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CYBER COMMODIFICATION

*Miriam A. Cherry**

INTRODUCTION

Last year, the Huffington Post weblog found itself involved in a contentious legal dispute with its unpaid bloggers about the commodification of its content.¹ The Huffington Post features many posts that are straight-ahead news reports; other posts have featured more ideological content aimed at a liberal audience. Leading up to the 2008 election, many Huffington Post bloggers wrote accounts critical of then-President George W. Bush, specifically his administration's treatment of the Guantanamo Bay prisoners, while others wrote to assist fellow Democratic voters become more familiar with the primary candidates.² Regardless of one's personal political leanings, what is certain is that the website attracted a sophisticated level of writing in its posts. Featured bloggers included professional journalists and attorneys who contributed their efforts to the Huffington Post for free, despite normally being paid for their writing. Freshly updated content helped attract an additional audience to the blog, which grew rapidly, reaching 15 million hits per weekday.³

In March 2011 media giant AOL submitted a \$315 million acquisition bid for the Huffington Post.⁴ The web traffic that was driven to the HuffPo website was valuable to AOL, a company that had been searching both for more content providers and an expanded audience for existing content. Arianna Huffington and her financial backers stood to make a handsome profit from the acquisition. The bloggers, on the other hand, who had built the blog's readership by dint of their hard work, were to receive nothing.⁵ Frustrated, Jonathan Tasini, a journalist and labor

* Professor of Law, Saint Louis University Law School; J.D., 1999, Harvard Law School, B.A., 1996, Dartmouth College. Many of the ideas presented received a first discussion at the Engelberg Center for Innovation Law and Policy Roundtable on Platforms and Power, held in May of 2011 at New York University Law School, for which I would like to thank the organizers, Katherine Strandberg, Barton Beebe, and Helen Nissenbaum, as well as the other attendees. In addition, I wish to acknowledge Matthew Bodie, Ryan Calo, Danielle Citron, Christine Corcos, Erik Daniels, Monica Eppinger, John P. Hunt, Kimberly Krawiec, David Kullman, Angela Onwuachi-Willig, Karen Petroski, Winifred Poster, Robert L. Rogers, Peter Salsich, Anders Walker, and Jarrod Wong for their helpful insights and encouragement. Thanks to Gregory Goodwin, Kristen Henke, and Ameya Patankar for their able research assistance.

¹ See Paul Farhi, *Freelancer to File Class-Action Suit Against HuffPo and AOL Over Compensation*, WASHINGTONPOST.COM, Apr. 12, 2011, http://www.washingtonpost.com/lifestyle/style/freelancer-to-file-class-action-suit-against-huffpost-and-aol-over-compensation/2011/04/12/AFa9QGQD_story.html.

² See e.g. Shayana Kadidal, *Guantanamo, Six Years Later*, HUFFINGTON POST (Jan. 11, 2008) http://www.huffingtonpost.com/shayana-kadidal/guantanamo-six-years-late_b_81025.html; For the Huffington Post's current stance on this issue, see Ben Fox, *Guantanamo Closure Hopes Fade as Prison Turns Ten*, HUFFINGTON POST, Jan. 10, 2012, http://www.huffingtonpost.com/2012/01/10/guantanamo-closure-anniversary_n_1195984.html.

³ Nate Silver, *The Economics of Blogging and the Huffington Post*, NYTIMES.COM, Feb. 12, 2011, <http://fivethirtyeight.blogs.nytimes.com/2011/02/12/the-economics-of-blogging-and-the-huffington-post/> (estimating 15 million page hits per weekday on HuffPo and analyzing types of posts and attention they typically were attracting).

⁴ *Id.*; see also Julianne Pepitone, *Huffington Post blogger sues AOL for \$105 million*, CNNMONEY.COM, Apr. 12, 2011, http://money.cnn.com/2011/04/12/technology/huffington_post_blogger_lawsuit/index.htm.

⁵ Jeff Berovici, *AOL, Arianna Huffington Hit with Class Action Suit*, FORBES.COM, Apr. 12, 2011, <http://www.forbes.com/sites/jeffbercovici/2011/04/12/aol-arianna-huffington-hit-with-class-action-suit/>. See

activist,⁶ along with other unpaid bloggers, filed a lawsuit challenging the terms of the deal.⁷ The bloggers claimed that as their hard work had built the blog's value, they therefore deserved a share of the profits, either through a contract claim or a claim for unjust enrichment and restitution.⁸

The heart of the Huffington Post bloggers' claims seemed to rest, as many contract disputes do, in the differing expectations that the parties brought with them to the deal. From the bloggers' perspective, they performed work without payment because they believed that they were contributing to a political website that advanced the causes in which they believed. Retroactively, they learned that the founders were to profit from the blog, and they therefore felt taken advantage.⁹ On the other hand, the Huffington Post contended that the bloggers undertook their writing with no expectation of compensation. Further, they claimed that the bloggers did receive a substantial benefit, as they used the HuffPo "to connect and help their work be seen by as many people as possible. It's the same reason people go on TV shows: to promote their views and ideas."¹⁰ In other words, according to the HuffPo, the blog provided unknown writers with an important boon: a platform for expression and free publicity to a growing audience.¹¹ On March 30, 2012, the district court sided with the HuffPo blog and dismissed the bloggers' complaint.¹² The decision is now being appealed [Check with court].

While the Huffington Post dispute is a new context for examining the monetization of Internet websites and online activities, the fact, however, is that this question – whether a website is or should be commercialized – is becoming an increasingly common and vexing one. For in the past decade, technology has fundamentally shaped and restructured the ways in which many markets function.¹³ Indeed, certain

also Tim Ruten, *AOL? HuffPo. The Loser? Journalism*, L.A. TIMES, Feb. 9, 2011, <http://articles.latimes.com/2011/feb/09/opinion/la-oe-ruten-column-huffington-aol-20110209> ("To grasp its business model... you need to picture a galley rowed by slaves and commanded by pirates.").

⁶ Jonathan Tasini was previous the successful lead plaintiff in a lawsuit challenging the rights of newspapers to license the work of freelance writers to electronic databases without additional compensation. See *New York Times Co. v. Tasini*, 533 U.S. 483 (2001) (ruling in favor of freelance writers).

⁷ See *Tasini v. AOL Inc.*, Class Action Complaint, 11 CV 2472 (April 12, 2011) (S.D.N.Y.).

⁸ The claim would be that, although a formal contract was lacking, the organizers of the Huffington Post were unjustly enriched and a restitution theory would be applied to compensate the bloggers. *Do Huffington Post Bloggers Deserve to Get Paid?*, LAW BLOG, WSJ.COM, (Apr. 12, 2011, 4:01 PM) <http://blogs.wsj.com/digits/2011/04/12/should-huffington-post-bloggers-get-paid/tab/print/>.

⁹ The unpaid bloggers posted on the Twitter account #huffpuff, claiming that the HuffPo "built a blog-empire on the backs of thousands of citizen journalists." Ironically, liberal ideology generally tends to support organized labor and worker's rights.

¹⁰ Jeremy W. Peters, *Huffington Post Is Target of Suit on Behalf of Bloggers*, NYTIMES.COM, Apr. 12, 2011, <http://mediadecoder.blogs.nytimes.com/2011/04/12/huffington-post-is-target-of-suit-on-behalf-of-bloggers/?pagemode=print>.

¹¹ *Id.* For academic commentary discussing the rise of amateurism and peer production of weblogs, see, e.g. John Quiggen & Dan Hunter, *Money Ruins Everything*, 30 HASTINGS COMM. & ENT. L. J. 203, 220 (2008).

¹² *Tasini v. AOL*, ___ F.Supp.2d ___, 2012 WL 1066893 (S.D.N.Y. 2012).

¹³ For example, computerized trades have replaced the loud, frantic atmosphere of the "trading pit" where stockbrokers traditionally executed buy-sell orders. See, e.g. Graham Bowley, *The New Speed of Money, Reshaping Markets*, N.Y. TIMES, Jan. 1, 2011, http://www.nytimes.com/2011/01/02/business/02speed.html?_r=1&scp=1&sq=trading+floor+electronic&st=nyt; Michael J. De La Merced & Jack Ewing, *A German Bid to Take Over the Big Board*, N.Y. TIMES, Feb. 10, 2011, <http://query.nytimes.com/gst/fullpage.html?res=9C04EFDCE30F933A25751C0A9679D8B63&scp=2&sq=trading+floor+electronic&st=nyt>. See also Margaret Jane Radin, *Property Evolving in Cyberspace*, 15 J. L. & COM. 509, 509 (1996) (prescient article noting "the way we think about property is changing in light of the

goods and services, which in the past were off-limits because they would have been impracticable to sell or difficult to buy, have been brought to market by intermediaries such as eBay,¹⁴ Amazon.com,¹⁵ and Craigslist,¹⁶ as these platforms¹⁷ have either minimized or removed various transaction costs. Further, items that have traditionally been seen as non-monetizable, such as predictions about future events,¹⁸ tasks performed in minutes or even seconds of leisure time,¹⁹ or the friendship and connections that comprise social capital,²⁰ are all now rapidly in the process of being valued, monetized, globalized,²¹ and marketed online. At times these shifting boundaries have resulted in legal disputes.

When it comes to commodification on the Internet, it is a wild, wild World Wide Web. Researching encyclopedia articles for Wikipedia is an unpaid labor of love, but connecting to your friends on Facebook is a \$100 billion enterprise.²² Newspaper classified advertisements are definitely commercial, but their equivalent on Craigslist was mostly non-commercial – until the Delaware Chancery Court stepped in.²³ Selling your organs is prohibited in the United States, whereas selling hair

technological and social realities of the global flow of digital information over linked computer networks.”). See also M. Ryan Calo, *People Can Be So Fake: A New Dimension to Privacy and Technology Scholarship*, 114 PENN STATE L. REV. 809 (2010) (describing psychological literature on how humans are interacting with robotic devices, such as global mapping programs and roomba housekeepers).

¹⁴ EBAY (Mar. 2, 2012), <http://www.ebay.com>. As one of the first online auction websites, eBay has certainly had its share of commodification controversies. In 1999, the attempted auction of a human kidney on eBay created a furor and spurred further debate surrounding markets in human organs. See Amy Harmon, *Auction for a Kidney Pops Up on eBay's Site*, N.Y. TIMES, Sept. 3, 1999, at A13. Citing federal law criminalizing organ sales, see National Organ Transplant Act, 42 U.S.C. Section 274e (2007), eBay removed the auction, but not before bids had reached several million dollars. Since that time, eBay has attracted more than its share of non-traditional sale items, including “holy toast,” a grilled cheese sandwich with a grill pattern that reflected the likeness of the Virgin Mary, occult items, and even people putting themselves up for sale. \$28,000 Bid Wins Sandwich, CHI. TRIB., Nov. 23, 2004, at 18; “Virgin Mary” Sandwich Sells on eBay for \$28,000: Online Casino Gobbles Up Grilled Cheese Icon, CNN.COM, Nov. 23, 2004, <http://www.cnn.com/2004/US/11/23/ebay.sandwich.ap/index.html>; See Mary Ann Georgantopolous, *Student's eBay Stint Pays the Bills, Makes a Friend*, BOSTON GLOBE, Aug. 12, 2007, at 4 (describing vacationing student who sold himself – or at least one week of his labor – in order to pay for an airline ticket back to the United States). Which goods and services are considered legitimately for sale, which are jokes, and which are banned is a seemingly delicate and ever-shifting line implicating issues of public policy, morality, and the doctrines of common law contracts. As new markets form and transaction costs continue to fall, the boundaries between market and non-market activity are prone to increased slippage. So while it is legally acceptable for one to sell the space on his or her forehead to sport a tattoo with the name of a corporation, the literal sale of one's soul is forbidden on Internet auction sites. See Andrew Adam Newman, *The Body as Billboard: Your Ad Here*, N.Y. TIMES, Feb. 17, 2009, at B3; *Soul Seller*, CHI. TRIB., June 14, 2004, at 49 (describing auction for a soul that slipped past eBay's rules; price of a soul in that auction was mere \$400).

¹⁵ AMAZON (Mar. 2, 2012), <http://www.amazon.com>.

¹⁶ CRAIG'S LIST (Mar. 2, 2012), <http://www.craigslist.com>.

¹⁷ I use this term throughout the article even though it has many meanings – a technical platform, a platform from which to speak, or in the words of one commentator, platforms as the “curators of public discourse.” See Tarleton Gillespie, *The Politics of “Platforms,”* NEW MEDIA & SOCIETY (2010); Niva Elkin-Koren, *User-Generated Platforms*, WORKING WITHIN THE BOUNDARIES OF INTELLECTUAL PROPERTY (ROCHELLE DREYFUSS, DIANE L. ZIMMERMAN & HARRY FIRST, EDs.) (OXFORD UNIVERSITY PRESS, 2010), available at <http://ssrn.com/abstract=1648465>.

¹⁸ See generally MICHAEL ABRAMOWICZ, PREDICTOCRACY (2008) (describing the benefits of prediction markets). For the author's discussion of the legal issues surrounding prediction markets, see Miriam A. Cherry & Robert L. Rogers, *Prediction Markets and the First Amendment*, 2008 U. ILL. L. REV. 833 (2008); Miriam A. Cherry & Robert L. Rogers, *Tiresias and the Justices: Using Information Markets to Predict Supreme Court Decisions*, 100 NW. U. L. REV. 1141 (2006); Miriam A. Cherry & Robert L. Rogers, *Markets for Markets: Origins and Subjects of Information Markets*, 58 RUTGERS L. REV. 339 (2006).

¹⁹ Randall Stross, *When the Assembly Line Moves Online*, N.Y. TIMES, Oct. 31, 2010, at 5.

²⁰ See *infra*, note ___ and accompanying text.

²¹ See, e.g. Miriam A. Cherry, *The Global Dimensions of Virtual Work*, 54 ST. LOUIS UNIV. L. J. 471 (2010) (noting increasing trend toward globalization in online work).

²² See Section III(B), *infra*.

²³ See Section III(A), *infra*.

promises to rescue third-world citizens from poverty.²⁴ Selling sex is illegal as prostitution, but selling adultery online is a hot new business model.²⁵ And a small company offering a free service to academics has quietly become the dominant method for disseminating academic legal research, quietly beating massive commercial data providers without anyone initially noticing.²⁶ This Article explores these and other recent developments to explore the challenging legal issues raised by Internet commodification of what is often unpaid labor.

The new technology that has given rise to these unconventional markets raises provocative legal and theoretical questions. As productive collaborative uses of the Internet continue to develop, how are the lines between monetized and free goods and services being drawn in cyberspace, and how is technology working to shape or change existing norms about what is and what is not commodified? As new technologies are being created, disputes arise about how and when marketization could or should occur. Money can attract participation in ways that purely fun activities might not be able to, and provide important incentives for engaging users. On the other hand, the Internet has at its ethos an “open access” ethic²⁷ that has led to many useful free innovations, with examples that are as wide-ranging as the development of Linux to free mapping programs and Wikipedia.²⁸

It is often difficult to analyze change when it is unfolding and one is living through it. Much of our current body of contract law doctrine traces its origins to the rise of mass production and expansion of factory labor three hundred years ago.²⁹ The changes in information technology and commerce that are now taking place are equally as complex and dramatic as the innovations during the original Industrial Revolution.³⁰ Accompanying advances in communication and information technology is a dramatic expansion of online trade and commerce. As such, it is important to think of contract law’s place in this new world of networked trade and commerce. This Article identifies current developments and analyzes what types of legal issues these developments may pose for the future. Some well-established doctrines of contract law may help in resolving disputes in this diverse wild-web world.

This Article makes a unique contribution to the theoretical work surrounding commodification. In *The Wealth of Networks*, Professor

²⁴ See Section I, *infra*.

²⁵ See Section II, *infra*.

²⁶ See Section IV(B), *infra*.

²⁷ For example, see GOOGLE MAPS (Mar. 2, 2012), <http://www.googlemaps.com>; & MAPQUEST (Mar. 2, 2012) <http://www.mapquest.com>.

²⁸ WIKIPEDIA.ORG (Mar. 2, 2012), <http://www.wikipedia.org>.

²⁹ For example, the doctrine on the foreseeability of contract damages comes to us from the case *Hadley v. Baxendale*, 9 Ex. 341, 16 Eng. Rep. 145 (1854). As noted by Professor Richard Danzig, the case was part of a sea change in commerce that came along with the advent of mass production. See Richard Danzig, *Hadley v. Baxendale: A Study in the Industrialization of the Law*, 4 J. LEG. STUD. 249, 252 (1975).

³⁰ One contemporary of the English Industrial Revolution wrote the following in describing the changes and the effect that had on the law of commerce: “What our Law was then [before the Industrial Revolution], it is not now; and what is now, can best be understood by seeing what it was, then. It is like the comparison between England under former, and present, systems of transit, for persons, property, and intelligence: between the days of lumbering wagons, stage coaches, and a creeping post – and of swift, luxurious railroads and lightening telegraphs. All is altered: material, inducing corresponding moral and social changes.” S. WARREN, A POPULAR AND PRACTICAL INTRODUCTION TO LAW STUDIES 12 (3d ed. 1863).

Yochai Benkler extols the virtues of free collaboration in cyberspace, via what he describes as open-source or “commons-based peer production.”³¹ Professor Margaret Radin also expresses skepticism about markets in relation to unconventional markets. On a first examination, choices about commodification seem binary – an on or off switch – and as such they are in fundamental tension. With a deeper examination, however, I believe this is a false dichotomy. Commodification is more of a continuum, with many portions of the Internet existing in states of what Radin might term “incomplete commodification.”³² While Professors Benkler and Radin are skeptical of marketization of the Internet, that skepticism is, in my view, mostly unjustified. There is nothing about the Internet that inherently means that it must be free. In fact, it is my contention that contests and disputes arise not because of commodification itself but because of misunderstandings about the degree of commodification surrounding a particular transaction. With the appropriate qualifications and limits that will be pointed out throughout the Article, monetization need not be as problematic, as these two scholars seem to assume.

Keeping this thesis in mind, while scholars have provided narrow telescopic glimpses into isolated components of cyber commodification, this piece aims to catalogue and describe these issues further. At the outset, I note that cyber commodification is a multivalent concept that does not lend itself to easy analysis or description. The term cyber commodification as I employ it refers to a number of ideas, including creating new markets for goods or services on the Internet that have not existed before; monetizing items that we would not normally think of as financial concepts, such as friendship, or two seconds of someone’s time, or someone’s individual predictions about the future; creating business models that attempt to harness what would traditionally be unpaid labor and what commentators have referred to as “peer production”; or leveraging or arbitraging the differing values of goods or services based on the absence of geographic boundaries on the Internet. As this is a complex and new phenomenon, the rest of this Article seeks to provide a rough exploratory map of this new terrain.

In order to map the concept of cyber commodification more fully, the rest of this paper is structured as a systematic analysis of the concept

³¹ See, e.g. YOCHAI BENKLER, *THE WEALTH OF NETWORKS* 9 (2006) (“As collaboration among far-flung individuals becomes more common, the idea of doing things that require cooperation with others becomes much more attainable, and the range of projects individuals can choose as their own therefore qualitatively increases. The very fluidity and low commitment required of any given cooperative relationship increases the range and diversity of cooperative relations people can enter, and therefore of collaborative projects they can conceive of as open to them.”). See also Steven A. Hetcher, *Hume’s Penguin, or, Yochai Benkler and the Nature of Peer Production*, 11 VAND. J. ENT. & TECH. L. 963 (2009).

³² Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849 (1987); see also Margaret Jane Radin & Madhavi Sunder, *Introduction, The Subject and Object of Commodification*, RETHINKING COMMODIFICATION 25 (MARTHA ERTMAN & JOAN C. WILLIAMS EDS., 2005) (Radin is “convinced that [her] most useful scholarly contribution is likely to be having made the word ‘commodification’ speakable in legal academic discourse.”). Indeed, as early as 2002, Professor Margaret Jane Radin, a pioneer of commodification theory in legal literature, noted that the Internet and other computer technology was helping to accelerate various types of commodification by lowering transaction costs and bringing buyers and sellers together in a truly global marketplace. Margaret Jane Radin, *Incomplete Commodification in the Computerized World*, in THE COMMODIFICATION OF INFORMATION 4 (NIVA ELKIN-KOREN & NEIL WEINSTOCK NETANEL EDS., 2002).

in five parts, using both illustrative examples and broader theoretical material. Part One explains how cyber commodification is *different* from earlier forms of commodification that are more familiar to us. As such it seeks insights from the first wave of commodification theory that grew out of advances in medical technology that enabled us to think about reproduction, organ sales, and other biologic components associated with the body in market terms. From this more historical and theoretical background, Part Two discusses the *forces* that have propelled cyber commodification. These forces include anonymity, the elimination of geographical barriers, and the lack of jurisdictional guidelines that apply to the Internet. While the examples in this section range all the way from an online market for adultery to Chinese “goldfarmers” who play video game characters for a living, what they all share in common is that they explain why the cyber commodification phenomenon has become ubiquitous. In Part Three, I discuss the *process* of cyber commodification, using the business model of craigslist as an illustrative example as well as examining prediction markets, which monetize knowledge and information. Part Four moves on to *contests and disputes* that have arise from differing expectations that parties bring with them into various transactions. Finally, in Part Five, I discuss the greater *implications* of cyber commodification, including its various associated costs and benefits.

I. Differentiating Cyber Commodification

Previously, scholars have studied and analyzed commodification of goods and services, with a great deal of attention focusing on non-traditional or controversial markets, such as markets in surrogacy or the sale of organs or body parts. Some of these unconventional categories push the boundaries of what most in our society would consider off-limits or problematic. In the literature unconventional markets are thus oft-referred to as “taboo trades,” “repugnant markets,”³³ or, humorously, “ick-onomics.”³⁴ While these matters have been at least partially analyzed by courts and academic commentators, the markers between monetized and non-monetized transactions are still being clarified. Indeed, it is important to realize that these delineations are often contextually and culturally dependent. For example, payment for organs is forbidden in the United States, but is permitted in Iran;³⁵ markets in fossils are outlawed in many European countries, but they thrive in the lightly regulated market of the United States.³⁶ So, what can we learn from these examples for our present purposes of exploring cyber commodification?

³³ Alvin E. Roth, *Repugnance as a Constraint on Markets*, 21 J. ECON. PERSPECTIVES 3 (Summer 2007).

³⁴ *Id.*

³⁵ Alex Tabarrok, *The Meat Market*, WALL ST. J., Jan. 8, 2010, at A1; Alex Altman & Claire Suddath, *How does Kidney-Trafficking Work?*, TIME.COM, July 27, 2009, <http://www.time.com/time/health/article/0,8599,1912880,00.html>.

³⁶ Miriam A. Cherry, *A Tyrannosaurus-Rex Aptly Named “Sue”*: *Using a Disputed Dinosaur to Teach Contract Defenses*, 82 N.D. L. REV. 295 (2005) (describing lightly regulated fossil markets in the United States).

Further, what are the differences between these offline commodification concerns and what is happening now online? Specifically, how have markets responded to previous technological changes? How did the law play a role in the creation or inhibition of the markets? In order to examine these questions, a brief general background of the legal doctrines, and then a short literature review is helpful.

A. Existing Legal Framework for Regulation of New Markets

As a broad overview, U.S. federal and state laws police the border of marketable goods and services. On the first order are constitutional provisions, such as the Thirteenth Amendment,³⁷ and statutes that criminalize, forbid, or otherwise ban markets in a particular good or service. These provisions are sometimes dependent on context, and may shift over time along with the changing morals of the day. In addition, many statutes set the ground rules for participation in markets or attempt to protect vulnerable participants,³⁸ although these statutes are more about regulation than forbidding particular market activity. Finally, other common law legal doctrines, such as public policy, consideration, and the concept of inalienability in property law operate within common law to establish the line between permissible market versus non-market activity.³⁹

Constitutional provisions or criminal statutes can put certain activities off-limits for exchange in a market.⁴⁰ Constitutional provisions can be used to outlaw an entire market for a good entirely, such as was the case with the prohibition of alcohol.⁴¹ Criminal statutes may also be written in such a way that make an entire market illegal; or it may be context dependent. For example, many drugs that once were legal, such as cocaine, are now banned.⁴² But other banned drugs, specifically marijuana, are permissible with the presence of particular medical conditions in certain states.⁴³ Sexual activity, which would otherwise be legal is criminalized if it involves the exchange of money.⁴⁴ And Federal

³⁷ U.S. CONST. amend. XIII; Mario L. Barnes & Erwin Chemerinsky, *The Once and Future Equal Protection Doctrine?*, 43 CONN. L. REV. 1059 (2011).

³⁸ See generally Joel Seligman, *The Changing Nature of Securities Regulation*, 6 WASH. U. J. L. & PUB. POL'Y 205 (2001).

³⁹ Margaret Jane Radin, *Market Inalienability*, 100 HARV. L. REV. 1849 (1987).

⁴⁰ See, e.g. Gary Fields & John R. Emshwiller, *As Criminal Laws Proliferate, More Ensnared*, WALL ST. J., July 23-24, 2011, at A1 (describing father and son who were arrested for digging arrowheads on federal land).

⁴¹ U.S. CONST. amend. XVIII (repealed by U.S. CONST. amend. XXI) (instituting prohibition along with the Volstead Act). See also Susan Lorde Martin, *Wine Wars – Direct Shipment of Wine: The Twenty-First Amendment, The Commerce Clause, and Consumers' Rights*, 38 AM. BUS. L. J. 1 (2000); Lloyd C. Anderson, *Direct Shipment of Wine, The Commerce Clause and the Twenty-First Amendment: A Call for Legislative Reform*, 27 AKRON L. REV. 1 (2004).

⁴² See, e.g. NICK REDING, *METHLAND THE DEATH AND LIFE OF AN AMERICAN SMALL TOWN* (2010).

⁴³ See, e.g. Michael Berkey, *Mary Jane's New Dance: The Medical Marijuana Legal Tango*, 9 CARDOZO PUB. L. POL'Y & ETHICS J. 417 (2011).

⁴⁴ Anti-prostitution laws criminalize the payment of money for sexual services. However, this rule is also context-dependent and produces odd results in its application at times. While payment for sexual services is banned in prostitution, producers of pornography legally pay performers for their appearance in sexually explicit films, which include payment for sexual services. See *Taylor v. State*, 167 Ariz. 429, 808 P.2d 314 (Ariz.Ct.App. 1990). See also Andrew Gilden, *Sexual (Re)Consideration: Adult Entertainment Contracts and the Problem of Enforceability*, 96 GEO. L. J. 541 (2007). Recently, Prof. Spearlt Maldonado has argued that the justification for the distinction between prostitution and pornography is a flimsy one, since both constitute the commodification of sexual services. As such, the criminalization of prostitution treats those in like situations unequally, in fact criminalizing the activity for those of lower socio-economic class. Spearlt

anti-gambling laws have recently been strengthened as a reaction to the growth of Internet gambling.⁴⁵

In other instances, state or federal statutes do not prevent a market from existing or activity from taking place, but instead they regulate who may participate in the market or otherwise prescribe rules to which market participants must adhere. At times the regulation largely replicates the role of custom⁴⁶ but in other instances regulations exist for advancing consumer or investor protection. Examples of such statutes include the Magnuson-Moss Act,⁴⁷ which governs the form and structure of warranties provided for consumer goods, or the rules regarding accredited investors under the Securities and Exchange Act.⁴⁸

Even when there is no applicable statute explicitly criminalizing or regulating a market, the common law doctrines of consideration and public policy may play a role in market regulation. The touchstone of contract law is the bargained-for-exchange, the reciprocal inducement of consideration as described by Oliver Wendell Holmes.⁴⁹ Long the bane of first-year law students, the doctrine is littered with moral commitments,⁵⁰ and promises to make charitable donations.⁵¹ While not often litigated,⁵² the doctrine of consideration performs an important policing function in terms of decisions about what kinds of trades will be enforceable, and thus legitimately part of a market economy, and those trades that are unenforceable. Public policy is another ill-defined doctrine,⁵³ but it too has formed the basis for striking down particular private bargains.⁵⁴ From this broad legal overview, I turn now to a literature review of commodification theory.

B. Scholarly Analysis of Commodification

In the last two decades, legal scholarship has tried to theorize coherent doctrinal approaches to the regulation of markets in human tissues and organs,⁵⁵ sex,⁵⁶ surrogate pregnancy,⁵⁷ and even the online sale of

Maldonado, *Pornography and Prostitution* (unpublished draft on file with author).

⁴⁵ Miriam A. Cherry & Robert L. Rogers, *Prediction Markets and the First Amendment*, 2008 U. ILL. L. REV. 833 (2008).

⁴⁶ Indeed, one commentator has noted that certain provisions of the Sarbanes-Oxley Act inscribed into law the “best practices” that existed at the time. See, e.g. Lawrence Cunningham, *The Sarbanes-Oxley Yawn: Heavy Rhetoric, Light Reform (And It Just Might Work)*, 35 CONN. L. REV. 915 (2003).

⁴⁷ Magnuson-Moss Warranty-FTC Improvement Act, Pub. L. No. 93-637, § 106(b), 88 Stat. 2183, (1974) (codified as amended at 15 U.S.C. § 2306 (2006)).

⁴⁸ Securities and Exchange Act, 15 U.S.C. § 77c (2006); Integrated Resources Real Estate Ltd. Partnerships Securities Litigation, 815 F.Supp 620, 630-31 (S.D.N.Y. 1993) (noting that the purpose of the Securities and Exchange Act in exempting those who qualify as accredited investors is to facilitate specially designed offerings while also protecting against the danger posed by the lack of SEC scrutiny of offer and sale).

⁴⁹ OLIVER WENDELL HOLMES, *THE COMMON LAW* 230 (MARK DEWOLFE HOWE ED., BELKNAP PRESS OF HARVARD UNIV. PRESS 1963) (1881).

⁵⁰ *Hamer v. Sidway*, 27 N.E. 256 (N.Y. 1891).

⁵¹ *Johnson v. Otterbein Univ.*, 41 Ohio St. 527 (Oh. 1885).

⁵² Among practitioners, the doctrine of consideration would generally be considered a “deadletter” since consideration is present in almost all commercial deals with which a transactional attorney would have to deal.

⁵³ *Shaheen v. Knight*, 11 Pa. D. & C.2d 41 (Penn. Comm. Pleas 1957).

⁵⁴ *Matter of Baby M*, 537 A.2d 1227 (N.J. 1987); RESTATEMENT (SECOND) OF CONTRACTS §§ 178, 179 (1981).

⁵⁵ See, e.g. Michele Goodwin, *Empires of the Flesh: Tissue and Organ Taboos*, 60 ALA. L. REV. 1219, 1221-22 (2009) (arguing for compensation to family members to increase organ supply rather than modifying default rules of donation); Lisa Milot, *What are We – Laborers, Factories, or Spare Parts? The Tax Treatment*

virginity.⁵⁸ Over thirty years ago, Elisabeth M. Landes and Richard Posner sparked widespread controversy when they began writing about the creation of markets for child adoption.⁵⁹ Proposals surrounding markets for human organs have also sparked serious debate.⁶⁰

Feminist theorists have been at the forefront of this commodification discussion, perhaps because some of these markets have gender implications, concern the body, or concern women's traditional roles, which were historically outside and apart from paid labor markets.⁶¹ Many of these theorists were concerned with the dignitary aspects of these trades, and argued that women's bodies and reproductive capacities should not be the subject of trade or market pressures. Other feminists were concerned about the exploitation of poor women by the wealthy, sometimes based on racial lines or based on development status of the countries in which women lived. Some were concerned that the monetization of reproductive capacity could only lead to further exploitation.

Although there are a number of conflicting discussions and assumptions surrounding the development of commodification of the body, opponents of commodification in these areas voice arguments that touch on two general areas of concern. First, there is a concern that markets can be coercive and play on the desperation that arises from abject poverty and economic inequality.⁶² Second, opponents argue that commodification will corrupt basic human values, meaning that "certain moral and civic goods are diminished or corrupted if bought and sold for money."⁶³ In other words, particular markets might impair the value of human life and, perhaps, dignity. While the first argument looks to the ideal of consent, the dignity argument examines the type of goods on offer and questions whether the purchase and sale of those goods will produce good results for society overall.⁶⁴

Other feminist theorists, including Professors Katharine Silbaugh⁶⁵ and

of Transfers of Human Body Materials, 67 WASH. & LEE L. REV. 1053 (2010) (proposing tax reforms to address various types of transactions in body materials). In her work *The Immortal Life of Henrietta Lacks*, author Rebecca Skloot invites the reader to contemplate some of the questions involved with the commercialization of human tissues. See generally REBECCA SKLOOT, *THE IMMORTAL LIFE OF HENRIETTA LACKS* (2010).

⁵⁶MARGARET RADIN, *CONTESTED COMMODITIES* (1996) 132.

⁵⁷ See, e.g., Carol Sanger, *Developing Markets in Baby-Making: In the Matter of Baby M*, 30 HARV. J. L. & GENDER 67 (2007).

⁵⁸ Kimberly D. Krawiec, *A Woman's Worth*, 88 N.C. L. REV. 1739, 1739-40 (2010) (recounting story of 2008 virginity auction at Moonlite Bunny Ranch in Nevada).

⁵⁹ See, e.g. Elisabeth M. Landes & Richard Posner, *The Economics of the Baby Shortage*, 7 J. LEGAL STUD. 323 (1978); RICHARD POSNER, *SEX AND REASON* (1992). The secondary literature that has developed in response to this provocative argument has been extensive. See generally Kimberly D. Krawiec, *Altruism and Intermediation in the Market for Babies*, 66 WASH. & LEE L. REV. 203 (2009) (collecting sources).

⁶⁰ See Roth, *supra* note 32. See also Emily C. Lee, *Trading Kidneys for Prison Time: When Two Contradictory Legal Traditions Intersect, Which One has the Right-Of-Way?*, 43 U.S.F.L REV. 507, 508 (2009) (describing proposed bill in South Carolina that would have provided good time credit for prisoners who became kidney donors, S.B. 480, 117th Gen. Assem., Reg. Sess. (S.C.2007)).

⁶¹ RETHINKING COMMODIFICATION (MARTHA ERTMAN & JOHN C. WILLIAMS, EDS. 2005).

⁶² Michael J. Sandel, *What Money Can't Buy, The Moral Limits of Markets*, RETHINKING COMMODIFICATION 122 (MARTHA ERTMAN & JOAN C. WILLIAMS EDS., 2005).

⁶³ *Id.* at 124.

⁶⁴ *Id.*

⁶⁵ Martha Ertman, *Marriage as a Trade: Bridging the Private/ Private Distinction*, 36 HARV. C.R.-C.L. REV. 79 (2001).

Martha Ertman⁶⁶ have argued in favor of commodification more generally, proposing that familial relations would be more equitable if they were to be viewed in monetized terms. Indeed, Professor Kimberly Krawiec has advocated for the monetization of certain of these taboo trades, arguing that legalization and monetization of the sexual economy could lead to women's empowerment and more full participation in the market economy.⁶⁷

While these various arguments in favor or against commodification of the body resound in arguments based on either equality or autonomy, Professor Joan Williams notes that perhaps this is a false dichotomy.⁶⁸ Rather than a fully market transaction or a wholly non-commodified one, Williams suggests that all transactions fall on some part of a continuum, which she terms "differentiated ties."⁶⁹ Some amount of commodification of our private lives is inevitable, according to Williams, and rather than focus on judging whether this is appropriate or not, she asks several key questions. Williams exhorts us to be concerned with whether the end result of the commodification is liberating, who controls the process of marketing and receives the proceeds, and whether the commodification advances or harms social ties.⁷⁰ While "differentiated ties" is an awkward terminology that does not seem to capture fully Williams' concept, the questions she poses are important, and I will return to these insights in the last portion of the Article.

How does the further development of Internet technology have an impact on some of these unconventional markets? What is marketable has always been contextually and culturally dependent, and has been subject to change over time, apart from any changes in the technological mechanisms for market exchange. But particular aspects of this new technology have their own dynamic that seem to encourage commodification. Would even Landes and Posner have predicted an online market for human hair?⁷¹ In dealing with sales that concern the body, the Internet seems to reduce transaction costs. These reduced transaction costs can take the form of an intermediary website acting as platform. The legitimacy and acceptability that such an intermediary conveys may encourage particular types of transactions to become commodified, and perhaps seem more acceptable. To ask the converse question, however, how does the theory surrounding the first generation

⁶⁶ Katherine Silbaugh, *Marriage contracts and the Family Economy*, 93 NW. U.L. REV. 65 (1998).

⁶⁷ Krawiec, *supra* note 57 at 1768-69.

⁶⁸ Joan C. Williams & Viviana A. Zelizer, *To Commodify or Not to Commodify: That Is Not the Question*, in RETHINKING COMMODIFICATION 368 (MARTHA ERTMAN & JOAN C. WILLIAMS EDS., 2005).

⁶⁹ *Id.*

⁷⁰ *Id.* at 375-77.

⁷¹ On BuyandSellHair.com, sellers can create listings for their hair, including color and length. See *Listings for Hair for Sale*, BUYANDELLHAIR.COM, <http://buyandsellhair.com/ad-category/hair-for-sale/> (last visited, Mar. 2, 2012). While in developed countries this may not be big business, in developing countries the sale of hair can forestall abject poverty. For example, in Eastern Europe, some children sell their hair for \$3.20 to buy food, and the hair is then sold in the United Kingdom and the United States for thousands of dollars. See Eddie Fitzmaurice, *Children Sell Their Hair for \$3*, THE SUN-HERALD, Feb 22, 2004. On the other end of the spectrum, many choose to make donations of their hair, through organizations such as Locks of Love, to those who need it due to various illnesses or chemotherapy. *Mission & Vision*, LOCKS OF LOVE, <http://www.locksoflove.org/mission.html> (last visited Mar. 2, 2012). Note that wigs are not covered by most health insurance plans, as they are considered cosmetic.

of commodification analyses have applicability for the questions of Internet commodification? Let us turn to some examples that illustrate the forces pushing toward cyber commodification, and we will return to the theoretical matters when discussing the implications of cyber commodification in the last portion of the Article.

II. Forces Propelling Cyber Commodification

Several exogenous forces have made cyber commodification increasingly prevalent. These forces are directly related to several distinctive traits of the very Internet itself – the ability for market participants to maintain anonymity, reduction in transaction costs, the increasing irrelevance of geography and even national borders, and the lack of clear jurisdictional boundaries. These forces can best be described through accompanying illustrative examples. For anonymity, this discussion takes the form of an online market for adultery and child naming. For transaction costs and the decreasing relevance of geography, I discuss virtual work and a new method of financing start-up businesses known as crowdfunding.

A. Anonymity

Anonymity encourages the growth of cyber commodification. According to a recent article, “[a]nonymity and pseudonymity are intrinsic to, and inseparable from, cyberspace, because a computer serves as a medium through which interaction is facilitated . . . [T]he identity of each individual is removed either completely or in part.”⁷² Both the concepts of anonymity and deindividuation have been used as frameworks to analyze the proliferation of various types of conduct in cyberspace including defamation,⁷³ software piracy,⁷⁴ gambling,⁷⁵ and harassment and cyber-bullying.⁷⁶

Numerous studies indicate that people behave differently when they believe their identity is anonymous.⁷⁷ However, the role anonymity plays in

⁷² Sameer Hinduja, *Deindividuation and Internet Software Privacy*, 11 CYBERPSYCHOLOGY & BEHAV. 391, 392 (2008).

⁷³ Rowland, *supra* note 54.

⁷⁴ Hinduja, *supra* note 71.

⁷⁵ Mark Griffiths et al., *Internet Gambling: An Overview of Psychosocial Impacts*, 10 UNLV GAMBLING & RES. J. 27 (2006).

⁷⁶ Daniel Keats Citron, *Cyber Civil Rights*, 89 B.U. L. REV. 61 (2009); Warren Chik, *Harassment Through the Digital Medium A Cross-Jurisdictional Comparative Analysis on the Law of Cyberstalking*, 3 J. OF INT’L COM. L. & TECH. 13 (2008); Cf. Frank Pasquale, *Beyond Innovation and Competition: The Need for Qualified Transparency in Internet Intermediaries*, 104 NW. U. L. REV. 105, 113 (describing ways in which negative terms can be searched).

⁷⁷ See e.g. Katherine S. Williams, *On-Line Anonymity, Deindividuation and Freedom of Expression and Privacy*, 110 PENN ST. L. REV. 687, 691 (2006) (citing GUSTAV LE BON, *THE CROWD: A STUDY OF THE POPULAR MIND* (Transaction Publishers 1995) (1895)); M.E. Kabay, *Anonymity and Pseudonymity in Cyberspace: Deindividuation, Incivility and Lawlessness Versus Freedom and Privacy at the Annual Conference of the European Institute for Computer Anti-virus Research* (Mar. 16, 1998) available at <http://www.mekabay.com/overviews/anonpseudo.pdf>, (citing Phillip G. Zimbardo, *The Human Choice:*

a person's decision-making is subject to debate. One predominant theory⁷⁸ within the psychological literature is deindividuation, "or the state of alienation, reduced inhibition, and lack of self-awareness which occurs when a personal sense of identity is overwhelmed by that of the group."⁷⁹ Early research focused on an individual losing self-awareness due to participation in a large group.⁸⁰ However, even absent group membership, anonymity may be a contributing factor to deindividuation because anonymity results in a lack of self-awareness.⁸¹ This resulting lack of self-awareness can lead to disinhibited or anti-normative behavior.⁸² For example, from the relative anonymity of his or her car, a driver is more likely to exhibit road rage,⁸³ a participant in an experiment is more likely to deliver a higher voltage of electric shock to his co-participant if his face is concealed,⁸⁴ and anonymous students are more likely to write cruel comments about instructors in their teaching evaluations.⁸⁵

Evidence supporting a causal link between anonymity and certain behavior on the Internet is lacking, but several otherwise important observations regarding anonymity and Internet behavior exist. For instance, anonymity is rationally chosen by people who do not want to be held accountable for their decision making.⁸⁶ Anonymity allows individuals to engage in a behavior without the fear of stigma associated with that behavior.⁸⁷ Further, individuals may act online without receiving disapproval or judgment.⁸⁸ Most importantly, computer-mediated

Individuation, Reason and Order Versus Deindividuation, Impulse, and Chaos, in NEBRASKA SYMPOSIUM ON MOTIVATION (W.J. Arnold & D. Levine, eds., University of Nebraska Press (Lincoln) 1969)).

⁷⁸ Social Identity Theory of Deindividuation (SIDE) is particularly relevant in the Internet context. SIDE divides the self into two subgroups: (1) personal - - the qualities that make an individual different from others; and (2) social - - the groups the individual belongs to and the identity of that person within the groups. Williams, *supra* note 54, at 693. Deindividuation results when an individual abandons the personal identity for the social identity and the norms and frames or reference from different groups. Williams *supra* note 54, at 693. While anonymity may not cause anti-normative behavior, it can facilitate acting on an impulse or lower inhibitions which allows a person to behave in a way she would not if not anonymous. John Suler, *The Online Disinhibition Effect*, 7 CYBERPSYCHOLOGY & BEHAV. 321, 322 (2004). Most likely, anonymity is simply the best option for someone predisposed to anti-normative behavior, because it is less likely that he or she will get caught. Katherine S. Williams, *Using Tittle's Control Balance Theory to Understand Computer Crime and Deviance*, 22 INT'L REV. OF L. COMPUTERS & TECH. 145, 146 (2008).

⁷⁹ Diane Rowland, *Gripping, Bitching and Speaking Your Mind: Defamation and Free Expression on the Internet*, 110 PENN ST. L. REV. 519, 531 (2006) (citing S. Reicher, R.M. Levine, and E. Gordijn, *More on Deindividuation, Power Relations Between Groups and the Expression of Social Identity*, 37 BRIT. J. OF SOC. PSYCHOL. 15 (1998)).

⁸⁰ *Id.* at 531.

⁸¹ See Edward Diener, *Deindividuation: Causes and Consequences*, 5 SOCIAL BEHAVIOR & PERSONALITY 143, 145-146 (1977) (citing Zimbardo).

⁸² *Id.* at 149.

⁸³ Williams, *supra* note 54 at 692 (citing P. Ellison, *Anonymity and Aggressive Driving Behaviour: A Field Study*, 10 J. SOC. BEHAV. & PERSONALITY 256 (1995)).

⁸⁴ *Id.* (citing Zimbardo).

⁸⁵ Mary W. Lindhal & Michael L. Unger, *Cruelty in Student Teaching Evaluations*, 58 COLLEGE TEACHING 71, 73 (2010).

⁸⁶ Williams, *supra* note 54, at 696.

⁸⁷ Griffiths et al., *supra* note 17, at 30.

⁸⁸ *Id.*

communication brings individuals into on-line groups where they may potentially act on the norms espoused by the group, thereby losing their sense of self-awareness.⁸⁹ For the sake of balance, it is also important to point out the positive aspects of anonymity: people living under oppressive political regimes may seek out information from the rest of the world, and may allow for critique of the government without fear of repercussions. Anonymity can allow for more personal freedom – for better or worse.

Currently, the most significant commentary about anonymity, deindividuation and behavior on the Internet is in the context of free speech and defamation.⁹⁰ Commentary has focused on harassment and its proliferation due to the anonymity of cyberbullies.⁹¹ The Internet and other technological advances allow bullying to continue around the clock, anonymously, and more maliciously.⁹² With a feeling of anonymity, bullies on the Internet act on impulse without reflection.⁹³ As one commentator has noted, “technology allows bullies to be meaner, more frequently, with more allies, before an inestimable audience. It gives them a greater sense of invincibility and inhibits their fear of being caught or punished.”⁹⁴

Compared to these free speech and criminal law aspects, relatively little analysis is available on how anonymity drives commodification. As many markets in cyberspace feature anonymous or semi-anonymous transactions, my contention is that they may encourage non-traditional markets to form. Aside from facilitating purchases, markets also are socially constructed spaces, and in a capitalist economy, they play a vital role in social interactions. Consider the local souk in a rural agricultural village. The market brings buyers and sellers together to interact in a social space – they can commiserate about crop failures, animals, and perhaps learn about larger market trends as they talk amongst themselves. The participants will know each other personally, and will be repeat players.

Participants in an online market, however, act in ways vastly different from the way they would in a village souk. With technology, market participants have little or no information to tell them with whom they are dealing. To substitute for the face-to-face interaction between buyers and

⁸⁹ Williams, *supra* note 54, at 693.

⁹⁰ See generally Susanna Moore, *The Challenge of Internet Anonymity: Protecting John Doe on the Internet*, 26 J. MARSHALL J. COMPUTER & INFO. L. 469 (2009); Lyrrisa Barnett Lidsky, *Anonymity in Cyberspace: What Can We Learn from John Doe?*, 50 B.C. L. REV. 1372 (2009); Lyrrisa Barnett Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 DUKE L.J. 855 (2000).

⁹¹ See generally Darby Dickerson, *Cyberbullies on Campus*, 37 U. TOL. L. REV. 51 (2005); Citron, *supra* note 75.

⁹² See *Id.*, at 56; Mark Franek, *Rise of the Cyberbully Demands New Rules*, CHRISTIAN SCI. MONITOR, May 10, 2004, at 9; Glenn R. Stutzky, *Cyber Bullying Information*, INSTITUTE FOR PUBLIC POLICY AND SOCIAL RESEARCH,

http://www.ippsr.msu.edu/Documents/Forums/2006_Mar_CYBER_BULLYING_INFORMATION_2006%20--%20Provided%20by%20Mr.%20Glenn%20Stutzky.pdf (last visited Sep. 29, 2011);

⁹³ Franek, *supra* note 91.

⁹⁴ *Id.*

sellers, other proxies for trust have emerged via intermediaries.⁹⁵ For example, buyer and seller ratings on platforms such as eBay and Amazon.com may signal to the other party whether a participant is trustworthy. If goods are shipped late, damaged, or broken, a seller may receive poor ratings, which would warn other purchasers to steer clear of that merchant.⁹⁶

In the past, if a buyer wanted to purchase a good or service from the “gray market,” or even a good or service that might be legal, but was perhaps unsavory, it was difficult to make that purchase anonymously. Certain types of alcoholic beverages could only be purchased in certain places, from approved retailers, on particular days and times; alcohol bottles were hidden from view in brown paper bags. The same is true of pornography or sexual aids.⁹⁷ If a person physically had to go out in public to a store in order to purchase such an item, there was the risk that they would be seen by a co-worker, friend or neighbor. Along with the purchase came the further risk that the purchaser might be judged or ridiculed. Today, with anonymous online shopping, purchasers can buy anything from the most innocuous to the most embarrassing of items without revealing their identities. Removing the inhibitions associated with providing one’s name means many items can be monetized that would have been unthinkable before.

The concepts of anonymity and deindividuation therefore become central to any discussion of cyber commodification. Anonymity lends to the proliferation of taboo markets for two reasons. If a participant in a taboo market does not want to be identified or held accountable for his or her participation in the marketplace, then the anonymity offered by the Internet is the sensible and rational medium for his or her transaction. The Internet offers greater anonymity than face-to-face marketplaces, therefore, a participant, if concerned with stigma or judgment, will conduct his or her transaction anonymously on the Internet.

As an additional matter, Internet marketplaces may display a particular culture or promote non-normative behavior. If a specific website or marketplace invites an individual to join a group, the individual’s membership in the group may cause a loss of self-awareness and deindividuation. Membership on a website that then promotes a particular kind of unconventional marketplace could lead some individuals to a loss of self-awareness and deindividuation. Here I focus on two unconventional markets are driven by anonymity, the online market for adultery and the market for baby naming rights.

⁹⁵ Lior Strahlavitz, “How’s My Driving?” *For Everyone (and Everything?)*, 81 N.Y.U. L. REV. 1699 (2006).

⁹⁶ EBAY (Mar. 2, 2012), <http://www.ebay.com>.

⁹⁷ Indeed, pornography does a brisk business, with \$2.8 billion estimated business per year online. Jon Swartz, *Purveyors of Porn Scramble to Keep Up with Internet*, U.S.A. TODAY, http://www.usatoday.com/tech/techinvestor/industry/2007-06-05-internet-porn_N.htm, June 12, 2007.

1. The Market for Adultery

With its branding tagline, “Life is short, Have an affair,”⁹⁸ the dating website Ashley Madison focuses on a specific demographic: those who are married.⁹⁹ In the United States, the user demographic of the website is heavily male; but in Australia, where prostitution is legal, and married men often patronize prostitutes, married women often avail themselves of the website.¹⁰⁰ Before the advent of the Internet, those who were seeking to have an extra-marital affair could not trumpet their desires; a personal advertisement in a newspaper could lead to discovery by a spouse. The Ashley Madison website, therefore, thrives on promoting a sense of anonymity in its users’ affairs.

While posting a profile on the Ashley Madison website is free, contacting other members requires payment.¹⁰¹ Users can look at other member’s profiles and “test the waters,” but if they want to initiate contact, they have to purchase access.¹⁰² Credit card charges show up under the name of an innocuous sounding business, so as not to alert a suspicious spouse that money is being spent on a dating website.¹⁰³ Customers can also pay using other means, such as a money order, electronic funds transfer from their bank, or pre-paid gift card.¹⁰⁴ These alternate methods of payment help a customer keep his or her use of the website hidden from a partner or spouse.

Ashley Madison’s business model depends on promoting a sense of anonymity among its users; and the website therefore strongly promotes the concept of privacy and anonymity as a key selling point for their customers. The home page for the website features a woman holding her finger over her lips, illustrating the privacy the website offers.¹⁰⁵ The tagline under the website reads, “The world’s leading married dating service for *discreet* encounters,” with the word *discreet* emphasized.¹⁰⁶ A *Time* article discussed the latest marketing tactic used by AshleyMadison.com and other similar websites: mobile cheating.¹⁰⁷ The websites have created mobile applications or “apps” to allow users to search online profiles via their cellular phones without leaving suspicious electronic trails on their home computer.¹⁰⁸ Anonymity on the Internet, however indirectly, has led to the monetization of adultery.

⁹⁸ ASHLEY MADISON, <http://www.ashleymadison.com/> (last visited Mar. 2, 2012).

⁹⁹ *Id.*

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¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ Jeremy Caplan, *Cheating 2.0: New Mobile Apps Make Adultery Easier*, TIME, June 29, 2009, available at <http://www.time.com/time/magazine/article/0,9171,1909602,00.html>.

¹⁰⁸ *Id.*

2. Baby Names and Branding Rights

Another example of anonymity facilitating the development of a market can be seen in the purchase and sale of baby naming rights. On the Internet, markets have arisen to facilitate naming and branding. Selling naming rights to your child most probably would be seen as odd in a small community where everyone knows each other. So odd in fact, that it might even be seen as a matter that should be prevented by law. After all, most people name their children in a way that is meaningful within their family, or perhaps to give honor to an historical figure, not treated as a way to make money. Despite that, today some parents are selling the rights to name their children online.¹⁰⁹

There is historical precedent addressing the sale of baby names in the context of consideration doctrine. In an influential 1882 case, *Wolford v. Powers*,¹¹⁰ the Indiana Supreme Court held that the right to name a child constituted good consideration. In that case, an elderly friend of the family promised the sum of \$10,000 to help the family's younger son complete his education, but asked in return that the child be named after him. Although to a certain extent, this looked to the Court like a gift to the child, the Court reasoned that the father did give up the right to name his son, and that naming rights, in other contexts, such as a named university endowed chair, did have value.¹¹¹ Thus the court enforced the promise, holding that consideration existed.¹¹² A decade later in *Diffenderfer v. Scott*, an Indiana Appeals Court treated the consideration question as settled, quoting *Wolford v. Powers*.¹¹³ Similar decisions in other jurisdictions followed resting upon the same logic.¹¹⁴

For example, the Massachusetts Supreme Judicial Court adopted the *Wolford* precedent, noting in *Eaton v. Libbey*, a 1896 case, that “[w]e have no doubt that the privilege of naming a child is a valid consideration for a promise. . . Gifts to a child because of its name are common, and a change of name is often made the condition of a gift or bequest.”¹¹⁵ Further, in 1914, the Supreme Judicial Court of Massachusetts noted in *Gardner v. Denison* that the “privilege of naming a child is a valid consideration for a promise to pay money . . . [the child] loses the

¹⁰⁹ *What's in a Name? Four Thousand Fifty Dollars*, FREAKONOMICS.COM, <http://www.freakonomics.com/2009/01/21/whats-in-a-name-four-thousand-and-fifty-dollars/?scp=1&sq=baby+naming+rights&st=nyt> (last visited April 4, 2011).; Matthew Purdy, *Our Towns: A Boy Named Soup*, N.Y. TIMES, Aug. 1, 2001, <http://www.nytimes.com/2001/08/01/nyregion/our-towns-a-boy-named-soup.html?scp=3&sq=baby+naming+rights&st=nyt>; Joshua Rhett Miller, *Woman Blames eBay for Thwarting Baby Name Auction*, FOX NEWS, Aug. 13, 2009, <http://www.foxnews.com/story/0,2933,539311,00.html>.

¹¹⁰ *Wolford v. Powers*, 85 Ind. 294 (Ind. 1882).

¹¹¹ *Id.* at *7.

¹¹² *Id.*

¹¹³ *Diffenderfer v. Scott*, 5 Ind.App. 243 (Ind. App. 1892).

¹¹⁴ See, e.g. *Daily v. Minnick*, 60 L.R.A. 840, 914 (Iowa 1902); *Babock v. Chase*, 36 N.Y.S. 879 (Sup. Ct. 1895); *Shumm by Whyner v. Berg*, 231 P.2d 39, 44 (Cal. 1951) (collecting cases).

¹¹⁵ *Eaton v. Libbey*, 165 Mass. 218, 220 (Mass. 1896).

opportunity or receiving a more advantageous name, and is compelled to bear whatever detriment may flow from the name imposed upon him.”¹¹⁶ While at first, the possibility of “detriment” flowing from a name may seem somewhat odd - other than in playground teasing - the popular book *Freakonomics* discusses, at length, the fact that certainly names may actually lead to better job and financial prospects than others.¹¹⁷

Many of these well-established precedents, however, involved a close relationship between an older, wealthier individual, at times with a blood tie with the family, and who was often a widow or widower without children. For example, in *Gardner v. Denison*, the court mentions that the elderly man who made the promise regarding the child’s name was taken care of in his or her declining years by the child’s parents.¹¹⁸ However, after the will was read, no provision had been made for the child that had been named after him.¹¹⁹ In this way, some of the “bargains” that were struck around the child’s name seem like another way of formalizing extended familial and caretaking relationships.

Modern day online auctions of naming rights to children, however, are structured as impersonal arms-length transactions. Rather than looking like an arrangement to shore up extended familial relationships, these auctions look more like desperate pleas for money. The bids are from parents in difficult financial circumstances who might be willing to name their child “Xanax” or “Clorox” for the right amount of money.¹²⁰ But at present time, that money does not seem to be forthcoming from corporations;¹²¹ perhaps they sense that these types of auctions are still somewhat gauche or taboo, and would not result in the type of “good press” that most corporations seek for publicity purposes. On the other hand, some might feel that any publicity is good publicity – which might explain why a casino paid \$10,000 to advertise its brand on a woman’s forehead.¹²²

B. Reduction of Geographic Barriers and Other Transaction Costs

In addition to anonymity, other features of the Internet seem to promote the forces of cyber commodification. These features include the

¹¹⁶ *Gardner v. Denison*, 105 N.E. 359 (Mass. 1914).

¹¹⁷ See STEVEN D. LEVITT & STEPHEN J. DUBNER, *FREAKONOMICS* (2005) (chapter discussing earning prospects for job seekers on the basis of their names); Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable Than Lakisha And Jamal? A Field Experiment on Labor Market Discrimination*, (Nat’l Bureau of Econ. Research, Working Paper No. 9873, 2003), available at <http://www.nber.org/papers/w9873>. (collecting empirical data showing that having an African American sounding name reduced the likelihood of receiving an interview when compared with similarly skilled and educated applicant with White sounding name). See also Angela Onwuachi-Willig & Mario Barnes, *By Any Other Name?: On Being “Regarded As” Black, and Why Title VII Should Apply Even if Lakisha and Jamal are White*, 2005 WIS. L. REV. 1283 (2005).

¹¹⁸ *Gardner v. Denison*, 105 N.E. 359 (Mass. 1914).

¹¹⁹ *Id.*

¹²⁰ Don Oldenburg, *Ringling Up Baby; Companies Yawned at Child Naming Rights, But Was It an Idea Ahead of Its Time?*, WASH. POST, Sept. 11, 2001, available at 2001 WLNR 13180849; Matthew Kauffman, *Newborn Naming Game: No Takers*, HARTFORD COURANT, Aug. 15, 2001, available at 2001 WLNR 10671257

¹²¹ *Id.*

¹²² Aaron Falk, *Mom Sells Face Space for Tattoo Advertisement*, DESERTNEWS.COM (Jun. 30, 2005), <http://www.deseretnews.com/article/600145187/Mom-sells-face-space-for-tattoo-advertisement.html>.

decreasing relevance of geography and even national borders, and the lack of clear jurisdictional legal boundaries. In short, the Internet lowers transaction costs dramatically, and this propels the forces of commodification. The two clearest illustrations of these forces are virtual work and crowdfunding.

1. Virtual Work

As Internet and computer technology becomes increasingly ubiquitous and less expensive, it has opened the door for new ways to buy and sell not only objects, but also labor and time. In a previous article, I described this phenomena, which I have termed “virtual work,” but which has also been alternately described as “labor as a service,” “peer production,” or “playbor.”¹²³ As noted by Randall Stross in *The New York Times*, crowdsourcing technology has enabled the slicing of labor into small increments, micro-tasks that break down a large job into its lowest common denominator.¹²⁴ After the tasks are farmed out to individual workers, they are then re-aggregated and the overall job is completed. This is a process known as crowdsourcing.¹²⁵

In fact, millions of people worldwide entertain themselves or supplement their incomes – or both – by working within virtual worlds such as Second Life or casually “clicking” to make a few dollars for simple tasks on websites like Amazon.com’s Mechanical Turk.¹²⁶ Because the money in virtual worlds is convertible to real world money, virtual work is having an impact on real world economies. One economist, Edward Castronova, has estimated that the economy of Sony’s game EverQuest and its world, Norrath, has a GNP, per capita, equivalent to that of Bulgaria.¹²⁷ Another commentator, discussing entrepreneurship in virtual worlds, had this to say:

[V]irtual worlds are home to serious business conducted by hundreds of thousands of users. One study suggests that virtual economies may reach the size of small countries. The business varies from mining virtual gold to real gambling and anything in-between. Virtual world entrepreneurship is somewhat ironic. Much of the fun of virtual worlds is unpredictability. . . . Yet, entrepreneurship thrives in these worlds. Like any

¹²³ See Trebor Scholz & Laura Liu, *From Mobile Playgrounds to Sweatshop City*, SITUATED TECHNOLOGIES PAMPHLETS 7 (2010), <http://www.situatedtechnologies.net/?q=node/105>.

¹²⁴ See Stross, *supra* note 18.

¹²⁵ See, e.g. Jeff Howe, *The Rise of Crowdsourcing*, WIRED, June 2006, at 176, 178-79 (using term “crowdsourcing” to describe work performed with the aid of contributions from diverse groups of users on the internet); Deborah Halbert, *Mass Culture and the Culture of the Masses, A Manifesto for User-Generated Rights*, 11 VAND. J. ENT. & TECH. L. 921, 929 (2009) (“Computer technology in the hands of the masses has made available software programs that can create music, documents, and art just as well as expensive studios did in the past. This democratization of technology disrupts the monopoly on the creative means of production. The world of amateur production also demonstrates that many are motivated by noncommercial reasons.”).

¹²⁶ EDWARD CASTRONOVA, SYNTHETIC WORLDS THE BUSINESS AND CULTURE OF ONLINE GAMES 2-3 (2005).

¹²⁷ *Id.* at 19-20.

economy, where there is a demand for something of value and someone willing to supply it, a market will form.¹²⁸

These pursuits are far more than mere “games.” Recently, employment agencies like Manpower and Randstad have begun recruiting, collecting resumes and performing interviews with candidates on virtual worlds such as Second Life.¹²⁹ In the wake of the economic downturn, websites such as ELance, which serve to connect companies seeking short term help with workers willing to take on short term assignments, have been doing brisk business.¹³⁰ Throughout cyberspace, workers hold various jobs that, in the words of leading commentators, make it possible to “work in a fantasy world to pay rent in reality.”¹³¹

Recently, Professor Jonathan Zittrain noted that the advent of virtual work simultaneously provides immense promise and peril for workers in the new digital economy.¹³² New technology allowing collaboration can provide remarkable opportunities for workers and employers alike. Traditional limitations on collaboration – of travel, of meeting, of commuting – can be minimized or reduced. Employers can use virtual spaces to make contacts and recruit talent, without spending money on transportation.¹³³ Certainly, the possibility of matching workers and jobs in cyberspace creates more opportunities and more efficient labor

¹²⁸ Michael Risch, *Virtual Rule of Law*, 112 W. VA. L. REV. 1, 6 (2009) (internal citations omitted). See also Andrea Vanina Arias, *Life, Liberty, and the Pursuit of Swords and Armor: Regulating the Theft of Virtual Goods*, 57 EMORY L.J. 1301, 1302 (2008) (citing sources estimating that trade in virtual goods amounts from approximately \$200 million to \$2 billion a year); Michael Capiro, *Virtual Worlds with Real-World Losses*, 56 FED. LAW. 12 (Dec. 2009) (reporting estimate from investment banking firm Piper Jaffray that virtual sales of goods amounted to \$621 million in 2009 and were expected to grow to \$2.3 billion by 2013); Theodore P. Seto, *When is a Game Only a Game?: The Taxation of Virtual Worlds*, 77 U. CIN. L. REV. 1027 (2009) (noting that Ailin Graef, “a Chinese-born citizen and resident of Germany, had parlayed an initial investment of \$9.95 into virtual communities and other virtual holdings having a real-world fair market value, in the aggregate, of more than one million dollars. In theory, Graef could have pulled her Second Life earnings out at any time; at some point, she did in fact withdraw enough to found an 80-employee real-world company.”).

¹²⁹ Both Manpower and Randstad have advertisements posted on YouTube touting their recruiting services in Second Life. See, e.g., *Virtual Jobs at Ronstad*, YOUTUBE.COM, (Apr. 12, 2007) http://www.youtube.com/watch?v=k5xF43POYv8&feature=Playlist&p=7B20448ABA3A94B8&playnext=1&playnext_from=PL&index=43 (advertisement for Randstad); Manpower’s Machinima on the World of Virtual Work, Youtube.com (July 12, 2007), <http://www.youtube.com/watch?v=sNjxucD18bo> (advertisement for Manpower);

¹³⁰ See Ann Meyer, *Fewer Strings a Draw for Employers, Virtual Contract Workers, Internet Tools help Firms Grow, Afford to Add Talent*, CHI. TRIB., Nov. 23, 2009, at 19 (noting that “[y]ear-over-year project hiring on Elance rose 40 percent in October, and more than 300,000 jobs have been posted on the Web site during the past 12 months”). Cf. Emma L. Carew, *Tough Times Lead many into Virtual Work World*, STAR-LEDGER, July 12, 2009 (noting that the poor economy has pushed many employers into hiring virtual office assistants).

¹³¹ F. Gregory Lastowka & Dan Hunter, *The Laws of the Virtual Worlds*, 92 CAL. L. REV. 1, 11 (2004).

¹³² Jonathan Zittrain, *Work the New Digital Sweatshops*, NEWSWEEK, Dec. 8, 2009 (“It all sounds great, and in many ways, it is. The Internet has created new markets for human labor potentially gleaned anywhere in the world . . . [but] online contracting circumvents a range of labor laws and practices found in most developed countries that govern worker protections, minimum wage, health and retirement benefits, child labor, and so forth.”); See also Robert D. Hof, *The End of Work as You Know It*, BUS. WK. 80, Aug. 20, 2007, at 80 available at 2007 WLNR 15875667 (“Will this be a new world of empowered individuals encased in a bubble of time-saving technologies? Or will it be a brave new world of virtual sweatshops, where all but a tech-savvy few are relegated to an always-on world in which keystrokes, contacts, and purchases are tracked and fed into the faceless corporate maw?”).

¹³³ See, e.g. Gabrielle Monaghan, *A Virtual Way to Find Real Talent*, SUNDAY TIMES, March 16, 2008, at 19 (describing KPMG and Accenture recruiting events on Second Life, and the fact that the Manpower recruiting agency has also opened an island within Second Life); Joel Dresang, *Manpower Opens Office in Online Virtual Society*, MILWAUKEE J. SENTINEL, July 13, 2007 at D1.

markets.¹³⁴ These changes can benefit workers, in part by increasing flexibility and allowing workers more control over when and how they are able to perform work.¹³⁵ In addition, employees have used virtual worlds as part of their protected right to organize and to protest.¹³⁶ For example, in September, 2007, over 2,000 employees protested IBM Italy's pay package by appearing at IBM's headquarters in Second Life.¹³⁷

Virtual work, however, presents many of the same enduring problems that workers' rights advocates have struggled with over the years. Gold farming operations and other types of virtual work have been criticized by commentators as creating new "virtual sweatshops."¹³⁸ For years corporations have engaged in races to the bottom, not only in selecting the jurisdiction of incorporation that will govern their internal corporate affairs,¹³⁹ but also to find the jurisdictions with the cheapest labor and the least regulation of employment relationships.¹⁴⁰ The concern about virtual work is that it will lead to further acceleration of the race to the bottom and ultimately the further erosion of worker's rights and benefits.¹⁴¹

In a popular press article, Professor Jonathan Zittrain set out a useful typology of crowdsourcing based on the level of knowledge required in order to complete a given work task.¹⁴² In the level requiring the most skill, companies post difficult scientific problems and promise a reward for the answer. For example, on the Innocentive website,¹⁴³ highly skilled scientists try to solve complicated problems in order to reap financial prizes. In the middle skill level, some websites rate and grade workers at various tasks to ensure quality control for routine backroom operations, such as that performed by customer service representatives. For example,

¹³⁴ See Kermit Pattison, *How to Enlist a Global Work Force of Freelancers*, N.Y. TIMES, June 25, 2009 (noting ways in which working with freelancers can increase productivity); Cf. ALAN HYDE, WORKING IN SILICON VALLEY: ECONOMIC AND LEGAL ANALYSIS OF A HIGH-VELOCITY LABOR MARKET (2003).

¹³⁵ Carol Sladek & Ellie Hollander, *Where is Everyone? The Rise of Workplace Flexibility*, BENEFITS Q., April 1, 2009, at 17 (noting that flexibility is "being able to be at Little League at 3:30 in the afternoon, with the ability to catch up on work after dinner with the family. Flexibility is a way for the employer to acknowledge and enable the whole person.").

¹³⁶ 29 U.S.C. §151-169 (2000).

¹³⁷ *On Strike, Virtually*, THE ECONOMIST, March 15, 2008, at 87, available at 2008 WLNR 5068500.

¹³⁸ See David Barboza, *Ogre to Slay? Outsource it to Chinese*, N.Y. TIMES, Dec. 9, 2005 at A1; Cf. Wendy Duong, *Ghetto'ing Third World Workers with Hi-Tech: Industrial Application of Artificial Intelligence and its Effect on Foreign Direct Investment in the Third World – Exploring Regulatory Solutions Through an Emblematic Case for the New Economy*, 21 TEMPLE INT'L & COMP. L. J. 63 (2008).

¹³⁹ See, e.g. Brett H. McDonnell, *Getting Stuck Between Bottom and Top: State Competition For Corporate Charters In The Presence of Network Effects*, 31 HOFSTRA L. REV. 681 (2003) (describing the decision process of choosing a jurisdiction of incorporation).

¹⁴⁰ See, e.g. Raul Delgado Wise & James M. Cyper, *NAFTA, Labor, and the National State: The Strategic Role of Mexican Labor under NAFTA: Critical Perspectives on Current Economic Integration*, 610 ANNALS 120 (2007) (discussing the impact of the North American Free Trade Agreement on outsourcing); Keith Woffinden, *Surfing the Next Wave of Outsourcing: The Ethics of Sending Domestic Legal Work to Foreign Countries Under New York City Opinion 2006-3*, 2007 B.Y.U. L. REV. 483 (2007) (discussing the legal and ethical implications of outsourcing legal work); Christina Laun, *The Central American Free Trade Agreement and the Decline of U.S. Manufacturing*, 17 IND. INT'L & COMP. L. REV. 431 (2007) (considering impact of Central American Free Trade Agreement on U.S. manufacturing industries); Archie A. Alexander III, *American Diagnostic Radiology Moves Offshore: Where Is The "Internet Wave" Taking This Field?*, 20 J. L. & HEALTH 199 (2006/2007) (analyzing outsourcing of medical services).

¹⁴¹ Katherine Van Wezel Stone, *To The Yukon and Beyond: Local Laborers In A Global Market*, 3 J. SMALL & EMERGING BUS. L. 93 (1999) (describing race to the bottom phenomenon within global labor markets).

¹⁴² Jonathan Zittrain, *Work the New Digital Sweatshops*, NEWSWEEK, Dec. 8, 2009.

¹⁴³ INNOCENTIVE, <http://www.innocentive.com> (last visited Mar. 2, 2012).

on LiveOps,¹⁴⁴ telephone calls are routed to individual customer service workers on their cellphones. Finally, at the lowest end, there is work that encompasses tasks that require only minimal awareness, such as the entry of a few characters or the clicking of a mouse in a second or two. Regardless of the level of skill involved, crowdsourcing takes the products of many workers to create something greater than the sum of its parts.¹⁴⁵

Crowdsourcing and other types of distributed work are likely to increase in frequency in the years to come. While once Amazon's Mechanical Turk was synonymous with crowdsourcing, there are now many more websites that promise to help users harness the power of the crowd. The tasks that can be assigned through crowdsourcing are virtually limitless.¹⁴⁶ Other websites work subtly, sometimes without the knowledge of the user. For example, to prevent websites and blogs from being swamped with "spam" from automated comment generators, many sites require users to enter a word. The reCAPTCHA software uses this anti-spam device to digitize books and newspapers by aggregating them one word at a time.¹⁴⁷ In another twist, some websites are using fun games to entice users to work for them. For example, one website presents players with puzzles, the answers to which help scientists to determine how proteins fold.¹⁴⁸ Crowdsourcing has been used to check surveillance cameras between the United States - Mexico border to look for aliens, and to use computers to help SETI in their search for different types of aliens.¹⁴⁹

Other forms of virtual work blur the line between work and leisure. A number of China's new "factories" feature computer workers, typing and clicking away, playing video games, collecting coins and swords, and fighting monsters.¹⁵⁰ Known as "gold farmers," these workers are paid to harvest virtual treasures for online gamers in the developed world. These First World gamers want to advance quickly within the game and, tired of the repetitive tasks necessary to build a high-level character, would prefer to pay others to do the work.¹⁵¹ As a result, gold farming operations have appeared in many Third World countries,

¹⁴⁴ LIVEOPS, <http://www.liveops.com> (last visited Mar. 2, 2012).

¹⁴⁵ Jeff Howe, *The Rise of Crowdsourcing*, WIRED, June 2006, at 176, 178-79 (using term "crowdsourcing" to describe work performed with the aid of contributions from diverse groups of users on the internet).

¹⁴⁶ Pamela Licalzi O'Connell, *Mining the Minds of the Masses*, N.Y. TIMES, March 8, 2010 at G1 (describing NASA's use of crowdsourcing); Jamar Younger, *Students Aid Mars Scientists*, ARIZ. DAILY STAR, Feb. 28, 2008, at 4.

¹⁴⁷ reCAPTCHA, <http://recaptcha.net/> (last visited Mar. 2, 2012).

¹⁴⁸ FOLDIT.COM, <http://www.foldit.com> (last visited Mar. 2, 2012). The game is described in more detail in Lewis Dartnell, *Your Computer Needs You, Addictive online games that tap your brainpower without you noticing can help to crack problems that have defeated the most powerful computers*, NEW SCIENTIST, Nov. 8, 2008, at 36.

¹⁴⁹ See Benkler, *supra* note 33, at 81-83.

¹⁵⁰ David Barboza, *Ogre to Slay? Outsource it to Chinese*, N.Y. TIMES, Dec. 9, 2005 at A1.

¹⁵¹ According to another recent article on the Chinese gold farmers, there are now three models for reaping the bounty of the virtual world. In the traditional, more typical model which is the one described above, the gold farmers use their experienced characters in order to perform repetitious tasks, garner valuables, and then, through intermediaries, sell the virtual property in exchange for cash. In the second model, called "leveling," a wealthy player will pay the gold farmers to play his character twenty-four hours a day, allowing the character to become vastly powerful in a short period. Finally, the third model involves assembling a team of Chinese players, who guide the first-world player to the highest levels, and then let the first world player receive the most valuable objects (which cannot be sold). See Julian Dibbell, *The Life of a Chinese Gold Farmer*, N.Y. TIMES, June 17, 2007, § 6 (Magazine), at 36.

where labor costs are low.¹⁵² For example, a company named Blacksnow opened operations in Tijuana, Mexico, paying Mexican nationals dollars a day to kill dragons and obtain objects in Mythic Entertainment's online Camelot game.¹⁵³ Acting as an intermediary, Blacksnow later resold these virtual objects on eBay¹⁵⁴ and other online exchange sites to high bidders in First World countries, thereby taking advantage of lower labor costs in developing nations.¹⁵⁵ Another model that uses these relative differences in wages is to have Third World computer workers "play" the characters of First World gamers while they sleep.¹⁵⁶ Workers in Third World countries are playing these online games not as entertainment, but as a means of making a living.¹⁵⁷ Their alternatives may include far more dangerous work in a dirty, crowded, and unsafe factory or barely scraping by as a subsistence farmer.¹⁵⁸

All of this is to say that, because of the way crowdsourcing technology has developed, and the existing vacuum in meaningful regulation, virtual work straddles the line between commodified and non-commodified activity. Virtual work, rather like many other aspects of emerging technologies on the internet, is a diverse mix of free collaboration coexisting with monetized and commodified settings.¹⁵⁹ As Professor Lior Strahilevitz has described, one of the models for clickwork depends on collaboration, and this collaboration is not always successful if the market economics are subtracted from the equation.¹⁶⁰ It may be that virtual worlds may be big enough for several economies (or non-economies, as the case may be) to coexist with each other. Here is a controversial question: could non-commodification lead to the exploitation of virtual workers? I will return to this question in the last

¹⁵² *Id.*

¹⁵³ When Mythic Entertainment attempted to shut down Blacksnow's trading site, Blacksnow brought suit in the Central District of California, but the suit was settled before trial. Complaint, Blacksnow Interactive v. Mythic Entm't Inc., No. 02-00112 (C.D. Cal. Filed Feb. 5, 2002). See also Richard Raysman & Peter Brown, *Novel Legal Issues in Virtual Property*, 234 N.Y.L.J. 3 (col. 1), Aug. 9, 2005 (describing complaint and legal issues surrounding complaint).

¹⁵⁴ EBAY, <http://www.ebay.com> (last visited Mar. 2, 2012) (well-known internet auction website).

¹⁵⁵ Class Action Complaint, Hernandez v. Internet Gaming Entm't, Ltd., No. 07-21403-Civ (S.D. Fla. filed May 31, 2007), available at 2007 WL 1799038. In this pending lawsuit, users who played the game World of Warcraft sued an online auction website that employed gold farmers, alleging that the monetization and sale of virtual property devalued the currency in the world and removed scarce resources. The complaint alleged that "IGE gold farmers are often citizens of developing third world countries who spend up to 14 hours per day, or more, logged into World of Warcraft collecting resources and world of Warcraft gold." *Id.* at 8. See also Complaint, Blizzard Entm't, Inc. v. In Game Dollar, L.L.C., No. 07-0589 (C.D. Cal. Filed on May 22, 2007) (terminated after permanent injunction granted, Jan. 28, 2008); Complaint, MDY Indus., L.L.C. v. Blizzard Entm't, Inc., No. 06-2555 (D. Ariz. 2006 filed on Oct. 25, 2006).

¹⁵⁶ See Dibbell, *supra* note 151.

¹⁵⁷ David Barboza, *Video Game Sweatshops? Chinese Players Toil for Virtual Booty*, INT'L HERALD TRIB., Dec. 9, 2005, at 1.

¹⁵⁸ According to 2003 data from an ILO survey, average employees in different countries work varying numbers of hours. In the United States, the average employee worked slightly more than 40 hours per week. Americans worked more than the French, whose workers averaged 35.5 hours, and worked more than most of the average workers in countries in industrialized Europe. However, workers in the developing world worked much harder, with more hours worked in Argentina, China, and Mexico. The hardest working country was Egypt, where employees worked on average fifty-seven hours per week. See SANGHEON LEE, ET.AL., WORKING TIME AROUND THE WORLD: TRENDS IN WORKING HOURS, LAWS AND POLICIES IN A GLOBAL COMPARATIVE PERSPECTIVE (2003).

¹⁵⁹ For example, while the internet is encouraging a culture of sharing, open source software, and distributed, collaborative work, see Yochai Benkler, *Coase's Penguin, or, Linux and the Nature of the Firm*, 112 YALE L.J. 369 (2002), many aspects of virtual worlds or crowdsourcing are commodified.

¹⁶⁰ Lior Jacob Strahilevitz, *Wealth Without Markets*, 116 YALE L.J. 1472, 1498 (2007).

section of the Article.

2. Crowdfunding

Crowdfunding is an excellent illustration of the forces of cyber commodification. While traditionally, there have been numerous barriers to raising investment capital, such as the limited number of individuals with large amounts of money to invest or an innovator's limited ability to find and contact those individuals, these barriers can be overcome through new crowdfunding models.

Crowdfunding appeals to those with small amounts of money to invest. Crowdfunding websites allow entrepreneurs to communicate information about their businesses and endeavors to a larger audience. According to a recent book, crowdfunding covers a multitude of activities:

Crowdfunding describes the collective cooperation, attention and trust by people who network and pool their money and other resources together, usually via the Internet, to support efforts initiated by other people or organizations . . . The crowdfunding space is quite diverse, comprised of many niches, and shares a lot of social networking's energy. Whether to solicit donations and create a fan base for an around-the-world sailing adventure, to pre-sell copies of a book, or to finance a startup in return for equity, some form of crowdfunding is available.¹⁶¹

Pooling their money allows individuals with only small amounts to invest the ability to join in the market, often helping artists and musicians produce their work and or to help charitable organizations get off the ground.¹⁶²

Until very recently, there was no exemption from the securities laws for crowdfunding, since a general solicitation on a website would have run afoul of the 1933 Securities and Exchange Act rules against unregistered public offerings.¹⁶³ As a result, in recent years crowdfunding websites turned to alternate and creative investment forms. For example, some crowdfunding websites followed the model of the website Kiva,¹⁶⁴ which promotes microfinance, and which promises no return or interest on the amount, just a return of the capital. In these ways people can put up small amounts of money for a good cause, rather like a donation to a social entrepreneurship model like the Grameen Bank.

¹⁶¹ KEVIN LAWTON & DAN MAROM, *THE CROWDFUNDING REVOLUTION* 1-2 (2010).

¹⁶² Thomas Lee Hazen, *Crowdfunding or Fraudfunding? Social Networks and the Securities Laws – Why any Specially Tailored Exemption Should be Conditioned on Meaningful Disclosure* 1 (Feb. 20, 2012) (forthcoming available at <http://ssrn.com/abstract=1954040>).

¹⁶³ For a comprehensive analysis of the Securities and Exchange Act provisions pre-existing the JOBS Act, see Joan MacLeod Heminway & Sheldon Ryan Hoffman, *Proceed at Your Peril: Crowdfunding and the Securities Act of 1933*, 78 TENN. L. REV. 879, 961 (2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1875584; C. Steven Bradford, *Crowdfunding and the Federal Securities Laws*, COLUM. BUS. L. J. (forthcoming), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1916184.

¹⁶⁴ KIVA, <http://www.kiva.org> (last visited Mar. 2, 2012).

Other websites, like Kickstarter¹⁶⁵ and IndieGoGo,¹⁶⁶ provided those who put up money a return in the form of discounted products or free merchandise, but not the traditional monetary dividend traditionally associated with stock.¹⁶⁷

In April, 2012, the JOBS Act was signed into law, creating a small exemption for crowdfunding. The new law allows for a limited exemption for crowdfunding of up to \$1 million per year, with certain limits on amounts per each investor including to annual income or net worth, with particular requirements that crowdsourcing websites and companies on using those websites must meet.¹⁶⁸ Needless to say, the regulatory atmosphere for crowdfunding has now changed dramatically. Professor Steven Bradford, however, notes that the costs of complying with the crowdfunding exemption may be high enough that only high profile or well-funded companies may be able to use it; of course that somewhat defeats the purpose of assisting start-up companies with their financing.¹⁶⁹ While the regulatory environment for crowdfunding has improved, we will need to see whether barriers to entry will inhibit its growth.

III. The Process of Cyber Commodification

Historically, it is not uncommon for innovation to start with gifted amateurs inventing or acting out of passion, then for the advance to be taken over by business people and investors who integrate the innovation into the existing economy and develop it for profit. One could think about the development of cellphones and their relationship to the earlier ham radio operators on the autopatch. Thinking back to the Huffington Post example, what began as a gathering akin to a liberal town hall meeting eventually became something closer to a for-profit new-media business. In this section, the business model of craigslist, the monetization of Facebook, and the growth of social entrepreneurship are examined.

A. Free or Not to Be?: The Clash between eBay and Craigslist

In 2004, online auction giant eBay¹⁷⁰ sought to acquire craigslist,¹⁷¹ the largest online site for classified advertisements in North America. While two of craigslist's founders, Craig Newmark and John Buckmaster, were not interested in selling the company, they were amenable to having eBay buy out the shares of the remaining (third) shareholder, who was actively

¹⁶⁵ KICKSTARTER, <http://www.kickstarter.com> (last visited Mar. 2, 2012).

¹⁶⁶ INDIEGOGO, <http://www.indiegogo.com> (last visited Mar. 2, 2012).

¹⁶⁷ Nikki D. Pope, Crowdfunding Microstartups: It's Time for the Securities and Exchange Commission to Approve a Small Offering Exemption 105-109 (Aug. 26, 2011) (available at <http://ssrn.com/abstract=1916985>).

¹⁶⁸ Jumpstart Our Business Startups (JOBS) Act, Title III, H.R. 3606 (April 2012).

¹⁶⁹ C. Steven Bradford, *The New Federal Crowdfunding Exemption: Promise Unfulfilled*, 40 SEC. REG. L. J. (forthcoming 2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2066088.

¹⁷⁰ EBAY, <http://www.ebay.com> (last visited Mar. 2, 2012).

¹⁷¹ CRAIG'S LIST, <http://www.craigslist.org> (last visited Mar. 2, 2012).

shopping his shares.¹⁷² Understanding that they would only acquire a minority holding of 28.4%, eBay sought to protect its interests through cumulative voting rights.¹⁷³ Mathematically, cumulative voting would give eBay one seat on the three-person craigslist board with Newmark and Buckmaster as the two other directors.¹⁷⁴ From their perspective, Newmark and Buckmaster were concerned that eBay would take what they learned as shareholders and use that information to compete against craigslist.¹⁷⁵ As such, they built in provisions to remove certain rights from eBay's equity shares if eBay started a competing business.¹⁷⁶

From the beginning, the relationship between eBay and craigslist was particularly fraught. In his 2010 opinion, Chancellor Chandler categorized the two companies as "oil and water."¹⁷⁷ Expounding upon this theme, Chancellor Chandler explained:

Even though both companies enjoy household-name status, craigslist and eBay are, to put it mildly, different animals. Indeed, the two companies are a study in contrasts, with different business strategies, different cultures, and different perspectives on what it means to run a successful business . . . Though a for-profit concern, craigslist largely operates its business as a community service. Nearly all classified advertisements are placed on craigslist free of charge. Moreover, craigslist does not sell advertising space on its website to third parties. . . For most of its history craigslist has not focused on monetizing its site. The relatively small amount of monetization craigslist has pursued (for select job postings and apartment listings) does not approach what many craigslist competitors would consider an optimal or even minimally acceptable level. . . eBay is a for-profit concern that operates its business with an eye to maximizing revenues, profits, and market share . . . It has a large management team and a formal management structure. It employs over 16,000 people at multiple locations around the world. . . It might be said that "eBay" is a moniker for monetization and that "craigslist" is anything but.¹⁷⁸

The clash of values played itself out in the years after eBay's investment and eventually led to the dispute that landed the parties in the Delaware courts. During this time, eBay advised craigslist on ways to monetize the website, while Craig Newmark and John Buckmaster rebuffed eBay's

¹⁷² eBay v. Newmark, 16 A.3d 1, 9-10 (Del. Ch. 2010).

¹⁷³ *Id.*, at 11.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*, at 13.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*, at 7.

¹⁷⁸ *Id.*, at 8-9.

suggestions.¹⁷⁹ Meanwhile, eBay decided to launch its own competing platform for online classifieds, Kijiji.com.¹⁸⁰ Launching the competing website triggered serious consequences for eBay's investment, leading its shares to lose some of their associated rights, per the original terms of the investment contract.¹⁸¹ Chancellor Chandler ruled that while the new staggered board structure that craigslist put in place was contemplated by the shareholder's agreement and was permissible, the poison pill and right of first refusal provisions were impermissible.¹⁸²

In discussing the implementation of the poison pill, and the threat to its corporate culture that craigslist perceived, the Delaware Chancery Court engaged in a lengthy discussion about profit maximization. As the Court noted in discussing the craigslist business model:

Jim and Craig did prove that they personally believe craigslist should not be about the business of stockholder wealth maximization, now or in the future . . . The corporate form in which craigslist operates, however, is not an appropriate vehicle for purely philanthropic ends, at least not when there are other stockholders interested in realizing a return on their investment. Jim and Craig opted to form craigslist, Inc. as a for profit Delaware corporation and voluntarily accepted millions of dollars from eBay as part of a transaction whereby eBay became a stockholder. Having chosen a for-profit corporate form the craigslist directors are bound by the fiduciary duties and standards that accompany that form. Those standards include acting to promote the value of the corporation for the benefit of its stockholders. The "Inc." after the company name has to mean at least that.¹⁸³

Here, the court privileged eBay's more traditional business model and the concept of shareholder primacy above craigslist's "public service" business model.¹⁸⁴ But in the new Internet economy, the business model craigslist uses is not as odd as Chancellor Chandler's opinion might lead us to believe. Many of us would pay a few cents to query directions from an online GPS mapping program each time we used it. Others would pay to get information that is now freely available on wikipedia or other websites. Instead, however, these services choose not to monetize, instead building a free, open access service.

¹⁷⁹ *Id.*, at 15; Ina Steiner, *eBay Founder Pierre Omidyar Testifies in eBay v. Craigslist Trial*, ECOMMERCEBYTES.COM (Dec. 8, 2009), <http://www.auctionbytes.com/cab/cab/abn/y09/m12/i08/s01>.

¹⁸⁰ *eBay*, 16 A.3d, at 17.

¹⁸¹ *eBay*, 16 A.3d, at 20.

¹⁸² *eBay*, 14 A.3d at 33, 48.

¹⁸³ *eBay*, 16 A.3d, at 34.

¹⁸⁴ For commentary on the dueling business models involved in the case, see Joshua Fershee, *Philanthropy as a Business Model: Comparing Ford to Craigslist*, BUSINESS LAW PROF BLOG, http://lawprofessors.typepad.com/business_law/2010/09/philanthropy-as-a-business-model-comparing-ford-to-craigslist.html (last visited Jan. 18, 2012); Dealbook, *Craigslist Meets the Capitalists*, NYTIMES.COM (May 2, 2008); Steven M. Davidoff, *What's Next for eBay, Craigslist and the Poison Pill*, NYTIMES.COM (Sept. 13, 2010), <http://dealbook.nytimes.com/2010/09/13/whats-next-for-ebay-craigslist-and-poison-pills/>.

Similarly, rather than try to achieve maximum returns by wringing every advertising dollar from its site, craigslist opted to build its user base with a free and uncomplicated interface. By charging landlords a small fee to list properties in New York City, and also charging employers for listing want-ads, craigslist keeps itself afloat while attaining modest returns. If the format of the website were to change too drastically, including too much monetization, craigslist might encounter resistance from users. In other words, once a non-commodified website begins to include too many monetized elements, it might risk losing its user base. Too much monetization too quickly could prove to be the end of many a once-convenient website. And without the power of the crowd behind it, a business that relies on user input and content may find itself out of business entirely.

Despite all of these possible justifications for craigslist to operate as it did, the Delaware Chancery Court insisted upon analyzing the problem through the narrow lens of shareholder profit maximization. As such the “eBay model” was triumphant. In light of this holding, it might be best for us to acknowledge that the temptation to monetize something free may always be there, not just because of moral hazard, but also because corporate law might suggest such a result as the default rule.¹⁸⁵ Whether this default is normatively desirable may be another question.¹⁸⁶ The monetization of friendship also is a part of the process of cyber commodification, and I turn to that discussion in the next subpart.

B. Social NetWORKing

Another example of the process of commodification can be seen in the monetization of friendship. Currently valued at an estimated \$100 billion,¹⁸⁷ Facebook can be both a valuable personal and business networking application.¹⁸⁸ Indeed, in both the for-profit and non-profit sectors, social networking is hailed as a major trend.¹⁸⁹ Traditionally, friendship is seen as a gift freely given, separate and apart from money.¹⁹⁰ With the advent of social networking, however, the monetization of friendship is increasingly possible and companies are beginning to take advantage of this new business model. However, the commodification of friendship may have some unintended consequences.

As Stephanie Rosenbloom reports in the *New York Times*, “imagine a

¹⁸⁵ *Dodd v. Ford Motor Co.*, 170 N.W. 668 (Mich. 1919).

¹⁸⁶ Lynn A. Stout, *Bad and Not-So-Bad Arguments for Shareholder Primacy*, 75 S. CAL. L. REV. 1189 (2002); Lynn A. Stout, *Why We Should Stop Teaching Dodd v. Ford*, 3 VAND. L. & BUS. REV. 163 (2008); Judd Sneider, *Green is Good: Sustainability, Profitability, and a New Paradigm for Corporate Governance*, 94 IOWA L. REV. 987 (2009).

¹⁸⁷ See, e.g. Anupretta Das, *Face-Off Over Facebook IPO*, WALL ST. J., Jan. 25, at C1.

¹⁸⁸ Facebook has over 800 million users, according to their estimates. *Statistics*, FACEBOOK, <https://www.facebook.com/press/info.php?statistics> (last visited Jan. 24, 2012). See also Stephanie Rosenbloom, *On Facebook, Scholars Link up with Data*, N.Y. TIMES, Dec. 17, 2007, available at <http://www.nytimes.com/2007/12/17/style/17facebook.html?ref=stephanierosenbloom>.

¹⁸⁹ According to one recent estimate, the average American spends over eight hours a day in front of a screen, whether that is computer, cell, or television, with teenagers receiving over 2,000 text messages per month. See Nicholas Carr, *Is the Internet Making Us Quick But Shallow?*, CNN.com (June 7, 2010).

¹⁹⁰ See generally Ethan J. Leib, *Friendship and the Law*, 54 U.C.L.A. L. REV. 631, 642-54 (2007) (describing characteristics of friends; money conspicuously absent from this description).

world in which we are assigned a number that indicates how influential we are.”¹⁹¹ New businesses such as Klout,¹⁹² PeerIndex,¹⁹³ and Twitter Grader¹⁹⁴ datamine social media activities and assign those who use them so-called influence scores.¹⁹⁵ These scores are based on online social networking activity, and increase depending on the number of followers and friends that a user has been able to attract.¹⁹⁶ And as a user recommends a business to the user’s social network friends and they follow suit, the user’s influence score rises. Currently, those with high scores get preferential treatment from retailers. According to the story, more than 2,500 marketers are now using Klout’s data, including companies as diverse as Audi and the Las Vegas Palms.¹⁹⁷

In a blog post analyzing the *New York Times* article, Professor Danielle Citron writes:

What’s troubling is the trend’s implications for society and culture. It seems old school to say that people blog, make friends, and engage in online chats to play, experiment, and create culture. Now, they may feel pressured to do all of these things as a matter of economic necessity. We may forgo experimentation for product endorsements, and idle chatter for better job prospects. This makes our children’s choice to engage with social media seem like less of choice than a carefully cultivated necessity.¹⁹⁸

As Professor Citron’s comment contemplates, and as the previous section describing crowdsourcing has noted, the divide between “virtual work” and “virtual leisure” is a difficult one. So too is the gap between what is fun and pleasurable on Facebook and what provides a monetary benefit. Using Facebook is free, but every user helps expand the monetization as they represent an addition to the audience for potential advertising. Facebook merely provides the platform. On its own, without someone’s friends on it as members as well, Facebook would not provide a very satisfying experience. Rather, it is the user-generated content, which Facebook then owns, that provides the true value of the website.

C. From Networking to Social Entrepreneurship

The idea that social ties are valuable and subject to monetization certainly is one example of cyber commodification. But there are other,

¹⁹¹ Stephanie Rosenblum, *Got Twitter? You’ve Been Scored*, N.Y. TIMES, June 25, 2011, available at <http://www.nytimes.com/2011/06/26/sunday-review/26rosenblum.html?ref=stephanierosenblum>.

¹⁹² KLOUT, <https://www.klout.com/> (last visited Mar. 2, 2012).

¹⁹³ PEERINDEX, <http://www.peerindex.com> (last visited Mar. 2, 2012).

¹⁹⁴ TWITTER GRADER, <http://www.tweet.grader.com/> (last visited Mar. 2, 2012).

¹⁹⁵ Rosenblum, *supra* note 191.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ Danielle Citron, *Scoring Ourselves to Economic Death*, CONCURRING OPINIONS (June 28, 2011, 6:24 PM), <http://www.concurringopinions.com/archives/2011/06/scoring-ourselves-to-economic-death.html>.

more philanthropic ways of combining business, social networking, and technology, specifically in the form of a new model called social entrepreneurship. As one author explains, “to qualify as social entrepreneurship, the activity must not only be entrepreneurial and social in nature, but also groundbreaking in scale and effect.”¹⁹⁹ Professor Celia Taylor notes that for a business model to qualify as social entrepreneurship, an “entity must engage in ordinary, viable business enterprise. . . however, a social business must be created and run for the express purpose of pursuing specific, articulated social goals, rather than maximizing profits.”²⁰⁰ The concept is somewhat related to corporate social responsibility (CSR), for social entrepreneurs, in common with those who believe in CSR, aim to provide two interrelated goals, financial profit and social progress.²⁰¹ As one author explains, however, they are different in the sense that social entrepreneurship is of necessity built into the business, rather than CSR, which may in some instances be “bolted on.”²⁰² Without the social goal, the socially entrepreneurial business would not exist.²⁰³

As social entrepreneurship is a fairly new concept, there are not yet many concrete examples, and defining a social business can result in some measure of interpretation and debate. One current business model that seems to exemplify social entrepreneurship is microfinance. Grameen Bank founder Muhammad Yunus conceived of his plan for microfinance based on his own observations of Bangladeshi poverty and the provision of small personal loans from his own pocket.²⁰⁴ The idea was to assist some of the poorest people in the world by providing seed money for small businesses that would also enrich their communities by providing much-needed services. In such a way, a small amount of money could yield large social dividends. Today, the Grameen Bank has grown with international philanthropic support, but “Grameencredit” maintains as its most distinctive feature that the loans are based on trust, not collateral.²⁰⁵ Other programs may help teach those living in poverty skills such as installing solar panels, which can help that person financially, and also increase the standard of living in impoverished communities.

Individuals will likely donate either their money or time to socially

¹⁹⁹ See David E. Pozen, *We Are All Entrepreneurs*, 43 WAKE FOREST L. REV. 283, 297 (2008).

²⁰⁰ Celia R. Taylor, *The Second Annual Symposium of the Adolf A. Berle, Jr. Center on Corporations, Law and Society*, 34 SEATTLE U. L. REV. 1501, 1506 (2011).

²⁰¹ See, e.g. Janet E. Kerr, *Sustainability Meets Profitability: The Convenient Truth of How The Business Judgment Rule Protects A Board's Decision to Engage in Social Entrepreneurship*, 29 CARDOZO L. REV. 623, 634 (2007). See also *What is Social Entrepreneurship? The New Heroes*, PBS.ORG (2005), <http://www.pbs.org/opb/thenewheroes/whatis/>.

²⁰² MARC J. LANE, SOCIAL ENTERPRISE EMPOWERING MISSION-DRIVEN ENTREPRENEURS 3-4 (ABA 2011).

²⁰³ *Id.*

²⁰⁴ *First Loan he gave was \$27 from own pocket*, THE DAILY STAR (Oct. 14, 2006) <http://www.thedailystar.net/2006/10/14/d6101401033.htm>.

²⁰⁵ *What is Mircocredit?*, GRAMEEN BANK (July 2011), http://www.grameen-info.org/index.php?option=com_content&task=view&id=28&Itemid=108. On the other hand, Kerr attributes social entrepreneurship to philanthropy by wealthy technology investors. As she puts it, the “idea of social entrepreneurship was born in the early 1990’s when a handful of wealthy executives and investors, most of them connected in some way to the budding tech boom, began to think about how philanthropy might work differently and about how they could take what made them rich in business and apply those tactics to charity.” Kerr, *supra* note 201 at 624.

entrepreneurial ventures from purely philanthropic motivations, and while these may be the motivations for corporate donations as well, a business might have other goals in engaging in social entrepreneurship. Investing and participating in social businesses can uncover new markets for the sale of goods and services. As one commentator notes, “social ventures can provide important access to markets, which companies can then capitalize on with their profit-maximizing operations.”²⁰⁶ Corporations can also benefit from engaging in social business as a research opportunity to learn about the people, the culture, and the resources in the particular geographic area where a social enterprise is implemented.²⁰⁷

In other words, social entrepreneurship is a composite of various business models, with a lesser degree of commodification. Other such “hybrid” business models are currently being developed, including businesses that focus on sustainability and those that have registered as B Corporations.²⁰⁸ The urge for profit helps individuals while also benefiting communities and leading to an increase in knowledge and human capital. While many of the problems and disputes surrounding commodification involve an incongruous clash of expectations around profit, social entrepreneurship may provide a template for navigating mixed or partially commodified business models. Other ways of reconciling cyber commodification, however, have not been so successful. And so from the topic of the process of cyber commodification, we turn to the area of contests and disputes.

IV. Contests and Disputes

As we saw in the Introduction, differing expectations over the nature of the Huffington Post – whether the blog was intended as an online forum for the liberal community or a for-profit entity – created a clash of values and ultimately led to a lawsuit. Whether it is the expectations of virtual workers, the question of whether predictions about the future can be monetized, or how access to legal research materials should be apportioned, the same questions of commodification and conflicting expectations run throughout many of the examples provided. We have seen that commodification is not necessarily bad – in virtual work, in fact, it may be a necessity to ensure that workers receive a living wage. However, disputes tend to occur when one group comes to a contractual relationship believing that they are participating in a non-commodified website, when really the creators of the website have monetization of the

²⁰⁶ Taylor, *supra* note 200, at 1507.

²⁰⁷ Taylor, *supra* note 200, at 1508.

²⁰⁸ B Corporations, or “Benefit Corporations” are hybrids between for-profit and non-profit companies. As a “B Corporation,” a company pledges to work toward other factors other than profit, including environmental impact, positive treatment of workers, and community relations. The company then files independently verified reports documenting their efforts in order to maintain B Corporation status. See e.g. Antony Page & Robert A. Katz, *The Role of Social Enterprise*, 35 VT. L. REV. 59 (2010); Danielle Douglas, *Benefit Corporations Sign Up*, WASHINGTON POST, Jan. 24, 2011, at A11; Michael R. Deskins, *Benefit Corporation Legislation, Version 1.0 – A Breakthrough in Stakeholder Rights?*, 15 LEWIS & CLARK L. REV. 1047 (2011).

website in mind. In this section, I wish to examine some of the instances where there have been contests and disputes over cyber commodification. Here I begin with an analysis of the commodification of knowledge in prediction markets, then shift to the market for legal research, and end with an analysis of “free” Wi-Fi.

A. Prediction Markets

Prediction markets are a new economic tool that allow thousands of individuals on the Internet to express their opinions within a market setting.²⁰⁹ By letting people put “their money where their mouth is,” prediction markets encourage thousands of people to join together in cyberspace to predict future events. In other writing I have described how prediction markets operate, as well the opportunities and challenges posed by them in more depth.²¹⁰

The short version is that prediction markets organize and aggregate individual knowledge into a collective result.²¹¹ Each individual who is a trader in the information market acts to maximize his or her own reward. At the same time, the organizers of the market collectivize the results and harvest the valuable information that market participants have generated. The theory behind information markets is loosely related to the semi-strong version of the efficient market hypothesis (EMH), which holds that, in a properly functioning capital market, the prices of securities will reflect all relevant publicly available information.²¹² To put it another way, most markets contain a “price discovery” function, aggregating information and predictions into the current price of that security.²¹³ In traditional capital markets, however, the information-seeking aspects are, to a certain degree, by-products of trading and raising capital. In contrast, this information-seeking is the sole reason for the information market’s existence.

One of the most well-known prediction markets is the Iowa Electronic Markets (“IEM”).²¹⁴ The IEM, started in 1988 by academics at the University of Iowa Business School, has been operating since that time to predict the outcomes of various elections.²¹⁵ Any individual participant is

²⁰⁹ See MICHAEL ABRAMOWICZ, *PREDICTOCRACY* (Yale University Press 2008).

²¹⁰ See Miriam A. Cherry & Robert L. Rogers, *Tiresias and the Justices: Using Information Markets to Predict Supreme Court Decisions*, 100 NORTHWESTERN U. L. REV. 1141 (2006); Miriam A. Cherry & Robert L. Rogers, *Prediction Markets and the First Amendment*, 2008 U. ILL. L. REV. 833 (2008); Miriam A. Cherry & Robert L. Rogers, *Markets for Markets: Origins and Subjects of Information Markets*, 58 RUTGERS L. REV. 339 (2006).

²¹¹ JAMES SUROWIECKI, *THE WISDOM OF CROWDS* xiv, 3-4 (2004).

²¹² Eugene F. Fama, *Efficient Capital Markets: A Review of Theory and Empirical Work*, 25 J. FIN. 383, 383 (1970); Ronald J. Gilson & Reinier H. Kraakman, *The Mechanisms of Market Efficiency*, 70 VA. L. REV. 549, 552-53 (1984).

²¹³ See generally Michael T. Chng, *A Model of Price Discovery and Market Design: Theory and Empirical Theory*, 24 J. OF FUTURE MARKETS 1107, 1108-10 (2004) (describing price discovery function performed by derivatives markets).

²¹⁴ See, e.g., Jordan Erin, *Iowa Electronic Markets Yield Near-Accurate Result*, DES MOINES REG., Nov. 10, 2004, at B5, available at 2004 WL 90800910. The IEM trades at <http://www.biz.uiowa.edu/iem/>.

²¹⁵ Joyce Berg, et al., *Results from a Dozen Years of Election Futures Markets Research* 1 (Nov. 2000) http://www.biz.uiowa.edu/iem/archive/BFNR_2000.pdf [hereinafter Berg, et al., Results] The IEM has also expanded into predictions further afield from its base of political predictions. *Id.* at 7 n.10; Jordan Erin, *U of I Markets Tapped to Predict Flu Activity*, DES MOINES REG., Nov. 22, 2004, at B1, available at 2004 WL 100489665.

limited to a \$500 investment, so although the financial stake of any one person in the outcome is modest, each still has a financial incentive for making a correct prediction.²¹⁶ Other similar political prediction markets have appeared to predict the outcome of elections in Austria,²¹⁷ Germany,²¹⁸ and Canada.²¹⁹ In previous work I detail the origins of various prediction markets and classify the areas in which they are operating.²²⁰

At the same time that prediction markets started to become more common, the legal regime surrounding “real” money markets became more chilly. In 2006, an online gambling ban enacted in the United States had a devastating effect on the growth of publicly available prediction markets.²²¹ Although a prediction markets are not the same as, say, betting in a horse race, that is, the prediction market seeks information above and beyond allocation between players, the law was written so broadly that prediction markets were swept into its coverage. Despite some argument on the part of the author that prediction markets involved speech and expressive conduct, the gambling ban has meant that the majority of publicly available prediction markets have either been forced into using play money or have taken their operations overseas.²²²

Ultimately, the regulatory ban on using money in prediction markets effectively frustrated the development of an important information-gathering technology. The larger point, which I will return to in Section VI, is that commodification in and of itself is not necessarily “bad” when it comes to a developing technology. In fact, commodification can be quite beneficial at times, especially when it functions to incentivize participants to reveal information, predictions, and knowledge that could benefit others. While some commodification situations cry out for more regulation, perhaps because of the desperation of those engaged in them, or some idea of exploitation, those elements could not be further from the type of useful predictive activity present in an information market. As such, regulation of commodification should be fully analyzed before being imposed – especially when the technology here was not even truly the subject of the regulation. With that lesson, I turn to see how access to legal and government materials has been commodified, somewhat in defiance of the notion that these materials should be publicly available to all citizens. Recent developments are somewhat encouraging that access to information may be more

²¹⁶ See Saul Levmore, *Simply Efficient Markets and the Role of Regulation: Lessons from the Iowa Electronic Markets and the Hollywood Stock Exchange*, 28 J. CORP. L. 589, 589 (2003).

²¹⁷ Austrian Political Stock Markets, Austrian Electronic Markets, <http://www.imw.tuwien.ac.at/apsm> (information markets predicting outcomes of Austrian elections).

²¹⁸ WAHLSTREET, <http://www.wahlstreet.de> (last visited Mar. 4, 2012) (information market predicting outcomes of German elections).

²¹⁹ ELECTION STOCK MARKET, <http://esm.ubc.ca> (last visited Mar. 4, 2012) (information market predicting outcomes of Canadian elections).

²²⁰ Miriam A. Cherry & Robert L. Rogers, *Markets for Markets: Origins and Subjects of Information Markets*, 58 RUTGERS L. REV. 339 (2006).

²²¹ In October 2006, Congress passed the Unlawful Internet Gambling Enforcement Act of 2006, Security and Accountability for Every Port Act of 2006, Pub. L. No. 109-347, 120 Stat. 1884, 19522 (codified at 31 USCA 5361-5367 West Supp. 2007); See Miriam A. Cherry & Robert L. Rogers, *Prediction Markets and the First Amendment*, 2008 U. ILL. L. REV. 833, 840-46 (2008) (analyzing impact of the Act).

²²² See Emile Servan-Schreiber, et al., *Prediction Markets: Does Money Matter?*, 14 ELECTRONIC MARKETS 3 (2004).

forthcoming – but this area is also not without its dispute.

B. The Monetization of Legal Research and an Online Clearinghouse for Legal Academia

In a common-law, precedent-based system such as the one we have in the United States, the strength of a legal argument rests, in large part, on how other courts have resolved the same or similar issues. Such a system leads to consistency of results, and with consistency comes stability. In other words, the system depends on making arguments from precedent. Therefore, access to justice largely rests on having access to earlier decided cases. Local governments, states, and the federal government, however, have been slow to make materials accessible, even though the justice system is supported by taxpayers. While some law libraries feature open access to the public, others are privately run. But access to a law library does not necessarily guarantee up to date legal research. Among print resources, it is difficult and time-consuming to check to see if a particular case has been overruled or otherwise called into question. Without any ability to use computerized searching, and given the sheer volume of what one person might need to sift through, the quest for cases in print format can be difficult and time-consuming.²²³

As far as online resources, for years this gap in access has been filled by for-profit companies. Various CDs with legal information are available for purchase from a variety of vendors. For the most part, however, the need for computerized research has been filled by two for-profit companies, Westlaw²²⁴ and Lexis.²²⁵ For years, these two providers have featured searchable databases in which users could enter Boolean searches to find applicable caselaw, statutes, law review articles, and newspaper articles. Further, users of both these databases could perform an automated check to see what other cases had cited any case they were examining, and to see, ultimately, if any particular case was overruled or otherwise had its authority called into question. These commercialized databases were problematic for access, however, in that they have historically charged a substantial sum for their services.²²⁶ As more and more other services migrated online, both Lexis and Westlaw moved to a world wide web model, which meant that its users could access the service whether researching from work, from the library, at home, or elsewhere. Still, the service remained expensive and there were few competitors to challenge the market domination of Westlaw and Lexis. Paradoxically, access to materials written by judges and legislators – all of which was meant to be open to the public – was made proprietary and

²²³ See Michael W. Carroll, *The Movement for Open Access Law*, 10 LEWIS & CLARK L. REV. 741, 742-3 (2006) (describing difficulty of finding materials before computerized access to legal materials).

²²⁴ WESTLAW, www.westlaw.com (last visited Mar. 4, 2012).

²²⁵ LEXISNEXIS, www.lexis.com (last visited Mar. 4, 2012).

²²⁶ Ashlee Vance, *Legal Sites Plan Revamps as Rivals Undercut Price*, N.Y. TIMES, Jan. 24, 2010, <http://www.nytimes.com/2010/01/25/technology/25westlaw.html?scp=1&sq=westlaw%20vs.%20lexis&st=cs> (discussing online legal database pricing); Ashby Jones, *Can Bloomberg Compete with Westlaw and LexisNexis?* LAW BLOG, WALL ST. J., July 8, 2010, <http://blogs.wsj.com/law/2010/07/08/can-bloomberg-law-compete-with-westlaw-and-lexisnexus/> (same).

commercialized simply because Westlaw and Lexis allowed users to search effectively and conveniently.

The same access problem is also present with academic legal research. In the field of legal studies, law review articles and other legal academic writing has historically been difficult for the public to access freely.²²⁷ Most law schools publish a law review, and in some instances schools also publish secondary journals specializing in a particular type of legal scholarship. Historically, law reviews were only available to those that had a subscription, with the result that law libraries were one of the few places these materials were available. As technology developed, Westlaw and Lexis placed law review articles online. While legal academics and law students worked for free to write and edit these articles, these online databases charged their subscribers for access to these works. Not only are these databases expensive, but between the time the author submitted their work to the law review, and then the time when the article actually would be available on the electronic database, often a year or more would pass.

More recently, many law reviews began making published articles available for free on their websites. While this was a significant step toward more accessibility, there is no centralized aggregating or indexing service that allows for search across different law review websites. Likewise, law journals only post the final versions of articles, meaning that there continues to be a significant time lag between when an article is given to the law review editors and when it becomes available to the public.

Enter the Social Science Research Network (SSRN), which touted its website²²⁸ as a free platform for housing academic research in the social sciences. The SSRN website is a platform that allows registered users to post drafts of their articles to the Internet.²²⁹ Although SSRN does not allow for content searching in the same way as commercial database like Westlaw or Lexis, it has the advantage of making an author's work almost immediately available. In addition, it is a free service, which is a huge assistance to those who are searching for legal knowledge but do not have access to expensive databases. This was such an advantage that many thought of SSRN as cutting edge – a new and revolutionary “open access” way of thinking about legal and social science scholarship. Legal academics were able to point others to their work quickly and for free, expanding their readership and the audience for their ideas.²³⁰

Quickly, however, concerns among academics began to emerge. Even though SSRN had acted in many ways like an open access non-profit and was run by prominent academics, actually the website is owned by a for-profit corporation.²³¹ Many academics found out about the for-profit

²²⁷ See Dan Hunter, *Walled Gardens*, 62 WASH. & LEE L. REV. 607, 613 (2005) (describing difficulty accessing materials and calling on law review publishing to become more open access).

²²⁸ SOCIAL SCIENCE RESEARCH NETWORK (SSRN) HOME PAGE, <http://www.ssrn.com> (last visited Mar. 4, 2012).

²²⁹ Hunter, *supra* note 233, at 626.

²³⁰ *Id.*

²³¹ Matthew Bodie, *An Interview with SSRN's Gregg Gordon*, PRAWFSBLAWG, June 15, 2006, available at http://prawfsblawg.blogs.com/prawfsblawg/2006/06/an_interview_wi.html (questioning SSRN's commitment

nature of SSRN in surprising ways. First, there was a false alarm that SSRN was going to charge for access to papers. However, it was then learned that SSRN would not charge for internet viewing, but would be selling bound hard copies of papers to those who wanted such a printout.²³² Later, users of the website began to see advertisements on the sides of the screen that were tied to the topics of the papers that were being searched. Further, any article that was posted on SSRN received an SSRN watermark down the middle of the page as a form of advertising.²³³ Throughout all of these efforts, SSRN has been testing ways to commercialize its website, but the professors who were posting papers did not necessarily realize that this work that they were posting was in the process of being commercialized by others.

As Professor James Grimmelmann noted, in describing the reasons that he was choosing to post his research papers elsewhere:

[i]f you make your money by selling subscriptions, then it makes institutional sense to place your own advertising on the goods. Never mind what these decisions do to open access to scholarship. That's no longer the point. SSRN is a for-profit corporation. It's not yet (I think) a money-making corporation, but its goal is to make money for its owners. It has chosen to do so by providing useful open-access services to scholars, but when push comes to shove, the bottom line comes before the open access part. We don't need to blame SSRN or find fault with it. It's just doing what comes naturally—making the decision that [it has] supplied sufficient open access to fit into a market niche and declaring that good enough.²³⁴

In other words, whether a website promotes an open access ethic or is a commercialized venture is an important norm. When operators of platforms and users are not in agreement about what those norms should be, disputes arise. While at first SSRN seemed to promise a revolution in open access that might make a very real difference in the status quo of legal research, the question is whether it will dedicate itself to that mission in the future. Will the owners of SSRN succumb to moral hazard? SSRN may be poised for the same type of dispute between owners and users that rocked the Huffington Post.

C. "Free" Wi-Fi

to open access scholarship given the for-profit nature of their business).

²³² Gary D. Price, *New From SSRN (Social Science Research Network: Option to Purchase Bound Hard Copies of Selected Papers)*, INFODOCKET.COM (July 27, 2011, 12:34 PM), <http://infodocket.com/2011/07/27/new-from-ssrn-social-science-research-network-option-to-purchase-bound-hard-copies-of-selected-papers/>.

²³³ James Grimmelmann, *SSRN Considered Harmful*, THE SELECTED WORKS OF JAMES GRIMMELMANN (Feb. 26, 2007), http://works.bepress.com/com/james_grimmelmann/14/.

²³⁴ James Grimmelmann, *Why I no Longer Post to SSRN*, THE LABORATORIUM (Nov. 28, 2006, 11:29 PM), http://laboratorium.net/archive/2006/11/28/why_i_no_longer_post_to_ssrn.

Another area of contest and dispute about monetization concerns the provision of Wireless fidelity (Wi-Fi). Wi-Fi is an almost ubiquitous recent phenomenon, allowing Internet access in public settings, such as coffee shops, restaurants, hotels, or airports. At the end of the 1990s, small, independent, local businesses tended to provide free Internet service and chains and large businesses tended to charge customers for access. However, within the last year or so, the market has undergone a paradigm shift, with large chains now offering free Wi-Fi. Meanwhile, small businesses, perhaps because of the challenging economic environment during the recession, have started charging for their Wi-Fi services.

Wi-Fi, which had existed on some university campuses, started to see more widespread adoption around the turn of the century.²³⁵ Among one of the first commercial users of this new technology was Starbucks Coffee, which announced at the beginning of 2001 that they would begin rolling out Wi-Fi access across the United States in a partnership with MobileStar.²³⁶ The results were incredible: by the end of the year, over five hundred Starbucks had installed Wi-Fi and had high transmission speeds.²³⁷ Access to Starbucks' network did not come cheaply, however. Users could choose between \$15.95 a month for unlimited access, or use a pay-as-you-go plan which cost "about \$3 for 15 minutes."²³⁸ However, only ten months after the announced partnership with Starbucks, MobileStar went out of business, and at least one analyst speculated that the high cost of its pricing structure was to blame.²³⁹ Quickly, other Wi-Fi providers moved into the market, and some began offering free access—perhaps most noticeably a non-profit which provided free Wi-Fi to areas in New York City.²⁴⁰

By 2003, news accounts noted that Wi-Fi access in commercial space had increased to include the now-defunct Borders Books and McDonalds, smaller retailers and some locations in Europe.²⁴¹ Pricing structure was in a state of flux, likely due to the new players entering the market. While retailers like Starbucks still charged access fees, McDonalds and retailers like it provided an hour of free access with the purchase of certain meals.²⁴² Other providers also sought to enter the market and provide Wi-Fi access to consumers for free, hoping to monetize access to these users by selling advertisements.²⁴³ At least some of these providers saw themselves in direct competition with the older market participants, like

²³⁵ Vikas Bajaj, *Thursday Starbucks brews plan for wireless; Shops to offer fast Net service from Richardson's MobileStar*, THE DALLAS MORNING NEWS, Jan. 4, 2001, at 1D.

²³⁶ *Id.* MobileStar had been responsible for Wi-Fi access at 130 airports.

²³⁷ Michelle Megna, *Wireless at Starbucks*, DAILY NEWS, Aug. 16, 2001, at 12.

²³⁸ *Id.*

²³⁹ Mark Kellner, *MobileStar killed by its own greed*, WASHINGTON TIMES, OCT. 15, 2001, at D6.

²⁴⁰ Michelle Megna, *Wireless Areas around the City Let you Access the Internet for Free*, DAILY NEWS (NEW YORK), Oct. 21, 2001, at 6.

²⁴¹ David Akin, *Do you want Wi-Fi to go with those fries?*, GLOBE AND MAIL, Mar. 12, 2003, at B5.

²⁴² *Id.*

²⁴³ Rob Wright, *Wireless For Free -- Solution Provider Invents an Innovative Marketing Approach*, VARBUSINESS, May 26, 2003, at 62.

Starbucks.²⁴⁴ The approach seemed to be working, and by mid 2003, both the technology and finance sectors had doubts about the ability to capitalize Wi-Fi hotspots, some cautioning that the industry would do well to remember the pitfalls of the then recent dot-com crash.²⁴⁵

It seemed the tipping point for free Wi-Fi access arrived in 2004. News media continued to publish stories highlighting the increasing proliferation of Wi-Fi networks, while simultaneously casting doubts that models requiring payment for access were sustainable.²⁴⁶ The media portrayed the payment model as facing stiff competition from those providing free Wi-Fi, both intentionally²⁴⁷ and accidentally.²⁴⁸ Small businesses proclaimed they would use free Wi-Fi access as a loss-leader to draw in business—sometimes evoking Starbucks directly in comparison.²⁴⁹ However, by 2005 a report by JiWire, Inc seemed to dampen those projections, noting that of the 34,544 Wi-Fi hotspots listed, only 10% were free, while Starbucks maintained 5,770 hotspots, and McDonalds nearly 12,000.²⁵⁰

The competition between price structures has not yet subsided—despite the frequent shifting in the market, both in terms of who the providers are and what share of the market they captured. In 2008, one of the largest providers of Wi-Fi access, AT&T, moved to allow free unlimited access at any of its hotspots—provided the customer purchased home high speed Internet first.²⁵¹ Shortly thereafter, AT&T partnered with Starbucks to service their Wi-Fi, and offered two free hours of access, then a first for Starbucks.²⁵² However, this move did not prevent small local coffee shops, large chains like Panera, and even fast food restaurants like Schlotzky's Deli from providing free Wi-Fi access as an attempt to drive visitors from Starbucks.²⁵³ Interestingly, soon after partnering with AT&T, Starbucks announced they would attempt to fuse both price structures by granting limited free access to customers who used a loyalty card at least once per month.²⁵⁴ USA Today noted that Starbucks rolled the program out during “the worst slump in its history” and likely did so in an attempt to draw

²⁴⁴ *Id.*

²⁴⁵ Karen Lowry Miller, *The Wi-Fi Bubble*, NEWSWEEK, Aug. 4, 2003, at 36.

²⁴⁶ Matt Richtel, *Wi-Fi's Challenge: Making it Pay*, N. Y. TIMES, Jun. 7, 2004, at 13.

²⁴⁷ Crayton Harrison, *Wi-Fi for Free You get a Place to Surf: Shops Get a Loyal Clientele*, DALLAS MORNING NEWS, Oct. 14, 2004, at 3D. (contending that many Dallas area businesses are providing free wifi as a loss leader).

²⁴⁸ Jefferson Graham, *Businesses Cast Wi-Fi Lures to Hook Customers*, USA TODAY, Sept. 13, 2004, at 5B (quoting customer who noted that, “If I have to use a Starbucks and pay, I will. But there are so many places now that are free, I don't have to use the Starbucks option very often.”).

²⁴⁹ Lisa Lacy, *Panera Bread Co. Hopes Customers Hang Around, 'Chill Out': Try the Wi-Fi Web Access* NATIONAL POST'S FINANCIAL POST & FP INVESTING, Dec. 3, 2004, at IN3.

²⁵⁰ Karen Robinson-Jacobs, *Take a Sip and Stay Awhile - While Surfing at High Speed Restaurants and Cafes Lead the Pack in Offering Wi-Fi connections*, DALLAS MORNING NEWS, Feb. 26, 2006, at 5D.

²⁵¹ *AT&T's Broadband Customers Get Unlimited Wi-Fi*, TECHWEB, Jan. 23, 2008.

²⁵² *AT&T Pushes Wi-Fi Into Starbucks*, TECHWEB, Feb. 11, 2008.

²⁵³ *Wi-Fi Cafes; Easy To Find, But Free Is Fading Away*, TECHWEB, Apr. 29, 2008.

²⁵⁴ Susan Stellin, *Free Wi-Fi, but Not for All*, N. Y. TIMES, May 6, 2008, at 6.

customers and profits.²⁵⁵

Anecdotal evidence suggests that independent coffee shop owners, at least those in New York City, are starting to reverse course and remove free Wi-Fi due to a tightening economy and increased costs.²⁵⁶ Further evidence suggests smaller owners do not see their customer base becoming disillusioned with these developments—seemingly believing that movements that focus on locality and small businesses will keep their customers spending.²⁵⁷ It seems their theory will soon be put to the test since in 2010, Starbucks announced it would be removing all pay mechanisms from its Wi-Fi access and would be allowing unrestricted free access.²⁵⁸

Despite nearly ten years of technological development and consumer demand, there is still no clear consensus on Wi-Fi pricing structure. While it would seem that customers would vastly prefer free Wi-Fi rather than have it tacked on as an extra charge of staying in a hotel room, for example, consumers are apparently willing to pay for Wi-Fi as a matter of convenience. Despite being a pioneer of commercial Wi-Fi application, Starbucks resisted the movement to free Wi-Fi until last year, when it suddenly reversed its policy. Meanwhile, small businesses seem to now be eschewing free Wi-Fi in the hopes of lowering their costs, hoping that their supporters will stay loyal anyway. As to how this impacts consumer expectations, consumers may not be sure what the pricing structure will be, and where will receive free access.²⁵⁹

Whether it is the expectations of bloggers, the question of whether predictions about the future can be monetized, or how access to legal research materials should be apportioned, the same questions of commodification and conflicting expectations run throughout all of these examples. We have seen that commodification is not necessarily bad – in virtual work, in fact, it may be a necessity to ensure that workers receive a living wage, and in prediction markets, money is an effective motivator for gathering data. However, disputes tend to occur when one group comes to a contractual relationship believing that they are participating in a non-commodified website, when really the creators of the website may have something commodified in mind. From these lessons, we turn next to the larger doctrinal and theoretical implications of cyber

²⁵⁵ Bruce Horowitz, *Starbucks' New Flavor: Free Wi-Fi; Chain Hopes to Perk up Traffic*, USA TODAY, Jun. 3, 2008, at 8. Interestingly, less than a month after the free AT&T Wi-Fi program, T-Mobile, Starbucks' former Wi-Fi provider, filed suit against Starbucks claiming a breach of contract. Three days later, the parties entered into a memorandum of understanding. Bloomberg News Section, *T-Mobile Sues Starbucks Over Hot Spots*, N. Y. TIMES, Jun. 7, 2008 at 2; *Starbucks And T-Mobile Settle Dispute Over Wi-Fi*, TECHWEB, Jun. 12, 2008.

²⁵⁶ David Osborne, *US Coffee Shops Pull Plug on Laptop Lounging; Owners Fed up with Patrons Buying a Coffee and then Surfing Web for Hours*, THE INDEPENDENT, Aug. 8, 2009, at 30.

²⁵⁷ Claire Cain Miller, *Aiming at Rivals, Starbucks Will Offer Free Wi-Fi*, N. Y. TIMES, Jun. 15, 2010, at 1.

²⁵⁸ *Id.*

²⁵⁹ More recently, with the advent of smartphones, many rely on their phones to check email and surf the web, independent of Wi-Fi.

commodification.

VI. The Implications of Cyber Commodification

To this point, this Article has focused on elaborating various facets of the concept of cyber commodification. How cyber commodification differs from other forms; the forces propelling cyber commodification; the process by which it takes place; and the contests that have arisen over this topic. In each of these sections, I have endeavored to provide examples of how different aspects of monetization or non-monetization – predicting it, policing it, advocating for one situation or another – has been fairly confounding. In this section, I want to extrapolate several larger theoretical points that can be drawn from the examples that I have spun out.

First, it is of note that the issues surrounding cyber commodification are similar in some respects to the debate in intellectual property law about creating proper incentives for creators by protecting IP rights, while at the same time allowing for experimentation, parody, fair use, and open access. This central conflict is played out in many of the debates over open access material versus the drive to copyright.²⁶⁰ Similar argumentative tropes might be analogous in the context of cyber commodification as well. The problem, however, is slightly different as the value generated from various collaborative activities comes from the wisdom of the crowd, and the aggregation of talents and opinions, rather than the work of an individual creator seeking intellectual property protection for an personal invention.

Second, rather than looking at the issue in cold or impersonal market rhetoric, it is important to recognize commodification as a more human sociological issue. As noted by Viviana Zelizer in *The Social Meaning of Money*, “[w]hile money does serve as a key rational tool of the modern economic market, it also exists outside the sphere of the market and is profoundly influenced by cultural and social structures.”²⁶¹ In her book, *Collateral Knowledge*, Professor Annelise Riles provides further anthropological insights into the social construction of markets.²⁶² Riles argues persuasively that market components, such as the notion of collateral, may function as substitutes for personal knowledge of the counterparty to a transaction or elaborate dispute resolution mechanisms.²⁶³ These insights are important to understanding another point raised by Professor Zelizer:

Clearly, a link is missing in the traditional approach to money. Impressed by the fungible, impersonal

²⁶⁰ See, e.g. Brett M. Frischmann, *An Economic Theory of Infrastructure and Commons Management*, 89 MINN. L. REV. 917, 921 (2005); Michael J. Madison, Brett M. Frischmann & Katherine J. Strandburg, *Constructing Commons in the Cultural Environment*, 95 CORNELL L. REV. 657 (2010).

²⁶¹ VIVIANA A. ZELIZER, *THE SOCIAL MEANING OF MONEY* 18 (1994).

²⁶² ANNELISE RILES, *COLLATERAL KNOWLEDGE LEGAL REASONING IN THE GLOBAL FINANCIAL MARKETS* 54-55 (2011).

²⁶³ *Id.*

characteristics of money, classic theorists emphasized its instrumental rationality and apparently unlimited capacity to transform products, relationships, and sometimes even emotions into an abstract and objective numerical equivalent. But money is neither culturally neutral nor socially anonymous. It may well “corrupt” values and convert social ties into numbers, but values and social relations reciprocally transmute money by investing it with meaning and social patterns.²⁶⁴

In other words, some of the cyber-exchanges that I have been discussing at various points in the Article may help us make sense of the larger web of collaborative knowledge that better communication and technology have made possible. With these observations, I want to turn now to examine some thoughts about cyber commodification, first on the doctrinal level of contract law and then on a broader macro level.

A. Doctrinal Implications of Cyber Commodification for Contract Law

As for some of the legal disputes about commodification raised in earlier parts of the paper, we may want to look to well-known doctrines of contract law to help us resolve many of these questions. So, in an earlier part of the paper, I discussed the fact that there are some services, such as mapping programs and social networking that may allow users free access, but then dictate particular terms of use through adhesive end user license agreements that no one reads. Also, there are situations, such as the Huffington Post bloggers example, where clashing notions of whether the relationship was or should be commodified have caused conflict. Some virtual activity is obviously paid work, but other types blur the lines between work and leisure. This permeable boundary leads to disputes.

The traditional doctrines of contract law may be useful in analyzing these varied situations. The ancient doctrine of consideration, which I alluded to previously, may provide one mode of analysis. We would ask here whether a bargained-for-exchange exists between websites and users. In many instances, a website might be providing users with valuable services, but they may not receive anything directly in return from the users. In a peer production model in which the user does not pay to use the platform, it might at first seem that there is no consideration and therefore no binding contract. On the other hand, in a peer production model, the website is gaining control, in many instances, of the content that a person is posting, and that content is extremely valuable, since it serves to build the value of the site, and to attract other users. The power of many of these websites comes from the crowd, and the ability to attract others to use the service. Further, if a website is gathering information about its users so that it can have information for advertisers or use that information in other ways, that might qualify as

²⁶⁴ ZELIZER, *supra* note 267, at 18.

receiving something tangibly valuable for consideration purposes under existing caselaw.²⁶⁵

Other contractual rubrics may also be helpful for resolving disputes. One such possibility would be the doctrine of good faith and fair dealing; another would be unjust enrichment. While not strictly contractual, unjust enrichment theories focus on a *quantum meruit* or restitutionary measure of recovery when one party has unjustly enriched another, and no contract is present.²⁶⁶ The doctrine recognizes that technically assent is missing, and that contractual bargaining has been defective, but nonetheless, unfairness has occurred and one party has been enriched.²⁶⁷ In other words, many cases in this area discuss the “hypothetical bargain” model, i.e. what would the parties have decided if they could turn back time and we could assume that they behaved in a rational way toward each other? Even though the bloggers lost this argument at the trial court level, one assumes that the founders of the Huffington Post would have rather had the content from the bloggers, even if they would (retroactively) have to consider paying them, and that the bloggers may well have assented under those circumstances.

Further, a question that will be increasingly important to ask is how to facilitate drawing the distinction between those who are participating in crowdsourcing websites or other virtual work for fun and in some unpaid capacity even though some of their services might be paid in another context (such as editing in Wikipedia) and those who are opting to work in the market economy and thus arguably should receive the traditional legal protections for employment activity (clickworkers clicking away on Amazon’s Mechanical Turk). As it currently stands, this distinction is notoriously difficult to draw.²⁶⁸

One solution would be to leave the issue in the regime of voluntary, contractual private ordering. If the majority of users participate just for fun, that might weigh in favor of the default rule being no regulation, with an opt-in to the protections of labor and employment law. On the other hand, one could argue that the default rule should be protection, and then users must deliberately and unequivocally state they are volunteers, acknowledge that they will not receive monetary payment, and clearly opt out. In my view, the later approach – requiring an extremely clear opt out – is the better approach. Considering the differential bargaining power often at issue in employment situations – which is why certain legal protections exist – it may make more sense to create a default rule of

²⁶⁵ *Dahl v. Hem Pharmaceuticals Corp.*, 7 F.3d 1399 (1993) (holding that information gathered in a clinical drug trial could constitute consideration necessary to finding of a contractual relationship, in case where a pharmaceutical company promised study participants free drug treatment in exchange for participation, later renege on promise by arguing that provision of the medicine was only gratuitous).

²⁶⁶ See RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT, § 1 cmt. B (Discussion Draft 2000) (“Unjustified enrichment is enrichment that lacks an adequate legal basis: it results from a transfer that the law treats as ineffective to work a conclusive alteration in ownership rights.”); LORD GOFF OF CHIEVELEY & GARETH JONES, *THE LAW OF RESTITUTION* 13 (Gareth Jones, ed., 6th ed. 2007) (noting that unjust enrichment is a “principle of justice which the law recognizes and gives effect to in a wide variety of claims.”).

²⁶⁷ See Peter Linzer, *Rough Justice: A Theory of Restitution and Reliance, Contracts and Torts*, 2001 Wis. L. REV. 695, 764.

²⁶⁸ I have explored this question in a more in-depth way in other writing. See Miriam A. Cherry, *Working For (Virtually) Minimum Wage: Applying the Fair Labor Standards Act in Cyberspace*, 60 ALA. L. REV. 1077, 1105-10 (2009).

regulation, with clear assent needed in order to disclaim the protections.

Of course, this runs the risk of making the opt-out process potentially burdensome for those looking for fun and not looking to be bogged down with legalities. One way to deal with the opt-out would be to include it in the form clickwrap agreements that users must necessarily agree to in order to use many websites, receive free downloads, or order products.²⁶⁹ This is the format that many businesses currently use on websites, and it would, at the very least, provide some sort of notice as to what type of legal category / relationship the user was entering.

This is merely one suggestion, however, and it is far from perfect. First, our minimum wage law, the Fair Labor Standards Act (FLSA)²⁷⁰ is an immutable default rule – normally it cannot be waived. After all, if employers and employees could “opt out” of the minimum wage, that would undercut its very existence. Companies might choose to exploit such an exemption opportunistically, not just to apply to those who participate as volunteers and for entertainment. Using Facebook to get back in touch with old friends could be a “hobby,” but getting users to do work on translating portions of the website looks more like the traditional “work” that one would assume the company’s employees would typically handle.

As I have noted before in previous work, there are serious critiques of clickwrap licenses themselves.²⁷¹ Clickwrap “agreements” are problematic because they incorporate some of the worst characteristics of adhesion contracts, allowing for “acceptance” or “rejection” of the terms as a whole only on a take it or leave it basis with no negotiation on behalf of the user.²⁷² Some of the boilerplate terms contained in online agreements is so harsh or one-sided that it would likely be held unenforceable.²⁷³ In “browsewrap” contracts, certain contractual provisions are found only by visiting another portion of the website.²⁷⁴ Courts have hesitated to enforce browsewraps because of the very real problem of lack of assent – if the user was not on notice that these terms even existed, it is difficult to think of them as being part of a voluntary contract.²⁷⁵ Further, given worker’s lack of knowledge of basic rights governing the employment relationship,²⁷⁶ it is problematic to assume that workers will understand the legalese associated with a clickwrap or browsewrap.

²⁶⁹ See, e.g. Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429 (2002).

²⁷⁰ Fair Labor Standards Act of 1938, ch. 676, 52 Stat. 1060 (codified as amended at 29 U.S.C. Sections 201-19 (2006)).

²⁷¹ See Miriam A. Cherry, *Working For (Virtually) Minimum Wage: Applying the Fair Labor Standards Act in Cyberspace*, 60 ALA. L. REV. 1077 (2009).

²⁷² Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173 (1983) (providing summary of adhesion contracts concepts).

²⁷³ See, e.g. Shmeul I. Becher & Tal Z. Zarsky, *E-Contract Doctrine 2.0: Standard Form Contracting in the Age of Online User Participation*, 14 MICH. TELECOMM. TECH. L. REV. 303 (2008); Mark A. Lemley, *Terms of Use*, 91 MINN. L. REV. 459 (2006); Robert L. Oakley, *Fairness in Electronic Contracting: Minimum Standards for Non-Negotiated Contracts*, 42 HOUS. L. REV. 1041 (2005).

²⁷⁴ See, e.g. *Specht, et al v. Netscape Communications Corp.*, 150 F. Supp. 585 (SDNY 2001) (discussing various forms of online contracting).

²⁷⁵ *Id.*

²⁷⁶ Pauline T. Kim, *Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World*, 83 CORNELL L. REV. 105 (1997).

Given the existing problems with online contracting, what other models might we look to for answers? As I have noted in previous writing, there are several factors that should be given a prominent role in any determination of whether online activity is “work” and subject to regulation under FLSA.²⁷⁷ Is such activity being monetized and commodified? If that is case, perhaps commodification is an indication that the activity should properly be classified as paid work. Another factor might be whether the work is “de-skilled” work. In such situations, the potential for exploitation might be higher, and thus the protections of the FLSA might be more important.

Finally, since the Department of Labor may choose to regulate this activity in the near future, it might make sense for private employers that are experimenting with this type of work – and the websites that facilitate them – to attempt a self-regulatory response in order to frame the dialogue if in fact an extension of the FLSA is proposed, which seems likely. One such response might be to construct a code of “best practices” for cyberwork that attempted to draw some of the lines between work and entertainment activity, and set out some guidelines that would prevent the more extreme forms of exploitation. These “best practices” would be influential if they formed a coherent set of expectations which both workers and employers could adhere. If such a voluntary response is present, the line-drawing exercise necessitated by the FLSA may not be as difficult as it might first appear.

B. Theoretical Implications of Cyber Commodification

From these practical solutions, I now turn to a more theoretical discussion of cyber commodification. It is important to note that cyber commodification has become a controversial area because group knowledge has particular characteristics that make it unique. After all, what do crowdsourcing, crowdfunding, prediction markets, and wikipedia all have in common? They all rely on, indeed could not exist without, the contributions of a large group of members. That is what is so interesting about these new businesses, the ones that harness the Internet successfully in a multitude of ways. What is common between prediction markets and crowdsourcing is that both acknowledge that large groups, when properly harnessed, can result in better outcomes than the efforts of individuals.²⁷⁸

These various websites, programs, and crowdsourcing tools are only valuable because of their scale.²⁷⁹ For example, Facebook is at its most useful when a person attains a critical mass of friends or acquaintances who are also using it. If a person has zero Facebook friends, being on Facebook will not be enjoyable, since here will be no

²⁷⁷ Miriam A. Cherry, *Working For (Virtually) Minimum Wage: Applying the Fair Labor Standards Act in Cyberspace*, 60 ALA. L. REV. 1077 (2009).

²⁷⁸ See Abramowicz, *supra* note 208; Surowiecki, *supra* note 209; Cass Sunstein, *Infotopia*, *supra* note 70.

²⁷⁹ See Teppo Felin & Todd R. Zenjer, *Information Aggregation, Matching and Radical Market Hybrids: Implications for the Theory of the Firm*, 9 STRATEGIC ORGANIZATION 163 (2011) (noting that both crowdsourcing websites and prediction markets harness the power of the crowd, and also perform information aggregating and matching functions).

one to read or “like” any posts. In other words, the intrinsic value of the Facebook site to the individual person depends on how many others in their social circle are also using it. And the connections, the fun part of being on Facebook also generate value for the company itself, which can brag to advertisers about the number of connections generated and the captive eyeballs on its platform. Like Facebook, so too wikipedia, craigslist, Amazon’s Mechanical Turk, and countless other websites that are either commercial, or not. They depend on vast numbers of eyeballs and users – in other words, harnessing the collective knowledge, skills, and time.

In examining these questions, I am largely interested in two legal theorists, Professors Margaret Jane Radin and Yochai Benkler, whose work informs and provides structure for the present context. Professor Radin introduced and developed the theory of commodification in legal studies in a series of pathbreaking works concerning the commodification of the body and sexuality. For some years, Professor Benkler has been writing about open source computing and how networked peer production would seem to provide a “third way” of non-commodified production, apart from either markets or the firm, to borrow the terminology from Coase’s theory of the firm.

In *Contested Commodities*, Professor Radin is concerned with how commodification interacts and perhaps subtracts from what she terms the conception of personhood.²⁸⁰ Aside from the theoretical concept of commodification, which she explores in depth, she is also concerned with subordination, objectification, and the inequitable distribution of wealth within society. In fact, one question she raises is whether these other ills are the real concern, not commodification itself.²⁸¹ Radin does not espouse either one of these dualities precisely, and she mostly concentrates on commodification as it interacts with the sale of the body and related elements. As such, she focuses not so much on the dichotomy between commodification and non-commodification, but with the concept of human flourishing.

Although Radin declares that she does not believe in setting up a binary opposition between “universal commodification” and complete “non-commodification,” she hints at various points throughout the book that commodification is dangerous. Although Professor Radin formally claims that she believes in discourse pluralism, the more examples she provides, the more the reader becomes convinced that commodification is a problem. In her view, we are on a slippery slope of commodification that will chip away at our dignity, and ultimately our personhood as we slip our way down the slope. This is despite the fact that much of “woman’s work” has been undervalued precisely because it is outside the realm of the marketplace.

In his book, *The Wealth of Networks* and an accompanying law review article,²⁸² Professor Yochai Benkler focuses on the potential for

²⁸⁰ MARGARET JANE RADIN, *CONTESTED COMMODITIES* 154 (1996).

²⁸¹ *Id.* at 155.

²⁸² Yochai Benkler, *Coase’s Penguin, or, Linux and the Nature of the Firm*, 112 *YALE L.J.* 369 (2002);

collaborative work in cyberspace.²⁸³ Both in the book and an accompanying law review article, Professor Benkler regales the reader with rich descriptions of the Linux operating system, wikipedia, Project Gutenberg, and the NASA Mars project. In all of these online endeavors, users coordinate their efforts through collaboration by using small segments of their time, talents, or computing power. In Benkler's vision, this "peer production" model presents another option for economic coordination (in addition to Coase's description of markets and firms) when certain conditions are met. Throughout both the book and the law review article, it is no secret that Professor Benkler strongly advocates for the importance of the peer production model. According to Professor Benkler, money does not (and moreover should not) play into the motivations of the participants. Rather, he claims, users are motivated by intellectual joy, pride, excellence, giving back to the community, and other similar non-monetary interests. While Professor Benkler mostly assumes that the users' interests and those of the creators match, he does occasionally allude to the idea of moral hazard.

In Professor Benkler's view, peer production stands the best chance of succeeding when the model is able to take into account the differing interests, talents, and capabilities of the users. Projects that allow for users to harness their talents and match them with available tasks, Benkler suggests, will be the most efficient for the peer production model. Benkler identifies two additional criteria for successful peer production: granularity, which will allow for only a small task and a small commitment of time or effort, and, second, modularity, which allows for those discrete elements to be both successfully broken down and then later integrated into the larger project. While Professors Radin and Benkler approach the problem quite differently – Radin from a feminist perspective, Benkler from an open source advocacy perspective – both seem to view commodification with suspicion.

No theory to date explains why harnessing collective knowledge in cyberspace results in the presence of Wikipedia, and simultaneously, prediction markets. Both do aggregate knowledge, but one is explicitly free, relying solely on the goodwill of volunteer editors and a few donated dollars, while prediction markets are built around the central theme that money is the only element that matters. How do we reconcile these conflicting models? How do we recognize that bloggers may view their contributions differently in varying situations, and that they are unhappy when their expectations about monetization are not met by the blog's operators?

Overall, both Professors Radin and Benkler have made outstanding contributions to commodification theory but at the same time seem

See also Steven A. Hetcher, *Hume's Penguin, or, Yochai Benkler and the Nature of Peer Production*, 11 VAND. J. ENT. & TECH. L. 963 (2009).

²⁸³ See, e.g. YOCHAI BENKLER, *THE WEALTH OF NETWORKS* 9 (2006) ("As collaboration among far-flung individuals becomes more common, the idea of doing things that require cooperation with others becomes much more attainable, and the range of projects individuals can choose as their own therefore qualitatively increases. The very fluidity and low commitment required of any given cooperative relationship increases the range and diversity of cooperative relations people can enter, and therefore of collaborative projects they can conceive of as open to them.").

skeptical of monetizing information on the Internet. While I understand their suspicion, the world of cyber commodification is so diverse that a rule of absolute non-commodification would do at least some of these new forms of collaboration a disservice. For example, payment is important in virtual work to prevent exploitation of workers, especially disenfranchised ones in the Third World. A norm of non-commodification does not take the rather unique status of these Third World workers into account. Money also may help us attain more accurate results in prediction markets.

What is it that markets do that perhaps other forms are not able to do? Markets, after all, perform an allocative function as well as a coordination task. A market orders and organizes what would otherwise be random activity. Money might incentivize people to reveal their knowledge. Further, a living wage for work performed is important. Contrary to what both Professors Radin and Benkler seem to advocate, money itself is not the problem in some of the scenarios set out in this Article.²⁸⁴ In fact, the lack of money for work on the Internet – especially when it concerns the meager wages paid to Third World workers in a crowdsourcing scheme – can smack more of exploitation than free collaboration.

One way to look at this is as a coordination problem. As we know from Coase's theory of the firm, both markets and firms are ways of efficiently organizing economic activity. So what motivates people in a non-commodified crowdsourcing situation? The question of motivation is far more complicated than *homo economicus* would have us believe.²⁸⁵ There is a complicated series of motivations that drive any one person, including a mixture of altruism and of self-interest. Further, while certain tasks might be feely volunteered, other tasks are simply too boring, mundane, annoying, or time-intensive that people will not do them unless they are paid.

Despite the warnings from Professors Benkler and Radin about commodification, there are certain areas where we should not be worried about monetization, but instead we should be worried about non-monetization. So failing to pay workers minimum wage online should not be praised as a new method of peer production – it should be viewed skeptical, in some instances even condemned in the even that it leads to exploitation. Those who change the expectations of users halfway through a relationship due to moral hazard and the lure of money should not have their own expectations respected. At the same time, participants in social entrepreneurship or a prediction market will likely benefit from having a monetary exchange as part of their freedom of expression. There is no reason to fear these forms of exchanges just because they involve money. Returning to Professor Zelizer's point, money may influence society, but society influences money as well. Perhaps through efforts such as social

²⁸⁴ See Yochai Benkler & Helen Nissenbaum, *Commons-based Peer Production and Virtue*, 14 J. OF POLITICAL PHILOSOPHY 394 (2006) (arguing that unpaid peer production is morally virtuous).

²⁸⁵ See RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE* (2008); DANIEL KAHNEMAN & AMOS TVERSKY, *CHOICES, VALUES, AND FRAMES* (2000).

entrepreneurship, we can change the way we think about the very concept of monetization.

Therefore, I would suggest that, unlike the Delaware Chancery Court, we do not have to choose between the wholly monetized model of eBay and the public-service world of craigslist. Instead of imposing choices, dichotomies, and artificial categories to these new forms of collaboration and business organization, we should allow entrepreneurs, social or otherwise, the freedom to experiment, explore, and choose different models. This means, however, that websites should be free not only to implement a philanthropic or social business model, but also to use money to motivate their participants, such as in virtual work or within prediction markets. But when doing so, we must keep in mind Professor Radin's particular admonition: will any particular activity in cyberspace add in total to the sum of human flourishing?

CONCLUSION

Ultimately, our journey across the Internet shows us that cyberspace is currently in a state of incomplete commodification.²⁸⁶ The current landscape of cyberspace contains multiple regimes of commodified, non-commodified, and mixed-use settings. This mixture – which in many instances defies logic or common sense – tells us that there is no one natural “state of nature” for the Internet. If anything, the development of certain intermediate business models like social entrepreneurship can potentially reframe the ways that we look at the nature of markets and the theory of the firm.
