(Not So) Fine Print

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"In no event," the fine print on a computer warranty reads, shall the manufacturer "have any liability for any direct, special, incidental or consequential damages including but not limited to damages for lost profits, loss of data, loss of use of equipment or facilities, interruption of business or failure to maintain the confidentiality of data arising in any way out of these terms and conditions."

"We assume no responsibility whatsoever for loss or damage due to fire, theft, collision or otherwise to the vehicle or its contents, however caused," a parking garage ticket indicates.

"By breaking the seal of this software packet," an adhesive label on a CD proclaims," you accept the terms and conditions of the End-User Agreement... "

Take it or leave it provisions like these have become standard in the sale of goods and services. By clicking "I agree" or even by dint of accepting delivery and/or paying the bill, and without signing anything, Margaret Jane Radin, a professor of law at the University of Michigan points out, consumers (albeit unknowingly) often exculpate manufacturers from any liability for negligence and limit -- or eliminate -- their rights to become party to a class action suit, to initiate legal action in their home state, and to get a jury trial.

In Boilerplate (a reference to the rigid metal once used to construct steam boilers), Radin suggests that the "information asymmetry" between producers and consumers, the technical jargon of fine print, a market which may have reached "a lemons equilibrium" (whereby virtually all companies offer terms advantageous to themselves, leaving potential purchasers with no alternatives), and business-friendly courts are reducing the substantive meaning of individual consent and contractual rights and degrading democracy.

Employing, at times, its own legal jargon, Boilerplate is not an easy read. But Radin makes a compelling case that boilerplate constitutes a clear and present danger to our core values. The practical remedies she suggests ought to command the attention of anyone concerned about the imposition of non-negotiable terms on American consumers.

Radin effectively refutes the arguments of proponents of boilerplate that mass markets societies should live with a "shortfall in consent" because making too many transactions subject to challenge will undermine the predictability of enforcement, diminish robust economic activity, and raise prices. These are empirical questions, Radin writes, and we should not "easily or unreflectively" assume that "the benefit to society as a whole is co-extensive with benefit to the firm" or that the current approach is the best one. After all, some countries in Europe regulate contracts which have not been individually negotiated if they bind consumers to terms that can change at the firm's discretion and/or limit redress (which doesn't impede commerce).

Aware that Americans prefer private market-based solutions "for most everything," Radin agrees that it would be helpful for companies to respond to "threats of reputational harm" (spread, she hopes, by social networking sites) by developing best practices, including opt out regimes, posting them electronically, and soliciting a stamp of approval by truly independent rating agencies. And by customizing more transactions.

In the end, however, Radin claims that a hybrid system, which includes an active role for government, is best-suited to regulate the use of boilerplate by entities motivated by bottom-line consideration. Because boilerplate is more like an interaction between strangers than a consensual bargain, exchange or transfer, she makes the intriguing proposal that courts should consider any attempts to impose "under conditions of recipients' 'sheer ignorance'" under tort law instead of contract law. New torts might well treat boilerplate provisions as defective, unsafe, or injurious products or as intentional deprivations of legal rights. Unlike contract law, moreover, tort laws permits punitive damages and findings of emotional distress and pain and suffering.

Radin also supports legislation and directives by consumer protection agencies, at the state and federal level, aimed at "overreach" clauses that exculpate manufacturers or service providers from harmful behavior that is worse than mere negligence, confine disputes to preferred judicial jurisdictions or settlement by arbitrators, or limit remedies.
Even if regulation is cumbersome, includes costs that will be passed along to consumers, and puts power in the hands of bureaucrats, current practices, Radin demonstrates, generate costs that we ought to regard as unacceptable. Boilerplate transfers the right of consent that belongs to each of us under the law to private companies who use paperwork (and its electronic equivalent) and the knowledge that few Americans will read or can parse it to create their own legal universe and an infrastructure that makes an exchange on a level playing field virtually impossible. As Radin concludes, we ought to start over, with a sense of urgency born of the conviction that soon it will be too late, and design a new conceptual, political, and legal framework to contain a dangerous, but barely visible, invader.