

# The Consumer Rights Bill: changes on the horizon for digital content providers?

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## Introduction

This is the age of digital content, where consumers are abandoning traditional media and instead accessing content in digital form. Recent statistics show that digital sales for music, video and games in the UK now exceed £1 billion each year, with 44% of sales in the entertainment market arising from digital formats in 2013.

It is therefore surprising that there are no consumer laws which provide for minimum standards in relation to the supply of digital content. The laws which provide for standards in relation to goods and services date from the 1970s and 1980s, well before the Web was a glint in Sir Tim Berners-Lee's eye, and cannot be comfortably applied to digital content.

With this issue in mind, and as part of a broader plan to update consumer laws, the Department for Business Innovation & Skills (BIS) introduced the Consumer Rights Bill – which includes bespoke consumer rights in relation to digital content – to Parliament in January 2014.

This article considers what the Bill, if implemented in its current form, could mean for digital content businesses. In summary, whilst many businesses would welcome greater clarity over consumer rights and remedies, striking the right balance will be crucial in order to avoid fettering innovation and incurring unnecessary costs. The Bill represents an amended version of the draft Bill which was published in June 2013 and has already taken into account some of the concerns raised. However, with debate in Parliament ongoing, businesses still have the opportunity to voice their concerns.

## What is digital content?

Professor Bradgate, an academic who was commissioned by BIS to investigate consumer rights and digital content, defined digital content as “*data or information products supplied in digital format as a stream of zeros and ones so as to be readable by a computer and give instructions to the computer*”. Digital content includes mp3s, software, streamed films, e-books, online games and apps. The means for supplying digital content are varied: it can be downloaded or streamed via the Internet; sent by email or another means; supplied in physical form (such as on a DVD); or incorporated into another product (such as a car with a navigation system).

## Is the lack of statutory standards in relation to digital content actually a problem?

BIS has proposed the digital content provisions in the Bill on the basis that the current legal position is uncertain and this makes it difficult for consumers to enforce their rights. According to research commissioned by the European Commission in 2011, between 16% and 23% of consumers experience problems when purchasing digital content. The most common problems relate to access and quality issues, and poor, complex or unclear information being provided about digital content.

A 2011 Which? also survey revealed that whilst 43% of consumers have been disappointed by a digital download, 27% of them failed to do anything about it. One factor that may discourage consumers from seeking redress is that businesses do not usually permit refunds in their terms and conditions, although Which? discovered that many businesses are giving refunds on a discretionary basis.

## What statutory standards does the current law require digital content to meet?

There is no legislation in the UK which stipulates statutory standards that digital content must meet when it is supplied to consumers.

The Sales of Goods Act 1979 (“**SGA**”) and the Supply of Goods and Services Act 1982 (“**SGSA**”) provide consumers with implied terms for goods and services and remedies if those terms are breached, but these Acts cannot comfortably be applied to cover digital content.

The Unfair Contract Terms Act 1977 (“**UCTA**”) prevents sellers from excluding or restricting liability for breach of the SGA and SGSA implied terms, meaning that consumers benefit from the implied rights and remedies regardless of any contract terms to the contrary.

Under common law, a court could imply terms into a contract for the supply of digital content (such as fitness for purpose). However, it’s unlikely that a consumer would go to court about a low value digital content purchase. In any case, depending on the circumstances it may be permissible to exclude or restrict liability in relation to common law implied terms (unlike with the implied terms under the SGA and SGSA).

## **The proposed provisions on digital content in the Bill**

### ***What types of contract would the Bill apply to?***

Under the Bill, digital content, which is defined as “*data which are produced and supplied in digital form*”, would be treated separately from goods and services. The provisions on digital content would apply where a trader supplies digital content to a consumer under a contract where:

- the consumer either pays for the supply; or
- the digital content is supplied free of charge with paid-for goods, services or other digital content and is not generally available without the purchase of such goods, services or other digital content.

Payment includes the use of any facility for which money has been paid (such as gift vouchers and virtual currencies), but does not include other types of “payment” (such as the provision of personal information). However, the Bill includes a provision which would permit the digital content provisions to be extended to cover other types of digital content contracts where appropriate to do so because of significant consumer detriment. This would be done by statutory instruments approved by both houses of Parliament.

***What statutory rights would the Bill give consumers in relation to digital content?***

Contracts for the supply of digital content would be treated as including the following terms:

- the digital content is of satisfactory quality;
- the digital content is reasonably fit for any particular purpose made known to the trader before purchase;
- the digital content matches any description given to it by the trader;
- certain pre-contract information which must be provided to consumers under the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (“**CCICACRs**”) (such as the trader’s identity and information on cancellation rights); and
- the trader has the right to supply the digital content.

The Bill also clarifies that the statutory standards on quality, fitness for purpose and content matching its description apply to digital content:

- when it reaches the consumer’s device, or (if earlier) when it reaches another trader chosen by the consumer (for example, an internet service provider or a mobile network operator) to supply a service by which digital content reaches the device. This clarification would assist a digital content trader if it was determined (for example) that a consumer’s internet connection was to blame for quality or other issues;
- whenever it is modified by the trader (for example, through updates and upgrades), if the contract is subject to the right of a trader or a third party to modify the digital content; and
- each time it is transmitted between a consumer and a trader using a processing facility that the trader has made available to the consumer (for example, in the case of multiplayer online games). The contract would also be treated as including a term that the processing facility must be available to the consumer for a reasonable amount of time, unless a time is specified in the contract.

In addition, there are cross-over provisions in the sections on goods and services. For example, goods would not conform to the statutory standards applicable to goods if any digital content which is included within those goods do not conform to the statutory standards applicable to digital content.

***What remedies would a consumer have if digital content failed to meet statutory standards?***

If digital content did not meet any of the statutory standards in relation to satisfactory quality, fitness for a particular purpose and matching its description, then the consumer would be entitled to repair or a replacement. If digital content does not conform to these statutory standards at any time within six months of when it was first supplied, then it would be assumed not to have conformed from the outset (except where it can be established that it did in fact conform when first supplied or if the application of this provision is incompatible with the nature of the digital content or the nature of the fault).

The repair or replacement would need to be carried out within a reasonable time, without causing significant consumer inconvenience and at the trader's expense. If a repair or replacement was impossible, or if the trader fails to carry out a repair or replacement as required, then the consumer would be entitled to a price reduction (which could be a full refund where appropriate).

If the trader acted in breach of any of the pre-contract information which must be provided under the CCICACRs, the consumer would be entitled to recover from the trader the amount of any resulting costs up to the amount of the price paid for the digital content.

If the trader did not have the right to supply digital content, the consumer would have the right to a refund of the full purchase price.

***What other claims could a consumer make against a trader in relation to digital content?***

If digital content (regardless of whether it was paid for or not) caused damage to a consumer's device or other digital content which would not have occurred if the trader had exercised reasonable care and skill, the consumer would be entitled to ask the trader to repair the damage (within a reasonable time, without significant consumer inconvenience and at the trader's cost), or provide compensation for the damage with an appropriate payment.

It should also be noted that the legislation would not prevent consumers from seeking other remedies for breach of the statutory standards (such as a damages claim).

***Can liability in relation to the statutory standards for digital content be excluded or restricted?***

No. A contract for digital content would not bind a consumer to the extent that it excluded or restricted a consumer's rights or remedies or the trader's liability in relation to the statutory standards or the compensation payable for damage to a consumer's device or other digital content.

***Would the Bill apply where digital content is supplied by a non-UK entity and/or under a contract which is not subject to English law?***

Yes, in theory the legislation would still apply. Where a contract has a close connection to the UK (for example, the digital content is supplied from a .uk website or it is possible to make purchases from a website in sterling), it would not be possible to circumvent consumer protection laws simply by using a foreign entity and/or by making terms and conditions subject to foreign law. However, many traders who do not specifically target UK consumers may decide to take the enforcement risk.

***What other legislative changes are on the horizon which may affect digital content providers?***

The revised distance selling rules, the CCICACRs, replace the Consumer Protection (Distance Selling) Regulations 2000 on 13 June 2014 and contain some specific provisions in relation to digital content. Digital content providers who transact with consumers therefore need to consider their impact. In particular, there are new information and cancellation rules for digital content which businesses will need to factor into their sale process and terms and conditions. For further information, please refer to our update [here](#).

## **What practical steps would digital content providers need to take if the Bill gets passed?**

### **1. *Characterise the digital content which is being supplied***

The Bill states that the rights and remedies would apply when digital content is either paid for, or is supplied for free with paid-for goods, services or other digital content and is not otherwise generally available.

To determine whether the provisions of the Bill apply to free content, a business would need to consider whether the free content is supplied “with” the paid-for content or not. In some cases it might be difficult to disentangle free and paid-for content. If this is a potential concern, care would need to be taken when describing and making available the different types of content.

### **2. *Review the T&Cs (and any associated policies) which apply to the supply of digital content***

Businesses would need to carry out a review of the terms and conditions under which digital content is supplied (and any associated policies) in order to ensure that there are:

- no disclaimers which could suggest that the statutory standards do not apply;
- no prohibited exclusions or limitations of liability; and
- no restrictions on how consumers can exercise their rights (for example, requiring claims for compensation for damage to be notified within a certain period of time, or in the governing law and jurisdiction clauses).

At the same time it would be worth checking that terms and conditions comply with other consumer laws (for example, the new CCICACRs and the Unfair Terms in Consumer Contracts Regulations 1999). Failure to ensure that terms and conditions are compliant may lead to specific statutory consequences (for example, the consumer not being bound by the contract and/or extended cooling off rights), consumer complaints, regulatory investigation and/or reputational damage. In addition, remember that it is a criminal offence under the Consumer Protection from Unfair Trading Regulations 2008 to misstate a consumer’s legal rights.

### **3. *Ensure descriptions for digital content are accurate***

Businesses would need to ensure that descriptions for digital content – including in advertising, marketing and on download pages - accurately reflect what is supplied. However, remember that the general rules and codes on practice on advertising, marketing and unfair trading already apply to digital content, so care should always be taken when advertising and marketing.

### **4. *Ensure staff receive suitable training***

Customer service staff would need to receive training on the new rights and remedies in relation to digital content in order to ensure that consumers are given the correct information and that any problems (for example, in relation to requests for repairs or replacements, or compensation) are handled in the correct way.

## **What could the Bill mean for digital content providers, and what opportunities are there for businesses to voice their opinions?**

Implementing any legal change costs businesses time and money: BIS, in its impact assessment, has estimated that the initial costs of complying with the digital content provisions of the Bill would be around £3.2 million, and that subsequent annual costs would amount to just over £4 million a year.

However, clearer consumer rights are also said to increase consumer confidence in digital content – particularly in relation to digital content which is sold by new market entrants - and therefore may increase sales. As such, change may not be something for the digital content industry to fear, especially given that many businesses are already giving refunds on a discretionary basis.

The Bill is currently being considered by the House of Commons' Public Bill Committee. These debates, which must be completed by 13 March 2014, may culminate in amendments being made to the Bill before any further Parliamentary debate. In the meantime, interested parties - including businesses which may be impacted by the Bill - should submit written evidence to the Public Bill Committee in order to ensure that the right balance is struck and that legislation does not discourage future innovation.

# Key contacts



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