The Cute Contracts Conundrum

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David Hoffman, Relational Contracts of Adhesion, 85 *Univ. of Chicago L. Rev*, 1395 (2018).

When considering online contracts, three assumptions often come to mind. First, terms of service and other online agreements are purposefully written to be impossible to read. Second, lawyers at large law firms create these long documents by copying them verbatim from one client to another with minimal tweaking. But third, none of this really matters, as no one reads these contracts anyway.

David Hoffman's recent paper *Relational Contracts of Adhesion* closely examines each of these assumptions. In doing so, Professor Hoffman provides at least two major contributions to the growing literature and research on online standard form contracts. First, he proves that these common assumptions are, in some cases, wrong. Second, he explains *why* these surprising outcomes are unfolding.

First, Hoffman demonstrates that some terms of service provided by popular websites are in fact written in ways that are easily read. Indeed, the sites are hoping that their users actually read the document they drafted. These terms are custom-drafted for each specific firm, and use "cute" language as part of an overall initiative to promote the site's brand and develop the firm's unique voice.

To reach this surprising conclusion, Hoffman examines the terms of (among others) Bumble, Tumblr, Kickstarter, Etsy and Airbnb. He finds them to be carefully drafted for readability. Some use humor; others provide users with important rights. Drafting unique, "cute", and readable provisions is a costly and taxing task both in terms of the actual time the employees must put in, and the additional liability these new provisions might generate for the firm because of their lenient language. Yet these terms have emerged.

What are these provisions and their drafters trying to achieve? In many cases, Hoffman argues, they do *not* strive to achieve the classical objectives of contractual language (namely, setting forth the rights and obligations of the contractual parties). Rather, they attempt to *persuade* the users reading these provisions (either before or after the contract's formation) to act in a specific way. Hoffman refers to such contractual language as "precatory fine print." The firms understand that these provisions will probably never end up being litigated, even though some of the rights the firms could be asserting in court would most likely be upheld.

Hoffman's second main contribution relates to his attempt to explain *why* firms are now taking the time to incorporate cute and readable texts into documents no one was supposed to read anyway. To answer this question, Hoffman, who is a seasoned expert in the field of standard-form-contract law and theory, ventures outside of this field's comfort zone. Here, he reaches out to several in-house lawyers after failing to come up with a reasonable theoretical explanation for the firms' effort in drafting documents nobody will read or use.

The results of the survey of in-house lawyers are intriguing. They indicate that the drafters of the noted contractual provisions turn out to be insiders — the firms' lawyers and general counsel, as well as other employees — as opposed to outside counsel. These employees explain that, in drafting, their objectives were to better reflect the firm's ideology in the contractual language. In doing so, they were striving to build consumer trust and promote the firm's brand. Rather than bury contractual provisions, they were interested in showcasing them. The survey respondents also indicated that the contracts were drafted with specific audiences in mind: not necessarily their users, but often journalists and regulators. Furthermore, some firms followed up and found that indeed the initiative was successful and

that the messages reflected in the modified contract have been effective in successfully conveying positive signals about the firm, especially given favorable press coverage.

Hoffman's study focuses on a diverse set of websites. This diversity makes it difficult to wave away his findings by arguing that they result from the specific circumstances involving the examined websites. Indeed, each one of the selected websites is unique (something Hoffman acknowledges). Some are struggling to enter a market dominated by a powerful incumbent, while others are catering to a specific set of users who might be more sensitive to abusive contractual language (such as merchants). The emerging pattern across diverse websites is impossible to ignore. However, the implications of this study will require additional research, as it is very difficult to further predict (as Hoffman admits) which firms will offer friendly contractual language in the future.

One of this article's strengths is its willingness to recognize its potential methodological shortcomings. Asking a handful of in-house lawyers why they drafted the contracts the way they did can lead to unrepresentative results. In addition, the fact that respondents tended to praise their own hard work and complain about the limited assistance they received from the external law firms is far from surprising. Towards the end of the paper, Hoffman provides candid responses to possible critiques regarding the paper's methodology. He also acknowledges that the "cute" language adopted by firms might be a manipulative ploy to enhance trust without showing anything in return. Yet he finds the redrafting important and potentially helpful to consumers, given the fact that it requires firms to substantially reflect on their business practices. This process might lead firms to cease obnoxious forms of conduct many executives will feel uncomfortable with once they are fleshed out. Indeed, in the digital environment, mandatory self-reflection is a common strategy to promote the consumer's objectives and can be found in the GDPR's requirement to engage in impact assessments (Article 35).

Sometimes, the answers to difficult questions are simple. Contractual language is not always unfriendly to users (at least in form, if not in substance) because the actual humans working at the relevant firms feel bad about drafting draconian provisions. It is heart-warming to learn that occasionally, internal battles within tech firms regarding user protection end up settled in the users' favor (for a famous example where that did not happen, see this WSJ report regarding Microsoft). One can only hope that as firms mature, gain market value, and lock in a substantial user segment, they will not have a change of heart and shift back to unreadable, mind-numbing standard forms and contracts.

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