Changing Digital Landscape

INTRODUCTION

In the 21st century our lives are becoming more digital as we start to rely on connected devices, like mobile phones, automated vehicles and smart fridges, i.e., products that utilise and are often reliant on software that can change over time (whether by a software update or artificial intelligence, "AI", such as machine learning).

Historically, the law has been slow to afford the same protections to software as it does to tangible products. The UK's Office for Product Safety and Standards (OPSS) recently sought the public's views on possible changes to UK product safety post-Brexit, including to address new technologies; and, similarly, the European Commission plans to remove obstacles to consumers bringing claims in respect of digital products.

Against this background, the CJEU (Court of Justice of the European Union) recently ruled that at least for the purpose of the Commercial Agents Directive (86/653/EEC), software can constitute goods (even if not supplied on a physical medium) – perhaps indicating the first shift towards a more modern approach to new technologies.

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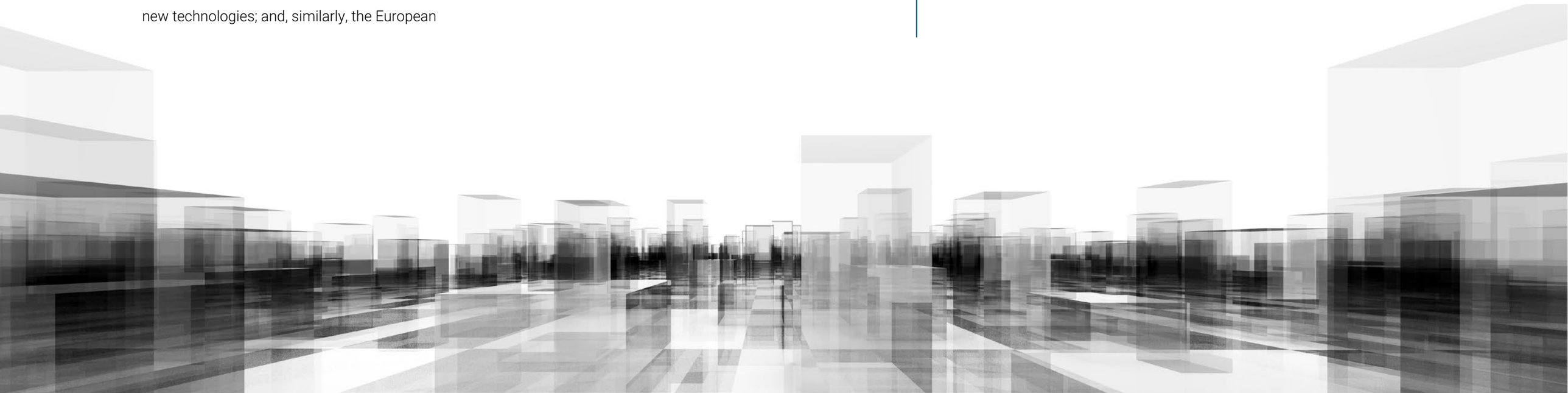

The historic approach to software

Software is not a tangible good or physical "thing". It might be supplied on a physical thing (like a disc or pre-installed on a computer) but more and more frequently it will be downloaded; and product liability law developed before downloading was common. For instance, the law of contract has traditionally only afforded consumers with protection where software is supplied on a physical medium[1]. Or, in the case of bespoke or "made to measure" software, the creation itself might be considered a service which must be performed with reasonable care and skill[2]. But this left a lacuna in the law for "off the peg" (ready-made) software where it had not been supplied on a physical medium.

The issue was recognised in the Consumer Rights Act (CRA) which was introduced in October 2015, affording consumers new protections when purchasing "digital content" (defined as "data produced and supplied in a digital form") which would include software. Such protections mirror those previously afforded only to tangible goods – namely that the digital content must be of satisfactory quality, fit for purposes and as described. Curiously, the CRA does not seek to achieve this by extending or clarifying the definition of "goods" to include digital content, but instead gives "digital content" its own section – thereby tacitly acknowledging that "digital content" is something separate and distinct from goods.

Despite the introduction of the CRA, issues remain around the applicability of product liability law to software, including:

1. It remains unclear whether the definitions of "product" in the Consumer Protection Act 1987 and General Product Safety Regulations 2005 are intended to include software.
2. In a society where most people accept that software will contain bugs, particularly when new (and often to be fixed by later updates), it may be difficult to determine what level of safety is to be expected.
3. At the moment, the safety of a product is determined at the point it is put into circulation; but if a product can change throughout its lifecycle, then it is possible it could become unsafe at a later date.
4. Further, if a producer can update a product to make it safer then questions arise as to whether there is any obligation on it to do so, particularly if consumer expectations of safety change throughout a product's lifecycle.
5. Further still, if a product can change throughout its lifecycle then it is not clear when limitation should start to run in the context of a product which becomes unsafe; and, on this point, the CRA appears to suggest that regardless of when a flaw is introduced, the limitation period will still run from the date the product was originally supplied[3] – creating a possibility a flaw could be introduced into a product close to or after the 6 year limitation period in contract, leaving the consumer without such a claim.

1 See St Albans City and District Council v International Computers [1996] 4 All ER 481

2 See Salvage Association v CAP Financial Services Ltd [1995] FSR 654

3 See Section 40(3)

The ongoing reviews by the OPSS and EU

The government created the OPSS in 2018 with the stated purpose of delivering and improving consumer protection in the UK. In March 2021 the OPSS issued a call for evidence with a view to reforming the product safety framework so that it is fit for the future including for example connected devices. The call for evidence recognises that "The growth of internet-connected devices blurs the boundary between product and service, and between an individual product and a connected one", that "a growing number of products can now communicate with each other and us, learn and evolve in a way that was not envisioned when product regulations were drafted" and that "the interface of software and hardware blurs the boundaries of producer responsibility".

The response was published in November 2021 and it acknowledged that "the current framework was designed for traditional products" and that clarity was needed with regard to "whether the definition of 'product' includes software, the requirements for software updates, and where liability lies". In this respect the OPSS says it is working with the government "to understand the impact of AI on product safety and liability".

Whilst the UK has of course now left the EU (and the transition period has now ended), such that the UK can set its own product liability rules, it is also worth noting what is also happening at an EU level (particularly given that the current framework is largely inherited from the UK's time as an EU member).

In 2018 the European Commission (EC) published a review of the Product Liability Directive (PLD), upon which the domestic Consumer Protection Act is based, and concluded that it remained an "adequate tool" but had criticisms regarding its applicability to interconnected, digital, autonomous and intelligent products – particularly where products can be changed or adapted throughout their lifecycle.

As a result, the EC plans to revise the PLD and recently closed a public consultation. The amendments being considered include extending the PLD to cover software and digital content and defects resulting from changes made to a product after it has been put into circulation.

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The decision in The Software Incubator Ltd v Computer Associates (UK) Ltd

In The Software Incubator Ltd v Computer Associates (UK) Ltd the court was required to consider the Commercial Agents (Council Directive) Regulations 1993 which implemented the Commercial Agents Directive (86/653/EEC) in the UK. The purpose of this Directive and the subsequent 1993 Regulations is to provide protections for commercial agents selling 'goods'. The court was asked to determine whether software was goods.

The High Court found in 2016 that software was goods for the purposes of the 1993 Regulations. As such, the matter was appealed and in 2018 the Court of Appeal said that software was not goods[4] . Despite acknowledging that the distinction between tangible and intangible goods "seems artificial in the modern age"[5], the court said it could not ignore the judicial authorities maintaining the distinction. (The court even acknowledged that the introduction of the CRA had rather proved the point by drawing a clear distinction between tangible, moveable items on the one hand and digital content on the other.)

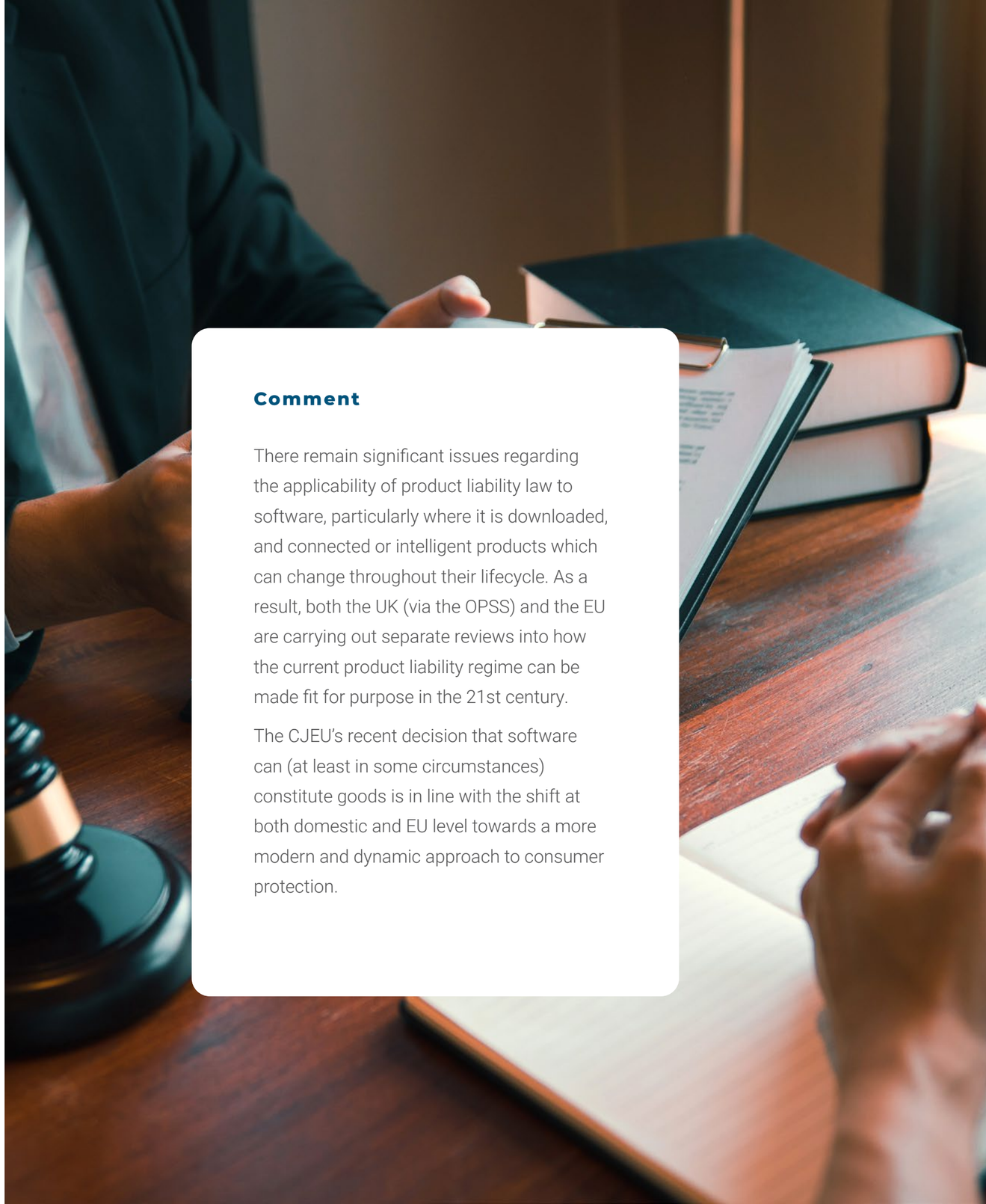
The matter was appealed again to the Supreme Court which referred the issue to the CJEU. As a result, in September 2021 the CJEU confirmed that for the purposes of the specific Directive, software can constitute goods.[6] The CJEU came to this conclusion because its own body of caselaw established that goods meant "products which can be valued in money and which are capable, as such, of forming the subject of commercial transactions". It followed (the court said) that software fell within this definition.

The final word of the Supreme Court is awaited.

4 See Computer Associates UK Ltd v The Software Incubator Ltd [2018] EWCA Civ 518

5 Ibid para 45

6 See Case C-410/19



Comment

There remain significant issues regarding the applicability of product liability law to software, particularly where it is downloaded, and connected or intelligent products which can change throughout their lifecycle. As a result, both the UK (via the OPSS) and the EU are carrying out separate reviews into how the current product liability regime can be made fit for purpose in the 21st century.

The CJEU's recent decision that software can (at least in some circumstances) constitute goods is in line with the shift at both domestic and EU level towards a more modern and dynamic approach to consumer protection.

If you would like to discuss any of the information contained within this document, please do not hesitate to get in touch.

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