

# Digital Products and the Right of Withdrawal

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## 1 Introduction

Returning products to the provider and asking for refunds are the behaviors as common as purchasing goods. Usually, consumers would return products if they are dissatisfied with the products or the service, not to mention the products with defects. The Consumer Rights Directive (CRD) [2] ensures consumers' right of withdrawal and records it in the Article 9. That is, the consumer could withdraw from a contract without any reason in a period of 14 days.

In this paper, however, we would delve into how withdrawal works on the digital products. Firstly, the delimited research question is presented, followed by the definition of digital products. The related rules in the directive would then be described and analyzed. After that, how withdrawal works in relation to digital products were discussed. Afterwards, the potential problems and proposed solutions are provided. Finally, a brief conclusion of our works would be presented.

### 1.1 Research Question

- How does right of withdrawal work in relation to digital products?
  - Is there any potential problem?
  - If so, what solution could be proposed?

## 2 Definition and Description of Related Rules

### 2.1 Definition of Digital Products

Digital products are divided into two types: tangible and intangible. Tangible digital products are electronic products based on digital technology, such as digital cameras, digital televisions, digital camcorders, MP3 players, DVDs, VCDs. Intangible digital products, also known as digital products, are products that can be digitised and transmitted via digital networks.

The concept of “digital content” was introduced into the EU legal framework in CRD, which defines it as “data which are produced and supplied in digital form”.<sup>1</sup>

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<sup>1</sup>Article 2 (11)

The definition of digital content is very broad. The CRD provides some specific definitions: “computer programs, applications, games, music, videos or texts, irrespective of whether they are accessed through downloading or streaming, from a tangible medium or through any other means.”<sup>2</sup>

The concept of “goods” is used in the CRD. “Goods” means “any tangible movable object”. According to the CRD, digital content shall be considered as goods within the meaning of the Directive if it is made available on tangible media such as CDs or DVDs.<sup>2</sup> What about digital content that is not made available on tangible media? Unfortunately, the Recital (or article) in the CRD does not give an answer. The only thing we could say is that such digital products is neither goods nor services. Therefore, the law for this kind of products should be different compared to goods and services.

## 2.2 Description of the Related Rules

In order to obtain more insight for answering our research question, we must realize the rules in the CRD which are related to the right of withdrawal. Therefore, in this section, we would mainly focus on describing the **Article 9**; and would further illustrate several associated rules mentioned in Article 9. To clearly describe the rules, we divide Article 9 into two parts and focus on the most related ones.

**Article 9-1** The consumer could withdraw from a distance or off-premises contract in a period of 14 days without giving any reason, except for the condition mentioned in Article 16. However, the consumer shall bear the cost of returning the goods (Article 14); and could not ask for the supplementary cost if they choose another type of delivery (Article 13-2).

- **Article 16:** In (m) of this article, it maintains that the right of withdrawal shall not be provided when the consumers consent to lose their right of withdrawal previously.
- **Article 14:** If the trader has agreed to bear the cost of returning goods or the trader failed to inform the consumer that he should bear them, the consumer shall bear no cost of returning goods. Otherwise, the consumer shall bear the direct cost of returning goods.
- **Article 13-2:** The consumer shall not ask for supplemental cost when they opt to using another delivery way other than the least expensive and standard one provided by the trader.

**Article 9-2(c)** The withdrawal period (mentioned in Article 9-1) of digital products shall expire after 14 days from the day of conclusion of the contract.

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<sup>2</sup>Recital 19

### 3 Analysis of the related Rules

In this section, analysis of several related rules in CRD would be included. Also, the insight and the result we obtain after analyzing would be further extended to come up with our potential problems(see section 5).

#### 3.1 Analysis of Article 9

Indeed, the statement, “*The consumer shall have a period of 14 days to withdraw from a distance or off-premises contract, without giving any reason.*”, ensures the consumers’ right of withdrawal. Some arguments claim that the right of withdrawal is intended to address the legal and economic imbalance between consumers and merchants in the market places. [9]<sup>3</sup> The imbalance might occur and put the consumers into positions of weakness by several possible reasons:

- The contract is too complex to understand
- The consumers sign the contract under some “surprised factors”, e.g., being pressured by merchant’s aggressiveness, lack of consideration and information in a hurried condition.
- The difficulty of knowing the product at firsthand, e.g., distance contracting.

Therefore, ensuring right of withdrawal do raise the consumers from disadvantage and fill the gap between consumers and merchants.

The exceptions mentioned in the CRD<sup>4</sup> seems to destroy the balance maintained by ensuring the right of withdrawal. However, if we read through the exceptions, we would observe that the exceptions actually balance the interest between the merchants and the consumers. For instance, it is hard to sale personalized or customized products if consumers could withdraw from the contract without giving any reason. Thus, merchant might suffer heavy loss when there is no specific exception. Also, this point of view was claimed by Jiangqiu in his work at 2019. [8]<sup>5</sup>

Although we agree on the argument that the exceptions could better balance the interest between traders and consumers, the exception condition in Article 16(m) seems to break the balance again and contradicts the intention of right of withdrawal. Furthermore, this exception is related to “digital content” which we must focus on in our work. We would elaborate and further analyze it in the section 3.3.

Finally, we could assume that the Article 9 is originally created for normal goods and services since there are some unsuited rules for digital products. For instance, Article 13(2) and Article 14 could only be applied on tangible goods since there is almost no cost for delivering intangible digital contents via digital network. Therefore, it does not make sense to apply such unsuitable rules<sup>6</sup> on the digital products.

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<sup>3</sup>Section 5.1

<sup>4</sup>Article 16

<sup>5</sup>Chapter 5

<sup>6</sup>Article 13(2) and Article 14

### 3.2 Deficiency of information requirement

Before purchasing a digital product and signing a contract, the specific information and rules on the contract are important for the consumers.

According to CRD <sup>7</sup>, the consumer must be provided with questions about the functionality of the digital product, including applicable technical protection measures, and the interoperability of the hardware and software of the digital product. These issues are known or foreseeable to the trader. Furthermore, the CRD obliges traders to inform consumers about the possibility of recourse to an out-of-court complaint and redress mechanism. <sup>8</sup>

However, the information offered in the contract for the digital product seems to be not comprehensive. For instance, the main characteristics of goods and services are asked to include in the contracts. <sup>9</sup> On the other hand, when it comes to the characteristics of digital products, consumers are not given enough information to know what they are entitled to do about the main features of the product since the CRD only require such characteristics in the range of “goods” and “services”. Therefore, the deficiency of such information requirement for digital products’ contract might pose a serious problem.

### 3.3 Analysis of Right of withdrawal for digital product

According to the CRD <sup>10</sup>, if the consumer expressly agrees in advance and begins to execute the contract, they have no rights to withdraw from the purchase of digital products. That is, the consumers are deemed to have acknowledged the loss of the right of withdrawal. This means that the consumer loses the right of withdrawal as soon as the merchant obtains the consumers’ confirmation and the conclusion of the contracts.

We believe that this rule has almost no value for the consumer. This is because the acknowledgement and execution of the contract is equivalent to the loss of the right of withdrawal at the same time. The purpose of the right of withdrawal is to check the product purchased at a distance, which is almost impossible in the case of digital content contracts under the CRD.

## 4 How right of withdrawal works in relation to digital products

Before expiry of withdrawal period, once the consumer informs the trader his decision of withdrawing from the contract <sup>11</sup>, he then shall send back the goods and ask for refund. <sup>12</sup> However, it is the case of normal “goods”; how about

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<sup>7</sup>Article 6(s)(t)

<sup>8</sup>Article 6(t)

<sup>9</sup>Article 5-1(a), 6-1(a)

<sup>10</sup>Article 16(a)(i)(m)

<sup>11</sup>Article 6(h)

<sup>12</sup>Article 14

digital products? In order to figure out how right of withdrawal works in EU, we tried to find the answer in the documentation (terms and conditions) offered by famous platforms which sale digital products. Their return and refund policies would first be described and be listed clearly so that we could compare their policies. Afterwards, further discussion and extended potential problems would be placed in section 5.

#### 4.1 Online PC Gaming Platform: Steam

In EU, the right of withdrawal described in the Steam documentation follows the European Law. The consumers could have 14 days withdrawal period for any digital contents they purchased on Steam platform. However, Steam also provides several exceptions that the right of withdrawal is not applicable. We observe that these exceptions in Steam are exactly corresponded to the exceptions mentioned in CRD.<sup>13</sup>

#### 4.2 Ebook Publishing Platforms: Amazon KDP, Barnes&Noble Press, Draft2Digital, Smashwords

The return and refund policies for digital books in different ebook platforms are shown in Table 1. It could be observed that except for Amazon KDP, the other platform tend to prevent consumers from returning ebooks in order to protect the authors. In this way, the authors would be more willing to create and publish their works on the platform. To briefly conclude this section, Both

**Table 1.** Return and refund policies in different ebook platforms

Platform	Return and refund policy
Amazon KDP	Consumers can cancel an accidental book order within fourteen days. [5]
Barnes&Noble Press	Digital contents and other download purchases are not returnable [6]
Draft2Digital	Unless otherwise designated on the Site, all sales are final and non-returnable. [7]
Smashwords	The books are not returnable. All sales are final. [10]

types (Game & Ebook) of platforms follow the EU law for consumers' right of withdrawal while they have different strategies or return policies. This variety of policy may cause different problems. We would further illustrate such problems and suggested solutions in the following sections.

## 5 Potential Problems

### 5.1 Potential problems for digital consumers in terms of the Pre-contractual information

The accuracy and authenticity of the information provided by digital content plays a decisive role in determining the consumer's decision. However, for intan-

<sup>13</sup>Steam documentation exceptions[11]: (a)(b)(c)(d)(e) are corresponded to CRD[2]: Article 16(a)(c)(f)(i)(m)

gible digital content, such as computer software, online movies, music or subscriptions to periodicals, it is important to be aware of the information provided. Although we can be informed of some relevant information, such as the name and basic description of a movie. But for other features, such as the quality of computer software and movies or the truth of news, it is difficult for consumers to judge. Most digital content is subject to specific licensing conditions that determine the functionality and availability of digital content. Therefore, it is necessary for businesses to provide more specific information to consumers of intangible digital content. For example, whether a downloaded movie can be shared, or whether a purchased e-book can be printed.

In the 2011 Consumers Conditions Scoreboard we can see that between 16 percentages and 44 percentages of consumers do not understand the information provided by the supplier. This depends on the access channel, but also on age and education level. The most frequently cited reasons for not understanding information are the complexity of the language and the technical nature of the language.<sup>14</sup>

However, the CRD does not specify to the supplier in what way information about digital content must be communicated, and how information about digital content must include protection of consumer rights in order to be of real help to digital consumers.

## 5.2 Potential problems for digital consumers in terms of the right of withdraw

**Compatibility problem after upgrading digital content** Consumer interest relies heavily on the use of digital products on the device of their choice. However, they may not be able to play content on electronic devices (such as computers or car radios) or transfer files from one format to another, and in some cases they must purchase a newer version of the file digital product in order to be able to use it.

In the CRD, it is required that businesses provide information to digital consumers about the functionality and compatibility of their products (see “Deficiency of information requirement” section). In recital (19), the concept of compatibility is explained. However, this becomes a potential problem if, after digital consumers have consumed (e.g., computer software), digital content is updated so that the digital content purchased by consumers is not compatible with their hardware and software environments. This is because if the sealed computer software is unsealed after delivery, the digital consumer loses the right of withdrawal<sup>15</sup>. In Common European sales law<sup>16</sup>, this is unfair to consumers.

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<sup>14</sup>Europe Economics, 2011, p. 458

<sup>15</sup>Article 16(i)

<sup>16</sup>CESL[3] Art.103 “Digital content is not considered as not conforming to the contract for the sole reason that updated digital content has become available after the conclusion of the contract.”

**The issues may occur in online platform (Game & Ebook)** After describing and comparing return policies for digital contents in different online platform, we come up with several potential problems.

For Steam, although it follows the EU law and have flexibility on asking for consumers' consent on loss of their right of withdrawal, there might still be some problems. For ebook published platforms, varied issues might occur due to different return policies on platforms. We would divide the problems into two condition for both game platform and ebook published platform.

1. For online PC gaming platform (Steam):
  - (a) The products are returnable.
    - i. The consumer pass all the mission in the game and ask for return before expiry of withdrawal.
  - (b) The products are not returnable due to consumers' consent.
    - i. There are full of bugs and flaws in the game, so the consumers have awful gaming experience.
    - ii. The consumers could not operate the game due to the lack of hardware level or due to the compatibility problems.
2. For ebook published platform:
  - (a) Amazon KDP (returnable)
    - i. The consumer finish reading all the content and ask for return it before expiry. [12]
    - ii. The consumer do not finish reading the book, but they do gain specific knowledge from them. After achieving their objectives, they ask for withdrawal.
  - (b) The other platforms (not returnable)
    - i. The products are faulty.
    - ii. The consumer could not open the digital file due to the compatibility problems or the device issues.

## 6 Proposed Solutions

### 6.1 Solution to deficiency of information

In response to the potential problem of merchants providing information to digital consumers, we want to make it clear that merchants should highlight important information. For example, prices, usage limitations, and key product features (e.g., hardware and software requirements for computer software) should be prominently displayed in the product description on the merchant's website. In addition, merchants need to be mindful of the understandability of information descriptions. For example, instead of telling consumers that they are "copy-protected," they should tell them that "this movie cannot be copied or remade."

## 6.2 Solution to issue occur in online platform (Game & Ebook)

In this section, we would try to suggest our possible solutions to the problem listed in section 5.2.

- For problems: 1(b)ii, 2(b)ii in section 5.2
  1. Traders could offer test game or test ebook in the platform, which the formats and the requirements of device are exactly the same as the products. The consumers could download such files and try operate the game or the read the ebook. If the test version is workable, the corresponded actual products should be workable as well. This procedure can be done before signing the contract. Therefore, the problem could be solved.
- For problems: 1(b)i, 2(b)i in section 5.2
  1. We have found possible solutions in UK law. It ensures several properties of the digital products:
    - The quality of the digital content is satisfactory.<sup>17</sup>
    - The digital content is reasonably fit for that purpose.<sup>18</sup>
    - The digital content will match any description of it given by the trader.<sup>19</sup>

If the digital content does not meet the criteria above and develops a fault, the consumers have the right to have their digital products repaired or replaced. [1]

- For problems: 1(a)i, 2(a)i, 2(a)ii in section 5.2

It is hard to come up with the suggested solution to these kinds of problems. As we could see that the petition [12] ask Amazon to stop allowing refunds on eBooks 7 years ago while the ebooks are still returnable on Amazon KDP platform. It might injure the authors' and creators' copy-right; and further damp their enthusiasm of creativity down. However, we still manage come up with two ideas:

1. Implement the subscription model. That is, the consumers pay a certain value of money in a period of time (one month/ year) while they can read several sets of Ebooks or play a bunch of PC games. Therefore, the traders get paid, and the consumer could choose the products meet their needs from lots of options.
2. Partial refunds: Since the consumers do download and use the products (Game & ebook), we suggest that they should pay certain value's money. This way, the partial refund could partly protect the consumer right, and the money they paid could keep pushing the creators to publish new works.

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<sup>17</sup>Section 34: Digital content to be of satisfactory quality

<sup>18</sup>Section 35: Digital content to be fit for particular purpose

<sup>19</sup>Section 36: Digital content to be as described



## 7 Conclusion

In this paper, we critically analyze the 2011 CRD[2] from the perspective of protecting the rights of digital consumers, the potential problematic issues of contractual information and the right of withdrawal, and explore possible solutions. As far as we know, Strengthening EU consumer rights [4] has been proposed for information obligations <sup>20</sup>. However, there is no definition of intangible digital content, nor does it address the potential problems we have analyzed with regard to the right of withdrawal of intangible digital content. In conclusion, we would like to see further improvements in the rights of digital consumers.

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<sup>20</sup>In SECR[4] Information obligations:Before concluding a contract, traders must provide to consumers, in clear, understandable language, information, such as:their identity and contact details;the product’s main characteristics; and the conditions that apply, including payment terms, delivery time, performance and duration of the contract and termination conditions.

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