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We don't ignore price.
Why do we ignore boilerplate contracts?

By Jim Gibson
illustrations by Katie McBride

Last year, I bought four computers. I didn't really need them. It's a long story. It's a story about the market, about contract law, and about the power—or lack of power—of consumers like you and me.

As Americans, we have great faith in the power of the free market. And rightly so. Adam Smith's invisible hand is an unrivaled engine of economic prosperity. Its genius lies in its decentralization, its reliance on the collective power of billions of private, individual decisions about what to sell, what to buy, and how much to pay. This decentralization means that if a seller sets its price too high (or makes its quality too low), the government does not have to do anything. The market will take care of it by driving consumers to a competing seller with a lower price (or higher quality).

In theory, the invisible hand governs contracts as well, keeping their terms competitive. Salary too low? Bargain with your employer by demonstrating that others would offer you more. Interested in buying that nice yellow house with the picket fence? Once you remind the owner that there are other houses out there, you have the leverage to haggle over repairs, closing date, and whether the washer and dryer convey.

But despite what we learn in law school about offer, counter-offer, and the meeting of the minds, the vast majority of consumer contracts are contracts of adhesion—standard-form boilerplate that consumers either accept or reject wholesale.

In theory, this lack of negotiation presents no problem. So you can't bargain for different contract terms. So what? No one haggles with a supermarket cashier over the price of a loaf of bread, how thinly it is sliced, or whether it's covered by a warranty. If you don't like the pricing or the slicing, just take your business elsewhere. Our collective power as consumers drives unwanted terms out of the marketplace. Competition, not negotiation, is the answer.

Like price, a contract term is just a feature of the transaction. If you don't like the contract, just walk away. When you walk away, you're signaling to the invisible hand to come down hard on that seller.

But does the theory work in practice? Consider this: A couple of years ago, a British video game retailer hatched an April Fool's Day scheme. Buried deep in its online sales contract, to which customers had to agree when making a purchase, was the following term: "By placing an order via this Web site on the first day of the fourth month of the year 2010 Anno Domini, you agree to grant Us a non transferable option to claim, for now and for ever more, your immortal soul."

The fine print described how the company could exercise its option, including serving notice

"in 6 (six) foot high letters of fire." But if you were an attentive customer and you wanted to hold onto your soul—or had "already given it to another party"—you could opt out of the provision by clicking a link. Those who did were rewarded with a discount offer and the chance to win free games.

You can guess what happened. The vast majority of customers never clicked the link. They simply agreed to the entire contract without reading it.

We've all been there. We've all installed some new software on a computer or made a purchase on some website. Up pops a long, undifferentiated mass of legalese. Despite our legal training, what do we do? We breeze right past the terms, click on "I Agree," and get on with our lives. By doing so, we fail to send any signal to the marketplace about the content of the contract.

Why don't we read these terms? Courts take them seriously, so why don't we? We don't ignore price. Why do we ignore contracts?

Perhaps we're just lazy and get what we deserve when we become bound to contracts we never read. That's the attitude that contract law takes: As long as we have an opportunity to read, and we indicate our assent, the fact that we didn't read makes no difference to a court.

But at a certain point, the failure to read may be more smart than slothful. If the boilerplate is too long or arrives too late in the transaction, the cost of reading and rejecting it may exceed the benefit—even if we don't like its terms. We may rationally decide to allocate our limited time and attention to something other than fine print.

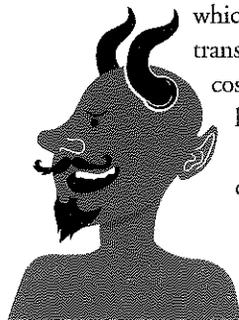
Which explanation is correct? Are we lazy, or are we smart? It's hard to answer that question in the abstract because some form contracts are shorter, more accessible, and easier to understand than others. It's a context-specific inquiry. And as I mulled over these issues last year, I found myself searching for a way to give the inquiry some context.

So I bought four computers.

I bought one computer from each of the top four sellers of Windows-based systems (Acer, Dell, HP, and Toshiba). Together, they account for two-thirds of the domestic market. Through their websites, I ordered a basic unit with no extra bells and whistles, just the standard hardware and software included in the purchase price.

Most of you have probably done something like this yourselves. But then I did something you didn't. I paid attention to the boilerplate. In fact, I kept track of every form contract to which I became bound in the course of these four transactions. Why? Because I wanted to measure the cost to the consumer of actually doing what the law thinks we should do: read all those terms.

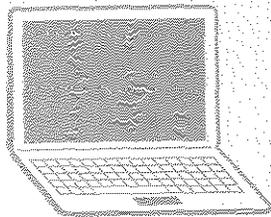
My approach was conservative; I included only contracts to which I explicitly expressed



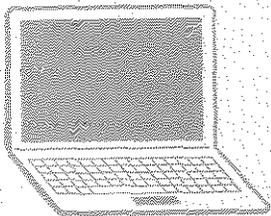
How to accept a boilerplate contract when



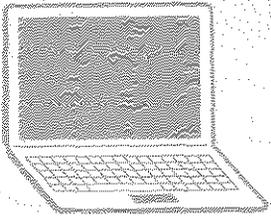
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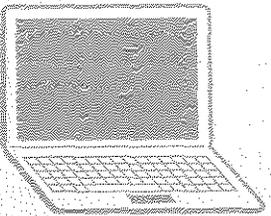
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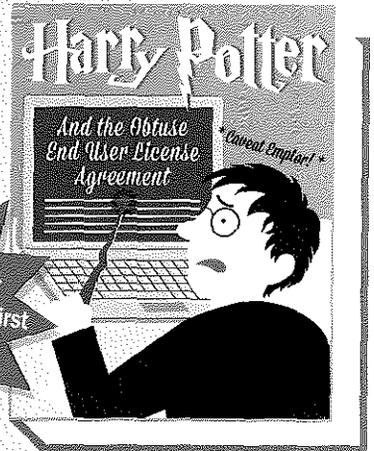
Actually, buy four.

On average, for each purchase you will enter into

25 binding contracts totaling

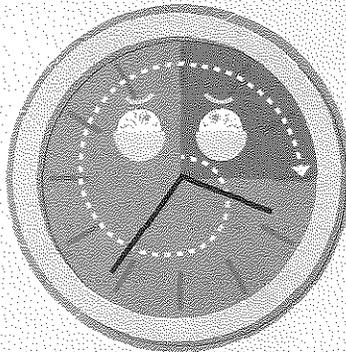
74,897 words.

This is just a tad fewer words than in the first Harry Potter book.



Based on studies of reading rates of legal texts, the average reading time for

74,897 words of boilerplate would be just over



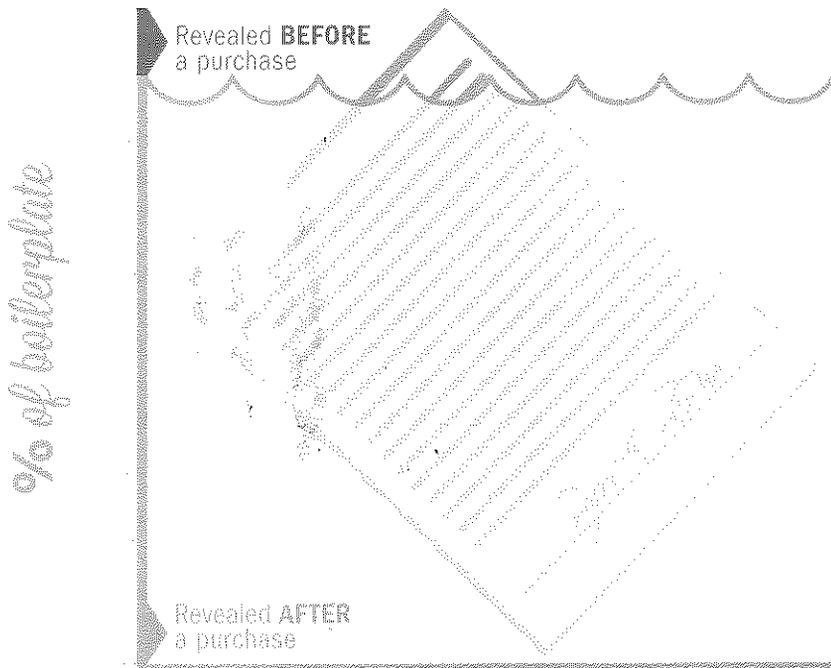
Even though sellers sometimes use the same boilerplate, reading the various contracts of all four, plus analyzing and weighing their differences, would take more than



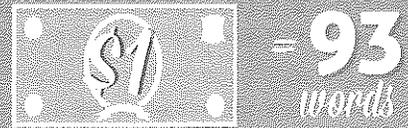
While sending a signal to the marketplace

Q: How is boilerplate like an iceberg?

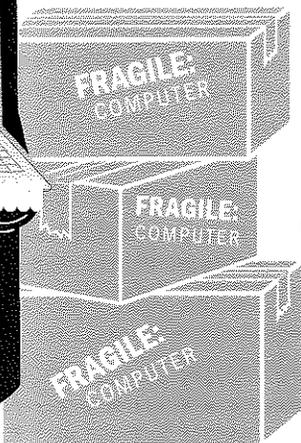
A: Most remains hidden until it's too late.



Computers are expensive, but time is also money. For the average computer purchase you'd read 93 words per dollar spent. Imagine having to read that much for some everyday purchases:



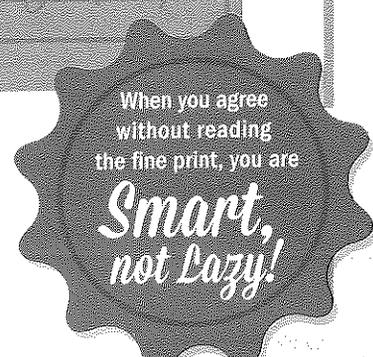
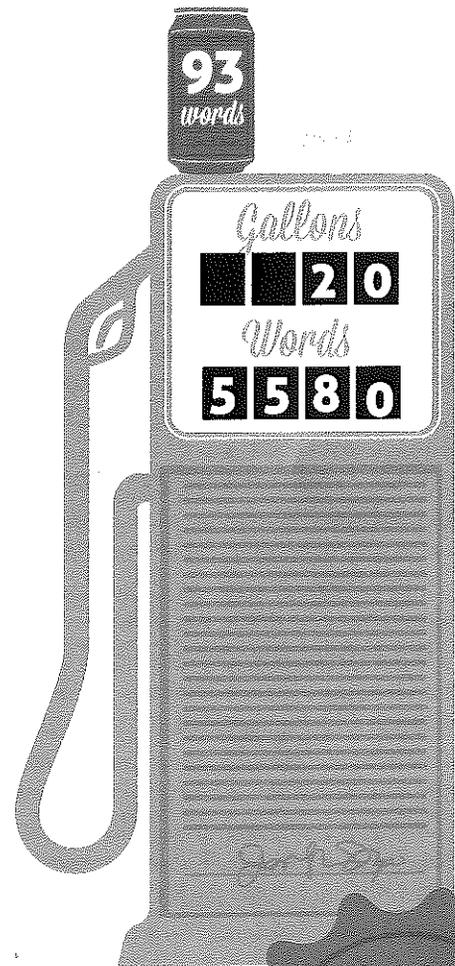
Now that you've read and compared boilerplate from four computers, send your signal to the marketplace.



Select the computer with the best specs and most favorable terms, and register your rejection of the unfavorable boilerplate by returning the rejected computers. Then, hope for your refund. Good luck!

Congratulations!
You have sent a signal to the marketplace.*

** Disclaimer: This is something no reasonable person should do.*



consent and whose terms were easy to locate. In other words, I included only contracts that a court would clearly enforce against me.

The result? Even with my conservative approach, each purchase produced, on average, 25 binding contracts totaling 74,897 words. To put that in perspective, it's just a tad fewer words than in the first Harry Potter book. Of course, Harry Potter is a page-turner, whereas boilerplate contracts are anything but. So perhaps a better analogy is tax forms: you could read every word of the instruction booklet for IRS Form 1040a, cover to cover, all 88 pages, and still be more than a thousand words short of the boilerplate total from a single computer purchase. (Or the truly masochistic can try reading a typical law review article, then reading it again, and then once more. Without skipping the footnotes.)

How long would it take the average consumer to read all those terms? Based on studies of reading rates of legal texts, the average reading time for 74,897 words of boilerplate would be just over seven hours. So if you want to send an informed signal to the marketplace about the terms of computer contracts, set aside almost a full working day. And even at that slow rate, studies show that comprehension is pretty poor.

But wait—computers are expensive. One should expect to spend some time checking them out before parting with so much money. I addressed this issue by expressing the consumer's burden in dollars per word. Even under this metric, the burden is high: 93 words per dollar spent. Imagine having to read 93 words of boilerplate each time you buy a can of soda, 279 words when buying a \$3 gallon of milk, or 5,580 words when filling a 20-gallon tank with gas.

What's more, these figures probably underestimate the cost to consumers of reading the fine print because competition works best when consumers can compare products. To really send an informed signal to the marketplace, a consumer would have to read the boilerplate from more than one product. Some contracts will be the same from seller to seller—for example, all four here use the same Windows license—but it would still take more than 15 hours just to read the various contracts of these four sellers, let alone the time it would take to analyze and weigh their differences.

And it gets worse. Of the 74,897 average words, only 7,698 were presented to me before my purchase. That's about one in ten. The other 90 percent revealed themselves only after the computer arrived and I started it up. So if you really want to "shop" for boilerplate, you have to order multiple computers, await their arrival, start them all up, open the various programs, and then examine the boilerplate within. Only then could you register your rejection of boilerplate terms with the marketplace—e.g., by returning the rejected computers and receiving refunds. Good luck with that.

What does all this mean? With computer purchases, at least, it means that the cost of actually reading the fine print is so high that doing so is irrational; consumers who don't read are being smart, not lazy. Consequently, the market is doing nothing to regulate the terms of boilerplate. The market will respond if Dell charges a high price, but if Dell buries a pro-seller provision in its boilerplate (really just a subtle way of raising the price, right?), consumers will have no idea, and the market will not pressure Dell to remove it. And that means there's little reason to enforce the contract.

Mine is not the only study that tracks the costs of reading contracts, although it is the only one that follows consumers all the way through a transaction. Despite the mounting evidence that consumers don't read, some scholars argue that boilerplate should be enforced. One theory is that some subset of consumers reads, and the readers can represent the rest of us. That sometimes happens—witness the recent public outcry over Instagram's changes to its user terms—but those instances are very rare exceptions to the rule. Another theory is that these terms don't matter—that sellers ignore them just as much as consumers do—and that disputes are handled as customer service issues, not legal matters. But this argument proves too much; if that's the case, why bother with boilerplate terms at all? Why bother to pay attorneys to write them and make courts enforce them if no one cares about them? It would be cheaper for seller and consumer alike to do away with them.

No, the fact is that these terms do matter. It's in the fine print that you promise to arbitrate rather than litigate. It's in the fine print that you agree to pay Dell a restocking fee, allow Microsoft to share your private information, and limit the remedies you can claim against McAfee. It's in the fine print that you agree to waive participation in a class action suit.

Reasonable people can disagree about whether waiving class actions or paying restocking fees is a good thing. But the whole point of the competitive free market is that we do not make these decisions for each other. Rather, each of us makes an individual decision, and the market responds accordingly. That almost never happens with consumer contracts. Their length and manner of presentation actively discourage it.

When we fail to read, we fail to make individual decisions, and the market fails as well. Contract law needs to catch up with this reality. ■

Jim Gibson is a professor and the director of the Intellectual Property Institute at Richmond Law. This article derives from a publication, "Vertical Boilerplate," forthcoming in Washington & Lee Law Review.