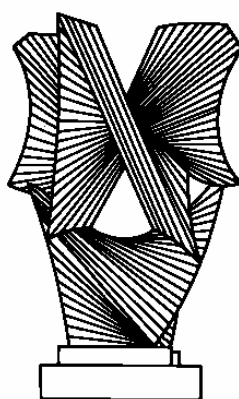


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The Myth of the “Opportunity to Read” in Contract Law

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THE MYTH OF THE “OPPORTUNITY TO READ” IN CONTRACT LAW

*Omri Ben-Shahar**

Abstract

Standard form contracts in consumer transactions are usually not read by consumers. This “unreadness” of contracts creates opportunities for drafters to engage in unfair trade practices. Various doctrines of contracts and consumer protection law address this concern. One of the prominent solutions coming out of recent proposals for reform is to give individuals a more substantial opportunity to read the contract before manifesting assent. With the greater opportunity to read, more transactors will actually read the terms and assent to the boilerplate will be more “robust.” This Essay argues that solutions that focus on providing consumers an opportunity to read are useless, and can potentially be harmful. Most likely, greater opportunity to read would not produce greater readership of contracts—not the type that can help people make informed decisions—and the purpose of this solution would not be achieved, and could have unintended consequences. Even if the compliance with the requirement of opportunity-to-read is fairly cheap (e.g., giving consumers access to the boilerplate in advance), making this a central feature of the legal regulation of standard form contracts makes little sense. The paper ends by proposing non-legal approaches to making the contract terms more transparent, by building on market devices such as ratings and labeling.

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INTRODUCTION

Real people don't read standard form contracts. Reading is boring, incomprehensible, alienating, time consuming, but most of all pointless. We want the product, not the contract. Besides, lots of people bought the product or the service along with the same contract and seem happy enough, so we presume that there must be nothing particularly important buried in the contract terms.

And what if they did read? Surely, there is nothing they can do about the bad stuff they know they will find. Are they going to cross out the unfavorable term? Are they going to call some semi-automatic "customer service agent" and negotiate? Other than lose the excitement about the deal and maybe walk away from it (to what? A better contract?), there is not much individuals can do. Dedicated readers can expect only heartache, which is a very poor reward for engaging in such time-consuming endeavor. Apart from an exotic individual here or there, nobody reads.

Good or bad as this reality might be, contract law refuses to come to grips with it, and European contract law is no exception. Contract law owes its foundations to the days of the arm's length bargain to trade a horse—to the notion that contract provisions come prior to the transaction and are known and custom designed by the parties. In that setting, of course, reading the contract is a simple task that is commonly done and is necessary to assure that the text reflects the terms agreed upon. It is a heroic scholarly ideal, however, to preserve this module in the era of mass standard form contracts. It is counter-realistic, I will argue, to cling to the reading of contracts as the foundation for mutual assent.

Of course, the pragmatic reality of "unreadiness" is widely recognized. Still, it is surprising how deep the unwillingness of contracts commentators to reconcile with this reality is. Rather, it is now a standard view to confront the unreadiness reality with

myths, fictions, and presumptions, all intended to preserve a conceptual apparatus that fits a world in which transactors know all the terms. Even if individuals do not read the terms, so goes a prominent line of argument, at least they should have an opportunity to read. Assent, it is said, depends on individuals having a meaningful, precontractual, opportunity to read. It is only in the presence of such opportunity to read that it can be said that individuals chose to manifest assent without actually reading, and thus to be bound to the boilerplate terms.

The fact that people do not read contracts has not discouraged commentators and reformers from designing proposals that assume readability, encourage readership, aimed at increase reading, require notice and physical presentation of unread terms or reasonable access to terms on the web so that they can be read, in short, provide opportunities to read.¹ Contract terms that fail these opportunity-to-read tests would thus be unenforceable, lacking assent. Just recently, for example, the American Law Institute (ALI) considered a draft for new principles of software contracting that would settle the law of standard form electronic contracting over information goods, and render retail form contracts enforceable only when the terms are “accessible electronically prior” to payment or to the transaction.² Similarly, the European Draft Common Frame of Reference requires that terms of consumer contracts be provided before the conclusion of the contract, as a way to address the problem of “consumer at a significant informational disadvantage.”³ The premise underlying these reform proposals is to provide more substantial opportunity to read, alleging that it will “increase the number of readers of standard forms” and would

¹ Robert A. Hillman and Jeffrey J. Rachlinski, *Standard Form Contracting in the Electronic Age*, 77 *New York University Law Review* 429, 488-492 (2002); ALI principles p. 97

² PRINCIPLES OF THE LAW OF SOFTWARE CONTRACTS, *Discussion Draft* (March 30, 2007), The American Law Institute (Hereinafter “ALI Principles”) §§2.01(c)(1), 2.02(c)(2).

³ PRINCIPLES, DEFINITIONS AND MODEL RULES OF EUROPEAN PRIVATE LAW, *Draft Common Frame of Reference* (2008) (Hereinafter “DCFR”) §§ II.-3:103, 3:105.

render the notion of assent more “meaningful,” more “robust.”⁴

The ALI and DCFR approaches would probably appeal to many contracts scholars who are concerned about shrinkwraps and the willingness of courts to enforce “terms-in-the-box.” To these scholars, the absence of an opportunity to read is what makes the difference in determining whether the terms should bind.⁵ The ALI’s solution is appealing to contracts scholars because it is aligned nicely with the doctrine of mutual assent, which requires affirmative acceptance of the terms. How can a person assent to terms that he or she did not read, did not have an opportunity to read, or was discouraged from reading?

More fundamentally, this idea of implied-assent-to-available-but-unread-terms is appealing to scholars because of the premise—what I will argue to be merely a myth—that it accords greater respect to individuals—that it bolsters the “autonomy” of people.⁶ Choosing not to read is a more meaningful surrender to the unread terms when there is an option to read than when the option does not exist. This autonomy grounding is of particular relevance to advocates of the “Private Law Society” concept—an early German edition of law-and-economics—who view individuals’ private power as the essential governing method (as opposed to public order), but consider a crucial role for legal regulation in protecting individuals from misuse of concentrated private power.⁷ A major way in which the law can establish a “form” for private transactions to function optimally is by ensuring that individuals make

⁴ ALI principles, at 130-131.

⁵ See e.g. Stewart Macaulay, Symposium: Freedom of Contract: Solutions in Search for a Problem?, 2004 Wis. L. Rev. 777; Deborah Post, Dismantling Democracy: Common Sense and the Contract Jurisprudence of Frank Easterbrook, 16 Touro L. Rev. 1205 (2000); Roger C. Bern, “Terms Later” Contracting: Bad Economics, Bad Morals, and a Bad Idea for a Uniform Law, Judge Easterbrook Notwithstanding, 12 J. L. & Pol’y 641 (2004).

⁶ Karl N. Llewellyn. THE COMMON LAW TRADITION: DECIDING APPEALS 369 (1970); Robert A. Hillman, *Online Boilerplate: Would Mandatory Web Site Disclosure of e-Standard Terms Backfire?*, in BOILERPLATE: FOUNDATIONS OF MARKET CONTRACTS 87-89 (O. Ben-Shahar, Ed., 2006)

⁷ David J. Gerber, *Constitutionalizing the Economy: German Neo-Liberalism, Competition Law, and the “New” Europe*, 42 Amer. J. Comp. L. 25, 36-37 (1994).

informed choices, not oppressed by concentrated business tactics. Information is therefore essential for private party power.⁸ How can individuals make contracting decisions without having an opportunity to review the information prior to the transaction?

Now, everybody knows that even with a “robust” opportunity to review the information about the contract terms, very few individuals will jump on this opportunity and actually read. Thus, if what we care about is meaningful, informed, assent to the written contract, let’s be sober: very little of it, if at all, would take place. What the supporters of opportunity-to-read must be thinking, then, is that if true affirmative assent cannot be produced, at least the autonomy-based presumptions underlying this doctrine can be satisfied. People manifest assent, not by affirmative informed acceptance of terms, but by deciding to forgo the opportunity to read. At the very least, then, an opportunity to read preserves the framework of mutual assent as an underpinning for contractual obligation.

Thus, a great deal of attention is turned to the minimal requirements that would transform unreadness from a practice of surrender to power of business into a valid ritual of autonomous assent, even if a passive one. A *passive ritual*, I called it, searching for a sterile term; my colleague Jim White more candidly called this type of assent *autistic*.⁹ But it is not the non-reader retail transactor who is autistic; in fact, this passive assenter is rational and, by and large, doing quite well: saving transactions costs and paying low prices. Sadly, it is the debate over contract law doctrine and the directions of reform that display the inability to come to terms and to reconcile with an evident reality. Not autistic, but perhaps naïve.

The problem with the solutions to the phenomenon of unreadness is that they

⁸ Stefan Grundmann, *The Concept of the Private Law Society After 50 Years of European Law and European Business Law*, p. 17.

⁹ James J. White, *Autistic Contracts*, 45 Wayne L. Rev 1693 (2000).

do nothing to improve the terms that the ordinary non-reader gets. The premise underlying this essay is that there is nothing wrong with one's autonomous choice to enter a contract not knowing the legal terms, not even caring about the opportunity to read. For those who (smartly) prefer not to know, it is utterly irrelevant whether the terms-they-don't-know are available before or after the deal, inside or outside the shrinkwrap, in small or large print, at the top or the bottom of the web page, in a unified or a separate agreement, one or n clicks away from the vendor's homepage, in legal or laymen's language, in the first version or the last version of the modified booklet of endless terms they receive by mail, and so on. It doesn't even matter what these terms say—arbitration at home or in Timbuktu. Who cares? When was the last time that your satisfaction with a purchase of a consumer good was affected by what the boilerplate hid? To be sure, for the occasional motivated reader type who cares about this stuff at the time of contracting and needs to know in order to engage in comparison shopping—let's be optimistic and call him/her “the-One-In-a-Thousand” (hereinafter, the “OIT”)—opportunities may already be abundant to read the boilerplate in advance, but even if not, it is only ex-post anyway that the OIT will figure out which of the cryptic boilerplate terms stands in its way.

It is true that unread boilerplate is at times oppressive, and that it would be nice for the law do something about it. I am not arguing that the law should do nothing to constrain oppressive tactics. The law may have some tools—although my own view is that cultivating non-legal mechanisms (especially on the Internet) is a more effective item to put on the social agenda, and I will explore this view in some length at the end of this Essay. But whether some legal patrol can help improve the legal quality of the transaction, it does not rely on readership, opportunity to read, and other “derivatives” or the readiness property. It is not the customers that should spy on

the boilerplate. In fact, the deeper we allow the illusion of contract literacy as safeguard to take hold, the less eager we might be to design schemes that can actually matter. From consumers' perspective, a reform that is aimed at improving readiness could backfire.¹⁰ Non-readers can benefit from social policies that protect the integrity of their choice set, but not those that guarantee them the useless opportunity-to-read. They would benefit from mechanisms that accord them more meaningful information about the *product* (as opposed to the contract), that give incentives to sellers to avoid over-reaching and over-pricing, and encourage minimal terms and minimum quality.

Thus, what I want to argue in this essay is, primarily, that we need to let one paradigm go—that the opportunity-to-read is necessary for meaningful assent. It can be discarded with no noticeable harm. In fact, it may even improve matters in terms of protection of individual transactors, since the presumption of assent that accompanies pre-disclosed terms assuages the need to develop other protections. More importantly, attentions should be focused on identifying better methods of empowering individuals to “legislate” their own private affairs through private law. Such alternative methods can be masqueraded public law—regulations by the government mandating the range of permissible terms. This, however, would be a far cry from a private law society. Indeed, it would be an admission that private contracting cannot work well unless severely constricted and harnessed by public regulation. Instead, in part III of the essay, I explore (in a very preliminary fashion) two methods of information dissemination. One method involves *rating* of contracts, in the same way that Zagat rates restaurants. The other method focuses on *labeling* of contracts on package, in the same way that food products are labeled for nutrition facts.

The essay proceeds as follows. Part I describes the role of opportunity-to-read

¹⁰ Robert A. Hillman, *Online Boilerplate: Would Mandatory Web Site Disclosure of e-Standard Terms Backfire?*, in *BOILERPLATE: FOUNDATIONS OF MARKET CONTRACTS* 83-94 (O. Ben-Shahar, Ed., 2006).

in contract doctrine and the view that it renders assent more meaningful. Part II discusses the futility of the opportunity to read and the reasons why it might even hurt transactors. Finally, Part III explores some alternative solutions to the problem of unread contracts.

I. THE OPPORTUNITY-TO-READ

A. The Duty to Read and Its Limitations

How do we reconcile a reality in which standard form contracts are unread with a legal tradition that bases obligations on assent? If the rationale for the binding force of contract is the autonomous choice individuals made to surrender to it, how can individuals choose obligations which they have not read and which they do not know?

Contract law had developed traditions that resolve this paradox through presumptions. One such presumption underlies the “duty to read.” True, people do not read contracts; but they can be *presumed* to read. This is a fairly strong presumption. As Williston said, even if an illiterate executes a standard form contract, he is presumed to have read it and bound to its terms. The duty to read encompasses the duty to ask someone to read or to explain the terms.¹¹ This presumption, of course, is not based on generalized empirical regularity. Rather, it is a method to shift the burden of information acquisition to the passive party.

One must confess, though, that the logic underlying the duty to read is somewhat shaky. If potential transactors were handed a readable text, then it would be plausible to place them under a duty to read the contractual terms, and to presume that their assent is informed by readership. In cost-benefit terms, if the cost of reading is

¹¹ SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 1577 (Rev. Ed. 1937).

not too great—if the text is not too difficult to read—then reading is indeed a reasonable “precaution” one should take before entering a contract. Thus, for example, it would be reasonable to impose a duty to read the Direction for Use and any “black box” warning on the packaging of a pharmaceutical drug. The text here is short and readable (“Do not take more than 8 caplets every 24 hours”) and so the cost to read is small; and the benefit of informed use is substantial.

However, when the cost of the precautionary step becomes excessive—when reading a contract requires a significant investment of resources—the cost-benefit analysis changes. Moreover, when the benefit of reading—the information one acquires about the contingent terms of the deal—is minor, reading the fine terms is no longer a reasonable standard of care. Why would we hold someone liable, then, for failing to take care measures that are recognized as excessively costly? It would be reasonable to impose a duty to read the model information or the warning label on the outside of the packaging of a consumer product. But it is not reasonable to impose a duty to read the long boilerplate.

Recognizing that the duty to read leads to an extreme outcome, whereby non-readers are bound by the boilerplate and drafters get a free pass to sneak in one-sided terms, other doctrines of contract law take an opposite approach. Insurance law, for example, restricts individuals’ obligations by the doctrine of reasonable expectations. If the language of the clause is difficult to read and understand, the presumption is not that it is read, but rather that it means what a reasonable non-reader would expect. Objectively reasonable expectations will be honored even if painstaking study of the policy terms would have negated them.¹² If an insurer has reason to expect that the insured would not have manifested assent if she knew the term in fine print, this term

¹² Robert Keeton, *Insurance Law Rights at Variance with Policy Provisions*, 83 Harv. L.Rev 961, 966-967 (1970); *C&J Fertilizer, Inc. v. Allied Mutual Insurance*, 227 N.W.2d 169 (Ia.1975)

is not part of the agreement.¹³ By virtue of being unreadable, then, the term becomes irrelevant; the obligation is dictated instead by context and reason.

Between the two polar solutions dictated by the duty to read and by the reasonable expectations doctrine, other intermediate solutions are available. The unconscionability doctrine, for example, restricts the scope of the duty to read regime. Non-readers are not bound by excessive, exploitative provisions. Because the problem of unreadness is closely related to what is often regarded as procedural unconscionability, it is often enough to show that the “adhesive” term is substantively unconscionable in order to get relief.¹⁴

Similarly, the presumption of readership that arises from the duty to read can be rebutted by evidence of contrary actual assent. Thus, terms in fine print cannot override various provisions that are introduced through actual practice (course of performance), or through precontractual oral representations.¹⁵ Here, if an individual received oral assurance regarding some feature of the transaction, she is no longer under the grip of the duty to read. Unread terms cannot undo the effect of closely followed business practices and express assertions. Thus, importantly, if a seller provides an express warranty, it cannot disclaim the implied warranty of merchantability in the fine print.¹⁶

Still, these mitigating doctrines provide relief to non-readers only in a small set of circumstances. By and large, standard form terms are part of the enforceable agreement, even though it is recognized that they are almost never read. How, then, can it be said that they were assented to? How do we close the disturbing gap between the ideal of autonomous informed choice and the reality of uninformed-ness?

¹³ Restatement (Second) of Contracts §211(3).

¹⁴ *Romano v. Manor Care, Inc.*, 861 So.2d 59 (Fla. 2003).

¹⁵ JAMES J. WHITE AND ROBERT S. SUMMERS, 1 UNIFORM COMMERCIAL CODE pp. 117-119, 786-790 (5th Ed., 2006).

¹⁶ Magnuson Moss Warranty Disclosure Act, 15 U.S.C.A §2308.

B. Opportunity to Read

People can agree to buy a surprise. Sometime, the surprise is an attribute of the product or service. The most extreme example is a lottery ticket, in which the “surprise” is affirmatively sought. But more commonly, various products or services are purchased knowing that they might not perform as hoped (e.g., the arrival time of the flight, or the sweetness of the watermelon). Other times, the surprise can be avoided by a more thorough prior research about the characteristics of a product or service, but individuals prefer to avoid the precontractual cost. Thus, when one buys a car or a cellphone, some of the features (or the absence of features) are discovered only later, through experience and use. Or when one orders a dish at a restaurant, some of its ingredients are unknown. In these situations it is understood that the agreement is not lacking due to the surprise. As long as a party who accepts the deal is choosing not to pre-research its features more extensively, this party’s assent is valid. She is providing “blanket assent” to the known and unknown features of the deal alike.¹⁷

It is commonly thought that an opportunity to read the contract is necessary and critical for assent to cover also the unread terms.¹⁸ The logic of this view, I take it, is that a party can be held to have agreed to terms which she did not read only if she chose not to read. And for there to be a meaningful choice not-to-read, reading must be an available option. In the same way that we can only choose not to fly to the moon if we are invited to join the spaceship, we can only choose not to read the contract terms if we have an opportunity to read. Otherwise, when a course of action

¹⁷ KARL LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 370-371 (196); Randy Barnett, *Consenting to Form Contracts*, 71 *Fordham Law Review* 627 (2002).

¹⁸ See, e.g., Uniform Computer Information Transactions Act (“UCITA”) §112(a) and official comment 8 (“A manifestation of assent to a record or term under this Act cannot occur unless there was an opportunity to review the record or term.”)

is not available, we cannot “choose” to forgo the opportunity and to refrain from it.

The opportunity to read solution is featured prominently in current proposals for reforms. For example, in the DFCR, the Study Group sought a solution to the problem of shrinkwrap contracts. Section II.-3:103(1) states that in consumer contracts the terms must be provided to consumers some reasonable time before the contract is concluded. Similarly, in the proposed ALI Principles of Software Contracts, Section 2.01(c)(1) proposes a solution to the problem of shrinkwrap contracts (which are commonly enforced in American law¹⁹): “a transferee will be deemed to have adopted a standard form as a contract if the standard form is reasonably accessible electronically prior to the initiation of the transfer at issue.” In the Reporter’s note titled *Promoting Reading and the Opportunity to Read Terms*, it is explained that:

The preferred strategy of the Principles is to establish vendor best practices that promote reading of terms before the transferee commits to a transfer [...]. Increasing the opportunity to read supports autonomy reasons for enforcing software standard forms and substantiates Karl Llewellyn’s conception of transferees’ blanket *assent* to reasonable standard terms, so long as they have had a reasonable opportunity to read them.²⁰

It is the assumption of the drafters of this proposal that a precontractual opportunity to read, “at least in theory,” would lead to “increased number of readers of standard forms and shoppers of terms.”²¹ Moreover, it is their stated view that “the idea of individual assent is obviously more robust when transferees have an opportunity to read and compare terms.”²² In other words, we can say that individuals chose to be bound by unread terms only if they had an opportunity to read which they waived. In the same spirit, the Principles’ chief Reporter, Robert Hillman, suggested elsewhere

¹⁹ ProCD v. Zeidenberg, 86 F.3d 1447 (7th Cir. 1996).

²⁰ ALI Principles, at 130-131.

²¹ *Id.*, at 149.

²² *Id.*

that another way to promote opportunities to read standard form terms is through online mandatory disclosure of terms.²³

The ALI *Principles* address an area of contracting that was previously the subject of another reform. In 1999, the ALI and NCCUSL published the Uniform Computer Information Transactions Act (UCITA), which too sought to address software contracting. UCITA, which ended up being enacted in only two U.S. states (Maryland and Virginia) differs from the ALI principles in many aspects, but it shares one fundamental approach: Assent to shrinkwrapped terms can only be presumed if the assenting party had an opportunity to read.²⁴

American case law has similarly put significant emphasis on opportunity-to-read. For example, in the leading case *Specht v. Netscape*,²⁵ the court held that a browsewrap (the contract terms that are presented through a hyperlink on a webpage) is not binding because the reference to the contract terms was not conspicuous enough. Users could not view the link to the terms at a prominent place on the screen, such that would call their attention to the fact that terms are included in the download, but rather had to scroll down to find the link. There was no assent because there was no meaningful opportunity to review the terms.²⁶ Similar claims by parties that they were deprived of an opportunity to read the boilerplate are raised quite often, with varying success. For example, in a recent case the court held that

“[p]laintiffs were not made aware of the [employment contract] until they were required to sign it. At that point in time, plaintiffs had already leased

²³ Robert A. Hillman, *Online Boilerplate: Would Mandatory Web Site Disclosure of e-Standard Terms Backfire?*, in *BOILERPLATE: FOUNDATIONS OF MARKET CONTRACTS* 87-89 (O. Ben-Shahar, Ed., 2006).

²⁴ Uniform Computer Information Transactions Act (rev. ed. Aug. 23, 2001) § 112(a) provides: “A person manifests assent to a record or term if the person, acting with knowledge of, or *after having an opportunity to review* the record or term or a copy of it: (1) authenticates the record or term with intent to adopt or accept it; or (2) intentionally engages in conduct or makes statements with reason to know that the other party or its electronic agent may infer from the conduct or statement that the person assents to the record or term.” § 112(e)(1) further provides that a user’s opportunity to review online contract terms exists if a “record” (or electronic writing) of the contract terms is “made available in a manner that ought to call it to the attention of a reasonable person and permit review.”

²⁵ 306 F.3d 17 (2nd Cir. 2002).

²⁶ See also *Ticketmaster v. Tickets.com*, 2003 WL 21406289 (C.D.Cal.).

or purchased trucks as required by FedEx, undergone training, and financially committed themselves to working for FedEx. Plaintiffs had to sign the [employment contract] without an opportunity to read it thoroughly, review it with a lawyer, or negotiate any changes to it. These circumstances constitute an absence of meaningful choice.”²⁷

The irony of this decision is that the term the court ended up striking was a mandatory arbitration clause – one that plaintiffs would have likely not read and would not have understood or challenged had they been given “an opportunity to read it thoroughly.”

It is not altogether clear why an opportunity to read provides more robust basis for assent to unread terms. When the terms of a contract are not available upfront, it can still be said that the contracting party made a choice to be bound by them. She made a choice to enter into an agreement that is bundled with a known element of surprise—bundled with terms that will only pop out of the box after the contract is formed and the shrinkwrap is removed. As long as the presence of such hidden terms is not in itself surprising, and as long as there is an option not to take the contract as a whole, the hidden terms can be covered by the blanket assent.

In practice, blanket assent is given to “features” of products and transactions even if it is impossible to know them in advance (as in the case of the sweetness of the watermelon, or in the case of an agreement to be bound by command dictated later on by some agreed authority.) An individual who knows that the terms are shrinkwrapped in the box and may not be accessed in advance can be deemed to be exercising the same “robust” autonomous choice to purchase a surprise, especially if the price is right. The opportunity to read and know the terms in advance is not strictly necessary to render assent to the unknown terms, if the assenting party understands that additional terms or features will only become evident at a later stage,

²⁷ Lucey v. FedEx Ground Package Systems, Inc., 2007 WL 3052997 (D.N.J., Oct. 18, 2007).

and that they might not be the nicest of terms.²⁸

Thus, assent can be “meaningful” even if the terms are not available, so long as this feature itself is understood. But my critique of the opportunity to read argument does not rely on any debate as to the proper conception of “meaningfulness.” My argument is that even if one endorsed the view that an opportunity to read is a crucial component of meaningful acceptance—that only then can we say that an individual made an autonomous choice to accept the unread terms—the opportunity must still be a practical one. An opportunity to read is *not* like an opportunity to *inspect* goods. The latter makes sense—a buyer from a remote seller may have never seen the goods prior to shipment and thus inspection can effectively reveal—even to a lay person—some features that might be unpleasantly surprising or disappointing. In these situations, the rights to reject the goods²⁹ or to withdraw from the contract³⁰ give the buyer a practical defense tactic against undesirable surprises, and acceptance following such inspection is indeed more meaningful. An opportunity to read the terms is different than an opportunity to inspect because it is simply too impractical. In the next section, I explain why.

I. AGAINST THE OPPORTUNITY TO READ

A. Capacity to Read

Imagine a world in which individual consumers are shown the contract before buying the product, and make a deliberate decision that they want to read and acknowledge the terms before deciding whether or not to buy. Surely, it is to such consumers that the opportunity-to-read would matter. Unfortunately, even if these

²⁸ Barnett analogizes this blind assent to a soldier who commits to obey the commands of a superior, the content of which he will only learn in the future. See *id.*, at p. 636.

²⁹ UCC 2-513(1).

³⁰ DCFR II.-5:201.

consumers exist, they will likely fail in their attempt to read and comprehend the terms.

First, even a simplified version of the legal terms—what the DCFR denotes as “transparent” terms³¹—is too complicated a task for most consumers, given existing levels of literacy.³² Take, for example, eBay’s User Agreement, which is one of the more impressive examples I found for a contract in lay language.³³ The easy to comprehend terms are the ones that people know anyway, without reading the agreement, such as the “fees and services” provision. The legal terms—what we usually find in boilerplate—are also simpler. But even with eBay’s heroic effort to simplify, would most people understand a term stating that “when you give us content, you grant us a non-exclusive, worldwide, perpetual, irrevocable, royalty-free, sublicensable (through multiple tiers) right to exercise the copyright, publicity, and database rights (but no other rights) you have in the content, in any media known now or in the future?”

Most contracts, however, are not summarized in easy language. Ebay’s or Google’s browsewraps are the exception, probably because the user agreement is over a free service that creates little if any consumer complaints. Even for these service providers, the “Privacy Policy” section of their Terms of Service includes significantly more legal language and analytical complexity. But the bulk of consumer boilerplate terms are more complex. Take a contract many of you surely did not read when clicking “I Agree” upon installing the software—the Microsoft XP End User License Agreement (not a very inviting title for a 10 page single space text). The

³¹ DCFR II.-9:402.

³² Alan M. White and Cath Lesser Mansfield, *Literacy and Contract*, 13 Stan. L. & Pol’y Rev. 233 (2002); Melvin A. Eisenberg, *Text Anxiety*, 59 S.Cal L.Rev. 305 (1986); Melvin A. Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 Stan. L.Rev. 211 (1995).

³³ Ebay’s “Your User Agreement” at <http://pages.ebay.com/help/policies/user-agreement.html? trksid=m40>, last visited on March 10, 2008.

version installed on my (previous) computer was 4000 words long. If a user wanted to read, say, the remedies term—the term that U.S. regulators deemed important enough to require a mandatory appearance, ALL CAPS—she must traverse through 16 previous paragraphs (all of which affect, in some way, the recovery of damages) to reach a provision that is drafted in one sentence, 186 words long! Maybe a few well-paid contracts attorneys can read and understand, after years of experience, what it says. Others would be foolish to try.

The limits of the ability to understand are not solely language comprehension. More fundamental is our limited ability to process the significance of the terms. We are limited in our ability to foresee the types of consequential harms arising from use of a product, and so we cannot assess the significance of a limitation of consequential damages. We have no information about probabilities of defects, and so we cannot ascertain the value of a warranty, or the expected cost of a warranty disclaimer. Think of the decision to purchase overpriced comprehensive insurance for rental car. The terms are explained in easy English at the rental counter, but the buy-or-waive decision is awfully distorted by judgment-of-probability biases.

Moreover, to understand the effect and value of a boilerplate term the consumer has to know the default rule that this term trumps. This is most acute in the context of choice of regime clauses. Some jurisdictions might be better for the consumer if the case came before them, other are worse, but do people know the different substantive rules that these jurisdictions apply *ex ante*, so as to evaluate what they gain or lose through such clauses? Do they know if they will fare better in arbitration versus litigation, once a yet-unknown dispute arises? Or, with modification clauses, do individuals understand that the contract contains a clause that allows the business to modify any term in the contract (including the dickered terms), and do so

without getting explicit affirmative assent? Namely, do people know that they agree to opt out of the silence-is-rejection default and allow vendors to modify the contract (by sending a new agreement, that doesn't always highlight the changes) that becomes binding by virtue of not being rejected?

The limited capacity to read is further aggravated by time constraints. The familiar example/metaphor is the rental car contract and the rushed circumstances under which patrons have to sign it. But the time-to-read problem is more fundamental than this example suggests. It does not arise from artificial constraints that vendors place over their clients, nor is it a consequence of the format of contracting (electronic, mail order, phone, or over-the-counter). People want to surf the internet without even having to click "I agree" every time they enter a new site, surely they do not want to spend the time to read the text of the terms-of-service. The time-to-read problem arises from individuals' desires to enter into many "small" transactions and the fact that each such transaction, while small in stakes, is big in contract text. There is not enough time to read all these texts.

B. Is it Rational to Read?

The opportunity-to-read paradigm is based on the assumption that unreadness is a consequence of a reality in which individuals who want to read and to find out what is in the contract are faced with prohibitive burdens. In that reality, if contracts were available and accessible these individuals would read them and make better decisions in terms of willingness to pay. This is why the opportunity to read is believed to restore individuals' "autonomy." Enough individuals want to read contracts and make a more informed decision; given the opportunity—they will.

In my view, this is not the reality in which we live. A decision not to read is

not just an implicit surrender to cognitive limitations and to texts that are too long to read and too difficult to comprehend. It is very much an affirmative and rational decision *not to know* what is in the contract—it is a preference *not to care*. This decision not to read/know/care is actually a smart decision. Spending effort to read and to process what’s in the contract boilerplate would be one of the more striking examples of consumer irrationality and obsessive behavior.

The reasons that it is irrational to read are well rehearsed in the literature, and I will not pretend to have discovered them. Processing the effect of contract terms is time consuming and boring. If we succeeded in reading the text and understanding it, we are often struck by the remoteness of the contingencies it covers—ones that we don’t expect to materialize, such that cost of figuring out and improving the terms that apply to these contingencies is not worth it.

I believe that the most basic reason why it is irrational to read standard form terms is that it is too difficult to know which terms are desirable and which are not. If the individual is rational and just a bit economic-oriented, and cares about paying a competitive low price for the product, the individual knows that restrictive terms are one of the factors that make such a price possible. (Many consumers, and even commentators, may overlook this price trade-off, but unfortunately it exists even if overlooked.) When individuals participate in transactions and enter into contracts, their desire is not necessarily to get the best legal terms. They want only the terms that are worth the price, which for most people are the “economy class” and not the “first class” terms. This is precisely why many people reject extended warranty programs offered by retailers. They don’t want to buy better terms.

Moreover, restrictive and exculpatory terms are more affordable not only because they reduce the “quality” of the purchase, but also because they shield the

consumer from *cross-subsidizing* other consumers.³⁴ A contract with restrictive terms is, paradoxically, good for most consumers, because if the restrictive terms were not in place—if the vendor’s liability was broader—the vendor’s expenditures on satisfying consumer claims would not be distributed to all consumers. Instead, they are likely to benefit a small subset of people who would know best how to make the most of these terms (e.g., hire lawyers and sue.) The benefiting subset of consumers are cross-subsidized by the remaining, non-suing, “silent majority.” Through higher prices, everyone pays for the cost of providing these entitlements. True, all paying parties *potentially* benefit from them, but only a few *actually* realize these benefits. It is like paying a higher airfare because a small subset of other equally paying parties can make their way into the first class. If you don’t expect to be one of those who line up early or push their way onto the first class—if you expect to be one of those who will end up in the economy class—you don’t want to pay for the perks enjoyed by select others. It may be rational, then, if you read the boilerplate, to hope to find in it more restrictive terms!

This assumes that individuals know which terms are good and which are bad. But the fact that legal terms are priced creates perhaps the most difficult problem—people simply do not have the experience and information necessary to make sensible judgments about which legal provisions to buy. Do we really know how much a broader warranty is worth to us and what is the maximum we should be willing to pay for it? Do we know, before using the product, how likely it is to malfunction, how costly it would be to repair, or how easy it would be to invoke the warranty? Is the disclaimer of warranty reflected in the price and should we pay more for the extended

³⁴ Clayton P. Gillette, *Rolling Contracts as an Agency Problem*, 2004 Wis. L.Rev. 679; Gwyn D. Quillen, *Contract Damages and Cross-Subsidization*, 61. S.Cal L.Rev. 1125 (1988).

warranty as offered?³⁵ Or, think again about the choice of law/forum clauses. Ex ante, individuals surely know nothing about the value of such terms. At best, the actuarial benefit from a more permissible choice-of-forum can be valued by seasoned legal professionals familiar with the law of various dispute resolution fora. Realistically, it is the lawyers for the drafting party, who can figure out these benefit, and only after extended legal research and close monitoring of the comparative precedents coming out of various jurisdictions. Without good information, individuals' perceptions are likely to be biased and irrational, creating fertile opportunities for vendors to exploit this by catering to the distorted preferences. Ironically, the exploitation is not done through injection of bad terms, but rather through selling people unnecessary or overpriced good terms.

Thus, reading the contract in order to find out what is in the boilerplate is senseless, because it is too hard to figure out whether the content of the contract, *in light of the price paid*, is good or bad. Whatever we find buried in the legalese cannot help us decide if to take or leave the deal. The actuarial knowledge necessary to make an intelligent decision is mind-boggling. Even if each specific term could be explained as simply as eBay or Google explain their User Agreements, individuals would not know what to do with the information. As other commentators have analogized before, not wanting to know what's in the contract is equivalent to not wanting to know how electrons reach their destined stops in a computer's microprocessor.³⁶

Now, throw into the mix the fact that there might be very little variation across vendors with respect to the legal terms that accompany the competing products. What,

³⁵ See, e.g., Peter Siegelman, *Adverse Selection in Insurance Markets: An Exaggerated Threat*, 113 Yale L.J. 1123 (2004).

³⁶ Douglas Baird, *The Boilerplate Puzzle*, in *BOILERPLATE: FOUNDATIONS OF MARKET CONTRACTS* 131-142 (O. Ben-Shahar, Ed., 2006).

then, is the prospect for an individual who read the terms, understood them, considered their relative price, and decided she didn't like this "bundle?" is it plausible to imagine her going over the same exercise with other products, reading pages and pages of boilerplate? Sometimes the language will be identical, other times it will vary. Even when the language varies, it is exceedingly difficult to compare. But quite often the value coming out of the boilerplate terms does not vary much across firms. One firm may stipulate arbitration with JAMS, another with AAA. Their limitations of remedies are likely to be similar and the warranties they offer are likely to be standard. It is unlikely, therefore, that comparison shopping for legal terms would be productive. Interestingly, even if there is meaningful competition between makers of a certain good, providing variety and choice over many features including price and upgrades, there may be very little competition over legal terms.³⁷ The boilerplate terms in the sales agreement for a Dell computer is the same for a low end and a high end model.³⁸

What more, we know that even if we searched and found better terms, it is not very likely that we will have the patience, down the road, to insist on enforcement of these contractual rights. When the terms provide advantages to consumers, do vendors conform to these obligations or do they give people the runaround? How costly would it be to "urge" vendors to perform? It might be that, if and when the need arises, it would take forever for a helpful agent to answer the vendor's 1-800-WARRANTY number. Many people will give up on insisting that the favorable term be followed to the letter. What is the point, then, in securing these terms?

This wedge between de-facto rights and the strict letter of the contract may

³⁷ Marcel Kahan & Michael Klausner, *Standardization and Innovation in Corporate Contracting (Or "The Economics of Boilerplate")*, 83 Va. L. Rev. 713 (1997).

³⁸ See <http://www.dell.com/content/topics/global.aspx/policy/en/policy?c=us&l=en&s=gen&~section=012> (last visited May 24, 2008).

also work to the benefit of consumers. When the terms are (as is usually the case) unfavorable to consumers, do vendors stick to them literally, or are they willing to forgive the one-sidedness when consumers make reasonable pleas? When I called my credit card issuer, or my cable service provider, or my bank, with a request to waive some fee or charge that was accrued as a result of my less-than-perfect command over the service terms, I was greeted with surprising cooperation. Despite my own express statements to the contrary, I knew very well that these vendors didn't have to give me any break—that somewhere in the fine print there surely was a terms that gave them the right to charge me the surprising fee (although I didn't bother to check, because of capacity factors discussed in part A above). They probably know as much, but they gave me a break anyway because it was a good business strategy to make a paying repeat-customer happy.³⁹ To be sure, some vendors are tougher. There is probably a distribution of varying propensities to forgive the harsh boilerplate, depending on how much these vendors rely on the happiness of the customer for continued business. I imagine that a local bank is more forgiving than a national car rental company. Also, various businesses are managed differently, with different forgiveness policies towards their consumers. But this only reinforces the view that the way to help consumers is not to equip them with the opportunity to read the terms or even with marginally better boilerplate terms. Rather, consumers will be better off if vendors are scrutinized by their concern for repeat business and are patronized according to their actual practices and their average degree of consumer satisfaction.

Finally, as already mentioned, it is irrational to read the standard form terms because they are not “durable.” In every contract, the individual will find a

³⁹ Lucian A. Bebchuk & Richard A. Posner, *One-Sided Contracts in Competitive Consumer Markets*, in *BOILERPLATE: FOUNDATIONS OF MARKET CONTRACTS* 3-11 (O. Ben-Shahar, Ed., 2006); Jason S. Johnston, *Cooperative Negotiations in the Shadow of Boilerplate*, in *BOILERPLATE: FOUNDATIONS OF MARKET CONTRACTS* 12-28 (O. Ben-Shahar, Ed., 2006).

modification clause that entitles the business to modify the terms by posting a new version on its website, or by sending a new Terms-of-Service agreement to one's address, or by asking the user to re-click "I agree" to the modified version.⁴⁰ Thus, to effectively be informed about the legal terms, the individual has to engage in alert monitoring of the evolving terms. Here, it is all the more pointless because it is close to impossible to understand what the modification means, and even if a bad term is discovered in the modified boilerplate rejecting it involves discontinuing the service and incurring termination fees, switching costs, and an uncertain fate at the hands of a substitute vendor.

C. The few readers

In the law and economics folklore, an influential argument maintains that the presence of few sophisticated comparison shoppers who actually read the contract terms will operate to discipline the drafters of standard forms and force them to use only the most efficient provisions.⁴¹ These might be the "OITs" that I referred to earlier—the odd individuals that has the habit of reading boilerplate—or sophisticated purchasing agents that read contracts for a living. Not that comparison shoppers necessarily eliminate the bargaining power that might otherwise rest with the drafter. Their presence only guarantees that any bargaining power that exists would be used to extract higher prices (and other purely distributive terms), not oppressive boilerplate. For these few readers to have the effect they are said to have, they must have an opportunity to read the contract. Thus, goes the argument, even if most people cannot

⁴⁰ See, e.g., the term in one of Google's user agreements:

"Google may make changes to the Universal Terms or Additional Terms from time to time. When these changes are made, Google will make a new copy of the Universal Terms available at <http://www.google.com/accounts/TOS?hl=en> and any new Additional Terms will be made available to you from within, or through, the affected Services."

Google Term of Service, available at <http://www.google.com/accounts/TOS?hl=en>

⁴¹ Alan Schwartz and Louis L. Wilde, *Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis*, 127 U.Pa. L. Rev. 630 (1979); George L. Priest, *A Theory of the Consumer Product Warranty*, 90 Yale L.J. 1297.

and do not read standard terms, there are a few who can act as “reading agents”—if only they have the opportunity to read.⁴²

I have strong doubts whether a small subset of reader can induce the necessary discipline upon the drafters of the standard form, even if they have access to the terms of the contract and read them thoroughly. Rather, it is likely that sophisticated strategies would develop to “separate” this group and give it the terms it is looking for without letting these terms trickle through also to the non-reading majority.⁴³ For example, in the most recent version of the Comcast terms of service which I received at my home residence, a new arbitration clause was introduced. It eliminated some of the self-serving aspects of arbitration that courts in the U.S. deem unconscionable (e.g., mutuality, filing fees), but preserved every other self-favorable arrangement (limited discovery, no class-action), to the maximal tolerable extent. It also included an interesting provision:

Right to Opt Out: If you do not wish to be bound by this arbitration provision, you must notify Comcast in writing within 30 days of the date that you first receive this agreement by visiting www.comcast.com/arbitrationoptout, or by mail to [...]⁴⁴

With this opt out provision, it is likely that advance readers would opt out while the remaining many will be bound by the clause.

Thus, it is questionable whether securing an opportunity to read for the sophisticated readers would serve the interests of non-readers. Worse, it might well be that the advantages secured by readers would be cross-subsidized by non-readers. In the Comcast contract, for example, the right to file class action suit may be secured by the sophisticated readers who opt out of mandatory arbitration, but its actuarial cost may be rolled into the cost of the service borne by all. This very phenomenon—the

⁴² Clayton P. Gillette, *Rolling Contracts as an Agency Problem*, 2004 Wis. L.Rev. 679.

⁴³ David Gilo and Ariel Porat, *The Unconventional Uses of Transactions Costs*, in *BOILERPLATE: FOUNDATIONS OF MARKET CONTRACTS* 66-81 (O. Ben-Shahar, Ed., 2006).

⁴⁴ Comcast Agreement for Residential Services § 13 (October 2007).

sophisticated being subsidized by the “masses”—is alleged to be happening in credit card contracts, whereby the advantages secured by the more educated credit card users (e.g., low APR, airline miles) are “funded” by the fees and the high interest rates paid by non-sophisticated consumers.⁴⁵ In other words, the opportunity to read backfires—it merely helps sophisticated parties separate themselves from the nonreaders—and insert a wedge between the deal they get and the (worse) deal everyone else gets.⁴⁶

D. Summary

There are many reasons to be skeptical about the opportunity-to-read as a solution to the problem of assent to standard form contracts, and I reviewed some of them above. In addition, there is some evidence that the availability of terms in advance of the purchase does nothing improve their content. Florencia Marotta-Wurgler conducted a study of terms in software license agreements and compared the terms in the contracts that were available to read prior to the sale-and-payment with those that were “shrinkwrapped” and were not available until after the sale.⁴⁷ She discovered, strikingly, that when the terms come after the payment they are not any worse, and in fact they might be slightly better. Thus, in the area which she studied, an opportunity to read does nothing to improve the terms.

Furthermore, there is a concern that a “robust” opportunity to read would backfire in yet another way. As suggested by Robert Hillman, the presence of an opportunity-to-read might eliminate a procedural flaw in assent and might make it

⁴⁵ Ronald J. Mann, *Contracting for Credit*, in *BOILERPLATE: FOUNDATIONS OF MARKET CONTRACTS* 106, 110 (O. Ben-Shahar, Ed., 2006).

⁴⁶ Gilo and Porat, *supra* note 43, at 70-71, provide examples for hidden benefits that are granted to selected consumers.

⁴⁷ Florencia Marotta-Wurgler, *Are ‘Pay Now, Terms Later’ Contracts Worse for Buyers? Evidence from Software License Agreements*, NYU Law and Economics Working Paper No. 05-10 (2005).

harder for courts to make a finding of procedural unconscionability.⁴⁸ Thus, the chance that a consumer will be rescued ex post from an oppressive term through the filter of the doctrine of unconscionability is incrementally diminished when the ex-ante protection accorded by an opportunity to read is perceived to be stronger. Indeed, in a recent decision, a U.S. court rejected the unconscionability claim because the consumer had unlimited time to review the arbitration clause and thus a reasonable opportunity to understand the term.⁴⁹

III. INSTEAD OF OPPORTUNITY TO READ

The main reason why the opportunity to read would not resolve the gap between legal assent and real assent is that, as I argued in part II, it is an opportunity that people would not exploit. To be sure, there are ways to accord individuals a useful opportunity. For example, if legal terms have to be presented in a simple, intuitive format—short, non-technical, accompanied with examples and perhaps within a menu of choices—some comparison shoppers might be willing to take some time and examine these terms. If, say, a vendor explains what are the main practical differences that the terms make, how it squares against other common terms, and how it might be invoked between the parties, and if the consumer is further accorded a choice of different terms with different prices (e.g., checking a box for added coverage on online order forms), the opportunity to read can become meaningful to those who want to take the time and become informed. Still, it is unlikely that many people will want to become educated about the now-readable legal terms. Remember, the problem now is not only that the terms are written in an incomprehensible language; the problem is that individual do not know how to evaluate the content of

⁴⁸ Robert A. Hillman, *Online Boilerplate: Would Mandatory Web Site Disclosure of e-Standard Terms Backfire?*, in *BOILERPLATE: FOUNDATIONS OF MARKET CONTRACTS* 83-94 (O. Ben-Shahar, Ed., 2006).

⁴⁹ *Riensch v. Cingular Wireless, LLC*, 2006 U.S. Dist. LEXIS 93747 (W.D. Wash. Dec. 27, 2006).

the terms—the contingent events for which many of the terms apply.

There are solutions to the problem of non-readership that are aimed not at informing individuals, but instead at uprooting the really bad terms that sometimes come about as a result of uninformedness. These solutions include ex post oversight by court through doctrines like unconscionability and reasonable expectations; ex ante legislative prohibitions on specific content of terms that fall outside predetermined mandatory range;⁵⁰ pre-approval of standard form terms by a government agency, which effectively operates as the reading agent;⁵¹ and the right to revoke the contract after a reasonable opportunity to examine the boilerplate terms in full and to determine their impact on the value of the transaction.⁵² Much has been said about the efficacy of these approaches. My purpose in the remainder of the essay is not to revisit these directions, but to explore, in a very preliminary way, alternative solutions that, rather than replace consumer informed decision or tinker with contract doctrine, rely on market mechanisms to provide some degree of informed-ness.

Since it is pointless to hope that individuals will read contracts, any sensible solution that builds on private ordering as the core instrument of social organization must provide individuals only the minimal information that is relevant and essential. As Stephan Grundmann pointed out, for a Private Law Society it may be appropriate to make only the most material information available—such that would improve consumer decisions—and have it provided by the cheapest information supplier.⁵³ In the remainder of this essay, I examine information devices that aggregate basic data about the contracts and place a minimal burden on consumers.

⁵⁰ See, e.g., DCFR II.-5:101, 9:411.

⁵¹ This is the approach taken by Israeli contract law. See, e.g., Sinai Deutch, *Controlling Standard Contracts – The Israeli Version*, 30 McGill L.J. 458 (1985). See generally Clayton P. Gillette, *Preapproved Boilerplate*, in *BOILERPLATE: FOUNDATIONS OF MARKET CONTRACTS* 95-105 (O. Ben-Shahar, Ed., 2006)

⁵² *ProCD v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996); UCITA § 112(e)(3).

⁵³ Stefan Grundmann, *The Concept of the Private Law Society After 50 Years of European Law and European Business Law*, p. 17.

A. Rating of Contracts

When deciding whether to enter a transaction for a product or service, individuals want to be able to predict the degree of satisfaction that they will obtain, in light of the price charged. The price is usually a simple parameter, easy to understand; can it be compared to simple measure of anticipated satisfaction? Can the various aspects of the transaction be collapsed into a single parameter, an “average” of the different attributes?

This dilemma is, of course, at the core of any purchase decision regarding product features. Rating the quality features of goods and services is a deep-rooted market practice that allows consumers to conduct such price/satisfactions predictions. For example, when reserving a hotel online, Expedia.Com and other reservations services rate the each hotel on the basis of customer review along several attributes (cleanliness, service, comfort). When deciding how to vote for a senator, voters can check how he is rated by the Environmental Defense Fund or the NRA. When choosing a restaurant, Zagat and other review networks provide a score and a simple breakdown of features that reflect the quality of the establishment relative to its cohort. When buying a new car, Consumer Reports provides a variety of ratings of performance, safety, durability, as well as overall recommendations. When purchasing goods from an online retailer, various intermediaries provide ratings that help shoppers predict the quality of the goods sold. Amazon.Com, for example, refers buyers who search second hand books to a long list of sellers and provides a comparison of prices and the satisfaction rating, which again is a single parameter of aggregating the experience of prior buyers. Ebay uses a well-known feedback rating of each seller, showing the number of prior sales and the percentage of satisfied

customers.

These rating scores aggregate some, but not all aspects of the product or service. None of them capture the subtleties. Still, individuals who are not interested in spending the time to study the nuances can rely on the ratings to chaperone them through the comparison shopping process. Their advantage is that they put weight on those aspects that average buyers and users actually care about most.

Can a similar score be given to the contract terms? Can one of the rated features be the “legal” experience – the quality of the boilerplate terms once they are brought to bear on the transaction? It is often said that the standard form terms are just another feature of the mass-produced product.⁵⁴ If so, and if other aspects of the product can be rated, why not the contract?

Many problems might arise. First, what methodology ought to be used to rank different contracts, each containing numerous terms and provisions? To be sure, the same problem arises when rating, say, a hotel or a restaurant, all of which have numerous features, many of them idiosyncratic, and yet the market produced successful and reliable summary scales. Still, there needs to be some underlying algorithm that weighs the different terms to produce an average. For example, Florencia Marotta-Wurgler developed a score system for software licenses.⁵⁵ Each term in the contract, according to her methodology, is compared to the legally provided default rule; if it is more pro-consumer than the default rule, it scores +1; if it's worse, it scores -1; and if it is equivalent to the default rule, it scores 0. Most EULAs contain up to 20 terms, hence the aggregate score can vary within a broad range. She samples hundreds of contracts and finds that they range from -15 to +2, with an average of -6.

⁵⁴ Arthur Allen Leff, *Contract as Thing*, 19 Am. U. L. Rev. 131, 144-151 (1976); Margaret Jane Radin, *Online Standardization and the Integration of Text and Machine*, 70 Fordham L. Rev. 1125 (2002); Baird, supra note 36.

⁵⁵ Marotta-Wurgler, supra note 47.

Another potential rating methodology for contracts can be based on experience reports from customers. Individuals can be surveyed, or given the option to rate, the experience as it relates to aspects governed by the legal terms. How good was the warranty and repair service? How difficult was it to return the goods for replacement, repair, or refund? How effectively did the vendor respond to problems with the service? Were there hidden fees and surprising burdens originating from the fine print? Were there restrictions on the types of permitted uses? Was the contract modified post-purchase in an unfavorable way? Did arbitration bar effective vindication of rights under the contract? In the same way that online intermediaries collect feedback regarding product and service features, they can aggregate legal information

One might wonder, if people indeed care about the contract terms is there already a rating service available on the Web, to disseminate the relative score of the contracts and EULAs. There are many rating services for the product or service, is there one also for the contracts? One service I came across is “EULALyzer”—a free downloadable software that analyzes the boilerplate terms of other software.⁵⁶ It is installed on the user’s computer and scans any clickwrap EULA before the user accepts it. It flags problematic terms and gives them rating scores. My own experience with this service suggested only mild success, but it also demonstrated that a rating service can eventually become a prominent tool.

Moreover, existing product or service ratings already include evaluation of some of the “legal” terms. When buyers rate eBay sellers, they often add comments that address aspects of the “contract,” not merely the “product.” They tell not only how good the product turned out to be or whether shipping was timely, but also how

⁵⁶ <http://www.javacoolsoftware.com/eulalyzer.html>

seller responded to non-conformities, how much of the risk of loss the seller assumed, whether payments was refunded, and so on.

Yet even if some information about the boilerplate contract can be deciphered by looking at existing product rating scores, or by running a EULAlyzer-type program, it is obvious that a full blown boilerplate score does not prominently exist. Buyers can compare vendors along parameters such as prices, shipping costs, overall satisfaction, perhaps even on aspects such as privacy and data security policies. But they do not have a readily available boilerplate rating scale to refer to. In some areas of transacting—e-commerce being one such area—the absence of specialized rating service for contracts might suggest that individuals would have little use for it. In these areas, individuals do not want a separate rating for the contract because, as I argue throughout this essay, at the time of entering the contract they don't care much about the legal terms. Perhaps they prefer to take an occasional loss that is due to a bad legal term over the chore of reading an inquiring about the legal contents in every transaction. But in other areas—e.g., mortgage and lending contracts, car sales, residential leases—individuals care a great deal about the less salient terms and yet rating services have not become prominent.

B. Labeling

Standard form contract term convey information. There is an essential core to this information, and there is a lot of legal “fluff.” The essential warranty information is its scope, duration, and the primary exclusions. The essential return policy information is the condition of the goods or packaging, duration, restocking fee, and risk of loss. The essential choice of law and forum information is which State's law applies and where to file complaint. If property rights are an issue, as in the sale of

information products such as music downloads, the essential provision apply to the number of copies the user may make, the right to resell, and the significant DRM protections. And so on, there are probably a handful of essential terms buried in each boilerplate contract.

A labeling regime would develop easily readable formats through which this essential information will be summarized and uniformly presented, available for review prior to purchase. It would work in a similar way to food nutrition labeling. Under the existing American food labeling laws, producers of processed food products must present some of the essential information about the ingredients in the product and its nutrition data. The ingredients listing is a list of all the ingredients of the food, which must be listed in descending order of predominance.⁵⁷ This labeling requirement is not always helpful because the ingredients are listed by their chemical name, which many consumers cannot decipher. The nutrition labeling is a far more successful regime and can provide a template for a contract term labeling regime. Under the nutrition labeling law, information has to be displayed in a uniform format for all products. It is headed “Nutrition Facts,” it appears in a uniform place on the package, in a black framed box, in readable font, and it presents information on several specific categories that matter to consumers: calorie count, fats, cholesterol, sodium, and carbohydrates. The nutrition data box also provides, somewhat less prominently, information about vitamins and minerals.⁵⁸

This labeling regime is widely perceived to be successful, at least for sub-sets of consumers who have special dietary concerns and are more anxious to acquire the

⁵⁷ Food, Drug, and Cosmetic Act § 403(i) and (k), 21 C.F.R. 101.4, 101.22-35.

⁵⁸ Peter Barton Hutt, *A Brief History of FDA Regulation Relating to the Nutrient Content of Food*, in NUTRITION LABELING HANDBOOK (R. Shapiro, Ed., 1995)

information, and increasingly for the overall population of shoppers.⁵⁹ Labeling of standard form contract terms can be designed in a similar way: a uniform box in a uniform and prominent place on the package; in it no more than a handful of categories (warranty term, return policy, DRMs, choice of forum), each summarized with standard meaning phrases. In specific areas of contracting, there can be specific labeling that is relevant only to these contracts. For example, in labeling of software EULAs, it would be important to know if spyware is being installed along with the software. This way, consumers can then find the information more readily and understand it more easily.

Interestingly, in nutrition labeling it is the list of “negative” nutrients that is displayed more prominently (e.g., cholesterol and fats). Information about “positive” nutrients such as vitamins is also available, but consumers do not need the nutrition data box to know these attributes—the producer has the incentive to place this information prominently in the ads and on the front of the package. In similar way, boilerplate data labeling is intended to display information about “negative” terms—such that consumers are not likely to find in the promotional displays. The reason why in the first place we are concerned with unreadable terms is the existence of negative terms, and thus these are the terms that would prominently appear on the label.

CONCLUDING REMARKS

This Essay is part of a conference on “Private Law Society and the Common Frame of Reference.” This is a theme that invites the commentator to explore a host of fundamental issues on how modern European contract law accords novel protections for individual transactors and bolsters the role of private law as a platform for

⁵⁹ See, e.g., DIETARY REFERENCE INTAKES: GUIDING PRINCIPLES FOR NUTRITION LABELING AND FORTIFICATION 113 (Institute of Medicine, 2001)

economic activity. And yet, I declined the temptation to remark on the bigger themes, and chose instead to talk about a fairly narrow subject—the opportunity of individuals to read standard form terms before concluding the contract. It is my view that this issue of opportunity-to-read stands in the way and needs to be cast aside. It diverts attention away from other aspects of private law policy that could provide meaningful protection to individuals against the power of large, sophisticated parties. Indeed, in the U.S. the problem of shrinkwrap contracts, which deprive individuals of the opportunity to read the fine print, has featured prominently in any codification project (UCITA, ALI Principles), and the leading case on the issue has been labeled as “one of the most famous American contract cases in the past decade.”⁶⁰ This problem of “terms in the box” was also a prominent sticking point in the attempts to revise Article 2 of the Uniform Commercial Code and its infamous section 2-207, and perhaps accounts for the failure of that reform.⁶¹ Contract law is obsessively engaged with this problem of enhanced opportunity to read, in the name of principles of autonomy and individual power, but ironically—so I claimed in this Essay—the solutions currently offered do nothing to promote competition and robust assent. Opportunity to read fine print is sterile ammunition against the power and sophistication of contract drafters.

It was beyond the scope of this Essay to examine the other prominent “European” solution to problem of oppressive fine print terms—mandatory restrictions on the content of consumer contracts.⁶² Unlike opportunity-to-read, this may be an effective form of regulation, but some might worry that it forces upon consumers price/terms bundles that are not optimal. This form of intervention is a far

⁶⁰ William Whitford, *Appendix: ProCD v. Zeidenberg in Context*, 2004 Wisc. L.Rev. 821.

⁶¹ James J. White, *Contracting Under Amended 2-207*, 2004 Wisc. L.Rev. 723, 737-742.

⁶² See, e.g. DCFR Intr. 27-28; DCFR II.-9:411 (“Terms which are presumed to be unfair in contracts between a business and a consumer”); Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.

cry from the ideal of a Private Law Society, under which individuals are empowered to make private choices and are not restricted to purchasing regulated bundles.

Critical as I may be of existing directions for reform, I ended the study by pointing to other mechanisms that can effectively help consumers get greater satisfaction in their commercial transactions. With or without legal intervention, mechanisms of ratings of service and labeling of hidden characteristics have been developing to inform a broad spectrum of consumer choice. For the typical autonomous individual, who does not want to be submerged in information but rather to enjoy a satisfying consumption experience, these mechanisms provide a superior opportunity to navigate between complex market choices.

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