

Kickstarter: crowdsourcing, commitments and consumer protection

Neil Brown examines the crowdsourced funding website Kickstarter, asking what Kickstarter needs to do to ensure that consumers are adequately protected against project failure.

What is Kickstarter?

Kickstarter describes itself as a “funding platform for creative projects.”¹ In essence, it is a website to which project creators can upload their projects and ask for funding from the Kickstarter user community. As a project creator, it may seem an attractive alternative to more traditional funding such as a bank loan or venture capital investment, and, since the site started in April 2009, over 85,000 projects have been launched, with over \$407 million being raised.²

It is a relatively simple approach: a project sets out how much money it needs to achieve a stated goal, and offers incentives to users to fund the project. These incentives are usually tiered, with increased funding commitments getting more substantial rewards. Often, the rewards are linked to the items being funded — if a project creator needed \$1000 to fund development of her computer game, she might offer 50 rewards of copies of the game for anyone who offers at least \$20 of funding, the game and some extra artwork for backers of at least \$30, and perhaps the game, some artwork and an hour’s Skype conversation to anyone who pledges \$250. For someone who particularly wants this game to be developed, wants to get hold of before others, or just sees this an an opportunity to get the game for less than its eventual retail price, funding the project may seem attractive.

It is an “all or nothing” approach — a project is either fully funded, and the backers’ payments are taken, or the project fails to reach its funding target, and no monies are taken. Once a project meets its funding target, Kickstarter deducts its fee from

1 <http://www.kickstarter.com/help/faq/kickstarter%20basics>

2 <http://www.kickstarter.com/help/stats>

the pledged monies and passes the remaining portion to the project creator.³

So far, it seems a reasonably straightforward system: I find a project I want to support, I log into Kickstarter and make my pledge. If the project is fully funded, the project creator gets her money and goes off to perform the project — in the example here, the creator goes off to develop her game. She will post regular updates about her activities, perhaps even asking Kickstarter backers for ideas or to see what backers think about different options. When the game is finished, she sends out copies to her backers, and then goes on to make a fortune selling it to the open market.

At least, that's how it should work, but it is not always that smooth. A project may meet its funding goal, and the backers' monies are paid to the project creator, and, initially, all seems well — the project creator posts updates, and things seem to be progressing. Gradually, the updates become less and less regular, perhaps even tail off completely. At best, an update is posted that an unexpected and insurmountable obstacle has been reached, and the project will never be finished;⁴ at worst, the updates cease, the project remains unfinished months after the projected completion date and no rewards are shipped.⁵

Where does that leave backers?

No liability if a project goes wrong?

Since its launch, Kickstarter's position has been that it is an intermediary, a site which effects introductions between project creators and potential backers. This approach out was set out in its first set of terms and conditions:

³ <http://www.kickstarter.com/help/faq/kickstarter%20basics>

⁴ See, for example, the "Hanfree" iPad stand project: <http://www.kickstarter.com/projects/831303939/hanfree-ipad-accessory-use-the-ipad-hands-free>

The last update, which announced that the project has been cancelled, is available only to backers, but a draft is available, posted by user "Neil Singh," in his comment dated August 22nd, at: <http://www.kickstarter.com/projects/831303939/hanfree-ipad-accessory-use-the-ipad-hands-free/comments>

⁵ See, for example, the "ZionEyez" HD video-recording glasses project: <http://www.kickstarter.com/projects/zioneyez/eyeztm-by-zioneyez-hd-video-recording-glasses-for>

Kickstarter shall not be liable for your interactions with any organizations and/or individuals found on or through the Kickstarter service. ... Kickstarter does not oversee the performance or punctuality of projects. Kickstarter is not responsible for any damage or loss incurred as a result of any such dealings. Kickstarter is under no obligation to become involved in disputes between Backers and Project Creators”⁶

Responsibility, Kickstarter stated, remains with the project creators, who were “wholly responsible for fulfilling obligations both implied and stated in any project listing they create.”

Kickstarter’s terms have been modified a number of times since the site was launched, but the general timbre remains the same, if not strengthened:

“Kickstarter does not offer refunds. ... Project Creators are required to fulfill all rewards of their successful fundraising campaigns or refund any Backer whose reward they do not or cannot fulfill. Kickstarter is not liable for any damages or loss incurred related to rewards or any other use of the Service.”⁷

A backer who has paid towards a project which has not delivered would get little comfort from Kickstarter, and would, instead, be directed towards the project creator.

Pursuing the project creator

Whilst some project creators may have the funds available to issue rewards, this is perhaps unlikely where the Kickstarter funding has been spent on failed attempts to deliver the project. If a project creator is unwilling or unable to provide a refund on being asked, a backer would need to initiate legal action against that project creator. With most backers being consumers, and

⁶ Excerpts from Kickstarter’s first terms of use, available via the Internet Archive / Wayback Machine: <http://web.archive.org/web/20100306010428/http://www.kickstarter.com/terms-of-use>

⁷ Kickstarter’s terms of use, as at 3rd February 2012: <http://www.kickstarter.com/terms-of-use>

most pledges being of relatively low value,⁸ this is unlikely to be a viable option.

For UK-based projects, which Kickstarter began to support in October 2012,⁹ Money Claim Online¹⁰ may be a straightforward mechanism for doing this, but, for US-based projects, even if judgment were obtained, successful enforcement of any order is likely to be beyond most consumer backers. In any case, where a project has exhausted its funding, an order may be a hollow victory if the project creator has no funds to pay.

Other common approaches, such as a claim against one's credit card company, may also prove challenging. For US-based projects, which still make up the majority of projects on Kickstarter, a user will have paid via Amazon's payment mechanism. Whilst Amazon does offer a complaint and refund system, it requires that complaints are submitted within 30 days of payment, rather than 30 days from the point of breach.¹¹ As a project may well have promised a completion date of longer than one month after funding, a backer may not know that there is a problem within Amazon's complaints time period.

Similarly, a UK backer funding via a credit card may seek to use s75, Consumer Credit Act 1974 to reclaim the lost pledged amount from their bank, but it is unclear if the requisite "debtor-creditor-supplier" relationship is broken by the intermediary involvement of Amazon Payments. For UK based projects, payment is made by the backer to Kickstarter, which then distributes the money; again, there is no direct link between the backer and the project creator. Whilst potentially beneficial from a security perspective, in that the project creator never sees a backer's credit card details, it may be less desirable from a consumer protection point of view. A user relying on a card provider's own "chargeback" scheme may well find themselves

⁸ According to Kickstarter, the average pledge is \$71, and the most common pledge is \$25: <http://www.kickstarter.com/start>

⁹ <http://www.kickstarter.com/blog/kickstarter-in-the-uk-the-first-month>

¹⁰ <https://www.moneyclaim.gov.uk>

¹¹ <https://payments.amazon.co.uk/help/Personal-Accounts/User-Agreement-Policies/Buyer-Dispute-Programme>

in the same position, even if they fall within the relevant transaction reporting period.¹²

The result is that, for the vast majority of backers, if a project fails and the project creator does not provide refunds, recourse is limited. Unsurprisingly, this has led to discontent; one backer of the ZionEyez project, which has yet to deliver over a year after the expected shipping date, has commented that they are “never funding another KickStarter (sic) project,” with another noting that “we can safely assume that the project is dead and our cash is gone.”¹³

Should Kickstarter be liable for projects?

In adopting the stance that a backer can only take action against a project creator in the event of a problem, Kickstarter is positioning itself as a mere intermediary, an introducer.¹⁴ It makes available a platform which third party projects creators can use, and backers enter into direct relationships with these creators. If there is a problem, a backer’s recourse is against that creator, with whom the backer has a contractual relationship for the performance of the project in question.

Although unattractive to backers, who might benefit from a right of action against Kickstarter if a project fails to deliver, from a public policy point of view, affirming Kickstarter’s role as an intermediary seems appropriate. The policy rationale behind intermediary liability shields for online services within Europe is that, without such shields, a service provider could be held liable for the actions of those who use its systems and platforms — if a company could be held liable for the actions of its users, it is unlikely to innovate and develop exciting new services, with a severely detrimental effect on creativity in the information society.

¹² See, for example, VISA Europe’s scheme: <http://www.visaeurope.com/idoc.ashx?docid=6836ade1-c479-4986-9dcc-5fcca73e50f3&version=-1>

¹³ Comments made on the “ZionEyez” project: <http://www.kickstarter.com/projects/zioneyez/eyeztm-by-zioneyez-hd-video-recording-glasses-for>

¹⁴ In this respect, Kickstarter is not substantially different to eBay, which was considered to be an intermediary by the CJEU in case C-324/09, *L’Oréal v eBay*. The fact that Kickstarter receives a percentage of a successful project’s funding does not prevent a finding of being an intermediary: *Google France v. Louis Vuitton* (C-236/08) at paragraph 116.

In offering a platform which enables projects (which might not otherwise have an obvious funding route) to seek backing, Kickstarter provides a useful social function; legal liability for all projects offered through Kickstarter would likely kill the platform, and others based on a similar theme. However, the current situation, in which consumers' expectations are not met, is both damaging to Kickstarter as a brand and to crowdsourcing as an approach to funding: if crowdsourcing is indeed socially desirable, it needs to be done in a responsible manner, with appropriate consumer protection.

Balancing innovation and consumer protection

Squaring this circle means finding an approach in which Kickstarter is not liable for projects which fail, but which protects consumers against unforeseeable harm. The solution I posit here is not one of law, but of education: Kickstarter should further its efforts to inform potential backers of the risks associated with backing a project, and, in particular, to distinguish between "backing" a project and placing a pre-order.

The projects which Kickstarter hosts are often intrinsically risky, in that their success is not guaranteed. Even with funding secured, a project may fail to complete; that is an inherent part of business life. The challenge facing Kickstarter and other similar platforms is that it brings consumers into what is inherently a business environment. Whilst those experienced in doing business with new companies and backing new projects become accustomed to assessing the risk of a transaction before entering into it, consumers, usually isolated from trading risk by consumer protection laws, are unlikely to have that same awareness.

Importantly, given the risks inherent in any creative or development activity, unless a project has items on its warehouse shelves and ready to ship, it is unlikely to be desirable for consumers to think of backing a Kickstarter project as placing a pre-order. Doing so builds the expectation that they are, in effect, purchasing a product from a shop, rather than helping to fund the activity intending to bring about the product or service. Whilst some projects will succeed, an expectation of success without appropriate risk awareness sets a consumer up for a fall.

To its credit, Kickstarter has taken steps in this direction, although they are not yet sufficiently prominent. FAQs have been updated¹⁵ and guidelines for hardware and design projects modified to require a functional prototype and prohibit the use of potentially misleading simulated images,¹⁶ but it is unlikely that it has yet reached a point where every backer makes a risk/benefit calculation before backing, rather than acting as if they were pre-ordering in the relatively safe environment of an online store.

An interstitial page between choosing to back and project and the final confirmatory click would provide an opportunity to remind users that, no matter how impressive or certain a project may sound, there is an element of risk, and that, whilst the terms may require a project creator to issue a refund in the event of project failure, lack of assets to back such a refund is a possibility. Similarly, offering a series of click-through bullet points when a user logs in for the first time or after a period of absence, offering some key suggestions of what to look for in a project, may help educate without frightening potential investors.

Kickstarter may not be able to stop a project from failing to meet its objectives, but, by doing as much as it can to ensure that backers are aware of risks, the likelihood of backers feeling cheated is greatly reduced. Similarly, if backers are more aware of the risks, projects competing for funding will be incentivised to reduce risk, or else spell out more clearly what their risks are, bringing about a secondary benefit of increase quality of projects.

Conclusion

As an intermediary platform provider, Kickstarter plays a beneficial role in encouraging investment in projects which may otherwise struggle to obtain funding. As an intermediary, it would not be appropriate for Kickstarter to assume liability for the projects which it hosted; doing so would likely prove an intolerable burden.

However, recognising the limited opportunities for a backer to recover monies against a project which fails to complete successfully, Kickstarter should do more to educate users on the

¹⁵ <http://www.kickstarter.com/blog/kickstarter-is-not-a-store>

¹⁶ <http://www.kickstarter.com/help/guidelines>

assessment of risk prior to backing a project — an educational approach, rather than a legal approach, is likely to bring about the best results, with better-informed consumers making wiser decisions, and projects incentivised to increase the information which they make available, to encourage risk-aware backing.