



Informing Progress - Shaping the Future

FOIL UPDATE 16th February 2022



A more modern approach to consumer protection?

In this update, we consider the recent decision of the CJEU in *The Software Incubator Ltd v Computer Associates (UK) Ltd* and whether it represents a shift towards a more modern approach to consumer protection in a world of digital and connected products.

The decision

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'. In the particular case, the defendant had supplied software to the claimant (as a commercial agent); and the court was asked to determine whether software was goods. If it was goods then the claimant would be afforded the protections under the 1993 Regulations (and vice versa).

At first instance, the High Court found that software was goods for the purposes of the 1993 Regulations. The defendant appealed; and in 2018 the Court of Appeal said that software was not goods. Despite acknowledging that the distinction between tangible and intangible goods "seems artificial in the modern age", the court said it could not ignore the judicial authorities maintaining the distinction.

IN BRIEF

The CJEU determined that for the purposes of the Commercial Agents Directive (86/653/EEC) (and therefore the Commercial Agents (Council Directive) Regulations 1993) software can constitute 'goods'.

The claimant appealed to the Supreme Court; and the Supreme Court referred the issue of whether software is goods to the CJEU. In response, the CJEU confirmed that for the purposes of the specific Directive (and therefore the 1993 Regulations) software can constitute goods. 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.

Commentary

As the world becomes more digital and reliant on connected devices and software, which can change over time (via updates and AI machine learning), there has been increased focus on whether traditional product liability law remains fit for purpose.

Historically, the law has been slow to afford the same protections to software as it does to tangible products (i.e., physical “things”), particularly if the software is not supplied on a physical medium (e.g., if it is downloaded). This distinction has even been codified in the Consumer Rights Act 2015 which sought to extend some contractual protections to ‘digital content’ but did so by dealing with it separately rather than by extending or clarifying the definition of ‘goods’. It was this approach that partly influenced the Court of Appeal in *The Software Incubator Ltd v Computer Associates (UK) Ltd* when it said the distinction remained.

Product liability law has also traditionally assessed the safety of a product only at the point it is put into circulation. But if a product can change throughout its lifecycle, then it is possible it can change from safe to unsafe (perhaps because of a faulty update or a glitch in its AI). And questions remain regarding when limitation will start to run for a product that becomes unsafe after it has been supplied.

The above issues have prompted reviews of product liability law both in the UK and in the EU. In the UK, the OPSS issued a call for evidence (see [here](#)) with a view to reforming the product safety framework so that it is fit for the future including in respect of, e.g., connected devices. The response (see [here](#)), published in November 2021, 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”.

In addition, the EC is considering revisions to the Product Liability Directive to cover software and digital content and defects resulting from changes made to a product after it has been put into circulation.

In this respect, the CJEU’s recent decision in *The Software Incubator Ltd v Computer Associates (UK) Ltd* 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.

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