Texas A&M University School of Law

From the SelectedWorks of Brian Larson

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Available at: https://works.bepress.com/brian-larson/38/
These slides & bibliographic notes at the URL visible here and on most slides below: tiny.cc/SCCI18
www.REULab.gatech.edu

This panel arises out of work at the Responsible End-User Licensing Lab, or REUL Lab, founded at the Georgia Institute of Technology and funded there by grants from the Digital Integrative Liberal Arts Center in the Ivan Allen College of Liberal Arts. Co-directors of the lab at Georgia Tech are Brittain postdoctoral fellows Halcyon Lawrence and Sarah Laiola. The lab continues to operate in collaboration with its founder, Brian Larson, who is now at Texas A&M University School of Law. REUL Lab focuses its work principally on end-user licensing in the U.S. There are very different regimes for their enforcement in places like the European Union.

We hope in this program to get some ideas from you about disseminating this research in a way that will be useful to those in our field(s).

For a start, what is an end-user license agreement or EULA?
End-user licensing is the effort by which producers of software (such as the Mac operating system), websites (such as LinkedIn.com), mobile applications (such as Hootsuite for Android), and consumer products with embedded software (including the so-called Internet of things) attempt to define their legal relationships with the consumers or users of their products. The producers are licensors, and the consumers or end-users are the licensees.

See “What are EULAs?” at www.Reullab.gatech.edu/what-are-eulas/
End-user license agreement or EULA is not the universal term for these efforts. They are also often called other things, as seen by these clips from a variety of websites

- Terms of use (and privacy) (from Zillow.com)
- Terms of service (from?)
- Terms and conditions (from Spotify)

Whatever they are called, EULAs raise issues. I’ll highlight a couple here, which I think you’ll all accept as facts, though I won’t back them up with statistics at this point. Dr. Lawrence will do that in some areas.
First, names like "terms of service" and "terms and conditions" sound like policies rather than contracts, especially when they appear as part of “Terms of service and privacy policy.” And they are sometimes located obscurely on a screen.
A principal impediment is that they are too long or are presented at a time when the consumer is focused on completing some other task, so that consumers don’t read them.
Another is that EULAs are written in prose that’s very difficult to read. It is generally above the reading level of the average person.
Finally, consumers who make some effort to read and understand EULAs may still be blind-sided by surprising terms deeply embedded in the text. For example, users of sites where artists can promote their works are often surprised by the rights that they grant to the sites to use their works. There are news reports of companies inserting outrageous provisions just to test how little consumers pay attention, including the agreement to provide one's first born child or to spend hours cleaning toilets.

We offer three positions

- **Larson**: Scholars of technical communication and the communicators and designers they train must be the ethical bridge between consumers and producers of products governed by EULAs.

- **Lawrence**: User-centered design should be an affirmative, ethical strategy to protect the consumers’ interests in online agreements.

- **Laiola**: The field of digital humanities might aid in finding a solution to the challenge of presenting complex information within a EULA.

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Read.

I'll begin…
Until the last couple years, the legal framework—the customary American law of contracts—generally favored the producers and not the consumers.

But recent developments suggest that designers of communication and information may play a critical practical role.

Until the last couple years, the legal framework—the customary American law of contracts—generally favored the producers and not the consumers. Consequently, up to the time we wrote our proposal in October, I was thinking of this as an ethics problem. Since, then, I’ve reviewed more recent cases, and I think there is a practical gap for information and communication designers to fill. Don’t get me wrong, I still want all our efforts to be grounded in ethics, but my sense is that the legal landscape as changed some....
In general, a contract is an exchange of promises. It begins with an offer by one party and an acceptance by another. (The promises have to be supported by something called “consideration,” too, but we can leave that bit out today.) So Tom Sawyer says to some neighbor boys, “For five bucks you can paint this here fence.” Once they answer “Agreed!” we have a contract.
The old saw about a contract being a meeting of the minds is not the reality of contract law. Since telepathy is not available to parties, lawyers, and jurists, they rely instead on the “objective theory of contracts.” The objective theory of contracts is grounded in legal philosophy and epistemology of communication. The question is whether a person’s outward behavior manifests her intention to make or accept an offer. Because the offer and acceptance can take place in words or by conduct and can be express or implied, the law has developed a rich set of heuristics for determining when it happens. However, in the case of express verbal offers and acceptances, the law did did not have to have too fine a mechanism. In the Tom Sawyer example, there is easily a contract. So when Internet contracts came along, customary law was ready to accept them largely without question...
Customary law: Click-wraps are contracts

- Click-wrap... These agreements come in many forms, but they are distinguished by a need for the user to click on or do something before proceeding with the product. Classic is the “Register” button that is grayed out until the consumer clicks the box agreeing to the terms. Or perhaps the register button itself has the word agree in it.
- Since the beginning of this century, courts have almost always enforced click-wraps as contracts.

Customary law: Browsewraps may be enforced

- Browse-wrap: ‘terms and conditions, posted on a Web site or accessible on the screen… that do not require the user to expressly manifest assent, such as by clicking “yes” or “I agree.”’
- We’re all at least vaguely familiar with these. The web page gives little or no indication that using it is covered by any rules at all, unless…

Customary law: Browsewraps may be enforced

• If you browse to the bottom of the page, though, you might notice these links. Clicking on “Terms” takes you to a page that says, “By accessing or using any part of the Move Network or the services provided on it or other Web sites as set forth below (collectively, the “Services”), you agree to accept and comply with the terms, conditions, and notices stated herein and as may be modified by Move from time-to-time without notice to you (the “Terms of Use”).”
• In an early survey of cases, Kunz et al. concluded that “the cases favoring enforcement of the browse-wrap agreement have mainly involved methodical “screen scraping” of Web site data by competitors, in violation of posted terms and conditions. By contrast, … decisions squarely rejecting a browse-wrap agreement involved a situation where individual users downloaded software.” Kunz et al. at 283 (internal cites omitted).
• Recent cases, however, have proposed a more fact-based inquiry.
A series of recent cases in state and federal trial and appellate courts have shaken up the customary view some thought was a slam-dunk with regard to EULAs. One of the most striking was Berkson v. Gogo LLC, 97 F.Supp.3d 359 (E.D.N.Y. 2015).
In *Berkson*, the Judge Jack Weinstein concluded that a click-wrap was not enforceable as a contract because the design of the website and process by which the consumer created an account did not, in the judge’s view, make it clear (a) whether the consumer had notice she was entering into a contract—that is, whether the producer’s site manifested an offer—or (b) whether the consumer manifested assent to the terms of that agreement. It’s hard to see here, but the Gogo page included a checkbox for the consumer to click indicating that she agreed to the “Terms of Use.” Weinstein provided a four-point framework for evaluating contract terms (quoted from p. 402):

1. Aside from clicking the equivalent of sign-in (e.g., log-in, buy-now, purchase, etc.), is there substantial evidence from the website that the user was aware that she was binding herself to more than an offer of services or goods in exchange for money?
2. Did the design and content of the website, including the homepage, make the “terms of use” (i.e., the contract details) readily and obviously available to the user?
3. Was the importance of the details of the contract obscured or minimized by the physical manifestation of assent expected of a consumer seeking to purchase or subscribe to a service or product?
4. Did the merchant clearly draw the consumer’s attention to material terms that would alter what a reasonable consumer would understand to be her default rights when initiating an online consumer transaction from the consumer’s state of residence?
Principles of contract formation are not the only point where there may be problems.

Have you ever wondered what happens after you click the “I agree” button? According to customary contract law, before either party can make claims about what’s in the contract, they need to provide evidence about its terms. These are part of the law’s epistemology of evidence. In DILLON v. BMO HARRIS BANK, 173 F. Supp. 3d 258 (M.D.N.C. 2016), the court doubted the evidence of the contract offered by the producer, because it did not clearly describe the process by which it kept the records, and the individuals who testified were not clearly the folks who had personal knowledge about these matters.
Producers need to manage the commitments they are making, protect their copyrights and trademarks, manage confidential and proprietary information, and limit their legal risks. But just using the express words of offer and acceptance is no longer manageable. Communication designers need to make the words stick by designing interfaces that unequivocally make offers whose terms are clear to consumers and by collecting unequivocal manifestations of assent from consumers. Information designers need to be attentive to the process by which evidence about these agreements is gathered and retained.
Where are the “legs” for this research?

- Articles in technical communication characterizing commitments of legal philosophy and epistemology of communication and how communication/information designers can address them?
- Others?

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