

Implied Terms in Contracts for Supply of Goods, Services and Digital Content

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Abstract

Certain terms implied under the Sale of Goods Acts 1893 and 1979 replicated by the United Kingdom Consumer Rights Act 2015 foster consumer rights. The paper explores the extent to which the Nigeria Sale of Goods Act 1893 and UK Sale of Goods Act 1979 are fit to address the implied terms for digital content. Since the term “goods” does not cover digital content, buyers of digital content are not protected by the implied terms contained in the Sale of Goods Acts. This paper comparatively considers consumer protection regimes in the United Kingdom and Nigeria in relation to implied terms in supply of goods, services and digital content under the new Consumer Rights Act 2015 and Federal Competition and Consumer Protection Act 2019 respectively. The paper finds that consumers of goods, services and digital content are much more protected under the implied terms of the Consumer Rights Act. Whilst the improvement in the Federal Competition and Consumer Protection Act in enlisting consumer rights is commendable, a major deficit is exclusion of digital content implied terms. It is recommended that the Federal Competition and Consumer Protection Act should be amended to reflect and accommodate the provisions on implied terms relating to digital content.

Keywords: Implied Terms, Consumer Rights, Digital Content, United Kingdom, Nigeria

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1 Introduction

The pace of technology and the growth in the retail industry, as well as the diversity and complexity of the products and services available to consumers (particularly online) has begun to outstrip the ability of the pre-existing law to deal with it in Nigeria. The Sale of Goods Act 1893 (the United Kingdom had a new Sale of Goods Act in 1979) regulates sale of goods in the United Kingdom (UK) and Nigeria. The English law on sale of goods was received into the Nigerian legal system as Statute of General Application (which refers to statutes in force in England on 1 January 1900). The law was part of the English law introduced into Nigeria by the British colonial administration. A number of states have enacted their own laws. However, the SGA is still applicable in a number of states in Nigeria. Whilst the Sale of Goods Act 1893 (“SGA 1893”) has since been applied in its original version in Nigeria, the UK now has the Sale of Goods Act 1979 (“SGA 1979”). Significant statutory amendments made in the SGA 1979, notably in 1994 and 2002 were designed to make the implied terms more effective. The SGA 1893 applied in the UK and Nigeria when computers and the Internet were not in place. The legislation was simply not designed for the kind of digital products and services which are commonly supplied and purchased in the 21st century. The SGA 1979 became law at a time when computers and the Internet were still in their incubatory stages (Althaf, 2014). It does not only keep pace with changes, but also provisions that aim at protecting consumers are specifically incorporated, shifting the regime from one of *caveat emptor* (Atiyah *et al*, 2001) to one of *caveat venditor* (Althaf, 2014).

With the effluxion of time, the SGA 1979 responds to novel ways in which sale of goods transactions are made. This is evident in the debate on whether computer software constituted goods or not under the SGA 1979 regime. It is now settled that software not sold by way of a physical medium is not goods for the purposes of the SGA 1979. The approach under the SGA 1979 is to make a distinction between software *per se* and software on physical media. It is upon this distinction the right of the consumer to the particular product is established. The focus of existing analysis on software reflects its genesis in the 1980s. At that time, the technological environment was significantly different to that faced by modern traders in modern economies. The problem with existing software-as-goods analyses is that their frame of reference is stuck in the technological and economic environment of the 1980s, which no longer reflects modern trading conditions. An Australian *ACCC v Valve (No 3)* (2016) FCA 196 illustrates the risk identified that digital products and software may not necessarily be understood as equivalents. The UK Consumer Rights Act 2015 (“CRA”) has made the frame of reference to shift away from software towards digital products as an overall category of tradable items. Digital content products include computer software, films, music, games, e-books, ring tones and apps and consumers can access these in a variety of ways, both through physical (e.g. on a disk) and intangible media such as downloads via the internet (Bradgate, 2010).

There is enormous potential of the digital content market in light of development in the current world of technology. Essentially, the growth of the digital content market is driven by consumer demands. Purchase of

smart-phones and other digital products has led to an increase in purchase of digital content via the use of such products thereby increasing the activities of consumers in the purchase of digital products. With this increase, there is bound to be increase in risk in the purchase of digital content. The digital content market may continue to grow to the detriment of consumers. There is, in fact, the real problem that the growth in the quantity of the digital content may not match its quality. Over the years, the Nigerian consumer as a result of the knowledge imbalance has suffered so much in the hands of producers and suppliers of goods and services with whom they were engaged in trade relationships in terms of supplying substandard goods and services, fake and expired products, etc. In the digital age, similar challenges cannot be ignored. The three main problems experienced by consumers purchasing digital content in the UK concern poor information provision (both lack of information and unclear/complex information), access and quality problems (Europe Economics, 2011). Further, consumer reluctance is likely to arise due to a number of factors, including non-existence and poor understanding of digital content rights. When consumers do experience problems and are unable to claim the remedy they expect, consumer confidence may be undermined. Therefore, there is the need for consumer protection.

The CRA is applicable to the majority of business to consumer contracts and governs, amongst other things, the standards to be met for goods, digital content and services, the fairness of terms and notices and the enforcement of consumer rights. The main aim of the CRA is to consolidate consumer rights into one place, whilst enhancing protections for consumers and modernising the law to take into account digital advances. The CRA is in three parts and contains 10 schedules. It introduces new statutory rights and remedies that apply when a consumer purchases goods, services and digital products from a trader. The focus of this paper is the Part 1 which provides consumer rights and remedies in respect of contracts to purchase goods, services and digital content.

Nigeria still applies the received SGA 1893 and no prospect of any amendment or repeal in view soon. It has been found that the provisions of the SGA 1893 apply indiscriminately to consumer transactions in Nigeria in purchase of goods (Akpofurere, 2014). The Federal Competition and Consumer Protection Act 2019 ("FCCPA") improves consumer protection in Nigeria, containing the implied terms. However, Digital content does not fit well into FCCPA framework. In particular the fact that digital content is excluded from the FCCPA is one of the major deficits of the present consumer protection regime in Nigeria. The CRA is a piece of UK legislation to govern the supply of digital content as a category of product in its own right. This paper examines the changes the CRA has brought to implied terms not only to supply of digital content but also to goods and services. It considers the CRA as a model with a view to determining how the implied terms and the tiered remedies are used to protect the consumer in supply of digital content over the Internet and the policy implications for Nigeria.

2 Applicability of Sale of Goods Act to Computer Software

One of the key features of the SGA is its implied terms. Whether a sale of goods transaction is a business-to-business transaction or a consumer transaction, the SGA provides certain assurances through its implied terms provisions. Although classified as "implied terms", the provisions inserted into the contract by sections 12 to 15 cannot be excluded where the buyer deals as a consumer and the provisions have much in common with imposed rules of law, rather than with true contractual terms. Thus, the seller, in the case of a sale has the right to sell, and that in the case of agreement to sell, he will have a right to sell goods at the time the property is to pass (*Akoshile v Ogidan* (1950) 19 NLR 87.¹ This condition effectively imposes two requirements on the seller, which might be termed "the ownership requirement" and "the intellectual property requirement" (Bradgate, 2010). Thus the implied term is broken if the seller purports to sell goods which he does not own or have the owner's authority to sell. Typically this term comes into play where a buyer purchases goods which have been stolen or acquired by deception from their true owner or, for instance, when a consumer who has contracted to acquire goods from a third party resells them before property in the goods has passed to him e.g. because he has not paid for them and the transfer of property is conditional on payment. A common example is where a motor-vehicle is taken on hire purchase terms and the hire purchaser seeks to dispose of it before completing the hire purchase payments.

The second requirement, termed the "intellectual property requirement" extends the reach of section 12 to situations where the seller owns the goods but reselling them infringes the intellectual property rights of some third-party, so that the seller does not have the right to sell the goods. Thus, in *Niblett Ltd. v Confectioner's Materials Co. Ltd.* (1921) 3 K.B. 387, X sold tins of condensed milk to Y. The label infringed the Nestle trade mark and Y could only resell them by removing the labels. It was held that X was in breach of section 12(1). This aspect of section 12 is likely to be particularly important in the case of digital products, where the risk of infringement of intellectual property rights, including copyright, patents and trademarks may be especially high (Bradgate, 2010). Section 12 (2) implies two further terms, both classified as warranties. They provide that (a) the goods are free from any charge or encumbrance not disclosed to the buyer before the sale; and (b) that the

¹ Section 12 (1), Sale of Goods Act 1893.

buyer will enjoy quiet possession of the goods except insofar as it may be disturbed by the person entitled to a disclosed encumbrance. Both of these terms could be significant in the context particularly of computer software. Similar implied terms are also contained in the SGA1979 where sellers and suppliers have an obligation to ensure quiet possession,¹ unencumbered title² Most important in cases involving software and other digital products, however, are rights regarding the quality of goods, their fitness for purpose, and their correspondence with description.

Prior to the enactment of the CRA, the right of consumers to the purchase of digital content has been ambiguous. This ambiguity is not unrelated to the debate regarding the classification of digital content as goods or services. The lack of clarity surrounding the legal approach of digital content has created an aura of unpredictability where a legal response is needed in addressing problems that may arise (Green and Djahongir, 2007). Among the EU, an analysis of the situation within the Member States demonstrates that the classification of digital content is subject to considerable legal uncertainty (Loos, 2011). This might partly be due to an unresolved controversy about how to classify digital content. It is noteworthy here that the SGA applies specifically where the subject matter of a contract of sale is a good, as opposed to other types of property such as immovable or intangible property (John N. Adams and Hector MacQueen, 2010). The SGA 1979 section 61(1) provides that 'goods' includes: all personal chattels other than things in action and money, and in Scotland all corporeal moveables except money; and in particular 'goods' includes emblements, industrial growing crops, and things attached to or forming part of the land but which are agreed to be severed before sale or under the contract of sale; and includes an undivided share in goods. Similarly, 62 of SGA 1893 defines goods to include: "all chattels personal other than things in action and money and includes emblements, industrial growing crops, and things attached to and forming part of the land which are agreed to be severed before sale or contract under sale".

Loos (2011) states that classifying contracts for the supply of digital contents as *sui generis* contracts, to which consumer sales law is then declared applicable is an approach pursued in the UK. This approach leaves the courts free to invoke the general principles of common law leading to a similar result as those that would be applicable under the Sale of Goods Act or Supply of Goods and Services Act. Arguments in favour of a *sui generis* approach were that it would leave more room to consider the relevant technological developments. Arguments against it could be that it also leads to the introduction of unfamiliar legal concepts and thus possibly to more legal uncertainty (Helberger *et al.* 2013).

Given that these statutory definitions do not specifically address software, courts apply the common law definition of goods as being personal chattels and, specifically, choses in possession. In doing so, they differentiate software embodied in a physical medium from software that is not. Only the former constitutes goods. Software not sold by way of a physical medium is not goods for the purposes of the SGA 1979. The intangible nature of digital content as well as its proper classification (that is on whether digital content ought to be treated as goods) has had some notable comments from the courts in relation to the SGA 1979. The case of *St Albans City and District Council v International Computers Ltd.*(1996) 4 All ER 481, was a decision of the Court of Appeal of England and Wales. That case involved a transfer of software *simpliciter*. An employee of the seller attended the buyer's premises and installed software onto the buyer's hardware from a disk, but then took that disk away. The disk — the physical medium — was not transferred as part of the transaction. While Nourse and Hirst LJ decided the case upon general contractual principles, Sir Iain Gildewell also considered whether there was a sale of goods, and concluded there was not. A distinction was drawn 'between the program and the disk carrying the program'; the disk was goods, but the program in and of itself was not (Helberger *et al.* 2013). Sir Iain Gildewell likened a disk containing software to an instruction manual containing information about maintaining and repairing a car — incorrect instructions in a manual can render the manual (as goods) defective, as can a defective program to a disk (Helberger *et al.* 2013). However, since the disk was not itself transferred to the purchaser, there was no transfer of goods. For this reason, the terms implied by the SGA 1979 did not apply; though on the facts of the case, the Court of Appeal found that an express term of the contract had been breached in any event. A similar decision was reached in *Watford Electronics Ltd v Sanderson CFL Ltd* (2000) 2 All ER (Comm) 984.

The approach under the SGA 1979 decided in *St Albans City and District Council* case was to make a distinction between software *per se* and software on physical media and it is upon this distinction the right of the consumer to the particular product is established. The major pitfall of this approach is that in bringing digital content attached to a physical media under the purview of the SGA 1979, digital content transmitted electronically are left out. Green and Djahongir (2007) argue that the approach ignores several natures of interests in goods, with each nature demanding a *sui generis* approach in terms of legal treatment. There have also been arguments on the contrary that digital content should be classified as service rather than goods. As

¹ Sale of Goods Act 1979, ss 12(2)(b), (5).

² Sale of Goods Act 1979, ss 12(2)(a), (3)–(4).

stated earlier, digital content comes in various forms ranging from text, audio and video files, graphics, animations and images thus including features of both goods and services. It has been argued that services are not capable of being stored (Bhagwati, 1986) and the emphasis on the legal treatment of services is on the way a service is provided rather than the product itself. As far as digital content is concerned, it may very well seem that the convenient classification would be more contextual rather than a rigid classification into goods or services. While courts have managed to bring digital content sold in physical carrier media within the purview of the SGA, digital content that are transmitted electronically escape the provisions of the SGA. In other words, the SGA, owing to its definition of the term ‘goods’ is ill suited to deal with digital content and is therefore not technologically neutral, in that it is applied by courts in a discriminatory fashion favouring digital content transferred over physical carrier media over those that may be simply downloaded without the aid of any physical carrier media (Althaf, 2014). It has been rightly observed that any adequate regulatory framework for digital content must exhibit a thorough understanding of the digital content market and must also reflect consumer concerns as any gaps between these concerns and the existing legal regimes may cause an imbalance that will ultimately be to the detriment of the digital consumer (Helberger, 2013).

3 The Digital Content Markets

The digital content market involves the distribution, buying and selling of goods and services on a digital platform. It reveals a combination of competition, innovation and entrepreneurship with businesses highly dependent on digital technology. Bradgate (2010) defines digital content in a technical fashion as ‘... data or information products supplied in digital format as a stream of zeros and ones so as to be readable by a computer and give instructions to the computer...’ The CRA defines digital content to mean data produced and supplied in digital form. The EU Directive on Consumer Rights defines digital content as “data which are produced and supplied in digital form, such as computer programs, apps, games, music, videos or texts, irrespective of whether they are accessed through downloading or streaming, from a tangible medium or through any other means.” (EU Directive on Consumer Rights, 2011) The definition of digital content under the Consumer Rights Act seems broad enough to include all forms of digital content which is desirable considering the evolutionary nature of digital technology. Digital content varies in form, such as text, audio and video files, graphics, animations and images (Mullan, 2011). It essentially refers to information available for distribution on electronic media (Global Digital Market, 2015). Digital content are basically online products that cannot be held, touched, or tasted. They are only created and delivered electronically.

By making the world a global village, the internet has spearheaded the seamless transmission of data and digital content across jurisdictions from the comfort of homes through the use of computer systems and mobile telephones. From messaging and other forms of online communication transmissions to the sharing of media and entertainment and to the completion of transactions in the sale of goods and services, digital content is constantly being shared across countries, and Nigeria has not been left behind in the digital content boom. In November 2019, the Nigerian Communications Commission (NCC) reported the number of active internet users in Nigeria at almost 123 million, which was up from about 109 million in 2018(NCC, 2019). Probably one of the most evident characteristics of digital content markets is the move from the supply of predominantly tangible goods towards intangible products. Instead of printing and selling a tangible book in a bookstore, it is now also possible to “print” the same book in electronic form and offer it for download. Music is not only offered for sale in the form of CDs (tangible) but also in the form of MP3s, etc. Games are played increasingly online and ringtones purchased via the mobile phone. Other forms of digital content have a hybrid character and combine the characteristics of the sale of goods and the provision of services. For example, software sales may involve (1) the sale of a physical copy of the software, (2) an online (automated) update service, and (3) a real-time (remote) software support service (e.g., a help desk). Digital content products include computer software, films, music, games, e-books, ring tones and apps and consumers can access these in a variety of ways, both through physical (e.g on a disk) and intangible media (e.g. downloads via the internet). Some of the types of digital content available to Nigerian users include, among others, services that facilitate user communications such as social media and messaging services, services that facilitate the creation and delivery of amateur and professionally produced content, and digital marketing services. Digitization has enabled the emergence of a plethora of new business models for the delivery of digital content. Consumers can choose between “on-demand” offerings, “near-on-demand” content, on-demand downloading, streaming, webcasting, IP-based TV, subscription to purchase e-books, e-journals, and e-newspapers, social broadcasting, cloud computing, apps, in-app purchases, and many more. The digital content market in Nigeria is expanding and growing. The edutainment platform has planned to expand its digital market across the African continent, especially in Nigeria, its biggest market in digital content broadcasting to schools and homes. In developing educational contents, the platform uses technology tools to develop digital contents and broadcast same through digital channels that would help enhance quality teaching and learning in schools (Cliodhna, 2021).

The growth of the digital content market has been accelerated by the access of most consumers to the

Internet, the development of high-speed broadband which has enabled consumers to download large files containing high-quality products at low cost, the range of intangible digital product that are available electronically (streaming and social networking sites), possibility of storing digital products, for instance on cloud platforms, evolution and ease in the payment mechanisms tailored to facilitate digital content purchases and improved access to information about sellers and their products (OECD Digital Economy, 2013). The relative ease and access to the internet has invariably led to the growth of consumer demands for digital products which in turn has led to the expansion of content providers and intermediaries. The business models in the digital content market are unexpectedly diversified just as digital content itself takes on various forms. It was forecasted in 2010 that by 2015, the digital content market would see a 60% expansion (from \$7.5 billion to \$20 billion) (OECD Digital Economy, 2013). It has been noted that there has been an upsurge in the number of consumers subscribing to music services (with revenue from music subscription accounting for 23% of the global digital revenue) and in 2014, it was noted that the music industry global digital revenue increased by 6.9% to \$6.85 billion, deriving the same proportion of revenue from physical format sales (Digital Music Report, 2015). The telecommunications sector is the major investors in the market as some telecommunications operators have launched a platform whereby their respective costumers pay for digital content and services. Players in the digital content market, essentially the Media and Entertainment companies, through the innovative use of technology are also providing more individualised content for consumers tailored to their respective wants, for examples, the provision of digital services via Amazon Prime, Kindle Services. It has also been observed that the widespread use of smart-phones has ensured that the global consumer spending on mobile “apps” and content will continue to rise (Digital World, 2013).

The Digital Content market in the UK is established, large and growing. For example, in the UK more than £1billion was spent on downloaded films, music and games in 2012. However, reports show that significant number of consumers experience problems with their digital content purchases (Europe Economics, 2011). A survey by the Europe Economics shows the percentage of consumers in the UK who had experienced at least one problem with digital content during 2012. The problems experienced were access (31%); lack of information (24%); unclear/complex information (18%); quality (14%); security (9%); unfair terms and conditions (2%); and privacy (2%) (Europe Economics, 2011). The three main problems experienced by consumers purchasing digital content concern poor information provision (both lack of information and unclear/complex information), access and quality. Poor (lacking or overly complex) information provision often causes consumers to experience problems with the performance of the digital content they purchase. Another large proportion of problems in the ‘lack of information’ category were due to ‘content being of poorer quality than expected given the information provided by the supplier. Two thirds of those who had problems accessing digital content they had purchased identified unexpected service interruptions at the suppliers end as the cause of these. Feedback from industry, commissioned as part of the same report explained that such short-term access restrictions typically relate to internet connection problems and thus require action by internet service providers rather than the suppliers of the digital content (Europe Economics, 2011). Longer term access restrictions can be caused by issues with interoperability and technical protection measures, which mean that consumers are only able to use digital content on certain devices. Consumer organisations highlighted that cross-border restrictions on product use could also result in problems for consumers. The report also showed that many consumers experience problems with the quality of digital content they purchase. A large number of quality problems were with visual or sound quality (36%), with another major problem in this area being corrupt content that could not function on the consumer’s device and sometimes caused damage to the device itself (32% of all quality problems). A number of consumers experience problems with the quality of downloaded digital content. Providing clear quality standards and remedies for digital content within the CRA has helped standardise and protect consumers’ reasonable expectations, and will provide clarity for both businesses and consumers. Though the above detriment was found in the UK, the size of consumer detriment in this area in Nigeria is likely to be greater than the above estimates suggest.

4 Supply of Goods, Services and Digital Content under the Consumer Rights Act

The Consumer Right Act 2015 applies to all consumer contracts for the supply of goods, services and digital content entered into after 1st October 2015. A consumer contract is a contract between a “trader” and “consumer” for the trader to supply goods, digital content or services. By section 2(2), a “trader” means a person acting for purposes relating to that person’s trade, business, craft or profession, whether acting personally or through another person acting in the trader’s name or on the trader’s behalf. By section 2(3), a “consumer” means an individual (which must mean a natural person only) acting for purposes that are wholly or mainly outside that individual’s trade, business, craft or profession. The apparent pitfall associated with this definition is its exclusion of non-natural persons such as corporate entities. It is argued however that a definition that envisages corporate entities as consumers is desirable especially in light of the increasing growth of e-commerce (Damilola, 2015).

The CRA consolidates the range of rights and remedies available to consumers in respect of business to consumer contracts in one legislative instrument. These consist in a number of statutory protections which are deemed to be included as terms in relevant contracts. The Act also introduces some new protections, including digital content as follows:

(a) Sale of Goods Implied Terms

The provisions relating to the sale and supply of goods apply to “contracts to supply goods”¹ – that is, sales contracts, contracts for the hire of goods, hire-purchase agreements and contracts for the transfer of goods.² The definition “contracts to supply goods” includes conditional contracts, contracts in relation to goods sold on credit or which have not yet been manufactured and contracts where the consideration for the goods is provided by the consumer doing something other than paying a price. “Goods” means any tangible moveable items, but that includes water, gas and electricity if and only if they are put up for supply in a limited volume or set quantity.³ Contracts to supply goods are deemed to contain implied terms (liability under which cannot be excluded or limited)⁴ that the goods are of satisfactory quality,⁵ fit for purpose⁶ and are in accordance with any description⁷ or sample of such goods.⁸ It is an implied term that the trader has the right to sell or transfer the goods, that the goods are free from charges or encumbrances and that the consumer will enjoy quiet possession of the goods.⁹ Unless the trader and the consumer have agreed otherwise, the contract is to be treated as including a term that the trader must deliver the goods to the consumer at an “agreed” time or period.¹⁰ If the contract does not specify an agreed time or period for delivery of goods, it is implied in the contract that the trader must deliver the goods without undue delay and in any event not more than 30 days after the day on which the contract was entered into.¹¹ The goods remain at the trader’s risk until they are delivered to the consumer.¹²

The CRA introduces some new rights in addition to the rights stated as implied terms. First, certain pre-contract information is incorporated into the contract. The Consumer Contract (Information, Cancellation and Additional Charges) Regulations 2013 specify certain information which traders must provide to the consumers, with specific requirement depending on whether the contract is made ‘on premises’ or as a distance contract. These include, for example, requirement to describe the main characteristics of the goods, the identity and contact details of the trader, the total price (including all taxes) and charges, the trader’s complain handling policy, and whether any after-sale services or guarantees are available, and the applicable conditions. Under section 12 of the CRA, these informational requirements (with the exception of the main characteristics of the goods) must be treated as a term of the contract. Second, where goods are supplied by reference to a model seen or examined by a consumer before they enter into a contract the goods must match the model, unless the relevant differences are brought to the consumer’s attention before they enter into the contract.¹³ Third, the rules on goods contract must be complied with if goods are supplied alongside a service and/or digital content as part of a mixed contract. If a contract to supply goods includes a term that such goods will be installed by the trader, the goods will not conform if they are not installed correctly.¹⁴ If goods have a digital content element (e.g. a mobile phone with pre-loaded digital content) and the digital content element does not meet the statutory quality requirements in respect of digital content (described below), the goods themselves will be defective for the purposes of the CRA.¹⁵

4.1 Tiered Remedies for Defective Goods

The remedy available depends on the type of breach involved. Where the breach relates to satisfactory quality, fitness for purpose, goods to be as described, goods to match sample or model and digital content supplied with goods to conform to contract, the following remedies are available:

- a. Short term right to reject.¹⁶
- b. Right to repair or replacement.¹⁷

¹ Consumer Rights Act, s.3(4).

² Consumer Rights Act, s. 3(2).

³ Consumer Rights Act, s.2 (8).

⁴ Consumer Rights Act, s.31.

⁵ Consumer Rights Act, s. 9.

⁶ Consumer Rights Act, s.10.

⁷ Consumer Rights Act, s.11.

⁸ Consumer Rights Act, s.13.

⁹ Consumer Rights Act, s.17.

¹⁰ Consumer Rights Act, s.28.

¹¹ Consumer Rights Act, 28(3).

¹² Consumer Rights Act, s.29.

¹³ Consumer Rights Act, s.14.

¹⁴ Consumer Rights Act, s.15.

¹⁵ Consumer Rights Act, s.16.

¹⁶ Consumer Rights Act, ss 20, 22.

¹⁷ Consumer Rights Act, s.23.

c. Right to price reduction or final right to reject.¹

For breach of most of the implied terms in relation to goods the consumer has a short-term right to reject. If the consumer is going to exercise this right they must do so within 30 days beginning with the first day after ownership (or possession, as applicable) of the goods has been transferred to the consumer, the goods have been delivered and, where the contract requires the trader to install the goods or take other action, the trader has notified the consumer that the action has been taken. All the consumer needs to do to exercise this right (or the final right to reject (see below) is indicate to the trader that he/she is rejecting the goods and treating the contract as at an end. Where the consumer chooses to exercise this right, he must prove that there has been a breach of the implied term(s). Once the consumer has exercised this right, generally the trader has a duty to give the consumer a refund without undue delay and, in any event, within 14 days beginning with the day on which the trader agrees that the consumer is entitled to a refund. In these circumstances the consumer also has a duty to make the goods available for collection or to return them as agreed. Whether the consumer has a duty to return them or not, the trader must bear any reasonable costs of returning them, other than any costs incurred by the consumer in returning the goods to the place where the consumer took possession of them.

For breach of most of the implied terms in relation to goods and digital content the consumer has the right to repair or replacement. If the consumer requires the trader to repair or replace, the trader must do so within a reasonable time and without significant inconvenience to the consumer, and bear any necessary costs incurred in doing so (including costs of labour, materials or postage). The consumer cannot require repair or replacement if that right (the repair or the replacement) is impossible or disproportionate compared to the other rights. Either of those rights are disproportionate to the other if in comparison to the other it imposes costs on the trader which are unreasonable, taking into account the value which the goods/digital content would have if there had been no breach, the significance of the breach and whether the other right could be effected without significant inconvenience to the consumer. Where the consumer alleges breach of the implied terms within the period of six months from the date of delivery of goods/supply of digital content, and they require repair or replacement, they must still prove breach, if they do, it is presumed that the goods/digital content did not conform to the contract standard at the date of delivery and, in that case, the trader would have to show otherwise.

The right to price reduction is, generally, the right to require the trader to reduce by an appropriate amount the price the consumer is required to pay under the contract and to receive a refund from the trader for anything already paid by the consumer above the reduced amount.

The amount of the reduction could, in appropriate circumstances, be the full amount of the price.

A consumer who has the right to a price reduction and the final right to reject may only exercise one (not both) and may only do so in one of these situations:

- (i) After one repair or one replacement, the breach has still not been remedied (goods only);
- (ii) Where repair or replacement is either impossible or disproportionate; or
- (iii) The consumer has required the trader to repair or replace the goods and/or digital content, but the trader is in breach of the requirement to do so within a reasonable time and without significant inconvenience to the consumer.

Once the consumer has exercised the right to a price reduction, generally the trader has a duty to give the consumer a refund without undue delay and, in any event, within 14 days beginning with the day on which the trader agrees that the consumer is entitled to a refund. If instead of a price reduction the consumer chooses to exercise the final right to reject, then all he needs do (as with the short-term right to reject) is indicate to the trader that he is rejecting the goods and treating the contract as at an end.

If the consumer exercises the final right to reject, any refund to the consumer may be reduced by a deduction for use, to take into account the use the consumer had of the goods in the period since they were delivered. There are exceptions to this however e.g. if the final right to reject is exercised within the first 6 months beginning with the first day after passing of ownership/possession, delivery and installation or other action required by the trader, and the consumer has been notified of completion of that action, then no deduction may be made for use (unless the goods consist of a motor vehicle or other goods specified by Order of the Secretary of State).

Where the breach relates to conformity with pre-contractual information required to be given under Consumer Contract Regulations which are included as terms of the contract, the consumer has the right to recover from the trader the amount of any costs incurred by the consumer as a result of the breach, up to the amount of the price paid or the value of other consideration given for the goods.² Where the breach relates to the right to have goods installed correctly, the consumer has the right to repair or replacement³ and the right to price reduction or final right to reject.⁴ Where the breach relates to delivery, if the trader does not deliver within an

¹ Consumer Rights Act, ss 20, 24.

² Consumer Rights Act, s. 19(5).

³ Consumer Rights Act, s.23.

⁴ Consumer Rights Act, ss. 20 and 24.

agreed time or agreed period, or within the implied period of 30 days, when told that either of these circumstances were essential then the consumer may treat the contract as at an end and receive a refund.

(b) Implied Terms for Sale of Services

In relation to consumer contracts for services, the CRA also implies some terms. Services can be provided alone without goods (such as dry cleaning, entertainment, hairdressing etc.) or may be provided with goods (such as repairing a vehicle, double glazing, building a conservatory, installing a kitchen etc). Chapter 4 of the CRA (services) applies only to a contract for a trade to supply a service to a consumer,¹ and does not include a contract of employment or apprenticeship, or specific services which may be specified by the Secretary of State. Under the CRA, the following minimum standards are implied into a consumer contract for services: the trader must perform the consumer service with reasonable care and skill;² where the price is not contractually agreed in advance for the service, the consumer must pay a reasonable price;³ where a timescale for performing the service is not agreed in advance, the service must be performed within a reasonable time.⁴ The CRA further provides that any spoken or written voluntary statement made by the trader (about the trader or the trader's service) may be a binding contractual term where the consumer relies on it when deciding to enter into the contract or making any decision about the service after entering into the contract.⁵

4.2 Statutory remedies for non-conforming service

Where services do not conform to the contract, the following statutory remedies are available to consumers:

(i) right to require "repeat performance" of the service to the extent necessary to fulfill the contract.⁶ If the consumer requires this, the trader must provide it within a reasonable time (depends on the nature of the service and purpose for which the service was to be performed) and without significant inconvenience to the consumer and must bear any necessary costs incurred in doing so (including labour and materials). The consumer cannot require repeat performance where completing performance in line with the contract is impossible.

(ii) Or right to a price reduction (including the right to receive a refund). Similar to goods and digital content, the right to require the trader to reduce by an appropriate amount the price the consumer is required to pay under the contract and to receive a refund from the trader without undue delay and, in any event, within 14 days beginning with the day on which the trader agrees that the consumer is entitled to a refund, for anything already paid by the consumer above the reduced amount. The amount of the reduction could, in appropriate circumstances, be the full amount of the price. The consumer will only be entitled to a price reduction where repeat performance is impossible or the consumer has required repeat performance but the trader has failed to do it within a reasonable time and without significant inconvenience to the consumer.⁷

(c) Sale of digital content

The Act makes applicable to digital content, certain implied terms that normally accrue to tangible products or goods under the sale of goods law. It is therefore important to state that the implied terms below are not in any way a new invention but more akin to a tailoring of certain terms which are ordinarily applicable to tangible products classified as goods to adapt to digital content contracts. The approach adopted by the CRA in relation to digital content contracts has a sufficient degree of flexibility. Its scope can always be extended when necessary to match current realities thus leaving more room for technological advancements. The prospect that the scope of the Act in relation to digital content can be widened is not just beneficial to prospective consumers but also ensures that the quality standards of digital content will always be in perspective.⁸

Digital content contracts that come within the scope of the CRA have an implied term that the quality of the digital content is satisfactory.⁹ The test to determine whether a digital content is satisfactory is an objective one and apart from the test of reasonability, it appears that a digital content may be considered to be of a qualitative nature where the digital content is fit for all the purposes it is usually supplied for, free of minor defects, safe and durable.¹⁰ However where a defect affecting the quality of the digital content comes within the knowledge of the consumer, or where the consumer examines the digital content and which such examination ought to reveal, the consumer will not be covered by the implied term. An implied term that the supply of digital content by the trader to the consumer must be of satisfactory quality appears to compel the trader to assume third party risk (for instance where traders use third party software in their software that is provided on the basis of 'no warranties') (Freshfields, 2014) and give warranties beyond what they have recourse to.

¹ Consumer Rights Act, s. 48(1).

² Consumer Rights Act, s.49; s. 142(3).

³ Consumer Rights Act, s.51.

⁴ Consumer Rights Act, s. 52.

⁵ Consumer Rights Act, s. 50(1) and (2).

⁶ Consumer Rights Act, s.55.

⁷ Consumer Rights Act, s.56.

⁸ Damilola Ogunsipe, above, p. 19.

⁹ Consumer Rights Act, s. 34(1).

¹⁰ Consumer Rights Act, s. 34(3).

Similar to goods, digital content must be fit for the particular purpose in which the consumer is contracting for.¹ The CRA further provides that digital content contract will be treated as including an implied term that the digital content is reasonably fit for purpose.² It has been argued that the implied term that the supply of digital content must be fit for the particular purpose it is being contracted for does not adequately capture the nature of digital content. The underlying basis of most supply of digital content, it is argued is to sell contractual rights to use digital content rather than a right to use such content for whatever purpose the consumer may choose (Freshfields, 2014). Added to digital content contracts is the inclusion of the implied term that every contract to supply digital content must match any description given to it by its trader to the consumer.³

Certain pre-contract information which must be provided to consumers in a contract to supply digital content (information, cancellation and additional charges) is to be treated as included as a term of contract⁴ and any change to that information made before entering into contract or later is not effective except expressly agreed between the consumer and the trader.⁵ Where digital content is not supplied in a tangible model, that is, it is supplied via streaming and download, there is an implied term that the digital content must be of satisfactory quality, fit for a particular purpose and as described at the point when it reaches the consumer device.⁶ Section 40(1) of the CRA provides that where a digital content contract is made subject to the right of a third party to modify the digital content such modification must be of satisfactory quality, fit for that particular purpose and still conforms to the description. Importantly, the Act clarifies that the need for the supply of digital content to match description does not prevent the trader from improving features or adding new features to the digital content as long it continues to match the description and information provided by the trader.⁷ Any updates to digital content must also comply with these terms. In recognition of copyright laws, the CRA provides for an implied term that the trader has a right to supply digital content to the consumer or in a situation where there has been an agreement to supply digital content of which the consumer has paid a price for, there is an implied term that the trader will have the right to supply such content.⁸

4.3 Statutory remedies for digital content

The remedies available for digital content are similar to those for tangible goods but with differences to reflect the intangible nature of digital content. The basic remedies provided under the CRA for consumers are the right to replace or repair, the right to price reduction and a right of refund (this applies where the trader did not have the right to provide the content).⁹ Where a consumer has a right to repair or replacement of digital content, the Act compels the trader to do so within a reasonable time and in a manner that does not cause significant inconvenience to the consumer.¹⁰ The burden of cost in repairing or replacing digital content is on the trader,¹¹ however, the trader cannot incur costs that will be impossible or disproportionate to the cost of other remedies.¹² This remedy afforded to the consumer provides sufficient clarity to both consumers and traders as to where their respective obligations depend. Also, it is argued that the existence of a right to repair or replacement will invariably boost the quality of digital content being purchased by consumers as the burden of cost of such repair and replacement is on the trader. In contrast to the sale of goods, there is no statutory limit on the number of repairs or replacements undertaken by the trader to make the digital content conform, but they cannot do so indefinitely as the repair or replacement must be done within a reasonable time without causing significant inconvenience to the consumer.

Where repair or replacement is impossible, or if not done within a reasonable time or without significant inconvenience to the consumer, the consumer will be entitled to keep the digital content but receive a reduction in price. This refund can be up to the full amount paid for the content.¹³ In exercising a right to price reduction, the trader is prohibited from imposing any fee on the consumer. Section 46 of the CRA will apply to remedy for damage to device or to other digital content if a trader supplies digital content to a consumer under a contract; the digital content causes damage to a device or to other digital content, the device or digital content that is damaged belongs to the consumer, and the damage is of a kind that would not have occurred if the trader had exercised reasonable care and skill. If the consumer requires the trader to provide a remedy under this section, the trader must either repair the damage, or compensate the consumer for the damage with an appropriate

¹ Consumer Rights Act, s. 35(1).

² Consumer Rights Act, s. 35(3).

³ Consumer Rights Act, s. 36(1).

⁴ Consumer Rights Act, s. 37(2).

⁵ Consumer Rights Act, s. 37(3).

⁶ Consumer Rights Act, s. 39.

⁷ Consumer Rights Act, s. 40(2).

⁸ Consumer Rights Act, s. 41.

⁹ Consumer Rights Act, s. 42(2).

¹⁰ Consumer Rights Act, s. 43(2)(a).

¹¹ Consumer Rights Act, s. 43(2)(b).

¹² Consumer Rights Act, s. 43(3).

¹³ Consumer Rights Act, s. 44.

payment. A compensation payment under this section must be made without undue delay, and in any event within 14 days beginning with the day on which the trader agrees that the consumer is entitled to the payment. Where the trader does not have the right to provide the content, the consumer will be entitled to an immediate refund. If the breach only affects some of the digital content purchased, the right to a refund will not extend to the unaffected digital content. If the content is provided on a tangible medium such as a CD, the goods will need to be made available to the trader to get a refund but, in relation to downloaded digital content, there is no duty on the consumer to return or delete the digital content.

Certain remedies that are ordinarily applicable to goods or services do not apply to digital content hence further reinforcing the need for digital content to be treated in a peculiar fashion. Unlike with the sale of goods, there is no right to reject non-conforming digital content and there is no way to return digital content (Lexis-Nexis Financial Services, 2015). The remedies regarding price reduction and refund can be viewed as an attempt to restructure the economic imbalance that often exists between traders supplying digital content and consumers purchasing digital content. However, it is not clear how such restructuring will work in practice. It has been observed that the consumers' right to price reduction may prove a grey area for traders and consumers alike in establishing the scale of reduction in cases where there are less fundamental flaws with the purchased digital content (Oliver Bray and Susan Perkins, 2015). The Act simply provides that consumers have the right to require the trader to reduce the price by an appropriate amount. Although this right may be viewed as an attempt to strengthen the bargaining powers of consumers in this regard, there is, however, a need for further clarity in determining the scale of reduction in the price. Such lack of clarity in determining the scale of reduction may result in consumers seeking for full refund for less fundamental flaws in digital content or an alternative scenario, consumers will forego such right since the defect is superficial. The CRA also makes it clear that these are in addition to rights the consumer already has under the general law e.g. the ability to claim damages, seek an injunction etc. and that these rights may be used either in the alternative to or cumulatively with the statutory rights (provided this does not result in recovering for the same loss twice).¹

5 Federal Competition and Consumer Protection Act 2019

The Consumer Protection Act (CPA) No. 66 of 1992, Cap. C25 Laws of the Federation of Nigeria, 2004, was the primary law on protection of the consumers in Nigeria before 2019. The Act established the Consumer Protection Council to provide a holistic protection of the consumer in line with the United Nations Guidelines for Consumer Protection. However, the CPA was replaced in 2019 by the Federal Competition and Consumer Protection Act (FCCPA) which is currently the principal legislation on consumer protection in Nigeria, from which all other laws derive their consumer protection provisions (Akpan, 2019). The FCCPA is enacted to promote economic efficiency, maintain competitiveness in the Nigerian market and protect the welfare of the consumers. The Act applies to all businesses and all commercial activities within Nigeria and extends to any establishment in which the Federal, State or Local Government engages in for commercial purposes. It also applies to conduct outside Nigeria by a citizen of Nigeria or a person resident in Nigeria in relation to the acquisition of shares or other assets outside Nigeria resulting in the change of control of a business, part of a business or any asset of a business, in Nigeria. The FCCPA has established the Federal Competition and Consumer Protection Commission ("Commission") and the Competition and Consumer Protection Tribunal for the promotion of competition in the Nigerian markets at all levels by eliminating monopolies, prohibiting abuse of a dominant market position and penalising other restrictive trade and business practices, facilitating access of all citizens to safe products, securing the protection of rights for all consumers in Nigeria, and related matters. Indeed, the Act has introduced ground breaking changes into the Nigerian regulatory regime. Its oversight function extends beyond just consumer protection issues, and covers all entities in Nigeria, whether they are engaged in commercial activities as bodies corporate, or as government agencies and bodies. The objectives and scope of the application of the FCCPA are to promote and maintain competition in the Nigerian market, promote economic efficiency, protect and promote the interests and welfare of consumers by providing them with wider variety of quality products at competitive prices, prohibit restrictive or unfair business practices which prevent, restrict or distort competition or constitute an abuse of a dominant position of market power in Nigeria, etcetera.

The Commission is charged with the responsibility of facilitating access by all citizens to safe products and to secure the protection of rights for all consumers in Nigeria. Additional responsibilities include initiating broad-based policies, advising the Federal Government on national policies relating to competition and consumer protection, performing adjudicatory roles, eliminating anti-competition agreements, enforcing provisions of the FCCPA and rules and regulations made pursuant to the FCCPA. The FCCPA is thus a piece of legislation that is robust enough to achieve its objectives and open up the Nigerian market to small and medium scale businesses by removing monopolies and market dominance by one business, alongside protecting Nigerian consumers and their rights (Nwosu and Ata-Agboni, 2021).

¹ See for example, Consumer Rights Act, ss 42(6) and 42(7).

Section 167 (1) the FCCPA states that goods includes ship, aircraft, and vehicles; minerals, trees and crops whether on, under, or attached to land or not; and gas and electricity. In any transaction or agreement pertaining to the supply of goods to a consumer, there is an implied warranty that the goods must comply with the requirements and standards contemplated in section 131 (1) and (2) of the FCCPA. The rights to safe and good quality goods contained in section 131(1) (a-d) of the FCCPA are similar to the implied terms found in SGA and replicated by the CRA. Every consumer has a right to receive goods that are reasonably suitable for the purposes for which they are generally intended; of good quality, in good working order and free of defects; will be useable and durable for a reasonable period of time, having regard to the use to which they would normally be put and to all the surrounding circumstances of their supply; and comply with any applicable standards set by industry sector regulators. In addition, subsection (2) of section 131 provides that if a consumer has specifically informed an undertaking of the particular purpose for which the consumer wishes to acquire any goods, or the use to which the consumer intends to apply those goods, and the undertaking ordinarily offers to supply such goods or acts in a manner consistent with being knowledgeable about the use of those goods, the consumer has a right to expect that the goods are reasonably suitable for the specific purpose that the consumer has indicated. Goods must also correspond with description and sample.

(a) Remedies for Supply of Defective Goods

A consumer has the right to reject goods¹ where the goods are intended to satisfy a particular purpose which is communicated to the supplier and upon delivery, the goods are not fit for that purpose; where the consumer did not have the opportunity of examining the goods before purchase and upon delivery the goods do not match the sample and/or description or they do not meet up to the quality and type envisaged in the sales agreement and where the goods are defective and unsafe. Where a consumer returns goods in any of these circumstances the consumer is entitled to a full refund of money paid for the goods. The consumer's right to return unsafe or defective goods under any law or enactment is not prejudiced.²

(b) Implied Terms for Goods and services

Section 142 (1) of the FCCPA states that a contract is a contract for the supply of a service for the purposes of this Act whether or not goods are also transferred or to be transferred, or bailed or to be bailed by way of hire, under the contract and whatever is the nature of the consideration for which the service is to be carried out. A contract for apprenticeship is not a contract for the supply of a service.³ Section 142 (3) FCCPA provides that there is an implied term that the supplier will carry out the service with reasonable care and skill. Where under a contract for the supply of a service by a supplier acting in the course of a business, the time for the service to be carried out is not fixed by the contract, left to be fixed in a manner agreed by the contract or determined by the course of dealing between the parties, it is implied that the supplier will carry out the service within a reasonable time.⁴

6 Consumer Rights Act and Federal Competition and Consumer Protection Act Compared

The CRA and FCCPA provide implied terms for the supply of goods and services. Provisions for digital content or products are made only by the CRA. The CRA introduces some new rights in addition to the rights stated as implied terms which have no equivalents in the FCCPA. Certain pre-contract information provided by the traders to the consumers must be treated as term of the contract. Subject to the exception stated earlier, where goods are supplied by reference to a model seen or examined by a consumer before they enter into a contract (e.g. a car on a showroom floor or a TV in a department store) the goods must match the model. In modern day commercial transactions, goods are displayed in showroom floors for instance, for the consumer to examine and select. This differs from goods by description. This right is novel. Under the CRA, in certain circumstances, goods will not be in conformity with the contract if they have been incorrectly installed by the trader.⁵ The CRA and FCCPA provide for the implied term that the supplier will carry out service with 'reasonable care and skill'. The term 'reasonable care and skill' is not defined by the Acts in order to allow the standard to be flexible between sectors and industries. The threshold for when a price or time for performance would be considered 'reasonable' is a question of fact.⁶ Where it is alleged that goods or services are defective, the onus of proof shall lie on the undertaking that supplied the goods or services.⁷ Placing the onus on the undertaking is advantageous to the consumer.

The CRA also introduces a series of tiered remedies, which are intended to keep parties out of court and clarify the interaction between a consumer's rights of rejection, repair, replacement and price reduction. The

¹ FCCPA, s. 122.

² FCCPA, s. 122(2).

³ FCCPA Act, s. 142 (2).

⁴ FCCPA, s.143.

⁵ Consumer Rights Act, s. 15.

⁶ Consumer Rights Act, ss 51(3) and 52(3).

⁷ FCCPA, s.145.

short term right to reject is in effect the replacement of the right under the general law to reject immediately for breach of a condition. The FCCPA does not contain short term right to reject. Rather the right to reject defective goods under the general law is retained. The remedies under the CRA can be relied on sequentially in so far as they are available for a breach of the implied terms. The FCCPA does not provide for tiered remedies for supply of defective goods as the CRA. The remedies provided by the CRA is comprehensive as each implied term pertaining to goods has a remedy attached.

Where services do not conform to the contract, the CRA provides for repeat performance and price reduction. The type of remedy is expressly stated by the CRA to mean repair or replacement. The FCCPA states that where there is failure to perform a service to the standards contemplated, the consumer may either “request for remedy” of any defect in the quality of the services performed or goods supplied; or refund to the consumer a reasonable portion of the price paid for the services performed and goods supplied, having regard to the extent of the failure.¹ What the term “request for remedy” includes is not stated.

7 Conclusion and Recommendations

The UK law has reached a settled view as to whether software constitutes goods and has taken the lead in improving more important area of business. The CRA has moved beyond the traditional goods and services dichotomy and recognises digital products as a third category of case warranting consumer protection. It has effectively dealt with the rise of digital products. It is an example of a legal regime embodying the kind of modern technological and economic thinking, directly tackling the broader issue of digital products. It also represents a legal regime from which Nigeria can learn; a regime that is innovative and might serve as a model for the reform in the digital arena. The CRA extends the implied terms found in the SGA and other related legislation to digital products in a way that is compatible with modern technological development. This is needed because digital content does not fit squarely into the traditional categories of goods (as digital content is usually licensed and not sold) or services (where a mere requirement for digital content to be provided with reasonable skill and care does not go far enough to protect consumers in the event of faulty digital products).

It provides new rights and remedies specifically for digital content, new statutory remedies where services are not carried out with reasonable care and skill or as agreed with the consumer, and a new short-term right to reject faulty goods within 30 days and get a refund. For digital content which does not meet the statutory standards, consumers have the right to require the trader to repair or replace the item within a reasonable time and a right to a price reduction and refund. In contrast with goods remedies however, consumers do not have an express right to reject digital content which is not in tangible form because “digital content cannot be returned in any meaningful sense”. The changes implemented by the CRA have made access to remedies easier and more understandable by both the consumer and the trader. The new law is aimed at helping to avoid disagreements. However, if disputes do arise, it is aimed at giving consumers greater access to redress via alternative dispute resolution, without having to resort to court proceedings. If court proceedings are necessary, the CRA significantly increases the court’s ability to intervene in consumer contracts. Whilst the CRA and FCCPA protect the consumers through the implied terms in the supply of goods and services, the new rights and remedies provided by the CRA accord the consumers greater protection in the UK. It is commendable that the FCCPA consolidates consumer protection laws into a single comprehensive legislative document. The consolidation of consumer rights and other consumer protection laws into a single legislative piece of document simplifies the understanding of consumer rights not just for traders and analysts but also for the consumers it is designed to protect. However, the statutory implied terms, or some equivalent provisions, apply to contracts for the sale of goods and services only. One would think that the rights of the consumer relating to digital content would have been addressed in the FCCPA. The Nigerian consumer law regime when hypothetically applied to digital content may depict significant loopholes that may not only put the consumer at the mercy of a malevolent trader but can also stifle the growth of digital content in Nigeria. Laws designed to address issues peculiar to the analogue world will always prove to be inadequate when applied to the digital world due also to its peculiarities.

There is the need to avail the consumer better protection in terms of new rights and remedies in the supply of goods and services. Digital content market is growing in Nigeria and challenges relating to quality of digital products abound. Besides, Nigerian consumer legal regime should take into consideration new innovations and technological advancements. The supply of digital products to consumers should attract statutory protections that have traditionally been afforded to goods. If, therefore, the Nigerian government is to achieve its objective of “developing rules on new digital products to ensure that the core principles of consumer protection apply”, it must ensure that the statutory implied terms, or some equivalent provisions, apply to contracts for the sale of digital products, to the extent necessary to give effect to the consumer’s reasonable expectation. By giving consumer rights some legal clarity in digital content as seen under the CRA, traders and digital content suppliers will be compelled to prepare their terms and conditions in a manner that complies with the provisions of the law.

¹ FCCPA, s. 130(2).

Through consumer empowerment, traders and digital content suppliers alike will have greater incentives to ensure their products maintain the requisite quality needed in a competitive market. It is recommended that the FCCPA should be amended to include provisions for digital content. The policy rationale for proposing inclusion of digital content implied terms to the FCCPA is that the Act has not kept up with technological change. The CRA constitutes an innovative model for Nigerian law in this regard. The amendment will enable the government to use effectively market forces to control and regulate the quality of digital content.

The amendment would provide legal certainty for both businesses and consumers as to what rights and remedies are available in relation to consumer purchases of digital content and avoid adaptation of supply of goods and services rights. This would in turn support a growing and significant part of the Nigerian economy and protect intellectual property rights by taking into account the unique nature of digital content (such as the importance of copyright control, technical compatibility issues, and difficulties in returning digital content). Such amendment would provide a framework that can therefore adapt to future innovations, and reduce consumer detriment, through easier access to redress mechanisms. It is important that a set of quality standards that digital content must meet and remedies which will be available to consumers when digital content does not meet these quality standards should be considered in the proposed amendment.

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