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LET'S BATTLE

Understanding Digital Goods

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General Overview



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QUALIFICATION
COUNTRY SPECIFICS

What is meant under 'Digital Goods'?

... data or information products

... supplied in digital format as a stream of zeros and ones so as to be readable by a computer, and

... give instructions to the computer.

CONSUMER RIGHTS IN DIGITAL PRODUCTS

*A research report prepared for the UK Department for Business, Innovation and Skills
by Professor Robert Bradgate
September, 2010*

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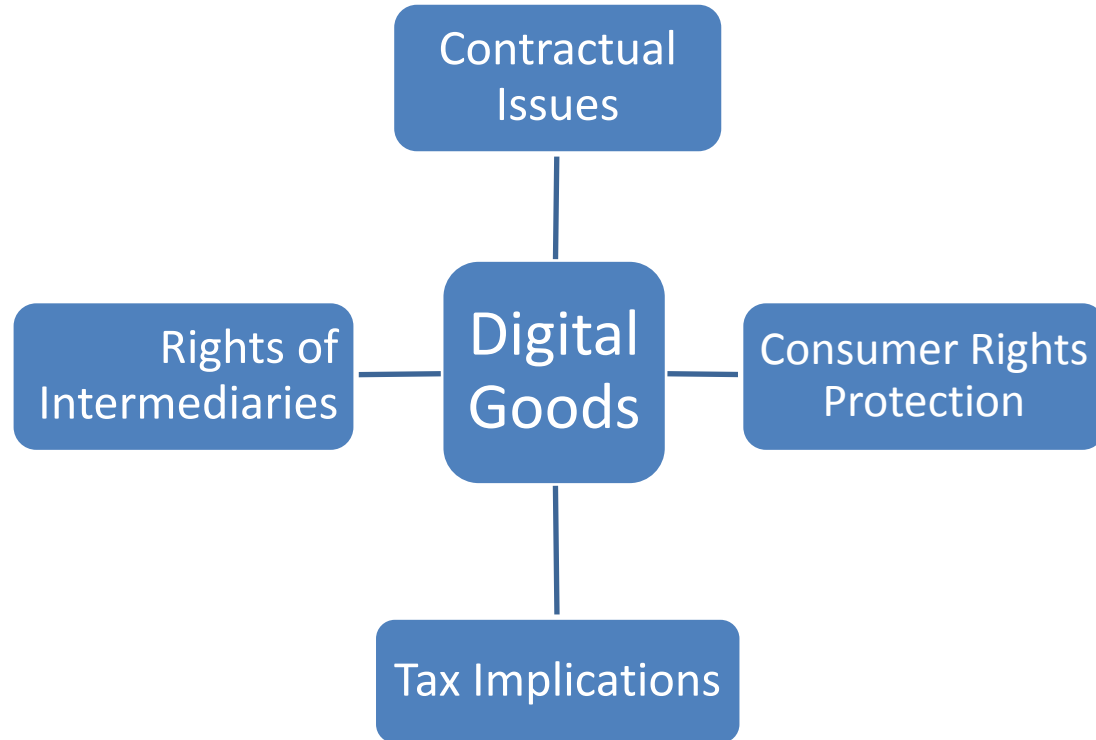
Examples of Digital Goods

- Music distributed via Spotify;
- Games sold on Steam;
- Videos accessible on YouTube;
- E-books sold on Amazon;
- Google maps, etc.

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Why qualification of Digital Goods is so important?



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Related notions

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Digital Goods

E-Commerce

Digital Economy

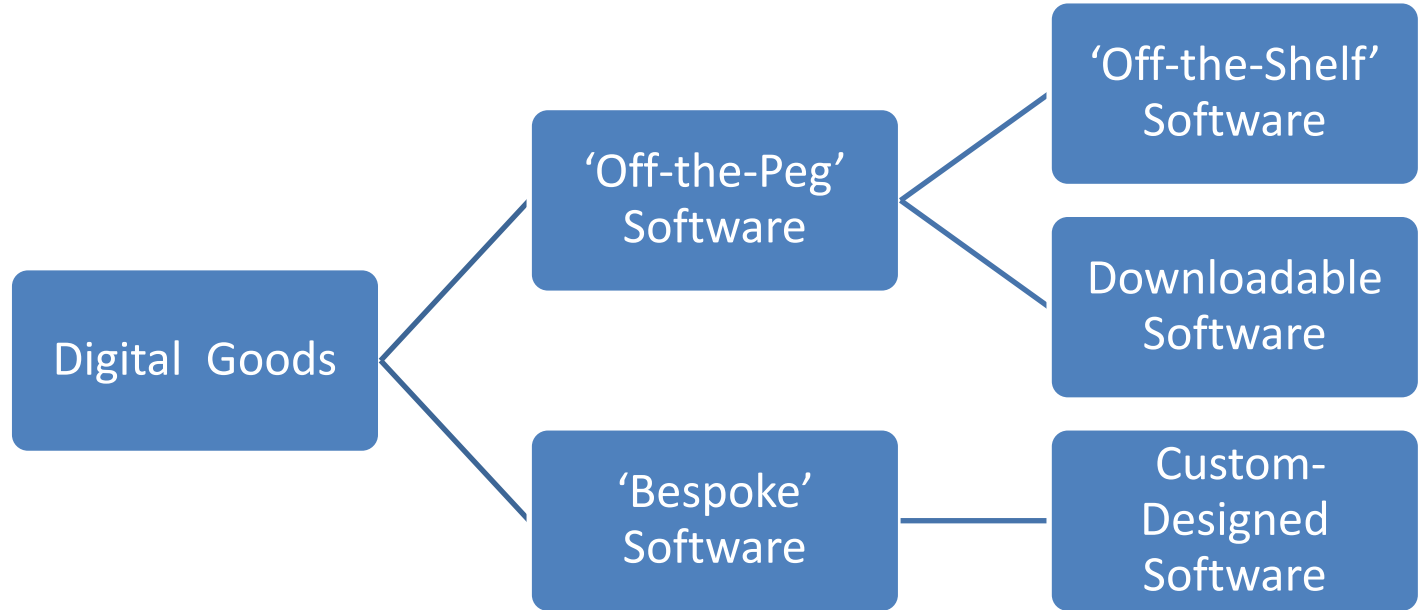
Types & Qualification



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Types of Digital Goods



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What do different types of Digital Goods resemble most?

'Bespoke' Software => **contract for professional services:**

- Seller develops tailor-made software customised for specific need of the user;
- Buyer pays for the process, rather than for a result.

'Off-the-Peg' Software = > **contract of sale of goods:**

- Product is massmarketed and commodified, more closely resembles a physical product;
- Seller is likely to be required to comply with Implied Terms of sales of goods contract.

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Legal Nature of Digital Goods



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Digital Goods: Sale of Goods

A contract of sale of goods is a contract by which the seller transfers or agrees to *transfer the property in goods* to the buyer for a money consideration called the price.



To invoke Implied Terms the following needs to be establish:

- *Are digital products 'goods'?*
- *If so, is the contract for the supply of software or other digital product, one for the transfer of property in goods?*

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Implied Terms

- i. the seller has the right to sell the goods;
- ii. the goods supplied correspond with their description;
- iii. the goods are of satisfactory quality and reasonably fit for the buyer's purpose, and
- iv. the goods correspond with any sample by which they are sold.

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Digital Goods: Sale of Goods

Problems:

- the contract is likely to be classified as sale of goods if the digital product is supplied on physical medium; otherwise qualification is under question;
- two consumers buying the same (e.g.) computer program (one buying it on disk, the other downloading it from the Internet), have different rights and remedies if the program proves faulty

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Digital Goods: Provision of Services

Wide definition of services;

Contract is more likely to be qualified as provision of services, if access to digital goods is provided offline;

Lower protection for consumers (the standard is '***due skill and care***'); not possible to invoke Implied Terms)

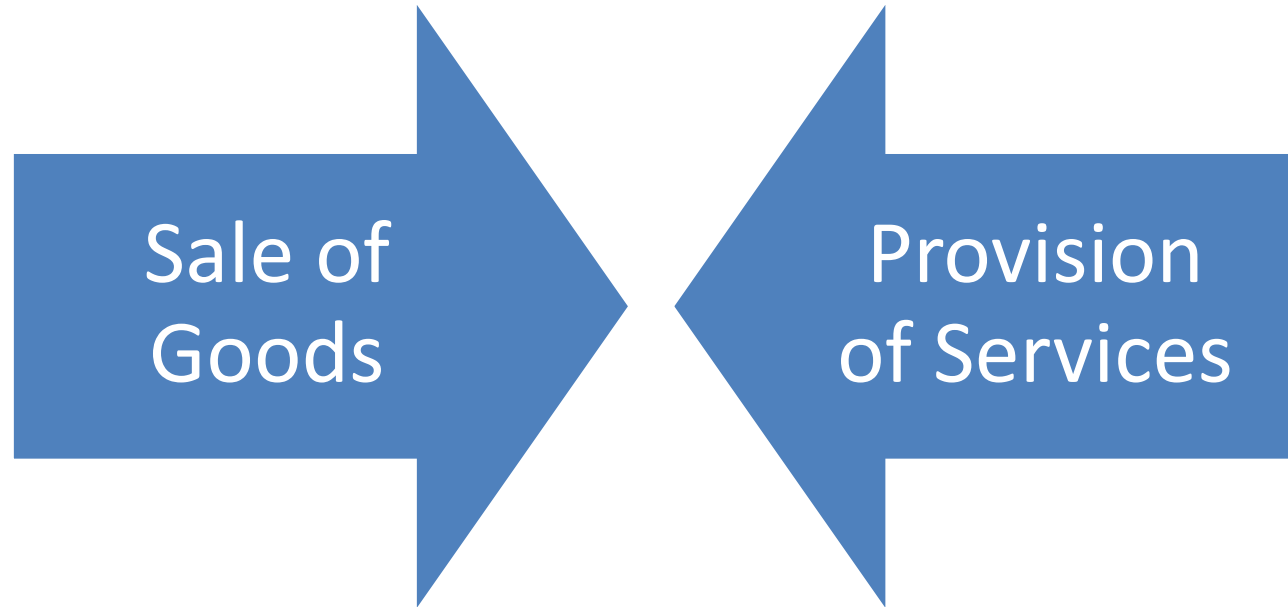
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Controversy

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Digital Goods: Contract Sui Generis

- ✓ Sale of Digital Goods is either sales of goods, nor pure license of software, but a mixture of those
- ✓ Established in case *Beta Computers (Europe) Ltd v Adobe Systems Ltd*
- ✓ Problems:
 - (i) Provides for a lower protection to consumers than sale of goods;
 - (ii) Shall be specifically regulated in law (case law is discrepant and scarce).

Country Specific Regulation



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European Union

Consumer Rights Directive 2011/83/EC (applies in all Member States from 13 June 2014):

Sales contracts (incl. digital content on tangible medium)

Service contracts

Contracts for online digital content

Contract for supply of public utilities

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European Union

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CRD seems to apply also to contracts for the supply of online digital content even if they do not involve payment

Right of withdrawal:

- ✓ Seller shall notify consumer about the right of withdrawal not later than before download or streaming;
- ✓ Consumers are able to pull out of purchases of digital content up to the point where downloading or streaming of the content begins.

Other considerations:

- I. New VAT rules on place of supply of telecommunications, broadcasting and electronic services (**Council Implementing Regulation (EU) No 1042/2013**);

- II. **A Digital Single Market Strategy for Europe** (May 2015):
 - Better online access to digital goods and services;
 - An environment where digital networks and services can prosper;
 - Digital as a driver for growth

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United Kingdom

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Before 2014

- The legal nature of digital goods is not clear
- Software is not goods but that does not mean it is “services” (service => action of some sort; software => a thing, though an intangible one)

Consumer Rights Bill (2014)

Minimum quality rights:

- ✓ Digital content is of satisfactory quality;
- ✓ Digital content fits for a particular purpose;
- ✓ Digital content is as described by the trader;
- ✓ Right to a repair or replacement, or a price reduction where the digital content does not conform to the contract;
- ✓ Remedy for any damage caused to the device or other digital content.

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Brazil

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Leading case - ***Extraordinary Appeal 176.626-3/SP***, decided on November 10th, 1998:

“...Though most software are negotiated through licenses of use, such software may nevertheless qualify as a good or a service...”

General understanding: *software that does not qualify as an off-the-shelf software or service may be qualified as a copyright*

Other case law: **Netflix case & Xbox case**

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Brazil

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Off-the-Shelf Software = Goods

- Sale of goods contract;
- Purchase price of the goods
- ISS (service tax) not applicable

Services

- Professional services contract;
- Remuneration fee
- ISS applicable

Copyright

- Software license agreement
- Royalties
- ISS likely to be applicable

Wide definition of Software:

- 1. results of software programming in the form of:
 - ✓ operating system;
 - ✓ operating, application, entertainment and/or educational software program or its components;
 - ✓ websites and/or online services; OR*
- 2. means of cryptographic protection of information*

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Mail.ru Games Case

Mail.ru Games position:

- ❑ sales of additional game functionality = transfers of limited rights to a computer program (VAT-exempted);
- ❑ access to the additional functionality = access to an expanded version of the relevant computer program (game).

Position of tax authorities:

- ❑ license agreement offered by Mail.ru Games to players is a *hybrid agreement* encompassing an agreement to provide services as well as a license agreement;
- ❑ Mail.ru Games provided players with *services* in the form of *organizing the process of the game*.

Court decision:

access to additional game functionality is NOT a LICENSE but is rather a SERVICE:

- no additional part of the computer program is provided to a user to access additional functionality => not a sale of an expanded version of a computer program;
- no connection between access to additional functionality and downloading of the game or provision of access to a game;
- agreement contains clauses unusual for a license agreement, (denial of access to additional functionality as a result of its usage, theft, etc.)

*Ruling of the Moscow Arbitration Court of 17 November 2014 on case No. A40-91072/14-90-176
Ruling No. 09АП-2062/2015 of the Ninth Arbitration Appeal Court of 6 March 2015*

THANK YOU!
ДЗЯКУЙ!
СПАСИБО!



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