**6 Digital Products**

**What is a Digital Product?**

The term digital product encompasses any item on the internet that can only be accessed via a technological device, that the user has ‘earned’ the right to use through a transaction, usually financial.[[1]](#footnote-1) Examples include e-books, video game files and movie downloads. Consumers may assume that purchasing an e-book on a website affords the same rights as purchasing a physical book on a website, but this is not always the case.

**Terms and Conditions**

When purchasing digital products, the rights of the consumer are dictated by the terms and conditions of the platform selling the product.[[2]](#footnote-2) As these transactions are typically concluded by browse-wrap or click-wrap methods, it is difficult to contest problems that may arise as there is no option to negotiate the terms and conditions. Australian courts have confirmed that it is the responsibility of the signatory to be aware of a website’s terms and conditions when making an online purchase.

**Example: Microsoft Store’s book category closure**

In April 2019, Microsoft [closed the book category of its online store](https://support.microsoft.com/en-us/account-billing/books-in-microsoft-store-faq-ff0b7b84-7052-4088-9262-d7e4ee22419c). As well as preventing future sales, this closure affected previous sales. From July 2019, purchased e-books were permanently removed from consumer’s devices. The decision sparked conversation about what ownership means in the context of digital products, and how much control consumers have over the products they have purchased. In the instance of Microsoft Store consumers, they were licensees whose rights of use were dictated by Microsoft. Unlike purchasing a novel from a physical or online bookstore, where the purchaser can use that book regardless of what happens to the vendor where it’s purchased, e-books are controlled by the vendor and can be removed from devices or even altered after being purchased. This is despite the fact that e-book transactions are completed with ‘buy now’ options, not ‘lease now’ options (see [Amazon's Kindle store](https://uonstaff-my.sharepoint.com/personal/mkh799_newcastle_edu_au/Documents/BACKUP%20OF%20DOCS%20for%20Onedrive/TEACHING/2024%20teaching/LAWS6087/unedited%20wiki%20edits/Amazon's%20Kindle%20store)).

**Consumer law and digital products**

The Australian Consumer Law does not impose any obligations of sustained access to a purchased digital product.

The notion that users are licensing these digital products, rather than purchasing them, requires the definitions of goods and services to be considered. Consumer guarantees for goods are concerned with the quality and freedom of use of the good, whereas consumer guarantees for services are concerned with the duration and purpose of the service.[[3]](#footnote-3) It is only if digital products are considered a good that there will be a consumer right to continued use of the digital product.

The Australian Consumer Law states that the term ‘goods’ is inclusive of objects including computer software.[[4]](#footnote-4) The programs that facilitate the use of e-books, like Amazon’s Kindle app and device, and Apple’s Books app, are computer software; however, digital products do not fit into this definition as easily. In [*Valve Corporation v Australian Competition and Consumer Commission* [2017] FCAFC 224](https://jade.io/article/567886), the Federal Court considered the implication of ‘computer software’ in relation to goods. Edelman J at [156] stated that the data that accompanies computer software is not a good, but conceded that it is difficult to differentiate the two. A recent dispute involving video games confirms that digital products are considered a service rather than a good.

**Example: Ubisoft’s *The Crew***

In December 2023, Ubisoft, a video game publisher, removed one of its titles, *The Crew*, from both digital stores and the consoles of users who had already purchased the game. Ubisoft were discontinuing the servers that *The Crew* relied on to be played. The withdrawal of the game was permitted under the end-user license agreement. This led to a [petition](https://www.aph.gov.au/e-petitions/petition/EN6080) demanding the enactment of legislation that requires digital products to remain operational without support from its publisher. In response, the Assistant Treasurer and Minister for Financial Services stated that digital products [confer a license to use the product, not a right of ownership](https://epetitions.aph.gov.au/api/ministerialresponse/download/EN6080).

As long as digital products are considered services rather than goods, the Australian Consumer Law offers limited protection for consumers of digital products. Their license to use the digital product will be governed by the terms and conditions set by the company.

1. Alp Toygar, C. E. Tapie Rohm Jr. & Jake Zhu, ‘A New Asset Type: Digital Assets’ (2013) Journal of International Technology and Information Management 22(4), 113. [↑](#footnote-ref-1)
2. Australian Communications Consumer Action Network, ‘Access to Digital Assets upon Death or Incapacity: Submission by the Australian Communications Consumer Action Network to the New South Wales Law Reform Commission’ (2018) <https://lawreform.nsw.gov.au/documents/Current-projects/Digital%20assets/Preliminary%20submissions/PDI10.pdf> [↑](#footnote-ref-2)
3. Competition and Consumer Act 2010 (Cth), Sch 2, ‘The Australian Consumer Law’, ss 51-59; 60-63. [↑](#footnote-ref-3)
4. Competition and Consumer Act 2010 (Cth), Sch 2, ‘The Australian Consumer Law’, s 2. [↑](#footnote-ref-4)