Are Sign-in-Wrap Agreements Unreadable?

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Uri Benoliel & Shmuel I. Becher, *The Duty to Read the Unreadable*, 60 **B.C. L. Rev.** __ (forthcoming, 2019), available at SSRN.

Uri Benoliel and Shmuel I. Belcher answer the question posited in the title to this review with an absolute yes. In a well-written, concise, and quite persuasive article, the authors test the readability of 500 of the most popular websites' "sign-in-wrap agreements," which require online users to accept terms before using the website's services. The authors employ two readability tests that measure the average length of sentences and the average number of syllables per word. After detailing the legitimacy of these tests, the authors report that the sign-in-wrap agreements are no more readable than academic journal articles and thus are "unreadable" by consumers. The article proceeds by providing a nice discussion of the nature of the two tests, the results, and the implications for contract law. The article adds important weight to other studies that conclude that Internet agreements challenge consumers. Although hardly revelatory, such empirical studies increase the pressure on lawmakers to revise the duty-to-read rule in the context of consumer standard-form contracts.

Benoliel and Becher recognize that long sentences and multi-syllabic words are only two of the many problems facing consumers who make Internet agreements. But they reason that paying attention to part of the problem provides a step in the right direction. They, therefore, suggest a series of regulatory moves and judicial responses. Perhaps most important, the authors argue that vendors drafting consumer Internet contracts should have a duty to draft agreements that receive a favorable readability score. The authors also sensibly call on courts to continue policing substantive terms and suggest that judges should relax the duty-to-read rule when consumers are faced with unreadable contracts. The authors are more tepid about another possible reform, requiring vendors to include a plain-language version of the agreement alongside the contract. They reason in part that two versions of the agreement can only create confusion over which version to read and which is binding.

Although Benoliel and Becher see the potential pitfalls of these and other solutions, they may have too readily discounted a few problems. Perhaps most concerning is the possibility that readability regulation may backfire by making consumer Internet contracts more likely enforceable without improving their substance. The authors recognize that sophisticated drafters may satisfy the readable tests with shorter sentences and words, but may substitute legalese that does not improve comprehension or may use deliberately flawed grammar. They also see the possibility that consumers will not read even more readable agreements because of their length, consumer over-optimism that nothing will go wrong, or the temptation to free ride on others reading. They respond in part that consumer behavior is not possible to predict, but that consumers may more likely read if they expect readable terms. However, if the authors' prediction is mistaken, legalese remains a challenge, and consumers still don't read, improving readability will only mean the loss of some consumer ammunition for overturning contentious terms.

Another quibble. Benoliel and Becher's treatment of the role of Internet watchdog groups, which can evaluate and report on the fairness of Internet standard forms, is a bit confusing. At one point, the authors argue that market forces and reputational concerns likely will not help lead to more readable terms, but they do not consider whether watchdog groups can help change the equation. At an earlier point, however, the authors see the benefit of readable terms in reducing the transaction costs of watchdog group reporting, implicitly acknowledging the efficacy of such groups.

People should pay attention to *The Duty to Read the Unreadable*. The article not only substantiates the long-heard cries of the impossible nature of Internet standard forms, but does so with hard evidence. Further, the authors'

thoughtful evaluation of their proposed reforms underscores the difficult challenge of improving the plight of Internet consumers.

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