‘TWIXT CUP AND LIP: LIABILITY OF TRADERS UNDER CONSUMER CONTRACTS FOR DIGITAL CONTENT DAMAGED IN TRANSIT

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Abstract

This article considers trader liability for damage to digital content in transit. Issues arising from the rule introduced by the Consumer Rights Act 2015 are considered and alternatives addressed. The burden of proof and a right to receive a re-supply, regardless of the point of damage, are also considered.

Introduction

In March 2015, the Consumer Rights Act 2015 (CRA) was passed, and it is intended to simplify and improve consumer legislation in the UK. It contains general unfair terms provisions, not only providing a somewhat revised implementation of the Unfair Terms in Consumer Contracts Directive,[1] but also encompassing consumer elements of the Unfair Contract Terms Act 1977 (UCTA) which are removed from UCTA. Alongside its treatment of unfair terms across consumer contracts in general, the Act also addresses the broad range of issues in relation to several specific types of consumer contracts. It deals with contracts for goods, services and ‘digital content’, and also contracts which are a mixture of these. It is the first piece of UK legislation to specifically recognise digital content as *sui generis*, distinct from goods and services, and that is dealt with in Chapter 3 of the Act, and it is an aspect of this which is addressed here.

This article is, first, concerned with the trader’s liability for damage to digital content during transit. It will discuss the journey of digital content from the trader to the consumer’s Internet Service Provider (ISP), and onto the consumer’s home network, until it finally reaches the end-user device where it would actually be used by the consumer. The aim is to identify the point at which the trader should be regarded as having (at least largely) fulfilled their obligation and ceases to be liable for subsequently occurring damage to the digital content. We will start with the Consumer Rights Act 2015 which stipulates the approach that is now to be applied, and the issues arising from it. We then look for possible alternative ideas involving an analysis of the well-established concept of ‘passing of risk’ for goods, together with a ‘control’-based approach largely derived from the Proposal for a Regulation on a Common European Sales Law[2] (CESL), before seeking a suggested way forward. The article then moves on to look at the question of whether, even if damage occurs beyond the point where the trader’s obligation to supply has been fulfilled, at whatever point that takes place, there might still be some obligation on the trader to attempt re-supply. Finally, an issue relating to the appropriate allocation of the burden of proof will be addressed.

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[1] Directive 93/13/EEC on unfair terms in consumer contracts 1993 (OJ L95/29).
[2] Proposal for a Regulation on a Common European Sales Law (2011/0284 (COD)).

Supplying Digital Content

We are used to the separation of passing of property and passing of risk in connection with the sale of goods, but when considering liability which traders face when supplying digital content, a different approach was adopted in the Consumer Rights Act 2015. Section 39 CRA focuses on determination of when digital content is supplied, and it is this test which operates as the equivalent of 'passing of risk' in relation to the sale of goods under the Sale of Goods Act 1979 (SGA). Both determine when traders have fulfilled their contractual obligation to supply products of the requisite standard. For the supply of digital content, this occurs if one of two possibilities under s. 39(2) CRA is satisfied. This is the case when digital content (a) reaches the consumer's device, or (b) when it reaches a 'trader chosen by the consumer' via whose service the content reaches the consumer's device. At first glance the focus seems to be on the supply to the consumer's device. However, the Explanatory Notes make clear that supply to such a 'chosen trader' is, in reality, of much greater importance.[3] 'Chosen trader', as envisaged under (b), includes, for example, the consumer's Internet Service Provider (ISP) which provides the consumer with connectivity to the internet. By that definition the focus completely shifts from (a) to (b) because virtually all transactions, except those between a consumer and their chosen ISP, have to pass the ISP to reach the consumer's device. Therefore, in most cases traders have fulfilled their obligation before the product has even reached the consumer's modem. Should, however, a situation fall within the scope of (a) the opposite would apply and the consumer would virtually never have to bear the risk of damage during transmission. The Act only offers these two fairly extreme positions and the next paragraphs will explore the reasons why neither is entirely satisfactory.

Under a scheme of early fulfilment, ie. s. 39(2)(b) CRA, consumers become responsible for transmission of the content when it is within the charge of the ISP. The Department for Business, Innovation & Skills (BIS) explained that traders would not have to face liability for events which they cannot control.[4] The reverse conclusion would be that the risk is better placed with the consumer for an event which is, in practical terms, as much beyond their as the trader's control, albeit they have chosen the ISP. In such cases, the consumer may be able to rely on the duty of the ISP under the term implied by s. 49 CRA which requires a service contract to be performed with reasonable care and skill. This obligation is mandatory and cannot be excluded by the ISP.[5] However, it is only an obligation to take 'reasonable care and skill', unlike the trader's strict liability in relation to the quality of the digital content, and the only viable option it gives to the consumer is a claim in damages,[6] whereas they are likely to be far happier with a swift re-supply from the trader, and very unlikely to feel able to take action against the ISP.

In fact, it is suggested that an opposite approach might well result in better outcomes. Completing supply, and with it the trader's liability for damage, at a late stage, as under s. 39(2)(a) CRA, would be favourable for consumers. They would only have to bear the risk of damage once the digital contents reached their end-user device, and traders would remain liable for any damage until that point. This would mean traders remained liable for events which are beyond their control, but traders are generally in a stronger position to carry such burden, and re-supplying the product is a low-cost (or very low cost) remedy which would solve the consumer's problem in many cases. If the problem is persistent traders might have to find an

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[3] CRA, s. 39(2)(b); cf. Department for Business, Innovation and Skills, 'Consumer Rights Act 2015 - Explanatory Notes' para 192.
[4] CRA, s. 39; ibid 194.
[5] ibid.
[6] See CRA, s. 54(7)(a).

alternative means of supply (such as a copy on a physical carrier), or try to put pressure on the ISP to resolve the disruption. Eventually, if the problem does originate from a source which is beyond a trader's control, and there is no practicable alternative means of supply, there would be a point at which continuance of the trader's liability, after trying to resend the digital content, might be viewed as unreasonable, but it is arguably much less so than leaving all the risk on the consumer, once the digital content has reached the consumer's ISP. In any event, a much more discriminating approach is suggested below.

Goods – Physical Form and Ownership

We should consider alternatives to the solution offered under s. 39 CRA, and firstly we shall look at the approaches taken to goods. Rules on the passing of risk regarding the sale of goods have been developed over decades.[7] They used to be provided solely by the Sale of Goods Act 1979 (SGA), but the CRA has introduced new rules for the consumer context. Obviously this article is concerned with the latter context in relation to digital content, but both sets of rules for goods will be compared here with the digital situation. The traditional rule under the SGA provides for risk to pass when 'property passes', unless the parties have agreed otherwise. This is a rule generally aligning the passing of risk with ownership moving from the seller to the buyer.[8] In contrast, s. 29(2) CRA states that, in relation to consumer contracts, risk passes with physical possession of the goods.[9] There are difficulties with carrying over either of these approaches to the context of digital content.

There are obvious problems in adapting to the context of digital content any rule which focuses on physical possession moving from one party to another. The lack of physical form had caused problems in relation to the classification of digital content prior to the implementation of the CRA.[10] The argument was that in order for digital content to be goods it had to be tangible which, in turn, related to a physical presence.[11] To some extent, this was the reason why the Law Commission saw it as necessary to introduce digital content as a sui generis category,[12] and with it emerged the need for a more suitable method of dealing with liability for damage for digital content in transit.

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[7] *Goode on Commercial Law* (Ewan McKendrick ed, 4th edn, LexisNexis UK and Penguin Books 2010) ch 9.

[8] LS Sealy and RJA Hooley, *Commercial Law : Text, Cases, and Materials* (4th edn, Oxford University Press 2009) 70–71.

[9] CRA, s. 29(2) reads: '*The goods remain at the trader's risk until they come into the physical possession of (a) the consumer ...*'.

[10] In order to determine which rights buyers of digital products would enjoy, it was asked whether digital products were similar to goods or service. Depending on the outcome buyers would have been granted rights under the SGA or the SGSA. The reasoning provided was, however, never convincing enough to be determinative.

[11] The The requirement, even though never expressly stated under UK law, is nicely illustrated in the case of *St Albans City and District Council v International Computers Ltd* [1997] FSR 251where, both at first instance and on appeal, the judges concluded that digital content would only be covered by the SGA, ie. be classified as 'goods', if delivered on a physical medium. Consequently, any other product would lack the necessary physical component to be considered under the SGA. See also Ken Moon, 'The Nature of Computer Programs: Tangible? Goods? Personal Property? Intellectual Property?' (2009) 31 E.I.P.R. 396; Robert Bradgate, 'Consumer Rights in Digital Products - A Research Report Prepared for the UK Department for Business, Innovation and Skills'; Natali Helberger and others, 'Digital Content Contracts for Consumers' (2013) 36 J Consum Policy 37

12 Bradgate, "Consumer Rights in Digital Products" (September 2010), p.16, https://www.gov.uk/government uploads/system/uploads/attachment_ data/file/3183 7 II 0-112 5-consumer-rights-in-digital-products.pdf Accessed 17 May 2017]; see also Heiberger et al., "Digital Content Contracts for Consumers" (2013) 36 J. Consum. Policy 37, 39.

Of course, arguments can be made for some type of physical presence for digital content, but they are difficult in themselves, and unconvincing as the linchpin for a rule about passing of risk. There is no physical object which departs from the supplier and arrives with the acquirer. Digital content consists of data which exists as a binary sequence on a carrier in the form of bits and bytes. They make up the smallest parts out of which data consists and occupy physical space on the carrier in the form of magnetic or optical status,[13] but it is not the physical object that was dispatched and transferred. They are merely a series of changes to the physical medium by which it is transferred and on which it eventually arrives. Further, the physical aspect of goods goes far beyond that of digital content. For the latter, it is not needed in the same sense as it is for goods; the physical appearance of digital content is a cryptic string of states and mainly an auxiliary means of making the product persistent; and only the correct interpretation of it bears a fruitful result. The core of it is merely an idea translated into binary form, and this is reflected in the fact that digital products are predominantly covered by other areas of law such as intellectual property law, ie. copyrights, database rights, and patents.[14]

The significance of intellectual property rights in relation to digital content, not only reflects their intangible nature and the complications in carrying over ideas of transfer of physical possession, it also provides the core difficulty with transposing the traditional rules from the Sale of Goods Act 1979 to the context of digital content. For business transactions in goods, s. 20(1) SGA states that 'Unless otherwise agreed, the goods remain at the seller's risk until the property in them is transferred to the buyer ….' Transfer of 'property', in turn, means that 'there will be transferred to him a title to an absolute legal interest in the goods sold [(ownership)].'[15] In transactions in relation to digital content, acquirers, especially consumers, virtually never obtain an absolute legal title in the product.[16] Ownership commonly remains with the producer and consumers pay for a license to exploit the contents in question. Such licenses are not 'transferred', but rather come into existence at the time of purchase. In some sense, they are the main substance of the contract without which the consumer would not obtain anything usable.[17] Transfer of ownership does not generally take place when the product is digital.

Therefore, neither the approach on the 'passing of risk' involving physical possession under the Consumer Rights Act 2015, nor that relating to ownership under the Sale of Goods Act 1979, offer a solution which could simply be adopted to answer the question of the extent of the endurance of the trader's liability for damage to digital content during transit. There is nevertheless one desirable aspect of the CRA which should be emphasised: the rule is not at the mercy of the normally superior bargaining power of a commercial seller because, apart from a very few exceptions, the rule in s. 29 CRA is unaffected by express agreement and intention to the contrary.[18] This aspect is equally true under s. 39 CRA, and should certainly not be changed.

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[13] This is true for any digital data; even if it is not saved on a medium it would, for the duration of its existence, still occupy space on the RAM (Random Access Memory) which, in turn, translates to occupation of a certain number of electronic parts, ie. transistors.

[14] Andrew Murray, *Information Technology Law* (1st edn, Oxford University Press 2010) ch 8.

[15] *Benjamin s Sale of Goods,??* edition, edited by M.G. Bridge and J.P. Benjamin (London: Sweet & Maxwell/Thomson Reuters, 2012), para.5-003 (check edition [1992]); also Goode, *Goode on Commercial Law* (2010), p.2 6 7.

[16] The only exception would be a purchaser who commissioned the development of a particular product. In such a situation it is potentially intended that the developer transfers not only a copy of the content, but the entire source code, a compiled version and all rights attached.

[17] Diane Rowland, Uta Kohl and Andrew Charlesworth, *Information Technology Law* (4th edn, Routledge 2012) 398–401.

[18] In comparison, SGA, s. 20(1) which is concerned with the passing of risk in business transactions, begins with the words '*Unless otherwise agreed*' which are not featured in CRA, s. 29.

The European Approach

We should now turn to another alternative approach to dealing with our problem. In 2011 the European Commission put forward an approach in their Proposed CESL.[19] Article 142.2 addressed the 'passing of risk' in consumer contracts for digital content and stated:

> 'In a contract for the supply of digital content not supplied on a tangible medium, the risk passes at the time when the consumer or a third party designated by the consumer for this purpose has obtained the control of the digital content.'

Just like s. 39 CRA, this provision avoids the problematic concepts of 'possession' or 'ownership' but it adopts a different approach to that of the CRA. Of course, it raises the question of the meaning of 'a third party designated by the consumer', and if this phrase is understood also to extend to the consumer's ISP, the approach has the same problems as s. 39 CRA.[20] However, this approach would seem to have been intended to require the consumer to actively 'designate' another party who is to receive the digital content (ie. a true agent for such receipt), and we will proceed on this basis. Whether or not it is correct, as an interpretation of the proposed Article 142.2, it is an approach which provides a useful contrast. It could circumvent those limitations encountered under s. 39 CRA, and be advantageous to consumers, as the following will show, but it does depend strongly on the notion of 'control'. Prima facie, this concept exhibits greater similarities to the pragmatic concept of possession than the more esoteric concept of ownership and might be seen to reflect the reasonable expectations of consumers. Furthermore, it was designed to be 'mandatory in nature; which means that the parties may not, to the detriment of the consumer, exclude its application or derogate from or vary its effects'[21]. Thus, it should not be subject to change through the greater bargaining power of the trader.

Blázquez has considered the concept of control, explaining his views by reference to the idea of 'full control'. In this case, consumers would take 'control' of the product once it has reached a location where it would reasonably be used as intended by the consumer. In other words, even though digital content could potentially be manipulated within the consumer's network whilst in transit, this would locate 'control' on the consumer's end-user device. Only when the intact product arrived at such a device, would the trader be released from their obligation to supply. Blázquez asserts that Article 142.2 CESL aims to achieve this and the correct interpretation of the provision would be that 'risk is [only] borne by the consumer when he has

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[19] The proposal has to be treated with care as it was withdrawn in its entirety on 16th December 2014 due to the idea of producing a '*[m]odified proposal […] to fully unleash the potential of e-commerce in the Digital Single Market*' (European Commission, 'Commission Work Programme 2015' Annex 2, Items 60). The Commission has since launched a much larger campaign: '*Digital Single Market – Bringing down barriers to unlock online opportunities*' (European Commission, 'Digital Single Market' <http://ec.europa.eu/priorities/digital-single-market/> accessed 28 September 2015). As part of this broader work on the Digital Single Market, a Proposal for a Directive on certain aspects concerning contracts for the supply of digital content (2015/0287 (COD)) has been brought forward. Nevertheless, the potential of what was proposed in CESL as model should still be considered.

[20] The proposed Digital Content Directive mirrors s. 39 CRA in its impact (see Art. 5 and Rec. 23). It could be questioned as to whether this is a reaction to the approach taken to 'control' by Blázquez (see text at fn 22) under which two extreme positions, but this time favouring the consumer, in relation to the point of liability of the trader would again have been generated. The suggestion being made here, is for a much more discriminating approach, more appropriately dividing the burden of damage in transit between trader and consumer.

[21] Blázquez, 'Passing of Risk' in Javier Plaza Penadés and Luz M Martínez Velencoso (eds), *European Perspectives on the Common European Sales Law* (1st edn, Springer 2014) at p. 201.

obtained full control of the digital content'.[22] Of course, 'full control', as suggested by Blázquez, would be identical to the position under s. 39(2)(a) CRA and suffer from the same weaknesses. Placing liability on the trader for the entire transfer is certainly not ideal but would be better than placing the entire burden on the consumer at a much too early stage; but 'control' need not be treated in this way. A much more discriminating approach could be taken to it.

Firstly, consumers could be regarded as in control of the content once it has passed the home router (or modem)[23] which would mean that consumers had to bear the risk of any interference within their internal network, but this should also be seen as too blanket an approach, and heed has to be paid to the possible complications which may arise once the digital content has passed the consumer's modem, to address the point at which risk should lie at the consumer's door.

Along the way from the modem to the point where the content is accessible, a multitude of events can occur which might compromise the product. Consumers might, for instance, utilise demilitarised zones (DMZ) or proxy servers, technical facilities which perform security tasks within a private network. Much more common are anti-virus scanners and software firewalls which operate on the consumer's laptop, tablet, or phone and, in some cases, are even built into the operating system.[24] The risks in relation to transmission between modem and end-user device are too diverse for a blanket solution thereafter and we need to look at what this should turn upon.

We should consider an event-based approach, where 'control' over digital content depends on the component of the consumer's system which causes the damage. It is contended that we should look at what can be technologically expected of the 'average consumer' to distinguish these events, and determine where risk should lie in relation to them. The average consumer will normally employ certain components for the reasonable protection of his or her private network, such as firewalls and anti-virus scanners;[25] other components are implemented as a more particular choice of the individual consumer, in the form of more advanced technology to enhance security of their private network, the use of which exceeds the knowledge and abilities of the average consumer. If not carefully set up, such means carry an increased chance of damage to otherwise flawless content. The components typically falling within this group are DMZs and proxy servers. Generally, consumers who decide to enhance their network protection beyond the average consumer's standard are aware of the technical risks involved and proceed in contemplation of them. Thus, a distinction could be drawn, making traders not liable for damage arising from such components, but relieving consumers of bearing the risk of interfering events, which are caused by components that the average consumer would employ. The view can be taken that traders are aware of the use of anti-virus scanners and firewalls, and their products should be developed to a standard that would not cause problems with the security components used, knowingly or otherwise, by the average consumer. Of course, not only the type of component, for example an anti-virus scanner, but also its quality

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[22] Blazquez, "Passing of Risk" in European Perspectives on the Common European Sales Law (2014), p.201

[23] Most domestic networks will now use a router with an integrated modem to connect their devices to the internet. Yet, the modem must be understood to be the interface between the two spheres.

[24] See Microsoft Corporation, 'Windows Firewall' (*windows.microsoft.com*) <http://windows.microsoft.com/en-gb/windows-8/windows-firewall-from-start-to-finish> also Microsoft Corporation, 'Windows Defender' (*windows.microsoft.com*) <http://windows.microsoft.com/en-gb/windows/using-defender> Both accessed 18 May 2017.

[25] Software firewalls and anti-virus applications can be deactivated temporarily or even removed, but it would be unreasonable to set the threshold to such a high level, where consumers need to have in-depth knowledge, especially when it is recommended for the protection of the consumer's data to keep such means active at all times. Furthermore, supply of digital content can occur in so many different forms (via e-mail, download, web-access, cloud-access, etc.) that the recurring need to deactivate the protective measures would compromise the system's security.

must be such that the average consumer would employ it, depending upon such factors as price, producer's reputation, and, naturally, market share, if the trader is to be liable.

Obligation to Re-Supply

We have looked at the point at which the risk of damage to the digital content in transit should be transferred from the trader to the consumer. Now it has to be considered whether, at whatever point that occurs, an obligation to re-supply a digital product, which was damaged in previous attempts of supply, should continue for a time after that has occurred.

Satisfactory Quality

First, we should briefly acknowledge an argument which might be made in relation to using the implied term that digital content should be of 'satisfactory quality'. Section 34 CRA implies a term into consumer contracts for the supply of digital content which requires digital content to be of satisfactory quality. The test under s. 34 CRA is derived from the well-known test for satisfactory quality for sales of goods under s. 14 SGA. It sets out an exercise requiring consideration of the 'standard of a reasonable person' against the background of the price, description and any other relevant factors. The applied standard should encompass, inter alia, freedom from security holes as well as freedom from technical flaws and defects,[26] but what should be addressed here in particular is the durability aspect of satisfactory quality. Part of the quality assessment requires digital products, in appropriate cases, to be durable.[27] In relation to goods, in the case of Lambert v Lewis,[28] Lord Diplock examined the implied term of, what was then, 'merchantability', in relation to durability, and came to the conclusions that duties as to 'merchantable quality', as imposed by the Sale of Goods Act 1979, would continue '*for a* reasonable time after delivery*'*.[29] An argument might be encountered that 'durability' imposed a duty for traders to supply a product which would continue to be of satisfactory quality for a reasonable time. It would then cover those incidents affecting digital content after the point when it has been supplied. However, such an argument should be quickly dismissed. Durability is only concerned with a problem which was part of the product before the supply, but which simply did not manifest itself until after that point.[30]

Licenses

Consideration should, thus, be given to a more holistic possibility for an obligation to re-supply, also covering cases where a problem occurred after the 'supply' of the digital content, but before it reached the device on which the consumer would use it. The significance of licences for the supply of digital contents must be addressed.

As was explained before, consumers usually do not purchase the digital content (or the copyrights in it) but a licence that permits its use.[31] In online transactions, the license agreement is commonly presented to the consumer during the contracting process, as a so-called click-

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[26] N. Helberger et al, *Digital Consumers and the Law* (Alphen aan den Rijn: Kluwer Law International, 2013) 106.
[27] CRA, s. 34(3)(d).
[28] *Lambert v Lewis*[1982] AC 225. Lord Diplock's analysis of this case is of particular interest as the agreement was between a trader and a consumer.
[29] *Lambert v Lewis*[1982] AC 225 at 276; see also Benjamin's Sale of Goods, para 11-057.
[30] Cf. *Mash & Murrell Ltd v Joseph I Emanuel Ltd* (1961) 1 WLR 862. CA.
[31] S. Stokes, *Digital Copyright*, 4th edn, (Oxford: Hart Publishing Ltd 2014) p140.

wrap license.[32] If the digital content is damaged in transit, then prima facie the consumer has a license but nothing usable under it. The existence of such a license gives rise to an argument for an obligation to re-supply.

What needs to be looked at is whether, in such circumstances, traders impliedly agreed to re-supply (or make available) the contents after the purchase. In a somewhat different context this type of idea was considered by Jacob J in Sony Computer Entertainment Inc v Owen;[33] a case involving digital content provided on a physical carrier. In his judgement, Jacob J explained *that* 'if you got your license and your [product] would not work, you would still have a license, but you could not operate your license'.[34] The tenor of his statement suggests that there ought to be something in the contract allowing the consumer to make use of this license. This could be seen as an appropriate situation for an implied term, and one implied in law, as suitable to all contracts of a given type, rather than in fact, ie. just on the basis of the intention of those particular parties. Implying terms in law requires identification of a type of contract, and here it would seem to be consumer contracts for the supply of digital content. The other requirement for such implication has been stated as one of 'necessity'.[35] However, as much analysis has shown,[36] and the courts are beginning to recognise,[37] this would be better stated simply as a matter of 'reasonableness, fairness and the balancing of competing policy considerations'.[38] It then becomes a question of whether the consumer should be left with a useless license, or whether there should be some obligation on the trader to make some attempts to re-supply on the consumer's request.

Of course, in arguing for such an implied term, it should be asked whether an obligation to re-supply would place an unreasonable burden on traders. There are two factors to be taken into account, which are 'effort' and 'cost'. When considering 'effort', one must look at the period during which the obligation would persist and the number of attempts the trader might have to make. Traders might think it unreasonable for such an obligation to persist over the entire period during which the license is valid, but consumers who cannot make use of their license because they never received a working product might expect there to be such an obligation. On the other hand, if, after numerous attempts, the consumer cannot resolve the problem with their system in order to allow a successful supply, a trader might argue they should be regarded as having fulfilled their contractual obligation. It becomes a question of balancing the amount of effort a trader reasonably has to put into attempts to re-supply, against the expectations of the consumer. In many instances, human intervention would not be required at all on the part of the trader. If the digital content is accessible online by the consumer, it could eliminate the need for action by the trader completely. Consumers could request the product from a server numerous times until it eventually reached the end-user device unharmed. This constant availability of digital content obviously also helps in relation to the costs for this 'service'. Unlike goods, digital content can simply be sent, or downloaded, at a negligible cost.

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[32] It is commonly referred to as 'click wrap license'. However, this is not the right place to embark upon the exact meaning to be accorded to such terminology.

[33] *Sony Computer Entertainment Inc v Owen* [2002] E.M.L.R. 742 Ch D

[34] *Sony Computer Entertainment v Owen* [2002] E.M.L.R. 742 at 748.

[35] Per Lord Wilberforce in *Liverpool City Council v Irwin* (1976) 2 All ER 39, 44.

[36] E. Peden, 'Policy Concerns behind Implication of Terms in Law' [2001] L.Q.R. 459, 466–467.

[37] *Crossley v Faithful & Gould Holdings Ltd* (2004) 4 All ER 447 [36].

[38] *Treitel on the Law of Contract*, 14th edn, edited by E. Peel (London: Sweet & Maxwell, 2015), para 6-035;*Koffinan and Macdonald's Law of Contract, 8th* edn, edited by E. Macdonald and R. Aktins (Oxford: Oxford University Press, 2014), para.7.43;Atiyah 's Introduction to the Law of Contract, 6th edn, edited by P.S. Aliyah and S. A. Smith (Oxford: Oxford University Press, 2005), p.161.

Under an implied term to re-supply, the obligation should be maintained for a reasonable time, but as it can be a low 'effort' and 'cost' obligation, the time frame should be applied generously to enable, at least, initial operation of the consumer's product license. Imposing such obligation, even extensively, does not appear to burden traders in a significant manner, but it might raise concerns of susceptibility to abuse by consumers. However, technological limitations can be imposed to prevent consumers who received their original supply without problems, from taking advantage of re-supply to try to obtain a second useable copy. We are familiar with the use of Digital Right Management (DRM) allowing traders to control the use of digital content by limiting or monitoring access, including attempts to duplicate,[39] and the same could be used here. Moreover, products are often 'unlocked' or 'redeemed' on a user account for an online service via which digital content can be accessed for the license duration. Should consumers then try to acquire a second copy, DRM would restrict access to prevent simultaneous or unauthorised use. Potential for abuse is not a significant argument against the law imposing an obligation to re-supply digital content on traders.

Burden of Proof

One final issue regarding the liability of traders, which is considered here, must be addressed and that is in relation to the burden of proof. As is generally the case, especially for the ordinary person, it is difficult to provide evidence of a causal link between technological mishaps and the damage in question. Being unable to establish this link is likely to leave consumers without the possibility of enforcing their rights when traders deny responsibility. In the light of this, the burden of proof should be placed on traders who are, in any event, likely to have superior technological expertise or resources.[40] If damage occurs, the trader should have to show that either the faulty component is one which deviates from the standard of the average consumer, and hence is regarded as within the consumer's 'control', or, at least, that none of the other components, in relation to which the trader would be liable, if those components were responsible, have caused the damage. In other words, effectively the trader's liability is presumed, but can be rebutted by identifying the faulty component as one for which the consumer is responsible, such as one not used by the average consumer, or eliminating the components for which the trader is liable, such as one used by the average consumer. The recently proposed Digital Content Directive[41] suggests this approach with regards to conformity of digital content,[42] which also relates to failure to supply.[43] Of course, there is an issue in relation to the trader having access to the components which are within the consumer's system. The consumer may be unwilling to co-operate with an investigation by the trader or, more likely, unable to provide the assistance which the trader needs to do so. Such scenario is also considered by the proposed Directive.[44] It provides for the burden not to fall on the trader where, after having made 'necessary efforts', the trader cannot get the required access to components. The proposed Directive provides guidance as to the extent to which traders are required to act. 'Necessary efforts' can be understood to require some form of positive action which must be proportionate to the situation, the product and the method of delivery.[45] As such,

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[39] C. May, *Digital Rights Management: The Problem of Expanding Ownership Rights* (Oxford: Chandos Publishing (Oxford) Ltd 2007) 67–69.

[40] Proposal for a Directive on certain aspects concerning contracts for the supply of digital content (2015/0287 (COD) (pDCD), Recital 32.

[41] pDCD)). See further fns. 19 and 20, above.

[42] pDCD, Art. 9.

[43] pDCD, Art. 10(1).

[44] pDCD, Art. 10(3) & Rec. 32.

[45] pDCD, Rec 33.

it would be reasonable to contact the consumer in order to obtain information about the setup of the network and its components, but, to safeguard the consumer's privacy, a trader's first response should not be direct remote access to the consumer's device, and Rec. 33 states that the consumer *'*should cooperate … in order to allow the trader to ascertain the consumer's digital environment.*'* Having made those efforts, if the trader shows that all the components which are accessible to the trader, for which they are liable, have not caused the damage, they will not be responsible, unless the consumer provides evidence to the contrary.

Conclusion

The problem of damage to digital content in transit has been considered, and a number of ways of dealing with it have been addressed. It is contended that a preferable solution to that in the current legislation can be found. Section 39 of the Consumer Rights Act 2015 addresses the trader's liability for damage in relation to digital content during transfer, but the method it adopts lacks sufficient discrimination and favours traders in far too many situations.

However, the understanding of the proposed CESL discussed here, under which 'risk passes' when buyers get control over the digital content, provides an apt starting point which only needs to be refined in terms of the meaning of 'control', and this can take place by reference to what can be expected of the average consumer. Alongside that, the suggested approach to the burden of proof should also be adopted. However, at whatever point in the transfer 'risk passes', the situation would be assuaged by an obligation to re-supply digital content which has not reached the point of being usable on the consumer's end-user device undamaged.