

On the Dilemma and Solutions of the No-Reading Problem in Digital Standard Form Consumer Contracts

WEI Zhuoyan

Shanghai Starriver Bilingual School, Shanghai, China

The problem that consumers often fail to read the standard form contracts they willingly enter into has been recognized by many scholars. This is a pressing issue because it may result in the consumers being disadvantaged in bargains. Several laws have already been put in place to protect consumers, but the protection is often inadequate. This essay assesses how the current solutions are carried out and investigates whether new methods can be put in place. It argues that the key to dealing with the no-reading phenomenon is to make contracts more accessible to consumers so that they can be more inclined to guard their own interests.

Keywords: no-reading problem, consumer protection, standard form contracts

It has almost become the norm that modern consumers “agree to the terms and conditions” without even clicking on the hyperlink of the “Terms of Use” page. This may seem to be trivial, but the consequences are severe.

With the rapid growth of e-commerce (Hale, 2015, p. 353), as the prevalence of electronic standard form contracts increased, so did businesses’ bargaining power, relative to consumers. A standard contract is “entered [...] according to pre-drawn terms [...] and intended to be applied similarly in a large number of individual cases” (Sheldon, 1974, p. 17). According to the Consumer Rights Act of 2015, a consumer refers to “an individual acting for purposes that are wholly or mainly outside that individual’s trade, business, craft or profession” (CRA, 2015, p. 2). Digital standard form consumer contracts, which allow businesses to gain unfair advantages through information asymmetry, should be improved by making them more accessible to consumers through clearer formatting and personalized disclosure.

The asymmetric information mainly originates from the no-reading problem. Ram identifies the roots of it: The terms may be difficult to understand; consumers often focus on the main deal and omit the details; consumers usually underestimate the risk in contracts (2022, p. 206). According to research done by Bakos and Trossen (2009), only 0.1% to 0.2% of retail software shoppers choose to access the license agreement, and among those who do, many spend very little time on it.

Although consumers do save time by skipping these terms, this ubiquitous issue eventually disadvantages them. A major result of the no-reading problem is that consumers tend to be overly optimistic about the unread terms, causing contract quality to deteriorate as the sellers’ incentives to provide better contracts are reduced (Ayres & Schwartz, 2014, pp. 562-567). For example, Apple’s iBook Author Agreement required books created with the software to be sold through Apple (Mello, 2012, Par. 2)—this unreasonable demand may be attributed to the fact that the APP users would not have expected such a term to be present in the agreement.

Tackling this phenomenon, much has been done in the legal sphere. In the English common law, there have been great transformations from *L'Estrange v. Graucob*, where the claimant is bound by a clause in small print on brown paper (O'Sullivan, 2020, p. 165), to Lord Denning's Red Hand Rule stipulating that the more onerous the clause, the greater the duty to bring it to the other party's attention (O'Sullivan, 2020, p. 171). The American system has precedents that more specifically target electronic contracts. In *Nguyen v. Barnes & Noble, Inc.*, the court distinguishes between clickwrap (where one needs to click "I agree") and browsewrap (where one's assent is given by viewing the website) agreement, favoring the former over the latter (Hale, 2015, p. 354).

Building on these existing provisions, scholars came up with more thorough solutions providing easier access to information. Ayres and Schwartz advocate for "term substantiation", where sellers learn whether their consumers hold accurate beliefs about the terms of agreement and can only enforce unexpected clauses if they disclose them in a warning box (2014, p. 545). This resembles an upgraded version of the Red Hand Rule, for it systematically lays out the format in which terms should be presented, and it determines the excessiveness of clauses based on the actual consumer expectations. Although the practicality of surveying consumer expectations is questionable, the implementation of the warning box, in which terms are listed in "descending order of consumer importance" (Ayres & Schwartz, 2014, p. 545), may be an effective approach.

Porat and Strahilevitz are more creative. They propose the use of personalized disclosure, where "individuals are assigned default terms in contracts or wills that are tailored to their own personalities, characteristics, and past behaviors" (Porat & Strahilevitz, 2013, p. 1417). The use of big data in disclosing terms would indeed make the contract reading process much easier. For example, consumers' purchasing history could be used for personalized health warnings (Busch, 2019, p. 316). It is hard to declare a general rule regarding the extent to which businesses should personalize disclosure or to impose a strict responsibility on firms to use this method, but it might be plausible for the court to allow firms to use personalized disclosure as a defense against consumers who claim to be unaware of the terms.

Contrary to the mainstream opinion, Wilkinson-Ryan puts forward the argument that courts should deter companies from drafting standard contracts, because even though most consumers do not read them when entering the deal, they do feel bound by them afterwards. And since they consider the clauses legitimate, they rarely take legal actions even when the terms they render valid are actually legally unenforceable. His reasoning, although consumer-friendly, seeks only substantive but not procedural fairness, advocating the abolishment of the assent analysis (which uses the consumer's consent as the basis for enforceability), and the full reliance on the unconscionability test (which voids substantively unfair contract terms) (2017, p. 170). This undermines the element of agreement, an essential element of a contract (Arvind, 2019, p. 21), and it almost guarantees the abuse of the unconscionability rule.

It is of vital importance that the law teaches and encourages consumers to read their contracts, not only because the 10 minutes saved could cost them 10 thousand dollars later on, but also because their indifferent attitude toward standard form contracts might result in monopolies putting them in unfavorable and nonnegotiable positions in the long run. This is especially true for the sharing economy that has become popular in the recent decades—Professor Prassl (2018) highlights how these platforms often provide subpar services and exclude their responsibilities.

These seemingly hopeless situations, however, may be altered by consumers if they take the time to scrutinize the contracts and choose to purchase goods and services from platforms that offer better terms and

conditions. With enough careful consumers taking a stance against unfair terms, firms may finally have to craft contracts to the consumers' benefits in order to secure their own profits. Otherwise, we can only sit and wait for the firms to grow into monopolies and exploit us some more.

Besides the effort of the populace, the authority is also limiting the firms' exclusion of liability through the Consumer Rights Act, which prevents companies from "[excluding] or [restricting] liability for death or personal injury resulting from negligence" (CRA, 2015, p. 39), and through the "contra proferentem" rule, which means that a "clause is construed against the interests of the person seeking to rely on it" (O'Sullivan, 2020, p. 200).

The key to eliminating the unequal bargaining power lies within the consumers' ability to read contracts, which was made possible through the previously established legal doctrines, and should be further improved through the adoption of the warning box and the personalized disclosure discussed above. We neither indulge ourselves by supporting substantive fairness discussed by Wilkinson-Ryan, nor by relying on the "informed minority" whose current population is too unnoticeable to incentivize firms (Bakos & Trossen, 2009, p. 4); instead, we ourselves have to become the "informed majority".

References

- Arvind, T. T. (Ed.). (2019). Chapter 2. Bargaining and agreeing: Offer, acceptance, and formation. In *Contract law* (pp. 19-55). Oxford: Oxford University Press.
- Ayres, I., & Schwartz, A. (2014). The no-reading problem in consumer contract law. *Stanford Law Review*, 66(3), 545-610.
- Bakos, Y. N., & Trossen, D. R. (2009). Does anyone read the fine print? Testing a law and economics approach to standard form contracts. *Working Papers 09-04*. NET Institute.
- Busch, C. (2019). Implementing personalized law. *The University of Chicago Law Review*, 86(2), 309-332.
- Parliament of the United Kingdom (2015). Consumer rights act 2015.
- Hale, R. (2015). Recent developments in online consumer contracts. *Business Lawyer*, 71(1), 353-360.
- Mello, J. P. (2012). Apple scraps controversial terms in iBook Author Eula Agreement. *PCWorld*. Retrieved from www.pcworld.com/article/474186/apple_scraps_controversial_terms_in_i_book_author_eula_agreement.html (accessed on 5 Apr. 2022)
- O'Sullivan, J. (2020). *O'Sullivan & Hilliard's The law of contract (core texts series)* (9th ed.). Oxford: Oxford University Press.
- Porat, A., & Strahilevitz, L. J. (2013). Personalizing default rules and disclosure with big data. *Mich. L. Rev.*, 112, 1417-1478.
- Prassl, J. (2018). *Humans as a service: The promise and perils of work in the gig economy* (1st ed.). Oxford: Oxford University Press.
- Ram, D. (2022). An analysis on the terms and conditions of the Clickwrap Agreement and the benefits of maintaining the Click Wrap Agreement in cloud computing. In *Regulatory aspects of artificial intelligence on blockchain* (pp. 205-224). Hershey: IGI Global.
- Sheldon, J. E. (1974). Consumer protection and standard contracts: The Swedish experiment in administrative control. *Am. J. Comp. L.*, 22, 17-70.
- Wilkinson-Ryan, T. (2017). The perverse consequences of disclosing standard terms. *Cornell L. Rev.*, 103, 117-176.