

need to know

07|2015



SHERIDANS

Consumer Rights Act 2015

This document has been prepared by Ukie Partner Member, Sheridans and only covers the basics of the new Consumer Rights Act 2015, further advice should be obtained before acting on the information provided. This note is intended to be used as a guide only and is not a full review of the new Act and does not constitute legal advice.

On 1 October 2015 the Consumer Rights Act 2015 (the “Act”) will come into force in the UK. It includes new rules which will affect anyone selling digital content to consumers in the UK. In simple terms, digital content such as games will have to meet certain standards by law. The basic intention behind the Act is to extend the rights already available to people buying physical goods to people buying “digital content” and, with a few tweaks, to recognise the differences in the online world.

This guide outlines the key changes taking place and takes a look at the wider implications for the games industry.

What is Digital Content?

Digital content is defined in the Act as data which is produced and supplied in digital form. Such a wide definition means the Act will cover software, apps, ringtones, e-books, cloud computing (in certain circumstances), online journals and more traditional forms of digital media such as music, film and television and, most importantly, games that are downloaded. This means all games bought from Steam, iTunes or any other digital platforms will be included under the Act.

When do the rights apply?

The new rights apply to contracts for the supply of digital content to a consumer if the content is supplied in exchange for money.

The Act only applies to contracts with consumers and not business to business (B2B) contracts.

So any platforms which provide digital content

directly to consumers will be bound by the terms of the Act (like Steam, GOG or those making their games available to the public directly). Consumers who purchase games from online retailers will not necessarily have entered into a contract with the actual developers or publishers of the game they’ve bought as their contract will be with the retailer. The new rights will therefore only apply to their contract with the retailer and they will not be able to sue the developer or publisher under the Act. For instance, if you were to buy Fallout 4 from Steam and it was faulty, you would have a right under the Act against Steam (not Bethesda).

The Act does not apply to contracts where consumers have received the digital content for free. For example, users of Facebook online and via the app will have a contract in place between themselves and Facebook (the Facebook terms) and the content provided will be digital content but, as it is provided for free, it will not fall within the scope of the Act. Equally, digital content provided in exchange for personal data will not be included in the Act as it is regarded as being “free digital content”.

Where a consumer downloads a game for free it is unlikely that the contract between the supplier and the consumer will therefore fall within the scope of the Act. However, this may not be the case if, for example, the user is able to make in-game/app purchases (in exchange for virtual currency, for example). Once the consumer has paid a price for the digital content, the contract will fall the Act will apply. So free2play games will be caught by this legislation and developers will not be able to avoid the rules by virtue of their game being free to download. However, if the user never pays for any in-app purchases then they cannot rely on this new legislation.

Consumer Rights Act 2015

At what point do the statutory rights begin and for how long do they apply?

Under the Act, the consumer rights relating to digital content are automatically implied into the terms of the contract and the time period for the consumer to bring a claim is 6 years from the date of supply. Updates to digital content (to software, games etc.) will not restart the clock for the purposes of this time limitation period.

So, what are the statutory quality rights?

Under the Act, digital content must:

+ be of satisfactory quality

What this actually means in practice will be determined by what a reasonable person would think is "satisfactory quality", taking into consideration all relevant circumstances.

Minor bugs in a game or app for example, are unlikely to mean that the supplier has breached the satisfactory quality right. A reasonable person would expect some minor defects in this kind of sophisticated digital content (such as the odd crash, for example). A minor defect in an MP3 however, is more likely to constitute a breach as a reasonable person would expect an MP3 to free of these defects. So the Act does not make it necessary for all games and apps to be perfect but if there are significant issues then this would be a concern.

+ be fit for purpose

This means that if a consumer makes known to a trader that he wants to use the digital content for a particular purpose, before entering into the contract, the digital content must meet that purpose. However, this will not be the case where it can be shown that the consumer did not rely on the trader's judgement or that it would have been unreasonable for them to do so.

Where developers are allowing consumers to have early access to games they should ensure that consumers are aware that they are playing an early version of the game and that the game is likely to contain bugs. Any defects or bugs in early access games are therefore less likely to be seen as making the game unfit for purpose or not of satisfactory quality. The early access wording on Steam is a good example of how to make users aware that the game may be buggy and not work exactly as finally intended.

+ meet any description

This means that digital content must match its description. Descriptions of software and games must therefore be accurate.

This may create difficulties for a publisher of games where updates to the game result in it not matching the description provided at the point of supply, or, if an aspect of the game such as multiplayer is not ready when launched.

A developer or publisher cannot get round this by simply changing the game description - the Act specifically states that providers cannot unilaterally change the specification or functionality of digital content without a consumer's consent. For example, even where an update to a game actually improves its playability this may not be allowed if the game no longer matches the original description/specification. A solution for developers and publishers may be to obtain upfront user consent to regular variations to the game by way of updates (provided that these terms were not in breach of the list of unfair terms in part 2 of the Act).

What Remedies are available under the Act?

Where a consumer can show that the digital content did not meet the statutory quality rights at the time it was supplied, they will be legally entitled to the following remedies:

- + Right to repair or replacement.
- + Right to a price reduction (up to full refund) where repair or replacement are impossible, or were not done within a reasonable time and without significant inconvenience to the consumer.

Where digital content has damaged the consumer's device or other digital content, the supplier will also be liable to repair the damage or compensate the consumer where a repair is not possible. Equally, these remedies also apply to contracts for "free digital content" and not simply those under which users have paid.

It is possible to limit liability in this regard but any limitation of liability will be subject to the provisions on fairness within the Act.

Other points to consider...

These quality rights are distinct and separate from Rights under Consumer Contracts (Information, Cancellation and Additional Charges) Regs 2013, which include requirements about functionality, interoperability, pre-contract information and rights concerning cancellation and refunds.

What should I do next?

For further advice please contact Alex Tutty at Sheridans (atutty@sheridans.co.uk).

@uk.ie 

Ukie on facebook 

Ukie on linkedIn 

ukie.org.uk 