

A Contract or a Novella?



By Judge Mark P. Painter

The United States Constitution has about 4,400 words. We declared our independence from Great Britain and started a new nation in 1,326 words. Some publishers of children's books have a 12,000-word limit.

The complete "iTunes Store TERMS OF SERVICE" checks in at 14,465 words. (See excerpt in the box to get an idea.)

Translation of the excerpt: (1) we don't claim that anything will work, or do anything that you might expect it to do (such as playing tunes); (2) if it's defective or breaks you have to fix it at your expense; and (3) these terms are so outrageous that in some states they are illegal.

Of course, it is unreadable legalese. The passage checks out at grade level 22.8, which means that you had to go at least almost all the way through the 23rd grade to understand it. Most of us didn't. (This article — my writing only — tests at the 7th-grade level, just above the average American reading level.)

The iTunes document is written at about the 15th-grade level, so it is incomprehensible to its intended audience, which includes 7th-graders (in their words and type):

This Service is available for individuals aged 13 years or older. If you are 13 or older but under the age of 18, you should review this Agreement with your parent or guardian to make sure that you and your parent or guardian understand it.

Fails All Facets

There are two facets of readability: comprehension and legibility. The first is measured by the readability levels. Most important is sentence length,

which should be an average of about 18 words. The iTunes "contract" is 29; much too high. With many 50- and 60-word sentences, wrong words, bad sentence construction, and lawyerisms such as *provided that* and *and/or*, it is written at an incomprehensible level.

And is it legible? A text printed in an Old English Type would be difficult reading. But others are too. The iTunes novella downloads in Helvetica type. Helvetica is an excellent font — for logos, headings, signage. But not for text, especially long text. Text should be in a serif type, such as Georgia or Palatino. The serifs ("doodads") on the letters direct our eyes rightward, making reading easier. And using all caps makes text *much* harder to read. In lower case, many letters come above (b, d, f, h, k, l, t) and below (g, j, p, q, y) the line. We need to see that; using all capitals cuts off all the shapes. (Bold would be much better to emphasize without sacrificing readability.)

A Contract?

It seems that now, to use any software, hardware, or service we are asked to "accept" contract terms similar to the iTunes novella. Until relatively recently, a contract was an agreement between two parties. Usually the terms were truly bargained about and the process was a give-and-take. But who looks out for us when we "accept" the iTunes terms? Should courts even enforce these one-sided alleged contracts? Should the government regulate them? Surely, the issue of readability will play a part in the answer. ■

Mark Painter served as a judge on the Ohio Court of Appeals for 14 years, after 13 years on the Hamilton County Municipal Court. In 2009 he was elected by the United Nations General Assembly to the United Nations Appeals Tribunal. Judge Painter is the author more than 400 nationally published decisions, 145 legal articles, and six books, including *The Legal Writer: 40 Rules for the Art of Legal Writing*, which is available at <http://store.cincybooks.com>. He has given nearly 200 writing seminars worldwide. Contact him through his website, www.judgepainter.org.

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