



Comparative Notes on Consumer Remedies for Defective Digital Content and Software Updates

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Abstract

The remedies for a faulty kettle are familiar. The position is less clear when the faulty product is a game, an application, an e-book or the software inside a connected device, and less clear again when the fault is introduced or left uncured by an update. This communication compares the remedies available in four systems: the European Union under its two 2019 directives on digital content and on the sale of goods, the United Kingdom under the Consumer Rights Act 2015, Australia under the Australian Consumer Law, and the United States under the Uniform Commercial Code and related sources. It is a commentary on the legal texts and the literature and reports no original findings. Three points of comparison are taken: whether digital content is covered by a dedicated regime or by analogy with goods, how the hierarchy of remedies is arranged, and whether the trader owes a continuing duty to supply updates. The European Union is the only one of the four to impose an express update obligation as part of conformity. The note identifies the duration of that obligation, the division of responsibility between seller and software producer and the treatment of content supplied in exchange for personal data as the questions most in need of clarification.

Keywords: *Digital content, Consumer remedies, Software updates, Conformity, Consumer law, Comparative law*

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1. Introduction

Consumer sales law was written for things that can be handed over and inspected. Digital content fits poorly. It is usually licensed and not sold, it may be supplied once or streamed continuously, and it changes after supply because the trader retains the ability to modify it remotely. [Perzanowski and Schultz \(2016\)](#) describe the resulting erosion of the buyer's position as the end of ownership. An early comparative study found that national laws classified the same transaction variously as sale, service or licence ([Helberger et al., 2013](#)).

This note sets four systems side by side and asks what a consumer can demand when digital content is defective, with particular attention to updates. It is a selective commentary on legislation and published

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scholarship.

2. Four Regulatory Models

Table 1 summarises the four models. The European Union has the most detailed regime. Directive 2019/770 governs contracts for the supply of digital content and digital services ([European Union, 2019a](#)), and Directive 2019/771 brings goods with digital elements within the law of sale ([European Union, 2019b](#)). Both are full harmonisation measures, so that member states may not depart from the conformity rules in either direction. The Digital Content Directive also applies where the consumer provides personal data instead of paying a price, a step whose contractual implications [Metzger \(2017\)](#) had examined while the proposal was under negotiation.

The United Kingdom legislated earlier and separately. Chapter 3 of Part 1 of the Consumer Rights Act 2015 creates statutory terms that digital content must be of satisfactory quality, fit for a particular purpose and as described ([United Kingdom, 2015](#)). Australia chose not to create a separate category. The Australian Consumer Law defines goods to include computer software, so that the consumer guarantees, including the guarantee of acceptable quality, apply directly ([Commonwealth of Australia, 2010](#)). The Federal Court confirmed in *Australian Competition and Consumer Commission v Valve Corporation* (2016) that games supplied by download from an overseas platform were covered.

Table 1: Regulatory models for defective digital content in four legal systems			
System	Legal basis	Conformity standard	Duty to supply updates
European Union	Directives 2019/770 and 2019/771	Subjective and objective conformity requirements	Express; includes security updates
United Kingdom	Consumer Rights Act 2015, Part 1, Chapter 3	Satisfactory quality, fitness for purpose, as described	None express; modified content must conform
Australia	Australian Consumer Law; software is goods	Acceptable quality, including durability	None express
United States	Uniform Commercial Code Article 2 by analogy	Implied merchantability, subject to disclaimer	None; governed by licence terms
Soft law (US)	ALI Principles of the Law of Software Contracts	Warranty against known material hidden defects	Not addressed

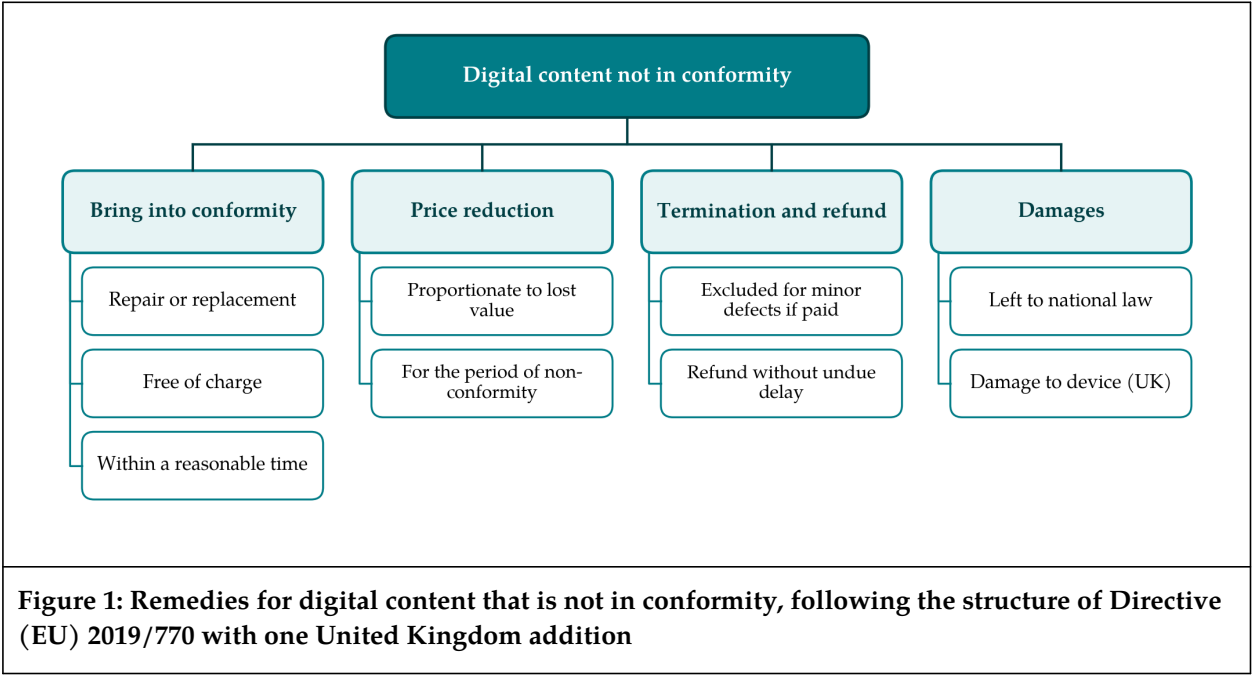
The United States has no federal or uniform regime for consumer digital content. Courts have often applied Article 2 of the Uniform Commercial Code to software by analogy, with its implied warranty of merchantability, but the Code permits conspicuous disclaimers and the limitation of remedies to repair or replacement. The American Law Institute's Principles of the Law of Software Contracts propose, among other things, a non-disclaimable warranty that the software contains no material hidden defects of which the transferor was aware ([American Law Institute, 2010](#)), but the Principles are not binding law.

3. The Hierarchy of Remedies

Under the Digital Content Directive the consumer's first entitlement is to have the content brought into conformity, free of charge and within a reasonable time. If that is impossible or disproportionate, or the trader fails to do it, the consumer may claim a proportionate price reduction or terminate the contract. Termination is excluded where content was supplied for a price and the lack of conformity is only minor. The directive leaves damages to national law. Figure 1 sets out this structure, which the commentary describes as a two-stage hierarchy adapted from sales law ([Sein and Spindler, 2019](#); [Carvalho, 2019](#)).

The British scheme is similar in outline. The consumer has a right to repair or replacement and, failing that, to a price reduction which may extend to the full price. There is no short-term right to reject of the kind available for goods, a point considered in the research report that preceded the Act ([Bradgate, 2010](#)). The Act adds a remedy with no direct counterpart in the directive: where digital content damages the

consumer's device or other digital content and reasonable care would have prevented it, the trader must repair the damage or pay compensation.



Australian law arranges remedies by the gravity of the failure. For a major failure the consumer may choose a refund or a replacement; otherwise the supplier may choose to remedy the failure within a reasonable time. In the United States the outcome depends largely on the licence terms.

4. Updates as Part of Conformity

The most distinctive European rule concerns updates. The trader must ensure that the consumer is informed of and supplied with updates, including security updates, that are necessary to keep the content in conformity. Where supply is continuous the duty lasts for the contract period. Where there is a single act of supply it lasts for the period the consumer may reasonably expect, given the type and purpose of the content and the circumstances of the contract. If the consumer fails to install an update within a reasonable time, the trader is not liable for a defect resulting solely from that failure, provided the consumer was told of the update and of the consequences of not installing it and the installation instructions were adequate. [Staudenmayer \(2020\)](#) presents the update obligation as a central innovation of the two directives, since it extends conformity beyond the moment of supply.

The same directive regulates the opposite problem, the update that makes things worse. A trader supplying content over a period may modify it beyond what conformity requires only if the contract allows it and gives a valid reason, the consumer bears no extra cost and is clearly informed. If the modification has more than a minor negative effect on access or use, the consumer may terminate. The Consumer Rights Act addresses modification more briefly, requiring that content as modified still meets the statutory terms.

5. Points That Remain Unsettled

Three questions stand out. The first is how long a trader must keep supplying updates for content bought outright. The reasonable expectation standard is flexible, and it will fall to national courts and eventually the Court of Justice to give it content. The second is the allocation of responsibility in the supply chain: the seller of a connected device owes the update duty to the consumer, yet only the manufacturer or software developer can usually perform it. The third concerns content supplied in exchange for personal data. Price reduction has no obvious meaning where no price was paid, and the directive accordingly allows termination even for minor defects in such cases.

6. Conclusion

The four systems agree that digital content must meet a standard of quality and disagree on almost everything else. For software that is expected to change throughout its life, a conformity standard fixed at the moment of supply protects the consumer only briefly. The European approach of treating updates as part of what the trader promises is the more coherent answer, and its unresolved details are worth close study by systems considering reform.

Conflict of interest

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