Blogs
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As digital media continues to supplant physical media, e-commerce sites offering digital content have experienced unprecedented growth. These sites offer consumers access to video games, music, movies, e-books, and many other types of digital media at the click of a button. Although purchasing digital media—as opposed to physical media—has become commonplace for consumers, a recent case, *McTyere et al v. Apple, Inc.*, suggests that consumers' understanding of terms like "sell," "buy," and "purchase" have not fully caught up to our new digital reality. When a consumer buys a book in a physical bookstore, they own indefinitely the physical copy of the book that they purchased. However, when consumers click a "Buy" button on an e-book platform, they almost always receive a *license* to a copy of the e-book, a license that typically can be terminated by the e-book platform or the book's publisher under certain circumstances. *McTyere* has highlighted this important legal

distinction between buying physical and digital media and raises the question of whether it is deceptive to describe the licensing of rights to digital media using the same terminology as has traditionally been used to describe the sale of books, CDs, DVDs, and other physical goods.

In 2021, a putative class of iTunes Store users sued Apple in the U.S. District Court for the Western District of New York over Apple's operation of the iTunes Store. The plaintiffs alleged that Apple's use of a "Buy" button for digital content in its iTunes Store and Apple's description of such content as having been "purchased" by users constituted false representations *because Apple reserves the right to later remove such content from a user's device or iCloud storage*.

The plaintiffs asserted claims against Apple under Sections 349 and 350 of the New York General Business Law (GBL) as well as common law claims for unjust enrichment. The GBL prohibits "deceptive acts or practices in the conduct of any business, trade, or commerce" and "false advertising in the conduct of any business, trade, or commerce." To state a claim under either Section 349 or 350, a plaintiff must allege that the defendant engaged in (1) **consumer-oriented conduct** that is (2) **materially misleading,** and that (3) the plaintiff suffered **injury** because of the defendant's allegedly deceptive act or practice.

In moving to dismiss the lawsuit, Apple challenged factors 2 and 3 of the plaintiffs' GBL claim and argued that their unjust enrichment claim was merely duplicative of the GBL claim. Apple's motion was denied, with the court holding that the plaintiffs' claims raised issues that could not be resolved on a motion to dismiss.

Whether Apple's Use of the Term "Buy" Was Materially Misleading

Apple moved to dismiss the plaintiffs' complaint on the grounds that Apple's use of the term "buy" in connection with digital content available through the iTunes Store was not materially misleading. Apple argued that the dictionary definition of "buy" supported its position, for example, Apple noted that Merriam-Webster provides the following "buy" definition: "[T]o acquire possession, ownership, *or rights to the use or services of* by payment especially of money."

Because plaintiffs received the *right to the use* of the applicable digital content after completing a transaction, Apple claimed that the plaintiffs did indeed buy a license to the purchased content. The fact that the content may have been later removed from the iTunes Store (and plaintiffs' accounts) is immaterial, according to Apple, on the question of whether its use of the word "buy" was materially misleading.

The court, however, found that Apple's preferred definition of "buy" does not resolve the question of whether Apple's use was misleading. According to the court, Apple's *right to use*argument does not get to the heart of the matter because "[t]he right to use something may last but a moment or forever"; the court provided the following hypothetical in support of its view:

Take, for example, two consumers who each pay $19.99 to "buy" two different movies on the iTunes Store, each planning to watch the movie the next night. The following night, the first streams his movie purchase without a hitch. But when the second sits down on the couch and opens the iTunes Store, she finds that the movie has disappeared from her "purchased" folder. As it turns out, Apple lost the rights to that movie minutes before. Both consumers had the "right to the use of" their movie purchases for the twenty-some hours between the time they purchased them and the time they sat down to watch them. But the second would-be movie watcher understandably might feel a little miffed if she were told that she received exactly what she paid for.

The court also observed that taking Apple's argument at face value dissolves the difference between buying and renting: "[B]oth a consumer who paid $4.99 to rent a movie and a consumer who paid $19.99 to buy it received the 'right to use of' that digital movie."

Ultimately, the court concluded that "reasonable consumers might have believed that their purchasing digital content [using a "Buy" button] from the iTunes Store gave them the ability to use that digital content indefinitely." Accordingly, plaintiffs were found to have sufficiently alleged that the iTunes Store contained statements that were materially misleading.

Whether Apple's Legal Terms Address Its Allegedly Misleading Statements

Under certain circumstances, the presence of a disclaimer or similar clarifying language may defeat a claim of deception. Accordingly, claims alleging deceptive acts or false advertising under the GBL may fail when a defendant has fully disclosed the terms and conditions of an allegedly deceptive transaction. Apple moved to dismiss on the grounds that the applicable terms and conditions fully disclosed to consumers that purchased content may later become unavailable, thus curing any allegedly misleading statements in the iTunes Store interface about "buying" or "purchasing" content.

The court, however, identified several factual questions related to Apple's argument that cannot be resolved on a motion to dismiss (as the court must accept all factual allegations as true and draw all reasonable inferences in favor of the plaintiff in evaluating a defendant's motion to dismiss).

First, a factual dispute exists as to whether the plaintiffs were "sufficiently informed of any restrictions in the terms and conditions." Whether or not the plaintiffs were aware of and agreed to Apple's legal terms is the "sort of factual dispute [that] is not ordinarily amenable to resolution on a motion to dismiss."

Second, there is a factual dispute regarding whether the language in the iTunes legal terms addressing post-purchase removal of content was added to such legal terms before or after plaintiffs made their purchases because the record is silent on when plaintiffs made their purchases. Although the court noted that the language in Apple's current legal terms "might well bar the plaintiffs' claims here," that language does not appear in earlier versions of Apple's legal terms. Instead, earlier versions of the legal terms only contain more general language about Apple reserving "the right to change, suspend, remove, or disable access to any iTunes products, content, or other materials comprising a part of the iTunes service at any time without notice."

Finally, the court opined on the earlier language used by Apple in its iTunes legal terms, holding that a reasonable consumer might read it and "believe that once he or she has 'purchased' digital content and that content is saved to his or her 'purchased' folder, Apple cannot at that point suspend or terminate access to it, notwithstanding whether it otherwise could do so to other material in the iTunes Store before purchase." Such ambiguity prevented the court, at least at the motion to dismiss stage, from holding that Apple's legal terms cure the allegedly misleading statements about consumers "buying" iTunes content.

Whether the Plaintiffs Were Harmed by Apple's Allegedly Misleading Statements

Apple also moved to dismiss the complaint on the grounds that the plaintiffs were not harmed by any allegedly misleading statements by Apple. To satisfy the injury element of GBL deceptive practices and false advertising claims, the plaintiffs must allege that, due to a materially misleading practice, they purchased a product and did not receive the full value of their purchase. The plaintiffs can satisfy this requirement by alleging that they would either not have purchased the product in question or not paid as much as they did for the product had they known the true facts.

Although the plaintiffs' complaint failed to provide any details about what content was purchased or how long the plaintiffs had access to it, the complaint did allege that the plaintiffs would not have bought the digital content or would only have been willing to pay substantially less for it had they known about the possibility that they might lose access to the content later.

Although the court notes that the thinness of the plaintiffs' allegations of harm and the lack of specific information about plaintiffs' purchases "might ultimately prove fatal to their claims," the claims are "comparable" to what "numerous other judges in the circuit have deemed adequate to survive a motion to dismiss." As a result, the court found that the plaintiffs' allegations of harm, thin as they may be, were sufficient to survive a motion to dismiss.

Whether Unjust Enrichment Claims Are Duplicative of GBL Claims

Finally, Apple moved to dismiss the plaintiffs' unjust enrichment claim, alleging that the claim is duplicative of the plaintiffs' GBL claims. Noting that the U.S. Court of Appeals for the Second Circuit's position on whether an unjust enrichment claim must be dismissed if it appears to be duplicative of other theories of recovery appears to be in flux, the court declined to dismiss the plaintiff's unjust enrichment claims at this point absent further guidance from the Second Circuit on the question.

Takeaways to Date From the *McTyere* Case

Although the *McTyere* decision deals only with a motion to dismiss, and has yet to address the substantive merits of the plaintiffs' claims and Apple's defenses, the court's opinion does suggest some actionable insights on how e-commerce sites offering digital content may be able to avoid similar claims:

- An e-commerce site operator offering digital content for sale should clearly inform consumers, ideally in both the site's legal terms and as part of the transactional flow process, that consumers are in fact purchasing a *license* to make certain uses of a copy of the digital content in question—and not buying a copy of the content itself—when they click the site's "Buy" button.
    - Such notice might highlight for consumers that all digital items are licensed, not sold, and that references to "sale" or "purchase" in connection with a digital item relate solely to acquiring a license to access and use such item pursuant to the terms of such license.

- In offering licenses to digital content (as will typically be the case), e-commerce sites ideally will want to provide consumers with an opportunity to review the applicable license terms prior to completing a transaction involving such content.
- An e-commerce site operator ideally should consider, where possible, obtaining rights from its upstream content licensors permitting site customers to continue to access and redownload their purchased digital content even after the site operator's right to offer the content for sale to new customers has expired or terminated.
- Note that the *McTyere* court's logic may also apply to non-fungible tokens (NFTs); similar to digital content consumers, NFT consumers, in "buying" an NFT, typically receive only a license to access and use the digital content associated with the NFT (even if they obtain ownership of the specific "token" associated with such digital content).
- Finally, as our society rapidly transitions to an era where most, if not all, media and entertainment content is available only in digital formats, e-commerce companies and content creators will want to consider to what extent sales terminology that emerged from the analog age may need to be updated, modified, caveated, or even retired in the digital age.

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