

'Real Time' Mobile Content; Quality and the Standards of Liability

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Introduction

The mobile entertainment market is growing rapidly and generating large income. It was estimated at the end of 2006 that the global mobile entertainment market was worth \$17 billion, this number is predicted to change dramatically to \$47 billion by the end of 2009 and \$77 billion by the year 2011, which is nearly 55% of the whole m-commerce market. This large development in the market income is due to two types of mobile content; mobile TV and mobile games.¹

Mobile content, a term used to describe any type of media which can be viewed or used over a mobile phone and without going into technological detail, is basically pockets of data transferred through a wireless network, then transferred into the required product utilizing a 'presentation language'² embodied into the mobile handset. These types of products can be referred to as 'intangible goods', 'dematerialized goods' or 'data products'.

Whether 'data products' and software are a form of 'goods', within the meaning of the Sale of Goods Act 1979 (SGA 1979), has been a matter of scholarly debate for some time.³ If the 'data products' do fall under the meaning of 'goods' in SGA 1979, the 'data products' will benefit from the strict liability standard imposed on the seller regarding the satisfactory quality of goods and

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¹ Juniper Research, "Press Release: Mobile Entertainment Market to Reach \$47bn by 2009 Boosted by Mobile TV and Games". <http://www.juniperresearch.com/shop/viewpressrelease.php?pr=38> accessed on Oct. 17th 2007.

² Mobile content presentation means the layout, sequencing and timing of multimedia objects on the terminal screen and other devices such as a speaker. The most common languages for mobile content are WML (Wireless Markup Language) and SMIL (Synchronized Multimedia Integration Language, XML based language).

³ Atiyah, P. Adams, J. & Macqueen H. (Atiyah) "The Sale of Goods". (11th ed.) Longman: Pearson. 2005, 145; Rowlands, D. and Macdonald, E. "Information Technology Law", (3rd ed) Cavendish Publishing, 2004. 150-190; Green, S. & Saidov, D. "Software as Goods" (2007) Journal of Business Law 161

fit for purposes.⁴ However, if they are regarded as services the supplier will only be under the negligent liability standard provided for in the Supply of Goods and Services Act 1982 (SGSA 1982), where he will have to provide the services with due care and skill.⁵

In autumn 2007 the EU published a Resolution⁶ approving an EU Green Paper⁷ on EU Consumer Laws. The Green paper suggested that the Consumer Sales Directive⁸ should also be extended not only to apply to 'tangible moveable items' but include 'intangible goods, such as software and data'. The EU's concern is that in the current situation with excluding software and data

"may prompt professionals to try to avoid responsibility for possible damages/non conformity of such products through conditions in End User Licence Agreements (EULAs), preventing consumers from making use of remedies for non-conformity and invoking damages".⁹

This paper will look into whether this proposal to add 'intangible goods' to the Consumer Sales Directive, would be an adequate solution to remedy the current defaults of the mobile entertainment market. It will further look at the appropriateness of this remedy to the nature of certain types of mobile content, such as mobile TV and interactive mobile gaming. However, to understand the scope of the problem, it will first discuss the current situation of the mobile entertainment market regarding the liability of the mobile content provider in regards to the quality of the product

The Liability of Mobile Content Providers

When viewing the exemption clauses stated in the 'terms and conditions' provided for in the standard form contracts of mobile content providers, it can be noted that they all state that the item is supplied to the buyer on an "as is" basis; the provider does not take any liability regarding the 'satisfactory quality, fitness for a particular purpose, suitability and reliability'.¹⁰ As an example Vodafone UK 'Terms and Conditions' provide:

⁴ Sales of Good Act 179, s 13- s15

⁵ Supply of Goods and Services Act 1982, s 13

⁶ European Parliament Resolution of 6 September 2007 on the Green Paper on the Review of the Consumer Acquis, available at: www.europarl.europa.eu/sides/getDoc.do?Type=TA&Reference=P6-TA-2007-0383&language=EN accessed on March 3rd, 2008

⁷ COM (2006) 744 final, available at www.ec.europa.eu/consumers/cons_int/safe_shop/acquis/green-paper_cons_acquis_en.pdf accessed on March 3rd, 2008

⁸ Implemented in the UK by the Sale and Supply of Goods to Consumers Regulations of 2002.

⁹ Para 3.1 COM (2006) 744 final,

¹⁰ It has to be pointed out that the wording used in the 'terms and conditions' are not exactly the same in all mobile content providers standard form contracts; however, they are similar in the meaning. There are numerous mobile entertainment providers and the following are only examples. See 3 network UK website 'terms & conditions', available at:

*"The Service is supplied to you on an "as is" basis and we make no warranties, express or implied, with respect to the Service and/or the Content whatsoever (including without limitation regarding their satisfactory quality, fitness for a particular purpose, suitability, reliability, timeliness, accuracy, completeness, security or that they are free from error) unless specifically set out in these Terms."*¹¹

It can be argued from the above clause, and bearing in mind that these types of products do not fall under SGA 1979 definition of 'goods', that the mobile content providers are trying to avoid any type of responsibility and liability regarding the quality of mobile content. The term 'as is', in which the mobile content providers base their supply, is not referred to in SGA 1979 or in the SGSA 1982. However, it can be found in s2-316 of United States Uniform Commercial Code. This term which is commonly used by traders describes a sale's transactions in which the seller offers goods in their present, existing condition to prospective buyers. The term '*as is*' gives notice to buyers that they are taking a risk on the quality of the goods; the buyer is free to inspect the goods before purchase; but if any hidden defects are discovered after purchase, the buyer has no recourse against the seller. Any implied or express warranties that usually accompany goods for sale are excluded in an "as is" sale.¹² In mobile product transactions inspecting the 'goods' would seem to some extent impossible due to the nature of the 'goods' being intangible goods and also the nature of the transaction where the 'goods' are only transferred after the purchase.¹³

The applicability of such a term within the laws of England and Wales raises several issues. The term represents the rule of *caveat emptor*, where the buyer has to look out for his own interest. Historically this was the view of the common law in England and Wales before the late 19th century prior to the introduction of the Sale of Goods Act 1893. The Act introduced implied terms regarding the quality and fitness of goods; although it has to be stated that the courts had gradually abandoned the application of this rule prior to that date.¹⁴

http://www.three.co.uk/personal/help_support/terms_conditions.omp?cid=1121263960241 accessed on Feb. 20th 2008. See also, Orange UK website 'terms & conditions' para 17, available at: <http://www1.orange.co.uk/mobileterms/#3> accessed on Feb. 20th 2008. See also, Gameloft UK website 'Conditions of Use'; available at: http://www2.gameloft.com/corpo_legal.php accessed on Feb. 20th 2008

¹¹ Vodafon UK website Terms and Conditions available at: http://online.vodafone.co.uk/dispatch/Portal/appmanager/vodafone/wrp?nfpb=true&pageLabel=template12&pageID=PTC_0002 accessed on Feb. 18th, 2008

¹² Uniform Commercial Code, s 2- 316

¹³ Some mobile entertainment providers do provide a free trial period regarding certain types of mobile entertainment; for example the network 3 provides a free trial period for mobile games; however, this can not be provided for all types of mobile entertainment such as ringtones and mobile videos.

¹⁴ For further information on the historical development of the Sale of Goods Act 1893 see, Goode, R. "*Commercial Law*" (3rd ed.), LexisNexis UK and Penguin Books, 2004. p 183 -189 & p 279 -282. Also see, Bridge, M. "*The Sale of Goods*" Oxford University Press, 1997. Ch 7

Lord Steyn commented in *Slater v Finning*¹⁵ that the principal of *caveat emptor* has been replaced with *caveat venditor*. It has been suggested that the move from *caveat emptor* to *caveat venditor* could be explained by the common view which places the consumer at a disadvantage; as the seller is at a better place to know the quality of the goods and services.¹⁶

Furthermore, providing mobile entertainment on an 'as is' basis in the UK may not be permitted regarding consumer contracts. When providing sales on an 'as is' basis all express and implied warranties regarding the quality and fitness of goods are excluded.¹⁷ However, one of the important changes made to implied quality terms came into effect by the Supply of Goods (Implied Terms) Act 1973; where such terms were made non-excludable in consumer contracts.¹⁸ Nevertheless, data products such as mobile content may not be able to benefit from these provisions, as they might not fall under the definition of 'goods'.

An illustration that mobile content providers maybe taking advantage of the current situation can be seen in the complaint brought to OFT from Leicestershire County Counsel against Vodafone UK regarding unfair contract terms and misleading promotional literature.¹⁹ The complaint was regarding several terms placed in their 'terms and conditions', after reviewing the case, Vodafone agreed to change their terms and conditions with others 'as appropriate to the law', except when it came to the terms excluding their liability regarding the provided product. Vodafone UK regarding those terms stated that they will modify them 'when it is practical' and currently still remain as they are; however, Vodafone UK did state that it will 'not enforce the provision in the meantime'.

The regulatory body responsible for mobile content in the UK, PhonepayPlus, is responsible for regulating all premium rate services. It requires that the quality of the service regarding mobile content to be of 'adequate technical quality'.²⁰ This term was used in an adjudication where a consumer bought a mobile game from a mobile content provider. The process required the provider to send a password to the consumer enabling her to download the mobile game. However, even after several attempts, the passwords did not work. The adjudication board found that the service to be of inadequate technical quality, and ordered the content provider to refund the consumer in addition to imposing a fine on the mobile content provider.²¹

¹⁵ *Slater v Finning* [1997] 473 AC, 486

¹⁶ Howelles, G. & Weatherill, S. "Consumer protection Law". 2nd ed. (2005) Ashgate publishing Company. p 146

¹⁷ s2-316 Uniform Commercial Code

¹⁸ s 6(2)(a) Unfair Contract Terms Act

¹⁹ Case Number CW/00801/11/04, available on the OFT website at url: http://www.ofcom.org.uk/bulletins/comp_bull_index/comp_bull_ccases/closed_all/cw_801/ accessed on March 4th, 2008

²⁰ Paragraph 3.2.4 PhonePayPlus Code of Practice 11th edition

²¹ Complaint made against mProvision Ltd. Adjudication date March 10th 2006. Available at: <http://www.phonepayplus.org.uk/consumers/adjudications/default.asp?cmd=3&id=419> accessed on March 1st, 2008

Although this term, as we have seen, does provide the consumer with a level of protection; however, from a legal point of view it raises a couple of issues. The term 'adequate technical quality' is vague; there is no explanation to what is meant by this term; what would be the level of technical quality for the service to be deemed 'adequate'. Thus, leaving both the mobile content provider and the consumer with a level of legal un-certainty, as the consumer does not know what the level of service he should be expecting nor does the provider know what the level of service he is liable for. Secondly, this term only extends to the service and not to the content itself. Whether the provided content is of satisfactory quality and fit for the purpose remains unresolved.

Provided Solutions:

It was mentioned above that EU Commission issued a Resolution were it accepted the need

"to examine issues relating to the protection of consumers when they conclude contracts providing digital content, software and data, in the light of the protection afforded by [the Consumer Sales Directive]"²²

It purposed to extend the Consumer Sales Directive to include '*intangible goods, such as software and data*'. This solution has been previously suggested,²³ this argument is based on the fact that the definition of 'goods' in SGA 1979 does not accommodate 'digital goods'. The wording of the SGA 1979 regarding the definition was laid down in the Nineteenth century, and is unable to accommodate the type of transactions and 'goods' available in the Twenty-First Century. Furthermore, SGA 1893 reflected the commercial activity and the legal concepts of the 19th century. It was legislated to codify the principles of existing body of case law of that time. It has been continually 'patched ' and up-dated by later legislations so as to accommodate and adapt to 20th century commercial activity, especially with the introduction of mass market products and the development of standard form contracts.²⁴ Therefore, it could be up-dated once again to accommodate the new types of 'goods' currently available.

Including the term 'digital products' to the meaning of 'goods', the contract for the download of a "digital product" may then be treated as compound, or composite, of sale and service, with the download taking in consideration the standard of reasonable care and skill, and the 'digital product' transferred being given the status of the physical 'goods'.²⁵ The approximation would add to the

²² Para 31 of the Resolution, *Supra fn6*

²³ Poyton D. "*Dematerialized goods and liability in the electronic environment: the truth is, there is no spoon (box)*" (2005) 19 International Review of Law, Computers & Technology 1. 83

²⁴ See Yates D. "*Exclusion Clauses in Contracts*" (2nd ed.) Sweet & Maxwell, 1982, ch. 1; , G. & Diamond, A. "*The Consumer, Society and the Law*" (4th ed) Penguin Books, 1981. ch 2

²⁵ The Courts have taken this view that contract can contain two parts. First part could be a contract for the supply of a service and the second a contract of sale. *Hyundai Heavy Industries Co Ltd v Papadopoulos* [1980] 1 WLR 1129.

one advocated by Sir Glidewell in *St. Albans and District Council v International Computers Ltd*²⁶ the advantage of ensuring that the other provisions relating to 'goods' would apply with the same levels of protection for the purchaser, with no consideration to the argument that they fit into the tradition definition of 'goods' or not.²⁷

This argument puts the assumption that the 'download' and the 'digital product' can be distinguished or separated from each other, a matter which is not always the case. In watching streaming videos, such as live TV on a mobile phone, the data sent is itself the product. If in anyway the sending of the data is distorted or defective, the product will be distorted as it is the same data. This is the same regarding SMS and MMS which are data in themselves sent through a wireless connection but instead of reaching as 'voice' they are received as data. Thus, if the SMS or MMS is in anyway distorted, it is the data in itself which is distorted or defective. Moreover, in 'real time' applications, such as mobile TV and interactive mobile games, any delay or distortion in the data sent lowers the quality of the product to extent it will be deemed 'useless'.²⁸ Hence, the separation of the 'download' and the 'digital product' cannot be achieved, as each packet of data is considered an end product by itself, essential to the over all end product as a whole (i.e. the TV program). Thus, placing the standard of reasonable care and skill on the 'download', and placing strict liability on the 'digital product' cannot be achieved.

A further solution purposed is that of common sense; however, it has to be pointed out that it was made in regards to software. It is argued that if computer software and other intangible purchased via electronic contracts do not fit easily into existing categories they should not be inappropriately forced into one. This was the opinion of Lord Penrose in *Beta v Adobe*:²⁹

*"... the supply of proprietary software for a price is a contract sui generis which may involve elements of nominate contracts such as sale, but would be inadequately understood if expressed wholly in terms of any of the nominate contracts".*³⁰

This conclusion is convenient because it avoids difficult issues raised by forcing computer software into an existing category, but on the other side it does raise other difficulties of its own. Scott-Baker J in *St Albans City and District Council v International Computers Ltd* was concerned that if computer software does not fall inside the definition of goods, the purchaser would feel that he is unprotected by any statutory regime.³¹ Napier also concludes that if computer software is not categorized as goods, then the 'legal analysis' would defeat

²⁶ [1997] F.S.R. 251

²⁷ See Poyton, *op cit*

²⁸ Zbu, K. "Bringing Neutrality to Network Neutrality" (2007) 22 Berkeley Technology Law Journal 615. 618

²⁹Bradgate, R. "Commercial Law"(3rd ed.) Butterworths, 2003. 273

³⁰ *Ibid*

³¹ 1995 FSR 686 at 699

purchasers' common sense expectations.³² It can be also argued that by considering software as *sui generis*, the law lacks certainty and allows for too much flexibility in judicial decisions. Looking at other existing statutory regimes, however, may answer some of the criticism of this approach, and a level of 'protection' could be found with the possible common law implication of terms of quality and fitness.

A relevant statute to consider is the Unfair Contract Act 1977. Sections 2 and 3 of the Act make any contractual terms excluding or limiting liability for negligence or breach of contract subject to the test of reasonableness. However, there is provision for implied terms relating to quality of goods or standards of service that are protected. It has been submitted that there is no reason why a court could not imply terms equivalent to those found in the SGA into the contract of the parties at common law.³³

The judiciary have shown previously a tendency to imply equivalent terms to those found in a relevant statute, where appropriate, to a transaction not included in a statute. For example, in *Dodd and Wilson*³⁴ the contract concerned did not fall within the Sale of Goods Act 1893, nevertheless an equivalent term was implied at common law.

The implication of a term could be based either on the intention of the parties or as a matter of law because of the type of the contract under consideration. Support for this argument can be found in the *obiter* comments of Sir Iain Glidwell in *St Albans City and District Council v International Computers Ltd*:

*"In the present case if, contrary to my view, the matter were not covered by express terms of the contract, I would hold that the contract was subject to an implied term that[the software] was reasonably fit for, that is, reasonably capable of achieving the purpose specified."*³⁵

Such comments, though *obiter*, clearly state the approach made by the courts when dealing with questions of liability and the implication of terms. In this context, it appears, and contrary to what Scott-Baker J suggested, if a contract for the supply of computer software were to be treated *sui generis*, the purchaser is not as so 'unprotected'. However, there are some gaps in the protection that can be afforded by the courts implying terms at common law and such terms are subject to express contrary terms and expectation clauses to a greater extent than their statutory counterparts.³⁶

³²Napier B. "The future of information technology law" (1992) 51 Cambridge Law Journal 1, 46. 55-57

³³ Rowland & Macdonald, *op cit*, p 186

³⁴ 1946 2 All ER 691

³⁵ 1997 F.S.R. 251 at 266

³⁶ Poyton, *op cit*,

It has to be noted that the price of mobile content is considered to be of low value and cases regarding its quality to reach the courts is highly unlikely. The majority of consumer complaints regarding low cost items do not reach courts but are settled over the counter or by exchange of letters,³⁷ and in our case of mobile content could be over the phone by calling a customer service number. Thus, a solution that provides a level of protection to the consumer without awaiting the protection to be decided by courts is needed. In addition that knowing the required quality provides both the consumer and the content provider with a level of certainty before entering into the transaction.

It is clear to see that at this age with the development of technology of mobile products and mobile handsets has resulted in the convergence of services and devices. The mobile phone can be used as a TV, computer, music player, fax machine and among other things its original purpose as a telephone. This convergence of services and devices is not only limited to mobile phones but also other devices, to the extent it can no longer be properly distinguished between the different machines and services.³⁸ As mentioned above, this convergence is not just limited to services and devices but, with the development of technology, has also reached the sending of the product and the product itself. It is no longer possible to distinguish or separate between the sending of the data and the data itself. This is certainly the case in regards to mobile TV, as any delay or distortion in sending the data will result in the mobile content being considered to be useless.

Dreier suggest that the law makers should provide one legal regime only instead of different regimes designed for each player, machine or way of distributing the service.³⁹ If the legislator still continues to find solutions to new issues on the basis of the different traditional models, the results will be come less convincing due to applying contradictory rules to factual situations which are the same.

Regarding mobile TV and other 'real time' mobile content the sending of the data and the quality of the data have converged, the sending of each pocket of data maybe considered an end product essential to the final whole end product; maybe the above suggestion can be taken a step further. The suggestion is that there should be a convergence of the standards of liability regarding 'real time' data products. The 'data product provider' will be required to provide skill and care, and to ensure that his product will be of satisfactory quality and fit for purpose. The previous court cases regarding both issues can provide a level of certainty to the parties. Furthermore, the courts have previously applied the two sets of liability to the same case in *Hyundai Heavy Industries Co Ltd v Papadopoulos*,⁴⁰ although, it was performed by dividing the contract into two parts but still both sets of liability were applied to the same transaction.

³⁷ Howelles and Weatherill, *op cit*, 170

³⁸ Dreier, T. "Law and Information Technology-An Uneasy Marriage, or Getting Along with Each Other" 2005 14 Information & Communication Technology Law 3, 207. 211

³⁹ *Ibid*

⁴⁰ [1980] 1 WLR 1129

Furthermore, regarding similar goods which are not 'data products', such as music videos or games sold on CDs, as it appears to be generally accepted that when software is supplied on a physical carrier medium it may be classified as goods.⁴¹ Here, it may be argued that buyer of 'data products' will receive greater protection than that given for a buyer of the same product on a CD. In such cases the seller is not providing the service of delivery, thus only strict liability is applied; however, if he was providing such a service he too will be required to provide skill and care regarding the delivery of the product, hence, the two standards will apply although in regards to different aspects of the same contract.

Although the convergence of liability could be suitable for 'real time' applications, its appropriateness to other forms of mobile content is under question. The two standards of liability are applicable to different stages of the transaction, each for a different purpose. The strict liability is to ensure that purchased item permits the consumer to benefit from it for the purpose he has purchased it for, should it be merely for his enjoyment. As for the negligent liability it is to ensure that the service provider take adequate skill and care to deliver this product. Converging these two types of liability standards may contradict their original purpose.

Conclusion:

Mobile content is a vast growing market, and with the introduction of 'real time' applications, such as mobile TV and interactive games, it is expected to be more widely used and boost the market income. However, the current situation does not guarantee the consumers protection if the mobile content is not of satisfactory quality, a matter which can lead the mobile content providers taking advantage of this situation by excluding their liabilities.

The EU Commissions' purposed solution to include intangible goods such as software and data products to the Consumer Sales Directive may help in remedying the situation to a number of data products. However, its appropriateness to 'real time' mobile content is a matter which may be under questioning, due to the nature of these products, as the sending of the data and the data itself is hard to distinguish.

Whatever the appropriate solutions maybe, the regulator should act in away which guaranties the parties to the transaction a level of certainty, which in turn should lead to the development of this vast growing market. In all cases the implication of this amendment to the market is a matter greatly awaited to see whether the desired and reasonable level of protection can be offered to mobile content users.

⁴¹ Atiyah, *op cit*, 77-79