

What's in a Name?

Software, Digital Products, and the Sale of Goods

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Abstract

This article addresses how the advent of trade in computer software, and now digital products, has challenged the application of sales law and consumer law. It addresses the law of three jurisdictions: the United Kingdom ('UK'), Australia and New Zealand. Often, applying the 'goods' criterion in these regimes will be uncontroversial. Nevertheless, modern market conditions have created a need to move beyond the existing question of whether software constitutes 'goods', and instead to ask how a range of different types of digital products fit into sales law and consumer law regimes. Many legal systems have settled the software-as-goods question. However, software is only one kind of commonly traded digital product. This article argues that other types of digital products — including apps, firmware, digital music and electronic books — should be treated the same way as software by sales law and consumer law regimes. Recent developments in UK consumer law are also analysed as an innovative model for reform regarding party rights and obligations in the supply of digital products.

I Introduction

For over 100 years, common law legal systems have applied special legal regimes to the sale of goods. The *Sale of Goods Act 1893* (UK) set the standard for the common law world. In the United Kingdom ('UK'), the original 1893 Act is now consolidated by the *Sale of Goods Act 1979* (UK). It was also the basis for derivative Sale of Goods Acts now in force in each of the Australian states and territories — the *Sale of Goods Act 1954* (ACT), the *Sale of Goods Act 1923* (NSW), the *Sale of Goods Act 1972* (NT), the *Sale of Goods Act 1896* (Qld), the *Sale of Goods Act 1895* (SA), the *Sale of Goods Act 1896* (Tas), the *Goods Act 1958* (Vic) and the *Sale of Goods Act 1895* (WA) — as well as New Zealand's *Sale of Goods Act 1908* (NZ). This UK, Australian and New Zealand ('NZ') legislation applies alongside the common law in regulating sales of goods. The

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legislation addresses particular issues, while the common law has residual application.¹

More recently, structural inequalities between consumers and suppliers have prompted protective measures for consumer contracts. In the UK, Australia and NZ, consumer protection legislation has been enacted, applying to (among other things) supplies of goods. In the UK, this legislation is the *Consumer Rights Act 2015* (UK). In Australia, consumer protection legislation was contained in the *Trade Practices Act 1974* (Cth), and is now contained in the *Australian Consumer Law*.² New Zealand's legislation, the *Consumer Guarantees Act 1993* (NZ), was an inspiration for the reform of Australia's law. In addition to having federal application, the *Australian Consumer Law* applies as the law of each Australian state and territory through local implementation legislation,³ ensuring uniform Australian consumer protection law. While the regular sales laws of common law states are based upon the principle of party autonomy, and operate subject to party agreement,⁴ these consumer protection regimes are mandatory — their protections cannot be excluded by contract.⁵

Sales law regimes only apply to transactions involving 'goods'.⁶ In many cases, the identification of goods poses no difficulty. The theoretical idea of 'thinghood' underpinning the law's understanding of goods⁷ is intuitive and often easy to apply. UK and Australian cases abound where it was so obvious that goods were involved, that judgments either do not mention the concept at all, or do not analyse it in detail.⁸ To take one example, the English decision of *Lockett v A&M Charles Ltd*⁹ involved the sale of restaurant food causing illness, breaching an implied warranty that it be fit for human consumption — the reported decision does not make any mention of the *Sale of Goods Act 1893* (UK) at all.

However, since the 1980s, computer software as a unit of economic exchange has challenged traditional legislative models framed in earlier times.¹⁰

¹ *Sale of Goods Act 1979* (UK) s 62(2); *Sale of Goods Act 1923* (NSW) s 4(2); *Goods Act 1958* (Vic) s 4(2); *Sale of Goods Act 1908* (NZ) s 60(2).

² *Competition and Consumer Act 2010* (Cth) sch 2 ('Australian Consumer Law').

³ See, eg, *Fair Trading Act 1987* (NSW) s 28(1); *Australian Consumer Law and Fair Trading Act 2012* (Vic) s 8(1).

⁴ *Sale of Goods Act 1979* (UK) s 55(1); *Sale of Goods Act 1923* (NSW) s 57; *Goods Act 1958* (Vic) s 61; *Sale of Goods Act 1908* (NZ) s 56. See also JW Carter, 'Party Autonomy and Statutory Regulation: Sale of Goods' (1993) 6(2) *Journal of Contract Law* 93, 93.

⁵ *Consumer Rights Act 2015* (UK) ss 31(1)–(2); *Australian Consumer Law* s 64(1); *Consumer Guarantees Act 1993* (NZ) s 43(1).

⁶ See, eg, *Sale of Goods Act 1979* (UK) s 2(1), requiring a sale, of goods, involving the passage of property, for money consideration.

⁷ *Australian Competition and Consumer Commission v Valve Corporation (No 3)* [2016] FCA 196 (24 March 2016) [128] ('ACCC v Valve (No 3)').

⁸ See, eg, *Niblett Ltd v Confectioners' Materials Company Ltd* [1921] 3 KB 387: tins of condensed milk; *Rowland v Divall* [1923] 2 KB 500: a motor car; *Metal Roofing and Cladding Pty Ltd v Amcor Trading Pty Ltd* [1999] QCA 472 (12 November 1999): polyvinyl chloride ('PVC') resin to be used in the manufacture of PVC pipes; *Elder Smith Goldsbrough Mort Ltd v McBride* [1976] 2 NSWLR 631: a Hereford bull known as Midgeon Supreme.

⁹ [1938] 4 All ER 170.

¹⁰ Christopher Kee, 'Rethinking the Common Law Definition of Goods' in Andrea Bächler and Markus Müller-Chen (eds), *Private Law: National — Global — Comparative, Festschrift für Ingeborg Schwenzer zum 60 Geburtstag* (Intersentia, 2011) 925, 925; Trevor Cox, 'Chaos Versus

Software simply could not have been taken into account at the time sales law models were developed.¹¹ Whether or not software constitutes goods for the purpose of sales law and consumer law was debated for some time. All three jurisdictions addressed in this article have — through case law or legislative intervention — settled this debate. Nevertheless, that historical question is now part of a larger problem addressed by this article. The real contemporary question is not whether software constitutes goods, but whether the much broader class of digital products that are now commonly traded are properly the subject of sales law and consumer law regimes. Such digital products include apps, firmware, digital music and electronic books. Should digital products, as a broader class of products, be treated the same way as software?

Part II of this article explains the practical importance of this taxonomic issue. Part III then summarises existing law in the UK, Australia and NZ addressing the classification of software. Part IV addresses the key problem confronted by this article: namely, that various kinds of digital products commonly traded today are not necessarily sufficiently identifiable with software to conclude that they would be treated the same way. Part IV argues that a more contemporary perspective is required, shifting the focus of modern analysis towards digital products as an overall category of products. Finally, Part V assesses the UK's recent legislative intervention — the *Consumer Rights Act 2015* (UK) — as an excellent model from which both Australian and NZ lawmakers might learn.

II What's in a Name? — Not Just Taxonomy for Taxonomy's Sake

This article is concerned with digital products. Existing literature, case law and legislation addresses software — one type of digital product. So, what's in a name? Rather than this issue being an exercise in taxonomy for taxonomy's sake, our understanding of digital products and software vis-à-vis the goods concept has real practical importance for the rights of buyers and consumers, and the obligations of sellers and suppliers.

The meaning of the term 'goods' depends upon the context in which it is used.¹² Two brief examples drawn from criminal law and copyright law demonstrate the broader significance of classifying digital products in the law. In the criminal law context, not dissimilar definitional issues recently arose in the NZ case of *Dixon v R*,¹³ a prosecution under the *Crimes Act 1961* (NZ) s 249(1)(a).

That provision establishes that it is an offence to 'directly or indirectly, [access] any computer system and thereby, dishonestly or by deception, and without claim of right' obtain 'any property'. The appellant, who worked for a security firm providing services to a bar, accessed the bar's security system to

Uniformity: The Divergent Views of Software in the International Community' [2000] (3) *Business Law International* 359, 359.

¹¹ Sarah Green and Djakhongir Saidov, 'Software as Goods' [2007] (Mar) *Journal of Business Law* 161, 162, 178.

¹² *The Noordam* [No 2] [1920] 1 AC 904, 908–9.

¹³ [2016] 1 NZLR 678.

obtain digital footage of a well-known patron, which he then attempted to sell to the media, before uploading it to YouTube.¹⁴ At issue was whether this digital footage — spliced into a compilation on the bar's computers, copied onto a USB stick, and then deleted from the bar's computers¹⁵ — was 'property' within the meaning of the offence.¹⁶ Property is defined in the *Crimes Act 1961* (NZ) s 2(1) to include 'real and personal property, ... money, electricity, and any debt, and any thing in action, and any other right or interest'. The NZ Supreme Court referred to the classification of software in sales law as 'one aspect of the broader statutory context',¹⁷ and specifically referred to *St Albans City and District Council v International Computers Ltd*¹⁸ (addressed below) as differentiating information from the medium on which it is stored.¹⁹ The Court held that the conviction recorded at trial must stand.²⁰

[W]e have no doubt that the digital files at issue are property and not simply information. In summary, we consider that the digital files can be identified, have a value and are capable of being transferred to others. They also have a physical presence, albeit one that cannot be detected by means of the unaided senses. Whether they are classified as tangible or intangible, the digital files are nevertheless property for the purposes of s 249(1)(a).²¹

A further example of the significance of properly classifying digital products is provided by the *Copyright Act 1968* (Cth) and its treatment of computer programs. Pursuant to the *Copyright Act 1968* (Cth) s 31(1)(d), copyright includes the exclusive right 'to enter into a commercial rental arrangement in respect of the [computer] program'. Further, pursuant to s 196(1) of the Act, copyright constitutes personal property. Computer programs are literary works for the purposes of the *Copyright Act 1968* (Cth).²² However, digital music — another kind of digital product — is classified very differently. It is a musical work that has been reduced to material (in this case, digital) form, and also represents a copy of a sound recording. The Australian copyright context is, therefore, one particular area of the law where a distinction is drawn between software and other kinds of digital products.

In both examples, the digital matter is considered property. Goods, however, are one specific type of property. That digital products constitute property does not necessarily lead to the conclusion that digital products are goods. Returning now to the core concern of this article — sales law and consumer law — whether or not software, and digital products in general, constitute(s) goods affects the rights of buyers and consumers, and the obligations of sellers and suppliers.

In the UK, Australia and NZ, certain rights are conferred upon buyers and consumers by operation of sales and consumer law. Whether or not the subject

¹⁴ Ibid 684 [1]–[2].

¹⁵ Ibid 687 [12].

¹⁶ Ibid 685 [6].

¹⁷ Ibid 686 [11].

¹⁸ [1996] 4 All ER 481, 493 ('*St Albans City and District Council*').

¹⁹ *Dixon v R* [2016] 1 NZLR 678, 689 [19].

²⁰ Ibid 698 [53], 703 [72].

²¹ Ibid 690–1 [25].

²² *Copyright Act 1968* (Cth) s 47AB.

matter of a transaction constitutes goods is a threshold condition for buyers and consumers being automatically granted those rights. For example, sellers and suppliers have an obligation to ensure quiet possession,²³ unencumbered title²⁴ and correspondence with any sample.²⁵ Another right conferred concerns title in general,²⁶ not necessarily relevant where digital products are licensed — a common form of distribution.²⁷ Most important in cases involving software and other digital products, however, are rights regarding the quality of goods,²⁸ their fitness for purpose,²⁹ and their correspondence with description.³⁰

Applications of these rights to transactions involving ‘regular’ goods are readily appreciated — a non-roadworthy car, or machinery lacking a critical performance capability, for example. Factual scenarios involving software and digital products implicating one or more of these rights can also be easily imagined. A computer game might be released into the market in an objectively unfinished or otherwise imperfect state — the 2014 release of ‘Assassin’s Creed Unity’ was one example where (in the publisher’s own words) ‘the overall quality of the game was diminished by bugs and unexpected technical issues’.³¹ An app might be designed for the Android system, but be incompatible with particular types of Android devices.³² Or digital music may be acquired that is not at the expected standard of recording quality.³³

If digital products are considered goods, buyers and consumers would enjoy the automatic protection of these rights, by operation of law. It would still stand to

²³ *Sale of Goods Act 1979* (UK) ss 12(2)(b), (5); *Sale of Goods Act 1923* (NSW) s 17(2); *Goods Act 1958* (Vic) s 17(b); *Australian Consumer Law* s 52; *Sale of Goods Act 1908* (NZ) s 14(b); *Consumer Guarantees Act 1993* (NZ) s 5(1)(c).

²⁴ *Sale of Goods Act 1979* (UK) ss 12(2)(a), (3)–(4); *Sale of Goods Act 1923* (NSW) s 17(3); *Goods Act 1958* (Vic) s 17(c); *Australian Consumer Law* s 53; *Sale of Goods Act 1908* (NZ) s 14(c); *Consumer Guarantees Act 1993* (NZ) s 5(1)(b).

²⁵ *Sale of Goods Act 1979* (UK) s 15; *Sale of Goods Act 1923* (NSW) s 20; *Goods Act 1958* (Vic) s 20; *Australian Consumer Law* s 57; *Sale of Goods Act 1908* (NZ) s 17; *Consumer Guarantees Act 1993* (NZ) s 10.

²⁶ *Sale of Goods Act 1979* (UK) s 12(1); *Sale of Goods Act 1923* (NSW) s 17(1); *Goods Act 1958* (Vic) s 17(a); *Australian Consumer Law* s 51; *Sale of Goods Act 1908* (NZ) s 14(a); *Consumer Guarantees Act 1993* (NZ) ss 5(1)(a), (2).

²⁷ Cf Thomas Lockhart and Richard McKenna, ‘Software License Agreements in Light of the UCC and the Convention on the International Sale of Goods’ (1991) 70(7) *Michigan Bar Journal* 646, 646.

²⁸ *Sale of Goods Act 1979* (UK) ss 14(2)–(2C); *Sale of Goods Act 1923* (NSW) s 19(2); *Goods Act 1958* (Vic) s 19(b); *Australian Consumer Law* s 54; *Sale of Goods Act 1908* (NZ) s 16(b); *Consumer Guarantees Act 1993* (NZ) ss 6–7.

²⁹ *Sale of Goods Act 1979* (UK) s 14(3); *Sale of Goods Act 1923* (NSW) s 19(1); *Goods Act 1958* (Vic) s 19(a); *Australian Consumer Law* s 55; *Sale of Goods Act 1908* (NZ) s 16(a); *Consumer Guarantees Act 1993* (NZ) s 8.

³⁰ *Sale of Goods Act 1979* (UK) s 13; *Sale of Goods Act 1923* (NSW) s 18; *Goods Act 1958* (Vic) s 18; *Australian Consumer Law* s 56; *Sale of Goods Act 1908* (NZ) s 15; *Consumer Guarantees Act 1993* (NZ) s 9.

³¹ Yannis Mallat, *An Update on Assassin’s Creed Unity from Yannis Mallat* (26 November 2014) Assassin’s Creed — Ubisoft <http://assassinscreed.ubi.com/en-gb/news/news_detail.aspx?c=tc:154-186654-16&ct=tc:148-76770-32>.

³² See generally Android, *Device Compatibility*, Android Developers <<https://developer.android.com/guide/practices/compatibility.html>>.

³³ Cf Yanto Browning, ‘Studio-Quality Digital Music? It’s Only as Good as Your Set-Up’ (17 March 2014) *The Conversation* <<http://theconversation.com/studio-quality-digital-music-its-only-as-good-as-your-set-up-24415>>.

be determined whether (on the facts of a particular case) there is a breach. Nevertheless, as a gateway issue, this matter has great significance — it determines whether or not the protections apply at all. Thus, writing in the context of the *Sale of Goods Act 1979* (UK), Marsoof identifies that ‘[i]t cannot be doubted that one of the key features of the *SGA* is its implied terms’.³⁴

It is true that goods contracts are not the only contracts enjoying the benefit of legislative protections. The common law world has traditionally recognised a dichotomy between goods contracts and services contracts. Legislation confers rights with respect to services contracts — for example, under the *Australian Consumer Law*’s pt 3-2, div 1, sub-div B. It may be that some contracts involving digital products are best characterised as ‘a pure service’ — where software is ‘deployed to the user, on demand, at the time of use and typically on a subscription or “pay-as-you-go” basis’.³⁵ This ‘software-as-a-service’ market is growing in importance,³⁶ reflected in the popularity of music streaming services, referred to in Part IV. Nevertheless, even if this is the case, uncertainty as to whether digital products are goods or services still matters. Different protections apply to each. In the recent decision of *ACCC v Valve (No 3)*, Valve sought to defend proceedings brought by the Australian Competition and Consumer Commission (‘ACCC’) under the *Australian Consumer Law* on grounds (among others) that its Steam computer gaming platform was a service, rather than goods.³⁷ The ACCC’s claim was based on the guarantee of acceptable quality under the *Australian Consumer Law* s 54, applying to goods transactions only. Valve’s submission was ultimately unsuccessful,³⁸ though Edelman J did express some difficulty in characterising particular parts of the Steam platform as goods or services.³⁹

In the UK, the dichotomy between goods and services has been broken by the *Consumer Rights Act 2015* (UK), which came into force on 1 October 2015. This legislation proceeds on the basis of a third way — treating digital product transactions as a sui generis category, with their own specific legislative protections.⁴⁰ The Act’s very first operative section — its s 1(1) application provision — explains that its pt 1 consumer protection provisions apply ‘where there is an agreement between a trader and a consumer for the trader to supply goods, digital content or services, if the agreement is a contract’. The *Consumer Rights Act 2015* (UK) overcomes problems caused by the restrictive goods-and-services-dichotomy by recognising digital products as a third category of case — referred to as digital content for the purposes of that legislation. Thus, in pt 1 of the Act, ch 2 deals with goods, ch 4 addresses services, but ch 3 is a standalone regime addressing consumer protections for digital content.

³⁴ Althaf Marsoof, ‘Digital Content and the Definition Dilemma under the *Sale of Goods Act 1979*: Will the Consumer Rights Bill 2013 Remedy the Malady?’ (2014) 9(4) *Journal of International Commercial Law and Technology* 285, 286.

³⁵ Dan Jerker B Svantesson, ‘A Call for Judicial Activism — Rapid Technological Developments and Slow Legal Developments’ (2011) 36(1) *Alternative Law Journal* 33, 34.

³⁶ *Ibid.*

³⁷ [2016] FCA 196 (24 March 2016) [6].

³⁸ *Ibid* [7], [340].

³⁹ *Ibid* [156].

⁴⁰ Marsoof, above n 34, 288.

As explained in Part V, this legislation is a best-practice model for reform. Nevertheless, even in the UK, the classification of digital products as goods or otherwise still matters. Sui generis protections only apply to consumer transactions, and even then consumers are defined as natural persons only.⁴¹ Outside the consumer context, the taxonomic difficulties encountered under the *Sale of Goods Act 1979* (UK) with respect to both software and digital products remain relevant.⁴²

If digital products are not considered goods, and are not afforded sui generis protections as under the *Consumer Rights Act 2015* (UK), rights enjoyed by buyers and consumers may fall to be determined by the common law. On the facts of a particular case, the common law might imply protective terms substantively equivalent to those in sales law or consumer law regimes. This view was reached by Sir Iain Gildewell in obiter dicta in *St Albans City and District Council*⁴³ — a case involving defective computer software acquired by a local council authority, causing financial loss. However, it is important to appreciate that the common law's protection is no substitute for the rights conferred by sales law and consumer law. The common law has two fundamental limitations. First, while legislative protections apply by operation of law, the common law only implies relevant contractual terms in fact. The requirements of the common law are 'strict',⁴⁴ including that the term be so obvious that it goes without saying,⁴⁵ a high threshold that will not be met in every case. Second, the common law's protections are afforded by implying terms in contracts of sale. This can be compared to consumer law — where there need only be a 'supply' of goods. Though the *Consumer Rights Act 2015* (UK) s 1(1) requires that a supply of goods be by contract, under the *Australian Consumer Law*, supply is defined broadly as including 'supply (including re-supply) by way of sale, lease, hire or hire-purchase'.⁴⁶

In sum, the classification of digital products as goods or otherwise matters because it stands to affect the rights of buyers and consumers, and the obligations of sellers and suppliers. An analysis of this issue matters because it is not entirely clear that the law's existing classification of software would extend to digital products in general. On the contrary, there are very real reasons to believe that it might not, as analysed in Part IV.

III The State of Play — Software and the Concept of 'Goods'

It was famously remarked by Lord Steyn that '[i]n law context is everything'.⁴⁷ The classification of software is not the primary concern of this article, being a settled question in the three jurisdictions under consideration. However, the issue is still an essential contextual element informing this article's analysis.

⁴¹ *Consumer Rights Act 2015* (UK) s 2(3).

⁴² Marsoof, above n 34, 290.

⁴³ [1996] 4 All ER 481, 494.

⁴⁴ Ibid.

⁴⁵ *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266, 282–3.

⁴⁶ *Australian Consumer Law* s 2(1).

⁴⁷ *R v Secretary of State for the Home Department; Ex parte Daly* [2001] 2 AC 532, 548 [28].

For the purposes of this Part's analysis, the position taken in the *Consumer Rights Act 2015* (UK) will be put to one side. In Part A, the common law's classification of software is assessed, while in Part B, the impact of legislative interventions in Australia and NZ are considered.

A *Software's Classification at Common Law*

In the UK, Australia and NZ, the question of whether software constitutes 'goods' under sales law and consumer law is determined by the common law, subject to statutory intervention. Five key cases develop the position that software constitutes goods when it is embodied in a physical medium, but not when it is software *simpliciter*; that is, software in and of itself. While these cases were all decided in the UK and Australia, they likely reflect the position that would have been taken in NZ had the issue arisen prior to the legislative interventions addressed in Part B.⁴⁸

Though this Part addresses software's classification at common law, the starting point in all three jurisdictions is their Sale of Goods Acts' definitions of 'goods'. In the UK and in Australia, there is still no specific reference to software in these definitions. For this reason, the *Sale of Goods Act 1979* (UK) and the derivative Australian state and territory statutory definitions are a convenient starting point. Both define goods on an inclusive basis. The common law then applies its definition of goods, where items do not fall within the specifically enumerated categories. At common law, goods are understood as choses in possession, given that things in action (the common law's other type of personal chattel) are excluded from the statutory definitions. At common law, choses in possession are 'items capable of being the subject of actual possession'.⁴⁹ That goods are tangible and movable items is, therefore, central to the common law's conception of goods — recently described as 'thinghood' by Edelman J in the Federal Court of Australia.⁵⁰

The *Sale of Goods Act 1979* (UK) s 61(1) provides that 'goods':

includes all personal chattels other than things in action and money, and in Scotland all corporeal moveables except money; and in particular 'goods' includes emblements, industrial growing crops, and things attached to or forming part of the land but which are agreed to be severed before sale or under the contract of sale; and includes an undivided share in goods ...

So far as Australia's statutory definitions are concerned, the *Goods Act 1958* (Vic) is representative, though slight variations exist in the expression of the various state and territory definitions.⁵¹ The *Goods Act 1958* (Vic) s 3(1), similarly to the UK Act, defines 'goods' by providing that the term 'includes all chattels personal other than things in action and money' and that '[t]he term includes

⁴⁸ *Dixon v R* [2016] 1 NZLR 678, 687 [11] n 11. Cf *Electricity Supply Association of New Zealand Inc v Commerce Commission* (1998) 6 NZBLC 102,555.

⁴⁹ LexisNexis, *Halsbury's Laws of Australia* (at 6 February 2012) 315 Personal Property, '(A) Introduction — Meaning and Classification of Personal Property' [315-15].

⁵⁰ *ACCC v Valve (No 3)* [2016] FCA 196 (24 March 2016) [128].

⁵¹ See also *Sale of Goods Act 1954* (ACT) ss 2 [dictionary]; *Sale of Goods Act 1923* (NSW) s 5(1); *Sale of Goods Act 1972* (NT) s 5(1); *Sale of Goods Act 1896* (Qld) s 3(1); *Sale of Goods Act 1895* (SA) s A2(1); *Sale of Goods Act 1896* (Tas) s 3(1); *Sale of Goods Act 1895* (WA) s 60(1).

emblems and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale’.

Given that these statutory definitions do not specifically address software, courts apply the common law definition of goods as being personal chattels and, specifically, choses in possession. In doing so, they differentiate software embodied in a physical medium from software that is not. Only the former constitutes goods. Software not sold by way of a physical medium is not goods for the purposes of the UK and Australian Sale of Goods Acts.

There are five cases from which this principle is distilled, and which provide interesting factual applications of its distinction. The first of these is *Toby Constructions Products Pty Ltd v Computa Bar (Sales) Pty Ltd*,⁵² which involved the sale of ‘a computer system, comprising both hardware and software’ as an ‘aggregate operative system’.⁵³ As the software was bound up in the hardware, there was ‘a sale of tangible chattels, a transfer of identifiable physical property’, and the transaction was treated by the New South Wales (‘NSW’) Supreme Court as a sale of goods.⁵⁴ As a result, the implied terms contained in the *Sale of Goods Act 1923* (NSW) and the *Trade Practices Act 1974* (Cth) (as the *Competition and Consumer Act 2010* (Cth) was then known) applied.

The second case, *St Albans City and District Council*,⁵⁵ was a decision of the Court of Appeal of England and Wales. That case involved a transfer of software *simpliciter*. An employee of the seller attended the buyer’s premises and installed software onto the buyer’s hardware from a disk, but then took that disk away. The disk — the physical medium — was not transferred as part of the transaction. While Nourse and Hirst LJ decided the case upon general contractual principles, Sir Iain Gildewell also considered whether there was a sale of goods, and concluded there was not. A distinction was drawn ‘between the program and the disk carrying the program’; the disk was goods, but the program in and of itself was not.⁵⁶ Sir Iain Gildewell likened a disk containing software to an instruction manual containing information about maintaining and repairing a car — incorrect instructions in a manual can render the manual (as goods) defective, as can a defective program to a disk.⁵⁷ However, since the disk was not itself transferred to the purchaser, there was no transfer of goods.⁵⁸ For this reason, the terms implied by the *Sale of Goods Act 1979* (UK) did not apply; though on the facts of the case, the Court of Appeal found that an express term of the contract had been breached in any event.

Watford Electronics Ltd v Sanderson CFL Ltd,⁵⁹ a case of the High Court of England and Wales, involved the purchase of a bespoke integrated software system along with various items of hardware. Though expressing reservations about the

⁵² [1983] 2 NSWLR 48 (*‘Toby Constructions’*).

⁵³ *Ibid* 54.

⁵⁴ *Ibid*.

⁵⁵ [1996] 4 All ER 481.

⁵⁶ *Ibid* 493.

⁵⁷ *Ibid*.

⁵⁸ *Ibid*.

⁵⁹ [2000] 2 All ER (Comm) 984.

distinction drawn in *St Albans City and District Council*,⁶⁰ the Court's decision ultimately turned on a different prerequisite to the application of the *Sale of Goods Act 1979* (UK) — the requirement of a sale, not satisfied given that the software was licensed only.⁶¹

Australia's Administrative Appeals Tribunal in *Re Amlink Technologies Pty Ltd and Australian Trade Commission*⁶² also critiqued Sir Iain Gildewell's distinction.⁶³ Nevertheless, the decision was consistent with that distinction⁶⁴ when it found that events management software distributed via CD-ROM⁶⁵ was goods.⁶⁶ Though this case was decided under the *Export Market Development Grants Act 1997* (Cth), and did not concern the application of sales law or consumer law regimes, the classification issue was significant for a different reason. That the relevant export grant category was goods (rather than intellectual property or know-how) affected the conditions attached to the grant.⁶⁷ Notwithstanding being decided outside the sales law context, sales law jurisprudence was referred to in resolving the definitional issue.⁶⁸

Software downloaded directly from the internet with no physical medium involved at all was addressed by the NSW Supreme Court in *Gammasonics Institute for Medical Research Pty Ltd v Comrad Medical Systems Pty Ltd*.⁶⁹ While reservations were again expressed regarding Sir Iain Gildewell's distinction,⁷⁰ that distinction was held to represent the current state of the law. Though the Court saw some 'merit' in adopting a 'technology-neutral' approach,⁷¹ it held that any change to the common law's position required legislative intervention.⁷² Since software *simpliciter* was held not to constitute goods, the implied terms under the *Sale of Goods Act 1923* (NSW) could not apply. The five cases surveyed here establish a clear theme of tangibility running through the common law's position.

B Software following Statutory Intervention

Legislative intervention of the kind referred to in *Gammasonics* has occurred in NZ, with respect to its sales law and consumer law. The *Sale of Goods Amendment Act 2003* (NZ) amended the *Sale of Goods Act 1908* (NZ) to expressly confirm that computer software constitutes goods. Under the *Sale of Goods Act 1908* (NZ) s 2(1), para (c) of the definition of 'goods' now provides that the term includes, 'to avoid doubt, computer software'. Equivalent amendments were made to NZ's consumer law. The *Consumer Guarantees Amendment Act 2003* (NZ) amended the

⁶⁰ Ibid 1002–3 [59].

⁶¹ Ibid 1003 [60].

⁶² (2005) 86 ALD 370.

⁶³ Ibid 375 [30].

⁶⁴ Ibid 376 [34].

⁶⁵ Ibid 376 [33].

⁶⁶ Ibid 377 [42].

⁶⁷ Ibid 374 [23]–[24].

⁶⁸ Ibid 374–8 [25]–[43].

⁶⁹ (2010) 77 NSWLR 479 ('*Gammasonics*').

⁷⁰ Ibid 484 [26]–[27].

⁷¹ Ibid 487 [38].

⁷² Ibid 488 [45].

Consumer Guarantees Act 1993 (NZ) and in that case, goods also include ‘to avoid doubt ... computer software’.⁷³

Legislative intervention has also occurred in Australia, with respect to consumer law only. Australia’s sales law maintains the common law position described in Part A. This legislative intervention was effected by the 2010 reforms to Australia’s consumer law, where the *Trade Practices Act 1974* (Cth) became the *Competition and Consumer Act 2010* (Cth), containing the *Australian Consumer Law* in its sch 2. Pursuant to the definitions provision in the *Australian Consumer Law* s 2(1), para (e) of the definition of goods now includes ‘computer software’ (as well as para (g) including ‘any component part of, or accessory to, goods’).

Before the 2010 reforms, the equivalent provision in the *Trade Practices Act 1974* (Cth)⁷⁴ made no mention of software, so adopted the common law position. Case law has recognised the *Australian Consumer Law* s 2(1) definition as a departure from the common law.⁷⁵ For the purposes of Australia’s consumer law, software is now treated as goods irrespective of its form.⁷⁶ Though this change is not addressed in the relevant Explanatory Memorandum,⁷⁷ and even finds no mention at all in one of Australia’s key consumer law texts,⁷⁸ it is apparent that NZ’s 2003 reforms were influential. The literature⁷⁹ and also the legislative history⁸⁰ concerning the *Australian Consumer Law* demonstrate that the legislation, as a whole, borrowed heavily from the *Consumer Guarantees Act 1993* (NZ).

Though the UK recognises digital products as a sui generis category under the *Consumer Rights Act 2015* (UK), like Australia, it has not altered the common law position on software under the *Sale of Goods Act 1979* (UK). The common law position, focusing on tangibility, remains relevant for non-consumer transactions in the UK.

The five cases addressed above, statutory interventions in Australia’s consumer law, and legislative amendment to both sales and consumer law in NZ, identify when software constitutes goods. What, then, does this tell us about digital products in general? Is this purported distinction, really, much ado about nothing?

⁷³ *Consumer Guarantees Act 1993* (NZ) s 2(1) (definition of ‘goods’, para (b)(vi)).

⁷⁴ *Trade Practices Act 1974* (Cth) s 4(1).

⁷⁵ *ACCC v Valve (No 3)* [2016] FCA 196 (24 March 2016) [137]; *Goldiwood Pty Ltd v ADL (Aust) Pty Ltd* [2014] QCAT 238 (27 May 2014) [25]–[26], [28] (‘Goldiwood’).

⁷⁶ See, eg, *Goldiwood* [2014] QCAT 238 (27 May 2014) [37].

⁷⁷ Explanatory Memorandum, Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010 (Cth).

⁷⁸ Alex Bruce, *Consumer Protection Law in Australia* (LexisNexis Butterworths, 2nd ed, 2014).

⁷⁹ Stephen Corones and Philip Clarke, *Australian Consumer Law — Commentary and Materials* (Thomson Reuters, 5th ed, 2015) 12 [1.40].

⁸⁰ Commonwealth, *Parliamentary Debates*, House of Representatives, 17 March 2010, 2719–20 (Craig Emerson, Minister for Competition Policy and Consumer Affairs); Explanatory Memorandum, Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010 (Cth) 178–9 [7.9], 614–27 [25.75]–[25.134].

IV Digital Products and Goods – A More Contemporary Perspective

In the 1980s and 1990s, the software-as-goods question was important in and of itself. Software was an emerging unit of economic exchange, and was quickly growing in both commercial and practical importance, with its classification involving a novel question. Today, that question is no longer novel. However, its settlement in the UK, Australia and NZ does not directly solve the problem addressed by this article — the treatment of digital products, as an overall category of products, under sales law and consumer law regimes.

A *Software-as-Goods – An Outmoded Analysis*

The focus of existing analysis on software reflects its genesis in the 1980s. At that time, the technological environment was significantly different to that faced by modern traders in modern economies. Software was often distributed on 5¼ inch or 3½ inch floppy disks. Electronic distribution of software was not a common means of commercial software distribution. As a broad generalisation, computers (often desktop computers) ran operating systems such as MS-DOS, Windows 3.1 or Mac System. Through those operating systems they ran software — understood in this traditional context as ‘computer programs’. Those programs consisted of, and may also have made use of, ‘files’. Understanding what constituted software in this environment, at this time, was relatively straightforward. Software was a traditional computer program that may or may not have made use of other external files to achieve particular user results. A word processor would be seen as software; individual document files created pursuant to that software would not. Similarly, a mathematical program may generate random numbers — though not operating by reference to external files, this kind of computer program would also be understood as software.

This traditional understanding of software is reflected in the 1983 decision of *Toby Constructions*. In that case, Rogers J of the NSW Supreme Court explained:

A computer is a device designed to accept data, manipulate or process it in accordance with instructions, being the programmes, and generate a useful output. Both input and output need physical devices such as readers, teletype printers, video display tubes and discs. The heart of the computer is the central processing unit which performs the actual processing. All these items are tangible physical objects. By itself hardware can do nothing. The really important part of the system is the software. Programmes are the instructions or commands that tell the hardware what to do.⁸¹

The problem with existing software-as-goods analyses is that their frame of reference is stuck in the technological and economic environment of the 1980s, which no longer reflects modern trading conditions. There are some isolated examples in the academic literature taking a broader approach.⁸² However, analysis of software has

⁸¹ *Toby Constructions* [1983] 2 NSWLR 48, 51.

⁸² Hiroo Sono, ‘The Applicability and Non-Applicability of the *CISG* to Software Transactions’ in Camilla Andersen and Ulrich Schroeter (eds), *Sharing International Commercial Law across*

‘significantly dominated’ existing thought.⁸³ Most literature addressing software and the concept of goods equates software with traditional computer programs,⁸⁴ as Rogers J did in 1983. While some analysis has assumed the equivalence of software and digital products,⁸⁵ it is not clear that this assumption is valid.

A recent Australian authority — *ACCC v Valve (No 3)*⁸⁶ — illustrates the risk identified here; namely, that digital products and software may not necessarily be understood as equivalents. In that case, the ACCC alleged that Valve (operator of the Steam computer gaming platform) engaged in misleading or deceptive conduct contrary to the *Australian Consumer Law* s 18(1), and made a false or misleading representation under the *Australian Consumer Law* s 29(1)(m), by a series of no-refund representations.⁸⁷ The issues addressed in this article were implicated as it was alleged that the no-refund representations were contrary to the non-excludable⁸⁸ consumer guarantee of acceptable quality in the *Australian Consumer Law* s 54, which applies only to supplies of goods.⁸⁹

The Federal Court of Australia held that through the Steam platform, Valve did engage in the supply of goods — being computer games.⁹⁰ However, in reaching that conclusion, Edelman J made the following observations about the term ‘computer software’, as it appears in the definition of goods contained in the *Australian Consumer Law* s 2(1):

Mr Dunkle’s evidence, which I accept, was that computer software is instructions or programs that make hardware work. The video games provided by Steam required computer software to make them work. The material downloaded by consumers included non-executable data such as music and html images. Mr Dunkle’s uncontested evidence on this point was that this non-executable data was not computer software. But he accepted that the computer software made that non-executable data work ... As Mr Dunkle said, the games consist of software and a number of other assets (eg music, images).⁹¹

I do not accept the ACCC’s primary submission that *everything* that was supplied by Valve ... was a supply of a good. As I have explained, some matters provided were not goods. For instance, the non-executable data which accompanied, and was incidental to, the computer software was not a good although it is hard to see how it could be decoupled from the computer software.⁹²

National Boundaries — Festschrift for Albert H Kritzer on the Occasion of his Eightieth Birthday (Wildy, Simmonds & Hill Publishing, 2008) 512, 512–3. Cf Kee, above n 10, 930–4; Dan Jerker B Svantesson, ‘Amlink Technologies Pty Ltd and Australian Trade Commission [2005] AATA 359 — Software Finally Recognised as “Goods”’ (2005) 13 *Trade Practices Law Journal* 232, 233.

⁸³ Marsoof, above n 34, 286.

⁸⁴ See, eg, Green and Saidov, above n 11, 161.

⁸⁵ Marsoof, above n 34, 286.

⁸⁶ [2016] FCA 196 (24 March 2016).

⁸⁷ *Ibid* [2].

⁸⁸ *Australian Consumer Law* s 64(1).

⁸⁹ *Ibid* s 54(1)(a).

⁹⁰ *ACCC v Valve (No 3)* [2016] FCA 196 (24 March 2016) [157].

⁹¹ *Ibid* [138]–[139].

⁹² *Ibid* [156] (emphasis in original).

On this view, only executable data constitutes software, and falls within the statutorily expanded definition of goods. However, alongside software, a variety of other digital products are now commonly traded and are now also economically important. While it is clear in the UK, Australia and NZ when software will and will not constitute goods, what is not clear is whether other types of digital products would be treated the same way. The various types of digital products do not form a closed list — the concept itself is hard to define.⁹³ Apps, firmware, digital music and electronic books are four examples of commonly traded digital products whose classification is not clear, on the law's current state.

This article argues that these digital products are sufficiently distinct from software to make it not at all obvious that they would be classified the same way. Nevertheless, this article argues that they should be. To properly advance a resolution of this issue, a more contemporary perspective on existing software-as-goods analysis is needed. The frame of reference should be shifted away from (only) software, and towards digital products as an overall category of tradeable items.

B *Apps as Digital Products*

Of these other kinds of digital products, the one most closely resembling software (as traditionally understood) is the app. It might be thought that apps would be identified as software, given that an application is technically defined as the software used for a particular role or a particular task that a device performs.⁹⁴ In accordance with the analysis in *ACCC v Valve (No 3)*, an app may be characterised as executable data, and therefore software.⁹⁵ Nevertheless, there is still the potential for perceived differences between apps and traditional computer software. Apps are distributed through particular online platforms that differ from the distribution channels traditionally used for computer programs. The Apple App Store, Google Play and the Windows Store are well-known examples. Apps might therefore be seen to occupy a distinct market position. Over 100 billion downloads have been reported from the Apple App Store alone.⁹⁶ These downloads have resulted in more than US\$30 billion being paid to app developers.⁹⁷ The possibility for the perception of differences between apps and computer programs is also evidenced by some products being separately distributed in both forms. For example, Microsoft's Surface tablet was (in its first generation) manufactured in both 'RT' and 'Pro' versions. The Surface RT would only run apps from the Windows Store, while the Surface Pro was capable of running both Windows Store apps as well as full desktop programs. Microsoft Office 2013 was distributed as an app version for the Surface RT, but as a full desktop program for the Surface Pro and other personal computer platforms. While, on the one hand, this is the natural

⁹³ Clarice Marinho Martins de Castro, Chris Reed and Ruy de Queiroz, 'Digital Content and Cloud-Based Contracts in Brazil and the European Union' (2016) 24(1) *International Journal of Law and Information Technology* 99, 103.

⁹⁴ Andrew Butterfield, Gerard Ekembe Ngondi and Anne Kerr (eds), *A Dictionary of Computer Science* (Oxford University Press, 7th ed, 2016 online version) [application].

⁹⁵ [2016] FCA 196 (24 March 2016) [138]–[139], [156].

⁹⁶ Max Taves and Shara Tibken, *Apple: More Than 100 Billion App Downloads from the iTunes Store* (8 June 2015) CNET <<http://www.cnet.com/news/wwdc-by-the-numbers/>>.

⁹⁷ *Ibid.*

consequence of different hardware models running different operating systems, it reinforces that apps and traditional computer programs may be understood as different, at least from a commercial perspective.

C *Firmware as Digital Products*

Firmware has some similarities to software, being defined as system software held in read-only memory.⁹⁸ Even though an operating system in itself might fit the description of a traditional computer program set out in *Toby Constructions*, and would constitute executable data as discussed in *ACCC v Valve (No 3)*, other firmware and operating system updates might not. Further, system software itself might be thought of as qualitatively different to the kind of software described by Rogers J in *Toby Constructions*. It is not obvious that the conception of software which has been the subject of existing analysis would include either apps or firmware.

D *Apps and Firmware – Policy and Classification*

When distributed through platforms such as the Apple App Store, Google Play or the Windows Store, apps and firmware are, by definition, distributed electronically rather than via physical media. Thus, for both, being clear about the definition of goods vis-à-vis digital products is important. Policy considerations support both apps and firmware being given the same treatment as software in existing software-as-goods analysis. This is because both apps and firmware fulfil the same functional purposes as traditional programs. It is therefore important to be clear that apps and firmware should be treated at law the same way that software currently is — whether or not particular sales law or consumer law regimes recognise software as goods. While it is not beyond doubt that common law courts would hold otherwise, clarity is desirable. It is a commonly held belief that the law perpetually plays catch-up with technology,⁹⁹ and published examples of judges' unfamiliarity with even common technologies are apt to reinforce perceptions of this kind.¹⁰⁰

E *Digital Music and Electronic Books as Digital Products*

Still other digital products have a much less obvious analogy with software as traditionally understood. Two examples assessed here are digital music and electronic books. Neither constitutes executable data — with music files accompanying computer games being specifically identified as not constituting software by Edelman J in *ACCC v Valve (No 3)*.¹⁰¹ Recasting existing analysis

⁹⁸ Butterfield, Ngondi and Kerr, above n 94, [firmware].

⁹⁹ Svantesson, 'A Call for Judicial Activism', above n 35, 33.

¹⁰⁰ See, eg, Dyson Heydon, *Reasons for Ruling on Disqualification Applications* (31 August 2015) Royal Commission into Trade Union Governance and Corruption, 18 [51] <<http://www.tradeunionroyalcommission.gov.au/Hearings/Documents/2015/Evidence31August2015/ReasonsforRulingonDisqualificationApplicationdated31August2015.pdf>>.

¹⁰¹ [2016] FCA 196 (24 March 2016) [138]–[139], [156].

away from software and towards digital products in general is even more important in these cases. For these digital products, policy considerations also support their receiving the same treatment as software. From early and notorious beginnings, where both were typically distributed through peer-to-peer file sharing networks (largely in infringement of intellectual property rights), both have become big (legitimate) industries, and important units of economic exchange.

F *Tax Law – A Policy Exemplar*

Shifting the focus of analysis to the overall category of digital products might also promote coherence with developments in other areas of the law. Australia's tax law — specifically, the goods and services tax ('GST') — provides an interesting policy exemplar addressing digital products as an overall category of products.

The Australian Government, in its 2015 budget, signalled its intention to apply the GST to imported digital products (in addition to those domestically supplied) from 1 July 2017.¹⁰² The GST is levied through the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) ('GST Act'). Following this budget announcement, the Australian Government released two versions of an exposure draft bill,¹⁰³ before the Tax and Superannuation Laws Amendment (2016 Measures No 1) Bill 2016 (Cth) was passed by both houses of Federal Parliament on 4 May 2016, receiving Royal Assent the following day.

The law, as far as possible, should speak a language appropriate to modern technological conditions. As the Explanatory Memorandum accompanying the Tax and Superannuation Laws Amendment (2016 Measures No 1) Bill 2016 (Cth) pointed out, there have been 'significant changes in Australia and the world' in the 15 years since the GST's introduction.¹⁰⁴ While, at that time, cross-border intangible supplies 'were relatively unusual, especially for consumers', today they 'form a large and growing part of Australian consumption'.¹⁰⁵ Domestically distributed digital products have always been subject to GST, though under the *GST Act* in its original form, imported digital products have not. The *Tax and Superannuation Laws Amendment (2016 Measures No 1) Act 2016* (Cth) changes this so that all digital products, regardless of their origin, will become subject to GST. Given this vision for Australia's GST to capture digital products as a category of products, precedent does exist for the kind of mindset change urged by this article with respect to sales law and consumer law regimes.

This coherence might ultimately only be achieved in substance, if not in form. Interestingly, this law reform does not involve broadening the GST's definition of goods. The *GST Act* s 195-1 defines 'goods' (an exhaustive

¹⁰² Australian Government, *Budget Measures: Budget Paper No. 2: 2015–16* (Commonwealth of Australia, 2015) 20–1.

¹⁰³ Tax Laws Amendment (Tax Integrity: GST and Digital Products) Bill 2015 (Cth), issued in May 2015; Tax Laws Amendment (GST Treatment of Cross-Border Transactions) Bill 2015 (Cth), issued in October 2015.

¹⁰⁴ Explanatory Memorandum, Tax and Superannuation Laws Amendment (2016 Measures No 1) Bill 2016 (Cth) 3.

¹⁰⁵ *Ibid.*

definition) as ‘any form of tangible personal property’, and the *Tax and Superannuation Laws Amendment (2016 Measures No 1) Act 2016* (Cth) makes no change to this definition. Domestically supplied digital products are taxed on the basis that they are supplies of ‘anything other than goods or real property’ under the *GST Act* s 9-25(5). The 2016 amendments secure the taxable status of imported digital products by adding a new limb to the existing list of taxable supplies of ‘anything other than goods or real property’.¹⁰⁶ As a matter of form, these changes to Australia’s GST regime will therefore result in the offshore supply of digital products being taxed specifically *because* they are *not* goods for the purposes of GST law. As a matter of substance, however, the measure secures the taxable status of all digital products — software and otherwise — regardless of origin. As summarised by the Explanatory Memorandum, ‘[t]his change results in supplies of digital products, such as streaming or downloading of movies, music, apps, games and e-books ... receiving similar GST treatment whether they are supplied by a local or foreign supplier’.¹⁰⁷

G Digital Music and Electronic Books — Policy and Classification

Digital music and electronic books are two examples of digital products which do not have a strong analogy with software, as traditionally understood. Digital music and electronic books are both more akin to the external files that these programs made use of — or, adopting the perspective taken in *ACCC v Valve (No 3)*, non-executable data. Though the NZ Supreme Court in *Dixon v R* was of the view that ‘valuable digital files’ can constitute property,¹⁰⁸ and that there was no distinction between data files and software in this respect,¹⁰⁹ goods are only one kind of property. The conclusion that digital music and electronic books would be treated the same way as software, in applying the definition of goods, does not necessarily follow. Nevertheless, policy factors support the treatment of digital music and electronic books in the same way as software. This is because both relate to their historical corporeal equivalents in the same way that software *simpliciter* does. As explained by Marsoof, ‘[b]ut for the lack of tangibility, the nature of transactions relating to the sale of digital content is in every sense identical to transactions concerning physical goods’.¹¹⁰

Software *simpliciter* has a tangible and movable equivalent — software distributed through physical media. Similarly, digital music and electronic books have tangible and movable equivalents — including compact discs, vinyl records and tapes for the former, and hardback books, softcover books, print newspapers and print magazines for the latter. Software housed in a tangible medium is clearly goods, as are tangible music products and print books.¹¹¹ It would therefore make logical sense for digital music and electronic books to receive the same treatment

¹⁰⁶ *Tax and Superannuation Laws Amendment (2016 Measures No 1) Act 2016* (Cth) sch 1 pt 1 cl 1.

¹⁰⁷ Explanatory Memorandum, *Tax and Superannuation Laws Amendment (2016 Measures No 1) Bill 2016* (Cth) 12 [1.26].

¹⁰⁸ [2016] 1 NZLR 678, 694 [37].

¹⁰⁹ *Ibid* 697 [50].

¹¹⁰ Marsoof, above n 34, 285.

¹¹¹ Kee, above n 10, 931–2.

under sales law and consumer law as software *simpliciter*, whether that involves treating those digital products as goods or not.

Further, all types of digital products under discussion here are important to the modern economy. For example, the International Federation of the Phonographic Industry reported that in 2014, digital music distribution reached parity with physical format sales for the first time, each representing 46% of global industry revenue.¹¹² By way of further example, 2013 saw a particularly auspicious milestone reached, with the iTunes store marking its 25 billionth song download.¹¹³ While these considerations do not speak to legal classification per se, they do underscore the importance of clarity. Since digital music and electronic books would not clearly be identified as programs, they do not fit neatly into the existing analysis of software as goods (or otherwise). Recasting the focus of that analysis around digital products would ensure that they do.

H *Streaming Services — A Counter-Example*

These kinds of digital products, however, must be contrasted with increasingly popular music streaming services¹¹⁴ such as Pandora, Spotify, iTunes Radio and Apple Music. Treating digital music the same way as software for the purpose of defining goods under sales law regimes will not lead to the (inappropriate) application of those regimes to music streaming services. Streaming is a different means of accessing digital content as compared to downloading.¹¹⁵ Even if a legal system does treat software as goods, and (according to this article's argument) goes on to more broadly treat digital products as goods too, it is in the nature of music streaming services that they do not involve a sale.¹¹⁶ Without a sale, there can be no application of the UK, Australian or NZ Sale of Goods Acts.¹¹⁷ These platforms may still be governed by legislation addressing the supply of services — as outlined in Part II, it is not the case that every transaction involving digital products must be classified on the basis of a binary choice between goods and non-goods (and not anything else at all).

As against this analysis, however, it is interesting to note that the consumer protection regimes contained in the *Australian Consumer Law* and the *Consumer Guarantees Act 1993* (NZ) require only that there be a supply of goods, rather than a sale.¹¹⁸ The concept of supply is broader — defined (on an inclusive basis) by

¹¹² International Federation of the Phonographic Industry, *IFPI Digital Music Report 2015*, 6 <<http://www.ifpi.org/downloads/Digital-Music-Report-2015.pdf>>.

¹¹³ Apple (Australia), 'iTunes Store Sets New Record with 25 Billion Songs Sold' (Press Release, 6 February 2013) <<https://www.apple.com/au/pr/library/2013/02/06iTunes-Store-Sets-New-Record-with-25-Billion-Songs-Sold.html>>.

¹¹⁴ Lexy Savvides and Nic Healey, *Australian Music-Streaming Services Compared* (26 November 2015) CNET <<http://www.cnet.com/au/news/australian-music-streaming-services-compared/>>.

¹¹⁵ Martins de Castro, Reed and de Queiroz, above n 93, 104.

¹¹⁶ Cf Corones and Clarke, above n 79, 462 [11.25]; Svantesson, 'A Call for Judicial Activism', above n 35, 34–5.

¹¹⁷ *Sale of Goods Act 1979* (UK) ss 1(1), 2(1); *Sale of Goods Act 1923* (NSW) s 6(1); *Goods Act 1958* (Vic) s 6(1); *Sale of Goods Act 1908* (NZ) s 3(1).

¹¹⁸ See, eg, *Australian Consumer Law* s 54(1)(a); *Consumer Guarantees Act 1993* (NZ) s 6(1) — both with respect to the consumer guarantee of acceptable quality.

reference to sales, as well as exchanges, leases, hire, and hire-purchase arrangements,¹¹⁹ although the Federal Court of Australia in *ACCC v Valve (No 3)* suggested that assessing whether there is a supply of goods should be treated as one question, rather than two.¹²⁰ Nevertheless, in *Goldiwood*, the Queensland Civil and Administrative Tribunal applied Australia's consumer guarantees regime to web-based software.¹²¹ As explained by the Tribunal, this kind of supply might not only involve an absence of physical media, but 'it could well be that no software is downloaded onto the purchaser's device at all'.¹²²

I *Interim Conclusion*

Whether or not sales law and consumer law regimes treat software as goods, this Part's analysis supports apps, firmware, digital music and electronic books being treated the same way as software. These four types of digital products might not be identified as programs in the traditional sense, supporting the argument that digital products as an overall category of products should now be the focus of ongoing analysis. Maintaining the present focus on software only risks excluding, by implication, these other types of digital products from its scope. Whether or not digital products constitute goods for the purposes of sales law and consumer law regimes stands to meaningfully affect the rights of buyers and consumers, and the obligations of sellers and suppliers. So far as legislative intervention has occurred in the Australian and NZ contexts, such intervention does not solve the issues addressed in this Part. That intervention still only focuses on software.

V **A Break from Tradition – UK Consumer Law as an Innovation and a Model for Reform**

On the other hand, recent legislative intervention in the UK represents a break from this tradition. The *Consumer Rights Act 2015* (UK), introduced in Part II above, represents an opportunity for Australian and NZ lawmakers to learn, and represents an innovative model for reform. The Act came into force on 1 October 2015 and does not simply recognise software as constituting goods.¹²³ Instead, it breaks the traditional dichotomy of goods and services and recognises digital products — termed digital content under the Act — as a third category of consumer contract attracting the benefit of its consumer protection provisions.¹²⁴

The term 'digital content' is defined in the *Consumer Rights Act 2015* (UK) s 2(9) as 'data which are produced and supplied in digital form'. Through this definition, the Act does not limit its application to software, and unambiguously captures the four kinds of digital product addressed in this article. Thus, the

¹¹⁹ *Australian Consumer Law* s 2(1) (definition of 'supply'); *Consumer Guarantees Act 1993* (NZ) s 2(1) (definition of 'supply').

¹²⁰ [2016] FCA 196 (24 March 2016) [126].

¹²¹ [2014] QCAT 238 (27 May 2014) [37].

¹²² *Ibid* [27]. But see [27] n 8 where the Tribunal noted that 'usually' there will be 'some' software installed on a user's device, even if only 'login facilitation software or help files'.

¹²³ Marsoof, above n 34, 288.

¹²⁴ *Ibid*.

Explanatory Notes to the Act point out that '[d]igital content may be supplied on a tangible medium ... for example a DVD or software, on a computer or not, for example an e-book or music download';¹²⁵ and they go on to note that digital content 'includes software, music, computer games and applications or "apps"'.¹²⁶

One of the difficulties encountered with respect to existing software-as-goods analysis has been identifying how software *simpliciter* fits into the existing goods and services dichotomy.¹²⁷ While recognising a third category of contract under consumer law may not be necessary or even desirable if digital products can be effectively accommodated within these traditional categories,¹²⁸ given the limitations of the common law position analysed in Part III, this framework represents an important development in UK consumer law.¹²⁹ Even so, as explained in Part II above, the *Consumer Rights Act 2015* (UK) does not completely solve the taxonomic issue addressed by this article. Outside of its consumer context, difficulties persist under the *Sale of Goods Act 1979* (UK).

Nevertheless, the *Consumer Rights Act 2015* (UK) is significant for three reasons. First, it is an example of a legal regime embodying the kind of modern technological and economic thinking advocated by this article. Rather than adopting the half-way solution taken in Australia and NZ, the *Consumer Rights Act 2015* (UK) directly tackles the broader issue of digital products. Second, it represents a legal regime from which both Australia and NZ can learn; a regime that is innovative and might serve as a model for the reform of our own domestic regimes. The protections offered by the *Consumer Rights Act 2015* (UK) are already familiar to Australian law¹³⁰ — including that goods be of satisfactory quality,¹³¹ that they be fit for a particular purpose,¹³² and that they be as described.¹³³ By recognising digital products as a third type of consumer contract, these same protections are extended to digital products¹³⁴ in a way that is entirely compatible with existing Australian and NZ consumer protection regimes.

However, third and most importantly, the very existence of the *Consumer Rights Act 2015* (UK) pt 1 ch 3 ('[d]igital content') is recognition of the fact that in modern technological and economic conditions, it is not enough to clarify only the classification of software. The Act's Explanatory Notes identify (in rationalising its approach) that 'it was not clear what, if any, legal rights the consumer has if digital content proves defective or fails to live up to the consumer's expectations', as 'it is not clear whether digital content would be described as goods, services, or something

¹²⁵ Explanatory Notes, *Consumer Rights Act 2015* (UK) 16 [39].

¹²⁶ *Ibid* 41 [166].

¹²⁷ Martins de Castro, Reed and de Queiroz, above n 93, 105; Green and Saidov, above n 11, 161–2.

¹²⁸ Martins de Castro, Reed and de Queiroz, above n 93, 114, 117–8.

¹²⁹ Cf Marsoof, above n 34, 289.

¹³⁰ Trent Glover, 'A New Era for Consumer Protection in the United Kingdom?' (2015) 31 (9&10) *Competition and Consumer Law News* 122, 122.

¹³¹ *Consumer Rights Act 2015* (UK) s 9.

¹³² *Ibid* s 10.

¹³³ *Ibid* s 11.

¹³⁴ *Ibid* s 34 (satisfactory quality); s 35 (fit for particular purpose); s 36 (to be as described). See generally Explanatory Notes, *Consumer Rights Act 2015* (UK) 43 [177]. See also Martins de Castro, Reed and de Queiroz, above n 93, 110; Glover, above n 130, 122.

else'.¹³⁵ This conclusion was reached on the basis of a report commissioned by the UK Department for Business, Innovation and Skills,¹³⁶ describing 'much of the legal analysis in the decided cases' as 'thin'.¹³⁷ This identified risk was borne out in *ACCC v Valve (No 3)*, and its differentiation of executable from non-executable data.

For the purposes of UK consumer law, we can therefore see a clear solution to the problem identified in Part II of this article. In the UK, the supply of digital products (and not just software) to consumers will attract the kinds of statutory protections that have traditionally been afforded to goods. The *Consumer Rights Act 2015* (UK) makes clear that, in the case of digital products, these rights (and obligations) automatically apply, and that resort to the common law rules for implying terms in fact (which will not be satisfied in every single case) is not necessary.

VI Conclusion

Special legal regimes dealing with sales of goods have existed in common law legal systems for over 100 years. More recently, consumer law has introduced non-excludable protections for consumer transactions concerning goods (and also services). Contracts falling within these regimes are subject to rules tailored to those contexts. In particular, they automatically imply certain terms and protections into goods transactions that are not automatically implied under the common law of contract. Where digital products are at issue, the way in which they fit (or do not fit) into these regimes will affect the rights of buyers and consumers, and the obligations of sellers and suppliers.

UK, Australian and NZ law have each reached a settled view as to whether software constitutes goods. However, these solutions do not address a more important question in today's technological and economic environment — are digital products, as a broader category of products, goods for the purposes of sales law and consumer law? It is not at all clear that four types of commonly traded digital products — apps, firmware, digital music and electronic books — are sufficiently identifiable with software to conclude with certainty that they would be treated the same way at common law and under statute in these countries.

This article argues that existing software-as-goods analysis should be recast around the broader concept of digital products. This would ensure that it does not exclude other digital products from its scope, by implication. This article also argues that the *Consumer Rights Act 2015* (UK) constitutes an innovative model for Australian and NZ law reform. That Act has moved beyond the traditional goods and services dichotomy and recognises digital products as a third category of case warranting consumer protection. Its very existence evidences the problem with which this article is concerned.

¹³⁵ Explanatory Notes, *Consumer Rights Act 2015* (UK) 42 [169].

¹³⁶ See generally Robert Bradgate, *Consumer Rights in Digital Products — A Research Report Prepared for the UK Department for Business, Innovation and Skills* (UK Department for Business, Innovation and Skills, 2010).

¹³⁷ *Ibid* 32 [75].

In this sense, this article's analysis might be thought of as a tale of three jurisdictions. Software's character as goods (or otherwise) is settled in all three, but only the consumer law of one (the UK) has effectively dealt with the rise of digital products.

Debate over software's classification made contextual sense in the technological and economic environment of the 1980s and 1990s. Today, however, software is just one of several kinds of digital products that are common and important units of economic exchange. What's in a name? As this article has demonstrated, quite a lot. Technology and the economy have moved past the point where a focus on software alone can be justified. Ensuring that digital products as an overall category of products are the focus of continued analysis will best reflect the market of today.