

# BEWARE IF YOU ARE A 'DIGITAL CONSUMER' – INTANGIBLE DIGITAL GOODS AND CONSUMER PROTECTION IN SRI LANKA

WAC Perera

Faculty of Law, General Sir John Kotelawala Defence University, Rathmalana, Sri Lanka  
*anushkacp94@gmail.com*

**Abstract** - “First, the man was illiterate. Then he became literate. In recent times, he has even become e-literate”.

Justice Saleem Marsoof thus highlights, in a nutshell, the technological evolution of mankind which took place within a noticeably short period of time. Unlike in the past, where the sale of only physical, or rather tangible goods occurred, in the contemporary era, the consumers are well capable of buying goods which have no physical existence, such as computer software, from numerous online stores. These goods could broadly be categorised as intangible digital goods due to the fact that the entire transaction takes place on a digital platform without coming into contact with a human hand. Whether it be a mobile application, a video game, or even an office tool such as Microsoft word, the buying of which has become commonplace as a matter of convenience, since the purchaser can simply make the payment using his/her credit card at his/her leisure. Although this is the current social situation, from a legal point of view, it is highly doubtful as to what form of legal protection would be afforded to these digital goods under the existing overly outdated consumer protection regime. Thus, this research is conducted to analyse the legal system of Sri Lanka with regard to consumer protection using the black letter approach, with a comparative analysis of UK, and New Zealand legislations, in order to ascertain the extent to which a 'digital consumer' is protected in Sri Lanka in respect of intangible goods purchased.

**Keywords** - Intangible digital goods, consumer protection, Sri Lanka

## I. INTRODUCTION

Until recent times, goods sold and purchased in the market were those with a tangible, physical existence such as vegetables, fruits, and other similar domestic necessities. However, with the innovation of the internet,

following the technological revolution, the world woke up to a digital era in which the people in the society could purchase intangible goods from various online stores such as Play store, Apple store, as well as numerous websites which provide a consumer with the facility to download their digital products upon payment. These payments could also be made through online payment methods either directly via credit or debit cards or through facilities such as PayPal. These digital goods fall under various different categories. Some may belong to the category of software and include application software which are commonly known as 'apps' and widely used on mobile devices either to enhance performance such as camera quality, or to perform a specific task such as scanning documents, or purely for entertainment purposes such as simply playing a mobile game. In addition, some of these software are purchased for office use such as Microsoft Word, Excel, PowerPoint, as well as operating software such as Windows. Furthermore, these goods also include downloadable movies, music albums, e-books, magazines, online games, and even electronic tickets. Nevertheless, these digital goods could broadly be given the term 'intangibles' in distinguishing them from ordinary tangible goods for academic purposes.

In the year 2015, Sri Lanka ranked number one with regard to e-commerce readiness in South Asia and has been able to maintain that position in the Global Networked Readiness Index ever since (Attygalle, 2017). Moreover, as statistically proven, this small island has an ever-growing percentage of 30% internet subscribers out of the total population (Weerakoon, 2017). Thus, as it appears, Sri Lanka is at a significant position on the platform of digital consumerism.

Although the existence is in an intangible form, similar to tangible goods, digital goods also carry inherent defects with them. Some software do not perform the task for

which they were downloaded due to malfunctioning, and in other instances the purchaser may discover, upon downloading it by paying a considerable price, that the software cannot be installed on the particular device even though the description of it specifically states that it could be successfully installed. Moreover, some e-books could not be accessed, and movies could not be played. Nevertheless, whatever the defect maybe, it ultimately results in a situation where the digital good purchased cannot be regarded as being 'fit' for the purpose.

In such situations, with regard to tangible goods, the statutory law of Sri Lanka explicitly provides numerous effective remedies that can be used against the seller from whom the particular defective good was purchased. However, after a cursory glance at the wording of these legislations, it is questionable as to whether this protection afforded to tangible goods also extends to digital goods, in the same capacity. Thus, this research is conducted to analyze the existing legal regime with regard to consumer protection in Sri Lanka to find out whether the digital consumers are also protected in this south Asian top ranked e-commerce ready country, in the same capacity as ordinary consumers; and if so, to what extent. Moreover, the objectives of this study also include analyzing the relevant legislations in New Zealand, and the United Kingdom (UK) to make necessary amendments to that of Sri Lanka.

## II. METHODOLOGY

This research is conducted as a doctrinal legal research by using the black letter approach. As primary data, the author uses the existing legislations in Sri Lanka with regard to consumer protection. Moreover, newspaper articles, web articles, as well as opinions of jurists expressed in written forms are used as secondary data in order to support the legal arguments. In addition, the comparative research methodology is given effect, through an analysis of respective legislations in other jurisdictions for the purpose of making recommendations to improve the existing legal regime in Sri Lanka with regard to consumer rights.

## III. RESULTS

The main pieces of legislation that regulate the consumer protection regime in Sri Lanka with regard to the sale of goods could be identified as; the Consumer Affairs Authority Act No. 09 of 2003 (hereinafter referred to as the CAAA), and the Sale of Goods Ordinance No. 11 of 1896

(hereinafter referred to as the SOGO). In order to find out whether or not the application of the legal provisions of these legislations extend to digital goods as well, it is necessary to analyse the relevant interpretation sections of these legislations to ascertain whether or not the definition given to the term, 'goods' include intangible digital goods as well.

Section 75 of the CAAA interprets 'goods' to mean;

"Any food, drink, pharmaceutical, fuel, and any other merchandise."

Section 59 of the SOGO interprets 'goods' to include;

"All movables except moneys. The term includes 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."

Thus, as it is apparent, a direct reference to intangible digital goods in any of the above definitions cannot be found. With regard to the former definition, the application of the *eiusdem generis* rule would undoubtedly suggest that the phrase 'any other merchandise' needs to be interpreted along the line of the specific classes referred in the definition (i.e. foods, drinks, pharmaceuticals, and fuel), all of which belong to the class of tangible goods. As a result, any legal protection given to a consumer against defective goods purchased, would not extend to intangible goods. Hence, as Ekanayake (2014) warns these "...intangible digital goods delivered in the process of downloading or streaming are exempted from the consumer's right to redress..." (Emphasis added).

With regard to the latter definition, it is to be noted that the SOGO was enacted in the 19th century even before the internet itself was invented. Thus, the intention of the parliament was clearly not to regulate the sale of digital goods. Moreover, the wording of the definition of 'goods' given under section 59, explicitly suggests that it refers to movable corporeal goods and not by any means to intangibles, as it specifically includes tangible goods such as crops.

Thus, as evidenced, with reference to the aforementioned factors, consumer rights jurisdiction in Sri Lanka, under the CAAA, and the SOGO, does not extend to intangible digital goods and as a result a digital consumer is barred from his/her legal right to redress. This could be identified as a significant lacuna in the Sri Lankan consumer rights

regime which has constituted a black mark on the platform of digital consumerism.

Without prejudice to the above, as an alternative approach, one could argue that the consumer protection afforded to 'services' under the CAAA could be invoked to protect digital consumers in Sri Lanka, due to the fact that section 75 interprets a 'service' to include several aspects of information technology industry as well. It states;

“Service’ means, service of any description which is made available to-actual or potential users, and includes; inter alia,

(g) The provision of information technology and communications.”

However, although it is arguable as to whether or not the provision of digital goods could be categorized under the heading of 'services' rather than 'goods', the generally accepted view is that they are classified as goods (Cave, 2015). This position was also upheld in the case of *The Software Incubator Limited v Computer Associates UK Limited* (2018) EWCA Civ 518 where the court decided that a sale of a software is a sale of goods, and not a provision of a service.

## IV. DISCUSSION

As iterated above, Sri Lanka lacks effective legal provisions to protect digital consumers due to the fact that the interpretation of the term 'goods' in both CAAA, and SOGO only includes tangible goods and not intangible digital goods. As mentioned above, although it could be argued that the sale of such goods could be regulated by categorising them as services, the legal authorities appear to affirm the negative. Thus, the only solution that is available to remedy the injustice that would otherwise be caused to the arena of digital consumerism by this lacuna is to amend the above mentioned legislations so as to also include intangible digital goods in their respective scope. In doing so, it is of paramount importance to observe the relevant statutory provisions in other jurisdictions, namely; New Zealand, and the United Kingdom (UK).

### A. New Zealand.

Firstly, with regard to New Zealand, it can be seen that it has a separate Consumer Guarantees Act No. 91 of 1993 (hereinafter referred to as CGA) which operates alongside with the Contract and Commercial Law Act No. 5 of

2017 (hereinafter referred to as CCLA) which repealed the provisions of the Sale of Goods Act. As it appears, in these legislations, the interpretation of the term 'goods' expressly includes inter alia software, as well as other intangible goods. For instance, section 2 of the CGA states;

“The term ‘Goods’,

(a) Means personal property of every kind (whether tangible or intangible), other than money and choses in action; and

(b) Includes -

(vi) To avoid doubt, water and computer software.”

Moreover, section 119 of the CCLA provides;

“Goods,

(a) Include;

(i) All kinds of movable personal property, including animals; and

(ii) Computer software.”

Thus, as manifested, both the legislations clearly recognize software as 'goods' under the respective sections. Moreover, other digital goods such as downloadable movies, and e-books could successfully be classified under the term 'intangible' goods in the CGA thereby establishing a doubt free legal environment for consumer rights in New Zealand.

### B. The United Kingdom

Secondly, with regard to the law of the UK, it appears that it regulates the sale of digital goods through the Consumer Rights Act of 2015 (hereinafter referred to as the CRA). Here, unlike in New Zealand, it is instructive to note that the law does not provide for the regulation of a digital good by merely interpreting it as a good in the ordinary manner, but rather it regulates it under a separate chapter of the Act, as 'digital content'. Section 2(9) of the Act interprets this term as follows;

“Digital content’ means data which are produced and supplied in digital form.”

Thus, as clearly interpreted, this umbrella term is wide enough to cover any type of digital goods as it only requires the products to be in digital form.

The legal protection given to a purchaser who downloads a digital product is specified under chapter 3 of the Act. Accordingly, it extensively deals with digital goods by giving numerous guarantees and rights to consumers who purchase such goods. Some of which could be discussed as follows.

Firstly, section 34 specifies that the digital content has to be of satisfactory quality. It further states that the quality of digital content is satisfactory only if it meets the standards that a reasonable person would consider satisfactory, taking account of; any description given, the price, as well as such other surrounding circumstances. To this end, it is instructive to note that under the SOGO in Sri Lanka, any such guarantee against quality is not even given to tangible goods as it follows the common law principle of caveat emptor (Buyer beware) unless under the limited circumstances specified under section 15 of the Ordinance. Thus, the consumer protection regime in Sri Lanka appears to be lagging far behind that of the UK.

Secondly, section 35 states that digital content has to be 'fit' for the particular purpose for which it was downloaded. It can be seen that this is a guarantee which is available to a consumer in Sri Lanka as well, under section 32(1) (d) of the CAAA as a warranty. Nevertheless, as discussed above, digital consumers are not benefitted from this warranty since the Act only applies to tangible goods.

Thirdly, section 36 of the Act stipulates that the particular digital content sold should match with the description given to it by the seller. As it is apparent, with regard to almost all the digital goods that are available online, there is a description column with all the details of the product on the webpage itself. Thus, if the buyer discovers that the functioning of the product does not match with the given description on which he/she relied, after downloading it, he/she can successfully invoke the provisions of this section and take a legal action. However, even though this is also another warranty given to Sri Lankan consumers as well, under section 14 of the SOGO, due to the very fact that its application does not extend to intangible digital goods, digital consumers are barred from invoking its provisions.

In addition, the CRA of the UK also provides various rights to digital consumers. These include; right to repair or replacement, right to price reduction, right to a refund, as well as, right to claim compensation for any damage caused to the device onto which the digital good was downloaded or to any other digital content that was

available on that device before the particular product was downloaded. Nevertheless, as demonstrated, such rights are not available to digital consumers in Sri Lanka under any legislation.

Thus, as it is evident, the Sri Lankan legal regime with regard to consumer rights appears to be far too inadequate in protecting digital consumers compared to the protection given in the UK, as well as in New Zealand. Thus, this could be viewed as a noticeable lacuna which calls for immediate action.

## V. CONCLUSION AND RECOMMENDATIONS

Unlike in the past, more than 30% of the total population in Sri Lanka is connected to the internet today. Being one of the top ranked countries in South Asia with regard to e-commerce readiness, people of this country engage in purchasing digital goods from various online stores on a daily basis. Due to the very fact that these goods fall under the category of intangible goods as exemplified, the applicability of legal provisions under the CAAA, and the SOGO to such transactions is highly doubtful as the interpretation of the term 'goods' in those legislations only includes the aspects of tangible goods. Although one could raise a question as to whether the digital goods could be brought under the broad auspices of the definition given to services, the legal authorities in the international arena appear to support otherwise. Thus, owing to this lacuna, it could be argued that the existing legal regime of Sri Lanka has become a 'toothless lion' in protecting the consumer rights in the digital age. Hence, it is strictly recommended that the respective legislations referred to above have to be amended in order to extend their scope to intangible digital goods as well. In doing so, it is recommended that the laws in other jurisdictions such as New Zealand, and the UK be taken as models due to the fact that the respective legislations in those countries have been successful in providing a strong, doubt free legal environment for consumer rights on the platform of digital consumerism. Whilst the statutory law of New Zealand regulates the sale of digital goods indiscriminate to that of tangible goods by simply including them under the definition of goods, it can be seen with regard to the law of the UK that digital goods are treated differently under a separate chapter of the relevant statute by specifically addressing almost all the potential issues that could arise out of a transaction which is purely a digital one. Thus, it could be stated that the law of the UK is one step ahead of

that of New Zealand in dealing with consumer protection in a digital era. Hence, it is recommended that Sri Lanka should take those aspects into consideration in drafting the amendment to include intangible digital goods within the league of the consumer protection laws in order to provide a safer platform to digital consumers in Sri Lanka.

## References

- Consumer Affairs Authority Act, No. 09 of 2003
- Consumer Guarantees Act No. 91 of 1993
- Contract and Commercial Law Act No. 5 of 2017
- Consumer Rights Act of 2015
- Sale of Goods Ordinance, No. 11 of 1896
- The Software Incubator Limited v Computer Associates UK Limited (2018) EWCA Civ 518
- Cave, B. (2015). Is software a good or a service?. [Online] Lexology. Available at: <https://www.lexology.com/library/detail.aspx?g=d05039e7-feef-4ff7-ac48-165da127e436> [Accessed 5 May 2018].
- Ekanayake, R. (2014). Sri Lanka's consumer rights and risks in the digital age. [Online] Lanka Business Online. Available at: <http://ftp.lankabusinessonline.com/news/sri-lankas-consumer-rights-and-risks-in-the-digital-age/155208712> [Accessed 25 April 2018].
- Marsoof, S. Legal Issues Relating to e-Commerce. Academia, [Online]. Available at: [http://www.academia.edu/5459778/Legal\\_Issues\\_Relating\\_to\\_e-Commerce](http://www.academia.edu/5459778/Legal_Issues_Relating_to_e-Commerce) [Accessed 20 April 2018].
- Weerakoon, D. (2017). Gaps exist in digital consumer and data protection laws in Sri Lanka' Experts discuss consumer rights in the digital age at forum organized by IPS. The Island.