

SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2023-2024 Regular Session

AB 2426 (Irwin)
Version: June 6, 2024
Hearing Date: June 25, 2024
Fiscal: Yes
Urgency: No
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SUBJECT

Consumer protection: false advertising: digital goods

DIGEST

This bill makes it unlawful for a person to advertise or offer for sale a digital good that is not available for permanent offline download with the terms “buy,” “purchase,” or any other term which a reasonable person would understand to confer an unrestricted ownership interest in the digital good, or alongside an option for a time-limited rental, unless the seller meets specified conditions.

EXECUTIVE SUMMARY

Our increasingly online lives have opened up a vast market of online “digital goods.” These are products that are offered for “sale” but are not available to be permanently downloaded. These digital goods, such as movies on streaming services or books to be read on various electronic devices, are “purchased” by consumers. However, despite what an ordinary consumer might think, oftentimes these sales are only providing license to access and use these digital goods and do not confer ownership of anything.

This bill seeks to address the arguably misleading use of the terms “buy,” “purchase,” or other similar terms in these transactions by prohibiting their use unless the seller of the good either (1) secures an affirmative acknowledgement from the buyer that indicates they are only receiving a license to access the digital good that may be unilaterally revoked and includes the terms of the license; or (2) the seller provides a clear and conspicuous statement that the transaction is only conferring a license and includes some easily accessible method to access the terms and conditions of that license. These must be separate and apart from any other terms and conditions.

The bill is author-sponsored. It is supported by CALPIRG. The bill is opposed by the RXN Group and the Entertainment Software Association.

PROPOSED CHANGES TO THE LAW

Existing law:

- 1) Establishes the Consumer Legal Remedies Act (CLRA), which prohibits unfair methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or which results in the sale or lease of goods or services to any consumer. (Civ. Code § 1750 et seq.)
- 2) Provides that any consumer who suffers any damage as a result of the use or employment by any person of a method, act, or practice declared to be unlawful by Section 1770 of the Civil Code may bring an action against that person to recover or obtain any of the following:
 - a) actual damages, but in no case shall the total award of damages in a class action be less than \$1,000;
 - b) an order enjoining the methods, acts, or practices;
 - c) restitution of property;
 - d) punitive damages;
 - e) court costs and attorney's fees to a prevailing plaintiff. However, reasonable attorney's fees may be awarded to a prevailing defendant upon a finding by the court that the plaintiff's prosecution of the action was not in good faith; and
 - f) any other relief that the court deems proper. (Civ. Code § 1780(a), (e).)
- 3) Establishes the Unfair Competition Law (UCL), which provides a statutory cause of action for any unlawful, unfair, or fraudulent business act or practice and unfair, deceptive, untrue, or misleading advertising, including over the internet. (Bus. & Prof. Code § 17200 et seq.)
- 4) Establishes the False Advertising Law (FAL), which proscribes making or disseminating any statement that is known or should be known to be untrue or misleading with intent to directly or indirectly dispose of real or personal property. (Bus. & Prof. Code § 17500 et seq.)
- 5) Provides remedies for individuals who have suffered damages as a result of fraud or deceit, including situations involving fraudulent misrepresentations. (See Civil Code §§ 1709-1710, 1572-1573.)

This bill:

- 1) Makes it unlawful for a person to advertise or offer for sale a digital good with the terms "buy," "purchase," or any other term which a reasonable person would understand to confer an unrestricted ownership interest in the digital

good, or alongside an option for a time-limited rental, unless either of the following occur:

- a) The seller receives at the time of each transaction an affirmative acknowledgment from the purchaser indicating all of the following:
 - i. That the purchaser is receiving a license to access the digital good.
 - ii. A complete list of restrictions and conditions of the license.
 - iii. That access to the digital good may be unilaterally revoked by the seller if they no longer hold a right to the digital good, if applicable.
 - b) The seller provides to the consumer before executing each transaction a clear and conspicuous statement that does both of the following:
 - i. States in plain language that “buying” or “purchasing” the digital good is a license.
 - ii. Includes a hyperlink, QR code, or similar method to access the terms and conditions that provide full details on the license.
- 2) Requires any affirmative acknowledgment from the purchaser or clear and conspicuous statement pursuant to the above to be distinct and separate from any other terms and conditions of the transaction that the purchaser acknowledges or agrees to.
- 3) Clarifies that it does not require a person to download a digital good, or prohibit a person from storing a digital good on a server for access through the internet.
- 4) Excludes the following from the scope of the bill:
 - a) Any subscription-based service that advertises or offers for sale access to any digital good solely for the duration of the subscription.
 - b) Any digital good that is advertised or offered to a person for no monetary consideration.
 - c) Any digital good that is advertised or offered to a person that the seller makes available at the time of purchase for permanent offline download to an external storage source to be used without a connection to the internet.
- 5) Defines the relevant terms, including:
 - a) “Clear and conspicuous” means in a manner that clearly calls attention to the language, such as in larger type than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same size, or set off from the surrounding text of the same size by symbols or other marks.
 - b) “Digital application or game” means any application or game that a person accesses and manipulates using a specialized electronic gaming device, computer, mobile device, tablet, or other device with a display screen, including any add-ons or additional content for that application or game.

- c) "Digital audio work" means a work that results from the fixation of a series of musical, spoken, or other sounds that are transferred electronically, including prerecorded or live songs, music, readings of books or other written materials, speeches, ringtones, or other sound recording.
- d) "Digital audiovisual work" means a series of related images that, when shown in succession, impart an impression of motion, together with accompanying sounds. "Digital audiovisual work" includes motion pictures, musicals, videos, news and entertainment programs, and live events.
- e) "Digital book" means a work that is generally recognized in the ordinary and usual sense as a book that is transferred electronically, including a work of fiction or nonfiction.
- f) "Digital code" means a code that provides the person that holds the code a right to obtain an additional digital good, a digital audiovisual work, digital audio work, or digital book that may be obtained by any means, including tangible forms and electronic mail, regardless of whether the code is designated as song code, video code, or book code. "Digital code" includes codes used to access or obtain any specified digital goods, or any additional digital goods that have been previously purchased, and promotion cards or codes that are purchased by a retailer or other business entity for use by the retailer's or entity's customers.
- g) "Digital good" means a digital audiovisual work, digital audio work, digital book, digital code, or digital application or game, whether electronically or digitally delivered or accessed. "Digital good" does not include a cable television service, satellite relay television service, or any other distribution of television, video, or radio service.

COMMENTS

1. California's consumer protection laws

The Legislature has long considered consumer protection to be a matter of high importance. State law is replete with statutes aimed at protecting California consumers from unfair, dishonest, or harmful market practices. These consumer-protection laws authorize consumers to enforce their own rights and seek remedies to make them whole.

The UCL (Bus. & Prof. Code § 17200) provides remedies for "anything that can properly be called a business practice and that at the same time is forbidden by law." (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 180 [citations omitted].) The UCL provides that a court "may make such orders or judgments . . . as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair

competition.” (Bus. & Prof. Code § 17203; *see also Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1146 [“An order for restitution, then, is authorized by the clear language of the [UCL.”].) The law also permits courts to award injunctive relief and, in certain cases, to assess civil penalties against the violator. (Bus. & Prof. Code §§ 17203, 17206.)

The FAL proscribes making or disseminating any statement that is known or should be known to be untrue or misleading with intent to directly or indirectly dispose of real or personal property. (Bus. & Prof. Code § 17500 et seq.) Violators are subject to a civil penalty not to exceed \$2,500 for each violation in an action brought by the Attorney General or by any district attorney, county counsel, or city attorney. (Bus. & Prof. Code § 17536.) Similar to the UCL, the FAL provides that a person may bring an action for an injunction or restitution if the person has suffered injury in fact and has lost money or property as a result of a violation of the FAL. (Bus. & Prof. Code § 17535.)

The CLRA was enacted “to protect the statute’s beneficiaries from deceptive and unfair business practices,” and to provide aggrieved consumers with “strong remedial provisions for violations of the statute.” (*Am. Online, Inc. v. Superior Court* (2001) 90 Cal.App.4th 1, 11.) The CLRA prohibits “unfair methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or which results in the sale or lease of goods or services to any consumer,” (Civ. Code § 1770(a)), and prohibits conduct “likely to mislead a reasonable consumer.” (*Colgan v. Leatherman Tool Grp., Inc.* (2006) 135 Cal. App. 4th 663, 680; internal quotation marks omitted.)

Among other things, the CLRA prohibits merchants from “representing that a transaction confers or involves rights, remedies, or obligations which it does not have or involve, or which are prohibited by law,” or representing that goods “are of a particular standard, quality, or grade” when they are of another. (Civ. Code § 1770.) Consumers who are harmed by unlawful practices specified in the Act have a right of action under the CLRA to recover damages and other remedies, including actual damages; an order to enjoin the unlawful act; restitution; punitive damages; or any other relief that the court deems proper. (Civ. Code § 1780.)

2. Providing transparency in digital good “sales”

Digital goods are now ubiquitous. These online products and services include music, movies, video games, and books. These products are increasingly easy to purchase on the many devices most people use to take advantage of these goods, reading on a Kindle, watching a movie on their laptop, or playing an online video game on their gaming system.

However, while many of these goods are available to “buy” or “purchase” online, the buyer is not receiving the type of ownership that comes with ancient products like DVDs, CDs, or paper books:

As the entertainment industry shifts its distribution strategy to let people buy or rent movies closer to—or simultaneously with—their release in theaters, you may find yourself amassing a larger digital library than you’ve had in the past. But when you buy a movie from a digital service like Amazon Prime Video or Vudu, does it really belong to you? What if you buy a song on iTunes or download one to your phone from Spotify? Are these files yours forever? If you cancel the service or, as unlikely as it may seem, one of these huge companies goes out of business, what then?

The answer is a little complex, but the short version is, no, you don’t actually own the digital media files that you purchase. This doesn’t mean you’re imminently at risk of losing every digital movie and TV show you’ve ever bought at the whim of a megacorp, but it is possible. . . .

What you’re purchasing in most cases is a license to watch that video or listen to that song.¹

While there is nothing inherently wrong with these licensing structures, they may not align with what a consumer expects, especially when the term “buy” or “purchase” is being used. A report put out by the Department of Commerce’s Internet Policy Task Force concludes:

It does not appear that consumers have a clear understanding whether they own or license the products and services they purchase online due in part to the length and opacity of most EULAs, the labelling of the “buy” button, and the lack of clear and conspicuous information regarding ownership status on websites. The Task Force believes that consumers would benefit from more information on the nature of the transactions they enter into, including whether they are paying for access to content or for ownership of a copy, in order to instill greater confidence and enhance participation in the online marketplace.²

This bill seeks to ensure consumers know what they are getting in these transactions by prohibiting sellers from advertising or offering for sale digital goods using the terms

¹ Geoffrey Morrison, *You Don’t Really Own the Digital Movies You Buy* (August 4, 2021) The New York Times, <https://www.nytimes.com/wirecutter/blog/you-dont-own-your-digital-movies/>. All internet citations are current as of June 15, 2024.

² *White Paper on Remixes, First Sale, and Statutory Damages* (January 2016) Department of Commerce Internet Policy Task Force, <https://www.uspto.gov/sites/default/files/documents/copyrightwhitepaper.pdf>.

“buy,” “purchase,” or other similar terms which a reasonable person would understand to confer an unrestricted ownership interest in the digital good. A “digital good” is a digital audiovisual work, digital audio work, digital book, digital code, or digital application or game, as defined, whether electronically or digitally delivered or accessed.

There are two conditions provided by the bill in which the seller can use such terms. The first is if the seller secures an affirmative acknowledgement from the buyer that indicates they are only receiving a license to access the digital good that may be unilaterally revoked and includes the complete list of restrictions and conditions of the license. The other exception is where the seller provides a clear and conspicuous statement that the transaction is only conferring a license and includes some easily accessible method to access the terms and conditions of that license, such as a QR code or hyperlink.

In order to ensure consumers are adequately put on notice in these transactions, the acknowledgment or statement above must be separate and distinct from any other terms and conditions of the transaction. The bill does not apply to sales of digital goods that can actually be permanently downloaded for offline use.

According to the author:

When a consumer purchases an online digital good like a movie or TV show, they receive the ability to view the media at their leisure. Often times, the consumer believes that their purchase has given them permanent ownership of that digital good, similar to how the purchase of movie on a DVD or a paperback book provides access in perpetuity. In reality though, the consumer has only purchased a license, which, according to the seller’s terms and conditions, the seller can revoke at any point. This lack of understanding has frequently led to consumer confusion and frustration when their purchased digital good disappears from their online library, sometimes with little to no warning.

AB 2426 will address this issue by requiring sellers of digital goods to provide an explicit disclosure for each purchase of a digital good that informs the consumer of the true nature of their purchase, ensuring that consumers have a full understanding of exactly what they have bought.

Writing in support, CALPIRG explains the need for the bill:

In recent years, acquisitions, mergers and lapsed contracts at various media companies have put at risk the digital media that consumers may have believed they owned. In some cases, the media companies have struck last-minute deals to continue providing consumers access to their

purchased content until the next merger puts it under threat. In other cases, though, consumers have entirely lost access to digital content they purchased.

As retailers continue to pivot away from selling physical media, the need for additional consumer protections on the purchase of digital goods becomes more important.

Writing in opposition, RXN Group asserts:

We appreciate the consumer protection and transparency goals of AB 2426 as they apply to digitally purchased digital “products.” However, NFTs are not traditional products, but rather are a series of letters and numbers that identify the location, associated rights, and accessibility of a digital asset on the blockchain. The NFT is not the associated digital asset, e.g., the art, baseball card, automobile title, or college diploma.

When individuals purchase NFTs, they are purchasing the key that provides access to what is behind an otherwise locked door - essentially, they are purchasing access and property rights as well as associated rights offered by the seller, e.g., to interact with, display, and enjoy the digital asset in approved ways, e.g., within an online game. Thus, the bill’s requirement that digital goods must be downloadable to an external storage source is inapposite with regard to NFTs.

SUPPORT

CALPIRG

OPPOSITION

Entertainment Software Association
RXN Group

RELATED LEGISLATION

Pending Legislation: None known.

Prior Legislation: None known.

PRIOR VOTES:

Assembly Floor (Ayes 72, Noes 0)
Assembly Appropriations Committee (Ayes 15, Noes 0)
Assembly Privacy and Consumer Protection Committee (Ayes 11, Noes 0)
