

**CONSUMER PROTECTION IN DIGITAL CONTENT PRODUCTS IN
TANZANIA AND ITS IMPLICATION TO THE SELLER AGAINST
DISHONEST CONSUMER: A CASE STUDY OF MUSIC CD AND DVD
BUSSINESS IN TANZANIA**

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**DISSERTATION SUBMITTED IN PARTIAL FULFILMENT OF THE
REQUIRMENTS FOR THE MASTER OF LAW IN INFORMATION
TECHNOLOGY AND TELECOMMUNICATIONS (LLM IN IT & T) OF
THE OPEN UNIVERSITY OF TANZANIA**

2014

CERTIFICATION

The undersigned certifies that he has read and hereby recommends for acceptance a dissertation titled, *“Consumer Protection in Digital Content Products in Tanzania and its implication to the Seller against dishonest Consumer: A Case Study of Music CD and DVD business in Tanzania”* in partial fulfillment of the requirement for the award Masters of Law in Information Technology and Telecommunications (LL.M IT & T) of the Open University of Tanzania.

.....
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.....
Date

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DECLARATION

I, **Masoud Hamidu Rukazibwa**, do hereby declare that this dissertation is my own original work and that it has not been presented and will not be presented to any other University for a similar award or any other award.

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Signature

.....

Date

DEDICATION

This research report is dedicated to my lovely elder brother Mudrikat Hamidu Rukazibwa for his financial support and his encouragement during my whole period of my study life thank you very much for bringing me up to this level of study, also another dedication is to my parents the late Hamidu Rukazibwa my farther and Mrs. Safina Hamidu for bring me in this world and also for their good care during my childhood, Last but most dedication is to my family, my wife Nasra Robert Marandu and my children Abdulmarik Masoud Hamidu, Mariam Masoud Hamidu and Majidi Masoud Hamidu for their tolerance to me during undergoing this research report as they were missing my family responsibility some time.

ACKNOWLEDGMENT

I feel necessary to acknowledge and thanks to all persons whom I have received help and advice in completing this research report. First and foremost special and sincere thanks should go to my research supervisor Professor Ian Lloyd for the dedication of his valuable time and enormous support through quick response, guidance and enlightening comments that have helped me to the completion of this research study.

Secondly, I would like also to extend my sincere gratitude to my lectures, program coordinator and my classmate pertaining to Master of Laws in Information Technology and Telecommunication 2013/14 intake. Thirdly, I would like to extend my sincere thanks to the Music CD and DVD sellers at both Kariakoo Dares salaam and at Darajani Zanzibar for accepting and responding to my in interview concerning this study when undergoing this research.

Fourthly thanks to my family, relatives and friends for their moral and material support during the study period and for releasing me from some family responsibilities. Fifthly, thanks to my fellow Advocates partners who tolerated me and work hard to cover my vacant during the period of pursuing this Master program, thank you for your assistance.

Finally, the author of this work bears al liability for any possible correctness of the information presented in this work.

ABSTRACT

This research assessed and examined the existing sale of goods and consumer protection laws in Tanzania in protecting the consumer of digital content products and also looking on some technical implication on remedies available under Tanzanian Sale of Goods laws and when applied as in St. Alban's case of UK which extended the protection in ordinary goods to the digital content products when are in defective. The objective of the study was to assess, examine and identify the lacuna/gap to the existing Tanzania laws on sales of goods which impliedly provide for consumer protection in digital content product supplied in tangible medium like music CD and DVD and examine the implication to the seller against dishonest consumer who may copy digital product and seek to return it. The study was based on case study approach where by various report, literatures and interview on consumer protection in digital content product in Tanzania were assessed and seller of music CD and DVD were interviewed on the matter. During literature review it was observed that different writers wrote on consumer protection in digital content products in Europe particular in UK and there was neither of writers wrote on the seller remedies against the possible dishonest consumer nor in the related topic. It was concluded that the consumer of digital content products in Tanzania expressly are not protected as relevant laws do not until St. Alban's case of UK is adopted by Tanzania courts consumer of digital content products will be protected. The study recommended the sale of good laws in Tanzania to be amended and expressly extend the protection to the digital content products and also suggested only the remedies to the fault supplied digital content to be replacement.

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LIST OF STATUTES

A: NATIONAL LEGISTRATIONS

United Republic of Tanzania Constitution, 1977 as was amended from time to time

Sale of Good Act Cap 214 of Tanzania law

The Law of Contract Act Cap 345 of Tanzania Law

Fair Competition Act, Act No 8 of 2003

The Control of Price Ordinance, Proclamation No.12 of 1920, Cap 110, Laws of
Tanganyika, 1928, Volume II

Contract Decree Cap 149 of Zanzibar Law

B: INTERANTIONAL LEGISTRATIONS

The Consumer Protection Act, 1987

The Consumer Protection Act, 2010

Sale of Goods Act 1979 (SGA)

Supply of Goods and Services Act 1982

French Intellectual Property code

Consumer Guarantees Act 1993

Uniform Commercial Code

US Copyright Act

LIST OF CASES

Trust Bank Ltd v. Le-Marsh Enterprises Ltd, Joseph Mbui Magari and Lawrence

Macharia (Commercial case No.4 of 2000 unreported case)

St Alban's v. International Computer Limited [1996]4 All ER 481

ABBREVIATIONS

BPI	British Phonographic Industry
BEUC	Bureau Européen des Unions de Consommateurs
CD	Compact Disc
CESL	Common European Sales Law
COSOTA	Copyright Society of Tanzania
COSOZA	Copyright Society of Zanzibar
DVD	Digital Video Disc
EU	European Union
ICL	International Computer Limited
PROFECO	Procuraduría Federal del Consumidor
SGA	Sale of Good Act
OECD	Organization for Economic Co-operation and Development
UK	United Kingdom
UNCTAD	United Nations Conference on Trade and Development
US	United State
WTO	World Trade Organization

CHAPTER ONE

1.0 INTRODUCTION

This chapter introduces the study by looking on the background of the research topic and the very important factors which lead to the researcher to conduct this research with this topic. In this chapter the researcher is being guided to concentrate on the objective and significance of this research. The chapter commences with the background of the research problem which explain on the topic of this research to help the reader to understand the topic of the research and then proceeds with the explanations on the statement of the problem which guided the researcher, also the objectives of the study, research questions, significance of the study, scope of the study, limitation and delimitation of the study all of this helping the research to concentrate with the objective and significance of this research.

1.1 Background to the Problem

Tanzania is made up with two former independent states which is Government of Tanganyika and Revolution Government of Zanzibar following the union of two states in 1964 , which resulted into one union government of Tanzania , an event which caused disappearance of government of Tanganyika but leaving the government of Zanzibar in intact. The union constitution provides for union matters which appear in appendixes in the schedule of the constitution¹.

Zanzibar has its own executive organ with the president of Zanzibar as a head of executive arm, its own legislature concerning non-union matters through the House

¹ United Republic of Tanzania Constitution of 1977 as was amended from time to time

of Representatives of Zanzibar, and its own judiciary called Judiciary of Zanzibar. However the Court of Appeal is a union matter, Zanzibar has its own law governing Sale of goods, while in Tanzania Mainland which was to be known as Tanganyika which operate under the name of the United Republic of Tanzania (Tanzania) has its legislations taking the name of Tanzanian Legislations even if the Legislation is for non-union matter which is to be used only in Tanzania Mainland. The legislation to be applied also in Zanzibar it is required to be consented by the House of Representative of Zanzibar.

There are two set of legislations in Tanzania, one governing sale of goods which is Zanzibar sales of goods embodied under Zanzibar contract Decree and another set of law governing Tanzania mainland sales of goods Cap214. In Tanzania mainland the sales of goods is being governed with the *Sale of Goods Act Cap214* and the *Law of Contract Act Cap 345* both of Tanzanian laws gives guidance on how the contract of sale could be concluded, the law of Contract cover on what is contract and how the contract is formed by just explaining on very essentials to the contract, and that there is offer and acceptance which initiates the contract between the parties after one party offering to another to enter into contract and the offer is accepted by another party and agrees to inter into contract.

Also the Sales of Goods Act provide on how the sales of the goods from seller to buyer can be concluded just providing the different situation and different kind of goods with its guidance on how such different sales of goods could be concluded, also providing for impliedly warranty on the sale of goods on goodness and fitness of the goods sold.

Under Sales of Goods Act² define goods to includes all chattels personal other things in action and money, emblements, industrial growing crops, and things attached to or forming part of the land, which are agreed to be severed before sale or under the contract of sale; Also section 16 of the Act³ provides for *Circumstances in which implied warranty as to quality or fitness arises*, that subject to the provision of this Act and any other written laws in that behalf, there is no implied condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows-

- (a) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skills of judgment and the goods are of a description which it is in the course of the seller's business to supply (whether he is the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose:

Provided that, in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose;

- (b) Where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or not), there shall be no implied condition that the goods shall be of merchantable quality:

Provided that if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed;

² Section 2 of the Sales of goods Act Cap 214 of Tanzanian Laws

³ Sales of goods Act Cap 214 of Tanzanian Laws

- (c) an implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade;
- (d) an express warranty or condition does not negative a warranty or condition implied by this Act unless inconsistent with that warranty or condition.

This give the consumer of the good in any form the right to complain on the ground that the good supplied or sold to him is in defective or it does not conform the quality or the purpose in which the good was bought for by the consumer which the law give the consumer remedies inter alia is the right to opt whether to avoid the transaction or seek for any replacement, withdraw or demanding for refund after return of the faulty good.

In Zanzibar under Contract Decree Cap 149 Law⁴ with the Sale of Goods embodied in, the same is not quite different with that of Tanzania Mainland Sales of Goods on providing the same warranty to the goods to be sold under section 110 provide for implied warranty of goodness or quality which may be established by customer of any trade, and section 114 of the Contract Decree⁵ also provide for the impliedly for the ordered goods for a specific purposes for which good of the denomination mentioned in the order are usually sold there is an implied warranty by the seller that the goods supplied are fit for that purpose.

Both legislations definitions of Goods do not includes goods sold in digital form, leaving the definition of good to cover only normal ordinary goods of which a buyer

⁴ Zanzibar Contract Decree Cap 149

⁵ Ibid

has an opportunity to examine it and have a decision on whether to buy or not to buy such good. For example goods⁶ “to includes all chattels personal other than things in action and money, emblements, industrial growing crops, and things attached to or forming part of the Land, which are agreed to be severed before sale or under the contract of sale” also the good⁷ is being shortly and simply defined “to mean and includes every kind of movable property”, and Sale⁸ is defined to mean “the exchange of property for a price and involves the transfer of the ownership of the thing sold from the seller to the buyer”.

However in deciding English case of *St Alban’s v ICL*⁹, Sir Ian was obviously anxious to minimize the scope of the lacuna in sales laws of UK (Sale of Goods Act of 1979) which is the same lacuna in Tanzania sales laws by went on to add that where software is supplied through a physical medium such as CD or DVD the physical medium will be goods and subject to the SGA which is like our sales laws in Tanzania and good be protected with the implied terms on the quality and fitness of the good supplied or sold, the same case law from the common law jurisdiction which is very persuasive in Tanzania courts when deciding the similar matter on whether the digital content in a tangible medium like CD or DVD can be protected as good under sales goods laws in Tanzania.

Under Fair Competition Act, 2003 of laws of Tanzania consumers are protected only against unfair market practices, this law can be seen to be the main consumer

⁶Under Sale of Goods Act Cap 214 of Tanzanian Main land Laws

⁷Under Zanzibar Contract Decree Cap 149, embodying Sale of Goods

⁸ Ibid

⁹ [1996]4 All ER 481

protection law in Tanzania¹⁰ the law was resulted from the competition regime which can be traced way back in 1980 when Tanzania opened the doors to free market economy through economic reforms and trade liberalization, which was the era marked the evolution of consumer protection law in Tanzania.

This demanded the enactment of the laws to regulate trade liberalization, privatization and de-regulation process the law seen to be much important in control of anti-competitive behavior and conduct and protection of consumers from unfair market practices. Despite of this law being drafted putting into consideration best international practice by deriving its principles from UNCTAD model law which also incorporated universal consumer rights in its consumer protection contained sections, but the law¹¹ never cover the consumer protection on goods sold in digital content, which was the most challenge to the presented paper on the scattered pieces of consumer protection which is making enforcement to be a challenging duty due to the emerging issue of e-commerce which was addressed in the paper¹².

This law although seems to provide for consumer protection but do not provide real consumer protection rights which can protect the consumer of good particularly on goods sold in digital content only provide for consumer rights on:

Right to choice under section 9(2)(b) and (c), Right to redress, parts v to vii; , Right to be informed, section 93 and Right to safety, parts viii.

¹⁰ Martha Kisyombe(Tanzania) Competition and Consumer Protection Policy: a Tanzanian perspective, a paper presented at UNCTAD ad-hoc expert group meeting on the interface between competition policy and consumer, welfare 12,13, July 2012. Geneva, Switzerland.

¹¹ Tanzania Fair Competition Act,2003

¹² Martha Kisyombe opcit

All of the sections of laws above never cover on how the good sold in tangible medium which containing digital contents like music CD and DVD pass from the seller to the buyer and on how the consumer of such product is protected against the defective and unsatisfactory product, including the rights of the consumer to return the defective or unsatisfactory goods for either replacement, repair or refund depending on the option of the consumer and the law governing the same when goods returned within prescribed time in the legislation.

The consumer of the goods in digital form unlike an ordinary consumer of tangible goods which does not requires to be installed or insert into player to resume its function when it is inserted into in digital player devices to read out and verify its good and genuine, which the buyer have opportunity to examine the good before buying it, this is quite different to the good sold in digital form which need time and warrant to the consumer to install or insert in to read and play the goods to get result.

Like in United Kingdom, the Bill to increase and improve consumer rights on goods sold in digital form¹³, give consumer protection, who buy a film on a DVD and if the film will not play even though the disk appear to be in good condition, the treat such good sold in digital content on the DVD not of satisfactory quality and entitle the consumer of such goods to return it to the seller within 30 days of purchase for full refund by providing that “That the digital content must be of satisfactory quality. If the digital content did not meet the quality, and if the digital content were in physical form (i.e. on a disk or embedded in goods such as a digital camera) the consumer

¹³ From Department for Business Innovation& Skills: [http://discuss.bias.gov.uk/consumer rights bill/what –are-my –rights-under-the-draft-bill-when-buying –digital-content/](http://discuss.bias.gov.uk/consumer%20rights%20bill/what-are-my-rights-under-the-draft-bill-when-buying-digital-content/)

would be entitled to return the faulty digital content for an immediate refund within 30 days, or if they preferred they could ask for a repair or replacement of the disk.

The Bill to increase the consumer rights was the result of the new European Union's Directive approved by EU's Council of Ministers on 10th of October, 2011 extending consumer protection to digital content which every member state including the United Kingdom and other member states were to implement it by enacting or amending their legislation to make sure that the consumer of goods in digital form are protected.

It was settled in St Alban's case of UK that in absence of the provision of the law in the sale laws in UK which could expressly provide for protection of consumer of digital content product which are fault, the digital product supplied through a tangible medium such CD or DVD can be protected under the terms of warranty on goods to be of fitness and goodness in the sale of goods laws, like it is also the case in Tanzania and being one of common law country the above case principles can be applied also by the court in Tanzania and found the consumer of music CD or DVD are also protected like the same way the consumer of the normal ordinary goods are protected under the impliedly terms on the goods sold to meet the quality, fitness and the purpose on which it was bought for, which can entitle the consumer to return the good (CD or DVD) to the seller on the ground that the good is fault which is possible for dishonest consumer to copy the supplied or sold music CD or DVD before returning it to the seller on the complain that the CD or DVD is fault even if not and can get the refund of money and found himself benefiting twice with his copy which this study tend to examine on whether also the seller are protected

against such dishonest consumer ?

However in Tanzania the above case of UK cannot bound the courts in Tanzania to apply it on deciding any case of the similar fact although it have been a legal practice for our court of law to borrow some good principle from some common law country like UK and apply them in deciding the similar matter of their case in hand. But it should be until the case from outside Tanzania is adopted and used by the court and especially the highest courts of records in Tanzania is when it can apply as the binding precedent in Tanzania and clearly be seen the consumer of the digital products are protected by the sales law of Tanzania.

1.2 Statement of the Problem

Music industrial in Tanzania is being among of the business sectors which play a vital role in the growth of the national economy, the sector has encouraged both local and foreigner investors who wish to invest in this music industrial sector in Tanzania by either being Promoters or Distributor of Tanzanian Musician product. With this regard the business has attracted both consumers and sellers of different level who are engaged in this business, the government still not taking a very clear steps in trying to protect both seller and consumers engaged in this sector of buying and selling of digital content product like that sold in tangible media like music CD and DVD to guarantee both rights of the parties.

For example in case the digital content product purchased is of no good quality or it is in defective by enacting the law or amend the sales of goods laws to clearly stipulate for clear consumer protection to the digital content product supplied in both

tangible and intangible medium by the law stipulating for the clear remedies of the defective supplied digital content product and also provide for seller of digital content product protection against any possible cheat of the dishonest consumer of digital content product who may copy the digital content in a tangible medium and seek to return the tangible medium on ground of being fault as in St Alban's case the digital content supplied through a tangible medium were treated as good and protected under sale laws.

Now under above decide case of UK the same findings can be used to bind Tanzanian court, even if the courts in Tanzania would adopt and apply the similar position of law cannot be said that we have law in Tanzania providing for consumer protection to the consumer purchasing digital content product, only the lawyers and other information technology professional persons will be aware with this position of law.

The situation is forcing the legislature to enact or amend the current sale law and come with the clear law which can provide for the consumer protection against default digital content product and also to include the provision of law which is likely to combat the possible dishonest consumers of music CD or DVD who may copy the music in CD or DVD and later on seek to return the tangible medium(CD or DVD) on the ground that it is fault while it is not but just a mere human behavior of looking to benefit twice, having the copy of the music he wanted and get refund of his money paid, the sales of goods in Tanzania being left out the seller of the good sold in digital content without protection on the possibility of some dishonest consumer who may copy the CD or DVD and later on seek the refund on the ground

that the good was fault.

The situation bring out this study to assess and examine an impliedly consumer protection rights in Tanzanian sales law on the right to return good sold in tangible medium like Music CD or DVD which contain digital content product on ground of being fault and its implication to the seller, when the dishonest consumer copy the digital content in CD or DVD and seek to return the tangible medium and recommend accordingly.

1.3 Research Objectives

This Research was guided by the following general and specific objectives:

1.3.1 General Objectives

The Research main objective was to assess and examine the existing Tanzanian laws on Sale of Goods which impliedly provide for consumer Protection in tangible media goods sold in digital form and its implication to the Seller against dishonest consumer who may copy the digital content good in tangible medium music CD or DVD and seek to return to the seller the tangible medium CD or DVD.

1.3.2 Specific Objectives

The Research specific objectives included:

To identify lacunas/gaps in the existing Tanzanian sale of goods and consumer protection laws in protecting of consumer of goods sold in tangible media which contain digital contents. To assess implication of such gaps in the sales of goods and consumer protection laws in Tanzania in protecting consumers of goods sold in

tangible media containing digital contents.

To assess implication of the impliedly warranty under Tanzanian sale of goods laws to the consumer which have effect of possible right to return fault digital product goods and its effect when the dishonest consumer copy the digital content and seek to return the tangible medium on ground that it is fault. What is the right of the seller?

To come with the suggestions on means to improve the sales of goods and consumer protection laws or recommendation on which law could be adapted to protect consumer of digital content goods sold in tangible media (Music CD and DVD) in Tanzania.

To come with the suggestion and recommendation on the mean to protect the seller against the dishonest consumer of digital content product who may copy the digital content good in tangible medium and seek to return the tangible medium on ground of good being fault

1.4 Research Questions

The research was seeking to answer the following general and specific questions:

1.4.1 General Question

- i) Whether there is law in Tanzania giving consumer protection for consumer of goods sold in tangible media which contain digital content like music CD and DVD?

- ii) If the answer to question (i) is YES then: To what extent such law/laws protect consumer of goods in tangible media which contain digital content like music CD and DVD?
- iii) If the answer to the question (i) is NO then: What should be done in protection of consumer of goods in tangible media which contain digital form like music CD and DVD?
- iv) Whether the seller of goods in digital content are also protected against the dishonest consumer who may copy the digital content and seek to return tangible medium good on ground of being fault.

1.4.2 Specific Questions

- i) What are lacunas/gaps in the existing sale of goods and consumer protection laws in protecting the consumer of goods in tangible media goods containing digital contents such as music CD and DVD?
- ii) What are the implications of the shortcomings in the existing sales of goods and consumer protection laws in Tanzania in protecting consumer of goods in tangible media which contain digital contents like CD and DVD?
- iii) What are the implications of the impliedly warranty which give protection to the consumer and its effect to the seller on possibility of copying digital goods by dishonest consumer before seeking to return good on ground of being fault.

1.5 Significance of the Study

This Research drawn out with the following significance:

The analysis of the existing laws, identification of lacuna in the existing laws and some recommendation, suggestion and advice to the ways and mean to improve the existing laws or adoption of new law for protection of consumer of goods in tangible media which contain digital content like music CD and DVD to the Tanzania government in both part, Tanzania Main land and Zanzibar, so as to amend the existing laws and give full protection for the consumer of digital contents goods sold in tangible media like CD and DVD.

The assessment of the impliedly warranty on the sales laws to the seller is likely to suggest new phase of protection to the seller which is not yet worked in some jurisdiction which can benefit by protecting the seller against dishonest consumer in Tanzania.

The research findings to this study to be used as a source of reference by the academicians and general public at large.

1.6 Scope of the Study

The study covered analysis of all existing laws on sales of goods and consumer protection in Tanzania in protecting consumer of the good sold in tangible media which contain digital contents like music CD and DVD, how the said laws in existence can be improved to give full consumer protection on digital content goods sold in tangible media like CD and DVD, how the said laws can be improved to give full consumer protection on digital good contents and it covered only consumer protection of the good sold in digital contents, also assess the impliedly terms on warranty on fitness and goodness of goods sold and its effect on right to return goods

by the consumer on ground good in fault also its implication to the right of the seller against dishonest consumer who may copy the digital content and seeks to return the physical medium CD or DVD on ground of being fault, this study covers both consumer and seller of goods sold in tangible media which contain digital content only music CD and DVD as the case study.

1.7 Delimitations of the Study

Although there were limitation of funds to complete the study the researcher managed to visit and collect information for analysis. data were collected from both Tanzania mainland and Zanzibar Attorney General offices for collection of the existing laws in consumer protection and sales of goods in Tanzania and some other laws and case laws related to the topic from outside were reviewed through internet. And also some oral interview was conducted to the seller of the music CD and DVD at Kariakoo Dare ssalaam and Darajani Zanzibar to interview the seller of music CD and DVD on the related questions of this study.

CHAPTER TWO

2.0 LITERATURE REVIEW

The Researcher during literature review did search for any relevant work, Articles any other relevant material related to this study by searching any previous researcher/authors and any materials available relevant to this topic, and come with findings that different writers and some material relevant to this study can be classified to:

2.1 Consumer Protection in Digital Content in Europe

Some different writers and different materials from different jurisdiction about consumer protection on the goods sold in digital content in general who explained and which suggest that there is no enough legislations and the laws are not much clear on protecting the consumer of goods or services in digital content product, some writer includes;

Prof. Robert report¹⁴ which was concerned the consumer protection right in digital product which also covered music CD and DVD. The report urged on the UK games industry to worth euro 2 billion in 2006 and 32% of the UK population now considered themselves “gamers” and digital downloads making 12.5% of UK album sales and 95% of singles sales, and yet, notwithstanding the growing importance of the digital economy and digital products within it, the laws response remains uncertain and unclear whether consumer who buy digital products enjoy the same legal protection as that available when they purchase physical, analogue products.

¹⁴ Professor Robert Bradgate on Consumer Rights in Digital Products, A research report prepared for the UK Department for Business, Innovation and Skills on September, 2010.

The report¹⁵ commissioned in light of this commitment to examine some of the legal issues raised by the continued growth of the market in digital products; its aim being to consider the adequacy of the protection currently given by the existing law to the consumer of digital and if that protection does not meet the government's commitment might best be met. The report however concentrated with the view that the growing importance of the digital economy and the products which comprise it, it is not clear on what exactly is any legal rights the purchaser of a digital product has if the product proves being defectives or fails to live up to expectations. It went on proposing for the consumers purchasing digital products to be treated in the same way as these purchasing the physical goods which can bring the same rights and remedies on the items purchased where the consumer have the right to receive goods which is supplied by which the supplier is on obligation to supply and sell items with their real description, with satisfactory quality and reasonably fit for the consumer's purpose.

This suggestion would lead to the consumer of digital content product to have the similar remedy for breach of impliedly terms under the sales of good law, which entitle for remedy on breach of such impliedly terms. The report was of the view that since Lord justice Glidewell in the case of *St. Albans v ICL* in 1996 was already proposed and accepted in his held that digital content supplied in tangible medium is good and the consumer of such digital content can be protected under SGA law, it cannot be difficult to generalize all digital content items supplied in both tangible

¹⁵ *ibid*

and intangible medium to be good and consumer be protected under sales of goods laws.

Prof. Robert on his report¹⁶ concluded that the lack of any clear rule governing digital products itself is a serious weakness in the law that weakness is compounded by the fact that the different interpretations are to be found scattered through reported cases and article in academic and Practitioner journals. The law is therefore not clear, not accessible not easily comprehensible; and in so far as the different analysis involved the drawing of arbitrary distinctions, not rational.

Also the Sales Law Review Group¹⁷ which was appointed to work under the terms of reference inter alia which included the following;

To review the general sales law's provisions of the sales of goods Acts 1893 and 1980 and to make recommendations for a scheme of legislation capable of providing a statutory sales law framework appropriate to modern-day condition and needs.

To examine the provisions of the proposed EU Directives on consumer contractual rights in the light of existing Irish consumer law, to contribute to the development of the Irish response to the proposed Directive, and to consider and make recommendations as to how the Directive and Irish contract and sales law may best

¹⁶ Ibid

¹⁷ The Report on the Legislation governing the sale of goods and supply of services published by Dublin stationery office, the group appointed in November by then Tánaiste and Minister for Enterprise, Trade and Employment, Mary Coughlan T.D. Available at [http://www.djei.ie/publications/commerce/2011/sales law review group report 2011.pdf](http://www.djei.ie/publications/commerce/2011/sales%20law%20review%20group%20report%202011.pdf)

be integrated. It proceeded to classify on the contracts of supply of software as good or services and considered uncertainty surrounds of the law on the classification of contracts for supply of software and digital content.

The report was of the view that though there is no Irish authority in the matter but UK case law (St Albans case) suggests that, if software is to be treated as goods, it must be contained on a tangible medium, and where other software or other digital content is downloaded from internet or transferred to end user by email, no such tangible medium is involved;

The report try to distinguishing different transaction as goods and that of services by found that the duties and liabilities of the seller of goods and that of supplier of services are different and also the two type of transaction are governed by different laws, it ended on recommending the minimization of the differences in the legal treatment of contracts of sale and the contract of supply of services, the same change which would serve in reducing the anomalies which currently exist where software is supplied through different media i.e. when the digital content is supplied through a tangible medium and when it is supplied through downloading in internet.

Moreover the UK bill to increase and improve consumer rights on good in digital form¹⁸ the bill was drafted to give a consumer protection for the one purchasing a film on a DVD and if the film will not play even though the disk appears to be in

¹⁸ The Consumer Rights Bill (Improving Consumer Law) from Department for Business Innovation &Skill. Available at <http://discuss.bis.gov.uk/consumerrightsbill/what-are-my-rights-under-the-draft-bill-when-buying-digital-content/>

good condition, the bill treat such digital content good on the DVD not of satisfactory quality and entitle the consumer of such goods to return it to the seller within 30 days of purchase for full refund.

It is stated in the bill that “The digital content quality rights set out that the digital content must be of satisfactory quality. If the digital content did not meet the quality right, and if the digital content were in physical form (example on a disk or embedded in goods such as a digital camera) the consumer would be entitled to return the faulty digital content for an immediate refund within 30 days, or if they preferred they could ask for a repair or replacement of the disk.

2.2 Consumer Protection in Tanzania Generally

Research on reviewing literature found no one in Tanzania as written on the topic; Consumer protection in digital content products in Tanzania and its implication to the seller against dishonest consumer: Case study being in music CD and DVD business in Tanzania. Only some few authors in Tanzania tried to write on consumer protection in Tanzania generally, concentrated on consumer of normal goods and other few angle of consumer protection, such writers include N.N.NNditi¹⁹ who never touch on consumer protection in digital content product and its implication to the seller, Nditi²⁰ wrote on historical background of the consumer protection in Tanzania, which he categorized in four phrases during colonial era, independence era toward Arusha declaration;

¹⁹ N.N.N Nditi “Consumer Protection Law and Practice: Its relevance and reality in a developing economy with Reference to Tanzania” PhD Thesis, University of Dares Salaam, 1987.

²⁰ Ibid

That in the pre-colonial era Tanzanian societies developed the consumer protection issue not only in the exchange of food stuff but also in what was termed as commodity trade in particular trade in cottage industries in era the practices were dictated by the very low level of development of commodity production in those earlier communities.

And during colonial era (Germany 1896-1919 and with British 1920-1961) this era was affected on importing many goods for nonnatives, later on as time passed some local industries started to be established where both consumer of both local and imported goods started facing problems especially of being cheated and falsely represented with goods thus triggered importation of capitalist concept of consumer protection and other relevant laws and practices²¹.

In Tanzania Main land (Tanganyika) during British colonial era (1920-1961) during this era it is said to had constituted an amalgam of archaic and modern consumer law and practices some laws were enacted including proclaimed the control of prices Ordinance²², this law inter alia was making as an offence to either sell or offer for sale or buy or offer to buy any price-controlled articles at price-exceeding the fixed maximum prices under section 3,4 and 9 of the law²³.

After independent of 1961 the consumer protection concept was left in vain and mercy of capital for almost six (6) years, which later on was followed by Arusha declaration which was proclaimed by introducing Ujamaa socialism in Tanzania,

²¹ *ibid*

²² Proclamation NO12 of 1920 Cap 110 Law of Tanganyika 1928 Volume11

²³ *Ibid*

which according to Nyerere's philosophy of man –centralism which according to him all social, economic, political and legal activities have to have man as the benefited through different government policies, by legal judicial and administrative arms of the state thus lead to enactment of consumer protection laws in different sectors.

However such enacted laws on consumer protection never expressly extend its protection to the consumer of digital content goods by expressly providing to the real law which provide for both consumer protection to the fault digital contents goods sold in tangible medium and for the seller's right when dishonest consumer of good in digital content return the digital content in tangible medium such as music CD and DVD on ground that it is faulty seeking refund while he has already copied the digital content and seek to return it even if it is not fault.

The Tanzania law under sale of good Act²⁴ on impliedly terms on warranty that goods sold is of the good quality and fit for the purpose which is being bought for this is being provided under section 16 of the sale of good Act, which Court of Appeal in UK already applied this provision of law on extending the goods warranted under this law which is similar to the same sale of good Act of UK by findings of the Court of Appeal on St Alban's case that also the digital content goods sold in tangible medium are goods which the consumer of it can be protected under the same provisions of law under the sales of good Act which intend to give impliedly warrant on the goodness and fitness of the goods sold. The same law and

²⁴Tanzania Sale of Good Act Cap 214 of Law of Tanzania.

findings can be adopted by the relevant authorities and courts in Tanzania which are also under the common law jurisdiction zone to decide such case on the consumer protection in digital content goods, but it is until such findings of the court of Appeal is accepted and adopted to be used in the court of Tanzania it can become the position of law in Tanzania.

Another writer who influenced this study from Tanzania is Consolatha²⁵ who examined exhaustively the consumer protection in Tanzania in Telecommunication sector, but she never went further and examines on both consumer and seller protection in Tanzania in goods sold in digital content in tangible medium like Music CD and DVD to identify such consumer right and its implication to the seller when the dishonest consumer copies the digital content good in tangible medium before seeking to return the tangible medium on ground that it is fault as this study do.

Consolatha's paper focused on analyzing all telecommunication laws, policy and Regulation governing Tanzania communications Regulatory Authority on consumer protection to see if there are any lacunae to be addressed into these laws, and she concluded by findings revealing that the existing laws, policy and regulations have short comings which telecommunication regulator in Tanzania take advantages of, because of that the consumers in the telecommunication sector end are the one who carry the burden of the shortcomings in the laws, policy and regulation.

²⁵Consolatha Moringi Resto "Consumer protection under the Tanzania Telecommunication Laws, Policy and Regulations: A case study of Tanzania Communications Regulatory Authority" LLM on IT&T, Open University of Tanzania, 2011.

This study is somehow related to Consolatha work only on the bases of being both study deal with consumer protection in Tanzania but differ on the different case study and area of protection and this study being wider on protection by looking protection on both consumer and the seller right in case of dealing with dishonest consumer who may seek to return the digital content good in tangible medium i.e. music CDandDVD) on ground of being fault how is such seller is protected against such dishonest consumer of digital content goods.

Consolatha²⁶ recommended the Tanzanian government to enact one law which will deal with consumer protection in general in Tanzania, and also was of the view that due to globalization, there is a growth of cross boarder trading and foreign direct investment by transnational cooperation. International cooperation is essential economic development however the engagement in International commerce should go hand in hand with consumer protection therefore the government was encouraged to ratify the International instruments which will protect consumers. International cooperation is necessary, as different countries have signed bilateral and tripartite agreements for the proper protection of their consumer within the region. Anti-consumer protection behaviors will have adverse effects to consumers if there is no multinational cooperation.

Also this study reviewed Adam²⁷ presentation which tried to explain the cyber laws status in Tanzania, where mambi in Tanzania cyber status concluded that with high development of technology which is being facing the whole world. Tanzania should

²⁶ ibid

²⁷ Adam Mambi presented paper on cyber laws work shop for EAC,24-2 April,2006, Kampala (The status of cyber laws in Tanzania available at [www.tanzania.gate way.org/.../EAC cyber laws status inTanzania_Mambi.P](http://www.tanzania.gateway.org/.../EAC_cyber_laws_status_inTanzania_Mambi.P)

not be left behind without enacting new laws for cyber law and also amend some of its laws to work together with this modern life of technology, in Mambi's presentation he quoted one of the Tanzania High Court case which was decided based on possibility of the Tanzanian Courts to accept computer evidence and diverting from only admitting in court only the best evidence under the Tanzania law of evidence which accept only the primary evidence which in most cases will be the written, and signed or authenticated documents.

The role of the judiciary in Tanzania was seen in the case of Trust Bank Ltd v. Le-Marsh Enterprises Ltd., Joseph Mbui Magari and Lawrence Macharia (Commercial case No.4 of 2000 unreported case) Judge Nsenkela in resolving some of the issues which were before the court for decision one was that of whether computer /electronic evidence is admissible in our courts in Tanzania? the answer to this issue was yes the judge seeking different authorities and laws of evidence regarding the same from different common law jurisdiction including UK, reached on the observation that although the laws in Tanzania do not recognize computer evidence as original, to him he found the paper based evidence and e-evidence in equal footing weight, the judge urged that in absence of e-laws in Tanzania the court will find way of dispensing justice even in difficult circumstances of absence of legal guidance, following this court decision it is with the impact of e-evidence to be admissible under our courts in Tanzania, that it departed from strict application of the "BEST EVIDENCE RULE"

Such new law of precedence could be adopted in deciding the case concerning the consumer protection right on the digital content goods and the all-digital content

transaction and its protection to the consumer who purchase software goods as it was already held by the UK Court in St Alban's case now the same law developed by UK court can be adopted by our court in Tanzania so as to become the consumer protection law in Tanzania also the court can develop the precedent on how also the seller can be protected from the dishonest consumer in digital content goods who may tend to copy the digital content in tangible such as CD or DVD and seek to invoke section 16 of Tanzanian Sale of Good Act Cap 214 as it was decided in Albana's case that consumer of goods in digital content can be protected by sales laws under impliedly terms of warranty that good should of good quality and fit for the bought purpose.

Moreover this study reviewed the Position paper²⁸ the paper was very important to this study as it try to analyze and study the situation in Tanzania in regard of e-commerce which it was on the view that consumer protection in Tanzania can be provided under; the consumer protection, the sale of goods and supply of goods laws which at the moment only still give the protection to the consumer who purchase normal goods through normal ordinary off-line contract while it is quite different from such other jurisdiction like UK where consumer are protected against numerous risks in distance contract by way of off-line laws which are equally applicable to the online law example of such laws in UK are such as the sales of goods Act , the supply of goods and services Act and consumer protection Act 1987 and consumer protection 2010 which real offer protection to the consumer on the defective product etc.

²⁸ Paper presented by Tanzania Law Commission which is available at [www.lrc.tz/download/position paper on e-commerce](http://www.lrc.tz/download/position%20paper%20on%20e-commerce)

It went on commenting that, the laws in Tanzania neither cover distance selling contracts nor recognize cyber space or digital signatures. What the laws say is only the contract to be in writing and duly signed or authenticated before a witness. Whereby with e-commerce this arrangement is of no longer applicable hence affecting the former laws which have to face changes and reforms to accommodate e-commerce principles, there is a need for our country (Tanzania) to introduce distance selling regulations these laws could real protect consumers who purchase goods and services over the internet²⁹.

The paper on its way forward commented that having seen the existing lacuna and other legal problem facing e-commerce, the Law Reform Commission of Tanzania was intending to review and research on the laws related to this area which is being affected by rapid development of e-commerce, the rationale behind is to protect the consumers and facilitate business transactions. The Commission will further recommend on the enactment of the new laws to cover this crucial area which has a high impact on the economic development in Tanzania and East Africa in general, where some East African countries example Uganda was having bill on the e-commerce law, the paper observed the need for East Africa Community to have model Law on E-Commerce the paper among of the suggested laws to be reviewed were to include the Law of Contract Ordinance and Sale of Goods Ordinance.

It ended on concluding that the fore going discussion has revealed that the use of electronic commerce and online contracts is growing very fast in the world. While some countries have adopted the new laws to cover this area, Tanzania is far behind

²⁹ *ibid*

in this area, most of her legislations are offline oriented hence need to be changed to focus on online the rationale behind being to protect consumer and boost our economy. This was to be done by Law Reform Commission by looking forward and review, research and come up with the reform recommended.

The paper³⁰ never specifically focused on consumer protection on the goods sold in digital content delivered in tangible medium like CD or DVD and also some right and protection to the seller against some dishonest consumer who may intends to copy the digital content and seek to return the tangible medium CD or DVD after having copied the digital content and claim the digital content to be in fault while not and seek to invoke the remedies available under the sale of goods law on the impliedly terms and warranty that the good should be of good quality and fit for the purposes it is being bought for.

2.3 Different Protection to Consumer of Digital Product Supplied in Different Form

The researcher found different literature on different protection to the consumer who purchased the same digital product but supplied in different form. Article on warning over digital music and film purchases³¹ under this article the Consumer Focus reminds shoppers those digital products such as films, music and computer software are not protected under the same terms and condition as the purchaser of CDs or DVDs this reminder was for these consumer purchasing such digital content product through downloading the music and film not being covered by the Sales of Good

³⁰ *ibid*

³¹ Article from Consumer Focus of Get the Guardian's Money Talks email available at <http://www.theguardian.com/money/2010/dec/17/warning-digital-music-film-purchases>

Act, this was to mean that the consumer buying through online downloading digital music, film and computer software do not have the same legal protection as people buying CDs or DVDs.

The Consumer Focus argued that the digital products are not considered as *tangible good* when it is not supplied in tangible form like CD or DVD or any other tangible form, it was emphasized that while consumers on the high street are protected by the Sale of Goods Act if their digital product purchased are not of satisfactory quality, fit for purpose or as described, while people buying digital goods through online are not protected, this mean that if a downloaded song, movie or piece of software does not play on the buyers' computer or MP3 player, they have no legal right to a refund.

The conducted survey of Consumer Focus found more than half of people buying digital goods could not find information on what to do if they had problem with their purchased digital products, it further argued that almost a quarter of the orders for digital products placed as part of the survey did not come with a receipt. The article³² continue to provide further that a third of shoppers in the survey were not provided with information about additional software and equipment needed in order for their purchase to work, it quoted the deputy chief executive of Consumer Focus, said that "it's crazy to have a situation where someone who buys music on CD has the legal right to a refund if it does not work, but someone who download the same music does not. Consumer laws on buying digital goods, whether it is streaming films, or downloading music and software, need updating to reflect the reality of 21st century life.

³² Ibid

It was recommendation of this article that UK should be striving to be the best place in the world for digital consumers to have given a better consumer protection on when shopping online and making it clear exactly what they are getting when they buy digital products which will also help boosting growth of market, it called for the retailers of digital products to introduce summary boxes to give to the consumers all the essential information they need before they complete their purchase which would include details of product's specifications, the full cost, a customer service helpline and the software and equipment required for the product to work. This literature found somehow being related to this study since it explains for the different protection on consumer purchasing different digital content products as also the study seek to know how both consumer and the seller of the digital content product are protected in different situations by our laws.

Another literature review in this area by this study is BPI³³ supported the consultant's assessment that the digital content should be treated differently to a good and service as it does not fall squarely into either category. BPI was on believe that digital music is to be regarded as a service for the purposes of the copyright Directive and the E-Commerce Directive, it was argued by BPI that if the UK government proposes that it be treated as a sui generis new category on such context, that must clear be without prejudice to the fact that digital music is a service for the purposes of the relevant Directives. I t follows that the remedies for sub-standard digital content should differ from the remedies available for sub-standard physical

³³ British Recorded Music Industry Ltd, Response to Department for Business Innovation & Skills Consultation on the supply of goods, services and digital content October,2012 available at <http://www.bpi.co.uk/assets/files/BPI%20Response%20to%20Consumer%20Bill%20of%20Rights%20consultant.pdf>.

goods.

BPI was on the view that the concept of returning digital content is not of viable as digital content cannot be returned to the trader without excluding the possibility that the consumer retains a faulty yet usable copy of the content on their device instead of deleting the content, it was therefore the believes of BPI that the remedies of repair and replacement are most applicable to digital content, and that the consumers should not be entitled to return digital content or be entitled to a refund, this is because there is a very difficult problem in many cases there is no physical out let the consumer can visit to “prove” they do not have a digital content on their device, and as such there may be an expectation of redress, that is in practice difficult if not impossible to achieve.

It was further argued that even if they could visit a physical out let that would be of no help as they can make a copy onto a different device than that one they bring in for examination this was said in the research put forward by which the consultation shows that offering refund is common practice from retailers. However, it should be left to the content provider as their discretion and such remedy should not be prescribed by law.

This study find this literature to be relevant to this study as it explain and argue in different concept of possible remedies to the consumer of online purchase of digital content product and its effect and difficult to the retailer of such service which also this study seek to redress on the transaction involving tangible digital content good

sold to the dishonest consumer if intends to return such digital content good after their have copied the digital content and seek to return the tangible medium.

Moreover this study was influenced by BEUC³⁴ the position paper which started by arguing that despite online purchase of digital content being the source of opportunity for both businesses and consumers and being an important element of the digital single market, the consumer detriment regarding the purchase of digital content is currently very high as an empirical report conducted for the European commission estimated such detriment to be in the region of Euro 64 billion per year in the EU, this immense consumer damage has to do to a significant degree with the fact that European consumer protection legislation is barely applicable to such transaction and national legislation has not adapted to these types of products which has led to legal uncertainty, a lack of consumer confidence and fragmentation of internal market.

This paper³⁵ provide for an assessment of the different contract law related to this area which are relevant for consumers when buying digital content products or in the frame of an eventual revision of the 1999 Sales of Goods Directive, the view of this paper is that likewise, in any other types of contract, in case of defective in digital content, the contracting party should be entitled to the remedies granted under consumer law, this is in line with the main consumer expectations when purchasing digital content: example, in a survey carried out by their member Consumer Focus 55% of consumers who bought a digital product in the last 12 months (211-2012) in

³⁴ BEUC The European Consumer Organization which is a Consumer Voice in Europe, Position paper on digital products: EU Consumers need clear rights. Available at www.beuc.eu/publications/2012-00832-01-e.pdf.

³⁵ Ibid

UK thought they were entitled to replacement if a digital download was faulty and 52% believed they were entitled to full refund, this was contrary to the consumer expectation due to the fact that the remedies for defective goods do not extend to the digital content.

However the presence of case law of *St. Alban's* case extended the protection for the consumer of the digital content products supplied in tangible medium to be covered as goods hence the consumer should be protected under sales goods laws. These rules on legal guarantees for digital content products must be granted to all consumers not only to those who are “opted” for by business, as would be the case with the CESL (Common European Sales Law) consequently, the European Commission should make a legislative proposal introducing remedies for defective digital content, which could be done by proposing a specific Directive on digital products or in the frame of a revision of the 1999 Sales of Goods Directive. This paper is so relevant literature to this study as it suggests after it analyzed consumer protection on digital content goods as this study *inter alia* does.

Lastly but not least this study was influenced by the OECD (2013) Report³⁶ this report was prepared in support of the committee's review of the 1999 OECD Guidelines for consumer protection in the context of Electronic Commerce (OECD, 1999) the purpose being to examine :

- i. How e-commerce in digital content products is involving.
- ii. Which issues may need to be addressed to ensure continued development of

³⁶ The OECD (2013), The report on “Protecting and Empowering Consumers in the purchase of Digital content products” OECD Digital Economy Papers, No.219, OECD available at <http://dx.doi.org/10.1787/5k49czlc7wd3-en>

the market in ways that enhance transparency, promote informed consumer decision making and protect against misleading, fraudulent or unfair commercial practices.

The focus of this report was on digital content products that are purchased through e-commerce transaction of which all process including the confirmation of orders is being carried out electronically and subsequently provided to consumers electronically through streaming, downloads or storage on cloud computing platforms.

The paper³⁷ discussed the different treatment of the digital content as goods or services by just referring different jurisdiction and countries such as Austria, Germany and Switzerland, where digital content products, like software which has been obtained through downloading electronically, have been treated by the court in these jurisdictions in the same manner as goods (Rott,2010) and some of the court decisions in these countries have drawn a distinction based on whether the digital content is transferred to the consumer for permanent or temporary use. In the former case, general consumer protection rules (including sale law and rules on guarantees for lack of conformity) apply. In the latter case, where, for example, consumers stream content or purchase video-on-demanded products, general consumer protection rules would not apply.

The court decisions in other countries try to tied product classification to the way of supply; for example the digital content products supplied in tangible supports are

³⁷ Ibid

being considered as goods, while such digital content product supplied in an intangible format are considered to be services. Under Australian case law for example, the software which is bundled with computer hardware is considered as a sale of a good. Also in the United Kingdom, software delivered on a tangible support, such as a CD or DVD, has been regarded by the courts as a sale of a good.

Different from the software downloaded from the internet or uploaded from a CD or data key and that is retained by the supplier and not supplied to the consumer has not been treated as a sale of goods (BIS UK, 2010, P.14). Moreover in other jurisdiction like Mexico, PROFECO interpreted Article 92 of the country's Federal Consumer Protection Law, which pertains to a consumer's right to return or exchange a product, get refund, and/or compensation, as applying to all types of digital content products regardless of the form in which they are being supplied to the consumers.

In the European Union, the consumer right directives which applies to all member of European Union the Directive on Consumer Rights, (2011) regards digital content which is being delivered on a tangible medium as a good. Digital content which is delivered to the consumer through an intangible format, however, is neither treated as a good or as a service. The directive provides specific information requirements to be provided by businesses when selling tangible and intangible digital content products. Consumers buying digital content which is being delivered through a tangible medium enjoy a 14 days right of withdrawal or up to 12 months from the end of the initial withdrawal period in the case where a seller would not have clearly informed its customers about the right to return products. The consumers buying

intangible digital content products enjoy the right of withdrawal up until the downloading of the product begins, if:

- i. The performance has commenced with the consumer with the consumer's prior express consent, and
- ii. The buyer has acknowledged his /her agreement to thereby lose his/her right of withdrawal (Directive on Consumer Rights, 2011, Article 16m).

Some have called for the development of a digital content directive which would provide a comprehensive regime for digital content products that would specify, among other issues, what rights the buyer of digital content have (Consumer Council of Norway, 2012). In Australia digital content delivered in electronic format is considered as a service. Under the country's consumer law, such services must be i) rendered with due care and skill ii) reasonably fit for any purpose, or capable of achieving any result that the purchaser makes known to the supplier (whether expressly or by implication); and iii) delivered within a reasonable time. Where there is a "minor" failure by a supplier to comply with one of the consumer guarantees, a consumer may seek a remedy for the failure, within a reasonable time ; if the seller fails to do so, buyers can seek to recover their costs or terminate the contract. Where there is a "major" failure or the failure cannot be remedied, consumers may terminate their contract or, if they choose to accept the service, seek compensation.

In New Zealand, in 2001, the Consumer Guarantees Act 1993 was amended to include all forms of computer software, as goods. In France, all forms of software are also treated as goods; moreover, copyright law expressly provides that technical

protection measure should not affect product products' interoperability (French Intellectual Property Code, Article L331-5, paragraph4).

In the United States, intangible downloaded products have not been consistently considered as good or services. Some courts have considered in their decision to regulate downloaded software as a good under the Uniform Commercial Code, while other courts never agree to extend the definition of a good to include digital content supplied through downloading in internet such as e-books. Some other courts goes further to look at what the digital content product does to make their decision on determination; example, a software program which continuously scan for viruses may be more likely to be considered as a service than a good, some few courts which heard and determine some online game disputes applied the common law of service contracts to resolve issues.

The definition of streaming digital products is being provided under the US Copyright Act which provides that "in order to stream digital music or videos over the internet, streaming service providers must get public performance licenses from individual copyright holders. The provider of the service is then able to stream the digital product to consumers' computer in the form of a public performance; this has raised issue of classification which has been the subject of discussion in regional and international organizations, including the WTO where this issue remains unresolved (Wunsch-Vincent and Hold, 2011). With respect to goods, in most countries, consumers generally have the right to: i) receive goods which conform to the specification provided in the sales contract, and are of satisfactory quality and reasonably fit the designated purpose; ii) have a defective product replaced; iii) get a

refund or price reduction in cases where products do not conform with the sale or are defective; and iv) claim damages for loss suffered as a DSTI/CP(2011)25/FINAL³⁴ result of a defective product or merchant's breach of contract . In the contract of supply of services, consumers have the remedy against the trader failure to take reasonable care, a consumer will have to prove that the supplier has been negligent in the provision of the service and that such negligence resulted in a serious breach of the contract (BIS UK, 2010).

The remedy when the digital content is in defective is not to return the tangible digital content products; it is often not possible to return them, once a packing seal has been broken, in any way remedies that exist for defective or undelivered digital content products are often available only at the discretion of suppliers. The situation is more complicated when digital content products are being supplied electronically, since whether intangible digital content is to be treated as a good or services is uncertain to many jurisdictions, it was discussed at the OECD³⁸, that it was seem that the suppliers do not provide to the purchaser with redress for non-conforming, defective or undelivered digital content products, in particular for products accessed via downloading or streaming this is according to the Article 173.1 of the proposed optional regulation on a common European sales laws-EC,2011a.

Most of the terms and condition of the contracts excluded liability for the damaged software this is according to the UK³⁹ where in some instances, countries have addressed issues in a generic fashion which does not depend on the nature of the

³⁸ OECD workshop in April 2012.

³⁹ UK's mystery shopping survey of 2010 available in Consumer Focus, 2010, p.24

product. In Finland, for example, in absence of the or misleading, information provided to consumers, problems are being addressed similarly for all products, focusing on the issue of non-conformity.

The UK government in 2012 having launched a public consultation with the view towards identifying the kind of redress rights which should be available to consumers when problem with faulty or low quality digital content products happens. It was on this context, a distinction has been made between; i) the digital content product itself (such as a game); and ii) the service supplied by the content provider that allow the purchaser to access and use the digital content product and download other products(so- called “related services”).

Stakeholders noted that in the case of problems with accessing or using the digital content, purchaser generally have difficulty determining whether the content itself or the related services is faulty, given the link between the digital content product and the related services, stakeholders have been asked to comment on i) whether related services should be regarded as good or services and how to assign liability; and ii) whether related services should be considered as combined digital content product/service contract where the ability of the provider to limit its liability for a related services would be restricted(BIS UK,2012b).This paper is so much literature to this study as it explain a lot on different digital content product and its different protection from different jurisdiction over view.

The researcher directly did not find any writer who wrote on the same subject of this study which is “Consumer protection on digital content product in Tanzania and its

implication to the seller against dishonest consumer who may seek to return the tangible medium after copying the digital content and how such seller is protected against such possible dishonest consumer of the digital content supplied in tangible medium especial such music CD and DVD business in Tanzania.

Many writers wrote on consumer protection in general and very few writers from different jurisdiction especially from UK wrote on the consumer protection in the digital content goods both the digital product supplied through tangible medium such as CD or DVD, it seems much concentration was directed to the consumer rather than seller and many finding of the many writers focus on arguing that the government forgotten to extent expressly the consumer protection law to the digital content product business despite of due to the increase of technology much consumers have transferred from purchasing an ordinary good of which the consumer can have an opportunity to inspect goods before purchasing it which is quite different to the digital good where some digital content goods needed to be installed or inserted first into the device and play to determine if the digital good was ok.

Some findings of the writers who wrote on consumer protection in digital content goods, try to differentiate the different protection to the consumer purchasing the same digital content product but supplied in different ways, one supplied through tangible medium like in CD or DVD other supplied through downloading in the internet where it was argued that the consumer of the digital content goods were not protected in UK until the delivering of the St. Albana's case in 1994 which held inter alia that the software supplied in tangible medium are goods to be protected under

the sales of good Act, the software cover in this case includes the computer software which is supplied in the CD or DVD and the same consumer who purchase the same computer software by downloading the same computer software will not be covered and protected under sales of good Act which was to these writers to be confusing.

CHAPTER THREE

3.0 RESEARCH DESIGN AND METHODOLOGY

The Researcher in this chapter explain his Research Design and Methodology used and also the case study design which was used during this study and its data got from the case study which enabled the researcher obtain the information which assisted him to come out with this purposive and comprehensive research.

3.1 Area of Study

The researcher chosen area of the study were both both Attorney General Chambers of Tanzania (in Dares salaam) and in Zanzibar Libraries, music CD and DVD Sellers office at both Kariakoo- Dares salaam and at Darajani- Zanzibar , the reasons of choosing such area of study were of the following:

- i) Both Attorney General Chamber of Tanzania Mainland and that of Zanzibar are so responsible for all laws of Tanzania and every new laws to be enacted should be drafted and published by them, this will make sure that the searcher will be able to search for the laws if any which deals with consumer protection of goods sold in tangible media which contain digital contents like Music CD and DVD.
- ii) The Researcher will be able to advice and recommend for new laws to be enacted.
- iii) Both Kariakoo- Dares salaam and Darajani- Zanzibar music CD and DVD sellers offices are only place where the researcher obtained the vital information on how this business is being conducted, how the consumers are guaranteed on the purchased music CD and DVD that the digital content in CD or DVD is not fault, also is where the researcher got information on whether the

seller are not facing the problem of dishonest consumer to copy the digital content in CD or DVD and seek to return the tangible medium(CD or DVD on ground that it is fault. Also on these places researcher interviewed both the seller and buyer on the research questions.

3.2 Data Collection

The Researcher collected all kind of data including Primary, Secondary and other data for the purpose of coming out with good composition for the research.

3.2.1 Primary Data

Research primary data were collected through observation and oral interview with the both consumers and the sellers of the music CD and DVD found at both seller's place at Kariakoo- Dares salaam and Darajani- Zanzibar who were interview on the research questions of this study.

3.2.2 Secondary Data

The Secondary data were collected by researcher from both Attorney General Chamber at both Dares salaam and Zanzibar specifically to search for the available piece of legislation and case laws governing sales of goods and consumer protection which is the area of this study which researcher reviewed in order to come out with this study.

3.2.3 Other Data

The Researcher collected by gathering different data such as publicized articles, journal and papers presented in different jurisdictions which were searched through

different websites relevant to this study were collected and reviewed assisted the researcher to come with the research paper of high quality data.

3.3 Data Collection Method and Techniques

The Researcher applied the use of various data collection methods so as to obtain as the best information which assisted the researcher to analyze data, which include,informal interview, documentary review, observation and informal discussion which will impact the reliability of data collected.

3.3.1 Interview

The researcher conducted inform interview with the both sellers and consumer of the music CD and DVD at both sellers offices in Dares salaam at Kariakoo and in Zanzibar at Darajani this informal interview preferred by researcher was due to the fact that usually sellers and consumers of music CD and DVD are not formal persons to deal with as the most of them are non-educated persons who not be happy with the very formal interview and questionnaire which to them it is time consuming and causing disturbance to their business while not gaining anything direct from the asked question by researcher .

The informal interview to both sellers and consumers of the music CD and DVD were asked randomly about the research questions of this study just to extract information from them concerning research questions. Particularly on whether both the consumers and also the seller of the music CD and DVD in Tanzania are protected for fault digital content sold to the consumer and also against dishonest consumer who may seek to return the sold music CD or DVD on ground of being

fault after the consumer having copied the digital music in and what to return it to the seller.

3.3.2 Documentary Review

Both Tanzania and Zanzibar Attorney General Chamber documents related this study were reviewed such as the two tabled bills on Data Protection law and Computer crime laws were reviewed from the area of study will assisted the researcher to know the current position of Tanzania on e-laws also other different documents such as different contract of music CD and DVD were reviewed which were obtained from the music CD Seller which shows the non-inclusion of same terms which guarantee to the purchaser on the goods purchased from the seller, some relevant cases and legislative related to the study were reviewed.

3.3.3 Observation and Informal Discussion

The researcher also applied for observation technique in the case study which assisted in getting the data, this helped in the situation clarification as it helped the researcher in comparing the data collected through observation with that collected from respondents through the use of interview and documentary review.

3.3.4 Review of Literature

The Researcher reviewed different Literature from both, outside Tanzanian particular from UK and from Tanzania which are somehow whether having no direct connection with this study but to some extent being related to this study were reviewed and also with these literature which are so much related to this study also

were reviewed thus was to get concept and knowledge concerning the research topic and help the researcher to come with the good and comprehensive research.

The research did not get direct from both reviewed literature from outside and in Tanzania which is about the consumer protection in digital content product in Tanzania and its complication to the seller when the dishonest consumer copy the digital content before seeking to return to the seller on ground of being fault” case study being in Tanzania music CD and DVD business. But to some extent the reviewed literature assisted the researcher to introduce and explain and also analyses the problem and make the conclusion and recommendation on assistance to the reviewed to this study.

CHAPTER FOUR

4.0 PRESENTATION, ANALYSIS AND DISCUSSION OF FINDINGS

This chapter consist the presentation, analysis and discussion of research findings, it is to this chapter where both general and specific questions of this study raised in chapter one are being answered.

4.1 Consumer Protection in Digital Content Product Under Tanzanian Law

In Tanzania the consumer of goods are being not directly protected under the law, but impliedly are being protected under Tanzanian sales of goods Act⁴⁰ for Tanzania Main land and also in Tanzania Zanzibar under Zanzibar Contract Decree⁴¹ under the sale of goods embodied in the contract Decree Cap 149. Both laws on sales of goods contain the provision of laws on impliedly warranting terms on goodness, fitness and quality of the good sold to the consumer, like under UK's Sale of Goods Act (SGA) of 1979 provide for impliedly warrant on the good sold to be of goodness and fitness as Tanzania both sales of goods laws provide.

In UK in the *St. Albana's* case the Court of Appeal was on the view that the digital content supplied through physical medium should be regarded as good hence be protected under the sale of goods laws. Also in Tanzania the Consumer are seen to be protected by the Tanzania Fair Competition Act⁴² this law although seems to provide for consumer protection but do not generally protect all consumer, it only protect the consumer from *counterfeit goods* and mainly provide for protection of

⁴⁰ The Sale of Goods Act Cap 214 of laws of Tanzania Main land

⁴¹ The Zanzibar Contract Decree Cap 149 of laws of Zanzibar

⁴² The Tanzania Fair Competition Act, 2003 of laws of Tanzania

consumer from un fair market practices by also provide to the provider of services or goods in Tanzania against unfair completion for market. This law does not go further and provide for protection of consumer purchasing digital content like music CD or DVD and provide for the remedies in case of purchased digital content is fault.

4.2 Impliedly Warranty Terms on Sold Good Under Tanzanian Laws

Under Tanzanian Main land, the sale of goods Act⁴³ section 16 provides that;

“Subject to the provision of this Act and any other written law in that behalf, there is no implied condition as to the *quality* or *fitness* for any particular purpose of goods supplied under a contract of sale, except as follow:-

- (a) Where the buyer , expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller’s skill of judgment and the goods are of a description which it is in the course of the seller’s business to supply(whether he is the manufacture or not), there is an implied condition that the goods shall be reasonably fit for such purpose;

Provided that, in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose.

- (b) Where goods are bought by description from a seller who deals in good of that description (whether he be the manufacture or not), there is an implied condition that the goods shall be of Merchantable quality.

⁴³ Tanzania Sales of Goods Act Cap 214

Provided that if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed;

- (c) an implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade;
- (d) an express warranty or condition does not negative a warranty or condition implied by this Act unless inconsistent with that warranty or condition.

Coming to the Zanzibar law on the sales of goods which is being provided under the Zanzibar contract Decree Cap 149 it is stipulated under Part VII on Sale of Goods under section 110 of the Decree⁴⁴ provide that “An implied warranty of goodness or quality may be established by the custom of any particular trade”. Also further implied warranty that the bulk is equal in quality to the sample under section 112 of the same Decree⁴⁵ It is the both laws of Tanzania main land and that of Zanzibar provide for impliedly terms of warranty on the goodness, fitness and the quality for the good sold in Tanzania which may be invoked by the consumer of good in Tanzania if their purchased goods are fault.

The question the consumers should ask themselves before invoking this impliedly terms provision of law is on “whether the sold thing to be claimed as fault is good if it is good is when the protection under the sales of goods laws can apply and allow the invoking of the impliedly terms of warrant under the sales of goods laws of Tanzania.

⁴⁴ The Zanzibar Contract Decree Cap 149 of the law of Zanzibar

⁴⁵ Ibid

4.3 The Digital Music Content Supplied in CD Or DVD is to be Treated as Good In Tanzania?

The consumer of music CD and DVD in Tanzania when they purchase such music CD and DVD should be aware that such purchased thing are digital content product just supplied in a tangible medium like CD or DVD and the purchaser do not buy CD or DVD but the digital content which is music in the CD or DVD. Under the Tanzanian sales of goods both of Tanzania main land and Zanzibar do not go further to provide and cover the digital content product, the laws only define the “good” and under the definition of good do not cover the product supplied in digital content form and it does not define the digital content as it is being clearly defined under EU Consumer Protection Directive 2011 on both its Preamble (19) that;

Digital content means data which are produced and supplied in digital form, such as computer programs, applications, games, music, video or texts, irrespective of whether they are accessed through downloading or streaming, from a tangible medium or through any other means. Contracts for the supply of digital content should fall within the scope of the Directive. if digital content is supplied on a tangible medium, such as a CD or DVD, it should be considered as goods within the meaning of this Directives. Similarly to contracts for the supply of water, gas or electricity, where they are not put up for sale in a limited volume or set quality, or of district heating, contracts for digital content which is not supplied on a tangible medium should be classified, for the purpose of this Directive, neither as sales contracts nor as services contracts for such contract, the consumer should have a right of withdrawal unless he has consented to the beginning of the performance of

the contract during the withdrawal period and has acknowledge that he will consequently lose the right to withdrawal from the contract. In addition to the general information requirements, the trader should inform the consumer about the functionality and the relevant interoperability of digital content. The notion of functionality should refer to the ways in which digital content can be used, for instance for the tracking of consumer behavior. It should also refer to the absence or presence of any technical restrictions such as protection via digital Right Management or region coding.

The notion of relevant interoperability is meant to describe the information regarding the standard hardware and software environment with which the digital content is compatible, for instance the operation system, the necessary version and certain hardware features. The commission should examine the need for further harmonization of provisions in respect of digital content and submit, if necessary, a legislative proposal for addressing this matter.

Also it is clearly defined under Article 2(11) *digital content* to means “data which are produced and supplied in digital form”

Under Tanzanian sales of goods both laws define goods to means, from Tanzanian main land Sale of Goods Act⁴⁶ under section 2 of the Act define good to “*includes all chattels personal other than things in action and money, emblements, industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale*” And under the

⁴⁶ Tanzania Sale of Goods Act Cap 214 of Tanzania law

Zanzibar sales of goods⁴⁷ good is simply being defined to “*means and includes every kind of movable property*”

With the above definition of goods from Tanzanian sales laws all are not expressly define good to includes digital content as good or do not go further to provide for the definition of digital contents. But with the decision of English case of St. Albana’s case which is the common law precedent which have an effect of being persuasive case to the Tanzanian court of which the Tanzania courts can adopt when facing same problem of regarding the digital content to be *good* or not.

Under St. Albana’s case the UK Court of Appeal put clearly that the software (digital content) supplied through a tangible medium such as CD or DVD should be regarded as good and be protected under *Sale of Goods Act (SGA)* on its impliedly terms of warranty that good supplied should be of goodness, quality and fit for the purpose it is being bought for. With UK case law of St. Alban’s case from common law jurisdiction as also Tanzania being among of common law can use this case on determining cases of the similar nature in absence of the Tanzanian laws governing consumer protection on the digital content product, this case can be applied horizontal precedent by the Tanzania courts when deciding cases involving e-commerce business terms in absence of e-laws in Tanzania which clearly provide for law governing digital content business.

It is therefore to this junction in other way we can say that the impliedly terms of warranty on goodness and fitness for the good sold by seller to the consumer under

⁴⁷ Sale of Goods under Zanzibar Contract Decree Cap 149 of Zanzibar

both Tanzanian sale of goods laws and being applied together with UK St. Albans precedent, it can be seen and concluded that technically the consumer of digital content goods in Tanzania such as consumer of music CD and DVD in Tanzania are protected under the fault music CD or DVD. While in reality in Tanzania there is no a clearly law on consumer protection especially which define goods to includes digital content and expressly giving the definition of a digital content as it being stipulated under the EU Consumer Protection Directives 2011 do, which is very important in this modern technology where a lot of transaction involves sales of digital content product of which Tanzania cannot be left behind under this digital technology development.

4.4 The Effect of St. Albans VICL Case to Tanzanian Sale of Goods Laws

Although Tanzania is among of common law countries of which the courts in Tanzania may adopt any case law from any common law country like this from UK court of Appeal decision of St Albans, this usually will depend on the discretion of the courts in Tanzania to adopt it as a very persuasive or ignore it and come out with their own findings and different opinion on the same matter involving the same facts in issue of whether the software supplied in a tangible medium may be treated as good and be protected under the Tanzanian Sale of Goods Act? Depending and taking into consideration both the nature of the case in their hands and the governing nature of the sale of goods laws of Tanzania.

The St Albans decision even when taken and considered by the Tanzania courts in normal common law rules into a contract for supply of digital product, the same will

not be satisfied solution in many ways as common law implied terms are less predictable than statutory ones, the common law has less effective due to less effectiveness it is likely to be classified as conditions in fact it does not give rise to automatic right of consumer to reject goods and also not subject to an absolute prohibition on exclusion. Unlike impliedly statutory terms, having statutory is a preferable solution for consumer protection on digital content product which have advantage that it would not be necessary to wait for the random possibility which a suitable case would come before the court.

It was clearly and widely accepted that digital product in and of itself fall outside the real definition of “*good*” all over the world, including Tanzania also this being the view proposed by Lord Justice Glidewell when deciding this case. The law regarding consumer protection in digital content products would not be said to be settled by Glidewell L.J. in this case as lord justice Glidewell never offered any reasoned arguments to explain on how he reached on his conclusion, merely asserting that “*clearly program of itself is not*” within the definition of “*goods*” in the Sale of Goods Act. But the Act does not in fact define goods, or purport to do so: it states that “*goods*” includes all personal chattels” It was argued clearly by Prof. Robert⁴⁸ that it would not be inconsistent with the statute to conclude that items other than personal chattels are included in the definition.

⁴⁸ Professor Robert Bradgate on Consumer Rights in Digital Products, A research report prepared for the UK Department for Business, Innovation and Skills on September,2010

It was further argued by Prof. Robert⁴⁹ that lord justice Glidewell's comments may be said to be technically *obiter dicta* and therefore of persuasive authority, but not conclusive as a statement of the law. It is therefore with such comment from some scholar of the law may the decision of Glidewell lord justice decision on St. Alban's case not be preferred to be adopted by the Tanzania courts as good authoritative case on digital content product consumer protection, when deciding the similar case with the same material fact and fact in issue like that of St. Alban's case, this may be so because the courts in Tanzania are not bound to take an authority from other common law country like that of UK in this case but only the authority being much of persuasive nature and not a binding precedent to take.

Therefore it is until the courts in Tanzania accepted this an authoritative case from UK and apply and adopt it in deciding the similar case which may occurs in Tanzania on whether the software supplied by seller through a tangible medium such as CD or DVD should be treated and regarded as good and be protected by Sale of Goods Act of Tanzania under its impliedly warranty terms on the *goodness, fitness* and *quality* of the goods supplied to the consumer by the seller.

Once it is applied and adopted to be authority pursuing the Tanzania court it is when this case law will be good authority on extending consumer protection to the digital products be protected as any other who purchase an ordinary good and lead to have an effect to the Tanzania Sale of Goods Act by extending the definition of goods to include also the digital products sold and supplied in tangible medium also to be good, which will have some effect on amending Tanzania sale of goods laws

⁴⁹ Ibid

particularly on their definition of goods to cover also digital product and other necessary amend to suit the added definition of good which includes some provision of sale laws providing on how the sale of different good pass from the seller to the buyer which should also be changed to fit this nature of this digital product as good, this end on concluding that at the moment before the courts in Tanzania to adopt the St. Alban's also good authority to be followed by Tanzania court, St. Alban's case has no effect to the Tanzania sale of goods laws and the definition of good under the Sale of Goods laws in Tanzania are still as they are which is not covering the digital product as goods in these laws. Hence the consumers of digital product are legally not being protected under sale of goods laws of Tanzania.

4.5 Consumer Protection Under Tanzania Sale of Goods Laws and its Implication to the Seller of Digital Content Products

Both sale of goods laws of Tanzania main land and that of Zanzibar under impliedly terms of warranty that the goods sold are to be of the good quality and fit for the purpose bought, the consumer of the digital content good like music CD or DVD can get protection against the seller of the defective digital content goods by being entitled with the remedy for returning good either for full refund or for replacement as the consumer would opt, this raise very contentious issues on the application of the consumer of other ordinary goods remedies equal to the consumer of such digital content supplied in the physical tangible medium like CD or DVD may benefit twice by copying the digital content like music in a CD or DVD before seeking to return the tangible medium after copying its digital content music in and

seek to get the full refund on the ground that the digital content good supplied was of fault.

General in the most sales of goods laws almost in different jurisdiction including Tanzania sale of Goods laws never extent such protection on sale of goods business to also cover and give remedies to the seller especially of this kind and very special kind of good which is so complicated to deal with and easily to be remain to the consumer even if it is returned to the seller.

In the Draft Consumer Rights Bills⁵⁰ in response to its 2012 consultation it was the findings that digital content on a tangible medium, such as on a disk, will need to be made available to the trader that is to say through returning of a fault disk and for the digital content which is not on a tangible medium, the consumer may be in breach of copyright law if they intentionally retain the digital content and continue to use it, the government justification on this was that; unlike the remedies for goods, we do not propose to introduce as short term right –to-reject for fault digital content when it is sold in intangible form such as by downloaded or streamed and not by proposing a second tier of remedy of rescission of contract.

This is primarily because *digital content is very easily to be copied* and can be very difficult to delete from the device altogether. In addition digital content not provided on tangible medium can be meaningfully returned to the trader⁵¹. The ground

⁵⁰ House of Common-Draft Consumer Rights Bill-Business, innovation and Skills Committee available at <http://wwwpublications.parliament.uk/pa/cm201314/cmselect/cmbis/697/69706.htm>

⁵¹ Ibid

justifying non returning non returning of the digital content to the seller according to the Bill response to the consultations is that the digital content can be easily be copied by the consumer and it is the same ground that, although it may be seemed that if the digital content is supplied through tangible physical medium as in case of music CD and DVD sold to the consumer but when it is allowed to be returned to the seller on ground of being fault the consumer may easily copy it before it is returned and benefit twice by his refund and remaining with the copy of music.

It was argued by the sellers of music CD and DVD during interviewing them that, although they do test music CD or DVD nearest to be sold to the sold to the consumer by inserting on their CD or DVD Player devices before selling the same but the sellers conceded on not being able to play all parts of the music and in case the consumer is of the *whole sale* business they can just test only a single CD as the sample for the lest of music CD. Also in replying on the issue of sellers right in case the dishonest consumer tendency of returning music CD or DVD on ground of being fault after having made a copy of music content in the CD or DVD, it was their argument that in most cases this is being happening to them especially some of the consumer of music CD they have just returning the sold music CD on ground that is not properly playing.

Sometimes they complain some part of the music CD is tracking and before realizing such kind of dishonest consumer they used to refund their purchased money as the result the such kind of complains increased and the consumer were against being replaced by another music CD, this was because they had already having such music

copied in their devices or any other tangible medium. Later on after realized that, they started remedying the complaint of default music CD only by allowing replacement of the another CD thus combated this situation by reducing such complaint as many dishonest consumer would prefer to benefit by getting the copy of the music for free and get back their money by way of refund.

4.6 Tanzanian Copyright Protection Against Consumer Copying Music CD or DVD

In Tanzania once the consumer as acquired the music CD or DVD legally the issue of protecting the consumer from making the copy for their private use is not prohibited by the copyright law. It is to that reasons the copyright societies both that of Tanzania main land COSOTA and that of Zanzibar COSOZA went further by legalizing copying for the commercial use by some of seller of the music CD or DVD who burn music CD or DVD in the public and sale them in the public, this is allowed after the Sellers having acquired the license which is obtained by paying to the copyright societies the licensing fee to burn the artist music CD or DVD.

With this reasons the buyer of the original music CD or DVD is being treated equally as the one paying for the license to burn the CD or DVD. This is making difficult in Tanzania to enforce the copyright infringement of the copyright holder if in real the consumer of the music CD or DVD decide to copy the music CD or DVD and seek to return it on ground of being fault by the dishonest consumer. Copyright law can do nothing to control such practice in Tanzania as it was been suggested by other jurisdiction that the dishonest consumer copying the digital content can be controlled by being prosecuting them under copyright laws.

Also in UK there is now a proposal under discussion on legalizing the consumer who buy digital product to be allowed to make a copy of the digital product for private use and if successful it will lead on amending copyright law which prohibit for the consumer of digital content product to make a copy for private use and if the proposal will pass in UK the consumer will not be prohibited by copyright law to copy the bought CD or DVD and if this practice is allowed by the law, the dishonest consumer of the digital content product possibly may take advantage of copying digital content product and seek to return the same will increase, unless also the consumer protection, sale of goods Act or any other law be amended or enacted to also to protect the seller from such dishonest consumer by introducing this new seller protection against dishonest consumer of the digital content product.

Also such dishonest consumer can also be controlled through introducing the Digital Content Management where the manufacture of such tangible medium used in supplying or delivering digital content product such as CD or DVD put the *digital lock* to control the copying practice within dishonest consumer and also the government can review the remedies for a fault digital content product not to be of refunding consumer perhaps replacement this can help to combat the situation.

It is therefore the findings of this study that the dishonest consumer who tends to copy the digital content and seek to return it to the seller on ground of being fault it is not possible to be controlled by copyright law perhaps by introducing the new law special for dealing with this special digital product transaction which should be able not only to give consumer of digital product protection against the fault digital

product supplied to them by the seller but also to be able for the first time to give protection of the law to the seller against the dishonest consumer who may copy the digital content product in tangible medium like CD or DVD and seek to return the same after copying such digital content and retaining the copy of such digital content look to return the tangible medium CD or DVD on ground of being fault which different jurisdiction and countries have not foreseen it.

CHAPTER FIVE

5.0 CONCLUSION AND RECOMMENDATION

This study analyzing the consumer protection in digital content product laws by looking the existing laws and its remedies to the consumer particular right to return the fault digital content product and its implication to the seller, the case study being in music CD and DVD business in Tanzania. Generally the findings indicate that there is no direct law in Tanzania expressly protecting the consumer of digital content product as the Sale of Goods.

Laws only protect the consumer of an ordinary goods covered under their definition of goods in sale of goods laws impliedly with the very famous case from UK that of St. Alban's case, if the courts in Tanzania can adopt this case, under the existing Sale of goods laws on its impliedly warranty terms embodied in these laws could be used also to extend its protection to the consumer of digital content product which can raise also another unforeseeable implication to the seller of digital product like music CD or DVD are likely to suffer a lot when the dishonest consumer will copy the digital content before returning it to seller on ground of being fault and seek to be refunded which this study observed as the finding is clearly analyzed below.

5.1 Conclusion

The findings reveal that the all existing consumer protection laws in both Tanzania main land and Zanzibar directly does not extend its consumer protection to the digital content product consumed but only expressly do protect the consumer of the an ordinary goods cover in the definition of the *good* in their sale of goods laws which is the shortcoming to these law especially on its definition not being covering digital content goods with thus it can be said that the consumer protection for the digital product should enacted in Tanzania and be clear, accessible and comprehensible by Tanzania both jurisdiction enacting a new special law for consumer protection on this special product which is a digital product or amend the current existing sale of goods laws to insert and bring in some provision of law governing and defining the digital content and its special way of transaction.

The Tanzania current existing sale of goods laws does not clearly cover the digital product but it can be extended to cover also digital product as good by borrowing some necessary key decision of the Court of Appeal in the *St. Alban's v ICL* 1996 case in which lord justice Glide well gave his opinion that software can be classified as good provided it is supplied in physical medium such as CD, DVD or any other data key, this is not a binding case to the Tanzanian courts may be adopted to be part of our laws or ignored by Tanzanian courts depending on the way can be regarded by the Tanzania courts to be good persuasive case and apply it is when it may be seen that consumer of digital product in Tanzania are protected before it is early to preempt that Tanzania courts may adopt this case.

currently the consumer of digital content product can be protected through sales of laws in Tanzania when read together with St. Alban's case before it is adopted in Tanzania it cannot be said that consumer of digital content are protected in Tanzania until the same case with the similar material facts with the same fact in issues being whether the software supplied in tangible medium like music CD or DVD can be regarded in Tanzania as good and the consumer of it be protected under the Sale of goods laws on their embodied impliedly warranty terms on the quality and fitness of the goods supplied by the Seller.

Even if the courts in Tanzania could accept and adopt this case in deciding the similar case in Tanzania it cannot be easily known to the Tanzania public at large only to the few specialized lawyer on information technology law, and it is to this reason the sale of goods laws needed to clearly stipulate it under their provision of laws by extending the its definition to cover also digital content goods and some provisions of law expressly giving the protection to such consumer by amending them to cover this new angle of the technological product which is quite different to the other ordinary goods and not by implication drawn from UK case.

Before St. Alban's case of UK be applied and accepted by Tanzania courts deciding on the same issue of whether the digital content supplied in tangible medium like music CD or DVD are to be regarded as good as it is the situation now. In Tanzania digital content product in any form whether intangible or tangible form is not yet regarded as good and the consumer of it be protected under Tanzanian sale of goods

laws, this is because the definition of “good” under sale of goods laws of Tanzania do not cover the digital content products.

This scenario to the study found in another way the consumer of digital content product of both supplied in tangible and intangible through download in internet example by downloading computer program through internet the consumer of such digital content is not protected by Tanzania sales of goods laws the reasons behind is that although the UK case law has already defined “goods” to includes also the digital product supplied through a tangible medium like music CD or DVD which is an authority in UK but the same cannot be said to be bind the Tanzania courts perhaps the same are adopted by the highest court in Tanzania and became a binding authority in Tanzania and it is until adopted and accepted in Tanzania it can be said that with through the sale of goods in Tanzania and with the case law adopted from UK only consumer of the digital product supplied through tangible medium like these purchasing music CD or DVD are protected against fault digital product supplied to them through the impliedly warranty terms embodied in the Tanzanian sale of goods both laws.

5.2 Recommendations

As per the research findings the following recommendations are hereby proposed on consumer in digital content product laws in Tanzania:

Both in Tanzania main land and Zanzibar to enact different laws on e-commerce and e-laws in general including consumer protection in digital content products in both

purchased through intangible and tangible medium which can clearly give consumer of digital content products in both tangible like music CD or DVD and intangible downloaded through internet full protection against fault sold digital content products.

Both Tanzania main land and Zanzibar to amend their sale of goods laws to clearly define “good” expressly to cover also digital product and clearly stipulate on how the digital product transaction can be concluded which is quite different from the normal ordinary good of which the consumer is able to examine it before purchasing it.

That the suggested law to be enacted and be amended in protecting the consumer of digital product should be flexible to change from time to time due to technology change of now and then which is more fast and so should the laws be able to change fast to suit the global technological changes which is inevitable so as to efficiently give full protection to the consumers of digital content product which its need are being increasing now and then due to the technological change. It is to that reason, it is hereby recommended to introduce a mechanism for changing of the laws in both Tanzania jurisdiction (Tanzania main land and Zanzibar) which will help on reviewing the existing laws and suggest for amendment fast to suit the technological change.

The laws to be enacted in governing the digital products transaction in Tanzania should not only seek to give protection only to the consumer of digital content

products but also to give protection also to the sellers/trader of digital content products against dishonest consumer who may copy the digital content and look to return it to the seller or seek any remedy on ground of being fault.

Tanzania in both jurisdiction, Tanzania main land and Zanzibar to amend their existing copyright laws to clearly stipulate on what right the consumer of digital content products get when purchasing the music CD or DVD and other digital products which clearly will distinguish and prohibit the right to copy the digital content product and combat any threat to the sellers of digital content product against dishonest consumer copying the digital content product and seek to return it while already retaining the copy of digital content product.

Like this BEUC (The consumer voice in Europe),both Tanzania jurisdiction, Tanzania main land and Zanzibar should encourage and support the establishment in both Tanzania jurisdiction *consumer voice in Tanzania* the organization which can be responsible for safeguarding the consumer right inter alia and be responsible for advising the government for the needed laws on consumer protection.

The sellers of music CD and DV D in Tanzania are hereby recommended to adopt the use of Digital Right Management (DRM) which is the a special technology used by hardware manufacturers ,publishers, copyright holder and individuals with the intent to control the use of digital content and devices after sale. This can be done by the music sellers requiring the manufacture of CD or DVD to put *digital lock*

which can stop the dishonest consumer to copy the music in CD or DVD and seek to return the same for refunding money after copying it.

The Tanzania both jurisdiction, Tanzania main land and that of Zanzibar are hereby recommended on the new e-law and consumer in digital product laws to be enacted and also with the current sale of goods laws to be amended to provide for only the remedy for fault digital content product to be only by replacement and not refunding the money to the consumer which can help to control such dishonest consumer who always seek to have their money paid back by seller and continue retaining the copy of the digital content in order to benefit twice.

With globalization development which is being resulting from the growth of cross boarder trading and foreign direct investment by transaction. International being vital for the economic development in Tanzania, the engagement in international commerce thus should go together with the consumer protection in digital content products it is to this reason Tanzania is recommended and encouraged to rectify the international instruments dealing with consumer protection in digital product which can help to give full protection to the consumer of digital product in Tanzania and outside Tanzania where the international instrument ratified cover and protect.

Lastly more research is recommended in Tanzania and the world at large as this study only look for the consumer protection in digital content products especially and taking as the case study only in the music CD and DVD business, since the use and need for digital products is being increasingly now and then as in the future

everything will be operated and used through and use of digital system (software) which the consumer needed to purchase in order to run the machine or equipment.

More research is needed and recommended to cover other area and different types of digital content products like the consumer protection on the purchased online downloaded digital content product such as computer program, ringtone, game and other digital products purchased online through downloading in internet and its implication to the seller when the issue of defective of the downloaded digital product arise and the possibility of returning the purchased through online downloading of software and possibility of the dishonest consumer not be able to delete the product on his device and return to the seller on ground of being fault .

Some researches to be able to come with suggestions on how to protect the consumer against such dishonest consumer and be able to analyze and access any other complications and implication involved this digital content transaction.

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