The Clicking without Reading Problem

Dennis W. K. Khong
School of Law, University of Manchester
United Kingdom

> "One of the mysteries of human conduct is why adult men and women all over England are ready to sign documents which they do not read, at the behest of canvessers whom they do not know, binding them to pay for articles which they do not want, with money which they have not got."
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> Sir Gerald B. Hurst[1]

Abstract

This paper discusses the common problem of Internet and computer users clicking and agreeing to online and electronic contract terms without first reading and evaluating them. The clicking without reading problem is an extension to the signing without reading problem occurring with paper-based contracts. In this paper I examine the reasons why it might be efficient for individuals to click without reading, although it might lead to a socially inefficient outcome. A behavioural approach will be used to analyse this problem, and paternalistic approach such as the UK Unfair Contract Terms Act 1977 and the European Directive on Unfair Terms in Consumer Contracts are examined. Finally, taking into account the unique characteristics of online and electronic contracts and the associated goods and services, this paper suggests a solution in favour of paternalism as against libertarian paternalism.

1. Introduction

A few years ago, software firm PC Pitstop included a clause in the End-User Licence Agreement (EULA) of their software promising to anyone who read it a monetary payment if he sent a note to an email address in the EULA. Only after four months and more than three thousand downloads later, did someone finally write in to claim the payment. PC Pitstop gladly wrote a cheque of $1000 to the lucky emailer.2

In October this year, Kelhem Salter booked a flight through an online travel website. Burried in the terms and conditions of his booking agreement, which he did not read, is a clause which states that "[You] agree to receive promotional material either by post, e-mail, phone or SMS text." Subsequently he started to receive SMS messages on his mobile phone for which he was charged £1.28 each, and he was unsuccessful in getting his mobile phone operator to cancel his charge. His mobile phone operator

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[1] Hurst, *Closed Chapters* (Manchester: Manchester University Press 1942), p. 141.
[2] Magid, 'It Pays to Read License Agreements' undated, at http://www.pcpitstop.com/spycheck/eula.asp.

defended its action by claiming that Kelhem has given prior consent to receiving the messages.[3]

Agreeing to terms and conditions by way of clicking on an on-screen button or ticking an 'I agree' checkbox is often required when installing computer software or setting up an account on Internet websites. Unfortunately, most users do not be read these terms and conditions as this neglect is mostly harmless most of the time, but as the story above illustrates, inconvenience and costs may be imposed on users who inadvertently 'agreed' to onerous terms.

Many reasons can be found for the clicking without reading phenomenon, and some of them have a psychological or behavioural basis. For example, the person who agrees to the terms and conditions is not the same person who uses the online service or computer software. The terms and conditions are too long and difficult to understand. Users do not believe that 'bad' terms exist in the agreement, and finally, that the law will invalidate unreasonable terms to their advantage. In the behaviour literature, omitting to read because of cognitive limitation is a form of bounded rationality, a belief that bad or unreasonable terms will not exist or will be unenforceable may be rooted in optimistic bias.

2. Standard Form Contracts

Standard form contracts are the most common form of contracts. They are known as contract of adhesion, because the purchaser in a consumer contract can only accept the terms *in toto* or reject the contract altogether. No negotiation is conducted over the terms of the contracts, except maybe on the price. Cooter and Ulen try to distinguish standard form contracts due to efficiency reasons from contract of adhesion due to seller's monopoly power.[4] However this distinction is difficult to make in practice because both efficiency and monopoly effects may be observed at the same time.

The existence of standard form contracts cannot be explained only by sellers exercising their monopoly power. In the world of neoclassical economics, all actors are assumed to have perfect information and the market is characteristically competitive. Consequently, even without bargaining, sellers offering contracts which have terms not demanded by purchasers will not survive and will be driven out of the competitive market. Therefore, all contract terms, even if they appear onerous or 'unfair', are supposed to be efficient. For example, a piece of software may be offered for free or at a low price without any support or service guarantee, and at the same time sold at a high price with support included, for this essentially is the business model for free or open source software. Consequently, the conclusion of classical law and economics literature on standard form contracts is that absent evidence of market power, the terms of thereof should be taken to be efficient, and all terms should be enforced irrespective of whether they might appear to be reasonable or otherwise to a third party observer. [5]

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[3] Judge, 'Don't Ring Us, We'll Fleece You' *The Times*, 10 December 2005.
[4] Cooter and Ulen, *Law and Economics*, 4th ed. (Addison Wesley 2003), p. 288.
[5] Kronman and Posner, *The Economics of Contract Law* (Little Brown & Co 1979).

The same economic analysis becomes controversial when applied to monopolistic market structures, as economic modelling shows that profit-maximising firms will also offer favourable terms which are observable to potential consumers if by doing so, profits will increase due to the increase in the willingness to pay of the purchasers.[6] But this is not a conclusion accepted with consensus. there is no consensus on whether terms in standard form contracts remain efficient when the seller has any degree of market power.

The use of standard form contracts is efficient for another reason: they promote the smooth functioning of the economy by reducing the transaction cost of negotiation and allow cheap repeated transactions without having to negotiate anew each time a contract is made. The legal effects of terms in standard form contracts are better known, notwithstanding that they are written in legalese, because they follow precedents and established judicial interpretations. Drafting a contract is unlike writing an essay. Extreme care has to be taken in the careful use of words and phrases, as early court cases might have already made a determination of the meanings of those words. A standard form contract therefore is usually the fruit of careful deliberation to minimise the uncertainty in legal effects.

The sales and customer service personnel in modern business organisations, more over, are not at liberty to negotiate and vary contract terms. At most they may be given power to offer a discount on the price. In fact, it might be the case that no one in the business organisation has the power to vary contract terms as these terms are pre-approved by committees and have been carefully written and vetted by teams of lawyers.

3. The Signing Without Reading Problem

The clicking without reading problem is a variation of the signing without reading problem.[7] The fist puzzle for scholars in the signing without reading problem is why many people accept standard form contracts without reading them. Standard economic explanation points to the problem of asymmetric information: sellers who draft the standard form contract knows and understands the content and implications of the contracts while purchasers often do not have the same capacity to do so. Consequently, the analysis goes, cheap but consumer-unfriendly contracts will drive expensive but consumer-friendly contracts out the market, just like in the case of the market for lemons.[8]

Some scholars believe that if a certain number of consumers read the contract terms and thereby rejecting contracts with 'bad' terms, the market will be induced to

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[6] Korobkin, 'Bounded Rationality, Standard Form Contracts, and Unconscionability' (2003) *Uni. Chi. L. R.* 1203, 1211; Akerlof, 'The Market for Lemons: Quality Uncertainty and the Market Mechanism' (1970) *Quarterly J. Econ.* 488.

[7] De Geest, 'The Signing-Without-Reading Problem: An Analysis of the European Directive on Unfair Contract Terms' in Schäfer and Lwowski eds., *Konsequenzen wirtschaftsrechtlicher Normen: Festschrift fuẗr Claus Ott zum 65 Geburtstag* (Wiesbaden: Gabler Verlag 2002).

[8] Goldberg, 'Institutional Change and the Quasi-Invisible Hand' (1974) *J. Law & Econ.* 461.

provide contracts with 'good' terms.[9] Others on the other hand shows that short of everyone reading the contract terms, bad terms will persist in standard form contracts due to the problem of free-riding by non-readers.[10]

Behavioural economists too have tried to offer several explanations for the signing without reading problem.[11] The first reason is related to bounded rationality of the purchasers. Unlike the consumers in neo-classical economics, purchasers in the real world have cognitive limitation. They do not have the ability to understand the meaning of all terms, as the latter usually are in legalese, and even if they could understand the meaning of the terms, they might not be able to predict the consequences of agreeing to those terms. Therefore bounded rationality implies that purchasers have limited information and limited information processing ability.

The second behavioural explanation is the optimistic bias. Because bad contracts which severely penalise purchasers are so rarely heard of, due to availability heuristic, purchasers rationalise that the chances of them being affected negatively because of standard form contracts is extremely small. They may also carry the belief, rightly or wrongly, that the law protects them from unfair or bad contract terms.

4. Solutions to the Signing without Reading Problem

Regardless of the economic explanations, courts and legal scholars have always maintained their suspicions over standard form contracts. Even when the doctrine of freedom of contract held sway in the nineteenth century,[12] judges were utilising various contractual doctrines to exclude standard form contractual terms from being enforced or interpreted to the purchaser's detriment. For example, the doctrine of incorporation of terms requires that contractual terms have to be brought to the attention of the purchasers prior to the formation of contract in order to be valid.[13] The *contra proferentum rule* allows courts to interpret ambiguous exclusion clauses in standard form contracts in favour of the party who did not write the contract.[14]

With the turning of the tide on the freedom of contract, regulatory intervention in the form of regulation against unfair terms becomes more important. The Unfair Contract Terms Act of 1977 avoids exclusion or liability-limiting clauses in some contracts, and imposes a reasonable test on some of these clauses. The European Directive 93/13/EEC on Unfair Terms in Consumer Contracts future restricts certain types of contract terms in consumer contracts.

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[9] Schwartz and Wilde, 'Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis' (1979) *Uni. Penn. L R.* 630; Trebilcock and Dewees, 'Judicial Control of Standard Form Contract' in Burrows and Veljanovski eds., *The Economic Approach to Law* (London: Butterworth 1981).

[10] Katz, 'The Strategic Structure of Offer and Acceptance: Game Theory and the Law of Contract Formation' (199) *Mich. L. R.* 215; Gazal-Ayal, 'Economic Analysis of Standard Form Contracts: The Monopoly Case' (2007) 24 *Eur. J. Law & Econ.* 119.

[11] See Korobkin, n. 6.

[12] Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford: Oxford University Press 1979).

[13] *Parker* v. *South Eastern Railway* (1877) 2 CPD 416.

[14] See. eg. *John Lee & Son (Grantham) Ltd*. v. *Railway Executive* [1949] 2 All ER 581.

4.1 Paternalism

The regulatory approach to restrict the enforcement or applicability of certain contractual clauses in standard form contracts can be terms as a paternalistic approach. Paternalism in contract law comes in the form of mandating certain terms to be included in some classes of contracts, and invalidating clauses on grounds such as unreasonableness or unconscionability. In conventional law and economics terminology, paternalism is a means of correcting purported market failures. However, the paternalistic approach is not unanimously accepted by all economists. To free market economists, legal paternalism is illiberal and more regulation does not guarantee less inefficient contracts.[15]

In the UK, the Unfair Terms in Consumer Contracts Regulations 1999 implements the EC Directive 93/13/EC on Unfair Terms in Consumer Contracts. Regulation 8 makes an unfair term non-binding on the consumer. Schedule 2 provides a non-exhaustive blacklist of contractual terms which are regarded as unfair. This list include clauses which unilaterally alter the terms of a contract and which limit the ability of the consumer to exercise his rights for legal remedies.

In addition to the 1993 EC Directive, the Unfair Contract Terms Act 1977 renders exclusion clauses invalid or subject to a reasonableness test. Other legislation such as the Consumer Credit Act 1974, Road Traffic Act 1988 in respect of compulsory insurance, Public Passenger Vehicles Act 1981, Landlord and Tenant Act 1985, Consumer Protection Act 1987 on product liability, and other Acts of Parliament restrict or avoids exclusion clauses which are bad for consumers.

4.2 Libertarian Paternalism

An alternative to paternalism is based on the findings of behavioural law and economics. Instead of mandating or invalidating contract terms, libertarian paternalism seeks to correct behavioural biases while promoting consumer's choice.[16] Hence, libertarian paternalism can be seen as a form of soft paternalism.[17]

The approach of libertarian paternalism is to nudge consumers in such as way that they would enter contracts efficiently. In the case of the signing without reading problem and the clicking without reading problem, a requirement may be implemented that unusual contract terms have to be highlighted and explained in easy to understand language before they can be incorporated and enforced. This may serve as an information-forcing mechanism to overcome the rational ignorance problem.

In *Spurling Ltd.* v. *Bradshaw*, Denning LJ. suggested in an *obiter dictum* that "the more unreasonable a clause is, the greater the notice which must be given of it. Some clauses which I have seen would need to be printed in red ink on the face of the

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[15] Coase, 'The Choice of the Institutional Framework: A Comment' (1974) *J. L. & Econ.* 493.
[16] Thalar and Sunstein, 'Behavioral Economics, Public Policy, and Paternalism: Libertarian Paternalism' (2003) *Am. Econ. R.* 175; Thalar and Sunstein, 'Libertarian Paternalism is Not an Oxymoron' (2003) *Uni. Chi. L. R.* 1159.
[17] Ogus, 'The Paradoxes of Legal Paternalism and How to Resolve Them' (2010) *Legal Studies* 61.

document with a red hand pointing to it before the notice could be held to be sufficient."[18]

It is true that the paternalistic approach of invalidating contract terms is at odds with the libertarian paternalistic approach where no terms are invalidated. Each approach has its advantages and disadvantages. For example, paternalism may be considered as a safety net where no reasonable consumer is willing to accept those terms deemed to be void and unfair. The disadvantage of paternalism is that choice is restricted and some consumers may want to accept bad terms at low price. Whether paternalism is a good is very similar to the debate over minimum wage. Regulation against unfair contract terms is like a wage floor. In theory there will always be consumers who are willing to buy accept a term under the floor, but by granting an inalienable protection, a redistribution from the seller to the purchaser is made.

5. Further Issues Regarding the Clicking Without Reading Problem

The clicking without reading problem adds an additional layer of complexity to the signing without reading problem. As alluded above, clicking on a graphical button or checking a tick box occurs mainly in computer software, on a website, or through software connected to the Internet. Invariably, the contract terms are adhesive in nature, and the consumer or purchaser does not have the opportunity to bargain with a human counterpart. That means purchasers could only vote by their feed and not voice their dissatisfactions.[19] Therefore, it is impossible in theory to detect whether any status quo bias is in play when purchasers accept standard form contracts without reading.[20]

5.1 The Anonymous Internet

There is a saying that on the Internet, no one knows if you are a dog. The majority of websites and services on the Internet do not require the validation of the identity of the users. False identification information may be entered with impunity. Indeed this might be a good thing, since there is always the danger that websites may misuse personal information to commit identity fraud.

One situation where a semblance of true identity is needed is when a purchaser makes a purchase using a credit or debit card on an e-commerce website. This is needed for the card processing bank to verify the identity of the cardholder. Even that, the requirement of disclosing the true identity to the online seller may be circumvented by using a reputable third party payment gateway such as Paypal so that no credit card information is directly provided to those e-commerce websites.

Apart from the issue of identity fraud, anonymity in standard form contract is a good thing to the purchasers. As the identity of the purchaser is unknown means that it is

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[18] [1956] 2 All ER 121, 125.

[19] Hirschman, *Voice, Exit and Loyalty: Responses to Decline in Firms, Organizations, and States.* (Cambridge, MA: Harvard University Press 1970).

[20] See Klick, 'The Microfoundation of Standard Form Contracts: Price Discrimination vs. Behavioral Bias' (2005) *Flo. State Uni. L. R.* 555, 558.

extremely difficult for the seller to take legal action against anonymous purchasers to compel them to perform certain obligations. This would therefore work in favour of restricting onerous terms in online or electronic contracts, and make the contracts more like unilateral contracts. On the other hand, sellers could compensate this restriction by giving themselves unilateral power to terminate the contract or to vary the contract terms by way of notice.

It has to be noted that anonymity by itself serves as no injunction against incorporation of onerous terms such as those imposing financial burden on purchasers. But the fact that purchasers are largely anonymous means that it will be impossible in practice to enforce those provisions. It is difficult to say whether it will be more likely for sellers to incorporate this kind of terms or otherwise, taking into account that purchasers will likely not read contract terms by hiding behind a cloak of anonymity.

5.2 Imperfect Substitutes

Software and websites, as objects of copyright, tend to be differentiated from one another. If a compositing substitute is available, it will naturally be an imperfect substitute, for a perfect substitute will likely be bordering on copyright infringement. Because of this imperfect competition, the conditions for the emergence of efficient terms because of competition are not likely to materialise. Even if purchasers read the terms and conditions of contract, they would not be able to compare two products or services on a like-to-like basis. As some research has shown, our cognitive limitation means that we would not be able to weigh the costs and benefits of different salient and non-salient features without omitting some of them in our mental calculation. As a rational response, contract terms might tend not to be given much weight compared to price and product features.

5.3 Network Effect

Social networking websites gain value and utility exponentially as the number of users increases. As the number of users increases, the potential 'network' connections that can be made between users increases exponentially. At the same time with the growth of the number of users, those websites become more attractive for non-users to join, and thereby increases in value and market power. This economic effect due to the number of users is known in the literature as network effect or network externality.[21]

One consequence of network effect is that the first mover advantage becomes very important. The first provider of a service which manages to attract a sufficient number of users will quickly become dominant in a particular relevant market. It will also gain market power to prevent users from changing to other providers because of network-related switching cost. For example, now that Facebook has gained significant number of subscribers in certain geographical markets, it would be very difficult to migrate to an equivalent social networking websites unless many subscribers move *en bloc*.

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[21] Liebowitz and Margolis, 'Network Effects and Externalities' (1998) 2 *New Palgrave Dictionary of Economics and the Law* 671.

Network effect may also be another reason for the clicking without reading problem. Apart from optimistic bias, new users will tend to weigh in favour of joining social networking websites when they already have friends in those networks. Therefore, agreeing to terms and conditions becomes irrelevant or insignificant.

6.1 Paternalism or Libertarian Paternalism?

The two approaches to the clicking without reading problem are paternalism and libertarian paternalism. Compared to libertarian paternalism, paternalism takes a high-handed approach to the problem.

Libertarian paternalism would work if information debiasing would lead purchasers to make better informed choices under the condition of market competition. However, the operating conditions for online and electronic contracts are characteristically different from traditional signing without reading problem, where in the latter, the object of the contract may be the supply of a good or service available in a very competitive environment.

Characteristics of software and websites, such as imperfect substitutions and network effects, mean that the condition for perfect competition is almost never realised in the online and electronic environment. As such even with information debiasing, the libertarian paternalistic approach would not guarantee an outcome of efficient contracting.

Therefore, the remaining solution lies with paternalism, which is by and large, the European approach. The European Directive on Unfair Terms in Consumer Contracts was drafted in an era where the electronic and online contracting was not pervasive. It was indeed written when paper contracts were still the norm. Therefore, it might be high time to examine the practices of electronic and online contracts to see whether a new directive on unfair contract terms might be needed.

6.2 Conclusion

The clicking without reading problem and the antecedent signing without reading problem are not going away any time soon. The occurrence has deep-rooted behavioural reasoning. The only issue for policy makers is whether to choose the high-handed approach of paternalism or a light-handed approach of libertarian paternalism.

It might appear that in a competitive environment, a light-handed approach might be all that is necessary, although there are scholars who remained unconvinced. However, when it comes to the online and electronic environment, economic effects such as imperfect substitutions and network effects tilt the issue in favour of a heavier-handed approach, as a perfectly competitive environment is never realised. It might be necessary to revisit the European Directive to see if any additions to its list of unfair terms should be made to take into account the unique characteristics of online and electronic contracts.