Is Contract Law Ready for the Internet of Things?

Author : Nancy Kim

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Stacy-Ann Elvy, *Contracting in the Age of the Internet of Things: Article 2 of the UCC and Beyond*, 44 **Hofstra L. Rev.** 839 (2016).

When Amazon announced that it was expanding its Dash Button Program, its stock went up 2.3%. Amazon's Dash button refers to a wi-fi enabled device that can be attached to a cupboard or refrigerator and allows a customer to order a specific item, such as more laundry detergent, simply by pressing the button. While some wondered whether consumers really needed this, others wondered whether the law was ready for this. As recent events reveal (such as the tragedy of Tesla's self-driving automobile accident), technology is raising legal questions more quickly than lawmakers can anticipate or respond to them. In her article, Contracting in the Age of the Internet of Things: Article 2 of the UCC and Beyond, Stacy-Ann Elvy considers whether contract law is ready for the Internet of Things, and concludes that the answer is a regretful but resounding No. Contract law is woefully behind the times when it comes to dealing with issues raised by the Internet of Things ("IOT"). Elvy does a frightfully good job of identifying some of the potential problems—are such devices agents? (Probably yes). How should courts assess consumer assent when contracts are entered into through IOT devices? (It's complicated). Perhaps most frightening of all—won't the "legion of data" generated by the IOT worsen the preexisting information asymmetry in favor of companies? (Certainly).

Elvy's article makes three primary arguments. First, where IOT devices enter into contracts on behalf of consumers, existing laws regulating e-commerce may not adequately protect consumers. Second, Article 2 of the UCC and contract law generally are ill-equipped to deal with the IOT. Finally, information asymmetries, exacerbated by the data generated by the IOT, will shift the power balance even more in favor of companies. Elvy makes certain proposals to recognize and respond to these changes in the contracting environment brought about by the IOT. Her proposed changes to Article 2 include prohibiting post-contract formation disclosure of terms in consumer IOT contracts, prohibiting the use of unilateral amendments and defining unconscionability to include high levels of information asymmetry. Elvy also recommends that courts consider the extent to which consumers can access and control the data which they generate. Her proposals are exhaustive and thoughtful and well-worth a read. A short review does not do them justice.

In making her arguments, Elvy responds to anticipated critiques, including the stale and timeworn arguments that consumers have a duty to read and that form contracts lower transactions costs. She also counters the more recent argument that the IOT will increase consumer bargaining power and decrease information asymmetry.

Assent to mass consumer contracts, of course, was a problem even before the IOT. It became a bigger problem with wrap contracts—where clicking, swiping and tapping were viewed as sufficient to trigger a duty to read. But, as Elvy notes, the Internet of Things threatens to make online contractual assent even more fantastical with the introduction of electronic contracting agents. Elvy refers to the growing distance between consumers and contracts as "contract distancing" and argues that the "notice and opportunity to read" test creates even more problems when it comes to the IOT. Of course, she's right. The more removed the consumer is from the act of contracting and the harder it is to access the actual terms, the less real the consequences of that contract seem. If you can even call it a contract.

Elvy's final recommendation is that the Uniform Law Commission and the American Law Institute (which is currently working on a Restatement of Consumer Contracts) consider the changes to the contracting environment brought about by the IOT. The UCC and the Restatement (Second) of Contracts recognized how changes in the marketplace created changes in contracting behavior. In order to stay true to the underlying objective of contract law (which after all, is the

fulfillment of the reasonable expectations of the parties, not maximizing efficiency or eliminating transaction costs), the ULC and the ALI shifted doctrinal rules to fit the marketplace. The commercial landscape has shifted once again. It is high time for contract law to respond.

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