

Alert | Marketing, Advertising, Sweepstakes & Promotions Law



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AB 2426: New California Law Requires Clear Licensing Disclosures for Digital Goods

Go-To Guide:

- On Sept. 24, 2024, California Gov. Gavin Newsom signed **AB 2426** into law.
- Beginning Jan. 1, 2025, sellers and advertisers of digital goods in California must conspicuously and explicitly disclose to consumers when a transaction will grant a license to use or access a digital good, rather than provide an unrestricted ownership interest.

General Rule

The recently passed AB 2426 expands California’s False Advertising Law (Business and Professions Code § 17500, *et seq.*) by adding section 17500.6 to address the sale of digital goods. This new law seeks to avoid potential confusion about whether consumers are buying ownership of a digital good – like an electronic recording of a song – or just a license to access that good.

If access to a licensed digital product can be revoked after a consumer has paid for such access, the new law prohibits advertising that uses terms a “reasonable” person would understand to confer unrestricted ownership – such as “buy” or “purchase” – unless certain steps are followed. The statute lists two options for businesses to comply and minimize liability risks.

Option 1: Affirmative Acknowledgment

At the time of the transaction, obtain affirmative acknowledgment from the consumer indicating that they understand *all* of the following:

- i. The transaction is the mere granting of a license to access the digital good;
- ii. All restrictions or conditions imposed under the license to maintain access to the digital good; and
- iii. If applicable, that the merchant may unilaterally revoke the license upon any violation of the license terms.

Option 2: Clear and Conspicuous Disclosure

Provide clear and conspicuous disclosure of the following before the consumer can complete the transaction:

- i. Explanation that “buying” or “purchasing” confers only a license, and
- ii. A link, QR code, or other method by which the consumer may access the full license terms.

In both cases, the acknowledgment or disclosure must occur distinctly and separately from any other terms and conditions that the consumer acknowledges or accepts, such as privacy policies, online terms of service, or other general terms. As a practical matter, using a separate checkbox (or similar way of giving affirmative consent) would be a best practice to minimize the likelihood of any dispute about compliance.

Scope of Applicability

The statute sets forth a broad list of items (summarized below) that will be considered “digital goods,” including most types of downloadable or digitally accessible content. Confusingly, the statute includes “live events” in the list of “audiovisual works” without explaining whether only recordings of such events are covered or if live streaming is encompassed as well. This confusion is resolved – at least for typical pay-per-view broadcasts – by a broad exemption for “a cable television service, satellite relay television service, or any other distribution of television, video, or radio service” (presumably exempting cable TV and popular streaming services for movies, TV series, music, and so on). Exactly how the courts will resolve potential ambiguities caused by these seemingly overlapping provisions with regard to “live events” made accessible other than via a “television, video or radio service” remains to be seen. A fuller list of the statutory definitions is provided below. In all cases, the referenced content/items would be in a form offered for download or other access via a computer, tablet, mobile phone, or other smart device.

Digital Goods Covered by AB 2426:

- Digital **audiovisual works** (motion pictures, musicals, videos, news, and entertainment programs, recordings of live events, etc.)
- Digital **audio works** (prerecorded and/or live songs, music, readings of books or other written materials, speeches, ringtones, and other sound recordings)
- Digital **books** (books transferred electronically, regardless of genre or content)

- Digital **code** (any code that can be used to access or obtain the above-covered goods, including promotion cards or codes purchased by a retailer or other business entity for use by customers)
- Digital **applications or games** (regardless of the nature or type of device on which the app or game is accessed)

Excluded Digital Goods:

- Television, video, or radio access services, including cable or satellite TV
- Subscription-based services that provide access to a digital good solely during the consumer's subscription
- Any digital good advertised or offered without monetary consideration
- Any digital good that the purchaser can access permanently after the transaction

Risks and Penalties of Non-Compliance

Businesses should be wary of consumer class actions and government enforcement efforts. Violation of the new statute could constitute a false or misleading advertising practice, which can result in a wide range of remedies under California's False Advertising Law and Unfair Competition Law – including restitution and injunctive relief – and the possibility of attorneys' fees and costs. (*See, e.g., Cal. Bus. & Prof. Code § 17203; Cal. Code Civ. Proc. § 1021.5*). With governmental enforcement, public prosecutors have latitude under California's consumer protection statutes, so businesses also face the risk of civil penalties (which can be as high as \$2,500 per violation) and disgorgement (which is now available under recent amendments to the Government Code). (*See Cal. Bus. & Prof. Code § 17206; Cal. Gov. Code § 12527.6.*)

Companies offering licenses to digital goods covered by the new law should review their marketing materials either to avoid use of terms like “buy” or “purchase,” or to implement the disclosure and/or consumer-acknowledgment procedures outlined in the law.

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