

FAST works to influence anticipated new Consumer Law on Digital Content

The Consumer Rights Bill (“Bill”) is to change the legal rights and remedies of consumers who acquire ‘Digital Content’ – software, e-books, music, films etc. A seller is defined as a ‘trader’ (this includes those who write the content and/or sell it online). Consumers are you and I in our private lives.

This is clearly a pro-consumer law, beefing up the legal rights and ramifications if the seller/trader supplies substandard or defective Digital Content. Cases will be judged on the facts. The Bill is currently making its way through the parliamentary process of review by both the House of Commons and the Lords.

The reason why this topic matters to FAST is largely twofold:

1. The concepts of ‘fitness for purpose’ and ‘satisfactory quality’ which we are so familiar with since the 1970s in purchasing physical goods from shops on the high street will also be applied to digital products/content sold to consumers in the pure digital form. This law is being crafted for the era of now with delivery over the internet by downloading being commonplace for consumers as opposed to buying copies of Digital Content on discs. For software, Apps are clearly covered.
2. These rules will not apply to business-to-business contracts, however, these legal concepts will be recorded in our black letter law which could conceivably aid the development of thinking in the business space. I call this policy drift or ‘leakage’. Indeed it is easier to draw

inspiration for legal development on a law which is well established in another field. Further, on occasions when a court needs to decide on a case on the facts in front of it, it may need to take inspiration from another field of law to arrive at the correct decision.

As far as software is concerned, these new rules will give consumers express statutory rights in UK law which cannot be contracted out of. Those doing business with consumers in this space and context must comply. Another example is to think of perhaps industry standard licence terms which might need to be reviewed in the light of these developments if the software publisher seeks to provide limited warranties and to exclude certain liabilities. Broadcast iron statutory rights therefore must impinge on how the seller seeks to protect against legal liabilities.

FAST welcomes the development of law keeping it up-to-date. However, we are working to ensure the development of good law which is balanced and not an impediment to the software industry doing business in the UK. Increased legal burdens, perhaps for the smaller software suppliers more so, could have the chilling effect on SME software developers not supplying the consumer or seeking to insure against risk which I would expect to increase prices for consumer software.

FAST has provided suggested changes to amend the new rules so that there is an element of acting reasonably in traders being on the hook. One provision seeks to pin liability in

statute for damage to device or other digital content and clearly a legal claim could be material. Further, we have argued that Trading Standards should continue unfettered to inspect shops without notice and request to see what is under the counter. This is because in our experience this has unearthed counterfeit software. Such action is much more cost efficient than legal routes and can produce immediate removal of illicit products which may not be – to coin a phrase - “satisfactory quality” for the consumer.

To date a concession from the government which was inspired by FAST is that a trader may limit liability in certain respects that is ‘fair’. We also understand that there is a change to clarify that additions or enhancements to digital content through updates will not breach the “as described” provision.

In summary, clearly this law is being debated so the draft of the Bill may change. FAST will continue its work and on the Bill’s guidance for business and consumers. **Do contact me to get involved as these issues can be more important than they first appear.** For example; query whether these rules will apply to a cloud or hybrid cloud/IP delivery model? Watch this space!.

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