider under the service provisions, depending on how the bandwidth was described to the consumer and whether the consumer based their decision on choosing their broadband provider on the basis of that information (See the associated Services guidance on Business Companion).

Frequently Asked Questions:**Do I have to investigate the cause of a fault when the digital content is supplied across a network?**

- Whilst you may wish to do so, if the consumer claims that the digital content is faulty, it is for them to prove where the fault arose (i.e. that it was not with their ISP or MNO, bandwidth or device).
- There is no legal requirement for you to investigate the source or cause of problems if the consumer makes a complaint but has not got the evidence to back up their claim.
- However the Government encourages traders to be as helpful as possible in helping consumers identify the cause of a fault in cases where the trader has access to information that the consumer does not (for example, if the trader knows that there is a fault on their server).

Will I have to provide a remedy for a fault caused by a third party?

- You do not have to provide a remedy for a fault caused by a problem that is in the control of the consumer, such as their device, or their bandwidth, or with the service provided by the ISP or mobile network operator (in which case any liability would lie with the ISP or network provider in relation to the network service).
- If a fault occurs during the transmission process by intermediaries that you have chosen or offered, the consumer may not have any way to claim for a remedy from the intermediary.
- In these cases, if the digital content does not meet the quality rights, you will be liable for a remedy to the consumer. You may then be able to claim from the third party trader (the intermediary).

What is a reasonable time for the provision of online access?

- If you specify a time period in the contract for the digital content, then the online access must be provided for that length of time.
- If no time period is specified, then what is reasonable will depend on the facts of the case (for example, it may depend on how much the consumer paid for the digital content, what is a normal length of time for online access for that type of digital content to be provided etc.).

Am I expected to provide online access to the digital content forever?

- No. You have to provide online access for the time specified in the contract or if not specified, for a reasonable period of time (see above).

7. Updates

Many updates are to the consumer's benefit and most consumers will want updates that enhance or improve features. If you are going to provide updates, then you should make that clear in the contract.

However, a contract term allowing you to provide updates may also be assessable for fairness under Part 2 of the Act (Unfair Terms). Schedule 2 to the Act illustrates the meaning of "unfair" by providing a non-exhaustive list of terms that may be regarded as unfair and included amongst these are, for example, terms that have the object or effect of allowing you (the trader) to alter unilaterally without valid reason any characteristics of the digital content to be provided. If a term is judged unfair, it is not binding on the consumer.

Following any update, the digital content must still meet the quality rights, (cross reference) which are:

- Digital content being of satisfactory quality
- Digital content being fit for a particular purpose
- Digital content being as described

Features can be added to digital content, or enhanced, as long as the original description is still met and the digital content conforms to the pre-contractual information provided by the trader. New features will not form part of the description of the digital content. Under the Unfair Terms provisions, terms which allow you to unilaterally vary the characteristics of the digital content may be unenforceable unless you have a valid reason to make the change. For example, enhancing a product or protecting against a security threat may be judged as a valid reason for changing the characteristics whereas introducing a feature which collects the details

of the consumer's contacts without their consent would probably not be. There are other examples of possible unfair terms set out in Schedule 2 to the Act.

The time limit for a consumer to make a claim relating to an update is within 6 years of when the digital content was first supplied – not within 6 years of the update being supplied (in Scotland this period is 5 years), unless the update is provided under a separate contract that falls within the scope of the quality rights provided in the Act. Note that for contracts for the ongoing supply of digital content (e.g. subscription contracts), it is likely that each item of digital content will be separately supplied.

Frequently Asked Questions:

Does an update count as a repair?

- A repair is something that you provide in response to a consumer identifying a fault, that is, a breach of the quality rights. Under the Act, if a consumer shows that the quality rights are not complied with, they can ask you to repair the digital content so that it does meet the quality rights. If you issue a general update and it does ensure that the digital content meets the quality rights, then this will be enough to count as a repair. A repair does not have to be bespoke for an individual consumer – it just has to rectify the fault (that is, make it comply with the quality rights).
- Conversely, just because you are issuing a general update, it does not necessarily mean that the quality rights have been breached.

What happens if the consumer's device cannot support an upgrade?

- A variety of factors would be relevant in this scenario, for example, the description of the digital content in terms of functionality and interoperability, and whether the upgrade met that description (if it did not, the supplier of the digital content would be liable for any remedy), and the extent to which the consumer's device met that description (if it did not, this would be the consumer's responsibility),
- Other factors may include whether the description of the digital content complied with the Consumer Contract Regulations.

How can I offer a subscription product which changes over time?

- The Consumer Contracts (Information and Cancellation) Regulations 2013 require that you state the main characteristics of the digital content prior to entering into a contract to supply the digital content to the consumer. This information forms part of the contract.
- To a large extent, you have control over how the main characteristics of the digital content are described. (For example, you could state that the digital content

package includes “version X” of a word processor, or you could state that it includes the “latest version” of a word processor).

- However contract terms that state that the digital content will change post-contract may be assessable for fairness under part 2 of the Bill.
- Of course, it is always open to you to expressly agree a change to the pre-contractual information with the consumer, or to agree a new contract with the consumer if that is agreeable to the consumer.
- See the FAQ above “Does this apply to digital content, such as software, provided on the cloud?”, for the application of the quality rights to digital content on the cloud.

Am I prevented from making any changes to the digital content because it still has to be as described – e.g. does this mean I could not change the way a feature works to make it use less processing power?

- The digital content should always match the description that you gave of it (unless the description allowed for variation) – it should always contain the features that it was described as having or the consumer would be entitled to a remedy.
- Whether or not this right is breached following an update will largely depend on how you described the digital content in the first place. For example, if it was described as having a spellchecker of a particular type or function, then it should always have a spellchecker that meets those specifications unless the consumer expressly agrees otherwise. However if you do not describe how the spellchecker works, then it would not matter what the underlying processes were, as long as there was still a spellchecker.
- Other quality rights (satisfactory quality and fitness for a particular purpose) also have to be met.

What happens if there is a security threat and I have to remove a feature for safety reasons?

- Under this section, the digital content should always match the description that you gave of it (unless the description allowed for variation) – it should always contain the features that it was described as having unless the consumer expressly agrees otherwise, or the consumer would be entitled to a remedy.
- However under the Act the remedy would be a repair or a replacement in the first instance – and that is what most consumers will want. A “repair” means making sure that the digital content meets the quality rights. This means that if you were working to make the feature secure and then to re-instate it, or to provide a security patch, you would be providing that repair.

- Repairs and replacements have to be conducted within a reasonable time and without significant inconvenience to the consumer.
- Instead of (or in some cases in addition to) asking for a repair or a replacement, a consumer could seek common law (and other) remedies of damages, specific performance or, in Scotland, specific implement but not so as to recover twice for the same loss.

What happens if I decide to remove a feature because not many consumers use it and it is taking too much processing power?

- Under this section the digital content should always match the description that you gave of it (unless the description allowed for variation) – it should always contain the features that it was described as having or the consumer would be entitled to a remedy.
- However under the Act, the remedy would be a repair or a replacement in the first instance. If you have taken a commercial decision not to re-instate the feature, and cannot provide a repair or replacement of the digital content, you must provide the consumer with some financial compensation.
- That financial compensation might only be small if the change represented a little used feature.
- If the consumer agrees to a binding change in the contract – for example the removal of the feature – you will not be in breach of contract and therefore you are not liable for any remedy.
- Instead of (or in some cases in addition to) asking for a repair or a replacement, a consumer could seek common law (and other) remedies of damages, specific performance or, in Scotland, specific implement but not so as to recover twice for the same loss.

Digital content works in a complex environment. What happens if a consumer updates their operating system and as a result the digital content that I supplied no longer works?

- The quality rights are judged on the day the digital content was first supplied. As long as the digital content that you supplied met the quality rights at that point, then if the consumer does something they should not have done or does not do something they should have done, which results in the digital content no longer being of satisfactory quality, you may not be liable.
- For contracts for the ongoing supply of digital content (e.g. subscription contracts), each item of digital content will be separately supplied.
- However, consumers should not be discouraged from accepting updates because this could leave them vulnerable to security threats. You should therefore aim to

keep digital content up to date with changes to operating systems as far as is practical.

Digital content works in a complex environment. If a new version of an operating system is developed, but the digital content that I supplied will not work with on it, I will need to update the digital content to work for the majority of consumers (who will have the updated operating system). However then it will no longer work for consumers who still have the older version of the operating system. Am I liable because the digital content will no longer meet the description?

- Digital content works in a complex environment and most consumers are aware of this and will strive to keep their software and hardware up to date.
- You could describe the digital content in a way that reflects this complex environment. For example, that the digital content will work on the latest or previous version of a particular operating system.
- Or you could provide a remedy for the consumers who were affected by the upgrade because they had not kept their operating system up to date and the upgrade means they could no longer use the digital content they paid you for. This would firstly be a repair or a replacement. If that was impossible then it would be some money back.

Does the 6 year limitation period mean that the digital content has to keep working for 6 years?

- The 6 year limitation period (5 years in Scotland) refers to the time period in which a consumer can take a claim for breach of contract (i.e. from the date of supply of the digital content). So if they have some faulty digital content they have 6 years within which to claim their quality rights (5 in Scotland).
- This is different from saying that the digital content has to last for 6 years. The lifespan of digital content is covered under the durability aspect of satisfactory quality. It will depend upon the reasonable expectations of consumers. It may not be reasonable for consumers to expect a cheap app to last for a long period of time, but it may be more reasonable for them to expect the operating system to be more durable.

8. Changes to the Digital Content Contract

You can make changes to the contract to supply the digital content, for example if you want to change the description of the digital content (by the removal of a key feature) but changes to the contract require the express consent of the consumer.

The purpose of the express consent provisions are to ensure that the consumer is not surprised by changes. In particular, a consumer should not be put in the position

of having to accept a change in a concluded contract which they had not expected, either in nature or degree.

If you need to be able to change elements included in pre-contractual information (PCI), for example the description of the digital content or the price of a subscription to digital content, you can give the information needed to satisfy the PCI requirements of the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 in a way that permits you to make changes during the lifetime of the contract without triggering the need to obtain the consumer's express agreement.

Importantly this right to vary must comply with the requirements on unfair terms – fairness and transparency – which look to ensuring, for instance, that consumers can foresee the changes that you may make and understand the implications for them of those changes, as well as covering whether the extent of variations permitted are reasonable. The PCI information required under the Regulations will need to reflect the fact that particular potential changes may be made and any other information provided voluntarily by the trader that forms part of the description and may later change would need to be qualified at the same time as providing it.

If you needed to implement a change to any of the elements of the contract *before* the contract was concluded, you would need to seek the consumer's express agreement to that change because the PCI previously given would no longer be correct. You would have to highlight the changes to the consumer whose express agreement would then be demonstrated by their entering the contract on the basis of the changed information.

If you have not made provision in the PCI for any variability of the information, then any change would be ineffective unless the consumer expressly agrees.

Of course, none of the above prevents you from seeking express consent post-contract for changes effected post-contract - even where the PCI contains relevant variation terms - in order to achieve certainty that the changes are valid. And these requirements will stand alongside any sector specific requirements (for example, from OFCOM).

9. Trader's Right to Supply the Digital Content

You must have the right to supply the digital content that you have contracted to supply. Often where the consumer buys digital content from you, there will be other traders who have rights over the digital content, particularly intellectual property rights. So the Act makes it a requirement of the contract that you have the right to supply the digital content.

If you do not have the right to supply the digital content at all, the consumer will be entitled to a refund. (See below at "What if I didn't have the correct rights to supply the digital content?")

10. Digital content that damages the consumer's other digital content and/or device

As explained above for the majority of the digital content provisions to apply, there must be a contract involving digital content that has been paid for. The following is however an exception to that general rule. If any digital content supplied under contract, whether free or paid for, damages other digital content on the consumer's device, or the device itself, you **may** be liable for a remedy. You may limit your liability in the contract, but any limitations must be fair.

Digital content works in a very complex environment, and a new piece of digital content may affect other digital content in unexpected and unpredictable ways, unrelated to the design or development of the digital content itself. You will not automatically be liable simply because the digital content causes something else to stop working but you are expected to take all reasonable steps to try and prevent this from happening.

For you to be liable for a remedy, the consumer must show

1. that the digital content was provided under a contract; this will usually mean (in England, Wales and Northern Ireland) that the consumer has given something in return for the digital content (usually money but possibly also agreeing to act in a particular way or giving their personal data)
2. that the digital content has damaged other digital content that they own, and/or that the digital content has damaged their device, and
3. that you failed to use reasonable care and skill to prevent the damage.

If the consumer is able to demonstrate this, then you must either:

1. repair the damage, or
2. pay the consumer an appropriate amount of compensation.

As with other remedies for digital content, the repair must be carried out at no cost to the consumer, within a reasonable time and without causing the consumer significant inconvenience.

Example 1

"A consumer buys an app for organising their music and photos, but when they start to use it, they find that it has a bug that causes the app to delete their music and photos."

Assuming the consumer was able to show that the damage was caused by the app itself and that the damage would not have arisen if the trader had used reasonable care and skill, the trader would be liable to either repair the damage (by recovering the music and photos for the consumer) or to make an appropriate payment to the consumer to compensate for the damage. The trader can choose which remedy they offer to the consumer.

Frequently Asked Questions:

Do I have to investigate the cause of the damage?

- Whilst you may wish to do so, if the consumer makes a claim for damage caused by the digital content supplied by you, it is for the consumer to prove what caused the fault and that you failed to use reasonable care and skill to prevent it.
- There is no legal requirement for you to investigate the source or cause of problems if the consumer makes a complaint but has not got the evidence to back up their claim.
- However, the Government encourages traders to be as helpful as possible in helping consumers identify the cause of the damage in cases where the trader has access to information that the consumer does not. Businesses that treat consumers fairly and helpfully may have a competitive advantage against those who treat them poorly.

Am I liable for damage caused by consumer behaviour (e.g. they failed to follow the installation instructions correctly, or they did not have the appropriate minimum system requirements)?

- It is clearly in everyone's best interest to make sure any installation instructions are as clear as possible and it is also a requirement elsewhere that you give information about functionality and interoperability of any digital content before a consumer is bound by a contract. Assuming you have complied with these requirements, the consumer firstly has to demonstrate that the digital content supplied by you under the contract caused the damage, and then that you failed to use reasonable care and skill to prevent the damage.
- If installation instructions are clear and easy to follow and require minimal technical knowledge on the consumer's part, but have not been followed correctly and it is this that caused the damage, then it is unlikely that you would be liable under this section.

Am I liable if the digital content caused the damage, but an update was issued before the damage occurred that would have prevented it, which the consumer did not download?

- You may be liable if the consumer can show that the digital content supplied by you caused the damage, and then that you failed to use reasonable care and skill to prevent the damage.
- If an update is available, it is in your interest to make the consumer aware of the update and the consequences of not applying it.

- It may be difficult for the consumer to show that you failed to use reasonable care and skill in respect of any damage that is caused after the update that would have prevented the damage.

Am I liable if the digital content caused the damage, but I have subsequently issued an update to repair the digital content and prevent further damage?

- You may be liable if the consumer can show that the digital content supplied by you caused the damage, and then that you failed to use reasonable care and skill to prevent the damage.
- The fact that you have issued a repair to the digital content you provided does not alleviate your responsibility under this section to repair other damaged digital content or any device that may have been damaged by the digital content you contractually provided if that damage could have been avoided had you taken reasonable care and skill.

Am I liable for problems caused by a virus or malicious software that attacked the consumer's device through a weakness in the digital content that I supplied?

- No, the damage has to be caused by the digital content itself. In this case, it is the virus that causes the damage.
- However the consumer may be able to claim that the digital content was not of satisfactory quality if they could reasonably expect the digital content to be secure enough to prevent such attacks from occurring.

What is "reasonable care and skill?"

- We expect that reasonable care and skill will be judged against the normal standards in the industry. If you took the care and used the skill that other competent digital content providers would have taken, it is likely that this will be judged as reasonable.
- For example, you would be expected to undertake the normal amount of compatibility testing conducted by the industry.

What about emergency security updates?

- We expect that how much care and skill is reasonable will be judged in the context in which the action was performed.
- So for example, if software has a security vulnerability and an update has to be released to address the security threat in a short space of time, we expect that a lower standard of care would be considered reasonable than for a more routine production process.

How could a consumer show that I have failed to act with “reasonable care and skill?”

- A consumer may be able to demonstrate this if they can show that the damage was of a type (and occurred in such a context) that you could reasonably have foreseen the problem, and could reasonably have been expected to test for and resolve the problem. For example, a tablet app for organising photos was tested by the trader only with photos taken on the tablet itself and not with photos imported to the tablet from a camera. If the app caused damage to the photos on the camera when the user tries to import them to their tablet (i.e. it didn't import them and instead deleted the photos from the camera without warning), then the consumer may be able to show a lack of reasonable care and skill because it is normal consumer behaviour to import photos from a camera to other device like tablets. In these instances the damage may affect a large number of consumers.
- Although you are not required to, it would be good business practice to respond positively to consumer queries about your testing and resolution of problems, since this information will only be in your domain.

Am I required to exhaustively test for every possible configuration of software on a consumer's device?

- You are only likely to be required to conduct this type of exhaustive testing if this is considered to be the industry standard. In this case, it is likely that in not doing so you would not have taken the care and skill that is reasonable.
- As exhaustive testing is only the industry norm for very essential types of (business) software (such as in the nuclear power or space industry), you should take reasonable care and skill as and when problems with a particularly unusual software configuration do come to light.
- Although you are not required to, it would be good business practice to respond positively to consumer queries about your testing and resolution of problems, since this information will only be in your domain.

What constitutes an appropriate payment for the damage?

- An appropriate payment would financially compensate the consumer for the damage caused but would not cover any consequential losses incurred by the consumer.
- So, if the damage has simply stopped the spell checker from working within a word processor, the financial compensation might be relatively small. However, the digital content might have introduced some code that has damaged all the digital content on the consumer's device, including the underlying operating system. In this case, the compensation could be considerably more.

- However, you may exclude or restrict your liability for damage to other digital content or to a device as long as that limitation would be judged as fair under the Unfair Terms provisions.

Is the consumer entitled to any other form of compensation for digital content that damages their device or other digital content?

- It may also be open to the consumer to seek damages for breach of an implied term arising from the quality rights.
- Any term limiting liability for damage under these circumstances will be subject to Part 2 (Unfair Terms).

11. Restricting Liability

A contract for digital content cannot contain any terms excluding or restricting liability for:

- Digital content being of satisfactory quality
- Digital content being fit for a particular purpose
- Digital content being as described
- Digital content complying with other pre-contractual information
- The trader's right to supply the digital content

If a contract does contain such terms, then they are not binding on the consumer.

Example 1

A contract for digital content contains a term which states that:

“XYZ TECHNOLOGY, Ltd PROVIDES THE PRODUCT SOFTWARE “AS-IS” AND DISCLAIMS ALL WARRANTIES AND CONDITIONS, WHETHER EXPRESS, IMPLIED, OR STATUTORY, INCLUDING THE WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, TITLE, QUIET ENJOYMENT, ACCURACY, AND NON-INFRINGEMENT OF THIRD-PARTY RIGHTS. XYZ TECHNOLOGY, Ltd MAKES NO WARRANTY THAT THE PRODUCT SOFTWARE WILL BE UNINTERRUPTED, FREE OF VIRUSES OR OTHER HARMFUL CODE, TIMELY, SECURE, OR ERROR-FREE”

This term would not be binding on the consumer insofar as it attempts to restrict liability for any of the rights listed above. It appears to try and exclude liability for all the rights and would therefore not be binding on the consumer.

Liability for damage to the consumer's device or other digital content can be restricted or excluded to the extent that such contract terms would be judged as fair under Part 2 of the Act. Ultimately, what is fair would be a matter for the courts to decide.

Frequently Asked Questions:

Do these exclusions on liability also apply to B2B contracts?

- No. Part 1 of the Consumer Rights Act only applies to Business to Consumer contracts.

Am I exposed to higher liabilities than I was before because I am not able to limit the extent of my liability under the contract?

- Under the Act, financial liability for breaches of the quality rights only extends as far as the amount paid for the digital content that breached the rights: for breach of the quality rights the Act provides that the consumer may be able to claim a reduction to the price paid for the digital content and so the maximum amount that it could be reduced by and that you could be required to pay back is the price the consumer paid for the digital content.
- However the consumer may be able to claim other remedies in law for breach of contract, including damages, specific performance or in Scotland specific implement, but not so as to recover twice for the same loss.

D. Digital Content: If Things Go Wrong

As a trader, you have certain obligations if the digital content that you supply does not meet the requirements under the contract and in the Consumer Rights Act. This guidance explains what options are available to the consumer in these situations. These options are referred to as "remedies".

It is also open to the consumer to claim common law remedies for breach of contract, which could include damages. The rest of this guidance however focusses on the statutory remedies.

1. When is the consumer entitled to a remedy?

A consumer may seek a remedy if any of the Act's requirements regarding digital content (see "**Requirements on the Trader**" above) are not complied with. Which remedies are available will depend on which of the consumer's rights under the Act is breached.

The remedies covered in sections 4 and 5 are available to the consumer if digital content does not meet the requirements of:

- Being of satisfactory quality
- Being fit for a particular purpose, and
- Meeting the description.

This includes following an update.

Sections 6 and 7 explain the remedies available for breaches of the consumer's other rights under the Act.

a. Proving that digital content does not meet the requirements

A consumer will only be legally entitled to any of the remedies detailed in the following sections if the digital content did not meet the consumer's rights at the time it was supplied. Essentially, there are two aspects of this:

1. The digital content does not meet the requirements; and
2. This issue was present at the time the digital content was supplied or updated.

For example, if the consumer considers that the digital content is not of satisfactory quality, the consumer needs to show that there is a fault or issue, which makes the quality fall below the standard a reasonable person would think is satisfactory.

The digital content must have failed to meet the consumer's rights at the time that it was supplied to the consumer (or in the case of updates, at the time that it was updated). In some cases this will be very clear. For example, the digital content may not match the description if it does not contain a key function that was mentioned when the product was described, in which case this type of fault is likely to have existed when it was supplied. In some cases the existence of the fault when the digital content was supplied will be more difficult to establish, particularly where the consumer considers the digital content is not of satisfactory quality. For example, when a major bug in a game is not apparent until the late stages of game play. The fault may therefore show itself sometime after the digital content was supplied, but the root cause of the problem was present at that time.

There are special rules about who is responsible for proving that the digital content failed to meet the requirements at that time – see **“The Reverse Burden of Proof”** section, below.

Example 1

“A consumer downloads an e-book, but then discovers that chapter 2 is missing.”

The digital content is clearly faulty and the consumer is entitled to a remedy.

Example 2

“A consumer pays for an app but when she has downloaded it she finds that it has some defects. She complains that the digital content is faulty but the trader argues that these types of apps often contain minor defects.”

Whether or not there is a “fault” (i.e. the quality of the digital content is not satisfactory so it does not conform to the contract) depends on whether the quality is of a level a “reasonable person” would expect of the digital content. This will be different for different types of digital content. But factors such as the price and any description are relevant – in this case, the consumer would be more justified in expecting the app to be fault-free if she had paid a particularly high price for it than if it had been relatively cheap. Ultimately, if the trader and consumer are unable to agree, it would be for a court to decide.

Frequently Asked Questions:**The customer argues the digital content is not of satisfactory quality, but I disagree – what now?**

- It is not possible to prescribe which faults mean digital content is not of satisfactory quality, as this will depend on the specific circumstances, type of digital content and extent of the fault.
- You can examine digital content and/or send it for tests (e.g. to the manufacturer) if necessary to establish whether there is a fault. You could seek the view of an expert in the type of digital content.
- You should consider the issue from a consumer’s point of view – would you be happy with the digital content if you had bought it?
- If there is no fault – that is, the digital content is not below the standard that a reasonable person would consider satisfactory – you are not obliged to provide a remedy. However, some traders choose to provide a remedy but to make clear that they are doing so for goodwill and do not accept that the digital content is faulty. If the customer wishes to pursue things further they may resort to court action – the decision of whether digital content is of satisfactory quality is ultimately for the court.

2. Who’s responsible, when?

In most cases you will be responsible for the condition of the digital content until the time that it is supplied to the consumer, or to a trader under the control of the consumer (such as their ISP or mobile network operator). This means that in most cases, if digital content is faulty as a result of something that happens during the

transmission of the digital content across the Internet, the consumer will have a right to seek a replacement, a repair or a refund from you. You are not liable if the fault occurs as a result of a problem with a trader under the control of the consumer (such as their ISP or mobile service provider), the consumer's bandwidth, or on the consumer's device).

a. Time limits for exercising remedies

The consumer's rights regarding digital content form part of the contract between the trader and the consumer. Except where a time period is stated in the Act (for example, the 30-day right to reject for digital content within goods), this means a consumer can enforce a remedy for up to **6 years after the consumer receives the digital content, or 5 years in Scotland**. That is the limitation period for breach of contract claims. A consumer will of course only be entitled to a remedy if one of the statutory rights is breached – that is if the consumer can show that the digital content did not meet their rights set out above (under “**What the Consumer Can Expect**”) at the time of supply.

As regards updates, the Act makes clear that the time period for bringing a claim begins when the digital content was first supplied notwithstanding the fact that the update itself may have occurred some time after the original supply. This means that any claim for breach must be brought within 6 years of the date the digital content was first supplied.

b. Who the consumer should go to

Under the Consumer Rights Act, the digital content you supply must be as described, of satisfactory quality and fit for purpose. If you have supplied digital content to a consumer and it does not conform to these requirements or other terms in the contract, **it is up to you to put this right with the consumer**, and not the manufacturer of the digital content. However, in practical terms, it may be that the manufacturer has an update or a patch which will remedy the issue that can be provided to the consumer.

3. The reverse burden of proof

As explained in “**When is the consumer entitled to a remedy?**”, above, the remedies detailed in the following sections will only be available if

1. The digital content does not meet the rights (see the **Requirements on the Trader** guidance); and
2. This issue was present at the time the digital content was supplied or updated.

In some cases this will be difficult to establish, particularly where the consumer considers the digital content is not of satisfactory quality. For example, digital content

with many different features or a game with many different levels may appear to function perfectly until that feature is used or that level is reached. The fault may therefore show itself sometime after the digital content was supplied, but the root cause of the problem was present at that time.

Generally speaking, it is the responsibility of the consumer to prove that digital content did not meet the requirements of the Consumer Rights Act at the time of supply. However, there is an exception which is referred to below as the "**reverse burden of proof**".

Where the issue arises within six months starting on the day of supply, then the assumption is that the digital content failed to meet the requirements at the time of supply, unless this assumption is incompatible with the digital content in question or the way in which it does not meet the requirements, and **you** would have to prove that the digital content did conform to the contract when it was supplied.

Note that this reverse burden of proof does not apply to proving that the digital content does not meet the Act's requirements – it applies only to proving that this was the case at the time of supply.

Example 1

"A consumer buys a computer game but discovers a major fault in a higher level of the game after 5 months of game play".

Because the fault was discovered 5 months after supply, the assumption is that the fault was present at the time of delivery unless this does not make sense in the circumstances. It is open to you to examine the digital content or send it for diagnostic tests to establish whether there was an inherent fault in the digital content at the time of supply. However as the fault has appeared within the 6 month period, the consumer does not have to provide this type of evidence.

Example 2

"A consumer buys a computer game but this stops working after 5 months because the consumer has downloaded an update of a new operating system."

Because the fault was discovered 5 month after supply, the assumption is that the fault was present at the time of delivery unless this does not make sense in the circumstances. Because in this example the fault was caused by the new operating system download, it is incompatible with the idea that the fault was present on the day of delivery. However, the consumer may have a case that the digital content was not durable and therefore not of satisfactory quality depending on factors such as the price paid for the game and the normal expectations of consumers.

4. Repair or Replacement of Faulty Digital content (1st tier remedies)

The consumer has the right to have faulty digital content repaired or replaced and you must cover any necessary costs of doing so.

A consumer may enforce their right to a repair or replacement for up to 6 years from supply (5 years in Scotland), if they can show that the digital content does not meet the rights set out above and that they did not meet these at the time of supply.

See “**How to obtain a remedy**”, above, for further information on the 6 year / 5 year limitation period for the consumer to enforce a remedy and see “**The reverse burden of proof**” for further information on proving in the first 6 months that a fault was present at the time of supply.

You must provide the repair or replacement within a **reasonable time** and without causing **significant inconvenience** to the consumer. If the repair/replacement work takes longer than a reasonable time, or causes significant inconvenience to the consumer, the consumer may have the right to demand some money back (see “**The Reduction in Price (2nd tier remedy)**” for further detail on this remedy).

On the other hand, once the consumer has agreed to a repair or replacement, they must allow you a reasonable time to complete the work without changing their mind and opting for the other approach. However, if it would cause the consumer significant inconvenience to allow you to carry out the repair, then they do not have to do so.

Example

“A consumer downloads an e-book but discovers that a chapter is missing. He emails the trader and they offer a new download of the e-book with the missing chapter, but it will not be available for 7 days. The consumer accepts this. However, the next day the consumer changes their mind and decides that they would rather have their money back.”

Under the Act the consumer is not entitled to do this – after asking for a repair or replacement, the consumer must allow the trader a reasonable time to complete this work.

a. What counts as a repair?

A repair is an attempt to fix any defects so that the digital content meets the requirements of the contract, including:

- Being of satisfactory quality
- Being fit for a particular purpose, and
- Meeting the description

What counts as satisfactory quality is determined by what a **reasonable person** would think is satisfactory, looking at all the relevant circumstances.

See the “**Digital content: What the consumer can expect**” section of this guidance (above) for further detail on what these requirements mean in practice.

You do not have to carry out the repair yourself, you could refer the digital content to a specialist or the manufacturer, for instance, but as the contract is between you and the consumer, you will remain legally responsible for ensuring that the repair is carried out properly.

A repair does not have to be a bespoke solution, and so can be delivered in the form of an update as long as the update has the effect of making the digital content conform to the contract.

Frequently Asked Questions:

What is a “reasonable time” for a repair or replacement?

- What is a reasonable time may be judged against the context of the repair/replacement.
- For example, a reasonable time to provide a repeat download of a music file may be quite short whereas a reasonable time to produce a security patch may be significantly longer. This would be judged against the industry norm.

What is significant inconvenience to the consumer?

- The Act does not specify what counts as significant inconvenience as the impact on the consumer will depend on the nature of the digital content and vary from case to case.
- For some repairs to be carried out, a consumer may need to be available at a particular time, for example where advice needs to be provided on the phone to support a consumer giving effect to the repair. The amount of notice you give as to when the advice session will take place may affect whether or not there is significant inconvenience.

Is there a limit on the number of repairs or replacements I can provide to the consumer?

- Unlike goods, there is no strict limit on the number of times you can repair or replace digital content. However any repair or replacement has to be carried out within a reasonable time and without significant inconvenience to the consumer.

- For digital content within goods (e.g. supplied on a DVD or pre-loaded onto a device), the goods remedies apply and these do limit the trader to a single repair or replacement (see the associated Goods guidance in Business Companion).

Do I have to continue to support digital content if consumers have refused an upgrade?

- Whether or not you provide technical support for digital content products is a commercial decision.
- However where digital content is sub-standard (in breach of statutory rights), then you should provide a repair/replacement of the digital content (which may come in the form of an upgrade or patch).
- So the repair may come in the form of the upgrade that the consumer has previously refused.
- If a consumer refuses a repair, as long as the repair offered does indeed bring the digital content in line with the consumer's rights, and within the parameters set out (within reasonable time, without significant inconvenience), then they would not be entitled to move to the next tier of remedies.

Where an update fails, a consumer should be able to revert to a previous version?

- There is nothing in the Bill that prevents this.
- If an update renders the digital content faulty, then the remedy would be a repair.
- Repair means bringing the digital content back into conformity with the contract.
- If reverting to the original version meets this description, then reverting to that version could be the repair.

How can I be expected to repair digital content if I have not produced it?

- If a repair (or replacement) is not possible, you can move straight to a second tier remedy of a price reduction.
- It is also open to you and the consumer to agree an alternative remedy or to move straight to a price reduction, if that is preferable to both of you. However the consumer is always entitled to insist on their statutory remedies as provided in the Bill.

Does an update count as a repair?

- A repair is something that you provide in response to a breach of the quality rights. Under the Act, if a consumer shows that the quality rights are not complied with, they can ask you to repair the digital content so that it does meet the quality rights. If you issue a general update and it does ensure that the digital content meets the quality rights, then this will be enough to count as a repair. A repair does not have to be bespoke for an individual consumer – it just has to rectify the fault (that is, make it comply with the quality rights).
- Conversely, if you are issuing a general update because you yourself have identified a fault rather than responding to a consumer complaint, it does not necessarily mean that the quality rights have been breached.

b. What counts as a replacement?

Generally, the replacement digital content should be the same as the digital content that is being replaced. It must meet the requirements that the original digital content should have met (satisfactory quality, etc.).

The extent to which a replacement must be identical will depend on the digital content. For mass produced digital content, a replacement could be a repeat download or a repeat of the streaming.

Where you are unable to provide the same digital content as a replacement (for example where a replacement would contain the same fault), nothing prevents you from offering an alternative, but you cannot force the consumer to accept. Similarly the consumer cannot force you to offer an alternative.

Frequently Asked Questions:

Am I allowed to offer alternative digital content (e.g. a different game) as a replacement?

- You and the consumer could, of course, agree that non-identical digital content is acceptable as a replacement when the consumer comes to you for a replacement.
- However, you cannot force the consumer to accept an alternative to a straight replacement; but equally, the consumer cannot force you to offer an alternative

c. Repair vs. Replacement

It is up to the consumer to choose whether they would prefer a repair or a replacement, but if the one that they choose is impossible or would be disproportionately costly to you (compared to the other option), they may not insist on it and would have to accept the alternative.

Repair or replacement is disproportionate to the other if it would impose costs that would be unreasonably higher than those associated with the other remedy, considering:

- The value the digital content would have if it conformed to the contract
- The significance of the lack of conformity (of the fault)
- Whether the other remedy would cause the consumer significant inconvenience.

Repair or replacement does not have to be carried out if they are impossible. So, if a repair is impossible, you would be liable to provide a replacement only and vice versa. Often for digital content only one of the two remedies would be appropriate: a repair (an update) would be an appropriate remedy where the fault is within the original code for the digital content and so a replacement would not remedy the problem. However, where the problem occurred during the supply of the digital content an update would be unlikely to fix the problem and a repeat download or a repeat of the streaming would be appropriate.

Example 1

“A consumer downloads a new game, but there is a bug in level one of the game that causes the game to crash continually.”

In this instance, a repeat download would not rectify the fault because the downloaded game is likely to contain the same bug as the original version. In this instance a repair (probably in the form of the update) would be the most appropriate remedy.

However if the consumer agreed to an alternative game as an alternative to replacement/repair, there is nothing to prevent you doing so.

5. The Reduction in Price (2nd tier remedy)

The consumer has a right to a reduction in price, after or instead of a repair or replacement, if certain criteria are met. As a result, the right to a reduction in price is sometimes referred to as the “**2nd tier remedy**”. (Repair and replacement are the “**1st tier remedies**”.)

a. When does this remedy become available to the consumer?

The consumer has access to a reduction in price in the following situations:

1. You were unable to provide a repair or replacement because both were impossible.
2. The consumer asked for a repair or replacement but it has not been done in a reasonable time or without significant inconvenience to the consumer.

b. Right to a price reduction

You are not legally obliged to accept returned faulty digital content and offer a refund (although you can if you choose to do so and the consumer agrees). But if the consumer is entitled to a second tier remedy, they can keep the digital content but receive a reduction in the price to take account of the fault (which in appropriate cases may be a full price reduction – i.e. all of their money back).

The reduction that you offer must be an appropriate amount. This should usually reflect the difference between the value of the digital content as it was sold (with the fault) and its value if there had been no fault (i.e. the amount that the consumer paid originally).

If the consumer accepts this remedy, they have accepted and been compensated for the fault and so cannot require further remedies to address that particular fault. If, however, a further fault appears, the consumer will still have a right to pursue remedies as normal for that further fault.

Once you have agreed an appropriate payment with the consumer, you must make that payment within 14 days. You must use the same payment method that the consumer used for the original purchase, unless the consumer expressly agrees otherwise.

Frequently Asked Questions:

How is the price reduction calculated if only a portion of the digital content is affected?

- The price reduction should normally reflect the difference between the value of the digital content as it was originally sold and the value of the faulty digital content.
- For example, if a consumer pays a monthly subscription to download 5 movies per month and one movie fails to download and the download cannot be repeated, an appropriate price reduction may be 1/5th of the monthly subscription.

What if the consumer doesn't agree with the price reduction that I offer them?

- In the first instance it would be good practice to try and resolve the issue through discussion with the consumer. You could ask the consumer to provide some evidence as to why they think the price reduction should be different.

- Under the Alternative Dispute Resolution Directive which is due to be implemented in July 2015, in cases where there is no obligation to use ADR, if a consumer raises a complaint with you and you are unable to resolve it with them directly, you must provide information about who the relevant ADR provider(s) is and explain whether you are prepared to make use of the relevant provider.
- If the consumer wishes to pursue things further they may resort to court action.

What about the case when the consumer claims that the portion of digital content that was faulty was the only part of the digital content that they were concerned about?

- You would not normally be liable for the full amount paid if only a portion of the digital content was faulty, because the consumer has still received usable digital content that has a value.
- However, if the consumer had previously advised you that they wanted the digital content for a specific purpose (and they had relied on your skill or judgement in making the purchase) then the digital content may not be fit for the particular purpose and so a price reduction of the full amount of the price may be more appropriate.
- For example, if the parental control part of a security software package failed to work and could not be repaired, then an appropriate payment would only be a portion of the price paid. If, however, the consumer had previously advised you that they specifically wanted the parental controls, then the digital content would not be fit for that particular purpose and an appropriate amount may be the full price.

When do I have to give the consumer all of their money back?

- If the digital content was wholly unusable then the appropriate amount would be 100% of the price paid. For example, when an ebook failed to download and the download couldn't be repeated, or when an app contained a bug such that it never opened,
- What is appropriate will be case specific. For example, a full refund may be necessary if digital content does not function in its entirety and that renders the whole digital content unsatisfactory, for example a downloaded film failed to play in the last 5 minutes of the main feature, or the last chapter of a book fails to download.

6. What if I didn't have the correct rights to supply the digital content?

If you have supplied digital content to the consumer without the right to do so, the consumer is entitled to a refund, but there is no corresponding duty on the consumer to return or delete the digital content. The consumer's continued use of the digital content will be limited by Intellectual Property Law. The Act does not undermine any intellectual property rights. Where the digital content that you did not have the right to supply was only part of the contract (e.g. a single film supplied as part of a subscription package), you do not have to refund the full amount paid, but an amount relating only to the portion of digital content affected by the breach. You must give a refund without undue delay and within 14 days beginning with the day on which you agree that the consumer is entitled to a refund. The same means of payment must be used as the consumer used to pay for the digital content unless the consumer expressly agrees otherwise.

For further information on your obligations under intellectual property law see:

<http://www.ipo.gov.uk/blogs/equip/>.

A range of resources aimed specifically at copyright can be found at:

<https://www.gov.uk/intellectual-property/copyright>

7. What if the digital content has damaged the consumer's device or other digital content?

If the digital content that you have supplied to a consumer under contract, has damaged the consumer's other digital content and/or device and the consumer can show that you failed to use reasonable care and skill to prevent the damage, then you have to provide a remedy to the consumer.

You have two options for a remedy. If you are able to repair the damage caused, for example if it is possible to rectify the fault by changing the settings on the user's device, then you can do so.

If it is not possible to repair the damage then you have to compensate the consumer with an appropriate payment. You may limit your liability in the contract as long as that contract term is fair.

Frequently Asked Questions:

I have supplied a consumer with a device (for example, a smartphone) and it is no longer working because the consumer downloaded some digital content from another trader which has caused the device to be faulty. How can I demonstrate that I am not liable to repair the damage?

- If the consumer asserts that there is a fault with digital content (or with goods), it is for them to prove that the fault exists and where it originates.

- However, you may choose to help the consumer identify the source of the problem as a matter of goodwill.
- If the device was working well before the digital download, and you identify that the download caused the fault on the device, the consumer would have to demonstrate to the trader who supplied the download, that it was their download that caused the damage, and that the supplier of the download failed to use reasonable care and skill to prevent the damage.
- The fact that the damage occurred immediately following the download may be enough to show that the digital content caused the damage, but the consumer would still need to show that the trader failed to use reasonable care and skill (cross reference to FAQ on reasonable care and skill).

How can I repair digital content that I did not develop?

- You have the option to repair the damage if you are able. But the consumer cannot require you to make a repair.
- It may be possible for you to repair the damage if, for example, the damage has been caused by some settings being altered and they can be switched back. This might be relatively easy for you to do, but a consumer just may not know how.

If a device has been damaged, who would be responsible for handling the repair?

- The responsibility for any repair lies with the trader who supplied the digital content that caused the damage, although they are not required to provide a repair if they are not able. (They may choose to make an appropriate payment to the consumer instead).
- The trader who supplied the digital content may pass the device on to the supplier of the device for a repair if that is possible to do so (this may be desirable in cases where a repair on a device by a third party would invalidate the device warranty), but the trader who supplied the digital content is liable for the cost of the repair, not the supplier of the device or the consumer.
- The supplier of the device is not entitled to make the repair and charge it back to the supplier of the digital content under the Act, although nothing prevents them from doing so if they have agreed this with the supplier of the digital content and the consumer.

How can I calculate an appropriate payment?

- You are required to compensate the consumer only for any damage to the consumer's digital content or device. If you pay the consumer the cost of recovering or replacing any damaged or lost digital content, that payment would be an appropriate amount.
- We anticipate that the appropriate payment would reflect the damage caused. If the digital content was completely unusable then an appropriate payment could be the cost of replacing the digital content. If the damage was that a small and non-essential feature of the digital content was no longer working, but the rest was still usable, then the appropriate payment might be relatively small.
- However, you may exclude or restrict your liability for damage to other digital content or to a device as long as that limitation would be judged as fair under the Unfair Terms provisions.

Where a digital content download affects digital content downloads from other providers, what compensation is the consumer entitled to and would a compensation limit exist?

- If the consumer can show that the digital content supplied by you has damaged other digital content and that you failed to use reasonable care and skill to prevent the damage, you are liable to either repair the damage or make an appropriate payment in compensation.
- The Act limits the compensation payable to compensation the consumer for the damage with an appropriate amount so consequential losses may not be included.
- However, you may exclude or restrict your liability for damage to other digital content or to a device as long as that limitation would be judged as fair under the Unfair Terms provisions.

Will I have to pay for other losses incurred because of the damage to the digital content (e.g. if a consumer was not able to access the internet as a result of the damage, on the day when there was a special offer available for an online purchase of a sofa, and so they had to buy the sofa elsewhere at a higher price)?

- The appropriate payment only covers damage to the digital content or device. Other financial losses occurring as a consequence of the damage are not covered. If the consumer felt they had a strong case for compensation for such a loss they would have to look to other types of legal action, for example possibly they could make a claim in negligence.

- The cost of recovering or replacing any damaged or lost digital content or damage to the device would be the main element of any payment.
- The payment would not be expected to cover other financial losses or compensation for factors such as emotional distress.

8. What if there is a problem with other information provided pre-contractually that isn't part of the description?

If there is a problem with the information that you have provided pre-contractually that does not form part of the description of the digital content, then the consumer is entitled to some compensation for any costs they incur as a result, up to the price paid for the digital content.

If they have not incurred any costs as a result of the incorrect or missing information, they would not be entitled to compensation.

9. What if I can't agree a solution with the consumer?

Under the Alternative Dispute Resolution Directive, which is due to be implemented in July 2015, in cases where there is no obligation to use ADR, if a consumer raises a complaint with you and you are unable to resolve it with them directly, you must provide information about who the relevant ADR provider(s) is and explain whether you are prepared to make use of the relevant provider.

If the consumer wishes to pursue things further they may resort to court action.

10. Digital content in Goods

If you supply digital content in tangible form e.g. on a disk or pre-loaded onto a device such as a phone or tablet, then you are still supplying digital content. The digital content quality rights will therefore apply to the digital content. However, since the digital content is part of the goods then if it does not meet the quality rights, the goods remedies will apply.

E. Digital Content in Scotland, Wales and Northern Ireland

Parts 1 to 3 of the Act largely extend to the whole of the United Kingdom. The digital content provisions apply in all jurisdictions.

Digital content means data which are produced and supplied in digital form. This encompasses products such as software and apps, e-books and computer games. Digital content such as computer software has sometimes been treated as services and sometimes as goods. It has elements of both types of product. Although digital content is treated as a separate category in the Act, digital content also falls within the scope of the sale and supply of goods and services to consumers. The categorisation in the Act of digital content, as distinct from goods and services, does not mean that digital content falls outside the meaning of “goods” or “services” for other pieces of legislation such as the Scotland Act.



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