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New California Law Requires Disclosures for Selling Online Digital Goods

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A new California law, AB 2426, will require any company offering to California consumers online-only digital goods – including a broad category of online media and content, such as games, video, audio, digital books and other digital assets (potentially including NFTs and other blockchain-based digital assets) – to disclose conspicuously that the consumer is purchasing a license of limited duration, and to separately provide the terms of that license. The law takes effect on January 1, 2025, and a violation constitutes a misdemeanor that could give rise to civil penalties. Before this date, covered companies may need to update their licenses, as well as the purchase flow for digital content, to provide the requisite notice and obtain customer acknowledgements at the point of sale.

Legislative history

Two events appear to have prompted the introduction of AB 2426. First, on December 4, 2023, a popular online store announced that it would remove certain content that consumers accessed due to failed negotiations with the content producers. Second, a popular online-only driving game became inaccessible to users who had previously paid for access.

Both events prompted outrage and complaints from consumers, which caught the attention of California Assemblymember Jacqui Irwin, who introduced the bill in February of this year.

Summary of the law

The law is aimed at prohibiting gaming companies and other providers of digital content from potentially confusing consumers, and requires disclosures that purchasers are buying a limited license to access the applicable content. While certain existing terms of service clearly specify what rights purchasers are obtaining, the new law requires such disclosures to be made clearly and conspicuously, at the point of sale for each transaction and separately from other applicable terms.

The law defines “digital good” as “a digital audiovisual work, digital audio work, digital book, digital code, or digital application or game, whether electronically or digitally delivered or accessed.” The law further broadly defines “digital code” as:

“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.”

A seller of a “digital good” cannot advertise or offer it for sale with the terms “buy” or “purchase,” or any other term that a reasonable person would understand to confer an unrestricted ownership interest, or alongside an option for a time-limited rental, unless the advertisement or offering complies with (A) or (B) below:

A. The seller receives an affirmative acknowledgement from the purchaser indicating all of the following:
   - That the purchaser is receiving a license to access the digital good.
   - That a complete list of restrictions and conditions of the license is provided.
   - 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:
    - States in plain language that buying or purchasing the digital good is a license.
    - Includes a hyperlink, QR code or similar method to access the terms and conditions that provide full details on the license.

Further, any affirmative acknowledgement from the purchaser or clear and conspicuous statement under (A) and/or (B) must be distinct and separate from any other terms and conditions of the transaction.

The law expressly exempts:

- Any subscription-based service that advertises or offers for sale access to any digital good solely for the duration of the subscription.
- Any digital good that is advertised or offered to a person for no monetary consideration (e.g., freemium content without in-app, monetary purchases).
- Any digital good that is advertised or offered that the seller cannot revoke access to after the transaction – including making the digital good available at the time of purchase for permanent offline download to an external storage source to be used without a connection to the internet.

Potential implications

For digital goods not qualifying for the foregoing exemptions, sellers must provide clear and conspicuous disclosures and obtain acknowledgements as described above.

Because the legislative history for AB 2426 is silent regarding NFTs, it is difficult to evaluate its application to these digital assets. On the one hand, NFT sales are generally considered to be permanent and irrevocable. As such, NFTs might qualify for an exemption. On the other hand, certain digital goods (including audiovisual files and other digital assets) linked to, embodied by, or associated with NFTs can be altered, removed, or destroyed after purchase. Therefore, the law also might apply to sales of NFTs or similar blockchain-based digital assets, and require the same disclosures.

It also is unclear whether the law was intended to apply to freemium games that allow the purchase of in-game content. The law requires the disclosure to be made “at the time of each transaction” or “before executing each transaction.” Publishers of freemium games will have to make the required disclosures for each in-game purchase, potentially interrupting the user experience (UX) and inserting friction at the point of purchase.

Lastly, the law’s definition of “digital good” is broad enough to potentially implicate both the platform and individual content creators.

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