

Your legal queries answered by computer law expert Rodney Hylton-Potts, a solicitor practising in London. Send your questions to him care of Computer and Software Retailing. You'll also be helping other dealers who share your problems.

The sign that will help stop software thieves

Q Every now and again, young lads come into my store and say that a cassette game they bought from me won't load. I try to replace it with the same game knowing that they may have copies it and are trying for another title to copy. But if it's not in stock am I within my rights to offer a credit note?

A A buyer can recover back money paid under a contract if there has been a total failure of consideration. In other words, if he has not received any part of what he bargained for. Such a failure can be created in the case before us by the buyer returning the cassette he has received.

The buyer can insist on payment and not replacement and the seller may possibly have been "conned" in the manner suggested in the question.

I would suggest that a visible and obvious notice be placed at the cash point desk stating that in the event of a cassette being defective, a replacement will be provided. Thus if seen before the contract is made, it will be a term of the contract of sale.

The offering of a credit note in the event of the cassette being out of stock implies that the buyer can purchase any other type of cassette. Similarly if he insists on his money back the same "con trick" may have been committed.

To avoid this the only practical solution is to test the returned cassette at the shop. If the cassette works at the shop, there can be no complaint because there has either been an attempted "con" or the buyer's machine is faulty.

Q My shop is on the authorised dealer list for a major maker of small business computers, so my name appears alongside every advertisement when the company launches a new product. The trouble is that the products are rarely ready at the time the advertisements appear. What can I do?

A This is a good illustration of a case where a lawyer can help a businessman but before doing so must find out what the

businessman wants to do. The correct reply to the question therefore is: "What do you want to do?"

If you want to continue to be an authorised dealer the only possible remedy is through a letter of complaint. Usually "letter" should read "letters". As ever write to the managing director, complaints departments generally have developed the art of "fobbing off" complaints. There is no guarantee that your letter won't be re-directed to the complaints department but a personalised letter has more chance.

If you want to terminate your relationship, look at the terms of any agreement entered into before doing so. You may have to give notice or you may be able to claim damages for loss of reputation. If that is the remedy you seek, seek legal advice because the first letter is always the most important.

Q I sold an accounts package to a local garage. It came from a reputable company and I tried it before passing it on to the customer. Now he complains that it keeps losing data, or that it's garbled, and that it's costing him money. Has he got a claim against me, or against the software house, or anyone?

A The accounts package may be the cause of the problem or indeed the hardware. Presuming it is not of merchantable quality and the purchaser can bring an action for damages for loss arising directly and naturally, in the ordinary course of events, from the seller's breach of contract.

A retailer can find himself the defendant in a potentially large claim. He will be able to third party the manufacturer or software house but there is always the danger that it or they will not be liquid and unable to pay the damages. A retailer should obtain a carefully drafted exclusion clause to cover purchasers who are not consumers.

This will not help, however, where the purchaser is a "consumer" under the Unfair Contract Terms Act. A "consumer" is someone who does not make the contract in the ordinary course of business whereas the person selling

the goods to him does. Even when selling to people in the trade, i.e. not "consumers", the exclusion clause will only work to the extent that it is reasonable.

Q What is the meaning of "goods of merchantable quality".

A Goods sold are of merchantable quality if a reasonable man in the shoes of the actual buyer would accept them as fulfilling the contract which was in fact made.

That is the result of the Sale of Goods Act, which implies as a condition of all contracts of sale by a seller who sells in the course of a business that the goods sold are of merchantable quality.

- However that condition does not apply
- in respect of defects specifically drawn to the attention of the buyer before the contract is made, or
 - when the buyer examines the goods before the contract is made, in respect of details which that examination ought to reveal.

I must warn readers however to be wary of general definitions on "merchantable quality". Each case will turn on its own facts and the meaning of the term can lead to many hours of Courtroom argument.

Great care is taken to ensure that the advice in You and the Law is accurate. However, neither Rodney Hylton-Potts or Computer and Software Retailing can accept legal liability for the replies given. We regret that Rodney Hylton-Potts cannot enter into any correspondence, but he welcomes questions for answer in his column.