



Sourcing Entertainment in a Digital World







 What are digital goods?

- People generally mean variations on:
 - e-books
 - digital audio
 - digital video



MTC Types of Digital Goods

The diagram is a 2x2 matrix with the following quadrants:

- Top-Left (Permanently possessed by customer, Has a physical counterpart):**
 - E-books
 - Purchased/downloaded audio
 - Purchased/downloaded video
- Top-Right (Permanently possessed by customer, Has no physical counterpart):**
 - Mobile Apps and Games
- Bottom-Left (Temporarily accessible by customer, Has a physical counterpart):**
 - Audio streamed by subscription
 - Video on demand/pay-per-view
 - Limited-time rentals
- Bottom-Right (Temporarily accessible by customer, Has no physical counterpart):**
 - Online services (chat, dating)
 - Gaming

MTC Sales and Use Taxation

- How are they sourced?
- Depends on how you define them
- State approaches to definition
 - Undefined
 - Defined explicitly or implicitly via reference to an equivalent (tangible personal property, services)
 - SSUTA: Specific digital products taxed as a new category of taxable good

MTC Normand v. Cox Commc'ns Louisiana, LLC

- 14-563 (La.App. 5 Cir. 12/23/14) (La. Ct.App. Dec. 23, 2014)
- La. Rev. Stat. Ann. 47:301(16)(a) "Tangible personal property" means and includes personal property which may be seen, weighed, measured, felt or touched, or is in any other manner perceptible to the senses.
- 61 La. Admin. Code Pt I, 4301: Examples of tangible personal property include but are not limited to:
 - iv. digital or electronic products such as "canned" computer software, electronic files, and "on demand" audio and video downloads.

 **Normand v. Cox Commc'ns Louisiana, LLC**

- LA Revenue Information Bulletin No.10-015: pay-per-view and video-on-demand movies were tangible personal property subject to Louisiana sales and use tax
 - perceptible to the senses
 - customers do not take title to the programs, but have control over paying fees to watch the programs.
- Followed by issuance of RIB No. 11-009, which repealed No. 10-015

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 **Normand v. Cox Commc'ns Louisiana, LLC**

- Video-on-demand and pay-per-view programming not subject to Jefferson Parish sales tax
 - Was not taxable lease/rental of tangible personal property
 - Was service



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 **Chicago's Amusement Tax**

- Effective July 1, 9% tax on all cloud-based streaming services
 - Does not affect the sales of movies, songs and games delivered electronically
 - Companies have till Sept. 1 to comply
- Netflix will be raising subscription rate for any accounts with a billing address in Chicago

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Varying state definitions of digital goods: undefined

- Arizona: digital goods undefined, but state broadly defines tangible personal property
- Alabama: digital goods undefined (but does specifically identify digital photographs as tangible property and thus taxable)(Ala. Admin. Code 810-6-1-.119)
- Florida: no definition of digital goods

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Varying state definitions of digital goods: undefined

- Undefined ≠ untaxable, but may be harder to source
- Arizona: Digital goods considered included in definition of tangible personal property and taxable as TPP.
- Florida: Technical Assistance Advisement 11A-002, 1/31/2011 (finding digital transfer of video production and editing) that digital goods are not subject to tax. Same item transferred in tangible form would have been taxable.

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Varying state definitions of digital goods: defined via reference to TPP

- Texas Tax Code §151.010: "taxable item" includes tangible personal property and taxable services.
 - Sale or use of a taxable item in electronic form instead of on physical media does not alter the item's tax status
- Robert Smith Flipflopfoto v. Alabama, 2006 WL 3587184
 - Do digital photographs constitute tangible personal property?
 - the internet and e-mail involve the transmission of electrical impulses, i.e., electricity, which, as indicated, constitutes tangible personal property. Consequently, the electronic transfer of digital photographic images from a seller to a purchaser for a price constitutes the sale of tangible personal property
 - Was taxpayer providing a nontaxable service, with the transfer of the tangible photographs only incidental?
 - No; "the retail sale of photographs is taxable, whether delivered in final printed form or in digital form over the internet or by e-mail"

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 Taxed as tangible personal property

- May Broadcasting Co. v. Boehm, 490 N.W.2d 203 (1992)
- Syndicated programming purchased by broadcaster was delivered by satellite transmission from the distributor's transmitter to May's receiver; then stored on videotape
 - programming was taxable as "tangible personal property:" **"A transmission by satellite is the transmission of a tangible thing-an electronic signal."**



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 Varying state definitions of digital goods: defined via reference to an intangible

- Texas Comptroller of Public Accounts, Letter No. 201207532L (7/31/12):
 - subscription fees for video streaming subject to sales tax as a sale of cable television services
 - subscription fee for "borrowing" electronic books subject to sales tax as a sale of information services.
 - Sourced accordingly

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 Varying state definitions of digital goods: defined under SSUTA

- "Specified digital products" means electronically transferred:
 - Digital Audio-Visual Works
 - Digital Audio Works
 - Digital Books
- All other digital goods are categorized as "products transferred electronically"
- Member states must adopt these definitions

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MTC Varying state definitions of digital goods: defined under SSUTA

- In addition, SSUTA provisions discuss the sale of a "digital code."
- If member states want to tax digital products that fall outside these terms, they must specifically tax them by statute.
 - May extend sales and use tax to digital products sold regardless of whether the purchaser has a right to permanent use.

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MTC Varying state definitions of digital goods: defined under SSUTA

- Under SSUTA, unless state statute specifically states otherwise, a tax on digital products is construed as being imposed on a sale
 - (i) to a purchaser that is an "end user;"
 - (ii) when the seller grants the right of "permanent use," and
 - (iii) that is not conditioned upon continued payment to the seller by the purchaser

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MTC Sourcing under SSUTA

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graph TD
  A[Seller's place of business if received there] --> B[Location where purchaser receives the item]
  B --> C[Purchaser's address from seller's business records]
  C --> D[Purchaser's address from time of sale (from pmt instrument)]
  D --> E[Origin sourcing: address where item first made available for transmission by seller]
  
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SSUTA State Variations

- A number of states impose broader definition/taxation of digital products
- Examples:
 - Wisconsin: SSUTA-defined digital products, plus electronic greeting cards, artwork, periodicals, video games (unless tax exempt in tangible form)
 - Kentucky: same as above, but exempts audio-visual products
 - Vermont: SSUTA-defined digital products, plus ringtones

Source: CCH Intelliconnect

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SSUTA State Variations

- Taxable if right to use a digital good is not permanent:

YES	NO
KY, MN, NJ, NC, OH, SD, UT, VT, WA, WI	AR, GA, IN, IA, KS, MI, NV, ND, OK, RI, WV, WY
- Taxable if right to use digital good is conditioned on continual payment:

YES	NO
MN, NE, NJ, NC, OH, SD, UT, VT, WA, WI	AR, GA, IN, IA, KS, KY, MI, NV, ND, OK, RI, WV, WY

Source: CCH Intelliconnect

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SSUTA State Variations

- Taxable if sold to user other than end user:

YES	NO
SD, UT	AR, GA, IN, IA, KS, MI, NV, ND, OK, RI, WV, WY, MN, NE, NJ, NC, OH, VT, WA, WI
- Exemptions:
 - MN: digital textbooks when used in a course of study
 - WA: entity-based exemption for audio and television broadcasters

Source: CCH Intelliconnect

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MTC Inconsistency has attracted federal attention

- Digital Goods & Services Tax Fairness Act
 - S. 851 (114th Congress)
 - Intent is to prevent state and local governments from imposing "multiple and discriminatory" taxes on digital goods and services.
 - Excludes certain services from the definition of "digital service"



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MTC Sourcing under Digital Goods & Services Tax Fairness Act



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    graph TD
      A["if received by the customer at a business location of the seller, such business location"] --> B["Primary use location of digital good or service  
Primary use location = street address representative of where the actual end user's use will primarily occur"]
      B --> C["Location good is received by customer or customer's donee, if known to seller and maintained in ordinary course of business"]
      C --> D["Customer's address as maintained in the ordinary course of business"]
      D --> E["Customer's address obtained during sale (pmt instrument)"]
      E --> F["Location good was first available for transmission by seller"]
  
```

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MTC Sales Factor Sourcing

- Section 17 – modeled on MA sourcing rules
- Shift to market sourcing – hierarchy of rules for services and intangibles



this is the **MARKET** where the storekeeper buys the food and brings it to his store near your house

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